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Toward an Interstate Standard of Equal Protection of the Laws: A Speculative Essay

Arthur S. Miller*
Jeffrey H. Bowman**

Today, the fourteenth amendment embodies much of what has become our natural-law Constitution. After a century, the amendment stands as both a symbol of national unity and a practical guarantee of nationally established rights.

—Kenneth L. Karst***

I. INTRODUCTION

“During the twentieth century, the United States became a united state. Given the world and national history of our troubled century, that was probably inevitable, and there is surely no turning back”¹ That comment by Professor Theodore Lowi is the basic theme of this essay, which suggests that the time has come for our constitutional law to recognize that we are indeed a “united state.” The immediate focus will be upon equal protection of the laws, an express limitation on the states only, but a concept that is at times “incorporated” into the fifth amendment’s due process limitation on the federal government. We argue for a national—an *interstate*—standard for equal protection, predicated on the basic position that the term, “the laws,” in the fourteenth amendment should be interpreted to mean more than those of one state or one jurisdiction only.

That, to be sure, cuts against the grain of orthodox equal protection doctrine. But it is the next logical step for equal protection interpretation to take. In a well-known sentence, Archibald Cox maintained that “[o]nce loosed, the idea of equality is

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*** Karst, *Not One Law at Rome and Another at Athens: The Fourteenth Amendment in Nationwide Application*, 1972 WASH. U.L.Q. 383, 404.

1. T. LOWI, *THE END OF LIBERALISM* 295 (2d ed. 1979).

not easily cabined."² Surely that is accurate. A little over a half-century ago, Justice Holmes, in an opinion his idolators would like to forget, called equal protection the usual last resort of constitutional arguments—and brusquely dismissed Carrie Buck's plea that she should not be involuntarily sterilized.³ Since then the idea of equal protection has indeed been loosed so that commentators routinely talk about the "new" or "substantive" equal protection.

That familiar learning will not be retraced here. Nor is this essay an exhaustive delineation of all of the nuances and permutations of interstate equal protection; rather, it is a speculative essay, designed more to stimulate debate than to answer all of the questions of such a doctrinal extension. We recognize that it will take a considerable mental leap into the dark future for others to grasp and agree with our net conclusion. The discussion below begins with an examination of the "new" jurisprudence of the Supreme Court, which cannot be traced beyond *Cooper v. Aaron*⁴ in 1958, and then proceeds to set forth the arguments, pro and con, for interstate equal protection. The resurrection of substantive due process with its significant elements of equal protection, in conjunction with the concept of "reverse incorporation" and the potential meaning of "national citizenship," suggests that the growth of equal protection is far from over.

II. THE HISTORICAL AND SOCIAL CONTEXT OF EQUAL PROTECTION

The nation began in 1789 without an equality principle in the Constitution, it having been dropped after enunciation in the Declaration of Independence. Only when the Civil War produced the fourteenth amendment did one appear—as a limitation on the states alone, not on the federal government. Only in this century—and, then, mostly since 1954—has the principle been applied to the federal government.⁵ This essay does not trace that development, for Professor Karst's recent discussion of the congruence between the equality protections of the four-

2. Cox, *The Supreme Court, 1965 Term-Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV L. REV. 91 (1966).

3. *Buck v. Bell*, 274 U.S. 200 (1927).

4. 358 U.S. 1 (1958).

5. See *Bolling v. Sharpe*, 347 U.S. 497 (1954); Karst, *The Fifth Amendment's Guarantee of Equal Protection*, 55 N.C.L. REV. 541 (1977).

teenth and fifth amendments ably sets out the several considerations therein.⁶

Historically, equal protection provides a classic illustration of one aspect of the "living" or "operative" Constitution. The words in the document remain the same, but their content continues to change through time. That disturbs some commentators, who believe that we have an "imperial judiciary" or "government by judiciary."⁷ Those accusations are hardly accurate, even though their basis—that the Supreme Court has read new meaning into ancient clauses—is correct. There should be no surprise that a further extension of equal protection is recommended. Cardozo once maintained that there were fields in the "domain of law where fundamental conceptions have been developed to their uttermost conclusions by the organon of logic."⁸ He was not then talking about the Constitution; and it is by no means clear that he was correct. The genius of American law, including the area of "constitutional common law,"⁹ is that principles have a way of being ameliorated in a sort of Hegelian synthesis, or of striking some type of Aristotelian golden mean, rather than being extended to the outermost limits of their logic. To cite but one relevant example, *Shelley v. Kramer*¹⁰ could have revolutionized private law; but it has not. The principle has scarcely been extended since 1948. Nevertheless, as de Tocqueville noted a century and a half ago, there seems to be a marked tendency toward egalitarianism in the United States.¹¹ That, according to the late Professor Alexander Bickel,¹² has been one of the drummers to which the Supreme Court has marched in recent decades. The history of Supreme Court law-making since *Buck v. Bell* evidences the accuracy of Bickel's observation.

It is not that the actual social structure in the United States has been altered substantially—as Bickel implied—because it has not. No massive redistribution of wealth has occurred, although members of the working class have been able to catch at

6. Karst, *supra* note ***.

7. E.g., R. BERGER, *GOVERNMENT BY JUDICIARY* (1977); L. GRAGLIA, *DISASTER BY DECREE* (1976); Glazer, *Towards an Imperial Judiciary?*, 41 *PUB. INTEREST* 104 (1975).

8. *SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO* 294 (M. Hall ed. 1947).

9. See Monaghan, *The Supreme Court, 1974 Term—Foreward: Constitutional Common Law*, 89 *HARV. L. REV.* 1 (1975).

10. 334 U.S. 1 (1948).

11. A. DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* (F. Botten ed. 1864).

12. A. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* 103 (1970).

least some crumbs from the groaning table of economic opulence that is the United States. The expansion of equal protection law occurred almost entirely during America's true "golden age"—that time from about 1945 to 1970 when the dollar was king and American military might supreme, when commentators could seriously talk about a *Pax Americana*, and when economic growth within the United States seemed to know no bounds.¹³ However, in the last ten years recognition of "the limits to growth" and the coming of a steady-state economy has so altered the social milieu¹⁴ in which constitutional norms are applied that one must recognize that discussions of constitutional issues outside of the social context in which they arise tend, more and more, to be mere sterile exercises in doctrinal exegesis—helpful perhaps to lawyers but not at all helpful to the lawyer-judges who sit upon the High Bench.¹⁵ The point is obvious. At least, it should be obvious; but it is little acknowledged in the law journals and elsewhere in the legal profession. "Legalism"—the notion that law is *there*, separate and apart from the warp and woof of society—still is the prevailing ideology of lawyers.¹⁶ That is a pathetic fallacy, but one routinely purveyed to thousands of law students.

A full contextual analysis is not possible within the scope of this essay. Suffice it merely to draw attention to Professor Lester C. Thurow's insightful book, *The Zero-Sum Society*.¹⁷ He maintains that the political (for which, read constitutional) order is in disarray, unable to deal effectively with the consequences of burgeoning and coalescing economic problems such as inflation, unemployment, slow growth, low productivity, environmental decay, economic discrimination, and inequality, because massive distributional actions must be taken. "In the past," Thurow says, "political and economic power was distributed in such a way that substantial economic losses could be imposed on parts of the population Economic losses were allocated to particular powerless groups rather than spread across the population. These groups are no longer willing to accept losses and are

13. See A. MILLER, *DEMOCRATIC DICTATORSHIP: THE EMERGENT CONSTITUTION OF CONTROL* (1981).

14. See W. OPHULS, *ECOLOGY AND THE POLITICS OF SCARCITY* (1976).

15. For examples, see almost any issue of the *Supreme Court Review* and any of the *Harvard Law Review's* annual summaries of Supreme Court activities.

16. See J. SHKLAR, *LEGALISM* (1964).

17. L. THUROW, *THE ZERO-SUM SOCIETY* (1980).

able to raise substantially the costs for those who wish to impose losses upon them."¹⁸

The meaning in political or constitutional terms is paradoxical: pluralism as a political order is breaking down *simply because it has been successful*.¹⁹ Thurow ends his important discussion of "the zero-sum society" with these ominous words:

As we head into the 1980s, it is well to remember that there is really only one important question in political economy. If elected, whose income do you and your party propose to cut in the process of solving the economic problems facing us? Our economy and the solutions to its problems have a substantial zero-sum element. Our economic life would be easier if this were not true, but we are going to have to learn to play a zero-sum economic game. If we cannot learn, or prefer to pretend that the zero-sum problem does not exist, we are simply going to fail.²⁰

Law, including constitutional law, is a reflection of economics. A number of zero-sum Supreme Court decisions on equal protection have been rendered in recent years—*Bakke*,²¹ *Weber*,²² *Rodriguez*,²³ and *Fullilove*²⁴ are perhaps the outstanding examples. The Justices are playing a zero-sum economics game while using lawyers' language—an example of how economists and lawyers can be talking about the same thing but using different word symbols, and thus not communicating at all (as John R. Commons observed in 1950).²⁵

In sum, then, equal protection law and its analysis by courts and commentators alike should be seen in the context of the zero-sum society. That society is, as Lowi says, a "united state." The thesis of this essay is that it is both feasible and desirable to think of equal protection as a national standard, one that recognizes "the claims of equal national citizenship" in a "national community,"²⁶ with that standard being interstate, not intra-

18. *Id.* at 12.

19. See A. Miller, Oracle in the Marble Palace: Politics and the Supreme Court (manuscript in possession of author); T. Lowi, *supra* note 1. See also H. Kariel, *THE DECLINE OF AMERICAN PLURALISM* (1961).

20. L. Thurow, *supra* note 17, at 214.

21. *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978).

22. *United Steel Workers v. Weber*, 443 U.S. 193 (1979).

23. *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1 (1973).

24. *Fullilove v. Klutznick*, 448 U.S. 448 (1980).

25. J. Commons, *THE ECONOMICS OF COLLECTIVE ACTION* 309-14 (1950).

26. Karst, *The Supreme Court, 1976 Term-Foreword: Equal Citizenship Under the*

state. The fourteenth amendment, of course, speaks in terms of *no state* denying to any *person* within its jurisdiction the *equal protection* of the *laws*. That delphic command is far from clear, as dozens of cases illustrate. But those decisions revolve around two basic questions—what is state action? and what is equal protection?—and one important, but seldom discussed, question: what is a person? It is familiar learning that state action has been an evolving concept whose development is not yet over, and that equal protection is determined by different standards according to the factual contexts in which issues arise. As for the problem of who or what is a person, a tribunal that without argument conceded that the disembodied entities called corporations are constitutional persons²⁷ almost a century later refused that status to a fetus.²⁸

The meaning of the word, "laws," in the fourteenth amendment has not been subjected to rigorous analysis by scholars. Historically, of course, it meant the laws of a given state or of a given jurisdiction within one state. At most, the Court, as in *Yick Wo v. Hopkins*,²⁹ has been willing at times to penetrate the thicket of administration and determine how given statutes or ordinances are administered; or it has made, as in *Palmer*³⁰ and *Davis*,³¹ the motivation of legislators the determining criterion. In *San Antonio School District v. Rodriguez*,³² a Court majority rejected disparities of financing between school districts, finding no equal protection violation.

If one takes an antiquarian view of constitutional interpretation, resting primarily on *stare decisis* and ultimately on the intentions of those who wrote the fourteenth amendment, then the answer to the question—should there be an interstate standard of equal protection?—is easy: No. But the Justices, save when they wished, and that is seldom, have never been circumscribed by such a rigid view of interpretation. Those who acknowledge, in Professor Ray Forrester's language, "truth in judging,"³³ readily concede that the Justices make up the law as they go along—always have, as Justice White said in *Miranda v.*

Fourteenth Amendment, 91 HARV. L. REV. 1 (1977).

27. *Santa Clara County v. Southern Pac. Ry.*, 118 U.S. 394 (1886).

28. *Roe v. Wade*, 410 U.S. 113 (1973).

29. 118 U.S. 356 (1886).

30. 403 U.S. 217 (1971).

31. 426 U.S. 229 (1976).

32. 411 U.S. 1 (1973).

33. Forrester, *Are We Ready for Truth in Judging?*, 63 A.B.A.J. 1212 (1977).

*Arizona*³⁴—and no doubt will continue to do so as long as the Court functions. Indeed, as Justice Brennan flatly stated in *Richmond Newspapers v. Virginia*,³⁵ “Under our system, judges are not mere umpires, but, in their own sphere, lawmakers—a coordinate branch of government.”³⁶ The road, thus, is open for new vistas to be seen in equal protection law—and it is one of those vistas that we advocate: Equal protection, to repeat, should include discriminations among states, with “laws” meaning the laws of other states as well, whenever fundamental rights are at issue. A tribunal that can swallow, without difficulty, the notion that an artificial economic collectivity is a person, and even extend freedom of speech to it,³⁷ surely should be able to read the word “laws” more expansively.

III. THE NEW JURISPRUDENCE OF THE SUPREME COURT

That there is a sociological basis for the United States being a united state admits of no doubt. Americans are far more closely knit together today, because of scientific and technological developments in transportation, communications, and other economic activities, than were their predecessors in 1787, 1800, 1850, or even 1900. There have been more changes in the human condition in the little more than a century since the fourteenth amendment was placed in the Constitution than in known human history before 1868. We are in the midst today of a *third* industrial revolution, one which bids fair to alter the environment in which *Homo sapiens* exist more than either the first or second,³⁸ and one which can only be compared to the agricultural revolution that occurred eons ago. There should, therefore, be little wonder that ancient constitutional mechanisms and institutions are being adapted to new social conditions. The scrutiny here is on one of those institutions—the Supreme Court of the United States and its “new” jurisprudence of the past quarter-century.

Our account, necessarily brief, begins with *Cooper v.*

34. 384 U.S. 436, 531 (1966) (White, J., dissenting).

35. 448 U.S. 555 (1980).

36. *Id.* at 595 (Brennan, J., concurring).

37. *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978). See Miller, *On Politics, Democracy, and the First Amendment: A Commentary on First National Bank v. Bellotti*, *WASH. & LEE L. REV.* — (1981).

38. See, e.g., P. LARGE, *THE MICRO REVOLUTION* (1980); A. BURKITT & E. WILLIAMS, *THE SILICON CIVILIZATION* (1980).

Aaron,³⁹ the Little Rock school desegregation decision of 1958. There, in a unique opinion individually signed by all nine Justices, the Court unanimously held that defiance of the principle of *Brown v. Board of Education* (I & II)⁴⁰ could not be tolerated, and that a Supreme Court decision was "the law of the land."⁴¹ As such, the Court said, it was, under the theory of article VI's principle of federal supremacy, superior to and overriding of any inconsistent state law or policy. In the words of Professor Philip Kurland, "the Court seemed to assume the same scope for its decision as the statute [the 1964 Civil Rights Act] could claim."⁴² Kurland goes on to assert that "[a] Supreme Court opinion, whatever its merits, cannot seriously be treated as the equivalent of a statute for purposes of the Supremacy Clause. Nor have they been so treated, however highly the Supreme Court itself may regard some of them."⁴³

On the latter point, Professor Kurland is technically correct. But on the larger matter he surely can be faulted. Decisions of the Supreme Court, whether liked or not, *are* considered to be "the law of the land" and thus to be the "equivalent of a statute for purposes of the Supremacy Clause." Not only laymen but members of the legal profession view those decisions as establishing a norm of conduct not unlike a statute. The meaning for present purposes is clear: a decision on equal protection in, say, a case coming from New York is the law of the land. That means that law enforcement personnel in all other states are similarly bound even though they could not be held in contempt for refusing to adhere to the decision. That, at least, is the inescapable inference to be drawn from such decisions as *Shapiro v. Thompson*.⁴⁴ There should not be, as Professor Karst has said in quoting Cicero, "one law at Rome and another at Athens."⁴⁵

Although it is logically impossible to infer a general principle from a particular one, that is precisely what is being done. Law is far from the logical endeavor that some think it is. Justice Felix Frankfurter said it well in 1954:

39. 358 U.S. 1 (1958).

40. 347 U.S. 483 (1954); 349 U.S. 294 (1955).

41. 358 U.S. at 18.

42. P. KURLAND, *POLITICS, THE CONSTITUTION AND THE WARREN COURT* 185 (1970).

43. *Id.* at 186.

44. 394 U.S. 618 (1969).

45. Karst, *Not One Law at Rome and Another at Athens: The Fourteenth Amendment in Nationwide Application*, 1972 WASH. U.L.Q. 383, 404 (1972).

Human society keeps changing. Needs emerge, first vaguely felt and unexpressed, imperceptibly gathering strength, steadily becoming more and more exigent, generating a force which, if left unheeded and denied response so as to satisfy the impulse behind it at least in part, may burst forth with an intensity that exacts more than reasonable satisfaction. Law as the response to those needs is not merely a system of logical deduction, though considerations of logic are far from irrelevant. *Law presupposes sociological wisdom as well as logical unfolding.*⁴⁶

One of the considerations of logic that distinctly is not relevant is the plain and simple proposition that a Supreme Court decision in a *single case* (even though not a class action) is the statement of a *general norm*. Some language of Chief Justice Fred Vinson is apposite: “[Y]ou are,” he told the American Bar Association, “in a sense, prosecuting or defending class actions; . . . you represent not only your clients, but tremendously important principles, upon which are based the plans, hopes, and aspirations of a great many people throughout the country.”⁴⁷ In other words, cases are chosen not in the interests of the litigants but in the interests of the development of the law—the development of general principles. The Court rules not only for the parties at the bar, but for generations yet unborn. The “class actions” that are constitutional cases are, to be sure, “backdoor” or de facto class actions, for often, perhaps usually, litigation is solely between the parties before the Court. (They can also validly be called “backdoor” advisory opinions.)⁴⁸ However, once the Justices have decided a dispute on the merits the result has the practical, but not the technical, effect of binding everyone similarly situated throughout the nation. The meaning should be clear: the Court has assumed “the role of a third legislative chamber.”⁴⁹ Some decry that,⁵⁰ but most do not deny it. For better or for worse, something akin to, but not exactly the same as,

46. F. FRANKFURTER, *OF LAW AND MEN* 35 (1956) (emphasis added).

47. Address by Chief Justice Vinson to the American Bar Association (Sept. 7, 1949), reprinted in 69 S. Ct. v, vi (1949). See Miller, *Constitutional Decisions as De Facto Class Actions*, — U. DET. J. URB. L. — (1981).

48. See Miller & Barron, *The Supreme Court, the Adversary System, and the Flow of Information to the Justices: A Preliminary Inquiry*, in A. MILLER, *THE SUPREME COURT* 261 (1978).

49. L. HAND, *THE BILL OF RIGHTS* 55 (1958).

50. See, e.g., Leedes, *The Supreme Court Mess*, 57 TEX. L. REV. 1361 (1979); Bridwell, *The Scope of Judicial Review: A Dirge for the Theorists of Majority Rule?*, 31 S.C.L. REV. 617 (1980).

what the Framers refused to put into the Constitution when drafted in 1787—a Council of Revision⁵¹—has been created by judicial assertion and public acquiescence.

That means, however, merely that a single Supreme Court decision can have a statute-like effect. As with Congress, the Justices feel free to “repeal” previous decisions and to “enact” others, for as Justice William O. Douglas said in *Glidden v. Zdanok*, constitutional questions are “always open.”⁵² There is another, more portentous development in the new jurisprudence, heralded by *Cooper v. Aaron*—the propensity of the Court at times, but far from always, to set forth its rulings in deliberate general language. *Cooper* started it, but the process has not ended. The decisions are not many, but they are significant. They include, but are not limited to *Reynolds v. Sims*⁵³ (one person/one vote); *Miranda v. Arizona*⁵⁴ (on what police officers should do with criminal suspects); *Green v. School Board*⁵⁵ (in which an “affirmative duty” was imposed upon school boards to integrate public schools); the abortion cases⁵⁶ (setting forth when a woman may voluntarily have an abortion based on a trimester system); and *United States v. Snapp*⁵⁷ (where a contractual agreement was held to override first amendment rights). The point is that in these illustrative cases, the Justices openly and outwardly used statutory-like language and wrote opinions couched in general terms (for the entire nation) and with little regard for the actual litigants. Clarence Gideon, to take another example, was of little importance *as an individual* to the Court; his significance was that the facts of his incarceration by Florida provided a looked-for stimulus to make a general rule about the availability of counsel in noncapital criminal cases.⁵⁸ Support for the point being made may be found in *Pickering v. School Board*,⁵⁹ where Justice Marshall expressly refused to extend the “rule of the case” beyond the specific facts of the *Pickering*

51. Under Randolph’s proposed Council of Revision, every law passed by the legislature automatically would have been previewed by the judiciary before taking effect. See *United States v. Richardson*, 418 U.S. 166, 189 (1974) (Powell, J., concurring).

52. 370 U.S. 530, 592 (1962) (Douglas, J., dissenting).

53. 377 U.S. 533 (1964).

54. 384 U.S. 436 (1966).

55. 391 U.S. 430 (1968).

56. *Roe v. Wade*, 410 U.S. 113 (1973); *Doe v. Bolton*, 410 U.S. 179 (1973).

57. 444 U.S. 507 (1980), *rehearing denied*, 100 S. Ct. 1668 (1980).

58. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

59. 391 U.S. 563 (1968).

litigation.

This is not the time to discuss the matter further. Suffice it to conclude that the time-honored result of the adversary system—the production of the “law of the case”—is slowly being changed to mean the “law of the land.”⁶⁰ From that may be derived the proposition that the “laws” covered by equal protection should have an interstate dimension in those areas considered to be “fundamental rights.” That is the ultimate meaning of *Cooper v. Aaron*. Our discussion now narrows to a case study on voting, which will be used as an example for the larger principle.

IV. ENFRANCHISING THE INDEPENDENT VOTER

In 1980 some 35 states held a presidential primary, determining over 65 percent of each convention's votes. Yet voters in sixteen of these states, who did not wish to be publicly affiliated with a political party, were statutorily barred from voting in their state's primary. These states selected a total of 1,324 delegates to the Democratic and 735 delegates to the Republican National Conventions. Statutes there prescribe a “closed primary,” by which voting is restricted to those who, in some manner and at some time prior to voting, publicly declare their affiliation with a political party and have that affiliation recorded. The consequence is a gross disenfranchisement of millions of Americans that raises serious questions about the most significant voting bloc in the country, the independent voters.⁶¹ Is

60. Compare *Cooper v. Aaron*, 358 U.S. 1 (1958), with President Lincoln's views: Judicial decisions “must be binding in any case upon the parties to a suit as to the object of the suit,” and “while they are also entitled to very high respect and consideration in all parallel cases by all other departments of the Government,” nonetheless,

if the policy of the Government is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made in ordinary litigation between parties in personal actions the people will have ceased to be their own rulers, having to that extent practically assigned their Government into the hands of that eminent tribunal.

Quoted in J. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* 213 (1980). See also R. JACKSON, *THE STRUGGLE FOR JUDICIAL SUPREMACY* 96-104 (1941) (discussing how national monetary policy was set by the Supreme Court in a lawsuit between private parties involving the sum of \$15.60).

61. There is a growing movement away from the two major political parties. A recent Gallup Poll, conducted from November 1980 to February 1981, indicates that 31% of the American voters consider themselves to be “independents.” (42% were Democrats and 29% were Republicans). *N.Y. Times*, Mar. 8, 1981, at 30, col. 2. Moreover, it is likely that this figure will continue to grow in future elections since 45% of the voters under 30 classify themselves as independents. N. NIE, S. VERBA, & J. PETROCIK, *THE CHANGING*

their fundamental right to vote fatally diluted? And, if so, are they being accorded equal protection of the laws?

Political parties have existed in this nation for over 175 years and today dominate the presidential nominating process. In most elections, participation in the political party nominating process is the *sine qua non* to meaningful participation in the electoral process. As the impetus for increased popular participation in the nominating process has grown from the progressive movement of the early twentieth century,⁶² the traditional party caucus has been replaced by popularly elected nominating conventions and by the increased use of direct primaries.⁶³ Justice Pitney's oft-quoted statement in *Newberry v. United States*⁶⁴ that "every voter comes to the polls on the day of the general election confined in his choice to those few candidates who have received party nominations"⁶⁵ evidences early judicial recognition of the important role political parties and primary elections play in the electoral process.

Beginning with Wendell Wilkie's attempt to use the 1944 Wisconsin presidential primary as a vehicle for demonstrating his popular support within the Republican Party, primary competition has become a feature of every presidential election.⁶⁶ Primaries played an especially important role in the campaigns for the Republican nominations in 1948 (Stassen, Dewey, and

AMERICAN VOTER 64 (1976).

62. States that have passed primary election laws have done so because "[c]onventions were thought to be susceptible to manipulation by party leaders and a wide-spread faith existed that more popular participation would have a cleansing effect on politics." V. KEY, JR., *POLITICS, PARTIES AND PRESSURE GROUPS* 409 (5th ed. 1964). Similarly, Robert M. LaFollette, Sr., called for the adoption of the primary, arguing,

No longer . . . will there stand between the voter and the official a political machine with a complicated system of caucuses and conventions, by the easy manipulation of which it thwarts the will of the voter and rules of official conduct If the voter is competent to cast his ballot at the general election for the official of his choice, he is equally competent to vote directly at the primary election for the nomination of the candidates of his choice.

Speech by Robert M. LaFollette, Sr., accepting nomination for governor, August 8, 1900. Interestingly, this speech was not quoted in *TORRELLE, LAFOLLETTE'S POLITICAL PHILOSOPHY* 36-37 (1920), as reported in *LaFollette v. Democratic Party*, 93 Wis. 2d 473, 492-93, 287 N.W.2d 519, 527 (1980).

63. C. MERIAM & R. OVERACKER, *PRIMARY ELECTIONS* 60-67 (1928).

64. 256 U.S. 232 (1921).

65. *Id.* at 286 (Pitney, J., dissenting).

66. Presidential primaries, of course, have been on the American political scene longer than this. Their effect on the party nominating process, however, was questionable. In 1912, for example, Theodore Roosevelt won 9 out of 12 primaries yet lost his race against President William Howard Taft for the Republican Party nomination.

Taft), 1952 (Eisenhower and Taft), 1964 (Goldwater and Rockefeller), 1976 (Ford and Reagan), and 1980 (Reagan and Bush); and the Democratic nominations in 1952 (Kefauver,⁶⁷ Russell, and Truman—supported favorite sons), 1956 (Stevenson and Kefauver), 1960 (Kennedy and Humphrey), 1968 (McCarthy, Kennedy, and Johnson—supported favorite sons), 1972 (McGovern, Humphrey, Muskie, Wallace and Jackson), 1976 (Carter and Udall) and 1980 (Carter and Kennedy).⁶⁸

Moreover, it is clear that the winners of the Democratic and Republican Party nominations are historically the only viable candidates for election to the presidency.⁶⁹ Professor R. A. Dahl, writing in 1964, noted the dominance of the two-party system with respect to both the executive and legislative branches:

Since 1860 every presidential election has been won by either a Democrat or a Republican; in only four presidential elections during that period has a third party ever carried a single state. . . . Since 1862 one of the two parties has always had a clear majority of seats in the House; in the Senate, independents or third party members have prevented a clear majority during a total of ten years. The number of seats held by third party members is almost always extremely low.⁷⁰

Nomination by a recognized party substantially reduces the scope of a citizen's real choice in the general election. Today, the nomination process is controlled by voting in the primary elections (and caucuses). Theodore H. White has appraised the im-

67. In 1952, Senator Kefauver won 12 of the 16 presidential primaries, yet the nomination went to Senator Adlai E. Stevenson, who had entered no primaries.

68. For the official primary returns from 1948-1972, see CONGRESSIONAL QUARTERLY, GUIDE TO U.S. ELECTIONS 332-49 (1975). For the 1976 primary returns, see CONGRESSIONAL QUARTERLY, POLITICS IN AMERICA 142-47 (1979).

69. Indeed, the District of Columbia Circuit recently recognized this phenomenon: Regular presidential contests between the Republican and Democratic parties began in 1852. However, the present Democratic Party can trace its origins to the Democratic Republican Party which Thomas Jefferson began to assemble even before the end of Washington's first term. H. BONE, AMERICAN POLITICS AND THE PARTY SYSTEM, 28-30 (1971). A case can likewise be made that Hamilton's Federalists and subsequently the Whig Party were the predecessors of the present Republican Party. E. SAIT, AMERICAN PARTIES AND ELECTIONS 205 (1927). If so, then the only Presidents who may plausibly claim not to be the products of the two-party rivalry are James Monroe and John Quincy Adams, who served during a sort of party "interregnum" after the decline of the Federalists and before the rise of the Whigs. See Bone, *supra*, at 28.

Ripon Society v. National Republican Party, 525 F.2d 567, 581, n.37 (D.C. Cir. 1975) (en banc), *cert. denied*, 424 U.S. 933 (1976).

70. R. DAHL, PLURALIST DEMOCRACY IN THE UNITED STATES 214 (1967).

portance of the primary election this way:

Primaries had already thus become, by 1972, one of the great drive engines of American politics—for a primary is a deed. All else in politics, except money, is words—comment, rhetoric, analysis, polls. But a primary is a fact. There is a hardness to such a fact, especially if the victory is a contested one. With the lift of such an event, a candidate can compel attention, build votes, change minds. It is the underdog's classic route to power in America.⁷¹

Presidential primaries should be viewed for what they actually are, integral parts of the general election, controlling the choices of those who have the right to vote. Because of this determinative role, primary outcomes should be truly representative of all the voters, not merely of avowed party members. A recent but single United States Supreme Court case interferes with this position.

A. *The LaFollette Case*

In *Democratic Party of the United States v. LaFollette*,⁷² the Supreme Court considered a challenge by the National Democratic Party to Wisconsin's open primary law.⁷³ The Wisconsin law permits all qualified voters to cast ballots in the presidential preference primary regardless of their party affiliation. Wisconsin delegates to the national convention are selected by party members at statewide party caucuses, but they are bound by state statute to vote in accordance with the preferences expressed in the primary. However, this open primary approach conflicts with the rules of the Democratic Party which decree that only those persons who openly and publicly declare their adherence to the principles of the Democratic Party may participate in the party's presidential preference primary. The National Party argued that as a result of Wisconsin's failure to restrict its Democratic primary to publicly declared party members, the popularity of various candidates within the party was distorted. The Party further argued that the binding open

71. T. WHITE, *THE MAKING OF THE PRESIDENT* 1972 at 71 (1973).

72. 101 S. Ct. 1010 (1981).

73. The "open primary" is so named because the "voter is not required to declare publicly a party preference or to have that preference publicly recorded. Each voter makes a choice of party in the privacy of the voting booth." 93 Wis. 2d at 485, 287 N.W.2d at 523.

primary would "infringe severely on the Democratic Party's effort to conduct its affairs."⁷⁴

A divided Court, speaking through Justice Stewart, ruled that Wisconsin could not bind the Democratic Party to honor the results of the open primary at its national convention. Justice Stewart found that the "issue is whether the state may compel the National Party to seat a delegation chosen in a way that violates the rules of the Party."⁷⁵ He asserted that resolution of this issue was controlled by the Court's decision in *Cousins v. Wigoda*.⁷⁶ There, the Court held that the 1972 Democratic National Convention had the right to refuse to seat an Illinois delegation that was chosen in accordance with state law but that violated party rules regarding participation of minorities, women and young people. In *LaFollette*, the Court found that "the members of the National Party, speaking through their rules, chose to define their associational rights by limiting those who could participate in the processes leading to the selection of delegates to the National Convention."⁷⁷ Because of this the Court concluded that "a State, or a court, may not constitutionally substitute its judgment for that of the Party."⁷⁸

The Court's analysis is seriously defective on two counts. First, the emphasis placed on *Cousins* is inappropriate. Indeed, as Justice Powell recognized in dissent, "[T]he facts of this case present issues that differ considerably from those we dealt with in *Cousins*."⁷⁹ In *Cousins* the Court was concerned that the delegates who vote on party rules and procedure, adopt a party platform, and vote for party officers be party members chosen in accordance with party rules and not a court order. There, "suffrage was exercised at the primary election to elect delegates to a National Party Convention."⁸⁰ In *LaFollette* the selection of individual delegates to the National Convention was not at issue because the delegate selection process was under the exclusive control of the Democratic Party. Wisconsin law provides that

74. Brief for Appellants at 33, *Democratic Party of the United States v. LaFollette*, 101 S. Ct. 1010 (1981).

75. *Democratic Party of the United States v. LaFollette*, 101 S. Ct. at 1018.

76. 419 U.S. 477 (1975).

77. 101 S. Ct. at 1019.

78. *Id.* at 1020. Justice Stewart merely restated the question at issue, and then used the question as a "reason." A conclusion is not a reason, even when uttered by a Supreme Court Justice.

79. *Id.* at 1022. (Powell, J., dissenting).

80. 419 U.S. 477, 489 (1975).

the "method of selecting the delegates or alternates [is] determined by the state party organization."⁸¹ No delegates are selected by the voter in Wisconsin. Once a delegate is elected, through whatever manner or process, Wisconsin law requires only that the delegate "vote in accord with the results of the open primary election."⁸² As Justice Powell noted, "While this regulation affecting participation in the primary is hardly insignificant, it differs substantially from the direct state interference in delegate selection at issue in *Cousins*."⁸³

Secondly, in an opinion which exalts form over substance, Justice Stewart, under the guise of associational rights, has given the two major parties a blank check to make rules for themselves and for all others affected by the parties' rules. In finding that "a State or a court may not constitutionally substitute its own judgment for that of a party,"⁸⁴ the Court has gone much too far in protecting the right of association. It has in practical effect, permitted those who control the major parties to make rules for all Americans. When the actions of any association have such a profound and far-reaching effect, not only on the group itself, but upon a state (as in *LaFollette*) and, indeed, upon the nation as a whole, members of the association should be held to have duties beyond that of looking out for their own protected rights. The National Democratic Party performs a significant public⁸⁵ function every four years when it selects one of the two major candidates for President of the United States.

81. WIS. STAT. ANN. § 8.12(3)(b) (WEST SUPP. 1980).

82. *Democratic Party of the United States v. LaFollette*, 101 S. Ct. 1010, 1014 (1981).

83. *Id.* at 1023. (Powell, J., dissenting) (emphasis added).

84. *Id.* at 1020. Justice Stewart offers no authority in support of this contention. He further states: "A political party's choice among the various ways of determining the make-up of a State's delegation to the party's national convention is protected by the Constitution." *Id.* Again, Stewart fails to cite authority for support or on point. Instead, he refers to *Ripon Society v. National Republican Party*, 525 F.2d 567, 585 (D.C. Cir. 1975) (en banc), cert. denied, 424 U.S. 933 (1976). That is hardly dispositive, particularly since Stewart designated it as a "cf."

85. The public nature of the primary is the extent to which public money is used in the primary process. The Presidential Primary Matching Payment Account Act, 26 U.S.C. §§ 9031-9042 (1976), provides limited public financing of presidential primary elections by authorizing federal matching payments for certain contributions to eligible candidates. The Act establishes a separate account within the United States Treasury known as the Presidential Primary Matching Payment Account from which the Secretary of the Treasury transfers funds to candidates whom the Federal Election Commission certifies are eligible to receive such funds. As of February 26, 1981, a total of \$31,309,062.16 had been certified to ten presidential candidates eligible to receive federal primary matching funds.

The Democratic Party is not a mere "private club"⁸⁶ primarily concerned, like the NAACP, with the associational rights of its members. When, as has become obvious, early presidential primaries (as in New Hampshire) and even party caucuses (as in Iowa) can have significant national ramifications—mainly, it seems, because of the mass media—then the privateness of the "political associations" should give way to clear recognition of their public, indeed national, status. This is what Justice Stewart in his majority opinion failed to perceive,⁸⁷ and what, therefore, makes his opinion and the decision faulty.⁸⁸

Voting is the first duty of democracy. Indeed, the Founding

86. 93 Wis. 2d at 515, 287 N.W.2d at 538.

87. Justice White, as a result of his association with the 1960 campaign of President Kennedy, and Chief Justice Burger, as a result of his association with the 1948 presidential campaign of Harold Stassen, are the only members of the current Court with even minimal national political experience. It has been suggested that

[i]n matters of political structure and process, . . . judges properly give deference to legislators whose work requires them to be in the thick of active political engagement. For when judges, particularly those appointed for life, come to questions of political process, they almost by definition do not have the benefit of current experience.

Leventhal, *Courts and Political Thickets*, 77 COLUM. L. REV. 345, 380 (1977). To illustrate the point, Judge Leventhal noted,

In 1916, Felix Frankfurter observed that Charles Evans Hughes, although a former governor, was waging a commonplace political campaign that was utterly lacking in distinction, a condition that he thought was in part due to the different nature of the intervening assignment on the Supreme Court where he had served with distinction.

Id.

88. *LaFollette* also presents the interesting question of whether the associational rights of the National Party transcend those of the State Party. As Justice Powell pointed out: "It is significant that the Democratic Party of Wisconsin, which represents those citizens of Wisconsin willing to take part publicly in party affairs, is here *defending* the state law." 101 S. Ct. 1010, 1024 (Powell, J., dissenting). The State Party, originally named in the action as respondent with the National Party, responded by agreeing that the state law may be validly applied against it and the National Party. The State Party then cross-claimed against the National Party and asked the court to recognize its delegation selected in accord with Wisconsin law. The State Party also filed papers in support of the Wisconsin law with the Supreme Court.

The Wisconsin law also had the support of the Democratic controlled state legislature. On September 5, 1979, by a unanimous vote of the state senate and a 92-1 vote of its assembly, the Wisconsin legislature by joint resolution supported the "firm and enduring commitment of the people of Wisconsin to the open presidential preference primary law as an integral element of Wisconsin's proud tradition of direct and effective participatory democracy." *Democratic Party v. LaFollette*, Docket No. 79-1631 (February 25, 1981) (Joint Appendix at 75-78). Moreover, on September 14, 1979, a bill intended to create a modified closed primary was firmly rejected in committee. 93 Wis. 2d at 490 n.14, 287 N.W.2d at 526 n.14.

Fathers⁸⁹ recognized that “[a] fundamental principle of our representative democracy is,” in Alexander Hamilton’s words, “that the people should choose whom they please to govern them.”⁹⁰ As stated by James Madison:

As each representative will be chosen by a greater number of citizens in the large than in the small republic, it will be more difficult for unworthy candidates to practice with success the vicious arts by which elections are too often carried; and the suffrage of the people being more free will be more likely to centre in men who possess the most attractive merit and the most diffusive and established characters.⁹¹

Not only does the Court’s approach in *LaFollette*, with its emphasis on the associational rights of party members, seemingly ignore the importance of the vote in a democracy, but it runs counter to the Court’s traditionally vigilant interest in protecting the right of the voting franchise against state or party abridgment. One hundred years ago in *Ex parte Siebold*,⁹² the Supreme Court held that Congress may enact statutes which protect every citizen against state interference with the right to vote. In *Yick Wo v. Hopkins*,⁹³ the Court recognized that “the political franchise of voting” was a “fundamental political right,”⁹⁴ preservative of all other individual rights. During the past two decades the Supreme Court has repeatedly emphasized the significance of a citizen’s right to vote and has vigorously protected it against infringement in any form. In 1964 in *Reynolds v. Sims*,⁹⁵ the Court stated,

Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exer-

89. The wisdom and expectations of the drafters of the Constitution have served as a foundation for the continued expansion of popular suffrage. Thus, six of the last twelve amendments to the Constitution have extended the elective franchise by restricting limitations thereon and expanding the ambit of protected participation. Amendment XV (race, color and previous condition of servitude); Amendment XVII (senatorial elections); Amendment XIX (women’s suffrage); Amendment XXIII (District of Columbia); Amendment XXIV (abolition of the poll tax); Amendment XXVI (18 year-old right to vote).

90. *Powell v. McCormack*, 395 U.S. 486, 547 (1969) (quoting Alexander Hamilton, from 2 DEBATES ON THE FEDERAL CONSTITUTION 257 (J. Elliot ed. 1876)).

91. THE FEDERALIST No. 10 (J. Madison), at 58 (H. Lodge ed. 1888).

92. 100 U.S. 371 (1880).

93. 118 U.S. 356 (1886).

94. *Id.* at 370.

95. 377 U.S. 533, 562 (1964). Although technically dicta, subsequent citation has made the Court’s language an accurate statement of law.

cise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.⁹⁶

The Court decided *Wesberry v. Sanders*⁹⁷ that same year and observed that “[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.”⁹⁸

Two years later, in *Harper v. Virginia Board of Elections*,⁹⁹ the Court declared the right to vote to be one of the fundamental rights protected by the equal protection clause of the fourteenth amendment, and concluded that “classifications which might invade or restrain them must be closely scrutinized and carefully confined.”¹⁰⁰ Subsequent cases have amplified and considerably broadened these holdings in applying them to specific circumstances.¹⁰¹ Moreover, it is no longer open to serious question that the right to vote in a primary election is as protected against state encroachment as is the right to vote in the general election.

The early attitude of the Supreme Court toward the status of primary elections may be gleaned from *Newberry v. United States*.¹⁰² There the Court found that

[primaries] are in no sense elections for an office, but merely methods by which party adherents agree upon candidates whom they intend to offer and support for ultimate choice by all qualified electors. General provisions touching elections in constitutions or statutes are not necessarily applicable to primaries—the two things are radically different.¹⁰³

The Court held that article I, section 4 of the Constitution, giving Congress power to regulate the manner of holding elections for the House of Representatives and the Senate, did not em-

96. *Id.* at 561-62 (1964).

97. 376 U.S. 1 (1964).

98. *Id.* at 17.

99. 383 U.S. 663 (1966).

100. *Id.* at 670.

101. *See, e.g.,* *Dunn v. Blumstein*, 405 U.S. 330 (1972) (durational residence requirement for voting found unconstitutional); *Kramer v. Union Free School Dist. No. 15*, 395 U.S. 621 (1969) (a state may not deny the right to vote to a citizen because he does not own or lease taxable realty).

102. 256 U.S. 232 (1921).

103. *Id.* at 250.

power Congress to limit expenditures of candidates in senatorial primaries.¹⁰⁴

As late as 1935 primaries were considered, in the absence of state regulation, to be functions of the political parties, which were recognized as private associations. In *Grovey v. Townsend*,¹⁰⁵ the Court held that the decision of the Convention of the Texas Democratic Party to exclude all blacks from participating in the Democratic primary did not constitute state action and therefore was not prohibited by either the fourteenth or the fifteenth amendments. This ruling came despite the Court's earlier decisions in *Nixon v. Herndon*¹⁰⁶ and *Nixon v. Condon*.¹⁰⁷ In *Herndon* a Texas law declaring blacks ineligible to vote in the Democratic primary was held to violate the fourteenth amendment. In *Condon* a subsequent Texas statute which likewise excluded blacks by allowing the Democratic Party executive committee to determine its voting membership was also found to violate the equal protection clause. In neither *Herndon* nor *Condon*, however, did the Court define "primary" as part of the electoral process.

The judicial view represented by *Grovey* underwent a radical change beginning with *United States v. Classic*.¹⁰⁸ The Court there overruled its decisions in *Newberry* and *Grovey* and held that the right to vote in a primary election was entitled to the same amount of protection from state abridgement as the right to vote in a general election:

Where the state law has made the primary an integral part of the procedure of choice, or where in fact the primary effectively controls the choice, the right of the elector to have his ballot counted at the primary, is likewise included in the right protected by Article I, § 2. And this right of participation is protected just as is the right to vote at the election, where the primary is by law made an integral part of the election machinery, whether the voter exercises his right in a party primary

104. Substantial disagreement with this point was expressed by the concurring Justices. Four Justices would have held that Congress had the power to regulate primary elections selecting senatorial nominees. *Id.* at 267-68 (White, C.J., concurring in part); *Id.* at 291 (Pitney, J., concurring in part, joined by Brandeis and Clarke, J.J.). One Justice reserved the question. *Id.* at 258 (McKenna, J., concurring, but reserving the question of Congress' power under the seventeenth amendment).

105. 295 U.S. 45 (1935).

106. 273 U.S. 536 (1927).

107. 286 U.S. 73 (1932).

108. 313 U.S. 299 (1941).

which invariably, sometimes or never determines the ultimate choice of the representative.¹⁰⁹

Three years later in *Smith v. Allwright*¹¹⁰ (the third of the quartet of cases commonly referred to as the "White Primary" cases),¹¹¹ the Supreme Court recognized the significance of the primary and the interest of each voter in effective political participation at this decisive stage of the electoral process. In *Smith* the Court held that the exclusion of blacks from the Texas Democratic primaries was state action in violation of the fifteenth amendment. Specifically overruling *Grovey*, the Court finally concluded that "the right to vote in . . . a primary for the nomination of candidates without discrimination by the State, like the right to vote in a general election, is a right secured by the Constitution."¹¹² The Court later extended constitutional protections to voters in "unofficial" primaries. In *Terry v. Adams*¹¹³ the Court scrutinized an association of qualified white Democratic voters which selected candidates who would then run for nomination in the official Democratic primary in Texas. The Court held that exclusion of blacks was invalid under the fifteenth amendment because they were not permitted to participate in a significant stage of the electoral process¹¹⁴ — "the sole stage of the electoral process where the bargaining and interplay of rival political forces would make [the blacks' vote] count." Although *Smith* and *Terry* were not fourteenth amendment cases, the principle is clear. Our argument herein merely takes the *Terry* principle one step further. Just as the exclusion from the primary election stage, where effective formation and compromise take place, denied the blacks their fifteenth amendment rights, we suggest that closed primary systems (such as Florida's) operate to exclude unaffiliated voters from the determinative "primary" stage of the electoral process,¹¹⁵ and thus in-

109. *Id.* at 318.

110. 321 U.S. 649 (1944).

111. *Terry v. Adams*, 345 U.S. 461 (1953); *Smith v. Allwright*, 321 U.S. 649 (1944); *Nixon v. Condon*, 286 U.S. 73 (1932); *Nixon v. Herndon*, 273 U.S. 536 (1927).

112. *Smith v. Allwright*, 321 U.S. at 661-62.

113. 345 U.S. 461 (1953).

114. *Id.* at 484 (plurality opinion of Clark, J., concurring, joined by Vinson, C.J., Reed and Jackson, J.J.).

115. Although to our knowledge no data exist, if it could be shown that a significant number of independent voters are either black or members of other minority groups, the extension of equal protection analysis to the rights of independents to vote in primary elections could be seen merely as the application of the standard adopted by the Court

volve an equal protection dimension.

The essence of the White Primary decisions is the premise that determination of who *can* be voted for in the general election is as important, or more important, as who *will* be voted for in that election. As Justice Pitney has stated, "The likelihood of a candidate succeeding in an election without a party nomination is practically negligible As a practical matter, the ultimate choice of the mass of voters is predetermined when the nominations have been made."¹¹⁶ Indeed, the Supreme Court has recently noted the winnowing process inherent in primary elections and its importance in a full election cycle. In *Storer v. Brown*,¹¹⁷ the Court upheld the state's move to guarantee that the primary election process reduce the number of candidates in the general election. Sustaining a state law that refused to permit defeated primary election candidates to get on the general election ballot via a third party candidacy, the Court reasoned,

The direct party primary in California is not merely an exercise or warm-up for the general election but an integral part of the entire election process, the initial stage in a two-stage process by which the people choose their public officers. It functions to winnow out and finally reject all but the chosen candidates.¹¹⁸

The right of citizens to vote in primaries was aptly described by the Third Circuit in *Lynch v. Torquato*.¹¹⁹

[T]he citizen's constitutional right to equality as an elector . . . applies to the choice of those who shall be his elected representatives in the conduct of government, not in the internal management of political party. It is true that this right extends to state regulated and party conducted primaries. However, this is because the function of primaries is to select nominees for governmental office even though, not because, they are party enterprises. The people, when engaged in primary and general elections for the selection of their representatives in government, may rationally be viewed as the 'state' in action, with the consequence that the organization and regulation of these enterprises must be such as accord each elector equal

in the "White Primary" cases.

116. *Newberry v. United States*, 256 U.S. 232, 286 (1921) (Pitney, J., concurring in part).

117. 415 U.S. 724 (1974).

118. *Id.* at 735. See also *Lubin v. Panish*, 415 U.S. 709, 715-16 (1974).

119. 343 F.2d 370 (3d Cir. 1965).

protection of the laws.¹²⁰

Although most of the cases in this series¹²¹ dealt with black voting rights, the underlying principle is that the same set of rules which govern the conduct of the general election should also operate in the regulation of the nomination process. That means that the spirit of the fifteenth amendment should be read into the equal protection clause and be applied generally. It is valid to maintain that the Court has at least tacitly recognized that the right to vote may be rendered meaningless in the absence of a correlative right to participate in the nominating process by which candidates are selected.

It is clear that the presidential primary is far more than a mere warm-up for the general election. It is an integral part of the entire selection process—the beginning of a two stage process. It functions to winnow out and finally reject all but the chosen candidates for the November election. But this is done in the closed primary states without allowing all voters to participate. Voters who choose to remain unaffiliated are barred from the most important ballot box, rendering their opportunity in the general election, as in November 1980, an empty charade. The question is whether that is desirable and also whether it jibes with the Constitution. The answer on both counts should be in the negative, both for purposes of policy and, for constitutional reasons. The right to vote can only mean the right to cast a meaningful ballot—something not now possible in Florida and other closed primary states, and something wrongfully limited by *LaFollette*.

B. Reasons for Enfranchisement

Three important arguments stand out in favor of opening primaries to all eligible voters, regardless of their willingness to declare party affiliation. The first, a practical observation, arises from an increasing political independence in this nation. The second finds root in considerations of our right to privacy. The third is that closed primary systems are unjustifiably

120. *Id.* at 372.

121. In addition to the judicial decisions discussed above, Congress enacted two pieces of legislation which had the effect of removing restrictions on the franchise: the Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified in 42 U.S.C. §§ 1971 to 1973bb-1 (1976)), and the Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, 84 Stat. 314 (amending 42 U.S.C. §§ 1973b, 1973c, 1973aa to 1973bb-4 (1970) (amended and repealed in part, 1975)).

discriminatory.

1. *Increasing political independence.* Many Americans are "issue-oriented," and for that reason are not party followers.¹²² Since John F. Kennedy's success in 1960, the personality and "media image" of political candidates dominate over political party labels. Presidential candidates are marketed through television by advertising specialists. As political analyst David Broder observed in 1972, "Television and radio enable well-financed candidates to go directly into the homes of voters far more effectively than even the most well-organized political machine."¹²³ There is strong evidence that the parties are weakening.¹²⁴ Indeed, recent polls have indicated a steady rise in the number of voters who consider themselves independent.¹²⁵ Fewer than fifty percent of the eligible voters voted for either Ronald Reagan or Jimmy Carter in 1980. Moreover, the national party-affiliated voters increasingly split tickets in general elections—a sign of weakened party loyalty and increased voter independence. This trend is documented in an electoral study which illustrates "defection rates" for those who profess affiliation with a political party.¹²⁶ Justice Powell, in his dissenting

122. D. BRODER, *THE PARTY'S OVER* (1972). "Seen as not relevant, parties are bypassed with the voters making their choices on the basis of their own issue preferences and those of the candidates." G. POMPER, *VOTERS' CHOICE* 183 (1975). See also E. LADD, JR. & C. HADLEY, *TRANSFORMATIONS OF THE AMERICAN PARTY SYSTEM* 301 (1975) (parties are perceived as less than needed by the contemporary electorate). Many voters go beyond merely viewing political parties as irrelevant, but actually distrust them. See A. RANNEY, *CURING THE MISCHIEFS OF FACTION* 56 (1973); G. POMPER, *VOTER'S CHOICE* 183 (1975).

123. D. BRODER, *THE PARTY'S OVER* 239-40 (1972). The Supreme Court in *Buckley* recognized the "electorate's increasing dependence on television, radio, and other mass media for news and information." *Buckley v. Valeo*, 424 U.S. at 19.

124. See *Branti v. Finkel*, 445 U.S. 507, 531-32, n.18 (1980) (Powell, J., dissenting) (citing Burnham, *The 1976 Election: Has the Crisis Been Adjourned* in *AMERICAN POLITICS AND PUBLIC POLICY* 19-22 (W. Burnham & W. Weinberg eds. 1976); D. BRODER, *THE PARTY'S OVER* 239-40 (1972); Herbers, *The Party's Over for the Political Parties*, *N.Y. Times*, Dec. 9, 1979, § 6 (Magazine), at 159; Pomper, *The Decline of the Party in American Elections*, 92 *POL. SOC. Q.* 21, 40-41 (1977)).

125. Perhaps this is also caused by the lack of discernible differences in ideology between the major parties. "Political parties in this country traditionally have been characterized by a fluidity and overlap of philosophy and membership." *Rosario v. Rockefeller*, 410 U.S. 752, 769 (1973) (Powell, J., dissenting). Three Justices joined Powell in the dissent.

126. N. NIE, S. VERBA, & J. PETROCIK, *THE CHANGING AMERICAN VOTER* 52 (1976). Similarly, a 1952 survey reported 74% of the electorate as party regulars in voting for state and local offices. By 1974, however, that percentage had dropped to 42%. E. LADD, JR. & C. HADLEY, *TRANSFORMATION OF THE AMERICAN PARTY SYSTEM* 293-96 (1975).

opinion in *Rosario v. Rockefeller*,¹²⁷ recognized the trend toward greater voter independence: "Partisan political activities do not constantly engage the attention of large numbers of Americans, especially as party labels and loyalties tend to be less persuasive than issues and qualities of individual candidates."¹²⁸ In sum, the voter evaluates candidates on the basis of information and impressions conveyed by the mass media, and "acts as an individual, not a member of collectivity."¹²⁹

2. *Right to privacy*. Another important reason for abolishing the closed primary system is that it violates the constitutional right to privacy¹³⁰ and secrecy of the ballot by forcing voters to declare publicly their party preferences. It is clear that

[o]ne simple recognition of privacy's importance to self-governance is the curtain on the voting booth. But the shelter of privacy is needed for more than the casting of the formal vote, both because there are other ways of registering self-governing choices and because the process of reaching a decision does not take place only at the moment of formal choice registering; it is a continuous process which extends from the receipt of each item of information from a speaker to each choice, formal or informal, which the citizen registers. He who performs his listening and deciding functions in a glass house is coerced by public opinion, whether anyone is actually looking in or not. If every magazine he reads, every rally he attends, every person he speaks to might somehow become a matter of public knowledge, he would feel inhibiting pressure. The pressure is the same as that felt by a member of the NAACP in Alabama when he fears that the fact of his membership will be publicized.¹³¹

Yet, in a closed primary system, the names of publicly declared

127. 410 U.S. 752 (1973). In *Rosario* the Court merely held that a state may establish a public declaration of party affiliation as a prerequisite to voting in a party primary in order to prevent raiding.

128. *Id.* at 771 (Powell, J., dissenting).

129. Note, *The Constitutionality of Non-Member Voting*, in *Political Primary Elections*, 14 WILLAMETTE L.J. 259, 289 (1978), (citing N. NIE, S. VERBA, J. PETROCIK, *THE CHANGING AMERICAN VOTER* 347 (1976)).

130. See, e.g., *West Va. Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (declaring that a state statute compelling each public school student to pledge allegiance to the flag violated the first amendment). The Court stated, "[I]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *Id.* at 642.

131. Note, *Privacy in the First Amendment*, 82 YALE L.J. 1466-67 (1973).

voters appear on a "poll list" of a particular political party. These poll lists are public documents and as such, are available both for public inspection and sale.¹³² It is not surprising that many people are unwilling to declare party preference because of fear of undue pressure or harassment from employers, business associates, social acquaintances or opposing party members.¹³³

In the few states, including Wisconsin, where the legislatures have adopted an open primary system, voters are not required to state publicly a party preference. Each voter makes a choice of party in the privacy of the voting booth. It is this important essence of the system, rather than its particular form, that characterizes the open primary. As the Wisconsin Supreme Court recognized, "It is . . . the 'private declaration' of party preference in the voting booth, as compared with a public, recorded declaration, that characterizes the Wisconsin presidential preference vote as an open primary."¹³⁴

In guaranteeing a private primary ballot, the open primary law serves an interest fundamental to democracy—privacy of political preferences and convictions.¹³⁵ Indeed, this right of privacy was recently reaffirmed by the Supreme Court in *Buckley*

132. At least one court has observed that compiling lists of supporters and nonsupporters for campaigning, polling, patronage and other uses may be very helpful to a political organization. *Nader v. Schaffer*, 417 F. Supp. 837, 848 (D. Conn. 1976), *aff'd mem.*, 424 U.S. 989 (1976). See also C. MERRIAM & H. GOSNELL, *THE AMERICAN PARTY SYSTEM* 288 (1940).

For a good discussion of compelled disclosure through poll lists, see Skornicka, *State Action in Presidential Candidate Selection*, 1976 U. Wis. L. Rev. 1269, 1296-97.

133. In *LaFollette* two independent voters filed an amici curiae brief with the United States Supreme Court. James MacDonald and Elliott Maraniss presented the "interests of independent voters who wish to participate in presidential primaries, but who decline to affiliate with an organized party." Brief of Amici Curiae James MacDonald and Elliott Maraniss Urging Affirmance at 2, *Democratic Party v. LaFollette*, Docket No. 79-1631 (February 25, 1981). Both Mr. MacDonald and Mr. Maraniss have been independent voters for nearly twenty years. Neither can wholeheartedly support the goals of either major party. As a journalist wishing to maintain impartiality, the interest of Mr. Maraniss in not publicly affiliating with a major party is particularly compelling.

134. *LaFollette v. Democratic Party*, 93 Wis. 2d 473, 485, 287 N.W.2d. 519, 523 (1980).

For a discussion of this and a detailed analysis of the open primary, see Comment, *The Constitutionality of Non-Member Voting in Political Primary Elections*, 14 WIL-LAMETTE L.J. 259 (1978); Comment, *Open Versus Closed Primaries: A Dilemma in the Illinois Election Process*, 1977 S. ILL. L.J. 210.

135. The Court has long held fundamental the right of privacy of association and beliefs. See, e.g., *Buckley v. Valeo*, 424 U.S. 1 (1976); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *NAACP v. Button*, 371 U.S. 415 (1963); *Shelton v. Tucker*, 364 U.S. 479 (1960).

v. Valeo.¹³⁶ There, the Court found this right to be "fundamental in a free society," and the advent of the secret ballot to be "one of the great political reforms."¹³⁷ The *Buckley* Court, in discussing the disclosure requirements of the Federal Election Campaign Act of 1971,¹³⁸ recognized that compelled disclosure "can seriously infringe on privacy of association and belief guaranteed by the First Amendment."¹³⁹ Drawing from a long line of cases invalidating various disclosure requirements,¹⁴⁰ the Court established a balancing test between the infringement of first amendment rights and the governmental interest asserted. As applied here, the burden that compelled disclosure imposes on the independent primary voter must be balanced against the associational interests of the national party and its members or the general interests of the state.

What societal interest does a closed primary further? It is by no means clear that any such group interest, as opposed to associational interest, is served by the closed primary. Since primary elections are an integral part of the electoral process, they must be held to a standard of serving the large interest of all people rather than a small group of people who call themselves Democrats or Republicans.

Even though advocates of a closed primary would argue that an open primary permits non-party members to have a significant effect on the selection of a Democrat or Republican presidential candidate¹⁴¹ and that the open primary therefore violates

136. 424 U.S. 1 (1976).

137. *Buckley v. Valeo*, 424 U.S. 1, 237 (1976) (Burger, C.J., concurring in part and dissenting in part).

138. The Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972), has been amended as follows: Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (1974); Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, 90 Stat. 475; Federal Election Campaign Act Amendments of 1977, Pub. L. No. 95-216, 91 Stat. 1655; Federal Election Campaign Act Amendments of 1979, Pub. L. No. 96-187, 93 Stat. 1339 (1980). The Act is codified as amended beginning at 2 U.S.C. § 431.

139. *Buckley v. Valeo*, 424 U.S. 1, 64 (1976).

140. See, e.g., *Gibson v. Florida Legislative Comm.*, 372 U.S. 539 (1963); *NAACP v. Button*, 371 U.S. 415 (1963); *Shelton v. Tucker*, 364 U.S. 479 (1960); *Bates v. Little Rock*, 361 U.S. 516 (1960); and *NAACP v. Alabama*, 357 U.S. 449 (1958).

141. One writer states that a political party may advance its own and its supporters' ideology through the nomination of a candidate and that this freedom would be meaningless if parties could not determine that ideology. Note, *Presidential Nominating Conventions: Party Rules, State Law and the Constitution*, 62 *Geo. L.J.* 1621, 1626-27 (1974). Another commentator argues that because a major aspect of the primary is the furtherance of associational interest, the primary election should express the party members' consensus. Note, *Primary Elections: The Real Party in Interest*, 27 *RUTGERS L.*

the constitutionally guaranteed freedom to associate for political purposes, that is not the critical point. It is true that in *Cousins v. Wigoda*,¹⁴² Justice Brennan described the protected right of a major party and its adherents this way:

[I]ts adherents enjoy a constitutionally protected right of political association. "There can no longer be any doubt that freedom to associate with others for the common advancement of political beliefs and ideas is a form of 'orderly group activity' protected by the First and Fourteenth Amendments. . . . The right to associate with the political party of one's choice is an integral part of this basic constitutional freedom."¹⁴³

The national political party is thus interested in protecting the integrity of the primary as a party function protecting its associational interests "from intrusion by those with adverse political principles."¹⁴⁴ The Constitution and the electoral process it protects speak, however, in terms of the individual's rights as a unit of what Professor Karst calls a "national citizenship." Permitting all voters to participate in party primaries does not dilute the right of association one iota. The exact contrary is more accurate. No person, as in *Terry v. Adams*, is being denied the right to act collectively with others. All that would be done is to prevent the collectivity—the party—from discriminating against those who choose to march alone to the ballot box.

The argument that a contemporaneous, publicly recorded statement of party preferences is necessary to maintain the integrity of associational rights is therefore specious. The Wisconsin Supreme Court correctly observed that this objection is dependent upon two unsupported assumptions: "[F]irst, that voters who do not have a commonality of interest with the party will attempt to vote on the party ballot in sufficient numbers to jeopardize the primary's integrity; and second, that a contemporaneous declaration of party preference is a necessary and effective way of preventing this result."¹⁴⁵ It should be noted that a national party has the burden of persuading the court that a

REV. 298, 306 (1974). Parties, however, are "mere vague electoral alliances." L. THURLOW, *THE ZERO-SUM SOCIETY* 212 (1980).

142. 419 U.S. 477 (1975).

143. *Id.* at 487. See also the concurring opinion of Justices Rehnquist, Stewart, and Chief Justice Burger at 491.

144. *Ray v. Blair*, 343 U.S. 214, 221-22 (1952).

145. *LaFollette v. Democratic Party*, 93 Wis. 2d 473, 495, 287 N.W.2d 519, 533 (1980).

particular state statute infringes upon a national party's associational rights.¹⁴⁶ Analysis of the closed primary indicates that such a system cannot support a compelling societal interest, and, on the other hand, the open primary system protects vital individual interests.

There are three categories of voters who may be charged as not having a commonality of interest with a national party. One such category is made up of "raiders." "Raiding" has been defined by the Supreme Court as "the practice whereby voters in sympathy with one party vote in another's primary in order to distort that primary's results."¹⁴⁷ Raiding, when it occurs, presents a serious problem because it "is an act hostile to the party; it amounts to a fraud on the party. It deprives the party and its members of the purpose of their association."¹⁴⁸ Yet, documented instances of raiding are relatively rare¹⁴⁹ and are not a significant problem or serious threat to party integrity. Indeed, the National Democratic Party has acknowledged that there is no real evidence to show the existence of raiding.¹⁵⁰

146. *Marchioro v. Chaney*, 442 U.S. 191, 195 (1979). See also *American Party of Texas v. White*, 415 U.S. 767, 790 (1974).

147. *Kusper v. Pontikes*, 414 U.S. 51, 59 (1973).

148. 93 Wis. 2d at 506, 287 N.W.2d at 532. In 1910 the Wisconsin Supreme Court, upholding its open primary law, commented on raiding: "That any considerable following of one political creed will deliberately desert their own party at the primary to foist an unworthy set of candidates on a rival party presupposes a degree of moral turpitude that we cannot presume to exist." *Van Alstine v. Frear*, 125 N.W. 961, 969 (Wis. 1910).

149. *Developments in the Law—Elections*, 88 HARV. L. REV. 1111, 1173 (1975) ("Although there are documented cases of organized raiding [citing no cases after 1950], the recent decline of party machines capable of inducing their members to raid and the absence of durational requirements in many states suggest that the likelihood of raiding may be overstated.")

Indeed, raiding is not a serious threat. See Skornicka, *State Action in Presidential Candidate Selection*, 1976 WIS. L. REV. 1269, 1301-03; *Democratic Party of the United States v. LaFollette*, 101 S. Ct. 1010, 1026 (1981) (Powell, J., dissenting). See also *LaFollette v. Democratic Party*, 93 Wis. 2d 473, 495 n.32, 287 N.W.2d 519, 533 n.32, (1980), citing Note, *The Constitutionality of Non-Member Voting in Primary Elections*, 14 WILLAMETTE L.J. 259, 282-86 (1978); Adamany, *Communication: Cross-Over Voting and the Democratic Party's Reform Rules*, 70 AM. POL. SCI. REV. 536, 538 (1976); Note, *Primary Elections: The Real Party in Interest*, 27 RUTGERS L. REV. 298, 307 n.74 (1974); *Developments in the Law—Elections*, 88 HARV. L. REV. 1111, 1172-73 (1975); Note, *Constitutional Issues in Durational Party Affiliation Requirements*, 25 MAINE L. REV. 147, 154 (1973).

150. REPORT OF THE COMMISSION ON PRESIDENTIAL NOMINATION AND PARTY STRUCTURE, OPENNESS, PARTICIPATION AND PARTY BUILDING: REFORMS FOR A STRONGER DEMOCRATIC PARTY 68 (1978) (Winograd Commission) ("Some have argued the Republicans 'raid' Democratic primaries. However, the existence of 'raiding' has never been conclusively proven by survey research.")

A second category of voters presumably not possessing a commonality of interest with a party are adherents to the alternative national party or other parties. These are the "crossover" voters. Theoretically, the closed primary prevents members of one political party from voting on the rival party's ballot—a not uncommon occurrence and allegedly harmful under the open primary system. Thus, the Democratic Party opposes open primaries because of a concern that that delegation allocated according to the primary results would not fairly reflect the division of preferences among "Democratic identifiers in the electorate."¹⁵¹ Yet, as the Wisconsin Supreme Court concluded in analyzing data submitted by the Democratic Party, "Wisconsin's open primary produces an electorate which is as representative (or as unrepresentative) of 'Democratic identifiers in the electorate' as is the electorate produced by closed primaries and caucuses which are acceptable to the National Party."¹⁵²

Additionally, it seems clear from the Wisconsin experience that when a member of one party decides to cross over and vote in another party's primary, the vote is cast out of a desire to express principled support for a particular presidential candidate. In 1968, for example, Wisconsin Republicans voted for Senator Eugene McCarthy in the Democratic primary. Political scientist Austin Ranney described the crossover voters this way:

[They] deserted their party to register their special approval of a candidate, or policy associated with a candidate, available only in the other party. [Eugene] McCarthy's Republican supporters clearly did not vote for him because they thought he would be the easiest Democrat for Nixon to beat in November; they did so because they liked him and his opposition to the Vietnam War.¹⁵³

151. *LaFollette v. Democratic Party*, 93 Wis. 2d at 508, 287 N.W.2d at 534.

152. *Id.* The court's conclusion is also supported by past experience in the Wisconsin primary. In 1968 Senator Eugene McCarthy won the Wisconsin Democratic primary. In 1972 Senator George McGovern won the Wisconsin primary and went on to win the Democratic nomination on the first ballot. Similarly, in 1976 and 1980, Jimmy Carter won the Wisconsin Democratic primary and the nomination of the Democratic primary.

On the Republican side, Richard Nixon won both the Wisconsin primary and the Republican nomination in 1968 and 1972. Similarly, both Gerald Ford in 1976, and Ronald Reagan in 1980 won the Wisconsin primary and the Republican nomination.

In short, the winners of the Wisconsin open primary seem to be reflective of the views of their respective political parties as confirmed by the national nominating conventions and are not some sort of aberrant.

153. Ranney, *Turnout and Representation in Presidential Primary Elections*, 66 AM. POL. SCI. REV. 35 (1972).

Studies of the Wisconsin open primary indicate that a small percentage of the total primary voters were persons who chose to vote in the other party's primary.¹⁵⁴ Moreover, the studies demonstrate that the statewide result of the primary election was not affected by Republican crossover voting, even though the vote was admittedly diluted.¹⁵⁵ Justice Powell, dissenting in *Rosario v. Rockefeller*,¹⁵⁶ summed up the reasons for voting in the other party's primary when he wrote:

Citizens generally declare or alter party affiliation for reasons quite unconnected with any premeditated intention to disrupt or frustrate the plans of a party with which they are not in sympathy. Citizens customarily choose a party and vote in [the] primary simply because it presents candidates and issues more responsive to their immediate concerns and aspirations.¹⁵⁷

A third possible category of voters who do not have a commonality of interest are the "independents."¹⁵⁸ The declaration of preference required by a closed primary appears to be no more effective than the open primary in deterring the participation of independent voters. Indeed, some studies suggest that in closed primary systems, some voters who consider themselves independent enroll or register as party members to vote in the primary of their choice.¹⁵⁹ It seems clear that voters who do not share a commonality of interest with a political party will not vote on that party's ballot in sufficient numbers to jeopardize the primary's integrity. Even if this were to occur, however, the closed primary is an unnecessary and ineffective way of preventing this result.

In Rule 2A of its Delegate Selection Rules for the 1980 Convention, the Democratic Party regulates participation in the delegate selection process by defining Democratic voters as those persons "who publicly declare their party preference Democratic and have that preference publicly recorded."¹⁶⁰ By implication

154. Hedlund, *Cross-Over Voting in a 1976 Open Presidential Primary*, 41 PUB. OPIN. Q. 498, 502, 513 (1979).

155. *Id.* at 502-03.

156. 410 U.S. 752 (1973).

157. *Id.* at 769-70 (Powell, J., dissenting).

158. Those not affiliated or registered with any political party.

159. Note, *The Constitutionality of Non-Member Voting in Primary Elections*, 14 WILLAMETTE L.J. 259, 277 n.103, 288 (1978); Hedlund, *Cross-Over Voting in a 1976 Open Presidential Primary*, 41 PUB. OPIN. Q. 498, 502, 513 (1979).

160. Delegate Selection Rules for the 1980 Democratic National Convention, Rule 2.

the party is saying that it does not want independents to participate because they do not share a common interest with voters who have publicly affiliated themselves with the party.

Yet, under Rule 2A, voters are Democratic voters simply if they think they are and say they are, even if only for the purpose of voting in one primary election. Indeed, the Wisconsin Supreme Court noted that "the [Democratic] Party does not set forth any objective standards against which a voter may test his or her self-designation. Nor does the National Party set forth any subjective standards to guide voters in determining their party preference."¹⁶¹ Under Rule 2A any person of any political party or persuasion would be eligible to vote in a Democratic primary if that person would be willing to affiliate with the Democratic Party for that one primary election. It is difficult to perceive the increased benefits of associational rights under this system as opposed to the Wisconsin "open primary" system.¹⁶²

"Defining who is and who is not a Republican or Democrat, defining the commonality of interest which binds Democrats or Republicans, or defining the Republican's or Democrat's commitment to the party are key issues which have not been resolved by the parties."¹⁶³ The significance of the declaration of party preference is far from clear. Indeed, it is uncertain exactly what membership in a political party signals. Contrary to the experience of many European democracies and the fears of the Founding Fathers,¹⁶⁴ the formation of political parties in the United States has not exerted a fragmenting effect upon our political life. The reason for this is that pluralism within parties, rather than pluralism among parties has been a hallmark of American politics.

161. *LaFollette v. Democratic Party*, 93 Wis. 2d at 505, 287 N.W.2d at 531.

162. Justice Powell keenly points out:

The Wisconsin statute states that "[i]n each year in which electors for president and vice-president are to be elected, the voters of this state shall be given an opportunity to express their preference for the person to be the presidential candidate of *their party*." Wis. Stat. § 8.12(1) (emphasis added). Thus the act of voting in the Democratic primary fairly can be described as an act of affiliation with the Democratic Party. The real issue in this case is whether the party has the right to decide that only *publicly* affiliated voters may participate.

Democratic Party of the United States v. LaFollette, 101 S. Ct. 1010, 1023 n.2 (1981) (Powell, J., dissenting).

163. 93 Wis. 2d at 505, 287 N.W.2d at 531.

164. See L. EPSTEIN, *POLITICAL PARTIES IN WESTERN DEMOCRACIES* (1967); R. DAHL, *PLURALIST DEMOCRACY IN THE UNITED STATES* (1967).

Political parties have been viewed not as ideological refuges for "true believers," but as groupings of diverse interests joined together in a coalition for the purpose of achieving shared political goals. Only under such a pragmatic view could men of such diverse ideologies as George Wallace and the late Allard Lowenstein in the Democratic Party, and Ronald Reagan and Pete McCloskey in the Republican Party, share the same party affiliation.¹⁶⁵ Given such a non-ideological tradition in party politics, it is not surprising that interparty mobility has been a facet of American political life. The two major parties with rather nebulous and informal criteria for party membership have, in the United States, created parties broadly composed of "persons from all walks of life" and of "all shades of economic and political opinion."¹⁶⁶ Thus, it seems that the chief characteristic of parties is not the commonality of aims among its membership to be advanced by candidates, but rather, as one court stated, it is "the direction and control of the struggle for political power among men who may have contradictory interests and often mutually exclusive hopes of securing them. This the parties do by institutionalizing the struggle and emphasizing positive measures to create a strong and general agreement on policies."¹⁶⁷ Indeed, the intellectual nature of a political party has been characterized this way:

It is not concerned with matters of fact, or doctrine, or even principle, except as they bear upon the great cause for existence: success at the polls. Such organizations contain not only men of divergent views; they must also appeal to voters of differing opinions, prejudices and loyalties. It is folly to talk of finding an actual basis [for political parties] in any set of principles relating to public welfare.¹⁶⁸

The closed primary's contemporaneous declaration of party preference is an "unnecessary and ineffective way to prevent raiders, members of an alternative national party, adherents of

165. It is little wonder that the Supreme Court has noted, "Major parties encompass candidates of great diversity. In many situations the label 'Republican' or 'Democrat' tells the voter little." *Buckley v. Valeo*, 424 U.S. 1, 70 (1976).

166. H. BONE, *AMERICAN POLITICS AND THE PARTY SYSTEM* 284 (1955).

167. *Compare Irish v. Democratic-Farmer-Labor Party*, 287 F. Supp. 794, 805 (D. Minn. 1968) with *Bendinger v. Oglivie*, 335 F. Supp. 572, 575 (N.D. Ill. 1971).

168. *Alexander v. Todman*, 337 F.2d 962, 973 (3d Cir. 1964) (citing Robinson, *The Place of Party in the Political History of the United States*, ANNUAL REPORTS OF THE AMERICAN HISTORICAL ASSOCIATION FOR THE YEARS 1927 AND 1928 at 202 (1929)).

other parties and independents from voting in a national party primary ballot."¹⁶⁹ Indeed, there seems to be little difference in effect between the closed and open primary systems:

[T]he essence of the legal definitions of party membership in the United States will surely continue to be self-designation. The fact remains that today even in Illinois, New York, or any other closed primary state you are a Democrat if you say you are; no one can effectively say you are not; and you can become a Republican any time the spirit moves you simply by saying that you have become one. You accept no obligations by such a declaration; you receive only a privilege—the privilege of taking an equal part in the making of a party's most important decision, the nomination of its candidates for public office. The only remaining restriction is that in some states, such as California, you may have to let the registrar of voters know that you have changed parties, and you may even have to do so several weeks or even months before your new party's next primary. But in many closed primary states you do not even have to do that, and in Wisconsin and other open primary states you are not allowed to make an official declaration of your party membership One can only conclude that the so-called 'closed' primaries are just a hair more closed than the so-called 'open' primaries.¹⁷⁰

The significant difference between the open and closed primary is that voters "resent being prohibited from voting if they refuse to [make] a party declaration and having their affiliation a matter of public record for fear of losing their jobs or risking other penalties."¹⁷¹ The difference between the open and closed primary is not, as advocates of the closed primary would assert, that the open primary permits large numbers of Republicans, independents, and other party adherents to vote, for example, on the Democratic Party ballot. Rather, the difference is that the open primary permits more people to vote for the candidate and issues of their choice by allowing a private declaration of party preference. Publicly stating a party preference can be a dilemma for the independent voter who does not understand the significance of such a public declaration or is unwilling to do so because of a fear of undue pressure or harassment. The question thus becomes which is worse, the alleged dangers of "crossover"

169. 93 Wis. 2d at 497, 287 N.W.2d at 535.

170. A. RANNEY, *CURING THE MISCHIEFS OF FACTION* 166-67 (1975).

171. W. GOODMAN, *THE TWO-PARTY SYSTEM IN THE UNITED STATES* 207-08 (1964).

voting or the disenfranchisement of independent voters unwilling to record publicly a party preference. It is our contention that the closed primary system, in light of the *Buckley* test, cannot support a sufficient governmental interest to justify compelled disclosure of party affiliation.

Conversely, the open primary serves a significant state interest of encouraging voters to participate in selecting the candidates of political parties which, in turn, fosters democratic government.¹⁷² As the Supreme Court has pointed out, "Preservation of the democratic process is certainly an interest protection of which may in some instances justify limitations on First Amendment freedoms."¹⁷³ Historically, the primary was intended to enlarge citizen participation in the political process and remove from political bosses the process of selecting candidates. Presumably, the legislatures of open primary states believe democracy is best served by stimulating political activity and that "facilitat[ing] and enlarg[ing] public discussion and participation in the electoral process [are] goals vital to a self-governing people."¹⁷⁴

It is "ironic," as Justice Powell forcefully pointed out in *LaFollette*, that Rule 2A has the "effect of calling into question a state law that was intended itself to open up participation in the nominating process and minimize the influence of 'party bosses.'"¹⁷⁵ The *LaFollette* decision, with its deference to national party rules allows the political bosses to wrest control of the nominational process from the hands of the primary voters. As David Broder commented, "The justices clearly signaled the Democrats that the way is open for them to begin repair of their own distorted nominating process by curbing the number of delegates chosen in primaries."¹⁷⁶

172. The National Democratic Party in fact replaced the Wisconsin open primary with a closed caucus system in 1980. A similar displacement was made in Michigan, which had an open primary system. Only 15,000 people in the state of Michigan participated in the Democratic closed caucus. See N.Y. Times, April 27, 1980, at p. 1, col. 2. By comparison, 625,185 people voted in the Wisconsin Democratic primary and 897,464 voted in the Republican primary. 38 CONG. Q. W. RPTS. 901 (April 5, 1980). Wisconsin had the second highest percentage of voter age turnout in its 1976 primary of the 24 states conducting primaries. A. RANNEY, PARTICIPATION IN AMERICAN PRESIDENTIAL NOMINATIONS 25 (1977).

173. *Elrod v. Burns*, 427 U.S. 347, 368 (1976).

174. *Buckley v. Valeo*, 424 U.S. 1, 92-93 (1976).

175. *Democratic Party of the United States v. LaFollette*, 101 S. Ct. 1010, 1022 (1981) (Powell, J., dissenting).

176. Broder, *But Will They Change Those Rules*, Wash. Post, March 1, 1981, § C,

It has been clear since the NAACP cases were decided,¹⁷⁷ that "freedom to associate with others for the common advancement of political beliefs and ideas is . . . protected by the First and Fourteenth Amendments."¹⁷⁸ A close corollary to the right of association is the right to be free of unwanted association.¹⁷⁹ Even though the Court has traditionally tended to limit the right of nonparticipation to cases involving personal convictions so deeply held as to be considered matters of conscience,¹⁸⁰ in recent years it has extended the right to include situations where an individual has been required to support a political or ideological cause with which the individual simply disagrees.¹⁸¹ The Court, in *Elrod v. Burns*,¹⁸² held that state officials could not condition retention of public employment on the affiliation with a particular political party. Similarly, in *Abood v. Detroit Board of Education*,¹⁸³ the Court held that the first amendment prevents the government from requiring objecting public employees to contribute to union political or ideological activities not germane to collective bargaining.¹⁸⁴ Recently, in *Branti v. Finkel*,¹⁸⁵ the Court likewise upheld the right of public defenders to be free from coerced political affiliation as a condition of employment. This trilogy of cases marks the emergence of a distinctive first amendment right to resist coerced participation in or support of political or ideological activity. Indeed, the Court in *Abood* said that such a right was "at the heart of the First Amendment."¹⁸⁶ Similarly, the independent voter should not be

at 7, col. 2.

177. *Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539 (1963); *NAACP v. Button*, 371 U.S. 415 (1963); *Gremillion v. NAACP*, 366 U.S. 293 (1961); *Shelton v. Tucker*, 364 U.S. 479 (1960); *Bates v. City of Little Rock*, 361 U.S. 516 (1960); and *NAACP v. Alabama*, 357 U.S. 449 (1958).

178. *Cousins v. Wigoda*, 419 U.S. 477, 487 (1975) (citing *Kusper v. Pontikes*, 414 U.S. 51, 56-57 (1973)).

179. One commentator notes that "[t]his right has most often been asserted in a labor law context. See, e.g., *Brotherhood of Railway Clerks v. Allen*, 373 U.S. 113 (1963); *International Ass'n. of Machinists v. Street*, 367 U.S. 740 (1961); *Railway Employees Dep't v. Hanson*, 351 U.S. 225 (1956). See also *Lathrop v. Donohue*, 367 U.S. 820 (1961) (attack on the dues requirement under an integrated bar system)." Skornicka, *State Action in Presidential Candidate Selection*, 1976 U. Wis. L. Rev. 1269, 1296-97.

180. See, e.g., *Board of Educ. v. Barnette*, 319 U.S. 624 (1943).

181. For a thorough treatment of this subject area, see Comment, *The Right of Ideological Nonassociation*, 66 CAL. L. REV. 767 (1978).

182. 427 U.S. 347 (1976).

183. 431 U.S. 290 (1977).

184. *Id.* at 235.

185. 445 U.S. 507 (1980).

186. 431 U.S. at 234-35.

coerced into joining one of the major parties in order to exercise the right to vote in a primary.

3. *Unjustified discrimination.* The third reason for enfranchising the independent voter is that the closed primary also ignores the right of all persons to vote once the state has decided to make the right available to some. Membership in either the Democratic or Republican parties should not be an admission ticket to the primary ballot box. This is especially so, as the Supreme Court said in *United States v. Classic*,¹⁸⁷ “[w]here the state law has made the primary an integral part of the procedure of choice, or where in fact the primary effectively controls the choice.”¹⁸⁸ After all, political parties are not mentioned, directly or indirectly, in the United States Constitution.¹⁸⁹ The drafters of the Constitution did not foresee the modern importance of political parties in the United States. They were non-party—even anti-party—independents. Thus on October 2, 1780, John Adams, writing to a friend about the new constitution for Massachusetts, said: “There is nothing which I dread so much as a division of the republic into two great parties, each arranged under its leader, and concerting measures in opposition to each other. This in my humble apprehension, is to be dreaded as the greatest political evil under our constitution.”¹⁹⁰ The view that the rise of political parties was an evil, tending to foment strife and discord in the body politic, was widespread. George Washington similarly warned his countrymen “in the most solemn manner against the baneful effects of the spirit of party,”¹⁹¹ and James Madison thought it the principal task of the new Constitution to hold the “mischiefs of faction”¹⁹² in check.

The meaning is clear: the independent voter in a closed primary state is being denied a fundamental right.¹⁹³ That in turn

187. 345 U.S. 461 (1953).

188. *Id.* at 467.

189. “Partisan politics bear the imprimatur only of tradition, not the Constitution.” *Elrod v. Burns*, 427 U.S. 347, 369 n.22 (1976).

190. 9 J. ADAMS, *THE WORKS OF JOHN ADAMS* 511 (1854).

191. G. WASHINGTON, *Farewell Address*, reprinted in *DOCUMENTS OF AMERICAN HISTORY* 169, 172 (H. Commager ed. 1946).

192. *THE FEDERALIST* No. 10 (J. Madison) at 52 (H. Lodge ed. 1888). Indeed, in the early 1790’s “most Americans did not want parties.” *J. Burns, THE DEADLOCK OF DEMOCRACY* 27 (1967).

193. Ideally, of course, the primary should not only be open, but also have delegates allocated in accordance with its results. Although it might be argued, as Justice Powell suggests with regard to the Vermont primary, *Democratic Party v. LaFollette*, 101 S. Ct. 1010, 1025 n.11 (1981) (Powell, J., dissenting), that a nonbinding primary is but an idle

can only mean that he is being denied equal protection. But, if the Supreme Court so held, a major expansion of equal protection could occur—to make the Constitutional standard national or interstate rather than intrastate. The time has come for such a development. After all, the fourteenth amendment speaks of “equal protection of the laws”—but does not define “laws.” Arguably the Justices would not have to embrace a concept of interstate equal protection. They could rule that an independent voter in a closed primary state was being denied his fourteenth amendment rights vis-a-vis other voters in that same state. But under the “new” jurisprudence of the Court, even such a limited decision would have a general effect.

Ours is a national citizenship.¹⁹⁴ Justice Bradley, addressing the issue of equality in the Slaughter-House Cases, judicially expressed the view of such a citizenship:

A citizen of the United States has a perfect constitutional right to go and reside in any state he chooses, and to claim citizenship therein, and an equality of rights with every other citizen He is not bound to cringe to any superior, or to pray for any act of grace, as a means of enjoying all the rights and privileges enjoyed by other citizens If a man be denied full equality before the law, he is denied one of the essential rights of citizenship as a citizen of the United States.¹⁹⁵

Although Justice Bradley spoke in dissent, his words capture nicely the concept of a national citizenship and a “united state.”

gesture; nevertheless, the intense attention of the media and the perception of the people in the other states is to the contrary. In his famed August 1974 memorandum outlining President Carter’s successful 1976 strategy, Hamilton Jordan wrote:

The press shows an exaggerated interest in the early primaries as they represent the first confrontation between candidates We would do well to understand the very special and powerful role the press plays in interpreting the primary results for the rest of the nation. What is actually accomplished in the New Hampshire primary is less important than how the press interprets it for the rest of the nation.

J. WITCOVER, *MARATHON* 144 (1978). The primary process is important not only as a delegate selection process, but also, in this “media age,” as a means of creating and maintaining the impression of an electable presidential candidate. The independent voter in Florida, unlike the independent voter in Wisconsin, is cut out of that process.

194. See Karst, *The Fifth Amendment’s Guarantee of Equal Protection*, 55 N.C.L. REV. 541, 550-51 (1977).

195. *Slaughter-House Cases*, 83 U.S. (16 Wall. 1872) 36, 112-13 (Bradley, J., dissenting). Professor Karst notes constitutional support for the idea of equal national citizenship, e.g., the prohibition against the granting of titles of nobility by the United States, U.S. CONST., art. I, § 9, cl. 8; the prohibition against direct federal taxes that are not proportional to population, *id.* § 9, cl. 4. Karst, *supra* note 194, at 550 n.53.

As Professor Karst wrote a century later, "The substantive core of the amendment, and of the equal protection clause in particular, is a principle of equal citizenship, which presumptively guarantees to each individual the right to be treated by the organized society as a respected, responsible, and participating member."¹⁹⁶

Professor Karst maintains that if, after the Civil War, there could be any doubt that we are all citizens of the United States, that doubt was removed by the fourteenth amendment's explicit declaration: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."¹⁹⁷ Indeed, absent that specific command, Karst believes that a spirit of national citizenship would prevail, such that we would think of ourselves primarily as citizens of the nation, and only secondarily of the several states, for "[w]e are all part of one economy; we are highly mobile, both in capacity and in inclination; a national system of communication hands us the same news and the same entertainment; we look to the national government as the chief arena for the interplay of political forces."¹⁹⁸ It is clear that these aspects of our nationhood demand a generous view of the powers of the national government.¹⁹⁹ "And as those expanded powers have been exercised, we [Americans] have come to perceive the obligations of citizenship as running primarily to the national polity."²⁰⁰ The principle of equal national citizenship means more than the correction of abuses by the state; the heart of the principle is that citizens have the right to equal treatment by the government. Equality in the electoral process is a crucial affirmation of the equal worth of citizens.²⁰¹

Some may object that such a concept of equal protection would strike a body blow at federalism and state sovereignty. Yet, despite recent Supreme Court decisions in support of

196. Karst, *The Supreme Court, 1976 Term—Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 4 (1977).

197. U.S. CONST. amend. XIV.

198. Karst, *supra* note 194, at 550-51.

199. Stern, *The Commerce Clause and the National Economy*, 1933-46, 59 HARV. L. REV. 645, 883 (1946).

200. Karst, *supra* note 194, at 551.

201. "To the extent that a citizen's right to vote is debased, he is that much less a citizen." *Reynolds v. Sims*, 377 U.S. 533, 567 (1964), *cited in* Karst, *supra* note 196, at 29.

states' rights, federalism as it was once known is dead.²⁰² Among other factors, a national income tax, technological imperatives, and immersion of the nation in world affairs point to a conclusion that the several states are political anachronisms.²⁰³ If people truly believed in federalism, there would be no New York City going to the federal government to avoid bankruptcy, no Chrysler seeking a similar financial bailout, and no state and local governments receiving enormous grants-in-aid from the federal government. The death knell for federalism occurred long ago; it should be recognized and accepted.

Moreover, the decline of federalism is apparent in the electoral process. Uniform, nationwide standards for electoral practices and voting rights have increasingly supplanted diverse election laws.²⁰⁴ This result runs contrary to a long history of state control in conducting elections and defining the scope of the franchise. One need only look at four developments in the last twenty-five years to understand how this transfer of power away from the states has occurred: constitutional amendments;²⁰⁵ Supreme Court decisionmaking;²⁰⁶ congressional legislation;²⁰⁷ and the Federal Election Commission.²⁰⁸

202. Strong national unity was recognized by Justice Holmes:

I do not think the United States would come to an end if we lost the power to declare an Act of Congress void. I do think the union would be imperiled if we could not make the declaration as to the laws of the several states.

J. BARRON & C. DIENES, CONSTITUTIONAL LAW 36 (1975).

203. Currently, a national economic system is superimposed on a decentralized political order. Politics and law tend to follow economics; the inexorable result is that the states will become even less important in the future. See A. MILLER, SOCIAL CHANGE AND FUNDAMENTAL LAW 43-95 (1979); Miller, *Reason of State and the Emergent Constitution of Control*, 64 MINN. L. REV. 585 (1980).

204. For a complete discussion of this subject, see Claude, *Nationalizing Electoral Process Standards: Is an Obituary for State's Rights Premature?* 13 IDAHO L. REV. 373 (1977).

205. See note 89 *supra*.

206. *E.g.*, Buckley v. Valeo, 424 U.S. 1 (1976); Bullock v. Carter, 405 U.S. 134 (1972); Williams v. Rhodes, 393 U.S. 23 (1968); Reynolds v. Sims, 377 U.S. 533 (1964).

207. *E.g.*, the Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972), as amended, Pub. L. No. 93-443. Voting Rights Act Amendment of 1970, Pub. L. No. 91-285, 84 Stat. 314 (1970) (amended and repealed in part in 1975); Civil Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (1965).

208. The Commission is the independent agency of the United States government charged with primary and exclusive jurisdiction to implement civil enforcement of the federal election laws. 2 U.S.C. § 437c(b)(1) (1976). The laws over which the Commission has civil enforcement jurisdiction are the Federal Election Campaign Act of 1971, as amended, *supra* note 139; the Presidential Election Campaign Fund Act, 26 U.S.C. §§ 9001-9013 (1976); and the Presidential Primary Matching Payment Account Act, 26 U.S.C. §§ 9031-9042 (1976).

The federalism argument also ignores that the nomination of a presidential candidate is not a regional or state function but rather a national function of the national parties. It is clear that the National Democratic and Republican Parties are no more than loose federations of state parties. The nomination of a presidential candidate once every four years is perhaps the only national organizational effort undertaken by the national parties. The procedure used by both the major parties is clearly a nationwide process. Political science studies have noted that the "argument for recognition of state sovereignty in a national political convention is specious."²⁰⁹ Moreover, to analogize between a state whose sovereignty in the electoral college is constitutionally established, and the state political party to the national political party is inappropriate. It has been concluded that "[a] national political party has its federal aspects, such as its dependence on state victories to give it the electoral votes necessary for winning a presidential election. But in its national convention its chief business, the nomination and election of a President, is an operation more national than federal."²¹⁰

V. CONCLUSION

Enough has been said to show that voting is indeed a fundamental right, and that voting in primaries should be included in that right. As long as the two-party system continues, which may not be more than a few years, a further point can be made: all voters should be able to cast a ballot in primaries for one of the candidates in each party. There is no logical reason why even the Wisconsin system should not be expanded that far. We, however, do no more than mention the point here; and do not argue for it at this time. Our net conclusion is that there are solid legal and policy grounds for fully enfranchising the independent voters in America.

That need not take a constitutional amendment. The Supreme Court can do it in an appropriate case brought, say, by an independent voter in Florida. What external standards of judgment should the Justices apply should such a case eventuate? We suggest that the Wisconsin system be enunciated as the constitutional minimum. And, as suggested above, that part of the

209. P. DAVID, R. GOLDMAN, & R. BAIN, *THE POLITICS OF NATIONAL PARTY CONVENTIONS* 177 (1960).

210. *Id.*

Wisconsin system which allows delegate selection by caucus, without regard to the primary, violates fundamental principles of fairness. In short, "interstate equal protection" should be the law, by giving to the word "laws" in the fourteenth amendment an expansive reading. Whether that is a "neutral principle," as some people who should know better plump for,²¹¹ we do not say. The point is that a nation that calls itself democratic, that has a commitment to equality, and that seeks to be a model for nations elsewhere can no longer suffer the actual disenfranchisement of what is perhaps the largest—certainly the fastest growing—group of voters. There is nothing sacrosanct in the two-party system; or, indeed, in parties themselves.

In saying all of this, in advocating an interstate standard for equal protection, we recognize, with Jeremy Bentham, that "[t]he establishment of perfect equality is a chimera; all we can do is to diminish inequality."²¹² Interstate equal protection is one way to do that. Americans living in the zero-sum society deserve no less. Surely, it is the logical extension of the Court's pronouncement in *Cooper v. Aaron* that its decisions are "the law of the land." Equal protection is an area where a fundamental conception should be developed, in Cardozo's words, "to their uttermost conclusions."²¹³

A further point deserves mention. There is no need at this time to suggest all possible human rights that might be considered to be so fundamental as to fall under the rubric of interstate equal protection. Once the principle is established, as it can be with the right to vote, then the other areas of concern can be analyzed with an eye toward determining whether they too should receive nationwide protection. The concept of national citizenship in a "united state" that is the United States requires precisely that.

Some may argue that if regulation of political parties comes it should be by statute, not be judicial decision. If the elected representatives of the people in Congress can be persuaded to enact a comprehensive voting rights law that would go not only

211. See, e.g., Greenwalt, *The Enduring Significance of Neutral Principles*, 78 COLUM. L. REV. 983 (1978), which is a latter-day celebration of Weschler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959) (rightly called "verbally muddled" by Anthony R. Blackshield of the Faculty of Law, University of Sydney). See A. MILLER, *SOCIAL CHANGE AND FUNDAMENTAL LAW* 170 (1979).

212. J. BENTHAM, *THE THEORY OF LEGISLATION* 120 (1931).

213. *SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO* 294 (M. Hall ed. 1947).

to the right to cast a ballot (as in the Voting Rights Act of 1965) but also to the ways in which candidates are selected, then there would be no need for the Court to intervene.²¹⁴ Absent such a statute (and the likelihood of one being enacted is remote at best) the Court is the only avenue open to those who are disenfranchised by the present system. The Supreme Court has already involved itself in the election process, principally in the White Primary and Legislative Reapportionment Cases; hence, there is no good reason why it should not enter this "political thicket."²¹⁵ The essential argument here is not so much over what should be done, but over how it can be effected. Those who argue for a quietistic role for the Supreme Court will, of course, abhor interstate equal protection and call for a legislative resolution;²¹⁶ but those who see a larger role for the Court, such as Professor John Hart Ely with his "representation-reinforcing" theory of judicial review,²¹⁷ just might accept the basic conclusions of this article.

214. The extreme deference the *LaFollette* Court showed to the political party system poses the question of who, if anyone, can control these private governments. Could, for example, Congress legislate a national or regional primary system? Arthur Schlesinger Jr. suggests that such a measure "might well administer the coup de grace" to the political parties and, would almost certainly be opposed by the major parties. Arthur S. Schlesinger, *Crisis of the Party System: II*, Wall St. J., May 14, 1979, at 14, col. 4. If so, would the principle of *LaFollette* ("a State, or a court, may not constitutionally substitute its own judgment for that of a party") prohibit or foreclose Congress from doing that?

215. *Baker v. Carr*, 369 U.S. 186, 266 (1961) (Frankfurter, J., dissenting).

216. A. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* (1970); A. BICKEL, *THE MORALITY OF CONSENT* (1975).

217. J. ELY, *DEMOCRACY AND DISTRUST* (1980).