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Regulating Our Mischievous Factions: Presidential Nominations and the Law

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INTRODUCTION

United States citizens have been electing their president for over two hundred years. Political parties have supported rival national tickets since 1796. Despite this long tradition, there is still a great deal of uncertainty about the legal and constitutional status of the presidential nomination process. This Article discusses the key legal principles involved in presidential nomination litigation and suggests an approach emphasizing the First Amendment associational rights of political parties while respecting the rights of candidates, voters, and party members.

The process by which the two major parties nominate their presidential candidates is crucial to the operation of our democracy. No president has been elected without receiving the nomination of either the Democratic Party or the Republican Party since 1848, when the voters chose Zachary Taylor of the Whig Party.[1] No independent or third party presidential candidate has received as much as twenty percent of the popular vote since former President Theodore Roosevelt garnered 27.39 percent in 1912 running under

[1] CONGRESSIONAL QUARTERLY, GUIDE TO U.S. ELECTIONS 332-66 (2nd ed. 1985).

the Progressive (Bull Moose) banner.[2] The presidential nomination process has often led to litigation, including three U.S. Supreme Court opinions.[3] Yet several crucial legal issues remain unresolved, including the extent to which intra-party disputes are non-justiciable "political questions," the extent to which the nomination process is state action, and the extent to which the parties' associational rights give them immunity from state and federal legislation. This uncertainty is disturbing given the importance of presidential nominations.

Part I of this Article reviews the history of presidential nominations,[4] while Part II briefly surveys the substantive grounds for legal challenges to the nomination process.[5] Part II also discusses three procedural issues that have often arisen in presidential nomination litigation: the proper parties, timing, and justiciability.[6] The Article concludes that questions relating to the proper parties pose only minor difficulties. Timing is a more serious problem since political disputes often become moot before a final decision on the merits is possible. The justiciability issue poses the greatest difficulties. The political question doctrine has not been applied consistently to presidential nominations and its use in this context finds little or no support in Supreme Court decisions. This Article will argue that intra-party disputes are not "political questions" and the courts' reluctance to intervene in party affairs should be based on respect for the parties' associational rights and not from any supposed inability to decide cases arising from partisan political disputes.

Finally, and most importantly, this Article addresses the question of the constitutional status of national conventions and the delegate selection process.[7] First, it will trace the development of the parties' associational rights. This analysis concludes that the parties are virtually immune from state regulation of presidential nominations and that most federal regulation, apart from regulation of campaign contributions, would be found unconstitutional. This constitutional immunity has a significant exception—invidious

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[2] *Id.* at 348-66.

[3] Democratic Party v. Wisconsin ex rel. LaFollette, 450 U.S. 107 (1981); Cousins v. Wigoda, 419 U.S. 477 (1975); Brown v. O'Brien, 409 U.S. 1 (1972).

[4] *See infra* notes 10-22 and accompanying text.

[5] *See infra* notes 23-43 and accompanying text.

[6] *See infra* notes 44-105 and accompanying text.

[7] *See infra* notes 106-218 and accompanying text.

racial and sexual discrimination by the major parties receives less constitutional protection.

This Article will then examine the question of whether presidential nominations constitute state action.[8] In the author's opinion, recognition of the parties associational rights indicates clearly that the nomination process is not a public function. In addition, other grounds often asserted (including governmental regulation of the nomination process, federal funding of conventions and nomination campaigns, and the provision of preferential ballot access to party nominees) do not justify a finding of state action.

These themes are tied together in a final section,[9] which argues that inconsistencies and uncertainties in the case law concerning justiciability and state action can be resolved by using the parties' associational rights as the starting point for legal analysis. If the presidential nomination process is treated as a protected exercise of the right to association, then clearly this process is not state action except where state decisions themselves are challenged (e.g., in challenges to statutes governing presidential primaries). Similarly, by beginning the analysis with the parties' associational rights, it becomes apparent that there is no need to invoke the political question doctrine. This is important because courts should be free to decide intra-party disputes where associational rights are not threatened.

This analysis by no means disposes of all the thorny questions that can arise in presidential nomination litigation, but it does simplify some difficult threshold issues and it is fully consistent with all relevant Supreme Court decisions. The author expects the law to develop along the lines suggested in this Article because the increasing recognition of associational rights in recent years makes such development inevitable.

I. BRIEF HISTORY OF PRESIDENTIAL NOMINATIONS

The U.S. Constitution makes no reference to political parties. Indeed, James Madison, perhaps the most brilliant and articulate advocate of the Constitution, believed that "the public good is disregarded in the conflicts of rival parties,"[10] and that one of the new charter's greatest virtues was its potential for "curing the

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[8] *See infra* notes 219-381 and accompanying text.

[9] *See infra* note 382 and accompanying text.

[10] THE FEDERALIST No. 10, at 62 (J. Madison) (Dunne ed. 1901).

mischiefs of faction."[11] Whatever the hopes of the framers might have been, national political parties emerged within the first few years of the new republic.

Regular partisan nomination procedures first appeared in 1800, when both the Federalist Party and the Democratic-Republican Party (ancestor of the modern Democratic Party) chose their presidential and vice-presidential candidates through a caucus of party members in Congress.[12] This system remained in effect until 1816. Presidential nominations then became decentralized, with each state holding caucuses or conventions. The election of 1832 saw the emergence of national party conventions, with delegates apportioned to the states by electoral vote.[13] These delegates were chosen by local caucuses that were often controlled by party bosses.[14]

The next major development in presidential nominations was the introduction of the primary election. The primary election was a Progressive Era reform—its most important advocate was Gov. Robert LaFollette in Wisconsin.[15] The primary was intended to reduce the influence of party leaders.[16] By 1912, presidential primary elections were used to select delegates to the national party convention in twelve states.[17] All modern primaries are governed by state election laws. Some presidential primaries elect delegates by district, others by proportional representation, and still others on a winner-take-all basis.[18] Some states hold primaries with no binding effect at all—the so-called "beauty contest."[19]

The last twenty years have seen a flurry of reform in presidential nominations. Elaborate party rules were devised, and state party organizations that refused to follow them have found their delegations rejected by the Credentials Committees[20] at the national

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[11] *Id.* at 63.

[12] M. OSTROGORSKI, DEMOCRACY AND THE ORGANIZATION OF POLITICAL PARTIES 13-15 (F. Clarke trans. 1902). CONGRESSIONAL QUARTERLY, *supra* note 1, at 9; *Cousins*, 419 U.S. at 490 n.9.

[13] OSTROGORSKI, *supra* note 12, at 59-64.

[14] *Id.* at 65.

[15] CONGRESSIONAL QUARTERLY, *supra* note 1, at 379.

[16] *Id.*; *cf.* Geary v. Renne, 880 F.2d 1062, 1076-77 (9th Cir. 1989) (discussing Progressive Era reforms in California).

[17] J.W. DAVIS, PRESIDENTIAL PRIMARIES: ROAD TO THE WHITE HOUSE 43 (1980).

[18] CONGRESSIONAL QUARTERLY, *supra* note 1, at 381.

[19] *Id.*

[20] In 1964 and 1968, all-white Democratic delegations from southern states were successfully challenged by integrated states. CONGRESSIONAL QUARTERLY, INC., NATIONAL PARTY CONVENTIONS 1831-1972, 85, 109 (1983). *See also* Democratic Party v. Wisconsin ex rel. LaFollette, 450 U.S. 107 (1981); Cousins v. Wigoda, 419 U.S. 477 (1975).

convention. These rules have regularized the procedure in caucus states, and now state conventions often reflect selections made in open county or precinct caucuses.[21] Another significant development has been the increase in the number of presidential primaries. By 1980, thirty-seven jurisdictions held presidential primaries although the number has declined somewhat since then.[22] All in all, national nomination procedures have come to look like a quasi-democratic elective process—it is no surprise that constitutional and statutory challenges to the process have increased in recent decades.

II. PROCEDURAL AND SUBSTANTIVE ISSUES INVOLVED IN CHALLENGES TO PRESIDENTIAL NOMINATION PROCEDURES

A. *Substantive Grounds for Challenging Party Actions*

Legal challenges to the presidential nomination process have involved a wide variety of theories. The challengers' theories fall into three basic categories: constitutional challenges, statutory challenges, and challenges based on party rules. This section of the Article surveys the three categories and outlines the major limitations on each type of challenge.

1. *Constitutional Challenges*

Challenges have often attacked the nomination process on constitutional grounds. The equal protection clause of the fourteenth amendment has been used to attack racial discrimination in non-presidential primary elections in several historic decisions.[23] In recent years, gender discrimination has emerged as another basis for equal protection challenges.[24] The parties' efforts to achieve affirmative action goals may lead to additional challenges claiming reverse

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[21] CONGRESSIONAL QUARTERLY, GUIDE TO U.S. ELECTIONS, *supra* note 1, at 382.

[22] *Id.* at 380-81.

[23] Terry v. Adams, 345 U.S. 461 (1953), *reh'g denied*, 345 U.S. 1003 (1953); Smith v. Allwright, 321 U.S. 649 (1944), *reh'g denied*, 322 U.S. 769 (1944).

[24] *See* Marchioro v. Chaney, 442 U.S. 191 (1979) (challenge to gender quotas in composition of state party committee); Bachur v. Democratic Nat'l Party, 836 F.2d 837 (4th Cir. 1987) (challenge to gender quotas for election of delegates to 1984 national convention).

discrimination.[25] Finally, there have been many efforts to challenge the nomination procedures based on the principle of one person, one vote.[26]

Equal protection is only one potential constitutional argument. Challengers have also cited constitutional protections of free speech,[27] freedom of the press, the right to vote, group and individual associational rights,[28] and due process.[29] Future constitutional arguments may be based on freedom of religion and the establishment clause.[30] Of these, a due process challenge to internal party proceedings is potentially the most powerful, if such a challenge is permissible.

The obvious limitation on these theories is that these constitutional protections require a finding of state action. As recently as the early 1970's, federal courts routinely found that virtually every aspect of the party's presidential nomination process was state action.[31] As we shall see, however, these holdings are no longer viable and future constitutional attacks could be limited solely to government-mandated procedures such as primary elections and federal financing of presidential nomination campaigns.

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[25] *See Marchioro*, 442 U.S. 191; *Bachur*, 825 F.2d 837; Ricard v. State of Louisiana, 544 So. 2d 1310 (La. App. 1989); *see also* Charter of the Democratic Party of the United States (adopted in 1988, for use until 1992), which requires 50% of delegates be women (art. II, sec. 4) and provides for setting specific goals for minority participation (art. X, sec. 3). Rules of the Republican Party (adopted in 1988 for use until 1992) require numerically equal representation of both genders in the office of vice chairman of the Republican National Committee (Rule 23(a)(2)) and on convention committees (Rule 17(a)).

[26] *See* Gray v. Sanders, 372 U.S. 368 (1963); Wymbs v. Republican State Exec. Comm., 719 F.2d 1072 (11th Cir. 1983), *cert. denied*, 465 U.S. 1103 (1984); Montano v. Lefkowitz, 575 F.2d 378 (2d Cir. 1978); Ripon Soc'y v. Nat'l Republican Party, 525 F.2d 567 (D.C. Cir. 1975) (en banc), *cert. denied*, 424 U.S. 933 (1976); Seergy v. Kings County Republican Cent. Comm., 459 F.2d 308 (2d Cir. 1972); Irish v. Democratic-Farmer-Labor Party, 399 F.2d 119 (8th Cir. 1968); Heitmanis v. Austin, 677 F. Supp. 1347, 1357 n.7 (E.D. Mich. 1988); Dahl v. Republican State Comm., 319 F. Supp. 682 (W.D. Wash. 1979); Hunt v. Democratic Party, 439 F. Supp. 788 (N.D. Okla. 1977); Doty v. Montana State Democratic Cent. Comm., 333 F. Supp. 49 (D. Mont. 1971).

[27] *See* Kay v. New Hampshire Democratic Party, 821 F.2d 31 (1st Cir. 1987); *Heitmanis*, 677 F. Supp. at 1357 n.7.

[28] *See Heitmanis*, 677 F. Supp. 1347.

[29] *See* Brown v. O'Brien, 469 F.2d 563, 567-70 (D.C. Cir. 1972), *stayed* 409 U.S. 1 (1972), *vacated* 409 U.S. 816 (1972).

[30] For example, if a party attempted to restrict membership on the basis of religion or passed a resolution, as the Arizona Republican Party recently did, declaring that the U.S. is a Christian nation, then such arguments might be made effectively.

[31] *See Brown*, 469 F.2d at 567; Bode v. Nat'l Democratic Party, 452 F.2d 1302, 1304-1305 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 1019 (1972); Georgia v. Nat'l Democratic Party, 447 F.2d 1271, 1275 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 858 (1971); *Doty*, 333 F. Supp. at 51.

2. *Statutory Challenges*

The second category of challenge is the statutory challenge. There are several federal statutes that directly regulate presidential nominations. The Voting Rights Act[32] prohibits discrimination on the basis of race or color in state elections. It requires "preclearance" of any changes in election laws in certain jurisdictions. The statute has been construed to require preclearance of rules for the election of delegates to national conventions in states subject to preclearance.[33] Because the Voting Rights Act has been an increasingly popular basis for litigation in recent years,[34] there is a substantial likelihood that it will be used to challenge delegate selection systems in the future.

The Federal Election Campaign Act[35] regulates the financing of presidential campaigns. The statute defines the term "election" to include "a convention or caucus of a political party which has authority to nominate a candidate."[36] However, because the Act is concerned chiefly with the financial practices of election campaigns, it probably could not be used to challenge the delegate selection process or the conduct of a national convention.

The Presidential Election Campaign Fund Act[37] provides matching funds for presidential campaigns. Because it provides greater funding to the nominees of the major parties,[38] a dispute could arise as to which candidate was the official party nominee if the convention split or if its result was subject to challenge. The Act specifically provides for judicial review.[39]

State election laws governing presidential primary elections or delegate selection have also led to legal challenges to party actions. Challengers have typically invoked state laws governing delegate selection or presidential primaries.[40]

The future of statutory challenges to presidential nominations like the future of constitutional challenges is questionable. In a series of cases over the last fifteen years, the U.S. Supreme Court has granted political parties greater immunity from statutory res-

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[32] 42 U.S.C. §§ 1971-1974 (1982).
[33] MacGuire v. Amos, 343 F. Supp. 119, 121 (M.D. Ala. 1972).
[34] See *Heitmanis*, 677 F. Supp. at 1357 n.7.
[35] 2 U.S.C. §§ 431-456 (1982).
[36] 2 U.S.C. § 431(1)(b).
[37] 26 U.S.C. §§ 9001-9013 (1982).
[38] 26 U.S.C. § 9004(a).
[39] 26 U.S.C. § 9011.
[40] *See, e.g.*, *Cousins*, *supra* note 3; *LaFollette*, *supra* note 3.

trictions based on the parties' constitutional right to freedom of association.[41] As we shall see, this freedom is not absolute, but it is clear that statutory restrictions impinging on the rights of political association must be justified by a compelling state interest in order to withstand constitutional scrutiny.

3. *Party Rules*

In the last decade, the Supreme Court has recognized that political parties are entitled to a certain degree of autonomy because they have associational rights under the Constitution. The corollary to the greater respect given to party rules is that the rules themselves have become the basis for legal challenges.[42] Legal challenges alleging violations of party rules have been rare to date, but are likely to become more common as other types of challenges become less available due to associational rights concerns.

Like the other types of challenges, a challenge based on party rules faces a fundamental obstacle. Courts have frequently refused to rule on intra-party disputes involving presidential nominations on the ground that such disputes are non-justiciable political questions.[43]

In this writer's view, the courts that have adopted the approach that such disputes are non-justiciable have erred. If the courts are to follow a hands-off policy, it should be based on the parties' associational rights and not on the basis of an inconsistent policy of deciding some, but not all, cases arising from political disputes. The justiciability/political question issue may be with us for some time, however, since some recent lower court precedents support it and the Supreme Court has not spoken definitively.

B. *Procedural Issues*

1. *Proper Parties*

Obtaining standing to sue is not a major impediment in litigation concerning presidential nominations. Where voting or mem-

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[41] Eu v. San Francisco County Democratic Cent. Comm., ____U.S. ____, 109 S. Ct. 1013 (1989); Tashjian v. Republican Party, 479 U.S. 208 (1986); Democratic Party v. Wisconsin *ex rel.* LaFollette, 450 U.S. 107 (1981); Cousins v. Wigoda, 419 U.S. 477 (1975).

[42] See *Brown*, 469 F.2d at 570; *Heitmanis*, 677 F. Supp. 1347; McMenamin v. Philadelphia County Democratic Exec. Comm., 405 F. Supp. 998 (E.D. Pa. 1975).

[43] *See Wymbs*, 719 F.2d at 1080-86; *Heitmanis*, 677 F. Supp. at 361; Stuckey v. Richardson, 372 S.E.2d 458, 460 (Ga. App. 1988).

bership rights are concerned, plaintiffs, who have had their rights denied or diminished, have standing.[44] Where a candidate's rights are at stake, the candidate may bring suit.[45] In delegate challenges, the competing slates of delegates may sue.[46] A political organization that is not a party, but merely a faction or study group within it, may lack standing, however, according to a majority of the judges who addressed this issue in *Ripon Society v. National Republican Party*.[47] Obviously, such organizations could turn to their membership to find individual plaintiffs with standing.[48]

Identifying the proper defendant posed problems in the past. As recently as 1971, the National Republican Party contended that it could not be sued as an unincorporated association, arguing that it was merely an aggregate of state parties acting in concert.[49] This contention was rejected by the D.C. Circuit.[50] The national parties were later given statutory recognition in the Federal Election Campaign Act.[51] The most recent Supreme Court decision on the subject treated the "National Democratic Party of the U.S." as a legal entity that was responsible for the national convention, its committees, and the party's various commissions.[52] The political parties

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[44] *See, e.g.*, Kusper v. Pontikes, 414 U.S. 51 (1973) (plaintiff challenged statute barring her from voting in primary); *Gray*, 372 U.S. at 375 (voter in primary challenged violation of one person, one vote principle); Baker v. Carr, 369 U.S. 186, 204-08 (1962); Erum v. Cayetano, 881 F.2d 689, 691 (9th Cir. 1989); McLain v. Meier, 851 F.2d 1045, 1048 (8th Cir. 1988); *Bachur*, 836 F.2d at 840; O'Hair v. White, 675 F.2d 680, 688-90 (5th Cir. 1982). *But cf.* Curry v. Baker, 802 F.2d 1302, 1312-13 (11th Cir. 1986), *stay den.* 479 U.S. 1301 (1985), *cert. dismissed*, 479 U.S. 1023 (1986) (mere dilution of vote may not be enough to create standing).

[45] Moore v. Ogilvie, 394 U.S. 814 (1969); Williams v. Rhodes, 393 U.S. 23 (1968); Richard v. State of Louisiana, 544 So. 2d 1310 (La. App. 1989).

[46] *LaFollette*, 450 U.S. 107.

[47] 525 F.2d 567, 573-74 (D.C. Cir. 1975) (en banc), *cert. denied*, 424 U.S. 933 (1976).

[48] *Id.* at 573.

[49] *See Georgia*, 447 F.2d at 1273 n.2.

[50] *Id.*

[51] *See* 2 U.S.C.A. § 431-456, especially § 431(16) defining the term "political party," § 431(14) defining "national committee," and § 437h(a) giving national committees standing to sue.

[52] *LaFollette*, 450 U.S. 107. Bachur v. Democratic National Party, 666 F. Supp. 763, 766 (D. Md. 1987), *rev'd on other grounds*, 836 F.2d 837 (4th Cir. 1987) found that "[t]he Democratic National Party is a non-profit organization which, through the Democratic National Committee, promulgated rules for the selection of delegates to the 1984 Democratic National Convention." In *Wymbs*, the court found that:

> Between quadrennial national conventions, the Republican National Committee is the embodiment and manager of the affairs of the Republican National Party. During the Republican National Convention, the convention itself is the Party. It conducts all of its own business, including the resolution of

do not have standing, however, to independently enforce the Presidential Election Campaign Fund Act.[53]

Finally, procedural fairness requires that a candidate whose nomination is at issue be joined as a necessary party, but candidates who do not object to the practice at issue do not need to be joined.[54] National parties are necessary parties in local challenges to the application of national party rules.[55]

2. *Timing*

The biggest practical problem in using legal processes to influence the political process is that the courts move so slowly. A controversy concerning the Illinois delegation to the 1972 Democratic convention was decided by the Supreme Court in 1975—and this resolution overruled an injunction that was in effect at the time of the convention.[56] The litigants should have been thankful that their case was decided more expeditiously than the legal battle to outlaw the Texas "white only" Democratic primary, which extended over two decades.[57] When the issue is a relatively abstract institutional practice, such as malapportionment of delegates, the litigants may be able to wait patiently for a ruling. But most political lawsuits are intended to influence a particular election and become moot if not decided quickly.

In the most sensitive cases, such as those involving delegate challenges or ballot access, the courts have often had to act quickly. In 1968, and again in 1972, the U.S. Supreme Court ruled on presidential campaign litigation during the election year. The 1968 decision *Williams v. Rhodes* ordered the state of Ohio to include George Wallace's American Independent Party on the ballot.[58] The

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> credentials disputes, and sets the rules and platform upon which the Republican National Committee will act until the next quadrennial convention.

Id. at 1074 n.7. As of 1989, the Republican National Committee is still an unincorporated association. The Democratic National Committee has formed a corporation in the District of Columbia under the name "DNC Services Corp." In addition, the Democratic Party forms a special corporation to run its quadrennial conventions. In 1988, the corporation was called the "1988 Democratic National Committee Convention Corp."

[53] FEC v. Nat'l Conservative PAC, 470 U.S. 480, 484-90 (1985).

[54] Farley v. Mahoney, 496 N.Y.S.2d 607, 611 (1985); Jordan v. Officer, 170 Ill. App. 3d 776, 525 N.E.2d 1067 (1988).

[55] *See Wymbs*, 719 F.2d at 1079-80; *Heitmanis*, 677 F. Supp. at 1358 n.8.

[56] *Cousins*, 419 U.S. 477.

[57] Nixon v. Herndon, 273 U.S. 536 (1927); *Allwright*, 321 U.S. 649.

[58] 393 U.S. 23 (1968). See also Labor Farm Party v. Election Board, 117 Wis.2d 351, 344 N.W.2d 177 (1984) (Wisconsin Supreme Court decided case on merits prior to presidential primary).

Court refused to give similar relief to the Socialist Labor Party because it had not acted as quickly to bring an appeal.[59]

The July 7, 1972, decision *O'Brien v. Brown* stayed federal circuit court orders affecting the composition of the Illinois and California delegations to the 1972 Democratic convention.[60] There were enough delegates at stake to change the outcome of the convention. The Supreme Court's action left the ultimate decision to the convention,[61] thereby insuring that Sen. McGovern would receive the Democratic nomination. However, the Supreme Court did not resolve all the issues; it did not rule on the merits and it did not preclude further action by state courts.[62] The legal brinkmanship involved in *O'Brien* and *Williams* is not feasible for most litigation nor is it a desirable way to adjudicate important legal issues. Since ordinary appellate review cannot be timely, writs and stays are crucially important in campaign litigation. Plaintiffs are at an inherent disadvantage because courts are reluctant to tamper with the status quo if they are uncertain about the merits. Thus far, the unfortunate situation where a preliminary ruling on a critical nomination issue is reversed on the merits after the convention has been avoided. In 1980, it could have happened—an erroneous Wisconsin court order resulted in the seating of a delegation chosen in violation of party rules—but the number of delegates involved did not affect the outcome of the convention.[63]

If appellate review is not complete prior to an election, the case may be dismissed as moot.[64] Federal courts ordinarily are barred from deciding moot cases since they do not present a "case" or "controversy" as required by article III, section 2 of the Constitution.[65] If this policy was followed consistently, the opportunity for the development of appellate precedents in the election law field would be virtually eliminated. There is an exception to the usual mootness rule, however, that has allowed appellate review of statutes or party rules that are continuing in nature. The Supreme

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[59] *Id.* at 35.

[60] 409 U.S. 1 (1972).

[61] *Id.* at 5.

[62] *See Cousins*, 419 U.S. at 486.

[63] Democratic Party v. *ex rel.* LaFollette, 287 N.W.2d 519 (1980), *rev'd*, 450 U.S. 107 (1981).

[64] *E.g.*, Keene v. Nat'l Democratic Party, 475 F.2d 1287 (D.C. Cir. 1973) (holding the case moot in regard to seating of delegates, after being instructed by the Supreme Court, 409 U.S. 816 (1972), to determine the issue); Martin-Trigona v. Baxter, 345 N.W.2d 744, 745-46 (Iowa 1989).

[65] U.S. CONST. art. III, § 2; *see* Liner v. Jafco, Inc., 375 U.S. 301, 306 n.3 (1964).

Court explained this exception in *Storer v. Brown*, a 1974 decision concerning access to the 1972 California ballot:[66]

> The 1972 election is long over, and no effective relief can be provided to the candidates or voters, but this case is not moot, since the issues properly presented, and their effects on independent candidacies will persist as the California statutes are applied in future elections. This is, therefore, a case where the controversy is "capable of repetition, yet evading review." The "capable of repetition, yet evading review" doctrine, in the context of election cases, is appropriate when there are "as applied" challenges as well as in the most typical case involving only facial attacks. The construction of the statute, an understanding of its operation, and possibie constitutional limits on its application, will have the effect of simplifying future challenges, thus increasing the likelihood that timely filed cases can be adjudicated before an election is held.[67]

Federal courts have applied this doctrine in many election cases.[68] In other cases, the procedural nature of the case preserves the controversy after the election. For example, a lower court order may have a continuing effect,[69] the party rule at stake may be continuing,[70] or contempt proceedings may follow a party's defiance of a court order.[71]

3. *Justiciability and the Political Question Doctrine*

The political question doctrine poses a potentially important bar to challenges arising from intra-party disputes. The political question doctrine holds that certain types of legal challenges are not justiciable, because, *inter alia*, the matter at hand is more appropriately decided by another branch of government, there is "a lack of judicially discoverable and manageable standards for resolving it," or there is "the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion."[72]

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[66] 415 U.S. 724 (1974).

[67] *Id.* at 737 n.8 (citations omitted).

[68] *See, e.g., LaFollette*, 450 U.S. 107; Rosario v. Rockefeller, 410 U.S. 752, 756 (1973); Dunn v. Blumstein, 405 U.S. 330, 333 n.2 (1972); *Moore*, 394 U.S. at 816 (1969); Ferency v. Austin, 666 F.2d 1023, 1025 (6th Cir. 1981); *Bachur*, 666 F. Supp. at 772-74.

[69] *See LaFollette*, 450 U.S. at 115 n.13; *Moore*, 394 U.S. at 816.

[70] *Wymbs*, 719 F.2d at 1074-75 n.7; *Bachur*, 836 F.2d at 839 n.1; *Ricard*, 544 So.2d 1310.

[71] *Cousins*, 419 U.S. 477.

[72] *Baker*, 369 U.S. at 217.

The Supreme Court has significantly limited the scope of the political question doctrine, but lower courts continue to apply it to presidential nomination litigation despite the lack of Supreme Court precedent. As will be argued at greater length later,[73] the political question doctrine should not be applied to nomination cases. Rather, the parties' associational rights provide a sounder basis for a "hands-off policy" towards intra-party disputes.

The Supreme Court has severely limited the political question doctrine in recent decades. *Baker v. Carr*[74] and its progeny (the one person, one vote cases[75]) have established that the equal protection clause provides sufficiently definite standards to allow judicial review of districting for general and primary elections. *Powell v. McCormack* held that the courts could review some decisions of the House of Representatives concerning the fitness of its members.[76] *Powell* suggests by analogy that the parties' resolution of delegate challenges does not present a non-reviewable political question. Even more recently, a majority of the Supreme Court held that an equal protection challenge to the alleged gerrymandering of the Indiana legislature was justiciable.[77] No recent Supreme Court decision has held an intra-party dispute to be a non-justiciable political question. Nonetheless, the political question doctrine remains an open issue in cases involving national political parties.

Lower court decisions have found the political question doctrine applicable in presidential nomination cases. The Eighth Circuit invoked the political question doctrine in the 1968 case *Irish v. Democratic-Farmer-Labor Party*.[78] Plaintiffs attacked the Minnesota Democrats' use of unequally apportioned caucuses to select delegates to the national convention. In a cryptic opinion, the court concluded that there was "a lack of judicially discoverable and manageable standards" for reviewing the constitutionality of party caucuses. Conversely, two subsequent D.C. Circuit cases held that the legality of unequal apportionment of delegates among the states was a justiciable issue.[79]

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[73] *See infra* notes 91-105 and accompanying text.

[74] 369 U.S. 186.

[75] *See, e.g.*, Reynolds v. Sims, 377 U.S. 533 (1964), *reh'g denied*, 379 U.S. 870 (1964); Gray v. Sanders, 372 U.S. 368 (1962).

[76] 395 U.S. 486 (1969).

[77] Davis v. Bandemer, 478 U.S. 109, 118-27 (1986).

[78] 399 F.2d 119 (8th Cir. 1968).

[79] *Bode*, 452 F.2d at 1305; *Georgia*, 447 F.2d 1271.

The Supreme Court revived the justiciability issue, perhaps inadvertently, in *O'Brien v. Brown*,[80] an opinion staying a D.C. Circuit order that required the 1972 Democratic convention to seat 151 California delegates committed to Sen. George McGovern. The Court also enjoined a slate of Illinois delegates under the control of Chicago Mayor Richard J. Daley from judicially challenging their exclusion by the Convention's Credentials Committee.

The Supreme Court declined to rule on the merits, but the 5-4 per curiam ruling noted that

> [h]ighly important questions are presented concerning *justiciability*, whether the action of the Credentials Committee is state action, and if so the reach of the Due Process Clause in this unique context. Vital rights of association guaranteed by the Constitution are also involved. While the Court is unwilling to undertake final resolution of the important constitutional questions presented without full briefing and argument and adequate opportunity for deliberation, we entertain grave doubts as to the action taken by the Court of Appeals.[81] (emphasis added)

Although this statement is hardly a clear holding on the justiciability issue, the D.C. Circuit, apparently chastened by the Supreme Court's opinion in *O'Brien*, decided to "pretermit" a decision on the justiciability of a challenge to delegate apportionment in the 1975 *Ripon Society* decision.[82] Rather than decide if the case was justiciable, the court found the case had no merit and hence there was no need to decide if it was justiciable.[83] The Fourth Circuit followed the spirit of *Ripon Society* in *Bachur v. Democratic National Party*, finding that the case was "not justiciable because it [was] lacking in merit."[84]

In *Wymbs v. Republican State Executive Committee*, the Eleventh Circuit found that a challenge to the apportionment of delegates within a state was non-justiciable.[85] The court based that decision on three grounds: the national party was not made a party to the litigation; the party's associational freedoms; and there was a lack of proper standards to decide the case.[86] A 1988 federal

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[80] 409 U.S. 1.
[81] *Id.* at 4-5.
[82] 525 F.2d 567.
[83] *Id.* at 577-78.
[84] 836 F.2d 837, 841 (4th Cir. 1987).
[85] 719 F.2d 1072, 1078-86 (11th Cir. 1983), *cert. denied*, 465 U.S. 1103 (1984).
[86] *Id.*

district court case concerning delegate selection in Michigan came to a similar conclusion,[87] as did a 1988 state court case involving the selection of Republican delegates from Georgia.[88]

Despite this smattering of precedent, most recent decisions have resolved intra-party disputes on the merits with little or no discussion of justiciability.[89] The political question doctrine clearly remains "in a state of some confusion."[90] This confusion is most likely attributable to the perplexity created by the two purposes served by the political question doctrine.

First, the political question doctrine serves as a surrogate for the first amendment. Many cases invoking the political question doctrine are based on the general principle that courts should not intervene in party affairs.[91] This reluctance to intervene in party affairs is commendable, but it properly arises from recognition of the parties' first amendment associational rights, and not from an ill-defined rule that some, but not all, cases involving intra-party disputes are non-justiciable political questions. The courts should not analogize intra-party disputes to political disputes in the other

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[87] *Heitmanis*, 677 F. Supp. at 1360-61.

[88] Stuckey v. Richardson, 372 S.E.2d 458 (1988).

[89] *Eu*, ____U.S. ____, 109 S. Ct. 1013 (1989) (challenge to statutes regulating composition of state party organizations); *Tashjian*, 479 U.S. 208 (challenge to statute requiring closed primaries); *LaFollette*, 450 U.S. 107 (dispute over Wisconsin delegation to 1980 Democratic National Convention); *Marchioro*, 442 U.S. 191 (dispute over composition of Washington State Democratic Party Committee); *Cousins*, 419 U.S. 477 (dispute over Illinois delegation to 1972 Democratic National Convention); Grimes v. Smith, 776 F.2d 1359 (7th Cir. 1985) (dispute over alleged conspiracy to mislead voters in city primary election); Hopfmann v. Connolly, 769 F.2d 24 (1st Cir. 1985) (dispute over rule limiting eligibility in Democratic primary to candidates who received at least 15% of vote in party convention); *Ferency*, 666 F.2d 1023 (dispute over selection of delegates to 1980 Democratic National Convention); *Montano*, 575 F.2d 378 (2nd Cir. 1978) (challenge to New York procedures for nominating candidates for special congressional election); Ammond v. McGahn, 532 F.2d 325 (3rd Cir. 1976) (dispute over state senator's exclusion from party caucus); Riddell v. National Democratic Party, 508 F.2d 770 (5th Cir. 1975) (dispute between rival factions in state party over use of party name); Smith v. Cherry, 489 F.2d 1098 (7th Cir. 1973) (dispute over selection of candidate by party committee); Jackson v. Michigan State Democratic Party, 593 F. Supp. 1033 (E.D. Mich. 1984) (dispute over selection of Michigan delegation to 1984 Democratic National Convention); Hunt v. Democratic Party of Oklahoma, 439 F. Supp. 788 (N.D. Okla. 1977) (challenge to composition of state party); Martin-Trigona v. Dunn, 425 F. Supp. 813 (N.D. Ill. 1977) (challenge to slate-making activities of Democratic Party in Chicago mayoral election); Todd v. Oklahoma State Democratic Central Committee, 361 F. Supp. 491 (W.D. Okla. 1973) (challenge to composition of Democratic Party of Oklahoma).

[90] L. TRIBE, AMERICAN CONSTITUTIONAL LAW 2d ed. §§ 3-13, at 96 (1988).

[91] *See, e.g.*, *Wymbs*, 719 F.2d at 1082-83; *Ripon Soc'y*, 525 F.2d at 604 (Tamm, J., concurring); *id.* at 595 (Danaher, J., concurring); *Irish*, 399 F.2d 120; *Heitmanis*, 677 F. Supp. at 1359.

branches of government. Disputes between or within the non-judicial branches of the federal government are non-justiciable under separation-of-powers principles—principles that do not apply to intra-party disputes.[92]

A better analogy is to intramural conflicts within religious organizations. These decisions are largely immune from legal attack, not because the issues presented are non-justiciable—they are immune because of first amendment concerns.[93] Interestingly, several recent decisions holding intra-party disputes to be non-justiciable make explicit reference to first amendment principles.[94] It is intellectually sounder, however, for the courts to cease relying on the political question doctrine and to base their analysis on pure first amendment principles.

The political question doctrine has served a second, more defensible, purpose. Many of the cases in which the doctrine has been raised involve attempts to apply the one person, one vote principle to delegate selection[95] or involve attacks on such practices as the unit rule (which requires all delegates from a state or other unit to vote for the same candidate),[96] gender quotas for delegates,[97] and the automatic granting of delegate status to party officials.[98] The difficulty in these cases is that, even if delegate selection is state action, there are nonetheless no clear constitutional guidelines on how delegates must be selected. In particular, the one person, one vote principle is difficult to apply to national conventions since they were never intended to be purely representative democratic bodies.[99] There are, arguably, an infinite number of fair methods by which a party may select a presidential nominee. It is not surprising that some courts have recognized that legal challenges to delegate selection formulas suffer from "lack of judicially dis-

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[92] *See O'Brien*, 409 U.S. at 11-12 (Marshall, J., dissenting).

[93] Cf. Serbian Eastern Orthodox Diocese v. Milovojevich, 426 U.S. 696 (1976), *reh. den.* 429 U.S. 873 (1976) (first amendment requires state court to defer to decisions of church hierarchy); Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440 (1969).

[94] *Wymbs*, 719 F.2d at 1086; *Heitmanis*, 677 F. Supp. at 1361; *Stuckey*, 372 S.E.2d at 460.

[95] *Wymbs*, 719 F.2d at 1086; *Ripon Society*, 525 F.2d at 567; *Irish*, 399 F.2d at 120.

[96] *O'Brien*, 409 U.S. 1.

[97] *Bachur*, 836 F.2d 837.

[98] *Heitmanis*, 677 F. Supp. 1347.

[99] *See Ripon Soc'y*, 525 F.2d at 611 (Wilkey, J., concurring).

coverable and manageable standards"[100] or have recognized the "impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion."[101] Two of the criteria for a political question are set forth in *Baker*.[102]

A fuller recognition of first amendment associational rights would make this second purpose of the political question doctrine largely obsolete as well. As argued more fully later,[103] decisions such as apportionment of delegates and delegate selection are protected by the first amendment and are not state action. These activities have substantial immunity from statutory or constitutional restraints. Thus, most challenges to these activities should be rejected on first amendment grounds. In instances where state action is present (i.e., primary elections), the political question doctrine should not prevent the prohibition of practices that are unconstitutional or are otherwise illegal, such as violations of the Voting Rights Act. In short, if the parties' associational rights are given the respect they deserve, the need to apply the political question doctrine to cases arising from the presidential nomination process would be eliminated. Continued reliance on this doctrine in such cases is at odds with the tradition of judicial review that began with *Marbury v. Madison*[104] and continued in *Baker v. Carr*.[105]

III. STATE ACTION VS. EXERCISE OF ASSOCIATION RIGHTS—WHAT IS A NATIONAL CONVENTION?

A. *Introduction*

Thus far this Article has surveyed the substantive bases for challenges to the presidential nomination process and discussed the major procedural issues likely to arise in such challenges. We now confront the more difficult question of the constitutional status of the presidential nomination process. Legal challenges to the parties'

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[100] *Wymbs*, 719 F.2d at 1085-86; *Ripon Soc'y*, 525 F.2d at 602-03 (Tamm, J., concurring); *id.* at 614 (Wilkey, J., concurring); *Irish*, 399 F.2d at 121; *Heitmanis*, 677 F. Supp. at 1359.

[101] *Wymbs*, 719 F.2d at 1082-84; *Irish*, 399 F.2d at 121; *Heitmanis*, 677 F. Supp. at 1359.

[102] 369 U.S. at 217.

[103] *See infra* notes 106-45 and accompanying text.

[104] 5 U.S. (1 Cranch) 49 (1803).

[105] 369 U.S. at 217 n.50.

actions involve two related constitutional issues. First, to what extent are the parties' actions state action, thereby subjecting them to constitutional attack? Second, to what extent are the actions an exercise of the right of political association, thereby giving them a measure of constitutional protection? The doctrines of state action and associational freedom are potentially in conflict, but they may also help to define one another.

B. *Associational Rights*

State and federal election laws regulate many aspects of party affairs, such as voting qualifications, delegate selection procedures, and campaign finance. Sometimes legislative action has been sponsored by the parties themselves (e.g., the white primary legislation in southern states, applied only to Democratic primaries).[106] However, in other cases, such as the Progressive Era reforms, political regulations were adopted in order to change the parties' traditional way of doing business.[107] Only in the last few years has the Supreme Court recognized constitutional limits on the extent to which government may regulate intra-party affairs.[108]

As we shall see, the parties' conventions and delegate selection methods are largely immune from state regulation because the parties' associational rights outweigh the state's interest in regulating presidential nominations.[109] The case law also suggests that the parties' associational rights will prevail over conflicting federal laws except in the areas of campaign contributions and anti-discrimination legislation.[110]

1. *Development of Associational Rights*

The seminal cases of *Cousins v. Wigoda*[111] and *Democratic Party v. Wisconsin ex. rel. LaFollette*[112] developed from two related sets of constitutional precedents. The first line of cases established that private groups concerned with political affairs have a constitutional right to be free of burdensome governmental regulations

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[106] See Nixon v. Herndon, 273 U.S. 536 (1927).
[107] CONGRESSIONAL QUARTERLY, *supra* note 1, at 379.
[108] *See infra* notes 124-37 and accompanying text.
[109] *See infra* notes 111-45 and accompanying text.
[110] *See infra* notes 138-45 and accompanying text.
[111] 419 U.S. 477 (1975).
[112] 450 U.S. 107 (1981).

that are not justified by a compelling government interest.[113] The second line of cases established that voters have a constitutional right to associate with the political party of their choice, which can override state election laws, even if those laws are directed at otherwise legitimate state concerns such as preserving the integrity of primaries and the orderly regulation of access to the ballot.[114]

The first line of cases developed from *NAACP v. Alabama*, which struck down a state court order requiring the NAACP to disclose its membership lists.[115] The Court found that the state failed to show that disclosure had a substantial relationship to any valid state interest, and therefore the NAACP's right to associate could not be burdened.[116] A crucial element in the opinion was the Court's holding that the NAACP had the right to assert the constitutional claims of its members.[117]

The *NAACP v. Alabama* opinion pronounced that the constitutional right of association was a "liberty" interest protected by the due process clause of the fourteenth amendment.[118] Subsequent cases emphasize a first amendment right to free association.[119] Despite this shift in textual authority, the central inquiry in challenging governmental burdens on private associations has remained constant: whether the government has shown "compelling interests that justify the imposition of its will."[120]

The second line of cases arose from challenges to state election laws. One leading case is *Kusper v. Pontikes*,[121] which struck down an Illinois law barring persons from voting in a party's primary if they had voted in another party's primary during the preceding twenty-three months. The Court found that the twenty-three month rule "substantially restrict[ed] an Illinois voter's freedom to change his political party affiliation" and that the state's legitimate interest

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[113] *See infra* notes 115-20 and accompanying text.

[114] *See infra* notes 121-23 and accompanying text.

[115] 357 U.S. 449, 466 (1958).

[116] *Id.*

[117] *See id.* at 458-60.

[118] *Id.* at 460; *see also* Shelton v. Tucker, 364 U.S. 479, 484-85 (1960) (striking down law that required public school teachers to declare all of their associational ties); Bates v. Little Rock, 361 U.S. 516 (1960) (voiding convictions for violating city ordinances that required disclosure of the names of all members of organizations operating within the municipalities).

[119] *See, e.g.*, Healy v. James, 408 U.S. 169 (1972).

[120] Democratic Party v. Wisconsin ex rel. LaFollette, 450 U.S. 107, 124 (1981); Cousins v. Wigoda, 419 U.S. 477, 489 (1975); Williams v. Rhodes, 393 U.S. 24 (1968).

[121] 414 U.S. 51 (1973).

in preventing "raiding" by crossover voters did not justify the severe device used to prevent it.[122] The earlier decision in *Williams v. Rhodes*[123] invalidated Ohio laws that made it virtually impossible for small or newly-formed parties to get on the ballot. These cases are significant because, unlike *NAACP v. Alabama* and its progeny, the state interests involved (preservation of the integrity of primaries in *Kusper* and orderly regulation of ballot access in *Williams*) were clearly legitimate state goals. These cases demonstrated that associational rights take precedence over state election laws absent a close link between the election law and the asserted compelling state interests.

Cousins synthesized these two lines of cases, holding that state election laws may not overrule a political party's decision on the seating of delegates at its presidential nominating convention.[124] The litigation arose when the Credentials Committee of the 1972 Democratic National Convention ruled that the fifty-nine person delegation elected in a state-sponsored presidential primary to represent Chicago would not be seated because the local party organization (the famous Daley "machine") had violated several party rules. The Convention's Credentials Committee replaced these delegates with an insurgent slate chosen in non-statutory party caucuses. The elected slate obtained an injunction from an Illinois court barring the insurgents from acting as delegates, but the full Convention accepted the recommendation of the Credentials Committee and seated the insurgents.[125]

The Illinois courts, subsequently held the insurgent slate in contempt, finding that the state mandated primary election was the exclusive legal means for choosing delegates.[126] The U.S. Supreme Court reversed, holding that the first amendment associational rights of the insurgent slate and the Democratic Party were violated by the injunction.[127] The Court rejected the state's contention that it had a compelling interest in protecting the decision made by its voters in the primary, reasoning that "[t]he Convention serves the pervasive national interest in the selection of candidates

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[122] *Id.* at 57; *compare* Rosario v. Rockefeller, 410 U.S. 752 (1973) (upholding a N.Y. statute requiring primary voters to register as party adherents thirty days prior to the previous general election).

[123] 393 U.S. 23 (1968).

[124] 419 U.S. at 490.

[125] *Id.* at 478-81.

[126] *Id.* at 481-83.

[127] *Id.* at 489.

for national office, and this national interest is greater than any interest of an individual state."[128]

The reasoning in *Cousins* leads to the conclusion that a state only has very limited power to interfere with a national convention's decisions on delegate challenges, since it has no compelling interest in the convention's national function. This conclusion was reaffirmed in *LaFollette*.[129] In *LaFollette*, the Wisconsin Supreme Court ordered the National Democratic Party to seat a state delegation that was legally bound to cast its votes in accordance with the results in Wisconsin's "open" primary—an election in which a voter could vote in any party's primary without pre-registration or any public declaration of party affiliation.[130] Democratic party rules required state parties to select delegates through procedures restricted to "Democratic voters only who publicly declare their party preference and have that preference publicly recorded."[131] The Supreme Court held that the party could enforce this rule by refusing to seat the Wisconsin delegation.[132] The Court assumed that Wisconsin could choose to hold an open primary, but it held that Wisconsin could not compel the Democratic party to seat delegates chosen in such an election.[133]

Subsequent Supreme Court decisions have extended to local parties the constitutional autonomy *Cousins* and *LaFollette* gave to national parties. In *Tashjian v. Republican Party*,[134] the Court ruled that a Connecticut statute requiring parties to hold closed primaries for state offices was unconstitutional as applied to the Republican Party because that party had adopted a rule permitting independent voters to vote in its primary. The Court employed a balancing test and found that the purported state interests—reducing administrative costs, preventing "raiding" by non-members, preventing voter confusion and protecting the two party system—did not justify the statute's significant limitations on the party's right to determine its own membership policies.[135]

In *Eu v. San Francisco County Democratic Central Committee*, the Court held that California statutes barring political parties from

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[128] *Id.* at 490.
[129] 450 U.S. 107.
[130] *Id.* at 110-11.
[131] Rule 2A, Delegate Selection Rules for the 1980 Democratic National Convention.
[132] *LaFollette*, 450 U.S. at 121.
[133] *Id.* at 126.
[134] 479 U.S. 208 (1986).
[135] *Id.* at 217-25.

endorsing candidates in party primaries and California statutes specifying the composition of party committees were unenforceable.[136] The Court held that the statutes violated the parties' rights of free speech and association.[137]

On the other hand, the Supreme Court has steadfastly refused to find in favor of private non-political organizations seeking to use the doctrine of associational rights to evade statutes outlawing discriminatory membership policies. In *Roberts v. United States Jaycees*, the Court held that the associational rights of the Jaycees organization did not clothe it with immunity from a Minnesota statute barring sex discrimination in places of public accommodation.[138]

The Court came to a similar conclusion in *Board of Directors of Rotary Int'l v. Rotary Club*.[139] The Rotary organization revoked the charter of a local affiliate because it admitted women, contrary to the organization's rules. The local affiliate sued and obtained a favorable judgment pursuant to California's Unruh (Civil Rights) Act. The U.S. Supreme Court affirmed.[140] In considering the national organization's asserted right of expressive association, the Court noted that, as a matter of policy, Rotary Clubs do not take positions on political or international issues.[141] The Court followed *Roberts* in holding that the state's compelling interest in eliminating discrimination against women outweighed the rights of the Rotary members given the limited nature of the infringement.[142]

Clearly, the Supreme Court has been far more protective of the associational rights of political parties than those of other types of organizations.[143] This is because the Court focuses on the *connection* between the challenged legislation and the group's purposes. Political parties benefit from the idea that "the membership

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[136] ___ U.S. ___, 109 S. Ct. 1013, 1020 (1989). *Cf.* Geary v. Renne, 880 F.2d 1062 (1989) (upholding provisions of California law barring parties from endorsing candidates for specified "nonpartisan" offices).

[137] *Id.* at 1016.

[138] 468 U.S. 609, 612 (1984).

[139] 481 U.S. 537 (1987).

[140] *Id.*

[141] *Id.* at 548.

[142] *Id.* at 548-49; *see also* New York State Club Ass'n v. City of New York, 487 U.S. 1 (1988) (rejecting a facial attack on a city anti-discrimination ordinance that applied to certain private clubs).

[143] Compare Tashjian v. Republican Party, 479 U.S. 208 (1986); NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982); *LaFollette*, 450 U.S. 107; *Cousins*, 419 U.S. 477; NAACP v. Button, 371 U.S. 415 (1963); NAACP v. Alabama, 357 U.S. 449 (1958).

is the message." In *Roberts* and *Rotary Club* the Court found that the avowed purposes of the Rotary Club, which were largely non-political, were not likely to be affected by the compelled admission of women. But in *LaFollette*, the Court held that, for political parties, "the freedom to associate for the 'common advancement of political beliefs,' . . . necessarily presupposes the freedom to identify the people who constitute the association, and to limit the association to those people only."[144] In *Tashjian*, the Court amplified this conclusion. It held that the Republican Party's attempt to broaden its base by allowing freer participation in its primaries was "conduct undeniably central to the exercise of the right of association. As [the Court has previously] said, the freedom to join together in furtherance of common political beliefs 'necessarily presupposes the freedom to identify the people who constitute the association.' "[145]

2. *How Free Are the National Parties?*

As a practical matter, the national parties will probably continue to allow state and federal statutes to govern delegate selection, particularly in states with a long tradition of holding a presidential primary.[146] Election laws are consistent, with the goals of party leaders in most instances since party leaders are well-represented in state legislatures and Congress.[147]

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[144] *LaFollette*, 450 U.S. at 122 (quoting, in part, *Kusper v. Pontikes*, 414 U.S. 51, at 57 (1973)) (footnote omitted).

[145] *Tashjian*, 479 U.S. at 214 (quoting *LaFollette*, 450 U.S. at 127).

[146] THE RULES OF THE REPUBLICAN PARTY; Rule 32, adopted at the 1988 convention, provides that delegates shall be selected in accordance with state law, except when state law conflicts with specified national rules. A similar rule was in place prior to the 1988 convention. In addition, art. 2, § 2 of the current CHARTER OF THE DEMOCRATIC PARTY OF THE UNITED STATES, provides that:

> State Party rules or state laws relating to the election of delegates to the National Convention shall be observed unless in conflict with this Charter and other provisions adopted pursuant to authority of the Charter, including the resolutions or other actions of the National Convention. In the event of such conflict with state laws, state Parties shall be required to take provable positive steps to bring such laws into conformity and to carry out such other measures as may be required by the National Convention or the Democratic National Committee.

[147] On the other hand, in *Tashjian*, the Second Circuit's opinion found that the state Democratic Party deliberately tried to hurt the Republicans by requiring them to use a closed primary. Republican Party of State of Connecticut v. Tashjian, 770 F.2d 265, 270, 281-83 (2d Cir. 1985), *aff'd*, 479 U.S. 208 (1986). The author suspects this type of gamesmanship to be the exception, not the rule, at least in presidential politics. *See, e.g.*, *Ricard*, 544 So. 2d 1310 (statute incorporated party rule).

Despite these practical realities, it would be useful if party leaders, candidates, and lawmakers could predict whether a given statute can be constitutionally applied to an unwilling party. Because the established constitutional test involves case-by-case balancing and because some Supreme Court decisions have been closely split, perfect predictability is out of reach. But some generalizations are possible.

a. *National Parties vs. State Laws*

The national parties are in a very strong position to defy state laws governing delegate selection because the Supreme Court has held that the states do not have a compelling interest in regulating the choice of presidential nominees. In *Cousins*, the majority flatly stated that:

> The States themselves have no constitutionally mandated role in the great task of the selection of Presidential and Vice-Presidential candidates . . . The Convention serves the pervasive national interest in the selection of candidates for national office, and this national interest is greater than any interest of an individual State . . . Thus Illinois' interest in protecting the integrity of its electoral process cannot be deemed compelling in the context of the selection of delegates to the National Party Convention.[148]

This blanket statement was not repeated in *LaFollette*, but the *LaFollette* Court gave even less weight to the claimed state interest in delegate selection. The Court held that states have an interest in regulating presidential primary elections, but do not have a compelling interest in "the imposition of voting requirements upon those who, in a separate process, are eventually selected as delegates."[149]

As discussed above, there is a strong connection between the internal rules of national parties and their constitutionally protected purposes.[150] Given the weak interest that states have in the selection of presidential nominees, the national parties are in a strong legal position when they defy state laws. This is reflected in several circuit court decisions that have held that the national parties are

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[148] 419 U.S. at 489-91.

[149] 450 U.S. at 125.

[150] *See supra* note 145 and accompanying text.

not bound by state laws purporting to regulate presidential nominations.[151]

b. *Federal Authority vs. Party Rules*

The Supreme Court has been more willing to uphold federal legislation that conflicts with party autonomy.[152] Interestingly, this tendency is not based on anything in the text of the Constitution, but rather on the Court's assumption that the federal government should have a major role in regulating elections to federal offices.[153]

In practice, the federal government is directly involved in nomination campaigns, national conventions, and the general election campaigns of party nominees. It subsidizes both primary campaigns and party conventions under the Federal Election Campaign Act.[154] But the federal government has not tried to tell the parties who they must seat as delegates as Illinois did in *Cousins*[155] and Wisconsin did in *LaFollette*.[156] As a result, there is less certainty as to the federal government's power to intervene in party affairs.

One cannot assume that the federal government is subject to the same restraints as the states. Justice Brennan's statement in *Cousins* that "[t]he Convention serves the pervasive national interest in the selection of candidates for national office and this national interest is greater than any interest of an individual state"[157] can certainly be read to imply that national goals embodied in federal legislation will weigh more heavily in the constitutional balance.

(i) *Constitutional Sources of Federal Authority Over Presidential Elections*

An unschooled reader of the Constitution could be forgiven for thinking that the federal government has *less* authority over presidential nominations than state governments. Article II, section

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[151] *See* Ferency v. Austin, 666 F.2d 1023 (6th Cir. 1981) (Michigan statute requiring open presidential primary could not be enforced against National Democratic Party); Riddell v. Nat'l Democratic Party, 508 F.2d 770 (5th Cir. 1975) (invalidating Mississippi statute governing use of the term Democratic Party in the context of dispute concerning seating at national convention).

[152] *See infra* notes 171-77 and accompanying text.

[153] *See infra* notes 158-69 and accompanying text.

[154] 2 U.S.C. §§ 431-456.

[155] *See supra* notes 124-28 and accompanying text.

[156] *See supra* notes 129-33 and accompanying text.

[157] *See Cousins*, 419 U.S. at 490.

1 of the U.S. Constitution, which specifies the process for selection of the president, states that "[e]ach State shall appoint, in such Manner as the Legislature thereof may direct, a number of Electors."[158] The states' electors meet in their respective states and vote for the candidates for president and vice-president.[159] If one set of candidates for the two offices receives a majority of the electoral vote, as they have in every election since 1876, those candidates become president and vice-president. If there is no majority in the electoral vote, as in 1876, and as nearly happened in 1968, the House of Representatives selects the president but each state congressional delegation votes as a unit.[160]

This system clearly assumes that each state is to choose its preference for national office—each state votes separately. The textual basis for federal power over presidential elections is relatively slight: article II, section 1, clause 2 authorizes Congress to "determine the Time of choosing the Electors, and the Day on which they shall give their Votes."[161] This contrasts with article I, section 4, clause 1, which authorizes Congress to make or alter regulations over the time, place, *and manner* of holding Congressional elections.[162]

Despite the contrast in Constitutional language, the Supreme Court has not limited federal power over presidential elections to merely regulating their timing. In *Burroughs v. United States*,[163] the Court found that federal power over presidential elections is extensive. The issue was whether the provisions of the Federal Corrupt Practices Act requiring disclosure of financial contributions to presidential campaigns were constitutional. The Court held that:

> The President is vested with the executive power of the nation. The importance of his election and the vital character of its relationship to and effect upon the welfare and safety of the whole people cannot be too strongly stated. To say that Congress is without power to pass appropriate legislation to safeguard such an election from the improper use of money to influence the result is to deny to the nation in a vital particular the power of

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[158] U.S. CONST. art. II, § 1, cl. 2.
[159] *Id.* at cl. 3, amend. XII.
[160] *Id.*
[161] *Id.* at art. II, § 1, cl. 2.
[162] *Id.* at art. I, § 4, cl. 1.
[163] 290 U.S. 534 (1934).

> self-protection. Congress undoubtedly possesses that power, as it possesses every other power essential to preserve the departments and institutions of the general government from impairment or destruction, whether threatened by force or by corruption.[164]

The Court quoted extensively from its earlier decision in *Ex Parte Yarbrough*, a decision upholding Congress' power to protect the right to vote in Congressional elections. The *Burroughs* Court thereby implied that Congressional power to regulate presidential elections was equal to its power over Congressional elections.[165] The source of this power seemingly derives from necessity rather than any particular clause in the Constitution.

In *Oregon v. Mitchell*,[166] in ruling on the constitutionality of the Voting Rights Act, a majority of the Court seemingly assumed that Congressional power over presidential elections was congruent with Congressional power over Congressional elections. Justice Black was the swing vote in a divided Court. In a footnote, he adopted the theory of *Burroughs* that Congress has plenary power over presidential elections.

> [T]his Court in *Burroughs v. United States* . . . upheld the power of Congress to regulate certain aspects of elections for presidential and vice-presidential electors, specifically rejecting a construction of Art. II, Sec. I, that would have curtailed the power of Congress to regulate such elections. Finally, and most important, inherent in the very concept of a supreme national government with national officers is a residual power in Congress to insure that those officers represent their national constituency as responsively as possible. This power arises from the nature of our constitutional system of government and from the Necessary and Proper Clause.[167]

In *United States v. Classic*, the Court had construed the article I, section 4 grant of Congressional power over Congressional elections as extending to Congressional primaries as well.[168] Finally, in *Buckley v. Valeo*,[169] which upheld public financing of presidential campaigns, a majority of the Justices subscribed to part III of the Court's opinion, which stated flatly that "Congress has the power

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[164] *Id.* at 545.
[165] 110 U.S. 651 (1884).
[166] 400 U.S. 112 (1979).
[167] *Id.* at 124 n.7.
[168] 313 U.S. 299, 317 (1941).
[169] 424 U.S. 1 (1976).

to regulate Presidential elections and primaries," citing *Classic* and *Burroughs*.[170]

(ii) *Federal Authority Over Campaign Finance*

First amendment rights have been tested against federal power in the area of campaign finance. These cases, however, offer only limited insight into how the Supreme Court would react to other types of federal restrictions on political parties.

Buckley is the seminal case concerning federal power to regulate presidential campaign finance. Initially, the Court held that Congress has plenary power to regulate presidential elections, as discussed above.[171] Next, the Court acknowledged that the constitutional guarantee of free association for the advancement of political beliefs encompasses the right to associate with a political party.[172] The Court upheld limits on financial contributions to political parties and candidates based on the governmental interest in deterring corruption and the appearance of corruption.[173] The Court also held, however, that limits on expenditures for political speech, which are independent from a candidate's campaign, were unconstitutional.[174]

More significant for our purposes, the Court held that public financing of presidential nomination campaigns and national conventions was constitutional.[175] The Court rejected an analogy to the proscribed public financing of religion, holding that public financing of conventions and election campaigns facilitates rather than abridges first amendment rights.[176] The Court also dismissed as purely speculative the concern that federal financing would lead to federal control of parties' internal affairs.[177]

Justice Burger's dissent made some interesting points. It concluded that public financing of partisan campaigns was not a legitimate expenditure of public funds, finding the analogy to separation of church and state to be persuasive.[178] Justice Burger

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[170] *Id.* at 90. For a discussion of *Burroughs*, see *supra* notes 163-64 and accompanying text. For a discussion of *Classic*, see *supra* note 168 and accompanying text.

[171] Buckley v. Valeo, 424 U.S. 1, 13 n.16 (1976).

[172] *Id.* at 15.

[173] *Id.* at 12-60.

[174] *Id.* at 85-108.

[175] *Id.* at 92-93.

[176] *Id.* at 93.

[177] *Id.* at 93 n.126.

[178] *Id.* at 248 (Burger, J., dissenting).

noted that delegate selection has always been private and speculated that the decision in *Buckley* might lead to judicial monitoring of delegate selection.[179]

A 1985 decision, *Federal Election Commission v. National Conservative Political Action Commission*, strengthened the first amendment rights of political organizations. The Court held that a statute making it illegal for a political action committee to spend over $1,000 on the campaign of a presidential candidate who had accepted public financing was unconstitutional.[180] The Court found that such expenditures "produce speech at the core of the First Amendment."[181] The Court also held that there was a distinction, for constitutional purposes, between purely political organizations and corporations or labor organizations; limitations on political expenditures of such non-political groups had been deemed constitutional in earlier decisions.[182] This opinion suggests once again that political associations have a greater associational autonomy than economic associations.

Finally, there is one potentially significant circuit court decision in the area of public financing. *In re Carter/Mondale Reelection Committee* held that it would violate the first amendment rights of the Carter campaign to deny federal funding pending an investigation of potential violations of campaign laws by the Federal Election Commission (FEC).[183] This decision suggests that, after the national convention, a legal challenger may have a difficult burden to overcome in denying the nominee his or her federal funding.

(iii) *Analogy to State Regulation of State Parties*

A more fruitful method for predicting how the courts will resolve conflicts between federal law and party associational freedoms is to examine Supreme Court precedents concerning state regulation of state conventions and party committees. As recently as 1979, four years after *Cousins*, the Supreme Court held that a state party organization was not constitutionally immune from state election laws regulating the membership of the party's state com-

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[179] *Id.* at 250 (Burger, J., dissenting).

[180] 470 U.S. 480 (1985).

[181] *Id.* at 493.

[182] *Id.* at 495-96, 500-01. *Cf.* FEC v. Nat'l Right to Work Comm., 459 U.S. 197 (1982) (limiting political fund-raising by corporations).

[183] 642 F.2d 538 (D.C. Cir. 1980).

mittee. In *Marchioro v. Chaney*, the Court considered a challenge to a Washington statute providing that each party's state committee must consist of two persons from each county in the state.[184] The state Democratic Party adopted procedures for selecting additional delegates, one from each legislative district. The state committee refused to seat the additional delegates based on the statute. The Supreme Court affirmed the decision of the Washington Supreme Court, which held that the statute did not infringe on the first amendment associational rights of the party.[185]

However, *Marchioro* was only a temporary setback in the progress of the associational rights of political parties. The Supreme Court relied on some unusual factual circumstances to avoid deciding the core first amendment issue. The Court found that an unregulated body, the state party convention, had actual control over state party activities.[186] The statutorily mandated state party committee only had two functions: filling vacancies in the national convention delegation, which was not at issue, and certain powers over internal party affairs. Because these powers over internal party affairs were granted to the statutory state committee by the party's unregulated state convention, the Supreme Court held that there was no first amendment violation.[187] The Court stated that

> all of the "internal party decisions" which appellants claim should not be made by a statutorily composed Committee are made not because of anything in the statute, but because of delegations of authority from the Convention itself. . . . There can be no complaint that the party's right to govern itself has been substantially burdened by statute when the source of the complaint is the party's own decision to confer critical authority on the State Committee.[188]

The Supreme Court subsequently held that state parties had protection from a state statute in *Tashjian*.[189] The Court held that the Republican Party could ignore a Connecticut statute requiring the party to hold a closed primary because the statute contravened party rules that permitted unaffiliated voters to participate.[190] This

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[184] 442 U.S. 191 (1979).
[185] Marchioro v. Chaney, 582 P.2d 47 (Wash. 1978), *aff'd*, 442 U.S. 191 (1979).
[186] 442 U.S. at 198-99.
[187] *Id.*
[188] *Id.*
[189] 479 U.S. 208.
[190] *Id.* at 224-25.

decision firmly established that the type of autonomy granted the national parties in *Cousins*[191] and *LaFollette*[192] also applies to state party organizations. Presumably, the state's interests weigh more heavily on a balancing test when they are applied to the conduct of state elections but, nonetheless, the *Tashjian* Court found that the party's associational right to define participation in its primary outweighed the state's interests, even as to elections for state offices.[193]

The Supreme Court went even farther in recognizing state party autonomy in the recent unanimous decision in *Eu*.[194] The *Eu* Court struck down California statutes that dictated the structure of party organizations at the county and state levels.[195] The statutes also established the maximum term for the chair of a state party central committee, required that the chair rotate between residents of the northern and southern parts of the state, and imposed other restrictions on party affairs.[196] The Court found that all of these requirements were unconstitutional.[197]

The Court gave short shrift to the state's arguments that these statutes served a compelling interest, holding that

> [the state] contends that the challenged laws serve a compelling "interest in the 'democratic management of the political party's internal affairs' ". . . . This, however, is not a case where intervention is necessary to prevent the derogation of civil rights of party adherents. . . . Moreover, as we have observed the State has no interest in "protect[ing] the integrity of the Party against the Party itself" . . . a state cannot substitute its judgment for that of the party as to the desirability of a particular internal party structure, any more than it can tell a party that its proposed communication to party members is unwise.[198]

Cases at the federal circuit level have also recognized that state statutes are vulnerable if they infringe upon state parties' association rights. An interesting older case is *Riddell v. National Dem-*

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[191] *See supra* notes 147-48 and accompanying text.

[192] *See supra* notes 148-49 and accompanying text.

[193] 479 U.S. at 217-25.

[194] Eu v. San Francisco County Democratic Cent. Comm., ____U.S. ____, 109 S. Ct. 1013 (1989).

[195] *Id.* at 1016.

[196] *Id.*

[197] *Id.* at 1025.

[198] *Id.*

ocratic Party.[199] The case arose from a split in the Mississippi Democratic Party between the "Regular Faction," representing the established state party, and the "Loyalist Faction." The loyalist faction had been recognized as the official Democratic Party of Mississippi for purposes of the Democratic National Convention since 1958. The Loyalists favored integration and favored civil rights legislation which the Regular Faction opposed. The Regular Faction sought an injunction requiring the national Democratic Party to seat their delegation at the 1972 convention. The trial court agreed that the Regular Faction should be seated at the convention, but refused to issue an injunction against the national Democratic Party.[200]

On appeal, the Fifth Circuit held that Mississippi's party registration statute, which prohibited the Loyalists from referring to themselves as the Democratic Party, violated the right of free association.[201] It opined that a split in the state Democratic Party could not be papered over by statute, but rather was properly resolved through the political process.[202] This case suggests that if a national political convention were to split, the F.E.C. and state election officials might have to recognize both factions.

In *Hopfmann v. Connolly*, the First Circuit upheld a rule of the Massachusetts Democratic Party limiting access to the ballot in the state primary to candidates who received fifteen percent or more of the votes at a party convention.[203] The court found that the first amendment associational rights of supporters of a candidate excluded from the ballot were not violated by the party and the state's enforcement of the fifteen percent rule. The court relied almost exclusively on decision of the Massachusetts Supreme Judicial Court in *Langone v. Secretary of the Commonwealth*,[204] which decided the same question. The state court followed *La-Follette*[205] in holding that it could not construe state election laws to nullify the Democratic Party's rules on ballot access because "[w]e view this as a substantial interference with the fundamental

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[199] 508 F.2d 770 (5th Cir. 1975).

[200] *Id.* at 773-74.

[201] *Id.* at 779.

[202] *Id.* at 778.

[203] 769 F.2d 24 (1st Cir. 1985), *cert. denied*, 479 U.S. 1023 (1987).

[204] 446 N.E.2d 43 (Mass.), *cert. denied*, 460 U.S. 1087 (1983). N.E.2d 43 (Mass.), *cert. denied*, 460 U.S. 1087 (1983).

[205] *See supra* notes 148-49 and accompanying text.

rights of association guaranteed to the party and its members by the First and Fourteenth Amendments."[206]

Curry v. Baker is another federal circuit court opinion upholding state party autonomy.[207] Pursuant to state statutory authority,[208] the Alabama Democratic Party adopted a rule prohibiting voters who had participated in other parties' nomination procedures from voting in its primaries or its run-off primaries. One of the two contenders in the Democratic run-off primary for governor urged voters who earlier had voted in the Republican primary to crossover and vote for him. A state party committee found that there were enough crossover voters to have swung the election and gave the nomination to the candidate who received a minority of the votes, but presumably a majority of the valid, non-crossover votes.

The 11th Circuit upheld the validity of the state party rule against crossovers.[209] It also upheld the state party committee's decision to give the second place finisher the nomination.[210] The party's decision was based on the findings of voter surveys, which showed that crossover voting changed the result. The case has interesting implications, assuming it would be followed by a federal court reviewing a national convention's actions. The role of the state party in overturning the results of the primary is very similar to what the credentials committee and full party conventions do in reviewing the results of individual state contests for delegates. The *Curry* decision anticipated *Tashjian* and *Eu* in granting substantial deference to the decision of official state party committees.

(iv) *Summary*

To summarize, Supreme Court and circuit court decisions, apart from the unusual case of *Marchioro*,[211] have consistently upheld the freedom of state party conventions and committees to organize themselves and their nomination processes for state-wide offices as they deem appropriate.[212] The courts have refused to apply state statutes in a manner that conflicts with party rules.

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[206] Langone v. Secretary of the Commonwealth, 446 N.E.2d 43, 47-48 (Mass.), *cert. denied*, 460 U.S. 1087 (1983).

[207] 802 F.2d 1302 (11th Cir. 1986).

[208] ALA. CODE §§ 17-16-14 (1975).

[209] Curry v. Baker, 802 F.2d 1302, 1311-12 (11th Cir. 1986).

[210] *Id.* at 1312.

[211] *See supra* notes 184-88 and accompanying text.

[212] *But cf.* Farley v. Mohoney, 496 N.Y.S.2d 607 (N.Y. Sup. Ct. 1985), *aff'd*, 496 N.Y.S.2d 382 (N.Y. App. Div. 1985) (state party required to meet filing deadlines).

Assuming this is the best possible analogy for future conflicts between federal legislation and national party rules, it seems likely that party rules would also prevail over conflicting federal statutes, as least insofar as those statutes impose a burden on associational freedom. The cases involving campaign finance laws certainly confirm the familiar principle that associational rights must give way to compelling state interests where the statute is narrowly drawn so as to minimize intrusion on party rights. But, outside of the limited context of campaign finance laws, federal legislation as well as state legislation must give way to party associational freedoms.

c. *Invidious Discrimination is Not Protected*

The parties' associational freedom has a potentially important exception. The Supreme Court has been understandably reluctant to enforce private associational rights when they conflict with constitutional or statutory restrictions on racial or sexual discrimination. This reluctance first surfaced in state action cases such as *Terry v. Adams*,[213] and *Shelley v. Kraemer*,[214] and was reaffirmed in cases involving civil rights laws such as *Heart of Atlanta Motel, Inc. v. United States*.[215] In *Hishon v. King & Spalding*,[216] a law partnership argued that it had a constitutional right to discriminate against women. The Court held that

> "[i]nvidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment, but it has never been accorded affirmative constitutional protections. . . ." There is no constitutional right, for example, to discriminate in the selection of who may attend a private school or join a labor union.[217]

In balancing the expressive rights of political parties against the rights of those excluded on racial, religious, sexual, or other prohibited grounds, the courts will probably continue to be reluctant to condone "invidious discrimination," at least when it in-

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[213] 345 U.S. 461 (1953). *See infra* notes 245-49 and accompanying text.

[214] 334 U.S. 1 (1948) (restrictive covenants based on race are judicially unenforceable).

[215] 379 U.S. 241 (1964) (Congress may employ its interstate commerce power to regulate discrimination in public accommodations that affect interstate commerce).

[216] 467 U.S. 69 (1984).

[217] Hishon v. King & Spalding, 467 U.S. 69, 78 (1984) (quoting Norwood v. Harrison, 413 U.S. 455, 470 (1973)).

volves the major parties.[218] Such discriminatory rules should have less constitutional protection than other types of rules. On the other hand, the close connection between the parties' rules and their expressive purposes and associational reason for being may provide them greater protection than other types of organizations. Whatever the result, it is reasonably clear that racially and sexually exclusionary party rules face a higher burden. This is reasonable given the strong constitutional policy against discrimination.

C. *State Action*

1. *The Importance of State Action*

The question of whether a particular party activity amounts to state action is crucial in any challenge based on federal constitutional grounds. Since the *Civil Rights Cases*[219] were decided in 1883, a finding of state action has been a prerequisite to applying the equal protection and due process guarantees of the fourteenth amendment. The state action requirement also applies to other potential constitutional challenges to the presidential nomination process.[220]

Several important state action decisions directly address the status of the political nomination process at the state level. The Texas White Primary Cases dealt with blatant racial exclusion by a state party that had an effective monopoly on political power in the state.[221] The context of contemporary national political conventions is quite different: they are national in scope, they exercise only duopoly power over the presidency, and overt racial exclusion seems to be a thing of the past. Nonetheless, the reach of the state action concept is likely to remain an important issue in litigation concerning presidential nominations.

State action is important because the procedures by which delegates are selected are potentially vulnerable to a variety of

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[218] A minor party could argue that it is organized on racial, religious, or ethnic grounds (e.g., Black Panthers, Ku Klux Klan, or fundamentalist Christian groups). The major parties are in no position to so argue. See PREAMBLE TO THE RULES OF THE REPUBLICAN PARTY and CHARTER OF THE DEMOCRATIC PARTY OF THE UNITED STATES, Preamble and Art. I, § 4, stating the major parties' philosophy of being open to all.

[219] 109 U.S. 3, 11-14 (1883).

[220] A finding of state action is a prerequisite to relief in cases asserting first amendment speech rights. Hudgens v. NLRB, 424 U.S. 507 (1976).

[221] *See infra* notes 228-49 and accompanying text.

equal protection challenges, even absent blatant racial discrimination. For example, both major parties have undertaken affirmative action efforts[222] that may be subject to attack as reverse discrimination, as in *Regents of the University of California v. Bakke*[223] and *City of Richmond v. J.A. Croson Co.*[224]

State action is also relevant to delegate apportionment. Delegate apportionment is governed by intricate formulas, generally arrived at after a struggle between party factions. Whatever the formula, delegates are never allocated to the states on a precise one person, one vote or a one party member, one vote basis. A challenge could be based on the equal protection rights of under-represented party members if the apportionment scheme is considered state action.

Finally, state action is crucial because state action must comply with due process requirements. The effect of the imposition of court-mandated due process safeguards on the party's procedures for selecting delegates and nominating their national ticket could be profound. The presence or absence of state action in the presidential nomination process has been discussed frequently in both legal treatises and articles.[225]

2. *Potential Grounds For Finding State Action*

Given that the Supreme Court has held that the selection and seating of delegates at a party's national convention is an exercise of associational rights, it might seem obvious that such activities are not state action. Nonetheless, there is legal precedent to the contrary. Challengers can assert plausible grounds for finding state action even at the national convention itself. These grounds will be discussed individually along with a critical evaluation of each. The author concludes that in light of the parties' associational rights, the national conventions and the means of selecting delegates are, for the most part, not state action.

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[222] *See supra* note 25 and accompanying text.

[223] 438 U.S. 265 (1978).

[224] ___ U.S. ___, 109 S. Ct. 706 (1989).

[225] *See, e.g.*, Chambers & Rotunda, *Reform of Presidential Nominating Conventions*, 56 VA. L. REV. 179, 194-96 (1979); Rotunda, *Constitutional and Statutory Restrictions on Political Parties in the Wake of Cousins v. Wigoda*, 53 TEX. L. REV. 935, 951-60 (1975); Weisburd, *Candidate-Making and the Constitution: Constitutional Restraints on and Protections of Party Nominating Methods*, 57 S. CAL. L. REV. 213, 214-54 (1984); Note, *Freedom of Association and State Regulation of Delegate Selection*, 36 VAND. L. REV. 105, 134-36 (1983); Comment, *Cousins and LaFollette: An Anomaly Created By a Choice Between Freedom of Association and the Right to Vote*, 80 NW. U.L. REV. 666, 677-81.

a. *Public Function*

One of the more familiar principles in the law of state action is that if a private party performs a public function, it becomes subject to the restraints the constitution places on the state. Performing a public function is treated as state action.[226]

A series of legal challenges to the Texas Democratic Party's policy of excluding blacks from its nomination process first gave rise to the public function doctrine.[227] Despite this history, however, it is becoming increasingly obvious that the public function theory is not properly applicable to parties' actions in choosing candidates as long as the government is not otherwise involved in the parties' actions.

As noted, the public function theory of state action developed out of a particular historical struggle—the effort to end the post-Reconstruction Texas Democratic Party's policy of barring blacks from participating in its primary elections. The first of the Texas White Primary Cases, *Nixon v. Herndon*,[228] held that a statute enforcing racial restrictions in the state-run Democratic primary was unconstitutional. The Court rejected Texas' argument[229] that the statute dealt solely with the affairs of a private group.

The Texas Democrats responded by passing a statute that gave the executive committee of a political party "the power to prescribe the qualifications of its own members." The Supreme Court held, in *Nixon v. Condon*, that this statute made the executive committees' acts state action. The executive committees would not have possessed the power to make membership rules excluding blacks in the absence of the statute because general authority over party affairs was ordinarily held by the state party convention.[230] The Court held that, because it received its power from the state, the Democratic Party's executive committee was acting as an "organ of the state" and, therefore, was subject to the fourteenth amendment's prohibition of racial discrimination.[231] The Court left open the question of the party's authority to determine its own membership in the absence of a statute.

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[226] *See infra* notes 227-364 and accompanying text.
[227] *See infra* notes 228-49 and accompanying text.
[228] 273 U.S. 536 (1927).
[229] *See id.* at 538.
[230] 286 U.S. 73, 85 (1932).
[231] *Id.* at 88.

The Texas Democrats won a temporary victory by adopting a resolution at their state convention barring blacks from voting in Democratic primaries. In *Grovey v. Townsend*, the Supreme Court found that this policy was not state action and that the party was merely exercising its inherent power to define its membership.[232]

The New Deal court that came into being after 1935 adopted a more expansive approach to state action. In *Classic*,[233] a case concerning the applicability of federal election fraud laws to state primary elections, the Court reversed an earlier holding[234] that primary elections were not elections for constitutional purposes.[235] The Court opined that if "state law has made the primary an integral part of the procedure of choice, or [if] in fact the primary effectively controls the choice" then a constitutional right exists to participate in the primary and federal laws may protect that right.[236]

Classic was not a state action case, but the Court's ruling that primary elections were part of the electoral scheme had an important impact on state action theory. In *Smith v. Allwright*, another Texas case, the Court relied on *Classic* to overrule *Grovey*.[237] The Court stated that "the recognition of the place of the primary in the electoral scheme makes clear that state delegation to a party of the power to fix the qualifications of primary elections is delegation of a state function that may make the party's action the action of the State."[238] This statement marked the birth of the rule that some activities are inherently state (or public) functions and hence are state action regardless of who performs them.

The public function theory was restated by the Fourth Circuit in 1947 in *Rice v. Elmore*, a class action suit challenging racial restrictions on participation in the South Carolina Democratic primary.[239] The legislature had repealed its laws regulating primary elections in the wake of *Allwright*, putting this function under the complete control of the party.[240] The court found that "[t]he party may, indeed, have been a mere private aggregation of individuals in the early days of the Republic, but with the passage of the

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[232] 295 U.S. 45, 53 (1935).
[233] United States v. Classic, 313 U.S. 299 (1941).
[234] Newberry v. United States, 256 U.S. 232, 250 (1921).
[235] *Classic*, 313 U.S. at 317-18.
[236] 313 U.S. at 318.
[237] 321 U.S. 649, 666 (1944).
[238] *Id.* at 660.
[239] 165 F.2d 387 (4th Cir. 1947), *cert. denied*, 333 U.S. 875 (1948).
[240] *Id.* at 388.

years, political parties have become in effect state institutions, governmental agencies through which sovereign power is exercised by the people."[241] The court held that the actions of party officials were subject to constitutional review because "[h]aving undertaken to perform an important function relating to the exercise of sovereignty by the people, they may not violate the fundamental principles laid down by the Constitution for its exercise."[242]

The Fourth Circuit adhered to this view in *Baskin v. Brown*,[243] a 1949 case challenging racial restrictions on participation in the South Carolina Democratic primary. The court held that:

> The argument is made that a political party does not exercise state power but is a mere voluntary organization of citizens to which the constitutional limitations upon the powers of the state have no application. This may be true of a political party which does not undertake the performance of state functions, but not of one which is allowed by the state to take over and operate a vital part of its electoral machinery.[244]

Rice and *Baskin* were cited with approval in *Terry*, the last of the Supreme Court's Texas White Primary Cases.[245] The issue in *Terry* was whether the Jaybird Democratic Association, an all-white Democratic organization in Fort Bend County, Texas, could exclude blacks from primary elections that it held prior to the official Democratic primary. Eight Justices, in four separate opinions, held that the Jaybird's primary was state action. Significantly, however, none of the opinions held that party nominations were necessarily a state or public function. Instead, the Justices focused on the special facts of the case: the Jaybirds admitted intent to evade constitution restrictions;[246] their success in staging the only local election that mattered;[247] the fact that county officials voted in the Jaybird primary;[248] and the connections between the statutory official party and the Jaybird Association.[249] In short, *Terry* is a

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[241] *Id.* at 389.

[242] *Id.* at 391 (citations omitted).

[243] 174 F.2d 391 (4th Cir. 1949).

[244] *Id.* at 394.

[245] Terry v. Adams, 345 U.S. 461, 465-66 (1953).

[246] *Id.* at 463-64, 469-70 (Black, J., opinion); *id.* at 474-77 (Frankfurter, J., opinion); *id.* at 480, 483-84 (Clark, J., concurring).

[247] *Id.* at 463, 469 (Black, J., opinion); *id.* at 472, 474, 477 (Frankfurter, J., opinion); *id.* at 480, 483-84 (Clark, J., concurring).

[248] *Id.* at 473-77 (Frankfurter, J., opinion).

[249] *Id.* at 482-84 (Clark, J., concurring).

case where a court might have found that party nominations are a public function, but did not. If it is a public function case, it is so only by implication.

Subsequent lower court decisions went further. A 1971 D.C. Circuit decision held that the process of nominating a candidate for president was state action. In *Georgia v. National Democratic Party*, the court read the Texas White Primary Cases as holding that *nominating* is a public function.[250] The court was reviewing a constitutional challenge to the delegate apportionment formulas proposed by the two major parties for their 1972 national conventions. The court found that the parties' rules were state action, stating that

> [t]he Supreme Court has consistently found state action in the activities of state political parties insofar as those activities touch upon the machinery whereby *candidates* are nominated by the parties to seek election to local or national office. This is the clear force of the *Texas White Primary Cases*; and, as those cases and others demonstrate, it makes no difference for purposes of finding state action that the state party acts through a statewide party primary, a state party convention, or a state party committee.[251]

Several other cases decided prior to the 1972 party conventions also held that national party rules or decisions were state action, although these decisions were not necessarily based on the principle that nomination is a public function.[252]

Georgia v. National Democratic Party, and other decisions with similar holdings, have been subject to criticism.[253] In this writer's opinion, these decisions are no longer good law to the extent they hold that nominating a candidate for national office is itself a public function. This conclusion is based on two contentions. First, the Supreme Court has curtailed the scope of the public function

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[250] 447 F.2d 1271, 1275 (D.C. Cir. 1971).

[251] *Id.* at 1275.

[252] Brown v. O'Brien, 469 F.2d 563, 567 (D.C. Cir. 1972), *vacated*, 409 U.S. 816 (1972); Bode v. Nat'l Democratic Party, 452 F.2d 1302, 1304-05 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 1019 (1972); Doty v. Montana State Democratic Cent. Comm., 333 F. Supp. 49, 51 (D. Mont. 1971); Maxey v. Wash. State Democratic Comm., 319 F. Supp. 673, 678 (W.D. Wash. 1970).

[253] *See* Ripon Soc'y v. Nat'l Republican Party, 525 F.2d 567, 574-75 (D.C. Cir. 1975); *id.* at 596-602 (Tamm, J., concurring); *id.* at 605-09 (Wilkey, J., concurring); Weisburd, *supra* note 225, at 221-51.

theory.[254] Second, subsequent Supreme Court cases recognizing party associational rights imply that nominating a candidate is, or can be, a constitutionally protected private function.[255]

The scope of the public function concept was contracted after an expansive period during which the Supreme Court found that owning a company town,[256] operating a park,[257] and even operating a shopping center[258] were public functions. The contraction began with *Lloyd Corp. v. Tanner*,[259] in which the Court reversed itself and held that a large private shopping center could not be sued for interfering with first amendment rights.[260]

In *Jackson v. Metropolitan Edison Co.*, the Court held that a heavily regulated private utility that cut off service to a customer pursuant to state-approved tariff rules was not performing a public function.[261] The Court imposed an important limitation on the public function theory when it held that the public function theory was limited to "powers traditionally exclusively reserved to the State."[262] According to the Court, the public function at issue in the White Primary Cases was holding an "election."[263] Thus, the Court in *Metropolitan Edison* did not read the earlier cases as holding that *nominating a candidate* was a public function.

Finally, the Court's decision in *Garcia v. San Antonio Metropolitan Transit Authority*, though not a state action case, strongly criticizes the central premise of the public function theory, viz., that certain activities are "traditional governmental functions."[264]

The second trend affecting state action questions is the Court's increasing recognition of first amendment associational rights. If national conventions are private associations exercising first amendment rights, it seems inconsistent to hold that they are simultane-

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[254] *See infra* notes 259-64 and accompanying text.

[255] *See infra* notes 265-88 and accompanying text.

[256] Marsh v. Alabama, 326 U.S. 501 (1946).

[257] Evans v. Newton, 382 U.S. 296 (1966).

[258] Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, 391 U.S. 308 (1968).

[259] 407 U.S. 551 (1972).

[260] *Id.* at 570.

[261] 419 U.S. 345 (1974).

[262] *Id.* at 352.

[263] *Id.*

[264] 469 U.S. 528, 546-47 (1985). The Court overruled National League of Cities v. Usery, 426 U.S. 833 (1976), which held that Congress could not constitutionally apply the Fair Labor Standards Act to state employees engaged in areas of traditional governmental functions. The *Garcia* Court concluded that attempts to define such functions were unworkable. *Id.* at 538-47.

ously carrying out a public function. The Supreme Court has mandated that a party's "freedom to associate for the 'common advancement of political beliefs . . . necessarily presupposes the freedom to identify the people who constitute the association' " and that "[a]ny interference with the freedom of a party is simultaneously an interference with the freedom of its adherents."[265] These holdings strongly imply that party actions are constitutionally protected from constitutional scrutiny.

Nonetheless, the Supreme Court has not yet held that the state action holdings in the White Primary Cases are limited by the associational rights recognized in *Cousins* and *LaFollette*. The *Cousins* opinion emphasized that it did not address the questions of "whether the decisions of a national political party in the area of delegate selection constitute state or governmental action . . . [and] . . . whether national political parties are subject to the principles of the reapportionment decisions, or other constitutional restraints in their methods of delegate selection and allocation."[266]

The subsequent decision in *Flagg Bros., Inc. v. Brooks* did elucidate the courts position concerning the status of nominations as a public function.[267] The Court, in dicta, opined that

> [w]hile the Constitution protects private rights of association and advocacy with regard to the election of public officials, our cases make it clear that the conduct of elections themselves is an exclusively public function . . . The doctrine does not reach to all forms of private political activity, but encompasses only state-regulated elections or elections conducted by organizations which in practice produce "the uncontested choice of public officials."[268]

This dictum is the clearest statement that our highest court has made concerning the impact of *Cousins* on the state action question. It implies, but does not hold, that elections are a public function and nominations are not.

The federal circuits have been slow to find that nominations are not a public function in the wake of *Cousins* and *LaFollette*. In *Ripon Society v. National Republican Party*,[269] a D.C. Circuit *en banc* decision, the plurality opinion recognized that *Cousins*

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[265] *LaFollette*, 450 U.S. at 122 (citations omitted).
[266] *Cousins*, 419 U.S. at 483-84 n.4.
[267] 436 U.S. 149 (1978).
[268] *Id.* at 158 (citations omitted).
[269] 525 F.2d 567 (D.C. Cir. 1975).

undercut the reasoning of the D.C. Circuit's prior decisions that selection of delegates to national conventions was state action.[270] However, the court's opinion did not decide the state action question.[271] Two well-reasoned concurrences went farther, however. Judge Tamm's concurrence rejected the idea that national conventions perform a public function. In discussing *Cousins*, Judge Tamm noted that "[i]f the states cannot enforce the results of their primaries, there is some question whether the acts of national conventions should be considered those of states acting in concert."[272] Judge Wilkey's concurrence also cited the effect of *Cousins* on the public function argument, concluding that: "Feeble indeed is the 'state function' which no state has the power to control. Thus [*Cousins*] would seem to perish the claim that the Republican National Convention's allocation of delegates is in any way a 'state function.' "[273]

In *Wymbs v. Republican State Executive Committee*,[274] the court noted parenthetically that "[i]n the earlier fifteenth amendment cases, involving white-only primaries or other disenfranchisement of blacks, the courts freely found the conduct of political parties and groups to constitute state action. But recently, courts have hesitated to find state action when, as in this case, racial discrimination is not involved."[275]

Recently, in *Kay v. New Hampshire Democratic Party*,[276] the First Circuit found, in a case involving a Democratic presidential candidate's forum, that, any attempt to characterize the forum as state action would "confront" first amendment freedoms of political parties, citing *LaFollette*.[277]

Trial courts have been bolder in assessing the consequences of *Cousins* and *LaFollette* on the public function theory. In *Martin-Trigona v. Dunne*,[278] the court opined that slate-making for local offices by Chicago's Democratic ward committeemen was constitutionally-protected association, not state action, citing *Cousins*.[279]

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[270] *Id.* at 575.
[271] *Id.* at 576.
[272] *Id.* at 600 n.7 (Tamm, J., concurring).
[273] *Id.* at 608-09 (Wilkey, J., concurring).
[274] 719 F.2d 1072 (11th Cir. 1983), *cert. denied*, 465 U.S. 1103 (1984).
[275] *Id.* at 1077.
[276] 821 F.2d 31 (1st Cir. 1987).
[277] *Id.* at 33.
[278] 425 F. Supp. 813 (N.D. Ill. 1977).
[279] *Id.* at 814.

In *Hunt v. Democratic Party*, the court concluded that party rules governing state party committees were not state action, finding that the first principle governing this type of case is that parties have first amendment associational rights.[280] In *Ferency v. Austin*[281] the trial court deemed that the Michigan Democratic presidential caucuses were not state action because the state could not constitutionally tell the party how to select delegates to its national convention. The court's ruling as to the Michigan caucuses was reaffirmed in 1984 by *Jackson v. Michigan State Democratic Party*,[282] a district court case, and *Ferency v. Secretary of State*,[283] a state appellate decision.

On the other hand, in *Bachur v. Democratic National Party*, the district court determined that party rules for the selection of national convention delegates in a state primary *were* state action.[284] The court found that, because the state was obliged to defer to party rules, under *LaFollette* and *Tashjian*, the party became a state institution. The court cited the classic exposition of the public function theory in *Rice*.[285] This revival of the public function theory was short-lived, however, as the Fourth Circuit reversed the decision in *Bachur*.[286] The appellate decision did not address the state action issue, but held that the party's associational rights prevail over the challenger's right to vote for the delegates of his or her choice.[287] Finally, in *Heitmanis v. Austin*, the court found that because the party, not the state, has the final say on delegate selection, delegate selection is not state action.[288]

To summarize, the trial courts have given *Cousins* and *LaFollette* a practical construction. Barring a change in the law, it appears that the public function theory does not apply to delegate selection and party nomination proceedings generally.

b. *State Regulation*

The public function theory is not the sole basis on which litigants have urged, and courts have found, party activity to be

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[280] 439 F. Supp. 788 (N.D. Okla. 1977).
[281] 493 F. Supp. 683 (W.D. Mich. 1989), *aff'd*, 666 F.2d 1023 (6th Cir. 1981).
[282] 593 F. Supp. 1033 (E.D. Mich 1984).
[283] 362 N.W.2d 743 (Mich. 1984).
[284] 666 F. Supp. 763 (D. Md.), *rev'd on other grounds*, 836 F.2d 837 (4th Cir. 1987).
[285] *See supra* notes 239-42 and accompanying text.
[286] Bachur v. Democratic Nat'l Party, 836 F.2d 837 (4th Cir. 1987).
[287] *Id.* at 842.
[288] 677 F. Supp. 1347 (E.D. Mich. 1988).

state action. Other factors include the extensive regulation of the parties by statute, the preferential ballot access given to party nominees, and federal financing to candidates and party conventions. Each of these factors will be examined in turn, beginning with the effect of state regulation.

Smith v. Allwright, one of the Texas White Primary Cases discussed the effect of state statutory regulation on party activities.[289] In finding that the Texas Democratic Party's exclusion of blacks from its primaries was state action, the Court emphasized the fact that nominations for state office were heavily regulated by statute. The Court found that, "this statutory system for the selection of party nominees for inclusion on the general election ballot makes the party which is required to follow these legislative directions an agency of the state insofar as it determines the participants in a primary election."[290]

The Supreme Court came to a similar conclusion in the 1962 case, *Gray v. Sanders*.[291] The case concerned Georgia's use of a county-unit system in state primary elections. This system required that nominees receive a majority of county-unit votes, which were not attributed so as to reflect the counties' population. As a result, voters in the least populous county had ninety-nine times more influence than voters in the most populous county. The Court found that this system, which was mandated by statute, was state action, holding that "state regulation of this preliminary phase of the election process makes it state action."[292]

Although it might be plausible to read the *Allwright* and *Gray* as authority for the proposition that regulation of party activities could make those activities state action, it has since become clear that regulation, in and of itself, does not convert private activity into state action. The death knell for this theory came in the 1974 decision *Metropolitan Edison*.[293] The Court held that the termination of electrical service by a heavily regulated private utility was not state action simply because the utility was regulated. The Court stated that

> [t]he mere fact that a business is subject to state regulation does not by itself confer its action into that of the State for purposes

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[289] Smith v. Allwright, 321 U.S. 649 (1944).

[290] *Id.* at 663.

[291] 372 U.S. 368 (1963).

[292] *Id.* at 374-75.

[293] Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974).

> of the Fourteenth Amendment . . . [Neither] does the fact that the regulation is extensive and detailed. . . . It may well be that acts of a heavily regulated utility with at least something of a governmentally protected monopoly will more readily be found to be internal "state" acts than will the acts of an entity lacking these characteristics. *But the inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the state itself.*[294]

The effect of *Metropolitan Edison* on the prior cases holding national party activity to be state action became apparent in the 1975 D.C. Circuit opinion in *Ripon Society*.[295] Judge McGowan's opinion for the court deliberately avoided deciding whether the 1976 Republican delegate allocation formula was state action. By avoiding this issue Judge McGowan's opinion recognized that *Metropolitan Edison* cast's serious doubt on the D.C. Circuit's earlier holding in *Georgia v. National Democratic Party*[296] and *Bode v. National Democratic Party*[297] that national party delegate allocation formulas were state action.[298] Two of the concurring opinions in the *Ripon Society* case were bolder. Judge Tamm read *Metropolitan Edison* as holding that:

> the mere fact that the state regulates some aspects of an organization does not make its activities state action. . . . There must be a sufficient nexus between the challenged action and the state regulation. Clearly no such nexus exists between any state statute and the allocation of delegates to the Republican Convention.[299]

Judge Tamm also found that federal regulations under the Federal Election Campaign Act were also insufficient to trigger a finding of state action.[300]

Judge Wilkey found that state regulation did not make either the national convention or its delegate allocation formula state action. Judge Wilkey's concurrence reasoned that because the for-

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[294] *Id.* at 350-51 (emphasis added).

[295] 525 F.2d 567.

[296] For a discussion of Georgia v. Nat'l Democratic Party, see *supra* notes 250-51 and accompanying text.

[297] For a discussion of Bode v. Nat'l Democratic Party, see *supra* note 252 and accompanying text.

[298] *Ripon Soc'y*, 525 F.2d at 574-75.

[299] *Id.* at 599 (Tamm, J., concurring) (citations omitted).

[300] *Id.* at 601.

mula was the product of party deliberations and was not compelled, restricted, modified, devised, or encouraged by government, it was not state action.[301]

The Supreme Court's holding in *Metropolitan Edison* that regulated activities were not necessarily state action was reaffirmed in the 1982 decisions *Rendell-Baker v. Kohn*[302] and *Blum v. Yaretsky*.[303]

A 1986 district court case, *California Republican Party v. Mercier*, followed these precedents.[304] The defendant mailed state cards that falsely represented themselves as official Republican party endorsements. The state party sued under 42 U.S.C. section 1983, contending that because the defendant was masquerading as the California Republican Party, he was acting under color of state law. The court determined that the California Republican Party's activities were not state action and, therefore, the defendant was not acting under color of state law.[305] The court explained its holding as follows:

> The Party's theory on its Section 1983 claim is that Mercier was masquerading as the California Republican party, and since the California Republican party is heavily regulated, it is essentially an entity of the state government. . . . [H]eavy state regulation of private action does not turn that action into state action. Though heavily regulated, the California Republican party is not part of the state government, and its actions are not state actions.[306]

In conclusion, parties can no longer argue, and courts can no longer decree, that state or federal regulation of the nomination process in and of itself makes the various aspects of that process state action. This is not to propose, however, that state or federal regulation is irrelevant. Clearly, if a given party action is *required* by state or federal law and the law is constitutional, then both the law and the party's action would be subject to constitutional scrutiny as state action.

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[301] *Id.* at 606-07 (Wilkey, J., concurring).

[302] 457 U.S. 830, 841 (1982) (regulation of private school does not make its personnel decisions state action).

[303] 457 U.S. 991, 1004 (1982) (regulation of nursing homes does not make facility-initiated discharges and transfers state action).

[304] 652 F. Supp. 928 (C.D. Cal. 1986).

[305] California Republican Party v. Mercier, 652 F. Supp. 928, 933-34 (C.D. Cal. 1986).

[306] *Id.* (citation omitted).

c. *Effect of Preferential Ballot Access*

The election laws of most states provide automatic or preferential access to the ballot to the presidential nominees of major parties.[307] Some courts and commentators have asserted that preferential ballot access can make party nominations state action. This argument has only appeared in the last two decades. It may have been implicit in some of the Texas White Primary Cases, but none of those cases actually referred to preferential ballot access as a basis for concluding that party activities were state action.

The first reference to preferential ballot access occurs in 1941 in *United States v. Classic*.[308] It must be remembered this is not a state action case—it held that the federal government had the power to proscribe corrupt practices in state-mandated primary elections for federal office.[309] The Court was careful to note the great advantages that state law gave to official nominees, stating that

> [i]n common with many other states Louisiana has exercised [its] discretion by setting up machinery for the effective choice of party candidates for representative in Congress by primary elections and by its laws it eliminates or seriously restricts the candidacy at the general election of all those who are defeated at the primary.[310]

In *Allwright*, one of the Texas White Primary Cases, the Court again was at pains to describe how state law granted ballot preference to party nominees.[311] The Court majority made reference to the fact that the parties certified candidates for inclusion on the state ballot and to the fact that persons who were not so certified could not appear on the general election ballot as party nominees.[312] The Court further noted that independent or non-partisan candidates could only be placed in nomination by qualified voters who did not participate in party primaries for that office.[313] The Court summarized its reasoning as follows:

> if the state requires a certain election procedure, prescribes a general election ballot made up of party nominees so chosen and

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[307] *See Allwright*, 321 U.S. at 660.

[308] *Classic*, 313 U.S. 299.

[309] *Id.* at 318-20.

[310] *Id.* at 311.

[311] 321 U.S. 649. For a discussion of *Allwright*, see *supra* notes 237-38 and accompanying text.

[312] *Id.* at 663.

[313] *Id.* at 653.

> *limits the choice of the electorate in general elections for state offices, practically speaking, to those whose names appear on such a ballot*, it endorses, adopts and enforces the discrimination against Negroes, practiced by a party entrusted by Texas law with the determination of the qualifications of participants in the primary.[314]

The Court's decision did not turn solely on ballot access, but it is one of several factors that led the Court to its decision. Later state action decisions at the circuit level such as *Rice* and *Baskin* made no explicit reference to ballot access as a factor in finding state action.[315]

In a spate of decisions preceding the 1972 party conventions holding that delegate apportionment nor delegate selection was state action,[316] there is a paucity of references to ballot access as a factor. One intriguing and somewhat ambiguous exception is the D.C. Circuit's 1971 decision in *Georgia v. National Democratic Party*.[317] Here, the court held that the parties' methods of apportioning delegates to the states were state action:

> The electorate's choice in a general election is effectively restricted to the nominees of the two parties. By placing the nominees' names on the ballot, the states, in effect, have adopted this narrowing process as a necessary adjunct of their election procedures. Therefore, every step in the nominating process . . . is as much a product of state action as if the states themselves were collectively to conduct such primary conventions.[318]

The D.C. Circuit was clearly referring to state election laws concerning ballot access. But the decision is devoid of analysis of specific state statutes or of how those statutes benefit the national parties. The *Georgia* decision relies on two rationales for finding state action, the one quoted above and an earlier discussion that seems to adopt the public function theory.[319] In a subsequent case, the D.C. Circuit expressed uncertainty as to whether its decision

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[314] *Id.* at 664 (emphasis added).

[315] The reader will recall that these decisions read *Allwright* and *Classic* to hold that party nominations were inherently state action, because nominating was a public function. For a discussion of *Rice*, see *supra* notes 239-42 and accompanying text. For a discussion of *Baskin*, see *supra* notes 243-44 and accompanying text.

[316] See *supra* note 252 and accompanying text.

[317] 447 F.2d 1271.

[318] *Id.* at 1276.

[319] *See id.* at 1275-76.

in *Georgia* was based on preferential ballot access. In *Ripon Society*,[320] the plurality opinion avoided making a decision on the state action question but noted that the intervening Supreme Court cases of *Metropolitan Edison*,[321] *Moose Lodge #107 v. Irvis*,[322] and *Cousins* cast doubt on its prior state action analysis. The court discussed the ballot access factor in a footnote, writing that

> even assuming that our finding of state action in Georgia rested not on the power of the states to prove or disapprove the "narrowing process" [which the court now found questionable in the wake of *Cousins*] but merely on their support of its outcome by the placement of the candidate's name on the ballot, *Moose Lodge* and [*Metropolitan Edison*] must still give us pause. Both cases rejected claims of state action based on the award to the defendants of a state benefit, which in the case of the power licensed in [*Metropolitan Edison*], the court was prepared to assume was a monopoly.[323]

Here for the first time is an explicit discussion of the effect of ballot access on a finding of state action, but it comes in a case in which the plurality did not decide whether delegate allocation formulas are state action.

Judge Tamm's concurrence in *Ripon Society* read the earlier decision in Georgia as holding that the states made the party's activities their own "through placing the party nominees' names on the ballot."[324] Judge Tamm found this analysis no longer tenable in light of *Metropolitan Edison*, noting that the nomination function is not a traditional state function nor is the state interested in the mechanics of the narrowing process so long as the size and complexity of the ballot is within reason.[325] Finally, Judge Tamm made the following wise observations about preferential ballot access:

> If there is a Constitutional violation in these procedures, it is not the certification, but the state's grant of automatic ballot access to the major party's candidates. The remedy should not be to interfere with the associational activities of the national parties,

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[320] 525 F.2d 567.

[321] For a discussion of *Metropolitan Edison*, see *supra* notes 261-63 and accompanying text.

[322] 407 U.S. 163 (1972).

[323] *Ripon Soc'y*, 525 F.2d at 575 n.18.

[324] *Id.* at 600 (Tamm, J., concurring).

[325] *Id.* at 600-01 (Tamm, J., concurring).

> but to deny their candidate the advantage in securing a place on the state's ballot.[326]

Judge Wilkey's concurrence reached the same result. Judge Wilkey read *Georgia* as holding that the party nominating process was state action "because the states ratify the results of the convention through the automatic placement of its nominees on the general election ballot."[327] Judge Wilkey, like Judge Tamm, recognized, in light of *Metropolitan Edison* and *Cousins*, that the fact "that the states utilize the national party convention choices as the party nominees to go on the ballot, instead of requiring a petition or other device, does not retroactively transmute the national convention nominating process into state action."[328]

The argument that preferential ballot access makes partisan nominations state action was given new life in 1978 with the publication of Professor Lawrence Tribe's authoritative text, *American Constitutional Law*. Professor Tribe devoted section 13-23 of his book to discussion of state action problems in political party activity.[329] He noted that there were at least three theories holding that party activities are state action: the public function theory, the existence of governmental regulation of the party nominating process, and the granting of preferential ballot access.[330] Professor Tribe described this third theory as follows:

> The third, and most persuasive, basis for finding state action in the behavior of political parties is that the state incorporates that behavior into its political structure by granting preferential ballot access to the nominees of political parties, thereby making party nomination a kind of "feeder" into the state's official political system. Every state grants access to the general election ballot to the nominees of political parties that satisfy certain conditions, conditions that typically differ from those that independent candidates must satisfy. In effect, therefore, the state delegates to the political party the decidedly governmental function of determining who may gain a place on the ballot. Notwithstanding the failure of the Supreme Court to formulate the governing principle, it thus seems clear that those actions of a political party integrally involved in the selection of a candidate for public office

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[326] *Id.* at 601 n.9 (Tamm, J., concurring).
[327] *Id.* at 606 (Wilkey, J., concurring).
[328] *Id.* at 607-08 (Wilkey, J., concurring).
[329] L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 13-23 (1st ed. 1978).
[330] *Id.* at 790.

> should be treated as state action when the state incorporates the party's choice by conferring some political benefit, such as preferential ballot access, upon that candidate.[331]

Other commentators have made the same point,[332] but the effect of Professor Tribe's text was felt immediately in the 1978 Second Circuit decision *Montano v. Lefkowitz*.[333] The plaintiffs brought a constitutional challenge to the method by which four New York political parties chose nominees for a special election to a vacant Congressional seat. Under New York law, each party could nominate a candidate in whatever way its party rules prescribed. The court reasoned that the party selection process was state action because the state delegated this function to the parties under its election law.[334] The court noted that *Ripon Society*, decided three years earlier, questioned whether there was state action as regards national political parties, but the court concluded in a footnote that

> whether or not the D.C. Circuit confirms such doubts to national delegate selection rules, we join with "most commentators" and "many lower courts" in holding that when the state grants political parties the right to nominate candidates and *then gives those nominees special access to the ballot* . . . the parties' procedures constitute state action.[335]

Most recently, in *Bachur*, a 1987 case involving voting rules for a national convention, the district court took note of Professor Tribe's argument.[336] The court noted that *if* Professor Tribe's test was adopted, a Maryland Democratic Party rule requiring that voters choose equal numbers of male and female delegates for the

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[331] *Id.*

[332] *See, e.g.*, Note, *Developments in the Law—Elections*, 88 HARV. L. REV. 1111, 1158-59 (1975); Kester, *Constitutional Restrictions on Political Parties*, 60 VA. L. REV. 725, 766-67 (1974); Raymar, *Judicial Review of Credentials Contests: The Experiences of the 1972 Democratic National Convention*, 42 GEO. WASH. L. REV. 1, 18-19 (1973); Weisburd, *Candidate-Making and the Constitution: Constitutional Restraint on and Protection of Party Nominating Methods*, 57 S. CAL. L. REV. 213, 241-50 (1984); Note, *Judicial Intervention in National Political Conventions: An Idea Whose Time Has Come*, 59 CORNELL L. REV. 107, 123-24 (1973); Comment, *One Man, One Vote in Selection of Delegates to National Nominating Conventions*, 37 U. CHI. L. REV. 536-44 (1970); Comment, *State Action in Presidential Candidate Selection*, 1976 WIS. L. REV. 1269, 1280-81, 1292 (1976).

[333] 575 F.2d 378 (2d Cir. 1978).

[334] *Id.* at 383 n.7 (citing Tribe, *supra* note 329, at 788, 790) (emphasis added).

[335] *Id.*

[336] Bachur v. Democratic Nat'l Party, 666 F. Supp. 763, 775 (D. Md. 1987).

national convention would constitute state action because both delegate candidates and presidential candidates received preferential ballot access under state law.[337] The *Bachur* court found, however, that the Tribe formula *had not* been adopted by the Supreme Court.[338] The district court decision in *Bachur* was later reversed on other grounds.[339]

It is difficult to assess the current status of the ballot access as state action theory. As noted above, there is some support for it in the case law, but the most recent case on the topic backs away from it.[340] There is little or no explicit support for it in the presidential context before the decision in *Ripon Society* and that decision did not adopt the theory.

In this author's opinion, the ballot access as state action theory can no longer be applied to national conventions, given the parties' substantial immunity from state law under the first amendment. It would be anomalous in the extreme if a state that cannot control the membership of its delegation to a national convention can, nonetheless, retroactively render the national convention state action by providing an unsought and unneeded advantage in access to the general election ballot. Clearly, the national parties can meet any constitutionally legitimate ballot access requirement. Automatic ballot access is simply a bureaucratic shortcut for the national parties. It is difficult to see why the existence or nonexistence of such an unnecessary shortcut should have any impact on the state action question.

More fundamentally, access to the ballot should not be viewed as a privilege granted to the national parties. Access to the ballot is a constitutional right that the states have only limited power to regulate. This point was argued most forcefully in a 1984 article by Professor Arthur M. Weisburd.[341] Professor Weisburd argues that the Supreme Court has recognized that parties have a right of access to the general election ballot if they have a reasonable degree of popular support.[342] Because parties have a constitutional right of access to the ballot, ballot access is not a privilege granted by the state to the parties. In this author's opinion, the whole concept

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[337] *Id.* at 776.

[338] *Id.*

[339] *See Bachur*, 836 F.2d 837.

[340] Bachur v. Democratic Nat'l Party, 666 F. Supp. at 776.

[341] *See* Weisburd, *supra* note 332.

[342] *Id.* at 242-44; *see* American Party v. White, 415 U.S. 767 (1974); Jenness v. Fortson, 403 U.S. 431 (1971); *Williams*, 393 U.S. 24.

of ballot access as a privilege is inconsistent with the constitutional rights of political parties and the practical reality that they do not need any special favors to qualify for the ballot.

Finally, the ballot access as state action argument seems inconsistent with "nexus" requirements imposed by *Metropolitan Edison*[343] and *Lugar v. Edmondson Oil Co.*[344] *Lugar* sets forth a two-step test for state action. The first step is that "the deprivation must be caused by the exercise of some right or privilege created by the state or by a rule of conduct imposed by the state or by a person for whom the state is responsible."[345] The second part of the test requires that "the party charged with the deprivation must be a person who may fairly be said to be a state actor."[346]

In regard to the first standard, the *Lugar* Court noted that it was important to determine whether the policy at issue can "in any way be ascribed to a governmental decision."[347] It would be difficult to ascribe the decisions of a party credentials committee or a national convention to a decision by the government to grant ballot access in the general election.

Arguments that a national party's actions are state action would face difficulties under the second part of the test as well because, as the Court stated, "[a]ction by a private party pursuant to . . . statute, without something more, was not sufficient to justify a characterization of that party as a 'state actor'."[348] Here again, if all the government does is grant ballot access, it is difficult to find any governmental involvement in specific decisions concerning who may be a delegate, how the delegates are apportioned, and how the national convention will operate in general. *Lugar*'s and *Metropolitan Edison*'s focus on the nexus between the government and the actual decision at issue is inconsistent with the notion that simply granting ballot access will turn an earlier party action into state action.

There is one potential exception to the analysis presented above that could be of great significance in a presidential election. If a national convention split, or an unsuccessful candidate bolted and ran independently, the candidate who was not chosen by the na-

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[343] *See supra* notes 293-94 and accompanying text.

[344] 457 U.S. 922, 939 (1982).

[345] *Id.* at 937.

[346] *Id.*

[347] *Id.* at 938.

[348] *Id.* (quoting Moose Lodge No. 107 v. Irvis, 407 U.S. 163, at 177 (1972)).

tional convention could plausibly argue that the selection of his or her opponent was state action. The Supreme Court has permitted states to exclude unsuccessful candidates for party nomination from the ballot. In *Storer v. Brown*, the Court held that a California law that barred an individual affiliated with a party from running for national office as an independent was constitutional.[349] The Court found that the law furthered a compelling interest in the stability of the political system by preventing independent candidacies from bleeding support from major party candidates.

So long as *Storer* remains good law, a losing candidate in a national convention could be barred from running for president by state statutes recognizing the official nominee and barring others who participated in the process from forming a new party or running as independents. Such a candidate would have a very strong argument that state law has delegated the right to exclude candidates from the ballot to the national party. In this circumstance, there would be a nexus between state law and the deprivation suffered by the disappointed candidate.

In 1980, the Republican Party suffered this type of split. John Anderson, a Republican member of Congress and a candidate for the 1980 Republican presidential nomination, bolted the party and ran as an independent candidate for president. He was placed on the ballot in virtually every state. The U.S. Supreme Court reversed a decision that excluded Anderson from the Ohio ballot because he did not file his nominating petition in March of 1980, prior to the time when Ronald Reagan clinched the Republican nomination.[350] Thus, in the most recent actual test, the Supreme Court did not uphold state laws excluding a disappointed nomination candidate from running as an independent.

This controversy was foreseen by Judge Tamm in his concurrence in *Ripon Society*, which is quoted above. Judge Tamm properly concluded that rather than interfere with the associational activities of the national parties by imposing constitutional standards, the courts should deny the parties' candidates any advantages in securing a place on a state ballot.[351] By extension, the proper solution where a candidate bolts the party is not to subject the party decision to constitutional scrutiny, but rather to find

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[349] 415 U.S. 724 (1974). *See also* Davis v. State Election Bd. of Okla., 762 P.2d 932, 935 (Okla. 1988).

[350] Anderson v. Celebrezze, 460 U.S. 780 (1983).

[351] *Ripon Soc'y*, 525 F.2d at 567 n.9 (Tamm, J., concurring).

unconstitutional those statutes that prohibit the candidate from appearing as an independent or under his own party label. This could entail overruling *Storer*.[352]

d. *Effect of Public Financing*

A new factor that emerged in recent years is the federal financing of national conventions and presidential nomination campaigns. The effect of public financing on the state action issue was first discussed, as were so many other issues, in *Ripon Society*. The plurality opinion mentioned 1974 legislation providing federal financing of presidential nominating conventions, national committees, and primary campaigns.[353] The court stated in dictum that "if the parties' conventions, and their candidates, are to be so far underwritten by the federal government, then perhaps they must share its Constitutional obligations."[354] Judge Tamm's concurrence also recognized the importance of federal funding but concluded that "absent a finding of racial discrimination, the mere receipt of government funds is not enough to dictate [a finding of state action]."[355] Judge Wilkey's concurrence came to the same conclusion.[356]

Judge Tamm's and Judge Wilkey's reasoning found support after the fact in *Rendell-Baker*[357] and *Blum*.[358] *Rendell-Baker* held that there was no state action in the decision of a privately operated school to terminate an employees despite the fact that virtually all the school's income was derived from government funding.[359] Similarly, in *Blum*, the court held that decisions made by physicians and nursing home administrators were not state action despite the fact that the private nursing home involved received more than ninety percent of its funding from the government.[360]

Despite these decisions, two subsequent cases have, probably erroneously, relied on public financing of presidential nomination campaigns as a significant factor supporting a finding of state

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[352] *See supra* note 349 and accompanying text.
[353] *Ripon Soc'y*, 525 F.2d at 576.
[354] *Id.*
[355] *Id.* at 601 (Tamm, J., concurring).
[356] *Id.* at 608 (Wilkey, J., concurring).
[357] Rendell-Baker v. Kohn, 457 U.S. 830 (1982) (White, J., concurring).
[358] Blum v. Yaretsky, 457 U.S. 991 (1982).
[359] *Rendell-Baker*, 457 U.S. at 844.
[360] *Blum*, 457 U.S. at 1011.

action. In *Bachur*,[361] the district court's highly idiosyncratic opinion (later reversed on other grounds) found that the federal financing of presidential nominating conventions meant that the national party received significant aid from government officials and therefore met the state action tests set forth in *Lugar*.[362] In a very different context, the Third Circuit found in *Ammond v. McGahn* that the decisions of the Democratic caucus of the New Jersey state senate were state action because the caucus' sessions were conducted in the state house, on state property, were serviced by state paid employees, and because notices of the caucus' meetings were paid for by the state.[363] A better reasoned decision to the contrary is *Mercier*, finding that state provisions of tax preferences and discount mailing rates to a person sending out political mailings did not turn his or her actions into state action.[364]

Despite some recent authority to the contrary, it seems clear that public financing of primary campaigns and national campaigns, in and of itself, does not turn the national parties' nominating process into state action. This is not to say, however, that, in an individual case, party decisions concerning how to spend public funds or governmental decisions concerning who is to receive the money and how it is to be spent could not be challenged on constitutional grounds. For purposes of this Article, however, it is concluded that public financing is mostly a "red herring" that should not mislead courts into thinking that party activity is state action.

e. *State Action and Racial Discrimination*

In the discussion above of political parties' first amendment rights, it was noted that first amendment protection of associational rights may be lessened where there is racial or sexual discrimination. Conversely there is also some authority for the proposition that state action may be defined more broadly where there is a discriminatory exclusion from party activities.

The *Ripon Society* opinions stated in dictum that in cases of overt racial discrimination, a lesser degree of governmental involvement may trigger constitutional scrutiny.[365] Similarly, in *Flagg*

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[361] *Bachur*, 666 F. Supp. 763.

[362] *Id.* at 777.

[363] 532 F.2d 325, 327 n.3 (3rd Cir. 1976).

[364] *Mercier*, 652 F. Supp. at 934.

[365] *See Ripon Soc'y*, 525 F.2d at 589 (McKinnon, J., plurality opinion); *id.* at 602 (Tamm, J., concurring); *id.* at 606 n.10 (Wilkey, J., concurring).

Brothers, the Supreme Court noted in dictum that special consideration may be appropriate under the public function theory in cases involving racial restrictions on voting rights.[366]

The distinction between cases involving racial discrimination and other cases was also noted in *Wymbs*, a case involving selection of delegates to national conventions.[367] The Court stated that

> [i]n the earlier fifteenth amendment cases, involving the white-only primaries or other disenfranchisement of blacks, the courts freely found the conduct of political parties and groups to constitute state action. But recently, courts have hesitated to find state action when, as in this case, racial discrimination is not involved.[368]

Thus, in the unlikely event that a major party adopts a racially exclusive policy, actions that would otherwise be considered private and protected by the first amendment could be invalidated as violative of equal protection. A party that adopted a racially exclusionary policy could hardly claim surprise; *Terry* shows that even unsubsidized and unofficial party activities that exclude a racial minority may be treated as state action.[369] Separate treatment of racial exclusion for state action purposes may appear to be "result-oriented," but it is consistent with the purpose behind the adoption of the fourteenth and fifteenth amendments. These amendments were specifically intended to eliminate governmental racism, so perhaps their scope should be broader when necessary to achieve this purpose.

D. *A Proposal for an Associational Rights-Based Analysis*

Throughout the long, tangled history of legal challenges to partisan presidential nominating procedures, there are two contradictory tendencies that have produced a somewhat schizophrenic body of law. The first, and strongest, tendency is to give political parties substantial autonomy from judicial review. The second tendency is the courts' unwillingness to allow political parties to engage in especially flagrant violations of voting rights, particularly in cases involving overt racial discrimination.

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[366] 436 U.S. at 158 n.7.

[367] Wymbs v. Republican State Exec. Comm., 719 F.2d 1072 (11th Cir. 1983), *cert. denied*, 465 U.S. 1103 (1984).

[368] *Id.* at 1077; *see also* Heitmanis v. Austin, 677 F. Supp. 1347, 1358 (E.D. Mich. 1988).

[369] *See supra* notes 245-49 and accompanying text.

Although the tendency to grant the parties autonomy has generally prevailed, nonetheless, the cases have presented a theoretical muddle because until 1975 there had not been a simple, understandable theory to support the courts' reluctance to intervene in party affairs. Prior to the recognition of associational rights concerns in *Cousins* and *LaFollette*,[370] the courts turned to the clearly inapplicable political question doctrine to avoid intruding into party affairs. On the other hand, the courts, seeing no limit on the reach of state action, had declared virtually every aspect of the presidential nomination process to be state action. The courts had given themselves license to review party affairs but seemingly lacked the will to actually do so. The recognition of associational rights should have dramatically changed the situation, but the courts have continued to issue confusing rulings or non-rulings on the justiciability and state action issues.

In this author's opinion, the way out of this muddle is to begin the legal analysis by giving primary emphasis to the first amendment associational rights of national political parties. It is already well-established that national conventions themselves, as well as their local delegate selection processes, are largely immune from state regulation. If a case ever arises, the Supreme Court will probably find that national parties have a constitutional immunity from many forms of federal regulation as well, based on *Tashjian* and *Eu*.[371] Although no Supreme Court case has yet recognized it, it seems inevitable that the courts will ultimately conclude that there is no state action regarding party activities that are protected by the first amendment.

Admittedly, the relationship between first amendment protections and state action could be argued the other way around. While this author argues that the first amendment requires that federal courts not intervene in party activities that the legislative branch could not constitutionally regulate under the first amendment, nonetheless, the argument could be inverted. One could logically argue that parties that nominate candidates engage in state action and thereby waive their first amendment rights to some extent.

When constitutional values clash, the time-honored method of resolving such conflicts is to engage in the mysterious process of "weighing" the values at stake. While this process is not always intellectually satisfying, it may be an appropriate way to resolve

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[370] *See supra* notes 124-33 and accompanying text.

[371] *See supra* notes 134-37 and accompanying text.

the conflict between first amendment associational rights and the myriad of other constitutional rights protected by a finding of state action. If one applies a balancing approach, the arguments for party autonomy clearly outweigh the arguments for finding that there is state action. The right of national political parties to establish membership requirements, delegate selection rules, and procedural rules governing the national convention is clearly at the heart of those values protected by the first amendment.[372]

No organization is more powerful or more important in petitioning the government for the redress of grievances or expressing political ideas than a political party. This fundamental fact has always undergirded the court's reluctance to intervene in party affairs. In *Cousins*, *LaFollette*, *Tashjian* and *Eu*, the Supreme Court established the conceptual basis for recognizing party autonomy as a fundamental first amendment value.

By contrast, state action questions involving national parties are inherently not at the core of the values protected by the various constitutional provisions. When one attacks the decisions of party committees that set delegate selection and apportionment rules, or that decide which delegates will be seated and which shall be excluded, clearly one is on the periphery of what might be considered government action. The first amendment versus state action issue comes up in precisely those cases in which state action is least obvious and associational rights most important. The cases that pose state action issues are the ones where it is least clear that the constitutional protections being asserted were ever intended to apply to the conduct at issue.

Currently, no court[373] or commentator has ever engaged in the balancing process described above. This approach, however, does have a place within the canonical authorities of both case law and learned commentary.

The Supreme Court has from time to time recognized that in enforcing constitutional restraints on government, it must also be sensitive to potential conflicts with other constitutional values. Thus, for example, in *Marsh v. Alabama*, where the issue was

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[372] *See, e.g.*, *Cousins*, 419 U.S. at 491 (Rehnquist, J., concurring); *Buckley*, 424 U.S. at 15; *FEC v. Nat'l Conservative PAC*, 470 U.S. 480, 493-94 (1985); In re Grand Jury Proceeding, 842 F.2d 1229, 1234 (11th Cir. 1988); Delgado v. Smith, 861 F.2d 1489, 1495.

[373] *Cf. Delgado*, 861 F.2d 1497-98 (holding that circulation of initiative petitions was not state action because it was constitutionally protected activity); *Martin-Trigona*, 435 N.W.2d at 745 (finding that nomination proceedings involved private matters, not public questions).

whether first amendment activities could be banned on the premises of a company-owned town, the Court acknowledged the existence of a conflict between the property rights of the landowner and the first amendment rights of the plaintiffs.[374] It held that the first amendment should prevail. Similarly, in *Gilmore v. City of Montgomery*, the Supreme Court recognized the danger that an overbroad application of fourteenth amendment rights could threaten freedom of association.[375] The appellate court found that the government may not grant exclusive use of a public facility to a racially segregated group.[376] The Supreme Court noted, however, that "any denial of access must withstand close scrutiny and be carefully circumscribed" in order to protect associational rights.[377] Finally, some commentators advocate the use of a balancing test to decide state action issues.[378]

The use of a balancing approach finds some support in Professor Tribe's treatise. Professor Tribe argues that in deciding state action issues, there are two possible starting points. One view finds that state action "exists in a Constitutional universe that includes a developed conception of individual liberty which serves to limit the scope of possible government action."[379] By recognizing that individual liberty exists before the state action determination is made, this viewpoint clearly implies that state action cannot be found in those areas protected by the first amendment. Professor Tribe notes that it is much easier to develop a coherent theory of state action under this theory than under an alternative theory recognizing liberty only where the government chooses not to act.[380]

The consequence of adopting the first amendment as a touchstone for both associational rights and state action issues is to greatly simplify legal analysis. The vast majority of state action questions can be resolved by the simple expedient of examining what and whose actions are being challenged. Thus, for example, if one's challenge is directed at the legitimacy, interpretation, or application of federal statutes concerning campaign finance, or if it is directed at state election laws, both the function involved and

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[374] 326 U.S. 501, 506 (1946).

[375] 417 U.S. 556 (1974).

[376] *Id.* at 566.

[377] *Id.* at 575.

[378] *See* R. ROTUNDA, S. NOWAK & S. YOUNG, TREATISE ON CONSTITUTIONAL LAW; Substance and Procedure, § 16.5.

[379] L. TRIBE, AMERICAN CONSTITUTIONAL LAW, § 18-2, p. 1691 (2nd ed. 1988).

[380] *Id.* at 1692.

the actor involved are clearly governmental. If, on the other hand, one is challenging a formula for allocating delegates or a party decision on credentials or eligibility for participation in caucuses or primaries, one is seeking review of the actions of a party actor. While there is an infinite number of permutations and possibilities of hybrid state-party action, if first amendment values are recognized as paramount, most state action decisions could be resolved by answering a simple question: whose decision is being challenged, that of the state or that of the party?

The theory suggested above allows, as well, a revival of the public function theory as a basis for state action decisions. The actions that are public functions, i.e., ballot access laws, the operation of primary elections, the selection of presidential electors, and the provision of public financing to political parties, are subject to constitutional attack. On the other hand, those functions that are essentially partisan in nature, including the internal law of the national convention, the decision as to how delegates are to be selected, and the actual nomination itself, are first amendment activities and should not directly or indirectly come under judicial scrutiny as state action.

The theory suggested above is fully consistent with the Texas White Primary Cases. *Allwright* held that primary elections were state action and there is no reason to depart from this holding.[381] To the extent a party uses state election machinery to select its national convention delegates, it has deliberately sought the imprimatur of the government and must permit constitutional challenges to the manner in which the primary is held. On the other hand, the weight given to the primary, if any, in the party selection process is within the bounds of the associational rights of the party and a party is not required to pay attention to the results of primaries that violate its own rules.

The more expansive ruling in *Terry* is also consistent with an associational rights-based analysis.[382] In *Terry*, the majority of the justices found that the decision of the Jaybird Democratic Association was the only election that mattered and that its procedure was adopted for the explicit purpose of evading constitutional restrictions. Under these extreme circumstances of party monopoly and of the intentional replacement of state mandated election procedures with a purportedly private proceeding, the balance shifts

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[381] *See supra* notes 237-38 and accompanying text.

[382] *See supra* notes 245-49 and accompanying text.

in favor of a finding of state action since a core right (the right to participate in the political process on an equal basis) has been totally eliminated. To limit this case to its facts involves some confusion of theory because the justices did not agree on which facts were dispositive. However, since it is unlikely that the extreme facts involved in *Terry* will recur at the national level in the foreseeable future, it is the type of problem that can probably be ignored by the courts.

Any solution to the vexing problem of the constitutional role of national party conventions involves trade-offs of some sort. The clarity of and respect for first amendment rights that will be achieved by continuing to recognize first amendment autonomy and by interpreting state action accordingly also involves the creation of a potential new area of contest. If the courts persist in deferring to party decisions, at some point the field of battle will switch from the constitutional and statutory arena to the arena of the law of internal party affairs. If the states and the federal government must defer to party decisions, the question remains as to who speaks for the party.

National conventions and national party committees have rules, just as other nonprofit organizations have rules. The courts would not hesitate to enforce the bylaws or articles of incorporation of a foundation, charity, or university if a dispute arose involving those rules. Just as the loser in a fight for control of a charitable trust would turn to the courts for an interpretation of the trust instrument and review of the actions of the trustees, so might a spurned candidate for the party nomination turn to the courts for review of decisions of the rules committee or for review of rulings from the chair at the national convention. The issue would be decided not on constitutional grounds, but on the basis that the candidate's rights under the internal law of the organization had been violated.

It is beyond the scope of this Article to predict how such challenges will be dealt with. It is worth noting that a similar problem arises when schisms occur in religious organizations. Deference to private decisions is a simple and proper solution to the vast majority of intra-party or intra-religious disputes, but sometimes a dispute involves a more fundamental issue going to the very identity of the organization. We must recognize that if a party is a constitutionally protected private organization whose internal decisions ordinarily cannot be regulated by the government and do not constitute state action, nonetheless, we have not solved all the legal problems posed by challenges to party action. There will

always be some basis for legal attack on the presidential nomination process. But if we give primary emphasis to the parties' constitutional right to operate according to rules of their own choosing, we turn the focus of the analysis where it belongs, viz., on the parties' own rules, and avoid the theoretical quagmire of deciding state action and justiciability questions in every case.