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Mandates of the National Political Party Clash with Interests of the Individual States as the Party Executes Its Policy by Abolition of State Delegate Selection Results: Legal Issues of the 1972 Democratic Convention and Beyond

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INTRODUCTION

The courts have rarely intervened into the activities of political parties, preferring to allow the parties to resolve internal conflicts through their own machinery. This attitude of restraint has been especially marked in reference to national political parties.

Pre-convention 1972 provided the Supreme Court with an opportunity to rewrite its philosophical premises in this field of court-political party relations. However, the Court decided in O'Brien v. Brown to,

1. A notable exception to judicial abstention has been racial discrimination by direct or indirect exclusion of Negroes from voting rights in state party primaries or club polls. Nixon v. Herndon, 273 U.S. 536 (1927); Nixon v. Condon, 286 U.S. 73 (1932); Smith v. Allwright, 321 U.S. 649 (1944); Terry v. Adams, 345 U.S. 461 (1953). The group of cases came to be known as the Texas White Primary Cases.

2. It is noteworthy that the national political parties have not yet been subject to the reapportionment principles in their methods of delegate selection and allocation. The lower federal courts have split on whether those principles apply to national parties. Even the court that found the principles applicable decided that the National Democratic Party's allocation amalgam of "one Democrat, one vote" and "one man, one vote" complied with the mandates of those cases. Compare Bode v. National Democratic Party, 452 F.2d 1302 (D.C. Cir. 1971), cert. denied 404 U.S. 1019 (1972) with Irish v. Democratic-Farmer-Labor Party, 399 F.2d 119 (8th Cir. 1968).


O'Brien involved the credential challenge out of California. Keane was the companion case concerning Illinois' delegate seating dispute.

The Court in distinguishing prior intrusions into political party affairs footnoted this comment:

This is not a case in which claims are made that injury arises from invidious discrimination based on race in a primary contest within a single state. (Citations omitted.)

Ten years earlier the Court had inserted a cautionary footnote in Gray v. Sanders, 372 U.S. 368, 378 n.10 (1963) that it was not deciding reapportionment principles for an analogous national political party nominating convention.

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at least temporarily, leave a national political party to its hybrid existence as an association private yet quasi-governmental (as its role in the elective process illustrates), voluntary yet vital (as its history in viable political candidacies attests), and deliberative yet spontaneous (as its volatile political climate always exhibits).

Since this decision to refrain is not now perfectly clear, given the Court's October, 1972 remand of Keane v. National Democratic Party to the District of Columbia Circuit Court of Appeals, and since the Court had indicated in its July, 1972, stay order opinion that it or other courts may yet consider the matter under more favorable circumstances, the 1972 controversies and their issues remain important. For these reasons, the permissibility and the capability of a court involving itself in the subject matter of, for example, delegate selection Guidelines, which were the crux of the 1972 National Democratic Party Convention disputes, will be considered. The legal issues raised by those confrontations and a forecast of their resolution will also be developed. Speculation as to the status of a national political party policy guideline in relation to conflicting state electoral law will be discussed. Finally, the timing and remedy options available to a court fashioning a judicial disposition will be treated.

RECENT HISTORY

The 1972 National Democratic Convention, embroiled in the application of a new set of democratic delegate selection Guidelines, voted

4. While the Court viewed the California challenge as moot and remanded it "with directions to dismiss the case as moot", O'Brien v. Brown, 41 U.S.L.W. 3182 (U.S. October 10, 1972), it had this to say about the Illinois challenge:

   The petition for a writ of certiorari is granted. The judgment is vacated, and the case is remanded to the U.S. Court of Appeals for the District of Columbia Circuit to determine whether this case has become moot. Keane v. National Democratic Party, 41 U.S.L.W. 3182 (U.S. October 10, 1972.)

   As will be developed below (see p. 166 infra) collateral effects such as a state court injunction violation related to these events and the right to vote for national committeeman and committeewoman remain unresolved in Illinois. This may be the basis for considering the California challenge moot while reserving the opinion in the Illinois challenge.


   The Court is now asked to review these novel and important questions and to resolve them within the remaining days prior to the opening sessions of the convention now scheduled to be convened Monday, July 10, 1972.

   The Court concludes it cannot in this limited time give to these issues the consideration warranted for final decision on the merits. We therefore take no action on the petitions for certiorari at this time. Id., at 2719.

   The Court further added:

   If this system is to be altered by federal courts in the exercise of their extraordinary equity powers, it should not be done under the circumstances and time pressures surrounding the actions brought in the District Court, and the expedited review in the Court of Appeals and in this Court. (Emphasis added) Id., at 2720.
at various stages to alter the state electoral results in two delegations. Acting upon its Credentials Committee's recommendation of June 30, 1972, the Convention voted on July 10, 1972 to unseat a portion of the Illinois delegation on the grounds that its state party organization exerted excessive influence in effectuating the election of 59 uncommitted delegates—a violation of that national party's new guidelines. The Credentials Committee also recommended a change in the impact of California's "winner-take-all" primary law by apportionment of the delegates to the various candidates according to their popular vote support in that primary. This recommendation was influenced by a Guideline interpretation that a prohibition of the unit rule extended mandatorily to "winner-take-all" primaries and was necessary to achieve effective minority expression. It was later defeated on the convention floor.

The issues find their origin in 1968 when the National Democratic Party Convention approved this mandate:

It is understood that a State Democratic Party in selecting and certifying delegates to the National Convention thereby undertakes to assure that such delegates have been selected through a process in which all Democratic voters have had a full and timely opportunity to participate.

In determining whether a state party has complied with this mandate, the convention shall require that:

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

(2) All feasible efforts have been made to assure that delegates are selected through party primary, convention or committee procedures open to public participation within the calendar year of the National Convention.

To implement this broad charge, the 1968 Convention authorized the Democratic Party National Committee to appoint a Commission on Party Structure and Delegate Selection to study current selection methods and to elaborate upon the mandate based upon those studies.

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6. Chicago Tribune, July 1, 1972, at 1, col. 5.
7. Chicago Tribune, July 12, 1972 at 1, col. 1.
8. Chicago Tribune, July 1, 1972 at 3, col. 3.
10. 1968 Democratic Proceedings, #269.
11. Commission on Party Structure and Delegate Selection, Mandate for Reform 10 (hereinafter cited as Mandate for Reform), the Commission literature describing the history behind its appointment.

For an elaborate chronicle of how the 1968 Convention sired the Commission and of prior conventions' credential challenges, see the Mandate for Reform, supra; Schmidt and Whalen, Credentials Contests and the 1968 and 1972 Democratic National Con-
After months of analysis, which divulged many patently undemocratic delegate selection procedures and statistics, the Commission in April, 1970, published the Guidelines, representing the Commission's interpretation of the 1968 mandate. To indicate the project's serious purpose, the Commission literature, the Mandate for Reform, contained this language in explaining the significance of the "all feasible efforts" clause in the mandate above:

'All feasible efforts' means that the state Party has held hearings, introduced bills, worked for their enactment, and amended its rules in every necessary way short of exposing the Party or its members to legal sanctions [to conform with those Guidelines].

The Call of the 1972 Convention adopted these Guidelines.

When Chicago's regular party organization candidates swept the delegate elections in the March 21, 1972, Illinois primary, and Senator George McGovern won the California "winner-take-all" primary,
the wheels of challenge began to churn. The viability of the Guidelines and the authority of a national political party to enforce them would be tested.

These challenges finally culminated in the summer of '72 in proceedings before the Credentials Committee, the District of Columbia Courts, the Supreme Court, and the Convention floor. The arbiter was the Convention itself and its decisions are now well-known recent history. California sat fully committed to Senator George McGovern. Mayor Richard Daley’s Chicago forces went home to Illinois, their seats occupied by a group of challengers. The federal courts, consistent with tradition, observed the proceedings with the rest of the nation.18

18. The Illinois challenge presents an extremely confusing factual setting. Under different names and sometimes parties, this case proceeded at various stages in multiple jurisdictional environments.

There were three stops in the Cook County Circuit Court (Illinois’ trial court) before two different judges, one excusing himself after being accused of prejudice by the challengers. These proceedings basically involved an April, 1972, filing, a removal that same month to the Illinois federal courts, a June remand to the state courts, a pre-convention injunction against the challengers, and post-convention contempt activity. Wigoda v. Cousins, No. 72 CH 2288 (Ill. Cir. Ct. 1972). An emergency appeal to the Illinois Supreme Court initiated by the challengers after the convention was denied. Wigoda v. Cousins (Ill. Sup. Ct. August 4, 1972).

There were also proceedings in Illinois’ federal courts prior to the convention with each side seeking injunctions against the other. In June, District Court Judge Will remanded an injunction case against the challengers to the state court, in which it originated, for a want of subject matter jurisdiction. Wigoda v. Cousins, 342 F. Supp. 82 (N.D. Ill. 1972). While the challengers later won a district court battle in the court of Judge McGarr for an injunction against the elected delegation from proceeding in the state courts, Cousins v. Wigoda, 72 C 1108 (N.D. Ill. June 9, 1972), the Seventh Circuit, reviewing both district court actions, concurred in the analysis of Judge Will and vacated the injunction. Wigoda v. Cousins, No. 72-1384 (7th Cir. June 30, 1972); Cousins v. Wigoda, No. 72-1455 (7th Cir. June 30, 1972).

Then, there was the June and July activity in the District of Columbia. Twice the District Court and Judge Hart were involved, the first case dismissed on appeal since the Credentials Committee had not yet acted. Keane v. National Democratic Party, No. 1010-72 (D.D.C. June 19, 1972); Keane v. National Democratic Party, No. 1015-72 (D.C. Cir. June 20, 1972). After the Credentials Committee voted against the elected delegations in the Illinois and California challenges in early July, the two delegations’ complaints were treated by the District of Columbia Courts as companion cases. While the action was now directed against the party rather than the challengers, the Illinois challengers intervened and counter-claimed with the party for an injunction against state court proceedings. Keane v. National Democratic Party, No. 1320-72 (D.D.C. July 3, 1972); Keane v. National Democratic Party, No. 1320-72 (D.D.C. July 3, 1972). After the District Court upheld the Credentials Committee recommendations, the D.C. Circuit Court of Appeals assumed jurisdiction, upholding the Committee on the Illinois issue and granting an injunction against state court proceedings to the challengers. Keane v. National Democratic Party, No. 72-1629 (D.C. Cir. July 5, 1972). Keane v. Cousins, No. 72-1631 (D.C. Cir. July 5, 1972). This court was to become enmeshed in the Illinois affair twice more, once to interpret whether the Supreme Court stay order of the July D.C. Circuit judgment also suspended Illinois’ state court proceedings, Keane v. Cousins, No. 72-1631 (August 3, 1972), and again to determine whether the matter was moot upon the Supreme Court’s October vacation of the D.C. Circuit order and remand to that court. Keane v. National Democratic Party, 41 U.S.L.W. 3182 (U.S. October 10, 1972).

On July 1, 1972, shortly before the Convention, there was an appearance before Justice Rehnquist, sitting as emergency appeals Circuit Justice, in which the challengers sought to enjoin Illinois state court proceedings. It was denied. Cousins v. Wigoda, 92 S. Ct. 2610 (Emer. Ct. App. 1972).
CONSTITUTIONALITY OF THE NATIONAL DEMOCRATIC PARTY GUIDELINES

Most would agree that the goals of the National Democratic Party Guidelines, which precipitated the 1972 convention controversies, are praiseworthy aims expressive of an ideal of democratic government—full meaningful participation by all members of a vital political organization. However, other ideals such as those expressed in our Constitution must not be cast aside in the building process. The D.C. Circuit Court of Appeals expressed this concept well in its July, 1972, opinion going to the merits of the Convention controversies:

We recognize that some consider the change adopted by the Party to be a laudable one and the direction of recent attempts at Democratic Party reform is quite plainly toward the principle of proportioned representation and maximum participation of minority views. But the process by which that result is reached is necessarily as important as the result itself. We cannot be blind to the fundamental deficiencies in the fairness of the process of reaching that result. Nor can we overlook the injuries to which those deficiencies gave rise.

If those other ideals are to be affected in striving for full representation, the inroads must be narrowly construed. Certain National Democratic

There were then the proceedings before the entire Supreme Court, which logically should have resolved all conflict but did not insofar as the petitions for certiorari were not ruled on initially and the effect of their stay order on state court activity was not explicated. O'Brien v. Brown (the California challenge case) and Keane v. National Democratic Party, 92 S. Ct. 2718 (1972). The effect of the proceedings were further clouded by its post-convention remand to the D.C. Circuit to consider whether the Illinois affair was moot. Keane v. National Democratic Party, 41 U.S.L.W. 3182 (U.S. October 10, 1972).

By contrast, the California challenge was uncomplicated. In the week before the Convention, it routinely if rapidly followed the normal procedural course from the federal district court to the federal circuit court to the United States Supreme Court. Brown v. O'Brien, No. 315-72 (D.D.C. July 3, 1972), rev'd, No. 72-1628 (D.C. Cir. July 5, 1972), stayed, 92 S. Ct. 2718 (1972), vacated, 41 U.S.L.W. 3182 (U.S. October 10, 1972).

19. One political analysist is of the opinion that old-time conventions dominated by party bosses is the system most responsive to the electorate since these figures truly have a stake in the outcome. Winning elections is a crucial prerequisite to their livelihood. He says:

The motivational force behind the selection of party candidates ought to be that of winning the election. Any trade-off between ideological purity and voter appeal ought to favor the latter. This statement of the problem suggests that the convention ought to be populated by 'professional' politicians rather than 'amateurs'. When a group of people are more concerned with winning elections by pleasing a majority of the voters than in adopting any specific policy, they would be more willing to modify their behavior to fit the desires of the public.

Goldstein, One Man, One Vote and the Political Convention, Alternative Methods of Implementation: A Political Analysis, 40 U. Cin. L. Rev. 1 (1971).

Party Guidelines as currently drafted appear to be constitutionally in-
firm media to that end.

Two areas of the Guidelines stand out as rugged attempts to achieve
the objectives of democratization—those treating slate-making and dis-

crimination. Guidelines speaking to these problem areas were violated
by a portion of the delegation elected from Illinois according to the
party’s hearing officer and its Credentials Com-

Guideline C-4 muzzles for purposes of delegate selection the voices
of officials elected or appointed before the calendar year of the dele-
gate elections. It provides in pertinent part:

[T]he Commission requires State Parties to prohibit any practices
by which officials elected or appointed before the calendar year
(of the Convention) choose nominating committees or propose or
endorse a slate of candidates—even when the possibility for a chal-

lenge to such slate or committee is provided.22

While it is often difficult to successfully wage a campaign against
the support of the regular political organization, usually a group of
incumbents, the most logical means of combating “bossism” is to work
vigorously to establish one’s own broad base of popular support. It,
of course, becomes easier to establish this popularity base if the “or-

organization’s” voice is muted. However, such a method blatantly im-

pinges upon the exercise of the first amendment right of free speech.
This is not even a case of constitutionally questionable prior re-

straints;23 it is prior abolition.

The immediate effect of this rule is to segregate the elected official
from the constituency which elected him in the first place on the im-
portant issue of qualifications of prospective delegates to a national
political party convention which nominates a candidate for

If the Party intends to open up opportunities for the “little guy”, its
methodology in this area is astonishingly offensive. Although it would

21. Findings and Report of Cecil F. Poole, Hearing Officer to Credentials Com-

mittee of the 1972 Democratic National Convention, 8-12 (June 25, 1972) [hereinafter
cited as The Findings].

The Credential Committee agreed with those findings in total in adopting its recom-

mendation to unseat the Chicago delegation.

22. MANDATE FOR REFORM 47.


24. When a Georgia legislature sought to unseat Julian Bond for speaking out

against Viet Nam, the Court ruled in favor of Bond, saying:

The manifest function of the First Amendment in a representative govern-

ment requires that legislators be given the widest latitude to express their
views on issues of policy . . . . (emphasis added)


Query: Logically extending this guideline and its principles, what about an incumbent
President attempting to build up Congressional strength for his programs by his power
of candidate endorsement?
be admirable to insure that everyone has reasonable access to the formal machinery to participate as a voter or as a candidate, the burden should thereafter be upon a candidate to gather his own support rather than relying upon an artificial and probably unconstitutional silencing of influential elected officials.

Guideline C-6 is similarly debilitated by its passage into the domain of the first amendment. It imposes these requirements upon political groups:

Furthermore, whenever slates are presented to caucuses, meetings, conventions, committees or to voters in a primary, the Commission requires State Parties to adopt procedures which assure that: 1. The bodies making up the slates have been elected, assembled, or appointed for the slate-making task with adequate public notice that they would perform such task.

In demanding that the public be given notice of when and where groups intending to develop delegate slates will assemble, rights of free association may be violated.

While there have been cases which have authorized infringement of first amendment rights for compelling reasons, these have generally been restricted to the areas of national security. Perhaps the case most supportive of the party's right to inhibit political activity by officials not elected within the Presidential election year is United Public Workers v. Mitchell. There the Court upheld the constitutionality of the Hatch Act, which prohibited partisan political activity by federal employees of the Executive Branch, on the rationale that Congress had the power to regulate, within reasonable limits, the political conduct of federal government employees. By analogy, it may be constitutionally permissible for the Party to inhibit the political activity of some of its members, in order to contribute to the democratic character of its delegate selection. The Court, however, has not reconsidered.

25. E.g., In Dunn v. Blumetein, 405 U.S. 330 (1972) the Court struck down Tennessee's durational requirements governing voting rights as violative of equal protection, referring to that right in the familiar language of "a fundamental political right, . . . preservative of all rights."

26. E.g., Williams v. Rhodes, 393 U.S. 23 (1968) held that Ohio's election law was so burdensome on third party efforts (in this case George Wallace's effort) to obtain a designation on the ballot that it violated a right to an effective candidacy.

   
   Our form of government is built on the premise that every citizen shall have the right to engage in political expression and association . . . . Exercise of these basic freedoms in America has traditionally been through the media of political associations . . . .


30. Id. at 96.
ered the Hatch Act, at least directly, for twenty-five years; therefore, Mitchell's viability as strong precedent is questionable.\textsuperscript{32}

Constitutional concern is also raised by the manner in which the Guidelines handle the problem of discrimination on the basis of race, nationality, age, and sex. Guideline A-1 requires that:

[S]tate Parties overcome the effects of past discrimination by affirmative steps to encourage minority group participation, including representation of minority groups on the national convention delegation in reasonable relation to the group's presence in the population of the State. [Footnote 2 adds: "It is the understanding of the Commission that this is not to be accomplished by the mandatory imposition of quotas."]\textsuperscript{33}

It is difficult to reconcile the footnote prohibiting mandatory quotas with the textual body requiring affirmative steps to achieve representation in reasonable relationship to the minority's presence in the population. Such affirmative steps as including increased voter registration drives among minorities and perhaps slating those groups in an affirmatively representative manner, may be constitutional. However, if the affirmative steps include the imposition of post-election adjustments to accomplish the goal, serious constitutional questions concerning the denial of equal protection under the laws are raised. To posit quotas in the textual language under one expression and then to negate the concept in a direct footnote declaration smacks of sophistry.

Judge MacKinnon of the D.C. Circuit Court of Appeals, although upholding the Illinois unseating on the basis of Guideline C-6 violations, was deeply concerned about the validity of Guidelines A-1 and A-2. In response to the argument that the Guidelines stand merely

\textsuperscript{32} One recent article contends that the Hatch Act would be found unconstitutional today. Political Activity and the Public Employee: A Sufficient Cause for Dismissal? 64 Nw. U.L. Rev. 736 (1969).

A recent federal district court case held unconstitutional the Hatch Act's prohibition against federal employees taking "active part in political management or in political campaigns." 5 U.S.C. § 7324 (1971). The court urged that decisions subsequent to United Public Workers v. Mitchell have obsoleted its holding, especially those cases developing the "least restrictive alternative test" for governmental incursions into the area of free speech. Nat'l Ass'n of Letter Carriers, AFL-CIO v. U.S. Civil Service Comm., 41 U.S.L.W. 2069 (D.D.C. August 8, 1972) (three-judge court).

\textsuperscript{33} MANDATE FOR REFORM 40.

Guideline A-2, A-1's sister guideline, states in relevant part:

The Commission requires State Parties to overcome the effects of past discrimination by affirmative steps to encourage representation on the national convention delegation of young people—defined as people of not more than thirty, nor less than eighteen years of age—and women in reasonable relationship to their presence in the population of the States. (Footnote 2 reads the same as above.)

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for an exhortation to State Parties to take strong affirmative action to insure roughly proportional representation, the opinion stated:

Judge MacKinnon believes this argument somewhat disingenuous and would conclude to the extent that the guidelines obviously do create some required preference for such groups, they do represent the imposition of quotas which are a denial of equal protection of the laws to those groups that are fenced out.\footnote{Brown v. O'Brien et seq. (footnote 20 supra) at 17.}

On the other hand, Judges Bazelon and Fahey would find the Guidelines constitutionally repugnant to the Equal Protection Clause only if \textit{applied} to justify the imposition of a post-electoral result quota. They did not, however, read the language to demand such quotas.\footnote{id. at 16.}

Judge MacKinnon distinguished the many federal court cases upholding quota employment laws to remedy past discrimination against Blacks\footnote{E.g., Carter v. Gallagher, 452 F.2d 315 (8th Cir. 1971) (en banc), cert. denied, 406 U.S. 950 (1972); Contractors Association v. Secretary of Labor, 442 F.2d 159 (3rd Cir. 1971), cert. denied, 404 U.S. 854 (1971).} on the basis that "Illinois election laws do not operate in a manner which deprives any individual of any race, sex, age, etc. from the right to participate in any Illinois election as a candidate or elector for any office."\footnote{Brown v. O'Brien et seq. (footnote 20 supra) at 18.} The opinion reads:

\begin{itemize}
  \item Absent any violation of constitutional rights in the conduct of elections in Illinois he [Judge MacKinnon] would find no justification for an affirmative action program here and would accordingly conclude that Guidelines A-1 and A-2 unconstitutionally deny equal protection without the necessity for doing so to protect other constitutional rights. \cite{Emphasis added.}
\end{itemize}

While Judge MacKinnon stressed the formal openness of the election machinery, Credential Committee Hearing Officer Cecil Poole defended his own decision, which recommended unseating, as not based upon a quota imposition but upon the pre-existing informal and clandestine operations of the Illinois State Party. He said:

From the mass of sharply conflicting evidence, there emerges a clear pattern of concerted action by the organization in the use of its influence and prestige in support of its regulars, encouraging their candidacies, agreements on numbers, cooperation in the preparation of sample ballots, their widespread distribution by party workers, their prominence at headquarters of ward officials, and
the formidable array of party power in behalf of its preferred candidates.39

He further added:

The Hearing Officer concludes, and finds, that the underrepresentation complained of was not the result of fortune, unaffected by the efforts of the organization, but was a continuation of the same conditions exposed in the Commission Report and came about because, although diligent in including its own regulars, the organization in Chicago expended no such resources on the segments of the population as required by Guidelines A-1 and A-2.40

Poole's discrimination argument in effect relates back to the violations of Guidelines C-4 and C-6 insofar as they demonstrated a failure to take affirmative steps prior to the election to attain proportional representation, and in fact demonstrated positive steps to perpetuate underrepresentation among minorities.

The problem to a great extent lies in semantics and ambiguous expression. For the party to fulfill the due process requirement of adequate notice, it will have to elucidate the meaning of Guidelines A-1 and A-2. Insofar as they advocate one constitutional guarantee—freedom from discrimination—by the outright denial of another—equal protection, they may contain constitutional defects. It is ironic that in responding to the goal of the Equal Protection Clause, the party's means of attainment may be violating that very clause.

Many of the other Guidelines are admirable and seemingly constitutional responses to the objective of democratic procedures. Guidelines governing publication of party rules (A-5), abolition of candidacy and filing fees (A-4), public notice of party meetings involving the delegate selection process (C-1), timely elections within the Presidential election year (C-4), and others are valid rules furthering the development of truly open, meaningful, and fully participatory elections of delegates.41 For these the party is to be commended.

40. Id. at 24.
Poole himself admitted that a quota system would probably be unconstitutional:

Any such principle would be encumbered by grave doubt in any case, but its application here is unnecessary because the underrepresentation found was so extreme as to indicate (with a high degree of conviction) a failure to open up to fuller participation by those who have historically been excluded, as intended by the Guidelines and the Call to the 1972 Convention. Id., at 5.

The alleged extreme underrepresentation was supported in the report by statistics. Blacks, Latins, females and youth, representing 37%, 10%, 52%, and 30% of Chicago's population constituted only 20%, 3%, 15%, and 8% respectively of the elected delegation. Id. at 21.

41. MANDATE FOR REFORM 34 (Summary of the Guidelines).

These observations of the validity of the Democratic Party's guidelines, of course,
A party, however, cannot deign itself the final authority on the constitutionality of its rules, especially when it serves as one of the two vital conduits in providing viable candidates for the Presidency as the Democratic and Republican parties do. Our Constitution does not subscribe to the Machiavellian maxim of the end justifying the means, and the courts may see fit to review the party's actions to check that such a philosophy is not motivating integral decisions in the Presidential election process.

**Threshold Matters: Jurisdiction and Justiciability**

Before a court can intervene in the decisions of a national political party, it must first determine whether it has jurisdiction of the subject matter of the controversy. Then it must decide whether it is capable of fashioning a remedy; that is, is the subject matter justiciable in this context? This raises twin issues. The court must ask whether the decisions of the national political party in the area of delegate selection are such state action as to raise constitutional questions through the absorption system of the fourteenth amendment and its "no state shall . . ." language. If it answers that issue affirmatively, the court must then decide whether standards productive of manageable remedies are available, a decision which is basically an offspring of the political question doctrine.

have not so much been intended to exhaust the constitutional research as illustrate some of the serious issues raised by many of them.

42. The question of subject matter jurisdiction presents a more difficult problem for federal courts than state courts whose jurisdiction is general as a rule. The jurisdiction of the lower federal courts is particularly limited. The two federal district courts involved in the 1972 controversy split on this issue. Judge Will held that no subject matter jurisdiction existed on a federal question basis (28 U.S.C. § 1331 (1971)). He contended that the relation of the national party convention and its delegate seating methods to the U.S. Const. art. II, § 1 (the Presidential and Vice-Presidential electoral system) was too remote to constitute a true federal question. Wigoda v. Cousins, 342 F. Supp. 82, 84 (N.D. Ill. 1972).


Most of the specific statutory grants of jurisdiction speak to the State or state law. E.g. 42 U.S.C. § 1983 (1971) (the basic Civil Rights statute). The resolution of whether national political party activity is state action and then whether the "State" or "state law" language in those statutes includes all forms of state action will determine whether the statutory grant applies.

Other possible original jurisdictional bases are 28 U.S.C. § 1343(3) (1971) ("... under color of any State law . . . regulation, custom or usage, of any right, privilege, or immunity secured by the Constitution of the United States . . ."); 28 U.S.C. § 1343 (4) (1971) ("... to secure equitable relief under any Act of Congress, providing for the protection of civil rights, including the right to vote."); or 28 U.S.C. § 1344 (1971) ("... to recover possession of any office except . . . (delegate?) . . . wherein it appears that the sole question touching the title to office arises out of denial of the right to vote . . . on account of race, color, or previous condition of servitude.")
State Action: A Question of Jurisdiction

The issue of whether a transaction is accountable to the fourteenth amendment has been fallow territory for academic treatment. The concept of "state action" has become so contorted that its highly liberal definition in some cases has virtually eliminated it as a serious barrier to constitutional review. Nevertheless, in controversies involving political parties the considerations have ranged from an elaborate syllogism finding state action to a lengthy justification of dismissal of the complaint for a lack of state action.


44. E.g., Shelley v. Kraemer, 334 U.S. 1 (1948) where the fact that local courts enforced racially restrictive property covenants in private house sales was enough to call in the fourteenth amendment; E.g., Amalgamated Food Employees Union v. Logan Valley Plaza, 391 U.S. 308 (1968) in which a privately owned shopping plaza was considered the equivalent of a public business center and thus subject to first amendment mandates (through the fourteenth) to not totally suppress free expression, including picketing.

45. Georgia v. National Democratic Party, 447 F.2d 1271 (D.C. Cir. 1971), cert. denied 404 U.S. 858 (1971), the case deciding against the strict application of the one-man, one-vote equation to the national political party's delegate allocation formula, spoke at length on the state action issue in developing its right to hear the matter at all. (Id., at 1274-1276). The D.C. Circuit Court of Appeals deemed the Texas White Primary Cases and the Reapportionment Cases of Gray v. Sanders [note 1 supra] compelling analogies. The appearance in those cases of two different problems—racial discrimination and equal protection in voting power—in various state political party settings (primary, committee, and convention) was influential. The Court also viewed the delegate-selection process to be as integral to the electoral system as the candidate nomination process was in those cases. Finally, it justified the extension of that reasoning to national political parties since "the collective activity of all the states' delegates at the national convention can be no less readily classified as state action." 447 F.2d at 1275.

46. On the other hand, in Smith v. State Executive Committee of Democratic Party of Georgia, 288 F. Supp. 371 (N.D. Ga. 1968) in which case the petitioners complained on an equal protection basis about the statutory scheme of committee appointment of delegates to the national political party convention, the Court declared that state action required the performance of some state officer, and the gubernatorial nominee's action, even if an incumbent, was in his capacity as party head rather than head of state.

The Court chose to distinguish those White Primary and Reapportionment Cases, which involved political parties, as restricted to the actual voting process by general or primary election and not applicable to the remote selection of political party delegates.

The Court further deemed Terry v. Adams, 345 U.S. 461 (1953) as doubtful authority since its basis was the fifteenth amendment prohibition against racial discrimination.

In the case of Lynch v. Torruato, 343 F.2d 370, 372 (3d Cir. 1965), in which non-elective steps in the selection of a political party county chairman were attacked, the federal court of appeals made this distinction which lends some support to the theory of the non-existence of state action in our problem:

[T]he citizen's constitutional right to equality as an elector, as declared in the relevant Supreme Court decisions, applies to the choice of those who shall be his elected representatives in the conduct of government, not in the internal management of a political party.

It should be noted, however, by comparison that a delegate's dominant function is electoral, despite his committee participation in, for example, platform formulation. He is, therefore, integrally involved in the choice of a truly governmental officer—the
The latter treatment is probably explainable as an excuse not to hear a controversial issue. The restraint schematic of the federal courts including such concepts of state action and such doctrines as political question, ripeness, mootness, and others are often unpredictable bases for constitutional review.

The assumption, explicated in *Brown v. O'Brien,*\(^47\) by the District of Columbia Court of Appeals, and implied in the October, 1972 Supreme Court remand of *Keane v. National Democratic Party*\(^48\) is that the national political party's important function of nominating a presidential candidate constitutes state action. The remarks of Justice Marshall's dissent, in the August, 1972, Supreme Court decision of *O'Brien v. Brown* to stay the D.C. Circuit's order, are also appropriate:

> [T]he action of the Party in these cases [the two challenges], was governmental action, and therefore subject to the requirements of due process. The primary election [to elect delegates], was, by state law, the first step in a process designed to select a Democratic candidate for President; the State will include electors pledged to that candidate on the ballot in the general election. The State is intertwined in the process at every step, not only authorizing the primary but conducting it, and adopting its result for use in the general election. In these circumstances, the primary must be regarded as an integral part of the general election.\(^49\)

**Political Question: An Issue of Justiciability**

Even if a court assumes jurisdiction, there still remain the questions of whether the court should be involved in this type of subject matter and whether it is capable of fashioning a judicial remedy. Courts often ask themselves these questions before proceeding to the merits,

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That court, faced with the 1972 credentials challenges summarily found state action citing its elaborate development in *Georgia v. National Democratic Party,* 447 F.2d 1271 (D.C. Cir. 1971), *cert. den. 404 U.S. 858 (1971):* “We have no difficulty concluding that defendants' National Democratic Party action against these delegates was state action.”


49. 92 S. Ct. 2718, 2724 (Marshall J., dissenting).

It has also been the general consensus of articles treating this topic that the acts of the national political party in its nominating convention are the acts of government, whether or not its delegates come from a state in which delegate selection is controlled by statute or state party rule and whether or not the originating system is primary, committee, or convention. *See Regulation of Political Parties: Vote Dilution in the Presidential Nomination Procedure,* 54 *Iowa L. Rev.* 470, 476 (1968). Chambers and Rotunda, *Reform of Presidential Nominating Conventions,* 56 *Va. L. Rev.* 179, 194 (1970); *Constitutional Safeguards in the Selection of Delegates to Presidential Nominating Conventions,* 78 *Yale L.J.* 1228, 1222 (1969).

*But see One Man, One Vote and Selection of Delegates to National Nominating Conventions,* 37 *U. Chi. L. Rev.* 536, 538 (1970).
and the controversy at issue is one of those situations when the inquiry is highly relevant.

Therefore, a consideration possibly more significant than "state action" in the area of political party affairs is that of the political question. *Baker v. Carr*, the case which developed the concept at length, categorized the doctrine's impact into two main thrusts: commitment of the matter either by explicit Constitutional language or by traditional respect for the separation of powers to another branch of government, and confrontation with a subject matter incapable of judicial resolution due to a lack of manageable standards.

Since it would strain the meaning of "another branch of government" to categorize the national political party and its convention as another branch of government merely because some of its members are Congressmen or its role is integral to the election of the Executive, the concept of separation of powers is viewed to have no deterrent effect on judicial review in our type of controversy. Justice Marshall in his dissent in *O'Brien v. Brown* agreed:

Neither the executive nor the legislative branch of government purports to have jurisdiction over the claims asserted in these cases. Apart from the judicial forum only one other forum has been suggested—the full convention of the National Democratic Party—and that is most assuredly not a coordinate branch of government to which the federal courts owe deference within the meaning of the separation of powers or the political question doctrine.

However, the second aspect of the political question doctrine—the availability of justiciable standards—raises a more serious dilemma in the context of these 1972 convention controversies.

One of the problems in the pre-*Baker v. Carr* days was that allegations of malapportionment appeared before the Court as a violation of  

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50. 369 U.S. 186 (1962).
51. Id. at 211.
52. Id. at 217.

The Court has cautioned, however, that the colloquial meaning of "political" does not control the political question: "The objection that the subject matter of the suit is political is little more than a play on words." *Nixon v. Herndon*, 273 U.S. 536, 540 (1927) (Justice Holmes), one of the White Primary Cases.


However, in *Irish v. Democratic-Farmer-Labor Party of Minnesota*, 399 F.2d 119, 121 (8th Cir. 1968) a panel of the Eighth Circuit, including now Supreme Court Justice Blackmun, dismissed a complaint concerning malapportioned counties in national party delegate selection in a per curiam opinion:

Certainly we have here 'a lack of judicially discoverable and manageable standards'. Perhaps, we also have the 'impossibility of a court's undertaking independent resolution without expressing a lack of respect due coordinate branches of government' (Quoting in part from *Baker v. Carr*, 369 U.S. 186, 187, 217, 226 (1962)).
the "republican form of government" constitutional standard,\textsuperscript{54} and were consequently dismissed as non-justiciable political questions.\textsuperscript{55} It was not until the same matter appeared under the aegis of the Equal Protection Clause that the Court said that "judicial standards under the Equal Protection Clause are well developed and familiar;"\textsuperscript{56} and that, therefore, the matter of malapportionment is justiciable. This evaluation of the manageability of the Equal Protection Clause was eventually substantiated with the application of the simple equation of "one man-one vote" to apportionment problems.\textsuperscript{57} This freed the Court from superimposing its policy judgment on the States in holding that the Constitution clearly intended each man's vote to be equally effective. The quantifiable nature of the issue thus provided easy administration and testing.

The standards, upon which the current claims in the national political party challenges were based, were the Due Process Clause and various first amendment rights, including freedom of speech and association and the right to vote. The subject matter which was to be weighed on those scales was the National Democratic Guidelines as drafted and as applied.

The application of the Guidelines presented little difficulty since the standards of procedural due process, like those of equal protection, are "well developed" and easily tested. What is required in this context are the recurrent themes of clear notice as to what state party actions are expected in order to comply with the Guidelines, and if an alleged violation occurs, an opportunity to be heard.\textsuperscript{58} The failure to meet these dictates of the Due Process Clause is what proved to be the constitutional defect in the National Democratic Party's handling of the California challenge.\textsuperscript{59}

However, it is the substantive element of the Guidelines which raises the real problem of justiciability.\textsuperscript{60} The Guidelines are the response

\textsuperscript{54} "The United States shall guarantee to every State in this Union a Republican Form of Government . . . ." U.S. Const. art. IV, § 4.

\textsuperscript{55} Colegrove v. Green, 328 U.S. 549 (1946), for example, came up under this basis and was dismissed as part of the "political thicket".


\textsuperscript{57} E.g., Gray v. Sanders, 372 U.S. 368 (1963); Reynolds v. Sims, 377 U.S. 533 (1964). The cases viewed all considerations other than arithmetical equality irrelevant.


\textsuperscript{59} See p. 157 infra.

\textsuperscript{60} By analogy, in one federal circuit court case, an equal protection argument by an independent candidate, based upon the inequalities inherent in the political patronage system of the two major political parties, was accepted as a statement of a claim upon which relief could be granted. The dissent stressed the non-justiciability of such a
to the “democratizing” mandate of the Party, but there is much room for heated debate as to which standards will make the party a more democratic organization.\(^6\) It is an area which requires policy evaluations, and the Court has long admitted, if not always practiced, that it has neither the resources nor the time of other branches of government to develop a studied solution.\(^6\) It was the issue of substantive constitutionality which arose in the Illinois challenge and at least one court—the D.C. Circuit Court of Appeals—found the matter amenable to Constitutional standards.\(^6\)

This problem of manageability should not and has not prevented the Court from setting certain standards to protect important First Amendment rights. If the party infringes upon important rights such as free and private association in its admirable goal of achieving “full, meaningful, and timely participation,” the Court has the repertoire to determine whether the infringement is constitutionally justifiable in furthering other constitutional interests such as effective voting or meaningful candidacy. It is not as if the Court is authoring the Guidelines; it is merely checking them for validity. The Court has not only the ability but the obligation to do so.\(^6\)

As with “state action”, the political question doctrine is a slippery concept which may serve as an excuse not to hear a case for some other underlying reason. For example, the Court may have been implicitly allowing the States lead time to clean their own malapportioned

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A distinction should be drawn in this area between the rights of voters and candidates for public office to be given equal treatment by the state in the 'mechanical aspects of the election process' . . . and remedies for alleged abuses of the persuasion or electioneering aspects of the process. (Emphasis added.)

Shakman v. Democratic Organization of Cook County, 435 F.2d 267, 271 (7th Cir. 1970) (dissent).

61. In fact, the issue of what is "democratic" is strikingly reminiscent of what is "republican" which, as indicated above, was a non-justiciable standard according to the Baker v. Carr court. Even the Equal Protection Clause was viewed by the dissent in that case as unproductive of standards in certain settings:

In the last analysis, what lies at the core of this controversy is a difference of opinion as to the function of representative government . . . The federal courts have not been empowered by the Equal Protection Clause to judge whether this resolution of the State's internal political conflict is desirable or undesirable, wise or unwise.


These same misgivings about superimposition of judicial policy are applicable to the Due Process Clause, which is one of the dominant issues in the convention challenges.

62. This attitude of the Court is especially evident in non-review of Congressional economic legislation. McCloskey, Economic Due Process and the Supreme Court: An Exhumation and Reburial, 1962 SUP. CT. REV. 34.


64. "A denial of Constitutionally protected rights demands judicial protection; our oath and our office requires no less of us." Reynolds v. Sims, 377 U.S. 533, 566 (1964), protecting the right to an equal vote.
houses prior to the series of Reapportionment Cases. Upon continued dereliction by the States, the Court in Baker v. Carr then intervened but refused to overrule even the plurality opinion of Colegrove v. Green. Therefore, when this Court-manufactured doctrine of the political question appears in a prior case, it should not be viewed as ironclad precedent for future recurrences. It may be that the time or facts are not proper, that rehabilitative time is being granted, or some other tacit motive is at work.

Therefore, despite these hurdles of state action and justiciability, a court, observing a grievous injury or a great issue, will not often allow the hurdles to become insurmountable. Almost as the injury intensifies and the issue magnifies, so does the federal question grow, so does state action increase, and so does justiciability become more imperative. If the issues of the Democratic Convention of 1972 linger or recur, the courts, including our highest court, must go to the merits of the controversy, not permitting what seems to be an abstruse procedural framework to deter them.

THE MERITS

In this labyrinth of sensitive political affairs, some members of the Judiciary were not restrained from resolving or urging a resolution of the 1972 National Democratic Party Convention credential challenges on their legal merits.

Two days before the Convention was gavelled to order, Cook County Circuit Court Judge Daniel A. Covelli issued an injunction restraining the challengers from taking the seats of Illinois' elected delegation. Although there was no formal opinion with his order, transcripts reveal that his legal rationale was premised upon the supremacy of state law in relation to a voluntary association rule such as that of a national political party. He failed to find any legal right whereby a non-

65. In Irish v. Democratic-Farmer-Labor Party, 399 F.2d 119, 120 (8th Cir. 1968), where petitioners complained of a malapportioned state convention choosing delegates to the national political party convention, that court dismissed the claim, stating: One significant guideline fact is that in the many reapportionment cases the courts have never moved in hastily. Instead, the attitude has been one of reluctance and of willingness to have the challenged body initially given the opportunity to attempt to reorganize itself.
68. The July 8 proceeding transcript reads: The Court: A group of persons set themselves up and decided that they would override the thousands of voters that had selected the delegates that they had voted for and that had won. I don't think we have reached that point in the United States yet. Record at 116, Wigoda v. Cousins, No. 72-CH2288 (Ill. Cir. Ct. July 8, 1972).
governmental conference such as a political party convention could contravene governmental law and prevail. He analogized the events to a situation wherein a group such as the Knights of Columbus passed a club rule allowing polygamy. He asked, in effect, if the government had outlawed such a marital mode, could the club rule “legalizing” it possibly stand? 69

When widely divergent views generate from the same set of facts, the fork usually occurs at the stage of primary definitions. In the proceeding in the Illinois trial, once Judge Covelli had designated the national political party a purely private organization, the remainder of his legal theory rushed forward with continuity. Instead of entering the realm of federal constitutional issues, the court chose to pit the state statutes and constitution against the rule of a private organization operating within the state of Illinois. There was no need to enter into considerations of the fourteenth amendment since the party by prior definition was private and without “state” characteristics. In this context, it cannot be seriously argued that a private citizen, group of citizens, or organization has the right to frustrate State electoral results—results which were cast and tabulated through State election machinery, which the national political party chose to utilize. As a truly legitimate interest of the State and its citizenry, such elections may be regulated and enforced by organs of the State, including its courts.

Other courts, however, differed in their views of a national political party and its role in reference to a State. In dismissing an attempt to remove the same controversy to Illinois' federal courts, Judge Hubert Will proffered this suggestion:

This is not to suggest that the qualifications and eligibility of delegates to national political party conventions is properly determinable by state law or by state courts. If it were 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. The proper forum for determination of the eligibility of delegates to serve at such a convention is the Credentials Committee of the party at such a convention. 71

70. Illinois' new 1971 Constitution mandates that elections shall be “free and equal,” ILL. CONST. art. III, § 3; and the state statutes say that the election of delegates and alternates “... to national nominating conventions ... shall be made in the manner provided in this Article 7 and not otherwise;” ILL. REV. STAT. ch. 46, § 7-1, et. seq. (1971).
The district court further speculated that "an attempt by an individual state to control a national convention of a party will necessarily fail due to the limits of its own jurisdiction." While this statement may be technically correct, the state court through its power of injunction over resident delegates and challengers demonstrated in Illinois how such a court may obliquely extend its jurisdictional influence in quasi-long arm fashion. When the delegate or challenger returns to his home state, he may face contempt charges—a very high price in the practice of his political beliefs.

Still another court viewed the issues in a different way. The Court of Appeals for the District of Columbia, deliberating upon the merits in both the Illinois and California credential challenges, held that as to the Illinois controversy no inconsistency existed between Illinois' electoral laws and the National Democratic Party's credential Guidelines. It, therefore, found no need to treat the crucial confrontation in which there would be a clear conflict between the state law and the party rule.

The Court reasoned:

The Illinois election law is, by itself, not incompatible with guideline C-6 of the McGovern Commission. [This guideline, prohibiting private slate-making, was allegedly violated by Chicago's regular political organization]. The guideline complements the Illinois law in an area—selection of delegate slates—where the state law is silent.

The court then decided that a national political party, with its broad freedom of association, can determine the qualifications of its convention membership, "if exercised within the confines of the Constitution." It cautioned, however, that although the party serves a quasi-governmental role in the important process of elections, and must therefore operate in that role in a constitutional manner, a court must act gingerly so as not to chill the party's important first amendment right of association. The court said, "We begin with a firm conviction that the political parties must have wide latitude in interpreting their own rules and regulations." In effect, the court was balancing the interest of the people in executing the ballots they cast and the interest of the party in free association. Both the right to vote and the right to free association are important offspring of the first amendment, and the scale must be delicate indeed.

Wigoda v. Cousins, No. 72-1384 (7th Cir. June 30, 1972).
74. Id. at 16. The court did not explain away the "and not otherwise" language in the Illinois statute. See note 70, supra.
75. Id. at 16.
76. Id. at 9.
Without treating each of the alleged guideline violations since the violation of one would be sufficient grounds for unseating the delegation, the court decided that Guideline C-6 contained no constitutional infirmity as written or as applied, and therefore upheld the right of the National Democratic Party to unseat the elected delegation from Illinois.\(^7\)

The jolting impact of this court's decision was that a national political party convention was empowered to strip State delegates of their elected official status and to thereby disenfranchise those who voted for them. In other words, the Party could apply the strictest of penalties—negation of electoral ballots—to enforce its policy.

Still unanswered, however, was the dilemma of a state law and a convention rule directly in conflict, but the California challenge apparently contained the ripe setting. It seemed that the California challenge would precipitate the head-on clash between the law and the rule insofar as California's "winner-take-all" state primary laws\(^7\) ran directly contrary to the Credentials Committee's interpretation of the mandate itself\(^7\) and Guideline B-6\(^8\) as a prohibition of such delegate primaries. The court, however, was once again able to avoid the necessity of resolving the legal issue of direct contravention when it quite properly found that the application of the Guidelines was constitutionally defective in other respects. In noting the constitutional importance of the process of electing the President of the United States, the opinion held that integral steps in that election must be subject to the standards of due process. Guideline B-6 was viewed as textually "vague" and applied in virtual ex post facto style insofar as the mandatory character of the guideline was unclear and the "clarification" by the Credentials Committee postdated the California primary.\(^8\)

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\(^7\) Id. at 16.

Query: Can the first amendment rights of one group be enhanced at the expense of those same rights in another group?

\(^8\) CAL. GEN. LAWS ANN., Elec. C.A. § 6386 (Deering, 1971) reads:

The Secretary of State shall issue a certificate of election to each person who is a member of the delegation which received the largest vote cast for any delegation of the Democratic Party, such person thereby being elected as delegate or alternate to the Democratic National Convention.

\(^9\) "... [t]he convention shall require that:

1. The unit rule not be used in any stage of the delegate selection process.

..." 1968 DEMOCRATIC PROCEEDINGS 269.

\(^8\) The Commission believes a full and meaningful opportunity to participate in the delegate selection process is precluded unless the presidential preference of each Democrat is fairly represented at all levels of the process. ... The Commission believes that there are at least two different methods by which a State Party can provide for such representation. First, in at-large elections it can divide delegate votes among presidential candidates in proportion to their demonstrated strength. ..." MANDATE FOR REFORM 44.

\(^8\) Brown v. O'Brien, et seq. (see footnote 20 supra) at 12.

In addition, Guideline B-6 was in the category of "urged" recommendations whereas,
The tremendous legal significance of this part of the decision is that, insofar as the party's right of association permits the establishment of Guidelines by which to measure the qualifications of its associates, those Guidelines, especially in the context of an integral step in the Presidential election process, are subject to judicial review for constitutionality.

Therefore, in the Illinois challenge, the court found one Guideline constitutional on its face and as applied, and allowed the drastic measure of unseating. In the California dispute, it found another guideline constitutionally violative of due process for its vagueness and as retroactively applied, and would not allow the drastic steps of disenfranchisement.

What remains for interesting conjecture (in fact, all is conjecture given the decisions of the Supreme Court) is the setting in which not only is the state electoral law constitutional, but the party guideline is also constitutional on its face and as applied. Nevertheless, the two conflict in a vital provision. For example, if the National Democratic Party clarifies its firm resolution to bar "winner-take-all" primaries in the 1976 delegate elections and the California state law remains the same, at least partially due to no state party effort to change it, and the Court views both "winner-take-all" and "winner-take-part" systems constitutional, there exists the classic head-to-head clash.

On this point and in anticipation of it presenting itself, the Democratic Party argued in its brief that its status as a private voluntary organization and its imperative right of unfettered association dictated that neither a court nor a state has a right to impair its decisions, including those decisions whether or not to honor the delegate selections from a state. It further contended that since its concerns are national in scope while the states' interests are inherently parochial in perspective, the local unit must not be allowed to frustrate the national purpose and policies surrounding Presidential nominations and ultimately elections. To support this concept, the party argued:

At bottom, the Supremacy Clause, Article VI, is involved for if a state could frustrate the procedures of the national parties which nominate the President and Vice-President, it would thereby in-
terfere in a fundamental way with the executors of federal law.\textsuperscript{83} The party proclaimed that it would not interfere with but would honor the electoral results of the various states if the elections complied with the national party rules "designed to assure fair representation of all party members in all the states."\textsuperscript{84}

The party's argument, although expressive of some valid concerns, is inconsistent in other respects. For example, it disclaims the trait of state action for purposes of jurisdiction, yet considers itself the "executor" of federal law when its rules contravene state law.\textsuperscript{85} Furthermore, despite protests to the contrary, some of the party Guidelines are de facto interference with state elections. Guidelines in conflict with state law (for example, a future requirement abolishing "winner-take-all" primaries) say, in effect: "Change your law (or make all feasible efforts) or we will not effectuate your electoral results at our convention." Such a policy stands for a respect of state law if it happens to coincide with party philosophy. The party's argument would therefore be more frankly stated if it forthrightly contended that its rules are in all instances superior to state law, at least for purposes of delegate seating at its convention.

The challenged delegations' briefs, on the other hand, argued that the right to vote is so sacrosanct that it cannot be infringed by a state, much less a political party, to execute even the most noble policies. The elected Illinois delegation spoke to the issue in these words:

Because the right to vote is fundamental, it cannot be abridged, either by the state or any organization possessing governmental powers. Such abridgments are subject to the most exacting scrutiny and can be upheld only if necessary to promote a compelling state interest: (citations omitted) . . . . It is thus not sufficient for the party to show the abridgement of the right to vote is merely rationally related to an otherwise legitimate party purpose. Thus, the position of the defendants before this court that enforcement of the McGovern Commission guidelines is necessary to effectuate (sic) alleged past practices or to broaden the participation of voters in party affairs is insufficient to justify the drastic measure of disenfranchising seven hundred thousand votes.\textsuperscript{86}

\textsuperscript{83} Id. at 31.

Interestingly, Illinois trial court Judge Covelli turned this argument around so that the state law was deemed supreme in relation to a private political party rule. See p. 155 supra.

\textsuperscript{84} Id. at 31A.

\textsuperscript{85} Id. at 10, 31. This style of argumentation, ranging from claims of the non-existence of "state" law to the execution of the highest law of the land—the federal law, is, of course, partially attributable to the rights of alternative pleading.


This brief substantially reflected the basic arguments of both challenged delegations.
The theory further branched by corollary to the right of an effective candidacy, including a candidacy as a national political party delegate, which right is protected by the fourteenth amendment.\(^8\)

The courts are then hypothetically faced with the crucial consideration currently unanswered in American case law as to the status of national political parties in relation to other organizations, especially the states. It is the answer to this preliminary question which will allow many of the sub-issues to flow inexorably from it.

The issue is a difficult one. Will the states be allowed to frustrate uniform national political party policy by the absolute imposition of electoral results possibly derived from undemocratic processes? Conversely, will the party be allowed to cancel out electoral results in state delegate elections on the basis that the methods did not abide by party ideals? The danger at the one end is that undemocratic state electoral processes—and there are undeniably many\(^8\)—will perpetuate indefinitely unless spurred to amendatory practices. The peril at the other end is that the party, in the volatile milieu of a national convention, may unseat delegates under the pretense of a guideline violation when the underlying motive is political in its most colloquial sense.\(^9\) There is additionally the risk of muting or misrepresenting the voices of thousands of voters in the name of democracy with no time for polling their choices in a new “democratic” election.

The solution to this problem lies in an analysis of the underlying subject matter at stake. At the bottom of this maze of arguments lies an important stage in the election of the President and Vice-President of the United States. Although these contests are of great concern to states such as Illinois and California, the total interest is larger than either or both of those states. In short, the Presidential election is not a mere state interest but a crucial national interest, and it is this interest, and virtually this interest alone, which is the dominating force in the roles of the national political parties. What are the national political parties but concerts of all the states engaged in the formulation of national policies in the vital elimination process of Presidential candidates? Certainly we cannot permit the individual states to sap

although, of course, the arguments concerning the validity of the particular guidelines are necessarily individual.

87. \textit{Id.} at 25.
88. \textit{See} note 12 \textit{supra.}
89. \textit{E.g.}, The Rhode Island challenge, also based upon a “winner-take-all” primary prohibition basis, was defeated in the Credentials Committee despite no apparent factual or legal differences from the California challenge. Chicago Tribune, July 4, 1972, at 2, col. 1.
the strength behind national coalitions, which in a gestalt sense are larger than even the sum of their parts—the individual states.

The national political parties and their processes may not be the ideal organs to facilitate the Presidential election. Modern movements toward constitutional amendment of the entire Presidential election system arise with great frequency. Congress has invaded the process by making uniform for national election purposes age and residency requirements, and the Court upheld the constitutionality of the legislation. It may do more, possibly requiring a national political party primary or uniform state primaries for Presidential candidates. However, until such events transpire, the national political party convention system with its many drawbacks must suffice. Certainly, total autonomy of the states with their fragmented views of how to best handle Presidential elections is an inferior alternative. Let the individual states feed input into the formulation of that uniform national political party policy, but once the policy is determined, let all states be bound. The election of the President and Vice-President of the United States and all its antecedent steps are too vital for the result to be otherwise.

The political parties, however, will carry the scars of a Pyrrhic victory in obtaining a power of disenfranchisement to execute their policies, for if these Presidential electoral steps are so crucial, the formulation and implementation of the policies affecting that election must be reviewable for constitutional character. Consistency demands such a conclusion. Therefore, although the party will have been granted the power to implement its necessarily national policy through its rules, the high price will have been the reviewability of its decisions by the courts, and thus an infringement upon its jealously guarded independence and its traditionally wide-open life style. Its mandates will be reviewable for substantive and procedural constitutionality. If a rule is substantively unconstitutional, it will not be allowed to negate state electoral results. If a party rule is substantively constitutional, the state must have adequate notice of its meaning in time to adjust or attempt to adjust to its demands.

Furthermore and if at all possible, the courts should expect the party to resolve challenges quickly enough to allow for a new election. This would remove important fact-finding and decision-making matters.

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from the mercurial climate of convention time, and, more importantly, impose a good faith duty upon the party to attempt to preserve the vote of the electorate.\(^9\)

**PREVIEW OF THE SUPREME COURT’S VIEW OF THE MERITS**

The United States Supreme Court, while refusing to consider the merits of the controversy—at least under the circumstances of the 1972 Democratic Convention challenges, nevertheless leaked impressions of what it considered the merit issues to be. The per curiam opinion revealed this response:

Thus these cases involve claims of the power of the federal judiciary to review actions heretofore thought to lie in the control of political parties. Highly important questions are presented concerning justiciability, whether the action of the Credentials Committee is state action, and if so the reach of the Due Process Clause in this unique context. Vital rights of association guaranteed by the Constitution are also involved.\(^9\)

The dissent by Justice Marshall viewed the issues in a similar light, but he wanted to do more than state the issues; he wanted to adjudicate them. He and Justice Douglas, who concurred with the dissent, observed these conflicts generating from the controversies:

While the delegates couch their arguments in various ways all of the arguments boil down to these two: i.e. they have been denied due process and the voters who elected them have been denied an opportunity to vote for the candidate of their choice.\(^9\) . . . Thus when the Party deprived the candidates of their status as delegates it was obliged to do so in a manner consistent with the demands of due process.\(^9\) . . . In the cases before this Court, it is claimed that the presidential primary is an integral part of the election machinery and that the right to vote in the presidential primary has been impaired. That claim should be heard and decided on its merits, certainly not by the use of the stay mechanism in lieu of granting certiorari and plenary consideration.\(^9\)

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\(^9\) Of course, as is illustrated by the factual settings behind the 1972 Democratic Convention challenges, a new election may not always cure the irreparable damage. For example, a candidate may have already expended considerable energy on the premise of a “winner-take-all” primary suddenly changed to a prorated election. In a like manner, the “organization” cue (if the Guidelines stripping its influence are constitutional; see p. 143) may have already been transmitted, and a new election cannot silence that fact. Therefore, in some cases, early expeditious treatment of the challenges may provide a deliberative milieu, but a new election would either be unfair or meaningless.


\(^9\) Id. at 2721, n.1 (Marshall, J., dissenting).

\(^9\) Id. at 2724.

\(^9\) Id. at 2726.
Therefore, the Court through this opinion observed issues of first amendment rights of association, voting, and candidacy in addition to questions of due process of law. It, however, did not speak to the controversy of the relationship of the national political party and its rules to the states and their electoral results, for in fact, there may not have been a direct conflict of the two as indicated in the opinion of the District of Columbia Circuit Court of Appeals.  

Vicious Circle: Brief Time Between Ripeness and Mootness

When the courts are again thrust into the affairs of national political parties, there remain the extremely difficult considerations of when to hear the controversy and what remedy to fashion.

The District of Columbia District Court initially assumed jurisdiction of the Illinois matter prior to the proceedings before the Credentials Committee Hearing Officer. The District of Columbia Circuit Court of Appeals, however, viewed assumption of the matter as premature and vacated the District Court's order. Therefore, one court concluded such matters were not ripe at the very least until the Convention Hearing Officer heard the factual arguments and made unfavorable recommendations to the Credentials Committee.

The events of 1972 illustrate the severe mechanical problems inherent in the current system of both convention and judicial review. The convention challenge machinery does not begin to function until shortly before the convention. For example, Hearing Officer Poole's fact finding report on the Illinois situation was issued on June 25, 1972, approximately two weeks before the convention. One week later on July 1, 1972, the Credentials Committee nurtured the apple of ripeness to a ruddier shade by accepting the fact-finding reports on the Illinois and California challenges. If the controversy had not been ripe before, the apple had fallen off the tree by the time the District of Columbia Courts reconsidered the problem. When the matter appeared before the District Court on July 3, 1972 less than one week remained before the convention was to commence formal activities.

In five days, three federal courts (District of Columbia District,  

100. The Findings at 1.
101. Chicago Tribune, July 1, 1972 at 1, col. 5 and at 3, col. 3 respectively.
that same jurisdiction's Circuit and the United States Supreme Court) decided whether to adjudicate the issues. The first two did; our highest court did not. In fact, the Supreme Court pushed the doctrine of ripeness to its logical limit when it attributed, among other factors, this element as its basis for refraining:

In light of the availability of the convention as a forum to review the recommendations of the Credentials Committee, in which process, the complaining parties might obtain the relief they have sought from the federal courts . . . , we conclude the judgments of the Court of Appeals must be stayed.\footnote{103}

Therefore, the federal judicial doctrine of “ripeness”, developed to discourage advisory opinions as contrary to the “case and controversy” language of Article III,\footnote{104} has forced the courts in this syndrome into a “rushed deliberation” if they are to fashion a remedy for a current controversy. This environment can hardly be deemed conducive to sound judicial review of important legal issues, including the presentation of some matters of first impression. The Supreme Court said in this regard:

\[\text{[I]f this system is to be altered by federal courts in the exercise of their extraordinary equity powers, it should not be done under the circumstances and time pressures surrounding the actions brought in the District Court, and the expedited review in the Court of Appeals and this Court.}\footnote{105}\]

The doctrine of ripeness, compounded by understandable demand for judicial deliberation, has then drawn half the orb of the proverbial vicious circle. The circle is bottomed out by the doctrine of mootness, developed by the Court to prevent the use of its time in matters once suitable for adjudication but in which subsequent events have removed that need.\footnote{106} The result is virtually: “you can't bring it too early and you can't bring it too late—even if the only time you can bring it is too late because we won't let you bring it any earlier.”

The Court, in the convention controversy, stated that “we recognize

\footnote{103} O'Brien v. Brown, 92 S. Ct. 2718, 2720 (1972).
\footnote{104} \textit{E.g.}, United Public Workers v. Mitchell, 330 U.S. 75 (1947) said: As is well known, the federal courts, established pursuant to Article III, do not render advisory opinions. For adjudication of constitutional issues concrete legal issues, presented in actual cases, not abstractions, are requisite.
\footnote{106} A comic-tragic application of this doctrine occurred where after sitting on a case for two and one-half years, the Court refused to consider a child labor law regulating youth under sixteen on the basis that the plaintiff's passage of his sixteenth birthday "mooted" the question. Atherton Mills v. Johnston, 259 U.S. 13 (1922).
Query: For a Court whose concerns and decisions stretch beyond the actual litigants, should moot cases which produce a substantial record from the pre-existing actual case or controversy be automatically stricken from consideration?
that a stay of the Court of Appeals judgments may well preclude any judicial review of the final action of the Democratic National Convention on the recommendation of its Credentials Committee.\textsuperscript{107} In other words, the Court had entrusted the finality of crucial Presidential election decisions to the unpredictable fate of a political convention floor vote. This is truly a case of a vanishing controversy.

By interesting contrast, Justice Marshall initially spoke of an alternative review after the convention floor decision but during convention week and then stated:

\begin{quote}
If we wait even longer—until the national convention is over—and ultimately sustain the delegates’ claims on the merits, we would have no choice but to declare the convention null and void and to require that it be repeated. The dispute in these cases concerns the right to participate in the machinery to elect the President of the United States. If participation is denied, there is no possible way for the underlying disputes to become moot. The drastic remedy that delay might require should be avoided at all costs. \textsuperscript{[emphasis added]}\textsuperscript{108}
\end{quote}

He then concluded:

\begin{quote}
It is unfortunate that cases like these must be decided quickly or not at all, but sometimes that cannot be avoided. Where there are no substantial facts in dispute and where the allegation is made that a right as fundamental as the right to participate in the process leading to the election of the President of the United States is threatened, I believe that our duty lies in making decisions, not avoiding them.\textsuperscript{109}
\end{quote}

One particularly encouraging recent case to those who hope for a resolution of the important issues generated by these challenges is Moore v. Ogilvie.\textsuperscript{110} Even though the judicial machinery was too cumbersome to react to a complaint based upon Illinois’ 1968 electoral restrictions governing the placement of third parties on its ballot, the Court said, in overturning those restrictions, that the criterion for belated review in such cases should be whether “the problem is . . . capable of repetition yet evading review.”\textsuperscript{111} This case, although not

\textsuperscript{108.} Id. at 2723 (Marshall, J., dissenting).
\textsuperscript{109.} Id. at 2726.
\textsuperscript{111.} Id. at 816, quoting the standard espoused in Southern Pacific Terminal Co.
particularly soothing to the losing sides in the 1972 Democratic Convention controversies, indicates that the Court may yet provide a prospective remedy.\textsuperscript{112}

Another exception to the mootness doctrine has been based upon the existence of collateral effects. Although this exception has been most notably applied in criminal cases (for example, a two-time loser often receives more severe sentences),\textsuperscript{113} it has not been restricted to that category.\textsuperscript{114} In the Illinois challenge, two issues remained alive after the convention. One, and by far the most important, collateral effect was the violation against the state court injunction by the challengers who took their delegate seats contrary to that order.\textsuperscript{115} The second was the right to vote as delegates after the convention for the state's national political party committeeman and committeewoman. No similar collateral consequences lingered in the California challenge. Perhaps, this is the reason that the Supreme Court in its October, 1972, review of the writs for certiorari, found outright that the California issues were moot while remanding the Illinois issues to the District of Columbia Circuit Court of Appeals to determine the very question of mootness.\textsuperscript{116}

If the Court assumes jurisdiction and goes to the merits, it is faced with the difficult task of fashioning a creative remedy—whether it be solely prospective, partially retroactive (the possible collateral effects in Illinois if the unseating was deemed constitutional or unconstitutional), or absolutely retroactive (invalidation of the convention or Presidential election). If the Court's remedy is prospective, the range of its dicta to influence future proceedings will be important since it is unlikely that the issues will recur exactly as they arose in the Illinois and California challenges.\textsuperscript{117}

\textsuperscript{112} In fact, the Court even refused to find moot one case, in which union election laws of questionable legality were amended during the pendency of litigation, on the basis of possible re-enactment of the old by-laws once litigation concluded. Wirtz v. Hotel, Motel, & Club Employees Union, Local 6, 391 U.S. 492 (1968).
\textsuperscript{113} E.g., Sibron v. New York, 392 U.S. 40 (1968).
\textsuperscript{114} E.g., Esteban v. Central Missouri State College, 290 F. Supp. 622 (W.D. Mo. 1968), a student disciplinary action case based upon civil rights jurisdiction.
\textsuperscript{115} Wigoda v. Cousins, No. 72 CH 2288 (Ill. Cir. Ct. 1972), still pending resolution.
\textsuperscript{117} For an elaborate discussion of procedural methods available to the courts in enforcing its orders in political party contexts, see Note, Regulation of Political Parties Vote Dilution in the Presidential Nomination Procedure, 54 Iowa L. Rev. 470, 485 (1968).
CONCLUSION

The national political parties by the very nature of their national purpose must prevail over individual states in the area of Presidential nominations when conflicts between the two arise. However, since the parties are quasi-governmental bodies, endowed with attributes of state action, their policies, such as those illustrated by the 1972 National Democratic guidelines, must be reviewable for constitutional substance and application by courts empowered with the capacity and standards to adjudicate such activities, and at a time sufficient to provide current or future relief.

The oft-quoted words of Justice Pitney in Newberry v. United States have continued vitality today:

It seems to me too clear for discussion that primary elections and nominating conventions are so closely related to the final election, so vital to representative government that power to regulate them is within the general authority of Congress. It is a matter of common knowledge that the great mass of the American electorate is grouped into political parties, to one or the other of which voters adhere with tenacity, due to their divergent views on questions of public policy, their interests, their environment, and various other influences, sentimental and historical. So strong with the great majority of voters are party associations, so potent the party slogan, so effective the party organization, that the likelihood of a candidate succeeding in an election without a party nomination is practically negligible. As a result, every voter comes to the polls on the day of the general election confined in his choice to those few candidates who have received party nominations... As a practical matter, the ultimate choice of the mass of voters is predetermined when the nominations have been made.118

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118. 256 U.S. 232, 285 (1921), dissenting to a portion of the majority opinion striking down the Federal Corrupt Practices Act as unconstitutional.