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## Is the Party Over? You Don't Have to Go Home, But You Can't Stay Here: Political Party Affiliations, Trends, and Requirements After *Patton v. Illinois State Board of Elections*, 51 J. Marshall L. Rev. 749 (2018)

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# IS THE PARTY OVER? YOU DON'T HAVE TO GO HOME, BUT YOU CAN'T STAY HERE: POLITICAL PARTY AFFILIATION, TRENDS, AND REQUIREMENTS AFTER *PATTON V. ILLINOIS STATE BOARD OF ELECTIONS*

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## I. INTRODUCTION

Political parties have a place at the bedrock of Constitutional rights and principles that are of the free and democratic foundation of the United States. The formation of national political parties was almost concurrent with the establishment of the Republic itself,<sup>1</sup> with the right to associate with the political party of one's choice being an integral part of this basic constitutional freedom.<sup>2</sup> But

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1. *Cal. Democratic Party v. Jones*, 530 U.S. 567, 574 (2000); *see also Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 214 (1986) (stating that “[t]he freedom of association protected by the First and Fourteenth Amendments includes partisan political organization.”).

2. *Kusper v. Pontikes*, 414 U.S. 51, 57 (1973); *see also MADISON, THE*

what does it mean to be a “member of” or “affiliated with” a political party?

It may seem like a simple question to answer, but it is one that brings about many different thoughts, ideas, and subsequent litigation. Whether they be thoughts of people cheering at rallies and political conventions, proudly wearing their party’s buttons, shirts, and other garb, or whether they be imagery of a more insidious, ubiquitous pictures of Tammany Hall or notions of the “smoke-filled room” where political party “insiders” secretly work outside the view of “regular” people, the way to define political party “affiliation” or “membership” is more complicated than it may seem at first glance. In today’s fast-paced, ultra-connected world, the direct allegiance to political parties versus to individuals (i.e. Trump-Republicans or Obama-Democrats) is becoming increasingly clear.

Because the Constitution grants to the States a broad power to prescribe the “Times, Places, and Manner” for holding elections, which power is massaged by state control over the election process for state offices,<sup>3</sup> how States define political party “affiliation” affects the implementation of a State’s regulation of voters, candidates, and the nomination process. These laws, governing who may, and who may not, participate in the political party primary election process, must strike a balance, to wit: the First and Fourteenth Amendments protect the right to associate with the political party of one’s choice,<sup>4</sup> while States (and political parties) have the “legitimate interest in curtailing ‘raiding’ by members of opposing political parties, and preserving the integrity of the electoral process.”<sup>5</sup> The result leaves States with the ability to adopt reasonable, tailored conditions to be imposed on the right to change political parties.<sup>6</sup> While the U.S. Supreme Court has clearly held that States may regulate party-switching,<sup>7</sup> there is no definitive universal test to define political party affiliation in the first place.

What further complicates this issue is an increasing amount of people declining to self-identify as members of either the

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FEDERALIST NO. 51 (James Madison) (discussing the right to freely participate, vote, and affiliate as political parties representing the principal check against one part of society inflicting injustice on the other part).

3. *Tashjian*, 479 U.S. at 217 (citing U.S. CONST. art. I, §4, cl. 1); *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 451 (2008).

4. *Kusper*, 414 U.S. at 57.

5. *Sperling v. Cnty. Officers Electoral Bd.*, 57 Ill. 2d 81, 84 (1974); *Rosario v. Rockefeller*, 410 U.S. 752, 761-62 (1973). “Party Raiding” is generally described generally as the practice “whereby voters in sympathy with one party designate themselves as voters of another party so as to influence or determine the results of the other party’s primary.” *Rosario*, 410 U.S. at 760-61.

6. *Sperling*, 57 Ill. 2d at 84; *See also Storer v. Brown*, 415 U.S. 724, 732-33 (1974) (discussing and comparing outcomes in cases evaluating the constitutionality of ballot access laws and party-switching restrictions).

7. *Storer*, 415 U.S. at 732-33.

Democratic or Republican parties and instead identifying as “independent,” often with a particular ideological leaning.<sup>8</sup> Interestingly, while an increasing amount of people declare their “independence” from political parties, in practice, most “independents” still vote and act like their partisan counterparts.<sup>9</sup> Thus, while States and political parties assert their rights to an orderly and defined electoral and nomination process, adopting large-scale or universal formulae to judge individual political party affiliation is, at best, difficult and unlikely to reflect the true intentions of individual participants in the electoral process.

The difficulty of making the determination to define individual political party affiliations has led to states implementing differing legislative schemes to administer elections and the nomination processes of political parties with varying degrees of “openness” as to the qualifications for voters, candidates, and petition signers who participate in the political party nomination process.<sup>10</sup> The *ad hoc*

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8. *Party Affiliation*, GALLUP, [www.news.gallup.com/poll/15370/party-affiliation.aspx](http://www.news.gallup.com/poll/15370/party-affiliation.aspx) (last visited Aug. 31, 2018); see also *A Deep Dive Into Party Affiliation*, PEW RES. CTR. (Apr. 7, 2015), [www.people-press.org/2015/04/07/a-deep-dive-into-party-affiliation/#party-id-by-generation](http://www.people-press.org/2015/04/07/a-deep-dive-into-party-affiliation/#party-id-by-generation) (finding that the “the biggest change in partisan affiliation in recent years is the growing share of Americans who decline to affiliate with either party . . . The rise in the share of independents has been particularly dramatic over the past decade). This trend was apparently recognized by the dissent in one of the seminal cases recognizing the prevention of “party raiding” as a legitimate interest. See *Rosario*, 410 U.S. at 771 (Powell, J., dissenting) (explaining, in dissent, that “[p]artisan political activities do not constantly engage the attention of large numbers of Americans, especially as party labels and loyalties tend to be less persuasive than issues and the qualities of individual candidates. The crossover in registration from one party to another is most often impelled by motives is most often impelled by motives quite unrelated to a desire to raid or distort a party’s primary.”).

9. See *Political Polarization in the American Public*, PEW RES. CTR. app. B (Why We Include Leaners With Partisans) (June 12, 2014), [www.people-press.org/2014/06/12/appendix-b-why-we-include-leaners-with-partisans/](http://www.people-press.org/2014/06/12/appendix-b-why-we-include-leaners-with-partisans/) (showing the trends between declared political party preference and actual voting practices); see also John Sides, *Most Political Independents Actually Aren’t*, WASH. POST (Jan. 8, 2014), [www.washingtonpost.com/news/monkey-cage/wp/2014/01/08/most-political-independents-actually-arent/?utm\\_term=.49f99492e0e4](http://www.washingtonpost.com/news/monkey-cage/wp/2014/01/08/most-political-independents-actually-arent/?utm_term=.49f99492e0e4) (discussing the decline of “pure” independent voters despite data showing increased “independent” political affiliation); Alan Abramowitz, *The Partisans in the Closet: Political Independents Are (Mostly) a Figment of Your Imagination*, POLITICO (Jan. 8, 2014), [www.politico.com/magazine/story/2014/01/independent-voters-partisans-in-the-closet-101931#.U4ZIAfIdUsP](http://www.politico.com/magazine/story/2014/01/independent-voters-partisans-in-the-closet-101931#.U4ZIAfIdUsP) (asserting that most individuals who identify as “independent” tend to support only one political party’s candidates).

10. Compare *Rosario*, 410 U.S. at 753 (illustrating the “Closed Primary” systems of New York whereby only enrolled, registered members of a political party may vote in that party’s primary), with *Primary Elections in California*, CAL. SECRETARY OF ST., [www.sos.ca.gov/elections/primary-elections-california/](http://www.sos.ca.gov/elections/primary-elections-california/) (last visited Sept. 26, 2018) (discussing California’s use of the “Open” or “Top-Two” primary system titled “Top Two Candidates Open Primary Act”); see also *State Primary Election Systems*, NAT’L CONF. ST. LEGISLATURES (June 2016), [www.ncsl.org/documents/Elections/Primary\\_Types\\_Table\\_2017.pdf](http://www.ncsl.org/documents/Elections/Primary_Types_Table_2017.pdf)

evaluation of these different systems has produced a wide array of legal and practical opinions.<sup>11</sup>

Illinois presents perhaps the most interesting case and litigation history, whereby the previous legislative structure defining party affiliation and restrictions to party-switching was ruled unconstitutional.<sup>12</sup> Subsequent legislative and judicial actions (or inactions) have thus produced a political system that actually enables political gamesmanship that promotes coordinated “party raiding” on others while imposing steep impediments to individuals seeking to participate in the political process with the party of their choice. No case better represents the dysfunction of the current law in Illinois, as it relates to defining and regulating political party affiliation, than *Patton v. Illinois State Bd. of Elections*.<sup>13</sup>

While a bit unorthodox to devote an entire analysis to a non-precedential case,<sup>14</sup> the Patton legacy demonstrates the incongruity between the law and political reality.<sup>15</sup> It now appears that Illinois falls into a sort of middle-ground, a semi-open primary system whereby party-affiliation is defined as one who is a “qualified primary voter” of a given political party.<sup>16</sup> Under current Illinois law, voters do not have to register their party affiliation prior to voting but must choose which party's ballot they will vote in the primary, and whichever ballot they choose is a matter of public

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(summarizing the primary election and affiliation requirement schemes for state, local, and congressional elections); *A Primer on Primaries*, 20 THE CANVASS: STATES AND ELECTION REFORM NAT'L CONF. ST. LEGISLATURES, May 2011, [www.ncsl.org/documents/legismgt/elect/Canvass\\_May\\_2011\\_No\\_20.pdf](http://www.ncsl.org/documents/legismgt/elect/Canvass_May_2011_No_20.pdf), (describing different types of primary elections conducted in various states).

11. See Michael R. Dimino, Sr., *It's My Party and I'll Do What I Want to: Political Parties, Unconstitutional Conditions, and the Freedom of Association*, 12 FIRST AMEND. L. REV. 65, 66 (2013) (discussing, in particular, the US Supreme Court's “ad hoc approach” to the developing doctrine of evaluating laws regulating states, political parties, and political party affiliation).

12. See *Kusper v. Pontikes*, 414 U.S. 51, 61 (1973) (holding unconstitutional the 23-month “lockout” rule on voters switching party-affiliation found in Section 7-43(d) of the Illinois Election Code); see also *Sperling v. Cty. Officers Electoral Bd.*, 57 Ill.2d 81, 86 (1974) (holding that the two-year party-switching restrictions within Section 7-10 of the Illinois Election Code were unenforceable as to voters, petition signers, and candidates).

13. *Patton v. Ill. State Bd. of Elections*, 2018 IL App (1st) 180425-U.

14. *Patton*, 2018 IL App (1st) 180425-U was decided by the Illinois Appellate Court under Illinois Supreme Court Rule 23(b). The unusual appellate court order dismissing the original appeal, 2018 IL App. (1st) 18022-U is noteworthy, but not pertinent to the discussion herein. Nor is the Illinois Supreme Court's initial intervention to order a stay of the candidate's removal from the ballot and for the appellate court to expedite consideration of the appeal, followed by denial of the petition for leave to appeal.

15. It may also seem odd to highlight and discuss a case in which the authors lost.

16. *Cullerton v. Du Page Cty. Officers Electoral Bd.*, 384 Ill. App. 3d 989, 996 (2d Dist. 2008) (discussing the history of Illinois primary party-switching restrictions).

record.<sup>17</sup> But vestiges of previous statutory sections mixed with judicial decisions stand as further, more complicated restrictions on party-switching and affiliation as applied to voters, candidates, and petition signers.

We are now left with Patton, where the candidate, a lifelong, unflinching Republican,<sup>18</sup> was removed from the primary election ballot and was forced to seek election at the General Election under a “new” political party label, the “Downstate United” party.<sup>19</sup>

This article examines the evolution of “party-switching” and party affiliation law in Illinois and the implications of the current state of party affiliation restrictions, as seen through the outcome of the Patton case. Ultimately, what may seem like a simple question—that of one’s political party affiliation—has caused significant litigation and uncertainty among voters, candidates, and attorneys alike. In Illinois, without curative legislative action, we are left with a system of defining political party affiliation that contains serious issues ripe with opportunities for “gotcha games” to deny ballot access or voting rights, which has given rise to forms of political gamesmanship. This “legal political” maneuvering is the reverse of so-called “party-raiding,” whereby opposing political parties utilize ballot access objections and litigation to try and prevent voters of another political party from nominating the candidate of their choosing.

## II. BACKGROUND

### A. *History of Illinois Party Affiliation & Party-Switching Laws*

In Illinois determining who is entitled to participate in a given political party’s nomination process is generally defined by meeting

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17. See *Rudd v. Lake Cty. Electoral Bd.*, 2016 IL App (2d) 160649, ¶ 3 (explaining how “Illinois has an open primary system, which means that voters do not have to register with their party affiliation and may vote in either party’s primary. Voters, however, must choose which party’s ballot they will vote in the primary, and whichever ballot they choose is a matter of public record because it is considered a declaration of the voter’s current party affiliation”); see also *Kusper v. Pontikes*, 414 U.S. at 68 (1973) (Rehnquist, J. dissenting) (discussing the interplay of Section 7-43, 7-44, and 7-45 of the Illinois Election Code and the emphasis on a primary voter’s declaration of party affiliation at the primary election itself).

18. Brief of Petitioner-Appellant at 5, *Patton*, 2018 IL App (1st) 180425-U [hereinafter Brief of Petitioner-Appellant].

19. Joseph Bustos, *Hal Patton Files to Run for State Senate as Third-Party Candidate*, BELLEVILLE NEWS-DEMOCRAT (June 25, 2018, 4:59 PM), [www.bnd.com/news/local/article213791039.html](http://www.bnd.com/news/local/article213791039.html); Kelsey Landis, *No one objected to his candidacy, so Edwardsville mayor will be on the ballot*, BELLEVILLE NEWS-DEMOCRAT (July 3, 2018, 9:36 AM), [www.bnd.com/news/local/article214253739.html](http://www.bnd.com/news/local/article214253739.html).

the requirements of a “qualified primary voter” or “qualified primary elector”<sup>20</sup> as used in Articles 7<sup>21</sup> and 8<sup>22</sup> of the Illinois Election Code.<sup>23</sup>

Illinois once had a statutory 23-month “lock-in” rule that defined acts of political party affiliation and restricted party-switching by voters, candidates, and signers of nominating petitions.<sup>24</sup> Essentially, these restrictions prohibited participation in another political party’s primary if a person had participated in a different political party’s primary within two years.<sup>25</sup> However, in contrast with the past iterations of the Illinois Election Code, as it stands today, there is no explicit definition of “qualified primary voter” remaining in the statute.<sup>26</sup>

How Illinois’s party-switching and affiliation law has evolved since 1970 is due both to judicial determination and legislative action and/or reaction.<sup>27</sup> As shown in Table 1,<sup>28</sup> the relevant portions of the Illinois Election Code defining what constitutes party affiliation have been cut while vestiges of party-switching restrictions remain.

In summary, where the Illinois Election Code once had detailed specific requirements and definitions for “qualified primary electors” as applied to party-switching restrictions for voters, petition signers, and for candidates, the Code now provides that: (i) a candidate must file, as part of their nominating petitions, a Statement of Candidacy attesting that he or she is a “qualified

20. As noted by the Illinois Supreme Court in *Hossfeld v. Ill. State Bd. of Elections*, the phrase “qualified primary elector” and “qualified primary voter” have the same meaning. *Hossfeld v. Ill. State Bd. of Elections*, 288 Ill. 2d 418, Fn 3 (2010) (citing *Sperling*, 57 Ill.2d at 83).

21. 10 ILL. COMP. STAT. 5/7-1, *et seq.* (2018).

22. 10 ILL. COMP. STAT. 5/8-1, *et seq.* (2018).

23. Further, pursuant to Section 8-15 of the Illinois Election Code, unless express provided otherwise within Article 8, the provisions of Article 7 apply to govern primary elections and contests thereof under Article 8. 10 ILL. COMP. STAT. 5/8-15 (2018).

24. *See* P.A. 89-331, § 3, eff. Aug. 17, 1995 (current version at 10 ILL. COMP. STAT. 5/7-43 (2018)) (showing the explicit restriction barring the right to vote at a primary where either (i) the person signed the nominating petition of a candidate of a different political party or of an independent candidate, (ii) the person participated in a different political party’s township caucus, or (iii) the person votes at the primary of a different political party within a period of 23 calendar months preceding the calendar month in which the primary is held); P.A. 86-786, § 5, eff. Sept. 6, 1989 (current version at 10 ILL. COMP. STAT. 5/7-10 (2018)) (containing the definition of “qualified primary elector” of a political party “for purposes of determining eligibility to sign a petition for nomination or eligibility to be a candidate” under Article 7 of the Election Code, which included the two year party-switching restriction as applied to petition signers and candidates).

25. *See Cullerton*, 384 Ill. App. 3d at 992 (discussing the history of Illinois primary party-switching restrictions).

26. *Hossfeld*, 238 Ill.2d at 427; *Cullerton*, 384 Ill. App. 3d at 995.

27. *See* Appendix A.

28. *See* Appendix A.

primary voter” of the political party for which nomination is sought;<sup>29</sup> (ii) “a ‘qualified primary elector’ of a party may not sign petitions for or be a candidate in the primary of more than one party;”<sup>30</sup> and (iii) a person who either files a statement of candidacy as a candidate of one party at a primary, or who votes the primary ballot of one party, cannot file a statement of candidacy as a candidate of a different established political party (or as an independent) at the general election immediately following that general primary.<sup>31</sup> Notably, absent from the Illinois Election Code is a definition of “qualified primary voter” of a given political party, which gives rise to the litigation eventually bringing about *Patton*.

As discussed herein, the aftermath of two cases (*Kusper* and *Sperling*), which found certain portions of party-switching restrictions in the Election Code to be unconstitutional, increased the ambiguity with the applicable, remaining portions of the Election Code, which, eventually, set the stage for new judicial applications of party-switching restrictions. What follows traces the judicial and legislative history of this area of law that, ultimately, leads to the absurd result and effect of the *Patton* case and reveals the legislative “holes” in need of General Assembly repair.

### *B. The Effect of Kusper and Sperling*

The Illinois Election Code once had a specific definition of “qualified primary elector” within Section 7-10 (and mirrored in Section 8-8), which also restricted voting, signing petitions, or seeking nomination as a candidate of more than one political party within a 23-month period.<sup>32</sup> However, in 1973 the U.S. Supreme Court decision in *Kusper v. Pontikes*<sup>33</sup> set in motion the progeny of cases evaluating the Freedom of Association with Illinois party-switching restrictions. In *Kusper*, the Court struck down the 23-month “lockout” rule found in Section 7-43(d) of the Illinois Election Code that applied to voters.<sup>34</sup> The Court reasoned that the 23-month

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29. 10 ILL. COMP. STAT. 5/7-10 (2018).

30. *Id.*; see also *Hossfeld*, 238 Ill.2d at 427, 429 (explaining the legislative history of the party-switching restrictions applicable to signers of nominating petitions and what language the current version of the statute still contains).

31. 10 ILL. COMP. STAT. 5/7-43 (2018); Table 1, *supra* note 97. Note that there is no prohibition against filing as a “new political party” candidate, which allowed the candidate in *Patton* to eventually do so after courts determined that he was not a qualified Republican.

32. See P.A. 89-331, § 3, eff. Aug. 17, 1995 (current version at 10 ILL. COMP. STAT. 5/7-43 (2018)) addressing previous restrictions applicable to primary voters); P.A. 86-786, § 5, eff. Sept. 6, 1989 (current version at 10 ILL. COMP. STAT. 5/7-10 (2018)) (containing a definition of “qualified primary voter” and party-switching restrictions for petition signers and those who sought to become political party candidates).

33. *Kusper v. Pontikes*, 414 U.S. 51 (1973).

34. *Id.* at 61.



restriction “substantially restricts an Illinois voter’s freedom to change his political party affiliation” because, “[o]ne who wishes to change his party registration must wait almost two years before his choice will be given effect . . . [and] he is forced to forgo participation in any primary elections occurring within the statutory 23-month hiatus.”<sup>35</sup> Ultimately, because the Court found that the restriction had the effect “to ‘lock’ the voter into his pre-existing party affiliation for a substantial period of time following participation in any primary election, and each succeeding primary vote extends this period of confinement,”<sup>36</sup> and because the legislative goal could be attained by a far less substantial and unnecessary burden, the 23-month “lockout” restriction applying to voters was held unconstitutional.<sup>37</sup>

Kusper was soon followed, and expanded upon, by the Illinois Supreme Court in *Sperling v. County Officers Electoral Bd.*,<sup>38</sup> whereby the two-year party-switching restrictions that were within Section 7-10 of the Illinois Election Code were found to be unconstitutional and unenforceable.<sup>39</sup> The court first held that the absolute, 23-month restriction on those voters who wish to sign primary nominating petitions was invalid under *Kusper*.<sup>40</sup> Further, the court held that the two-year party-switching restrictions applicable to candidates was also unenforceable because the restrictions on voters and petition signers were so intertwined that each “cannot be considered independent and severable from the invalid portions of the [statute].”<sup>41</sup>

The immediate result after *Kusper* and *Sperling*, before any “curative” legislation, was to render inoperable those restrictions upon candidates in a party primary, and voters who signed nominating petitions, concerning those individuals’ prior political affiliations.<sup>42</sup> Thus, until about 1990,<sup>43</sup> there were no enforceable “party-switching” or affiliation restrictions to prevent voters, candidates, or petition signers from changing party allegiance from primary election to primary election.

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35. *Id.* at 57.

36. *Id.*

37. *Id.* at 61 (discussing and distinguishing the Court’s decision and reasoning for the New York Case, *Rosario v. Rockefeller*, 410 U.S. 752 (1973)).

38. *Sperling v. Cty. Officers Electoral Bd.*, 57 Ill. 2d 81 (1974).

39. *Id.* at 86.

40. *Id.* at 84.

41. *Id.* at 86.

42. *Dooley v. McGillicuddy*, 63 Ill. 2d 54, 60 (1976).

43. See P.A. 86-1348, § 2, eff. Sept. 7, 1990 (current version at 10 ILL. COMP. STAT. 5/7-10 (2018)) (formally removing the two year party-switching restriction for candidates and petition signers), discussed *infra* note 102. *But c.f.* *Watkins v. Burke*, 122 Ill. App. 3d 499, 502 (1st Dist. 1984) (finding pursuant to the pre-1990 changes to Section 7-10 that when “an otherwise qualified voter has signed the nominating petitions of more than one party, the signature appearing on the petition first signed is valid and all subsequent signatures appearing on the nominating petitions of other parties are invalid”).

### C. Interim Legislative Changes

The legislative response to *Kusper* and *Sperling* came two-fold. First, the General Assembly in 1990 struck the definition of “qualified primary voter,” as used to define “eligibility” for both petition signers and potential candidates, from both Sections 7-10 and 8-8 of the Illinois Election Code.<sup>44</sup>

While both these enactments seemed to eliminate any “vestige of the former party-switching rule” from the statute,<sup>45</sup> the Code retained the requirement that candidates seeking the nomination of an established party must file a Statement of Candidacy wherein the candidate swears that he or she is a “qualified primary voter of the party to which the nomination petition relates.”<sup>46</sup> This is where the problem began for *Patton* (and others similarly situated). The definition of “qualified primary voter” having been eliminated from the statute along with explicit party-switching restrictions being deleted, the Statement of Candidacy requirements and the restriction on “qualified primary voters” from signing different political party nominating petitions, or from being a candidate for multiple parties at the same primary election, seemingly remained.

The result led to judicial interpretations that appear to now prescribe “new” party-switching and affiliation restrictions not apparent in Illinois law.

### D. “Qualified Primary Voters” and Candidate Party-Switching Reborn: The Cases of *Cullerton* & *Hossfeld*

With the retained Statement of Candidacy language requiring that a candidate swear to be a “qualified primary voter” of a political party, the litigation testing new (or remaining) Illinois statutory party-switching restrictions post-*Kusper* and *Sperling*, as applied to candidates, came about in *Cullerton* and then *Hossfeld*.

In *Cullerton*, the Illinois Appellate Court considered the eligibility of a candidate who attempted to be a Democratic Party candidate at the General Election<sup>47</sup> despite voting a Republican Party ballot at the preceding General Primary Election.<sup>48</sup> The Appellate Court reasoned that the requirement that a candidate be a “qualified primary voter of the party for which he seeks a nomination” mandates, “if nothing else, that the candidate [must]

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44. See Appendix B.

45. *Hossfeld*, 238 Ill.2d at 428.

46. *Id.*

47. The candidate had been selected to fill a vacancy in nomination. *Cullerton*, 384 Ill. App. 3d at 990.

48. *Id.*

have been eligible to vote in the primary for that party in the most recent primary election preceding the candidate's filing the statement of candidacy.”<sup>49</sup> The court held that, “the limitation on candidate party-switching found in the statement-of-candidacy portion of section 7-10 of the Code, which requires that a candidate attest to being a ‘qualified primary voter’ of the party whose nomination the candidate seeks, is now viable even in light of *Sperling*.”<sup>50</sup>

Thus, *Cullerton* interpreted a rule that a candidate who voted in one party’s primary election could not then be a different political party’s nominee at the next, following general election. *Cullerton* marked the first of the “party-switching” cases that defines who can—and who cannot switch parties, and during what certain time period (without any particular statute explicitly providing for same).

Following *Cullerton*, our Supreme Court handed down a unanimous decision in *Hossfeld v. Illinois State Bd. of Elections*,<sup>51</sup> wherein a candidate voted in the Democratic Party, Consolidated Primary Election, voted in the April Consolidated (“general”) Election, and then filed as a Republican Party candidate at the next General Primary Election.<sup>52</sup> In concluding that the candidate had *not* violated any party-switching restrictions, the Illinois Supreme Court found that “the Election Code no longer contains express time limitations on party-switching, and [the candidate] did not run afoul of the only remaining restriction, set forth in both sections 7–10 and 8–8, that a ‘qualified primary elector’ of a party may not sign petitions for or be a candidate in the primary of more than one party.”<sup>53</sup> The court in *Hossfeld* adopted a temporal rule limiting candidate party-switching within an “election cycle” (i.e. from the primary until the subsequent general election).<sup>54</sup>

Thus, under *Cullerton* and *Hossfeld*, a petition signer, a candidate, and a voter may change his political affiliation from one election cycle to another, similar to the temporal restrictions previously ruled upon by *Kusper* and *Sperling*. The problem with *Cullerton* and *Hossfeld* is that the temporal party-switching restrictions were not explicitly legislatively mandated and were not in the Illinois Election Code.

This “legislative hole” was seemingly closed in 2012 when the General Assembly codified the remaining party-switching restrictions, in light of the *Hossfeld* holding,<sup>55</sup> to determine who is

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49. *Id.* at 996.

50. *Id.* at 997.

51. *Hossfeld v. Ill. State Bd. of Elections*, 238 Ill.2d 418 (2010).

52. *Id.* at 421-22.

53. *Id.* at 429.

54. *Id.*

55. See P.A. 97-681, § 5, eff. March 30, 2012 (current version at 10 ILL. COMP. STAT. 5/7-43 (2018)), State of Illinois, 97th Gen. Assembly, H.R. Transcription

a “qualified primary voter” when it passed Public Act 97-0681, which modified Section 7-43 of the Illinois Election Code to read:

§7-43. Every person having resided in this State 6 months and in the precinct 30 days next preceding any primary therein who shall be a citizen of the United States of the age of 18 or more years shall be entitled to vote at such primary.

The following regulations shall be applicable to primaries:

No person shall be entitled to vote at a primary:

(a) Unless he declares his party affiliations as required by this Article.

(b) (Blank.)

(c) (Blank.)

(c.5) If that person has participated in the town political party caucus, under Section 45–50 of the Township Code, of another political party by signing an affidavit of voters attending the caucus within 45 days before the first day of the calendar month in which the primary is held.

(d) (Blank.)

(e) In cities, villages and incorporated towns having a board of election commissioners only voters registered as provided by Article 6 of this Act shall be entitled to vote at such primary.

(f) No person shall be entitled to vote at a primary unless he is registered under the provisions of Articles 4, 5 or 6 of this Act, when his registration is required by any of said Articles to entitle him to vote at the election with reference to which the primary is held.

A person (i) who filed a statement of candidacy for a partisan office as a qualified primary voter of an established political party or (ii) who voted the ballot of an established political party at a general primary election may not file a statement of candidacy as a candidate of a different established political party or as an independent candidate for a partisan office to be filled at the general election immediately following the general primary for which the person filed the statement or voted the ballot. A person may file a statement of candidacy for a partisan office as a qualified primary voter of an established political party regardless of any prior filing of candidacy for a partisan office or voting the ballot of an established political party at any prior election.<sup>56</sup>

Public Act 97-0681’s amendment to Section 7-43 treats the act of filing a Statement of Candidacy as tantamount to taking a primary ballot and considers both interchangeable acts as the “commitment from the candidate as to what Party they want to be

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Deb., 31st Legislative Day, at 95, 102 (Mar. 29, 2011), *available at* [www.ilga.gov/House/transcripts/Htrans97/09700031.pdf](http://www.ilga.gov/House/transcripts/Htrans97/09700031.pdf) (noting, during legislative debate, that the law was being updated to clarify and codify a court ruling).

56. 10 ILL. COMP. STAT. 5/7-43 (2018).

associated with for that one election cycle.”<sup>57</sup> Notably, Section 7-43 still contains no mention of signing nominating petitions and, it would seem, does not place a restriction against “filing a statement of candidacy” if you have signed nominating petitions of a different political party.

Instead, the new language in Section 7-43 specifically includes the sentence that, “[a] person may file a *statement of candidacy* for a partisan office *as a qualified primary voter* of an established political party *regardless of any prior filing of candidacy for a partisan office or voting the ballot of an established political party* at any prior election.”<sup>58</sup> Clearly, the inclusion of this portion further solidifies an intended connection between “voting” and “filing” (a Statement of Candidacy) as the determinative acts that define a “qualified primary voter” and political party “affiliation” for purposes of the Illinois Election Code. These two types of sworn public declarations as matters of public record are not able to be “withdrawn,”<sup>59</sup> and by tying both within a definition of who is “qualified” to vote at a primary election it would seem to settle a new definition for “qualified primary voter.”

Nevertheless, while the General Assembly seemed to re-codify and define what constitutes a “qualified primary voter,” after *Hossfeld* there have been different judicial interpretations dealing with other “vestiges”<sup>60</sup> of party-switching restrictions that remained in the Illinois Election Code. The 2012 revision to Section 7-43 of the Election Code should have settled these matters, but that ultimately has not been the case.

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57. P.A. 97-681, § 5, eff. March 30, 2012 (current version at 10 ILL. COMP. STAT. 5/7-43 (2018)), State of Illinois, 97th Gen. Assembly, H.R. Transcription Deb., 31st Legislative Day, at 98-99 (Mar. 29, 2011) (statements by Representative Fortner), *available at* [www.ilga.gov/House/transcripts/Htrans97/09700031.pdf](http://www.ilga.gov/House/transcripts/Htrans97/09700031.pdf) (last visited on Feb. 10, 2019).

58. 10 ILL. COMP. STAT. 5/7-43 (2018) (emphasis added).

59. *See* *Rudd v. Lake Cty. Electoral Bd.*, 2016 IL App (2d) 160649 at ¶¶ 11-12 (finding that “[t]he fact of [the candidate’s] earlier established-party candidacy in this election cycle simply is not [the candidate’s to ‘take back.’ Once [the candidate] filed his nominating papers, his sworn statement of candidacy and his sworn statement of party affiliation were matters of public record, precisely because Rudd had publicly expressed them. . . . That [the candidate] withdrew from and ultimately did not vote in the March 2016 primary is of no significance under section 7-43.”).

60. Ironically, in *Hossfeld*, the Illinois Supreme Court discussed how the General Assembly eliminated any “vestige of the former party-switching rule” from the statute. *Hossfeld*, 238 Ill.2d at 427-28; *see also* Michael J. Kasper, *It’s My Party and I’ll Run If I Want to: Party-Switching & Candidate Eligibility in Light of Hossfeld v. State Bd. of Elections*, 35 S. ILL. U.L.J. 249, 260-61 (2011) (discussing the effective difference and problematic language used by the courts in both *Cullerton* and *Hossfeld* and confusion it may leave).

*E. Vestiges of Candidate & Petition Signer Party-Switching Restrictions in § 7-10 and §8-8 of the Election Code*

While *Cullerton* and *Hossfeld* dealt primarily with a candidate's past voting conduct as determinative of the candidate's party-affiliation, since Public Act 86-1348 there remained the following sentence in both Section 7-10 and Section 8-8 of the Election Code: "A 'qualified primary elector' of a party may not sign petitions for or be a candidate in the primary of more than one party."<sup>61</sup> As such, a branch of cases has developed that have diverged from cases (and statute) that tie party affiliation to voting or filing a statement of candidacy. Instead, these cases examine the effect of signing a nominating petition and thus declare one's party affiliation in order to be able to stand as a candidate for nomination of a given political party. This ultimately led to the removal of candidate *Patton*, a lifelong Republican, from the Republican Party primary ballot.

During the pendency of *Hossfeld*, the Illinois Appellate Court examined a case where a candidate who, prior to becoming a candidate herself, signed the nominating petitions of the opposite party's candidate running for the same office.<sup>62</sup> The court in *Rosenzweig* noted specifically the "egregious example" of party-raiding violations and "political maneuvering" committed by the candidate.<sup>63</sup> Ultimately, the court in *Rosenzweig* extended *Watkins v. Burke*<sup>64</sup> and Section 7-10 (or 8-8) of the Election Code to find the candidacy invalid where the candidate first signed the nominating petitions of a candidate running for the nomination of a different political party for the same office.<sup>65</sup> In rejecting an argument that the restrictions to signing different party petitions and running as a candidate for different parties should be treated separately, the court held that "the remaining restriction in section 8-8 of the Election Code prohibits signing a nominating petition for a candidate from one political party and then running as a candidate for another political party in the same election cycle."<sup>66</sup>

*Rosenzweig* was decided before the enactment of Public Act 97-

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61. 10 ILL. COMP. STAT. 5/7-10 (2018); 10 ILL. COMP. STAT. 5/8-8 (2018).

62. *Rosenzweig v. Ill. State Bd. of Elections*, 409 Ill. App. 3d 176, 181 (1st Dist. 2011).

63. *Id.*

64. *Watkins v. Burke*, 122 Ill. App. 3d 499, 502 (1st Dist. 1984) (analyzing Section 7-10 of the Illinois Election Code with a definition of "qualified primary voter" before the 1990 Amendments discussed above, found that when, "an otherwise qualified voter has signed the nominating petitions of more than one party, the signature appearing on the petition first signed is valid and all subsequent signatures appearing on the nominating petitions of other parties are invalid").

65. *Rosenzweig*, 409 Ill. App. 3d at 181.

66. *Id.*

0681. Hence, the General Assembly amended and specified qualifications for primary voters in Section 7-43 of the Illinois Election Code, which made no mention of the effect of signing a nominating petition on one's status as a "qualified primary voter" of a given political party.<sup>67</sup> Nonetheless, the holding of *Rosenzweig* and the expansion of its rule was extended in *Schmidt v. Illinois State Bd. of Elections*.<sup>68</sup>

In *Schmidt*, a candidate signed a nominating petition on behalf of a candidate seeking the nomination of a different political party but had signed a candidate of her own party's petition first.<sup>69</sup> While the court in *Schmidt* held that the candidacy was valid, the court, in *dicta*, stated that the petition-signing sequencing holding of *Watkins* (extended by *Rosenzweig*) could apply beyond "only voter signatures" and to the "signatures of a candidate for office."<sup>70</sup> Neither the court in *Schmidt* nor the court in *Rosenzweig* mentioned that the ordered petition signing "rule" of *Watkins* was intended to avoid the "draconian sanction" of disqualifying a voter's signature from all nominating petitions if she or she inadvertently signed for different political parties.<sup>71</sup>

While the outcome in *Schmidt* was opposite of that in *Rosenzweig*, *Schmidt* tends to further the reasoning and holding of *Rosenzweig* and the "rule" that a potential candidate who signs a nominating petition of one political party (for whatever office) is barred from seeking nomination as a candidate of a different political party (for whatever office). The court did not reflect upon Public Act 97-0681 or the term "qualified primary elector" as it is used in Section 7-10 (or 8-8) of the Illinois Election Code and it even recognized that the "Election Code is silent as to the consequences" of violating the restriction in Section 8-8 of the Election Code against signing petitions or being a candidate in the primary of more than on party.<sup>72</sup> But no restraint was placed on its ultimate holding.

Instead, beyond the plain language of the Election Code, there now seems to be a "court-legislated" rule about the sequence of

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67. See 10 ILL. COMP. STAT. 5/7-43 (2018); *c.f.* P.A. 95-699, § 5, eff. Nov. 9, 2007 (current version at 10 ILL. COMP. STAT. 5/7-43 (2018)) (deleting any reference to signing nominating petitions and the effect on one's qualification to vote in a given primary election).

68. *Schmidt v. Ill. State Bd. of Elections*, 2016 IL App (4th) 160189.

69. *Id.* at ¶¶ 24-25. The court went into lengthy discussion to distinguish *Rosenzweig* and the "egregious" political maneuvering in that case versus the case presented in *Schmidt*. *Id.* at ¶ 24.

70. *Id.* at ¶ 25.

71. *Watkins*, 122 Ill. App. 3d at 502.

72. *Schmidt*, at ¶ 17. *C.f.* *McNamara v. Oak Lawn Mun. Officers Electoral Bd.*, 356 Ill. App. 3d 961, 967 (1st Dist. 2005) (holding where the Election Code was silent as to the remedy or effect of violating a specific provision, "[w]e will not read a remedy into a statute that fails to provide for one, particularly a drastic remedy that deprives a citizen of the right to run for office.").

signing nominating petitions and the ability, through petition objection litigation, to invalidate an entire candidacy.

Enter *Patton*. Where one signature on a nominating petition circulated by the candidate's old friend and dental patient was enough to invalidate a lifetime of clear connection and affiliation with one political party.

### III. *PATTON V. ILLINOIS STATE BOARD OF ELECTIONS & THE CURRENT STATE OF PARTY-AFFILIATION REQUIREMENTS*

After Public Act 97-0681, *Hossfeld*, and *Cullerton*, there was a new interpretation of the meaning of who is a “qualified primary voter” of a given political party and what party-switching restrictions exist based on voting in a party's primary or filing a statement of candidacy as a candidate for nomination of a political party. Additionally, and despite the interpretation of what “qualified primary voter” means, under *Rosenzweig* and *Schmidt* signing nominating petitions of one party can affect the entire candidacy of a candidate for nomination of another political party. The result of these two lines of cases, and the problems with how Section 7-10 and Section 8-8 have been interpreted, are seen in the outcome of *Patton*.<sup>73</sup>

*Patton* involved a case where the candidate, who currently serves as a Mayor of the City of Edwardsville, sought the Republican Party nomination for the office of State Senator.<sup>74</sup> The candidate had previously served as a Republican Party precinct committeeman, ran (and served) as a Republican Party county board member, voted a Republican Party ballot in the 2000, 2002, 2006, 2008, 2012, 2014, and most recent 2016 General Primary Elections, and is active in his local Republican Party committee organization.<sup>75</sup>

Before the candidate filed his state senate petitions as a candidate for nomination of the Republican Party, he signed the nominating petitions for a candidate (the incumbent) for state representative, who was seeking the Democratic Party's nomination.<sup>76</sup> The state representative candidate, and her entire family, were long-time family friends and dental patients of Dr. Patton, the candidate.<sup>77</sup> When presented with a nominating petition by the state representative's mother-in-law, Dr. Patton signed it.<sup>78</sup>

The initial challenge to the *Patton* candidacy was heard by the

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73. *Patton v. Ill. State Bd. of Elections*, 2018 IL App (1st) 180425-U.

74. *Id.* at ¶ 2; Brief of Petitioner-Appellant, *supra* note 18, at 5.

75. Brief of Petitioner-Appellant, *supra* note 18, at 6.

76. *Patton*, 2018 IL App (1st) 180425-U, ¶4; Brief of Petitioner-Appellant, *supra* note 18, at 6.

77. Brief of Petitioner-Appellant, *supra* note 18, at 6.

78. *Id.*



Illinois State Board of Elections sitting *ex officio* as the State Officers Electoral Board.<sup>79</sup> The Board voted along partisan lines, four votes in favor of sustaining the objection to four votes in favor of overruling the objection and, thus, the candidate's name was initially on the ballot.<sup>80</sup> On judicial review in the Circuit Court of Cook County, the candidacy was invalidated and, after various procedural obscurities,<sup>81</sup> the appellate court ultimately affirmed.<sup>82</sup>

The appellate court held that (i) Dr. Patton was *not* a qualified, affiliated, member of the Republican Party because he signed a nominating petition for a long-time friend and dental patient who is seeking the nomination of a different office in the Democratic Party primary; and (ii) the following language, and vestige of unconstitutional party-switching restrictions, from Section 8-8 of the Election Code compels removal of the candidate from the Republican Party primary ballot: "A 'qualified primary elector' of a party may not sign petitions for or be a candidate in the primary of more than one party"<sup>83, 84</sup>

The appellate court did not address the issue of Dr. Patton's political history and his eligibility as a Republican Party "qualified primary voter" pursuant to Section 7-43 of the Election Code,<sup>85</sup> as amended by Public Act 97-0681.<sup>86</sup> In fact, while the appeal was pending, the candidate voted early in the General Primary Election and was unchallenged when he requested a Republican Party ballot.<sup>87</sup> Hence, by the plainest definition the candidate was a "qualified primary voter" of the political party for which nomination is sought, which is exactly what the candidate was required to

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79. See *Patton*, 2018 IL App (1st) 180425-U, ¶5; see 10 ILL. COMP. STAT. 5/10-9 (2018) (describing how the State Officers Electoral Board hears objections to petitions for candidates seeking nomination in Legislative Districts encompassing more than one county).

80. *Patton*, 2018 IL App (1st) 180425-U, ¶6; see *Cook Cty. Republican Party v. Ill. State Bd. of Elections*, 232 Ill. 2d 231, 241 (2009) (discussing the authority to pursue judicial review even if the administrative board failed to reach a decision by majority vote).

81. See *Patton*, 2018 IL App (1st) 180222-U, ¶ 19 (deciding that not all issues had been resolved before the circuit court and, after being ordered to expedite the appeal by the Illinois Supreme Court, dismissed the initial appeal).

82. *Patton*, 2018 IL App (1st) 180425-U, ¶ 33. The Illinois Supreme Court declined the candidates Petition for Leave to Appeal, as did the U.S. Supreme Court with the candidate's emergency application for stay. Leave to Appeal, *Patton*, II. Sup. Ct. Docket No. 123337, 2018 WL 1404289 (Ill. Mar. 13, 2018).

83. 10 ILL. COMP. STAT. 5/8-8 (2018).

84. *Patton*, 2018 IL App (1st) 180425-U, ¶¶ 21, 23.

85. 10 ILL. COMP. STAT. 5/7-43 (2018).

86. See generally, *Patton*, 2018 IL App (1st) 180425-U (discussing the relevant language in Section 8-8 of the Election Code, but at no point evaluating the arguments regarding Section 7-43 or the candidate's voting and political affiliation history, which were argued at length before the electoral board and circuit court).

87. Petition for Leave to Appeal at 2, *Patton*, 2018 IL App (1st) 180425-U.

swear to in his Statement of Candidacy.<sup>88</sup>

Thus, based on the *Patton* case Illinois law currently requires that candidates for nomination of a political party be “qualified primary electors” of the political party for which nomination is sought. But independently, a candidacy can be invalidated for one unverified signature on a friend and patient’s nominating petition despite an otherwise unblemished history of “affiliation” with only one political party.

The irony is that lifelong Republican candidate *Patton* is seeking election after forced to form a “new political party” and undergo the significantly increased cost and effort required to gain access to the ballot.<sup>89</sup> The appellate court decided the candidate was not a “Republican,” even though he does not and never has, affiliated with the Democratic Party.<sup>90</sup> Thus, the law now essentially forces candidates, like the one in *Patton*, to “affiliate” with some new or pseudo political organization.<sup>91</sup> The real result, as it stands, is to stymie political participation and more congenial political interactions with what boiled down to a “gotcha game.”

The objection to Republican *Patton*, backed by the opposing political organization, utilized the petition objection process to “raid” or otherwise disrupt the primary election for the other political party. Had candidate *Patton* not had the resources to pursue a new party candidacy, the Democratic Party candidate

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88. See 10 ILL. COMP. STAT. 5/8-8 (2018) (requiring established party candidates seeking the nomination for members of the Illinois General Assembly to file a statement of candidacy as part of their nominating petitions wherein the candidate must swear that he or she is a “qualified primary voter of the party to which the petition relates”); 10 ILL. COMP. STAT. 5/7-10 (2018) (requiring all established party candidates to file a statement of candidacy as part of their nominating petitions wherein the candidate must swear that he or she is a “qualified primary voter of the party to which the petition relates.”).

89. See 10 ILL. COMP. STAT. 5/10-2 (2018) (detailing the signature and petition requirements for new political party candidates). Also noteworthy is that, after *Libertarian Party of Ill. v. Scholz*, 872 F.3d 518, 524 (7th Cir. 2017), the “full-slate” requirement was ruled unconstitutional.

90. *Patton*, at 22-23. The appellate court did not discuss Dr. Patton’s past affiliation with the Republican Party and, instead, applied the “rule” of *Rosenzweig* and *Schmidt. Id.*

91. See Joseph Bustos, *Hal Patton Files to Run for State Senate as Third-Party Candidate*, BELLEVILLE NEWS-DEMOCRAT (June 25, 2018), [www.bnd.com/news/local/article213791039.html](http://www.bnd.com/news/local/article213791039.html) (describing how Dr. Hal Patton filed nominating petitions as a “new party” candidate named the “Downstate United” party); Joseph Bustos, *He was kicked off the ballot, so he’s starting his own party to run for State Senate*, BELLEVILLE NEWS-DEMOCRAT (Apr. 10, 2018), [www.bnd.com/news/local/article208366404.html](http://www.bnd.com/news/local/article208366404.html) (describing the start to Dr. Patton’s process to circulate petitions as a “new party” candidate); Dan Brannan, *Hal Patton Seeks 5,000 Signatures to Refile as New Party Illinois Senate Candidate*, RIVERBENDER.COM (June 16, 2018), [www.riverbender.com/articles/details/hal-patton-seeks-5000-signatures-to-refile-as-new-party-illinois-senate-candidate-29113.cfm](http://www.riverbender.com/articles/details/hal-patton-seeks-5000-signatures-to-refile-as-new-party-illinois-senate-candidate-29113.cfm) (describing the effort of Dr. Patton to collect and file nominating petitions in order to form a “new” political party as a result of the appellate court’s order).

would likely be unchallenged in the General Election. Thus, instead of party operatives voting or seeking candidacy in the opposing party's primary, this form of "party-raiding" utilizes the party-switching restrictions to eliminate viable opposition. This is exactly what the party-switching and party affiliation laws were designed to protect against.

#### IV. A WAY FORWARD: INTENT-BASED POLITICAL PARTY AFFILIATION

Given the growing ambiguity in how individuals self-identify and "affiliate" with political parties, perhaps a way to avoid the result in *Patton* is to evaluate a question of political party affiliation similar to a question of a candidate's residency – one based on *intent*.

Similar to the Illinois Supreme Court case *Maksym v. Bd. of Election Com'rs of City of Chicago*,<sup>92</sup> where party affiliation can be viewed as something a person first can "establish" and then can only change when the first affiliation is "abandoned."<sup>93</sup> This would be akin to past precedent evaluating of party affiliation (and residency) through one's past acts.<sup>94</sup>

If based more on a totality of the circumstances, or even based on various sworn declarations of affiliation, the current Illinois political affiliation laws would function in accordance with their purpose. In line with Section 7-43 of the Illinois Election Code, a person's voting history could be seen as form of sworn declarations of current party affiliation.<sup>95</sup> Similarly, a potential candidate's Statement of Candidacy, which is a sworn, public declaration, constitutes an expression of party affiliation upon its filing.<sup>96</sup> These acts could be used to either help "establish" party affiliation or

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92. *Maksym v. Bd. of Election Com'rs of City of Chi.*, 242 Ill. 2d 303 (2011).

93. *See Id.* at 319 (explaining that both the establishment and the abandonment of a residence is principally a question of intent, "Intent is gathered primarily from the acts of a person").

94. *See Rouse v. Thompson*, 228 Ill. 522, 567 (1907) (Carter, J., dissenting) (concurring with the conclusion reached by the court with respect to testing party affiliation by comparing judging party affiliation with residency); *See also Cullerton*, 384 Ill. App. 3d at 997 (looking backwards at a potential candidates past acts, i.e., voting in a primary, to evaluate party affiliation).

95. *See Rudd*, 2016 IL App (2d) 160649, ¶ 3 (explaining that "Illinois has an open primary system, which means that voters do not have to register with their party affiliation and may vote in either party's primary. Voters, however, must choose which party's ballot they will vote in the primary, and whichever ballot they choose is a matter of public record because it is considered a declaration of the voter's current party affiliation"); *see also Kusper*, 414 U.S. at 68 (1973) (Rehnquist, J., dissenting) (discussing the interplay of Section 7-43, 7-44, and 7-45 of the Illinois Election Code and the emphasis on a primary voter's declaration of party affiliation at the primary election itself).

96. *Rudd*, 2016 IL App (2d) 160649, ¶ 11 (*citing Morrison v. Colley*, 467 F.3d 503, 510 (6th Cir. 2006)).

signify “abandonment” for some other political party.

Such a legislative scheme would only require minor changes to Sections 7-10 and 8-8 of the Illinois Election Code in order to clarify the current petition signer and candidate restriction language. The result would be a more just application of party-affiliation rules that will better reflect the true nature of the public perception of political party affiliation.

## V. CONCLUSION

So, what does it mean to be “affiliated” with a political party? The answer, according to current Illinois law means many things and holds one act, for example, of signing a nominating petition, as the conclusive act of affiliation despite one’s entire history showing affiliation to one particular political party. The result, as the *Patton* case demonstrates, is patently unfair, confusing, and overall fails to truly protect political parties from traditional “party-raiding” tactics. Instead, the current law has been judicially formed and politically utilized to effectuate a form of “reverse party-raiding” to meddle in the affairs of the opposite political parties, in an attempt to increase the chances for the meddling-party’s candidate to be successfully elected at the general election.

The current state of the law is unsustainable and requires action. The basic, fundamental right to vote, tied to one’s right to affiliate with the political party of one’s choice and to seek candidacy for elective office, remains a matter of judicial interpretation. The legislative and judicial impediments to seeking office or otherwise participating in the political, nominating process in Illinois, make Illinois particularly stand out as problematic in this area.

While such a legislative fix should be relatively easy and not overly partisan, the likelihood of any real action in the near future is, unfortunately, generally unlikely. Until legislatively solved, candidates, voters, and petition signers must all be on guard so that their own kindness or lack of knowledge of the Illinois Election Code does not cause an inadvertent disqualification. The hope, still, is that these laws and their judicial interpretations do not serve to overly burden or diminish political and electoral participation and some sense can be restored so that the law simultaneously upholds the democratic ideals within political party participation while considering the reality and perception of political party affiliation in general.

## APPENDIX A

Table 1<sup>97</sup>

Pre- “Kusper” Version	Current Version
<p>Former §7–10 of the Election Code (relevant portions only):</p> <p>We, the undersigned, members of and affiliated with the .... party and qualified primary electors of the .... party, in the .... of ...., in the county of .... and State of Illinois, do hereby petition that the following named person or persons shall be a candidate or candidates of the .... party for the nomination for (or in case of committeemen for election to) the office or offices hereinafter specified, to be voted for at the primary election to be held on the .... day of ....</p> <p>Each petition must include as a part thereof, a statement of candidacy for each of the candidates filing, or in whose behalf the petition is filed. This statement shall set out the address of such candidate, the office for which he is a candidate, shall state that the candidate is a qualified primary voter of the party to which the petition relates and is qualified for the office specified . . . .</p> <p>For the purpose of determining eligibility to sign a petition for nomination or eligibility to be a candidate under this Article, a “qualified primary elector” of a party (1) is an elector who has not requested a primary ballot of any other party at a primary election held within 2 years of the date on which the petition must be filed or (2) is a first-time voter in this State registered since the last primary</p>	<p>Current §7–10 of the Election Code (relevant portions only):</p> <p>We, the undersigned, members of and affiliated with the .... party and qualified primary electors of the .... party, in the .... of ...., in the county of .... and State of Illinois, do hereby petition that the following named person or persons shall be a candidate or candidates of the .... party for the nomination for (or in case of committeemen for election to) the office or offices hereinafter specified, to be voted for at the primary election to be held on (insert date). . . .</p> <p>Each petition must include as a part thereof, a statement of candidacy for each of the candidates filing, or in whose behalf the petition is filed. This statement shall set out the address of such candidate, the office for which he is a candidate, shall state that the candidate is a qualified primary voter of the party to which the petition relates and is qualified for the office specified . . . .</p> <p>A “qualified primary elector” of a party may not sign petitions for or be a candidate in the primary of more than one party.<sup>99</sup></p>

97. It is also noteworthy that certain portions of the Illinois Election Code have not been “updated” to eliminate the 23-month switching restriction – or still has some explicit vestige of same. *See e.g.*, 10 ILL. COMP. STAT. 5/7-45 (2018) (providing a form affidavit for a person seeking to vote at a primary, but who is challenged, to sign and submit to the primary election judges, which includes, *inter alia*, the statement that “had I have not voted at a primary of another political party within a period of 23 calendar months prior to the calendar month in which this primary is being held” and that “I have not signed the petition for nomination of a candidate of a political party with which I am not affiliate”).

99. 10 ILL. COMP. STAT. 5/7-10 (2018).

<p>of an even numbered year preceding the date on which the petition must be filed, but <i>no such person may sign petitions for or be a candidate in the primary of more than one party.</i> However, in the case of the first primary following the election at which a party first qualifies as a “political party”, as defined in Section 7–2, a “qualified primary elector” of such party is an elector who has not requested a primary ballot of any other party at any primary election held within 2 years of the date on which the petition must be filed.<sup>98</sup></p>	
<p>Former §7–43 of the Election Code:</p> <p>Every person having resided in this State 6 months and in the precinct 30 days next preceding any primary therein who shall be a citizen of the United States of the age of 18 or more years, shall be entitled to vote at such primary.</p> <p>The following regulations shall be applicable to primaries:</p> <p>No person shall be entitled to vote at a primary</p> <p>(a) Unless he declares his party affiliations as required by this Article</p> <p>(b) Who shall have signed the petition for nomination of a candidate of any party with which he does not affiliate, when such candidate is to be voted for at the primary.</p> <p>(c) Who shall have signed the nominating papers of an independent candidate for any office for which office candidates for nomination are to be voted for at such primary.</p> <p>(c.5) If that person has participated in the town political party caucus, under Section 45–50 of the Township Code, 1 of another political party by signing an affidavit of voters attending the caucus within 45 days before the first day of the calendar month in which the primary is held.</p> <p>(d) If he has voted at a primary held under this Article 7 of another political party within a period of 23 calendar months next preceding the calendar month in which such primary is held: Provided, participation by a primary elector in a primary of a political party</p>	<p>Current §7–43 of the Election Code:</p> <p>Every person having resided in this State 6 months and in the precinct 30 days next preceding any primary therein who shall be a citizen of the United States of the age of 18 or more years shall be entitled to vote at such primary.</p> <p>The following regulations shall be applicable to primaries:</p> <p>No person shall be entitled to vote at a primary:</p> <p>(a) Unless he declares his party affiliations as required by this Article.</p> <p>(b) (Blank).</p> <p>(c) (Blank).</p> <p>(c.5) If that person has participated in the town political party caucus, under Section 45-50 of the Township Code, of another political party by signing an affidavit of voters attending the caucus within 45 days before the first day of the calendar month in which the primary is held.</p> <p>(d) (Blank).</p> <p>In cities, villages and incorporated towns having a board of election commissioners only voters registered as provided by Article 6 of this Act shall be entitled to vote at such primary.</p> <p>No person shall be entitled to vote at a primary unless he is registered under the provisions of Articles 4, 5 or 6 of this Act,<sup>3</sup> when his registration is required by any of said Articles to entitle him to vote at the election with</p>

98. P.A. 86-786, § 5, eff. Sept. 6, 1989 (current version at 10 ILL. COMP. STAT. 5/7-10 (2018)) (emphasis added for comparison effect).

<p>which, under the provisions of Section 7-2 of this Article, is a political party within a city, village or incorporated town or town only and entitled hereunder to make nominations of candidates for city, village or incorporated town or town offices only, and for no other office or offices, shall not disqualify such primary elector from participating in other primaries of his party: And, provided, that no qualified voter shall be precluded from participating in the primary of any purely city, village or incorporated town or town political party under the provisions of Section 7-2 of this Article by reason of such voter having voted at the primary of another political party within a period of 23 calendar months next preceding the calendar month in which he seeks to participate is held.</p> <p>(e) In cities, villages and incorporated towns having a board of election commissioners only voters registered as provided by Article 6 of this Act 2 shall be entitled to vote at such primary.</p> <p>(f) No person shall be entitled to vote at a primary unless he is registered under the provisions of Articles 4, 5 or 6 of this Act,<sup>3</sup> when his registration is required by any of said Articles to entitle him to vote at the election with reference to which the primary is held.<sup>100</sup></p>	<p>reference to which the primary is held.</p> <p>A person (i) who filed a statement of candidacy for a partisan office as a qualified primary voter of an established political party or (ii) who voted the ballot of an established political party at a general primary election may not file a statement of candidacy as a candidate of a different established political party or as an independent candidate for a partisan office to be filled at the general election immediately following the general primary for which the person filed the statement or voted the ballot. A person may file a statement of candidacy for a partisan office as a qualified primary voter of an established political party regardless of any prior filing of candidacy for a partisan office or voting the ballot of an established political party at any prior election.<sup>101</sup></p>
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100. P.A. 89-331, § 3, eff. Aug. 17, 1995 (current version at 10 ILL. COMP. STAT. 5/7-43 (2018)).

101. 10 ILL. COMP. STAT. 5/7-43 (2018).

## APPENDIX B

~~For the purpose of determining eligibility to sign a petition for nomination or eligibility to be a candidate under this Article, A 'qualified primary elector' of a party (1) is an elector who has not requested a primary ballot of any other party at a primary election held within 2 years of the date on which the petition must be filed or (2) is a first-time voter in this State registered since the last primary of an even numbered year preceding the date on which the petition must be filed, but no such person may not sign petitions for or be a candidate in the primary of more than one party.<sup>102</sup>~~

This portion of Section 8-8 or Section 7-10 of the Election Code has not been changed since 1990.

Next, in 2007 the General Assembly amended Section 7-43 of the Illinois Election Code, which once placed explicit restrictions on primary voter eligibility, with respect to voting in the primary or signing nominating petitions for different political parties, by eliminating any party-switching restrictions from the definition of who is eligible to vote in a primary election, to wit:

§ 7-43. . . .

The following regulations shall be applicable to primaries:

No person shall be entitled to vote at a primary:

- (a) Unless he declares his party affiliations as required by this Article.
- (b) ~~(Blank.) Who shall have signed the petition for nomination of a candidate of any party with which he does not affiliate, when such candidate is to be voted for at the primary.~~
- (c) ~~(Blank.) Who shall have signed the nominating papers of an independent candidate for any office for which office candidates for nomination are to be voted for at such primary.~~

. . .

(d) (Blank.) If he has voted at a primary held under this Article 7 of another political party within a period of 23 calendar months next preceding the calendar month in which such primary is held: Provided, participation by a primary elector in a primary of a political party which, under the provisions of Section 7-2 of this Article, is a political party within a city, village or incorporated town or town only and entitled hereunder to make nominations of candidates for city, village or incorporated town or town offices only, and for no other office or offices, shall not disqualify such primary elector from participating in other primaries of his party: And, provided, that no qualified voter shall be precluded from participating in the primary

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102. P.A. 86-1348, § 2, eff. Sept. 7, 1990 (current version at 10 ILL. COMP. STAT. 5/7-10 (2018)) (showing the legislative deletions, with strike-outs and the remaining text in bold); *see also Cullerton*, 384 Ill. App. 3d at 994 (detailing the history and passage of Public Act 86-1348).



of any purely city, village or incorporated town or town political party under the provisions of Section 7-2 of this Article by reason of such voter having voted at the primary of another political party within a period of 23 calendar months next preceding the calendar month in which he seeks to participate is held.<sup>103</sup>

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103. P.A. 95-699, § 5, eff. Nov. 9, 2007 (current version at 10 ILL. COMP. STAT. 5/7-43 (2018)) (showing the legislative deletions, with strike-outs, and additions, in bold, made to Section 7-43 that have not been restored in any current version of this section).