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Election Fraud - Winning at All Costs: Election Fraud in the Third Circuit

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ELECTION FRAUD—WINNING AT ALL COSTS: ELECTION FRAUD IN THE THIRD CIRCUIT

Marks v. Stinson

I. INTRODUCTION

The touchstone of a democratic nation involves the right of its citizens to vote and elect its leaders.[1] Throughout the history of the United

1. Burson v. Freeman, 504 U.S. 191, 213 (1992) (stating right to vote represents fundamental right, essential to free and democratic society). Although the Constitution does not enumerate a specific right to vote, the United States Supreme Court has consistently recognized this right as fundamental. *Id.*; *accord* Shaw v. Reno, 113 S. Ct. 2816, 2822 (1993) (discussing history of voting rights); Storer v. Brown, 415 U.S. 724, 730 (1974) (recognizing constitutional right to vote); Reynolds v. Sims, 377 U.S. 533, 555 (1964) (stating right to vote represents "the essence of a democratic society"); Wesberry v. Sanders, 376 U.S. 1, 17 (1964) (noting that all other rights are "illusory" if Constitution does not protect rights to vote); Lane v. Wilson, 307 U.S. 268, 273-74 (1939) (recognizing right to vote for candidate); Guinn v. United States, 238 U.S. 347, 362-63 (1915) (holding that right to vote for qualified voter cannot be denied); United States v. Mosley, 238 U.S. 383, 386 (1915) (stating each voter has right to have their vote counted); *Ex parte* Yarbrough, 110 U.S. 651, 662-63 (1884) (recognizing Constitution protects right to vote); Griffin v. Burns, 570 F.2d 1065, 1075 (1st Cir. 1978) (stating right to vote represents heart of democratic society); Duncan v. Poythress, 515 F. Supp. 327, 336 (N.D. Ga.) (stating "right to vote is clearly fundamental, and is protected" by Due Process and Equal Protection clause), *aff'd*, 657 F.2d 691 (5th Cir. 1981), *and cert. dismissed*, 459 U.S. 1012 (1982); *see also* New York City Bd. of Examiners v. Morris, 489 U.S. 688, 693 (1989) (recognizing right to full and effective participation in political process); Powell v. McCormack, 395 U.S. 486, 548 (1969) (recognizing right to vote for candidate of choice); Williams v. Rhodes, 393 U.S. 23, 30 (1968) (same); United States v. Gordon, 836 F.2d 1312, 1314 (11th Cir. 1988) (holding right to cast "meaningful" vote in elections constitutes property right); Henry J. Steiner, *Political Participation as a Human Right*, 1 HARV. HUM. RTS. J. 77, 77 (1980) (stating that universal right to political participation exists); Rick G. Strange, *Application of Voting Rights Act to Communities Containing Two or More Minority Groups—When is the Whole Greater Than the Sum of the Parts?*, 20 TEX. TECH L. REV. 95, 95 n.2 (stating equality in voting has its origins in Declaration of Independence) (citing Mobile v. Bolden, 446 U.S. 55, 103-04 (1980) (Marshall, J., dissenting)); Robert A. Blake, Jr., Note, *A Step Toward a Colorblind Society:* Shaw v. Reno, 29 WAKE FOREST L. REV. 937, 937 (1994) (noting essentialness of right to vote in democratic society and examining how society has discriminated against minorities in exercise of this right); Daniel J. Garfield, Comment, *Don't Box Me In: The Unconstitutionality of Amendment 2 and English-Only Amendments*, 89 NW. U. L. REV. 690, 719-23 (1995) (discussing right to equal vote and hypothesizing that this may represent most important right protected through Equal Protection). This right to vote extends to primary as well as general elections. Gray v. Sanders, 372 U.S. 368, 374 (1963); Smith v. Allwright, 321 U.S. 649, 661-62 (1944); United States v. Classic, 313 U.S. 299, 315 (1941). Constitutional protections also apply to local elections and referendums. Phoenix v. Kolodziejski, 399 U.S. 204, 213-15 (1970); Kramer v. Union Free Sch. Dist., 395 U.S. 621, 625-26 (1969). The right to vote extends protections to voter registration and voting by absentee ballot. Smith v. Meese,

States, persons have fought to secure, maintain and utilize this right.[2] The

821 F.2d 1484, 1490 (11th Cir. 1987); *accord* Lane v. Wilson, 307 U.S. 268, 273-74 (1939) (pertaining to voter registration); Toney v. White, 476 F.2d 203, 207-08 (5th Cir.), *vacated in part on reh'g*, 488 F.2d 310 (5th Cir. 1973) (same). The number of prosecutions for election or voting fraud underscores the importance of the right to vote in our democratic society. *See* Anderson v. United States, 417 U.S. 211 (1974) (casting fictitious votes in primary election); United States v. Classic, 313 U.S. 299 (1941) (altering and falsely counting and certifying ballots); United States v. Gradwell, 243 U.S. 476 (1917) (prosecuting for bribing voters); James v. Bowman, 190 U.S. 127 (1903) (same); Blitz v. United States, 153 U.S. 308 (1894) (impersonating voter); United States v. Cole, 41 F.3d 303, 311 (7th Cir. 1994) (upholding conviction of conspiracy to commit election fraud and multiple voting where defendant completed sections of voter's absentee applications and ballots); United States v. Boards, 10 F.3d 587 (8th Cir. 1993) (finding defendants guilty of falsifying voter information to maintain their eligibility to vote and voting multiple times), *cert. denied*, 114 S. Ct. 2674 (1994); United States v. Odom, 858 F.2d 664, 665 (11th Cir. 1988) (upholding defendant's conviction for 32 counts of election fraud where defendant bought absentee votes for $30 and bottle of wine or whiskey per vote obtained); United States v. Townsley, 843 F.2d 1070, 1086 (8th Cir. 1988) (upholding defendant's conviction of conspiracy to commit voter fraud), *cert. dismissed*, 499 U.S. 944 (1991); United States v. Gordon, 836 F.2d 1312, 1314 (11th Cir. 1988) (reversing conviction for mailing absentee ballots fraudulently marked); United States v. Howard, 774 F.2d 838, 842 (7th Cir. 1985) (upholding conviction of voter fraud where defendants used false addresses to register to vote and even placed placards with their last name on doors of addresses used); United States v. Olinger, 759 F.2d 1293, 1295-96 (7th Cir.) (upholding conviction of vote fraud by election judge who bribed voters and facilitated multiple voting), *cert. denied*, 474 U.S. 839 (1985); United States v. Mason, 673 F.2d 737, 740 (4th Cir. 1982) (affirming conviction of campaign worker for vote buying); United States v. EB Malmay, 671 F.2d 869, 890 (5th Cir. 1982) (buying votes); United States v. Bowman, 636 F.2d 1003, 1005 (5th Cir. 1981) (conspiring and aiding and abetting others to buy votes); United States v. Bryant, 516 F.2d 307, 308 (7th Cir. 1975) (conspiring to violate constitutional rights of another by casting fraudulent ballots); United States v. States, 488 F.2d 761, 762 (8th Cir. 1973) (casting false absentee ballots in primary elections), *cert. denied*, 417 U.S. 950 (1974).

2. In particular, women and minorities spearheaded this fight. *See* Shaw v. Reno, 113 S. Ct. 2816, 2822-23 (1993) (noting that even after Congress passed amendments allowing minorities to vote, states continued to discriminate in an attempt to circumvent the amendments); Minor v. Happersett, 88 U.S. (21 Wall.) 162, 178 (1874) (holding government could withhold voting rights from women); Karen M. Arrington, *The Struggle to Gain the Right to Vote: 1787-1965*, *in* VOTING RIGHTS IN AMERICA 25, 30 (Karen M. Arrington & William L. Taylor eds., 1992) (discussing various historical movements to gain the right to vote); ELEANOR FLEXNER, CENTURY OF STRUGGLE, THE WOMEN'S RIGHTS MOVEMENT IN THE UNITED STATES (1959) (enumerating on women's suffrage movement); AILEEN S. KRADITOR, THE IDEAS OF THE WOMAN SUFFRAGE MOVEMENT, 1890 - 1920 (1981) (same); Alexander M. Bickel, *The Voting Rights Cases*, *in* 1966 THE SUPREME COURT REVIEW 79 (Philip B. Kurland ed., 1966) (detailing history of Supreme Court voting rights cases); James F. Blumstein, *Defining and Proving Race Discrimination: Perspectives on the Purpose v. Results Approach from the Voting Rights Act*, 69 VA. L. REV. 633, 637 (1983) (describing minorities' struggle to gain equality in voting); David Cocanower & David Rich, *Residency Requirements for Voting*, 12 ARIZ. L. REV. 477 (1970) (detailing use of residency requirements to disenfranchise alien and minority voters); Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success*, 89 MICH. L. REV. 1077, 1081-91 (1991) (exploring history of African Americans' right to vote); Alan Howard & Bruce Howard, *The Dilemma of the Voting Rights Act—Recognizing the Emerging Political Equality Norm*, 83

Fifteenth, Nineteenth and Twenty-Sixth Amendments to the United States Constitution embody the result of this struggle.[3] People who conduct an election illegally, however, invalidate an individual's freedom of choice exercised through the right to vote.[4] If fraud occurs in the election process,

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COLUM. L. REV. 1615 (1983) (discussing "safe-districting" as regards minorities); Marcia Johnson, *The Systematic Denial of the Right to Vote to America's Minorities*, 11 HARV. BLACKLETTER J. 61 (1994) (discussing struggle of minorities to maintain equality in voting practices); Jamin B. Raskin, *Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage*, 141 U. PA. L. REV. 1391 (1993) (discussing new group of persons, legal aliens, who fight for equality in voting rights); Strange, *supra* note 1, at 95 n.2 (discussing constitutional amendments which increased rights of citizens to vote and discrimination faced by minority voters); Jennifer K. Brown, Note, *The Nineteenth Amendment and Women's Equality*, 102 YALE L.J. 2175 (1993) (exploring impact of suffrage on women's equality issues).

Several groups of voting rights violations rise to the level of a constitutional encroachment. Such encroachment occurs when unfairly apportioned voting districts dilute the vote. *Reynolds*, 377 U.S. at 533; *Gray*, 372 U.S. at 376-77; Baker v. Carr, 369 U.S. 186, 236-38 (1962). Discrimination also violates the Constitution. Moore v. Ogilvie, 394 U.S. 814, 817-19 (1969) (prohibiting discrimination due to geographic area); South Carolina v. Katzenbach, 383 U.S. 301, 324-25 (1966) (upholding Voting Rights Act which prohibits racial discrimination in voting); Carrington v. Rash, 380 U.S. 89, 95-97 (1965) (prohibiting residence discrimination against member of armed forces); United States v. Raines, 362 U.S. 17, 24-26 (1960) (dealing with racial discrimination in voter registration); Communist Party of Illinois v. State Bd. of Elections, 518 F.2d 517, 518-19 (7th Cir.) (prohibiting discrimination based on geographic location), *cert. denied*, 423 U.S. 986 (1975); Shakman v. Democratic Org. of Cook County, 435 F.2d 267, 270-71 (7th Cir. 1970) (rejecting discrimination on basis of political association). Election fraud also violates the Constitution. *Classic*, 313 U.S. at 315 (indicting defendants for altering ballots in primary election); Smith v. Cherry, 489 F.2d 1098, 1100-01 (1973) (placing fake candidate on primary ballot), *cert. denied*, 417 U.S. 910 (1974); *Ex parte* Siebold, 100 U.S. 371, 378-80 (1880) (stuffing ballot box). Furthermore, courts will closely scrutinize laws restricting access to voting or to the ballot. Lubin v. Panish, 415 U.S. 709, 717-18 (1979) (holding filing fee to obtain access to ballot unconstitutional); Williams v. Rhodes, 393 U.S. 23, 24 (1968) (holding state law restricted access to ballot); Harper v. Virginia State Bd. of Elections, 383 U.S. 663, 665 (1966) (finding poll tax unconstitutional); Briscoe v. Kusper, 435 F.2d 1046, 1055 (7th Cir. 1970) (holding failure to notify possible candidates of new standards to appear on ballot reflects denial of access to ballot).

3. The Fifteenth Amendment, ratified in 1870, gives the right to vote to all persons regardless of "race, color, or previous condition of servitude." U.S. CONST. amend. XV. The Fifteenth Amendment provides "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." *Id.* § 1. Congress has the power to enforce this Amendment. *Id.* § 2. Similarly, the Nineteenth Amendment, added in 1920, grants this same right to all persons regardless of their sex. U.S. CONST. amend. XIX. Congress also has the power to enforce this Amendment. *Id.* § 2. The Twenty-Sixth Amendment as of 1971 extended this right to all citizens over the age of 18. U.S. CONST. amend. XXVI; *see also* Oregon v. Mitchell, 400 U.S. 112 (1970) (holding provision of Voting Rights Act which lowered voting age to 18 constitutional prior to constitutional amendment). Congress may also enforce this Amendment as necessary. U.S. CONST. amend. XXVI, § 2.

4. *See Burson*, 504 U.S. at 213 (recognizing that right to cast vote in election not tainted by fraud or intimidation represents fundamental right); Anderson v.

the candidate declared the winner may not represent the people's choice. What if the government, responsible for conducting the election, taints the election results?[5] What protection exists for the candidates and the

United States, 417 U.S. 211, 246 (1974) (Douglas, J., dissenting) (stating right to vote includes right to have that vote undiluted by illegal or fraudulently cast votes); Ortiz v. City of Philadelphia Office of City Comm'rs Voter Registration Div., 28 F.3d 306, 318 (3d Cir. 1994) (Scirica, J., concurring) (stating "nothing undermines democratic government more quickly than fraudulent elections . . . [it] devalues and dilutes the vote of each citizen . . . who has lawfully voted."); Kasper v. Board of Election Comm'rs of Chicago, 814 F.2d 332, 334 (7th Cir. 1987) (stating that election fraud "dilutes the votes of the honest"); Ketchum v. City Council of Chicago, 630 F. Supp. 551, 565 (N.D. Ill. 1985) (noting that fraud eliminates citizen's ability to vote effectively); Michael W. Carey et al., *Federal Prosecution of State and Local Public Officials: The Obstacles to Punishing Breaches of the Public Trust and a Proposal for Reform, Part One*, 94 W. VA. L. REV. 301, 331-33 (Winter 1991/1992) (noting that election fraud, especially by public officials, denies citizens their right to fair elections).

5. This taint occurred in Marks v. Stinson, 19 F.3d 873 (3d Cir. 1994). The Philadelphia County Commissioners, who acted as the County Board of Elections, provided approximately 1000 absentee ballots directly to Democratic candidate Stinson and his campaign workers. *Id.* at 877. This violated a Pennsylvania statute which required that the voters obtain their own absentee ballot through the mail. *Id.* at 876 (discussing 25 PA. CONS. STAT. ANN. § 3146.2(a) & (e)(1)-(e)(2) (1994)). The Board of Elections did not provide this assistance to Republican candidate Marks. *Id.*

Overall, the public frequently accuses and tries officials for misconduct. *See Classic*, 313 U.S. at 299 (finding election fraud where election officials changed ballots in favor of candidate who won); *In re* Coy, 127 U.S. 731 (1888) (upholding conviction of election judge for tampering with voter poll lists); Smith v. Meese, 821 F.2d 1484 (11th Cir. 1987) (African-American voters claiming that United States Attorneys ignored their complaints regarding illegal conduct by white public officials while investigating allegations of misconduct of African-American officials); Kasper v. Board of Election Comm'rs of Chicago, 814 F.2d 332, 335 (7th Cir. 1987) (Republican party alleging that Board of Elections has, for years, not conducted voter canvass, which allowed "ghost voters" to remain registered voters, thus assisting those wishing to engage in election fraud); Hutchinson v. Miller, 797 F.2d 1279, 1281 (4th Cir. 1986) (recounting plaintiff's allegations that an election board member moved switches on voting machines to change numbers of votes cast for each candidate and allegedly used a portable modem to change vote totals), *cert. denied*, 479 U.S. 1088 (1987); United States v. Olinger, 759 F.2d 1293, 1295-97 (7th Cir.) (finding that election judge had falsified voter information, facilitated multiple voting and offered to pay for votes), *cert. denied*, 474 U.S. 839 (1985); Griffin v. Burns, 570 F.2d 1065, 1079-80 (1st Cir. 1988) (finding government officials' illegal invalidation of absentee ballots affected election results); Donohue v. Board of Elections of N.Y., 435 F. Supp. 957, 961-62 (E.D.N.Y. 1976) (alleging New York election officials committed fraud in voter registration for presidential election); Ury v. Santee, 303 F. Supp. 119, 126 (N.D. Ill. 1969) (holding village's officials could not reduce number of districts just prior to election and should have provided adequate voting facilities); *In re* General Election, 605 A.2d 1164, 1166-67 (N.J. Super. Ct. Law Div. 1992) (holding election officials improperly rejected legal votes and ordering new election); *see also* Dayna L. Cunningham, *Who Are to Be the Electors? A Reflection on the History of Voter Registration in the United States*, 9 YALE L. & POL'Y REV. 370, 384 (1991) (asserting that most fraud in Chicago concerns affirmative action of election officials or their knowledge and consent); James A. Gardner, *Consent, Legitimacy and Elections: Implementing Popular Sovereignty Under the Lockean Constitution*, 52 U. PITT. L. REV. 189, 235-36 (1990) (discussing

individuals who lose the right to vote and whose right to a fair election is effectively stolen?

Allegations of state election fraud present several difficult issues which a federal court must overcome to properly decide the case. First, the federal court must confront the abstention doctrine.[6] This doctrine requires that federal courts refrain from examining cases that state courts should review.[7] State and local laws prescribe how to conduct their elections and the procedures for challenging those elections.[8] Accordingly, local and state governments should monitor the potential violations of these laws.[9] Second, if the federal court hurdles abstention, the court

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allegations of official misconduct in November 1982 Chicago election). For example, after the November 1982 Chicago general election, 26 persons, the majority of them election officials, faced charges of election fraud. *Id.* at 235-36. In particular, the plaintiffs accused these officials of forging signatures, impersonating voters, registering ineligible voters, "assisting" older or disabled voters, bribing voters, illegally dispensing and voting absentee ballots, and using weapons and force to persuade voters and campaign workers. *Id.* The plaintiffs accused one official of running a ballot through the tabulator 200 times, in order to increase his candidate's margin of victory. *Id.* Overall, the defendants allegedly obtained 10% of the votes via fraud. *Id.*

6. For a discussion of the abstention doctrine, see *infra* notes 38-83 and accompanying text.

7. *See generally* 15A CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE §§ 3914.14, 4241-47, 4251-52, 4255 (1988) (discussing applications of *Younger, Rooker-Feldman* and *Pullman* abstentions as well as abstention generally); Ann Althouse, *The Misguided Search for State Interest in Abstention Cases: Observations on the Occasion of* Pennzoil v. Texaco, 63 N.Y.U. L. REV. 1051 (1988) (discussing how abstention doctrine may damage enforcement of federal law); Michael G. Collins, *The Right to Avoid Trial: Justifying Federal Court Intervention into Ongoing State Court Proceedings*, 66 N.C. L. REV. 49 (1987) (providing general examination of abstention issues, focusing on *Younger* and *Pullman* abstention); Martin H. Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L.J. 71 (1984) (discussing abstention concerns and focusing on *Pullman* abstention); James C. Rehnquist, *Taking Comity Seriously: How to Neutralize the Abstention Doctrine*, 46 STAN. L. REV. 1049 (1994) (reviewing *Pullman* and *Younger* abstention as well as comity considerations). For a discussion of *Rooker-Feldman* abstention, see *infra* notes 45-58 and accompanying text. For a discussion of the *Younger* abstention doctrine, see *infra* notes 59-70 and accompanying text. For a discussion of *Pullman* abstention, see *infra* notes 71-76 and accompanying text. For other concerns affecting abstention, see *infra* notes 77-83 and accompanying text.

8. For a listing of these state laws in the states in the Third Circuit, see the appendix at the end of this casebrief.

9. Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 106 (1984) (stating "it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law"); Kasper v. Board of Election Comm'rs of Chicago, 814 F.2d 332, 338 (7th Cir. 1987) (noting that ability of federal courts to interfere in local elections limited by Constitution); Curry v. Baker, 802 F.2d 1302, 1304 (11th Cir.) (asserting that state courts represent "far better forums" for resolving state and local election disputes), *stay denied*, 479 U.S. 1301, *and cert. dismissed*, 479 U.S. 1023 (1986); Bodine v. Elkhart County Election Bd., 788 F.2d 1270, 1272 (7th Cir. 1986) (stating that federal courts should not become entangled in every local election dispute); Grimes v. Smith, 776 F.2d 1359, 1367 (7th Cir. 1985) (asserting that federal courts should not supervise local and state elections); Gamza v. Aguirre, 619 F.2d 449, 453 (5th

must find a federal cause of action that provides the plaintiff standing.[10] If a federal cause of action exists, the plaintiff must then prove the election fraud.[11] Finally, if the plaintiff proves election fraud under a federal cause of action, the federal court must select an appropriate remedy. Such remedies range from money damages to a new election.[12]

The United States Court of Appeals for the Third Circuit recently addressed these issues in *Marks v. Stinson*.[13] The Third Circuit decided that the abstention doctrine did not preclude it from examining the results of Pennsylvania's state senatorial election.[14] The court, upon finding fraud, adopted a new remedy.[15] Because the winning candidate engaged in

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Cir. 1980) (holding court would not review claim of miscount in state election). In *Kasper*, the federal court declined to adjudicate a Chicago city election. *Kasper*, 814 F.2d at 344-45. The United States Court of Appeals for the Seventh Circuit noted that the nature of our country, built on concepts of federalism, mandates that the states and local governing bodies control their own elections. *Id.* at 340. Federal courts should not interfere every time a minute irregularity occurs in a local or state election. *Id.* As a result, violations of state election laws do not usually rise to the level of a constitutional violation under 42 U.S.C. § 1983 (Supp. 1994). *See* Snowden v. Hughes, 321 U.S. 1, 11 (1944) (holding violation of state election laws, even by state officials, does not violate Constitution); *accord Kasper*, 814 F.2d at 338 (refusing to order change in system to canvass voters as district court would substitute its judgment for that of state court).

10. Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590 (1875) (holding that federal courts may only decide issues of federal law).

11. The plaintiff may struggle with this burden because the election officials often perpetuate the fraud. *See* Burson v. Freeman, 504 U.S. 191, 209 (1992) (noting difficulties of detecting fraud in elections and stating that this difficulty in detection resulted in its past success); *see also* Gardner, *supra* note 5, at 236 (noting that election fraud makes it difficult to determine true winners). For a discussion of cases where election or government officials participate in the fraudulent election scheme, see *supra* note 5 and accompanying text.

12. For a discussion of the possible remedies, see *infra* notes 149-71 and accompanying text.

13. Marks v. Stinson, 19 F.3d 873 (3d Cir. 1994) (giving opinion on appeal from grant of preliminary injunction); Marks v. Stinson, No. 94 Civ. 1474 (3d Cir. Aug. 18, 1994) [hereinafter *Marks*, No. 94 Civ. 1474], *cert. denied*, 115 S. Ct. 901 (1995) (affirming district court's grant of final injunction; unpublished Third Circuit opinion copy received from Judge Newcomer's Chambers, United States District Court for the Eastern District of Pennsylvania). For the facts of the *Marks* case, see *infra* notes 172-208 and accompanying text. For a discussion of the *Marks* case on the issue of abstention, see *infra* notes 214-55 and accompanying text. For discussion of the cause of action issues in *Marks*, see *infra* notes 256-91 and accompanying text. Finally, for a discussion of the remedy invoked in the *Marks* case, see *infra* notes 292-318 and accompanying text.

14. *Marks*, 19 F.3d at 881-86. The case involved an interim election conducted in Philadelphia for the seat of the second district state senator. *Id.* at 875. The position would expire in December 1994. *Id.* The election had special significance because the winner would give his party control of the state senate. *Id.*

15. Marc Duvoisin, *U.S. High Court Lets Vote Reversal Stand*, PHILA. INQUIRER, Jan. 18, 1995, at B3. For a further discussion of the uniqueness of this remedy, see *infra* notes 292-318 and accompanying text.

voter fraud, the Third Circuit removed him and certified the losing candidate as the winner.[16]

Given the increasing accusations of election fraud,[17] future losers of state elections will likely rely on *Marks* to remove the winner from office.

16. *Marks*, No. 94 Civ. 1474, *supra* note 13. For a discussion of the court's rationale for employing this unique remedy, see *infra* notes 319-35 and accompanying text.

17. *See Hearing of the Senate Rules and Administration Comm. Subject: Petition Filed in Oregon Disputing the Validity of the Election of Senator Bob Packwood*, 1993 WL 9426940 (May 10, 1993) (investigating charges of election fraud in Oregon senatorial race and finding no such fraud); Bruce Bortz, *Ellen's Case, Political Fortunes Collapse; Parris to Get Fresh, Clean Start as Guv Jan. 18*, MARYLAND REPORT, Jan. 9, 1995, at 1 (discussing strengths and noting weaknesses of Sauerbrey's case of election fraud against her Democratic opponent); Mary Brooks, *Vote May End Stalemate in Eatonville - Voters Re-Elect a Town Council Member Cleared in a Fraud Case, and They May Have Halted a Political Feud*, ORLANDO SENTINEL TRIB., Mar. 7, 1993, at B1 (describing how court acquitted town council member of election fraud); *Eyewitness News* (CBS television broadcast, Jan. 9, 1995) (updating that Sauerbrey's case proceeded to court); *GOP to Seat Democrats in Disputed Races but Party Leaders Still Plan to Investigate Elections of 3*, DET. NEWS, Jan. 4, 1995, at A8 (voting fraud alleged in election of three United States House of Representatives members for Connecticut, North Carolina and California and discussing investigation plans); *Judge Tosses Out Hialeah Mayor's Win*, NAT'L L.J., Nov. 21, 1994, at A10 (state judge invalidating mayoral election upon finding that campaign workers forged absentee ballots); John A. MacDonald, *House Gets Formal Challenge to 2nd District Election Results*, HARTFORD COURANT, Jan. 5, 1995, at A6 (stating Republican Edward Munster has evidence of vote fraud and has filed challenge with the House—the Connecticut Supreme Court ruled that he had lost the election); Will McClatchy & Pamela J. Podger, *Election Fraud Called Common: Reform Groups Calls for New Registration Laws*, THE FRESNO BEE, Dec. 21, 1994, at B1 (describing efforts of concerned citizen group, after learning of widespread fraud in recent election, to organize information on that fraud so that losing candidates can decide whether to formally contest elections); David Montgomery, *Sauerbrey's Last Stand; Inside Fortified Offices, Army of Volunteers Works All Hours to Find Proof of Vote Fraud*, WASH. POST, Nov. 26, 1994, at C3 (describing efforts of losing governor candidate, Ellen Sauerbrey, to prove election fraud by her opponent); *New Election Ordered in Schuylkill County*, LEGAL INTELLIGENCER, Aug. 16, 1994, at 5 (finding that election official had altered ballots in favor of Republican candidates, court ordered new election); *Newscenter 5: Midday; WCVB; Boston* (ABC television broadcast, Nov. 30, 1994) (discussing challenge on four referendum questions on state ballot); *Newschannel 2-First at Five; WMAR-TV 2* (NBC television broadcast, Jan. 11, 1995) (noting that in contest of Maryland governor's race, political scientist found errors and that if state court suit fails, plaintiff may file suit in federal court); *Ousted Governor Withdraws Election Suit*, LEGAL INTELLIGENCER, Jan. 18, 1995, at 5 (losing Maryland gubernatorial candidate withdrawing her suit of election fraud); Elizabeth Schwinn, *Feinstein Wants Election Fraud Claim Thrown Out; Says Huffington Has No Proof of Illegal Voting*, S.F. EXAMINER, Jan. 10, 1995, at A6 (recounting allegations by losing candidate in United States Senate race in California of voter fraud—noting that losing candidate Huffington has filed petition with Senate Rules Committee); *Voter Fraud Confirmed*, HOUS. CHRON., May 5, 1994, at A30 (ordering of new election by state court given evidence of fraud in mail-in ballots); *Westside Watch: On to Washington?*, L.A. TIMES, Jan. 5, 1995, at J2 (stating that losing House of Representatives candidate has decided not to seek overturn of election based upon allegations of voter fraud in court, but may proceed to House Oversight Committee). Rumors of fraud also existed in the 1960 Presidential Election, where Richard Nixon lost to John Kennedy by one half of a percentage point. Marianne Means, *Sore Losers Continue to Reject Verdict of the*

Most recently, Ellen Sauerbrey contested the Maryland gubernatorial race.[18] Sauerbrey, who lost the election by a narrow margin, contends that her democratic opponent engaged in voter fraud.[19] Although she contested the election in state court, Sauerbrey told reporters that she may move her case to federal court.[20] Additionally, federal courts appear more willing to review such claims.[21] Based on this trend, the *Marks* decision represents an opportunity for these unsuccessful candidates to seek federal judicial review of state elections.

This Casebrief explores the background of election fraud cases by examining the abstention doctrine, applicable causes of action and appropriate remedies.[22] This Casebrief also investigates other legal and social issues such as separation of powers, equity and comity.[23] The analysis section will scrutinize the approach of the Third Circuit on these abstention, standing and remedies issues and will examine the rationale for its deci-

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Voters, STATE JOURNAL-REGISTER (Springfield, Ill.), Dec. 7, 1994, at 6 (editorial). Nixon, however, did not contest the election. *Id.*

18. Montgomery, *supra* note 17, at C3. The Democratic candidate Glendening allegedly engaged in voter fraud. *Id.* Approximately 100 volunteers examined voting records for evidence of fraud. *Id.* Only one other candidate has contested a gubernatorial race in Maryland history. Frank A. DeFilippo, *One for the Books*, BALT. EVENING SUN, Jan. 5, 1995, at 17A (editorial). This challenged occurred in 1875. *Id.*

19. Bortz, *supra* note 17, at 2. Sauerbrey alleged that dead persons voted, ineligible prisoners voted, election machines lacked proper security and ineligible voters remained on the voting roster. *Id.* At the state court hearing, an election administrator conceded that some ineligible voters remained on the rosters. *Newschannel 2-First at Five*, *supra* note 17. A political scientist and statistician found error in the Maryland election process. *Id.*

20. *Newschannel 2-First at Five*, *supra* note 17. According to a television broadcast, Sauerbrey may seek assistance from federal courts if her state case fails. *Id.* At the state court hearing, Sauerbrey asked the judge to declare her the winner of the Maryland governor's race or to order a new election. Tom Stuckey, *Maryland's Losing Gubernatorial Candidate is Charging Voter Fraud Republican Lawmaker Asks Judge to Declare her the Winner or Order New Election*, DET. NEWS, Dec. 28, 1994, at A11. Ironically, the Third Circuit in the *Marks* case upheld the certification of the losing candidate as the winner. *Marks*, No. 94 Civ. 1474 , *supra* note 13, at 6-11. The Maryland Circuit Court Judge found no evidence of fraud. *Ousted Governor Withdraws Election Suit*, *supra* note 17, at 5. Sauerbrey appealed, to the Maryland Court of Appeals, then subsequently withdrew her suit without comment. *Id.*

21. Peter H. Schuck, *Legal Complexity: Some Causes, Consequences, and Cures*, 42 DUKE L.J. 1, 13 (1992).

22. For a discussion of the background of the abstention doctrine, see *infra* notes 38-83 and accompanying text. For a discussion of the applicable causes of action, see *infra* notes 84-148 and accompanying text. For a discussion of the remedies available, see *infra* notes 149-71 and accompanying text. This Casebrief focuses primarily on Pennsylvania election law. In order to apply this Casebrief to other states in the Third Circuit, the attached appendix describes the Pennsylvania statute and its counterpart in Delaware, New Jersey and the Virgin Islands.

23. For a discussion of the principles of separation of powers, comity and equity, see *infra* notes 77-83 and accompanying text.

sion.[24] The conclusion will summarize these issues and discuss the potential impact of this case in future election contests.[25]

II. OVERVIEW

Election fraud represents a broad term which encompasses numerous candidate and voter actions.[26] One of the more prevalent forms of election fraud involves vote buying.[27] The unsuccessful candidate, or those voters deprived of their effective right to vote, typically initiate election fraud cases.[28]

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24. For a discussion of the Third Circuit's decision in *Marks* and its rationale, see *infra* notes 209-335 and accompanying text.

25. For the conclusion and discussion of the impact of the *Marks* decision, see *infra* notes 319-42 and accompanying text.

26. This Casebrief defines the term election fraud as any action by the voter or the candidate which results in an illegally cast or counted vote.

27. Steve Barber et al., Comment, *The Purging of Empowerment: Voter Purge Laws and the Voting Rights Act*, 23 HARV. C.R.-C.L. L. REV. 483, 549 n.328. Vote buying encompasses situations where voters are paid to vote for a certain candidate or political party. *Id.*; *see also Winning at any Cost: How Money Poisons Kentucky's Elections*, LOUISVILLE COURIER, (Special Report reprinted from Oct. 11-18, 1987). Fraudulent practices may include stuffing the ballot box, casting more than one vote per voter, voting by dead persons (also called "ghost" or "tombstone" voting), intimidating voters, intentionally miscounting votes and changing or destroying votes or ballots cast. United States v. EB Malmay, 671 F.2d 869, 873 n.4 (5th Cir. 1982) (citation omitted). This activity occurs throughout the United States. Voting Rights Act of 1965, H.R. REP. NO. 439, 89th Cong., 1st Sess. (1965), *reprinted in* 1965 U.S.C.C.A.N. 2471. Paper ballots create a special risk of election fraud. Hackett v. President of City Council of Phila., 298 F. Supp. 1021, 1028 (E.D. Pa. 1969). A risk of "chain voting" exists when using paper ballots. *Id.* "Chain voting" occurs when:

> a voter secretes a ballot upon his person without having placed it in the ballot box and takes it from the voting room to a place where it is marked by someone, who, in turn, gives the ballot to the second person in the chain who then goes into the polling room, picks up a blank ballot, goes to the polling booth, deposits the ballot marked outside the polling room and secretes the blank ballot on his person and by this means takes the blank ballot from the voting room. This is repeated again and again until all of those voters who take part in the "chain voting" have voted.

Farrell-Cheek Steel Co., 115 NLRB 926, 927 n.3 (1956).

The Justice Department brings charges against approximately 100 persons per year for election or voter fraud. Barber et al., *supra*, at 549 n.326 (citing telephone conversation with Craig Dosant, Director, Election Crimes Branch, Department of Justice (Feb. 19, 1988)). Commentators have suggested, however, that voting fraud occurs more often. *Id.*; *see also id.* (citing testimony by Daniel Webb, United States Attorney for Northern District of Illinois which approximated that 100,000 instances of voter fraud occurred in Chicago's 1982 election, from *Voting Rights Act: Criminal Violations: Hearings Before the Subcomm. on the Constitution of the Senate Judiciary Comm.*, 98th Cong., 1st Sess. 6 (1984)).

28. Unsuccessful candidates may bring suit. *See* Roberts v. Wamser, 883 F.2d 617, 618 (8th Cir. 1989) (challenging election practices of election board); Hutchinson v. Miller, 797 F.2d 1279, 1279-80 (4th Cir. 1986) (involving unsuccessful candidates asking for money damages based upon alleged election irregularities), *cert. denied*, 479 U.S. 1088 (1987); Bodine v. Elkhart County Election Bd., 788 F.2d 1270, 1271 (7th Cir. 1985) (holding that losing candidates could not obtain dam-

The first issue a federal court faces when reviewing an election fraud case involves its authority to hear the case in light of the abstention doctrine.[29] The role of federal courts in election disputes entails "general application of laws and procedures, not the particulars of election disputes."[30] Federal courts typically intervene where states withhold the right to vote due to "class-based restrictions."[31] Federal courts have also inter-

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ages from election officials because of errors in computerized voting machines); Welch v. McKenzie, 765 F.2d 1311, 1312 (5th Cir. 1985) (losing minority candidate sued); Thompson v. Brown, 434 F.2d 1092, 1093-94 (5th Cir. 1970) (losing white candidates suing successful black candidate); Lehner v. O'Rourke, 339 F. Supp. 309, 311-12 (S.D.N.Y. 1971) (losing candidate alleging election irregularities). Those voters claiming the election infringed their right to vote may also sue. *See* Duncan v. Poythress, 657 F.2d 691, 703 (5th Cir. 1981) (voters alleging that governor should call special election rather than appoint replacement judge), *cert. granted*, 455 U.S. 937, *and cert. dismissed*, 459 U.S. 1012 (1982); Griffin v. Burns, 570 F.2d 1065, 1066-67 (1st Cir. 1978) (voters whose absentee ballots state courts threw out sued); Powell v. Power, 436 F.2d 84, 86 (2d Cir. 1970) (six voters in congressional primary brought suit alleging that non-qualified voters also voted); Donohue v. Board of Elections of N.Y., 435 F. Supp. 957, 960-62 (E.D.N.Y. 1976) (voters sued alleging infringement of their right to vote when illegal votes cast by thousands of unqualified voters); Ury v. Santee, 303 F. Supp. 119, 121-27 (N.D. Ill. 1969) (alleging that lack of voting facilities deprived persons of their right to vote). In some cases, both the disgruntled candidates and their voters bring suit. *See* Roe v. Alabama, 52 F.3d 300 (11th Cir.) (seeking federal court to enjoin state court's order to count illegal absentee ballots), *cert. denied*, 1995 WL 428353 (Oct. 2, 1995); Bell v. Southwell, 376 F.2d 659, 660-62 (5th Cir. 1967) (asking court to set aside state election that state conducted in racially discriminatory manner).

29. For a discussion of the abstention doctrine, see *infra* notes 38-83 and accompanying text.

30. Hutchinson v. Miller, 797 F.2d 1279, 1283 (4th Cir. 1986), *cert. denied*, 479 U.S. 1088 (1987); *see also Welch*, 765 F.2d at 1316-17 (holding that district court properly resolved mishandling of absentee ballots); Gamza v. Aguirre, 619 F.2d 449, 452-53 (5th Cir. 1980) (stating that error in vote counting does not confer jurisdiction on federal courts); Hennings v. Grafton, 523 F.2d 861, 863-64 (7th Cir. 1975) (holding that asking voters to vote second time in district where voting machines malfunctioned did not violate Constitution); Pettengill v. Putnam County R-1 Sch. Dist., 472 F.2d 121, 121-22 (8th Cir. 1973) (holding that federal court would not examine allegations that not all voters who cast ballots qualified by state law to vote); *Powell*, 436 F.2d at 86 (same); Johnson v. Hood, 430 F.2d 610, 612 (5th Cir. 1970) (noting that because federal constitution or laws did not secure right to vote in state election, federal court would not hear dispute over vote counting). In *Hutchinson v. Miller*, unsuccessful candidates filed suit alleging deficiencies existed in the election process in West Virginia's 1980 general election. *Hutchinson*, 797 F.2d at 1279. Hutchinson, a defeated candidate for the United States House of Representatives, sought a recount by the local county commission. *Id.* at 1280. When these officials refused, Hutchinson filed suit claiming that the election officials fixed the vote totals and attempted to cover up their illegal activity. *Id.* The United States Court of Appeals for the Fourth Circuit refused to become entangled in a "political dispute over the results of an election". *Id.* at 1282.

31. *Hutchinson*, 797 F.2d at 1283. These class-based restrictions include durational residency requirements and state or local redistricting which dilutes the vote of a certain group of persons. *Id.*; *see, e.g.*, Dunn v. Blumstein, 405 U.S. 330 (1972) (reviewing state case regarding durational residence requirement); Avery v. Midland County, 390 U.S. 474 (1968) (reviewing alleged dilution of votes); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (reviewing state's poll tax and classi-

vened where Congress expressly grants them permission.[32] Absent these statutes, however, the federal courts have limited involvement in state elections.[33] Nevertheless, with the escalating occurrence of election fraud in state systems, federal courts may now, more often, review state elections.[34]

If the federal court finds that it has jurisdiction, the plaintiff may bring suit under: (1) the Equal Protection Clause of the Fourteenth Amendment; (2) the Substantive Due Process Clause of the Fourteenth Amendment; (3) civil conspiracy; (4) the First Amendment Right of Asso-

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fying it as class-based); Carrington v. Rash, 380 U.S. 89 (1965) (restricting state residence requirements where members of armed forces concerned); Reynolds v. Sims, 377 U.S. 533 (1964) (involving vote dilution by state); Wesberry v. Sanders, 376 U.S. 1 (1964) (same); Bell v. Southwell, 376 F.2d 659 (5th Cir. 1967) (reviewing state's racial classification in voting procedures).

32. *See* 42 U.S.C. §§ 1971(d), 1973j(f) (Supp. 1994) (granting jurisdiction to United States district court for Voting Rights Act violations); 42 U.S.C. §§ 2000a-6, 2000e-6 (Supp. 1994) (conferring jurisdiction to United States district courts for Civil Rights violations); *see, e.g.*, 12 U.S.C. § 1441a(11) (Supp. 1994) (giving jurisdiction to district courts for Resolution Trust Corporations); 16 U.S.C. § 19jj-2 (Supp. 1994) (conferring jurisdiction for national parks); 16 U.S.C. § 1385(e) (Supp. 1994) (placing jurisdiction in federal courts for dolphin consumer protection); 22 U.S.C. § 2129(b) (Supp. 1994) (international travel); 42 U.S.C. § 7523 (Supp. 1994) (air pollution); 49 U.S.C. § 1810(a) (Supp. 1994) (hazardous waste transportation). Further, the Voting Rights Act prohibits racial discrimination in voting and thus grants federal courts the ability to exercise jurisdiction when the state, local or federal government discriminates against voters. *Hutchinson*, 797 F.2d at 1283; *see* Rome v. United States, 446 U.S. 156, 160-62 (1980) (exercising jurisdiction where discriminatory intent found); Perkins v. Matthews, 400 U.S. 379, 383-87 (1971) (exercising jurisdiction where changing voting system appeared discriminatory). Congress codified the Voting Rights Act at 42 U.S.C. §§ 1971-1974 (Supp. 1994) For the text of the relevant statutory provisions, see *infra* notes 116 & 127.

33. *See Welch*, 765 F.2d at 1314 (stating that district court's opinion "makes clear that with respect to both the statutory and constitutional claims, it viewed the case as a 'garden variety' election dispute that should have been resolved in state court"); *see also* Pennhurst State Sch. and Hosp. v. Halderman, 465 U.S. 89, 106 (1984) (stating "it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law"); Kasper v. Board of Election Comm'rs of Chicago, 814 F.2d 332, 338 (7th Cir. 1987) (noting that Constitution limits ability of federal courts to interfere in local elections); Curry v. Baker, 802 F.2d 1302, 1304 (11th Cir.) (asserting that state courts constitute "far better forums" for resolving state and local election disputes), *stay denied*, 479 U.S. 1301, *and cert. dismissed*, 479 U.S. 1023 (1986); Bodine v. Elkhart County Election Bd., 788 F.2d 1270, 1272 (7th Cir. 1986) (stating that federal courts should not hear every local election dispute); Grimes v. Smith, 776 F.2d 1359, 1367 (7th Cir. 1985) (asserting that federal courts should not supervise local and state elections); Gamza v. Aguirre, 619 F.2d 449, 454 (5th Cir. 1980) (deciding not to review state election where alleged inaccuracies occurred in tallying the votes).

34. In fact, federal courts have already reviewed state election procedures. For a list of these cases, see *supra* note 5. For a list of recent election fraud allegations, see *supra* note 17. Potentially, these cases could arrive in federal court. Ellen Sauerbrey, the losing Maryland gubernatorial candidate, considered filing her proceeding in federal court with her allegations of voter fraud. *Newschannel 2-First at Five*, *supra* note 17.

ciation; (5) the Voting Rights Act; and (6) the Civil Rights Act.[35] While the aforementioned constitute federal causes of action, most states in the Third Circuit also have a process to contest election results.[36] Finally, assuming the plaintiff proves election fraud, the federal court must formulate an appropriate remedy.[37]

A. *Abstention Doctrine*

The abstention doctrine recognizes the competing concerns between state rights and the vindication of federal claims.[38] A federal court has a narrow power to abstain and should only invoke it when the case meets the United States Supreme Court's stringent abstention requirements.[39] With state-run elections, a federal court may not interfere.[40] In many election fraud cases, however, plaintiffs possess a claim under at least one federal statute.[41] The Supreme Court recommends that a federal court not abstain if a party implicates either the Voting Rights Act or the Civil Rights

35. U.S. CONST. amend. XIV; U.S. CONST. amend. I; 42 U.S.C. § 1973 (Supp. 1994); 42 U.S.C. § 1983 (Supp. 1994). For the text of the Fourteenth Amendment and a discussion on the corresponding causes of action, see *infra* notes 91-103 and accompanying text. For the text of the Voting Rights Act, see *infra* notes 116 & 127. For a discussion of the causes of action under the Voting Rights Act, see *infra* notes 116-30 and accompanying text. For the text of the Civil Rights Act, see *infra* note 131. For a discussion of the cause of action under the Civil Rights Act, see *infra* notes 131-48 and accompanying text.

36. DEL. CODE ANN. tit. 15, §§ 5901, 5904, 5941-5943, 5948-5955 (1993); N.J. STAT. ANN. §§ 19:29-2, 19:57-24.1 (West 1989); 25 PA. CONS. STAT. ANN. §§ 3146.8(e), 3261-3263, 3376-3277, 3401, 3459 (1994). The Virgin Islands do not have a specific election contest statute. Thus, state elections may be contested in federal or state courts.

37. For a discussion of possible remedies, see *infra* notes 149-71 and accompanying text.

38. Redish, *supra* note 7, at 71.

39. Ankenbrandt v. Richards, 504 U.S. 689, 705 (1992); Port Auth. Police Benevolent Ass'n v. Port Auth. of N.Y. & N.J. Police Dep't, 973 F.2d 169, 172 (3d Cir. 1992) (citing United Services Auto Ass'n v. Muir, 692 F.2d 356, 361 (3d Cir. 1986), *cert. denied*, 479 U.S. 1031 (1987)); Gwynedd Properties Inc. v. Lower Gwynedd Township, 970 F.2d 1195, 1199 (3d Cir. 1992).

40. Curry v. Baker, 802 F.2d 1302, 1304-05 (11th Cir. 1986); Saxon v. Fielding, 614 F.2d 78, 80 (5th Cir. 1980); Pettengill v. Putnam County R-1 Sch. Dist., 472 F.2d 121, 122 (8th Cir. 1973); Kasper v. Hayes, 651 F. Supp. 1311, 1314 (N.D. Ill.), *aff'd*, 810 F.2d 1167 (7th Cir. 1987). In *Curry*, the United States Court of Appeals for the Eleventh Circuit stated "law and public policy establish that far better forums for disputes involving elections to state offices are found in the party machinery and the court system of the affected state." *Curry*, 802 F.2d at 1305.

41. *See, e.g.*, Roe v. Alabama, 53 F.3d 300 (11th Cir.) (stating voters and candidate had action under Civil Rights Act), *cert. denied*, 1995 WL 428353 (Oct. 2, 1995); Thompson v. Brown, 434 F.2d 1092, 1095-96 (5th Cir. 1970) (removing case based on Civil Rights Act); Bell v. Southwell, 376 F.2d 659, 664-65 (5th Cir. 1967) (finding that voters and defeated candidate had action under Voting Rights Act as well as Civil Rights Act); Ury v. Santee, 303 F. Supp. 119, 125 (N.D. Ill. 1969) (holding voters had cause of action under Civil Rights Act).

Act.[42] Further, the plaintiffs need not have a state forum hear these federal claims. A party may simultaneously pursue these claims in the state and federal court systems.[43] Nevertheless, given the critical state interests involved, abstention represents a persuasive argument for the party seeking to uphold the state election.[44]

1. *Rooker-Feldman*

The Supreme Court developed the Rooker-Feldman abstention doctrine in *District of Columbia Court of Appeals v. Feldman*[45] and *Rooker v. Fidelity Trust.*[46] The doctrine holds that a United States district court cannot review a final state court adjudication.[47] The courts reasoned that because a

42. Patsy v. Board of Regents, 457 U.S. 496, 501-02 (1982); Trainor v. Hernandez, 431 U.S. 434, 461-62 (1977); San Francisco County Democratic Cent. Comm. v. Eu, 826 F.2d 814, 825 n.19 (9th Cir. 1987), *aff'd*, 489 U.S. 214 (1989); Miofsky v. Superior Court of Cal., 703 F.2d 332, 338 (9th Cir. 1983). One reason involves the detrimental delay to the parties when a federal court abstains. Zwickler v. Koota, 389 U.S. 241, 252 (1967); Baggett v. Bullitt, 377 U.S. 360, 378-79 (1964); Stretton v. Disciplinary Bd. of Supreme Court of Pa., 944 F.2d 137, 140 (3d Cir. 1991); Libertarian Party of Ind. v. Marian County Bd. of Voter Registration, 778 F. Supp. 1458, 1460-61 (S.D. Ind. 1991); Black v. Cook County Officers Electoral Bd., 750 F. Supp. 901, 902 (N.D. Ill. 1990). Further, voting also embodies significant rights. Wesberry v. Sanders, 376 U.S. 1, 17 (1964) (stating "[o]ther rights, even the most basic, are illusory if the right to vote is undermined."). The Third Circuit has recently affirmed two district courts' decisions not to abstain from an election case. Marks v. Stinson, 19 F.3d 873, 885 (3d Cir. 1994); Stretton v. Disciplinary Bd. of Supreme Court of Pa., 944 F.2d 137, 140 (3d Cir. 1991).

43. Patsy v. Board of Regents, 457 U.S. 496, 500 (1982); *Marks*, 19 F.3d at 885. This choice exists only if the federal claim does not "interfere with the state judicial process" remedy. *Patsy*, 457 U.S. at 501.

44. Indeed, many Third Circuit cases claiming that the abstention doctrine applies and have succeeded. *See* O'Neill v. City of Phila., 32 F.3d 785, 793 (3d Cir. 1994) (stating abstention appropriate under *Younger*), *cert. denied*, 115 S. Ct. 1355 (1995); Guarino v. Larsen, 11 F.3d 1151, 1162 (3d Cir. 1993) (applying *Rooker-Feldman* abstention doctrine); Port Auth. Police Benevolent Ass'n v. Port Auth. of N.Y. & N.J. Police Dep't, 973 F.2d 169, 173, 177 (3d Cir. 1992) (abstaining under *Rooker-Feldman* and *Younger*); Blake v. Papadakos, 953 F.2d 68, 71-72 (3d Cir. 1992) (succeeding under *Rooker-Feldman* abstention doctrine); Chez Sez III Corp. v. Township of Union, 945 F.2d 628, 633 (1991) (holding *Pullman* abstention appropriate), *cert. denied*, 503 U.S. 907 (1992); Hughes v. Lipscher, 906 F.2d 961, 966-67 (3d Cir. 1990) (same); Schall v. Joyce, 885 F.2d 101, 107-12 (3d Cir. 1989) (holding *Younger* abstention applied); Stern v. Nix, 840 F.2d 208, 213 (3d Cir.) (stating *Rooker-Feldman* abstention applied), *cert. denied*, 488 U.S. 826 (1988).

45. 460 U.S. 462 (1983).

46. 263 U.S. 413 (1923).

47. *Feldman*, 460 U.S. at 482; *Port Auth.*, 973 F.2d at 177; Valenti v. Mitchell, 962 F.2d 288, 296 (3d Cir. 1992). This doctrine hinges upon the notion that a case, once in the state court system, must exhaust all means of appeals in that system. *Feldman*, 460 U.S. at 483. A litigant may then appeal the final decision of the state's judicial court to the United States Supreme Court, but cannot proceed back up the federal system beginning with the United States district courts. *Id.* Several circuits have also stated that the federal district courts also cannot review either lower state court decisions or the state's highest court decisions. *Port Auth.*, 973 F.2d at 177; *accord* Keene Corp. v. Cass, 908 F.2d 293, 296-97 (8th Cir. 1990)

litigant may only appeal a final state court decision to the United States Supreme Court, a litigant cannot argue the same claim in the federal court system.[48] In *Valenti v. Mitchell*,[49] the Third Circuit held that Rooker-Feldman does not bind non-adjudicative and administrative acts because such acts address prospective relief and have legislative tendencies.[50] The Rooker-Feldman doctrine only governs adjudicatory acts which prescribe relief for past wrongs.[51]

If the previous or concurrent state court action constitutes an adjudicatory action, the court must examine the parties and the state proceeding.[52] Rooker-Feldman abstention only applies to parties of both the state court decision and the federal claim.[53] The state proceeding must give the parties a "realistic opportunity to fully and fairly litigate" their claims for the court to apply abstention.[54] If the parties did not have this opportunity in the state system, the federal court need not abstain.[55]

Regardless of the identity of the parties in the state proceeding, Rooker-Feldman applies to state court cases " 'inextricably intertwined with the state court's [decision] in a judicial proceeding.' "[56] An inextrica-

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(noting federal courts' lack of jurisdiction over all state court decisions and that litigant cannot evade Supreme Court review by asserting Section 1983 constitutional action); Worldwide Church of God v. McNair, 805 F.2d 888, 892-93 (9th Cir. 1986) (holding federal courts cannot review final or non-final state court decisions); Hale v. Harney, 786 F.2d 688, 691 (5th Cir. 1986) (same).

48. *Port Auth.*, 973 F.2d at 177. In fact, in *Port Authority*, this supported the federal court's abstention. These plaintiffs brought the exact same claim in federal and state courts. *Id.*

49. 962 F.2d 288 (3d Cir. 1992).

50. *Id.* at 296-97. In *Valenti*, candidates in a national election brought suit under the Civil Rights Act, claiming that Pennsylvania officials refused to list them on the primary ballot. *Valenti*, 962 F.2d at 297. The Third Circuit held that *Rooker-Feldman* did not apply because the state court had not adjudicated the proceeding. *Id.*

51. *Valenti*, 962 F.2d at 297. The Third Circuit noted that *Rooker-Feldman* does not preclude all review. *Id.* at 296. "If the decision of the high state court is not an 'adjudication', a federal district court is not banned from review." *Id.* Non-adjudicative decisions constitute those " 'looking to the future and changing existing conditions.' " *Id.* (quoting *Feldman*, 460 U.S. at 477).

52. *See* Johnson v. De Grandy, 114 S. Ct. 2647, 2654 (1994) (noting that *Rooker-Feldman* does not apply if party in federal court not party in state court proceeding).

53. *De Grandy*, 114 S. Ct. at 2654; *Valenti*, 962 F.2d at 297. Federal court review remains possible, however, if the parties are identical.

54. Centifanti v. Nix, 865 F.2d 1422, 1433 (3d Cir. 1989); *accord* Marks v. Stinson, 19 F.3d 873, 886 n.11 (3d Cir. 1994) (noting *Rooker-Feldman* only applies where plaintiff had a reasonable opportunity to raise federal claim in state proceedings); Wood v. Orange County, 715 F.2d 1543, 1546-47 (11th Cir. 1983) (same), *cert. denied*, 467 U.S. 1210 (1984).

55. *Centifanti*, 865 F.2d at 1433. The court noted that this opportunity must include "full[ ] and fair[ ] litigat[ion]" of relevant issues. *Id.*

56. Port Auth. Police Benevolent Ass'n v. Port Auth. of N.Y. & N.J. Police Dep't, 973 F.2d 169, 177 (3d Cir. 1992) (citing *Feldman*, 460 U.S. at 483 n.16). In *Port Authority*, the Third Circuit stated that because the parties raised identical

bly intertwined case involves the federal court deciding the correctness of a state court decision.[57] If the federal court finds that its decision will necessarily contradict or alter the state court decision, the federal court must abstain.[58]

2. Younger *Abstention*

In *Younger v. Harris*,[59] the Supreme Court held that federal courts should not intervene in state criminal prosecutions unless unusual circumstances exist.[60] The courts expanded this concept to civil proceedings which implicate significant state interests in *Middlesex County Ethics Committee v. Garden State Bar Ass'n*.[61] The party seeking abstention from federal court must show: (1) current state judicial proceedings exist involving state plaintiffs seeking classification as federal plaintiffs; (2) significant state interests surround the state actions; and (3) the state system offers a sufficient forum for federal claims.[62] As a result, a federal court may only

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claims in both the federal and state courts, the claims were inextricably intertwined. *Id.* at 177.

57. Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 25 (1987) (Marshall, J., concurring); *Centifanti*, 865 F.2d at 1430.

58. *Centifanti*, 865 F.2d at 1430; *accord Pennzoil*, 481 U.S. at 25 (noting clear contradiction where "federal relief can only be predicated upon a conviction that the state court was wrong").

59. 401 U.S. 37 (1971).

60. *Id.* at 54; *see also* MARTIN H. REDISH, FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER 295-307 (1980) (describing *Younger* abstention doctrine); Althouse, *supra* note 7, at 1051 (same); Collins, *supra* note 7, at 54-56 (describing policy base of *Younger* abstention doctrine); Redish, *The Doctrine of* Younger v. Harris: *Deference in Search of a Rationale*, 63 CORNELL L. REV. 463 (1978) (providing in-depth analysis of *Younger* doctrine); Ralph U. Whitten, *Federal Declaratory and Injunctive Interference with State Court Proceedings: The Supreme Court and the Limits of Judicial Discretion*, 53 N.C. L. REV. 591, 597-616 (1975) (discussing rules governing injunctions).

61. 457 U.S. 423, 432 (1982). Recently, the Supreme Court expanded *Younger* abstention to cases where both parties include private citizens or entities. Pennzoil Co. v. Texaco, 481 U.S. 1 (1987). Considerable debate exists over the appropriateness of *Younger* in civil cases. Collins, *supra* note 7, at 55 n.144; *see* Trainor v. Hernandez, 431 U.S. 434, 453-56 (1977) (Brennan, J., dissenting) (stating principles requiring abstention in criminal cases do not apply with equal force to civil cases); Huffman v. Pursue, 420 U.S. 592, 592-93 (1975) (holding abstention appropriate because civil case sufficiently similar to criminal proceeding); Robert Bartels, *Avoiding a Comity of Errors: A Model for Adjudicating Federal Civil Rights Suits that 'Interfere' with State Civil Proceedings*, 29 STAN. L. REV. 27 (1976) (describing this debate); REDISH, *supra* note 60, at 315-21 (same); William H. Theis, Younger v. Harris*: Federalism in Context*, 33 HASTINGS L.J. 103, 172-84 (1981) (same); Note, *The New Federal Comity: Pursuit of Younger Ideas in a Civil Context*, 61 IOWA L. REV. 784 (1976) (same); Note, Younger *Grows Older: Equitable Abstention in Civil Proceedings*, 50 N.Y.U. L. REV. 870 (1975) (same).

62. Middlesex County Ethics Comm., 457 U.S. at 432; *see* Marks v. Stinson, 19 F.3d 873, 882 (3d Cir. 1994) (Third Circuit case discussing these requirements); Gwynedd Properties, Inc. v. Lower Gwynedd Township, 970 F.2d 1195, 1200 (3d Cir. 1992) (same); Schall v. Joyce, 885 F.2d 101, 106 (3d Cir. 1989) (listing requirements and holding that state's interest that " 'its orders and judgments are not

exercise jurisdiction in state proceedings where exceptional harms would occur without federal court intervention.[63] Such harm would arise where the state system did not offer an adequate remedy to prevent the individual's impairment or loss of federal rights.[64]

In *Schall v. Joyce*,[65] the Third Circuit stated that if the party meets the three requirements, the federal court must abstain unless a bad faith prosecution, harassment, or a patently unconstitutional rule causing irreparable injury to the plaintiff results.[66] Thus, even if a party fulfills the *Younger* requirements, abstention may be inappropriate when a party faces irreparable harm or a facially unconstitutional statute.[67]

Commentators criticize the *Younger* doctrine for the issues it leaves unresolved.[68] For instance, *Younger* does not state what circumstances

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rendered nugatory' " suffices under second prong of test) (quoting Juidice v. Vail, 430 U.S. 327 (1977)). Considerable discussion has occurred over the first prong of *Younger* regarding the pendency of a state administrative proceeding. O'Neill v. City of Phila., 32 F.3d 785, 790-91 (3d Cir. 1994), *cert. denied*, 115 S. Ct. 1355 (1995). The United States Court of Appeals for the Eighth Circuit has characterized a state claim as pending if unusual state review exists. Alleghany Corp. v. Pomeroy, 898 F.2d 1314 (8th Cir. 1990). The United States Court of Appeals for the Fifth Circuit has held that availability of state review does not make a state claim pending. Thomas v. Texas State Bd. of Medical Examiners, 807 F.2d 453, 456 (5th Cir. 1987). The Third Circuit has adopted the position of the Eighth Circuit that availability gauges the classification of the state claim as pending. *O'Neill*, 32 F.3d at 791. Notions of comity and the possibility that the state court could avoid the constitutional issue support this decision. *Id.* *O'Neill* also invoked the abstention doctrine, where the litigant challenged the City of Philadelphia's parking ticket procedures. *Id.* at 789. First, because of the availability of state review procedures, the court characterized the case as pending. *Id.* at 791. Second, the city had an important, regulatory interest in its parking procedures, while the federal courts did not. *Id.* at 792. Finally, the state system, if utilized, would have afforded the litigants adequate opportunity. *Id.*

63. Collins, supra note 7, at 55-56.

64. *Id.*; *see* Judice v. Vail, 430 U.S. 327, 337 (1977) (stating that court should abstain under *Younger* doctrine unless constitutional harms cannot be fully remedied in state court); *accord Middlesex County Ethics Comm.*, 457 U.S. at 431-32 (recognizing that important part of *Younger* analysis involves determining if state courts give adequate opportunity to litigants).

65. 885 F.2d 101 (3d Cir. 1989).

66. *Id.* at 106.

67. *O'Neill*, 32 F.3d at 789 n.11; Port Auth. Police Benevolent Ass'n v. Port Auth. of N.Y. & N.J. Police Dep't, 973 F.2d 169, 176 (3d Cir. 1992) (listing examples of extraordinary circumstances as including statutes where all aspects flagrantly violate Constitution or where abstention would cause " 'irreparable injury' ") (quoting Younger v. Harris, 401 U.S. 37 (1971)); *Schall*, 885 F.2d at 106.

68. Collins, *supra* note 7, at 56. Collins notes that *Younger* does not address "when a particular state court remedy is inadequate, and why state remedies are less adequate in the context of anticipatory, as opposed to ongoing proceedings." *Id.* Further, Collins points to the inconsistency between "*Younger*'s articulated equity, comity, and federalism concerns" and the scrutiny of available state remedies. *Id.*

render a state court's actions insufficient.[69] Further, it fails to explain the Court's focus on the sufficiency of state remedies, when the doctrine's central tenets involve notions of comity and respect for a parallel adjudicatory system.[70]

3. Pullman *Abstention*

Unlike *Younger* abstention, *Pullman* abstention focuses on the federal court's ability to adjudicate matters of state law.[71] In *Railroad Commission of Texas v. Pullman Co.*,[72] the Supreme Court held that a federal court should abstain if, in addition to the federal claim, ambiguous or unresolved issues of state law exist and may affect the outcome of the federal claim.[73]

The Third Circuit enunciated its three requirements for *Pullman* abstention in *Stretton v. Disciplinary Board of the Supreme Court of Pennsylvania*.[74] Federal courts should consider abstention if: (1) the federal constitutional claims involve uncertain areas of state law; (2) the resolution of these state law issues would "obviate the need for, or substantially narrow, adjudication of the federal claims;" and (3) a federal court's erroneous declaration of state law would impede important state policies.[75] After addressing these three requirements, the federal court must weigh

69. *Id.* In *Marks v. Stinson*, the Third Circuit held that requiring plaintiffs to post a $50,000 bond did not give them the opportunity to fully and fairly litigate their claims. 19 F.3d 873, 884 n.7 (3d Cir. 1994).

70. Collins, *supra* note 7, at 56. Abstention does not apply where "federal proceedings parallel but do not interfere with state proceedings . . . ." Gwynedd Properties Inc. v. Lower Gwynedd Township, 970 F.2d 1195, 1201 (1992).

71. Althouse, *supra* note 7, at 1070. *See generally* Martha A. Field, *Abstention in Constitutional Cases: The Scope of the* Pullman *Abstention Doctrine*, 122 U. PA. L. REV. 1071 (1974) (discussing Pullman abstention); Douglas Laycock, *Federal Interference with State Prosecutions: The Need for Prospective Relief*, 1977 SUP. CT. REV. 193, 226-27 (same); Note, *Abstention: An Exercise in Federalism*, 108 U. PA. L. REV. 226, 227-34 (1959) (same). In typical *Pullman* cases, the litigants must bring the case to state court after filing the federal lawsuit. Collins, *supra* note 7, at n.27 (citing 17 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4242, at 453 (1978)). In situations where the state court proceedings occur before the federal proceedings, the Younger doctrine becomes more applicable. Collins, *supra* note 7, at n.27.

72. 312 U.S. 496 (1941).

73. *Id.* at 498-500; Chez Sez III Corp. v. Township of Union, 945 F.2d 628, 631 (3d Cir. 1991) (enunciating requirements for *Pullman* doctrine), *cert. denied*, 503 U.S. 907 (1992); *see also* Redish, *supra* note 7, at 109-10 (discussing when *Pullman* abstention could expand to full abstention); Michael Wells, *Preliminary Injunctions and Abstention: Some Problems in Federalism*, 63 CORNELL L. REV. 65 (1977) (elaborating on *Pullman* abstention). The Third Circuit added an additional requirement for *Pullman* abstention by adding the adjective "difficult". United Servs. Auto Assoc. v. Muir, 792 F.2d 356, 361 (3d Cir. 1986), *cert. denied*, 479 U.S. 1031 (1987). The court should abstain from difficult areas of state law, rather than just ambiguous areas. *Id.* Rare instances require application of *Pullman* abstention. REDISH, *supra* note 60, at 109.

74. 944 F.2d 137 (3d Cir. 1991).

75. *Id.* at 140; *accord Chez Sez III*, 945 F.2d at 631 (enunciating same three requirements).

other factors including the availability of adequate state remedies, the duration of the litigation and the probable effect, on the parties, if the federal court does not abstain.[76]

4. *Other Abstention Considerations*

In addition to the Supreme Court doctrines noted above, the common-law notions of equity, comity and federalism also limit the federal courts' jurisdiction over claims which do not interfere with significant state issues.[77] Comity entails situations with minimal or non-existent violations of constitutional rights and, therefore, imposes a less rigid standard than the more formal abstention doctrines.[78]

Equity and federalism represent two concerns which, although rarely specified by a court, frequently support the policies behind its actions.[79] Equity deals with notions of fairness and developed as an alternative to harsh common laws.[80] Equity courts possess broad remedial powers, and thus may adjudicate a controversy based on unfairness.[81] Conversely, fed-

76. *Stretton*, 944 F.2d at 140. In *Stretton*, a candidate for judge sued on a First Amendment basis. *Id.* at 137. He challenged the Pennsylvania Code of Judicial Conduct, which prohibited judicial candidates from announcing their views on controversial topics and from personally requesting campaign funds from voters. *Id.* The Third Circuit found that abstention applied based on the time factor. *Id.* at 141. The election would occur in a few weeks and it appeared that the state court would not produce a timely ruling. *Id.* Further, the Third Circuit determined that Pennsylvania law did not violate the First Amendment. *Id.* at 142. Therefore, the candidate for judge received no redress from the federal court. *Id.*

77. *See* Althouse, *supra* note 7, at 1060-62 (describing principles of equity, federalism and comity); Rehnquist, *supra* note 7, at 1049 (describing comity and how it relates to *Younger* and *Pullman* abstention doctrines). Judicial comity indicates that the "courts of one state or jurisdiction will give effect to laws and judicial decisions of another state or jurisdiction, not as a matter of obligation but out of deference and mutual respect." BLACK'S LAW DICTIONARY 267 (6th ed. 1990).

78. *See* Noble v. White, 996 F.2d 797, 799 (5th Cir. 1993) (stating that comity reflects sufficient justification for federal court not to adjudicate state election case); *accord* Hubbard v. Ammerman, 465 F.2d 1169, 1181 (5th Cir. 1972) (holding violation of Texas election law not matter of federal court review despite possibility of illegally cast ballots), *cert. denied*, 410 U.S. 910 (1973); *see also* Rehnquist, *supra* note 7, at 1049 (describing applicability of comity to *Younger* and *Pullman* abstention doctrines).

79. For a listing of those courts which specifically mentioned comity, federalism or equity see *infra* note 83.

80. Lemon v. Kurtzman, 411 U.S. 192, 200-01 (1973); *accord* Holmberg v. Armbrecht, 327 U.S. 392, 396 (1946) (noting flexibility represents hallmark of equity); Hecht Co. v. Bowles, 321 U.S. 321, 329-30 (1944) (same); Hilton Davis Chem. Co. v. Warner-Jenkinson Co., 62 F.3d 1512, 1521 (Fed. Cir. 1995) (stating that equity originated in England as alternative to harsh rules of common law); *In re* Tri-Way Sec. and Escort Serv., Inc., 114 B.R. 24, 27 (E.D.N.Y. 1990) (same). The Supreme Court in *Hecht* remarked that "[t]he qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims." *Hecht*, 321 U.S. at 329-30.

81. *Lemon*, 411 U.S. at 200-01; *accord* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 15, 27 n.10 (1971) (discussing breadth of equity powers to rem-

eralism involves the relation between the states and the federal government.[82] As evidenced by the abstention doctrines discussed above, federal courts rarely intrude in areas of traditional state government activity.[83]

B. *Causes of Action*

Once the federal court hurdles abstention, it must decide if the plaintiffs have alleged a legitimate federal cause of action. A plaintiff typically brings an election fraud case under the Fourteenth Amendment,[84] the First Amendment,[85] the Civil Rights Act[86] and the Voting Rights Act.[87] The Due Process and Equal Protection clauses of the Fourteenth Amendment may serve as the basis for an election challenge.[88] In order to invoke these clauses, however, the plaintiff must allege a serious violation.[89] The United States Court of Appeals for the Eleventh Circuit, in *Roe v. Alabama*,

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edy constitutional violation); Brown v. Board of Educ., 349 U.S. 294, 299-300 (1955) (noting flexibility of broad equity powers). In *Lemon*, the United States Supreme Court upheld an equitable remedy of authorizing funds for distribution to private schools. *Lemon*, 411 U.S. at 208-09. The Court stated that this remedy "look[ed] to the practical realities and necessities" of the situation. *Id.* at 201.

82. BLACK'S LAW DICTIONARY 612 (6th ed. 1990).

83. *See* Kasper v. Board of Election Comm'rs of Chicago, 814 F.2d 332, 340 (7th Cir. 1987) (holding that federal court should not hear state election disputes, generally, due to federalist system of government); Bodine v. Elkhart County Election Bd., 788 F.2d 1270, 1272 (7th Cir. 1986) (same); Gamza v. Aguirre, 619 F.2d 449, 453 (5th Cir. 1980) (stating that "[t]he very nature of the federal union contemplates separate functions for the states"). In fact, the notion of comity supports the *Pullman* and *Younger* abstention doctrines. Trent v. Dial Medical of Fla., 33 F.3d 217, 223 n.5 (1994); *see also* Juidice v. Vail, 430 U.S. 327, 334 (1977) (stating *Younger* founded on notions of comity and federalism); Port Auth. Police Benevolent Ass'n v. Port Auth. of N.Y. & N.J. Police Dep't, 973 F.2d 169, 173 (3d Cir. 1992) (same).

84. U.S. CONST. amend. XIV.

85. U.S. CONST. amend. I.

86. 42 U.S.C. § 1983 (Supp. 1994).

87. 42 U.S.C. §§ 1971-1974 (Supp. 1994).

88. U.S. CONST. amend. XIV, § 1. The Due Process Clause states "nor shall any State deprive any person of life, liberty, or property, without due process of law." *Id.* The Equal Protection Clause specifies that a State may not deny, to any person within its jurisdiction, equal protection of the laws. *Id.* While the Fourteenth Amendment applies to state action, the Fifth Amendment contains a similar due process provision which restricts the federal government's actions. U.S. CONST. amend. V (stating "nor be deprived of life, liberty, or property, without due process of law"). The Fifth Amendment does not contain an explicit equal protection clause, but courts read this guarantee into the Fifth Amendment Due Process Clause. *Id.*; JEROME A. BARRON ET AL., CONSTITUTIONAL LAW: PRINCIPLES AND POLICY 549 (4th ed. 1992). For a discussion of the right to vote enforced under the Fourteenth Amendment, see Arthur E. Bonfield, *The Right to Vote and Judicial Enforcement of Section Two of the Fourteenth Amendment*, 46 CORNELL L.Q. 108 (1960); William W. Van Alstyne, *The Fourteenth Amendment, the 'Right' to Vote, and the Understanding of the Thirty-Ninth Congress*, 1965 SUP. CT. REV. 33, 44.

89. Roe v. Alabama, 43 F.3d 574, 580 (11th Cir.), *cert. denied*, 1995 WL 428353 (Oct. 2, 1995).

held that an election fraud claim must involve a fundamentally unfair election.[90]

1. *Equal Protection*

Plaintiffs often pursue election fraud under the Fourteenth Amendment Equal Protection Clause. If the state political process favors one candidate over another, that candidate possesses an equal protection claim.[91] Further, if a candidate's or voter's race causes differential treatment, an equal protection violation exists.[92] In either situation, the plaintiff must prove discriminatory intent.[93]

2. *Substantive Due Process*

If no evidence of a racially-motivated scheme arises, the plaintiffs will pursue their claim under the Fourteenth Amendment's Substantive Due Process Clause. This clause provides that no state shall "deprive any person of life, liberty, or property, without due process of law."[94] The concept of "liberty" includes fundamental rights.[95] Thus, the state may not

90. *Id.* (citing Duncan v. Poythress, 657 F.2d 691, 703 (5th Cir. 1981), *cert. denied*, 459 U.S. 1012 (1982)). The Eleventh Circuit found fundamental unfairness in the Alabama Circuit Court order to count the improperly completed absentee ballots in the election results. *Id.*

91. Marks v. Stinson, No. CIV. A.93-6157, 1994 WL 146113, at *33 (E.D. Pa. Apr. 26, 1994), *aff'd, Marks*, No. 94 Civ. 1474, *supra* note 13, *cert. denied*, 115 S. Ct. 901 (1995); *accord* Illinois State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 178 (1979) (finding Equal Protection clause implicated where independent and new candidate forced to obtain 25,000 voter signatures to appear on ballot); Williams v. Rhodes, 393 U.S. 23, 30-34 (1968) (holding state laws violated Equal Protection clause because law discriminated against new political parties); Libertarian Party of Indiana v. Marion County Bd. of Voter Registration, 778 F. Supp. 1458 (S.D. Ind. 1991) (same).

92. Marks v. Stinson, No. CIV.A.93-6157, 1994 WL 146113, at *33 (E.D. Pa. Apr. 26, 1994), *aff'd, Marks*, No. 94 Civ. 1474, *supra* note 13, *cert. denied*, 115 S. Ct. 901 (1995). Race historically constitutes a suspect class and, thus, any law or state action based on race will receive the strictest judicial scrutiny. *See, e.g.*, Loving v. Virginia, 388 U.S. 1 (1967) (holding law restricting marriages between races unconstitutional under the Equal Protection Clause); McLaughlin v. Florida, 379 U.S. 184, 192 (1964) (holding race equals suspect class); Strauder v. West Virginia, 100 U.S. 303 (1879) (holding unconstitutional certain laws that prohibit blacks from sitting as jurors). Courts only uphold differential treatment of a suspect class if necessary to further a compelling state interest. Regan v. Taxation With Representation of Wash., 461 U.S. 540 (1983).

93. City of Mobile v. Bolden, 446 U.S. 55 (1980); Washington v. Davis, 426 U.S. 229 (1976). In *Bolden*, the Court held that plaintiffs did not have a claim because they lacked evidence of discriminatory intent. *Bolden*, 446 U.S. at 74. "[P]roof of discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." *Id.* at 67.

94. U.S. CONST. amend. XIV.

95. *See* Mullins v. Oregon, 57 F.3d 789, 793 (9th Cir. 1995) (noting that Substantive Due Process Clause includes "those aspects of liberty that we as a society traditionally have protected as fundamental"); James Bopp, Jr. & Richard E. Coleson, Webster *and the Future of Substantive Due Process*, 28 DUQ. L. REV. 271, 280

impose an unreasonable burden upon these rights.[96] Typically, the Court has limited fundamental rights, under the Substantive Due Process Clause, to privacy rights in marriage, procreation and child-rearing.[97] Certain circuit courts, however, have extended fundamental rights to voting and all procedures encompassed therein.[98] In the election context, a plaintiff may implicate the Due Process Clause only if the election violations rise to the level of "patent and fundamental unfairness."[99]

The United States Court of Appeals for the Fifth Circuit found a substantive due process violation in *Duncan v. Poythress*.[100] In *Duncan*, the state's governor, rather than calling a special election, improperly appointed a judge to fill a recent vacancy.[101] Several voters filed suit, claiming violation of their fundamental right to vote.[102] The Fifth Circuit

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(Winter 1990) (stating that both liberty interests and fundamental rights are protected by Due Process Clause of Fourteenth Amendment).

96. BARRON ET AL., *supra* note 88, at 381.

97. *Id.* at 381, 402-508; *see* Cruzan v. Director, Mo. Dept. of Health, 497 U.S. 261 (1990) (recognizing constitutional right to die); Moore v. City of East Cleveland, 431 U.S. 494 (1977) (recognizing right to make family living arrangement decisions); Roe v. Wade, 410 U.S. 113 (1973) (characterizing right to abortion as fundamental); Griswold v. Connecticut, 381 U.S. 479 (1965) (recognizing fundamental right to contraception).

98. *See* Welch v. McKenzie, 765 F.2d 1311, 1317 (5th Cir. 1985) (finding illegal absentee voting did not rise to level of due process violation); Duncan v. Poythress, 657 F.2d 691, 703-05 (5th Cir. 1981) (holding that governor's action of appointing replacement judge, rather than calling special election, implicated substantive due process rights), *cert. granted*, 455 U.S. 937, *and cert. dismissed*, 459 U.S. 1012 (1982); Gamza v. Aguirre, 619 F.2d 449, 452-53 & n.3 (5th Cir. 1980) (stating that error in vote counting did not constitute a substantive due process violation because right to hold political office not protected by Due Process Clause); Griffin v. Burns, 570 F.2d 1065, 1078-79 (1st Cir. 1978) (holding rejection of absentee ballots by Rhode Island Supreme Court, because not used in primary election, violated absentee voters' substantive due process rights); Pettengill v. Putnam County R-1 Sch. Dist., 472 F.2d 121, 121-22 (8th Cir. 1973) (refusing to hear school board election under substantive Due Process Clause even though unqualified voters had voted); Powell v. Power, 436 F.2d 84, 86 (2d Cir. 1970) (refusing to become involved in trivial election disputes under guise of substantive Due Process Clause); Johnson v. Hood, 430 F.2d 610, 612 (5th Cir. 1970) (finding no substantive due process violation in miscounting of votes where Constitution or federal statutes do not guarantee right to vote in state election).

99. *Welch*, 765 F.2d at 1317 (quoting *Duncan*, 657 F.2d at 701, 703). For a discussion of the facts of *Welch*, see *infra* notes 123-25, 144-48, 270-77 and accompanying text. Such unfairness involves more than a mere dispute over the counting or marking of ballots. *Welch*, 765 F.2d at 1317; *see also Gamza*, 619 F.2d at 452-53 (stating failure to count some votes not substantive due process violation); *Pettengill*, 472 F.2d at 121-22 (refusing to scrutinize election irregularities); *Powell*, 436 F.2d at 86 (finding that votes by non-qualified voters not substantive due process violation); *Johnson*, 430 F.2d at 612 (holding vote miscount not actionable under substantive Due Process Clause).

100. 657 F.2d 691 (5th Cir. 1981).

101. *Id.* at 703. Per state law, the governor must call a special election when a judgeship becomes vacant. *Id.*

102. *Id.* The court did not state how many voters filed suit. *Id.* at 693. It just stated "several." *Id.* The voters named the Governor of Georgia, the resigning

concluded that this infringement on voting rights violated the Fourteenth Amendment Substantive Due Process Clause.[103]

3. *Civil Conspiracy*

A civil conspiracy exists where a group of persons, acting in concert, seek to violate the laws or rights of others.[104] In *Hampton v. Hanrahan*,[105] the United States Court of Appeals for the Seventh Circuit held that the plaintiff need not prove each conspirator knew all other co-conspirators or the exact extent of the plan or the existence of an exact agreement.[106] Although a civil conspiracy does not automatically confer federal jurisdiction, proof of a conspiracy enables the plaintiff to reach private parties under the Civil Rights Act.[107]

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judge, the appointed replacement judge and the Georgia Secretary of State as defendants. *Id.*

103. *Id.* The Third Circuit had not previously examined voter fraud under the substantive Due Process Clause. Generally, the Third Circuit takes a conservative approach in finding a substantive due process violation. *See* Reich v. Beharry, 883 F.2d 239, 243 (3d Cir. 1989) (holding no substantive due process violation where county controller denied payment to special prosecutor for fees he incurred while attempting, unsuccessfully, to prosecute same county controller); Ransom v. Marrazzo, 848 F.2d 398, 411-12 (3d Cir. 1988) (finding that denial of water and sewage services did not implicate substantive Due Process Clause as no entitlement to this action existed); Mauriello v. University of Medicine and Dentistry of N.J., 781 F.2d 46 (3d Cir.) (noting that entitlements under state law do not constitute violations of substantive due process), *cert. denied*, 479 U.S. 818 (1986). The Third Circuit noted that the Constitution creates substantive due process rights, not state law. *Reich*, 883 F.2d at 244 (citing Mangels v. Pena, 789 F.2d 836, 839 (10th Cir. 1986)). The court stated that in the Third Circuit "not all property interests worthy of procedural due process protection are protected by the concept of substantive due process". *Id.* at 245.

104. BLACK'S LAW DICTIONARY 245 (6th ed. 1990) (citing Lake Mortgage Co., Inc. v. Federal Nat'l Mortgage Ass'n, 308 N.E.2d 739, 744 (Ind. Ct. App. 1974)); *see also* Hampton v. Hanrahan, 600 F.2d 600, 620-21 (7th Cir. 1979) (defining same). A civil conspiracy applies to private parties only. If government involvement exists, the cause of action falls under 42 U.S.C. § 1983 (Supp. 1994).

105. 600 F.2d 600 (7th Cir. 1979).

106. *Id.* at 621; *accord* Snell v. Tunnell, 920 F.2d 673, 702 (10th Cir. 1990), *cert. denied*, 499 U.S. 976 (1991). "[I]t simply must be shown that there was a single plan, the essential nature and general scope of which [was] known to each person who is to be held responsible for its consequences." *Hampton*, 600 F.2d at 621 (quoting Hoffman-LaRoche, Inc. v. Greenberg, 447 F.2d 872, 875 (7th Cir. 1971)). A litigant may use circumstantial evidence to prove the single plan and knowledge requirements. *Id.* Co-conspirators have liability for the acts of other co-conspirators during the course of the conspiracy. Dixon v. City of Lawton, 898 F.2d 1443, 1449 n.6 (10th Cir. 1990).

107. The Civil Rights Act, by its terms, relates solely to state actors. For the text of the Civil Rights Act, see *infra* note 131. For a discussion of how plaintiffs implicate private parties under this Act, see *infra* notes 135-40 and accompanying text.

4. *Violation of First Amendment*

Unlike the Fourteenth Amendment, the First Amendment confers jurisdiction to the federal courts.[108] The First Amendment guarantees freedom of speech and of the press.[109] The Supreme Court has interpreted the First Amendment to include the freedom of association.[110] In *NAACP v. Alabama*,[111] the Supreme Court held that the First Amendment protects the right to associate and to advance ideas and beliefs.[112]

Freedom of association frequently involves both the political arena and the electoral process.[113] An election campaign represents a quest for political office and a means of disseminating ideas.[114] If a candidate or state actor, by either hampering a candidate's freedom to campaign or a

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108. U.S. CONST. amend. I (conferring federal jurisdiction by specifying that "Congress shall make no law"). For the text of the First Amendment, see *infra* note 109.

109. U.S. CONST. amend. I. The First Amendment states "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." *Id.*

110. NAACP v. Alabama, 357 U.S. 449, 460 (1958). The United States Supreme Court stated that "freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces the freedom of speech." *Id.* For a list of cases discussing the right of association in the political arena see *infra* note 113.

111. 357 U.S. 449 (1958).

112. *Id.* at 460. Specifically, the Court held that the plaintiffs' rights of association included the right not to produce the names and addresses of their members. *Id.* at 462-63.

113. *See, e.g.*, Federal Election Comm'n v. Massachusetts Citizens for Life, 479 U.S. 238, 263 (1986) (holding unconstitutional provision of Federal Election Campaign Act which prohibited corporations from using treasury funds to further candidate's campaign); Federal Election Comm'n v. National Conservative Political Action Comm., 470 U.S. 480, 482-83, 490 (1985) (holding that to limit amount independent political committees could spend on candidate's campaign violates First Amendment); Anderson v. Celebrezze, 460 U.S. 780, 792-93 (1983) (holding exclusion of candidate from ballot for failing to file statement of candidacy and nominating petition in March, for November election, violated First Amendment right of association); Lubin v. Panish, 415 U.S. 709, 716 (1974) (recognizing right to associate for advancement of political beliefs); Williams v. Rhodes, 393 U.S. 23, 30 (1968) (same); Buckley v. Valeo, 424 U.S. 1, 39-59 (1976) (holding Federal Election Campaign Act of 1971 provision, which imposed limit on candidate's expenditures from his own finances and ceiling on total campaign expenditure, unconstitutional).

114. Marks v. Stinson, No. CIV.A.93-6157, 1994 WL 146113, at *32 (E.D. Pa. Apr. 26, 1994) (citing Illinois State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 186 (1979)), *aff'd*, *Marks*, No. 94 Civ. 1474, *supra*, note 13, *cert. denied*, 115 S. Ct. 901 (1995). In *Illinois State Board*, the Court noted that election campaigns disseminate ideas and thoughts. 440 U.S. at 186. The influence of the thoughts of the Abolitionists, Populists and Progressives still exist today. *Id.* at 185. Although these groups lacked popularity at one time and did not initially win elections, their thoughts prevailed. *Id.* at 185-86.

party's freedom to vote, interferes with the advancement of these political ideas, they may violate the First Amendment right of association.[115]

5. *Voting Rights Act*

The Voting Rights Act prohibits a state from denying the right of citizens to vote on the basis of race, color or their ability to speak English.[116] The Third Circuit has held that to prove a violation of this Act, the plaintiff must show the state employed a "racial discriminatory strategy."[117] The Voting Rights Act imposes a totality of the circumstances test which considers a variety of factors in determining whether a violation has occurred.[118] In election fraud cases, the most relevant factor relates to "the use of voting mechanisms which restrict the voting potential of minori-

115. *Illinois State Board*, 440 U.S. at 184; *Buckley*, 424 U.S. at 39-59; *Williams*, 393 U.S. at 30; Newcomb v. Brennan, 558 F.2d 825, 828 (7th Cir.), *cert. denied*, 434 U.S. 968 (1977).

116. 42 U.S.C. § 1973 (Supp. 1994). The statute states in pertinent part:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.
>
> (b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

Id.; *see* Shaw v. Reno, 113 S. Ct. 2816, 2823 (1993) (stating that Congress enacted Voting Rights Act in response to discriminatory practices by some states against minority voters); South Carolina v. Katzenbach, 383 U.S. 301, 308 (1966) (same); Brooks v. Nacrelli, 331 F. Supp. 1350 (E.D. Pa. 1971), *aff'd*, 473 F.2d 955 (3d Cir. 1973) (same). State action comprises an essential part of the Voting Rights Act as well as the Civil Rights Act. Moore v. City of Paducah, 890 F.2d 831, 833 (6th Cir. 1989).

117. Jenkins v. Red Clay Consol. Sch. Dist. Bd. of Educ., 4 F.3d 1103, 1114 (3d Cir. 1993), *cert. denied*, 114 S. Ct. 2779 (1994); *Brooks*, 331 F. Supp. at 1352.

118. Robert Barnes, Comment, *Vote Dilution, Discriminatory Results, and Proportional Representation: What is the Appropriate Remedy for a Violation of Section 2 of the Voting Rights Act?*, 32 UCLA L. REV. 1203, 1206 (1985). The Senate Judiciary Committee has listed these factors as:

> 1. [T]he extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;
>
> 2. the extent to which voting in the elections of the state or political subdivision is racially polarized;

ties."[119] Such mechanisms include misinforming minority voters of voting requirements or taking advantage of the minority group's difficulty with the English language.[120] Under this Act, candidates, voters and political parties have standing to bring a claim.[121]

Even in situations of blatant state discrimination, however, a federal court may decline a Voting Rights Act claim.[122] In *Welch v. McKenzie*,[123] the Fifth Circuit found no violation of the Voting Rights Act even though the state favored a white candidate over a black candidate.[124] The court, focusing on the voters, held that the plaintiffs did not prove "racial motivation or state-created impairment of black votes."[125] Not all provisions of the Voting Rights Act, however, specify race.[126] One provision states that voting standards or procedures cannot differ among individuals in the same voting district.[127] Some courts hold that non-racial discrimination

3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;
4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;
5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;
6. whether political campaigns have been characterized by overt or subtle racial appeals;
7. the extent to which members of the minority group have been elected to public office in the jurisdiction.

S. REP. NO. 417, 97th Cong., 2d Sess. (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 206-07.

119. Barnes, *supra* note 118, at 1206.

120. In *Marks v. Stinson*, Stinson campaign workers told a group of hispanic voters that if they did not want to go the polls on election day, they could complete absentee ballots. 19 F.3d 873, 877 (3d Cir. 1994). These campaign workers lied to the hispanic voters. *Id.* Further, Stinson campaign workers assisted those minority voters, who did not understand English, in completing their absentee ballots. *Id.*

121. Marks v. Stinson, No. CIV.A.93-6157, 1994 WL 47710, at *11 (E.D. Pa. Feb. 18), *vacated in part*, 19 F.3d 873 (3d Cir. 1994); *see* Anderson v. Celebrezze, 460 U.S. 780 (1983) (candidate); Illinois State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173 (1979) (political party); Harman v. Forssenius, 380 U.S. 528 (1965) (voter). *But see* Roberts v. Wamser, 883 F.2d 617 (8th Cir. 1989) (holding that losing candidate does not have standing to sue under Voting Rights Act).

122. Welch v. McKenzie, 765 F.2d 1311, 1316 (5th Cir. 1985).

123. *Id.*

124. *Id.* For a discussion of the state's preference of a white candidate, see *infra* notes 125, 144-48, 270-77 and accompanying text.

125. *Id.* at 1316. The court held that the violation of state law, in the handling of absentee ballots, did not rise to the level of a constitutional violation. *Id.* at 1311.

126. *See* 42 U.S.C. § 1971-1974 (Supp. 1994) (failing to mention race). Certain provisions of the Voting Rights Act specifically mention race. 42 U.S.C. §§ 1971(a)(1), 1971(e), 1973, 1973a, 1973b(a)-(b), 1973b(d), 1973c, 1973d, 1973h(a), 1973k, 1973aa-5.

127. 42 U.S.C. § 1971(a)(2)(A). The section states:

supports a claim under this section of the Voting Rights Act.[128] Neither the Third Circuit nor the United States Supreme Court have ruled on this issue.[129] Arguably, because Congress used the word "race" in other provisions of the Voting Rights Act, this section only applies to non-racial discrimination.[130]

6. *Civil Rights Act § 1983*

Section 1983 of the Civil Rights Act (Section 1983) states that no person "under color of any statute, ordinance, regulation, custom, or usage of any State" may deprive another citizen of any constitutional rights.[131] In *Kasper v. Board of Election Commissioners of Chicago*,[132] the Seventh Circuit held that in order to establish a violation under Section 1983, the plaintiffs must prove "willful conduct which undermines the organic processes by which candidates are elected."[133] Thus, negligent conduct by election officials does not establish a Section 1983 violation.[134]

> No person acting under color of law shall (A) in determining whether any individual is qualified under State law or laws to vote in any election, apply any standard, practice, or procedure different from the standards, practices, or procedures applied under such law or laws to other individuals within the same county, parish, or similar political subdivision who have been found by State officials to be qualified to vote.

Id. No evidence exists whether Congress intended this provision to apply solely to racial distinctions or to all forms of discrimination.

128. *See* Ball v. Brown, 450 F. Supp. 4 (N.D. Ohio 1977) (holding sex discrimination context in voting actionable); Frazier v. Callicutt, 383 F. Supp. 15 (N.D. Miss. 1974) (treating students different from nonstudents supports an action); Brier v. Luger, 351 F. Supp. 313, 316 (M.D. Pa. 1972) (holding any treatment which differs among individuals supports action under 42 U.S.C. § 1971(a)(2)(A)).

129. Brief for Appellee at 31, Marks v. Stinson, 19 F.3d 873 (3d Cir. 1994).

130. *Id.* at 32. For a list of those sections explicitly mentioning race, see *supra* note 126.

131. 42 U.S.C. § 1983 (Supp. 1994). The section states:

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

Id.

132. 814 F.2d 332 (7th Cir. 1987).

133. *Id.* at 343 (quoting Bodine v. Elkhart County Election Bd., 788 F.2d 1270, 1272 (7th Cir. 1986)); *accord* Dieckhoff v. Severson, 915 F.2d 1145, 1148 (7th Cir. 1990) (quoting same language from *Bodine*); Hennings v. Grafton, 523 F.2d 861, 863-64 (7th Cir. 1975) (holding actions evincing actual intent or "should have known" constitute Section 1983 violation).

134. *Bodine*, 788 F.2d at 1272; Hendon v. North Carolina State Bd. of Elections, 710 F.2d 177, 182 (4th Cir. 1983); Gamza v. Aquirre, 619 F.2d 449, 452-53 (5th Cir. 1980). The *Kasper* court noted that a violation of state law will not sup-

In addition to state actors, plaintiffs may hold private parties accountable under the Civil Rights Act.[135] In *Adickes v. S.H. Kress & Co.*,[136] the Supreme Court held that a private party's liability hinges on his or her willing participation in the conspiracy with the State.[137] In *Melo v. Hafer*,[138] the Third Circuit held that it would find the private party liable if he conspired with a state actor.[139] Because the conspiracy occurred prior to when the individual assumed office, the private party did not face liability under the Civil Rights Act.[140]

Many courts, however, refuse to scrutinize state elections under the guise of the Civil Rights Act because these elections constitute the province of the states.[141] The United States Court of Appeals for the Ninth

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port a claim under Section 1983. *Kasper*, 814 F.2d at 342. This includes state election laws. *Id.*; *accord* Snowden v. Hughes, 321 U.S. 1, 11 (1944) (holding violation of state election laws, even by state officials, does not violate Constitution);

135. Marks v. Stinson, No. CIV.A.93-6157, 1994 WL 146113, at *30 (E.D. Pa. Apr. 26, 1994), *aff'd*, *Marks*, No. 94 Civ. 1474, *supra* note 13, *cert. denied*, 115 S. Ct. 901 (1995); *see also Kasper*, 814 F.2d at 332 (holding that private parties, working with election judges and allowing persons to vote more than once, participated in state action under Section 1983).

136. 398 U.S. 144 (1970).

137. *Id.* at 152; *accord* United States v. Price, 383 U.S. 787, 794 (1966) (holding conspiracy established if private actor willfully participates); Dennis v. Sparks, 449 U.S. 24, 27-28 (1980) (same); Melo v. Hafer, 912 F.2d 628, 638 (3d Cir. 1990) (same), *aff'd*, 112 S. Ct. 358 (1991). The Third Circuit has likewise adopted this view. *Melo*, 912 F.2d at 638. The Third Circuit held that "federal employees who conspire with state officials to violate someone's constitutional rights are treated as acting under color of state law." *Id.* A litigant need not show that the public officials "substituted the judgment of private parties for their own judgment." *Id.* n.12.

138. 912 F.2d 628 (3d Cir. 1990).

139. *Id.* at 638-39. The plaintiff previously worked in the Auditor General's Office. *Id.* at 631. His former boss received money for hiring and promotion decisions. *Id.* The United States Attorney's Office investigated and compiled a list of the persons whose jobs the Auditor's office "bought." *Id.* The U.S. Attorneys, however, did not know whether those persons holding "bought" jobs, had knowledge of this buy out. *Id.* For instance, Melo, did not know that someone purchased his job for him. *Id.* The Attorney's Office instructed their lawyer, West, to keep the list of jobs "bought" confidential. *Id.* Instead, however, he disclosed the list to Hafer, who started running for the Auditor General position. *Id.* at 638. West gave the list to Hafer, knowing that this would give her an edge and expecting that she would fire the persons listed. *Id.*

140. *Id.* at 639. At the time of the conspiracy between West and Hafer, Hafer had not received her position as a state official. *Id.* at 638. After her election, no further conspiracy occurred. *Id.* Therefore, West, the private party, did not violate the Civil Rights Act. *Id.*

141. Soules v. Kauaians for Nukolii Campaign Comm., 849 F.2d 1176, 1183 (9th Cir. 1988); Curry v. Baker, 802 F.2d 1302, 1315 (11th Cir.), *cert. denied*, 479 U.S. 1023 (1986); Hutchinson v. Miller, 797 F.2d 1279, 1283 (4th Cir. 1986), *cert. denied*, 479 U.S. 1088 (1987); Welch v. McKenzie, 765 F.2d 1311 (5th Cir. 1985); Gamza v. Aguirre, 619 F.2d 449, 452-53 (5th Cir. 1980); Griffin v. Burns, 570 F.2d 1065, 1076 (1st Cir. 1978); Hennings v. Grafton, 523 F.2d 861 (7th Cir. 1975); Pettengill v. Putnam County R-1 Sch. Dist., 472 F.2d 121, 121-22 (8th Cir. 1973); Hubbard v. Ammerman, 465 F.2d 1169, 1176 (5th Cir. 1972), *cert. denied*, 410 U.S.

Circuit, in *Soules v. Kauaians for Nukolii Campaign Committee*,[142] stated that it will not hear "garden variety election irregularities."[143] The Fifth Circuit, in *Welch v. McKenzie*,[144] also declined to review state election laws.[145] In *Welch*, most of the absentee ballots, which in total constituted six percent of the election returns, violated Mississippi law.[146] Welch, a minority and a losing candidate, proceeded to federal court alleging violations of the Voting Rights Act.[147] Despite the acknowledged abuses, the Fifth Circuit, like the Ninth Circuit, declined to intervene in a "garden variety" election dispute.[148]

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910 (1973); Powell v. Power, 436 F.2d 84, 88 (2d Cir. 1970). Federal courts may not unquestionably oversee compliance with state election laws. *Hutchinson*, 797 F.2d at 1286-87; *Soules*, 849 F.2d at 1184. In *Hutchinson*, the Fourth Circuit noted that human error may cause small infractions in a state's election law and that losing candidates may "view these . . . in a less than charitable light." 797 F.2d at 1286-87. These minor infractions, however, do not rise to the level of a constitutional claim. *Soules*, 849 F.2d at 1183; *Curry*, 802 F.2d at 1315; Duncan v. Poythress, 657 F.2d 691, 701 (5th Cir. 1981), *cert. granted*, 455 U.S. 937, *and cert. dismissed*, 459 U.S. 1012 (1982); *Griffin*, 570 F.2d at 1076.

142. 849 F.2d 1176 (9th Cir. 1988).

143. *Id.* at 1183 (citing *Griffin*, 570 F.2d at 1076 (noting uniform view among the circuit courts of rejecting jurisdiction over garden variety election disputes)); *accord Curry*, 802 F.2d at 1304-05 (noting up front that "federal courts should not be involved in settling state election disputes"); *Duncan*, 657 F.2d at 701 (stating garden variety election disputes should return to state courts).

144. 765 F.2d 1311 (5th Cir. 1985).

145. *Id.*

146. *Id.* at 1312. Other absentee voters fraudulently cast their ballots. *Id.* This election involved the supervisor position in Copiah County. *Id.* Similar to the *Marks* case, the violations included illegal delivery and early opening of the absentee ballots. *Id.* In *Marks*, however, the absentee ballots comprised only four percent of the total election returns. Brief for Appellant at 24, Marks v. Stinson, 94 Civ. 1474 (3d Cir. Aug. 18, 1994).

147. *Welch*, 765 F.2d at 1313-14. Welch also alleged a violation of Section 1983 of the Civil Rights Act. *Id.* Evidence existed that some white campaign workers intimidated African-Americans while casting their votes. *Id.* at 1314.

148. *Id.* at 1316. Rather, the court left this issue for the state courts. *Id.* at 1314. The court characterized the abuse of the absentee ballot process as a procedure which Copiah County used continuously and represented mere ignorance of the election laws. *Id.* The Fifth Circuit found that the state court system would provide Welch an adequate opportunity. *Id.* The state court later convicted the winning candidate, Hood, of conspiracy to commit voter fraud in state court. *Id.* The Fifth Circuit acknowledged that suspicion levels rise in stolen elections where the losing candidate has a minority classification. *Id.* at 1317. This suspicion, alone, does not violate the Constitution. *Id.* Due to the varying methods of voter and election fraud, the lack of prosecutions or law suits involving these methods and the fact-sensitive nature of the cases, a majority view on what constitutes garden variety election fraud does not exist. For instance, the Fifth Circuit contradicts itself regarding what type of fraud it will review. In Duncan v. Poythress, 657 F.2d 691 (5th Cir. 1981), *cert. granted*, 455 U.S. 937, *and cert. dismissed*, 459 U.S. 1012 (1982), the Fifth Circuit found the governor violated the citizens' right to vote by appointing a replacement judge rather than holding a special election. *Id.* at 703. Yet when the state does not count votes or miscounts votes or improperly handles votes, the Fifth Circuit will not hear the case. *See* Welch v. McKenzie, 765 F.2d 1311, 1314-15 (5th Cir. 1985) (refusing to hear state election dispute despite evi-

C. *Remedies*

After the plaintiff proves election fraud, the court must then select the appropriate remedy.[149] The Supreme Court acknowledged that a federal court may invoke a wide range of remedies and that appellate review will be "correspondingly narrow."[150] The Court characterized these remedies as a "special blend of what is necessary, what is fair, and what is workable."[151] Flexibility represents an important aspect of the remedy.[152] According to the Third Circuit, it may only review "arbitrary, fanciful, or unreasonable" remedies formulated by the district court.[153]

Typical remedies for election fraud cases include a new election, invalidating the election but keeping the office vacant, deferring to state designated remedies, or certifying the losing candidate as the winner.[154] Nonetheless, practical realities make selecting one of these remedies inherently difficult.[155] For instance, courts may not invalidate an election or

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dence of voter intimidation, mishandling of absentee ballots in contravention of state law and blatant favoring of one candidate over another); Gamza v. Aguirre, 619 F.2d 449, 452-53 (5th Cir. 1980) (refusing to review where state officials failed to count certain votes and erred in counting others, stating no candidate has right to hold political office); Johnson v. Hood, 430 F.2d 610, 612 (5th Cir. 1970) (characterizing state's problem as one of merely not counting votes and stating that neither the Constitution nor any federal law guarantees right to vote in state election).

149. *See generally* Barnes, *supra* note 118 (describing general remedies for all Voting Rights Act violations, not just election fraud). These remedies include forcing minority proportional representation in government, ensuring equal access to vote, redrawing voting districts and requiring the voting district to submit a plan to remedy the discrimination. *Id.* at 1241, 1244-45, 1256, 1258.

150. Lemon v. Kurtzman, 411 U.S. 192, 200 (1973) (citing Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 15, 27 n.10 (1971)). The Third Circuit recognized the power of the district court to formulate a remedy unique to the situation. Evans v. Buchanan, 582 F.2d 750, 764 (3d Cir. 1978), *cert. denied*, 446 U.S. 923 (1980).

151. *Lemon*, 411 U.S. at 200.

152. *Id.* (citing Brown v. Board of Educ., 349 U.S. 294, 300 (1955)).

153. *Evans*, 582 F.2d at 764 (citing Evans v. Buchanan, 555 F.2d 373, 378 (3d Cir. 1977)).

154. Marks v. Stinson, 19 F.3d 873, 889 (3d Cir. 1994). For a list of the cases in which the court ordered new elections, see *infra* note 158. *See* Crowe v. Lucas, 595 F.2d 985 (5th Cir. 1979) (declaring election null and void). For a list of cases where state has discretion in formulating the remedy, see *infra* note 164. *See also* Kenneth W. Starr, *Federal Judicial Invalidation as a Remedy for Irregularities in State Elections*, 49 N.Y.U. L. REV. 1092, 1124-26 (1974) (describing these potential remedies); *Developments in the Law Elections*, 88 HARV. L. REV. 1111, 1298-99 (1975) (critiquing election remedies). For a discussion of the newest remedy, certifying the opposing candidate as winner, see *infra* notes 166-71 and accompanying text. Generally, courts consider money damages to losing candidates inappropriate and, therefore, will not order them. Hutchinson v. Miller, 797 F.2d 1279, 1280 (4th Cir. 1986), *cert. denied*, 479 U.S. 1088 (1987).

155. Burson v. Freeman, 504 U.S. 191, 209 (1992) (noting that any remedy for election fraud represents "an imperfect one"); Ketchum v. City Council of Chicago, 630 F. Supp. 551, 565 (N.D. Ill. 1985) (noting that future relief has "little consequence to the many voters who sought to vote . . . and could not do so effec-

order a new election if these remedies either inconvenience the citizens or render that office vacant for a significant period of time.[156] Additionally, vacating an office or ordering another candidate to assume office may not necessarily restore the voter's right to vote or the candidate's right to a fair election.[157]

Invalidating the old election and ordering a new election constitutes the most popular remedy.[158] The United States District Court for the

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tively" (citing Coalition for Educ. in Dist. One v. Board of Elections, 370 F. Supp. 42, 58 (S.D.N.Y.), *aff'd*, 495 F.2d 1090 (2d Cir. 1974))). In Marks v. Stinson, 19 F.3d 873 (3d Cir. 1994), the Third Circuit also recognized the difficult balancing in formulating an appropriate remedy. *Marks*, 19 F.3d at 886-92. The court noted that by ordering a new election, Marks, a candidate who presumably did nothing wrong, must finance a second campaign. *Id.* at 887. But if the court certified the election based on the results of the machine tabulation only, those absentee voters who cast legal ballots would effectively lose the vote they cast. *Id.* Additionally, holding a new election and removing the former victor from office leaves the office vacant for a period of time. *Id.* at 889.

156. *Id.*; *see Burson*, 504 U.S. at 209 (noting that ordering new election tends to decrease voter turnout); *Marks*, 19 F.3d at 889 (recognizing that office may remain vacant until court reaches decision); Brief for Appellee at 49, Marks v. Stinson, 19 F.3d 873 (3d Cir. 1994) (stating that new election would "disenfranchise 40,000 machine voters who were not involved in the absentee ballot scheme, clearly an unduly harsh result").

157. Further, these remedies may cause the public to lose faith in the election system. *See* Donohue v. Board of Elections of N.Y., 435 F. Supp. 957, 967 (E.D.N.Y. 1976) (noting that fraudulent election results deflate public confidence); Marks v. Stinson, No. CIV.A 93-6157, 1994 WL 146113, at *35 (E.D. Pa. Apr. 26, 1994) (noting that election problems left voters "angered and disillusioned by the Special Election and its aftermath" as well as feeling "suppressed disgust and outrage at the officials and the system responsible"), *aff'd*, *Marks*, No. 94 Civ. 1474, *supra* note 13, *cert. denied*, 115 S. Ct. 901 (1995).

158. *See* Hadnott v. Amos, 394 U.S. 358, 366-67 (1969) (ordering new election for failing to include black candidate on ballot); Griffin v. Burns, 570 F.2d 1065 (1st Cir. 1978) (upholding order for new primary election when state discovered that some voters have voted by absentee ballot, which primary elections disallowed); Bell v. Southwell, 376 F.2d 659, 663-64 (5th Cir. 1967) (ordering special election when state conducted justice of peace election in racially discriminatory manner); Hamer v. Campbell, 358 F.2d 215, 224 (5th Cir.), *cert. denied*, 385 U.S. 851 (1966) (holding district court should have ordered new election where state forced minority voters to pay poll tax); *Ketchum*, 630 F. Supp. at 565 (noting that federal courts often invoke special election to remedy violations of voting rights); *Donohue*, 435 F. Supp. at 968 (noting power of court to order new election in Presidential elections as well, although court in this instance dismissed complaint); Cousins v. City Council of Chicago, 361 F. Supp. 530, 537 (N.D. Ill. 1973) (stating district apportionment problems may require special election), *aff'd in part rev'd in part*, 503 F.2d 912 (7th Cir. 1974), *and cert. denied*, Rayner v. City Council of Chicago, 420 U.S. 992 (1975); Perkins v. Matthews, 336 F. Supp. 6, 9 (S.D. Miss. 1971) (ordering new election for violation of Voting Rights Act with at large voting system); Dollinger v. Jefferson County Comm'rs Court, 335 F. Supp. 340, 343-44 (E.D. Tex. 1971) (not ordering new election where reorganization of precincts caused voters to elect candidate not voted for, but court acknowledged that new election may apply in certain circumstances); Lehner v. O'Rourke, 339 F. Supp. 309, 313 (S.D.N.Y. 1971) (stating court may order new election but such "drastic power . . . must be used guardedly"); Ury v. Santee, 303 F. Supp. 119, 126-27 (N.D.

Eastern District of New York noted that the right to order a new election extends to presidential elections.[159] The new election remedy, however, may have little deterrent effect.[160] Further, a new election may reward the offending candidate by providing him or her a second opportunity to campaign and more efficiently conceal fraudulent activity.[161] Monetarily, a new election may harm both the state and the candidates who must finance another campaign.[162] Despite these negative aspects, a new election may restore the faith of the voters in the election process.[163]

Other federal courts, in order to avoid federal overreaching claims by the states, allow state courts to designate such remedies.[164] Generally, federal courts defer to the state in cases involving racially motivated voting districts or redistricting.[165]

Finally, the court may certify another candidate as the lawful election winner.[166] Nevertheless, if the federal court decides to certify a new candidate, it may struggle determining who should win the election absent fraud.[167] Further, due to the secret nature of the voting system, a recount

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Ill. 1969) (invalidating and ordering new election because lack of voting facilities denied right to vote).

159. *Donohue*, 435 F. Supp. at 968.

160. *See* Duvoisin, *supra* note 15, at B3 (attorney for Marks stating "[i]f the most a judge could do is order a new election, 'a person could cheat, and the worst thing that could happen is that he runs again' . . . . [t]here's no downside risk to cheating").

161. Brief for Appellee at 49, Marks v. Stinson, 19 F.3d 873 (3d Cir. 1994); *see also* Duvoisin, *supra* note 15, at B3 (noting quote by lawyer in case that new election allows an offender to "run[ ] again").

162. Brief for Appellee at 50, Marks v. Stinson, 19 F.3d 873 (3d Cir. 1994); *see also* Marks v. Stinson, 19 F.3d 873, 890 (3d Cir. 1994) (stating that new election "may not be justifiable in terms of the expense to the state and the burden on the candidates").

163. *Marks*, 19 F.3d at 889.

164. Barnes, *supra* note 118, at 1207; *see* Roe v. Alabama, 43 F.3d 574, 583 (11th Cir. 1995) (certifying issue of validity of absentee ballots, under state law, to Alabama Supreme Court), *cert. denied*, 1995 WL 428353 (Oct. 2, 1995).

165. *See* Barnes, *supra* note 118, at 1206-07 (discussing advantages and disadvantages of various remedies); *see, e.g.*, Wise v. Lipscomb, 437 U.S. 535, 540 (1978) (recognizing preference for state legislatures to adopt reapportionment scheme); White v. Weiser, 412 U.S. 783, 795 (1973) (claiming "state legislatures have 'primary jurisdiction' over legislative reapportionment"); Cook v. Luckett, 735 F.2d 912, 920-21 (5th Cir. 1984) (discussing district court's rejection of county reapportionment plan); Sierra v. El Paso Indep. Sch. Dist., 591 F. Supp. 802, 812 (W.D. Tex. 1984) (requiring school district to submit reapportionment plan rather than devise its own); Gingles v. Edmisten, 590 F. Supp. 345, 379-84 (E.D.N.C. 1984) (evaluating plaintiff's objections to proposed reapportionment plan); Major v. Treen, 574 F. Supp. 325, 355-56 (E.D. La. 1983) (allowing legislature opportunity to develop acceptable reapportionment plan).

166. *See* Marks v. Stinson, No. Civ. A 93-6157, 1994 WL 146113, at *34-35 (E.D. Pa. Apr. 26, 1994) (ordering that candidate Marks assume senatorial seat formerly held by Stinson), *aff'd*, *Marks*, No. 94 Civ. 1474, *supra* note 13, *cert. denied*, 115 S. Ct. 901 (1995).

167. The election abuses themselves make it extremely difficult to determine the actual election winner. Gardner, *supra* note 5, at 236.

may be virtually impossible.[168] Therefore, some courts hold that determining the actual election winner does not require a mathematically precise recount.[169] This rationale created the opportunity for the Third Circuit's new remedy in *Marks v. Stinson*.[170] The Third Circuit not only removed the offending candidate from office, but also declared his opponent the winner.[171]

III. THE FACTS OF *MARKS V. STINSON*

Republican Bruce Marks and Democrat William Stinson opposed each other in Pennsylvania's second senatorial district election, held on November 2, 1993.[172] The interim election would fill a vacancy for a term that expired in December, 1994.[173] The election winner would provide his political party with control of the state Senate.[174] At the close of the voting day, the machine polls showed that Marks had received 19,691 votes while Stinson obtained 19,127.[175] Stinson, however, won the bulk of the absentee votes.[176] After counting the absentee ballots, Stinson acquired

168. Curry v. Baker, 802 F.2d 1302, 1314 (11th Cir.), *cert. denied*, 479 U.S. 1023 (1986); Marks v. Stinson, 19 F.3d 873, 889 (3d Cir. 1994). In *Curry*, the Eleventh Circuit stated "[u]nder this standard, massive voting irregularities could never be effectively redressed; it would put a premium on wrongdoing of enormous proportions." *Id.*

169. *Curry*, 802 F.2d at 1314; Griffin v. Burns, 570 F.2d 1065, 1080 (1st Cir. 1978). The *Marks* court based its remedy on this notion. Marks asserted that requiring each voter to testify regarding the extent of the undue influence to ascertain, with exact mathematical certainty, how many votes Marks would have won by "would be grossly unfair." Brief for Appellee at 41, Marks v. Stinson, 19 F.3d 873 (3d Cir. 1994).

170. *Marks*, 19 F.3d at 889 n.14. In a footnote, the Third Circuit stated that the district court did not need mathematical precision to determine the winner. *Id.* The court noted that expert testimony may help determine the winner. *Id.* On remand, the district court utilized a statistician to determine the election victor. *Marks*, 1994 WL 146113, at *27-29.

171. *Marks*, No. 94 Civ. 1474, *supra* note 13, at 11. A case decided by the Eleventh Circuit in 1986 may have helped to pave the way for this decision. *Curry*, 802 F.2d at 1313. The Eleventh Circuit stated that the district court incorrectly held that "the subcommittee's action could be supported only by a precise determination as to the specific number of votes illegally cast." *Id.* This lack of precision enabled the district court in *Marks* to use statistical methods, rather than actual counting of illegal versus legal absentee ballots, to determine the election winner. *Marks*, 1994 WL 146113, at *27-29.

172. *Marks*, 19 F.3d at 875.

173. *Id.* Usually, a senator will remain in office for four years. PA. CONST. art. II, § 3. The term of office begins in December, after the election. *Id.* § 2.

174. *Marks*, 19 F.3d at 875. Prior to the interim election, Democrats and Republicans each occupied 25 seats in the state senate. *Harrisburg*, LEGAL INTELLIGENCER, Feb. 2, 1994, at 5.

175. *Marks*, 19 F.3d at 875-76.

176. *Id.* at 876. Voters cast 1767 absentee ballots in the November election. *Id.* Marks received only 371 votes. *Id.* Stinson, however, won the remaining 1396 votes. *Id.*

20,523 votes as compared to Marks' 20,062.[177] The Philadelphia County Board of Elections (Board), therefore, certified Stinson as the winner.[178]

Prior to the actual election, however, Marks discovered evidence of wrongdoing by both the Board and the Stinson campaign team.[179] Starting November 1, 1993, Marks sought relief in state court.[180] These efforts

177. *Id.* Thus, out of 1767 absentee votes, Stinson received 1396, or 79%, while Marks only received 371, or 21%. *Id.*

178. *Id.*

179. *Id.* at 879. Marks petitioned the Philadelphia County Court of Common Pleas, on the day before the election, to impound all absentee ballots. *Id.* Marks alleged that Stinson's campaign workers informed certain voters that they could vote by absentee ballot rather than proceeding to the polls on election day. *Id.* The court instructed Marks to petition the election day judge, to hear the case on election day. *Id.*

180. *Id.* at 879. On election day, the election judge refused to hear Marks' claims. *Id.* Marks attempted to challenge the absentee ballots at the polls, but the Board opened and counted these ballots. *Id.* On November 3, the day following election day, Judge Maier, the election day judge, heard Marks' claims but found his arguments lacked merit. *Id.* Marks then filed an emergency petition with the Pennsylvania Supreme Court. *Id.* This court granted his petition. *Id.* On November 17, the court held that they lacked jurisdiction to review the matter and remanded the case to the Election Board. *Id.* at 879-80. The Board heard the action, but deferred to those persons authorized to watch the polls that day. *Id.* at 880. Because no pollwatcher came to court, the Board declared Stinson the winner. *Id.* Ironically, the Board certified Stinson earlier than other candidates who had uncontestedly won on election day. *Id.* The certification violated 25 PA. CONS. STAT. ANN. § 3146.8(e) (1994). *Id.* This statute gave Marks 48 hours to appeal the Board's decision. *Id.* Marks appealed the Board's decision to the Pennsylvania Court of Common Pleas. *Id.* Marks also filed an emergency petition with the Pennsylvania Supreme Court, requesting that Stinson not vote when the Senate reconvened on November 22, 1993. *Id.* The Supreme Court denied this petition. *Id.* Upon reconvening, Republican senate members objected to Stinson's voting. *Id.* However, the Senate voted and declared that Stinson properly took his seat. *Id.* Stinson could vote on this matter, and his vote decided the issue of whether he properly took office. *Id.* at 880-81 (citing Jubelirer v. Singel, 638 A.2d 352 (Pa. Commw. 1994)). Meanwhile, the Pennsylvania Court of Common Pleas affirmed the Board's decision, finding that it could only consider the scant amount of evidence that Marks presented to the Board. *Id.* Marks also appealed this decision to the Pennsylvania Supreme Court. *Id.* The court had not decided this appeal when Marks filed the federal action. *Id.* Consequently, the United States District Court for the Eastern District of Pennsylvania heard this federal action. *Id.* Further, several Latino voters had contested the election under 25 PA. CONS. STAT. ANN. § 3459 (1994). The judge ruled that these Latinos must post a $50,000 bond before proceeding. *Id.*; *Marks Refuses to Put Up Bond*, THE LEGAL INTELLIGENCER, Dec. 17, 1993, at 29. The voters could not post this bond. *Id.* The court dismissed their action on January 10, 1994. *Marks*, 19 F.3d at 880. For the state proceedings themselves, see *In re:* Second State Senatorial Election, November Term, 1993, No. 397 (Court of Common Pleas, Phila. County), *dismissed* Jan. 10, 1994 (A3602-3619), *appeal filed*, No. 0002 Appeal Docket 1994 (Pa. Supreme Ct.), *and appeal withdrawn* by Appellants Bruce S. Marks and Republican State Committee, Mar. 14, 1994; *In re:* General Election Contest Second Pa. State Senatorial Dist., Nov. Term, 1993, No. 2887 (Court of Common Pleas, Phila. County), *dismissed* Jan. 10, 1994 (A3620); *In re:* Second State Senatorial Election, No. 143 E.D. Misc. Docket 1993 (Pa. Supreme Ct.), *order entered* Nov. 17, 1993 (A2730); *In re:* Second State Senatorial Election, No. 147 E.D. Misc. Docket 1993 (Pa. Supreme Ct.) (A3064); *In re:*

proved futile.[181] Subsequently, Marks, along with the Republican State Committee and eight individual voters, commenced an action in the United States District Court for the Eastern District of Pennsylvania alleging violations of the Civil Rights Act and the Voting Rights Act.[182] Marks also sought a preliminary injunction which would prevent Stinson from taking office.[183]

The United States District Court for the Eastern District of Pennsylvania, Judge Clarence Newcomer presiding, commenced a three-day hearing on January 7, 1994.[184] The court found sufficient evidence of voter fraud to grant a preliminary injunction.[185] According to the findings of fact, approximately three weeks before the election, Stinson learned through a poll that Marks led him by four percentage points.[186] Based on this finding, Stinson ordered his campaign workers to saturate the Latino and African-American portions of the city with absentee ballot applications.[187] Campaign members joked that "Hispanics would sign anything."[188]

Election Contest In Second State Senatorial District, No. 148 E.D. Misc. Docket 1993 (Pa. Supreme Ct.) (A3075); Jubelirer v. Singel, 638 A.2d 352 (Pa. Commw. Ct. 1994); Deely v. Singel, Commonwealth Court Docket No. 124 M.D. 1994 (issued Mar. 18, 1994).

181. For a list of the state court proceedings, see *supra* note 180. Further, plaintiffs alleged that Stinson asked Judge Maier to seal the absentee ballots so that Marks and the public could not inspect them. Brief for Appellee Bruce S. Marks at 8, Marks v. Stinson, 19 F.3d 873, 879 (3d Cir. 1994). Judge Maier complied with Stinson's request. *Id.*

182. *Id.* at 873.

183. *Id.* at 874. The eight plaintiff voters included two Republicans, who voted at the polling locations on the voting machines, and six minority voters, who used the absentee ballot method. Brief for Appellant William Stinson at 4, Marks v. Stinson, 94 Civ. 1474 (3d Cir. Aug. 18, 1994). Initially, Marks and the other plaintiffs sought a temporary restraining order in federal court. Brief for Appellee Bruce Marks at 1, Marks v. Stinson, 94 Civ. 1474 (3d Cir. Aug. 18, 1994). The court denied this request. *Id.* The amended complaint, filed on December 22, 1994, ultimately succeeded. *Id.*

184. Marks v. Stinson, No. CIV. A. 93-6157, 1994 WL 47710, *1 (E.D. Pa. Feb. 18, 1994), *vacated in part*, 19 F.3d 873 (3d Cir. 1994).

185. *Marks*, 1994 WL 47710, at *15-16. The preliminary injunction ordered the Board to recertify the election results based solely on the machine votes. *Id.* at *16. In the future, the Election Commission must print all ballots and other absentee materials in both English and Spanish. *Id.* Further, the Board may only send absentee applications and ballots to the voter through the mail or hand delivered by the Board. *Id.* Additionally, the voter must return these ballots in the same manner as prescribed by Pennsylvania law. *Id.*

186. Marks v. Stinson, No. CIV. A. 93-6157, 1994 WL 146113, at *11 (E.D. Pa. Apr. 26, 1994), *aff'd*, *Marks*, No. 94 Civ. 1474, *supra* note 13, *cert. denied*, 115 S. Ct. 901 (1995).

187. *Id.* at *11-12. A "significant portion" of the second senatorial district includes Latino and African-American voters. *Id.* at *2. The Pennsylvania election laws require that the voter send for the absentee ballot himself, if he finds himself outside the area for the day. 25 PA. CONS. STAT. ANN. § 3146.2(a), (e)(1)-(2) (1994). Thus, Stinson and the Board's actions contradicted Pennsylvania law.

188. *Marks*, 1994 WL 146113, at *11.

The Stinson scheme entailed deceiving minority voters that the state created a "new way to vote."[189] These campaign workers told certain minorities that they could now vote from the convenience of their home, via the absentee ballot, rather than proceeding to the polls on election day.[190] For each such absentee application, the Stinson campaign worker received one dollar.[191] The Stinson campaign workers delivered these absentee voter applications directly to members of the Board.[192] The Board received these applications and, in return, issued ballots to the Stinson campaign workers, for delivery to those applicants the Board accepted.[193] Upon delivering the ballots, the campaign workers "assisted" these minor-

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189. *Id.* at *12. Campaign workers also used phone scripts in Spanish as well as English to tell voters of this alleged new way to vote. *Id.* at *14.

190. *Id.* This procedure also contravenes Pennsylvania's election laws, which require that the citizen state, on the application, the "reason for his absence." 25 PA. CONS. STAT. ANN. § 3146.2(e)(1) (1994). The absentee ballot method only applies if the voter does not have the physical capability to proceed to the polls or "because his duties, occupation or business require him to be elsewhere during the entire period the polls are open." *Id.* § 3146.1(j)-(k). An unwillingness to proceed to the polls does not suffice. *Id.* If the voter has the ability to go to the polls on election day, he or she must proceed to the polls, even if he or she previously obtained an absentee ballot. *Id.* The voter must void the absentee ballot if no longer needed. *Id.* Further, the Philadelphia applications did not have such a line to explain the reason for the voter's absence. *Marks*, 1994 WL 146113, at *2. Philadelphia also does not have an application in Spanish, even though 25% of the Second Senatorial District speaks that language. *Id.*

191. *Marks*, 1994 WL 146113, at *13. The court estimated that the Stinson campaign spent $500-$700 for this purpose. *Id.*

192. *Id.* at *15. This delivery violated Pennsylvania's election law. 25 PA. CONS. STAT. ANN. § 3146.5. The voter must send his or her application in to the Election Board. *Id.* The Board then mails the ballot to the voter for completion and return before election day. *Id.*

193. *Marks*, 1994 WL 146113, at *15. This also violates Pennsylvania's election laws, which require that the Board mail the ballot only to the voter. 25 PA. CONS. STAT. ANN. § 3146.5. At the hearing, committee person Jennie Bolno stated that for the 20 years she worked in her division, the Board sent absentee ballots through the mail. *Marks*, 1994 WL 146113, at *4. If a voter had a physical disability, however, an employee of the Commissioners' Office would deliver and return the absentee ballot. *Id.* In this 1993 Special Election, however, Board Commissioner Tartaglione distributed ballots to Stinson campaign workers from her home. *Id.* at *9. Other campaign workers picked up the ballot packages, marked specifically for the Stinson campaign, from the Commission's office. Brief for Appellees other than Bruce S. Marks at 14, Marks v. Stinson, No. 94 Civ. 1474 (3d Cir. Aug. 18, 1994). The Board and the Stinson campaign had arranged and coordinated implementation of this scheme. *Marks*, 1994 WL 146113, at *13 (stating in its finding of fact that "scheme was known to at least Commissioners Talmadge and Tartaglione . . . and was known and ratified by Candidate Stinson"). The Commissioners contended that these practices of distributing ballots occurred repeatedly over the past 20 years "to facilitate exercise" of the right to vote. Brief for Appellants Board of Elections, Tartaglione, Kane and Talmadge at 4, Marks v. Stinson, No. 94 Civ. 1474 (3d Cir. Aug. 18, 1994). They also asserted that allowing a voter to return the absentee ballot via campaign workers represents their "interpretation" of the Election Code. *Id.* at 5.

ity voters in completing their ballots.[194] This assistance included filling out the ballots without explaining the true nature of the document to the voter.[195] In other instances, the workers instructed the voter how to complete the ballot, or forged the ballot.[196] According to the testimony of some voters, they did not know they signed absentee voter applications or ballots.[197] The Stinson campaign worker, then, returned the ballot to the

194. *Marks*, 1994 WL 146113, at *9. This assistance violates the election laws, which require that the voter complete the ballot "in secret." 25 PA. CONS. STAT. ANN. § 3146.6 (1994). The district court found:

> Stinson issued instructions to Joseph Martz, his Campaign Manager, and to O'Brien to direct the campaign workers, when delivering the Absentee Ballot Packages into the homes of the voters, to instruct the voter to either check the straight Democratic box, or to check off the individual Democratic names, and then to return the completed absentee ballot to [another campaign worker].

Marks, 1994 WL 146113, at *9. Stinson alleged, on appeal, that the evidence only proved that his campaign staff influenced a "handful of voters." Brief for Appellant William Stinson at 26, Marks v. Stinson, No. 94 Civ. 1474 (3d Cir. Aug. 18, 1994). Stinson's brief states "[o]nly eleven stated that they were told how to vote or that they did not mark their own ballot; of these eleven, three testified that they voted the way they wanted to vote." *Id.* Only two claimed that the Board forged their ballot. *Id.* Stinson also claimed that he did not know the election worker who improperly influenced certain voters. *Id.* at 27.

195. *Marks*, 1994 WL 146113, at *9. On those applications, which the voters did not date, the Stinson workers would mark the date themselves. *Id.* at *8. The variations in ink color evidenced these markings. *Id.*

196. *Id.* at *9, *11. In a similar manner, Stinson had sent his campaign workers into white neighborhoods to solicit absentee ballot applications since July, 1993. *Id.* Such tactics persuaded these voters. *Id.* The district court found, however, that the minority campaign deliberately attempted to take advantage of minorities, particularly the Latinos, who did not fully understand English. *Id.* at *11-12. Approximately 450 illegal ballots for predominantly white areas and 600 illegal ballots from predominantly minority areas existed. Brief for Appellee Bruce S. Marks at 10, Marks v. Stinson, No. 94 Civ. 1474 (3d Cir. Aug. 18, 1994). Stinson informed his campaign workers not to fill in the dates on the absentee ballot applications. *Marks*, 1994 WL 146113, at *10. These tactics hid the fact that the workers solicited these ballots "many months prior to Election Day." *Id.* Jones, a Stinson campaign worker, testified that he would review the applications and complete any "necessary information" that the voter did not supply. *Id.* Jones testified that, Stinson reprimanded him for completing dates on some of the applications. *Id.* Per Jones, Stinson said "he was never going to lose another election because of absentee ballots." *Id.* Jones, aware of the illegality of this process and fearing his accountability if outsiders discovered the scheme, resigned. *Id.*

197. *Marks*, 1994 WL 146113, at *13. The record does not reflect what the voters thought they signed.

Board.[198] Stinson had knowledge of this activity.[199] The Board did not render this same type of assistance to Marks.[200]

Based upon this evidence, the district court enjoined Stinson from assuming office.[201] Further, the district court declared Marks the certified winner of the election.[202] On appeal, the Third Circuit affirmed the district court's injunction that removed Stinson from office.[203] However, the Third Circuit remanded the case to the district court to determine whether Marks would have won absent the wrongdoing.[204] If Marks would have won, the district court could use its equitable powers to impose an appropriate remedy, for example, a new election.[205]

On remand, the district court utilized the evidence of statisticians to determine whether Marks would have won the election absent Stinson's offenses.[206] The district court concluded that Marks would have won and

198. Marks v. Stinson, 19 F.3d 873, 877 (3d Cir. 1994). This violates the Pennsylvania election law which states that the voter must deliver or mail the ballot to the Board. 25 PA. CONS. STAT. ANN. § 3146.6 (1994). Further, the workers did not properly seal or time-stamp their envelopes, as Pennsylvania election law requires. *Marks*, 1994 WL 146113, at *15. The district court found that "the workers had control of which ballots were returned and subsequently counted." *Id.* The campaign workers even returned some absentee ballots after the deadline. *Id.* The Board, nevertheless, counted these applications valid. *Id.*

199. *Marks*, 1994 WL 146113, at *10. Stinson argued on appeal that only "low-level members of the Stinson campaign" had responsibility for these actions. Brief for Appellant William Stinson at 8, Marks v. Stinson, No. 94 Civ. 1474 (3d. Cir. Aug. 18, 1994). He also characterized the activities as "[i]mproperly delivered ballots." *Id.* at 21.

200. *Marks*, 1994 WL 146113, at *20. The Board alleged that they provided this type of assistance for many years and to Marks. Brief for Appellant William Stinson at 5, Marks v. Stinson, No. 94 Civ. 1474 (3d Cir. Aug. 18, 1994). Thus, the absentee ballot procedure did not represent a "secret Democratic conspiracy." *Id.* The district court found that the Board had engaged in this procedure in the past, but for a small amount of absentee ballots. *Marks*, 1994 WL 146113, at *5. In contrast, this 1993 Special Election involved hundreds of absentee ballots. *Id.* The district court also found that Marks did not know about or use this alleged unwritten procedure. *Id.*

201. *Marks*, 1994 WL 47710, at *16. In its preliminary injunction, the district court ordered the Board to certify Marks within 72 hours. *Id.* Further, the court required that the Board distribute ballots in English as well as Spanish and only distribute them directly to the voter. *Id.* Similarly, the court ordered that the Board could only receive completed ballots from voters. *Id.*

202. *Id.*; *see also* Michael DeCourcy Hinds, *Vote-Fraud Ruling Shifts Pennsylvania Senate*, N.Y. TIMES, Feb. 19, 1994, at A1 (describing court's ruling).

203. Marks v. Stinson, 19 F.3d 873, 889-90 (3d Cir. 1994).

204. *Id.* For a discussion of the statistical methods used to determine Marks the winner, see *infra* note 207.

205. *Id.* For a description of other possible remedies see *supra* notes 149-71 and accompanying text.

206. Marks v. Stinson, No. CIV. A. 93-6157, 1994 WL 146113, at *27-29 (E.D. Pa. Apr. 26, 1994), *aff'd*, *Marks*, No. 94 Civ. 1474, *supra* note 13, *cert. denied*, 115 S. Ct. 901 (1995). Prior to the hearing for the final injunction, the district court granted a motion to intervene from 10 voters who claimed to have cast legal absentee ballots. *Id.* at *1.

re-certified Marks as the election winner.[207] The Third Circuit affirmed this decision, finding that the evidence demonstrated a conspiracy between the Board and the Stinson campaign.[208]

IV. ANALYSIS

In *Marks*, the Third Circuit held that abstention under the *Rooker-Feldman*, *Younger* or *Pullman* doctrines did not apply.[209] The court affirmed the district court's finding of intentional discrimination against minority voters under the Civil Rights Act.[210] Specifically, violations of the First Amendment right of association, and the Fourteenth Amendment Equal Protection and Substantive Due Process Clauses supported causes of action under Section 1983.[211] Because Section 1983 sufficed for injunctive

207. *Id.* at 37; Shannon P. Duffy, *Judge Declares Marks the Winner; Newcomer Finds 'Massive' Election Fraud*, THE LEGAL INTELLIGENCER, Apr. 27, 1994, at A1. The state swore Marks in as senator on April 28, 1994. Brief of Appellee Bruce S. Marks at 4, Marks v. Stinson, No. 94 Civ. 1474 (3d Cir. Aug. 18, 1994).

The district court appointed Dr. Orley Ashenfelter, a professor at Princeton University, as an independent statistician expert. Brief for Appellee Bruce S. Marks at 11, Marks v. Stinson, No. 94 Civ. 1474 (3d Cir. Aug. 18, 1994). He ran a regression analysis showing the historical relationship between machine voting and absentee ballot voting and its impact on the corresponding election winner. *Id.* This analysis demonstrated that had the 1993 election coincided with past elections, Marks would have won. *Id.* "The actual difference in absentee votes between the candidates in the 1993 election was more than three standard deviations larger than the expected result." *Id.* The expert stated that this difference resulted from the large scale absentee ballot fraud, perpetrated by Stinson and the election board. *Id.*

208. *Marks*, No. 94 Civ. 1474, *supra* note 13, at 3. The Third Circuit based its affirmance on Section 1983 of the Civil Rights Act alone, not reaching the Voting Rights Act issues. *Id.* at 10. The United States Supreme Court declined to review the case. Dougherty v. Marks, No. 94-814, 1994 WL 649997 (U.S.). Only certain intervenors, those voters claiming their right to vote included a new election, appealed the case to the United States Supreme Court. Duvoisin, *supra* note 15, at B3; Richard Carelli, *Court Allows Ruling in Senate Election Stinson-Marks Opinion Remains*, THE LEGAL INTELLIGENCER, Jan. 18, 1995, at 1. The intervenors contended that the appropriate remedy involved a new election, not the seating of candidate Marks. Duvoisin, *supra* note 15, at B3; Carelli, *supra*, at 8. Marks and the other Republican challengers contended the appeal moot. *Id.* Marks lost the next regular election in November 1994, thus ending his term on November 30, 1994. *Id.* The intervenors, however, contended that because this election constituted a situation "capable of repetition, yet evading review," the court could not categorize it as moot. *Id.*; *see* Southern Pac. Terminal Co. v. ICC, 219 U.S. 498 (1911) (holding that exception to mootness doctrine occurs when case "is capable of repetition, yet evading review"); *see also* Roe v. Wade, 410 U.S. 113, 123-25 (1973) (holding case not moot although pregnancy ended when case reached Supreme Court). The United States Supreme Court gave no reason for not reviewing the case. Duvoisin, *supra* note 15, at B3; Carelli, *supra*, at 8.

209. Marks v. Stinson, 19 F.3d 873, 885 (3d Cir. 1994).

210. *Marks*, No. 94 Civ. 1474, *supra* note 13, at 5. For the text of the Civil Rights Act, see *supra* note 131.

211. *Marks*, No. 94 Civ. 1474, *supra* note 13, at 5. For text of the First Amendment, see *supra* note 109. For the text of the Fourteenth Amendment, see *supra* note 88.

relief, the Third Circuit did not address the Voting Rights Act.[212] Finally, the Third Circuit affirmed the seating of Marks as the new state senator.[213]

A. *Abstention in the* Marks *Case*

1. Rooker-Feldman

In *Marks*, the Third Circuit emphasized the abstention doctrine because it intervened in an election, typically regulated by local and state government.[214] The court stated that the *Rooker-Feldman* doctrine did not apply to the Latino plaintiffs because they did not institute state court proceedings.[215] According to the court in *Valenti v. Mitchell*, non-parties to state court proceedings may have their day in federal court.[216] The Third Circuit determined that *Rooker-Feldman* did not apply to Marks and the Republican State Committee because a state court had not adjudicated their claims.[217] The Third Circuit further held that the plaintiffs' federal claims did not inextricably tie to the state court actions, such that the federal court should abstain from hearing the case.[218] When the Eastern District of Pennsylvania decided, and the Third Circuit affirmed *Marks*, the state courts had not actually heard Marks' claims.[219] Therefore, any decision by the federal courts would not affect any prior state court ruling.[220]

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212. *Id.* at 10. At oral argument, Marks stated he would also pursue his claims under the Voting Rights Act because that Act enhanced his chances of recovering damages. *Id.*

213. *Id.* at 11. For an analysis of this remedy, see *supra* notes 292-318 and accompanying text.

214. Marks v. Stinson, 19 F.3d 873, 884 (3d Cir. 1994) (acknowledging presence of state proceedings about election dispute, but referring to prior discussion of abstention doctrine). Under Pennsylvania law, each candidate may station a pollwatcher at each polling location who may challenge absentee ballots at the close of the polls. 25 PA. CONS. STAT. ANN. § 3146.8(e) (1994). The Board of Elections hears any such challenges within seven days. *Id.* The candidate may appeal this result to the Pennsylvania Court of Common Pleas. *Id.*

215. *Marks*, 19 F.3d at 885-86 n.11. The court stated "*Rooker-Feldman* did not bar the district court from hearing the claims of the Latino plaintiffs because they were not parties to any of the state court proceedings on the matter." *Id.*

216. Valenti v. Mitchell, 962 F.2d 288, 297 (3d Cir. 1992).

217. *Marks*, 19 F.3d at 885-86 n.11. The state courts dismissed their complaints without any hearing on the merits. *Id.* For a discussion of the state court proceedings, see *supra* note 180 and accompanying text.

218. *Id.*; *see also* Port Auth. Police Benevolent Ass'n v. Port Auth. of N.Y. & N.J. Police Dep't, 973 F.2d 169, 177 (3d Cir. 1992) (stating requirement that two claims cannot inextricably intertwine).

219. *Marks*, 19 F.3d at 886 n.11. The Philadelphia Court of Common Pleas dismissed Mark's claims and thus never heard the merits of his case. *Id.* Similarly, the claims of the other two voting plaintiffs, Steck and Lorenzo, did not require abstention. *Id.* The state courts did not decide their claims and, in order for the federal court to decide their claims, it need not conclude that any state court erred. *Id.*

220. *Id.* (citing Centifanti v. Nix, 865 F.2d 1422, 1430 (3d Cir. 1989)). The state courts did not reach the merits of Marks' lawsuit. *Id.*

Accordingly, the claims in the federal and state systems did not inextricably intertwine.[221]

2. Younger *Abstention*

The Third Circuit thoroughly analyzed the *Younger* abstention doctrine.[222] The court concluded that *Younger* did not compel it to abstain from exercising jurisdiction over the case.[223] The Third Circuit stated that the abstention constitutes "the exception and not the rule."[224] Additionally, even if the plaintiff meets all three *Younger* requirements, the federal court need not abstain.[225] The Third Circuit also noted that because the plaintiffs alleged a Civil Rights claim, they had no obligation to resort to the state courts.[226] Based on the nature of this claim, the plaintiffs could initially file suit in the federal system.[227]

The first requirement of *Younger* entails the presence of ongoing state proceedings.[228] When the district court decided this abstention claim, the plaintiff had an appeal awaiting review by the Supreme Court of Pennsylvania and an election contest pending in the Pennsylvania State Senate.[229]

The Third Circuit did not find these facts dispositive because Marks had the ability to pursue his claim in federal court.[230] In addition, if the federal proceedings did not interfere with the state, a civil rights plaintiff may proceed in federal court.[231] A plaintiff need only exhaust all state appellate remedies if the federal court's decision would "effectively annul

221. *Id.* The Third Circuit justified its decision by stating "the district court could (and did) find that Marks' and the RSC's [Republican State Committee] fraud and constitutional claims had merit without also finding that the court of common pleas erred when it dismissed their proceedings." *Id.*

222. *Id.* at 881-85. The Third Circuit addressed only *Younger* abstention in the text of its opinion, while discussing *Rooker-Feldman* and *Pullman* in footnotes. *Id.*

223. *Id.* at 885.

224. *Id.* at 881.

225. *Id.* at 882.

226. *Id.* (citing Patsy v. Board of Regents of State of Florida, 457 U.S. 496 (1982)). If a plaintiff asserts rights under a federal statute, he or she may sue in federal court under federal question jurisdiction. 28 U.S.C. § 1331 (1995).

227. *Marks*, 19 F.3d at 882 (citing Monaghan v. Deakins, 798 F.2d 632, 638 (3d Cir. 1986), *aff'd in part and vacated in part*, 484 U.S. 193 (1988)).

228. Middlesex County Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423, 432 (1982) (discussing necessary elements of *Younger* to "non criminal judicial proceedings"). For a description of the *Marks* state proceedings, see *supra* note 180.

229. *Marks*, 19 F.3d at 884. Because Marks asserted causes of action under the Constitution and federal statutes, he could initially file suit in federal court. 28 U.S.C. § 1331 (1995).

230. *Marks*, 19 F.3d at 882.

231. *Id.* The Third Circuit stated that "*Younger* principles do not bar a Civil Rights Act plaintiff from going forward in a federal forum simply because there are unexhausted possibilities for state litigation over the same subject matter." *Id.* at 883.

the state judgment."[232] The court concluded by stating that even if the federal court's decision would affect the state proceeding, such "collateral effects in the state proceeding is not interference for *Younger* purposes."[233]

The second prong of *Younger* states that federal courts should abstain from the implication of important state interests.[234] The Third Circuit did not specifically address this prong.[235] Similarly, the Third Circuit did not examine the third prong of *Younger*. This prong demands that the state system grant the litigants a full and fair opportunity to present their claims.[236] Nonetheless, the district court concluded that the state system did not allow it to hear the plaintiffs' claims.[237] Because Marks' first line of appeal in the state system involved the Board of Elections, one of the parties who perpetuated the voter fraud, no adequate opportunity to hear the plaintiffs existed.[238]

Further, the Court of Common Pleas, did not hear Marks' appeal on the merits.[239] Thus, the Third Circuit could have concluded that Marks did not receive a full and fair opportunity in state court to present his

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232. *Id.*

233. *Id.* at 885. The Third Circuit's analysis of this first prong seems tenuous because the plaintiff had an appeal pending in the state court system. This appeal, before the Pennsylvania Supreme Court, involved examining whether the Court of Common Pleas had jurisdiction to hear the Marks' election contest. *Id.* at 884 n.8. If the Pennsylvania Supreme Court found that the Court of Common Pleas had jurisdiction, the suit in the Court of Common Pleas would mirror the suit presently before the Third Circuit. A federal decision on this matter would alleviate the necessity of the state court proceeding. For a description of interference under the *Younger* doctrine, see *supra* notes 59-70 and accompanying text.

234. Middlesex County Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423, 432 (1982).

235. However, regulation of elections undoubtedly represents an important state interest. *See* Anderson v. Celebrezze, 460 U.S. 780, 788 n.9 (1983) (noting state's important regulatory interests in elections); Johnson v. Cook County Officers Electoral Bd., 680 F. Supp. 1229, 1234 (N.D. Ill. 1988) (discussing state's important interest in regulating its elections and ensuring their fairness). While the Third Circuit did not discuss the second prong, the importance of state elections tends to support federal abstention. For a discussion of abstention considerations of important state interests, see *supra* notes 82-83 and accompanying text.

236. *Middlesex*, 457 U.S. at 432. Ironically, the Third Circuit did not elaborate on this aspect of the *Younger* doctrine, even though it supports their decision not to abstain.

237. Marks v. Stinson, No. CIV. A. 93-6157, 1994 WL 37722, at *2-3 (E.D. Pa. Feb. 7, 1994) (denying defendant's motion to dismiss on grounds that federal court should abstain), *aff'd*, 19 F.3d 873 (3d Cir. 1994).

238. Pennsylvania law requires that the Board of Elections hear all absentee ballot challenges within seven days. 25 PA. CONS. STAT. ANN. § 3146.8(e) (1994). In *Marks*, The Third Circuit accepted the district court's finding that the Board of Elections assisted in perpetuating the election fraud. Marks v. Stinson, 19 F.3d 873, 877-78 (3d Cir. 1994).

239. *Marks*, 19 F.3d at 886 n.11. The Philadelphia Court of Common Pleas dismissed Marks' case. *Id.*

claims.[240] Based on this lack of opportunity in the state system, the abstention doctrine did not apply.[241]

Although not specifically stated, the Third Circuit implicitly relied on *Schall v. Joyce*.[242] Under *Schall*, a federal court can intervene where extraordinary circumstances exist or where irreparable harm may occur to the plaintiffs.[243] The Third Circuit stated that the Pennsylvania Supreme Court had not considered the probability of its jurisdiction over Marks' case.[244] Thus, if the Third Circuit abstained, the federal courts might not have heard or adjudicated the plaintiff's claim before the end of the November 1994 term.[245] Therefore, it appears that the extraordinary circumstances of limited time and potential irreparable harm also influenced the court's decision.[246]

3. Pullman *Abstention*

The Third Circuit also concluded that the *Pullman* abstention doctrine did not apply to the facts of the Marks/Stinson election.[247] Stinson and the Election Board contended that Pennsylvania election law lacked certainty by not specifying whether campaign workers could deliver absentee ballots directly to voters.[248] In rejecting this contention, the Third Circuit could have relied on *Stretton v. Disciplinary Board of the Supreme Court*

240. For a discussion of Marks' futile attempts in the state courts, see *supra* notes 180-81 and accompanying text.

241. The third prong of *Younger* requires that the party seeking abstention show that the state system offers a sufficient forum for federal claims. Middlesex County Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423, 432 (1982). For a discussion of the requirements under *Younger*, see *supra* note 62 and accompanying text. But criticism exists over *Younger*, for the reason that it does not specify what factors make a state system sufficient. For a discussion of this criticism, see *supra* note 68 and accompanying text.

242. 885 F.2d 101 (3d Cir. 1989).

243. *Id.* at 106; *see also Middlesex*, 457 U.S. at 436 n.14 (stating abstention improper if exceptional harm would occur); O'Neill v. City of Phila., 32 F.3d 785, 789 n.11 (3d Cir. 1994) (stating that even if *Younger* applied, "abstention is not appropriate where the federal claimant makes a showing of bad faith, harassment, or some other extraordinary circumstance"), *cert. denied*, 115 S. Ct. 1355 (1995); Port Auth. Police Benevolent Ass'n v. Port Auth. of N.Y. & N.J. Police Dep't, 973 F.2d 169, 176 (3d Cir. 1992) (discussing exceptional circumstances including bad faith prosecutions).

244. Marks v. Stinson, 19 F.3d 873, 884 n.8 (3d Cir. 1994).

245. This involved an interim election to fill a vacant office. *Id.* at 875. The term of office expired in November 1994. *Id.*

246. *Id.* at 889. The Third Circuit urged the district court to resolve the issue as soon as possible, cognizant of the election's time constraints. *Id.*

247. *Id.* at 882 n.6. The court noted that the defendants did not raise *Pullman* abstention at the district court level, but rather, raised it for the first time on appeal. *Id.*

248. *Id.*

of Pennsylvania.[249] In *Stretton*, the Third Circuit found that because an election would occur in three weeks and a state court decision seemed unlikely, the abstention doctrine did not apply.[250] Similarly in *Marks*, only nine months remained in the state senatorial term of office.[251] If the Third Circuit decided that abstention applied, the state court may not have addressed Marks' claims until after Stinson completed his term. At that point, Marks would have nothing to gain and Stinson would have nothing to lose. Thus, the exigent time factor in this case should preclude *Pullman* abstention, even if the facts met the doctrine's technical requirements.[252]

Although the federal court did not abstain from this election dispute, the court's abstention analysis demonstrates its respect for the sanctity of the state court system.[253] The small number of successful Third Circuit abstention cases demonstrates that many litigants do not overcome the abstention hurdle.[254] Absent exigent circumstances like outrageous conduct or time restrictions, abstention arguments have a high probability of success in the Third Circuit.[255]

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249. Stretton v. Disciplinary Bd. of the Supreme Court of Pa., 944 F.2d 137 (3d Cir. 1991). For a discussion of the facts of *Stretton* and the *Pullman* abstention doctrine, see *supra* notes 74-76 and accompanying text.

250. *Stretton*, 944 F.2d at 141. For a discussion of an applicable abstention doctrine, see *supra* notes 71-76 and accompanying text.

251. *Marks*, 19 F.3d at 875. The interim senatorial term was to expire in December, 1994. *Id.* The Third Circuit rendered its decision on abstention in March, 1994. *Id.* at 873.

252. For a discussion of time as an exigent factor under Pullman abstention, see *supra* notes 71-76 and accompanying text.

253. The court provided a lengthy description of Pennsylvania election and election appeals process. *Marks*, 19 F.3d at 875-77. This description used deferential terminology. *Id.* at 879-81.

254. For a list of the successful abstention cases, see *infra* note 255. The amount of time that the Third Circuit spent addressing this issue in *Marks* also indicates the court's recognition of the importance of abstention. *Marks*, 19 F.3d at 881-85.

255. *See* O'Neill v. City of Phila., 32 F.3d 785, 792 (3d Cir. 1994) (holding abstention applies to challenge of city parking ticket procedures), *cert. denied*, 115 S. Ct. 1355 (1995); Port Auth. Police Benevolent Ass'n v. Port Auth. of N.Y. & N.J. Police Dep't, 973 F.2d 169, 172 (3d Cir. 1992) (dismissing case on *Younger* and *Rooker-Feldman* grounds); Schall v. Joyce, 885 F.2d 101, 109 (3d Cir. 1989) (holding *Younger* abstention applies); Stern v. Nix, 840 F.2d 208 (3d Cir. 1988) (abstaining under *Rooker-Feldman*), *cert. denied*, 488 U.S. 826 (1988); *see also Marks*, 19 F.3d at 881-85 (holding abstention not applicable to allegation of large scale voter fraud); Valenti v. Mitchell, 962 F.2d 288, 297 (3d Cir. 1992) (holding abstention did not apply to candidate suing under Civil Rights Act where Pennsylvania officials refused to list candidate on primary ballot); Stretton v. Disciplinary Bd. of the Supreme Court of Pa., 944 F.2d 137, 141 (3d Cir. 1991) (holding abstention did not apply where election would occur in three weeks).

B. *Civil Rights Act in the Third Circuit*

The Third Circuit concluded that Marks had a valid claim under the Civil Rights Act.[256] Specifically, Marks possessed three valid constitutional causes of action: (1) violation of the First Amendment right of association; (2) violation of the Fourteenth Amendment Equal Protection Clause; and (3) violation of the Fourteenth Amendment Substantive Due Process Clause.[257] The Third Circuit, by relying on the findings of the district court, did not specifically address these claims.[258]

As a result, the Third Circuit failed to address two key aspects of the Civil Rights claim. First, the Third Circuit did not confront the requirement that state officials act intentionally.[259] The district court, however, found ample evidence of Stinson's, his campaign workers' and the Election Board's intentional conduct.[260] Second, the Third Circuit did not deal with the liability of private parties under the Civil Rights Act. Private parties, such as Stinson and his campaign workers, violate the Civil Rights Act only if they act in concert with the State in entertaining a conspir-

256. *Marks*, 94 Civ. 1474, *supra* note 13, at 6. For the text of the Civil Rights Act, see *supra* note 131.

257. *Id.* at 5. For the text of the First Amendment, see *supra* note 109. For the text of the Fourteenth Amendment, see *supra* note 88.

258. *Id.* The district court found that defendants violated plaintiffs' First Amendment right of association because defendants had engaged in deliberate conduct to favor the Democratic candidate. Marks v. Stinson, No. CIV. A. 93-6157, 1994 WL 146113, at *32 (E.D. Pa. Apr. 26, 1994), *aff'd*, *Marks*, No. 94 Civ. 1474, *supra* note 13, *cert. denied*, 115 S. Ct. 901 (1995). This favoritism allegedly deprived plaintiffs of their right/opportunity to vote for those political groups they wished to associate with based on similarity of political views. *Id.* The defendants also infringed plaintiffs' Fourteenth Amendment right of equal protection in two aspects. *Id.* at *33. First, the defendants favored the Democratic candidate over the Republican and thus, denied plaintiffs' candidate and party equal protection. *Id.* Second, the defendants treated the minority plaintiffs' candidate differently based on the candidate's race. *Id.* Therefore, the defendants violated the plaintiffs' right to equal protection of the law. *Id.* The substantive due process portion of the Fourteenth Amendment protects the right to vote in addition to other fundamental rights. *Id.* (citing Reynolds v. Sims, 377 U.S. 533, 554, *reh'g denied*, 379 U.S. 870 (1964)). Thus, by depriving the plaintiffs of their effective right to vote, the defendants violated plaintiffs' substantive due process rights. *Id.* For a discussion of the First Amendment right of association, see *supra* notes 110-15 and accompanying text. For a discussion of the Fourteenth Amendment Equal Protection Clause, see *supra* notes 91-93 and accompanying text. For discussion of the Fourteenth Amendment's protection of Substantive Due Process, see *supra* notes 94-103 and accompanying text.

259. *See* Kasper v. Board of Election Comm'rs of Chicago, 814 F.2d 332, 343 (7th Cir. 1987) (holding that intent represents important aspect of Civil Rights claim). For a discussion of the "intentional aspect," see *supra* notes 132-34 and accompanying text.

260. *Marks*, 1994 WL 146113, at *30-32. The intentional activity included: accepting absentee ballot applications after the deadline, delivery of absentee applications and ballots to voters by campaign workers in violation of Pennsylvania law, and taking advantage of minority voters. *Id.* For a complete description of the infractions by the Stinson campaign and the Election Board, see *supra* notes 172-208 and accompanying text.

acy.[261] Again, the district court found ample evidence of this concert of action and conspiracy.[262]

In lieu of examining these two aspects of the Civil Rights Act, the Third Circuit focused on whether the fraudulent election activities constituted a "garden variety election dispute."[263] Such disputes do not fall under the Civil Rights Act.[264] The Third Circuit found that this case involved a "large scale wrongdoing."[265] The court emphasized the election officials' integral participation in the fraudulent scheme.[266] The court also noted other recent Third Circuit cases where a violation of the Civil Rights Act did not substantiate a constitutional challenge.[267] Based on this high standard, a Third Circuit litigant claiming a Civil Rights Act violation cannot expect an easy victory.[268]

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261. Adickes v. S.H. Fress & Co., 398 U.S. 144, 152 (1970); *accord* Lugar v. Edmondson Oil Co., 457 U.S. 922, 941 (1982) (affirming that private citizen may be liable if acting in conspiracy with state).

262. *Marks*, 1994 WL 146113, at *30. The district court found that the state actors and the private parties represented "willful participants" in this scheme. *Id.* Indeed, either party, acting alone, could not carry out this scheme. *Id.*

263. *Marks*, 94 Civ. 1474, *supra* note 13, at 7-9. For a discussion of garden variety election disputes, see *supra* notes 143, 148 and accompanying text.

264. Soules v. Kavaians for Nukolii Campaign Comm., 849 F.2d 1176, 1183 (9th Cir. 1988); *accord* Curry v. Baker, 802 F.2d 1302, 1315 (11th Cir. 1986) (holding garden variety election dispute not appropriate for federal intervention), *cert. denied*, 479 U.S. 1023 (1986); Welch v. McKenzie, 765 F.2d 1311 (5th Cir. 1985) (same); Duncan v. Poythress, 657 F.2d 691, 701 (5th Cir. 1981) (same), *cert. granted*, 455 U.S. 937, *and cert. dismissed*, 459 U.S. 1012 (1982); Griffin v. Burns, 570 F.2d 1065, 1076 (1st Cir. 1978) (same).

265. *Marks*, 94 Civ. 1474, *supra* note 13, at 7. The court stated "[t]he record makes clear that the election was stolen from Marks and that the board made this possible by disregarding Pennsylvania law." *Id.*

266. *Id.* at 8. For a discussion of the election officials' participation in this scheme, see *supra* notes 172-208 and accompanying text.

267. *Id.* The court noted two recent Third Circuit decisions. *Id.* (citing Ferraro v. City of Long Branch, 23 F.3d 803, 806-07 (3d Cir. 1994); Midnight Sessions, Ltd. v. City of Phila., 945 F.2d 667 (3d Cir. 1991), *cert. denied* 112 S. Ct. 1668 (1992)).

In *Ferraro*, a municipal city employee sued city officials for changing his job position to include more labor and less managerial work. *Ferraro*, 23 F.3d at 804. No commensurate change in salary or title followed. *Id.* The Third Circuit held that this did not constitute a civil rights action. *Id.* The court declined to involve itself in governmental personnel decisions. *Id.* at 807.

In *Midnight Sessions*, the court denied the plaintiff a license to run an all night dance hall. *Midnight Sessions*, 945 F.2d at 678-79. The Third Circuit held that no constitutional violation existed and thus, the claim did not fall under the Civil Rights Act. *Id.* at 679-82. The plaintiff had no "legitimate claim of entitlement" to a license thus, no procedural due process violation occurred. *Id.* at 679. Further, the right to obtain a license did not rise to a fundamental right; therefore, the case did not involve the substantive Due Process Clause. *Id.* at 682.

268. The circumstances must be seriously detrimental to warrant recovery, as federal courts will not intervene in "garden variety election irregularities." Soules v. Kauaians for Nukolii Campaign Comm., 849 F.2d 1176, 1184 (9th Cir. 1988); *Curry*, 802 F.2d at 1314-17; Hutchinson v. Miller, 797 F.2d 1279, 1283 (4th Cir. 1986), *cert. denied*, 479 U.S. 1088 (1987); Bodine v. Elkhart County Election Bd.,

The Third Circuit's holding contradicted that of the Fifth Circuit in *Welch v. McKenzie*.[269] *Welch* involved an election for county supervisor between an African-American and a Caucasian.[270] During the election, the state accepted absentee ballots in violation of state law.[271] The losing African-American candidate brought suit, under the Civil Rights Act, alleging that the mishandling of the absentee ballots had racial motivations.[272] Evidence of intimidation by Caucasian campaign workers toward African-American voters also existed.[273] Nevertheless, the Fifth Circuit found that this conduct did not rise to a constitutional violation.[274]

The court in *Welch* emphasized that the state did not use the absentee voting method to intentionally discriminate among voters.[275] The Fifth Circuit held that the mishandling constituted a misinterpretation of state voting laws.[276] Further, although it conceded that the procedures favored

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788 F.2d 1270, 1271-73 (7th Cir. 1986); Gamza v. Aguirre, 619 F.2d 449, 453-54 (5th Cir.), *reh'g denied*, 625 F.2d 1016 (1980); Griffin v. Burns, 570 F.2d 1065, 1076 (1st Cir. 1978); Pettengill v. Putnam County R-1 Sch. Dist., 472 F.2d 121 (8th Cir. 1973). In *Soules*, the Eighth Circuit stated that "[o]nly pervasive error which undermines the 'organic processes' of the ballot is sufficient to trigger constitutional scrutiny." *Soules*, 849 F.2d at 1184 (citing Hennings v. Grafton, 523 F.2d 861, 864 (7th Cir. 1975)).

269. 765 F.2d 1311 (5th Cir. 1985).

270. *Id.* at 1312-13. For a discussion of *Welch*, see *supra* notes 123-25, 144-48 and accompanying text.

271. *Id.* These violations included allowing the campaign workers to deliver the ballots to the voters and early opening of the ballots. *Id.*

272. *Id.* at 1312. The African-American candidate, as well as three voters, filed suit. *Id.* The election involved 115 absentee ballots, well in excess of the number of absentee ballots cast in any prior election. *Id.* Interestingly, statisticians in *Marks* relied upon the substantial increase in the number of absentee ballots to determine that election fraud occurred. Marks v. Stinson, No. CIV. A. 93-6157, 1994 WL 146113, at *28-29 (E.D. Pa. Apr. 26, 1994), *aff'd*, *Marks*, No. 94 Civ. 1657, *supra* note 13, *cert. denied*, 115 S. Ct. 901 (1995).

273. *Welch*, 765 F.2d at 1314. The district court affirmed that the winning campaign workers fraudulently obtained, through intimidation of an African-American family, at least six absentee votes. *Id.*

274. *Id.* The Fifth Circuit found that the violation of local election laws were not substantial enough to violate the Constitution. *Id.* at 1317.

275. *Id.* at 1315-16.

276. *Id.* The defendants in *Marks*, relying on *Welch*, also asserted that the mishandling by the Election Board constituted a misinterpretation of state voting laws. Brief for Appellant William Stinson at 23-25, Marks v. Stinson, No. 94 Civ. 1474 (3d Cir. Aug. 18, 1994). Stinson and the Election Board contended that Democrats and Republicans used the absentee ballot voting procedures, in the Philadelphia elections, for many years. Brief for Appellant Board of Elections, Tartaglione, Kane and Talmadge at 5-6, Marks v. Stinson, 19 F.3d 873 (3d Cir. 1994) (No. 94-1474); Brief for Appellant William Stinson at 11-28, Marks v. Stinson, 19 F.3d 873 (3d Cir. 1994) (No. 94-1474). The Board asserted that this practice coincided "with the longstanding policy of the Board to liberally construe the Pennsylvania Election Code to enfranchise as many qualified voters as possible." Brief for Appellant Bd. of Comm'rs at 5, Marks v. Stinson, 19 F.3d 873 (3d Cir. 1994). Both the district court and the appellate court rejected this argument. *Marks*, 1994 WL 146113, at *5-6.

the Caucasian candidate, the Fifth Circuit found no evidence of racial bias. The court stated that the election problems entailed "garden variety election disputes" which the state court should resolve.[277]

The Third Circuit did not follow the Fifth Circuit's approach in *Welch* based upon the extent of fraud in the Philadelphia election.[278] Yet, the fraud in *Welch* may have exceeded that in *Marks*.[279] In *Marks*, roughly three percent of the voting returns represented illegal absentee ballots.[280] The court held that this percentage triggered a constitutional violation.[281] In *Welch*, absentee votes constituted six percent of total election returns.[282] Under the Mississippi state election laws, most of these absentee votes would not count due to ballot mishandling.[283] Nevertheless, the Fifth Circuit found this procedure did not violate the Constitution.[284]

C. *Does the Third Circuit Require Racial Discrimination Under the Voting Rights Act?*

The Third Circuit based its holding solely on the Civil Rights Act.[285] The court did not address Marks' Voting Rights Act claim. In failing to address the Voting Rights Act, the Third Circuit did not seize its opportunity to confront the scope of this Act.[286] The plaintiffs in *Marks* alleged violations of sections 1971(a)(2)(A) and 1973 of the Voting Rights Act.[287]

277. *Welch*, 765 F.2d at 1315-16. The court stated that had the county registrar given absentee ballots only to Caucasian voters, or if the Democratic executive committee overseeing the election only included Caucasian members, they would more likely conclude racial bias existed. *Id.* at 1316. Further, the Fifth Circuit noted that stolen elections involving a losing minority candidate raise suspicions, but do not necessarily rise to a constitutional violation. *Id.* at 1317.

278. *Marks*, 94 Civ. 1474, *supra* note 13, at 7-9. The court characterized the Philadelphia election as a "large scale wrongdoing," while the election in *Welch* represented only a "garden variety election dispute." *Id.* at 7. The Philadelphia election covered a larger territory and a correspondingly greater number of persons. *Marks*, 1994 WL 146113, at *29.

279. *Marks*, 1994 WL 146113, at *29. In *Marks*, the Board allowed over 1000 illegal votes. *Id.* In *Welch*, the voters cast only 115 absentee ballots. *Welch*, 765 F.2d at 1312.

280. Brief for Appellant William Stinson at 24, Marks v. Stinson, 19 F.3d 873 (3d Cir. 1994). Out of 40,585 votes, voters cast 1767 as absentee ballots. *Id.* The absentee ballots represented four percent of the total vote. *Id.* The district court found that voters illegally cast 1050 of the absentee ballots, representing three percent of the total vote. *Id.*

281. *Marks*, 94 Civ. 1474, *supra* note 13, at 7-8.

282. *Welch*, 765 F.2d at 1312. A total of 1735 people voted in the county election. *Id.* Absentee ballots accounted for 115 of the votes, representing six percent of the total election returns. *Id.*

283. *Id.* For a list and discussion of the relevant state election laws, see *supra* notes 172-208 and accompanying text.

284. *Id.*

285. *Marks*, 94 Civ. 1474, *supra* note 13, at 10. For the text of the Civil Rights Act, see *supra* note 131.

286. *Id.* For the text of the Voting Rights Act, see *supra* notes 116 and 127.

287. *Id.*

Section 1973 of the Voting Rights Act (the Act) makes racial discrimination actionable.[288] Thus, *Marks* did not decide whether non-racial discrimination warranted punishment under the Act. Presently, neither the Third Circuit nor the United States Supreme Court have directly addressed this issue. The Third Circuit has, however, indirectly confronted this question.

In *Brier v. Luger*, the United States District Court for the Eastern District of Pennsylvania held that disparate treatment of individuals, supported an action under section 1971(a)(2)(A) of the Act.[289] Conversely, in *Robison v. Canterbury Village*, the Third Circuit implied that sections 1971 and 1973 of the Act dealt with intentional interference on racial grounds.[290] Thus, the Third Circuit has not decided whether intentional, non-racial discrimination supports an action under section 1971 of the Act.[291]

D. *A Unique Remedy for Election Fraud*

The Third Circuit did not initially accept the district court's preliminary injunction.[292] On the case's first appeal to the Third Circuit, the court affirmed the decision to enjoin Stinson but rejected the decision to seat Marks.[293] In fashioning an appropriate remedy, the court looked to other circuits in lieu of previous Third Circuit cases.[294] By affirming the

288. 42 U.S.C. § 1973 (Supp. 1994). However, § 1971(a)(2)(A) does not specifically mention race. For the text of these statutory provisions, see *supra* notes 116 and 127.

289. 351 F. Supp. 313, 316-17 (M.D. Pa. 1972). However, the plaintiff did not provide sufficient proof of the alleged discrimination. *Id.* The parties did not appeal this case to the Third Circuit.

290. 848 F.2d 424, 431 n.10 (3d Cir. 1988). The plaintiffs, former tenants of Canterbury Village and officers of the local borough, sued Canterbury Village, a residential development corporation. *Id.* at 425. The plaintiffs alleged that the corporation attempted to coerce them to follow the developer's wishes. *Id.* at 426. The corporation also took retaliatory action against them. *Id.* They specifically alleged violations of the First, Ninth and Fourteenth Amendments, as well as infringement upon their voting rights under the Voting Rights Act. *Id.* The court considered the Voting Rights Act issue and found them without merit. *Id.* at 431 n.10. The Third Circuit denied recovery under this statute "since each of those statutes deals with interference on racial grounds with a person's right to vote, and we find no evidence of interference with voting rights, much less for racial reasons, on this record." *Id.*

291. Thus, the plaintiff should argue precedent from the other circuits. *See* Ball v. Brown, 450 F. Supp. 4 (N.D. Ohio 1977) (holding sex discrimination in voting actionable); Frazier v. Callicut, 383 F. Supp. 15 (N.D. Miss. 1974) (holding treating students differently from non-students actionable); Brier v. Luger, 351 F. Supp. 313, 316 (M.D. Pa. 1972) (holding any disparate treatment among individuals actionable under 42 U.S.C. § 1971 (a)(2)(A) (Supp. 1994)).

292. Marks v. Stinson, 19 F.3d 873, 886-90 (3d Cir. 1995).

293. *Id.*

294. *Id.* The Third Circuit examined, in order: Bell v. Southwell, 376 F.2d 659 (5th Cir. 1967); Griffin v. Burns, 570 F.2d 1065 (1st Cir. 1978) and Curry v. Baker, 802 F.2d 1302 (11th Cir. 1986).

district court's decision to remove Stinson from office, the Third Circuit relied on *Bell v. Southwell*.[295] In *Bell*, the Fifth Circuit set aside an election due to the state's racially discriminatory practices.[296] The court had difficulty discerning who would have won absent these practices.[297] Accordingly, the court enjoined the candidate from taking office.[298]

Similarly, in *Marks*, the fraud had tainted the election so that the court had trouble determining the actual winner.[299] Because Stinson and his campaign perpetuated this fraud, the court removed Stinson from office.[300] The Third Circuit stated, however, that the fraud created uncertainty as to the true victor.[301] This uncertainty kept the Third Circuit from affirming the decision to seat Marks as the replacement state representative.[302]

The Third Circuit recognized the necessity of enforcing the will of the electorate.[303] Therefore, unless the district court concluded that Marks would win the election absent fraud, the court could not certify him as the

295. *Marks*, 19 F.3d at 887 (citing *Bell*, 376 F.2d at 659).

296. *Bell*, 376 F.2d at 662-65. The Georgia special election in *Bell* involved the office of Justice of the Peace. *Id.* at 660. An African-American female named Bell represented one of the six candidates running for office. *Id.* The other five candidates were Caucasian males. *Id.* The campaign workers segregated the polling booths; one for Caucasian males, one for Caucasian females and the other for African-Americans. *Id.* at 660-61. Bell alleged that his representatives could not oversee the voting procedures because Caucasians physically blocked their access. *Id.* at 661. An election official allegedly struck some of Bell's representatives. *Id.* Police arrested African-American women attempting to vote in the Caucasian female voting booth. *Id.* Further, Caucasian officials intimidated African-American voters in an attempt to deter their vote. *Id.*

297. The Fifth Circuit stated that prejudice would result if the court assumed that all African-American voters would vote for Bell and all Caucasian voters would vote for any candidate except Bell. *Id.* at 662. Further, based on the intimidation strategies employed, the court could not calculate how many more African-American voters would have voted absent intimidation. *Id.*

298. *Id.* at 665. The Fifth Circuit set aside this tainted election, ordering a new election. *Id.*

299. *Marks*, 19 F.3d at 887. The Third Circuit noted the district court's finding that "the wrongdoing of Stinson and the other defendants may have made it impossible to determine who would have won a fair election." *Id.*

300. *Id.* The Third Circuit contemplated that this seat should remain vacant until the district court determined the true winner. *Id.* at 889.

301. *Id.* at 887. Uncertainty existed as to how the voters would actually vote absent widespread fraud. *Id.* The Third Circuit noted that Stinson's fraudulent activities made it extremely difficult, if not impossible, to determine who would have prevailed in a fraud-free election. *Id.*

302. *Id.* Initially, the Third Circuit declared that the senate seat remain vacant until the district court determined the true winner. *Id.* at 889.

303. *Id.* at 888. The plaintiff, Marks, had argued that the court's primary purpose involved punishing the party engaged in fraudulent activity. *Id.* at 887. The Third Circuit acknowledged that Stinson should not benefit from his wrongdoing and that Marks should not finance another election campaign. *Id.* However, the court held that its duty did not entail punishing the wrongdoer in this civil proceeding. *Id.* at 887-88. The court stated that the rights of the voters represented its primary concern. *Id.* at 888.

winner.[304] The Third Circuit, based upon the voting machine tabulations, could have declared Marks the winner.[305] The court believed this certification, however, would invalidate the rights of the legal absentee voters.[306]

The Third Circuit relied on *Griffin v. Burns* to support its decision not to certify election results based solely on machine tabulation.[307] In *Griffin*, the state violated its laws by using absentee ballots in a primary election.[308] The Supreme Court of Rhode Island invalidated all the absentee ballots and certified the election result based on the machine totals.[309] In response, absentee voters brought a class action claiming the state violated their civil rights by not counting their ballots.[310] The United States Court of Appeals for the First Circuit stated that due to the constitutional protection afforded voting rights, the Rhode Island Supreme Court could not conclude that all absentee voters would withhold their vote if they knew the state would invalidate their ballots.[311] Therefore, the First Circuit, by concluding the Rhode Island Supreme Court erroneously excluded all absentee ballots from the machine vote, ordered a new election.[312]

Unlike the court in *Griffin*, however, the Third Circuit did not order a new election.[313] The court stated that although *Griffin* applied, it could fashion remedies aside from a new election.[314] As a result, the Third Cir-

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304. *Id.* at 887-88. At this part of the opinion, the court focused on voting rights cases that stressed the importance of the right to vote and the right to count the votes. *Id.* at 887 (citing United States v. Mosley, 238 U.S. 383 (1915)).

305. *Id.* at 888. Precedent exists to support this action. For a listing of such precedent, see *infra* note 328.

306. *Id.* at 889. These rights include the right to vote and to have that vote count. For a list of cases protecting these rights, see *supra* note 1.

307. *Id.* at 888-89 (citing Griffin v. Burns, 570 F.2d 1065 (1st Cir. 1978)).

308. *Griffin*, 570 F.2d at 1067. Rhode Island law only permitted absentee ballots in general elections. *Id.* Approximately 10% of the total vote constituted absentee ballots. *Id.*

309. *Id.* at 1068. The Rhode Island Supreme Court noted that under Rhode Island law, no authority supported the use of absentee ballots in an election primary. *Id.* Accordingly, the court voided the absentee ballots. *Id.* The court then removed the winning candidate from office. *Id.*

310. *Id.* at 1068-69. The candidate who lost at the state court level, as well as two absentee voters, brought suit under 42 U.S.C. § 1983. *Id.*

311. *Id.* at 1080. Some of the absentee voters testified that they would have voted in person, at the polls, had they known that the state planned to void the absentee ballots. *Id.* The First Circuit strongly believed that many other absentee voters would have acted consistently with this testimony. *Id.*

312. *Id.* The court stated that

> [g]iven the evidence of some voters . . . that they would have voted in person, and the importance of the right to vote, the court could infer that it was more likely than not that a very significant proportion of those voting by absentee ballot would have gone to the polls had such ballots not been available.

Id. at 1080.

313. Marks v. Stinson, 19 F.3d 873, 889-90 (3d Cir. 1994).

314. *Id.* at 889 n.13. The Third Circuit stated "[n]othing in *Griffin* suggests that a new election is required in all instances in which voters, reasonably or unrea-

cuit remanded the case to the district court, ordering it not to certify Marks as the winner *unless it concluded that Marks would have won but for Stinson's fraud.*[315] On remand, the district court estimated that Marks would have won the election but for the fraud.[316] Thus, the district court announced that Marks won the state senatorial election.[317] When Stinson appealed, the Third Circuit upheld Marks' certification as the winner.[318]

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sonably, make a mistake about the place or manner in which they are authorized to vote. Nor do we so suggest." *Id.*

315. *Id.* at 889 (emphasis added). Oddly, the court focused on its time limits. The court recognized that by removing Stinson from office, the position would remain vacant until the lawsuit concluded. *Id.* The court stated "[w]hile substantial periods without representation are regrettable, the consequences of placing political power in unauthorized hands are of far graver concern." *Id.* The Third Circuit hypothesized that the district court automatically certified Marks as the election winner in order to prevent the office from remaining vacant for an extended period of time. *Id.* In stating that the district court should determine whether Marks would have won absent fraud, it cited *Curry v. Baker. Id.* (citing Curry v. Baker, 802 F.2d 1302 (11th Cir. 1986), *stay denied,* 479 U.S. 1301, *and cert. dismissed,* 479 U.S. 1023 (1986)). In *Curry,* the question involved a Democratic committee's certification of Democratic nominee for Alabama governor. *Curry,* 802 F.2d at 1305-06. The Eleventh Circuit held that the committee need not determine, with mathematical certainty, who would win the nomination absent fraud. *Curry,* 802 F.2d at 1313. An approximation of who won the majority of the votes would suffice. *Id.* Unlike the party nomination in *Curry, Marks* involved an election to fill a governmental post. *Marks,* 19 F.3d at 875; *Curry,* 802 F.2d at 1304-05.

316. Marks v. Stinson, No. CIV. A. 93-6157, 1994 WL 146113, at *18 (E.D. Pa. Apr. 26, 1994), *aff'd, Marks,* No. 94 Civ. 1474, *supra* note 13, *cert. denied,* 115 S. Ct. 901 (1995). For a discussion of the statistical methods used, see *supra* note 207 and accompanying text.

317. *Id.* The district court stated in its Order:

> The County Board of Commissioners, acting as the Board of Elections, is ORDERED to RECERTIFY the results of the 1993 Special Election in the Second Senatorial District based on the finding and conclusion that Bruce S. Marks would have won the election BUT FOR the wrongdoing. Such recertification is to be completed within forty-eight (48) hours of the date of this Order and is then to be transmitted forthwith to the Secretary of the Commonwealth as required by law . . . .

Id. at *37.

318. *Marks,* 94 Civ. 1474, *supra* note 13, at 7-9. The Third Circuit did not review, in detail, the statistician's findings. *Id.*

V. CONCLUSION

The Third Circuit has consistently protected the rights of voters.[319] In particular, this Circuit attempts to effectuate the voters' intent.[320] For example, in *Stapleton v. Board of Elections*,[321] the Third Circuit held that mismarked ballots counted as votes for those Virgin Islands offices supporting voter's intent.[322] In that election the Virgin Islands used a paper ballot.[323] Some voters checked both the box allowing them to vote a straight party ticket and the particular box, for the other party's candidate.[324] The losing candidate asked the court to invalidate these mismarked ballots.[325] Instead, the Third Circuit effectuated the voters' intent by counting these technically mismarked ballots.[326] Similarly, the *Marks* court attempted to effectuate the intent of the voters by estimating the actual results of the election absent voter fraud.[327]

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319. *See* Marks v. Stinson, 19 F.3d 831 (3d Cir. 1994) (ordering that state swear into office candidate who would represent voter's choice absent fraud), *cert. denied*, 115 S. Ct. 901 (1995); Jenkins v. Red Clay Consol. Sch. Dist. Bd. of Educ., 4 F.3d 1103 (3d Cir. 1993) (holding that at-large voting scheme cannot rely on potential that people may elect African-American candidates when they never realize that potential), *cert. denied*, 114 S. Ct. 2779 (1994); Stapleton v. Board of Elections, 821 F.2d 191, 194 (3d Cir. 1987) (holding that state should count mismarked election ballots if court can determine voter's intention); Wells Fargo Guard Servs. v. NLRB, 659 F.2d 363 (3d Cir. 1981) (upholding NLRB decision to set aside election due to altered ballot, even though minute chance existed that alteration did not mislead any voters); United States v. Shoup, 608 F.2d 950 (3d Cir. 1979) (affirming conviction of owner of voting machine manufacture and repair company for obstruction of justice for leading federal officials to believe voting fraud occurred); Marshall v. Local Union 12447, United Steelworkers of Am. AFL-CIO, 591 F.2d 199, 204 (3d Cir. 1978) (holding union must take reasonable steps to ensure voters could mark ballot in secret). *But see* Donatelli v. Mitchell, 2 F.3d 508 (3d Cir. 1993) (upholding reapportionment plan which resulted in state senator's assignment to new district which had not elected him).

320. For a discussion of the attempt to effectuate the voter's intent in *Stapleton*, see *infra* notes 321-26 and accompanying text. The Third Circuit also focused on effectuating the voter's intent in *Marks*. For a discussion of the focus on voter's intent, see *supra* note 319 and accompanying text.

321. 821 F.2d 191 (3d Cir. 1987).

322. *Id.* at 194.

323. *Id.* at 191.

324. *Id.* at 192.

325. *Id.*

326. *Id.* at 194.

327. The Third Circuit did not want to certify the election results based solely on the machine tabulations. Marks v. Stinson, 19 F.3d 873, 887 (3d Cir. 1994). The court stated that this certification would disenfranchise absentee voters who voted lawfully. *Id.* at 887-88. The Third Circuit affirmed the district court's effort to estimate the results of the election absent fraud. *Marks*, No. 94 Civ. 1474, *supra* note 13, at 6-10. Using an expert statistician, the district court could "effectuate the intent of the voting" by estimating the number of absentee ballots that each candidate cast. Marks v. Stinson, No. CIV. A. 93-6157, 1994 WL 146113, at *27-29 (E.D. Pa. Apr. 26, 1994), *aff'd*, *Marks*, No. 94 Civ. 1474, *supra* note 13, *cert. denied*, 115. S. Ct. 901 (1995).

The Third Circuit could have ignored the voting rights of the absentee voters and certified the election based solely on the machine results.[328] The district court initially adopted this remedy but, on appeal, the Third Circuit rejected it.[329] The Third Circuit instead, instructed the district court, based on the statistician's estimates, to declare that Marks would have won the election but for Stinson's and the Board's wrongdoing.[330] The district court removed Stinson from office and certified Marks as the state senator.[331] The Third Circuit upheld this remedy because it accurately estimated the intent of the legal absentee voters.[332]

Despite the novelty of the *Marks* remedy, the result coincides with the Third Circuit's attitude toward voter and election fraud.[333] First, previous decisions illustrate the Third Circuit's preference to effectuate voter intent.[334] This preference helped craft the new remedy. Second, the case had unique facts. The candidates ran for an interim senatorial position which would end eight months after the election. If the Third Circuit did not approve the district court's remedy, the case may have become moot and the offending candidate would remain in office for his full term.[335] This result would not deter future instances of fraudulent election conduct.

Overall, the *Marks* case yields an uncommon result in a circuit inundated with state level election fraud. The Third Circuit's willingness to hurdle the abstention doctrine represents a noteworthy occurrence. The court's interpretation of federal causes of action also reveals what future election contestants must prove to sustain their case. Further, future elec-

328. Support exists for the remedy of counting the machine votes only where fraud occurs in the absentee ballot procedure. *See, e.g.*, Gooch v. Hendrix, 851 P.2d 1321, 1332-33 (Cal. 1993) (affirming decision to disregard all absentee ballots where impossible to distinguish illegal from legal, but also setting aside entire election); Parra v. Harvey, 89 So. 2d 870, 874 (Fla. 1956) (holding that election should be decided by machine votes only where illegal absentee ballots cast); Wood v. Diefenbach, 81 So. 2d 777 (Fla. 1955) (disregarding absentee ballots and certifying winner on machines); Griffin v. Knoth, 67 So. 2d 431, 432 (Fla. 1953); Petition of Byron, 398 A.2d 599, 603-04 (N.J. Super. Ct. Law Div. 1978) (throwing out all absentee ballots due to fraud and selecting winners based on machine totals), *aff'd*, 406 A.2d 982 (N.J. Super. Ct. App. Div.), *and cert. denied*, 412 A.2d 786 (N.J. 1979).

329. Marks v. Stinson, 19 F.3d 873, 889-90 (3d Cir. 1994). For a summation of the district court's Order enforcing this remedy, see *supra* note 317.

330. *Id.* For discussion of statistical measure employed, see *supra* note 207.

331. *Marks*, 1994 WL 146113, at *35-37.

332. *Marks*, No. 94 Civ. 1474, *supra* note 13, at 11.

333. Such fraud seems to be prevalent in the Third Circuit's territory. This fraud particularly prevails in Philadelphia. For a discussion of the Third Circuit's perception of voter fraud, see *infra* note 341 and accompanying text.

334. For a discussion of the Third Circuit's attempts to effectuate voter intent, see *supra* notes 303-04, 319-20 and accompanying text.

335. Marks v. Stinson, 19 F.3d 873, 875 (3d Cir. 1994). The Third Circuit noted that the interim election for state senator expired in December 1994, only seven months away. *Id.*

tion fraud litigants will pursue the remedy in *Marks*. Presently, although no other federal court has removed a candidate from office, certain courts have referred to the opinion.[336]

Because the Supreme Court declined to review *Marks*, practitioners do not know whether the remedy created by the Third Circuit will withstand subsequent challenge. However, the Supreme Court's attitude toward voter fraud in *Burson v. Freeman*,[337] suggests that it might uphold the *Marks* court's remedy. In *Burson*, the Court recognized that a state possesses a compelling interest to prevent voter fraud so that voters may vote "freely and effectively."[338] However, the Court also noted the difficulties of detecting voter fraud and concluded that the "remedy for a tainted election is an imperfect one."[339] The Court further recognized that "rerunning an election would have a negative impact on voter turn out."[340] These statements evidence the Court's realization that a new election may not constitute the best remedy for voters and candidates victimized by election fraud. The Court, therefore, might accept new remedies that help punish the wrongdoer and potentially deter such fraud.

While a single judicial decision can alleviate fraud in one instance, it will take more than the *Marks* decision to reduce the widespread fraud in the Third Circuit.[341] As Judge Newcomer noted "it would be a delusion to conclude that the underlying evils which conceived and nurtured the wrongdoing involved have been eliminated. Only a concerned citizenry

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336. *See* Ortiz v. City of Phila. Office of the City Comm'rs Voter Registration Div., 28 F.3d 306, 333 n.21 (3d Cir. 1994) (Lewis, J., dissenting) (noting that *Marks* reminds us of seriousness and pervasiveness of election fraud); West Hanover Township v. Pennsylvania Labor Relations Bd., 646 A.2d 625, 629 (Pa. Commw. 1994) (recognizing that *Marks* revealed problems inherent with mailed ballots).

337. 504 U.S. 191 (1993).

338. *Id.* at 199, 208.

339. *Id.* at 209.

340. *Id.*

341. Ortiz v. City of Phila. Office of the City Comm'rs Voter Registration Div., 28 F.3d 306, 318 (3d Cir. 1994) (Scirica, J., concurring) (discussing constitutionality of voter purge laws); *id.* at 333 n.21 (Lewis, J., dissenting) (noting that "City [of Philadelphia] is no newcomer to dishonest election tactics"). Judge Scirica stated "[v]oter fraud, including the practice of voting dead or non-resident citizens, is no stranger to Pennsylvania, especially to the City of Philadelphia." *Id.* (Scirica, J., concurring). Continuing, Judge Scirica remarked that "fraudulent voting in Philadelphia remains egregious and flagrant today." *Id.* (Scirica, J., concurring). Evidently, election fraud also prevailed in the 1940s and even earlier. *See* Williams v. Osser, 350 F. Supp. 646, 652 (E.D. Pa. 1972) (1940 suit by Committee of 70, a watchdog group, charging fraud by "phantom voters"—the court found that 50,000 ineligible voters existed on the Philadelphia lists); W.E.B. DU BOIS, THE PHILADELPHIA NEGRO: A SOCIAL STUDY 372, 376-77 (1899) (discussing prevalence of vote buying). Voter fraud has also plagued Chicago. *See* Kasper v. Board of Election Comm'rs of Chicago, 814 F.2d 332, 334 (7th Cir. 1987) (noting that voting fraud represents Chicago's biggest industry). The Seventh Circuit estimated that nine percent of the registered voters pertained to unoccupied parcels of land, the dead or persons who had moved. *Id.*

can do that. Only then will they have a permanent and justified confidence in the electoral process."[342]

Michelle L. Robertson

342. Marks v. Stinson, No. CIV. A. 93-6157, 1994 WL 146113, at *35 (E.D. Pa. Apr. 26, 1994), *aff'd, Marks*, No. 94 Civ. 1474, *supra* note 13, *cert. denied*, 115 S. Ct. 901 (1995).

APPENDIX OF ANALOGOUS STATUTES

PENNSYLVANIA ELECTION STATUTES

25 PA. CONS. STAT. ANN. (1994) Sections:

3146.1(j)	Entitled to vote by absentee ballot if out of county due to duties/job/profession.
3146.1(k)	Entitled to vote by absentee ballot if have illness or physical disability.
3146.2(a)	Can receive absentee application in person or through mail from Election Board.
3146.2(e)(1)	Must state on application reason for absence, address where ballot is to be mailed, if out of county due to job.
3146.2(e)(2)	If illness, send application with nature of illness and attending physician's name and address. Give address where ballot to be sent to.
3146.5	Board shall deliver or mail ballots to voters
3146.6	Voter must mark ballot in secret, must mail back to Board or deliver in person. If in county on election day, must proceed to polls.
3146.8(e)	Candidate has right to have pollwatcher challenge absentee ballot because person could have voted in person. If challenged, Board will have hearing within seven days. May appeal Board's decision to Common Pleas Court.
3459	If contest election, must post bond in amount set by court.
3261-63	General election recounts and contests
3376-77, 3401	Jurisdiction to Court of Common Pleas for election contests.

DELAWARE ELECTION STATUTES

DEL. CODE ANN. Title 15 (1993) Sections:

5502	Persons eligible to vote by absentee.
5503	Affidavits required of voter applying for absentee ballot.
5504	Request ballot from County.
5505	Distribution of ballot – county shall mail.
5508	Standard instructions to voters.
5509	Voting procedure – return ballot to county via mail.
5513	County delivers absentee ballots to polling places.
5514	Election officers can only receive absentee ballots from member of department of their county.
5516	Absentee ballot challenges procedure.
5941	Contested Election – right to contest.

5942-43	Won't set aside election for voting irregularities or illegal voting unless enough to change outcome of election.
5948-55	Jurisdiction to state courts.

NEW JERSEY ELECTION STATUTES

N.J. STAT. ANN. (West 1989) Sections:

19:57-3	Persons entitled to vote by absentee ballot.
19:57-4	Civilian absentee or military service ballot; application; provision for sick and disabled.
19:57-6	Applications for absentee ballot to county clerk.
19:57-10	Investigation of absentee applications.
19:57-11	Forwarding of absentee ballots by mail or hand deliver to voters by county clerk.
19:57-13	Voter must mark ballot in secret.
19:57-23	Voters must return ballot by mail or personal delivery.
19:57-24	Duties of county election board after receiving absentee ballots.
19:57-24.1	Absentee challengers.
19:57-28	Voter cannot vote in person at polls if absentee ballot completed.
19:57-29.2	Jurisdiction of election contests to Superior Court of that county; post $500 bond.
19:57-36	Validity of election not affected by irregularities in absentee voting.
19:57-37	Violations.
19:57-37.1	No one else can deliver ballot other than voter unless the ballot is sealed and the delivery person signs on the outside of the ballot.

U.S. VIRGIN ISLANDS STATUTES

VIRGIN ISL. CODE ANN. Title 18 (Supp. 1994) Sections:

662	Circumstances under which absentee voting is permitted (basically any).
664	Applications for ballots can be made in person or in writing.
665	Voting procedure – mark ballot in presence of official who does not see whom the voter votes for, and then voter mails to Election Board.
667	Provision for poll watchers.