DePaul Law Review

Volume 23
Issue 2 *Winter 1974*

Article 13

Rosario v. Rockefeller and Kusper v. Pontikes - Voters and other Strangers

Neal Taslitz

ROSARIO v. ROCKEFELLER AND *KUSPER v. PONTIKES*— VOTERS AND OTHER STRANGERS

In *Rosario v. Rockfeller*,[1] petitioners[2] brought suit in federal court for declaratory relief[3] alleging that the New York Election Law[4] had unconstitutionally deprived them of their right to vote in New York's 1972 presidential primary and had also abridged their freedom to associate with the political party of their choice. The avowed purpose of the challenged section of this law was to prevent political party "raiding," whereby voters in sympathy with one party enrolled themselves in an opposing political party with the intention of voting for the weakest candidate in

1. 410 U.S. 752 (1973) [hereinafter cited in text as *Rosario*].

2. Petitioner, Pedro J. Rosario, was joined by William J. Freedman, Karen Lee Gottesman, and Steven Eisner. All of the petitioners registered to vote for the first time in December of 1971, and at that time completed an enrollment blank designating their affiliation with the Democratic Party. None of the petitioners were permitted to vote in the Democratic primary held in New York on June 20, 1972. Brief for Petitioner at 8 n.4, Rosario v. Rockefeller, 410 U.S. 752 (1973).

3. Petitioners sued under 42 U.S.C. § 1983 and 28 U.S.C. § 1343(3). 42 U.S.C. § 1983 (1970) provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or any other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

28 U.S.C. § 1343(3) (1970) grants original jurisdiction to the district courts in civil actions under 42 U.S.C. § 1983.

4. N.Y. ELECTION LAW § 186 (McKinney 1964) provides in pertinent part:

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

the latter party's primary. In effect, the statute in question prohibited otherwise qualified voters from participating in a primary election unless their enrollments in a political party were completed at least thirty days prior to the general election preceding the primary or about eight months prior to the June primary.[5]

In an unpublished opinion, Chief Judge Jacob Mishler of the United States District Court for the Eastern District of New York, declared section 186 of the New York Election Law unconstitutional in violation of the petitioners' rights to vote in a primary election, and in violation of their first and fourteenth amendment rights to associate freely with the political party of their choice.[6] The Court of Appeals for the Second

5. The cut-off date for enrollment provided by section 186 occurs almost eight months before a presidential primary (held in June) and eleven months before a non-presidential primary (held in September). N.Y. ELECTION LAW § 187 (McKinney 1964) provides exceptions for certain persons who failed to meet the cut-off date prescribed by section 186. Section 187 includes, in pertinent part:

> Application for special enrollment, transfer or correction of enrollment.
>
> 1. At any time after January first and before the thirtieth day preceding the next fall primary, except during the thirty days preceding a spring primary, and except on the day of a primary, a voter may enroll with a party, transfer his enrollment after moving within a county, and under certain circumstances, correct his enrollment, as hereinafter in this section provided.
>
> 2. A voter may enroll with a party if he did not enroll on the day of the annual enrollment (a) because he became of age after the preceding general election, or (b) because he was naturalized subsequent to ninety days prior to the preceding general election, or (c) because he did not have the necessary residential qualifications as provided by section one hundred fifty, to enable him to enroll in the preceding year, or (d) because of being or having been at all previous times for enrollment a member of the armed forces of the United States as defined in section three hundred three, or (e) because of being the spouse, child or parent of such member of the armed forces and being absent from his or her county of residence at all previous times for enrollment by reason of accompanying or being with such member of the armed forces, or (f) because he was an inmate or patient of a veterans' bureau hospital located outside the state of New York at all previous times for enrollment, or the spouse, parents or child of such inmate or patient accompanying or being with such inmate or patient at such times, or (g) because he was incapacitated by illness during the previous enrollment period thereby preventing him from enrolling.
>
> . . . .
>
> 6. Special enrollment under the classification set forth in clause (c) of subdivision two is hereby expressly limited to a voter otherwise qualified, who did not have the qualifications to vote at the previous general election and such special enrollment is restricted to the same county the voter resided in at the preceding year.

6. Rosario v. Rockefeller, Civil No. 71-1573 (E.D.N.Y. Feb. 10, 1972). In this decision Judge Mishler also concluded that section 186 established a durational residence requirement, and as such, was in violation of the 1970 amendments to the Vot-

Circuit reversed the district court's opinion, holding the statute constitutional as serving a "compelling state interest."[7] Eleven months later, in a five-to-four decision, the Supreme Court affirmed the appellate court's opinion.[8] In its conclusion the Court stated:

> New York did not prohibit the petitioners from voting in the 1972 primary election or from associating with the political party of their choice. It merely imposed a legitimate time limitation on their enrollment, which they chose to disregard.[9]

The Supreme Court viewed the statute as meeting the requirements of the "compelling state interest" test on the grounds that it preserved the integrity of New York's closed primary electoral process.[10] The decision is unique in that it marked the first time that the Supreme Court had dealt with a statute designed to prevent voters from "raiding" another political party.[11] The Court's opinion is significant in that it examines a statute aimed at preventing "raiding" and sanctions it by applying the "compelling state interest" test. However, the decision is narrow since it is applicable only to statutory schemes that use a means which does not *absolutely* deprive a voter of his constitutional rights. Thus, while recognizing the "compelling state interest" in the prevention of "raiding," the Court has only sanctioned one particular kind of statute dealing with this problem.

This note is divided into three sections. The first section briefly sur-

---

ing Rights Act of 1965, 42 U.S.C. § 1973aa-1 (1970). However, the Supreme Court later ruled that the petitioners lacked standing to argue this issue since they did not claim to be recently arrived residents of the state nor to have moved from one county to another nor to have changed their residence within the relevant time period and therefore could not represent a class to which they did not belong. 410 U.S. at 759 n.9. *See* notes 72-74 *infra.*

7. Rosario v. Rockefeller, 458 F.2d 649 (2d Cir. 1972), *aff'd*, 410 U.S. 752 (1973).

8. Stewart, J., delivered the majority opinion of the Court, in which Burger, C.J., and White, Blackmun, and Rehnquist, JJ., joined. Powell, J., wrote the dissenting opinion, in which Douglas, Brennan, and Marshall, J.J. joined.

9. 410 U.S. at 762.

10. *Cf.* Dunn v. Blumstein, 405 U.S. 330, 345 (1972); Bullock v. Carter, 405 U.S. 134, 145 (1972).

11. Jordan v. Meisser, 405 U.S. 907 (1972) (mem.), dealt with the same issue as that found in *Rosario* but was dismissed for want of a substantial federal question on the ground that the plaintiff could have enrolled after the cut-off date under an exception to the challenged statute. *See* Rosario v. Rockefeller, 458 F.2d 649, 654 n.6 (2d Cir. 1972). Two other cases the Supreme Court has decided which have been cited as supporting statutes designed to prevent "raiding" are Jenness v. Fortson, 403 U.S. 431 (1971) and Lippitt v. Cipollone, 404 U.S. 1032 (1972), *aff'g mem.*, 337 F. Supp. 1405 (N.D. Ohio 1971). However, both of these cases dealt with restrictions placed upon a person's right to run as a candidate for political office rather than upon a person's right to vote in a primary election.

veys the judicial development of a citizen's right to vote in both general and primary elections. The second section compares and contrasts the Supreme Court's decision in *Rosario* with recent cases involving challenges to similar "raiding" statutes. Particular emphasis will be placed on the decision of the United States Supreme Court in *Kusper v. Pontikes*,[12] overturning an Illinois election law. The third section contains a critical analysis of the Supreme Court's opinion in *Rosario*. This analysis will include the author's viewpoint regarding the significance of *Pontikes* in relation to *Rosario*. Finally, the conclusions of both cases taken together will be examined to determine the possible effects they may have on future decisions involving statutes designed to protect the integrity of the American political process.

THE CITIZEN'S RIGHT TO VOTE IN GENERAL AND PRIMARY ELECTIONS

The right to vote, and the Supreme Court's interest in the protection of that right against state abridgement, occupies a fundamental position in this country's democratic form of government.[13]

Nearly one hundred years ago, in *Ex parte Siebold*,[14] the Supreme Court held that Congress may enact statutes which protect every citizen against state interference with the right to vote. In *Yick Wo v. Hopkins*,[15] referring to "the political franchise of voting," the Supreme Court stated that it was a "fundamental political right, because preservative of all rights."[16]

12. Kusper v. Pontikes, 42 U.S.L.W. 4003 (U.S. Nov. 19, 1973) [hereinafter cited in text as *Pontikes*].

13. *See, e.g.*, Dunn v. Blumstein, 405 U.S. 330 (1972) (durational residence requirement for voting found unconstitutional); Kramer v. Union Free School District No. 15, 395 U.S. 621 (1969) (a state may not deny the right to vote to a citizen because he does not own or lease taxable realty; Williams v. Rhodes, 393 U.S. 23 (1968) (state abridgment of individual's right to associate and right to vote must serve a "compelling state interest"); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (a state may not impose a poll tax); Carrington v. Rash, 380 U.S. 89 (1965) (a state may not deny the right to vote to a bona fide resident because he is a member of the armed forces); Reynolds v. Sims, 377 U.S. 533 (1964) (a state may not dilute a citizen's vote through malapportionment); United States v. Classic, 313 U.S. 299 (1941) (the right to vote in a primary election is entitled to the same protection against state abridgment as in a general election); Nixon v. Herndon, 273 U.S. 536 (1927) (a state may not deny Negroes the right to vote in a primary eleciton); Yick Wo v. Hopkins, 118 U.S. 356 (1886) (the right to vote is a fundamental right); United States v. Reese, 92 U.S. 214 (1875) (a state may not deny Negroes the right to vote in a municipal election). For additional cases *see* Rosario v. Rockefeller, 410 U.S. 752, 765 (1973).

14. 100 U.S. 371 (1879). *See Ex Parte* Yarbrough, 110 U.S. 651 (1884).

15. 118 U.S. 356 (1886).

16. *Id.* at 370.

During the past decade, judicial decisions have vigorously protected a citizen's right to vote against infringement of any kind. In 1964 the Supreme Court decided *Reynolds v. Sims*,[17] in which it stated:

> Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, and any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.[18]

In *Harper v. Virginia Board of Elections*,[19] the Supreme Court declared the right to vote to be one of the fundamental rights protected by the equal protection clause of the fourteenth amendment, and concluded that "classifications which might invade or restrain them must be closely scrutinized and carefully confined."[20]

The stringency of the language used in the above decisions laid the foundation for the "compelling state interest" test, introduced in *Williams v. Rhodes*.[21] In that decision the Supreme Court said that state abridgments of an individual's first and fourteenth amendment rights were valid only if they served the purpose of a "compelling state interest" and did not constitute an "invidious" discrimination.[22] Less than one year later, the Supreme Court decided *Kramer v. Union Free School District No. 15*,[23] in which it applied the same test used in *Williams* to a New York education law which restricted the vote in local board elections. The opinion is an extremely significant one because of the distinction it made

17. 377 U.S. 533 (1964).

18. *Id.* at 561-62; *Cf.* Carrington v. Rash, 380 U.S. 89, 96 (1965) which held that: "[S]tates may not casually deprive a class of individuals of the vote because of some remote administrative benefit to the State."

19. 383 U.S. 663 (1966).

20. *Id.* at 670.

21. 393 U.S. 23 (1968). *Williams* involved a challenge to a set of Ohio statutes which made it almost impossible for a new political party to have its name and its candidates placed on the ballot in the general election. The Court overturned the statutes concluding that: "The State has here failed to show any 'compelling interest' which justifies imposing such heavy burdens on the right to vote and to associate." *Id.* at 31. *Cf.* NAACP v. Button, 371 U.S. 415 (1963) whre the "compelling state interest" test was used in protecting first amendment rights of association. The "compelling interest" test was much more rigid than the traditional equal protection formula established in McGowan v. State of Maryland, 366 U.S. 420 (1961). The Court in *McGowan* stated that "[a] statutory discrimination will not be set aside if any state facts reasonably may be conceived to justify it." *Id.* at 426. The new test also differed from the traditional one by placing the burden of proof in determining whether or not a statute is supported by a "compelling state interest" on the state itself. 393 U.S. 23, 31 (1968).

22. 393 U.S. 23, 30-31 (1968).

23. 395 U.S. 621 (1969).

between the types of requirements which states place on an individual's right to vote. The Court classified these requirements into two categories. The first category includes the basic voting requirements of citizenship, age, and residency. The second category includes all requirements beyond the "basic voting requirements." These "additional" requirements are subject to the "compelling state interest" test.[24]

One of the questions examined in *Rosario* was whether or not this "compelling state interest" test was applicable to statutes imposing restrictions on the right to vote in a *primary* election. The question was first dealt with in *Newberry v. United States*.[25] In that decision the Court concluded that the word "elections," as used in article I of the Constitution, did not include primary elections. The Court stated that: "General provisions touching elections in constitutions or statutes are not necessarily applicable to primaries—the two things are radically different."[26] However, in *Nixon v. Herndon*,[27] a Texas statute which denied Negroes the right to vote in a Democratic Party primary election was declared unconstitutional in violation of the equal protection clause of the fourteenth amendment. The statute was later re-enacted giving the state executive committee of a political party the power to prescribe the qualifications of its party members; but in *Nixon v. Condon*,[28] this statute was also found to violate the Constitution.

The *Nixon* cases were decided under the equal protection clause of the fourteenth amendment but did not go as far as to define "primary" as a part of the electoral process itself. However, in the landmark decision of *United States v. Classic*,[29] the Supreme Court reversed the position established twenty years earlier in *Newberry* and held that the right to vote in a primary election was entitled to the same amount of protection from state abridgment as in a general election.[30] Three years af-

24. [I]f a challenged state grants the right to vote to some bona fide residents of requisite age and citizenship and denies the franchise to others, the Court must determine whether the exclusions are necessary to promote a compelling state interest.

Id. at 627.

25. 256 U.S. 232 (1921).

26. *Id.* at 250.

27. 273 U.S. 536 (1927).

28. 286 U.S. 73 (1932). *But cf.* Grovey v. Townsend, 295 U.S. 45 (1935).

29. 313 U.S. 299 (1941).

30. The Court stated that:

Where the state law has made the primary an integral part of the procedure of choice, or where in fact the primary effectively controls the choice, the right of the elector to have his ballot counted at the primary, is likewise included in the right protected by Article I, § 2. And this right of

ter *Classic*, in *Smith v. Allwright*,[31] the Court finally concluded that:

> [T]he right to vote in . . . a primary for the nomination of candidates without discrimination by the State, like the right to vote in a general election, is a right secured by the Constitution.[32]

Thus, the decisions reached in the above cases make it clear that the "compelling state interest" test must be equally applied to "additional" restrictions placed upon a citizen's right to vote in a *primary election* as well as in a general election. In *Rosario*, the enrollment requirement found in section 186 of the New York Election Law is clearly an "additional" requirement since it goes beyond the basic restrictions concerning citizenship, age, or residence. It was, therefore, subject to the scrutiny of the "compelling state interest" test. The reasoning behind the Supreme Court's decision to uphold the statute on the ground that it met the "compelling state interest" test lies in the specific purpose of the statute itself. The Supreme Court for the first time was dealing with a statute which had as its sole purpose the prevention of political party "raiding" by voters in a primary election.[33] The Court viewed the delayed enrollment scheme as essential in order to prevent party "raiding" from occurring.[34] The prevention of party "raiding" was believed to be a "compelling state interest" since it insured the preservation of the integrity of the electoral process.[35]

---

participation is protected just as is the right to vote at the election, where the primary is by law made an integral part of the election machinery, whether the voter exercises his right in a party primary which invariably, sometimes or never determines the ultimate choice of the representative.

313 U.S. at 318.

31. 321 U.S. 649 (1944).

32. *Id.* at 661-62.

33. *See* note 11 *supra.*

34. The purpose for requiring enrollment prior to a general election was that:

> Few 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. And, it would be the rare politician who could successfully urge his constituents to vote for him or his party in the up-coming general election, while at the same time urging a cross-over enrollment for the purpose of upsetting the opposite party's primary . . . . 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.

458 F.2d 649, 653 (2d Cir. 1972), *as quoted in* 410 U.S. at 761-62.

35. *See* Bullock v. Carter, 405 U.S. 134 (1972) where the Court stated that: "[A] state has an interest, if not a duty, to protect the integrity of its political processes from frivolous or fraudulent candidacies." *Id.* at 145. But *cf.* Dunn v. Blumstein, 405 U.S. 330 (1972) where the Court maintained that the "prevention of

Justifying the length of the time limitation for enrollment in *Rosario*, the Supreme Court referred to *Lippitt v. Cipollone*[36] in which it affirmed without opinion a decision of the United States District Court for the Northern District of Ohio. The lower court had declared constitutional an Ohio statute which made it impossible for a person to be a candidate for nomination or election in a political party primary if he had voted as a member of another political party in a primary election within the preceeding four years. The district court held that the statute protected a "compelling state interest" since it sought to prevent candidates from switching parties for opportunistic reasons and therefore protected the integrity of the political process. *Rosario* can be distinguished from *Lippitt* since the petitioner in *Lippitt* was seeking to run for a political office, whereas the petitioners in *Rosario* were seeking to vote in a primary election.[37] This difference is significant because the right to hold office is not a fundamental right, as is the right to vote in a primary election.[38] Thus, the issue involved in *Rosario* is unique, since the Supreme Court sanctioned a statute designed to prevent political party "raiding" by voters rather than by candidates.

Within the past two years, there have been several lower court opinions dealing with statutes designed to prevent party "raiding" by voters. In September of 1971, a federal district court[39] overturned a provision of a

---

[electoral] fraud is a legitimate and compelling government goal," but invalidated Tennessee's durational residence requirements for voting in a general election as not necessary to further a "compelling state interest." *Id.* at 345.

36. 404 U.S. 1032 (1972), *aff'g mem.*, 337 F. Supp. 1405 (N.D. Ohio 1971); *cf.* Ray v. Blair, 343 U.S. 214 (1952).

37. *Cf.* Brief for Lawyers for McGovern as Amicus Curiae at 9, Rosario v. Rockefeller, 410 U.S. 752 (1973), *citing* Bendinger v. Ogilvie, 335 F. Supp. 572, 576 (N.D. Ill. 1971).

> The state's interest in limiting *candidates* from switching parties . . . is greater than its interest in limiting *voters* from switching parties. The state's interest in preserving a vigorous and competitive two-party system is fostered by the requirement that candidates demonstrate a certain loyalty and attachment to the party in whose primary they are running; the same cannot be said of voters, however, who should be freer to demonstrate their changes in political attitude by voting for popular candidates or against unpopular candidates in any party's primary election. Thus, it is not inconsistent to prevent candidates from switching parties from election to election and at the same time to permit voters to do so.

(Emphasis added.)

38. Bullock v. Carter, 405 U.S. 134, 142-43 (1972).

39. Gordon v. Executive Comm. of the Democratic Party, 335 F. Supp. 166 (D.D.C. 1971) (per curiam).

South Carolina election law[40] which denied a voter his right to vote in a primary election if he refused to take an oath affirming that he had not voted in another party's primary election, convention, or precinct meeting, within the preceeding year. The court found that "[n]o sound or compelling purpose can possibly justify 'locking' a citizen into a party and denying to him for a full year freedom to change parties."[41]

Less than three months later in *Fonthan v. McKeithen*,[42] a district court upheld a Louisiana statute[43] which required a six month waiting period after a voter had changed party affiliation before he would be eligible to vote in a primary election. The statute was subjected to the traditional "rational relation" test instead of the "compelling state interest" test used in *Kramer v. Union Free School District No. 15*.[44] The Court distinguished *Fonthan* from the situation in *Kramer* on the theory that the Louisiana statute in *Fonthan* was a temporary suspension of voter eligibility, whereas the New York statute in *Kramer* acted as a permanent suspension of voting rights. However, since the Louisiana restriction goes beyond reasonable citizenship, age, and residency requirements it should have been categorized as an "additional" restriction, and as such, subjected to the "compelling state interest" test prescribed in *Kramer*.[45] The New York statute challenged in *Rosario* is similar to the statute challenged in *Fonthan*, because neither act provides for a permanent deprivation of voting eligibility. In *Rosario*, however, the Supreme Court correctly recognized a temporary denial of voting rights as an "additional" restriction and therefore, applied the "compelling state interest" test to the statute.

In May of 1972, the United States District Court of New Jersey held that certain provisions of a New Jersey election law[46] were an unconstitutional burden on a citizen's right to vote and on a citizen's right to associate freely with a political party.[47] The court stated:

> [A]lthough the defendants have met their burden of showing a compelling interest by the state in preventing 'raiding,' the infringements on the

40. S.C. CODE ANN. § 23-400.71 (Supp. 1971).

41. 335 F. Supp. at 169.

42. 336 F. Supp. 153 (E.D. La. 1971), *appeal dismissed sub nom.* Fantham v. Edwards, 409 U.S. 1120 (1973).

43. LA. REV. STAT. ANN. § 18:270.204 (Supp. 1973).

44. 395 U.S. 621 (1969).

45. *See* note 24 *supra.*

46. N.J. STAT. ANN. § 19:23-45 (1964).

47. Nagler v. Stiles, 343 F. Supp. 415 (D. N.J. 1972).

> right to vote and the right of association which the State selected go far beyond what is necessary for the protection of that interest.[48]

Judge Fisher distinguished the New Jersey statute from the one found in *Rosario* on the grounds that the latter accomplished its goal of inhibiting "raiding" without imposing "an excessively long commitment to a party by a voter."[49] The significance of this distinction is that it qualifies the statute in *Rosario* as one which serves a "compelling state interest" without being overly broad or making unnecessary infringements on the right to vote and the right to associate freely. This same distinction was pointed out two months later in *Yale v. Curvin.*[50] In overturning a Rhode Island statute[51] which placed a twenty-six month waiting period before persons who had switched their political affiliations could vote in a primary election the court noted that "[u]nlike the Rhode Island law, the New York law is narrow and does not disenfranchise a voter from a succeeding primary election."[52] The district court recognized the legitimate interest that the state has in the prevention of "raiding" but concluded that the twenty-six month restriction on voting was too broad and too drastic an infringement upon a citizen's constitutional rights.

On March 7, 1972, exactly one month prior to the appellate court's decision to uphold the statute in *Rosario*, the District Court for the Northern District of Illinois decided *Pontikes v. Kusper.*[53] The court overturned an Illinois statute which prohibited a voter from participating in a political party primary if he had voted in the primary of another party within the preceeding twenty-three months.[54] Judge Swygert found the statute to be a substantial burden on a citizen's right to vote in a primary election as well as an infringement upon their right of free association. Since party "raiding" by voters in Illinois was not considered to be a serious threat, the statute designed to prevent it was not deemed as serving a "compelling state interest," and therefore, the statute was declared invalid.[55] The opinion of the court in *Pontikes* was influenced by the abso-

48. *Id.* at 418.

49. 343 F. Supp. 415, 417-18 (D. N.J. 1972).

50. 345 F. Supp. 447 (D. R.I. 1972).

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

52. 345 F. Supp. 447, 451 (D. R.I. 1972).

53. 345 F. Supp. 1104 (N.D. Ill. 1972) (Marovitz, J., dissenting), *aff'd*, 42 U.S.L.W. 4003 (U.S. Nov. 19, 1973).

54. ILL. REV. STAT. ch. 46, § 7-43(d) (1971).

55. 345 F. Supp. 1104, 1108 (N.D. Ill. 1972). Referring to the statute, Judge Swygert stated that:

> The state's interest . . . could be characterized as "compelling" only if

lute and drastic qualities of section 7-43(d).[56] Under the Illinois law, those that choose to switch parties after voting in a primary election were deprived of their right to vote in any primary for a period of twenty-three months. The provision made it impossible for the petitioners to vote in one party's primary in March of 1972 because they had voted in another party's primary thirteen months earlier. Thus, the statute had the effect of *absolutely* depriving petitioners of their right to vote. However, in *Rosario* the Supreme Court pointed out that the New York Election Law did not *absolutely* deprive the petitioners of their right to vote in the June primary, but rather placed a cut-off date on their enrollment—which they had to meet in order to vote in the primary.[57] Thus, the Illinois and New York statutes are distinguishable in the degree to which they restricted the electorate's voting rights. Although both statutes are temporary restrictions, the statute in *Pontikes absolutely* denies voters their right to vote in a primary election, whereas the law in *Rosario* denies the right to vote only to those persons who fail to enroll at least thirty days prior to the general election preceeding the primary in which they wish to vote.[58]

In November of 1973, the United States Supreme Court affirmed the district court's decision in *Pontikes*.[59] The absolute denial of the appellee's right to vote in the Democratic primary election was the determining factor in the Court's opinion.[60] Referring to the effect of the Illinois statute on the appellee's right to vote, Mr. Justice Stewart stated: "[T]he state law absolutely precluded her from participating in the 1972 Democratic primary."[61] This distinguishing factor explains why the Court reached opposite conclusions in *Rosario* and *Pontikes*. As Justice Stewart stated:

> Unlike the petitioners in *Rosario*, whose disenfranchisement was caused by their own failure to take timely measures to enroll, there was no action

---

> . . . raiding constitutes a more important danger than the danger to constitutionally protected rights . . . [and] [t]here is no evidence to indicate that raiding is more likely to take place than "honest" switches of affiliation.

Id. at 1108.

56. *See* note 54 *supra.*

57. 410 U.S. at 757.

58. *See* exemptions listed in note 5 *supra.*

59. Kusper v. Pontikes, 42 U.S.L.W. 4003 (U.S. Nov. 19, 1973). Stewart, J., delivered the majority opinion of the Court, in which Douglas, Brennan, White, Marshall and Powell, JJ., joined. Burger, C.J., concurred in the result. Blackmun, J., filed a dissenting opinion. Rehnquist, J., filed a dissenting opinion, in which Blackmun, J., joined.

60. *Id.* at 4006.

61. *Id.*

> that Mrs. Pontikes could have taken to make herself eligible to vote in the 1972 Democratic primary.[62]

Thus, the Court found that the Illinois election law "substantially abridged" the appellee's freedom to associate with the political party of her choice and therefore, overturned the statute.

THE WEAKNESSES AND IMPLICATIONS OF *Rosario*

Before reviewing the effects that the Supreme Court's opinion in *Rosario* may have on future decisions, it is necessary to examine the opinion's inherent weaknesses. The most significant weakness in Mr. Justice Stewart's opinion concerns his failure to apply the "least drastic means" test[63] to New York's statutory enrollment scheme. Petitioners had argued that section 332 of the New York Election Law[64] offered a "less drastic means" to prevent "raiding."[65] However, the Court reasoned that section 332 was "too cumbersome to have any real deterrent effect on raiding in a primary."[66] Therefore, the Court concluded that section 186 "imposed a legitimate time limitation" on the petitioner's

---

62. *Id.*

63. In Shelton v. Tucker, 364 U.S. 479, 488 (1960) Mr. Justice Stewart pointed out that "even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose." *Accord,* Dunn v. Blumstein, 405 U.S. 330, 343 (1972).

64. N.Y. ELECTION LAW § 332 (McKinney 1964) provides in pertinent part:

> 1. The supreme court or a justice thereof within the judicial district, or the county judge within his county, in a proceeding instituted by a duly enrolled voter of a party, at least ten days before a primary election, shall direct the enrollment of any voter with such party to be cancelled if it appears either that any material statement in the declaration of the voter upon which he was enrolled is false. . . .
>
> 2. The chairman of the county committee of a party with which a voter is enrolled in such county, may, . . . after a hearing . . . determine that the voter is not in sympathy with the principals of such party. . . . [T]he enrollment of such voter [may] be cancelled if it appears . . . that such determination is just.

65. Rosario v. Rockefeller, 410 U.S. at 762 n.10.

66. *Id. But see In re* Mendelsohn, 197 Misc. 993, 99 N.Y.S.2d 438 (Sup. Ct. 1950); Zuckman v. Donahue, 191 Misc. 399, 79 N.Y.S.2d 169 (Sup. Ct.), *aff'd,* 274 App. Div. 216, 80 N.Y.S.2d 698, *aff'd mem.,* 298 N.Y. 627, 81 N.E.2d 371 (1948); Werbel v. Gernstein, 191 Misc. 275, 78 N.Y.S.2d 440 (Sup. Ct.), *aff'd,* 273 App. Div. 917, 78 N.Y.S.2d 926 (1948); *In re* Newkirk, 144 Misc. 765, 259 N.Y.S. 434 (Sup. Ct. 1931). Also the Supreme Court's opinion in *Rosario* failed to mention the criminal sanctions available in Article 16 of the New York Election Law for violations of the elective franchise. These sanctions further enhance the state's ability to prevent "raiding." *See* N.Y. ELECTION LAW §§ 421, 436 (McKinney Supp. 1972).

enrollment.[67] Thus, as pointed out in Mr. Justice Powell's dissenting opinion: "The Court . . . fails to address the critical question of whether [the state's] interest may be protected adequately by less severe measures."[68] Furthermore, Mr. Justice Powell believes that a less drastic enrollment deadline (thirty to sixty days prior to the primary election) would prevent most "raiding" activity, yet at the same time allow "honest" voters a reasonable opportunity to switch parties prior to the primary election without denying them their right to vote.[69] Surely, a less drastic time limitation could have accomplished the same end, without imposing such a heavy burden on those who choose to switch political parties for legitimate purposes.[70]

The Court's reasoning for sanctioning the cut-off date thirty days prior to the preceding general election as meeting the "least drastic means" test was based on the alleged inconsistency a voter would face in planning to vote for one party in a general election while at the same time switching his political affiliation with the intention of "raiding" another political party eight months hence.[71] The amount of cognitive dissonance involved in switching parties prior to a general election would, no doubt, be hard

67. 410 U.S. at 762. Mr. Justice Stewart's conclusion in *Rosario* seems to contradict his opinion concerning the "least drastic means" test which he discussed in Shelton v. Tucker, 364 U.S. 479, 488 (1960). *See* note 62 *supra*. This apparent contradiction might be explained by the particular situation found in *Rosario*. Justice Stewart emphasized the fact that the petitioners in *Rosario* did not explain why they failed to enroll prior to the cut-off date. Justice Stewart also emphasized the fact that the petitioners did not claim that they were unaware of the cut-off date. By concluding that the petitioners could have enrolled, but chose not to, Mr. Justice Stewart put the blame not on the statute, but on the petitioners themselves. 410 U.S. at 758. This factor seems to have been decisive in Justice Stewart's decision to uphold the New York statute. It is quite possible that Justice Stewart believed that the petitioners did not comply with the cut-off date intentionally in order to subject the election law in question to the rudiments of a judicial test. If, in fact, the petitioners had stated a valid reason why they had failed to enroll on time, the Court's decision might have been in their favor.

68. *Id.* at 770.

69. *Id.* at 771.

70. The appellate court in *Rosario* pointed out that New York "has a particular interest in preventing raiding," since

> [i]n addition to the major parties, Democrat and Republican, two minority parties, Conservative and Liberal, are established throughout the state and usually present a full slate of candidates in the general election. Yet as there are only 107,000 enrolled Conservatives and 109,000 enrolled Liberals as opposed to 2,950,000 enrolled Republicans and 3,565,000 enrolled Democrats, successful raiding of these minority parties would present little difficulty on statewide basis absent § 186.

458 F.2d 649, 652 n.3 (2d Cir. 1972). Obviously, this factor had an influence on the Court's decision to uphold such a drastic means. However, even in this situation, there is no evidence that "raiding" occurs more frequently than "honest" switches of affiliation against "raiders."

71. *See* note 34 *supra*.

to measure. Yet, it would seem that such dissonance would be a greater deterrent to "honest" switches in party affiliation than to those bent on sabotaging another political party. Moreover, placing the cut-off date for enrollment eight months in advance of a primary deprives the voter of making a rational decision in choosing a political party, since many of the candidates, let alone the issues, are not even known at that time.

Thus, forcing the voter to enroll in a political party eight months prior to the primary election in order to be eligible to vote in that primary deprives the voter of the opportunity to make a rational decision and may distort the results of the primary by not allowing the voter to vote for the true candidate of his choice. Such distortion would seriously undermine the validity of the primary election results. A cut-off date one or two months prior to the primary election would undoubtedly aid the voter in making a more educated and rational decision in choosing which party to enroll in, while still acting as a preventative to party "raiding."

A second weakness in the Court's opinion can be found in its decision not to grant the petitioner's standing to argue that section 186 conflicts with the 1970 amendments to the Voting Rights Act of 1965.[72] Avoiding the plaintiff's allegations, the Court has left open the question of whether or not the Voting Rights Act was meant to apply to primary elections as well as to presidential elections.[73] 42 U.S.C. § 1973l(c)(1) seems to indicate that section 1973 aa-1(d) is applicable to primaries.[74] An in depth examination by the Court on this issue would have been helpful.

---

72. Petitioners alleged that 42 U.S.C. § 1973 aa-1(d) specifically prohibits an otherwise qualified voter from being denied the right to vote in a presidential primary for failure to comply with any type of durational residency requirement. *See* Rosario v. Rockefeller, 410 U.S. 752, 759 n.9 (1973).

73. 42 U.S.C. § 1973aa-1 (1970) provides that

> each State shall provide by law for registration or, other means of qualification of all duly qualified residents . . . not later than thirty days immediately prior to any presidential election, for registration or qualification to vote . . . in such election.

Cf. Allen v. State Bd. of Elections, 393 U.S. 544, 563-67 (1968). *But cf.* Rosario v. Rockefeller, 458 F.2d 649, 654 (2d Cir. 1972) where the appellate court argued that § 1973 aa-1(d) did not apply to votes cast in presidential primaries.

74. *See* note 6 *supra*. H.R. REP. No. 439, 89th Cong., 1st Sess. 32 (1965) states:

> Clause (1) of [The Voting Rights Act of 1965, 42 U.S.C. § 1973 *l*(c)(1)] . . . contains a definition of the term "vote" for purposes of all sections of the act. The definition makes it clear that the act extends to all elections —Federal, State, local, *primary*, special, or general—and to all actions connected with registration, voting, or having a ballot counted in such elections.

(Emphasis added).

In estimating the possible effects of *Rosario* on future decisions, the subjectivity of the "compelling state interest" test needs to be kept in mind. That is, the individual needs of a state will have to be taken into consideration before the Court can determine whether or not a statute designed to prevent harm to the integrity of the American political process meets that state's "compelling interest." Thus, a statute that meets the test in one state may fail in another. Moreover, the stringency or absolute effect of the statute itself will determine whether or not it is acceptable. This latter determination was clearly pointed out by the Supreme Court's decision in *Pontikes* to overturn the Illinois election law.[75] The Court was careful to note that although Mrs. Pontikes was not absolutely precluded from associating with the Democratic party, she was absolutely precluded from voting in the Democratic party's election. As the Court said:

> [T]he Illinois statute deprived her of any voice in choosing the party's candidates, and thus substantially abridged her ability to associate effectively with the party of her choice.[76]

Thus, the line of demarcation where one's freedom of political association becomes "substantially abridged" can be drawn at the point where the state absolutely denies one of his right to vote in any political party primary. This line of demarcation is the distinguishing factor between the New York and Illinois election laws.

CONCLUSION

The Court's failure to declare the statute in *Rosario* unconstitutional as "substantially abridging" one's freedom of political association (merely because the statute did not absolutely deny the petitioners of their right to vote) is unfortunate. State imposed obstacles on the road to the voting polls should not have to be insurmountable before they are declared unconstitutional. A weighing of the state's interest in the prevention of party "raiding" against a citizen's right to participate in the primary election of his choice would be a more reasonable manner in which to determine whether or not a person's right to vote and/or right of political association have been "substantially abridged." In the words of Mr. Justice Black:

> 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,

75. Kusper v. Pontikes, 42 U.S.L.W. 4003, 4006 (U.S. Nov. 19, 1973).
76. *Id.*

> we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.[77]

Although the Supreme Court's opinion in *Rosario* may presently seem to be a step backwards from Justice Black's words of wisdom, hopefully, it will eventually be viewed as only a side-step taken to avoid a particular situation which could have hindered the integrity of the political process. In the more immediate future, *Rosario* will add to the ammunition of those states desiring to impose requirements under which the right of suffrage may be exercised.[78] In the final analysis, the greater a state's need to impose requirements on the right to vote in order to protect the integrity of the political process, the greater the probabilities are that those requirements will pass the "compelling state interest" test provided, of course, that the requirements imposed do not *absolutely* deprive citizens of their right to vote.

*Neal Taslitz**

77. Wesberry v. Sanders, 376 U.S. 1, 17 (1963).

78. *See, e.g.*, Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45 (1959); Pope v. Williams, 193 U.S. 621 (1904); Mason v. Missouri, 179 U.S. 328 (1900).

* The author dedicates this case note to the memory of the late Thomas George Krepps, a 1973 graduate of the De Paul University College of Law.