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I. INTRODUCTION

Immediately prior to the 1972 Democratic National Convention, a political-legal drama of significant magnitude unfolded. The arena shifted from hotel lobbies to hearing rooms, to committee rooms, to the living room of a United States district judge, to the courtroom, to various vacation spots where the Supreme Court Justices recently had retired, to the Supreme Court, and finally to the floor of the Democratic National Convention itself. At stake was the nomination of the Democratic Party's presidential candidate to challenge the incumbent Richard Nixon. Specifically at issue was the validity of the California winner-take-all primary, which Senator McGovern had won in June, receiving the entire 271-vote California delegation to the national convention.

The roots of the controversy can be traced to the 1968 Democratic National Convention, which adopted a minority report from its Rules Committee abolishing the unit rule down to the precinct level. The convention also accepted the recommendation of its Credentials Committee establishing a Commission on Party Structure and Delegate Selection—the McGovern Commission.[1] The resolutions adopting the reports called for the state Democratic parties to give "all Democratic voters . . . full, meaningful and timely opportunity to participate" in the delegate selection process and directed the McGovern Commission to aid the state parties in meeting the convention's charge.[2]

After conducting extensive national hearings, the McGovern Commission issued its report, *Mandate for Reform*, in April 1970, and the Democratic National Committee adopted it in February 1971.[3] In its

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1. After Senator McGovern announced his candidacy, Representative Donald M. Fraser chaired the McGovern Commission.

2. *See* COMMISSION ON PARTY STRUCTURE AND DELEGATE SELECTION, MANDATE FOR REFORM 9 & n.1, 52-53 (1970) (hereinafter cited as MCGOVERN COMMISSION REPORT).

3. Prior to the 1968 Democratic National Convention, supporters of Senator Eugene

attempt to put flesh upon the skeleton of the broad charge given by the 1968 convention, the McGovern Commission established guidelines designed to eliminate inequities in the delegate selection process.[4] The Commission divided the guidelines into three categories: (1) problems of access to the delegate selection process; (2) problems of dilution of influence in the delegate selection process; and (3) mixed problems of access and dilution.[5] Within each category, the Commission established mandatory rules, which *required* certain action by the state parties and advisory rules, which the Commission *urged* but did not require the state parties to adopt.[6] If compliance with a required guideline necessitated a change of state law, the Commission did not relieve the state parties from the obligation of accomplishing the required statutory change until they had made "all feasible efforts," including the holding of hearings, the introduction of bills, work for the bills' enactment, and amendments to the state parties' rules "in every necessary way short of exposing the Party or its members to legal sanctions" in order to accomplish the change.[7]

The members of the McGovern Commission disagreed over whether to adopt a guideline requiring the abolition of winner-take-all primaries.[8] In one guideline, the Commission stated its belief that "a full and meaningful opportunity to participate in the delegate selection pro-

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McCarthy established the Commission on the Democratic Selection of Presidential Nominees chaired by Governor (now Senator) Harold Hughes of Iowa (the Hughes Commission). The Hughes Commission completed its report, *The Democratic Choice*, before the 1968 convention, and it undoubtedly influenced the convention's commitment to party reform. One striking finding of the Hughes Commission was that over 600 delegates to the 1968 Democratic National Convention were selected by procedures in which there had been no direct voter participation since 1966. COMMISSION ON THE DEMOCRATIC SELECTION OF PRESIDENTIAL NOMINEES, THE DEMOCRATIC CHOICE 24 (1968) (hereinafter cited as HUGHES COMMISSION REPORT). The Hughes Commission concluded that: "[S]tate systems for selecting delegates to the National Convention and the procedures of the Convention itself, display considerably less fidelity to basic democratic principles than a nation which claims to govern itself can safely tolerate . . . .

. . . .

. . . National parties . . . are media which any segment of the population can use every four years to express its views, to vindicate its interest, and to change policies. But if existing parties fail to perform this function, they will not survive." *Id.* at 2, 15-16. The McGovern Commission regarded itself as an agent responsible solely to the Democratic National Convention. Consequently, it reasoned that adoption of its report by the Democratic National Committee was unnecessary. *See* McGOVERN COMMISSION REPORT, *supra* note 2, at 36; Segal, *Delegate Selection Standards: The Democratic Party's Experience*, 38 GEO. WASH. L. REV. 873 (1970). *See also* Brown v. O'Brien, Civil No. 72-1628 (D.C. Cir. July 5, 1972), *judgment stayed*, 92 S. Ct. 2718 (1972).

4. McGOVERN COMMISSION REPORT, *supra* note 2, at 33.
5. *Id.* at 38.
6. *Id.* at 34-36.
7. *Id.* at 37.
8. *See* Brown v. O'Brien, Civil No. 72-1628 (D.C. Cir. July 5, 1972).

cess is precluded unless the presidential preference of each Democrat is fairly represented at all levels of the process."[9] The Commission, however, decided not to require state parties to have minority viewpoints represented within their delegations to the 1972 national convention;[10] instead, the Commission urged the state parties to adopt fair minority representation procedures and recommended that the 1972 convention "adopt a rule requiring state parties to provide for representation of minority views to the highest level of the nominating process for the 1976 National Convention."[11] Since the minority representation guideline was not mandatory, the "all feasible efforts" standard for changing conflicting state law did not apply.

After the adoption of the McGovern Commission Report, the California Democratic Party succeeded in altering state law on delegate selection,[12] but the party chose not to seek the abolition of the state's winner-take-all primary.[13] Thus, with all of the 271 delegates awarded to California under the allocation formula devised by the Democratic National Committee at stake,[14] it became increasingly clear as the primary season wore on that the California winner-take-all primary election would play the pivotal role in determining the Democratic Party's presidential nominee.[15]

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9. McGOVERN COMMISSION REPORT, *supra* note 2, at 44. *See also* Note, *Regulation of Political Parties: Vote Dilution in the Presidential Nomination Procedure*, 54 IOWA L. REV. 471 (1968): "Vote dilution may . . . occur when there is no provision for minority delegate representation at succeeding levels in the nomination procedure. If a plurality or majority vote in each district selects the representation for that district, those votes cast for other presidential candidates receive no weight beyond the precinct caucus or primary election." *Id.* at 483.

10. Brown v. O'Brien, Civil No. 72-1628, at 6 (D.C. Cir. July 5, 1972).

11. McGOVERN COMMISSION REPORT, *supra* note 2, at 44-45. At their 1972 convention, the Democrats abolished winner-take-all primaries because they fail to provide for representation of minority viewpoints within a state's delegation. This action was recommended by the Rules Committee, COMMITTEE ON RULES OF THE 1972 DEMOCRATIC NATIONAL CONVENTION, REPORT § 4 [hereinafter cited as 1972 RULES COMMITTEE REPORT], and approved by the convention. N.Y. Times, July 13, 1972, at 24, col. 2.

12. *See* CAL. ELECTIONS CODE §§ 6300 et seq. (West Supp. 1972).

13. *Cf.* CAL. ELECTIONS CODE § 6386 (West Supp. 1972). *See generally* Brown v. O'Brien, Civil No. 72-1628 (D.C. Cir. July 5, 1972).

14. For discussions of the allocation formula chosen by the Democrats see Bode v. National Democratic Party, 452 F.2d 1302 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 1019 (1972) (delegates need not be allocated exclusively in accord with a "one Democrat, one vote" formula); Georgia v. National Democratic Party, 447 F.2d 1271 (D.C. Cir.), *cert. denied*, 404 U.S. 858 (1971) (delegates need not be allocated exclusively according to a state's total population). For a discussion of the Republican allocation formula see Ripon Soc'y v. National Republican Party, 343 F. Supp. 168 (D.D.C. 1972).

15. The phenomenon was not limited to 1972. In 1968, Senator Robert Kennedy's victory in California briefly made him the frontrunner for the nomination. Moreover, the California primary also has held special importance to the Republican Party. In 1964, Senator Barry Goldwa-

The legal issues underlying the California delegate challenge at the 1972 Democratic National Convention are the subject of this Article. The Article briefly will sketch some of the recent constitutional developments in party reform litigation. It will argue that winner-take-all primaries, especially in California because of its size, are violations of equal protection as interpreted by the voting rights cases decided during the past 40 years.[16] Finally, it will take the superficially paradoxical position that despite its unconstitutionality, California's winner-take-all primary did not violate the rules governing delegate selection to the 1972 Democratic National Convention; therefore, unless declared unconstitutional by a court, the 1972 Democratic National Convention should only have invalidated California's winner-take-all primary prospectively. Of course, that is in fact what happened after all the turmoil had ended.

II. THE DEVELOPMENT OF CONSTITUTIONAL SAFEGUARDS TO PROMOTE INTRAPARTY DEMOCRACY

Although the framers of the Constitution did not account for political parties,[17] their phenomenal growth soon made it apparent that political parties were important parts of the elective process. With this realization, states sought to impose restrictions upon them. At the outset, courts apparently were reluctant to permit governmental regulation;[18] but as the parties themselves failed to clean up the corruption and fraud that accompanied the election process, and as the extraordinary importance of the parties within the election process became more and more evident, the courts adopted a more receptive attitude toward state regulation of party activities.[19]

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ter effectively assured himself of the Republican nomination by defeating New York's Governor Nelson Rockefeller in the California primary.

16. This argument is intimated in R. DIXON, DEMOCRATIC REPRESENTATION 565-71 (1968); Note, *Constitutional Safeguards in the Selection of Delegates to Presidential Nominating Conventions*, 78 YALE L.J. 1228, 1239-40 n.45 (1969).

17. The twelfth amendment, enacted in 1804, changed the prior method of presidential and vice presidential selection described in article II, § 1 of the Constitution. Prior to the amendment, electors cast ballots for 2 persons without designating their respective choices for president and vice president. The person receiving a majority of the votes became the president and the person receiving the second highest total became the vice president. The twelfth amendment requires electors to cast separate ballots for the president and vice president, and implicitly recognizes the realities of political party nominations.

18. *See* Note, *Freedom of Association and the Selection of Delegates to National Political Conventions*, 56 CORNELL L. REV. 148, 153 (1970).

19. *See* Brief for Common Cause as Amicus Curiae, at 6-9, Maxey v. Washington State Democratic Comm., Civil No. 71-1051 (9th Cir. Nov. 8, 1971); Note, *supra* note 18, at 153-54.

A. Judicial Protection of the Nomination Process

After the power of government to regulate political parties became established, the question of whether constitutional protections apply to the party processes of nomination and endorsement arose. In a series of cases from 1927-1953 (frequently referred to as the *White Primary Cases*),[20] the Supreme Court established the rule that all procedures which form an integral part of the election process and discriminate on the basis of race are subject to scrutiny under the Constitution. In *Gray v. Sanders*,[21] the first substantive equal protection voting rights case decided by the Supreme Court after its landmark procedural decision in *Baker v. Carr*,[22] the Court held that the guarantee of equal protection applies to primary elections, regardless of whether the factor of racial discrimination is involved.[23] Recently, the Court reaffirmed its commitment to impose the constitutional requirements of equal protection upon all the integral parts of the election process in *Moorc v. Ogilvie*,[24] a case that held unconstitutional an Illinois statute requiring new political parties to obtain at least 200 signaturcs from each of 50 counties in order to appear on the ballot.[25]

B. Applying Constitutional Safeguards to Intraparty Procedures: The Barrier of State Action

When courts move from the realm of the election process and attempt to apply constitutional safeguards to intraparty procedures, they must face the threshold question of state action. Professor Charles Black has aptly observed that "[t]he field is a conceptual disaster area."[26] Although the *White Primary Cases* seemingly provide an umbrella of state action sufficient to cover the party nomination process,

20. Terry v. Adams, 345 U.S. 461 (1953); Smith v. Allwright, 321 U.S. 649 (1944); United States v. Classic, 313 U.S. 299 (1941); Grovey v. Townsend, 295 U.S. 45 (1935); Nixon v. Condon, 286 U.S. 73 (1932); Nixon v. Herndon, 273 U.S. 536 (1927); Baskin v. Brown, 174 F.2d 391 (4th Cir. 1949); Rice v. Elmore, 165 F.2d 387 (4th Cir. 1947).

21. 372 U.S. 368 (1963).

22. 369 U.S. 186 (1962).

23. 372 U.S. at 379-80.

24. 394 U.S. 814, 818 (1969). *Moore v. Ogilvie* overruled MacDougall v. Green, 335 U.S. 281 (1948), in which Justice Douglas dissented as follows: "The protection which the Constitution gives voting rights covers not only the general election but also extends to every integral part of the electoral process, including primaries. . . . When candidates are chosen for the general election by a nominating petition, that procedure also becomes an integral part of the electoral process. It is entitled to the same protection as that which the Fourteenth Amendment grants any other part." 335 U.S. at 288 (Douglas, J., dissenting). Since Justice Douglas wrote the opinion in *Moore v. Ogilvie*, it seems clear that his earlier dissent is now the law.

25. 394 U.S. at 819. Illinois has 102 counties.

26. Black, *The Supreme Court—Foreword*, 81 HARV. L. REV. 69, 95 (1967).

as recently as 1968 at least one court held that a delegate selection process did not involve state action sufficient to invoke the equal protection guarantees.[27] Nevertheless, the more recent cases involving challenges to delegate selection procedures have held that state action was present.[28] Moreover, in two cases decided in 1971 by the District of Columbia Circuit, different panels of the court held that the process by which the Democratic Party allocated delegates to the states for its national convention involved state action.[29] When the dramatic California delegate challenge arose, the trend toward finding state action[30] in intraparty nomination contests already was well established.[31]

C. *The Functional Approach to Intervention in Intraparty Procedures*

Their traditional reluctance to intervene in the internal operation

27. Smith v. State Democratic Executive Comm., 288 F. Supp. 371, 375-76 (N.D. Ga. 1968). Another court perhaps held that relief in a delegate selection challenge was unwarranted because no state action was present. *See* Irish v. Democratic-Farmer-Labor Party, 287 F. Supp. 794, 801 (D. Minn.), *aff'd per curiam*, 399 F.2d 119 (8th Cir. 1968). Most commentators reject the proposition. *See, e.g.*, Chambers & Rotunda, *Reform of Presidential Nominating Conventions*, 56 VA. L. REV. 179, 194-96 (1970); Note, *supra* note 16, at 1232-35. *But see* Note, *One Man, One Vote and Selection of Delegates to National Nominating Conventions*, 37 U. CHI. L. REV. 536, 538-44 (1970).

28. *See* Doty v. Montana State Democratic Cent. Comm., 333 F. Supp. 49, 51 (D. Mont. 1971); Maxey v. Washington State Democratic Comm., 319 F. Supp. 673, 678 (W.D. Wash. 1970).

29. *See* Bode v. National Democratic Party, 452 F.2d 1302, 1304 (D.C. Cir. 1971); Georgia v. National Democratic Party, 447 F.2d 1271, 1275-76 (D.C. Cir. 1971). *See also* Ripon Soc'y v. National Republican Party, 343 F. Supp. 168 (D.D.C. 1972).

30. In a related area, a court has held that party delegate selection rules fall within the provisions of § 5 of the Voting Rights Act of 1965, requiring submission of any change to the United States Attorney General or approval by the United States District Court for the District of Columbia. MacGuire v. Amos, 343 F. Supp. 119 (M.D. Ala. 1972).

31. Insofar as the constitutional validity of a state-decreed primary is concerned, little controversy exists over whether there is sufficient state action involved to invoke constitutional protections. Even commentary that rejects the argument that state action exists in intraparty challenges acknowledges that "[i]n those states whose statutes prescribe . . . the selection of national convention delegates . . . a finding of state action would be justified." Note, *supra* note 27, at 541. The California statute that establishes the state's winner-take-all primary is a clearcut commitment by the state legislature to a particular procedure. Even under the most limited viewpoint of state action, the primary would be susceptible to challenge under the fourteenth amendment. *See* Barthelmes v. Morris, 342 F. Supp. 153, 157 (D. Md. 1972).

The state action issue with respect to the action by the Democratic Party's Credentials Committee is less clear. The court of appeals dealt with the problem summarily, but the Supreme Court indicated that the presence of state action might be in serious question. *See* notes 223-39 *infra* and accompanying text. The Supreme Court may intend to re-establish the importance of the state action doctrine as a decision-making tool. *See* Moose Lodge v. Irvis, 407 U.S. 163 (1972), in which the Court rejected for lack of state action a challenge to Pennsylvania's practice of issuing liquor licenses to private clubs that discriminate on the basis of race. For further discussion of the state action issue see pp. 1015-16 *infra*.

of a voluntary association nevertheless has caused courts to analyze carefully the function that a party is performing when application of constitutional safeguards to intraparty procedures is being sought. The first significant articulation of this functional approach to party affairs was the decision of *Lynch v. Torquato*,[32] in which the Third Circuit refused to apply one person, one vote principles to the election of a county chairman whose function the court found to be primarily the internal management of party affairs. The court indicated that if the challenge involved a governmental function of the party, like the nomination of candidates, state action sufficient to trigger judicial intervention would exist.[33]

The most recent application of the functional approach occurred in *Seergy v. Kings County Republican County Committee*.[34] In that case, the Second Circuit adopted the approach used by the Third Circuit in *Lynch v. Torquato*. The plaintiff's challenge in *Seergy* involved a statute that permitted members of the party county committee to cast equal votes although they represented districts of unequal population. The court described the county committee's function as "essentially to handle the party's internal affairs at the county level . . . [although] [i]n rare instances, the county committee may choose the party nominee or play a major part in that determination."[35] The court also stated that "the essential standard . . . is whether their function in voting is to select a nominee for public governmental office, as distinguished from conduct of the private affairs of their political organization."[36] The Second Circuit's holding in *Seergy* apparently states the current law on the application of equal protection principles to intraparty disputes: if the challenge is to matters that affect management of the party, the courts will not intervene; but if the challenge relates to party action that is governmental in nature—for example, nominating a candidate for office—then the guarantees of the equal protection clause apply.[37]

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32. 343 F.2d 370 (3d Cir. 1965).

33. Acknowledging that one person, one vote principles applied to both state-regulated and party-conducted primaries, the court said that "this is because the function of primaries is to select nominees for government office even though, not because, they are party enterprises." 343 F.2d at 372.

34. 459 F.2d 308 (2d Cir. 1972).

35. 459 F.2d at 310.

36. *Id.* at 313.

37. *See id.* at 314.

D. *The Growth of One Person, One Vote as a Standard of Equal Protection*

Hadley v. Junior College District[38] represents the broadest application to date of the one person, one vote formula by the Supreme Court.[39] In that case, the Court held that equal protection meant one person, one vote in the context of an election for the board of trustees of a junior college district. In its opinion, the Court announced a threshold test for the application of one person, one vote principles: if the persons to be elected perform governmental functions, then the one person, one vote doctrine applies. Moreover, the *Hadley* Court rejected a different kind of functional approach that had been suggested earlier in *Sailors v. Board of Education*.[40] In *Sailors*, local school districts chose representatives to sit on the county school board; since the local districts had unequal population and the representatives all cast equally weighted ballots, the procedure was challenged on the basis of the one person, one vote principle. The Supreme Court articulated two bases for upholding the procedure. First, it viewed the proccdure as an essentially appointive process. In fact, it found that no election for the county school board ever took place or was intended.[41] Since the Court has never decreed in what circumstances an election was constitutionally mandated,[42] and since the equal population principle, as previously derived, applied only when there was a commitment to a popular election, the principle did not apply in *Sailors*.[43] Secondly, the court in *Sailors* intimated that the office involved was administrative rather than legislative and apparently

38. 397 U.S. 50 (1970).

39. In Baker v. Carr, 369 U.S. 186 (1962), the Supreme Court held that matters of apportionment of state legislatures were justiciable and subject to adjudication in federal courts under the equal protection clause. Reynolds v. Sims, 377 U.S. 533 (1964), and its companion cases later held that the guarantee of equal protection in the context of legislative apportionment requires the legislative districts in both houses of a bicameral state legislature to have substantially equal population. In subsequent cases, the Court extended the equal population principle to local units of government of general legislative power in Avery v. Midland County, 390 U.S. 474 (1968), and to special purpose districts in Hadley v. Junior College Dist., 397 U.S. 50 (1970). At the same time, the Court developed a very strict rule of population equality, refusing to accept any set deviation from equality as de minimis. *See* Wells v. Rockefeller, 394 U.S. 542 (1969); Kirkpatrick v. Preisler, 394 U.S. 526 (1969). In the most recent one person, one vote case, which involved a local legislative body, the Court seemingly retreated from its previous rigidity and accepted a larger deviation from perfect population equality because of historic reasons and the lack of a built-in bias. Abate v. Mundt, 403 U.S. 182 (1971).

40. 387 U.S. 105 (1967).

41. *Id.* at 109.

42. *See* Fortson v. Morris, 385 U.S. 231, 233 (1966).

43. *See* Note, *supra* note 16, at 1242.

attached constitutional significance to that difference.[44] The *Hadley* Court, however, rejected this legislative-administrative distinction.[45]

As a result of the *Hadley* decision, the application of the one person, one vote doctrine hinges upon two related factors. First, there must be a commitment to an elective process; and secondly, the persons elected at the threshold must be performing governmental functions. Once the "governmental function" threshold requirement is met, however, no further functional distinctions are of constitutional significance. This approach to the one person, one vote doctrine easily meshes with the approach used by the lower federal courts to define the application of equal protection principles in the intraparty dispute context.

E. Maxey v. Washington State Democratic Committee: The Application of One Person, One Vote to Intraparty Nomination Procedures

Three principles emerge from the preceding discussion. The *White Primary Cases, Gray v. Sanders*, and *Moore v. Ogilvie* make it clear that the nomination process is an integral part of the election process, to which constitutional safeguards apply. *Lynch v. Torquato* and *Seergy v. Kings County Republican County Committee* distinguish the internal management and governmental functions of political parties. They apply constitutional safeguards to intraparty disputes concerning political parties' governmental functions—for example, the nomination process—but refuse to resolve internal management squabbles on a constitutional basis. Finally, *Hadley v. Junior College District* indicates that one person, one vote principles will apply to political party operations that are governmental in nature, provided that there is a commitment to an elective process.[46]

Maxey v. Washington State Democratic Committee[47] represents the intersection of these three principles. District Judge Goodwin recog-

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44. 387 U.S. at 110.

45. The Court in *Hadley* specifically and unequivocally rejected this distinction, saying "there is no discernible, valid reason why constitutional distinctions should be drawn on the basis of the purpose of the election. . . . It should be remembered that in cases like this one we are asked by voters to insure that they are given equal treatment, and from their perspective the harm from unequal treatment is the same in any election, regardless of the officials selected." 397 U.S. at 55.

46. The McGovern Commission also recognizes the separate role that a party plays in the nomination process. In one guideline, the Commission stated that "[w]henever other party business is mixed, without differentiation, with the delegate selection process, the Commission requires State Parties to . . . clearly designate the delegate selection procedures as distinct from other Party business." MCGOVERN COMMISSION REPORT, *supra* note 2, at 43.

47. 319 F. Supp. 673 (W.D. Wash. 1970).

nized the importance of the functional distinction in party roles when he decided *Maxey* and its companion case, *Dahl v. Republican State Committee*.[48] In *Dahl*, plaintiffs challenged a state statutory procedure for electing party officials as a violation of equal protection. Plaintiffs in *Maxey*, on the other hand, challenged the Democratic delegate selection process as a violation of equal protection. Following *Lynch v. Torquato*, Judge Goodwin found that party officials acting solely as party officials do not necessarily perform governmental functions. Accordingly, he declined to invalidate the state statute relating exclusively to selection of party officials; however, he simultaneously held that the Democratic Party's delegate selection process specifically and exclusively involved the party's role in the process of nominating a presidential candidate so that the equal protection guarantees applied.[49] Moreover, District Judge Goodwin found that a commitment to the elective process had been made in *Maxey*, and that the process of selecting delegates to the national nominating convention was part of the nomination process and therefore governmental in nature. Accordingly, he followed *Hadley v. Junior College District* and applied the one person, one vote formula.[50]

Judge Goodwin indicated that the outcome in *Maxey* also turned upon a question left open in *Gray v. Sanders*.[51] In *Gray*, the Supreme Court invalidated the county unit system that Georgia used to nominate statewide officials in a primary. Under the Georgia procedure, units were allocated to the counties, and votes were tabulated on a county-by-county basis, with the plurality winner in each county receiving the entire unit vote allotted to that county. A victory in the primary election depended on the unit vote accumulation rather than the popular vote count. The Supreme Court declared the unit voting procedure to be unconstitutional, but a footnote to its opinion stated that its holding did

48. 319 F. Supp. 682 (W.D. Wash. 1970).

49. In effect, *Maxey* involved the situation described in Lynch v. Torquato, 343 F.2d 370 (3d Cir. 1965), which the Third Circuit indicated would dictate a different result. *See* text accompanying note 33 *supra*.

50. Neither the *Maxey v. Washington State Democratic Comm.* court nor the court in *Doty v. Montana State Democratic Cent. Comm.* had to decide the problem of defining the appropriate constituency for determining one person, one vote. *See also* Bode v. National Democratic Party, 452 F.2d 1302 (D.C. Cir. 1971); Georgia v. National Democratic Party, 447 F.2d 1271 (D.C. Cir. 1971); Ripon Soc'y v. National Republican Party, 343 F. Supp. 168 (D.D.C. 1972); Barthelmes v. Morris, 342 F. Supp. 153 (D. Md. 1972). For an interesting discussion of the problems that selection of any single standard would entail see Goldstein, *One Man, One Vote, and the Political Conventions, Alternative Methods of Implementation: A Political Analysis*, 40 U. CIN. L. REV. 1 (1971).

51. 372 U.S. 368 (1963).

not reach the issue that would be posed if a convention system rather than a primary election were used to nominate candidates.[52] Since the delegate selection procedure in *Maxey* ultimately relied on a state convention, Judge Goodwin reasoned that the case required a decision on the issue left open in *Gray*'s convention footnote.[53] Accordingly, he held that the one person, one vote principle applies to intraparty nominating procedures.[54]

F. From One Person, One Vote to Fair and Effective Representation

Gray v. Sanders was a complex case. Commentators have not appreciated fully the breadth of its scope and impact.[55] In invalidating Georgia's county unit system, the Supreme Court indicated that "[t]he conception of political equality . . . can mean only one thing—one person, one vote."[56] This enunciation of the equal population rule as a requirement of equal protection subsequently was adopted for state legislative districts[57] and local governments.[58]

But *Gray v. Sanders* was not entirely, or even primarily, an equal population case. Prior to the *Gray* decision, Georgia had not allocated units to its counties according to the one person, one vote principle. The district court in *Gray* invalidated the plan on that basis, but it left open the possibility that an appropriately apportioned unit system could pass constitutional muster.[59] The Supreme Court modified the ruling of the district court, holding that the entire system itself, even if properly apportioned, inherently would violate the equal protection clause.[60] The Court set forth the principle underlying its decision in a crucial footnote to its opinion.

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52. *Id.* at 378 n.10.

53. *See* text accompanying note 61 *infra*.

54. 319 F. Supp. at 678.

55. *See, e.g.*, Fischer, *One Man, One Vote and the Political Convention, Alternative Methods of Implementation: A Legal Analysis*, 40 U. CIN. L. REV. 32, 37-41 (1971); Goldstein, *supra* note 50, at 10. *But see* Chambers & Rotunda, *supra* note 27, at 199-203.

56. 372 U.S. at 381.

57. *See* Reynolds v. Sims, 377 U.S. 533 (1964).

58. Avery v. Midland County, 390 U.S. 474 (1968).

59. Sanders v. Gray, 203 F. Supp. 158, 170 (N.D. Ga. 1962).

60. Under the original Georgia statute, the allocation of unit votes to counties was not on a strict per capita basis. Under a revised statute, Georgia had allocated units to counties pursuant to a "bracket system" based on broad population categories. The district court struck down the revised statute reasoning that the broad population categories, in effect, contained an inherent bias against the larger counties. 203 F. Supp. at 170. *Cf.* Abate v. Mundt, 403 U.S. 182 (1971) (lack of built-in bias and historical circumstances justify deviation from one person, one vote principle); Hadley v. Junior College Dist., 397 U.S. 50 (1970) (one person, one vote principle applicable to special purpose districts).

> The county unit system . . . would allow the candidate winning the popular vote in the county to have the entire unit vote of that county. Hence the weighting of votes would continue, even if unit votes were allocated strictly in proportion to population. Thus if a candidate won 6,000 of 10,000 votes in a particular county, he would get the entire unit vote, the 4,000 other votes for a different candidate being worth nothing and being counted only for the purpose of being discarded.[61]

Since the subsequent reapportionment cases derived their language from it, *Gray* frequently is seen only from a one person, one vote perspective. One unquestionably important feature of the ruling in *Gray* was that a classification of voters according to geographic areas has an unconstitutional effect unless the voters in each area have a substantially equal number of representatives on a per capita basis. But *Gray* dealt with matters relating to the *quality* of representation as well. By rejecting the proposition that an appropriately allocated unit system can be constitutional, *Gray* establishes that equal protection in the nomination process embraces a notion of fair and effective political representation at the locus of decision-making. Per capita equality is not made the exclusive test of "fair and effective"; rather, it becomes the starting point.

Gray's focus on the nonarithmetical factors in election cases also raises the problem that an at-large, winner-take-all election can lead to the same unfair result that the *Gray* Court condemned in its crucial vote-discarding footnote. As one commentator has noted concerning this problem:

> A statewide election at large . . . would place each voter on the same plane . . . . All voters would be 'weighted' equally . . . . In terms of 'fair and effective representation,' however . . . the at-large systems are winner-take-all systems and offer the prospect that a bare 51 percent statewide popular vote [or less in a plurality-take-all system] will be magnified into 100 percent representation. This would constitute a new form of . . . overrepresentation and of underrepresentation of identifiable portions of the electorate.[62]

Gray consequently has implications for the composition of a delegation from a preliminary stage to every subsequent level in the nomination process. The footnote in *Gray* disclaiming application of its holding to a situation in which a convention system rather than a primary election is used to nominate candidates should be considered as concerning itself primarily with the quality of representation issue. When it left open the issue of candidate selection by convention, the Court foresaw the potential impact of its decision on the entire political process and therefore declined to extend the implications of its decision to another context. The Supreme Court has not ruled on a quality of representation

61. 372 U.S. at 381 n.12.
62. R. DIXON, *supra* note 16, at 17.

or political spectrum representation issue in the context of a party nomination since its decision of *Gray*.[63] Part III of this Article will argue that the groundwork already exists for a holding that the California winner-take-all slate primary violates equal protection because it unconstitutionally discards votes at a "preliminary election that in fact determines the true weight a vote will have."[64]

III. THE CALIFORNIA WINNER-TAKE-ALL PRIMARY

Different statutes govern the Democratic and Republican party primaries in California.[65] The Democratic Party's statute for delegate selection was enacted in December 1971 as a response to the McGovern Commission Guidelines.[66] Common to both the Democratic and Republican Party statutes, however, is the provision that slates of delegates committed to a particular candidate (or uncommitted) shall be elected on a statewide winner-take-all basis. The winning slates then are committed to vote for their candidate for a specified period of time at the national nominating conventions. Since California had the largest single delegation to the 1972 Republican Convention and the second largest delegation to the 1972 Democratic Convention,[67] the importance of securing a victory in its primary election is manifest.

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63. Although he indicated that he was ruling on this precise issue in Maxey v. Washington State Democratic Comm., 319 F. Supp. 673, 679 (W.D. Wash. 1970), District Judge Goodwin's decision of the case did not require a ruling on whether quality of representation principles apply to an intraparty nomination process; rather, *Maxey*, which applied the one person, one vote principle to the delegate selection procedure, could rely adequately upon the prior decisions of Hadley v. Junior College Dist., 397 U.S. 50 (1970) (one person, one vote applies when there is a commitment to an elective process and the persons elected perform "governmental" functions); Moore v. Ogilvie, 394 U.S. 814 (1969) (constitutional safeguards apply to all integral parts of the election process); Lynch v. Torquato, 343 F.2d 308 (3d Cir. 1965) (constitutional safeguards apply to party procedures when the party performs a "governmental function").

Professor Barton has characterized the notion of quality representation as political spectrum representation. *See* Barton, *The General Election Ballot: More Nominess or More Representative Nominees?*, 22 STAN. L. REV. 165, 166-67 (1970). The Court has dealt with political spectrum issues in several multimember legislative district cases. *See, e.g.*, Whitcomb v. Chavis, 403 U.S. 124 (1971); Connor v. Johnson, 402 U.S. 690 (1971); Burns v. Richardson, 384 U.S. 73 (1966); Fortson v. Dorsey, 379 U.S. 433 (1965). *See also* notes 178-200 *infra* and accompanying text.

In terms of equal population doctrine, the *Gray* convention footnote might have significance as a warning that there must be a commitment to an elective process before equal population principles apply. If a closed convention system without popular participation at the baseline were used, then the equal population principle of *Gray* might not apply.

64. Gray v. Sanders, 372 U.S. 368, 380 (1963).

65. *See* CAL. ELECTIONS CODE §§ 6200-02 (West 1961) (applicable to the Republican party); CAL. ELECTIONS CODE §§ 6385-87 (West Supp. 1972) (applicable to the Democratic party).

66. *See* notes 12-15 *supra* and accompanying text.

67. In California, the candidate receiving a plurality of the votes in any party's primary receives all of the state's delegates to the party's convention. CAL. ELECTIONS CODE § 6201 (West

A. *The Appropriate Geographic Constituency*

In *Gray v. Sanders*, the Supreme Court indicated that the vote-discarding feature of the county unit system—what one commentator has called the "wash out" problem[68]—violated equal protection because within a geographical unit all voters must be granted equally effective ballots.[69] *Gray* involved a primary election to nominate candidates for various statewide offices; therefore, the Supreme Court found that the appropriate geographical unit was the entire state. It also is necessary to determine the proper geographical constituency for the presidential nomination process in order to analyze the implications of *Gray* for a winner-take-all, statewide-slate primary.[70]

The nomination of a presidential candidate is one of the major functions of the national parties. The national Democratic and Republican parties are loose federations of state parties, and the nomination of a presidential candidate once every four years is one of the few—and, except for the campaign itself, perhaps the only—truly national organizational efforts undertaken by the major American political parties. While the parties have assumed such importance that the function of nominating the two presidential aspirants is subject to constitutional scrutiny under the fourteenth amendment,[71] the process is still largely controlled by the national parties themselves;[72] consequently, the parties

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1961), § 6386 (West Supp. 1972). Democratic delegates are required to vote for the plurality winner until he receives less than 15% of the votes on any ballot at the convention or until released by the candidate. CAL. ELECTIONS CODE § 6316 (West Supp. 1972). Republican delegates are pledged to support the plurality winner for the duration of the convention. CAL. ELECTIONS CODE §§ 6507, 6058 (West 1961). In a year when many candidates run, as many as 60 to 70% of California voters consequently may not be represented at their convention. Their votes are discarded, and they are denied any participation or representation in the bargaining and coalescing of interests that precedes the final choosing of a presidential nominee.

68. *See* Note, *Bode v. National Democratic Party: Apportionment of Delegates to National Political Conventions*, 85 HARV. L. REV. 1460, 1467 n.37 (1972).

69. *See* Gray v. Sanders, 372 U.S. 368, 379-81. A concurring opinion also recognized the importance of the principle. *See* 372 U.S. at 382 (Stewart, J., concurring).

70. For an indication of the importance of how the geographical constituency is defined see Chambers & Rotunda, *supra* note 27, at 200. Chambers and Rotunda argue that if the state is the proper geographic unit, then *Gray v. Sanders* may require a statewide winner-take-all primary. *Id.* Their conclusion would maximize the unrepresentativeness of the current system, in which the winner-take-all primary is the exception, and defeat the action of the 1972 Democratic National Convention abolishing winner-take-all primaries for the 1976 convention. *But see* McPherson v. Blacker, 146 U.S. 1 (1892) (district method of selecting Presidential Electors held constitutional).

71. Bode v. National Democratic Comm., 452 F.2d 1302, 1304-05 (D.C. Cir. 1971); Georgia v. National Democratic Comm., 447 F.2d 1271, 1276 (D.C. Cir. 1971).

72. Unlike a presidential election, for which the Constitution specifies an election procedure, U.S. CONST. art. II, § 1, the nomination of a presidential candidate is left to the major political parties within the limitations imposed by the fourteenth amendment. No equivalent to the Electoral College is imposed upon the nominating process. *See* Gray v. Sanders, 372 U.S. 368, 378 (1963).

have a good deal of discretion, within the framework of the guarantee of equal protection, to establish a nationwide candidate selection mechanism.[73] For reasons of political expediency and convenience, the parties in practice have chosen to focus their procedures for the selection of delegates to the national nominating conventions upon the various states. If, however, the national parties should choose to abandon the states in favor of some other geographical subunit for purposes of delegate selection, the Constitution would not impede them. For example, the parties could focus their delegate selection procedures on a regional basis using the federal judicial circuits or the federal executive regions as the appropriate geographical units for selecting delegates to their national conventions.[74] A state orientation in delegate selection simply does not have the same special constitutional status that it possesses in an actual election. The Electoral College system, a specific compromise at the Constitutional Convention, constitutionally established each semi-sovereign state as the focus for selecting electors.[75] The Constitution does not impose any such requirement upon the nomination process. It is therefore inappropriate to view each state as the final decision-making forum for the nomination of a presidential candidate.

The procedure used by both major American political parties for the selection of a presidential nominee is clearly an integrated nationwide process.[76] "Each state of the delegate-selecting process is part of an over-all unitary plan . . . ."[77] The ultimate forum at which coalition formation and candidate selection take place in both parties is the national nominating convention. State statutes explicitly recognize this and place on the presidential ballot the names of the candidates desig-

73. *See* Bode v. National Democratic Comm., 452 F.2d 1302, 1304-05 (D.C. Cir. 1971); Georgia v. National Democratic Comm., 447 F.2d 1271 (D.C. Cir. 1971); Ripon Soc'y v. National Republican Party, 343 F. Supp. 168 (D.D.C. 1972).

74. As an intermediate alternative between the present convention system and a single national primary, Senator Packwood has suggested a series of regional primaries. N.Y. Times, Apr. 8, 1972, at 12, col. 5. It would seem that Congress could enact either the regional or the national primary without the necessity of a constitutional amendment.

75. U.S. CONST. art. II, § 1.

76. Three political scientists note that the "argument for recognition of state sovereignty in a national political convention is specious." P. DAVID, R. GOLDMAN & R. BAIN, THE POLITICS OF NATIONAL PARTY CONVENTIONS 177 (1960). The resemblance between a state, whose sovereignty in the Electoral College is constitutionally established, and the state organization of a political party with respect to the party's national organization is entirely superficial. David, Goldman, and Bain conclude that "[a] national political party has its federal aspects, such as its dependence on state victories to give it the electoral votes necessary for winning a presidential election. But in its national convention its chief business, the nomination and election of a President, is an operation more national than federal." *Id.*

77. Maxey v. Washington State Democratic Comm., 319 F. Supp. 673, 680 (W.D. Wash. 1970).

nated by the national nominating conventions.[78] There is no separate ballot status for the winner of the state primary.

Since the presidential nominating convention is the culmination of a coordinated national procedure for selecting the presidential nominees, the winner-take-all, statewide-slate primary is analogous to the Georgia county unit system, and *Gray* therefore should control. The appropriate geographic unit for the officers nominated in Georgia was the state. In the presidential nominating situation, it is the nation. Georgia assigned each county a number of units to be voted as a block for the candidate winning a plurality of votes within the county. California has been assigned a number of delegates who are effectively required to vote as a block for the candidate winning a plurality of votes within the state—and in fact are chosen for the slate by the candidate on the basis of commitment to him.[79] Its winner-take-all, statewide-slate primary therefore has the same constitutional defects as the county unit system invalidated in *Gray*. Those who vote for a candidate who does not win a plurality of the popular vote in the primary are effectively excluded from having a voice at the national nominating convention.[80] Their votes are discarded prior to the national convention at a preliminary stage in the nominating process. Under the quality of representation rule enunciated in *Gray*, discarding votes in this fashion has an invidious effect because the right to vote effectively cannot be diluted in "any preliminary election that in fact determines the true weight a vote will have."[81] Intermediate winner-take-all nominating procedures therefore violate the equal protection clause unless there is some overriding state interest in the invidious discarding of votes.

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78. *See, e.g.*, CAL. ELECTIONS CODE § 10204 (West 1961). *See also* O'Brien v. Brown, 92 S.Ct. 2718 (1972) (Marshall, J., dissenting).

79. The major difference between the Georgia and California systems is that Georgia employed arithmetic "units" whereas California employs human "units" in the form of delegates. The choice of California's delegates is so limited, however, that the state might just as well adopt arithmetic units. The possibility of eventual release to vote for someone other than the plurality winner does not alter the delegates' status. California has such a large percentage of the total delegate vote at the convention (9% for the Democrats, and 7% for the Republicans in 1972) that a victory in its primary is tantamount to ensuring that the plurality winner of the California primary will never receive less than 15% of the votes cast in any convention ballot. *See* note 67 *supra*. Release by their candidate or—in the case of a Republican candidate—breach of pledge, likely would occur only after several ballots. Consequently, release or breach would occur only after completion of the crucial initial stages of the coalition-forming process. Moreover, delegates are unlikely to exert any influence on behalf of anyone who did not vote for the plurality winner. Even if the delegates are eventually released, only those who voted for candidates ideologically close to the plurality winner can expect any representation.

80. *Cf.* Williams v. Rhodes, 393 U.S. 23, 41 (1968) (state may not infringe right of political association) (Harlan, J., concurring).

81. 372 U.S. at 380. *See also* DAHL, A PREFACE TO DEMOCRATIC THEORY 137 (1956).

B. *Effective Representation at the Locus of Decision-Making*

Numerous cases demonstrate the principle that every voter has a fundamental interest in fair and effective representation at the ultimate decision-making forum. Whenever states have attempted to infringe this interest, the Supreme Court has required them to justify their actions by compelling state interests.

1. *The White Primary Cases.*—In the *White Primary Cases*,[82] the Supreme Court early and forcefully articulated the principle that each voter has an interest in effective political participation at the decisive stage of the elective process. Using a series of racially discriminatory devices, Texas had attempted to circumvent the fifteenth amendment by barring blacks from participation in the party nomination process. In *Terry v. Adams*,[83] a private political group of white Democrats known as the Jaybird Democratic Association held a straw poll prior to the primary. Although blacks participated fully in the primary itself and in the general election, the Jaybirds did not allow blacks to participate in this "preprimary." Candidates winning the Jaybird primaries typically ran unopposed in the Democratic primaries. The Supreme Court found that the exclusion of blacks from the Jaybird primaries was unconstitutional because blacks had been excluded from a significant stage of the electoral process.

> [A]t the sole stage of the local political process where the bargaining and interplay of rival political forces would make [the blacks' vote] count . . . . [T]he Jaybird Democratic Association is the decisive power in the county's recognized electoral process. Over the years its balloting has emerged as the locus of effective political choice.[84]

Just as the exclusion of blacks from the election stage where effective coalition formation and compromise takes place denied them their fifteenth amendment rights,[85] the California delegate selection mechanism operates to exclude all representatives other than those winning a plurality of the primary vote from the nominating convention. The exclusion discriminates against the supporters of the nonplurality winners who, in multi-candidate contests, often represent the majority of those participating in the primary. Moreover, the discrimination occurs at the national nominating convention, the only place where coalitions can be formed among supporters of presidential candidates from differ-

82. *See* note 20 *supra*.

83. 345 U.S. 461 (1953).

84. 345 U.S. at 484 (plurality opinion of Clark, Jackson, Reed, JJ., & Vinson, C.J.).

85. *Cf.* Bullock v. Carter, 405 U.S. 134 (1972) (Texas' excessive primary election filing fee held unconstituional).

ent states.

2. *The Racial Gerrymander Case.*—In *Gomillion v. Lightfoot*,[86] the Supreme Court invalidated an attempt by the city of Tuskegee, Alabama, to draw its boundaries so as to exclude virtually all of the city's black voters. The Court held that the attempt to define the city boundary so as to exclude blacks violated the fifteenth amendment. The fifteenth amendment prohibits abridgment of the right to vote on account of race,[87] but after the racial gerrymander the blacks were not totally disfranchised. For example, they still could vote in statewide elections. Moreover, the subsequent decision of *Palmer v. Thompson*[88] makes it clear that racially motivated governmental actions are not automatic constitutional violations. In *Palmer*, the Supreme Court refused to declare that the city of Jackson, Mississippi, had acted unconstitutionally by closing a municipal swimming pool in response to a federal court order to desegregate the pool. The Court reasoned that absent a showing that the closing impaired some constitutionally protected interest, racial motivation alone was an insufficient ground for overturning the city's action.[89] Although the *Palmer* decision concerned the fourteenth amendment's equal protection clause rather than the fifteenth amendment, the principle enunciated in *Palmer* seemingly would apply to the *Gomillion* situation as well. Something more than racially motivated line-drawing must have been at stake in *Gomillion*. Since the blacks of Tuskegee were not disfranchised, the fifteenth amendment violation must have rested on some notion that the blacks of Tuskegee had a constitutionally protected interest in participating in an electoral forum that significantly affected their lives. Cutting them off from participation in Tuskegee politics on account of their race therefore constituted an abridgment of their right to vote in violation of the fifteenth amendment.[90]

Gomillion bears on California's winner-take-all primary because it indicates the importance of effective participation in a relevant forum. Just as the blacks fenced out of Tuskegee could not cast an effective ballot within the forum making important decisions affecting their welfare, the voters in a statewide, winner-take-all slate primary can participate in the nomination process but do not cast effective ballots. The

86. 364 U.S. 339 (1960).

87. "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." U.S. CONST. amend. XV, § 1.

88. 403 U.S. 217 (1971).

89. *Id.* at 226.

90. *See generally* Barton, *supra* note 58, at 179-80.

ballots of all those voters who do not align themselves with the plurality winner are washed out. Consequently, all viewpoints except those of the supporters of the plurality winner systematically are excluded from representation at the national convention where the selection of a nominee occurs.

3. The Reapportionment Cases.—Since its decision of *Gray v. Sanders*,[91] the Supreme Court has emphasized the importance of effective voter participation at significant stages in the electoral process numerous times. In *Lucas v. Colorado General Assembly*,[92] decided as a companion case to *Reynolds v. Sims*,[93] the Supreme Court held that adoption of an apportionment plan by referendum did not insulate the plan from scrutiny under the one person, one vote principle. The Court expressly found that the availability of the referendum device as a means of correcting malapportionment was an insufficient justification for any deviation from the one person, one vote principle and declared that, "[a]n individual's constitutionally protected right to cast an equally weighted vote cannot be denied even by a vote of a majority of a State's electorate . . . ."[94]

The thrust of the *Lucas* decision is that an equal opportunity to vote at one election does not insulate the result of that election from examination under the equal protection clause. If, as stated by Chief Justice Warren, a "citizen's constitutional rights can hardly be infringed simply because a majority of the people choose that it be,"[95] then it surely must follow that California's winner-take-all primary is also unconstitutional, unless an overriding state interest justifies the lack of representation for a large segment of the primary participants at the national convention.[96]

In *Avery v. Midland County*,[97] the Supreme Court extended the one person, one vote rule to local units of government having general legislative power. The dissenters in *Avery* argued that a properly constituted state legislature should have substantial leeway in structuring local units of government, and that because each person had an equal shot at infiuencing the state legislature, he should be willing to abide by the decisions it made about structuring local units of government. The majority expressly rejected the dissenters' position and said that a majority of voters may not use a referendum, constitutional provision, or accur-

91. 372 U.S. 368 (1963).
92. 377 U.S. 713, 735 (1964).
93. 377 U.S. 533 (1964).
94. 377 U.S. at 736.
95. *Id.* at 736-37.
96. *See* Dunn v. Blumstein, 405 U.S. 330 (1972).
97. 390 U.S. 474 (1968).

ately apportioned representatives to violate the one person, one vote principle.[98] *Avery* clearly establishes the principle that satisfaction of the equal population principle at one level of decision-making does not mean that deviation from the principle is permissible at another level. Together, *Lucas* and *Avery* emphasize the principle of the *White Primary Cases* that the equal protection inquiry must extend to all relevant stages of the electoral process, and voters must have an effective voice at the locus of decision-making. In the context of the California winner-take-all primary, these cases require that the supporters of nonplurality winners have an effective voice at the national nominating convention even though they had an opportunity to participate in their local primary.

4. *The Voter Qualification Cases.—Kramer v. Union Free School District*[99] and *Phoenix v. Kolodziejski*[100] reinforce the thrust of the reapportionment cases. In *Kramer*, the Supreme Court held that a statute setting voting qualifications for participation in local school board elections was unnecessary to promote a compelling state interest and therefore unconstitutional. The dissenters in *Kramer* criticized the majority opinion because the alleged disfranchisement was not from the state legislative elections, in which plaintiff could participate equally, but only from a special purpose district election.[101] The Court again reaffirmed its position that proper representation at the state level could not validate unrepresentative institutions at the local level and reiterated its belief that a properly apportioned decision-making body cannot delegate part of its power to another body elected by only a portion of the eligible voters.[102] *Phoenix v. Kolodziejski* demonstrates the same belief. When a majority of the Supreme Court declared that limiting the franchise to only certain property holders in general obligation bond elections was unconstitutional, the dissenters argued that since the city

98. "Inequitable apportionment of local governing bodies offends the Constitution even if adopted by a properly apportioned legislature representing the majority of the State's citizens. The majority of a State—by Constitutional provision, by referendum, or through accurately apportioned representatives—can no more place a minority in oversize districts without depriving that minority of equal protection of the laws than they can deprive the minority of the ballot altogether . . . . Government—National, State, and local—must grant to each citizen the equal protection of its laws, which includes an equal opportunity to influence the election of lawmakers, no matter how large the majority wishing to deprive other citizens of equal treatment or how small the minority who object to their mistreatment." *Id.* at 481-82 n.6.

99. 395 U.S. 621 (1969).

100. 399 U.S. 204 (1970).

101. Kramer v. Union Free School Dist., 395 U.S. 621, 634 (1969) (Stewart, Black & Harlan, JJ., dissenting).

102. 395 U.S. at 628.

council was properly apportioned, there was no constitutional violation.[103] A majority of the Court disagrced and held that non-property holders were denied equal protection by not being allowed to participate in the bond election.

From the voter qualification cases as well as the white primary, racial gerrymander, and reapportionment cases, it is apparent that the interest in fair and effective representation at the ultimate decision-making forum, which the Supreme Court identified in *Gray v. Sanders*, is of fundamental importance, and that any attempt to infringe it must undergo strict constitutional scrutiny.[104] The Court consistently has refused to accept the theory that satisfaction of equal protection at any single step in a continuing elective process will guarantee equal protection throughout that process and protect the fundamental interest in fair and effective representation at the ultimate decision-making forum.[105] If a state could choose the forum in which to provide full and effective representation, the advances in voting equality could be sabotaged easily.[106] Accordingly, a state must give full protection to the interest of the voters in effective representation at the national nominating convention, unless it can show that it has a conflicting interest of overriding importance which it cannot achieve in less restrictive ways.

C. Parallel Constitutional Development: The Ballot Access Cases

The area of general election ballot access offers a policy basis for applying to intraparty conflict the principle that every voter must have fair and effective representation at the ultimate decision-making forum. In *Williams v. Rhodes*,[107] the Supreme Court invalidated as a violation of equal protection a series of Ohio statutes that placed excessively burdensome impediments on third party presidential candidates' access to the presidential election ballot.[108] *Rhodes* represents an attempt by the Court to establish groundrules for the representation of different viewpoints within the election system. By reducing barriers to general

103. City of Phoenix v. Kolodziejski, 399 U.S. 204, 215 (1970) (Stewart, Harlan, JJ., & Burger, C.J., dissenting).

104. *See, e.g.*, Dunn v. Blumstein, 405 U.S. 330 (1970).

105. *See, e.g.*, Kramer v. Union Free School Dist., 395 U.S. 621, 628 n.10 (1969).

106. *See* Terry v. Adams, 345 U.S. 461 (1953); Smith v. Allwright, 321 U.S. 649 (1944).

107. 393 U.S. 23 (1968).

108. In a concurring opinion, Justice Douglas reasoned that the statute infringed upon the first amendment right of political association as protected by the fourteenth amendment. Williams v. Rhodes, 393 U.S. 23, 35 (1968) (Douglas, J., concurring). Justice Harlan agreed. 393 U.S. at 41 (Harlan, J., concurring). Justice Black's majority opinion also relied upon the first amendment, but as a fundamental interest triggering strict equal protection scrutiny. 393 U.S. at 31.

election ballot access, *Rhodes* implicitly encourages the formation of third parties.[109] In contrast, *Gray v. Sanders*[110] and *Terry v. Adams*[111] reflect a doctrine designed to promote intraparty democracy. For example, in *Terry v. Adams* the Court refused to countenance election procedures that barred a racial group from effective participation at an early, critical stage in the nomination process of their party, and in *Gray v. Sanders* the Court struck down the county unit system because it discarded votes at a preliminary stage in the nomination process without counting them at the ultimate forum of decision-making. *Rhodes, Gray*, and *Terry* all indicate the existence of a constitutionally protected individual interest in effective participation in the political process; however, they suggest different means to promote that interest.[112]

Rhodes recognized the importance of political diversity but perhaps established the formation of third parties as the preferred strategy for political dissidents to exercise political influence;[113] yet, it is illogical for the courts to protect the interest of dissidents in effective political participation when they assert it outside the traditional framework of American politics, and to disregard it when they assert it at the centers of power within the major parties.[114] Since the interest at stake is effective political participation, the guarantee of a place on the ballot to third or even fourth parties may be less important than a guarantee of democratic procedures within the major party nominating process.[115] In the foreseeable future, groups wishing to influence the choice of candidates who have a chance to win the presidency must rely on intraparty proce-

109. A variety of factors prevented access to the ballot in *Rhodes*. Two significant factors were statutory provisions requiring third party candidates to obtain the signatures of at least 15% of the electorate 9 months prior to the election. 393 U.S. at 24, 26. In a subsequent case, the Court has indicated that a straight 5% requirement without any other barriers will pass constitutional muster. Jenness v. Fortson, 403 U.S. 431 (1971). Moore v. Ogilvie, 394 U.S. 814 (1969), also facilitates access by splinter parties to the general election ballot. *See* note 24 *supra* and accompanying text. The rationale underlying both *Rhodes* and *Moore* is a belief that the opportunity for "the advancement of political goals means little if a party can be kept off the election ballot and thus denied an equal opportunity to win votes." 393 U.S. at 31.

110. 372 U.S. 368 (1963).

111. 345 U.S. 461 (1953).

112. *See* Barton, *supra* note 63, at 166-67.

113. *See* Note, *supra* note 16, at 1251-52.

114. *See* Barton, *supra* note 63, at 166; Note, *supra* note 16, at 1251.

115. Chief Justice Burger recently noted in Bullock v. Carter, 405 U.S. 134 (1972), that constitutional doctrine normally does not favor the abandonment of major party affiliation in order to pursue basic political rights. *Id.* at 145. One authority also notes that "the legal monopoly of parties is generally less important than the actual monopoly; no purpose is served by leaving complete liberty to nonparty candidates if normally only party candidates have any chance of success." M. DUVERGER, POLITICAL PARTIES 355 (1955). *See also* Barton, *supra* note 63, at 171-72.

dures as the major vehicle to accomplish their goal.

Exclusive reliance upon the *Rhodes* doctrine also could undermine the traditional stability of the two-party system by fostering splinter parties.[116] Minority parties increase the likelihood that a president will be elected by only a plurality of the popular vote. Encouraging minority parties therefore might undercut the representativeness of the only office in the nation for which all Americans vote[117] and discourage coalition formation until after the election itself.[118] Unrepresentative procedures at the nominating stage could compound the problem. If the major parties structure their nominating procedures so as to allow a minority to control intermediate stages of the nominating process (or at best allow majorities to cancel out entirely any minority strength at intermediate stages), the danger of having the President reflect the will of a very narrow, strategically located, political faction is more acute.[119]

Intraparty conflict traditionally has served to promote compromise and coalition prior to the general election;[120] but when prospects for success inside a party seem bleak because of unfair delegate selection procedures, vigorous party activity may be discouraged.[121] Legal doctrines that encourage dissidents to desert the major parties rather than attempt to make themselves heard within the party councils might jeopardize the continued vitality of the two-party system and its attendant political stability.[122] Courts can avoid such destabilization by according equal weight to the individual interest in effective political participation when exercised both within and without the major political parties.[123]

D. A Traditional Equal Protection Approach to the Winner-Take-All Primary

State legislatures frequently classify citizens into groups for various purposes. The resulting classifications are subject to scrutiny under the equal protection clause of the fourteenth amendment. Upon a showing

116. *See id.* at 167-72.

117. *See also* Williams v. Rhodes, 393 U.S. 23, 53-54, 54 n.8 (1968) (Stewart, J., dissenting).

118. *See generally* A. BICKEL, REFORM AND CONTINUITY 54-55 (1971); A. BICKEL, THE NEW AGE OF POLITICAL REFORM 31-33 (1968).

119. A. BICKEL, REFORM AND CONTINUITY 54 (1971).

120. The court in Irish v. Democratic-Farmer-Labor Party, 287 F. Supp. 794 (D. Minn. 1968), characterized the role of major parties as "the direction and control of the struggle for political power among men who may have contradictory interests and often mutually exclusive hopes of securing them. This the parties do by institutionalizing the struggle and emphasizing positive measures to create a strong and general agreement on policies." *Id.* at 805.

121. *See* MCGOVERN COMMISSION REPORT, *supra* note 2, at 13, 49.

122. *See id.* at 49; HUGHES COMMISSION REPORT, *supra* note 3, at 15-16.

123. *See* Note, *supra* note 16, at 1252.

that the classification has worked to his disadvantage, a petitioner can impose an obligation upon the state to justify its classificatory scheme.[124] In determining the content of the state's burden of justification, the Supreme Court has applied a two-level test.[125] In the area of economic regulation, the Court has only sought to assure that distinctions drawn by a challenged statute bear a rational relationship to a legitimate state legislative purpose.[126] On the other hand, in cases involving "suspect classifications" or touching on "fundamental interests," the Court has subjected classifications to a strict scrutiny that requires the state to show not only that it has a compelling interest that justifies the law creating the classifications, but also that the distinctions drawn by the law are necessary to further its purpose.[127]

1. *Political Association Impinged.*—The winner-take-all primary designates the faction within each of the major political parties that will be present at the national nominating conventions and by that presence able to exercise the constitutionally protected right of political association.[128] The winner-take-all slate primary, however, permits only delegates chosen by the plurality winner to join their political power with that of "fellow partisans" from other states.[129] Supporters of candidates who do not win a plurality of the primary vote in their states cannot exercise any political power at the national level of the nominating process.

The winner-take-all primary thus discriminates between two classes of persons within each party in a state—those who voted for the plurality winner and all other voters in the primary. A second factor exacerbates the problem. The backers of candidates who did not win a plurality of the primary vote in the state not only are unable to join with others of like persuasion at the national level, but also have their votes joined with those of their opponents to count against their own candidate at the national level. Since allocation formulas assign delegates to national conventions according to the total population and party vote within a state, a state receives delegate strength for all party factions—but that

124. *See generally Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1076-1132 (1969).

125. *Id.*

126. *See* Dandridge v. Williams, 397 U.S. 471 (1970).

127. *See* Dunn v. Blumstein, 405 U.S. 330 (1972); Williams v. Rhodes, 393 U.S. 23 (1968).

128. "The right to have one's voice heard and one's views considered by the appropriate governmental authority is at the core of the right of political association." Williams v. Rhodes, 393 U.S. 23, 41 (1968) (Harlan, J., concurring).

129. *See* Petitioner's Brief for Motion for Leave to File Complaint at 55, Delaware v. New York, 385 U.S. 895 (1966) (use of "fellow partisans" phrase).

strength works to the disadvantage of all factions other than the one supporting the plurality winner. Delegates allocated to reflect the strength of nonplurality winners actually are awarded to an opponent. The winner-take-all primary is therefore doubly discriminatory—its rigid structure bars all factions, except supporters of the primary winner, from the national conventions and awards delegates allocated to represent all the factions to a single faction. By discriminating in favor of plurality winners, the winner-take-all primary burdens "the right of individuals to associate for the advancement of political beliefs"[130] which a majority of the Supreme Court in *Williams v. Rhodes* found to be a constitutionally protected fundamental interest.[131]

2. *Political Association Penalized.*—In the winner-take-all delegate selection procedure, the sole basis of classification determining which voters are to receive any representation at the ultimate stage in the nomination process is candidate preference. Unless supporters of a particular candidate win a plurality of the popular vote, their voting strength is ignored entirely for purposes of representation at the national nominating conventions. It is axiomatic that a voter has the unfettered right to choose to support any candidate he or she wishes—freedom of political association can mean nothing less. The winner-take-all system, however, penalizes all those who have exercised their basic right of association in a way different from the plurality by creating classifications that reward those who voted for the plurality winner and exclude entirely all others from effective political association at the national level. The only sure way to have an effective voice at the national convention is to support the candidate who is likely to win the primary; supporters of any other candidate automatically are excluded from the critical forums of the national nomination process, the nominating conventions.[132]

Dunn v. Blumstein[133] held that durational residency requirements for voting were unconstitutional. In its opinion the Supreme Court stated that durational residence laws classified bona fide residents on the basis of recent travel and penalized only those persons who recently had exercised that fundamental personal right.[134] The vice of a durational

130. Williams v. Rhodes, 393 U.S. 23, 30 (1968).

131. Justice Harlan has stated that "no matter what the institution to which the decision is entrusted, political groups have a right to be heard before it." *Id.* at 42 (Harlan, J., concurring).

132. If a compromise prior to the primary election is attempted, one likely could not attain effective representation because he has no ability to ascertain the identity of the plurality winner with any degree of certainty prior to the primary itself.

133. 405 U.S. 330 (1972).

134. *Id.* at 334.

residence law is that a person must "choose between travel and the basic right to vote."[135] Winner-take-all primaries offer a similarly distasteful choice. A voter must choose the candidate who will be picked by the plurality, if his identity can be divined, or face total impotence at the national convention and concomitant abridgment of his right of political association. A state should be able to force this choice upon its voters only if it can demonstrate that a compelling state interest necessitates its winner-take-all primary.

IV. THE POLICY ISSUES

Use of the principle of *Gray v. Sanders*—that every voter has a fundamental interest in fair and effective representation at the ultimate decision-making forum—to invalidate the winner-take-all primary would assure substantially proportional representation at the national nominating convention to all political elements in a party. Indeed, a system of proportional representation[136] may be the only way to make each vote awarded under the one person, one vote formula an effective vote.[137] Critics maintain, however, that proportional representation transforms a two-party system into a multiparty system;[138] promotes the instability of coalition government; and, unlike a functioning two-party system, delays the process of compromise until after the final election.[139] The extension of proportional representation to the election stage itself admittedly would exacerbate the destabilizing impact of *Williams v. Rhodes*, discussed earlier.[140] Not only would it be easier for splinter parties to gain access to the general election ballot, but intra-party dissidents also would be assured of representation in elective bodies. Part IV of this Article will attempt to show that the critics' fears are not applicable to party nominations,[141] and especially not to an

135. *Id.* at 342.

136. The system of proportional representation is "designed to give each minority a number of representatives that is proportionate to that minority's electoral strength." Silva, *Relation of Representation and the Party System to the Number of Seats Apportioned to a Legislative District*, 17 W. POL. Q. 742, 757 (1964).

137. *See* R. DIXON, *supra* note 16, at 525.

138. *Id.*

139. *See* Barton, *supra* note 63, at 168-69.

140. *See* notes 107-23 *supra* and accompanying text.

141. *But see* A. BICKEL, *supra* note 119, at 57-58. Professor Bickel accepts the general principle that minority representation at the national nominating convention should be required, but admits a few exceptions to that rule. He justifies his exceptions on the ground that the popular interest generated by a winner-take-all primary helps to educate the electorate. Professor Bickel also argues that achieving minority representation by a method of proportionality would "tend to direct attention to presidential preferences, and to de-emphasize other views and attitudes having to do with issues more than personalities . . . ." *Id.* at 59. The objective of voter education,

intermediate step in the nominating process; rather, proportional representation at national conventions is a way to achieve fair and effective political participation without sacrificing the legitimate goal of maintaining the stability of the two-party system.[142] Proportional representation is appropriate for presidential nominating conventions because they are ultimate decision-making forums in an elective nominating process,[143] not because proportional representation is applicable to all deliberative bodies.[144]

A. The Interest in Stable and Effective Government

Every state has an interest in ensuring stable and effective government.[145] The Constitution permits a state to advance this interest by limiting direct participation in representative government. For example, the Constitution clearly does not require all decisions by a state legislature to be submitted to a direct vote by the people; nor does the Constitution require every political view to be given representation in the state

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however, can be achieved by a multitude of other mechanisms that would burden the minority representation goal less than a winner-take-all primary. As for the argument that proportionality overemphasizes personalities, although it is true that the key determinant of representation would be votes for a candidate, proportional representation does not have to direct voter attention to candidates' personalities. If further issue refinement is desired, uncommitted slates could be fielded, or several slates all committed to the same candidate could compete. The latter phenomenon occurred in the June, 1972, New York primary when the regular Democratic organization slates in Brooklyn endorsed Senator McGovern, but were defeated by other slates also committed to McGovern but selected by reform elements in the party.

142. *Cf.* Ray v. Blair, 343 U.S. 214 (1952) (state statute permitting Democratic Party to close the official primary to any candidate refusing to pledge himself to support candidate named by the national party is not unconstitutional because twelfth amendment does not demand absolute freedom for the elector to vote his own choice). The first amendment right of political association might militate against strict judicial regulation of political parties. *See generally* Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 29 (1959); *Developments in the Law—Judicial Control of Actions of Private Associations*, 76 HARV. L. REV. 983 (1963). This consideration, however, is forceful only in the case of small or ad hoc parties and independent candidates. *See* Note, *supra* note 16, at 1250 n.88. The Supreme Court has recognized the significance of the difference between the major parties and other political groups. "The fact is that there are obvious differences in kind between the needs and potentials of a political party with historically established broad support, on the one hand, and a new or small political organization on the other . . . . Sometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike . . . ." Jenness v. Fortson, 403 U.S. 431, 441-42 (1971).

143. *See generally* P. DAVID, R. GOLDMAN & R. BAIN, *supra* note 76, at 197-99.

144. "If the *Gray* rationale were extended mechanically to deliberative nominating bodies —*i.e.*, functional equivalents of the primary—it might seem that the same rationale could be applied to invalidate single-member constituencies in state legislatures, for the votes of those who favor a losing candidate in a district are 'wasted'—not represented—at the decision-making stage in the legislative process. Such a result, carried to its logical conclusion, would seem to require strict proportional representation in every legislative body." Note, *supra* note 16, at 1239 n.45.

145. *See* Ray v. Blair, 343 U.S. 214 (1952).

legislatures. In a representative democracy, the state's need to guarantee stable and effective government may necessitate limiting an individual's right to full and effective participation in governmental decisions at some stage. The state may limit the individual's right, however, only when such limitations are necessary to achieve its interest in stable and effective government.[146]

1. *Winner-take-all primaries increase political fragmentation.*— The presidential nominating process does not end after the primary election. The ultimate selection of a presidential candidate occurs at the national nominating conventions. The main purpose of these conventions is to make a single choice and a single compromise—the selection of a presidential candidate.[147] At their nominating conventions, the parties attempt to forge coalitions.[148] The ultimate winner of the presidency is the party (or person) creating the more effective coalition; however, if the coalition-formation stage is itself unrepresentative—as it necessarily is under California's winner-take-all primary—serious inequities in the electoral system result.

In the United States, winner-take-all elections generally have divided the relevant electorate into two broad coalitions of interests. In an election rather than a nominating procedure, the result is a more or less stable two-party system. The pre-election coalition formation that occurs in a functioning two-party system promotes stability since the give and take of compromise occurs prior to the election. This preliminary political activity ensures that a broadly based governing coalition will control the institutions of government.[149] In contrast to the election stage, use of a winner-take-all procedure in the nomination stage impairs the ability of parties to unite behind a single candidate by exaggerating factional hostilities and magnifying their importance.[150] The intro-

146. *See* Williams v. Rhodes, 393 U.S. 23 (1968).

147. P. DAVID, R. GOLDMAN & R. BAIN, *supra* note 76, at 177. *See also* A. BICKEL, *supra* note 119, at 59-60.

148. Professor Bickel has noted that it is particularly important to have minorities represented at the national nominating convention because it "sits briefly and only periodically, and has as its sole object the composition of a governing coalition. The minority must be there, quite simply, in order that some portion of it may be coalesced with; or to put in in other terms, no relevant majority exists for purposes of constituting such a deliberative assembly until the assembly's own majority-building work is done, and that work can be done only if the total or near-total constituency is present through its delegates." A. BICKEL, THE NEW AGE OF POLITICAL REFORM 26-27 (1968).

149. *See* Barton, *supra* note 63, at 168-69.

150. Winner-take-all primaries tend to exacerbate factional differences and raise the level of hostility within a party. The winner-take-all primary consequently may promote bimodality within each party, making ultimate compromise and unity more difficult. *See* Lowi, *Party, Policy and Constitution in America*, in THE AMERICAN PARTY SYSTEMS 239-41 (W. Chambers & W.

duction of winner-take-all elections at an early stage crystallizes factional differences within the parties. As these differences become more sharply defined, compromise increasingly becomes more difficult, and in order to win votes, the factions begin focusing their attacks on the opposing faction rather than the opposite party.[151]

On the other hand, a nomination system that translates votes at the lowest level into representation at all higher levels—including the national convention—provides each candidate with many opponents rather than only one. Political strategy, therefore, would bar campaigning against a single opposing faction within the party,[152] and the result would be a less personalized campaign with a lower level of hostility. Despite the increased intraparty competition, compromise at the nominating convention would become less difficult. The convention would be more pluralistic rather than dualistic and polarized, and, since the convention would represent the political strengths of the various candidates in the electorate, a losing candidate would be more likely to abide by the choice of the convention.[153] Far from promoting political instability and factionalism, representation of all political views at the nominating conventions would reduce instability by promoting compromise within the parties.[154]

Burnham eds. 1967); Note, *One Man, One Vote and Selection of Delegates to National Nominating Conventions*, 37 U. CHI. L. REV. 536, 555-56 (1970). *See generally* W. BURNHAM, CRITICAL ELECTIONS AND THE MAINSPRINGS OF AMERICAN POLITICS (1970); J. BURNS, THE DEADLOCK OF DEMOCRACY (1963). A nomination process characterized solely by winner-take-all primaries could institutionalize what in reality would be a 4-party system. For a discussion of the problems with the winner-take-all direct primary see Goldstein, *supra* note 55, at 12-24.

151. A winner-take-all system within the nomination process also impairs the ability of each party to represent the ideological center of the electorate because there is no pressure on party factions to form subcoalitions within the party.

152. Nationally syndicated columnist Warren Rogers' study of the Wisconsin primary indicated that the multitude of Democratic candidates focused their critical attention on President Nixon and not on each other. Mr. Rogers gathered his data by analyzing the content of speeches and statements made by the candidates and news stories in the local media. *See* Rogers, *Mitchell's Wondering About Primary Plan*, The Nashville Tennessean, April 17, 1972, at 9, col. 1 (Mr. Rogers confirmed the information by telephone conversation). The Wisconsin primary contrasts sharply with the intensely personal California campaign in which supporters of Senators Humphrey and McGovern hurled epithets at each other; given California's winner-take-all primary, however, the result was predictable.

153. Professor Bickel, in making this point, noted that although minority delegates may not form part of the ultimate coalition, "minorities are more likely to share a sense of the legitimacy of the convention, are less likely, although dissatisfied, to be disaffected, if they were present and had access." A. BICKEL, *supra* note 119, at 56.

154. The realization that representation of a broad spectrum of intraparty political views at the nominating convention will promote political stability and compromise rather than instability or fragmentation has spurred the parties to examine their own procedures for delegate selection and caused the states to reassess their delegate selection methods. Recognizing the importance of

2. *Limitations on the interest in full and effective participation.*—As intimated above,[155] the principle of *Gray v. Sanders*—that every voter has a fundamental interest in full and effective representation at the ultimate decision-making forum—does not necessarily apply with full force to all election procedures. Moreover, the voting rights cases have not established when, if ever, the Constitution requires an election.[156]

In *Fortson v. Morris*,[157] the Supreme Court upheld a Georgia constitutional provision that provided for the selection of the governor by the General Assembly from the two top vote-getters in a gubernatorial election in which no candidate received a majority of the popular vote. The majority viewed the General Assembly election as an "alternative" to a popular election, to which the standards of *Gray v. Sanders* did not apply.[158] The four dissenters disagreed with the Court's factual characterization of the General Assembly selection as an alternative. They viewed the entire election as one continuing, integrated process.[159] Under the dissenters' characterization of the selection process, the Georgia system might have conflicted with *Gray*'s broad principle that votes cannot be discarded at intermediate stages in the election process.[160] Although the majority in *Fortson v. Morris* could have distinguished

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minority representation procedures in the nomination process, most states eschew the winner-take-all mode of delegate selection. *See* U.S. SENATE, NOMINATION AND ELECTION OF THE PRESIDENT AND VICE PRESIDENT OF THE UNITED STATES 74-177 (1972). The 1972 Democratic National Convention acted upon the recommendation of the McGovern Commission and abolished the winner-take-all primary for the 1976 convention. 1972 RULES COMMITTEE REPORT, *supra* note 11.

The rarity of the winner-take-all device in the nomination process should be contrasted with its universality in the general presidential election. Every state uses a "general ticket" to elect electors. A candidate winning a plurality of such a state's popular vote consequently wins its entire electoral vote. Despite the movement away from winner-take-all devices in the nomination process, no comparable movement in the manner of choosing electors has developed. The state's different interests in the nomination and election stages have caused the movement in the one area and not in the other.

155. *See* notes 19-35 *supra* and accompanying text.

156. *See, e.g.*, Sailors v. Board of Educ., 387 U.S. 105 (1967).

157. 385 U.S. 231 (1966).

158. *Id.* at 233-34.

159. "The Court misstates the question we must decide. . . .

It is said that the general election is over and that a new, and different alternative procedure is now about to be used. But that is belied by the realities. . . . The election, commencing with the primary, will indeed not be finally completed until the winner has taken the oath of office." 385 U.S. at 238 (Douglas, Brennan, Fortas, JJ., & Warren, C.J., dissenting).

160. "A legislator when voting for governor has only a single vote. Even if he followed the majority vote of his constituency, he would necessarily disregard the votes of those who voted for the other candidate, whether their votes almost carried the day or were way in the minority." *Id.* at 240.

Gray on the ground that the legislature was in effect a convention[161] and thus could have held that the rationale used to invalidate the county unit system in *Gray* was inapplicable to a mixed voting and convention system,[162] the Court instead chose to hold only that the principles of *Gray* did not apply because there had been no commitment to a popular election in the alternative procedure used for the selection of a governor.

While the Supreme Court's opinion in *Fortson v. Morris* distinguished *Gray* only on the ground that the alternative procedure for selecting a governor was not intended to be an elective process, its rather strained interpretation of the facts must be evidence of its unarticulated concern with the broader implications of the *Gray* doctrine. If the Court mechanically had relied on *Gray* to control the *Fortson* selection procedure as the district court did,[163] *Gray*'s constitutional doctrine subsequently might have been extended far beyond the nomination context. Unleashed without modification into the context of a general elcction, *Gray* could be very stiff medicine[164] because there are some situations when the state's interest in stable and effective government may outweigh the individual's interest in full representation of his views. Two such situations are the election of electors to the Electoral College and the election of state legislators. This occurs only because the interest of the state in stable and effective government is stronger and because the individual's interest in full and effective representation is more completely protected in such situations than in an intermediate stage of the presidential nominating process.[165]

(a) *The Electoral College.*—Although the state interest in stable and efficient government is not served by discarding votes at an interme-

161. One interpretation of *Fortson* notes that it sanctions a "representative process in the performance of a nonlegislative task, after the voters have exercised untrammeled their right to choose first-tier spokesmen." Chambers & Rotunda, *supra* note 27, at 202. Chambers and Rotunda conclude that "*Fortson* and *Gray* together thus permit selection of an officer through indirect election by a representative body, but not by a mechanical unit system," and indicate that a multistage selection of delegates to the national convention is permissible. *Id.* The Chambers and Rotunda explanation apparently has its roots in the *Harvard Law Review*'s survey of Supreme Court decisions for the October 1966 Term, which, however, acknowledged that its proffered rationale was "left unmentioned even by the majority." *See The Supreme Court, 1966 Term*, 81 HARV. L. REV. 69, 149-50 (1967).

162. *See* 372 U.S. at 378 n.10.

163. In a short per curiam opinion, the district court mechanically had applied the *Gray* rationale without considering any of the possible complications that could arise by applying the rationale, without modification, to a general election. *See* 262 F. Supp. 93 (N.D. Ga. 1966).

164. *See generally* Whitcomb v. Chavis, 403 U.S. 124 (1971), in which the Supreme Court expressed its unwillingness to establish a right of minority representation in a state legislature. *See also* Barton, *supra* note 63, at 165-72.

165. *See* Note, *supra* note 16, at 1239-40 n.45.

diate stage of the presidential nominating procedure, the interest in governmental stability at the presidential election stage is more apparent, and all states employ the "general ticket" method of selecting electors to promote that interest. Challenges to this method of selecting electors have not met with success.[166]

If the general ticket method were discarded, splinter groups in each state would be able to secure part of its electoral votes. Without any incentive to resolve conflicts prior to the election, dissident groups would tend to forego compromise and instead would take their case directly to the electorate hoping for at least a portion of the electoral vote. The consequence would be reduced stability, and the President could no longer claim that he represented a national consensus. Moreover, such a system would increase the likelihood that no majority would evolve in the Electoral College, therefore increasing the possibility that the House of Representatives would select the President, in which case each state, regardless of size, would be entitled to a single vote.[167] Any system leading to the use of this antiquated device must be viewed with skepticism.[168]

The Constituion also establishes each state as the formal unit for elector selection and specifically empowers the states to appoint the electors "in such Manner as the Legislature thereof may direct."[169] The inclusion of the Electoral College principle within the Constitution was "the result of specific historical concerns,"[170] and this textual commitment of elector selection to the state legislature places its choice of method beyond strict judicial scrutiny. No similar command exists for the selection of delegates in the nominating process.

The difference in function between the Electoral College and a nominating convention also is significant. The Electoral College is not a deliberative, representative body; rather, it is an assembly created to register one prior decision of a majority of its constituency. An individual's right to have his minority position represented and the general democratic-societal need to have full articulation of political minority views consequently are disruptive to the function of the Electoral College. The nominating conventions, however, are deliberative bodies meant to form the broadest possible coalition of viewpoints and select

166. *See, e.g.*, Delaware v. New York, 385 U.S. 895 (1966); Williams v. Board of Elections, 288 F. Supp. 622 (E.D. Va. 1968), *aff'd per curiam*, 393 U.S. 320 (1969).

167. U.S. CONST. art. II, § 1.

168. *See* Note, *supra* note 68, at 1467-68 n.37.

169. U.S. CONST. art. II, § 1.

170. Gray v. Sanders, 372 U.S. 368, 378 (1963).

a nominee for the presidency acceptable to that coalition.[171] In a nominating convention, individual interest and societal need are stronger and harmonize with the convention's basic function. Indeed, unless minority positions are represented at the convention, the coalition process might not occur.[172] A state may, therefore, be able to carry its burden of justification and limit the interest of individuals in fair and effective representation in the context of a general ticket to select electors, but fail to carry its burden of justification regarding the winner-take-all primary method of selecting delegates to the national nominating convention.

(b) *The State Legislatures.*—Although the states have no overriding interest in maintaining a winner-take-all primary, their interest in stable and effective government may be sufficient to justify limiting political minority representation in their legislatures.[173] One important justification lies in the differences between the nomination stage and the election itself. In a two-party system, political coalitions normally are formed prior to the election "under the pressure of the need to obtain a victorious candidate."[174] Forming political coalitions before the election

171. Professor Bickel describes these 2 types of institutions as follows: "There are by and large . . . two sorts of multi-member democratic institutions: the representative deliberative assembly, and the body meant to register a single prior decision of its constituency. Congress is the typical institution of the former sort, the electoral college of the latter. . . . Institutions meant to act by registering the decision of a majority of their constituency should consist of members responsive to that majority, and of no one else. Deliberative institutions, charged also to think, should reflect as many significant factions in the total constituency as possible. That is why all American legislatures are districted. None is elected at large, to be a creature wholly of the majority, nor does any state send to Congress an entire delegation elected on a statewide basis." A. BICKEL, *supra* note 148, at 26.

172. *See id.* at 26-27.

173. "[W]hile the interest in full and effective participation by political minorities must be deemed fundamental, a state may, for compelling and constitutionally permissible reasons, give less than full protection to this interest. In the case of state legislatures, there are strong interests in favor of single-member districts which counterbalance the interests of political minorities in substantially proportional representation. First, the function of a legislature is to govern, not to make only a single decision. The makeup of majorities within each district may shift on every issue before the legislature, and no system of selecting a legislator can assure that he will carry out the wishes only of those who voted for him. In addition, a legislator serves his constituents in ways other than voting, and it is not accurate to say that the voters for the losing candidate are effectively unrepresented.

"The second strong state interest in single-member constituencies is the promotion of the two-party system. While *Williams v. Rhodes* [citation omitted] limits the extent to which a state may justify its statutory voting regulations by referring to the interest in two-party government, it seems to indicate that there is such a constitutionally recognizable interest. *Cf.* Ray v. Blair, 343 U.S. 241 (1952). Single-member legislative districts, themselves an attempt to assure a degree of minority representation, would therefore seem to be a justifiable deviation from a standard of strict proportional representation." Note, *supra* note 16, at 1239-40 n.45.

174. Barton, *supra* note 63, at 168.

leaves a majority party in control of the legislatures with sufficient popular support to govern effectively immediately after the election.[175] In the context of the election itself, however, proportional representation attempts to "create a legislature that corresponds exactly to the spectrum of political views of the electorate."[176] Unlike the nominating conventions, which basically make a single choice and a single compromise, a legislature is an ongoing political body charged with making an entire range of political decisions through compromise and bargaining. Full enforcement of the right to political minority representation through proportional representation would minimize the incentives for compromise prior to the election and place splinter parties in pivotal positions by giving them enough votes to frustrate essential legislation. Effective legislation therefore would require compromise within the legislative chamber, but since the range of issues is broad, coalitions would vary according to the specific issues involved. Building effective and stable majorities would be a most tenuous business. Obduracy by any faction could result in legislative inaction and ineffectiveness—in short, stalemate.[177] In the context of a nominating convention, however, the risk of inaction is slim; the pressures of time and political expediency

175. Barton points out that the 2-party system is more accountable to voters because, when they cast their ballots, they have a better idea of the structure and the goals of the coalition hammered out before election day. *Id.* at 169.

176. *Id.* at 168.

177. A representative from a single-member constituency feels an especial obligation to his own constituents, not only in terms of voting representation, but also as an advocate for the many interests of his constituents. He is directly and visibly accountable to his constituents, and in order to assure some probability of re-election, he must serve his entire constituency. In contrast, under proportional representation, a legislator would not represent any identificable individual or district. The state therefore clearly has a strong interest in maintaining the feature of the 2-party system that makes legislators accountable to their constituents, although that may require some sacrifice of the interest in maximum political spectrum representation at the locus of effective decision-making. On the other hand, Professor Bickel has noted that the use of legislative districts is itself a means of promoting diversity of political viewpoints within a deliberative body. A. BICKEL, *supra* note 148, at 26. Districting represents a compromise between the goals of proportional representation and political stability. No state chooses its legislators on a statewide, winner-take-all slate basis, and Congress has guaranteed that members of the House of Representatives will be chosen from single-member districts in order to encourage broad representation of political groups. *See* Whitcomb v. Chavis, 403 U.S. 124, 157-59 nn.38-39 (1971). Moreover, the Supreme Court has said that courts reapportioning legislatures should use single-member districts whenever feasible. *See* Connor v. Johnson, 402 U.S. 690 (1971).

The same state interests in accountability and constituency representation do not exist in the case of a nominating convention. Delegates are not re-elected on the basis of prior performance and there is little need for geographical identification within the state. Instead, the need is for adequate reflection at the national nominating conventions of the relative baseline strengths of the competing candidates. As a consequence, there is little need for each delegate solely to represent a geographic constituency within his state.

cause the party factions to coalesce around a standard bearer. Consequently, the states may be able to justify limiting political minority representation within their legislatures in order to protect their interest in stable and effective government, but cannot use the same justifications to limit minority representation in a political nominating convention.

B. Political Spectrum Issues in General Elections

Although its interest in stable and efficient government is cognizably stronger during a final election than during the nomination process, a state clearly does not have unlimited power to diminish the individual's interest in full and effective representation at the ultimate decision-making forum.[178] Although the doctrine of *Gray v. Sanders* may not be entirely applicable to state legislatures or other ultimate decision-making forums, courts have listened sympathetically to political spectrum issues in a number of contexts.[179] For example, when blacks have raised the argument that switching from a single-member district to an at-large system of representation has diluted their voting strength, the courts have been responsive.[180] Regardless of racial motivation, however, a system of representation that operates to dilute or cancel out the voting strength of a political minority, or one that is biased in favor of particular political interests violates the equal protection clause;[181] equal protection sometimes requires a measure of political spectrum representation even at the general election stage.[182]

The legislative multimember district cases, however, pose a significant problem that arguably would prevent application of the *Gray* principle to a nominating convention. Despite its declaration that any apportionment scheme that "designedly or otherwise . . . would operate to minimize or cancel out the voting strength of racial or political

178. Although the power of a state to select electors to the Electoral College has special constitutional recognition, that power is probably not beyond judicial scrutiny under the equal protection clause. For example, California likely could not constitutionally allocate 50% of its Electoral College electors to an election by the residents of San Francisco and allocate the remaining 50% to an at large election by the state's other residents.

179. *See, e.g.*, Whitcomb v. Chavis, 403 U.S. 124 (1971); Allen v. Board of Elections, 393 U.S. 544 (1969); Williams v. Rhodes, 393 U.S. 23 (1968).

180. *See* Allen v. Board of Elections, 393 U.S. 544 (1969); Smith v. Paris, 257 F. Supp. 901 (M.D. Ala. 1966), *modified*, 386 F.2d 979 (5th Cir. 1967), *cited approvingly in* Whitcomb v. Chavis, 403 U.S. 124, 149 (1971); Sims v. Baggett, 247 F. Supp. 96 (M.D. Ala. 1965).

181. *See* Abate v. Mundt, 403 U.S. 182, 185-86 (1971); Hadley v. Junior College Dist., 397 U.S. 50, 57-58 (1970).

182. Of course, the winner-take-all primary, which rewards the plurality winner and ignores all others, has a structural bias that cannot withstand strict constitutional scrutiny.

elements of the voting population" would violate equal protection,[183] the Supreme Court has yet to invalidate a multimember districting plan.[184] In such cases, the Court has refused to establish a per se rule that multimember districts violate equal protection; instead, it has required a case-by-case showing of vote dilution.[185] For example, in *Whitcomb v. Chavis*,[186] a recent challenge to a multimember legislative district, the Court acknowledged that a system structured so as to dilute or cancel out the voting strength of a political minority would violate equal protection,[187] but found that the plaintiffs had not carried their burden of proof and shown that their political strength actually had been canceled out or diluted.[188] The Court rejected the district court's finding of dilution and noted that whenever a candidate in the general election loses, one can argue that his supporters were without a legislative voice of their own:

> [P]laintiffs' position comes to this: that although they have equal opportunity to participate in and influence the selection of candidates and legislators, and although the ghetto votes predominantly Democratic and that party slates candidates satisfactory to the ghetto, invidious discrimination nevertheless results when the ghetto, along with all other Democrats, suffers the disaster of losing too many elections.[189]

Mr. Justice White, the author of the majority opinion in *Chavis*, characterized the district court's finding as "expressive of the more general proposition that any group with distinctive interests must be represented in legislative halls if it is numerous enough to command at least one seat and represents a majority living in an area sufficiently compact to constitute a single-member district."[190] The Court understandably was concerned about such an approach for the same reasons that it is reluctant to extend the doctrine of *Gray v. Sanders*—the principle is not easily contained.[191] Moreover, Justice White indicated that if all interest groups are entitled to representation at the ultimate decision-making forum—in this case, the legislative chamber—then the Court would have to deal with similar claims from labor groups, the university community, and religious or ethnic groups occupying identifiable geo-

183. Fortson v. Dorsey, 379 U.S. 433, 439 (1965).
184. *See* Whitcomb v. Chavis, 403 U.S. 124, 142-43 (1971).
185. *See id.* at 142-44.
186. 403 U.S. 124 (1971).
187. *See* Burns v. Richardson, 384 U.S. 73 (1966); Fortson v. Dorsey, 379 U.S. 433 (1965).
188. 403 U.S. at 149-55.
189. *Id.* at 153. The Court also noted that plaintiff's argument applied to single-member districts as well as multimember districts—especially "safe" single-member districts. *Id.*
190. *Id.* at 156.
191. *Id.* at 156-57.

graphic areas.[192] *Chavis*, however, did not indicate that courts should not listen sympathetically to political spectrum issues when they are raised in an intraparty context; rather, Justice White's opinion explicitly acknowledges that the issues involved in a general election are significantly different from those arising in an intraparty case. For example, Justice White noted that plaintiffs had directed their challenge to the "legislative forum where public policy is finally fashioned,"[193] apparently because they believed that the "chance of winning or significantly influencing intraparty fights" was "inadequate protection to minorities, political, racial, or economic . . . ."[194] Since, as this Article has argued above,[195] the considerations that caution against extension of the doctrine of *Gray v. Sanders* to general elections do not have the same force in an intraparty context, Justice White's refusal to apply the *Gray* principle in *Chavis* should be explained on that basis. Indeed, requiring the political parties to safeguard the interest of voters in fair and effective representation in the intraparty context seemingly would be a logical outgrowth of *Chavis*' intimation that the "chance of winning or significantly influencing intraparty fights" should minimize the importance of establishing a constitutional right of political spectrum representation in "the legislative forum where public policy is finally fashioned."[196]

The winner-take-all primary and a multimember district differ in three other fundamental respects. First, a delegate to a presidential nominating convention does not respond to the same pressures as a state legislator. Consequently, application of the *Gray* principle to a multimember district may be unwise. For example, a state legislator is required to make a large range of political choices as well as serve his constituency in numerous nonvoting functions;[197] moreover, he repre-

192. *Id.*

193. *Id.* at 159.

194. *Id.*

195. *See* notes 107-23 *supra* and accompanying text.

196. Some political scientists advocate party competition as a means of exercising influence within political parties. *See* Note, *supra* note 27, at 556-58. The theory seemingly is related to the economic model in which consumer sovereignty hinges upon the ability of the consumer to switch brands or substitute similar products. In the 2-party system, however, it is not clear that a similar mechanism functions adequately. Consumer sovereignty requires innumerable alternatives that simply do not exist in a 2-party system. Although the need to attract independent voters may effect marginal shifts in policy orientation, party competition alone likely will be insufficient to provide the stimulus necessary for political spectrum representation. *See generally* W. BURNHAM, *supra* note 150, at 118-34. For an interesting theoretical discussion by an economist of the relative merits of party competition ("exit") and intraparty democracy ("voice") in influencing organization behavior see A. HIRSCHMAN, EXIT, VOICE AND LOYALTY (1970).

197. For example, constituents often ask their representative for assistance in dealing with

sents, by definition, all members of his constituency. The multimember legislative district therefore does not automatically eliminate the nonplurality voter from fair and effective representation. Unless the situation is one-sided, a shift in political alignments could result in a legislator's ouster from office at the next election. Secondly, any winner-take-all element in a multimember district is a coincidental outgrowth of the district's own voting patterns. Split tickets can win elections in multimember districts. Unlike *Whitcomb v. Chavis*, in which "the failure of the ghetto to have legislative seats in proportion to its population emerge[d] more as a function of losing elections than of built-in bias,"[198] the failure of nonplurality political factions to have representation on a winner-take-all delegate slate is mandated by the built-in bias of the primary itself.[199] Thirdly, the Supreme Court has noted that the opportunity for abuse in multimember districts is greater, and proving built-in bias against a political minority is easier, if "districts are large in relation to the total number of legislators."[200] Viewed against this guideline, California's winner-take-all primary poses a very high possibility for abuse.

V. BROWN V. O'BRIEN: THE CREDENTIALS CHALLENGE AND ITS AFTERMATH

In April 1972, supporters of each of the Democratic and Republican candidates in the California primary filed suit in the Supreme Court of California seeking to have the winner-take-all feature of the state's primary declared invalid. In an exercise of discretion, the court declined to take original jurisdiction or rule on the merits of the action. The imminence of the primary election prevented any further action prior to the election date.[201] Senator Humphrey subsequently lost the primary election to Senator McGovern by some five percentage points.[202] Humphrey's supporters unsuccessfully turned to the courts in another attempt to have the election's winner-take-all feature invalidated. They

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the governmental bureaucracy or for information not easily available to an ordinary citizen. Constituents therefore view their legislator as an advocate for their parochial interests in the government.

198. 403 U.S. at 153.

199. *See also* Hadley v. Junior College Dist., 397 U.S. 50 (1970).

200. Burns v. Richardson, 384 U.S. 73, 88 (1966).

201. *See* Barron v. Brown, Civil No. S.A.C. 7939 (Cal. Sup. Ct., May 3, 1972). The author of this article was chief counsel for petitioners in the case and wishes to acknowledge the editorial assistance of Vincent Chieffo and Charles Rosenberg, of the California bar, and the research assistance of David Fishback, Frank Martin, and Paul Weirbos in preparation of the brief in that case.

202. N.Y. Times, June 8, 1972, at 1, col. 5.

sought a share of California's delegates based on their voting strength in the primary.[203] Denied relief, they took their grievance to the Credentials Committee of the 1972 Democratic National Convention and succeeded in ousting part of McGovern's California slate.[204] The ousted McGovern delegates then took their turn in court, and Judge Hart of the District of Columbia District Court initially denied relief.[205] The Court of Appeals reversed his decision, holding that the action of the Credentials Committee violated due process of law.[206] Sitting in special session, the Supreme Court stayed the judgment of the Court of Appeals without acting on the accompanying petition for a writ of certiorari. The Court's action left the outcome of the controversy squarely to the Democratic National Convention. The Convention reversed the decision of its Credentials Committee and voted to seat all the pro-McGovern California delegates. This section will argue that the action of the Credentials Committee was improper, and that the decision of the Court of Appeals is supportable, in view of the limited alternatives available to the court.

A. The Issues Before the Credentials Committee

The Humphrey supporters evidently adopted two lines of attack before the Credentials Committee.[207] First, they argued that the McGovern Commission guidelines barred use of the winner-take-all primary. The hearing examiner appointed by the Credentials Committee, noting that the guidelines were phrased in the "urge" language rather than the "require" language, unequivocally rejected that position.[208] After the hearing examiner filed his report, the Humphrey supporters dropped their first ground of attack.[209] Renewing their challenge before the Credentials Committee itself, the Humphrey forces relied solely upon a second mode of attack. They maintained that the winner-take-all primary violated the mandate of the 1968 Democratic National Convention to the McGovern Commission, which required that "[t]he unit rule

203. *See* TIME, July 3, 1972, at 11.

204. *See* N.Y. Times, June 25, 1972, § N, at 40, col. 3; TIME, July 10, 1972, at 15.

205. N.Y. Times, July 4, 1972, at 4, col. 7.

206. Brown v. O'Brien, Civil No. 72-1628 (D.C. Cir.), *judgment stayed*, 92 S. Ct. 2718 (1972).

207. For a discussion of the role of the Credentials Committee in constitutional adjudication see Schmidt & Whalen, *Credentials Contests at the 1968—and 1972—Democratic National Conventions*, 82 HARV. L. REV. 1438 (1969), who state: "It does not seem reasonable to expect the Credentials Committee of the National Convention to decide hard issues of constitutional interpretation about which courts are in doubt." *Id.* at 1449-50.

208. Brown v. O'Brien, Civil No. 72-1628, at 6-8 (D.C. Cir. July 5, 1972).

209. *Id.* at 4.

not be used in any stage of the delegate selection process . . . ."[210] On that basis, the Credentials Committee voted to exclude 151 pro-McGovern California delegates.[211]

Writing in 1969 about the mandate of the 1968 Democratic National Convention that abolished the unit rule, two commentators noted that majority rule mechanisms at preliminary stages in the delegate selection process might have the same disfranchising result as the unit rule.[212] The McGovern Commission also recognized the problem and urged the states to provide for minority representation in 1972;[213] both the Commission[214] and the commentators[215] acknowledged, however, that the abolition of the unit rule by the 1968 Convention did not require elimination of the winner-take-all primary.

The pro-McGovern California delegates adopted the same approach and argued that the 1968 mandate did not compel the abolition of winner-take-all primaries; that the candidates and party officials had never interpreted the 1968 resolution to require the elimination of winner-take-all primaries; and that the "legislative history" of the 1968 mandate gave no support to the position that the reformers had contemplated the abolition of winner-take-all primaries.[216] The Credentials Committee perfunctorily rejected these arguments.[217]

B. The Issues In the Court of Appeals

The court of appeals accepted each of the McGovern delegates' arguments. It determined that the 1968 mandate was vague and indeterminate,[218] and that the legislative history provided no support for the proposition that the reformers had contemplated the abolition of winner-take-all primaries.[219] Furthermore, the court noted that all parties had justifiably relied on the repeated assertions of party officials

210. *Id.* at 4, 8. *See also* text accompanying notes 3-15 *supra*.

211. Brown v. O'Brien, Civil No. 72-1628, at 4-5 (D.C. Cir. July 5, 1972).

212. *See* Schmidt & Whalen, *supra* note 207, at 1458-59.

213. *See* MCGOVERN COMMISSION REPORT, *supra* note 2, at 44-45.

214. *Id.* at 35-36.

215. *See* Schmidt & Whalen, *supra* note 207, at 1459.

216. *See* Brown v. O'Brien, Civil No. 72-1628, at 6-9 (D.C. Cir. July 5, 1972). The Hughes Commission refused to "flatly condemn the winner-take-all principle in state primaries, since such primaries offer a useful device for engaging popular interest and involvement in the process of selecting a President." *Id.* at 9 (citing HUGHES COMMISSION REPORT, *supra* note 3, at 19). The position is similar to that taken by Professor Bickel, a member of the Hughes Commission. *See* A. BICKEL, *supra* note 119, at 57-58; *supra* note 148, at 25-26.

217. *See* Brown v. O'Brien, Civil No. 72-1628, at 9 (D.C. Cir. July 5, 1972).

218. *Id.* at 9-10.

219. *Id.* at 10.

that the mandate had not proscribed winner-take-all primaries.[220] As a result of these findings, the court made its determinative evaluation of the case: "[T]he Democratic Party did not merely interpret one of its rules—in essence, it acted in defiance of its own rules as interpreted in the Call for the 1972 Convention by establishing retroactively an entirely new and unannounced standard of conduct."[221] Such conduct, concluded the court, violated due process of law.[222] The significance of the decision lies not only in its ultimate holding, but also in the court's treatment of the state action and ripeness issues.

1. *State Action.*—The court of appeals, citing *Terry v. Adams*[223] and *Georgia v. National Democratic Party*,[224] experienced no difficulty surmounting the threshold barrier of state action. The Supreme Court, on the other hand, expressed "grave doubts" about the action of the court of appeals on this basis and noted that credentials challenges normally concern intraparty disputes, which are determined by the convention itself.[225] *Lynch v. Torquato*,[226] *Maxey v. Washington State Democratic Committee*,[227] and *Seergy v. Kings County Republican County Committee*,[228] however, all indicate that political parties must adhere to constitutional standards in their governmental activities, which include the nominating function.

Nevertheless, the court's intervention does pose the question of the propriety of judicial application of constitutional restrictions to a private association.[229] In *Georgia v. National Democratic Party*, however, the court of appeals squarely held that the allocation of delegates to the states for representation at the Democratic National Convention constituted state action. In essence, *Georgia* applied the rationale of *Marjorie Webster Junior College, Inc. v. Middle States Association of Colleges*

220. *Id.*
221. *Id.*
222. *Id.* at 12.
223. 345 U.S. 461 (1953).
224. 447 F.2d 1271 (D.C. Cir. 1971).
225. O'Brien v. Brown, 92 S. Ct. 2718, 2720 (1972).
226. 343 F.2d 370 (3d Cir. 1965).
227. 319 F. Supp. 573 (W.D. Wash. 1970).
228. 459 F.2d 308 (2d Cir. 1972).
229. *See generally Developments in the Law, supra* note 142, which states: "The internal processes by which these political determinations [that is, internal compromise] are made are ill-understood, and perhaps better left unexplored. To find that these processes are by the Constitution subject to judicial scrutiny would seriously hamper their operation and burden the courts, and it seems impossible to create procedural devices which would protect against abuse and yet permit the requisite degree of autonomy." *Id.* at 1061. The Supreme Court also hesitated to decide *O'Brien v. Brown* for similar reasons. *See* 92 S. Ct. at 2720. *See also* note 142 *supra.*

and Secondary Schools, Inc.[230] to the delegate allocation situation.[231] In *Marjorie Webster*, the court of appeals had assumed but did not hold that an accrediting agency, which also was a private association, was subject to the restrictions of due process.[232] In its opinion in *Marjorie Webster*, the court noted that the nature of the agency's activity[233] and the recognition accorded to accreditation by federal educational grant programs could render the action of the association state action for the purpose of applying the due process clause.[234] Indeed, in *Rice v. Elmore*,[235] a case tacitly approved by the Supreme Court in *Terry v. Adams*,[236] the Fourth Circuit stated the modern view of the relationship between party and state:

> The party may, indeed, have been a mere private aggregation of individuals in the early days of the Republic, but with the passage of the years, political parties have become in effect state institutions, governmental agencies through which sovereign power is exercised by the people.[237]

According to *Terry v. Adams*, the nomination process is an integral part of the election machinery subject to constitutional scrutiny.[238] Moreover, the recognition granted to successful nominees by the various states in their ballots makes the action of the parties in the nomination process the action of the states.[239]

2. *Ripeness.*—In an earlier challenge involving the Illinois delegation to the 1972 Democratic National Convention, District Judge Hart had invalidated certain McGovern Commission guidelines that he inter-

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230. 432 F.2d 650 (D.C. Cir.), *cert. denied*, 400 U.S. 965 (1970).

231. Several law review articles also are persuasive in making a case for state action. *See, e.g.*, Bellamy, *Applicability of the Fourteenth Amendment to the Allocation of Delegates to the Democratic National Convention*, 38 GEO. WASH. L. REV. 892, 895-97 (1970); Note, *supra* note 9, at 476-77. *But see* Note, *supra* note 27, at 538-45.

232. 432 F.2d at 653.

233. Among other cases, the court cited Terry v. Adams, 345 U.S. 461 (1953), for the proposition that state action depends upon the function at issue. The Supreme Court recently used the functional approach in a different context in Evans v. Newton, 382 U.S. 296 (1966) (operation of a park is a state function and therefore may not be operated on a segregated basis).

234. 432 F.2d at 658. Judges Bazelon and MacKinnon were on the panel that decided *Marjorie Webster* and also constituted the majority of the panel deciding *Brown v. O'Brien*.

235. 165 F.2d 387 (4th Cir. 1947).

236. 345 U.S. 461 (1953).

237. 165 F.2d at 389. *See also* Newberry v. United States, 256 U.S. 232, 286 (1921) (Pitney, J., concurring): "[T]he likelihood of a candidate succeeding in an election without a party nomination is practically negligible . . . . As a practical matter, the ultimate choice of the mass of voters is predetermined when the nominations have been made."

238. *See* text accompanying notes 20-24 and 82-85 *supra*.

239. *See* O'Brien v. Brown, 92 S. Ct. 2718, 2720 (1972) (Marshall, J., dissenting). *See also* Bode v. National Democratic Party, 452 F.2d 1302, 1304-05 (D.C. Cir. 1971); Ripon Soc'y v. National Republican Party, 343 F. Supp. 168 (D.D.C. 1972).

preted to impose quotas based on race, sex and age. Since the suit had been filed before the Credentials Committee had taken any action on the challenge, the court of appeals vacated this decision on the ground of prematurity.[240] Deciding that the action of the Credentials Committee raised a justiciable controversy in the California delegate contest, the court of appeals intervened in the controversy at an intermediate stage before the national convention had taken any final action.

When courts should involve themselves in the activities of political parties is a question that cannot be answered easily.[241] In granting the stay of the court of appeals' judgment, the Supreme Court said that the "[a]vailability of the convention as a forum to review the recommendations of the Credentials Committee" called for judicial restraint.[242] Sound policy reasons often justify delaying judicial intervention into the affairs of a private association. If the courts avoid the conflict entirely, informal negotiation and compromise may provide an effective long-run solution to the controversy. Moreover, direct negotiation and compromise likely would increase the internal responsibility of the party organization and provide a better basis on which to promote party unity in the post-convention period. On the other hand, litigation tends to produce a "victory" for one side that hardens positions and makes compromise difficult. The national nominating convention exists in order to reach an accommodation on a party nominee and unify the party for the general election. Intraparty litigation, which may short-circuit negotiation, can thus frustrate the convention's very purpose.

Judicial restraint, however, perhaps was not the preferable answer to the specific problem faced by the court of appeals. Justice Marshall observed that the court of appeals had three available alternatives regarding intervention: intervention before the convention; intervention after the convention had acted upon the report of its Credentials Committee; or intervention after the convention itself.[243] Justice Marshall reasoned that delaying intervention until the middle of or after the convention would represent a greater intrusion into the political process of the party than intervention at the preconvention stage.[244] He noted that a court can fashion relief to minimize undesirable intrusion upon the independence of political parties.[245] He suggested that declaratory

240. *See* Brown v. O'Brien, Civil No. 72-1628, at 13 n.5, 15, 16 n.6, 17-18 (D.C. Cir. July 5, 1972).

241. *See generally Developments in the Law, supra* note 142, at 1070-71.

242. 92 S. Ct. at 2720.

243. *Id.* at 2722.

244. *Id.* at 2722-23.

245. *Id.* at 2723; *Cf.* Ripon Soc'y v. National Republican Party, 343 F. Supp. 168 (D.D.C. 1972).

relief prior to the convention would put the party on notice of the constitutional issues involved but, unlike injunctive relief, would not interfere directly with the party's internal processes unless that interference should become absolutely necessary.[246] This seems like a sensible approach which the court of appeals might have been well advised to follow.

In a sense, the Supreme Court's majority gambled that the Democratic National Convention would reverse its Credentials Committee and therefore avoid a major intrusion by the courts into the nomination process. In this instance, the Court's gamble proved correct; however, the stakes were high, and a miscalculation would have evoked subsequent intervention at an extraordinary cost.[247]

3. *The Constitutional Issues.*—The court of appeals' finding that the Credentials Committee changed the party rules after the primary led to its decision that the McGovern delegates had been denied due process of law. Eli Segal, general counsel for the McGovern Commission, has argued that the McGovern Commission was a creature of the 1968 Democratic National Convention, and "[i]n the area of delegate selection, the Commission speaks for its creator, the 1968 Convention, in much the same way that an administrative agency speaks for its creator, the legislature."[248] In Segal's opinion the convention plays a dual role—it is both a legislative and a judicial body.[249] Segal argues that the 1968 Convention, in its legislative capacity, created the Commission with a broad mandate.[250] In the exercise of its rule-making power, the Commission established its guidelines as its interpretation of the mandate.[251] Viewing the Democratic National Convention as a "self-

246. 92 S. Ct. at 2723; Ripon Soc'y v. National Republican Party, 343 F. Supp. 168 (D.D.C. 1972).

247. Although the court of appeals had to decide *Brown v. O'Brien*, the Supreme Court's entire role in the drama was discretionary. For a discussion of the mediating devices that federal courts may use to avoid sensitive political or constitutional issues see Bickel, *The Supreme Court, 1960 Term, Foreword: The Passive Virtues*, 75 HARV. L. REV. 40 (1961). The Court's decision to act on an application for a stay in July, although it would not be able to act on the accompanying petition for certiorari until October, raises serious questions about the propriety of the Court's use of the stay. Although the stay ostensibly had no precedental force, Justice Marshall noted that it had the same effect on the parties as would a ruling on the merits. 92 S. Ct. at 2726. However, the parties had no opportunity to present argument or brief the issues further. Seen in this light, the procedure employed may have been an abuse of judicial power, especially in view of the Court's apparent zest to enter the fray and issue a nondecision which amounted to a rebuke of the court of appeals.

248. Segal, *supra* note 3, at 882.

249. *See id.* at 883 n.58.

250. *Id.* at 882-83.

251. *Id.* at 883.

contained legal system" he would find that the 1972 Credentials Committee and Convention sat in review of the Commission's work to determine whether the Commission exceeded its delegation of authority.[252]

In reviewing credentials contests, he maintains that the convention and its Credentials Committee perform essentially adjudicatory functions,[253] although political considerations clearly will color much of this adjudication.[254] To a certain extent, such flexibility is desirable because it allows the compromise and accommodation that strict adherence to an adjudicatory model otherwise might thwart.

Recognizing the political system's need for flexibility, the court of appeals indicated that political parties must have wide latitude to interpret their own regulations;[255] but the court also implied that there are limits to the leeway that can be permitted in the name of flexibility.[256] In the California challenge, the Credentials Committee abandoned the adjudication/negotiation norm and invoked a legislative mode of action that jeopardized "the legitimacy of the process of electing the President."[257] The lack of any substantial support for the Credentials Committee's position that the 1968 mandate required abolition of the winner-take-all primary justified the court's conclusion that retroactive rule-making was involved.[258]

A dissent to the court of appeals' opinion argued that the retroactive effect of the Credentials Committee's action did not make it unconstitutional and cited *SEC v. Chenery Corp.*[259] for that proposition. In *Chenery*, the SEC prohibited management from trading in company stock during a corporate reorganization, although there was no specific SEC rule barring that particular conduct. The Supreme Court earlier had held that general equitable grounds did not permit a flat SEC prohibition of this conduct.[260] On remand, the SEC had found that the specific conduct involved violated the thrust of the securities act.

Chenery upheld the SEC's reasoning and suggested three reasons

252. *Id.* at 883 n.58.

253. *Id.*

254. *See id.* at 883 n.60; Schmidt & Whalen, *supra* note 207, at 1466-67.

255. Brown v. O'Brien, Civil No. 72-1628, at 9 (D.C. Cir. July 5, 1972).

256. *Id.* at 10-11.

257. *Id.* at 11.

258. A criminal law doctrine lends weight to the court of appeals' analysis. In a series of cases beginning with Thompson v. City of Louisville, 362 U.S. 199 (1960), the Supreme Court has maintained that a conviction devoid of evidentiary support violates due process. By analogy, the Credentials Committee rested its interpretation of the 1968 mandate on a ground so unreasonable as to violate due process.

259. 332 U.S. 194 (1947).

260. SEC v. Chenery Corp., 318 U.S. 80 (1943).

why an administrative agency might prefer to proceed on an ad hoc, case-by-case basis, without resort to administrative rule-making. First, the conduct proscribed might be unforeseeable and the problem unavoidable.[261] Secondly, the agency may not have sufficient experience to warrant drafting a rule with its possible rigidity.[262] Thirdly, some kinds of conduct may be so specialized that it would be impossible to describe them in terms of a general rule.[263] The *Chenery* Court held that in order to determine whether an agency has exceeded its power when proceeding on an ad hoc basis, a reviewing court should look at two things—whether the agency based its action on substantial evidence and whether its ruling was consistent with the power granted by Congress.[264]

In contrast to the Supreme Court's assessment of the SEC action in *Chenery*, the court of appeals in the California challenge found that the McGovern Commission had based its action on substantial evidence and acted within its authorized power, but that the Credentials Committee had acted arbitrarily. The Committee was not proceeding on a case-by-case basis with a view toward developing a rule of conduct, and it had not applied the same standard of conduct to other delegations elected in winner-take-all primaries.[265] Moreover, a rule sufficient to govern the situation already existed.[266] The unfairness of the Committee's action did not merely concern the inevitable retroactivity that accompanies, for example, a court decision on the constitutionality of a law, but rather the explicit retroactivity of a new rule established to govern conduct that already had taken place. The *Chenery* decision allows administrative flexibility to deal with unforeseen situations for which no pre-existing rule exists. Perhaps, as the dissenters in *Chenery* argued, even that decision permits administrative lawlessness,[267] but the "lawlessness" permitted in *Chenery* had a very different character from the retroactive legislation involved in the California delegate challenge.

VI. CONCLUSION

This Article has sketched the background and discussed the perspective of recent party reform litigation. It has argued that the

261. 332 U.S. at 202.

262. *Id.* at 202-03.

263. *Id.* at 203.

264. *Id.* at 207.

265. The court of appeals did not rule on the equal protection aspects of the case. *See* Civil No. 72-1628, at 12 n.4.

266. The Rules Committee, the convention's legislative branch, took responsibility for recommending abolition of winner-take-all primaries in 1976. 1972 RULES COMMITTEE REPORT § 4.

267. 322 U.S. at 212-13 (Frankfurter & Jackson, JJ., dissenting).

winner-take-all, statewide-slate primary, especially in large states like California, violates equal protection. Finally, it has taken the positions that the action of the Credentials Committee of the 1972 Democratic National Convention in rejecting the 151 McGovern delegates elected in California's primary was improper, and that intervention by the court of appeals was warranted despite the unconstitutionality of the winner-take-all primary.