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THE RECODIFIED NEW YORK ELECTION LAW—A SMALL STEP IN THE RIGHT DIRECTION

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I. Introduction

During the 1976 national and local election campaigns, the New York State Election Law and its "Byzantine" procedures came under withering attack by both the candidates and the press. The inadequacies of the existing law had long been recognized and decried by numerous citizens groups and legislators.

The first step toward much-needed substantive election law reform has been taken recently with the passage of an Election Law Recodification Act. The new law, passed under the sponsorship of Assemblyman Melvin H. Miller, Chairman of the Election Law Committee, went into effect on December 1, 1977.

The Election Law Recodification is characterized as a

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3. For example: "The whole thing is an invisible process. If the average voter could see what was happening in here, they'd think it was something out of Kafka." Statement of Mark Alcott, lawyer for the Carter campaign, referring to the judicial review of the Carter petitions. Id. "The New York Election Laws exclude the average voter in New York . . . . The people who signed our delegate petitions have been effectively disenfranchised because they forgot to dot their i's." Statement of Paul Rivet, lawyer for the Carter campaign, made in conjunction with the announcement that the Carter forces would go into federal court to seek reinstatement of delegate slates in ten congressional districts. Id. March 29, 1976, p. 20, col. 4. "Jimmy Carter's last words to New York voters were 'Vote for me' and then, in an afterthought, 'Where my name is on the ballot, vote for me.' " Id. April 30, 1976, p. 12, col. 6. However, the existing law was a two-edged sword waiting to be used by its one-time victims, as the New York Times editorialized regarding the subsequent attack by supporters of candidate Carter on the independent petitions of former Senator Eugene McCarthy. Id. October 9, 1976, p. 18 (editorial).
"simplification and clarification of present law" which "should not generate controversy among the members of the legislature." Nonetheless, the recodification has effected changes which are of importance to most citizens. This Article will examine these changes and describe their effect upon voting, registration and party enrollment, designation and nomination of candidates, the conduct of elections, and judicial review procedures.

II. Administration of Elections

The New York State Constitution requires equal representation of the two major political parties in the administration of elections.


7. Id. The same refrain was echoed in the memorandum of the League of Women Voters, which indicated that "most importantly, the bill by and large does not go beyond the scope of the meaning of 'recodification.' In other words, it does not make changes that warrant separate legislative consideration." League of Women Voters, Legislative Memorandum 1 (1976). However, the League concedes that the new law "eliminates provisions which were contradictory, which had been made obsolete by enactment of superceding laws. It consolidates and reorganizes the law into logical order, eliminating most duplication." Id.

The recodification furnishes a procedural framework into which substantive changes can later be incorporated. One memorandum in support of the law indicated:

The bill contains a minimum of substantive changes, none of which are of major significance, but makes numerous technical and procedural amendments. We find no problem with such changes, and agree with the sponsors that substantive amendments, while needed, will be best left to separate legislation so as not to impede passage and approval of the recodification. We also note that the bill does not take effect until December 1, 1977, which will enable possible deficiencies to be corrected during the 1977 legislative session.


9. Id. §§ 6-100 to 6-166.

10. Id. §§ 8-100 to 9-220.

11. Id. §§ 16-100 to 16-118.

12. N. Y. Const. art. 2, § 8 provides:

All laws creating, regulating or affecting boards or officers charged with the duty of registering voters, or of distributing ballots to voters, or of receiving, recording or counting votes at elections, shall secure equal representation of the two political parties which, at the general election next preceding that for which such boards or officers are to serve, cast the highest and the next highest number of votes. All such boards and officers shall be appointed or elected in such manner, and upon the nomination of such representatives of said parties respectively, as the legislature may direct. Existing laws on this subject shall continue until the legislature shall otherwise provide. This section shall not apply to town, or village elections.

Village elections are governed by Article 15 of the new law. Pursuant to the provisions of
including registration of voters, distribution of ballots, and the receiving, recording and counting of votes at elections. 13

Although the purpose of this constitutional provision is "to guarantee equality of representation to the two majority political parties" on boards charged with election administration, its effect often has been both to impede fraud-free elections, 15 and to hinder the other established political parties. 16 Moreover, bipartisan administration of elections may not always accomplish the primary purpose of the Election Law: the citizen's right freely and fairly to choose those who will govern them. 17

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15. See, e.g., Note, Election Administration in New York: Pruning the Political Thicket, 84 Yale L.J. 61, 72-77, 82-84 (1974), discussing the constitutionality of the method of selecting election officials on a bipartisan basis.

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16. In Bishop v. Lomenzo, 350 F. Supp. 576 (E.D.N.Y. 1972), plaintiffs asked a three-judge federal court to declare unconstitutional those provisions of the New York Election Law which provided that only enrolled members of the two major political parties (historically, Democratic and Republican) could act as registrars, thus excluding members of the Liberal and Conservative Parties as well as independent voters. The court found that the restrictions did not affect the fundamental right to vote, and that if, arguendo, a compelling state interest were required to be shown to justify such a restriction, "ample justification" was shown by New York's interest in minimizing irregularities and the risk of fraud. Id. at 589.

In Socialist Workers Party v. Rockefeller, 314 F. Supp. 984 (S.D.N.Y. 1970), members of the Socialist Workers Party charged that the bipartisan composition of the various Boards of Elections denied members of other parties due process in determining the legal suffrage of nominating (and, impliedly, designating) petitions. The district court rejected such argument on the bases that (1) board actions are merely ministerial (see notes 206-12 and accompanying text infra); (2) there was judicial review of such actions (see notes 213-20 and accompanying text infra); and (3) there was a failure to demonstrate specific examples of abuse. For a contrary view see Weiss v. Duberstein, 445 F. 2d 1297 (2d Cir. 1971) which found the actions of the Board of Elections of the City of New York to be more than ministerial. Weiss challenged the then existing Election Law which limited the four Election Commissioner positions on the Board of Election to the choices of the New York County and Kings County Republican and Democratic County Chairmen. After such provision was declared unconstitutional, Weiss v. Duberstein, (Civil No. C70-1200 (S.D.N.Y., Sept. 1, 1971)), aff'd, 465 F.2d 1405 (2d Cir.), cert. denied, 409 U.S. 876 (1972), remedial state legislation expanded the size of the Board to ten and provided for appointment by the Republican and Democratic chairman of each of the five counties that comprise the City of New York.

See also Note, Election Administration in New York City: Pruning the Political Thicket, 84 Yale L.J. 61 (1974).

17. See, e.g., Crane v. Voorhis, 257 N.Y. 298, 178 N.E. 169 (1931); Hopper v. Britt, 203
The court of appeals consistently has sought to implement the right of voters to choose those who will govern, indicating a belief that party organization should not control the political process. In upholding the principle of free and fair elector choice, the court in *In re Callahan* held unconstitutional a statute prohibiting a party committee from nominating as its own candidate a candidate of another party. The court stated that the committee had the right to vote "for whom they will." Similarly, in *Hopper v. Britt*, the court invalidated a law which prohibited a multi-party candidate from having his name printed on the ballot more than once. In striking down the provision, the court indicated that every voter must be afforded the right to cast his vote under the party line of his choice. Finally in *Coffey v. Democratic Committee*, the court of appeals pointed out that the intent of the Election Law was to assure the citizen that his wishes may be expressed by his ballot, regardless of the wishes of political party leaders. "In other words, the scheme is to permit the voters to construct the organization from the bottom upwards, instead of permitting leaders to construct it from the top downwards."

*Yevoli v. Cristenfeld* involved a challenge to the Democratic and Republican County Committees' rules prohibiting support of candidates who had accepted the endorsement of other political parties. The lower court, noting that the restriction was aimed primarily at the Liberal and Conservative Parties, held the rule invalid:

[The restrictions] contravene the basic philosophy of our democratic system, which forbids such undue impairment of the franchise.... The whole purpose of the Election Law and of the Constitution under which it is enacted, is that, within reasonable bounds and regulations, all voters shall, so

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19. *Id.* at 61, 93 N.E. at 262.
20. *Id.*
21. 203 N.Y. 144, 96 N.E. 371 (1911).
22. *Id.* at 151, 96 N.E. at 373.
23. 164 N.Y. 335 (1900).
24. *Id.* at 342.
26. *Id.* at 592, 272 N.E.2d at 898, 324 N.Y.S.2d at 317.
far as the law provides, have equal, easy and unrestricted opportunities to
declare their choice for each office. . . .

The court of appeals reversed\(^{28}\) on the basis of the dissent in the
appellate division. While the decision may appear inconsistent with
the principle of full and fair voter choice, the appellate division
dissent emphasized the limited role of the party committee in the
election process:\(^{29}\)

[except in special elections and in the filling of vacancies, the county com-
mittee does not nominate the candidates of its party. What it does do is
endorse, i.e., recommend, a potential candidate to the enrolled voters of its
party. That candidate must then seek his party's nomination in its primary
election.

The court of appeals expressed the same view in Kooperstein v.
Power,\(^{30}\) where insurgent designees for certain judicial positions
challenged the petitions of designees supported by the New York
County Democratic Executive Committee. The insurgents claimed
that the latter designations had not been approved by the Demo-
cratic Party County Committee for New York County.\(^{31}\) In rejecting
the challenge, the court stated that the designations were made
by proper petitions and not by the actions of the party committees.\(^{32}\)

In following the principles of the Election Law, the courts tradi-
tionally have given administrative requirements a liberal construc-
tion. Thus in the absence of fraud, the will of the people will not be
thwarted by technicalities requiring precise compliance.\(^{33}\) However,
liberality of construction is not to be carried to extremes,\(^{34}\) and "a

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29. 37 App. Div. 2d 153, 158, 322 N.Y.S.2d 750, 755 (2d Dep't 1971) (Latham & Shapiro,
J.J., dissenting).
30. 153 N.Y.S.2d 908 (Sup. Ct.), aff'd, 2 App. Div. 2d 655, 153 N.Y.S.2d 541 (1st Dep't),
31. 153 N.Y.S.2d at 909.
32. Id.
34. In In re Burns, 199 Misc. 1005, 1008, 106 N.Y.S.2d 993, 997 (Sup. Ct. 1951) the court
stated:
We have here a designating petition where the election board in the first instance
rejected more than one third of the names on the designating petition as invalid for
various reasons, a figure the respondent does not dispute, and an additional 1,310 have
been found to be invalid on this trial by direct testimony. There comes a time when
the respondent should be called upon to come forward with proof of the legality of the
remaining petitions. The court finds this time has arrived.
In the absence of any testimony, I find that all of the designating petitions signed
consistent pattern of surface irregularity is fatal to a claim of substantial compliance... notwithstanding the absence of fraudulent intent. 35

The recodified Election Law, following the mandate of the state Constitution, 37 retains bipartisan control of registration procedures, 38 designation of election inspectors, 39 and membership on election boards. 40 Thus, independent and third-party registrants are not likely to have significant control over the administration of the franchise. 41

by the subscribing witnesses directly attacked, amounting to an additional 311 sheets, containing an additional 1,489 signatures, are also invalid. This computation of 2,799 signatures found to be invalid, leaves a balance of 1,320 valid signatures, far short of the required number to place Mr. Sullivan's name on the Democratic primary ballot.

The court does not find that Mr. Sullivan had knowledge of the irregularity of the designating petitions, but by the same token he cannot profit thereby.

The narrow line between good faith mistake and utter disregard for the law gave rise to a sharply worded dissent from Judge Matthew J. Jasen in Ruiz v. McKenna, 40 N.Y.2d 815, 355 N.E.2d 787, 387 N.Y.S.2d 558 (1976). Of 2,570 signatures filed 1,514 were struck by the Board of Elections or a referee in the supreme court. However, the majority found no inference that candidate McKenna was guilty of any fraud. Judge Jasen noted that McKenna was dissatisfied at the technique, pace and results of a door-to-door campaign for signatures. He therefore decided to solicit the signatures of passersby. Judge Jasen indicated that rampant disregard of technical formalities should prove fatal to a candidate's petition:

Where irregularities are not the product of deceitful intent or fraudulent design, a pattern of irregularities bespeaks either incompetence in execution of methods or indifference to the need for compliance with the requirements of the Election Law. The ultimate danger is that both incompetence and indifference may mask corrupt, if not fraudulent practices. . . . It should be even more obvious that a consistent pattern of surface irregularity is fatal to a claim of substantial compliance. . . . Where the undisputed evidence establishes a pattern of willful fraud, or ignorance of the statutory provisions, or inartful and incompetent execution of methods appropriate to achieve compliance with statute, and the pattern permeates an entire petition, it is well within the traditional powers of the court to declare that as a matter of law, in the truest sense of that term of art, the entire petition is invalid.

Id. at 818, 355 N.E.2d at 788, 387 N.Y.S.2d at 559-60 (Jasen, J., dissenting) (citations omitted) (emphasis added). See also text accompanying notes 181-97 infra.

36. Id. See note 34 supra.
37. N.Y. Const. art. 2, § 3. See note 12 supra.
39. Id. § 3-400(4).
40. Id. § 3-300.
41. See note 16 supra.
III. Qualifications for Voting

A. Qualifications of Voters

The power of the state to establish voter qualifications or restrictions is generally well established; the state may even impose restrictions on federal elections, if such restrictions are not arbitrary and are designed to promote intelligent use of the ballot. However, any qualifications or restrictions which have the effect of restricting or denying the franchise of any group must be carefully scrutinized. In determining whether such a law violates the equal protection clause of the fourteenth amendment, the court must consider the facts and circumstances surrounding the law, the governmental interest which the state claims to be protecting, and the interests of those who are disadvantaged by the exclusionary classification.

When the law interferes with the right to vote, the equal protection clause requires strict scrutiny of the classification. Under this test, the suspect classification must further a substantial and compelling state interest. Furthermore, if there are several reasonable meth-


45. See note 46 infra.

Traditional equal protection analysis utilizes one of two tests: the rational basis test and the compelling state interest test. A classification having a legitimate state interest would generally be sustained if there were a rational basis for it. McGowan v. Maryland, 366 U.S. 420 (1961). If the classification involved a suspect class or a fundamental right, then it would be subjected to the strict scrutiny test. The classification would be upheld only if it served a compelling state interest and was the least restrictive means available for achieving that interest. Shapiro v. Thompson, 394 U.S. 618 (1969); Loving v. Virginia, 388 U.S. 1 (1967).

Suspect classifications include race, Loving v. Virginia 388 U.S. 1 (1967); alienage, In re Griffiths, 413 U.S. 717 (1973); and national origin, Oyama v. California, 322 U.S. 633 (1940). Fundamental rights have been held to include voting, Harper v. Virginia Bd. of of Elec., 383 U.S. 663 (1966); Dunn v. Blumstein, 405 U.S. 330 (1972); travel, Shapiro v. Thompson, 394 U.S. 618 (1969); and procreation, Skinner v. Oklahoma, 316 U.S. 535 (1942). In addition, there are various intermediate approaches of equal protection analysis which require more than a rational basis but less than compelling reasons. Under these approaches, the court will balance the state interest advanced against the right interfered with. For a thorough discussion of these tests, see Gunther, The Supreme Court, The 1971 Term-Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv. L. Rev. 1 (1972).

ods of pursuing this interest, the test requires that the state choose the method least likely to interfere with the constitutionally protected activity. 47

1. Age Requirements

The New York State Constitution provides that every citizen shall be entitled to vote at every election, "provided that such citizen is twenty-one years of age or over and shall have been a resident of this state, and of the county, city, or village for three months next preceding an election." 48 However, changes in federal law, court decisions and conforming provisions of state law have altered these requirements drastically. 49

Since the enactment of the twenty-sixth amendment to the United States Constitution, 50 all but five states have instituted legislation lowering the age of majority in state elections to eighteen. 51 Three of the remaining states have lowered the age to nineteen, 52 while two states have made no amendment and retain twenty-one as the minimum age for voting in state elections. 53 The recodified Election Law provides that to be eligible to vote in New York State, a citizen must be eighteen years of age or over on the day of the election, and a resident of this state and of his county, city or village for the 30 days preceding the election. 54

2. Residency Requirements

In Atkin v. Onondaga County Board of Elections, 55 the court of
appeals ruled that the state constitutional and statutory provisions requiring a voter to be a resident "of the county, city, or village for three months next preceding an election," were not designed to meet a compelling state interest, and therefore violated the equal protection clause of the fourteenth amendment. The three-month time limit was held to be an arbitrary and unconstitutional standard. However, not all durational residency requirements are arbitrary and unconstitutional under this standard. In Atkin, the state Attorney General indicated that a thirty-day durational requirement would be more reasonable, and this limit has been incorporated into the recodified Election Law.

For the purpose of registering and voting, certain persons, including students, inmates of asylums or public care facilities, and prisoners neither gain nor lose residence by reason of their status. The prior Election Law required a member of any of these classes to file with the Board of Elections taking his registration "a written statement showing where he actually resides and where he claims to be legally domiciled, his business or occupation, his business address, and to which class he claims to belong." The recodified law now requires a similar statement from any voter "who has removed from his residence but who is still eligible to vote from that address."

3. Literacy Requirements

The state Constitution provides that "no person shall become entitled to vote by attaining majority, by naturalization or other-
wise, unless such person is also able, except for physical disability, to read and write English.” 66 However, the United States Supreme Court has ruled literacy criteria unconstitutional, 67 and the recodified Election Law has removed the literacy requirement from consideration in testing voter eligibility. 68

4. Other Disabilities and Requirements

The recodified Election Law continues to exclude from suffrage any person: (1) convicted of bribery (insofar as the bribery affected an election) 69; (2) convicted of any other crime equivalent to a felony under New York law (or under federal law where a federal court has exclusive jurisdiction), unless he has been pardoned or his maximum sentence of imprisonment has expired or he has been discharged from parole; 70 or (3) “adjudged incompetent or committed to an institution for the care and treatment of the mentally ill or mentally defective by order of competent judicial authority.” 71

B. Qualifications of Registrants

In addition to the qualifications of voters, the second requirement for voting in New York State is registration. Section 5-100 of the recodified Election Law reads in pertinent part:

A person shall not be entitled to vote in any election held pursuant to this chapter unless he shall be registered, and if required, enrolled pursuant to the provisions of this article unless he shall present a court order directing that he be permitted to vote at such election. 72

Therefore, in addition to meeting citizenship, age and residency requirements, 73 the prospective voter must register or vote at least

66. N.Y. Const. art. 2, § 1.
70. Id. § 5-106(2),(3),(4).
71. Id. § 5-106(6).
72. Id. § 5-100. Furthermore, sections 5-400 and 5-406 provide for the cancellation of registration of voters who fail to vote throughout the two preceding calendar years. Sections 1 and 6 of Article 2 of the New York State Constitution authorize the enactment of the above sections of the Election Law.
73. See notes 42-65 and accompanying text supra.
every two years, or his registration will be cancelled.

The constitutionality and practicality of the two year reregistration requirement is questionable. Legislation cancelling registration for failure to vote recently has been subjected to scrutiny on fourteenth amendment equal protection grounds. In Michigan State UWA Community Action Program Council v. Austin, the Michigan Supreme Court held unconstitutional a state statute which imposed cancellation of registration for failure to vote within two years. A federal district court found a similar one year reregistration statute unconstitutional in Beare v. Smith. Both the Austin and Beare decisions viewed the respective cancellation provisions as an interference with the fundamental right to vote.

Assuming that such one or two year statutes are unconstitutional, the contention that all reregistration statutes are invalid does not necessarily follow. In addition, providing a longer period before cancellation might avoid constitutional attacks upon the statute while maintaining the legitimate state interest in preventing fraud and permitting wider exercise of the franchise.

IV. Registration and Enrollment

Once a person has (or will by the succeeding election) fulfilled the eligibility requirements, that person may register centrally, locally, or specially by mail. Central registration is conducted at

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75. 387 Mich. at 520, 198 N.W.2d at 390.
77. In Marston v. Lewis, 410 U.S. 679, 680 (1973), the Supreme Court, in dictum, stated: We recognize that a person does not have a federal constitutional right to walk up to a voting place on election day and demand a ballot. States have valid and sufficient interests in providing for some period of time—prior to an election—in order to prepare adequate voter records and protect its electoral processes from possible frauds. Such reasoning should also apply to preregistration requirement.
79. Id. § 5-200.
80. Id. § 5-202.
81. Id. § 5-210. Failure to register properly need not preclude one from voting in any event, since Section 8-302(b) of the recodified New York Election Law provides a mechanism for a voter challenged for improper registration to vote after filling out an affidavit. See text accompanying note 90 infra.
the offices of the Board of Elections and is available to voters during specified times of the year. The recodified Election Law also provides that "any qualified person" may register by mail. Each county Board of Elections is required to make registration application forms "as freely and widely distributed as possible." In addition, Boards of Elections are required to hold local registration at least once a year upon published notice to prospective registrants. Failure to provide adequately for local registration may result in the reopening of registration. This was the case in Elsner v. Boothroyd, in which the appellate division directed the county Board of Elections to reopen registration after a judicial determination that the Board had failed to provide adequate local registration facilities. Justice John Larkin dissented, claiming that the applicants had not made diligent efforts to register at the time and place made available by the Board.

Failure to be registered properly need not preclude a person from casting his ballot. The recodified Election Law permits one challenged for lack of registration to vote after completing an affidavit stating that he or she is validly registered in another election district and is still a duly qualified voter in that district. The same procedure is available to those whose poll record has been lost or misplaced.

The recodified statute also provides for transfer of registration and enrollment, and allows a voter to change or correct his en-

83. Id. § 5-210(1).
84. Id.
85. Id.
86. Id. § 5-202. Section 5-202 requires that the period of registration begin no earlier than the sixth Saturday nor later than the fourth Saturday preceding the general election.
88. Id. at 989, 388 N.Y.S.2d at 49. The court did not state what its standard of adequacy was, but merely held that where the board provided a nine-month central voter registration period, a ten-month mail registration period, and two personal registration days during the eleven months immediately preceding election day, it had "failed to provide adequate local registration." Id.
89. Id. (Larkin, J., dissenting). The trial court had found that 46% of the applicants gave no reason for failing to register other than "I didn't have the time," or "My time is too valuable."
91. Id. § 5-208.
92. Id. § 5-304.
93. Id. § 5-306.
Enrollment. Enrollment pertains to a voter's selection of a particular party\textsuperscript{94} (or choice to remain an independent voter)\textsuperscript{95} and determines the voter's right to participate in primary elections.\textsuperscript{96} Transfer of registration and enrollment can be an important consideration for a citizen who wishes to vote or run as a candidate in primary elections. Unless a specific request for a "transfer" of registration is made after a voter changes residence, there is a danger that the transfer will be handled as a new or changed enrollment, which does not take effect until the "first Tuesday following the next succeeding general election,"\textsuperscript{97} thus precluding his participation in that election or its primaries.

In \textit{Sullivan v. Power},\textsuperscript{98} the appellate division considered whether

\begin{itemize}
  \item \textsuperscript{94} \textit{Id.} § 5-300.
  \item \textsuperscript{95} \textit{Id.}
  \item \textsuperscript{96} \textit{Id.} § 5-308.
  \item \textsuperscript{98} \textit{24 App. Div. 2d 709, 262 N.Y.S.2d 794 (1st Dep't), aff'd, 16 N.Y.2d 854, 210 N.E.2d 652, 263 N.Y.S.2d 333 (1965).}
\end{itemize}
persons who had changed their residence to new election districts but had not transferred their enrollments, were qualified to witness designating petitions:

The subscribing witnesses . . . on their respective registrations . . . became "enrolled voters" of the "same political party as the voters qualified to sign the petition . . . [and therefore were] "enrolled voters" of [that] party as of the time of the obtaining and witnessing of the signatures and the subscribing of their respective authenticating statements, and as of the time of the filing of the petitions [even though their enrollments had not been transferred]."

Once enrolled a voter may have his enrollment cancelled for falsely making a material statement in the voter declaration, or for not being in sympathy with the principles of the party in which he enrolled. While initially this may appear to violate the first amendment right of freedom of association, courts have presumed the validity of declarations of party allegiance, unless affirmative proof to the contrary is adduced. If this proof is presented, the decision to cancel party enrollment is based upon the principle of preserving the integrity of the political parties:

A condition of membership in a political party is the sympathy with its principles and the purpose of fostering and effectuating them . . . . The Legislature of this State in its wisdom enacted the Wilson-Pakula Law . . . by virtue of which it sought to restrict, according to its terms, the manner in which one could or could not invade the political party of which one was not a member to obtain party or public offices. Its purpose was to protect the integrity of political parties and to prevent the invasion into or the capture of control of political parties by persons not in sympathy with the principles of such political parties. The constitutionality of such legislation has been sustained.

Party sympathy is determined by the actions of the enrolled member, such as the circulation of petitions for candidates of

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99. Id. at 709, 262 N.Y.S.2d at 796.
104. In In re Mendelsohn, 197 Misc. 2d 993, 99 N.Y.S.2d 438 (Sup. Ct.), aff'd sub nom.,
opposing parties. Before the enrollment can be cancelled, however, the enrolled member is entitled to adequate notice and a hearing before the chairman of the county committee of the party with which the voter is enrolled.

V. Candidacies and Petitions

A. Requirements

Candidacies in New York are achieved primarily through convention or by petition, under either independent or political party auspices. Any candidate for statewide office who receives twenty-five percent of the vote of an established state party committee may run in the primary election. However, failure to secure a designation at the state committee level does not preclude the candidate from getting on the primary ballot via petition. Petitions for statewide office must be signed by twenty thousand enrolled party members or by five percent of the party's total enrollment, whichever is less. Candidates for most local offices need only secure the signa-

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Mendelsohn v. Wolpin, 277 App. Div. 947, 98 N.Y.S.2d 1022, aff'd, 301 N.Y. 670, 94 N.E.2d 254 (1950), the supreme court was convinced that the challenged member of the Democratic Party had sought the approval of the Bronx Executive Committee of the Liberal Party before enrolling as a Democrat. In a related case, the court struck the same person's designation as a member of the State Assembly on the basis that the cancellation of enrollment ordered in Mendelsohn on August 4, 1950, related back to the date of the challenge to such enrollment and effectively voided designating petitions filed on July 18, 1950. Wolpin v. Hefferman, 197 Misc. 589, 99 N.Y.S.2d 446 (Sup. Ct., 227 App. Div. 947, 98 N.Y.S.2d 1022 (2d Dep't), aff'd, 301 N.Y. 672, 94 N.E.2d 255 (1950). See notes 128-32 and accompanying text infra, with regard to designations of persons not enrolled in the designating party.


107. 1976 N.Y. Laws ch. 233 §§ 6-100 - 6-166 (McKinney 1976). The use of proxy notes at a party caucus has been held violative of "one man, one vote" for diluting the vote of the qualified voters who attend in person. Atkins v. Monahan, 91 Misc. 2d 499 (Sup. Ct. 1977).

108. Id. § 6-118.

109. Id. §§ 6-138, 6-140 and 6-142.

110. Id. §§ 6-104 - 6-118.

111. Id. § 6-104(2). The candidate must make a demand to be placed on the ballot within seven days of the state committee meeting. Id.

112. Id. § 6-134(1).

113. Id. New York formerly required a distribution of such signatures in each county but that provision was held unconstitutional as an effective dilution of the rights of the electorate. Socialist Workers Party v. Rockefeller, 314 F. Supp. 984 (S.D.N.Y.), aff'd 400 U.S. 806
tures of five percent of the enrolled party members residing in the political unit in which the voting is to occur.\(^{114}\)

Candidacy requirements vary from office to office,\(^{115}\) but no one may be designated or nominated to a political office who (1) is not a citizen of the state; (2) is not eligible to be elected to the office; or (3) if elected, would not be able to meet the constitutional or statutory qualification by the time he took office.\(^{116}\)

The form of the designating petition has been modified to include a representation by the signers that they are entitled to vote at the next primary election\(^{117}\) and to exclude a representation of support for the designated candidates.\(^{118}\) In addition, the petitioner must designate a committee of enrolled party members to fill vacancies on the primary ballot if the designated individual is unable to be a candidate.\(^{119}\) The petition is completed by a witness statement, which is deemed the equivalent of a sworn statement,\(^{120}\) attesting

\(^{114}\) Id. § 6-136(2).

\(^{115}\) See, e.g., N.Y. Const. art. 3, § 7 (member of legislature); Id. art. 4, § 2, (governor and lieutenant governor); U.S. Const. art. I, § 2(2) (member of the House of Representatives); and Id. art. I, § 3(3) (United States Senator).

\(^{116}\) 1976 N.Y. Laws ch. 233, § 6-122. But see Mark v. Van Wart, 68 Misc. 2d 40, 325 N.Y.S.2d 767 (Sup. Ct. 1971), in which the Board of Elections of the County of Westchester was directed to accept petitions to nominate Edward Mark, a minor, as a candidate for the office of member of the City Council although such candidate would not have been eligible to serve until eighteen days after commencement of the term of office, since section 30 of the New York State Public Officers Law permitted thirty days for the taking of the oath of office. Interestingly enough, since candidate Mark was a minor, his mother had to file the petition for judicial review. Id. at 40, 325 N.Y.S.2d at 768. In Brayman v. Stevens, 54 Misc.2d 974, 977, 283 N.Y.S.2d 933, 937 (Sup. Ct.) aff'd, 28 App. Div. 2d 1095, 285 N.Y.S.2d 280 (2d Dep't 1967) the court invalidated an attempt to nominate the same person to two different offices since the candidate, if successful would only be able to hold one office at a time.


\(^{118}\) Id. (amending N.Y. Elec. Law § 135 (McKinney 1976)).

\(^{119}\) Id. See text accompanying note 128 infra.

\(^{120}\) 1976 N.Y. Laws ch. 233, § 6-132(2) (McKinney 1976) (witness statement); § 6-132(3) (notary statement). In section 135 of the former law, a petition taken by one authorized to take an affidavit was favored method of collection although this has been revised in sections 6-132 and 6-140 of the recodified New York Election Law.

The statement to be executed by the notary or commissioner of deeds recites that the person who signed the petition sheet did so in the presence of the appropriate officer, and, being duly sworn, said that the subscribed statement was true. Failure to comply strictly with the taking of an appropriate oath or affirmation may lead to the invalidating of the petition. Donnelly v. Dowd, 12 N.Y.2d 651, 185 N.E.2d 10, 232 N.Y.S.2d 33 (1962); see also Lombardi v. State Bd. of Elec., 54 App. Div. 2d 533, 386 N.Y.S.2d 719 (1976). There is, however, a
that the petition was signed in the presence of the witness by persons duly identified to the witness.\textsuperscript{121} The form of a nominating petition for an independent nomination is substantially the same as a designating petition for a party candidacy.\textsuperscript{122}

Petitions are circulated during designated periods\textsuperscript{123} and are filed at either a local or state Board of Elections.\textsuperscript{124} A person designated as a candidate in any manner other than a primary election may decline the nomination by filing a signed and acknowledged statement.\textsuperscript{125} If the nominee is not an enrolled member of the party which selected him, or is conducting an independent candidacy, he must specifically accept the designation in writing.\textsuperscript{126}

Candidate incapacities creating a vacancy may be filled by the appropriate committee on vacancies or by the party committee.\textsuperscript{127} Furthermore, the courts have ruled that a party's voters should not be unrepresented at the polls even if it is necessary to order a write-in primary to nominate a candidate.\textsuperscript{128} The recodified Election Law now provides for write-in primaries.\textsuperscript{129}

\begin{enumerate}
\item Presumption that the officer acts properly which is not rebutted by a negative inference. Locascio v. Feuer, 34 N.Y.2d 976, 318 N.E.2d 603, 360 N.Y.S.2d 412 (1974). Absent fraud, evidence of an oath may not be necessary to the extent it is shown that the signers are fully informed of the purpose of the petition. La Mendola v. Mahoney, 49 App. Div. 2d 798, 379 N.Y.S.2d 234 (4th Dep't 1975), although Pilat v. Sachs, 59 App. Div. 2d 515, 397 N.Y.S.2d 804 (1st Dep't 1977), aff'd, 42 N.Y.2d 984, 398 N.Y.S.2d 409 (1977), would appear to overrule La Mendola insofar as the "work product" of numerous notaries and commissioners of deeds was invalidated for failure to render oaths. In Pilat it was argued that the filing of a petition on its face purported to be taken under oath but which was not, constituted fraud per se since such act constituted a misdemeanor, but the courts did not accept this position. See also notes 168-76 and accompanying text infra.
\item Locascio v. Feuer, 34 N.Y.2d 976, 318 N.E.2d 603, 360 N.Y.S.2d 412 (1974). Absent fraud, evidence of an oath may not be necessary to the extent it is shown that the signers are fully informed of the purpose of the petition. La Mendola v. Mahoney, 49 App. Div. 2d 798, 379 N.Y.S.2d 234 (4th Dep't 1975), although Pilat v. Sachs, 59 App. Div. 2d 515, 397 N.Y.S.2d 804 (1st Dep't 1977), aff'd, 42 N.Y.2d 984, 398 N.Y.S.2d 409 (1977), would appear to overrule La Mendola insofar as the "work product" of numerous notaries and commissioners of deeds was invalidated for failure to render oaths. In Pilat it was argued that the filing of a petition on its face purported to be taken under oath but which was not, constituted fraud per se since such act constituted a misdemeanor, but the courts did not accept this position. See also notes 168-76 and accompanying text infra.
\item 121. 1976 N.Y. Laws ch. 233, § 6-132(2).
\item 122. Id. § 6-140. The signing must be witnessed by one qualified to sign the nominating petition, hence, if such person had voted in a primary election or signed a valid and effective designating or nominating petition for the same office, all signatures so collected would be invalid. Id. § 6-138. See, Carroll v. McNab, ___ App. Div. 2d ____, 398 N.Y.S.2d 549 (2d Dep't 1977) (persons who previously signed valid designating petitions for the same office could not act as subscribing witnesses for independent petition).
\item 123. Id. § 6-134(6) (designating petitions); § 6-138(4) (nominating petitions).
\item 124. Id. § 6-144.
\item 125. Id. § 6-146.
\item 126. Id.
\item 127. Id. § 6-148. Such vacancies may be caused by declination by the designee, or a tie vote at a primary. The committee on vacancies may act where a candidate is disqualified although the petition pursuant to which the candidacy was proffered is otherwise valid. Marley v. Hamilton, 55 App. Div. 2d 864, ___ N.Y.S.2d ____ (2d Dep't 1976).
\end{enumerate}
Section 6-120(1) of the recodified Election Law restricts candidacies in primaries to enrolled members of the designating party, absent specific approval by the party committee having jurisdiction over the designation. This section’s predecessor, commonly referred to as the “Wilson-Pakula Law,” was designed purposely to prevent the “raiding” of one political party by another. Out-of-party designations must be authorized by an appropriate party committee, however, that committee need not be constituted within the particular political subdivision, so long as party rules provide that the particular committee represents the subdivision. The party itself retains the sole discretion to determine how this authorization is to be granted, but where the rules are silent the court of appeals has reasoned in Dent v. Power, that the appropriate committee would be one constituted within the political subdivision. When a party does not have a local committee established within a political subdivision, the party’s State Committee will be directed to authorize the designation.

B. Standing to Object

Both qualified voters and aggrieved candidates have standing to contest election matters, including objections to primary designa-

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130. Id.
131. Id. § 6-120(3).
135. Id. In Egan v. Prevote, 65 App. Div. 2d 862, ___ N.Y.S.2d ___ (2d Dep’t 1976) the court determined that the “appropriate committee” was comprised of members of the Queens County Republican Executive Committee from the affected congressional district.
138. Id. at 827, 122 N.E.2d at 104. Recourse to a local committee is unnecessary when party rules provide an authorized committee. Anderson v. Meisser, 22 N.Y.2d 316, 239 N.E.2d 531, 292 N.Y.S.2d 654 (1968).
139. This was the case in Langley v. Erway, 22 N.Y.2d 781, 239 N.E.2d 559, 292 N.Y.S.2d 694 (1968), in which the court of appeals determined that in the absence of a duly constituted county committee in Schoharie County, a designation of the Conservative Party for Albany and Schoharie Counties could be made only by the State Committee of the Conservative Party.
tions and nominations. Qualified voters are those who are eligible to vote for a particular candidate in the primary election. This limitation is based upon the structure of the primary system of New York:

In many States, voters may cross party lines and vote in any party's primaries, but in New York State, they may vote only in the primary of the party in which they enrolled the previous year. Therefore, in this State, an enrolled voter would seem to have an interest only as to the primaries in the party in which he or she enrolled.

Candidates are "aggrieved" and accorded standing when the matter involves the interests of the candidate in the office sought. The restriction regarding party lines is generally inapplicable to candidates.

In Pilat v. Sachs, petitioners objected to the nominating petitions of the Liberal Party designating a candidate for the office of Mayor of the City of New York. Respondents, citing Wydler v. Christenfeld, moved for dismissal arguing that the action, commenced by two enrolled members of the Liberal Party (who had served general and specific objections on the Board of Elections), had not been brought by the "real party in interest"—a member of the Republican Party seeking the nomination for mayor. The mo-


144. As to the nomination of a candidate who has not enrolled as a member of the party in the political subdivision involved, pursuant to Election Law § 137(4), (1976 N.Y. Laws ch. 233, § 6-120) the court of appeals in Wydler v. Christenfeld, 35 N.Y.2d 719, 720, 320 N.E.2d 278, 278, 361 N.Y.S.2d 647, 647 (1974), substantially limited the standing of those who could contest such nomination:

[Section 137(4)] has as its purpose the regulation of the affairs of a political party and is intended to have as its beneficiaries, only members of that political party or one who asserts that he was entitled to the authorization thereunder. It is of no interest to others that formalities have not been followed, so long as the purpose of subdivision 4 of Section 137 is not frustrated.


tion was denied by a Special Referee whose report was subsequently adopted by the court. The referee stated:

It was stipulated that the expenses for prosecuting this proceeding are being paid by the Committee for Goodman (the campaign organization of the Republican candidate). The testimony of Pilat (an objector), Osborne (a handwriting expert), and Steele (the campaign co-ordinator for the Republican candidate), make it clear that the Goodman campaign organization is vigorously prosecuting this proceeding . . . . He (the Republican) is the one who is the prime force behind the proceeding, who controls it through the pursestrings. Goodman's interest in this proceeding is not a jurisdictional defect under Matter of Wydler against Christenfeld . . . . That case dealt with a candidate of another party challenging a certificate issued pursuant to section 137 of the Election Law.

This is a proceeding by two objectors specifically authorized by Sections 145 and 330, Subdivision 1, of the Election Law. An objector, as opposed to a candidate aggrieved, is likely to be a nominee of a particular political organization or candidate. The statute does not prohibit this.\footnote{147}

\section*{C. Irregularities}

Authenticated petitions filed in proper form, and bearing the requisite number of signatures, are presumed valid,\footnote{148} but are open to objection before the appropriate board of elections\footnote{149} and the supreme court.\footnote{150} The late filing of a designating petition is a fatal defect.\footnote{151}

Written objections to petitions, both general\footnote{152} and specific,\footnote{153} must be timely filed\footnote{154} with the appropriate election board.\footnote{155} Notice must be given to all interested parties.\footnote{156}

\begin{footnotes}
\item[150] 150. Id. § 16-102.
\item[152] 152. 1976 N.Y. Laws ch. 233, § 6-154(2).
\item[153] 153. Id.
\item[154] 154. Id.
\item[155] 155. Id.
\item[156] 156. Generally, this includes the appropriate Board of Elections and candidates on the
The technicalities of the Election Law are not meant to discourage or entrap the naive or freshman office seeker. Rather, by facilitating the verification of petitions, the Election Law seeks to prevent fraud on the public and other candidates.\textsuperscript{157} Thus, the Election Law requires only substantial compliance with most sections, although some sections are of sufficient importance to mandate strict and uniform compliance.\textsuperscript{158}

Petition signers must be enrolled voters of the party and entitled


In \textit{Pilat v. Sachs}, the first named member of the Committee on Vacancies had been served copies of the general and specific objections to the contested petition as required by the regulations of the Board of Elections of the City of New York and testified to personal service of the petition and order to show cause within the statutory fourteen-day period. However, the caption of such petition and order did not name such person and the order did not provide for service on him. In affirming the determination of the supreme court in this regard, the appellate division stated:

Respondent argues that the petition is fatally defective in failing to join the first named member of the Committee on Vacancies . . . as a “necessary” party. Petitioner counters that Mr. Davidson was named in the petition portion of the Petition and Order to Show Cause, had notice of the proceeding and participated in the proceeding, and therefore is within the jurisdiction of the court. In \textit{Matter of Lloyd v. Power}, 37 App. Div. 2d 792, the court said “Under the provisions of CPLR 1001-1004 there are no longer ‘necessary parties’ but only parties who ‘ought’ to be joined”. The statute is clear as to when joinder may be excused. (CPLR 1001(b)) . . . Respondent’s argument must therefore fall.

\textsuperscript{157} See text accompanying notes 181-204 infra.

to vote at the next primary. Identification of signers is deemed essential and both the failure to list and the incorrect listing of the signer’s election or assembly district is a fatal deformity requiring the invalidation of his signature, since it hinders both election officials and potential petition objectors from quickly verifying petition signatures.

Generally, sheets must be consecutively numbered. On the sheet, candidates must be identified by the county or other geographical unit describing the office sought, unless this is obvious. Absent evidence of fraud, properly explained erasures and alterations do not generally cause the invalidation of the petition sheets, unless these modifications are made subsequent to execution.

Subscribing witnesses to the petition must be enrolled members of the party. Each subscribing witness must personally obtain the signatures and require identification of each signer. Personal

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159. 1976 N.Y. Laws ch. 233, § 6-132 (McKinney 1976). If a voter moves his place of residence to a location within the same election district, that voter still is eligible to vote. However, if he moves outside the district and does not reregister with the Board, he is ineligible. See GASSMAN, 16 ELECTION LAW DECISIONS AND PROCEDURE 156 (2d ed. 1962).


162. Gilmore v. Kugler, 21 App. Div. 2d 293, 249 N.Y.S.2d 960 (3d Dep’t 1964). If the number of sheets is not material, or if only an insubstantial violation of section 6-130 occurs, the defect is not fatal. Lawrence v. Coveney, 39 App. Div. 2d 951, 333 N.Y.S.2d 444 (2d Dep’t 1972) (designating petition consists of only four sheets); Lamula v. Power, 13 N.Y.2d 873, 192 N.E.2d 725, 243 N.Y.S.2d 17 (1963) (6 sheets of a 685-page petition were not bound in consecutive order).


knowledge of each signer is not required;\textsuperscript{170} the level of cognition is that "in the exercise of reasonable judgment and circumspection the said witness is satisfied in his mind and conscience that the person whose signature he authenticates is in fact the person he represents himself to be."\textsuperscript{171}

The failure to list, or the incorrect listing of election or assembly districts of subscribing witnesses,\textsuperscript{172} as well as misstatements concerning residence,\textsuperscript{173} prior registration,\textsuperscript{174} or the number of signatures on any page\textsuperscript{175} are all fatal defects; and each sheet of the petition containing defective verifications will be invalidated.\textsuperscript{176}

When notaries or commissioners of deeds collect signatures or petitions,\textsuperscript{177} the signers must affirm the statements regarding the designation or nomination of the candidates.\textsuperscript{178} A presumption exists


\textsuperscript{171} Stephens v. Heffernan, 186 Misc. 275, 59 N.Y.S.2d 234 (Sup. Ct. 1945).

\textsuperscript{172} Rutter v. Coveney, 38 N.Y.2d 993, 348 N.E.2d 913, 384 N.Y.S.2d 437 (1976); Gordon v. Catania, 45 App. Div. 2d 937, 358 N.Y.S.2d 952 (1974). \textit{But see} Vari v. Hayduk, ___ Misc. 2d ___, rev'd, 59 App. Div. 2d 571, 397 N.Y.S.2d 824 (2d Dep't) aff'd, 35 N.Y.2d 176, ___ N.E.2d ___ (1977), in which it was held unnecessary to include the Assembly District designation for offices to be filled in the City of Mount Vernon since all of such City is in an Assembly District.


\textsuperscript{174} Crosbie v. Cohen, 258 App. Div. 738, 14 N.Y.S.2d 897 (2d Dep't 1939).


\textsuperscript{178} The person being sworn must realize that he or she is being sworn and this must be shown unequivocally. The administration of the oath is called a jurat. "The jurat is a statement by the notary that the facts contained in the body of the affidavit were sworn to before him, with the date thereof, and signed by the officer, with his official title and a statement of his jurisdiction." 42 NY Jur, \textit{Notaries and Commissioners of Deeds} § 17. The form in which an oath is administered is not rigid, although some form is essential. The form must "appeal] to the conscience of the person to whom it is administered and [bind] him to speak the truth . . . [a]n unequivocal and present act by which the affiant consciously takes upon himself the obligation of an oath" is required. Furthermore the affiant must be in the \textit{personal presence} of the person administering the oath so that a certain identification can be made. 2 NY Jur, \textit{Affidavit, Oath, and Affirmation} § 4 (emphasis added). The case law expounding the above principles of law began with \textit{O'Reilly v. People}, 86 N.Y. 154 (1881) and has remained constant to the present. A recent case enunciated the standard as follows:

As far back as 1881 in \textit{O'Reilly v. People} . . . it was determined that to constitute a valid oath for the falsity upon which perjury will lie there must be an unequivocal and present act in some form in the presence of an officer authorized to administer oaths,
that this has been done. In all cases, the subscribing witness, notary or commissioner must sign the authenticating statement at the bottom of each sheet.

Fraud is the most intolerable election irregularity since it most seriously violates the integrity of the electoral process. When numerous forgeries and false attestations are found, courts will invalidate every sheet on which they appear. If a subscribing witness falsely swears to one petition, all the petitions signed by that witness will be invalidated. When a candidate participates in obtaining fraudulent signatures, all his petitions will be declared invalid.

One court stated its view toward fraud as follows:

If designating petitions are to perform their lawful and intended function, it is essential that they be kept free from fraud in their making. It is to that end that the legislature has made meticulous requirements with respect to them. The surest way to keep them free from fraud is to let it be known that any taint of fraud will wholly invalidate them, rather than merely set the court to the task of counting up the number of fraudulent instances in order to see whether they reduce the number of signatures below the minimum required by law.

Even though the candidate has not participated in the fraud, his petitions may still be invalidated if the court finds that the petitions are permeated with fraud. The New York State Court of Appeals has closely scrutinized nomination petitions when fraud by the candidate is alleged. For example, in 1968, in Aronson v. Power, the court found a designating petition requiring three hundred fifty signatures, by which the affiant consciously takes upon himself the obligation of the oath. That stated principle has been followed to date.


natures was invalidated by fraudulent practices and irregularities affecting ten percent of the signatures on nine sheets out of a total of one hundred twenty sheets. The court held the petition was so permeated with fraud as to invalidate the entire petition, even though there was no proof that the candidate had participated in the fraud. The candidate, however, had failed to testify as to his lack of participation and knowledge. In 1976, in *Galiber v. Previte*, the court found an entire petitioning procedure permeated with fraud with the knowledge and active participation of the candidate when it was shown that: (1) the signatures consistently were taken without regard to the signer's eligibility to sign, and without any effort to inform the signers for whom and for what purposes they were signing; (2) the subscribing witnesses were not in fact the persons who took the signatures; and (3) the dates on the subscribing witnesses' statements did not correspond with the dates on which the signatures were taken. Faced with such pervasive irregularity in which the candidate actively joined, the court invalidated the entire petition.

During the 1976 election campaign, the court of appeals decided two fraud cases, which are difficult to harmonize. Each was decided over an incredulous dissent. In *Ruiz v. McKenna*, the court held that a designating petition, in which nearly sixty percent of the signatures were invalidated by the Board of Elections, was not permeated with fraud. While recognizing that the evidence "might well have supported an inference either that there was fraudulent intent which infected the petition, or that the irregularities similar to those proved permeated the whole designating petition," the court refused to draw that inference as a matter of law. The record revealed that respondent actively and personally engaged in the solicitation of signatures, and that the high percentage of invalid

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186. The irregularities affected 1,181 of the 1,223 signatures. *Id.*
188. *Id.* at 823, 355 N.E.2d at 791, 387 N.Y.S.2d at 562.
190. *Id.* at 818, 355 N.E.2d at 789, 387 N.Y.S.2d at 560. Of the 2,570 signatures obtained by the candidate, the Board of Elections invalidated 1,514. Since there remained 1,056 valid signatures, satisfying the statutory requirement of 1,000, the Board validated the petition.
191. *Id.* at 817, 355 N.E.2d at 788, 387 N.Y.S.2d at 558.
192. The candidate personally subscribed 189 of the 198 sheets and thus certified that he witnessed 2,495 of the 2,570 signatures submitted. *Id.* 355 N.E.2d at 788, 387 N.Y.S.2d at 559.
signatures was due to soliciting signatures under false pretenses, failure to obtain signatures personally, disregard for voter registration and party enrollment, ineligibility of subscribing witnesses, and numerous other irregularities. Judge Jasen, dissenting, found this "a consistent pattern of surface irregularity . . . fatal to a claim of substantial compliance" which was a "direct result of [the candidate's] failure to undertake reasonable efforts to protect the quality of his signatures." This pattern of massive irregularity, said Judge Jasen, permeated the entire petition, and it was therefore "well within the traditional powers of the court to declare that, as a matter of law, in the truest sense of that word of art, the entire petition is invalid."

A week later, in a per curiam decision in which Judge Jasen concurred, the court in Proskin v. May, held that where over fifty percent of the signatures on a designating petition were invalid, fraud and irregularity so permeated the petition as a whole to call for its invalidation, despite a showing that the candidate had no personal knowledge of the fraud or irregularity. Judge Cooke dissented, pointing out that the balance of the signatures, well above the minimum required for designation, were affirmatively found to be valid, and the declaration of their invalidity was a "forfeiture or penalty" because of the invalid signatures. "Such a sanction certainly is not in order where there is no knowledge or participation by the candidate, otherwise, an innocent candidate would be penalized and, perhaps even more importantly, valid signatures would be disenfranchised."

A recent court of appeals decision has made it more difficult to harmonize Ruiz and Proskin. In Pilat v. Sachs, 5,373 signatures were filed for a designation requiring 2,551 valid signatures. The Board of Elections of the City of New York invalidated 1,390 signatures. The supreme court, after a line by line examination, validated 248 of these invalidated signatures but invalidated an additional

193. Id. See also note 30 supra.
194. Id. at 818, 355 N.E.2d at 788, 387 N.Y.S.2d at 559 (Jasen, J., dissenting).
195. Id., 355 N.E.2d at 789, 387 N.Y.S.2d at 559-60.
196. 40 N.Y.2d 829, 355 N.E.2d 793, 387 N.Y.S.2d 564 (1976). Sixty-three signatures were required for a valid petition. Of the 220 signatures contained in the petition, 116 were declared invalid, leaving 104 valid signatures (41 more than necessary).
197. Id. at 831, 355 N.E.2d at 794, 387 N.Y.S.2d at 565 (Cooke, J., dissenting).
198. 42 N.Y.2d 984, 398 N.Y.S.2d 409 (1977), aff'g, 397 N.Y.S.2d 804 (1st Dep't).
1,554 signatures. Of the signatures which it invalidated, the court found 372 "non-genuine" signatures (111 of which were additionally invalid for other reasons) and voided 189 signatures collected by certain subscribing witnesses "as being permeated with fraud or irregularity." It likewise invalidated 1,104 signatures for the failure of certain notaries or commissioners of deeds to administer oaths to signers of the petitions. Nevertheless, 2,668 signatures remained valid, and this was sufficient to validate the petition.

Petitioner argued that the procedures employed by respondent constituted a pattern of irregularities that required the court to invalidate the petition under the permeation theory in Proskin. The supreme court rejected this argument, stating:

There is a presumption of validity which attends any petition filed in proper form with the Board of Elections. The evidence as presented by the petitioner is wholly insufficient to warrant a finding that the entire petition was tainted with fraud. The Court finds that the irregularities were unpatterned and are to be overlooked, in order to further the broader public interest in favor of a meaningful election choice . . . . The bona fide signatories of the Liberal Party petitions should not be deprived of their right to designate and vote for the candidate of their choice.199

The Appellate Division affirmed,200 impliedly rejecting the permeation theory in Proskin. The appellate court also rejected narrow and technical construction of the Election Law:

The entire object of our election laws, in furtherance of the democratic process, is to provide qualified voters the opportunity to designate a candidate of their choice, and to require a narrow and technical construction of these laws would defeat rather than effectuate that objective. It is reasonably to be expected that in the collection of over 5,000 signatures technical inadvertencies . . . , human nature being what it is, are bound to arise and those signatures characterized as irregular have been the subject of scrutiny by two referees and the Justice in Special Term and in due course striken from the petition . . . .201

The court of appeals affirmed in a memorandum decision which cited Ruiz v. McKenna, and added only: "The courts below considered the question of permeation of fraud and irregularities, usually a question of fact, and resolved in each instance this question in

199. Id.
200. 397 N.Y.S. 2d 804 (1st Dep't 1977).
201. Id. at 805.
respondent's favor."

This series of cases suggests that while allegations of fraud in the making of petitions still trigger close scrutiny by the courts, the court will allow a certain amount of "human error" and "inadvertence" to pass unpenalized. The difference between fraud and error is a question of fact, but the court will not declare a petition invalid unless there is a clear pattern of fraud or irregularity which permeates the petition.

In contrast with the court's generosity in dealing with human error, the court does not treat so lightly plain sloppiness. Less than two months after deciding Proskin and Ruiz, the court of appeals may well have dictated the outcome of the 1976 presidential election when it rejected the independent nominating petition filed by Eugene McCarthy. Since the individual signatures were solicited and collected in a "haphazard manner," the court invalidated the petitions, finding less than even substantial compliance with the statute.

VI. Board of Elections and Judicial Review

A. Board Review

Board of Elections review of petitions is generally commenced pursuant to the filing of objections, although a board arguably has a duty to invalidate petitions sua sponte. The various boards of elections are empowered to make their own rules consistent with the Election Law regarding objections to petitions. Failure to serve objections on an opposing candidate in accordance with the rules of the local board of elections could preclude a board determination as to the validity or invalidity of the petitions.

The statute authorizing local boards to consider objections to

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204. Id. at 630, 357 N.E.2d at 969, 389 N.Y.S.2d at 313.
206. This ability is implied from the Board's inherent power to review petitions absent specific objections. 1976 N.Y. Laws, ch. 233, § 6-154(3) (McKinney 1976).
207. Id. at § 6-154(2) (McKinney 1976).
petitions has been interpreted\(^{210}\) as limiting the power of election boards to a consideration of the face of the petition:

\[\text{[T]he Legislature did not intend to vest in these local officials the preliminary power to pass on the validity of the nominating papers filed with them where the decision involved questions of fact. They may pass on purely ministerial questions, but I do not think the Legislature intended that they should go behind the face of the papers.}\(^{211}\)

Furthermore, when a board exceeds the scope of its power, members of the board can be held liable in damages to an aggrieved candidate.\(^{212}\)

### B. Judicial Review.

#### 1. Jurisdiction

At common law, judicial review of election matters did not exist, since such matters were considered to be in the province of the "political arm" of the government. Today, judicial review extends only so far as specifically granted by the state legislature.\(^{213}\)

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\(^{210}\) In re Frankel, 212 App. Div. 664, 208 N.Y.S. 721 (2d Dep't 1925).

\(^{211}\) Id. at 671, 208 N.Y.S. at 727.


\(^{213}\) See People ex rel. Conliss v. North, 72 N.Y. 124 (1878); State ex rel. Morris v. Sherman, 63 N.D. 9, 245 N.W. 877 (1932); Reese v. Dempsey, 48 N.M. 417, 152 P.2d 157 (1944); State ex rel. Myers v. Garner, 148 W. Va. 92, 133 S.E.2d 82 (1963); Longshore v. City of Homewood, 277 Ala. 444, 171 So. 2d 453 (1965). Article 16 of the recodified Election Law grants jurisdiction to the courts to review election procedures. See in particular sections 16-102 (former section 330(1) and (2)) (pursuant to which an aggrieved candidate or objector, and, under the new law, the chairman of a party committee, may commence an action contesting the nomination or designation of a candidate); section 16-106 (former sections 330(4), (5) and (6)) (pursuant to which an aggrieved candidate or certain voters may contest the canvass of returns in an election; and section 16-114 (formerly section 471) (pursuant to which campaign expenditure filings may be mandated and the Fair Campaign Code [section 3-106, formerly section 472] may be enforced). It is not clear whether an action to enforce the Fair Campaign Code requires an exhaustion of administrative remedies before the State Board of Elections. See article 3 Title I. The court of appeals had appeared to construe strictly and narrowly the courts' jurisdiction to review election matters in Yevoli v. Christenfeld, 29 N.Y.2d 591, 272 N.E.2d 898, 324 N.Y.S.2d 317, rev'd 37 App. Div. 2d 153, 322 N.Y.S. 750 (1st Dep't 1971). In Yevoli the court adopted the dissenting opinion in the Appellate Division, stating: "we believe that a fair reading of all of the provisions of the Election Law compels the conclusion that courts have no right or business to become enmeshed in the internal workings of our political parties." 37 App. Div. 2d at 158, 322 N.Y.S.2d at 755 (emphasis added) (see notes 13 through 15 and accompanying text supra); and in Kane v. Republican County Committee, 12 N.Y.2d 658, 185 N.E.2d 12, 232 N.Y.S. 36, aff'd 17 App. Div. 2d 707, 230 N.Y.S.2d 761 (2d Dep't 1962). In Kane, the petitioner sought delivery of certain information designed to facilitate his securing designating petitions. In rejecting his request, the
The supreme court possesses plenary and summary jurisdiction to review the validity of petitions and elections, even if such questions had been raised previously before the Board of Elections. This is not an inherent power of the supreme court; however, it is conferred entirely by statute. Moreover, the statute does not empower the supreme court to cancel, set aside, or annul a general election. When a petition has been invalidated, the court may

Appellate Division said:

Petitioner brought this proceeding in order to obtain signatures on his primary petition inasmuch as petitioner made no claim that he sought the requested information in order to object to or dispute the designation of his opponent. The Supreme Court has no summary jurisdiction under section 330 to grant the relief requested, which invoked 'no question of law or fact' raised by an aggrieved candidate as to designation or nomination of any candidate.


In Farber v. Carroll, 59 App. Div. 2d 514, 397 N.Y.S.2d 803, (1st Dep't), aff'd, 42 N.Y.2d 989, ___ N.E.2d ____ (N.Y.2d) (1977), the appellate division appeared to extend the jurisdiction of the courts under section 330 of the former law, beyond that established in Yevoli, stating:

The parties, candidates for separate public office agreed, somewhat anomalously, to join in one Republican primary petition, with petitioner-respondent Farber being permitted at the same time to enter into a similar arrangement with another person, a rival candidate for the same office sought by respondent-appellant Carroll. As should have been expected, after not too long, Carroll taxed Farber with favoritism toward his rival and a falling-out ensued. For whatever reason, Carroll, who had possession of the collection of signed petitions, refused Farber's demand that they be timely filed with the Board of Elections alternative to being delivered to Farber. The instant suit ensued, culminating in an order by Special Term that the petitions be filed. We hold that order to have been properly made, and further that petitioner-respondent never waived the protection of section 330 of the Election Law. The petitions, to the extent that they expressed the desire of enrolled voters to have the designees on the primary ballot, belonged to neither party exclusively, and to allow retention by either party to the detriment of the other would be to frustrate the electoral scheme completely.

The appellate division found the order of the supreme court to be "within the ambit of section 330 of the Election Law, to wit, 'the designation of . . . [a] . . . candidate . . .'. The supreme court had not found the action to be within the ambit of section 330 because it was instituted prior to and not during the statutory 14-day period under that section and had predicated jurisdiction under 42 U.S.C. § 1983 (the Civil Rights Act) based on the motion of Carroll's attorney for a dismissal for lack of jurisdiction constituting actions under color of state law. See Snowden v. Hughes, 321 U.S. 1 (1944) holding that, absent invidious discrimination, the Civil Rights Act does not apply to state elections.


217. Oster v. Village of Jordan, 42 Misc. 2d 432, 248 N.Y.S.2d 328 (Sup. Ct. 1964);
The supreme court does have the power to review and correct general election returns. Rice v. Power, 19 N.Y.2d 106, 224 N.E.2d 865, 278 N.Y.S.2d 361 (1967). In Rice it was contended that the election of a delegate to the New York State Constitutional Convention was subject to the exclusive review of the Convention itself. Id. at 108, 224 N.E.2d at 866, 278 N.Y.S.2d at 363. The court of appeals rejected this view, stating:

In our view, section 330 of the Election Law validly vests summary jurisdiction in the Supreme Court to order a recanvass of the absentee and military ballots cast in such an election. It is true that the State Constitution (art. XIX, § 2) makes the Convention the ultimate 'judge of the election, returns and qualifications of its members.' However, the New York City Board of Elections has the duty of determining and certifying which candidate received 'the greatest number of votes' for the office of delegate to the Constitutional Convention (Election Law, § 276), and no provision in the Constitution deprives the courts of jurisdiction under section 330 to inquire whether the board has properly discharged its duty. Although the Convention is privileged to disregard the certificate issued by the Board of Elections in determining whether a delegate was properly elected and should be seated, this does not in any way vitiate the power of the courts to require that the certificate reflect an accurate tally of the votes cast.

In a subsequent action arising out of the same matter, Rice v. Power, 19 N.Y.2d 474, 227 N.E. 2d 583, 280 N.Y.S. 2d 657 (1967), the court of appeals noted that if an action to review election returns was not within the scope of section 330, the plenary judicial remedy was quo warranto, id. at 482, 227 N.E.2d at 588, 280 N.Y.S.2d at 664. In such case, the court considered the degree of proof necessary to alter a recanvass of votes, stating:

The Supreme Court is given summary jurisdiction to determine a controversy arising from the canvass of returns by a city Board of Canvassers and may direct a recanvass or correction of the board's determination (§ 330, and subd. 5).

But if the court is to change the result of the board's recanvass, which the statute expressly provides shall supersede that of the election inspectors, it must do so on a record which will show reliably that the board on recanvass has been mistaken in its result.

The power of the supreme court to review the returns in primary elections and order new elections is not limited as in the case of general elections. See Note, Primary Challenges in New York: Caselaw v. Coleslaw v. Election Protection, 73 Colum. L. Rev. 318 (1973). For a discussion of the standards that arguably should be applied (but which to date have not been so applied) in determining whether a new primary election should be ordered, see Finklestein and Robbins, Mathematical Probability in Election Challenges, 73 Colum. L. Rev. 241 (1973).

For a case which defies not only the mathematical probabilities referred to above but simple logic, see Biaggi v. The City of New York Board of Elections, Sup. Ct., Bronx Co., 1974 (Index No. 14704/1974). In that case a primary election was held in the Conservative Party for the purpose of nominating a candidate for the office of Member of the House of Representatives. The incumbent Democratic congressman Mario Biaggi was authorized to run in the primary by the Executive Committee of the Conservative Party of Bronx County and was opposed by an enrolled Conservative, Francis L. McHugh.

In the primary, McHugh received 304 votes to Biaggi's 297. Biaggi instituted a proceeding for a new election pursuant to section 330 of the Election Law. In the supreme court, the Special Referee found 112 "suspect votes" noting "[a]pplying a probability analysis, it is unnecessarily to strain the probability to assume the likelihood that even a small portion of the 112 suspect or irregular votes could produce a different result."

However, the court's method of determining the "suspect votes" is questionable. Due to the necessity to certify a candidate quickly for the November general election not all of the
order the Board of Elections to provide enrolled voters with a write-in ballot.\textsuperscript{218}

The courts have distinguished actions to validate petitions from invalidation proceedings,\textsuperscript{219} and have treated the former more liber-

election districts in the congressional district were recanvassed. Only 55 election districts (which had accounted for 286 votes in the Conservative Party primary) were reviewed. In the selfsame districts and on the same day, 7,305 persons participated in a Democratic primary. Respondent McHugh argued that the suspect votes should have been allocated proportionally to the two primaries, i.e., only .038% of such suspect votes should be attributed to the Conservative primary since it was unlikely that every irregularity took place in the Conservative primary. The referee rejected this argument finding “it is a view not clearly adopted by any legal authority, and lends itself to the discarded formula of mathematical possibility.” If time had permitted (the shortness of time however does not shift the burden of proof which is on the petitioner seeking a new election), it should have been possible to determine how many enrolled Conservatives participated in the primary and any discrepancy between that number and the total Biaggi-McHugh votes would be clearly irregular. Indeed, this procedure was utilized in 15 election districts, wherein the total vote in the Conservative primary was 73 and the recorded signatures only 60, leaving 13 irregularities. Unless an apportioning formula is utilized, no primary of a party held contemporaneously with a primary of disparately larger participation will be saved from being set aside.

In one election district, other than those referred to above, the referee reported that 38 votes were recorded although only 6 enrolled Conservatives had signed in to vote, hence there were 32 suspect votes. Respondent McHugh argued, to no avail, that such suspect votes could not have produced a different result since in the district in question, the 56th election district of the 80th Assembly District, Biaggi was credited with 26 votes to McHugh’s 12, hence, if only 6 votes were valid and were assumed to be in Biaggi’s favor, the effect of such irregularity would be to increase McHugh’s margin of victory by 8 votes (the net effect of the irregularity). This policy of giving effect to the reasonable application of any irregularity has been followed. Haney v. Comm. of Elections, --- App. Div. 2d ---, 398 N.Y.S.2d 358 (2d Dep’t 1977) (where only three enrolled members of a party voted in a primary in a particular district, it was impossible for candidates to receive four votes); Christ v. Dodd, 91 Misc.2d 250, 399 N.Y.S.2d 168, aff’d, --- App. Div. 2d ---, 398 N.Y.S.2d 550, aff’d, 42 N.Y.2d 1078, --- N.E.2d ---, --- N.Y.S.2d --- (1977) (irregularities apportioned as to their natural effects would not change outcome of primary).


219. In Pell v. Coveney, 37 N.Y.2d 494, 336 N.E.2d 421, 373 N.Y.S.2d 860 (1975), the court of appeals permitted late commencement of an action to validate a petition where the delay was occasioned by the delay of the Board of Elections to give notice of its determination of invalidity. Since Pell, the courts have routinely extended the time for service of orders to validate a petition where the responsible Board of Elections does not act within the statutory period. Colvin v. Romeo, --- App. Div. 2d ---, 398 N.Y.S.2d --- (4th Dep’t 1977). Prior to Pell, it was common to seek an order contingent upon the action of the Board of Elections. See, e.g., Gassman, Election Law, Decisions and Procedure (Election Law Forms, Petition in Support of Motion to Validate Designating Petition), 935 (2d ed. 1962).

Although an action to validate is generally commenced by service of a petition and order to show cause, in In re Straniere, 59 App. Div.2d 572, 397 N.Y.S.2d 823 (2d Dep’t), aff’d, 42
ally, apparently believing that a candidate should not be denied access to the election procedure by a procedural bar if he can show a meritorious claim.

2. Institution of Proceedings

Proceedings under article 16 of the recodified Election Law must be instituted within the prescribed time periods. Failure to do so deprives the court of jurisdiction. Recently, the court of appeals reaffirmed this rule:

Service by mailing was incomplete under the particular statute so long as the persons to be served did not receive delivery within the 14-day period.

However, the court did not strictly adhere to this rule in Contessa v. McCarthy which dispensed with proof of actual receipt of service when process was mailed five days before the end of the limitation period. The necessity for proof of delivery is unclear, and guidance can only be ascertained by the principle that mailing must be accomplished "at a time when it might reasonably have been expected that receipt would occur within the statutory period."

C. Venue

The proper venue for election law matters is the Special Term of the Supreme Court in the county in which the dispute arises. If no

N.Y.2d 984, N.E.2d ___, 398 N.Y.S.2d 409 (1977), the Appellate Division, Second Department, reversed the determination of the Supreme Court, Richmond County, and permitted an action based on a counterclaim to a petition and order to show cause to invalidate the petition. See also Ambro v. Coveney, 20 N.Y.2d 850, 231 N.E.2d 776, 285 N.Y.S. 2d 83 (1967).

220. In Butler v. Hayduk, 37 N.Y.2d 497, 336 N.E.2d 423, 373 N.Y.S.2d 863 (1975), (heard and decided at the same time as Pell v. Coveney) the court of appeals denied relief on the basis that the failure to serve all necessary parties was in the control of the party commencing the action. But see, Wager v. New York State Board of Elections, ___ App. Div. 2d ___, 398 N.Y.S.2d 551 (2d Dep't 1977). Although the recitation of the facts by the court appears to indicate that mail service was not completed in accordance with either the statute or the order, the court found jurisdiction where service on one party by certified mail was effected by notice received from the post office of a Hempstead delivery which could not be completed because the post office was closed.


Special Term is in session, the matter may be brought before any Special Term in the same judicial district.\textsuperscript{226}

\section{VII. Conclusion}

The recodification of the Election Law has as its purpose simplifying and clarifying\textsuperscript{227} the election procedures in New York. "The bill contains a minimum of substantive changes, but makes numerous technical and procedure amendments."\textsuperscript{228}

A major benefit of the recodification is a presentation of the administrative procedures in a more understandable and readable form,\textsuperscript{229} thus making it a practical aid to party committees and candidates, but the recodification also serves a long-range purpose:\textsuperscript{230} in removing obsolete and obtuse provisions from the law, and consolidating and clarifying the remaining provisions in a more orderly and meaningful manner, it has prepared the groundwork for future substantive election law reform.

Further revision in the manner of registration is no doubt to come, even though a recent study indicates that easier registration does not necessarily result in increased voter turnout.\textsuperscript{231} Still, the recodi-

\begin{thebibliography}{99}
\bibitem{227} See note 3 supra.
\bibitem{228} State Board of Elections, Memorandum in Support I (May 27, 1976).
\bibitem{229} New York State Assembly Elections Committee, Memorandum in Support (1976).
\bibitem{230} \textit{Id.} See also League of Women Voters, Legislative Memorandum I (1976).
\bibitem{231} N. Y. Times, November 20, 1977, p. 24, col. 4.

The study was conducted by the Committee for the Study of the American Electorate, described as a bipartisan, non-profit group, on the November 8, 1977 election, and noted that voter decline was greatest in areas that had adopted postcard registration.

President Carter has proposed various methods of extending the franchise by making registration easier. Critics of his proposal argue that relaxation of registration safeguards would increase election fraud. In \textit{Donohue v. Board of Elections}, 435 F. Supp. 957 (E.D.N.Y. 1976), the court considered the possibility of such fraud. The action was commenced by members of the Republican, Conservative and Labor parties to enjoin the New York State electors from casting their votes in the Electoral College for the Democratic Party nominee. The petitioners charged that "the ballots cast by legitimate voters [in the national election] were debased and diluted by the illegal votes allegedly cast by thousands of unqualified voters." \textit{Id.} at 961.

A statistical sampling of voters was prepared under the court's guidelines and supervision, which purported to demonstrate that a potential 138,207 votes (4.9\% of the voting population) were "confirmed frauds", and a potential 306,107 votes (10.8\% of the voting population, including the "confirmed frauds") were "irregular votes." \textit{Id.} The large number of "confirmed frauds" and "irregularities" was caused in large part by the mail registration procedures in the Election Law (N.Y. Elec. Law, § 153, as amended, 1976 N.Y. Laws ch. 233, § 5-210).
\end{thebibliography}
fication has begun the necessary housecleaning without which any attempt at substantive reform would fail.

It would appear that the critics of easier registration and voting procedures, at least based on practices in New York, would have reason to be concerned if adequate safeguards are not employed.