

ADMINISTRATIVE UNFEASIBILITY: THE TORRICELLI REPLACEMENT CASE AND THE CREATION OF A NEW ELECTION LAW STANDARD

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I. Introduction

On January 7, 2003, former United States Senator Frank Lautenberg took his seat in the United States Senate, representing for the second time the eight million New Jerseyans he had represented for eighteen years as a Senator.¹ The story of how Senator Lautenberg returned to that body has often been told as a political tale centering on Senator Robert Torricelli and a pharmaceutical industry executive, Douglas Forrester.² However, the return also involved a cast that included the state supreme court, countless members of the state, national, and international media, and what seemed to be the entire national political establishment. It was a political upheaval.

However, it was also a legal upheaval. Not since Bruno Hauptmann's sensationalized trial for murder in Flemington³ had so much attention been paid to the regularly secluded New Jersey legal establishment. From lawyers to judges, no one in the legal community in the Garden State was free from interest and focus on this issue. The controversy placed the New Jersey Supreme Court in the center of a political storm that had the potential to decide control of the United States Senate.⁴

Many see the effect of the decisions by the state supreme court as

¹ Lautenberg retired from the Senate in 2001. *About U.S. Senator Frank R. Lautenberg*, at <http://lautenberg.senate.gov/about.html> (last visited Jan. 14, 2003). For information regarding the circumstances of Lautenberg's retirement and return, see Robert Cohen, *Lautenberg Gladly Steps Up for Political Foe*, STAR-LEDGER, Oct. 2, 2002, at A9.

² Douglas Forrester was selected as the Republican nominee for United States Senate in the 2002 primary election after capturing forty-four percent of the vote. David Kinney, *Forrester to Take on Torricelli*, STAR-LEDGER, June 5, 2002, at A1. His two primary opponents, State Senators Diane Allen (R-Burlington) and John Matheussen (R-Gloucester), who received thirty-seven percent and nineteen percent of the votes cast, respectively, both endorsed Forrester in the subsequent general election. *Id.*; Brian P. Murphy, *Forrester Wins GOP Senate Nod*, at http://www.politicsnj.com/murphy060402_primaryelection.htm.

³ See *State v. Hauptmann*, 180 A. 809 (NJ Ct. Errors and Appeals 1935).

⁴ David Kinney, *Torricelli Quits Race*, STAR-LEDGER, October 1, 2002, at A1. Torricelli cited the preservation of a Democratic majority in the Senate as one major reason for his withdrawal from the race. *Id.*

only impacting New Jersey's representative in the United States Senate. That is certainly true from a political standpoint, but that view is shortsighted. The direct effect of the court's decision in the *New Jersey Democratic Party v. Samson*⁵ was to place the name of Frank R. Lautenberg on the general election ballot for 2002, which allowed his subsequent electoral success and his return to the Senate. However, it is the long-term effect of the court's opinion that will demonstrate the real impact of the rushed process that saw the seven justices of the state supreme court placed ever so briefly in the national spotlight.

Perhaps not since the Robinsons put forth their claims about the insufficiency of the funding of New Jersey's school system,⁶ or the people of Mount Laurel had their zoning laws challenged,⁷ has one decision by the state supreme court held such great potential for long term and far reaching effects on a specific area of legal practice. This article seeks to review the circumstances that led to this decision, the arguments that the court heard from the interested parties, and the effects that the decision itself could potentially have on the practice of election law in the state.

II. Election Law is a Balance of Different Societal Values

Elections at their most basic are the mechanism through which individuals ratify a choice to work together as a community.⁸ New England town meetings still serve in many ways as the ultimate modern continuation of the beginnings of American democracy - neighbors getting together to make decisions for their town.⁹ Residents gather at a

⁵ *The New Jersey Democratic Party v. Samson*, 175 N.J. 172 (2002) [hereinafter *Order*]; *The New Jersey Democratic Party v. Samson*, 175 N.J. 178 (2002) [hereinafter *Opinion*].

⁶ See *Robinson v. Cahill*, 303 A.2d 273 (N.J. 1973) (held that the state government had a duty under the state constitution to ensure that a thorough and efficient education was provided to all children).

⁷ See *Southern Burlington County NAACP v. Township of Mount Laurel*, 336 A.2d 713 (NJ 1975) (mandating the provision of affordable housing in every municipality in New Jersey).

⁸ See, e.g., BLACK'S LAW DICTIONARY 422-3 (7th ed. 2000), which explains core concepts of an election as follows: "free election. An election in which the political system and processes guarantee that each voter will be able to vote according to conscience . . . popular election. An election by people as a whole, rather than by a select group." *Id.*

⁹ Such meetings are termed "direct democracy." SAMUEL ISSACHAROFF, PAMELA S. KARLAN & RICHARD H. PILDES, *THE LAW OF DEMOCRACY* 982 (2d ed. 2001) [hereinafter *LAW OF DEMOCRACY*]. The popularity of direct democracy and two of its most common forms - initiative and referendum - has grown significantly in recent years. *Id.*, citing

central location, elect from among themselves a leader of the town meeting, and then discuss – often at length – topics that are left for the local governing body to decide in many other states.¹⁰

Beyond that basic premise of people gathering in a group to vote issue by issue on governing themselves, elections and democracy – and the laws that govern their practice – grow increasingly complex. It is the role of the legislatures and courts that create and interpret those laws to draw lines between the different societal values governing the theoretical underpinnings of an election.

There is perhaps no area of the law that requires more direct involvement by the judiciary than the regulation of politics and elections.¹¹ It seems that not a year goes by without the presence of a judge in the practices of politics, and certainly no year passes without a judicial intervention in the effects of voting.¹² This presence of judicial decision-makers in the electoral process is the logical extension of the role of courts in the constitutional structure of government.

For an example of judicial intervention in the practice of politics, one need not look further than the seminal American constitutional law case of *Marbury v. Madison*,¹³ which formalized the role of judicial review in the practice of democratic republicanism. While students immemorial have learned the *Marbury* principle that courts are the ultimate arbiters of what is constitutional, it is not lost on scholars of election law that the underlying facts of that case laid out an early constitutional test of political patronage. An election occurred; the incumbents were ousted; they made appointments; the appointments were not completed; and people went to court.¹⁴ Students remember the

David B. Magleby, *Governing by Initiative: Let the Voters Decide?*, 66 U. COLO. L. REV. 13, 13-14 (1995).

¹⁰ Editorial, *Why Town Meeting*, RUTLAND HERALD, March 4, 2001, available at <http://www.rutlandherald.nybor.com/Archive/Articles/Article/21532> (last visited Oct. 25, 2002). “On Monday and Tuesday, Vermonters will gather for town meeting, an institution that remains central to the state’s civic life and its concept of itself . . . Town meeting gives us a chance to take stock of who we are as citizens, to hear what neighbors have to say, and to have a say of our own.” *Id.*

¹¹ See LAW OF DEMOCRACY, *supra* note 9, at 324. One common area of judicial intervention and supervision of the electoral process is legislative redistricting. *Id.* See, e.g., *Page v. Bartels*, 144 F.Supp.2d 346 (D.N.J. 2001).

¹² See *Reinhart v. Miller*, 505 A.2d 247 (L. Div. 1985); *Petition for Recheck of Voting Machines and Irregular Ballots in Third Ward of Jersey City*, 88 A.2d 227 (App. Div. 1952).

¹³ 5 U.S. 137 (1803).

¹⁴ *Id.* at 153.

case for its role in the creation of judicial review. Practitioners of election law may view it as a prominent example of the Supreme Court using an election law case to make a national statement. Two hundred years later, such judicial intervention in the electoral process still occurs regularly.¹⁵

Election law may be viewed as the balancing of the importance of the right to participate in the electoral process against the importance of the need for regulations to effectuate that participation. It may be helpful to view the creation of election laws as a continuum that begins with no regulations on the electoral process at one end, and no ability to participate in the process at the other. At some point on that continuum, legislators find the point where they feel the values underlying election laws are best placed. Courts then judge whether that point on the continuum is the proper balance point for these values. But how do courts assess these values? What factors enter into balancing the need for regulations against the unfettered right of the people to participate in the electoral process?

At one end of the continuum is a regulatory regime with no limitation on the ability of people to participate in the democratic process (beyond, one must presume, an inability to vote more than once on any given electoral question). Imagine that even the most basic requirements of electoral participation did not exist: no requirement for registration, no requirement for minimum residency duration, and no age requirements. At the other extreme would be such onerous requirements that the laws themselves would dictate to the lawmakers. One need not look beyond America's earliest voting requirements to see examples of such strict limitations. Restrictions based on gender, race, condition of servitude, property ownership, religion, residency duration and naturalization duration, literacy, and intelligence were some of the more common barriers to the exercise of the right to vote.¹⁶ Under those conditions, the vast bulk of the governed were not legally entitled to the franchise.¹⁷

¹⁵ For examples of such intervention, *see supra* note 11.

¹⁶ *See generally* DANIEL HAYS LOWENSTEIN AND RICHARD L. HANSEN, *ELECTION LAW*, 23–37 (2d. ed. 2001).

¹⁷ *See* *LAW OF DEMOCRACY*, *supra* note 9, at 16. The American electorate of the late 18th century was comprised solely of white males; furthermore, only approximately fifty to seventy-five percent of white males were enfranchised due to property requirements and other restrictions. *Id.*, *citing* Chilton Williamson, *AMERICAN SUFFRAGE: FROM PROPERTY TO DEMOCRACY 1760-1860* (1960).

Throughout the nation's development, the broadening of the franchise has been the *raison d'être* of election law practice. The process of constitutional amendment was used to expand the franchise to blacks,¹⁸ women,¹⁹ and those over age eighteen.²⁰ These amendments broadened the pool of the voters.

One value, then, and perhaps the most critical in election law, is that the greatest number of voters possible should be allowed to make a choice to participate in the electoral process. If that was the only value that mattered in the creation and interpretation of election laws, however, any voter could vote on an election day without any need for further restrictions.²¹

However, significant countervailing values prevent the unlimited and unfettered practice of voting. Not the least among those values is the need for orderly elections. Regulation of the actual voting process in order to protect the communal right to participate in elections is of paramount importance to the state. Voting without regulation would lead to chaos, and that concept necessarily leads to the argument that regulations *must* be placed on voting to allow the right of franchise to be successfully transformed into the opportunity for electoral choice.

Once one decides that there needs to be some order to elections to ensure that they are meaningfully carried out, one necessarily begins to travel along the electoral regulatory continuum. One valid starting point is with the procedural requirements that precede election day itself. Who is permitted to vote? The only way to ensure that qualified voters alone are allowed to vote is to have registration lists. Therefore, jurisdictions such as New Jersey require the advanced registration of voters.²² How long, then, must someone be registered in order to allow them to vote? Put a different way, how long must the electoral mechanism work in advance of an election to ensure that those who seek to vote are actually eligible? Such a pre-registration requirement often will include a minimum length of residency as a prerequisite to participation. In New Jersey, the Legislature has determined that it should take no more than twenty-nine days for a voting applicant's

¹⁸ U.S. CONST. amend. XV.

¹⁹ U.S. CONST. amend. XIX.

²⁰ U.S. CONST. amend. XXVI.

²¹ This in itself is a value judgment – that there should be one day, not many, that voters are permitted to choose their leaders.

²² N.J. STAT. ANN. §19:31-1 *et. seq.* (West 2002).

qualifications to be verified in order to allow them to participate.²³ Advanced registration requirements seek to protect the franchise as a whole by ensuring registration takes place far enough in advance to guarantee that the most possible qualified votes are recorded, and that only qualified voters may participate. Additional safeguards include requirements of voting in local precincts to diminish the incidence of fraud,²⁴ limitations on the use of absentee ballots,²⁵ and the permissibility of the challenging of voters' credentials by partisan volunteers.²⁶ When determining the validity of these requirements, courts often assess the placement of the statutes on the electoral regulatory continuum under the language and guidance of constitutional provisions.²⁷ Courts in New Jersey have found themselves checking the Legislature, as it finds that balancing point on the continuum which provides the broadest possible right of voter participation while maintaining the state's interest in orderly elections.²⁸

In sum, courts are called upon to balance the participation rights of the voters against the state's need for an orderly election. Similarly, legislators seek to protect the right to vote, fettered only by the necessity of the electoral process to protect the democratic institution as a whole. The community must ask itself: when is the individual's right to vote trumped by the need to have orderly elections so as to protect the rights of other voters?

It is this balancing of values that courts must perform in election law cases, and it is this quandary that faced the New Jersey Supreme Court in October of 2002.

²³ N.J. STAT. ANN. §19:31-5 (West 2002).

²⁴ N.J. STAT. ANN. §19:8-1 (West 2002).

²⁵ N.J. STAT. ANN. §19:57-1 *et seq.* (West 2002).

²⁶ N.J. STAT. ANN. §19:7-1 *et seq.* (West 2002).

²⁷ See, e.g., *Hartman v. Covert*, 303 N.J.Super. 326, 331-332 (Law Div. 1997). The court wrote:

In determining the constitutionality of a state election law, first one must examine whether or not the law burdens rights protected by First and Fourteenth Amendments to the Constitution. If it is established that the challenged law burdens the rights of political parties and their members, then in order for the law to withstand constitutional scrutiny, the state must prove that the law advances a compelling state interest.

Id. at 332 (internal citations omitted).

²⁸ See *id.*

III. Senator Robert Torricelli's Withdrawal Forced the State Supreme Court to Balance Countervailing Interests

No one had ever accused Bob Torricelli of being understated. When then-incumbent Senator Torricelli spoke to a group of Democratic activists in August of 2002, most took for gospel the seriousness with which he viewed his chances of re-election. "No force on earth," Torricelli pronounced, "would prevent me from getting re-elected."²⁹ Most in the political community believed him, or at least believed that he believed it.

A political lifetime of these pronouncements and their subsequent correctness had made Bob Torricelli a near legend in New Jersey politics. Called "The Torch," the Senator had a reputation for playing politics "ruthlessly."³⁰ As a result, when the rumors began to swirl that Bob Torricelli was going to withdraw from the race for the United States Senate only thirty-six days prior to the election, some practitioners of both politics and law expressed doubt.

It was on the afternoon of the last day of September that Torricelli ended his campaign.³¹ A press conference in Governor James E. McGreevey's office, followed by a letter to the state's Attorney General, David Samson,³² stated his intention to withdraw from the November election. During his press conference, Torricelli said that he had asked attorneys to file papers requesting that his name be removed from the ballot with the United States Supreme Court, thereby empowering the state Democratic party to name a ballot replacement.³³

This came as a surprise to practitioners of election law, for the replacement statute in New Jersey was fairly settled and seemingly

²⁹ Steve Kornacki, *Forrester: It's about Torricelli being Torricelli*, at http://www.politicsnj.com/kornacki082402_Forrester.htm (last visited Jan. 14, 2003).

³⁰ John Hassell, *Tough Guy Torricelli Takes Jab at Accusers in Victorious Return*, STAR-LEDGER, January 5, 2002 at A7.

³¹ David Kinney, *Torricelli Quits Race*, STAR-LEDGER, October 1, 2002, at A1

³² *Id.*; Steve Kornacki and Brian Murphy, *Torricelli drops bid for Senate re-election*, at http://www.politicsnj.com/Kornacki093002_Torricelli.htm (last visited Oct. 25, 2002). In New Jersey, the Attorney General is charged with the administration of the Division of Elections, which is the clearinghouse for official correspondence on elections for statewide and legislative offices. See, <http://state.nj.us/lps/progs-units.htm> (last visited Oct. 25, 2002).

³³ See, Torricelli Withdrawal Press Conference (CSPAN television broadcast, Sept. 30, 2002). This was the only time that any Democrat spoke of appealing to the United States Supreme Court for relief. At the time of the conference lawyers for the state Democrats were already preparing documents to the New Jersey Supreme Court. Republican lawyers would have preferred Senator Torricelli's plan.

clear on its face. The statute provides, "In the event of a vacancy, howsoever caused, among candidates nominated at primaries, which vacancy shall occur not later than the 51st day before the general election . . . " the party of the candidate could replace the nominee no later than the forty-eighth day prior to the general election.³⁴ The statute is silent as to what would happen after the forty-eighth day.³⁵ It was

³⁴ N.J. STAT. ANN. §19:13-20 (West 2002). The statute provides in relevant part:

In the event of a vacancy, howsoever caused, among candidates nominated at primaries, which vacancy shall occur not later than the 51st day before the general election, or in the event of inability to select a candidate because of a tie vote at such primary, a candidate shall be selected in the following manner: a. (1) In the case of an office to be filled by the voters of the entire State, the candidate shall be selected by the State committee of the political party wherein such vacancy has occurred . . . At any meeting held for the selection of a candidate under this subsection, a majority of the persons eligible to vote thereat shall be required to be present for the conduct of any business, and no person shall be entitled to vote at that meeting who is appointed to the State committee or county committee after the seventh day preceding the date of the meeting . . . (4) Whenever in accordance with the provisions of subsection a. of this section the State committee of a political party is empowered to select a candidate to fill a vacancy, it shall be the responsibility of the chairman of that State committee to give notice to each of the members of the committee of the date, time and place of the meeting at which the selection will be made, that meeting to be held at least one day following the date on which the notice is given. d. A selection made pursuant to this section shall be made not later than the 48th day preceding the date of the general election, and a statement of such selection shall be filed with the Secretary of State or the appropriate county clerk, as the case may be, not later than said 48th day, and in the following manner:

(1) A selection made by a State committee of a political party shall be certified to the Secretary of State by the State chairman of the political party . . . e. A statement filed pursuant to subsection d. of this section shall state the residence and post office address of the person so selected, and shall certify that the person so selected is qualified under the laws of this State to be a candidate for such office, and is a member of the political party filling the vacancy. Accompanying the statement the person endorsed therein shall file a certificate stating that he is qualified under the laws of this State to be a candidate for the office mentioned in the statement, that he consents to stand as a candidate at the ensuing general election and that he is a member of the political party named in said statement, and further that he is not a member of, or identified with, any other political party or any political organization espousing the cause of candidates of any other political party, to which shall be annexed the oath of allegiance prescribed in R.S. 41:1-1 duly taken and subscribed by him before an officer authorized to take oaths in this State. The person so selected shall be the candidate of the party for such office at the ensuing general election.

presumed that nothing could.

The state Democratic party first filed its complaint and request that the county clerks be enjoined from printing ballots in the superior court in Middlesex County³⁶ - a curious choice because none of the relevant parties were situated there.³⁷ Simultaneously, the state Democrats also filed with the state supreme court a motion for direct certification in an attempt to bring the case immediately before that court.³⁸ Neither the Attorney General nor the Forrester campaign offered any opposition to that motion.³⁹

Judge Yolanda Ciccone of the Superior Court in Middlesex County was assigned the case, and set the hearing for the afternoon of the next day, October 1, 2002, with briefs due in the morning.⁴⁰ Immediately prior to this deadline for briefs, the state supreme court granted the motion for direct certification, and ordered briefs due the following morning, with oral argument to follow immediately thereafter.⁴¹

³⁵ *Id.*

³⁶ *Order*, 175 N.J. at 174; *Opinion*, 175 N.J. at 184.

³⁷ The State Democratic Party is officially based in Trenton, Mercer County. <http://www.njdems.org/contact.htm> (last visited Dec. 6, 2002). The Attorney General is in Trenton, Mercer County. <http://www.state.nj.us> (last visited Jan. 14, 2003). The Republican opponent, Douglas Forrester resides in West Windsor, Mercer County. <http://www.nbc10.com/politics/1697024/detail.htm> (last visited Dec. 6, 2002). Finally, twenty of the twenty-one county clerks named as defendants are logically based outside of Middlesex County.

³⁸ *Order*, 175 N.J. at 174; *Opinion*, 175 N.J. at 184. Such a motion is allowed under N.J. Rule 2:12-1 (2002). *See also* N.J. Rule 2:12-4 (2002). The rule states the grounds for such a motion:

Certification will be granted only if the appeal presents a question of general public importance which has not been but should be settled by the Supreme Court or is similar to a question presented on another appeal to the Supreme Court; if the decision under review is in conflict with any other decision of the same or a higher court or calls for an exercise of the Supreme Court's supervision and in other matters if the interest of justice requires.

Id.

³⁹ *Order*, 175 N.J. at 174; *Opinion*, 175 N.J. at 184. No party offered opposition to this motion because it was in the interest of all parties to have the issues presented resolved expeditiously.

⁴⁰ *Order*, 175 N.J. at 174; *Opinion*, 175 N.J. at 184.

⁴¹ *Order*, 175 N.J. at 174; *Opinion*, 175 N.J. at 184.

IV. Each of the Parties Formulated Arguments Based on Convincing the Court of the Proper Location of the Replacement Deadline on the Electoral Regulatory Continuum

The momentous nature of the litigation was evidenced by the crush of media that descended upon Trenton in the days surrounding the state supreme court's hearing. Far less visible was the legal preparation by the parties to the case. As in any litigation, the parties needed to frame their arguments to make the outcome they desired as easy as possible for the court to reach. At the same time, the parties were hampered by a lack of time for in-depth analysis, operating in such a compacted schedule. This was the epitome of law at lightning speed, with the presence of live television making the pressure on the parties even greater.

Each interested party hoped to convince the state supreme court that it had found the appropriate location of the replacement deadline on the electoral regulatory continuum. For the Democrats,⁴² framing the issue meant trying to drive the court to the less restrictive end of the spectrum. For Forrester, it meant convincing the court that the Legislature had found the correct place on the continuum, and that firm replacement deadlines should be left undisturbed. For the Attorney General, it meant representing the state's interest in orderly elections. For the attorney for the Clerks, it meant trying to speak with one voice for twenty-one differing county clerks, each of whom had progressed at a different pace in election day preparation.

As a result, the court was presented with arguments stressing one of two distinct views of election law. The Democrats raised the specter of harm to voters collectively, arguing that in the absence of a Democratic candidate⁴³ voters would be harmed for they faced no "real"

⁴² For purposes of brevity, I shall shorten the parties formal captioned names. By "the Democrats," I refer to the Democratic State Committee and its Chair. By "the Forrester campaign," I refer to the campaign of Republican nominee Douglas Forrester. By "the Clerks" I refer to the collective representation of the County Clerks, which as discussed below was a sub-plot to the litigation. By the Attorney General, I refer specifically and generally to then New Jersey Attorney General David Samson and his office. Samson resigned in February 2003. Josh Margolin and Jeff Whelan, *State Attorney General to Resign*, STAR-LEDGER, January 21, 2003, at A1. First Assistant Attorney General Peter Harvey was named as his acting replacement. Jeff Whelan and Robert Schwanberg, *Harvey Nomination in Holding Pattern*, STAR-LEDGER, March 22, 2003, at A13.

⁴³ This statement is slightly simplistic. The Court largely viewed the Torricelli withdrawal as correctly done. That is, they viewed the question as whether the Democrats

choice.⁴⁴ Conversely, Republicans argued that voters individually would be harmed if there were a replacement because some voters had already received ballots and others could be individually disenfranchised.⁴⁵ In addition, Republicans argued that it was the Legislature and not the courts that should decide the placement on the continuum of the date after which candidates could not be replaced.

A. The Democrats Argued that Voters Collectively Would Be Harmed in the Absence of a Replacement Candidate

While much of the press attention focused on whether or not the statute was clear on its face concerning the ability of a political party to replace a candidate after the statutory deadline for the replacement of candidates had passed, the Democrats' first task was to establish what right would be violated if the election for United States Senate went forward with either Senator Torricelli's name or no name on the ballot for their party. Under the *Hartman* standard,⁴⁶ in order for the Democrats to prevail, they would have to claim a constitutional right would be violated if a replacement was denied, thereby showing that the regulation barring replacements after forty-eight days was overly restrictive.

The Democrats wisely focused their argument on the basic right to vote, strengthened by New Jersey's long history of voter choice.⁴⁷ They wrote to the court, "N.J.S.A. 19:13-20 is rooted in the paramount public policy that the voters should have the opportunity to choose from among competing candidates."⁴⁸ The Democrats relied on the state supreme court's decision in a 1952 case that allowed a candidate replacement after the statutory deadline.⁴⁹ Specifically, that court proclaimed that the intent of the election laws was "to preserve the two

could replace Senator Torricelli with another candidate. Republicans argued to a skeptical court that the very withdrawal fell outside the text of the statute. In essence, Democrats were arguing that Senator Torricelli could be replaced with another name. Republicans were arguing that Senator Torricelli's name should remain on the ballot.

⁴⁴ See *infra* Section IV.A.

⁴⁵ See *infra* Section IV.B.

⁴⁶ See *supra* note 27.

⁴⁷ Letter Brief for Plaintiffs New Jersey Democratic Party, et. al., at 8, New Jersey Democratic Party v. Samson, 172 N.J. 178 (2002) [HEREINAFTER Democratic brief].

⁴⁸ *Id.*

⁴⁹ *Kilmurray v. Gilfert*, 10 N.J. 435, 441 (1952).

party system and to submit to the electorate a ballot bearing the names of candidates of both major political parties”⁵⁰ The Democrats then linked the ability to choose between two major party candidates and the right to vote: “[T]he exercise of the right to vote in an election which provides clear choices on the ballot is the cornerstone.”⁵¹ The Democrats concluded that the right to vote was meaningless if there was no choice over which that right could be exercised.⁵²

Certainly, the Democrats knew that one valid rejoinder to their arguments was that the statute on its face prescribed dates after which a replacement would be unable to be completed. In their brief and at oral argument, the Democrats parried that issue by using New Jersey’s history of judicial activism to its advantage. In their papers, the Democrats referred to the “age old maxim”⁵³ that election laws are to be “liberally construed so as not to compromise their very purpose.”⁵⁴ Essentially, the Democrats argued that, even if one assumes that the language of the statute was clear, the overriding right to vote, and moreover the corollary right to choose between major party candidates, required the court to ignore the language of the statute. The Democrats argued further that, as a practical matter, there was no reason not to allow the change because it was still early enough in the electoral process to allow for such a change without adversely affecting voters. Finally, they proffered that the statute was unclear enough that the court could effectively grant the relief they sought without jeopardizing the collective right of voters to participate in an election unmarred by lateness because of the ballot change.

Notably, the Democrats did not seek to facially overturn the statute. They did not ask the court for a new standard. Instead, they sought the creation of a special one-time remedy that would allow them to replace Torricelli on the ballot because of the need to protect the right to vote, arguing that the court could reach this result by considering at the factual circumstances and the high level of public importance.

⁵⁰ Democratic brief, *supra* note 47, at 8, *citing Kilmurray*, 10 N.J. at 441.

⁵¹ Democratic brief, *supra* note 47, at 8, *citing Gangemi v. Rosengard*, 44 N.J. 166, 170 (1957).

⁵² Democratic brief, *supra* note 47, at 8.

⁵³ *Id.* at 10.

⁵⁴ *Id.*

B. *The Forrester Campaign Argued that the Change Would Necessarily Affect Individual Voters' Right to Vote in an Orderly Election*

While the Democrats focused on a special one-time remedy, the strength of the Republican argument relied on the plain text of the statute. The Republicans ostensibly had a strong argument. The statute on its face had a forty-eight day replacement deadline; the replacement was sought on the thirty-sixth day; the Legislature had recently amended the statute to *lengthen* the replacement deadline to allow for new technology and absentee ballots.⁵⁵ Furthermore, the Republicans believed that the federal Uniform and Overseas Citizens Absentee Voting Act,⁵⁶ which governs American citizens' ability to vote while overseas, would be violated if the ballots were revised and reissued by the county clerks. Essentially, the Republicans argued that the Legislature had endeavored to protect voters collectively by setting the deadline for replacements at forty-eight days, thereby ensuring enough time for the proper printing and distribution of ballots. They further argued that Congress had sought to protect the right to vote via absentee ballot by allowing the United States Attorney General to compel states to send out ballots early enough to insure they would be received in time. The Republicans thus contended that the right to vote was at stake if the ballots were reprinted.

First, the Forrester campaign sought to have the court follow its own dicta in another election case from 1990.⁵⁷ In *Catania v. Haberle*, the state supreme court allowed a replacement on the ballot, although notably in advance of the forty-eighth day prior to the election. In reaching its decision, the court wrote, "Obviously there will be cases in which provisions must be interpreted strictly, mandatory, for in some cases it will be apparent that the interpretation serves important state interest, including orderly electoral processes."⁵⁸ That language makes

⁵⁵ The 1985 New Jersey State Assembly Committee Statement on the lengthening legislation was clear as to its intention. It said that the extension was purposefully designed to permit, "absentee voters, particularly military and civilian voters dwelling abroad, sufficient time to apply for, receive, execute, and return their ballots" See Assembly State Government, Civil Service, Elections, Pensions and Veterans Affairs Committee, Statement to Senate Bill No. 2044, 1985.

⁵⁶ 42 U.S.C. 1973ff *et seq.* (2002).

⁵⁷ *Catania v. Haberle*, 123 N.J. 438 (1991).

⁵⁸ *Id.* at 440. In that case, a political party sought to fill a vacant spot on the ballot after the deadline to replace empty ballot places had passed. *Id.*

it clear that the court envisioned some times when the language of the statute would prevent a candidate from being replaced on the ballot. The Republicans believed that the combination of the passing of the statutory deadline, and the admission that there were ballots already mailed to and received back from absentee voters, indicated that the *Catania* standard for strict enforcement had been met in this case.

Second, the Forrester campaign argued that the right of overseas civilians and military voters to participate would be at risk if the court granted the reprinting of ballots to include a replacement candidate. Republicans cited federal precedent arising in Florida, where the Attorney General had relied upon the Act in ordering ballots to be mailed out thirty-five days prior to the election.⁵⁹ In the Florida case, the court held that voting by absentee ballot for these federally protected voters was a "right, not a privilege."⁶⁰ This was an important distinction, for in New Jersey the opposite had always been true. Voting by absentee ballot is considered to be a privilege, not a right.⁶¹ Thus, the Republicans were relying in part upon the federally recognized right to vote via absentee ballot to counter the Democrats' claim of the right of voter choice.

Finally, the Forrester campaign argued that, by allowing this replacement to occur, the court was opening up the political process to chaos; that replacing candidates would become a political tactic; and that voters were ill-served by last minute replacements.

The Forrester position largely rested on the strict interpretation of the statute. Essentially, Forrester was telling the state supreme court that legislators know more about politics than judges, and in the Legislature's deliberations it had become clear that forty-eight days was the proper no-replacement window. Therefore, by allowing a replacement the court would be ignoring the Legislature. Finally, Forrester's team argued that federal law required the court to bar the replacement in order to protect the right of overseas voters to vote by absentee ballot. In brief, the Forrester campaign contended that both the Legislature and Congress had spoken, and that thirty-six days was simply too late to replace a candidate.

⁵⁹ See *Bush v. Hillsborough County Canvassing Board et al*, 123 F.Supp.2d 1305 (N.D. Fla. 2000).

⁶⁰ *Id.* at 1307.

⁶¹ *Mulcahy v. Bergen County Board of Elections*, 156 N.J.Super. 429, 434 (Law Div. 1978).

C. The County Clerks' Attorney Represented to the Court that the Replacement Was Possible

New Jersey's twenty-one county clerks are charged with the practical administration of elections, and were the officials who would bear responsibility for making any possible alterations to the ballot. However, the state supreme court heard oral argument only from the attorney who had warranted to the court that he represented twenty of the state's twenty-one county clerks.⁶² The position, then, of the "clerks" generally became that of the attorney that the court recognized as representing them.⁶³ That attorney told the court that the replacement was possible within thirty-six days,⁶⁴ providing the court with a factual basis upon which to conclude that the practicalities of the replacement could be carried out.⁶⁵

Therefore, what the attorney represented to the court was that the clerks, if given enough money, could make the replacement on the ballots, reprint them, and ensure that the ballots were sent overseas and to other absentee voters in a timely fashion. This representation supported the Democratic position that allowing a replacement on the ballot would not affect the collective right to vote in an orderly manner.

D. The State Attorney General Suggested a New Test for Determining the Possibility of Replacing a Candidate on the Ballot after the Statutory Deadline Had Passed

New Jersey's Attorney General was the primary defendant in this case because of his role as administrator of elections in the state; the statute governing replacements specifically places the replacement

⁶² Of concern to election law practitioners, however, should be the fact that five clerks had separate representation at the hearing and were not permitted to address the court. *Live Arguments before the New Jersey Supreme Court* (NJN broadcast, Oct. 2, 2002). The clerks of Burlington, Mercer, Monmouth, Morris, and Somerset submitted separate filings to the court, but were not afforded argument time. *Id.*

⁶³ This oversight gave the impression that the clerks were able to perform the task of replacement, even though not all the clerks necessarily agreed.

⁶⁴ Argument of John M. Carbone, Esq. *Live Arguments before the New Jersey Supreme Court* (NJN broadcast, Oct. 2, 2002).

⁶⁵ *Opinion*, 175 N.J. at 195-196.

mechanism under his supervision.⁶⁶ Certainly, it would have been unsurprising if his argument was protective of the mechanism and of the statute that established it. However, the Attorney General, in seeking to balance the competing individual and state interests in the electoral process – as the court itself was attempting to do – rather suggested a dramatic new standard for evaluating the applicability of election laws.

The Attorney General recognized quickly that there was a balance sought in the statute between the need for orderly elections and the importance of preserving voter rights.⁶⁷ “Within the context of this fundamental interest,” the Attorney General wrote, “is the recognition that voters should have the fullest choices possible among viable and qualified candidates.”⁶⁸ At the same time, the Attorney General recognized that, “there must be an orderly administration of the election for the benefit of the voters.”⁶⁹ Further, the Attorney General recognized that the Legislature had acted to set the deadline.⁷⁰

The Attorney General both succinctly phrased the question and provided the mechanism for the court to decide the answer: “The precise question for this Court is whether the dual interests of full voter choice and an orderly administration of the election can be effectuated if the requested relief were to be granted.”⁷¹ To answer the question, the Attorney General suggested a new test that created a fact-based analysis as to whether the replacement should be allowed: “[I]t is the position of the Attorney General that if the county clerks represent to the Court that it is *administratively feasible* to replace Senator Torricelli’s name on the ballots, the Court has the discretion to allow a substitute candidate.”⁷²

The Attorney General’s suggested test established a balancing mechanism that focused upon whether the county clerks thought it was logistically possible to make the change to the ballots. That factual analytical rubric necessarily required the court to look to only one set of facts: whether the county clerks thought they could prepare the ballots in time to ensure an orderly election. The test evaded any balancing of

⁶⁶ N.J. STAT. ANN. § 19:13-20 (West 2002).

⁶⁷ See Brief for Attorney General David Samson, at 8, *New Jersey Democratic Party v. Samson*, 172 N.J. 178 (2002) [hereinafter Government brief].

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.* at 8. (Emphasis added).

statutory deadlines by focusing the court's attention solely on whether it was possible to change the ballots. To phrase the question another way, the administrative feasibility test asks, "at what point is it absolutely impossible to change the ballots?"

This was a profound administrative usurpation of legislative intent. The Legislature had reviewed the law in 1985.⁷³ It had looked to the then current deadline, took testimony, specifically stated that the deadline needed to be longer, and moved it.⁷⁴ The Attorney General in his argument essentially argued that the Legislature had not been the proper place for that balancing to occur. Rather, he argued that it was up to the judicial supervision of county clerks to decide when the deadline should be. The proposal of such a test constituted a fundamental shift in election law creation.

V. The Court Accepted the Administrative Feasibility Test and Ordered a Replacement Candidate

Six hours after the court finished hearing argument it handed down its order allowing the Democrats to replace the name of Robert Torricelli on the general election ballot.⁷⁵ Its later decision confirmed that the court had viewed the Attorney General's test as an appropriate way to review the statute.⁷⁶

The court began with a recitation of the history of New Jersey election law and its focus on the need to provide voter choice.⁷⁷ Quoting former Chief Justice Weintraub, the court found that, "[t]he right to vote would be empty indeed if it did not include the right of choice for whom to vote."⁷⁸ The court accepted the argument that the right to vote was singularly tied to the right to choose.⁷⁹

The court then looked to the statutory text and found it wanting.⁸⁰ The court wrote that, "In the absence of explicit direction from the Legislature," the language of the statute was not clear enough to

⁷³ See *supra* note 55.

⁷⁴ *Id.*

⁷⁵ *Order*, 175 N.J. at 176; *Opinion*, 175 N.J. at 185.

⁷⁶ For a discussion of the administrative feasibility test, see *Opinion*, 175 N.J. at 194-196.

⁷⁷ *Opinion*, 175 N.J. at 186-190.

⁷⁸ *Id.* at 186, citing *Gangemi v. Rosengard*, 44 N.J. 166, 170 (1965) (internal citations omitted).

⁷⁹ *Opinion*, 175 N.J. at 186.

⁸⁰ *Id.* at 191.

warrant its strict enforcement.⁸¹ The court found that other states' replacement deadlines were clearer, and that New Jersey's lack of clarity doomed its enforcement.⁸² The court wrote, "[i]f that is not what the Legislature intended, we anticipate it will amend Section 20 accordingly."⁸³

The court could have stopped there. It had found both a clear public interest in the preservation of the right to vote and a statute that was, in its opinion, not clear enough for enforcement. Certainly that was enough for the court to grant the remedy sought by the Democrats. It had done exactly the same in *Kilmurray*, placing a candidate on the ballot after the replacement deadline because of a lack of clarity of the statute and the overriding public interest in voter choice.⁸⁴

Unfortunately, the court did not stop there. It gave another reason for allowing the replacement on the ballot: that a replacement should be made if it was possible to do so. "At bottom," the court wrote, "if on the record before us it is administratively feasible to replace Senator Torricelli's name on the ballot, the general statutory intent and underlying purpose of the election laws to enable voters to exercise the franchise and to choose from among various candidates is furthered."⁸⁵

The court's new standard creates a fact-based test for determining whether or not a replacement can take place. The court looked to the number of ballots that had been printed, mailed, and received back, and found that a remedy could be crafted to ensure that the replacement could take place.⁸⁶ The court balanced the number of ballots that needed to be reprinted and re-mailed, looked to the amount of time left before the election and accepted the representations made by the counsel to the county clerks that the change could be made.⁸⁷

⁸¹ *Id.*

⁸² The Court found that New York's replacement statute declared that withdrawals after that State's deadline were "fatal defects" and could not be replaced. *Opinion*, 175 N.J. at 191-192. Both at argument and in its decision, the court showed its favor upon New York's clarity. *Opinion*, 175 N.J. at 192, citing N.Y. ELEC. LAW § 1-106(2) (McKinney 1998).

⁸³ *Opinion*, 175 N.J. at 195.

⁸⁴ See *Kilmurray*, 10 N.J. at 440.

⁸⁵ *Opinion*, 175 N.J. at 195.

⁸⁶ This remedy was in the form of a special master to oversee the replacement and the implementation of the court's order. *Id.* at 196. Mercer County Assignment Judge Linda Feinberg, a veteran election law judge, was selected. *Id.*

⁸⁷ An important moment came at oral argument when the Attorney General refused to guarantee that the change could be made in the time remaining before the election; the attorney for the clerks later confirmed it could. *Live Arguments before the New Jersey*

The reaction to the decision was swift and predictable. Democrats praised the court for its wisdom.⁸⁸ Republicans condemned the court for its ignorance of the legislature.⁸⁹ And the voters went to the polls on election day and sent Frank Lautenberg back to Washington.⁹⁰

VI. Conclusion: The New Jersey Supreme Court's Administrative Feasibility Test Created a Dangerous New Standard for Election Law

The balancing test that the court created with its new administrative feasibility standard may have worked well enough in this instance. However, it is important to note that the election proceeded with Judge Linda Feinberg overseeing the ballot replacement process. With advance approval from the state supreme court, Judge Feinberg allowed an extension of the deadline for the receipt of federal overseas absentee ballots,⁹¹ and there were no notable problems with the replacement ballots on election day.

As a general matter, however, the state supreme court's decision has opened the door to an entirely new area of election law litigation. For many years, deadlines in the statute were often treated as settled and solid dates that were a necessary constant in the process.⁹² This litigation and the court's unnecessary "standard creation" may have the effect of creating "election courts," a situation in which all deadlines set by the Legislature in the election code may be changed if it is administratively feasible to do so.

As noted above, elections are about a community making joint decisions about how they are to be governed, and by whom.⁹³ The need for rules governing those elections in order to preserve the ability of the process of democracy to occur necessarily requires firm dates and deadlines. Examples in election law abound: the deadline for filing

Supreme Court (NJN broadcast, Oct. 2, 2002).

⁸⁸ David Kinney and Josh Margolin, *Court Clears Lautenberg Run – Republicans Vow to Fight Switch in Senate Election Ballots*, STAR-LEDGER, Oct. 3, 2002 at A1.

⁸⁹ *Id.*

⁹⁰ Lautenberg received 1,138,193 votes to Forrester's 928,439; approximately 44,000 votes were captured by the four third-party candidates. Nov. 2002 General Election Results, available at http://state.nj.us/lps/elections/elec2002/results/2002g_us_state_sum_candidate_tally.pdf (last visited Dec. 6, 2002).

⁹¹ The Forrester campaign brought an action to Judge Feinberg to extend the receipt deadline for absentee ballots, which she granted after oral argument.

⁹² See *Lesniak v. Budzash*, 133 N.J. 1, 7 (1993).

⁹³ See *supra* notes 8-9.

petitions in order to run for office;⁹⁴ the deadline to register to vote;⁹⁵ the deadline to file a change of party affiliation in order to allow one to vote in a primary election;⁹⁶ and the deadline to complete the ballot in order to allow it to be printed and prepared for the election. Each of these deadlines as well as numerous other deadlines by their definition limit the ability of some to take full advantage of the franchise.

But the deadlines serve another purpose. They allow the administrators of the elections the time to prepare the mechanics of voting. The deadline for voter registration allows the verification of eligibility to vote, the deadline for party changes preserves the right of a party not to be raided by members of another party, and the deadline for the printing of ballots allows for time to review and prepare the ballot, prepare the machines, and send out absentee ballots by mail. In short, the Legislature has set these deadlines in order to create windows in which election processes can take place. By creating a fact-based analytical process to review these deadlines, the court has created a situation where the stability of these time windows is in constant doubt.

Looking solely at the candidate replacement statutes, clearly there are countless possible scenarios in which the fifty-one day deadline can now be ignored. If we now know it is possible to replace a federal candidate thirty-six days before the election, we certainly can assume that a local or state candidate can be replaced in the same time window. Or can we? If a candidate for mayor of a town wishes to withdraw on the thirty-sixth day prior to the election and her party wishes to replace her on the ballot, a court would need to look at the feasibility of replacing that candidate with another. Perhaps it is easier to reprint ballots in one county than another. Perhaps one clerk is especially hard working and all of the ballots are done. Perhaps it would be much more expensive to make the change in one county than another. The benefit of the hard deadline is that all candidates, and therefore voters, are treated equally.

Is it conceivable that a candidate for office in one county would be allowed off the ballot by one judge, while another candidate would be forced to stay on by a different fact finder? Clearly it is. Therefore, the Legislature would be wise to amend the statute to eliminate any doubt as to the process for replacing candidates on the ballot. The state

⁹⁴ N.J. STAT. ANN. § 19:13-9 (West 2002).

⁹⁵ N.J. STAT. ANN. § 19:31-6.1 (West 2002).

⁹⁶ N.J. STAT. ANN. § 19:23-45 (West 2002).

supreme court's decision did not only place one person on the ballot as a replacement. Rather, it created a standard calling for case-by-case analysis of replacement candidates that may well lead to a patchwork of replacement litigation.

An extreme example is illustrative of the difficulties inherent in applying the new administrative feasibility standard. There are only eighteen residents of the Bergen County municipality of Teterboro.⁹⁷ For the purposes of this hypothetical, assume that a candidate for borough council wished to drop out of the race fifteen days prior to the election. Is it administratively feasible to replace the candidate in just fifteen days? It is a fact sensitive question. For example, is it reasonable to have the town clerk walk the new ballots to each of the houses? Can the town's police deliver a note to each home explaining the change? Clearly the slope could not be more slippery.

However, the regulations concerning candidate replacement are not the only election provisions that are affected by the establishment of the administrative feasibility standard. New Jersey law requires that petitions for public office be filed by 4:00 p.m. on the fifty-fourth day prior to the primary election for major party candidates.⁹⁸ The statute maintains that the petitions must be received by a certain date and time; it does not say what happens if the petition comes in late.⁹⁹ One court allowed a twenty-minute extension based on a traffic delay.¹⁰⁰ Certainly a candidate who files a day late could argue that it is certainly administratively feasible to allow his petition to be accepted and be placed on the ballot. If a new candidate can be placed on the ballot on the thirty-sixth day prior to an election, certainly a candidate could be placed on the ballot despite a delay in the filing of his petition.

It is not hard to see the potential for absurdity created by a case-by-case review of stable election deadlines. When a legislative deadline is balanced against extenuating circumstances and those circumstances are allowed to overcome the legislative deadline, courts become election monitors. Certainly the state supreme court does not want to become the clearing house for the creation of factual records to support ignorance of election deadlines.

⁹⁷ 2000 Census Profile, *at* <http://www.wnjin.state.nj.us/OneStopCareerCenter/LaborMarketInformation/lmi25/sf1/ber/sf172480.pdf> (last visited Jan. 14, 2003).

⁹⁸ N.J. STAT. ANN. § 19:21-13 (West 2002).

⁹⁹ *Id.*

¹⁰⁰ Application of Cucci, 92 N.J.Super. 223, 224-225 (Law. Div. 1966).

In closing, it is undisputed that the New Jersey Supreme Court's decision to allow the replacement of Democratic nominee Robert Torricelli with Frank Lautenberg on the November 2002 general election ballot generated much publicity and discussion in the political community. However, while the direct effect of that decision may have been to send a different person to the United States Senate, the long-term effect on the practice of election law is just beginning. It is imperative that the Legislature should take the state supreme court up on its offer to amend the election statutes in order to make clear that deadlines in the statutes are not arbitrary, but rather exist so as to guarantee that the right to participate in the electoral process and the right to vote in orderly elections are once again able to coincide.