Vanderbilt Law Review

Volume 36
Issue 1 *Issue 1 - January 1983*

Article 4

1-1983

Freedom of Association and State Regulation of Delegate Selection: Potential for Conflict at the 1984 Democratic National Convention

Platte B. Moring, III

Follow this and additional works at: https://scholarship.law.vanderbilt.edu/vlr

 Part of the First Amendment Commons, and the State and Local Government Law Commons

Recommended Citation

Platte B. Moring, III, Freedom of Association and State Regulation of Delegate Selection: Potential for Conflict at the 1984 Democratic National Convention, 36 *Vanderbilt Law Review* 105 (1983)
Available at: https://scholarship.law.vanderbilt.edu/vlr/vol36/iss1/4

This Note is brought to you for free and open access by Scholarship@Vanderbilt Law. It has been accepted for inclusion in Vanderbilt Law Review by an authorized editor of Scholarship@Vanderbilt Law. For more information, please contact mark.j.williams@vanderbilt.edu.

NOTES

Freedom of Association and State Regulation of Delegate Selection: Potential for Conflict at the 1984 Democratic National Convention

I. INTRODUCTION

Every state has enacted laws that limit the freedom of political parties, including regulations on the method by which political parties select delegates to the national nominating conventions.[1] Although national and state parties historically have accepted state regulation of their affairs,[2] the Democratic National Committee recently has demanded that state parties follow national party rules rather than conflicting state laws.[3] In 1975 and again in 1981

---

1. L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 13-22, at 785 n.1 (1978); *see* Chambers & Rotunda, *Reform of Presidential Nominating Conventions*, 56 VA. L. REV. 179, 182 (1970); *Developments in the Law—Elections*, 88 HARV. L. REV. 1111, 1120 (1975). The extent and constitutionality of federal regulation of political parties is outside the scope of this Note. In a resolution passed at its 1976 convention, the National Democratic Party expressed its position on this matter:

> [T]hat this convention, recognizing the Responsibility of our National Party to provide for our Presidential nominating process, urges the U.S. Congress to refrain from intervening in these Party affairs unless and until the National Party requests legislative assistance, and in no case should Congress legislate in any manner which is in derogation of the right of a National Party to mandate its own affairs.

COMMISSION ON PRESIDENTIAL NOMINATION AND PARTY STRUCTURE, DEMOCRATIC NAT'L COMM., OPENNESS, PARTICIPATION AND PARTY BUILDING: REFORMS FOR A STRONGER DEMOCRATIC PARTY 31-32 (1978) [hereinafter cited as WINOGRAD COMM'N REPORT]. *See* Buckley v. Valeo, 424 U.S. 1 (1976).

2. C. COTTER & B. HENNESSY, POLITICS WITHOUT POWER: THE NATIONAL PARTY COMMITTEES 19 (1964).

3. L. TRIBE, *supra* note 1, § 13-22. This Note limits its focus to the National Democratic Party because the delegate selection rules of the National Republican Party do not offer the same potential for conflict between state law and state party rules. The Republican rules maintain that state laws shall govern in any conflict with state party procedures. REPUBLICAN NATIONAL CONVENTION, RULES ADOPTED BY THE REPUBLICAN NATIONAL CONVENTION, Rule 3I(a), (c), (f), (g) & (n) (1980). Consequently, most of the credentials disputes and court cases concern state laws and delegate selection procedures of the National Democratic Party. Political third parties likely will not initiate a state party-state law dispute because they seldom have conventions or primaries and, therefore, state regulations generally do not

the Supreme Court agreed with the position of the Democratic National Committee that the states have no interest in regulating the national party.[4] Accordingly, the Court ruled that state laws cannot require state parties to select delegates in a manner contrary to national party rules.[5] The Court, however, has not yet addressed the constitutionality of state regulation of state political parties when the regulations do not conflict with national party rules,[6] although one lower court has indicated that state statutes may prevail in this situation.[7]

The Delegate Selection Rules for the 1984 Democratic National Convention give state parties considerable discretion in developing their delegate selection processes for the Convention.[8] The national party rules allow a state party to select delegates by one of several systems that conform to certain minimum standards.[9] These delegate selection alternatives may lead to credentials challenges at the 1984 Convention if a state party adopts a method of selection that differs from the method approved by the state legislature, and both schemes conform to the national party rules.[10] This Note begins with a discussion of the history of the regulation of state parties by state law and national party rules. The Note then traces the development of case law concerning state regulation of party delegate selection procedures. Finally, the Note explores the potential for credentials disputes and litigation on the primacy of state party rules over contrary state laws if both the party rules and the state regulations comply with the Delegate Selection Rules for the 1984 Democratic National Convention. The Note concludes that the first amendment right of freedom of association guarantees that a state party may select delegates to the

---

govern their nomination procedures. Third party procedures are also outside the scope of this Note.

4. *The Supreme Court, 1980 Term*, 95 HARV. L. REV. 17, 241, 247 (1981); *see* Democratic Party v. Wisconsin *ex rel.* La Follette, 450 U.S. 107 (1981); Cousins v. Wigoda, 419 U.S. 477 (1975).

5. *See* Democratic Party v. Wisconsin *ex rel.* La Follette, 450 U.S. 107 (1981); Cousins v. Wigoda, 419 U.S. 477 (1975).

6. *The Supreme Court, 1980 Term, supra* note 4, at 247.

7. *See* Ferency v. Austin, 493 F. Supp. 683 (W.D. Mich. 1980), *aff'd*, 666 F.2d 1023 (6th Cir. 1981); *infra* notes 118-23 and accompanying text.

8. *See infra* part IV.

9. *See id.*

10. *Accord* Schmidt & Whalen, *Credentials Contests at the 1968—and 1972—Democratic National Conventions*, 82 HARV. L. REV. 1438, 1448 (1969) ("[A]lleged violations of state laws or party rules—especially those involving the issues of interpretation most likely to come before the National Convention—may not entail any violation of the Convention's own standards.").

national convention in any manner consistent with the national party rules.[11]

II. History of State Party Regulation

A. *The Early Years*

By the early 1800's every state had some form of political party organization consisting of a central committee and a chairman.[12] As confederations of county and city committees, these party organizations held meetings to nominate candidates, direct campaigns, and distribute patronage.[13] Private citizens voluntarily organized and managed the state parties as private associations.[14] Since parties were "unknown to" the law, they existed neither "in compliance with" nor "against" the law.[15] Parties were "wholly without constitutional basis, products of slow evolution, trial and error, tradition, and use."[16]

During their developmental years the state parties operated solely under their own rules as private associations.[17] They wrote their own constitutions and bylaws and reconciled their internal disputes.[18] During this period the state parties conducted their af-

---

11. The questions presented in this Note have more than just academic appeal. The method that a state party chooses to select delegates profoundly affects contests to win the party's nomination and ultimately the Presidency. *See* A. Ranney, Curing the Mischiefs of Faction: Party Reform in America 10-11 (1975). This Note limits its discussion to delegate selection for the national convention because courts rarely have adjudicated the constitutionality of state regulation of other state party activities. *See infra* notes 128-43 and accompanying text. The arguments presented in this Note apply, nevertheless, to disputes concerning a conflict between state laws and state party rules in other contexts. Apart from assuring fair, nondiscriminatory general party procedures and providing methods for the selection of national committee members, the national party rules do not govern the conduct of state parties outside the Presidential nomination process. *See* Democratic National Committee, The Charter and By-Laws of the Democratic Party of the United States, art. I (1982). The state parties freely develop their own rules and procedures without national party supervision. To extend the theme of this Note one step further, state party rules that conform to any applicable national party guidelines prevail over contrary state laws purporting to regulate state party structure and activities. *See infra* part IIIC.

12. R. Huckshorn, Party Leadership in the States 8 (1976).

13. *Id.*

14. A. Ranney, *supra* note 11, at 75.

15. *Id.*

16. C. Cotter & B. Hennessy, *supra* note 2, at 16; *see* Elrod v. Burns, 427 U.S. 347, 369 n.22 (1976) ("Partisan politics bears the imprimatur only of tradition, not the Constitution.").

17. Tuttle, *Limitations Upon the Power of the Legislature to Control Political Parties and Their Primaries*, 1 Mich. L. Rev. 466, 468 (1903).

18.

From their origins in the 1790's until after the Civil War, American political parties at

fairs virtually free of national party or governmental interference.[19]

To obtain greater influence in the selection of the party's Presidential nominee, state party leaders in 1832 replaced the then-existing congressional caucus system[20] with the national convention.[21] From the Call[22] to the first Democratic National Convention in 1832 until 1904 the state party organizations retained exclusive control of delegate selection to the national convention and, thus, of the nomination process.[23] Consequently, "until well into the twentieth century the national conventions remained gatherings that, in the view of some observers, resembled nothing so much as 'international conferences of delegates from sovereign nations.' "[24] State parties appointed delegates to the convention through the Governor's office, state central committee, or state convention.[25]

---

all levels were . . . "entirely private association[s]; it was no more illegal to commit fraud in the party caucus or primary than it would be to do so in the election of an officer of a drinking club."

A. RANNEY, *supra* note 11, at 78-79 (quoting V.O. Key, American political scientist). *See* State *ex rel.* La Follette v. Democratic Party, 93 Wis. 2d 473, 491, 287 N.W.2d 519, 526 (1980), *rev'd*, 450 U.S. 107 (1981); R. HUCKSHORN, *supra* note 12, at 12.

19. State parties in the 1800's enjoyed such a preferred position in the law that the state courts regularly struck down state regulations as an invasion of the parties' internal affairs. Note, *Freedom of Association and the Selection of Delegates to National Political Conventions*, 56 CORNELL L. REV. 148, 153 (1970). In 1886 the Colorado Legislature demonstrated its deference to the state party by asking the State Supreme Court: "Is it constitutional to enact any law attempting to regulate the machinery of a political party in making nominations of candidates for public office?" Tuttle, *supra* note 17, at 469. In 1866 California and New York became the first states to adopt statutes regulating the internal affairs of state parties. The California law merely requested state parties to give public notice of party meetings and New York's statute prohibited bribery in party caucuses. A. RANNEY, *supra* note 11, at 79.

20. The congressional caucus consisted of regular meetings of each party's members of Congress to select the party's national ticket. This system was in effect from 1800 to 1824. *See* A. RANNEY, *supra* note 11, at 64-69, 171-74.

21. *Id.* at 172.

22. The Call, promulgated by the national committee under authority provided by the preceding national convention, specifies the manner of delegate selection, the order of business, and the procedures of the national convention. Raymar, *Judicial Review of Credentials Contests: The Experience of the 1972 Democratic National Convention*, 42 GEO. WASH. L. REV. 1 n.1 (1973).

23. A. RANNEY, *supra* note 11, at 174. In 1844 the Democratic National Convention organized the first credentials committee and thereby rejected the view that each state party should review the qualifications of its own delegates. Instead, the Convention instituted centralized review by a committee of national party members. Rotunda, *Constitutional and Statutory Restrictions on Political Parties in the Wake of* Cousins v. Wigoda, 53 TEX. L. REV. 935, 947 (1975).

24. A. RANNEY, *supra* note 11, at 176.

25. *Id.* at 82. *See* State *ex rel.* La Follette v. Democratic Party, 93 Wis. 2d 473, 491, 287 N.W.2d 519, 526 (1980), *rev'd*, 450 U.S. 107 (1981).

B. The Progressive Reforms

In conjunction with the Progressive movement of the early 1900's, Robert M. La Follette[26] and other reformers targeted state parties as subjects for legislative regulation. They believed that unsupervised political parties had led to boss rule, political corruption, and election fraud.[27] Consequently, the reformers demanded comprehensive state laws governing the conduct of state parties.[28] By 1920 most states had adopted statutes regulating every major aspect of party structure and activity.[29]

State regulation of state political parties began with laws designed to eliminate fraudulent conduct in intraparty elections.[30] Statutes mandated secret ballots for the election of party officers and candidates.[31] States instituted more regulation at the turn of the century with the adoption of the Australian ballot.[32] Since public authorities printed, distributed, and counted this secret ballot, which specified each candidate's party affiliation next to his name, legislators began to perceive a need for laws specifying qualifications for party membership, candidacy, and status as a political party.[33] Next, the states passed statutes closely regulating the state parties' internal affairs, including what committees and conventions they must have, their membership selection procedures, who might participate in decisionmaking, and the powers that one party organ had over another.[34] Finally, state after state began to

---

26. For a discussion of the life of Robert M. La Follette and his contribution to the reform movement, see A. LOVEJOY, LA FOLLETTE AND THE ESTABLISHMENT OF THE DIRECT PRIMARY IN WISCONSIN—1890-1904 (1941).

27. A. RANNEY, *supra* note 11, at 80. During the Progressive era courts permitted almost any party regulation designed to eliminate corruption. Note, *supra* note 19, at 153-54. *See* State *ex rel.* McCarthy v. Moore, 87 Minn. 308, 311, 92 N.W. 4, 5 (1902) (regulation of parties necessary to protect voters against "the corrupt control by party managers of caucuses and conventions"); People *ex rel.* Coffey v. Democratic Gen. Comm., 164 N.Y. 335, 340, 58 N.E. 124, 125 (1900) (regulation upheld as necessary to make "snap caucuses impossible, and the selection of delegates by brute force extremely difficult").

28. A. RANNEY, *supra* note 11, at 80.

29. *Id.* at 81.

30. *Id.* at 79; *see supra* note 19.

31. A. RANNEY, *supra* note 11, at 81. For a comprehensive survey of early state laws regulating political parties, see Starr, *The Legal Status of American Political Parties* (pts. 1 & 2), 34 AM. POL. SCI. REV. 439, 685 (1940).

32. A. RANNEY, *supra* note 11, at 79-80.

33. State *ex rel.* La Follette v. Democratic Party, 93 Wis. 2d 473, 491, 287 N.W.2d 519, 526 (1980), *rev'd*, 450 U.S. 107 (1981).

34. A. RANNEY, *supra* note 11, at 18. The statutes regulated the organizational structure of the parties, the powers and duties of various party assemblies, the composition of the state central committee and convention, the time and place of committee and convention meetings, the terms of office of party officials, and the selection of delegates to the national

adopt the presidential primary[35] to circumvent the power of state party organizations and to allow greater public participation in the nominating process.[36] Increased state regulation restricted the liberty of the state parties to determine the method of selecting delegates to the national convention.

C. *Regulation by the National Party*

Before 1952 the Democratic National Committee served only as an "umbilical [cord] between national conventions";[37] it met to promulgate the Call to the national convention and to organize the quadrennial Presidential campaign.[38] The national party began to assert control over the state parties with the expulsion of Wright Morrow from the Democratic National Committee in 1952.[39] After Mr. Morrow endorsed the Republican Presidential nominee, the National Committee refused to seat him.[40] This action served notice upon the state parties that the Committee alone would determine its membership and no longer automatically would accept anyone certified by a state party.[41]

Four years later the convention itself began to assert control over its membership. Reacting to the 1948 attempt by the Dixiecrats to campaign for the Presidency under the regular name and symbols of the Democratic Party,[42] the 1956 National Convention adopted a rule that conditioned the seating of delegates upon the

---

convention. Comment, *One Man, One Vote and Selection of Delegates to National Nominating Conventions*, 37 U. CHI. L. REV. 536 (1970).

35. State *ex rel.* La Follette v. Democratic Party, 93 Wis. 2d 473, 493, 287 N.W.2d 519, 527 (1980), *rev'd*, 450 U.S. 107 (1981). By 1916, 26 states had some form of Presidential primary. WINOGRAD COMM'N REPORT, *supra* note 1, at 2.

36. WINOGRAD COMM'N REPORT, *supra* note 1, at 2. For a discussion of the successive waves of state regulation of political parties, see C. MERRIAM, PRIMARY ELECTIONS 28-47 (1909).

37. C. COTTER & B. HENNESSY, *supra* note 2, at 4.

38. *Id.* at 14.

39. A. RANNEY, *supra* note 11, at 180-81.

40. *Id.* Morrow's seat remained vacant until 1955 when Senator Lyndon Johnson and Representative Sam Rayburn persuaded the Texas State Central Committee to appoint a new committeeman acceptable to the Democratic National Committee. *Id.* at 180-81.

41. *Id.* "[F]or over a century after its establishment in 1848 the Democratic National Committee accepted without question any and all members selected for it by the state parties . . . ." *Id.*

42. The strategy of the Dixiecrats was to win enough electoral votes under the Democratic Party label to throw the Presidential election into the House of Representatives, where they could barter with the two major parties for concessions on states' rights issues. *Id.* at 182. For a thorough account of the Dixiecrat revolt of 1948, see E. ADER, THE DIXIECRAT MOVEMENT (1955).

assurance of each state party that the national committee nominee would appear on the state ballot as the regular Democratic candidate.[43] This action greatly changed the relationship between national and state parties and "established the centralizing principle that henceforth the national party agencies will not only decide how many votes each state delegation gets at the national convention but will also impose national rules on what kinds of persons can be selected."[44]

This provision was the precursor of a series of convention mandates that reaffirmed national party supervision of the delegate selection procedures of the state parties. In 1964 the Democratic National Convention refused to seat several duly elected delegates because they failed to sign a loyalty oath.[45] This controversy prompted the creation of the first national party commission to study state systems for selecting delegates.[46] The commission recommended that the party require equal participation in the delegate selection process, and the Call to the 1968 Convention included this resolution.[47] The Convention implemented the reform by barring the entire Mississippi delegation for alleged racial discrimination in state delegate selection.[48]

Unsatisfied with these reforms the 1968 Convention established the Commission on Party Structure and Delegate Selection [McGovern-Fraser Commission], which proposed radical changes in the delegate selection rules.[49] The Democratic National Com-

---

43. A. RANNEY, *supra* note 11, at 182-83.

44. *Id.* at 183.

45. Rotunda, *supra* note 23, at 948; *see* OFFICIAL PROCEEDINGS OF THE DEMOCRATIC NATIONAL CONVENTION 4 (1964); T. WHITE, MAKING OF THE PRESIDENT 1964, 169 n.4 (1965).

46. *See* COMMISSION ON THE DEMOCRATIC SELECTION OF PRESIDENTIAL NOMINEES, DEMOCRATIC NAT'L COMM., THE DEMOCRATIC CHOICE (1968), *reprinted in* 144 CONG. REC. E9172 (1968). Before the 1964 Democratic National Convention the national party never examined the method of delegate selection stipulated by state party rules or state laws. Memorandum from Louise Lindblom, Executive Director of the Compliance Review Comm'n, to members of the Compliance Review Comm'n (July 27, 1982) (discussing work of the Commission) [hereinafter cited as Memorandum from Louise Lindblom].

47. DEMOCRATIC NATIONAL COMMITTEE, THE CALL FOR THE 1968 DEMOCRATIC NATIONAL CONVENTION (1967).

48. Rotunda, *supra* note 23, at 948; *see* Schmidt & Whalen, *supra* note 10, at 1450 n.50.

49. *See* COMMISSION ON PARTY STRUCTURE AND DELEGATE SELECTION, DEMOCRATIC NAT'L COMM., MANDATE FOR REFORM (1971) [hereinafter cited as MCGOVERN-FRASER COMM'N REPORT], *reprinted in* 117 CONG. REC. 32908 (1971). These changes encompassed 18 guidelines that prohibited *ex officio* delegates, limited delegate fees to $10.00, eliminated the unit rule, encouraged full participation by minority groups, women, and youth, and required delegate selection within the calendar year. *Id.*

mittee adopted these procedural reforms and made compliance with them a precondition for seating state delegations at the convention:[50]

> By establishing specific procedural criteria that state Democratic parties would have to meet in choosing delegates to the national convention, the national party achieved an unprecedented degree of control over the actions of state parties. Although the guidelines acknowledged that delegate-selection procedures could vary from state to state, the imposition of minimum standards in the operation of these procedures forced every state party to make significant changes in rules, traditions, and, in some instances, state law.[51]

Then-National Party Chairman Lawrence F. O'Brien commented, " 'Never has a political party so totally changed its way of doing business in such a short period of time.' "[52]

The delegate selection rules for the 1972 Presidential nomination "introduced the formalities and some of the ideals of law" into the national-state party relationship.[53] Since then the National Democratic Party has written a Charter and Bylaws[54] and, after each quadrennial convention, has appointed a commission to evaluate and amend the delegate selection rules.[55] In 1972 the Democratic National Committee produced written rules that required state parties to make "all feasible efforts" to change state laws that conflicted with national party regulations.[56] Hearing officers appointed by the national party entertained appeals from state parties which claimed that state laws prevented them from complying with the national party rules.[57]

This issue of the predominance of national party rules over state laws reached the United States Supreme Court for the first time when the Credentials Committee at the 1972 Democratic Na-

---

50. J. STEWART, ONE LAST CHANCE: THE DEMOCRATIC PARTY, 1974-76, at 39 (1974).

51. *Id.*

52. *Id.* at 40.

53. Vining, *Delegate Selection Reform and the Extension of Law into Politics*, 60 VA. L. REV. 1389, 1389 (1974).

54. DEMOCRATIC NATIONAL COMMISSION, THE CHARTER AND THE BY-LAWS OF THE DEMOCRATIC PARTY OF THE UNITED STATES (amended Mar. 26, 1982).

55. *See* COMMISSION ON DELEGATE SELECTION AND PARTY STRUCTURE, DEMOCRATIC NAT'L COMM., DEMOCRATS ALL (1973) [hereinafter cited as MIKULSKI COMM'N REPORT]; COMMISSION ON PRESIDENTIAL NOMINATION, DEMOCRATIC NAT'L COMM. (1982) [hereinafter cited as HUNT COMM'N REPORT]; WINOGRAD COMM'N REPORT, *supra* note 1. The Mikulski Commission Report called for the creation of a Compliance Review Commission to administer and enforce the delegate selection process. The Compliance Review Commission serves as the preliminary credentials committee by assisting state parties in developing their delegate selection plans and by hearing delegate challenges. Memorandum from Louise Lindblom, *supra* note 46.

56. MCGOVERN-FRASER COMM'N REPORT, *supra* note 49, at 32915-18.

57. Vining, *supra* note 53, at 1398.

tional Convention recommended the unseating of delegates elected under the California and Illinois laws that violated national party rules.[58] The Court has not yet ruled on the constitutionality of extensive state regulation of the internal affairs of state parties.[59] The next part of this Note describes the current state of the law regarding national party rules vis-á-vis state statutes.

III. Development of the Law by the Courts

A. *First Amendment Freedom of Association*

Because the Founding Fathers regarded political parties as "evil in intent and disastrous in effect,"[60] they made no provision for such entities in the Constitution.[61] Nonetheless, they built the government upon the premise that every citizen has the right to express his ideas; they enshrined this freedom in the first amendment of the Bill of Rights.[62] Political parties traditionally have served as a medium for the exercise of this fundamental freedom.[63] Consequently, the federal courts have ruled repeatedly that "[t]he express constitutional rights of speech and assembly are of slight value indeed if they do not carry with them a concomitant right of political association. Speeches and assemblies after all are not ends in themselves but means to effect change through the political process."[64] Specifically, " '[t]he National Democratic Party and its ad-

58. O'Brien v. Brown, 409 U.S. 1 (1972). See *infra* notes 205-14 and accompanying text for a discussion of this case.

59. *See supra* note 6 and accompanying text. In Marchioro v. Chaney, 442 U.S. 191 (1979), the Supreme Court declined to examine the constitutionality of a state statute that set forth the composition of the state party central committee. In 1976 the Washington State Democratic Convention had adopted an amendment to the party charter to increase the size of the state central committee above state statutory requirements. Apparently relying on the statute, the state central committee refused to seat the newly elected committee members at its subsequent meeting. Several members of the Washington State Democratic Party contended that the state law violated their right to freedom of association under the first and fourteenth amendments. Since plaintiff challenged the decision of the state central committee rather than the statute itself, the Court found no substantial burden imposed by state law on the party's right to govern itself. *Id.*

60. A. Ranney, *supra* note 11, at 30; *see* R. Hofstadter, The Idea of a Party System 12-16 (1969).

61. Comment, *The Application of Constitutional Provisions to Political Parties*, 40 Tenn. L. Rev. 217, 218 (1973).

62. Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957).

63. *Id.*

64. Ripon Soc'y, Inc. v. National Republican Party, 525 F.2d 567, 585 (D.C. Cir. 1975), *cert. denied*, 424 U.S. 933 (1975); *see* Kusper v. Pontikes, 414 U.S. 51, 56, 57 (1973); Healy v. James, 408 U.S. 169, 181 (1972); Williams v. Rhodes, 393 U.S. 23, 32 (1968); NAACP v. Button, 371 U.S. 415, 444-45 (1963); Bates v. City of Little Rock, 361 U.S. 516, 523 (1960); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460 (1958).

herents enjoy a constitutionally protected right of political association.' "[65]

The fourteenth amendment protects a political party's freedom of association from infringement by the states.[66] Any state law that limits the discretion of a political party harms associational interests.[67] The right to associate, however, is not absolute.[68] A court may sustain a significant interference with the protected right of political association if a state can demonstrate a sufficiently important interest in the legislation.[69] The court will consider the legislative history and the merit of the state's interest.[70] The statute is constitutional if the state has a legitimate, compelling interest that it cannot accomplish by less restrictive means.[71]

States have used article II, section one of the Constitution[72] as a basis for enacting statutes prescribing the method of delegate se-

---

65. Democratic Party v. Wisconsin *ex rel.* La Follette, 450 U.S. 107, 121 (1981) (quoting Cousins v. Wigoda, 419 U.S. 477, 487 (1975)); *see* Williams v. Rhodes, 393 U.S. 23, 30-31 (1968).

66. Democratic Party v. Wisconsin *ex rel.* La Follette, 450 U.S. 107, 121 (1981); Cousins v. Wigoda, 419 U.S. 477, 487 (1975); Williams v. Rhodes, 393 U.S. 23, 30-31 (1968).

67. L. TRIBE, *supra* note 1, § 13-22.

68. United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548, 567 (1973).

69. Buckley v. Valeo, 424 U.S. 1, 25 (1976). Although the Supreme Court has utilized different terms to describe the state interest required to pass constitutional review, *see, e.g.*, Elrod v. Burns, 427 U.S. 347, 362 (1976) ("paramount" and "vital importance"); *Buckley*, 424 U.S. at 25 ("sufficiently important"); Cousins v. Wigoda, 419 U.S. 477, 489 (1975) ("compelling"); Rosario v. Rockefeller, 410 U.S. 752, 761-62 (1973) ("legitimate"); Jenness v. Fortson, 403 U.S. 431, 442 (1971) ("important"), the test applied to state restraints on political parties is the same strict scrutiny standard used in examining any state infringement on the freedoms granted by the first eight amendments. Ferency v. Austin, 493 F. Supp. 683, 691 (W.D. Mich. 1980) ("Because fundamental rights guaranteed by the First and Fourteenth Amendments are here involved, i.e., a political party's right to freedom of association, this court is called upon to strictly scrutinize the constitutionality of . . . [the] election law as it applies to the state Democratic Party."), *aff'd*, 666 F.2d 1023 (6th Cir. 1981). *See also* Note, *The Party Affiliation Requirement: A Constitutional Inquiry*, 1980 NEW ENG. L. REV. 71, 88-89. ("Strict scrutiny, in most applications, has an outcome determinative result with only a rare statute surviving this most exacting analysis."); Comment, *The Constitutionality of Non-Member Voting in Political Party Primary Elections*, 14 WILLIAMETTE L.J. 259, 274 (1978) ("The Court has stated that the right to associate is fundamental and that governmental action tending to infringe on the right is subject to the closest judicial scrutiny.").

70. Storer v. Brown, 415 U.S. 724, 729-30 (1974).

71. Kusper v. Pontikes, 414 U.S. 51, 59 (1973); Dunn v. Blumstein, 405 U.S. 330, 345 (1972); *see* Reply Brief for Appellants at 2-3, Democratic Party v. Wisconsin *ex rel.* La Follette, 450 U.S. 107 (1981).

72. U.S. CONST. art. II, § 1 ("Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors . . . .").

lection to political party conventions.[73] This provision only gives states the power to appoint Presidential electors to the electoral college, and does not extend to them the constitutional authority to regulate state parties. Furthermore, in exercising their supervisory powers over elections, the states may not infringe upon basic constitutional protections such as the freedom of association.[74] The Court has reasoned that "[a]ny connection between the process of selecting electors and the means by which political party members in a State associate to elect delegates to party nominating conventions is so remote and tenuous as to be wholly without constitutional significance."[75]

B. National Party Rules versus State Statutes

In three recent cases federal and state courts have balanced the National Democratic Party's right to freedom of association against confiicting state interests.[76] The courts subjected the state statutes, which regulated delegate selection, to close scrutiny and determined that the states did not have a sufficiently important interest to compel the National Democratic Party to seat delegates chosen contrary to its rules.[77] The national party rules prevailed over nonconforming state laws.

1. *Cousins v. Wigoda*

The first case to reach the Supreme Court, *Cousins v. Wigoda*,[78] concerned the seating of Illinois delegates at the 1972 Democratic National Convention.[79] In the Illinois primary the Cook County Democratic Party selected a slate of delegates for the

---

73. Note, *Judicial Intervention in National Political Conventions: An Idea Whose Time Has Come*, 59 CORNELL L. REV. 107, 127 (1973) [hereinafter cited as Note, *Judicial Intervention*]; Note, *National Party Conventions: State's Interest Subordinate to Party's in Delegate Selection Process*, 29 U. MIAMI L. REV. 806, 808 (1975).

74. *The Supreme Court, 1980 Term, supra* note 4, at 248 n.42; *see* Kusper v. Pontikes, 414 U.S. 51, 56-57 (1973); Williams v. Rhodes, 393 U.S. 23, 28-29 (1968); *see also* Reply Brief for Appellants, *supra* note 71, at 2 ("The issue is not whether the State has authority to enact primary statutes. It is whether the State's exercise of its power violates the National Party's First and Fourteenth Amendment rights. . . .").

75. Democratic Party v. Wisconsin *ex rel.* La Follette, 450 U.S. 107, 125 n.31 (1981).

76. Cousins v. Wigoda, 419 U.S. 477 (1975); Ferency v. Austin, 666 F.2d 1023 (6th Cir. 1981); State *ex rel.* La Follette v. Democratic Party, 93 Wis. 2d 473, 287 N.W.2d 519 (1980), *rev'd*, 450 U.S. 107 (1981).

77. Democratic Party v. Wisconsin *ex rel.* La Follette, 450 U.S. 107, 121 (1981); Cousins v. Wigoda, 419 U.S. 477 (1975); Ferency v. Austin, 666 F.2d 1023, 1025 (6th Cir. 1981).

78. 419 U.S. 477 (1975).

79. *Id.*

ballot by procedures that violated national party rules.[80] Although the voters of Cook County duly elected these "Wigoda" delegates, the national party's Credentials Committee refused to seat them and replaced them with the "Cousins" delegates chosen in compliance with party rules.[81] A Wigoda delegate challenged the constitutionality of the Committee's decision.[82] The Court of Appeals for the District of Columbia Circuit sustained the Committee's action,[83] but three days before the opening of the Convention the Supreme Court granted a stay of the decision.[84] The following day the Circuit Court of Cook County acted on a separate suit filed by the Wigoda delegates[85] and enjoined the Cousins delegates from sitting at the Convention.[86] Nevertheless, the Democratic National Convention adopted the Credentials Committee recommendation and seated the Cousins delegates.[87] After the Convention the Supreme Court granted certiorari "to decide . . . whether the [Illinois] Appellate Court was correct in according primacy to state law over the National Political Party's rules in the determination of the qualifications and eligibility of delegates to the Party's National Convention."[88]

---

80. Brief for Appellants at 18, Democratic Party v. Wisconsin *ex rel.* La Follette, 450 U.S. 107 (1981). On June 30, 1972, the Credentials Committee approved the findings of a hearing officer that the county party chose the elected delegates in violation of party guidelines "A-1 (minority group participation), A-2 (women and youth participation), A-5 (existence of party rules), C-1 (adequate public notice of party affairs), C-4 (timing of delegate selection), and C-6 (slate-making)." Cousins v. Wigoda, 419 U.S. 477, 479 & n.1 (1975).

81. *Cousins*, 419 U.S. at 479-80.

82. O'Brien v. Brown, 409 U.S. 1 (1972). The excluded delegates alleged that "the refusal of the party to accept them as delegates denie[d] them due process, and denie[d] the voters who elected them their right to full participation in the electoral process as guaranteed by the United States Constitution." *Id.* at 6-7 & n.1 (Marshall, J., dissenting).

83. *Id.* at 1-2. *O'Brien* consolidated the appeals of two groups of petitioners challenging the recommendations of the Credentials Committee regarding the unseating of delegates. In addition to the Illinois challenge, California delegates committed to Senator George McGovern contested the Committee's conclusion that the winner-take-all delegate selection method violated a mandate of the 1968 Democratic National Convention. In actions filed in the United States District Court for the District of Columbia, the court dismissed both complaints as nonjusticiable. The Court of Appeals for the District of Columbia Circuit sustained the Committee's decision concerning the Illinois delegates, but held the Committee's decision regarding the California delegates unconstitutional. *Id.* at 2; *see* Blumstein, *Party Reform, The Winner-Take-All Primary, and the California Delegate Challenge: The Gold Rush Revisited*, 25 VAND. L. REV. 975 (1972).

84. *O'Brien*, 409 U.S. at 5.

85. The Wigoda delegates filed for an injunction against the Cousins delegates in the Circuit Court of Cook County on April 19, 1972. *Cousins*, 419 U.S. at 480 n.2 (1975).

86. Brief for Appellants, *supra* note 80, at 18.

87. *Cousins*, 419 U.S. at 481.

88. *Id.* at 483.

The Supreme Court found that Illinois did not have a compelling interest in delegate selection for a national party convention.[89] Since "[t]he States themselves have no constitutionally mandated role in the great task of the selection of Presidential and Vice-Presidential candidates,"[90] the Court ruled that a state cannot extend extraterritorially its own jurisdiction by regulating the national party.[91] The need for uniform decisionmaking by a central body serves a national interest greater than any interest of an individual state.[92] The Court noted that "[i]f the qualifications and eligibility of delegates to the National Political Party Conventions were left to state law 'each of the fifty states could establish the qualifications of its delegates to the various party conventions without regard to party policy, an obviously intolerable result.' "[93] Since Illinois had no compelling interest in protecting the integrity of its electoral process, the national party rules had primacy over state law governing delegate selection.[94]

2. *Democratic Party v. Wisconsin* ex rel. *La Follette*

Following the 1980 Democratic National Convention, the Supreme Court again addressed the issue of state regulation of party delegate selection in *Democratic Party v. Wisconsin* ex rel. *La Follette*.[95] In May 1979 the Democratic Party of Wisconsin submitted its Delegate Selection Plan[96] to the Compliance Review Commission of the national party.[97] The Commission rejected the plan because it contravened national party rule 2A, which limited participation in the delegate selection process to Democrats who publicly declared their party preference.[98] The state party's plan incorpo-

---

89. *Id.* at 489.

90. *Id.* at 489-90.

91. *Id.* at 491; *see* Rotunda, *supra* note 23, at 936.

92. 419 U.S. at 490; *see* Rotunda, *supra* note 23, at 951.

93. 419 U.S. at 490.

94. *See* Comment, Cousins v. Wigoda: *Primary Elections, Delegate Selection, and the National Political Convention*, 70 NW. U.L. REV. 699 (1975); *Developments in the Law—Elections*, *supra* note 1, at 1209.

95. 450 U.S. 107 (1981).

96. The Delegate Selection Rules of the Democratic National Convention require each state party to adopt written rules and procedures covering all aspects of the delegate selection process. DEMOCRATIC NATIONAL COMMITTEE, DELEGATE SELECTION RULES FOR THE 1980 DEMOCRATIC NATIONAL CONVENTION 1-3 (1978).

97. *La Follette*, 450 U.S. at 112.

98. WIS. STAT. ANN. § 8.12(3)(b) (1977) (amended 1982). The open primary system permits any registered voter to vote in either the Democratic or the Republican primary.

rated the Wisconsin open primary law,[99] which permitted all voters, regardless of party preference, to vote in the Democratic primary. The national party rules did not forbid a state from conducting an open primary "so long as it [was] not binding on the National Party Convention."[100]

The Wisconsin Attorney General[101] brought an original action on behalf of the State in the Wisconsin Supreme Court against the National Democratic Party and the Democratic National Committee for a declaration that the national party constitutionally could not refuse to seat the Wisconsin delegation at the 1980 Convention.[102] Concluding that the open primary law did not substantially burden the national party's freedom of association and that the State had compelling interests in the election statute, the Wisconsin Supreme Court declared the state delegate selection system constitutional and binding on the national party.[103] Notwithstanding the United States Supreme Court's stay of the Wisconsin judgment,[104] the national party seated the Wisconsin delegates even though the method of their selection had violated rule 2A.[105]

A six-member majority of the Supreme Court found that *La Follette* presented the same issue as *Cousins* and reversed the Wisconsin decision.[106] The Court determined that Wisconsin had im-

---

99. DEMOCRATIC NATIONAL COMMITTEE, *supra* note 96, at 3-4. "Rule 2A is an integral part of the National Party's twelve-year effort to reform its processes for choosing presidential candidates." Brief for Appellants, *supra* note 80, at 4; *see supra* notes 37-59 and accompanying text.

100. *La Follette*, 450 U.S. at 121. The Wisconsin statute, however, did bind the national convention.

> The voters in Wisconsin's "open" primary express their choice among Presidential candidates for the Democratic Party's nomination; they do not vote for delegates to the National Convention. Delegates to the National Convention are chosen separately, after the primary, at caucuses of persons who have stated their affiliation with the Party. But these delegates, under Wisconsin law, are bound to vote at the National Convention in accord with the results of the open primary election.

Id. at 111-12 (footnotes omitted).

101. Wisconsin Attorney General Bronson C. La Follette is the grandson of Robert La Follette. *See supra* note 26 and accompanying text.

102. *La Follette*, 450 U.S. at 113.

103. State *ex rel.* La Follette v. Democratic Party, 93 Wis. 2d 473, 287 N.W.2d 519 (1980), *rev'd*, 450 U.S. 107 (1981).

104. *La Follette*, 450 U.S. at 114-15.

105. *Id.* Rule 20 permits exemptions from these rules when state parties take "probable positive steps to achieve legislative changes to bring the state law into compliance with the provisions" of the Delegate Selection Rules. DEMOCRATIC NATIONAL COMMITTEE, *supra* note 96, at rule 20. Even though the rules forbid a rule 20 exemption from rule 2A, *id.* at rule 2B, the Credentials Committee decided to seat the Wisconsin delegates. Brief for Appellants, *supra* note 80, at 12.

106. 450 U.S. at 121.

posed a substantial burden on the party's freedom of association by refusing to accommodate the collective will of the national party absent a compelling state interest.[107] The Court stated that Wisconsin had a substantial interest in the conduct of the Presidential preference primary but could not mandate that the primary result govern delegate voting at the national convention.[108] Unlike *Cousins*, the *La Follette* opinion emphasized the importance of a political party's goals and the need for a party to have the freedom to choose the means it believes will best advance its interests.[109] The Court did not mention, as it did in *Cousins*, the impermissible application of extraterritorial jurisdiction and the need for national uniformity.[110] The three dissenting Justices[111] found that the national party lacked any ideology that a primary open to non-Democrats seriously would distort and that the state had compelling interests in increasing voter participation and maintaining the secrecy of the ballot.[112]

3. *Ferency v. Austin*

In *Ferency v. Autsin*[113] the Court of Appeals for the Sixth Circuit heard a case similar to *La Follette* that concerned the Michigan open primary law. *Ferency* differed from *La Follette* in that the Michigan Democratic Party adopted a delegate selection plan in contravention of state law but in conformity with the national delegate selection rules.[114] The Sixth Circuit held that an alternative delegate selection plan prepared by a state party in compliance with national party rules has primacy over a nonconforming state law scheme.[115]

Before the Sixth Circuit heard the case on appeal, the Supreme Court issued its opinion in *La Follette*. Concluding that both *Cousins* and *La Follette* gave primacy to national party rules

---

107. *The Supreme Court, 1980 Term, supra* note 4, at 242.

108. 450 U.S. at 125-26; *see supra* note 100.

109. 450 U.S. at 123-24 & n.26. *See* Ripon Soc'y, Inc. v. National Republican Party, 525 F.2d 567, 585 (D.C. Cir. 1975) (en banc), *cert. denied*, 424 U.S. 933 (1976).

110. *See supra* notes 91-92 and accompanying text.

111. Justice Powell, joined by Justices Blackmun and Rehnquist, wrote in dissent. *See infra* note 112.

112. *The Supreme Court, 1980 Term, supra* note 4, at 243. *See La Follette*, 450 U.S. at 126-38 (1981) (dissenting opinions).

113. 666 F.2d 1023 (6th Cir. 1981).

114. *Id.* at 1024-25. In *La Follette* the Democratic Party of Wisconsin defended the state law. *See La Follette*, 450 U.S. at 133 (Powell, J., dissenting).

115. *Ferency*, 666 F.2d at 1025.

over contrary state laws, the Sixth Circuit affirmed the district court's ruling in favor of the state party[116] and held that these cases controlled the constitutionality of the Michigan open primary law.[117] The Sixth Circuit recognized that a state party delegate selection plan would prevail over a nonconforming plan mandated by state law but, like the Supreme Court in *Cousins* and *La Follette*, the court did not address the situation in which the state statute conforms to national party rules. The district court, however, had heard precisely this argument, which is the central issue of this Note: Can state law constitutionally require the state party to select delegates in a manner that conforms with national party rules but differs from the state party's chosen method?

After arguing unsuccessfully to the district court that Michigan law required the state party to participate in the open primary, plaintiff[118] contended alternatively that another state law,[119] consistent with national party rules,[120] required the Michigan Democratic Party to select delegates in state and county conventions rather than by caucus as the alternate delegate selection plan stipulated.[121] Avoiding the constitutional issue, the court determined that the legislature had repealed the relevant statute without clearly articulating its interest in supervising the delegate selection process of a party not participating in the open primary.[122] In dictum, however, the court implied that state law would prevail over state party procedures if the legislature designated a delegate selection scheme: "This is not to say that the legislature is powerless to require party implementation of state conventions."[123] Accordingly, no court yet has decided whether a state party delegate selection plan has primacy over a different plan approved by the

116. 493 F. Supp. 683 (W.D. Mich. 1980), *aff'd*, 666 F.2d 1023 (6th Cir. 1981).

117. *Ferency*, 666 F.2d at 1025.

118. Plaintiff was Zolton Ferency, an attorney and precinct delegate elected in the open primary. *Id.* at 1024.

119. Ferency v. Austin, 493 F. Supp. 683, 695-96 (W.D. Mich. 1980), *aff'd*, 666 F.2d 1023 (6th Cir. 1981).

120. 493 F. Supp. at 695-96. The Michigan Democratic Party, however, raised the issue at oral argument that this state law might violate national party rules. *Id.* at 695.

121. *Id.* Since the national party rules forbade the Michigan Democratic Party from allocating delegato votes on the basis of the open primary result, the stete party developed an alternate plan providing for delegate selection and allocation in caucuses. The Michigan law stated, "[p]olitical parties not participating in the presidential primary shall elect their delegates and alternates [by state and county conventions]." *Id.* at 696 (quoting MICH. COMP. LAWS ANN. § 168.617 (1972) (repealed 1976)).

122. 493 F. Supp. at 696.

123. *Id.*

state legislature when both schemes conform to the national party rules.

C. *Legitimate State Interests*

In contrast to *Cousins* and *La Follette*, some cases have held that states have a compelling interest in regulating electoral processes. Although states have no constitutionally mandated role in Presidential nomination,[124] the Constitution does grant them power to make laws concerning the time, place, and manner of holding primary and general elections for state and federal offices.[125] Unless Congress directs otherwise, states may regulate the conduct of these elections and determine voter qualifications within the confines of the Constitution.[126]

States have a compelling interest in preserving the integrity and orderliness of the electoral process and the right of citizens to vote.[127] Consequently, courts have held constitutional statutes designed to eliminate political corruption and election fraud.[128] To ensure orderly elections, states may require candidates to have substantial support within their parties,[129] insist that parties settle their internal competition before the general election,[130] limit each party to one candidate for each office on the general election ballot,[131] and establish requirements for ballot access.[132] States also have a legitimate interest in encouraging party loyalty,[133] strengthening political parties,[134] establishing party affiliation require-

---

124. Cousins v. Wigoda, 419 U.S. 477, 489-90 (1975); *see supra* notes 72-75 and accompanying text.

125. "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed as each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of Choosing Senators." U.S. CONST. art. I, § 4; *see* Oregon v. Mitchell, 400 U.S. 112, 122 (1970).

126. Oregon v. Mitchell, 400 U.S. at 124-25.

127. Democratic Party v. Wisconsin *ex rel. La Follette*, 450 U.S. 107, 124 n.28 (1981); *see* Dunn v. Blumstein, 405 U.S. 330 (1972); Kramer v. Union School Dist., 395 U.S. 621 (1969); Williams v. Rhodes, 393 U.S. 23 (1968); Reynolds v. Sims, 377 U.S. 533 (1964).

128. *See* Buckley v. Valeo, 424 U.S. 1 (1976); Dunn v. Blumstein, 405 U.S. 330 (1972); Bullock v. Carter, 405 U.S. 134, 145 (1972); *supra* note 30 and accompanying text.

129. *See* American Party v. White, 415 U.S. 767, 782 n.14 (1974); Jenness v. Fortson, 403 U.S. 431, 442 (1971).

130. *See* American Party v. White, 415 U.S. at 781.

131. *See id.* at 786.

132. *See id.* at 782-84; Jenness v. Fortson, 403 U.S. 431, 442 (1971); Anderson v. Celebrezze, 664 F.2d 554, 564-67 (6th Cir. 1981).

133. Seergy v. Kings County Republican County Comm., 459 F.2d 308, 314 (2d Cir. 1972).

134. *See id.*; Nader v. Schaffer, 417 F. Supp. 837, 845 (D. Conn.), *aff'd mem.*, 429 U.S.

ments,[135] and eliminating cross-over voting[136] and raiding.[137] Finally, states have a compelling interest in providing secrecy of the ballot, increasing voter participation in primaries, and preventing harassment of voters.[138]

Federal and state courts, however, have struck down as unconstitutional some state laws regulating elections for public and party office. The Supreme Court overturned Texas laws that disqualified blacks from participating in primaries[139] and that required a filing fee to run for local political office.[140] The Court found that Mississippi did not have a compelling interest justifying a state statute that regulated the use of the Democratic Party name.[141] Generally, state laws may not confer partisan advantages upon one political party and deny them to another.[142] Any legislation regarding elections must have uniform application throughout the state.[143]

The compelling state interests in the conduct of elections for public office and in effective suffrage probably do not apply to primary elections and other party procedures for the selection of delegates to a national party convention.[144] Although *Cousins* and *La*

---

989 (1976).

135. *Compare* Storer v. Brown, 415 U.S. 724 (1974) (six month preregistration upheld), Rosario v. Rockefeller, 410 U.S. 752 (1973) (11 month preregistration upheld) *with* Kusper v. Pontikes, 414 U.S. 51 (1973) (23 month preregistration held unconstitutional). *See also Developments in the Law—Elections, supra* note 1, at 1163 ("Thirty-four states and the District of Columbia have attempted to preserve the ideological coherence of parties through statutes preventing persons not affiliated with a party from voting in its candidate-selection and delegate-selection primaries."); *id.* at 1163-65.

136. Cross-over voting differs from raiding in that cross-over voters decide to participate in another party's primary because it appears more interesting, whereas raiders vote in the other party's primary in an effort to foist the least attractive candidate upon their opponent. Adamany, *Cross-Over Voting and the Democratic Party's Reform Rules*, 70 AM. POL. SCI. REV. 536, 538 (1976).

137. *See* Rosario v. Rockefeller, 410 U.S. 752, 758 (1973); Nader v. Schaffer, 417 F. Supp. 837, 847 (D. Conn.), *aff'd mem.*, 429 U.S. 989 (1976).

138. *See* Democratic Party v. Wisconsin *ex rel.* La Follette, 450 U.S. 107, 124-25 (1981).

139. *See* Nixon v. Herndon, 273 U.S. 536 (1927); *see also* Nixon v. Condon, 286 U.S. 73 (1932) (Texas Democratic Party excluded blacks from primary on the basis of state law authorizing party executive committees to prescribe voter qualifications).

140. *See* Bullock v. Carter, 405 U.S. 134 (1972); *see also* Lubin v. Panish, 415 U.S. 709 (1974) (California law on filing fees held unconstitutional).

141. *See* Riddell v. National Democratic Party, 508 F.2d 770 (5th Cir. 1975).

142. Tuttle, *supra* noto 17, at 472; *see* Rodriguez v. Popular Democratic Party, 457 U.S. 1 (1982); State *ex rel.* Fitz v. Jensen, 86 Minn. 19, 89 N.W. 1126 (1902).

143. Tuttle, *supra* note 17, at 471 (citing Marsh v. Hanly, 111 Cal. 368, 43 P. 975 (1896)).

144. Cousins v. Wigoda, 419 U.S. 477, 489 (1975); *see also id.* at 497 (Powell, J., concurring) ("[S]tate regulation of state primaries or conventions for state offices raises different considerations requiring a wholly different balance.").

Follette do not provide a universal pronouncement on the constitutionality of state legislation regarding delegate selection systems or other internal party matters, the opinions indicate that these laws likely will not pass constitutional scrutiny. The Court in *Cousins* stated, "Consideration of the special function of delegates to . . . a Convention militates persuasively against the conclusion that the asserted interest constitutes a compelling state interest [in the regulation of the party]."[145] Since a state does not have a compelling interest in this activity, it should refrain from regulating internal party matters.

IV. The 1984 Delegate Selection Rules and Goals

Notwithstanding the Supreme Court's ruling that states have no constitutionally mandated role in the Presidential nomination process,[146] states have continued to regulate the method by which state parties select delegates to the Democratic National Convention.[147] Because the states have a compelling interest in the conduct of elections for public office and state parties often use primary elections to select delegates to the national convention, state parties are in the "anomalous position of having one of their functions—nomination of their candidates—governed by the states as an integral part of the comprehensive state-regulated election system."[148] The participation of both the state and the party in the nomination process makes conflict inevitable. Delegate Selection Rules for the 1984 Democratic National Convention[149] aggravate the situation by rewriting the 1980 rules, which at least one state has enacted into law,[150] and by providing the state parties with new alternatives for choosing delegates.

The Commission on Presidential Nomination[151] developed the 1984 Delegate Selection Rules with specific goals in mind.[152] Observing that "remote-control campaigns, single-issue crusades, and

---

145. *Id.* at 489.

146. *See supra* note 124 and accompanying text.

147. State *ex rel.* La Follette v. Democratic Party, 93 Wis. 2d 473, 494, 287 N.W.2d 519, 528 (1980), *rev'd*, 450 U.S. 107 (1981). For a description of state procedures used in the 1980 presidential nominating process, see Democratic National Convention Committee, The Democrats 80-92 (1980).

148. *La Follette*, 93 Wis. 2d at 494, 287 N.W.2d at 528.

149. On March 26, 1982, the Democratic National Committee approved the 1984 Delegate Selection Rules, as contained in the Hunt Comm'n Report, *supra* note 59.

150. *See* Cal. Elec. Code §§ 6305-6365.2 (West Supp. 1982).

151. *See* Hunt Comm'n Report, *supra* note 59.

152. *Id.* at 1-2.

faceless government" were replacing a nominating process once characterized by "the politics of personal contact, deliberative judgment, coalition and compromise," the Commission promulgated rules to strengthen "the party as a cohesive force in government and within the electorate."[153] The rules give elected and party officials a greater role in the nomination process, return some decisionmaking discretion to the national convention, and allow state parties more options in formulating their delegate selection plans.[154]

Under the 1984 rules a state party may select its base delegation by primary, convention, caucus, or any combination of these methods.[155] Additionally, the new rules provide that a state may choose at-large delegates,[156] and party and elected official delegates[157] under three options: a state convention, a committee consisting of all delegates elected at the district level, or a State Democratic Committee.[158]

The 1984 rules present state parties with an increased number of acceptable systems for allocating delegates among Democratic Presidential candidates. Rule 12 on the Fair Reflection of Presidential Preferences gives the state parties greater freedom to shape their delegate selection processes "in light of their own preferences and traditions."[159] The 1980 rules required that state parties allocate delegates to a candidate in proportion to the vote, above a specified threshold,[160] that the Presidential contender won in a particular district caucus or primary.[161] In 1984 a state party has two additional options for fair reflection of the voters' Presidential preferences. It may choose the "bonus delegate plan," which ini-

153. *Id.* at 2.

154. *Id.* at 6-7.

155. Whether a party decides to use a Presidential preference primary or a caucus system, 75% of its base delegation must be elected at the congressional district level or lower. The other 25% of the base delegation is elected at large. *Id.* at rule 7C.

156. *Id.* at rules 7C, 8.

157. The new rules provide that elected and party officials will constitute 22% of the convention delegates. The House Democratic Caucus and the Senate Democratic Conference will choose approximately 14% of these delegates to remain unpledged. The state parties will select the remainder, who may or may not commit themselves to a candidate. *Id.* at rules 7, 8.

158. *Id.* at rules 8C, 9B. The State Democratic Committee must meet certain specified criteria to participate in delegate selection. *See id.* at rule 8C.

159. *Id.* at 22.

160. "The threshold in states holding a binding primary shall be calculated by dividing the number of delegates to be elected in the district into 100%, except that the threshold shall not exceed 25%. The threshold in caucus states shall be 20%." *Id.* at rule 12A(1).

161. *Id.* at 21.

tially awards one delegate to the primary or caucus winner in a district and then allocates proportionally the remainder of the delegates elected from that district.[162] Alternatively, in districts no larger than a congressional district, the party may opt for direct election of individual delegates on the primary ballot.[163]

These options for delegate selection and allocation invite conflict between state laws and state party procedures that both conform to national party rules and provide for different delegate selection systems.[164] For example, a state may decide to retain the laws it passed for the 1980 Presidential campaign, notwithstanding the state party's current desire to implement one of the options provided in the new rules. Conversely, a state may adopt new laws that conform to the 1984 delegate selection rules but do not incorporate the party's preferred option. As the 1984 Democratic National Convention approaches, these new rules will lead to a process of accommodation or confrontation between state legislatures and state parties.[165] The next part discusses the likely resolution of a confrontation, first by the national convention and then by the courts.

V. The Conflict between State Party and State Statute

A. Resolution by the Democratic National Convention

If a conflict arises in 1984 between state statutes and state party procedures, the national convention and the courts will use different techniques and standards to determine whether state interest or party preference prevails. While the pressures of campaigning for and winning the Presidency will sway the national convention, the courts will have to balance the asserted state interest against the party's freedom of association. The judicial outcome is more predictable than the political determination.

The national convention traditionally has applied state law

---

162. *Id.* at rule 12A(2). Districts that elect fewer than three delegates may not use this option. *Id.*

163. *Id.* at rule 12A(3).

164. The scope and extent of this conflict will not be apparent until April 15, 1983, when state parties must submit their delegate selection plans to the Compliance Review Commission of the Democratic National Committee. *See id.* at rule 1C.

165. This Note does not discuss all of the conflicts that could arise between state law and the state party in the choice of delegate selection procedures. Other conflicts may develop concerning prerequisites for party membership and participation in the delegate selection process, petition requirements for delegate candidates, and filing deadlines for Presidential candidates.

and, in its absence, state party rules.[166] The national party, however, has not applied this policy consistently. At the 1912 and 1932 Democratic National Conventions state delegations presented credentials disputes necessitating a choice between state party procedures and state laws that allowed two different methods of delegate selection, each of them acceptable to the national party. Historical factors and political forces explain the different conclusions reached by the delegates seated at the conventions in each year.

At the 1912 Democratic National Convention, nineteen delegates from Ohio contended that the unit rule[167] imposed by their state party convention violated state law.[168] The state convention had instructed all of Ohio's delegates to vote for the state governor, a favorite son candidate, who had won Ohio's party-run statewide Presidential preference primary.[169] The dissenting delegates, who had been elected at the district level pursuant to state law, maintained that this state convention mandate did not apply to them.[170] Addressing the National Convention, Mr. I. J. Dunn, a delegate from Nebraska, stated the issue:

> I ask you, which do you believe ought to be binding upon a Democratic National Convention—a State-wide primary called by the Democratic State Central Committee of Ohio without recognition in the State law, or a district primary called and held under the authority of law, where every Democrat was given an opportunity to cast his vote under the law of that Sovereign State? Is the law of the State Central Committee of Ohio, or the State Convention, greater than the law of the State of Ohio, which represents the majority and will of the sovereign people of that State?[171]

Notwithstanding the national convention's historical enforcement

---

166. C. COTTER & B. HENNESSY, *supra* note 2, at 19. Courts traditionally have held that parties may establish their own nominating procedures when no state law governs the nominating process. *See, e.g.*, Smith v. McQueen, 232 Ala. 90, 166 So. 788 (1936); Foster v. Ponder, 235 Ark. 660, 361 S.W.2d 538 (1962); McLain v. Fish, 159 Ark. 199, 251 S.W. 686 (1923); Malone v. Superior Ct., 40 Cal. 2d 546, 254 P.2d 517 (1953); Wallace v. Cash, 328 S.W.2d 516 (Ky. 1959); Phillips v. Gallagher, 73 Minn. 528, 76 N.W. 285 (1898); State *ex rel.* McCurdy v. De Maioribus, 176 Ohio St. 108, 198 N.E.2d 60 (1965); Wall v. Currie, 147 Tex. 127, 213 S.W.2d 816 (1948); State *ex rel.* Smith v. Bosworth, 145 W. Va. 753, 117 S.E.2d 610 (1960).

167. The unit requires that all members of a state delegation vote according to the preferences of the majority. A. RANNEY, *supra* note 11, at 17.

168. W. HART, THE DEMOCRATIC CONVENTIONS OF 1908-1912-1916 REPUBLICAN CONVENTIONS OF 1912-1916 AND PROGRESSIVE CONVENTION OF 1912 WITH OTHER POLITICAL AND HISTORICAL OBSERVATIONS 116 (1916).

169. OFFICIAL PROCEEDINGS OF THE DEMOCRATIC NATIONAL CONVENTION 59-75 (1912).

170. *Id.*

171. *Id.* at 74.

of the unit rule,[172] the Democratic National Committee[173] passed a preconvention resolution giving state central committees the right to choose the method of delegate selection provided that no state law imposed a mandatory method.[174] Consistent with convention history, the Credentials Committee recommended the recognition of state party procedure over state law, but the national assembly adopted the Committee's minority report favoring state law.[175] Political considerations explain this outcome: First, the majority of the delegates favored Woodrow Wilson for the nomination over the candidate supported by the Ohio unit rule, and second, the unit rule had become associated with discredited political bossism.[176]

At the 1932 Democratic National Convention, several Minnesota delegates challenged the procedures used by the state central committee at the state convention.[177] Minnesota law required that delegates elected in district primaries pursuant to state law constitute county conventions, which, in turn, select delegates to the state convention.[178] The state convention, however, customarily had allowed each member of the state central committee to vote at the convention. When the state convention met, the delegates learned that the state chairman had packed the state committee by appointing more than one hundred members.[179] The indignant delegates elected according to state law convened on their own and sent a separate delegation to the national convention. Notwithstanding the inherent unfairness of the state party procedures, the Credentials Committee recommended seating the delegates chosen in the state convention dominated by the Minnesota Central Committee.[180]

Once again, political maneuvering controlled the decisionmaking process as the National Convention seated the delegates selected by the party-run state convention instead of those elected pursuant to state law.[181] The delegates chosen under state law had

---

172. The Democratic National Convention enforced the unit rule until 1976. A. RANNEY, *supra* note 11, at 85.

173. OFFICIAL PROCEEDINGS OF THE DEMOCRATIC NATIONAL CONVENTION 66 (1912).

174. *Id.*

175. *Id.*

176. *Id.*

177. OFFICIAL PROCEEDINGS OF THE DEMOCRATIC NATIONAL CONVENTION 54-58, 71-79 (1932).

178. *Id.* at 54.

179. *Id.*

180. *Id.* at 73.

181. *Id.* at 79.

no commitment to any candidate, whereas the delegates controlled by the state party chairman were instructed to vote as a unit for Franklin Roosevelt, the eventual Convention nominee.[182] A vote for state party procedures over state law was a vote for Mr. Roosevelt.

If a credentials dispute arises at the 1984 Democratic National Convention, the delegates may have to choose between state laws and state party procedures, both of which conform to national party rules. The recently enacted Charter and Bylaws of the national party offer no guidance on this issue.[183] Like the 1912 and 1932 controversies, the conflict necessarily will consist of a challenge by a faction of a state delegation or by a group claiming to be the official state delegation. Absent such a challenge, the Credentials Committee will not concern itself with state laws and routinely will seat those delegates chosen according to the delegate selection plan adopted by the state party and approved by the national party's Compliance Review Commission.[184] The outcome of a challenge is unpredictable, but the leading contenders for the Democratic nomination certainly will play a major role in resolving the conflict. If the challengers do not bring the dispute to the courts, the national convention will make the final determination.[185]

B. Resolution by the Courts

1. The Political Question Doctrine

If a challenge concerning the 1984 Delegate Selection Rules reaches the courts, constitutional analysis will replace politics as the method of resolving the conflict between state laws and state party rules. Since any state statute regulating delegate selection procedures infringes upon the state party's fundamental right of freedom of association, a court will subject the asserted state interest to strict scrutiny to determine whether it is legitimate and

182. *Id.* at 74.

183. Interview with Ronald D. Eastman, counsel for appellants in *La Follette*, in Washington, D.C. (Aug. 5, 1982) [hereinafter cited as Interview with Ronald D. Eastman].

184. Telephone interview with Louise Lindblom, Executive Director of the Compliance Review Commission (July 26, 1982). "The position currently taken by the dominant forces in both national parties is that, in the absence of congressional legislation to the contrary, the national parties are private associations, not public agencies; and as such they have a right to govern their own affairs by their own rules without regard to contrary provisions in state laws." A. RANNEY, *supra* note 11, at 85.

185. C. COTTER & B. HENNESSY, *supra* noto 2, at 19.

compelling.[186] No state interest in delegate selection likely will meet this stringent standard, because the Constitution protects a party's interest in choosing its own methods to achieve its goals.[187]

Several situations may lead to litigation of the conflict between state law and state party rules. A state, similar to Wisconsin in *La Follette*, may seek a declaration that its delegate selection system is constitutional as applied to the state party and that the National Democratic Party must seat its delegates.[188] An interested person, such as plaintiff in *Ferency*, may seek a declaratory judgment that would require state officials to enforce election laws against the state party.[189] A state, objecting to the delegate selection procedures used by the state party, may deny automatic ballot access to the candidate nominated by the Democratic National Convention.[190] If so, the state or national party may challenge the denial as an unconstitutional infringement of its freedom of association.[191]

A court may not resolve those disputes if it makes a threshold determination that the issue presents a nonjusticiable political question.[192] "Assuming that political parties are necessary to our representative form of government, the question arises whether the judiciary possesses the requisite resources and expertise to intervene in party affairs without seriously, perhaps fatally, impairing the parties' functioning."[193] Federal courts have avoided the task of resolving controversies concerning county and state parties by invoking the political question doctrine.[194] Although the Supreme Court did not address this issue in *Cousins* or *La Follette*,[195] the Court has stated, "It is hostile to a democratic system to involve the judiciary in the politics of the people. . . . Courts ought not

---

186. *See supra* notes 67 & 69-71 and accompanying texts.

187. Interview with Ronald D. Eastman, *supra* note 183. *See* Ripon Soc'y, Inc. v. National Republican Party, 525 F.2d 567 (D.C. Cir. 1975), *cert. denied*, 424 U.S. 933 (1976).

188. *See* Democratic Party v. Wisconsin *ex rel.* La Follette, 450 U.S. 107, 113 (1981).

189. *See* Ferency v. Austin, 493 F. Supp. 683 (W.D. Mich. 1980), *aff'd*, 666 F.2d 1023 (6th Cir. 1981); *see also* 28 U.S.C. § 2201 (Supp. IV 1980) (Declaratory Judgment Act).

190. *Developments in the Law—Elections, supra* note 1, at 1212.

191. *Id.*

192. Rotunda, *supra* note 23, at 936.

193. *Id.* at 945.

194. Irish v. Democratic-Farmer-Labor Party, 399 F.2d 119 (8th Cir. 1968); Lynch v. Torquato, 343 F.2d 370 (3d Cir. 1965); Smith v. State Exec. Comm. of Democratic Party, 288 F. Supp. 371 (N.D. Ga. 1968); Chandler v. Neff, 298 F. Supp. 515 (W.D. Tex. 1924).

195. Cousins v. Wigoda, 419 U.S. 477, 483 n.4 (1975); *see* Democratic Party v. Wisconsin *ex rel.* La Follette, 450 U.S. 107 (1981).

enter this political thicket."[196] The elements of the doctrine, however, do not necessarily compel judicial restraint in this area.[197]

The strand of the political question doctrine deeming some issues nonjusticiable because of a "constitutional commitment" to a coordinate branch of government clearly is inapposite to conflicts concerning political parties.[198] Since parties have no basis in the Constitution[199] and, therefore, do not serve as political branches of government, the separation of powers principle advanced by this aspect of the doctrine does not warrant judicial abstention.[200] Two other strands, "lack of judicially discoverable and manageable standards" and "impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion,"[201] may justify judicial refusal to adjudicate these matters. Accordingly, courts should consider the nature of the dispute and its timing in determining whether to apply the political question doctrine.

A court can find judicially discoverable and manageable standards in the national party's own rules if a dispute arises over the conformity of state or national party actions to party regulations,[202] or over whether the party actions satisfied due process.[203] Similarly, in a controversy between state party delegate selection procedures and state law, a court would apply first amendment analysis.[204] The judiciary, however, should not attempt to resolve contests between political factions for ideological control of the party. These challenges present policy determinations outside a

196. Colegrove v. Green, 328 U.S. 549, 552-56 (1946).

197. *See* Note, *Mandates of the National Political Party Clash with Interests of the Individual States as the Party Executes its Policy by Abolition of State Delegate Selection Results: Legal Issues of the 1972 Democratic Convention and Beyond*, 4 LOY. U. CHI. L.J. 137 (1973); Note, *Judicial Intervention in the Presidential Selection Process: One Step Backwards*, 47 N.Y.U. L. REV. 1184 (1972); Comment, *Political Parties, Courts and Political Question Doctrine: New Developments*, 52 OR. L. REV. 269 (1973).

198. Raymar, *supra* note 22, at 16 ("There is no 'textually demonstrable constitutional commitment of the [selection of Presidential nominees] to a coordinate political department' of the federal government, and, at least since 1832, there has been no question of judicial review 'expressing lack of the respect due coordinate branches of government.' "). *See* Note, *Judicial Intervention in Political Party Disputes: The Political Thicket Reconsidered*, 22 U.C.L.A. L. REV. 622, 634 (1975).

199. *See supra* note 61 and accompanying text.

200. O'Brien v. Brown, 409 U.S. 1, 11-12 (1972) (Marshall, J., dissenting).

201. Baker v. Carr, 369 U.S. 186, 217 (1962); *see* Powell v. McCormack, 395 U.S. 486, 518 (1969).

202. *Developments in the Law—Elections*, *supra* note 1, at 1203; *see Developments in the Law—Judicial Control of Actions of Private Associations*, 76 HARV. L. REV. 983, 994-98 (1963).

203. O'Brien v. Brown, 409 U.S. 1, 12-13 (1972) (Marshall, J., dissenting).

204. *See supra* notes 60-75 and accompanying text.

court's discretion.

The courts also must consider timing in deciding whether to invoke the political question doctrine. Faced with deciding two credentials contests a few days before the opening of the 1972 Democratic National Convention, the Supreme Court in *O'Brien v. Brown*[205] took the traditional judicial approach and allowed the highest authority within the party, the national convention, to resolve the disputes.[206] It stayed the ruling of the Court of Appeals for the District of Columbia Circuit, which had adjudicated the challenges[207] after the district court had found the complaints nonjusticiable.[208] Moreover, the Court implied that judicial intervention was inappropriate at anytime during an ongoing nomination process: "It has been understood since our national political parties first came into being as voluntary associations of individuals that the convention itself is the proper forum for determining intra-party disputes as to which delegates shall be seated."[209] Accordingly, the Court's decision in *La Follette* and *Cousins* followed the conclusion of the nominating process.[210]

In theory, a conflict between state law and party procedures might arise at almost any stage of the delegate selection process. Challengers may seek judicial review following the promulgation of national or state party rules,[211] after the Credentials Committee decides a particular challenge,[212] following the national convention's adoption or rejection of the Committee report, or after the

---

205. 409 U.S. 1 (1972).

206. *Id.* at 5 ("[F]or nearly a century and a half the national political parties themselves have determined controversies regarding the seating of delegates to their conventions."); *see* Ferency v. Austin, 493 F. Supp. 683, 694 (W.D. Mich. 1980), *aff'd*, 666 F.2d 1023 (6th Cir. 1981) ("[T]he courts have given broad latitude to political parties to enable them to conduct their own affairs and settle their own disputes without judicial interference."); Tuttle, *supra* note 17, at 468; Comment, *supra* note 34, at 558; *see* Note, *Constitutional Law: Conventional Reluctance or Doctrinal Departure? The Political Question Doctrine*, 51 N.C. L. REV. 290, 291 (1972); Case Note, *Constitutional Law—The Political Question Doctrine*—O'Brien v. Brown *and* Keane v. National Democratic Party, 22 DE PAUL L. REV. 887, 896 (1973); Comment, O'Brien v. Brown: *The Politics of Avoidance*, 58 IOWA L. REV. 432, 446 (1972).

207. *See* Brown v. O'Brien, 469 F.2d 563 (D.C. Cir.), *stayed*, 409 U.S. 1 (1972).

208. *Brown*, 469 F.2d at 565.

209. O'Brien v. Brown, 409 U.S. 1, 4 (1972); *see* Cousins v. Wigoda, 419 U.S. 477, 491 (1975).

210. *See* Democratic Party v. Wisconsin, *ex rel.* La Follette, 450 U.S. 107, 124 (1981); Cousins v. Wigoda, 419 U.S. 477, 490 (1975). *But cf.* Note, *Judicial Intervention*, *supra* note 73, at 130 (courts should actively intervene in conventions).

211. *See* Ferency v. Austin, 493 F. Supp. 683 (W.D. Mich. 1980), *aff'd*, 666 F.2d 1023 (6th Cir. 1981).

212. *See* O'Brien v. Brown, 409 U.S. 1 (1972).

convention.[213] Arguably, the least intrusive and most effective time for court intervention is at the submission of the state party's delegate selection plan to the Compliance Review Commission.[214] In *Ferency v. Austin*, plaintiff hoped that litigation at this stage of the delegate selection process would allow a judicial resolution of the conflict before the start of the national convention.[215] The national party in 1983,[216] however, may object to judicial interference at this time because the Convention would not have an opportunity to settle the state delegation dispute itself. Nevertheless, given its deferential approach in *O'Brien* and practical time constraints, the Supreme Court probably will not rule on conflicting state law and state party delegate selection procedures until the conclusion of the Convention and Presidential election.[217] If a case does appear on the Court docket, the adjournment of the Convention will not moot the dispute.[218] The issue most certainly will fall within the class of cases and controversies that are "capable of repetition, yet evading review."[219]

2. The Compelling Party Interest

If a court finds a challenge concerning state regulation of state parties justiciable, it must subject the state law to first amendment freedom of association analysis. *La Follette* provides the constitutional standard of review for a challenged state statute. Resolution of the issue that this Note presents, however, requires extending the *La Follette* analysis to the situation in which both state law and state party procedures comply with national party rules. In *Cousins, La Follette*, and *Ferency* the federal courts based their decisions on the violation of national party rules by the state stat-

---

213. Raymar, *supra* note 22, at 15; *see* Democratic Party v. Wisconsin *ex rel.* La Follette, 450 U.S. 107 (1981); Cousins v. Wigoda, 419 U.S. 477 (1975); O'Brien v. Brown, 409 U.S. 1, 9 (1972) (Marshall, J., dissenting).

214. Note, *supra* note 198, at 652.

215. *See* Ferency v. Austin, 493 F. Supp. 683 (W.D. Mich. 1980), *aff'd*, 666 F.2d 1023 (6th Cir. 1981).

216. *See supra* note 164.

217. The courts should refrain from adjudicating a dispute concerning delegate selection during the period between the nomination and the Presidential election because of the "need for unquestioning adherence to political decision already made." *See* Baker v. Carr, 369 U.S. 186, 217 (1962).

218. Brief for Appellants, *supra* note 80, at 12 n.12.

219. Democratic Party v. Wisconsin *ex rel.* La Follette, 450 U.S. 107, 115 n.13 (1981); Rosario v. Rockefeller, 410 U.S. 752, 756 n.5 (1973); Dunn v. Blumstein, 405 U.S. 330, 333 n.2 (1972).

utes.[220] In 1984 state laws may conform to national party rules yet contradict state party procedures. Whether the state is regulating the national party or the state party should make no difference in the balance of that party's right to freedom of association against a state's asserted interest in its laws.

Dictum in *Cousins* concerning the need for national uniformity in delegate selection and the implied unconstitutionality of a state's extraterritorial extension of its authority[221] may suggest that a different balancing test should apply in reviewing state regulation of state parties when state law does not interfere with the associational rights of the national party.[222] Unlike the laws in *Cousins, La Follette*, and *Ferency*, a state statute that complies with the national party rules only affects the state party's rights of association. The Supreme Court in *La Follette*, however, did not adopt the reasoning of the *Cousins* dictum;[223] instead, it relied strictly upon freedom of association analysis. The Court stated: "A political party's choice among the various ways of determining the make-up of a State's delegation to the party's national convention is protected by the Constitution."[224] A state law regulating a state party's choice of delegate selection procedures is as unconstitutional as a state statute that impinges upon the freedom of association of the national party. Consequently, any state regulation of delegate selection that contradicts state party procedures should undergo the same strict scrutiny mandated by the Court in *La Follette*.

States have attempted unconvincingly to justify their regulations of party rights of association on the basis of some constitutional grant of authority.[225] The issue is not whether states have the authority to enact statutes regulating party primaries, conventions, or caucuses, but whether the states' exercise of their power interferes impermissibly with the first and fourteenth amendment rights of political parties.[226] The only constitutionally legitimate state interest in political party activities is the regulation of congressional and state elections for the limited purpose of assuring

220. *See supra* notes 80, 98-100, & 113-15 and accompanying texts.
221. *See supra* notes 91-92 and accompanying text.
222. *See Court Voids Wisconsin Open Primary Law*, 67 A.B.A. J. 491-92 (1982).
223. *See supra* notes 109-10 and accompanying text.
224. Democratic Party v. Wisconsin *ex rel.* La Follette, 450 U.S. 107, 124 (1981).
225. *See supra* notes 72-75 and accompanying text.
226. Reply Brief for Appellants, *supra* note 71, at 2.

their orderliness.[227] This state interest is not present in the selection of delegates to a national party convention.[228] Accordingly, a state party that submits a delegate selection plan in compliance with the national rules is constitutionally immune from state interference with its preferred procedures.

The *La Follette* opinion emphasized the importance of freedom of association to effective implementation of the party's goals.[229] This emphasis perhaps reflected the argument of the National Democratic Party:

> First and Fourteenth Amendment protection against state infringement of associational rights applies with special force where political parties are selecting their candidates. A party's candidate selection process represents an organized attempt of like-minded individuals to shape the policies, programs, and personnel of the government itself. Moreover, when choosing candidates, political parties make decisions reconciling the varied interests of their adherents. These decisions reflect political judgments and compromises that are easily distorted by government intrusion. . . . There are virtually no standards by which legislatures or judges can determine with certainty the political effectiveness of a particular choice of means to achieve a concededly valid objective.[230]

Since the nomination process is so critical to the purposes for which individuals decide to associate in political parties, state laws should not burden a state party's freedom in choosing its method of selecting delegates.[231]

3. Party Rules as State Action

After determining that state regulation of the Presidential nominating process is improper, the court next may inquire whether national or state party rules themselves constitute state action and, therefore, are subject to the limits of the Constitution.

---

227. *See* Comment, *The Supreme Court and the Credentials Challenge Cases: Ask a Political Question, You Get a Political Answer*, 62 CALIF. L. REV. 1344 (1974); *supra* notes 128-45 and accompanying text. *But see* Note, *Freedom of Association or Forced Association:* Democratic Party of the United States v. Wisconsin *ex rel.* La Follette, 1982 DET. C.L. REV. 173 (1982); Note, *supra* note 69, at 77.

228. "[A state] 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." Cousins v. Wigoda, 419 U.S. 477, 491 (1975); *see supra* notes 129-30 and accompanying text.

229. *See supra* note 109 and accompanying text.

230. Brief for Appellants, *supra* note 80, at 12-13, 25.

231. *See* Graham v. Fong Eu, 403 F. Supp. 37, 44-45 (N.D. Cal. 1975), *aff'd*, 423 U.S. 1067 (1976) ("Whether the voters will participate in the delegate selection process, and, if so, at what stage, and whether their participation will be translated directly into delegate representation at the national conventions are matters for the political parties themselves to determine, and, if the parties permit it, for the state.").

Many state and federal courts have addressed this question.[232] National party rules, which provide for a delegate selection process "open to all members of the Democratic Party regardless of race, sex, age, color, creed, national origin, religion, ethnic identity, economic status, or philosophical persuasion," proscribe any form of invidious discrimination.[233] Since state parties must follow these rules, they necessarily must conduct their activities in conformity with the dictates of the fourteenth and fifteenth amendments.[234] The District of Columbia Circuit[235] has virtually eliminated the equal protection clause of the fourteenth amendment as a basis for challenging the constitutionality of delegate apportionment rules

---

232. For a discussion of political party activities as state action, see Terry v. Adams, 345 U.S. 461 (1953); Smith v. Allwright, 321 U.S. 649 (1944); Nixon v. Condon, 286 U.S. 73 (1932); Nixon v. Herndon, 273 U.S. 536 (1927); Rice v. Elmore, 165 F.2d 387 (4th Cir. 1947), *cert. denied*, 333 U.S. 875 (1948); L. TRIBE, *supra* note 1, § 13-22; Kester, *Constitutional Restrictions on Political Parties*, 60 VA. L. REV. 735 (1974); Raymar, *supra* note 22, at 18-20; Rotunda, *supra* note 23, at 951-60; Note, *Judicial Intervention in Political Party Disputes: The Political Thicket Reconsidered*, 22 U.C.L.A. L. REV. 622, 626-32 (1975); *Developments in the Law—Elections*, *supra* note 1, at 1155-63. For differing views of federal and state courts on the applicability of the equal protection clause to political parties, see Gray v. Sanders, 372 U.S. 368 (1963); Ripon Soc'y, Inc. v. National Republican Party, 525 F.2d 548 (D.C. Cir. 1975), *cert. denied*, 424 U.S. 933 (1976); Seergy v. Kings County Republican County Comm., 459 F.2d 308 (2d Cir. 1972); Bode v. National Democratic Party, 452 F.2d 1302 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 1019 (1972); Georgia v. National Democratic Party, 447 F.2d 1271 (D.C. Cir. 1971); Irish v. Democratic-Farmer-Labor Party, 399 F.2d 119 (8th Cir. 1968); Lynch v. Torquato, 343 F.2d 370 (3d Cir. 1965); Doty v. Montana State Democratic Cent. Comm., 333 F. Supp. 49 (D. Mont. 1971); Dahl v. Rapublican State Comm., 319 F. Supp. 682 (W.D. Wash. 1970); Maxey v. Washington State Democratic Comm., 319 F. Supp. 673 (W.D. Wash. 1970); Smith v. State Exec. Comm., 288 F. Supp. 371 (N.D. Ga. 1968); Bentman v. Seventh Ward Democratic Exec. Comm., 421 Pa. 188, 218 A.2d 261 (1966); Bellamy, *Applicability of the Fourteenth Amendment to the Allocation of Delegates to the Democratic National Convention*, 38 GEO. WASH. L. REV. 892 (1970); Goldstein, *One Man, One Vote and the Political Convention—Alternative Methods of Implementation: A Political Analysis*, 40 U. CIN. L. REV. 1 (1971); Rauh, Bode, and Fishback, *National Convention Apportionment: The Politics and the Law*, 23 AM. U.L. REV. 1 (1973); Note, *Presidential Nominating Conventions: Party Rules, State Law, and the Constitution*, 62 GEO. L.J. 1621 (1974); Note, Bode v. National Democratic Party: *Apportionment of Delegates to National Political Conventions*, 85 HARV. L. REV. 1460 (1972); Note, *One Person-One Vote: The Presidential Primaries and Other National Convention Delegate Selection Processes*, 24 HAST. L.J. 257 (1973); Note, *Constitutional Safeguards in the Selection of Delegates to the Presidential Nominating Conventions*, 78 YALE L.J. 1228 (1969); Note, *Equal Representation of Party Members on Political Party Central Committees*, 88 YALE L.J. 167 (1978); Comment, *supra* note 34.

233. HUNT COMM'N REPORT, *supra* note 59, at rule 4.

234. "The rights of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." U.S. CONST. amend. XV, § 1.

235. Ripon Soc'y, Inc. v. National Republican Party, 525 F.2d 567 (D.C. Cir. 1975), *cert. denied*, 424 U.S. 933 (1976).

at the national convention:

> We conclude, therefore, that the Equal Protection Clause, assuming it is applicable, does not require the representation in presidential nominating conventions of some defined constituency on a one person, one vote basis. It is satisfied if the representational scheme and each of its elements rationally advance some legitimate interest of the party in winning elections or otherwise achieving its political goals.[236]

Since the goal of political parties in allocating delegates to geographical areas is to strengthen the party and win elections,[237] they operate within the limits of the Constitution. Indeed,

> [i]n cases in which application of constitutional norms to party activity appears substantially to infringe its associational interest in advancing the shared political ideas of its members, there may be a compelling party interest—much like a compelling state interest when constitutional rights are asserted against the state government—which justifies relaxing the enforcement of the independent constitutional norms.[238]

The Constitution protects the party's interests; neither state laws nor the Constitution should restrict the method of delegate selection chosen by the state parties as long as the procedure conforms to national party rules.

VI. CONCLUSION

Before the Chairman of the National Democratic Party pounds the gavel to mark the opening of the 1984 Democratic National Convention, controversies concerning delegate selection rules will arise and will require resolution. Candidates, state parties, or state governments may challenge the rules at the national party convention or in the courts. Because party structure is determined "most immediately by the content, interpretation, and application of its own rules and the relevant public laws,"[239] any judicial or legislative interference with the state or national party rules will affect not only the parties themselves, but also the American political system.

Since their creation in the early 1800's, state parties have experienced periods of absolute freedom and of comprehensive gov-

---

236. *Id.* at 586-87.

237. HUNT COMM'N REPORT, *supra* note 59, at 6-9.

238. *Developments in the Law—Elections, supra* note 1, at 1213.

239. A newly enacted provision of the Charter of the National Democratic Party, calling for equal division of state party central committees between men and women, conflicts with many state statutes. The national party's Committee on State Participation has called for immediate implementation of this rule. *See* DEMOCRATIC NATIONAL COMMITTEE, THE CHARTER AND BY-LAWS OF THE DEMOCRATIC PARTY OF THE UNITED STATES, art. 11, § 16 (1982).

ernmental regulation. During the past decade the National Democratic Party has asserted itself and won the right to structure its organization in a manner that it believes will best further its interests. With the preparation of the 1984 Delegate Selection Rules, the national party has attempted to extend this capability to the state parties.

The state parties should not permit the state legislature to determine their organizational structure and nominating processes. Since the national party rules require fairness and openness in state delegation selection, states have no reason to legislate in this area. Political parties can and will monitor their own affairs because they realize that party unity and electoral victory depend upon fair administration of the delegate selection process. The parties do not want rules disputes to alienate any candidate or interest group. If existing laws conflict with the state party's preferred delegate selection system, the legislature should repeal these statutes to accommodate the party preference and avoid a confrontation.

Governmental control of the selection of party leaders compromises the electoral process and lessens the incentive for partisan participation in America. By regulating state parties and requiring them to select their leaders in a certain way, the states are "sacrificing the valuable substance of partisan loyalty and allegiance to the mere mechanism of partisan association."[240] Parties will have no opportunity to become instruments of responsible government if state laws control their most basic and important function—selection of a candidate for the Presidency.[241] If the state parties allow the state legislatures to regulate their capacity to form coalitions for the displacement of incumbent public officials, what check on government is left? State parties should seize the opportunities provided by the 1984 Delegate Selection Rules and start governing their own affairs.

PLATTE B. MORING, III

240. A. RANNEY, *supra* note 11, at 98-99 (quoting H. CROLY, PROGRESSIVE DEMOCRACY 342-43 (1915)).

241. *Id.*