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The Emerging Federally Secured Right of Political Participation

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I. Introduction

Judicial decisions on voting rights chronicle the growth of American democracy. Few aspects of our national life have proved more amenable to judicial intervention. The emerging federally secured right of political participation has largely been the work product of the federal courts. Dramatic increases in the level of popular political participation made possible by favorable judicial decisions suggest the need for an overview—for taking stock of how far we have come since the early days of the Republic. As early as 1886, the Court declared in *Yick Wo v. Hopkins*[1] that voting is "a fundamental right because it is preservative of all rights."[2] *Yick Wo* was the harbinger of a distant future. Not until "much later, indeed not until the 1961 Term—nearly a century after the Fourteenth Amendment was adopted—was discrimination against voters on grounds *other than race* struck down."[3] Since the Court held that the apportionment of state legislatures was subject to review under the equal protection clause of the fourteenth amendment in *Baker v. Carr*,[4] the seed planted by the Court in *Yick Wo* has, three-quarters of a century later, begun to bear fruit.

This Article will review the highly restrictive, antidemocratic practices which characterized access to the political system in many parts of the United States from the adoption of early

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[1]118 U.S. 356 (1886).

[2]*Id.* at 371.

[3]Oregon v. Mitchell, 400 U.S. 112, 136 (1970) (Douglas, J., dissenting) (emphasis in original).

[4]369 U.S. 186 (1962).

state constitutions until the pace of change began to quicken little more than a decade ago. Traditional constitutional doctrine on voting and political candidacy will be critically examined. Recent decisions of the Supreme Court extending the right to vote will be considered with emphasis on the expanding scope of federal judicial review. The emergence of a federally secured right of political participation, which extends to voting and to political candidacy, also will be identified and its parameters delineated. However, the validity of age and durational residency requirements for public office are beyond the scope of this Article.

II. State Restrictions on Voting and Political Candidacy Imposed by Early State Constitutions

The right of widespread popular political participation does not "share in the glorious history of other democratic values."[5] At the time of the American Revolution, voting and candidacy for public office were narrowly restricted in most states to a very small portion of the population. Early state constitutions jealously guarded against popular access to the ballot or public office through a plethora of exclusions: property ownership, poll taxes, personal wealth, religion, sex, age, race, and durational residency. The ancestry of the traditional doctrine can be traced directly to the union of landed aristocracy and powerful commercial interests which dominated the young Republic at the close of the eighteenth century.[6] In the century following the Civil War there was also a proliferation of vague state constitutional provisions which disfranchised for illiteracy, economic and social status, and conviction of certain crimes. Such provisions were easily subject to selective enforcement on racial and economic grounds. Significantly, these restrictive practices of early state constitutions were continued to a greater or lesser extent in most states until as recently as the 1960's and were protected by traditional constitutional doctrine which immunized state electoral practices from federal judicial review.

The restrictions in the early state constitutions are generally inconsistent with a political system in which each member of the adult population is extended the opportunity for effective political participation. Consideration of the various restrictions on

[5]Gangemi v. Rosengard, 44 N.J. 166, 169, 207 A.2d 665, 666 (1965).

[6]*See, e.g.*, C. Beard, An Economic Interpretation of the Constitution of the United States (1913); J. Main, The Antifederalists: Critics of the Constitution, 1781-1788 (1961). *But see* R. Brown, Charles Beard and the Constitution (1956); C. Warren, The Making of the Constitution (1937). A general picture of the growth of the American constitutional system is presented in A. Kelley & W. Harbison, The American Constitution (rev. ed. 1955).

voting and political candidacy in an historical context exposes the social, economic, ethnic, and sexist bias of traditional constitutional doctrine. As the cumulative impact of the various restrictions is apprehended, claims of their validity based on nothing other than long continued practice and tradition can be evaluated more realistically. Moreover, the various restrictions frustrating popular participation in the political process throughout our history can be traced, almost without exception, to the qualifications established in early state constitutions. The protracted struggle to remove the various archaic state restrictions on popular access to the political process is a documentary of the growth of American democracy.

Property Ownership—Property ownership requirements for voting and candidacy were common in the early state constitutions.[7] For example, the New Jersey Constitution of 1776 limited the right to vote for representatives in the council and assembly to inhabitants with a worth of fifty pounds.[8] Membership on the New Jersey legislative council was restricted to freeholders with a worth of at least one thousand pounds, proclamation money, of real and personal estate.[9] The early state constitutions were patterned after English law which had long confined the suffrage and public office to substantial property owners.[10] There were variations in the size or value of the freehold required as a precedent to voting.[11] Substantially larger property requirements were established for candidacy for public office than for voting. The most restrictive property requirements were attached to the most important offices. Thus, the Georgia Constitution of 1789 required that senators possess a freehold of 250 acres or some property in the amount of 250 pounds and that representatives possess a freehold of 200 acres or some property in the amount of 150 pounds.[12] The Governor of Georgia, in comparison, was required to be possessed of "five hundred acres of land, in his own right, within this State, and other species of property to the amount of one thousand pounds sterling."[13]

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[7]*See generally* 1-6 AMERICAN CHARTERS, CONSTITUTIONS AND ORGANIC LAWS (F. Thorpe ed. 1906) [hereinafter cited as THORPE].

[8]N.J. CONST. arts. III, IV (1776), *reprinted in* 5 THORPE 2595.

[9]*Id.*

[10]1 Hen. 5, c. 1 (1413). This Act of Parliament restricted voting to those who had free land valued at forty shillings a year above all charges.

[11]*Compare, e.g.*, the New Jersey fifty pound qualification *with* the Georgia ten pound and the New York twenty pound classifications. GA. CONST. art. IX (1777), *reprinted in* 2 THORPE 779; N.Y. CONST. art. VII (1777), *reprinted in* 5 THORPE 2630.

[12]GA. CONST. art. I, § 3 (1789), *reprinted in* 2 THORPE 786.

[13]*Id.* art. II, § 3, 2 THORPE 787.

In the early days of the Republic, even the apportionment of elected representatives sometimes was based upon property considerations.[14] Under an 1835 amendment to the North Carolina Constitution of 1776, public taxes paid into the state treasury constituted the basis of apportionment of state senatorial districts.[15] The South Carolina Constitution of 1778 likewise provided for reapportionment according to "white inhabitants and . . . taxable property."[16] Some states permitted nonresident property owners to vote on the basis of their ownership of property in a particular district.[17] Similarly, nonresident property owners were eligible for election to the South Carolina House of Representatives and Senate by the districts in which they owned property.[18] Some early state constitutions specifically excluded paupers from political candidacies.[19]

Poll Taxes—Likewise, access to the ballot often was restricted to persons who had paid a poll tax. The New Hampshire Constitution of 1784, for example, extended the franchise to any otherwise qualified voter paying a poll tax.[20] Similarly, the New York Constitution of 1777 limited the franchise to otherwise qualified voters with a freehold of twenty pounds or a rented tenement with a yearly value of forty shillings and who had "been rated and actually [had] paid taxes to this State."[21]

Religious Tests—Religious tests for access to the ballot and to public office also were established by some early state constitutions. The Georgia Constitution of 1777 required that its representatives "be of the Protestant religion."[22] The South Carolina Constitution of 1778 limited voting to any otherwise qualified elector "who acknowledges the being of a God, and believes in a further state of rewards and punishments."[23] The South Carolina Constitution of 1895, which currently is in force, provides that "[n]o person shall be eligible to the office of Governor

[14]*See, e.g.*, U.S. CONST. art. I, § 2, cl. 3. This clause contained the noted "three-fifths compromise," under which the property interests in slaves of citizens of some states was recognized as a basis for apportionment of United States Representatives. See 1 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 196-201 (M. Farrand ed. 1966) [hereinafter cited as RECORDS]; 2 *id.* at 219-23.

[15]N.C. CONST. amend. I, § 1 (1835), *reprinted in* 5 THORPE 2794.

[16]S.C. CONST. art. XV (1778), *reprinted in* 6 THORPE 3252.

[17]*See, e.g.*, MD. CONST. art. IV (1776), *reprinted in* 3 THORPE 1691. *See also* S.C. CONST. art. I, § 4 (1790), *reprinted in* 6 THORPE 3258.

[18]S.C. CONST. art. I, §§ 6, 7 (1790), *reprinted in* 6 THORPE 3259. *But see, e.g.*, N.C. CONST. art. IX (1776), *reprinted in* 5 THORPE 2790.

[19]*See, e.g.*, MASS. CONST. amend. III (1821), *reprinted in* 3 THORPE 1912.

[20]N.H. CONST. pt. II (1784), *reprinted in* 4 THORPE 2459.

[21]N.Y. CONST. art. VII (1777), *reprinted in* 5 THORPE 2630.

[22]GA. CONST. art. VI (1777), *reprinted in* 2 THORPE 779.

[23]S.C. CONST. art. XIII (1778), *reprinted in* 6 THORPE 3251.

who denies the existence of the Supreme Being."[24] The Vermont Constitution of 1777 provided that no religious test would ever be required of any civil officer or magistrate in that state except the following declaration:

> I do believe in one God, the Creator and Governor of the universe, the rewarder of the good and punisher of the wicked. And I do acknowledge the scriptures of the old and new testament to be given by divine inspiration, and own and profess the protestant religion.[25]

Sex—Early state constitutions restricted suffrage and eligibility for public office to males who were otherwise qualified.[26] In 1875 the Supreme Court held that the right to vote was not protected by the privileges and immunities clause of the fourteenth amendment and that state governments were republican in form within the meaning of the guaranty clause notwithstanding their denial of the suffrage to women.[27]

Age—The franchise was restricted under the early state constitutions to otherwise qualified voters twenty-one years of age or over. Moreover, the right to vote was not extended to persons under the age of twenty-one until Georgia, in 1943, and Kentucky, in 1955, permitted eighteen-year-olds to vote.[28] Age restrictions on candidacy for public office which discriminate against otherwise qualified voters have been established by the federal and state constitutions and have prevailed virtually without challenge until the past several years.

Race—Early state constitutions varied considerably in their treatment of race as a restriction on the franchise. Massachusetts, New Hampshire, New Jersey, and New York, for example, permitted otherwise qualified "inhabitants" to vote without regard to race.[29] Pennsylvania, Maryland and North Carolina allowed otherwise qualified "freemen" to vote, a restriction exclusive of slaves but inclusive of free colored persons.[30] Of the thir-

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[24]S.C. CONST. art. IV, § 3. This qualification was retained in the 1973 amendment of this article. *Compare* S.C. CONST. art. XXXVIII (1778), *reprinted in* 6 THORPE 3255, declaring the "Christian Protestant religion" to be the "established religion of this State."

[25]VT. CONST. art. IX (1777), *reprinted in* 6 THORPE 3743. *See also* DEL. CONST. art. 22 (1776), *reprinted in* 1 THORPE 566. *Compare* the "free exercise" clause of VA. CONST. § 16 (1776), *reprinted in* 7 THORPE 3814.

[26]*See, e.g.*, PA. CONST. § 6 (1776), *reprinted in* 5 THORPE 3084.

[27]Minor v. Happersett, 88 U.S. (21 Wall.) 162 (1874).

[28]Oregon v. Mitchell, 400 U.S. 112, 245 (1970) (Brennan, J., dissenting). Alaska and Hawaii, since their admission to the Union in 1959, have extended the vote to nineteen-year-olds and twenty-year-olds respectively. *Id.* at 245 n.28.

[29]Minor v. Happersett, 88 U.S. (21 Wall.) 162, 172 (1874).

[30]*Id.* at 172-73. In 1835 North Carolina prohibited free Negroes or mu-

teen original states, only South Carolina restricted the vote to "white" persons.[31] As new states were admitted to the Union, however, they frequently restricted the suffrage to persons of the "white" race.[32] Neither Orientals nor American Indians were eligible under state constitutional provisions restricting the franchise to "white" persons. The California Constitution of 1879 spoke unmistakably to the suffrage status of naturalized United States citizens of Chinese origin:

> [N]o native of China, no idiot, insane person, or person convicted of any infamous crime and no person hereafter convicted of the embezzlement or misappropriation of public money, shall ever exercise the privilege of an elector in this State.[33]

Durational Residency—Most early state constitutions imposed state or county durational residency requirements of varying length on voting. One-year durational residency requirements were established by Pennsylvania,[34] North Carolina,[35] Maryland,[36] New Jersey,[37] and South Carolina.[38] Six-month durational residency requirements were adopted by Georgia[39] and New York.[40]

Significantly, neither Massachusetts nor New Hampshire imposed durational residency requirements on voting in their early constitutions. Massachusetts required only that otherwise qualified voters be inhabitants.[41] The following clause was adopted in explanation of the inhabitancy requirement:

> And to remove all doubts concerning the meaning of the word, "inhabitant" in this constitution, every per-

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lattos to the fourth generation from voting. N.C. CONST. amend. I, § 3, cl. 3 (1835), *reprinted in* 5 THORPE 2796.

[31]Minor v. Happersett, 88 U.S. (21 Wall.) 162, 172 (1874).

[32]*See, e.g.*, ALA. CONST. art. III, § 5 (1819), *reprinted in* 1 THORPE 99; CAL. CONST. art. II, § 1 (1849), *reprinted in* 1 THORPE 393; MISS. CONST. art. III, § 1 (1817), *reprinted in* 4 THORPE 2035; ORE. CONST. art. II, § 2 (1857), *reprinted in* 5 THORPE 3000.

[33]CAL. CONST. art. II, § 1 (1879), *reprinted in* 1 THORPE 415.

[34]PA. CONST. § 6 (1776), *reprinted in* 5 THORPE 3084. *Compare* PA. CONST. art. III, § 1 (1790), *reprinted in* 5 THORPE 3096, which required residence "in the State two years next before the election, and within that time . . . [payment of] a State or County tax, which shall have been assessed at least six months before the election."

[35]N.C. CONST. arts. VIII, IX (1776), *reprinted in* 5 THORPE 2790.

[36]MD. CONST. art. II (1776), *reprinted in* 3 THORPE 1691.

[37]N.J. CONST. art. IV (1776), *reprinted in* 5 THORPE 2595.

[38]S.C. CONST. art. XIII (1778), *reprinted in* 6 THORPE 3251. The durational residency requirement for voting was increased to two years in S.C. CONST. art. I, § 4 (1790), *reprinted in* 6 THORPE 3258.

[39]GA. CONST. art. IX (1777), *reprinted in* 2 THORPE 779.

[40]N.Y. CONST. art. VII (1777), *reprinted in* 5 THORPE 2630.

[41]MASS. CONST. art. II (1780), *reprinted in* 3 THORPE 1895.

> son shall be considered as an inhabitant, for the purpose of electing or being elected into any office, or place within this state in that town, district or plantation where he dwelleth, or hath his home.[42]

The New Hampshire Constitutions of 1784 and 1792 were patterned after the Massachusetts Constitution of 1780 and included an inhabitancy rather than a durational residency requirement.[43] An inhabitancy requirement patterned after the Massachusetts Constitution of 1780 also was adopted at the Federal Constitutional Convention as the only residency qualification for membership in the United States Senate and House of Representatives.[44] Under the Articles of Confederation, some states had imposed lengthy state durational residency requirements for election as delegates to the Congress.[45]

Each of the early state constitutions imposed durational residency requirements for public office, although there was, as there is now, substantial variation among the states in the length of durational residency required for election to the same office. Early durational residency requirements for governor ran the gamut: South Carolina—ten years,[46] North Carolina—five years,[47] and Connecticut—one year.[48] There is no evidence that Connecticut suffered as a result of its one-year requirement or, conversely, that South Carolina or North Carolina benefited from their longer requirements.

Literacy Tests—In the century following the Civil War, literacy tests became closely identified with the racial exclusion policies of Southern states. But literacy tests were by no means

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[42] *Id.*, 3 THORPE 1896. *But see id.* amend. III (1835), 3 THORPE 1912 (one-year durational residency required for voting).

[43] N.H. CONST. pt. II (1784), *reprinted in* 4 THORPE 2459; N.H. CONST. (1792), *reprinted in* 4 THORPE 2479.

[44] *See* 2 RECORDS, *supra* note 14, at 216-19.

[45] *See, e.g.*, MD. CONST. art. XXVII (1776), *reprinted in* 3 THORPE 1695 (five-year state durational residency required for election from Maryland as delegate to Congress). *Compare* 2 RECORDS, *supra* note 14, at 217, in which Mr. Mercer of Maryland remarked that a state durational residency requirement for membership in the United States Senate and House of Representatives

> would present a greater alienship among the States than existed under the old federal system. It would interweave local prejudices & State distinctions in the very Constitution which is meant to cure them. He mentioned instances of violent disputes raised in Maryland concerning the term "residence."

[46] S.C. CONST. art. V (1778), *reprinted in* 6 THORPE 3249; S.C. CONST. art. II, § 2 (1790), *reprinted in* 6 THORPE 3262.

[47] N.C. CONST. art. XV (1776), *reprinted in* 5 THORPE 2791.

[48] CONN. CONST. art. IV, § 1, and art. VI (1818), *reprinted in* 1 THORPE 540, 544.

limited to the South,[49] and in 1959 the Supreme Court upheld the facial validity of a literacy test.[50] Loosely worded tests of voter "understanding" adopted by many states vested local officials with unbridled discretion and invited discrimination on racial and economic grounds. The Alabama Constitution of 1901, for example, provided that voters must be "persons who are of good character and who understand the duties and obligations of citizenship under a republican form of government."[51]

Moral Character—Conviction of crimes involving moral turpitude historically has been a ground for denial of the franchise and for disqualification from public office.[52] Although the state interest in preventing electoral fraud is compelling, the loosely worded moral character qualifications adopted by many states demonstrably were intended to exclude on racial, economic, or status grounds rather than to preserve the purity of the ballot box. The Alabama Constitution of 1901 denied the vote to physically able persons who had not "worked or been regularly engaged in some lawful employment, business or occupation, trade or calling for the greater part of the twelve months next preceding the time they offer to register . . . ."[53] In addition to excluding persons convicted of specified as well as unspecified crimes involving moral turpitude, the Alabama Constitution of 1901 excluded persons "convicted as a vagrant or tramp" and persons convicted of assault and battery on their wives, bigamy, adultery, sodomy, miscegenation or crimes against nature.[54]

Citizenship—Many states have restricted the suffrage to citizens of the United States, while others have extended it to persons of foreign birth who have declared their intention to become citizens of the United States.[55] Likewise, candidacy for public office has been restricted in some instances to natural born citizens of the United States.[56]

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[49]*See, e.g.*, MASS. CONST. amend. XX (1857), *reprinted in* 3 THORPE 1919.

[50]Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45 (1959).

[51]ALA. CONST. art. VIII, § 180 (1901), *reprinted in* 1 THORPE 210. *But see* Louisiana v. United States, 380 U.S. 145 (1965).

[52]*See, e.g.*, MD. CONST. art. LIV (1776), *reprinted in* 3 THORPE 1700. *See also* Cohen, *Tennessee Civil Disabilities: A Systemic Approach*, 41 TENN. L. REV. 253, 256-67 (1974).

[53]ALA. CONST. art. VIII, § 181 (1901), *reprinted in* 1 THORPE 210.

[54]*Id.* § 182.

[55]*See* Minor v. Happersett, 88 U.S. (21 Wall.) 162, 177 (1874).

[56]U.S. CONST. art. II, § 1, cl. 5 (President of the United States). *But cf. In re* Griffiths, 413 U.S. 717 (1973) (exclusion of aliens from the practice of law violates equal protection, and classifications based on alienage are inherently suspect and subject to strict scrutiny).

III. Traditional Constitutional Doctrine Regarding Voting and Candidacy

The elaborate restrictions that frustrated popular participation in the electoral process were styled "qualifications" and were included in most state constitutions in the eighteenth and nineteenth centuries. The qualifications established in the early state constitutions set a pattern generally followed by new states as they were admitted to the Union and by cities and counties adopting charters under "home rule" legislation.

Some of the harshest restrictions of the franchise in the original state constitutions were diluted by various states even prior to the adoption of the Federal Constitution. Thus, Governor Morris' proposal at the Federal Constitutional Convention "to restrain the right of suffrage to freeholders" was defeated, *inter alia,* because elections in Philadelphia, New York, and Boston "where the Merchants, & Mechanics vote are at least as good as those made by freeholders only . . . . The people have been long accustomed to this right in various parts of America, and will never allow it to be abridged."[57] Many of the restrictive state qualifications, however, survived in original or modified form until the 1960's. Some of them, such as restrictions on political candidacy by age or lengthy state or local durational residency requirements, still are rigorously enforced. State restrictions on participation in state elections were, until very recently, shielded from federal judicial scrutiny.

The doctrine of *Minor v. Happersett,*[58] that the "Constitution of the United States does not confer the right of suffrage upon any one," prevailed until *Baker v. Carr*[59] was decided in 1962. In 1874, the Court in *Minor* held that the right to vote was not conferred upon citizens of the United States by the privileges and immunities clause[60] or the due process clause of the fourteenth amendment,[61] nor by the clause which guarantees to every state a republican form of government.[62]

In *Pope v. Williams*[63] the Court relied upon *Minor* to uphold a Maryland law requiring persons entering the state to make a declaration of their intent to become citizens and residents of the state at least one year before they registered to vote. In *Pope* the Court held that the one-year waiting period did not deny equal

[57] 2 Records, *supra* note 14, at 216 (remarks of Mr. Gorham from Massachusetts).

[58] 88 U.S. (21 Wall.) 162, 178 (1874).

[59] 369 U.S. 186, 226 (1962).

[60] 88 U.S. (21 Wall.) at 171.

[61] *Id.* at 175.

[62] *Id.* at 175-77.

[63] 193 U.S. 621 (1904).

protection, nor was it repugnant to any fundamental rights or implied guaranties of the Federal Constitution. The Court stated that the "privilege to vote in any State is not given by the Federal Constitution, or by any of its amendments."[64] Under the traditional doctrine, voting was not "a privilege springing from citizenship of the United States."[65] The question of "whether the conditions prescribed by the State might be regarded by others as reasonable or unreasonable is not a Federal one."[66] Thus, the Court concluded that

> the privilege to vote in a State is within the jurisdiction of the State itself, to be exercised as the State may direct, and upon such terms as to it may seem proper, *provided, of course, no discrimination is made between individuals in violation of the Federal Constitution.*[67]

In *Snowden v. Hughes*[68] the Court once again hewed to the line set in *Minor* and *Pope*. The *Snowden* Court declined to consider whether a claim arose under the Civil Rights Act for the unlawful refusal of state officials to place the name of a nominated candidate on the ballot. The *Snowden* Court adhered to the view that the "right to become a candidate for state office, like the right to vote for the election of state officers, . . . is a right or privilege of state citizenship, not of national citizenship . . . ."[69] The equal protection claim in *Snowden* was not grounded upon facial invalidity of a state statute but, rather, on the unlawful denial of a right conferred by state law.[70] *Snowden* is the high water mark of federal indifference to the rights of political candidacy, as are *Minor* and *Pope* of voting rights. Since the right to vote or to be a candidate were incidents of state and not of national citizenship, even the unlawful denial of these rights did not establish a federal claim.

The view that the Constitution did not confer rights of voting and political candidacy in state elections upon anyone has deep roots in American constitutional history. Under the Constitution as originally adopted, the qualifications for candidacy in federal elections were specifically prescribed and, therefore, were fed-

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[64] *Id.* at 632.

[65] *Id.*

[66] *Id.* at 633.

[67] *Id.* at 632 (emphasis added). This qualification has occasionally been relied on to sanction federal protection of electoral rights. *See, e.g.*, Bolanowski v. Raich, 330 F. Supp. 724, 727-28 (E.D. Mich. 1971). *But cf.* Snowden v. Hughes, 321 U.S. 1, 7-8 (1944); Pope v. Williams, 193 U.S. 621 (1904). It is obvious, however, that the Court in *Pope* and *Snowden* did not intend its qualification to be given such an expansive interpretation.

[68] 321 U.S. 1 (1944).

[69] *Id.* at 7.

[70] *Id.* at 7-8.

eralized.[71] Voting in federal elections, however, was left in state hands,[72] subject to Congressional change.[73] The original Constitution was silent as to voting or candidacy in state elections, unless it can be said that such rights were secured to United States citizens by the original privileges and immunities clause.[74] Under the "fundamental rights" interpretation of article IV, section 2 of the Constitution, "the elective franchise, as regulated and established by the laws or constitution of the state in which it is to be exercised" was considered a privilege of United States citizenship.[75] But state autonomy over the electoral process was deeply ingrained by the time of the Civil War.[76] The fifteenth amendment secured the right to vote without regard to race—the first setback for state electoral autonomy. The nineteenth amendment's establishment of the right to vote without regard to sex constituted another federal incursion. And, more recently, the twenty-sixth amendment has established the right to vote of all persons eighteen years of age or over. But the *Minor-Pope-Snowden* doctrine of federal indifference to the state electoral process, except as to race or sex, prevailed until the 1960's when the Warren Court used the equal protection clause to slice away some of the more egregious exclusionary state electoral practices.

Baker v. Carr[77] sounded the death knell of the traditional doctrine. Although *Baker* did not expressly overrule the *Minor-Pope-Snowden* doctrine, it unceremoniously relegated *Minor* to a footnote discussing the guaranty clause.[78] Less than a decade after *Baker* had apparently laid the *Minor-Pope-Snowden* rationale to rest, however, the doctrine ostensibly came to life, albeit briefly, in *Oregon v. Mitchell.*[79] Mr. Justice Black's opinion for the five-member majority validated the 1970 Voting Rights Act Amendments enfranchising eighteen-year-olds in federal elections, abol-

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[71] U.S. CONST. art. I, § 2, cl. 2 (House of Representatives); *id.* § 3, cl. 3 (Senate); *id.* art. II, § 1, cl. 4 (President).

[72] *Id.* art. I, § 2, cl. 1. Popular election of Senators was not required until the adoption of the seventeenth amendment in 1913, which likewise required that the "electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures." *Id.* amend. XVII.

[73] *Id.* art. I, § 4, cl. 1.

[74] *Id.* art. IV, § 2, cl. 1.

[75] Corfield v. Coryell, 6 F. Cas. 546, 551-52 (No. 3,230) (C.C.E.D. Pa. 1823). *See also* J. TEN BROEK, THE ANTI-SLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT (1951). It is difficult to conceive of voting as a fundamental or inviolable right, if it is properly subject to whatever unreasonable exclusions state laws and constitutions may attach to it.

[76] *See e.g.*, Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).

[77] 369 U.S. 186 (1962).

[78] *Id.* at 222 n.48.

[79] 400 U.S. 112, 125 (1970) (5-4 decision).

ishing literacy tests as a prerequisite to voting, and abolishing state durational residency requirements in excess of thirty days in presidential elections. The Court, however, invalidated the amendment enfranchising eighteen-year-olds in state and local elections. Mr. Justice Black restated the traditional doctrine that state control over state elections is exclusive and not subject to congressional regulation under section five of the fourteenth amendment.

The upshot of the Court's apparent reversion to the traditional doctrine of state electoral autonomy was the swift enactment of the twenty-sixth amendment. *Minor* and *Pope* were cited approvingly by Mr. Justice Black in *Mitchell.* But, aside from *Mitchell,* the traditional doctrine appears to have been consumed in the past twelve years by its exception—namely, that federal relief is available to redress state denial of constitutional rights as applied to voting and political candidacy. *Mitchell* could be viewed as the modern apogee of the Court's refusal in election cases to recognize that "[n]otions of what constitutes equal treatment for purposes of the Equal Protection Clause *do* change."[80] The Court's holding in *Mitchell* as it related to age requirements for voting in state and local elections was mooted by the enactment of the twenty-sixth amendment. And since only three of the five-member *Mitchell* majority still serve,[81] its continuing validity is doubtful. The swift enactment of the twenty-sixth amendment unmistakably demonstrated a repudiation of the traditional state electoral autonomy doctrine of *Minor, Pope,* and *Snowden. Mitchell* reflects an accurate recognition of the lack of judicially manageable standards for determining a permissible age for voting in state elections.

IV. Voting as a Federally Secured Right

Baker v. Carr[82] was one of those rare watershed cases that gave issue to a new line of authority. It marked the point of departure for courts in securing a federal right of political participation. Since *Baker* was decided in 1962, the Supreme Court repeatedly has struck down significant intrusions on the equal right of all citizens to participate meaningfully in the political process, subject, of course, to reasonable state and federal regulation. Slowly, at first, then surely, and then swiftly, the courts and Congress moved against discrimination in the electoral process.

[80]Harper v. Virginia Bd. of Elections, 383 U.S. 663, 669 (1966) (emphasis in original).

[81]Justices Black and Harlan have been replaced by Justices Rehnquist and Powell.

[82]369 U.S. 186 (1962).

The first efforts were directed at securing equal political rights of Blacks. But, beginning in 1962, the battle was extended to other fronts. The protected classes now include such diverse groups as minority political parties, the poor, persons not owning property, special occupational groups such as military or government employees, urban voters, qualified voters in state confinement, voters changing their party affiliation, and recent migrants from other states. Since restrictions on candidacy dilute the range of voter choice, and thus impair the effectiveness of voting rights, the invalidation of an exclusionary classification on voting should, at least, render that classification suspect as applied to candidacy because of the reciprocal relationship between voting and candidacy.

Restrictions on Racial Minorities—To secure their political rights, Blacks have been forced to struggle against grandfather clauses,[83] exclusion from political parties on racial grounds,[84] literacy tests,[85] barriers to registration,[86] gerrymandering,[87] and outright fraud and intimidation.[88] Securing the right to vote was but the first step toward political equality. As the right to vote, grudgingly yielded at first, became firmly established, a new generation of leadership looked increasingly to political candidacy to secure their rights. They were met, however, with substantial barriers to candidacy,[89] including more sophisticated methods of discrimination—exclusionary filing fees,[90] complicated indirect election laws, racially neutral on their face,[91] and, in some cases, durational residency requirements.[92] Significantly, the right to be a candidate—the right to a place on the ballot without regard to race—was vindicated as a logical corollary of the right to vote.[93]

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[83]Guinn v. United States, 238 U.S. 347 (1915).

[84]*See, e.g.*, Smith v. Allwright, 321 U.S. 649 (1944); Nixon v. Condon, 286 U.S. 73 (1932); Nixon v. Herndon, 273 U.S. 536 (1927).

[85]Oregon v. Mitchell, 400 U.S. 112 (1970); South Carolina v. Katzenbach, 383 U.S. 301 (1966).

[86]United States v. Mississippi, 380 U.S. 128 (1965), *on remand*, 256 F. Supp. 344 (S.D. Miss. 1966); *cf.* United States v. Louisiana, 265 F. Supp. 703 (E.D. La. 1966), *aff'd per curiam*, 386 U.S. 270 (1967).

[87]Gomillion v. Lightfoot, 364 U.S. 339 (1960).

[88]United States v. Classic, 313 U.S. 299 (1941).

[89]*See, e.g.*, Hadnott v. Amos, 394 U.S. 358 (1969).

[90]Jenness v. Little, 306 F. Supp. 925 (N.D. Ga. 1969), *appeal dismissed sub nom.*, Matthews v. Little, 397 U.S. 94 (1970).

[91]Turner v. Fouche, 396 U.S. 346 (1970).

[92]Walker v. Yucht, 352 F. Supp. 85 (D. Del. 1972), *stay granted*, No. A-458, U.S., Oct. 31, 1972 (Brennan, J.). The plaintiff, Rev. Jessee Walker, was a Negro who, like many others of his race, had recently migrated from the South to the urban North.

[93]Jenness v. Little, 306 F. Supp. 925, 926-27 (N.D. Ga. 1969), *appeal dismissed sub nom.*, Matthews v. Little, 397 U.S. 94 (1970).

In 1965 and again in 1970, Congress in the Voting Rights Acts struck a decisive blow at the last major, formal vestiges of racial discrimination in the electoral process.[94]

Vote-Weighting Restrictions—In *Baker* the Court for the first time entered the political thicket of reapportionment which it had earlier shunned.[95] Reapportionment, as the Court's experience shows, "presented a tangle of partisan politics in which geography, economics, urban life, rural constituencies, and numerous other nonlegal factors play varying roles."[96] The Court observed that judicially manageable standards to effectuate its "one-person/one-vote" decree were provided by the "well developed and familiar" standards of the equal protection clause.[97] The Court reasoned that "it has been open to courts since the enactment of the Fourteenth Amendment to determine, if on the particular facts they must, that a discrimination reflects *no* policy, but simply arbitrary and capricious action."[98] Thus, applying the traditional equal protection standard, the Court held that the voters' claim against a malapportioned Tennessee legislature was justiciable and, if true, presented a claim within reach of judicial protection under the fourteenth amendment.[99] This principle was soon extended to numerous other cases. The weighting of rural votes more heavily than urban votes and the weighting of the votes of some small rural counties more heavily than other larger rural counties were held to violate the equal protection clause.[100] Likewise, the unequal weighting of votes through bicameralism in state legislatures[101] and in state delegations to the United States House of Representatives[102] were held to violate the equal protection clause.

Restrictions on Minority Political Parties—The right to vote is "heavily burdened if that vote may be cast only for one of two parties at a time when other parties are clamoring for a place on the ballot."[103] Likewise, filing fees, as applied to indigents without an alternative means of ballot access, infringe the

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[94]The Voting Rights Act of 1965, 42 U.S.C. §§ 1973 *et seq.* (1970), was interpreted and its constitutionality upheld in South Carolina v. Katzenbach, 383 U.S. 301 (1966). The extension of the 1965 literacy test provisions in the 1970 Amendments to outlaw literacy tests throughout the United States was upheld in Oregon v. Mitchell, 400 U.S. 112 (1970).

[95]*See* Colegrove v. Green, 328 U.S. 549 (1946).

[96]Oregon v. Mitchell, 400 U.S. 112, 138 (1970) (Douglas, J., dissenting).

[97]Baker v. Carr, 369 U.S. 186, 226 (1962).

[98]*Id.* (emphasis in original).

[99]*Id.* at 237.

[100]Gray v. Sanders, 372 U.S. 368 (1963).

[101]Reynolds v. Sims, 377 U.S. 533 (1964).

[102]Wesberry v. Sanders, 376 U.S. 1 (1964).

[103]Williams v. Rhodes, 393 U.S. 23, 31 (1968).

right to vote as well as the individual rights of impecunious aspirants for public office.[104] Indeed, *Williams v. Rhodes*,[105] *Bullock v. Carter*,[106] and *Lubin v. Panish*[107] attach substantial, if not primary, importance to the right of candidacy as a correlative of the right to vote. The "number of voters in favor of a party is relevant in considering whether state laws violate the Equal Protection Clause."[108]

Restrictions on Change of Parties—Legislation which " 'locks' voters into a pre-existing party affiliation from one primary to the next [when] . . . the only way to break the 'lock' is to forego voting in *any* primary for a period of [twenty-three months]" infringes the right of "free political association."[109] However, states can require that a voter register as a party member thirty days prior to the previous general election—a date eight months prior to the presidential primary and eleven months prior to the non-presidential primary—to be eligible to vote in a party primary.[110] The difference in outcome between *Rosario v. Rockefeller*[111] and *Kusper v. Pontikes*[112] is one of degree, of "line-drawing." New York's eleven-month waiting period in *Rosario* advanced the legitimate state interest of maintaining the integrity of the political process by preventing interparty raiding. The Court in *Kusper* was unconvinced that Illinois' twenty-three-month period was "an essential instrument to counter the evil at which it was aimed."[113] Although in *Storer v. Brown*,[114] a one-year restriction on change of parties by candidates was found to be reasonable, a restriction of two years or longer would probably be invalid because of its impact in locking a candidate into his pre-existing party affiliation.[115]

Occupational Restrictions—There is no indication that occupation affords "a permissible basis for distinguishing between qualified voters within the State."[116] Thus, in *Carrington v. Rash*,[117] the Supreme Court struck down a conclusive presump-

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[104]*See* Lubin v. Panish, 415 U.S. 709 (1974); Bullock v. Carter, 405 U.S. 134 (1972).

[105]393 U.S. 23 (1968).

[106]405 U.S. 134 (1972).

[107]415 U.S. 709 (1974).

[108]Williams v. Rhodes, 393 U.S. 23, 34 (1968).

[109]Kusper v. Pontikes, 414 U.S. 51, 61 (1973).

[110]Rosario v. Rockefeller, 410 U.S. 752 (1973).

[111]410 U.S. 752 (1973).

[112]414 U.S. 51 (1973).

[113]Storer v. Brown, 415 U.S. 724, 732 (1974).

[114]415 U.S. 724 (1974).

[115]*Cf.* Kusper v. Pontikes, 414 U.S. 51 (1973).

[116]Gray v. Sanders, 372 U.S. 368 (1963).

[117]380 U.S. 89 (1965).

tion that persons moving to Texas while on military duty could never vote in state elections so long as they were members of the armed forces.[118] The State asserted an interest in "immunizing its elections from the concentrated balloting of military personnel, whose collective voice may overwhelm a small local civilian community."[119] The *Carrington* Court responded, however, that the right to vote is " 'so vital to the maintenance of democratic institutions' . . . [that it] cannot constitutionally be obliterated because of a fear of the political views of a particular group of bona fide residents."[120] The Court concluded that " '[f]encing out' from the franchise a sector of the population because of the way they may vote is constitutionally impermissible."[121]

In *Carrington,* Texas also asserted a state "interest in protecting the franchise from infiltration by transients."[122] *Carrington* demonstrates that no valid state interest is served by excluding bona fide residents from the political process, and that the legitimate state interest in restricting political participation to bona fide residents can be protected by means less dramatic and overreaching than a conclusive presumption of the nonresidency of persons moving to Texas as members of the Armed Forces. Mere declarations by voters of their intent to vote in a state or county "is often not conclusive; the election officials may look to actual facts and circumstances."[123] *Carrington* establishes that civilian durational residency as a conclusive presumption of bona fide residency imposes "an invidious discrimination in violation of the Fourteenth Amendment."[124] Every state "is free to take reasonable and adequate steps . . . to see that all applicants for the vote actually fulfill the requirements of bona fide residence."[125] Bona fide residency of voters advances the compelling state interest that those who live in an area have an equal voice in the election of public officials. As applied to candidacy, a bona fide residence qualification appears carefully tailored to advance the compelling state interest in the accessibility and accountability of public elected officers—both of which are vital to a democratic system.[126]

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[118] *Id.* at 89-90 n.1.

[119] *Id.* at 93.

[120] *Id.* at 94.

[121] *Id.*

[122] *Id.* at 93.

[123] *Id.* at 95.

[124] *Id.* at 96.

[125] *Id. Accord,* Hadnott v. Amos, 320 F. Supp. 107, 119-23 (M.D. Ala. 1970), *aff'd mem.*, 401 U.S. 968 (1971). *Cf.* Williams v. North Carolina, 325 U.S. 226, 235-36 (1945).

[126] Query whether a bona fide residency qualification for administrative

In *Evans v. Cornman*,[127] Montgomery County, Maryland, registration officials sought to deny the vote to persons living on the premises of the National Institute of Health, a federal reservation within the county.[128] The Court noted the "vital ways in which NIH residents are affected by electoral decisions."[129] Among these were criminal laws, state spending and taxing decisions, unemployment and workmen's compensation laws, automobile legislation, jurisdiction of state courts, and matters relating to Maryland public schools. The sole interest or purpose asserted by the State was "to insure that only those citizens who are primarily or substantially interested in or affected by electoral decisions have a voice in making them."[130] The Court invalidated the exclusion on equal protection grounds. After *Evans*, it is plain that states cannot fence off otherwise qualified bona fide state residents and deny them their right to vote.[131] By analogy, comparable restrictions on candidacy would be suspect.[132]

Property Ownership and Wealth Restrictions—In *Kramer v. Union Free School District*,[133] the Court invalidated a property ownership restriction of the suffrage. The State of New York restricted the franchise in certain school board elections to owners or lessees of taxable real property and their spouses, or to parents or guardians of enrolled children. The State attempted to justify this restriction with the argument that "increasing complexity . . . make[s] it extremely difficult for the electorate fully to understand the whys and wherefores of the detailed operations of the school system."[134] The State further contended that many communications of the school boards and school administrations in New York were "sent home to the parents through . . . pupils and [were] 'not broadcast to the general public;' thus, nonparents [were] less informed than parents."[135] The State argued that taxpayers had "enough of an interest 'through the burden on their pocketbooks,' to acquire such information as they may need."[136] New York maintained that it had a "legitimate interest . . . in restricting a voice in school matters to those 'directly affected'

officers not subject to popular election would not intrude too significantly on the right to travel to be permitted?

[127]398 U.S. 419 (1970).

[128]*Id.* at 419-20.

[129]*Id.* at 424.

[130]*Id.* at 422.

[131]*Id.* at 426.

[132]*Compare, e.g.*, Evans v. Cornman, 398 U.S. 419 (1970), *with* Turner v. Fouche, 396 U.S. 346 (1970).

[133]395 U.S. 621 (1969).

[134]*Id.* at 631.

[135]*Id.*

[136]*Id.*

by such decisions."[137] The Court in *Kramer* did not reach the question of whether the State, in some circumstances, might limit the exercise of the franchise to those "primarily interested" or "primarily affected," because the challenged exclusion did not meet the equal protection test that "all those excluded . . . [be] in fact substantially less interested or affected than those the statute includes."[138] The Court invalidated the New York statute because the classification did not meet the "exacting standard of precision" required of statutes which selectively distribute the franchise.[139] The State failed to offer "any justification for the exclusion of seemingly interested and informed residents."[140]

Until recently, Louisiana permitted "only property taxpayers to vote in utility bond elections."[141] In *Cipriano v. City of Houma*,[142] it was argued that the state interest purportedly served by the Louisiana statute was that

> property owners have a "special pecuniary interest" in the election because the efficiency of the utility system directly affects "property and property values" and thus "the basic security of their investment in [their] property [is] at stake."[143]

At the time of the election contested in *Cipriano*, only about forty percent of the city's registered voters were property taxpayers.[144] The Court observed, however, that the operation of the utility systems "affects virtually every resident of the city, nonproperty owners as well as property owners."[145] The Louisiana statute was held violative of the equal protection clause because it irrationally excluded from voting nonproperty owners with an equal stake in the outcome of bond elections.[146] The property ownership decisions in the context of voting and candidacy plainly illustrate the applicability of the logic of voting cases involving candidacy.[147]

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[137] *Id.*

[138] *Id.* at 632.

[139] *Id.* at 633. The New York law allowed the vote to "many persons who have, at best, a remote and indirect interest in school affairs, and, on the other hand exclude[d] others who have a distinct and direct interest in the school meeting decisions." *Id.* at 632.

[140] *Id.* at 633.

[141] Cipriano v. City of Houma, 395 U.S. 701, 704 n.4 (1969).

[142] 395 U.S. 701 (1969).

[143] *Id.* at 704.

[144] *Id.* at 705.

[145] *Id.* "Property owners, like nonproperty owners, use the utilities and pay the rates; however, the impact of the revenue bond issue on [property owners] is unconnected to their status as property taxpayers." *Id.*

[146] *Id. Accord*, City of Phoenix v. Kolodziejski, 399 U.S. 204 (1970).

[147] *Compare, e.g.*, Turner v. Fouche, 396 U.S. 346 (1970), *with* City of Phoenix v. Kolodziejski, 399 U.S. 204 (1970), *and* Cipriano v. City of Houma,

In *Harper v. Virginia Board of Elections,*[148] the Court invalidated a state poll tax which operated as a precondition to voting. The poll tax significantly intruded upon the right to vote, and classified voters on the basis of wealth. Here, too, the applicability of the logic of voting cases to candidacy cases has been demonstrated.[149]

Location—The Court recently held in *O'Brien v. Skinner*[150] that otherwise qualified voters in state confinement cannot be denied the right to vote, at least when absentee ballots are made available to other persons unable to reach the polls.

V. Political Candidacy as a Federally Secured Right

The emergence of a limited, federally secured right of political candidacy is one of the most significant recent public law developments. Although largely a creation of the past six years, the once protean contours of this right have now received sufficient judicial definition to merit critical recapitulation and examination. The right to be a candidate issues from two distinct but related sources. It wells derivatively from the right to vote, since restrictions on candidacy have an obvious impact upon the right to cast a meaningful vote for the candidate of one's choice. The right springs directly from the right of political association protected by the first and fourteenth amendments. The confluence of voting rights and the right of political association has thus given rise to a new but mighty tributary to the mainstream of fundamental American political freedoms. As this right is more clearly delineated over the years, it promises a sure, if not swift, passage toward a more democratic society for the United States. Significantly, courts now recognize that limitations on the ability of candidates to obtain a position on the ballot burden "two different, although overlapping, kinds of rights—the right of individuals to associate for the advancement of political beliefs, and the rights of qualified voters, regardless of their political persuasion, to cast their votes effectively."[151]

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395 U.S. 701 (1969), *and* Kramer v. Union Free School Dist., 395 U.S. 621 (1969).

[148]383 U.S. 663 (1966).

[149]*Compare, e.g.*, Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966), *with* Lubin v. Panish, 415 U.S. 709 (1974), *and* Bullock v. Carter, 405 U.S. 134 (1972).

[150]414 U.S. 524 (1974). *Cf.* Goosby v. Osser, 409 U.S. 512 (1973); McDonald v. Board of Election Comm'rs, 394 U.S. 802 (1969).

[151]Williams v. Rhodes, 393 U.S. 23, 30 (1968).

A. *Right of Association*

Candidacy for public office is intimately related to the freedoms of speech and assembly protected by the first amendment. In *NAACP v. Button*,[152] the freedom to associate with others for the common advancement of political beliefs and ideas was recognized as a form of "orderly group activity" protected by the first and fourteenth amendments. The first amendment's right of association protects "vigorous advocacy."[153] As a "form of political expression,"[154] candidacy for public office would appear even more central than the advocacy of litigation to secure the constitutional rights of Blacks vindicated in *Button*. Because first amendment freedoms "need breathing space to survive, government may regulate in the area only with narrow specificity."[155] Accordingly, significant intrusions on the "delicate and vulnerable" associational rights protected by the first amendment call for strict scrutiny.[156]

If the freedom of association for the purpose of advancing ideas and airing grievances throws a cloak of inviolability on the privacy of membership lists of groups espousing dissident beliefs,[157] then, a fortiori, it must extend to public advocacy in political campaigns. To be sure, there are differences between constitutionally protected advocacy and political candidacy. Freedom of speech and association do not automatically guarantee a place on the ballot. The Constitution entrusts the administration of the electoral process primarily to the states. Reasonable regulation of access to the ballot is essential if elections "are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes."[158] Thus, political participation is subject to reasonable state regulation for the protection of multifarious, legitimate state interests. For example, a state can protect the integrity of its system of primary elections by laws aimed at "raiding"[159] and can require that minor political parties demonstrate some reasonable quantum of voter support to obtain a place on the ballot.[160] But the thesis of this Article and the

[152]371 U.S. 415 (1963). *Cf.* UMW, Dist. 12 v. Illinois State Bar Ass'n, 389 U.S. 217 (1967).

[153]371 U.S. at 429.

[154]*Id.*

[155]*Id.* at 433.

[156]*Id.*

[157]Bates v. City of Little Rock, 361 U.S. 516, 522-33 (1960); NAACP v. Alabama, 357 U.S. 449, 460-61 (1958).

[158]Storer v. Brown, 415 U.S. 724, 730 (1974). *Cf.* Rosario v. Rockefeller, 410 U.S. 752 (1973). *But see* Kusper v. Pontikes, 414 U.S. 51, 61 (1973).

[159]Storer v. Brown, 415 U.S. 724, 731 (1974).

[160]*See, e.g.*, American Party v. White, 415 U.S. 767 (1974); Jenness v. Fortson, 403 U.S. 431, 439 (1971).

thrust of recent Supreme Court decisions is that state infringement of basic constitutional protections is impermissible as applied to *candidacy* as well as to *voting*. Certainly, not every restriction on political candidacy is of constitutional dimensions. But when fundamental constitutional values are jeopardized, there is then a qualified right to be a candidate.

B. Exclusion of Minority Parties and Candidates

The freedom of association, long protected by the first amendment, includes the "right to form a party for the advancement of political goals."[161] The right to be a candidate would mean "little if a party can be kept off the election ballot and thus denied an equal opportunity to win votes."[162] For example, in *Williams v. Rhodes*,[163] the Court invalidated restrictive Ohio legislation that made it impossible for electors committed to Governor George Wallace to obtain a place on the 1968 ballot.[164] The restrictive provisions were considered invidious on at least three grounds: they made it "virtually impossible for any party to qualify except the Democratic and Republican Parties,"[165] the two major parties faced "substantially smaller burdens" to obtain ballot position than independent parties,[166] and Ohio laws made "no provision for ballot position for independent *candidates* as distinguished from political parties."[167] As a result, the Court declared that "the totality of the Ohio restrictive laws taken as a whole imposes a burden on voting and associational rights which we hold is an invidious discrimination, in violation of the Equal Protection Clause."[168]

Williams put to rest any lingering doubts about the applicability of federal constitutional guarantees to political candidacy.[169] The Court observed that the "extensive power" of states over state elections has been "always subject to the limitation that they not be exercised in a way that violates other specific provisions of the Constitution."[170] The Court held that "no state

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[161]Williams v. Rhodes, 393 U.S. 23, 31 (1968).

[162]*Id.*

[163]393 U.S. 23 (1968).

[164]Although Wallace partisans obtained 450,000 signatures on petitions—more than the fifteen percent required by Ohio for a place on the ballot—the Independent Party did not meet the early deadline for filing the primary election petitions as required by the detailed and rigorous standards of Ohio laws. *Id.* at 26-27.

[165]*Id.* at 25.

[166]*Id.* at 25-26.

[167]*Id.* at 26 (emphasis added).

[168]*Id.* at 34.

[169]*See* text at section III *infra*.

[170]393 U.S. at 29.

can pass a law regulating elections that violates the Fourteenth Amendment's [equal protection clause] . . . ."[171]

Williams made it clear that "the Equal Protection Clause does not make every minor difference in the application of laws to different groups a violation of our Constitution."[172] The Court articulated a standard appropriate for determining whether or not a state law violates the equal protection clause: "we must consider the facts and circumstances behind the law, the interests which the State claims to be protecting, and the interests of those who are disadvantaged by the classification."[173] Because the restrictive Ohio legislation imposed "such unequal burdens on minority groups," the Court stated that only a compelling state interest could justify the state regulations.[174] The Court concluded that Ohio had "failed to show any 'compelling interest' which justified imposing such heavy burdens on the right to vote and to associate."[175]

Since *Williams* plainly established the qualified right to be a political candidate, states may no longer totally exclude independent candidates from the ballot.[176] Nor can they impose substantially heavier burdens on independent candidates to obtain ballot position than are imposed on major parties or their candidates.[177] *Williams* also demonstrates that the confluence of associational and voting rights can be of sufficient constitutional dimension to trigger strict scrutiny of state restrictions on the right to be a candidate.

In *Jenness v. Fortson,*[178] the Court re-examined *Williams* in some detail and approved a Georgia law that conditioned an independent candidate's access to the ballot on filing a nominating petition signed by not less than five percent of those eligible to vote for the office he is seeking.[179] In contrast to the Ohio statutory scheme considered in *Williams,* the Georgia election law "in no way [froze] the status quo, but implicitly [recognized] the potential fluidity of American political life."[180] The Georgia law presented a statutory scheme "vastly different" from the one before the Court in *Williams,* since Georgia freely provided for write-in votes, fully recognized independent candidacies, did not fix an unreasonable filing deadline for independents, and did not

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[171] *Id.*
[172] *Id.* at 30.
[173] *Id.*
[174] *Id.* at 31.
[175] *Id.*
[176] *See* text accompanying notes 165 & 167 *supra.*
[177] *See* text accompanying note 166 *supra.*
[178] 403 U.S. 431 (1971).
[179] *Id.* at 432.
[180] *Id.* at 439.

require independent candidates or small parties to establish elaborate election machinery.[181] The Court concluded:

> There is surely an important state interest in requiring some preliminary showing of a significant modicum of support before printing the name of a political organization's candidate on the ballot—the interest, if no other, in avoiding confusion, deception, and even frustration of the democratic process at the general election.[182]

The *Jenness* Court did not state what standard it applied to determine the validity of the Georgia law. Apparently, however, it used the traditional reasonable basis test because the Georgia restriction on candidacy and voting did not significantly intrude on fundamental interests of political candidates and was reasonably related to important state interests.

The *Williams-Jenness* rationale recently has been amplified in *Storer v. Brown*[183] and *American Party v. White*.[184] In *Storer* the Court upheld a California law denying ballot status as an independent to candidates who had voted in an immediately preceding partisan primary or who had a registered affiliation with a qualified political party at any time within one year prior to the immediately preceding primary election.[185] The Court observed that there is no "litmus-paper test for separating those restrictions that are valid from those that are invidious under the Equal Protection Clause."[186] The rules are "not self-executing," the judgments that must be made are "hard" ones, and the result of the process in any specific case "may be very difficult to predict with great assurance."[187] As applied to two of the appellants, the Court's holding in *Storer* closely followed the *Jenness* pattern. The *Storer* Court observed that it had "never been suggested that the *Williams-Kramer-Dunn* rule automatically invalidates every substantial restriction on the right to vote or associate."[188] The California statute was reasonably related to "the States' strong interest in maintaining the integrity of the political process by preventing interparty raiding."[189] Importantly, the Court also observed that "[o]ther variables must be considered where qualifications for *candidates* rather than for *voters* are at issue."[190] The "other variables" obviously comprehend the legitimate state

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[181] *Id.* at 438.
[182] *Id.* at 442.
[183] 415 U.S. 724 (1974).
[184] 415 U.S. 767 (1974).
[185] 415 U.S. at 726.
[186] *Id.* at 730.
[187] *Id.*
[188] *Id.* at 729.
[189] *Id.* at 731.
[190] *Id.* at 732 (emphasis added).

interests delineated in *Jenness* and *Bullock v. Carter*.[191] The Court supported the reasonableness of the one-year California waiting period on the authority of *Rosario v. Rockefeller*,[192] in which the Court approved an eleven-month waiting period for voters who wanted to change parties. The Court's reasoning in *Storer*, as applied to the two appellants, proceeded along *Jenness* lines. However, the Court held that the one-year disaffiliation provision was "not only permissible but *compelling* and . . . [outweighed] the interest the candidate and his supporters may have [had] in making a late rather than an early decision to seek independent ballot status."[193]

With respect to two other appellants, the Court vacated the district court's judgment and remanded the case for further proceedings. Both had satisfied the one-year disaffiliation provision.[194] California law required that an independent candidate for President file a petition signed by five percent of the total number of votes cast in the last general election which, the Court stated, "[did] not appear to be excessive."[195] However, the petition signatures must have been obtained over a twenty-four-day period between the primary and general election. The Court was concerned by the fact that signature gathering had to await the conclusion of the primary and by the possibility that the available pool of possible signers, after eliminating the total primary vote, might have constituted a substantially larger percentage of the eligible pool than the five percent approved in *Jenness*.[196] The "inevitable question for judgment" on remand, therefore, was whether "a reasonably diligent independent candidate [could] be expected to satisfy the signature requirements . . . ."[197] The Court observed that there is

> no sufficient state interest in conditioning ballot position for an independent candidate on his forming a new political party as long as the State is free to assure itself that

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[191]405 U.S. 134 (1972). *Bullock* recognized that a State has a "legitimate interest in regulating the number of candidates on the ballot . . . . [and in] protect[ing] the integrity of its political processes from frivolous or fraudulent candidacies." *Id.* at 145.

[192]410 U.S. 752 (1973). *But cf.* Kusper v. Pontikes, 414 U.S. 51 (1973) (twenty-three month waiting period to change parties invalidated).

[193]415 U.S. at 736 (emphasis added). *See* American Party v. White, 415 U.S. 767 (1974), in which the Court, citing *Storer*, stated that the validity of qualifications for ballot position which intrude on the right of association or discriminate against minority parties depends "upon whether they are necessary to further compelling state interests." *Id.* at 780.

[194]415 U.S. at 738.

[195]*Id.*

[196]*Id.* at 743-44.

[197]*Id.* at 742.

> the candidate is a serious contender, truly independent and with a satisfactory level of community support.[198]

Independent candidates cannot be forced to surrender their independent status and choose the "political party route . . . to appear on the ballot in the general election."[199]

In *American Party v. White*[200] the Court disapproved the Texas practice of limiting names on absentee ballots to the two major established political parties.[201] It sustained Texas laws requiring, as a condition of ballot access by independent parties, a petition containing signatures equal to one percent of the total vote cast for governor in the last preceding election.[202] The Court believed that the one percent support requirement fell "within the *outer boundaries* of support the State may require before according political parties ballot position"[203] and satisfied compelling state interests.[204]

The right to be a candidate recognized in *Williams* was solidified by *Jenness*, *Storer*, and *American Party*. The right to be a candidate extends to every otherwise qualified person who can satisfy reasonable state requirements relating to a required quantum of voter support. The state interest in limiting the ballot to candidates with a "significant modicum of support"[205] avoids confusion, deception, and frustration of the democratic process and thereby serves compelling state interests. Any other restrictions on access to the ballot by candidates demonstrating a significant modicum of support would be subject to the Court's close scrutiny and would be justified only if they were precisely related to their purpose and served a compelling state interest.

C. Property Ownership Restrictions on Candidacy

In *Turner v. Fouche*[206] the Supreme Court held that a Georgia freeholder requirement for school board membership denied equal protection because "the challenged classification rests on grounds wholly irrelevant to the achievement of a valid state objective."[207] It observed that there is "a federal constitutional right to be con-

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[198] *Id.* at 746.

[199] *Id.*

[200] 415 U.S. 767 (1974).

[201] *Id.* at 795. *Cf.* O'Brien v. Skinner, 414 U.S. 524 (1974); Goosby v. Osser, 409 U.S. 512 (1973).

[202] 415 U.S. at 777.

[203] *Id.* at 783 (emphasis added).

[204] *Id.* at 780-81.

[205] *Id.* at 782 n.14, *quoting from* Jenness v. Fortson, 403 U.S. 431, 442 (1971).

[206] 396 U.S. 346 (1970).

[207] *Id.* at 362.

sidered for public service without the burden of invidiously discriminatory disqualifications."[208] The Court was unable to discern any legitimate state interest in the Georgia freeholder qualification for office since eighty-five percent of the Taliferro County school budget was derived from sources other than the Board's levy on real property, and because "lack of ownership of realty [does not] establish a lack of attachment to the community and its educational values."[209] Therefore, the Court applied the traditional test of equal protection and invalidated the challenged classification as "wholly irrelevant to the achievement of a valid state objective."[210] Since the Georgia freeholder requirement did not meet even this test, the Court found it unnecessary to resolve the dispute occasioned by Georgia's claim that the compelling interest standard was "inapposite" because it applies to "exclusions from voting," and not to the right to be a candidate.[211] The application of the traditional test in *Turner* has apparently confused some courts which have interpreted *Turner* as precluding strict scrutiny of durational residency requirements for public office.[212] Such

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[208] *Id.*

[209] *Id.* at 364. The Court declared that the state "may not deny to some the privilege of holding public office that it extends to others on the basis of distinctions that violate federal constitutional guarantees." *Id.* at 362-63.

[210] *Id.* at 362. *Accord,* Landes v. Town of North Hempstead, 20 N.Y.2d 417, 231 N.E.2d 120, 284 N.Y.S.2d 441 (1967).

[211] 396 U.S. at 362.

[212] *See, e.g.,* Chimento v. Stark, 353 F. Supp. 1211, 1218 (D.N.H.), *aff'd mem.,* 414 U.S. 802 (1974) (Campbell, J., concurring) (seven-year state residency for governor); Walker v. Yucht, 352 F. Supp. 85, 90 (D. Del. 1972) (three-year state residency for state House of Representatives); Hayes v. Gill, 52 Hawaii 251, 259-60, 473 P.2d 872, 879 (1970) (three-year state residency for state House of Representatives); State *ex rel.* Gralike v. Walsh, 483 S.W.2d 70, 75-76 (Mo. 1972) (one-year district residency for state senator); DeHond v. Nyquist, 65 Misc. 2d 526, 318 N.Y.S.2d 650 (Sup. Ct. 1971) (three-year city residency for city board of education). *But see* Wellford v. Battaglia, 343 F. Supp. 143, 146 (D. Del. 1972), *aff'd,* 485 F.2d 1151, 1152 (3d Cir. 1973) (five-year city residency for mayor); Green v. McKeon, 335 F. Supp. 630, 632 (E.D. Mich. 1971), *aff'd,* 468 F.2d 883, 884 (6th Cir. 1972) (two-year city residency and city property ownership for city elective or appointive office); Thompson v. Mellon, 9 Cal. 3d 96, 103, 507 P.2d 628, 633, 107 Cal. Rptr. 20, 25 (1973) (two-year city residency for city council); Cowan v. City of Aspen, 509 P.2d 1269, 1273 (Colo. 1973) (three-year city residency for municipal candidates).

Durational residency requirements of one year and of six months have been upheld on the ground that they serve compelling state interests. *See* Draper v. Phelps, 351 F. Supp. 677, 681 (W.D. Okla. 1972) (six-month district residency for state House of Representatives); Hadnott v. Amos, 320 F. Supp. 107, 119, *aff'd,* 401 U.S. 968 (1971) (dictum) (one-year circuit residency for state circuit judge); Cowan v. City of Aspen, 509 P.2d 1269, 1273 (Colo. 1973) (three-year city residency for municipal candidates).

a distinction between voting and candidacy is untenable because, as in *Williams*, it disregards the often critical relationship between the two. The distinction, as a conclusive presumption, goes too far in that it precludes the careful, case-by-case balancing of competing interests anticipated by the Court in *Williams*. It also fails to accord proper respect to the rights of association implicit in political candidacy. *Williams* and *Turner* are easily reconciled: Selection of an appropriate standard of review for determining the constitutionality of various restrictions on political candidacy should follow—not precede—deliberate judicial consideration of the factual circumstances and competing interests involved in individual cases. There is no need for the Court to use "a cannon to dispose of a case that calls for no more than a popgun."[213]

D. Filing Fees as a Bar to Candidacy

In *Bullock v. Carter*[214] persons who sought to become political candidates challenged Texas party primary filing fees. The Court invalidated the filing fees because of their "patently exclusionary character."[215] Examining the fees "in a realistic light [to determine] the extent and nature of their *impact on voters*,"[216] the Court concluded that "the laws must be 'closely scrutinized'" because "the Texas filing fee scheme has a real and appreciable impact on the exercise of the franchise and because this impact is related to the resources of voters supporting a particular candidate . . . ."[217] The Court stated that it had

> not heretofore attached such fundamental status to candidacy as to invoke a rigorous standard of review. However, the rights of voters and the rights of candidates do not lend themselves to neat separation . . . .[218]

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[213]Thorpe v. Housing Authority, 393 U.S. 268, 284 (1969) (Black, J., concurring).

[214]405 U.S. 134 (1972).

[215]*Id.* at 143. In counties with populations of one million or more, candidates for two-year terms could be assessed up to ten percent of their aggregate annual salary, and candidates for four-year terms could be assessed up to fifteen percent. In smaller counties, there were no percentage limitations. A $6,300 filing fee—thirty-two percent of the annual salary of $19,700—was set for county judge in Tarrant County—an office sought by one appellee in *Bullock*. Filing fees in excess of $5,000 were typical for certain offices in some counties. Amounts not needed to finance the primary were refunded and, in some counties, refunds tended to run as high as fifty percent or more of the assessed filing fee. *Id.* at 138.

[216]*Id.* at 143 (emphasis added).

[217]*Id.* at 144.

[218]*Id.* at 142-43.

The opinion noted that a barrier to candidacy "does not of itself compel close scrutiny."[219]

The impact of the filing fees on voters was considered "real and appreciable" because voters were "substantially limited in their choice of candidates"[220] and was not unlike the exclusionary impact of the poll tax in *Harper v. Virginia Board of Elections.*[221] The *Bullock* Court measured impact on the exercise of the franchise in terms of *candidacy* as well as on voting. The Court was thus concerned that "[m]any potential office seekers . . . [are] precluded from seeking the nomination of their chosen party, no matter how qualified they might be, and no matter how broad or enthusiastic their popular support."[222] It also observed that the Texas system fell "with unequal weight on voters, *as well as candidates,* according to their economic status."[223] Thus, despite the fact that the Texas filing fee system had a limited rational basis,[224] the Court found that Texas had failed to make the "showing of necessity" necessary under the strict scrutiny standard.[225]

In *Lubin v. Panish,*[226] a filing fee of $701.60 for a place on the Board of Supervisors of Los Angeles County was invalidated when challenged by an indigent citizen who had sought nomination but was unable to pay the fee. The Court took notice of the "shift in emphasis" from "restricting the ballot to achieve voting rationality," a concern of progressive thought in the first half of the century, to the present "enlarged demand for an expansion of political opportunity."[227] Corresponding to the demand for increased political opportunity "has been a gradual enlargement of the Fourteenth Amendment's equal protection provision in the area of voting rights."[228] The Court recognized the state's legitimate interest in discouraging "fragmentation of voter choice" and eliminating frivolous candidates[229] but held that this interest must be achieved "by a means that does not unfairly or unnecessarily burden either a minority party's *or an individual candidate's* equally important interest in the continued availability of political opportunity."[230] The Court considered the impact of the filing

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[219] *Id.* at 143.

[220] *Id.* at 144.

[221] 383 U.S. 663 (1966).

[222] 405 U.S. at 143.

[223] *Id.* at 144.

[224] *Id.* at 147. Filing fees relieve the state treasury of the cost of conducting primary elections—a "legitimate state objective."

[225] *Id.*

[226] 415 U.S. 709 (1974).

[227] *Id.* at 713.

[228] *Id.*

[229] *Id.* at 715.

[230] *Id.* at 716 (emphasis added).

fees upon voters and noted once again that the "right of a party or an individual to a place on a ballot is entitled to protection and is intertwined with the rights of voters."[231] Filing fees cannot be used as the "sole means of determining a candidate's 'seriousness' "[232] since even a moderate fee might prevent impecunious but serious candidates from seeking election.[233] Although the Court did not discuss the standard of review it applied in *Lubin*, the California filing fee was found "not reasonably necessary," in the absence of an alternative access to the ballot for indigents.[234]

More broadly construed, the filing fee cases suggest that conclusive presumptions relating to candidate status which penalize fundamental rights or classify on the basis of constitutionally suspect traits deserve close scrutiny. This is especially true of factors over which a candidate has no present control. The indigent office seekers in *Bullock* and *Lubin* were " '*unable*, not simply *unwilling*, to pay assessed fees.' "[235]

Acceptance of the *Bullock* Court's conclusion that not every barrier to candidacy requires strict scrutiny is not inconsistent with the view that close scrutiny of restrictions on political candidacy may often be appropriate. The Supreme Court recently observed that "[s]tatutes creating permanent irrebuttable presumptions have long been disfavored under the Due Process Clause . . . ."[236] Thus, the Court had invalidated a federal statute that created a conclusive presumption that gifts made within two years prior to the donor's death were made in contemplation of death and thus required the payment of a higher tax.[237] For similar reasons, the Court struck down Illinois' irrebuttable statutory presumption that all unmarried fathers are unqualified to raise their children.[238] It is apparently unnecessary that the conclusive presumption be "permanent" because the Court invalidated a nonpermanent conclusive presumption of fault in Georgia's law authorizing the *suspension* without a hearing of the driving license of an uninsured motorist involved in an accident who could not post security for the amount of damages claimed.[239] Conclu-

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[231] *Id.*

[232] *Id.*

[233] *Id.* at 717.

[234] *Id.* at 718.

[235] *Id.* at 717, *quoting from* Bullock v. Carter, 405 U.S. 134, 146 (1972) (emphasis in original).

[236] Vlandis v. Kline, 412 U.S. 441, 446 (1973).

[237] Heiner v. Donnan, 285 U.S. 312 (1932).

[238] Stanley v. Illinois, 405 U.S. 645 (1972).

[239] Bell v. Burson, 402 U.S. 535 (1971). Georgia's presumption was not "permanent" since the suspension was only temporary, the motorist being entitled to the return of his license upon proof of lack of fault at the trial.

sive presumptions barring candidacy for public office generally appear neither reasonable nor necessary as a sole means of determining a candidate's "seriousness" or "ability to serve."

VI. Abstention

When claims of federally secured political rights are premised upon unsettled questions of state law, abstention may be appropriate. In *Harris County Commissioners Court v. Moore*,[240] a precinct consolidation, intended to reduce population disparities among precincts, resulted in the displacement of three Texas justices of the peace and two constables. Acting pursuant to Texas statute,[241] the Harris County governing body had declared these offices vacant since there were more officials living in the precinct than the number of offices available under state law.[242] The displaced justices and constables brought suit in federal district court and a three-judge court was convened, which enjoined implementation of the redistricting plan on the ground that the Texas statute providing for the removal of the plaintiffs was unconstitutional on its face. The district court reasoned that a statute which shortens the term of an elected official merely because redistricting places him in a district with others "invidiously and irrationally discriminates between him and others not so affected."[243] In addition, it held that the statute as applied had discriminated between those who voted or were entitled to vote for the displaced officials and voters in other precincts whose elected officials were permitted to serve a full term. The Supreme Court reversed and remanded to the district court with directions to abstain. Abstention was considered appropriate under the doctrine of *Railroad Commission v. Pullman Co.*[244] because the Texas statute under which the justices and constables were removed from office was in apparent conflict with article 5, section 24 of the Texas Constitution which provides a mechanism for removal of county officers, including justices and constables.[245] The case

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[240]95 S. Ct. 870 (1975).

[241]Tex. Rev. Civ. Stat. art. 2351½(c) (1971).

[242]After redistricting, four justices and three constables found themselves residents of a single precinct, which was entitled by law to a mixiumum of only one constable and two justices of the peace. 95 S. Ct. at 873.

[243]*Id.* at 874.

[244]312 U.S. 496 (1941). *See also* Lake Carriers Ass'n v. MacMullan, 406 U.S. 498 (1972); Reetz v. Bozanich, 397 U.S. 82 (1970). Under the *Pullman* doctrine, federal abstention is proper when a federal claim is premised on an unsettled question of state law and a state court settlement of the underlying question of state law might obviate the need for reaching the federal constitutional question.

[245]95 S. Ct. at 876. It also appeared "far from settled that under state law the appellee officeholders must lose their jobs." *Id.* at 877.

for abstention allegedly was further strengthened because "the availability of the relief sought turn[s] in large part on the same unsettled state law questions."[246] Justice Douglas dissented on the ground that the Supreme Court should "leave to our district judges the question whether the local law problem counseled abstention."[247]

The application of abstention in *Harris County* is consistent with the long-standing policy of avoiding unnecessary decisions on constitutional questions.[248] Abstention, however, exacts a heavy toll. As a practical matter, it often forecloses access to a federal court of original jurisdiction. While it is technically possible for the federal plaintiff to reserve his federal claims for trial in the federal district court,[249] factors of cost and time heavily militate in favor of waiver of the right to return to a federal court.[250] Yet, the availability of a federal forum for the vindication of federal claims may be equal in importance to the declaratory role of the Supreme Court in the exposition of federal rights.[251] Conceivably, the disruptive effect of the abstention doctrine upon state policies of justiciability[252] may, in some instances, outweigh the value of federal deference of the state law question to the state courts. Thus, the Supreme Court in *Harris County* was forced into the unusual posture of directing that the district court *dismiss* the complaint in order "to remove any possible obstacles to state court jurisdiction."[253] The unusual course adopted in *Harris County* goes to form rather than substance since the dismissal was without prejudice to the right of the federal plaintiffs to make reservation in the state courts, similar to that outlined in *England v. State Board of Medical Examiners*.[254] Whether the Texas Supreme Court, faced with reservation following federal "dismissal," would

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[246]*Id.* at 877.

[247]*Id.* at 879 (Douglas, J., dissenting).

[248]*See, e.g.*, Ashwander v. TVA, 297 U.S. 288, 346 (Brandeis, J., concurring).

[249]*See* England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411, 421-22 (1964). The state courts must be fully apprised of the nature of the federal challenge to the state statute. Government & Civic Employees Organizing Comm. v. Windsor, 353 U.S. 364, 366 (1957).

[250]*See* NAACP v. Button, 371 U.S. 415, 427 (1963).

[251]*See, e.g.*, Mishkin, *The Federal "Question" in the District Courts*, 53 COLUM. L. REV. 157, 170-71 (1953).

[252]*See, e.g.*, United Services Life Ins. Co. v. Delaney, 396 S.W.2d 855 (Tex. 1965). *Cf.* Romero v. Coldwell, 455 F.2d 1163, 1167 (5th Cir. 1972); Barrett v. Atlantic Richfield Co., 444 F.2d 38, 45-46 (5th Cir. 1971).

[253]95 S. Ct. at 878. Ordinarily the "proper course in ordering *Pullman* abstention is to remand with instructions to retain jurisdiction but to stay the federal suit pending determination of the state law questions in the state court." *Id.* at 878 n.14.

[254]375 U.S. 411 (1964).

decide the federal question remains to be seen. The precedence of the right to make an *England* reservation over state doctrines of justiciability is clear under the supremacy clause.[255] The upshot is that abstention in *Harris County* could promote more friction between federal and state courts than it would avoid.

State courts are the final expositors of state law under our federal system and the reluctance of federal courts to render decisions which could be undermined by later state court decisions is understandable. However, reluctance to reach difficult state law questions should be tempered by the fact that federal district judges are generally "versed in the idiosyncrasies of . . . [state] law."[256] In diversity cases, federal judges decide difficult questions of state law regularly, although the federal diversity decisions are equally subject to the possibility that a state forum will subsequently decide that the federal court's interpretation of state law was erroneous. Justice Douglas' recommendation, that in matters of abstention the Supreme Court defer to federal district judges "who are from the state whose local law is at issue,"[257] would probably result in an unfortunate increase in the incidence of abstention since federal district judges in many areas may be even more loath than the Supreme Court to reach federal constitutional questions.

It is important to keep the abstention doctrine within reasonable bounds. There is a danger that *Harris County* will prompt a rash of misconceived abstention orders at the district court level which either will not be challenged because of the time consuming and expensive appeal process[258] or will be mooted prior to decision.[259] As Justice Douglas observed, the plaintiffs in *Harris*

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[255]*Compare* Henry v. Mississippi, 379 U.S. 443 (1965).

[256]95 S. Ct. at 878 (Douglas, J., dissenting).

[257]*Id.* at 879 (Douglas, J., dissenting).

[258]An abstention order of a three-judge court is probably no longer appealable directly to the Supreme Court under 28 U.S.C. § 1253 (1970). *See* Daniel v. Waters, Civil No. 74-2230 (6th Cir., Apr. 10, 1975). *Cf.* Gonzales v. Automatic Employees Credit Union, 419 U.S. 90, 100 (1974), *noted in* 8 IND. L. REV. 595 (1975). *But cf.* Zwickler v. Koota, 389 U.S. 241 (1967); Doud v. Hodge, 350 U.S. 485 (1956). It is unclear whether an abstention order is final within the meaning of 28 U.S.C. § 1291, or whether it would amount to a denial of requested injunctive relief under 28 U.S.C. § 1291(a). *Cf.* Gonzales v. Automatic Employees Credit Union, *supra*, at 293 n.11. The only method of review may be under 28 U.S.C. § 1292(b) in the court of appeals and by certiorari, either before or after judgment, under 28 U.S.C. § 1254.

[259]The threat of mootness in political cases presents especially troublesome problems. Abstention exacerbates the mootness problem, although the issues may sometimes be reviewed subsequently under the "capable-of-repetition-yet-evading-review" exception to mootness. *See, e.g.*, Dunn v. Blumstein, 405 U.S. 330 (1972).

County "would necessarily have to be very rich officeholders—or else be financed by some foundation—to be able to pay the expense of this long, drawn-out litigation."[260] The heavy toll exacted by abstention in terms of time, expense, and frustration of federal rights may often outweigh its value in promoting a harmonious federalism. But the value of abstention in avoiding premature federal questions cannot be gainsaid.

The primary purpose of the federal courts should be the vindication of federal rights. The difficulty with abstention is that it may effectively foreclose access to a federal court of original jurisdiction. Although the avoidance of unnecessary constitutional decisions embodies an important policy of judicial restraint, the value of abstention in particular cases should be carefully balanced against the need to provide a federal forum of original jurisdiction for the vindication of federal rights. Absent an expedited process for certification of unsettled state law questions to the state court of last resort,[261] the doctrine often exacts too heavy a toll in the timely vindication of federal rights.[262] Abstention can perhaps be justified in *Harris County* because the unresolved state constitutional question was different in character from plaintiffs' federal equal protection claim. When the unresolved state constitutional claim and the asserted federal claim are based on similar provisions in the state and federal constitution, abstention would be highly inappropriate. Closing the door to federal courts solely to provide an "opportunity for the state courts to dispose of the problem either under the . . . [state] Constitution or the U.S. Constitution," as Chief Justice Burger suggested several years ago,[263] would negate federal jurisdiction over federal constitutional claims against state officers and would violate the Congressional purposes in bestowing federal question jurisdiction upon the federal courts.[264]

VII. Political Party Governance and the Nomination Process

Courts traditionally have regarded political parties as private voluntary organizations which, absent exceptional circum-

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[260]95 S. Ct. at 878 (Douglas, J., dissenting).

[261]*See, e.g.*, Fla. Stat. Ann. § 25.031 (1961). *See also* Lillich & Mundy, *Federal Court Certification of Doubtful State Law Questions*, 18 U.C.L.A. L. Rev. 888 (1971).

[262]*See, e.g.*, Home Tel. & Tel. Co. v. City of Los Angeles, 227 U.S. 278 (1913). *Cf.* Wisconsin v. Constantineau, 400 U.S. 433 (1971).

[263]Wisconsin v. Constantineau, 400 U.S. 433, 440 (1971) (Burger, C.J., dissenting).

[264]*See* 42 U.S.C. § 1983 (1970) and its jurisdictional counterparts, 28 U.S.C. §§ 1331, 1343. *See also* Zwickler v. Koota, 389 U.S. 241, 248 (1967);

stances,[265] are free to operate under their own rules without judicial interference or supervision.[266] During the past decade, reform efforts to "democratize" American political parties[267] have spawned claims that party governance constitutes state action and that political parties are accountable under the due process and equal protection clauses of the fourteenth amendment.[268] The Supreme Court has not yet had occasion for plenary review of "these novel and important questions."[269] But, in *Cousins v. Wigoda*,[270] the Court held that the rules of a national political party must be accorded primacy over state law in the determination of the qualifications and eligibility of delegates to the party's national convention.

The Cousins delegates successfully argued before the National Democratic Party Credentials Committee that the seating of the Wigoda delegates elected in the 1972 Illinois primary was violative of party guidelines.[271] Two days before the convention

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Harman v. Forssenius, 380 U.S. 528 (1965); Baggett v. Bullitt, 377 U.S. 360 (1964).

[265]The "White Primary" cases, *supra* note 84, are the major exception. Another exception is Gray v. Sanders, 372 U.S. 368 (1963), in which the Court invalidated the Georgia county unit system of counting votes in primary elections under the one-person/one-vote principle.

[266]*See, e.g.*, Irish v. Democratic-Farmer-Labor Party, 399 F.2d 119 (8th Cir. 1968); Lynch v. Torquato, 343 F.2d 370 (3d Cir. 1965); Smith v. State Executive Comm. of Democratic Party, 288 F. Supp. 371 (N.D. Ga. 1968).

[267]*See, e.g.*, 1968 DEMOCRATIC PROCEEDINGS #269. This mandate called for all Democratic voters to have "a full and timely opportunity to participate" in 1972, urged the abandonment of the unit rule, and declared that delegates should be selected within the calendar year of the 1972 national convention. *See also* COMM'N ON PARTY STRUCTURE AND DELEGATE SELECTION, MANDATE FOR REFORM (1970); OFFICIAL CALL FOR THE 1972 DEMOCRATIC NATIONAL CONVENTION (1971). The McGovern Commission's MANDATE FOR REFORM (1970) established the controversial guidelines under which the Illinois and California delegations to the 1972 Convention were challenged. *See* Cousins v. Wigoda, 95 S. Ct. 541 (1975); Brown v. O'Brien, 409 U.S. 1 (1972) (per curiam). For comments on the development of the 1972 guidelines, *see* Schmidt & Whalen, *Credentials Contests and the 1968—and 1972—Democratic National Conventions*, 82 HARV. L. REV. 1438 (1969); Segal, *Delegate Selection Standards: The Democratic Party's Experience*, 38 GEO. WASH. L. REV. 873 (1970).

[268]*See, e.g.*, O'Brien v. Brown, 409 U.S. 1 (1972); Bode v. National Democratic Party, 452 F.2d 1302 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 1019 (1972); Georgia v. National Democratic Party, 447 F.2d 1271 (D.C. Cir. 1971); Irish v. Democratic-Farmer-Labor Party, 399 F.2d 119 (8th Cir. 1968); Lynch v. Torquato, 343 F.2d 370 (3d Cir. 1965); Smith v. State Executive Comm. of Democratic Party, 288 F. Supp. 371 (N.D. Ga. 1968).

[269]O'Brien v. Brown, 409 U.S. 1, 3 (1972).

[270]95 S. Ct. 541 (1975).

[271]The Credentials Committee sustained the findings and report of a hearing officer that the Wigoda delegates had been chosen in violation

the Wigoda delegates obtained an injunction from the Illinois Circuit Court enjoining the Cousins group from acting as delegates at the convention. The Cousins delegates took their seats and participated fully as delegates throughout the convention.[272] The Illinois Appellate Court affirmed the circuit court's injunction and held that the "right to sit as a delegate representing Illinois at the national nominating convention is governed exclusively by the Illinois Election Code," and that the "interest of the State in protecting the effective right to participate in primaries is superior to whatever other interests the party itself might wish to protect."[273] In consequence, proceedings to adjudge the Cousins delegates in criminal contempt were brought in the Illinois Circuit Court pending review by the United States Supreme Court of the validity of the injunction. Only the presence of collateral legal consequences—in this case, criminal contempt—avoided dismissal of the petition for certiorari on the ground of mootness.[274]

In June and July of 1972 the District Court for the District of Columbia and the Court of Appeals for the District of Columbia twice considered an action brought by one of the Wigoda delegates challenging the constitutionality of the party guidelines.[275] The Cousins delegates intervened, and the party counterclaimed for an injunction enjoining the Wigoda delegates from proceeding with the state court action. The case, although initially dismissed because the Credentials Committee had not yet decided the Cousins challenge, proceeded after the Credentials Committee had adopted the hearing officer's findings and report.[276] The court of appeals

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of Guidelines A-1 (minority group participation), A-2 (women and youth participation), A-5 (existence of party rules), C-1 (adequate public notice of party affairs), C-4 (timing of delegate selection), and C-6 (slate-making). *Id.* at 543 n.1.

[272]Generally an injunction must be obeyed, even if there is a question of its validity, until it is challenged and overturned in court. *See, e.g.*, Walker v. City of Birmingham, 388 U.S. 307 (1967). Disobedience of the Illinois injunction in *Cousins* was excusable because the acts of the Cousins delegates fell within the exception to the *Walker* rule: "This case would arise in quite a different constitutional posture if the petitioners, before disobeying the injunction, had challenged it in the Alabama courts, and had been met with delay or frustration of their constitutional claims." *Id.* at 318.

[273]Wigoda v. Cousins, 14 Ill. App. 3d 460, 472-77, 302 N.E.2d 614, 626-29 (1973), *appeal denied without opinion*, Ill. Sup. Ct., Nov. 29, 1973.

[274]*See, e.g.*, Keane v. National Democratic Party, 469 F.2d 563 (D.C. Cir. 1972), *stay granted sub nom.*, O'Brien v. Brown, 409 U.S. 1, *cert. granted and judgment vacated and remanded for a determination of mootness*, 409 U.S. 816, *dismissed as moot*, 475 F.2d 1287 (1973).

[275]*Id.*

[276]95 S. Ct. at 546.

affirmed the dismissal of the complaint but granted the counterclaim and directed the entry of an order enjoining the Wigoda delegates from proceeding with the Illinois suit.[277] The Supreme Court at a Special Term on July 7 stayed the judgment of the court of appeals[278] and, on October 10, granted certiorari, vacated the judgment, and remanded for a determination of mootness.[279]

The Cousins delegates contended that the Illinois Circuit Court was without jurisdiction to enter its July 8 injunction, notwithstanding the Supreme Court's July 7 stay of the court of appeals' judgment. Their argument was based on the Court's reference, in its per curiam opinion supporting the stay, to "the large public interest in allowing the political processes to function free from judicial supervision."[280] The Supreme Court, however, found the argument to be without merit and agreed with the Illinois Appellate Court that the stay order "completely froze the order of the Court of Appeals, including the injunction order directed to the Circuit Court of Illinois, thereby allowing the Circuit Court to proceed."[281]

In considering whether the "State's legitimate interest in the protection of votes cast at the primary"[282] justified the injunction, the Court observed that, though legitimate, the " 'subordinating interest of the state must be compelling' to justify the injunction's abridgment of the exercise by petitioners and the National Democratic Party of their constitutionally protected rights of association."[283] Having found the compelling interest standard applicable, the Court concluded that "Illinois' interest in protecting the integrity of its electoral process cannot be deemed compelling in the context of the selection of delegates to the National Party Convention."[284] Thus, the Court reiterated the belief that " 'the

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[277]Keane v. National Democratic Party, 469 F.2d 563, 573-75 (D.C. Cir. 1972).

[278]O'Brien v. Brown, 409 U.S. 1 (1973) (per curiam).

[279]Keane v. National Democratic Party, 409 U.S. 816 (1972).

[280]O'Brien v. Brown, 409 U.S. 1, 5 (1972).

[281]Cousins v. Wigoda, 95 S. Ct. 541, 547 (1975), *quoting from* Wigoda v. Cousins, 14 Ill. App. 3d 460, 302 N.E.2d 614 (1973). The Cousins delegates also argued that the District of Columbia Circuit Court of Appeals' injunction "did not alter the binding collateral estoppel and *res judicata* effect of that [court of appeals] judgment so as to permit collateral attack in the Illinois state courts." *Id.* The failure to plead and prove the collateral estoppel defense in the Illinois Circuit Court as required by Illinois law was an adequate state ground foreclosing Supreme Court review. *See, e.g.*, Louisville & N.R.R. v. Woodford, 234 U.S. 46 (1914).

[282]95 S. Ct. at 548.

[283]*Id, quoting from* NAACP v. Alabama, 357 U.S. 449, 463 (1958).

[284]95 S. Ct. at 549.

convention itself [was] the proper forum for determining intraparty disputes as to which delegates [should] be seated.' "[285]

Cousins was premised in part on the "constitutionally protected right of association" of the National Democratic Party and its adherents.[286] The decisive rationale of the holding was the "pervasive national interest in the selection of candidates for national office."[287] This national interest was deemed "greater than any interest of an individual state."[288] The Court recognized that if each of the fifty states could establish the qualifications of its delegates to the various party conventions without regard to party policy, the result "could seriously undercut or indeed destroy the effectiveness of the National Party Convention, . . . a process which usually involves coalitions cutting across state lines."[289] The Court referred to the admonition of Mr. Justice Pitney in *Newberry v. United States*[290] as to the paramount necessity for effective performance of the Convention's task: "As a practical matter, the ultimate choice of the mass of voters is predetermined when the nominations have been made."[291]

In concluding that the convention was the proper forum to determine intraparty disputes like the Cousins-Wigoda controversy, the Court was careful to note that *Cousins* was not a case "presenting claims that the Party's delegate selection procedures are not exercised within the confines of the constitution."[292] Does this reasonably imply that the courts—not the convention—may be the appropriate forum for testing whether party delegate selection procedures are constitutional? The Court's quotation of Justice Pitney in *Newberry* certainly provides some support for a later holding that delegate selection constitutes governmental action because it is an "integral part" of the election process.[293] The concurring justices[294] in *Cousins* would have rested the result "unequivocably on the freedom to assemble and associate . . . and [would not have discussed or hinted] at resolution of issues neither presented here nor previously resolved . . . ."[295] They criticized the Court for "unnecessarily broad language" and for turning

[285] *Id.*, *quoting from* O'Brien v. Brown, 409 U.S. 1, 4 (1972).

[286] 95 S. Ct. at 547.

[287] *Id.* at 549.

[288] *Id.*

[289] *Id.*

[290] 256 U.S. 232 (1921).

[291] *Id.* at 286 (Pitney, J., concurring in part and dissenting in part).

[292] 95 S. Ct. at 549.

[293] *Id.* at 548-49.

[294] *Id.* at 549 (Burger, C.J., Stewart & Rehnquist, JJ., concurring).

[295] *Id.* at 552. The reference was to note 4 in the opinion in which the Court listed three questions "not before us in this case, and [upon which the Court] . . . intimat[ed] no views upon the merits." *Id.* at 545-46.

"virtually on its head" the Court's opinion in *O'Brien*.[296] The concurring justices also criticized the Court for denigrating the residual authority of the states in the selection of presidential and vice-presidential candidates.[297]

Justice Powell agreed that the national convention could seat whomever it pleased as delegates at large but dissented on the ground that Illinois has "a legitimate interest in protecting its citizens from being *represented* by delegates who have been rejected by these citizens in a democratic election."[298]

Cousins has federalized the law of delegate selection to national conventions on the basis of the "pervasive national interest" in the selection of presidential and vice-presidential candidates. Under the majority view, rules of national political parties are entitled to presumptive validity when they conflict with state laws. The decision should be welcomed by those who favor the growth of strong, national political parties. The substantial interest in the primacy of national rather than state authority in the governance of national political parties can be justified for many of the same reasons supporting the primacy of national interests under the commerce clause.[299]

Justice Pitney's opinion in *Newberry v. United States*[300] deserves careful consideration because of its apparent consistency with the views of the present majority.[301] The Federal Corrupt Practices Act,[302] which regulated candidate expenses in primary elections for senator and representative, was invalidated in *Newberry* as beyond the power of Congress under article I, section 4 of the Constitution.[303] Justice Pitney, concurring on other grounds,

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[296]*Id.* at 550.

[297]*Id.* at 552.

[298]*Id.* (Powell, J., concurring in part and dissenting in part) (emphasis in original).

[299]*See, e.g.*, Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964); Wickard v. Filburn, 317 U.S. 111 (1942); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824).

[300]256 U.S. 232, 275 (1921) (Pitney, J., concurring in part and dissenting in part).

[301]Two separate references were made to Justice Pitney's opinion in the majority opinion in *Cousins* and one in the concurring opinion. *See* Cousins v. Wigoda, 95 S. Ct. 541, 546 n.4, 549 (1975). *Compare id.* at 551 (Rehnquist, J., concurring).

[302]Act of June 25, 1910, ch. 392, 36 Stat. 822, *as amended*, Act of Aug. 8, 1911, ch. 33, 37 Stat. 25.

[303]U.S. CONST. art. 1, § 4 provides:

> The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make

strongly affirmed the power of Congress under article I, section 4 with a broad construction of the section[304] and an argument that the "authority of Congress to regulate the primary elections and nominating conventions arises, of necessity, not from any indefinite or implied grant of power, but from one clearly expressed in the Constitution itself . . . ."[305] The difficulty with using Justice Pitney's opinion in *Newberry* to support the Court's "pervasive national interest" argument in *Cousins* was suggested by Justice Rehnquist: "*Newberry*, . . . without more, does not establish . . . a 'national interest' which *standing alone, apart from valid congressional legislation or constitutional provision* would override state regulation in this situation."[306] The absence of valid congressional legislation or constitutional provision, however, does not preclude the applicability of federal common law.[307] The "pervasive national interest" argument is not "unnecessarily broad and vague" if it premises a holding based on federal common law.[308]

The desirability for the primacy of national party rules pertaining to delegate selection to national political conventions is as apparent as the need for uniform federal rules governing the commercial paper of the United States.[309] In *Clearfield Trust v. United States*[310] the primacy of state law would have led to ex-

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or alter such Regulations, except as to the Places of Choosing Senators.

The present Court has adopted a much more expanded view of the scope of federal authority over national elections than when *Newberry* was decided. *See, e.g.*, Oregon v. Mitchell, 400 U.S. 112 (1970), in which Justice Black declared: "Acting under its broad authority to create and maintain a national government, Congress unquestionably has power to regulate federal elections." *Id.* at 134.

[304]256 U.S. at 279-80.

[305]*Id.* at 286. The clearly expressed grant of power referred to by Justice Pitney was the necessary and proper clause of article I, section 8 of the Constitution.

[306]95 S. Ct. at 551 (Rehnquist, J., concurring) (emphasis added).

[307]Federal common law refers generally to "federal rules of decision where the authority for a federal rule is not explicitly or clearly found in statutory or constitutional command." H.M. HART & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 770 (rev. ed. 1973). On the general problems of federal common law and the relevant scholarly literature, see *id.* at 756-832.

[308]*Id.* at 756-832.

[309]*See* Clearfield Trust Co. v. United States, 318 U.S. 363 (1943).

[310]318 U.S. 363 (1943). *Compare* Illinois v. City of Milwaukee, 406 U.S. 91 (1972) (federal common law of air or water in their ambient or interstate aspects); Bivens v. Six Unknown Named Agents, 402 U.S. 388 (1971) (federal right to damages implied from violation of fourth amendment); Petty v. Tennessee-Missouri Bridge Comm'n, 359 U.S. 275 (1959) (federal common law governs construction of interstate compact); Textile Workers

ceptional uncertainty and diverse results in commercial transactions in situations in which the "desirability of a uniform rule is plain."[311] In *Cousins*, as in *Clearfield Trust*, the "choice of a federal rule designed to protect a federal right . . . stands as a convenient source of reference for fashioning federal rules applicable to these federal questions."[312] While there is no justification for the application of federal law to litigation purely between private parties concerning transactions "essentially of local concern,"[313] it is apparent, as the majority reasoned in *Cousins*, that the selection of presidential and vice-presidential candidates by national political parties is a transaction essentially of national concern.

Congress has acted through valid legislation to protect the strong federal interest in presidential elections.[314] The Court could infer from the various federal voting rights acts a federal policy of protecting presidential elections and requiring that they be conducted in a democratic manner. In *Cousins* the Court made federal law interstitially, that is, it filled in one of the important gaps created by the absence of comprehensive federal legislation regulating the conducting of presidential nominations and elections. As Justice Jackson once stated:

> The federal courts have no *general* common law . . . . But this is not to say that wherever we have occasion to decide a federal question which cannot be answered from federal statutes alone we may not resort to all the source materials of the common law, or that when we have fashioned an answer it does not become a part of the federal non-statutory or common law.[315]

The source of the federal law is found in the Federal Constitution, statutes, or common law and is implemented and conditioned by them.[316]

The difficulty with interpreting *Cousins* as interstitial federal common law emanating from federal voting rights statutes is that the federal statutes have been addressed to presidential elections and not the convention-nominating process. In this re-

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Union v. Lincoln Mills, 353 U.S. 448 (1957) (federal common law of labor contracts must be fashioned from the policies of national labor laws).

[311] 318 U.S. at 367.

[312] *Id.*

[313] Bank of America Nat'l Trust & Sav. Ass'n v. Parnell, 352 U.S. 29, 35 (1956).

[314] *See* Voting Rights Act of 1965, 42 U.S.C. §§ 1973 *et seq.* (1970). *See also* Oregon v. Mitchell, 400 U.S. 112 (1970); South Carolina v. Katzenbach, 383 U.S. 301 (1966).

[315] D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447, 469 (1942) (Jackson, J., concurring).

[316] *Id.* at 472.

spect, Justice Pitney's opinion in *Newberry* may provide the missing link.[317] However, even if the primacy of the rules of national political parties cannot be inferred interstitially from federal voting rights legislation regulating presidential elections, the primacy of national party rules may be inferred from the fact that national elections are primarily a matter of national concern and that the "States themselves have no constitutionally mandated role in the great task of the selection of presidential and vice-presidential candidates."[318]

The sensitive and highly important questions concerning the reach of the due process clause in intraparty disputes make the applicability of federal common law by the courts particularly appropriate. The Court is uniquely well-suited to define a limited federal common law applicable to the nomination of presidential candidates. Moreover, the Court is in a much better position than Congress to balance the concept of fairness implicit in the due process clauses of the fifth and fourteenth amendments against equally sensitive first amendment rights of speech and association. As the guarantor of first amendment rights under our system, the Court would not face the formidable inhibitions to congressional regulation under the first amendment.[319] Policies of judicial restraint developed to accommodate interests of state governments[320] or coordinate federal branches[321] would be correspondingly appropriate in fashioning a common law appropriate to party governance as it relates to the nomination process.

Respect for delicate first amendment rights of association and free speech demand that rules of private political associations be accorded the presumptive validity courts give acts of Congress[322] or state legislatures.[323] Courts have wisely refrained from straight-jacketing political parties with one-person/one-vote[324] or

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[317] *See* text accompanying note 291 *supra*.

[318] 95 S. Ct. at 549. *But see id.* at 551-52 (Rehnquist, J., concurring).

[319] *See, e.g.*, American Communications Ass'n v. Douds, 339 U.S. 382, 407 (1950).

[320] *See, e.g.*, Younger v. Harris, 401 U.S. 37 (1971).

[321] *See, e.g.*, United Public Workers v. Mitchell, 330 U.S. 75 (1947).

[322] *See, e.g.*, Fleming v. Nestor, 363 U.S. 603 (1960).

[323] *See, e.g.*, Dandridge v. Williams, 397 U.S. 471 (1970).

[324] *See, e.g.*, Georgia v. National Democratic Party, 447 F.2d 1271 (D.C. Cir. 1971); Irish v. Democratic-Farmer-Labor Party, 399 F.2d 119 (8th Cir. 1968). In Gray v. Sanders, 372 U.S. 368, 378 n.10 (1973), the Court expressly declined to reach the question of whether its decision applied to nomination by convention. But the Court has been reluctant to extend the one-person/one-vote requirement beyond popular elections. *See, e.g.*, Sailors v. Board of Educ., 387 U.S. 105, 109-10 (1967). *Cf.* Fortson v. Morris, 385 U.S. 231 (1966).

one-party-member/one-vote formulae.[325] The fact that it is impossible to decide rationally whether it would be fairer to distribute delegates according to population or party membership is evidence that the difference is not one of constitutional dimensions.

National political parties serve a quasi-governmental function. Political parties are not deprived of their quasi-public character simply because they are private associations.[326] The predominant character and purpose of political parties, like that of a park in *Evans v. Newton*,[327] is public. The broad reach of state action under the fourteenth amendment[328] should be sufficient to reach political parties, although it would appear that national political parties would more appropriately fall within the purview of the due process clause of the fifth rather than the fourteenth amendment.[329]

Despite the federal common law approach of the Court in *Cousins*, significant obstacles frustrate the creation of federal common law applicable to political party governance and the nomination process. Lack of ripeness[330] will preclude federal review in political cases until there is adequate time to permit the reflection necessary for deliberate judicial decision-making, and mootness will require dismissal.[331] Furthermore, two aspects of the political question doctrine[332] often will counsel against judicial intervention: the lack of judicially discoverable and manageable standards, and the impossibility of deciding a question without an initial nonjudicial, discretionary policy determination. Lack of justiciability, therefore, will preclude federal determination of many claims and will shield federal courts from becoming embroiled in intraparty squabbles. Most intraparty disputes are best left to the decision of the people on election day. An appropriate time frame for judicial resolution of a problem is essential since court

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[325]Bode v. National Democratic Party, 452 F.2d 1302 (D.C. Cir. 1971); Lynch v. Torquato, 343 F.2d 370 (3d Cir. 1965).

[326]*Compare* Amalgamated Food Employees Union v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968); Marsh v. Alabama, 326 U.S. 501 (1946); Civil Rights Cases, 109 U.S. 3, 41 (1883) (Harlan, J., dissenting). *But cf.* Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972).

[327]382 U.S. 296 (1966).

[328]*See, e.g.*, Reitman v. Mulkey, 387 U.S. 369 (1967); Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961); Shelley v Kraemer, 334 U.S. 1 (1948).

[329]*See, e.g.*, Bolling v. Sharpe, 347 U.S. 497 (1964); Schneider v. Rusk, 377 U.S. 163 (1964).

[330]*See, e.g.*, Poe v. Ullman, 367 U.S. 497 (1961) (challenge to unenforced birth control statute held nonjusticiable).

[331]This was the situation in Keane v. National Democratic Party, 469 F.2d 563 (D.C. Cir. 1972). *See* text accompanying notes 275-79 *supra*.

[332]*See* Baker v. Carr, 369 U.S. 186, 217 (1962).

involvement in convention-eve delegate disputes would appear unwise, absent abuses of the most flagrant kind.

The Court's decision in *O'Brien v. Brown*[333] recognized the strong tradition of judicial noninterference in the affairs of private political parties. The striking differences of language and concept between *O'Brien* and *Cousins* suggest the need for closer examination. Does *Cousins*, as Justice Rehnquist has charged, "turn virtually on its head the Court's opinion in *O'Brien*"?[334] Careful scrutiny of the two opinions suggests otherwise. Two members of the Court, Justices Douglas and Marshall, dissented in *O'Brien*. Justice White voted to deny the application for a stay but did not write an opinion. Justice Brennan, the author of the majority opinion in *Cousins*, concurred in *O'Brien* because of the "limited time available . . . [to] give these difficult and important questions consideration adequate for their proper resolution."[335] Apparently, Justice Blackmun must have had reservations in *O'Brien* similar to those of Justice Brennan, since Justice Blackmun was one of the five-member majority in *Cousins*. What emerges is a sharply divided Court in which the time frame for judicial deliberation is sufficient to shift two members, Justices Brennan and Blackmun.

Is the justiciability of claims to be seated at future national political conventions implicit in *Cousins*?[336] If the rules of national political parties are to be given precedence over the laws of the states, it is apparent that party rules must satisfy the basic fairness requirements of due process. There is no way to assure the fairness of party rules other than by providing access to the courts. There is no reason why the fairness of party rules relating to the nomination of candidates should not be subjected to judicial review. Courts could distinguish between party rules pertaining to the nomination of candidates and rules of internal governance and allow a wider scope of review to the former. Moreover, by assuring a rudimentary level of fairness, judicial review of party rules pertaining to the election of public officials would not necessarily involve the courts in convention-eve intra-party disputes. Party members displeased with internal party governance on matters unrelated to the election of public officers generally should not look to the courts for relief. They can seek self-help within the party structure, join another party, or organize a party of their choice. The courts would probably still be confronted with convention-eve claims of unfairness of rules as applied, but they could abstain from intervention except in the

[333] 409 U.S. 1 (1972).

[334] 95 S. Ct. at 550 (Rehnquist, J., concurring).

[335] 409 U.S. at 5-6.

[336] *Cf.* Sailors v. Board of Educ., 387 U.S. 105 (1967).

most flagrant cases[337] and in situations in which there is sufficient time for judicial deliberation. The appropriate redress for claims of unfairness of party rules respecting internal governance generally should be at the polls. Likewise, the courts will be unable to hear some claims of unfairness of rules, as applied, for three reasons: (1) the lack of sufficient time for review, (2) the inadequacy of judicial remedies, and (3) the need to avoid judicial intervention in the broad range of matters falling within party discretion.

In balance, then, the tradition of judicial nonintervention in party rules relating directly to the election of public officials should be subordinated to a limited extent to the vital public interest in access to the nomination process. Obviously, different judicial standards will be relevant to party nomination rules than have been applied to election laws because different interests are at stake. The availability of competing political groups in our system is the best antidote for party rules, the unfairness of which is not of constitutional dimensions. But the courts are an appropriate forum to insist upon fundamental fairness of party rules respecting the nomination of public officials. The obligation of the party to adopt written rules concerning the nomination of public officials, the right to adequate public notice of all nominating caucuses leading to the selection of public officials, the right of reasonable access to party membership lists prior to caucuses, the right of party members to speak and to vote at such caucuses, and the right to have votes counted fairly should, at least, be comprehended by due process of law. If a party wishes to go further, it may. But it is clear that due process neither commands nor forbids affirmative action to increase participation by youth, women, and minorities in closer proportion to their distribution in the population or party membership. Due process neither commands nor forbids assignment of votes to districts by one-person/one-vote or one-party-member/one-vote standards. Nor does due process appear to affect the bonus a party may wish to assign for favorable votes in preceding elections.

Justice Powell's concern that the citizens of a state should not be represented at national nominating conventions "by delegates who have been rejected by these citizens in a democratic election"[338] is well-placed. One danger implicit in the primacy of party rules over state law is that party rules are especially susceptible to manipulation by political insiders. Thus, it appears

[337] *Cf.* Younger v. Harris, 401 U.S. 37 (1971) (bad faith or harassment by prosecution necessary to support federal intervention with state law enforcement efforts).

[338] Cousins v. Wigoda, 95 S. Ct. 541, 552 (1975) (Powell, J., concurring in part and dissenting in part).

essential that the Court, having declared the primacy of national party rules over state laws, require that national party rules pertaining to presidential nominations be consistent with due process and that they be so administered to the extent that judicial accountability is appropriate or possible under the circumstances. To the extent that Justice Powell's opinion would allow a national nominating convention to seat whomever it pleased as at-large delegates, it should be disapproved. The seating of at-large delegates, unless in conformity with fair party rules, would unreasonably dilute the votes of other delegates.

The national political parties must pay with judicial accountability for the primacy of their rules over state law in matters relating to the seating of delegates. The holding in *Cousins* would be indefensible unless national party rules respecting the nomination of presidential and vice-presidential candidates were subject to judicial review for their fundamental fairness.

The perspective from which the courts should consider the fairness of national political party rules respecting nomination of presidential candidates was properly established in *O'Brien*. Judicial intervention should be approached "with great caution and restraint" because the circumstances often involve "relationships of great delicacy."[339] The courts should deliberately balance the gravity and urgency of the need for affording judicial relief and the effectiveness of judicial remedies against the intrusive impact of a court decree upon the delicate first amendment associational rights of political parties and their adherents. Moreover, political parties should have "wide latitude in interpreting their own rules and regulations."[340]

It has been suggested that *Cousins* implies the need for judicial accountability of rules of national political parties respecting nomination of public officials. This argument applies with equal force to the party rules governing nomination of United States Senators and Representatives. The people will remain free to assert their sense of civic responsibility, their economic interests, or their personal prejudices in the nominating process. The important thing is that the nomination process, like the election which follows, should be fairly organized to allow maximum effective popular participation.

Most states have extensive legislation regulating the nomination of public officials and the organization of political parties. How disruptive will *Cousins* be of the vast systems of state regu-

[339]O'Brien v. Brown, 409 U.S. 1, 4 (1972).

[340]Keane v. National Democratic Party, 469 F.2d 563, 569 (D.C. Cir. 1972). The latitude "must be especially wide where, as here, a reviewing court is hampered by severe shortage of time which prevents a prolonged inquiry into the meaning of rules." *Id.*

latory legislation? Initially, it should be recalled that *Cousins* does not apply to political party rules of internal governance.[341] Presumably, state legislation respecting party rules of internal governance is not affected by *Cousins*. It will generally be possible to construe party rules so that they do not conflict with state law.[342] Only when the conflict between party rules and state laws is unavoidable do party rules displace state law. The primacy of national party rules respecting the nomination of presidential candidates, like federal common law, is interstitial in character. The vast amount of state legislation not in conflict with national party rules governing the nomination process remains intact and is unaffected by *Cousins*.

VIII. Conclusion

Despite its recency, the federally secured right of political participation is now established. It extends both to voting and to political candidacy. Although an important new source of political rights, this federal right does not disparage the substantial residual authority of the states to control their electoral processes.

The right to a place on the ballot is not absolute; it is limited to candidates who can demonstrate substantial public support. The right is not available to disgruntled partisans who, as "sour-grape" independent candidates, would subvert the legitimate state interest in a viable partisan primary system. But the right is incontestably available to genuine, independent candidates who wish to seek elective office within or without the structure of established political parties. Conclusive presumptions, such as those inherent in filing fees, which bar the candidacy of otherwise qualified candidates for public office, have become suspect and are subject to strict scrutiny. Other restrictions, such as property ownership, are invalid since they fail even to meet the less stringent reasonable basis test of equal protection.

The states retain enormous residual authority to establish and maintain independent electoral systems. Nothing in recent decisions establishing a federally secured right of political candidacy even remotely threatens to impose a federal straightjacket on the diverse electoral systems of the several states. There is plenty of room, even after the limited federal right to be a candidate has been secured, for the states and localities to let a thousand flowers bloom. The Court's recognition and vindication of a limited, federally secured right of political candidacy has been characterized by judicial statesmanship of the first magni-

[341] *Compare* Lynch v. Torquato, 343 F.2d 370 (3d Cir. 1965).

[342] *See, e.g.*, Keane v. National Democratic Party, 469 F.2d 563, 572 (D.C. Cir. 1972).

tude. Nowhere is the obligation of the Court greater than in assuring that the political deck is not stacked, and that the rules of the game are fair. By asserting federal authority to assure fundamental fairness in access to the political system, the Court is responding to the growing demand of our society for a more open, truly democratic political system. Ironically, the larger federal judicial role in state electoral affairs to secure equality of access to the political system may ultimately permit even greater federal judicial deference to the political decisions of state and local institutions. To the extent that various exclusionary structural barriers may have frustrated popular efforts to elect responsive state and local officials in the past, the increased federal judicial role should be welcomed by citizens who support vigorous state and local government.

The emergence of a federally secured right of political participation has paralleled the growing national consensus for universal adult access to and participation in the political system. The Court has both mirrored the times and prodded society in the direction in which it was already moving. The inability of opponents of *Baker* to reverse the one-person/one-vote ruling by constitutional amendment bears witness to the fact the the Court's voting decisions, even the most controversial ones, have not substantially disparaged the Court's legitimacy or wasted its scarce resources. Moreover, the Court's response to widely perceived popular needs in the voting area has probably enhanced popular approval of the Court and strengthened its legitimacy. Although the recent judicial trend does pose serious questions relating to federalism, the Court has invalidated significant intrusions on the rights of voting and political candidacy on federal grounds without impinging on legitimate state interests in developing political systems responsive to state needs. The Court's recent posture in the voting rights area evidences an appropriate level of federal judicial respect for state political institutions. The Court's restraint, however, has been tempered by its willingness to cast aside archaic state practices that are unreasonable and inconsistent with a democratic polity.