Adjudicating National Convention Delegate Selection Disputes: Prospects for the Development of Democratic Party Law

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[T]he national convention is part and parcel of the magic by which men rule. It is a great ceremony symbolizing an expression of the will of the mass of party membership. . . . That the convention may not, in fact, constitute a precision instrument for gauging and expressing the “will” of the rank and file of the party is, in one sense, immaterial. It works; it arrives at acceptable decisions, at least most of the time.1

The Guidelines we have adopted are designed to open the door to all Democrats who seek a voice in their Party’s most important decision: the choice of its presidential nominee . . . . We believe that popular control of the Democratic Party is necessary for its survival.2

If the qualifications and eligibility of delegates to 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”. . . . Such a regime could seriously undercut or indeed destroy the effectiveness of the National Party Convention as a concerted enterprise engaged in the vital process of choosing Presidential and Vice-Presidential candidates—a process which usually involves coalitions cutting across state lines. The Convention serves the pervasive national interest in the selection of candidates for national office, and this national interest is greater than any interest of an individual State.3

Two weeks before the 1972 Democratic National Convention assembled in Miami, Florida, the Convention Credentials Committee had before it 82 challenges from 31 delegations. Twenty-three chal-

4. Of the People, Report of the Credentials Committee to the 1972 Democratic National Convention (1972) [hereinafter cited as Of the People]. Credentials challenge procedures were governed by detailed quasi-judicial rules, including notice of intent to challenge, answer, appointment of a hearing officer, hearings, filing of findings of fact to be submitted to the Committee no later than 32 days before the Convention opened, filing of exceptions to the hearing officer’s rulings, consideration by the Credentials Committee not later than 2 weeks before the Convention, and preparation and distribution of the Committee’s report up to 48 hours before the Convention. Concurrence of 10 percent of the Committee members was required to submit a minority report to the plenary Convention. Challenges unresolved by the Committee went to the Convention for final resolution. See The Official Call for the 1972 Democratic Convention 16-24 (1971) [hereinafter cited as 1972 Call].
Delegates from fifteen states, unresolved by the Committee, were settled on the floor of the convention itself. Since final resolution of credentials disputes could determine the choice of the party's presidential nominee, the stakes were high and power politics prevailed over any thought of dispassionate deliberation.

The proliferation of challenges was attributable to the development of an elaborate set of party rules implementing a 1968 Convention mandate. That mandate called for reform of convention delegate selection procedures and required state Democratic parties to give all Democratic voters a full, meaningful, and timely opportunity to participate in the selection of delegates. Implementation of the mandate produced guidelines designed to remedy circumstances in which meaningful participation of Democratic voters in the choice of their presidential nominee was "often difficult or costly, sometimes completely illusory, and, in not a few instances, impossible." By committing itself through an enactment of the 1968 Convention to a national party policy assuring that delegate selection processes would be democratized, the national party assumed unprecedented control over state party practices.

5. See R. Bain and J. Parris, Convention Decisions and Voting Records 332 (1973) [hereinafter cited as Bain and Parris].

6. Reviewing credentials contests several weeks after the Convention, the National Party Chairman remarked, "Everyone can agree on rhetoric and words when you get to a thing like the platform. But when you're talking about credentials—credentials mean cold stiff votes, and that's real power." T. White, The Making of the President 1972 161 (1973).


8. Mandate for Reform, supra note 2, at 10. The Commission on Party Structure and Delegate Selection [hereinafter referred to as 1969 Commission] was appointed in 1969 by the Chairman of the Democratic National Committee to implement the 1968 Convention mandate. The Commission included public office-holders, party officials, labor leaders, and civil rights organizers, among others. Implementation of the guidelines recommended by the Commission was to be a joint effort of the state and national party. Id. at 15-16. In April, 1970, the Democratic National Committee adopted the guidelines as the standards with which state parties, in qualifying and certifying delegates to the 1972 Convention, were required to make all efforts to comply. 1972 Call, supra note 4, at 12.

9. Since its inception, the national convention has been the policy-making body of our political parties. The adoption and implementation of national standards for delegate selection was in itself an expression of party policy. See Bain and Parris, supra note 5, at 1-3. In December 1974, a charter was adopted at Kansas City, Mo. by the Conference on Democratic Policy and Organization which had been charged with that responsibility by the 1972 Convention. Art. 2, § 2 states:

The National Convention shall be the highest authority of the Democratic Party, subject to the provisions of this Charter. The National Convention shall recognize the state and other Parties entitled to participate in the conduct of the national affairs of the Democratic Party, including its convention, conferences, and committees.
THE NATURE OF THE CONFLICTS

Methods of selecting delegates to national party nominating conventions reflect the federal character of our national government. State delegate selection systems have been as varied as the local practices and customs which created them. The national party guidelines generated by the 1968 Convention mandate for reform of delegate selection superimposed on state party procedures minimum standards of fairness which state parties were expected to meet. Even though the guidelines were viewed as binding on state parties, the Commission on Party Structure and Delegate Selection lacked direct enforcement powers. However, the guidelines' status as party law derived from the Commission's posture as the agent of the 1968 Convention and from the power of the 1972 Credentials Committee to recommend sanctions for non-compliance with those rules. Significantly, since there was no mechanism for monitoring compliance with the rules before the delegate selection process began, they were enforced through credentials challenges and the party's ultimate sanction of refusing to seat non-complying delegates at the national convention.

The stage was thus set for inevitable clashes between the national rules and delegates selected according to state law or state party custom found to violate those rules. Resolution of these conflicts in 1972 raised legal questions concerning the relationship between the national party and state parties, culminating in the United States Supreme Court ruling that when the qualifications of delegates to be seated at a national nominating convention are at issue, national party rules will supersede state law:

If the qualifications and eligibility of delegates to National Political Party Conventions were left to state law each of the fifty states could establish the qualifications of its delegates to the various

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10. MANDATE FOR REFORM, supra note 2, at 17-20.
11. See note 8 supra.
12. Id.
13. The Credentials Committee was empowered by the Democratic National Committee, which in turn derived its authority from the preceding convention, to determine and resolve questions concerning the seating of delegates; it reported its findings to the 1972 Convention for final resolution. 1972 CALL, supra note 4, at 13.
14. MANDATE FOR REFORM, supra note 2, at 36-37.
party conventions without regard to party policy, an obviously intolerable result.\textsuperscript{16}

A system of party law is now evolving which will be based on the Party Charter and the by-laws adopted pursuant to that Charter.\textsuperscript{17} This unique attempt to submit a political party to the governance of law has accelerated the interaction of constitutional, legal, and policy considerations. This article will examine that interaction through analysis of real and potential conflicts between the associational rights of the party and other constitutional rights which party rules and their enforcement may invade; and of clashes between national party rules and state law or state party custom. Settlement of disputes arising from these conflicts brings into focus the tensions inherent in the party's dual role as consensus-builder among its constituent groups and as adjudicator of delegate selection disputes. The article is premised on the proposition that national political parties should be allowed to perform their vital functions of compromising interests, reconciling differences and choosing presidential nominees free from judicial intervention. The proper sphere for resolution of intra-party disputes is not the courtroom but party procedures providing for impartial adjudication based on known rules promulgated in advance by the national party.

\textbf{The Constitutional Framework:}

\textit{The National Nominating Convention}

The national nominating convention developed extra-constitutionally and extra-legally to fill a void in our governmental system, providing a means for uniting widely scattered points of political leadership in support of candidates for the Presidency. Entirely the product of custom, the convention system developed from two earlier methods of choosing a President: before the rise of political parties, the nomination and election procedures were

\textsuperscript{16} Cousins v. Wigoda, 419 U.S. 477, 490 (1975). This decision emerged from the most celebrated of the 1972 credentials contests, involving the unseating of 59 delegates from Illinois, including Mayor Richard Daley of Chicago. It was determined by the hearing officer, the Credentials Committee, and the Convention that the delegates had failed to comply with certain party rules. \textit{Id.} at 477-83.

\textsuperscript{17} The Delegate Selection Rules incorporated into the Call for the 1976 Convention will govern until the 1976 Convention adjourns. The Charter may be amended by vote of a majority of the delegates to the national convention or by vote of two-thirds of the members of the Democratic National Committee. See Resolution of Adoption and Implementation, and art. 12, sec. 1, \textit{Party Charter}, \textit{supra} note 9. The by-laws are designed to fill in the gaps where the Charter is not explicit and can be amended by a majority vote of the National Convention or of the Democratic National Committee. \textit{By-Laws of the Democratic Party of the United States}, adopted by the Democratic National Committee, October 14, 1975 [hereinafter cited as \textit{Party By-Laws}].
merged in the electoral college. The electors were to meet in their respective states and vote for the President by ballots which were forwarded to the national government. When constitutional provisions proved inadequate, they were supplemented by the use of congressional caucuses to nominate presidential candidates. By 1832 public national conventions nominated the presidential and vice-presidential candidates of both political parties. While evolution was in the direction of popular participation in the process of selecting delegates, the convention also became a mechanism through which widely dispersed party leaders could negotiate and compromise on a presidential choice. However, the Constitution expressly provided for neither popular election of presidential electors nor control of presidential nominations by political parties.

The States’ Role in Nominating and Electing the President

Although the Constitution is silent on a method of nominating presidential candidates, article II, section 1 gives to the state legislatures the power to direct the manner of selecting presidential electors. The twelfth amendment prescribes the process by which these electors shall meet to choose the President and Vice-President in their respective states, but state legislatures retain exclusive power to direct the manner in which these electors shall be selected.

While the constitutional mandate of the states in the selection of presidential electors is clear, the states’ role in the presidential nominating process is not. Pervasive state regulation of the electoral

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18. U.S. Const. art. II, § 1 provides that:

Each State shall appoint, in such Manner as the Legislature thereof may direct,
a Number of Electors, equal to the whole Number of Senators and Representatives
to which the State may be entitled in the Congress . . .

The Electors shall meet in their respective States, and vote by Ballot for two
Persons of whom one at least shall not be an Inhabitant of the same State with
themselves. . .

This system was defended by Alexander Hamilton in The Federalist, No. 68, on the theory that the selection of the President should be by a small number of persons “most capable of analyzing the qualities adapted to the station, and acting under circumstances favourable to deliberation . . .” Wesleyan University Press, 1961 at 458.


20. Id.

21. U.S. Const. amend. XII.

22. See McPherson v. Blacker, 146 U.S. 1 (1892). The Supreme Court analyzed the methods by which the states choose presidential electors and concluded that the legislative history of art. II, sec. 1 indicated that state power was intended to be broad. The state legislatures could “appoint” electors directly or through popular election or “as otherwise might be directed.” Id. at 28.
process has been justified by state interests in protecting the integrity of elections, in guaranteeing state citizens the right of effective suffrage, and in facilitating the election of public officials. Although this power of the states to regulate voting procedures is beyond dispute, it must be exercised within constitutional limitations.

Delegates to national nominating conventions are currently selected from the individual states. However, there appears to be no constitutional impediment to restructuring the presidential nominating system. The Supreme Court in Cousins v. Wigoda supported this proposition: "[t]he States themselves have no constitutionally mandated role in the great task of the selection of Presidential and Vice-Presidential candidates." The Court, however, distinguished between the interests of a state in the regulation of elections for public office and the interest of a state in regulation of the process by which delegates are selected to a national party nominating convention. Even though in Cousins the challenged delegates were chosen in a state primary election, the Court viewed the state interest as less compelling than the right of a political party to be free to make and enforce its own rules for the selection of national convention delegates. The importance of the task performed by such delegates, the Court reasoned, and "the special function of delegates to such a Convention militate[d] persuasively against the conclusion that the asserted interest constitute[d] a compelling state interest."

While concurring with the majority that the state interest in protecting its electoral processes for primary delegate selection was insufficient to overcome the constitutional right of a political party to set its own standards for selecting convention delegates, Mr. Justice Rehnquist refused to downplay the legitimacy of the state inter-

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23. See Key, supra note 19, at 617-22 for the principal types of state regulation.
27. Id. at 489-90.
28. Id. at 489.
He inferred that the states might have residual constitutional authority, presumably under the tenth amendment, to regulate the process by which presidential candidates are nominated. Such a reservation of state regulatory rights, however, would seem inconsistent with the fact that parties have historically been free to adopt alternative mechanisms for making presidential nominations in which the states had no role. Furthermore, proposals repeatedly appear to nominate presidential candidates by regional or national primaries in which the states would not be an electoral unit at all. Although the applicability of state law to the regulation of the manner of selecting delegates is not disputed when a party chooses to use state election machinery, that authority does not extend to determining the eligibility or qualifications of delegates to be seated at a convention. Rather, the decision to adopt and enforce national standards for delegate selection is solely a matter of party policy, arrived at within the political process and constitutionally protected through freedom to associate for the advancement of shared political goals.

**Freedom of Association and Political Party Activity**

Freedom to associate with others for the common advancement of political beliefs is a right firmly grounded in the first and fourteenth amendments. It is viewed as a fundamental right protected from encroachment by federal and state governments. Since the effective operation of democratic government is built on the premise that its citizens should be free to express their political beliefs through association with a political party, any interference with a

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29. *Id.* at 492 (Chief Justice Burger and Mr. Justice Stewart joined in this concurring opinion).
30. U.S. Const. amend. X states that: powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the States respectively, or to the people.
31. See notes 18-19 *supra* and accompanying text. See also *David, Goldman, Bain,* supra note 19, at xiii; *Key,* supra note 19, at 412; Blumstein, *Party Reform, the Winner-Take-All Primary, and the California Delegate Challenge: The Gold Rush Revisited,* 25 Vand. L. Rev. 975, 988 (1972) for the view that parties have chosen to focus their procedures for the selection of delegates to national conventions on the states only for reasons of convenience; that if the national parties should choose some other geographical unit for purposes of delegate selection, the Constitution would not impede them.
34. See notes 35 through 38 *infra* and accompanying text. See also Cousins v. Wigoda, 419 U.S. 477, 487, 496 (Rehnquist, J., concurring).
political party's freedom is an interference with the freedom of its adherents.\textsuperscript{34} Freedom to advance shared political principles implies the right to effectuate those principles within the confines of the Constitution. A party, for example, may require candidates for Presidential Elector to pledge to support the nominees of the Party's national convention; such a pledge is a legitimate method of "securing party candidates in the general election, pledged to the philosophy and leadership of that party."\textsuperscript{37} Similarly, a political party may adopt rules for its own governance and standards for the selection of delegates to its national convention to effectuate national party philosophy substantially free from governmental intrusions.

Although freedom of parties to adopt and act upon common principles and policies is broad, it is not absolute.\textsuperscript{38} It may conflict with legitimate state regulation of electoral procedures or it may be subject to restraint when party activity is shown to infringe other constitutional rights. Thus, while the power of a state to regulate political party activity is limited by first amendment associational rights, freedom to associate in pursuit of common beliefs may under certain circumstances be limited in turn by the constitutional rights of individual voters.

**CONSTITUTIONAL LIMITS ON POLITICAL PARTIES**

**State Primary Elections**

The courts have traditionally been reluctant to intervene in "[v]ital rights of association guaranteed by the Constitution."\textsuperscript{39} This non-intervention policy has been abandoned, however, in special cases when state parties have been found to be involved in racial discrimination. In the White Primary Cases of the 1940's and 1950's,\textsuperscript{40} the Supreme Court dealt with racially discriminatory practices of state political groups. It examined the relationship between official state action and practices alleged to violate the fifteenth amendment.\textsuperscript{41} In one instance, the Court found that even though the

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\item \textsuperscript{34} Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957).
\item \textsuperscript{37} Ray v. Blair, 343 U.S. 214, 227 (1952).
\item \textsuperscript{38} See Note, Freedom of Association and the Selection of Delegates to National Political Conventions, 56 CORNELL L. REV. 148 (1970).
\item \textsuperscript{40} Terry v. Adams, 345 U.S. 461 (1953); Smith v. Allwright, 321 U.S. 649 (1944).
\item \textsuperscript{41} U.S. CONST. amend. XV, § 1 provides:
\begin{quote}
The right 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.
\end{quote}
nominees for the general election were selected by state party convention, state regulation of the process made the party an agency of the state for purposes of the primary.\textsuperscript{42} In another case, the Court found state action in the exclusion of blacks from the pre-primary elections of an organization of all white voters conducted as if it were a political party.\textsuperscript{43} The organization's candidates had consistently run unopposed in the Democratic primary and the general election. Therefore, victory in the pre-primary election was tantamount to election to office. In finding that the fifteenth amendment had been violated, the Court noted that the very purpose of the association's primary was to exclude blacks from participating in the state primary.

The White Primary Cases, however, should not necessarily be read to imply a general principle that any action of a political party is governmental action, subjecting the party activity to federal constitutional scrutiny by courts.\textsuperscript{44} Since the prohibitions of the fourteenth and fifteenth amendments apply only to governmental acts, the crucial inquiry must be to what extent the allegedly unconstitutional party activity is related to powers traditionally exercised by the state or federal government. Since the White Primary Cases were concerned with application of the fifteenth amendment only, it is necessary to look beyond invidious discrimination in state primaries to other party activities which might be restrained by the fourteenth amendment. Whether the court will intervene in disputes involving national convention delegate selection will depend upon whether that process is viewed as governmental action or as the activity of a private association, protected from governmental intrusions.

\textbf{What Action Is State Action?}

The current state of the law in this area is uncertain. Decisions of the federal circuit courts differ, and the Supreme Court has not yet directly addressed the issue of whether national political party activity qualifies as governmental action. The United States Court of Appeals for the Eighth Circuit, in \textit{Irish v. Democratic-Farmer-}

\textsuperscript{42} Smith v. Allwright, 321 U.S. 649 (1944).
\textsuperscript{43} Terry v. Adams, 345 U.S. 461 (1953). The Court found that
[t]he evil here is that the State, through the action and abdication of those whom it has clothed with authority, has permitted white voters to go through a procedure which predetermines the legally devised primary. \textit{Id.} at 477.
\textsuperscript{44} See Kester, \textit{Constitutional Restrictions on Political Parties}, 60 Va. L. Rev. 735, 755-57 (1974) [hereinafter cited as Kester].
Labor Party of Minnesota," dismisses a complaint of malapportionment of county, district, and state conventions, refusing to interfere with the discretion of the delegates. In Lynch v. Torquato, voters brought suit against a Democratic county committee to require election of the county chairman by popular vote. In dismissing that case, the United States Court of Appeals for the Third Circuit held:

>The citizen’s constitutional right to equality as an elector . . . applies to the choice of those who shall be his elected representative in the conduct of government, not in the internal management of a political party. It is true that this right extends to state regulated and party conducted primaries. However, this is because the function of primaries is to select nominees for governmental office even though, not because, they are party enterprises. . . . [T]he normal role of party leaders in conducting internal affairs of their party, other than primary or general elections, does not make their party offices governmental offices or the filling of these offices state action . . . .

In addition, a United States District Court also declined to intervene in an action brought by members of the Georgia Democratic Party alleging unconstitutional apportionment of the state committee which chose national convention delegates. The court held that it lacked jurisdiction over the internal management of a political party. However, in Maxey v. Washington State Democratic Committee involving the national delegate selection process, the one-person, one-vote principle was held applicable to the selection of delegates to state and national conventions. The court reasoned that the nominating phase of a state-created presidential election process was a critical one, and found that, therefore, the delegate selection process required close constitutional scrutiny.

When the delegate selection process for the 1972 national conventions began, the question of whether national party action was state action had not been settled. The United States Court of Appeals for

45. 399 F.2d 119 (8th Cir. 1968).
46. 343 F.2d 370 (3d Cir. 1965).
47. Id. at 372 (emphasis added). See also Dahl v. Republican State Committee, 319 F. Supp. 682 (W.D. Wash. 1970) (holding that election of state committee members is not an integral part of the state-created process and therefore not subject to equal protection limitations of one-person, one-vote).
49. 319 F. Supp. 673 (W.D. Wash. 1970). The court viewed Smith v. Allwright, 321 U.S. 649 (1944) and Terry v. Adams, 345 U.S. 461 (1953) as dispositive of the issue of state action, even though the facts were clearly distinguishable: no invidious discrimination was involved and the claim related to national convention delegates rather than to the nomination in a state primary of state officials.
the District of Columbia became the focus of national convention credentials disputes, and the court found requisite state action in cases involving the Democratic Party's delegate-allocation formulas.\textsuperscript{50} Citing the White Primary Cases as precedent,\textsuperscript{51} it analyzed the states' role in conducting general elections at which presidential electors are chosen and concluded that party nomination procedures are integrally related to the subsequent general election.\textsuperscript{52} In ruling that national delegate-allocation decisions constitute state action, the court failed to give any weight to the right of a voluntary association to advance its own political interests by utilizing a delegate formula of its choosing.\textsuperscript{53}

The Democratic Party's delegate selection rules were the basis for credentials challenges immediately preceding the 1972 Convention, in which the issue of state action was once again germane. In \textit{Brown v. O'Brien}\textsuperscript{54} the District of Columbia Circuit Court decided that fourteenth amendment claims were applicable to the enforcement of party rules, but it cast little light on state action analysis. The court examined the assertion of unseated delegates from California that they had been denied due process of law by the action of the Convention Credentials Committee,\textsuperscript{55} and concluded without further explanation that the national party's action was state action. It reasoned that since the delegates' expulsion was based on a retroactive application of party rules, the Credentials Committee had acted in violation of fundamental principles of due process. Similarly, in the Illinois dispute,\textsuperscript{56} the court again adopted the reasoning

\textsuperscript{54.} \textit{Brown v. O'Brien}, 469 F.2d 563 (D.C. Cir.), \textit{stay granted} 409 U.S. 1 (1972). The \textit{Brown} case was a consolidation of two suits by ousted California and Illinois delegates.
\textsuperscript{55.} \textit{Id.} at 567. The California plaintiffs were 151 of 271 delegates elected in accordance with state law and with the rules of the California Democratic Party which gave the winner of a plurality of the delegates the state's entire delegation. The Credentials Committee recommended that 151 of those delegates be unseated and that those seats be allocated to the candidates who had together received a total of 56 percent of the vote in the California primary. California had previously received assurances from party officials that the winner-take-all would not violate the party rules for 1972. \textit{See Of The People, supra} note 4, at 31-33.
\textsuperscript{56.} \textit{Brown v. O'Brien}, 469 F.2d 563, 571 (D.C. Cir.), \textit{stay granted}, 409 U.S. 1 (1972). The Illinois plaintiffs, 59 delegates elected according to state law, were judged by the Credentials Committee to have been selected in violation of party rules; the plaintiffs were unseated and replaced by another group of delegates who had not been elected according to state law. \textit{See Of The People, supra} note 4, at 41.
of the White Primary Cases.\textsuperscript{57} It found the process by which candidates for an office are endorsed an integral part of the election itself, and applied that principle to the choosing of convention delegates.\textsuperscript{58} Such a broad analogy to the White Primary Cases ignores the crucial factual distinctions between those cases and the application of fourteenth amendment restraints to the presidential nominating procedures of national political parties.\textsuperscript{59}

The Supreme Court's only articulation of whether constitutional restrictions should be applied in this context was an indirect one.\textsuperscript{60} It may, however, serve as an indication of the Court's probable position on judicial intervention in internal party matters. In staying the decision of the circuit court in \textit{Brown v. O'Brien},\textsuperscript{61} the Court noted an absence of authority supporting the action of the lower court in intervening in the internal determination of a national political party. . . regarding the seating of delegates. . . . [N]o holding of this Court up to now gives support for judicial intervention in the circumstances presented here, involving as they do relationships of great delicacy that are essentially political in nature. . . . Judicial intervention in this area traditionally has been approached with great caution and restraint.\textsuperscript{62}

The Court distinguished the White Primary Cases, noting that the case it was considering was not one arising from invidious racial discrimination in a primary contest within a single state.\textsuperscript{63} While entertaining "grave doubts" as to the action taken by the court of appeals, the Supreme Court was unwilling to undertake final resolution of the constitutional questions presented. Without adequate time for deliberation, the majority did not suggest another test for state action when enforcement of a political party's delegate selection standards is at issue.\textsuperscript{64}

\textsuperscript{57} See notes 40 through 43 \textit{supra} and accompanying text.
\textsuperscript{58} 469 F.2d 563, 572.
\textsuperscript{59} See Kester, \textit{supra} note 44, at 757.
\textsuperscript{61} 469 F.2d 563 (D.C. Cir. 1972).
\textsuperscript{63} \textit{O'Brien v. Brown}, 409 U.S. 1, 4 n.1.
\textsuperscript{64} \textit{Id.} at 5. Mr. Justice Marshall issued a strong dissent, agreeing with the court of appeals that party action was governmental action in the context of a national nominating convention where delegates are elected in a state primary. Arguing that since the state recognizes and adopts the primary results by giving political parties automatic access to the
Although it could be argued that the threshold for finding state action may be lower when party practices are found to involve racial discrimination, no court has expressed a rational basis for making this factor the distinguishing one. When determining the applicability of fourteenth amendment restraints, the critical distinctions between state primary cases and those involving national convention delegate selection lie elsewhere. First, a court should examine the degree to which nominating procedures are equivalent to election to office. It is noteworthy that the White Primary Cases concerned situations in which the significant contest for office occurred in the primary or pre-primary and not in the general election. Voters foreclosed by racial discrimination from participating in the primary were foreclosed from an effective choice in the election, because nomination was, for all practical purposes, equivalent to election. Selection of delegates to a national nominating convention, however, concerns the choice of those who will later choose the party's nominee for President. This initial stage is several steps removed from the actual election of the President.  

Second, the inquiry must be whether there is a sufficiently close relationship between the state or national government and the challenged action of a private association, so that the activity of the latter may fairly be treated as that of the state. Courts have had no difficulty finding state action where a private entity exercises powers "traditionally exclusively reserved to the State."  

The Supreme Court has held, however, that the individual states have no consti-

general election ballot, the primary has been "infused with state action," and the claimants were therefore entitled to judicial resolution of their constitutional claims. Id. at 13. When the Supreme Court later resolved the issue of whether national party rules supersede state law in Cousins v. Wigoda, 419 U.S. 477 (1975), state action was not at issue because the case was before the Court on appeal from a state court injunction still in effect against the challengers. See notes 79 through 83 infra and accompanying text.  

65. See notes 20 through 26 supra and accompanying text. See also Riddell v. National Democratic Party, 344 F. Supp. 908, 923 (S.D. Miss. 1972), in which the court discussed the distinction between the role of the national convention nominating process and the presidential election:

... [The] National Democratic Party being only a political organization and carrying with it only the right and power to select candidates and not the absolute power to elect them, the vast number of individuals who were deprived of the direct voice in nominating a candidate ... are still without right to vote for or reject those individuals selected as candidates for them. ... [T]he national organization takes its political risk ... [T]he uninvited or denied members have their veto voice at the polls, if they are dissatisfied with the choice ...  

66. Jackson v. Metropolitan Edison Co., 419 U.S. 345, 352 (1974). In Jackson, the Court held that where the state has not put its own weight on the side of the proposed practice "by ordering it," private action is not transformed into state action merely because the state regulates the activity involved.
tationally mandated role in the presidential nominating process.\footnote{Cousins v. Wigoda, 419 U.S. 477 (1975).} Since the rules for choosing delegates to serve at national party conventions is protected by first amendment rights of association,\footnote{See notes 35 through 37 supra and accompanying text.} the states’ role, if any, may be abrogated if the parties decide to choose their presidential nominees without utilizing state election machinery.\footnote{See notes 31 and 32 supra and accompanying text.} When, as a convenience, a party makes use of automatic access to the state primary ballot, the resulting state regulation of the delegate selection process is not sufficient to transform party action into state action. Should extensive congressional regulation of national political party activity be found constitutionally permissible, the necessary nexus between party action and governmental action might be found to exist.\footnote{The concurring judges in Ripon Society, Inc. v. National Republican Party, Civil No. 74-1358 (D.C. Cir., Sept. 30, 1975), 44 U.S.L.W. 2161 (Oct. 14, 1975), did not view regulation of political expenditures or federal financing of campaigns sufficient to trigger a finding of governmental action in the context of national convention procedures.}

Third, in each instance where constitutional claims are made against a private entity such as a political party, the courts must weigh the alleged intrusion against the high value traditionally given free exercise of first amendment associational rights if the party action rationally advances a legitimate party interest. The United States Court of Appeals for the District of Columbia, sitting en banc in Ripon Society, Inc. v. National Republican Party,\footnote{Civil No. 74-1358 (D.C. Cir., Sept. 30, 1975), 44 U.S.L.W. 2161 (Oct. 14, 1975).} weighed those conflicting interests and concluded that first amendment rights must include not only the right to form political associations but also to organize and direct a political party in a way that will most effectively achieve its goals.\footnote{44 U.S.L.W. 2161, at 2163.}

In the same case, the court reconsidered its state action analysis in Georgia v. National Democratic Party\footnote{447 F.2d 1271 (D.C. Cir.), cert. denied, 404 U.S. 858 (1971).} and in Bode v. National Democratic Party.\footnote{452 F.2d 1302 (D.C. Cir. 1971), cert denied, 404 U.S. 1019 (1972).} Finding that reliance upon the White Primary Cases was not persuasive precedent for applying state action to the activities of a national political party, the court held that a Republican National Convention delegate allocation formula which awarded “bonus” delegates for Republican electoral victories in a state did not violate fourteenth amendment equal protection. This decision is not in conflict with the Supreme Court’s position in O’Brien v. Brown.\footnote{409 U.S. 1 (1972).} Since, however, the Court, in staying the orders
of the circuit court immediately before the 1972 Democratic Convention was to open, did not address the issue of state action, the question is ripe for further analysis.

**National Party Rules and State Law**

*States' Rights and the Associational Rights of Political Parties: Balancing Interests*

Until the last decade, the autonomy enjoyed by individual state parties in adopting systems of delegate selection resulted in widely varying practices from state to state. This variation was not in itself the impetus for the reform which set national delegate selection standards; the incentive instead came from inequities created by discrimination and procedural irregularities in the systems which tended to limit access to the delegate selection process. It has been noted that the significance of party rules which set national standards rests in the Democratic Party's rejection of the traditional notion that the determination of methods of selecting delegates be left to state parties and state legislatures. It should have been foreseeable that such a dramatic break with past practice would lead to confrontations between the national party and the states.

The issue of whether state law should be accorded primacy over national party rules in the determination of the qualifications of delegates to the party's national convention arose from the unseating of Illinois delegates elected according to state law. After the 1972 Convention Credentials Committee voted to recommend to the Convention that 59 of the delegates elected in the Illinois primary be unseated for alleged violations of the party rules, the ousted delegates obtained an injunction from an Illinois court preventing the challengers from being seated. Even though the chal-

76. The Supreme Court stayed the judgment of the court of appeals only three days before the Democratic Convention convened on July 10, 1972. Id. at 3.

77. See notes 60 through 64 supra and accompanying text.

78. The Supreme Court had an opportunity to settle the matter in Ripon Society, Inc. v. National Republican Party, Civil No. 74-1358, but denied the petition for certiorari.

79. *Mandate For Reform*, supra note 2, at 17.


82. See note 4 supra.

83. The Credentials Committee voted to accept the report of its hearing officer which found violations of guidelines A-1 (participation of minority groups), A-2 (participation of women and young people), C-1 (adequate public notice of party activities), C-4 (timings of the delegate selection process), and C-6 (non-public slate-making). *Findings and Report of Cecil Poole, Hearing Officer* (June 25, 1972) (on file at the Democratic National Committee).

lengers were seated by the convention, they remained subject to contempt of court proceedings for violation of the state court injunction, which was later affirmed by the Illinois Appellate Court. The United States Supreme Court, in an opinion rendered well after the 1972 Convention had adjourned, ruled that in the context of the Illinois challenge, national party rules took precedence over state law in the determination of the qualifications and eligibility of delegates to national party conventions. In weighing the interests at stake in that controversy, the Court relied heavily on the constitutionally protected right of political association, implying a preferred position for that right when a national nominating process is involved. The Court observed that even had the Illinois challengers been forced to comply with the state court injunction, no court could have coerced the convention to seat the challenged delegates in their place.

It should be noted that in the Illinois dispute the state election law was not by itself incompatible with national rules. Nevertheless, a party’s right to determine the qualifications of delegates to its conventions cannot be defeated merely because challenged delegates have been elected according to state law. Where state law is silent, as well as where state law conflicts with a national rule, party policy will prevail unless the state interest is found to be compelling. Even though a party cannot coerce a sovereign state to change its election laws to conform with national party rules, a party’s freedom to engage in political activity at a national convention cannot be restricted by state lines. It would be illogical to contend that each state could establish the qualifications of delegates to national conventions without impermissibly interfering with the party’s right to define and enforce its own national policy. Party policies have been in the past and could continue to be enforced, when necessary, by

87. The challenged delegates conceded that neither their own associational rights nor Illinois’ interest in seating the delegates elected according to state law could compel a national party convention to seat them. They stated that they would have preferred Chicago be without representation at the Convention to having unelected “spurious representatives” speak for the Democratic electorate. Brief for Respondents 46, Cousins v. Wigoda, 419 U.S. 477 (1975). Mr. Justice Powell, concurring in part and dissenting in part in Cousins, agreed that the Convention could seat whom it pleased, but contended that the injunction should still have been upheld to prevent delegates from being seated who had been rejected by the voters in a democratic election. 419 U.S. 477, 496-97 (1975).
88. ILL. REV. STAT. ch. 46, §§ 7-1 et seq. (1973).
91. For example, in 1968 the Democratic National Convention refused to seat the “Regular” Mississippi delegation elected in accordance with state law on the grounds that blacks
a convention’s refusal to seat delegates who flout that party policy.\footnote{92}

Whether such a drastic sanction is wise policy should also be considered. The question involves weighing different interests: the interest of the party in establishing and enforcing internal party law binding on state parties and the necessity that a national political party build and sustain coalitions across state lines necessary to elect that party’s presidential and vice-presidential candidates.\footnote{93} To be effective, a party’s efforts must be directed toward obtaining consensus among its constituent groups. Such a consensus should take cognizance of the reasonable limits of imposing national party law on an essentially federal system. Expulsion from the convention as a sanction for non-compliance with national rules should, therefore, be used sparingly and only under circumstances in which less drastic means have first been tried or where violation of national standards is shown to be willful. Where rules are clear well in advance of the start of the delegate selection process\footnote{94} and the national party’s determination to enforce them is agreed upon and understood, the necessity of invoking the ultimate sanction of unseating delegates chosen according to state law should be minimized.

**National Party Rules and State Law: A Defense to Non-Compliance**

The Commission on Party Structure and Delegate Selection, appointed to implement the 1968 Convention mandate to reform delegate selection procedure, expressed the intention in its 1970 report\footnote{95} to work with state parties to democratize state procedures. The

\footnote{92}{In a complaint filed on Sept. 12, 1975 in federal district court for the District of Columbia, the State of Wisconsin has requested declaratory and injunctive relief against the National Democratic Party to prospectively prevent the Party from refusing to seat delegates elected according to the state’s open primary law even though that law conflicts directly with a national party rule requiring some indication of party affiliation in delegate selection processes. Wisconsin v. Democratic Party of the United States, Civil No. 75-1487 (D.D.C., filed Sept. 12, 1975). After Cousins, such coercive relief would be inconsistent with the convention’s right to seat whatever delegates it decides have conformed with national party policy.}

\footnote{93}{This process has been called by a commentator the “vital rites of party integration” in which factions are reconciled and their differences submerged at the national convention in the interest of adopting a platform and presenting a unified appeal to the general electorate. F. Sorauf, Political Parties in the American System 107 (1964).}

\footnote{94}{After the 1976 Convention, the Party Charter and by-laws adopted pursuant to the Charter will govern the delegate selection process. The existence of the Charter precludes the necessity of adopting new rules to govern the selection of delegates to each succeeding convention. Known policies and implementing rules will put all state parties on notice of what standards guide party activities. Party Charter, supra note 9, Resolution of Adoption and Implementation.}

\footnote{95}{Mandate for Reform, supra note 2, at 16.}
Commission adopted a standard of compliance requiring state parties to make "all feasible efforts" to conform state law to party guidelines, but it recognized that practical and political obstacles often prevent the desired legislative change. In the language of certain resolutions passed by its 1972 Convention, the Party reaffirmed this recognition of the difficulty created by an absolute standard of compliance. The Convention resolved that delegates to the 1976 Convention:

[s]hall be selected through or mandated by Primary elections conducted by public authority or by other selection processes in which adequate provision is made to restrict participation in such elections or processes to Democratic voters. . . . In the event that state law does not permit a state Party to conform with the provisions of this section, it has an obligation to make all feasible efforts to repeal, amend or otherwise modify such laws to accomplish these objectives.

This resolution was implemented in Rule 2 of the 1976 Delegate Selection Rules:

A. State Parties must take all feasible steps to restrict participation in the delegate selection process to Democratic voters only. Such steps shall be included in proposed [State] Party rules submitted to the Compliance Review Commission of the National Democratic Party. Such rules, when approved by the [Commission] and implemented shall constitute adequate provisions within the meaning of Section 9 of the 1972 . . . mandate.

B. State Parties shall take all feasible steps to encourage non-affiliated and new voters to register or enroll as Democrats and to provide simple, easy procedures through which they may do so.

Rule 20 states:

Wherever any part of any section contained in these rules conflicts with existing state laws, the State Party shall take provable posi-
tive steps to achieve legislative changes to bring the state law into compliance with the provisions of these rules.\textsuperscript{100}

Thus, when a state party fails to comply with national rules because state law conflicts with those rules, the state party can successfully defend a challenge to its delegation for non-compliance if it can show that requisite steps were made to comply. A failure to make these efforts would bar a state party from claiming immunity to a challenge based on non-compliance.

Even though national party rules have been held to supersede state law,\textsuperscript{101} there will nevertheless be instances where the Convention will seat delegations not in complete compliance with the Delegate Selection Rules. In such situations, the state party must show good faith efforts to effect legislative change or take other measures, not requiring a change in state law, to comply with a given rule.\textsuperscript{102} Treatment of the good faith standard by the Compliance Review Commission will be a signal to state parties of how rigorous their efforts to comply must be when this basic conflict exists. The language of the newly adopted Charter points to the possibility that strict enforcement of national party rules in conflict with state law, may in the future defer to the realities of federalism.\textsuperscript{103}

\textsuperscript{100} Id. at 17-18.

\textsuperscript{101} Cousins v. Wigoda, 419 U.S. 477 (1975).

\textsuperscript{102} The Compliance Review Commission [hereinafter referred to as CRC] established by the 1976 Rules to monitor state compliance has issued a memo indicating in general what a good faith effort requires:

While the CRC has not set out specific steps a state Party must take to see that corrective legislation is enacted, the general understanding of the good faith effort that must be made includes the following: introduction of necessary legislation; endorsement of and active lobbying for the legislation by Party leadership (i.e. State Chairman, State Committee, Governor, Members of Congress, Party leadership in the legislature); active campaign for the passage of such legislation (i.e. testimony at hearings, statements on floor of the legislature, press releases, newspaper articles, letters to the editor and appropriate state officials).

In some instances other avenues for producing the desired changes may be possible. State Parties are encouraged to explore these possible alternatives if the required legislation is not likely to be enacted. The CRC staff will be pleased to work with you on developing viable alternatives.

Finally, in the event that a state is unable to bring about the necessary statutory revision, the CRC will look to these attempts and weigh them in terms of the requirement specified by the particular Rule in question and in relation to Rule 20.

\textsuperscript{103} The Charter of the Democratic Party has incorporated similar language which makes the standard for compliance less rigid:

State Party rules or state laws relating to the election of delegates to the National Convention shall be observed unless in conflict with this Charter and other provisions adopted pursuant to authority of the Charter, including the resolutions or other actions of the National Convention. \textit{In the event of such conflict with state
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Party Affiliation Requirement

The concept of restricting participation in party primaries to voters who have indicated an affinity for that party's policies and purposes is consistent with the constitutionally protected right to band together for "the common advancement of political beliefs." Since one of the purposes of organizing into political parties is to aggregate interests and to create coalitions in pursuit of public office, it is reasonable to want to prevent those who do not share those interests from "raiding" a party's primary and distorting the vote. The 1972 Democratic Convention implemented this premise by setting a dual standard for participation in the delegate selection process. The first requires state parties to adopt delegate selection processes in which "adequate provision is made to restrict participation . . . to Democratic voters." The second would discourage "excessively burdensome re-registration requirements" by suggesting "frequent and easily exercised opportunities for non-affiliated voters and new voters to register as Democrats." These criteria are designed to maintain the integrity of the Party's primary, while at the same time confirming a commitment to opening the Party to all those who wish to identify themselves as Democrats.

Participants in the debate at the 1972 Convention on the passage of the affiliation provision of the Rules Committee Report recognized compelling arguments for and against party affiliation requirements. Proponents of both positions agreed that voters hostile to Democratic Party policies should be excluded from Democratic endorsement processes. The majority report of the Rules Committee required state parties to take affirmative steps to establish registration processes for identifying Democrats at least 14 days before the primary or caucus, limiting participation to those who have indicated an affinity for Democratic policies. This was consistent with the constitutionally protected right to band together for "the common advancement of political beliefs."
who declared themselves as Democrats. The minority report\textsuperscript{110} required only that in those states where an identification process already existed, registered Republicans not be allowed to vote in Democratic endorsement processes. No provision in the minority report was made for states such as Wisconsin where no registration process exists, an omission which would have allowed no remedy for cross-over voting. Since the majority report was adopted by the Convention,\textsuperscript{111} it stands as a policy commitment to the principle of Democratic identification as a prerequisite to participation in Democratic Party endorsement processes.

Enforcement of compliance with the affiliation requirement ought not to impose complete uniformity in an area traditionally regulated by state law. However, state parties should be expected to meet the national party standards of "adequate provision" and "all feasible efforts." In an attempt to clarify those standards the Party's Compliance Review Commission\textsuperscript{112} has described specific examples of steps a state party could take to bring state law or custom into compliance with Rule 2:\textsuperscript{113}

\begin{itemize}
  \item a. each state Party must submit and lobby for state legislation establishing party registration or legislation that will limit or tend to limit participation in the Democratic Party's delegate selection process to Democratic voters only;
  \item b. in the event Party registration is not enacted, the state Party would be required to adopt alternatives that would attempt to limit participation to Democrats, \textit{i.e.}, Party affiliation cards, Party enrollment drives, etc.
  \item c. in caucus system states without Party registration or enrollment, [a state party could] require those desiring to participate in the delegate selection process to sign a Party affiliation card.\textsuperscript{114}
\end{itemize}

Each state is thus required to include in its proposed delegate selection plan, submitted to the Compliance Review Commission for

\textsuperscript{110} Id., Minority Report, sec. 9.
\textsuperscript{111} The majority report was adopted by voice vote of the 1972 Convention delegates. 1972 OFFICIAL PROCEEDINGS, supra note 108, at 244.
\textsuperscript{112} The Compliance Review Commission was provided for in Rule 19. It consists of 25 members, appointed by the Democratic National Chairman to:

\begin{itemize}
  \item administer and enforce affirmative action requirements for the National and State [Democratic] Parties and approve or recommend changes in such plans;
  \item conduct periodic evaluations and provide technical assistance to State Parties on affirmative action and delegate selection implementation . . .
\end{itemize}

\textsuperscript{113} See note 92 supra and accompanying text.
\textsuperscript{114} Memo to Compliance Review Commission from Robert F. Wagner, Chairman (April 18, 1975) (on file at the Democratic National Committee).
approval, some provision for party affiliation.\textsuperscript{115} If legislation is necessary for compliance the state party could defend a later challenge to its delegation, based on failure to conform to national party standards,\textsuperscript{116} by showing that good faith efforts were made to obtain passage of the necessary law.\textsuperscript{117}

A different problem arises when a state party for reasons of tradition or policy does not wish to change non-complying law. In the State of Wisconsin, for example, cross-over voting in the primary of either major political party without party identification has been a traditional practice.\textsuperscript{118} Wisconsin law does not compel voters in a presidential primary to publicly declare their affiliation with the party in whose primary they choose to vote,\textsuperscript{119} and the state party has up to this time not been willing to take the necessary measures to change the law. This reluctance would, of course, preclude the state party from invoking the "all feasible steps" defense built into the rules.

The State of Wisconsin recently filed suit in federal court\textsuperscript{120} in its own behalf and as parens patriae against the National Democratic

\textsuperscript{115} For example, the State of Illinois has submitted a plan approved by the CRC on August 8, 1975 which provides:
2. Participation in the primary shall be open only to Democratic voters. A person must register as a Democrat by the close of precinct registration (approximately 30 days before the primary), although individuals who voted as Democrats in the 1974 primary or thereafter are automatically so registered.
19. This plan is dependent upon the passage of legislation, presently pending in the Illinois General Assembly, which is being supported by the State Central Committee through provable positive steps.

\textbf{Delegate Selection Plan for the Illinois Delegation to the 1976 Democratic National Convention} (on file at the Democratic National Committee). The legislation implementing the party affiliation plan has not been passed by the Illinois legislature. Chicago Sun Times, June 13, 1975, at 16, col. 1. Presumably, to defend a challenge based on non-compliance with Rule 2A, the State Party would first have to show what provable positive steps it took to pass the legislation and second, consider alternatives not requiring legislation which would "tend to limit participation to Democrats."

\textsuperscript{116} This kind of challenge would be based on the holding of Cousins v. Wigoda, 419 U.S. 477 (1975).

\textsuperscript{117} Conversely, if no legislation is necessary, then the applicable standard is full compliance.

\textsuperscript{118} N.Y. Times, Aug. 17, 1975, at 37, col. 1.

\textsuperscript{119} \textsc{Wisc. Stat. Ann.} §§ 5.73(4), 5.60(8)(e)(d), 8.12 (1973). Section 5.60(8) states:

There shall be a separate ballot for each party qualified under 5.62, listing the names of all potential candidates of that party . . . Each voter shall be given the ballots of all the parties participating in the presidential preference vote, but may vote on one ballot only.

\textsuperscript{120} Wisconsin v. Democratic Party of the United States, Civil No. 75-1487, (D.D.C., filed Sept. 12, 1975). The complaint invokes federal jurisdiction under art. II, § 1 of the Constitution and the first, fifth, ninth, tenth, twelfth, and fourteenth amendments, claiming that a threat by defendants to enforce the party mandate requiring state parties to make adequate provision to restrict participation in the state's delegate selection process to Democratic voters would deprive plaintiffs of their constitutional rights.
Party, requesting declaratory and injunctive relief to prevent the national party from refusing to seat the state delegation elected according to non-complying Wisconsin law. However, the national party rule\textsuperscript{121} which conflicts with the Wisconsin open primary law\textsuperscript{122} was officially promulgated well before delegate selection was to begin. Furthermore, the principle of party affiliation as a requisite for participation in the delegate selection process is included in the Party Charter.\textsuperscript{123} Clearly, neither lack of adequate notice nor reliance on a different standard, as in the 1972 California challenge,\textsuperscript{124} create due process problems for the state if the national party enforces the affiliation requirement. Even if Wisconsin can show that the threatened party enforcement of the rule would constitute state action, it would still face the Cousins\textsuperscript{125} obstacle of preeminence of party law over state law. Unless the court found Wisconsin's interest in ensuring open access to party primary ballots by maintaining a cross-over primary more compelling than the Supreme Court found Illinois' interest in Cousins,\textsuperscript{126} Wisconsin could not prevail over the national party.

The question of restrictions on the right to vote in primary elections has been most recently considered by the Supreme Court in the context of challenges to state statutes alleged to confine that right by unduly limiting cross-over voting. The cases involved claims by individual voters that state limitations on changing party affiliation for purposes of voting in a primary infringed their constitutionally protected interest in associating with the party of their choice. In adjudicating these claims, the Court weighed the state's interest in preventing "raiding" of party primaries by voters either indifferent or hostile to the policies of the raided party, against the voters' rights to associate effectively with their chosen party. In

\begin{itemize}
\item See note 119 supra.
\item Party Charter, supra note 9, art. 2, sec. 4 (v.). That section states: "The National Convention shall be composed of delegates who are chosen through processes which ... restrict participation to Democrats only."
\item See Brown v. O'Brien, 469 F.2d 563, 569-70 (D.C. Cir. 1972); see also note 135 infra.
\item Cousins v. Wigoda, 419 U.S. 477 (1975).
\item In fact the Democratic Party has moved to dismiss the complaint on the following grounds:
\begin{enumerate}
\item Failure to allege a case or controversy within the meaning of article III of the Constitution;
\item Lack of subject matter jurisdiction under the U.S. Code or the Constitution;
\item Lack of standing;
\item Failure of plaintiffs to state a claim upon which relief can be granted because the case involves a nonjusticiable "political question."
\end{enumerate}
\end{itemize}

In *Kusper v. Pontikes*, the Court concluded that statutes restricting a voter's freedom to change his political party affiliation are permissible only if the state's legitimate interest cannot be satisfied in a less drastic way. In *Rosario v. Rockefeller*, the Court gave controlling weight to the state's legitimate interest in preventing raiding and upheld the constitutionality of a statute which placed only a time limit on changing affiliation on the ground that it did not lock a voter into an unwanted party affiliation from one primary to another.

An examination of the holdings in *Kusper* and *Rosario* in conjunction with the Wisconsin claim presents instructive juxtapositions. In *Rosario* and *Kusper* individual voters alleged constitutional deprivations of associational rights by the state, a claim adjudicable by balancing the individual's constitutional protection against the legitimacy of the state interest. If the state interest prevails, the state will enforce its law. In the Wisconsin case, the state claims deprivation of its constitutional rights and those of its voters by a political party. Even though the party can apply sanctions for non-compliance with its national rules, there is no way that a voluntary association can coerce a state to change its laws to comply with those rules. Furthermore, the state party has options, other than changing state law, which could eliminate the conflict: it could provide party affiliation cards for primary voting; it could adopt a caucus system for selection of national convention delegates in which participants might sign an affiliation card; or it can proceed with the selection of delegates according to state law and risk a challenge to its delegates' eligibility under party challenge procedures. The only sanction available to the party is the power of its

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129. See note 120 supra.
130. CRC Memo No. 4, supra note 102, provided that “in some instances other avenues for producing the desired changes may be possible” and that the Compliance Commission expressly encouraged state parties to “explore these alternatives if the required legislation is not likely to be enacted.”
131. Rule 19H provides that:

In the event the Delegate Selection Plan of a State Party is found to be in default or non-compliance and such default or non-compliance is not remedied by corrective action by the time the first stage of the delegate selection process has begun, it shall be the duty of the Executive Committee of the Democratic National Committee to constitute a committee from that State, to propose and implement a process which will result in the selection of a delegation from the affected State which shall (1) be broadly representative, (2) reflect that State's division of presidential preference, and (3) involve as broad a participation as is practicable under the circumstances.

1976 Delegate Rules, supra note 15, at 17. The Wisconsin suit names the Democratic Na-
convention, in judging the qualifications of its delegates, to refuse to seat those delegates selected by non-complying processes. After Cousins, the courts cannot compel a national party convention to seat any delegates it chooses, for policy reasons, to reject.\textsuperscript{132}

\textit{Fair Reflection of Presidential Preferences in Convention Delegations}

That delegates to Democratic National Conventions should "fairly [reflect] the division of preferences expressed by those who participate in the Presidential nominating process"\textsuperscript{133} is consistent with the party reform tenet that minority views should be represented at conventions. The underlying policy assumes that voters should have an opportunity to directly influence the choice of the presidential nominee.\textsuperscript{134} In 1972, the California challenge arose from a "winner-take-all" primary system in which a plurality of the primary voters could elect all of that state's convention delegates, in effect, disenfranchising those voters who cast ballots for other candidates.\textsuperscript{135} The 1972 Convention sought to clarify the ambiguity which led to the California litigation by expressly requiring "fair reflection" of presidential preferences in the delegate selection plans adopted for 1976. Although the fair reflection requirement solved the winner-take-all problem, new problems emerged in defining what is "fair" and in translating that requirement into specific rules which could be implemented by the state parties. The new Delegate Selection Commission\textsuperscript{136} chose to interpret "fair reflection" as meaning that "preferences securing less than fifteen percent of the votes cast for the whole delegation need not be awarded any delegates."\textsuperscript{137} This rule represents a policy decision to limit application

\textsuperscript{132} See notes 81 through 87 supra and accompanying text.
\textsuperscript{133} By The People, supra note 97, sec. 4.
\textsuperscript{134} MANDATE FOR REFORM, supra note 2, at 44.
\textsuperscript{135} See Brown v. O'Brien, 469 F.2d 563, 566-70 (D.C.Cir.), stay granted, 409 U.S. 1 (1972). The challengers claimed that 56 percent of the California voters who did not vote for Senator George McGovern in the primary were unrepresented at the Convention. This was undoubtedly true, but the California party leaders had been repeatedly assured that the "winner-take-all" concept would be considered viable by the National Party through 1972. Those delegates who were challenged claimed violation of due process based on an attempt to reinterpret the national rules retroactively. The federal appellate court agreed.
\textsuperscript{136} See note 98 supra.
\textsuperscript{137} Rule 11 provides in part that:
At all stages of the delegate selection process, delegations shall be allocated in a fashion that fairly reflects the expressed presidential preference, uncommitted, or no preference status of the primary voters, or if there be no binding primary, the
of the basic proportionality principle in a binding primary, caucus, or convention. The Commission's intention was to avoid the proliferation of splinter candidates which might result from a literal application of the proportionality requirement. The Commission also stipulated that in a non-binding presidential primary, where votes are cast for individual delegate candidates directly, the votes for those individuals shall constitute a fair reflection, provided that the electoral unit from which the delegates are elected is no larger than a congressional district.

Whether these provisions conform to the 1972 Convention resolution is not entirely clarified by its legislative history. For example, as to non-primary states, one observer believes that it was intended that "fair reflection" be applied at all levels of a caucus delegate selection procedure so that minority blocs of voters will not be eliminated in the early precinct caucuses. However, the prevailing view in the Delegate Selection Commission assumed that strict proportionality was never intended and that preferences need not be

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138. See TOWARD FAIRNESS & UNITY FOR '76 23 (1973) (a review of the McGovern-Fraser Delegate Selection Guidelines by the Coalition for a Democratic Majority) [hereinafter cited as TOWARD FAIRNESS AND UNITY].

139. Rule 11, 1976 DELEGATE RULES, supra note 15, at 6. Rule 11 provides:

In states electing delegates in primaries in which votes are cast only for individual delegate candidates, delegates shall be elected from districts no larger than a Congressional District.

This provision has been called a "loophole," because it can have a "winner-take-all" effect within a Congressional District rather than fairly reflecting the division of presidential preferences within that district. A plurality of the voters voting for individual delegates in a primary could elect all the delegates because primary voters are likely to cast all their votes for delegate-candidates pledged to the same presidential candidate. For a detailed analysis of this effect, see Memo Election of National Convention Delegates in Non-binding Primaries, prepared by the Americans For Democratic Action, March, 1975 (available at 1424 16th St. NW, Washington, D.C. 20036). Regulation 8.48 of the CRC sets out other examples of cases where the "fair reflection" standard is met:

1. Where votes for those preferences receiving less than 15% are distributed proportionately to those receiving more than 15%.
2. Where those preferences receiving less than 15% receive their proportionate share.
3. Where votes for those preferences receiving less than 15% are treated as having no preference or uncommitted.
4. Any combination of the above.


140. Simple majority vote, it is argued, would eliminate some minority views early in the process and would have a disunifying effect on the party. See Statement of Congressman Donald Fraser to the Executive Committee of the Democratic National Committee, Feb. 18, 1974 (on file at the Democratic National Committee).
“mathematically calibrated but only reflected. . . . Fairness allows room for reasonable flexibility.”

Whether an individual state decides upon a system in which delegates are selected by primary, caucus, convention, or some combination, the 1976 Party Rules require that plans for delegate selection be reviewed by the national party well in advance of the start of the process itself. Since structural conformity of the state plan with national rules will have been determined by the Compliance Review Commission before the Convention, challenges based on a retroactive interpretation of the fair reflection mandate will be impossible in 1976.

Even though the fair reflection provision of the mandate will not always operate to strictly reflect minority views where individual delegates are elected in congressional districts, credentials procedures require that a challenge to a delegation based on noncompliance with the 1972 mandate would be summarily dismissed by the Chairman of the Credentials Committee. Such a challenge

141. Statement of Alex Seith to the Executive Committee of the Democratic National Committee, Feb. 15, 1974. Seith was Vice-Chairman of the Delegate Selection Commission. He noted in his testimony the difficulty of perfectly reflecting voter preferences early in the year of the Convention when circumstances may be quite different from those when the Convention meets. For example, neither Hubert Humphrey nor Robert Kennedy had entered the early selection process in 1968; in 1972, Sen. Edmund Muskie, an early front-runner, was no longer a candidate by convention time.

142. Rule 19E provides that:

Each State Party shall submit a Delegate Selection Plan, consistent with the National Party Rules, to the Compliance Review Commission for approval . . . .

(2) The Compliance Review Commission shall act on the proposed plan within sixty (60) days. Its decision shall be final and binding.


143. The only grounds for challenge in 1976 are:

(1) violation of a delegate selection plan approved by the Compliance Review Commission;
(2) violation of an affirmative action plan approved by the Compliance Review Commission;
(3) failure of a state to have an approved delegate selection plan;
(4) failure of a state to have an approved affirmative action plan.


144. Rule 5. Dismissal and Decision on the Pleadings

(a) Dismissal. (1) The Chairperson of the Credentials Committee shall dismiss any challenge, or part of a challenge, which fails to allege a violation, or lack, of a State delegate selection or affirmative action plan approved by the Compliance Review Commission . . . .

(c) . . . . A dismissal under Rule 5(a)(1) shall be final.

1976 Credentials Procedures, supra note 143. See also Appendix.
would fail to meet the test of limited allowable grounds for challenge based on failure by a state to have had approved or to implement an affirmative action and delegate selection plan.

This substantial narrowing of the grounds for intra-party challenges,145 combined with early clarification and interpretation of the rules themselves, will not only avoid post hoc rule-making but should also reduce the number of challenges based on politically-motivated dissatisfaction with the results of the process,146 rather than on alleged failure to comply with a specific rule. Since the practical effect of the rules and their application to individual presidential candidates will not be known until the delegate selection process has been completed, even-handed enforcement of the rules through intraparty machinery should be facilitated. When disputes do arise over implementation of state delegate selection plans, fashioning remedies fair to all parties will in most cases take place well before the convention meets, since according to Party Rules challenges must be brought promptly after a violation is alleged to have occurred.147 This promptness standard puts a heavy burden on potential challengers to know precisely when such a violation has taken place, but should serve to expedite early adjudication of disputes and to eliminate frivolous challenges.

As set out in Rule 11, the principle of fair reflection of presidential preferences, though likely to result in less precise proportionality than may have originally been intended, has not been abandoned. It must be applied by the Credentials Committee when proposing remedies to the convention when violations have been found.149 This provision in the rules for credentials procedures reaffirms the party's commitment that serious efforts will be made to take into account

145. CREDENTIALS PROCEDURES, supra note 143, at 4.
147. Rule 3 provides:
(a) A credentials challenge shall be commenced by the filing of a written Challenge not later than (1) ten calendar days after the violation occurred, or (2) ten calendar days after the selection of any delegate whose credentials to the Democratic National Convention are to be put in issue, whichever occurs first. . . . (emphasis added).
1976 CREDENTIALS PROCEDURES, supra note 143. This is a very strict standard to meet because a violation could occur without a potential challenger becoming aware of it until the ten day period has lapsed. In that case, the challenge would be precluded.
148. See note 139 supra and accompanying text.
149. Rule 9 provides:
(h) Presidential Preference of Delegation. Except where a violation is of such a nature as to vitiate or cast serious doubt on the expressed presidential preference of the political unit represented by the challenged delegates, any remedy for a violation shall fairly reflect the expressed presidential preference of that political unit.
1976 CREDENTIALS PROCEDURES, supra note 143.
minority views regarding the presidential nominee in the process of adjudicating challenges as well as in the process of selecting delegates. As long as the Party Charter remains unchanged, fair reflection of presidential preferences will be party law, and state parties as well as presidential candidates will have notice of what standards must be met in the future. The experience of 1976 will undoubtedly affect the convention decision as to whether this policy goal continues to be a practicable and desirable one.

**Affirmative Action: Another Look at the Full Participation Standard**

In attempting to achieve full participation of Democratic voters in the delegate selection process, party rules must provide adequately for fair procedures, not for a guaranteed result in the composition of a delegation. However, the Democratic Party's commitment to openness cannot be measured by fair procedures alone; it will be tested in 1976 by how rigorously the 1972 affirmative action mandate is enforced.

The impetus for party reform efforts of the 1970's derived largely from recognition of the need to overcome the effects of past discrimination which had resulted in gross underrepresentation of certain of the party's constituent groups in the delegate selection process. Steps toward making a binding commitment to an open party began at the 1964 National Convention and were reaffirmed in 1968 and 1972. Originally, however, this standard merely indicated an agreement not to discriminate; no specific affirmative acts were required of state parties until the reform guidelines were incorporated.

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150. The Party Charter provides in art. 2, sec. 4 (ii) that delegates to National Conventions shall be chosen through processes which "fairly reflect the division of preferences expressed by those who participate in the Presidential nominating process." Party Charter, supra note 9.

151. Toward Fairness and Unity, supra note 138, at 4-6. ("To resort to complex formulas to establish democracy by demography would . . . be absurdly unworkable . . . ." Id. at 5).

152. Mandate for Reform, supra note 2, at 26-29.

153. The 1964 Democratic National Convention adopted a resolution which conditioned the seating of delegations at future conventions on the assurance that state parties would not discriminate. The 1968 Convention adopted the 1964 resolution for the 1972 Call. In 1966, the Party's Special Equal Rights Committee adopted six anti-discrimination standards for the state parties to meet. These standards became an official policy statement of the Democratic Party. Each state party was required by the 1970 Delegate Selection Commission to include a statement of that policy in its party rules and to take steps to implement them. Guideline A-1, Id. at 39-40.

154. Guideline A-1 required state parties to overcome the effects of past discrimination by affirmative steps to encourage minority group participation—in reasonable relationship to the group's presence in the population of the state.

Guideline A-2 required state parties to eliminate discrimination on the grounds of age or sex and to overcome the effects of past discrimination by affirmative steps to encourage
rated into the call for the 1972 Convention as the standards with which state parties were required to "make all efforts to comply. . . ." While requiring reasonable representation of minorities, women, and young people, the 1969 Commission on Party Structure and Delegate Selection disavowed any intent to impose mandatory demographic quotas on state delegations.

It was nevertheless argued by some that reasonable representation amounted to an attempt to achieve "democracy . . . by fiat," to predetermine the composition of a delegation rather than to facilitate fuller participation of previously underrepresented groups. Ambiguity in the 1972 affirmative action standard led to confusion as to the responsibility of state parties. An examination of what actually was done in 1972 indicates little consistency in the interpretation and implementation of affirmative action obligations. Uncertainty and inconvenience sometimes led state parties to alter the final composition of delegations by adding members of underrepresented groups to provide reasonable representation rather than to provide for affirmative action as the guidelines required. Lack of adequate guidance from the national party resulted in many challenges at the 1972 Convention for alleged failure to include enough women, blacks, and young persons in state delegations.

In 1972, when a challenge reached the hearing stage, upon a showing of underrepresentation by the challenger, the burden of proof shifted to the challenged to show that "'appropriate' action was taken to achieve the 'proper' representation." This meant that the demographic composition of a delegation created a rebuttable presumption that affirmative action had not taken place. The uncertainty as to whether de facto quotas had been intended, in spite of the Commission's express disavowal of quotas in theory,
created a situation ripe for clarification. Since the Party lacked any mechanism for monitoring compliance with the openness standard before the delegate selection process began, 1972 credentials disputes were adjudicated by the Credentials Committee or by the Convention as a whole in an atmosphere pervaded by considerations of political advantage rather than by questions of legal proof.\textsuperscript{163}

Even though the Party's intent to develop procedures to broaden participation was clear prior to the 1972 Convention, how affirmative action steps would be enforced was not. In order to clarify the affirmative action obligation, the 1972 Convention resolved that a new commission

\[\text{g}l\text{i}ve \text{ special attention to implementing through monitoring and compliance review, the requirement that the National and State Democratic Parties take affirmative action to achieve full participation of minorities, youth, and women in the delegate selection process and all Party affairs.}\textsuperscript{164}\]

The new Delegate Selection Commission faced the task of devising rules which would eliminate resort to \textit{de facto} quotas while strengthening the affirmative action standard. The key was clarification of the relationship between the composition of a delegation and the effectiveness of state affirmative action programs. The 1972 mandate required provision for monitoring of state affirmative action plans so that the effective implementation of these plans, and not the delegation's final composition, would be the criterion for judging later compliance with national party standards.

The delegate selection rules for 1976 help to clarify what is now expected of the state parties:

18. \textbf{AFFIRMATIVE ACTION}

A. In order to encourage full participation by all Democrats, with particular concern for minority groups, Native Americans, women, and youth, in the delegate selection process and in all Party affairs, the National and State Democratic Parties shall adopt and implement Affirmative Action Programs.

(1) The goal of such affirmative action shall be to encourage such participation in delegate selection processes and in Party organizations at all levels of the aforementioned groups as indicated by their presence in the Democratic electorate.

(2) This goal shall not be accomplished either directly or indirectly by the Party's imposition of mandatory quotas at any level of the delegate selection process or in any other Party affairs.

\textsuperscript{163} T. \textsc{White}, \textit{The Making of the President} 1972 161-66 (1973).

\textsuperscript{164} \textit{By The People}, \textit{supra} note 97, sec. 6C.
B. Performance under an approved Affirmative Action Plan and composition of the convention delegation shall be considered relevant evidence in the challenge of any State delegation, but composition alone shall not constitute prima facie evidence of discrimination, nor shall it shift the burden of proof to the challenged party. If a State Party has adopted and implemented an approved Affirmative Action Program, the Party shall not be subject to challenge based solely on delegation composition or primary results.165

It is now clear that emphasis is upon the fairness of the affirmative action process rather than on attempts to assure a given result. The “reasonable representation” language of 1972 has been removed and replaced with a more flexible standard, requiring proven efforts to include the party’s constituent groups. Composition of the delegation will serve merely as evidence, along with other testimony, of failure to take required affirmative action should a challenge arise. At least for 1976, the burden of proof rests with the challenger to show the state party’s failure to carry out its own affirmative action guidelines.166 But if a state party has adopted and implemented an approved affirmative action program, the delegation cannot be challenged solely on the basis of delegation composition or primary result.167

The rules further provide that a challenge to implementation of a state plan brought up to thirty days before the state’s delegate selection process begins will be heard by the Compliance Review Commission.168 All other affirmative action challenges will be processed by the Credentials Committee.169 In the latter challenges, if the Credentials Committee determines that prompt corrective action by a state party can remedy non-implementation, the Executive Committee of the Democratic National Committee170 may issue

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166. The language of Rule 18A has been adopted in exactly the same form in the Party Charter, except that the emphasized clauses have been deleted. Party Charter, supra note 9, art. 10, sec. 6. At the Charter Convention in Kansas City in December 1974, members of caucuses representing blacks, women, and Spanish-speaking delegates lobbied for removal of the language, which recreates ambiguity as to who has the burden of proof in a challenge to a state delegation based on non-compliance with the affirmative action standard.
169. Rule 8(b) and (c), 1976 Credentials Procedures, supra note 143, at 11-12. In a resolution adopted by the Democratic National Committee on October 14, 1975, Rule 19 of the 1976 Delegate Selection Rules was modified insofar as it applies to the jurisdiction of the Compliance Review Commission to hear certain challenges. The resolution provides that when Rule 19 is inconsistent with the Rules of Procedure of the Credentials Committee, the latter shall prevail.
170. The Executive Committee of the Democratic National Committee is elected by the
a compliance order, and the Executive Committee's determination as to whether there has in fact been compliance will be conclusive in such cases.\textsuperscript{171} The jurisdiction of the Compliance Review Commission, after it has approved an affirmative action plan, is limited to ordering implementation of the plan or other necessary action to correct inadequate affirmative action efforts. After delegates have been selected, challenges can be adjudicated only by the Credentials Committee. In contrast to 1972, the entire challenge process has been moved further in time from the Convention. This should substantially reduce challenges which have not been finally adjudicated by the time the convention meets.

The steps detailed by each state's affirmative action plan submitted by state parties for approval will serve as review guidelines for testing the adequacy of those plans.\textsuperscript{172} The Commission's insistence on clear standards is designed to mitigate uncertainty as to what is expected of state parties and therefore to substantially reduce the number of affirmative action challenges which reach the Credentials Committee. The proper focus of monitoring and compliance procedures should be on ensuring enforcement of party standards, not on stimulating challenges. Because the party made a commitment to govern the conduct of the delegate selection process by an established body of rules, it was necessary to adopt quasi-judicial procedures to enforce the rules fairly. As a result, the prospect of settling disputes before presidential aspirations become vested in the final outcome of adjudication seems good. Moreover, party law has a better chance of surviving the vagaries of political change when adequate provision is made for traditional standards of due process in settling disputes arising from its enforcement.

Although there seems to be consensus about the desirability of affirmative action in the delegate selection process, continued contention exists concerning language in the 1972 affirmative action mandate,\textsuperscript{173} the 1976 rules,\textsuperscript{174} and the Party Charter\textsuperscript{175} requiring af-

\begin{itemize}
  \item \textsuperscript{171} Rule 8(d), 1976 Credentials Procedures, \textit{supra} note 143, at 12-13.
  \item \textsuperscript{172} The Compliance Review Commission resolved that in reviewing affirmative action plans, it will approve only those which detail concrete steps that a state proposes to include in its program. The goal of this specificity requirement is to create objective standards for reviewing disputes and to facilitate proof of implementation. Resolution adopted by the Compliance Review Commission, April 26, 1975 (on file at the Democratic National Committee).
  \item \textsuperscript{173} By the People, \textit{supra} note 97, sec. 6C.
  \item \textsuperscript{174} 1976 Delegate Rules, \textit{supra} note 15, at 11-12.
  \item \textsuperscript{175} Party Charter, \textit{supra} note 9, art. 10, sec. 3.
\end{itemize}
firmative action in “all party affairs” as well. This language has been defined in the by-laws of the Charter to include “the first level of the state political process at which party officials are nominated or selected, or party platforms and rules are formulated.” Problems inherent in monitoring state party activities not directly involved with national convention delegate selection and in fashioning appropriate remedies for non-compliance with the affirmative action standard in internal state party matters are certain to arise. The underlying rationale of openness as a desirable goal permeating the party structure has not been fully accepted by state parties. Some party officials may well consider this aspect of the rule to create unreasonable administrative and financial burdens, and could seek to modify the requirement in the by-laws or to amend the Charter itself.

Recourse to the courts after *O'Brien* and *Cousins* is not likely to produce solutions to disputes between state parties and the national party over the scope of affirmative action. The right to require affirmative action programs is well within the constitutional right of a voluntary association to make rules governing its own internal affairs. Furthermore, in the light of the party’s express disavowal of demographic quotas in either delegate selection or other party affairs, a claim of denial of equal protection by those who perceive themselves as victims of quotas appears unfounded. Affirmative action programs are intended to compensate for past discrimination or indifference by state parties toward efforts to broaden the party’s base. The problem is one of conciliation and compromise among groups who seek access to political power. The appropriate remedy for state party officials who find affirmative action rules excessively burdensome and for those who see such programs as essential to their aspirations is similar. Those who seek to change party policy must generate intra-party support for their positions rather than looking to the courts for relief.

**CONCLUSION**

The development of party law need not precipitate judicial int-
vention in the settlement of disputes. When consensus exists as to the goals the rules are to advance and intra-party mechanisms provide for fair adjudication of disputes resort to the courts should be minimal. Judicial intervention in delegate selection disputes has in the recent past been encouraged largely by the party's failure to provide procedures which required adjudication of disputes well before the outcome of the delegate contests themselves could determine the choice of the presidential nominee. Mechanisms for early monitoring of state affirmative action and delegate selection plans and their implementation by state parties should correct this basic weakness. Where the rules are clear and known in advance, the expectations of voters and state party organizations need not be frustrated by uncertainty concerning the meaning of party standards, and rights of due process need not be violated by retroactive interpretation of those rules.

Party nominating conventions provide a means for contending candidates, factions, and interests to build coalitions and reach agreement on a nominee and on policy. This function will be better served if delegate selection disputes have been substantially settled well before the convention begins. The processes of selecting convention delegates and of settling disputes arising from that process are now governed by rules which in themselves represent compromises of conflicting interests within the party.

As a commitment to party law becomes accepted by various party interests and constituencies, the rules and procedures will represent consensus at any given time. In a real sense, party law is national party policy, and the courts' unwillingness to infringe upon party autonomy will minimize judicial intervention in internal policy matters. The rules which the party chooses to adopt are subject to change if the consensus which created them ceases to accept their standards.

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