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Substitution of Nominees on the Ballot for Congressional Office, "Sore Loser" Laws, and Other "Ballot Access" Issues

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Substitution of Nominees on the Ballot for Congressional Office, "Sore Loser" Laws, and Other "Ballot Access" Issues

Summary

In July of 2006 federal courts ruled that former Representative Tom DeLay, who had earlier won the Republican primary nomination for Congress from the 22nd District of Texas, could not have his name substituted on the general election ballot by the Republican party even if Mr. DeLay had changed his legal residence and voluntarily withdrew from the race. In Ohio, however, a different result ensued a month later when Representative Robert Ney, who had won the Republican party nomination in an earlier May primary, formally announced his withdrawal from the race on August 14, 2006, but was permitted to be replaced through a "special primary" to nominate another candidate. In Connecticut, the defeated candidate for the Democratic party nomination in the August 2006 primary, incumbent Senator Joseph Lieberman, appears to be able to be on the ballot either as an "independent" or nominee of a minor party in the general election in November, although a similar ballot position for the general election for one who had lost a party nominating primary would be barred in numerous states (including Ohio) because of the application of their so-called "sore loser" laws. Several years earlier, on September 30, 2002, former Senator Robert Torrecelli, the Democratic nominee for the United States Senate from New Jersey, voluntarily withdrew from the Senate race and, even at that late date, a new candidate was allowed to be chosen by the Democratic party in New Jersey and to have his name appear on the November ballot. Meanwhile in Missouri, the Democratic nominee for the United States Senate in the 2000 election, former Governor Mel Carnahan, died in a plane crash on October 16, 2000, three weeks before the general election, was *not* able to be replaced on the ballot, received the most votes in the ensuing election, and the "vacancy" created was filled by a temporary replacement named by the Governor.

It is the constitutional authority of the *states* in the United States Constitution, at Article I, Section 4, clause 1, concerning the "times, places, and manner" of federal elections, which allows the states to promulgate their own laws, rules and regulations regarding the ballot, the structure of the ballot, and concerning so-called "ballot access" requirements for political party nominees, new party nominees, and independent candidates, that has led to the varying and different treatment and requirements for placement, removal and/or substitution of a candidate's name on the ballot, depending on the state in which the congressional election is to be held.

This report discusses the extent of the states' authority over the procedures of federal elections, examines the limitations placed by the courts on the ability of the states to limit or regulate "ballot access," that is, the requirements of minor or new party candidates, or independent candidates, to have their names printed on the ballot and programmed into voting machines, and analyzes the new cases on ballot access that have been handed down by the Federal courts in recent months.

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Substitution of Party Nominees on the Ballot for Congressional Office, State "Sore Loser" Laws, and Other "Ballot Access" Issues

Background

On July 6, 2006, a United States District Court ruled that former Representative Tom DeLay, who had earlier won the Republican primary nomination for Congress from the 22nd District of Texas, could not have his name substituted on the general election ballot by the Republican party even if Mr. DeLay had changed his legal residence and voluntarily withdrew from the race.[1] That decision was upheld on appeal by the United States Court of Appeals, and a request to stay the opinion was denied by Justice Scalia of the United States Supreme Court.[2]

In Ohio, a different result ensued a month later when Representative Robert Ney, who had won the Republican party nomination in an earlier May primary, formally announced his withdrawal from the race on August 14, 2006.[3] In that instance, the Republican party in Ohio was permitted to have a "special primary" to nominate another candidate for the general election (although some questions had surfaced as to whether one of the candidates would be eligible to run in the primary and general election because of Ohio's "sore loser" law.)[4]

In Connecticut, the defeated candidate for the Democratic party nomination in the August 2006 primary, incumbent Senator Joseph Lieberman, appears to be able to be on the ballot either as an "independent" or nominee of a minor party in the general election in November,[5] although a similar ballot position for the general election for one who had lost a party nominating primary would be barred in

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[1] *Texas Democratic Party v. Benkiser*, ___ F.Supp. ___ , Case No. A-06CA-459-SS (D.C.W.Tex 2006).

[2] *Texas Democratic Party v. Benkiser*, ___ F.3d ___ , No. 06-50812 (5th Cir. August 3, 2006); see *Application for Stay of Enforcement of the Judgment Below Pending the Filing and Disposition of a Petition for a Writ of Certiorari to the Fifth Circuit*, August 7, 2006.

[3] Representative Ney publicly announced his decision to withdraw on August 7, 2006 (Washington Post, "Embattled Representative Ney Won't Seek Reelection," at P. A1, August 8, 2006), but did not formally notify state officials until August 14, 2006. Associated Press, "Ohio Rep. Ney Asks Off the Ballot," August 14, 2006.

[4] State of Ohio, Office of the Attorney General, Opinion No. 2006-035, August 10, 2006.

[5] Washington Post, "Lieberman Defeated in Democratic Primary; Senator Vows Independent Run as Antiwar Candidate Prevails," p. A1, August 9, 2006; Washington Post, "Connecticut Groups Push to Remove Lieberman From Ballot," p. A6, August 22, 2006.

numerous states (including Ohio) because of the application of their so-called "sore loser" laws.

Several years earlier, on September 30, 2002, former Senator Robert Torrecelli, the Democratic nominee for the United States Senate from New Jersey, voluntarily withdrew from the Senate race and, even at that late date, a new candidate was allowed to be chosen by the Democratic party in New Jersey and to have his name appear on the November ballot.[6] Meanwhile in Missouri, the Democratic nominee for the United States Senate in the 2000 election, former Governor Mel Carnahan, died in a plane crash on October 16, 2000, three weeks before the general election, was *not* able to be substituted for, and continued to have his name on the ballot in the November general election. When the deceased candidate received the most votes in the ensuing election, a "vacancy" was declared and the acting Governor, under the 17th Amendment and Missouri law, chose a temporary replacement until the next statewide election to fill the remainder of the term.[7]

This report will examine federal law and constitutional provisions to explain the seeming disparity in treatment concerning the placing and substitution of candidates names on the ballot for federal offices. In the course of this discussion, the report will analyze what have generally been characterized as "ballot access" issues in the states.

Division of Constitutional Authority

Initially, it should be noted that under our federal system, an interesting division of jurisdiction occurs in the case of elections to the United States Congress. In the first instance, the **terms** of federal congressional offices and the **qualifications of candidates** eligible for federal offices are established and fixed by the United States Constitution, and are unalterable by the Congress itself or by any state unilaterally.[8] The Constitution expressly provides, however, in the so-called "times, places and manner" clause, that the individual states have the general authority to **administer** congressional elections within their jurisdictions.[9] Furthermore, the states, within constitutional parameters, have the authority to set the **qualifications to vote** for

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[6] *New Jersey Democratic Party, Inc. v. Samson*, 814 A.2d 1025 (order, October 2, 2002), 814 A.2d 1028 (opinion, Supreme Court of New Jersey, October 8, 2002). The Supreme Court of the United States denied review of the New Jersey Supreme Court order and decision, *Forrester v. New Jersey Democratic Party, Inc.*, 537 U.S. 803 (application for stay denied, October 7, 2002), *cert. denied*, 537 U.S. 1083 (2002).

[7] Washington Post, "Jean Carnahan Named to Senate," at A6, December 6, 2000. *Note* generally, CRS Report RL31338, "Disqualification, Death, or Ineligibility of the Winner of a Congressional Election," by Jack Maskell.

[8] United States Constitution, Article I, Section 2, cl. 2; and Article I, Section 3, cl. 3. *See Powell v. McCormack*,395 U.S. 486 (1969); *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995); *Cook v. Gralike*, 531 U.S. 510 (2001).

[9] Article I, Section 4, cl. 1. This provision of the Constitution reserves to Congress a residual, superceding authority to adopt legislation concerning such elections.

those federal offices at these elections.[10] As to the final results of the election and seating in Congress, the Constitution provides that each House of Congress has the authority to be the final judge of the **results** of those congressional elections held in the states, and to judge the three **constitutional qualifications** for office (age, citizenship, and inhabitancy in the state when elected) of the Members-elect presenting themselves for membership in the institution.[11]

State Authority Over Election Administration and Procedures

The states' authority over election administration and procedures for congressional elections is set out at Article I, Section 4, clause 1, of the United States Constitution, and provides as follows:

> The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

Under this express constitutional authority of the states to regulate the "times, places and manner" of congressional elections, the states may promulgate regulatory and administrative provisions dealing with the mechanics and procedures of the elections for congressional office which are held within their jurisdictions. This procedural and administrative authority has been found to extend to such things as, for example, the form of the ballots, the positioning of candidates' names and party affiliations on the ballot, voting procedures and mechanics, counting votes and certifying winners, and the nominating and/or petition process generally, including the authority to enact reasonable requirements and regulations for a candidate's name to appear on the ballot — that is, so-called "ballot access" requirements for major party, new party, and independent candidates.[12] In discussing the breadth of the legislative authority in the states over the conduct of federal elections, the Supreme Court explained as follows:

> The subject matter is the "times, places and manner of holding elections for Senators and Representatives." It cannot be doubted that these comprehensive

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[10] In Article I, Section 2, clause 1, and the 17th Amendment of the Constitution, states are authorized to establish the qualifications to *vote* in federal congressional elections, as long as such qualifications are the same as those to vote in state elections for the most numerous house of the state legislature. The states must follow constitutional mandates for federal elections, such as the 15th (Negro/emancipated slave voting rights), 19th (women's suffrage), and 26th Amendments (18-year old vote), as well as equal protection principles of the 14th Amendment, and federal statutory requirements for voting rights.

[11] Article I, Section 5, cl. 1:"Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members ...."

[12] *Storer v. Brown*, 415 U.S. 724 (1974); *Jenness v. Fortson*, 403 U.S. 431 (1971); *Bullock v. Carter*, 405 U.S. 134, 145 (1972); *Williams v. Tucker*, 382 F. Supp. 381, 387-388 (M.D.Pa. 1974).

> words embrace an authority to provide a complete code for congressional elections, not only as to times and places, but in relation to notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns....[13]

It is this authority of the *states* over the ballot, the structure of the ballot, and concerning so-called "ballot access" requirements for political party nominees, new party nominees, and independent candidates, that has led to the varying and different treatment and requirements for placement, removal and/or substitution of a candidate's name on the ballot, depending on the state in which the congressional election is to be held. Since these matters are generally subjects of state law, within the parameters and requirements of the United States Constitution, it is the application of the particular state law that may result in a different outcome of a withdrawal of a congressional candidate who has won a major party nomination in a primary in Texas, as opposed to a withdrawal and substitution of a party-nominated candidate for Congress in Ohio or in New Jersey, the death of a nominated candidate in Missouri, or the ability to be on the ballot in Connecticut as an independent or the nominee of a new party in a general election after losing a party primary for the same office.

Although the state legislatures have broad authority under the United States Constitution concerning the procedures for federal elections within their jurisdictions, the constitutional provision expressly provides a superceding, residual authority within the Congress to legislate different provisions for federal elections held in the states. This residual authority in Congress has been found to be as extensive and complete as the state legislatures' authority over such elections within their respective jurisdictions. After discussing the breadth and extent of the states' authority over election procedures for federal office, the Supreme Court explained the authority of Congress over such elections:

> This view is confirmed by the second clause of Article I, section 4, which provides that "the Congress may at any time by law make or alter such regulations," with the single exception stated. The phrase "such regulations" plainly refers to regulations of the same general character that the legislature of the State is authorized to prescribe with respect to congressional elections. In exercising this power, the Congress may supplement these state regulations or may substitute its own. It may impose additional penalties for the violation of state laws or provide independent sanctions. It 'has general supervisory power over the whole subject.' *Ex parte Seibold,* 100 U.S. 371, 387; *Ex parte Yarbrough,* 110 U.S. 651, 661; *Ex parte Clark,* 100 U.S. 399; *United States v. Mosely,* 238 U.S. 383, 386; *Newberry v. United States,* 256 U.S. 232, 255.[14]

Despite the broad, residual and superceding authority of Congress in this area, Congress has not extensively exercised this power with respect to the procedures for federal elections in the various states. Congress has, it may be noted, legislated in this area, for example, in 1872 to assure that there will be a uniform date for the election

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[13] *Smiley v. Holm,* 285 U.S. 355, 366 (1932).

[14] 285 U.S. at 366-367.

of Representatives and Senators throughout all of the states (the Tuesday immediately following the first Monday in November in the particular, applicable even-numbered election years),[15] and has legislated a detailed system for regulating, reporting and disclosing the campaign finances of candidates to federal office.[16] However, as a policy matter, and under Article I, Section 4, clause 1, Congress has traditionally allowed the states, within the framework of the federal constitutional and statutory mandates, to exercise the substantive control over the procedures and administrative details of elections within their own respective jurisdictions (and the states have then often further devolved immediate administrative and supervisory control over many election procedures to local and county authorities within their jurisdictions). This policy has generally recognized the principle that because of the varying political cultures, practices, and traditions across the nation, and from state-to-state, that operational authority over most of the election mechanics is more appropriately left to the states and localities.

Thus, as shown by the recent instances regarding candidate-substitutions on the ballot for the United States House of Representatives and the United States Senate, the particular procedural laws of the state in question govern the resolution of the issue. In Texas, the courts looking at the matter of the attempted withdrawal of and replacement for former Representative Tom DeLay on the ballot for the United States House of Representatives from the 22nd district of Texas, interpreted a Texas election law, in light of the United States Constitution's qualifications requirements, to find that former Representative Tom DeLay could not be replaced on the ballot by the Republican party after Mr. DeLay had won the nomination at a primary election. To prevent what has been described as the "gaming" of the nomination system with the use of so-called "straw" candidates, "stalking horses" or "place-holder" candidates, Texas law currently provides that when parties nominate candidates by primary election, one party is not permitted to later replace a candidate so nominated, unless the candidate is not "eligible" for the office.[17] Since "eligibility" for the office of Representative in the United States Congress is established in and governed exclusively by the provisions of the United States Constitution — and those provisions require only that the candidate be 25 years of age, a citizen of the United States for seven years and, at the time of election, be an inhabitant of the state from which elected — Mr. DeLay was found not to be, at the time of the decision, "ineligible" under the United States Constitution for the congressional seat, and thus could not be replaced on the ballot under Texas law.[18]

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[15] 17 Stat. 28, ch. 11, § 3, February 2, 1872, now 2 U.S.C. § 7.

[16] *See* Federal Election Campaign Act, as amended, 2 U.S.C. §§ 431 et seq.

[17] Texas Election Code §§ 145.003, 145.036, and 145.037. See discussion in *Texas Democratic Party v. Benkiser*, (5th Cir.) Slip op. at 25, n.19.

[18] There is no "durational" residency requirement under the Constitution, as one must merely be an inhabitant of the state "when elected." Article I, Section 2, cl. 2; *See* 2 Farrand, *Records of the Federal Convention of 1787*, 216-219, and, for example, case of Pierre E.G. Salinger, Case 134, *United States Senate Election, Expulsion, and Censure Cases, 1793-1990*, Senate Doc. 103-33, at 413 (1995), S.Rept. 1381, 88th Cong., 2d Sess. (1964). State law may thus not create nor operate to create a "durational" residency requirement, or a "pre-election residency" requirement which is additional to the three exclusive

(continued...)

In Ohio, however, after the withdrawal of a nominated candidate, the election laws of the State of Ohio permit the political party to name a substitute, or if the candidate withdraws at least 80 days before the general election, to have a "special election" primary to nominate a substitute.[19] So although Representative Ney withdrew from the congressional election race in Ohio at an even later date than did former Representative DeLay in Texas, a special primary was allowed to be held in Ohio to substitute a name on the ballot as the Republican party's nominee for the general election for Representative. Similarly, in New Jersey, the state election laws provided for a specific procedure for the replacement of candidates who withdrew up to 50 days before an election,[20] but the courts found that the state statute did not necessarily preclude party substitution for a withdrawn candidate closer to the election if the administrators of the election certified that the substitution could be made without significant disruption to election procedures.[21] In Missouri, however, the Democratic nominee for United States Senator died in a plane crash so close to the November 2000 general election, on October 16, 2000, that the deadline under Missouri law for finalizing the ballot and programming machines had passed; the party therefore could not substitute another candidate, and the deceased candidate's name was left on the ballot.[22]

Constitutionality of Ballot Access Rules

"Ballot access" rules and provisions in the states, the processes by which candidates are certified to have their names appear on the ballot and programmed into voting machines, are generally promulgated by states in an attempt to prevent the proliferation of frivolous candidates, ballot overcrowding and voter confusion,

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[18] (...continued)
constitutional qualifications to congressional office. *Powell v. McCormack, U.S. Term Limits, Inc. v. Thornton,*; *Cook v. Gralike; Schaefer v. Townsend,* 215 F.3d 1031 (9th Cir. 2000); *Campbell v. Davidson,* 233 F.3d 1229 (10th Cir. 2000).

[19] Ohio Revised Code, Sections 3513.31(B), 3513.312. See State of Ohio, Office of the Attorney General, Opinion No. 2006-035, at pp. 2-5, August 10, 2006.

[20] New Jersey Statute Annotated, §19:13-20 (1999).

[21] *New Jersey Democratic Party. v. Samson,*; *Forrester v. New Jersey Democratic Party, Inc.*, 537 U.S. 803 (application for stay denied, October 7, 2002), *cert. denied,* 537 U.S. 1083 (2002).

[22] Annotated Missouri Statutes, §§ 115.379, and 105.040. Under the so-called "American Rule," observed and followed in both House and Senate election contests and disputes, if a deceased (or otherwise ineligible) congressional candidate receives the most votes in an election, a "vacancy" occurs and is filled according to the Constitution and implementing state law, but the second place finisher is *not* declared the winner (as under the so-called "British Rule"). Note, generally, discussion in CRS Report RL31338, *supra*, and Riddick and Fruman, *Riddick's Senate Procedure, Precedents and Practice,* S. Doc. No. 101-28, 101st Cong., 2d Sess. 701 (1992); 2 *Deschler's Precedents of the U.S. House of Representatives,* Ch. 7, § 9, at 96; and *Smith v. Brown* (40th Cong.), Rowell's Digest of Contested Election Cases, 220-221.

election fraud, and to facilitate generally proper election administration.[23] While those interests of the state are certainly legitimate and significant, ballot access procedures must, under constitutional principles of the First and Fourteenth Amendments, provide a reasonable and not-impermissibly discriminatory method for new party and independent candidates to qualify for the ballot.[24] That there may be different methods or "tracks" to the ballot, or differing requirements to have one's name placed on the ballot, depending on whether one is the nominee of a major political party, a minor or new party, or an independent candidate, is not necessarily constitutionally impermissible, as long as such methods do not "unfairly or unnecessarily burden" new party or independent candidates.[25]

In examining state laws which treat different candidates differently as far as ballot access, the courts will not always apply "heightened scrutiny" to determine if the hurdles imposed on new, minor or independent candidates by election procedures are, on balance, permissible. If the state laws impose only what are found to be "reasonable, nondiscriminatory restrictions" on the protected rights affected, then the regulations and procedures of the state would be upheld when they are sufficiently related to the legitimate state interests asserted.[26] However, when the restrictions on rights are considered to be "severe," then the regulation in question "must be narrowly drawn to advance a state interest of compelling importance."[27]

The Supreme Court explained the analytic framework it employs for state regulations which work to limit access to the ballot and thus impact associational rights of voters, political parties, candidates, and their supporters:

> When deciding whether a State election law violates First and Fourteenth Amendment associational rights, we weigh the "character and magnitude" of the burden the State's rule imposes on those rights against the interests the State contends justify that burden, and consider the extent to which the State's concerns make the burden necessary. [citations omitted] ... Regulations imposing

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[23] *Storer v. Brown*, 415 U.S. 724 (1974); *Jenness v. Fortson*, 403 U.S. 431 (1971); *Bullock v. Carter*, 405 U.S. 134, 145 (1972); *Williams v. Tucker*, 382 F. Supp. 381, 387-388 (M.D.Pa. 1974).

[24] "[B]allot access must be genuinely open to all, subject to reasonable requirements." *Lubin v. Panish*, 415 U.S. 709, 719 (1974); *Anderson v. Celebrezze*, 460 U.S. 780 (1983); *Jenness v. Fortson*, 403 U.S. 431, 439 (1971); *McCarthy v. Briscoe*, 429 US 1317 (1976); *Williams v. Rhodes*, 393 U.S. 23 (1968).

[25] *Lubin v. Panish, supra* at 716. Although various state laws may differ significantly, major party candidates are generally granted a ballot position in general elections upon nomination by their party at either a primary, convention or caucus, while minor, new party and independent candidates must usually submit petitions signed by a certain percentage of the voting age population, registered voters, or percentage of those actually voting in previous elections, to qualify for a ballot position.

[26] *Jenness v. Fortson*, 403 U.S. at 441- 442; *Williams v. Rhodes*,; *Bullock v. Carter*, 405 U.S. 134 (1972); *American Party of Texas v. White*, 415 U.S. 767 (1974).

[27] *Anderson v. Celebrezze*, 460 U.S. at 788, 789; *Burdick v. Takushi*, 504 U.S. 428, 434 (1992); *Norman v. Reed*, 502 U.S. 279, 289 (1992); *see* discussion in *Libertarian Party of Ohio v. Blackwell*, ___ F.3rd ___ No. 04-4215, at 5 (6th Cir. September 6, 2006).

> severe burdens on plaintiffs rights must be narrowly tailored and advance a compelling state interest. Lesser burdens, however, trigger less exacting review, and a State's "important regulatory interests," will usually be enough to justify "reasonable nondiscriminatory restrictions."[28]

Additionally, reasonable "ballot access" procedures, including filing requirements, filing deadlines, a show of qualifying support by new or minor party or independent candidates, "sore loser" laws and other restrictions on cross-filing and multiple candidacies, have been found generally to be within the state's purview to "regulate[ ] election *procedures*" to serve the state interest of "protecting the integrity and regularity of the election process....," and when found to be within the state's administrative authority over election procedures, were not deemed to be impermissible "additional qualifications" for federal office, even though they may create certain procedural hurdles or requirements which a candidate must overcome to be placed on the ballot.[29] The distinction between permissible, procedural "ballot access" regulations by the states, such as the "sore loser" laws and the requirements for independents or new party candidates to demonstrate some level of support (such as a certain number of signatures on a petition) to appear on a ballot, as opposed to prohibited "additional qualification" requirements added by the states was explained by the Supreme Court in *U.S. Term Limits, Inc.:*

> The provisions at issue in *Storer* and our other Elections Clause cases were thus constitutional because they regulated election *procedures* and did not even arguably impose any substantive qualification rendering a class of potential candidates ineligible for ballot position. They served the state interest in protecting the integrity and regularity of the election process, an interest independent of any attempt to evade the constitutional prohibition against the imposition of additional qualifications for service in Congress. And they did not involve measures that exclude candidates from the ballot without reference to the candidate's support in the electoral process.[30]

Disaffiliation Rules and "Fusion" Candidates

In California, the statutory scheme upheld by the Supreme Court, in *Storer v. Brown, supra,* worked to prevent a ballot position to an independent candidate not only if that candidate had run in and been defeated in a primary election of a political party (a so-called "sore loser" provision), but also if that person had "voted in the immediately preceding primary" or "had a registered affiliation with a qualified political party at any time within one year prior to the immediate preceding primary election."[31] This so-called "disaffiliation" requirement, along with the "sore loser" provision, were found by the Supreme Court to further important and compelling state interests:

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[28] *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997).

[29] *See* discussion in *U.S. Term Limits, Inc. v. Thornton,* 514 U.S. at 832-835, comparing legitimate "ballot access" provisions as in *Storer v. Brown,*, with impermissible additional qualifications for federal office, such as individual state-imposed term limits.

[30] *U.S. Term Limits, Inc. v. Thorton,* 514 U.S. at 835.

[31] *Storer v. Brown*, 415 U.S. at 726.

> A candidate in one party primary may not now run in that of another; if he loses in the primary, he may not run as an independent; and he must not have associated with another political party for a year prior to the primary.... The direct primary in California is not merely an exercise or warm-up for the general election but an integral part of the entire election process, the initial stage in a two-stage process by which the people choose their public officers. It functions to winnow out and finally reject all but the chosen candidates. The State's general policy is to have contending forces within the party employ the primary campaign and primary election to finally settle their differences. The general election ballot is reserved for major struggles; it is not a forum for continuing intraparty feuds. The provision against defeated primary candidates running as independents effectuates this aim, the visible result being to prevent the losers from continuing the struggle and to limit the names on the ballot to those who have won the primaries and those independents who have properly qualified. The people, it is hoped, are presented with understandable choices and the winner in the general election with sufficient support to govern effectively.
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> Section 6830(d)(Supp. 1974) carries very similar credentials. It protects the direct primary process by refusing to recognize independent candidates who do not make early plans to leave a party and take the alternative course to the ballot. It works against independent candidates prompted by short-range political goals, pique, or personal quarrel. It is also a substantial barrier to a party fielding an "independent" candidate to capture and bleed off votes in the general election that might well go to another party.
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> ... California apparently believes with the Founding Fathers that splintered parties and unrestrained factionalism may do significant damage to the fabric of government. The Federalist, No. 10 (Madison).[32]

In a somewhat similar vein, the Supreme Court upheld a Minnesota statute which prohibits, as do the laws of many other states, a candidate from appearing on the ballot as the candidate of more than one political party, often referred to as "fusion" candidacies. While the Court noted some potential burden on the First and Fourteenth Amendment rights of association and speech of a political party and its supporters in such anti-fusion laws, the Court found the burdens to be "not severe," as the laws "do not restrict the ability of the New Party and its members to endorse, support, or vote for anyone they like," nor do they "directly limit the party's access to the ballot."[33] As such, the Court found that the state's interests "to reduce election - and campaign- related disorder," and the interests put forward by the state of "avoiding voter confusion, promoting candidate competition (by reserving limited ballot space for opposing candidates), preventing electoral distortions and ballot manipulations, and discouraging party splintering and 'unrestrained factionalism,'"[34] were sufficient state interests promoted by this ban.

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[32] *Storer v. Brown*, 415 U.S. at 734-736.

[33] *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 363 (1997).

[34] *Timmons*, 520 U.S. at 358, 364.

Sore Loser Laws

Certain states have statutory provisions that have become known as "sore loser" laws. "Sore losers" have been described by one United States Court of Appeals as follows: "'Sore losers' are candidates who lose a major party primary but insist on running on a minor party ticket" or as an independent in the general election.[35] The laws in several states now prohibit one who has run and lost in a primary, from obtaining a place on the ballot in the general election as an independent or as a minor party candidate.

In early state litigation, in 1902, a Minnesota statutory scheme preventing an unsuccessful congressional candidate at a primary election from having his name printed on the general election ballot as an independent for the same congressional office was upheld against a challenge that it created an additional qualification to office, as long as the candidate could run in a write-in campaign.[36] Similarly, in 1934 a Nebraska Supreme Court ruled that a candidate who was defeated in the primary election for the office of Governor could not by petition have his name printed on the general election ballot even for another office, that of United States Senator, since the statutory scheme preventing those defeated at the primary from being on the ballot in the general election did not create an additional qualification for congressional office.[37] In the only case found voiding a "sore loser" law's application to a congressional candidate, the North Dakota Supreme Court in 1942 ruled that the state statute was inapplicable to congressional candidates on the basis that it impermissibly created an additional qualification for congressional office.[38]

The clear trend in litigation in federal courts has been favorable to state "sore loser" laws as a species of "ballot access" provisions that help states maintain the integrity of the nominating and election process by preventing "interparty raiding," carrying "intraparty feuds" into the general election, "unrestrained factionalism," ballot clutter, and voter confusion.[39] In *Williams v. Tucker*, a three-judge federal district court upheld the provisions of the Pennsylvania election code which worked to require a candidate to choose between a primary nomination or an independent petition route to the general election, and which barred both state and federal candidates who lost in the primary election from running again in the general election

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[35] *Patriot Party v. Allegheny City Dept. of Elections*, 95 F.3d 253, 265 (3rd Cir. 1996). The court in *Patriot Party* found that the state prohibition on cross-party nominations by small parties was not a "sore loser" law, and did not narrowly promote a sufficient interest to overcome constitutional objections of burdening First and Fourteenth Amendment rights of free association. *Id.* at 264.

[36] *State ex rel. McCarthy v. Moore, County Auditor*, 87 Minn. 308, 92 N.W. 4 (1902).

[37] *State ex rel. O'Sullivan v. Swanson*, 257 N.W. 255 (Sup. Ct. Neb. 1934).

[38] *State ex rel. Sundfor v. Thorson*, 6 N.W. 2d 89, 90-92 (Sup. Ct. N.D. 1942).

[39] *Storer v. Brown*, 415 U.S. at 731, 735, 736; *Patriot Party v. Allegheny City Dept. of Elections*, 95 F.3d at 264-265.

as independent candidates.[40] The court in *Williams v. Tucker* relied significantly on the Supreme Court decision and reasoning in *Storer v. Brown*, in justifying certain state regulations on the nomination, ballot, and general election procedures. The court there found that the laws in question, "which have the combined effect of preventing a candidate defeated in the primary from obtaining a position on the general election ballot as the candidate of a political body, do not for this reason violate the first amendment or the equal protection clause of the fourteenth amendment."[41]

Filing Deadlines

As part of the administrative duties involving ballot access, preparation and printing of the ballots, a state must by necessity, because of the exigencies of time and duties, limit or establish a time-frame or deadline by which the ballot must be "set" or finalized, that is, a reasonable time before the general or primary election when no more candidates may be placed on the ballot or programmed into the voting machines. Courts have noted that states have a "compelling interest" in setting deadlines and in finalizing the ballot "so that general election ballots can be properly and timely prepared and distributed."[42] One of the consequences of *not* having a "set" ballot at some reasonable point prior to an election (and of allowing last-minute changes in the candidates on the printed ballot and on voting machines), would be the disenfranchisement of military and other absentee voters, since such last-minute changes would not allow sufficient time before election day to prepare, print, mail out and then to receive back by mail new absentee ballots with such changes.

As found by one federal court, with an election a "mere five weeks away" even if plaintiffs had prevailed on the merits of their arguments against their exclusion from the ballot, the court would have still refused to require the state to change its ballots by including petitioners' names, since the court recognized the overriding administrative necessities of deadlines to insure "time available for election officials to complete their election preparations" before the election.[43] The court noted the "risk [of] substantial disruption of the electoral process" that could ensue by changing a ballot after the state-established administrative deadline for finalization of those ballots, and noted the "tight schedule" of election officials, and the myriad duties and responsibilities that are valid administrative reasons for reasonable deadlines for finalizing ballots:

> Last minute voter registration, processing of many absentee ballot requests, supervising the printing of voting machine ballots, sample ballots, tally sheets, and instruction sheets, instruction classes for election judges and clerks [*footnote*: mailing of absentee ballots and classes for election judges and clerks have already begun], final preparation of voter lists and signature cards, and

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[40] 382 F. Supp. 381, 387-388 (M.D.Pa. 1974).

[41] *Id.* at 387.

[42] *Whig Party of Alabama v. Siegelman*, 500 F.Supp. 1195, 1205 (D.C. Ala. 1980).

[43] *Maddox v. Wrightson*, 421 F. Supp. 1249, 1252 (D.C. Del. 1976).

> distribution of voting machines and supplies remain to be accomplished before [the] November [election].[44]

Courts have thus been loathe to require or allow parties to force changes to ballots close to an election, that is, at the "eleventh hour," with an election "close at hand," or with "the imminence of election," because of "the potential for seriously disrupting the State's electoral process."[45] With an election "less than three weeks away," a federal court refused to require the changing of a ballot to add petitioners' names, even on a strong First Amendment showing by petitioners, since "much of the ballot and voting machine preparation" had already taken place, and there needed to be a balancing and a proper weight given to the state's needs and interests in an "orderly" election, including the prevention of the "possible disenfranchisement of absentee and military voters caused by eleventh hour changes to the ballot."[46] Justice Marshall, on circuit, turned down on October 1 a request to order names to be printed on a ballot for an upcoming November election citing, among other reasons, the state's concern for the potential "chaotic and disruptive effect upon the electoral process," since the "Presidential and overseas ballots have already been printed; some have been distributed. The general absentee ballots are currently being printed."[47]

The filing deadline and requirement for finalizing the ballots are among the reasons that a political party might not be allowed under state procedures to substitute a nominee on the ballot after a particular time prior to an election. This is often the reason that a candidate who died or withdrew shortly before an election would still have his or her name on the ballot and programmed into voting machines, at the time of the election.[48] States interpreting their own statutes might show differing degrees of leniency as to such deadlines, particularly, as in the case of the United States Senate election in New Jersey in 2002, if election administrators attest that the change can be implemented in the time remaining before the election without significant disruption or disenfranchisement of absentee voters.[49]

Overly long filing deadlines for parties and candidates, particularly with respect to the deadlines established for the collection of signatures on petitions for new, minor party or independent candidates, might also be used, however, as a device or method to burden or to improperly keep those candidates off of the ballot. Recent cases have affirmed that some filing deadlines, particularly when combined with stringent signature requirements for petitions, may unfairly burden the First and

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[44] *Id.* at 1252.

[45] *NAACP v. New York,* 413 U.S. 345, 369 (1973); *Valenti v. Mitchell,* 962 F.2d 288 (3rd Cir. 1992); *Smith v. Board of Elections,* 586 F. Supp. 309, 312 (N.D. Ill. 1984).

[46] *Valenti v. Mitchell, supra* at 301.

[47] *Fishman v. Schaffer*, 429 U.S. 1325, 1330 (1976). The state election procedure in question provided a filing deadline for petitions of nine weeks before an election.

[48] Note, for example, instances of Senate candidate Mel Carnahan in Missouri, in 2000; Representatives Hale Boggs of Louisiana, and Nick Begich of Alaska, in 1972; and Representative Clement Miller of California in 1962.

[49] *New Jersey Democratic Party. v. Samson,* 814 A.2d 1025.

Fourteenth Amendment rights of rights of voters and the parties and candidates that they support.[50]

In Ohio, *all* political parties are required by the Ohio Constitution to nominate their candidates by a primary election. Furthermore, all minor parties (parties which receive less than 5% of the vote) are required by statute to file a petition with the Secretary of State — containing signatures of 1% of the total votes cast in the previous election — 120 days in advance of the required state primary. In presidential election years, with the presidential primary being moved from May to the first Tuesday in March, a minor party would have to garner signatures and submit a petition to participate in a primary for the November election almost one full year before that November general election. Under these circumstances, and considering the track record of the State of Ohio (which the court indicated had the fewest minor party candidates for President of any of the most populous states),[51] the combination of such laws and requirements was found in a recent decision to have imposed a "severe" burden on the associational rights of the voters seeking to associate with this party, as well as a severe burden on the party seeking support and the placement of its candidates on the ballot, which was not justified by any countervailing, compelling state interest. The court there noted: "Deadlines early in the election cycle require minor political parties to recruit supporters at a time when the major party candidates are not known and when the populace is not politically energized."[52]

Show of Support

Among the requirements differing from major party candidates that a state may impose upon new, minor, and independent candidates as a condition to appearing on the ballot, is that the candidate show some "modicum of support" by the electorate,

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[50] Earlier cases established that strict deadlines for the filing of petitions by minor, new or independent candidates may not be of such a necessity as to overcome Fourteenth Amendment and First Amendment complaints of unfair treatment of supporters of those candidates who must file petitions to gain ballot access, as opposed to nominated party candidates who had much later deadlines. *Anderson v. Celebrezze*, 460 U.S. 780 (1983) (Ohio filing deadline in March for independent candidates not justified by state administrative need for so much time to verify petition signatures); *New Alliance Party of Alabama v. Hand*, 933 F.2d 1568, 1574 (11th Cir. 1991)(April deadline for new and minor party candidates not justified as "... evidence tends to show that the State would be able to place the name of a candidate on the ballot at a fairly late date without unduly impairing the administrative task of printing the ballot ...."); *McCarthy v. Kirkpatrick*, 420 F. Supp. 366, 374 (W.D.Mo. 1976), deadline of 188 days before election for independent candidates to file petitions was too long, as State of Missouri could conceivably add or take names off ballot as late as September for a November election; *McCarthy v. Austin*, 423 F. Supp. 990, 999 (W.D. Mich. 1976), ordering the placement of a name on the ballot on August 27 would not "seriously disrupt [State] preparations for the general election" in November.

[51] *Libertarian Party of Ohio v. Blackwell*, 04-4215, at 8 (6th Cir., Sept. 6, 2006): "...Ohio is among the most restrictive, if not the most restrictive, state in granting minor parties access to the ballot. Of the eight most populous states, Ohio has had by far the fewest minor political parties on its general election ballot."

[52] *Libertarian Party of Ohio v. Blackwell*, slip op. at 5.

in the interest in weeding out frivolous candidates and cluttering the ballot with multiple candidates, leading to voter confusion.[53]

In *Green Party of Arkansas v. Daniels*, the United States District Court in Arkansas, in August of 2006, found that restrictive petition requirements for new parties to have their candidates appear on the ballot (signatures totaling 3% of the number of votes for Governor or presidential elector — which would be 24,171 signatures — as compared to only 10,000 for independent candidates) would burden the "rights of individuals to associate for the advancement of political beliefs, ... the right of qualified voters, regardless of political persuasion to cast their votes effectively" and the "right of citizens to create and develop new political parties." [54] The court there determined that these burdens were *not* justified by a "narrowly drawn" recognition scheme that served "a compelling state interest."[55] The court found from the history of ballot access by new party and independent candidates in Arkansas, that the 10,000 signature requirement would suffice to meet the state's asserted interests and needs:

> The 10,000 signature threshold is a sufficient modicum of support to serve the state's interest in avoiding cluttered ballots and the evidence shows quite clearly that the three percent requirement is much higher than necessary as it imposes a severe burden under the First and Fourteenth Amendments on the associational rights of the Green Party and the candidates who are plaintiffs in this case because they cannot get on the ballot otherwise.[56]

In New Mexico, a statutory scheme was upheld by the United States District Court of New Mexico in a decision released September 18, 2006.[57] The New Mexico statutory scheme in question provided for a two-step petition requirement for new parties to have their candidates appear on the ballot. In the first step, a political party seeking recognition as a "minor political party" must file a petition containing signatures from at least one-half of one percent of the total votes cast for the office of Governor of New Mexico (or President of the United States) at the preceding election in New Mexico. After the party is certified, the party may then nominate candidates for public office as prescribed in the party's rules, and must then certify the names of candidates by the second Tuesday in July, — and with such certification provide *another* petition for each candidate with signatures of one percent of the total votes cast for the office of Governor of New Mexico (or President of the United States) at the preceding election. The Libertarian Party in New Mexico filed the original petition to be recognized as a "minor political party," but did not file the petitions required at the second step for its candidates to appear on the ballot, but

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[53] *Lubin v. Panish*, 415 U.S. 709, 714 (1974); *Jenness v. Fortson*, 403 U.S. 431, 442 (1971).

[54] *Green Party of Arkansas v. Daniels*, ___ F.Supp. ___ , No. 4:06CV00758 GH (E.D. Ark. August 23, 2006), Memorandum Opinion and Order, at pp. 8, citing *Williams v. Rhodes*, at 30-31, and *Norman v. Reed*, 502 U.S. 279, 2888 (1992).

[55] *Id.* at 10.

[56] *Id.*

[57] *Libertarian Party of New Mexico v. Vigil-Giron*, ___ F. Supp. ___, Civ-06-0615 MV/ACT, (D.N.M September 18, 2006).

rather filed a law suit claiming that the two-step petition process violated the First and Fourteenth Amendment rights of association and speech of its party, its members and candidates. The court there, focusing primarily (as did the complaint) on the second, 1% signature requirement, did not believe that the "character and magnitude" of the burdens imposed on new and minor parties, their candidates and supporters, were severe enough to overturn the requirements. The court noted that the Supreme Court in the past has allowed petition requirements of between 1% of the total vote cast for Governor in the preceding election (in Texas),[58] and, in Georgia, up to 5% of the number of voters eligible to vote in the last election for the office in question.[59] In this case the court found that the second petition requirement of a 1% showing of support legitimately supported the goals of the state "avoiding overloaded ballots and frivolous candidacies, which in turn diminish victory margins, contribute to the cost of conducting elections, confuse and frustrate voters, increase the need for burdensome runoffs, and may ultimately discourage voter participation and in the electoral process."[60] As to the dual petition requirements taken together, the court conceded that "it is more burdensome for a political organization to obtain the necessary signatures" for becoming a minor party, and then shortly thereafter having to obtain signatures for its list of candidates. However, the court concluded that on the whole "the burdens are still substantially less than the burdens imposed by schemes previously upheld by the Supreme Court."[61] The court concluded:

> The State has separate interests in ensuring support for a political party and ensuring a modicum of support for a particular candidate nominated by that party. The fact that these two petitions may, under certain circumstances, occur in the same election cycle does not create a sufficient burden to outweigh the important State interests served by the requirements.[62]

Combinations of Factors

In some cases a court may look not *only* to the number of petition signatures required for a candidate to be placed on the ballot, or to the length of time before an election that a petition must be filed by new, minor, or independent candidates, but may also look to the totality of circumstances in finding unnecessary burdens on the First and Fourteenth Amendment rights of supporters, voters, parties, and candidates. In *Lee v. Keith*,[63] decided on September 18, 2006, the United States Court of Appeals for the Seventh Circuit found the Illinois statutory scheme for independent candidates to be overly burdensome, and not a narrowly drawn provision which advances the state interests asserted. The statutory scheme for independents to be on the ballot for the State General Assembly required nominating petitions to be filed 92 days before the March primary for that office, or 323 days before the November general election,

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[58] *American Party of Texas v. White*, 415 U.S. 767 (1974).

[59] *Jenness v. Fortson*, 402 U.S. 431 (1971).

[60] *Libertarian Party of New Mexico v. Vigil-Giron*, at 13.

[61] *Id.* at 19.

[62] *Id.* at 23.

[63] *Lee v. Keith*, No. 05-4355, (7th Cir. September 18, 2006).

required the obtaining of signatures from voters equaling 10% of the vote in the last general election (raised in 1979 from 5%), and disqualified anyone who signs such a petition for an independent candidate from voting in the primary. As noted by the court, since one year from the institution of these requirements (1980), "not a single independent candidate for state legislative office has qualified for ballot access."[64] The court concluded in that case:

> When measured by comparison to the ballot access requirements in the other 49 states or by the stifling effect they have had on independent legislative candidacies since their inception, the combined effect of Illinois' ballot access requirements for independent General Assembly candidates falls on the "severe" end of this sliding scale....
>
> Because Illinois' ballot access requirements combine to severely burden the rights of candidates and voters to launch and support independent candidacies, they must by "narrowly drawn" to advance s "compelling" state interest....
>
> We conclude that these ballot access requirements, in combination, severely burden First and Fourteenth Amendemnt rights and are not narrowly drawn to advance Illinois's interest in avoiding the political instability of party splintering and excessive factionalism and the ballot clutter of frivolous candidacies. We do not question that these are important state interests; they have long been recognized as such.... But the Supreme Court has also observed that the interest in political stability "does not permit a State to completely insulate the two-party system from minor parties' or independent candidates' competition and influence," ... and that is effectively what Illinois has done.[65]

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[64] *Lee v. Keith,* at 2.

[65] *Lee v. Keith,* at 9, 10, 13.