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Freedom of Association and the Selection of Delegates to National Political Conventions

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FREEDOM OF ASSOCIATION AND THE SELECTION OF DELEGATES TO NATIONAL POLITICAL CONVENTIONS

It is disconcerting that the professional politicians who run our two national parties often seem to be more concerned with maintaining control of their parties than with winning control of the government.[1] So it was that Goldwater's "organizational strength" won him the 1964 Republican nomination despite his consistently poor showing in the primaries and opinion polls.[2] Likewise, in 1968, McCarthy supporters within the Democratic Party often found their efforts to secure delegate representation futile.[3]

Faced with what many viewed as a meaningless choice of presidential candidates in 1968,[4] some Democrats sought to reform the nomination procedure within their party.[5] Twenty challenges were filed with the Credentials Committee of the 1968 Democratic National Convention; fifteen were argued before the Committee, and five were brought before the Convention through minority reports.[6] Although all challenges based on undemocratic delegate selection or constitutional violation failed,[7] the reformers made their point: the Convention adopted a

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1 A. BICKEL, THE NEW AGE OF POLITICAL REFORM: THE ELECTORAL COLLEGE, THE CONVENTION, AND THE PARTY SYSTEM 25 (1968); *cf.* Note, *The Presidential Nomination: Equal Protection at the Grass Roots*, 42 S. CAL. L. REV. 169, 175 (1969). The more conventional theory of the structural-functionalists is that the professionals will always choose the most popular candidate because they seek the rewards of electoral victory. *Cf.* David, *Reforming the Presidential Nominating Process*, 27 LAW & CONTEMP. PROB. 159, 169-70 (1962).

2 David, *Introduction* to NATIONAL MUNICIPAL LEAGUE, PRESIDENTIAL NOMINATING PROCEDURES IN 1964, at 4-5 (1965).

3 In Pennsylvania's 1968 presidential preference primary, for example, McCarthy received 71.6% of the total Democratic vote; however, the at-large delegates appointed by the Democratic State Committee included almost no McCarthy supporters, and he received only 21½ of the state's 130 delegate votes (under 17%) at the Convention. 26 CONG. Q. WEEKLY REP. 2242, 2244 (1968). *See also* Schmidt & Whalen, *Credentials Contests at the 1968—and 1972—Democratic National Conventions*, 82 HARV. L. REV. 1438, 1454-55 (1969); Note, *supra* note 1, at 176.

4 *See* Note, *Regulation of Political Parties: Vote Dilution in the Presidential Nomination Procedure*, 54 IOWA L. REV. 471 (1968).

5 The legal issues discussed herein apply with equal force to any political party; however, they have not yet arisen within the Republican Party. *See* A. BICKEL, *supra* note 1, at 34, 37.

6 This was the greatest number of challenges in party history. Schmidt & Whalen, *supra* note 3, at 1438-39. *See also* T. WHITE, THE MAKING OF THE PRESIDENT 1968, at 273 (1969).

7 Only challenges based on racial discrimination in violation of the Call to the 1968 Convention were successful. Schmidt & Whalen, *supra* note 3, at 1438-54.

minority report of the Rules Committee aimed at democratizing[8] delegate selection for future conventions. It directs that the Call to the 1972 Convention require that

> [a]ll feasible efforts [be] made to assure that delegates are selected through party primary, convention, or committee procedures open to public participation within the calendar year of the National Convention.[9]

The majority report of the Credentials Committee, also adopted by the Convention, called for "appropriate revisions in the delegate selection process to assure the fullest possible participation and to make the Democratic Party completely representative of grass-root sentiment."[10] Pursuant to a recommendation of this report, the Democratic National Chairman has established a Commission on Party Structure and Delegate Selection to assist the state parties in conforming with the Call to the 1972 Democratic National Convention.[11] The Commission has adopted guidelines for interpreting the language in the minority report, which in effect establish a defense for non-compliance with the democratization procedures when compliance is impossible under existing state law.[12]

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8 [O]ne was slowly overwhelmed by the sense of the grotesquely obsolete. More than 600 delegates to this convention had been chosen by processes begun over two years before. In three states, one man alone could appoint all, or most, of the delegates to a national convention. . . . In other states, many or all delegates were appointed by the Party's executive committee, whose members were themselves chosen by processes incomprehensible to any but seasoned full-time politicians. In yet other states, delegates were chosen by unofficial caucuses meeting at obscure halls, schools or private homes where extremists and activists, proclaiming themselves Republicans or Democrats, could raid and dominate the grass roots selection process in either party.

T. WHITE, *supra* note 6, at 274.

9 The Origins, Mandate and Guidelines of the Commission on Party Structure and Delegate Selection 2 (undated memorandum published by the Democratic Party Commission on Party Structure and Delegate Selection) [hereinafter cited as Comm'n Memorandum]. The minority report also provided that "the unit rule not be used in any stage of the delegate selection process . . . ." *Id. See* A. BICKEL, *supra* note 1, at 28-29; T. WHITE, *supra* note 6, at 273-75; Schmidt & Whalen, *supra* note 3, at 1455-56.

10 Comm'n Memorandum 1. *See* Schmidt & Whalen, *supra* note 3, at 1455.

11 Comm'n Memorandum 1. Whether the national party could compel the state party to change its rules is an interesting legal question. In State *ex rel.* Cook v. Hanser, 122 Wis. 534, 100 N.W. 964 (1904), it was held that the national convention was not the supreme authority within the state party. *Contra,* State *ex rel.* Nebraska Republican State Cent. Comm. v. Wait, 92 Neb. 313, 138 N.W. 159 (1912). *See also* Starr, *The Legal Status of American Political Parties, I,* 34 AM. POL. SCI. REV. 439, 450 (1940). Whatever the law, the national convention's power to judge the qualifications of delegates thereto has apparently never been challenged, so the party has the means to enforce its rules on delegate selection.

12 The guidelines read as follows:

Recognizing that even the most vigorous and timely effort by the state and na-

The requirement of "all feasible efforts" in the 1972 Call, however, should be interpreted to include a judicial challenge to undemocratic state laws.[13] Such challenges have already been made under the equal protection clause of the fourteenth amendment, but they have proved unsuccessful.[14] Recent Supreme Court decisions on freedom of association, on the other hand, indicate that an attack rooted in that first amendment right would enable a political party to democratize the delegate selection process.

I

THE FAILURE OF EQUAL PROTECTION

Insurgents within the Democratic Party in 1968 sought judicial assistance in their efforts to reform the nomination procedure even before the National Convention met. Both *Smith v. State Executive Com-*

tional party might fail in this situation, it was agreed that a delegation should be allowed to prove to the Credentials Committee that Republican control of the legislature made compliance impossible. The language "all feasible efforts" was accepted by the group to meet this problem after its proponents clarified two points: 1) the exception would be applicable only where the opposition party controlled the legislature at all times during which it might be reasonably possible to pass a new law going into effect in 1972 or before; and 2) a delegation establishing impossibility on this ground would also be obliged to show that it had held hearings, introduced bills and lobbied for their enactment, and that its state party rules had been amended in every necessary way, short of exposing the party or its members to legal sanctions.

Comm'n Memorandum 4.

13 No implication that the reforms of the 1968 Convention are meaningless without a challenge to these state laws is intended. Some state laws on delegate selection provide for an exercise of discretion in the state party to avoid the most undemocratic provisions. *E.g.*, N.Y. ELECTION LAW § 21 (McKinney 1964); PA. STAT. tit. 25, §§ 2838-39 (1936). (Both provide for election of district delegates in primaries during the convention year and for appointment of at-large delegates by the state committee, elected two years before, but neither require that there be any at-large delegates.) Under these conditions, the guidelines presumably require that the most democratic method available be used. However, even the most democratic method of selection available under New York law, the district primary, does not allow delegate candidates to indicate their presidential candidate preference on the ballot. *See* N.Y. ELECTION LAW § 108 (McKinney 1964) (form of ballot). Furthermore, state legislators are among the professional politicians who now control national conventions and are not likely to voluntarily diminish their own power. Thus, providing any defense to credentials challenges based on undemocratic state laws without requiring judicial challenge will probably discourage reform. *See* Schmidt & Whalen, *supra* note 3, at 1457-58.

14 Despite its rejection by the courts, two recent law review notes have continued to advocate this approach. Note, *supra* note 4; Note, *The Presidential Nomination: Equal Protection at the Grass Roots*, 42 S. CAL. L. REV. 169 (1969). *But see* Note, *One Man, One Vote and Selection of Delegates to National Nominating Conventions*, 37 U. CHI. L. REV. 536 (1970).

mittee of the Democratic Party[15] and *Irish v. Democratic-Farmer-Labor Party*[16] attacked the delegate selection process under the equal protection clause of the fourteenth amendment.[17] The petitioners combined the "one person, one vote" standard of the apportionment cases[18] with the concept of state action in the white primary cases[19] and contended that the courts should ensure that the opinions of all party members be given equal weight in the nomination process.

Both of these efforts failed. The *Smith* court pointed out that the only decision going deeper into the affairs of a political party than the primary election, *Terry v. Adams*,[20] was decided under the fifteenth amendment,[21] and then concluded that even if an equal protection claim were in order it would fail since all party members could participate in the state party convention held two years before the National Convention. The state convention, the court noted, could control the state central committee which, as the depository of the "sole legal power in party affairs," could control the selection of delegates.[22] In theory, then, there was no denial of equal protection, even though delegate selection was in fact made by the state chairman with the consent of the gubernatorial nominee. In *Irish*, the court distinguished the cases dealing with racial discrimination, discussed the "almost insurmountable problem with respect to remedy," and concluded that the case presented "a non-justiciable political question."[23]

Despite the tenuousness of the equal protection formulation in *Smith* and the avoidance of the real issue in *Irish*, the desire of the courts to avoid the questions raised is understandable. What, for example, is the method of delegate selection required by equal protection?[24] How are delegates to be apportioned?[25] These are only some of

15 288 F. Supp. 371 (N.D. Ga. 1968).

16 399 F.2d 119 (8th Cir. 1968).

17 There were at least two other actions begun besides those mentioned in the text. One, involving the Washington State Democratic Committee, was apparently dropped before trial. Schmidt & Whalen, *supra* note 3, at 1446 n.32. In addition, a key vote by the Missouri delegation at the 1968 Democratic National Convention in favor of democratizing the delegate selection process for future conventions was apparently arranged when McCarthy supporters in that state abandoned a lawsuit attacking the use of the unit rule. *Id.* at 1456 n.83.

18 *E.g.*, Gray v. Sanders, 372 U.S. 368 (1963).

19 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).

20 345 U.S. 461 (1953).

21 288 F. Supp. at 376.

22 *Id.* at 377.

23 399 F.2d at 120-21.

24 Some of the alternatives include precinct caucuses, district conventions, state conventions, and district or state-wide primaries.

25 Possible methods of apportionment are population, party enrollment, and votes

the problems the courts would face if they chose to rewrite the rules of presidential politics with the equal protection clause.[26]

Furthermore, the distinctions drawn by the courts between delegate selection reform and the white primary cases[27] are valid. Through the medium of those cases the Supreme Court made it clear that the Constitution prohibits a political party from denying membership to an individual on the basis of race. At issue was the concept of state action rather than the definition of equal protection, and nowhere do the cases define the extent to which the party may otherwise condition membership or regulate its internal affairs without being subject to judicial scrutiny. The answers to these questions depend on the applicability of the equal protection clause of the fourteenth amendment to the affairs of political parties, and they are not to be found in the white primary cases.[28]

II

Freedom of Association and Political Parties

It has frequently been observed that the Constitution contains no specific protection of freedom of political association and that the Founding Fathers viewed political parties with distrust.[29] To ground this freedom constitutionally, however, one need only recall that this nation was born in the activities of political associations such as the

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received by party candidates in previous elections. It would also be uncertain whether uniform methods were required in all parties and in all states.

26 Add to the lack of standards the requests for judicial substitution of one set of delegates for another on the very eve of a convention, and the results in *Smith* and *Irish* become predictable. *Cf.* Schmidt & Whalen, *supra* note 3, at 1449 & nn.46 & 49.

Lack of standards has led some advocates of the equal protection approach to nomination reform to argue for a host of state and federal laws establishing standards. *E.g.*, Note, *supra* note 4, at 482-95. They concede that the passage of such legislation is unlikely, but then seem to ignore the problem that the courts will have to establish standards if equal protection is to yield any results. *Id.* at 496.

27 Cases cited in note 19 *supra*.

28 The determination of whether equal protection will apply to the internal affairs of a political party may depend on how successful the parties are at reforming themselves: "I would not consider intervention by this Court into so delicate a field if there were any other relief available to the people . . . ." Baker v. Carr, 369 U.S. 186, 258 (1962) (Clark, J., concurring).

29 State *ex rel.* Shepard v. Superior Court, 60 Wash. 370, 382, 111 P. 233, 238 (1910) ("Political parties being neither mentioned, protected, nor favored in the constitution . . . ."); G. Abernathy, The Right of Assembly and Association 191 (1961); D. Fellman, The Constitutional Right of Association 38 (1963); Mitau, *Judicial Determination of Political Party Organizational Autonomy*, 42 Minn. L. Rev. 245 (1957). For a

Sons of Liberty and the Committees of Correspondence.[30] Although Madison, the principal author of the Bill of Rights, condemned the spirit of "faction" in *The Federalist No. 10*, he concluded that it could not be eliminated without destroying liberty.[31] In 1794, when Congress sought to condemn the forerunners of modern political parties for organizing the Whiskey Rebellion, Madison led the successful opposition, arguing that regulation of political associations was beyond Congress's power.[32]

Noting this background, courts early proclaimed the inviolability of an individual's rights to organize, join, and manage a political party.[33] Some courts found these rights to be corollaries of the right of suffrage,[34] while others found them inherent in the constitutional rights of assembly and petition.[35] Still others viewed these rights as basic to a free people.[36] A few courts even adopted the position that political parties had certain inherent and inviolable rights separate and distinct from their members.[37]

The preferred position of political parties in the law was so firmly established by the end of the nineteenth century that state attempts to establish a mandatory party structure or an open nominating procedure were regularly struck down as invasions of the party's right to regulate its internal affairs.[38] During the progressive era, however, legislative pressure for reform of political parties mounted, and the courts began to focus on the reasonableness of regulations.[39] Soon thereafter,

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thorough, if somewhat outdated, compilation of state constitutional provisions dealing with political parties, see Starr, *supra* note 11, at 441-42.

30 Schlesinger, *Biography of a Nation of Joiners*, 50 AM. HIST. REV. 1, 4-5 (1944).

31 THE FEDERALIST No. 10, at 105-06 (J. Hamilton ed. 1865) (J. Madison).

32 *See* R. HORN, GROUPS AND THE CONSTITUTION 17-18 (1956); E. LINK, DEMOCRATIC-REPUBLICAN SOCIETIES, 1790-1800, at 205 (1942).

33 G. ABERNATHY, *supra* note 29, at 173, 191; D. FELLMAN, *supra* note 29, at 38-39; C. RICE, FREEDOM OF ASSOCIATION 100-01 (1962); Rice, *The Constitutional Right of Association*, 16 HASTINGS L.J. 491, 500 (1965); Starr, *supra* note 11, at 444-45.

The chronological inconsistency between the historical outline presented in the text accompanying notes 34-41 *infra* and the case dates may be explained by noting that courts of different states were at similar phases of historical development at different times.

34 *See, e.g.*, Sarlls v. State *ex rel.* Trimble, 210 Ind. 88, 166 N.E. 270 (1929); *Ex parte* Wilson, 7 Okla. Crim. 610, 125 P. 739 (1912); State *ex rel.* McGrael v. Phelps, 144 Wis. 1, 128 N.W. 1041 (1910).

35 *See, e.g.*, Britton v. Board of Election Comm'rs, 129 Cal. 337, 61 P. 1115 (1900); Riter v. Douglass, 32 Nev. 400, 109 P. 444 (1910).

36 *See, e.g.*, Davidson v. Hanson, 87 Minn. 211, 92 N.W. 93 (1902).

37 *See, e.g.*, Whipple v. Broad, 25 Colo. 407, 55 P. 172 (1898). *See also* Friedman, *Reflections upon the Law of Political Parties*, 44 CALIF. L. REV. 65, 65-68 (1956).

38 *E.g.*, Britton v. Board of Election Comm'rs, 129 Cal. 337, 61 P. 1115 (1900).

39 *E.g.*, State *ex rel.* Plimmer v. Poston, 58 Ohio St. 620, 51 N.E. 150 (1898). (require-

confronted by evidence of widespread political corruption, they capitulated and allowed almost any statutory regulation in the interest of "purifying" the electoral process.[40] Today the issue most frequently presented seems to be whether the legislature has chosen to regulate the party, not whether it has the power to do so.[41]

While the erosion of the preferred position of political parties was being completed, a more general concept of freedom of association, rooted in the first amendment, began to appear in judicial opinions. Although it has developed most fully as a protection for pressure groups such as the NAACP,[42] freedom of association includes the right to join and manage a political party.[43] Recent Supreme Court cases on freedom of association dealing specifically with political parties may help to establish criteria for testing the constitutionality of state laws concerning delegate selection.

The Communist Party cases, for example, point out that this freedom is not in any sense absolute. In *Gerende v. Board of Supervisors of Elections*,[44] the Supreme Court upheld a Maryland statute that excluded from the ballot candidates who refused to take an oath against forcible or violent overthrow of the government and knowing

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ment of one percent of previous total vote not unreasonable for ballot position for party candidate); DeWalt v. Bartley, 146 Pa. 529, 24 A. 185 (1892) (three percent requirement for other than regular nominees not unreasonable); Ransom v. Black, 54 N.J.L. 446, 24 A. 489 (1892) (five percent requirement not unreasonable); *see* Starr, *supra* note 11, at 446; Note, *Limitations on Access to the General Election Ballot*, 37 COLUM. L. REV. 86, 90 (1937).

40 *E.g.*, State *ex rel.* Nordin v. Erickson, 119 Minn. 152, 156, 137 N.W. 385, 386 (1912) (regulation upheld as "necessary to secure a pure and orderly election . . . [free from] unfair combinations, undue influence, and coercion . . . ."); 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 . . . ."); *see* R. HORN, *supra* note 32, at 96; Mitau, *The Status of Political Party Organization in Minnesota Law*, 40 MINN. L. REV. 561, 576-78 (1956).

41 *E.g.*, Alexander v. Booth, 56 So. 2d 716 (Fla. 1952); Democratic-Farmer-Labor State Cent. Comm. v. Holm, 227 Minn. 52, 33 N.W.2d 831 (1948); Leichter v. Prendergast, 32 Misc. 2d 234, 223 N.Y.S.2d 789 (Sup. Ct. 1961); Carter v. Tomlinson, 149 Tex. 7, 227 S.W.2d 795 (1950).

42 It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the "liberty" assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech.

NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460 (1958). *See* H. KALVEN, JR., THE NEGRO AND THE FIRST AMENDMENT 65-121 (1965).

43 Cases discussed at text accompanying notes 44-68 *infra*.

44 341 U.S. 56 (1951).

membership in organizations advocating such activity. In *Scales v. United States*,[45] the Court held that criminal prosecution for knowing membership in the Communist Party was constitutionally valid, for it "does not cut deeper into the freedom of association than is necessary to deal with the 'substantive evils that Congress has a right to prevent.' "[46]

The legislative power to limit individual political activity and to restrict potential sources of financial contributions open to political parties was challenged in two labor relations cases. *United Public Workers v. Mitchell*[47] upheld the Hatch Act prohibition of all partisan political activity by federal civil service employees.[48] The Court found that the individual's freedom of political association was protected somewhere in the first, ninth, or tenth amendments,[49] but then applied a balancing test and found that the government's legitimate interest in maintaining an efficient bureaucracy justified the limitations.[50] Justices Black and Douglas, in dissent, however, pointed out that the issue rested solely on the first amendment.[51]

United States v. CIO[52] involved the constitutionality of the Taft-Hartley amendment to the Federal Corrupt Practices Act, forbidding political contributions and expenditures by labor unions,[53] which the defendants argued violated the first, ninth, and tenth amendments.[54] The district court found that the law unjustifiably abridged first amendment freedoms,[55] but the Supreme Court construed the claimed violation out of the statute.[56] A concurring opinion by Justice Rut-

45 367 U.S. 203 (1961).

46 *Id.* at 229, *quoting* Schenck v. United States, 249 U.S. 47, 52 (1919). *Accord*, Communist Party of the United States v. Subversive Activities Control Bd., 367 U.S. 1, 90-91 (1961) (on balance of "constitutionally protected right of association" against "value to the public of the ends which the regulation may achieve," registration and disclosure provisions of Internal Security Act of 1950, 50 U.S.C. §§ 784-87 (1964), held valid); Communist Party of the United States v. Peek, 20 Cal. 2d 536, 551, 127 P.2d 889, 898 (1942) (law in question void for vagueness, but state has the power to exclude political parties advocating the unlawful overthrow of the government from ballot position).

47 330 U.S. 75 (1947).

48 18 U.S.C. § 595 (1964).

49 330 U.S. at 95.

50 *Id.* at 96-104.

51 *Id.* at 110-11, 124-26.

52 335 U.S. 106 (1948).

53 Labor-Management Relations Act (Taft-Hartley Act), ch. 120, § 304, 61 Stat. 159 (1947), *amending* Federal Corrupt Practices Act of 1925, ch. 368, § 313, 43 Stat. 1074 (repealed 1948).

54 335 U.S. at 109.

55 *Id.*

56 *Id.* at 110-24. The Court determined that the placing of a political advertisement by the union in a union newspaper was not an "expenditure" prohibited by the Act.

ledge, in which three other members of the Court joined, concluded, however, that the law was an unconstitutional restriction of associational rights protected by the first amendment, particularly freedom of assembly.[57] Rutledge asserted that both the objectives of the law and the means it adopted to obtain them were relevant in determining its constitutionality. One objective of this law was to reduce the influence of unions on the electoral process. This, Rutledge indicated, was an illegitimate objective for government; *i.e.*, if the law sought to accomplish nothing else it would fail as an unjustifiable infringement on the association's right to participate in the political process and express the collective opinion of its members.[58] A second objective of the statute was to protect union members from being forced to support political activities they opposed. Although conceding that protecting an individual's right to dissent was a legitimate government objective, Rutledge pointed out that less drastic means were available for achieving it.[59]

The most recent Court pronouncements on the law of political association grew out of the 1968 third party campaign of George Wallace. *Williams v. Rhodes*[60] represents the successful culmination of Wallace's efforts to have the American Independent Party qualified on the ballot in all fifty states. At issue were Ohio election laws for qualifying new political parties for ballot positions, which required the maintenance of an elaborate party structure and the filing of petitions signed by fifteen percent of the electorate nine months before the election.[61] The Court, finding the political question doctrine inapplicable, held that the state's power to designate presidential electors[62] was subject to the limitations on state action imposed by the equal protection clause of the fourteenth amendment.[63] The Court then jumped from

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57 *Id.* at 143-44, 153.

58 *Id.* at 143-45.

59 If merely "minority or dissenter protection" were intended, it would be sufficient for securing this to permit the dissenting members to carry the burden of making known their position and to relieve them of any duty to pay dues or portions of them to be applied to the forbidden uses without jeopardy to their rights as members.

Id. at 149. *See also* R. HORN, *supra* note 32, at 114-17. For a discussion of freedom of association in other labor cases, see Comment, *Freedom from Political Association: The Street and Lathrop Decisions*, 56 NW. U.L. REV. 777 (1962).

60 393 U.S. 23 (1968).

61 *Id.* at 25 n.1. One of Ohio's requirements for access to the ballot as a political party was that the party elect delegates and alternates to a national convention in the state primary. *Id.*

62 U.S. CONST. art. II, § 1.

63 393 U.S. at 29.

equal protection to freedom of association as protected by the first and fourteenth amendments, and, balancing freedom of association against a "compelling state interest," concluded that "the totality of the Ohio restrictive laws taken as a whole imposes a burden on voting and associational rights which we hold to be an invidious discrimination in violation of the Equal Protection Clause."[64]

This opinion at least indicates that its strict-constructionist author, Justice Black, agreed that political parties may be protected from state regulation by the first amendment guarantee of freedom of association. Furthermore, two concurring opinions considered the relevant issue to be freedom of association as controlled by the first amendment.[65]

It appears from these cases that political parties are protected against statutory regulation of their affairs by a constitutional right of freedom of association. Included in this right is the freedom of individuals "to engage in association for the advancement of beliefs and

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64 *Id.* at 30-34. Justice Black, the author of the majority opinion, has never fully accepted a constitutional right of freedom of association as part of the first amendment. Emerson, *Freedom of Association and Freedom of Expression*, 74 YALE L.J. 1, 14-15 (1964). It is quite unlikely, therefore, that the champion of the absolutists was adopting a balancing approach to the first amendment. Instead, he seemed to be saying that the right of freedom of association could be defined by the use of the Court's balancing test and that it was Ohio's unequal distribution of this quasi-first amendment right to Republicans and Democrats but not to Wallace supporters that was "invidious discrimination" in violation of the equal protection clause. *Cf.* 30 OHIO ST. L.J. 203, 207-09 (1969).

65 The First Amendment, made applicable to the States by reason of the Fourteenth Amendment, lies at the root of these cases. The right of association is one form of "orderly group activity" . . . protected by the First Amendment.

393 U.S. at 38 (Douglas, J., concurring), *quoting* NAACP v. Button, 371 U.S. 415, 430 (1963).

I would rest this decision entirely on the proposition that Ohio's statutory scheme violates the basic right of political association assured by the First Amendment which is protected against state infringement under the Due Process Clause of the Fourteenth Amendment.

393 U.S. at 41 (Harlan, J., concurring).

Douglas went on to adopt the absolutist approach to this first amendment right, stating that "the men who drafted our Bill of Rights did all the 'balancing' that was to be done in this field." *Id.* at 40, *citing* Konigsberg v. State Bar, 366 U.S. 36, 61 (1961) (Black, J., dissenting).

Harlan accepted the results of the Court's "compelling state interest" balance and pointed out that even if the state had a substantial interest in maintaining majority rather than plurality government, a "substantial variety of less restrictive alternatives" than institutionalizing a two-party system were available. 393 U.S. at 46 n.8.

In dissent, Justice Stewart applied the compelling state interest standard, but he concluded that the state's interest was rather substantial and the infringement of associational rights rather insignificant. *Id.* at 60. Chief Justice Warren and Justice White also dissented, the Chief Justice pointing to the lack of time for adequate deliberation: "I think it is fair to say that the ramifications of our decision today may be comparable to those of Baker v. Carr, . . . a case we deliberated for nearly a year." *Id.* at 63.

ideas"[66] and its corollary, the freedom of associations to express their "bloc sentiment"[67] and regulate their internal affairs. At the same time, it is clear that this right is not absolute but subject to reasonable regulation and limitation by government. The reasonableness of such regulation is judicially determined by a first amendment balancing test, in which such terms as "compelling interests," "too broadly drawn," "overbreadth," and "less drastic means" become relevant.[68]

The cases imply that the constitutionality of statutory infringements on freedom of political association may be determined by a three-step inquiry. First, it must be asked whether the state's interests in the regulation are legitimate, or, in other words, whether they are interests that government may pursue. If they are not, as, for example, a state's interests in disenfranchising a racial minority are not, the inquiry ends and the law is clearly unconstitutional. If the state's interests are legitimate, then it must be determined whether they are "compelling" or "substantial" when weighed against the infringement of associational freedoms that they cause. This is the most difficult part of the test to apply, and it is here that precedent affords the least guidance. Each regulation must be judged on its own facts and surrounding circumstances; in *Mitchell* the government's interest in a non-political bureaucracy was sufficiently substantial, while in *Williams* the state's interests in shortening the ballot and assuring majority rule were not. Finally, if these two obstacles are overcome, the alternatives available to the state must be considered. If the government's legitimate and compelling interests might be served by a narrower infringement of the freedom of political association, the law must fail. Although the Court has never explicitly outlined such steps in its decision-making process, those cases on freedom of association involving political parties indicate that such a test will be useful in determining the constitutionality of state laws that regulate political activity.

CONCLUSION

Thirty-six states have laws affecting the selection of delegates to the national nominating conventions of political parties.[69] These laws

66 393 U.S. at 38 (Douglas, J., concurring), *quoting* NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460 (1958).

67 United States v. CIO, 335 U.S. 106, 143 (1948) (Rutledge, J., concurring).

68 For two recent compilations of the various balancing standards used in freedom of association cases, see Note, *Judicial Rewriting of Overbroad Statutes: Protecting the Freedom of Association from Scales to Robel*, 57 CALIF. L. REV. 240 (1969); Note, *Less Drastic Means and the First Amendment*, 78 YALE L.J. 464 (1969).

69 Binkerd, *Summary* to NATIONAL MUNICIPAL LEAGUE, *supra* note 2, at 1.

determine with varying degrees of precision how the party delegates are chosen,[70] and it is probably fair to assume that they are in large measure responsible for the undemocratic procedures that prevail.[71] Even in states that require some or all delegates to be directly elected, the existing laws may impede an effective popular choice by preventing the delegates' presidential candidate preference from appearing on the ballot.[72] Where the delegates must be chosen by a state convention or party executive committee, the laws may require this body to be elected as much as two years before the national convention.[73] The statutes frequently require that delegates be selected indirectly by a process three or four steps removed from popular control.[74]

To test the constitutionality of these laws would require that each one be examined separately. It is clear, however, that few, if any, would be able to withstand an attack based on freedom of political association by a party seeking to democratize itself.[75] It is difficult to conceive of a legitimate state interest, for example, in preventing the candidate preference of delegates from appearing on the ballot or requiring that delegates be chosen by a party committee elected two years before the national convention.[76] It seems that the state's interest in an orderly selection procedure could be adequately served by allowing the parties to select delegates in a primary rather than at a series of caucuses and conventions.[77]

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70 All delegates to the national conventions are selected by direct election in only 10 states. In four states the district delegates are elected directly but the at-large delegates are chosen by the state party executive committee or convention. In the remaining 36 states, delegates are selected by state committees or conventions, local caucuses, or some combination of the two. *Id.*; *see* Note, *supra* note 4, at 487-88.

71 *See* Schmidt & Whalen, *supra* note 3, at 1447.

72 *See, e.g.*, N.Y. ELECTION LAW § 108 (McKinney 1964) (form of ballot).

73 *See* A. BICKEL, *supra* note 1, at 24; note 8 *supra*.

74 For example, in Texas all party members may participate in precinct caucuses. The precinct caucus elects one delegate to the county convention for every 25 votes cast in the precinct for the party's gubernatorial nominee in the last election. The county convention elects one delegate to the state convention for every 300 to 600 votes cast in the county in the last election for the gubernatorial nominee, and the state convention elects the delegates to the national convention. TEX. ELECTION CODE ANN. art. 13.34 (Supp. 1970). *See also* COLO. REV. STAT. ANN. § 49-6-5 (1965).

75 One of the inherent advantages in the balancing test from the reformers' point of view is that it frees a party seeking to democratize itself from the restrictions imposed by state law but does not free a party establishment trying to make its internal procedure less democratic. A state may have a legitimate and compelling interest in ensuring that the parties are representative of the people, and it is probably justified in establishing a base of democratic participation below which the parties may not go.

76 *Cf.* Williams v. Rhodes, 393 U.S. 23 (1968); Communist Party of the United States v. Peek, 20 Cal. 2d 526, 553-54, 127 P.2d 889, 899-900 (1942) (requirement that a new party demonstrate popular support two years before election to obtain ballot position held constitutionally invalid).

77 The state's interest would be especially insignificant if the parties financed the

The significance of the minority report of the Rules Committee adopted by the 1968 Democratic National Convention lies in its rejection of the idea that the manner of selecting delegates must be left to state parties and legislatures.[78] The Commission on Party Structure and Delegate Selection should not establish non-conforming state laws as an excuse for non-compliance with the report until those laws have been judicially weighed against the freedom of association.

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primary election themselves as they normally do in a number of states. *See, e.g.*, S.C. CODE ANN. § 23-449.10 (1962); *cf.* MD. ANN. CODE art. 33, § 72(b) (1957). *See also* Bunting v. Board of Canvassers & Registration, 90 R.I. 63, 153 A.2d 560 (1958) (state law so construed that party may disregard established primary procedure and choose its nominees as it wisbes).

78 Schmidt & Whalen, *supra* note 3, at 1456.