Constitutional Law - Filling Senatorial Vacancies

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CONSTITUTIONAL LAW—FILLING SENATORIAL VACANCIES


I. INTRODUCTION

On April 4, 1991, United States Senator John Heinz died in a mid-air collision near Philadelphia when his airplane collided with a helicopter. The death of Senator Heinz left a vacancy that both the Democratic and Republican Parties were eager to fill with their own respective candidates. In compliance with the Pennsylvania election statute, the leaders of each party selected a candidate to run in a special election to fill this vacancy.

John S. Trinsey, Jr., a private citizen who was disgruntled by his inability to break into the party system, challenged the validity of the Pennsylvania statute on the ground that the statute authorized the selection of the candidate without a primary in violation of the Seventeenth and Fourteenth Amendments of the United States Constitution. In _Trinsey v. Pennsylvania_, the United States Court of Appeals for the Third Circuit rejected Trinsey's challenge and held that the Seventeenth and Fourteenth Amendments do not require states to conduct primary elections when selecting candidates for a special election to fill a senatorial vacancy. The focus of the Third Circuit's opinion was on interpreting the Seventeenth Amendment. The specific language of the Seven-

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1. The airplane that was carrying Senator Heinz collided in mid-air with a helicopter whose pilot was "inspecting the plane's landing gear after the plane reported a problem with the nose wheel." _Copter Rotor Hit Heinz's Plane, Early Data Find_, N.Y. TIMES, April 7, 1991, part 1, at A21.

2. For a discussion of the political parties' selection process, see infra notes 16-20 and accompanying text.


4. _Trinsey v. Pennsylvania_, 941 F.2d 224, 226 (3d Cir.), _cert. denied_, 112 S. Ct. 658 (1991). Trinsey, a former Olympic rower and real estate developer, was a Township Supervisor for Upper Merion Township, Pennsylvania at the time of the case. Katharine Seelye, _Judge: Challenge on Senate Vacancy Has Some Merit_, PHILA. INQUIRER, May 30, 1991, at B5. Although Mr. Trinsey is not a lawyer, he represented himself before the United States District Court for the Eastern District of Pennsylvania. _Id_. A seemingly flamboyant person, Mr. Trinsey's "court papers are studded with unlawyelry assertions, such as: 'Jack Trinsey is an American Freedom Fighter, the new blood that must go to Washington to cope with the big government that is destroying not only the rights of the people of Pennsylvania but indeed the people of this great country.'" _Id_.


6. _Id_. at 236.

7. _Id_. at 231.
teenth Amendment that was at issue reads: "When vacancies happen in the representation of any State in the Senate, . . . the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct." 8

The issue raised by Trinsey’s challenge was one of first impression before any United States court. 9 Thus, in deciding to uphold the Pennsylvania statute, the Third Circuit established a precedent which is likely to strongly influence future decisions on this issue. 10

It would be reaching to apply the holding of Trinsey to issues other than the constitutional validity of procedures surrounding senatorial vacancies. A narrow reading of the opinion is appropriate because the Third Circuit based its decision specifically on its interpretation of the Seventeenth Amendment’s vacancy provision. 11 Nevertheless, one may infer from the court’s analysis that, in future cases involving other aspects of the Seventeenth Amendment, the Third Circuit will interpret that amendment strictly and in relative isolation from other constitutional provisions. 12

8. U.S. CONST. amend. XVII, cl. 2. For the full text of clause two of the Seventeenth Amendment, see infra note 11.


10. Pennsylvania was the only state in the Third Circuit affected by this decision. Both Delaware and New Jersey election laws already require primary elections as part of the special election process. See Del. Code Ann. tit. 15, §§ 3301, 7321 (1981); N.J. Rev. Stat. § 19:27-6 (1989). Although the Virgin Islands are a member of the Third Circuit, it is not represented by a United States Senator and remains unaffected by the decision. See U.S. Const. art. I, § 3, cl. 1, amended by U.S. Const. amend. XVII, § 1.

11. Trinsey, 941 F.2d at 231. The Seventeenth Amendment reads in pertinent part:

When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: Provided, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

U.S. Const. amend. XVII, cl. 2.

12. See Trinsey, 941 F.2d at 227. In Trinsey, the Third Circuit specifically stated that the Qualifications Clause of Article I, § 2 of the United States Constitution, which applied to the House of Representatives, was irrelevant to the election of United States Senators. Id.

The Qualification Clause reads: "The House of Representatives shall be composed of Members chosen every second Year by the People of the several States and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature." U.S. Const. art. I, § 2, cl. 1. The Qualifications Clause is often cited as grounds for requiring primary elections to select candidates for the general elections for the House of Representatives. See generally Tashjian v. Republican Party of Connecticut, 479 U.S. 208, 227 (1986) (holding that if state required primary elections as part of elections process, then state must protect right to vote in such primaries).
II. Case Analysis

A. Factual and Procedural History

The death of Senator John Heinz left Pennsylvania without its full representation in the United States Senate. The Pennsylvania General Assembly had established procedures, via state statute, to fill the remainder of an unexpired term should such a senatorial vacancy occur.13

The Pennsylvania statute, under section 2776 of title 25, provides that senatorial vacancies are to be filled “for the unexpired term by the vote of the electors of the State at a special decision” and that “[c]andidates to fill vacancies in the office of United States Senator shall be nominated by political parties, in accordance with party rules relating to the filling of vacancies.”14 Neither the statute, nor the Democratic and Republican Party rules, require that political parties hold primary elections to select candidates for the special election to fill senatorial vacancies.15

13. The Pennsylvania legislature passed a statute outlining the procedures for filling senatorial vacancies in 1937 under 1937 Pa. Laws 320 art. VI § 626. The statute was amended into its current form in 1963. PA. STAT. ANN. tit. 25, § 2754 (Supp. 1991). The pre-1937 statute required the state to hold primaries to select candidates for the special election to fill the vacancy. 1913 Pa. Laws 454 § 3. This statute stated that a senatorial vacancy would be filled by a special election “held at the time of the next general election whose antecedent primary occurs at least sixty days after the happening of such vacancy . . . . Candidates . . . shall be nominated at said antecedent primaries.” Id.

Section 2776, which eliminated the requirement for primary elections, reads:

Whenever a vacancy shall occur in the office of United States Senator, said vacancy shall be filled for the unexpired term by the vote of the electors of the State at a special election to be held at the time of the next general or municipal election, occurring at least ninety (90) days after the happening of such vacancy, and it shall be the duty of the Governor to issue writs of election to the various county boards of elections and to the Secretary of the Commonwealth within ten (10) days after the happening of said vacancy. Candidates to fill vacancies in the Office of United States Senator shall be nominated by political parties, in accordance with the party rules relating to the filling of vacancies.


14. PA. STAT. ANN. tit. 25, § 2776. For the full text of § 2776, see supra note 13.

15. Trinsey, 941 F.2d at 225-26. Under another Pennsylvania statute, PA. STAT. ANN. tit. 25, § 2831 (Supp. 1991), the Democratic and Republican Parties are named as the only political parties allowed to select their candidates in the manner outlined in § 2776. Id. Section 2831, which was not challenged in Trinsey, requires that “[t]he [only] ‘political parties’ who are entitled to nominate their candidates in this manner are those whose candidate for any office in the last general election received at least two percent statewide and two percent in at least ten counties of the largest vote cast in the state for any elected candidate.” Id.

The Supreme Court has generally held that similar statutes governing the participation of third party candidates are constitutional. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 13-20 (2d ed. 1988). Tribe has commented that “[a]lthough these barriers [against minority parties] to the ballot box are
Until the special election could be held to fill the vacancy left by Senator Heinz's death, Governor Casey exercised his authority under section 2776 and appointed Harris Wofford to fill the vacancy temporarily. That temporary appointment and the support of Governor Casey encouraged Democratic Party leaders to select Wofford as their candidate for the special election to fill the unexpired term.

The Republican Party leaders quickly chose former Governor Richard Thornburgh as their candidate after he resigned from his position as United States Attorney General to run in the special election. Given former Governor Thornburgh's political stature in Pennsylvania, the Republican Party leadership did not seriously consider any other candidates.

John S. Trinsey, Jr., a relative political unknown, believed that the operation of section 2776 deprived him of the opportunity to compete.
in the special election.\textsuperscript{21} Trinsey filed a complaint in the United States District Court for the Eastern District of Pennsylvania alleging that section 2776 violated his Fourteenth Amendment due process rights because it allowed political party leaders to choose candidates without holding primary elections.\textsuperscript{22} Mr. Trinsey asked the district court to grant two forms of relief. First, he sought to have section 2776 declared unconstitutional and set aside.\textsuperscript{23} Second, Mr. Trinsey sought injunctive relief, requesting that he and others be placed on the November election ballot, and that Harris Wofford be restrained from filling his temporary appointment to the United States Senate.\textsuperscript{24}

After oral argument, the district court dismissed Trinsey's motions for injunctive relief.\textsuperscript{25} The court did, however, declare that section 2776 was unconstitutional under the Seventeenth and Fourteenth Amendments\textsuperscript{26} because the absence of primary elections deprived Trinsey of the opportunity to vote for a candidate of his choice.\textsuperscript{27}

The defendants, including among others, the Commonwealth of Pennsylvania and the Governor,\textsuperscript{28} appealed to the Third Circuit, which

\textsuperscript{21} Trinsey v. Pennsylvania, 941 F.2d 224, 226 (3d Cir.), cert. denied, 112 S. Ct. 658 (1991). Section 2776 does not require the Republican and Democratic Parties to hold any primary elections before selecting their candidates \textsc{Pa. Stat. Ann. tit. 25, § 2776.} For the text of § 2776, see \textsuperscript{supra} note 13. As a result, Trinsey argued that he was deprived of the opportunity to compete for the position and that the voters were deprived of the opportunity to select a candidate. \textsc{Trinsey, 941 F.2d at 226.}

\textsuperscript{22} \textit{Id.} at 226. Trinsey's complaint alleged that § 2776 violated his Seventeenth Amendment rights. \textit{Id.} Moreover, Mr. Trinsey mistakenly alleged that § 2776 violated the Fifteenth Amendment when he actually intended to refer to the Fourteenth Amendment due process right. \textit{Id.} at 226 n.2. Both the district court and the Third Circuit read the complaint as intended. \textit{Id.}

\textsuperscript{23} \textit{Id.} at 226.

\textsuperscript{24} \textit{Id.}

\textsuperscript{25} \textit{Id.} The district court concluded that Trinsey's name could not be placed on the ballot unless he met Pennsylvania's requirements for third party candidates. \textit{Id.} at 228. For a discussion of allowable restrictions on third party candidates, see \textsuperscript{supra} note 15 and accompanying text.

\textsuperscript{26} \textit{Trinsey, 941 F.2d at 235.} The district court determined that § 2776 violated the Equal Protection Clause of the Fourteenth Amendment. \textit{Id.; see also U.S. Const. amend. XIV, § 1.}

\textsuperscript{27} \textit{Trinsey, 941 F.2d at 235.} While the district court's decision did not grant Trinsey all the relief that he desired, he stated, "It's a smashing victory for me." Seelye, \textit{supra} note 4, at B5.

\textsuperscript{28} The list of defendants was quite inclusive. Trinsey filed suit against the Commonwealth of Pennsylvania, the Department of State, the Board of Elections, the Governor and the Secretary of the Commonwealth. \textit{Trinsey, 941 F.2d at 226.} The district court allowed the Republican State Committee of Pennsylvania, the Pennsylvania Democratic State Committee and several party leaders to intervene in the case. \textit{Id.} Because Trinsey appeared \textit{pro se} and was not an attorney, the Third Circuit appointed Professor Laura E. Little of Temple University School of Law to argue his position. \textit{Id.} at 226-27. The court wanted to ensure that adverse interests were properly presented so that the court could engage in "informed decisionmaking." \textit{Id.}
reversed the district court's decision. In overruling the district court decision concerning the Seventeenth Amendment, the Third Circuit held: (1) the Seventeenth Amendment could not be construed to require primary elections to fill senatorial vacancies, and (2) related case law granted state legislatures wide discretion in establishing election laws, especially when special elections were required to fill a vacancy. The Third Circuit ordered the special election to proceed according to the Pennsylvania statute.

The Third Circuit also summarily overruled the district court's Fourteenth Amendment decision. Although its analysis was brief, the court held that existing Supreme Court case law required it to hold that the statute did not violate Trinsey's equal protection rights.

**B. District Court Analysis**

The district court held that the statute violated the plaintiff's Seventeenth Amendment right to vote for a United States senator. Because this issue was one of first impression before any federal court, there was no case law directly on point to guide the court. As a result, the district court based its decision on an evaluation of the Seventeenth Amendment's legislative history and on the reasoning of cases that the court believed to be analogous.

The district court determined that section 2776 infringed "upon the fundamental right to vote." The district court, therefore, applied

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29. *Id.* at 236. Since the issues involved were questions of law, the Third Circuit's review was plenary. *Id.* at 228.
30. *Id.* at 234.
31. *Id.* at 236.
32. *Id.* at 235-36.
33. *Id.* at 236 (citing Rodriguez v. Popular Democratic Party, 457 U.S. 1 (1982)).
35. *Trinsey*, 766 F. Supp. at 1342 ("The issue before this court, whether the right to vote must be protected at the nomination stage, has not been squarely presented before.").
   The Third Circuit stated that it read "those cases differently." *Id.* The Third Circuit also distinguished these cases from the instant case on factual grounds. *Id.* at 232. For a discussion of the Third Circuit's treatment of *Tashjian* and *Classic*, see infra notes 61-81 and accompanying text.
37. *Trinsey*, 766 F. Supp. at 1347. The district court relied on two propositions in determining that a fundamental right was involved. First, the district court stated that "[n]o right is more precious in a free country than that of having a voice in the election of those who make laws." *Id.* at 1342. Secondly, the district court believed that the Supreme Court protected the right to vote in "every stage in the selection process." *Id.* at 1344 (quoting *Tashjian* v. Republican
strict scrutiny review to the Pennsylvania statute under which the statute could be upheld only if the Commonwealth showed that the statute “advances a compelling governmental interest and is narrowly tailored to serve that interest.”

The defendants proffered four state interests: (1) to limit the names on the ballot; (2) to guard against “splintered parties and an unstable political system;” (3) to prevent the “clogging of the election mechanism;” and (4) to minimize the length of service of an appointed senator. The district court determined that these proffered interests were not compelling and, even if the interests were compelling, the statute was not narrowly tailored to serve those interests. The district court thus held that the statute was unconstitutional to the extent that it failed to require primary elections in filling a senatorial vacancy.

The district court, however, upheld the operation of the statute in two other areas, which also had been the subject of Trinsey’s injunctive relief. First, the court affirmed the constitutionality of Governor Casey’s temporary appointment of Harris Wofford to the Senate. Second, the court held that Trinsey’s name would not be placed on the ballot unless he met Pennsylvania’s requirements for third party candidates.

Party of Connecticut, 479 U.S. 208, 227 (1986)). By combining these two distinct propositions, the district court concluded that under the Seventeenth Amendment, a general fundamental right to vote extended to the nomination process for filling senatorial vacancies. Id. at 1347.

Justice William O. Douglas appears to have originated the term “strict scrutiny” in his opinion in Skinner v. Oklahoma, 316 U.S. 535 (1942). ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 1790 (Leonard W. Levy et al. eds., 1986). The Court developed the test to review legislation ”that discriminated against the exercise of fundamental interests. . . . To pass the test of strict scrutiny, . . . a legislat[ion] . . . must be ‘necessary to achieve a compelling state interest.’ ” Id. (emphasis omitted).

The district court held that the first three state interests were not sufficiently compelling because “Pennsylvania conducts primaries for regular elections and has not explained why the vacancy primary presents a greater threat to its interests than these normal primary elections.” Id. at 1346. The district court recognized that while the fourth interest had some merit, as it was not narrowly tailored as it could have been. Id. For a list of legislative goals, see supra note 39 and accompanying text.

The Third Circuit characterized the district court’s decision and reasoning as follows: “It issued a final judgment on the merits declaring section 2776 to be unconstitutional, essentially on the ground that the statute violates the Seventeenth Amendment, U.S. Const. amend. XVII, because it does not provide for a primary election before a special election to fill a Senatorial vacancy.” Id. The Third Circuit noted that the district court did uphold certain portions of § 2776. Id. at 228. For a discussion of the portions of § 2776 that the district court upheld, see infra notes 42-43 and accompanying text.

The district court stated: “The Commonwealth of Pennsylvania has no duty to include the plaintiff as an independent candidate on the November 5,
C. Third Circuit Analysis

On appeal, the Third Circuit reversed the district court's decision and concluded that the Pennsylvania statute should be examined under a rational relationship test, as opposed to the strict scrutiny review applied by the district court. Because the Commonwealth articulated several legitimate state interests supporting the purpose of the statute,

1991 election ballot unless the plaintiff meets Pennsylvania's requirements for third party candidates.” Id. Thus, the court upheld the provision requiring a political party to meet the state's minimum qualifications before being allowed to place a candidate on the ballot. Id. For a discussion of the state's restrictions on third party candidates and the Supreme Court's view on such restrictions, see supra note 15.

44. Trinsey, 941 F.2d at 234. The Third Circuit stated:

Once we conclude that the Seventeenth Amendment does not mandate . . . a primary before holding a general election to fill a senatorial vacancy, it follows that there is no fundamental right that is infringed . . . . [Therefore,] Rodriguez, counsels us to apply a more deferential standard of review over a state's choice of the manner in which to fill legislative vacancies. [A court's focus should be] whether the "system plainly serves [a] legitimate purpose."

Id. (quoting Rodriguez v. Popular Democratic Party, 457 U.S. 1, 12 (1982)).

While the Third Circuit applied a rational relationship test, it did not expressly state which of the various rational relationship tests it was applying. The Trinsey court appeared to apply a rational relationship test with bite. See Trinsey, 941 F.2d at 234-35; see generally City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985) (establishing relationship with bite test).

To apply its rational relationship test, the Trinsey court examined the proffered legislative goals supporting § 2776 to ensure that the state's goals were legitimate. Trinsey, 941 F.2d at 234-35. Then, the court determined that § 2776 actually did further those goals which the legislature specifically proffered. Id. For a discussion of the legislative goals, see supra note 39 and accompanying text.

Through case law, the Supreme Court developed the rational relationship test to evaluate certain legislative statutes. Professor Tribe stated:

The Supreme Court, from its earliest examination of socioeconomic regulation, has considered that equal protection demands reasonableness in legislative and administrative classifications . . . . This theory of rationality . . . between means and ends assumes that all legislation must have a legitimate public purpose . . . based on some conception of the general good.

Tribe, supra note 15, § 16-2, at 1439-40.

Courts have applied the phrase "rational relationship test" to two different levels of review. The lowest level of review has been described as "any conceivable basis test." McGowen v. Maryland, 366 U.S. 420, 426 (1961) ("A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."); see also United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 177 (1980) (applying not "patently arbitrary or irrational" test).

Under the more stringent level of review, a "classification fails unless it is substantially related to a sufficiently important government interest." Cleburne, 473 U.S. at 440-41. In Cleburne, the Court declared a statute unconstitutional because the proffered legislative goals were based on "irrational prejudice." Id. at 450. Although there may have been other conceivable bases to support the statute, the Court considered only those presented by the legislature. Id. at 447-49.
the Third Circuit held that the statute is constitutional under the rational relationship test.\textsuperscript{45}

The Third Circuit found that neither the text of the Seventeenth Amendment nor its legislative history indicate that a "state is constitutionally bound to hold a primary for nominations to fill senatorial vacancies."\textsuperscript{46} Additionally, the Third Circuit noted that relevant case law\textsuperscript{47} suggested that the "Supreme Court views the manner in which the nominees are selected to have been left to the discretion of the states."\textsuperscript{48} Finally, the Third Circuit dismissed Trinsey's equal protection argument under the Fourteenth Amendment because the Pennsylvania statute treated all voters equally.\textsuperscript{49} As a result, the Third Circuit held that the statute did not violate Trinsey's fundamental rights.\textsuperscript{50}

1. **Seventeenth Amendment Analysis**

a. **Legislative History of the Seventeenth Amendment**

The Third Circuit first examined the Seventeenth Amendment and its legislative history to determine whether a state must hold primaries to select candidates for a special election to fill a senatorial vacancy.\textsuperscript{51} The Seventeenth Amendment is silent on the issue of primary elections.\textsuperscript{52} Therefore, if such a requirement exists, it would have to be implied. The Third Circuit determined that no legislative history or other constitutional provisions exist to support such an implication.\textsuperscript{53}

\textsuperscript{45} *Trinsey*, 941 F.2d at 234. For a discussion of the Commonwealth goals furthered by § 2776, see *supra* note 39 and accompanying text.

\textsuperscript{46} *Trinsey*, 941 F.2d at 234.


\textsuperscript{48} *Trinsey*, 941 F.2d at 234.

\textsuperscript{49} Id. at 235-36.

\textsuperscript{50} Id.

\textsuperscript{51} Id. at 228-35. For the pertinent text of the Seventeenth Amendment, see *supra* note 11.

\textsuperscript{52} See U.S. Const. amend. XVII.

\textsuperscript{53} *Trinsey*, 941 F.2d at 230. In fact, the legislative history of the Seventeenth Amendment indicates that the Framers intended states to have wide discretion in establishing election procedures. The author of the Senate report on the Seventeenth Amendment, Senator Borah, stated that "popular elections have come peculiarly to be matters of local arrangement. The manner of holding them has become essentially local. The trend of events and the logic of conditions have made them local." *Id.* (quoting 47 Cong. Rec. 1886 (1911)).

The Constitution does not specifically require, nor have the courts recognized any implied requirement, that states conduct primary elections in any general or special election. The only other constitutional provision dealing with elections is the Qualifications Clause of Article I. For a discussion and text of Article I, see *supra* note 12. Article I does not specifically require primary elections. See U.S. Const. art. I.

The only requirement that the Supreme Court has levied on states in conducting elections is that if the state chooses to utilize primary elections in the election process, then the state must respect the constitutionally protected right
The court noted that during the congressional debates surrounding the passage of the Seventeenth Amendment, several legislators expressed the belief that the states were moving toward a system incorporating primary elections into the selection of candidates for Senator.\(^5\) The court stated that such comments were observations on probable trends, rather than mandates that the declarants intended to impose on the states.\(^5\)

The court also examined the goals of the Seventeenth Amendment and determined that the absence of a primary election requirement would not frustrate any of those goals.\(^5\) One of the goals supporting the Seventeenth Amendment to which the Third Circuit pointed was to lessen the influence of corrupt political bosses on senatorial elections.\(^5\) As to this goal, the Third Circuit stated that there was no "firm evidence that [the framers of the Seventeenth Amendment] believed that they were tackling the political machines by mandating primaries as well as direct elections of Senators."\(^5\)

\(^5\) For a discussion of the Tashjian opinion, see infra notes 73-76.

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\(^5\) Trinsey, 941 F.2d at 230. Senator McCumber stated: "Coincident, if not preceding this change of election of United States Senators, will be nomination of senators by popular vote. This means in most instances a double campaign, first fought to a finish between the candidates of a particular party, and then between the successful candidates of opposing political parties." Id. (quoting 47 Cong. Rec. 1881 (1911)) (emphasis omitted). Senator McCumber seemed to think that primaries were the trend of the future, but his statement indicates that he did not believe that primary elections were part of the Seventeenth Amendment—he specifically stated such a requirement would be "coincident" or "preceding" the passage of this particular amendment. Id. Senator Borah, author of the Senate Report, stated that "[e]ach state has its primary elections or is coming to have [them]." Id. (quoting 47 Cong. Rec. 1886 (1911)).

\(^5\) Id. at 229. The Third Circuit noted the following: The Senators addressing the issue during the floor debates discussed three problems [in having state legislatures select Senators]: (1) the selection of state legislators on the basis of their ability to fill seats in the United States Senate instead of their ability to enact state laws; (2) the diversion of state legislatures' attention away from addressing the problems of their states; and (3) political corruption. Id. (citing 46 Cong. Rec. 1104-05, 2256 (1911)).

\(^5\) Id. at 230. Senator Beveridge stated:

The caucus fixes who is to be nominated; conventions, run by bosses, say who is to be nominated by both parties. . . . [I]f you want to encourage the negligence of the great privilege and duty of the voting by the people just continue to take away from them more of their participation in government.

Id. at 230 n.7 (quoting 46 Cong. Rec. 2257 (1911)).

\(^5\) Id. at 230.
Finally, the court noted that even if the framers had intended to require primary elections in general elections, such intent would not apply to special elections like the one the court now faced.59

b. Case Law Involving the Seventeenth Amendment

Having decided that the Seventeenth Amendment and its legislative history offered no guidance as to whether states must conduct primary elections to select candidates for special elections to fill senatorial vacancies, the Third Circuit turned to existing case involving primary elections.60

The Third Circuit began its analysis by distinguishing Tashjian v. Republican Party of Connecticut61 and United States v. Classic,62 two Supreme Court cases on which the district court relied in reaching its decision that states are constitutionally required to conduct primary elections for special elections.63 Contrary to the district court, the Third Circuit interpreted neither case as requiring that a state hold primary elections as a prelude to a special election.64

In Classic, the relevant issue before the Supreme Court was "whether the right of qualified voters to vote in the Louisiana primary and to have their ballots counted is a right secured by the Constitution."65 Louisiana officials were charged with altering the votes in a primary election to select a representative to Congress.66 The officials allegedly violated a federal criminal statute that made it a crime to violate the constitutional rights of any United States citizen.67 The defendants argued that the statute did not apply because the Constitution did not guarantee the right to vote in primary elections.68 The Court rejected the defendants' argument and held that the "right of participation is protected just as is the right to vote at the election, where the primary is by law an integral part of the election machinery."69

59. Id. at 231 (legislative debate focused on general elections, with little discussion of primary elections).
60. Id.
63. Trinsey, 941 F.2d at 231-33. The district court determined that the cases supported the position that the right to nominate candidates through primary elections should be accorded the same protection as the right to vote in a general election. Id. The Third Circuit, however, stated that "[w]e read those cases differently." Id. For a discussion of the district court's analysis of this right, see supra notes 37-41 and accompanying text.
64. Trinsey, 941 F.2d at 231-32.
66. Id.
67. Id. at 308.
68. Id. at 309.
69. Id. at 318 (emphasis added). Since Louisiana made the primary an integral part of the election of representatives, the
The Third Circuit noted that the *Classic* court did not hold that the Constitution requires states to conduct primary elections.\(^{70}\) Instead, the Third Circuit stated that *Classic* stands for the proposition that if a state chooses to hold primary elections, then the Constitution protects the right of qualified voters to participate.\(^{71}\) The Third Circuit held that because Pennsylvania did not incorporate a primary election requirement into the special election process, *Classic* did apply to the facts of this case.\(^{72}\)

The Third Circuit reached a similar conclusion in its analysis of *Tashjian*. In *Tashjian*, the Supreme Court addressed the issue of whether a state could require voters in a party primary to be registered members of that party.\(^{73}\) The Connecticut legislature enacted a statute which prevented any political party from allowing voters who were registered as independents to participate in the party’s primary elections.\(^{74}\) The Republican Party challenged the law on the grounds that it violated an individual’s First Amendment right to “enter into political association with individuals of its own choosing.”\(^{75}\) The Court accepted the Republican Party’s argument and held that the Connecticut statute was unconstitutional in its application.\(^{76}\)

Although the *Tashjian* decision was based on First Amendment grounds, the Court also stated that the Seventeenth Amendment protected the right to vote in state primaries if and only if primaries were part of the election process.\(^{77}\) The Court also stated that “‘[w]here the Court held that the defendants violated the voters’ right to vote under Article I, § 2 of the Constitution. *Id.*

The text of Article I, § 2 reads: “The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have Qualifications requisite for Electors of the most numerous Branch of the State Legislature.” U.S. CONST. art. I, § 2.

\(^{70}\) Trinsey v. Pennsylvania, 941 F.2d 224, 231 (3d Cir. 1991), cert. denied, 112 S. Ct. 658 (1991); see also *Classic*, 313 U.S. at 311. The *Classic* Court stated: “[T]he states are given wide discretion in the formulation of a system for the choice by the people of representatives in Congress. In common with many other states Louisiana has exercised that discretion by setting up . . . primary elections . . . .” *Id.*

\(^{71}\) *Trinsey*, 941 F.2d at 231-32; see also *Classic*, 313 U.S. at 318.

\(^{72}\) *Trinsey*, 941 F.2d at 231-32.


\(^{74}\) *Id.* at 211-12.

\(^{75}\) *Id.* at 211. The Republican Party desired to involve independent voters in its primary process. *Id.* at 212.

\(^{76}\) *Id.* at 225 (concluding that state's interests were insubstantial to justify burdening Republican Party’s First Amendment rights through enforcement of statute).

\(^{77}\) *Id.* at 227. The district court in *Trinsey* relied heavily on the following language in *Tashjian* to determine that primary elections must be held to select candidates for the special election: “[T]he Seventeenth Amendment . . . applies to the entire process by which federal legislators are chosen . . . . The constitu-
state law has made the primary an integral part of the procedure of choice, or where in fact the primary effectively controls the choice . . . the Seventeenth Amendment applies to primaries as well as general elections."

The Third Circuit in *Trinsey* interpreted this language to indicate that primary elections are not constitutionally mandated. The Third Circuit further distinguished *Classic* and *Tashjian* from the case at bar based on the nature of the elections involved. Both *Classic* and *Tashjian* involved "regular general elections, whereas [the Pennsylvania statute] is concerned only with the special election of a successor to a vacancy in a Senate seat." The Third Circuit implied that even if those cases did hold that a state must conduct primary elections in its general elections, such a holding would not apply to special elections to fill senatorial vacancies.

The Third Circuit then analyzed two cases that the district court did not address: *Valenti v. Rockefeller*, a district court case, and *Rodriguez v. Popular Democratic Party*, a Supreme Court case. Both cases strongly indicate that state legislatures are given wide discretion in establishing procedures to fill vacancies in elected offices. The Third Circuit reasoned that these cases supported its position that the Pennsylvania statute should be tested under the more deferential rational relationship test.

*Valenti v. Rockefeller*, was decided by the United States District Court for the Southern District of New York and involved a challenge to a New York election law. The operation of the law resulted in a temporary
appointment to the United States Senate.\textsuperscript{87} The appointee held office for 29 months before the vacancy was filled after a special election.\textsuperscript{88} The long appointment period was the result of the legislature's desire to hold primary elections to select candidates for the special election.\textsuperscript{89} The plaintiffs in the case argued that such a long tenure by a "temporary" appointee was a violation of their Seventeenth Amendment right to vote for a senator.\textsuperscript{90}

The Valenti court held that the statute was constitutional under the Seventeenth Amendment because the statute represented a reasonable exercise of the discretion that the Amendment confers upon state legislatures.\textsuperscript{91} In support of its holding, the court stated: "[A]s the Seventeenth Amendment has specifically given to the legislatures of the states power to regulate vacancy elections, it is not for a federal court to substitute its own judgment for that of the elected representatives of the people."\textsuperscript{92}

The Third Circuit stated that the basis for the Valenti court's decision was applicable to the case in Trinsey.\textsuperscript{93} While Valenti focused on the length of time before the special election and Trinsey focused instead on the non-existence of primary elections, the outcome of Valenti hinged on the court's interpretation of the Seventeenth Amendment and the discretion that the Amendment grants to state legislatures.\textsuperscript{94} The Trinsey court reasoned that the same degree of reasonable discretion should be granted to the Pennsylvania legislature.\textsuperscript{95}

The Third Circuit next analyzed Rodriguez v. Popular Democratic Party.\textsuperscript{87} Valenti, 292 F. Supp. at 853.

88. Id. at 853-55. The vacancy was created by the assassination of Robert F. Kennedy. Id. at 853.

89. Id. at 854-55.

90. Id. at 853.

91. Id. at 866.

92. Id. at 867.


95. Trinsey, 941 F.2d at 233-34. Based at least partly on Valenti, the Third Circuit applied a rational relationship test to § 2776. Id. For a discussion of the rational relationship test, see supra note 44.

It is unclear which test the Valenti court actually applied in its analysis of the New York law. On the one hand, the Valenti court focused on the discretion of the state legislature and stated that it should not substitute its own judgment for that of the legislature. Valenti, 292 F. Supp. at 867. On the other hand, the court stated that the law was constitutional because it furthered an important or substantial state interest. Id. at 866-67.

This dichotomy in the Valenti court's analysis makes it unclear whether it applied a rational relationship or intermediate scrutiny test. The Valenti court applied what it called "careful scrutiny." Id. at 859. Nevertheless, it is clear that the Valenti court did not find that fundamental interests were at stake: "We are confronted with no fundamental imperfection in the functioning of democracy. No political party or portion of the state's citizens can claim that it is permanently disadvantaged . . . . We have, rather, only the unusual, temporary, and
In *Rodriguez*, the Supreme Court addressed the issue of whether a Puerto Rican statute was constitutional in allowing political parties to appoint successors to fill vacancies in the Puerto Rico legislature without holding special elections.\(^9\) While this issue did not raise any federal election questions, the Supreme Court nevertheless analogized the claim in *Rodriguez* to the Seventeenth Amendment claim in *Valenti* to come to its decision.\(^9\)

The Supreme Court held in *Rodriguez* that "[t]he methods by which the people of Puerto Rico and their representatives have chosen to structure the Commonwealth's electoral system are entitled to substantial deference."\(^9\) Because the statute's burden did not "fall disproportionately on any discreet group of voters," the Supreme Court held that the law was constitutional under a rational relationship test.\(^9\)

In *Trinsey*, the Third Circuit regarded *Rodriguez* as reflecting the United States Supreme Court's approach to Seventeenth Amendment issues.\(^10\) Based upon the Supreme Court's holding, the Third Circuit in *Trinsey* held that the Pennsylvania statute at issue should receive treatment equally deferential.\(^10\)

2. *Fourteenth Amendment Analysis: Equal Protection Rights*

In its Fourteenth Amendment equal protection analysis, the Third Circuit relied exclusively on the Supreme Court's decision in *Rodriguez*.\(^10\) In *Rodriguez*, the Supreme Court held that the statute at issue did not violate any of the voters' or candidates' equal protection rights because it treated all voters and candidates equally.\(^10\)

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\(^9\) Rodriguez v. Popular Democratic Party, 457 U.S. 1, 3 (1982). The Puerto Rico Supreme Court interpreted the Puerto Rican statute to mean that the political party to whom the predecessor belonged could appoint a single candidate who would be "automatically elected to fill the vacancy." Id. at 4 (citing P.R. LAWS ANN. tit. 16, §§ 3206-3207 (1980)). Under the statute, if the party put forth several candidates, then only those candidates could compete for the vacancy in a special primary election. Id. at 4-5.

\(^9\) Id. at 10-11. In *Rodriguez*, the Supreme Court stated that "the fact that the Seventeenth Amendment permits a state, if it chooses, to forgo a special election in favor of a temporary appointment to the United States Senate suggests that a state is not constitutionally prohibited from exercising similar latitude with regard to vacancies in its own legislature." Id. (referring to Valenti v. Rockefeller, 292 F. Supp. 851 (S.D.N.Y. 1968)).

\(^9\) Id. at 8.

\(^9\) Id. at 12. The Court stated: "[The] system plainly serves the legitimate purpose of ensuring that vacancies are filled promptly . . . ." Id.

\(^10\) Trinsey, 941 F.2d at 233.

\(^10\) Id. at 234.

\(^10\) Id. at 235-36; see Rodriguez, 457 U.S. at 15. For a statement of the facts and issue in *Rodriguez*, see supra note 96 and accompanying text.

\(^10\) Rodriguez, 457 U.S. at 10. The Supreme Court noted that "[a]ll qualified voters have an equal opportunity to select a district representative in the
Court stated that "[a] vacancy in the legislature is an unexpected, unpredictable event, and a statute providing that all such vacancies be filled by appointment does not have a special impact on any discreet group of voters or candidates."\(^{104}\)

Applying the rationale in Rodriguez, the Third Circuit, held that the challenged Pennsylvania statute, section 2776, did not operate to the detriment of any discrete group of voters or candidates.\(^{105}\) The Trinsey court stated that any senatorial vacancy is clearly unpredictable, and that section 2776 treats all voters similarly regardless of which political group holds power at the moment.\(^{106}\) As a result of the statute's equal treatment of voters in such an unforeseeable event, the Trinsey court held that the Pennsylvania statute did not violate the Equal Protection Clause of the Fourteenth Amendment.\(^{107}\)

### III. Conclusion

The Trinsey case has established the precedent that a state is not required to hold primary elections when selecting candidates for a special election to fill a senatorial vacancy.\(^{108}\) The United States Supreme Court denied certiorari on the case in December of 1991,\(^{109}\) possibly because the special election to fill Senator Heinz’s vacancy had already taken place in November of 1991, thus rendering the issue moot.\(^{110}\)

Nevertheless, the Third Circuit’s reasoning would likely have withstood review by the United States Supreme Court for three reasons. First, the Seventeenth Amendment specifically directs that special elections to fill senatorial vacancies are to be held as “the legislature may direct.”\(^{111}\) Second, the Third Circuit’s opinion accurately reflects ex-

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108. *Id*. at 235 (concluding that § 2776 was “a permissible exercise of [the legislature’s] discretion” (quoting *Valenti v. Rockefeller*, 292 F. Supp. 851, 866 (S.D.N.Y. 1968))).
110. No one in Pennsylvania will again have standing to challenge § 2776 until there is another senatorial vacancy in Pennsylvania and an individual alleges an injury caused by the statute’s operation. The United States Supreme Court established the requirement for standing in *Allen v. Wright*, 468 U.S. 737 (1984). The Court stated that to establish standing, “‘[t]he injury alleged must be, for example, ‘distinct and palpable,’ . . . not ‘abstract’ or ‘conjectural’ or ‘hypothetical’.” *Allen*, 468 U.S. at 751 (citations omitted). As a result of the standing requirements articulated in *Allen*, a court will not entertain a challenge to § 2776 unless a person faces imminent harm or already has been injured by the statute.
111. *See U.S. Const.* amend. XVII.
isting case law on the issue.112 The one weakness, however, in the Third Circuit’s case analysis was the manner in which it relied on Rodriguez to support the use of a rational relationship test to review the constitutionality of the challenged Pennsylvania statute.115 Although its reliance was justifiable, the Third Circuit should have laid more groundwork to establish why the Supreme Court’s analysis in Rodriguez applied to the facts in Trinsey so that the precise rule in Trinsey could be clearly identified for application in future costs. In spite of the factual differences between the two cases,114 Rodriguez contained a significant amount of language which the Third Circuit should have utilized to support its application of the Supreme Court’s reasoning in Rodriguez to Trinsey.115 Finally, the justices on the present Supreme Court tend to give state legislatures greater deference and are less likely to imply rights not specifically granted by the Constitution.116

In spite of Mr. Trinsey’s protest, section 2776 operated smoothly to replace the vacancy in the United States Senate created by the tragic death of Senator John Heinz.117 The United States Supreme Court’s denial of certiorari was convenient not only because the issue was moot

112. For a discussion of the related case law, see supra notes 60-101 and accompanying text.

113. For a discussion of the Third Circuit’s treatment of Rodriguez, see supra notes 96-105 and accompanying text.


115. Rodriguez, 457 U.S. at 8-9. The Supreme Court stated in Rodriguez that “[n]o provision of the Federal Constitution expressly mandates the procedures that a state . . . must follow in filling vacancies in its own legislature.” Id. at 8. The Court supported that proposition by referring to the Seventeenth Amendment. Id. at 8 n.7. Such a reference clearly indicates that the Court believed that the Seventeenth Amendment did not mandate any specific procedures that the legislature must follow when filling senatorial vacancies.


Given the Court’s conservative nature, it is likely to agree with the Third Circuit’s opinion for two reasons. First, the Court would be reluctant to infer any rights not expressly granted in the Seventeenth Amendment. Second, the Court’s tendency to defer to state legislatures would be even more pronounced because the Seventeenth Amendment expressly grants the legislatures a degree of discretion in filling senatorial vacancies. See U.S. CONST. amend. XVII.

117. Harris Wofford served only six months as an appointed United States Senator since Senator Heinz died in April and the special election was held in November. Harris Wofford then went on to upset Governor Thornburgh in the special election when the voters had the opportunity to select between two diverse candidates. Wofford, Tasting a First Victory, Is no Stranger to Public Service, supra note 17, at 14.
by the time the Court considered the case,\textsuperscript{118} but also because a decision to reverse the Third Circuit might have jeopardized the election of Senator Wofford.

\textit{Michael B. Novakovic}

\begin{quotation}
\textsuperscript{118} For a discussion of the timing of the special election and the Court's consideration of the case, see \textit{supra} notes 108-09 and accompanying text.
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