La Follette's Folly: A Critique of Party Associational Rights in Presidential Nomination Politics

Alan Martinson
University of Michigan Law School

Follow this and additional works at: https://repository.law.umich.edu/mjlr

Part of the Law and Politics Commons, and the State and Local Government Law Commons

Recommended Citation
Available at: https://repository.law.umich.edu/mjlr/vol42/iss1/6

This Note is brought to you for free and open access by the University of Michigan Journal of Law Reform at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in University of Michigan Journal of Law Reform by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.
Every four years, observers of the presidential nomination season decry the undue influence of those states that hold their primaries first, particularly Iowa and New Hampshire. Currently, Democratic Party rules protect the position of these states. In 2008, two states disregarded party rules in order to move their primaries to a more influential position in the primary season. As punishment for disobeying the rules, the national party diluted the influence of the delegates from these states at the national convention. Legislative solutions to the problems of the current nomination process appear unlikely. Moreover, Supreme Court jurisprudence places no limits on a party's choice to refuse to seat delegates. This Note proposes that the Court evaluate state regulation of parties more seriously with respect to presidential nomination conventions by balancing the burden on the party's associational rights against the state's interest in regulation.

INTRODUCTION

The 2008 presidential primary season produced its share of surprises, with the outcome of both parties' nomination battles unsettled well beyond traditionally early contests in Iowa and New Hampshire. Not surprising, however, was the iron fist with which the national parties controlled the nomination process. For decades, national party control has meant favoritism of certain states over others. Although New Hampshire is given free reign to schedule its primary as early as its Secretary of State desires, and Iowans have their votes counted just days after the New Year, residents of other states can only hope to influence the nomination process if the battle remains unsettled beyond those first primaries. The fortuity of the 2008 contest, and the systemic problems it masked, do not diminish the concerns regarding the privileged position that party rules—particularly the Democrats—afford certain states at the expense of everyone else.

As it is every four years, supposedly quasi-sovereign states have been effectively powerless against the two major political parties.

* University of Michigan Law School, J.D. 2008; Claremont McKenna College, B.A. 2004. Thanks to Professor Ellen Katz for helping me develop my ideas and for providing useful comments on a draft of this Note. Thanks also to Christopher Kriva for his helpful suggestions.
States attempting to break the stranglehold in 2008 received harsh punishments. Michigan moved its primary up to mid-January, only to have the Democrats initially strip the state of all of its delegates and the Republicans allow only half the original number. Florida moved its primary up to late-January, with the same result. Frustrated politicians and voters filed lawsuits challenging the draconian punishments, but the current law regarding the associational rights of parties made their claims difficult. While Michigan and Florida were later able to regain their delegates (though with only half a vote each), they did so under circumstances that ensured that they would have no impact on the outcome and did not change the underlying policy favoring Iowa and New Hampshire.

Indeed, the Supreme Court has progressively strengthened the associational rights of parties in determining the method for choosing their nominees, even in the face of state opposition. While states have power to force parties to hold primaries for candidates who will appear on the states’ general election ballots, their power does not extend much further. Particularly, national parties possess practically unfettered control of presidential nomination procedures and, indeed, full authority to blackmail states into following party procedures, as the Court has noted on several occasions. During the 2008 election cycle, another dimension of party control came to the forefront: Party rules allowing certain

2. Id. The Democratic Rules Committee eventually met in May of 2008 to decide what to do with the Michigan and Florida delegations. In the interests of party unity and harmony, the Democrats decided to reinstate each state’s delegates for the Convention, but with only half a vote for each delegate. Katharine Q. Seelye & Jeff Zeleny, Democrats Approve Deal on Michigan and Florida, N.Y. TIMES, June 1, 2008, at A1.
8. See La Follette, 450 U.S. at 124–26; Cousins, 419 U.S. at 487–91.
states permission to hold early primaries, while discriminating against all other states, caused political controversy. Nonetheless, the relevant precedent is broad enough to protect the parties' actions.

This Note questions the soundness of applying precedent on party associational rights to the controversy regarding presidential primary dates. The present nomination system results from historical accident and subsequent entrenchment, not calculated party activity. It discriminates against governments and citizens of other states, without adequate justification. Although in many respects parties should enjoy broad powers to choose their standard-bearer, the states' role and interest in the election of the President dictates that parties should only be able to impose generally-applicable rules on states. To that end, the Supreme Court should more explicitly balance the burden on the party's associational rights against the state's interest in regulation. Specifically, the Court should give parties less deference with respect to delegate seating, and consider the circumstances and relative interests at stake in the clash between the party and the states.

Part I outlines the history of party nomination contests in this country, with particular emphasis on Iowa and New Hampshire. Part II discusses the current political issues surrounding the presidential nomination process, including the front-loading problem, special privileges early states enjoy, and the prospect of political solutions. Part III addresses the current state of the law of party associational rights with a focus on the La Follette case. Part IV analyzes how the relevant precedents apply to the present issue—particularly the Democratic Party rules—and suggests recommendations about how the Supreme Court should modify its constitutional jurisprudence in this area.

I. HISTORY OF PRESIDENTIAL NOMINATION CONTESTS

The nomination process both parties use to select their presidential candidates, consisting primarily of caucuses and primaries, is the product of progressive democratization. In reaching the current system, however, quirky relics of past practices persist.

Early in American history, the newly formed Federalist and Democratic-Republican parties sought to develop a system for selecting their respective presidential candidates. Their considerations were similar to considerations parties face today: They wanted to maintain control of the nominating process, while also encouraging ultimate party unity.\textsuperscript{10} The Democratic-Republicans first solved the dilemma in 1800 by enlisting Members of Congress to caucus and select a nominee, and leaving the Federalists to slowly dissolve.\textsuperscript{11} In 1824, however, the caucus process broke down, leading to a highly contested general election with no clear winner.\textsuperscript{12} Andrew Jackson’s populist ascendancy emboldened his supporters to create a convention-based system of nominations, breaking elites’ stranglehold on the process.\textsuperscript{13} The new system, with its more decentralized and popular orientation, fit within the larger Jacksonian march toward a “political nation.”\textsuperscript{14} Nonetheless, the selection process still did not include direct elections; rather, the power severely shifted from the elites to local and state party organizations.\textsuperscript{15} Consequently, different means of selecting delegates for the national convention proliferated, some of which were more or less open and transparent.\textsuperscript{16} Generally, caucuses or party leaders (such as the governor or party bosses) chose delegates.\textsuperscript{17} Delegates were supposed to represent states’ interests at the convention, where they would select candidates in infamous “smoke-filled back rooms.”\textsuperscript{18}

In the late 1800s, larger political movements were brewing that would ultimately change the nomination process. Political participation in the nominating process declined, and observers wondered what had gone wrong.\textsuperscript{19} Progressive Era reformers viewed many of the electoral mechanisms in the United States, including the nomination process, as corrupt and insular, so they

\begin{thebibliography}{9}
\bibitem{19} Id.
\bibitem{20} Id. Andrew Jackson won the popular vote, but John Quincy Adams ultimately prevailed in a vote of the House of Representatives.
\bibitem{21} Id. at 7.
\bibitem{22} Alan Ware, The American Direct Primary: Party Institutionalization and Transformation in the North 65 (2002).
\bibitem{23} Scala, supra note 10, at 7.
\bibitem{24} Id.
\bibitem{25} Id.
\bibitem{26} Id.
\bibitem{27} Ware, supra note 14, at 65–68.
\end{thebibliography}
demanded change.\textsuperscript{20} One major reform was the Australian (or "secret") ballot, which wrestled control from party bosses and fundamentally transformed politics from a "face-to-face" endeavor to a more formal process.\textsuperscript{21} Another was the general shift from indirect to direct methods of selecting candidates and public officials. Over time, the direct primary changed from a radical method of selecting candidates in just a few jurisdictions to more widespread acceptance.\textsuperscript{22} The direct election of Senators also provides an obvious example of this trend.\textsuperscript{23}

The turn of the 20th Century brought the first direct primaries for presidential convention delegates when, in 1901, a Florida law allowed parties to elect delegates to their national elections via primaries.\textsuperscript{24} In 1905, Wisconsin passed a law requiring parties to use primaries in selecting delegates.\textsuperscript{25} Oregon, in 1910, became the first state to require its delegates to support the winner of its presidential preference primary at the party convention.\textsuperscript{26} Many other states followed Oregon's lead, including New Hampshire,\textsuperscript{27} although these states remained a minority until the post-1968 McGovern-Fraser reforms.\textsuperscript{28} The move to primaries, however, had relatively little effect on the party conventions, as the number of primaries was insufficient to select a nominee; candidates were still chosen in backroom negotiations among uncommitted delegates.\textsuperscript{29} Nonetheless, the pre-McGovern-Fraser primaries served as an important precursor to the current system and influenced the structure that followed.\textsuperscript{30}

Following controversy surrounding Hubert Humphrey's careful use of party rules to secure the 1968 nomination, the Democratic Party created the Commission on Party Structure and Delegate Selection (later the McGovern-Fraser Commission) to address nomination issues.\textsuperscript{31} The Commission changed party rules to give

\begin{itemize}
\item \textsuperscript{20} Id.
\item \textsuperscript{21} Id. at 33–34.
\item \textsuperscript{22} See id. at 95–128.
\item \textsuperscript{23} See U.S. CONST. amend. XVII.
\item \textsuperscript{24} Ware, supra note 14, at 248.
\item \textsuperscript{25} Id.
\item \textsuperscript{26} Id.
\item \textsuperscript{27} Niall A. Palmer, The New Hampshire Primary and the American Electoral Process 1 (1997).
\item \textsuperscript{28} Ware, supra note 14, at 248.
\item \textsuperscript{29} Id. at 250–51.
\item \textsuperscript{30} This is not to say that the primaries were irrelevant before 1972; a victory in the primaries undoubtedly added to the sense that a candidate could gain support among the general voting population. Scala, supra note 10, at 9. They were simply not determinative.
\item \textsuperscript{31} Id. at 14–15.
\end{itemize}
increased incentives for primaries, at the expense of caucuses. The Republicans, fearing being left out of the increased media attention that accompanies primaries, soon followed suit.

This is more or less the state of the presidential nominating system today. But several predictable changes have unfolded in the past forty years. First, there has been significant front-loading in the presidential nomination process. Early primary victories often give candidates momentum that can carry them all the way to the nomination. As a result, states wishing to have more say in the nomination move up their primaries to have more influence. This phenomenon began slowly, as only a few states challenged New Hampshire’s position as the first primary, and the nomination process remained diffuse for several decades. In 1988, a group of Southern states established a “Super Tuesday” collection of primaries early in the season, which further advanced the nomination process. By 1996, over two-thirds of the Republican delegates were selected by the sixth week of the primary season. By 2000, many states held primaries and caucuses at the earliest date allowed by the parties. The 2008 season saw states schedule primaries even earlier, with some states even challenging party rules penalizing early primary dates.

Second, parties institutionalized dates on which primaries can be held. For example, the Democrats strictly forbid states from holding primaries prior to the first Tuesday of February, with specific exceptions for four states, including Iowa and New Hampshire. Republican rules also penalize states for holding early

32. Ware, supra note 14, at 252.
33. Id. at 253.
34. Party rules have changed in numerous ways following the reforms, but the structure remains the same, with the primaries producing a clear winner for each party in advance of the conventions. Id.
36. Id. at 13–15.
37. Id. at 16–17.
38. Id. at 16–18.
40. Democratic Rules, supra note 9, Rule 11A (“No meetings, caucuses, conventions or primaries which constitute the first determining stage in the presidential nomination process (the date of the primary in primary states, and the date of the first tier caucus in caucus states) may be held prior to the first Tuesday in February. . . . Provided, however, that the Iowa precinct caucuses may be held no earlier than 22 days before the first Tuesday in February; that the Nevada first-tier caucuses may be held no earlier than 17 days before the first Tuesday in February; that the New Hampshire primary may be held no earlier than 14 days before the first Tuesday in February; and that the South Carolina primary may be held no earlier than 7 days before the first Tuesday in February. In no instance may a state which
primaries, but they do not allow exceptions for particular states.\textsuperscript{41} Therefore, the Republican Party rules are less objectionable from a fairness perspective.

In sum, developments in the primary process, both party-created and naturally-occurring, have promoted early primaries. Democrats have gone even further by specifically granting exemptions from party rules on primary dates to certain states.

\textbf{B. Iowa}

Iowa benefits from a tradition of holding the “first in the nation” presidential caucus. Caucuses are complex, organized processes unfolding over many months, and Iowa is no exception. No state, however, begins the delegate selection process before Iowa. Although this situation results more from happenstance than logic, Iowa’s status now appears enshrined in modern political lore.

Although Iowa has held caucuses for the selection of national party convention delegates for the entirety of its state history save one year, its early contests are a relatively new development.\textsuperscript{42} In 1972, the Iowa Democratic Party moved its caucus to January 24, not in an effort to have an early impact on the race, but rather to enable party workers to process paper work for each progressive stage of the caucuses to compensate for an unusually early (July 9) scheduled delegate selection procedures on or between the first Tuesday in February and the second Tuesday in June 1984 move out of compliance with the provisions of this rule.

\textsuperscript{41} \textit{Republican Nat’l Comm., Rules of the Republican Party,} Rule 15(b) (2004) [hereinafter \textit{Republican Rules}], available at \url{http://www.gop.com/About/Rules11-20.htm} (“(1) Except with respect to delegates and alternate delegates elected under paragraph (c)(1)(ii) of this rule and if consistent with paragraph (d)(4) of this rule: (i) No presidential primary, caucus, convention, or other meeting may be held for the purpose of voting for a presidential candidate and/or selecting delegates or alternate delegates to the national convention, prior to the first Tuesday of February in the year in which the national convention is held. . . .”). The party rules go on to state: “If any state or state party violates the Rules of the Republican Party relating to the timing of the selection process resulting in the election of delegates or alternate delegates to the next national convention, such state shall suffer a loss of its delegates and alternate delegates to that national convention as follows: (1) If a state or state party violates the Rules of the Republican Party relating to the timing of the selection process resulting in the election of delegates or alternate delegates to the national convention before the call to the national convention is issued, then the number of delegates to the national convention from that state shall be reduced by fifty percent (50%), and the corresponding alternates delegates shall also be reduced.” \textit{Id.}, Rule 16(a).

\textsuperscript{42} Peverill Squire, \textit{Iowa and the Nomination Process,} in \textit{The Iowa Caucuses and the Presidential Nominating Process} 1–3 (Peverill Squire ed., 1989). The only exception was 1916. Iowa changed back to a caucus for the next cycle because only a quarter of registered voters had participated in the primary. \textit{A Complete History of the Iowa Caucuses, The Gazette} (Cedar Rapids, Iowa), Dec. 27, 2006, \url{http://www.iowacaucus.com/apps/pbcs.dll/article?AID=/20061227/IOWACAUCUS03/61227001}. 
Democratic National Convention. The caucuses did not gain significant national attention, but the attention they did get convinced Democratic and Republican leaders in the state to cooperate in holding early primaries in 1976, on January 19. When Jimmy Carter invested significant resources in the state that year, achieving a win that propelled him into front runner status, Iowa's place of significance was set.

The significance of the caucuses, at least in the minds of candidates and the media, has increased in the last thirty years. Candidates invest significant resources and alter their policy positions to appeal to Iowans. Predictably, Iowa has fought hard to maintain its status as "first in the nation," and it has enjoyed success in doing so—particularly in the Democratic Party, where its position is protected by party rules.

C. New Hampshire

New Hampshire has firmly rooted its position as the first primary of the presidential nominating season for many years. Like Iowa, New Hampshire's move to an early date was not an attempt to gain influence, but rather an attempt at administrative efficiency. In 1916, officials moved the primary to the second Tuesday in March to coincide with Town Meeting Day, making New Hampshire the second primary in the nation. When Indiana moved its primary to a later date in 1920, New Hampshire became the first primary.

43. Squire, supra note 42, at 1–2.
44. Id. at 2.
45. Id. at 3.
49. Democratic Rules, supra note 9, Rule 11A. Note that the Republican Party strips all early states of half of their delegates, but candidates still focus their energy on those states. Republican Rules, supra note 41, Rule 16(a).
50. See supra note 27 and accompanying text.
51. Scala, supra note 10, at 9. Town Meeting Day was the day New Hampshire residents weighed in on local issues via local democracy. Id.
where it remains today.52 Indeed, New Hampshire law dictates that the state be first in the nation.55

The New Hampshire primary has played an important role in presidential nomination contests. The primary was first thrust into the spotlight in 1952, when Eisenhower's win (despite remaining in Paris and not campaigning in the state54) propelled him to the Republican nomination, and Sen. Estes Kefauver's shocking victory over incumbent President Harry Truman pushed Truman to forgo re-election.55 The state's importance to candidates grew over the next several election cycles, until 1968, when Richard Nixon (who had invested significant time in New Hampshire in various roles since 195456) demolished his opposition, clearing the Republican field, and Eugene McCarthy's remarkable second-place finish set in motion President Johnson's withdrawal from the race.57 By 1972, with New Hampshire as the first primary in a process increasingly reliant on primaries, the state's place as a proving ground and most critical stage for presidential hopefuls was set.58 Although history has shown the contest to be influential, it is not always decisive, as evidenced by big wins by the likes of Gary Hart in 198459, John McCain in 200060, and Hillary Clinton in 2008.61

More than Iowa, New Hampshire worked to maintain its position in the presidential nomination season. For example, state Republicans successfully fought off Arizona and Delaware's 1996 attempts to take over the first spot by demanding that all major candidates sign a pledge to support New Hampshire's position as the first primary.62 The Secretary of State has said he would do

52. Id.
53. N.H. REV. STAT. ANN. § 653:9 (2008) ("Presidential Primary Election—The presidential primary election shall be held on the second Tuesday in March or on a date selected by the secretary of state which is 7 days or more immediately preceding the date on which any other state shall hold a similar election, whichever is earlier, of each year when a president of the United States is to be elected or the year previous.").
55. PALMER, supra note 27, at 3-6.
57. Id. at 131-34.
58. PALMER, supra note 27, at 13.
59. Id. at 19-21.
60. SCALA, supra note 10, at 31.
62. MAYER & BUSCH, supra note 35, at 163-64.
whatever it took to ensure that the state went first. Like Iowa, Democratic rules protect New Hampshire's election date.

Prior to the 1984 nominating season, the state fought an epic battle with the national Democratic Party to receive and extend a special exemption for the state to hold an early primary. Party rules had allowed the state party to hold its primary on the first Tuesday in March, but state law set a primary date on the last day of February. The primary was originally set for March 6, which fit within the exemption window, but Vermont decided to hold a primary on the same date, triggering New Hampshire's law requiring it to hold the first primary. After a standoff, the national party ultimately capitulated (in part because the earlier primary date was out of the state party's control), making the national party wary of future confrontations.

D. Nevada and South Carolina

Nevada and South Carolina do not have as long of a tradition of holding early primaries, but their current position is worth mentioning. Democratic Party rules grant these states favored positions on the nomination calendar, and they both held early contests (for both parties) in 2008. For 2008, the Democrats granted South Carolina and Nevada early dates in order to include more African-Americans and Latinos in the process, as well as to increase geographic diversity. Besides Iowa and New Hampshire, Nevada and South Carolina are the only states allowed to have first determining stages for delegates prior to the first Tuesday in February. The non-discriminatory Republican rules strip these early states of half of their delegates.

64. DEMOCRATIC RULES, supra note 9, Rule 11A.
65. PALMER, supra note 27, at 137–46; see also infra Part II.A.
66. PALMER, supra note 27, at 137–42.
67. Id. at 139–43. The Vermont Democratic Primary did not trigger the New Hampshire law, as it was just a "beauty contest," where no delegates were selected. The Vermont Republican primary, however, had the potential to select delegates, which triggered the New Hampshire law. Id.
68. Id. at 143–46.
69. DEMOCRATIC RULES, supra note 9, Rule 11A.
71. REPUBLICAN RULES, supra note 41, Rule 16(a).
II. POLITICAL ISSUES IN THE NOMINATION PROCESS

While the current situation favoring the four early states arose and remained in place for a variety of reasons, there are important reasons why many states and the parties have an interest in changing the system. Voters in disfavored states also have an interest in increasing their influence on the process. There is also little reason to believe that the several favored states do a particularly good job of selecting candidates who can win a general election or govern effectively. Consequently, every four years, commentators discuss potential political changes to the process. Unfortunately, they generally all reach the same conclusion: political reform in this area is nearly impossible.

A. Front-Loading and the Role of Party Rules

As discussed above, party rules play a key role in maintaining the position of the early primary states. Moreover, the reasons and history behind those rules remain relevant to this day and inform any potential reform.

States have an obvious interest in voting early in the nominating process. Front-loading has increased dramatically in recent years. And it makes a lot of sense for states to go early in the process; they receive increased press coverage, an economic boost, candidate attention, policy concessions, and, of course, influence on the nomination. Indeed, the influence of the early states is emphasized by the number of candidates who drop out of the presidential nominating context after losing an early state. By the time the later states vote, only one viable candidate may remain.

The continuous march toward front-loading persists. Super Tuesday, the first day both parties allow primaries and caucuses without penalty or special exemption, gets more crowded every four years. In 2008, twenty-two states held Democratic primaries on Super Tuesday, accounting for fifty-two percent of the Democratic delegates, while twenty-one held Republican primaries, accounting for forty-one percent of Republican delegates. With

72 Mayer & Busch, supra note 35, at 4–22.
73 Id. at 23–30.
74 Id. at 40–46.
75 Democratic Rules, supra note 9, Rule 11A; Republican Rules, supra note 41, Rule 15(a).
the nomination potentially decided by the second week of February, later states have very little say in the process, and remaining states will likely move their primary dates to Super Tuesday. Of course, when all the states have moved earlier, they will face a classic "tragedy of the commons," as the states will no longer be differentiated from each other, and derive no benefit from their early date.\footnote{Mayer & Busch, supra note 35, at 49–50.}

The two major political parties have an interest in combating front-loading of presidential primaries, given the way the nominating season tests the candidates' political abilities. In this way, the Democrats' decision to allow four states to go first makes sense. It is much better for the party to test the candidates over a series of primaries and caucuses, rather than a single date with a large percentage of the delegates chosen. Thus, the front-loading problem is inextricably tied to the early state exemption problem. Once the early state exemption problem is solved, more comprehensive solutions to the front-loading problem will enter the realm of possibility.\footnote{For examples of solutions that would prove more feasible without the Democrats' early state exemptions, see infra Part II.C and the sources cited therein.}

The parties also have a strong interest in preventing states from going too early in the process. If states were voting in November of the prior year to nominate a candidate running in a presidential election twelve months later, for example, the resulting candidate might not still be considered the best candidate for the party the following November. This is always a problem, even in a system with somewhat later primaries, but extremely early dates exacerbate the problem.

As a result of this interest in limiting the move toward earlier primaries, the parties instituted the rules setting Super Tuesday as the first day for primary contests.\footnote{Democratic Rules, supra note 9, Rule 11A; Republican Rules, supra note 41, Rule 15(a).} This seems reasonable (and clearly supported by the case law), given that this rule is non-discriminatory against states and advances legitimate party concerns; in other words, the balancing of interests clearly favors the party.\footnote{See infra Part III.C.} Moreover, the Republican rule simply penalizing all states violating the prohibition on early primaries\footnote{Republican Rules, supra note 41, Rule 15(a).} passes the same test.

The Republican rule effectively limits the effect of front-loading by requiring states to choose between early influence and a full slate
of delegates. It is the Democratic rule, meanwhile, which raises the most concerns about fairness.

Democratic Party Rule 11A has a controversial history, as alluded to above. In 1980, the party decided to create a window during which its primaries could be held. For 1984, the party decided to grant specific exemptions to Iowa and New Hampshire, allowing them to hold their primaries prior to the second Tuesday in March and warning other states not to violate the window. This exemption has continued to the present day and has expanded to include the additional states of Nevada and South Carolina.

B. The Michigan and Florida Experiments

In 2008, two states without exemptions challenged Democratic rules by holding primaries prior to the first Tuesday in February. Michigan and Florida, both hoping to exert greater influence on the nominating process, changed state law to move up to earlier dates. While the Republicans, per their rule, took only half of those states’ delegates, the Democrats initially decided to strip all convention delegates from those states. Though the Democrats did decide to reinstate each state’s delegates with half their votes, the damage had already been done to Michigan and Florida’s attempts to impact the outcome; indeed, the plan to reinstate the delegates was adopted with the unambiguous intent to have no impact on the nomination. The experiences in Michigan and Florida demonstrate the entrenchment that Iowa and New Hampshire have achieved.

Michigan, hoping that presidential candidates would pay attention to its poor economy, decided to move up its 2008 presidential primary to January 15. Leading Michigan Democrats described the move as a war on the way Americans select presidential candidates, and attacked the privileged role of Iowa and New

82. See Part I.C, supra.
83. PALMER, supra note 27, at 137.
84. DEMOCRATIC NAT’L COMM., DELEGATE SELECTION RULES FOR THE 1984 DEMOCRATIC NATIONAL CONVENTION, Rule 10A (1982). Note also the March date for the start of the 1984 primaries, which emphasizes the significant movement toward front-loading.
85. Cillizza & Goldfarb, supra note 70.
86. Zito, supra note 1.
87. Id.
88. Seelye & Zeleny, supra note 2.
89. Dawson Bell, Jan. 15 Primary Gets the Go-Ahead, DETROIT FREE PRESS, Nov. 22, 2007, at 1A.
They argued that Michigan was being bullied by the national party in order to maintain Iowa and New Hampshire's lock on the process. After the state announced the change and it was ratified by the Michigan Supreme Court, however, many leading Democratic presidential candidates, in an attempt to placate Iowa and New Hampshire voters and the national party establishment, had their names removed from the ballot. Even before that, all of the major Democratic candidates had already made a pledge not to campaign in Michigan if the primary was held on January 15. Consequently, despite Michigan's efforts to gain equal footing with respect to presidential nominations, and likely because of it, the role of its Democratic primary in the nomination process was significantly diminished.

Florida, meanwhile, faced a similar situation, with only slightly better results. Before Michigan changed its date, Florida selected a January 29, 2008 primary date, and the Democratic National Committee ("DNC") voted to strip Florida of all of its delegates. The DNC made the decision even though the primary date change was passed by a Republican-controlled legislature and using an alternate date would have cost the state party millions of dollars. Democratic presidential candidates, as they did in Michigan, signed a pledge to boycott the Florida primary at the urging of party leaders in the four exempted early states. They did not, however, remove their names from the ballot. That, combined with the intense campaigning of the major candidates' supporters—if not the candidates' official campaigns—meant that the Florida primary possessed greater relevance for the Democratic race than the Michigan primary. Nonetheless, with no delegates

---

90. Brian Dickerson, Michigan Fuels a Political Revolution, DETROIT FREE PRESS, Sept. 5, 2007, at 1A.
91. Id.
92. Bell, supra note 89. A notable exception was Hillary Clinton. Her name remained on the ballot, adding to the controversy when the Democratic Party was deciding what to do with the Michigan and Florida delegates.
93. Dickerson, supra note 90.
95. Id.
98. Id. The Democratic candidates did attempt to circumvent the boycott in some respects, though they did not break the official boycott. Notably, Clinton publicly proclaimed that she would work to seat the Florida and Michigan delegations, and she was in Florida when
to claim and no serious campaigning there (both the result of the early states’ monopoly on the process), Florida’s role was significantly diminished.

It is worth noting that, although Michigan and Florida were initially stripped entirely of their delegates by the Democratic Party for voting too early and were later only able to receive reinstatement for half of their votes, the exempted states also broke party rules by holding their contests earlier than the dates listed in the Democratic Rules. Nonetheless, the party did not punish the exempted states for violating the rules. This selective enforcement raises questions about the party’s interest in enforcement generally.

C. Proposals for Reform

Many commentators have proposed alternative fixes to the current process of selecting presidential nominees. Such proposals are aimed at both the front-loading problem and the early state exemption problem, but I will focus on the latter. I will only discuss several representative proposals, which is sufficient to demonstrate how one might structure a better system. None of these proposals has received serious consideration, and this fact highlights the difficulty in achieving a political solution to the problem.

One plan, which the Republican Party very nearly adopted in 2000, is called the Delaware Plan, or “small states first” plan. Under this plan, the primary season would be spread out over four months, with the thirteen smallest states going in the first month and progressing to the twelve largest states’ primaries in month four. Although this plan eliminates the stronghold maintained by the four exempt states, it creates its own inequality. Therefore, even if this plan is possible to achieve, it is still objectionable under the standard set forth below.


100. MAYER & BUSCH, supra note 35, at 105–09.
101. Id.
102. See infra Part IV.D. The Delaware Plan might be less objectionable than our current system, however, as the parties' interests in promoting retail politics are more legitimately exercised in this case. Under the current system, parties exercise those interests in an arbitrary manner by privileging specific states without regard to neutral factors. Nonetheless, the Delaware Plan remains problematic.
A key alternative to the Delaware Plan is the so-called "California Plan." Also called the Graduated Random Presidential Primary System, the plan randomly generates a primary calendar, while ensuring that the schedule is spread out over ten, two-week intervals, and allowing for fewer delegates to be selected in the first few weeks so as to guarantee retail politicking. Although this plan has many benefits, such a radical change is unlikely to occur absent a significant outside influence, such as a Supreme Court ruling.

Over the years, numerous Congressional proposals sought to reform the presidential nominating process. The most notable recent effort was undertaken by Minnesota Senator Amy Klobuchar, with "tri-partisan" support. Klobuchar's plan is for a rotating regional primary, where four regions would alternate every four years to host primaries during different months of the campaign. States could hold their primaries within a seven-day window during their region's month. Congressional efforts to enact such changes, however, are problematic—beyond even the great difficulty of reaching legislative consensus—because federalism concerns may mean that Congress does not have the power to force the states into such a system. Thus, in addition to the political difficulties involved in a uniform plan, constitutional difficulties further cloud the picture.

104. Id. at 82-83.
105. It is not, of course, a perfect plan, as it suffers from the same problem of geographic disbursement that troubled some observers of the Delaware Plan. See, e.g., Mayer & Busch, supra note 35, at 107.
109. Id.
110. Mayer & Busch, supra note 106, at 614-19. It is substantially certain that New Hampshire would challenge federal primary legislation on such grounds. But cf. Burroughs v. United States, 290 U.S. 534, 545-47 (1934) (holding that Congress has the power to protect the integrity of the presidential election process in order to protect the government from impairment or destruction).
111. Senators and Representatives from the early states would likely invest significant political capital in blocking any significant change.
112. The constitutionality of federal regulation of presidential primaries does, indeed, constitute an interesting question. Insofar as it is a question of whether the federal government can impose its will on the states, a short discussion here will do. Burroughs contains strong language regarding the right of Congress to regulate the presidential selection process, but it is in the context of a federal corruption statute. 290 U.S. at 545-47. That situation is different from a federal statute creating equal power among states in the nomination process because the integrity of the federal government is not directly implicated in the
Other potential transformational primary plans could include a national primary, an "interregional primary" plan, or a "balanced primary."  

More incremental plans are also a possibility, both to combat front-loading and to eliminate the privileged position of Iowa, New Hampshire, Nevada, and South Carolina. For example, the parties might tie incentives to states' selection of certain primary dates. The parties could allow later states to have winner-take-all primaries, while earlier states would have to give delegates in proportion to the vote. Or the parties could apply a tiered system of what the Republicans already do, granting more delegates to later states for each step back they take in the primary season.

In the end, however, none of the above plans are likely to take root, given the stranglehold the early states have on the process. As noted earlier, the parties are unlikely to address the problems of front-loading without solving the early primary problem. Meanwhile, the early states have sufficient leverage to retain their exclusive positions. Those dynamics could change, but a successful legal assault

latter situation. Justice Hugo Black's plurality opinion in Oregon v. Mitchell also provides support for Congress' power; he wrote that Congress possesses "ultimate supervisory power" over both congressional and presidential elections. 400 U.S. 112, 123–24 (1970). On the other hand, it is far from clear that the Constitution should be read to give Congress power to bind the states with respect to presidential primaries. Mayer & Busch, supra note 35, at 134–35. Regardless, the issue is not settled and has little bearing on this Note's primary question: Do the states have the power to force the parties to accept delegates selected in violation of party rules that treat the various states differently?  

113. See John Haskell, Fundamentally Flawed: Understanding and Reforming Presidential Primaries 73–76 (1996). A uniform national primary date, of course, would completely change the nature of the nomination process by eliminating the focus on retail politics and disadvantaging lesser-known candidates. The parties would be reluctant to make such a change for a variety of reasons, including a lack of momentum-building and the huge advantage it creates for better-known, but not necessarily more electable, candidates. I am willing to concede that parties have an interest in having the primary season spread out over the calendar, but that interest should be circumscribed when the party uses means that discriminate among states.


117. Id.

118. See Part I.A, supra.

119. Their leverage extends not only over the party, but also over candidates and potential candidates. Candidates do not want to upset voters in Iowa and New Hampshire by supporting efforts to supplant those states. Doing so would approach political suicide if the efforts proved unsuccessful. Candidates also plan their activities for years ahead of time and invest many resources in cultivating support in the early states. Eliminating Iowa and New Hampshire's special positions would upset their expectations.
would likely prove more effective—and, in any event, quicker—in undercutting the early states' positions.

Political scientist Larry Sabato concedes that a political solution is impossible, largely because of Iowa and New Hampshire’s hell-bent stance on their privileged positions.\(^{120}\) He argues that the current constitutional structure “ignores the politics of the system almost entirely,” concluding the structure must be changed by constitutional amendment.\(^{121}\) Consequently, he proposes an amendment to create a regional lottery plan.\(^{122}\) While Sabato is correct that the Constitution fails to address the problem, he fails to consider the possibility that a change in how the Supreme Court interprets the present Constitution could change the political dynamics and knock Iowa and New Hampshire off their perch. Even so, Sabato unwittingly proposes a guiding principle that the Court can use as the basis for reform: “Every state and region ought to have essentially an equal chance, over time, to influence the outcome of the parties’ presidential nominations, and thus the selection of presidents.”\(^{123}\)

III. PARTY ASSOCIATIONAL RIGHTS AND THE LAW

Given the difficulty of a political solution,\(^{124}\) and assuming that a constitutional amendment would similarly prove too difficult to usher through Congress and receive state ratification, a solution will require court intervention. Although this route is not impossible, Supreme Court jurisprudence over the past thirty-five years creates a difficult landscape for a constitutional challenge to the parties’ stranglehold on the rules of presidential nominations. This Part discusses the current landscape, whereas recommendations

\(^{120}\) Larry J. Sabato, Politics: America’s Missing Constitutional Link, Va. Q. Rev., Summer 2006, at 149. Sabato argues that the incentives for Senators and Representatives from the early states, combined with the presidential ambitions of many Senators, would effectively end any serious effort. Id. at 155–56.

\(^{121}\) Id. at 157; see also infra Part III.A.

\(^{122}\) Sabato’s proposal is similar to Klobuchar’s, in that he proposes that the nation be divided into four regions, but he differs by allowing states to choose any day within that region’s month for their primary and also by choosing the order of regions by lottery, rather than alternation. Sabato, supra note 120, at 158–61.

\(^{123}\) Id. at 156.

\(^{124}\) Again, we will set aside discussion of the constitutionality of a political solution. It is worth noting, however, that the party associational rights discussed in this Part would have bearing on that issue. Nonetheless, that does not mean that the analysis would be the same. As Part IV will argue, states have additional interests in protecting their citizens and in selecting a President that are different from the federal government’s interests.
for the application and modification of constitutional jurisprudence are reserved for later. 125

A. Constitutional Silence

As anyone who has taken a high school American history course knows, key Founding Fathers opposed the idea of political parties; consequently, the Constitution makes no provision for their existence or regulation. This has created interpretive difficulties, as courts have had to rely on ill-suited constitutional clauses to apply to controversies involving the parties. Indeed, one commentator has described constitutional silence as a "clear case of constitutional failure." 126

First Amendment law is a complex subject, and its application to private organizations in general remains outside the scope of this Note. It is sufficient to state that private organizations enjoy substantial freedom from governmental interference, including for actions intended to influence our political system. 127 This freedom also sensibly extends to partisan political organizations with respect to the right to associate with individuals of similar political persuasion. 128 Courts have also held that party rights to associate with particular viewpoints are protected, even in the face of opposing individual First Amendment rights. 129 It is thus well-established that the rights of private organizations should not be limited simply by the fact that they are trying to elect individuals to government; this makes sense, so long as they do not conflict with compelling state interests.

One key consideration, however, suggests a different analysis when party interests run up against state interests: The party's relationship with government is fundamentally different from most

125. See infra Part IV.
129. E.g., Duke v. Massey, 87 F.3d 1226, 1235 (11th Cir. 1996) (holding that the Georgia Republican Party could refuse to list David Duke on the state's presidential primary ballot on the grounds that Duke held "adverse political principles"); Republican Party of Tex. v. Dietz, 940 S.W.2d 86, 92–93 (Tex. 1997) (holding under Texas Constitution that the party could refuse to allow Log Cabin Republicans to participate in the formulation of its internal party platform); see also Eu v. San Francisco County Democratic Cent. Comm., 489 U.S. 214, 224 (1989) (holding that a party has the right to "select a standard bearer who best represents the party's ideologies and preferences" (quoting Ripon Soc., Inc. v. Nat'l Republican Party, 525 F.2d 567, 601 (D.C. Cir. 1975))).
private organizations, in that its operations are necessarily linked to state elections. While it makes sense to vigorously protect parties as private organizations promoting particular viewpoints, it is less clear that they deserve—and, indeed, receive—constitutionally-protected freedom when it comes to the processes that elect candidates.\textsuperscript{130} The cases discussed below\textsuperscript{131} give parties some strong associational rights in these settings, but the parties' quasi-public character renders the Constitution essentially silent with respect to the core conflict. Consequently, party autonomy from government regulation of primary election processes is not sacrosanct or absolute.

\textit{B. State Regulation of Primary Elections, Generally}

In recent years, the Supreme Court has given political parties wide associational latitude to organize and dictate the rules of their primaries, insulated from state laws to the contrary. Indeed, the Court has protected the major parties from attacks on their associational rights on most occasions.\textsuperscript{132} In addition to the cases bearing directly on presidential primaries discussed below,\textsuperscript{133} the Court has addressed a series of cases regarding parties' rights to determine the rules for participation in primaries.

\textit{Tashjian v. Republican Party of Connecticut}\textsuperscript{134} is a key case in the development of party associational rights. In that case, the state Republican Party challenged a Connecticut law that required that only party members could vote in a party primary.\textsuperscript{135} They had attempted to change the law in the state legislature, but Democrats—presumably to marginalize the Republicans by preventing moderating independent voters from voting in the primaries—blocked the move.\textsuperscript{136} Despite the state's claim that its law was narrowly tailored to advance legitimate state interests in the integrity of elections and to prevent party raiding, the Supreme Court held the law violated the Republicans' associational rights.\textsuperscript{137} The Court said that the Constitution protects "[t]he Party's deter-

\textsuperscript{130} See Issacharoff, supra note 126, at 285–90.
\textsuperscript{131} See infra Part III.B–C.
\textsuperscript{132} Mayer & Busch, supra note 35, at 137–38.
\textsuperscript{133} See infra Part III.C.
\textsuperscript{134} 479 U.S. 208 (1986).
\textsuperscript{135} Id. at 211.
\textsuperscript{136} Id. at 212.
\textsuperscript{137} Id. at 224–25.
mination of the boundaries of its own association, and of the structure which best allows it to pursue its political goals.\textsuperscript{138}

The Court made even stronger statements in support of party associational rights in \textit{Eu v. San Francisco County Democratic Central Committee}.\textsuperscript{139} Therein, the Democratic Party challenged a California law that banned parties from making primary endorsements and dictated internal procedures of the parties.\textsuperscript{140} Justice Marshall's majority opinion struck down the laws on First Amendment association grounds.\textsuperscript{141} \textit{Eu} constituted an easy case, where the state's flimsy justifications ran up against strong party interests in basic self-governance and speech. Nonetheless, the Court's decision on the party self-governance issue is important.\textsuperscript{142} On the other hand, and offering important support for my argument, the Court in \textit{Eu} did recognize a line of case law allowing states to interfere with party internal affairs when a compelling state interest is implicated.\textsuperscript{143} The Court, in \textit{Storer v. Brown},\textsuperscript{144} pointed out the necessity of state involvement in elections, including primary elections: "[T]here must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes."\textsuperscript{145} Because current party rules influence an arbitrary result, this statement outlining the main legitimate purposes for state regulation provides support for intervention.

The most recent significant iteration of party associational rights comes in \textit{California Democratic Party v. Jones}.\textsuperscript{146} In \textit{Jones}, the Court struck down California's "blanket primary" on First Amendment grounds.\textsuperscript{147} The driving force behind the opinion was the Court's desire to protect a party from being forced to associate with voters

\textsuperscript{138}. \textit{Id.}
\textsuperscript{139}. 489 U.S. 214, 222-25, 229-33 (1989).
\textsuperscript{140}. \textit{Id.} at 216.
\textsuperscript{141}. \textit{Id.} at 233.
\textsuperscript{142}. Professor Issacharoff has argued that \textit{Eu} is primarily a decision protecting avenues of speech. \textit{Issacharoff, supra} note 126, at 288-89. In doing so, however, he completely ignores the part of the decision striking down the regulation of the party's internal affairs. Despite his protestations, \textit{Eu} clearly acknowledges a right of party association with respect to institutional affairs.
\textsuperscript{143}. \textit{Eu}, 489 U.S. at 231-33; \textit{see}, e.g., Am. Party of Tex. v. White, 415 U.S. 767, 781 (1974) (holding that a state can force parties to use primaries to select nominees); \textit{Storer v. Brown}, 415 U.S. 724, 730 (1974) (holding that a state may interfere with a party's internal affairs if needed to make elections fair and honest).
\textsuperscript{144}. 415 U.S. 724.
\textsuperscript{145}. \textit{Id.} at 730.
\textsuperscript{146}. 530 U.S. 567 (2000).
\textsuperscript{147}. A "blanket primary" is a primary where voters can choose to vote in different parties' primaries for different offices.
\textsuperscript{148}. 530 U.S. at 586.
who would not even identify with the party on the day of the election.\(^{149}\) As in *Tashjian* and *Eu*, the Court did not find the state's proffered interests sufficient to justify the incursion.\(^{150}\) Nonetheless, the Court did recognize that fairness could be a compelling state interest in regulating political parties, given the right circumstances.\(^{151}\) Taken together, these three cases make it clear that, although the state and party necessarily must work together in the primary context, state regulation of core party activities is generally not allowed absent a compelling state interest.

The *White Primary Cases*\(^{152}\) provide the contrary view of party associational rights. Those cases dealt with a variety of efforts by Democrats in the South to exclude blacks from the candidate selection process by effectively declaring the party to be public in that context.\(^{153}\) Among the cases, *Smith v. Allwright* made the most significant holding with respect to bringing parties within the purview of states: The party conducts primary elections "under state statutory authority," and that statutory system makes the party an "agency of the state" for the purposes of the election, so the state can impose duties that are public in nature—in that case, constitutional duties—in the setting of primary elections.\(^{154}\) In other words, parties are public entities in the context of primary elections.

This broad understanding of the *White Primary Cases* simply does not hold up in light of the more recent decisions on party associational rights. Nor should it be surprising that the courts have limited their continued application. The broad implications of classifying otherwise private entities as completely public in the context of primary elections has led scholars and judges to seek various ways of limiting the scope of the *White Primary Cases*.\(^{155}\) Nonetheless, the cases can—and should—be read in light of the more recent precedent to hold that party activities relating to primary elections are at least quasi-public, such that the state has

\(^{149}\) See id. at 581–82.
\(^{150}\) Id. at 582–86.
\(^{151}\) Id. at 584–85.
\(^{154}\) 321 U.S. at 663–65.
strong interests in the process, particularly when the party has a discriminatory purpose.¹⁵⁶

C. State Regulation of Presidential Primaries

The Supreme Court has also decided several cases directly bearing on a national party's decision as to whether to seat delegates chosen by means violating party rules. These cases, although distinguishable, provide a major roadblock to invalidating the Democratic Party's unfair rules. Consequently, I will discuss them in some depth in order to lay the groundwork for a departure from the course they set.

_Cousins v. Wigoda_¹⁵⁷ is the case that changed the tide toward greater party associational rights, and it is important in the presidential primary context.¹⁵⁸ The case arose when, in 1972, Chicago Democratic voters elected a group of delegates to represent them at the Democratic National Convention, but another slate of delegates challenged the seating of the first group of delegates because the Chicago election had violated party rules.¹⁵⁹ The national party agreed with the challenge and refused to seat the first group of delegates in favor of the challenging group, despite a Cook County court ruling enjoining the challenging group from acting as delegates.¹⁶⁰ The Supreme Court agreed with the national party; even though the state had an interest in the integrity of its electoral processes and in effective suffrage for its citizens, the Court held that that interest did not carry over to the Democratic Convention because of

¹⁵⁶. Courts and scholars have spilled significant ink on the issue of state action in the primary election context. See, e.g., LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1118–21 (2d. ed. 1988); Mayer & Busch, supra note 106, at 619–23; Lowenstein, supra note 153, at 1747–54. I do not add to that discussion because the issue I address is not whether the parties are acting as agents of the state, but whether a state can impose certain requirements on the parties. The Supreme Court has implicitly recognized this distinction. See Democratic Party of U.S. v. Wisconsin ex rel. La Follette, 450 U.S. 107 (1981) (no mention of state action requirement); Cousins v. Wigoda, 419 U.S. 477 (1975) (same).

¹⁵⁷. 419 U.S. 477.

¹⁵⁸. Mayer & Busch, supra note 35, at 137.

¹⁵⁹. Cousins, 419 U.S. at 480.

¹⁶⁰. Id. at 480–81. The Supreme Court did not reach the question of whether the elected delegates could force the national party to seat them at the Convention, as the elected delegates had conceded that they could not. Id. at 488. While that conclusion seems reasonable in the context of Cousins, it is less clear in the present instance, where party rules provide for seating of delegates from some states under substantially the same circumstances. Thus, the party's associational rights are arguably less burdened in the present case, and the party could be forced to accept all delegates selected in a similar way on a "take it or leave it" basis. See infra Part IV.
the national nature of the selection of presidential candidates. Because states do not have a constitutional role in the selection of candidates, the Court effectively held that they had no interest in light of the "pervasive national interest in the selection of candidates for national office." Despite the Court's strong language on the subject, the context of the case makes its applicability to the Democratic Party rules regarding primary dates limited. In Cousins, the Court was concerned about each state trying to impose its own rules on the national party: "If the qualifications and eligibility of delegates to National Political Party Conventions were left to state law 'each of the fifty states could establish the qualifications of its delegates to the various party conventions without regard to party policy, an obviously intolerable result.' Even though states should not be allowed to overrule generally applicable party delegate selection rules, it does not follow that parties should be allowed to apply different rules to different states. Consequently, Cousins does not definitively end the discussion.

Justice Rehnquist's concurrence in Cousins would have reached the same result, although he would have used less sweeping language. He would not have downplayed the state's interest as much as the majority, but simply would have held the interest insufficient to support "a total restriction" on the right of the contesting group to assemble and seek the national party's approval as delegates. Rehnquist flatly rejected the majority's contention that states had no role in the process, as the states "have residual authority in all areas not taken from them by the Constitution or by validly enacted congressional legislation." Both the majority and concurrence in Cousins make mention of a case decided several years earlier: O'Brien concerned the same Illinois delegate dispute (as well as an additional one), but in the context of a constitutional challenge to the Credentials Committee's refusal to seat delegates. The Court rejected the constitutional challenge on the grounds that "for nearly a century and a half the national political parties themselves have determined controversies regarding the seating of delegates to

161. Cousins, 419 U.S. at 489–90.
162. Id. at 490.
163. Id. (quoting Wigoda v. Cousins, 342 F. Supp. 82, 86 (N.D. Ill. 1972)).
164. Id. at 491–92.
165. Id. at 492.
166. Id. at 495–96.
167. Id. at 491, 494.
169. Id. at 2–5.
their conventions. 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.\textsuperscript{170} The \textit{Cousins} majority clearly distinguished the facts of \textit{O'Brien}: "Whatever the case of actions presenting claims that the Party's delegate selection procedures are not exercised within the confines of the Constitution [as in \textit{O'Brien}] this is a case where '... the convention itself (was) the proper forum for determining intra-party disputes as to which delegates (should) be seated.'\textsuperscript{171} In other words, the Court did not pass final judgment on whether delegate selection rules could be subject to constitutional attack, and that remains an open question. \textit{O'Brien} and \textit{Cousins}' discussion of \textit{O'Brien} serve to emphasize that the Court has \textit{not} held that national party conventions are wholly private in nature and thus immune from state regulation.\textsuperscript{172}

\textit{Democratic Party of U.S. v. Wisconsin ex rel. La Follette}\textsuperscript{173} provides another example of a national party's strong rights with respect to seating—and, indeed, not seating—delegates in the face of state attempts to dictate the process. Under Wisconsin law, delegates to national party conventions were selected in an open primary, but Democratic Party rules at the time forbade states from requiring that delegates to their convention vote according to the results of a primary open to non-Democrats.\textsuperscript{174} Thus, there was an inherent conflict between the Wisconsin law and Democratic rules. The Wisconsin Supreme Court acknowledged the Democratic Party's associational rights, but held that the burden on those rights was justified in light of the state's compelling interest in maintaining its primary.\textsuperscript{175}

The Supreme Court disagreed with the Wisconsin Supreme Court, holding that "[a] political party's choice among various ways of determining the makeup of a State's delegation to the party's national convention is protected by the Constitution."\textsuperscript{176} The Court also rejected the state's proffered interest in holding an open primary as a justification for requiring the national party to seat the

\textsuperscript{170} \textit{Id.} at 5.
\textsuperscript{171} \textit{Cousins}, 419 U.S. at 491 (quoting \textit{O'Brien}, 409 U.S. at 4).
\textsuperscript{172} At least one Court of Appeals has, however, concluded that some constitutional requirements do not apply to national party conventions. \textit{See} Ripon Soc., Inc. v. Nat'l Republican Party, 525 F.2d 567, 586-87 (D.C. Cir. 1975) (holding that one-person, one-vote does not apply to a party's formula for allocating delegates).
\textsuperscript{173} 450 U.S. 107 (1981).
\textsuperscript{174} \textit{Id.} at 109–10.
\textsuperscript{175} \textit{State ex rel. La Follette v. Democratic Party of U.S.}, 287 N.W.2d 519, 541 (Wis. 1980).
\textsuperscript{176} \textit{La Follette}, 450 U.S. at 124.
delegates; although the state has an interest in holding an open primary, that interest does not extend to allow the state to dictate that the national party must accept delegates bound by the primary.\textsuperscript{177} Taken on its face, \textit{La Follette} provides parties wide discretion in refusing to seat delegates.

Justice Powell authored a dissent in which he argues the Democratic Party's associational rights are not substantially burdened.\textsuperscript{178} Significantly, Powell pointed out the wide array of procedures that party rules allowed for delegate selection, including caucuses and allowing voters to change party affiliation with little or no effort before and after the primary; thus, refusing to accept delegates chosen in an open primary is hard to justify as vital to protect the party's associational rights.\textsuperscript{179} Even if Powell is wrong on this point, his argument is more compelling in the context of party regulation of presidential primary dates, where the party has already decided to accept delegates selected early. Powell goes on to stress important state interests as well, noting that "a continuing accommodation of the interests of the parties with those of the States and their citizens"\textsuperscript{180} makes sense and is suggested by history.\textsuperscript{181}

As the reader may have gleaned from the preceding cases, the Supreme Court tends to view state regulation of parties, particularly party decisions regarding the seating of delegates, with skepticism. Nonetheless, the cases as a whole make out a two-part test in determining whether state or party constitutional interests prevail.\textsuperscript{182} First, the court must evaluate the burden of state regulation on the party's constitutional rights.\textsuperscript{183} Second, the court must

\begin{itemize}
\item \textsuperscript{177} \textit{Id.} at 124–26.
\item \textsuperscript{178} \textit{Id.} at 128–34.
\item \textsuperscript{179} \textit{Id.} at 133.
\item \textsuperscript{180} \textit{Id.} at 137.
\item \textsuperscript{181} \textit{Id.} at 134–37. The Court's decision in \textit{La Follette} is open to attack on other grounds. Most notably, the Court asserts that the issue of "whether [a] state may compel the National Party to seat a delegation chosen in a way that violates the rules of the Party" was resolved in \textit{Cousins}. \textit{Id.} at 121. The Court mistakenly believed that the trial court in \textit{Cousins} had enjoined the Democratic Party "from refusing to seat delegates selected in a manner in accord with state law." \textit{Id.} (emphasis added). Of course, the trial court in \textit{Cousins} actually enjoined the party from seating delegates in a manner in violation of state law. \textit{Cousins v. Wigoda}, 419 U.S. 477, 480–81 (1975). Thus, \textit{La Follette} is based on an improper reading of the relevant precedent. Even though the ruling in \textit{Cousins} seems to compel the conclusion that the \textit{La Follette} Court mistakenly draws from it, that is not necessarily so. In the context of presidential primaries, a party may be less burdened by being forced to seat delegates in a way that the party accepts with respect to other states' delegates.
\item \textsuperscript{183} \textit{La Follette}, 450 U.S. at 128 (Powell, J., dissenting).
\end{itemize}
determine if the state has a compelling interest in regulation.\textsuperscript{184} This Note does not quarrel with the basic test. Rather, it proposes that the Court modify the contours of the test to conform with Justice Powell's pragmatic approach to the burden on parties, as well as to better recognize state interests in parties treating them fairly vis-à-vis other states. The Court should consider closely the relative interests of the party and the state, rather than looking at each in isolation.

IV. REVAMPING THE LAW APPLIED TO PRESIDENTIAL NOMINATION CALENDARS

As is evident, the Supreme Court has set a high bar for states wishing to regulate parties and their rules regarding presidential primaries. Nonetheless, the Court has not directly addressed the question of whether states may set primary dates that are contrary to party rules, nor has it addressed that question in the specific setting of party rules that discriminate in favor of certain states by allowing them to hold early primaries without penalization. It is to this question that we turn.

A. What the Court's Jurisprudence Means for Party Rules Regarding Primary Dates

To begin, there is the relatively easy case of the Republican Party rules, which require that states holding party primaries before a designated day are required to forgo half of their delegates to the party's national convention.\textsuperscript{185} Under the two-part test, we first look at the burden on the party's associational rights. Imagine the case where a state, say Ohio, passed a law that moved the primary date up prior to "Super Tuesday." In and of itself, that action is unobjectionable. Imagine now that Ohio sues the national party to require them to seat all of the delegates selected in the early primary. This second action constitutes a direct conflict between the state and the party. For the Republicans, the burden of this action does not seem insignificant. The party certainly has an interest in preventing a

\textsuperscript{184} Id. Indeed, Cousins implicitly accepts such a test as the controlling one by engaging in a detailed analysis of both the burden on the party and the state's proffered compelling state interest. 419 U.S. at 488-90. The La Follette majority refused to evaluate the burden on the party (though it did look at Wisconsin's proffered interest), therefore suggesting a shift in the general test. 450 U.S. at 123-26. More recent cases, however, have reaffirmed the test as the two-step process I have described. See Cal. Democratic Party, 530 U.S. at 579-86.

\textsuperscript{185} Republican Rules, supra note 41, Rule 16(a).
scenario where the nominee is selected too far before the general election, as the party's preferences and candidates' electability may change over time. It has chosen a cut-off date, which it has applied to all state primaries, further indicating its strong interest.

The state's interest in regulating the Republican Party, meanwhile, is not very great, if it exists at all. Indeed, the state's motive, gaining an advantage vis-à-vis other states in the selection of presidential nominees, is not legitimate under the test of Storer, as it creates more, not less, chaos. More important, though, is the holding in Cousins that states have no interest protecting the right of their citizens to effective suffrage or the integrity of the electoral process in the primary election context. Additionally, even if this part of Cousins is overruled, as I will argue it should be, the state's interest is not strong here because its voters' effective suffrage is not actually being disadvantaged in the nomination process vis-à-vis other states. Consequently, the substantial burden on the party and insubstantial interest of the state dictate a victory for the Republican Rule, if challenged.

The Democratic Rules, which grant exemptions allowing four favored states to hold early primaries, create a more difficult question, although they would likely be upheld if challenged under current law. Let us use the hypothetical involving Ohio again. In one respect, the burden on Democratic Party's associational rights is the same as the Republicans. The Democrats certainly have an interest in setting a cutoff date for primaries, and the Ohio law disrupts that interest. On the other hand, the fact that the Democrats allow specified states to hold primaries before that date suggests that their interest in the cutoff date they chose is not all that strong. Or at least such an inference would be proper under Justice Powell's dissent in La Follette. Moreover, the party interests at stake in this case are different than in La Follette. Whereas in La Follette the party's core interest in limiting their association to like-minded individuals to advance common political beliefs was at


188. See infra Part IV.D.

189. Democratic Rules, supra note 9, Rule 11A.

190. See La Follette, 450 U.S. at 133 (Powell, J., dissenting).
the interest in limiting when individuals can associate is
less central to the party. The Court’s majority opinion, however,
does not appear to leave much, if any, room for second-guessing:
“A political party’s choice among the various ways of determining
the makeup of a State’s delegation to the party’s national conven-
tion is protected by the [First Amendment, and] the courts may
not interfere on the ground that they view a particular expression
as unwise or irrational.” 192 Thus, although the burden on the
Democratic Party’s interest in setting its rules regarding presiden-
tial primaries is arguably much smaller—and, consequently, the
party is less burdened—the Court’s broad language in La Follette
requires that the Court find a significant burden here.

Just as the burden on the party would be found significant un-
der La Follette, a finding that the state’s interest is compelling would
directly contradict the statement in Cousins that a state’s “interest
in protecting the integrity of its electoral process cannot be
deemed compelling in the context of the selection of delegates to
the National Party Convention” and that the interest in effective
suffrage for residents cannot be compelling. 193 In La Follette, the
Court characterized Cousins as creating a near-absolute bar to find-
ing that a state has a compelling interest: “In Cousins . . . nine
justices agreed that a State could not constitutionally compel a na-
tional political convention to seat delegates against its will.” 194 The
Court just does not believe that the state can have an interest in the
delegate selection process. Therefore, a court could not find the
state’s interest in choosing an early primary date compelling with-
out violating precedent.

Of course, states in reality do have a strong interest in holding
early primaries. The attention that presidential candidates pay to
Iowa and New Hampshire, including by making policy concessions,
illustrates only part of the point. In addition to receiving attention
and special benefits, which do not create compelling state inter-
ests, early states also have the chance to significantly affect who
becomes the next president. States thus have an interest in not hav-
ing their citizens disadvantaged vis-à-vis other states’ in the selection
of presidential nominees. Therefore, the interest is not in voting
whenever they want, but in protecting their equality and the equality
of their citizens. Nonetheless, this interest carries no weight under
current doctrine. Cousins and La Follette taken together mean that a

191. Id. at 121–22. A party’s right to associate, and the corollary right not to associate, is
192. La Follette, 450 U.S. at 124.
193. 419 U.S. at 491.
194. 450 U.S. at 125–26 n.31 (citing Cousins, 419 U.S. at 492).
court would almost certainly hold for the Democratic Party in a case challenging the party’s refusal to seat delegates.

B. A Concrete Example: Nelson v. Dean

The Supreme Court’s jurisprudence in this area was put into action in a case challenging the Democratic National Party’s refusal to seat delegates selected in Florida’s early primary, Nelson v. Dean. The case provides an example of how the Court’s jurisdiction applies to the presidential nomination calendar situation. In that case, the district court addressed a lawsuit by a group of individuals asking the court to force the national Democratic Party to seat the delegates selected in the Florida presidential primary, the date of which violated party rules.

In Nelson, the court acknowledged that a state’s compelling interest can override a party’s First Amendment rights, but it did not consider the burden on the party in balancing both sides’ interests. Instead, it relied on language from La Follette to apply an absolute prohibition that “the state cannot ‘constitutionally compel a national political convention to seat delegates against its will.’” The court did, however, address whether the party had an interest in the rules, the analysis of which roughly approximates an analysis of the burden. Its compelling interest is in setting a schedule for primary contests and requiring compliance. And intrusions on the party’s power to set its presidential nomination schedule may pose a burden, depending on the circumstances. But, as in La Follette, the opinion in Nelson does not attempt to evaluate whether the party truly would be burdened by the regulation; the simple fact that the party has made the rule is enough to immunize it from challenge.

Plaintiffs had raised the issue that Cousins and La Follette involved core associational rights of who to include in the party decision-making process, whereas it is less important that the party choose not to associate with delegates selected in a process whose only flaw was that the votes were cast too soon. The district court dismissed those arguments, asserting that associational rights allow the voter

195. 528 F. Supp. 2d 1271 (N.D. Fla. 2007).
196. Id. at 1275–76. The fact that the lawsuit was filed by individuals raised state action issues, but the court did not address those issues, moving instead to the familiar two-part test. Id. at 1276–77.
197. Id. at 1279 (quoting La Follette, 450 U.S. at 126 n.31).
198. Id. at 1280.
199. Id.
200. Id. at 1279.
to "choose to associate, or not to associate, for reasons the holder deems sufficient."\[^{201}\] Under that reasoning, the party could refuse to seat delegates that were selected in primaries held on a Wednesday. But the Supreme Court's refusal to delve into evaluating the burden on parties leads to, even if it does not require, this conclusion.

The district court also looked at whether the state had a compelling interest in having its delegates seated, deciding that it did not.\[^{202}\] Interestingly, the court found that Florida's interest in an early primary date was less compelling than the state interests at stake in Cousins, as the potential adverse effect on the national party and other states is greater when a state changes its primary date.\[^{203}\] There are a number of problems with this finding. First, it is hard to see the adverse effects on other states. Although moving up the primary might give Florida a better position vis-à-vis other states, such an action would do nothing to impede other states from doing anything with respect to the primary, including making their own changes. Second, the fact that the court acknowledges that states are placed in a worse position by having other states go earlier in the nomination season supports the very point that it seeks to refute: States have a strong interest in having a good position on the nomination calendar. Third, it is hard to see how the adverse effect on the party is greater in a case where the state is trying to hold a primary on a date that the party already allows for other states than a case where the party refused to seat delegates selected in a way that limited minority, women, and youth participation, among other problems.\[^{204}\] Nonetheless, the absolute rule in Cousins means that, although the district court's evaluation of state interest was wrong, its conclusion that the state's interest is not compelling is undoubtedly required.

### C. What Went Wrong in Party Associational Rights

The Supreme Court's creation of effective immunity for national party conventions tips the balance of power too far in favor of the parties and against state regulation.\[^{205}\] One major problem with the

\[^{201}\] Id.
\[^{202}\] Id. at 1278-79.
\[^{203}\] Id. at 1278.
\[^{205}\] Professor Tribe has argued that the Court gave away too much in La Follette and should have paid more attention to the "public influence of the political parties," given the inextricable relationship between the parties and states. See Tribe, supra note 156, at 1115.
Court’s jurisprudence is the absence of any investigation of the burden of state regulation on the party. Instead, any regulation that limits the party’s ability to make decisions regarding its national convention, even arbitrary decisions, is deemed to significantly burden party associational rights.\textsuperscript{206}

Indeed, the Court treats the party’s associational rights as absolute, absent a compelling state interest. The problem with this broad conclusion is that it does not accurately reflect the burdens actually placed on the party’s associational interests. While forcing a party to accept voters who do not share common beliefs cuts to the core of associational interests, forcing a party to accept party voters who cast their votes too early does not, especially when one considers that the party has already allowed other party voters, different only in that they live in different states, to cast early votes. The case is made even stronger by the fact that the early states are similarly violating party rules, yet face no consequences. Interestingly, the issues decided in Cousins and La Follette did not require such sweeping language. In Cousins, the Democratic Party had rejected delegates selected using methods that were systematically unfair to younger voters, minorities, and women.\textsuperscript{207} In La Follette, the Democratic Party rejected delegates selected in a primary that was open to voters who chose not to publicly associate themselves with the party.\textsuperscript{208} In both cases, the burden of state regulation forcing the seating of delegates was arguably very high, so the Court’s broad language was unnecessary.

None of this is to suggest that the party does not have a significant interest in creating a schedule for its presidential nomination process. The party certainly does have such an interest, and allowing states to set and enforce the schedule by legislative fiat would unduly burden party rights. But it does not rise to the level of core associational interests, which at least arguably should receive near absolute protection. Rather, the burden on the party should be evaluated in light of all the relevant circumstances. Moreover, when the party decides to grant exceptions to the general rule, those exceptions undercut the party’s claim that state regulation with similar effect creates a heavy burden. Thus, although Cousins and La Follette may have been correctly decided on their facts, the

\begin{footnotesize}
\textsuperscript{207} 419 U.S. at 479 n.1.
\textsuperscript{208} 450 U.S. at 109–13.
\end{footnotesize}
rule of those cases with respect to party burdens is not necessarily justifiable in other circumstances.

Another problem with the Court's jurisprudence is in its evaluation of compelling state interests. The Court does not see what can be a compelling interest in the context of presidential primaries, so it makes any interest by definition uncompelling. The key move is a decoupling of the delegate-selecting stage from the convention. Although the Court sees how the state can have an interest in the delegate-selecting stage, that interest does not carry over to having those delegates seated at the convention. The closing passage in Justice Stewart's majority opinion in \textit{La Follette} illustrates the problem:

\begin{quote}
The State has a substantial interest in the manner in which its elections are conducted, and the National Party has a substantial interest in the manner in which the delegates to its National Convention are selected. But those interests are not incompatible, and \ldots both interests can be preserved. The National Party rules do not forbid Wisconsin to conduct an open primary. But if Wisconsin does open its primary, it cannot require that Wisconsin delegates to the National Party Convention vote there in accordance with the primary results, if to do so would violate Party rules.\footnote{Id. at 126.}
\end{quote}

In other words, the state has a compelling interest in holding its primary in the manner it wishes, but it has little interest—\textit{and certainly not} a compelling interest—\textit{in} ensuring that the results of that primary have any effect on the presidential nomination. This argument is absurd, as Justice Powell pointed out, because the whole point of the state holding a presidential primary is to select delegates who will influence the nomination.\footnote{Id. at 134.} The Supreme Court's error was in concluding that the state has no interest in ensuring that its citizens' preferences are considered in the nomination process.

\textit{D. Balancing State and Party Rights: Recommendations for Reform}

The problems that the presidential primary scheduling context raises with respect to the Court's jurisprudence suggest that changes are necessary. Although the two-part test evaluating party

\begin{footnotes}
\item[209.] \textit{Id.} at 126.
\item[210.] \textit{Id.} at 134.
\end{footnotes}
burdens and state interests is basically sound, the Court should modify its application of that test to better reflect the interests at stake and effect a balance between states and parties.

With respect to the burden on the party, the Court should not insist that any and every regulation of parties regarding their national convention places a significant burden on parties. It should take a more pragmatic approach. This is essentially Justice Powell's point in dissent in *La Follette* when he writes, "I would look closely at the nature of the intrusion, in light of the association involved, to see whether we are presented with a real limitation on First Amendment freedoms."211 We should not presume that state regulation poses great risk to party associational rights. In the present context of the nomination calendar, it appears that the burden on party First Amendment freedoms is not great.

Although the party certainly has an associational interest in setting its calendar, the party's own actions suggest that the actions of Florida and Michigan do not burden that interest very much. First, and most importantly, the Democratic Party has allowed other states to hold early primaries. This suggests that the party's interest in a cutoff date is not all that strong. Second, the history of the situation suggests that a strong motivation for the party rules has been fear of retaliation by Iowa and New Hampshire.212 Therefore, the party would actually have more freedom with respect to its calendar if it were not allowed to play favorites. Finally, the party has selectively enforced its calendar rules by allowing Iowa and New Hampshire to go even earlier than their privileged dates set in the rules. If the party wants to be able to set its own calendar, it should have to adopt a rational plan that treats states fairly.

The Court should also re-examine its jurisprudence with respect to state interests. One key change would be to recognize that the state's interest in controlling the conduct of presidential primaries is nearly meaningless without recognizing the related interest in having delegates selected according to that nomination contest

211. *Id.* at 130–31.

212. One might object that the tradition of holding early contests in Iowa and New Hampshire should weigh in favor of the party's right to give them a privileged position. I have two responses. First, there is not very strong evidence of a tradition. As noted, their position was much a historical accident, and the Democratic Party fought and lost a tense battle with New Hampshire in the early 1980s regarding the state's early primary. PALMER, *supra* note 27, at 199–43. Twenty years is hardly time to create a tradition. Second, and more important, tradition is not recognized as a factor in any cases where the court has evaluated state regulations purported to burden party associational rights. Even if it were recognized, it is hard to imagine how it could make a significant impact when considered alongside the party's interest in regulating the selection of delegates and the state's interest in regulating elections.
actually seated at the convention. La Follette's holding to the contrary defies our sense of what an election is about and should be overruled. It is equivalent to saying that, as long as the state election procedures are followed, the state has no interest in making sure that the winner of its primary vote-getter rather than the runner-up (or no candidate at all) assumes office. While a state does not have an interest in ensuring that a particular candidate is successful, it does have an interest in making sure the views of its citizens are effectuated. That interest should of course be limited by the party associational rights at stake, but it should prevail when the burden on parties is relatively small.

Cousins' similar holding, that states have no legitimate role in the selection of presidential candidates, also seems flatly wrong and should be overruled. It ignores the inextricable nature of the relationship between parties and states. Parties participate in state-run elections and operate within government. The eventual president will make decisions having significant impacts on the states. The Court's rule also ignores the role of states in the federal system and in the ultimate selection of a president. States should be able to protect their citizens from arbitrary vote deprivation, even in the context of a presidential nomination contest, and every state ought to have an equal shot to influence the process.

In essence, my proposal is to delve more deeply into the relative burdens and interests in order to reach a better balance of power between party and state. I think such a mode of analysis will lead to robust—but not unlimited—First Amendment protections with respect to regulations bearing on core party interests, such as substantive party values, as well as a more reasonable basis for inquiry into less central interests, such as the nomination calendar. It recognizes that parties do have a strong interest in the methods used to select delegates, including the prevention of front-loading and the maintenance of a reasonable calendar. For example, a party could enforce a generally applicable rule penalizing states for holding primaries before or after a certain date by stripping some or all of their convention delegates.

Under my proposal, the Republicans could maintain their primary season structure. As noted above, the burden of state regulation on the Republicans' associational rights would be more substantial because they have not made exceptions to their rule, and the state's interest would be less substantial in their case because the

213. Id. at 126.
party has treated all states the same. But the party's power would no longer be unlimited. While the Republican Rules would likely withstand an attack on the basis of the test I propose, the Democratic Rules would not pass when subjected to the balancing test because the Democrats have not shown their interest in their rule to be as strong and because the state has a greater interest in receiving equal treatment vis-à-vis other states. I think these different outcomes would be the correct results.

V. Conclusion

This Note addresses one form of challenge to party rules regarding the nomination calendar. Other avenues are possible, including individual rights claims under the Fourteenth Amendment. Nonetheless, I think that my proposal is preferable. It provides a solution that allows parties to retain significant freedom when their associational interests are at their apex, yet gives courts a basis for limiting parties when they push the limits of their power and "step on the foot" of a state's valid election-related interests. Because Cousins and La Follette concerned more central party associational rights, those cases may be decided the same way under the framework I have proposed. Under my reform, however, the Supreme Court would have to actually look at the situation and understand what each side was trying to accomplish before reaching a conclusion.

This is not to say that my proposal would not have larger implications beyond the presidential nomination context. Rather, it might push the Court to adopt a more complex view of the relationship between states and parties more generally. That would be a good thing. Our Constitution's silence on the issue has led to a jurisprudence that, as I have alluded to, too readily applies standard First Amendment associational protections to a setting where they are not appropriate. This Note recommends an approach that better fits the realities of party-state relations.