IT'S MY PARTY AND I'LL RUN IF I WANT TO: PARTY-SWITCHING & CANDIDATE ELIGIBILITY IN LIGHT OF *HOSSFELD V. STATE BOARD OF ELECTIONS*

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I. INTRODUCTION

Remember when you were in college? If you found yourself at a dull party, you simply crossed the street to the next one to see if that was more to your liking. American politics is a lot like that. Ever since the founding of our country, the United States has had a rich tradition of politicians crossing the street to another political party more to their, or to their voters, liking. Elbridge Gerry, a founding father and early party-switcher, is best known, not for his switch from Federalist to Democratic-Republican, but for the lizard-like redistricting plan that coined the phrase "gerrymander."[1] Other famous party-switchers include Wendell Willkie, who switched parties prior to his 1940's presidential run,[2] Ronald Reagan, who campaigned as a Democrat for Harry Truman,[3] Strom Thurmand,[4] and Arlen Specter, who switched from Democrat to Republican and back again during his long political career.[5] Illinois is likewise familiar with party-switchers. In the 1980s, longtime Chicago Democratic Ward Committeeman and Alderman Edward Vrdolyak famously left the Democrats, made a short pit stop with the Solidarity Party, before finally

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1. Jeroen Daanen, *A Biography of Elbridge Gerry 1744–1814*, UNIV. OF GRUNINGEN, http://www.let.rug.nl/usa/B/gerry/gerry.htm (last updated Sept. 14, 2010).
2. *Wendell Willkie*, US FAMILY, http://www.usfamily.net/web/timwalker/sitedocs/ home.html (last updated May 2, 2007).
3. Reeve Hamilton, *Party Switching Politicians Often Stay in Office*, TEX. TRIB. (Nov. 11, 2009), http://www.texastribune.org/texas-legislature/texas-legislature/party-switching-politicians-often-stay-in-office/.
4. *Strom Thurmand is Dead*, TSM FORUMS, http://forums.thesmartmarks.com/index.php?showtopic=35693 (last visited Feb.8, 2011).
5. Chris Cillizza, *Specter to Switch Parties*, WASH. POST (Apr. 28, 2009; 11:51 AM), http://voices.washingtonpost.com/thefix/senate/specter-to-switch-parties.html.

settling in as a Republican.[6] More recently, a former State legislator from the Chicago suburbs switched from Republican to Democrat because, as he put it, "I can do more as a member of the majority party."[7] It makes you wonder, is this principled realignment, or simply protecting one's hide? It also makes you wonder, aren't there some rules against these shenanigans? Well, in Illinois at least, it turns out that there are some rules in place to prevent these shenanigans.

Candidates seeking elective office in Illinois must file, amongst nominating petitions and other papers, a Statement of Candidacy declaring that the candidate is a "qualified primary voter" of their political party.[8] The Illinois Supreme Court recently took up the meaning of this statutory phrase in considering the practice of "party-switching," where a candidate votes in one party's primary election and later seeks to become a candidate for a different political party. On September 22, 2010, the court affirmed the decision of the First District Appellate Court in *Hossfeld v. Illinois State Board of Elections.*[9] The case involved the eligibility of Steve Rauschenberger to run as a Republican candidate in the 2010 Primary Election for the office of State Senator from the 22nd Legislative District.[10] Prior to that Primary Election, Hossfeld filed an Objector's Petition, pursuant to the applicable provisions of the Election Code,[11] challenging Rauschenberger's eligibility to run as a Republican candidate. The gist of Hossfeld's Petition was that Rauschenberger was ineligible to run as a Republican candidate in the 2010 Primary Election because he had voted as a Democrat in the 2009 Primary Election.[12]

The challenge to Rauschenberger's candidacy was initially heard by the Illinois State Board of Elections,[13] which voted along partisan political lines, with the four Democratic members voting to sustain the Petition, and the four Republican members voting to overrule it. As a result of the Board's tie-vote, Rauschenberger's name remained on the ballot for the

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6. Dirk Johnson, *Ex Leader o Democrats in Chicago Switches Party*, N.Y. TIMES, Sept. 16, 1987, *available at* http://query.nytimes.com/gst/fullpage.html?res=9B0DE1DB1730F935A2575AC0A961948260.
7. John Patterson, *Party SwitchLleaves Trail of Hurt Feelings GOP gunning for Ex-Mate Froehlich*, ARLINGTON HEIGHTS DAILY HERALD, Dec. 30, 2007.
8. 10 ILL. COMP. STAT. 5/7–10, /8–8 (2011).
9 Hossfeld v. Ill. State Bd. of Elections, 939 N.E. 2d 368 (Ill. 2010).
10. *Id.*
11. 10 ILL. COMP. STAT. 5/10–8 (2011).
12. *Id*.
13. Because the 22nd Legislative District encompasses more than one county, Hossfeld's Petition was heard by the Illinois State Board of Elections sitting as the State Officers Electoral Board. 10 ILL. COMP. STAT. 5/10–9 (2011).

primary election.[14] Hossfeld unsuccessfully petitioned for Judicial Review in the Circuit Court of Cook County, and then appealed to the First District Appellate Court, which by a two to one vote affirmed the decision.[15]

The Supreme Court granted the Petition for Leave to Appeal to determine whether the appellate court's decision conflicted with an earlier Second District Appellate Court's decision in *Cullerton v. DuPage County Officers Electoral Board*.[16] In *Cullerton*, when no Democratic candidate appeared on the primary ballot, the Democratic Party appointed Thomas Cullerton to run as the Democratic nominee for the State Senate in the November, 2008 General Election.[17] A challenge to Cullerton's candidacy asserted that he could not run as a Democratic candidate because he had voted as a Republican in the immediately preceding primary election.[18] The Second District Appellate Court[19] ruled that Cullerton could not run as a Democratic candidate in the 2008 General Election because he had voted Republican in the 2008 Primary Election.[20]

Both cases addressed the issue of party-switching by candidates for public office in Illinois. In each case, a person sought to become a candidate for a political party after having voted in another party's most recent primary election. While the Supreme Court's decision in *Hossfeld* clearly establishes that Illinois law imposes no restrictions on candidate party-switching from one election cycle to the next, its decision left unclear the continued validity of the appellate court's decision in *Cullerton*, which involved party switching within an election cycle. On one hand, the Court's decision declares that "no vestige of the former party-switching rule remains in the statute" and that "the Election Code no longer contains express time limitations on party-switching . . . ,"[21] but on the other hand, the court did not specifically overrule *Cullerton*, which equally clearly endorsed a time limitation, albeit the relatively short one, between a primary and the ensuing general election on party-switching.

This article will examine the history of Illinois' party-switching statutes, the judicial decisions that undercut them, and the constitutional

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14. *See* Cook Cnty. Republican Party v. Ill. State Bd. of Elections, 902 N.E.2d 652 (Ill. 2009); Ill. Campaign for Political Reform v. Ill. State Bd. of Elections, 886 N.E.2d 1220 (Ill. App. Ct. 2008).
15. Hossfeld v. Ill. State Bd. of Elections, 924 N.E.2d 88 (Ill. App. Ct. 2010).
16. Cullerton v. Du Page Cnty. Officers Electoral Bd., 894 N.E.2d 774 (Ill. App. Ct. 2008).
17. *Id.* at 775.
18. *Id.*
19. Because the Legislative District at issue in *Cullerton* is located entirely in DuPage County, the DuPage County Officers Electoral Board had jurisdiction. 10 ILL. COMP. STAT. 5/10–9 (2011). Also, because judicial review may be taken in the county where the electoral board's decision is rendered, the Second District Appellate Court had jurisdiction over the appeal. 10 ILL. COMP. STAT. 5/10–10.1 (2011).
20. *Cullerton*, 894 N.E.2d at 775.
21. Hossfeld v. Ill. State Bd. of Elections, 939 N.E.2d 368 (Ill. 2010).

implications of any remaining party-switching restrictions that may have survived the Supreme Court's decision in *Hossfeld*. In short, the Supreme Court's decision should have explicitly overruled the Second District's decision in *Cullerton*, because the Illinois Election Code should not be read to impose any restrictions or limitations on party-switching. Moreover, the Qualifications Clause of the Illinois Constitution probably limits the General Assembly's ability to impose any such restrictions at all.

II. THE HISTORY OF PARTY-SWITCHING IN ILLINOIS

As mentioned above, every candidate for public office must file a Statement of Candidacy along with his or her other nominating papers. The requirements of that form are set forth in the Illinois Election Code:

> The name of no candidate shall be printed upon the primary ballot unless a petition for nomination shall have been filed in his behalf as provided for in this Section. Each such petition shall include . . . a statement of candidacy by the candidate 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, is qualified for the office specified . . . and may be in substantially the following form:
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> State of Illinois)
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> County of ……)
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> I, ……., being first duly sworn, say that I reside at ……. street in the city (or village of) ……. in the county of …….. State of Illinois; that I am a qualified voter therein and am a qualified primary voter of ……. party; that I am a candidate for nomination to the office of ……. to be voted on at the primary election to be held on (insert date); that I am legally qualified to hold such office and that I have filed a statement of economic interests as required by the Illinois Governmental Ethics Act and I hereby request that my name be printed upon the official primary ballot for nomination for such office.
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> Signed ……..[22]

This provision applies to all candidates seeking to run in any political party's primary election for any state executive, legislative or judicial

22. 10 ILL. COMP. STAT. 5/8–8 (2011).

office.[23] Notably, a candidate must attest that he or she is "a qualified primary voter" of the political party whose nomination he or she seeks. Independent, non-partisan and new political party candidates must also file a Statement of Candidacy, but that Statement need not contain an attestation about being a "qualified primary voter" of any political party.[24]

The issue presented in both *Hossfeld* and *Cullerton* was what effect, if any, a candidate's prior voting behavior had on the veracity of the statement that the candidate was a "qualified primary voter" of a particular political party.[25] In addressing this issue, the courts had to consider the meaning of this requirement in conjunction with Illinois' historic legislative prohibitions on switching political parties.

The Illinois Election Code once imposed restrictions on party-switching by three groups of political actors: voters, petition signers, and candidates.[26] Regarding voters, Section 43(d) of the Election Code prohibited a person from voting in a political party's primary election if he or she had voted in another party's primary within the preceding 23 months.[27] That Section specifically provided that:

> No person shall be entitled to vote at a primary: (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 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 in held.[28]

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23. Section 8–8 governs primary elections for offices in the Illinois General Assembly and Section 7–10 governs primary elections for all other elective state offices. 10 ILL. COMP. STAT. 57–105/7–1, /8–1 (2011).
24. 10 ILL. COMP. STAT. 57–105/10–4 (2011).
25. 10 ILL. COMP. STAT. 5/7–10, /8–8 (2011).
26. ILL. REV. STAT. ch. 46, par. 7–43(d) (1992); ILL. REV. STAT., ch. 46, par. 7–10 (1992).
27. ILL. REV. STAT. ch. 46, par. 7–43(d) (1992).
28. *Id.*

In 1973, however, in *Kusper v. Pontikes*, the U.S. Supreme Court struck down the so-called "23 month rule" applicable to voters.[29] The Court ruled that the 23-month restrictions were an unconstitutional restriction on the right of free political association protected by the First and Fourteenth Amendments, because "[o]ne who wishes to change his party registration must wait almost two years before his choice will be given effect."[30] The statute was unconstitutional because it 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."[31]

At the same time, Illinois law also imposed party-switching restrictions on both voters who signed candidates' nominating petitions and voters who seek to become political party candidates.[32] That provision explained that:

> 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."[33]

Just one year after the U.S. Supreme Court's decision in *Kusper v. Pontikes*, the Illinois Supreme Court struck down the two-year party-switching restriction on petition signers in *Sperling v. County Officers Electoral Board*.[34] Sperling had filed nominating papers to run as a Democratic judicial candidate in the 1974 primary election, and was challenged because he had voted in the 1972 Republican primary election.[35] In other words, the court was squarely presented with the two-year party-switching prohibition.

In a curious decision, the Illinois Supreme Court restored the candidate to the ballot, because it held that, under *Kusper*, the 2-year party-switching restriction on petition signers was likewise unconstitutional.[36]

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29. Kusper v. Pontikes, 414 U.S. 51 (1973).
30. *Id*. at 57.
31. *Id.*
32. ILL. REV. STAT. ch. 46, par. 7–10 (1992).
33. *Id.*
34. Sperling v. Cnty. Officers Electoral Bd., 309 N.E.2d 589 (Ill. 1974).
35. *Id*. at 590.
36. *Id.* at 591.

The court, however, began its analysis by explaining that "standards governing party changes by candidates should be more restrictive that those relating to voters generally" and that "the restriction on candidates could be upheld against constitutional challenge."[37] In fact, just a few years earlier, and before *Kusper*, the Federal District Court for the Northern District of Illinois upheld the 2-year party-switching restriction applicable to candidates.[38]

Instead, the Supreme Court held, even though it was not the issue presented, that the two-year party-switching restriction on petition signers was unconstitutional.[39] The Supreme Court went on, however, to also render the two-year party-switching restriction applicable to candidates unenforceable because the party-switching restrictions on voters and petitions signers were so intertwined with the restrictions on candidates, that the General Assembly would not have enacted the restriction applicable to candidates alone.[40] As a result, the court concluded that "the restrictions upon candidates cannot be considered independent and severable from the invalid portions of the plan."[41] The court went on to invite further clarifying legislation by the General Assembly, but until such time the party-switching restrictions on candidates were rendered "inoperable" by the court's decision in *Sperling*.[42]

In short, the Illinois Election Code once contained three provisions regarding candidate eligibility and party-switching. The first, the Statement of Candidacy provision, set forth the necessary declaration that a primary election candidate be a "qualified primary voter" of the applicable political party. The second, the 23-Month Rule, applied only to voters and prohibited party-switching within 23 months of voting in another party's primary election. Finally, the "party-switching" provision applicable to petition signers and candidates precluded a person from signing or running if he or she had participated in another party's primary within the most recent two years.

As a result of *Kusper* and *Sperling*, both the 23-Month Rule applicable to voters and the two-year party-switching restrictions applicable to petition

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37. *Id*.
38. Bendinger v. Ogilvie, 335 F.Supp. 572 (N.D. Ill. 1971). In *Bendinger*, the Court rejected a candidate's First Amendment challenges to the 2-year party-switching statute because in the absence of restriction on candidates "party swapping and changing might conceivably become so prevalent that the average political party could no longer function properly." *Id.* at 575. The Court also endorsed tying candidate eligibility to the immediately preceding primary election: "the political party for which a person voted in the last primary election is an excellent indicator of party allegiance. It is clear, concise and unalterable." *Id.* at 576.
39. *Sperling*, 390 N.E.2d at 592.
40. *Id*.
41. *Id*.
42. Dooley v. McGillicudy, 345 N.E.2d 102, 105 (Ill. 1976).

signers and candidates were rendered unenforceable. In response, the General Assembly took two separate actions. More recently, the General Assembly repealed the 23-Month restrictions from Section 7-43.[43] As a result, Illinois law no longer imposes any restrictions on voters in primary elections, and voters are free to switch party allegiance from primary election to primary election without restriction.

Prior to that action, the General Assembly also repealed the applicable provisions of the two-year party switching restrictions of Sections 7-10 and 8-8.[44] Specifically, Public Act 86-1348 changed Sections 7-10 and 8-8 as follows:

> ~~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."[45]

These legislative enactments appeared to end the debate about any remaining party-switching restrictions in the Election Code. While it deleted the explicit restrictions on party-switching in the Code, the Legislature did not, however, amend any of the provisions requiring a candidate to attest to being a "qualified primary voter" in the Statement of Candidacy. As a result of these amendments, the Election Code contained no explicit prohibition on party-switching, but did continue to require that candidates in primary elections attest to being a "qualified primary voter" of their party in the Statement of Candidacy. Into this setting, the litigation in both *Cullerton* and *Hossfeld* considered the meaning of the Statement of Candidacy phrase "qualified primary voter" in light of *Kusper*, *Sperling*, and the subsequent legislative enactments.

III. PARTY-SWITCHING REVISITED: *CULLERTON* AND *HOSSFELD*

In *Cullerton*, for the first time since the legislative action, an appellate court considered the eligibility of a candidate party-switcher.[46] Despite the legislature's deletion of the explicit reference to party-switching, the court held that the "qualified primary voter" clause of the Statement of

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43. 2007 Ill. Legis. Serv. P.A. 95–699 (West).
44. 1990 Ill. Legis. Serv. P.A. 86–1348 (West).
45. *Id.*
46. Cullerton v. Du Page Cnty. Officers Electoral Bd., 894 N.E.2d 774, 781 (Ill. App. Ct. 2008).

Candidacy provision still effectively prohibited party-switching: "we conclude 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*."[47]

In holding that Cullerton was not eligible to run as a Democrat because he voted in the preceding Republican Party primary, the *Cullerton* court noted that:

> The plain and ordinary meaning of the requirement that a candidate be a qualified primary voter of the party for which he seeks nomination mandates, if nothing else, that the candidate 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*.[48]

In short, because Cullerton had voted in the 2008 Republican primary election he could not become a Democratic candidate until he had a chance to re-align himself with the Democratic Party by voting in its next primary election, which was the February 2, 2010 primary.[49] The Court explained how Cullerton was "locked" as a Republican primary voter until the date of the 2010 primary election:

> [A]t all times between the 2006 primary and the next primary, in 2008, petitioner was a qualified primary voter of the Republican Party, and he was not a qualified primary voter of the Democratic Party. Likewise, when petitioner chose to vote in the Republican and not the Democratic primary in 2008, he was barred by statute from voting in the Democratic primary in that same year. Accordingly, at all times since the 2008 primary (and until the next primary, now scheduled for 2010), including the time at which petitioner submitted his statement of candidacy pursuant 7-10, he was not a qualified voter of the Democratic Party. We therefore reject petitioner's argument that he met the requirement, from section 7-10 of the Code, that he be a qualified primary voter of the Democratic party at the time of his nomination.[50]

Thus, *Cullerton* established a rule that a candidate who voted in one party's primary election could not stand as another party's nominee in the following general election. The unresolved issue, because it was not

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47. *Id.* (emphasis added).
48. *Id.* at 779 (emphasis added).
49. *Id*. at 780.
50. *Id*.

presented to the court, was how long does the party-switching restriction relate back? The facts of *Cullerton* applied to a voter in one party's primary switching after the primary but before the general election to which that primary was related: or an election "cycle" to use the vernacular of the election business. The language the court used, however, seemed to indicate that the prohition on party-switching went back to the pre-amendment two-year period. For example, the court indicated that the "legislature *left intact* the restriction on party-changing in the statement-of-candidacy portion of Section 7-10."[51] If the legislature had "left intact" the restriction it must have been in the same form as previously, otherwise it would have been left "intact."

The court also says that "the legislature severed the unconstitutional restriction[s] on petition signers from the . . . restriction[s] on candidates."[52] If, as the *Cullerton* court concludes, all the legislature did was "sever" the unconstitutional restriction on party-switching by petition signers, then the surviving portions of the statute would remain in its prior form— i.e. a two-year party switching restriction. If a patient has an infected leg that has to be "severed" from the body, that action does not change the surviving leg to an arm—it remains a leg. Similarly, it appears that is what the *Cullerton* court determined the legislature did; it removed the infected, unconstitutional, two-year party-switching restriction on petition signer's leg, but it "left intact" the healthy two-year restriction on candidate's leg.

In the very next election, in *Hossfeld*, the Supreme Court entered the fray with an opportunity to settle the questions left unanswered by *Cullerton*: is there a statutory restriction on candidate party-switching, and, if so, how long is it? In *Hossfeld*, the candidate, Rauschenberger, voted in the February 24, 2009, Democratic Primary in the consolidated election, at which township and other local officials are nominated.[53] He then voted in general to enter the February 2010 Republican Party primary.[54] Although that 2009 Democratic Primary was, to quote *Cullerton*, "the most recent primary election preceding the candidate's filing the statement of candidacy,"[55] the important distinguishing fact is that there was an intervening general election, the Consolidated General election in April 2009, before Rauschenberger signed his Statement of Candidacy.[56]

Both Cullerton and Rauschenberger executed the same Statement of Candidacy, in which both claimed to be a "qualified primary voter" of their

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51. *Id*. at 781 (emphasis added).
52. *Id*. at 780.
53. Hossfeld v. Ill. State Bd. of Elections, 924 N.E.2d 88, 89 (Ill. App. Ct. 2010). *See* 10 ILL. COMP. STAT. 5/2A–1.1 (2011).
54. *Hossfeld*, 924 N.E.2d at 91.
55. *Id*. at 93.
56. *Id*.

respective political parties.[57] The Second District ruled that Cullerton's was invalid because he had voted Republican in "the most recent primary election preceding the candidate's filing the statement of candidacy."[58] The Supreme Court, on the other hand, ruled that Rauschenberger's Statement was valid despite the fact that he voted Democratic in the most recent primary preceding the filing of his Republican Statement of Candidacy.[59] So what gives?

The only factual difference between the cases must explain the different outcomes in the two cases. Cullerton attempted to switch parties in the middle of an election cycle—meaning between a primary and the immediately subsequent general election.[60] Rauschenberger, on the other hand, switched parties in the period between election cycles—meaning he voted in a primary, the succeeding general election occurred, and then he switched parties.[61]

While this factual distinction is certainly a clean way to distinguish the two cases, the statutory language does not support the different outcomes. Prior to *Sperling*, the Sections 7-10 and 8-8 contained an explicit two-year party-switching prohibition.[62] The 1990 amendments to the Code deleted the express two-year ban, but did not remove the "qualified primary voter" requirement from the Statement of Candidacy provision.[63]

In addressing this issue, the *Cullerton* court noted that "[t]he legislature did not, and to date has not, removed the statement-of-candidacy restriction."[64] As a result, the *Cullerton* court concluded that the party-switching prohibition for candidates survived *Kusper*, *Sperling*, and the legislative amendments because "the legislature left intact the restriction on party changing in the statement-of-candidacy portion of section 7-10."[65] The court then concluded that "the legislature has spoken on this issue—the Code provides that a candidate must be a qualified primary voter of the political party for which he seeks a nomination."[66]

The *Cullerton* court's use of the phrase "left intact" regarding candidate party-switching is important.[67] There can be no doubt that prior

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57. Cullerton v. Du Page Cnty. Officers Electoral Bd., 894 N.E.2d 774, 776 (Ill. App. Ct. 2008); *Hossfeld*, 924 N.E.2d at 92.
58. *Cullerton*, 894 N.E.2d at 775.
59. *Hossfeld*, 924 N.E.2d at 94.
60. *Id.* at 743.
61. *Id*.
62. ILL. REV. STAT. 46, par. 7–10 (1992).
63. 1990 Ill. Legis. Serv. P.A. 86–1348 (West).
64. *Id.*
65. Cullerton v. Du Page Cnty. Officers Electoral Bd., 894 N.E.2d 774, 780 (Ill. App. Ct. 2008).
66. *Id*.
67. *Id.*

to *Sperling* and the 1990 amendment, the Code contained an explicit two-year prohibition on candidate party-switching.[68] The 1990 amendment only deleted language from the statute, it did not add any new language changing the length of the party-switching prohibition.[69] Instead, the amendment removed the two-year prohibition from one portion of Section 7-10, but did not change the "qualified primary voter" requirement in the Statement of Candidacy portion of the same Section.[70] The *Cullerton* court appears to recognize that by concluding that the legislature "left intact" the candidate party-switching prohibition through the Statement of Candidacy.[71] If the prohibition was left "intact" then it must have been left in the same form it was before—two-years—or else it would not have been left "intact." If the candidate party-switching restriction was "left intact" at two years, Rauschenberger should have been declared ineligible because he switched parties within a two-year period.

The Supreme Court, however, takes a completely different course in *Hossfeld*. Instead of concluding that the statutory party-switching prohibition on candidates was left intact, the Supreme Court ruled that Rauschenberger was an eligible Republican candidate despite voting as a Democrat within the prior two-years because "the Election Code no longer contains express time limitations on party-switching . . . ."[72] More forcefully, the court declared that "no vestige of the former party-switching rule remains in the statute."[73] The reason for that, the court concludes, is that "[a]fter deleting the two-year no-switch rule, the General Assembly has not seen fit to enact any further time restrictions."[74] If there has been "no vestige" of the "former party-switching rule" in the Election Code after the 1990 amendments, and "the General Assembly has not seen fit to enact any further restrictions," what then is to be made of *Cullerton*? The *Cullerton* decision unmistakably imposed an "express time limitation" on party-switching. This conflicts with the Supreme Court's statement in *Hossfeld* that there are "no longer express time limitations."[75] As a result, the Supreme Court appears to be saying that *Cullerton* was wrongly decided and should have been overruled.

The court, however, does not go quite that far. While at one point the decision appears heading in that direction, at other points the decision turns to the factual distinctions between the two cases by discussing the

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68. ILL. REV. STAT. ch. 46, par. 7–10 (1992).
69. 1990 Ill. Legis. Serv. P.A. 86–1348 (West).
70. *Id*.
71. *Cullerton*, 894 N.E. 2d at 780.
72. Hossfeld v. Ill. State Bd. of Elections, 939 N.E.2d 368, 374 (Ill. 2010).
73. *Id*.
74. *Id.* at 375.
75. *Id*. at 374.

consolidated versus general election schedule.[76] The decision leaves no doubt that nothing prohibits a candidate from switching parties between election cycles, but it is unclear whether party-switching within an election cycle, as Cullerton did, is likewise permitted. In that regard, the court's decision in *Hossfeld* is unsatisfying. Having determined that the Election Code contains "no vestige" of the "former party-switching rule,"[77] the court should have explicitly overruled *Cullerton* and declared that the "qualified primary voter" requirement in the Statement of Candidacy is not a party-switching restriction.

This is especially true in light of the fact that, at least for offices created by the Illinois Constitution as was the case in both *Cullerton* and *Hossfeld*, there is no requirement that a candidate be a registered voter at all, much less a voter of a particular political party. As a result, the constitutionality of any party-switching restriction by candidates for constitutional offices is, at the very least, questionable.

IV. PARTY AFFILIATION AND THE ILLINOIS CONSTITUTION

The Illinois Constitution contains three qualifications clauses: one for legislators,[78] one for executive offices,[79] and one for judicial offices.[80] Regarding legislators, Article IV, § 2(c) provides that, "[t]o be eligible to serve as a member of the General Assembly, a person must be a United States citizen . . . and for the two years preceding his election or appointment a resident of the district which he is to represent."[81] Similarly, Article V, § 3, provides that, "[t]o be eligible to hold the office of Governor, Lieutenant Governor, Attorney General, Secretary of State, Comptroller or Treasurer, a person must be a United States citizen . . . and a resident of this State for the three years preceding his election."[82] Finally, the Constitution established the following three eligibility criteria for judicial offices: "United States citizen, a licensed attorney-at-law of this State, and a resident of the unit which selects him."[83]

The immediately striking aspect of these provisions is that none of them contains even a suggestion that one of the eligibility criteria be that a person be a "voter," much less a "qualified primary voter" of a particular political party. Can the Election Code require an additional criterion—

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76. *Id*.
77. *Id*.
78. ILL. CONST. art. IV, § 2(c).
79. ILL. CONST. art. V, § 3.
80. ILL. CONST. art. VI, § 11.
81. ILL. CONST. art. IV, § 2(c).
82. ILL. CONST. art. V, § 3.
83. ILL. CONST. art. VI, § 11.

voter status—to those contained in the Constitution? One of the most well settled tenets of constitutional law is that where the Constitution sets forth the qualifications for an office, the legislature may not impose any additional eligibility criteria on that office.[84] This is true not only in Illinois, but at the federal level as well.[85]

In *U.S. Term Limits v. Thornton*, the U.S. Supreme Court struck down State legislation imposing term limits on members of Congress as violating the Qualifications Clause of the federal Constitution because the legislation imposed an additional qualification—non-incumbency—for Congressional office.[86] In reaching its conclusion, the Supreme Court took "note of the striking unanimity among the courts that have considered the issue," and pointed out that there is not even "a single case in which a state court or federal court has approved of a State's addition of qualifications for a Member of Congress.[87] To the contrary, an impressive number of courts have determined that States lack the authority to add qualifications."[88]

In *U.S. Term Limits*, the Supreme Court considered "whether the fact that [the term limits legislation] is formulated as a ballot access restriction rather than as an outright disqualification is of constitutional significance."[89] The legislation at issue in *U.S. Term Limits* prevented election authorities from certifying anyone who exceeded the term limits cap as a candidate in the next election.[90] The Court summarily rejected this contention because "allowing States to evade the Qualifications Clauses by 'dress[ing] eligibility to stand for Congress in ballot access clothing' trivializes the basic principles of our democracy that underlie those Clauses."[91]

The Illinois party-switching prohibition is likewise cloaked as a ballot access restriction; it requires a candidate to have a certain status—qualified primary voter—in order to appear on the ballot.[92] In this regard, it is a lot like the statutory provision in *U.S. Term Limits*, which required candidates

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84. Maddux v. Blagojevich, 911 N.E.2d 979, 988 (Ill. 2009); O'Brien v. White, 846 N.E.2d 116, 124 (Ill. 2006); Thies v. State Bd. of Elections, 529 N.E. 2d 565, 569 (Ill. 1988).
85. U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779 (1995).
86. *Id*. at 797.
87. *Id*. at 798.
88. *Id*. at 798–99 (citing Chandler v. Howell, 175 P. 569 (Wash. 1918); Ekwall v. Stadelman, 30 P.2d 1037, 1040 (Or. 1934); Stockton v. McFarland, 106 P.2d 328, 330 (Ariz. 1940); State *ex rel.* Johnson v. Crane, 197 P.2d 864 (Wyo. 1948); Dillon v. Fiorina, 340 F. Supp. 729, 731 (D. N.M. 1972); Stack v. Adams, 315 F. Supp. 1295, 1297–1298 (N.D. Fla.1970); Buckingham v. State, 35 A.2d 903, 905 (Del. 1944); Stumpf v. Lau, 839 P.2d 120, 123 (Nev. 1992); Danielson v. Fitzsimmons, 44 N.W.2d 484, 486 (Minn. 1950); *In re* Opinion of Judges, 116 N.W.2d 233, 234 (S.D. 1962)).
89. *Thornton*, 514 U.S. at 787.
90. *Id*. at 830.
91. *Id*.
92. 10 ILL. COMP. STAT. 5/7–10, /8–8 (2011).

to have a certain status—non-incumbancy—as a ballot access threshold requirement. The fact that it is also a status that the candidate must possess also distinguishes it from the other ballot access requirements, all of which require candidates to take certain steps in furtherance of their candidacy, submitting nominating petitions,[93] signing a Statement of Candidacy,[94] and completing an economic disclosure statement.[95] Each of these provisions requires a candidate to take an affirmative step—signing a Statement, gathering signatures, and completing a form. The Qualifications Clause, on the other hand, requires a person to have a status—citizenship, age, residency, or professional licensure.[96] Being a "qualified primary voter" is closer to a status, like non-incumbency, than it is to an affirmative ministerial step towards candidacy. As a result, it may, if Illinois law is similar to its federal counterpart, run afoul of the prohibition against adding to constitutional qualifications.

In *Maddux v. Blagojevich*, the Illinois Supreme Court also held that the General Assembly could not add to the provisions of the Qualifications Clause of the Illinois Constitution.[97] In *Maddux*, the Supreme Court considered Article VI, Section 15(a), which authorizes the General Assembly to "provide by law for the retirement of Judges and Associate Judges at a prescribed age."[98] The Supreme Court held that the legislature could not impose a statutory age limitation for election as a judge in addition to Section 11's express eligibility provisions.[99] In other words, the Supreme Court held that Section 15's authorization for laws on judicial retirements did not permit the legislature to add an age requirement not stated in Section 11.[100] In another related and consistent case, the Supreme Court had earlier ruled that a judge must be a resident of the unit that selects him.[101]

Article III, § 4 empowers the General Assembly to enact "[l]aws governing voter registration and the conduct of elections . . . ."[102] In furtherance of that provision, the General Assembly enacted Sections 7-10 and 8-8 of the Election Code setting the steps candidates must take to qualify for the ballot in a primary election.[103] Those sections require candidates for the General Assembly file a Statement of Candidacy that

93. *Id.*
94. *Id.*
95. 10 ILL. COMP. STAT. 5/7–12 (2011).
96. ILL. CONST. art. IV, § 2(c), art. V, § 3, art. VI, § 11.
97. Maddux v. Blagojevich, 911 N.E.2d 979, 988 (Ill. 2009).
98. *Id.* at 984.
99. *Id.* at 991.
100. *Id.* at 992.
101. Thies v. State Bd. of Elections, 529 N.E.2d 565 (Ill. 1988).
102. ILL. CONST. art. III, § 4.
103. 10 ILL. COMP. STAT. 5/7–10, /8–8 (2011).

contains six separate statements: (1) the candidate's address; (2) the office sought; (3) that the candidate is a qualified primary voter of the applicable political party; (4) that the candidate is qualified for the office; (5) that the candidate will file a Statement of Economic Interests; and (6) a request that his or her name be placed on the ballot.[104]

Interestingly, the suggested format includes an additional seventh statement that is not included in the enumeration from the preceding paragraph: namely that the candidate is a "qualified voter therein" that appears after the candidate's address.[105] This final element appears only in the suggested format section of the statute and not in the enumeration of the necessary elements that appear in the preceding paragraph.

In *Henderson v. Miller*,[106] the First District Appellate Court considered the meaning of the phrase "qualified primary voter." In that case, the court considered the eligibility of a candidate to serve in the Chicago City Council whose Statement of Candidacy listed his address at 1109 S. Troy in Chicago, but who, at the time of the election, was registered to vote at 1647 S. Springfield in Chicago, with both addresses being located in the applicable ward.[107] The Illinois Municipal Code required candidates for alderman to be residents of their ward, and unlike the Illinois Constitution, also to be registered voters of the municipality.[108] The court specifically concluded that the phrase "qualified voter therein" referred to the municipality, and not the specific street address on the Statement of Candidacy.[109] In fact, the court specifically concluded: "[o]ur reading of the [Statement of Candidacy] shows that the defendant did not swear that he was voter at 1109 South Troy; he swore only that he resided there."[110]

In interpreting the statutory language in the Statement of Candidacy, the *Henderson* Court concluded:

> The act does not require that a candidate be a voter at his place of residence. The defendant's Statement of Candidacy is on a form provided by the Board of Election Commissioners of the City of Chicago. If the plaintiffs' argument is correct, the form provided by the Board requires a candidate to swear to something which the statute itself does not require. The illogic of the plaintiffs' argument is apparent. We agree with the

104. *Id.*
105. *Id.*
106. Henderson v. Miller, 592 N.E.2d 570 (Ill. App. Ct. 1992).
107. *Id.* at 572.
108. *Id.* at 573.
109. *Id.* "The plaintiffs now ask us to infer that when the defendant swore he was a 'voter therein,' he was swearing that he was a voter at 1109 South Troy and not in the City of Chicago. We must decline to do so." *Id.*
110. *Id.* at 572–73.

> defendant's contention that his Statement of Candidacy did not fraudulently misrepresent that he was a 'voter at 1109 South Troy.' Consequently, removing the defendant from office based on that allegation would not be justified.[111]

In *Henderson*, the Appellate Court rejected the notion that the Statement of Candidacy, although required by the Election Code, could require a candidate to swear to something not included in the statute.[112] Does then, the Election Code require a candidate to swear to something not required by the Constitution?

V. CONSIDERATION OF VOTER REGISTRATION AS A CANDIDATE ELIGIBILITY CRITERIA AT THE ILLINOIS CONSTITUTIONAL CONVENTION

The Illinois Constitution establishes the three qualifications for constitutional offices: citizenship, 21 years of age, and residency.[113] Sections 7-10 and 8-8 of the Election Code impose an additional fourth qualification, namely status as a "qualified primary voter" of the party whose nomination the candidate seeks.[114] It makes sense then, that in order to be a "qualified primary voter" of a particular political party, a candidate must first be a qualified "voter." In other words, if a person is ineligible to run unless they are a qualified primary voter, that same person must first be a qualified voter.

The difficulty with this assumption, however, is that the Constitutional Convention of 1970 specifically considered, and rejected, voter registration status as an eligibility criteria for constitutional offices. In considering whether candidates for public office must be registered to vote, an original committee draft presented on Wednesday, July 15, 1970, initially contained the words, "a *voter* in the legislative district".[115] Delegate Peccarelli emphasized that in the draft "[w]e also added a requirement that he must be a registered voter of the district," explaining that "[h]e is eligible to vote, and that eligibility is by being registered."[116] Delegate Tomei inquired: "You mean that he must be registered to vote." Delegate Peccarelli

111. *Id*. at 573.
112. *Id.*
113. ILL. CONST. art. IV, § 2(c), art. V, § 3, art. VI, § 11.
114. 10 ILL. COMP. STAT. 5/7–10, /8–8 (2011).
115. RECORD OF PROCEEDINGS, SIXTH ILLINOIS CONSTITUTIONAL CONVENTION *(Verbatim Transcript for December 8, 1969-September 3, 1970)* 2666 (1970) (emphasis supplied).
116. *Id*. at 112.

replied, "[h]e must be a voter. And, there's only one way to be a voter and that's to be registered."[117]

A couple of days later, on Friday, July 17, after much discussion concerning the age limitation on members of the General Assembly and its relation to the general right of suffrage, Delegate Knuppel offered a formal amendment. It provided that a member of the General Assembly "*must be a voter* 21 years of age who for at least two years has been a resident of the district . . . ."[118] After debate, that amendment received only one vote and was resoundingly defeated.[119] The Constitutional Convention then adopted the current language, which does not include the voter registration as an eligibility criterion.[120] Consequently, the official annotation of the 1970 Constitution observes, "[i]t may be noted in passing that [Art. IV, sec. 2(c)] does not require a legislator to be a registered voter . . . ."[121]

Thus, the Illinois Constitutional Convention rejected voter registration status as an eligibility qualification for State constitutional offices. How then, can the Election Code impose a requirement that a candidate for office be a "qualified primary voter" of a political party? Surely, a candidate cannot be a "qualified primary voter" in a political party without first being a "voter." But the Constitutional convention specifically rejected the notion that a candidate for office must be a registered voter.

The fact that Sections 7-10 and 8-8 are couched in terms of ballot access does not make it less of a "qualification." In other words, in order to be elected to an Illinois Constitutional office as a nominee of a political party, a candidate must meet four separate statuses: (1) citizenship; (2) age; (3) residency; and (4) primary voter eligibility.[122] The first three of these appear in the text of the Constitution, but the last was added by the Supreme Court's decision in *Hossfeld*, and in apparent contravention of the express decision of the Constitutional Convention.

The easy, perhaps too easy, answer is that *Hossfeld* is not an eligibility criteria in the same way that "non-incumbency" was in *U.S. Term Limits*, or the way that age was in *Maddux*, because *Hossfeld* only precludes a candidate from appearing on the ballot as a political party nominee.[123] In other words, a candidate who switches parties is not completely barred from

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117. *Id.* at 2667.
118. *Id.* at 2816 (emphasis supplied).
119. *Id.* at 2819.
120. *Id.*
121. GEORGE D. BRADEN & RUBIN G. COHEN, THE ILLINOIS CONSTITUTION: AN ANNOTATED AND COMPARATIVE ANALYSIS PREPARED FOR THE ILLINOIS CONSTITUTIONAL STUDY COMMISSION 122 (Thomas G. Lyons, Chairman and Terrel E. Clarke, Co-Chairman) (Univ. of Illinois, October 1969).
122. ILL. CONST. art. IV, § 2(c), art. V, § 3, art. VI, § 11, 10 ILL. COMP. STAT. 5/7–10, /8–8.
123. Hossfeld v. Ill. State Bd. of Elections, 939 N.E.2d 368, 372 (Ill. 2010).

appearing on the ballot—he or she is only precluded from appearing on the ballot as the nominee of another political party. While a Democratic primary voter may not run as a Republican in the next general election or *vice versa*, *Hosffeld* would likewise preclude such a voter from running as the nominee of the new political party, such as the Libertarian or Green Party. In other words, a party-switcher is not completely without options—he or she could run as an independent candidate.

The trouble with this is, of course, that independent candidacies for the legislature are so rare as to be virtually nonexistent. In fact, only three independent candidates qualified for the ballot in 1980, and none had qualified between 1980 and 2006.[124] The Seventh Circuit Court of Appeals has noted that "the unrivaled severity" of:

> ballot access restrictions [on independent candidates] has had the effect of thoroughly excluding independent General Assembly candidates from Illinois's[125] ballots. Three independents did manage to qualify for the ballot during the first election governed by the increased signature requirement. But in the 12 election cycles since 1980, not a single independent legislative candidate has qualified.[126]

As a result, an independent candidacy is not really a true alternative route to election from the established political parties.

VI. CONCLUSION

The Illinois Constitution Convention was unequivocal in its rejection of the notion that legislative candidates be registered voters as an eligibility criteria for election to the Illinois General Assembly. Nonetheless, the Illinois Election Code requires candidates for the office of Senator or Representative to file a form declaring themselves to be "qualified primary voters" of the party whose nomination they seek.[127] At one point, the Election Code precluded candidates from running as a partisan candidate if they had voted in another party's primary during the previous two years.[128] In other words, the statute looked *backwards* and determined whether a

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124. Lee v. Keith, 463 F.3d 763 (7th Cir. 2006). In *Lee*, the Seventh Circuit Court of Appeals invalidated a statutory scheme where independent candidates for the Illinois General Assembly were required to file their nominations papers at the same time as candidates in partisan primary elections, several months prior to the primary election. The legislature subsequently enacted legislation providing that independent legislative candidates now file at the same time as candidates of new political parties, in the summer between the primary and general elections. *Id.*

125. *Id.* at 769.

126. *Id*.

127. 10 ILL. COMP. STAT. 5/7–10, /8–8 (2011).

128. ILL. REV. STAT. ch. 46, par. 7–10 (1971).

candidate was a "qualified primary voter" by looking at the voting behavior in *prior* elections. Although the Illinois Supreme Court invalidated the two-year look back in *Sperling*,[129] both *Cullerton* and *Hossfeld* continue to basic concept of looking backwards to determine candidate eligibility. This approach, however, does not harmonize with the Constitutional Convention's express rejection of voter registration as an eligibility criterion for elective State offices.

Instead, compliance with the "qualified primary voter' requirement of the Election Code could be determined by looking *forward*, not backward. In other words, in determining whether a person is a "qualified primary voter" of a particular party, a court should look, not at the past, but at the future, and determine whether the candidate would be eligible to vote in the *next* primary election. The result in *Hossfeld* would be the same—the candidate would be eligible because he would be able vote in the next Republican primary election. The result in *Cullerton*, however, would be different because in that case the candidate would have been free to vote in the next Democratic primary.

Using a forward, rather than backward, looking approach to candidate eligibility would accomplish the Supreme Court's statement, in *Hossfeld*, that there is "no vestige" of the old two-year party switching restriction. In fact, because Illinois has an open primary system whereby voters are able to declare their party affiliation on Election Day,[130] every voter would be a "qualified primary voter" of every political party. Moreover, this approach would be consistent with the Constitutional Convention's rejection of voter registration as an eligibility criteria—a candidate need not be a voter, but instead only be "qualified" to be a voter at the next primary election.

Finally, and perhaps most importantly, allowing the free change of party affiliation without restriction maximizes the power of the voters—they can accept or reject the party-switcher at the polls, it's up to them.

129. Sperling v. Cnty. Officers Electoral Bd., 309 N.E.2d 589 (Ill. 1974).
130. 10 ILL. COMP. STAT. 5/7–43 (2011).