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National Political Party Conventions: State's Interest Subordinate to Party's in Delegate Selection Process

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NATIONAL POLITICAL PARTY CONVENTIONS: STATE'S INTEREST SUBORDINATE TO PARTY'S IN DELEGATE SELECTION PROCESS

Petitioner-defendants, the Cousins delegates, challenged the seating of the Wigoda delegates, respondent-plaintiffs, at the 1972 Democratic National Convention.[1] In asserting a right to replace the Wigoda group, the Cousins challengers alleged that the Wigoda delegates had been chosen in violation of certain party guidelines on delegate selection.[2] A series of court battles ensued,[3] from which the Wigoda dele-

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in Colvin v. State, Dep't of Transp., 311 So. 2d 366 (Fla. 1975), the following statement was made in explaining why the court had granted certiorari to review a compensation order:

> Where the IRC is placed on the level an "appellate court" in the review of JIC actions, as it has been by our holding in *Scholastic Systems*, it follows as with DCA appeals that the actions of the "trial court" (JIC) arrive in the appellate court (IRC) with a presumption of correctness. JIC findings and awards or denial thereof can be overthrown only if not well founded under applicable legal principles, which would include a misapplication of applicable law, or upon a showing of a lack of competent evidence to support the findings or the ruling of the trial judge. IRC affirmance when there is such a lack of evidence, or reversal where the evidence is in fact sufficient, would constitute a "departure from the essential requirements of law" which would vest jurisdiction for certiorari in the Supreme Court.

Id. at 368. Thus, in terms of the types of questions which the supreme court will review under the *Scholastic Systems* doctrine, there appears to be no change from the appellate-type review which resulted from the *Wilson* case. What is different, however, is the manner in which the supreme court is exercising its discretion in deciding whether to grant or deny certiorari. A perusal of the Southern Reporter advance sheets since the *Scholastic Systems* decision clearly indicates that the supreme court's normal procedure has been to deny, rather than grant, certiorari.

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1. The 59 members of the Wigoda group, which included Mayor Richard Daley of Chicago, had been elected at the March 21, 1972, Illinois Democratic primary to represent the Chicago area as uncommitted delegates to the convention.

These delegates, who were chosen in the exclusive manner for electing delegates from Illinois on April 19 were certified by the Illinois Secretary of State to represent the Chicago area at the national convention, pursuant to ILL. STAT. ANN. ch. 46, §§ 7-1 *et seq.* (Smith-Hurd 1972) (prior to its amendments which have little bearing on this discussion).

The Cousins group, originally 10 in number, on March 31 filed their formal challenge with the National Democratic Party. Later, in Chicago on June 22 and June 24, 1972, the Cousins delegates were chosen at private caucuses, conducted according to the Party rules formulated by the McGovern Commission. *See* note 2 *infra*. Headed by Alderman William S. Singer and the Reverend Jesse Jackson, this group of delegates consisted of the original 10 challengers and 49 other individuals, including some candidates who had been defeated for election as delegates in the March 21 primary.

2. These Democratic Party guidelines were established as a result of discontent among some party members at their 1968 convention over the inability of the convention system to represent the will of the people in selecting presidential candidates. The 1968 convention committed itself to reforming the convention system by formulating procedures assuring greater public participation in selecting national convention delegates for the 1972 convention. Therefore, the McGovern-Fraser Commission was established to suggest changes in the process of choosing delegates. The guidelines, formulated by the Commission and subsequently adopted by the Democratic Party and incorporated into article III, part I of the Call to their 1972 Convention included assurances of adequate minority group, women, and youth participation and open slate-making procedures. All the guidelines are reprinted in full in 117 CONG. REC. 32908 (1971) (remarks of Senator McGovern concerning the COMMISSION ON PARTY STRUCTURE AND DELAGATE SELECTION OF THE DEMOCRATIC NATIONAL COMMITTEE [MCGOVERN COMMISSION], MANDATE FOR REFORM: A REPORT TO THE DEMOCRATIC NATIONAL COMMITTEE (1970)).

gates obtained an injunction from the Circuit Court of Cook County, Illinois to enjoin the Cousins delegates from participating as delegates to the convention. Following the convention's vote to seat them, however, the Cousins delegates ignored the injunction, and, as a result of their fully participating in the convention, criminal contempt proceedings were initiated against them.[4] The Cousins group challenged the constitutionality of the circuit court injunction, but the Illinois Appellate Court upheld the injunction on the ground that the state's interest prevailed over the party's interest in delegate selection procedures.[5] On certiorari, the United States Supreme Court *held,* reversed: The circuit court injunction which was based on the Illinois Election Code[6] and which prevented the challenging delegates' participation in the Democratic National Convention, abridged political associational rights of both the Cousins challengers and the Democratic Party. In the selection of delegates to national political conventions a state's interest is subordinate to the pervasive national interest served by the party convention. *Cousins v. Wigoda,* 95 S. Ct. 541 (1975).[7]

Historically, political parties have enjoyed a position relatively independent of judicial intervention regarding their internal affairs. Rather than impose the views of one faction of the party upon another, courts have recognized the desirability of allowing parties to resolve their own internal conflicts. Courts, however, have occasionally intruded into party affairs in two types of conflict:[8] (1) conflicts between the state's power to regulate the electoral process and the party's

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Traditionally, the call to the convention (where the national parties invite the states to send a certain number of delegates meeting certain criteria, such as loyalty to the party) has contained few qualifications for delegates; therefore, seldom were challenges asserted. Segal, *Delegate Selection Standards: The Democratic Party's Experience,* 38 GEO. WASH. L. REV. 873 (1970). However, with the unprecedented promulgation of rules by both major parties in recent years, the number of challenges has dramatically increased.

3. The extensive litigation concerning the seating of the Chicago delegates is outlined in Wigoda v. Cousins, 14 Ill. App. 3d 460, 461-68, 302 N.E.2d 614, 618-22 (1973), and Cousins v. Wigoda, 95 S. Ct. 541, 543-47 (1975).

4. A lawyer for the Wigoda group petitioned the circuit court to hold the Cousins group in contempt of the court order. For an account of this contempt proceeding see N.Y. Times, Sept. 15, 1972, at 25, col. 1. The contempt proceedings were pending in the circuit court and awaiting the outcome of this Supreme Court decision.

5. Wigoda v. Cousins, 14 Ill. App. 3d 460, 302 N.E.2d 614 (1973). The Illinois Appelate Court based its affirmance of the July 8 injunction on the grounds that the Illinois law provided the exclusive manner to select delegates. "[T]he law of the state is supreme and party rules to the contrary are of no effect." 14 Ill. App. 3d at 475, 302 N.E.2d at 627. The Supreme Court of Illinois, without opinion, denied leave to appeal this judgment. Wigoda v. Cousins, Ill. Sup. Ct. Nov. 29, 1973.

6. ILL. STAT. ANN. ch. 46, §§ 7-1 *et seq.* (Smith-Hurd 1972) (prior to its amendments which have little bearing on this discussion).

7. The majority consisted of Justices Brennan, Douglas, Blackmun, White, and Marshall. Justices Rehnquist, Stewart and Chief Justice Burger concurred in the result. Mr. Justice Powell concurred in part and dissented in part.

8. Note, *Presidential Nominating Conventions: Party Rules, State Law, and the Constitution,* 62 Geo. L.J. 1621 (1974) [hereinafter cited as 62 Geo. L.J.]; Note, *Judicial Intervention in the Presidential Candidate Selection Process: One Step Backwards,* 47 N.Y.U.L. REV. 1184 (1972) [hereinafter cited as 47 N.Y.U.L. REV.].

regulation of delegate selection, and (2) conflicts between the rights of individual voters, as protected by the fourteenth amendment, and the rights of the party.[9]

The first of these conflicts—which is the crux of the *Cousins* case—arises from the power granted to the states by article II, section 1[10] of the Constitution to prescribe the manner of appointing presidential electors. Courts have interpreted this state power broadly,[11] and through this power states have enacted statutes to establish the right of the electorate to vote in the general elections for President and to prescribe the method of selecting delegates to political party conventions.[12]

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9. The Supreme Court in *Cousins* did not deal extensively with this second conflict. However, other court decisions have considered the problem. Judicial intervention into party affairs on the basis of conflict between individual and party started with the Texas White Primary cases, as discussed in 47 N.Y.U.L. REV., *supra* note 8, at 1186-87 and in Comment, *The Application of Constitutional Provisions to Political Parties,* 40 TENN. L. REV. 217, 219-26 (1973).

With the emergence in Baker v. Carr, 369 U.S. 186, 217 (1972), of a new justiciability concept to enable judicial rulings on the electoral process, the Supreme Court may have provided a future basis for judicial intervention into party affairs through equal protection standards. Several commentators have urged the courts to apply equal protection standards in the apportionment of delegates to political party conventions. 62 GEO. L.J., *supra* note 8, at 1643 n.111.

Lower federal courts were divided concerning the expansion of judicial intervention into party matters, as discussed in 47 N.Y.U.L. REV., *supra* note 8, at 1191-202 until the stay order issued by the Supreme Court in O'Brien v. Brown, 409 U.S. 1 (1972), which barred the lower court's interference, halted any further expansionist tendencies and left the intervention issue undecided. Because *O'Brien* was being decided two days before the convention opened, the court was reluctant to review the case on its merits in the absence of greater judicial precedent.

Later, in Ripon Soc'y, Inc. v. National Republican Party, 343 F. Supp. 168 (D.D.C. 1972), certain Republican convention rules on the allocation of delegates through a bonus system were held unconstitutional. But basing his decision on *O'Brien*, Mr. Justice Rehnquist issued a stay order to preclude court review of party rules. Republican State Cent. Comm. v. Ripon Soc'y, Inc., 409 U.S. 1222 (1972). An analysis of these proceedings can be found in 47 N.Y.U.L. REV., *supra* note 8, at 1224-27.

This matter has not yet been fully decided. Following the Republican convention, the delegate allocation formula based on a bonus system was again challenged. In Ripon Soc'y, Inc. v. National Republican Party, Nos. 74-1337 & 74-1358 (D.C. Cir. Sept. 30, 1975), the D.C. Circuit held that the Republican party 1976 formula did not violate the equal protection clause. First amendment associational rights enabled the party to select a formula which rationally advanced legitimate party interests in political effectiveness.

10. U.S. CONST. art. II, § 1 reads in relevant part:

> Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors . . . .
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> . . . . The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes. . . .

Note that participation by the public or by political parties is not guaranteed. See text accompanying note 8 *supra* for the relationship of this constitutional provision to political parties. See note 12 *infra* for the relationship between this power and the state election laws covering delegate selection.

11. *E.g.*, McPherson v. Blacker, 146 U.S. 1 (1892).

12. Dicta in McPherson v. Blacker, 146 U.S. 1 (1892), indicates that appointment of electors may be made directly by the state legislatures without providing for an election by the voters. *See also, e.g., In re* Green, 134 U.S. 377 (1890); Sanchez v. United States, 376 F. Supp. 239 (D.P.R. 1974); Gray v. State, 233 F. Supp. 139 (N.D. Miss. 1964); Stanford v. Butler, 142 Tex. 692, 181 S.W.2d 269 (1944).

The Supreme Court has held that the primary is an integral part of the general election. United States v. Classic, 313 U.S. 299 (1941). Since the primary election is the first step by state law in a process designed to select a party's candidate for President, one might logically assume

First amendment associational rights of political parties, however, limit this broad power granted the states to regulate elections.[13] Because individuals have been extended "the right to band together for the advancement of political beliefs,"[14] a significant encroachment by the state on their associational rights "cannot be justified upon a mere showing of a legitimate state interest."[15] Yet the right to associate politically is not absolute.[16] The Court's holding in *Williams v. Rhodes*,[17] indicates that a "compelling state interest" might be demonstrated to justify an abridgment by state election laws of the political associational rights of individuals and their party.[18]

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that the article II, section 1 power would enable states to regulate the delegate selection process within their state.

As the concurring opinion in *Cousins* indicates, regarding the process of selecting presidential candidates, "[u]nder Art. II, § 1, the States are given the power to 'appoint, in such manner as the Legislature thereof may direct' Presidential electors." 95 S. Ct. at 551 (Rehnquist & Stewart, JJ., Burger, C.J., concurring) (footnote omitted).

Within "our constitutional system, the States also have residual authority in all areas not taken from them by the Constitution or by validly enacted congressional legislation." *Id.* at 552 (Rehnquist & Stewart, JJ., Burger, C.J. concurring). Thus, as the Fifth Circuit in Riddell v. National Democratic Party, 508 F.2d 770 (5th Cir. 1975), more recently noted, "the administration of the electoral process is a matter that the Constitution largely entrusts to the states, [under] Art. I, § 2, Art. II, § 1, in exercising their powers of supervision over elections . . . ." *Id.* at 776. State regulations of elections are necessary to insure that elections are fair, honest and orderly.

> [T]he States have evolved comprehensive and in many respects complex election codes regulating in most substantial ways, with regard to both federal and state elections, the time, place, and manner of holding *primary* and general elections . . . and the selection and qualifications of candidates.

Id. at 777, *quoting* Storer v. Brown, 415 U.S. 724, 731 (1974) (emphasis added).

13. Although political parties are afforded no specific protection in the Constitution, courts have recognized that rights were established in the concept of freedom of association. U.S. CONST. amend. I reads in relevant part: "Congress shall make no law respecting . . . the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

This provision has been made applicable to the states through the fourteenth amendment. NAACP v. Button, 371 U.S. 415 (1963). Inherent within this right of association is the right to express one's attitudes by membership in a group. Griswold v. Connecticut, 381 U.S. 479 (1965). Freedom to associate with others for the common advancement of political beliefs therefore was logically extended to protect pressure groups, Bates v. City of Little Rock, 361 U.S. 516 (1960); NAACP v. Alabama, 357 U.S. 449 (1958), and political groups as well, Williams v. Rhodes, 393 U.S. 23 (1968).

For a more extensive treatment of political associational rights as they limit state power to regulate elections see Note, *Freedom of Association and the Selection of Delegates to National Political Conventions*, 56 CORNELL L. REV. 148 (1970); 62 GEO. L.J., *supra* note 8, at 1624-33.

14. Hadnott v. Amos, 394 U.S. 358, 364 (1969).

15. Kusper v. Pontikes, 414 U.S. 51 (1973). *But see* Rosario v. Rockefeller, 410 U.S. 752 (1973).

16. *E.g.*, Gerende v. Board of Supervisors of Elections, 341 U.S. 56 (1951); Broadrick v. Oklahoma Personnel Bd., 338 F. Supp. 711 (W.D. Okla. 1972), *aff'd*, 413 U.S. 601 (1973) (state statute prohibiting political activities by state employees upheld). Also, in relation to the federal government interference with associational rights, *see* United Public Workers v. Mitchell, 330 U.S. 75 (1947).

17. 393 U.S. 23 (1968). *See also* 62 GEO. L.J., *supra* note 8, at 1625-26 n.21.

18. The Ohio election laws involved in *Williams* had made it virtually impossible for a new political party to be placed on the ballot in presidential elections. The Court noted that although article II, section 1 of the Constitution granted extensive powers to the states to pass laws regulating the selection of electors, this power was subject to limitations against burdening the right to vote based upon the equal protection clause and the individual's first amendment associational rights. The first amendment guarantee of the right to form a party would be

Cousins v. Wigoda, however, significantly expands these associational rights of the party and its adherents. For the first time, the Court recognized a constitutionally protected right of the party to be free from state encroachment in setting qualifications for future delegate selection at the national convention.[19] In *Cousins* the Court analyzed its former decisions which recognized a "right to associate with the political party of one's choice . . ."[20] free from significant state interference and decided that the circuit court injunction unconstitutionally interfered with the ability of the Cousins delegates to participate in the convention. The Court further decided that the concept of associational freedom also protects the party's right to determine its own criteria for delegate selection. In so holding, the Court found that the state's interest was not sufficiently compelling to justify interference with these associational rights.[21] The Court thus rejected respondents' contention that the state's interest in protecting its citizens' right to vote effectively and in maintaining the integrity of its electoral

meaningless if the state could keep the partv's candidates off the ballot. Even though the state may have demonstrated some legitimate interests, it did not sustain its burden for showing a compelling interest.

Chief Justice Warren's dissent in *Williams* predicted that the decision might lead to a wholesale revision by the courts of state ballot access provisions. 393 U.S. at 63 (Warren, C.J., dissenting). Although some subsequent decisions did revise state regulations on ballot access, the Court has not been consistent in the application of the compelling state interest test and has to some extent retreated from this approach. *See* Lubin v. Panish, 415 U.S. 709 (1974); *The Supreme Court, 1973 Term,* 88 HARV. L. REV. 41, 91-101 (1974).

19. In the past, the Supreme Court had recognized the need for political parties to set qualifications for candidates by requiring loyalty oaths. Ray v. Blair, 343 U.S. 214 (1952). Yet this decision was not based on any announced constitutional right of the party to assert its political associational rights. Courts have also recognized the party's right to determine its own membership. Yet these cases involved interpretation of state laws granting parties the right to make these determinations; no constitutional right to determine membership was established. *See* 62 GEO. L.J., *supra* note 8, at 1626 n.25. *But see* Bentman v. Seventh Ward Democratic Executive Comm., 421 Pa. 188, 218 A.2d 261 (1966); Cook v. Houser, 122 Wisc. 534, 100 N.W. 964 (1904) (where the party's rights were limited).

Although it may have appeared that parties derived their power over delegate selection from the first amendment, the existence of this right, and its scope, had not been established until the *Cousins v. Wigoda* decision in which the Court expanded these rights to enable the party to determine its own method of selecting delegates. Contrary to state law, delegates were seated who had not been elected by Illinois voters.

Since the Cousins delegates were not elected under Illinois law, Mr. Justice Powell in his dissenting opinion in *Cousins* argued that the state had "a legitimate interest in protecting its citizens from being represented by delegates who have been rejected by these citizens in a democratic election." 95 S. Ct. at 552 (Powell, J., dissenting).

After *Cousins* was decided, associational rights were further expanded to prevent the state from granting one group the exclusive right to use the party name. Riddell v. National Democratic Party, 508 F.2d 770 (5th Cir. 1975).

20. Kusper v. Pontikes, 414 U.S. 51, 56-58 (1973).

21. 95 S. Ct. at 548-49.

The Illinois Appellate Court had determined that the interference was justified since the state had a legitimate interest to protect the effectiveness of the "votes cast at the primary from the impairment that would result from stripping the respondents of their elected delegate status." *Id.* at 548. *See* note 5 *supra.* But, as the Supreme Court noted, the state objective to have its elected delegates seated may not have been accomplished even if the Cousins group has complied with the injunction. The Party could not be forced to accept the Wigoda delegates and could have left the seats vacant. All nine Justices agreed with this point.

process[22] was paramount to the party's interest in establishing delegate selection criteria. The Court said that "[c]onsideration of the special function of delegates to such a Convention militates persuasively against the conclusion that the asserted interest constitutes a compelling state interest."[23]

In applying the compelling state interest test to associational rights the Court appears to depart from its approach in *Williams* regarding the state's broad article II, section 1 power to determine the manner of appointing electors for President and Vice-President.[24] In the instant case the Court does not elaborate on the state's power and then apply limitations as it did in *Willams*. Rather, the Court suggests that "[t]he States themselves have no constitutionally mandated role in the great task of the selection of Presidential and Vice-Presidential candidates."[25]

Yet, as Mr. Justice Rehnquist, Chief Justice Burger, and Mr. Justice Stewart note in their concurring opinion, the Court in the past has recognized the state's authority to determine the manner of appointing presidential electors.[26] Notwithstanding its claim that this decision does not reach the merits of the question,[27] it may be that the majority holding that states have "no constitutionally mandated role" in the selection process, merely indicates the Court's desire to preserve a predominate role for Congress. The statement containing this holding especially in view of its footnote,[28] which refers to recent proposals in

22. The Court has traditionally held "that the right to vote is a 'fundamental political right, because preservative of all rights.' " 95 S. Ct. at 548.

One may question whether "the first amendment rights of one group [can] be enhanced at the expense of those same rights in another group." Note, *Mandates of the National Political Party Clash with Interests of the Individual States as the Party Executes its Policy by Abolition of State Delegate Selection Results: Legal Issues of the 1972 Democratic Convention and Beyond*, 4 LOYOLA U. L.J. (CHI.) 137, 157 n.77 (1973). The convention disenfranchised those who voted for the unseated delegates. But the majority in *Cousins* determined that the state's interest in protecting voting rights in a primary must yield when no compelling interest has been demonstrated.

23. 95 S. Ct. at 548. As the Court's reasoning in *Cousins* applied to delegate election for a presidential nominating convention, it is questionable whether the decision will have a significant impact on the state's role in congressional and state elections. State parties do not possess the pervasive national interest of a national convention. States therefore may be able to demonstrate more easily a compelling state interest superior to the ballot provisions. *See, e.g.*, Storer v. Brown, 415 U.S. 724 (1974). *But see* Lubin v. Panish, 415 U.S. 709 (1974). Yet the expansion of associational rights by *Cousins* could have some impact on congressional and state elections—absent a compelling state interest.

24. Williams v. Rhodes, 393 U.S. 23 (1968). For a discussion of the implications of the article II, section 1 power granted the states, see notes 10-12 *supra* and accompanying text. Of course, like every other power in the Constitution, it is subject to constitutional limitations.

25. 95 S. Ct. at 549 (footnote omitted).

26. *Id.* at 551-52 (Rehnquist & Stewart, JJ., Burger, C.J., concurring). These Justices argued that the question should not be whether the states have a "constitutionally mandated role" in this process, but whether the state's authority was sufficient to justify this injunction which "flatly prohibited" participation as delegates at the Convention. "[T]he national convention, and not the State, had the ultimate authority to choose among contesting delegations . . . ." *Id.* at 550.

27. *Id.* at 545-46 n.4.

28. *Id.* at 549 n.9.

Congress to establish regional or national primaries for parties to choose their nominees, might be interpreted to mean only that, although states may possess the power to enact statutes regulating the selection of presidential candidates, congressional power remains supreme.[29]

The concurring Justices also contend that the majority opinion, by disclaiming any intent to rule on whether actions of national political parties constitute state action, "intimate[d] views on questions on which it disclaims any intimation of views, and . . . turn[ed] virtually on its head the Court's opinion in *O'Brien v. Brown* . . . ."[30] Whereas in *O'Brien,* the Court stayed an intrusion by a lower federal court into the internal processes of the party, in *Cousins,* the Court for the first time ruled on the merits of a case involving associational rights of the party exercised through its national convention. Although the practical effect of *Cousins* was similar to that of *O'Brien,* as both cases nullified lower court orders interfering with party affairs, a change in the Court's viewpoint is evident in regard to its willingness to rule on the constitutionality of enforcing party guidelines for delegate selection. The Court's dicta in *O'Brien* indicated grave doubts concerning whether courts should rule on the constitutionality of such guidelines. But in *Cousins* the Court has receded from this position indicating, again in dicta, that the question remains open whether the convention or the courts are the proper forum to decide claims of unconstitutionality of the party's delegate selection procedures.[31] This admonition should put political parties on notice that any outrageous guidelines could be subjected to court scrutiny based on fourteenth amendment and right-to-vote considerations.[32]

Another issue raised by the concurring opinion is the "unnecessarily broad and vague statement"[33] the Court makes in claiming that "the national convention 'serves the pervasive national interest in the *selection of candidates for national office,* and that this interest is greater than *any interest* of an individual State.' "[34] The concurring

29. The Court has expressed divergent viewpoints in the past as to the power-sharing relationship between the role of the federal government and state governments in regulating elections. *See* Oregon v. Mitchell, 400 U.S. 112 (1970). The concurring Justices in *Cousins,* by referring to Justice Stewart's opinion in *Oregon v. Mitchell,* indicated their opposition to granting Congress power in this area of state domain.

30. 95 S. Ct. at 550 (Rehnquist & Stewart, JJ., Burger, C.J., concurring). The concurring Justices contended that the majority in *Cousins* had virtually repudiated the Court's decision not to intrude into party affairs in O'Brien v. Brown, 409 U.S. 1 (1972). *See* note 9 *supra.* It should be noted, however, that since the stay order granted in *O'Brien* was based on the time factor, the Court's views on the lack of wisdom by the court of appeals in interfering with party affairs was merely dicta.

31. 95 S. Ct. at 549. The Wigoda delegates had not contested the constitutionality of the Party's guidelines in *Cousins.*

32. *See* O'Brien v. Brown, 409 U.S. 1, 6-16 (1972) (Marshall, J., dissenting).

33. 95 S. Ct. at 551.

34. *Id.* at 551 (Rehnquist & Stewart, JJ., Burger, C.J., concurring) *quoting,* 95 S. Ct. at 549 (emphasis added). The majority had argued that permitting states to adopt their own delegate

opinion attempts to narrow this holding as far as possible by noting that the circuit court injunction was "as direct and severe an infringement of the right of association as can be conceived."[35] That is, the circuit court's "flat prohibition" against participation would have prevented the *Cousins* delegates from even asserting a claim for a convention seat.

Whether the concurring Justices would have ruled in favor of the party and the Cousins group if the state interference had been less severe remains unanswered.[36] But the omission of any suggestion of an alternate method which the states could have employed to protect their interests may indicate that an alternative was not readily available and that any sanctions which a state might impose would significantly inhibit the exercise of associational rights. Practically speaking, therefore, criticism of the overbreadth of the majority's statement should be directed not at the extent of state infringement of the associational rights, as the concurring opinion argues, but rather at the potential expansion of the national convention's rights in selecting candidates which will always prevail over any state rights.[37]

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qualifications would thwart public policy. As choosing candidates "involves coalitions cutting across state lines," such state interference could impair the effectiveness of the national convention. Effective performance by the convention is of the utmost importance since, practically speaking, candidates cannot succeed at "an election without a party nomination." *Id.* at 549.

35. *Id.* at 550.

36. The following court actions have been suggested as less severe remedies: 1) if the injunction had been limited so as not to bar their appearance to assert a challenge; or 2) if the lower court, in lieu of an injunction, had issued a declaratory judgment; or 3) if an order had been issued pursuant to a state statute that state procedures be exhausted first before any challenges can be made before the party.

As to the first of these alternatives, there seems to be little practical difference in preventing individuals from appearing to assert their challenge as compared to preventing individuals from participating if they are accepted by the party.

As to the second alternative, see O'Brien v. Brown, 409 U.S. 1, 10 (1972) (Marshall, J., dissenting). Mr. Justice Marshall suggested in *O'Brien* that since declaratory relief is a "milder remedy than an injunction," it would be particularly appropriate to "protect any constitutional rights that may be threatened" and avoid a "premature issuance of an injunction" before the convention had acted on the unseated delegates' claims. Yet the effects of a declaratory judgment in this situation would be almost as inhibiting as an injunction.

Regarding a state's establishing procedures for challenging delegates to wage their contests initially under state election laws, eight of the Justices would clearly reject this measure as being a less direct infringement on associational rights. Only Mr. Justice Powell's dissenting opinion was directed to the procedures outlined in the Illinois statute. The Cousins group had ignored this system. 95 S. Ct. at 552 (Powell, J., dissenting). Only Justice Powell claimed that a state's making available remedies would be a sufficient device to enable states to interfere with party activities.

37. The concurring Justices also expressed views opposed to this incursion into the state domain. *See* note 26 *supra*. However, these Justices, in addition, applied the Court's reasoning in the cases dealing with state regulation of access to the ballot. *See* note 18 *supra*. For the concurring Justices, the extent of the state's invasion of the associational right by the injunction was decisive; they impliedly rejected the majority position that any significant invasion would preclude state interference. The state may have several options available to it in regulating its ballot. Yet an analogous situation does not exist when states interfere with the national delegate selection process. Any interference would be significant. Therefore, the relevant question should be whether the states can exercise their authority by demonstrating a compelling state interest.

Furthermore, the majority's sweeping language,[38] which establishes the pervasive interest of the party over the state in the selection of candidates, may be misleading to future courts. Subsequent decisions could narrow the scope of this holding and distinguish *Cousins* as applying only to state-party conflicts over open slate-making guidelines—the delegate selection guideline mainly at issue in *Cousins*. The possibility of making such distinctions has become extremely significant in recent years because grounds for asserting challenges have dramatically increased with the establishment by both major parties of new guidelines for delegate selection.[39] That is, the rapidly expanding number of delegate selection guidelines makes it necessary for future courts to be more selective in determining which party rules will prevail over conflicting state election laws.[40] Although the *Cousins* Court did not deal with the issue, the scope of party guidelines should also be scrutinized by the courts for the same reasons.

Certainty in this area of the law is essential to enable any future challenging delegates to calculate the risk of sanctions being imposed if seated at a convention in contravention of state law. The potential sanctions are not insubstantial. For example, violation of an injunction could lead to contempt proceedings,[41] as happened in *Cousins*. While contempt proceedings for violating the injunction in this case were only pending in the circuit court, that court was merely exercising its discretion by waiting for this Supreme Court decision. An observer might assume that the contempt proceedings would be dismissed as a result of the Court's decision,[42] but the Cousins delegates did violate an injunction, which is an act of disrespect for a court order. They thus exposed themselves to the unresolved issue whether a contempt

38. It should be noted that the majority, later in its opinion, did somewhat limit its broad statement, concerning the state interest in selecting candidates for national office, to a narrower issue in this case. "Illinois' 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." 95 S. Ct. at 549 (emphasis added). The implication is that states may have an interest in other aspects of the nomination process. *See, e.g.*, note 40 *infra*.

39. For an explanation of some of the revised Democratic Party guidelines *see* 62 GEO. L.J., *supra* note 8, at 1623 n.8, 1627; N.Y. Times, Dec. 8, 1974, at 1, col. 8. For the Republican Party *see* Miami Herald, March 7, 1975, § A, at 8, col. 2; N.Y. Times, March 6, 1975, at 42, col. 2.

40. Party guidelines on minority representation, winner-take-all primaries, and open slate-making procedures would probably prevail over conflicting state election laws. Yet certain other guidelines may not. *See* 62 GEO. L.J., *supra* note 8, at 1631-33. As the state's machinery is used to conduct delegate selection procedures, a state could, for example, demonstrate an interest in preventing abuse of its procedures through fraud.

41. For a definition and a detailed account of a court's contempt power—the expansion of its use and the limitations imposed on its utilization—*see* R. GOLDFARB, THE CONTEMPT POWER (1963).

42. The Supreme Court made no determination on the contempt proceedings, most likely because no contempt convictions were handed down. Some newpaper reports, however made the assumption that the proceedings in this case would be dismissed. N.Y. Times, Jan. 16, 1975, at 16, col. 1; Washington Post, Jan. 16, 1975, § A, at 1, col. 1. For the contempt proceedings, *see* note 4 *supra*. Possibly, the pending contempt proceedings prevented the Court from refusing to reach the merits on the ground of mootness.

conviction will stand even though the violated court order was unconstitutional.[43]

The conflicting court decisions in this area of law indicate the possibility that the Cousins delegates and future challenging delegates could be held in contempt for violating a court injunction. But important first amendment associational rights were invaded by the *Cousins* injunction.[44] Before contempt proceedings are brought against future delegate challengers, the courts should consider these rights as mitigating circumstances.[45] As a precautionary measure, however, if an injunction is issued in the future to prevent delegates from participating at conventions, the challenging delegates should at least apply for a stay before violating the court order. The *Cousins* decision, in any event, should enable individuals to assert challenges with greater confidence than existed prior to the decision, and it provides a constitutional basis for dissolving injunctions effectuating state law which interferes with party convention affairs.

Cousins has also contributed to the erosion of a state political party's power in the delegate selection process. The formulation of rules at the national party level on delegate qualifications can now be constitutionally enforced against non-complying state political parties. As the national party is no longer hindered by state election laws, conflicting state election laws can no longer be used by state parties to justify their non-conformity to party rules. A more coherent national political party philosophy can be established by unseating state delegations in violation of party rules.

43. In certain cases, a criminal contempt conviction has been affirmed even though the violated court order might have been unconstitutional. The most prominent recent case holding violators of an unconstitutional injunction in contempt deal with civil rights march in Walker v. Birmingham, 388 U.S. 307 (1967). Other federal courts punishing individuals for disobedience of court orders are cited in Walker v. Birmingham, 388 U.S. at 314-15 n.5. This holding was also applied to a violation of an injunction inhibiting first amendment freedoms of newsmen. United States v. Dickinson, 465 F.2d 496 (5th Cir. 1972), *cert. denied*, 414 U.S. 979 (1973).

Yet there has been some authority to the contrary. *In re* Green, 369 U.S. 689 (1962); *In re* McConnell, 370 U.S. 230 (1962); State *ex rel.* Superior Ct. v. Sperry, 79 Wash. 2d 69, 483 P.2d 608 (1971).

44. Walker v. Birmingham, 388 U.S. 307 (1967), had indicated in dicta that attempts to dissolve an injunction on constitutional grounds may prove a good defense to contempt. Applying this reasoning, the Court could interpret the Cousins delegates' numerous court contests as attempts to dissolve the injunction by preventing its issuance.

The circuit court at its discretion could certainly dismiss the charges, especially if it recognizes that the Cousins delegates violated the injunction in good faith. Note that Alderman Singer, one of the leaders of the Cousins group, claimed his group viewed Keane v. National Democratic Party, 409 U.S. 1 (1972), as having already ruled that the courts lacked jurisdiction in this matter. N.Y. Times, Sept. 15, 1972, at 25, col. 1.

45. The importance of reversing any contempt convictions in this area cannot be stressed enough. Political parties in the past had not enforced with vigor their few requirements on delegate qualifications partly out of fear that any challenging delegates who are seated might be answerable to their home state on contempt charges. Segal, *Delegate Selection Standards: The Democratic Party's Experience*, 38 GEO. WASH. L. REV. 873, 874 n.7 (1970). Furthermore, no penalties can be exacted when individuals violate unconstitutional statutes. Injunctions, which when issued clash with first amendment freedoms, deserve no greater status.

Realizing that their procedures will be scrutinized according to national party standards, state political parties should seek to comply generally with the guidelines and work with the state legislatures to amend delegate selection procedures.[46] States should recognize the strong bargaining position provided the national party by the *Cousins* decision. Party rules regarding delegate selection will prevail over state laws even though the associational rights of the voters may have been abridged when their elected delegates are denied seating.[47] Therefore, it is within the state's interest to be represented at the convention by those selected through the state's procedures. To prevent disenfranchisement resulting from the *Cousins* decision, states should enact appropriate amendatory legislation. Conflicts between state law and party rules could then be avoided, as well as numerous court challenges and costly litigation.

Democratic National Chairman, Robert S. Strauss, recognized that this decision would place "ever greater responsibility on the political parties . . . to see that the expressed wishes and intent of the voters are carried out."[48] Individuals who are still dissatisfied with party rules, however, should not be precluded from access to the courts.

Courts also have a role in delegate selection procedures. The Court has indicated in the *Cousins* dicta that party guidelines might be subject to constitutional scrutiny to prevent an abridgment of individual voter's equal protection and due process rights.[49] Numerous commentators[50] would welcome such action by the courts to hold the party accountable for its conduct.[51] In selecting candidates for an office as important as the Presidency,[52] party actions must be made responsive to the will of the people.

Should the courts fail to scrutinize party rules, Congress may take action in this area. Notwithstanding their claim that they are not

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46. A practical problem may arise in the future, however, if the Democratic and Republican parties should enact conflicting guidelines. Independent political parties, in addition, may also adopt different rules. States may therefore be put in a position of enacting separate statutory provisions, depending on the political party, on certain delegate selection procedures.

However, enacting legislation in broad terms so that delegates must meet the party requirements before they can represent the state may solve some of the problems with conflicting party guidelines.

47. *See* note 21-23 and accompanying text *supra*.

48. N.Y. Times, Jan. 16, 1975, at 16, col. 1.

49. For a good explanation of the need for judicial review see O'Brien v. Brown, 409 U.S. 1, 6-16 (Marshall, J., dissenting). The time factor which has precluded judicial review in the past, such as in *O'Brien*, may not be an obstacle in the future in Democratic Party challenges since DEMOCRATS ALL: A REPORT OF THE COMMITTEE ON DELEGATE SELECTION AND PARTY STRUCTURE (1973) now establishes that each state Democratic Party will submit by March 31, 1976, affirmative action plans on its proposed delegate selection procedures. 62 GEO. L.J., *supra* note 8, at 1637-38.

50. *See* note 9 *supra*. *But see* 47 N.Y.L. REV., *supra* note 8, at 1185 n.5.

51. When inviting court review, the timing is important. If the convention disregards a court order, or if a challenge arises after the convention, should courts be placed in the position to void the actions of the whole convention?

52. *See, e.g.*, E. CORWIN & L. KOENIG, THE PRESIDENCY TODAY (1956).

deciding the point, the majority of the *Cousins* Court seem to indicate that congressional action might be upheld to regulate party selection criteria.[53] Yet, Congress must also realize that its statutory enactments cannot invade the associational rights of the party. Although congressional action is not now being advocated, the Court's continuous refusal definitively to decide whether party activities may be subjected to judicial intervention on constitutional grounds could necessitate a congressional prescription of flexible standards to correct abuses in delegate selection.

Uncertainty in this area of law can only inhibit individuals from asserting their associational rights. Therefore, in any future cases before the Supreme Court where state law has clashed with party rules, the Court should define the scope of *Cousins* and clearly establish a proper balance between state, party, and voter interests.

BRUCE A. HARRIS

ONE-YEAR DURATIONAL RESIDENCY REQUIREMENT FOR DISSOLUTION OF MARRIAGE IS NOT VIOLATIVE OF EQUAL PROTECTION

Appellant Sosna's petition for dissolution of marriage was dismissed by a state trial court for lack of jurisdiction due to a failure to comply with Iowa's durational residency requirement,[1] which requires that a petitioner in a dissolution of marriage action be an Iowa resident for one year preceding the filing of the petition if the respondent is a non-resident.[2] Subsequently, pursuant to rule 23 of the Federal Rules of Civil Procedure, appellant brought a class action against the state of Iowa and the trial court judge seeking declaratory and injunctive relief in the United States District Court for the Northern District of Iowa, asserting that Iowa's durational residency requirement violated the United States Constitution on equal protection and due process grounds. After certifying that the appellant represented the class of persons who had resided in Iowa for less than one year, and who desired to initiate dissolution of marriage actions,[3] the three-judge district court upheld the constitutionality of the statute.[4] On appeal the United States Supreme Court[5] *held,* affirmed: The Iowa one-year

53. *But see* Oregon v. Mitchell, 400 U.S. 112 (1970) (where the Justices were widely split on the issue of congressional intervention into state election qualifications).

1. IOWA CODE § 598.6 (1971).

2. Appellant-wife moved to Iowa in August 1972 and filed her petition for dissolution of marriage in September 1972. Respondent-husband was a resident of New York at the time of filing.

3. Sosna v. Iowa, 360 F. Supp. 1182 (N.D. Iowa 1973).

4. *Id.*

5. Before the Court dealt with the substantive issues of *Sosna,* it first addressed itself to the