
Timothy J. Hoy
University of Michigan Law School

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AFFIRMATIVE ACTION IN THE ELECTORAL PROCESS: THE CONSTITUTIONALITY OF THE DEMOCRATIC PARTY'S EQUAL DIVISION RULE

Affirmative action may be the major moral issue of our time. Even though many advocates of equal opportunity reject the view that favoring certain groups effectively counters racial and gender-based discrimination, the use and scope of affirmative action has continued to expand in the past decade.

While the Supreme Court has upheld affirmative action programs in employment and educational settings, there remain troubling questions regarding their use in our electoral process. Since 1980 the Democratic Party has required that each state delegation to its national convention consist of equal numbers of men and women. This party law, called the "equal division rule," raises serious questions as to the political efficacy and constitutionality of pursuing affirmative action goals through manipulation of an integral part of the electoral process.

Part I of this Note traces the history of affirmative action in the Democratic Party and the events preceding adoption and implementation of the equal division rule. Part II establishes that the equal division rule is subject to constitutional review.

2. See, e.g., Cohen, supra note 1, at 40.
Part III presents constitutional and state statutory challenges to the equal division rule. The Note concludes that use of the equal division rule "quota" in the delegate selection process is unconstitutional.

I. HISTORY OF AFFIRMATIVE ACTION IN THE DEMOCRATIC PARTY

A. The Use of Goals

The push to increase participation by blacks and other underrepresented groups in the delegate selection process evolved from the bitter fight over control of the Mississippi delegation to the 1964 Democratic National Convention. Thereafter, the Democratic National Committee, in its Call for the 1968 Convention, guaranteed the opportunity to participate in the delegate selection process to all Democrats regardless of race, religion, or ethnicity.


The mandate of the 1964 Convention created an equal rights committee to study discrimination in the state parties and to work for nondiscrimination. This committee was the first to propose affirmative action in the delegate selection process of the Democratic Party. About a year after the committee's report, its chair, Gov. Richard Hughes of New Jersey, reported in a letter to the state chairs that while the committee had "agreed that a quota system for delegations is not feasible in practice, it [was] determined to make certain that all delegations to the [1968 Convention] would be broadly representative of the Democrats of the State." 26 Cong. Q. Weekly Rep. 1343 (June 7, 1968); see also Tabach-bank & Kelly, Reform of the Delegate Selection Process to Democratic National Conventions: 1964 to the Present, 7 S.W.U. L. Rev. 273, 276 (1975) (tracing delegate selection reform through the various reform commissions).

The six "basic points" which the Hughes Committee established as minimal standards for equal participation in party affairs were:

1. All public meetings at all levels of the Democratic Party in each State should be open to all members of the Democratic Party regardless of race, color, creed or national origin.

2. No test for membership in, nor any oaths of loyalty to, the Democratic Party in any State should be required or used which has the effect of requiring prospective members of the Democratic Party to acquiesce in, condone or support discrimination on the grounds of race, color, creed or national origin.

3. The time and place for all public meetings of the Democratic Party on all levels should be publicized fully and in such a manner as to assure timely notice to all interested persons. Such meetings must be held in places accessible to all Party members and large enough to accommodate all interested persons.

4. The Democratic Party, on all levels, should support the broadest possible registration without discrimination on grounds of race, color, creed or national origin.
In 1969 the Democratic National Committee established the Commission on Party Structure and Delegate Selection ("the McGovern-Fraser Commission") to implement this mandate. The McGovern-Fraser Commission found that the party discriminated against blacks, women, and members under the age of thirty. The Commission urged greater involvement by these groups in the delegate selection process.

5. The Democratic Party in each State should publicize fully and in such manner as to assure notice to all interested parties a full description of the legal and practical procedures involved . . . should be done in such fashion that all prospective and current members of each State Democratic Party will be fully and adequately informed of the pertinent procedures in time to participate in each selection procedure at all levels of the Democratic Party organization.

6. The Democratic Party in each State should publicize fully and in such manner as to assure notice to all interested parties a complete description of legal and practical qualifications for all officers and representatives of the State Democratic Party. Such publication should be done in timely fashion so that all prospective candidates or applicants for any elected or appointed position within each State Democratic Party will have full and adequate opportunity to compete for office.

26 CONG. Q. WEEKLY REP. 1344 (June 7, 1968).

Failure to comply with these requirements could lead to refusal to seat the invalidly selected delegates. Id. at 1343. The Democratic National Committee accepted this recommendation when it adopted the 1968 CALL FOR THE DEMOCRATIC NATIONAL CONVENTION.

7. The 1968 Convention established this Commission with former Senator George McGovern, the Party's 1972 presidential nominee, and subsequently Donald Fraser, then a Congressman from Minnesota and later the mayor of Minneapolis, as its chair. See Tabach-bank & Kelly, supra note 6, at 280.


<table>
<thead>
<tr>
<th>Year</th>
<th>Percent Black</th>
<th>Percent Women</th>
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<tr>
<td>1952</td>
<td>1.5</td>
<td>12.5</td>
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<tr>
<td>1964</td>
<td>2</td>
<td>13</td>
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<td>1972</td>
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<td>1976</td>
<td>11</td>
<td>33</td>
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<td>1980</td>
<td>14</td>
<td>49</td>
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J. CEASER, REFORMING THE REFORMS 52 (1982).

9. Id. While the McGovern-Fraser Commission lacked direct enforcement power, the guidelines were treated as party law because of the Commission's status as agent of the 1968 Convention and also its close collaboration with the 1972 Credentials Committee. See Note, Adjudicating National Convention Delegation Disputes: Prospects for the Development of Democratic Party Law, 7 LOY. U. CHI. L.J. 374, 376 (1976). The Credentials Committee, with the power to establish rules governing the seating of delegates, made the guidelines obligatory and imposed sanctions on deficient delegations, including refusal to seat them. See Vining, Delegate Selection Reform and the Extension of Law
For the 1976 convention, the national party required each state party to adopt an affirmative action plan for the delegate selection process. These plans were designed to set forth steps which the state party would take to promote greater participation by blacks, Hispanics, women, and young Democrats. No quotas were involved. In 1978, however, the party decided that encouragement of participation and equal opportunity were not enough and that equality of result must be guaranteed through enactment of the equal division rule.

B. The Use of Quotas

Although proponents of the equal division requirement failed at the 1976 Democratic National Convention, they eventually succeeded in 1980: the Final Call for the 1980 Democratic Na-
tional Convention "require[d] that State Delegate Plans provide for equal division between Delegate men and Delegate women and Alternate men and Alternate women in the Convention Delegation." Thus, the Democratic Party now requires equal numerical representation of males and females in every delegation to the Democratic National Convention. Despite the party's past history of discrimination against women, the wisdom of adopting a gender-based quota to achieve equal division is questionable.

The use of quotas for affirmative action assumes the inadequacy of equal opportunity; thus, equality of result must be achieved even though some reverse discrimination might occur. The use of quotas may indeed make sense in an educational setting; but the idea that any political party — a voluntary organization to which individuals adhere because of their common views on major issues — must distribute power equally among certain groups in proportion to their voting strength is one that


14. 1980 Final Call, supra note 4. To implement the equal division rule, the Democratic National Committee proposed four alternative methods. The first method, used at the caucus level, has men and women elected separately and slated alternately according to sex. Thus, if a congressional district is allotted four delegates there will be two women and two men on the slate.

The second alternative is used at post-primary delegate selection caucuses. The state party must predetermine the sex of each delegate slot. After the presidential primary has allotted delegates by candidate, the caucus elects males or females following the state plan.

The third alternative places enforcement of the equal division rule squarely in the hands of state government officials. Under this scheme, candidates are grouped on the ballot by sex and presidential preference, and voters are instructed to vote for an equal number of men and women.

The final method is designed for use in a caucus-convention system as used in Iowa and Minnesota. At the caucus level, all Democrats, regardless of presidential preference, elect representatives to the district or state convention. The presidential candidate with the most supporters at the caucus will have the best chance of having supporters picked to proceed to the district or state convention at which delegates to the national convention are selected. Under this alternative, males and females are elected separately at each step and are not allowed to compete against each other except when only one delegate may go to the next highest level. Democratic Nat'l Comm., Suggested Methods for Achieving Equal Division at the Level of Publicly Elected Delegates (n.d.) (unpublished paper on file with the Journal of Law Reform). Thus, the system of delegate selection used in the state indicates the method used by an individual state party to achieve equal division. See generally 1980 Democratic Nat'l Convention Comm., The Democrats 1980 Democratic National Convention 80-93 (1980) (describing method of selection used by each state for 1980 convention); see also J. Ceaser, supra note 8 at 34-35 (1982). But the composition of the delegation is intended to reflect the state primary results. See 1980 Delegate Selection Rules, supra note 13.

threatens that party's vitality and unity.\textsuperscript{16}

The use of quotas conflicts with the voluntary nature of membership in our political parties. No one is forced to adhere to any party; rather, party allegiance ideally is based upon a shared desire to work toward the accomplishment of common goals. In such a voluntary organization party loyalty should cross all categories of gender, age, or race. Indeed, unity compels the association to ameliorate differences of opinion based on these characteristics.

While the underlying goal of the equal division rule is praiseworthy, the use of quotas denies the existence of party solidarity. The alleged need for equal division presupposes that women must be represented proportionately lest the views of women be inadequately expressed. This supposition further assumes that men cannot represent women and vice versa — a view with troublesome implications for our entire representative democracy. But women do not hold the same views on every issue. It is absurd to assume that a female member of the Stop ERA movement can better represent a female member of the National Organization for Women solely because they share a common sex.\textsuperscript{17} Furthermore, if party members are not loyal enough to represent the best interests of all Democrats, but rather are only able to represent members of their own group, then it is inconsistent to protect only women with a quota. The use of quotas should be extended to blacks, Hispanics, and young people.\textsuperscript{18} Such forced party disjunction could fatally divide an already fragmented organization.

\textsuperscript{16} Of course, exposure to differing views and new ideas is essential for a political body, lest it atrophy on a diet of old views that have lost their force and relevance. The members of political parties, however, join voluntarily. To keep the party united, consensus is essential. The party, therefore, must work to find a consensus among its members instead of employing methods which tend to balkanize rather than unite.

\textsuperscript{17} Voluntary identification with the Democratic Party overrides most sexist political proclivities in both men and women. A timely example is support of the Equal Rights Amendment ("ERA"), the proposed twenty-seventh amendment to the Constitution. Assuming arguendo that being anti-ERA is sexist and being pro-ERA is not sexist, a view many would not share, identifying oneself with the Democratic Party, which actively supports the ERA, creates a rebuttable presumption that the individual Democrat is pro-ERA regardless of his or her gender.

\textsuperscript{18} Indeed, it is hard to understand why only women have been singled out for quota preference. Both the McGovern-Fraser Commission, see Mandate for Reform, \textit{supra} note 8, at 44-46, and the Mikulski Commission, see Abzug, Segal & Kelber, \textit{supra} note 9, at 19, recognized the need for affirmative action in the party for members of racial minorities and young people as well as women. It has been proposed that black and other minority groups be guaranteed proportionate representation in all elective and appointive bodies of our government. See Bell, \textit{Reagan and Blacks' Rights}, N.Y. Times, Nov. 25, 1980, at A19, col. 1.
The equal division rule's divisiveness stems partially from the fact that delegates cannot be elected simply because they are active and loyal Democrats; instead, the factor of gender, which is irrelevant to party loyalty or fervor, must be taken into account. Regardless of qualifications, a delegate candidate may be denied participation simply because fifty percent of the delegates already on the slate are of the opposite gender. Thus, a gender-based rift is created, with two classes of Democrats, with gender being a significant factor in determining what opportunities each individual will enjoy in party affairs. 19

Despite these arguments against the equal division rule, the party has chosen to require equal division at all future conventions. In light of this fait accompli, the following sections address the question of whether the rule is judicially reviewable and, if so, whether it is constitutional.

II. THE REVIEWABILITY OF THE EQUAL DIVISION RULE

A. State Action

The personal rights guaranteed by the Constitution are enforceable only against governmental infringement; 20 the Constitution does not regulate the private affairs of individuals. 21 A court has no jurisdiction, therefore, to hear the merits of a constitutional claim unless the activity in question represents state

19. From a broader perspective, the concept of mandatory division of a political body is one that bodes ill for the basic concept of a representative democracy. If there must be equal division of a party convention, perhaps equal division should be required in Congress as well. At some point voters must be trusted to elect those persons whom they feel can best represent them, regardless of gender. To assume that elected officials are able to represent only their own interest groups is to refute the concept of representative democracy. Equal division is illogical and ill-considered in any setting involving representation.


21. The sole exception is the thirteenth amendment's prohibition of slavery, which encompasses both governmental and private action. See U.S. CONST. amend. XIII; Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968).
Despite recent decisions evincing a desire to restrict the scope of the state action concept, there is ample precedent supporting the view that implementation of the equal division rule constitutes state action.

In the *White Primary Cases*, the Supreme Court recognized that a political party's conduct may be subject to constitutional scrutiny. The *White Primary Cases* involved efforts by political parties to prevent blacks from voting in primary elections. In *United States v. Classic,* the Court held that "where state law has made the primary an integral part of [the electoral process]" a state political primary must be held to the same constitutional standards as the general election. In *Smith v. Allwright,* the state had delegated to the party authority to establish voter qualifications. In striking down a party rule prohibiting blacks from voting in a state-regulated party primary, the Court held that such a delegation of authority made the party's actions those of the state.

A finding of direct state regulation of party conduct, though, does not seem crucial to the state action determination. In *Terry v. Adams,* the Jaybird Democratic Association excluded blacks from voting in its "pre-primary" elections. For over sixty years the winner of this "pre-primary" had gone on to win the regular Democratic Party primary and the general election in the overwhelmingly Democratic Texas county. Unlike the situations in


23. *See Jackson v. Metropolitan Edison Co.,* 419 U.S. 345 (1974) (conduct of privately owned electric utility found not to constitute state action, because the utility was insufficiently tied to the government and provision of electric service is not an activity traditionally reserved to state authority or commonly associated with state sovereignty); *Moose Lodge No. 107 v. Irvis,* 407 U.S. 163 (1972) (private social club might be free to discriminate racially in its membership because its activities are not sufficiently tied to government to bring it within the Constitution). *But cf.* Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961) (privately owned restaurant occupying the street side of a city parking lot which holds itself open to the public has a close enough relationship with the government to bring it within the equal protection clause).


26. *Id.* at 318.


28. *Id.* at 664-65.


30. *Id.* at 465-66.
Classic and Smith, the state neither regulated nor afforded special recognition to the party activity in question. The Court found, however, that the absence of state regulation of party elections constituted a delegation of the state's authority to the party, establishing state action.\textsuperscript{31} The Court held the state in violation of the fifteenth amendment for merely permitting the Jaybirds to conduct a racially discriminatory primary within its borders.\textsuperscript{32}

The logic of the White Primary Cases dictates a finding of state action with respect to the equal division rule. The theme that runs throughout these cases is that the electoral process is a public function, and any "integral part" of that process is thus state action subject to constitutional scrutiny.\textsuperscript{33} For purposes of determining state action, the particular form of the nominating process — primary, caucus, or state convention — has no legal significance; assuming the conduct of the general election is state action,\textsuperscript{34} any integral part of that election must also constitute state action.\textsuperscript{35}

As a practical matter, a court should have little difficulty finding state action in the implementation of the equal division rule. Both the Democratic and Republican Parties are linked to the government in many ways. These links include pervasive regulation of party selection procedures in nearly every state,\textsuperscript{36} automatic ballot access in every state,\textsuperscript{37} federal campaign financing of Democratic and Republican presidential nominees,\textsuperscript{38} and

\begin{itemize}
  \item \textsuperscript{31} Id. at 469.
  \item \textsuperscript{32} Id.
  \item \textsuperscript{33} Rotunda, supra note 22, at 952. \textit{But see} Comment, \textit{One Man, One Vote and the Selection of Delegates to National Nominating Conventions}, 37 U. Chi. L. Rev. 536, 545 (1970) ("It would be a distortion of common understanding to call delegates state governmental officials.")
  \item \textsuperscript{34} Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 158 (1977) (dictum) ("While the Constitution protects private rights of association and advocacy with regard to the election of public officials, our cases make it clear that the conduct of the elections themselves is an exclusively public function.") (citing White Primary Cases, discussed supra notes 24-32 and accompanying text); \textit{see also} Pollack, \textit{Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler}, 108 U. Pa. L. Rev. 1, 23 (1959) ("Only a state can conduct elections — especially so where the state is one in which, under the Constitution, a republican form of government is perpetually guaranteed.")
  \item \textsuperscript{35} \textsuperscript{35} See Seergy v. Kings County Rep. County Comm., 459 F.2d 308, 313 (2d Cir. 1972); Lynch v. Torquato, 343 F.2d 370, 373 (3d Cir. 1965) (dictum); Bentrman v. Seventh Ward Dem. Exec. Comm., 421 Pa. 188, 218 A.2d 261 (1966); Wagner v. Gray, 74 So. 2d 89 (Fla. 1954); Rotunda, supra note 22, at 955; \textit{see also} United States v. Classic, 313 U.S. 299, 318 (1941) (constitutional safeguards apply to primary elections where "state law has made the primary an integral part of the procedure or choice")
  \item \textsuperscript{36} See Chambers & Rotunda, supra note 22, at 195.
  \item \textsuperscript{37} \textit{Cf.} Note, supra note 9, at 387.
  \item \textsuperscript{38} 16 U.S.C. § 9012(f) (1976).
\end{itemize}
state funding of Democratic and Republican primaries. Furthermore, the Court has recognized that nomination by either the Republican or Democratic Party is an unavoidable prerequisite for election to most major elective offices in the nation.

These "ties that bind" inject state action arguably into almost any official action of either major party, and certainly into those official actions directly related to the electoral process. Nothing in recent Supreme Court decisions indicates a retreat from the principles set forth in the White Primary Cases. Because it affects an integral part of the electoral process, the equal division rule is state action subject to constitutional scrutiny.

B. Justiciability: Application of the Political Question Doctrine

To be subject to the constitutional review, the party's adoption of the equal division rule must not only constitute state action; challenges to the rule must raise justiciable questions. The political question doctrine holds that certain matters are better resolved by the political process than by judicial review.

41. The Court has avoided the state action issue in each of the most important recent cases. See Democratic Party of United States v. Wisconsin ex rel. LaFollette, 450 U.S. 107, 121 (1981) (review limited to whether Wisconsin law could override party rules); Cousins v. Wigoda, 419 U.S. 477 (1975) (credentials challenge of delegates disposed of without reference to state action requirement; no claim that party rules violated the Constitution); O'Brien v. Brown, 409 U.S. 1 n.4 (1972) (circuit court's finding of state action not questioned on appeal); see also Rotunda, supra note 22, at 943-51.
42. See, e.g., Luther v. Borden, 48 U.S. (7 How.) 1 (1849); Baker v. Carr, 369 U.S. 186 (1962). In Baker the Court held that a reapportionment case is nonjusticiable if brought under the guaranty clause, but can be judicially reviewed if brought under the equal protection clause. The Baker Court stated that "it is the relationship between the judiciary and the coordinate branches of the Federal Government, and not the federal judiciary's relationship to the states, which gives rise to the 'political question,'" 369 U.S. at 210. The Court would refuse to decide a case if there were present any one of these elements: (1) a clear ("textually demonstrable") constitutional commitment of the issue to a coordinate political department, (2) a lack of judicially discoverable and manageable standards for resolving it, (3) the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion, (4) the impossibility of a court's deciding the issue without evincing a lack of respect for the political branch, (5) a peculiar need to adhere without question to the decision already made by the political body, or (6) the possibility of embarrassment from multifarious pronouncements by various departments on one question. Id. at 217. The Court decided that since the reasons for nonjusticiability have "nothing to do with their touching on matters of state governmental organization," id. at 218, a court could decide a reapportionment case when based on the equal protection clause. Id. at 237.
convention could be characterized as matters best resolved by the political party itself. The Supreme Court, though, has not accepted this rationale. In *Terry v. Adams,* for example, the Court upheld a fifteenth amendment challenge to internal party practices. A constitutional challenge to the equal division rule is no less justiciable. Two recent Supreme Court cases support this proposition. *Cousins v. Wigoda* and *Democratic Party of United States v. Wisconsin ex rel. LaFollette* indicate that the courts may review constitutional challenges to the national convention nominating process. While these two cases upheld the supremacy of party law over state regulation, the Court has never held that party law is immune from constitutional scrutiny.

### III. The Constitutionality of the Equal Division Rule

#### A. The Democratic Party’s Right To Associate Freely

The first amendment guarantees individuals the right to band together, privately, for political, religious, or purely social benefit. To safeguard this freedom, the Court rarely intrudes into the decisionmaking process of private organizations. In recent years the Supreme Court has been reluctant to regulate internal party rules or allow state control over the delegate selection process because such regulation abridges the first amendment right of free association. This reluctance, however,

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43. See Kester, *Constitutional Restrictions on Political Parties,* 60 U. Va. L. Rev. 735, 782-83 (1974); Comment, supra note 33, at 546-47. But see Rotunda, *supra* note 22, at 960-62 (arguing that the questions likely to arise in the context of party action are no more political than those decided by the Court in the right to vote cases).

44. 345 U.S. 461 (1953).


47. See Rotunda, *supra* note 22.

48. See *supra* note 41.


50. The first amendment reads in part: “Congress shall make no law . . . abridging . . . the right of the people peaceably to assemble . . . .” U.S. CONST. amend. I.

51. See, e.g., *Sweezy v. New Hampshire,* 354 U.S. 234, 250 (1957) (“Any interference with the freedom of a party is simultaneously an interference with the freedom of its adherents.”).

52. See, e.g., *Democratic Party of the United States v. Wisconsin ex rel. LaFollette,* 450 U.S. 107 (1981); *Cousins v. Wigoda,* 419 U.S. 477 (1975). Associational freedom appears to be the primary basis for the decisions in *LaFollette* and *Cousins.* In a footnote, the *LaFollette* Court quotes Professor Tribe: “Freedom of association would prove an empty guarantee if associations could not limit control over their decisions to those who
has never led to an absolute prohibition on judicial intervention in party affairs; the Court will balance the right of free association against other affected constitutional rights. For example, in the White Primary Cases the Court held that the fifteenth amendment right to vote free from any racial discrimination outweighed the right of free association. The right of free association, therefore, will not shield a party from certain constitutional commands.

Absent a finding of invidious racial discrimination, however, it is unclear which constitutional commands will override a party's right to free association. The equal division rule may be attacked as unconstitutional on several grounds: first, because the equal division rule involves a discrimination based on sex, it must be able to withstand equal protection scrutiny; second, the rule tampers with the fundamental right to vote and its corollary, the right to be a candidate; finally, the equal division rule may conflict with the equal rights provisions found in many state constitutions.

share the interests and persuasions that underlie the association's being." 450 U.S at 122 n.22 (quoting L. Tribe, supra note 22, § 13-24, at 791 (1978)) (footnote omitted). Similarly, the Cousins Court stated: "The National Democratic Party and its adherents enjoy a constitutionally protected right of political association." 419 U.S. at 487.

53. The Court has dealt with challenges to the delegate selection rules of the national Democratic Party in three recent cases: Democratic Party of the United States v. Wisconsin ex rel. LaFollette, 450 U.S. 107 (1981); Cousins v. Wigoda, 419 U.S. 477 (1975); O'Brien v. Brown, 409 U.S. 1 (1972). In Cousins and again in LaFollette, the Court held (1) that the rules of a national political party override conflicting state law, absent a compelling state interest, and (2) that any state interest in the selection of delegates to the Democratic National Convention is inferior to the party's right to determine the composition of its national convention. Cousins also limited O'Brien; the latter involved a refusal of the Court to intervene in the "internal determinations of a national political party . . . that are essentially political in nature." 409 U.S. at 4. Notwithstanding the broader pronouncement of O'Brien, Cousins and LaFollette demonstrate that while the limits of the rule are unclear, party law generally supersedes state law in the delegate selection process.

When dealing with the rules of a political party, the Cousins and LaFollette decisions show the importance the Court attaches to the first and fourteenth amendments' right of voluntary association. See Cousins, 419 U.S. at 487; LaFollette, 450 U.S. at 121. But "[n]either the right to associate nor the right to participate in political activities is absolute in any event." United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548, 567 (1973) (involving a constitutional challenge to a federal statute barring federal employees from taking an active role in politics).

54. See supra note 24 and accompanying text.

55. The White Primary Cases were distinguished in O'Brien because the latter was "not a case in which claims are made that injury arises from invidious discrimination based on race in a primary contest within a single state. Cf. Terry v. Adams, 345 U.S. 461 (1953); Smith v. Allwright, 321 U.S. 649 (1944)." O'Brien, 409 U.S. at 4 n.1 (footnotes omitted). But it is unlikely that a similar limiting distinction would be made again, because the Cousins Court specifically focused on whether state law should have primacy over party law in determining the qualifications of delegates to the national convention.
B. Equal Protection and the Equal Division Rule

1. Equal division and sex discrimination— If the issue were solely one of sex-based discrimination the equal division rule would likely pass muster. Gender-based classifications are currently afforded an intermediate degree of judicial scrutiny, and are upheld provided they "serve important governmental objectives and [are] substantially related to the achievement of those objectives." The goal of the equal division rule is to increase female participation in the nominating process — an undoubtedly important objective given the history of underrepresentation of women in party affairs. Furthermore, there is clearly a substantial relation between the rule and the achievement of the stated objec-

56. See, e.g., Orr v. Orr, 440 U.S. 268 (1979) (involving a challenge to the Alabama alimony statutes); Califano v. Webster, 430 U.S. 313 (1977) (upholding a provision of the Social Security Act which allowed women to compute their benefits more favorably than men); Craig v. Boren, 429 U.S. 190 (1976) (invalidating an Oklahoma law permitting the sale of 3.2% alcoholic-content beer to women at age 18 and to men at age 21); Reed v. Reed, 404 U.S. 71 (1971) (striking down an Oregon statute which preferred men to women as administrators of an intestate estate).


58. It is, of course, possible to argue that the objective of equal division is itself illegitimate. It could be said that elected delegates are to represent the interests of all their constituents; that the notion that only women delegates can sufficiently represent female Democrats is inherently sexist and threatens our concept of representative democracy. See supra notes 17-19 and accompanying text.

Justice Douglas's dissent in DeFunis v. Odegaard, 416 U.S. 312 (1974), posited a similar argument. In DeFunis, a white male applicant challenged the University of Washington Law School's affirmative action admissions program on the grounds that he had been denied admission in favor of persons with lower quantitative credentials (grade-point average and score on the Law School Admission Test) solely because of his race. The Court vacated the case, deciding that since the petitioner was due to graduate law school that year regardless of the outcome of the case, the issue was moot. Justice Douglas dissented from the finding of mootness and strongly argued against the program. Douglas wrote: "The purpose of the University of Washington cannot be to produce black lawyers for blacks, Polish lawyers for Poles, Jewish lawyers for Jews, Irish lawyers for Irish. It should be to produce good lawyers for Americans . . . . " Id. at 342 (Douglas, J., dissenting).

An analogous argument against the equal division rule can be culled from Wesberry v. Sanders, 376 U.S. 1 (1964) (finding an unconstitutional dilution of the right to vote due to a malapportionment of Georgia's congressional seats). "Wesberry," the Court later stated, "clearly established that the fundamental principle of representative government in this country is one of equal representation for equal numbers of people, without regard to race, sex, economic status, or place of residence within a state." Reynolds v. Sims, 377 U.S. 533, 560-61 (1964) (emphasis added). Adding the factor of sex to the principle of representative government, which the equal division rule does, appears to run counter to the Court's own reading of its decision in Wesberry.

59. See Abzug, Segal & Kelber, supra note 9 (discussing the use of affirmative action to increase the power and representation of women in the Democratic Party).
tive: the rule inevitably achieves the goal of equalizing the number of men and women delegates.

2. Equal division as affirmative action—The equal division rule is fashioned as an affirmative action program. This characterization could result in an entirely different type of judicial review.\(^6^0\) In *Fullilove v. Klutznick*,\(^6^1\) the Court rejected an equal protection challenge to the Minority Business Enterprise ("MBE") provision of the Public Works Employment Act of 1977, which provided that ten percent of all federal funds for local public works projects be used to procure services or supplies from businesses owned by minority group members.\(^6^2\) Chief Justice Burger appears to have melded the strict scrutiny test and the more lenient test advanced by Justice Brennan in *Regents of the University of California v. Bakke*.\(^6^3\) Burger's analysis provides insight into a possible standard of review of equal division if challenged solely on equal protection grounds.

Chief Justice Burger's *Fullilove* test has two components: (1) whether the objectives of the legislation are within the power of Congress;\(^6^4\) and (2) if within that power, whether the classification in this context is a constitutionally permissible means for achieving the objective—a means not violative of equal protection.\(^6^5\)

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64. 448 U.S. at 473.

65. Id. In light of Chief Justice Burger's "power-means" analysis in *Fullilove*, if the power exists, use of a gender-based classification will survive challenge if "substantially related to an important governmental objective." *Craig v. Boren*, 429 U.S. 190, 197 (1976). For example, this "substantial relationship" standard could, in light of *Fullilove*, be met by a similar statute which grants a percentage set-aside to firms headed by women. The government's objective, to eradicate sexism in government contracting, would most likely be considered an important one. The method used to realize this objective would most probably be considered substantially related to the objective. Thus, such a sex-based quota would pass judicial scrutiny. The power to discriminate sexually is not
The first amendment freedom of association clearly gives the party the power to prescribe delegate selection rules, just as it has the power to establish procedures to be used at its national conventions. The White Primary Cases, however, demonstrate that party rules are subject to judicial scrutiny when they abridge the right to vote guaranteed by the fifteenth amendment. While affording the party wide latitude in formulating its delegate selection rules, this power must be policed by the judiciary to keep it within the confines of the Constitution; obviously the Court will not defer to the party if it is acting outside the constitutional limits of its power, just as it would not defer to Congress if it were acting unconstitutionally.

The second question to be answered under Burger’s Fullilove test is whether the discriminatory criterion is a constitutionally permissible means for achieving the purported objectives. The means test involves a number of questions depending on the facts of the case.

Applying this analysis to the equal division rule, it could first be asserted that the equal division rule is an impermissible “means” of achieving greater opportunities for women because it is underinclusive. The equal division rule, of course, benefits only one group that the Democratic Party has identified as needing affirmative action in the delegate selection process. The underinclusiveness of the rule, however, does not render it an impermissible means unless it effects “an invidious discrimi-

without restrictions, however. The Court remains suspicious of classifications based on sex and generally will not uphold them if based solely on “merely rational grounds,” Taylor v. Louisiana, 419 U.S. 522, 534 (1975), or administrative convenience, Frontiero v. Richardson, 411 U.S. 677 (1973) (plurality opinion).

66. See supra note 24 and accompanying text.

67. In Fullilove, the inquiry centered upon: the amount of deference the judiciary should show a congressional act; whether Congress can act only in a “color-blind” manner; whether the act was either over or underinclusive in its coverage; and whether it impermissibly deprives nonminority contractors of access to at least some part of the work generated under the Act. 448 U.S. at 472-85.

68. In Fullilove the petitioner argued that the 10% set-aside provision of the MBE program was prohibitively underinclusive because it granted preference only to certain select minority groups while others, both groups and individuals, who could also show a history of past discrimination, were left unassisted. 448 U.S. at 485-86. Burger rejected the underinclusive argument because he found no showing of invidious discrimination in setting up the MBE program. Invidious discrimination could possibly be shown he said, by proof that an identifiable minority group that has suffered as much or more than the preferred group was not included in the program. The Chief Justice found it “not inconceivable” that a case could be made out against some limit on MBE eligibility in special circumstances. Id. at 486.

69. With the exception of the equal division rule, the delegate selection rules ban the use of quotas. 1980 Delegate Selection Rules, supra note 13, rule 6A(2).
Many believe that an “invidious” discrimination can be distinguished from a “benign” discrimination in that the purpose of an invidious discrimination is to discriminate against someone or some group in a way that “stigmatizes,” rather than to discriminate in favor of someone or some group. Because the number of delegate positions is constant, setting aside fifty percent of those positions for one underrepresented group without giving similar percentage guarantees to other underrepresented groups reduces the chances for, say, a black male or a Hispanic male under the age of thirty to be a delegate. Nevertheless, it can be argued that the rule does not directly discriminate against anyone, only in favor of women. The rule does not stigmatize males or blacks, for example; they are not given a badge of inferiority by not having their own quota allotment in each state delegation. Moreover, the party may choose to attack the vestiges of discrimination on a group-by-group basis rather than all at once. Accordingly, the party may adopt a rule designed to remedy only sex discrimination. The rule’s limited scope, producing no invidious discrimination, does not render the equal division rule an impermissible means.

The Court in Fullilove also rejected the assertion that the MBE program was overinclusive because some minority-owned businesses eligible for the ten percent set-aside program had not suffered from past discrimination and, therefore, should not benefit under the quota plan. An overinclusive discriminatory classification is unacceptable unless it provides reasonable assurance that its application will be limited to accomplishing its “re-

70. See 448 U.S. at 486.

71. What is ignored in applying these conclusory labels “benign” and “invidious” is that there is always a flip side to any discrimination. Racial discrimination against blacks has helped whites retain their grip on wealth and power in this country. Thus, discrimination against blacks was at the same time an inverse discrimination in favor of whites. Discrimination in the name of affirmative action may be benign in purpose, but never completely in effect. To discriminate in favor of one group is necessarily to discriminate against another group. The terms “invidious” and “benign” are thus to a large degree, worthless distinctions when speaking of discrimination.

72. The importance of the stigmatizing effect of discrimination as a grounds for invalidation of a statute or regulation is discussed by Justice Brennan in Regents of the Univ. of Cal. v. Bakke, 437 U.S. 265, 373-76 (1978).


74. 448 U.S. at 486. Chief Justice Burger noted that the act eliminated from participation in the program those businesses not “bona fide” within the guidelines. Id. at 487-88. Somehow, the Chief Justice found in this requirement sufficient assurance that the statute would not be overinclusive in its application.
medial” objectives. Chief Justice Burger found the MBE program provided such “reasonable assurance” because, first, the misapplication of ethnic and racial criteria is remediable and, second, the MBE program was temporary. In the absence of either factor, Burger would not have been reasonably assured that the MBE program would be limited to achieving its remedial objectives.

The equal division rule is overinclusive because it benefits women who would have been elected delegates without the fifty-fifty quota requirement. There have long been female delegates to the National Conventions. The rule, however, does not give “reasonable assurance” that it will be limited to its remedial objectives; and although a gender-based criteria is unlikely to be misapplied, the rule is not temporary — it is a permanent fixture of party law. If the set-aside program in Fullilove were to continue permanently without further congressional approval or review, the Court would have found the provision impermissibly overinclusive. The permanent status of the equal division rule likewise renders it invalidly overinclusive.

Thus, even if equal division were challenged solely on equal protection grounds, the rule could not stand unaltered. Equal division, however, involves more than sex discrimination in a context of affirmative action. Equal division forces voters to vote for an equal number of men and women as delegates; voters are not free to opt for the candidates of their choice. Consequently, the vote is encumbered and thus diluted. The equal division requirement, therefore, infringes upon a voter’s choice, forcing the voter to discriminate sexually when marking a ballot. Arguably, indeed quite probably, such a scheme unconstitutionally abridges the fundamental right to vote and, concomitantly, the right to be a candidate.

C. Equal Division and the Right to Vote

1. The right to be a delegate — Although no constitutional provision literally ensures the right to be a candidate, the

75. Id. at 487.
76. Id. at 489.
77. Id.
79. See 448 U.S. at 489.
courts have read the Constitution to provide such a right.\textsuperscript{81} Hence, while the state may place reasonable restrictions on ballot access, the restrictions must not violate any general provisions of the Constitution.\textsuperscript{82} It is possible, for example, for the state to impose certain restrictions in order to limit the size of the ballot,\textsuperscript{83} or avoid the possibility of fringe candidacies.\textsuperscript{84} In whatever form, ballot access restrictions must comport with the dictates of the equal protection clause.\textsuperscript{85} Additional constitutionally guaranteed individual rights such as the right to vote and the right to associate will generally outweigh the state's interest in regulating the right of candidacy.\textsuperscript{86}

Equal protection requires that a restriction with a "real or appreciable impact" on the right to vote be "closely scrutinized."\textsuperscript{87} Candidate restrictions must withstand the same level of scrutiny when they adversely affect voters.\textsuperscript{88} In examining the constitutionality of the equal division rule, however, additional constitutional rights beyond equal protection are involved. The rule contravenes the nineteenth amendment right to vote free from abridgement on the basis of sex.

The nineteenth amendment was passed to guarantee women's suffrage.\textsuperscript{89} Its wording, however, makes it equally applicable to men and women. The Supreme Court has held that "[t]he Nineteenth Amendment . . . applies to men and women alike and by its own force supersedes inconsistent measures."\textsuperscript{90} Therefore,

\begin{itemize}
\item \textsuperscript{81} See, e.g., Bullock v. Carter, 405 U.S. 134, 141 (1972).
\item \textsuperscript{82} See, e.g., Bullock v. Carter, 405 U.S. 134 (1972) (Texas's filing fees for candidates contravenes the equal protection clause of the fourteenth amendment by being so exorbitant as to preclude effectively some persons from running for office).
\item \textsuperscript{83} See, e.g., Storer v. Brown, 415 U.S. 724, 732 (1974) (allowing state to limit the size of the ballot in order to reduce voter confusion).
\item \textsuperscript{84} See American Party v. White, 415 U.S. 767, 781-85 (1974) (Texas law allowing ballot access by four different procedures does not violate the Constitution because some restrictions are imposed).
\item \textsuperscript{85} Bullock, 405 U.S. at 141.
\item \textsuperscript{86} See, e.g., Williams v. Rhodes, 393 U.S. 23, 30 (1968) (Ohio's ballot access restrictions invidiously discriminate in violation of the equal protection clause by burdening the right to associate).
\item \textsuperscript{87} Bullock, 405 U.S. at 144; Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (subjecting minimal poll tax to close scrutiny). But see McDonald v. Board of Election Comm'rs, 394 U.S. 802 (1969) (not subjecting to stringent standard of review incidental burden on voting right).
\item \textsuperscript{88} Bullock, 405 U.S. at 143.
\item \textsuperscript{89} The nineteenth amendment reads in part: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex." U.S. Const. amend. XIX.
\item \textsuperscript{90} Breedlove v. Suttles, 302 U.S. 277, 283 (1937) (upholding the constitutionality of a Georgia poll tax applicable only to men as an issue of taxing authority not involving the nineteenth amendment).
\end{itemize}
just as it is unconstitutional to abridge a woman's right to vote, it is equally unconstitutional to abridge a man's right to vote. Several state courts, in the years subsequent to the nineteenth amendment's adoption, relied upon the nineteenth amendment to hold that a woman could not be denied the right to be a candidate because of her sex. 91

Furthermore, an analogy between the fifteenth and nineteenth amendments also clearly leads to the conclusion that one cannot be denied the right to be a candidate on account of sex. The fifteenth amendment to the Constitution forbids the denial or abridgement of the right to vote on the basis of race. 92 The Court has noted the similarity between the fifteenth amendment and its "sister," the nineteenth, stating that the latter "is in character and phraseology precisely similar to the Fifteenth . . . . One cannot be valid and the other invalid." 93 These two constitutional addenda stand for the same thing: one proscribes race discrimination in voting, while the other proscribes sex discrimination in voting. Any law which would hinder a person's ability to become a candidate for elective office because of race is violative of both the fourteenth and fifteenth amendments. 94 It is unconstitutional for states to dictate, promote or facilitate "a distinction in the treatment of persons solely on the basis of race." 95 Thus, for instance, a state may not designate on a ballot which candidates are black and which are white. 96 Given the

91. See In re Opinion of the Justices, 240 Mass. 601, 135 N.E. 173 (Mass. 1922) (19th amendment elimination of male-only voting restriction in state constitution also eliminates similar restriction on ability to hold office) (advisory opinion); Opinion of the Justices, 113 A. 614, 617 (Me. 1921) (in opining that females have a right to hold office, the court noted, "[e]very political distinction based upon the consideration of sex was eliminated [by the 19th amendment]."); Preston v. Roberts, 183 N.C. 62, 110 S.E. 586 (1922) (19th amendment requires that a woman be allowed to serve as a notary public and clerk of court); cf. Graves v. Eubank, 205 Ala. 174, 87 S. 587 (1921) (after the 19th amendment poll taxes must be applied equally to men and women). Contra Breedlove v. Suttles, 302 U.S. 277 (1937) (Georgia poll tax on men only upheld as an issue of taxing authority not involving the nineteenth amendment).

92. U.S. Const. amend. XV.


94. See Georgia v. United States, 411 U.S. 526 (1973); Gomillion v. Lightfoot, 364 U.S. 339 (1960). Both cases involved the fixing of voting boundaries in a way which tended to dilute the voting strength of blacks. Given the degree of racial polarization in both places, the impairment of voting strength of individual blacks effectively impaired their ability to be candidates for elective office by making it harder for them to obtain enough petition signatures to meet filing qualifications.


96. Anderson v. Martin, 375 U.S. 399 (1964). One of the methods which the Democratic National Committee proposed to implement the equal division rule requires the
precise similarity of the two amendments, the same reasons that militate against racial discrimination in voting or candidacy should apply with equal force to sex discrimination in the same context.97

Any definition of the word candidate should include candidates for delegate to national political party nominating conventions. Delegate candidates stand for election in primaries; their names often appear on the ballot. The right to be a candidate encompasses the right to be a delegate candidate.98 Additionally, the importance of the national party conventions in the political scheme lends credence to the assertion that the right to be a delegate candidate is as important, say, as the right to stand for election to Congress or a city council. Indeed, in Cousins v. Wigoda,99 the Supreme Court stressed "the special function of delegates," acknowledging that "delegates perform a task of supreme importance to every citizen of the nation regardless of their state of residence."100 Furthermore, many cases evince the Court's willingness to protect constitutional rights at the primary election level.101 Thus, the importance the Court places on the initial stages of the electoral process also points to the need to safeguard constitutionally based rights associated with the delegate selection process. Close scrutiny should be applied to any device which could limit the rights of an individual to be a delegate candidate.

The equal division rule limits a person's chance to be a dele-

voter to opt for an equal number of male and female candidates by designating delegate candidates by sex on the ballot. See supra note 14. This alone may be unconstitutional under Anderson.

97. It is invalid to suggest that because sex discrimination is given a somewhat lower level of scrutiny than racial discrimination in a strict equal protection analysis, compare Orr v. Orr, 440 U.S. 268 (1979) (challenge to state alimony statute), with Loving v. Virginia, 388 U.S. 1 (1967) (state anti-miscegenation statute held invalid), the same should be true in situations involving denial or abridgement of the right to vote. The right to vote enjoys its own constitutional guarantees over and above equal protection of the laws. Denial or dilution of the right to vote on the basis of sex is banned to the same degree to which denial or dilution of the right to vote on the basis of race is banned. The almost literal similarity between the fifteenth and nineteenth amendments leaves no room for differing degrees of scrutiny.

98. See Rotunda, supra note 22, at 955-60 (arguing that the constitutional safeguards applicable to the general election must also apply at any integral part of the electoral process).


100. Id. at 490; see Newberry v. United States, 256 U.S. 232, 286 (Pitney, J., dissenting) ("the likelihood of a candidate succeeding in an election without a party nomination is practically negligible").

gate solely on the basis of sex. Prior to adoption of the quota, if a person ran for delegate from a district with four delegate slots, for example, he or she had four chances of being elected. Today, that same person's chances are cut in half, for an individual may only compete for the two seats allocated to members of his or her sex. Thus restricted, many people may simply forego standing for election.

If the right to be a candidate means anything, it means the right to place one's name in contention for a delegate seat. It means the right not to have that privilege restricted solely because of sex. Equal division says that you cannot run for slots two and four, you can only run for slots one and three — and the only reason for this restriction is sex. This limits the right to be a candidate; indeed it denies one absolutely the right to be a candidate for one-half of the seats at the national convention.

2. The right to vote—Underlying the right to be a candidate is the right to vote — a right the Court has termed "a fundamental political right . . . preservative of all rights." Although the right to vote is constitutionally protected in state and federal elections, it is not wholly beyond limitation by the states. A standard of strict scrutiny will be applied to a restriction where it "has a real and appreciable impact on the exercise of the franchise." A lesser standard of scrutiny may be used for certain limitations or incidental burdens, but strict scrutiny is the standard of review where a condition is placed on the right to vote or the strength of the vote is diluted.

103. Reynolds, 377 U.S. at 554 (1964). In Reynolds, a case involving an Alabama reapportionment scheme, the Court spoke not only of the right to vote but stated: "The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government. And the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote, just as effectively as by wholly prohibiting the free exercise of the franchise." Id. at 555.
The right to vote may be unconstitutionally infringed not only by a law which denies absolutely the right to vote, but also by a law which limits the right to vote freely for the candidates of one's choice. In the 1960's the Court was faced with numerous constitutional challenges to state reapportionment plans based on the concept that one's vote could be deprived as effectively by dilution as by outright denial. In *Wesberry v. Sanders* the Court recognized "that the fundamental principle of representative government in this country is one of equal representation for equal numbers of people, without regard to race, sex, economic status, or place of residence within a State."

Although the reapportionment cases dealt with legislative redistricting, the dilution doctrine encompasses a much broader range of actions. In *Gray v. Sanders*, the candidate winning a plurality in a primary election was awarded all of the county's electoral units — which counted toward nomination by a majority. The Court found this practice to be unconstitutional dilution of the minority voters' strength. Even earlier, the Court struck down practices whereby votes were destroyed by alteration, diluted by ballot-box stuffing, or simply not counted. Despite this broad range of application, the standard of review has remained consistent and simple — one person's vote must be counted equally with those of all other voters.

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109. 376 U.S. 1 (1964). In *Wesberry*, the Court established a test for judging the constitutional validity of congressional districting schemes. The Court required that the plan achieve substantial equality of population among the various districts established. Id. at 13-18.


112. *Id.* The Court further held that the 15th and 19th amendments forbid diluting votes on the basis of race or sex. *Id.* at 379-81.


There are three reasons why the dilution doctrine should apply to the delegate selection process. First, like their congressional counterparts, convention delegates are directly representative of the people who elect them. Delegates are members of a deliberative body which not only selects a presidential nominee, but also debates and adopts a legislative package — the party platform — which party candidates pledge to support. The Court has said that "the right to elect legislators in a free and unimpaired fashion is a bedrock of our political system." Thus, since the representative process begins with the selection of delegates, the right to vote should be no less encumbered when voting for a slate of delegates than when voting for a legislative representative.

Second, there appears to be little question of the importance of presidential primaries in the electoral process. As the Supreme Court has recognized, presidential primaries have become such an integral part of the scheme of electing presidents that "[a]s a practical matter the ultimate choice of the mass of voters is predetermined when the nominations have been made." It would, therefore, seem incongruous to safeguard heavily the right to vote in a general election but not at the effectively determinative stage — the primary.

Third, although the Supreme Court has never ruled on whether the dilution doctrine applies to delegate elections for national party conventions, it has come exceedingly close to doing so. In Gray v. Sanders, the Court applied the dilution doctrine to a situation where the primary election directly nominated candidates for state offices, but it explicitly reserved judgment where the nomination resulted from a convention. Nonetheless, the rationale for Gray applies with equal vigor to the situation addressed here, and it would be anomalous for the

117. Reynolds v. Sims, 377 U.S. at 562. ("To the extent that a citizen's right to vote is debased he is that much less a citizen."). Id. at 567.
118. See Cousins v. Wigoda, 419 U.S. at 489-90.
119. In 1980, voters in 35 state presidential primaries selected 71% of the delegates to the Democratic National Convention. Davis, Reforming the Reforms, New Republic, Feb. 17, 1982, at 8. It would have been impossible to win the Democratic presidential nomination without the support of most of these delegates. As the Court has further recognized, "the likelihood of a candidate succeeding in an election without a party nomination is practically negligible . . . ." Cousins v. Wigoda, 419 U.S. at 490 (citing Newberry v. United States, 256 U.S. 232, 286 (1921) (Pitney, J. dissenting)).
120. Cousins v. Wigoda, 419 U.S. at 490.
122. Id. at 378 n.10. This question was answered explicitly in the affirmative by Maxey v. Washington State Democratic Comm., 319 F. Supp. 673, 679 (W.D. Wash. 1970).
Court to decline to extend it. Additionally, the Court has never hesitated to protect constitutional rights in the primary election\textsuperscript{123} or political party setting.\textsuperscript{124} Furthermore, although the lower courts are split on the issue, most favor extending the dilution doctrine to the delegate selection process.\textsuperscript{125}

The objection to the plans under scrutiny in the reapportionment cases was that because they did not accurately apportion congressional or state legislative seats according to population, the votes of some people counted for more than the votes of others. The equal division rule does not weigh the votes of persons participating in the delegate selection process, but it nonetheless dilutes the voting strength of persons by limiting their choice of candidates. This method has the same effect as gerrymandering legislative districts; both actions limit the right to vote by limiting its effectiveness and meaning. Both methods toy impermissibly with the ideal of a representative democracy; tainted reapportionment does so by violating the one person-one vote concept, while equal division does so by using sex discrimination in voting to achieve proportionate male/female representation — a goal not countenanced by the Constitution.\textsuperscript{126}

The equal division rule does not directly impinge upon the concept of one person-one vote. It does, however, abridge the more general right to vote on which the concept of one person, one vote is based. While the lower courts may debate the applicability of the one person, one vote concept to the delegate se-

\textsuperscript{125.} Two circuit courts and three district courts have favored the application. See Redfearn v. Delaware Republican State Comm., 502 F.2d 1123 (3d Cir. 1974) (holding that if a state convention were state action, one person, one vote would be required); Seery v. Kings County Republican County Comm., 459 F.2d 308 (2d Cir. 1972) (malapportioned committee districts used in nominating process must be adjusted in accordance with one person, one vote); Doty v. Montana State Democratic Central Comm., 333 F. Supp. 49 (D. Mont. 1971) (national convention delegates may not be selected through malapportioned system); Maxey v. Washington State Democratic Comm., 319 F. Supp. 673 (W.D. Wash. 1970) (dilution doctrine applies to convention as well as primary); Smith v. State Exec. Comm., 288 F. Supp. 371 (N.D. Ga. 1968) (equal protection must be satisfied in selection of delegates). Only two circuit courts have ruled against the extension, Ripon Society v. National Republican Party, 525 F.2d 567 (D.C. Cir. 1975), \textit{cert. denied}, 424 U.S. 933 (1976) (one person, one vote inapplicable to force allocation of delegates); Irish v. Democratic-Farmer-Labor Party, 399 F.2d 119 (8th Cir. 1968) (allocation of delegates will not be forced despite malapportioned state convention system).
\textsuperscript{126.} See Reynolds v. Sims, 377 U.S. 533, 560-61 (1964). ("The fundamental principle of fair representative government in this country is one of equal representation for equal numbers of people without regard to race, sex, economic status, or place of residence within a State").
lection or nominating process, the basic right to vote clearly does apply to the primary system, and the dicta on the meaning of the right to vote found in the reapportionment cases applies with equal force to the concept of equal division. Specifically, the right to vote includes “the right to vote freely for the candidate of one’s choice.” Telling a voter that she or he may not vote for an all-female or all-male slate of delegates (or any unequal admixture thereof) abridges the free choice which is the keystone of the right to vote. Equal division thus “dilutes” the right to vote just as would an apportionment scheme which violates the one person, one vote concept.

D. The Equal Division Rule and Equal Rights

Sixteen states have constitutional provisions which guarantee equality of rights on the basis of sex. The equal division rule runs afoul of these provisions, because it creates sex-based restrictions on the right to compete for office. Men and women may compete only for the slots allocated to their respective gender. Thus, if one hundred men and ten women run for a total of four delegate seats, each woman would have a twenty percent chance of gaining a seat, while each man would have but a two percent chance, because two seats would be reserved for each gender. This violates the principle of equality of rights, because similarly situated persons are treated dissimilarly.

The Supreme Court’s decisions in Democratic Party of the United States v. Wisconsin ex rel. LaFollette and Cousins v.
Wigoda,\textsuperscript{132} made clear the proposition that while political parties are subject to federal constitutional dictates, party law prevails over state statutes, absent a compelling state interest which outweighs the party’s first amendment right of free association.\textsuperscript{133} In searching for such a compelling state interest, state constitutional provisions might carry greater weight than state statutory law. Given an important constitutional objective, it is unclear whether free association would still prevail.

Constitutional provisions evince supreme principles intended to guide governance of the state. The states could argue that there is a qualitative difference between the equal rights provision of their state constitutions and the statutes involved in \textit{LaFollette} and \textit{Cousins}. Additionally, the constitutional provisions in question deal with proscribing sex discrimination, a practice which the Supreme Court has held to trigger automatically heightened judicial scrutiny.\textsuperscript{134}

Conversely, the states with equal rights provisions could cite the fourteenth and nineteenth amendments to the federal constitution as grounds for their having a compelling interest contrary to the equal division rule. The right to associate freely, which played an important role in \textit{LaFollette} and \textit{Cousins}, is not an absolute right.\textsuperscript{135} When balanced against federal constitutional rights, as manifested by the state equal rights law, it may be outweighed.

\textbf{CONCLUSION}

In adopting a quota to achieve equal gender-based representation at its presidential nominating conventions, the Democratic Party has carried the concept of affirmative action beyond its

\begin{itemize}
\item \textsuperscript{132} 419 U.S. 477 (1975).
\item \textsuperscript{133} See \textit{LaFollette}, 450 U.S. at 120-26; \textit{Cousins}, 419 U.S. at 489-91; United States Civil Serv. Comm’n v. National Ass’n of Letter Carriers, 413 U.S. 548, 567 (1973). Professor Rotunda suggests:
\item [P]arty rules should control prenomination activities, and the legislature and courts should abstain from interference (a) if there is no claim that the party acted unconstitutionally; or (b) if a state statute conflicting with the party rule is an extraterritorial extension of the state’s jurisdiction (that is, if the statute in question is neither a federal statute regulating national parties nor a state statute regulating state parties) and if the state has no special interest justifying the burden its extraterritorial statute places on the national party.
\textsuperscript{134} See, e.g., Craig v. Boren, 429 U.S. 190 (1976) (invalidating an Oklahoma statute allowing females but not males to buy low-proof beer at age 18).
\item \textsuperscript{135} See Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam); cases cited supra note 133.
\end{itemize}
constitutional limits. While the rule was not adopted with any invidious motivation, the notions underlying equal division are at odds with the idea of a representative democracy. The dubious belief that the sexes must be evenly represented for the voice of women to be heard adequately is one that cannot carry the rule in light of its constitutional infirmities. Equal division involves the Democratic Party in sex discrimination; it dilutes the right to vote freely, and it restricts the right to be a candidate. Finally, many states have an interest in banning discrimination based solely on sex — an interest compelling enough to overcome the limits on state restrictions of party affairs enunciated in Cousins and LaFollette.

For over ten years the Democratic Party has worked in good faith to make itself a more open party. The goal of unhindered accessibility for all individuals who wish to participate in the delegate selection process suffers from no legal difficulties. Yet the Democratic Party is tied to the government in many ways and derives substantial benefits from the government due to its preferred status as one of our nation's two major parties. As such, the party's role in the electoral process is subject to constitutional scrutiny. Equal division constitutes a form of sex discrimination which impinges upon fundamental constitutional rights. It should be discarded voluntarily, before it is struck down.

—Timothy J. Hoy

136. A new party reform commission, named after its chairman, Governor Hunt of North Carolina, once again subjected the Democratic Party delegate selection rules and presidential nominating process to review after the 1980 election. For a brief review of the Hunt Commission’s proposals, see Davis, supra note 119. The Democratic National Committee, recently adopted the Hunt Commission’s proposals and, therefore, the equal division rule remains intact. See N.Y. Times, Mar. 27, 1982, at 1, col. 4 (midw. ed.).