University of Richmond Law Review

Volume 5 | Issue 2 Article 10

1971

One Man-One Vote in the Selection of Presidential Nominating Delegates by State Party Conventions

ONE MAN–ONE VOTE IN THE SELECTION OF PRESIDENTIAL NOMINATING DELEGATES BY STATE PARTY CONVENTIONS

If any conclusion can safely be drawn from the presidential nominating conventions of 1968, it is that the success of potential third party movements looms as a substantial threat to the traditional two party system in the United States.[1] To a large degree, this fact may be attributed to the lack of balanced voter participation inherent in the nominating processes now employed by the two major parties. This lack of participation has engendered a sense of futility in the minds of the individual party members, causing them to limit their support for the slate of candidates their party ultimately chooses.[2]

The political parties, despite an awareness of the problems of voter frustration, have been characteristically slow to change their representative machinery[3] and to offer new initiatives toward presidential nomination.[4]

---

[1] Governor George Wallace received over 10% of the popular vote in the 1968 presidential election, and followers of Senator Eugene McCarthy threatened even a fourth party. Dissatisfaction with the results of the nominating conventions was also evidenced by the large number of credentials contests. *See* Schmidt & Whalen, *Credentials Contests at the* 1968*–and* 1972*–Democratic National Conventions*, 82 HARV. L. REV. 1438 (1969).

In two recent voting rights cases, the Supreme Court has facilitated the achievement of third party status by major party dissidents. *See* Moore v. Ogilvie, 394 U.S. 814 (1969); Williams v. Rhodes, 393 U.S. 23 (1968).

[2] A distinctive feature of the politics of 1968 was the intense anti-administration sentiment shared by many voters, and at the same time a willingness to express this dissent through the traditional elective channels. Perhaps it was this anxious concern that made the ineffectiveness of the national conventions especially tragic. *See* COMMISSION ON PARTY STRUCTURE AND DELEGATE SELECTION, MANDATE FOR REFORM 14 (1970) [hereinafter cited as McGOVERN COMM'N REP.].

[3] The party system has traditionally existed independently of judicial and legislative control. Until recently, the legal status of the parties has been in doubt, making the application of constitutional concepts uncertain. Grovey v. Townsend, 295 U.S. 45 (1935). *But cf.* note 9 *infra*. Furthermore, the national party is not geared to exercise of firm control over state party activities because of limited personnel and resources. Pertinent policy decisions are possible only every four years when the national convention is convened. The tendency has been to leave the state parties to their own devices so long as they offer support to party presidential candidates.

[4] The process leading to nomination is begun at the state level with the selection of delegations to the national party conventions. Currently there are three broad systems of delegate selection: election by direct primary, election by party convention, and appointment by party officials. Variations or combinations of these systems by state parties are common, i.e., 60% of Virginia's 65 man delegation to the 1968 Democratic National Convention was chosen under a state convention process and the remaining 40% were appointees of the state chairman. McGOVERN COMM'N REP., *supra* note 2, at 63. The scope of this Note will not include a

Furthermore, the ideal solution—an open national convention providing uninhibited individual influence in the nominating process—is impractical. Fortunately, the federal courts have begun to apply constitutional safeguards to the selection of delegates to the national conventions, thereby insuring more equal representation and a greater degree of involvement by the individual party member.

I. Constitutional Guarantees in State Elections

Judicial intervention in the realm of state party election procedures has been predicated on the fourteenth and fifteenth amendments. The theories advanced have been based on the equal protection clause[5] and the right of a citizen to vote irrespective of race.[6] It is settled that no racially discriminatory practice can exclude minorities from state controlled primaries. In *United States v. Classic*,[7] the Supreme Court, recognizing the political reality that a Democratic nomination in Louisiana was tantamount to election, upheld the right of a qualified Negro voter to have his state primary ballot counted.[8] Furthermore, in *Smith v. Allwright*,[9] the Court invalidated a Texas Democratic Party procedure whereby non-whites were excluded from the party primary.[10] The *Allwright* case erased any doubt concerning

---

comparative analysis of the three methods of delegate selection, but will focus primarily on the state convention system. For such an analysis *see* Chambers & Rotunda, *Reform of Presidential Nominating Conventions*, 56 Va. L. Rev. 179, 182-91 (1970).

[5] The fourteenth amendment was recognized in the "reapportionment cases" as a protectionary force which might insure that voters would not have their votes "diluted" by political structures designed to favor particular interest groups. Avery v. Midland County, 390 U.S. 474 (1968); Reynolds v. Sims, 377 U.S. 533 (1964); Gray v. Sanders, 372 U.S. 368 (1963); Baker v. Carr, 369 U.S. 186 (1962).

[6] U.S. Const. amend. XV, § 1. This amendment was first applied to state and intraparty elective practices in the "white primary cases." Terry v. Adams, 345 U.S. 461 (1953); Smith v. Allwright, 321 U.S. 649 (1944); United States v. Classic, 313 U.S. 299 (1941); Grovey v. Townsend, 295 U.S. 45 (1935); Nixon v. Condon, 286 U.S. 73 (1932); Nixon v. Herndon, 273 U.S. 536 (1927); Baskin v. Brown, 174 F.2d 391 (4th Cir. 1949); Rice v. Elmore, 165 F.2d 387 (4th Cir. 1947).

[7] 313 U.S. 299 (1941).

[8] It was determined that election commissioners, conducting a primary election under Louisiana law, had rejected registered voters at the Democratic primary. Mr. Justice Stone stated:

> Where the state law has made the primary an integral part of the procedure of choice, or where in fact the primary effectively controls the choice, the right of the elector to have his ballot counted at the primary, is likewise included in the right protected by Article I, § 2. *Id.* at 318.

[9] 321 U.S. 649 (1944).

[10] Smith v. Allwright, 321 U.S. 649 (1944), overruled Grovey v. Townsend, 295

whether a primary for selection of federal officials was subject to federal control.

The decision in *Baker v. Carr*[11] has given rise to a firm judicial commitment to eradicate all methods of vote dilution in both local[12] and state[13] elections. While not directly concerned with party elections,[14] *Baker* clearly included within its dictate those representative party procedures which would constitute state action.[15] The Supreme Court in *Gray v. Sanders*[16] utilized the rationale set forth in the legislative apportionment controversies to overturn Georgia's county unit system[17] which, in the end result, weighed rural votes more heavily than urban votes. In this initiation of the "one man-one vote" concept founded upon the equal protection clause,[18] Mr.

U.S. 45 (1935), which, in ruling upon the policy established by a state party convention to exclude Negroes from party primaries, had held that to deny a vote in a primary was a mere refusal of party membership with which "the state need have no concern." *Id.* at 55. *See* pp. 353-55 *infra*.

[11] 369 U.S. 186 (1962).

[12] For cases dealing with county election plans, *see* Simon v. Lafayette Parish Police Jury, 226 F. Supp. 301 (W.D. La. 1964); Bianchi v. Griffing, 217 F. Supp. 166 (E.D.N.Y. 1963); Griffin v. Board of Supervisors, 60 Cal. 2d 318, 384 P.2d 421, 33 Cal. Rptr. 101 (1963). *See also* Weinstein, *The Effect of the Federal Reapportionment Decisions on Counties and Other Forms of Municipal Government*, 65 COLUM. L. REV. 21 (1965). For a case dealing with city election standards, *see* Ellis v. Mayor of Baltimore, 352 F.2d 123 (4th Cir. 1965).

[13] *See, e.g.*, Wesberry v. Sanders, 376 U.S. 1 (1964); Gray v. Sanders, 372 U.S. 368 (1963); WMCA, Inc. v. Lomenzo, 238 F. Supp. 916 (S.D.N.Y.), *aff'd per curiam*, 382 U.S. 4 (1965), *vacated as moot*, 384 U.S. 887 (1966). *But see* Thigpen v. Meyers, 231 F. Supp. 938 (W.D. Wash. 1964).

[14] In *Baker v. Carr* the Supreme Court determined that qualified voters under a Tennessee legislative apportionment statute had been denied equal protection of the laws by virtue of the debasement of their votes. A reapportionment of legislative representation had not taken place in over 60 years, which worked to the detriment of urban voters as urban areas had experienced considerable expansion. 369 U.S. 186, 188-94 (1962). The decision was especially significant in establishing that an apportionment controversy presented a justiciable constitutional cause of action, not to be restricted by the political question doctrine. *See* pp. 352-53 *infra*.

[15] *See* pp. 353-55 *infra*.

[16] 372 U.S. 368 (1963).

[17] In Georgia the county unit was used as a basis for counting votes in the primary election for statewide offices. Every qualified voter was given one vote, but the candidate for nomination who received the greatest number of votes in the county was assigned the county's unit vote, without any consideration of the minority vote. A plurality of the county unit vote determined the statewide outcome. *Id.* at 371-72.

[18] Whether the principle of "one man-one vote" in the state elections was properly elevated to the stature of a constitutional standard is a question of continuing academic debate. *See, e.g.*, Auerbach, *The Reapportionment Cases: One Person, One Vote—One Vote, One Value*, 1964 SUP. CT. REV. 1.

Justice Douglas concluded that "[o]nce the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote. . . ."[19] It was made clear that a popular election need not involve the total state electorate to warrant fourteenth amendment protection, but rather might involve only intraparty elections. Unfortunately, *Gray* failed to determine whether the "one man-one vote" standard would be similarly appropriate if the convention system were used for nominating candidates rather than the primary system.[20]

II. Obstacles to Judicial Intervention

Although given these prominent constitutional inroads into state elective methods, the courts have been hesitant to intervene in the field of convention delegate selection as it pertains to the process of nomination. Historically, two substantial obstacles have arisen to such judicial determination—nonjusticiability and a failure to demonstrate state action.

A. Nonjusticiability

The courts have generally been reluctant to interfere with the internal affairs of political parties.[21] Mr. Justice Frankfurter, in *Colegrove v. Green*,[22] characterized a voter reapportionment controversy as a "political thicket" to be avoided as, in his view, the Court was being asked to choose among competing political philosophies, and such an issue should be resolved in a nonjudicial forum.[23] However, the landmark decision in *Baker v. Carr*[24] overruled *Colegrove* by holding that gross malapportionment in legislative districts constituted a deprivation of equal protection under the fourteenth

[19] 372 U.S. at 379.

[20] *Id.* at 378 n.10.

[21] *See* Lynch v. Torquato, 343 F.2d 370 (3d Cir. 1965). The court refused to acknowledge that equal protection of the law had been denied a Democratic party member in Pennsylvania when precinct unit voting was used to elect the party's county chairmen. The county chairmen served mere administrative functions within the party organization, whereas "one man-one vote" applied to the choice of elected representatives in the conduct of government. No basis was found in this internal party matter to extend constitutional protection.

However, the court noted that the

> . . . [c]hoice of delegates to party national conventions for the nomination of candidates for President and Vice President would seem logically to be covered by the plaintiff's view of the reach of the equal protection clause.

Id. at 372 n.5.

[22] 328 U.S. 549 (1946).

[23] *Id.* at 556.

[24] 369 U.S. 186 (1962).

amendment which raised a justiciable issue. *Baker* created a novel approach to the political question doctrine, which requires the identification and availability of judicially manageable standards for adjudication.[25] Distinguishing between "political questions" and "political cases," the Court established that claims based on personal political rights, in contrast to guaranty clause[26] claims, are justiciable in nature.[27] The *Baker* decision, in recognizing that relief under the equal protection clause was not imperiled because discrimination related to political rights, exposed convention delegate selection to the potential regulatory power of the federal courts, regardless of its highly political nature. Inasmuch as the method of delegate selection reflects the individual's degree of involvement in the nomination process, a denial of equal participation would affect personal political rights and seemingly create a justiciable claim as a violation of equal protection of the laws.

B. State Action

The state action requirement has been a further obstacle to a constitutional determination of selection procedures for presidential nominating convention delegates. It is well established that the fourteenth amendment

[25] In redefining the political question concept, the Supreme Court set forth the following requisites, any one of which could support a finding of a non justiciable political issue:

a.) A constitutional commitment of the issue to a coordinate political department;

b.) A lack of judicially discoverable and manageable standards for resolving it;

c.) The obvious need for an initial policy determination by a non judicial body;

d.) The impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government;

e.) An unusual need for unquestioning adherence to a political decision already made;

f.) The potential embarrassment from multifarious pronouncements by various departments on one question. *Id.* at 217.

[26] "The United States shall guarantee to every State in this Union a Republican Form of Government. . . ." U.S. CONST. art. IV, § 4.

Challenges have been made to various forms of state action seeking judicial determination based on the guaranty clause. The Supreme Court has consistently refused to establish it as the source of a constitutional standard for invalidating state action because ". . . it rests with Congress to decide what government is the established one in a State." Luther v. Borden, 48 U.S. (7 How.) 1, 42 (1848). *See also* Highland Farms Diary v. Agnew, 300 U.S. 608 (1937); Ohio *ex rel.* Bryant v. Akron Metropolitan Park District, 281 U.S. 74 (1930); Mountain Timber Co. v. Washington, 243 U.S. 219 (1917); Ohio *ex rel.* Davis v. Hildebrant, 241 U.S. 565 (1916). *But cf.* National Prohibition Cases, 253 U.S. 350 (1920); Hawke v. Smith (No. 1), 253 U.S. 221 (1920).

[27] 369 U.S. at 217-34. *See* note 26 *supra.*

applies only to "state action" or action taken under color of state authority.[28] Nevertheless, state action as a requisite for application of constitutional safeguards ". . . is shrinking as a factor of deterrent influence in the area of discrimination."[29] There has been little difficulty in locating state action in those instances where state statuatory regulation of primaries and political parties has permitted equal protection violations.[30] Yet, to restrict the state action concept to cases involving state primary or convention statutes would be to ignore the facts that primaries and party conventions are an integral part of the state election machinery,[31] and that political parties have, in effect, become "state institutions" with or without specific statuatory authorization.[32] Accepting this premise, the conclusion is inescapable that the state's tolerance of an unrepresentative party elective procedure would constitute an equal protection violation justifying judicial intervention. Certainly a balancing of the relevant interests behind the state action limitation would favor the voting public's right to determine who the candidates at the general election are to be, as opposed to the political party's interest in maintaining the status quo.[33]

[28] Shelley v. Kraemer, 334 U.S. 1 (1948).

[29] Jones v. Alfred H. Mayer Co., 379 F.2d 33, 41 (8th Cir. 1967). *See* United States v. Guest, 383 U.S. 745 (1966); Katzenbach v. McClung, 379 U.S. 294 (1964); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964). *See generally* Lewis, *The Meaning of State Action*, 60 COLUM. L. REV. 1083 (1960); St. Antoine, *Color Blindness but not Myopia: A New Look At State Action, Equal Protection, and "Private" Racial Discrimination*, 59 MICH. L. REV. 993 (1961); Note, *Strange Career of "State Action" Under the Fourteenth Amendment*, 74 YALE L.J. 1448 (1965).

[30] Terry v. Adams, 345 U.S. 461 (1953); Smith v. Allwright, 321 U.S. 649 (1944); United States v. Classic, 313 U.S. 299 (1941).

[31] This is not a modern insight. The Pennsylvania Supreme Court in 1886 commented upon the unity of nomination and election:

> Under our frame of government a vast system of political machinery has grown up by which elections have been for many years practically controlled. It is so far-reaching in its effect that the people have in many instances little to do with the polls beyond the ratification of what had already been done by nominating conventions . . . . Primary elections and nominating conventions have now become a part of our great political system, and are welded and riveted into it so firmly as to be difficult of separation.

Leonard v. Commonwealth *ex rel.* Cassidy, 112 Pa. 607, 4 A. 220, 225 (1886). *See* Newberry v. United States, 256 U.S. 232, 285-86 (1921).

[32] *See* Terry v. Adams, 345 U.S. 461 (1953). Mr. Justic Black, while invalidating a primary conducted by the Jaybird Democratic Association because it excluded Negro voters, stated:

> When a state structures its electoral apparatus in a form which devolves upon a political organization the uncontested choice of public officials, that organization itself, in whatever disguise, takes on those attributes of government which draw the Constitution's safeguards into play. *Id.* at 484.

[33] It has been suggested that a search for the respective interests of the parties

Not all courts have readily adopted this expanded view of state action. The United States Court of Appeals for the Eighth Circuit in *Irish v. Democratic Farmer-Labor Party of Minnesota*[34] stated that an "attitude of non-interference is an appropriate starting point"[35] when the selection of Minnesota's delegates to the Democratic National Convention by action of party organization following properly apportioned county conventions was challenged on the basis of the "one man-one vote" principle.[36] A similar constitutional challenge to the delegate selection process of the Georgia Democratic Party was set aside in *Smith v. State Democratic Executive Committee*[37] because no action by the state was involved and no state officer was concerned. The criteria for a finding of state action should be consistent whether a state primary or a state party convention is under judicial examination. Therefore, the soundest approach would be to follow the rationale of *Smith v. Allwright*[38] and conclude that once a political party function, be it primary or convention, is viewed as part of the electorial process, it is state action to which both the fourteenth and fifteenth amendments[39] equally apply.

---

involved might illuminate the state action inquiry. The political parties would prefer to continue the elective process as it now functions, thereby eliminating the administrative chaos that often accompanies change. The voter, on the other hand, has a compelling need to participate in nomination of candidates as well as cast a ballot at the general election. The state action limitation would appear even less viable under this balancing scheme when the probable consequences of the failure of judicial intervention in this area of political party organization are considered; that is, a lack of party support and a further loss of confidence in the elective process. *See* Van Alstyne & Karst, *State Action*, 14 STAN. L. REV. 3 (1961).

[34] 399 F.2d 119 (8th Cir. 1968).

[35] *Id.* at 120.

[36] The *Irish* decision was formulated on other grounds than the failure of state action, however. Application of "one man-one vote" was deemed inappropriate when the alleged malapportionment resulted from action taken by properly elected precinct delegates to the county conventions. Furthermore, the court denied relief under the equal protection clause because there existed no judicially discoverable and manageable standards, making this a nonjusticiable political question. *Id.* at 121. The limited time scheme in which relief was sought was also a factor in the decision. *See* note 48 *infra.*

[37] 288 F. Supp. 371 (N.D. Ga. 1968).

[38] The Supreme Court in *Smith v. Allwright* acknowledged the unitary character of the electoral process and ". . . that state delegation to a party of the power to fix the qualifications of primary elections is delegation of a state function that may make the party's action the action of the state." 321 U.S. at 660.

[39] For a disscussion of state action as a requisite for application of the fifteenth amendment *see* Note, *Strange Career of State Action Under the Fifteenth Amendment*, 74 YALE L.J. 1448 (1965).

III. Application of "One Man-One Vote" to Party Conventions

Conceding the expanded recognition afforded constitutional guarantees with respect to state election procedures, and the erosion of the obstacles of nonjusticiability and state action, there could be no logical suggestion that these guarantees should apply to the presidential nomination process only when a state primary is employed to select delegates to the national conventions. The case of *Maxey v. Washington State Democratic Committee*[40] extended "one man-one vote" to a state party convention, invalidating a procedure which seriously failed to provide for allocation of convention delegates on a rational population basis. The analogy between a state primary system for nomination and a state convention process for nomination was so prominent that the United States District Court for the Western District of Washington could not ignore it.[41]

The Washington State Democratic Committee used a statewide convention system initiated by the election of county convention delegates at precinct caucuses. Subsequently, county conventions elected their allocated number of state convention delegates.[42] The formula applied by the state committee to apportion the state convention delegates votes was deemed an equal protection violation. The committee alloted a certain number of delegates for each county irrespective of population. Each county also received five delegates for each state senatorial district within its limits or, if a district covered more than one county, one delegate for each 20% of the county's population making up that district. Furthermore, the formula called for a variable award of delegate votes to the county depending upon the degree of success enjoyed by the party's presidential nominee in the last election.[43]

At the state level, congressional district caucuses, comprised of state convention delegates from the counties making up the particular congressional district, were convened to elect national convention delegate nominees. Ratification of these nominees by the state convention followed. The Washington state delegation to the Democratic National Convention was rounded out by the appointment of ex officio delegates by the state Democratic chairman.[44]

The state committee's formula indicated little concern with making the allocation of delegates reflective of the voting populace. The county was the

[40] 319 F. Supp. 673 (W.D. Wash. 1970).
[41] *Id.* at 678.
[42] *Id.* at 675-76.
[43] *Id.* at 675.
[44] There was no challenge presented concerning the ex officio delegates. *Id.* at 676.

base unit around which delegate votes were assigned, with any variance in population taken into account only by those few delegates assigned when the county was a portion of a larger state senatorial district. The disparities of representation among party members were obvious,[45] resulting in a serious lessening of the ability of voters in the more populous counties to participate in selecting the delegation to the national nominating convention.

The court in *Maxey* summarily dismissed the defendant committee's contention that no judicially manageable standards existed for resolving the dispute. The *Baker* case, in restricting the political question doctrine, had called for a determination of whether ". . . the duty asserted can be judicially identified and its breach judicially determined, and whether protection for the right asserted can be judicially molded."[46] The defendants did not deny the grossly unrepresentative nature of the delegate selection formula used by the state committee in Washington. The court determined, therefore, that judicial review would be no more difficult with respect to delegate selection formulae than it has been for state reapportionment.[47] The fact that the elective process complained of would not be effectuated until the 1972 convention would not affect the rights of the plaintiffs to sue, because their rights were presently endangered and time would be necessary to implement the court's decision.[48] Also, it was deemed immaterial that Washington state

[45] It was not disputed that, at the 1968 state convention, each delegate from King County, Washington represented approximately 2,800 total voters and 670 Democratic voters based on 1964 presidential returns, while each San Juan County delegate represented 420 total voters and 125 Democrats. *Id.*

[46] 369 U.S. at 198. *See* pp. 352-53 *supra.*

[47] 319 F. Supp. at 677.

[48] *But see* Irish v. Democratic-Farmer-Labor Party, 399 F.2d 119 (8th Cir. 1968). The plaintiffs sought a reallocation of votes among delegates to the 1968 Democratic National Convention and were denied relief partly because there was insufficient time to effectuate the court's decision. The case was decided on August 13, 1968 and the convention was to begin August 26, 1968. Rather than forcing the issue by judicial decree, it was noted that in many reapportionment cases the courts have moved cautiously. "[T]he attitude has been one of reluctance and of willingness to have the challenged body initially given the opportunity to attempt to reorganize itself." *Id.* at 120. *See also* note 36 *supra.*

The *Maxey* court adopted the same approach, but concluded that as the Washington State Democratic Committee had been using the challenged delegate selection formula since 1920, there could be no assurance that it would change before the 1972 national convention. Therefore, the fact that a selection formula for 1972 had not been announced should not jeopardize the right to relief. 319 F. Supp. at 677. *Cf.* Moore v. Ogilvie, 394 U.S. 814, 816 (1969); Gray v. Sanders, 372 U.S. 368, 376 (1963).

law[49] did not authorize a specific method of delegate apportionment to be used by the state committee.[50]

Rejecting the traditional arguments made by the defendant committee,[51] the *Maxey* court ruled that the "one man-one vote" concept necessitates a selection of state and county convention delegates other than by geographical subdivisions of the state. By diluting the votes of urban party members while placing greater weight on those of rural voters, the party had hampered full involvement in the nominating process to the same extent that a similar urban-rural malapportionment had denied equal protection in *Gray v. Sanders*.[52] If the national convention delegates were chosen in Washington by party primaries which weighed some votes over others, "one man-one vote" would clearly be relevant. There is no disparity in applying the same concept to the convention system, as both procedures serve the

---

[49] The legislature of Washington has delegated the following authority to political party groups within the state:

Authority—Generally. Each political party shall have the power to:

(1) Make its own rules and regulations;
(2) Call conventions;
(3) Elect delegates to conventions, state and national;
(4) Fill vacancies on the ticket;
(5) Provide for the nomination of presidential electors; and
(6) Perform all functions inherent in such an organization:

Provided, That in no instance shall any convention have the power to nominate any candidate to be voted for at any primary election. RCW § 29.42.010 (1965).

See, e.g., VA. CODE ANN. § 24.1-172 (Cum. Supp. 1970).

[50] Specific statutory authority is not required for a finding of state action in party elective practices so long as the parties have assumed a state function. 319 F. Supp. at 677-78.

Regulation of presidential nominating procedures cannot be said to be an inherent state function, but rather one that has been adopted.

> While it is true that the constitutional scheme for electing the President creates no right of popular participation, all states have created such a right. Once the state has undertaken to provide for popular elections, all votes must be equally valued. *Id.* at 679.

[51] The defendant committee argued the lack of a justiciable issue as well as the absence of plaintiffs' standing to sue. It was further suggested that "one man-one vote" is satisfied in the initial voting procedures at the precinct level, but the *Maxey* Court observed that

> [i]f the teachings of the *Reynolds* and *Gray* cases could be subverted simply by imposing an unrepresentative convention hierarchy upon a system which requires equal voting only at the lowest level, the one-man-one-vote principle would be illusory. *Id.* at 680.

Further contentions of defendant which were rejected were that the party's interest in a strong organization was overriding, and that the party represented ideas, not population. *Id.* at 681.

[52] 372 U.S. 368 (1963).

same function—sending nominating delegates to the national party conventions.[53]

This holding acknowledged the indispensable role that nomination of candidates plays in the total elective process.[54] However, the previous judicial tendency to leave the manner of delegate selection to the discretion of state political party organizations implied that nomination and election were independent steps. The privilege of casting a ballot was to be jealously protected, but the authority to choose who would be on that ballot was considered to be a power within the province of the party, to be dispensed to the party members as seen fit. The old view ignored the great influence exercised by the political parties, and that election to office without a party nomination is nearly impossible in modern politics.[55] Considering the strength of party associations, any alternatives in the choice of candidates are very often denied to the party member if he is refused a voice in nomination. The decisions in *United States v. Classic*[56] and *Moore v. Moore*[57] supported the more modern position by applying constitutional guarantees to primary procedures inasmuch as a vote in a general election is meaningless without a corresponding participation in the nominating procedure. This realization is especially crucial in light of the volatile climate in which politics must presently function:

> The presidential nominating process can and should be one of the most readily available and most effective means of accomplishing significant political change in this country. Close constitutional scrutiny therefore is in order wherever state and party procedures offer the voter something less than the fullest possible participation in the nominating process.[58]

The *Maxey* decision placed some limitation on judicial intervention in the presidential nomination process beyond the formative stages of the

---

[53] If the statement of the Supreme Court in *Gray* that "the concept of political equality in the voting booth contained in the Fifteenth Amendment extends to *all* phases of state elections" (emphasis added), 372 U.S. at 380, 83 S. Ct. at 808, has meaning, it must apply to those phases of state elections in which candidates are nominated by the convention system as well as to those in which candidates are nominated by primary elections. 319 F. Supp. at 679.

[54] *Id.* at 678.

[55] This basic political truth was set forth by the Supreme Court in Newberry v. United States, 256 U.S. 232, 285-286 (1921).

[56] 313 U.S. 299 (1941).

[57] 229 F. Supp. 435 (S.D. Ala. 1964).

[58] Maxey v. Washington State Democratic Comm., 319 F. Supp. 673, 678-79 (W.D. Wash. 1970).

county and state conventions by stating that where a convention system is employed, the elective process is initiated when the state committee allocates delegates to the state convention.[59] A companion case, *Dahl v. Republican State Committee*,[60] refused to apply "one man-one vote" to the election of the party state committee in that the election process had not yet begun at this level of political involvement. A vital distinction was made between the functions of the primarily administrative state committees and the representative, governmental nature of the state party conventions.[61] The internal workings of a political party were at issue, a matter beyond the authority of the judiciary to determine,[62] and any attempted reorganization would consequently be the legislature's responsibility.

IV. Implementation of the "Maxey" Rule

Accepting the incorporation of the "one man-one vote" concept into the state party convention system, how might the standard be met? The constitutional goal to be achieved is the alleviation of diluted votes which debase the effectiveness of any expression of "grass roots" preference as to presidential candidates. The percentage of delegates to the national party conventions supporting a given candidate should very nearly approximate the degree of support that candidate has at the local level.[63] In *Maxey* it was decided that a formula based on either total population or total party membership as determined by Democratic vote in the last presidential election should satisfy the equal vote requirement.[64] However, a gross popula-

---

[59] *Id.* at 679.

[60] 310 F. Supp. 682 (W.D. Wash. 1970).

[61] The *Dahl* court relied upon the decision of Sailors v. Board of Education, 387 U.S. 105 (1967), in which the Supreme Court refused to apply "one man-one vote" to the selection of a county school board because of the nonlegislative character of the body. So also, the party's state committee is primarily administrative and the election of the state committee could not be said to be an integral part of the presidential election process. The *Maxey* decision determined that this election machinery is activated when the state committee allocates delegates to the county conventions. Therefore, at the phase where state committees are being organized, the presidential nomination process has yet to begin. *Id.* at 684.

[62] *See also* Lynch v. Torquato, 343 F.2d 370 (3d Cir. 1965).

[63] Presumably, this might be accomplished by alleviating all types of discrimination now inherent in delegate selection, thereby making the state delegation reflective of the state party electorate. The need for reform in this area is painfully obvious. For instance, of the 2,666 delegates and alternates who attended the 1968 Republican National Convention, only 2.4% were black, 1% were under the age of 30, and 17% were women. McGovern Comm'n Rep., *supra* note 2, at 26.

[64] 319 F. Supp. at 679.

tion basis for representation would be inadequate when party votes, and not apportionment, are involved. Political party activity varies among legislative districts and, consequently, some minor discrimination would result against active party members in the party's most loyal districts. The more ideal criterion for establishing "one man-one vote" guidelines is party membership,[65] which disregards those voters whose views are not meaningful in the party's nomination process. The voters who are afforded equal representation should be those most directly interested in the success of the party's presidential candidate and best able to make an intelligent choice.

Party membership could be determined either by party votes cast in a previous election or party registration.[66] Use of registration figures would yield a formula based on a more current and responsive electorate, presumably better advised on pending party issues.[67] No drastic structural change need be made to those voting districts, precinct or county, which presently base delegate selection on gross population figures so as to reflect party membership. Rather, allocation of delegates could be predicated on the proportion of party members in that district in relation to state-wide party membership.[68] It could then be said that under the state convention system of nomination, a more balanced representation for all party members has been achieved.

Whether the state convention system for selecting national delegates is of sufficient worth to justify reform, irrespective of "one man-one vote," is another related question. Popular balloting in the precinct or county under this system, is often conducted at a time when the political evolution of issues and candidates culminating at the national convention is in its formative stages.[69] Consequently, the party voter has no realistic oppor-

---

[65] *Cf.* Gray v. Sanders, 372 U.S. 368, 381 (1963).

[66] *See* Burns v. Richardson, 384 U.S. 73, 91 (1966).

[67] While it might be argued that votes for the party candidate in the last state-wide general election would more accurately reflect party strength, use of registration figures would be more indicative of ideological preferences and more responsive to effective political organization. However, party registration might have the effect of limiting the electorate and, thereby, the "grass roots" involvement in the nomination process. State parties might chose their own standard so long as no invidious discrimination results.

[68] Such a procedure would eliminate the need for chaotic redistricting of the party organization. The balance between urban and rural interests with respect to internal party matters would not be disrupted. *See* Fortson v. Dorsey, 379 U.S. 433 (1965).

[69] The McGovern Commission reported that over 30% of the delegates to the 1968 Democratic National Convention had been selected before Senator Eugene McCarthy announced his candidacy, and that formal delegate selection steps had

tunity within this time scheme to inform himself and to express a meaningful preference. Certainly, the limited enthusiasm and participation on the precinct level many months prior to the formal initiation of the presidential campaign is not indicative of the voters' evolving interest and concern as the campaign issues unfold. The inadequacies of the state convention could be eliminated by a nationwide system of state party primaries, allowing voters to select delegates directly rather than through the stratified party structure. National conventions would then be directly representative of the voters' desires on both issues and candidates. State party primaries would in no way alter the traditional function of the national convention.[70]

The national parties have not been completely unaware of the manifest need for reform of the presidential nomination machinery.[71] The Democratic Party, following the 1968 convention debacle, appointed the Commission on Party Structure and Delegate Selection chaired by Senator George S. McGovern, to assist the state parties in a reformative effort. The McGovern Commission adopted official guidelines for delegate selection which went beyond an endorsement of equal apportionment and decried other abusive state party methods.[72] As to apportionment, the Commission established that at least 75% of the total state delegation must be selected below the congressional district level and that the apportionment formula must be based on gross population or some measure of party strength.[73] Whether these guidelines, and those being considered by the Republicans, will be effective in restoring the credibility of the delegate selection process is uncertain. If the parties fail in their reformation attempts, invalidation of

---

begun in all but 12 states when President Lyndon Johnson declared that he was not a candidate. McGovern Comm'n Rep. *supra* note 2, at 30.

[70] The national convention serves the necessary purpose of encouraging party debate and a formulation of a party platform. Without the opportunity to reconcile party differences and gather support which the national convention provides, the fall presidential campaigns would digress into greater confusion. It is not suggested that the national convention be replaced, but only that delegates be chosen in a democratic manner.

[71] The delegates of the 1968 Democratic National Convention passed a resolution calling for "full and timely opportunity to participate in nominating candidates;" more specifically, elimination of the unit rule in delegate selection and assurance that this selection process take place within the calendar year of the national convention. McGovern Comm'n Rep., *supra* note 2, at 15.

[72] The McGovern Commission forbade, among other practices, proxy voting and the unit rule, limited mandatory assessments of delegates and required that party meetings be held on uniform dates in public places after adequate public notice has been given.

[73] McGovern Comm'n Rep., *supra* note 2, at 45.

their present procedures by the courts or regulation by Congress[74] are less attractive alternatives.

V. Conclusion

Regardless of the method employed, the voter is demanding an increasing influence in the presidential nomination. The federal courts have embarked upon a course designed to protect the voter's full participation in the election process, including both nomination and the general ballots. Although the courts will undoubtedly continue to apply "one man-one vote" to the nominating process, it is extremely doubtful that change wrought by judicial intervention alone will abate the sense of alienation experienced by a growing segment of the electorate. The political parties are most able to restore public confidence in the elective process by providing the individual a greater voice in party presidential nominations. The *Maxey* decision calls for equal representation of party members when delegates to county and state party conventions are convened to select state delegations to the national conventions. A better approach would be to designate these state delegations through a state party primary, thereby insuring the voter uninhibited involvement in the nomination process. Whatever approach is taken, the need for reform is immediate, as the issue embraces the very foundation of democracy—the right to vote.

C.F.W.

[74] *See* Burroughs v. United States, 290 U.S. 534 (1934). The Court established that Congress has an inherent power "to preserve the purity of presidential and vice presidential elections." *Id.* at 544. If the viability of the traditional two party system were endangered, Congress might move to afford statuatory assurances that party procedures would not deny an equal protection of the laws in presidential nomination. Congressional intervention might also be predicated on the influence of the national conventions on interstate commerce. The regulatory authority of Congress has been extended over non-commercial instrumentalities so long as they function in interstate commerce. *See* United States v. Darby, 312 U.S. 100 (1941). Nevertheless, Congress has been unwilling to enter this political arena.