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Constitutional Law -- Changes in Party Affiliation and the Right to Vote in the Primary

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other could not effect county tax liability.

McLean imposes a difficult practical burden on tax officials, intensified by the inclusion of understated property within the discovery statute. Under *McLean*, tax officials are placed in a dilemma: if they hesitate to make a discovery, awaiting, for example, a ruling on an exemption question, the discovery might be foreclosed by the adjournment of the board of equalization and review; on the other hand, if they list the property without awaiting a ruling, they risk initiating an unwarranted discovery proceeding.

In dealing with a case in which an understatement of inventory is suspected, a tax official seeking to minimize the impact of *McLean* will probably have to list "value of unlisted inventory" as soon as he has reasonable grounds for assuming that substantial understatement is present. Valuation may be deferred until supporting data are available, at which time the board of equalization and review or the board of county commissioners can make an appraisal, perhaps after state income and franchise returns have been examined.[65] Such an approach places a premium on gamesmanship at the expense of orderly administration. Fortunately for tax officials, they are not liable for honest errors they make in listing. Until the result in *McLean* is altered by statute or subsequent decision, *ad valorem* tax discovery procedures in North Carolina will remain in some disorder.

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Constitutional Law—Changes in Party Affiliation and the Right to Vote in the Primary

Does the Constitution allow a state to bar a qualified voter from voting in a party primary for a period of months or even years after he has switched his party affiliation or last participated in another party's nominating procedures? The Supreme Court's increasing solicitude for the right to vote and for freedom to associate for political purposes has culminated within the last few years in the application of its new "com-

[65]One useful result of *McLean* is that it prevents supervisors from diplomatically arbitrating a valuation on the discovered property before it is listed. This has been a common practice not sanctioned under the statute. Valuation occurs after the listing of the property. The tax supervisor places a valuation on the property if it is feasible and the final valuation is set by the appropriate board. N.C. GEN. STAT. § 105-312(d) (1972).

pelling state interest" test[1] to cases challenging restrictions on the right to vote as a violation of equal protection and restrictions on freedom of association as a violation of due process, both guaranteed by the fourteenth amendment.[2] At the same time, voters have apparently abandoned traditional, long-term party loyalty in favor of an increasing tendency to vote for particular candidates or for the party most acceptable to them in a particular election. Since the beginning of 1971, federal courts in several states have faced challenges to the constitutionality of state statutes which condition a person's right to vote in his party's primary elections solely on the length of time since he switched his party registration or since he last participated in primary or convention activities of another party, without regard to the voter's motives or to the bona fide character of the switch.[3]

In *Rosario v. Rockefeller*,[4] the Court of Appeals for the Second Circuit upheld a New York law[5] requiring changes in party affiliation to be made before the last general election preceding the primary (a period of approximately seven to nine months) in order for the new party member to be eligible to vote in the next primary. Reversing the district court's decision, the appellate court found no constitutional restriction on the right to vote or freedom of association and no violation of the fourteenth amendment guarantee of equal protection.[6] The state had justified its statute as necessary to protect the integrity of the political party system in that it prevented "raiding," which was defined as "voters of one party fraudulently designating themselves as voters of another party in order to determine the results of the raided party's primary."[7] The Second Circuit accepted the state's argument that the

[1]*See* Singer, *Student Power at the Polls*, 31 OHIO ST. L.J. 703, 715-16 (1970) for an analysis of the elements of the compelling state interest test.

[2]*See* Williams v. Rhodes, 393 U.S. 23 (1968), for explicit recognition of the application of the "compelling state interest test" to alleged denials of both the right to vote and the freedom of association.

[3]Rosario v. Rockefeller, 458 F.2d 649 (2d Cir.), *cert. granted*, 92 S. Ct. 2062 (1972) (No. 71-1371); Yale v. Curvin, 345 F. Supp. 447 (D.R.I. 1972); Nagler v. Stiles, 343 F. Supp. 415 (D.N.J. 1972); Pontikes v. Kusper, 345 F. Supp. 1104 (N.D. Ill. 1972), *appeal docketed*, 40 U.S.L.W. 3619 (U.S. June 16, 1972) (No. 71-1631); Fontham v. McKeithen, 336 F. Supp. 153 (E.D. La. 1971), *appeal docketed*, 40 U.S.L.W. 3265 (U.S. Nov. 27, 1971) (No. 71-715); Gordon v. Executive Comm. of the Democratic Party, 335 F. Supp. 166 (D.S.C. 1971) (per curiam).

[4]458 F.2d 649 (2d Cir.), *cert. granted*, 92 S. Ct. 2062 (1972) (No. 71-1371).

[5]N.Y. ELECTIONS LAW § 186 (McKinney 1964).

[6]The court of appeals also reversed the district court's holding that § 186 violated the Voting Rights Act of 1970. Since this note considers the constitutonal issues of *Rosario* and comparable federal district court cases and since no other case on point discussed this issue, the *Roasrio* court's treatment of the statutory challenge will not be examined.

[7]458 F.2d at 651.

prevention of raiding is a compelling state interest and held that the means chosen for protecting the interest represented a minimal infringement on first and fourteenth amendment rights.

Until very recently, the right to vote in state elections was considered a mere privilege granted by the state subject to any restrictions the states might wish to impose, provided only that the state not violate the Constitution in regulating the franchise.[8] Citizens had no "right" to vote in state elections,[9] and the state wielded virtually unlimited powers in the regulation of voting in its elections.[10] Although these earlier cases are still cited in current decisions, the emphasis has shifted to the restriction that the regulations imposed by the states not violate any part of the Constitution.[11]

In recent years the Supreme Court has treated the franchise as a right protected by the Constitution, even though not expressly guaranteed for state elections:

> No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined. Our Constitution leaves no room for classification of people in a way that unnecessarily abridges this right.[12]

In *Reynolds v. Sims*[13] the Supreme Court described the right of suffrage as a "fundamental matter in a free and democratic society" and emphasized its importance by requiring that "any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized."[14]

The right to vote in a party primary receives the same zealous protection and is subjected to the same tests of constitutionality whenever the primary elections determine candidates for the general election or have been made an essential or integral step in the election process.[15]

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[8]Pope v. Williams, 193 U.S. 621, 632 (1904).

[9]Yet as early as 1886, while still recognized as a mere privilege rather than an absolute right guaranteed by the Constitution, voting was characterized as "a fundamental political right, because preservative of all rights." Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886).

[10]Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45, 50-51 (1959).

[11]*E.g.*, Evans v. Cornman, 398 U.S. 419, 422 (1970); Carrington v. Rash, 380 U.S. 89, 91 (1965).

[12]Wesberry v. Sanders, 376 U.S. 1, 17-18 (1964).

[13]377 U.S. 533 (1964).

[14]*Id.* at 561-62.

[15]Smith v. Allwright, 321 U.S. 649 (1944); United States v. Classic, 313 U.S. 299 (1941).

The traditional test for the constitutionality of a statute allegedly in violation of the fourteenth amendment guarantee of equal protection required only that the classification be rationally related to the achievement of legitimate state goals which the statute was designed to effect. In the application of this test, the law was presumed constitutional; unless the classification was wholly irrelevant to the state's objective, the act was upheld.[16] However, the Court increasingly carved out exceptions to the general rule and required stronger justification whenever certain types of classifications, based on "suspect criteria" or affecting "fundamental rights," were involved.[17] In *Williams v. Rhodes*[18] the Supreme Court explicitly held that only a "compelling state interest" could justify infringements on the "precious freedoms" of "the right of qualified voters, regardless of their political persuasion, to cast their votes effectively" and "the right of individuals to associate for the advancement of political beliefs."[19] The following year, in *Kramer v. Union Free School District*,[20] the Court applied the "compelling state interest test" to a New York law permitting only parents and guardians of children enrolled in local schools and the owners and lessees of taxable real property in the district to vote for members of district school boards.[21] As applied in *Kramer*, the test dictates that any statute affecting the right to vote must be carefully scrutinized and should be upheld only if it is necessary to promote a compelling state interest[22] and if the classifi-

[16]McGowan v. Maryland, 366 U.S. 420, 425-26 (1961). For arguments that the compelling state interest test is an invalid measure of infringements on the right to vote, and application of the traditional standard, *see, e.g.*, Kramer v. Union Free School Dist., 395 U.S. 621, 634 (1969) (Stewart, J., dissenting); Harper v. Virginia Bd. of Elections, 383 U.S. 663, 680 (1966) (Harlan, J., dissenting).

[17]*See generally* Shapiro v. Thompson, 394 U.S. 618, 655 (1969) (Harlan, J., dissenting); Cocanower & Rich, *Residency Requirements for Voting*, 12 ARIZ. L. REV. 477 (1970); Note, *Durational Residency Requirements in State Elections: Blumstein v. Ellington*, 46 IND. L.J. 222 (1971).

[18]393 U.S. 23 (1968).

[19]*Id.* at 30.

[20]395 U.S. 621 (1969).

[21]*Id.*

[22]More recently, the Court applied the compelling state interest test to durational residency requirements which bar participation in state or local elections until the voter has been a resident of the state or locality for a prescribed length of time. In Dunn v. Blumstein, 92 S. Ct. 995 (1972), Tennessee's statute requiring a year's residency in the state and three months in the county for eligibility to vote in state and local elections was struck down on the ground that the time limitation was only tenuously related to the state's need for knowledgeable voters or to its valid interest in preventing fraud. States can effect their interest in requiring that voters be bona fide residents by tests aimed directly at the elements of residency rather than by conclusively presuming that staying in the district a designated period of time automatically converts the person into a bona fide resident sufficiently knowledgeable about the issues to exercise the franchise.

cation was drawn with sufficient precision to be deemed necessary to achieve the state's asserted goal.[23]

The decision in *Rosario* and the issues it presents should be evaluated in the context of the several recent federal district court opinions examining similar statutes.[24] In *Fontham v. McKeithen*,[25] the sole case besides *Rosario* to sustain such a law, a six-month suspension of eligibility to vote in a party primary[26] was approved by the federal district court for the Eastern District of Louisiana. However, the court applied the traditional "rational relation" test for equal protection cases, an approach which seems clearly erroneous in view of the pattern of Supreme Court decisions.[27]

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[23]In a number of cases, including *Kramer*, the Court has avoided the question of whether the interest asserted by the state in support of its challenged legislation constituted a compelling state interest; instead, it held that the classification was not drawn with sufficient precision to be deemed "necessary to promote" the state's goal. *E.g.*, City of Phoenix v. Kolodziejski, 399 U.S. 204 (1970); Evans v. Cornman, 398 U.S. 419 (1970); Cipriano v. City of Houma, 395 U.S. 701 (1969) (per curiam).

[24]There is no Supreme Court decision which actually confronts this question. Jordan v. Meisser, 92 S. Ct. 947 (1972) (mem.), has sometimes been claimed to be on point; however, *Jordan* was dismissed for want of a substantial federal question because the plaintiff there could have enrolled after the normal deadline under an exception for prsons who did not have the age, residential, or other qualificatons at the time of the normal deadline for registration of one's party affiliation. *See* 458 F.2d at 654 n.6.

Two other Supreme Court cases are sometimes cited as supporting the constitutional validity of durational party membership requirements. Jenness v. Fortson, 403 U.S. 431 (1971), dealt with Georgia's restrictions on a person's eligibility to get on the ballot. The Court found no onerous limitations or inequities in the different routes for achieving a place on the ballot such as were found in *Williams v. Rhodes*, in which the restrictions strongly favored certain parties and were so great as to affect voters' rights to vote for the candidates of their choice.

In Lippitt v. Cipollone, 92 S. Ct. 729 (1972) (mem.), *aff'g* 337 F. Supp. 1405 (N.D. Ohio 1971), Ohio law denying a candidate's right to run in the primary of one party within four years of the time he voted as a member of a different party was held constitutional. The fact that the Supreme Court has left at least three of the six cases dealt with in this note, involving durational party membership requirements for eligibility to vote in primary elections, on its docket a substantial period of time suggests that it does not consider *Lippitt*, or the considerations on which it based its almost immediate decision in *Lippitt*, as dispositive of the issue. The right of a person to run as a candidate is not given the constitutional protection accorded the right to vote; thus, issues in the two kinds of cases involve different considerations unless restrictions on candidacy are so burdensome that they infringe on the right to vote or other fundamental rights, as in Williams v. Rhodes. Bendinger v. Ogilvie, 335 F. Supp. 572, 576 (N.D. Ill. 1971); Yale v. Curvin, 345 F. Supp. 447, 452 (D.R.I. 1972); Pontikes v. Kusper, 345 F. Supp. 1104, 1108-09 (N.D. Ill. 1972), *appeal docketed*, 40 U.S.L.W. 3619 (U.S. June 16, 1972) (No. 71-1631).

[25]336 F. Supp. 153 (E.D. La. 1971), *appeal docketed*, 40 U.S.L.W. 3265 (U.S. Nov. 27, 1971) (No. 71-715).

[26]LA. REV. STAT. ANN. § 18:270.204 (Supp. 1972).

[27]*See* notes 17-23 and accompanying text *supra*.

In *Gordon v. Executive Committee of the Democratic Party*,[28] a federal district court struck down provisions of a South Carolina law which required a voter in a primary election to swear that he had not voted in any primary, convention, or precinct meeting of another political party that year.[29] The "real intent of the statute," as interpreted by the court, was to prevent voting in two primaries for the same election; consequently, the enactment was upheld only to the extent it proscribed this fraudulent practice.[30] Although *Gordon* was one of the first decisions in the country to deal with the question of durational membership requirements for voting in primary elections, the court's *per curiam* opinion did not treat the issue of "raiding" at all.

In *Yale v. Curvin*,[31] *Pontikes v. Kusper*,[32] and *Nagler v. Stiles*,[33] however, three-judge federal district courts declared unconstitutional statutes specifically described as designed to prevent "raiding" of one party by members of another. In each of these cases the restriction on the first to vote was much more severe than in *Rosario*. New Jersey required a voter to abstain from voting in two subsequent annual primary elections before voting in the primary of another party.[34] Rhode Island denied a voter the right to vote in a primary for twenty-six months after voting in another party's primary or signing candidates' petitions to run in another party's primary or as an independent.[35] And Illinois permitted voters to participate in primaries only after twenty-three months had elapsed since they last voted in the primary of any other party.[36] All three of these cases regarded the prevention of raiding as a legitimate, perhaps even compelling, state interest, but felt that the means adopted by the legislatures imposed greater restrictions on the right to vote than were necessary to achieve the professed goal. Under these constructions the statutes failed to meet the "compelling state interest" test.

The opinions in *Yale v. Curvin* and *Nagler v. Stiles*, both of which were decided after *Rosario v. Rockefeller*, sought to distinguish *Rosario*

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[28]335 F. Supp. 166 (D.S.C. 1971) (per curiam).

[29]S.C. CODE ANN. § 23-400.71 (Supp. 1971).

[30]335 F. Supp. at 169.

[31]345 F. Supp. 447 (D.R.I. 1972).

[32]345 F. Supp. 1104 (N.D. Ill. 1972), *appeal docketed*, 40 U.S.L.W. 3619 (U.S. June 16, 1972) (No. 71-1631).

[33]343 F. Supp. 415 (D.N.J. 1972).

[34]N.J. STAT. ANN. § 19:23-45 (1964).

[35]R.I. GEN. LAWS ANN. §§ 17-15-24, -16-8 (1969).

[36]ILL. ANN. STAT. ch. 46, § 7-43(d) (Smith-Hurd Supp. 1972).

as involving a less onerous burden on the right to vote and on the freedom to associate for political purposes. Yet much of the reasoning of these cases, as well as the earlier *Pontikes v. Kusper*, would seem to apply equally to the less restrictive statute involved in *Rosario*.

Rosario was clearly correct in measuring the right of a citizen to vote in a party primary against the compelling state interest test, despite the *Fontham* court's conclusion to the contrary. Any burden or condition imposed on the right to vote requires the same close scrutiny elicited by an actual denial of the franchise.[37] The normal presumption of constitutionality of state legislation is derived from the basic assumption that the institutions of state government are structured to represent fairly all the people. When a challenged statute denies or conditions the right to vote, the challenge in effect attacks the foundation underlying the presumption of constitutonality, and the presumption cannot be invoked.[38] The burden thus devolves upon the state to justify both the interest served by the enactment and the means chosen to achieve that interest whenever fundamental rights are limited or denied.[39]

Does the prevention of raiding constitute a "compelling state interest" as the court held in *Rosario*? " 'Raiding' occurs when members of one party vote in the primary of another party for the sole purpose of bringing about the nomination of the weakest candidate."[40] The Court has repeatedly recognized a compelling state interest in the prevention of fraud and corruption.[41] The need to protect against subversion of the party system by persons with no loyalty voting in its primary is analogous to the state's desire to bar non-residents from entering the state, pretending to be residents, and voting in its elections—an interest upheld in *Dunn v. Blumstein* as a "legitimate and compelling governmental goal."[42] Federal courts have nonetheless split on the issue of whether the prevention of raiding qualifies as a compelling state interest.[43] *Rosario*[44]

[37]Kramer v. Union Free School Dist., 395 U.S. 621, 626 (1969); Dunn v. Blumstein, 92 S. Ct. 995, 1000 (1972); Harper v. Virginia Bd. of Elections, 383 U.S. 663, 670 (1966); Green v. McKeon, 335 F. Supp. 630, 632 (E.D. Mich. 1971); *cf.* Shapiro v. Thompson, 394 U.S. 618, 634 (1969). *But see* McDonald v. Board of Election Comm'rs, 394 U.S. 802 (1969).

[38]Kramer v. Union Free School Dist., 395 U.S. 621, 628 (1969).

[39]Dunn v. Blumstein, 92 S. Ct. 995, 1003 (1972).

[40]Pontikes v. Kusper, 345 F. Supp. 1104, 1108 (N.D. Ill. 1972), *appeal docketed*, 40 U.S.L.W. 3619 (U.S. June 16, 1972) (No. 71-1631); *accord*, Yale v. Curvin, 345 F. Supp. 447, 450-51 (D.R.I. 1972); Nagler v. Stiles, 343 F. Supp. 415, 416 (D.N.J. 1972).

[41]*See, e.g.*, Bullock v. Carter, 92 S. Ct. 849, 857 (1972); Shapiro v. Thompson, 394 U.S. 618, 637 (1969).

[42]92 S. Ct. at 1004.

[43]The difference apparently stems from doubts by some courts that raiding represents a

and *Nagler v. Stiles*[45] said "yes," *Gordon*[46] found no compelling purpose which could possibly justify restrictions of this nature on the right to vote, and *Yale v. Curvin*[47] avoided the issue as unnecessary for the disposition of the case.

Even if the compelling interest is found to exist, the means chosen to achieve the professed state goal must still be evaluated. Only if the classification is shown to be *necessary* to *promote* a compelling state interest can restrictions on fundamental rights be upheld.[48] Not only must the state adopt means which actually tend to help achieve its goal, it must follow the least burdensome path of furthering even the most compelling interest. "[I]f there are other, reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference."[49] *Rosario* found a minimal invasion of constitutional rights in the New York statute requiring changes in party affiliation before the preceding general election in order to vote in the primary. However, the court's argument seemed to turn on the assumption that no measures less restrictive would be equally effective in preventing raiding. "Allowing enrollment any time after the general election would not have the same deterrent effect on raiding for it would not put the voter in the unseemly position of asking to be enrolled in one party while at the same time intending to vote immediately for another."[50] The *Rasario* court dismissed the provision for challenges to individual voters[51] as too cumbersome to serve as an effective barrier against bad faith party cross-overs since no objective criteria exist for testing party loyalty in contrast to the concrete evidence available to establish a voter's place of residency.[52]

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substantial threat to the electoral process rather than from any disagreement over the legitimacy of the goal. *See, e.g.*, Pontikes v. Kusper, 345 F. Supp. 1104, 1108 (N.D. Ill. 1972), *appeal docketed*, 40 U.S.L.W. 3619 (U.S. June 16, 1972) (No. 71-1631). A state cannot logically justify restrictions on fundamental rights as a means of preventing an event which is unlikely to occur even without preventive measures.

[44]458 F.2d at 652.

[45]343 F. Supp. at 417-18.

[46]335 F. Supp. at 169.

[47]345 F. Supp. at 453.

[48]Dunn v. Blumstein, 92 S. Ct. 995, 1000 (1972); Cipriano v. City of Houma, 395 U.S. 701, 704 (1969) (per curiam); Kramer v. Union Free School Dist., 395 U.S. 621, 627 (1969); Shapiro v. Thompson, 394 U.S. 618, 634 (1969).

[49]Dunn v. Blumstein, 92 S. Ct. 995, 1003 (1972).

[50]458 F.2d at 653.

[51]N.Y. ELECTIONS LAW § 332 (McKinney 1964).

[52]458 F.2d at 653.

Yet, as *Pontikes v. Kusper* pointed out, it is not clear that raiding would constitute a substantial problem in the absence of statutes limiting the right to vote in primaries after a change in party affiliation. "There is no evidence to indicate that raiding is more likely to take place than 'honest' switches of affiliation. Forty-four states do not impose post-election restraints on changing affiliation. This would indicate that raiding is not a serious threat to the multi-party system."[53] In the absence of evidence to the contrary, it would seem that these other six states could get along with laws merely requiring an oath of affiliation and providing for individual challenges of alleged raiders just as easily as the forty-four.[54] In fact, the primary function of such restrictive statutes may be to protect the advantage of the dominant party by imposing a high price on transfers of party allegiance rather than to serve the avowed purpose of preserving party integrity.[55]

The difficulty of preventing raiding by the use of individual challenges does not necessarily justify resorting to more restrictive techniques for achieving the same goal. Adoption of a conclusive presumption of non-residency until a would-be voter has been in the state a specified length of time[56] or as long as he remains in the military service[57] has been held to violate the equal protection clause. Conclusive presumptions barring certain classes of would-be voters from the franchise almost inevitably violate the compelling state interest test by excluding some citizens with a stake in the outcome equal to that of other individuals allowed to vote.[58] Admittedly, existence of an improper motive for switching party registration is less susceptible of proof than residency, but it is not necessarily impossible to ascertain. Significantly, the burden is on the state to prove the necessity of a challenged statute as a means of achieving a compelling interest.[59] If forty-four states manage without such prohibitive laws, the remaining six presumably should not be able to limit the franchise in this manner without demon-

[53]Pontikes v. Kusper, 345 F. Supp. 1104, 1108 (N.D. Ill. 1972), *appeal docketed*, 40 U.S.L.W. 3619 (U.S. June 16, 1972) (No. 71-1631); *accord*, Yale v. Curvin, 345 F. Supp. 447, 451 (D.R.I. 1972); Nagler v. Stiles, 343 F. Supp. 415, 417 (D.N.J. 1972).

[54]*See, e.g.*, N.C. GEN. STAT. §§ 163-59, -74, -87 (1972).

[55]Fontham v. McKeithen, 336 F. Supp. 153, 173-74 (E.D. La. 1971) (Wisdom, J., dissenting) *appeal docketed*, 40 U.S.L.W. 3265 (U.S. Nov. 27, 1971) (No. 71-715).

[56]Dunn v. Blumstein, 92 S. Ct. 995, 1007 (1972).

[57]Carrington v. Rash, 380 U.S. 89 (1965).

[58]*See* Dunn v. Blumstein, 92 S. Ct. 995, 1007 (1972); Carrington v. Rash, 380 U.S. 89, 95-96 (1965).

[59]Dunn v. Blumstein, 92 S. Ct. 995, 1003 (1972); Williams v. Rhodes, 393 U.S. 23, 31 (1968).

strating a special need for more stringent protection against raiding, a need which has apparently not been established.[60]

Is the requirement that a voter change his party registration six months in advance of the primary or before the preceding general election effective in preventing raiding? According to the court in *Rosario*, "[f]ew persons have the effrontery or the foresight to enroll as say, 'Republicans' so that they can vote in a primary some seven months hence, when they full well intend to vote 'Democratic' in only a few weeks."[61] On the other hand, it seems doubtful that anyone unscrupulous enough to change his party affiliation with the intent of sabotaging the primary of a party to which he feels no loyalty would actually be deterred by the relatively minor inconsistency involved in making the switch before a general election in which he intends to vote for a different party. New York's law simply requires the malicious cross-registrant to plan ahead[62] and is much less likely to restrain the potential "raider" than the person who honestly feels that his over-all party loyalty lies with a party other than the one which he prefers in the upcoming general election.[63] One of the factors on which *Dunn v. Blumstein* turned was the recognition that honest new residents would be barred from voting while those willing to swear falsely to length of residency would not;[64] the New York primary law is similarly too imprecisely

[60]*Rosario* sought to justify the New York statute by the existence of the smaller Conservative and Liberal parties, which were considered particularly vulnerable to raiding and were offered as evidence of New York's special need for protection against raiding. 458 F.2d at 652 n.3. But this fact alone cannot license a state to deny or restrict the right to vote in ways that would otherwise be constitutionally impermissible without some showing that raiding is likely to occur or that less stringent restrictions are insufficient to repel the danger.

[61]458 F.2d at 653.

[62]*See* Fontham v. McKeithen, 336 F. Supp. 153, 174 (E.D. La. 1971) (Wisdom, J., dissenting), *appeal docketed*, 40 U.S.L.W. 3265 (U.S. Nov. 27, 1971) (No. 71-715).

[63]Conceivably, the states are actually seeking to "preserve the integrity of the political party system" by denying primary participation to anyone who does not exhibit a more or less permanent attachment to the party. But the need for stability of the political system does not justify exclusion of voters lacking long-term party attachments anymore than the need for political stability of a state authorizes the unconstitutional goal of "fencing out" from the franchise persons with views alien to the state and who have not been residents long enough to absorb state attitudes or at least to develop feelings of loyalty towards the state. Hall v. Beals, 396 U.S. 45, 53 (1969) (per curiam) (Marshall, J., dissenting): Cipriano v. City of Houma, 395 U.S. 701, 706 (1969) (per curiam); Carrington v. Rash, 380 U.S. 89, 93-94 (1965). Nor is it clear that allowing relatively unrestricted switches in party membership will damage the party system. Historically, many politicians as well as individual members have changed their party affiliation for opportunistic as well as ideological reasons; changes of this type may well add vitality to the party system rather than dilute it. Lippitt v. Cipollone, 92 S. Ct. 729, 730 (1972) (mem.) (Douglas, J., dissenting), *aff'g* 337 F. Supp. 1405 (1971).

[64]92 S. Ct. at 1005.

drawn to achieve its asserted purpose and gives the very person the law is intended to restrict an advantage over the honest citizen who falls within its terms.

If the time limit imposed on party membership as a condition to voting in the primary elections excludes people who have as strong a loyalty to the party or interest in the outcome of the primary as a substantial number of the long-time party members, the statute cannot withstand constitutional scrutiny.[65] Such time limits are inappropriate in a period when voters increasingly base their choice upon the candidate or the parties' stands on a current issue.[66] Voters need not commit their loyalties to a party on a long-term basis, from the national down to the local level, to qualify as being genuinely interested in a primary election.[67] Candidates within the same party frequently recommend conflicting programs; the national party may espouse issues totally different from those with which the local party is concerned; and the events of any moment may focus the spotlight on previously insignificant questions or completely re-align the standing of potential candidates. The privilege of voting for any candidate in a primary should not be contingent upon the voter's willingness to commit himself far in advance to a party whose candidates and issues may stand for opposite positions on different levels of government or at different times. While the six-month period of the New York law permits a more knowledgeable decision and greater flexibility in adjusting to changing issues and candidates on varying levels of government, the difference between the statute examined by *Rosario* and the twenty-six-month law of Rhode Island is merely a matter of degree. Even six months beforehand, the issues and candidates of a particular election are often unidentifiable; many voters in sympathy with the stand of one party or its candidates for that election would be barred from voting in its primary because they were unable to discern until too late how the choice would present itself.[68]

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[65]In Kramer v. Union Free School Dist., 395 U.S. 621, 632 (1969), the Supreme Court held that "[w]hether classifications allegedly limiting the franchise to those resident citizens 'primarily interested' deny those excluded equal protection of the laws depends, *inter alia*, on whether all those excluded are in fact substantially less interested or affected than those the statute includes."

[66]Yale v. Curvin, 345 F. Supp. 447, 451 (D.R.I. 1972).

[67]*Id.* at 453; Pontikes v. Kusper, 345 F. Supp. 1104, 1109 (N.D. Ill. 1972), *appeal docketed*, 40 U.S.L.W. 3619 (U.S. June 16, 1972) (No. 71-1631).

appeal docketed, 40 336 F. Supp. 153, 174 (E.D. La. 1971) (Wisdom, J., dissenting), appeal docketed, 40 U.S.L.W. 3265 (U.S. Nov. 27, 1971) (No. 71-715).

CONCLUSION

Although the Court of Appeals for the Second Circuit characterized the New York law as a minimal infringement on the precious freedom of association and the right to vote, the reasoning behind several federal district court cases dealing with comparable, more restrictive statutes would seem to call for a contrary interpretation of the effect of New York law. The compelling state interest test for determining whether restrictions on fundamental rights are unconstitutional requires that the state interest furthered by the legislation be a compelling one, that the statute carry the burden of justifying the restriction, that the restriction be necessary to promote the interest, and that the classification be precisely tailored so that the lines of exclusion correspond almost exactly with the exclusions necessary for achievement of the legislative goal. The Second Circuit apparently diluted the compelling state interest test, for it ignored the requirement that the classification be precisely tailored. It found the restriction necessary to achieve the state's interest in preventing raiding even though it was not clear that raiding constituted a significant problem or that much less restrictive means might not suffice to deal with whatever danger was present. In view of the development of the compelling state interest test and its recent application to durational residency requirements for voting, restrictions on the right to vote in primary elections cannot be conditioned upon the length of time since the voter switched his party registration or voted in another party's primary. The right to vote, whether in a general or primary election, ranks among the most cherished rights of our democratic system. Without strong evidence that raiding represents a serious threat to the integrity of the electoral process, no state can justify denying a citizen's fundamental constitutional right to vote in a primary election solely because he participated in the nominating procedure of another party for a recent prior election or within a specified period of time.

NORMA S. HARRELL

Constitutional Law—Cognovit Notes: Pretrial Waiver of Constitutional Rights in Civil Cases

In *D.H. Overmyer Co. v. Frick Co.*[1] and its companion case, *Swarb*

[1] 92 S. Ct. 775 (1972).