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bility and validity in non-criminal proceedings or the extension of the Court's reasoning into other areas of privilege, the implications of the ruling are important when viewed in the context of the growth of executive power in the American system. In addition, serious weaknesses in the *Nixon* test pose difficult problems for those who will apply it in future cases. What is called for in response to the decision is extreme presidential circumspection in asserting the privilege, as well as continued, responsible review by the courts. Hopefully, such judicious exercise of power will prevent executive privacy from degenerating into a convenient instrument for concealing from the public what it has a right to know.

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Constitutional Law—Lowering the Compelling State Interest Hurdle

During the twelve years since its decision in *Baker v. Carr*,[1] the Supreme Court has considered numerous challenges to state election laws raised by potential voters and candidates.[2] In ruling upon these challenges, the Court has developed an exacting standard to be applied in determining whether a state's restrictions on the right to vote violate the equal protection clause of the fourteenth amendment.[3] Because of the stringency of this standard, which requires a state to justify its restrictions by showing their necessity to further a "compelling" state interest,[4] many state laws regulating voter qualifications and candidacy

1. 369 U.S. 186 (1962). In this landmark, legislative apportionment case, the Court extended equal protection to nonracial challenges of state election statutes. Note, *Oregon v. Mitchell and the Compelling State Interest Doctrine—The End of an Era?*, 22 SYRACUSE L. REV. 1123, 1125 (1971). In so extending the equal protection clause, the Court "substantially modified the constitutional matrix in this area." 30 OHIO ST. L.J. 202 (1969).

2. *See, e.g.*, Kusper v. Pontikes, 414 U.S. 51 (1973); Dunn v. Blumstein, 405 U.S. 330 (1972); Bullock v. Carter, 405 U.S. 134 (1972); Evans v. Cornman, 398 U.S. 419 (1970); Kramer v. Union Free School Dist. No. 15, 395 U.S. 621 (1969).

3. *See* Kramer v. Union Free School Dist. No. 15, 395 U.S. 621 (1969), in which the Court justified its imposition of this new test as follows: "This careful examination is necessary because statutes distributing the franchise constitute the foundation of our representative society. Any unjustified discrimination in determining who may participate in political affairs or in the selection of public officials undermines the legitimacy of representative government." *Id.* at 626.

4. *Id.* at 627.

requirements have been declared unconstitutional.[5] In the recent case of *Storer v. Brown*,[6] however, the Supreme Court upheld the constitutionality of a portion of the California Election Code[7] concerning independent candidates.[8] In upholding these statutes, the Court ostensibly applied the compelling state interest test;[9] however, an examination of the majority opinion reveals that the Court actually applied a standard much closer to that of the traditional equal protection test that is normally reserved for cases in which neither fundamental rights nor suspect classifications are involved.[10] When viewed in light of other recent franchise opinions,[11] the *Storer* decision indicates the Court's willingness to give state legislatures greater latitude in enacting electoral restrictions and to ease the states' burdens in meeting challenges to these laws.

The *Storer* case arose out of the 1972 California elections in which plaintiffs Storer, Frommhagen, Hall, and Tyner sought to be placed on the ballot as independent candidates in the general election. Storer and Frommhagen, who both desired to run for Congress from their respective districts, were denied ballot access because they had been affiliated with the Democratic Party within a year prior to the 1972 primary,[12] thereby failing to meet one of the requirements for independent candidacy prescribed by California law.[13] Plaintiffs Hall and

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5. *See, e.g.*, cases cited note 2 *supra*.

6. 415 U.S. 724 (1974). Mr. Justice White wrote the majority opinion. Justices Brennan, Douglas, and Marshall dissented in an opinion written by Mr. Justice Brennan. *Id.* at 755.

7. CAL. ELEC. CODE §§ 6830-31, 6833 (West Supp. 1974).

8. 415 U.S. at 736.

9. *Id.*: *see* American Party v. White, 415 U.S. 767, 780 (1974).

10. In McGowan v. Maryland, 366 U.S. 420 (1961) Chief Justice Warren explained the traditional equal protection test as follows:

> Although no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.

Id. at 425-26. For a discussion of the development of the two equal protection standards and the distinctions between them see Engdahl, *Constitutionality of the Voting Age Statute*, 39 GEO. WASH. L. REV. 1, 28-32 (1970).

11. *E.g.*, O'Brien v. Skinner, 414 U.S. 524, 535 (1974) (Blackmun & Rehnquist, J.J., dissenting); Kusper v. Pontikes, 414 U.S. 51, 61 (1973) (Blackmun, J., dissenting); Rosario v. Rockefeller, 410 U.S. 752 (1973); Dunn v. Blumstein, 405 U.S. 330, 363 (1972) (Burger, C.J., dissenting); Lippitt v. Cipollone, 404 U.S. 1032 (1972), *aff'g mem.* 337 F. Supp. 1405 (N.D. Ohio 1971).

12. 415 U.S. at 728.

13. CAL. ELEC. CODE § 6830 (West Supp. 1974), which governs independent can-

Tyner, who desired to run for President and Vice-President of the United States,[14] complied with the above party disaffiliation requirement, but were denied ballot access because of their failure to meet the requirements concerning the submission of nominating petitions.[15] Thus the four potential candidates brought actions in federal district court challenging the constitutionality of the provisions of the California Election Code regulating independent candidates' access to the ballot.[16]

A three-judge district court dismissed the complaints, concluding that the statutes "served a sufficiently important state interest to sustain their constitutionality."[17] On direct appeal,[18] a divided Supreme Court upheld the provisions requiring one year of disaffiliation.[19] In doing so, the Court concluded that the requirement furthered "the State's interest in the stability of its political system"—an interest the Court found to be compelling. This note will examine the manner in which the Court evaluated the disaffiliation requirement and the nature and extent of its departure from the previously developed compelling state interest test.

Before evaluating the Court's opinion, it is necessary to examine

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didates, provides in part:

> Each candidate or group of candidates shall file a nomination paper which shall contain:
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> . . . .
>
> (c) A statement that the candidate and each signer of his nomination paper did not vote at the immediately preceding primary election at which a candidate was nominated for the office mentioned in the nomination paper. . . .
>
> (d) A statement that the candidate is not, and was not at any time during the one year preceding the immediately preceding primary election at which a candidate was nominated for the office mentioned in the nomination paper, registered as affiliated with a political party . . . .

14. Hall and Tyner were members of the Communist Party, which had failed to qualify for ballot status under California law. They therefore sought to run as independent candidates. 415 U.S. at 728.

15. The Court summarized these requirements as follows:

> The independent candidate must . . . file nomination papers signed by no less than 5% nor more than 6% of the entire vote cast in the preceding general election in the area for which the candidate seeks to run. § 6831. All of these signatures must be obtained during a 24-day period following the primary and ending 60 days prior to the general election, § 6833, and none of the signatures may be gathered from persons who vote at the primary election. § 6830(c).

Id. at 726-27.

16. *Id.* They argued that the statutes violated their first and fourteenth amendment rights.

17. *Id.* at 728.

18. 28 U.S.C. § 1253 (1970) authorizes an appeal directly to the Supreme Court from a judgment of a three-judge district court concerning the constitutionality of a state law.

19. The Court remanded the cases of Hall and Tyner, instructing the district court to determine from prior election data that was unavailable to the Court whether the petition requirements placed an unconstitutional burden on independents seeking positions on the ballot. 415 U.S. at 738-40.

briefly the franchise cases out of which the compelling state interest test evolved.[20] Its development may be viewed in three phases.[21] In the cases constituting the initial phase,[22] the Court articulated the importance of the right to vote[23] and asserted that a state's abridgment of this right should be examined very carefully.[24] By the time of its decision in *Harper v. Virginia Board of Elections*,[25] a majority of the Court was on the verge of expressing a new equal protection standard to be applied in voting rights cases.

The articulation of this new test occurred during the second phase. In *Williams v. Rhodes*[26] the Court made clear that, although a state had the authority to enact laws regulating elections, this grant of authority was not absolute; it could not be exercised in violation of the equal protection clause.[27] The Court then listed the following factors to be considered in determining whether an election statute is unconstitutional:

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20. Prior to the mid-1960's, the Court had applied the concepts of the equal protection clause to two types of cases: those involving commercial regulations, *e.g.*, McGowan v. Maryland, 366 U.S. 420 (1960), and those in which racially discriminatory state action was alleged, *e.g.*, Korematsu v. United States, 323 U.S. 214 (1944). The Court applied two different equal protection standards in evaluating statutes, its choice depending upon the type of classification involved. In commercial regulation cases, the Court determined whether the statute rationally promoted a legitimate state interest. The state's interest was presumed to be legitimate unless the classifications were shown to be arbitrary. Note, 22 SYRACUSE L. REV., *supra* note 1. Because this traditional standard allowed important individual rights to be subordinated to less important state interests, the Court applied a more stringent standard when racial classifications were involved. Because of their "suspect" classifications, these statutes were presumed illegitimate unless "shown to be absolutely free of any purpose which might encourage 'invidious discrimination.'" *Id.* at 1125.

21. This somewhat arbitrary division is devised merely to aid in the analysis of a large group of decisions. Admittedly it oversimplifies the process of the development of the compelling state interest test.

22. Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (Virginia's poll tax held unconstitutional); Carrington v. Rash, 380 U.S. 89 (1965) (Texas law prohibiting servicemen from voting held unconstitutional); Reynolds v. Sims, 377 U.S. 533 (1964) (Alabama state legislative apportionment plans held unconstitutional).

23. In Reynolds v. Sims, 377 U.S. 533 (1964), the Court stated that "[t]he right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government." *Id.* at 555. "Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society." *Id.* at 561-62.

24. In Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966), the Court said, "We have long been mindful that where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined." *Id.* at 670.

25. 383 U.S. 663 (1966).

26. 393 U.S. 23 (1968). This case involved a challenge by would-be candidates to the Ohio election laws, which, because of their stringent requirements, made it virtually impossible for a third party or an independent candidate to gain access to the ballot. *Id.* at 25.

27. *Id.* at 29.

"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."[28] Since the "precious" rights of voting and association were involved, the Court held that the State had to justify its infringement of them by showing a "compelling state interest."[29]

Because the majority in *Williams* rested its opinion on both first amendment and equal protection grounds, it remained unclear whether the Court had created a new equal protection test to be applied in franchise cases.[30] Subsequent decisions removed any uncertainty. Although *Shapiro v. Thompson*[31] was not a voting rights case, the Court stated succinctly the appropriate equal protection standard for evaluating statutes abridging rights that the Court deemed to be "fundamental": "[T]he traditional criteria do not apply in these cases. Since the classification here touches on the fundamental right of interstate movement, its constitutionality must be judged by the stricter standard of whether it promotes a *compelling* state interest."[32]

After the compelling state interest test had been used to declare several state election laws unconstitutional,[33] the development of the test entered its third phase[34] when certain members of the Court began to express their displeasure at the continued interference with enactments of state legislatures.[35] An early example of this abandonment

28. *Id.* at 30.

29. *Id.* at 31.

30. 30 OHIO ST. L.J., *supra* note 1, at 215.

31. 394 U.S. 618 (1969). This case arose out of challenges to states' durational residency requirements for welfare benefits.

32. *Id.* at 638. Having developed this new standard, the Court then began to apply it in cases in which state election laws were challenged. In Kramer v. Union Free School Dist. No. 15, 395 U.S. 621, 632 (1969), for example, the Court expressed the compelling state interest test in a two-step analysis. It must first be determined whether the classifications under consideration are "tailored so that the exclusion of appellant and members of his class is necessary to achieve the articulated state goal." If they are so tailored, then the Court must determine whether that goal constitutes a compelling state interest. *Id.* at 632 n.14.

33. *E.g.*, Dunn v. Blumstein, 405 U.S. 330 (1972) (Tennessee durational residency requirements for voting held unconstitutional); Bullock v. Carter, 405 U.S. 134 (1972) (Texas filing fee system held unconstitutional). Other cases in which the Court applied this standard in evaluating election laws include, City of Phoenix v. Kolodziejski, 399 U.S. 204 (1970) (Arizona law permitting only real property taxpayers to vote on issuance of general obligation bonds held unconstitutional); Evans v. Cornman, 398 U.S. 419 (1970) (Maryland law denying franchise to residents of federal enclaves within the state held unconstitutional); Cipriano v. City of Houma, 395 U.S. 701 (1969) (Louisiana law restricting franchise in certain elections to those who paid taxes on real property held unconstitutional).

34. This phase overlaps the previous one.

35. *See, e.g.*, Dunn v. Blumstein, 405 U.S. 330, 363 (1972) (Burger, C.J., dissent-

of the stringent standard was the Court's affirmance, by a five to four vote, of the district court decision in *Lippitt v. Cipollone*.[36] The majority accepted without opinion the standard applied below, which clearly was less demanding than the compelling state interest test.[37] More recently in *Rosario v. Rockefeller*[38] the majority applied a standard that, according to the dissent, resembled "the traditional 'rational basis' test."[39] Both of these cases were relied on by the majority in its decision in *Storer*,[40] which should also be included in this third phase.

In analyzing the *Storer* decision, it first must be determined whether, under the facts of the case, the application of the compelling state interest test was required. Although the Court has never classi-

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ing), in which the Chief Justice termed the compelling state interest test "seemingly insurmountable." *Id.* at 363-64. In the very recent case of O'Brien v. Skinner, 414 U.S. 524, 535 (1974) (Blackmun & Rehnquist, J.J., dissenting), Justice Blackmun expressed his dissatisfaction as follows: "I would refrain from continued tampering and interference with the details of state election laws. If details are deserving of cure, the State's legislature, not this Court, ought to be the curative agent." *Id.* at 537.

36. 404 U.S. 1032 (1972), *aff'g mem.* 337 F. Supp. 1405 (N.D. Ohio 1971). This case upheld Ohio's statute which specified that candidates in party primaries could not have voted in another party's primary within the four previous years.

A similar retreat by the Court from its application of the compelling state interest test occurred in equal protection challenges in other areas. *See, e.g.*, Salyer Land Co. v. Tulare Lake Basin Water Storage Dist., 410 U.S. 719 (1973) (California Water Code provision restricting voting rights in water district general elections to landowners and apportioning votes according to land value upheld); Lindsey v. Normet, 405 U.S. 56 (1972) (Oregon judicial procedure for evicting non-paying tenants upheld); Gordon v. Lance, 403 U.S. 1 (1971) (West Virginia requirement of sixty percent voter approval for incurring public debts or increasing tax rates upheld); Dandridge v. Williams, 397 U.S. 471 (1970) (Maryland law setting maximum for welfare grants upheld).

It has been suggested, and the Court's approaches in the above cases and in *Storer* add credence to the suggestion, that in recent years the Court has moved away from a rigid dual-pronged equal protection approach. Rather than choosing either the traditional, rational basis test or the stringent, compelling state interest test, the Court has begun to employ a standard lying somewhere between the two extremes. *See* San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 98-110 (1973) (Marshall, J., dissenting).

37. The district court stated that the state legislature is presumed to have acted constitutionally; Lippitt v. Cipollone, 337 F. Supp. 1405, 1406 (N.D. Ohio 1971), *aff'd mem.*, 404 U.S. 1032 (1972); a presumption that is rejected under the compelling state interest test. Kramer v. Union Free School Dist. No. 15, 395 U.S. 621, 627 (1969).

38. 410 U.S. 752 (1973). The Court upheld a provision of the New York Election Code that restricted primary voting to those whose party affiliation had been registered at least thirty days before the previous general election (*i.e.* eleven months prior to the non-presidential primary).

39. *Id.* at 767 (Powell, J., dissenting). The majority's opinion seems to support this conclusion because the Court affirmed the statute upon finding that the restriction was "tied to a particularized legitimate purpose, and [was] in no sense invidious or arbitrary." *Id.* at 762. The "invidious" or "arbitrary" test is traditionally applied in cases involving economic regulation. *See* note 20 *supra.*

40. 415 U.S. at 734, 736.

fied candidacy per se as a fundamental right,[41] it has recognized that the rights of candidates and those of voters often overlap.[42] Thus an infringement of candidates' rights that also affects those of voters requires the application of the compelling state interest test.[43] The majority's nominal use of the compelling state interest test in *Storer*[44] suggests that there was sufficient infringement of voters' rights here to require a close scrutiny. As the Court itself stated in *Lubin v. Panish*,[45] decided the same day as *Storer*, "[T]he right to vote is 'heavily burdened' if that vote may be cast only for one of two candidates in a primary election at a time when other candidates are clamoring for a place on the ballot."[46] Similarly, the rights of a significant group of voters are "heavily burdened" when the number of independent candidates is limited.

Although the Court recognized the necessity of applying the compelling state interest test in *Storer*, it departed from its own guidelines established in earlier cases in applying that test. One of the fundamental aspects of the test is the state's burden of justifying any restrictions on the right to vote.[47] In the past the Court had clearly rejected the automatic presumption of legitimacy of the state action[48] and instead had required the state to show compelling reasons for its restrictions.[49]

Despite this basic requirement, there is no indication in the *Storer* opinion that the burden of justification was placed on California. On the contrary, the Court stated that it had no reason for "concluding that the device California chose, § 6830(d), was *not* an essential part of its

41. *See* Bullock v. Carter, 405 U.S. 134, 142-43 (1972). *But cf.* Lippitt v. Cipollone, 404 U.S. 1032 (1972) (Douglas, J., dissenting), *aff'g mem.* 337 F. Supp. 1405 (N.D. Ohio 1971).

42. Bullock v. Carter, 405 U.S. 134, 143 (1972).

43. *Id.* at 144.

44. An example of the Court's use of this terminology is the following statement: "We also consider that interest as not only permissible, but compelling and as outweighing the interest [of] the candidate and his supporters. . . ." 415 U.S. at 736.

45. 415 U.S. 709 (1974). The Court held unconstitutional the California filing fee requirement, which in its application prevented indigent candidates from gaining ballot status. In reaching its decision, the Court found that the "[s]election of candidates solely on the basis of ability to pay a fixed fee without providing any alternative means [was] not *reasonably necessary* to the accomplishment of the State's legitimate election interests." *Id.* at 717 (emphasis added). Because of the State's complete failure to demonstrate the necessity of its restrictions, the Court in *Lubin* was able to find the statute unconstitutional under even the more tolerant standard that it applied.

46. *Id.* at 716.

47. Dunn v. Blumstein, 405 U.S. 330, 335 (1972).

48. *See* Kramer v. Union Free School Dist. No. 15, 395 U.S. 621, 627-28 (1969).

49. *See* Dunn v. Blumstein, 405 U.S. 330, 335 (1972).

overall mechanism to achieve its acceptable goals."[50] Rather than requiring the State to prove that the restriction *was* "necessary to achieve its articulated state goal,"[51] it accepted a lack of proof to the contrary as sufficient. Clearly in doing so, the Court eased considerably the State's task in justifying its statute.

Implicit in the Court's acceptance of the disaffiliation requirement is its assumption that an absence of the requirement would lead to political instability. However, the opinion referred to no data supporting such conclusion; thus it must be assumed that the Court was merely speculating on the result. Under the traditional equal protection test, such an approach by the Court is permissible.[52] But under previously enumerated guidelines, the compelling state interest test prohibits such speculation; mere theoretical problems do not justify infringements of individual rights.[53]

The Court's discussion of the rationale behind the disaffiliation requirement displays other ways in which it departed from past guidelines.[54] In prior decisions the Court had required "exacting standard[s] of precision" in statutes affecting voting rights.[55] Those statutes, which contained sweeping exclusions of a large number of citizens for reasons that were valid for only a segment of that group, were declared unconstitutional.[56] Here, however, the Court said that one of the justifications of the disaffiliation requirement was that it protected against "candidacies prompted by short-range political goals, pique or personal quarrel."[57] The Court failed to consider that in excluding those types of candidacies, the statute also excludes those prompted by a desire for public service and a belief that the partisan candidates fail to represent adequately the viewpoints of a significant group of voters.

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50. 415 U.S. at 73 (emphasis added).

51. Kramer v. Union Free School Dist. No. 15, 395 U.S. 621, 632 (1969).

52. Under this less stringent standard, "the Court may even engage in speculation to find some possible justification for the state law." Engdahl, *supra* note 10, at 32.

53. *See* Williams v. Rhodes, 393 U.S. 23, 33 (1968).

54. The Court stated the reasons for the disaffiliation requirement as follows:

> It protects the direct primary process by refusing to recognize independent candidates who do not make early plans to leave a party and take the alternate course to the ballot. It works against independent candidacies prompted by short-range political goals, pique or personal quarrel. It is also a substantial barrier to a party fielding an "independent" candidate to capture and bleed off votes in the general election that might well go to another party.

415 U.S. at 735.

55. *See* Dunn v. Blumstein, 405 U.S. 330, 360 (1972).

56. *See, e.g., id.* at 351; Carrington v. Rash, 380 U.S. 89, 96 (1965).

57. 415 U.S. at 735.

As the Court stated in *Storer* and had earlier stated in *Williams v. Rhodes*,[58] among the factors to be considered in evaluating a statute under the compelling state interest test are "the facts and circumstances behind the law."[59] In prior decisions the Court had included practical political considerations among the circumstances that it considered. Thus in *Williams* it noted that Ohio's early petition deadline was at odds with the constantly changing nature of American politics.[60] In *Storer*, however, the Court completely disregarded the disaffiliation requirement's relationship to political realities.[61] By omitting this consideration the Court failed to evaluate fully the extent of the impact of the requirement upon potential independent candidates.

The final and perhaps most striking departure of the Court from its past decisions was its failure to consider the availability of less burdensome means of achieving the State's objectives. Under the traditional equal protection test, a legislature has great latitude in enacting regulations, as long as they are rationally related to the state's objectives.[62] But under the compelling state interest test, there are further limitations on the legislature's authority. As the Court stated in *Dunn v. Blumstein*,[63] even if a state is attempting to achieve a legitimate interest, it cannot "unnecessarily burden or restrict constitutionally protected activity."[64] The Court stated further: "[I]f there are other, reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference. If it acts at all, it must choose 'less drastic means.'"[65] In contrast, while *Storer* stated that California was not required to choose ineffectual means to further its interests,[66] it failed to require California to show that there were no effective, but less burdensome, means available. This failure is especially significant in light of the Court's statement that "[a] State need not take the course California has."[67] Hav-

58. 393 U.S. 23 (1968).

59. 415 U.S. at 730, *quoting* Williams v. Rhodes, 393 U.S. 23, 30 (1968).

60. *See* 393 U.S. at 33. The Court explained that the identity of those opposed to the candidates and policies of the major parties often could not be determined until shortly before the election.

61. As the dissent noted, this requirement meant that a party member would have to realize seventeen months before an election that he desired to run as an independent candidate. Accordingly, he would have to take action at a time when the potential nominees of the two major parties would probably be unknown. 415 U.S. at 758.

62. Engdahl, *supra* note 10, at 29.

63. 405 U.S. 330 (1972).

64. *Id.* at 343.

65. *Id.*

66. 415 U.S. at 736.

67. *Id.* North Carolina, for example, is not noted for its political instability or

ing implied that some states achieved political stability by other means, the Court should have inquired into the nature of these alternatives. By not requiring the State to utilize less drastic means, the Court went a step further in increasing the latitude of the legislature's authority.

The significance of the *Storer* decision lies in its implications for future franchise cases. It suggests that, when election laws that do not directly and blatantly infringe the rights of voters are challenged, the Court will lower the justification hurdle that the state must surmount. As a result, it is likely that the Court will approve electoral restrictions that accomplish indirectly what it was previously declared could not be done directly. The *Storer* decision indicates particularly that when candidacy restrictions are involved, the Court will apply a more lenient standard of evaluation. Such an approach by the Court seems unwise, for little has been gained if a soldier in Texas[68] or an indigent in Virginia[69] is allowed into the voting booth only to discover that those candidates representing his point of view have been excluded from the ballot. James Madison recognized this critical relationship between rights of candidates and those of voters when he said, "A republic may be converted into an aristocracy or oligarchy, as well by limiting the number capable of being elected as the number authorized to elect."[70]

S. ELIZABETH GIBSON

Sovereign Immunity—Scheuer v. Rhodes: Reconciling Section 1983 Damage Actions with Governmental Immunities

In developing satisfactory judicial approaches to the section 1983 remedies of the Civil Rights Act,[1] federal courts have encountered con-

its high degree of interparty raiding, and yet it places no requirement of prior disaffiliation on independent candidates. Under N.C. GEN. STAT. § 163-122 (Supp. 1973), a potential independent candidate must file an affidavit stating that he "*does not* affiliate with any political party" (emphasis added). There is no further requirement that he must not have affiliated with a party at any time in the past.

68. *See* Carrington v. Rash, 380 U.S. 89 (1965).

69. *See* Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966).

70. 5 J. ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 404 (1845).

1. 42 U.S.C. § 1983 (1970) (originally enacted as Act of April 20, 1871, ch. 22, § 1, 17 Stat. 13) provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof