Constitutional Safeguards in the Selection of Delegates to Presidential Nominating Conventions

The presidential election year of 1968 produced a spate of deep-felt dissatisfaction with the current method of nominating and electing our President. The two major parties were both rocked with dissension; there was a strong third-party movement which wound up with more than 10% of the popular vote; and there was a threat of the formation of a fourth party. The George Wallace faction in particular, by nearly preventing either of the major party candidates from gaining a majority of the electoral vote, has stimulated widespread efforts at reforming the presidential election process. This activity has focused both on the Electoral College and on the various systems by which state parties select delegates to the national party conventions.

Both major parties have set up committees to study the method of selecting presidential nominees. The impetus for the establishment of these committees came largely from an internal challenge to the current procedures for delegate selection in the Democratic Party. Pro-McCarthy members of the Rules and Credentials committees of the 1968 Democratic National Convention set up a group—the Commission on the Democratic Selection of Presidential Nominees (the Hughes Commission)—to study the convention and the delegate selection process. The conclusion of the Hughes Commission was that state systems for selecting delegates to the National Convention and the procedures of the Convention itself, display considerably

1. E.g., there were some 19 credentials challenges at the 1968 Democratic National Convention; similar pitched battles were fought in the Rules Committee (abolition of the unit rule to the precinct level) and the Platform Committee (Vietnam War plank). See generally Schmidt & Whalen, Credentials Contests at the 1968—and 1972—Democratic National Conventions, 82 HARV. L. REV. 1438 (1969).

2. For example, Senator Birch Bayh has called for the elimination of the Electoral College and the substitution of direct election of the President by popular vote. Other plans for reform include district election of electors and proportional allocation of a state's electoral vote. See A. BICKEL, THE NEW AGE OF POLITICAL REFORM 53-73 (1968).

3. Senators Margaret Chase Smith and George Aiken have proposed doing away with the national party nominating conventions and substituting a national primary. Id. at 74. Representative Bob Eckhardt (D-Tex.) has proposed a bill to encourage states voluntarily to adopt uniform legislation for delegate selection. See State Delegates to National Political Conventions (memorandum from the American Law Division, Legislative Reference Service, to Hon. Bob Eckhardt, Aug. 19, 1968).

4. The report of the Hughes Commission, THE DEMOCRATIC CHOICE (hereinafter cited as HUGHES COMMISSION), was completed just prior to the 1968 Democratic National Convention.
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less fidelity to basic democratic principles than a nation which claims to govern itself can safely tolerate. . . .

. . . National parties. . . are media which any segment of the population can use every four years to express its view, to vindicate its interests, and to change policies. But if existing parties fail to perform this function, they will not survive.5

At the convention, a minority plank abolishing the unit rule down to the precinct level was adopted as a result of the Hughes Commission findings.

The Democratic National Committee subsequently formed a committee, under Senator George McGovern, to continue the study of the delegate selection process and to make further recommendations for change. Republican National Committee Chairman Rogers Morton established a counterpart committee, and the two major parties then decided to cooperate in a bi-partisan effort at reform of the presidential nominating process.6

In the face of barriers preventing them from effectively influencing the composition of the ballot, both the third party Wallace supporters and the Democratic and Republican intra-party dissidents turned to the courts. Wallace backers challenged the Ohio obstacles to placing new parties on the ballot;7 dissidents within the major parties attempted to have the courts apply constitutional safeguards to the delegate selection process.8 The interest which the courts were asked to protect in both types of cases is the same—full and effective participation in determining the composition of the presidential ballot. Like the blacks in the White Primary Cases,9 the political minorities sought judicial recognition of a constitutional right to participation in the nominating process. And as in the Reapportionment Cases,10 the courts

5. HUGHES COMMISSION 2, 15-16.
6. There is some evidence, however, that the cooperative effort is serving not to facilitate but to thwart further change. See R. Evans & R. Novak, Re-formed Reform, N.Y. Post, April 19, 1969, at 26, col. 3-4. Regardless of the outcome of the reform movement, delegate selection procedures will likely be challenged even more vigorously before the 1972 conventions, and courts will continue to be faced with the issues discussed in this Note.
7. Williams v. Rhodes, 393 U.S. 23 (1868). This case is discussed at pp. 1249-52 infra.
were asked to step into the "political thicket" to protect the interests of those voters who had their votes "diluted" by political structures designed to favor particular interest groups. While the third party advocates have twice been successful in attacking state restrictions on access to the ballot,\textsuperscript{11} the courts have thus far refused to intervene in the major party delegate selection process. This Note argues that the latter cases were incorrectly decided, and that the fourteenth amendment protects the right of all party members to participate—on an equal basis—in the choice of the presidential nominee of their party. Before discussing the substance of the constitutional claim, however, it is necessary to deal with three possible obstacles to judicial involvement.

I.

Issues presented for resolution by the courts must be "justiciable."\textsuperscript{13} The decisions of the Supreme Court in the \textit{Reapportionment Cases}\textsuperscript{10} indicate that, in spite of its highly political nature, the area of convention delegate selection is within the regulatory power of the federal courts. Prior to \textit{Baker v. Carr},\textsuperscript{14} Justice Frankfurter's plurality opinion in \textit{Colegrove v. Green}\textsuperscript{15} would have barred any claim that delegate selection procedures violate constitutional guarantees. The opinion of the Court in \textit{Colegrove} emphasized the "peculiarly political" nature of apportionment decisions and in effect stated that claims involving the structure of representative institutions were not justiciable.\textsuperscript{10} In \textit{Baker},

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\item \textsuperscript{11} Williams v. Rhodes, 393 U.S. 23 (1969); Moore v. Ogilvie, 394 U.S. 814 (1969).
\item \textsuperscript{12} These are the elements of justiciability under the "political question" doctrine as articulated in \textit{Baker v. Carr}, 369 U.S. 186, 217 (1962):
\begin{itemize}
\item (1) Textually demonstrable constitutional commitment of the issue to a coordinate political Department;
\item (2) or a lack of judicially discoverable and manageable standards for resolving it;
\item (3) or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion;
\item (4) or the impossibility of a court's undertaking independent resolution without expressing lack of respect due coordinate branches of the government;
\item (5) or an unusual need for unquestioning adherence to a political decision already made;
\item (6) or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.
\end{itemize}
\item \textsuperscript{13} Note 10 supra.
\item \textsuperscript{14} 369 U.S. 186 (1962).
\item \textsuperscript{15} 328 U.S. 549 (1946). Justices Reed and Burton joined Justice Frankfurter in \textit{Colegrove}. The fourth member of the majority was Justice Rutledge, who concurred on the basis of his view that the Court had power to decide the issue but should refrain from exercising it on policy grounds. \textit{Id.} at 564. Justice Black, joined by Justices Douglas and Murphy, dissented; two justices did not sit in the case.
\item \textsuperscript{16} Justice Frankfurter said the political question doctrine excluded the entire apportionment area from judicial action:
\begin{itemize}
\item The basis for the suit is not a private wrong, but a wrong suffered by Illinois as
\end{itemize}
\end{itemize}
however, the Court rejected the notion that any broad class of issues was by its very nature nonjusticiable, and outlined an ad hoc approach to "political questions" based in large part on the availability of standards for judicial decision. Under this test, claims defined in terms of the Guaranty Clause were found to be non-justiciable, but claims of deprivation of personal political rights might be heard since "[j]udicial standards under the Equal Protection Clause are well developed and familiar . . . ."\(^{18}\)

Insofar as particular delegate selection procedures have a direct impact on the individual's ability to participate effectively in the political process, they raise issues of personal political rights under the fourteenth amendment. The electoral procedures involved are analogous to those regulated by the courts in the Reapportionment Cases, and it would seem that the questions raised are no less susceptible to treatment through "well developed and familiar" judicial standards.\(^{10}\)

A second possible obstacle to judicial involvement in delegate selection procedures is the argument that courts lack jurisdiction to hear such cases. The Court in Baker was careful to distinguish the issue of jurisdiction of the subject matter from that of justiciability of the claim. The federal courts can exercise jurisdiction only by a specific statutory grant of power, or in matters constitutionally conferred. In Baker, the Court found jurisdiction in that a claimed denial of equal apportionment of representatives to the state legislature "does arise under the Constitution." In New York State Association of Trial Lawyers v. Rockefeller,\(^{20}\) on the other hand, the district court held that there was no federally protected right to have state court judges

\(^{17}\) U.S. CONSR., art. IV, sec. 4.
apportioned throughout the state so as to equalize court calendar waiting lists, and therefore no federal jurisdiction of the claim. Justice Harlan used the same approach in his dissent in Baker;21 his position was that until the Court decided whether the fourteenth amendment imposed some restraint on apportionment of state legislatures, there could be no federal jurisdiction.

In cases where the plaintiff argues that he is asserting "a claim under the constitution," it is of course impossible to establish jurisdiction without a prior consideration of whether the asserted constitutional right exists. If the Court denies jurisdiction, it has in effect decided on the merits that there is no constitutional right which can be asserted on the allegations in question.22 This Note will attempt to show that there is a constitutionally cognizable interest involved in claims by major party members to equal participation in the presidential nomination process. If a court should reject this argument, it should meet the substantive issues raised and not resort to "verbal fencing about 'jurisdiction.'"23

A third possible obstacle to the application of fourteenth amendment standards to party presidential nominating procedures is the requirement that there be a showing of state action before rights asserted under the fourteenth amendment can be protected. It is questionable whether in the current state of the doctrine the notion of state action has any analytic usefulness at all. As Professor Charles Black puts it: "The field is a conceptual disaster area; most constructive suggestions come down . . . to the suggestion that attention shift from the inquiry after "state action" to some other inquiry altogether."24 Nonetheless, judicial opinions continue to devote considerable space to the matter; and in Smith v. State Democratic Executive Committee25

22. See Dixon, Democratic Representation ch. VI (1968).
25. 288 F. Supp. 371 (N.D. Ga. 1968). Georgia law, at issue in Smith, places the party state executive committee in charge of selecting delegates to the national convention. Rule 55 of the Georgia Democratic Party gives the chairman of the state executive committee power to select all national convention delegates with the advice and consent of the Democratic gubernatorial nominee. The State Committee is composed of 200 members, 100 of whom are chosen by the Chairman, who in turn is chosen by the gubernatorial nominee. In addition, there is a quadrennial convention of the party following each gubernatorial election. Party rules designate as delegates members of the state executive committee and local county executive committees, and "such other delegates as may be designated by the Democratic Gubernatorial nominee." (Rule 53.) Since the governor had designated all party members as delegates, the Court found that there had
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a United States district court went so far as to reject a constitutional challenge to the delegate selection procedure of the Georgia Democratic Party on the ground that there had been an insufficient showing of state involvement. It therefore seems appropriate to discuss the subject briefly here.

Fifteen of the 51 electoral constituencies select their delegates to the national convention in whole or in part by party primary election. Whether or not these primaries are organized or regulated by the state, there can be little doubt that the guarantees of the fourteenth amendment apply. Nixon v. Herndon, Nixon v. Condon and Smith v. Allwright are typical of the cases in which the Court has found sufficient state involvement in party affairs so that fourteenth and fifteenth amendment guarantees apply to party membership qualifica-

been an open convention and thus, even if state action were present, there was no violation of equal protection.

26. The figure of fifteen does not include Alabama, where a primary is optional at the discretion of the state executive committee, provided that the party has gained more than 20% of the vote at the general election for state officers; or Arkansas, where a primary is optional and can be petitioned for no later than six months before the national convention.

27. 273 U.S. 536 (1927). The Court invalidated a Texas statute which expressly denied to blacks the right to vote in the Democratic Party primary. Justice Holmes said that it was "unnecessary to consider the Fifteenth Amendment" as it was "hard to imagine a more direct and obvious infringement of the Fourteenth." Id. at 541.

28. 286 U.S. 73 (1932). The Texas statute under challenge in Condon granted power to the party through its executive committee to prescribe qualifications for party membership and the right to vote in the primary. The executive committee of the Democratic Party barred blacks from participation in the primary, and the Court invalidated the regulation. Justice Cardozo for the Court held that the inherent power of a party to choose its members lay with the state convention. The statutory conferral of this authority upon the executive committee was sufficient state involvement to trigger the appropriate constitutional restraints.

29. 321 U.S. 649 (1944). After the decision in Nixon v. Condon, 286 U.S. 73 (1932), the Texas Democratic Party decided to exclude blacks by a resolution of the state convention which, according to the Court in Condon, had the inherent power to set qualifications for participation in the primary. In Grovey v. Townsend, 295 U.S. 45 (1935), the Court unanimously upheld the new restrictions imposed by the Texas Democratic Party. The doctrine of Grovey, however, was specifically overruled nine years later in Allwright where the Court admitted that while the privilege of membership in a political party alone might not be a concern of the state, yet "when . . . that privilege is also the essential qualification for voting in a primary to select nominees for a general election, the State makes the action of the party the action of the State." Id. at 664-65. Although Allwright was decided on fourteenth amendment grounds because racial discrimination was involved, the criteria for a finding of state action should be the same in a voting rights case under the fourteenth amendment. Once the primary is viewed as part of the electoral process, it is state action to which both the fourteenth and fifteenth amendments equally apply. "[T]he recognition of the place of the primary in the electoral scheme makes clear that state delegation to a party of the power to fix the qualifications of primary elections is delegation of a state function that may make the party's action the action of the State." Id. at 660.
tions. In *Allwright*, the Court also held that the holding of primary elections is essentially a state function, an integral part of the procedure for selecting public officials, and that the requisite state action is therefore present even when the state had delegated control to a political party. While the case involved a situation in which winning the Democratic nomination for an office was tantamount to election, the holding of primaries would appear to be no less a state function in two-party states.30

From the point of view of state action, the case in which delegates are selected at a state convention which is itself elected by party members is indistinguishable from that of primaries. In both situations, the state has delegated to a political party the function of setting up an electoral process for nominating candidates. *Allwright* is therefore clearly applicable.

Where state delegates to the national convention are selected by local party officials, by the governor, or by some other means not involving direct participation by the party rank and file, state action is also present. If the state participates directly in the holding of the convention, *Allwright* is controlling. Where the selection process is left wholly in the hands of the party, the “state function” notion as extended in *Terry v. Adams*31 is applicable.32 In *Terry*, the Court held that blacks

30. Most commentators seem to agree that in a constitutional democracy, party nomination is perhaps the most important factor in determining how voters will cast their ballots. See A. LAREMA & B. LAMBERT, VOTING IN DEMOCRACIES 31 (1960); G. DUVERGER, POLITICAL PARTIES 355 (1959); N. POLSBY & A. WILDSKY, PRESIDENTIAL ELECTIONS 9 (1959). This is true even where there is active party competition. See United States v. Classic, 313 U.S. 299, 318 (1941):

The right of participation is protected just as is the right to vote at the election, where the primary is by law made an integral part of the election machinery, whether the voter exercises his right in a party primary which invariably, sometimes or never determines the ultimate choice of the representative.

Cf. the dissent of Justice Douglas in *MacDougall v. Green*, 335 U.S. 281, 288 (1948), where the Court refused to strike down Illinois’ statute requiring 200 signatures from at least 50 counties in order to qualify for a place on the ballot:

The protection which the Constitution gives voting rights covers not only the general election but also extends to every integral part of the electoral process, including primaries . . . . When candidates are chosen for the general election by a nominating petition, that procedure also becomes an integral part of the electoral process. It is entitled to the same protection as that which the Fourteenth Amendment grants any other part.

*MacDougall* was overruled by the recent case of *Moore v. Ogilvie*, 394 U.S. 814 (1969), in an opinion written by Justice Douglas.


32. Cf. *Lynch v. Torquato*, 343 F.2d 370 (3d Cir. 1965). In *Lynch*, a functional approach was used in determining the applicability of the equal protection clause to internal party procedures. Plaintiffs sought an injunction against the election of a county chairman whose function the court found to be primarily the internal management of party affairs. While acknowledging that one man, one vote applies to both state-regulated and party-conducted primaries, the court said that “this is because the function of primaries is to select nominees for government office even though, not because, they are
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could not be excluded from a "pre-primary" held by a "self-governing club" which effectively controlled Democratic Party nominations in the county, even though the club was ostensibly completely independent of both the party and the state government. The case established that the holding of a formal primary under state or even party auspices is not a prerequisite for a finding of state action under the state function theory. Justice Black's opinion went so far as to suggest an affirmative state duty to ensure that none of its citizens were denied their fourteenth and fifteenth amendment rights to participate in the nomination process.\(^3\)

*Rice v. Elmore*,\(^3\) a Fourth Circuit case explicitly endorsed by Justice Black in *Terry*, neatly states the modern view of the relationship between party and state:

The party may, indeed, have been a mere private aggregation of individuals in the early days of the Republic, but with the passage of the years, political parties have become in effect state institutions, governmental agencies through which sovereign power is exercised by the people.\(^3\)

party enterprises." *Id.* at 372. Since a governmental function was not involved in all the activities of the county chairman, the court refused the injunction while leaving open the possibility of future suits on particular violations.

It is also interesting to note that the court, in a footnote, observed that "[I]ndeed, choice of delegates to party national conventions for the nomination of candidates for President and Vice President would seem logically to be covered by plaintiff's view of the reach of the equal protection clause." *Id.* n.5.

The district court opinion of Judge Dumbault, 228 F. Supp. 268 (W.D. Pa. 1964), is an amusing reminiscence by a one-time Democratic County Chairman. See also *Bentman v. Seventh Ward Democratic Executive Comm.*, 421 Pa. 188, 218 A.2d 261 (1966).

33. Justices Douglas and Burton joined with Justice Black in his opinion. Justice Frankfurter found state action in the participation by county election officials in the discriminatory Jaybird primary. 345 U.S. 461, 475-76 (1953). Justice Clark, joined by Chief Justice Vinson and Justices Jackson and Reed, found that blacks had been excluded from the electoral process at the sole stage of the local political process where the bargaining and interplay of rival political forces would make it count. . . . Whether viewed as a separate political organization or as an adjunct of the local Democratic Party, the Jaybird Democratic Association is the decisive power in the county's recognized electoral process. Over the years its balloting has emerged as the locus of effective political choice. *Id.* at 484.

34. 165 F.2d 387 (4th Cir. 1947). South Carolina had repealed all its primary laws in order to escape the holding of *Allwright*. The Court noted that the primary, whether with or without state participation, "fulfilled the same function in the election machinery of the state." *Id.* at 388. The delegation by the state of part of its election machinery was no bar to safeguarding the rights of the disenfranchised blacks. When party officials participate in what is a part of the state's machinery, they are election officers of the state de facto, if not de jure, and as such must observe the limitations of the Constitution. Having undertaken to perform an important function relating to the exercise of sovereignty by the people, they may not violate the fundamental principles laid down in the Constitution for its exercise. *Id.* at 391.

35. 165 F.2d at 389.
II.

If it be conceded that neither political question doctrine nor state action theory poses a serious obstacle to judicial involvement in the delegate selection process, it remains to determine the doctrinal framework for the consideration of claims by party members that they have been denied effective participation in the selection of national convention delegates. The *Reapportionment Cases,* which dealt with basically similar questions of fair representation in the electoral process, suggest that equal protection is the appropriate criterion.\(^7\)

In litigation under the equal protection clause, the predominant concern is whether

36. Note 10 *supra.*
37. Issues concerning the allotment of convention delegates among the states are beyond the scope of this Note. The legitimacy of the convention structures is assumed herein, but this assumption does not relieve each state from conformity to equal protection standards of one man, one vote in selecting its delegates to the national convention. The Supreme Court in *Gray v. Sanders,* 372 U.S. 368 (1963), and again in *Reynolds v. Sims,* 377 U.S. 533 (1964), specifically rejected the argument that the model of disproportionate voting power in the Electoral College and in the United States Senate legitimizes all other apportionment schemes not based solely on population. While the U.S. House of Representatives may allot a disproportionate number of seats to the less populous states, the states are not thereby relieved from any duty to follow the one man, one vote principle in the selection of their representatives to the House. Similarly, the membership in the Senate is not based on population; it should be clear, however, that no state could elect its Senators from districts of unequal population. Therefore, the fact that delegate allotment might be based in part on factors other than population does not of itself imply that state delegations need not follow the one man, one vote standard.

The analysis herein would hardly be complete, however, without a brief description of the allocation of delegate votes at the major party conventions. The Democrats award three delegates for each Electoral College vote; one delegate for each 100,000 popular votes cast in a state for the previous Democratic presidential nominee, with a minimum of one per state; one vote for each member of the Democratic National Committee (i.e., two delegates per state); and a ten delegate bonus for a state which went Democratic in the last presidential election. The Republicans award four delegates per state; a six delegate bonus if a state went Republican in the last presidential election or if it since has elected a Republican U.S. Senator or Governor; one delegate from each congressional district where the last Republican presidential nominee or congressional nominee got 2,000 votes, and one additional delegate if he received more than 10,000 votes; and two delegates for each representative elected at-large in a state.

The Hughes Commission discerned four objectives in the Democratic formula of apportioning delegates:

(I) one man, one vote;
(2) one Democrat, one vote;
(3) equal representation for states;
(4) reward for victory.

The Commission recommended that the last two objectives be deemphasized in importance, specifically by eliminating the flat grant of a 10-vote bonus for carrying the state. *Hughes Commission,* *supra* note 4, at 62-63.

The Republican formula places even greater emphasis on equal representation of states. The one Republican, one vote principle is truncated by the limitation that no additional delegates are awarded to congressional districts with over 10,000 Republican votes. The four at-large delegates per state represent twice the allotment by the Democratic formula, but four times the voting power, since the Republicans grant only half as many delegate votes as the Democrats.
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the rights allegedly impaired are individual and personal in nature. . . . While the result of a court decision . . . may be to require the restructuring of the geographical distribution of seats in a state legislature, the judicial focus must be concentrated upon ascertaining whether there has been any discrimination against certain of the State's citizens which constitutes an impermissible impairment of their constitutionally protected right to vote. 38

While the character of the interest involved and the deprivation to be remedied may be personal in nature, some commentators have argued that "the basic issue . . . is what kind of representation processes and institutions are required to assure a government that rests upon the will of the people." 39 The application of equal protection standards to apportionment admittedly has an impact on the political process as a whole. The rigid mathematical formula which has resulted from the equal protection approach excludes these political consequences from consideration. Therefore, critics of the Court's approach have argued that if the Court is to enter the area at all, it should adopt a substantive due process analysis which permits examination of the broader issues involved.

The Court's hesitancy to use substantive due process is understandable. It is one thing to enter the political arena to enforce a simple ground rule whose violation can be more or less objectively determined. 40 It is quite another to take responsibility for evaluating the over-all democratic quality of political institutions. To be sure, the

38. Reynolds v. Sims, 377 U.S. 533, 561 (1964). In Reynolds the Court acknowledged that it was "determining the basic standards and stating the applicable guidelines for implementing our discussion in Baker v. Carr." Id. at 599. It is worthy of note, however, that the Court hesitated in formulating one man, one vote as the appropriate standard of equal protection in the Reapportionment Cases. In Wesberry v. Sanders, 376 U.S. 1 (1964), a case involving apportionment of congressional districts, the Court evaded the problem of enunciating the requirements of equal protection by construing Article I, section 2 of the Constitution, which requires that Representatives be chosen "by the people of the several states," to mean one man, one vote. 376 U.S. at 7-8.

The republican guarantee clause would dictate a constitutional litigation focus encompassing necessarily a concern for representation results. The due process clause through its stress on ground rules of substantive reasonableness would yield the same breadth of focus. By contrast, grounding apportionment litigation on the equal protection clause tended to lead to a near-exclusive focus not on representation results and not on considerations of equal treatment of voter-plaintiffs, but rather on concern simply for equality in the total population masses encompassed in legislative districts—a concern in short for physical form and not for political substance. Cf. Bonfield, Baker v. Carr: New Light on the Constitutional Guarantee of Republican Government, 50 Calif. L. Rev. 245, 257 (1962).

decision to intervene in apportionment cases at all involved the Supreme Court in an inquiry into the "theoretic base of representation," but once the one man, one vote standard was adopted it had the advantage of easy administrative applicability without further resort to fundamental principles. The due process approach, on the other hand, does not lend itself as well to easily administered rules; the Court would have become involved in weighing political claims in each case it decided, a delicate enterprise for a Court under steady attack for its activist interpretation of the judicial role.

III.

In states where national convention delegates are selected through a primary, the application of equal protection standards is relatively straightforward. Since there is a clear commitment to popular participation in the nominating process, the state must guarantee one man, one vote. In *Gray v. Sanders*, the Court struck down the Georgia county unit system of tabulating votes in state-wide primaries for U.S. Senator, governor, and other state officials. Under the Georgia procedure the winner of the popular vote in each county received all the county's units, and the candidate with the largest number of units won

41. Justice Frankfurter, dissenting in *Baker v. Carr*, makes this point: Indeed, since "equal protection of the laws" can only mean an equality of persons standing in the same relation to whatever governmental action is challenged, the determination whether treatment is equal presupposes a determination concerning the nature of the relationship. This, with respect to apportionment, means an inquiry into the theoretic base of representation in an acceptable republican state. For a Court could not determine the equal-protection issue without in fact first determining the Republican-Form issue, simply because what is reasonable for equal protection purposes will depend upon what frame of government, basically, is allowed. To divorce "equal protection" from "Republican Form" is to talk about half a question.

369 U.S. at 301.

42. The one man, one vote standard in the case of legislative reapportionment requires that single-member districts be of equal population. Where the issue involves equality of voting power in party primaries, however, the gross population measure may be inadequate. The relevant population for determining one man, one vote guidelines in delegate selection would seem to be party membership. Cf. *Gray v. Sanders*, 372 U.S. 368, 381 (1963).

There are at least two measures of party membership which might be used: party registration, or votes for the party in some past election. Registration figures have the appeal of being current, flexible, and responsive to effective political organization. On the other hand, it might be argued that a local area should be represented in accordance with how it actually cast its vote at some prior election. This criterion would give local party organizations more incentive to work for a party nominee whom they did not support prior to the convention, and might enhance the effectiveness of parties as coalition-forgers by allowing a penalty to local organizations for disloyalty on election day. Issues of this type have arisen in *Burns v. Richardson*, 384 U.S. 73, 91 (1966), and *Rogers v. State Committee of the Republican Party*, 96 N.J. Super. 265 (1967).

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the nomination. The Court held that even where the total number of units was distributed among counties according to their population, the system was unconstitutional since it resulted in the disenfranchise-
ment at the locus of effective decision-making of the minority voters
d in each county, thereby making it possible for a candidate with less
 than a plurality of the total popular vote to win a plurality of county
 units and hence the nomination.44

Gray is applicable to methods wherein a national convention dele-
gate slate is selected, in a technique similar to the county unit system,
by electors chosen in district primaries. Any structuring of these pri-
maries which permits a candidate to receive the state’s delegates with
less than a plurality of the statewide popular vote is a violation of
equal protection.45

44. Id. at 381 n.12:
The county unit system . . . would allow the candidate winning the popular vote
in the county to have the entire unit vote of that county. Hence, the weighting of
votes would continue, even if unit votes were allocated strictly in proportion to popula-
tion. Thus if a candidate won 6,000 of 10,000 votes in a particular county, he would
get the entire unit vote, the 4,000 votes for a different candidate being worth nothing
and being counted only for the purpose of being discarded.

It was on this issue that the Supreme Court disagreed with the district court. Even
though the district court enjoined the use of the county unit system as it then operated,
the Supreme Court remanded for a broader decree barring use of the county unit
system under all circumstances. See 372 U.S. at 373.

45. The Court in Gray explicitly refused to consider whether the constitutional test
it used to strike down the county unit system would also apply to a nominating conven-
tion. 372 U.S. at 378 n.10. The Court did state, however, that in a primary, voters within
a geographic unit had a constitutionally protected interest in having their votes counted
in the final decision-making forum where the gubernatorial nominee was chosen. 372
U.S. at 379. This reasoning would seem to cast doubt upon the constitutional validity of
a nominating system where delegate slates are elected from geographical units on an
at-large, winner-take-all basis, and might also make suspect other delegate selection
procedures. The minimum which Gray should require is outlined in the text; its broader
implications are discussed herein.

The presidential nominating convention is a deliberative body, and distinguishable
on that basis from the vote-counting system struck down in Gray. If the Gray rationale
were extended mechanically to deliberative nominating bodies—i.e., functional equiv-
 alents of the primary—it might seem that the same rationale could be applied to in-
validate single-member constituencies in state legislatures, for the votes of those who
favor a losing candidate in a district are “wasted”—not represented—at the decision-
making stage in the legislative process. Such a result, carried to its logical conclusion,
would seem to require strict proportional representation in every legislative body.

However, while the interest in full and effective participation by political minorities
must be deemed fundamental, a state may, for compelling and constitutionally permis-
sible reasons, give less than full protection to this interest. In the case of state legislatures,
there are strong interests in favor of single-member districts which counterbalance the
interests of political minorities in substantially proportional representation. First, the
function of a legislature is to govern, not to make only a single decision. The makeup of
majorities within each district may shift on every issue before the legislature, and no
system of selecting a legislator can assure that he will carry out the wishes only of those
who voted for him. In addition, a legislator serves his constituents in ways other than
voting, and it is not accurate to say that the voters for the losing candidate are effec-
tively unrepresented.

The second strong state interest in single-member constituencies is the promotion of
the two-party system. While Williams v. Rhodes, 393 U.S. 23 (1969), limits the extent
to which a state may justify its statutory voting regulations by referring to the interest
in two-party government, it seems to indicate that there is such a constitutionally rec-
Where a state's national convention delegates are elected on a district basis, *Reynold v. Sims* is applicable. In that case the Court held that unless the districts electing representatives to both houses of the state legislature are apportioned substantially on a population basis, the voters in the more populous districts are denied equal protection. The analogy to representation in the state delegation to the national convention is direct. In each case, the interest of the individual voter is that his vote count for as much as that of any other voter. If a party member's elected representative on the state delegation to the national convention comes from a disproportionately large district, then the party member's ability to influence the state delegation's action at the convention has been "diluted," and he has been denied equal protection of the law.

Where the state's delegates to the national convention are selected at a state convention, or by appointment, it is best to distinguish "open" structures, where all party members are allowed to participate in the selection of representatives to the state convention or in the selection of the body responsible for delegate appointment, from "closed" structures, where there is no provision for direct participation by the party rank-and-file. If the state provides for an open state con-


The case of a nominating convention is much closer to that of the county unit system in *Gray* than to that of a state legislature. Although convention delegates often perform deliberative functions in that they are not generally bound to vote on every ballot for a previously endorsed candidate, they are selected for one primary purpose—the nomination of a presidential candidate—on which the electorate can express a clear choice. Moreover, the interest in the stability of the two-party system may be promoted rather than threatened by a convention system which assures representation to minorities within the parties in each state. Substantially proportional representation of intra-party minorities is likely to encourage the use of internal party procedures for the resolution of conflicts, and hence to reduce the motivation for the formation of new parties.

State at-large, winner-take-all state primaries, like that of California, would seem, therefore, to have the proscribed defects of the county unit system in *Gray*, without the strong justifications for single-member legislative districts. To invalidate these primaries as a denial of equal protection would be a relatively small step from *Gray*. The extent to which the *Gray* doctrine is used to invalidate other procedures which fall short of full proportional representation should depend upon the extent to which those other procedures ensure adequate minority representation at the national convention. It seems best that the Court adopt the "go-slow" approach it used in *Baker v. Carr* and *Williams v. Rhodes*, striking down clearly abusive practices without at first enunciating a precise, mandatory rule for national major party delegate selection.


47. *Reynolds* established that "the fundamental principle of representative govern-
ment in this country is one of equal representation for equal numbers of people." *Id.* at 560-61. Having set up numerical equality of voters as a presumptive requirement, the Court then seeks in specific cases "to ascertain ... whether there are any con-
vention with the delegates elected directly at the precinct or other local level, the analogy to *Reynolds v. Sims* should require that local districts be of equal population. However, where the procedures for selection of delegates to the state convention involve several stages, equal protection standards become less clear.

While *Gray v. Sanders* held that the state could not superimpose a county unit system on the outcome of the popular vote in a state primary, the later case of *Fortson v. Morris*\(^4\) seems to limit the principle of full popular control. In *Fortson*, the Court upheld a provision of the Georgia constitution which gave the state legislature the power to elect the governor when none of the candidates in the popular election received a majority of the vote. The *Fortson* majority treated the election by the legislature as a separate, alternative process under Georgia law, and therefore found no problem with the fact that the legislature's choice, Lester Maddox, had placed second in the popular vote.\(^4\) The Court asserted that since the state could provide for election of the governor exclusively by the legislature, it could also employ that procedure as an alternative to the popular vote in the event no candidate received a majority.\(^5\) *Gray* was held inapposite since nothing

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49. There are two observations about the case which deserve mention. First, there were strong political reasons for not overturning the Georgia legislature's choice of Lester Maddox. *Fortson* was argued on December 5, 1966; on that same day, the Court held that the Georgia legislature had violated the first amendment rights of Julian Bond in disqualifying him from membership. Bond *v.* Floyd, 385 U.S. 116 (1966). The Court's decision in *Fortson* was announced just one week later, on December 12, 1966, and its political impact was lost on no one.

Second, the Court adopted a curious construction of the facts of the case to fit its decision within *Gray*. The *Fortson* majority (it was a 5-4 decision) felt that it did not have to make a determination of when an election is constitutionally compelled, for it could distinguish *Gray*, which involved a primary, on the grounds of a state commitment to popular participation. That this distinction is strained was pointed out by Justice Douglas in dissent:

The Court mistates the question we must decide. It is not whether Georgia may select a Governor through a legislative election. It is whether the legislature may make the final choice when the election has been entrusted to the people and no candidate has received a majority of the votes. In other words, the legislative choice is only a part of the popular election machinery . . . . It is said that the general election is over and that a new, and different, alternative procedure is now about to be used. But that is belied by the realities . . . . The election, commencing with the primary, will indeed not be finally completed until the winner has taken the oath of office.


50. Justice Fortas in his dissent in *Fortson* went beyond the objection of Justice Douglas that the majority had adopted a disingenuous interpretation of the facts. Justice Fortas attacked the assumption of the majority that a state could withdraw the office of governor from popular election, 385 U.S. at 246-47, and would have demanded strict adherence to the popular election method:

If the vote cast by all of those who favor a particular candidate exceeds the number cast in favor of a rival, the result is constitutionally protected as a matter of equal protection of the laws from nullification except by the voters themselves. The candi-
in that case "indicated that it was intended to compel a state to elect its governors . . . through elections of the people rather than through selections by appointment or elections by the State Assembly."51 Fortson thus placed a limitation on Gray: before the one man, one vote rule is applicable, there must be a showing of a commitment to popular election as the exclusive means of selecting the official.

A second restriction on Gray first appeared in the area of the allocation of judges among districts of a state. Even where there has been a clear commitment to the popular election of judges, the courts have refused to apply the one man, one vote principle of Gray and Reynolds: "[J]udges . . . are not representative in the same sense as are legislatures or the executive. Their function is to administer the law, not to espouse the cause of a particular constituency."52 This functional distinction between judges on the one hand and legislators and executives on the other was combined with the notion of commitment to a popular election in Sailors v. Board of Education.53 The issue in Sailors was whether it was permissible for a state which provided for popular election of local school boards to provide for the selection of a county school board by delegates from the local boards, each local board having one vote despite the population disparity among the local districts. The Court held that county board members exercised "administrative" functions54 and that the system for selecting them was "basically appointive rather than elective."55 Where the state provides for elected local governments of general legislative powers, the one-man, one-vote principle is required,56 but "state and local officers of the non-legislative character involved here may . . . be chosen by the governor, by the legislature, or by some other appointive means rather than by election."57 The rationale of the opinion seems to have been that county board members did not "represent" the local electorate,

date receiving more votes than any other must receive the office unless he is disqualified on some constitutionally permissible basis or unless, in a runoff or some other type of election, the people properly and regularly, by their votes, decide differently.

Id. at 250.
51. 385 U.S. at 233.
54. Id. at 110.
55. Id. at 109.
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since they were "administrators." The state’s commitment to an election was therefore limited to the local board level, and one man, one vote was not required at higher stages.

Fortson and Sailors are relevant to a state nominating system which provides for several different stages in the selection of a state convention. Such a system might provide for the election of delegates by the rank and file at the precinct level, followed by county conventions of delegates from the precincts. The county conventions would then select delegates to the state convention. Where delegates to the state convention are not apportioned among the counties according to population, there is a justifiable claim that the votes of party members in the larger counties have been diluted.

Faced with exactly this situation in Irish v. Democratic-Farmer-Labor Party, a district court and the Eighth Circuit on appeal found the Reapportionment Cases inapplicable. Relying on an analogy to Fortson and Sailors, both courts seem to have reasoned that the process of choosing delegates to the state convention could be divided into two discrete procedures. At the precinct level came the popular election of delegates to the county conventions. Here, admittedly, equal protection required that one man, one vote be observed. At the second level, the various county conventions selected delegates to the state convention, which would in turn elect delegates to the national convention. The party constitution did not require popular participation on this level; the decision as to county representation at the state convention rested not with the precinct voters but with the county convention delegates. The party's choice to apportion state convention votes among counties on a basis other than population was therefore not the "malapportionment among the people as the electorate" which is forbidden by the equal protection clause.

58. Id. at 109 n.6. The Court noted that "[t]here is not even a formal method by which a delegate can determine the preferences of the people in his district."

59. 287 F. Supp. 794 (D. Minn. 1968), aff'd 399 F.2d 119 (8th Cir. 1968). The Minnesota procedure challenged in Irish calls for open precinct caucuses to elect delegates to county conventions. In turn, the county conventions select delegates to the state convention with one vote for each 1,000 cast in that county for the leading Democratic-Farmer-Labor statewide candidate or national Democratic candidate in the last election. No county receives less than six delegate votes. The plaintiffs in Irish alleged that this allocation violates the equal protection clause by over-representing the less populous counties at the state convention.

60. We hold simply that there is nothing of constitutional significance in the alleged malapportionment here above the precinct caucus level. What was done at the precinct level was in full accord with the one man-one vote principle. What took place thereafter was not the product of malapportionment among the people as the electorate. . . . We do not extend the one man, one vote principle beyond the
The Irish courts' analysis of the Minnesota procedure failed to recognize that there was but a single continuing procedure for the selection of the state's delegates to the national convention; the holding of county conventions to elect the state convention was in no sense an
alternative to selection by precinct representatives. The state was clearly committed to popular participation in the nominating process, with convention delegates representing the precinct voters. However, some of those voters—those from small counties—were given a greater weight in the convention than others. Fortson, where the majority found that the choice of a state governor had been taken altogether out of the hands of the electorate, was therefore inapposite. Once the state is committed to an electoral method of selection at the base line, it cannot distort the popular will by introducing unrepresentative procedures at higher levels of the process.

The district court's reliance on Sailors would appear equally misplaced. Sailors emphasized the administrative as opposed to representative functions of county school boards. County board members were treated as essentially appointed officials, and the state was granted wide discretion in choosing an appointive process. In Irish, on the other hand, the function of the convention delegates was to represent the will of those who participated in the precinct caucuses. The discretion granted a state in the choice of administrators would seem inappropriate where the purpose of the procedure is to guarantee that a political choice is made in accord with the wishes of a particular constituency. 

popular electorate and to decisions of those so properly elected; at least we do not do so upon the facts present in this case.

999 F.2d at 120.

61. In Dahl v. Republican State Comm., Civil No. 7557 (W.D. Wash. 1969), vacated, 393 U.S. 408 (1969), a statute of the State of Washington provided that the state committee of a major political party be composed of one committeeman and one committee-woman from each county. Plaintiffs' claim was that the voters of the four most populous counties were underrepresented at the state convention, which selected delegates to the national convention. This complaint was substantially the same as that made in Irish, but in Dahl the issue was framed as a direct challenge to the constitutionality of the state statute, rather than as a challenge to the rules of the party. A three-judge court found that the attack was not on the statute itself, but on the manner in which the party had exercised the power delegated to it by the statute; hence the court dismissed the action on the ground that the jurisdictional requirement for a three-judge court had not been met. The Supreme Court vacated and remanded for further proceedings if plaintiffs should choose to pursue the matter further.

62. The Supreme Court in Lucas v. Colorado General Assembly, 377 U.S. 713 (1964), invalidated a legislative apportionment plan which had been ratified in a statewide popular referendum. To the extent that the Eighth Circuit's decision in Irish held that only one stage in the process of electing representatives need guarantee one man, one vote, it would seem to conflict with Lucas as well as other reapportionment cases. Cf. Avery v. Midland County, 390 U.S. 474, 481 n.6 (1968). If Fortson and Sailors are interpreted as they were in Irish, it would apparently be permissible for a state to elect its legislature in a two step process, with one man, one vote at the baseline but unequal
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IV.

States where local party officials select the delegates to the state or national convention, like those where either the governor or state committee appoints delegates directly, allow no direct popular participation in the delegate selection process. Although local party officials may be elected at some time, they are not elected on the specific issue of the presidential nomination and are often chosen several years before the national convention, prior to the announcement of any presidential candidates. Procedures of this kind do not lend themselves to adjudication under the one man, one vote principle, but they may nonetheless deny equal protection of the law.

When the individual rights at stake are "fundamental," the Court has been willing to consider the broad political context in deciding whether there is a violation of equal protection. The equal protection clause has been used in voting rights cases to guarantee all citizens an opportunity to exert an effective influence at a crucial stage of the elective process. A recent comment characterized the Court's decision in Harper v. Virginia Bd. of Elections, where Virginia's poll tax was held unconstitutional, as based on its judgment that

the dilution of voting power is a severe handicap in a democratic society . . . . Any restriction on a person's ability to participate in the political process must be carefully scrutinized in a society where basic decisions are made and gain acceptability through the political mechanisms of a representative democracy.

Of all the choices the voter makes, it seems clear that that of a Presi-
dent is the most important. There is no question that every state is committed to the idea that this choice be made through the electoral process.8 The issue here is whether a state may structure the electoral process in such a way that the voters are denied any participation at the nomination stage—that is, whether rank and file party members may be classified as non-participants in the delegate selection process.

That the nomination process of the major parties is of fundamental importance in determining who will be President is a commonplace. As Justice Pitney put it, "the likelihood of a candidate succeeding in an election without a party nomination is practically negligible . . . . As a practical matter, the ultimate choice of the mass of voters is pre-determined when the nominations have been made."80 The campaigns for the major party nominations in 1964 and 1968 underlined the fact that where party members do not participate at the base line in the nominating process, the party machinery of a state may endorse candidates who have only minority support among the rank and file.80 The result of voter impotence at this stage may be that on election day very large numbers of citizens are confronted with two candidates neither of whom represents their preferences, with the result that they are unable adequately to express themselves through the electoral process.

The Supreme Court has recognized that where the nomination process is an extremely important part of the electoral system as a whole, the individual voter has a constitutionally protected interest in participation. Thus where nomination is by primary, blacks may not be excluded even though they have the right to vote in the final election.71 And where a formal primary system has been replaced by an informal poll involving minimal state action, the equal protection clause forbids the exclusion of minorities.72 Gray and the Reapportionment Cases make it clear that what is at stake here is more than a policy against racial discrimination. The denial to the voter of an effective voice at the locus of effective decision-making is equally impermissible whether based on sex, color, wealth, occupation, or geo-

68. See U.S. Senate, Nomination and Election of the President and Vice President of the United States 157-82 (1968).
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graphic area.73 The principle underlying all these decisions seems to be that a state may not create or tolerate a political structure which gives any group in the electorate disproportionate weight in influencing the outcome of vital political decisions. This principle is directly applicable to the closed convention situation.

The mere fact that the nomination process has been taken away from the voters and placed in the hands of a small group of party officials does not, of course, make it any less important an element in the final outcome. And the fact that the great majority, rather than an arbitrarily selected minority, are deprived of an effective say does not make the deprivation any less severe.74 If there were no legitimate interest on the side of the closed convention system, it would be a clearly arbitrary classification75 and therefore a violation of equal protection to allow the mass of party members no voice at all in delegate selection.

The basic argument in favor of the closed convention system is that state party organizations are best able to achieve their goals when they are free to allocate power over the nomination process in the manner


74. Indeed, the Reapportionment Cases have established an easier standard of proof for area discrimination cases than for race discrimination. In Wright v. Rockefeller, 376 U.S. 52 (1964), where a New York congressional apportionment statute was under challenge as racially discriminatory, the Court found against plaintiffs on the ground that they failed to meet their burden of proof in showing racial motivation in the drawing of district lines. Contrast this with the area-discrimination cases where, for example, in Swann v. Adams, 385 U.S. 440 (1967), the Supreme Court reversed a district court on the ground that neither the lower court nor the state had justified the population variances among districts. Cf. Wright v. Rockefeller, 376 U.S. 52, 72-73 (1964) (Goldberg, J., dissenting). See also Kilgarlin v. Hill, 386 U.S. 60 (1967); Steel, Nine Men in Black Who Think White, N.Y. Times, Oct. 15, 1968 (Magazine), at 122. Compare Smith v. Paris, 257 F. Supp. 901 (M.D. Ala. 1966), aff'd, 386 F.2d 979 (5th Cir. 1967) and United States v. Democratic Exec. Comm., 288 F. Supp. 943 (M.D. Ala. 1968) with Dusch v. Davis, 387 U.S. 112 (1967) and Burns v. Richardson, 384 U.S. 73 (1966).

74. Cf. Cipriano v. City of Houma, 37 U.S.L.W. 4598 (U.S. June 16, 1969), where the Supreme Court struck down a Louisiana statute which gave only property taxpayers the right to vote in elections called to approve the issuance of revenue bonds by a municipal utility. The result of the classification was that only 48% of the city's registered voters—those who were property taxpayers—could vote in the utility bond election, even though the revenue bonds were to be paid only from the operations of the utilities and not in any way from property tax revenue. That the classification excluded 52% of the registered voters did not prevent the Court from finding it arbitrary and therefore a violation of equal protection. And cf. Pierce v. Village of Osining, 292 F. Supp. 113 (S.D.N.Y. 1968), where a three-judge court invalidated a New York statute which would have disqualified 55% of the village's voters in an election to decide whether to change the form of government from a mayoral to a village manager system.

75. In Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966), the Court stated that "where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined." Id. at 670. The Virginia poll tax was invalid because "wealth ... is not germane to one's ability to participate intelligently in the electoral process." Id. at 698.
which seems to them most appropriate. It may also be felt that control by local party officials is desirable because it is they who are best able to achieve continuity and compromise, both important to a strong party structure.\textsuperscript{76} In essence, then, the constitutional question is whether at the nomination stage the interest in autonomy and stability of political parties\textsuperscript{77} outweighs the interest in effective voter participation in decision-making.\textsuperscript{78}

A decision of this kind cannot be made without examining the larger political context. In a political culture based on widespread and intense grass roots participation, where local officials are in close contact with and highly responsive to the mass of their constituents, a very high degree of internal party autonomy may be appropriate. Likewise, when the absence of national mass communication and transportation systems makes it difficult for rank and file party members to evaluate national political figures and issues, heavy reliance on local party officials as intermediaries and consensus builders may be justified.\textsuperscript{79} On the other hand, when an informed national electorate exists and local political mechanisms no longer effectively organize the vote, the re-

\textsuperscript{76} See generally A. Sindler, \textit{Political Parties in the United States} (1966). Sindler elsewhere defines the reason for maintaining party government as "the recognition that organized and enduring parties, when placed in a competitive relationship in their pursuit of political power, are better able than shifting factions, interest groups, or other rivals to perform a number of functions critical to the successful operation of constitutional government." Sindler, \textit{Baker v. Carr: How to "Sear the Conscience" of Legislators}, 72 \textit{Yale L.J.} 23, 28 n.14 (1962). This goal, he contends, may be inconsistent with a high degree of intra-party democracy if the dual objectives of strict party discipline and ideological moderation are sought. \textit{Political Parties in the United States}, \textit{supra}, at 92 n.1, 94-98.

\textsuperscript{77} In Williams v. Rhodes, 393 U.S. 23 (1968), the Supreme Court recognized a legitimate state interest in the maintenance of a strong two-party system so that the election winner be the choice of a majority of the voters. Another function of the two-party system was recognized by Polsby and Wildavsky: "The voter who follows his party identification ... can vastly simplify the choices he must make and thus reduce to manageable proportions the amount of time he spends on public affairs." \textit{Polsby & Wildavsky, Presidential Elections} 16 (2d ed. 1968). And further, "party identification for most people provides the safe cognitive anchorage around which political preferences are organized. Set adrift from this anchorage ... most voters have little or nothing to guide their choices." \textit{Id.} at 231. \textit{See also A. Sindler, Political Parties in the United States} 88-90 (1966). The widely-claimed interests in strong two-party government, however, are nowhere said by these commentators to be served by exclusive control of nomination procedures by party professionals. Indeed, the experience of the 1968 Democratic National Convention would seem to indicate the opposite conclusion.

\textsuperscript{78} In Kramer v. Union Free School District No. 15, 37 U.S.L.W. 4530 (U.S. June 16, 1969), the Supreme Court used a two-stage test. First, does the purported state interest require the restriction, and if so does it "accomplish this purpose with sufficient precision to justify denying appellant the franchise?" \textit{Id.} at 4533. And second, if the exclusion is necessary to promote the articulated state interest, is that interest a compelling one? \textit{Id.} n.14.

tention of exclusive control over nominations by unresponsive local officials is no longer functionally justified.

The Court must also take into account the evolution of ideas concerning the nature of representative government. At a time when it was felt to be permissible within a democratic framework to restrict the suffrage to male property holders and systematically to exclude sizeable groups on the basis of race, a system of excluding voters from participation in the nomination process might have been perfectly consistent with national norms. But in 1969, the power of party bureaucrats to disregard popular sentiment is an anomaly.

Over the last century, five constitutional amendments have directly extended the franchise. Although legislatures and political parties have had a major role in this "inclusion process," the Supreme Court has consistently accepted responsibility for guaranteeing minimum standards of participation. Thus the Court in Harper v. Virginia Bd. of Elections struck down a state poll tax law even though the recently passed twenty-fourth amendment had been limited to federal elections.

In two of the most recent voting rights cases under the equal protection clause—Williams v. Rhodes and Moore v. Ogilvie—the Supreme Court has, in effect, made it significantly easier for dissidents within the major parties to split off and gain third party status. In Rhodes, the Court struck down Ohio's regulations governing access of third parties to a place on the ballot, and in Ogilvie an Illinois requirement that new third parties obtain at least 200 signatures from

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80. U.S. Const. amend. XV, (denial of vote on account of race forbidden); amend. XVII (popular election of United States senators); amend. XIX (denial of vote on account of sex forbidden); amend. XXIII (right to vote in presidential elections extended to District of Columbia residents); amend. XXIV (outlawing poll tax in federal elections and primaries).

81. Even though expansion of the electorate has generally received bi-partisan endorsement, "the parties are not equipped to handle completely the adjustment of rights and demands which must accompany the 'inclusion process.' Courts become involved as well. Their role has been to oversee the definition and realization of the rights of political participation. . . . " Claude, Nationalization of the Electoral Process, 6 Harv. J. Legis. 139, 145 (1969).


83. In Harper, Justice Black objected that the Supreme Court had previously upheld state poll taxes. Justice Douglas' response was that the Equal Protection Clause is not shackled to the political theory of a particular era. In determining what lines are unconstitutionally discriminatory, we have never been confined to historic notions of equality, any more than we have restricted due process to a fixed catalogue of what was at a given time deemed to be the limits of fundamental rights. . . . Notions of what constitutes equal treatment for purposes of the Equal Protection Clause do change.

Id. at 669

84. 393 U.S. 23 (1968).

each of 50 counties in order to appear on the ballot was found to violate the equal protection clause. The underlying rationale of these decisions is that "the advancement of political goals means little if a party can be kept off the election ballots and thus denied an equal opportunity to win votes." In *Rhodes*, the Court noted that the "right of qualified voters . . . to cast their votes effectively" ranks among our "most precious freedoms."

The challenge to closed convention nominating procedures is an attempt to assert the same kinds of interests constitutionally safeguarded by the Court in *Rhodes* and *Ogilvie*. Dissidents within the major parties, like the new party advocates, seek to "make themselves heard at some crucial stage in the process of decision," but come up against party structures which deny them any participation at all.

86. The statute struck down in *Ogilvie* had been upheld in *MacDougall v. Green*, 355 U.S. 281 (1948).


88. Id. at 30. There was also a first amendment element to the decision in *Rhodes*. Justice Black's majority opinion emphasized both the interest in effective voting and the interest in freedom of political association, while Justice Harlan's concurrence was based exclusively on the first amendment. Justice Douglas' separate opinion emphasized the right of association, and he relied on the first amendment aspect of the case in *Rhodes*.

However, while it is true that Justice Black's opinion does not rely on the Reapportionment Cases, the equal protection ground seems to have been at least as important as the first amendment element of the case. When the Supreme Court in *Moore v. Ogilvie* was faced with Illinois' requirement that electors obtain 200 signatures in at least 50 counties to appear on the ballot, the Court found that the requirement violated equal protection. Justice Douglas' opinion for the majority overruled *MacDougall v. Green*, 355 U.S. 281 (1948), which had upheld identical restrictions, explicitly on the ground that the earlier case had been rendered obsolete by the one man, one vote decisions. The Court thus clearly indicated that there is a constitutionally protected interest in access to the ballot as an effective means for exerting influence on the political process, even where first amendment guarantees are not brought into play.

First amendment considerations might be thought to militate against judicial intervention in the nominating procedures of political parties. However, for the major parties, where state action is clearly involved, the notion that "private" political organizations can deny their members equal protection was rejected as early as *Smith v. Allwright*, 321 U.S. 715 (1944). See p. 1294 *supra*. The first amendment argument for autonomy may be stronger in the case of small parties which have little chance of success in national elections. One approach the Court could adopt in this area would be to classify political parties as "major" or "minor." Once a group attained major party status, the limitations advocated in this Note would apply, but independent candidates and small or ad hoc parties would be held to a less rigorous standard of equal protection in internal nominating procedures. In each case, the Court would balance the interest in equal participation by small party members against the interest in allowing minorities in national political campaigns to come together rapidly and effectively in third parties.

89. R. DAHL, A PREFACE TO DEMOCRATIC THEORY 137 (1956).

90. In order to achieve fundamental party democracy, the Hughes Commission outlines the following basic principles:

1. *Access*. Voters must have realistic and meaningful access to the process of select-
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For the Supreme Court to protect the interest in participation when it is put forward outside the traditional framework of American politics, but to disregard it when asserted at the centers of power within the major parties, would be both logically inconsistent and potentially at odds with the stability of the two-party system.

If the interest at stake is effective political participation, the guarantee of a place on the ballot to third or even fourth parties is far less important than a guarantee of democratic procedures in the major party nominating process. As Duverger, discussing the role of political parties within the democratic process, observes, "the legal monopoly of parties is generally less important than the actual monopoly; no purpose is served by leaving complete liberty to non-party candidates if normally only party candidates have any chance of success." So long as the plurality candidate wins a state's entire allotment of electoral votes, it is unrealistic to expect that the expanded right to a place on the ballot will prove an effective political weapon. For the foreseeable future, groups which wish to influence the actual choice of a President must continue to rely on intra-party procedures as their major vehicle.

Of course the current bias in the American political system in favor of the two-party system is no accident. While deciding in favor of the third party advocates, Justice Black's majority opinion in Rhodes explicitly recognized a legitimate state interest "in attempting to see that the election winner be the choice of a majority of its voters." To the extent that minority parties increase the likelihood that a President
will be elected with a minority of the popular vote, they undercut the representativeness of the only office in the nation for which all Americans vote. It is certainly not unreasonable to say that sound public policy dictates that the President represent a broad base of popular support. This implies that it is wise to encourage coalition-forming at an earlier stage in the electoral process than the election itself. Traditionally, intra-party conflict has served exactly this purpose. The role of the major parties was well characterized by the district court in Irish:

[A] primary function of a political party in a democracy is the direction and control of the struggle for political power among men who may have contradictory interests and often mutually exclusive hopes of securing them. This the parties do by institutionalizing the struggle and emphasizing positive measures to create a strong and general agreement on policies.

In Rhodes and Ogilvie, the interest in the preservation of the two party system was outweighed by the interest of individuals in effective participation in the electoral process. If the courts refuse to protect this same interest in participation when it is asserted by those working within the major parties, they will encourage the formation of third parties as the preferred strategy for minorities attempting to influence the composition of the presidential ballot. This destabilizing effect can be avoided if the courts accord equal weight to individual rights whether exercised within or without the major parties. The essence of the equal protection argument against closed conventions is thus that in a political system which places the greatest emphasis on openness and inclusiveness, it is simply inconsistent to permit a state to exclude the great mass of voters from one of the most important of the traditional mechanisms of political expression.