

THE "WINNER-TAKE-ALL" PRIMARY: RATIONALE AND STRATEGY FOR IT'S ABOLITION

By RALPH SMITH

I. INTRODUCTION

THE PRESIDENT of the United States has been and will probably continue to be one of two nominees selected by the two major political parties at a quadrennial conventions at which Black people have been traditionally under-represented.¹ This under-representation can be directed attributed to delegate selection methods which are unnecessarily complex, blatantly inequitable, and poorly conceived. Without some fundamental changes in these methods, the highest office in the land will not only continue to be inaccessible to Blacks but will also be immune to the pressures and resulting compromises that a group the size of the

Black population in this country should be able to exert.

The overall picture of delegate selection seems deceptively easy. The national party determines how many delegates each state is to have at the convention. This number of delegates is then selected in accordance with the statutory procedures of each individual state or territory.² Unless successfully challenged by a competing slate, the delegates selected at the state level are certified and seated by the party. Despite this apparent simplicity, fundamental political and constitutional questions can be asked about each step. Should a "one person one vote" standard apply to the apportionment of delegates among states?³ What are the constitu-

*The author gratefully acknowledges the invaluable assistance provided him in the preparation of this article by Mr. Dan Lowenstein of the California Secretary of State's office, Ms. Andrea Hill, Ms. Dorothy Otani of THE BLACK LAW JOURNAL and Atty. Charles Rosenberg of Los Angeles.

1. Only 5.5 percent of the 1968 delegates (to the Democratic Convention) were Black, although Blacks constituted over 11 percent of the population and an even higher percentage of Democratic voters. The most credible data available from the 1968 general election indicates that 85 percent of the Black Americans who voted cast their presidential ballots for the nominee of the Democratic Party. In 1964, when 94 percent of all Blacks voted Democratic, Blacks comprised only 2 percent of the entire Democratic National Convention. This situation was equally or more acute at the 1968 Republican National Convention where, of the 2,666 delegates and alternates assembled only 2.4% were Black. Of these, only 26 were actually voting delegates (1.9% of the total delegates), and 50 were alternates. Mandate for Reform. A Report of the Commission on Party Structure and Delegate Selection to the Democratic National Committee (1970), at 26. See also Appendix A.

2. See Appendix B.

3. The states have traditionally enjoyed far more flexibility in the selection of delegates to the Democratic Convention than to that of the Republican Party.

Although both parties recognize the supremacy of the convention in all party affairs, the Republican National Convention has tended to assert itself more strongly in dealing with state parties than the Demo-

crats have. For example, the rules of the Republican National Convention have always been explicit on acceptable methods of delegate selection, the apportionment of delegate votes within the states, the procedures incidental to credentials contest and the qualifications for participants at all party meetings and primaries (c.f. Report of the Committee on Rules and Order of Business, 1968 Republican National Convention), while the Democrats have been silent on these matters. Segal, *Delegate Selection Standards*, 38 Geo.Wash.L.Rev. 873, at 875.

Heralding some far-reaching changes in delegate selection, in 1969, the Democrats adopted a resolution providing:

It is understood that a state Democratic party, in selecting and certifying delegates to the national Convention, thereby undertakes to warrant that such delegates have been selected through a process in which all Democratic voters have had full and timely opportunity to participate. In determining whether a state party has complied with this mandate, the convention shall require that:

(1) The unit rule not be used at any stage of the delegate selection process; and

(2) All feasible efforts have been made to assure that delegates are selected through party primary convention, or committee procedure open to the public within the calendar year of the National Convention. Cong.Quar.Service, *The Presidential Nominating Conventions, 1968*, at 148, 197 (1968). See generally Schmidt & Whalen, *Credentials Contests at the 1968 - And 1972 - Democratic National Conventions*, 82 Harv.L.Rev. 1438 (1969).

tional limits governing the choice of each state as to the selection of its allotment of the delegates?⁴ What weight should the Credentials Committee attribute to the certification of a slate by the state?⁵

Although all of these questions are relevant to the issue of increased Black representation at the convention, it is only on the second question — that dealing with the intra-state delegate selection process — that this article will focus. Although the mechanism employed by each state has its own special effect (usually detrimental) on the quality and quantity of Black representation, this article will further be focused on the "winner-take-all" primary delegate selection system⁶ — a system which awards the entire allotment of the state's convention delegates to the slate pledged to the candidate who receives the plurality vote in the primary.

The motivation for writing this article can be found in the assertion that the "winner-take-all" primary adversely affects the political interests of Blacks to a degree that makes it abolition *sine qua non* to any qualitative increase in Black representation at the national conventions. With that assertion as his basis, the author's purpose is to present a strategy for the legal ambush of this particular scheme.

II. THE JUSTIFICATION

THE "WINNER-TAKE-ALL" method of selecting delegates to the national convention has been roundly criticized with good reason by New York Congresswoman Shirley Chisholm, the only Black candidate for the 1972 Democratic presidential nomination.⁷ Prior to the presidential primary in the state of California, Black political leaders across the country conveyed the impression that they were favorably disposed toward, or at least neutral to, Ms. Chisholm's campaign. This facade of support or neutrality crumbled in California as one recognized Black leader after another expressed his preference for one or the other of the two

major white candidates on the ballot.⁸

The California primary came much too late in the campaign for the desertion to be excused on the grounds that it was impossible to believe that Ms. Chisholm was determined to proceed with her campaign right up to the nominating convention. Ms. Chisholm is much too charismatic and committed a person to have lost support because of any alleged inability to articulate the desires and aspirations of the Black masses. The great majority of Black leaders who were involved have proven their commitment and foresight too often in the past to be passed over lightly as insensitive and myopic. The answer then must lie in some form of political expediency. Not necessarily political expediency in the crudest form of the term — not the type that would be inconsistent with the articulated concerns and demonstrated commitment of these individuals. Rather, it is the political expediency triggered by that same concern and commitment which has served to advance the interest of the Black community in the past.

The California primary, to a far greater extent than any prior or subsequent pre-convention event, forced Black political leaders to deny neutrality and aggressively assert what each perceived to be the interest of his constituency or of the Black community in general. With 271

4. Variations on the argument to apply the one person-one vote formula to delegate apportionment can be found in: Comment, *Constitutional Reform of State Delegate Selection to National Political Party Conventions*, 64 Nw.U.L.Rev. 915 (1970); Note, *Constitutional Safeguards in the Selection of Delegates to Presidential Nominating Conventions*, 78 Yale L.J. 1228 (1969); Note, *Regulation of Political Parties: Vote Dilution in the Presidential Nomination Procedure*, 54 Iowa L.Rev. 471 (1968). For an argument to the contrary, see Comment, *One Man, One Vote and Selection of Delegates to National Nominating Conventions*, U.Chi.L.Rev. 536. Also, Bellamy, *Applicability of the Fourteenth Amendment to the Allocation of Delegates to the Democratic National Convention*, 38 Geo.Wash.L.Rev. 892 (1970).

5. See generally citations in note 4, *supra*; Note, *One Man-One Vote in the Selection of Presidential Nominating Delegates by State Party Conventions*, 5 U.Chic.L.Rev. 349.

6. See Schmidt and Whalen, note 3, *supra*.

7. Ms. Chisholm was later joined in her opposition to the "winner-take-all" primary by the other losers in the California primary. Together a lawsuit was brought. See note 60, *infra*, and accompanying text.

8. Of the six Black members of the California State Assembly, three endorsed Humphrey, two endorsed McGovern, and one remained uncommitted. (The uncommitted one was Assemblywoman Yvonne Brathwaite, who at the time was conducting her own successful campaign for a Congressional seat.) The one state Senator also endorsed Humphrey. The McGovern backers were joined by Julian Bond, Coreta King, and Jesse Jackson.

convention delegate votes at stake, the importance of involvement in this state could hardly be over-emphasized. But it is more than the size which has destined California to be the most important of the presidential primaries in 1972; it is the "winner-take-all" aspect of the California law which is the major determinant of the concentration of Black political leaders around the two generally acknowledged frontrunners. In California, as in nowhere else in the nation, the charge that a vote for Congresswoman Chisholm was a "wasted" vote could be promptly and effectively documented. Since there appeared little hope of outdistancing the then narrowed field of candidates,⁹ the most the Chisholm campaign could have reasonably expected was some sort of "moral victory" by garnering a respectable percentage of the vote. And for Black political leaders a "moral victory" is no victory at all when compared with the multitudinous problems of the Black and poor in this country — problems which a sympathetic ear in the White House could assist in solving.

THAT THE "winner-take-all" aspect of the California primary forced Black political leaders to make the choices which they did, clearly illustrates that the Black community has a special interest in the abolition of that provision. The overall effect of the primary is to effectively deny representation at the convention to all but the supporters of the candidate whose slate receives a plurality of the votes cast in the primary. For the Black community, this deprivation is heightened appreciably by the fact that the "winning" candidate is probably less representative of its interest than of virtually any other group participating in the electoral process. Thus, it is definitely in the self-interest of Blacks to encourage and support the candidacy of Blacks who can garner enough delegate strength to obtain the nomination or at least effectively represent Black interests at the compromise-coalition stage of the process — the na-

tional nominating convention. However, the "winner-take-all" primary within the context of American society discourages the candidacy of Blacks by removing the possibility of their obtaining bargaining power even where there is little prospect of victory. In effect, it *does* make every vote cast for a Black candidate a "wasted" vote. Moreover, this form of delegate selection heightens the possibility that white candidates who will lose white votes because of their previously sympathetic attitudes toward the problems of the Black community will be doubly exposed to defeat. And most disastrous of all, Black political leaders and the Black community must choose whether to deny support to the candidate who better represents their interest or relinquish whatever little power they can exercise by providing that often necessary margin of victory.

III. STRATEGY

THE ODIUS operation of this process on the Black community leaves none but a position of active opposition tenable. As in most cases, the most appropriate forum in which to voice opposition is the state legislature. It is there where all factions are represented that the type of law-making essential to the changes sought should be done. In the past, however, it is the judicial branch which has responded with the sought-after relief leaving legislatures to slowly and reluctantly follow, if at all. It is a fair assumption that this instance will be no different and that resort to the courts will precede any abolition of the "winner-take-all" method of convention delegate selection.

A. Threshold Determination of Justiciability

ONCE THE decision is made to resort to the courts, the threshold question of "justiciability" must be faced. The nature

9. Of the nine candidates listed on the ballot, only Congresswoman Chisholm, Los Angeles Mayor Yorty, and Senators McGovern and Humphrey actively campaigned. Alabama Governor George Wallace, still confined to a hospital in Maryland as a result of gunshot wounds

of this case immediately brings into question the applicability of the "political question" doctrine.¹⁰ Briefly stated, although an issue may be found to be within the constitutional jurisdiction of the courts, the courts will still not hear it if it involves a political question." Indicia of the existence of a "political question" were first fully enunciated in the Supreme Court in the celebrated case of *Baker v. Carr*¹¹ and later in *Powell v. McCormack*.¹² *Baker v. Carr* held that

Prominent on the surface of any case held to involve a political question is found (1) a textually demonstrable constitutional commitment of the issue to a coordinate political department; (2) or a lack of judicially discoverable and manageable standard for resolving it; (3) or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; (4) or the impossibility of a court's undertaking independent resolution without expressing lack of respect due coordinate branches of government; (5) or an unusual need for unquestioning adherence to a political decision already made; (6) or the potential embarrassment from the multifarious pronouncements by various departments on the question. Unless one of these formulations is inextricable from the case at bar, there should be no dismissal for non-justiciability on the ground of the presence of a political question.¹³

No doubt, it will be contended that the processes used to select delegates to the national nominating conventions are much less amenable to judicial intervention than the legislative processes involved in *Baker* and subsequent cases.

However, all but the first of the six *Baker v. Carr* indicia were vitiated by *Powell v. McCormack*.¹⁴ In denying the Speaker's claim that under *Baker v. Carr* standards the issue presented by Adam Clayton Powell's suit challenging his exclusion from his seat in the House of Representatives, was nonjusticiable, the Court held that the controlling criteria for finding a "political question" was the existence or nonexistence of a "textually demonstrable commitment" to Congress of the power to exclude members on whatever grounds it pleased.¹⁵

Given this reformulation of the necessary test for the application of the political question doctrine, it is highly unlikely that justiciability will be a real obstacle to a timely suit to invalidate the "winner-take-all" primary method of delegate selection. It can hardly be claimed that there is textually demonstrable or even inferentially plausible constitutional commitment of the delegate election system to any other branch of the government.

B. Equal Protection Analysis

PRACTICAL, strategic, and legal considerations suggest that this delegate selection scheme is most vulnerable to attack on equal protection grounds. In fact, and in effect, the scheme is essentially "classificatory". It is the means by which the state determines which of the competing factions will be represented at the nominating convention, and which will not.

State legislatures frequently classify citizens into groups for various purposes. Those classifications are subject to scrutiny under the Equal Protection Clause of the Fourteenth Amendment. When harm as a result of the classification is demon-

suffered when an assailant attempted to assassinate him while he was campaigning in the Maryland primary, was unable to personally appear in California to lead the write-in drive he had started.

10. For an extensive and well documented discussion of the "political question" doctrine see Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 *Yale L.J.* 517.

11. 369 U.S. 186. Hereinafter cited as *Baker*.

12. 395 U.S. 486. Hereinafter cited as *Powell*. Adam Clayton Powell, elected to serve on the House of Representatives for the 90th Congress, was denied his seat by the adoption of House Resolution No. 278, which then-Speaker John McCormack had ruled was an issue which could exclude Powell by majority vote. The House action followed charges that Powell had misappropriated funds and abused the process of the New York courts.

13. *Baker*, 217.

14. For a comprehensive discussion of what *Powell* did to *Baker*, see *The Supreme Court*, 1968 *Term*, 83 *Harv. L. Rev.* 62 (1969).

15. "Our interpretation...discloses a determination (of this case) would require no more than interpretation of the Constitution. Such a determination falls within the traditional role accorded courts to interpret the law, and does not involve a 'lack of respect due a coordinate branch of government', nor does it involve an 'initial determination of a kind clearly for non-judicial discretion'. Our system of government requires that the federal courts on occasion interpret the Constitution in a manner at variance with the construction given the document by another branch. The alleged conflict that such an adjudication may cause cannot justify the courts' avoiding their constitutional responsibility.

"Nor are any other formulations of a political question 'inextricable from the case at bar'. Petitioners seek...an interpretation of the Constitution...for which there are clearly 'judicially manageable standards'. Finally, a judicial resolution of petitioners' claim will not result in 'multifarious pronouncements by various departments on one question'. For...it is the responsibility of this Court to act as the ultimate interpreter of the Constitution." *Powell*, 548-549.

strated, the state is under an obligation to justify the classificatory scheme. In determining the content of the burden of justification, the Supreme Court has applied a two-pronged test. In the area of economic regulation, the Court now seeks only to ascertain whether the distinctions drawn by the statute in question bear a "rational relationship to a legitimate state legislative purpose."¹⁶ On the other hand, in cases involving "suspect classification" or involving "fundamental interests," the Court subjects the classification to strict scrutiny. The state must show that it has a compelling interest which justifies the law and that the distinctions drawn are necessary to further its purpose.¹⁷

1. Finding a Fundamental Right that is Infringed

THE CHISHOLM experience suggests that the effect of the statutory scheme establishing the "winner-take-all" primary method of delegate selection is a classification which operates to the disadvantage of Blacks. As such it should be considered "suspect" and subjected to the "compelling state interest" test. In addition to some analytical problems with that argument, experience has demonstrated that there are certain assertions about the depth of racism in this society as a whole (not just the south) that the Supreme Court is not ready to accept. Thus, while casting the argument in racial terms may comport with reality, it is strategically unwise.

Nevertheless, the more stringent standard can be applied. As demonstrated in the following pages, a successful claim can be set out, contending that "racially neutral" (and as such more judicially palatable) but fundamental rights are infringed — the fundamental right to cast an effective ballot and the fundamental right of political association.

a. Infringement on the Right to Cast a Full and Effective Vote

THE SUPREME COURT has consistently found that the right to vote is a funda-

mental interest.¹⁸ But it is not just casting a ballot which is constitutionally protected, but casting an *effective* ballot.¹⁹ So the Court stated in *Williams v. Rhodes*, "the right of qualified voters, regardless of their political persuasion, to cast their votes effectively . . . rank(s) among our most precious freedoms."²⁰

That an effective vote requires voter participation at the significant stages of the elective process was articulated early and forcefully by the Supreme Court in the *White Primary Cases*.²¹ By a series of racially discriminatory devices, Texas had attempted to circumvent the Fifteenth Amendment by barring Blacks from participation in the party nomination process.²² In *Terry v. Adams*, the Jaybird Association, a private political group, held a straw poll prior to the primary. No Blacks were allowed to participate in this "pre-primary", though they were able to participate fully in the primary itself and the ensuing general election, the Court found the exclusion from the "pre-primary" unconstitutional since it was the "sole stage of the local political process where the bargaining and interplay of rival political forces would make [the Blacks' votes] count."²³ The Court found that since Blacks were denied participation at the election stage where effective coalition formation and compromise took place, they were denied their Fifteenth Amendment rights.

Perhaps the single most important case

16. See, *Dandridge v. Williams*, 397 U.S. 471 (1970).
17. See, *NAACP v. Button*, 371 U.S. 415, 438 (1963); Note, *Developments in the Law of Equal Protection*, 82 Harv. L. Rev. 1067, 1076-1131 (1969).

18. See, *Kramer v. Union Free School District*, 395 U.S. 621 (1969); *Reynolds v. Sims*, 377 U.S. 533 (1964). For review of the cases, see, Note, *Oregon v. Mitchell and the Compelling State Interest Doctrine—The End of An Era?*, 22 Syracuse L. Rev. 1123. See also Kirby, *The Constitutional Right to Vote*, 25 N.Y.U.L. Rev. 995.

19. See *Williams v. Rhodes*, 393 U.S. 21 (1968) and citations therein.

20. *Id.* at 30.
21. *Smith v. Allright*, 321 U.S., 649 (1944) and *Terry v. Adams*, 345 U.S. 461 (1953).

22. In *Smith v. Allright*, the Supreme Court rejected an argument that the Texas Democratic Party was a private voluntary organization and was thus free to exclude Blacks from membership.

23. ". . . Because the Jaybird-indorsed nominee meets no opposition in the Democratic primary, the (Black's) vote is nullified at the sole stage of the local political process where the bargaining and interplay of rival political forces would make it count . . . (this devise), as a result strike to the core of the electoral process." *Terry v. Adams*, 345 U.S. 461, 484.

on point is *Gray v. Sanders*,²⁴ the first voting rights case to be decided by the Supreme Court after the landmark decision in *Baker v. Carr*.²⁵ In invalidating the Georgia county unit system for nominating statewide officials, the Court said that "[t]he conception of political equality . . . can mean only one thing — one person, one vote."²⁶ This principle was held in *Reynolds v. Sims*²⁷ to be the constitutionally required standard for apportionment of both houses of a state's legislature, in *Avery v. Midland County*²⁸ for local government of general legislative power, in *Hadley v. Junior College District*²⁹ for special purpose local units, and in *Maxey v. Washington State Democratic Committee*³⁰ for delegate selection process to a state nominating convention.

IN SHORT, one important feature of the ruling in *Gray* was the indication that a classification of voters according to geographic areas has an invidious and unconstitutional effect unless the voters in each area have substantially equal numbers of representatives on a per capita basis.

It is important to note, however, that *Gray* was neither solely nor primarily an equal protection case. More than questions relating to the quantity, it involved matters relating to the *quality* of representation. The statute struck down in *Gray* provided a method for nominating statewide officials whereby each county in the state was allocated a number of unit votes. A candidate who received a plurality of the votes in any county during the primary, received that county's entire allotment of unit votes, and any candidate receiving the majority of the unit votes won the nomination. Under the original statute, Georgia had assigned unit votes to counties on other than a strict per capita basis. However, under the revised statute, the units were allocated pursuant to a "bracket system" based on broad population categories.

The District Court invalidated the Georgia statute on the ground that the

broad population categories, in effect, contained a built-in bias against the larger counties. But the same court upheld the basic county unit system provided that no county's unit votes were more disproportional to those of another county than are the votes of the states in the federal Electoral College.³¹ This latter portion of the hybrid decision was reversed by the Supreme Court on the grounds that the entire county unit system was unconstitutional "even if unit votes were allocated strictly in proportion to population."³²

In a crucial footnote, the Court said:

The county unit system . . . would allow the candidate winning the popular vote in the county to have the entire vote of that county. Hence, the weighting of votes would continue, even if unit votes were allocated strictly in proportion to population. Thus, if a candidate won 6,000 or 10,000 votes in a particular county, he would get the entire unit vote, the 4,000 votes for a different candidate being worth nothing and being counted only for the purpose of being discarded.³³

In short, the Court declared in *Gray* that in the absence of any compelling state interest, discarding the votes of those who did not vote for the plurality candidate has an invidious effect on voting. In the words of the Court, the discarding of votes in this fashion has an invidious effect because the right to vote effectively cannot be diluted in "any primary election that in fact determines the true weight a vote will have."³⁴

THE FOREGOING considerations lead to conclusions that the fundamental right to cast an effective vote is abridged if (1) the vote is excluded from the significant stage of the electoral process, (2) or is governed by some unit allocation formula

24. 372 U.S. 368 (1963). Hereinafter cited as *Gray*.

25. *Supra*, note 11.

26. *Gray* 381.

27. 377 U.S. 533 (1964).

28. 390 U.S. 474 (1968).

29. 397 U.S. 50 (1970).

30. 319 F. Supp. 673 (W.D. Wash. 1970).

31. *Gray*, 373 n. 5.

32. *Id.* at 381 n. 12.

33. *Id.*

34. *Id.* at 380.

which results in its being discarded at an early stage in the process. Judged against this standard, the winner-take-all primary delegate selection process is patently unconstitutional. This mechanism operates to exclude from the nominating convention — the truly significant stage of the nominating process — all representatives other than those who won a plurality of the primary vote. It classifies voters at a preliminary stage in the nominating process according to whom they vote for and then discards their vote if they did not vote for the plurality winner.

b. *Infringement on the Right of Political Association*

THAT THE RIGHT of political association is a fundamental right protected by the First and Fourteenth Amendments has been repeatedly asserted by the Supreme Court.³⁵ But that right like so many others would be a right without substance were it not for the protective penumbra with which it is cloaked. Within that penumbra the Court has found that a political group has the right to organize effectively so that its position may be heard in court,³⁶ in the legislature,³⁷ and before "whatever body [having] the power to make the State's selection of Electors."³⁸

As Justice Harlan pointed out in his concurrence in *Williams v. Rhodes*: "The right to have one's voice heard and one's voice considered by the appropriate governmental authority is at the core of the right of political association."³⁹ That the Justice's reference to "governmental authority" is not intended to be strictly construed can be inferred from his later statement: ". . . — no matter what the institution to which the decision is entrusted, political groups have a right to be heard before it"⁴⁰ and from the fact situation presented in *Rhodes*. At issue were Ohio election laws which required that a new political party obtain petitions signed by qualified electors totaling 15% of the number of ballots cast in the last gubernatorial election. This particular re-

quirement and other similarly restrictive provisions virtually precluded any new party from qualifying for a position on the ballot. The Ohio American Independent Party and the Socialist Labor Party⁴¹ brought companion suits, challenging the validity of these laws on the grounds that they were violative of the Equal Protection Clause of the Fourteenth Amendment.

Speaking for the Court, Justice Black found that the "Ohio restrictive laws . . . imposed a burden on voting and associational rights" and thus constituted "invidious discrimination."⁴² Concurring with his strict constructionist colleague, Justice Douglas asserted:

[The Equal Protection Clause] protects . . . political groups as well as . . . other entities . . . a State has precious little leeway in making it difficult or impossible for citizens to vote for whomsoever they please . . .⁴³

Thus, it does not seem at all inaccurate to suggest that the right to have one's voice considered by the national nominating convention is at the core of the right to political association.

OF INTEREST is the recent case of *Dunn v. Blumstein*.⁴⁴ In *Dunn*, the Supreme Court held durational residency provisions for voting to be unconstitutional since they "classify bona fide residents on the basis of recent travel, penalizing those persons and only those persons, who have gone from one jurisdiction to another." Speaking for the Court, Justice Marshall said:

The jurisdictional residence requirement

35. "It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech. *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958). See H. Kalven, Jr., *The Negro and the First Amendment* 65-121 (1965).

36. See note 17, *supra*.
37. See *Eastern Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137-138 (1961); *United States v. Harries*, 347 U.S. 612, 625-626 (1954); *United State v. Rumely*, 345 U.S. 41, 4-47 (1953).

38. *Williams v. Rhodes*, 42.

39. *Id.* at 41.

40. *Id.* at 42.

41. The companion case to *Williams v. Rhodes* was *Socialist Labor Party v. Rhodes*.

42. *Williams v. Rhodes*, 34.

43. *Id.*, at 39.

44. 92 S. Ct. 995 (1972). Hereinafter cited as *Dunn*.

directly impinges on the exercise of a second fundamental personal right, the right to travel.⁴⁵

In the present case such laws (durational residence laws), force a person who wishes to travel and change residence to choose between travel and the basic right to vote.⁴⁶

It is arguable by analogy, that the same result should follow if and when a citizen is forced to choose between the fundamental right of political association and some other fundamental right.

Both *Rhodes* and *Dunn* demonstrate defects in the "winner-take-all" primary delegate selection process. This process operates to make it structurally impossible for any voter to have his or her voice heard or considered at the national nominating convention unless he or she happened to support the plurality winner in the primary. The natural consequence of this is to force upon the voter the choice of ascertaining in advance who the winner will be and voting for him or her, in order to have his interests represented at the convention, or to opt for the association of his choice and face total impotence at the critical stage.

It is axiomatic that a voter has the unfettered right to choose to support any candidate he wishes. Freedom of political association can mean nothing less. However, by imposition of a classification which rewards those who picked the plurality winner and excludes all others from effective political association at the national level, the winner-take-all primary delegate selection process penalizes those who have exercised the freedom of association in a way different from the plurality. It thus burdens "the right of individuals to associate for the advancement of political beliefs."⁴⁷

IV. THE DEFENSE

HAVING established that fundamental rights are infringed by the "winner-take-all" method of selecting delegates to the national nominating conventions, the burden now shifts. Defendant State will attempt to demonstrate that there is some

"compelling state interest" which justifies the statutory scheme. In addition, arguing by analogy to the degree of control exercised by the state legislatures over selection of electors to the Electoral College and state legislatures, Defendant will contend that there is ample judicial precedent to validate this mechanism. All three contentions should fail.

A. No Compelling State Interest

AT THE OUTSET, it should be noted that the interest of the individual states is secondary to that of the national political parties. It is the national parties — these typically loose federations of state parties — which are primarily responsible for the nomination of presidential candidates. While the parties have assumed such importance that their processes are subject to scrutiny under the Fourteenth Amendment,⁴⁸ the presidential nomination process itself is still controlled primarily by the parties themselves. The parties have a significant amount of discretion in establishing candidate selection mechanisms. In practice, for reasons of political expediency and convenience, the parties have chosen to focus the delegate selection procedure around the various states. This is not constitutionally required. And it does not have to be.

Alternatives will be briefly discussed in the next chapter of this article. Suffice to say for the present, that the current process is not constitutionally required, and is not necessarily an obligation of the states. Thus, the real parties in interest are the national political parties.

However, it is undisputed that all states have an interest in ensuring stable and effective government. It may be contended that in order to advance this interest, an individual right to full and effective participation in governmental decisions be limited at some stage. Prudence, common sense, and judicial precedent suggest that this proposition is not

45. *Dunn*, 1001.

46. *Dunn*, 1003.

47. *Williams v. Rhodes*, 30.

lightly to be discarded. Even so, the question remains whether the state's interest in stable and effective government is so compelling at the nominating stage as to justify invasion of fundamental rights.

The presidential nominating process does not end at the conclusion of the state "winner-take-all" primary. Rather, the ultimate decision occurs at the national nominating convention. It is there that opposing groups with competing interests attempt to forge the coalition which will determine the single choice. The discarding of votes at the pre-convention level severely inhibits the representation of all significant interests at the nominating convention and thus distorts the compromise-coalition process. Instead of the broad-based coalition composed of all or most significant groups, the winner-take-all primary delegate selection process is conducive to the emergence of an unrepresentative, plurality-faction-controlled coalition of interests.⁴⁹ So narrow a coalition could hardly hope to unite the party. From so polarized an atmosphere the losing candidates would be hard-pressed to support the convention's selection and would be more inclined to sit out the election or to present their views directly to the voters in a splinter party.⁵⁰ In either case, it is obvious that far from serving to promote governmental stability and effectiveness, this process has the opposite effect. The non-involvement of influential pre-convention candidates and the emergence of third parties led by them, both increase the likelihood that the President will be elected with a minority of the popular vote or will be chosen by the House of Representatives due to failure to receive a majority vote in the Electoral College.⁵¹ In either case, it is governmental instability and probably ineffectiveness which is guaranteed, not the opposite. Thus, it is not totally facetious to contend that the state's interest in governmental stability and effectiveness supports the abolition of the "winner-take-all" primary delegate selection process rather than its continuation.

AN EVEN MORE persuasive denial of the existence of "compelling state interest" can be found in those cases where the court considered the claims of third parties. As discussed above, third parties are more disruptive to the states' interest in governmental stability and effectiveness than the selection of delegates to the national nominating conventions. Yet, the court gives every indication of making access to the ballot as easy as possible for the splinter groups.

In *Williams v. Rhodes* the Court attempted to establish ground rules for the representation of different points of view within the election system by invalidating an Ohio statutory scheme which effectively precluded splinter parties from obtaining positions on the presidential ballot. Ohio contended that its highly restrictive provisions were "justified because without them a large number of parties might qualify for the ballot, and the voters would then be confronted with a choice so confusing that the popular

48. See note 4, *supra*. Also see Note, *Freedom of Association and the Selection of Delegates to National Political Conventions*, 56 *Corn. L. Rev.* 148; Note, *Selecting and Certifying National Political Convention Delegates—A party or a State Right?*, 4 *Ga. L. Rev.* 875.

49. The coalition emerging from the 1964 Republican Party National Convention is perhaps the best recent example of the possibility and consequences of a complete takeover of the political party by one particular wing.

50. Former Senator Eugene McCarthy's nonchalance during the 1968 election campaign and his continuing threat of organizing a "fourth party" is right on point. Of course, the failure of the Democratic Party to fully abandon progressive domestic programs probably accounts for the continuing threat of dissident Dixiecrats led by Alabama Governor Wallace. See generally, R. Dixon, *Democratic Representation 17* (1968).

51. On [two] occasions in American history Congress has been intimately involved in the election of the President . . . In the election of 1800 the Democratic-Republican electors voted for Thomas Jefferson and Aaron Burr, intending Jefferson for President and Burr for Vice-President. Since there was no separate ballot for Vice-President under the original method of election, Burr received as many electoral votes as Jefferson. The House, consequently, was required to choose between them for President, electing Jefferson on the thirty-sixth ballot. The defect in the Constitution which caused this tie was eliminated by the Twelfth Amendment's requirement of separate ballots for President and Vice-President in the electoral college. The House of Representatives had to choose the President again in the election of 1824. Andrew Jackson, John Quincy Adams and William H. Crawford, as the recipients of the highest three numbers of electoral votes, were the candidates considered by the House. Adams was selected on the first ballot, receiving the votes of thirteen of the twenty-four states. Seven states gave their votes to Jackson and four to Crawford. A change of only one vote in any of six of the thirteen states voting for Adams would have prevented his election. Feerick, *The Electoral College—Why It Ought To Be Abolished*, 37 *Ford. L. Rev.* 1, 17.

will could be frustrated."⁵² In rejecting this argument, Justice Black stated: "No such remote danger can justify the immediate and crippling impact on the basic constitutional rights involved in this case."⁵³

*Moore v. Ogilvie*⁵⁴ also made access to the ballot in general elections easier for splinter parties. In *Ogilvie*, an Illinois statute which required a third party candidate to obtain at least 200 signatures in each of 50 counties was held violative of the Equal Protective Clause of the Fourteenth Amendment. Again, the Court stated its preference:

It is no answer to the argument under the Equal Protection Clause that this law was designed to require statewide support for launching a new political party rather than support from a few localities. This law applies a rigid, arbitrary formula to sparsely settled counties and populous counties alike, contrary to the constitutional theme of equality among citizens in the exercise of their political rights. *The idea that one group can be granted greater voting strength than another is hostile to the one man, one vote basis of our representative government.* (Emphasis added).⁵⁵

Both *Rhodes* and *Ogilvie* stand for the proposition that the opportunity for "the advancement of political goals means little if a party can be kept off the election ballot and thus denied an equal opportunity to win votes."⁵⁶

It is clear that a state has a strong interest in limiting the number of candidates in the final presidential election — an interest that is heightened by the potentially unstabilizing effect that multiple candidates could have on the national governing coalition. It is equally clear though that this interest does not override the individual's right to effective political participation even when that participation comes to the election stage and outside the traditional framework of American politics. Thus it seems that a *fortiori* state interest cannot be sufficiently "compelling" at the less critical pre-convention stage. A conclusion to the contrary would do injustice to logic and distort reality. It would favor the abandonment of the major political parties over

meaningful participation in them. While facilitating access to the general ballot may be important to those already estranged from the major political parties, it is no substitute for effective constitutional safeguards for those who wish to realistically influence the choice of presidential nominees.⁵⁷

B. Electoral College Analogy is Inapposite

RELYING ON *Whitcomb v. Chavis*⁵⁸ and *Williams v. Virginia State Board of Elections*⁵⁹ a federal district court recently held that by analogy to the Electoral College, the "winner-take-all" method of delegate selection is not constitutionally vulnerable.⁶⁰ In the words of the court:

. . . plaintiff's pleading . . . present an insubstantial federal question in view of *Williams v. Virginia State Board of Elections* and *Whitcomb v. Chavis* (citations omitted). In *Williams, supra*, the Supreme Court upheld the unit rule for choosing presidential electors. *A fortiori, this Court finds that delegates to the Democratic National Convention is not unconstitutional.* (Emphasis added).⁶¹

This conclusion evidences an erroneous reading of both cases cited and demonstrates a fundamental misunderstanding about the unique circumstances which present the only rationale for the Electoral College.

It is true that the Electoral College is in essence a "winner-take-all" process. It is also true that the challenges to methods of selecting electors have met with little success. However, the origin, nature, and

52. *Williams v. Rhodes*, 33.

53. *Id.*

54. 394 U.S. 814 (1968).

55. *Id.* at 819.

56. *Williams v. Rhodes*, 33.

57. Precisely this point was made by Chief Justice Burger in *Bullock v. Carter*, 92 S. Ct. 849. At issue on *Bullock v. Carter* was constitutionality of a filing fee system in the state of Texas. Under the Texas statutes, payment of the filing fee was an absolute prerequisite to a candidate's participation in a primary election. Two of the plaintiff appellees, Pate and Wischkaemper, had met all qualifications for the respective offices.

58. 305 F. Supp. 1364 (S.D. Ind. 1969), *ordered entered* 307 F. Supp. 1362 (S.D. Ind. 1969), *Rev'd sub nom. Whitcomb v. Chavis*, 403 U.C. 124 (1871). Hereinafter cited as *Whitcomb*.

59. 298 F. Supp. 622 (D. Va. 1968) (three judge court), *aff'd mem.* 393 U.S. 320 (1969). Hereinafter cited as *Williams*.

60. *Hollifield v. Brown*, F. Supp. (E.D. Ca. 1972). Hereinafter cited as *Hollifield*.

61. *Hollifield*, 60.

operation of the Electoral College are so different from that of the nominating process as to belie analogy. Moreover, in view of the admitted inequities inherent in the Electoral College and the multitudinous criticisms which have been leveled at this method of presidential selection, it seems hardly the system to emulate without some compelling reason for so doing.⁶²

Williams v. Virginia State Board of Elections is Inapplicable

IN *Williams*, plaintiffs contended that the Virginia Statute which provided for the selection of electors by a statewide general election was unconstitutional since the "winner-take-all" aspect of that method accorded no representation among the electors for the non-plurality minorities. Relying on *Gray* and *Wesberry*, they contended that the one person, one vote doctrine was violated.

The Court disagreed. Finding that the statewide method of selecting electors was "but another form of the unit rule"⁶³ and that "its effect is exceptionable in many aspects"⁶⁴ the court held:

Notwithstanding, it is difficult to equate the deprivations imposed by the unit rule with the denial of privileges outlawed by the one person, one vote doctrine or banned by the Constitutional mandates of protection.⁶⁵

This is no doubt the language on which the *Hollifield* Court relied. But the *Williams* Court did not stop there. It continued:

*In the selection of electors the [unit] rule does not in any way denigrate the power of one citizen's ballot and heighten the influence of another's vote. (Emphasis added.)*⁶⁶

It is this deliberate narrowing of the Court's holding that reduces the impact *Williams* would have on the selections of delegates to a national convention. And to put the matter to rest, in its final passages the Court said:

The merits and advantages of the plaintiff's thesis are readily recognizable . . . but we are of the opinion that a compulsory compliance with their demand or any

other proposed limitations on the selection by the State of its presidential electors would require a Constitutional amendment.⁶⁷

From the outset the *Williams* Court accepted the "predominance of that Constitutional design."⁶⁸ It recognized that the Constitution explicitly provided for the selection of presidential electors by each state "in such a manner as the Legislature thereof may direct."⁶⁹ From that premise, all questions regarding the wisdom of the electoral college were precluded, and the inquiry merely considered "whether Art. II, Section I considered alone or with Constitutional safeguards, permit[s] the selection of electors by a general election . . ."⁷⁰

No constitutional provision analogous to Article II, Section 1 can be found relating to the selection of delegates to a national nominating convention. Thus neither the underlying premise nor the resulting inquiry can be appropriately applied to the delegate selection process. Without premise or process and with a very narrow conclusion, reference can be made to *Williams*, but *Williams* can scarcely be used to justify the analogy.

NOR CAN the analogy be supported by any alleged similarities between the two. Except for the "winner-take-all" effect of both, delegate selection to the national nominating convention and the selection of electors to the electoral college have very little in common. Moreover, they are fundamentally different in two important aspects: The electoral college is essentially elitist in origin and non-deliberative in operation; the national convention nominating system is neither.

Justice Douglas aptly characterized the electoral college as being "designed by

62. For an excellent analysis of this institution and its inherent dangers, see Feerick, *The Electoral College—Why it Ought To Be Abolished*, 37 *For. L. Rev.* 1 (1968). See also Comment, *Electoral College Reforms: The Proposals and Prospects*, 14 *St. Louis L. J.* 121.

63. *Williams v. Virginia State*, 626.

64. *Id.* at 627.

65. *Id.*

66. *Id.*

67. *Id.*, at 629.

68. *Id.*, at 624.

69. Note—*supras*

70. *Williams v. Virginia State*, 626.

men who did not want the election of the President to be left to the people."⁷¹ More than fifteen proposals for electing the President were presented at the Constitutional Convention.⁷² Among them were several which called for direct election by the people.⁷³ These were rejected. One delegate stated:

It would be as unnatural to refer the choice of a proper character for chief Magistrate to the people, as it would, to refer a trial of colours to a blind man. The extent of the Country renders it impossible that the people can have the requisite capacity to judge of the respective pretentions of the Candidates.⁷⁴

Another, that the "ignorance of the people" would enable an organized group to "elect the [president] in every instance."⁷⁵ And it was Alexander Hamilton himself who presented the grandiose justification for the electoral college.

. . . (the choice) should be made by men most capable of analyzing the qualities adapted to the station . . . A small number of persons will be most likely to possess the information and discernment requisite to such complicated investigations.⁷⁶

No doubt Hamilton meant exactly what he thought he said. Although his elitist views coupled with the necessary compromises carried the day, his vision of a group of independent, capable, men deliberating over the choice for the Presidency, was never to be realized. What he could not see was the advent of the political parties and with them, the "pledged" elector. What he did not realize was that the constitutional language was sufficiently broad to allow an electoral college quite different from that he envisioned. As expressed by a Senate Select Committee in 1826:

Electors . . . have not answered the design of their institution. They are not the independent body and superior characters they were intended to be. They are not left to the exercise of their own judgment; on the contrary, they give their vote, or bind themselves to give it, according to the will of their constituents.⁷⁷

Thus, while it may have been intended to be a deliberative institution, the elec-

toral college has never been. All states recognize the "pledged" elector. These electors, once selected are required to meet in fifty-one separate places and cast their ballot for the candidate of their choice.⁷⁸ There is only one vote.⁷⁹ If no candidate receives a majority, there is no opportunity for consultation, negotiation, and compromise among the electors of the several states. The decision is left to the House of Representatives.

QUITE different from the above, is the process for selecting a party nominee. The disdain for popular participation is not only archaic but is antithetical to the origins of the present nominating process the central feature of which is the national convention.

The convention system from its very inception was a move toward democratization of the process of selecting the President.⁸⁰ It was a response to the total control exercised over the selection of nominees by the Congressional leaders of the major parties through what quickly became known as the "King Caucus."⁸¹ In 1832, realizing his immense popularity with the people, and aware of the uphill battle he faced were he to attempt to wrest the nomination from party leaders, Andrew Jackson and his colleagues decided to try an alternate route. They saw a convention of delegates from all the states as an excellent means of circumventing the party leaders while simultaneously maximizing Jackson's personal appeal.

The convention was expected to be an essentially deliberative process where broad interests would be represented and major compromises worked out so as to fashion a winning coalition. Unlike the

71. Gray 376, fn. 8.

72. See *Feerick*, *supra* 62.

73. *Id.*

74. 2 Records of the Federal Convention of 1787 at 31 (M. Farrand ed. 1911 & 1937). Hereinafter cited as Farrand.

75. *Id.* at 114.

76. The Federalist No. 68, at 452 (P. Ford ed. 1898) (A. Hamilton).

77. S. Doc. No. 22, 19th Cong., 1st Sess. 4 (1826).

78. 3 U.S.C. sec. 7.

79. 3 U.S.C. sec. 8, 8, 10.

80. The Democratic Choice: Report of the Commission on the Democratic Selection of Presidential Nominees (1968) at 11. Hereinafter cited as Hughes Comm.

81. *Hughes Comm.*, 10.

electoral college, it has remained true to its design, and with time, has become even more democratic in its organization and operations. Unlike electors, delegates of one state can influence the delegates of other states; and if no candidate is successful on the first ballot, there are others during which new factions may form and dissolve, allowing a new majority to be formed.⁸²

C. Multi-member Legislative District Analogy is also Inapposite

ALTHOUGH it is yet to be adequately articulated, an argument by analogy to the multi-member legislative districts can be foreseen by the *Hollifield* Court's reliance on *Whitcomb*. The argument will probably proceed: The process of selecting all the delegates in one election is like selecting all the legislators in a multi-member district. The Supreme Court upheld the multi-member district in *Whitcomb* despite an acknowledged discriminatory effect on minority interests. Therefore, the "winner-take-all" primary should be upheld.

Whitcomb v. Chavis Is Also Inapplicable

IN *Whitcomb*, relying on earlier holdings by the Supreme Court, (to the effect that while multi-member districts were not "per se illegal under the Equal Protection Clause," they may be subject to challenge where the circumstances operate to minimize or cancel out the voting strength of racial or political elements of the voting population").⁸³ plaintiffs attacked the constitutionality of Indiana statutes which provided for multi-member districting for the State General Assembly. In an impressive, well-written, sensitive opinion the District Court upheld Plaintiffs' contentions and revamped the system.⁸⁴

The Supreme Court reversed. Although the fairly long opinion by Justice White generated a tremendous amount of dicta, its holdings were essentially:

(1) Experience and insight have not demonstrated that multi-member districts are inherently invidious and violative of

the Fourteenth Amendment.⁸⁵

(2) District based elections decided by plurality vote are (not unconstitutional in either single or multi-member districts simply because the supporters of losing candidates have no legislative seats assigned to them. (emphasis added)⁸⁶

This second part of the Court's holding is amplified:

The mere fact that one interest group or another concerned with the outcome of Marion County elections has found itself out-voted and without legislative seats of its own provides no basis for invoking constitutional remedies where, as here, there is no indication that this segment of the population is being denied access to the political process. (Emphasis added.)⁸⁷

Query: can it not be asserted that the "winner-take-all" aspect when applied to the delegate selection proceedings in fact and effect excludes all but the supporters of the plurality winner from further participation in the nomination process and thus constitutes a denial of "access to the political system"?

Both in theory and in practice, there are essential differences between a state legislator and a convention delegate which demand a different standard of analysis to ascertain whether there has been a denial of access. Theoretically, a legislator is required to represent and is continuously accountable to all the members of his constituency. On the other hand, a convention delegate has indicated his intention and in some states is legally required to represent the interests of the

82. All of the above was pointed out in an abbreviated Memorandum filed in *Hollifield*. That memorandum reads in relevant part:

The Williams approach to "winner-take-all" is not in point regarding the issues raised in the present case for the following reasons: (1) The Electoral College is not a deliberative body. National nominating conventions are. (2) The Electoral College does not entertain minority views. National nominating conventions do. (3) Electors of one state do not influence or change the minds of electors of another state. National nominating convention delegates do. (4) Electors take the final act in the casting of a ballot for the election of the President which is a truly "winner-take-all" election to office. National nominating convention delegates do not. (5) Art. II of the Constitution (provides) for the election of the President . . . The Constitution, except for the Guarantees of the 14th and 1st amendment, is silent on state legislative methods of selecting delegates to national party nominating conventions . . .

83. *Forston v. Dorsey*, 376 U.S. 433, 439.

84. 305 F. Supp. 1964.

85. *Whitcomb v. Chavis*, 159.

86. *Id.* at 160.

87. *Id.* at 154.

plurality-winning slate. Unlike the legislator, the delegate is not even theoretically accountable and is not subject to removal by recall or rejection at the polls at the next election. Moreover, the legislator is called upon to make a large range of political choices and to represent his constituency on many non-voting matters while the convention delegate has one choice and one compromise — the selection of the presidential and vice-presidential nominees.

This being the case, it is not necessary to totally accept the *Whitcomb* Court's holding by paraphrase and say that the "winner-take-all" primary is not unconstitutional simply because no convention seats are assigned to other than the plurality winner. Rather reason and reality would dictate that while no legislative seats may not necessarily imply a denial of access to the political system, given the different circumstances and interests involved, a delegate selection system which provides no seat for other than the plurality winner does.

In summarizing the arguments of those who opposed multi-member districts, the Court said:

The chance of winning or significantly influencing intraparty fights and issue-oriented elections has seemed to some inadequate protection to minorities...⁸⁸

When coupled with the court's findings that the record showed that plaintiff had participated in their chosen party to the extent of influencing the parties' choice of candidates and that there was no indication that that party did not slate candidates "satisfactory to the ghetto,"⁸⁹ there appears the implication that the "denial of access to the political system" will to some extent hinge on the degree of participation in intraparty politics. If this is so, rather than supporting the "winner-take-all" primary as the *Hollifield* Court contended, or being inapplicable as the author concludes, *Whitcomb* may well support the plaintiffs in *Hollifield*. For the "winner-take-all" method of selecting delegates to the national convention operates directly upon intra-

party politics, excludes significant interest groups and makes nugatory the influence on the political process.

CONCLUSION

SINCE THE initiation of this article, litigation involving the California "winner-take-all" primary has erupted in both state and federal courts in California, and gives every indication of proceeding all the way to the Supreme Court. However, at this point it seems unlikely that any relief from the outcome of the 1972 primary will be forthcoming. Equitable considerations would seem to preclude any judicial pronouncement at this time. Thus, the final outcome and the last word on the constitutionality of the "winner-take-all" mechanism will remain unresolved.

The foregoing pages demonstrate that a *timely* suit brought by proper plaintiffs can be successful. While there is no guarantee that the Court will accept the arguments presented, they are sufficiently supported by legal precedent, consistent with political reality, and in accord with historical analysis to be worth the making.

EPILOGUE

THE CURRENT efforts of the Democratic Party to remedy the under-representation of Blacks, youth, women, and Spanish-speaking minorities at the 1972 National Convention must be commended.⁹⁰ It is this type of affirmative action which dem-

^{88.} *Id.* at 159.

^{89.} *Id.* at 152.

^{90.} Indicative of these efforts are the guidelines of the McGovern Commission which read in relevant part: The actions (at the 1964 and 1968 Conventions) demonstrates the intention of the Democratic Party to ensure a full opportunity for all minority group members to participate in the delegate selection process. To supplement the requirements of the 1964 and 1968 Conventions, the Commission requires that: . . . (2). State parties overcome the effects of past discrimination by affirmative steps to encourage minority group participation, including representation of minority groups on the national convention delegation in reasonable relationship to the group's presence in the population of the State. Discrimination on the basis of age or sex The commission requires State Parties to eliminate all vestiges of discrimination on these (age and sex) grounds. Furthermore, the Commission requires State Parties to overcome the effects of past discrimination by affirmative steps to encourage representation on the national convention delegation of young people . . . and women in reasonable relationship to their presence in the population of the State. McGovern Commission, 39, 40.

onstrates the goodwill essential to the vitality of the political parties and the electoral process. However successful resort to the courts may eventually be, the very nature of the adversary process, with its attendant costs and delay, precludes it from being an adequate substitute for voluntary compliance.

In spite of these efforts, the legal battle for the abolition of existing impediments to the assertion of the interests of the Black community (i.e., the winner-take-all primary) must continue. While their presence may to some extent influence the content of the party platform, Black delegates, irrevocably pledged to a McGovern, Wallace, or Humphrey can hardly demand the political concessions from the eventual nominee that Blacks committed to a Black candidate can. Having bartered away the power on the state level, Black delegates on white slates may be condemned to sit in silence while their chosen candidate vitiates erstwhile Black gains by making compromises dictated by political expediency.⁹¹ While current efforts may result in increased Black representation on all levels, commensurate structural leverage exercisable at the critical stage of the decision-making process is not guaranteed. Thus, it is important to continually distinguish between the increased participation by Blacks in the process and increased representation of Black interests, and examine both the status quo and proposed alternative with such distinction in mind.

As presented in the pleadings of *Barron v. Brown*,⁹² one alternative to the winner-take-all primary delegate selection mechanism would be to assure all candidates proportional representation at the convention by having all proposed slates ranked in hierarchical order. The final delegation would be composed of those members whose hierarchical rank corresponded with the percentage of the vote that their candidate received. Though well-intended, this alternative may well "rob Peter to pay Paul." It accomplishes the objective of assuring that no votes would be discarded prior to the

convention. However, on its face, it may do so at the expense of current efforts to assure that *all* slates represent a broad cross-section of the community.

Of far more promise is the proposal which would accept a modified version of the *Barron* formulation. Under this proposal, hierarchical ranking would be supplemented by a requirement that each slate demonstrate that at each ten percent interval, it represents a broad cross-section of the community in terms of race, ethnic affinity, and sex. And thus, it is this proposal which seems to achieve the best of all possible worlds.⁹³

WHILE IT IS DIFFICULT to assert as a fact the future course of the court, the foregoing demonstrates that affirmative action in the area of delegate selection would not be a radical departure from precedent. No doubt, effective action by the courts will require a cooperative effort and attitude by state legislatures and the political parties. But the absence of such cooperation cannot be an excuse to delay and inaction. If the right to an *effective* vote and the right to have one's voice heard where it counts is to mean anything within the context of choosing the President of the United States, the Court will again have to play a leading role. History and political reality dictate that it can do no less.

91. Blacks on the McGovern slates are not likely to feel any tremendous sense of accomplishment if their candidate wins the nomination at the cost of relinquishing one cabinet position to Alabama Governor Wallace. *See*.

And those Blacks committed to Senator Humphrey will undoubtedly not be inclined to announce that fact if the Senator's refusal to discount Governor Wallace as a running-mate is a precursor to embracing him as his Vice-President. *See*.

92. *Barron v. Brown* Civ. No. Sec. 7939 was a class action suit brought in the California Supreme Court seeking a writ of mandate to invalidate the statutory scheme providing for the "winner-take-all" primary in California. The writ was denied without decision. In arguing for a less onerous alternative, plaintiff's suggested:

The remedy can be fashioned by a modest alteration in the existing system. This court need only make two easily administrable changes. First, this court should direct Respondent to ascertain from each delegation a hierarchical order among its members. Secondly, this court should direct Respondent to certify as the California delegation only that percentage of each delegation in the primary equal to that delegation's percentage of the popular vote in the primary. (citations omitted.)

93. This is the proposal advanced by a Los Angeles-based citizens-advocate group called The Public Voice. One of its spokesmen, Bradford Peery, was interviewed, by the author concerning this position.

APPENDIX A

**Proportion of Black Delegates
at the 1968 Democratic National Convention,
Compared to proportion of Black Population,
by States,¹ 1968**

	Percent of Black Delegates from State	Percent of State Population that is Black ²		Percent of Black Delegates from State	Percent of State Population that is Black ²
Alabama	4	30	Nebraska	0	2
Alaska	0	3	Nevada	7	5
Arizona	3	3	New Hampshire	0	0
Arkansas	2	22	New Jersey	9	9
California	5	6	New Mexico	0	2
Colorado	8	2	New York	6	8
Connecticut	7	4	N. Carolina	6	25
Delaware	5	14	N. Dakota	0	0
Florida	7	18	Ohio	3	8
Georgia	26	29	Oklahoma	9	7
Hawaii	0	1	Oregon	0	1
Idaho	0	0	Pennsylvania	5	8
Illinois	6	10	Rhode Island	3	2
Indiana	8	6	S. Carolina	13	35
Iowa	2	1	S. Dakota	0	0
Kansas	3	4	Tennessee	11	17
Kentucky	8	7	Texas	4	12
Louisiana	18	32	Utah	0	1
Maine	0	0	Vermont	0	0
Maryland	6	17	Virginia	6	21
Massachusetts	3	2	Washington	0	2
Michigan	20	9	W. Virginia	2	5
Minnesota	5	1	Wisconsin	0	2
Mississippi	50	42	Wyoming	0	1
Missouri	4	9	Dist. of Columbia	67	54
Montana	0	0			

¹Information on the four territories was unavailable.

²Proportion of each state's population that is black is necessarily based on the 1960 census.

APPENDIX B

STATE	DATE	TYPE OF PRIMARY	TYPE OF PRESIDENTIAL PREFERENCE	DELEGATE SELECTION	TYPE OF COMMITMENT	DEMOCRATS	1972 CONVENTION VOTE	REPUBLICANS	1972 CONVENTION VOTE
ALABAMA	May 2	Open	Indirect	Yes	None	Primary, Delegate Convention	37	Primary	17
ALASKA						State Convention	10	State Convention	12
ARIZONA						State Convention, District/County Caucuses	25	State Convention, District/County Conventions	18
ARKANSAS	May 30	Closed	None	Yes	None	Primary, Delegate Convention	27	Primary, State Committee	18
CALIFORNIA	Jun. 6	Closed	Direct	Yes	Binding	Primary	271	Primary	86
COLORADO						State Convention, District/County Conventions	36	State Convention and District/County Caucuses	20
CONNECTICUT						State Convention, District/County Conventions	51	State Convention, District/County Caucuses	22
DELAWARE						State Convention	13	State Convention	12
D.C.	May 2	Closed	Direct	Yes	Binding	Primary	15	Primary	9
FLORIDA	Mar. 14	Closed	Direct	Yes	Binding	Primary, State Committee, Delegate Convention	81	Primary	40
GEORGIA						District/County Convention, Delegate Convention	53	State Convention, District/County Conventions	24
HAWAII						State Convention	17	State Convention, District/County Caucuses	14
IDAHO						State Convention, District/County Caucuses	17	State Convention, District/County Caucuses	14
ILLINOIS	Mar. 21	Closed	Direct	Yes	None	Primary, Delegate Convention	170	Primary, State Convention	58
INDIANA	May 2	Closed	Direct	No	Binding	State Convention, District/County Caucuses	76	State Convention, District/County Caucuses	32
IOWA						State Convention, District/County Conventions	46	State Convention, District/County Caucuses	22
KANSAS						State Convention, District/County Conventions	35	State Convention, District/County Conventions	20
KENTUCKY						State Convention, District/County Conventions	47	State Convention, District/County Conventions	24
LOUISIANA						District/County Conventions	44	State Convention, District/County Conventions	20
MAINE						State Convention	20	State Convention, District/County Caucuses	8
MARYLAND	May 16	Closed	Direct	Yes	Binding	Primary, Delegate Convention	53	Primary, Delegate Convention	26
MASSACHUSETTS	Apr. 25	Closed	Direct	Yes	Binding	Primary	102	Primary, State Committee	34
MICHIGAN	May 16	Closed	Direct	No	Binding	State Convention District/County Caucus	132	State Convention District/County Caucus	48
MINNESOTA						State Convention, District/County Conventions	64	State Convention, District/County Conventions	26
MISSISSIPPI						State Convention, District/County Conventions	25	State Convention, District/County Caucuses	13
MISSOURI						State Convention, District/County Conventions	73	State Convention, District/County Conventions	30

In Service to the Law Profession

LEGAL EDITORS

Well established lawbook publisher offers intellectually challenging jobs to attorneys who have a bent for legal research and writing. (Top half of graduating class from an American university affiliated law school preferred.) Library, writing and legal experience helpful. Outstanding benefits and working environment. Write or call for our brochure, "In Service to Law/Business/Society," and an employment application.

Tom Levernier
Director of Personnel
 Tele. 415 • 986-4410

BANCROFT-WHITNEY CO.
 301 Brannan Street
 San Francisco, California 94107



We Are an Equal Opportunity Employer

WE CREATE THINGS

Like income for a family that has lost its breadwinner.

Or a home free of debt for

a widow and her children. Like financial shields against sickness and accidents. Like a college education for a child, maybe like yours.

And like a financial cushion for people like you to retire on. In short, we create security, financial independence, peace of mind — through life insurance. And health insurance.

For people like you. You can depend on Golden State.



"the Man with the Golden Pen"

GOLDEN STATE

MUTUAL LIFE INSURANCE COMPANY

ARIZONA • CALIFORNIA • ILLINOIS • INDIANA • MICHIGAN • OREGON • TEXAS • WASHINGTON

HOME OFFICE: LOS ANGELES