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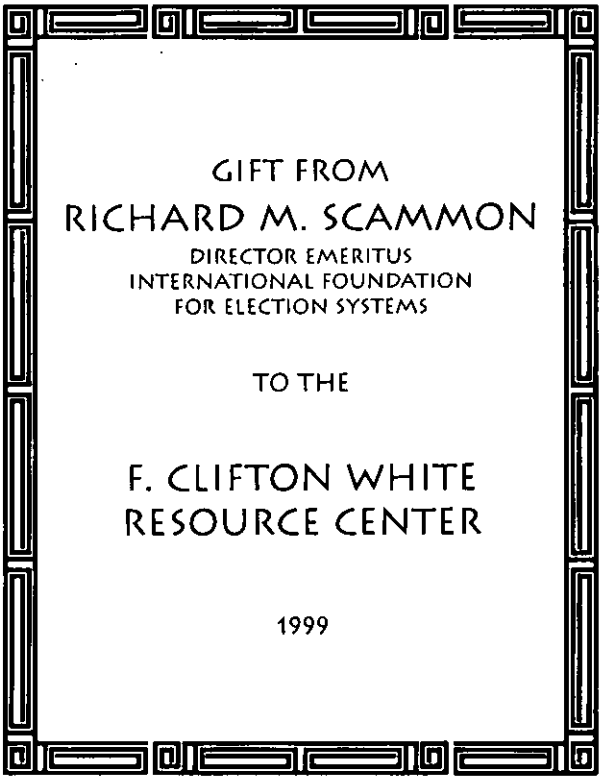
Election Case Law 88

A Summary of Judicial Precedent on Election Issues Other Than Campaign Financing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Election Case Law 89

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Disclaimer

The opinions, findings, and conclusions expressed in this publication are those solely of the authors and not those of the Federal Election Commission or Indiana University. This publication is not intended to provide legal advice or to eliminate the need for the assistance of legal counsel in answering specific election-related questions. The purpose of this publication is to provide a general overview of election case law in the United States and to serve as a background reference document for those who wish to conduct legal research concerning election-related issues.

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Introduction by the Clearinghouse

Although there has been extensive litigation in virtually every aspect of the election process, there has not for over a century been a single source that summarizes the significant cases and the direction of judicial thinking on election issues.

In order to be of service to both the legal profession and the election community, the Federal Election Commission's National Clearinghouse on Election Administration offers this volume entitled Election Case Law which we hope to update biennially.

Any summary, by definition, loses information. And in the field of election case law, information not included can sometimes be crucial. Moreover, such a document as this is subject to any number of typographical or other inadvertent errors which could have serious consequences if not verified against original sources. We therefore emphasize to users that THIS DOCUMENT IS INTENDED ONLY AS A GENERAL REFERENCE TOOL. NO DECISION REGARDING LEGAL ISSUES SHOULD BE MADE ON THE BASIS OF THIS DOCUMENT ALONE. SUCH DECISIONS SHOULD BE MADE ONLY AFTER A CAREFUL REVIEW OF THE APPROPRIATE DECISIONS BY LEGAL COUNSEL.

It is also important to note that THIS DOCUMENT DOES NOT CONTAIN CASES RELATED TO CAMPAIGN FINANCING. Those interested in judicial decisions related to the Federal Election Campaign Act may wish to purchase *Selected Court Case Abstracts* from the

Office of Public Disclosure
Federal Election Commission
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Washington, DC 20463
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Local Tele: 202/376-3140

Finally, no project of this magnitude and complexity could ever be successfully undertaken by a single mind or a single office. We therefore happily express our gratitude to the entire staff of the contractor and give special thanks to the members of the Advisory Board who assisted us so diligently and enthusiastically on this project. Those members are:

Mr. Craig C. Donsanto,
Director Election Crimes Branch
Washington, DC

The Honorable Allen J. Beermann
Secretary of State
Nebraska

Mr. Albert P. Lenge
Former Director and Attorney of Elections
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Mr. Kevin Coleman
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Preface

Acknowledgments

This publication is the culmination of a Federal Election Commission-sponsored project, *A Summary of Election Case Law*, FEC contract no. FE8AC025, awarded to the Indiana University School of Public and Environmental Affairs in September 1988. The objective of the project was to produce a summary of court case decisions on selected election-related topics that would enable the FEC and its National Clearinghouse on Election Administration to provide the U.S. Congress, state policymakers (including state legislators and state election officers), local election officials, and the legal community with fundamental legal information necessary for making informed decisions about the electoral process.

The efforts of the project team were aided immeasurably by the involvement of a Project Advisory Board appointed at the inception of the project. The five-member board played a constructive role at the start and at the end of the project, times when their assistance was most needed. The Board first met in Rockville, Maryland, on November 14, 1988, to review and comment on the project team's proposed workplan for completion of the project and production of the *Election Case Law* final report. Then, on July 31, 1989, the Board met again in Rockville to review and provide comments, suggestions, and recommendations regarding the draft final report prepared by the project team. The format and content of this publication are in large measure a reflection of the recommendations made by the Board, whose advice was heeded by the project team whenever feasible.

The project team wishes to acknowledge and thank the five Project Advisory Board members who generously provided their time, assistance, and insight:

Honorable Allen J. Beermann
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The *Election Case Law* project was conceived, promoted, nurtured, monitored, and prodded along by William C. Kimberling, Deputy Director of the National Clearinghouse on Election Administration and the FEC technical manager assigned to oversee the project. Mr. Kimberling had the wisdom to see the need for the project and to propose a very energetic, constructive Project Advisory Board to assist the project team. We offer our appreciation for his guidance, support, and patience during the gestation of *Election Case Law* and trust that the vision he had for this project has been realized.

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James A. Palmer, J.D., the project director for the *Election Case Law* project, is a research scientist and attorney at law with the Indiana University School of Public and Environmental Affairs. He has a broad range of research experience in the legal and public policy aspects of election law and administration, transportation safety, and criminal justice. He previously coauthored Federal Election Commission-sponsored reports on contested elections and recounts, campaign finance law, absentee voting, and ballot access.

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Chapter 1: Introduction to Election Case Law

Chapter 1: Introduction to Election Case Law

Introduction

Election Case Law is an overview of the law governing elections in the United States as formulated or applied by federal and state appellate courts in the context of specific court cases. It is intended to provide those without a legal background with an informative survey of the judicial treatment of the major issues in the area of elections and to serve as a helpful reference tool and starting point for attorneys who wish to conduct research on a specific election-related legal issue.

As an overview, *Election Case Law* does not contain everything you ever wanted to know about election case law nor does it include every appellate court case related to elections. The issues addressed in this publication are only those that appellate courts have considered; not every important election-related question has reached an appellate court for resolution. The court cases referenced in this publication were chosen selectively (a necessity since there have been over 5,000 appellate court cases on the subject of elections) in order to demonstrate the prevailing judicial position on a particular issue or, if there is no prevailing view, to present the alternative approaches that courts have taken in response to an issue. Leading court decisions reported since 1968 are emphasized, although important earlier cases are included if they are "landmark" decisions that continue to represent the current law on a particular issue.

Before using *Election Case Law*, the reader should bear in mind this caution: **No decision regarding an election-related matter should be made on the basis of this publication alone. Legal decisions and conclusions should be made only after a careful review of the appropriate election statutes and court cases and after consultation with legal counsel.**

Nature of Election Case Law

In *The Supreme Court and the Electoral Process in 1970*, Richard Claude noted that "judicial review and interpretation have provided avenues for change" and that "[w]here the Supreme Court is concerned, the changes that have taken place in the views of its members from 1870 to 1970 are enormous, especially with regard to voting rights and electoral process litigation."

This publication is about election case law, the body of law developed by the courts in election-related cases. In most election cases, the courts are called on

to interpret and apply the provisions of federal and state constitutions, statutes, and administrative rules in settling legal disputes arising from the election process. The U.S. Supreme Court, for example, has issued numerous decisions since 1965 relating to the meaning and application of various provisions of the Voting Rights Act.

To a much lesser degree, this work covers the "common law" or judge-made law affecting elections. The courts "make" election law to the extent they create, discover, or apply legal or equitable principles whose origin is not a constitution or statute, but rather the courts themselves. For example, in some jurisdictions, the criteria for establishing a domicile or residence for voting purposes are defined not by statute, but by court decision. In addition, few would disagree that courts are in fact creating law when they determine whether, as well as the extent to which, general constitutional or statutory principles, such as "equal protection" and "due process," apply to specific events and situations.

Organization by Election Function

Election Case Law has been organized into ten chapters: an introductory chapter and nine topical chapters. Each topical chapter contains the relevant case law applicable to one of the primary functions performed by every election system:

Administration, Management, and Staffing (Chapter 2). This function addresses matters related to the management and operation of election offices, including the appointment or election of all election personnel above the precinct level and their authority and duties. Chapter 2 covers items critical to the authority and operation of an election office, including staffing and personnel matters.

Reapportionment, Redistricting, and Reprecincting (Chapter 3). This function refers primarily to the drawing of boundaries (precinct lines) and the identification of polling places. Chapter 3 covers federal, state, and local districting, the principles that govern districting, and the standards that will be applied to determine whether districts have been properly constituted.

Ballot Access (Chapter 4). This function refers to the process whereby candidates and public questions come to appear on the ballot. Chapter 4 concentrates on the law of candidate entry and certification for a place on the ballot, including the requirements for political party qualification and voter support for candidates.

Voter Registration and Qualifications (Chapter 5). This function refers to the requirements for eligibility to vote and the process by which current voting eligibility is confirmed and recorded by means of registration procedures. Chapter 5 discusses registration processes and the maintenance of voter lists and the various qualifications that the states may and may not require as preconditions for voting in federal and state elections.

Campaign and Election Regulation (Chapter 6). This function refers to matters relating to fair campaign and election practices. Chapter 6 focuses on these practices, including dissemination of false information, election day activities, disclaimers, and Hatch Act restrictions. A comprehensive examination of federal and state campaign finance law was beyond the scope of this publication; however, some of the key universal concepts in campaign finanance regulation are presented.

Balloting (Chapter 7). This function refers to the design and preparation of the ballot, the positioning of political party and candidate names on the ballot, and the casting of ballots, including absentee voting. Chapter 7 addresses balloting issues such as the placement and wording of party and candidate names, voter assistance at the polls, and federal and state requirements for off-site voting, including mail elections and absentee procedures.

Ballot Tabulation (Chapter 8). This function refers to the counting of the ballots cast and the aggregation of returns. Chapter 8 explores ballot-tabulation issues such as ballot secrecy, the marking of ballots and determination of voter choices, and the effect of votes for ineligible or deceased candidates.

Certification of Results and Resolution of Challenges (Chapter 9). This function refers to the certification of election winners and the verification of election results through recounts and contests. Chapter 9 addresses election-outcome issues and examines the distinctions between federal and state office recount and contest procedures.

Right to Vote and Voting Rights Act (Chapter 10). The distribution of the franchise by the states is a fundamental function, one addressed also in Chapter 5. This chapter focuses on federal constitutional and statutory constraints on state discretion to restrict voting rights. The major federal law protecting members of racial and language-minority groups against election-related discrimination--the Voting Rights Act of 1965, as amended--is explained.

Chapter Contents

Each chapter presents the following information concerning the election system function covered by the chapter:

(1) **Summary of the Law.** Each chapter begins with a comprehensive narrative summary of the current state of the law on the topics addressed and an indication of any recent trends concerning the legal issues considered. Major subtopics within the summary are indicated by a boldface heading preceding each subtopic. Footnotes to all court cases referenced in summary are provided in the footnotes following the summary text.

(2) **Briefs of Leading Cases.** Following the narrative summary are 1-to-4-page "briefs" or summaries of selected leading or landmark court cases related to the election function addressed by the chapter. Each brief contains a complete

citation for the case, a statement of the general legal principle or rule for which the case stands (in boldface type), a summary of the essential facts of the case, the legal issues or questions the court was called upon to resolve, the court's decision or holding, and a summary of the court's reasoning in support of the decision. Each brief is followed by a commentary section in which the authors provide a historical perspective for the case and offer their view as to its legal implications.

(3) **Selected Case Summaries.** After the leading-case briefs is the Selected Case Summaries section, which includes, in alphabetical order, synopses or "squibs" (1 to 2 paragraphs) summarizing other important cases that were used to compile and were cited in the introductory narrative summary. Each case synopsis contains at least a statement of the legal principle or rule of law for which the case stands.

(4) **Selected Legal Literature.** The final section of each chapter is a bibliography of publications that may be consulted for further information by those who wish to undertake additional research concerning one or more of the topics discussed in the chapter. References are provided to relevant books, treatises, legal periodicals, caselaw analyses, federal agency reports, and other so-called secondary sources.

Selection of Court Cases

There were three primary criteria for the selection of cases for inclusion in this report: (1) the case addressed an important issue related to one of the nine key election system functions, (2) the case had potential extrajurisdictional application, and (3) except in the case of landmark U.S. Supreme Court decisions and cases involving the Voting Rights Act of 1965, the case was decided since January 1, 1968.

Under the first criterion, important issues were viewed as those substantive concerns that could affect large numbers of citizens. Specialists on election law and governmental operations recommended topics for consideration; other topics were suggested by the legal literature--what issues do those who write about elections consider to be important? In view of their nationwide application, issues involving federal constitutional or statutory law, as a rule, were considered important automatically. Other issues were evaluated individually as to their importance.

The second criterion involved the value of the case as a precedent; that is, would other courts look to the case for guidance when a similar situation arose in the future? Under the legal concept of *stare decisis*, once an issue has been decided by a appellate court, a precedent has been established and should be followed in future cases to ensure that there is certainty, predictability, and continuity to the law.

There are two types of precedential weight accorded to the rules of law established in appellate court cases: mandatory and persuasive. A mandatory precedent is one that a court should deem itself bound to follow; a persuasive precedent is one that a court should consider in reaching a decision but need not follow. The reader should be aware that not all cases are created equal as to their value as a precedent.

As a general rule, one should look to the appellate courts of one's own state for mandatory precedents on state law and to the U.S. Court of Appeals for the federal circuit in which the state is located and to the U.S. Supreme Court for mandatory precedents on federal law. Issues of federal law, however, can be raised in state court, and state appellate court decisions concerning federal law do operate as a mandatory precedent within a state unless they are reversed on appeal.

Because of the nationwide scope of federal constitutional and statutory law and the nationwide impact of Supreme Court decisions, the application of the criterion of potential precedential value resulted in the selection of nearly all U.S. Supreme Court cases on important election-related issues. U.S. Court of Appeals' decisions on federal law issues not yet addressed by the Supreme Court and some U.S. District Court decisions on federal law issues not yet considered by the Supreme Court or any Court of Appeals were also selected. The decisions of the U.S. Courts of Appeals, and even U.S. District Courts, traditionally have been given great respect and weight as precedents beyond the geographic limits of their circuit or district.

The selection of state court cases was in large part determined by the nature of the issue involved rather than the status of the deciding court within a state appellate court hierarchy; however, preference was given to decisions by the court of last resort of a state. For example, on a particular issue, a decision issued by a state's highest court was selected over similar decisions reaching the same result issued by intermediate appellate courts in the same state or other states. If there was no prevailing view in the United States on a particular issue, an attempt was made to identify court cases that reflected the conflicting positions on the issue.

Terminology

The reader is cautioned that the terms used in this publication to refer to certain election practices and procedures may not have the same meaning in all jurisdictions. For example, a "canvass" of votes in some states refers to an automatic, statutorily mandated verification of vote totals following an election, while in other states the term means a recount that has been filed by a losing candidate. To the extent possible, an attempt has been made to use election terminology that has a generally accepted meaning and that will cause the least confusion. The reader is advised, however, to be alert to the fact that there is variation in the election "lingo" among the states and, if there is any question regarding the mean-

ing of a particular election term, to look to the context in which the term is used in order to determine with some certainty what it means.

Scope of Judicial Review

Courts generally apply one of three types of scrutiny to a law or administrative action. The lowest level of scrutiny, minimal scrutiny, involves the court applying a "rational basis" test to the action. Under this level of scrutiny, if the court finds that a governmental action was grounded on a rational basis, the court will almost always uphold the action if the state has chosen a necessary means to intervene.

The middle of the continuum is the "balancing of interests" test. Under this form of scrutiny, the court looks at the interests of the government in regulating the matter and balances them against the harm allegedly inflicted upon the aggrieved party.

At the other end of the spectrum is strict scrutiny. This level of scrutiny, which involves the application of the "compelling state interest" test, comes into play when benefits or burdens are being distributed in a manner that is inconsistent with individual rights. The court will find such actions unconstitutional unless it can be shown that there is a compelling governmental reason behind the action and that the least restrictive alternative has been adopted to mitigate the harm.

Election cases tend to have a major impact upon an individual's constitutional rights, and courts are more likely to adopt higher levels of scrutiny than lower degrees in such cases. Each aspect of the election process, however, may be treated differently by the courts depending upon the perceived importance of the rights involved. Minor technical discrepancies in pre-balloting administrative procedures would tend to be perceived as less important than administrative actions that deny otherwise eligible persons the ability to cast a ballot; thus, courts would apply a lower standard of review to the former and a higher standard to the latter case. The administrative choice of the type of voting machine to be used in an election might be viewed as less critical than administrative actions that caused apparently valid, machine-cast ballots not to be counted; the court would apply a lower standard of review to the former situation and a higher standard to the latter.

Using This Volume

Two finding aids are provided to enable the reader to use *Election Case Law* easily and efficiently, especially when there is an interest in finding a particular topic or court case: a **Table of Contents** (at the beginning of the volume) and **Table of Cases** (at the end of the volume). No detailed index is included because an index would not add anything as a finding aid that is not offered by the detailed Table of Contents.

The use of the Table of Contents is a convenient way to identify the location of major topics discussed in this publication. Page references in the Table of Contents are by chapter (for example, Page 6-5 is the fifth page of Chapter Six). Discussions of major subtopics are identified by boldface headings in the text which correspond to entries in the Table of Contents.

In the Table of Cases, cases are listed alphabetically by the name of each party identified in the case citation (for example, the case *Terry v. Adams* could be found in the index under "Terry" and "Adams"). After each case entry in the Table of Contents is a reference to the chapter in which the case has been cited in the footnotes to the introductory summary of the law for the chapter and has also been either fully briefed or synopsized in the Selected Case Summaries. Major case summaries, that is, cases that have been identified as leading cases and fully briefed, are indicated by boldface chapter references in brackets. For example, a case listed as "Buonanno v. DiStefano -- **[8]**" would be found as a fully briefed leading case following the introductory text and footnotes in Chapter 8. Cases that have been synopsized in the Selected Case Summaries are indicated by non-boldface, unbracketed chapter references (for example, a case listed as "Brown v. Thomson -- 3" would be found in the Selected Case Summaries following the last fully briefed case in Chapter 3). If a case has more than one chapter reference, it can be found in each chapter indicated.

Chapter 2: Administration, Management, and Staffing

Chapter 2: Administration, Management, and Staffing

Introduction

The administration, management, and staffing of the election process are matters almost entirely governed by state statutes (within the limits of constitutional provisions). Accordingly, the legislature of each state may create offices, boards, and commissions to govern elections, may prescribe the duties of election officers, and may alter the duties and powers of such officers from time to time. In some jurisdictions, the legislative powers over such matters are exclusively with the state legislature, while in others the peculiarities of home rule constitutional or statutory provisions devolve the regulatory power over elections to units of local government smaller than the entire state.

Election officials have only the powers granted by statute or constitutional provision or implied therefrom. Election officials have a generalized duty to ensure free, honest, and open elections. Election officials also have a generalized duty to ensure that all legally entitled persons are permitted to vote and that all legally disqualified persons are not permitted to vote. Election officials also have a generalized duty to prevent fraud in the conduct of elections and to preserve the freedom and purity of the election process. Typically, election officials who willfully fail to perform their duties can be subjected to criminal prosecution.

The administration, management, and staffing of the election process are matters of state law. Within the obvious restrictions of the United States Constitution, the mandatory aspects of federal statutes such as the Voting Rights Act, and the restrictions of the constitutions of the various states, the legislature of each state can create its own system of election administration. Despite the potential for the creation of unique administrative systems, the statutes governing the administration, management, and staffing of the election process share many characteristics from state to state, and accordingly the appellate decisions rendered in one state tend to prove persuasive in other states with similar systems.

In the most general terms, state election administration systems must perform two functions: (1) selection of personnel, and (2) administration of state statutes governing the conduct of elections.

Typically, the Secretary of State or a similarly high-ranking public official, either elected or appointed, is empowered by statute as the chief election administrator of the state. Administrative power is then dispersed in a hierarchy, typically from a state-level board of elections (which might be especially selected or

might be composed of other state officers acting *ex officio*) down to boards of election at the local government administrative level, to boards at the ward and precinct level, to precinct election workers who actually conduct the mechanics of elections.

State statutes generally provide for uniform methods of appointment, supervision, and removal from office of election officials. Similarly, state statutes create a uniform system of election administration governing the eligibility of voters, their registration, the boundaries of voting districts, the eligibility of candidates for office and how they must conduct their campaigns, the offices and issues which will appear on ballots, the times and places elections are to be held, the methods of tabulating ballots, the resolution of challenges to elections, and the final determination and certification of election results. This chapter will focus on the selection and removal of election officials, and on the general scope of the powers of these officials in the administration of the election process.

Selection of Election Personnel

The selection of election personnel is a matter of state law. In the most general terms, state systems tend to require that election officials have at least the same qualifications as voters in general.

Virtually all state election systems require that election officials be appointed (or sometimes elected) on a bipartisan basis on the theory that the adversary confrontation between contending political parties will ensure the purity of the electoral process. No system of election personnel should permit a single party or a single political philosophy to dominate the very processes of democracy. Generally, bipartisanship is required in the appointment of election officials. However, equal representation of the parties in not required. The requirement of bipartisanship is satisfied if there is an adversary partisan confrontation at each voting place.[1] However, statutes authorizing appointments of election officers must not injure the associational rights and equal protection rights of potential appointees by limiting appointments to members of the two major parties without some constitutionally acceptable justification.[2]

Appointments to election boards are governed by statutory provisions, and timeliness of compliance is essential. In most systems, if primarily responsible officials fail to qualify nominees, then other authorized executives may make appointments.[3]

Generally, a board of election at any level of government serves as the guardian of the franchise. Since it is essentially the task of a state board of elections to supervise the administration of election laws by local boards and generally to see that all of the laws of the state in respect to elections are faithfully and properly obeyed, with due regard to the rights of the electors and political candidates, a challenge to the legality of the composition of such a board is clearly a justiciable issue.[4]

Removal of Election Personnel

The behavior of election personnel is controlled indirectly by judicial supervision of the election process to prevent fraud, redress various errors, punish election criminals, and fashion remedies for election failures and irregularities. These matters are the subject matter of other chapters of this summary.

Direct control of election personnel can be achieved by removing them from office. In general, a formal complaint and hearing are required prior to any removal of a member of a board of elections.[5]

Because of the unique character of the office of member of the state board of elections, the governor usually cannot remove the officer without cause, and the determination of the adequacy of cause is judicially reviewable.[6] The virtually universal rule requiring a hearing and a finding of cause before an executive can dismiss a member of a board of elections exists because to subject a neutral, bipartisan, and independent board to the unbridled whim of the executive would destroy its purpose and its efficacy. The political independence and neutrality of the board would be destroyed if its members were subject to arbitrary dismissal.[7]

Administration of Election Law

Generally, election officials have only those powers given them by statute and the powers reasonably implied to enable them to administer those statutes. The Secretary of State (or other election official) has no power to change mandatory provisions of the election code. Even where an elected secretary of state is the chief election officer, he or she still cannot negate mandatory provisions of the state election code. To allow the secretary of state to do so would violate the doctrine of separation of powers.[8]

The duties of the secretary of state, or other chief election officer, are limited (and specified by statute), and acts done beyond the scope of those limited duties as defined by the constitution and statutes have no effect, and local election officials act improperly if they follow the directions of the chief election officer in such cases.[9]

Local ordinances or regulations concerning elections which are in conflict with procedures established by the legislature governing the conduct of elections and with statutes authorizing particular officers to perform various duties in connection with elections are invalid.[10] The administrative rules of the typical state board of elections are equivalent in their efficacy to statutes, even where their effect has been to overrule previous decisions of the state supreme court.[11]

Courts may not usurp the function of election officials. Courts may not conduct a canvass of votes prematurely. Until the election officials have canvassed all voting machines and paper ballots, prepared a return, had the board of elections canvass the votes and determine the person elected, there has been no election for a court to review. The board not only has the right, but, virtually everywhere, the

statutory duty to conduct is own canvass, without judicial intervention, and that duty cannot be abdicated.[12]

Likewise, election officials themselves must follow the statutory rules. A canvass conducted in violation of specific requirements of the election code is void.[13] Where election officials have made a mistake, the court has no power to mandate an officer to do an act which he has no legal right to do. Election officials must obey the law, and election statutes, at least in reference to official powers and duties, are mandatory and must be strictly obeyed by election officials.[14]

Election officials have the actual or implied powers to perform their official duties. For example, election officials may relocate polling places to places less convenient for some voters so long as they do not impose a substantial burden on the right to vote.[15] Election officials have implicit powers to fashion extraordinary remedies in emergencies or natural disasters, including the authority to suspend and resume the election process. [16]

The ultimate purpose of election administration is to ensure fair elections, including an equal opportunity for all eligible electors to participate in the election process.[17] Reducing or eliminating the burdens and inconveniences of voting and thereby increasing voter turnout is not only a proper subject of legislation, but is also fundamental to the maintenance of a representative government.[18]

Notes

[1]*Vintson v. Anton*, 786 F.2d 1023 (11th Cir. 1986).

[2]*Iowa Socialist Party v. Slockett*, 604 F.Supp. 1391 (S.D.Iowa, Davenport Div. 1985).

[3]*In the matter of Appointment to the Hudson County Board of Elections*, 220 N.J.Super. 367, 532 A.2d 269 (N.J.Super. 1987).

[4]*Roch v. Garrahy*, 419 A.2d 827 (R.I. 1980).

[5]*State ex rel. Hughes v. Brown*, 31 Ohio St.2d 41, 285 N.E.2d 376 (Ohio 1972).

[6]*Lunding v. Walker*, 65 Ill.2d 516, 359 N.E.2d 96 (Ill. 1976).

[7]*Id.*

[8]*Weldon v. Sanders*, 99 N.M. 160, 655 P.2d 1004 (N.M. 1982).

[9]*Id.*

[10]*State v. Boisvert*, 371 A.2d 1182 (N.H. 1977).

[11]*Thorsness v. Daschle*, 285 N.W.2d 590 (S.D. 1979).

[12]*In the matter of Larsen v. Canary*, 107 A.D.2d 809, 484 N.Y.S.2d 645 (1985).

[13]*Weldon v. Sanders*, 99 N.M. 160, 655 P.2d 1004 (N.M. 1982).

[14]*State ex rel. Chevalier v. Brown*, 17 Ohio St.2d 61, 477 N.E.2d 623 (Ohio 1985).

[15]*Taylor v. Angarano*, 652 F.Supp. 827 (S.D.N.Y. 1986).

[16]*In re General Election--1985 (Two Cases)*, 531 A.2d 836 (C.C.Pa. 1987).

[17]*Id.*

[18]*Sawyer v. Chapman*, 240 Kan. 409, 729 P.2d 1220 (Kan. 1986).

Vintson v. Anton

786 F.2d 1023
United State Court of Appeals
Eleventh Circuit
April 14, 1986

Federal constitutional standards as well as bipartisan requirements of Alabama law are satisfied by substantial representation of Republicans on each election board in the state.

The Facts

Republicans who had not been appointed as election officials in their precincts in Walker County, Alabama for the November, 1982 election brought suit alleging a violation of their federal rights to a republican form of government, to freedom of speech, and to equal protection of the laws.

The Alabama constitution and election statutes require bipartisanship in the appointment of election officials. The apparent purpose of this requirement is to create an adversary situation as a means to prevent fraud and to ensure honesty in elections. In Walker County, Alabama, election officers are appointed by a board consisting of the probate judge, the sheriff, and the clerk of the circuit court (although the sheriff, who was a candidate for reelection, had been properly replaced by a qualified elector). Appointments are required by law to be made from lists submitted by the county chairmen of the two parties which received the highest number of votes in the preceding election "if each of said parties present a list" and "there are more than two lists filed." Each list was required to have at least three names of qualified electors from which an inspector and a clerk can be appointed for each voting place. In 1982, only the Democratic and Republican parties presented lists. The Democratic list had sufficient names, but the Republican list provided only two names instead of the required minimum of three.

The Alabama statutes provide that, if no lists are furnished, the board shall appoint inspectors, two of whom are to be from opposite parties, and clerks from opposing parties if practicable. This requirement establishes the existence of a requirement for bipartisanship in Alabama in connection with the appointment of election officials. However, only the Democratic party submitted proper lists under the statutes. In Walker County, the Democrats submitted six names and the Republicans three for the absentee ballot box (which still used paper ballots); the Democrats proposed four names for each of the 99 machine precincts while the Republicans proposed 2 names in 82 of those precincts and only one name for 17 of the precincts.

The appointing board named four election officials for each machine precinct, generally three Democrats and one Republican. Five Democrats and one Republican were appointed to the absentee box. For the 1982 election, 290 Democrats and 112 Republicans were chosen as election officials, and there was no precinct without at least one Republican official.

The Issues

The Eleventh Circuit had previously ruled that Alabama law does not require the appointment of an equal number of officials from each party on election boards. *Harris v. Conradi*, 675 F.2d 1212 (11th Cir.1982). The only issue in the present case is whether or not the circumstances of appointment of officials for the November, 1982 election violated any substantial federal rights of the plaintiffs.

The Holding and Rationale

The Eleventh Circuit *affirmed* the District Court's dismissal of the lawsuit.

"In the real world of practical life the employment (if it properly may be called that) which is at stake here does not constitute anyone's means of livelihood. It is probably not a recognized occupation or calling listed in the vocational dictionaries upon which administrative law judges hearing social security disability cases rely in finding jobs which they think a person having the claimant's residual skills could perform. Although 'keeping the wolf from the door is not an unworthy objective,' . . . no one could rely upon the job of being an election officer as a rational means of accomplishing that objective.

"Service as an election officer is ordinarily performed as a humble form of public-spirited service, inspired by partisan dedication and enthusiasm, rather than by non-political economic rapacity in quest of pecuniary gain. The pay is only $25 and the job exists only one day a year, like the ephemeral insects of summer or the moribund rose of which Ronsard the celebrated French poet sings: . . . .

"This Circuit held . . . that Alabama law does not require the appointment of equal numbers of officials from each party on election boards.

"If equality of numbers is not required (either in the composition of individual boards or in the total number of officials appointed in the County to serve at a particular election), and if consideration of party affiliation is legitimate and necessary in the composition of election boards in order to discourage dishonesty and fraud, it is difficult to see any merit in appellants' complaint regarding the November 2, 1982 election.

"If ever there was occasion for invoking the rule *de minimis*, it should be operative in the case at bar. No election board without a Republican election officer has been identified. The State's policy of bipartisanship has been followed. There was substantial representation of Republicans on each election board.

"The total Republican representation on the election boards throughout the County was more generous than would have been the case if proportionality to party strength as shown by the vote at primaries and general elections had been the desideratum.

"We therefore conclude that the substantial representation of Republicans resulting from the appointments made for the November 2, 1982 election fully satisfied the bipartisan requirements of Alabama law as well as the requirements imposed by federal constitutional standards, and that no federal constitutional rights of appellants were infringed."

Commentary

Judge Dumbauld, Senior District Judge for the Western District of Pennsylvania, sitting by designation, wrote the opinion which contains, for the curious (and perhaps as a symbol of the court's disdain for the merits of the lawsuit), a rare (and perhaps unique) use of a full-text, French language poem in an American judicial opinion.

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Iowa Socialist Party v. Slockett

604 F.Supp. 1391
United States District Court
S.D. Iowa, Davenport Division
March 1, 1985

A statute which limits the appointment of "mobile deputy registrars" to persons nominated only by the two political parties receiving the highest number of votes in the last preceding election is an unconstitutional burden on associational and equal protection rights.

The Facts

Plaintiffs brought a 42 U.S.C. Sec. 1983 civil rights action challenging the constitutionality of Iowa Code Section 48.27 which provides that "mobile deputy registrars" must be selected from a list of nominees submitted by the county chairmen of the two political parties receiving the highest number of votes in the last preceding election. The defendant in the case is the commissioner of registration of Johnson County, Iowa, who is responsible for administration of the statute. The parties agreed to submission on the merits.

Under Iowa statutes, voters may register by personally submitting a form to the county commissioner of registration, by mailing the form to the commissioner, or by submitting the form to a "mobile deputy registrar." Mobile deputy registrars may be temporary or permanent appointments, but both kinds are appointed from the same lists of nominees. The county commissioner of registration must appoint one temporary deputy registrar from each list for every eleven hundred county residents and one permanent deputy registrar from each list for each ten thousand residents. The permanent appointees serve on the permanent board of mobile deputy registrars, and the temporary appointees serve in that capacity for a term beginning 180 days before a general election or 120 days before a primary election until 5:00 p.m. on the tenth day before a general or primary election or the eleventh day before any other election. If the county chairman fails to submit a list of nominees, the commissioner must appoint the deputy registrars from among person known to be members of that political party. All deputy registrars serve without compensation of any kind.

The Issues

The plaintiffs contend that their rights to freedom of association, due process, and equal protection under the First and Fourteenth Amendments are infringed by Iowa's statutory system of appointment of mobile deputy registrars.

The Holding and Rationale

The U.S. District Court declared Iowa Code Sec. 48.27 to be unconstitutional as violative of the First and Fourteenth Amendments.

The court referred to two analogous cases which reached different results. *Bishop v. Lomenzo*, 350 F.Supp 576 (E.D.N.Y.1972), upheld the New York statutory system for appointment of "bipartisan teams" of deputy registrars selected from nominees of the two major parties on grounds of administrative convenience and on the public policy of minimizing the risk of fraud or irregularity through adversary representation in the

registration process. The court observed that the Iowa system does not require bipartisan teams of registrars, and that the Iowa system seems unrelated to concerns about fraud or irregularity. The court could see no reason to believe that independent or minor party registrars would be any more likely to abuse their office than members of major parties.

In *Rhode Island Minority Caucus, Inc. v. Baronian*, 590 F.2d 372 (1st Cir.1979), plaintiffs had sought injunctive relief against the Board of Canvassers of Providence, Rhode Island for appointing as unpaid voter registrars only persons sponsored by the Democratic or Republican parties or the League of Women Voters. Plaintiffs claimed constitutional violations because of racial discrimination and abridgment of freedom of association. The lower court denied relief on a finding that plaintiffs had failed to establish their probability of success on the merits, and the Court of Appeals affirmed on the ground that the severity of harm to plaintiffs had been dissipated by the passage of the 1978 general election. The Court of Appeals, however, did disagree with the district court's analysis. The Court of Appeals observed that the racial discrimination claim was not precluded by the fact that ten of the thirty appointees were members of minority groups; a racially balanced group of registrars does not immunize the Board of Canvassers from liability for individual acts of discrimination against plaintiffs. The Court of Appeals also felt that the case raised substantial First Amendment issues, and directed the district court to assess whether membership in the Democratic or Republican parties was a prerequisite for appointment as a registrar. The court did not reach the constitutional issue, but rather appeared to authorize the trial court to use a balancing test to determine if the burden on associational rights was of constitutional significance.

The court in the instant case also relied on *Anderson v. Celebrezze*, 460 U.S. 780, 103 S.Ct. 1564, 75 L.Ed.2d 547 (1983) for the analytical process for use in resolving constitutional challenges to state election laws. In *Anderson*, the court stated that there was no "litmus paper test" to distinguish valid from invalid state election laws. Instead, courts must first consider the magnitude of the asserted injury to constitutional rights, then identify the precise state interests put forward as justification for the constitutional burdens. This balancing test will allow the court to determine whether the challenged election law provision is unconstitutional.

The court then proceeded to apply the *Anderson* balancing test to the instant case. The Iowa statute does not require nominees for the office of mobile deputy registrar to be members of a party (and in fact one of the plaintiffs had been appointed as a nominee on the Democratic party list while he was a member of the Socialist party). Under the Iowa statute, it is unlawful for a mobile deputy registrar to refuse to register any eligible voter (and in fact such refusal is a misdemeanor). Further, deputy mobile registrars are prohibited from attempting to influence the party affiliation of the voter during the registration process. Persons not appointed as registrars are still free to distribute registration forms and encourage persons to use Iowa' alternative methods of registration (and in fact may promote their own political party while doing so, something registrars may not do). The Iowa system might, however, be used to restrict appointments of registrars to major party members only because eligibility for appointment requires the nomination of the county chairman of a major party (and in fact one member of the Socialist party had been denied nomination because he was not a Democrat). Finally, although non-registrars may distribute registration cards, the completed card must be postmarked by the twenty-fifth day before an election while an in-person registrant may submit his card as late as ten days before the election. In either case, "the certainty and convenience of on-the-spot registration is not afforded."

The court concluded that, although not severe, the Iowa system placed a burden that falls unequally on small political parties and independents. The state interests

put forward to justify this burden is that it wishes to maintain the integrity of the political system by appointing to offices those persons who use the system most. The state also wishes to ensure an orderly and systematic method of voter registration, and to prevent the appointment of persons who do not wish to serve. The court concluded that the state's interest in maintaining this system of appointment of registrars, although not inconsequential, is not great.

"The court views both the injury to plaintiffs' associational rights and the State's interests to be relatively minor. This does not mean, however, that the State may carry its burden by showing simply that the procedure set forth in Sec. 48.27 is one of a number of ways to achieve the asserted objectives. At a minimum, the State must show that it would be impractical to institute some other procedure less burdensome to plaintiffs' rights. . . . In the absence of such an explanation, the challenged statute must be found unconstitutional."

The court denied injunctive relief because an election was not imminent, but recommended to the Iowa legislature that it consider the matter of creating a constitutionally sound system for appointing mobile deputy registrars.

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Roch v. Garrahy

419 A.2d 827
Supreme Court of Rhode Island
August 29, 1980

In the absence of a statutory or constitutional provision to the contrary, the governor is under no obligation to ensure geographic, ethnic, religious, sexual, or racial diversity in the appointment of otherwise qualified persons to the Board of Elections.

The Facts

The plaintiff, chairman of the Rhode Island Republican State Central Committee, brought an action for declaratory and injunctive relief against the governor and other state officials claiming that the governor had failed to follow the mandate of the Rhode Island statute in appointing members to the Board of Elections. The specific complaint was that the members of the board did not meet the alleged statutory requirement to be broadly representative of the population of the state in that all are Caucasian, all are males, six reside in the city of Providence and all seven reside in the same county, all are Roman Catholics, and none represent significant ethnic groups in the state except for Irish-Americans and Italo-Americans. Further, no political organization other than the Democratic or Republican party is represented. The Superior Court dismissed the action on grounds of lack of jurisdiction, lack of standing, and failure to state a cause of action.

The Issues

On appeal, the defendants argued that the subject matter of the action is political and therefore outside the jurisdiction of the court and that the matter was not justiciable anyway. They further contended that the plaintiff lacked standing to bring the action, and that the plaintiff had failed to state a claim upon which relief can be granted.

The Holding and Rationale

The Rhode Island Supreme Court *affirmed* the trial court and *denied and dismissed* the appeal.

The court found that the trial court, under Rhode Island statutes, had jurisdiction over the subject matter of the case in that, given an appropriate case involving a party with adequate standing, the court could consider a controversy where the construction of a state statute and the governor's compliance with the statute were in issue. The court further found that the issue before the trial court was justiciable in that "[t]he determination of whether the Governor has obeyed a statutory mandate is appointing members of such an important body as the Board of Elections comes well within the area of controversy where the statutes of this state provide discoverable and manageable standards for use by courts in determining the legality of an executive act."

The court further found that the chairman of the state's Republican party had standing to bring the action since the plaintiff would certainly suffer some injury if the governor failed to meet statutory standards in appointing the Board of Elections.

Having determined that the trial court had jurisdiction, the issue was justiciable, and that the plaintiff had standing, the trial court should have accepted the allegations in the complaint as true and should have drawn every favorable conclusion therefrom to determine if there is any set of facts under which the complaint might state a claim upon which relief could be granted. The court concluded that the trial court correctly decided that no such set of facts exists.

The statute in question requires the governor, in making appointments to the Board of Elections, to "consider the abilities and integrity of the qualified electors under consideration and their knowledge and/or experience in the workings of the election laws of the state." The plaintiff's complaint does not challenge the abilities, integrity, or knowledge and/or experience of the appointees, nor does it suggest that they are not qualified electors. The statute also provides that in appointing the board, there shall be an effort to "strive to select a board whose membership shall be representative of all citizens of the state and of their diverse points of view." The court finds that this language is obviously directory and not mandatory. The word "strive" is a synonym for "try" or "attempt," and is not of mandatory significance.

"This language indicates a mild exhortation by the Legislature to the Governor and Senate to strive or try for diversity in conjunction with other characteristics. There is utterly no indication that the Legislature intended even to suggest any particular type of diversity. The plaintiffs assume, without support from the language of the statute, that the Legislature intended geographic, ethnic, religious, sexual, and racial diversity, as well as political. . . . Under no circumstances in construing such a statute may the court substitute its judgment in this exercise of discretion for that of the Governor and the Senate. Thus the complaint, read with every reasonable intendment in favor of the plaintiffs, has failed to state a claim upon which relief could be granted."

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Hughes v. Brown

31 Ohio St.2d 41, 285 N.E.2d 376
Supreme Court of Ohio
July 5, 1972

Members of county board of elections can not be removed by the Secretary of State without a formal complaint and hearing concerning misconduct of election.

The Facts

On June 9, 1972, the plaintiffs, members of the Cuyahoga County Board of Elections, received telegrams from the Ohio Secretary of State dismissing them from office. They then brought this complaint, alleging that they are state officers wrongfully dismissed from office in violation of the Ohio Constitution and of Ohio statutes. No written charges had been served against them. No reasons were given for their dismissal. No complaint was made against them. No hearing was held prior to their dismissal.

The Issues

Section 38, Article II of the Ohio Constitution provides: "Laws shall be passed providing for the prompt removal from office, upon complaint and hearing, of all officers . . . ." Previous Ohio decisions have interpreted this provision to mean that Ohio public officials can be removed from office only upon complaint and hearing.

R.C. Sec. 3.07 provides that only ". . . upon complaint and hearing . . ." shall a person holding office in this state ". . . have judgment of forfeiture of said office with all its emoluments entered thereon against him, creating thereby in said office a vacancy to be filled as prescribed by law. . . . ."

The Ohio Supreme Court issued an alternative writ of prohibition commanding the Secretary of State to show cause why a permanent writ should not issue. Although the Secretary's response was "incomplete and improper," the court treated it as a motion to dismiss the complaint.

The Holding and Rationale

The Ohio Supreme Court overruled the motion to dismiss and issued a permanent writ of prohibition which prevents the Secretary of State from removing members of the Board of Elections without complying with constitutional and statutory requirements.

The court observed that the Secretary of State agreed that he had purported to remove the board members without prior complaint and hearing. The Secretary of State, however, took the position that the complaint and hearing were not necessary because he did investigate the matter. On May 8, 1972 there was a meeting in Cleveland between the board and the Secretary of State where they had a general discussion of the preparation and conduct of the primary election of May 2, 1972 and the general plans for future elections in Cuyahoga County. The board members "accepted full responsibility" for the alleged misconduct of the May 2, 1972 primary.

The court held that "a formal complaint and hearing are required prior to any removal of a member of a board of elections . . . ."

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Weldon v. Sanders

99 N.M. 160, 655 P.2d 1004
Supreme Court of New Mexico
November 9, 1982

The Secretary of State, as chief election officer, cannot negate mandatory provisions of the state election code by issuing instructions for the conduct of elections.

The Facts

The plaintiff, a write-in candidate for district attorney, brought an election contest arising from the November, 1980 general election. During that election, write-in campaigns were conducted for a number of offices. In an effort to promote efficiency and avoid confusion, the Secretary of State (in her capacity as chief election officer) promulgated Memorandum #80-50 which listed the name variations which could be counted for the write-in candidates and required precinct officials to list all of the variations.

After the election, the Attorney General of New Mexico issued an opinion (80-36) concerning write-in name variations and how they should be counted.

The State Canvassing Board canvassed the election results. Applying 80-50, the board determined that the plaintiff had lost his election. Applying 80-36, the board determined that he had won his election. The state board decided to apply 80-50 because it was issued before the election, and thus declared the plaintiff's opponent the winner.

Weldon petitioned the New Mexico Supreme Court for a writ of mandamus to compel the State Canvassing Board to certify him as the winner because, based upon the face of the returns he had received the majority of votes cast. The court issued an alternative writ ordering the board to certify Weldon as the winner or show cause why it should not. Sanders, Weldon's opponent, intervened and argued that the alternative writ should not be made permanent because Weldon did not receive the majority of the legal votes cast.

The Issues

The issue before the court was whether or not the State Canvassing Board had the power to count some write-in votes and not others. Weldon argued that the state board could not accept the county canvasses prepared according to 80-50 because the county and state boards had no discretion to determine which write-in votes should be counted. Sanders argued that the state board had acted properly. The court quashed the alternative writ. Sanders was certified the winner, and the present election contest followed.

The trial court had found that the county canvassing boards involved did not comply with statutory requirements and that therefore only the precinct returns could properly be considered. Based on the precinct returns, Sanders received the majority of the votes cast. The trial court rejected Weldon's request to consider the actual write-in scrolls because Weldon had never actually applied for a recount. The trial court concluded Sanders was the winner and Weldon appealed.

The Supreme Court considered whether Weldon could bring an election contest, whether the district court correctly disregarded the county canvasses, and whether the trial court should have looked at the write-in scrolls.

The Holding and Rationale

The New Mexico Supreme Court *affirmed* the trial court.

First, the court concluded that Weldon could bring an election contest. New Mexico statutes provide three remedies for dissatisfied candidates: recheck, recount, and election contest. The recheck and recount procedures require timely application and are based upon a belief that the election might have been tainted by error or fraud. Weldon did not seek a recount or recheck in a timely fashion. Weldon's lawsuit, however, was based on alleged errors made by election officials and specifically alleged that he, and not his opponent, had received a majority of the votes. This allegation will support an election contest in New Mexico. A demand for a recount or recheck is not a prerequisite for an election contest.

The trial court found that the county boards violated state election statutes because they conducted their canvass directly from the write-in scrolls instead of from the precinct returns, and because the county boards corrected purported errors or omissions in the precinct returns without notifying precinct officials or the secretary of state. Because of the violations of the election code, the trial court refused to consider the county canvasses, looking instead to the precinct returns. This decision was crucial to the outcome of the case, because one county canvass (in the two-county judicial district) gave Weldon 235 more votes than the precinct returns, enough to give him the majority.

Weldon argued that election officials followed the procedures in the secretary of state's Memorandum #80-50 and properly found him to be the winner. The New Mexico statutes require that the county canvassing board shall canvass the election returns of the precincts. The term "election returns" means the certificate of the precinct board showing the total votes cast for each candidate (but may include also other documents such as poll books, tally books, and the like). The actual ballots are not part of the "election returns." If any apparent errors are found by the county board, they are to summon the precinct board and notify the secretary of state. Thus, the function of the county board is to find errors, not correct them. In canvassing directly from the write-in scrolls and not the election returns of the precincts (and in failing to notify the precinct boards or the secretary of state), the county canvassing boards violated the election code.

Weldon argued that the county canvassing boards properly followed the mandate of the secretary of state as the chief election officer under 80-50. The court concluded: "Although the secretary of state is the chief election officer . . . she cannot negate mandatory provisions of the Election Code. To allow the secretary of state to do so would violate the doctrine of separation of powers."

The court further observed that a state statute requires that the secretary of state shall "prepare instructions for the conduct of election and registration matters in accordance with the laws of the state. . . . Memorandum 80-50 is not in accordance with the laws of the state."

Because the secretary of state acted beyond the scope of her duties, her memorandum to the county canvassing boards had no effect. The election must be conducted according to the mandatory provisions of the state Election Code. The procedure

followed by the county boards could not be characterized as mere "irregularities," but rather were violations of mandatory code provisions.

The court finally ruled that the district court was correct in refusing to examine the write-in scrolls because Weldon had failed to make a timely request for the "recheck" procedure which would have allowed the examination of the ballots themselves.

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State v. Boisvert

371 A.2d 1182
Supreme Court of New Hampshire
March 31, 1977

Where a local ordinance concerning eligibility to serve as election official is in conflict with state election procedures mandated by the legislature, the local ordinance is invalid.

The Facts

Boisvert was duly elected and qualified as moderator (a local election official) of ward 7 in Nashua, New Hampshire. He served as moderator at the primary election held on September 14, 1976. In that same election, he was a candidate for nomination as a representative of ward 7 to the New Hampshire General Court.

Boisvert served as moderator and stood as a candidate at the same time with the full knowledge that the city of Nashua had an ordinance which provided that "No person shall serve as a Ward Worker (Moderator, Clerk, Selectman or Ballot Inspector) on election day who is on that same election day a candidate for any office other than Ward Worker." The city brought a complaint against Boisvert for violation of the ordinance, and he moved to dismiss on grounds that the ordinance was invalid. The district court denied the motion to dismiss and transferred the question of the validity of the ordinance to the Supreme Court without ruling.

The Issues

The issue is simply the validity of the Nashua city ordinance.

The Holding and Rationale

The New Hampshire Supreme Court held the ordinance is invalid, being "repugnant to the laws of the state."

The manner in which elections are to be conducted are described in great detail by New Hampshire statutes. The functions to be performed by each election official are specifically delineated by state statute, and their powers and duties are precisely defined by state statute. The office of moderator carries with it a number of specific statutory duties.

"We find that the foregoing provisions evidence a legislative intent that only the moderator, the official selected by the voters to perform the function of presiding over elections, may execute the duties discussed above. The ordinance in question is at variance with this statutory scheme and runs counter to the legislative purposes sought to be attained therein. This conclusion finds support in the consideration that uniformity in the conduct of the state election system is a desired goal of the legislature. . . . and is further buttressed . . . " by the fact that a state statute identical to the Nashua ordinance had been introduced in the state legislature and defeated.

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Selected Case Summaries

In re General Election--1985 (Two Cases), 531 A.2d 836 (Penn.Cwlth. 1987).

The judge of the Court of Common Pleas of Washington County, at the request of the county election board and without a hearing, suspended voting in 11 districts of the county during the statewide general election on November 5, 1985 because of storms along the Monongahela River which caused extensive flooding, loss of electricity, heat and water. The court then resumed the election process in those districts two weeks later, and later still dismissed the petitioners' Election Code appeal on grounds that they lacked standing and that the court's actions had been proper. Some of the eleven polling places had stayed open despite the court's order, although the county commissioners had declared a state of emergency and the governor had declared the county a disaster area. On appeal, the court determined that at least one of the plaintiffs, as a candidate in that election, had standing. The Pennsylvania Election Code is silent on the procedure to follow when natural disaster interferes with an election; however, the court of common pleas is empowered by the code to supervise elections and is required to stay in session from 7 a.m. to 10 p.m. on election day and "to decide matters pertaining to the election as may be necessary to carry out the intent of this act." Because the purpose of election law is to ensure fair elections, the court concluded that the court of common pleas implicitly had the authority to suspend voting in face of natural disaster in order to prevent the disenfranchisement of voters by circumstances beyond their control. Likewise, the court of common pleas had the implicit power to resume the suspended election. Held: the action of the court of common pleas is affirmed and the election results are valid.

In the matter of Appointment to the Hudson County Board of Elections, 220 N.J.Super. 367, 532 A.2d 269 (N.J.Super.App.Div. 1987).

The governor appointed a Democratic member to the county election board and Democratic party officials argued that the governor's appointment was invalid and that their nominee should have been appointed instead under the statute. The statute provides that during the 30-day period before February 15th each year, the chairperson and vice-chairperson of each county committee and the state committeeman and state committeewoman of each political party shall meet and jointly, in writing, nominate one person residing in the county as a member of the county board of elections. The nomination must be forwarded to the governor on or before March 1, and the governor must appoint the nominee. If nomination is not made because of a tie vote, the matter is forwarded to the state party chairperson who casts the deciding vote and forwards the results to the governor. If no nomination is forwarded to the governor within the statutory time period, the governor may appoint his own selection from citizens of the county. On February 26, 1987, the proper persons met in Hudson County and voted to nominate a qualified candidate by a vote of 3 to 1. This result was forwarded to the state Democratic chairperson on February 27, and it was delivered to the governor's office on March 2, 1987 (since March 1 was a Sunday). The governor appointed his own qualified nominee to the board on March 26. The governor argued that the failure to nominate the first candidate prior to the statutory deadline of February 15 allowed him to appoint his own candidate, despite the timely delivery by the statutory delivery deadline of March 2 (the first business day after Sunday, March 1). Held: the governor's appointment was valid because the statutory county committee had failed to act by the mandatory statutory deadline.

In the matter of Larsen v. Canary,
107 A.D.2d 809, 484 N.Y.S.2d 645 (App.Div. 2 Dep. 1985).

Larsen and Krupski were candidates for the office of trustee of the Town of Southold in the general election in November, 1984. Larsen alleged in her petition to the trial court that the unofficial vote tally was inaccurate because, among other irregularities, some absentee ballots had not been counted. She requested that all ballots be impounded, and that a recanvass be conducted by the court. Krupski noted in his response that the board of elections had already impounded the ballots and planned to canvass them, with both parties present, on November 15, 1984. Later, both Krupski and Larsen stipulated that a canvass by the court was not premature, and on November 16 the court conducted a canvass of all the paper ballots and absentee ballots and decreed that Larsen was the winner by four votes. The board of elections never conducted its canvass. Krupski appealed. Held: The trial court is reversed because it acted without jurisdiction in conducting a canvass of the ballots before the board of elections had conducted its canvass. New York statutes impose specific duties for canvassing the vote. Even though the attorneys for both candidates stipulated to the canvass by the court, that agreement cannot be binding on the board of elections which has statutory duties. "Indeed, the board not only has the right, but the statutory duty, to conduct its own canvass, without judicial intervention, and that duty cannot be abdicated." The matter is remitted to the board of elections to conduct its canvass and determine the winner.

Lunding v. Walker,
65 Ill.2d 516, 3 Ill.Dec. 686, 359 N.E.2d 96 (Ill. 1976).

In May, 1975 the governor removed Lunding from the State Board of Elections for "neglect of duty" because he failed to file a financial disclosure statement required by the governor's executive order. Lunding sought a restraining order to prevent the governor from removing him from office. Held: "We hold that in this particular instance, because of the unique character of the office held by plaintiff, the Governor could only remove plaintiff for cause. Further, we hold that the determination of the adequacy of the cause for removal is, in this case, judicially reviewable. Consequently, we affirm the issuance of the temporary injunction." The primary reason given by the court for this decision is its desire preserve the political neutrality and independence of the Board of Elections, as required by the Illinois constitution, which would be lost if members could be arbitrarily removed from office at the whim of the governor.

Sawyer v. Chapman,
240 Kan. 409, 729 P.2d 1220 (Kan. 1986).

The Kansas Mail Ballot Election Act, first passed in 1983, permits the use of mail ballots in certain specified elections. In May, 1985, the Board of County Commissioners of Sedgwick County authorized a countywide mail ballot election on obtaining voter approval for a 1% countywide retailers' sales tax. The election was conducted by the Sedgwick County Election Commissioner under a plan approved by the Kansas Secretary of State. The election took place from July 9 through July 30 and resulted in approval of the tax by a wide margin. Prior to this election, the measure had been defeated in four previous elections held with voting booths at polling places. A second mail ballot election was authorized and conducted in 1986 on the issuance of bonds for construction of a new jail, and that bond proposal was defeated by a wide margin. Before the ballots were mailed in the second election, the plaintiff-voter filed for a temporary restraining order, injunctive relief, and a declaratory judgment. The request for injunctive relief was denied and rendered moot by the results of the election, but the request for declaratory judgment attacked the constitutionality of the Mail Ballot Act on grounds that it infringed on the secrecy of the ballot and that it increased the

potential for fraud, intimidation, manipulation, undue influence, and abuse in the voting process. From an adverse ruling in the trial court, the Supreme Court heard this appeal. Because the appellant made a constitutional challenge to the voting process on the basis that illegal (i.e., unconstitutional) votes were cast, the court recognized his standing under a particular Kansas statute governing election contests. In its analysis, the court recognized that voting by mail might increase the potential for compromising the secrecy of the ballot and might increase the opportunity for election fraud. However, the state has an interest in obtaining increased participation in the democratic process by facilitating voting. Held: "The legislature weighed the added potential for fraud and loss of secrecy under mail ballot elections against the compelling state interest in increased participation in the election process and concluded the risk worth taking. Its action was lawful. We hold the Kansas Mail Ballot Election Act . . . is constitutional."

Stanton v. Panish,
167 Cal.Rptr. 584, 615 P.2d 1372 (Cal. 1980).

Panish, the Registrar-Recorder of Los Angeles County, announced his intention to remove a judicial office from the general election ballot for November 4, 1980, thus canceling the election scheduled for that office. The office became vacant by retirement in June, 1980 (although the term did not end until the end of 1980) and Stanton received the greatest number of votes, but less than a majority, in the June primary, thus becoming a "run-off" candidate in November. He seeks mandamus to compel the registrar and the Secretary of State to certify candidates for election and the results. Stanton contends that in these circumstances, where a six-year judicial term is expiring and the election process has begun to fill the office prior to the accrual of the vacancy, then the California Constitution requires that the office be filled by the completion of the election process rather than by an appointment. Held: The judicial office must appear on the ballot. ". . . [U]nless there is express constitutional or statutory provision otherwise, and whenever possible the succession of superior court judges shall be by popular election. Only if the electoral process cannot be carried out or a vacancy occurs prior to the qualification of a candidate or candidates for an office in the year in which an incumbent's term expires, does section 16(c) permit the postponement of an election for a superior court office beyond the sixth year of a term."

State ex rel. Chevalier v. Brown,
17 Ohio St.3d 61, 477 N.E.2d 623 (Ohio 1985).

The mayor-elect of Lorain, Ohio was killed in an automobile crash the day before his term was to begin, and the president of the city council was appointed mayor. On January 10, 1985 the Secretary of State's office advised the Director of the Lorain County Board of Elections that an election would be held in November, 1985 for the balance of the mayor's term (which ended in 1987). Several candidates filed nominating petitions which were certified by the board around February 26. Chevalier filed a petition for the mayoral race and did not pursue his previous plans to run for reelection to his council seat. On March 7, the Secretary of State's office notified the board that its previous communication had been in error and that no election for mayor would be held until the term had expired in 1987. Chevalier then brought this action for a writ to compel election officials either to conduct the originally scheduled mayoral election or, alternatively, to accept late petitions for city council offices. The Ohio statute provided that elections were to be held to fill the unexpired term of mayors who died in office until an amendment in 1984 provided that in the event of such a death, the president of the legislative authority of the city shall become the mayor and shall hold the office for the unexpired term. Apparently no one involved in the proceedings were aware of the 1984 amendment until the secretary of state discov-

ered his error on March 7. Held: "No statute exists which imposes a duty upon respondent election officials to hold an election for mayor, or to accept late petitions for council seats. In fact, to do so would be contrary to statute. . . . Mandamus does not lie to '. . . compel an officer to do an act which he has no legal right to do in the absence of the writ.'" The writ is denied.

Taylor v. Angarano,
652 F.Supp. 827 (S.D.N.Y. 1986).

Representative college student voters at SUNY-Purchase sought an injunction to prevent the Harrison Town Board from relocating polling places from the campus to locations 1.5 miles from the campus and within .6 miles of the public bus stop. Plaintiffs argued that the purpose in relocating the polling places was to make it more difficult for students to vote while the board contended it moved the polling places because there were incidents of electioneering and other disturbances at the campus polling places in the previous election. Held: injunctive relief denied because (1) the location of the new polling places, though less convenient, does not impose a substantial burden on the students' franchise; and (2) the board was entitled, because of the previous disturbances at the polls, to take the necessary steps to protect the integrity of its electoral process.

Thorsness v. Daschle,
285 N.W.2d 590 (S.D. 1979).

Daschle won a closely contested election to Congress. The South Dakota Supreme Court, after a period of litigation, agreed to examine all disputed ballots (in ten different categories). The question arose as to whether the administrative rules of the State Board of Elections are invalid because they overrule prior decisions of the Supreme Court. In 1974, the legislature created the board and conferred rule-making powers. The board has promulgated administrative rules for conducting elections, and those rules were "as binding as statutes." Although the rules do have the effect of validating some ballots that would have been invalid under previous Supreme Court rulings, the legislature has determined that the board has the power to adopt such rules. Held: After a *de novo* review, Daschle has 110 more votes than his opponent and is the winner.

Selected Legal Literature

Bernardini, "Illinois State Board of Elections: A History and Evaluation of the Formative Years," 11 John Marshall Journal 321 (1977-78).

Note, "Judicial Intervention in Political Party Disputes: the Political Thicket Reconsidered," 22 UCLA Law Review 622 (1975).

Note, "Local Legislation--Implied Preemption by Occupation--Local Election Ordinances Held Invalid Because State Legislation Impliedly Preempted Field," 35 Maryland Law Review 543 (1976).

Reiff, "Ohio Residency Law for Student Voters--Its Implications and a Proposal for More Effective Implementation of Residency Statutes," 28 Cleveland State Law Review 449 (1979).

Chapter 3: Reapportionment, Redistricting, and Reprecincting

Chapter 3: Reapportionment, Redistricting, and Reprecincting

Introduction

States and localities have traditionally had the authority to establish district boundaries for various offices. Most jurisdictions seemed to exercise the responsibility with more concern for political realities and incumbent protection than for the effect that districting plans would have upon the voters.

The Supreme Court finally ventured into the political thicket[1] of redistricting 25 years ago.[2] In its initial activist foray into the reapportionment field, the Supreme Court held that reapportionment was a justiciable issue.[3] In the years since the Court's determination that it was able to rule on redistricting issues, it has been presented with myriad federal, state, and local redistricting questions and has not yet fully resolved many of the issues that continue to confront officials responsible for redistricting.

Redistricting Standards

Redistricting must conform, as nearly as possible, to the principle of "one person, one vote."[4] In congressional redistricting cases, there is no room for any deviation from precise mathematical equality.[5] State legislative redistricting plans are, however, afforded a bit more leeway,[6] as are local plans.[7] There are, however, some minor local units of government whose responsibilities might not justify adhering to normal standards applicable to local government.[8]

Congressional Districts

In congressional district plans, the Court has held that slight deviations from precise mathematical equality were permissible only if they were unavoidable in spite of good faith efforts to achieve a standard of absolute numerical equality or if there was adequate justification shown.[9] The Court has refused to find that a congressional districting plan was *per se* valid even when the maximum population deviation among the congressional districts was less than the statistical imprecision of the available census data--in this case, a deviation of 0.7 percent, with a predictable undercount approximating one percent.[10]

What will qualify as acceptable justification for limited population variances in congressional districting cases? The Court has outlined a limited number of permissible justifications, but has never upheld a plan based exclusively upon any of these criteria. They include a policy of respecting municipal boundaries, making districts compact, a desire to avoid contests between incumbents, and preservation of the relative voting strength of minority groups.[11]

State Legislative Districts

While the Court has not established set standards for acceptable state legislative district deviations, it has found that population deviations of almost eight percent did not establish a prima facie case of invidious discrimination[12] and that population variances of as much as ten percent were *de minimis* disparities that were not in need of state justification.[13] Greater deviations, however, might have to be explained, but would be permitted if the state could offer "a satisfactory explanation grounded on acceptable state policy."[14] While the challenger carries the burden of proving that a state legislative districting plan with less than a ten percent overall range violates the Equal Protection Clause, if the disparity exceeds ten percent, the state has the burden of showing that the range is necessary to implement a rational state policy and that the disparity does not dilute or diminish the voting strength of any specially protected groups.[15]

Even a plan with a maximum deviation of as much as 89 percent was upheld by the Court because the state justified the variance by pointing to its longstanding and neutrally applied policy of using counties as the state's basic units of representation.[16] However, the Court invalidated another plan with a population variance of 20 percent because there were no "significant state policies or other acceptable considerations that require adoption of a plan with so great a variance" advanced by the state.[17]

Local Government Districts

Local government redistricting is subjected to essentially the same standards as those applied to states, with the Court perhaps even more receptive to justifications for deviation from mathematical equality in local cases than in state redistricting.[18]

Multi-Member Districts

While they may reluctantly permit certain types of such practices, the courts have not been particularly receptive to the concept of multi-member legislative districts. While multi-member districts are not unconstitutional *per se*, they are to be used in court-drawn plans only if there are insurmountable difficulties in doing

otherwise,[19] if they afford minorities a greater chance to participate in the political process, or if significant interests would be advanced by multi-member districts and single-member districts would jeopardize constitutional requirements.[20]

Multi-member districts are subject to the "access to the political process" test, in which there must be affirmative discrimination shown against minority voting rights,[21] and, under the Voting Rights Act Amendments of 1982, it need not be intentional.[22] The challenger bears the burden of proving that multi-member districts unconstitutionally operate to dilute or cancel the voting strength of racial or political elements.[23]

One of the principal reasons that the courts do not like multi-member districts is because of their impact upon the votes of minorities. A redistricting plan that serves to minimize or cancel out the voting strength of racial or political elements of the voting population[24] or which is motivated by an intent to discriminate against the allegedly disadvantaged groups is unconstitutional.[25] The burden is on the plaintiffs to show that they do not have an equal opportunity to participate in the political processes and to elect candidates of their choice.[26] This may be done through the use of historical and contemporary evidence[27] or even through prospective interpolation that shows the expectation of future degradation.[28] Discriminatory intent does not need to be shown; a showing of discriminatory effect is dispositive.[29] The courts, however, have refused to take racial subgroups into account in determining vote dilution claims; thus, a group of Hasidic Jews who claimed discrimination in a congressional redistricting case were held to have received adequate representation as whites, and the courts did not need to look further.[30]

The question that the courts will ask to determine unconstitutional vote dilution is whether a voting bloc majority was usually able to defeat candidates who were supported by a politically cohesive, geographically insular minority group.[31] The Supreme Court said that two factors would then come into play. If the minorities had actually had substantial difficulty in electing representatives of their choice and significant racial bloc voting had occurred, the test would be satisfied.[32]

Political Gerrymandering

The Supreme Court, in its most significant recent pronouncement on redistricting cases, has held that a claim may be properly based upon the grounds of political gerrymandering--the dilution of votes by members of political or ideological groups.[33] Political discrimination claims have a different standard of proof than do similar claims by a racial group. The plurality opinion of the Supreme Court in *Davis v. Bandemer* found that plaintiffs must adhere to the pre-1982 discrimination tests; they would have to prove both intentional discrimination against a political party or group and that there was a corresponding discriminatory impact on the party or group.[34] The Court has not yet thrown out a redistricting plan based exclusively on a political gerrymandering claim.

Procedural Aspects

Of particular note are a few phenomena of interest dealing with the responsibilities of the courts. Federal courts hearing state or congressional redistricting cases are required to convene three-judge panels.[35] Also, courts must adhere more strictly than a legislature or commission to the mathematical equality standard when called upon to redistrict state legislatures.[36] Courts are also restricted when it comes to multi-member districts. They are held to a higher burden for justifying their use,[37] and in only one unique instance, involving problems with military reservations, has the Supreme Court approved of their use by the courts.[38]

Notes

[1]*Colegrove v. Green*, 328 U.S. 549, 556, 66 S.Ct. 1198, 1201, 90 L.Ed. 1432, 1436 (1946).

[2]*Baker v. Carr*, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962).

[3]*Id.*

[4]*Gray v. Sanders*, 372 U.S. 368, 83 S.Ct. 801, 9 L.Ed.2d 821 (1963).

[5]*Kirkpatrick v. Preisler*, 394 U.S. 526, 89 S.Ct. 1225, 22 L.Ed.2d 519 (1969), *reh'g denied*, 395 U.S. 917, 89 S.Ct. 1737, 23 L.Ed.2d 231 (1969).

[6]*Reynolds v. Sims*, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964).

[7]*Avery v. Midland County*, 390 U.S. 574, 88 S.Ct. 1114, 20 L.Ed.2d 45 (1968).

[8]*Hadley v. Junior College District*, 397 U.S. 50, 90 S.Ct. 791, 25 L.Ed.2d 45 (1970).

[9]*Kirkpatrick v. Preisler*, 394 U.S. 526, 89 S.Ct. 1225, 22 L.Ed.2d 519 (1969), *reh'g denied*, 395 U.S. 917, 89 S.Ct. 1737, 23 L.Ed.2d 231 (1969).

[10]*Karcher v. Daggett*, 462 U.S. 725, 103 S.Ct. 2653, 77 L.Ed.2d 133 (1983).

[11]*Id.*

[12]*Gaffney v. Cummings*, 412 U.S. 735, 93 S.Ct. 2321, 37 L.Ed.2d 298 (1973).

[13]*Brown v. Thomson*, 462 U.S. 835, 103 S.Ct. 2690, 77 L.Ed.2d 214 (1983).

[14]*Swann v. Adams*, 385 U.S. 440, 87 S.Ct. 569, 17 L.Ed.2d 501 (1967).

[15]*Gaffney v. Cummings*, 412 U.S. 735, 93 S.Ct. 2321, 37 L.Ed.2d 298 (1973).

[16]*Brown v. Thomson*, 462 U.S. 835, 103 S.Ct. 2690, 77 L.Ed.2d 214 (1983).

[17]*Chapman v. Meier*, 420 U.S. 1, 95 S.Ct. 751, 42 L.Ed.2d 766 (1975).

[18]Tribe, American Constitutional Law 1073 (2nd Ed. 1988).

[19]*Chapman v. Meier*, 420 U.S. 1, 95 S.Ct. 751, 42 L.Ed.2d 766 (1975); *Connor v. Finch*, 431 U.S. 407, 97 S.Ct. 1828, 52 L.Ed.2d 465 (1977).

[20]*Zimmer v. McKeithen*, 485 F.2d 1297, 1308 (5th Cir. 1973) (en banc), *aff'd sub nom., East Carroll School Board Parish v. Marshall*, 424 U.S. 636, 96 S.Ct. 1083, 47 L.Ed.2d 296 (1976).

[21]See, *Whitcomb v. Chavis*, 403 U.S. 124, 91 S.Ct. 1858, 29 L.Ed.2d 363 (1971); *White v. Regester*, 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973).

[22]Voting Rights Act Amendments of 1982, 42 U.S.C. Sec. 1973 (1982).

[23]*Whitcomb v. Chavis*, 403 U.S. 124, 91 S.Ct. 1858, 29 L.Ed.2d 363 (1971).

[24]*Id.*

[25]*Id.*

[26]*See, Thornburg v. Gingles*, 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986), *City of Mobile v. Bolden*, 446 U.S. 55, 100 S.Ct. 1490, 64 L.Ed.2d 47 (1980); *White v. Regester*, 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973); *Whitcomb v. Chavis*, 403 U.S. 124, 91 S.Ct. 1858, 29 L.Ed.2d 363 (1971).

[27]*White v. Regester*, 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973); *Whitcomb v. Chavis*, 403 U.S. 124, 91 S.Ct. 1858, 29 L.Ed.2d 363 (1971).

[28]*Davis v. Bandemer*, 478 U.S. 109, 106 S.Ct. 2797, 92 L.Ed.2d 85 (1986).

[29]See, Sen. Report No. 97-417 at 36 (1982).

[30]*United Jewish Organizations v. Carey*, 430 U.S. 144, 97 S.Ct. 996, 51 L.Ed.2d 229 (1977).

[31]*Thornburg v. Gingles*, 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986).

[32]*Id.*

[33]*Davis v. Bandemer*, 478 U.S. 109, 106 S.Ct. 2797, 92 L.Ed.2d 85 (1986).

[34]*Id.*

[35]See, Williams, "New Three-Judge Courts of Reapportionment and Continuing Problems of Three-Judge Court Procedures, 65 Georgetown Law Journal 971 (1977).

[36]*Chapman v. Meier*, 420 U.S. 1, 95 S.Ct. 751, 42 L.Ed.2d 766 (1975). *See*, Miller, "Constitutionality of Political Gerrymandering: Davis v. Bandemer and Beyond," 4 Journal of Law & Politics 653 (1988).

[37]*Mahan v. Howell*, 410 U.S. 315, 93 S.Ct. 979, 35 L.Ed.2d 320 (1973), *modified*, 411 U.S. 922, 93 S.Ct. 1475, 36 L.Ed.2d 316 (1973).

[38]*Id.*

Gray v. Sanders

372 U.S. 368, 83 S.Ct. 801, 9 L.Ed.2d 821 (1963)
United States Supreme Court
March 18, 1963

Use of a unit-vote system in an election for a single office in a single constituency violates the Equal Protection Clause of the U.S. Constitution.

The Facts

The State of Georgia employed a county-unit method for nominating Democratic candidates to statewide office. Under this system, candidates for statewide nomination by the Democratic party had to win a weighted county vote. Each county was assigned a certain number of votes, and the plurality winner of the vote in the primary in that county received all of the votes of that county under a "winner-take-all" procedure, much akin to the federal electoral college system employed to elect the President and Vice President of the United States. Plaintiffs challenged the constitutionality of this unit-vote method.

The Issues

The question for decision was whether there is a right to cast a vote that is the mathematical equivalent of a vote cast by any other member of the same constituency.

The Holding and Rationale

The Supreme Court found that there was jurisdiction under the standards enunciated in *Baker v. Carr*. In a majority opinion, authored by Justice Douglas, the Court examined the impact of the votes of those individuals who had cast votes for the candidate who had not received the plurality of votes in a given county and looked closely at the prospect of a popular vote winner being the unit-vote loser.

The majority tried to avoid characterizing the dispute as an apportionment matter, insisting that this was "only a voting case" that had nothing to do with the composition of a legislative body, be it state or federal.

The Court noted that votes were effectively wasted if they were not cast for the winner in a given county and implied that there was some indefinable right of a voter to have his or her vote carry the same weight as a vote cast by another individual within the same district or jurisdiction. In Justice Stewart's concurring opinion was the language that "[w]ithin a given constituency, there can be room for but a single constitutional rule--one voter, one vote."

Commentary

This decision was important in that it was the Court's first opportunity to review a case whose substance fell within the "political thicket" area as elaborated upon in *Baker v. Carr*, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962).

In spite of its reluctance to use this as an opportunity to reach many of the *Baker v. Carr* issues, the concurrence by Justice Stewart first elaborated upon the equal representation (here "one voter, one vote") concept.

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Wesberry v. Sanders

376 U.S. 1, 84 S.Ct. 526, 11 L.Ed.2d 481 (1964)
United States Supreme Court
February 17, 1964

The population of congressional districts in the same state must be as nearly equal in population as practicable.

The Facts

The State of Georgia had established congressional districts with widely disparate populations. For example, one congressional district in the City of Atlanta contained approximately twenty percent of the state's population, but in turn elected only approximately ten percent of the state's congressional delegation. The plaintiffs were residents of the Atlanta district who filed suit as a result of the alleged underrepresentation.

The Issues

The question for decision was whether there is a right to have congressional apportionment determined on a *per capita* population basis.

The Holding and Rationale

The Supreme Court invalidated Georgia's congressional districting statute. The Court held that the population of congressional districts in the same state must be as nearly equal in population as practicable. Justice Black's majority opinion decreed that "one man's vote in a congressional election is to be worth as much as another's."

The Court reached its conclusion not as a result of a Fourteenth Amendment analysis and concern, but rather after reviewing the command of Article I, Section 2, of the United States Constitution requiring members of the House of Representatives to be elected "by the People of the several States." Justice Black felt that this provision governed intrastate congressional districting.

Commentary

This decision was important because it was the first post-*Baker v. Carr*, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962), opinion that specifically applied to congressional districting and because it held that "one man's vote [was] worth as much as another's."

The reliance on the Article I, Section 2, rationale for the holding was even raised as suspect at the time of the decision. Justice Harlan's dissent indicated that while he felt that Congress had the authority to address substantial intrastate population disparities among congressional districts, this authority was the exclusive remedy for such situations.

Today it is recognized that the Fourteenth Amendment analysis is the preferred approach for courts to use in reviewing congressional districting.

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Reynolds v. Sims

377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964)
United States Supreme Court
June 15, 1964

The Equal Protection Clause requires that seats in both houses of a bicameral legislature be apportioned on a per capita "one person, one vote" basis.

The Facts

The Alabama state legislature maintained districts with vast population disparities, including constituency population ratios as high as 46:1 in the Senate and 16:1 in the House. As a result, approximately one-fourth of the state's population could account for the election of a majority in each chamber of the legislature.

The plaintiffs claimed that there was gross discrimination against voters in counties in which the population had grown proportionately far more than other counties since the census of 1900.

A three-judge U.S. District Court panel from the Middle District of Alabama held that the apportionment scheme violated the Equal Protection Clause and further found that two new legislative districting proposals also failed to meet the test. The Court combined its preferred features in the two new plans and ordered temporary redistricting for the 1962 election. Both sides appealed the District Court decision.

The Issues

The question for decision was whether there is a right to have state legislative apportionment determined on a *per capita* population basis.

The Holding and Rationale

The Supreme Court ruled that the Equal Protection Clause requires that seats in both houses of a bicameral legislature be apportioned on a per capita "one person, one vote" basis.

The Court reviewed the right to suffrage, found it to be fundamental to a democratic form of government, and noted that *Wesberry v. Sanders*, 376 U.S. 1, 84 S.Ct. 526, 11 L.Ed.2d 481 (1964), required "equal representation for equal numbers of people." The Court applied a strict scrutiny test in Chief Justice Warren's majority opinion.

Weighing votes differently because of geographic happenstance was impermissible, according to the Court. The overriding objective would be equality of population among the different districts. According to the Court, "the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise."

This case dealt with state legislative districts, and the Court noted that there was a distinction between Congress and state legislative bodies--and between its decisions in *Gray v. Sanders*, 372 U.S. 368, 83 S.Ct. 801, 9 L.Ed.2d 821 (1963), and *Wesberry v. Sanders* and this case. Because there are more seats in a state legislative body to be distributed throughout a state than there are congressional seats in

the given state, the Court determined that it may be feasible at times to use political subdivision lines to a greater extent in establishing state legislative districts than in congressional districting, while still affording adequate representation to all parts of the state.

The Court also noted that "what is marginally permissible in one state may be unsatisfactory in another, depending on the particular circumstances of the case."

Recognizing that "it is a practical impossibility to arrange legislative districts so that each one has an equal number of residents, citizens, or voters," the Court set forth a standard for reapportionment. If "the divergences from a strict population standard are based on legitimate considerations incident to the effectuation of a rational state policy," some deviations would be permitted. States could redistrict with an eye toward "insuring some voice to political subdivisions," but could not use history alone, economic, or other group interests to justify population disparities.

Commentary

This was the first case in which the Supreme Court affirmed that there was a "one person, one vote" standard for legislative districting, albeit state legislative apportionment. This was also the first instance in which the Court applied the strict scrutiny approach in an apportionment case and used equal protection grounds instead of the Article I, Section 2, federal constitutional provisions.

The Court opened the doors for further challenges as a result of this case and used the majority opinion to establish certain general guidelines--both affirmative and negative--that, for the first time, a state could be guided by in its legislative redistricting process. This set the stage for later population variance standards.

The Court also indicated to the states through this case that congressional districts would be held to a higher standard of population equality than would be state legislative districts, but failed to provide specific guidance on what maximum variances would be looked upon favorably or unfavorably.

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Baker v. Carr

369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962)
United States Supreme Court
March 26, 1962

The courts have jurisdiction over questions of due process and equal protection raised with respect to the apportionment of state legislative seats.

The Facts

This case concerned the malapportionment of the Tennessee legislature based upon a 1901 statute (there had been no reapportionment in 60 years in spite of significant growth in and redistribution of the population). Some of Tennessee's 95 counties had eight to 30 times as much *per capita* representation for its residents as did other counties. Counties with more than 60 percent of the population could elect only 35 percent of each house of the legislature.

The plaintiffs alleged deprivation of their federal constitutional rights under 42 U.S. Code Sections 1983 and 1988. A three-judge panel of the U.S. District Court for the Middle District of Tennessee dismissed the claim because it lacked jurisdiction of the subject matter and because no claim was presented upon which relief could be granted. The plaintiffs appealed.

The Issues

The question for decision was whether a voter who claims to be underrepresented in a state legislature because of allegedly unconstitutional apportionment has a redressable personal injury.

The Holding and Rationale

The Supreme Court, in a majority opinion authored by Justice Brennan, addressed the question of whether a voter who claimed to be underrepresented in the legislature because of allegedly unconstitutional apportionment actually had standing. The Court found that such a person suffered a redressable personal injury. While the dispute did involve a political question, the Court recognized that practically speaking, nothing would be done to protect those being discriminated against if the courts failed to act. Thus, there was jurisdiction here. The Court also said that appropriate relief could be fashioned by the District Court.

The Court concluded that there was a justiciable cause of action within the reach of judicial protection under the Fourteenth Amendment.

Commentary

The case represented a significant departure from the Court's unwavering policy of refusing to intervene in redistricting matters. This was the first case to hold that state legislative districting cases were justiciable, opening the doors of courts everywhere to reapportionment cases. The decision also implied that congressional districting cases would similarly be subject to the court's jurisdiction.

The other significant aspect of this case was the Court's expression of the ability and willingness to fashion relief where violations of constitutional rights were found.

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Kirkpatrick v. Preisler

394 U.S. 526, 89 S.Ct. 1225, 22 L.Ed.2d 519 (1969), *reh'g denied*, 395 U.S. 917, 89 S.Ct. 1737, 23 L.Ed.2d 231 (1969)
United States Supreme Court
April 7, 1969

States must make a good faith effort to achieve precise mathematical equality in congressional districting so as to ensure that, as nearly as practicable, one person's vote in a congressional election is to be worth as much as another's.

The Facts

This case involved congressional districts in the State of Missouri that varied from the absolute population equality ideal in a range that went from 2.8 percent below the norm to 3.13 percent above the ideal--an overall range of almost six percent. The population variance ratio was approximately 1.06:1.

A three-judge panel of the U.S. District Court for the Western District of Missouri ruled that the districts did not meet constitutional standards.

The Issues

The question for decision was how close a state must make its congressional districting plan to precise mathematical equality.

The Holding and Rationale

The Supreme Court, in a majority opinion authored by Justice Brennan, looked to *Wesberry v. Sanders*, 376 U.S. 1, 84 S.Ct. 526, 11 L.Ed.2d 481 (1964), for direction, and affirmed the lower court decision, agreeing that states must make a good faith effort to achieve precise mathematical equality in congressional districting so as to ensure that as nearly as practicable, one person's vote in a congressional election is to be worth as much as another's.

The majority opinion rejected the argument that there may be a point at which population differences become justifiable because they may be *de minimis*. Slight deviations among congressional districts would be permitted only if they were unavoidable in the pursuit of good faith efforts to achieve mathematical precision in equality. The state would be required to show either that the variances were unavoidable or specifically justify the variances.

The Court considered and rejected several purported justifications that the state advanced as reasons for the variances. These justifications included (1) avoidance of fragmenting political subdivisions or areas with distinct economic and social interests, (2) practical political considerations, and (3) an asserted preference for districts that were geographically compact. The Court also declined to find that there was a systematic relationship between the variances in population among congressional districts and two other factors cited by the state as part of a rationale for disparities: varying proportions of eligible voters to total population and projected future population shifts among the congressional districts.

Commentary

There was no reference made to the applicability of the decision to state legislative districting standards in either the majority or Justice Fortas' concurring opinion.

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Mahan v. Howell

410 U.S. 315, 93 S.Ct. 979, 35 L.Ed.2d 320 (1973), *modified*,
411 U.S. 922, 93 S.Ct. 1475, 36 L.Ed.2d 316 (1973)
United States Supreme Court
February 21, 1973

More flexibility is constitutionally permissible with respect to state legislative reapportionment than in congressional redistricting.

The Facts

This Virginia case involved an apportionment plan for the Virginia General Assembly that included multi-member districts and special treatment of Norfolk-based naval personnel and focused upon a maximum variance of 16.4 percent from population equality. Three actions were consolidated into this case, and the four judges of the U.S. District Court assigned to the three actions sat as a four-judge panel in this action.

The variance was found to be unconstitutional by the four-judge panel because of its extreme nature, and an appeal was taken.

The Issues

The question for decision was whether the strict standard for precise mathematical equality applicable to congressional districting was also the standard that would be employed in assessing population variances in state legislative redistricting.

The Holding and Rationale

Justice Rehnquist's majority opinion set forth the maxim that "more flexibility was constitutionally permissible with respect to state legislative reapportionment than in congressional redistricting" due to the interest in the normal functioning of state and local governments.

The Court reviewed the state constitutional authority to enact local legislation covering particular political subdivisions that was afforded the legislature and found this to be a significant and substantial part of the General Assembly's powers. But not even rational state justifications could "be permitted to emasculate the goal of substantial equality."

The majority was not troubled by the 16.4 percent deviation, suggesting that while it "may well approach tolerable limits . . . we do not believe it exceeds them."

Commentary

This ruling showed that the Court would adopt a more relaxed approach to considering justifications for deviations from precise equality. However, Justice Brennan's dissent, joined by two other members of the Court, suggested that there should not necessarily be a different set of standards for state legislative and congressional districting; at least the burden of proof for deviations should be the same.

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Gaffney v. Cummings

412 U.S. 735, 93 S.Ct. 2321, 37 L.Ed.2d 298 (1973)
United States Supreme Court
June 18, 1973

A maximum deviation among state legislative districts of 7.83 percent and an average deviation of approximately two percent from the ideal do not establish a *prima facie* case of invidious discrimination, and states are not expected to draw state legislative districts without regard to their political effect.

The Facts

A bipartisan commission in Connecticut drew state legislative boundaries with one of its objectives being "political fairness"--ensuring that the composition of the House would be roughly equal to the proportion of the statewide total vote received by candidates of a major political party. The deviation ranged from 1.8 percent in Senate districts to 7.83 percent in House districts.

The plan was characterized by the plaintiffs as a political gerrymander and challenged as invidious discrimination under the Fourteenth Amendment.

A three-judge panel of the U.S. District Court for the District of Connecticut held that (1) population variances violated the Equal Protection Clause because they were not justified by any sufficient state interest, and (2) a policy of political partisanship is not a legitimate argument for violating the principle of numerical equality.

The Issues

The questions for decision were whether deviations of up to 7.83 percent were permissible and whether a redistricting plan based upon a "political fairness principle" was permissible.

The Holding and Rationale

The Supreme Court, in a majority opinion authored by Justice White, reversed the lower court panel. The Supreme Court held that the population deviations of almost eight percent did not establish a prima facie case of invidious discrimination and political considerations may be an appropriate component of state legislative reapportionment.

The Court ruled that a state legislative redistricting plan could be based upon political principles. Recognizing that "[d]istrict lines are rarely neutral phenomena, it thus follows that "[p]olitics and political considerations are inseparable from districting and apportionment," according to the majority. "The reality is that districting inevitably has and is intended to have substantial political consequences." The Court noted that it would be possible to use census data without political data to redistrict, but concluded that "this politically mindless approach may produce, whether intended or not, the most grossly gerrymandered results, and, in any event, it is most unlikely that the political impact of such a plan would remain undiscovered by the time it was proposed or adopted, in which event the results would be both known and, if not changed, intended."

Commentary

This was the first case to directly address a political vote dilution claim, and the Supreme Court made it clear that political gerrymandering would not be subject to the same strict degree of judicial scrutiny as other malapportionment claims. The Court also upheld a fairly high deviation (almost eight percent) by dismissing it as not being *prima facie* evidence of discrimination requiring justification by the state.

In this case, the Court again drew the distinction between state legislative districting and congressional districting without bothering to elaborate on why this was the case.

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White v. Regester

412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973)
United States Supreme Court
June 18, 1973

Multi-member districts will be invalidated if they tend to cancel out or minimize the voting strength of racial groups.

The Facts

In Dallas and Bexar counties in Texas, blacks and Mexican-Americans had elected only a handful of representatives to the state House of Representatives since the days of Reconstruction. The local political organizations were white-dominated and relied upon racial campaign tactics in the predominantly white precincts to defeat minority candidates. Election laws required that each candidate declare for a particular seat rather than opposing all other candidates in the district on an at-large basis, and there was no corresponding "subdistrict" residency rule. The laws also required a candidate to win nomination in a party primary by a majority rather than by a plurality vote.

The plaintiffs sued to invalidate the districting scheme, alleging discrimination. A U.S. District Court ordered that single-member districts be substituted for the multi-member districts.

The Issues

The questions for decision were whether there was racial discrimination to such an extent that a multi-member district plan should be invalidated and what level of evidence would be necessary to sustain such a finding.

The Holding and Rationale

The Court looked to *Whitcomb v. Chavis*, 403 U.S. 124, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1971), for guidance on the matter. The Court found that *Whitcomb* required the plaintiffs to shoulder the burden of producing "evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question."

Here, the Court quickly discovered that both the historical record and current circumstances clearly served as effective evidence of discrimination against Mexican-Americans in Bexar County and against blacks in Dallas County. The majority, in sustaining the lower court's findings, concluded that while "every racial or political group [does not have] a constitutional right to be represented in the state legislature," the redistricting scheme here had unquestionably worked "to cancel out or minimize the voting strength of racial groups."

The Court did not, however, address the issue of whether there had been discriminatory intent.

Commentary

This was the Supreme Court's first invalidation of a redistricting plan under the criteria espoused in *Whitcomb v. Chavis* and the first time that the Court struck down multi-member districts. The Court's ruling in this case, following the path of *Whitcomb*, began to formulate the "access to the political process" test now in use.

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Whitcomb v. Chavis

403 U.S. 124, 91 S.Ct. 1858, 29 L.Ed.2d 363 (1971)
United States Supreme Court
June 7, 1971

Evidence of discriminatory intent or actual minimization or cancellation of the voting strength of racial or political elements of the voting population must be shown to invalidate a district plan.

The Facts

Marion County (Indianapolis), Indiana, was constituted as a multi-member state legislative district, electing eight members of the state Senate and 15 members of the House of Representatives. The plaintiffs sued, alleging the unconstitutionality of the multi-member district on the grounds that it gave voters in single-member districts and smaller multi-member districts several unconstitutional advantages over the Marion County district in question. The plaintiffs also claimed that the district "illegally minimizes and cancels out the voting power of a cognizable racial minority in Marion County."

The U.S. District Court for the Southern District of Indiana found that the advantages proffered by single-member or smaller multi-member districts were "sufficiently persuasive to be a substantial factor in prescribing uniform, single-member districts as the basic scheme of the court's own plan." The lower court also upheld the claim that the multi-member Marion County district "illegally minimizes and cancels out the voting power of a cognizable racial minority" in that area.

The Issues

The questions for decision were whether a multi-member district resulted in unconstitutional disadvantages for voters of the district and what standard of proof would be necessary to show that a multi-member district unconstitutionally discriminated against a minority group.

The Holding and Rationale

The Supreme Court reversed the lower court's decision in a majority opinion authored by Justice White, joined by Chief Justice Burger and by Justices Black, Blackmun, and, in substantial part, Justice Stewart.

The Supreme Court agreed that unconstitutional disadvantages may have been afforded voters in single-member districts and smaller multi-member districts, but argued that the claim in this case rested exclusively on theory and that actual evidence of such discrimination would be necessary to sustain the allegation.

The Court then found major deficiencies in the trial court's approach to the overt discrimination claims. Justice White reminded the plaintiffs "that the challenger carr[ies] the burden of proving that multi-member districts unconstitutionally operate to cancel the voting strength of racial or political elements." Here, the Court continued, there was no evidence that ghetto residents "were not allowed to register or vote, to choose the political party they desired to support, to participate in its affairs or to be equally represented on those occasions when legislative candidates were chosen." The Court also noted the lack of evidence showing that the Marion County legislative

delegation was less concerned about the interests of ghetto residents than they would have been if delegation members were elected on a single-district basis.

The Court found that, in this case, the plaintiffs had not met their burden of proof because they had not shown that the use of multi-member districts had actually served "to minimize or cancel out the voting strength of racial or political elements of the voting population," when applied in practice, or that the redistricting scheme had been motivated by an intent to discriminate against the challengers.

Commentary

This case established the principle that multi-member districts were not unconstitutional *per se* and established the standard of evidence necessary to meet the burden of proof.

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Avery v. Midland County

390 U.S. 474, 88 S.Ct. 1114, 20 L.Ed.2d 45 (1968)
United States Supreme Court
April 1, 1968

The Equal Protection Clause requires equal districting by local governments.

The Facts

The agency with general governmental powers in Midland County, Texas, was the Commissioner's Court. This entity was split into four districts. The City of Midland itself was one district, containing more than 67,000 people, while the rural areas of the county were divided into three districts with less than 1,000 people each.

Plaintiffs brought an action in the district Court of Midland County on equal protection grounds, and the trial court agreed with their claim, ordering a new districting plan to be enacted. The Texas Court of Civil Appeals reversed the trial court, and the Texas Supreme Court reversed the appellate court. An appeal was taken from the state Supreme Court action.

The Issues

The question for decision was whether the Constitution requires local bodies of government to meet the one person, one vote requirement.

The Holding and Rationale

The Supreme Court, in a majority opinion written by Justice White, held that "the Constitution permits no substantial variation from equal population in drawing districts for units of local government having general governmental powers over the entire geographic area served by the body." Irrespective of such powers being legislative or otherwise, the Equal Protection Clause requires that "those qualified to vote have the right to an equally effective voice in the election process."

The Court rejected using non-population criteria for redistricting, including the number of qualified voters, land area, county road mileage, and taxable values.

Commentary

This was the Supreme Court's first decision that required the application of the equal districting principle to local government units, extending the rule of *Reynolds v. Sims*, 377 U.S. 713, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964). The majority opinion rejected the contention that the Commissioner's Court here was an administrative entity, rather than a legislative body, finding that the court had "general responsibility."

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Thornburg v. Gingles

478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986)
United States Supreme Court
June 30, 1986

If there generally is predictability of defeat of candidates representing a protected class in a reapportionment plan, the plan is discriminatory.

The Facts

A North Carolina state legislative redistricting plan created six large multi-member districts among a largely single-member plan. The six multi-member districts included areas that contained a majority of black voters that likely would have elected black legislators in a single-member system.

Black voters challenged the plan in U.S. District Court for the Eastern District of North Carolina, arguing that they had been illegally discriminated against by submersion into white majority areas. A three-judge District Court panel agreed with the plaintiffs, and the State of North Carolina appealed the ruling.

The Issues

The question for decision was what standards should be applied in considering claims of discrimination under the 1982 amendments to the Voting Rights Act.

The Holding and Rationale

The Supreme Court, in a majority opinion authored by Justice Brennan, upheld the trial court and said that Congress clearly intended that redistricting plans may be found discriminatory if their result, regardless of their intent, is to reduce or dilute the voting power of a protected minority group.

The Court found in this case that the voting power of North Carolina blacks had been diluted by the submersion of a politically cohesive black district into a majority white district in such a manner that black candidates usually or generally are defeated by white candidates. The Court considered and explicitly rejected an argument by the Justice Department that the absence of discrimination may be proved by showing that protected minorities are "occasionally" elected to office from the districts in question.

The Court set forth a standard for adjudication of claims under section 2 of the Voting Rights Act. Plaintiffs would be required to prove that the redistricting plan "operates to minimize or cancel out their ability to elect their preferred candidates" by showing that "a bloc voting majority [was] usually . . . able to defeat candidates supported by a politically cohesive, geographically insular minority group." This could be done by the Court finding that the minority had "substantial difficulty electing representatives of their choice" and that there had been "significant" racial bloc voting.

Justice Brennan's opinion said that the "mere loss of an occasional election" by minorities is not the stuff discrimination is made of, but he contended that the "predictability" of such losses in such a setting is the key.

The Court also rejected a Justice Department argument that suggested that appellate courts review lower court voting rights cases with special scrutiny. The Court announced that the courts should review such cases as they would any other case and overturn lower court rulings only when they are "clearly erroneous."

Commentary

There was considerable debate following this decision as to whether the Court had, as Justice O'Connor suggested in a concurring opinion, created "a right to a form of proportional representation in favor of all geographically and politically cohesive minority groups." The Justice Department said that it had not, but numerous commentators felt that it had. The key to the impact of this decision will be in how the Court wrestles with the dilemma of proof of equal opportunity and its relationship to a certain racial result. If the Court takes its ruling to the extreme, this case may ultimately create a right for certain government-designated minorities to literally control a certain number of seats or offices--a racial spoils system of sorts.

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Davis v. Bandemer

478 U.S. 109, 106 S.Ct. 2797, 92 L.Ed.2d 85 (1986)
United States Supreme Court
June 30, 1986

Political gerrymandering is a justiciable issue, and a redistricting plan that discriminates against political parties or political groups may be unconstitutional.

The Facts

In the wake of the 1980 census, the Indiana legislature passed a state legislative redistricting plan on a party line vote in 1981, following a Republican-dominated process. The plan, in the words of the Republican Speaker, was designed to "save as many incumbent Republicans as possible." In the 1982 legislative elections, Democratic candidates for the House of Representatives won 51.9 percent of the total votes cast around the state, but only 43 percent of the House seats.

Indiana Democrats filed a suit in U.S. District Court for the Southern District of Indiana alleging unconstitutional political gerrymandering and a violation of the Equal Protection Clause of the Fourteenth Amendment. On December 13, 1984, a three-judge panel held that the plan was unconstitutional because it violated the Equal Protection Clause. The lower court ruled that the redistricting plan had diluted the plaintiffs' voting strength as Democrats.

The District Court panel specifically said that in cases where there was a variance from mathematical equality, the proportionate voting influence of Democrats was adversely affected by the plan, and there was *prima facie* evidence of gerrymandering. The panel found an absence of compactness and contiguity among districts, observed that traditional political subdivisions had been conspicuously ignored, and noted that the redistricting process had been wholly the product of the Republican majority. None of the variances, according to the Court, were supported by acceptable neutral criteria.

The panel invalidated the districts on a 2-1 vote and ordered the legislature to prepare a new redistricting plan.

The State of Indiana appealed to the Supreme Court. An *amicus curiae* brief was filed on behalf of the Indiana Democrats by the Republican National Committee.

The Issues

The questions for decision were whether political gerrymandering was a justiciable issue, and, if so, what standards would be applied by the Court in determining what would be a permissible redistricting plan.

The Holding and Rationale

The Supreme Court rejected the specific claims of the Indiana Democrats, but six justices ruled that political gerrymandering is a justiciable issue under the terms of the Equal Protection Clause, there being none of the characteristics of a nonjusticiable political question present here.

In a plurality opinion written by Justice White, the Court ruled that plaintiffs would have to prove both intentional discrimination against a political group and a discriminatory impact upon the group.

The Court concluded that political gerrymandering may violate the Equal Protection Clause even if the districts are of equal population. Gerrymandering done on a political basis is impermissible "when the electoral system is arranged in a manner that will consistently degrade a voter's or a group of voters' influence on the political process as a whole."

The Supreme Court expressly rejected the lower court's standard of invalidating district lines that "purposely inhibit or prevent proportional representation," terming it too low a threshold. Instead of finding that a plan would be impermissible if it made it more difficult for a political group to win elections or a for a political party to win office, the Court held that a "finding of unconstitutionality must be supported by evidence of continued frustration of the will of a majority of the voters or effective denial to a minority of voters of a fair chance to influence the political process."

Justice White's opinion said that a consistent pattern of discrimination would have to be shown for a plan to be overturned; results from a single election would not be sufficient evidence. But Justice White wrote that a history of disproportionate results may either be actual or projected and, in tandem with "strong indicia of lack of political power and the denial of fair representation," would be enough to throw out a redistricting plan.

Justice White wrote that a plaintiff seeking to show unconstitutional discrimination would have to show that a plan would (1) prevent a group or party from improving its standing in any of the next few elections, (2) consign a group or party to minority status throughout the effective life of the redistricting plan, or (3) provide a group or party with no hope of doing better in the next round of redistricting.

Commentary

This was the first case in which the Supreme Court explicitly ruled that political gerrymandering may be unconstitutional, even when all other niceties of districting have been followed to the letter.

The court failed to develop a clear set of workable standards that a state (or political parties) could abide by in drawing up maps or in seeking to prove unconstitutional discrimination, leaving a heavy (and potentially prohibitively expensive) burden of proof on a potential plaintiff.

Initial concern was raised by a number of commentators over the Court opening a virtual revolving door for potential plaintiffs with its ruling that political gerrymandering could be unconstitutional. However, in the three years that have passed since the ruling, only one such case has reached the Supreme Court, and it summarily upheld a three-judge U.S. District Court ruling that the plan being questioned was not unconstitutional. *Badham v. Eu*, 694 F. Supp. 664 (N.D.Cal. 1988), *aff'd*, 57 U.S.L.W. 3470 (U.S. Jan. 17, 1989) (No. 87-1818), 109 S.Ct. 829, 102 L.Ed.2d 962 (1989).

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Selected Case Summaries

Badham v. Eu,
694 F. Supp. 664 (N.D.Cal. 1988), *aff'd*, 57 U.S.L.W. 3470 (U.S. Jan. 17, 1989) (No. 87-1818), 109 S.Ct. 829, 102 L.Ed.2d 962 (1989).

California's congressional redistricting plan was unsuccessfully challenged by state Republicans who claimed that they had been unconstitutionally subjected to vote dilution under the Equal Protection Clause, their First Amendment freedom of speech rights were being abridged, and they were not able to enjoy their full rights and privileges under the Guaranty Clause. The U.S. District Court waited until after the U.S. Supreme Court ruling in *Davis v. Bandemer*, 478 U.S. 109, 106 S.Ct. 109, 92 L.Ed.2d 85 (1986), and then held that a congressional redistricting case brought on political gerrymandering grounds is justiciable. In its substantive ruling, the District Court found that the First Amendment claim was specious, because the Republicans had adequate representation and could field and vote for their own candidates; the equal protection claim was also inappropriate, because the standard to be met under California's Constitution was only one of equal population; and that there was no valid Guaranty Clause claim. The District Court found no cause of action in this case, because there was no showing of the lack of political powers and denial of fair representation.

Brown v. Thomson,
462 U.S. 835, 103 S.Ct. 2690, 77 L.Ed.2d 214 (1983).

Wyoming's state legislative reapportionment plan, which contained a substantial population variance, was justifiable because of the state's longstanding and neutrally applied policy of having counties serve as the basic units of representation. The plan contained a maximum 89 percent deviation from population equality, but was challenged only because of a legislative decision to grant representation to the least populous county. The Court determined that the state's policy of using counties for representation justified the incremental deviation from equality that resulted from affording the county representation in the legislature.

Burns v. Richardson,
384 U.S. 73, 86 S.Ct. 1286, 16 L.Ed.2d 376 (1966).

The Supreme Court reversed a decision by a three-judge U.S. District Court panel that had held that Hawaii's use of multi-member districts was unconstitutional. The Equal Protection Clause of the Constitution does not require that at least one house of a bicameral state legislature be comprised of single-member legislative districts because there is no constitutional right to proportional representation. Multi-member districts are permissible, absent a showing that they were "designed to or would operate to minimize or cancel out the voting strength of racial or political elements of the voting population." The Court also addressed the question of incumbent protection, arguing that "the fact that district boundaries may have been drawn in a way that minimizes conflicts between present incumbents does not in and of itself establish invidiousness."

Chapman v. Meier,
420 U.S. 1, 95 S.Ct. 751, 42 L.Ed.2d 766 (1975).

The overall range among North Dakota state senate districts in this case was in excess of 20 percent. The U.S. District Court redrew the lines after finding that the range was too high, in spite of the fact that there was no specific racial or political group whose voting power was hampered and that the state wanted to preserve certain historical political subdivision boundaries. The Supreme Court determined that, in the

absence of some overwhelming need to do so, multi-member districts should be avoided in a court-imposed redistricting plan, because a federal court should be held to a higher standard than those otherwise performing the redistricting function on behalf of states.

City of Mobile v. Bolden,
446 U.S. 55, 100 S.Ct. 1490, 64 L.Ed.2d 47 (1980).

The Supreme Court resolved the ambiguity it had fostered in *Whitcomb v. Chavis*, 403 U.S. 124, 91 S.Ct. 1858, 29 L.Ed.2d 363 (1971), and *White v. Regester*, 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973), by requiring plaintiffs to make an affirmative showing of intentional discrimination to invoke judicial intervention. The majority refused to permit the Fourteenth or the Fifteenth Amendment to invalidate an ostensibly innocently motivated city commission districting plan, while a plurality opinion indicated that there was an intent-based requirement. No particular level of proof was set for a plaintiff to hurdle in showing that there had been an intent to discriminate, but the plurality wrote that evidence of the plan's discriminatory effect, even taken in combination with proof of both historical and current discrimination by government officials, was not enough to meet the intent requirement.

Hadley v. Junior College District,
397 U.S. 50, 1090 S.Ct. 791, 75 L.Ed.2d 45 (1970).

A Missouri junior college district elected just one-half of its trustees from members' districts that had almost 60 percent of the district's population. The Court said that this plan was inappropriate, but it would not require equal districts where "a State elects certain functionaries whose duties are so far removed from normal government activities and so disproportionately affect different groups that a popular election . . . might not be required."

Karcher v. Daggett,
462 U.S. 725, 103 S.Ct. 2653, 77 L.Ed.2d 133 (1983).

A New Jersey congressional districting plan containing a maximum population deviation among districts less than the statistical imprecision of available census data (here, less than 0.7 percent) is not *per se* valid. The Supreme Court set forth several justifications that it felt might warrant a variance from precise mathematical equality. These included respecting municipal boundaries; making districts compact, preserving the "cores" of existing districts; avoiding contests between incumbents; and preserving the voting strength of minorities.

Lucas v. Forty-Fourth Colorado General Assembly,
377 U.S. 713, 84 S.Ct. 1472, 12 L.Ed.2d 632 (1964).

Colorado apportioned only its lower house on the basis of population, a principle that was approved by voters of that state in a 1962 statewide referendum. Voters had also rejected a proposal to apportion both houses on the basis of population. Chief Justice Warren's majority opinion held that "An individual's constitutionally protected right to vote cannot be denied even by a vote of a majority of a State's electorate, if the apportionment scheme adopted by the voters fails to measure up to the requirements of the Equal Protection Clause."

United Jewish Organizations v. Carey,
430 U.S. 144, 97 S.Ct. 996, 51 L.Ed.2d 229 (1977).

The Court found in a New York redistricting case that Hasidic Jews were not entitled to representation as Hasidic Jews, apart from other white voters. In this case, the Court found that white voters as a whole were fairly represented in the district in question.

White v. Weiser,
412 U.S. 783, 93 S.Ct. 2348, 37 L.Ed.2d 336 (1973).

The Supreme Court majority opinion in a Texas case held that precise mathematical equality is the standard to be adhered to in congressional districting and that even small population variances would not be tolerated. While the overall range of deviation here was less than the deviation invalidated in *Kirkpatrick v. Preisler*, 394 U.S. 526, 89 S.Ct. 1225, 22 L.Ed.2d 519 (1969), *reh. den.*, 395 U.S. 917, 89 S.Ct. 1737, 23 L.Ed.2d 231 (1969), they were, however, not as mathematically equal as reasonably possible. The Court rejected an argument that the state attempted to avoid fragmenting political subdivision lines, but said that a redistricting plan was not *per se* invidious if it was drawn to minimize contests between current incumbents.

Zimmer v. McKeithen,
485 F.2d 1297 (5th Cir. 1973) *(en banc), aff'd sub nom.*, **East Carroll School Board Parish v. Marshall, 424 U.S. 636, 96 S.Ct. 1083, 47 L.Ed.2d 296 (1976).**

In the rural northeastern Louisiana Parish of East Carroll, black voters alleged discrimination in election to the police jury and school board because of at-large elections. The U.S. 5th Circuit Court of Appeals held that multi-member districts do not constitute denial of access to the political process where minorities have the opportunity to participate in candidate slating and elected representatives are responsive to minority concerns.

The Court of Appeals set forth the following criteria as being helpful to upholding a discrimination claim: (1) a showing of lack of access by minorities to the slating process, (2) unresponsiveness of legislators to the particularized interests of minorities, (3) a tenuous state policy underlying the preference for multi-member or at-large districts, and (4) the existence of past discrimination precluding the effective participation in the system by minorities. Proof is enhanced by showing the existence of (1) an extremely large district, (2) majority vote requirements, (3) anti-single-shot voting provisions, and (4) lack of the provision for at-large candidates running from particular geographic subdistricts. The fact of dilution is established upon proof of the existence of an aggregate of these factors, but not all of them need to be proved to obtain relief.

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Chapter 4: Ballot Access

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Introduction

Few election functions have been as exhaustively litigated, particularly in recent years, as the function relating to access to the ballot by a potential candidate. Yet while there has been a steady line of cases on the point since 1968, these decisions have not led to a firm, fixed set of criteria that all states may look to in establishing and enforcing access mechanisms for federal office candidates. Indeed, the litany continues. Only in the past twenty years have the courts been willing to examine ballot access laws on constitutional grounds, and many state restrictions have been invalidated because they have been found to impose an excessive burden upon the freedom of association of voters.

Right to Candidacy

While the right to vote is fundamental,[1] there is no parallel right to become a candidate.[2] However, "the rights of voters and the rights of candidates do not lend themselves to neat separation; laws that affect candidates always have at least some theoretical, correlative effect on voters."[3] The Supreme Court has recognized that "[t]he impact of candidate eligibility requirements on voters implicates basic constitutional rights,"[4] "the right to cast one's vote in a meaningful way--to have a choice of a candidate who represents the voter's views."[5]

Associational Rights of the Electorate

The Supreme Court has agreed that "voters can assert their preferences only through candidates or parties or both."[6] "[A] voter hopes to find on the ballot a candidate who comes near to reflecting his policy preferences on contemporary issues."[7] "The right to vote is 'heavily burdened' if that vote may be cast only for major-party candidates at a time when other candidates are 'clamoring for a place on the ballot.'"[8] "The exclusion of candidates also burdens voters' freedom of association, because an election campaign is an effective platform for the expression of views on the issues of the day, and a candidate serves as a rallying point for like-minded citizens."[9] Accordingly, "the right to form a party for the advancement of political goals means little if a party can be kept off the election ballot and thus denied an equal opportunity to win votes."[10]

The Supreme Court has traditionally favored the right to group expression as an extension of the individual right to express a point of view.[11] Given the link between the right to vote and the need for somebody to vote for, the Supreme Court has been called upon to judge how far a state may go to burden a person's right of political association. In its first in-depth treatment of a ballot access case, the Court determined that Ohio's access procedures for minor parties in presidential elections were unconstitutional because they unduly burdened the right of people to associate for the advancement of certain political beliefs and the right of voters to cast their votes effectively.[12] Here, major parties were automatically afforded access to the November ballot by obtaining ten percent of the vote cast in the last gubernatorial election, while new parties seeking access to the presidential ballot were forced, early in the election year, to file petitions signed by 15 percent of the number of ballots cast in the preceding gubernatorial election, establish a formal elaborate internal party structure, and conduct a primary election.

The majority applied a standard of strict scrutiny to the law and found that the state scheme placed an unequal burden on "two different, although overlapping, kinds of rights--the right of individuals to associate for the advancement of political beliefs and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively" without showing any compelling interest justifying the burden.[13] In a subsequent case, the Court again used the strict scrutiny standard and extended its voting and associational rights analysis to hold that even though one state's early filing deadline treated all candidates alike, "[s]ometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike."[14]

In a later case, the Court chastised states for limiting access on grounds such as administrative efficiency or voter confusion, finding that third parties have played a significant role in the political development of the nation and concluding that "an election campaign is a means of disseminating ideas as well as attaining political office."[15] Thus, "[o]verbroad restrictions on ballot access jeopardize this form of political expression."[16]

States typically provide three means by which a candidate may access the ballot: payment of filing fees to the party, the state, or both; filing of nominating petitions containing some number of signatures perhaps representative geographically of the area the candidate seeks to represent; or a combination of both filing fees and signed petitions.[17]

Filing Fees

Filing fees have traditionally been looked upon with disfavor by the courts, particularly if they are the sole means by which a candidate may access the ballot. In 1972, the Supreme Court invalidated a Texas filing fee requirement for independent candidate access to the ballot because it provided no alternative means of access to the primary election ballot and the exclusion of those unable to pay significant filing fees would adversely affect the rights of (not the candidate, but)

poor voters unable to subsidize their candidate's filing fee.[18] In 1974, the Supreme Court ruled that a filing fee requirement for access to the ballot was unconstitutional unless it provided an alternative means of access to the ballot for those unable to pay the fee.[19]

Petition Signatures

The alternative means of access that the Court cited was widely held to be the route of collecting signatures on nominating petitions. In its first foray into the field, the Supreme Court applied an equal protection analysis to Ohio's law requiring signatures from minor and new political parties equal to 15 percent of the aggregate total of votes cast at the last preceding general election for access to the general election ballot and found it simply too high compared to other states.[20] A revised seven percent threshold was also rejected as impractical. The Supreme Court condoned a Georgia standard requiring support from five percent of those eligible to vote in the preceding election[21] and subsequently has upheld every numerical requirement standard below five percent.[22] While states may require a "preliminary showing of a modicum of support" before allowing candidate access to the ballot,[23] the requirements may not be a "mere device to . . . exclude parties with significant support from the ballot."[24]

The courts have put the states on notice that they will not necessarily uphold a five percent or less signature standard if there are other restrictions which may burden a candidate or party seeking access to the ballot. The court may use a "totality of circumstances" test, which can include an examination of restrictions on the party affiliations of petition signers, geographic distribution requirements for those signing petitions, maximum numbers of signatures that may be submitted, filing fees, or an unusually short period within which petition signatures may be solicited and obtained.[25]

Indeed, challenges to numerical signature requirements have not met with much success since the 1980 landmark, with the exception of two 1984 cases.[26] Both of these cases had some unusual twists including a short petitioning window in a season noted for its inordinately bad weather and slow state response to complaints.

Filing Deadlines

An early filing deadline has been found to be unduly burdensome on a candidate. An early filing deadline limits the ability of an independent candidate and the candidate's supporters to capitalize on events and issues arising after the deadline, such as the major parties' selection of nominees and adoption of platforms and late-breaking events.[27] An early filing deadline also makes it more difficult for a candidate to organize a successful signature-gathering effort.[28]

Finally, in a presidential election, the early deadline may have an impact beyond that of the state boundary. The Court has held that while a state has an interest in regulating elections, "the State has a less important interest in regulating presidential elections than statewide or local elections, because the outcome of the former will be largely determined by voters beyond the State's boundaries."[29] However, "the Court drew no distinction between ballot access conditions which could be applied validly to national elections, and those which could be applied only to state and local elections."[30]

In light of this, states which have filing deadlines for independent or third party candidates before June 1 are likely to find the deadlines invalidated. Deadlines falling between June 1 and July 1 will probably be viewed as suspect by courts and thrown out if other circumstances compound the burden, and deadlines of 75 days or less (approximately two and one-half months) before the general election will generally be upheld.[31] Under the *Anderson* logic, if a signature requirement is consistent with that imposed by other states, has not increased dramatically over the years, and meets the *Jenness* five percent or less threshold, then it will probably be upheld. A reasonable opportunity for access must be afforded.

Geographic Distribution Requirements

Many states also impose geographic distribution requirements on the collection of petition signatures for ballot access. Signatures often must be obtained from a number of political districts within the state, usually counties. While some early cases indicated that the one-person, one-vote principle would invalidate these geographic distribution requirements on equal protection grounds,[32] states soon changed the distribution requirements to apply to congressional districts. Because these districts were substantially equal in population, the equal protection questions were moot.[33] No court since has held this device unconstitutional.[34] However, different county- or special district-based distribution schemes have not met with favor.[35]

'Pledge to Support' Requirements

"Pledge to support" requirements have fallen into disfavor with the courts. Many of those who sign a candidate's petition may not actually favor that candidate at the time of signing, but sign because they might want to preserve their option to vote for the candidate later, they may believe the candidate to be a "spoiler" who can siphon votes from their favored candidate's opponent, or they merely want to see a wide range of views and candidates represented on the ballot.

The current line of cases originates with a Kentucky case in which the American Party presidential candidate challenged that state's law requiring petition signers to declare their desire to vote for the candidate.[36] The Sixth Circuit

Court of Appeals agreed that the statute had the effect of jeopardizing the right to ballot secrecy. A similarly intrusive law requiring signers to state their intent to associate with the party and support its nominees was also invalidated.[37]

Party Affiliation

In 1974, the Supreme Court reviewed a California statute that required an independent candidate to (1) be unaffiliated with a qualified political party for a period of one year prior to the next primary election, (2) file nominating petitions signed by qualified voters totaling not less than five percent nor greater than six percent of the votes cast in the last general election, (3) obtain all signatures during a 24-day period following the primary election, and (4) use signatures from only those who had not voted in the primary election.[38] The Court held that the portion of the California statute which covered candidate affiliation was constitutional (although it remanded the case for a closer look at the other provisions). The Court reasoned that the statute did not discriminate against independents because the California Elections Code also required party candidates not to have been affiliated with another party for a year before filing[39] and because the provision served the state's compelling interest in the stability of its political system.[40] The Court had earlier upheld without opinion an Ohio statute which barred the primary candidacy of anyone who had voted in a different party's primary in the last four years.[41]

Restrictions on Party Access to the Ballot

Several states have laws that prohibit political parties from the ballot if they advocate the overthrow, by force or violence, of the local, state, or national government; advocate or carry on a program of sedition or treason; or are affiliated with or cooperate with any foreign government or any political party or group of individuals of any foreign government Several states also require that a party seeking access to the ballot may not be afforded ballot status unless and until it files an affidavit by its officers, under oath, certifying that the party does not advocate the overthrow, by force or violence, of the local, state, or national government; advocate or carry on a program of sedition or treason; or are affiliated with or cooperate with any foreign government or any political party or group of individuals of any foreign government.[42]

Even though such statutes exist today, the Supreme Court has found such statutes unconstitutional.[43] The Court held that the Indiana statute--similar to most others, including a federal statute--was worded so broadly that it impinged upon constitutionally protected free speech.[44] States are not permitted under the First and Fourteenth Amendments to regulate advocacy which is not limited to advocacy of action.[45] While there is "no right to rebellion, . . . there [is] at least a qualified right to talk about it."[46] Although the states can regulate advocating force or violence which is designed to overthrow the government and which is likely to

imminently incite or result in the overthrow of government by force or violence, the Court held that the Indiana statute did not expressly limit the coverage of the loyalty oath to the advocacy of action.[47] A minority of the Court in concurring also found that the statute was being applied in a discriminatory manner because the established political parties were not subject to the same requirements.[48]. The minority then reasoned that there was no compelling state interest justifying the deferential treatment afforded the Republican and Democratic parties.[49]

The Communist and Socialist Workers parties have traditionally run candidates for President and Vice President in each presidential election, and the courts have made it abundantly clear that "the First and Fourteenth Amendments guarantee 'freedom to associate with others for the common advancement of political beliefs and ideas,' a freedom that encompasses '[t]he right to associate with the political party of one's choice."[50] As noted above, the courts have even seen fit to protect the rights of contributors to these parties by allowing anonymity of contributions even where there was a particularly compelling reason for disclosure.[51] "While [t]he Supreme Court in deciding other federal and state statutes directly affecting the Communist Party or its members has not established a consistent standard for determining the permissible extent of government regulation of subversive groups,"[52] the courts will go a long way toward protecting the rights of a political party to be formed and allow people to associate freely with it.[53]

Write-In Voting

Before 1980, the write-in vote had been used by the courts as a crutch to avoid affording an independent candidate access to the ballot. In 1974, for example, the Supreme Court held that an independent candidate who was unable to qualify for the ballot could, nonetheless, resort to write-in votes.[54] In the context of determining whether the write-in alternative would be a way around a required filing fee, the Court found that access via write-in votes falls far short of access in terms of having the name of the candidate on the ballot."[55] Indeed, in *Anderson*, the Court took notice of the fact that "in the 1980 Presidential election, only 27 votes were cast in the State of Ohio for write-in candidates."[56] Nor is the option of write-in voting always available in a presidential election. According to one court, by allowing write-in votes for a presidential or vice-presidential candidate's electors, the state would be allowing voting for electors not yet designated and not yet qualified. The state has a compelling state and constitutional interest to protect and has chosen the least restrictive alternative by simply requiring the electors' names to be filed with the election authorities prior to the election.[57]

But another court has also noted (in another Ohio case) that although write-in votes need not be counted or recorded for candidates without certified electors, they should nonetheless be allowed because "a vote for President and Vice President is a symbolic vote. . . ."[58]

Scrutiny, Deference, and State Interests

After *Anderson*, it is evident that a state must demonstrate that its statute is the least restrictive means available to serve a compelling state interest to justify a state-imposed limitation on access to the ballot and overcome the Court-imposed standard of strict scrutiny.[59] In a national election, such as for President and Vice President, the state is additionally burdened by having to show that the statute not only meets the standards just outlined on the state level, but also is so important to the state that it justifies a dilution of the votes of those in other states.[60] The trend in the Court's decisions has shown that even though certain state concerns such as administrative convenience, prevention of voter confusion, and the desire to avoid the cost involved in runoff elections were legitimate,[61] it will be increasingly difficult for a state to meet the Supreme Court-imposed standards with restrictions beyond modest minimum support requirements[62] and reasonable disaffiliation statutes.[63] The Court determined that these means can forward important state concerns and only minimally restrict voters' rights.[64]

Notes

[1]*Yick Wo v. Hopkins*, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886); *Dunn v. Blumstein*, 405 U.S. 330, 92 S.Ct. 995, 31 L.Ed.2d 274 (1972); *Reynolds v. Sims*, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964).

[2]*Bullock v. Carter*, 405 U.S. 134, 92 S.Ct. 849, 31 L.Ed.2d 92 (1972); *Adams v. Askew*, 511 F.2d 700 (5th Cir. 1975).

[3]*Bullock v. Carter*, 405 U.S. 134, 92 S.Ct. 849, 31 L.Ed.2d 92 (1972).

[4]*Anderson v. Celebrezze*, 460 U.S. 780, 103 S.Ct. 1564, 75 L.Ed.2d 547 (1983).

[5]Note, "*Adams v. Askew*--The Right to Vote and the Right to Be a Candidate--Analogous or Incongruous Rights?" 33 Washington & Lee Law Review 243 (1976).

[6]*Anderson v. Celebrezze*, 460 U.S. 780, 103 S.Ct. 1564, 75 L.Ed.2d 547 (1983).

[7]*Lubin v. Panish*, 415 U.S. 709, 94 S.Ct. 1315, 39 L.Ed.2d 702 (1974).

[8]*Anderson v. Celebrezze*, 460 U.S. 780, 103 S.Ct. 1564, 75 L.Ed.2d 547 (1983), citing *Lubin v. Panish*, 415 U.S. 709, 94 S.Ct. 1315, 39 L.Ed.2d 702 (1974); *Williams v. Rhodes*, 393 U.S. 23, 89 S.Ct. 5, 21 L.Ed.2d 24 (1968).

[9]*Anderson v. Celebrezze*, 460 U.S. 780, 103 S.Ct. 1564, 75 L.Ed.2d 547 (1983).

[10]*Williams v. Rhodes*, 393 U.S. 23, 89 S.Ct. 5, 21 L.Ed.2d 24 (1968).

[11]*DeJonge v. Oregon*, 299 U.S. 353, 57 S.Ct. 255, 81 L.Ed.2d 278 (1937).

[12]*Williams v. Rhodes*, 393 U.S. 23, 89 S.Ct. 5, 21 L.Ed.2d 24 (1968).

[13]*Id.*

[14]*Anderson v. Celebrezze*, 460 U.S. 780, 103 S.Ct. 1564, 75 L.Ed.2d 547 (1983), quoting *Jenness v. Fortson*, 403 U.S. 431, 91 S.Ct. 1970, 29 L.Ed.2d 554 (1971).

[15]*Illinois State Board of Elections v. Socialist Workers' Party*, 440 U.S. 173, 99 S.Ct. 983, 59 L.Ed.2d 230 (1979).

[16]*Id.*

[17]See, Palmer and Feigenbaum, Ballot Access for Federal Candidates and Political Parties (1989).

[18]*Bullock v. Carter*, 405 U.S. 134, 92 S.Ct. 849, 31 L.Ed.2d 92 (1972).

[19]*Lubin v. Panish*, 415 U.S. 709, 94 S.Ct. 1315, 39 L.Ed.2d 702 (1974).

[20]*Williams v. Rhodes*, 393 U.S. 23, 89 S.Ct. 5, 21 L.Ed.2d 24 (1968).

[21]*Jenness v. Fortson*, 403 U.S. 431, 91 S.Ct. 1970, 29 L.Ed.2d 554 (1971).

[22]Note, "Ballot Access for Third Party and Independent Candidates After *Anderson v. Celebrezze*," 3 Journal of Law & Politics 127 (1986).

[23]*Jenness v. Fortson*, 403 U.S. 431, 91 S.Ct. 1970, 29 L.Ed.2d 554 (1971); *see, Munro v. Socialist Workers Party*, 479 U.S. 189, 107 S.Ct. 533, 93 L.Ed.2d 499 (1986).

[24]*American Party v. White*, 415 U.S. 767, 94 S.Ct. 1296, 39 L.Ed.2d 744 (1974).

[25]*Libertarian Party of Florida v. Florida*, 710 F.2d 790 (11th Cir. 1983), *cert. denied*, 469 U.S. 831, 105 S.Ct. 117, 83 L.Ed.2d 60 (1984).

[26]*Libertarian Party of Oklahoma v. Oklahoma State Election Board*, 593 F.Supp. 118 (W.D. Okla. 1984); *Blomquist v. Thomson*, 739 F.2d 525 (10th Cir. 1984).

[27]*Anderson v. Celebrezze*, 460 U.S. 780, 103 S.Ct. 1564, 75 L.Ed.2d 547 (1983).

[28]*Id.*; see, *Bradley v. Mandel*, 444 F.Supp. 983 (D.Md. 1978) (early filing deadline made it nearly impossible for independent candidate to obtain signatures, recruit and retain campaign workers, raise funds, and obtain media coverage).

[29]*Anderson v. Celebrezze*, 460 U.S. 780, 103 S.Ct. 1564, 75 L.Ed.2d 547 (1983).

[30]Note, "State Restrictions on Candidate Access to the Ballot in Presidential Elections: *Anderson v. Celebrezze*," 25 Boston College Law Review 1117 (1984).

[31]*Storer v. Brown*, 415 U.S. 724, 94 S.Ct. 1274, 39 L.Ed.2d 714 (1974). *See, Libertarian Party of Oklahoma v. Oklahoma State Election Board*, 593 F.Supp. 118 (W.D.Okla. 1984); *LaRouche v. Burgio*, 594 F.Supp. 614 (D.N.J. 1984); *LaRouche v. Monson*, 599 F.Supp. 621 (D.Utah 1984); *Crafts v. Quinn*, 482 A.2d 825 (Me. 1984); *Stoddard v. Quinn*, 593 F.Supp. 300 (D.Me. 1984) (involved non-presidential candidate).

[32]*Moore v. Ogilvie*, 394 U.S. 814, 89 S.Ct. 1493, 23 L.Ed.2d 1 (1969); *Socialist Labor Party v. Rhodes*, 318 F.Supp. 1262 (S.D.Ohio 1970).

[33]*Udall v. Bowen*, 419 F.Supp. 746 (S.D.Ind. 1976), *aff'd*, 425 U.S. 947, 96 S.Ct. 1720, 48 L.Ed.2d 191 (1977).

[34]See, *Libertarian Party of Virginia v. Davis*, 591 F.Supp. 1561 (E.D.Va. 1984), *aff'd*, 766 F.2d 865 (4th Cir. 1985), *cert. denied*, 475 U.S. 1013, 106 S.Ct. 1190, 59 L.Ed.2d 852 (1986); *Johnson v. Cuomo*, 595 F.Supp. 1126 (N.D.N.Y. 1984); *Libertarian Party v. Bond*, 596 F.Supp. 719 (E.D.Mo. 1984), *aff'd*, 764 F.2d 538 (8th Cir. 1985).

[35]*See, Communist Party v. State Board of Elections*, 518 F.2d 517 (7th Cir. 1975), *cert. denied*, 423 U.S. 986, 96 S.Ct. 394, 46 L.Ed.2d 303 (1975) (invalidating Wyoming post-Blomquist rule requiring 8,000 voters to sign the petition, a majority of whom could not be from the same county); *Libertarian Party of Nebraska v. Beermann*, 598 F.Supp. 57 (D.Nebr. 1984); *West Virginia Libertarian Party v. Manchin*, 270 S.E.2d 634 (W.Va. 1980) (provision overturned requiring canvasser to solicit signatures and voter to sign a petition only in magisterial district of residence).

[36]*Anderson v. Mills*, 664 F.2d 600 (6th Cir. 1981).

[37]*North Carolina Socialist Workers Party v. North Carolina State Board of Elections*, 538 F.Supp. 864 (E.D.N.C. 1982). *See also, Libertarian Party of Nebraska v. Beermann*, 598 F.Supp. 57 (D.Nebr. 1984); *Libertarian Party of South Dakota v. Kundert*, 579 F.Supp. 735 (D.S.D. 1984).

[38]*Storer v. Brown*, 415 U.S. 724, 94 S.Ct. 1274, 39 L.Ed.2d 714 (1974).

[39]*Id.*

[40]*Id.* The *Anderson* court distinguished Ohio's interest in that case from that of California in *Storer* by arguing that California's restrictions were substantially different from Ohio's in that California sought only to regulate an intrastate election, while Ohio regulated a national presidential election. *Anderson v. Celebrezze*, 460 U.S. 780, 103 S.Ct. 1564, 75 L.Ed.2d 547 (1983).

[41]*Lippitt v. Cipollone*, 404 U.S. 1032, 92 S.Ct. 729, 30 L.Ed.2d 725 (1972), *aff'g mem.*, 337 F.Supp. 1405 (N.D.Ohio 1971).

[42]See, e.g., Indiana Code Sec. 3-5-4-5 (West 1988) (recodifying prior law found unconstitutional); Arkansas Code Sec. 7-3-108 (Michie 1987).

[43]*Communist Party of Indiana v. Whitcomb*, 414 U.S. 441, 94 S.Ct. 662, 39 L.Ed.2d 568 (1974), *reh'g denied*, 415 U.S. 952, 94 S.Ct. 1476, 39 L.Ed.2d 568 (1974).

[44]*Id.*

[45]*Id.*

[46]Franz, "Unconstitutional and Outlawed Political Parties: A German-American Comparison," 5 Boston College International & Comparative Law Review 51 (1982) (hereafter "Unconstitutional Parties").

[47]*Communist Party of Indiana v. Whitcomb*, 414 U.S. 441, 94 S.Ct. 656, 38 L.Ed.2d 643 (1974), *reh'g denied*, 415 U.S. 952, 94 S.Ct. 1476, 39 L.Ed.2d 568 (1974).

[48]*Id.* (opinion of Justice Powell).

[49]*Id.* (opinion of Justice Powell).

[50]*Buckley v. Valeo*, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976), citing *Kusper v. Pontikes*, 414 U.S. 51, 94 S.Ct. 303, 38 L.Ed.2d 260 (1973), quoted in *Cousins v. Wigoda*, 419 U.S. 477, 95 S.Ct. 541, 42 L.Ed.2d 595 (1975).

[51]See e.g., *Federal Election Commission v. Hall-Tyner Campaign Committee*, 678 F.2d 416 (2d Cir. 1982), *cert. denied*, 459 U.S. 1145, 103 S.Ct. 785, 74 L.Ed.2d 992 (1983) (disclosure of contributors' names cannot be constitutionally compelled in light of a reasonable probability of threats, harassment, or reprisals from government officials or private parties); *Buckley v. Valeo*, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976) (governmental interest in disclosure is diminished when contribution is made to a minor party with little chance of winning).

[52]"Unconstitutional Parties" at 77.

[53]See, *Williams v. Rhodes*, 393 U.S. 23, 89 S.Ct. 5, 21 L.Ed.2d 24, (right to form a party means little if a party can be kept off the ballot).

[54]*Storer v. Brown*, 415 U.S. 724, 94 S.Ct. 1274, 39 L.Ed.2d 714 (1974).

[55]*Lubin v. Panish*, 415 U.S. 709, 94 S.Ct. 1315, 39 L.Ed.2d 702 (1974).

[56]*Anderson v. Celebrezze*, 460 U.S. 780, 103 S.Ct. 1564, 75 L.Ed.2d 547 (1983).

[57]*Bumppo v. Kentucky State Board of Elections*, No. C-84-0230 (W.D.Ky. 1985), *appeal dismissed*, No. 85-5486 (6th Cir. 1986), *appeal denied*, No. 87-5416 (6th Cir. 1988) (three judge panel).

[58]*Socialist Labor Party v. Rhodes*, 290 F.Supp. 983 (S.D.Ohio 1968) (*per curiam*) (three-judge panel).

[59]*Anderson v. Celebrezze*, 460 U.S. 780, 103 S.Ct. 1564, 75 L.Ed.2d 547 (1983).

[60]*Id.*

[61]*Bullock v. Carter*, 405 U.S. 134, 92 S.Ct. 849, 31 L.Ed.2d 92 (1972).

[62]*Illinois State Board of Elections v. Socialist Workers' Party*, 440 U.S. 173, 99 S.Ct. 983, 59 L.Ed.2d 230 (1979).

[63]*Storer v. Brown*, 415 U.S. 724, 94 S.Ct. 1274, 39 L.Ed.2d 714 (1974).

[64]*Id.*

Munro v. Socialist Workers Party

479 U.S. 189, 107 S.Ct. 533, 93 L.Ed.2d 499 (1986)
United States Supreme Court
December 10, 1986

States have a right to require a preliminary showing of substantial support in order to qualify for a place on the general election ballot.

The Facts

In 1977, the State of Washington amended its election law concerning the placement of minor party candidates on the general election ballot. Previously, minor party candidates gained ballot access by filing a certificate signed by at least 100 registered voters who had participated in the party convention and who had not participated in the primary election (open only to major parties). The 1977 amendments retained the requirement that minor party candidates be nominated by convention, but added the requirement that, as a condition for being listed on the general election ballot, the candidate must also appear on the primary ballot and receive at least one percent of the vote in the primary election. The primary election in Washington is a "blanket primary" at which voters may vote for the candidates of their choice without regard to political party. The filing deadlines for appearing on the primary ballot permit minor party candidates to hold their conventions in sufficient time to appear on the ballot.

In 1983, the legislature authorized a special election to be held to fill a U.S. Senate vacancy. Dean Peoples qualified as the Socialist Workers Party candidate by nomination at convention and by appearing on the primary ballot (with 32 other candidates). He received nine one-hundredths of one percent of the total votes cast, and thus his name was not placed on the general election ballot.

Peoples, his party, and two registered voters brought this action in the U.S. District Court, which denied relief, but the Ninth Circuit reversed, holding the Washington statute, as applied to candidates for statewide office, unconstitutional. The state appealed.

The Issues

The question for decision was whether the State of Washington's requirement that a minor party candidate for statewide office receive at least one percent of all votes cast in the primary election before the candidate's name will be placed on the general election ballot violated the First and Fourteenth Amendment.

The Holding and Rationale

The Supreme Court reversed the Ninth Circuit, holding that the Washington statute was constitutionally permissible.

The Court examined the line of cases on the issue and concluded that states may constitutionally require candidates to make a preliminary showing of substantial voter support in order to be placed on the general election ballot.

The Court further reasoned that states need not show actual voter confusion, ballot overcrowding, or the presence of frivolous candidates before imposing reasonable restrictions on ballot access (although these factors were apparently present in the legislative decision). Similarly, such reasonable restrictions do not restrict the appel-

lees' First Amendment rights too severely in relation to the state's interest in restricting access to the general election ballot.

The Court found no merit in the appellees' argument that lower voter turnout for primary elections reduces the pool of potential supporters from which the minor party must secure one percent of the vote. Since the statute in question did not impede voting at the primary, it does no more than require a candidate to show some significant voter support before being included on the general election ballot.

Finally, the Court reasoned that the Washington statute actually promoted First Amendment values which would otherwise be threatened by overly burdensome ballot access restrictions. Washington voters have freedom of association. The statute merely requires them to channel their "expressive activity" into a primary campaign in order to qualify for inclusion in the general election.

Commentary

This decision reiterates the U.S. Supreme Court's long-standing rule that states may impose reasonable restrictions on minor party access to general election ballots. Such restrictions have been upheld under statutory schemes that permit minor party or independent candidates some reasonable opportunity to gain general election ballot access by demonstrating significant voter support in advance of the general election, either by convention, petition, primary election participation, or some combination of these methods. The Court has said that there is no "litmus paper test" for deciding these cases, which means that the courts will continue to review these cases individually. A system that restricts access to the general election ballot without giving minor party and independent candidates at least the opportunity to earn ballot access would probably fail a First Amendment test and be found unconstitutional.

Perhaps most surprising--or confusing--about this decision is that the Court considered information that indicated that only one of 12 minor party candidates who sought access to the ballot had qualified since the law was enacted, but still felt that it was sufficient to grant easy access to the primary election ballot.

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Anderson v. Celebrezze

460 U.S. 780, 103 S.Ct. 1564, 75 L.Ed.2d 547 (1983)
United States Supreme Court
April 19, 1983

A filing deadline for independent candidates of more than 75 days before a primary election is unconstitutional because it unreasonably burdens the voting and associational rights of the candidate's supporters.

The Facts

The State of Ohio had a filing deadline of March 20 for independent candidate statements of candidacy and nominating petitions. The petitions were required to be filed with 5,000 signatures for general election ballot access. On April 24, 1980, John B. Anderson announced his independent candidacy for President, and he filed his requisite materials with the Ohio Secretary of State on May 16, 1980. The Secretary of State refused to accept the materials because they had been filed after the deadline.

Anderson challenged the action in U.S. District Court and received summary judgment ordering the state to place his name on the November general election ballot, with the trial court finding the statute to be unconstitutional under the First and Fourteenth Amendments.

The Court of Appeals reversed, holding that the early deadline served the state's interest in voter education by giving voters a longer opportunity to see how presidential candidates withstand the close scrutiny of a political campaign. Anderson appealed.

The Issues

The question for decision was whether Ohio's March 20 filing deadline for independent candidates unduly or unconstitutionally burdened a candidate and the candidate's supporters.

The Holding and Rationale

The Supreme Court, with Justice Stevens writing for the majority, reversed the Court of Appeals and held that Ohio's early filing deadline places an unconstitutional burden on the voting and associational rights of Anderson's supporters.

The Court applied a balancing test to the case, looked at the character and magnitude of the claimed injury to the plaintiffs' rights, identified and evaluated the state's justification for the burden, and determined how the state's justification held up against the plaintiffs' injuries.

The Court found that the deadline not only burdened the associational rights of independent voters and candidates, but that it placed a significant state restriction on the national electoral process in presidential elections. The Court held that none of the three interests advanced by the state--the need for greater voter education, equal treatment for partisan and independent candidates, and the desire for political stability--justified the early deadline. In fact, the Court found that the opposite may have been true with each interest.

What may have troubled the majority most was that there was a special burden placed upon an identifiable class of independent voters whose rights would be abridged by a late emerging presidential candidate who was not a part of the two

major political parties, but whose positions on the issues could command widespread community support. The Court was troubled that such candidates would be excluded from the general election ballot.

Commentary

This case represents the latest stage in a series of moves by the Supreme Court from strict scrutiny of ballot access cases to a more due process-oriented approach. The Court ended its emphasis on the two-tiered equal protection analysis for a flirtation with the balancing approach. Whether it intends to remain with this approach is yet to be determined.

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Lubin v. Panish

415 U.S. 709, 94 S.Ct. 1315, 39 L.Ed.2d 702 (1974)
United States Supreme Court
March 26, 1974

A state may not impose an unaffordable filing fee on an indigent person without providing a reasonable alternative means of access to the ballot.

The Facts

California law required a candidate for county supervisor to pay a filing fee in order to be placed upon the ballot in a party primary election. An indigent candidate was unable to pay the filing fee for such an office and filed suit to overturn the law on constitutional grounds.

The Issues

The question for decision was whether a state law that required a candidate to pay a filing fee to be entitled to a position on the ballot was constitutional if no other means of access to the ballot was available.

The Holding and Rationale

The Supreme Court looked at the burden on associational and voting rights and applied a standard of review above that of minimal scrutiny. The Court examined the state's arguments for requiring a filing fee and found that the state's desire to regulate the ballot and its desire to reduce spurious candidacies were, indeed, compelling interests; but the Court required that the state demonstrate that there were not any less restrictive alternatives that the state could use to promote these interests. Here, the Court found that the filing fee requirement was not reasonably necessary to achieve the state's objective to limit the size and manageability of the ballot.

The Court was particularly concerned about the lack of a reasonable alternative form of access and held that "in the absence of reasonable alternative means of ballot access, a State may not, consistent with constitutional standards, require from an indigent candidate filing fees he cannot pay."

Commentary

The Supreme Court's analysis in this case moved away from the reasoning in *Bullock v. Carter*, 405 U.S. 134, 92 S.Ct. 849, 31 L.Ed.2d 92 (1972). While the earlier case emphasized the effect on the rights of voters to vote for the candidate of their choice, the *Lubin* court placed greater emphasis upon the right of an individual to be a candidate for office.

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Williams v. Rhodes

393 U.S. 23, 89 S.Ct. 5, 21 L.Ed.2d 31 (1968)
United States Supreme Court
October 15, 1968

Restrictions on ballot access for minor parties and independents that give major political parties and their candidates a distinct advantage are unconstitutional if there is no compelling state interest to justify them.

The Facts

In Ohio, a new political party or one that had failed to receive at least ten percent of the vote in the previous gubernatorial election was required to file a nominating petition in order to be placed upon the general election ballot. The petition, required to be filed no less than 90 days before the state's spring primary election (approximately nine months before the general election), had to contain signatures of registered voters equal to fifteen percent of the total number of votes cast for governor in the last such election (here, approximately 433,000). In addition, a party seeking to qualify for a presidential election was required to create formal state and county organizations and had to convene a state convention with 500 delegates apportioned throughout the state (on the basis of party strength) to select presidential electors.

Independent candidates were not permitted on the ballot, and write-in candidacies were prohibited.

The American Independent Party challenged the constitutionality of the law.

The Issues

The question for decision was whether Ohio's requirements for third party ballot access and lack of provisions for independent candidate access were permissible or unduly burdensome.

The Holding and Rationale

The Supreme Court, in a majority opinion authored by Justice Black, found that the state's ballot access requirements "made it virtually impossible" for a new party with hundreds of thousands of members, or an established party with few members, to gain a place on the ballot, thus giving the two major parties "a decided advantage over any new parties struggling for existence" and violating the Equal Protection Clause.

The Court found strict scrutiny to be the appropriate standard for review here and found that the state ballot access scheme placed an unequal burden on "the right of individuals to associate for the advancement of political beliefs and the right of qualified voters [to] cast their votes effectively." While the state asserted several rationales for the system, the Court found none of them to be satisfactory enough to restrict the First Amendment guarantee of freedom of association. The interests included encouragement of a two-party system to ensure compromise and political stability, the need to avoid run-off elections, and a desire to avoid voter confusion.

Justice Harlan concurred in the result, but stated in his opinion that he would have rested the result entirely upon First Amendment associational rights and that reliance on the Equal Protection argument was unnecessary.

Commentary

The Supreme Court's strict scrutiny approach was consistent with the approach taken by the Court in other cases involving political matters during the decade.

This decision has been subject to considerable criticism, not because of its result, but rather because of the lack of attention that the Court gave to the underlying constitutional assumptions. Commentators have criticized the Court for the lack of elaboration on the constitutional rights actually infringed upon and the sufficiency of state interests needed to uphold a law. The decision made no reference to how far the Court would take the right of a voter to cast a ballot for a candidate of the voter's choice: would there be a right to access by a candidate supported by, for example, ten voters? The Court also failed to reach the question of whether barriers to access that only infringe upon parties that do not enjoy popular support will also be subjected to the strict scrutiny standard.

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Jenness v. Fortson

403 U.S. 431, 91 S.Ct. 1970, 29 L.Ed.2d 554 (1971)
United States Supreme Court
June 21, 1971

A preliminary showing of a modicum of support is an appropriate condition precedent to ballot access if the overall ballot access scheme is not unduly restrictive of the rights of third party and independent candidates.

The Facts

Georgia law required a nominee of a political organization whose candidate received 20 percent or more of the vote at the most recent gubernatorial or presidential election, or an independent candidate, to file a nominating petition signed by at least five percent of those eligible to vote at the last election for the office sought, as well as a filing fee, to gain access to the general election ballot. Petitions were permitted to be filed as late as June of the election year, and there were no requirements for an elaborate party machinery to be established.

The law was challenged on the grounds that the petition requirement was unduly burdensome. The filing fee was not at issue here.

The Issues

The question for decision was whether the state's five percent petition requirement constituted an unconstitutional burden upon the associational and voting rights of third party and independent candidates.

The Holding and Rationale

A unanimous Supreme Court, in a majority opinion authored by Justice Stewart, upheld Georgia's ballot access provisions. The Court found that the Georgia ballot access scheme was far different than that considered in *Williams v. Rhodes*, 393 U.S. 23, 89 S.Ct. 5, 21 L.Ed.2d 31 (1968), in that Georgia law did not serve to "freeze the political status quo," but rather "implicitly recognizes the potential fluidity of American political life."

The Court did not find that the rights of the prospective candidates and registered voters who had challenged the law had been abridged. Indeed, the Court subjected the laws to minimal scrutiny, not bothering to examine whether a less restrictive alternative to the five percent requirement would have sufficed, and said that there was "an important state interest in requiring some preliminary showing of a significant modicum of support before printing the name of a political organization and its candidates on the ballot--the interest, if no other, in avoiding confusion, deception, and even frustration of the democratic process at the general election."

Commentary

The decision in this case was more pragmatic than based in law. The Supreme Court appeared to approve of the general ballot access "package" that Georgia offered candidates and felt little need to go beyond a brief justification in upholding the law.

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Storer v. Brown

415 U.S. 724, 94 S.Ct. 1274, 39 L.Ed.2d 714 (1974)
United States Supreme Court
March 25, 1974

Provision requiring independent candidates be disaffiliated with a political party one year prior to the primary election was not unconstitutional.

The Issues

California's election code required independent candidates to have been disaffiliated with a political party for a period of at least one year before the primary election preceding the general election in which they desired to participate. Disaffiliation was to take the form of not having voted in the party's immediately preceding primary election or not having been a registered member of the party for the past 12 months. The election code also prohibited a person from signing a nominating petition for an independent candidate if the person had participated in a party's last preceding primary election.

The Holding and Rationale

The Court found that the one-year disaffiliation provision as it applied to candidates was constitutionally permissible because it furthered the state's "compelling" interest in the stability of the political system. The Court held that the provision protected the direct primary process by refusing to allow an independent candidate to take an alternate route to the ballot if the candidate does not disaffiliate from an established party early enough in the process. This would preserve the integrity of the electoral process and help to curb "unrestrained factionalism."

The Court failed to find, on the record before it, whether the access and disaffiliation requirements for individual signers of petitions were unconstitutionally severe and remanded the case to U.S. District Court for a realistic assessment of whether a "reasonably diligent" candidate could be expected to satisfy the burden or if it would "be only rarely that the unaffiliated candidates will succeed in getting on the ballot."

The Court also found, in an unrelated part of the case, that a 24-day period for circulation of nominating petitions may be too short.

Commentary

While ostensibly applying a strict scrutiny standard here, the Supreme Court failed to assess whether a less restrictive alternative would have sufficed to uphold the state's interests, leading to confusion over the actual standard that was applied. The test here is actually one of minimal scrutiny, easy to overcome.

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Moore v. Ogilvie

394 U.S. 814, 89 S.Ct. 1493, 23 L.Ed.2d 1 (1969)
United States Supreme Court
May 5, 1969

A law requiring independent candidates to collect a specified number of signatures in approximately one-half of the state's counties violates the Equal Protection Clause by discriminating against residents of populous counties.

The Facts

An Illinois law required an independent candidate for statewide office to collect 25,000 signatures of registered voters in an amount of not less than 200 signatures in at least 50 of the state's 102 counties.

The plaintiff alleged that the scheme was a violation of the Equal Protection Clause.

The Issues

The question for decision was whether a state could impose a requirement for petition signatures that required a minimum number of signatures from just a portion of the state's counties.

The Holding and Rationale

The Supreme Court invalidated the Illinois law, finding that the requirements discriminated against residents of populous counties in favor of those in rural counties because the formula applied equally to both.

The Court was particularly concerned that under the law the voters in 49 counties with 93.4 percent of the registered voters could not form a political party and place its candidates on the ballot, while just 25,000 of the remaining 6.6 percent of registered voters "properly distributed" among the remaining 53 counties could form a new party. As a result, the law "lacks the equality to which the exercise of political rights is entitled under the Fourteenth Amendment."

Commentary

The decision in this case was not as clear-cut as it purported to be. The Supreme Court emphasized the uneven distribution of population as the basis for reaching its result, but chose to ignore the question of constitutionality for similar state schemes in which county populations are, in practice, effectively equal. In the latter case, the law may still have constitutional problems because of potential discrimination against geographically insular groups, but the Court has not examined such a situation.

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Udall v. Bowen

419 F.Supp. 746 (S.D.Ind. 1976) (three-judge panel), *aff'd*, 425 U.S. 947, 9 S.Ct. 1720, 48 L.Ed.2d 191 (1977)
U.S. District Court for the Southern District of Indiana
April 1, 1976

A state law requiring a presidential candidate to submit petitions with the signatures of 500 registered voters from each of the state's congressional districts is constitutional.

The Facts

Presidential candidate Rep. Morris K. Udall sought to be included on Indiana's 1976 Democratic presidential primary ballot. A candidate was required to submit petitions with the signatures of 500 registered voters from each of the state's congressional districts to qualify for access. Udall supporters were unable to obtain all of the requisite signatures and challenged the law on the grounds that the provision violated equal protection and due process rights of voters.

The Issues

The question for decision was whether a state law which imposed a requirement that a presidential candidate submit petitions with the signatures of 500 voters from each of the state's equally populous congressional districts violated equal protection and due process rights of voters.

The Holding and Rationale

In a 2-1 decision, the U.S. District Court for the Southern District of Indiana upheld the Indiana law, relying on the argument that the congressional districts contained roughly the same population. "Because the eleven congressional districts in Indiana are substantially equal in population, the ballot access scheme prescribed . . . avoids the equal protection objections of the cases cited." The cases that the plaintiff relied upon were *Moore v. Ogilvie*, 394 U.S. 814, 89 S.Ct. 814, 23 L.Ed.2d 1 (1969), and *Communist Party v. State Board of Elections*, 518 F.2d 517 (7th Cir. 1975), *cert. denied*, 423 U.S. 986 (1975).

Commentary

Some have suggested that the better--or at least more readily justifiable approach--in this fact situation is the position assumed by Judge Swygert in dissenting. He wrote that "the statute gives the voters in one congressional district an absolute power over the nomination of a Presidential candidate regardless of the fact that the candidate may have overwhelmingly support with a majority of the voters of the other ten congressional districts of the state. Thus, there is a denial of the equal protection and due process guaranteed to the voters of the State of Indiana by the Fourteenth Amendment."

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Anderson v. Mills

664 F.2d 600 (6th Cir. 1981)
United States Court of Appeals, 6th Circuit
November 20, 1981

States must employ a less burdensome means of ensuring actual support for a new political party than "desire to vote" language.

The Facts

Kentucky law required that voters signing a petition of a minor party candidate declare their desire to vote for the candidate. The 1980 presidential candidate of the American Party, Percy Greaves, challenged the law in U.S. District Court for the Western District of Kentucky, arguing that the provision violated ballot secrecy assurances and violated free speech and associational rights. The trial court agreed with Greaves, and the commonwealth appealed.

The Issues

The question for decision was whether a state may require a registered voter to pledge to support a minor party candidate as a condition precedent for signing a nominating petition.

The Holding and Rationale

The United States Sixth Circuit Court of Appeals affirmed the lower court's ruling. The Court of Appeals held that the commonwealth could not infringe upon an individual's right to a secret ballot, and, because the declaration of support would subject a voter to the same "fears sought to be quelled by the secrecy of voting laws," it was impermissible. The court reviewed the litany of ballot access cases, noting that the U.S. Supreme Court "had never approved a declaration similar to the Kentucky 'desire to vote' provision" and had implicitly disavowed it in *Jenness v. Fortson*, 403 U.S. 431, 91 S.Ct. 1970, 29 L.Ed.2d 554 (1971). The court instructed the commonwealth to find a less burdensome means of committing a voter to a prospective candidate.

The court also addressed several other issues from consolidated cases. The court found that Kentucky's "sore loser" provision did not apply to presidential candidates because the statute predated Kentucky's presidential primary and there was no attempt to add to the sore loser provision language that would have prevented a candidate who had lost in a primary election from being placed on the ballot for the same office in the general election.

The court also interpreted the commonwealth's 55-day presidential candidate filing requirement to mean that petitions had to be filed that many days in advance of the general, rather than the primary, election. Finally, the court upheld the validity of Kentucky's 5,000 registered voter signature requirement for presidential candidates.

Commentary

This case ended a long line of state cases that had permitted the "pledge to support" requirement and forced states to alter their laws.

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Communist Party of Indiana v. Whitcomb

414 U.S. 441, 94 S.Ct. 656, 38 L.Ed.2d 635 (1974), *reh'g denied*, 415 U.S. 952, 94 S.Ct. 1476, 39 L.Ed.2d 568 (1974)
United States Supreme Court
January 9, 1974

A political party or candidate is not required to file an affidavit disavowing advocacy of the violent overthrow of local, state, or federal government.

The Facts

Indiana law banned from the ballot political parties that advocated the violent overthrow of government. All political parties were required to submit a sworn affidavit to the state prior to being certified for the ballot that stated that the party did not subscribe to such positions.

The Communist Party sued for access to the ballot after failing to file a proper affidavit.

The Issues

The question for decision was whether a state could require a political party to file an affidavit denying that it advocated the violent overthrow of government as a condition precedent to gaining access to the ballot.

The Holding and Rationale

The United States Supreme Court found the statute unconstitutional. The Court held that the Indiana statute--similar to most others, including a federal statute--was worded so broadly that it impinged upon constitutionally protected free speech. States are not permitted under the First and Fourteenth Amendments to regulate advocacy which is not limited to advocacy of action. Although the states can regulate advocating force or violence which is designed to overthrow the government and which is likely to imminently incite or result in the overthrow of government by force or violence, the Court held that the Indiana statute did not expressly limit the coverage of the loyalty oath to the advocacy of action.

A minority of the Court in concurring also found that the statute was being applied in a discriminatory manner because the established political parties were not subject to the same requirements. The minority then reasoned that there was no compelling state interest justifying the deferential treatment afforded the Republican and Democratic parties.

Commentary

While the Court did not look favorably upon an oath disavowing the violent overthrow of government, it has not overturned laws requiring a candidate to swear to uphold the United States or state constitutions.

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Selected Case Summaries

Adams v. Askew,
511 F.2d 700 (5th Cir. 1975).

The U.S. 5th Circuit Court of Appeals held that a Florida statutory scheme that required candidates for state office to pay filing fees of as much as five percent of the annual salary of the offices sought were not unconstitutional as applied to candidates who could and did pay filing fees without any stated undue burden on their financial resources.

American Party of Texas v. White,
415 U.S. 767, 94 S.Ct. 1296, 39 L.Ed.2d 744 (1974).

The United States Supreme Court used what appeared to be a strict scrutiny standard in upholding a Texas statute that denied access to the ballot to a political party that had not received at least two percent of the vote in the last general election nor filed petitions signed by registered voters in the amount of at least one percent of the votes cast in that election (the percentages varied according to office sought, but in no case were more than 500 signatures required). The Court said that "whether the qualifications for ballot positions are viewed as substantial burdens on the right to associate or as discriminations against [minor parties], their validity depends upon whether they are necessary to further compelling state interests. Here, the Court found that the access requirements served two compelling state interests--preserving the integrity of the election process and avoiding voter confusion--and other interests such as the modicum of support test and avoidance of intraparty disputes. The Court placed considerable stock in the fact that two of the plaintiffs had actually qualified for access to the ballot in the past under the same requirements. The Court also held that requiring minor parties to hold a convention instead of a primary election was not invidious discrimination under the Equal Protection Clause.

Blomquist v. Thomson,
739 F.2d 525 (10th Cir. 1984).

The Tenth Circuit Court of Appeals invalidated Wyoming's requirement that an independent candidate submit petitions bearing the signatures of registered voters totaling at least five percent of the votes cast for members of Congress in the preceding general election. A party needed to field a congressional candidate who received at least ten percent of the vote to be placed on the ballot. Using a balancing test, the District Court found that while the state had an interest in regulating the process, the provisions were impermissibly burdensome and ordered the Libertarian plaintiff to be placed on the ballot. The Election Code was amended, as suggested by the Court, and an appeal was taken by the plaintiff after the revisions were approved by the District Court. The Tenth Circuit Court of Appeals permitted a short-term compromise to remain in effect, allowing the plaintiff to collect one-sixth the number of signatures in the two-month period remaining before the deadline as they would be required to collect in the new normal 12-month period before an election (1,333 versus 8,000 signatures). The Tenth Circuit used the balancing test again to arrive at its determination that not to permit the compromise would impose too harsh a burden on the plaintiff.

Bullock v. Carter,
405 U.S. 134, 92 S.Ct. 849, 31 L.Ed.2d 92 (1972).

Applying the strict scrutiny approach, the U.S. Supreme Court struck down a Texas filing fee under the Equal Protection Clause because it conditioned access to the

ballot on the criterion of ability to pay. The Court found that this heavily burdened the rights of an undetermined number of voters to vote for candidates who were otherwise qualified and constituted impermissible wealth-based discrimination. The Texas law did not allow write-in candidacies and provided no alternatives to the fees, which ranged up to $8,900. The Court considered and handily rejected the state's argument that the filing fees were needed to regulate the number of candidates and to limit access just to serious candidates.

Illinois State Board of Elections v. Socialist Workers Party, 440 U.S. 173, 99 S.Ct. 983, 59 L.Ed.2d 230 (1970).

An Illinois law that required new political party and independent candidates for office in Chicago to file nominating petitions with signatures equal to at least five percent of the number of votes cast in the previous election in the city was struck down. The number of signatures required here for city office was approximately 36,000, while a candidate for statewide office would only have to file approximately 25,000 signatures. The Court opted for a traditional strict scrutiny approach and, in the words of Justice Marshall's majority opinion, the "discrepancy" producing such an "incongruous result" could not survive the analysis. The Court found that the state's interest in screening out frivolous candidates was not sufficient to uphold the "[o]verbroad restrictions" on third parties found here. The Court found that there was no reason for such a stringent requirement for Chicago elections, and noted that "[h]istorical accident, without more, cannot constitute a compelling state interest."

Libertarian Party of Florida v. Florida, 710 F.2d 790 (11th Cir. 1983), *cert. denied*, 469 U.S. 831, 105 S.Ct. 117, 83 L.Ed.2d 60 (1984).

The U.S. Court of Appeals for the 11th Circuit, relying on the litany of Supreme Court decisions in ballot access cases, upheld a Florida statute that imposed a nominating petition requirement of three percent of the state's registered voters for a minor party candidate. The Court of Appeals noted the difficulty in defending a given percentage or absolute numerical requirement as compelling or debasing it as too restrictive. The Court here applied a totality of the circumstances test, noting that Florida's overall ballot access scheme was not particularly restrictive.

Libertarian Party of Oklahoma v. Oklahoma State Election Board, 593 F.Supp. 118 (W.D.Okla. 1984).

The U.S. District Court for the Western District of Oklahoma invalidated an Oklahoma five percent petition requirement that was accompanied by a provision that required a party to receive ten percent of the vote to remain eligible as a "recognized" political party. The Court took note of the fact that there had not been a problem with crowded ballots before the law was changed and that only three other states imposed numerical restrictions on minor parties that were as high as those of Oklahoma.

North Carolina Socialist Workers Party v. North Carolina State Board of Elections, 538 F.Supp. 864 (E.D.N.C. 1982).

State law requiring a registered voter to state the intent to associate with a new party and to support its candidates as a condition for signing a ballot access petition was ruled unconstitutional by the U.S. District Court for the Eastern District of North Carolina. Responding to equal protection claims, the trial court here found that there were less restrictive means that the state could have employed to achieve the same result without the chilling effect.

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Chapter 5: Voter Registration and Qualifications

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Introduction

The states have the authority and responsibility for setting minimum standards for voting in local, state, and federal elections and for ensuring that individuals seeking to vote comply with the state qualifications. The discretion the states have in establishing the criteria and process by which citizens qualify for the franchise is limited by the commands of the U.S. Constitution, as well as state constitutional provisions, and federal legislation enacted pursuant to constitutional enabling authority, such as the 14th and 15th Amendments. This chapter examines the constitutional constraints on state legislative power to prescribe the requirements and procedures by which the franchise is granted and withheld or withdrawn. The impact of the Voting Rights Act of 1965 on state electoral action, however, is not discussed extensively in this chapter but rather in Chapter 10.

Voter Registration

All states have a system of voter registration to ensure that the constitutional and statutory qualifications for voting in a state have been met. When registration was first introduced, it was attacked for a variety of reasons. It was claimed, for example, that the requirement to register was not authorized by the state constitution or that it constituted an additional qualification for voting not specified in the state constitution. The courts have held that state permanent voter registration laws are a constitutional exercise of state power as long as they regulate in a reasonable and uniform manner how the privilege of voting will be exercised and afford voters a reasonable opportunity to register.[1]

Court challenges to the constitutionality of state laws authorizing voter registration are now historical curiosities since voter registration as an appropriate, important, and lawful election-related concern and function of state and local government is no longer questioned; however, a dual registration law that treats persons who are registered only for federal elections differently from persons registered for all elections is not reasonable and violates the Equal Protection Clause of the 14th Amendment.[2]

States may require voter information, including identification information such as race, during the compilation of registration lists in order to determine an applicant's eligibility to vote and to prevent voter fraud.[3] It is permissible for a state to purge periodically from the voter registration lists the names of voters who fail to vote and who, after notice, do not request reinstatement of their registration.[4]

Voter Qualifications in General

Each state has considerable latitude in defining the qualifications or preconditions for voting. The right of suffrage is subject to the imposition of state standards that are not discriminatory on account of race, sex, or age (for voters 18 years of age or older) and do not contravene any restriction that Congress pursuant to its constitutional powers has imposed.[5]

Once the franchise is granted to the electorate, lines may not be drawn as to who is qualified and who is not qualified to vote that are inconsistent with the Equal Protection Clause of the 14th Amendment.[6] If a state statute grants the right to vote to some bona fide residents of requisite age and citizenship but denies the vote to others, the exclusions deny equal protection of the laws under the 14th Amendment unless they are necessary to promote a compelling state interest.[7] Excluding or "fencing out" from the franchise a section of the resident population because of the way it may vote is constitutionally impermissible.[8]

General vs. Special Interest Elections

As long as an election is not one of special interest, any classification restricting the franchise on grounds other than residence, age, and citizenship cannot stand unless the classification serves a compelling state interest. In an election of general interest, restrictions on the franchise of any character must meet a stringent test of justification.[9]

Elections involving government entities that have general, important, or normal governmental functions or powers present questions of general interest to which the *Reynolds v. Sims* requirement of an unrestricted electorate ("one person, one vote") apply.[10] Governmental powers that will invoke the *Reynolds* rule are the imposition of ad valorem property or sales taxes, the enactment of laws governing the conduct of citizens, and the administration of normal functions of government, such as the maintenance of streets, the operation of schools, or sanitation, health, or welfare services.[11] Elections determined to be of general interest include a local school board election,[12] a municipal election to authorize the issuance of utility revenue bonds[13] or the issuance of general obligation bonds to finance municipal improvements[14] or library construction,[15] a local road district election to authorize the issuance of bonds and the levying of a property tax for the construction and maintenance of roads,[16] and an annexation election.[17]

In general interest elections where the vote is limited to residents who are primarily interested in or primarily affected by an election, it is a denial of equal protection under the 14th Amendment if excluded resident voters in fact are not substantially less interested in or affected by the election than those permitted to vote.[18]

Excluded resident voters were not determined to be substantially less interested in or affected by an election where (1) only the owners or lessees of real property in a school district and the parents or guardians of children enrolled in public schools in the district were permitted to vote in an election for school board members;[19] (2) only property taxpayers were allowed to vote in a municipal election to approve the issuance of utility revenue bonds and the bonds were to be repaid only from revenues from utility operations;[20] (3) only property owners were permitted to vote in a municipal election to authorize the issuance of general obligation bonds but where all residents would be substantially affected by the outcome of the election and excluded non-property owners would share the property tax burden indirectly through the payment of increased rents on leased rental property and pay other taxes used to service the general obligation bonds;[21] (4) only residents who "rendered" (or listed) real, personal, or mixed property of any value however trivial were permitted to vote in an election for the issuance of general obligation bonds to finance library construction;[22] (5) only property taxpayers were permitted to vote in a local road district election to authorize the issuance of bonds and the levying of a property tax for the construction and maintenance of roads;[23] and (6) only freeholders of an area proposed to be annexed could vote in a special referendum accompanying or preceding an annexation election involving all registered voters in the annexing municipality and the territory to be annexed.[24]

In a special interest election where the primary purpose of a government entity is limited or narrow, that is, it does exercise normal governmental authority, and its functions and activities have a disproportionately greater effect on a specific class of people, the "one person, one vote" requirement does not apply and voting may be limited to the affected class. There is a rational basis for a state to permit only landowners to vote in elections of a limited special-purpose district when the landowners as a class are required to bear a disproportionately greater economic burden or risk than non-landowning residents. The vote in such elections may be weighted according to the assessed evaluation of the land or the number of acres owned where the relative risks incurred and the distribution of the benefits and burdens are in proportion to the area or value of the land owned.[25]

A state constitutional guarantee of "free and equal" elections was found to have been infringed when residential landowners were required to pay irrigation district assessments but were prohibited from voting in district elections. In Washington, qualified voters who are significantly affected by the decisions of a special-purpose district must be given an opportunity to vote in district elections.[26]

The volume of business or the breadth of economic effect of a venture undertaken by a government entity as an incident to its narrow and primary governmental public function cannot alone subject the entity to the "one person, one vote"

requirement. The legality of a property-based voting scheme of a limited special-purpose district is not affected by an incidental business of generating and selling electric power to support its narrow primary purpose of storing, conserving, and delivering water for district landowners.[27]

Special limited-purpose government entities that do not exercise general, important, or normal governmental functions and have met the "rational basis" test for the limitation of the franchise in their elections to those disproportionately affected by the entity's operations (i.e., real property owners) include a water storage district created to acquire, store, and distribute water for farming,[28] an agricultural improvement and power district authorized to store and deliver untreated water to land owners, as well as to generate and sell hydroelectric power to support its water-related functions,[29] a community development district created to develop a community's infrastructure through the issuance of capital improvement bonds repaid by the district's landowners,[30] and a watershed improvement district with authority to construct dams and reservoirs.[31]

Residence

A state may legitimately restrict the right to participate in the political processes of the state and its political subdivisions to those who reside within the geographic confines of the governmental entity concerned and may take reasonable and adequate steps to ensure that all applicants for the vote actually fulfill the requirements of bona fide residence.[32] Nonresidents of a city are not constitutionally entitled to vote in municipal elections simply because the area where they reside is subject to the extraterritorial powers of the municipality;[33] however, a state may permit nonresidents to vote in municipal elections, along with resident voters, if there is a rational basis for the inclusion of nonresidents.[34] Individuals living on federal property under exclusive federal jurisdiction are residents of the state in which the federal enclave or reservation is located and must be permitted to vote in the same manner as other residents of the state.[35]

"Residence" for voting purposes is usually considered to synonymous with the terms "domicile" (or "domicil") and "legal residence" and the concepts they represent.[36] The general requirements for obtaining domicile are legal capacity, physical presence at a fixed place, and intent to acquire domicile.[37] Everyone must have a domicile and can have only one domicile for the same purpose, such as voting.[38] A change of domicile occurs when a person with the capacity to change domicile is physically present in a place and intends to make that place the person's home for the requisite duration.[39] In order to acquire a new domicile, there must be an intention to abandon the former domicile and to acquire another and remain there without the intention of returning to the former domicile.[40] A temporary absence will not effect a change of domicile.[41]

The "intention" required for acquisition of a new domicile varies among the states, and the question of intention has arisen primarily in cases involving college students who have claimed a campus living place as their domicile. An increasing

number of courts have come to accept the intention test contained in the *Restatement 2d, Conflict of Laws*, and to invalidate or redefine traditional domiciliary rules requiring an intent to remain permanently or even indefinitely.[42] The *Restatement* provides that:

> To acquire domicile of choice in a place, a person must intend to make that place his home for the time at least.[43]

The *Restatement* approach has been construed to mean that a plan to leave upon the happening of a future event, such as graduation from college, does not preclude one from acquiring domicile.[44]

While intent to remain permanently has been widely but by no means completely discarded as an element of domicile, many jurisdictions retain the "indefinite intention" rule. This rule means that even though a person cannot state with certitude an intention to live permanently in a fixed place, there is an intention to remain for an indefinite period.[45] This test has been liberally construed in one jurisdiction to mean the absence of definite plans to leave and move elsewhere.[46]

A test of residency as a voter qualification that is different and more stringent than the residency criteria applied to others cannot be used for a particular class of voter applicants, such as students, without violating the Equal Protection Clause of the 14th Amendment, the 26th Amendment's prohibition of age discrimination, or state constitutional requirements in some states.[47] An irrebuttable presumption against gaining residency (e.g., a domicile cannot be acquired by a student residing in a college dormitory) is also invalid.[48] There is a divergence of opinion as to whether rebuttable presumptions against residency are constitutionally permissible. Most courts have found rebuttable presumptions contrary to equal-protection and age-discrimination protections,[49] while at least one court has sustained a rebuttable presumption in the case of students on the ground that it was only a specialized statement of the rule that the burden of proof is on one who claims a change of domicile.[50]

Courts have also split on a related question as to whether particular classes of voter applicants may be subjected to a more searching inquiry as to their domicile and be required to provide information, documentation, or proof not required of other applicants. Some courts view a disparity in the treatment of voter applicants in the determination of residency, especially where the unequal treatment is in furtherance of an impermissible criterion of residency (e.g., presumption against student residency in a college dormitory), as a violation of equal-protection or age-discrimination rights or the Civil Rights Act (42 U.S.C. Sec. 1971) prohibition against the use of differential voting standards, practices, or procedures.[51]

A more extensive, searching inquiry as to residence by voting registrars has been upheld in the case of a class, such as students, likely to include transients or those who may lack the requisite intent to acquire domicile on the grounds that the inquiry is a reasonable effort to ensure that voter applicants are bona fide residents when conducted according to a uniform, neutral test of residency.[52] Other courts have upheld procedures for the confirmation of student residency, including

the use of questionnaires, where the students were not singled out for unusual treatment and a non-discriminatory, uniform procedure was employed.[53]

Residency definitions have operated in the past to exclude as "resident" voters those who are homeless or have non-traditional residences. Courts are now more inclined to find that fixed-location definitions of residence that effectively disfranchise voters do not promote any compelling state interest and therefore violate the Equal Protection Clause of the 14th Amendment.[54] As one court stated, the type of place a person calls home has no relevance to the person's eligibility to vote.[55] It should suffice to meet residency requirements if homeless individuals can identify a specific location they consider to be a "home base" and a place where they can be contacted and receive communications.[56]

Duration of Residence

States traditionally have restricted voting in federal and state elections to residents who have lived in the state and in a local political subdivision for a minimum period of time before a primary or general election, usually one year in the state, and have established registration cutoff dates that have the effect of establishing a minimum, preelection duration of residency.

Unnecessarily long durational-residency requirements and their functional equivalents---early preelection registration cutoff dates---have been invalidated under the Equal Protection Clause for lack of a compelling state interest.[57] The longest durational residency requirement approved by the U.S. Supreme Court is 50 days.[58] The Supreme Court has suggested that 30 days' durational residence is an ample period of time for the completion of preelection administrative tasks in confirming voter eligibility, at least in jurisdictions that have a 30-day cutoff for registration before an election.[59] Congress, in effect, has set a maximum 30-day residency duration for voting in presidential elections.[60]

Occupation

Occupation is not a permissible basis for distinguishing between qualified voters in a state.[61] For example, a state cannot prohibit U.S. military personnel from establishing residency in the state while serving in the Armed Forces.[62]

Payment of a Poll Tax

The 24th Amendment prohibits a requirement for the payment of a poll tax or any other tax in order to vote in a federal election.[63] The prescription of an equivalent to or milder substitute for the poll tax, such as the filing of a certificate of registration, is also banned by the 24th Amendment.[64] The 24th Amendment's ban on the payment of a poll taxes or any other tax or fee as a precondition for voting has been extended to all elections, federal, state, and local.[65] Wealth, like race, creed, or color, is not germane to one's ability to participate

intelligently in the electoral process. The requirement for the payment of a poll tax as a condition of obtaining a ballot causes an invidious discrimination in violation of the Equal Protection Clause of the 14th Amendment.[66]

Citizenship

A state may require citizenship as a qualification for voting.[67] States have the historical power to exclude aliens from participation in democratic institutions, including the right to deny aliens the right to vote.[68] The children of aliens, however, are citizens and entitled to vote if they were born in the United States.[69]

Minimum Age

The 26th Amendment forbids the denial or abridgment of the right to vote of U.S. citizens 18 years of age and older.[70] A state may, however, prescribe a minimum age as a qualification for voting at any election, including a primary election, by individuals less than 18 years of age.[71]

Sex

The 19th Amendment prohibits the denial or abridgment of the right to vote of U.S. citizens on account of sex.[72]

Mental Capacity

A state may ensure that its voters meet minimum standards of mental competency and intelligence.[73]

Conviction of a Crime

A state may, consistent with the 14th Amendment, disfranchise convicted felons.[74] States may selectively disfranchise and reenfranchise convicted felons provided that any distinction among convicted felons is rationally related to a legitimate state interest.[75] A state voting scheme can constitutionally permit unincarcerated felons to vote but deny that right to incarcerated felons[76] and limit the right to vote to felons who have successfully completed the terms of their probation under state court supervision.[77]

Disfranchisement upon conviction of a crime violates equal protection if the disfranchising requirement was adopted to discriminate against blacks and produces disproportionate effects along racial lines;[78] however, the fact that a significantly higher number of blacks than whites have been convicted of felonies does not alone establish a violation of the 14th Amendment or the Voting Rights Act of 1965.[79]

Enrollment in a Political Party

A state may require enrollment or registration of a voter in a political party as a condition for voting in the party's primary and may prescribe a reasonable time limit for pre-primary enrollment.[80] A cutoff date for party enrollment may be prior to a general election preceding a primary,[81] but may not be so early as to require a voter to forgo voting in a primary if the voter changes party affiliation.[82] Nevertheless, a political party may by party rule permit unaffiliated or independent voters to participate in its primary, and any state requirement requiring voters in the party's primary to be registered party members that is in conflict with the party rule is invalid as a violation of 1st and 14th Amendment rights of the party and its members.[83]

As a general rule, a state may not substitute its judgment for that of a political party,[84] and the party's determination of the boundaries of its own association and the structure that best allows it to pursue its political goals is protected by the Constitution.[85] However, the U.S. Supreme Court has not yet determined whether state regulation of primary voting qualifications may never withstand a challenge by a political party or its membership or whether a party may open its primary to all voters, including members of other parties.[86]

Notes

[1]*Blue v. State ex rel. Brown*, 206 Ind. 98, 188 N.E. 583 (1934); see also *Beare v. Briscoe*, 498 F.2d 244 (5th Cir. 1974).

[2]*Haskins v. Davis*, 253 F.Supp. 642 (E.D.Va. 1966).

[3]*Blue v. State ex rel. Brown*, 206 Ind. 98, 188 N.E. 585 (1934); *Kemp v. Tucker*, 396 F.Supp. 737 (M.D.Pa. 1975), *aff'd*, 423 U.S. 803, 96 S.Ct. 10, 46 L.Ed.2d 24 (1975).

[4]See, for example, *Williams v. Osser*, 350 F.Supp. 646 (E.D.Pa. 1972).

[5]U.S. Constitution, Amendments XV, XIX, and XVI; *Lassiter v. Northampton County Board of Elections*, 360 U.S. 45, 79 S.Ct. 985, 3 L.Ed.2d 1072 (1959); *Harper v. Virginia State Board of Elections*, 383 U.S. 663, 86 S.Ct. 1079, 16 L.Ed.2d 169 (1966).

[6]*Harper v. Virginia State Board of Elections*, 383 U.S. 663, 86 S.Ct. 1079, 16 L.Ed.2d 169 (1966).

[7]*Kramer v. Union Free School District*, 395 U.S. 621, 89 S.Ct. 1886, 23 L.Ed.2d 583 (1969).

[8]*Carrington v. Rash*, 380 U.S. 89, 85 S.Ct. 775, 13 L.Ed.2d 675 (1965).

[9]*Hill v. Stone*, 421 U.S. 289, 95 S.Ct. 1637, 44 L.Ed.2d 172 (1975).

[10]*Salyer Land Co. v. Tulare Lake Basin Water Storage District*, 410 U.S. 719, 93 S.Ct. 1224, 35 L.Ed.2d 659 (1973); *Ball v. James*, 451 U.S. 355, 101 S.Ct. 1811, 68 L.Ed.2d 150 (1981); *Hayward v. Clay*, 573 F.2d 187 (4th Cir. 1978), *cert. denied*, 439 U.S. 959, 99 S.Ct. 363, 58 L.Ed.2d 351 (1978).

[11]*Ball v. James*, 451 U.S. 355, 101 S.Ct. 1811, 68 L.Ed.2d 150 (1981).

[12]*Kramer v. Union Free School District*, 395 U.S. 621, 89 S.Ct. 1886, 23 L.Ed.2d 583 (1969).

[13]*Cipriano v. Houma*, 395 U.S. 701, 89 S.Ct. 1897, 23 L.Ed.2d 647 (1969).

[14]*City of Phoenix, Arizona v. Kolodziejski*, 399 U.S. 204, 90 S.Ct. 1990, 26 L.Ed.2d 523 (1970).

[15]*Hill v. Stone*, 421 U.S. 289, 95 S.Ct. 1637, 44 L.Ed.2d 172 (1975).

[16]*Herbert v. Police Jury of Parish of Vermillion*, 258 La. 41, 245 So.2d 349 (1971), *rev'd mem.*, 404 U.S. 807, 92 S.Ct. 52, 30 L.Ed. 39 (1971).

[17]*Hayward v. Clay*, 573 F.2d 187 (4th Cir. 1978), *cert. denied*, 439 U.S. 959, 99 S.Ct. 363, 58 L.Ed.2d 351 (1978).

[18]*Kramer v. Union Free School District*, 395 U.S. 621, 89 S.Ct. 1886, 23 L.Ed.2d 583 (1969).

[19]*Id.*

[20]*Cipriano v. Houma*, 395 U.S. 701, 89 S.Ct. 1897, 23 L.Ed.2d 647 (1969).

[21]*City of Phoenix, Arizona v. Kolodziejski*, 399 U.S. 204, 90 S.Ct. 1990, 26 L.Ed.2d 523 (1970).

[22]*Hill v. Stone*, 421 U.S. 289, 95 S.Ct. 1637, 44 L.Ed.2d 172 (1975).

[23]*Herbert v. Police Jury of Parish of Vermillion*, 258 La. 41, 245 So.2d 349 (1971), *rev'd mem.*, 404 U.S. 807, 92 S.Ct. 52, 30 L.Ed. 39 (1971).

[24]*Hayward v. Clay*, 573 F.2d 187 (4th Cir. 1978), *cert. denied*, 439 U.S. 959, 99 S.Ct. 363, 58 L.Ed.2d 351 (1978).

[25]*Salyer Land Co. v. Tulare Lake Basin Water Storage District*, 410 U.S. 719, 93 S.Ct. 1224, 35 L.Ed.2d 659 (1973); *Ball v. James*, 451 U.S. 355, 101 S.Ct. 1811, 68 L.Ed.2d 150 (1981); *Associated Enterprises, Inc. v. Toltec Watershed Improvement District*, 410 U.S. 743, 93 S.Ct. 1237, 35 L.Ed.2d 675 (1973).

[26]*Foster v. Sunnyside Valley Irrigation District*, 687 P.2d 841 (Wash. 1984).

[27]*Ball v. James*, 451 U.S. 355, 101 S.Ct. 1811, 68 L.Ed.2d 150 (1981).

[28]*Salyer Land Co. v. Tulare Lake Basin Water Storage District*, 410 U.S. 719, 93 S.Ct. 1224, 35 L.Ed.2d 659 (1973).

[29]*Ball v. James*, 451 U.S. 355, 101 S.Ct. 1811, 68 L.Ed.2d 150 (1981).

[30]*State v. Frontier Acres Community Development District Pasco County*, 472 So.2d 455 (Fla. 1985).

[31]*Associated Enterprises, Inc. v. Toltec Watershed Improvement District*, 410 U.S. 743, 93 S.Ct. 1237, 35 L.Ed.2d 675 (1973).

[32]*Pope v. Williams*, 193 U.S. 621, 24 S.Ct. 573, 48 L.Ed. 817 (1904); *Carrington v. Rash*, 380 U.S. 89, 85 S.Ct. 775, 13 L.Ed.2d 675 (1965); *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 99 S.Ct. 383, 58 L.Ed.2d 292 (1978).

[33]*Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 99 S.Ct. 383, 58 L.Ed.2d 292 (1978).

[34]*Spahos v. Mayor and Councilmen of Town of Savannah Beach, Tybee Island, Georgia*, 207 F.Supp. 688 (1962), *aff'd*, 371 U.S. 206, 83 S.Ct. 304, 9 L.Ed.2d 269 (1962); *Snead v. City of Albuquerque*, 663 F.Supp. 1084 (D.N.M. 1987), *aff'd*, 841 F.2d 1131 (10th Cir. 1987), *cert. denied*, ___ U.S. ___ 108 S.Ct. 1475, 99 L.Ed.2d 704 (1988).

[35]*Evans v. Cornman*, 398 U.S. 419, 90 S.Ct. 1752, 26 L.Ed.2d 370 (1970).

[36]*Hershkoff v. Board of Registrars of Voters of Worcester*, 366 Mass. 570, 321 N.Ed.2d 656 (1974); *Moore v. Hayes*, 744 P.2d 934 (Okla. 1987).

[37]*Palla v. Suffolk County Board of Elections*, 31 N.Y.2d 36, 286 N.E.2d 247, 334 N.Y.S.2d 860 (1972); *Lloyd v. Babb*, 296 N.C. 416, 251 S.E.2d 843 (1979).

[38]*Hershkoff v. Board of Registrars of Voters of Worcester*, 366 Mass. 570, 321 N.Ed.2d 656 (1974).

[39]*Id.*

[40]*Bright v. Baesler*, 336 F.Supp. 527 (E.D.Ky. 1971); *Lloyd v. Babb*, 296 N.C. 416, 251 S.E.2d 843 (1979); Moore v. Hayes, 744 P.2d 934 (Okla. 1987).

[41]*Moore v. Hayes*, 744 P.2d 934 (Okla. 1987).

[42]*Ramey v. Rockefeller*, 348 F.Supp. 780 (E.D.N.Y. 1972); *Newburger v. Peterson*, 344 F.Supp. 559 (D.N.H. 1972); *Hershkoff v. Board of Registrars of Voters of Worcester*, 366 Mass. 570, 321 N.Ed.2d 656 (1974); *Lloyd v. Babb*, 296 N.C. 416, 251 S.E.2d 843 (1979); *Williams v. Salerno*, 792 F.2d 323 (2nd Cir. 1986).

[43]Restatement Second, Conflict of Laws, Sec. 18, as cited in *Lloyd v. Babb*, 296 N.C. 416, 251 S.E.2d 843 (1979).

[44]*Hershkoff v. Board of Registrars of Voters of Worcester*, 366 Mass. 570, 321 N.Ed.2d 656 (1974); *Lloyd v. Babb*, 296 N.C. 416, 251 S.E.2d 843 (1979).

[45]*Bright v. Baesler*, 336 F.Supp. 527 (E.D.Ky. 1971).

[46]*Shivelhood v. Davis*, 336 F.Supp. 1111 (D.Vt. 1971).

[47]*Bright v. Baesler*, 336 F.Supp. 527 (E.D.Ky. 1971); *Wilkins v. Bentley*, 385 Mich. 670, 189 N.W.2d 423 (1971); *Anderson v. Brown*, 332 F.Supp. 1195 (S.D.Ohio 1971); *Sloane v. Smith*, 351 F.Supp. 1299 (M.D.Pa. 1972); *Williams v. Salerno*, 792 F.2d 323 (2nd Cir. 1986).

[48]*Auerbach v. Rettaliata*, 765 F.2d 350 (2nd Cir. 1985); *Williams v. Salerno*, 792 F.2d 323 (2nd Cir. 1986).

[49]*Jolicoeur v. Mihaly*, 5 Cal.3d 565, 488 P.2d 1, 96 Cal.Rptr. 697 (1971); *Bright v. Baesler*, 336 F.Supp. 527 (E.D.Ky. 1971); *Wilkins v. Bentley*, 385 Mich. 670, 189 N.W.2d 423 (1971); *Anderson v. Brown*, 332 F.Supp. 1195 (S.D.Ohio 1971); *Whatley v.*

Clark, 482 F.2d 1230 (5th Cir. 1973), *cert. denied*, 415 U.S. 934, 94 S.Ct. 1449, 39 L.Ed.2d 492 (1974).

[50]*Lloyd v. Babb*, 296 N.C. 416, 251 S.E.2d 843 (1979).

[51]*Jolicoeur v. Mihaly*, 5 Cal.3d 565, 488 P.2d 1, 96 Cal.Rptr. 697 (1971); *Shivelhood v. Davis*, 336 F.Supp. 1111 (D.Vt. 1971); *Bright v. Baesler*, 336 F.Supp. 527 (E.D.Ky. 1971); *Whatley v. Clark*, 482 F.2d 1230 (5th Cir. 1973), *cert. denied*, 415 U.S. 934, 94 S.Ct. 1449, 39 L.Ed.2d 492 (1974); *United States v. State of Texas*, 445 F.Supp. 1245 (S.D.Tex. 1978), *aff'd*, 439 U.S. 1105, 99 S.Ct. 1006, 59 L.Ed.2d 66 (1979).

[52]*Ramey v. Rockefeller*, 348 F.Supp. 780 (E.D.N.Y. 1972); *Dyer v. Huff*, 382 F.Supp. 1313 (D.S.C. 1973), *aff'd*, 506 F.2d 1397 (4th Cir. 1974); *Auerbach v. Rettaliata*, 765 F.2d 350 (2nd Cir. 1985).

[53]*McCoy v. McLeroy*, 348 F.Supp. 1034 (M.D.Ga. 1972); *Ballas v. Symm*, 494 F.2d 1167 (5th Cir. 1974).

[54]*Pitts v. Black*, 608 F.Supp. 696 (S.D.N.Y. 1984); *Collier v. Menzel*, 176 Cal.App.3d 24, 221 Cal.Rptr. 110 (Cal.App. 2nd Dist. 1985); *Fischer v. Stout*, 741 P.2d 217 (Alaska 1987).

[55]*Collier v. Menzel*, 176 Cal.App.3d 24, 221 Cal.Rptr. 110 (Cal.App. 2nd Dist. 1985).

[56]*Pitts v. Black*, 608 F.Supp. 696 (S.D.N.Y. 1984).

[57]*Affeldt v. Whitcomb*, 319 F.Supp. 69 (N.D.Ind. 1970), *aff'd*, 405 U.S. 1034, 92 S.Ct. 1304, 31 L.Ed.2d 576 (1972); *Kohn v. Davis*, 320 F.Supp. 246 (D.Vt. 1970), *aff'd*, 405 U.S. 1034, 92 S.Ct. 1305, 31 L.Ed.2d 576 (1972); *Dunn v. Blumstein*, 405 U.S. 330, 92 S.Ct. 995, 31 L.Ed.2d 274 (1972); *Burns v. Fortson*, 410 U.S. 686, 93 S.Ct. 1209, 35 L.Ed.2d 633 (1973); *Marston v. Lewis*, 410 U.S. 679, 93 S.Ct. 1211, 35 L.Ed.2d 627 (1973).

[58]*Burns v. Fortson*, 410 U.S. 686, 93 S.Ct. 1209, 35 L.Ed.2d 633 (1973); *Marston v. Lewis*, 410 U.S. 679, 93 S.Ct. 1211, 35 L.Ed.2d 627 (1973).

[59]*Dunn v. Blumstein*, 405 U.S. 330, 92 S.Ct. 995, 31 L.Ed.2d 274 (1972).

[60]Voting Rights Act of 1965, as amended, Sec. 202; 42 U.S.C. Sec. 1973aa-1.

[61]*Carrington v. Rash*, 380 U.S. 89, 85 S.Ct. 775, 13 L.Ed.2d 675 (1965).

[62]*Id.*

[63]U.S. Constitution, Amendment XXIV.

[64]*Harman v. Forssenius*, 380 U.S. 528, 85 S.Ct. 1177, 14 L.Ed.2d 50 (1965).

[65]*Harper v. Virginia State Board of Elections*, 383 U.S. 663, 86 S.Ct. 1079, 16 L.Ed.2d 169 (1966); *United States v. Texas*, 252 F.Supp. 234 (W.D.Tex. 1966), *aff'd*, 384 U.S. 155, 86 S.Ct. 1383, 16 L.Ed.2d 434 (1966); Voting Rights Act of 1965, as amended, Sec. 10 (42 U.S.C. Sec. 1973h).

[66]*Harper v. Virginia State Board of Elections*, 383 U.S. 663, 86 S.Ct. 1079, 16 L.Ed.2d 169 (1966).

[67]*Texas Supporters of Workers World Party Presidential Candidates v. Strake*, 511 F.Supp. 149 (S.D.Tex. 1981); *Harisiades v. Shaughnessy*, 342 U.S. 580, 72 S.Ct. 512, 96 L.Ed.2d 586 (1952).

[68]*Id.*

[69]*Regan v. King*, 49 F.Supp. 222 (N.D.Cal. 1942).

[70]U.S. Constitution, Amendment XXVI.

[71]*Gaunt v. Brown*, 341 F.Supp. 1187 (S.D.Ohio 1972), *aff'd*, 409 U.S. 809, 93 S.Ct. 69, 34 L.Ed.2d 71 (1972).

[72]U.S. Constitution, Amendment XIX.

[73]*Texas Supporters of Workers World Party Presidential Candidates v. Strake*, 511 F.Supp. 149 (S.D.Tex. 1981); Annotation, "Voting Rights of Persons Mentally Incapacitated," 80 A.L.R.3d 1116 (1977).

[74]*Richardson v. Ramirez*, 418 U.S. 24, 94 S.Ct. 2655, 41 L.Ed.2d 551 (1974); *Owens v. Barnes*, 711 F.2d 25 (3rd Cir. 1983), *cert. denied*, 464 U.S. 963, 104 S.Ct. 400, 78 L.Ed.2d 341 (1983).

[75]*Shepherd v. Trevino*, 575 F.2d 1110 (5th Cir. 1978), *cert. denied*, 439 U.S. 1129, 99 S.Ct. 1047, 59 L.Ed.2d 90 (1979); *Owens v. Barnes*, 711 F.2d 25 (3rd Cir. 1983), *cert. denied*, 464 U.S. 963, 104 S.Ct. 400, 78 L.Ed.2d 341 (1983).

[76]*Richardson v. Ramirez*, 418 U.S. 24, 94 S.Ct. 2655, 41 L.Ed.2d 551 (1974); *Owens v. Barnes*, 711 F.2d 25 (3rd Cir. 1983), *cert. denied*, 464 U.S. 963, 104 S.Ct. 400, 78 L.Ed.2d 341 (1983).

[77]*Shepherd v. Trevino*, 575 F.2d 1110 (5th Cir. 1978), *cert. denied*, 439 U.S. 1129, 99 S.Ct. 1047, 59 L.Ed.2d 90 (1979).

[78]*Hunter v. Underwood*, 471 U.S. 222, 105 S.Ct. 1916, 85 L.Ed.2d 222 (1985).

[79]*Hunter v. Underwood*, 471 U.S. 222, 105 S.Ct. 1916, 85 L.Ed.2d 222 (1985); *Wesley v. Collins*, 791 F.2d 1255 (6th Cir. 1986).

[80]*Rosario v. Rockefeller*, 410 U.S. 752, 93 S.Ct. 1245, 36 L.Ed.2d 1 (1973); *Kusper v. Pontikes*, 414 U.S. 51, 94 S.Ct. 303, 38 L.Ed.2d 260 (1973).

[81]*Rosario v. Rockefeller*, 410 U.S. 752, 93 S.Ct. 1245, 36 L.Ed.2d 1 (1973).

[82]*Kusper v. Pontikes*, 414 U.S. 51, 94 S.Ct. 303, 38 L.Ed.2d 260 (1973).

[83]*Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 107 S.Ct. 544, 93 L.Ed.2d 514 (1986).

[84]*Democratic Party of United States v. Wisconsin ex rel. LaFollette*, 450 U.S. 107, 101 S.Ct. 1010, 67 L.Ed.2d 82 (1981).

[85]*Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 107 S.Ct. 544, 93 L.Ed.2d 514 (1986).

[86]*Id.*

Blue v. State ex rel. Brown

206 Ind. 98, 188 N.E. 583 (1934)
Supreme Court of Indiana
January 23, 1934

In the absence of constitutional inhibition, a state legislature may adopt voter registration laws if they regulate in a reasonable and uniform manner how the privilege of voting will be exercised. The fact that a qualified voter is prevented from voting because of a failure to comply with a registration law does not invalidate the law if the voter is afforded a reasonable opportunity to register.

The Facts

An action was brought by the State of Indiana on relation of one Belle Brown, a qualified voter residing in Marion County, Indiana, against Cortez Blue and the other individual members of the county council of Marion County, the county council itself, and the Marion County auditor. Brown claimed that the county council had failed, neglected, and refused to appropriate the funds necessary to carry out the Permanent Registration Act of 1933 and that she and other qualified voters of the county would be disfranchised if the appropriation was not made. She asked for the issuance of a mandate to have the county auditor call a special session of the county council and to have the council appropriate sufficient funds to conduct voter registration in the county.

When the trial court overruled several demurrers filed by Blue and the other defendants, the defendants refused to plead over and elected to stand upon their demurrer. The trial court thereupon entered a finding and judgment in favor of Brown. The defendants appealed to the state supreme court.

The Issues

The question presented was whether Indiana's Permanent Registration Act of 1933 was constitutional as a reasonable, authorized exercise of legislative power under the state constitution.

The Holding and Rationale

The supreme court affirmed the judgment of the trial court in favor of Brown and other qualified voters.

The Indiana Supreme Court had held previously that the state legislature had the power to enact a law providing for a uniform system of registration of all voters. The appellant-defendants did not content that the legislature did not have the power to enact a registration law but rather that the present act was unconstitutional. They presented several propositions to support their contention that the Permanent Registration Act was unconstitutional, void, and wholly inoperative. The supreme court rejected all of the propositions.

The appellants asserted that since the state legislature had adopted a voter registration law in 1919 pursuant to a constitutional authorization to "provide for the registration of all persons entitled to vote" and subsequently repealed that law in 1927, it was given no further power to enact another registration law, once having exercised the constitutional power, until specially empowered to so by the state constitution. The court recited the general rule that one legislature cannot abridge or control the power of a succeeding legislature; what one legislature may do a succeeding one may do or undo. The appellants contention was not sustained.

The appellants also claimed that a registration statute that makes no provision for the registration of voters who at the time of the election possess the constitutional requirement of voters but are unable to register because of illness or necessary absence on public or private business is unconstitutional. The court noted that there was no provision for the sick and absentee to vote, and in the absence of an absentee voting law no constitutional provision was violated. It is not necessary to provide for the sick and absentees in the registration law either.

The Permanent Registration Act provided for registration during 1934 from January 15th until the 29th day before the primary election and a resumption of registration from May 15th until the 29th day before the general election. Thereafter the registration was to be conducted from the first secular day of each even-numbered year until the 29th day before the ensuing general primary or city primary election with the continuation of registration from the following May 15th until the 29th day before the general or city election. The supreme court found that the time provided for registration was reasonable.

If voters are given a reasonable opportunity to register, they are not in a position to complain that any of their constitutional rights have been violated. Citing Indiana precedent, the court said the legislature has the power to determine what regulations shall be complied with by qualified voters in order that their ballots may be counted so long as the requirement is not so grossly unreasonable that compliance is practically impossible.

In the absence of constitutional inhibition, the legislature may adopt registration laws if they merely regulate in a reasonable and uniform manner how the privilege of voting will be exercised. Registration laws do not impair or abridge the voter's privilege but merely regulate its exercise by requiring evidence of the right. The fact that a qualified voter is prevented from voting because of a failure to comply with a registration law does not invalidate the law if the voter is afforded a reasonable opportunity to register.

Under the state constitution, the legislature is mandated to pass a registration law. It is for the state legislature to fix the regulations and terms of a registration law when enacted and to provide the machinery for ascertaining prior to the election who are legal voters. It is for the legislature to furnish a reasonable regulation under which the right to vote is to be exercised. It is uniformly held that the legislature may adopt registration laws if it merely regulates in a reasonable and uniform manner how the privilege of voting is to be exercised. The Permanent Registration Act does not violation any constitutional provisions.

Commentary

State permanent voter registration laws are a constitutional exercise of state power as long as they regulate in a reasonable and uniform manner how the privilege of voting will be exercised and afford voters a reasonable opportunity to register; however, a dual registration law that treats persons who are registered only for federal elections differently from persons registered for all elections is not reasonable and violates the Equal Protection Clause of the 14th Amendment.

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Kramer v. Union Free School District

395 U.S. 621, 89 S.Ct. 1886, 23 L.Ed.2d 583 (1969)
United States Supreme Court
June 16, 1969

If a state limits voting in an election to resident voters who are primarily interested in or affected by the election, it is a denial of equal protection if the excluded resident voters are not in fact substantially less interested in or affected by the election than the included voters.

The Facts

The plaintiff Kramer was a 31-year-old bachelor who lived in his parents' home in the Union Free School District, did not own or lease any taxable real property in the district, and had no children. Even though he had voted in state and federal elections since 1959, his application to register and vote in the 1965 local school district election was rejected by the school district.

The New York statute under which the school district operated provided that the school board is to be elected at an annual meeting of qualified school district voters. To be qualified to vote at the annual meeting, an otherwise qualified district resident was required to be the owner or lessee of taxable real property in the district, be the spouse of one who owns or leases qualifying property, or be the parent or guardian of a child enrolled for a specified time during the preceding school year in a local district school. Kramer did not qualify under the statutory criteria.

After Kramer's attempts to register and vote were unsuccessful, he instituted a class action in U.S. District Court to challenge the constitutionality of the voter eligibility requirements for school district elections, claiming that the state law governing school district elections denied him equal protection of the laws in violation of the 14th Amendment.

Kramer's request for a 3-judge court was denied and the complaint dismissed. The Court of Appeals reversed, and on remand the 3-judge court ruled that the New York law was constitutional and dismissed Kramer's complaint. Kramer filed a direct appeal with the U.S. Supreme Court.

The Issues

The question for decision was whether the additional requirements of the New York law governing school district elections, by disqualifying otherwise qualified district residents from participating in district meetings and school board elections, violated the Equal Protection Clause of the 14th Amendment.

The Holding and Rationale

Finding that the New York law violated the Equal Protection Clause of the 14th Amendment, the Supreme Court reversed the judgment of the District Court and remanded for further proceedings.

The Court first considered the degree of scrutiny that must be given the challenged statute. It determined that the statute must be given a close and exacting examination. Per *Reynolds v. Sims*, since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized. Close scrutiny of statutes denying the franchise to citizens who are

otherwise qualified by residence or age to vote is required. According to the Court, the need for exacting scrutiny of statutes distributing the franchise is undiminished simply because, under a different statutory scheme for school board selection as is permitted in large city school districts in the state, the offices subject to election might have been filled through appointment. Therefore, if a challenged statute grants the right to vote to some "bona fide" residents of requisite age and citizenship and denies the franchise to others, the Court must determine whether the exclusions are necessary to promote a compelling state interest.

The Court then considered whether the exclusion of otherwise qualified voters under the statute was necessary to promote a compelling state interest. The state argued that it had a legitimate interest in limiting the franchise to persons primarily interested in school board elections and that the state could reasonably and permissibly conclude that property taxpayers, including lessees of taxable property, and parents of children enrolled in district schools are those primarily interested in school affairs.

The Court noted that it was not expressing an opinion as to whether a state in some circumstances might limit the exercise of the franchise to those "primarily interested" or "primarily affected." Even if it is assumed that the state could limit the franchise in school district elections to those "primarily interested in school affairs," close scrutiny of the classifications in the New York statute demonstrates that they do not accomplish this purpose with sufficient precision to justify denying Kramer the franchise. Whether classifications favoring those citizens "primarily interested" deny the excluded equal protection of the laws depends, *inter alia*, on whether all those excluded are in fact substantially less interested or affected than those included by the state. The classifications must be tailored so that the exclusion of Kramer and members of his class is necessary to achieve the articulated state goal.

The New York law does not meet the exacting standard of precision required of statutes that selectively distribute the franchise. The statutory classifications permit inclusion of many persons who have at best a remote and indirect interest in school affairs and exclude others who have a distinct and direct interest in the school meeting decisions. The statutory requirements are not sufficiently tailored to those "primarily interested" in school affairs to justify the denial of the franchise to Kramer and members of his class.

Commentary

Kramer provided the test for subsequent cases involving the exclusion of nontaxpayers in elections on revenue bonds, general obligation bonds, and property tax levies. The relative degree to which included and excluded voters are interested in or affected by the subject-matter of the election is determined, and if the excluded voters are not significantly less interested or affected, the exclusion will be found to be in violation of the Equal Protection Clause of the 14th Amendment.

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Ball v. James

451 U.S. 355, 101 S.Ct. 1811, 68 L.Ed.2d 150 (1981)
United States Supreme Court
April 29, 1981

The "one person, one vote" requirement applies to an election of the governing officials of a government entity that exercises general or important governmental powers, and all qualified resident voters must be permitted to vote in the election; however, where the primary purpose of a government entity is limited or narrow and its functions and activities have a disproportionately greater effect on a specific class of people, the "one person, one vote" requirement does not apply and voting may be limited to the affected class.

The Facts

The Salt River Project Agricultural Improvement and Power District stores, delivers, and conserves untreated water for the benefit of the owners of 236,000 acres of land in central Arizona. The District, which originated in 1903 as a federal reclamation project, was formed as a political subdivision of the state in 1937 in accordance with state legislation authorizing the creation of special public water districts within federal reclamation projects. The District, as well as its predecessor, the Salt River Project, has supported its water operations by generating and selling hydroelectric power and is the second largest utility in the state, serving approximately 240,000 consumers.

Special public water districts are authorized to raise money by levying taxes on real property in the District in proportion to the acreage owned and to sell tax-exempt bonds secured by liens on the real property as well as by District revenues. Voting in elections for the District's board of directors can be limited by the District to regularly qualified voters who own land in the District, and the voting power can be apportioned according to the number of acres owned. A "one acre, one vote" voting scheme was adopted by the District board of directors; however, this acreage-based system was modified in 1969 to permit the voting of fractional votes by the owners of less than one acre of land. At the time the lawsuit was initiated, there were ten District directors, each elected from a designated geographic area of the District. The state legislature subsequently added four at-large positions to the board of directors with each landowner having one vote in the at-large election.

A class of registered voters who lived in the District and owned no land or less than one acre filed a complaint in the U.S. District Court for the District of Arizona seeking declaratory and injunctive relief. The plaintiffs claimed that the acreage-based scheme for electing the District's board of directors violated the Equal Protection Clause of the 14th Amendment. The District Court found the voting scheme to be constitutional and dismissed the complaint on cross-motions for summary judgment upon stipulated facts. The Court of Appeals reversed the District Court, and the defendants appealed to the U.S. Supreme Court.

The Issues

The question presented was whether the purpose of the Salt River water district is sufficiently specialized and narrow and its activities bear on landowners so disportionately as to distinguish the water district and its landownership-based election system from those public entities whose more general governmental functions require the application of the "one person, one vote" principle.

The Holding and Rationale

By a 5-4 decision, the Supreme Court reversed the Court of Appeals and sustained the District Court's holding that the acreage-based voting scheme for electing the board of directors of the Salt River Project Agricultural Improvement and Power District did not violate the Equal Protection Clause of the 14th Amendment.

The Court of Appeals had compared the purposes and effects of the activities of the Salt River district with those of the water storage district in *Salyer Land Co. v. Tulare Lake Basin Water Storage District*, a 1973 case in which the Supreme Court held that the Tulare Lake District, by reason of its special limited purpose and the disproportionate impact of its activities on landowners as a group, was not subject to the "one person, one vote" requirement established in *Reynolds v. Sims*. According to the Supreme Court, the Court of Appeals conceived the question correctly, but reached the wrong conclusion by incorrectly applying the *Salyer* criteria to the facts of the Salt River case.

The *Reynolds* principle applies to elections of governmental officials who exercise general governmental powers over the entire geographic area served by the governmental body or perform important governmental functions that have significant impact on all resident citizens (citing *Avery v. Midland County, Texas* and *Hadley v. Junior College District of Metropolitan Kansas City, Missouri.*

The Court cited several reasons why the Salt River water district situation is comparable to the *Salyer* case. The Salt River District does not exercise the the sort of governmental powers that invoke the *Reynolds* demands, such as the imposition of ad valorem property taxes or sales taxes or the enactment of laws governing the conduct of citizens or the administration of the normal functions of government (e.g., street maintenance). The District's water functions, its primary purpose, are relatively narrow; it simply stores, conserves, and delivers water. The Court did not find it constitutionally significant that approximately 40% of the water delivered was for non-agricultural purposes. The constitutionally relevant fact is that all water delivered is distributed according to land ownership; land owners have an acreage-based entitlement to water stored by the District. The District does not and cannot control the use to which the water is put.

The water districts in California are essentially business enterprises created by and chiefly benefiting a specific group of landowners. These districts have been allowed by the state to become nominal public entities in order to obtain interest-free bond financing. The nominal public character of a water district cannot transform it into the type of governmental body subject to the "one person, one vote" requirement of *Reynolds*.

The existence and size of the District's hydroelectric power business do not affect the legality of the property-based voting scheme. The provision of electricity is not a traditional element of governmental sovereignty and is not in itself the type of general or important governmental function that would make the governmental producer subject to the *Reynolds* rule. The Court noted that the parties had stipulated that the authorized electric-power functions of the District were incidental to and supportive of its water functions.

The Court characterized the relationship between the residents who bought electricity from the District and the District itself as essentially the relation between consumers and a business enterprise from which they buy electrical power. The Court found nothing in prior cases to suggest that the volume of business or the breadth of economic effect of a governmental entity's venture undertaken as an incident to its

narrow and primary governmental public function can alone subject the entity to the "one person, one vote" requirement.

The Salt River District's functions are the narrow, special sort that justify departure from the *Reynolds* rule. As in the *Salyer* case, the effect of the District's operations is disproportionately greater on the landowners than on the residents seeking the right to vote. Only the landowners are subject to liens to secure District bonds and to acreage-based taxes of the District; only the landowners contributed capital to the project. The District's voting scheme bears a reasonable relationship to its statutory objectives; the state could rationally limit the vote to landowners.

Finally, since the number of acres owned is a reasonable reflection of the relative risks incurred by the landowners and the distribution of the benefits and burdens of the District's water operations, the state could rationally weight the landowners' vote on the basis of the acreage owned.

Commentary

In two 1973 cases, *Salyer Land Co. v. Tulare Lake Basin Water Storage District* and *Associated Enterprises, Inc. v. Toltec Watershed Improvement District*, the U.S. Supreme Court determined that there was a rational basis for and upheld the validity of property-based schemes for classifying eligible voters and for weighting the vote in certain special interest elections. These cases recognized an exception to the "one person, one vote" principle of *Reynolds v. Sims* in elections for the creation or selection of governing officials of a public entity which has a special limited purpose, although it may have some typical governmental powers, and whose activities disproportionately affect a definable class (usually real property owners).

Ball involved another special purpose public entity which had a disproportionately greater financial impact on landowners, but one which had authority to generate and sell electricity to support its primary purpose of storing and delivering water for district landowners. The Supreme Court determined that the *Salyer* exception applies irrespective of the existence, size, and economic impact of a function of a special purpose district undertaken as an incident of its narrow, primary public function.

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Holt Civic Club v. City of Tuscaloosa

439 U.S. 60, 99 S.Ct. 383, 58 L.Ed.2d 292 (1978)
United States Supreme Court
November 28, 1978

A state may limit the right to vote in municipal elections to residents of the municipality even if the municipality has extraterritorial police jurisdiction and the exercise of its extraterritorial police powers affects residents and non-residents alike.

The Facts

Alabama statutes provided that the police jurisdiction of Tuscaloosa extended three miles from the city's corporate limits. All residents within the 3-mile fringe were subject to the city's police and sanitary regulations, the criminal jurisdiction of the city's court, and the city's power to license businesses, trades, and professions, but were not permitted to vote in city elections.

The Holt Civic Club, an unincorporated civic association, and seven individual residents of Holt, an unincorporated community within the 3-mile police jurisdiction of Tuscaloosa, brought a statewide class action in the U.S. District Court for the Northern District of Alabama challenging the Alabama statutes. The plaintiffs claimed that the city's extraterritorial exercise of police powers over them without a concomitant extension of the right to vote on an equal footing with city residents violated the Due Process and Equal Protection Clauses of the 14th Amendment and sought to enjoin enforcement of the statutes.

The District Court denied plaintiffs' request for a three-judge court and dismissed the complaint for failure to state a claim for which relief could be granted. On appeal, the Court of Appeals ordered the convening of a three-judge court. The three-judge court then granted the defendants' motion to dismiss, rejecting the plaintiffs' constitutional claims and holding that extraterritorial regulation is not unconstitutional per se as a denial of equal protection as the plaintiffs urged and rejected the plaintiffs due process claim without comment.

The Issues

The question for decision was whether the Alabama statutes giving extraterritorial force to certain municipal ordinances and powers violated the Equal Protection and Due Process Clauses of the U.S. Constitution.

The Holding and Rationale

The Supreme Court, in a 6-3 vote, affirmed the judgment of the District Court and held that Alabama's police jurisdiction statutes do not violate the Equal Protection and Due Process Clauses.

The Court noted that none of its decisions had extended the "one man, one vote" principle to individuals residing beyond the geographic confines of the government entity involved. Prior court cases have recognized that a governmental unit may legitimately restrict the right to participate in its political processes to those who reside within its borders; however, even bona fide residence alone does not automatically confer the right to vote on all matters, for in special interest elections the state can constitutionally exclude residents who lack the required special interest.

The extraterritorial extension of municipal powers does not require concomitant extraterritorial extension of the franchise. The imaginary line defining a city's corporate limits cannot corral the influence of municipal actions. The indirect extraterritorial effects of many purely internal municipal actions may have a heavier impact on the surrounding environs than the direct regulation contemplated by Alabama's police jurisdiction statutes, yet no one would suggest that nonresidents likely to be affected by this sort of municipal action have a constitutional right to participate in the political processes bringing it about. The line marked by the Court's previous voting-qualifications decisions coincides with the geographic boundary of the governmental unit.

The Court determined that the Alabama statutes would be sustainable under the Equal Protection Clause if they bore some rational relationship to a legitimate state purpose. The Court stated that the state legislature has a legitimate interest in seeing that the substantial segment of the population residing in unincorporated communities does not go without basic municipal services, such as police, health, and fire protection, and it is not unreasonable for the legislature to require police jurisdiction residents to contribute through license fees to the expense of the services provided by the city. The police jurisdiction statutes were held to be a rational legislative response to the problems faced by the state's burgeoning cities.

Commentary

The *Holt Civic Club* decision provides that it is constitutionally legitimate for a state to limit the right to vote in general interest elections and to participate in the political processes of a governmental unit to bona fide residents of the governmental unit even though nonresidents are subject to and affected by the regulations and actions of the unit in the same manner and to the same degree as residents. On the other hand, other court decisions have held that a state may permit nonresidents to vote in municipal elections so long as the classification of nonresident voters entitled to vote has a rational relationship to the promotion of a legitimate state interest and those nonresidents to whom the vote is extended are directly affected by the outcome of the election.

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Lloyd v. Babb

296 N.C. 416, 252 S.E.2d 843 (1979)
North Carolina Supreme Court
February 5, 1979

Individuals, including college students, acquire domicile ("residency") for voting purposes at a place if they have abandoned their prior home, have a present intention to make that place their home, and have no intention presently to leave that place.

The Facts

The plaintiffs, all of whom were registered voters in Orange County, North Carolina, filed a complaint in a county superior court asking for relief in the form of a temporary and permanent injunction and writ of mandamus against individual defendants in their official capacity as members of the State Board of Elections or members or election officials of the Orange County Board of Elections. The plaintiffs alleged in essence that the defendants had systematically violated and continued to violate the state election laws by registering as voters students at the University of North Carolina at Chapel Hill who were not actually residents of Orange County. The plaintiffs sought the purging the voting rolls of the county and the reregistration of all voters, an order requiring that all registrars make full inquiry concerning the residency of any student seeking to register, and an order requiring that certain specific questions be asked of each student seeking to register.

After a hearing, the superior court found that large numbers of students had been registered who were not bona fide residents of the county and that the local election board had failed to require students to carry the burden of proving they were bona fide residents. The court ordered the purging from the voting rolls of all students who listed a home address outside the county at the time of their most recent enrollment, ordered the county board to presume that students were domiciled where their parents lived and to require them to rebut the presumption with evidence other than a statement of intention to reside permanently in the county, and required the local election officials to use a specific questionnaire for determining the residency of students. The defendants appealed, and the case was ultimately certified to the state supreme court.

The Issues

The underlying question addressed by the court was whether a student attending college could acquire domicile in the college community if the student intends to remain there only until graduation.

The Holding and Rationale

The state supreme court held that the lower court did not have the authority to order the purging of voter rolls and reregistration of voters in the county and that, in the absence of sufficient evidence to show that the local board had failed to require proof of the domicile of students, the remainder of the lower court's order was invalid. Regarding the underlying issue, the court redefined the criteria for acquisition of domicile to permit students to acquire a domicile in a college community if they have a present intention to make the community their home while attending school and until a new domicile is acquired.

The court held that it was error to order the purging of existing voter registrants. The statutory voter challenge procedure must be followed. This procedure provides for a separate, written challenge of each voter challenged with the burden of proof on the challenger and an opportunity provided to the challenged voter for a hearing before the local election board. The question of residence of a voter is a question of fact that is dependent on the circumstances of each individual case; no one fact is determinative of domicile. Proof of improper registration practices is not proof that voters so registered were not domiciled in the county.

The court then found that the evidence presented at the superior court hearing failed to show sufficiently that the county board had not required students to prove their domicile and as a result held that the remainder of the lower court's order could not stand.

It was contended that the principles governing the registration of student voters as enunciated in the court's earlier decision in *Hall v. Board of Elections*, 280 N.C. 600, 187 S.E.2d 52 (1972), were in conflict with the Equal Protection Clause of the U.S. Constitution. The *Hall* principles were (1) a student's residence for voting purposes is a question of fact dependent upon the circumstances of each individual case, (2) domicile may be proved by both direct and circumstantial evidence, (3) there is a rebuttable presumption that a student who leaves his parents' home to go to college is not domiciled in the place where the college is located, and (4) an adult student may acquire a domicile in the place where his college is located if he regards that place as his home and intends to remain their indefinitely. U.S. Supreme Court cases and other persuasive authorities impelled the court to modify the *Hall* principles by holding that a student who intends to remain in his college community only until graduation should not for that reason alone be denied the right to vote.

The court concluded that the U.S. Supreme Court decisions in *Carrington v. Rash*, *Kramer v. Union Free School District*, and *Dunn v. Blumstein* established four basic propositions: (1) any state law that tends to affect the right to vote by way of making classifications must be scrutinized for conformity with the Equal Protection Clause, (2) state laws that have the effect of denying certain classes the right to vote must have a compelling justification, (3) appropriately defined and uniformly applied bona fide residence requirements are permissible, and (4) otherwise eligible persons who reside in a community and are subject to its laws must be permitted to vote there even though their interests may differ from the majority of the community's residents.

The evidentiary inquiry endorsed by *Hall*, i.e., the principle that domicile can be proved by various kinds of direct and circumstantial evidence, is not an unjustifiable intrusion into the private affairs of students. Since the state has the power to require that voters be bona fide residents, a corollary must be that the state has authority to determine whether a person is a bona fide resident. The state is not constitutionally required to be bound by a would-be resident's declaration of residency alone.

The court also rejected what it characterized as the defendants' strongest argument: it is impermissible to make inquiries of students that are not routinely made of other would-be registrants. The U.S. Supreme Court in *Carrington* and *Dunn* made it clear that a state could classify persons as residents and nonresidents and forbid nonresidents from voting. The court noted that the issue did not involve the deprivation of the right to vote of one who is or could be determined to be a resident, but rather with the methods of making the classification of residents and nonresidents. The methods should be upheld if they are reasonable, not whether they serve a compelling state interest.

There is nothing improper in making special inquiries of students as to their domicile (citing *Dyer v. Huff*). By the nature of the activities they are engaged in, students are a transient group, their characteristics as individuals make them, as a group, a problem for election officials, and they are a markedly mobile group of sufficient numbers to have a decisive impact on elections. These factors make it reasonable for election officials to inquire of students more thoroughly than of other persons. An additional screening procedure, such as the use of a questionnaire for students, is a permissible attempt to determine who are the members of the relevant community.

There is no denial of equal protection in the use of a rebuttable presumption that a student who leaves his parents' home to go to college is not domiciled in the place where the college is located. The rebuttable presumption does not treat students differently from the rest of the population; it is merely a specialized statement of the general rule that the burden of proof is on one alleging a change of domicile.

The *Hall* decision indicated that if a student goes to college merely as a student, intending to remain there only until his education is completed and does not change his intention, he does not acquire a new domicile. The court indicated that this statement should not be interpreted to mean that a student must intend to stay in college not only until he graduates but also for some indefinite time beyond that date. The court reinterpreted and in effect modified the *Hall* "intention" rule: So long as a student intends to make his home in the community where he is physically present for the purpose of attending school and has no intent to return to his former home after graduation, he may claim the college community as his domicile. He need not intend to stay in the college community beyond graduation in order to establish his domicile there.

The requisites for domicile are legal capacity, physical presence, and intent to acquire domicile. An intent to acquire domicile requires both an intent to abandon one's prior domicile and an intent to remain at the new domicile. Abandonment of one's prior domicile and adoption of a new domicile may be shown by both declarations of the registrant and objective facts, which should be obtained by appropriate inquiries. The statement of intent to remain, according to *Hall*, must be an intent to remain "indefinitely."

The term "indefinitely" has many meanings. The meaning applied in *Hall* suggests that indefinitely does not include an intent or plan to leave at the happening of some specified future event, such as graduation. Other courts have been satisfied that there is an intent to stay indefinitely if there is simply no intention to leave presently. The court here was convinced that the latter definition is routinely applied to nonstudent voter applicants who intend to leave the community upon the occurrence of a future event, such as a promotion, that is no more or less certain than "graduation" or a student's post-graduation plans. Nonstudents, however, are not asked about their future plans, as students are, and are routinely registered. The result cannot help but be discriminatory even if the intent is otherwise.

The court cited with approval the decisions of courts in other states that interpreted their state's law of domicile to permit students to claim their college community as their domicile even though they intended to remain only until graduation, as well as the rule stated in the *Restatement 2nd, Conflict of Laws*: "To acquire domicile of choice in a place, a person must intend to make that place his home for the time at least." These cases and the *Restatement* require that in order to establish a new domicile in a place, a person must have abandoned his prior home and have a "present intention" to make that place his new home. A plan to leave upon the happening of a future event does not preclude one from acquiring domicile. The court found this approach to be constitutionally required.

As a result, the court announced a new rule for determining whether domicile for voting purposes has been acquired. A person acquires domicile at a place if he has abandoned his prior home, has a present intention to make that place his home, and has no intention presently to leave that place.

This rule as it is applied to students is as follows: A student is entitled to register to vote at the place where he is attending school if he can show by his declarations and by objective facts that he has abandoned his prior home, has a present intention of making the place where he is attending school his home, and intends to remain in the college town at least as long as he is a student there and until he acquires a new domicile. A registrar should make an inquiry more searching and extensive than is necessary with respect to other residents in order to determine whether in fact a student has abandoned his prior home and presently intends to remain in the college town at least as long as he is a student there.

Commentary

The *Lloyd* case is representative of the trend of cases liberalizing the "intention to remain" element of the test for domicile ("residency") by abandoning the test requiring an intent to remain "permanently" or "indefinitely" and accepting the *Restatement 2nd, Conflict of Laws*, criteria that require an intent to remain "for the time at least," a present intention to make a home at a place. The *Restatement* present intention test has not been universally adopted; tests for determining domicile vary among the states.

The *Lloyd* court's determination that a rebuttable presumption against acquisition of domicile by a student in a college community is valid is probably the minority position even though the court characterized the presumption as simply a specialized statement of the rule that the burden of proving domicile and eligibility to vote is on the applicant for registration and voting. Several courts have invalidated rebuttable-presumption laws on equal-protection and age-discrimination grounds. Irrebutable presumptions against student acquisition of a college-community domicile are certainly invalid.

The court's endorsement of a more searching inquiry of students as to their domicile and eligibility to vote as a reasonable method for ensuring that voting applicants are bona fide residents appears to be the predominant view; however, there is great divergence among courts as to the constitutionality of voter registration procedures that target students and other so-called transient populations for greater scrutiny. Some courts have found that registration screening procedures that focus on students violate equal-protection or age-discrimination rights. Other courts have upheld methods for confirming residency that have the result of subjecting students to a more searching inquiry only if they are part of a nondiscriminatory, uniform procedure applied to all voting applicants.

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Dunn v. Blumstein

405 U.S. 330, 92 S.Ct. 995, 31 L.Ed.2d 274 (1972)
United States Supreme Court
March 21, 1972

Durational residence requirements of 90 days or longer are not necessary to further a compelling state interest and are invalid; 30 days is ample time for completion of the administrative tasks necessary to confirm residence and prevent fraud.

The Facts

Blumstein moved to Tennessee in June 1970 to begin employment at Vanderbilt University in Nashville. With the intention of voting in the upcoming August and November elections, he attempted to register on July 1st, but the county registrar refused to register him because he had not met the state's durational residency requirements. Tennessee law permitted the registration of only those persons who at the time of the next election will have been residents of the state for one year and of the county for three months.

Blumstein exhausted state administrative remedies without success and then brought a class action for declaratory and injunctive relief in U.S. District Court challenging the Tennessee law on constitutional grounds. A 3-judge court agreed with Blumstein and held that the state durational residence requirements were unconstitutional. The governor, Winfield Dunn, and other defendants appealed to the Supreme Court.

The Issues

The issue presented was whether the Tennessee law, which required as a voter qualification not only residency in the state but residency for a minimum duration, impermissibly discriminated between old residents and new residents and therefore violated the Equal Protection Clause of the 14th Amendment.

The Holding and Rationale

The Supreme Court affirmed the judgment of the District Court in favor of Blumstein, finding that the state had not offered an adequate justification for it durational residence law and that consequently the Tennessee law violated the Equal Protection Clause.

The Court indicated that in deciding an equal protection case it will look to three things: (1) the character of the classification in question, (2) the individual interests affected by the classification, and (3) the governmental interest asserted in support of the classification.

The effect of the durational residency requirement is to completely bar from voting all residents not meeting the fixed durational standards and thereby deprive them of a fundamental political right. Citizens have a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction. This "equal right to vote," however, is not absolute. The states have the right to impose voter qualifications and regulate access to the franchise in other ways. Where the right to vote is granted to some citizens and denied to others, the exclusions must be necessary to promote a compelling state interest.

The durational residence requirement also directly impinges on the exercise of another fundamental personal right, the right of travel, which has long been recognized

as a basic right under the Constitution. Durational residence laws single out a class of "bona fide" residents who have recently exercised their right to travel and penalize them directly. It must be clearly shown that the burden imposed on the constitutional right of interstate migration is necessary to protect a compelling and substantial state interest.

The Court concluded that, whether it looked to the benefit withheld by the classification (the opportunity to vote) or the basis for the classification (recent interstate travel), the state must show a substantial and compelling reason for imposing the requirements. Durational residence laws must be measured by a strict equal protection test: they are unconstitutional unless the state can demonstrate that such laws are necessary to promote a compelling government interest.

The "compelling government interest" test, however, does not have the precision of a mathematical formula. The key words of the test ("necessary" and "compelling") emphasize a matter of degree--that a heavy burden of justification is on the state and that the statute will be closely scrutinized in light of its asserted purposes. Furtherance of a substantial state interest is not enough. The means chosen cannot unnecessarily burden or restrict constitutionally protected activity. Statutes affecting constitutional rights must be drawn with precision and be tailored to serve their legitimate objectives. If there are alternative, reasonable ways to achieve legitimate goals with a lesser burden on constitutionally protected activity, the state must choose the less drastic means.

The Court observed that it had noted approvingly in the past that the states have the power to require that voters to be "bona fide" residents of the relevant political subdivision and that an appropriately defined and uniformly applied requirement of "bona fide" residence could withstand close constitutional scrutiny. Durational residence requirements, as a separate voting qualification imposed on "bona fide" residents, must be tested separately by the stringent standard of review.

The Court thought it worth noting that in the Voting Rights Act Amendments of 1970 Congress had outlawed state durational residence requirements for presidential and vice-presidential elections and prohibited states from closing registration more than 30 days before such elections. Congress made a specific finding that those requirements do not bear a reasonable relationship to any compelling state interest in the conduct of presidential elections. The Voting Rights Act amendments had been upheld in *Oregon v. Mitchell*.

Tennessee asserted that its law served the basic purposes of preserving the purity of the ballot box by preventing fraud and having knowledgeable voters. The Court acknowledged that these were legitimate and compelling state goals. The Court determined that the 1-year and 90-day durational requirements were not necessary to achieve the fraud-prevention goal. Thirty days for preelection residence, which is the statutory cutoff point for registration prior to an election, appears to be an ample period of time for the state to complete whatever administrative tasks are necessary to confirm residence on an individualized basis and prevent fraud. One year or three months are too much.

The Court also concluded that there was simply too attenuated a relationship between the state interest in an informed electorate and the fixed requirement for the one-year and 90-day residency requirements. If the state seeks to assure intelligent use of the ballot, it may not serve this interest only with respect to new arrivals. Given the exacting standard of precision required of statutes affecting constitutional rights, the Court could not say that the durational residence requirements are necessary to further a compelling state interest.

Commentary

In *Dunn*, the Supreme Court appeared to have set a constitutional limit of 30 days for durational residence as a precondition for voting in congressional, state, and local elections, which is the maximum length of preelection residence that, in effect, is permitted in presidential elections by the Voting Rights Act of 1965, Sec. 202. The Court, however, subsequently approved a durational limit of more than 30 days. In *Marston v. Lewis* and *Burns v. Fortson*,, it found that the 50-day durational residency requirements in Arizona and Georgia had been shown to be necessary to promote compelling state interests.

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Harper v. Virginia State Board of Elections

383 U.S. 663, 86 S.Ct. 1079, 16 L.Ed.2d 169 (1966)
United States Supreme Court
March 24, 1966

Payment of a poll tax or other tax or fee cannot be required as a precondition for voting in state and local elections.

The Facts

A Virginia statute made the payment of poll taxes a prerequisite for voting in state elections. The poll taxes were required to be paid at least six months prior to the election in which the voter seeks to vote. State residents sued in U.S. District Court to have the poll tax declared unconstitutional.

The District Court followed the Supreme Court's previous decision in *Breedlove v. Suttles*, 302 U.S. 277, 58 S.Ct. 205, 82 L.Ed. 252, and dismissed the complaint. The plaintiffs appealed.

The Issues

The single issue was whether the requirement of payment of a poll tax as a precondition for voting in a state election violated the Equal Protection Clause of the 14th Amendment.

The Holding and Rationale

The Supreme Court reversed the District Court and overruled the *Breedlove* decision as it applied to the payment of poll taxes as a precondition for voting in state elections. The Court concluded that a state violates the Equal Protection Clause whenever it makes the affluence of the voter or payment of any fee an electoral standard.

According to the Court, the right to vote in federal elections is conferred by the Constitution (Article I, Sec. 2), but the right to vote in state elections is nowhere expressly mentioned; however, once the franchise is granted to the electorate, lines may not be drawn that are inconsistent with the Equal Protection Clause of the 14th Amendment. Per *Lassiter v. Northampton County Board of Elections*, the right of suffrage is subject to the imposition of state standards that are not discriminatory and do not contravene any restriction that Congress pursuant to its constitutional powers has imposed.

The literacy test in *Lassiter* had some relation to standards designed to promote intelligent use of the ballot, but a poll tax does not. Wealth, like race, creed, or color, is not germane to one's ability to participate intelligently in the electoral process. Voter qualifications have no relation to wealth nor to paying or not paying a poll tax or any other tax.

The Equal Protection Clause restrains states from fixing voter qualifications that invidiously discriminate, and the requirement of paying a fee as a condition of obtaining a ballot causes an invidious discrimination that runs afoul of the Equal Protection Clause. Where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications that might invade or restrain them must be closely scrutinized and carefully confined. Those principles apply to the poll tax as a prerequisite for voting. The right to vote is too precious and too fundamental to be so burdened.

Commentary

The payment of poll taxes as a precondition for voting would appear now to be a settled issue. The 24th Amendment prohibits the payment of a poll tax or any other tax in order to vote in a federal election. *Harman v. Forssenius* held that the prescription of an equivalent to, or milder substitute for, the poll tax, such as the filing of a certificate of registration, was banned by the 24th Amendment. *Harper* prohibits a poll tax requirement in state elections. The Voting Rights Act of 1965, Sec. 10 (42 U.S.C. Sec. 1973h) directs the U.S Attorney General to seek a declaratory judgment or injunctive relief against any state or political subdivision that enforces any requirement for the payment of a poll tax or substitute for the poll tax as a precondition for voting.

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Gaunt v. Brown

341 F.Supp. 1187
affirmed, 409 U.S. 809, 93 S.Ct. 69, 34 L.Ed.2d 71 (1972)
U.S. District Court for the Southern District of Ohio, W.D.
April 6, 1972

A state may prescribe an age limit as a qualification for voting at any election, including a primary election, so long as the right of an otherwise qualified voter 18 years of age or older is not denied or abridged on account of age.

The Facts

The constitutionality of an Ohio statute limiting the right to vote at a primary election to qualified electors who are 18 years of age or older was challenged in a U.S. District Court by 17-year-olds who would be 18 at the time of the general election following the primary in which they sought to vote.

The plaintiffs contested the right of the state to keep them from voting in the primary and thus having a voice in the selection of candidates for whom they may vote later at the general election and filed a motion for temporary and permanent injunction. They asserted that the denial of the right to participate in the earlier stages of the election in which they will be qualified to vote is a denial of equal protection under the 14th Amendment.

The Issues

The issue, as the court saw it, was: Do eighteen-year-olds, as a matter of equal protection of the laws, have the right to participate in the primary in which the candidates they may vote for at the general election are selected or, in other words, can a state deny a soon-to-be-18-year-old the right to vote in the connected primary?

The Holding and Rationale

The District Court denied the motion for a temporary and permanent injunction. Eighteen-year-olds do not have the right under the Equal Protection Clause of the 14th Amendment to participate in the primary in which the candidates they may vote for at the general election are selected.

According to the court, a state has the right to limit the right of soon-to-be-18-year-olds to vote in primaries under Article I, Sec. 2, of the Constitution and the 10th Amendment. States still have the power over voting qualifications except as it has been limited by the 15th, 19th, 24th, and 26th Amendments. The 26th Amendment does not grant the right to vote to 18-year-olds and was not intended to. It simply bans age qualifications above 18.

The court adopted the statement of Professor Charles Alan Wright to the effect that an age limit on voting necessarily must be arbitrary. It is a problem of "line drawing," and the clear meaning of the Constitution is that these lines are for the states to draw. In setting a minimum age limit within constitutional limits, a state is simply exercising the power reserved to it and is immune from the impact of the Equal Protection Clause. There are no cases that hold or even indicate that a state may not properly establish minimum age qualifications of voters.

Where a state is called on to justify its drawing the line for qualifications at 18 years of age, no test is required, but if one is required, it should be that of reasonableness rather than the more strict test of showing a compelling state interest.

Commentary

The right of voters 18 and older to vote in both federal and state elections was granted in the Voting Rights Act Amendments of 1970, which added Sec. 301 to the Voting Rights Act of 1965. The Sec. 301 authorization for 18-year-old voting in state and local elections was invalidated in *Oregon v. Mitchell*, 400 U.S. 112, 91 S.Ct. 260, 27 L.Ed.2d 272 (1970). The 26th Amendment, which effectively restored the right of voters 18 and older to vote in state and local elections, as well as federal elections, was ratified in 1971. The *Gaunt* case clarified the reach of the 26th Amendment and the authority of the states to set age-based voting qualifications. The states have the power, subject to state constitutional constraints, to deny the right to vote in any election to any individual who has not attained the age of 18 by election day.

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Richardson v. Ramirez

418 U.S. 24, 94 S.Ct. 2655, 41 L.Ed.2d 551 (1974)
United States Supreme Court
June 14, 1974

A state may disfranchise convicted felons who have completed their sentences and paroles.

The Facts

Ramirez, Lee, and Gill had been convicted of one or more felonies, served time in prison or jail, and successfully completed their paroles. Ramirez was convicted in Texas, Lee and Gill in California. All three had applied to register to vote in California and were refused registration by the voter registrar of the county where they resided.

The California constitution disfranchised persons convicted of infamous crimes, as well as embezzlement or misappropriation of public money, and required laws to be made to exclude from voting persons convicted of bribery, perjury, forgery, malfeasance in office, or other high crimes. The state election code prohibited the registration of and voting by persons convicted of disqualifying felonies. State law also provided for the restoration of the franchise to persons convicted of crime by court order after completion of probation or by executive pardon after completion of probation and rehabilitation proceedings.

The three ex-felons, on behalf of themselves and others similarly situated, filed a petition for a writ of mandate in the state supreme court to compel county election officials to register them to vote and named as defendants the three registrars who refused them registration, as well as the secretary of state, individually and as representatives of the class of all other voter registrars in the state. The petitioners challenged the constitutionality of their exclusion from the voting rolls on the grounds that (1) there was no compelling state interest that justified California's denial of the franchise to ex-felons and the denial therefore violated the Equal Protection Clause of the 14th Amendment and (2) the lack of uniformity throughout the state in the application of the constitutional and statutory provisions regarding the disfranchisement of those convicted of an "infamous crime."

The state supreme court held that the state constitutional and statutory provisions disfranchising persons convicted of an infamous crime denied the right of suffrage to ex-felons whose terms of incarceration and parole had expired in violation of the Equal Protection Clause and issued an alternative writ of mandate directing the county registrars to register the three petitioners and other similarly situated ex-felons. The U.S. Supreme Court granted certiorari upon petition by Richardson, a county clerk.

The Issues

The issue presented was whether it was a denial of equal protection for a state to disfranchise convicted felons who have completed their sentences and paroles.

The Holding and Rationale

The Supreme Court reversed and remanded the case for further proceedings not inconsistent with its opinion. The state supreme court erred in concluding that California could no longer, consistent with the Equal Protection Clause, exclude from the franchise convicted felons who have completed their sentences and paroles.

The Supreme was persuaded by and accepted the petitioner's argument that the framers of the 14th Amendment could not have intended to prohibit the disfranchisement of ex-felons as a denial of the equal protection of the laws under Section 1 of the Amendment when in the less-familiar Section 2 of the Amendment they had expressly exempted such disfranchisement from the sanction of reduced congressional representation imposed against a state when the right to vote is denied at any election.

Section 2 of the 14th Amendment provides:

> Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each State, ... But when the right to vote . . . is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, "except for participation in rebellion, or other crime", the basis of representation therein shall be reduced in proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

The Court held that the understanding of those who adopted the 14th Amendment, as reflected in the express language of Section 2 and in the "settled" historical and judicial understanding of the Amendment's applicability to state laws disfranchising felons, is of controlling significance in distinguishing such laws from other state limitations which have been held invalid under the Equal Protection Clause. The Court looked to the "scant" legislative history bearing on the meaning of Section 2, the Reconstruction Act requirements for readmission of the former Confederate states (persons convicted of common law felonies could be denied the right to vote for delegates to a state constitutional convention) and the congressional enabling acts readmitting those states, the fact that 29 states had constitutional provisions disfranchising felons at the time the 14th Amendment was adopted, and prior Supreme Court decisions indicating approval of felon disfranchisement either in dicta or summary affirmations of decisions rejecting constitutional challenges to felon disfranchisement.

According to the Court, Section 1 of the 14th Amendment, in dealing with voting rights as it does, could not have meant to bar outright a form of disfranchisement that was expressly exempted from the less drastic sanction of reduced representation that Section 2 imposed for other forms of disfranchisement.

Commentary

The *Richardson* case stands for the proposition that state disfranchisement of felons, whether incarcerated or not, does not violate the U.S. Constitution; however, it does not resolve the question whether a state's own constitution will permit such disfranchisement. Subsequent cases have held that the states may not only disfranchise felons without offending the Constitution, but may selectively disfranchise or reenfranchise convicted felons as long as the classification scheme used has a rational relationship to the achievement of a legitimate state interest. A state may not, however, disfranchise persons convicted of a crime if the purpose is to discriminate against blacks and the disfranchising law disproportionately affects blacks.

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Kusper v. Pontikes

414 U.S. 51, 94 S.Ct. 303, 38 L.Ed.2d 260 (1973)
United States Supreme Court
November 19, 1973

Where affiliation with a political party is required as a condition for voting in the party's primary, the deadline for changing party affiliation to another party in order to vote in its primary may not be so early as to require a voter to forgo voting in a primary as a result of the change.

The Facts

Pontikes was a qualified Chicago voter who voted in the February 1971 Republican primary and wanted to vote in the March 1972 Democratic primary, but was barred by the Illinois election code from doing so. The election code prohibited voting in the primary election of a political party if a person had voted in the primary of any other party within the preceding 23 months.

Pontikes filed a complaint in the U.S. District Court for declaratory and injunctive relief against the members of the Chicago Board of Election Commissioners, alleging the statute unconstitutionally abridged her freedom to associate with the political party of her choice by depriving her of the opportunity to vote in the Democratic primary. A three-judge court held that the 23-month rule was unconstitutional. The defendants appealed directly to the U.S. Supreme Court.

The Issues

The question addressed was whether the 23-month rule prevented voters from exercising their constitutional freedom to associate with the political party of their choice.

The Holding and Rationale

The Supreme Court, by a 7-2 vote, ruled in favor of Pontikes and affirmed the District Court judgment. The Illinois statute unconstitutionally infringes upon the right of free political association protected by the 1st and 14th Amendments.

The Court noted that while the states are largely entrusted by the Constitution with the administration of the electoral process, unduly restrictive state election laws may so impinge upon freedom of association as to run afoul of the 1st and 14th Amendments.

The Illinois statute substantially restricts a state voter's freedom to change his political party affiliation. A voter must wait nearly two years before a change in party registration is given effect and is forced to forgo participation in any primary occurring during the 23-month waiting period. The effect is to "lock" the voter into his preexisting party affiliation for a substantial period of time following participation in a primary, and each succeeding primary vote extends this period of confinement for another 23 months. By preventing Pontikes from participating at all in Democratic primary elections during the statutory period, the statute deprived her of any voice in choosing the party's candidates and thus substantially abridged her ability to associate effectively with the party of her choice.

Significant encroachments upon associational freedom cannot be justified upon a mere showing of a legitimate state interest. Even when pursuing a legitimate interest,

a state may not choose means that unnecessarily restrict constitutionally protected liberty. If a less drastic way of satisfying a legitimate interest exists, a state may not choose a legislative scheme that broadly stifles the exercise of fundamental personal liberties.

The defendants asserted that the 23-month rule prevented "raiding," the practice by which voters in sympathy with one party vote in another party's primary in order to distort that primary's results, and cited *Rosario v. Rockefeller* as a case in which the Supreme Court had recognized the state's interest in preventing raiding. The Court acknowledged that a state may have a legitimate interest in seeking to curtail raiding, but noted that there were a number of important differences between the New York law in *Rosario* and the Illinois statute.

In *Rosario*, New York's delayed-enrollment statute was upheld. That law required a voter to enroll in the party of his choice at least 30 days before a general election in order to be eligible to vote in the next party primary. The law in effect prevented any change in party affiliation during the eleven months between the deadline and the primary election. The New York statute, however, did not prevent voters from participating in the party primary of their choice; it merely imposed a time limit on enrollment. A New York voter who wanted to vote in a different party primary was not precluded from doing so as long as party allegiance was declared at least 30 days before the preceding general election. The delayed-enrollmment law, the *Rosario* court concluded, did not prevent voters from associating with the political party of their choice.

The Illinois law, on the other hand, locks voters into a preexisting party affiliation from one primary to the next, and the only way to break the lock is to forgo voting in any primary for almost two years. There was nothing that Pontikes could do to make herself eligible for the Democratic primary. The Illinois scheme does prevent voters from exercising their constitutional freedom to associate with the political party of their choice.

The legitimate state interest in preventing raiding cannot justify the device chosen to effect the goal. That device conspicously infringes upon basic constitutional liberty. As demonstrated in *Rosario*, the prevention of raiding can be achieved by less drastic means without burdening the exercise of constitutionally protected activity.

Commentary

The *Rosario*, *Pontikes*, and *Tashjian* decisions of the U.S. Supreme Court recognize the authority of a state to require affiliation with a political party as a precondition for voting in the party's primary, subject to the party's prerogative of extending, by party rule, the opportunity to participate in its primary to unaffiliated or independent voters. The cutoff date for changing party affiliation to another party in order to vote in its primary must fall after the preceding primary election.

Selected Case Summaries

Affeldt v. Whitcomb,
319 F.Supp. 69 (N.D.Ind. 1970), *aff'd*, 405 U.S. 1034, 92 S.Ct. 1304, 31 L.Ed.2d 576 (1972).

Indiana's 6-month durational residence requirement to vote is not supported by a compelling state interest; it infringes the fundamental right of new residents to vote and constitutes a violation of the Equal Protection Clause of the 14th Amendment.

Anderson v. Brown,
332 F.Supp. 1195 (S.D.Ohio 1971).

It is a violation of the Equal Protection Clause of the 14th Amendment for a state to apply different voter qualifications to students as a class and to all other persons over 18 as a class.

Associated Enterprises, Inc. v. Toltec Watershed Improvement District,
410 U.S. 743, 93 S.Ct. 1237, 35 L.Ed.2d 675 (1973).

A Wyoming statute authorizing a referendum for the creation of a watershed improvement district was challenged. The statute permitted only landowners to vote and weighted the vote according to acreage. A majority of the votes cast, representing a majority of the acreage in the district, in favor of the formation of the district was required. A watershed district is a governmental unit of special or limited purpose whose activities have a disproportionate effect on landowners within the district. The district's operations are conducted through projects, and the land is assessed for any benefits received. These assessments constitute a lien on the land until paid. The court held, as in *Salyer Land Co. v. Tulare Lake Basin Water Storage District*, 410 U.S. 710, 93 S.Ct. 1224, 35 L.Ed.2d 659 (1973), that the state could rationally conclude that landowners are primarily burdened and benefited by the establishment and operation of watershed districts and that it may condition the vote accordingly without violating the Equal Protection Clause of the 14th Amendment.

Attorney General of the Territory of Guam v. United States,
738 F.2d 1017 (9th Cir. 1984).

The right to vote in presidential elections under Article II of the Constitution inheres not in citizens but in states. Citizens vote indirectly for the President by voting for state electors. Since Guam is not a state, it can have no electors, and U.S. citizens residing in Guam cannot exercise individual votes in presidential elections. The 23rd Amendment solved this problem in regard to U.S. citizens residing in the District of Columbia by providing for the appointment of presidential electors for the District.

Auerbach v. Rettaliata,
765 F.2d 350 (2nd Cir. 1985).

A requirement that groups likely to include transients (such as students) must show something in addition to physical presence in the community in order to meet a neutral test of residence for the purpose of voting comports with the element of "necessity" in the strict scrutiny test and therefore does not deny equal protection.

Avery v. Midland County, Texas,
390 U.S. 474, 88 S.Ct. 1114, 20 L.Ed.2d 45 (1968).

The Equal Protection Clause of the 14th Amendment permits no substantial variation from equal population in drawing districts for local units of government having general governmental powers over the entire geographic area served by the body. The "one person, one vote" principle of *Reynolds v. Sims* applies to local units of government with "general responsibility and power for local affairs" or "authority to make a substantial number of decisions that affect all citizens."

Ballas v. Symm,
494 F.2d 1167 (5th Cir. 1974).

The use of a questionnaire by a voter registrar to elicit information pertaining to the residence of college students is not invidious discrimination and a violation of the 14th Amendment where the registrar requires completion of the questionnaire by those voter applicants whom the registrar does not know and cannot verify to be residents through alternative means. The procedure does not violate the Civil Rights Act (42 U.S.C. § 1971(a)(2)(A) prohibition against the use of differential voting standards, practices, or procedures since the registrar employed a uniform 3-step procedure for determining residency.

Beare v. Briscoe,
498 F.2d 244 (5th Cir. 1974).

Texas' constitutional and statutory provisions that required annual voter registration during a restricted 4-month period (October 1 to January 31) and thereby rendered it impossible for a substantial percentage of otherwise qualified voters to register violate the 14th Amendment's guaranty of equal protection where no compelling state interest is shown to justify the mass disfranchisement.

Bright v. Baesler,
336 F.Supp. 527 (E.D.Ky. 1971).

Additional or special criteria for proof of domicile may not be imposed upon university students. Students cannot be required to meet more stringent criteria than other voter registration applicants. A voter registrar may ask each applicant a series of questions directed at proving domicile, but each applicant should be asked the same questions and the questions should reasonably related to proof of domicile. Imposition of an extra burden of proof of domicile upon students does not serve a compelling state interest and violates the Equal Protection Clause of the 14th Amendment. Under Kentucky law, domicile is established by showing that the former domicile has been abandoned and no intention of returning to it exists. The intention required is the intention to live indefinitely at the claimed domicile.

Burns v. Fortson,
410 U.S. 686, 93 S.Ct. 1209, 35 L.Ed.2d 633 (1973).

A Georgia statute required registrars to close their voter registration books 50 days prior to the November general elections, except for persons seeking to register to vote for President or Vice President. The District Court concluded that the state had demonstrated that the 50-day period was necessary to promote the orderly, accurate, and efficient administration of state and local elections, free from fraud. The Supreme Court agreed, stating that *Marston v. Lewis* applied to this case, although the 50-day registration period approached the outer constitutional limits in this area.

Carrington v. Rash,
380 U.S. 89, 85 S.Ct. 775, 13 L.Ed.2d 675 (1965).

The Texas constitution prohibited any member of the U.S. Armed Forces who moved the member's home to Texas during the course of the member's military duty from ever voting in the state while serving in the Armed Forces. By forbidding a soldier ever to controvert the presumption of nonresidence, the state constitution imposes an invidious discrimination in violation of the Equal Protection Clause of the 14th Amendment. Occupation is not a permissible basis for distinguishing between qualified voters in a state. A state has the right to require that all military personnel enrolled to vote be "bona fide" residents of the community, but if they are in fact residents with the intention of making the state their home, they, as all other qualified residents, have a right to an equal opportunity for political representation. "Fencing out" from the franchise a section of the population because of the way it may vote is constitutionally impermissible. A state may not casually deprive a class of individuals of the vote because of some remote administrative benefit to the state.

Cipriano v. Houma,
395 U.S. 701, 89 S.Ct. 1897, 23 L.Ed.2d 647 (1969).

A Louisiana law gave only property taxpayers the right to vote in elections called to approve the issuance of revenue bonds by a municipal utility, and an election was held pursuant to the law in a city where the 60% of the registered voters who were not property taxpayers were excluded. Citing its decision in *Kramer v. Union Free School District*, the court found that the challenged provisions violated the Equal Protection Clause of the 14th Amendment. Per *Kramer*, if a challenged state statute grants the right to vote in a limited-purpose election to some otherwise qualified voters and denies it to others, the exclusions must be necessary to promote a compelling state interest. Moreover, no less showing that the exclusions are necessary to promote a compelling state interest is required merely because the questions scheduled for the election need not have been submitted to the voters. Whether the statute denies equal protection of the laws to those otherwise excluded voters depends on whether all those excluded are in fact substantially less interested or affected that those the statute includes. In this case, the revenue bonds are to be paid only from the operations of the utilities, and both property owners and nonproperty owners use the utilities and pay the rates. The benefits and burdens of the bond issue fall indiscriminately on property owner and non-property owner alike; both are substantially affected by the utility operations. The challenged statute contains a classification that excludes otherwise qualified voters who are as substantially affected and directly interested in the matter voted upon as are those who are permitted to vote. When, as in this case, the state's sole justification for the statute is that the classification provides a "rational basis" for limiting the franchise to those voters with a special interest, the statute clearly does not meet the exacting standard of precision required of statutes that selectively distribute the franchise. The court applied its decision in the case prospectively because it could produce substantial inequitable results if applied retroactively.

City of Phoenix, Arizona v. Kolodziejski,
399 U.S. 204, 90 S.Ct. 1990, 26 L.Ed.2d523 (1970).

An Arizona statute restricting to real property owners the vote in elections to approve the issuance of general obligation bonds was challenged. An election authorizing the issuance of general obligation bonds was held in Phoenix, and a majority of the real property owners voting approved the bond issues. The U.S. District Court did not perceive any significant difference between revenue bonds and general obligation bonds and therefore held that the exclusion of non-property-owning voters from the election on the general obligation bonds was unconstitutional under *Cipriano* and

Kramer. The Supreme Court affirmed the district court's judgment, holding that the challenged provisions violate the Equal Protection Clause of the Constitution. Presumptively, when all citizens are affected in important ways by a governmental decision subject to a referendum, the Constitution does not permit weighted voting or the exclusion of otherwise qualified citizens from the franchise. Property and non-property owners alike have a substantial interest in the public facilities and services available in the city and will be substantially affected by the ultimate outcome of the bond election. The non-property owners will contribute, as directly as property owners, to the servicing of the bonds by the payment of taxes to be used for that purpose. Even where general obligation bonds are serviced by property tax revenues, the lessees of dwelling units pay an increase in property tax passed on by landlords in the form of higher rent. Although owners of real property have interests somewhat different from the interests of non-property owners in the issuance of general obligation bonds, there is no basis for concluding that non-property owners are substantially less interested in the issuance of such securities than are property owners.

Collier v. Menzel,
176 Cal.App.3d 24, 221 Cal.Rptr. 110 (Cal.App.Ct 2nd Dist. 1985).

Three homeless, indigent citizens of Santa Barbara, California, submitted affidavits of registration to vote to the county clerk-recorder. They had listed as the address of their residence a street address where a city park was located. The clerk-recorder advised them that the address was insufficient as a residence address, and their applications could not be processed. The court concluded that the affidavits were sufficient for voter registration purposes and, as a consequence of the denial of the affidavits, the homeless applicants were unjustifiably deprived of their right to vote on an equal basis with other citizens. The designation of a public park as a residence for voting purposes can qualify as a place of "fixed habitation" under the state residential requirements of a fixed habitation and an intent to remain there. The intent to remain in the park was demonstrated by the submission of the certified registration affidavits. According to the court, classifications that deny the right to register or to vote on an equal basis with other citizens deserve the strictest scrutiny, and, as a result, the government must demonstrate it has a compelling public interest in using the classification and that the classification is necessary to serve its objectives. The court found that the government's election goals did not warrant refusal to register the homeless registration applicants. The type of place a person calls home has no relevance to the person's eligibility to vote if compliance with registration has been achieved, as in this case. A citizen who is qualified to vote is no more or no less so because of living in an unconventional place. The Equal Protection Clause demands no less than substantially equal representation for all citizens of all places as well as races. Denying the opportunity to vote to residents merely because they cannot afford housing denies a citizen's vote on the impermissible basis of economic status.

Democratic Party of United States v. Wisconsin ex rel. LaFollette,
450 U.S. 107, 101 S.Ct. 1010, 67 L.Ed.2d 82 (1981).

Wisconsin statutorily provided for an open Democratic Party presidential preference primary that permitted voting without regard to party affiliation and without requiring a public declaration of party preference. Although delegates to the National Party's national convention were chosen at a post-primary party caucuses, the delegates were bound under Wisconsin law to vote at the national convention in accord with the results of the open primary election. The open presidential primary did not violate the National Party's rules, the state's mandate that primary results determine the allocation of votes cast at state's delegates at the national convention did. The Supreme Court held that a state may not compel a National Party to seat a delegation chosen in a way that violates the rules of the party (citing *Cousins v. Wigoda*, 419 U.S. 477, 95

S.Ct. 541, 42 L.Ed.2d 595). A state or court may not constitutionally substitute its own judgment for that of the national political party. A political party's choice among the various ways of determining the makeup of a state's delegation to the party's national convention is protected by the Constitution.

Dyer v. Huff,
382 F.Supp. 1313 (D.S.C. 1973), *aff'd*, 506 F.2d 1397 (4th Cir. 1974).

Election officials may look behind the mere declaration of residency by a voter to determine the actual facts and circumstances (citing *Carrington v. Rash*). A county registration board charged with the responsibility of registering only qualified persons may ask college boarding students whose permanent residences are outside the county certain questions to determine residency and their qualifications.

Evans v. Cornman,
398 U.S. 419, 90 S.Ct. 1752, 26 L.Ed.2d 370 (1970).

Individuals living on a federal enclave or reservation subject to exclusive federal jurisdiction have a right to vote in the elections of the state in which the enclave or reservation is located if they fulfill state residency and other voter qualification requirements. A federal enclave or reservation is a part of the state in which it is located, and residents of the enclave or reservation are residents of the state. Before the right to vote can be restricted, the purpose of the restriction and the assertedly overriding interests served by it must meet close constitutional scrutiny. Residents of a federal enclave in Maryland had a stake equal to that of other Maryland residents and were entitled under the 14th Amendment to protect that stake by exercising the equal right to vote.

Fischer v. Stout,
741 P.2d 217 (Alaska 1987).

Alaska's constitution and statutes provide that voters in state and local elections must be residents of the election district in which they vote, and according to statute a person's residence is that fixed place of habitation to which the individual intends to return if absent. A "fixed place of habitation" need not be a house or apartment or have mail service. A residence need only be some specific locale within the district at which habitation can be specifically fixed. A hotel, shelter for the homeless, or even a park bench will be sufficient. The listing of a specific air force base is sufficient to fix a voter's residence to a specific locale where the base is wholly within a single election district, but a post office box or private mailing service listed as a voter's residence is clearly not a voter's fixed place of habitation and is insufficient to fix a voter's residence within a voting district.

Foster v. Sunnyside Valley Irrigation District,
687 P.2d 841 (Wash. 1984).

Resident landowners within an irrigation district who were subject to maintenance and operation assessments whether or not their land was irrigated and who were not entitled to vote in district elections because their land was not used for agricultural or horticultural purposes were denied the right to "free and equal" elections guaranteed by the Washington constitution. While it is consistent with the state constitution, as well as the federal constitution (per *Ball v. James*), to permit limited electoral qualifications in special-purpose districts where their activities are largely nongovernmental in nature and where the issue being voted upon disproportionately affects a definable class, the Washington constitution demands that those constitutionally qualified electors who are "significantly affected" by district decisions be given an opportunity to

vote in district elections. The votes in district elections may be apportioned according to the district's relative impact upon definable classes within the district's boundaries who are affected by district operations.

Hadley v. Junior College District of Metropolitan Kansas City, Missouri, 397 U.S. 50, 90 S.Ct. 791, 25 L.Ed.2d 45 (1970).

As a general rule, whenever a state or local government decides to select persons by popular election to perform governmental functions, such as education, the Equal Protection Clause of the 14th Amendment requires that each qualified voter must be given an equal opportunity to participate in that election, and when members of an elected body are chosen from separate districts, each district must be estabished on a basis that will ensure, as far as practicable, that equal numbers of voters can vote for proportionally equal numbers of officials.

Harisiades v. Shaughnessy, 342 U.S. 580, 72 S.Ct. 512, 96 L.Ed.2d 586 (1952).

Aliens stand on an equal footing with citizens in several respects, but in other respects have never been conceded legal parity with citizens. The states, to whom is entrusted the authority to set qualifications of voters, for most purposes require citizenship as a condition precedent to the voting franchise.

Harman v. Forssenius, 380 U.S. 528, 85 S.Ct. 1177, 14 L.Ed.2d 50 (1965).

A Virginia statute providing that a voter in a federal election could qualify either by paying the customary poll tax or by filing a witnessed or notarized certificate of residence six months before the election was challenged. The state law was held to be repugnant to the 24th Amendment, which provided that the right of a U.S. citizen to vote in a primary or other election for federal officers could not be denied or abridged by the United States or any state for failure to pay any poll or other tax. The confrontation of the federal voter with the requirement to pay the poll tax or file a certificate of residence constituted an abridgment of the right to vote in federal elections in contravention of the 24th Amendment. A state may not impose a penalty upon those who exercise a right guaranteed by the Constitution. The Virginia law imposes a material requirement solely upon those who refuse to surrender their constitutional right to vote in federal elections without paying a poll tax. It unquestionably erects a real obstacle to voting in federal elections for those who assert their constitutional exemption from the poll tax. For federal elections, the poll tax is abolished absolutely as a prerequisite to voting, and no equivalent or milder substitute may be imposed. Any material requirement imposed upon the federal voter solely because of the voter's refusal to waive the constitutional immunity subverts the effectiveness of the 24th Amendment, which was also designed to absolve all requirements impairing the right to vote in federal elections by reason of failure to pay the poll tax, and must fall under its ban.

Haskins v. Davis, 253 F.Supp. 642 (E.D.Va. 1966).

The provisions of Virginia's dual voter registration laws which treat persons who are registered only for federal elections differently from persons registered for all elections violates the Equal Protection Clause of the 14th Amendment. Separate registration was required for federal elections and all elections (including state elections); a person who did not pay the poll tax was entitled to register only for federal elections. *Harper v. Virginia State Board of Elections* invalidated the classification of

registration on the basis of whether or not they had paid a poll tax. There is no rational basis for distinguishing between persons registered to vote only in federal elections and those registered to vote in all elections.

Hayward v. Clay,
573 F.2d 187 (4th Cir. 1978), *cert. denied*, 439 U.S. 959, 99 S.Ct. 363, 58 L.Ed.2d 351 (1978).

A South Carolina statute requiring as a prerequisite to an annexation election that a majority of the freeholders in the area proposed for annexation approve the change in a referendum preceding or accompanying the annexation election violates the Equal Protection Clause of the 14th Amendment. Per *Cipriano v. City of Houma*, *Phoenix v. Kolodziejski*, and *Hill v. Stone*, normal governmental functions present questions of general interest to which the requirement of an unrestricted electorate is prescribed unless there is proof that a restriction of the franchise, on grounds other than age, citizenship, and residence, furthers a compelling state interest. Annexation, a change in the entire structure of local government, is a matter of general interest. The chief difference in the impact of annexation on freeholders and non-freeholders is the immediate and direct burden of property taxes, which is an insufficient basis for restricting the franchise to property owners (per *Phoenix v. Kolodziejski*).

Herbert v. Police Jury of Parish of Vermillion,
258 La. 41, 245 So.2d 349 (1971), *rev'd mem.*, 404 U.S. 807, 92 S.Ct. 52, 30 L.Ed. 39 (1971).

A special election was called by the governing body of a local road district in a Louisiana parish for the consideration of the issuance of bonds and the levying of a property tax for the construction and maintenance of roads in the district. All qualified voters in the district were permitted to vote, and the propositions were approved. The election was challenged on the grounds that the state constitution permitted only property taxpayers to vote in road elections. The trial court upheld the election, and the state supreme court reversed. The Supreme Court reversed the judgment of the state supreme court and upheld the election without opinion, citing without comment *Cipriano v. City of Houma*, *City of Phoenix v. Kolodziejski*, and *Parish School Board of the Parish of St. Charles v. Stewart*.

Hershkoff v. Board of Registrars of Voters of Worcester,
366 Mass. 570, 321 N.Ed.2d 656 (1974).

The words "resided" and "inhabitant" relating to voting mean that a voter must have his "domicile" in the appropriate city or town. Every person must have a domicile and can have only one domicile for the same purpose. A person's domicile is usually the place where he has his home, which is the place where a person dwells and which is the center of his domestic, social, and civil life (per *Restatement 2d, Conflict of Laws*). A change of domicile takes place when a person with capacity to change his domicile is physically present in a place and intends to make that place his home for the time at least. Capacity to change domicile for voting purposes is implicit in eligibility to vote. Support by parents or dormitory residence cannot be given effect to limit the young voter's freedom of choice of domicile. Young people who leave home to go to college are not automatically barred from voting in their home cities and towns. On the other hand, they are free to establish new homes in college dormitories.

Hill v. Stone,
421 U.S. 289, 95 S.Ct. 1637, 44 L.Ed.2d 172 (1975).

The provisions of the Texas constitution and election code and the Fort Worth city charter limiting the right to vote in city bond issue elections to persons who have "rendered" or listed real, mixed, or personal property for taxation in the election district in the election year was challenged after a bond authorization election to finance construction of a city library was defeated. The basic principle expressed in previous cases is that as long as an election is not one of special interest, any classification restricting the franchise on grounds other than residence, age, and citizenship cannot stand unless it is demonstrated that the classification serves a compelling state interest. Per *City of Phoenix v. Kolodziejski*, a general obligation bond issue, even where the debt service will be paid entirely out of property taxes as in this case, is a matter of general interest. In an election of general interest, restrictions on the franchise of any character must meet a stringent test of justification. The Texas scheme creates a classification based on rendering, and it in effect disfranchises those who have not rendered their property for taxation in the year of the bond election. Mere reasonableness will not sustain this classification. The Texas rendering requirement erects a classification that impermissibly disfranchises persons otherwise qualified to vote solely because they have not rendered some property for taxation. Per *City of Phoenix*, the Fort Worth election was not a "special interest" election, and as the state's interest falls far short of meeting the compelling state interest test, the restrictions on voting violate the Equal Protection Clause of the 14th Amendment.

Hunter v. Underwood,
471 U.S. 222, 105 S.Ct. 1916, 85 L.Ed.2d 222 (1985).

An Alabama constitutional provision disfranchising persons convicted of any crime involving moral turpitude, which had been construed to include minor non-felony offenses, had been adopted to discriminate against blacks on account of race, and had produced disproportionate effects along racial lines, violates equal protection.

Jolicoeur v. Mihaly,
5 Cal.3d 565, 488 P.2d 1, 96 Cal.Rptr. 697 (1971).

The 26th Amendment and California law require that voting registrars treat all citizens 18 years of age and older alike for all purposes related to voting. A state policy that for voting purposes unmarried minors are presumed to reside with their parents is invalid. In accordance with state law permitting a minor to be emancipated for residential and other purposes, minors 18 or older must be treated as emancipated and as adults for voting purposes in light of the 26th Amendment. Since the state legislature has determined that differential treatment of students for voting purposes may not be condoned as a legitimate government policy, there is no reason for construing differntial treatment of minors in a more favorable light. Registrars may question a citizen of any age as to the citizen's true domicile, but may not specially question the claim of domicile on account of age or occupational status.

Kemp v. Tucker,
396 F.Supp. 737 (M.D.Pa. 1975), *aff'd*, 423 U.S. 803, 96 S.Ct. 10, 46 L.Ed.2d 24 (1975).

A Pennsylvania election code requirement that a person's race be recorded on the voter registration card before the person will be permitted to vote does not violate 42 U.S.C. Sec. 1971(a)(1) or the 14th or 15th Amendment.

Kohn v. Davis,
320 F.Supp. 246 (D.Vt. 1970), *aff'd*, 405 U.S. 1034, 92 S.Ct. 1305, 31 L.Ed.2d 576 (1972).

The one-year durational residency required by the Vermont constitution as a condition precedent to the right to vote in the state is an unconstitutional limitation on two fundamental rights: the right to vote and the right to travel. The standard of review applicable to the discriminatory classification of citizens for eligibility to vote based solely on duration of residence in the state is that of compelling state interest. The burden of establishing justification by compelling state interest was on the state, and the burden was not sustained by the claim of administrative hardship.

McCoy v. McLeroy,
348 F.Supp. 1034 (M.D.Ga. 1972).

A Georgia voter registration procedure involving the interview of applicants by voter registrars at which general residency-related questions are asked first to obtain a preliminary indication as to whether the applicant is qualified to register, followed by additional, specific questions in accordance with the circumstances of each applicant's particular situation (e.g., in the case of students, whether the applicant has a Georgia driver's license and a Georgia vehicle tag, where the tag was obtained, whether out-of-state tuition is paid, and where the applicant's summers are spent) was challenged. The procedure does not deprive college students of 14th Amendment equal protection since the purpose is to determine whether or not each individual is a bona fide resident and is qualified to register to vote and students are not singled out as students for any particular unusual treatment or for the application of any policies or procedures applicable just to students.

Marston v. Lewis,
410 U.S. 679, 93 S.Ct. 1211, 35 L.Ed.2d 627 (1973).

Arizona statutes provided for a 50-day durational voter residency requirement and a 50-day voter registration requirement. A 3-judge U.S. District Court found the 50-day requirements were unconstitutional per *Dunn v. Blumstein* and enjoined enforcement of any residency and registration requirements of more than 30 days. Review of the court's judgment was sought as it applied to state and local elections, but not presidential elections. The Supreme Court upheld the Arizona law and retreated from the 30-day rule of *Dunn*, finding that the state had demonstrated that the 50-day cutoff was necessary to permit preparation of accurate voter lists and that there was a recent and amply justifiable legislative judgment that 50 rather than 30 days were necessary to promote the state's important interest in accurate voter lists. The Court was impressed by the "realities" of Arizona's registration and voting procedures, including a large-scale volunteer and apparently error-prone deputy registrar system and a fall primary system that complicated registration procedures.

Moore v. Hayes,
744 P.2d 934 (Okla. 1987).

The question of residence for voting purposes is synonymous with domicile and involves a factual inquiry into the place where one is habitually present and to which, when he departs, he intends to return. The dominant element in determining "legal residence" or "domicile" is the intention to abandon the former domicile and to acquire another without the intention of returning. When the existence of a legal residence or domicile at a certain place has been shown, it will be presumed to continue until a contrary intention is shown. A person's intention as to residence is a question of fact to be determined by the trier of facts and is conclusive on appeal unless shownto be clearly against the weight of evidence. One's place of present abode is only one

of the factors which may be considered, but it cannot be regarded as conclusive. A temporary absence even if it extends for a period of years will not effect a change of residence. Nor is the maintenance of a separate home inconsistent with the continuance of a person's legal residence in but one locality. Other factors which have been recognized as persuasive in determining intent are the holding of local office, the exercise of the right to vote in local elections, business and domestic relations, community activities, personal habits, and other objective facts ordinarily manifesting the existence of intent.

Newburger v. Peterson,
344 F.Supp. 559 (D.N.H. 1972).

A New Hampshire law that disqualifies citizens from voting in a town if they have a firm intention of leaving the town at a fixed time in the future violates the Equal Protection Clause of the 14th Amendment. The "indefinite intention" test for determining domicile--a person must intend to remain permanently or indefinitely in order to acquire domicile--was not shown to serve a compelling interest.

Owens v. Barnes,
711 F.2d 25 (3rd Cir. 1983), ***cert. denied*****, 464 U.S. 963, 104 S.Ct. 400, 78 L.Ed.2d 341 (1983).**

A state can not only disfranchise all convicted felons, but it can also distinguish among them provided that such distinction is rationally related to a legitimate state interest. Pennsylvania's voting scheme that permits unincarcerated felons to vote but denies that right to incarcerated felons satisfied the requisite level of scrutiny and does not violate the Equal Protection Clause of the 14th Amendment.

Palla v. Suffolk County Board of Elections,
31 N.Y.2d 36, 286 N.E.2d 247, 334 N.Y.S.2d 860 (1972).

New York election law provisions concerning the determination of student (and other transient) residency were challenged. A state statute provided that no person is deemed to have gained or lost a residence by reason of the person's presence or absence while a student at an institution of learning. Students were required to file a written statement concerning their actual residence and legal domicile. The statute, according to the court, raised no presumption for or against student residency, but rather required the local election board to look to other factors that the statute listed as being relevant for determining residence (i.e., domicile) for voting purposes. Residence imports not only an intention to reside at a fixed place, but also personal presence in that place coupled with conduct that bespeaks of such an intent. Though residency in a university dormitory satisfies the physical presence requirement, the coincidental declaration of a student applicant concerning intent to reside in the state or voting district is not conclusive, and election officials may look to the actual facts and circumstances attending the applicant's professions. The New York scheme, on its face and in its application, does not violate the Due Process and Equal Protection Clauses of the 14th Amendment, the Civil Rights Act (42 U.S.C. Sec. 1971), or the 26th Amendment and is at most merely a permissible effort to ennsure that all applicants for the vote actually fulfill the traditional requirements for bona fide residence. The statute imposes no voter qualifications and withholds no constitutionally secured right. It treats instead with the indicia of residence and is a reasonable incidental effort to assure that applicants actually fulfill the requirements of bona fide residency.

Pitts v. Black,
608 F.Supp. 696 (S.D.N.Y. 1984).

Homeless persons in New York City sought a permanent injunction and declaratory judgment prohibiting the practice of the city board of elections, acting with the advice and support of the state board of elections, from applying the state election law in such a manner as to completely disfranchise the plaintiffs. The policy of the city and state was that the homeless do not have a residence and therefore are not entitled to vote. The state election code defined "residence" as that place where a person maintains a fixed, permanent, and principal home and to which the person, wherever temporarily located, always intends to return. The court concluded that the application of the state election law as to residence and voter eligibility effectively disfranchises homeless individuals and violates the Equal Protection Clause of the 14th Amendment and 42 U.S.C. Sec. 1983. State statutes that effectively disfranchise one class of voters while granting the right to another class of voters are constitutionally invalid unless the exclusions are necessary to promote a compelling state interest. Where a compelling state interest exists, statutory restrictions on voting must be narrowly tailored to the articulated state interest, and the state must show that the interest cannot be served by a means less restrictive of the right to vote. The statewide disfranchisement of homeless individuals is not necessary to promote any compelling state interest. In determining whether an individual has a "residence," the key objective is to ascertain the place that is the center of an individual's life, the locus of his primary concern, and the place the individual presently intends to remain. These factors are similar to the requirements for establishing domicile in other legal contexts. The test for domicile is generally more stringent than the test for mere residence. Homeless individuals identifying a specific location within a political community that they consider their "home base," to which they return regularly, manifest an intent to remain for the present, and a place from which they can receive messages and be contacted, satisfy the more stringent domicile standard and should not be disfranchised solely because they have a non-traditional residence.

Ramey v. Rockefeller,
348 F.Supp. 780 (E.D.N.Y. 1972).

A New York law that enumerated certain categories of persons (e.g., students) who, despite their physical presence, may lack the intention required for acquiring domicile for voting purposes and who present specialized problems in determing residence does not violate the Equal Protection Clause or the Civil Rights Act (42 U.S.C. Sec. 1971(a)(2)(A)). The only constitutionally permissible test for bona fide residence is one which focuses on the individual's present intention and does not require allegiance to be pledged for an indefinite future. The state cannot go further than the test that an individual must intend to make the place where physically present as the individual's home for the time at least (per the *Restatement (Second) of the Conflict of Laws).*

Regan v. King,
49 F.Supp. 222 (N.D.Cal. 1942).

A person of the Japanese race who is born in the United States is a citizen and is entitled to vote if otherwise qualified (citing *U.S. v. Wong Kim Ark*, 169 U.S. 649, 18 S.Ct. 456, 42 L.Ed. 890 (1898); *Morrison v. California*, 291 U.S. 82, 54 S.Ct. 281, 78 L.Ed. 664 (1934); and *Perkins v. Elg*, 307 U.S. 325, 59 S.Ct. 884, 83 L.Ed. 1320 (1939)).

Salyer Land Company v. Tulare Lake Basin Water Storage District, 410 U.S. 719, 93 S.Ct. 1224, 35 L.Ed.2d 659 (1973).

Statutes permitting only landowners to vote in general elections for the directors of a water storage district and apportioning the vote in those elections according to the assessed evaluation of the land in the district are rationally based and do not violate the Equal Protection Clause of the 14th Amendment where the district has a special limited purpose (i.e., acquisition, storage, and distribution of water for farming) and its activities disproportionately affect the landowners as a group. Where the landowners as a class were required to bear the entire burden of the district's cost, the state could rationally conclude that the landowners, to the exclusion of residents and lessees of the land, should be charged with the responsibility for the operation of the district. The "one person, one vote" principle enunciated in *Reynolds v. Sims* is applicable to elections of units of local governments exercising general governmental power and not limited special purpose districts such as the Tulare Lake Basin Water Storage District.

Shepherd v. Trevino, 575 F.2d 1110 (5th Cir. 1978).

The selective disenfranchisement or reenfranchisement of convicted felons must pass the standard level of scrutiny applied to state laws violating the Equal Protection Clause; they must bear a rational relationship to the achievement of a legitimate state interest. A Texas statute that provided a mechanism for the reenfranchisement of convicted state felons who satisfactorily complete the terms of their probation under the supervision of a state court without providing a similar mechanism for the reenfranchisement of federal probationers does not violate the Equal Protection Clause of the 14th Amendment.

Shivelhood v. Davis, 336 F.Supp. 1111 (D.Vt. 1971).

A Vermont statute requiring election officials, in determining domicile, to acertain whether an individual is domiciled in a town as his permanent dwelling place with the intention of remaining there indefinitely or returning there if absent must be construed as requiring voter applicants to remain in the town "indefinitely" and not "permanently." Students' knowledge that they will graduate and may possibly leave the town after graduation does not preclude the obtaining of domicile in the town if the students have no definite plans to leave the town and move elsewhere. The Civil Rights Act (42 U.S.C. Sec. 1971(a)) prohibits a requirement that students fill out a supplemental questionnaire involving questions concerning their domicile unless all voter applicants are required to complete the same questionnaire.

Sloane v. Smith, 351 F.Supp. 1299 (M.D.Pa. 1972).

A local election board policy that students at a state university must meet a more stringent test of residency than other voter registration applicants is unjustifiable and violates the Equal Protection Clause of the 14th Amendment.

Snead v. City of Albuquerque, 663 F.Supp. 1084 (D.N.M. 1987), *aff'd*, 841 F.2d 1131 (10th Cir. 1987), *cert. denied*, ___ U.S. ___, 108 S.Ct. 1475, 99 L.Ed.2d 704 (1988).

The New Mexico constitution and enabling statutes authorized registered voters who owned property within a municipality and paid property taxes on the property but were residents of the county outside the municipality to vote in a municipal election

for the approval of general obligation bonds upon providing proof of payment of property taxes for the preceding year and registering with the municipal clerk. Per *Holt Civic Club v. City Tuscaloosa*, one who resides outside a governmental unit has no fundamental right to vote in its elections; therefore, the classification of non-resident voters on the basis of payment of property taxes must bear only a rational relationship toward promoting a legitimate state interest. The classification of voters eligible to vote in a municipal bond election must rationally limit extension of the vote to those who are directly affected by the outcome of the election. The extension of the vote to non-resident municipal taxpayers within the county and not to non-resident non-taxpayers in the county or to taxpayers residing outside the county represents a rational relationship to assuring that those who have direct financial interest will create any bond obligation and that the voting process runs efficiently and honestly.

Spahos v. Mayor and Councilmen of Town of Savannah Beach, Tybee I., Georgia, 207 F.Supp. 688 (1962), *aff'd*, 371 U.S. 206, 83 S.Ct. 304, 9 L.Ed.2d 269 (1962).

State statutes that permit the non-resident owners of real property located in a municipality within the county in which the property owners reside to vote in the elections of the municipality, along with municipal residents, and to elect three councilmen does not violate the Equal Protection Clause of the 14th Amendment as invidious discrimination. It is a rational objective for a state legislature to permit persons owning property within a municipality to have a voice in the management of municipal affairs.

State v. Frontier Acres Community Development District Pasco County, 472 So.2d 455 (Fla. 1985).

A community development district created pursuant to a Florida statute to develop a community's infrastructure (e.g., construction and acquisition of streets, drainage, and sewer system) through the issuance of capital improvement bonds to be repaid by special assessments on the district's landowners does not exercise "general governmental functions" and therefore elections for the district's board of supervisors are not subject to the "one person, one vote" requirement of *Reynolds v. Sims*. Because of the limited grant of powers to such districts, their narrow purpose, and the disproportionate effect that district operations have on landowners, who must bear the initial burden of the district's costs, community development districts meet the criteria to be excepted from the *Reynolds* rule, as articulated by the U.S. Supreme Court in *Ball v. James* and *Salyer Land Co. v. Tulare Lake Basin Water Storge District*. Therefore, it is reasonable for the state legislature to limit the voting for the district board of supervisors by temporarily excluding non-landowning district residents.

Tashjian v. Republican Party of Connecticut, 479 U.S. 208, 107 S.Ct. 544, 93 L.Ed.2d 514 (1986).

A Connecticut election code provision requiring voters in any political party primary to be registered voters of that party (a closed primary system) that conflicted with a state Republican Party rule permitting independent voters (i.e., registered voters not affiliated with any political party) to vote in the Republican primaries for federal and statewide offices impermissibly burdened the rights of the Republican Party and its members protected by the 1st and 14th Amendments where the state interests asserted in defense of the statute were insubstantial. A political party's determination of the boundaries of its own association and of the structure which best allows it to pursue its political goals is protected by the Constitution.

Texas Supporters of Workers World Party Presidential Candidates v. Strake, 511 F.Supp. 149 (S.D.Tex. 1981).

The U.S. Supreme Court has consistently and unequivocally acknowledged a state's historical power to exclude aliens from participation in democratic institutions, including the right to vote or to run for elective office (citing *Foley v. Connellie*, 435 U.S. 291, 98 S.Ct. 1067, 55 L.Ed.2d 287 (1978) and *Sugarman v. Dougall*, 413 U.S. 634, 93 S.Ct. 2842, 37 L.Ed.2d 853 (1972)). A state has a fundamental interest in ensuring its voters meet minimum standards of intelligence and reasonableness (citing *Oregon v. Mitchell*, 400 U.S. 112, 91 S.Ct. 260, 27 L.Ed.2d 272 (1970)).

United States v. State of Texas, 252 F.Supp. 234 (W.D.Texas 1966), *aff'd mem.*, 384 U.S. 155, 86 S.Ct. 1383, 16 L.Ed.2d 434 (1966).

The poll tax as a prerequisite to voting in a state infringes on the concept of liberty as protected by the Due Process Clause of the 14th Amendment and constitutes an invalid charge on the exercise of the right to vote.

United States v. State of Texas, 445 F.Supp. 1245 (S.D.Texas 1978) *aff'd mem.*, 439 U.S. 1105, 99 S.Ct. 1006, 59 L.Ed.2d 66 (1979).

The use of a questionnaire by a local registrar to determine residency and thus eligibility to vote violated the 26th Amendment rights of college students who resided in a college dormitory where the questionnaire was not required of other applications for registration and was in violation of a state rule prohibiting their use.

Walters v. Reed, 45 Cal.3d 1, 752 P.2d 443, 246 Cal.Rptr. 5 (1988).

When a person leaves his or her domicile with the intention to abandon it and currently resides in a place in which he or she does not intend to remain, that person may vote in the precinct of his or her former domicile until a new domicile has been acquired. In construing California election statutes, the court held that, since everyone must have a domicile somewhere, college students did not lose their right to vote on campus during the period between the date on which they abandoned their campus domiciles with no intention of returning there to live and the date on which they established new domiciles.

Wesley v. Collins, 791 F.2d 1255 (6th Cir. 1986).

The disfranchisement of felons, where a significantly higher number of blacks than whites are convicted of felonies, does not violate the Voting Rights Act of 1965 since states may constitutionally disfranchise felons and the right of felons to vote is not fundamental, nor does such disfranchisement violate the Equal Protection Clause of the 14th Amendment where there is no proof of a racially discriminatory intent or purpose.

Whatley v. Clark, 482 F.2d 1230 (5th Cir. 1973), *cert. denied*, 415 U.S. 934, 94 S.Ct. 1449, 39 L.Ed.2d 492 (1974).

The treatment of persons as presumptive nonresidents simply because they are students is not necessary to promote a compelling state interest and infringes rights guaranteed by the Equal Protection Clause of the 14th Amendment. The court invalidated a Texas statute that provided that a student could not be consid-

ered to have acquired a voting residence at the place where the student lived while attending school unless there was an intent to remain there and make that place the student's home indefinitely after ceasing to be a student.

Wilkins v. Bentley,
385 Mich. 670, 189 N.W.2d 423 (1971).

A Michigan statute providing that no elector was deemed to have gained a residence while a student at an institution of learning placed a burden on the right to vote and violated the Equal Protection Clause of the 14th Amendment (and the Michigan constitution) where the state could not demonstrate a compelling interest for the provision as applied to students.

Williams v. Osser,
350 F.Supp. 646 (E.D.Pa. 1972).

A Pennsylvania statute providing for the removal from the voter registration lists of person who have not voted at any primary or general election during the preceding two calendar years and who, after notice, have failed to request reinstatement of registration is constitutional. The two-year purge law bears a rational relationship to the legitimate state interests of prevention of fraud and maintenance of up-to-date, reliable registration lists and outweights the minimal burden on the individual's exercise of the franchise.

Williams v. Salerno,
792 F.2d 323 (2nd Cir. 1986).

The Equal Protection Clause of the 14th Amendment does not permit a state to discriminate against students by denying them the right to voter or by subjecting them to more vigorous registration requirements than are generally applied. An irrebutable presumption against student residency may not be created. Residence at a college dormitory may be established by a student if the student's former residence is abandoned with the intent to remain in the place where the student attends school. A New York requirement that a residence be a "fixed, permanent, and principal home" means that to be a resident a person must be physically present with the intent to remain in the place for the time at least.

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Chapter 6: Campaign and Election Regulation

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Introduction

This section details matters relating to fair campaign and election practices. Matters of campaign financing are generally beyond the scope of this publication, but four cases have been included because of their relevance to campaign and election regulation in general.

Campaign Finance

In the most significant decision on campaign finance regulation, *Buckley v. Valeo*,[1] the United States Supreme Court held that contribution limitations and disclosure provisions were valid because of their limited First Amendment effect and the need to address the real and perceived problem of corruption; public financing of elections was permissible because it promoted the general welfare and helped to enhance rather than restrict public discussion. The Court determined, however, that absent public financing, an individual's contributions to his or her own campaign could not be limited, nor could independent expenditures, because of the burden that such restrictions placed upon First Amendment rights of free expression.

Referendum elections are subject to different standards than candidate elections. A corporation, while it might be barred by statute from spending money on behalf of a candidate, may nonetheless freely make contributions or expenditures on behalf of a referendum,[2] and individuals may not be restricted in their contributions to a committee supporting or opposing a referendum.[3] Certain activities that might otherwise appear to be impermissible are also protected. For example, a newsletter published by a nonprofit organization advocating the election of candidates favoring its point of view was found by the U.S. Supreme Court to be protected by the First Amendment as a political expression and not a prohibited expenditure.[4]

Restrictions Under the Hatch Act

Federal laws have long governed the political activities of workers paid by federal funds or federal appropriations. The federal Hatch Act[5] and its many state-level permutations place restrictions on how active a public employee may be.

The purpose of these laws is to prohibit political activities among those employees whose employment is made possible by use of federal funds or a federal appropriation.[6] Certain officials and employees were statutorily exempted from the Act's purview, but the exemption was not intended to permit the political activity of an employee of an agency administering federal funds merely because he happened to have been elected to an entirely unrelated office.[7]

The Hatch Act does not rule out all political activities by a covered individual. For example, a covered state employee is permitted to attend a political convention[8] or write a single, isolated, unsolicited letter to the editor of a newspaper supporting a partisan candidate.[9] While a state may prohibit members of the legislative staff from joining or actively supporting a "partisan" political organization, faction, or activity that might tend to undermine their nonpartisan underpinnings, this restriction does not properly extend to any cause that might include expression of a view on an issue of public concern.[10] At least one state has determined that its mini-Hatch Act does not apply to a candidate who is on leave of absence for the purpose of running for office,[11] but the federal Hatch Act prohibits a state employee who works in a federally funded position from taking a leave of absence to run for partisan office.[12]

Although a state need not be perfect in attempting to distinguish between performance of proper governmental functions by its employees and impermissible political campaign activities, the legislature should exercise due care in separating the two areas.[13] In drafting such a statute, the legislature should take care to express prohibitions in terms that an ordinary person exercising ordinary common sense can sufficiently understand and comply with.[14]

Proceedings and sanctions against state and local employees under the Hatch Act are civil, not criminal in nature.[15]

Fair Campaign Practices

States are empowered to enact laws to promote and regulate political campaigns and candidacies.[16] Some 17 to 19 states have relied upon this authority to enact variants of laws prohibiting the use of false statements in political campaigns. The statutes typically prohibit a person from publishing or distributing false statements about a candidate for public office, with virtually all imposing misdemeanor penalties for violations.[17]

Statutes that prohibit a person during a political campaign from purposely and with knowledge of its falsity publishing a written or printed false statement about a candidate designed to promote the election or defeat of the candidate are not unconstitutional restraints on free speech.[18] Statutes governing publication and distribution of false information about the personal or political character or acts of a candidate designed or intended to elect, injure, or defeat a candidate relate to defamatory publications and do not intend to regulate self-laudation or dated laudatory comments by others.[19]

The most common state statutes cover false representations, prohibiting a person from knowingly publishing and distributing a false representation about a candidate or election concern if it is intended to affect voting at an election. These statutes often include proscriptions on defamation, fraudulent endorsement, and false information.

Most case law is on the topic of false information. The courts have been fairly strict in construing what constitutes false information. Statements of opinion, by themselves, are not actionable as false statements, and statements are not considered by the courts to be false if any reasonable inference of opinion or of correct fact can be drawn from them.[20] While the courts have preferred to uphold such statutes, they must meet certain conditions to pass muster. Two Ohio rulings illustrate the fine distinctions. In one, the court found that a statute prohibiting a person during a political campaign from purposely and with knowledge of its falsity publishing a written or printed false statement about a candidate designed to promote the election or defeat of the candidate was not an unconstitutional restraint on free speech.[21] However, when the statute required the maker of the statements to submit to administrative adjudication, this was found to be an unconstitutional prior restraint on free speech.[22] A court may also condemn the practice of appeals to bigotry and prejudice in campaign advertisements, but if there is truth in the ads, such tactics are not forbidden in making a false statement about a candidate.[23]

In examining the matter of statutes banning fraudulent endorsements, courts have found that prohibitions against implying that one has the endorsement or support of a political party when one does not are sufficiently narrow and specific as to afford due process under both the federal and state constitutions and are not impermissibly vague.[24]

Defamation statutes restrict a person from publishing and distributing false information about a candidate that generally would defame the candidate or cause people not to vote for the candidate. As with the fair use of opinion in false information cases, courts have also found that the use of extreme or illogical inferences in campaign literature based upon accurate statements of fact are not false information under statutes that prohibit the distribution of material containing false information with respect to the personal or political character of candidates.[25] Because of the seriousness of such a violation, courts have been reluctant to uphold statutes that do not meet the standards of current libel law.[26] A statute that prohibits deliberate misrepresentation of a candidate's qualifications, positions on issues, party affiliations, or endorsements was found to be unconstitutionally overbroad by the courts because it did not conform to the "actual malice" standard.[27] This now appears to be the preferred standard applied by the courts.

Campaign Promises

Campaign promises are another interesting area. While early cases upheld laws against promising voters certain incentives in return for a favorable vote on election day, such statutes have been interpreted more leniently of late. General promises do not generally serve to make a candidate liable under the law.[28] Nor is a platform promise of better government, lower taxes, or welfare reform as made generally to a group of voters, or handbills, buttons, pencils, and dinners, because they are commonly accepted means of publicizing a candidate's name and qualifications.[29] In its most recent pronouncement on the subject, the U.S. Supreme Court refused to uphold the Kentucky Supreme Court's ruling that a candidate for office who promised to reduce his salary if elected had violated the state's Corrupt Prac- tices Act.[30] Under the state's reasoning, the *de facto* reduction of taxes that would result constituted an offer of pecuniary gain to the voter.[31] The U.S. Supreme Court determined, however, that "[t]he chilling effect of such absolute accountability for factual misstatements in the course of political debate is incompatible with the atmosphere of free discussion contemplated by the First Amendment in the context of political campaigns."[32]

Degree of Knowledge Required

Actions must typically be done knowingly to support a finding of a violation.[33] Much attention has been devoted to defining this concept in practice. A North Dakota court found that one acts knowingly if the person has a firm belief, unaccompanied by substantial doubt, in the falsity of the statement.[34] A Minnesota court required that the statement in question must be known by the person to be false.[35] Another Minnesota case resulted in a finding that a candidate cannot claim subjective good faith as a complete defense, and the test for meeting the "knowingly" standard is to be left to the trier of fact upon the body of evidence.[36] Similarly, reckless disregard cannot be shown by proof of mere negligence; the defendant must be shown to have entertained serious doubts about the truth.[37]

A campaign falsity statute is the sole remedy for certain types of activities. In a Michigan case, there was no cause of action for allegedly fraudulent statements in campaign literature under a statute prohibiting fraud or error at an election that would have a direct effect on the election's outcome.[38]

Election Day Prohibitions

Courts have not been enthralled with prohibitions on election day statements and activity. A state cannot ban a newspaper's election day editorial stating that voters should vote a certain way on a referendum under a statute prohibiting soliciting of votes or electioneering on election day, because the statute offends the constitutional free speech guarantee.[39] A statute that prohibited the distribution on election day of any writing "against any candidate" was also found to be unconstitu-

tional on its face as violative of the First Amendment.[40] Finally, a more general statute that prohibited the inducement of a voter to vote for or refrain from voting for a candidate, political party, or referendum on election day was found to be an unconstitutional restraint on freedom of expression.[41]

One interesting variant on the timing restriction has been upheld by the courts. A state statute that effectively prohibited certain types of advertising by candidates until 63 days before the election is not an unconstitutional infringement on free speech.[42]

In other electioneering decisions, the courts have included in the definition of electioneering the use of an official county voting instruction poster at the polls that contained the name of a local official (who not so coincidentally was up for reelection) in larger letters than any of the other words on the poster.[43] The courts have also found electioneering to be broad enough to include a candidate serving on an election board who introduced himself to each arriving voter.[44]

Disclaimers and Anonymity

Disclaimers have also been widely required by law and, of late, disfavored by the judiciary. Disclaimers serve several purposes. Disclaimers help to promote honesty and fairness in the conduct of election campaigns and ensure that voters are provided with the information that they need to assess the bias, interest, and credibility of the person or organization disseminating information about political candidates and then aid in determining the weight to be given the particular statement in question.[45] The disclaimer provisions also compel those who charge candidates with private frailties or political misconduct to avow responsibility for their assertions.[46]

While at least one statute requiring political advertising to carry a "paid for by" disclaimer disclosing the name and address of the benefactor or group and treasurer on whose behalf the communication appears was upheld as not violating First Amendment free speech rights,[43] several other recent decisions have reached a different conclusion. One court found a ban on anonymous advertising to be an unconstitutionally overbroad restraint of freedom of expression,[47] while another merely found it was preempted as it applied to federal candidates.[48] Two courts that looked at the disclaimer problem in detail also found the statutes lacking. One court held that because the statute was not narrowly limited to those situations where the information sought had a substantial connection with the governmental interests sought to be advanced, it was incompatible with basic constitutional guarantees.[49] In a recent Illinois case, the Illinois Supreme Court found a violation of First Amendment rights to exist after applying strict scrutiny, because the statute did not purportedly advance a compelling state interest and less restrictive means were available to achieve state goals of serving an informed electorate, preventing false attribution, and attracting qualified candidates for public office.[50]

Where disclaimers are required, the courts have seen fit to impose a strict definition of willful conduct. A careless and negligent failure to comply with a disclaimer provision was insufficient to serve as a willful violation in Florida.[51] Yet, when it comes to what disclaimers are actually required to be placed upon, there may be a divergence of opinion. While a Kentucky court found that bumper stickers, for example, do not require a disclaimer,[52] another court found that they can be of such a nature as to fall within federal laws prohibiting distribution without an attribution statement.[53]

Bribery of Voters and Election Officials

Campaign bribery laws, especially as they pertain to vote buying, are fairly clear. A long litany of cases[54] has upheld statutes prohibiting the practice on the premises that potential voters have a legitimate right to decide to abstain from the voting process and that those who do choose to participate have the right to be protected from vote dilution that could occur from an infusion of cash into the system.[55]

Complicating matters is the merger of federal and state elections and election laws. To establish a violation of the federal laws against vote buying, one need not show specific intent to expose a federal election to corruption or the possibility of corruption.[56] Rather, all that is needed is to establish that the conduct occurred and that the conduct exposed federal aspects of the election to the possibility of corruption.[57]

Examples of things of value other than cash held to be vote buying include food stamps[58] and a promise to perform valuable services that do not include proper administration of the office sought, such as an express promise to work toward the release of the voter's imprisoned brother.[59] However, a postage-paid envelope supplied for the purpose of returning an absentee ballot is not a thing of value with respect to influencing a vote, because it merely facilitates voting.[60] There must be something beyond what is involved in the act of voting, i.e., an advantage that has an independent value to the voter.[61] Payment for campaign work does not violate the law.[62]

The act of giving or promising to give something of value is sufficient to meet the intent of a statute on corruptly influencing another's voting,[63] and the fact that the candidate does not fulfill the promise to the voter is immaterial.[64] Absent a preelection agreement, a payment made to a voter after an election does not constitute an offense.[65]

Federal jurisdiction exists in purely state elections if there is a conspiracy involving state action that dilutes the effect of ballots.[66]

Political Advertising - Signs

Finally, the U.S. Supreme Court has held that while a jurisdiction may not interfere with the right to display political signs on private property, the posting of political signs may be banned on public property to reduce visual clutter and potential threats to public safety.[67]

Notes

[1]*Buckley v. Valeo*, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976).

[2]*First National Bank of Boston v. Bellotti*, 435 U.S. 765, 98 S.Ct. 1407, 55 L.Ed.2d 707 (1978).

[3]*Citizens Against Rent Control v. Berkeley*, 454 U.S. 290, 102 S.Ct. 434, 70 L.Ed.2d 492 (1981).

[4]*Federal Election Commission v. Massachusetts Citizens for Life*, 479 U.S. 328, 107 S.Ct. 616, 93 L.Ed.2d 539 (1986).

[5]Hatch Act, 5 U.S.C. Secs. 1501-08, 7323-27.

[6]*Northern Virginia Regional Park Authority v. U.S. Civil Service Commission*, 437 F.2d 1346 (4th Cir. 1971), *cert. denied*, 403 U.S. 936, 91 S.Ct. 2254, 29 L.Ed.2d 717 (1971).

[7]*Id.*

[8]*City of Louisville v. FitzGerald*, 600 S.W. 456 (Ky. 1978).

[9]*Wilson v. U.S. Civil Service Commission*, 136 F.Supp. 104 (D.D.C. 1955).

[10]*State v. Haley*, 687 P.2d 305 (Alaska 1984).

[11]*Johnson v. Cushing*, 483 F.Supp. 608 (D.Minn. 1980).

[12]*Minnesota Department of Jobs and Training v. U.S. Merit Systems Protection Board*, 666 F.Supp. 1305 (D.Minn. 1987).

[13]*Fair Political Practices Commission v. Suitt*, 153 Cal.Rptr. 311, 90 Cal.App.3d 125 (Cal.App. 1979).

[14]*City of Louisville v. FitzGerald*, 600 S.W. 456 (Ky. 1978).

[15]*Smith v. U.S. Civil Service Commission*, 520 F.2d 731 (7th Cir. 1975).

[16]*Council No. 11, American Federation of State, County, and Municipal Employees, AFL-CIO v. Michigan Civil Service Commission*, 408 Mich. 385, 292 N.W.2d 442 (1980).

[17]Note, "Campaign Hyperbole: The Advisability of Legislating False Statements Out of Politics," 2 Journal of Law & Politics 405 (1985).

[18]*DeWine v. Ohio Elections Commission*, 61 Ohio App.2d. 25, 15 Ohio Op.3d 28, 399 N.E.2d 99 (Ohio App. 1978).

[19]*Graves v. Meland*, 264 N.W.2d 401 (Minn. 1978).

[20]*Sumner v. Bennett*, 45 Or.App. 275, 608 P.2d 566 (Or.App. 1980); *Committee of One Thousand to Re-elect State Senator Walt Brown v. Eivers*, 296 Or. 195, 674 P.23d 1159 (1983).

[21]*DeWine v. Ohio Elections Commission*, 61 Ohio App.2d. 25, 15 Ohio Op.3d 28, 399 N.E.2d 99 (Ohio App. 1978).

[22]*Pestrak v. Ohio Elections Commission*, 670 F.Supp. 1368 (S.D.Ohio 1987).

[23]*State ex rel. Skibinski v. Tadych*, 31 Wis.2d 189, 142 N.W.2d 838 (1966).

[24]*Schmitt v. McLaughlin*, 275 N.W.2d 587 (Minn. 1979), *reh'g denied*, (1978).

[25]*Matter of Ryan*, 303 N.W.2d 462 (Minn. 1981).

[26]*New York Times v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964); *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 91 S.Ct. 621, 28 L.Ed.2d 35 (1971).

[27]*Vanasco v. Schwartz*, 401 F.Supp. 87 (E.D.N.Y. 1975), *aff'd mem.*, 423 U.S. 1041, 96 S.Ct. 763, 46 L.Ed.2d 630 (1976).

[28]*Begley v. Wooton*, 350 S.W.2d 497 (Ky. 1961).

[29]*State v. Newton*, 328 So.2d 110 (La. 1976).

[30]*Brown v. Hartlage*, 3456 U.S. 45, 102 S.Ct. 1523, 71 L.Ed.2d 732 (1982).

[31]*Id.*

[32]*Id.*

[33]*Matter of Ryan*, 303 N.W.2d 462 (Minn. 1981).

[34]*Snortland v. Crawford*, 306 N.W.2d 614 (N.D. 1981).

[35]*Burns v. Valen*, 400 N.W.2d 123 (Minn.App. 1987).

[36]*Daugherty v. Hilary*, 344 N.W.2d 826 (Minn. 1984), *reh'g denied*, (1984).

[37]*St. Amant v. Thompson*, 390 U.S. 727, 88 S.Ct. 1323, 20 L.Ed.2d 262 (1968).

[38]*Eyde Construction Company v. Charter Township of Michigan*, 119 Mich.App. 792, 327 N.W.2d 364 (Mich.App. 1982).

[39]*Mills v. Alabama*, 384 U.S. 214, 86 S.Ct. 1434, 16 L.Ed.2d (1966).

[40]*Gore Newspaper Co. v. Shevin*, 397 F.Supp. 1253 (D.C.Fla. 1975).

[41]*KPOJ, Inc. v. Thornton*, 456 P.2d 76 (Or. 1969).

[42]*Sadowski v. Shevin*, 351 So.2d 44 (Fla.App. 1976), *reversed*, 345 So.2d 310, *on remand*, 345 So.2d 815 (1976).

[43]*Flamm v. Kusper*, 384 F.Supp. 1364 (N.D.Ill. 1974), *vacated and remanded*, 525 F.2d 695 (7th Cir. 1975).

[44]*Fish v. Redeker*, 411 P.2d 40 (Ariz.App. 1966).

[45]*State v. Acey*, 633 S.W.2d 306 (Tenn. 1982).

[46]*Commonwealth v. Evans*, 156 Pa.Super. 321, 40 A.2d 137 (1944), *application for allocatur refused*, (1945).

[47]*Schuster v. Imperial County Municipal Court*, 167 Cal.Rptr. 447, 109 C.A.3d 887 (Cal.App. 4th Dist. Div. 1 1980), *cert. denied, California v. Schuster*, 450 U.S. 1042, 101 S.Ct. 1760, 68 L.Ed.2d 239 (1980).

[48]*KVUE, Inc. v. Austin Broadcasting Corporation*, 709 F.2d 922 (5th Cir. 1983), *affirmed, Texas v. KVUE-TV, Inc.*, 465 U.S. 1092, 104 S.Ct. 1580, 80 L.Ed.2d 114 (1984).

[49]*State v. Fulton*, 337 So.2d 866 (La. 1976).

[50]*People v. White*, 116 Ill.2d 171, 107 Ill.Dec. 229, 506 N.E.2d 1284 (1987).

[51]*Sanders v. Florida Election Commission*, 407 So.2d 1069 (Fla.App. 4th Dist. 1981).

[52]*Thomas v. Collinsworth*, 606 S.W.2d 159 (Ky. 1980).

[53]*U.S. v. Insco*, 496 F.2d 204 (5th Cir. 1974).

[54]*U.S. v. Bowman*, 636 F.2d 1003 (5th Cir. 1981); *U.S. v. Malmay*, 671 F.2d 869 (5th Cir. 1982); *U.S. v. Mason*, 673 F.2d 737 (4th Cir. 1982); *U.S. v. Garcia*, 719 F.2d 99 (5th Cir. 1983); *U.S. v. Sayre*, 522 F.Supp. 923 (W.D.Mo. 1981); *U.S. v. Simms*, 588 F.Supp. 1179 (W.D.La. 1979).

[55]Donsanto, Federal Prosecution of Election Offenses (1988).

[56]*U.S. v. Bowman*, 636 F.2d 1003 (5th Cir. 1981); *U.S. v. Malmay*, 671 F.2d 869 (5th Cir. 1982); *U.S. v. Carmichael*, 685 F.2d 903 (4th Cir. 1982), *cert. denied*, 459 U.S. 1202, 103 S.Ct. 1187, 75 L.Ed.2d 434 (1983).

[57]*U.S. v. Mason*, 673 F.2d 737 (4th Cir. 1982).

[58]*U.S. v. Garcia*, 719 F.2d 99 (5th Cir. 1983).

[59]*Stebbins v. White*, 235 Cal.Rptr. 656, 190 Cal.App.3d 769 (Cal.App. 3d Dist. 1987).

[60]*Oregon Republican Party v. State*, 78 Or.App. 606, 717 P.2d 1206 (Or.App. 1986), *reversed*, 301 Or. 437, 722 P.2d 1237 (1986) (reversed on grounds of mootness), *on remand*, 81 Or.App. 523, 726 P.2d 412 (1986).

[61]*Id.*

[62]*U.S. v. Canales*, 744 F.2d 413 (5th Cir. 1984), *cert. denied*, 473 U.S. 906, 105 S.Ct. 3528, 87 L.Ed.2d 652 (1985).

[63]*Trushin v. State*, 425 So.2d 1126 (Fla. 1982), *reh'g denied*, (1983).

[64]*Stebbins v. White*, 235 Cal.Rptr. 656, 190 Cal.App.3d 769 (Cal.App. 3d Dist. 1987).

[65]*U.S. v. Campbell*, 845 F.2d 782 (8th Cir. 1988), *reh'g and reh'g en banc denied*, (1989).

[66]*U.S. v. Olinger*, 759 F.2d 1293 (7th Cir. 1985).

[67]*City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 104 S.Ct. 2118, 80 L.Ed.2d 772 (1984).

City Council v. Taxpayers for Vincent

466 U.S. 789, 104 S.Ct. 2118, 80 L.Ed.2d 772 (1984)
United States Supreme Court
May 15, 1984

A municipal ordinance prohibiting the posting of signs on public property is not unconstitutional as applied to the posting of political signs on public property.

The Facts

Supporters of a candidate for the Los Angeles City Council mapped out a plan to blanket the district with political posters, but consciously avoided posting the signs on certain types of public property (such as certain types of public utility poles) so as to avoid endangering public safety.

The campaign brought suit in U.S. District Court for the Central District of California for an injunction against enforcement of the city's sign posting ordinance by the city. The supporters also asked for compensatory and punitive damages. The District Court granted a summary judgment motion offered by the city, citing the ordinance's constitutionality, but was reversed by the U.S. Court of Appeals.

The Court of Appeals determined that the ordinance was unconstitutional because there were significant freedom of speech issues at stake, while the city did not show to the court's satisfaction that its interests in reduction of "visual clutter" were enough to overcome the effects of a complete ban. The city appealed.

The Issues

The question for decision was whether a city could prevent the posting of political campaign signs on public property.

The Holding and Rationale

The U.S. Supreme Court, in a majority opinion authored by Justice Stevens, reversed the Court of Appeals and remanded the case for further consideration.

The Court reviewed the facts and circumstances of the case and determined that a challenge to the ban on the grounds of overbreadth was inappropriate here, because there had been no showing of a realistic danger that the ordinance would significantly compromise the First Amendment protections of other persons who were not parties to the case. The Court held that the city had a legitimate interest in preventing visual clutter and ensuring public safety and that the ordinance did not violate the First Amendment.

One case of particular interest to the Court was *Lehman v. City of Shaker Heights*, 418 U.S. 298, 94 S.Ct. 2714, 41 L.Ed.2d 770 (1974), in which the Court upheld an Ohio city's ordinance prohibiting political advertising on public transit buses.

Commentary

This case may well represent the culmination of an extreme viewpoint of the Supreme Court that seems to place this type of political speech at a disadvantage when compared to the relative freedom afforded political speech in other contexts (compare this restrictive view, for example, with the *laissez faire* approach to regulating political broadcasts).

A more consistent approach would have been that adopted by the minority (Justices Marshall and Blackmun joining in the dissenting opinion of Justice Brennan). The minority suggested that the city here had not shown that its interest in reducing the visual clutter justified restricting the right of political communication, and they would have found the ordinance to have violated First Amendment rights.

If the Court continues to hold that the least restrictive alternative test is the applicable standard, there is little hope for a campaign organization to defeat a law, ordinance, or regulation that is premised on even the flimsiest governmental justification, as here with the desire to avoid "visual clutter."

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Brown v. Hartlage

456 U.S. 45, 102 S.Ct. 1523, 71 L.Ed.2d (1982)
United States Supreme Court
April 5, 1982

A state statute that prohibited a candidate from offering a voter an inducement to vote in exchange for a vote did not apply to a candidate's campaign promise to lower the salary of the office in question if elected.

The Facts

Carl Brown, a County Commissioner candidate in Kentucky, made a pledge to reduce the salary of county commissioners if elected. When it was brought to his attention that such a promise might violate a Kentucky law prohibiting a candidate from offering a voter a material benefit in consideration for a vote, Brown retracted his pledge. After he won the election, his opponent in the election filed suit in Jefferson County Circuit Court seeking to void the election on the grounds that Brown's statement violated the law. The Circuit Court agreed that Brown had violated the provision, but refused to overturn the election. The Kentucky Court of Appeals reversed the trial court, holding that Brown had violated the law and that his rescission was of no consequence, but that the lower court did not have the discretionary authority to perform the balancing of disenfranchisement of the electorate and the serious nature of the violation to reach a conclusion on the result of the election. The Court also held that Brown's statement was not constitutionally protected. Brown filed a writ of certiorari with the Supreme Court.

The Issues

The question for decision was whether a state statute prohibiting provision of material benefits as an inducement to vote applied to a candidate's pledge to reduce the salary of the position sought if elected.

The Holding and Rationale

Justice Brennan's majority opinion for the U.S. Supreme Court reversed the Kentucky courts and remanded the case for further consideration. The Court held that states do have a legitimate interest in preserving the integrity of the electoral process, but that a state restriction on First Amendment rights in this context would be held to strict scrutiny. To pass this test, the Court said that the restriction must be justified by a compelling state interest. The Court found none here, suggesting that a promise to lower salaries or taxes or increase taxes to provide certain benefits or services should not be considered in the same category of inviting corruption as is what the statute is aimed at: vote buying. The Court was also particularly concerned with the effect of restricting free speech in the campaign context, noting the chilling effects of absolute accountability in the course of political debate and finding that this "is incompatible with the atmosphere of free discussion contemplated by the First Amendment in the context of political campaigns."

Commentary

This is one of a few cases directly addressing the constitutionality of campaign speech statutes. The Court's feelings in this area are made rather clear in this case, and the Court used this case to warn states that controls over deceptive campaign speech would probably be subject to the same strict degree of scrutiny as the Court applied here. The Court seems content to allow political speech to be sorted out in the polling places, rather than the courtrooms, of America.

Mills v. Alabama

384 U.S. 214, 86 S.Ct. 1434, 16 L.Ed.2d 484 (1966)
United States Supreme Court
May 23, 1966

A state statute prohibiting a newspaper from publishing editorial comment on election day in support of or in opposition to a candidate or proposition on the ballot is an unconstitutional restraint on freedom of the press.

The Facts

An Alabama daily newspaper published an editorial on election day urging people to vote for a mayor-council form of government, an issue that was on the ballot. The newspaper's editor, Mills, was charged with violating a state statute that prohibited the solicitation of votes on election day in support of or in opposition to a candidate or proposition on the ballot. The trial court sustained demurrers to the complaint on the grounds that the law violated the federal and state constitutions by abridging freedom of speech. The state appealed, and the Alabama Supreme Court held that publication of the editorial was in fact a violation of the state prohibition and that the law as applied in this case did not serve as an unconstitutional restriction of free speech or on the rights of press under the First Amendment. The case was remanded to the trial court for further action. Mills appealed the Alabama Supreme Court's action to the U.S. Supreme Court.

The Issues

The question for decision was whether a state law prohibiting the solicitation of votes on election day in support of or in opposition to a candidate or proposition on the ballot was constitutional as it applied to the actions of a daily newspaper.

The Holding and Rationale

The U.S. Supreme Court, in a majority opinion authored by Justice Black, reversed the action of the Alabama Supreme Court. The Court traced the purpose of the First Amendment and found that it existed to protect the unfettered discussion of governmental affairs, including discussions of candidates, structures, and forms of government, the manner in which government is or should be operated, and all matters relating to political processes. The Court then looked at the specific use of the term "press" in the First Amendment and found that it applied to those entities that one would normally assume to come under its purview--newspapers, books, and magazines--but that it also included humble leaflets and circulars. The Court determined that suppressing the freedom of the press would violate the First Amendment, and, in this case, prohibiting the newspaper from making an editorial comment favoring an issue on the ballot would violate the constitutional guarantee of freedom of the press. Further, the Court held, no test of reasonableness would be sufficient to save the statute.

Commentary

This was a clear-cut case: an outright restriction on press freedom, further fueled by restraints on political speech. The Court wasted few words in quickly striking down this abhorrent statute and affirming its commitment to long-held principles.

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People v. White

116 Ill.2d 171, 107 Ill.Dec. 229, 506 N.E.2d 1284 (1987)
Supreme Court of Illinois
February 20, 1987

A state law prohibiting publication of political literature that does not contain the name and address of the persons publishing and distributing the literature violates the First Amendment.

The Facts

White distributed an anonymous campaign leaflet related to the 1984 White County State's Attorney election in contravention of an Illinois law that makes the act of publishing, circulating, or distributing anonymous political literature a Class A misdemeanor. White was prosecuted for the offense, but the trial court dismissed the charges.

The Issues

In its consideration of the statute, the Illinois Supreme Court struck down the law as unconstitutional, concluding that "the right to engage in political advocacy anonymously is an important one which can only be infringed upon by a statute carefully limited to serve compelling state interests." Applying a strict scrutiny approach, the Court considered the state's claims that there were such interests to be served, but rejected them as insufficient. These included a purported interest in an informed electorate, which the Court found to be unpersuasive, suggesting that the voters were smart enough to evaluate things on their merits; a concern that there might be persuasive last-minute smear campaigns, something that the Court found to be significant, but not important enough to justify a limit not restrained by time limits; false attribution problems, something that the Court was again concerned about, but not to such an extent as it believed the breadth of the statutory prohibition was justified; and an interest in attracting qualified candidates to office, a link that the Court found tenuous at best.

The Court continually expressed concern that the statute was too broad to be upheld. The statute was said to restrict true speech and "a great deal of innocent or favorable anonymous speech," something that the Court found to be totally unjustified by any state interest.

The Court concluded that the important rights at stake here could only be infringed upon by an extremely limited statute serving the state goals.

Commentary

This case is one of the most recent of the genre and contains probably the most extensive discussion of potential state interests and the arguments against permitting such a statute to stand. The Illinois court rejected the state's contention that the restraints imposed under state law amounted to a mere "negligible restraint" on free speech and remained unconvinced that by restricting just anonymous activity that sought to influence votes, the state was not being overly restrictive.

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Schmitt v. McLaughlin

275 N.W.2d 587 (Minn. 1979), *reh'g denied* (1979)
Supreme Court of Minnesota
February 2, 1979

A state statute that prohibits a person or candidate from implying that the candidate has the support or endorsement of a political party when the candidate does not have such support or endorsement is sufficiently narrow and specific as to be constitutional.

The Facts

In a county abstract clerk race, McLaughlin used a party acronym on signs and advertisements without receiving the support or endorsement of that party. After McLaughlin won, his opponent Schmitt contested the election on the grounds that McLaughlin had violated a state law that prohibits a person or candidate from implying that the candidate has the support or endorsement of a political party when the candidate does not have such support or endorsement.

The District Court of Ramsey County held that there was no violation, and Schmitt filed notice of review of the order denying the motion to dismiss the notice of contest. McLaughlin challenged the overbreadth and vagueness of the statute, alleging that it violated the Due Process Clause.

The Issues

The question for decision was whether a state statute that prohibits a person or candidate from implying that the candidate has the support or endorsement of a political party when the candidate does not have such support or endorsement affords the necessary constitutional safeguards.

The Holding and Rationale

The Minnesota Supreme Court reviewed the statute in question and determined that it only regulated false statements, specifically, false statements of endorsement or support. The Court, noting the general concern over the interpretation of the word "imply," erased all doubts, holding that the statute should be interpreted narrowly and that it had a clear meaning; persons of common intelligence should be able to accurately and adequately assess what type of conduct would run afoul of the law. After examining the actions complained of, the Court found that the actions by McLaughlin would reasonably imply that he had the party's support or endorsement and that a material violation had occurred.

The Court was reluctant, however, to remove McLaughlin from office, because it felt that the violation had not been made in bad faith. Here, the Court felt, McLaughlin merely wanted to identify himself as a member of the party, and, practically speaking, his use of the association with the party probably had no significant impact on his election because the candidates of that party for Governor and the party's two candidates for U.S. Senate (one was a special election) also both lost, while McLaughlin won his local race by more than 16,000 votes. The Court said that for a violation of the election law to be material, it must be intended to affect voting at an election.

Commentary

This case advanced a four-part test for determining the validity of a political advertising statute. To pass constitutional muster, a political advertising restriction

must (1) regulate or proscribe only constitutionally unprotected speech (false statements), (2) be so narrowly drawn as to regulate or proscribe specific behavior, (3) legitimately serve compelling state interests in preserving the integrity of the political process, and (4) avoid vagueness or ambiguity in its language so that a person of common intelligence will generally know what type of conduct will constitute a violation.

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United States v. Bowman

636 F.2d 1003
United States Court of Appeals for the Fifth Circuit, Unit A
February 9, 1981

To establish a violation of the Voting Rights Act proscribing vote buying, it is not required that specific intent to expose a federal election to corruption or the possibility of corruption be established.

The Facts

In a Louisiana election for parish school board, city marshal, and United States Congress, defendant Bowman paid off approximately 40 voters after driving them to the polls and providing them with slips of paper indicating the lever numbers of the candidate the voter was to vote for. Defendant Bowman was convicted on federal vote-buying charges and appealed the federal conviction on the grounds that the action was intended to influence the results of the parish school board election and was not intended to influence the results of a federal election through the admittedly nefarious activities.

The Issues

The question for decision was whether a federal vote-buying conviction could be sustained if the offender did not intend to influence a federal election by the illegal conduct.

The Holding and Rationale

The Court of Appeals found that the fact that there were federal candidates on the ballot subjected the defendant to the purview of the law. The Court here found that the defendant's acts had the potential to affect the federal elections that were on the ballot and that the avoidance of the potential to affect a federal election was part of the intent of the statute. The Court of Appeals found that 42 U.S.C. Sec. 1973i(c) was constitutional and that the statute did not require (1) that the payment be made on behalf of the federal candidate, (2) that the voter be paid to vote for a federal candidate, or (3) that the voter actually vote for the candidate the voter is being paid to vote for. Rather, the statute only requires that a person be paid to vote in an election in which specified federal officers are listed on the ballot, whether alone or along with state and local candidates. Proof of specific intent to influence a federal election is not needed before the statute can be applied.

The Court of Appeals determined that Congress can regulate federal elections so as to prevent violence, fraud, and corruption. State action in holding elections on the same day as federal elections does not deprive Congress of the right to legislate on matters affecting federal races. Under the Constitution, Congress may regulate "pure" federal elections, but not "pure" state or local elections. When federal and state candidates are on the same ballot, Congress may regulate any activity which exposes the federal aspects of the election to the possibility of corruption, whether or not the actual corruption takes place and whether or not the persons participating in such activity had a specific intent to expose the federal election to such corruption or possibility of corruption. Congress can regulate in this manner because the payment itself, not the purpose for which it is made, is the harm and gist of the offense. The Court of Appeals concluded that the only way to prevent corruption in federal elections with any reasonable possibility of success is to foreclose all chances of exposure by prohibiting corrupt practices anytime a federal candidate is on the ballot.

Commentary

This approach offers a special basis for federal jurisdiction in vote-buying cases and largely rests upon the Necessary and Proper Clause of the Constitution. Prosecutors are aided by this decision because they no longer have to prove the limits of the federal right to vote and because they no longer need to prove that the offensive pattern of conduct actually had a deleterious impact on a federal election.

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Pestrak v. Ohio Elections Commission

670 F.Supp. 1368
U.S. District Court for the Southern District of Ohio, Eastern District
October 7, 1987

A statute prohibiting false statements by political candidates and requiring administrative adjudication, constituted prior restraint on constitutionally permitted speech and permitted liabilty to be assessed on the basis of evidence that was less than clear and convincing and is thus unconstitutional.

The Facts

Pestrak, a candidate for County Commissioner, was brought before the Ohio Elections Commission on charges of circulating a false statement. The five-member, politically appointed commission found merit in the charges and sent the case to the local prosecutor for appropriate action. Pestrak filed a federal motion in U.S. District Court for the Southern District of Ohio to enjoin the prosecutor from proceeding on the charges.

The Issue

The questions for decision were whether requiring a candidate to submit to administrative adjudication of a false statement complaint before an election constituted unconstitutional prior restraint and on what basis was it appropriate to assess liability.

The Holding and Rationale

In granting Pestrak's motion to enjoin, the federal court held that the statute, by requiring administrative adjudication before the election, served to impose a restraint on free speech and permitted liability to be assessed on the basis of evidence that was less than clear and convincing and was thus unconstitutional. The Ohio elections Commission employed a standard of adjudication based upon a preponderance of the evidence, a lower standard than that advanced in *New York Times v. Sullivan*, 376 U.S 254, 84 S.Ct. 710, 11 L.Ed. 2d 686 (1964). The trial court held that criminal sanctions may only be applied if the statements made were both false and made with knowledge of their falsity or with reckless disregard for the truth, whether false or not.

Commentary

This case is likely to spell the death knell for administrative adjudication of campaign statements. Taken in conjunction with *Vanasco v. Schwartz*, 401 F.Supp. 87 (E.D.N.Y. 1975) (three-judge panel), *aff'd mem.*, 423 U.S. 1041, 96 S.Ct. 763, 46 L.Ed.2d 630 (1976), it is difficult to see why a state would be willing to go to the lengths necessary to establish a nonpolitical entity that would be held to the highest standards of due process and consideration of the evidence and could not effectively do so before the election.

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Schuster v. Imperial County Municipal Court

167 Cal.Rptr. 447, 109 Cal.App.3d 887
cert. denied, California v. Schuster, 450 U.S. 1042,
101 S.Ct. 1760, 68 L.Ed.2d 239 (1980)
California Fourth District Court of Appeals, Division One
August 28, 1980

A provision of the election code prohibiting all anonymous campaign literature is an unconstitutionally overbroad restraint of freedom of expression contrary to the state and federal constitutions.

The Facts

Defendants allegedly violated state law prohibiting the distribution of anonymous campaign literature. A complaint was filed in municipal court, and defendants sought a writ of prohibition in superior court after their demurrer to the complaint in municipal court was overruled. The state appealed to the Court of Appeals.

The Issues

The question for decision was whether a provision of the election code prohibiting all anonymous campaign literature was an unconstitutionally overbroad restraint of freedom of expression contrary to the state and federal constitutions.

The Holding and Rationale

The California Court of Appeals held that the provision of the election code prohibiting all anonymous campaign literature was an unconstitutionally overbroad restraint of freedom of expression contrary to the state and federal constitutions. The court here applied strict scrutiny to the statute in question, and found that while the state did possess a compelling concern in ensuring the integrty of elections--with many of these concerns fully elaborated in a declaration of findings and principles that was part of the law as enacted--there were more compelling arguments for permitting anonymity.

The court found that requiring attribution on all campaign materials would almost inevitably lead to the silencing of divergent minority views, reduce the quality and quantity of political debate, and ill serve the electorate by keeping it from being as informed as it might otherwise be. The court also noted that the restrictions on anonymity cannot be limited just to pejorative statements.

Commentary

This ruling was quite far-reaching and contains some of the same arguments later relied upon in *People v. White*, 116 Ill.2d 171, 107 Ill.Dec. 229, 506 N.E.2d 1284 (1987). The result is of particular interest because the legislature did try to overcome the strong presumption of unconstitutionality by fully elaborating the need for the statute and detailing the state interests at stake as part of the enacted law.

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Trushin v. State

425 So.2d 1126, *reh'g denied*, (1983)
Florida Supreme Court
November 4, 1982

A state statute that makes it a felony for anyone to directly or indirectly promise anything of value to another for the purpose of buying another's vote is not unconstitutionally overbroad.

The Facts

An attorney supporting two candidates for judge distributed a letter to residents of an apartment complex in the district urging the recipients to vote for the two candidates, and offering to prepare a free last will and testament for each person who came to his office and pledged to vote for those two candidates. Florida law prohibited the corrupt influencing of a person's vote, and the attorney was charged with vote buying under the statute. The Court of Appeals upheld the constitutionality of the measure, and the attorney appealed.

The Issues

The question for decision was whether a state statute that makes it a felony for anyone to directly or indirectly promise anything of value to another for the purpose of buying another's vote is unconstitutionally overbroad.

The Holding and Rationale

The Florida Supreme Court agreed that the statute in question that made it a felony for anyone to directly or indirectly promise anything of value to another for the purpose of buying another's vote was not unconstitutionally overbroad. The Court found that clearly criminal conduct is not protected by federal or state constitutional provisions, and the provision does not apply to the protected act of making campaign promises.

The Court expanded upon its decision, holding that the act of giving or promising to give something is proscribed, and thus the emphasis is on the act and not on the consideration provided in return for the act. Under the Court's analysis, the person offered a thing of value does not have to be a registered voter for the statutory provision to apply. Here, the Court found, the promise to prepare a will without charge for those pledging to vote for particular judicial candidates was a thing of value in corruptly influencing a person's vote.

Commentary

This ruling makes it much easier to effectively prosecute a person for vote buying. The offer of a service was defined as a thing of value here, and there was no requirement that the promise be fulfilled to reach a conviction under the statute.

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Commonwealth v. Wadzinski

492 Pa. 35, 422 A.2d 124 (1980)
Pennsylvania Supreme Court
September 22, 1980

A state statute imposing criminal sanctions on candidates if they published advertisements without first complying with notice provisions was an unreasonable restriction of free speech under the First and Fourteenth Amendments.

The Facts

The day before election day, a mayoral candidate went on the radio with a political advertisement without providing the requisite advance notice to the local election board and to his opponent as required by statute. The statute called for advance notice to be provided in sufficient time as to allow for a reply by the opponent, if the opponent so desired.

The candidate challenged his prosecution on the grounds that the statute was unconstitutional.

The Issues

The question for decision was whether a state provision requiring that advance notice of political advertisements be provided to the local election board and the candidate's opponent was an unreasonable restriction of free speech.

The Holding and Rationale

The Supreme Court of Pennsylvania applied a strict scrutiny standard of review to this case and struck down the law as unconstitutional. The Court found that there was a legitimate governmental interest in imposing such an advance notice requirement: ensuring that voters have access to accurate information.

The Court also noted that while the statute had been designed to prevent misleading, false, and scandalous charges from going unrebutted, the truth or falsity of the advertisements were not at issue. In fact, the Court found, the statute actually serves to chill speech by effectively forcing a candidate to suppress new information just uncovered in the waning days of a campaign, keeps a candidate from responding in kind to such charges, and only applies to character-oriented advertising and not that dealing with issues.

The Court determined that a statute imposing criminal sanctions on candidates if they published advertisements without first complying with notice provisions was an unreasonable restriction of free speech under the First and Fourteenth Amendments. While it noted that there may have been other reasons to find the law unconstitutional, such as prior restraint and its relative vagueness, the Court decided that it would not look at these issues in arriving at its decision because the other restrictions were so egregious.

Commentary

This case strikes a major blow against those proposing federal legislation requiring candidates to trade political advertisements or provide advance notice to an opponent of an upcoming spot. The lack of attention given by the Court to prior restraint issues is interesting in light of the emphasis afforded to this problem in similar situations involving administrative entities, such as in *Pestrak v. Ohio Elections*

Commission, 670 F.Supp. 1368 (S.D.Ohio 1987). By resting its decision on the free speech issue, however, the Court here follows more along the lines of the logic of decisions in cases involving false statements and anonymous advertising.

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United States v. Olinger

759 F.2d 1293
United States Court of Appeals for the Seventh Circuit
April 15, 1985

Where states provide for the election of officers, that right is protected against dilution involving state action under the Equal Protection Clause of the Fourteenth Amendment even if there is no federal race involved.

The Facts

Defendant Olinger, an election judge in a 1982 general election in Chicago, participated in a scheme that saw elderly and handicapped voters paid to vote straight party tickets on absentee ballots that included a congressional primary race. Olinger was paid for his services. He was convicted of vote fraud for conspiracy to violate the constitutional rights of qualified voters, 18 U.S.C. Sec. 241; conspiracy in violation of 18 U.S.C. Sec. 371 for the purpose of voting more than once in a general election, 42 U.S.C. Sec. 1973, and giving false registration information, 42 U.S.C. Sec. 1973i(c).

Olinger appealed, contending that the conviction was invalid because it alleged a conspiracy to violate a right which is not recognized as a federal constitutional or statutory right (i.e., the right to vote in state and local elections free from vote fraud by persons acting under color of state law) and that the conspiracies charged under 18 U.S.C. Secs. 241 and 371 were improperly charged because 42 U.S.C. 1973i(c) directly addressed the crime of conspiracy to commit vote fraud.

The Issues

The question for decision was whether there was a federal constitutional protection against vote dilution through vote fraud in a state election.

The Holding and Rationale

The Court of Appeals found that it was of no consequence that the primary motive behind the conspiracy was to affect the result in a local rather than a federal election, because any purpose of a conspiracy that violates federal law makes the conspiracy unlawful under federal law. Here, the conspiracy existed to cast false votes for all offices on the ballot.

In examining 42 U.S.C. Sec. 1973i(c), the Court of Appeals determined that it applied to entering into a conspiracy with one other individual; a conspiracy with more than one other individual involved would fall outside the scope of the statute. The language of 18 U.S.C. Secs. 241 and 371 applies to conspiracies of two or more persons. Finally, the court held that while the Constitution provides the right to vote only in federal elections and that the right to vote in purely state elections must derive from state law, where states provide for the election of officers, that right is protected against dilution involving state action under the Equal Protection Clause of the Fourteenth Amendment.

Commentary

The Court of Appeals rightly determined that the right of suffrage would be effectively worthless without protections that safeguard the exercise of the franchise. Here, there would be little likelihood of a successful state action, and the finding of federal jurisdiction, and the continuance of federal jurisdiction past the certification of the election results, affords the government not only the power to punish conspiracies

that poison federal elections, but also those conspiracies that involve the use of state action to dilute the effect of ballots cast for the candidate of one's choice in wholly state elections.

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Kennedy v. Voss

304 N.W.2d 299
Minnesota Supreme Court
March 13, 1981

Extreme or illogical inferences in campaign literature based upon accurate statements of fact are not "false information" under a statute proscribing the distribution of written or printed matter containing false information about the personal or political character or acts of candidates.

The Facts

Appellant Voss, a successful candidate for County Commissioner, distributed campaign literature that contained information noting an inconsistency between appellee Kennedy's votes and the way that Kennedy had portrayed them in his own campaign literature. Kennedy filed a notice of contest of the election in Dakota County District Court, alleging Voss had violated Minnesota's false campaign statements statute. The District Court for Dakota County held that the statements relating to Kennedy's lack of support for certain programs were in violation of the statute because they were false and Voss should know or reasonably should have known this.

Here, Voss had derided Kennedy's lack of support for a specific program based on a vote he had cast against the county budget. The District Court ordered the election invalidated. Voss appealed the ruling.

The Issues

The question for decision was whether an inference based upon fact is a false statement under a statute that prohibits knowingly making a false statement in a campaign.

The Holding and Rationale

The Minnesota Supreme Court, in a majority opinion authored by Chief Justice Sheran, reversed the trial court. The Court was less than impressed with the argument that inferences fell under the purview of the statute. The Court noted at the outset that it was satisfied that "[t]he public is adequately protected from such extreme inferences by the campaign process itself." The public would be well able to judge the situation for itself by examining competing brochures.

The Court concluded that extreme or illogical inferences in campaign literature based upon accurate statements of fact are not "false information" under Minnesota's statute proscribing distribution of written or printed matter containing false information with respect to the personal or political character or acts of candidates.

Commentary

If a court were to give the same weight to inferences, the courts would be overwhelmed with such cases and expert witnesses each campaign season. This ruling strictly interprets the statute in question, but does so in a way that it will be more fairly applied in the future and in a manner that will enable candidates and their supporters to adhere to both the law's letter and spirit without undue apprehension.

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Vanasco v. Schwartz

401 F.Supp. 87, *aff'd mem.*,
423 U.S. 1041, 96 S.Ct. 763, 46 L.Ed.2d 630 (1976).
U.S. District Court for the Eastern District of New York
July 14, 1975

A statute prohibiting deliberate misrepresentation of a candidate's qualifications, positions on issues, party affiliation, or endorsements was unconstitutionally overbroad and must instead conform to the "actual malice" standard.

The Facts

Losing candidate Vanasco used palm cards with the "Republican-Liberal" designation, one that he was not entitled to use, and falsely implied that he was the incumbent. He was brought up on charges before the politically appointed State Elections Board. New York's false campaign statement statute requires charges to be subjected to an administrative hearing before the board, and decisions of the board are based upon a finding that there was a "substantial" amount of evidence. There was some question as to the availability of judicial review. The board found that Vanasco had improperly used the party designation and ordered him to surrender or re-mark the remaining stock, which he did. The board also found another candidate to have violated the misrepresentation provisions of the statute.

Vanasco and the other charged candidate sued the board in the U.S. District Court for the Eastern District of New York, seeking a three-judge panel and injunctive relief in the short run and to overturn the law. All three motions were denied. The U.S. Court of Appeals for the Second Circuit, upon appeal, ordered a three-judge panel to be convened. An additional party joined the case at this point.

The Issues

The question for decision was whether a statute prohibiting deliberate misrepresentation of a candidate's qualifications, positions on issues, party affiliation, or endorsements was unconstitutionally overbroad.

The Holding and Rationale

The three-judge panel held that state regulation of campaign speech must be premised upon proof and the application of the "actual malice" standard set forth in *New York Times v. Sullivan*, 376 U.S 254, 84 S.Ct. 710, 11 L.Ed. 2d 686 (1964), and that the "substantial" evidence test was insufficient. Here, the court found that campaign speech was regulated, although it was perhaps the most exemplary type of speech sought to be protected. The court held that calculated falsehoods are not constitutionally protected and reached an accommodation based upon the slight social value that it assigned to falsehoods.

The court also noted that it would be impossible to eliminate attacks based upon race, sex, religious, or ethnic status, because this type of speech is protected. The statute being questioned here was facially overbroad, because it was susceptible to including protected speech and could have been constructed more narrowly to avoid the chilling effect found here. The court decided that, having already found the statute impermissibly overbroad, it would be unnecessary to examine the questions of prior restraint also raised by the application of the statute.

Commentary

This case is often considered to be the leading case on the question of how much a state can regulate political speech before it runs afoul of the free speech rights afforded to all individuals. Since the decision in this case was issued, a number of states have invalidated similar statutes, but at least one major recent case, *Pestrak v. Ohio Elections Commission*, 670 F.Supp. 1368 (S.D.Ohio 1987) runs counter to the result in this case.

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Selected Case Summaries

Buckley v. Valeo,
424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976).

In an action challenging the constitutionality of the Federal Election Campaign Act, the U.S. Supreme Court held that campaign contribution limits and disclosure requirements were valid because of their limited First Amendment effect and the need to address the real and perceived problem of corruption; public financing of elections was permissible because it promoted the general welfare and helped to enhance rather than restrict public discussion. The Court determined, however, that, absent public financing, an individual's contributions to his or her own campaign could not be limited, nor could independent expenditures, because of the burden that such restrictions placed upon First Amendment rights of free expression.

Burns v. Valen,
400 N.W.2d 123 (Minn.App. 1987).

For a violation of a false campaign statement law to be proven, it must be shown that the candidate disseminated a statement known by him to be false. In this case, a candidate distributed a brochure that said that 76 percent of the bar association's members in the district had voted to support him, while in fact the figure referred to the votes of those who responded to the survey, and only 47 percent of the total universe of members in the district had voted to support him. The Minnesota Court of Appeals found that the way the statement was framed was not falsely misleading.

Citizens Against Rent Control v. Berkeley,
454 U.S. 290, 102 S.Ct. 434, 70 L.Ed.2d 492 (1981).

A municipal ordinance limiting contributions by individuals to a committee supporting or opposing a referendum (but allowing such committees to make unlimited expenditures) was struck down by the U.S. Supreme Court. Individuals were free to spend as much as they wanted under the law, and the Court held that individuals acting in concert had an associational right to be as free collectively as they would be individually.

Committee of One Thousand to Re-elect State Senator Walt Brown v. Eivers,
296 Or. 195, 674 P.2d 1159 (1983).

The Oregon Supreme Court held that statements of opinion are not actionable as false statements, nor are statements false if any reasonable inference of opinion or of correct fact can be drawn from them. Here, where a candidate accused his opponent of being for an increase in the property tax, a reasonable inference of this could be drawn from the fact that the opponent supported a statewide referendum that would have established a mechanism that would likely have ultimately resulted in the imposition of a property tax.

Commonwealth v. Acquaviva,
187 Pa.Super. 550, 145 A.2d 407 (Pa.Super.Ct. 1958), ***application for allocatur dismissed,*** **(1959).**

Where a statute makes it unlawful to publish printed matter designed or tending to injure or defeat a candidate by reflecting on the candidate's personal character or political actions and subjecting the person to prosecution for civil and criminal libel prosecution if the statements are false, bare libel is not what is proscribed, but rather

it is the anonymity of the publication that is forbidden and that constitutes the essence of the offense. A conviction is justified regardless of malice, negligence, or falsity, and the elements of libel do not need to be spelled out in the statute.

Commonwealth v. Evans,
156 Pa.Super. 321, 40 A.2d 137 (Pa.Super.Ct. 1944), ***application for allocatur refused,*** **(1945).**

The purpose of the statute prohibiting a person from anonymously charging candidates with private frailties or political misconduct is to compel the person to avow responsibility for the assertions. The Pennsylvania Superior Court found that the Bill of Rights "doesn't contain one syllable which protects anonymous writers."

Daugherty v. Hilary,
344 N.W.2d 826 (Minn. 1984), ***reh'g denied,*** **(1984).**

In the first case after its pronouncements in the *Schmitt v. McLaughlin*, 275 N.W.2d 587 (Minn. 1979), and *Matter of Ryan*, 303 N.W.2d 462 (Minn. 1981), cases, the Minnesota Supreme Court found in a misleading sample ballot case that a candidate's subjective good faith on a "knowing" standard was not sufficient and that the test will be left to the trier of fact upon the evidence. Here, where the candidate knew of the statute, the body of law, and the effectiveness of sample ballots, the court found that there was a lack of good faith on the part of the candidate and set aside and nullified the candidate's primary election victory.

Federal Election Commission v. Massachusetts Citizens for Life,
479 U.S. 328, 107 S.Ct. 616, 93 L.Ed. 539 (1986).

The U.S. Supreme Court in this case determined that the Federal Election Campaign Act's prohibition on corporate expenditures is unconstitutional as applied to independent expenditures made by a narrowly defined type of nonprofit corporation. A nonprofit organization had distributed a publication advocating the election or defeat of certain candidates favoring or opposing the group's position on one issue. The Court said that three criteria must be fulfilled to exempt an entity from the law's purview: (1) the organization must be formed for the express purpose of promoting political ideas and cannot engage in business activities, (2) the organization cannot have shareholders or someone with a claim on its assets or earnings, and (3) the organization cannot be established by a business corporation or labor union and must have a policy prohibiting the acceptance of contributions from such entities.

First National Bank of Boston v. Bellotti,
435 U.S. 765, 98 S.Ct. 1407, 55 L.Ed.2d 707 (1978).

A Massachusetts corporation challenged the constitutionality of state statute limiting corporate contributions and expenditures in referendum elections where the business interest of the corporation was not materially affected. The U.S. Supreme Court held that referendum elections are subject to different standards than candidate elections and that the right of public discussion meant that a state could not limit the amount of contributions or expenditures made by individuals or groups in support of or opposition to a referendum.

Graves v. Meland,
264 N.W.2d 401 (Minn. 1978).

A statute on distribution of campaign literature containing false information with respect to the personal or political character or acts of a candidate that is designed

or tends to elect, injure, or defeat a candidate relates to defamatory publications and not to self-laudation or dated laudatory comments by others, as here, where the accused used out-of-context statements by prominent state and national leaders praising him.

Morefield v. Moore,
540 S.W.2d 873 (Ky. 1976).

State statute requiring political advertising to carry "paid for by" disclaimer disclosing the name and address of payor or group and treasurer on whose behalf the communication appears does not violate First Amendment free speech rights. Here, the purpose of the statute was to promote honesty and fairness in campaign conduct. In the words of the Kentucky Supreme Court, "a fundamental objective of the First amendment was to obviate the necessity for anonymity. Not only is it unnecessary in the conduct of political campaigns, it is repulsive."

Northern Virginia Regional Park Authority v. U.S. Civil Service Commission,
437 F.2d 1346 (4th Cir. 1971), *cert. denied*, **403 U.S. 936, 91 S.Ct. 2254, 29 L.Ed.2d 7171 (1971).**

The purpose of the Hatch Act is to prohibit political activities among state employees whose employment is made possible by use of federal funds or a federal appropriation. The legislative purpose of the Hatch Act exemption of individuals holding elective office was to exempt a small but important number of state elected officers and employees whose official duties in their elective positions involved administration of federally assisted projects, and it was not the exemption's purpose to tolerate the political activity of an employee of an agency administering federal funds merely because the employee happened to have been elected to an entirely unrelated office.

Oregon Republican Party v. State,
78 Or.App. 606, 717 P.2d 1206 (Or.App. 1986), *reversed*, **301 Or. 437, 722 P.2d 1237 (1986) (reversed on grounds of mootness),** *on remand*, **81 Or.App. 523, 726 P.2d 412 (1986).**

The Oregon Republican Party brought an action for the determination of the legality of providing voters with postage-paid absentee ballots. The courts, after the case followed a convoluted course through the legal system, ultimately determined that the postage-paid envelope was not a thing of value with respect to influencing a vote, but rather merely served as a means to facilitate voting. There was no undue influence found here. For the practice to be improper, there must be something involved beyond what is involved in the act of voting--i.e., an advantage that has an independent value to the voter.

People v. Hochberg,
386 N.Y.S.2d 740, 87 Misc.2d 1024 (N.Y.Sup.Ct. 1976).

A state statute prohibiting corrupt use of position or authority is not unconstitutional on grounds of inhibiting debate, thereby resulting in a restraint on free speech, because there is no constitutional right to use governmental powers in that manner. Here, an incumbent seeking reelection allegedly offered his opponent cash and promised him a public job if the opponent refrained from running against him.

Snortland v. Crawford,
306 N.W.2d 614 (N.D. 1981).

The North Dakota Supreme Court held that the word "knowingly" means the firm belief by the sponsor, unaccompanied by substantial doubt, in the falsity of the statement. In this case, a candidate had accused his opponent of "ordering" the Ten Commandments out of schools, when in fact he had merely advised schools to remove them. The Court acknowledged that a candidate can legally make a false statement, yet hide behind the fact that he did not think that the words were actually false.

State v. Acey,
633 S.W.2d 306 (Tenn. 1982).

The obvious purpose of a statute that imposes criminal sanctions upon persons who anonymously disseminate written statements about candidates for office is to promote honesty and fairness in the conduct of election campaigns and also to insure that voters have information that will help them in assessing bias, interest, and the credibility of a person or organization disseminating the information about political candidates and then in determining the appropriate weight to be given the particular statement. In this case, the statute was limited to written or printed circulars, advertisements, or statements about a candidate, and the Tennessee Supreme Court found that there was no less restrictive means of furthering legitimate purposes.

State v. Fulton,
337 So.2d 866 (La. 1976).

State statute forbidding the distribution of pamphlets without a disclaimer was not narrowly limited to those situations where information sought had substantial connection with governmental interests sought to be advanced and was found to be incompatible with basic constitutional guarantees. In this case, no substantial reason was advanced as being a particular governmental interest. The Louisiana Supreme Court determined that anonymous material is best evaluated by the voters and should be taken into account with a number of other factors by voters. The Court felt that the best test of an idea was in the public marketplace.

State ex rel. Skibinski v. Tadych,
31 Wis.2d 189, 142 N.W.2d 838 (1966).

While appeals to prejudice and bigotry are not to be condoned in the elective process, such tactics are not forbidden by a statute prohibiting a person from knowingly making or publishing a false statement in relation to a candidate, as here, where ouster of a winning candidate was sought on grounds that he had published a handbill labeling the loser as "leader" of an open housing group and charging that he had "squandered" public funds by attending conventions.

Stebbins v. White,
235 Cal.Rptr. 656, 190 Cal.App.3d 769 (Cal.App. 3 Dist. 1987), *cert. denied*, **(1987).**

The essence of an election bribe is an offer or promise to pay, lend, or contribute money or other valuable consideration to induce or reward a voter for voting or failing to vote in a certain way. A promise by a candidate to perform valuable services that do not include proper administration of the office sought, but rather is made for the express purpose of inducing a voter to vote for him and directly benefits the voter, here a promise to endeavor to free a voter's brother from custody in return for a vote, did not relate to the administration of the office, and the fact that the candidate does not fulfill the promise to the voter is immaterial. The result would be unchanged

even if the promise is not performable. The court was concerned that the line between rhetoric and bribery was crossed in this case.

United States v. Mason,
673 F.2d 737 (4th Cir. 1982).

Federal law proscribing vote buying uncategorically prohibits a payment or offer of payment for voting whether in a purely federal election or mixed federal/state election, without the requirement that the payment or offer of payment be made specifically on behalf of a federal candidate or that a special intent to influence a federal race exists. All that is needed is that the conduct occurred and that the conduct exposed federal aspects of the election process to the possibility of corruption. Here, a pattern of promises and expectations by voters that they would be paid for the act of voting was sufficient to sustain a conviction.

Selected Legal Literature

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Note, "Freedom of Speech: The Case of the 'Corrupt' Campaign Promise," 70 Kentucky Law Journal 203 (1981-1982).

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Weber, "Strange Case of the Reckless Promise: Reflections on *Brown v. Hartlage*," 10 Northern Kentucky Law Review 227 (1983).

Chapter 7: Balloting

Chapter 7: Balloting

Introduction

Balloting is the central function of a democratic election system--the expression at the polls of citizens' choices of those individuals they prefer to be their elected public officers at the local, state, and federal levels of government. This chapter will focus on balloting-related issues addressed by the courts, specifically questions concerning the content of the ballot itself, the process of balloting or voting, access to balloting or polling places, and the alternative methods provided for balloting in an election, including absentee voting.

Official Ballots

A state may require all voters to vote by printed ballots furnished by the state and forbid the use of other ballots or pasters.[1]

Printing of Ballots

All states prescribe requirements for the printing of ballots. The failure of election officials to comply with the technical requirements for the printing of ballots does not constitute a violation of the Due Process Clause of the U.S. Constitution if the failure was due to the simple negligence of the election officials and the ballots sufficiently comply with state law so that voters should not have been confused or misled.[2]

Position of Party and Candidate Names

The common wisdom has been that the position of the name of a political party and its candidates on the ballot can affect the election outcome. The courts have reached opposite conclusions as to the impact of statutes that favor major political parties or incumbent candidates in ballot position and the validity of such statutes.

A two-tier ballot-placement plan that gave the top positions on the ballot to the major political parties, while other parties on the ballot that qualified by filing

petitions were positioned below the major parties in the order in which their petitions were filed was determined to be reasonable and not invidious discrimination that denies equal protection to minor parties and their candidates. The differing treatment of minor parties did not exclude them from the ballot, did not prevent them from achieving major party status, and did not prevent any voters from voting for the candidates of their choice.[3]

In another case involving a state law under which incumbents were designated as candidates for reelection and placed first on the ballot, the court found that there was some advantage conferred by the designation of incumbency and the first position on the ballot, separately and in combination, but that the statute was constitutional. According to the court, voters do not have a constitutional right to a wholly rational election based solely on reasoned consideration of the issues and the candidates' positions.[4]

On the other hand, a state statute that reserved the first or left-hand column of the ballot for the political party that received the most votes in the last congressional election was held to have burdened the fundamental right to vote of the last-listed candidates in violation of the 14th Amendment. The court found that there was some advantage to the first ballot position and that there was no rational basis for the favoritism expressed in the statute.[5]

A ballot-placement practice whereby county clerks place their own party in the first or top position on the ballot in all general elections was held to be a violation of the Equal Protection Clause of the 14th Amendment where it was demonstrated that the top position is an advantage to candidates in an election and there was proof of the existence of an intentional or purposeful discrimination by the clerks that favored one class over another.[6]

A state may list candidate names on the primary ballot in the order in which candidate petitions for nomination are received so long as ties in filing are broken by nondiscriminatory means, such as the drawing of names by lot, and not on the basis of incumbency or seniority.[7]

Within constitutional limits, the ballot arrangement of independent candidates is a matter of choice for a state, which may allot political party candidates their own separate column and group independent candidates together in one column in order to maintain a manageable ballot and identify candidates who have not demonstrated the modicum of support required for qualification as a party candidate.[8]

Identification of the Candidate

States typically specify how candidates will be identified on the ballot to ensure that deceptive or confusing names are not used. As a rule, candidates will be listed by their given or legal names; however, even a legal name, such as "None-of-the-Above," may be considered misleading and deceptive and prohibited under a state's authority to regulate the manner in which candidates are identified

on the ballot.[9] Depending on the law of the state, a nickname by which a candidate is generally and commonly known or a name that is used as a means of identification authorized by law may be permitted; however, the name "Shelvie Prolife Rettmann" did not qualify as such a name and under a state statute was prohibited in the case of major political party candidates.[10] A derivative of a candidate's given name (e.g., "Nancy" for "Ferdinan") may be used if is properly acquired under the common law of a state and it is used in good faith for honest purposes, and the state does not restrict the identification of the candidate on the ballot to the candidate's "given" or "Christian" name.[11]

A state may not require that the race of candidates be designated on the ballot. This form of candidate identification operates as a discrimination against black candidates and is prohibited by the Equal Protection Clause of the 14th Amendment.[12]

Designation of a Candidate's Political Affiliation

States have the authority to regulate the designation of a candidate's political affiliation or philosophy on the ballot. They may require that a candidate who qualifies for the general election ballot by obtaining the requisite number of petition signatures be designated on the ballot as "Independent" with no political party affiliation indicated and limit the designation of a candidate's political party on the ballot to those candidates affiliated with a political party recognized or qualified under state law.[13] The prohibition of the word "Independent" as any part of the political designation of an independent non-party candidate on the ballot has been invalidated as being repugnant to both the 1st and 14th Amendments.[14]

Ballot Language

A confusing, turgid, and inartistic description of a proposed state constitutional amendment on the ballot does not violate the Due Process or Guaranty Clause (guaranteeing each state a republican form of government) if the voters are informed by the ballot of the subject of the amendment, are given a fair opportunity by publicity to consider its full text, and are not deceived by the ballot's wording.[15]

Party Levers on Voting Machines

A state statute requiring that all voting machines be equipped with mandatory party levers has been upheld on constitutional grounds. The party-lever law was not fundamentally unfair or unreasonably discriminatory in contravention of the 14th Amendment, although the wisdom of the statute was questionable.[16]

Bilingual Voting Requirements

The Voting Rights Act of 1965, as amended, provides for bilingual election-related materials. Section 203 requires that voting and registration notices, forms, instructions, assistance, and other election-relaterials materials and information (including ballots) must be provided in English and the language of a qualifying single-language minority if more than 5% of the voting-age citizens of a state or political subdivision are members of the single-language minority and the illiteracy rate of those members as a group is higher than the national illiteracy rate.[17] Under Section 4, bilingual ballots and other election-related notices, forms, instructions, assistance, and materials must be provided by a state (including all of its political subdivisions) or a specific political subdivision that on November 1, 1972, provided English-only election assistance and materials determined to be a "test or device."[18]

Polling Place Access

A handicapped person has a constitutional right to vote, but has no equal protection right to insist that all polling places be modified to eliminate architectural barriers.[19] The federal Voting Accessibility for the Elderly and Handicapped Act, however, affords protections for voters 65 and older and physically disabled voters in federal office elections.[20] As a rule, all polling places must be accessible to handicapped and elderly voters, and a reasonable number of accessible permanent registration facilities must be provided unless mail or at-home registration is permitted.[21] Voting and registration aids, including at least large-type instructions displayed conspicously at each polling place, must be provided.[22]

Voter Assistance

A state may adopt reasonable requirements for the provision of voter assistance to illiterate and handicapped voters at the polls. The state's interest in protecting the integrity of the franchise justifies the moderate restriction on the secrecy of the handicapped or illiterate voter's ballot that results when voter assistance is provided.[23]

The Voting Rights Act, as amended in 1982, provides that any voter who requires assistance to vote because of blindness, disability, or inability to read or write may be given assistance by a person of the voter's choice; however, voting assistance may not be provided by the voter's employer or the employer's agent or by an officer or agent of the voter's union.[24]

Limitation of a Voter to a Single Nominating Act

A state can restrict voters to a single nominating act for an office during an election and can prevent a voter from both signing an independent nominating petition and voting in a primary at which nominees for the same office are selected.[24]

Right to Write-In Voting

Some states do not permit write-in voting, and one court has held that the complete elimination of the opportunity to be a write-in candidate violated a state constitutional guarantee that all elections must be by "direct and secret vote" and impermissibly denied the right to vote for a candidate of one's choice as embodied in the constitutional provision.[25]

Voting by Incarcerated Voters

If voters confined in a penal institution or jail are not under any legal disability impeding their legal right to register and vote but are absolutely prohibited from exercising the franchise because they are not allowed to register or vote by absentee procedures or by any alternative means, they are denied equal protection of the laws if the state permits other classes of qualified voters, such as the physically handicapped, to register and vote by absentee measures.[26] At least one court has found a violation of prisoners' rights protected by a state constitution where incarcerated felons who are not disfranchised under state law are unable to vote by reason of their incarceration and has required that the felons be provided with an opportunity to register and vote.[27]

Absentee Voting

There is no fundamental right to vote by absentee ballot except to the extent Congress has created such a right in presidential and other federal elections. The absentee ballot is a purely remedial measure designed to afford absentee voters the privilege as a matter of convenience. Discrimination by a state among its citizens by allowing only certain classes of voters to vote by absentee ballot does not violate the Equal Protection Clause of the 14th Amendment where the statutory restrictions on absentee voting are reasonably related to protection against fraud in the voting of absentee ballots and the discriminatory classification is not invidious and does not have the stigma of wealth or race classifications.[28]

Absentee voting may be authorized for general elections and excluded in primary elections for non-federal offices.[29] A state may also prescribe different absentee voting procedures for different classes of absentee voters as long as the discrimination is not invidious and there is a rational basis for the absentee voting classification scheme.[30]

A state may not print only the names of the major political parties on the absentee ballots for primary and general elections and exclude a third party where the third party has met the statutory requirement for demonstrating the necessary level of support needed to win general ballot position for its candidates. This procedure in effect permits absentee voting by some classes of voters and denies the privilege to other classes in similar circumstances, and if a comparable alternative means to vote is not provided, it is an arbitrary discrimination violative of the Equal Protection Clause.[31]

The federal Uniformed and Overseas Citizens Absentee Voting Act provides that absent uniformed services voters and overseas voters must be permitted to vote by absentee ballot, as well as to use absentee registration procedures, in any federal office primary or general election.[32] Overseas voters are permitted to use the federal write-in absentee ballot in a general election for a federal office if certain requirements are met.[33]

The Voting Rights Act Amendments of 1970 ensure that qualified voters have an opportunity to vote in presidential elections by absentee ballot if they might be absent on election day, apply for an absentee ballot no later than seven days before the election, and return their ballots by poll-closing time on election day. If a state does not provide for absentee registration in order to vote absentee in a presidential election, an absentee ballot for voting in the election cannot be denied for failure to register. The Act also provides that the state registration deadline cannot be more than 30 days before a presidential election and that voters who move 29 days or less before the election can vote in person or by absentee ballot where they resided prior to moving if certain qualifications are met.[34]

Mail Ballot Elections

Elections conducted entirely by mail balloting have been upheld against a claim that such elections violate a state constitutional requirement that voting must be secret. It was determined that the secrecy provision was not intended to preclude reasonable measures to facilitate and increase exercise of the right to vote, such as absentee and mail ballot voting.[35]

Notes

[1]*Blackman v. Stone*, 101 F.2d 500 (7th Cir. 1939).

[2]*Hendon v. North Carolina State Board of Elections*, 710 F.2d 177 (1983).

[3]*Board of Election Commissioners of Chicago v. Libertarian Party of Illinois*, 591 F.2d 22 (7th Cir. 1919).

[4]*Clough v. Guzzi*, 416 F.Supp. 1057 (D.Mass. 1976).

[5]*McLain v. Meier*, 637 F.2d 1159 (8th Cir. 1980).

[6]*Sangmeister v. Woodard*, 565 F.2d 460 (7th Cir. 1977).

[7]*Mann v. Powell*, 333 F.Supp. 1261 (N.D.Ill. 1969).

[8]*McLain v. Meier*, 637 F.2d 1159 (8th Cir. 1980).

[9]*None of the Above v. Hardy*, 377 So.2d 385 (La.App. 1979).

[10]*Clifford v. Hoppe*, 357 N.W.2d 98 (Minn. 1984).

[11]*Stevenson v. Ellisor*, 270 S.C. 560, 243 S.E.2d 445 (1978).

[12]*Anderson v. Martin*, 375 U.S. 399, 84 S.Ct. 454, 11 L.Ed.2d 430 (1964).

[13]*Socialist Workers Party v. March Fong Eu*, 591 F.2d 1252 (9th Cir. 1978); *Dart v. Brown*, 717 F.2d 1492 (5th Cir. 1983).

[14] *Bachrach v. Secretary of Commonwealth*, 382 Mass. 268, 415 N.E.2d 832 (1981).

[15]*Kohler v. Tugwell*, 292 F.Supp. 978 (E.D.La. 1968), *aff'd*, 391 U.S. 531, 89 S.Ct. 879, 21 L.Ed.2d 755 (1969).

[16]*Voorhes v. Dempsey*, 231 F.Supp. 975 (D.Conn. 1964), *aff'd*, 379 U.S. 648, 85 S.Ct. 612, 13 L.Ed.2d 552 (1965).

[17]Voting Rights Act of 1965, as amended, Sec. 203; 42 U.S.C. Sec. 1973aa-1a.

[18]Voting Rights Act of 1965, as amended, Sec. 4; 42 U.S.C. Sec. 1973b.

[19]*Selph v. Council of City of Los Angeles*, 390 F.Supp. 58 (C.D.Cal. 1975); but see the federal Voting Accessibility for the Elderly and Handicapped Act, 42 U.S.C. Sec. 1973ee *et seq.*

[20]Voting Accessibility for the Elderly and Handicapped Act, Sec. 2 *et seq.*; 42 U.S.C. Sec. 1973ee *et seq.*

[21]Voting Accessibility for the Elderly and Handicapped Act, Secs. 3 and 4; 42 U.S.C. Secs. 1973ee-1 and 1973ee-2.

[22]Voting Accessibility for the Elderly and Handicapped Act, Sec. 5; 42 U.S.C. Sec. 1973ee-3.

[23]*Smith v. State of Arkansas*, 385 F.Supp. 703 (E.D.Ark. 1974).

[24]Voting Rights Act of 1965, as amended, Sec. 208; 42 U.S.C. Sec. 1973aa-6.

[25]*American Party of Texas v. White*, 415 U.S. 767, 94 S.Ct. 1296, 39 L.Ed.2d 744 (1974); *Jordan v. Officer*, 170 Ill.App.3d 776, 121 Ill.Dec.760, 525 N.Ed.2d 1067 (Ill.App.Ct. 5th Dist. 1988).

[26]*Smith v. Smathers*, 372 So.2d 427 (Fla. 1979).

[27]*McDonald v. Board of Election Commissioners*, 394 U.S. 712, 89 S.Ct. 1404, 22 L.Ed.2d 739 (1969); *O'Brien v. Skinner*, 414 U.S. 524, 94 S.Ct. 740, 38 L.Ed.2d 702 (1974); *Tate v. Collins*, 496 F.Supp. 205 (W.D.Tenn. 1980).

[28]*Cepulonis v. Secretary of Commonwealth*, 389 Mass 930, 452 N.E.2d 1137 (1983).

[29]*Prigmore v. Renfro*, 356 F.Supp. 427 (N.D.Ala. 1972).

[30]*Fidell v. Board of Elections of City of New York*, 343 F.Supp. 913 (E.D.N.Y. 1972); see also the Uniformed and Overseas Citizens Absentee Voting Act, 42 U.S.C. Sec. 1973ff-1.

[31]*Luse v. Wray*, 254 N.W.2d 324 (Iowa 1977).

[32]*American Party of Texas v. White*, 415 U.S. 767, 94 S.Ct. 1296, 39 L.Ed.2d 744 (1974).

[33]Uniformed and Overseas Citizens Absentee Voting Act, Sec. 102; 42 U.S.C. Sec. 1973ff-1.

[34]Uniformed and Overseas Citizens Absentee Voting Act, Secs. 102 and 103; 42 U.S.C. Secs. 1973ff-1 and 1973ff-2.

[35]Voting Rights Act of 1965, as amended, Sec. 202; 42 U.S.C. Sec. 1973aa-1; *Oregon v. Mitchell*, 400 U.S. 112, 91 S.Ct. 260, 27 L.Ed.2d 272 (1970).

[36]*Peterson v. City of San Diego*, 34 Cal.3d 225, 666 P.2d 974, 193 Cal.Rptr. 533 (1983).

McLain v. Meier

637 F.2d 1159
United States Court of Appeals
Eighth Circuit
October 21, 1980

A state may not provide a preferential ballot position to an incumbent party and its candidates or to an incumbent candidate, but may group independent candidates in a single column on the ballot.

The Facts

McLain, the organizer of a political group called "Chemical Farming Banned," attempted to file in the summer of 1978 as the group's party candidate for U.S. Representative from North Dakota in the fall general election. Ballot position for a new party candidate is earned under North Dakota law by filing 15,000 signatures by June 1st of the election year, a requirement which McLain did not meet. He was able to qualify as an independent non-party candidate by submitting 300 supporting signatures no later than 40 days before the general election.

McLain, who was opposed on the ballot by nominees of the Republican and Democrat Parties and another independent candidate, was listed, along with the other independent candidate, in a single column that was placed last on the ballot. He complained to the Secretary of State that each independent candidate had not been given a separate column on the ballot and, upon obtaining no satisfaction, the day before the election filed a complaint against the North Dakota Secretary of State and Attorney General in the U.S. District Court for the District of North Dakota seeking preliminary and permanent injunctive relief, including prevention of the election. The relief was denied and the election held.

The defendants subsequently filed a motion to dismiss for failure to state a claim upon which relief could be granted, and the District Court rendered a summary judgment in favor of the defendants. McLain appealed, and the Court of Appeals vacated the District Court's decision and remanded the case to enable McLain to file an amended complaint. The District Court ultimately entered a another judgment dismissing McLain's complaint, and McLain again appealed.

The Issues

The major question addressed was whether the North Dakota "incumbent first" and "independent column" statutes were constitutional.

The Holding and Rationale

The judgment of the District Court upholding the "incumbent first" statute was reversed and its judgment upholding the "independent column" statute was affirmed. Since McLain had no intention of qualifying as an independent candidate in the 1980 election, no permanent injunctive relief was necessary, and his prayer for injunctive relief was dismissed without prejudice.

North Dakota's "incumbent first" (or, more accurately, "incumbent party first") statute reserved the "first or left-hand column" of the ballot for the political party that received the most votes in the last congressional election, and the next columns were assigned according to the number of the votes a party received in the election. The law did not mention independent candidates, who therefore were relegated to the last column.

McLain alleged that if all other factors are equal, the undecided or uninformed voter will be drawn to the name appearing first on the ballot--the so-called "donkey" vote--and in a close election, victory may in fact turn on the windfall vote that accompanies an advantageous ballot position.

The District Court had found an inference that some advantage may accrue to the candidate whose name appears first on the ballot, relying primarily on the affidavit of an expert statistician for McLain, who reviewed four studies and concluded there was a definitive statistical advantage of at least 5% to the candidate whose name appeared first. The Court of Appeals, although it observed that studies introduced in other cases questioned the finding of positional bias, nevertheless concluded that there was no error in the District Court's finding of ballot advantage in the first position. In fact, as the court noted, it was not the first court to so hold, citing six previous cases in support.

The fairest remedy for a constitutionally defective placement of candidates would appear to be some form of ballot rotation whereby "first position" votes are shared equitably by all candidates. The court did not undertake to determine which rotation arrangement was financially and administratively feasible, but rather stressed that position advantage must be eliminated as much as possible.

The court next addressed the question whether the unequal effect flowing from the ballot design offended the Equal Protection Clause of the 14th Amendment. The standard of review applicable to the question was not clear, according to the court, but the "incumbent first" statute did not withstand even the minimal standard--the rational basis test--because the justification offered for the ballot arrangement was unsound. The District Court reasoned that the state had an interest in making the ballot as convenient and intelligible as possible for the great majority of voters, but this, according to the Court of Appeals, was a virtual admission that the state has chosen to serve the convenience of voters supporting incumbent and major party candidates at the expense of other voters.

The court held that the favoritism expressed in the "incumbent first" statute burdens the fundamental right to vote possessed by the supporters of the last-listed candidates in violation of the of the 14th Amendment and joined "numerous" other courts that have held "incumbent first" ballot procedures to be constitutionally unsound.

The "independent column" statute allotted political party candidates their own column on the ballot, while grouping all independent candidates together in one column with the effect, according to McLain, of making independents appear as mere bit performeds on a stage dominated by the Republican and Democrat "stars."

The court concluded that, on the present record, the provision of a single column for independent candidates met the rational basis test and is constitutionally permissible, noting that various forms of disparate treatment had been approved in the overwhelming majority of cases on the subject. Within constitutional limits, the ballot arrangement is a matter of choice for the state.

Two additional considerations were cited by the court in support of its conclusion. First, there was evidence to support the state's contention that the grouping of independents was necessary to maintain a manageable ballot, and the state has a legitimate interest in avoiding an unwieldy ballot (e.g., separate columns for the eleven 1976 presidential candidates) by grouping independent candidates in a single column. Second, the independent column may serve to identify those candidates who

have not demonstrated the modicum of support required for qualification as a party candidate. Insofar as the independent column may serve this informational purpose, the provision of such information is within the state's legitimate interests.

Commentary

The constitutionality of preferential ballot-position statutes and procedures, including "incumbent first" and "major party first" laws, is an open question, and the appellate courts have reached differing conclusions as to whether preference in ballot position infringes the equal-protection rights of candidates or voters, perhaps as a result of the conflicting research evidence as to whether the preferred ballot position ("first" or "left") is indeed advantageous and the degree of advantage gained, if any. The *McLain* court in effect found the North Dakota law to be unconstitutional per se; other courts have required more conclusive evidence of the advantage of a preferred ballot position in order to invalidate a preferential ballot-position law or procedure.

There is little controversy as to whether independent candidates can be grouped in a single column or row on the ballot. The *McLain* decision as to the constitutionality of this practice is the prevailing view.

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None of the Above v. Hardy

377 So.2d 385
Court of Appeal of Louisiana
First Circuit
October 5, 1979

A state may regulate how and in what circumstances the names of candidates are placed on the ballot to protect voters from confusion or fraudulent or frivolous candidates and therefore may prohibit the use of deceptive, misleading, or confusing names by candidates on the ballot.

The Facts

A candidate for Governor of Louisiana qualified to run for the office under the name Luther Devine "L.D." Knox and requested that his name appear on the ballot in that form; however, one month after the qualifying period, he legally changed his name to "None-of-the-Above" and requested the Secretary of State to identify him on the ballot by his new name. The Secretary of State requested an opinion from the Attorney General, who advised that Louisiana statutory law prohibits a candidate from designating a deceptive name to be printed on the ballot and that "None-of-the-Above" was a deceptive name and therefore impermissible.

Knox, or rather None-of-the-Above, filed suit in a state trial court requesting that the "deceptive name" statute and Attorney General's opinion be declared unconstitutional and that the defendant state officials be enjoined either to include his legal name on the ballot or from holding the gubernatorial election. The plaintiff admitted in his petition that he was not a serious candidate and that his sole purpose was to arouse interest in the adoption by the state legislature of an option for voters to vote for "none of the above" rather than for a specific candidate. The trial court sustained the defendants' peremptory exception of no right and no cause of action, and the plaintiff appealed to the Louisiana Court of Appeal.

The Issues

The questions addressed by the court were whether the name "None-of-the-Above" was deceptive as prohibited by the Louisiana "deceptive name" statute and whether the statute itself was constitutional.

The Holding and Rationale

The Court of Appeal affirmed the trial court's judgment in favor of the state officials. The court held that plaintiff's allegations of unconstitutionality were conclusions of law for which there were no allegations of fact to support and were in any event without substance.

Under the clear wording of the statute in question, a candidate must designate in his notice of candidacy the form in which his name shall appear on the ballot, but he may not designate a deceptive name. A state has a constitutional right to regulate how and in what circumstances the names of candidates will be placed on the ballot to protect voters from confusion or fraudulent or frivolous candidates (per the authority of *MacBride v. Exon*, 558 F.2d 443 (8th Cir. 1977)). The state therefore has an interest in preventing deceptive names from appearing on the ballot as the Louisiana Supreme Court has previously held. The court concluded that "None-of-the-Above" on the ballot would be misleading and deceptive and a violation of the statute.

Commentary

The *"None-of-the Above* case stands for the general proposition that states have broad authority, without violating candidates' constitutional rights, to specify how candidates are identified on the ballot in order to prevent the confusion and deception of the voters. A candidate's given or legal name is acceptable for placement on the ballot, except when it is deceptive, misleading, or confusing and the state has prohibited such names on the ballot. Nicknames and derivatives of a given name may be permitted, depending on the law of the state. Race, however, is not a valid form of candidate identification.

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Socialist Workers Party v. March Fong Eu

591 F.2d 1252
United States Court of Appeals
Ninth Circuit
September 26, 1978

A state may restrict the identification of a candidate's political party affiliation on the ballot to those candidates whose party has qualified for recognition on the ballot under state law.

The Facts

The Socialist Workers Party and other third parties and individuals initiated a lawsuit against the California Secretary of State in the U.S. District Court for the Northern District of California. The plaintiffs challenged the constitutionality of the state's ballot access procedures and requirements and the requirement for the mandatory printing on the general election ballot of the designation "Independent" rather than any party affiliation next to the name of a candidate for partisan office who qualified for the ballot through the independent nomination process. Independent nominations were made by filing petitions with the signatures of the required number of registered voters without regard to whether the signers had voted in the preceding primary or supported the party professing to nominate the independent candidate.

Under the ballot access statute, political parties and their candidates were permitted to qualify for ballot recognition under the party name only on a statewide basis; the candidates of non-statewide parties, therefore, could not be identified by party affiliation unless their party qualified as a statewide party.

The District Court upheld the ballot access statute, and no appeal was taken from that decision.

In regard to the independent-designation statute, the plaintiffs sought declaratory and injunctive relief mandating inclusion of party affiliation on the ballot for all independent nominees for statewide and non-statewide offices in the 1976 general election and declaring unconstitutional, as violations of the 1st and 14th Amendments, the absolute exclusion of party affiliation for all independent nominees.

On cross motions for summary judgment, the District Court held that the statute violated the Equal Protection Clause of the 14th Amendment insofar as it gave candidates associated with local (i.e., non-statewide) parties no means other than statewide qualification to have their political affiliation, instead of "Independent," printed on the ballot. The court granted the declaratory relief requested and declared the statute unconstitutional to the extent it affected non-statewide-office candidates, but nevertheless denied the injunctive relief requested.

The plaintiffs appealed directly to the U.S. Supreme Court, challenging the part of the District Court judgment denying injunctive relief, and the Supreme Court summarily affirmed the District Court ruling. The Secretary of State then brought an appeal to the U.S. Court of Appeals to challenge the District Court's granting of declaratory relief by finding the independent-designation statute unconstitutional as it applies to non-statewide-office candidates. The appeal was dismissed for lack of jurisdiction, but upon further consideration was reinstated by the Court of Appeals.

The Issues

The question presented was whether the California statutes that prohibited the qualification of political parties on a non-statewide basis and required the candidates of local political parties therefore to be identified on the general election ballot by the term "Independent" were constitutional.

The Holding and Rationale

The Court of Appeals upheld the California statutes and reversed the decision of the District Court.

The plaintiffs had argued that the independent-designation statute, in conjunction with the ballot-access statute, operated to violate their rights to freedom of speech and association under the 1st and 14th Amendments and their rights to equal protection under the 14th Amendment.

The Court reviewed prior Supreme Court cases that established two different, overlapping rights: the right to associate for the advancement of political beliefs and the right of qualified voters to cast their votes effectively regardless of their political persuasion (citing, *inter alia*, *Williams v. Rhodes*). These rights have been held to be "fundamental."

The Court did find any case specifically holding that candidates have a right to have specific information identifying their associates on the ballots or that voters, in order to vote effectively, have a right to be informed of those associates by information the ballot. The Court acknowledged that the independent-designation statute had possible effects on both associational and voting rights in that it failed to inform voters fully and possibly could contribute to misunderstanding by some voters. However, the Court was not confident that the consequences affected fundamental rights of candidates or voters. It could be argued that the proper identification of associates and elimination of voter misunderstanding as might otherwise occur were the responsibility of the candidates and voters, not the state.

The Court assumed for the sake of argument that the statute did affect fundamental rights and turned to the question as to whether the statute imposed a substantial burden on those assumed rights. Substantial burdens on associational and voting rights are unconstitutional unless they are essential to serve a compelling state interest (per *Storer v. Brown*). The District Court had found that the challenged statute substantially burdened protected constitutional rights as it applied to non-statewide elections and that the strict scrutiny standard should be applied; the Court of Appeals did not agree.

The Supreme Court has held that not every limitation or incidental burden on the exercise of voting rights is subject to a strict standard of review (*Bullock v. Carter*), and only classifications that constitute invidious discrimination offend the Equal Protection Clause (*American Party of Texas v. White*).

California, according to the Court, placed no unconstitutional restrictions on ballot access; it merely limited an indication of party affiliation to those parties that have qualified on a statewide basis, participate in the state primary, and subject themselves to state regulation. The term "independent" has a clear meaning in the context of the state ballot-qualification procedure. A state may in good faith choose a term of art ("Independent") to categorize its candidates without impermissibly burdening their rights or the rights of those who vote for or associate with them. The fact that some voters may mistake the term does not in itself make the categorization a substantial

burden; it is no more misleading than the labels "Democrat" or Republican." The labels "Independent," "Democrat," and "Republican" are a legitimate description indicating the reason a name is on the ballot. In the absence of other misleading conduct, such voter misinformation as might exist is not a substantial burden, and under the circumstances a "compelling state interest" need not be established.

The Court thereupon applied the "rational basis test" of *McDonald v. Board of Election*: the distinctions drawn by the statute must bear a rational relationship to a legitimate state end and be based on reasons related to that goal. The Court held that the independent-designation statute was rationally related to the state's legitimate interest in regulating its electoral process. A state may rationally choose to have a statewide party qualification and regulation mechanism and to list on the ballot for the benefit of voters the method by which the candidates place on the ballot was attained. It need not provide publicity to the candidate's party when his position on the ballot may be substantially attributable to the signatures of voters who are not members of the party.

California's decision to indicate the method through which a candidate comes to appear on the ballot inflicts no substantial burden on candidates or their associational rights. Local candidates are in a particularly advantageous position to communicate their party position and its relevance to voters.

The distinction drawn between statewide and local parties does not burden associational or voting rights. Local parties may still qualify candidates, organize and publicly endorse their candidates, and provide to voters the freedom of choice.

Commentary

The *Socialist Workers Party* case reaffirms that states have extensive authority to regulate not only access to the ballot by political organizations but also the manner in which candidates of political organizations not recognized under state law are identified on the ballot. A state may require that the term "Independent" be used on the ballot to designate so-called "petition" or "independent" candidates regardless of their party affiliation and, at least according to one court, may not prohibit the use of the term as a ballot designation for truly independent (i.e., non-party-affiliated) candidates.

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Jordan v. Officer

170 Ill.App.3d 776, 121 Ill.Dec. 760, 525 N.E.2d 1067
Appellate Court of Illinois
Fifth District
June 13, 1988

A state may limit a voter to a single nominating act for an office by prohibiting the voter from both signing a nominating petition for a independent candidate and voting at a primary at which candidates for the same office are nominated.

The Facts

In the February 27, 1987, Democratic Party primary election to nominate candidates for the city offices of East St. Louis, Illinois, Officer, a candidate for mayor, defeated Jordan, Franklin, and Malone, while Moore, a candidate for city treasurer, defeated Powell. Officer won by 1,035 votes and Moore by 987 votes. On May 9th, the candidates finishing second in each race, Jordan and Powell, petitioned the county circuit court contesting the primary results and named the other candidates in the two races as defendants. The plaintiffs alleged that over 2,000 voters in the primary had also signed nominating petitions for independent candidates in violation of state law and therefore were disqualified from voting in the primary.

On March 25th, the court ordered the city board of election commissioners to review the independent candidate nominating petitions and determine who among the petition signers also voted in the primary. The general election scheduled for April 7th was postponed by the court on April 2nd while the election board's review of the petitions was in progress. The circuit court's postponement order was appealed, and the Appellate Court vacated the order on May 15th, holding that the circuit court had erred. On May 18th, the circuit court entered a judgment on the merits of the contest, finding that 1,217 voters in the primary were ineligible to vote because they had signed petitions for independent candidates. The Democratic primary was voided and a new primary scheduled for July 14th, to be followed by the general election, which was rescheduled initially for August 25th and then changed to not later than August 4th. The defendants (winners of the first primary) appealed to the Appellate Court, arguing, *inter alia*, that the state election code provision prohibiting independent-candidate petition signers from voting in the primary was unconstitutional.

The Issues

The main issue to be resolved was whether the Illinois statute prohibiting a voter who signs a nominating petition for an independent candidate from voting in a later primary in which candidates for the same office are nominated was constitutional.

The Holding and Rationale

The Appellate Court reversed the circuit court judgment. The state election code provision in question was held to be constitutional, but the appropriate remedy was not a new election but rather an apportionment of the illegal votes between the candidates on a precinct-by-precinct basis. The primary election should not have been nullified in the absence of evidence demonstrating fraud or an effort to undermine the nominating process.

The defendants argued that *Tashjian v. Republican Party of Connecticut* and *Democratic Party of the United States v. Wisconsin*, two Supreme Court cases, prohibited the usurpation of the power of the party to determine its own membership by placing the burden of enforcing the single nominating act provision of the state code on state

election authorities. They claimed that the trial court appeared to require the state to do what was prohibited in *Tashjian*--prevent independents from voting in a partisan primary.

The Appellate Court responded by noting that the defendants apparently had misinterpreted the statute in question. It did not prohibit independents from voting in a party primary; it prevented those who had signed nominating petitions from voting in the primary. In fact, the Democratic Party in the present case had not adopted a rule that would have allowed the ineligible voters to vote in the party's primary. The primary responsibility for enforcing election laws resides in the election authority and its officials, not partisan party poll watchers.

The Appellate Court then held that the state election code provision prohibiting two nominating acts in a single election was constitutional. The state may prevent one signing the petition of an independent candidate from voting later in a primary in which candidates for the same office are being selected. Several cases were cited as precedent for this determination.

In *Rouse v. Thompson*, 228 Ill. 522, 81 N.E. 1109 (1907), an earlier version of the statute in question was held to be constitutional. The court stated that the freedom of the primary election would be destroyed if independent voters or voters affiliated with an opposite party can vote at the primary of a party with the voter has no political affiliation and thereby control the nominations of a party to which he is opposed and whose candidates he will vote against.

In *American Party of Texas v. White*, the U.S. Supreme upheld the constitutionality of a Texas statute that restricted the signers of an independent candidate's nominating petition to qualified voters who had not signed another independent candidate's petition or had voted in a party's primary election for the same office. The Supreme Court considered the statutory restriction to be nothing more than a prohibition against casting more than one vote in the process of nominating candidates for a particular office.

In *Jackson v. Ogilvie*, 325 F.Supp. 864 (N.D.Ill. 1971), *aff'd*, 403 U.S. 925, 91 S.Ct. 2247, 29 L.Ed.2d 705 (1971), which was cited with approval in *American Party of Texas*, the scheme in an Illinois statute similar to the Texas law was characterized as an attempt to ensure that each qualified voter in fact exercises the franchise, either by vote or by signing a nominating petition, but not by both.

Finally, the Court observed that an Illinois statute that precluded persons voting in a preceding primary election from signing an independent's nominating petition for an office for which candidates were selected at the primary had been upheld in *Stout v. Black*, 8 Ill.App.3d 167, 289 N.E.2d 456 (1973). The *Stout* court stated that allowing a person to take part in nominating two people for the same office can only lead to fraud and destruction of party organization.

The Appellate Court saw no rational basis for distinguishing between the Illinois statute in the *Stout* case and the Illinois statute in question. One is the converse of other.

Since the plaintiff Jordan had died after the contest action was initiated, his cause of action abated automatically upon his death, and Officer became the nominee for mayor without any apportionment of the illegal votes. Upon apportionment of the illegal votes in the treasurer's race, the defendant Moore, the apparent winner of the primary, still would win by a considerable margin.

Commentary

A minority of the states limit voters to a single act in nominating a candidate for an office, although there is considerable variation in the single-nominating-act laws. The case law, including *Jordan* and *American Party of Texas*, has approved these restrictions, and there does not appear to be any doubt as to their constitutionality.

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O'Brien v. Skinner

414 U.S. 524, 94 S.Ct. 740, 38 L.Ed.2d 702 (1974)
United States Supreme Court
January 16, 1974

If a state permits absentee registration or voting by one or more classes of legally qualified voters, it may not deny the opportunity to register and vote by absentee measures to a class of legally qualified voters who have no alternative means of registering and voting and as a result will be absolutely prohibited from voting.

The Facts

Before the 1972 general election in New York, 72 persons who were being detained in confinement in a county jail, some simply while awaiting trial and others pursuant to misdemeanor convictions, applied to the Monroe County authorities to establish a mobile voter registration unit in the jail, a practice which had been employed in other county jails in the state. When this request was denied, the inmates then requested that they either be transported to polling places under appropriate restrictions or, in the alternative, be permitted to register and vote under the state's absentee voting provisions. This request was also denied by the county authorities, who took the position that they were under no obligation to permit the inmates to register or vote in person and that the inmates did not qualify for absentee voting under state law.

The absentee voting law provided that qualified voters are allowed to register by absentee measures if they are unable to appear personally because they are confined at home or in a hospital or institution (except a mental institution) because of illness or physical disability or their duties, occupation, or business require them to be outside their county of residence. Absentee voting is allowed if the voters are unable to appear personally because of illness or physical disability, are inmates of a veterans' hospital, or are on vacation and are absent from their county of residence. The county election officials interpreted the law to mean that individuals incarcerated in a jail outside their county of residence were entitled to register by mail and to vote by absentee measures because they unavoidably absent from their home county because of duties, occupation, or business.

The inmates filed suit against the county sheriff and others in the Supreme Court for Monroe County, a trial court in New York State, which considered their claims as a proceeding in mandamus. This court held that the inmates, who were not otherwise disfranchised by law because of their confinement in jail, were entitled to register absentee since they were confined in an institution and were entitled to vote absentee because they were "physically disabled" from leaving their confinement.

On appeal, the Appellate Division of the Fourth Judicial Department of the Supreme Court, an intermediate state appellate court, agreed with the trial court, but the New York Court of Appeals, which is the "supreme court" of the state, reversed these holdings. The Court of Appeals held that the inmates' right to vote had not been arbitrarily denied, stating that the right to vote does not protect or ensure against those circumstances that render voting impracticable as long as the handicap to voting is a function of attendant practicalities or contingencies and not legal design. There was no violation of state statutes or a denial of federal or state constitutional rights. The inmates appealed to the U.S. Supreme Court.

The Issues

The question presented was whether the New York absentee registration and voting statutes, as construed by the state's highest court, denied the jail inmates equal protection of the law.

The Holding and Rationale

The Supreme Court, in a 7-2 decision, ruled in favor of the inmates and reversed the New York Court of Appeals.

The Court noted at the outset of the case that there was no question of disfranchisement because of conviction for criminal conduct raised by the state election laws. The jail inmates were not disabled from voting except by reason of not being able physically to go to the polls on election day or to make the appropriate registration in advance by mail.

The Court described how, under New York law, two citizens sitting side by side in the same cell awaiting trial, neither of whom is under a legal bar to voting, might receive different treatment as to voting rights. One citizen is a resident of the county where he is confined and cannot vote by absentee ballot, while the other citizen, who is a resident of an adjoining county, can vote absentee.

A similar claim had been presented previously to the Court in *McDonald v. Board of Election Commissioners of Chicago*. The statute in *McDonald* provided for absentee voting by medically incapacitated persons and by pretrial detainees who were incarcerated outside their county of residence. There was nothing the the record in *McDonald*, however, to show that the pretrial detainees incarcerated in their county of residence were in fact absolutely prohibited from voting by the state since there was a possibility that the state might furnish some other alternative means of voting.

In contrast, in this case jail inmates incarcerated in their county of residence were completely denied the ballot, while absentee registration and voting privileges were extended to voters who were unable to appear personally to register or vote because of illness or physical disability or their absence from their county of residence because of duties, occupation, or business. The New York statutes, as construed by its highest court, discriminate between categories of qualified voters in a way that, as applied to pretrial detainees and misdemeanants, is wholly arbitrary and operate as a restriction so severe as to constitute an unconstitutionally onerous burden on the exercise of the franchise.

The jail inmates and others similarly situated are under no legal disability to register or vote. They simply are not allowed to use the absentee ballot and are denied any alternative means of casting their vote although they are legally qualified to vote. The New York statutes, as construed to discriminate against the inmates, denies them equal protection of the laws guaranteed by the 14th Amendment.

Commentary

The *O'Brien* case stands for the legal principle that if a state does not make available a means, other than absentee or mail procedures, for registration and voting by incarcerated residents who are under no legal disability and are otherwise qualified to vote, then it is required to provide them an opportunity to register and vote by absentee measures if other classes of voters have been afforded that privilege. The practical effect of *O'Brien* appears to be that unless a state denies the opportunity for absentee registration and voting to all qualified voters, which it is prohibited by

federal statute from doing in federal office elections, then it must provide qualified incarcerated voters with some method for registering and voting, either by personal appearance or by absentee procedures.

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Prigmore v. Renfro

356 F.Supp. 427
United States District Court
Northern District of Alabama, W.D.

Absentee voting is not a fundamental right but rather a privilege that a state may grant as long as the classification of voters eligible to vote by absentee procedures has a rational basis and is not invidious. However, states must comply with any Congressional enactment that creates a right to vote by absentee ballot in federal office elections, and any state provisions in conflict with the federal statute are preempted.

The Facts

Charles Prigmore, a university professor, and Shirley Prigmore, his wife, were residents and registered voters of Tuscaloosa County, Alabama. During the summer of 1972 before their July 29th departure for Iran, where Charles Prigmore was scheduled to serve a one-year term as a Fulbright lecturer, the Prigmores asked Tuscaloosa County election officials that they be allowed to cast an absentee ballot by mail in the forthcoming November general election. They were informed that there was no provision in the Alabama absentee voting statutes that would permit them to vote absentee in the election.

Alabama law limited absentee voting to active-duty armed forces members and their wives, seamen and deep sea fishermen, disabled veterans confined in a V.A. facility, hospital patients confined because of physical disability, students enrolled at the university outside their county of residence and their wives, and persons whose regular business or occupation regularly requires their absence from their county of residence. Neither of the Prigmores had an occupation that required their regular absence from Tuscaloosa County.

The Prigmores brought an action in U.S. District Court on behalf of themselves and all others similarly situated seeking injunctive relief against state officials responsible for enforcement of the state absentee voting provisions. The plaintiffs sought injunctive relief restraining the defendants from enforcing the absentee voting law and attacked the application of the law to both presidential and non-presidential elections. They claimed that in non-presidential elections the failure of the law to provide absentee voting procedures for all qualified voters temporarily absent on election day was a denial of equal protection and due process rights under the 14th Amendment, the right to travel under the 5th Amendment, and privileges and immunities guararanteed under Article IV of the Constitution. They also asserted that the application of the law in presidential elections contravened the Voting Rights Act Amendments of 1970.

On August 20th, the originating district judge granted a temporary restraining order requiring that the Prigmores and their class be permitted to receive and cast absentee ballots by mail for federal and state offices. A three-judge panel conducted a hearing on September 22nd and rendered its judgment on September 28th before the election.

The Issues

The questions considered were whether the Alabama absentee voting statute violated the Voting Rights Act Amendments of 1970 in presidential elections and whether the law was an unconstitutional infringement of equal protection and the right to travel in non-presidential elections.

The Holding and Rationale

The court held that the Prigmores' rights had been violated only in respect to the presidential election and required the defendants to provide the Prigmores and all other absentee voters who apply with absentee ballots for the presidential election, but denied all other relief requested by the plaintiffs.

The presidential-election claim presented little difficulty to the court. The Voting Rights Act Amendments of 1970 (42 U.S.C. Sec. 1973aa-1) require a state to provide by law for the casting of absentee ballots in presidential elections by qualified state residents who may be absent from their election district on election day if they apply for a ballot no later than seven days before the election and return the ballots no later than poll-closing time on election day. Since the federal statute has been held constitutional and enforceable in federal elections (*Oregon v. Mitchell*), the state must comply with the statute and follow the required procedures concerning absentee voting.

The court next addressed the primary constitutional question: Does the Equal Protection Clause of the 14th Amendment permit the state to discriminate among its citizens by allowing only certain classes of voters to vote by absentee ballot? The resolution of the equal protection issue was dependent on the answer to a crucial threshold question: Should the state statute be sustained if it can be shown to have some rational basis ("rational basis" test) or must it withstand a more rigorous standard of review ("compelling state interest" test)?

The court was of the opinion that the compelling state interest test did not apply. In *McDonald v. Board of Election Commissoners of Chicago*, the U.S. Supreme Court noted that there is a crucial distinction between the right to vote and the right to an absentee ballot and applied the rational standard rather than the compelling standard in a case involving unsentenced inmates who were not among the classes of voters entitled to vote by absentee procedures.

The court found that the Alabama passed muster under the rational basis test. The statutes were neither unusual or arbitrary, they provided a method of absentee voting available to most absent voters, and their restrictions were reasonably related to protection against fraud in the voting of absentee ballots. In addition, the classification was not invidious and did not have the stigma of a wealth or racial classification condemned by the courts.

The court next turned to the plaintiff's contention that the lack of sufficient opportunities for absentee voting impinged on their fundamental right to travel, an element not present in the *McDonald* case. The failure to provide a right to cast an absentee ballot does not constitute a penalty imposed on the constitutional right to travel recognized in *Shapiro v. Thompson* and other Supreme Court decisions. It is a penalty but not one imposed solely because persons are travelers; it is imposed on all qualified voters, both travelers and non-travelers, who cannot reach the polling place on election day.

There is no fundamental right involved. The right to vote is basic to a democracy, but the right to an absentee ballot is not. The absentee ballot has always been viewed as a privilege and not an absolute or fundamental right. It is a purely remedial measure designed to afford absentee voting as a matter of convenience and not of right; it is a mere gratuitious convenience supplied by the state. There is no bar to the right to vote or the right to travel. The plaintiffs have a choice: stay home and vote or pursue their plans and not vote. They are not faced with a complete denial of the right to vote. The restriction that denial of the privilege imposes on the right to travel is not significant and does not overburden that right.

Commentary

There is no constitutional right to register and vote by absentee procedures, except in the situation described in *O'Brien v. Skinner*. A state has the authority and discretion to allocate the privilege of absentee voting to whatever groups of voters, if any, it desires as long as the classification of eligible absentee voters has a reasonable basis and does not constitute an invidious discrimination. A state may also choose to exclude absentee voting in all elections or permit it only in general elections.

State regulation of absentee voting, however, is subject to the provisions of any federal statute according absentee voting rights in federal office elections. Congress has guaranteed absentee voting for all absent voters in presidential elections (Voting Rights Act Amendments of 1970) and for absent uniformed services voters and overseas voters in all federal office elections (Uniformed and Overseas Citizens Absentee Voting Act).

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Selected Case Summaries

American Party of Texas v. White,
415 U.S. 767, 94 S.Ct. 1296, 39 L.Ed.2d 744 (1974).
A state may limit each political party to one candidate for each office on the ballot and may insist that intraparty competition be settled before the general election by primary election or by party convention. A state may prohibit a voter from casting more than one vote in the process of nominating candidates for a particular office, and a voter may be prevented from both voting in a primary and signing an independent election petition (citing *Jackson v. Ogilvie*, 325 F.Supp. 864 (N.D.Ill. 1971), *aff'd*, 403 U.S. 925, 91 S.Ct. 2247, 29 L.Ed.2d 705 (1971)). A state may determine that it is essential to the integrity of the nominating process to confine voters to supporting one party and its candidates in the course of the same nominating process. The practice in Texas of printing on an absentee ballot only the names of the two major, established parties and excluding a minor party that satisfied the statutory requirement for demonstrating the necessary community support needed to win general ballot position for its candidates is obviously discriminatory. Permitting absentee voting by some classes of voters and denying the privilege to other classes of otherwise qualified voters in similar circumstances, without affording a comparable alternative means to vote, is an arbritary discrimination violative of the Equal Protection Clause.

Anderson v. Martin,
375 U.S. 399, 84 S.Ct. 454, 11 L.Ed.2d 430 (1964).
A Louisiana statutory requirement that the nomination papers and ballots in all primary, general, or special elections must designate the race of candidates for elective office operates as a discrimination against Negro candidates and therefore is violative of the 14th Amendment's Equal Protection Clause.

Bachrach v. Secretary of Commonwealth,
382 Mass. 268, 415 N.E.2d 832 (1981).
A Massachusetts' statute forbidding the use of the word "Independent" as any part of the permitted up-to-three-word political designation of an independent candidate (i.e., a candidate not nominated by a qualified political party but rather by nominating petitions signed by the requisite number of voters) on the candidate's petitions or on the ballot is repugnant to the constitutional principles of the 1st and 14th Amendments.

Blackman v. Stone,
101 F.2d 500 (7th Cir. 1939).
An Illinois law requiring all voters to vote by printed ballots furnished by the state and forbiding the use of other ballots or pasters is a reasonable expression of the will of the state legislature and is not inconsistent in any manner with any provision of the Federal Constitution.

Board of Election Commissioners of Chicago v. Libertarian Party of Illinois,
591 F.2d 22 (7th Cir. 1979).
The two-tier plan for ballot placement adopted for use in Cook County, Illinois, provided that the top positions on the ballot would be assigned to the "established political parties" on the basis of a lottery, while the other parties on the ballot, "new political parties" eligible to appear on the ballot as a result of filing petitions, were to appear below the established political parties in the order in which they filed their petitions. The two-tier system is a reasonable solution of the problems faced by the

election officials and was not shown to be the product of invidious discrimination. Different treatment of minority parties that does not exclude them from the ballot, prevent them from attaining major party status if they achieve widespread support, or prevent any voters from voting for the candidate of their choice and that is reasonably determined to be necessary to further an important state interest does not result in a denial of equal protection.

Cepulonis v. Secretary of Commonwealth,
389 Mass. 930, 452 N.E.2d 1137 (1983).

Prisoners domiciled in Massachusetts, which does not disfranchise felons, who are unable to vote by reason of their incarceration must be provided with an opportunity to register to vote and given the means to vote in state elections in accordance with state constitutional rights.

Clifford v. Hoppe,
357 N.W.2d 98 (Minn. 1984).

A Minnesota statute provided that the name of a candidate may not appear on a ballot in any way that gives the candidate an advantage over the candidate's opponent except as otherwise provided by law. A candidate for nomination in a primary election could not use the name "Shelvie Prolife Rettmann" since it is neither a nickname by which Shelvie Rettmann is generally and commonly known nor a means of identification authorized by law. It is a statement of her position on a particular issue, which is statutorily prohibited, although candidates who do not seek the nomination of a major political party may include a designation of a political party or political principle on the general election ballot.

Clough v. Guzzi,
416 F.Supp. 1057 (D.Mass. 1976).

The Massachusetts ballot system, which designates incumbents as candidates for reelection and places them first on the ballot, does not violate the Equal Protection Clause of the 14th Amendment. The court found that the designation of incumbency does confer a distinct advantage on the incumbent candidate, a first ballot position, in combination with the designation of incumbency, confers some further increment of advantage in favor of incumbents, and the first ballot position alone was not proven to confer a substantial advantage. Voters do not have a constitutional right to a wholly rational election based solely on reasoned consideration of the issues and the candidates' positions. Even assuming some positional advantage is provided by the statute, the voters' right to choose their representatives is not sufficiently infringed to warrant strict judicial scrutiny of the statute and its underlying legislative purpose. The fact that some statistical advantage may accrue to one of the candidates by virtue of incumbency does not for constitutional purposes invalidate the otherwise legitimate purpose of informing the electorate in a clear manner who is the candidate for re-election and helping to eliminate the possibility of voter confusion.

Dart v. Brown,
717 F.2d 1491 (5th Cir. 1983).

A Louisiana statute providing that only candidates affiliated with a recognized political party may have a designation of their political party printed on the ballot after or below the candidate's name does not violate the constitutional rights of unrecognized parties and their candidates. The state has strong and legitimate interests in reducing the potential for voter confusion and deception which its ballot might otherwise tend to engender.

Fidell v. Board of Elections of City of New York,
343 F.Supp. 913 (E.D.N.Y. 1972).

The failure of New York to provide for absentee ballots in primary elections is reasonably related to valid governmental interests and does not constitute a violation of equal protection rights since providing absentee ballots in primaries would be impractical and would require an inordinate amount of time, effort, and expense. The Voting Rights Act Amendments of 1970 require the states to provide for absentee voting in presidential elections; however, these provisions do not apply to primaries (citing *Rosario v. Rockefeller*).

Hendon v. North Carolina State Board of Elections,
710 F.2d 177 (1983).

The failure of election officials to comply with the technical requirements for the printing of ballots (e.g., failure to divide the ballots into parallel columns separated by distinct black lines, failure to print party names in large type at the head of each party column, and failure to print instructions in heavy black type) does not constitute a violation of the Due Process Clause where the failure was due to the simple negligence of the election officials and the ballots sufficiently complied with the state law so that voters should not have been confused or deceived.

Kohler v. Tugwell,
292 F.Supp. 978 (E.D.La. 1968), *aff'd*, 393 U.S. 531, 89 S.Ct. 879, 21 L.Ed.2d 755 (1969).

A confusing, turgid, and inartistic description of a proposed state constitutional amendment on the ballot did not violate the Due Process Clause or the Guaranty Clause (guaranteeing each state a republican form of government) where the voters were informed by the ballot of the subject of the amendment, were given a fair opportunity by publicity to consider its full text, and were not deceived by the ballot's words.

Luse v. Wray,
254 N.W.2d 324 (Iowa 1977).

The Iowa election statutes provided for generally applicable absentee voting procedures and procedures specifically applicable to residents or patients of a health care facility located in the county in which applicants for an absentee ballot seek to vote. Under the general procedures, absentee ballots may be mailed to the applicants and returned by mail or personal delivery, while the special procedures for patients provided that the absentee ballots were to be delivered by a two-person bipartisan team representing the major political parties, voted by the patient, and returned by the bipartisan team. The special procedures for patients do not violate the state constitution or the Equal Protection Clause of the 14th Amendment. The Iowa classification of absentee voters does not constitute invidious discrimination and is a good faith effort to improve the voting process of the class involved, which may be ill or aged. There is a rational basis, as well as a compelling state interest, for the absentee voting classification scheme.

Mann v. Powell,
333 F.Supp. 1261 (N.D.Ill. 1969).

The Illinois election code provided that candidate names are to be listed on the ballot in the order in which candidate petitions for nomination are filed and where two or more petitions are received simultaneously, the official with whom the petitions are filed must break all ties and determine the order of filing. The order of listing candi-

dates' names on the ballot can affect the outcome of an election, and candidates have a right to equal protection in the allocation of ballot positions (per *Weisberg v. Powell*, 417 F.2d 388 (7th Cir. 1969). The establishment of a system by which ballot positions are allocated is a permissible legislative purpose. Although the system adopted is far from optimal and does not expressly preclude discrimination in breaking ties, it is rationally connected to the legislative purpose and does not compel the statute to be administered in a discriminatory fashion. However, where there is a threat of unlawful action in that the secretary of state has publicly declared that ties will be broken on the basis of "incumbency" or "seniority," a permanent injunction may be issued. The secretary of state and state election board may not break ties by any means other than a drawing of candidates' names by lot or other nondiscriminatory means by which each candidate has an equal opportunity to be placed first on the ballot.

McDonald v. Board of Election Commissioners of Chicago,
394 U.S. 712, 89 S.Ct. 1404, 22 L.Ed.2d 739 (1969).

An Illinois statute did not make provision for absentee voting by qualified electors who were unsentenced inmates, other than those absent from their county of residence, who could not readily appear at the polls because they were charged with a nonbailable offense or were not able to post the required bail. Where, as in the case of the Illinois absentee provisions, a classification is not drawn on the basis of wealth or race and there is nothing in the record to indicate that the statutory scheme has an impact on the ability to exercise the fundamental right to vote, strict judicial scrutiny is not required. Instead, the distinctions drawn by the challenged statute must bear some rational relationship to a legitimate state end and will be set aside as violative of the Equal Protection Clause of the 14th Amendment only if based on reasons totally unrelated to the pursuit of that goal. Since there is nothing to show that a judicially incapacitated pretrial detainee is absolutely prohibited from exercising the franchise, it is quite reasonable for the state legislaure to treat differently the physically handicapped, who are required to present physicians' affidavits attesting to an absolute inability to appear personally at the polls in order to qualify for an absentee ballot.

Peterson v. City of San Diego,
34 Cal.3d 225, 666 P.2d 974, 193 Cal.Rptr. 533 (1983).

An election conducted by mail ballot does not violate the California constitutional requirement that "voting shall be secret." The secrecy provision of the state constitution was never intended to preclude reasonable measures to facilitate and increase exercise of the right to vote, such as absentee and mail ballot voting. It may not be assumed that the secrecy provision was designed to serve a purpose other than its obvious one of protecting the voter's right to act in secret when such an assumption would impair rather than facilitate exercise of the fundamental right.

Sangmeister v. Woodard,
565 F.2d 460 (7th Cir. 1977).

The practice of Illinois county clerks of placing their own political party in the first or top position on voting ballots in all general elections violates the Equal Protection Clause of the 14th Amendment where the evidence supported the trial court's finding that the first position on a ballot was an advantage to a political candidate and the discrimination was intentional or purposeful. The case involved the application of the *Bohus* test (*Bohus v. Board of Election Commissioners*, 447 F.2d 821 (7th Cir. 1977), for determining the constitutionality of ballot placement procedures under the Equal Protection Clause. This two-step test provides that a plaintiff must show

that top placement on the ballot is an advantage in an election and prove the existence of an intentional or purposeful discrimination by authorities in which one class is favored over another. In *Sangmeister*, the court did not approve the trial court's order that the county clerks must adopt a rotational system for determining ballot placement, but rather provided guidelines for devising a constitutionally permissible ballot placement procedure: the procedure adopted must be neutral in character and not invariably award the first position to the clerk's party, the procedure should take account of all political parties involved, major and minor, and the clerks have the discretion to adopt any constitutional procedure and to experiment from election to election.

Selph v. Council of City of Los Angeles,
390 F.Supp. 58 (C.D.Cal. 1975).

A handicapped person has a constitutional right to vote, but has no equal protection right to insist that city officials modify all polling places within the city so as to eliminate architectural barriers. The city's providing the mechanism of the absentee ballot in an attempt to provide a satisfactory solution to the problems faced by disabled persons in voting is a rational alternative to the legitimate state purpose of minimizing the high cost and substantial administrative effort involved in providing a large number of accessible polling places.

Smith v. State of Arkansas,
385 F.Supp. 703 (E.D.Ark. 1974).

An Arkansas statute authorized voter assistance by a spouse or two election judges, one representing the major party and the other the minority party, if the voter informs the election judges that he cannot read or write or for any reason is unable to mark his ballot. The important goal of protecting the integrity of the franchise provides the compelling state interest that justifies this moderate restriction on the secrecy of the handicapped or illiterate voter's ballot. An unmarried voter is not denied equal protection because the married voter has one more alternative not available to the single voter. The legislature's motive in ensuring that the voter is not imposed upon by the person aiding him justifies the differing treatment of the married and the unmarried voter.

Smith v. Smathers,
372 So.2d 427 (Fla. 1979).

The complete elimination by the state legislature of the opportunity to be a write-in candidate violates the Florida constitutional requirement that "all elections by the people shall be by direct and secret vote" and impermissibly denies the right to vote for a candidate of one's choice as embodied in the constitututional provision.

Stevenson v. Ellisor
270 S.C. 560, 243 S.E.2d 445 (1978)

A derivative of one's given name (e.g., "Nancy" for "Ferdinan"), properly acquired under the common law and used in good faith for honest purposes, is not prohibited by the South Carolina election law requirement that a candidate's "name" be placed on the ballot. The word "name" is not synonymous with "Christian name" or "given name." Nicknames bearing no relation to a person's given name may not be used on the ballot.

Tate v. Collins,
496 F.Supp. 205 (W.D.Tenn. 1980).

Incarcerated persons who have been convicted of a non-infamous crime for which they are not subject to any voting disabilities and who are otherwise entitled to vote, but have been prohibited from voting by absentee ballot or personal appearance are denied equal protection of the law and must be afforded some method by which their elective franchise can be exercised (citing *O'Brien v. Skinner*).

Voorhes v. Dempsey,
231 F.Supp. 975 (D.Conn. 1964), *aff'd*, 379 U.S. 648, 85 S.Ct. 612, 13 L.Ed.2d 552 (1965).

A Connecticut statute requiring that all voting machines be equipped with mandatory party levers is not fundamentally unfair or unreasonably discriminatory in contravention of the 14th Amendment, although the wisdom of the statute may be questionable. The statute does not deny any candidate a place on the ballot or prevent any voter from voting for any candidate; a straight-ticket vote has no greater weight in the final tallies than a vote for a split ticket. The slight extra effort required for independent voters does not constitute such a burdensome and unreasonable discrimination that the independent voter is deprived of equal protection of laws, and the party lever does not deprive voters of a secret ballot.

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Chapter 8: Ballot Tabulation

Chapter 8: Ballot Tabulation

Introduction

The overriding purpose of election laws is to give effect to the voter's choice, and each valid vote should be counted.[1] A substantial compliance with the law regulating the conduct of elections is sufficient, and when the election has been held and the will of the electors has been manifested thereby, the election should be upheld even though there may have been attendant informalities and in some respects a failure to comply with statutory requirements; mere irregularities should not be permitted to frustrate the will of the voters, nor should the carelessness of election officials.[2]

However, the importance of order and precision in the voting process requires that the provisions of the election code be strictly interpreted to prevent the electoral process from being abused, especially in the recording of the vote. The recording of votes must be based on the objective criteria of the statute without regard to the special circumstances of any one case.[3]

The preference of most courts is to resolve voting disputes in favor of the voter because the object of election law is to secure the rights of duly qualified electors and not to defeat them.[4] Mistakes made by election officials or even their willful misconduct will not disenfranchise innocent voters.[5]

If the intent of the voter can be ascertained with reasonable certainty from an inspection of the ballot, the ballot ought to be counted.[6]

A voter should not be disenfranchised merely because a ministerial officer failed to perform his or her duty.[7] However, courts generally have no authority to compel an election official not to perform an official duty, such as a recount or recanvass, nor do courts generally have the authority to compel an election official to perform a discretionary duty.[8]

Counting Votes in General

As a general rule, if a voter affixes any mark to his ballot which fairly indicates his intention to vote for a particular candidate, the vote should be counted for the candidate unless a mandatory provision of the election law is violated.[9]

Ballots with inconsistent voting choices, such as straight-party votes for more than one party or votes for more than one candidate for the same office, are void.[10]

Statutory regulation of voting and election procedure is permissible so long as the statutes are calculated to facilitate and secure, rather than subvert or impede, the right to vote. Among the legitimate statutory objects are shielding the elector from the influence of coercion and corruption, protecting the integrity of the ballot, and insuring the orderly conduct of elections.[11]

In some states, the physical inspection of poll books and poll tickets used in an election is a mandatory statutory duty of the canvassers. The reason for this requirement is to ascertain that the number of ballots being counted is the same as the number of ballots cast by qualified voters. Such a poll ticket audit should reveal whether a ballot box has been stuffed or if ballots have been removed. No election certificate should be issued until this audit is performed.[12]

Paper Ballots

Generally, exact mechanical precision in marking paper ballots is not required.[13]

When the voter fails to place a mark of any kind inside the voting square next to the candidate's name on a paper ballot (even where a mark is nearby), election officials may not count the mark outside the voting square as a vote for that candidate, although the entire ballot is not invalidated.[14] Marks on paper ballots which clearly evidence the voter's intention should be counted because to refuse to count such a vote would deprive an honest and innocent voter of his or her franchise.[15]

Distinguishing Marks

A "distinguishing mark" which would void a ballot includes only those marks not intended to convey the voter's choice which are placed on the ballot with the intent to set the ballot apart from all others.[16]

Ballots with distinguishing marks may not be counted, but ballots with extraneous or stray marks which do not permit the individual ballot or voter to be identified may be counted.[17]

Counting by Machine

The counting of ballots by machine must comply with statutory requirements.[18] Bipartisan principles designed to safeguard the election process apply to the counting of votes by machine or computer.[19]

If circumstances make it impractical or impossible to count ballots by machine or computer, they must be counted manually.[20] Generally, the hand recount of a punch card ballot is governed by the same standards as the recounting of paper ballots.[21] Punch card ballots may be visually examined in an election contest to determine whether the voter's intent can be adequately identified.[22]

Write-in Ballots

On a write-in ballot, it is not necessary for the voter to mark the name he or she has written on the ballot with an "X". Neither is it necessary to indicate the party affiliation of the write-in candidate.[23]

To be valid, the write-in vote must be cast in substantial compliance with the statute.[24]

A write-in vote showing a candidate's surname alone is valid when it appears the use of the surname is sufficient in the circumstances to indicate for whom the voter intended to cast his ballot.[25]

Irregularities

The local board of election has implicit power to remedy an emergency situation or an irregularity (such as the failure of voting machines to record votes).[26] The failure of voting machines to properly record votes in some polling places constituted a constructive fraud because votes could not be tabulated and the final result of the election determined with any certainty. The proper remedy is to void the election and call a new one.[27]

Generally, when ballot boxes are found to contain excess ballots (that is, when there are more ballots in the box than the number of voters for that box as indicated by poll records) and there is no evidence of or allegation of fraud, the remedy is for the canvassers to remove, at random, a sufficient number of ballots to bring the number of ballots into balance with the number of voters and then to count the remaining ballots.[28]

Where the statute prohibits the opening of ballot boxes prior to the closing of the polls and the beginning of the official canvass, the premature opening of ballot boxes voids the election as to the polling places where the violation occurred.[29]

In a recanvass petition, technical noncompliance on the part of a notary public, where the petitioners acted in good faith, should not defeat the petition. An easily correctable mistake that causes no prejudice to anyone should not thwart a fundamental process of democracy.[30]

Where the outcome of an election cannot be determined with certainty because of irregularity or illegality, the remedy is to void the election and call for a new election.[31] Ordinarily an election should not be declared void unless it is shown that the result is not in accordance with the will of the electorate or that such will cannot be ascertained because of uncertainties.[32]

The remedy for a void election is to call a special election for those precincts where irregularities or illegalities voided the election.[33]

Some states permit the resolution of elections which result in tie votes by a coin toss or by lot.[34]

Signatures or Initials of Poll Workers

Many states require poll workers to initial all ballots, paper and punch card, for the purpose of distinguishing a valid ballot from a fraudulent one.[35] Generally, when state statute requires that ballots bear the signature or initials of two poll officials, ballots which lack such signatures or initials should not be counted, but should be set aside and preserved.[36]

Some states permit the electronic processing of punch card ballots in the canvass without manually inspecting the individual cards for the required poll worker signatures or initials. Punch card ballots which do not bear the required signatures or initials, however, may be voided by manual inspection during an election contest. Where this distinction is made, it is generally in the interest of convenience and efficiency in counting the ballots electronically.[37]

Ineligible Candidates

When a winning candidate is ineligible to assume the office to which he or she has been elected, the office is considered vacant. Receiving the highest number of votes does not confer the office on an ineligible person, but it does prevent the remaining, otherwise eligible candidates who received fewer votes from being elected. The remedy for such a situation is either a special election for that office or an appointment to the vacancy as appropriate under state law.[38]

It is the general rule that votes cast for a deceased, disqualified or ineligible person are not to be treated as void or thrown away, but are to be counted in determining the results of the election as regards the other candidates.[39]

Counting Absentee Ballots

Generally, in the absence of fraud or intentional wrongdoing, absentee ballots should be counted unless the voter substantially fails to comply with absentee voting law.[40]

Secrecy of Ballots

Generally, a voter who casts a ballot in good faith may not be asked to reveal for whom he or she voted.[41]

Some courts hold that the secrecy of the ballot is not an individual right which may be waived by a good faith voter, but rather is a societal right which safeguards the integrity of the election process itself.[42]

Voters may not be compelled to reveal for whom they voted.[43] However, voters who knowingly cast illegal ballots can be compelled to testify as to how and for whom they voted.[44]

Notes

[1]*Buonanno v. DiStefano*, 430 A.2d 765 (R.I. 1981).

[2]*Lambeth v. Levens*, 237 Kan. 614, 702 P.2d 320 (Kan. 1985).

[3]*Williams v. Rensselaer County Board of Elections*, 98 A.D.2d 938, 471 N.Y.S.2d 373 (A.D.3 Dept. 1983).

[4]*McCavitt v. Registrars of Voters of Brockton*, 385 Mass. 833, 434 N.E.2d 620 (Mass.App. 1982).

[5]*Ginenthal v. D'Apice*, 137 Misc.2d 849, 522 N.Y.S.2d 431 (N.Y.Sup.Ct. 1987)

[6]*McCavitt v. Registrars of Voters of Brockton*, 385 Mass. 833, 434 N.E.2d 620 (Mass.App. 1982).

[7]*Id.*

[8]*Woo v. Robinson*, 484 A.2d 950 (Del. 1984).

[9]*Devine v. Wonderlich*, 268 N.W.2d 620 (Iowa 1978).

[10]*Lorch v. Lohmeyer*, 247 N.E.2d 61 (Ind. 1969).

[11]*Devine v. Wonderlich*, 268 N.W.2d 620 (Iowa 1978);*Whitcomb v. Affeldt*, 319 F.Supp. 69 (N.D.Ind. 1970), *aff'd*, 405 U.S. 1034, 92 S.Ct. 1304, 31 L.Ed.2d 576 (1972).

[12]*Underwood v. County Commission of Kanawha County*, 349 S.E.2d 443 (W.Va. 1986).

[13]*Williams v. Rensselaer County Board of Elections*, 98 A.D.2d 938, 471 N.Y.S.2d 373 (A.D. 3 Dept. 1983).

[14]*Id.*

[15]*Lorch v. Lohmeyer*, 247 N.E.2d 61 (Ind. 1969).

[16]*Boevers v. Election Board of Canadian County*, 640 P.2d 1333 (Okla. 1981).

[17]*Lorch v. Lohmeyer*, 247 N.E.2d 61 (Ind. 1969).

[18]*Kelly v. Burlington County Board of Elections*, 207 N.J.Super. 335, 504 A.2d 153 (N.J.L. 1985).

[19]*Id.*

[20]*Id.*

[21]*McCavitt v. Registrars of Voters of Brockton*, 385 Mass. 833, 434 N.E.2d 620 (Mass.App. 1982).

[22]*Fischer v. Stout*, 741 P.2d 217 (Alaska 1987).

[23]*Knowles v. Holly*, 82 Wash. 694, 513 P.2d 18 (Wash. 1973).

[24]*Devine v. Wonderlich*, 268 N.W.2d 620 (Iowa 1978).

[25]*Id.*

[26]*Buonanno v. DiStefano*, 430 A.2d 765 (R.I. 1981).

[27]*Wood v. Kirby*, 566 S.W.2d 751 (Ky. 1978).

[28]*Johnson v. Trnka*, 154 N.W.2d 185 (Minn. 1967).

[29]*Clark v. Rankin County Democratic Executive Committee*, 322 So.2d 753 (Miss. 1975).

[30]*In re Recanvassing of Certain Voting Machines for the Election of Republican Candidate for County Commissioner in the November, 1983 General Election*, 475 A.2d 1352 (Pa. 1984).

[31]*McCavitt v. Registrars of Voters of Brockton*, 385 Mass. 833, 434 N.E.2d 620 (Mass.App. 1982).

[32]*Lambeth v. Levens*, 237 Kan. 614, 702 P.2d 320 (Kan. 1985).

[33]*Clark v. Rankin County Democratic Executive Committee*, 322 So.2d 753 (Miss. 1975).

[34]*Lambeth v. Levens*, 237 Kan. 614, 702 P.2d 320 (Kan. 1985).

[35]*Wright v. Gettinger*, 428 N.E.2d 1212 (Ind. 1981).

[36]*Johnson v. Trnka*, 154 N.W.2d 185 (Minn. 1967).

[37]*Manchin v. Dunfee*, 327 S.E.2d 710 (W.Va. 1984).

[38]*Highton v. Musto*, 186 N.J.Super. 281, 452 A.2d 487 (1982); *Tellez v. Superior Court*, 104 Ariz. 169, 450 P.2d 106 (Ariz. 1969); *Barber v. Edgar*, 294 A.2d 453 (Me. 1972); But see: *Williamson v. Cuyahoga County Board of Elections*, 11 Ohio St.2d 90, 464 N.E.2d 138 (Ohio 1984).

[39]*Highton v. Musto*, 186 N.J.Super. 281, 452 A.2d 487 (1982).

[40]*McCavitt v. Registrars of Voters of Brockton*, 385 Mass. 833, 434 N.E.2d 620 (Mass.App. 1982).

[41] *Id.*

[42] *Id.*

[43] *Wood v. Kirby*, 566 S.W.2d 751 (Ky. 1978).

[44] *Lambeth v. Levens*, 237 Kan. 614, 702 P.2d 320 (Kan. 1985).

Fischer v. Stout

741 P.2d 217
Supreme Court of Alaska
August 7, 1987

Alaska Supreme Court is required to review any and all questioned ballots in the election at issue.

The Facts

This action is an election recount appeal concerning whether certain votes or classes of votes were properly counted or rejected in the November, 1986 election for a state senate seat. Uehling defeated the incumbent Fischer by 6,730 to 6,715 votes. Following the recount requested by Fischer, Uehling was again declared the winner. Fischer then appealed.

The Issues

The court said that its obligation under AS 15.20.510 is to determine whether a "vote was cast in compliance with the requirements of Alaska's election law." Therefore, the court determined that it was obligated to review any and all questioned ballots cast in the election at issue, whether or not they were challenged in a previous administrative recount proceeding.

Specifically, the court had to consider the following:

1. Whether or not to count certain punch-card ballots based on the methods used to mark them.
2. Whether or not to count certain absentee ballots where the voter's residence was not listed as a fixed address.
3. Whether or not to count the absentee ballots of overseas voters.
4. Whether or not to count the absentee ballots of persons allegedly living outside the district.
5. Whether or not to count a number of individual ballots which were challenged for a variety of irregularities.
6. Whether or not to count the ballots cast by women who had signed a name different from the name under which they were registered.
7. Whether the Director of Elections correctly used a pro rata reduction method to adjust the returns proportionally to account for ineligible absentee ballots.

The Holding and Rationale

The Alaska Supreme Court vacated the certificate of election and remanded the matter to the Director of Elections for a partial further recount (after which, Uehling was again certified as the winner).

There were eight punch-card ballots in question, and the court examined each one to determine whether the voter's intent could be adequately identified. In each case, the court agreed with the original call of the Director of Elections. Fischer also challenged one ballot on which the voter signed his name. Since the Alaska statute calls a "spoiled" ballot one which has been "exhibited" and there was no evidence that this signed ballot had been so exhibited, the court rejected this challenge. Fischer also contended that two of the punch-card ballots had been marked entirely with pen

(that is, not punched at all) and should not have been counted. In a previous decision, the court had already adopted a policy that punch-card ballots marked entirely by pen or pencil could be counted if they provided clear evidence of the voter's intent. Accordingly, the court allowed the ballots.

Fischer challenged a number of absentee ballots on the basis of residence of the voter. In Alaska, voters must be residents of the district in which they vote, but they need not live in a house or apartment or even have mail service. "A residence need only be some specific locale within the district at which habitation can be specifically fixed. Thus, a hotel, shelter for the homeless, or even a park bench will be sufficient." Thus, the court validated five challenged absentee ballots of voters who listed their residence as "Elmendorf Air Force Base," a designation sufficient to establish a fixed residence in the district. Several absentee ballots were challenged because the voters listed post office boxes or private mail services as their addresses. The court counted those ballots if the voter had somehow provided additional information establishing a fixed place of residence within the district and disallowed those ballots from persons who gave no other residential information. One absentee voter allegedly gave a non-existent address; however, this ballot was counted because no evidence was produced to indicate that the voter did not live at such an address at the time of registration and the Alaska statute creates a presumption of residence.

Fischer challenged fourteen absentee ballots cast by voters living outside the United States. Persons domiciled in Alaska before leaving the United States who meet other technical requirements may register to vote in Alaska under AS 15.05.011 but may vote only in federal elections. Other Alaska voters, however, may vote an absentee ballot if they are otherwise qualified resident voters who are overseas on election day. Since each of the challenged ballots was cast by a voter who had a presumptively valid Alaska residence and because there was no evidence to the contrary, these ballots were properly counted as absentee ballots.

Fischer challenged a number of absentee ballots cast by voters who indicated on the return envelope that they had new residences outside the voting district. The court found that all of these ballots were improperly counted and should have been rejected. Three other ballots challenged on the same grounds were counted because there was insufficient evidence on the ballot or envelope to indicate that these voters intended to register a new residence outside the district.

Fischer challenged a number of absentee ballots on grounds that they contained attestation defects. Absentee ballots returned by mail must be in an envelope signed by the voter and attesting officer. If no officer is available, the voter may sign in the presence of two persons over age 18 who sign the form as witnesses. All of these ballots failed to indicate the source of the attesting officer's authority. The court found that, in the absence of evidence suggesting improper or unauthorized attestation, these ballots would be presumed to be properly attested and should be counted.

Fischer challenged the votes of several individual voters because of alleged defects or irregularities in their registrations or in their methods of casting absentee ballots. The court counted the ballots of persons whose vote was irregular because of clerical deficiencies in election administration, but invalidated the ballots of persons whose vote was irregular because of their own violation of mandatory election procedures (e.g., "witnessing" one's own absentee ballot or obviously having a permanent residence outside the voting district).

Both candidates questioned the ballots of six women who signed names different from the names under which they had registered to vote (but who were undoubtedly the same persons who had previously registered). An unpublished policy of the Director of

Elections resulted in the rejection of these ballots because the voters signed a name different than that with which they had registered. An Alaska statute specifies that a voter whose name is changed by marriage or court order "may vote under the previous name." The court interpreted this phrase to prevent the disenfranchisement of voters merely because they sign their new names instead of their old names. The court counted five of the ballots because these women could be properly identified as registered voters of the district and they had signed their new name and listed their previous name on their ballots.

After the Director of Elections determined that seventeen ballots had been erroneously counted, he proportionately reduced each candidate's actual vote total. This resulted in a reduction of Fischer's total by 6.5 votes and Uehling's total by 10.5 votes. Uehling contended that the Director exceeded her authority by using this formula to actually change the vote totals of the candidates and that her analysis should have ended when she correctly determined that the errors in the vote totals would not change the outcome of the election. The court agreed, holding that the proportionate vote reduction analysis is to be used only to determine if tainted ballots would change the result of the election and not for the purpose of actually changing the official vote totals.

Commentary

Although this case seems somewhat complicated, the court has actually applied fairly simple and traditional approaches. The basic premises guiding the court are that (1) state election statutes ought to be obeyed, and (2) qualified voters ought to have their votes counted. Accordingly, the court tends to presume voters are qualified in the absence of contrary evidence. The court tends to invalidate ballots when the voters are obviously in contravention of statutory requirements (e.g., when the voter obviously does not live in the district where he or she voted). In the case of errors or irregularities, the court tends to count the ballots when the error or irregularity is attributable to an election official and not to count the ballot when the error or irregularity is attributable to the voter who had reason to know better.

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Ginenthal v. D'Apice

137 Misc.2d 849, 522 N.Y.S.2d 431
Supreme Court, Westchester County
December 10, 1987

Where voting officials mistakenly placed the card containing the candidate's name on the wrong row of a voting machine, the candidate was entitled to have the votes cast on that machine counted as having been cast for him.

The Facts

There was a general election on November 3, 1987, for two councilmanic seats in the Town of North Salem. Ginenthal's name appeared on the ballot as the Democratic candidate for councilman at Row A, Column 12, and also as the Vigilant-Independent Party candidate at Row F, Column 12. In Election Districts 1, 2, and 3, the voting machines were correctly configured. In Election District 4, the card for Row F was inadvertently placed on Row E of the voting machine. Thus, in Election District 4, votes were cast for Ginenthal at Row E, Column 12, even though at that position on the voting machine, the card read "12F."

The Board of Elections refused to count the votes cast for Ginenthal at Row E, Column 12, in Election District 4 because Row E was not an officially designated line on the ballot. Ginenthal brought this action to direct the Board of Elections to canvass those votes and add them to his total votes.

The Issues

The issue was simply whether the votes are invalidated because the officials conducting the election made an innocent mistake.

The Holding and Rationale

The court ordered the Board of Elections to count the votes.

"The Court's determination of this matter is governed by a simple proposition and grounded on a basic principle. 'The right of suffrage is one of the most valuable and sacred rights which the Constitution has conferred upon the citizens of the State.' . . . It shall be given the highest respect, especially by our courts, and shall not be compromised, or allowed to be diminished. It follows, therefore, that courts are without power to disenfranchise a single voter . . . as well they should be, and where 'voters did everything required of them by law and the ballots were cast by them in conformity with the law, any dereliction of duty on the part of election officials or any irregularity in issuing, voting, counting or canvassing the ballots by any of the election officials does not render them "void."' . . . As stated by the Court of Appeals, '[w]e can conceive of no principle which permits the disenfranchisement of innocent voters for the mistake or even the willful misconduct of election officers in performing the duty cast upon them.' (*People ex rel. Hirsh v. Wood*, 148 N.Y. 142, 146-147, 42 N.E. 536)."

Applying this approach, the court merely observed that the error in voting was entirely the fault of the election officials and not the voters, that New York statutes empower the court to summarily correct obvious errors in the canvass, and that the proceeding is timely because it was brought within 30 days of the election.

Commentary

This case is an example of a county-level court applying well-established principles of election law. Generally speaking, courts will require the counting of votes if the voter has done everything properly to cast his or her ballot and the balloting is flawed because of some error, inadvertence, or even willful misconduct of election officials. Courts greatly disfavor disenfranchisement as a result of administrative incompetence.

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Boevers v. Election Board of Canadian County

640 P.2d 1333
Supreme Court of Oklahoma
November 17, 1981

Paper ballots which do not bear improper marks and which clearly reveal the voter's choice must be counted.

The Facts

Boevers was a candidate for the Republican nomination for county commissioner in the primary election. After a recount conducted at his request, the certified result gave him 227 votes and gave his opponent, Kremeier, 228 votes. Boevers then challenged the correctness of the results by petition alleging irregularities sufficient to entitle him to a certificate of nomination.

After the recount, Boevers sought to disqualify both of the judges of the district court in the county where the election was held from hearing his contest petition. The district judge immediately stepped down, but then assigned the case to the local associate district judge, who refused to recuse himself. After an adverse decision from that judge, Boevers asked the Oklahoma Supreme Court to assign a nonresident judge to hear the case. The Supreme Court assigned an out-of-county judge who presided over the election contest proceedings.

The Issues

The court identified the issues: (1) May a party to an election contest disqualify a resident judge or judges without cause? (2) Are the announced results of an election recount impervious to any challenge on a pure and unmixed question of law? and (3) Did the county election board err as a matter of law in declaring void two ballots cast for the contestant?

The Holding and Rationale

The Oklahoma Supreme Court granted the writ ordering the county board of elections to certify Boevers as the Republican nominee for county commissioner.

The court first determined that it was "manifest error" for the district judge to assign the election contest to his associate judge. "We therefore hold that when the judge regularly assigned to judicial service in the county where a contest petition is filed is asked by either party to disqualify himself without cause, he must do so."

The court then dealt with the ruling of the judge that it had assigned to the contest, who had ruled that he was powerless to resolve the matter because the county election board's recount decision must be treated as final in all cases under the Oklahoma statute. The Supreme Court held that this was error, since the statute merely indicates that there is no remedy by appeal from the board's decision. The law does not prevent a later review under other statutory authorization and certainly does not prevent review by the Supreme Court on a question of law which arises from a statutorily sanctioned election contest. Even in the absence of statutory authorization, the court has constitutional authority, known as "general superintendent control," over all Oklahoma courts and administrative agencies and has the power to "reexamine

the correctness of any board ruling on an issue of law which may affect the ultimate outcome of an election."

Ultimately, the court had to decide whether or not to count the two ballots cast for Boevers but declared void by the election board. The court, in its opinion, reproduced the two ballots. One shows a double horizontal line drawn through the name of his opponent and an "X" obviously within the box to the left of Boevers' name. The other shows multiple straight and curvilinear marks in and around the box to the left of Boevers' name and no other marks. The court ruled that the first questioned ballot was valid because the crossing out of the opponent's name was not a "distinguishing mark" which would invalidate the ballot. A "distinguishing mark" is not just any extraneous mark on a ballot in addition to that necessary to indicate the vote, but rather it is a mark deliberately placed on the ballot to set it apart from all others. The first ballot bears no such mark. The lines on the ballot merely indicate the voter's choice. The second questioned ballot contains nothing more that marks in the proper place indicating the voter's choice in a manner authorized by statute.

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Wright v. Gettinger

428 N.E.2d 1212
Supreme Court of Indiana
December 8, 1981

Electronic voting system ballots not endorsed by polling clerks and damaged, duplicate, or unpunched ballot cards could not be counted, but ballots with straight party votes plus votes for individuals as well as ballot cards with "hanging chads" could be counted.

The Facts

This appeal in an election contest is to determine the right and title to the office of Clerk of the Randolph County Circuit Court for the term beginning January, 1982, although the election in question took place in November, 1980 for this "hold-over" office.

Randolph County, Indiana, used an electronic voting system [EVS] in the 1980 election. The voter cast the vote by punching a ballot card with a stylus. The cards were taken from each election precinct and counted by a computer at a central location. Indiana has enabling statutes to provide for EVS voting, and the state election board had approved the particular system employed in this election. This case is the first time EVS voting had been before the Supreme Court.

On election night, Wright and Gettinger, the candidates, were only 17 votes apart out of over 12,000 cast, with Gettinger the winner. Wright timely filed for a recount and contest. In December, the circuit court appointed a recount commission, and in January, 1981 the recount commission certified Wright as the winner by a margin of 19 votes out of slightly fewer than 12,000 counted.

Gettinger then filed to contest the election, and a trial was held. In March, 1981 the circuit court found that Gettinger was the winner by 12 votes out of slightly more than 12,000 counted.

The Issues

The Indiana Supreme Court identified six issues:

1. Permitting the counting of ballots which did not contain the initials of the poll clerks of both political parties.
2. Permitting the counting of ballots which did not contain duplicate serial numbers on "remade" ballot cards and did not contain the precinct designation on the duplicate card.
3. Refusal of the court to count an absentee ballot where the punch made was insufficient to register on the electronic computer.
4. Refusal of the court to permit counting of ballots where the voter voted for two opposing straight tickets and, in addition, voted for an individual candidate.
5. Permitting the counting of ballots on which the voter voted one straight party ticket and then crossed over to vote for an individual candidate on the opposing ticket.
6. Consideration of ballots evidencing distinguishing marks.

The Holding and Rationale

After extensive analysis of the individual votes, the Indiana Supreme Court declared Wright the winner and remanded the case to the circuit court.

Sixty-six ballots in the election bore the initials of only one poll clerk. These ballots were counted in the original canvass, invalidated by the recount commission, and then counted by the circuit court judge at the trial. It is a mandatory requirement under Indiana election statutes that the initials of both polling clerks appear on the ballot cast by the voter, and if the initials are not on any ballot, it could not be counted. This statutory requirement, however, originated in 1880 when all voting was by paper ballot. The purpose of this mandatory provision is to prevent the counting of fraudulent votes by requiring the poll clerks to endorse their initials upon the official ballots, to the end that they be identified when taken from the ballot box. The rather elaborate initialing process required the voter to determine that the ballot handed him or her was properly initialed and required the voter to fold the paper ballot so as to expose the initials of the clerks. Ballots without initials were not permitted to be placed in the ballot box. When counting the ballots, one duty of those counting at the precinct was to observe the initials of both polling clerks on each ballot. Ballots without proper initials were voided and not counted.

The 1971 enabling statute for EVS voting specified that other election law provisions in conflict with this new statute did not apply to EVS voting. Thus, if there is no conflict between the old law and the new, initials of polling clerks are required on the EVS ballot cards. If this practice constitutes a conflict, the initials are not required. The enabling statute is an elaborate, self-contained system. Each ballot card has two attached, perforated stubs, each bearing the same serial number. The top stub was bound or stapled in the package of ballot cards retained by election officials. As voters presented themselves to the poll clerks, the clerks removed the computer ballot card and the wide stub attached to the ballot card by tearing at the perforation. The ballot cards were placed in gray envelopes when handed to the voters. The envelope covered the ballot card, but left the stub with the serial number exposed. This second stub was also supposed to show the name of the governmental unit holding the election and the designation and date of the election. The voter then went to the booth and used a stylus to punch out square holes in the ballot card to indicate his or her choice. The voter then placed the completed ballot in the envelope and presented the ballot to the election judge, who removed the stub, gave the stub to the voter, and deposited the ballot card in the ballot box. If the second stub was missing from the ballot when presented to the judge, the judge was required to refuse to place the ballot in the ballot box.

The court observed that this new method of voting provides a system for tracing the ballot within the polling place and into the ballot box to ensure that only proper and official ballots are cast. Because of the nature of the data processing machines used to count the votes, the cards may not be folded or bent. Therefore, the secrecy of the ballot is maintained by using the envelope. The numbered stub allows the judge at the ballot box to ensure that only proper ballots are placed in the box, just as the initialed paper ballots were handled under the old system. The serial number on the ballot can be compared with the duplicate at the polling place to determine if the ballot was properly given to the voter. The number of stubs can be compared to the number of ballots to give assurance that the number of ballots cast matches the number properly given out to voters. In the instant case, the number of ballots issued and the number of ballots cast matched, and there was no indication of fraud.

After lengthy analysis, the court determined that the EVS method of voting is imperfect in that after the ballot cards had been placed in the ballot box and both

stubs had been removed, there was no way to determine that only proper ballots, passed out by polling officials, and no others were in the ballot box unless the ballots were initialed by the poll clerks. "It is reasonable to assume that the legislature intended to retain the provision of initialing by the polling clerks for this purpose. . . . We can see no conflict so irreconcilable that we must set aside one provision of the law for the other." Accordingly, all 66 ballots without initials of both clerks were invalidated.

The EVS enabling statute provides for the handling of bent or torn ballot cards. A "remake team" of election officials and at least two observers of different parties process the bent or torn cards by creating exact duplicates which can be processed by the electronic equipment. Twenty-one of these remade ballots were rejected by the recount commission, but were counted by the trial judge. Some of these cards lacked serial numbers and some lacked precinct designations. Some had no original counterparts. The trial judge reasoned that voters should not be deprived of their votes by mistakes made by election officials, but the Supreme Court held that these ballots should not have been counted because to count these ballots would ignore the clear mandate of the Indiana statute and could create a situation that encourages election fraud.

There were a number of ballot cards where the voter had punched more than one straight-party ticket and then also voted for an individual candidate. There were others where the voter had voted a single straight-party ticket and then also voted for an individual candidate. The trial court properly rejected all of the former and correctly counted all of the latter.

Some ballots were alleged to have distinguishing marks, that is, marks placed on the ballot by the voter in order to identify that ballot as one cast by that particular voter. Such marks void the ballot in Indiana. The Supreme Court stated that even though EVS ballots are counted by machine, a distinguishing mark would still void the individual ballot card. In the instant case, however, the marks complained of were not distinguishing marks but rather random marks made by election officials or merely stains of unknown origin, and the ballots were properly counted.

Finally, two ballots contained "hanging chads," that is, they had been punched by the stylus but the paper to be removed was still attached to the card. These ballots could properly be counted because they showed the clear intent of the voter; however, the trial judge disallowed them because there was no indication whether or not the tabulating machine had already counted them. Since these two votes would not change the outcome of the election, the ruling is undisturbed.

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Buonanno v. DiStefano

430 A.2d 765
Supreme Court of Rhode Island
June 4, 1981

An election board had the authority to order a new election in polling places where two voting machines had obviously malfunctioned.

The Facts

Buonanno was a Democratic candidate for one of three at-large city council positions in Cranston. In the November, 1980 general election there were six candidates for the three at-large positions. When the polls closed and the voting machine votes were tabulated, Buonanno was among the top three candidates, leading the fourth place Mooradian by 91 votes. The next day, the Republican city chairperson asked the board of elections for a recount of the voting machine votes for the three at-large positions.

Ten days later, the board conducted the recount. Two days later, after examining the results, the Republican chairperson asked that two voting machines be set aside for inspection. Each machine showed a "remarkable discrepancy" between the number of votes for Mooradian and the number cast on those two machines for the other candidates, as well as between the number of votes cast for Mooradian and her opponents at the other polling places. Machine 1152 at the Special Services Center polling place showed Mooradian with only 39 votes, while the other five candidates had between 89 and 192 votes. On the other voting machines at the same location, she had received the third highest vote totals. Machine 0563 at the Matteoti Club polling place showed Mooradian with only 29 votes compared to her totals on the other machines at the same polling place (130 and 117 votes).

On December 5, the board held a hearing at which the two suspect machines were tested. All interested parties were present. The seals on the machines were broken and the machines were activated. The board chairperson then cast eleven votes for Mooradian on Machine 0563; the total still read 29. The board chairperson then cast eleven votes for Mooradian on Machine 1152; the machine then read 32 votes, 7 fewer than it had originally shown. A representative of the manufacturer said that the machines had been built in 1936-37 and that the malfunctions could have been brought on by old age. He said that although an X might appear on the face of the ballot beside the candidate's name, the vote was not being recorded by the counting mechanism.

The board concluded that the two machines had malfunctioned on election day and had failed to properly record the votes cast for Mooradian. To remedy this situation, the board decided to hold a special election on January 27, 1981 under its statutory powers. In its order for a special election, the board indicated that it was attempting to reconstruct the voting process as it existed on the original election day. It ruled that the special election would be limited to the two polling places which had the defective machines and that the only voters eligible to vote would be those who had actually voted at those polling places on the original election day. The ballots were to be identical to the originals, and all machines were to be in working order. Mail voting was authorized for those eligible to vote but who could not come to the polls for the special election. The only votes to be counted were those for the candidates for the at-large council seats.

Buononno sought *certiorari*. The Supreme Court granted the writ, but denied the requested stay of the board's special election order. After the special election votes

had been tabulated, the board declared Mooradian the winner of the third at-large council seat.

The Issues

The only issue was whether the board's action in calling the special election was a proper remedy for the malfunctioning voting machines.

The Holding and Rationale

The Supreme Court denied and dismissed *certiorari*, quashed its previous writ, and remitted the record to the board of elections.

The court disposed of the issue of Mooradian's standing by declaring that the Republican chairperson had acted as her agent in seeking the recount and the special election. All requests were timely made, and all actions of the parties and the board were authorized by and within the scope of state statutes.

The court then considered the power of the board of elections to order a new election. It first observed that state statutes which define the powers of the board do not prohibit the board from conducting a new election. The court also observed that ". . . the overriding purpose of the election laws is to give effect to the voter's choice. . . . Each valid vote should be counted. It would be unfair to hold that an investigation concerning the accuracy of the voting machines is *absolutely* prohibited because of the policy favoring the stability of results [of the election]. Such an *absolute* prohibition is completely at odds with the voter's right to vote for whomever they please to be their elected representatives and the voters' expectations that their votes will be counted."

The court ruled that a "happy balance" can be struck if the board of elections requires the contestant to show that election irregularities were sufficient to establish the probability that the result would be changed by a shift of or invalidation of the questioned votes. In the instant case, the board's test of the malfunctioning machines demonstrated a probability that the election results would be significantly different if the votes had been recorded correctly. Thus the board was justified in concluding that the original election was so tainted as to require remediation. Once the board had come to this reasonable conclusion, it had the implicit power to fashion the remedy. The court conceded that there were practical difficulties in carrying out this remedy. "At least the new election gave to the voters who had taken the pains to go to the polls a second chance to express their choice about whom they desired to serve in the council at-large positions. The practical difficulties are far outweighed by the value served by this remedy."

"We commend the board's ingenious effort to reconstruct the election process as it existed on November 4, 1980."

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Devine v. Wonderlich

268 N.W.2d 620
Supreme Court of Iowa
June 28, 1978

Absent some mandatory provision of the election law to the contrary, if a voter affixes any mark to his ballot which fairly indicates his intention to vote for a particular candidate, including a write-in candidate, the vote should be counted.

The Facts

In the November, 1976 election, the canvass showed that Francis P. Devine, a write-in candidate, had defeated Wonderlich for a seat on the Keokuk County board of supervisors. Wonderlich contested the election, and the contest court, after invalidating a number of ballots, declared Wonderlich the winner. Devine appealed, and the district court also concluded that Wonderlich was the winner. The Supreme Court then reviewed the matter *de novo*.

Devine had lost the same seat by 50 votes in the 1974 election. There was no Democratic candidate for the office in the 1976 primary, but Devine received a number of write-in votes anyway and decided to run for the office again. In late June, the Democratic central committee certified his candidacy to the county auditor. In September, his candidacy was challenged because he had not been selected by a reconvened county convention pursuant to Iowa statute. The auditor was then uncertain whether Devine's name should appear on the ballot. On October 4, he notified Devine that his name would be on the ballot, but two days later changed his mind. Devine then sought injunctive relief to be placed on the ballot. The auditor then had stickers printed to place on the ballot in case Devine won his lawsuit. Devine, however, lost his case, and the auditor then gave the stickers to the secretary of a county taxpayers' association, who distributed them to more than 3,000 people in the county.

Because of these problems, Devine received a great deal of publicity, and he campaigned heavily as a write-in candidate. The original canvass showed that he won by a two-vote margin.

The Issues

After the litigation, there remained before the Supreme Court the issue of the validity of 282 ballots, all but 10 claimed by Devine. The ballots fall into four categories: (1) the "sticker" ballots, (2) the ballots containing only "Devine" or "F. Devine," (3) the ballots with name variations, and (4) the ballots with other claimed irregularities.

The Holding and Rationale

The Iowa Supreme Court held that 164 of the ballots rejected by the district court should have been counted for Devine and that nine of them should have been counted for Wonderlich, thus making Devine the winner.

Many voters used the stickers originally intended for the ballot to vote for Devine as a write-in candidate by affixing the stickers to the official ballots. The district court rejected some of them because they contained words other than Devine's name and rejected others because they were not placed in the proper place on the ballot.

Extra words on the stickers would invalidate the votes only if they were identifying marks or "distinguishing marks," which are prohibited by statute. In this instance, the extra words on the sticker were identical to the words which appeared for other candidates on the printed ballot, and further they could not be individually identified because they were the stickers that the county auditor had printed in the first place and they were all identical. These ballots do not contain identifying marks and do give evidence of the voters intent. Likewise, when the sticker is close enough to the "proper place" on the ballot that the intent of the voter can be ascertained, it is a proper ballot. After examining the ballots, the Supreme Court determined that the intent of the voter could be determined for each one.

After examining the votes which indicated only the candidate's surname, the court concluded that this was sufficient to indicate the desire to vote for Francis P. Devine. Votes for Devine, Mr. Devine, or F. Devine should have been counted.

In the case of other name variations, the Supreme Court upheld the district court in counting close name variants (e.g., France Devine, Franics P. Deiven) and in rejecting more distant variants (e.g., Danny Devine, Russell Devine, Louis P. Levine). The court apparently used a common sense test of proximity.

Finally, the court counted most of the other irregular ballots (which had various kinds of marks and scratched-out names on them). Again the court decided to count the ballots where the intent of the voter could be reasonably and sensibly ascertained.

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Selected Case Summaries

Barber v. Edgar,
294 A.2d 453 (Me. 1972).

The winner of a primary election for sheriff died on election day. The governor declared that a vacancy existed for the candidacy and directed the county party committee to nominate a candidate for sheriff. The candidate who finished second in the primary sought declaratory judgment that he was entitled to the nomination. Held: votes for the deceased candidate were valid to prevent the election of the second place candidate, and the vacancy existed following the tabulation of the vote as the deceased was unable to receive election certification. Merely by counting the votes cast, it was apparent that the second place candidate did not receive a plurality of the votes and therefore could not have been elected.

Clark v. Rankin County Democratic Executive Committee,
322 So.2d 753 (Miss. 1975).

During a primary election for the office of representative from the district, some ballot boxes were opened before the time for the closing of the polls. It had been a practice in those polling places for some time to begin the count while the election was still going on in the next room. The loser contested the election. Held: the Corrupt Practices Law prohibits the premature opening of ballot boxes because the ballots were not counted in full public view. Such a violation renders the election void in those precincts where the practice was followed, thus changing the outcome of the election and requiring the governor to call a special election to select a representative from that district.

Hennings v. Grafton,
523 F.2d 861 (7th Cir. 1975).

A class action was brought on behalf of voters to require that the election of county officers be reconducted because of alleged irregularities. The electronic voting devices in use malfunctioned, a number failed to record votes properly, and election officials allowed some voters to vote a second time at some polling places where the malfunctions were discovered. Held: these facts do not establish a constitutional deprivation under 42 U.S.C. Sec. 1983.

Highton v. Musto,
186 N.J.Super. 281, 452 A.2d 487 (N.J.L. 1982).

Musto defeated Highton in a municipal election. Musto was convicted of a number of federal offenses and was sentenced, thereby becoming ineligible to hold the office to which he was elected. The office was declared vacant. In the election, Musto was one of the five highest vote getters, and Highton came in sixth. Highton contended in his lawsuit that the election of Musto should be considered a nullity, and that the votes cast for him should be treated as void, thus making Highton the fifth highest vote getter and electing him to the office. Held: votes cast for a deceased, disqualified, or ineligible person are not to be treated as void, but are to be counted to determine the results of the election in regards to other candidates. It was evidently the will of the electorate to elect Musto and not Highton (since there were 15 candidates and any one of the others might have been elected if Musto had not run). Highton does not become the fifth person elected merely because of Musto's ineligibility. Rather, Musto's ineligibility merely creates a vacancy in the office to be filled by the normal special election process.

In re Recanvassing of Certain Voting Machines for the Election of Republican Candidate for County Commissioner in the November, 1983 General Election, 475 A.2d 1325 (Pa. 1984).

Miller and Henry were candidates for county commissioner. The county board of elections certified that Miller had defeated Henry by three votes. Henry and others filed a petition to recanvass 17 voting districts. Miller moved to dismiss on grounds of untimely filing and technical noncompliance with verification requirements because a notary public had failed to administer the oath to all of the petitioners. Held: a candidate has twenty days after the date of the primary or election, or five days after the computation is completed, whichever is longer, to file a petition to recanvass. Henry's petition, filed five days after certification, was timely. The failure of the notary public to administer the proper oaths was his mistake, not the mistake of the petitioners, and therefore they should not suffer. "An easily correctable mistake that causes no prejudice to anyone should not thwart a fundamental process of democracy."

Johnson v. Trnka, 154 N.W.2d 185 (Minn. 1967).

Johnson was elected auditor of the county by two votes, and his opponent filed a contest. The court ordered an inspection of the ballots, which discovered six ballots in the ballot box which had not been properly initialed by the election judges as required by statute. In the township in question, there were 505 registered voters in the election register. The ballot box contained 507 ballots. Of the six ballots that were not initialed, four were for Johnson and two were for his opponent, Trnka. The court held that these were properly counted and resolved the issue of the excess ballots by withdrawing two ballots at random from the 507, thus leaving Johnson with a two-vote majority. Held: the statute prescribes with precision what is to be done when uninitialed ballots are found in the ballot box: set them aside and preserve them, but do not count them. If there is still an excess of ballots after removing the uninitialed ones, then ballots may be removed at random until the number of ballots matches the number of voters.

Kelly v. Burlington County Board of Elections, 207 N.J.Super. 335, 504 A.2d 153 (N.J.L. 1985).

For 8 years, absentee ballots provided by the county clerk had been counted by an electronic device. Following the 1984 election, the county election board insisted on a manual count and tabulation of the absentee ballots (involving more than 22,000 ballots). The clerk sued to restrain the board from using a manual count, claiming that machine counting is mandatory. The board of four members is deadlocked. Held: because the computer equipment which is used to count the absentee ballots is located in a room to which the public has no access and because only one person operates the machinery, there can be no compliance with the statutory requirement that the counting equipment be tested and operated in public and that the equipment be operated by a representative from each party. The statute permits manual counting if electronic counting becomes impracticable. Since the board is deadlocked and since the technical public access and bipartisan counting cannot be done electronically under present circumstances, the board may count the absentee ballots manually.

Knowles v. Holly, 82 Wash. 694, 513 P.2d 18 (Wash. 1973).

The loser contested an election for county commissioner on the grounds that illegal write-in votes were counted. Held: when an elector writes in the name of a person for whom he or she wishes to vote, it is not necessary to mark an "X" after

the name, nor is it necessary to indicate the political party affiliation of the candidate.

Lorch v. Lohmeyer,
247 N.E.2d 61 (Ind. 1969).

In an election contest for the office of city judge, issues arose as to whether to count certain paper ballots. Some ballots had irregular X marks in the party emblem, some had retraced X marks, and some had been marked with an infirm or unsteady hand on rough surfaces. Held: the votes should be counted if they "clearly evidenced the voter's intention, and the exercise of common sense dictates that to refuse to count such a vote would be to deprive an honest and innocent voter of his vote."

Lambeth v. Levens,
237 Kan. 614, 702 P.2d 320 (Kan. 1985).

The incumbent sheriff was defeated by one vote, and he sought a recount. The recount produced a tie vote. The special election board then tossed a coin and named Levens, the challenger, the winner. Lambeth filed a contest, and a panel of three inspectors was appointed to recanvass the vote. The recanvass produced a two-vote margin for Lambeth, three questionable votes, and 18 void or blank ballots. At trial the court found that all three questionable votes involved erasures, but that the intent of the voter was clear and they should be counted, putting Lambeth one vote ahead. The court did not rule on a challenged absentee vote on grounds that such a vote can only be challenged by election officials and not in an election contest. The trial court declared Lambeth the winner. The one absentee ballot had been cast by the voter's wife for the voter, who was of advanced age and ill. The voter's ballot was identical to that cast by his wife. The Supreme Court reversed and remanded back to the trial court with instructions to determine whether the one absentee ballot was illegally cast and if so to compel the voter's wife to disclose which candidate for sheriff she cast it for and to subtract that vote from the total. Further, the trial court is instructed that if this process results in a tie vote, then Levens is to be declared sheriff on the basis of the original coin toss to resolve the tie.

Manchin v. Dunfee,
327 S.E.2d 710 (W.Va. 1984).

The county commission, acting as the Board of Canvassers, refused to count 223 ballot cards in the final tabulation because they lacked one or both of the poll clerks' signatures. The Secretary of State, as the chief election official, filed for mandamus to require the board to include the cards in its canvass. A 1983 amendment to the election code required that the poll clerks each sign the ballot cards and provided that "[i]n the course of an election contest . . . such [unsigned] ballot card shall be null, void and of no effect and shall not be counted." The circuit court read the old balloting statute and the new electronic voting system statute *in pari materia*. The Supreme Court concluded that the legislative intent in the 1983 amendment was to require both clerks to sign the ballot cards and also to permit the challenge of unsigned cards in an election contest and not at a canvass or recount. "One of the underlying purposes of electronic voting systems is to enhance the speed and accuracy of counting votes. It would run counter to such goals to have the ballot cards manually examined on election evening to determine if they were properly signed by the respective poll clerks."

McCavitt v. Registrars of Voters of Brockton,
385 Mass. 833, 434 N.E.2d 620 (Mass.App. 1982).

A dispute arose over the mayoral election in Brockton. After a series of recounts and trials, the issues to be decided were whether the same standards apply to the counting of paper ballots and the hand recount of punch card ballots, whether absentee ballots are invalid if the voter is not in strict compliance with the law governing absentee balloting, and finally whether the government may compel an absentee voter to disclose for whom he voted. One candidate contended that in hand counting punch card ballots, the standard for determining a vote is whether light passes through the appropriate hole. Held: the same standard applies to the hand counting of punch card ballots as to paper ballots, i.e., if the intent of the voter can be ascertained, the vote is to be counted (as when the voter uses a pen instead of a stylus and makes a mark or a permanent depression in the card). Before considering the absentee ballot questions, the candidates were five votes apart. Some absentee ballots were notarized by a notary who was also a candidate in another ward; such a notarization by a candidate for office is facially invalid, and thus such ballots were rejected. Likewise, absentee ballots with illegible notary signatures and missing notary commission dates were rejected. Held: the rejection of the ballots notarized by the candidate-notary were properly rejected because the statutory bar is absolute. The absentee ballots with illegible notary signatures or missing commission dates should have been counted because the voters cast those ballots in good faith and should not be disenfranchised because of the failure of a public officer to perform some ministerial duty. A number of absentee ballots were accepted even though in technical non-compliance with voting procedure. Others were rejected for technical non-compliance. Held: Absentee voters must not be disenfranchised if they substantially comply with the election law. Therefore some of the votes were counted and others were not based on the court's perception of the seriousness of the deviation from technical requirements. Finally, the trial judge compelled some absentee voters to disclose for whom they voted. Held: it is improper to compel good faith voters to disclose for whom they voted. Without the testimony of the seven absentee voters who were improperly required to reveal their votes, there is no way to determine who won the election with any certainty. Therefore, the judgment below declaring a winner is vacated, and a new election is ordered.

Tellez v. Superior Court,
104 Ariz. 169, 450 P.2d 106 (1969).

Ballots in the Democratic primary carried four candidates for the office of county treasurer, including the incumbent. The incumbent died before the election, but still received the highest vote total in the primary. The second place candidate sought mandamus to be declared the nominee. The party committee declared the candidacy vacant and nominated another. Held: the second place candidate did not win the election merely because the candidate with the most votes was dead. The death of the winner merely voids the election as to that office.

Underwood v. County Commission of Kanawha County,
349 S.E.2d 443 (W.Va. 1986).

The county commissioners, sitting as the board of canvassers, conducted the canvass of the May, 1986 primary without physically inspecting the poll books and poll tickets used in the election. Plaintiffs sought mandamus to compel the board of canvassers to perform acts required by state statute. They appealed from a circuit court denial. The statutes clearly require custodial election officers to place before the commission all the items listed in the statutes, including poll books and poll tickets, in order to compare the number of ballots cast with the number of people who voted. This poll ticket audit will reveal if the ballot box has been stuffed or if

ballots have been removed. The commission argued that the statute was merely directory. Held: the poll ticket audit is a mandatory, non-discretionary duty that the commission is bound to perform. Further, a quorum of the commission must be present during the count. The requested writ was not issued because it would not change the outcome of the plaintiffs' elections, but the requirements will have strict future application. The court also ordered the "application deck" (i.e., the computer program used to count the votes) to be delivered to the state election commission for analysis because of alleged errors in the program.

Williams v. Rensselaer County Board of Elections,
98 A.D.2d 938, 471 N.Y.S.2d 373 (A.D. 3 Dept. 1983).

A candidate petitioned for a ruling that two emergency ballots were properly counted. Although other issues arose, of primary importance was a dispute over how ballots were to be marked. Held: "It is clear from the statute that the only place on a paper or absentee ballot where a vote may properly be recorded is in a voting square and that the only proper means of indicating a vote is by a 'X' or a 'check' . . . Thus, in order to determine whether a vote was properly cast, only the voting square may be examined. If the 'X' or 'check' is within the voting square, the vote is proper. Here, Cotten marked a 'check' but the mark is not within the voting square. Even assuming that the line is part of the square, the fact that the mark may touch the square is not dispositive since there is not a 'X' or 'check' within the voting square. Therefore, the vote cannot be counted. We note that this does not render the entire ballot invalid, but renders it blank only as to the office of councilman. . . ."

Williamson v. Cuyahoga County Board of Elections,
11 Ohio St.2d 90, 464 N.E.2d 138 (Ohio 1984).

Williamson was a candidate for law director of Brook Park. Lambros filed in the same race, but he was determined not to be a resident of the city and therefore ineligible to hold the office. His name was ordered removed from the ballot on October 20. On November 2, Lambros sought a temporary restraining order to prevent the removal of his name form the ballot and it was granted. As a result, Lambros' name appeared on the ballot on November 8 and votes were cast for him. The ballots remained sealed and no votes were counted. In March, the district court dismissed Lambros' complaint and dissolved the order. The Ohio Secretary of State then ordered the Cuyahoga County Board of Elections to count the votes. Williamson then brought this action in mandamus to compel the board to count only votes cast for him as the only eligible candidate and to certify him as the winner. Held: as the only eligible candidate on the ballot, only votes for Williamson may be counted.

Woo v. Robinson,
484 A.2d 950 (Del. 1984).

According to unofficial election returns, Woo had been elected Lt. Governor by 229 votes out of 250,000 cast. The Superior Court, sitting as a board of canvass, ordered that all voting machines used in New Castle County be opened and examined, that all absentee ballots in that county be opened and examined, that all write-in paper rolls used in the county be examined, and that a determination be made of the total votes cast for each candidate for Lt. Governor. Woo moved to stay that order. The statutes require the Superior Court to open and examine voting machines and absentee ballot boxes to make a recount upon a complaint filed under oath of fraud or mistake in the certificates of election. There are no issues of fraud in this case, but there are allegations of mistake in the preparation of the certificates. Some discrepancies existed in the reported vote, and some evidence existed that the absentee ballots were

not handled properly. Held: upon this showing of material discrepancies which could affect the results of the election, the Superior Court had no recourse under the statute but to order the recount.

Wood v. Kirby,
566 S.W.2d 751 (Ky. 1978).

In a school board election, one voting machine malfunctioned. A canvass and recanvass resulted in the certification of Kirby as the winner, and Wood appealed. In the Beechmont precinct, one voting machine showed 441 votes cast and the other showed 432. On one machine, Kirby received 159 votes and Wood received 241. On the other machine, Kirby received 172 votes, but Wood received only 9. Thus 251 votes remained unaccounted for, over 25% of all the votes cast in that precinct. There was no way to determine how many of the missing votes would have gone to Wood. Held: there has been no election and the office of school board member is vacant with the same legal effect as if the person elected had refused to qualify.

Selected Legal Literature

Batey, "Electoral Graffiti: the Right to Write-in," 5 Nova Law Journal 201 (1981).

Note, "A Vote on th' Talleysheet is Worth Two in the Box: *Peterson v. City of San Diego*," 18 University of San Francisco Law Review 635 (1984).

Note, "Election Law--the Secrecy of the Absentee Ballot," 30 Louisiana Law Review 461 (1970).

Note, "Elections--Vacancies Occurring Close to Elections," 75 West Virginia Law Review 184 (1972).

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Stephenson, "Electoral Law: Marking of Ballot Papers," 13 Victoria University Wellington Law Review 159 (1983).

Thomas, "Election Boards and Voting Machines--State of Oklahoma," 4 Tulsa Law Journal 137 (1967).

Willis, "Electronic Vote Counting in a Metropolitan Area," 26 Public Administration Review 25 (1966).

Chapter 9: Certification of Results and Resolution of Challenges

Chapter 9: Certification of Results and Resolution of Challenges

Introduction

States have a legitimate interest in ensuring that the proper results are properly certified and that challenges to the nomination or election of an individual are resolved in a fair and timely manner.

Canvass of Returns

The first phase of the post-election process in most states involves a canvass of the returns of the election. This canvass is effectively a ministerial check or recount of the votes announced on election night. The canvass serves as the basis for certification of the winning candidates.

Certification of Returns

Certification is a ministerial chore.[1] The certification of results should be limited to the appropriate official or canvassing board retallying the results as they appear on their face.[2] These results are then considered to be prima facie evidence of the returns of the election,[3] but may be overturned upon a showing of fraud or irregularity.[4] If two or more candidates receive a certificate of election for the same office, the presumption of election is defeated.[5]

A certificate of election is a rebuttable presumption of election to office,[6] but the returns of a recount are considered to supersede the results upon which the initial certificate was based.[7] In all cases, the actual ballots themselves, if properly preserved and free from apparent tampering, are considered to be even more determinative of the results than the certificate of election.[8]

The certificate of election is not determinative of the term or dates to which an elective official is entitled to assume and hold office.[9] A certificate, if issued under circumstances of fear or duress, is not valid.[10] If a certificate of election is defective because of the omission of a particular detail, it will not serve to invalidate an election in which the voters have fully, fairly, and honestly expressed their will.[11] The enjoinment of a certificate of election is a procedure that must be undertaken in the form of a contest.[12]

Recounts

States provide for recounts as part of their election systems. A recount is an integral part of the election process.[13] A recount is to be used for the purpose of ensuring the accuracy of the tally and not for ascertaining whether fraud or irregularities have crept into the election.[14] Once a recount has been commenced, it may be used for the benefit of all of the candidates in a particular race.[15]

If no recount is provided for by statute, a recount must occur instead in the form of a quo warranto proceeding to try the title to the office.[16] However, an action for quo warranto does not lie until the candidate holding the latest certificate of election takes possession of the office and assumes its duties.[17]

States have established statutory procedures for requesting recounts and contests of elections. At common law, there was no provision for contests, and, as recounts and election contests are statutory creatures, strict adherence to deadlines, grounds, and notice provisions is necessary to preserve the contestant's rights.[18]

Contests

A contestant must generally be an unsuccessful candidate for the office sought.[19] A member of one political party may not generally contest the nomination of a member of a different political party.[20] Death affects contest actions in different ways. If a person elected to office dies before he qualifies for the office and before his opponent could file a contest action, the right to contest the election is abated.[21] If the contestee dies pending the contestant's appeal from an adverse judgment and the resulting vacancy is filled by appointment, the action is also abated.[22] While the right to be a contestant is generally held to be a personal, nonassignable right, if an election for governor and lieutenant governor is contested and the contestant for governor dies pending the contest, the contestant for lieutenant governor may continue the gubernatorial contest for his own benefit, because the lieutenant governor succeeds to the governorship upon the governor's death.[23]

A contestant may seek relief in several forms from the court, but typically the contestant seeks to oust the ostensible winner and be seated instead, a power that the courts have.[24] A contest action must be timely filed,[25] but should not be filed before certification has taken place.[26] If a recount occurs, the time for filing a contest action is typically tolled.[27]

A contestant must also raise an objection to an irregularity in the nomination of a candidate before the election.[28] The court will not grant post-election relief if the contestant was aware of a major problem before the election or if there was a reasonable opportunity for the contestant to seek preelection relief.[29]

To be successful, a contestant must generally show that there was fraud or irregularities of a sufficient nature occurring in the election such as either to

place the outcome of the election in doubt[30] or to make it impossible to determine the true will of the voters.[31] In some jurisdictions, the contestant is still required to show that "but for" the fraud or irregularities, he would have been nominated or elected.[32] The contestant must affirmatively present all of his evidence because the court will not speculate as to why voters did or did not vote in a particular race or election.[33]

Even if there is a short time period remaining before the general election, relief may still be afforded a contestant in the form of a stay of the certification of results of the general election.[34]

Recounts and Contests of Congressional Races

Congressional recounts and contests are treated differently. Recounts of both primary and general election congressional races may be had under state law because it does not interfere with the constitutional privileges of Congress with respect to elections,[35] but contest proceedings for both House primaries[36] and Senate primaries,[37] and general elections are generally avoided by the states and left to the respective chambers of Congress to determine.[38] Cases involving state legislative races are similarly often left to the respective chambers for decision.[39]

Notes

[1] *Whelan v. Cuomo*, 415 F.Supp. 251 (E.D.N.Y. 1976).

[2] *Reed v. City of Montgomery*, 376 So.2d 708 (Ala. 1978).

[3] *State ex rel. Spaeth v. Olson ex rel. Sinner*, 359 N.W.2d 876 (N.D. 1985).

[4] *Reed v. City of Montgomery*, 376 So.2d 708 (Ala. 1978).

[5] *People ex rel. Hardacre v. Davidson*, 2 Cal.App. 100, 83 P. 161 (Dist.Ct.App. 1905).

[6] *State ex rel. Graves v. Wiegand*, 212 Wis. 286, 249 N.W. 537 (1933).

[7] *Id.*

[8] *Id.*

[9] *State ex rel. Spaeth v. Olson ex rel. Sinner*, 359 N.W.2d 876 (N.D. 1985).

[10] *State ex rel. Pike v. Hammons*, 166 Tenn. 469, 63 S.W.2d 660 (1933).

[11] *Tate v. Morley*, 223 Ga. 36, 153 S.E.2d 437 (1967).

[12] *Johnson v. Stevenson*, 170 F.2d 108 (5th Cir. 1948), *cert. denied*, 336 U.S. 904, 69 S.Ct. 491, 93 L.Ed. 1948 (1949).

[13] *Roudebush v. Hartke*, 405 U.S. 15, 92 S.Ct. 804, 31 L.Ed.2d 1 (1972).

[14] *Id.*

[15]*Hatcher v. Ardery*, 242 S.W.2d 105 (Ky.App. 1951).

[16]*Wickersham v. State Election Board*, 357 P.2d 421 (Okla. 1960).

[17]*State ex rel. McCormick v. Superior Court of Knox County*, 95 N.E.2d 829 (Ind. 1951).

[18]*Taylor v. Beckham*, 108 Ky. 278, 56 S.W. 177 (Ky.App. 1900).

[19]*McLavy v. Martin*, 167 So.2d 215 (La.Ct.App. 1st Cir. 1964).

[20]*Id.*

[21]*Fiegenbaum v. McFarlane*, 399 Ill. 367, 77 N.E.2d 816 (1948).

[22]*Hargett v. Parrish*, 114 Ala. 515, 21 So. 993 (1897).

[23]*Taylor v. Beckham*, 108 Ky. 278, 56 S.W. 177 (Ky.App. 1900).

[24]*Loyd v. Keathley*, 284 Ark. 391, 682 S.W.2d 739 (1985).

[25]*Redding v. Balkcom*, 246 Ga. 595, 272 S.E.2d 324 (1980).

[26]*Tazewell v. Davis*, 64 Or. 325, 130 P. 400 (1913).

[27]*Redding v. Balkcom*, 246 Ga. 595, 272 S.E.2d 324 (1980).

[28]*Tate v. Morley*, 223 Ga. 36, 153 S.E.2d 437 (1967).

[29]*Hart v. King*, 470 F.Supp. 1195 (D.Hawaii 1979).

[30]*Mirlisena v. Fellerhoff*, 11 Ohio Misc.2d 7, 463 N.E.2d 115 (C.P. 1984).

[31]*McNally v. Tollander*, 100 Wis. 490, 302 N.W.2d 440 (1981).

[32]*Moreau v. Tonry*, 339 So.2d 3 (La. 1976), *appeal dismissed*, 430 U.S. 925, 97 S.Ct. 1541, 51 L.Ed.2d 769 (1977).

[33]*Edmondson v. State ex rel. Phelps*, 533 P.2d 604 (Okla. 1974).

[34]*Redding v. Balkcom*, 246 Ga. 595, 272 S.E.2d 324 (1980).

[35]*Roudebush v. Hartke*, 405 U.S. 15, 92 S.Ct. 804, 31 L.Ed. 2d 1 (1972).

[36]*Rogers v. Barnes*, 172 Colo. 550, 474 P.2d 610 (1970) (en banc).

[37]*Barry v. United States ex rel. Cunningham*, 279 U.S. 597, 49 S.Ct. 452 (1929).

[38]*Gammage v. Compton*, 548 S.W.2d 1 (Tex. 1977); *Young v. Mikva*, 66 Ill.2d 579, 363 N.E.2d 851 (1977).

[39]*Markwort v. McGee*, 36 Cal.2d 593, 226 P.2d 1 (1951).

Loyd v. Keathley

284 Ark. 391, 82 S.W.2d 739 (1985)
Supreme Court of Arkansas
January 21, 1985

In a contest between two candidates, the court is empowered to oust the apparent winner and instead declare the contestant the winner.

The Facts

In a 1983 school director election, the contestant received six votes less than the apparent winner, the contestee. The circuit court concluded that 23 votes for the contestee were invalid for various reasons and declared the contestant the winner. The contestee appealed.

The Issues

The question for decision was whether the court had the power to enter judgment ousting the contestee from office and placing the contestant in office in his stead.

The Holding and Rationale

The Supreme Court upheld the circuit court ruling and declared the contestant as the proper school director.

The court examined the rationale set forth by the contestee that the court's power be limited to declaring the office vacant, with the vacancy to be filled subsequently by the other school directors under terms of the law. The court found the argument unsatisfactory because it (1) was contrary to the traditional practice of putting the actual winner in office, (2) would deprive the true winner of the office for which he campaigned successfully, (3) would nullify the power of the people to elect the person of their choice, and (4) would reduce the incentive for a defeated candidate to undertake a contest.

Commentary

The court set forth extremely persuasive reasons for seating the actual winner. The process may be controverted if the court is not able to truly rectify an untoward result. Merely allowing the office to be declared vacant or declaring a new election does not afford equity to the actual winner and those who elected him to office.

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Moreau v. Tonry

339 So.2d 3, *appeal dismissed*,
430 U.S. 925, 97 S.Ct. 1541, 51 L.Ed.2d 769 (1977)
Supreme Court of Louisiana
October 22, 1976

Even if the number of alleged irregularities exceeds the difference in votes between candidates, the contestant must prove either that he would have been elected but for the irregularities or fraud or that the fraud and irregularities are of such a serious nature that the voters have been deprived of the free expression of their will.

The Facts

Contestant Moreau ostensibly lost a congressional primary to contestee Tonry by a margin of 184 votes, but showed 43 forged signatures on the precinct register and 315 more votes cast on voting machines than signatures on precinct registers. These numbers exceeded the contestee's putative margin of victory. The district court affirmed the election, while the court of appeal reversed the district court and annulled the election. The contestee appealed.

The Issues

The question for decision was whether a contestant seeking to nullify an election on the grounds of irregularities must prove that he would have been elected but for the problems.

The Holding and Rationale

The Supreme Court reversed the court of appeals and upheld the validity of the election, suggesting that no inference could be made that the illegal votes were cast for the contestee and that the "but for" test was controlling. The court found the irregularities not so pervasive as to require nullification of the election. (The contestee later resigned the House seat and went to prison after a federal investigation which showed he had participated in a pattern of vote fraud.) Two justices, including the chief justice, dissented, arguing that the fraud and irregularities were serious enough to cast doubt on the true will of the voters.

Commentary

The position of the dissenters is probably better law in this case, given both the facts and the principle. When irregularities are found in numbers which cast a substantial shadow on the validity of the returns, the courts should be willing to step in to determine whether the election should be declared void or, if the facts support such a holding, to determine whether the contestant should be afforded the certificate of nomination or election. The ruling as it stands serves to encourage subterfuge, for under this rationale, as long as there is some apparent fraud in a close election which cannot be traced back to the apparent winner, the apparent winner will always emerge unscathed.

The better rule can be found in *Mirlisena v. Fellerhoff*, 463 N.E.2d 115, 11 Ohio Misc.2d 7 (C.P. 1984). This case suggests that the contestant must generally prove that irregularities would have changed the result of the election, but must not always show the precise number of irregularities.

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Mirlisena v. Fellerhoff

11 Ohio Misc.2d 7, 463 N.E.2d 115
Court of Common Pleas of Ohio, Hamilton County
January 4, 1984

A contestant must generally prove that irregularities would have changed the result of the election, but must not always show the precise number of irregularities.

The Facts

The contestant Mirlisena was the apparent loser in a councilmanic election by 62 votes out of a total of 76,592 votes cast. The contestant showed action by the county that potentially disenfranchised 13 voters, with others also apparently disenfranchised. The contestant contested the election on these grounds.

The Issues

The questions for decision were whether a contestant must generally prove that irregularities would have changed the result of the election and whether a precise number of irregularities must be shown.

The Holding and Rationale

The court ruled that irregularities are mooted unless they are significant enough to have rendered the results of the election uncertain, i.e., to have changed the results of the election. While the court determined that showing a precise number of irregularities was not necessary, a presumption of regularity does exist, and a solid, affirmative pattern of irregularities must be shown to overcome a showing of fewer irregularities than are necessary to change the results of the election. The court found that the 13 cases presented by the contestant were not of sufficient merit by themselves (and did not establish a pattern of disenfranchisement) to warrant voiding the election outcome.

Commentary

The court reached a rational conclusion in this case. The court suggested that it would allow an indefinite number of irregularities to be shown in order to call the validity of an election into question. Presumably this number would, at least after extrapolation, exceed the difference in the number of votes separating the leading candidates.

The case is significant not only for its acceptance of an indefinite number of irregularities, but also for the court's willingness to accept a conspiracy theory of sorts. The court will consider action on a contest if a number of irregularities are brought to its attention that, although fewer standing alone than the court might consider necessary to overturn the election, serve as evidence of a broader pattern of fraud or irregularities.

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McNally v. Tollander

100 Wis. 490, 302 N.W.2d 440 (1981)
Supreme Court of Wisconsin
March 3, 1981

An election must be set aside where deprivations of the right to vote are so significant in number or so egregious in character as to undermine the appearance of fairness, even when the outcome of the election might not be changed.

The Facts

A 1976 referendum petition to change the location of a county seat resulted in a dispute over when to hold the election to decide the question. Proper notice was not afforded the voters in the time prescribed by law, and questions arose over whether the election should be held.

As a result of differing interpretations from the state election board and the county clerk, election clerks in eight of the 16 towns comprising the county refused to distribute referendum ballots on election day. This inaction resulted in the disenfranchisement of approximately 40% of the voters.

The attorney general issued an official opinion, 60 Op. Att'y Gen. 219 (1977), endorsing the validity of the election. Later, following confusion over certification, the acting governor requested further clarification of the validity of the election from the attorney general. The attorney general, citing notice of further procedural irregularities in the election, retreated from his earlier opinion, but the acting governor took the action necessary to change the county seat per the (decisive) election results.

A class action was brought on behalf of those allegedly not properly notified of the election or who were denied the opportunity to vote. The trial court issued a judgment declaring the election void and granted an injunction against moving the county seat. The court of appeals reversed the trial court judgment. The contestants in the initial action appealed.

The Issues

The question for decision was whether an election can be voided for serious irregularities even if the outcome might not be changed.

The Holding and Rationale

The Supreme Court reversed the court of appeals and ruled that the election be set aside. The court held that the exclusion of 2,578 voters so undermined the appearance of fairness in the election that the election must be set aside.

The court considered the "outcome test," but distinguished this case from others using the test by finding that none of the other cases involved the wholesale deprivation of the right to vote.

The court considered the court of appeals' concern about what effect the setting aside of the election would have on the majority of voters who did vote. The court concluded that the temporary disenfranchisement of those voters was preferable to the permanent disenfranchisement of the 40 percent.

Commentary

The court quoted at length from the Harvard Law Review note on developments in the law of elections and followed its guidance on the question of voiding elections: courts should be free to use their discretion to void an election where proven violations have undermined the appearance of fairness in an election.

In this particular case, the court admittedly was not dealing with adjudicating the right of a particular candidate to an office, nor was this a case where a candidate stood to benefit from his own wrongdoing. Still, the principle reiterated here is important, because it allows courts to overturn elections that subvert the free will of all voters. Candidate elections should not be subjected to significantly different standards.

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Redding v. Balkcom

246 Ga. 595, 272 S.E.2d 324 (1980)
Supreme Court of Georgia
October 30, 1980

Relief is available to a primary contestant despite the proximity in time to the general election.

The Facts

A runoff primary election for county sheriff was conducted August 26, 1980. The apparent loser, Redding, filed a contest petition two days later, but failed to attach a required form of special process to the petition. The form of special process was ultimately attached to the petition, with a return day established as September 15, 1980, a date beyond the five-day filing deadline set by statute. Although the court found that obligation for issuing notice in the form of a special process fell upon the court clerk, the contestee's motion to dismiss the contest petition was granted, and the contestant appealed.

The Issues

The question for decision was whether relief was available to the contestant in view of the fact that the date for the general election was less than one week from the date of the court's decision.

The Holding and Rationale

The Supreme Court held that relief was available to the contestant in the form of a stay of the certification of the returns of the general election pending adjudication of the issues in the primary contest.

The court reviewed the line of cases holding that the courts have no right to interfere with the holding of a general election when deciding a primary election, but ruled that the mere passage of time should not be allowed to circumvent the will of the electorate as expressed at the ballot box.

The court held the trial court in error for dismissing the contest petition and directed an evidentiary hearing to be held on the merits as soon as possible. The general election was permitted to proceed, but certification would be delayed if necessary.

Commentary

While it is dangerous to interrupt the general election process--ballots must be printed well in advance of the election, candidates must have an appropriate period of time within which to express their positions, and the transfer of power should not be delayed unnecessarily--the contestant also has certain rights that should not be abrogated, especially because of something not in the contestant's control, such as the mere passage of time, as this decision recognizes.

Courts must walk a thin line in determining to what extent they will permit a primary election contest to take precedence over the general election. In some cases, such as *Moreau v. Tonry*, 339 So.2d 3 (La. 1976), *appeal dismissed*, 430 U.S. 925, 97 S.Ct. 1541, 51 L.Ed.2d 769 (1977), there may be an extremely short turnaround period between the primary and general elections. While irregularities may be suspected--or while some may even be shown--often more time is required to fully prove allegations.

The courts may often be in the position of permitting certification of an individual who is later found to have stolen the primary or delaying the certification of a legitimate candidate, thereby depriving the voters of representation (as in Congress) or the right to be represented by the *prima facie* winner. While no perfect solution exists, the ability to stay execution of a certificate of election affords the courts an extra degree of flexibility that may be employed appropriately and selectively.

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Roudebush v. Hartke

405 U.S. 15, 92 S.Ct. 804, 31 L.Ed.2d 1 (1972)
United States Supreme Court
February 23, 1972

A recount is an integral part of the state election process and does not interfere with the right of Congress to judge the elections, qualifications, and returns of its members.

The Facts

Official Indiana election returns showed that U.S. Senator R. Vance Hartke had retained his Senate seat in the 1970 general election by a margin of 4,383 over Rep. Richard L. Roudebush. More than 1.7 million votes were cast in the election. On the day after Hartke was certified as the winner by the Indiana Secretary of State, Roudebush filed a timely petition for recount in Marion County Superior Court. The court denied Hartke's motion to dismiss the petition, which had been based on the premise that the state recount procedure conflicted with the Indiana and United States Constitutions.

After the court ordered a recount commission to begin its work, Hartke filed a complaint in the U.S. District Court for the Southern District of Indiana seeking an injunction against the recount, arguing that Article I, Section 5 of the U.S. Constitution granted Congress the exclusive right of judging the election, qualifications, and returns of its members. A district judge temporarily restrained the recount until a three-judge panel could be convened. The panel, following a hearing and testimony, issued an interlocutory injunction in Hartke's favor on a 2-1 vote. Roudebush and the Indiana Attorney General, as an intervenor, both sought to appeal directly to the U.S. Supreme Court.

Hartke was sworn in as a member of the Senate, without prejudice to the outcome of a recount proceeding as might be ordered by the Supreme Court. Hartke then moved to dismiss the appeals, which were consolidated by the Supreme Court.

The Issues

The principal question for decision was whether the state-imposed recount procedure was a valid exercise of the state's power, under Article I, Section 4 of the United States Constitution, to prescribe the times, places, and manner of holding elections or was a forbidden infringement upon the Senate's power under Article I, Section 5.

The Holding and Rationale

The Supreme Court, in a 5-2 decision with two justices taking no part, reversed the three-judge district court panel, thus holding that a state may provide a ministerial recount procedure for congressional offices without infringing upon the power of Congress to judge the elections, qualifications, and returns of its members.

The court first determined that the Indiana recount procedure was not a judicial proceeding, in that the court performed only an administrative or ministerial function in approving or denying a recount request. If a petition for a recount was correct as to form and timely filed, a recount must be ordered.

The court then turned to Article I, Section 4 of the Constitution, noting that the states have the ability to regulate the conduct of congressional elections in the

absence of congressional activity. Citing *Smiley v. Holm*, 285 U.S. 355, 52 S.Ct. 397, 76 L.Ed. 795 (1932), the court noted that state responsibilities included the duties of inspectors and canvassers, the making and publication of election returns, and the enactment of the numerous requirements as to procedure and safeguards which are necessary to enforce the fundamental right involved.

The court conceded that a state's verification of the accuracy of election results is not totally separable from the Senate's power to judge elections and returns, but concluded that a recount can only be said to usurp the Senate's function if it frustrates the Senate's ability to make an independent final judgment. The court then suggested that the Senate could choose to accept or reject the recount, or even conduct its own recount.

Commentary

This decision resolved some of the tension between the two constitutional provisions which provide the background before which all congressional election contests are decided, by providing states with greater authority over federal elections in the case of recount proceedings. A logical extension of the question resolved in this case was left unanswered by the court: may a state provide a method by which to contest the final outcome of a congressional election on grounds such as vote fraud or other irregularities in the count? This holding would seem to indicate that contest proceedings that are an integral part of the state's electoral process may be instituted if the appropriate congressional body is afforded the opportunity to make the final and conclusive judgment as to who should be seated. However, state and federal courts have generally held that courts have no jurisdiction to pass on the merits of a congressional general election contest.

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Barry v. United States ex rel. Cunningham

279 U.S. 597, 49 S.Ct. 452, 73 L.Ed. 867 (1929)
United States Supreme Court
May 27, 1929

The United States Senate has the authority to pursue an investigation into corrupt practices allegedly occurring in a primary election for the office of United States Senator.

The Facts

In the 1926 United States Senate primary election in Pennsylvania, Rep. William S. Vare defeated Sen. George Wharton Pepper and Governor Gifford Pinchot. As a result of allegations of corrupt practices in the primary election, the Senate shortly thereafter appointed a special committee to investigate expenditures and inducements made to influence the nomination of any of the candidates.

Rep. Vare went on to defeat William B. Wilson in the general election, but Governor Pinchot filed a certificate of election that did not certify that Rep. Vare had been chosen by the qualified electors of the state. Wilson filed a formal contest of the general election, citing alleged corrupt practices, illegal registration and voting, and other irregularities in the general election. Rep. Vare was asked to stand aside when new members were sworn in.

Witnesses appeared before the Senate and testified that they had given cash to the Vare campaign in amounts inconsistent with expenditure precedents established by the Senate. One witness, Mr. Cunningham, refused to answer certain questions that the special committee had about the primary. He was arrested and remanded to the custody of the Senate Sergeant at Arms, under a warrant issued pursuant to a Senate resolution.

The United States Supreme Court took jurisdiction on writ of certiorari to review a judgment of the circuit court of appeals reversing a decision of the district court which discharged a writ of habeas corpus sought by Cunningham.

The Issues

There were three relevant constitutional questions involved in this case:

1. The extent to which the Senate could exercise its Article I, Section 5 jurisdiction over a member-elect who was not yet seated.

2. Whether a member-elect should be afforded the rights of other members of the Senate, assuming the Senate had jurisdiction.

3. Whether the refusal of the Senate to seat a claimant pending investigation deprived the claimant's state of its equal suffrage in the Senate under Article V of the Constitution.

The Holding and Rationale

The Supreme Court decision held that the Senate's jurisdiction over, and authority to adjudicate the right of, a claimant to a seat in that body immediately attaches when a member-elect presents himself to the Senate claiming such a right of membership. The court held that whether the credentials should be accepted and the oath of

membership be administered pending the adjudication was a question that is left to the discretion of the Senate. The court also held that the refusal of the Senate to seat a claimant pending investigation does not deprive the claimant's state of equal suffrage in the Senate within the meaning of Article V of the Constitution.

The court also examined restraints upon the Senate's exercise of power under the election clause and found that judicial review of the Senate's exercise of such authority would be appropriate upon a clear showing that the authority and attendant improvident use of power constituted a denial of due process of law.

Commentary

This case established the authority of Congress to intervene in actions arising from primary elections for seats in the House of Representatives or the Senate.

While the court, in dicta, held that, as judge of the elections of its members, the Senate was empowered to render a judgment beyond the review authority of any other tribunal, the court itself here actually reviewed the action of Congress.

This case apparently sets substantial value on the merits as the test for the appropriateness of judicial review of due process in congressional actions under Article I, Section 5.

The holdings of the case on justiciability are questionable today because of the interposition of *Baker v. Carr*, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962). In *Baker*, the Supreme Court formulated a new test of justiciability based upon the political question doctrine. However, *Barry* may still be viewed as controlling because it addresses the specialized matter of congressional authority within the limited context of election contests.

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Gammage v. Compton

548 S.W.2d 1
Supreme Court of Texas
February 9, 1977

State election contest provisions are inapplicable to contests of elections of members of the United States Congress.

The Facts

Robert Gammage was declared the official winner of the 1976 general election in the 22nd Congressional District of Texas over Rep. Ron Paul by a margin of 236 votes. Rep. Paul requested and received a recount which showed Gammage winning by 268 votes, and Gammage was then certified as the winner by the Secretary of State and Governor of Texas.

Rep. Paul filed a notice of contest in state district court, alleging election fraud and irregularity. The Texas Election Code expressly gave Texas district courts jurisdiction over election contests involving federal offices. Gammage was unconditionally sworn in as a Member of Congress on January 4, 1977. Gammage filed a motion the following day to dismiss the state court action on the ground that the respondent, a judge of the Texas district court, had no jurisdiction over the contest. The motion was denied on January 17, 1977, and Paul was permitted to undertake discovery. On February 9, 1977, however, the Supreme Court of Texas granted Gammage leave to file a petition for a writ of mandamus to dismiss Paul's action.

The Issues

Do the Federal Contested Elections Act and Article I, Section 5 of the United States Constitution prohibit state jurisdiction over contests of congressional elections?

The Holding and Rationale

The Supreme Court of Texas granted Gammage's writ of mandamus and ordered the suit dismissed. Relying upon legislative history, the court found that Texas courts had no jurisdiction over congressional election contests under the provisions allowing contests of federal offices. The court held that application of any other logic would find the Texas Election Code in conflict with Article I, Section 5 of the United States Constitution, which affords Congress the right to judge the election, qualifications, and returns of its members.

Paul had argued that under *Roudebush v. Hartke*, 405 U.S. 15, 92 S.Ct. 804, 31 L.Ed.2d 1 (1972), a congressional election contest was an integral part of the state election process as permitted under Article I, Section 4 of the Constitution. The court rejected this argument, with the majority distinguishing *Hartke* from the facts in *Gammage* by outlining the differences between an action based upon allegations of vote fraud and other irregularities (as in *Gammage*) and an action that merely sought a recount on grounds of the closeness of the race (as in *Hartke*). Two other important differences cited by the majority were Indiana's lack of a claim of exclusive jurisdiction over congressional contests and the fact that while Hartke had been conditionally seated by the Senate pending the recount, Gammage had been seated by the House without prejudice after a recount had taken place under state law.

The minority extended the *Hartke* principle to suggest that a state contest of a congressional race would be permissible if it did not interfere with a final determination by Congress. The dissenters further suggested that such an action might actually

aid the appropriate congressional body in its deliberations and that Congress could still initiate its own proceedings regardless of the status of any action taken under state law.

Commentary

The Texas Supreme Court relied upon the *Hartke* judicial inquiry test in its decision. *Hartke* had formulated the rule that where a state court's function in the recount process was merely ministerial and administrative, a federal court could enjoin a state court proceeding. The Texas Supreme Court extended the *Hartke* rule to the question of jurisdiction over contests.

This case is significant because Texas was one of just a relative handful of states with a statute that specifically permitted congressional election contests and was apparently the first of these states to test the provision. While a majority of courts have ruled that state relief is not appropriate in the case of congressional election contests, they have typically done so in the context of not having specific statutory authorization to conduct such proceedings.

This case is also important because it clearly establishes that the Federal Contested Elections Act is the sole vehicle for an unsuccessful congressional candidate to use in contesting a House election. The decision recognizes congressional supremacy in the area of congressional election contests and clearly interprets the *Hartke* rationale as applying essentially only to congressional election recounts and not to congressional election contests.

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Rogers v. Barnes

172 Colo. 550, 474 P.2d 610 (1970) (en banc)
Supreme Court of Colorado
September 21, 1970

Exclusive jurisdiction to adjudicate primary election contests for nomination to the U.S. House of Representatives rests with the Congress.

The Facts

Byron G. Rogers lost the 1970 primary election for the Democratic nomination to Colorado's 1st Congressional District seat to Craig S. Barnes by approximately 30 votes. Rogers filed an original proceeding with the Colorado Supreme Court contesting the primary election on the grounds of illegal votes, electioneering, and voting machine problems, claiming that but for the irregularities, he would have been the nominee. Barnes filed a motion to dismiss the Rogers petition.

The Issues

Does a state have jurisdiction to determine a primary election contest for nomination to a seat in the U.S. House of Representatives?

The Holding and Rationale

The Supreme Court of Colorado determined that it did not have jurisdiction over a primary election contest for nomination to a seat in the U.S. House of Representatives. The Court reviewed the principles establishing the supremacy of the Congress in determining general election contests for congressional office and observed that Colorado had not enacted a statute providing for congressional election contests.

The court noted that *United States v. Classic*, 313 U.S. 299, 61 S.Ct. 1031, 85 L.Ed.1368 (1941) had given states the authority to regulate primary elections for Congress to the extent that they are an integral part of the congressional election process. The court then suggested that since the provisions of Article 1, Section 4 of the Constitution applied to congressional primary elections, Article 1, Section 5 should also apply.

The court reviewed and adopted the finding in *State ex rel. Wettengel v. Zimmerman*, 249 Wis. 237, 24 N.W.2d 504 (1946), that a primary election is an integral part of the election process and that, as a result, under Article 1, Section 5 of the Constitution, Congress has the same exclusive jurisdiction over primary elections for congressional office as it maintained over general elections.

Commentary

This case is a modern application of the principle established earlier in this century that Congress maintains the exclusive jurisdiction over all congressional election contests, even those involving primary elections occurring under the terms of state law. The case is also of interest for its interpretation which extends the provisions of Article I, Section 5 to primary elections without the benefit of any substantial support for so doing.

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Johnson v. Stevenson

170 F.2d 108, *cert. denied*,
336 U.S. 904, 69 S.Ct. 491, 93 L.Ed. 1948 (1949)
United States Court of Appeals, 5th Circuit
October 7, 1948

Enjoining the issuance of a certificate of election is an action that must be pursued in the form of an election contest.

The Facts

In an extremely close primary election for the U.S. Senate in Texas in 1948, Rep. Lyndon B. Johnson was the apparent winner by 87 votes out of approximately 900,000 votes cast. The ostensible losing candidate, Coke Stevenson, alleging fraud in the election, filed suit in District Court to enjoin Rep. Johnson's certification by officials of the Texas Democratic Party. The District Court granted the request for a preliminary injunction and denied Johnson's motion to dismiss for lack of subject matter jurisdiction.

The Issues

The only issue was whether a state could entertain a proceeding to enjoin the issuance of a certificate of nomination for a candidate for the U.S. Senate based upon allegations of vote fraud and other election irregularities.

The Holding and Rationale

The Court of Appeals for the 5th Circuit reversed and remanded and instructed the court below to dismiss the complaint. The Court of Appeals stated that regardless of the merits of the complaint with respect to fraudulent returns and other irregularities in the election, the subject matter was not one in which the District Court could exercise equitable relief. The Court of Appeals held that the evidence presented and the object to be attained were in the nature of an election contest and that the proceeding should be undertaken in that form, not in the nature of a proceeding to enjoin the issuance of a certificate of nomination.

The Court of Appeals pointed toward the contest provisions available at law and also noted the availability of the congressional election contest machinery. The court also noted that congressional contest investigations had included primary elections.

Commentary

The approach taken by the 5th Circuit Court of Appeals in this case has been followed in a majority of cases involving elections for a number of different state and local offices. The determination that the enjoining of a certificate of election is tantamount to a contest proceeding and should be resolved in a manner appropriate to a contest is now well settled, even in general election cases.

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Selected Case Summaries

Burchell v. State Board of Election Commissioners,
252 Ky. 823, 68 S.W.2d 427 (Ky. 1934).

The Supreme Court of Kentucky held that Article I, Section 5 of the Constitution vested exclusive jurisdiction in the U.S. House of Representatives to determine the right of a representative to sit, and a state court has no jurisdiction with respect to a suit to compel election commissioners to issue an election certificate to a congressional candidate where if the relief were granted, it would affect the title of a representative already elected.

Edmondson v. State ex rel. Phelps,
533 P.2d 604 (Okla. 1974).

In this Senate election certain voting machines did not permit straight party voting as required by statute. All votes cast without reference to the party lever were, however, properly recorded. The court held that the fact that all participating voters did not vote in a particular race is not, of itself, evidence of an irregularity, and, absent competent evidence establishing why all of the voters did not vote in all of the races, the court may not speculate on whether a voter failed to vote in the Senate race because of the lever problem or for any other reason.

Fiegenbaum v. McFarlane,
399 Ill. 367, 77 N.E.2d 816 (1948).

If a person elected to office dies before he qualifies for the office and before his opponent could file a contest action, the right to contest the election is abated.

Hammill v. Valentine,
373 S.E.2d 9 (Ga. 1988).

A Georgia statute provided a five-day limitation period for filing an election contest. The court held that this period began after results were certified by the secretary of state and from the date of certification of the recount, not from the date of the election.

Hargett v. Parrish,
114 Ala. 515, 21 So. 993 (1897).

A contest action abates where the contestee dies pending the contestant's appeal from an adverse judgment and the resulting vacancy is filled by appointment.

Hart v. King,
470 F.Supp. 1195 (D.Hawaii 1979).

The court will consider granting post-election relief only where the contestant was not aware of a major problem before the election or the nature of the case prevented them from an opportunity to seek preelection relief.

Hatcher v. Ardery,
242 S.W.2d 105 (Ky.Ct.App. 1951).

Once a recount action has been initiated, it can be used for the benefit of all candidates in a particular race, with the scope dependent upon the demands of the parties.

Jordan v. Officer,
170 Ill.App.3d 776, 525 N.E.2d 1067, 121 Ill.Dec. 760 (Ill.App.Ct. 5th Dist. 1988).

Illegal votes should be apportioned between candidates on a precinct-by-precinct basis, rather than nullify an election, absent any evidence of fraud or effort to undermine the election process.

LaCaze v. Johnson,
305 So.2d 140 (La.Ct.App. 1974), *writ denied*, **310 So.2d 86 (La. 1974).**

This case, an action to enjoin local election officials from counting votes in a congressional general election on an allegedly malfunctioning voting machine, was denied by the Court of Appeal and the Supreme Court of Louisiana. *Roudebush v. Hartke*, 405 U.S. 15, 92 S.Ct. 804, 31 L.Ed.2d 1 (1972), was cited for its definition of judicial inquiry. The Louisiana courts ruled that the relief sought fell into the scope of a judicial inquiry because the relief sought included an evidentiary hearing as to the alleged malfunction of the voting machine and that the correct forum for the resolution of such issues was in the U.S. House of Representatives. The courts further ruled that the Louisiana contest statute did not mention, and thus was inapplicable to, contests for congressional seats. See also 304 So.2d 613 (La. 1974).

Markwort v. McGee,
36 Cal.2d 593, 226 P.2d 1 (1951).

The California Supreme Court, relying on state constitutional provisions similar to Article I, Section 5 of the U.S. Constitution, held that state courts had no jurisdiction to decide state primary election contests because the exclusive jurisdiction had been vested in the legislature by the state assembly.

Martin v. Porter,
47 Ohio Misc. 37, 353 N.E.2d 919 (C.P. 1976).

Noncompliance with a discretionary provision of the election law does not invalidate an election.

Maynard v. Hammond,
79 S.E.2d 295 (W.Va. 1953).

Irregularities in the conduct of an election, even though they constitute a violation of the election laws, not shown to have affected its result will not vitiate an election in the absence of a showing of fraud or misconduct preventing the free expression of the will of the voters.

McIntyre v. O'Neill,
603 F.Supp. 1053 (D.D.C. 1985), *vacated on other grounds*, **766 F.2d 535 (D.C.Cir. 1985).**

Plaintiff, who was certified as winner of a congressional race, was denied a seat in the U.S. House of Representatives pending the outcome of a congressional review of the election. The court denied the plaintiff the right to be seated because the claim involved a nonjusticiable political question and because there was no claim asserted

upon which relief could be granted. The court held that some abridgment of the right to a citizen's representation in Congress was an unavoidable and necessary consequence of the House's power to judge the election, qualifications, and returns of its members. The vacation of the district court's order was based upon mootness.

McLavy v. Martin,
167 So.2d 215 (La.Ct.App. 1st Cir. 1964).

Only a candidate who claims to have been elected may properly contest an election. A member of one political party may not contest the manner in which a nominee of another party is selected.

Odegard v. Olson,
264 Minn. 439, 119 N.W.2d 717 (1963).

The losing candidate in a congressional general election race sought to enjoin the secretary of state from issuing a certificate of election to the apparent winner until the losing candidate's contest petition could be heard and determined by the U.S. House of Representatives. The state statute said that a "certificate may not be issued until the proper court has determined the contest." The losing candidate asserted that the proper court, in this case, was the U.S. House of Representatives. The court disagreed, noting that the issuance of a certificate of election is a ministerial act that "would be gratuitous and of no force as bearing upon the merits" of the pending House contest. The court also noted that the House was free to seat a member without a valid certificate of election. The court finally interpreted the contest provision as applying solely to contests for office other than Congress.

People ex rel. Hardacre v. Davidson,
2 Cal.App. 100, 83 P. 161 (Dist.Ct.App. 1905).

A certificate of election is not *prima facie* evidence of a right to office where two certificates of election were issued to two persons for the same office.

Reed v. City of Montgomery,
376 So.2d 708 (Ala. 1979).

Certification process is effectively limited to computation of final results, with questions as to irregularities, fraud, or error handled best under the provisions for contesting an election.

State ex rel. Chavez v. Evans,
79 N.M. 578, 446 P.2d 445 (1968).

This case involved a proceeding in mandamus by several nominees to be certified for the offices to which they were nominated. The secretary of state of New Mexico had refused to certify the nomination of the candidates because they each had a deficiency in qualification under state law for election to federal office, although they apparently qualified under federal law. The Supreme Court of New Mexico held that the state statute unconstitutionally added qualifications for federal office candidates beyond those established under federal law and directed the secretary of state to certify the nominations of the petitioners seeking federal office. The court, citing *State ex rel. Wettengel v. Zimmerman*, 249 Wis. 237, 24 N.W.2d 504 (1946), and *Laxalt v. Cannon*, 80 Nev. 588, 397 P.2d 466 (1964), observed that any disputed facts were to be decided at the discretion of the Congress.

State ex rel. Graves v. Wiegand,
212 Wis. 286, 249 N.W. 537 (1933).

A certificate of election or statement by a canvassing board is presumptively correct, but the presumption is rebuttable. If there is a conflict between the result given in the certificate of a canvassing board and the result reached by a recount, the recount results prevail. The ballots themselves, when properly preserved, constitute the best evidence in recount proceedings.

State ex rel. McCormick v. Superior Court of Knox County,
95 N.E.2d 829 (Ind. 1951).

An action for quo warranto does not lie until the candidate holding the latest certificate of election takes possession of the office and assumes its duties.

State ex rel. Pike v. Hammons,
166 Tenn. 469, 63 S.W.2d 660 (1933).

A certificate of election issued by election commissioners because of fear and duress is null and void.

State ex rel. Spaeth v. Olson ex rel. Sinner,
359 N.W.2d 876 (N.D. 1985).

A certificate of election is not determinative of the term or dates on which an elective official is entitled to assume and hold office.

State ex rel. Wettengel v. Zimmerman,
249 Wis. 237, 24 N.W.2d 504 (1946).

The Supreme Court of Wisconsin ruled in a U.S. Senate candidate eligibility determination that a primary election is an integral part of the election process, and that as a result, under Article 1, Section 5 of the Constitution, Congress has the same exclusive jurisdiction over primary elections for congressional office as it maintained over general elections. The court based its conclusion upon a finding that no person could become a candidate of a political party in the state unless he could be a candidate for nomination by that party at a primary election.

Tate v. Morley,
223 Ga. 36, 153 S.E.2d 437 (1967).

An objection to an irregularity in the nomination of a candidate must be made before an election. Such an objection may not be raised after the nominee's name has been placed on the ballot and he has been elected to office. The mere fact a certificate of nomination is defective, through the omission of some detail, will not serve to invalidate an election in which the voters have fully, fairly, and honestly expressed their will.

Taylor v. Beckham,
108 Ky. 278, 56 S.W. 177 (Ky.Ct.App. 1900), *writ of error dismissed,* **178 U.S. 548, 20 S.Ct. 890, 44 L.Ed. 1187 (1900).**

Where an election for governor and lieutenant governor is contested and the contestant for governor dies, pending the contest, the contestant for lieutenant governor may continue the gubernatorial contest for his own benefit, because the lieutenant governor succeeds to the governorship upon the governor's death.

Taylor v. Roche,
271 S.C. 505, 248 S.E.2d 580 (1978).

There is no right to contest an election under common law. The right to contest an election exists only under constitutional and statutory provisions, and the procedure set forth under statute must be strictly construed.

Tazewell v. Davis,
64 Or. 325, 130 P. 400 (1913).

A contest action commenced prior to the official canvass is premature.

Whelan v. Cuomo,
415 F.Supp. 251 (E.D.N.Y. 1976).

The secretary of state exercises only a ministerial function in certifying the results of votes cast.

Wickersham v. State Election Board,
357 P.2d 421 (Okla. 1960).

The Supreme Court of Oklahoma, in ruling on a candidate eligibility question, held that the right to contest an election may be lost by laches or unexcusable delay. The court also held that where a right to a recount of votes cast for a particular office is not granted by statute, a proceeding that has for its purpose the matter of recounting the votes constitutes a challenge to the title to the office, and is therefore an action in the nature of quo warranto to try the right or title to the office.

Young v. Mikva,
66 Ill.2d 579, 363 N.E.2d 851 (1977).

Court does not have jurisdiction over an election contest unless the statutes specifically confer jurisdiction. State courts have held that statutes authorizing election contests exclude congressional contests or that state courts cannot constitutionally entertain such proceedings. *Roudebush v. Hartke*, 405 U.S. 15, 92 S.Ct. 804, 31 L.Ed.2d 1 (1972), does not overrule the long-standing rule that Congress has exclusive jurisdiction to determine the election contests of its members.

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Kutner, "Due Process in the Contested New Hampshire Senate Election: Fact, Fiction, or Farce," 11 New England Law Review 25 (1975).

Lewis, "Hayes-Tilden Election Contest," 47 ABA Journal 36 (1961).

Note, "Constitutional Law--Election Contests--Texas Statute Conferring Jurisdiction on District Courts over Election Contests Is Inapplicable to Contests of Congressional Elections," 9 St. Mary's Law Journal 349 (1977).

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Note, "Elections--Election Contests in North Carolina," 55 North Carolina Law Review 1228 (1977).

Note, "McIntyre v. O'Neill: The Political Question Doctrine and Judicial Review of Congressional Action Under the Election Clause," 3 Journal of Law & Politics 355 (1986).

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Wroth, "Election Contests and the Electoral Vote," 65 Dickinson Law Review 321 (1961).

Chapter 10: Right to Vote and Voting Rights Act

Chapter 10: Right to Vote and Voting Rights Act

Right to Vote

The opportunity of a citizen to vote, although not regarded strictly as a natural right but rather as a privilege conceded by society, nevertheless is regarded as a fundamental political right under certain conditions because it is preservative of all rights.[1] The privilege of voting in any state is within the jurisdiction of the state itself and is to be exercised as the state may direct and upon such terms as may seem proper, subject to the conditions of the Constitution.[2]

The right to vote is not given by the Constitution and its Amendments and is not a privilege springing from United States citizenship.[3] The right of suffrage is not a necessary attribute of national citizenship, but exemption from discrimination on account of race, color, or previous condition of servitude, sex, and age in the case of citizens 18 years of age or older is such an attribute, which is granted and secured by the Constitution.[4]

The 15th Amendment, and the 19th, 24th, and 26th Amendments as well, do not change, modify, or deprive states of their full power as to suffrage except as to the subject with which the Amendment deals and to the extent that obedience to the Amendment's command is necessary. The 15th, 19th, 24th, and 26th Amendments have self-operative force; any state requirement that directly or indirectly, inherently, or effectively excludes persons from voting on account of race, color, or previous condition of servitude; sex; payment of a tax as a condition for voting in a federal election; or age in violation of the Amendments is void.[5]

Once the franchise is extended by a state, lines may not be drawn that are inconsistent with the Equal Protection Clause of the 14th Amendment. States are restrained from fixing voter qualifications that invidiously discriminate, such as qualifications based on race, creed, color, or wealth.[6]

The right to vote for members of Congress is dependent on the Constitution, which adopts the same voter qualifications as defined by a state for electors of the most numerous branch of the state legislature, and the exercise of the right to vote in a congressional election, as well as a preceding primary where the primary is an integral part of the electoral process or in fact controls the choice in the election, does not depend exclusively on the law of the state.[7]

The authority of the states to establish voter qualifications and the constitutional limitations on state power in this area are discussed in greater detail in Chapter 5, Voter Registration and Qualifications.

The Voting Rights Act of 1965

The Voting Rights Act of 1965 was enacted by Congress to banish the blight of racial discrimination in voting and to provide stringent remedies for voting discrimination where it persists on a pervasive scale.[8] The Act is an appropriate and valid means for carrying out Congress' responsibilities under the 15th Amendment.[9]

Prohibition of Discriminatory Voting Requirements

Section 2 of the Act prohibits the imposition or application of a voting qualification, prerequisite to voting, or standard, practice, or procedure by a state or political subdivision in a manner resulting in the denial or abridgment of the right of a U.S. citizen to vote on account of race, color, or membership in a language minority group.[10] This section is violated if it is shown, based on the totality of the circumstances, that the political processes leading to nomination or election are not equally open to participation by members of a protected class of citizens in that its members have less opportunity than others to participate in the political process and to elect representatives of their choice; however, there is no right to have members of a protected class elected in numbers equal to their proportion in the population.[11] A violation of either Section 2 or the 14th or 15th Amendment can be proven by showing discriminatory effect alone,[12] while 14th and 15th Amendment violations require proof of both discriminatory intent and discriminatory impact.[13]

Federal Court Remedies

Section 3 of the Act provides remedies that a federal court can employ in proceedings instituted under any statute to enforce the voting guarantees of the 14th or 15th Amendment in a state or political subdivision, including the appointment of federal examiners, the suspension of discriminatory tests or devices, and the retention of jurisdiction where the violations justify equitable relief, during which time subsequent election law changes are subject to preclearance approval as under Section 5 of the Act.[14]

Section 4 Coverage and Suspension of Voting Tests

Section 4 of the Act provides for the automatic suspension of tests and devices in states and political subdivisions for which the U.S. Attorney General and the Director of the Census have made the authorized administrative determinations that trigger coverage by Section 4.[15] Section 4 applies to any state or political subdivision in which the Director of the Census determines for the presidential-election year of 1964, 1968, or 1972 that less than 50% of the voting-age population was registered to vote on November 1st or voted in the presidential election and which the U.S. Attorney General determines maintained a test or device on November 1st of the same presidential-election year.[16] Judicial review of the determinations made by the Attorney General and Director of the Census are absolutely barred.[17]

Tests and devices are now prohibited in all elections, state, federal, or local, conducted in any state or political subdivision, not just in states or political subdivisions subject to Section 4 of the Act.[18]

A "test or device" is (1) any requirement that as a prerequisite for voting a person demonstrate the ability to read, write, understand, or interpret any matter, demonstrate any educational achievement or knowledge of any particular subject, possess good moral character, or prove the person's qualifications by the voucher of registered voters or members of any other class or (2) for a Section 4 coverage determination for the 1972 presidential-election year, any practice or requirement by which election-related materials and assistance are provided in English only in a state or political subdivision in which the Director of the Census determines that more than 5% of the voting-age population are members of a single language minority.[19]

Section 4 Bailout (Termination of Coverage)

A state or political subdivision can "bail out" or terminate its coverage under Section 4 by obtaining a declaratory judgment from a 3-judge court of the U.S. District Court for the District of Columbia.[20] The statutory criteria that must be met in order to terminate Section 4 coverage are very stringent. The effect of the bailout requirements is that during the 10 years prior to the filing of the declaratory judgment action, the covered state or political subdivision must not have denied or abridged the right of anyone to vote on account of race, color, or membership in a language minority group. Specific criteria include, among others, (1) no discriminatory test or device was used during the 10-year period and (2) the covered jurisdiction and all of its governmental units have eliminated voting procedures and election methods that inhibit or dilute equal access to the electoral process.[21]

A political unit in a state or political subdivision covered by Section 4 cannot independently bring a bailout action unless the coverage formula has been applied to the unit as a "political subdivision." A bailout action to exempt a political unit in a covered state or political subdivision must be filed by and seek to exempt all of the covered state or political subdivision.[22]

A covered state will be denied exemption from the Act in a bailout action if it fails to refute evidence that its use of a literacy test during the 10 years preceding the filing of the action had the effect of denying or abridging the right to vote on account of race or color because of the state's history of maintaining an inferior school system for blacks. The state is required to show that its dual educational system had no appreciable effect on the ability of persons of voting age to meet a literacy requirement.[23]

Preclearance of Voting Changes

Whenever a state or political subdivision subject to Section 4 of the Act enacts or seeks to administer any voting qualification, prerequisite to voting, or standard, practice or procedure with respect to voting that is different from that in force or effect on November 1st of the presidential-year that triggered its coverage under Section 4, Section 5 of the Act suspends enforcement of the change until preclearance approval is received. Changes subject to preclearance are not and will not be effective until cleared pursuant to Section 5.[24]

Preclearance of an election law change is received either (1) by obtaining a declaratory judgment by a 3-judge court of the U.S. District Court for the District of Columbia that the change does not have the purpose *and* will not have the effect of denying or abridging the right to vote on account of race, color, membership in a language minority group or (2) by submitting the change to the U.S. Attorney General, who then does not interpose an objection within 60 days after submission or affirmatively indicates that no objection will be made.[25] The burden of proof that changes do not have a discriminatory purpose and will not have a discriminatory effect is on the jurisdiction seeking preclearance.[26] Preclearance of a change under Section 5 does not preclude a subsequent action to enjoin its enforcement.[27]

Section 5 of the Act, like Section 4(a), applies territorially, and the preclearance requirement includes all political units within a state or political subdivision designated for coverage under Section 4, whether or not they conduct voter registration.[28] Whether a political unit that adopts a potentially discriminatory change has some nominal electoral function has no relation to the requirement for preclearance approval.[29]

The fact that a covered jurisdiction adopted a new election practice after the effective date in the Voting Rights Act raises, in effect, a statutory inference that the practice may have been adopted for a discriminatory purpose or may have a discriminatory effect.[30] A voting change cannot be precleared unless both discriminatory purpose and effect are absent.[31] An official action taken for the purpose

of discriminating on account of race has no legitimacy; consequently, there must be objectively verifiable, legitimate, and nondiscriminatory reasons for a change.[32]

Section 5 is not concerned with a simple inventory of voting procedures but rather with the reality of changed practices as they affect black voters.[33] It looks not only to the present effects of changes but to their future effects as well, and an impermissible purpose may relate to anticipated as well as present circumstances.[34]

Preclearance is required for any enactment that alters the election law of a covered state or political subdivision in even a minor way.[35] Section 5 was designed to cover changes having a *potential* for discrimination.[36] It ensures that no voting procedure change is made that leads to a retrogression in the position of racial minorities with respect to their effective exercise of the vote.[37] Section 5 reaches both formal and informal changes, such as an administrative effort to comply with a statute that had received preclearance, and changes that affect only a single election and are unlikely to be repeated.[38] The election procedure *in fact* in force or effect on the date after which changes are subject to preclearance is to be considered in determining whether there is a subsequent change that must be precleared.[39] There is no exemption from the preclearance requirements merely because a change was adopted in an attempt to comply with the Act.[40]

Section 5 applies only to changes in voting procedures after the dates used in Section 4 to trigger coverage;[41] however, an entire election plan, including preexisting elements, may be subject to preclearance if the possible discriminatory purpose or effect of the changes cannot be determined in isolation from the preexisting elements of the new plan.[42]

The U.S. District Court for the District of Columbia may condition its preclearance approval on the adoption of modifications calculated to neutralize to the extent possible any adverse effect upon the political participation of black voters, such as by shifting from an at-large to a ward system of electing city councilman.[43]

In an action brought by the U.S. Attorney General to enjoin violations of Section 5, the court is limited, as in private suits brought by voters claiming noncompliance with Section 5 procedures, to determining whether a voting requirement is covered by Section 5 but has not yet been subjected to the required federal scrutiny.[44] If an election is conducted before preclearance of a voting change that affected the election, the court may permit the change to be submitted for federal approval and sustain the election if approval is received or order a new election if approval is not sought or received.[45]

The U.S. Attorney General is not deemed to have approved a voting change when the proposal was neither properly submitted nor in fact evaluated by the Attorney General.[46] A request for preclearance of certain identified changes in election practices that fails to identify other practices as new ones is not an adequate submission of the latter practices.[47] The U.S. Attorney General is not required to interpose redundant objections to the same change in voting laws.[48]

The failure of the Attorney General to interpose a timely objection to a submission is not subject to judicial review.[49]

A private party has standing to seek a declaratory judgment that a new enactment is covered by Section 5 and an injunction against further enforcement of the change pending compliance with Section 5.[50] Any U.S. District Court, not solely the U.S. District Court for the District of Columbia, has jurisdiction to hear an action brought by a private party seeking a declaratory judgment that a new enactment must be precleared.[51]

Protections for Language Minorities

Sections 4 and 203 of the Act provide additional voting protections for language minority groups.[52] Section 4 provides that no person may be denied the right to vote in any election because of inability to read, write, understand, or interpret any matter in the English language if the person completed the sixth primary grade (or where state law provides that a different level of education is presumptive of literacy, the person has completed an equivalent level of education) in a public or accredited private school in the United States, a U.S. territory, or Puerto Rico in which the dominant classroom language was other than English.[53] This provision has been superseded by the general ban on literacy tests.[54]

Under Section 203, a state or political subdivision must provide its registration and voting notices, forms, instructions, and assistance and other materials and information relating to the electoral process, including ballots, in the language of a single-language minority, as well as in English, if the Director of the Census determines that more than 5% of the voting-age citizens are members of a single-language minority and the illiteracy rate of such persons as a group is higher than the national illiteracy rate. A state or political subdivision subject to Section 203 may "bail out" or terminate its coverage and thus provide English-only voting materials and information, by obtaining a declaratory judgment in a U.S. District Court. To obtain this relief, it must demonstrate that the illiteracy rate of the affected language minority group is equal to or less than the national illiteracy rate.[55] In a bailout action, a updated national illiteracy rate determined by the Director of the Census is the rate against which to compare a covered jurisdiction's updated illiteracy rate.[56]

Additional Provisions

The Act prohibits a number of specific acts and provides a variety of remedies for violations of the Act.[57] For example, no person acting under color of law may fail or refuse to permit a person to vote who is entitled under the Act to vote or is otherwise qualified to vote or willfully fail or refuse to tabulate, count, and report the person's vote.[58] The U.S. Attorney General is permitted to institute an action for preventive relief whenever a person has engaged or there are

reasonable grounds to believe that any person is about to engage in any or practice prohibited by the Act.[59]

Other provisions and implications of the Voting Rights Act of 1965, as amended, are treated elsewhere: the effect of the act on changes to election schemes, including reapportionment, in Chapter 3, Reapportionment, Redistricting, and Reprecincting, and the poll tax ban, 26th Amendment implementation, and presidential election procedures in Chapter 5, Voter Registration and Qualifications.[60]

Notes

[1]*Yick Wo v. Hopkins*, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886).

[2]*Pope v. Williams*, 193 U.S. 621, 24 S.Ct. 573, 48 L.Ed. 817 (1904); *United States v. Cruikshank*, 92 U.S. 588, 23 L.Ed. 588 (1876).

[3]*Pope v. Williams*, 193 U.S. 621, 24 S.Ct. 573, 48 L.Ed. 817 (1904).

[4]U.S. Constitution, Amendments XV (race, color, or previous condition of servitude), XIX (sex), XXIV (poll tax), and XXVI (age); *United States v. Cruikshank*, 92 U.S. 588, 23 L.Ed. 588 (1876); *United States v. Reese*, 92 U.S. 214, 23 L.Ed. 563 (1875).

[5]*Guinn v. United States*, 238 U.S. 347, 35 S.Ct. 926, 59 L.Ed. 1340 (1915); *Lane v. Wilson*, 307 U.S. 268, 59 S.Ct. 872, 83 L.Ed. 1281 (1939); *Myers v. Anderson*, 238 U.S. 368, 35 S.Ct. 932, 59 L.Ed 1349 (1915); *Neal v. Delaware*, 103 U.S. 370, 26 L.Ed. 567 (1880); *Nixon v. Herndon*, 273 U.S. 536, 47 S.Ct. 446, 71 L.Ed. 759 (1927).

[6]*Harper v. Virginia State Board of Elections*, 383 U.S. 663, 86 S.Ct. 1079, 16 L.Ed.2d 169 (1966).

[7]*Ex Parte Yarbrough ("The Ku-Klux Cases")*, 110 U.S. 651, 4 S.Ct. 152, 28 L.Ed.2d 274 (1884); *United States v. Classic*, 313 U.S. 299, 61 S.Ct. 1031, 85 L.Ed. 1368 (1941); *Terry v. Adams*, 345 U.S. 461, 73 S.Ct. 809, 97 L.Ed. 1152 (1953).

[8]42 U.S.C. Sec. 1973 *et seq.*; *South Carolina v. Katzenbach*, 383 U.S. 301, 86 S.Ct. 803, 15 L.Ed.2d 769 (1966).

[9]*South Carolina v. Katzenbach*, 383 U.S. 301, 86 S.Ct. 803, 15 L.Ed.2d 769 (1966) (constitutionality of Act upheld).

[10]Voting Rights Act of 1965, as amended, Secs. 2(a) and 4(f)(2); 42 U.S.C. Secs. 1973(a) and 1973b(f)(2).

[11]Voting Rights Act of 1965, as amended, Sec. 2(b); 42 U.S.C. Sec. 1973(b).

[12]*Thornburg v. Gingles*, 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986) (Section 2 proof).

[13]*City of Mobile, Alabama v. Bolden*, 446 U.S. 55, 100 S.Ct. 1490, 64 L.Ed.2d 47 (1980). (14th and 15th Amendment proof).

[14]Voting Rights Act of 1965, as amended, Sec. 3; 42 U.S.C. Sec. 1973a.

[15]Voting Rights Act of 1965, as amended, Sec. 4(a); 42 U.S.C. Sec. 1973b(a).

[16]Voting Rights Act of 1965, as amended, Sec. 4(b); 42 U.S.C. Sec. 1973b(b).

[17]Voting Rights Act of 1965, as amended, Sec. 4(b); 42 U.S.C. Sec. 1973b(b); *Briscoe v. Bell*, 432 U.S. 404, 97 S.Ct. 2428, 53 L.Ed.2d 439 (1977).

[18]Voting Rights Act of 1965, as amended, Sec. 201; 42 U.S.C. Sec. 1973aa; *Oregon v. Mitchell*, 400 U.S. 112, 91 S.Ct. 260 (1970) (constitutionality of Sec. 201 upheld).

[19]Voting Rights Act of 1965, as amended, Secs. 4(c) and (f)(3); 42 U.S.C. Secs. 1973b(c) and (f)(3); and Voting Rights Act Amendments of 1970, Sec. 210; 42 U.S.C. Sec. 1973aa(b).

[20]Voting Rights Act of 1965, as amended, Sec. 4(a); 42 U.S.C. Sec. 1973b(a).

[21]Voting Rights Act of 1965, as amended, Sec. 4(a); 42 U.S.C. Sec. 1973b(a).

[22]*City of Rome v. United States*, 446 U.S. 156, 100 S.Ct. 1548, 64 L.Ed.2d 119 (1980).

[23]*Gaston County, North Carolina v. United States*, 395 U.S. 285, 89 S.Ct. 1720, 23 L.Ed.2d 309 (1969); *Commonwealth of Virginia v. United States*, 386 F.Supp. 1319 (D.D.C. 1974), *aff'd*, 420 U.S. 901, 95 S.Ct. 820, 24 L.Ed.2d 833 (1975).

[24]Voting Rights Act of 1965, as amended, Sec. 5; 42 U.S.C. Sec. 1973c; *Connor v. Waller*, 421 U.S. 656, 95 S.Ct. 2003, 44 L.Ed.2d 486 (1975).

[25]Voting Rights Act of 1965, as amended, Sec. 5; 42 U.S.C. Sec. 1973c.

[26]*City of Petersburg, Virginia v. United States*, 354 F.Supp 1021 (D.D.C. 1972), *aff'd*, 410 U.S. 962, 93 S.Ct. 1441, 35 L.Ed.2d 698 (1973); *Georgia v. United States*, 411 U.S. 526, 93 S.Ct. 1702, 36 L.Ed.2d 472 (1973); *McCain v. Lybrand*, 465 U.S. 236, 104 S.Ct. 1037, 79 L.Ed. 271 (1984).

[27]Voting Rights Act of 1965, as amended, Sec. 5; 42 U.S.C. Sec. 1973c.

[28]*United States v. Board of Commissioners of Sheffield, Alabama*, 435 U.S. 110, 98 S.Ct. 965, 55 L.Ed.2d 148 (1978); *City of Rome v. United States*, 446 U.S. 156, 100 S.Ct. 1548, 64 L.Ed.2d 119 (1980).

[29]*Dougherty County, Georgia, Board of Education v. White*, 439 U.S. 32, 99 S.Ct. 368, 58 L.Ed.2d 269 (1978).

[30]*McCain v. Lybrand*, 465 U.S. 236, 104 S.Ct. 1037, 79 L.Ed. 271 (1984).

[31]*City of Rome v. United States*, 446 U.S. 156, 100 S.Ct. 1548, 64 L.Ed.2d 119 (1980).

[32]*City of Richmond, Virginia v. United States*, 422 U.S., 95 S.Ct. 2296, 45 L.Ed.2d 245 (1975).

[33]*Georgia v. United States*, 411 U.S. 526, 93 S.Ct. 1702, 36 L.Ed.2d 472 (1973).

[34]*City of Pleasant Grove v. United States*, 479 U.S. 462, 107 S.Ct. 794, 93 L.Ed.2d 866 (1987).

[35]*Allen v. State Board of Elections*, 393 U.S. 544, 89 S.Ct. 817, 22 L.Ed.2d 1 (1969).

[36]*Perkins v. Mathews*, 400 U.S. 379, 91 S.Ct. 431, 27 L.Ed.2d 476 (1971).

[37]*Beer v. United States*, 425 U.S. 130, 96 S.Ct. 1357, 47 L.Ed.2d 629 (1976).

[38]*National Association for the Advancement of Colored People v. Hampton County Election Commission*, 470 U.S. 166, 105 S.Ct. 1128, 84 L.Ed.2d 124 (1985).

[39]*Perkins v. Mathews*, 400 U.S. 379, 91 S.Ct. 431, 27 L.Ed.2d 476 (1971).

[40]*Allen v. State Board of Elections*, 393 U.S. 544, 89 S.Ct. 817, 22 L.Ed.2d 1 (1969).

[41]*Beer v. United States*, 425 U.S. 130, 96 S.Ct. 1357, 47 L.Ed.2d 629 (1976).

[42]*City of Lockhart v. United States*, 60 U.S. 125, 103 S.Ct. 998, 74 L.Ed.2d 863 (1983).

[43]*City of Petersburg, Virginia v. United States*, 354 F.Supp 1021 (D.D.C. 1972), *aff'd*, 410 U.S. 962, 93 S.Ct. 1441, 35 L.Ed.2d 698 (1973).

[44]*United States v. Board of Supervisors of Warren County, Mississippi*, 429 U.S. 642, 97 S.Ct. 833, 51 L.Ed.2d 106 (1977).

[45]*Beer v. United States*, 425 U.S. 130, 96 S.Ct. 1357, 47 L.Ed.2d 629 (1976); *National Association for the Advancement of Colored People v. Hampton County Election Commission*, 470 U.S. 166, 105 S.Ct. 1128, 84 L.Ed.2d 124 (1985).

[46]*United States v. Board of Commissioners of Sheffield, Alabama*, 435 U.S. 110, 98 S.Ct. 965, 55 L.Ed.2d 148 (1978).

[47]*McCain v. Lybrand*, 465 U.S. 236, 104 S.Ct. 1037, 79 L.Ed. 271 (1984).

[48]*Blanding v. DuBose*, 454 U.S. 393, 102 S.Ct. 715, 70 L.Ed.2d 576 (1969).

[49]*Morris v. Gressette*, 432 U.S. 491, 97 S.Ct. 2411, 53 L.Ed.2d 506 (1977).

[50]*Allen v. State Board of Elections*, 393 U.S. 544, 89 S.Ct. 817, 22 L.Ed.2d 1 (1969).

[51]*Allen v. State Board of Elections*, 393 U.S. 544, 89 S.Ct. 817, 22 L.Ed.2d 1 (1969); Voting Rights Act of 1965, as amended, Sec. 12(f); 42 U.S.C. Sec. 1973j.

[52]Voting Rights Act of 1965, as amended, Secs. 4(e) and 203; 42 U.S.C. Secs. 1973b(e). and 1973aa-1a.

[53]Voting Rights Act of 1965, as amended, Sec. 4(e); 42 U.S.C. Sec. 1973b(e); *Katzenbach v. Morgan*, 384 U.S. 641, 86 S.Ct. 1717, 16 L.Ed.2d 828 (1966) (upholding constitutionality of Section 4(e)).

[54]Voting Rights Act of 1965, as amended, Sec. 201; 42 U.S.C. Sec. 1973aa-1.

[55]Voting Rights Act of 1965, as amended, Sec. 4(e); 42 U.S.C. Secs. 1973b(e).

[56]*Doi v. Bell*, 449 F.Supp. 267 (D.Hawaii 1978).

[57]Voting Rights Act of 1965, as amended, Secs. 11 and 12; 42 U.S.C. Secs. 1973i and 1973j.

[58]Voting Rights Act of 1965, as amended, Sec. 11(a); 42 U.S.C. Sec. 1973i(a).

[59]Voting Rights Act of 1965, as amended, Sec. 12(d); 42 U.S.C. Sec. 1973j(d).

[60]Voting Rights Act of 1965, as amended, Secs. 10 and 202; 42 U.S.C. Secs. 1973h and 1973aa-1.

United States v. Reese

92 U.S. 214, 23 L.Ed. 563 (1876)
United States Supreme Court
March 27, 1876

The 15th Amendment does not confer the right of suffrage upon anyone; however, the Amendment does invest U.S. citizens with the constitutional right of exemption from discrimination in the exercise of the elective franchise on account of race, color, or previous condition of servitude, and Congress may enforce this right by appropriate legislation.

The Facts

Reese and Foushee, inspectors of a municipal election held in Kentucky, refused to receive and count the vote of Garner, a U.S. citizen of African descent and, as a result, were indicted on four counts of violating Sections 3 and 4 the Enforcement Act of 1970 (16 Stat. 140), which had been adopted by Congress to enforce the 15th Amendment.

Section 3 made it a crime for a judge, inspector, or other officer of election whose duty is to receive, count, or give effect to the votes of qualified citizens to wrongfully refuse or omit to receive, count, or give effect to the vote of a citizen otherwise qualified to vote who presents an affidavit stating (1) the citizen's offer to perform any act required to be done as a prerequisite to qualifying to vote, (2) the time and place the offer was made, (3) the name of the person or officer whose duty it was to act on the offer, and (4) that the citizen was wrongfully prevented by the named person or officer from performing the act.

Section 4 provided for the punishment of any person who, alone or in combination with others, by force, bribery, threats, intimidation, or other lawful means hindered, delayed, prevented, or obstructed any citizen from doing any act required to be done to qualify to vote or from voting at any election.

The case was tried before the Circuit Court for the District of Kentucky. Upon the filing of general demurrers to the four counts of the indictment by the defendants, the demurrers were sustained and judgment given for the defendants. By reason of a division of opinion among the judges of the Circuit Court, a certificate of division was filed with the U.S. Supreme Court. The United States subsequently waived consideration of all claims in the indictment not arising out of the enforcement of the 15th Amendment.

The Issues

The question for consideration was whether the Enforcement Act of 1870 as written was effective for the punishment of inspectors of election who refuse to receive and count the votes of U.S. citizens who are qualified voters because of their race, color, or previous condition of servitude, i.e., was the Enforcement Act "appropriate legislation" enacted by Congress to enforce the 15th Amendment.

The Holding and Rationale

The Supreme Court affirmed the judgment of the Circuit Court in favor of the election inspectors, Reese and Foushee. According to the Court, the Enforcement Act of 1870 was not appropriate legislation under the 15th Amendment. The Court determined that Sections 3 and 4 of the Enforcement Act do not confine their operation to unlawful

discriminations on account of race, color, or previous condition of servitude and declined to uphold the Enforcement Act by limiting its application to violations on account of race, color, or previous condition of servitude.

The Supreme Court defined the scope of Congress' powers to protect rights granted by the Constitution, including right of U.S. citizens under the 15th Amendment. As a general propoposition, Congress can protect rights and immunities created by or dependent upon the Constitution. The form and manner of the protection may be as Congress provides in the legitimate exercise of its legislative discretion.

The 15th Amendment invests U.S. citizens with a new constitutional right, which is exemption from discrimination in the exercise of the elective franchise on account of race, color, or previous condition of servitude. The Amendment does not, however, confer the right of suffrage upon anyone, rather it prevents the states or the United States from giving preference in voting to one U.S. citizen over another on account of race, color, or previous condition of servitude. Prior to the Amendment, it was as much within the power of the states to exclude U.S. citizens from voting on account of race as it was on account of age, property, or education. Now if citizens of one race having certain qualifications are permitted by law to vote, those of another race having the same qualifications also must be permitted to vote.

Congress may enforce 15th Amendment rights by appropriate legislation as authorized by Section 2 of the Amendment; in fact, Congress' power to legislate at all upon the subject of state elections rests on this Amendment. Congress can provide punishment for the wrongful refusal to receive the vote of a qualified elector at a state election only when the wrongful refusal is because of race, color, or previous condition of servitude.

The Supreme Court determined that Sections 3 and 4 of the Enforcement Act of 1970 were too broad in their coverage. Wrongful acts that were within as well as without the congressional jurisdiction were covered. The Court stated that penal statutes should be construed strictly and held that it could not limit this statute by judicial construction to operate only on subjects that Congress could rightfully prohibit and punish. To limit the statute by judicial construction would be make a new law, not enforce an old one.

Section 3 does not limit the offense of an inspector of elections to a wrongful discrimination on account of race, color, or previous condition of servitude. The elector is required to state in the affidavit only that the elector has been wrongfully prevented from qualifying to vote; the reason is not required to be included. According to the Court, the law should not be in such a condition that the elector may act upon one idea of its meaning and the inspector upon another. Section 4 as well contains no words of limitation that would manifest any intention to confine its provisions to the terms of the 15th Amendment.

Commentary

The *Reese* case illustrates the impact that certain amendments to the U.S. Constitution have on voting rights. The 15th Amendment (race, color, or previous condition of servitude), the 19th Amendment (sex), the 24th Amendment (payment of a tax as a condition for voting in a federal election), and the 26th Amendment (age 18 or older) operate as limitations on the states' traditional powers to establish voting qualifications. These Amendments do not grant the right to vote *per se*, but rather prevent the states from discriminating on the basis of certain factors when defining voter qualifications.

Lane v. Wilson

307 U.S. 268, 59 S.Ct. 872, 83 L.Ed. 1281 (1939)
United States Supreme Court
May 22, 1939

The 15th Amendment secures freedom from discrimination on account of race in matters affecting the franchise and prohibits burdensome procedural requirements that effectively handicap the exercise of the franchise by blacks even though the abstract right to vote has not been restricted as to race.

The Facts

Lane, a negro resident of Oklahoma, sued Wilson and two other county election officials in U.S. District Court for $5,000 in damages for failing to register him to vote on October 17, 1934, in violation of a federal statute (8 U.S.C. Sec. 43) enacted in 1871 as "appropriate legislation" to enforce the 15th Amendment.

In 1915, the U.S. Supreme Court, in *Guinn v. United States*, 238 U.S. 347, 35 S.Ct. 926, 59 L.Ed. 1340, struck down as a violation of the 15th Amendment an Oklahoma constitutional provision that provided for a literary test as a condition for qualifying to vote, while at the same time it in effect relieved white voters from the test through the operation of a "grandfather clause."

The Oklahoma legislature then enacted a new registration scheme in 1916 that was directed toward the consequences of the *Guinn* decision. Individuals who had voted in the 1914 general election, when the discriminatory grandfather clause was in effect, automatically remained qualified as voters, while all others had to register between April 30 and May 11, 1916, if they were qualified to vote at that time. The registration deadline extended until June 30, 1916, if an individual was absent from the county or was prevented by sickness or unavoidable misfortune from registering during the 12-day period. Failure to register during the limited period resulted in loss of the right to register and thus permanent disfranchisement. Lane was qualified for registration in 1916, but did not then get on the registration list; it was unclear whether he had presented himself for registration during the 12-day period.

The federal statute on which Lane's damage claim was based provided that one who under color of state statute subjects any U.S. citizen or causes a U.S. citizen to be subjected to the deprivation of any rights, liabilities, or immunities secured by the U.S. Constitution is liable to the party injured in an action at law. Lane claimed also that the Oklahoma registration law was unconstitutional as state action that denied or abridged his right to vote on account of race, color, or previous condition of servitude as prohibited by the 15th Amendment.

The District Court found no proof of discrimination against negroes in the administration of the state law and no conflict with the 15th Amendment; the court entered a directed verdict in favor of the defendants. The 10th Circuit Court of Appeals affirmed the judgment on appeal. Lane brought certiorari to the U.S. Supreme Court.

The Issues

The major issue addressed was whether the Oklahoma registration law in question was unconstitutional as a violation of the 15th Amendment.

The Holding and Rationale

The Supreme Court, in a 6-2 decision, ruled in favor of Lane and reversed the judgment of the Circuit Court of Appeals.

The Court first acknowledged Lane's right to bring the damage suit in a U.S. District Court, noting that the 15th Amendment secures freedom from discrimination on account of race in matters affecting the franchise. Whoever under color of state law subjects another to such discrimination deprives him of what the 15th Amendment secures and under the implementing Congressional legislation becomes liable in an action at law. A federal court can entertain the statutory action at law where the relief requested is damages and, as in this case, the theory of the case is that the registration officials, acting under color of the Oklahoma law, discriminated against the plaintiff in that the law inherently operated discriminatorily.

The Court then considered the constitutionality of the registration scheme. It reaffirmed "the reach of the 15th Amendment against contrivances by a state to thwart equality in the enjoyment of the right to vote" of U.S. citizens regardless of race or color and, in oft-quoted language, stated: "The Amendment nullifies sophisticated as well as simple-minded modes of discrimination. It hits onerous procedural requirements which effectively handicap exercise of the franchise by the colored race although the abstract right to vote may remain unrestricted as to race."

The Court concluded that the 1916 legislation partook too much of the infirmity of the "grandfather clause" outlawed in *Guinn* to be able to survive. Since the registration in 1914 was held under the provisions condemned in *Guinn*, unfair discrimination continued by automatically granting lifetime voting privileges to white citizens sheltered by the invalidated "grandfather clause," while subjecting colored citizens to a new burden, a 12-period in which to reassert their constitutional rights. The opportunity for negro voters to free themselves from the effects of discrimination was too cabined and confined. The means that Oklahoma chose as substitutes for the invalidated "grandfather clause" operated unfairly against the very class on whose behalf the protection of the Constitution had been invoked successfully in *Guinn*. The Oklahoma registration scheme was unconstitutional.

Commentary

The *Lane* case was just one of many decided by the U.S. Supreme Court since the adoption of the 15th Amendment in 1870 that invalidated state schemes attempting to circumvent the mandate of the 15th Amendment and deprive blacks of the protections afforded by that Amendment. In *State of South Carolina v. Katzenbach*, the Supreme Court listed a number of the discriminatory devices and procedures rejected by the Court: grandfather clauses (*Guinn v. United States* and *Myers v. Anderson*), procedural hurdles (*Lane v. Wilson*), white primary (*Smith v. Allwright* and *Terry v. Adams*), improper challenges (*United States v. Thomas*), racial gerrymandering (*Gomillion v. Lightfoot*), and discriminatory application of voting tests (*Schnell v. Davis*, *Alabama v. United States*, and *Louisiana v. United States*). The 15th Amendment nullifies all forms of discrimination affecting black voting rights--"sophisticated as well as simple-minded modes of discrimination."

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South Carolina v. Katzenbach

383 U.S. 301, 86 S.Ct. 803, 15 L.Ed.2d 769 (1966)
United States Supreme Court
March 7, 1966

The Voting Rights Act of 1965 is constitutional as an appropriate exercise of Congress' power to enforce the 15th Amendment by "appropriate legislation."

The Facts

The State of South Carolina filed a bill of complaint in the U.S. Supreme Court against the U.S. Attorney General, invoking the Court's original jurisdiction as a trial court in cases involving a controversy between a state and a citizen of another state. South Carolina sought a declaration that parts of the Voting Rights Act of 1965 were unconstitutional and asked the Court to issue an injunction against enforcement of the challenged provisions by the Attorney General.

The Issues

The issue presented to the Supreme Court for consideration was whether the Voting Rights Act of 1965 [specifically Sections 4(a)-(d), 5, 6(b), 7, 9, 11, 12(a)-(c), 13(a), and (14)] was constitutional or, as the Court framed the question: "Has Congress exercised its powers under the Fifteenth Amendment in an appropriate manner with relation to the States?"

The Holding and Rationale

The Supreme Court, with Justice Black dissenting only as to the constitutionality of the Section 5 preclearance provisions, upheld the constitutionality of the challenged sections of the Voting Rights Act of 1965 (except Sections 11 and 12(a)-(c), which the Court found had been challenged prematurely) and dismissed South Carolina's bill of complaint.

According to the Court, the ground rules for resolving the constitutional question were clear: "As against the reserved powers of the States, Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting."

Section 1 of the 15th Amendment proscribes the denial or abridgment of the rights of U.S. citizens to vote by the United States or any state on account of race, color, or previous condition of servitude. This section is self-executing in that it invalidates state voting qualifications or procedures that are discriminatory on their face or in practice without further legislative specification by Congress. While states have broad powers to determine the conditions under which the right to vote is exercised, "the Fifteenth Amendment supersedes contrary exertions of state power."

South Carolina contended that only courts could strike down state statutes and procedures, not Congress. The Court said that Section 2 of the 15th Amendment expressly declares that Congress has the power to enforce the Amendment by "appropriate legislation." This meant that Congress was to be chiefly responsible for implementing the rights created in Section 1 of the Amendment. Therefore, Congress has full remedial powers to effectuate the constitutional prohibition against racial discrimination in voting.

South Carolina also argued that Congress was limited to prohibiting violations of the 15th Amendment in general terms; specific remedies must be left to the courts. The Court rejected this notion also. Congress is not circumscribed by any such artificial rules under Section 2. The test of the scope of Congress' express powers with relation to the reserved powers of the state is found in *McCulloch v. Maryland*, 4 Wheat. 316, 4 L.Ed. 579 (1819), in which Chief Justice Marshall said:

> Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.

Congress exercised its authority under Section 2 of the 15th Amendment in an inventive manner. The Act prescribes remedies for voting discrimination that become effective without prior adjudication; this was clearly a legitimate response to the problem for which there is ample precedent. The Act intentionally confines the remedies provided to a small number of states and political subdivisions known by name to Congress; this was a permissible method of dealing with the problem by Congress, which chose to limit its attention to the geographic areas where immediate action seemed necessary.

The states and political subdivisions falling within the coverage formula of Section 4(b), which subjected those jurisdictions to the suspension of voting tests and the necessity to preclear subsequent voting changes, were appropriate targets for the new remedies provided in the Act. Congress had reliable evidence of actual voting discrimination in the states and political subdivisions affected by the new remedies, and the formula that evolved to describe these areas was relevant to the problem of voting discrimination; therefore, Congress was entitled to infer a significant danger of the "evil" in the few remaining states and political subdivisions covered by Section 4(b). Upon examining the evidence available to Congress, the Court concluded that the coverage formula was rational both in theory and in practice.

The barring of direct judicial review of the findings by the U.S. Attorney General and Director of the Census that trigger application of the Section 4 coverage formula is valid and is in accord with prior Court decisions permitting Congress to withdraw judicial review of administrative determinations. The determinations of the Attorney General and the census director were unlikely to create any "plausible dispute."

Section 4(a)'s suspension of literacy tests and similar devices in jurisdictions covered by the Act for five years from the last occurrence of substantial voting discrimination is a legitimate response to the problem in the covered states, which for many years have instituted, framed, and administered various tests and devices in order to disfranchise negroes in violation of the 15th Amendment. There is ample precedent for this type of legislative response in prior 15th Amendment cases.

The suspension of new voting regulations in covered jurisdictions under Section 5 of the Act pending federal scrutiny, while "an uncommon exercise of congressional power," is permissible to prevent evasion of the Act's remedies by contriving new discriminatory rules: "[E]xceptional conditions can justify legislative measures not otherwise appropriate."

The Court sustained the remaining challenged provisions of the Act as an appropriate congressional response to the problem and held that all portions of the Act before the Court were a valid means of carrying out the commands of the 15th Amendment.

Commentary

The Voting Rights Act of 1965 exemplifies the extent to which Congress can act, in the exercise of its "full remedial powers to effectuate the constitutional prohibition against racial discrimination in voting." The Act provides for the pervasive, continuing intrusion by the federal government into the electoral systems of the states and political subdivisions who are subjected to the the Section 4 preclearance provisions. Congress may use any "rational means" to enforce the prohibition of the 15th Amendment by "appropriate legislation," and the Supreme Court will defer to the Congress' determination as to what is an appropriate legislative response to racial discrimination in voting as long as there is a rational or reasonable basis for any remedial statute.

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City of Mobile, Alabama v. Bolden

446 U.S. 55, 100 S.Ct. 1490, 64 L.Ed.2d 47 (1980)
United States Supreme Court
April 22, 1980

A racially discriminatory intent, purpose, or motivation must be shown, in addition to racially discriminatory effect or result, in order to prove that negro voting rights have been denied or abridged in violation of the 15th Amendment or that negro voting potential has been diluted in violation of the Equal Protection Clause of the 14th Amendment.

The Facts

Bolden and other plaintiffs brought a class-action suit in the U.S. District Court for the Southern District of Alabama on behalf of all negro citizens of Mobile, Alabama, against the City of Mobile and the three incumbent members of the Mobile city commission. The complaint alleged that the practice of electing city commissioners at large unfairly diluted the voting strength of negroes in Mobile in violation of Section 2 of the Voting Rights Act of 1965 and the 14th and 15th Amendments.

In elections for the 3-member city commission, each candidate runs at large for a 4-year term for one of three numbered posts and must receive a majority vote in order to be elected. Negro residents constituted 35.4% of the Mobile population, but no negro had ever been elected as a city commissioner since the establishment of the commission form of local government in Mobile in 1911.

Section 2 of the Voting Rights Act (42 U.S.C. Sec. 1973), which the plaintiffs claimed had been violated, provided before its amendment in 1982:

> No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color.

The District Court found that the plaintiffs' constitutional rights had been violated, entered judgment in their favor, and ordered the city commission to be disestablished and replaced by a mayor-council form of government with council members elected from single-member districts. Upon appeal, the 5th Circuit Court of Appeals agreed that the at-large elections violated the plaintiffs' 14th and 15th Amendment rights and affirmed the District Court judgment in its entirety. An appeal was taken by the defendant city and city commissioners to the U.S. Supreme Court.

The Issues

The Supreme Court defined the question in this case as whether the at-large system of municipal elections violates the rights of Mobile's negro voters in contravention of federal statutory or constitutional law.

The Holding and Rationale

The Supreme Court, by a 6-3 vote, reversed the judgment of the Court of Appeals. Justice Stewart, who wrote the Court's plurality opinion, was joined by three other justices in holding that the plaintiff's statutory and constitutional rights had not be violated. Justice Stewart concurred in the Court's finding that the plaintiffs' constitutional rights had not been violated but offered a different rationale for that conclusion, and Justice Blackmun concurred in the Court's judgment only because he considered

the Court of Appeals' remedy changing Mobile's form of government to a major-council system to be inappropriate.

In the plurality opinion, the Court noted that neither the District Court or Court of Appeals had addressed the plaintiffs' statutory claim that the Mobile election system violated Section 2 of the Voting Rights Act. It concluded, however, that the section's language and its sparse legislative history made it clear that Section 2 was intended to have an effect no different from that of the 15th Amendment itself. The section merely restated the prohibitions contained in the 15th Amendment and added nothing to the plaintiffs' claim that their 15th Amendment rights had been violated.

The Court then proceeded to provide a historical review of its previous 15th Amendment decisions, noting that the 15th Amendment forbids states to discriminate against negroes in matters having to with voting (citing, *inter alia, U.S. v. Reese*) and that state action that is neutral on its fact violates the 15th Amendment only if it is motivated by a discriminatory purpose (e.g., *Guinn v. United States*). *Gomillion v. Lightfoot* reaffirmed the principle that racially discriminatory motivation--an invidious purpose--is a necessary ingredient of a 15th Amendment violation.

Since the District Court and the Court of Appeals found that negroes in Mobile register and vote without hindrance, there was no violation of their 15th Amendment rights. The 15th Amendment does not entail the right to have negro candidates elected; it prohibits only purposefully discriminatory denial or abridgment by government of the freedom to vote on account of race, color, or previous condition of servitude. In view of the Court's finding that there was no 15th Amendment violation in the absence of a finding of purposeful discrimination, there was, of course, no violation of Section 2 of the Voting Rights Act, according to the Court's analysis.

The plurality opinion next addressed the question whether the at-large election scheme violated the Equal Protection Clause of the 14th Amendment. In its prior decisions, the Court recognized that multimember legislative districts are not unconstitutional *per se* and violated the 14th Amendment only if their purpose is invidiously to minimize or cancel out the voting potential of racial or ethnic minorities. A plaintiff must prove that there is purposeful discrimination--racially discriminatory intent or purpose--to show a violation of the Equal Protection Clause. Where the character of a law is readily explainable on grounds apart from race, disproportionate impact alone is not decisive as to whether there is an equal protection violation; the courts must look to other evidence to support a finding of discriminatory purpose.

The Court concluded that it was "clear" that the present case fell far short of showing that the defendants had conceived or operated a purposeful device to further racial discrimination. The District Court, and the Court of Appeals as well, applied the criteria for evaluation of a vote-dilution claim that had been articulated in *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973) and concluded that since an aggregate of the *Zimmer* factors were present, a discriminatory purpose had been proved. The Supreme Court rejected the evidentiary weight given the *Zimmer* factors and held that while they might afford some evidence of discriminatory purpose, satisfaction of those criteria is not of itself sufficient proof of a discriminatory purpose. The *Zimmer* decision, the Court said, evidently was decided on the misunderstanding that proof of a discriminatory effect alone was sufficient to prove a violation of the Equal Protection Clause.

The Supreme Court essentially determined that the "aggregate" of the *Zimmer* factors or "totality of circumstances" present in this case did not support the conclusion that there was a discriminatory purpose because each individual factor relied on by the District Court and Court of Appeals did not support an inference of purposeful discrimination. The Court stated that (1) the fact that no negro had been elected to

the city commission was not evidence of discrimination when there were no obstacles to negro registration or voting or negro candidacies for election to the commission, (2) discrimination against negroes in municipal employment and in the dispensation of public services by white officials was only the most tenuous and circumstantial evidence of the invalidity of the system by which they attained office, (3) the substantial history of official racial discrimination in the state cannot condemn present governmental action that is not unlawful ("in the manner of original sin"), and (4) the features of the Mobile at-large election system, including the majority-vote requirement, tend naturally to disadvantage any voting minority and are far from proof that the election scheme represents purposeful racial discimination.

The Court then rejected the notion that any political group in the minority has a federal constitutional right to elect candidates in proportion to its numbers. The Equal Protection Clause does not require proportional representation as an imperative of political organization. The right to equal participation in the electoral process does not protect any political group from election defeat.

Justice Blackmun, who concurred in the Court's judgment, disagreed with the plurality's conclusion that there was insufficient evidence of purposeful discrimination, and Justice Stevens, who also concurred, saw the constitutional issue from a completely different perspective. To Stevens, the case drew into question a political structure that treats all individuals as equals but adversely affects the political strength of a racially identifiable group. Such a structure may be challenged under the 14th and 15th Amendment but must be judged by a standard that allows the political process to function effectively. Stevens also rejected the *Zimmer* analysis but for the reason that it is inappropriate to focus on the subjective intent of decisionmakers.

According to Stevens, a proper test should focus on the objective effects of a political decision, and the proper standard can be found in *Gomillion v. Lightfoot*, which held than an irrational racial gerrymander violated the 15th Amendment. Using the *Gomillion* criteria, an at-large system is invalid if it (1) was manifestly not the product of a routine or traditional political decision, (2) had a significant adverse impact on a minority group, and (3) was unsupported by any neutral justification and thus was either totally irrational or entirely motivated by a desire to curtail the political strength of the minority. According to these "objective" criteria, the Mobile election system was constitutionally permissible.

Commentary

Voting-discrimination claims based on the 14th and 15th Amendments will fail, according to the *Bolden* decision, unless discriminatory intent or purpose is proved; however, Congress responded to the Supreme Court's pronouncement that claims for violations of Section 2 of the Voting Rights Act also will fail absent proof of discriminatory purpose by enacting the Voting Rights Act Amendments of 1982. The 1982 legislation repudiated the "intent" test for Section 2 claims and adopted a "results" test whereby a violation is proved if it is shown by a "totality of circumstances" that the election process is not equally open to participation by members of racial or language minority groups in that they have less opportunity that other voters to participate in the political process and to elect representatives of their choice. The *Bolden* rule regarding the necessity for demonstrating discriminatory purpose continues to apply to 14th and 15th Amendment voting-discrimination claims.

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Mississippi State Chapter, Operation Push v. Allain

674 F.Supp. 1245
United States District Court, Northern District
of Mississippi, Delta Division
November 16, 1987

Section 2 of the Voting Rights Act prohibits voting qualifications, prerequisites, standards, practices, and procedures that result in a denial or abridgment of voting rights on account of race, color, or membership in a language minority group. Proof of discriminatory intent or purpose is not required. A violation is established if, based on the totality of the circumstances, it is shown that the processes leading to nomination and election, including voter registration, are not equally open to participation by the protected minority-group members.

The Facts

In 1984, several black citizens of Mississippi and two non-profit organizations active in promoting black political participation, the Mississippi State Chapter Operation Push and Quitman County Voters League, brought a voting rights action in U.S. District Court on behalf of themselves and all black citizens who were registered voters or were eligible to vote but were not registered. The defendants named were the Governor, Attorney General, and Secretary of State of Mississippi, as well as all circuit clerks/county registrars and city clerks/city registrars in the state.

The plaintiffs challenged Mississippi's dual-registration law, which required registration with a municipal clerk after having registered with the county registrar as a condition for voting in municipal elections, and the prohibition on satellite or off-site voter registration as violations of the 14th and 15th Amendments, Section 2 of the Voting Rights Act of 1965, and 42 U.S.C. Secs. 1971 and 1983.

While this action was pending, the state legislature amended the laws in question to provide for a single registration effective for both non-municipal and municipal elections. Registration with the county registrar was sufficient for all elections; however, this amendment was not given retroactive effect, thereby requiring unregistered municipal voters to register with a municipal clerk if they had registered with the county registrar before the amendment became effective. The amendments also required that city clerks in municipalities of 500 or more population be appointed as deputy county registrars, thus enabling both non-municipal and municipal election registration to be accomplished by registering with the municipal clerk. At least 83 municipalities with a population under 500 remained under the dual-registration requirement.

Prior to 1984, county registars could not remove the registration books from their offices; however, they could be ordered by the county board of supervisors to spend not more than one day at any county precinct to register new voters. The 1984 amendments included authorization for the county registrars to conduct satellite registration at regular voting precincts if available or at alternate places otherwise whenever they deemed it necessary and after requesting and receiving approval by the county board of supervisors.

At the time of this action, and since 1965, the State of Mississippi and all of its subdivisions were covered by the Voting Rights Act of 1965 and were required to obtain preclearance of voting law changes. The 1984 amendments went into effect after their submission to and approval by the U.S. Attorney General. On the basis of the statutory amendments, the defendants moved to dismiss the action for mootness.

The District Court denied the motion, and after extensive pre-trial proceedings, a bench trial was conducted.

The Issues

The question answered by the District Court was whether the Mississippi election code provisions containing a residual dual-registration requirement and a limitation on satellite registration constituted a violation of Section 2 of the Voting Rights Act of 1965.

The Holding and Rationale

The District Court found that a Section 2 violation had been established by the state's failure to make the 1984 amendments retroactive, to mandate the deputization of all municipal clerks as deputy county registrars, and to require satellite registration on a uniform statewide basis.

Section 2 of the Voting Rights Act prohibits the imposition or application of any voting qualification, prerequisite to voting, and standard, practice, or procedure in a manner that results in the denial or abridgment of the right to vote on account of race, color, or membership in a language minority group. The District Court concluded that Congress intended Section 2 to cover discriminatory voter registration practices and procedures and that the Mississippi voter registrations laws were clearly voting qualifications or prerequisites covered by Section 2.

The 1982 amendments to the Voting Rights Act eliminated the necessity to prove discriminatory intent in order to prove a Section 2 violation. The current test, as set forth in Section 2(b) and applied by the U.S. Supreme Court in *Thornburg v. Gingles*, is a "results" test: "A violation . . . is established if, based on the totality of the circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by . . . citizens protected by subsection (a) of . . . [Section 2] in that . . . [they] have less opportunity than . . . [others] to participate in the political process and to elect representatives of their choice."

The District Court turned to the legislative history of amended Section 2 (1982 U.S. Code Congressional & Administrative News 177) for the criteria used by courts for their analysis as to whether a Section 2 violation has been proven: "To establish a violation, plaintiffs could show a variety of factors, depending on the kind of rule, practice, or procedure called into question." The nine factors cited in the legislative history of Section 2 do not represent an "all or nothing" test, but rather plaintiffs need only show that the "totality of circumstances" indicates a violation.

The court determined that the nine factors were relevant to a voter registration case even though the legislative report made reference to vote dilution in its discussion of the factors. The court then enumerated each factor and discussed the relationship of the facts of the case to each factor:

1. Extent of history of official discrimination touching minority-group participation in the democratic process. Several courts have found, and the District Court took judicial notice of their findings, that Mississippi has had an extensive history of purposeful official discrimination that touched on the right of black citizens to register, to vote, and otherwise to participate in the democratic process.

2. Extent of racially polarized voting. The court determined that voting behavior was not germane to the case.

3. Extent to which unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures enhanced the opportunity for minority-group discrimination. The court concluded that voting practices were not relevant or germane.

4. Denial of minority-group access to any candidate slating process. A candidate slating process is beyond the scope of the court's consideration of voter registration statutes.

5. Extent to which minority-group members bear the effects of discrimination in such areas as education, employment, and health that hinder their ability to Participate effectively in the political process. The court concluded that the state's failure to deputize all municipal clerks and to remove other administrative barriers to voter registration resulted in the disfranchisement of a substantial number of black citizens who, because of the continued existence of vast socioeconomic disparities, were unable to travel to the offices of the county registar to register to vote. The court cited blacks' disproportionate lack of transportation and their disproportionate inability to register during working hours, but noted that if some localized polling-place registration was conducted, the impact on the plaintiffs would be significantly minimized or eliminated.

6. Whether political campaigns have been characterized by overt or subtle racial appeals. Racial appeals bear little relevance to the state's registration procedures.

7. Extent to which minority-group members have been elected to public office. The District Court highlighted the fact that the U.S. Supreme Court, in *Thornburg v. Gingles*, identified the ability of blacks to elect candidates of their choice as one of the most important factors in a Section 2 challenge. According to the court, 9.9% of the elected officials in the state were black and blacks made up 35% of the state population; however, most black officials were elected from black-majority, single-member districts. Here, the plaintiffs proved that they experienced substantial difficulty in electing representatives of their choice outside black-majority districts (i.e., only three black officials had been elected in majority-white districts).

8. Significant lack of responsiveness by elected officials to the particularized needs of minority-group members. Blacks had experienced difficulty in having blacks deputized as voter registrars and in obtaining satellite registration in predominantly black locations. The court concluded that these efforts to become more involved in the political process, which had been frustrated by predominantly white voter registration officials, represented probative evidence of unresponsiveness by elected officials to the particularized needs of the blacks in Mississippi.

9. Whether the policy underlying the use of the voting qualification, prerequisitie, or standard, practice, or procedure in question was tenuous. Here the court found the strongest evidence of a Section 2 violation. The failure to make the 1984 amendments retroactive was not rationally related to any compelling state interest although motivated by economic and practical considerations. Mere convenience to the state is not justification for burdening citizens in the exercise of the right to register to vote, especially where blacks continue to face disproportionate economic and educational levels resulting from past discrimination that inhibits their political participation.

The court could not find any legitimate or compelling state interest served by the failure to deputize all municipal clerks as deputy county registrars, not just those in municipalities over 500 population; in fact, deputizing all municipal clerks would increase the availability of registration sites to those individuals who live farthest

from the most-populous areas of a county. In addition, the placing of the decision to initiate satellite voter registration in the sole discretion of the county registrar unnecessarily restricted access to the political process, and the widespread variation in voter registration procedures in the state may result in the unequal treatment of similarly situated individuals. The court could find no legitimate reason for the state's failure to require polling-place registration on a regular basis.

The court was of the opinion that under the "totality of the circumstances" and the "results" test, the plaintiffs had demonstrated a Section 2 violation. The court denied injunctive relief pending the outcome of the 1988 session of the state legislature, but offered guidelines for bringing Mississippi's election laws into compliance with the Voting Rights Act. The court retained jurisdiction over the case and ordered the defendants to report to the court within 120 days as to measures undertaken to bring the defendants into compliance with the court's opinion.

Commentary

The *Operation Push* case demonstrates how one court attempted to resolve a claim based on Section 2 of the Voting Rights Act after the Voting Rights Act Amendments of 1982 incorporated the "results" test for proving Section 2 claims. In *Thornburg v. Gingles*, 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986), the Supreme Court looked to the legislative history, specifically the Senate report, accompanying the 1982 amendments as an appropriate source for guidance in interpeting Section 2 and identifying the factors or "circumstances" probative of a Section 2 violation. The nine factors listed in the Senate Report, as the judge in *Operation Push* soon learned, are more appropriate for evaluating a vote-dilution claim than a claim based on a denial of access to the vote, as when registration opportunities are restricted. The court faithfully applied the nine criteria to the facts of the case and, in the end, ruled against Mississippi because it had a history of discrimination and could not demonstrate that any compelling state interest was served by the legislative choices that had been made regarding its voter registration procedures.

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City of Rome v. United States

446 U.S. 156, 100 S.Ct. 1548, 64 L.Ed.2d 119 (1980)
United States Supreme Court
April 22, 1980

The preclearance requirements of the Voting Rights Act of 1965 are constitutional. A political unit in a state determined to be subject to preclearance of voting changes cannot independently seek exemption ("bailout") from the preclearance requirements. The Attorney General has 60 days to respond to a preclearance request or motion for reconsideration, commencing with the date of the latest submission by the requesting jurisdiction. A jurisdiction seeking preclearance for voting changes must prove that the voting changes have neither discriminatory purpose nor discriminatory effect.

The Facts

In 1965, the U.S. Attorney General designated Georgia as a jurisdiction covered by the Voting Rights Act of 1965, with the effect that all municipalities in Georgia were required to comply with the preclearance procedure under Section 5 of the Act.

In 1966, the Georgia state legislature amended the charter of Rome, a city in northwestern Georgia with a population 23.4% black, to make several changes in the system for electing members of the city commission and board of education. The number of wards for city elections was reduced from 9 to 3. The 9 city commissioners were to be elected at-large by majority vote to one of 3 numbered posts in each ward with staggered terms for the 3 posts in each ward; a runoff election between the top two candidates was required if a majority of the vote was not received. The prior law provided for the election of the 9 commissioners, one resident from each ward, by plurality vote in an at-large election. The board of election was increased from 5 to 6 members, and each board member was to be elected by majority vote to one of two numbered, staggered-term posts in each ward with the same runoff procedure as provided for city commission elections. Board members were required to reside in the wards from which they were elected. The prior law had no ward residency requirement and provided for an at-large election with the board members elected by plurality vote. In addition, from 1964 to 1975, the city had made 60 annexations.

Section 5 of the Voting Rights Act of 1965 requires a covered jurisdiction wishing to enact any standard, practice, or procedure with respect to voting different from that in effect on November 1, 1964, to seek preclearance of the change from the U.S. Attorney General or the U.S. District Court for the District of Columbia. Annexations were held to be a voting change subject to preclearance by the U.S. Supreme Court in 1971 (*Perkins v. Mathews*). The preclearance requirement applied to any "state" or "political subdivision" within a state that is determined by the Attorney General to qualify under the coverage formula of Section 4(b) of the Act. Section 4(a) of the Act provides a procedure for exemption or "bailout" from the Act by which a covered jurisdiction can escape the preclearance requirements by filing a declaratory judgment action before the U.S. District Court for the District of Columbia and proving that no "test or device" had been used during the 17 years preceding the filing for the purpose of or with the effect of denying or abriding the right to vote on account of race or color.

The city submitted one annexation to the Attorney General for preclearance in 1974 and, in response to the Attorney General's inquiries, submitted the remainder of the annexations and the 1966 electoral changes. The Attorney General did not preclear the majority-vote, numbered-post, and staggered-term provisions for the city commission

and board of education or the ward-residency requirement for education board members because the changes would deprive negroes of the opportunity to elect a candidate of their choice in view of the common racial-bloc voting in the city. Thirteen of the annexations were not precleared. These annexed areas contained predominately white populations or were near predominately white areas, and the Attorney General determined that the city did not prove that the annexations would not dilute the negro vote.

The city filed a motion for reconsideration, and the Attorney General cleared the annexations for school board elections only, reasoning that because of the disapproval of the 1966 electoral changes, the preexisting electoral scheme was revived and was acceptable under the Act. The annexations were not cleared for city commission elections because the revival of the ward-residency requirement in those elecitons could have a discriminatory effect. The city and two of its officials then filed a declaratory judgment action in the U.S. District Court for the District of Columbia to obtain relief from the Voting Rights Act. A 3-judge court granted summary judgment for the United States, and the plaintiffs appealed to the U.S. Supreme Court.

The Issues

The questions presented to the Supreme Court were whether a city in a state subject to the Section 5 preclearance requirements of the Voting Rights Act could exempt itself independently of the state, whether Section 5 was constitutional and had been interpreted correctly by the District Court, when the 60-day period for an Attorney-General response to a motion for reconsideration of a denial of preclearance begins, and whether the District Court finding that the city had failed to prove that the election changes and annexations did not dilute the effectiveness of the negro vote in the city was clearly erroneous.

The Holding and Rationale

The Supreme Court, in a 6-3 vote, affirmed the judgment of the District Court in favor of the United States.

The city had contended in District Court that it could exempt itself from the coverage of the Act, but the court held that political units of a covered jurisdiction, such as Georgia, could not independently bring a Section 4(a) bailout action. The Supreme Court agreed, holding that the city was not a "political subdivision" for the purpose of a Section 4(a) bailout. The city was neither a "state" nor a "political subdivision" that the Attorney General had determined to fall within the coverage formula of Section 4(b). When a state falls within the coverage formula of Section 4(b), all political units of the state must preclear new voting procedures regardless of whether the unit registers voters and otherwise would come within the Act as a "political subdivision." The city comes within the Act because it is part of a covered state, and any bailout action to exempt the city must be filed by and seek to exempt all of the State of Georgia.

The Attorney General must interpose objections to original submissions for preclearance within 60 days after their submission; otherwise submitted voting practices become fully enforceable. By regulation, requests for reconsideration must also be decided within 60 days of their receipt. Here the Attorney General had failed to respond within 60 days of the city's initial submission of the reconsideration motion, and the city argued that as a result the electoral changes had been precleared. The Supreme Court rejected that argument because the city had supplemented its request for reconsideration and the Attorney General had responded within 60 days of the supplemental request. Relying on the logic of its decision in *Georgia v. United States*, the Court held that the 60-day reconsideration period should be interpeted to begin anew

when additional information is supplied by the submitting jurisdiction of its own accord.

The city also argued that the District Court erred in holding that Section 5 of the Act prohibits changes that have only a discriminatory effect. The Court easily disposed of this contention. Section 5 provides that the Attorney General may clear a practice only if it does not have a discriminatory purpose and will not have a discriminatory effect. Congress plainly intended that a voting practice may not be precleared unless both discriminatory purpose and effect are absent, and the Court has consistently interpreted Section 5 in such a manner.

The city challenged the constitutionality of Section 5 because it exceeds Congress' power to enforce the 15th Amendment and violates the principles of federalism. The Court held that even if Section 1 of the Amendment prohibits only purposeful discrimination, the Court's prior decisions foreclosed any argument that Congress may not outlaw voting practices that are discriminatory in effect pursuant to its power under Section 2 of the Amendment to enforce Section 1 by "appropriate legislation." Congress' authority under Section 2 is no less broad than its authority under the Necessary and Proper Clause. The Court's decision in *South Carolina v. Katzenbach*, which upheld the constitutionality of the Voting Rights Act, made it clear that Congress may, pursuant to its Section 2 authority, prohibit state action that perpetuates the effects of past discrimination even though it is not in itself violative of Section 1, as was the case with Congress' ban on the use of literacy tests. The Court held that the Voting Rights Act ban on electoral changes that are discriminatory in effect is an appropriate method of promoting the purposes of the 15th Amendment even if it is assumed that Section 1 of the Amendment prohibits only intentional discrimination. The Court also reaffirmed its holding in *South Carolina* that the 15th Amendment supersedes contrary exertions of state power and the Voting Rights Act is an appropriate means of carrying out Congress' constitutional responsibilities.

The Supreme Court also concluded that the District Court did not clearly err in finding that the city had failed to prove that the 1966 electoral changes would not dilute the effectiveness of the negro vote in Rome and deprive negroes of an opportunity to elect a candidate by single-shot voting. The District Court had found that the majority-vote, numbered-post, and staggered-term provisions (as well as the ward-residency requirements in school board elections), coupled with the presence of racial-bloc voting, a majority white population, and at-large elections would dilute negro voting strength.

The District Court also held that where the annexations substantially enlarged the number of white voters without a corresponding increase in negro voters, the importance of the votes of negro citizens in the pre-annexation city boundaries was reduced, and the city was required to prove, which it did not, that in city commission elections the electoral system fairly reflects the strength of the negro community as it exists after the annexations (as required by *City of Richmond v. United States*). The District Court's determination was influenced by the presence of vote-dilution factors such as at-large elections, the residency requirements, and the high degree of racial-bloc voting. The District Court's decision was not clearly erroneous.

Commentary

The only way a jurisdiction covered by Section 4 of the Voting Rights Act and subject to the preclearance requirements of Section 5 can be released from the federal oversight of election-related changes in the jurisdiction is by obtaining a declaratory judgment from the U.S. District Court for the District of Columbia terminating the Section 4 coverage ("bailout"). Under Section 4, as amended in 1982, the District Court

can grant declaratory relief only if it determines that the jurisdiction has had a "clean" record, excluding trivial, promptly corrected, and unrepeated violations, evidencing nondiscrimination in voting for the ten years preceding the filing of the action. The 1982 amendment of Section 4 also made it clear, as the *Rome* court held, that a political unit in a state covered by Section 4 cannot seek termination of coverage independent of the covered state unless a separate determination had been made by the Attorney General that the specific political unit was covered as a "political subdivision."

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Allen v. State Board of Elections

393 U.S. 544, 89 S.Ct. 817, 22 L.Ed.2d 1 (1969)
United States Supreme Court
March 3, 1969

A state or political subdivision covered by Section 5 of the Voting Rights Act of 1965 is required to obtain preclearance of all changes to its election law even if a voting change was adopted in an attempt to comply with the Act.

The Facts

In 1965, the States of Mississippi and Virginia were determined to be covered by the provisions of Section 4(a) of the Voting Rights Act of 1965 prohibiting any state and its political subdivisions from denying the right to vote in any election because of a failure to comply with any test or device. After this determination, the election codes and regulations in these states were amended, and in four separate cases before a three-judge U.S. District Court, private citizens sought a declaratory judgment that the states had failed to comply with Section 5 of the Voting Rights Act and an injunction against further enforcement of the changes in the election laws pending compliance with the preclearance requirements of Section 5 and approval of the changes.

Section 5 provided that if a state enacts any voting qualification, prerequisite to voting, or standard, practice, or procedure different from that in force and effect on November 1, 1964, no person can be deprived of the right to vote for failure to comply with the new enactment unless and until the state (1) receives a declaratory judgment in the U.S. District Court for the District of Columbia that the change will not have the effect of denying or abridging the right to vote on account of race or color or (2) submits the new provision to the U.S. Attorney General and, within 60 days of submission, the Attorney General does not formally object to the change.

The four cases (three from Mississippi and one from Virginia) were consolidated on appeal and disposed of by the Court's opinion. The Mississippi cases involved state code amendments that (1) permitted the county boards of supervisors to change the method of election of board members from district to at-large elections, (2) eliminated in eleven counties the option of selecting the county superintendent of education by either election or appointment by requiring appointment by the board of education, and (3) made changes in the requirements for independent candidates running in general elections, including a new rule that prohibited a person who voted in a primary election from being placed on the ballot as an independent candidate in the general election. The Virginia case concerned a state elections board bulletin that modified the statutory rule requiring a write-in vote to be made in the voter's own handwriting, a requirement that had precluded write-in voting by sticking a label with a candidate's name on the ballot, by permitting election judges to aid illiterate voters in casting a write-in vote upon request.

The complaints were dismissed by the U.S. District Court in all four cases, and the private litigants brough direct appeals to the U.S. Supreme Court.

The Issues

The question presented was whether the new state laws and regulations fell within the prohibition of Section 5 of the Voting Rights Act of 1965 preventing the enforcement of any voting qualification, prerequisite to voting, or standard, practice, or procedure with respect to voting until the state first complied with the Section 5 preclearance procedures.

The Holding and Rationale

The Supreme Court reversed the judgment in each of the Mississippi cases and vacated the judgment in the Virginia case. All four cases were remanded with instructions to issue injunctions restraining enforcement of the state election law changes until the states adequately demonstrated compliance with Section 5.

The court concluded that the Voting Rights Act of 1965 was aimed at the subtle as well as the obvious state regulations that have the effect of denying citizens their right to vote because of their race. Rejecting a narrow construction of the Act, the court found it compatible with prior court decisions to give a broad interpretation of the right to vote--"all action necessary to make a vote effective." The legislative history of the Act, on the whole, supported the view that Congress intended to reach any state enactment that altered the election law of a covered state "even in a minor way" and that all changes, "no matter how small," were subject to Section 5 scrutiny.

The court found that the state enactment in each case was a voting qualification, prerequisite to voting, or standard, practice, or procedure with respect to voting within the meaning of the Act. Analyzing each case, the court noted how the election law change affected the right to vote or the power of a citizen's vote. Noting that in none of the cases was it considering whether the new procedure with respect to voting had a discriminatory purpose or effect, the court found the crucial test to be whether the new procedure was different from the procedure in effect when the state became subject to the Act. The changes in all four cases were different; therefore, they must meet the preclearance requirements of Section 5 in order to be enforced.

The court also held that a state is not exempted from the Section 5 provisions merely because its legislation was passed in an attempt to comply with the Act. To hold otherwise would exempt legislation that had the effect of racial discrimination even though it allegedly had been adopted in an attempt to comply with the Act.

Commentary

The *Allen* case (actually four different cases) illustrates the scope of the requirement for preclearance approval of voting changes once a state or political subdivision is subject to the mandate of Section 5 of the Voting Rights Act. All changes--formal and informal, subtle and overt, major and minor, voluntary and involuntary--in election-related requirements, practices, and procedures in a covered jurisdiction must be precleared irrespective of any good faith or good intention in making the changes. A covered jurisdiction must submit all voting changes for approval, either to the U.S. District Court for the District of Columbia in a declaratory judgment action or to the U.S. Attorney General, and prove the changes are free of discriminatory purpose and effect.

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Katzenbach v. Morgan

384 U.S. 641, 86 S.Ct. 1717, 16 L.Ed.2d 828 (1966)
United States Supreme Court
June 13, 1966

Section 4(e) of the Voting Rights Act of 1965, which prohibits the application of English-only literacy requirements as a condition for voting against persons educated in non-English-language American flag schools, is constitutional.

The Facts

John and Christine Morgan, two registered voters of New York City, brought suit against the U.S. Attorney General and the New York City Board of Elections in the U.S. District Court for the District of Columbia seeking a declaration that Section 4(e) of the Voting Rights Act of 1965 was unconstitutional and an injunction prohibiting the defendants from enforcing or complying with Section 4(e).

Section 4(e) of the Act provided that no person who successfully completed the sixth primary grade in a public school in or a private school accredited by the Commonwealth of Puerto Rico in which the language of instruction was other than English could be denied the right to vote in any election because of the person's inability to read or write English. The plaintiffs challenged Section 4(e) to the extent it prohibited the enforcement of the New York election laws requiring an ability to read and write English as a condition of voting and to the extent it would permit voting by many New York City residents who migrated from Puerto Rico and had previously been denied the right to vote.

A 3-judge district court granted the declaratory and injunctive relief requested upon cross motions for summary judgment, holding that Congress exceeded the powers granted to it by the Constitution by enacting Section 4(e) and therefore usurped powers reserved to the states by the 10th Amendment. An appeal was taken by the defendants directly to the U.S. Supreme Court.

The Issues

The question addressed was whether Section 4(e) of the Voting Rights Act of 1965 was constitutional.

The Holding and Rationale

The Supreme Court, in a 9-0 vote, held that Section 4(e) was constitutional as a proper exercise of the powers granted to Congress by Section 5 of the 14th Amendment to enforce the provisions of the Amendment, including the Equal Protection Clause, by appropriate legislation. By force of the Supremacy Clause of the Constitution, the New York English-literacy requirement was unenforceable to the extent it conflicted with Section 4(e). The District Court judgment was reversed.

The Court acknowledged state authority to establish voting qualifications for elections for state officers and indirectly for U.S. Representatives and Senators, but noted that the states have no authority to grant or withhold the franchise on conditions that are forbidden by the 14th Amendment or other constitutional provisions.

It was argued that Section 4(e) cannot be sustained as appropriate legislation to enforce the Equal Protection Clause unless there is a judicial determination that the application of the English-literacy requirement prohibited by Section 4(e) is forbidden

by the Equal Protection Clause itself. The Court rejected this argument as unsupported by the language and history of Section 5 of the 14th Amendment. Section 5 is an enlargement of congressional power, and the limited construction would confine legislative power to the insignificant role of abrogating only those state laws that the courts were prepared to adjudge unconstitutional or of merely informing the judgment of the judiciary by particularizing the "majestic generalities" of Section 1 of the 14th Amendment.

The crucial question to be addressed by the Court then was: Could Congress prohibit the enforcement of the New York law by legislating under Section 5 of the 14th Amendment, not whether the judiciary would find that the Equal Protection Clause itself nullifies that law. In answering this question, the Court concluded that in adding Section 5, the draftsmen of the 14th Amendment intended to grant to Congress the same broad powers expressed in the Necessary and Proper Clause of the Constitution. The standard as to the reach of congressional powers, as enunciated in *McCulloch v. Maryland*, 4 Wheat. 316, 4 L.Ed. 579 (1819), was the measure of what constitutes "appropriate legislation under Section 5:

> Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.

Section 5 of the 14th Amendment is a positive grant of power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Amendment. Section 4(e), which is undoubtedly an enactment to enforce the Equal Protection Clause, is intended to secure 14th Amendment rights to citizens educated in non-English-language American flag schools and, according to the Court, secures for the Puerto Rican community residing in New York nondiscriminatory treatment by government. It was well within Congressional authority to say whether federal intrusion upon the state interests served by the English-literacy requirement was warranted in order to secure to the Puerto Rican community the right to vote or whether there was invidious discrimination in establishing voter qualifications that needed to be eliminated. The Court deferred to Congress' judgment as to what was "appropriate legislation," finding that there was a "basis" for Congress' resolution of the conflicting considerations it assessed and weighed. Section 4(e) of the Voting Rights Act met the *McCulloch* standard.

Commentary

The *Morgan* decision validated the Voting Rights Act provisions, specifically Section 4(e), prohibiting voting discrimination against U.S. citizens whose primary language is not English. The *Morgan* case is analogous to the Supreme Court's *South Carolina* decision: different Amendment, same result. The prohibition of race-based voting discrimination under the Voting Rights Act was sustained as "appropriate legislation" of Congress under Section 2 of the 15th Amendment; the prohibition of language-based voting discrimination was upheld as "appropriate legislation" to secure the guarantees of the Equal Protection Clause of the 14th Amendment pursuant to Congress' authority under Section 5 of the 14th Amendment. The use of literacy tests, English and non-English, as a condition for voting was banned upon the adoption of the Voting Rights Act Amendments of 1970.

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Selected Case Summaries

Beer v. United States,
425 U.S. 130, 96 S.Ct. 1357, 47 L.Ed.2d 629 (1976).

A city reapportionment plan cannot be rejected for preclearance under Section 5 of the Voting Rights Act of 1965 solely because it did not eliminate at-large councilmanic seats established prior to the date used in Section 4(b) of the Act to determine that a state and its political subdivisions were covered by the Act and subject to the preclearance requirements of Section 5. Section 5 applies only to subsequent changes in voting procedures. Section 5 of the Act ensures that no voting procedure change is made that leads to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise. A legislative reapportionment plan that enhances the position of racial minorities with respect to their effective exercise of the vote does not have the effect of diluting or abridging the right to vote on account of race within the meaning of Section 5 and cannot violate Section 5 unless the reapportionment itself so discriminates on the basis of race or color as to violate the Constitution.

Berry v. Doles,
438 U.S. 190, 98 S.Ct. 2692, 57 L.Ed.2d 693 (1978).

If a state or political unit fails to seek preclearance of a voting law change pursuant to Section 5 of the Voting Rights Act of 1965 as required and an election affected by the voting change is conducted, the political unit should be allowed to satisfy the Section 5 requirement of federal scrutiny and a new election ordered if approval of the change is denied (citing *Perkins v. Mathews*). A statute changing the terms of office for a three-member county board of commissioners from concurrent to staggered terms is subject to Section 5 approval.

Blanding v. DuBose,
454 U.S. 393, 102 S.Ct. 715, 70 L.Ed.2d 576 (1969).

The U.S. Attorney General is not required to interpose redundant objections to the same change in voting laws subject to preclearance approval under Section 5 of the Voting Rights Act of 1965. A letter advising the Attorney General of the results of a local referendum endorsing at-large elections of a county council is not a new preclearance submission but rather a request for reconsideration where the Attorney General had previously made a timely objection to an earlier submission of the state statute and county ordinance providing for at-large elections. Deference should be granted to the interpretation given statutes and regulations by the officials charged with their administration; the definitions of a preclearance submission and of a reconsideration request employed by the Attorney General are reasonable.

Briscoe v. Bell,
432 U.S. 404, 97 S.Ct. 2428, 53 L.Ed.2d 439 (1977).

Judicial review of determinations by the U.S. Attorney General and the Director of the Census under Section 4(b) are absolutely barred. Congress acted within its power to enforce the 14th and 15th Amendments by appropriate legislation in prohibiting judicial review of Section 4(b) determinations.

City of Lockhart v. United States,
60 U.S. 125, 103 S.Ct. 998, 74 L.Ed.2d 863 (1983).

When a jurisdiction is subject to the preclearance requirements of Section 5 of the Voting Rights Act of 1965, an entire election plan, including preexisting elements, may be a change subject to Section 5. The entire plan for the election of a local governing body is subject to Section 5 preclearance where preexisting numbered seats are not identical to those same numbered seats under the new plan, the possible discriminatory purpose or effect of new seats cannot be determined in isolation from the preexisting elements of the governing body, and the preexisting numbered-post system is an integral part of the new plan and the impact of any seat cannot be evaluated without considering the fact that all seats are filled in elections using numbered posts.

City of Petersburg, Virginia v. United States,
354 F.Supp 1021 (D.D.C. 1972), *aff'd* 410 U.S. 962, 93 S.Ct. 1441, 35 L.Ed.2d 698 (1973).

Where an annexation increases the white population of a city by nearly one-half and eliminates a black population majority, in the context of an at-large voting system and bloc-voting by race, the annexation dilutes the weight, strength, and power of the votes of black voters of the city with a concomitant effect upon their political influence. Preclearance approval under Section 5 of the Voting Rights Act of 1965 could be conditioned on the adoption of modifications calculated to neutralize to the extent possible any adverse effect upon the political participation of black voters, such as by shifting from an at-large to a ward system of electing city councilman. The burden of proof under Section 5 of the Act is placed upon the jurisdiction seeking preclearance approval to prove that the changes would not have the effect of discriminatorily depriving Negroes of the franchise on account of race or color.

City of Pleasant Grove v. United States,
479 U.S. 462, 107 S.Ct. 794, 93 L.Ed.2d 866 (1987).

An annexation of inhabited land or vacant land on which residential development is anticipated constitutes a change in voting practice or procedure subject to preclearance under Section 5 of the Voting Rights Act of 1965. The failure to annex black areas while simultaneously annexing white or uninhabited areas is highly significant in demonstrating that an annexation was racially motivated. Section 5 of the Act looks not only to the present effects of changes but to their future effects as well, and an impermissible purpose may relate to anticipated as well as present circumstances. It is an impermissible dilution of the black vote in advance by providing for the growth of a monolithic white voting block through annexation.

City of Port Arthur v. United States,
459 U.S. 159, 103 S.Ct. 530, 74 L.Ed.2d 334 (1982).

In a declaratory judgment action for approval of changes covered by Section 5 of the Voting Rights Act of 1965, including expansion of a city's boundaries through annexation and consolidation and a new electoral plan for the expanded city with a mixed single-member and at-large system governed by the majority-vote rule, the U.S. District Court for the District of Columbia could condition its Section 5 approval on the elimination of the majority-vote requirement for two of the three at-large seats as a hedge against the possibility that the electoral scheme contained a purposefully discriminatory element.

City of Richmond, Virginia v. United States,
422 U.S., 95 S.Ct. 2296, 45 L.Ed.2d 245 (1975).

In a political unit subject to Section 5 of the Voting Rights Act of 1965, an annexation reducing the relative political strength of the minority race in the enlarged jurisdiction as compared with what it was before the annexation does not have the effect of denying or abridging the right to vote on the grounds of race or color in violation of Section 5 as long as the post-annexation electoral system fairly recognizes the minority's political potential. Section 5 of the Act proscribes changes in voting procedures made with the purpose, as well have having the effect, of denying or abridging the right to vote on the grounds of race or color. There must be objectively verifiable, legitimate, and nondiscriminatory reasons for an annexation. An official action, whether an annexation or otherwise, taken for the purpose of discriminating against Negroes on account of their race has no legitimacy at all under the Constitution or the Voting Rights Act.

Commonwealth of Virginia v. United States,
386 F.Supp. 1319 (D.D.C. 1974), *aff'd*, 420 U.S. 901, 95 S.Ct. 820, 24 L.Ed.2d 833 (1975).

In a "bailout" or termination of coverage action under Section 4(a) of the Voting Rights Act of 1965, a covered state will be denied exemption from the Act if it fails to refute evidence that its use of a literacy test during the ten years preceding the filing of the action had the effect of denying or abridging the right to vote on account of race or color because of the state's history of maintaining an inferior school system for Negroes (citing *Gaston County, North Carolina v. United States*). The state is required to show that its dual educational system had no appreciable effect on the ability of persons of voting age to meet a literacy requirement.

Connor v. Johnson,
402 U.S. 690, 91 S.Ct. 1760, 29 L.Ed.2d 268 (1971).

A reapportionment plan devised and put into effect by a decree of a U.S. District Court is not subject to the preclearance approval requirement of Section 5 of the Voting Rights Act of 1965. When U.S. District Courts are forced to fashion reapportionment plans, single-member districts are preferable to large multi-member districts as a general matter.

Connor v. Waller,
421 U.S. 656, 95 S.Ct. 2003, 44 L.Ed.2d 486 (1975).

Statutory changes subject to preclearance under Section 5 of the Voting Rights Act of 1965 are not and will not be effective until and unless cleared pursuant to Section 5.

Davis v. Schnell,
81 F.Supp. 872 (S.D.Ala. 1949), *aff'd*, 336 U.S. 933, 60 S.Ct. 749, 93 L.Ed.2d 1093 (1949).

An Alabama constitutional provision restricting the registration of voters to persons who can understand and explain any article of the U.S. Constitution to the reasonable satisfaction of the local board of registrars was intended to be and was being used arbitrarily for the purpose of discrimination against applicants for the franchise on the basis of race or color. The state "interpretation test," both in its object and in the manner of its administration, is unconstitutional as a violation of the 15th Amendment. The absence of mention of race or color in the "interpretation test" requirement cannot save it; the impact of the requirement cannot be ignored.

Doi v. Bell,
449 F.Supp. 267 (D.Hawaii 1978).

In a "bailout" or termination of coverage action under Section 203(d) of the Voting Rights Act of 1965, as amended, a comparable updated national illiteracy rate determined by the Director of the Census is the rate against which to compare a covered jurisdiction's updated illiteracy rate.

Dougherty County, Georgia, Board of Education v. White,
439 U.S. 32, 99 S.Ct. 368, 58 L.Ed.2d 269 (1978).

A county board of education rule requiring its employees to take unpaid leaves of absence while campaigning for elective office is a standard, practice, or procedure with respect to voting and is subject to the preclearance approval requirement of the Voting Rights Act of 1965 in a state covered by Section 4 of the Act. Obstacles to candidate qualification are standards, practices, or procedures with respect to voting. If a provision has a potential for discrimination, Section 5 scrutiny is triggered. Whether a political subdivision that adopts a potentially discriminatory change has some nominal electoral function has no relation to the purpose of Section 5 and the requirement for preclearance approval of the change.

East Carroll Parish School Board v. Marshall,
424 U.S. 636, 96 S.Ct. 1083, 47 L.Ed.2d 296 (1976).

The preclearance procedures of Section 5 of the Voting Rights Act of 1965 do not apply to a reapportionment plan that is submitted and adopted pursuant to an order of a U.S. District Court and is a result of the court's equitable jurisdiction over adversary proceedings.

Ex Parte Yarbrough ("The Ku-Klux Cases"),
110 U.S. 651, 4 S.Ct. 152, 28 L.Ed.2d 274 (1884).

The right to vote for members of Congress is dependent on the Constitution, which adopts the same voter qualifications as defined by a state for electors of the most numerous branch of the state legislature, and the exercise of the right to vote in a congressional election does not depend exclusively on the law of the state. The 15th Amendment operates as an immediate source of a right to vote where a state constitution provides the words "white man" as a qualification for voting by annulling the discriminatory word "white" and thereby leaving colored men in the enjoyment of the same right as white persons. Congress has the power to protect a U.S. citizen in the exercise of rights conferred by or dependent on the Constitution.

Gaston County, North Carolina v. United States,
395 U.S. 285, 89 S.Ct. 1720, 23 L.Ed.2d 309 (1969).

In a "bailout" or termination of coverage action brought under Section 4(a) of the Voting Rights Act of 1965 by a state or political subdivision covered by the Act, the U.S. District Court for the District of Columbia may consider whether a literacy or educational requirement has the effect of denying the right to vote on account of race or color because the covered jurisdiction that seeks to impose the requirement has maintained separate and inferior schools for its Negro residents who are now of voting age.

Georgia v. United States,
411 U.S. 526, 93 S.Ct. 1702, 36 L.Ed.2d 472 (1973).

In a state covered by Section 4 of the Voting Rights Act of 1965, election law changes arising from the reapportionment of a state legislature, including extensive shifts from single-member to multimember districts, that have the potential for diluting the value of the Negro vote are standards, practices, and procedures with respect to voting within the meaning of Section 5 of the Act and are subject to the preclearance requirement of Section 5. Section 5 of the Act is not concerned with a simple inventory of voting procedures but rather with the reality of changed practices as they affect Negro voters. The U.S. Attorney General's administrative regulations (28 C.F.R. Part 51) for implementing the performance of the Attorney General's obligation to pass on state submissions under Section 5 of the Act are reasonable and consistent with the Act insofar as they place the same burden of proof on a party submitting a change to the Attorney General as exists in a declaratory judgment action under Section 5, i.e., the proposed change is without discriminatory purpose and effect, and insofar as they provide that the 60-day period during which the Attorney General may object to a submitted change does not commence until additional information requested by the Attorney General is received.

Gomillion v. Lightfoot,
364 U.S. 339, 81 S.Ct. 125, 5 L.Ed.2d 110 (1960).

State power to alter the boundaries of its municipalities is met and overcome by the 15th Amendment, which forbids a state from passing any law that deprives citizens of their vote because of race. When a state legislature singles out a readily isolated segment of a racial minority for special discriminatory treatment, as it does when a city's boundaries are changed to exclude Negro citizens, it violates the 15th Amendment. A state statute alleged to have worked unconstitutional deprivations of rights, such as the municipal franchise and consequent rights, is not immune to attack simply because the mechanism employed is a redefinition of municipal boundaries.

Guinn v. United States,
238 U.S. 347, 35 S.Ct. 926, 59 L.Ed. 1340 (1915).

The 15th Amendment does not change, modify, or deprive the states of their full power as to suffrage except as to the subject with which the Amendment deals and to the extent that obedience to its command is necessary. The 15th Amendment has self-operative force. Where a state constitution prohibited registration and voting for inability to read and write sections of the constitution, but contained a "grandfather clause" exempting from the literacy test requirement illiterate persons and the lineal descendents of such persons who on or before January 1, 1868, the pre-15th-Amendment date in the standard for exemption inherently excludes persons on account of race, color, or previous condition of servitude and is void as a violation of the 15th Amendment. The establishment of a literacy test alone is a valid exercise of a lawful state power. Where a state constitution prescribes voter qualifications that include a literacy test coupled with an invalid "grandfather clause" exemption from the test, the literacy test also is invalid if it is the intent of the constitutional requirement that the exempted persons should not under any conditions be subjected to the literacy test.

Hadnot v. Amos,
394 U.S. 358, 89 S.Ct. 1101, 22 L.Ed.2d 336 (1969).

When black candidates are disqualified from the general election ballot for not filing a second designation of a financial committee after the primary, the result of a construction of a state law by a local election officer, while white candidates who did

not file did not suffer disqualification, the unequal application of the same law to different racial groups has an especially invidious connotation and causes 15th and 1st Amendment rights to be subject to disparate treatment. Per *Allen v. State Board of Education*, a change in Alabama law from exempting independent candidates from the requirement to file a declaration of candidacy before March 1st to requiring all candidates to file a declaration before the primary increases the barriers placed on independent candidates and is within the purview of the preclearance requirements of Section 5 of the Voting Rights Act of 1965.

Haith v. Martin,
618 F.Supp. 410 (E.D.N.C. 1985), *aff'd*, 477 U.S. 901, 106 S.Ct. 3268, 91 L.Ed.2d 559 (1986).

Elections for members of the judiciary are subject to the preclearance requirement of Section 5 of the Voting Rights Act of 1965.

Harris v. Bell,
562 F.2d 772 (D.C.Cir. 1977).

The U.S. Attorney General's determination that previously unavailable information justifies withdrawal of an objection to a submission pursuant to Section 5 of the Voting Rights Act of 1965 and the application by the Attorney General of the statutory standards for not interposing an objection in the context of a decision to withdraw an objection are not subject to judicial review.

Hathorn v. Lovorn,
457 U.S. 255, 102 S.Ct. 2421, 72 L.Ed.2d 824 (1982).

State courts have the power and duty to decide whether a proposed change in election procedure requires preclearance under Section 5 of the Voting Rights Act of 1965 when the issue arises as a collateral matter in a state proceeding. When a party to a state proceeding asserts that Section 5 of the Act renders the contemplated relief unenforceable, the state court must examine the claim and refrain from ordering relief that would violate federal law.

Lane v. Wilson,
307 U.S. 268, 59 S.Ct. 872, 83 L.Ed. 1281 (1939).

The 15th Amendment reaches against contrivances by a state to thwart equality in the enjoyment of the right to vote by U.S. citizens regardless of race or color. The Amendment nullifies sophisticated as well as simple-minded modes of discrimination and hits onerous procedural requirements that effectively handicap exercise of the franchise by the colored race although the abstract right to vote may remain unrestricted as to race. An Oklahoma registration statute that required all citizens who had not voted in 1914, when a literacy test and invalid "grandfather clause" that effectively exempted white voters from the test were in effect, to register during a 12-day period in 1916 if they were qualified at that time and that perpetually disfranchised those who failed to register then was unfair discrimination against Negro voters and invalid under the 15th Amendment.

Lassiter v. Northampton County Board of Elections,
360 U.S. 45, 79 S.Ct. 985, 3 L.Ed.2d 1072 (1959).

A literacy test that is applied to all voters irrespective of color is consistent with the 14th and 17th Amendments. While the right of suffrage is established and guaranteed by the Constitution, it is subject to the imposition of state standards that are not discriminatory and do not contravene any restriction imposed by Congress acting pursuant to its constitutional powers. The ability to read and

write is a factor that a state may take into consideration in determining the qualifications of voters. A literacy test fair on its face violates the 15th Amendment if it is employed to perpetuate the discrimination that the 15th Amendment was designed to uproot.

Louisiana v. United States,
380 U.S. 145, 85 S.Ct. 817, 13 L.Ed.2d 709 (1965).

A Louisiana constitutional provision providing for an "interpretation test," which required every applicant for registration to be able to understand and give a reasonable interpretation of any section of the state or federal constitution when read to the applicant by the registrar, violates the Constitution. Louisiana's constitution and statutes requiring an interpretation test, which vested in the voting registrars virtually uncontrolled discretion as to who should and should not vote without any objective standard to guide them, conflicted with the prohibitions against discrimination in voting because of race found in the 15th Amendment and 42 U.S.C. 1971. A U.S. District Court could decree that a new state "citizenship test" to be administered to all prospective voters should be postponed as to voters who met age and residence requirements during the years when an invalid interpretation test was used until a complete reregistration of all voters in the affected parishes is ordered.

McCain v. Lybrand,
465 U.S. 236, 104 S.Ct. 1037, 79 L.Ed. 271 (1984).

When a jurisdiction subject to the preclearance requirements of Section 5 of the Voting Rights Act of 1965 makes clearly defined changes in its election practices, sending that legislation to the U.S. Attorney General merely with a general request for preclearance constitutes a submission of the changes made by the enactment and cannot be deemed a submission of changes made by previous legislation which themselves were independently subject to Section 5 preclearance. A request for preclearance of certain identified changes in election practices that fails to identify other practices as new ones is not an adequate submission of the latter practices. The fact that a covered jurisdiction adopted a new election practice after the effective date of the Voting Rights Act of 1965 raises, in effect, a statutory inference that the practice may have been adopted for a discriminatory purpose or may have a discriminatory effect and places the burden on the jurisdiction to establish that the practice is not discriminatory.

McDaniel v. Sanchez,
452 U.S. 130, 101 S.Ct. 2224, 68 L.Ed.2d 724 (1981).

The preclearance requirement of the Voting Rights Act applies to new legislative apportionment plans adopted without judicial discretion or approval, but not to plans prepared and adopted by a federal court to remedy a constitutional violation. Whenever a jurisdiction covered by the Act submits a proposal reflecting the policy choices of the elected representatives of the people, no matter what constraints have limited the choices available to them, the preclearance requirement of the Act is applicable. The reasons of a covered jurisdiction for proposing a new reapportionment plan, the particular method employed in formulating a plan that is submitted to a federal court on behalf of the covered jurisdiction, and the authority of a covered jurisdiction to enact the reapportionment plan are irrelevant to the statutory preclearance requirement. The essential characteristic of a legislative plan subject to Section 5 preclearance is the exercise of legislative judgment.

Minor v. Happersett,
88 U.S. 627, 21 Wall. 162 (1875).

The United States has no voters in the states of its own creation. The elective officers of the United States are all elected directly or indirectly by state voters. The Constitution does not confer the right of suffrage upon anyone. State constitutions and laws that commit the right of suffrage to men alone are not necessarily void. The Constitution, including the 14th Amendment, has not added the right of suffrage to the privileges and immunities of citizenship as they existed at the time the Constitution was adopted.

Morris v. Gressette,
432 U.S. 491, 97 S.Ct. 2411, 53 L.Ed.2d 506 (1977).

The failure of the U.S. Attorney General to interpose a timely objection under Section 5 of the Voting Rights Act of 1965 is not subject to judicial review. The Voting Rights Act does not expressly preclude judicial review of the Attorney General's action under Section 5; however, it was the intent of Congress that the extraordinary remedy of postponing the implementation of validly enacted state legislation was to come to an end when the Attorney General failed to interpose a timely objection based on a complete submission.

Myers v. Anderson,
238 U.S. 368, 35 S.Ct. 932, 59 L.Ed 1349 (1915).

A Maryland statute that conferred the right of registration and consequently the right to vote on male citizens who, in addition to meeting other qualification requirements, were either a taxpayer assessed on the city books for at least $500, a naturalized citizen or the child of naturalized citizens, or a citizen or descendant of a citizen who was entitled to vote in any state prior to January 1, 1868, is invalid. The "grandfather clause" registration standard automatically qualifying pre-1868 voters and their descendants was void because it amounts to a mere denial of the operative effect of the 15th Amendment, and the remaining two standards are invalid because such a unity existed among the standards that the destruction of one necessarily leaves no possible reason for recognizing the continued existence and operative force of the others.

National Association for the Advancement of Colored People v. Hampton County Election Commission,
470 U.S. 166, 105 S.Ct. 1128, 84 L.Ed.2d 124 (1985).

In a jurisdiction subject to the preclearance requirements of the Voting Rights Acts of 1965, the administrative rescheduling of an election for a date four months later than that precleared by the U.S. Attorney General and the effective alteration of the candidate filing deadline from a date approximately two months before the election to on almost six months before the election have the potential for discrimination and should have been precleared. The form of a change in voting procedure cannot determine whether it is within the scope of Section 5. Section 5 also reaches informal changes, such as an administrative effort to comply with a statute that had received preclearance. The Voting Rights Act reaches changes that affect even a single election and are unlikely to be repeated. Where an election has been held before changes in voting procedures have been precleared, it is appropriate to allow time for the submission of the changes to the Attorney General. If the approval of the Attorney

General is not sought or received, the election should be set aside. If the Attorney General determines that the changes had no discriminatory purpose or effect, the court should determine, in the exercise of its equitable jurisdiction, whether the results of the election may stand.

Neal v. Delaware,
103 U.S. 370, 26 L.Ed. 567 (1880).

The adoption of the 15th Amendment had the effect in law of removing or rendering inoperative a provision of a state constitution that restricted the right of suffrage to the white race. The presumption should be indulged in the first instance that a state recognizes an amendment of the Federal Constitution from the time of its adoption as binding on all of its citizens and every department of its government and to be enforced within its limits without reference to any inconsistent provisions in its constitution or statutes.

Nixon v. Condon,
286 U.S. 73, 52 S.Ct. 484, 76 L.Ed. 984 (1932).

When the state executive committee of a political party is invested by statute with the authority to determine party membership independent of the will of the party convention in whose name it undertakes to speak, it becomes to that extent an organ of the state and must submit to the mandates of equality and liberty that bind officials everywhere. Where a state executive committee of a political party limits party membership to "white Democrats" and thereby excludes Negroes from party membership and voting in the party's primary election, the committee members, as delegates of the state's power, have discriminated invidiously between white and black citizens in violation of the 14th Amendment, which was adopted with special solicitude for the members of the Negro race.

Nixon v. Herndon,
273 U.S. 536, 47 S.Ct. 446, 71 L.Ed. 759 (1927).

A state statute prohibiting Negroes from voting in a party primary election is a direct and obvious infringement of the 14th Amendment, which denies to any state the power to withhold from persons of color the equal protection of the laws. Color cannot be made the basis of a statutory classification affecting the right to vote in a primary election.

Oregon v. Mitchell,
400 U.S. 112, 91 S.Ct. 260 (1970).

The constitutionality of various provisions of the Voting Rights Act Amendments of 1970 was considered. In the exercise of its power to enforce the 14th and 15th Amendments, Congress can prohibit the use of literacy tests or other devices used to discriminate against voters on account of their race in both federal and state elections (Section 201 of the Voting Rights Act of 1965, as amended). Congress can fix the age of voters in national or federal elections (i.e., congressional, senatorial, and presidential and vice-presidential elections) and thus enfranchise 18-year-old citizens in national elections, but cannot interfere with the age of voters set by the states for state and local elections (Section 302 of the Voting Rights Act of 1965, as amended). Congress can set residency requirements and provide for absentee balloting in presidential and vice-presidential elections (Section 202 of the Voting Rights Act of 1965, as amended).

Perkins v. Mathews,
400 U.S. 379, 91 S.Ct. 431, 27 L.Ed.2d 476 (1971).

In actions in which a failure to comply with the preclearance requirement of Section 5 of the Voting Rights Act of 1965 is alleged, the U.S. District Court, per *Allen v. State Board of Elections*, is limited to deciding the "coverage" question, i.e., whether a state requirement is covered by Section 5 but has not been subjected to the required federal scrutiny. Changes in polling places, in boundary lines through annexations, and from ward to at-large elections are standards, practices, or procedures subject to Section 5 approval. The procedure *in fact* in force or effect on the date after which changes are subject to preclearance is considered in determining whether there is a subsequent "change" subject to preclearance. Section 5 was designed to cover changes having a *potential* for racial discrimination in voting. The interpretation of the U.S. Attorney General as to changes within the scope of Section 5 is to be shown great deference.

Pope v. Williams,
193 U.S. 621, 24 S.Ct. 573, 48 L.Ed. 817 (1904).

The privilege to vote in any state is not given by the Constitution or by any of its amendments and is not a privilege springing from U.S. citizenship. The privilege to vote in a state is within the jurisdiction of the state itself, to be exercised as the state may direct and upon such terms as may seem proper subject to the conditions of the Constitution. The right to vote for a member of Congress is not derived exclusively from state law, but the voter must be one entitled to vote under the state statute. A Maryland registration law requiring that a person who entered the state to reside, as a condition precedent to registration to vote, must have made a written declaration of intent to become a state citizen and resident at least one year prior to applying for registration violated no right protected by the Constitution.

Rogers v. Lodge,
458 U.S. 613, 102 S.Ct. 3272, 73 L.Ed.2d 1012 (1982).

Multimember districts are not unconstitutional *per se*. Per *Washington v. Davis* and *Arlington Heights v. Metropolitan Housing Development Corp.*, the invidious quality of a law claimed to be racially discriminatory must be ultimately traced to a racially discriminatory purpose in order for the Equal Protection Clause of the 14th Amendment to be violated. Purposeful racial discrimination invokes the strictest scrutiny of adverse differential treatment.

Rosario v. Rockefeller,
410 U.S. 752, 93 S.Ct. 1245, 36 L.Ed.2d 1 (1973).

New York's requirement for enrollment in a political party prior to a general election in order to qualify to vote in the party's subsequent primary election does not prohibit otherwise eligible voters from voting or associating with the party of their choice. An early cutoff date for party enrollment (approximately eight months before a presidential primary and eleven months prior to a non-presidential primary) is intended to inhibit "party raiding," an important state goal, and thus is tied to a particularized legitimate purpose and is in no sense invidious or arbitrary.

Smith v. Allwright,
321 U.S. 649, 64 S.Ct. 757, 88 L.Ed.2d 987 (1944).

The right to vote in a primary election for the nomination of candidates without discrimination by the state, like the right to vote in a general election, is a right secured by the Constitution and may not be abridged by any state on account of race.

If a state requires a certain electoral procedure, prescribes a general election ballot made up of party nominees so chosen, and limits the choice of the electorate in general elections for state offices, practically speaking to those whose names appear on such a ballot, it endorses, adopts, and enforces the discrimination against Negroes practiced by a political party entrusted by state law with the determination of the qualifications of participants in the primary. When the privilege of membership in a political party is also the essential qualification for voting in a primary to select nominees for a general election, the state makes the action of the party the action of the state.

Terry v. Adams,
345 U.S. 461, 73 S.Ct. 809, 97 L.Ed. 1152 (1953).

The 15th Amendment applies to any election in which public issues are decided or public officials selected. A primary conducted prior to the regular primary by an voluntary county political association not regulated by the state whose membership is limited to whites violates the 15th Amendment where it has become an integral part and the only effective part of the elective process that determines who shall rule and govern in the county.

Thornburg v. Gingles,
478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986).

The "Voting Rights Act Amendments of 1982," in amending Section 2 of the Voting Rights Act of 1965, make clear that a violation of either Section 2 of the Act can be proven by showing discriminatory effect alone and to establish as the relevant standard the "results test" applied in *White v. Regester*. Minority voters who contend that the multimember form of districting violates Section 2 of the Act must prove that the use of a multimember electoral structure operates to minimize or cancel out their ability to elect their preferred candidates. The use of multimember districts generally will not impede the ability of minority voters to elect representatives of their choice unless a bloc voting majority is usually able to defeat candidates supported by a politically cohesive, geographically insular minority group.

United Jewish Organizations of Williamsburgh, Inc. v. Carey,
430 U.S. 144, 97 S.Ct. 996, 51 L.Ed.2d (1977).

A new or revised reapportionment plan may not be adopted by a state covered by the Voting Rights Act of 1965 without compliance with the preclearance requirement of Section 5 of the Act. A state may deliberately create or preserve black majorities in particular districts in order to ensure that its reapportionment plan complies with Section 5 of the Act. Neither the 14th or 15 Amendments mandate any **per se** rule against using racial factors in districting and apportionment. Reapportionment does not violate the 14th or 15th Amendment merely because a state uses specific numerical quotas in establishing a certain number of black majority districts.

United States v. Board of Commissioners of Sheffield, Alabama,
435 U.S. 110, 98 S.Ct. 965, 55 L.Ed.2d 148 (1978).

Section 5 of the Voting Rights Act of 1965, like Section 4(a)of the Act, applies territorially, and the preclearance requirement of Section 5 includes all political units within a state or a political subdivision designated for coverage under Section 4 of the Act, whether or not they conduct voter registration. The U.S. Attorney General is not deemed to have approved a voting change when the proposal was neither properly submitted nor in fact evaluated by the Attorney General.

United States v. Board of Supervisors of Warren County, Mississippi,
429 U.S. 642, 97 S.Ct. 833, 51 L.Ed.2d 106 (1977).

In an action brought by the U.S. Attorney General to enjoin violations of Section 5 of the Voting Rights Act of 1965, the U.S. District Court is limited, as in private suits brought by voters claiming noncompliance with Section 5 procedures, to determining whether a voting requirement is covered by Section 5 but has not been subjected to the required federal scrutiny.

United States v. Classic,
313 U.S. 299, 61 S.Ct. 1031, 85 L.Ed. 1368 (1941).

Congress has the authority under Article I, Section 4, of the Constitution to regulate primary elections when they are a step in the exercise by the people of their choice of representatives in Congress. The right to participate in the choice of representatives in Congress is a right protected by Article I, Sections 2 and 4, of the Constitution. Where state law has made the primary an integral part of the procedure of choice or where in fact the primary controls the choice, the right of electors to have their ballots counted at the primary is included in the right protected by Article I, Section 2, of the Constitution. The right of participation is protected just as the right to vote at the election.

United States v. Cruikshank,
92 U.S. 588, 23 L.Ed. 588 (1876).

The right of suffrage is not a necessary attribute of national citizenship, but exemption from discrimination in the exercise of that right on account of race, color, or previous condition of servitude is. The right to vote in the states comes from the states and has not been granted or secured by the Constitution. The right of exemption from the prohibited discrimination comes from the United States and has been granted or secured by the Constitution.

United States v. Mosley,
238 U.S.383, 35 S.Ct. 904 (1915).

The right to have one's vote counted in an election for members of Congress is as open to protection by Congress as the right to put a ballot in a box.

United States v. Raines,
362 U.S. 17, 80 S.Ct. 519, 4 L.Ed.2d 524 (1960).

Congress has the power to authorize the United States to bring an action in support of private constitutional rights under the 15th Amendment, as it had in the Civil Rights Act. There is the highest public interest in the due observance of all the constitutional guarantees, including those that bear the most directly on private rights, and it is perfectly competent for Congress to authorize the United States to be the guardian of that public interest in a suit for injunctive relief.

Upham v. Seamon,
456 U.S. 37, 102 S.Ct. 1518, 71 L.Ed.2d 725 (1982).

A court is required to defer to legislative judgments on reapportionment as much as possible, but is forbidden to do so when the legislative plan would not meet the special standards of population equality and racial fairness that are applicable to court-ordered plans. With respect to districts in a state reapportionment plan to which the U.S. Attorney General has not objected upon submission of the plan for preclearance under Section 5 of the Voting Rights Act, and in the absence of any

finding of a constitutional or statutory violation with respect to those districts, a court must defer to the legislative judgments the plans reflect, even under circumstances in which a court order is required to effect an interim legislative apportionment plan. There may be reasons for rejecting parts of a state plan not objected to by the Attorney General, but those reasons must be something other than the limits on the court's remedial actions, which do not come into play until and unless a remedy is required.

Williams v. Mississippi,
170 U.S. 213, 18 S.Ct. 583, 42 L.Ed. 1012 (1898).

Where the Mississippi constitution and laws concerning the qualifications of voters are not limited by their language or effects to one race and vest discretion with administrative officers to accept or reject applicants for registration, there is no denial of equal protection of the laws under the 14th Amendment unless there is proof that the actual administration of the state constitution and statutes is evil and discriminating.

Wise v. Lipscomb,
437 U.S. 535, 98 S.Ct. 2493, 57 L.Ed.2d 411 (1978).

Plans imposed by court order are not subject to the preclearance requirements of Section 5 of the Voting Rights Act of 1965. A new reapportionment plan enacted by a state, including one purportedly in response to invalidation of the prior plan by a federal court, is not effective until it has received Section 5 preclearance. A federal court should not address the constitutionality of the new plan until preclearance has been obtained. Pending submission and preclearance, federal courts will at times necessarily be drawn further into the reapportionment process and required to devise and implement their own plans.

Yick Wo v. Hopkins,
118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886).

Though not regarded strictly as a natural right, but as a privilege merely conceded by society, according to its will, under certain conditions the political franchise of voting is regarded as a fundamental political right because it is preservative of all rights.

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