NOTE

POLITICAL PINCH-HITTING: FAIR OR FOUL PLAY IN THE 2002 NEW JERSEY SENATE ELECTION?*

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* This paper was selected as the recipient of the 2003 Winstead Sechrest & Minick P.C. award for the best student note written for the Houston Law Review.

I. INTRODUCTION

> It breaks your heart. It is designed to break your heart. The game begins in the spring, . . . blossoms in the summer, . . . and then as soon as the chill rains come, it stops and leaves you to face the fall alone.[1]

This poetic portrait of the baseball season is an apt description for an election year as well. Like the run for the major league pennant, the campaign for political office typically begins in early spring with party nominations for candidates; it blossoms in summer when primary elections are held; and then, in the chilly dampness of autumn, it ends with individual voters alone in a booth casting a ballot for the candidate of their choice. When the game is over and the election returns come in, the hearts of some voters will inevitably be broken because, as in any

1. A. Bartlett Giamatti, *The Green Fields of the Mind* (1977), *in* A GREAT AND GLORIOUS GAME: BASEBALL WRITINGS OF A. BARTLETT GIAMATTI 7, 7 (Kenneth S. Robson ed., 1998).

game in which there are winners and losers, victory necessitates defeat.

Winning an election requires more than political savvy, for the political game, like baseball, involves not only skill but also strategy. A new strategic play was introduced in the political game during the 2002 election year, namely "political pinch-hitting."[2] Political pinch-hitting is a tactic used late in the race whereby a new candidate is substituted for the primary winner who, according to polling data, appears likely to lose the election.[3] This Note focuses on the New Jersey Supreme Court's endorsement of this election tactic in *New Jersey Democratic Party, Inc. v. Samson*[4] and will consider whether such a strategy is fair or foul play.

Part II of this Note describes the *Samson* case. In order for the reader to appreciate the implications of the court's opinion, this Part gives a detailed account of events prior and subsequent to the court action initiated by the New Jersey Democratic Party. Part III provides a brief history of the federal laws governing U.S. Senate elections. Part IV critiques the New Jersey Supreme Court opinion. Finally, this Note concludes that political pinch-hitting is indeed foul play and ultimately charges the voting populace with the responsibility of maintaining ethical and fair elections.

II. THE PLAY-BY-PLAY ACCOUNT: *NEW JERSEY DEMOCRATIC PARTY, INC. V. SAMSON*

A. The Players Take the Field: The Circumstances Leading Up to Court Action

1. The Prized Pennant. As in any midterm election, the coveted prize in the 2002 election was control of the Senate.[5] The

2. "Pinch-hit" is a baseball term meaning "[t]o take another player's turn at bat." WEBSTER'S SPORTS DICTIONARY 314 (1976). A pinch hitter usually replaces a weaker hitter when the team is in need of a hit. *Id.* Although several journalists have used the term "pinch-hitting" in the political context, when referring to politics the term is not attributable to anyone in particular.

3. Columnist William Safire described the new practice of political pinch-hitting as follows: "If your candidate begins to fall behind in surveys, forget primary results and substitute a candidate whose recent activities and views cannot be thoroughly examined by media nor whose stamina can be tested on the trail." William Safire, *The Jersey Bounce*, N.Y. TIMES, Oct. 3, 2002, at A27.

4. 814 A.2d 1028 (N.J. 2002), *cert. denied sub nom.* Forrester v. N.J. Democratic Party, Inc., 537 U.S. 1083 (2002).

5. *See, e.g.*, Helen Dewar & Juliet Eilperin, *GOP Hopes Brighten in Fierce Fight for Senate: Democrats Must Win Battle to Regain House*, WASH. POST, Sept. 30, 2002, at A1

projected winner of the prize, however, has rarely been as uncertain as in the 2002 election year.[6] Democratic candidates across the nation united in their efforts to maintain and, if possible, increase their majority in the Senate.[7] Similarly, opposing Republicans focused on a net gain of at least one seat, which would put them in control of the Senate chamber.[8]

2. The Starting Line-Up. In New Jersey, the race for the Senate began with the primary elections held on June 4, 2002.[9] Taking the field for the Democrats was Robert Torricelli, a first-term Senator who was unopposed on the Democratic ballot.[10] Douglas Forrester emerged from the Republican dugout as

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(describing the 2002 midterm election as a "tense and wide-open fight for control of the Senate"); *see also* Dan Balz, *Bush Adviser Apologizes for Donations to Democrats*, WASH. POST, May 9, 2002, at A8 (noting that the White House was intently focused on "recapturing control of the Senate"). Control of the U.S. House of Representatives and state governorships are desirable prizes in midterm elections as well, but discussion thereof is beyond the scope of this Note.

6. *See* Dan Balz & David S. Broder, *Uncertainty Marks Campaign 2002: With Balance of Power at Stake, Both Parties Unsure How to Reach Voters*, WASH. POST, Jan. 6, 2002, at A1 ("Rarely has a midterm election year . . . begun with so much uncertainty and so many contradictory signals from voters."). Although election history exhibits a pattern of losses in both the House and the Senate for the president's party in the first midterm election after winning the White House, current issues and President Bush's high approval rating prevented the White House and Capitol Hill from making any confident predictions of the 2002 election outcome. *Id.* (noting that, in the fifty years prior to this race, Richard Nixon and Ronald Reagan were the only presidents who did not suffer Senate losses in the midterm elections subsequent to their assumptions of the presidency).

7. *See Several States Hold the Senate's Destiny; Competitive Races Include 7 Too Close to Call*, STAR-LEDGER (Newark), Oct. 1, 2002, at 12 [hereinafter *Senate's Destiny*]. The *Star-Ledger*, a daily newspaper published in Newark, New Jersey, is subtitled "The Voice of New Jersey." *See* http://www.starledger.com/contact.asp (last visited Aug. 2, 2003). In 1999, the *Star-Ledger* was ranked thirtieth in a survey of America's best newspapers. *See 21 for the 21st Century: America's Best Newspapers*, COLUM. JOURNALISM REV., Nov./Dec. 1999, at 14 (listing only the top twenty-one newspapers and instructing readers to visit the journal's Web site for a complete list of newspapers considered in the rankings); http://www.cjr.org./year/99/6/bestchart.asp (last visited Aug. 2, 2003) (listing all papers considered in the *Columbia Journalism Review* study). Prior to the 2002 election, Democrats enjoyed a slim majority of 50-49, with one seat held by an independent who generally voted with the Democrats. *Senate's Destiny*, *supra*.

8. *Senate's Destiny*, *supra* note 7. With Republican Vice President Dick Cheney casting tie-breaking votes, Republicans would effectively control the Senate with the gain of one seat. *Id.*

9. *See* David Kinney, *N.J. Voters Head to Polls Today to Decide Primary Races; Lower-than-Usual Turnout Expected Following Low-Key Campaign*, STAR-LEDGER (Newark), June 4, 2002, at 13. Although the primary elections in June may be the official start of the Senate race, candidates vying for a spot on a party ticket began campaigning in February of 2002, with one Senate hopeful announcing his candidacy as early as November of 2001. *See* Laura Mansnerus, *Race for New Jersey Senator Is On with First Radio Ad*, N.Y. TIMES, Feb. 1, 2002, at B5 (reporting candidacy announcements).

10. *See* Kinney, *supra* note 9 (noting that because there was no opposition in the Democratic primary, the "headline race" was for the Republican party nomination).

Torricelli's major challenger for a Senate seat.[11] From the outset, the incumbent Torricelli made Democratic control of the Senate a major part of his campaign platform.[12]

3. "Slump? I ain't in no slump. I just ain't hitting."[13] Given the fact that he was the incumbent, party expectations of Torricelli winning the Senate seat for the Democrats were not unreasonable.[14] However, voter support for Torricelli began to wane when the Senate Select Committee on Ethics rebuked him for "poor judgment and a failure to heed Senate rules in accepting expensive gifts from a major campaign contributor."[15] Once deemed a shoo-in for the Senate seat, Torricelli found himself in a "virtual dead heat" with the election less than two months away.[16] As the election drew nearer, Torricelli continued to slip in the polls, eventually falling behind the Republican candidate.[17] On September 30, 2002, "[a]fter spending [the previous day] closeted with national and state party officials," an emotional Torricelli publicly announced his withdrawal from the New Jersey race, stating that he did not

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11. *See id.*; Bill Sanderson, *Bizman Forrester Wins N.J. Primary*, N.Y. POST, June 5, 2002, at 20. Forrester was one of three Republican primary candidates competing for the opportunity to face the incumbent Torricelli in the November election. *Id.*

12. *See* Tom Turcol & Angela Couloumbis, *N.J. Senate Race Gets Feisty Start: Torricelli and Forrester Went Right for Attacks on Personal and Professional Integrity*, PHILA. INQUIRER, June 6, 2002, at A01, *available at* 2002 WL 22224809 ("'Let the fight begin!' Torricelli declared as he ripped into Forrester's business practices and urged voters to preserve Democratic control of the Senate."). Torricelli stressed the importance of preserving the slim majority held by Democrats in the Senate, explaining that it was necessary "in part to protect against the selection of federal justices who would tamper with abortion rights." *Id.*

13. JOHN BARTLETT, FAMILIAR QUOTATIONS: A COLLECTION OF PASSAGES, PHRASES, AND PROVERBS TRACED TO THEIR SOURCES IN ANCIENT AND MODERN LITERATURE 754 (16th ed. 1992) (quoting Yogi Berra).

14. *See* Edwin Chen, *Bush Travels to New Jersey to Support Senate Challenger*, L.A. TIMES, Sept. 24, 2002, at A16 (reporting that early in the race Torricelli had been favored to win); *see also* Marcus Gee, *Torricelli Quits Race; Control of Senate in Doubt*, GLOBE & MAIL (Toronto), Oct. 1, 2002, at A11 (describing the race as an "easy win" for Democrats, with Torricelli "leading [in the polls] by 14 percentage points" in June).

15. Chen, *supra* note 14. Torricelli reportedly received an $8100 Rolex watch, Italian suits, and other gifts from campaign contributor David Chang in exchange for his help with business deals in South Korea. Gee, *supra* note 14. *But see* Matthew Cooper, *Does Scandal Really Matter?*, TIME, Oct. 7, 2002, at 40 (acknowledging that information provided by David Chang regarding his gifts and contributions to Torricelli may not be reliable as he is a "dubious source" and "prone to rants"). Chang was sentenced to prison after pleading guilty "to making $53,700 in illegal political contributions to Mr. Torricelli's 1996 Senate campaign." Gee, *supra* note 14.

16. Chen, *supra* note 14 (commenting that whereas a dead heat is "never a good sign for an incumbent," it is "especially troublesome for Torricelli, because New Jersey has strong Democratic leanings").

17. Gee, *supra* note 14 (reporting that a survey conducted on the weekend of September 28–29 put Torricelli thirteen points behind the Republican challenger).

want to be responsible for the loss of the Democratic majority in the Senate.[18]

4. The Pinch Hitter Takes the Field. Robert Torricelli's withdrawal from the Senate race launched party leaders into a frenzied search for a new Democratic candidate.[19] Two days after Torricelli's withdrawal and a mere thirty-six days prior to the general election, New Jersey Democrats named former U.S. Senator Frank Lautenberg as their new candidate in the 2002 Senate race.[20]

B. The Umpire's Call: The Procedural Posture of the Case

In order to place the name of a new candidate on the election ballot, the New Jersey Democrats filed a complaint with the Superior Court, Law Division, Middlesex County, seeking injunctive and declaratory relief.[21] They simultaneously filed a Motion for Direct Certification of the matter with the New Jersey Supreme Court.[22] Court action was necessary because the New Jersey election laws, on their face, do not allow the late withdrawal and replacement of candidates.[23] The Superior Court quickly responded and "issued an Order to Show Cause and stayed the printing of the ballots for the general election."[24] The New Jersey Supreme Court, however, took prompt control of the situation and "directly certified the matter on its own motion."[25]

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18. *Id.* (viewing Torricelli's withdrawal from the Senate race as a blow to the Democratic Party's attempt to retain control of the Senate); *see also Senate's Destiny*, *supra* note 7 ("'I will not be responsible for a loss of the Democratic majority in the U.S. Senate,' Torricelli said as he announced his decision to drop out of the race. 'I will not allow that to happen. There is just too much at issue.'").

19. *See* Shailagh Murray, *New Jersey Democrats to Push Lautenberg in Place of Torricelli*, WALL ST. J., Oct. 2, 2002, at A6. The short list of desirable substitutes included former New Jersey Senator Bill Bradley as well as House Representatives Robert Menendez and Frank Pallone, Jr.; all of these potential candidates declined Torricelli's place on the ballot. *Id.*

20. *See* David Kocieniewski, *New Jersey Court Lets Lautenberg into Senate Race*, N.Y. TIMES, Oct. 3, 2002, at A1. Lautenberg served three terms in the Senate before retiring in 2000. Murray, *supra* note 19. He returned to the political playing field at age seventy-eight. *Id.*

21. *See* N.J. Democratic Party, Inc. v. Samson, 814 A.2d 1028, 1032 (N.J. 2002), *cert. denied sub nom.* Forrester v. N.J. Democratic Party, Inc., 537 U.S. 1083 (2002). The complaint sought, *inter alia*, an injunction prohibiting the inclusion of Torricelli's name on the ballot and a declaration allowing the substitution of a new candidate's name. *Id.*

22. *Id.*

23. Refer to note 28 *infra* and accompanying text (reproducing the text of the applicable New Jersey statute).

24. *Samson*, 814 A.2d at 1032. The Superior Court issued the Order to Show Cause on October 1, 2002. *Id.*

25. *Id.* New Jersey court rules provide that "the Supreme Court, on its own motion,

The New Jersey high court continued the stay on the printing of ballots as the parties prepared for oral argument scheduled on October 2, 2002.[26] The primary issue argued before the court was whether New Jersey election law prohibits the filling of a vacancy among candidates thirty-four days prior to the general election.[27] The relevant New Jersey statute provides:

> In the event of a vacancy, *howsoever caused*, among candidates nominated at primaries, *which vacancy shall occur not later than the 51st day before the general election*, or in the event of inability to select a candidate because of a tie vote at such primary, a candidate shall be selected in the following manner:
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> a. (1) In the case of an office to be filled by the voters of the entire State, the candidate shall be selected by the State committee of the political party wherein such vacancy has occurred.
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> . . . .
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> d. A selection made pursuant to this section *shall be made not later than the 48th day preceding the date of the general election*, and a statement of such selection shall be filed with the Secretary of State or the appropriate county clerk . . . not later than said 48th day . . . .[28]

After hearing oral arguments, the New Jersey Supreme Court unanimously decided that a legislative prohibition against filling the vacancy created by Torricelli's withdrawal did not exist.[29] The decision, according to the court, "is rooted in the

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[may] certify any action or class of actions for direct appeal." *Id.* (citing N.J. CT. R. 2:12-1). The Supreme Court directly certified the matter on its own motion, rendering the plaintiff's motion for direct certification and the Order to Show Cause issued by the Law Division moot. *Id.*

26. *Id.*

27. *See id.* at 1036–40 (summarizing arguments made by the parties).

28. N.J. STAT. ANN. § 19:13-20 (West 1999) (emphasis added).

29. *See Samson*, 814 A.2d at 1042 (holding that "[i]n the absence of explicit direction from the Legislature, . . . the relevant statutory provision [shall be construed] to promote the goals underlying [the] election laws—to ensure an opportunity for voters to exercise their right of choice . . . consonant with an orderly process for the handling of ballots"). The New Jersey Supreme Court decision sparked discussion about a political conspiracy. *See* Editorial, *Slander Against the Court*, STAR-LEDGER (Newark), Oct. 6, 2002, at 2 [hereinafter *Slander*]. Empirical studies of the voting patterns of judges have confirmed the existence of partisan judicial decision-making. *See* Emerson H. Tiller & Frank B. Cross, *A Modest Proposal for Improving American Justice*, 99 COLUM. L. REV. 215, 220–24 (1999) (focusing on data reflecting the voting patterns of federal judges). However, such talk of conspiracy sounds ludicrous given the fact that two of the justices, Chief Justice Deborah Poritz and Justice Peter Verniero, held top positions in Republican Christie Whitman's cabinet prior to taking the bench. *See Slander*, *supra* (commenting that if Poritz and Verniero "were doing the bidding of the Democratic machine, then it

statute and . . . prior precedents interpreting its provisions, and is informed by the knowledge that the substitution of a candidate at this time will not affect adversely the right of any qualified voter to participate in the election."[30] Accordingly, the court issued an order providing for the removal of Torricelli's name from the ballot and the replacement thereof with "the name of the candidate selected by the [Democratic] State Committee."[31]

Unhappy with the call made by the New Jersey Supreme Court, the parties opposing the Democrats' substitution play sought a new umpire for the political game.[32] The opposing parties applied for a stay with the United States Supreme Court.[33] The High Court, however, denied the application without comment.[34] Consequently, Frank Lautenberg was allowed to enter the New Jersey Senate race as the Democratic pinch hitter for the floundering Torricelli a mere five weeks before the general election.[35]

C. The Pinch Hitter Scores, but the Team Loses the Game: Results of the 2002 Senate Election

The success of the Democrats' strategic play in the New Jersey Senate race was immediately apparent as Lautenberg, the pinch hitter, advanced in the polls without delay.[36] After

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was a historic first"); *see also* Robert G. Seidenstein, *An Analysis: Court Independence Trumps Partisanship: Gutsy Decision Could Haunt Poritz*, 11 N.J. LAW. 40, Oct. 7, 2002, at 1 (weekly newspaper) (noting that the justices succeeded in making their decision "without retreating to their own political party roots").

30. *Samson*, 814 A.2d at 1042.

31. *Id.* at 1032.

32. A host of state and county officials joined New Jersey Attorney General David Samson, Douglas Forrester, and the other Senate candidates as defendants in the action brought by the New Jersey Democratic Party. *See id.* at 1028 (listing the defendants).

33. *See* Forrester v. N.J. Democratic Party, Inc., 537 U.S. 803 (2002); *see also* Jeff Zeleny, *GOP Asks Supreme Court to Step into N.J. Senate Case*, CHI. TRIB., Oct. 4, 2002, at 14 (noting that Senator Bill Frist of Tennessee hand-delivered an emergency petition to the United States Supreme Court, filed on behalf of Douglas Forrester, for a stay and reversal of the New Jersey Supreme Court decision). The appeal submitted to the U.S. Supreme Court argued that the "New Jersey Supreme Court usurped power which the United States Constitution places solely in the hands of the New Jersey Legislature." *Special Report with Brit Hume* (Fox News television broadcast, Oct. 3, 2002) (quoting the GOP's brief to the Supreme Court).

34. *See Forrester*, 537 U.S. 803.

35. *See* Robert S. Greenberger & Shailagh Murray, *High Court Spurns Challenge on New Jersey Ballot*, WALL ST. J., Oct. 8, 2002, at A4 (commenting that "Democrats were overjoyed by the high court's decision to stay out of a GOP challenge to the New Jersey court action").

36. *Id.* ("In the week since Mr. Torricelli bowed out of the race, Mr. Lautenberg has emerged slightly ahead in several polls and rallied the state Democratic party."). Although fifty-four percent of New Jersey's likely voters considered the substitution of Lautenberg for Torricelli "unfair," one in five of these voters said they would vote for

campaigning for only three weeks, Lautenberg assumed a commanding lead over the Republican candidate.[37] Lautenberg's brief campaign culminated with his winning the New Jersey Senate seat in the general election.[38] Yet, despite Lautenberg's win, Democrats failed to maintain control of the Senate.[39] Lautenberg scored, but the prized pennant went to the Republicans.

III. THE RULES OF THE GAME: CONSTITUTIONAL PROVISIONS PAST AND PRESENT

Prior to 1914, Senators were chosen by state legislatures in accordance with Article I, Section 3 of the United States Constitution.[40] The purpose of having the state legislatures select their Senators was twofold: (1) "it allayed the suspicions of the Anti-Federalists" who feared that the Constitution would create an overbearing federal authority,[41] and (2) it served as "an anchor

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Lautenberg anyway. Polling Institute, *Lautenberg Inches Ahead in Jersey Senate Race; 54% Say Democratic Candidate Swap Was Unfair*, Quinnipiac University, *at* http://www.quinnipiac.edu/x3452.xml (Oct. 7, 2002).

37. *See* Polling Institute, *Lautenberg Widens Lead in Jersey Senate Race, Quinnipiac University Poll Finds; Lead Grows Among Independents and Women Voters*, Quinnipiac University, *at* http://www.quinnipiac.edu/x3633.xml (Oct. 22, 2002). On October 22, 2002, Lautenberg enjoyed a fifty-two to forty-three percent lead over Forrester among likely voters. *Id.*

38. Dale Russakoff, *Democrats' Switch to Lautenberg Pays Off: Ex-Senator Defeats GOP's Forrester*, WASH. POST, Nov. 6, 2002, at A27; *see also Official List: Candidates for U.S. Senate*, State of New Jersey, Office of the Attorney General, New Jersey Division of Elections, *available at* http://www.state.nj.us/lps/elections/elec2002/results/2002g_us_state_sum_candidate_tally.pdf (Dec. 3, 2002) (reporting the tallied votes for the New Jersey Senate candidates).

39. *See* Stewart M. Powell et al., *GOP Wins Control of Senate*, SAN DIEGO UNION–TRIB., Nov. 6, 2002, at A1, *available at* 2002 WL 100353773 (proclaiming the Republican gain of control in the Senate while maintaining a House majority "a historic victory").

40. U.S. CONST. art. I, § 3, cl. 1, *amended by* U.S. CONST. amend. XVII, § 1 ("The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years; and each Senator shall have one Vote."). The election of Senators by state legislatures received "near-universal support" at the Constitutional Convention and the ratification conventions in the individual states. Todd J. Zywicki, *Beyond the Shell and Husk of History: The History of the Seventeenth Amendment and Its Implications for Current Reform Proposals*, 45 CLEV. ST. L. REV. 165, 183 (1997).

41. C.H. HOEBEKE, THE ROAD TO MASS DEMOCRACY: ORIGINAL INTENT AND THE SEVENTEENTH AMENDMENT 15–17 (1995). Virginia's delegate to the Constitutional Convention, George Mason, "made a point of declaring that the legislative election of senators would give the states some means of defending themselves against national encroachments." *Id.* at 44, 45 (internal quotation marks and footnote omitted). It should be noted, however, that some delegates thought state encroachment on the national government to be just as likely. *Id.* at 45; *see also* Zywicki, *supra* note 40, at 169 ("The primary institutional role played by the original Senate was to protect the structure of federalism and state sovereignty, in response to concerns by antifederalists and the public that an omnipotent federal government would swallow-up the state governments.").

against popular fluctuations."[42] Although senatorial elections by the state legislatures seemed to work well into the mid-1850s, the push for reform began as early as 1826 when direct election of Senators was first proposed.[43] Indeed, support for legislative election of Senators remained strong until the early 1870s when demands for direct elections "began in earnest."[44] Nearly one hundred years had passed since the initial proposal before the Constitution was amended to provide for direct election of Senators by the people.[45]

Finally, in 1913 the Seventeenth Amendment was adopted.[46] It provides in part, "The Senate of the United States shall be composed of two Senators from each State, *elected by the people thereof*, for six years; and each Senator shall have one vote."[47] In 1914 all senatorial elections were held by popular vote for the first time.[48]

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42. HOEBEKE, *supra* note 41, at 16 (internal quotation marks omitted). A Senate elected by the state legislatures would essentially "check[] the runaway tendencies of popular rule." *Id.* at 44–45 (discussing John Dickinson's arguments in favor of a Senate elected by legislatures). It would be an "anti-democratic body, patterned after the British House of Lords, and filled with the 'better men' of society." Zywicki, *supra* note 40, at 180. In contrast to the House of Representatives, "[t]he Senate would function 'with more coolness, with more system, and with more wisdom, . . . ' because its members would be drawn from the elite of society and as a result of its longer term and insulation from direct public pressure." *Id.* (quoting GORDON WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787, at 553 (1969)).

43. HOEBEKE, *supra* note 41, at 85. The direct election of Senators was first proposed in the House two years after popular voting was first recorded in a presidential election. *Id.*

44. *See* Zywicki, *supra* note 40, at 183. Traditionally, the demands for reform have been linked to partisan hostilities and deadlocks in some legislatures that resulted in vacant Senate seats as well as to the use of intimidation and bribery in the legislative selection process. *See* HOEBEKE, *supra* note 41, at 89–91. *But see* Zywicki, *supra* note 40, at 183–201 (acknowledging the traditional explanations for abandoning election by state legislatures but finding them to be inadequate bases for reform).

45. During the period from 1826 until 1913, proposed amendments providing for the election of Senators by popular vote were routinely rejected by Congress. *See* RALPH A. ROSSUM, FEDERALISM, THE SUPREME COURT, AND THE SEVENTEENTH AMENDMENT: THE IRONY OF CONSTITUTIONAL DEMOCRACY 183 (2001) (commenting that 188 proposals for the direct election of Senators were introduced before Congress during an 86-year period, 167 of them after 1880). Rebuffed by Congress, reformers sought to establish the popular vote at the state level. *See* HOEBEKE, *supra* note 41, at 146 (noting that reformers sought progress by "further curtailing the legislator's authority"). Though many attempts failed, Oregon finally blazed the trail in 1904 with its "foolproof method for dictating the outcome of Senate elections on the basis of direct popular opinion." *Id.* Fifteen states adopted the Oregon system between 1905 and 1908; twenty-eight states succeeded in implementing the popular election of Senators in some other form by the end of 1908. Zywicki, *supra* note 40, at 191.

46. U.S. CONST. amend. XVII (amending U.S. CONST. art. I, § 3, cl. 1); *see also* HOEBEKE, *supra* note 41, at 189–90 (noting that few amendments have been ratified more quickly than the Seventeenth Amendment).

47. U.S. CONST. amend. XVII, cl. 1 (emphasis added). According to Professor Zywicki, "[t]he Seventeenth Amendment did nothing more than formalize and make uniform the electoral practices of most of the states." Zywicki, *supra* note 40, at 192.

48. HOEBEKE, *supra* note 41, at 190 (remarking that the direct elections had little

Despite the shift of the senatorial selection process from the legislature to the populace, state legislatures retained the power to determine when, where, and how the election process would take place.[49] It is therefore not surprising that election laws adopted by the various state legislatures are often unique to those states.[50] Although state legislatures determine the processes, the Constitution places "the onerous burden of determining whether a state's senators [have], in fact, been properly elected" on the Senate.[51]

IV. THE UMPIRE NEEDS GLASSES: A CRITIQUE OF THE NEW JERSEY SUPREME COURT OPINION IN *SAMSON*

The New Jersey Supreme Court essentially held that the vacancy statute, section 19:13-20 of the New Jersey Statutes Annotated, "does not preclude the possibility of a vacancy occurring within fifty-one days of the general election."[52] As a corollary to this holding, the court also determined that such a vacancy may be filled by a candidate duly selected by the party's State Committee.[53] The court averred that its decision was "directed by principle and precedent."[54] This Part scrutinizes not only the principles and precedents drawn on by the court, but also the court's interpretation of the relevant statute.

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impact on the make-up of the Senate).

49. *See* U.S. CONST. art. I, § 4, cl. 1. The Constitution provides: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." *Id.*

50. State autonomy in the creation of election laws is perhaps one reason explaining the refusal of the U.S. Supreme Court to hear the *Samson* case. Although the Court did not provide an explanation, one may presume that the Justices "did not see a parallel between the New Jersey wrangle over Senate candidates and the [C]ourt's experience in 2000, when it stepped into a state ballot fight in Florida and issued a bitterly divided decision" in the Bush-Gore election. Lyle Denniston, *Supreme Court Stays Out of N.J. Race: Refusal to Intervene in Political Struggle Lets Lautenberg Run*, BOSTON GLOBE, Oct. 8, 2002, at A2, *available at* 2002 WL 4153325.

51. ROSSUM, *supra* note 45, at 184. The Constitution provides, in pertinent part: "Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members . . . ." U.S. CONST. art. I, § 5, cl. 1.

52. N.J. Democratic Party, Inc. v. Samson, 814 A.2d 1025, 1027 (2002) (issuing the court order).

53. *See* N.J. Democratic Party, Inc. v. Samson, 814 A.2d 1028, 1032 (2002), *cert. denied sub nom.* Forrester v. N.J. Democratic Party, Inc., 537 U.S. 1083 (2002).

54. *Id.* at 1036.

A. Champion of Voters' Rights

The New Jersey Supreme Court opened its legal analysis in *Samson* by championing voter franchise.[55] The *Samson* court spoke passionately about voters' rights, referring to them as "the citizen's sword and shield"[56] and "the keystone of a truly democratic society."[57] The court's heralding of the voting franchise parallels the rhetoric of the U.S. Supreme Court in *Wesberry v. Sanders*.[58] The Supreme Court declared in *Wesberry* that "[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live."[59] The Court continued: "Other rights, even the most basic, are illusory if the right to vote is undermined."[60] This section examines the voting franchise and questions whether the ardent defense thereof by the *Samson* court is in accord with the principles set out by the U.S. Supreme Court.

1. Voter Franchise. For the New Jersey Supreme Court, the concept of election law is a simple one: "At its center is the voter, whose fundamental right to exercise the franchise infuses our election statutes with purpose and meaning."[61] Accordingly, the New Jersey opinion adopts the following as a primary tenet: "'Election laws are to be liberally construed so as to effectuate their purpose. They should not be construed so as to deprive voters of their franchise or so as to render an election void for technical reasons.'"[62] The U.S. Supreme Court, however, has established that the right to vote and the right to associate for political reasons are not absolute.[63] "Election laws," the Court has acknowledged, "will invariably impose

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55. *Id.* at 1033–34.

56. *Id.* at 1033.

57. *Id.* (citing Gangemi v. Rosengard, 207 A.2d 665 (N.J. 1965)). The court also took note of the fact that, prior to the age of universal suffrage, the hoarding of the voting franchise "testifies to its exalted position in the real scheme of things." *Id.*

58. 376 U.S. 1, 17–18 (1964) (addressing the malapportionment of congressional representatives among the states).

59. *Id.* at 17.

60. *Id.*; *see also Samson*, 814 A.2d at 1033 (adopting the language of the U.S. Supreme Court).

61. *Samson*, 814 A.2d at 1033.

62. *Id.* (quoting Chief Justice Vanderbilt in *Kilmurray v. Gilfert*, 91 A.2d 865, 867 (N.J. 1952)).

63. Burdick v. Takushi, 504 U.S. 428, 433 (1992) (citing Munro v. Socialist Workers Party, 479 U.S. 189, 193 (1986)). In *Burdick*, the Supreme Court held that Hawaii's prohibition of write-in voting did not unreasonably infringe its citizens' rights under the First and Fourteenth Amendments. *Id.* at 441–42.

some burden upon individual voters."[64] Therefore, a law that creates some burden upon the right to vote will not automatically be invalidated.[65]

2. The Right of Choice. According to the New Jersey justices, the right of choice is inextricably linked to voter franchise.[66] Quoting Chief Justice Weintraub, the *Samson* court asserted:

> "[T]he right to vote would be empty indeed if it did not include the right of choice for whom to vote . . . . 'The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government.'"[67]

It is clear from the foregoing that the New Jersey Supreme Court highly reveres the voter's right of choice.

The United States Supreme Court likewise holds the right of choice in high regard.[68] Yet, despite the value placed on the right of choice, the Supreme Court has said that "limiting the choice of candidates to those who have complied with state election law requirements is the prototypical example of a regulation that, while it affects the right to vote, is eminently reasonable."[69] The nation's highest court has also addressed the misconception that "voters are entitled to cast their ballots for unqualified candidates," stating that it "appears to be driven by the assumption that an election system that imposes any restraint on voter choice is unconstitutional."[70] The Supreme Court stated unequivocally that this thinking "is simply wrong."[71] The Court

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64. *Id.* at 433. "Each provision of a code, 'whether it governs the registration and qualifications of voters, the selection and eligibility of candidates, or the voting process itself, inevitably affects—at least to some degree—the individual's right to vote and his right to associate with others for political ends.'" *Id.* (quoting Anderson v. Celebrezze, 460 U.S. 780, 788 (1983)).

65. A state's regulatory interests are generally sufficient to justify state election laws that place reasonable, nondiscriminatory restrictions on the constitutional rights of voters under the First and Fourteenth Amendments. *See id.* ("[T]o require that the regulation be narrowly tailored to advance a compelling state interest . . . would tie the hands of States seeking to assure that elections are operated equitably and efficiently.").

66. *Samson*, 814 A.2d at 1034 ("The right of choice as integral to the franchise itself, unlike universal suffrage, is grounded in the core values of the democratic system established by the framers of our Federal Constitution when this country was founded.").

67. *Id.* (alterations in original) (quoting Gangemi v. Rosengard, 207 A.2d 665, 667 (N.J. 1965) (quoting Reynolds v. Sims, 377 U.S. 533, 555 (1964))).

68. "Undeniably the Constitution of the United States protects the right of all qualified citizens to vote, in state as well as federal elections." *Reynolds*, 377 U.S. at 554.

69. *Burdick*, 504 U.S at 440 n.10 (citing *Celebrezze*, 460 U.S. at 788).

70. *Id.* (responding to Justice Kennedy's dissenting opinion).

71. *Id.*

has recognized that, "as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes."[72] Consequently, the right to choice, like the voting franchise, is not absolute.

3. The Beneficiaries of Voter Franchise. When a case or controversy arises implicating the voting franchise, the intended beneficiary of said right may be a relevant factor in determining whether the right has been infringed. There is no consensus, however, as to who should benefit from voting rights. Indeed, the U.S. Supreme Court has recognized that "the rights of voters and the rights of candidates do not lend themselves to neat separation."[73]

Though the rights of voters and those of candidates may not lend themselves to neat separation, there is a clear division among the various states as to who the beneficiary of the voting franchise should be. The Supreme Courts of New Mexico and Utah have designated the voter, not the candidate, to be the beneficiary.[74] New Mexico essentially adopted Kentucky's approach, finding that "an election is only 'free and equal' if the ballot allows the voter to choose between the *lawful* candidates for that office."[75] Whereas the New Mexico and Utah courts limit the benefits of voter franchise to the voters, the Missouri Supreme Court has extended it to the candidate.[76]

Given the division among the various state courts, the question arises as to whom the New Jersey Supreme Court is seeking to protect—the voter or the candidate? The New Jersey

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72. Storer v. Brown, 415 U.S. 724, 730 (1974) (noting that it is unlikely that all or even a large part of the comprehensive election codes developed by the states to regulate the time, place, and manner of elections, the registration and qualifications of voters, and the selection and qualification of candidates would fail to pass constitutional muster).

73. Bullock v. Carter, 405 U.S. 134, 143 (1972) (noting that "laws that affect candidates always have at least some theoretical, correlative effect on voters"); *see also Celebrezze*, 460 U.S. at 781 (recognizing that the Ohio filing deadline "burdens the associational rights of independent voters and candidates" alike).

74. *See* Gunaji v. Macias, 31 P.3d 1008, 1013 (N.M. 2001) ("As mere politicians or candidates for office, they have no constitutional right to be voted *for*."); Anderson v. Cook, 130 P.2d 278, 285 (Utah 1942) (noting that a provision of the Constitution guaranteeing the right of suffrage does not "guarantee any person the unqualified right to appear as a candidate").

75. *Gunaji*, 31 P.3d at 1016 (emphasis added) (commenting that "Kentucky has the most developed jurisprudence of any state on what [the 'free and equal'] clause means in relation to ballot problems").

76. *See* Kasten v. Guth, 375 S.W.2d 110, 114 (Mo. 1964) (holding that the right of write-in candidates to be on the ballot is protected); Preisler v. City of St. Louis, 322 S.W.2d 748, 753 (Mo. 1959) (stating that provisions in the election code give every eligible person the right to become a candidate for office).

Supreme Court's opinion focused primarily on the right of choice; thus, it is a safe presumption that the court had the voter in mind as the beneficiary of the voting franchise.

4. Primary Choices. In the New Jersey Supreme Court's valiant attempt to protect the voters' right of choice, it overlooked the fact that voters had the opportunity to exercise their right of choice in the primary elections. According to the United States Supreme Court:

> The direct party primary . . . is not merely an exercise or warm-up for the general election but an integral part of the entire election process, the initial stage in a two-stage process by which the people choose their public officers. It functions to winnow out and finally reject all but the chosen candidates.[77]

The New Jersey Supreme Court has similarly acknowledged the importance and validity of the primary process:

> A primary . . . is a medium for expressing the preferences of those united under the party standard; and, while protective legislative measures are to be enforced according to their spirit, a construction that would nullify votes cast by qualified primary electors is to be avoided unless that purpose be expressed in clear and unambiguous terms.[78]

Torricelli was unopposed in the Democratic primary.[79] Because he was an incumbent Senator, the New Jersey Democrats, no doubt, deemed Torricelli to be their best candidate for the Senate and, in fact, did not even consider other potential candidates.[80] By permitting Torricelli's untimely withdrawal from the race and the inclusion of Lautenberg on the ballot as his substitute, the New Jersey Supreme Court effectively overruled the choice made by voters in the primary election.

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77. *Storer*, 415 U.S. at 735 (footnote omitted) (discussing the California provision prohibiting defeated primary candidates from running as independents).

78. Wene v. Meyner, 98 A.2d 573, 577 (N.J. 1953).

79. Refer to notes 9–10 *supra* and accompanying text.

80. *See* Kinney, *supra* note 9. "Like it or not, incumbents win, and win often . . . ." Mark R. Brown, *Popularizing Ballot Access: The Front Door to Election Reform*, 58 OHIO ST. L.J. 1281, 1284 (1997) (studying the effects of restrictive fees and signature requirements on incumbency). "[T]he incumbent's advantage may be so great that it scares away all potential challengers. In 1990, 19.5 percent of House incumbents running faced no major party challenge at all." Einer Elhauge, *Are Term Limits Undemocratic?*, 64 U. CHI. L. REV. 83, 128 (1997) (footnotes omitted).

B. "Mr. Umpire, I respectfully protest your interpretation and application of the rules in this situation."[81]

The New Jersey Supreme Court concluded its opinion by emphasizing that "[its] decision is rooted in the statute and . . . prior precedents interpreting its provisions."[82] However, close reading of the statute and precedential case law reveals that the roots of the opinion are very shallow indeed. This section focuses on the statute; the section that follows reviews established case law.

1. Statutory Interpretation Generally. The goal of statutory interpretation is to discover the meaning of law.[83] The method of interpretation may be subjective, whereby "the meaning of the statute can be nothing other than the will of the legislator," or it may be objective, whereby the text of the statute determines the meaning.[84] Regardless of which interpretive method is applied to the vacancy statute in question, the product of interpretation does not match up with the meaning ascribed to it by the New Jersey Supreme Court.

2. Plain Meaning of the Statute. Objective interpreters, or textualists, often look first to the plain meaning of the statute.[85] Based on the relevant text in the vacancy statute,[86] the *Samson* court ascertained "an absolute right in a State committee to replace a candidate up to and including the forty-eighth day before the general election."[87] This reading seems to focus solely

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81. *Dear Coach . . . . About that Protest . . . .*, Amateur Baseball Umpire Home Page, *at* http://www.amateurumpire.com/coach/coach10.htm (last visited July 26, 2003) (advising coaches on how to properly protest an umpire's ruling).

82. N.J. Democratic Party, Inc. v. Samson, 814 A.2d 1028, 1042 (N.J. 2002), *cert. denied sub nom.* Forrester v. N.J. Democratic Party, Inc., 537 U.S. 1083 (2002).

83. *See* EDUARDO GARCÍA MÁYNEZ, INTRODUCCIÓN AL ESTUDIO DEL DERECHO (33d ed. 1982), *selected sections translated in* 30 U. MIAMI INTER-AM. L. REV 131, 140 (1998) (Robert S. Barker trans.).

84. *Id.* at 140–41. Proponents of subjective interpretation argue: "The statute is the work of the legislative branch; the legislature makes use of the statute in order to establish law; consequently, the meaning of the statute should be that meaning that the legislator wanted to state, since the statute is the legislator's statement." *Id.* at 141 (noting that "[t]his thesis does not take into account the fact that the wish of the legislator does not always coincide with that which is expressed in the statute"). In contrast, objective interpreters maintain that "legal texts have a meaning of their own, implicit in the signs of which they are composed, and independent of the actual or presumed will of their authors." *Id.*

85. Rickie Sonpal, Note, *Old Dictionaries and New Textualists*, 71 FORDHAM L. REV. 2177, 2195 (2003).

86. Refer to note 28 *supra* and accompanying text (quoting N.J. STAT. ANN. § 19:13-20 (West 1999)).

87. *Samson*, 814 A.2d at 1037.

on section (d) of the statute and is, therefore, not quite accurate.[88] The court neglected to take into account the clear and unambiguous stipulation that the vacancy which necessitates the replacement of a candidate cannot occur within fifty-one days of the election.[89]

There is nothing vague or confusing about the statutory limitation on vacancies; it clearly states that no vacancy shall occur within fifty-one days of the election.[90] When "the terms of a statute are plain, unambiguous, and explicit," according to Professor Harold Southerland, "the courts are not at liberty to go outside of the language to search for a meaning which it does not reasonably bear in the effort to ascertain and give effect to what may be imagined to have been or not to have been the intention of [the legislature]."[91] Thus, under the plain language of the statute, Torricelli's untimely withdrawal did not create a vacancy because a vacancy *cannot* occur during the fifty-one days preceding the election. Consequently, there was no opening on the ballot to fill and, as defendants rightly argued, "the voters must choose between other candidates and a Democratic Party candidate whose name must remain on the ballot even though he has withdrawn."[92]

3. Expressio Unius Est Exclusio Alterius.[93] In support of its opinion, the *Samson* court concentrated not so much on what the statute says, but more so on what it does not say. The court repeatedly emphasized that New Jersey election law does not specifically address vacancies that occur outside of the statutory period.[94] Because there was no explicit language found within the

88. Subsection (d) of the statute states in relevant part: "A selection made pursuant to this section shall be made not later than the 48th day preceding the date of the general election . . . ." N.J. STAT. ANN. § 19:13-20(d).

89. *See* § 19:13-20 ("In the event of a vacancy, howsoever caused, . . . [the] vacancy shall occur not later than the 51st day before the general election . . . ."). It should be noted that even if the reading of the statute given by the court were accurate, it does not provide for the replacement of a candidate thirty-six days prior to the election as in the instant case.

90. *See id.*

91. Harold P. Southerland, *Theory and Reality in Statutory Interpretation*, 15 ST. THOMAS L. REV. 1, 27 (2002).

92. *Samson*, 814 A.2d at 1038 (adding that if the withdrawn candidate should win the election, the governor can temporarily appoint someone to fill the Senate seat until a special election or general election is held pursuant to statute).

93. *Expressio unius est exclusio alterius* is defined as "[a] canon of construction holding that to express or include one thing implies the exclusion of the other, or of the alternative." BLACK'S LAW DICTIONARY 602 (7th ed. 1999).

94. The court stated: "Here, we confront a vacancy created outside of the statutory window. Nothing in [New Jersey Statutes Annotated section] 19:13-20 addresses the precise question whether a vacancy that occurs between the forty-eighth day and the

statute addressing the filling of vacancies that occur within forty-eight days of an election, the court concluded that the circumstances in *Samson* did not fall under the statute.[95]

It is true that the vacancy statute does not explicitly address this matter; however, a ban on the filling of vacancies occurring within forty-eight days of the election is implicitly provided by the statute. When the traditional hermeneutical tool *expressio unius est exclusio alterius* is applied, it becomes clear that the express provisions for filling vacancies that occur more than fifty-one days prior to an election necessarily exclude the filling of vacancies occurring after that time.[96] The court's reading of the statute would compel the legislature to create convoluted statutes that explicitly state what the law does and does not provide for.

4. Words Have Distinct Meanings. One of the guiding principles of statutory interpretation is that every word has a distinct meaning.[97] The New Jersey Legislature used the word "shall" in the vacancy statute, thereby giving the fifty-one day limitation mandatory construction.[98] The New Jersey Supreme Court, however, has deemed the limitation to be directory, not

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general election can, in that circumstance, be filled." *Samson*, 814 A.2d at 1037. The court added, "[section] 19:13-20 simply does not contain a legislative declaration that the filling of a vacancy within forty-eight days of the election is prohibited." *Id.* at 1038.

The court's decision caused one law professor to muse: "This imaginative interpretation leaves one wondering why the legislature would provide detailed rules for dealing with vacancies that occur before the 51st day, while giving courts an implicit license to invent new rules on the fly for vacancies that arise later." Nelson Lund, *The Replacements*, WALL ST. J., Oct. 11, 2002, at A12.

95. The court briefly reviewed parallel statutes from the states of New York, Colorado, and Washington and concluded that the fact that "other state legislatures have spoken clearly on [the issue] highlights the lack of a legislative declaration in the New Jersey statute." *Samson*, 814 A.2d at 1037–38 (footnote omitted).

96. *But see* Editorial, *Interpreting Election Laws*, 170 N.J. L.J. 22, 22 (2002) (arguing that the "use of inferential logic and axioms of construction to interpret language already presupposes that the text of the statute itself does not provide a definitive answer").

97. *See, e.g.*, Wisconsin *ex rel.* Marberry v. Macht, 665 N.W.2d 155, 160–61 (Wis. 2003) (noting that "when the legislature uses the words 'shall' and 'may' in a particular statutory section, [it] indicat[es] the legislature was aware of the distinct meanings of the words"); State Farm Fire & Cas. Co. v. Old Republic Ins. Co., 644 N.W.2d 715, 718–19 (Mich. 2002) (commenting that the dissent failed to "give effect to the distinct meanings of the words 'a' and 'the'" and that by so doing, "[t]he dissent essentially rewrites the statute"); Coutts v. Wis. Ret. Bd., 562 N.W.2d 917, 924 (Wis. 1997) ("*Because the two words can and should be given distinct meanings*, we conclude that 'paid' does not come within the meaning of 'payable.'" (emphasis added)); Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 403–04 (1950).

98. *See* N.J. STAT. ANN. § 19:13-20 (West 1999); *see also* Alabama v. Bozeman, 533 U.S. 146, 153 (2001) (acknowledging that "shall" connotes a command).

mandatory,[99] thereby confusing the meanings of "shall" and "may." These terms are not synonymous.[100] In giving "shall" directory construction, the court did not interpret the statute—it rewrote it and, in so doing, exceeded the bounds of its authority.[101]

The *Samson* court recognized that it had perhaps wandered a bit too far into left field with its unorthodox ascription of directive meaning to the term "shall." In anticipation of the criticism the opinion would generate, the court emphasized that it is "directed by principle and precedent" in construing New Jersey election laws[102] and quoted a portion of its 1991 *Catania v. Haberle*[103] decision:

> "Concerns have been expressed that by giving this deadline provision a directory, rather than mandatory, construction we will create doubts about many other sections of the election law, a law that is driven by deadlines. Our only response is that this Court has traditionally given a liberal interpretation to that law, 'liberal' in the sense of construing it to allow the greatest scope for public participation in the electoral process, to allow candidates to get on the ballot, to allow parties to put their candidates on the ballot, and most importantly to allow the voters a choice on Election Day."[104]

The *Catania* court, however, had kept its options open by adding: "'Obviously, there will be cases in which provisions must be interpreted strictly, mandatorily, for in some cases it will be apparent that that interpretation serves important state interests, including orderly electoral processes.'"[105] In essence, through precedent the New Jersey Supreme Court has reserved the right to determine whether a statute is mandatory or

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99. *Samson*, 814 A.2d at 1034 (citing Kilmurray v. Gilfert, 91 A.2d 865 (N.J. 1952)).

100. In contrast to "shall," the word "may" is usually "employed to imply permissive or discretional, and not mandatory, action or conduct." Shea v. Shea, 537 P.2d 417, 418 (Okla. 1975). "It will not be treated as a word of command unless there is something in the context or subject matter of the act to indicate that it was used in that sense." Bloom v. Tex. State Bd. of Exam'rs of Psychologists, 475 S.W.2d 374, 377 (Tex. Civ. App.—Austin 1972), *rev'd*, 492 S.W.2d 460 (Tex. 1973). Similarly, the context in which the term "shall" appears must be very persuasive before "shall" can be softened into a term connoting mere permission. People v. O'Rourke, 13 P.2d 989, 992 (Cal. Dist. Ct. App. 1932).

101. *See* Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26, 35 (1998) (stating that "the mandatory 'shall' . . . normally creates an obligation impervious to judicial discretion"). Members of the New Jersey Legislature rebuked the court, stating: "It is not the role of the Judiciary to re-interpret the mandatory nature of the term 'shall' as used in regard to the observation of the 51 day deadline and read for it the permissiveness of the term 'may.'" A.B. 2878, 210th Leg. (N.J. 2002).

102. *Samson*, 814 A.2d at 1036.

103. 588 A.2d 374 (N.J. 1991).

104. *Samson*, 814 A.2d at 1036 (quoting *Catania*, 588 A.2d at 379).

105. *Id.* (quoting *Catania*, 588 A.2d at 379).

directive in nature regardless of the language used by the legislature.

5. Legislative Intent. Maintaining that the vacancy statute was ambiguous and inexplicit, the New Jersey Supreme Court turned its attention to the legislature's intent in creating the statute.[106] The New Jersey justices determined that "the Court must consider the 'fundamental purpose' of the enactment, and, where it 'does not expressly address a specific situation . . . interpret it [in a manner] consonant with the probable intent of the draftsman had he anticipated the matter at hand.'"[107] The New Jersey Legislature certainly had some purpose in mind when it adopted the vacancy statute, for statutes "are not random groupings of words; they are intended to accomplish something, to remedy some perceived mischief or defect in the existing social order."[108]

The legislative purposes of the vacancy statute have been recognized by New Jersey courts. The Superior Court of New Jersey, Law Division, Camden County, acknowledged as one of the goals of New Jersey's election laws the assurance of "a quick selection of someone to fill the vacancy so that the public would have as much time as possible to evaluate that candidate between the time of selection and the date of the election."[109] The statute was likewise "designed to permit absentee voters, particularly military and civilian voters dwelling abroad, sufficient time to apply for, receive, execute and return their ballots."[110] The *Samson* court reiterated the *Kilmurray* court's statements regarding legislative intent by saying: "There is . . . no question but that the Legislature enacted [New Jersey Statutes Annotated section] 19:13-20 'to afford the various election officials sufficient time in which to attend to the mechanics of preparing for the general election.'"[111]

The *Samson* court found the legislative concerns regarding absentee ballots and election mechanics not to be particularly

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106. *Id.* at 1038–39.

107. *Id.* at 1038 (alterations in original) (quoting State, Township of Pennsauken v. Schad, 733 A.2d 1159, 1166 (N.J. 1999)).

108. Southerland, *supra* note 91, at 20–21. "Karl Llewellyn made the same point when he wrote that '[i]f a statute is to make sense, it must be read in the light of some assumed purpose. A statute merely declaring a rule, with no purpose or objective, is nonsense.'" *Id.* (quoting Llewellyn, *supra* note 97, at 400).

109. Fulbrook v. Reynolds, 698 A.2d 564, 567–68 (N.J. Super. Ct. Law Div. 1997) (discussing the statutory provisions for the filling of vacancies in general elections).

110. *Samson*, 814 A.2d at 1039 (internal quotation marks omitted) (relying on the Assembly Committee Statement to the 1985 amendments of the statute).

111. *Id.* (quoting Kilmurray v. Gilfert, 91 A.2d 865, 867 (N.J. 1952)).

relevant to the case at hand.[112] But the court never addressed the voting public's need for time to evaluate the candidates. During the course of a normal election, major party candidates are generally in the public eye for eight to ten months prior to the election.[113] The court did not concern itself with the fact that New Jersey voters would have only thirty-six days to evaluate a replacement candidate for an office of great import.

Instead of focusing on what the legislature did intend, the court chose to rest its opinion on what the law-making body did not intend. The court stated: "We do not believe that our Legislature intended to limit voters' choice in a case where there is sufficient time to place a new candidate on the ballot *and* conduct the election in an orderly manner."[114] With this statement, the court again assumed the role of champion of voter franchise.[115] As the defender of suffrage, the court relied on its own understanding of what the underlying basis of the statute should be, namely the right of choice.[116]

The *Samson* court succeeded in bending—some would say breaking—the statute to correspond to the court's desired outcome in the case. The justices defended their decision, declaring: "If that is not what the Legislature intended, we anticipate that it will amend Section 20 accordingly."[117] Given the court's apparent willingness to attribute its own intent and meaning to the statute, this statement almost has a ring of defiance to it. The legislature, however, could not be cowed, for it has responded to the court's opinion with two amendment

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112. The court was convinced that there was sufficient time to make the necessary ballot adjustments and to reissue absentee ballots before the election. *See id.* at 1032–33.

113. *See* Mansnerus, *supra* note 9.

114. *Samson*, 814 A.2d at 1039. The court also quoted from its *Catania* decision: "This Court has never announced that time limitations in election statutes should be construed to bar candidates from the ballot when that makes no sense and when it is obviously not the Legislature's intent." *Id.* at 1036 (quoting Catania v. Haberle, 588 A.2d 374, 379 (N.J. 1991)).

115. Refer to Part IV.A *supra* (heralding the right to vote as the most fundamental of all rights).

116. The *Samson* court asserted:

> In the absence of explicit direction from the Legislature, we have construed the relevant statutory provision to promote the goals underlying our election laws—to ensure an opportunity for voters to exercise their right of choice in the November 2002 senatorial election consonant with an orderly process for the handling of ballots.

814 A.2d at 1042 (citation omitted).

117. *Id.* at 1039 (determining that if the replacement of Torricelli's name on the ballot were administratively feasible, then the general intent and underlying purpose of the statute, namely voter franchise and right of choice, would be furthered).

proposals, neither of which adopts the court's reading of the statute.[118]

C. Same Game, Different Play: The Court's Reliance on Precedent

Precedent, according to *Black's Law Dictionary*, is "[a] decided case that furnishes a basis for determining later cases involving similar facts or issues."[119] The *Samson* court devoted much of its opinion to the discussion of previously decided cases.[120] Established case law provided the principles used by the court to support its decision. However, a survey of binding and persuasive authorities suggests that the New Jersey Supreme Court's decision is not as well grounded in precedent as the court perceived it to be.

1. New Jersey Cases Cited by the Court. The *Samson* court extracted many of its legal principles from prior New Jersey cases involving election law. However, the cases cited by the *Samson* court are not directly on point and can be easily distinguished from the case at hand.

a. *Wene v. Meyner*.[121] The court extracted the following principle from the *Wene* case: "A statute is not to be given an arbitrary construction, according to the strict letter, but rather one that will advance the sense and meaning fairly deducible from the context."[122] The principle itself seems suitable enough, but the circumstances that gave rise to it are quite different from those in *Samson*. In *Wene*, the plaintiff, a primary loser, sought to have the votes of those voters who had failed to sign a declaration required by law declared illegal and set aside.[123] As there was no evidence of malconduct, fraud, or corruption, the *Wene* court declined to impeach the outcome of the primary.[124] This case is easily distinguished from *Samson* because the

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118. *See* A.B. 2878, 210th Leg. (N.J. 2002) (reprimanding the court for overstepping its boundaries); S.B. 2096, 210th Leg. (N.J. 2002) (enforcing the 51-day limit to replace a vacancy).

119. BLACK'S LAW DICTIONARY, *supra* note 93, at 1195.

120. *See Samson*, 814 A.2d at 1033–36 (discussing the decisions of the New Jersey and United States Supreme Courts and the New Jersey lower courts).

121. 98 A.2d 573 (N.J. 1953).

122. *Id.* at 578 (cited in *Samson*, 814 A.2d at 1035).

123. *Id.* at 574–75.

124. *Id.* at 578. The court noted that the unwitting omission might lead to the indictment of local election officials, but that "absent malconduct, fraud or corruption," the election result would not be impeached. *Id.*

complaint in *Wene* arose after the election.[125] There is a marked difference in the treatment of pre- and post-election issues because election results are not to be casually voided.[126]

b. *Gangemi v. Rosengard*.[127] According to the *Samson* court, "*Gangemi* teaches that limitations on the right of voter choice in some circumstances will override other considerations."[128] The right of choice, however, was not the issue in *Gangemi*. The issue in *Gangemi* was whether the residence requirement imposed by the Faulkner Act was unconstitutional because of the arbitrary differentiation between cities and municipalities.[129] The *Gangemi* teachings to which the *Samson* court referred were, therefore, nothing more than dicta.

c. *Catania v. Haberle*.[130] In *Catania*, the *Samson* court also managed to find a principle that supports its opinion.[131] Unlike the preceding cases, *Catania* bears some similarity to *Samson* because it implicates the same statute.[132] In *Catania*, the vacancy in question occurred when the Republican Party primary failed to produce a candidate.[133] The Republican County Committees did not give timely notice of a meeting held for the purpose of filling

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125. *Id.* at 574.

126. *See, e.g.*, Jones v. State *ex rel.* Wilson, 55 N.E. 229, 233 (Ind. 1899). The court stated:

> All provisions of the election law are mandatory, if enforcement is sought before election in a direct proceeding for that purpose; but after election all should be held directory only, in support of the result, unless of a character to effect an obstruction to the free and intelligent casting of the vote or to the ascertainment of the result, or unless the provisions affect an essential element of the election, or unless it is expressly declared by the statute that the particular act is essential to the validity of an election, or that its omission shall render it void.

Id.

127. 207 A.2d 665 (N.J. 1965).

128. N.J. Democratic Party, Inc. v. Samson, 814 A.2d 1028, 1035 (N.J. 2002), *cert. denied sub nom.* Forrester v. N.J. Democratic Party, Inc., 537 U.S. 1083 (2002).

129. *See Gangemi*, 207 A.2d at 669–70 (finding the Faulkner Act to be unconstitutional).

130. 588 A.2d. 374 (N.J. 1990).

131. The *Catania* court stated:

> The general rule applied to the interpretation of our election laws is that absent some public interest sufficiently strong to permit the conclusion that the Legislature intended strict enforcement, statutes providing requirements for a candidate's name to appear on the ballot will not be construed so as to deprive the voters of the opportunity to make a choice.

Id. at 376 (quoted in *Samson*, 814 A.2d at 1036).

132. *See id.* at 375–76 (noting that if a vacancy was to be filled, N.J. STAT. ANN. § 19:13-20 would govern the procedure).

133. *Id.* at 374–75.

the vacancy as required by statute.[134] The *Catania* court held that the statutory deadline was not mandatory.[135]

Although *Catania* sounds very similar to the *Samson* case, it too may be easily distinguished. First, the vacancy in *Catania* occurred prior to the fifty-first day preceding the special election[136] and was, therefore, a legitimate vacancy as defined by the statute. Second, if the vacancy had not been filled, "the Democratic candidate's name would have been the *only* name on the ballot."[137] Third, the *Catania* court recognized the forty-eight-day time limit imposed by New Jersey Statutes Annotated section 19:13-20(d) as the requirement that must be met when filling a vacancy.[138]

d. *Kilmurray v. Gilfert*.[139] The *Samson* court relied heavily on *Kilmurray* in its opinion.[140] Of the cases cited by the *Samson* court, *Kilmurray* comes closest to matching the facts and issues addressed in *Samson*. In *Kilmurray*, as in *Samson*, the Democratic Party was allowed to fill an untimely vacancy.[141] However, in contrast to *Samson*, the petition of nomination of a replacement candidate was filed before the statutory deadline.[142] The *Kilmurray* court "deemed the thirty-seven day [vacancy] limitation to be directory and not mandatory, essentially holding that so long as the new candidate was selected by the committee within the thirty-four day [filing] period, that candidate had an absolute right to appear on the ballot."[143]

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134. *Id.* at 375–76 (explaining that section 19:13-20(b)(1) required notice to be given within seven days of the occurrence of the vacancy). Notice was given in late August or early September; in compliance with the statute, it should have been given in early June. *Id.* at 376.

135. *Id.* at 379 ("Our holding has no implication of the validity of the seven-day time limit. It is perfectly valid. All we hold is that it is not mandatory.").

136. *See id.* at 374–75 (implying that the vacancy occurred and could be filled within the time frame allowed by statute).

137. *Id.* at 375 (emphasis added).

138. *Id.* at 377–78.

139. 91 A.2d 865 (N.J. 1952).

140. *Kilmurray* provided the *Samson* court with the following tenet: "Election laws are to be liberally construed so as to effectuate their purpose. They should not be construed so as to deprive voters of their franchise or so as to render an election void for technical reasons." *Id.* at 867 (citations omitted) (quoted in N.J. Democratic Party, Inc. v. Samson, 814 A.2d 1028, 1033 (N.J. 2002), *cert. denied sub nom.* Forrester v. N.J. Democratic Party, Inc., 537 U.S. 1083 (2002)).

141. *Id.* at 866, 868. At the time *Kilmurray* was decided, the statute provided that a vacancy generally could not occur during the thirty-seven days preceding the election. *See id.* at 867.

142. *Id.* at 867. At the time, the vacancy statute provided that the filing of the name of a new candidate must be achieved prior to the thirty-fourth day preceding the election. *Id.*

143. *Samson*, 814 A.2d at 1034 (summarizing the holding of the *Kilmurray* court).

The fact that the candidate in *Kilmurray* had died unexpectedly, rather than willfully withdrawing because he was behind in the polls, is not particularly relevant.[144] A relevant point is that the *Kilmurray* court did not extend or ignore the deadline for placing a new candidate on the ballot.[145] To the contrary, the holding stipulated that the new candidate must be selected prior to the filing deadline.[146] This was not the case in *Samson*. Thus, the holding in *Kilmurray* may give legs to the opinion of the court in *Samson*, but those legs are shaky at best.

2. New Jersey Cases Not Cited by the Court. In its search for precedent, the New Jersey Supreme Court overlooked two cases directly on point.

a. *Conroy v. Nulton*.[147] Like *Samson*, *Conroy* involved candidate withdrawal under the New Jersey vacancy statute.[148] Conroy, the Democratic candidate for the Office of City Councilman, wished to withdraw from the election.[149] He presented his written resignation to the county clerk who refused to accept it.[150] Although the facts are somewhat vague, the court's opinion is not. The *Conroy* court asserted "that the right of a candidate to resign is an inherent right of the individual, *subject to reasonable legislative restrictions*."[151] The court added: "In the present situation, the legislature has seen fit to limit the exercise of that right to some date 'not later than thirty-seven days before the general election.'"[152]

b. *Introcaso v. Burke*.[153] *Introcaso* follows the New Jersey Supreme Court's lead in *Conroy*. In an opinion written by then Judge William J. Brennan, the New Jersey Superior Court stated:

> The right of a candidate for public office to resign is an inherent right of the individual. The right, however, must give way to reasonable legislative restrictions and also, in [Judge Brennan's] view, to overriding public considerations

144. *See Kilmurray*, 91 A.2d at 866 (explaining how the vacancy occurred).
145. *See id.* at 867.
146. *See id.* at 868.
147. 48 A.2d 831 (N.J. 1946).
148. *See id.* at 831–32.
149. *Id.* at 831.
150. *Id.*
151. *Id.* at 832 (emphasis added).
152. *Id.* (quoting N.J. STAT. ANN. § 19:13-20 prior to its current amended state).
153. 65 A.2d 786 (N.J. Super. Ct. Law Div. 1949).

> in any circumstances where to accord the right of withdrawal would be inimical to the public interest.[154]

The *Introcaso* court addressed many of the same considerations that begged the attention of the *Samson* court[155] and concluded that the plaintiff's untimely withdrawal as candidate for the Office of City Commissioner was not contrary to the public interest.[156] It is, however, unlikely that the *Introcaso* court would have come to this conclusion if the election in question had been on the same scale as the election in *Samson*.[157] It might also be argued that "sore-loser" withdrawal, as exhibited by Torricelli in the 2002 election, is indeed inimical to the public interest because such actions erode the public's trust in the candidates, the primary elections, the office holders, and the election process as a whole.

3. Persuasive Authority from the Various States. The *Samson* court cited the vacancy statutes of several states, but did not consider the case law of the various states.[158] Despite the fact that some states may have statutes that are more linguistically precise, the courts in other states often have had to decide the same or similar election law issues. This review of case law from other states shows the guidance that the New Jersey Supreme Court might have received had it looked to see how the umpires on other playing fields have been calling the game.

a. New York. The courts in neighboring New York have found statutory time requirements regarding the filing of certificates to be mandatory;[159] nevertheless, "using the discretionary powers vested in them," the New York courts have at times permitted late filings.[160] It is important to note that not all filings are treated alike. *In re Kress* contrasts untimely

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154. *Id.* at 787 (citation omitted).

155. The *Introcaso* court considered whether there was sufficient time to perform the mechanics involved in a change of ballot and the issuance of new absentee ballots to the military. *See id.* at 787–88.

156. *See id.* (admitting that no overriding public consideration existed to prevent the candidate from resigning).

157. The election in *Introcaso* was clearly on a much smaller scale than the Senate election in *Samson*, as evidenced by the fact that it involved the resending of a total of fourteen military ballots overseas. *See id.* at 787.

158. *See* N.J. Democratic Party, Inc. v. Samson, 814 A.2d at 1028, 1037 (N.J. 2002) (pulling together the more precise language of the vacancy statutes in some states), *cert. denied sub nom.* Forrester v. N.J. Democratic Party, Inc., 537 U.S. 1083 (2002).

159. *In re* Kress, 324 N.Y.S.2d 248, 249–50 (Sup. Ct. 1971).

160. *Id.* at 250. Late filings have been permitted "to relieve a mistake, to correct an error, or where an excusable inadvertence or accident leads to a delay in the filing." *Id.* None of these situations arose in *Samson*.

withdrawals with late filings of certificates of nomination and acceptance.[161] Whereas the New York courts are willing to permit late filing of nomination or acceptance certificates dependent upon the circumstances, the courts are "*most reluctant* to exercise their discretionary powers to permit late filings of declinations under any circumstances after the statutory time period has expired."[162] The *Kress* court declared:

> It is no longer a private matter involving the individual candidate only when he seeks to withdraw after the time for such withdrawal has expired. The public also has an interest in such action because the extent of the choices of the electorate for a given office is affected. Valid reasons exist why the courts must rarely if ever exercise summary discretionary powers to permit withdrawals after the statutory time for filing has expired.[163]

If the Senate election in *Samson* had taken place in New York, the application of *Kress* would have almost certainly prevented Torricelli's withdrawal from the race, and the ensuing vacancy would not have occurred.

b. Texas. The Supreme Court of Texas has acknowledged circumstances in which strict adherence to the deadlines of the election code may be waived.[164] The Texas court stated: "The withdrawal and replacement deadlines in the Election Code are not intended to apply to *unusual situations* when there is not a reasonable opportunity to comply with a statutorily set deadline."[165] The court added that "while the terms of the withdrawal and replacement statutes apply generally, in unusual situations, the political parties have inherent authority to choose

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161. *See id.* at 249–50.

162. *Id.* at 250 (emphasis added) (noting that the court denied attempted withdrawals due to their untimeliness in *In re Brook*, 6 N.Y.S.2d 954 (Sup. Ct. 1938), *Jerge v. Geddes*, 245 N.Y.S. 20 (App. Div. 1930), *Neary v. Voorhis*, 202 N.Y.S. 236 (App. Div. 1923), and *In re Halpin*, 95 N.Y.S. 611 (App. Div. 1905)).

163. *Id.*

164. *See* Slagle v. Hannah, 837 S.W.2d 100, 101 (Tex. 1992) (per curiam) (holding that the secretary of state must accept untimely certificates of nominations and order placement of nominees on the ballot). In *Slagle*, Bob Aikin the original nominee of the Democratic Party for the office of State Board of Education filed an untimely withdrawal from the race while simultaneously filing a timely application to be placed on the ballot for office of Texas Senate under an extended deadline provided by the federal court. *Id.* The federal court held that Aikin's withdrawal and refiling must be accepted, thereby leaving no nominees, neither Democrat nor Republican, on the ballot for the office of the Board. *Id.* at 101–03. Consequently, the Texas Supreme Court compelled Secretary of State John Hannah to accept the untimely certification of nomination from both parties for the Board election. *Id.* at 103.

165. *Id.* at 102 (emphasis added) (citing Kilday v. Germany, 163 S.W.2d 184 (Tex. 1942)).

nominees, as long as the method used is not expressly prohibited by statute."[166]

The situation in New Jersey, however, can hardly be described as unusual. Political polls prior to elections commonly project winners and losers. Likewise, the circumstances in *Samson* provided ample opportunity for compliance with the statute as illustrated by the fact that the polls indicated Torricelli's decline in popularity well before the deadline for withdrawal.[167] The New Jersey pinch-hitting strategy would, therefore, most likely be deemed foul play on Texas fields.

c. South Dakota. In *Burtch v. Medin*,[168] the Supreme Court of South Dakota refused to recognize the withdrawal of candidates within seventy days of the election as proscribed by state statute.[169] The plaintiff argued that the untimely withdrawal and substitution should be allowed because there was sufficient time to have the new nominees included on the official ballot and no one would be injured by disregarding the time limit set out by statute.[170] The court acknowledged the potential truth of the plaintiff's argument and recognized that such arguments may apply to other provisions of the primary law as well.[171] Nevertheless, the court refused to assume a legislative role, maintaining that "so long as the people of [South Dakota] retain the present law that governs [the] primary elections, its provisions must be obeyed."[172] The South Dakota Supreme Court, in contrast to the *Samson* court, planted its feet firmly on the statutory ground provided by the Legislature and refused to step out on the slippery slope of judicial legislation.

d. Ohio. With regard to election controversy, the initial standard applied by the Supreme Court of Ohio is that "courts should be *very reluctant* to interfere with elections, except to enforce rights or mandatory or ministerial duties as required by law."[173] Although Ohio election laws provide for withdrawal at

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166. *Id.* (citing *Kilday*, 163 S.W.2d at 187).

167. Refer to notes 14–17 *supra* and accompanying text (surveying newspaper articles that indicated this decline prior to Torricelli's withdrawal).

168. 210 N.W. 187 (S.D. 1926).

169. *See id.* at 188 (holding that the withdrawal and the corresponding nomination of new candidates was prohibited by statute).

170. *Id.*

171. *Id.*

172. *Id.*

173. *In re* Election Contest of Democratic Primary, 725 N.E.2d 271, 275, 277–78 (Ohio 2000) (emphasis added) (internal quotation marks omitted) (denying petition for new election as relief from the county election board's failure to remove withdrawn

any time prior to a primary election, the statutes also provide that removal of the name of the withdrawn candidate from the ballot is limited "to the extent practicable in the time remaining before the election and according to the directions of the secretary of state."[174] The Ohio Supreme Court found that the practicality of removing a withdrawn candidate's name from the ballot is a determination to be made by the board of elections and not the court.[175]

e. Maryland. The Court of Appeals of Maryland has taken a more liberal approach than New York, Texas, South Dakota, and Ohio. The court has declared:

> It appears to be well settled that *in the absence* of a statutory prohibition against resignation a candidate has a natural or inherent right to resign at any time and to have his name deleted from the ballot. Another person may be named to fill the vacancy at any time when the change can be made without disrupting or interfering with the orderly progress of a general election.[176]

However, the Maryland court loses some credence in light of the circular logic it used in holding that time limitations are inapplicable in cases where they clearly cannot apply.[177]

f. District of Columbia. Without any elaboration, the District of Columbia Court of Appeals held on at least one occasion that when a candidate did not meet the requirements to withdraw, the board of elections was correct in refusing to remove the candidate's name from the ballot or to indicate the withdrawal in another form.[178]

4. Summary. Although the game is the same, the calls made by the various umpires are very different. This limited survey of persuasive authority taken from the courts of selected states demonstrates that not all judiciaries are willing to

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candidates name from the primary election ballot).

174. *Id.* at 277 (quoting OHIO REV. CODE ANN. § 3513.50(E) (Anderson 1996)).

175. *See id.* at 277–78 (citing *State ex rel. Ohio Ass'n of Pub. Sch. Employees v. Civil Serv. Comm'n of Girard*, 345 N.E.2d 58, 60 (Ohio 1976), to compare the board's ability to determine whether removing a name from a ballot is practicable with a civil service commission's ability to determine whether promotional exams for civil servants are practicable).

176. Black v. Bd. of Supervisors of Elections of Balt. City, 191 A.2d 580, 582 (Md. 1963) (per curiam) (emphasis added) (citing 18 AM. JUR. *Elections* § 127 (1938)).

177. *See id.* at 583 (explaining that because the candidate was not nominated until sixty-three days before the election, he could not possibly decline nomination before the sixty-fifth day prior to the election as stipulated by statute).

178. *See* Morgan v. Martin, 327 A.2d 827, 830 (D.C. 1974) (per curiam).

override the mandates of the state legislatures while trumpeting voters' rights. Many courts have recognized the need to regulate the election process and have enforced statutory provisions to varying degrees. In fact, as illustrated in *Wene*, *Catania*, *Kilmurray*, and *Conroy*, the New Jersey Supreme Court has likewise acknowledged the necessity of rules in the political game. In *Samson*, however, the court seems to have thrown the rulebook away.

D. Major League Players Only: Preservation of the Two-Party System

One of the pillars supporting the New Jersey Supreme Court's *Samson* opinion is the voter's right of choice.[179] In *Samson*, the defendants argued that the presence of third-party candidates on the ballot offered voters a full choice.[180] The court, however, deemed it to be "'in the public interest and the *general intent of the election laws* to preserve the two-party system and to submit to the electorate a ballot bearing the names of candidates of *both major political parties* as well as of all other qualifying parties and groups.'"[181] This section considers whether the two-party system warrants the protection of and preservation by the court.

The *Samson* court maintains that Title 19 of the New Jersey Statutes Annotated recognizes the significance of the two parties in the electoral system inasmuch as it acknowledges the role of the "majority and minority parties" in both houses of the legislature.[182] Contrary to the court's assertion, the election laws do not refer specifically to either the Republican or the Democratic parties, but rather to whichever parties enjoy majority and minority status in the legislature at the given time.[183] To presume that the generic terms "majority" and "minority" denote the Republican and Democratic parties may seem reasonable because these parties typically represent the majority or minority in contemporary politics; however, this has

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179. Refer to notes 66–68 *supra* and accompanying text (emphasizing the significance of choice in a democratic society).

180. N.J. Democratic Party, Inc. v. Samson, 814 A.2d at 1028, 1041 (N.J. 2002) (identifying the arguing defendants as representatives of the Libertarian, Conservative, and Green parties), *cert. denied sub nom.* Forrester v. N.J. Democratic Party, Inc., 537 U.S. 1083 (2002).

181. *Id.* at 1034–35 (second emphasis added) (quoting Chief Justice Vanderbilt in *Kilmurray v. Gilfert*, 91 A.2d 865, 867 (N.J. 1952)).

182. *Id.* at 1041 (referencing N.J. STAT. ANN. § 19:44A-10.1, which provides for the establishment of a legislative leadership committee).

183. N.J. STAT. ANN. § 19:44A-10.1 (West 1999).

not always been the case. The irony of the court's presumption becomes apparent when one considers the fact that the Republican Party, which currently controls not only the White House but also both houses of Congress, was once neither the majority nor the minority, but was instead a political group with third-party status.[184]

The *Samson* court's affinity for a two-party system is somewhat outdated. Illustrative of this fact is the court's remark that the two-party system is "an organizing principle of the political process in this country";[185] the source of this remark is a work discussing party politics from the viewpoint of nineteenth century politician Martin Van Buren.[186] Contemporary democratic movements in previously nondemocratic countries have "sought to promote 'multi-party'—not 'two-party'—systems and elections."[187] Even in the United States, the inadequacy of the traditional two-party system has been acknowledged by the Supreme Court.[188] In *Williams v. Rhodes*, the language of the Supreme Court suggests that "the right to vote would lose its meaning if voters were limited to just one or two government-approved parties."[189]

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184. *See* Bradley A. Smith, Note, *Judicial Protection of Ballot-Access Rights: Third Parties Need Not Apply*, 28 HARV. J. ON LEGIS. 167, 169–70 (1991) (tracing the history of third parties in American politics). Smith asserts:

> Prior to the adoption of ballot-access laws, third parties regularly mounted serious challenges to the existing parties. Although only the Republican Party succeeded in displacing a major party, historically third parties have elected large numbers of officials, presented viable alternatives to voters, and forced major changes in established party positions.

Id.

185. *Samson*, 814 A.2d at 1041.

186. *See* Gerald Leonard, *Party as a "Political Safeguard of Federalism": Martin Van Buren and the Constitutional Theory of Party Politics*, 54 RUTGERS L. REV. 221, 221–27 (2001) (introducing Martin Van Buren's role in the development of political parties in the United States).

187. Smith, *supra* note 184, at 167–68 (acknowledging that despite the development of multi-party systems elsewhere in the world, the United States remains under the control of two major parties).

188. *See* Williams v. Rhodes, 393 U.S. 23, 31–32 (1968) (rejecting Ohio's asserted interest in assuring majority winners); *see also* Smith, *supra* note 184, at 206 (positing that "the interests states assert to justify additional barriers to third-party ballot status do not warrant the burdens placed on constitutional rights"). In *Williams*, "the state [of Ohio] claimed to have an interest in promoting compromise and stability through a two-party system. The Court found this insufficient to justify the burdens imposed on fundamental rights because the system promoted not a generic 'two-party' system, but two specific parties—Republicans and Democrats." Smith, *supra* note 184, at 179.

189. Smith, *supra* note 184, at 179 (summarizing the opinion of Justice Black); *see also Williams*, 393 U.S. at 31–32 (observing that "the right to vote is heavily burdened if that vote may be cast only for one of two parties at a time when other parties are clamoring for a place on the ballot").

The right to vote effectively is not a guarantee that the voter's choice will triumph in an election. Although this right has not been explicitly defined, the U.S. Supreme Court has found this right to be "impermissibly burdened if voters are presented with a narrow range of candidates while other parties are denied access to the ballot."[190] Given this criteria, the New Jersey Supreme Court decision in *Catania*, whereby the court declared a statutory time limit to be discretionary because mandatory application would result in only one name on the ballot,[191] seems appropriate. Using *Catania* as precedent in *Samson*, however, is inappropriate because Garden State voters were not presented with a narrow range of candidates after Torricelli's withdrawal from the 2002 election. Five candidates, in fact, remained on the ballot after Torricelli left the field.[192]

Although the court recognized the participation of third-party candidates as supportive of a robust democracy, it declared that "vigorous elections under [the] present system require the participation of the two major parties," that is, the Republican and Democratic parties.[193] The court's single-mindedness with regard to the major parties is difficult to reconcile with the fact that many unchallenged races take place across the nation every election year.[194] The court's insistence that both the Republican and Democratic parties be represented on the ballot also fails to recognize the increasing relevance of third parties on the political landscape.[195]

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190. Smith, *supra* note 184, at 193–94.

191. Catania v. Haberle, 588 A.2d 374, 375, 378 (N.J. 1990).

192. *See CNN.com Election 2002—State Races: New Jersey*, *at* http://www.cnn.com/ELECTION/2002/pages/states/NJ/ (last visited Oct. 30, 2003) (listing the following as candidates competing against Forrester and Lautenberg: Ted Glick, representing the Green Party; Elizabeth Macron, candidate for the Libertarian Party; Norman E. Wahner, a New Jersey Conservative; and Gregory Pason, representing the Socialist Party).

193. N.J. Democratic Party, Inc. v. Samson, 814 A.2d 1028, 1041 (N.J. 2002) (noting that "this Court has long accepted that . . . 'elections take place . . . in the context of a partisan, party-based political system'" (quoting Friends of Governor Tom Kean v. N.J. Election Law Enforcement Comm'n, 552 A.2d 612, 613 (N.J. 1985) (second alteration in original))), *cert. denied sub nom.* Forrester v. N.J. Democratic Party, Inc., 537 U.S. 1083 (2002).

194. Unopposed candidates are not a rarity in United States elections. For example, in Harris County, Texas, fifty-eight candidates for office were unopposed on the 2002 election ballot. *See Election 2002: Harris County Unopposed Candidates*, HOUS. CHRON., Nov. 6, 2002, at 31A. Justice Kennedy has likewise observed that many candidates on Hawaii's ballots go unchallenged. *See* Burdick v. Takushi, 504 U.S. 428, 442–43 (1992) (Kennedy, J., dissenting) (noting that thirty-three percent of the elections for Hawaii's state legislative offices in the 1986 general election involved single-candidate races).

195. *See* Noaman Barkatullah, *Restricting the "Marketplace of Ideas": Third Parties, Media Candidates, and* Forbes' *Imprecise Standards*, 18 ST. LOUIS U. PUB. L. REV. 485, 502 (1999) (reporting poll results showing that sixty percent of Americans favor the formation of a new political party).

Despite the court's cursory nod of recognition to third parties, its contention that a fair election can only take place if the Democratic Party remains on the ballot diminishes the political presence of the third parties. Third parties should not be treated like political bystanders. After all, third parties fulfill two critical functions in American politics: "[T]hey popularize ideas that the major parties would otherwise ignore, and they serve as political vehicles for citizens discontent with the policies put forth by the major parties."[196] Third parties are a central part of American politics and, as such, should not be relegated to the political dugout.[197]

E. Two Can Play at this Game, or Can They?: Consequences of the New Jersey Supreme Court Opinion

In its opinion, the New Jersey Supreme Court promptly dismissed concerns raised by defendants about future pinch-hitting plays by political parties.[198] The defendants expressed fears that an interpretation of the vacancy statute favoring the plaintiffs might result in "electoral chaos."[199] The court endeavored to allay such fears with the presumption that logistic, financial, and political difficulties would effectively prevent parties from making political pinch-hitting a regular practice.[200] As a final point, should the defendants' predictions come true, the court absolved itself of responsibility by tossing the ball back to the legislature, declaring that "if the Legislature credits defendants' 'parade of horribles' all it need do . . . is amend the statute."[201]

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196. STEVEN J. ROSENSTONE ET AL., THIRD PARTIES IN AMERICA: CITIZEN RESPONSE TO MAJOR PARTY FAILURE 221 (2d ed. 1996).

> Voters who assessed the major parties and their nominees exclusively on issues were 28 percent more likely than their neighbors to support third parties when a nationally prestigious third party candidate ran, and about 20 percent more likely to do so when a prestigious or nonprestigious candidate appeared on their ballots.

Id. at 164; *see also* Barkatullah, *supra* note 195, at 486–88 (tracing the history of third parties' rights).

197. *See* ROSENSTONE, *supra* note 196, at 223 (arguing that third parties "should not be viewed as organizations that stand outside the mainstream of the American political system").

198. *See Samson*, 814 A.2d at 1040–41. The court does not suggest that it cannot happen, but states that the defendants failed to present any evidence showing a rush of withdrawals in other states. *Id.*

199. *Id.* (reiterating the defendants' argument that any candidate fearful of losing could withdraw to allow someone else to run instead).

200. *Id.* It seems that the court has perhaps forgotten how deep political coffers can be and has not anticipated the effectiveness of bringing in a new candidate who is already well known and well liked by the public.

201. *Id.* at 1041.

Despite the New Jersey Supreme Court's disclaimer, the defendants' fears proved to be well founded. In fact, a mere eight days after the court issued its opinion, a Republican candidate in Montana dropped out of that state's U.S. Senate race.[202] Like Torricelli, the Montana candidate was trailing far behind in the polls and thus "wanted to give another Republican the chance to make a run at [the democratic incumbent]."[203] However, no one, not even the GOP Chairman and former Governor of Montana Marc Racicot, stepped up to the plate.[204]

Montana state law prohibits the withdrawal of a candidate within eighty-five days of the general election.[205] Accordingly, Montana's Secretary of State, Bob Brown, announced that the Republican Party was barred from appointing a replacement unless a court ruled otherwise.[206] The Montana Republicans, in contrast to the New Jersey Democrats, did not initiate legal proceedings.[207] Therefore, with no one to replace him, Taylor decided to get back in the game and see it out to the final inning.[208]

The 2002 election clearly demonstrated the willingness of major party candidates to withdraw from a political race for the benefit of their respective parties.[209] Last minute withdrawals for

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202. *See* Michael Janofsky, *Montana Candidate, Citing Smear Campaign, Ends Senate Bid*, N.Y. TIMES, Oct. 11, 2002, at A22 (identifying a television advertisement suggesting that Republican candidate Mike Taylor was homosexual as the reason for his withdrawal from the Senate race).

203. Matt Gouras, *Republican Returns to Montana's Senate Race*, CHI. TRIB., Oct. 23, 2002, at 9 (reporting Taylor's return to the race after his withdrawal twelve days prior).

204. *Id.*; *see also* Janofsky, *supra* note 202 (identifying Marc Racicot as the former Montana two-term Governor and then-current Chairman of the Republican National Committee who declined to step in as a pinch hitter for Taylor).

205. MONT. CODE ANN. § 13-10-325 (2003).

206. Janofsky, *supra* note 202.

207. It is conceivable that the Republicans chose not to initiate legal action in Montana because such action would be in direct contradiction to the party's involvement in the New Jersey proceedings.

208. *See* Gouras, *supra* note 203 (explaining that Mike Taylor's absence from the race would damage local Republican candidates).

209. Joining the ranks with Torricelli and Taylor are the prominent drop-outs in the Democratic primaries for Florida and New York governorships, Janet Reno and Andrew Cuomo, respectively. *See Recount Useless; Reno Must Go*, S. FLA. SUN-SENTINEL (Ft. Lauderdale), Sept. 15, 2002, at 4F, *available at* 2002 WL 100400826; Calvin Woodward, *Recent Political Dropouts Could Take Lessons from McGovern, Mondale, Dole: Dreary Polls Prodded the Three to Try Harder*, ST. LOUIS POST-DISPATCH, Oct. 13, 2002, at A6, *available at* 2002 WL 2591525. Former high-stakes losers are unable to understand the quitting that has taken place in the 2002 election year. *See* Woodward, *supra*. Bob Dole, who garnered only 159 electoral votes compared to Bill Clinton's 379, commented: "I think it's bad principle to tell your followers, 'I want to be your nominee but if I'm behind two weeks from the election, I'm going to drop out.'" *Id.* Similarly, George McGovern, who succeeded in winning a mere seventeen electoral votes in the 1972 presidential race against Richard Nixon, finds quitting before an election to be "a little unorthodox." *Id.*

the benefit of the party are certain to occur in the future as well. Although the New Jersey decision sets precedent for that state only, it provides a seemingly solid base for the argument that late-inning substitutions are okay.[210] One can easily envision "[p]arty bosses . . . playing the role of baseball coaches, sending in relief candidates when the going gets rough."[211]

V. CONCLUSION

Like baseball, "the game of politics is not one that is played without rules."[212] But, "[w]here there are rules, there are disputes over rules, and where there are disputes over rules, there are courts."[213] The players and the public, however, should be able to rely on the judicial umpires to call the game by the rules.

The New Jersey Supreme Court in *Samson* claims to be upholding the rules of the election game. The court looked to the overarching principles of voter franchise[214] and right of choice,[215] carefully considered the statutory language,[216] and relied on precedent set by the New Jersey courts.[217] Yet, as this Note has attempted to show, the court was out in left field with its opinion.

The New Jersey Legislature has responded to the opinion in *Samson* with two proposed bills.[218] The explicit language of both proposals is aimed at preventing political pinch-hitting in the future.[219] The *Samson* court, however, has displayed a willingness

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210. *See* Greenberger & Murray, *supra* note 35 (quoting David Norcross, attorney and former Republican National Committee member as saying that "[t]here is no doubt that both parties will try to stretch this new optional-candidate scheme as far as they can stretch it"). *But see Slander*, *supra* note 29 (commenting that the New Jersey ruling invites mischief, but that such mischief is not likely to occur often for two reasons: (1) the egos of most candidates will not allow them to quit, and (2) the major parties do not have "a strong bench with willing candidates who can win an election in a month").

211. *Slander*, *supra* note 29.

212. Allison H. Eid, *A Spotlight on Structure*, 72 U. COLO. L. REV. 911, 912 (2001) (discussing the role of the judiciary in politics in the wake of *Bush v. Gore*).

213. *Id.* at 917.

214. Refer to Part IV.A.1 *supra*.

215. Refer to Part IV.A.2 *supra*.

216. Refer to Part IV.B *supra*.

217. Refer to Part IV.C.1 *supra*.

218. *See* A.B. 2878, 210th Leg. (N.J. 2002) (referred to the Assembly State Government Committee); S.B. 2096, 210th Leg. (N.J. 2002) (referred to the Senate State Government Committee). Neither bill has gone beyond committee review. *See* New Jersey Legislature, *Main Bill Information: 2002–2003 Legislative Session*, *at* http://www.njleg.state.nj.us (last visited Nov. 8, 2003) (providing bill information for the 2002–2003 legislative session).

219. Assembly Bill 2878 amends the vacancy statute to read in relevant part as follows: "Notwithstanding the provisions of this section to the contrary, no vacancy among candidates seeking election at a general election, no matter the cause, shall be filled if the vacancy occurs between the 51st day prior to the day of that election and the day of the

to ignore statutory language;[220] thus, an amended statute offers no guarantee that such foul play will not be called fair by the New Jersey Supreme Court in future elections. Perhaps the time has come for Congress to intervene by enacting appropriate legislation governing the state election process.[221] However, until Congress decides to act, the responsibility of maintaining the integrity of the election process is left to the voting populace. American voters, regardless of their party affiliation, should make their disapproval of such unsavory political tactics known on election day.[222]

Political pinch-hitting is indeed foul play. It compromises the integrity of candidates, office holders, party primaries, and the election process as a whole. The Democratic drop-out, Robert Torricelli, should have heeded the words of baseball legend Hank Aaron: "My motto was always to keep swinging. Whether I was in a slump or feeling badly or having trouble off the field, the only thing to do was keep swinging."[223]

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election." A.B. 2878. Senate Bill 2096 differs slightly in that it provides for an exception for a vacancy "created not later than the 30th day before the election because the candidate dies or becomes physically or mentally incapacitated." S.B. 2096.

220. Refer to Part IV.B *supra*.

221. Refer to note 49 *supra* and accompanying text. Although the Constitution confers on Congress the power to alter or enact election laws regarding the times and manner of elections, U.S. CONST. Art. I, § 4, cl. 1, it is highly unlikely that Congress will exercise such power.

222. Party loyalty must take a backseat to the preservation of ethical and fair elections.

223. Quote attributed to Henry (Hank) Aaron, *Motivational Quotes*, *at* http://www.znetsports.com/motivation_quotes.asp (last visited Oct. 30, 2003).