

PARTY PARITY:
A DEFENSE OF THE DEMOCRATIC
PARTY EQUAL DIVISION RULE

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INTRODUCTION

Currently, women account for approximately 15.7% of legislators worldwide.¹ Out of 184 countries, only seventeen (approximately

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1. See INTER-PARLIAMENTARY UNION, WOMEN IN NATIONAL PARLIAMENTS, WORLD AVERAGES (revealing regional differences in that women occupy 39.9% of parliamentary seats in Nordic countries, but occupy less than 20% of such seats in every other world region), at <http://www.ipu.org/wmn-e/world.htm> (last modified Feb. 28, 2005).

nine percent) possess a critical mass of at least thirty percent female parliamentarians.² Many of these seventeen countries utilize some form of “positive discrimination” mechanism or gender quota to increase women’s political representation.³

The three primary types of gender quotas are constitutional quotas, election law quotas, and party level quotas.⁴ Much gender quota literature focuses on constitutional or party level quotas that require a specified percentage of female candidates on party lists or that prohibit more than a certain percentage of candidates of one gender per party list.⁵ This Comment focuses on the United States Democratic Party’s party level quotas.⁶ According to the Democratic Party’s Equal Division Rule, “[t]he National Convention shall be composed of delegates equally divided between men and women.”⁷

Equal division rules, like the one set forth by the Democratic Party, are more facially progressive than gender quotas, which require only that women serve as candidates for office.⁸ Implementation of

2. See *id.* (listing countries possessing at least thirty percent female parliamentarians in a lower or single house: Rwanda (48.8%), Sweden (45.3%), Norway (38.2%), Finland (37.5%), Denmark (36.9%), Netherlands (36.7%), Cuba (36%), Spain (36%), Costa Rica (35.1%), Mozambique (34.8%), Belgium (34.7%), Austria (33.9%), Argentina (33.7%), South Africa (32.8%), Germany (32.8%), Guyana (30.8%), and Iceland (30.2%)); see also Joni Lovenduski, *Women & Politics: Minority Representation or Critical Mass?*, 54 PARLIAMENTARY AFF. 743, 744 (2001) (acknowledging thirty percent as the critical mass or level that enables female legislators to effectively create and promote policy objectives). *But see* Susan Roth, *Women of the Senate Come into Their Own as Their Numbers Grow*, GANNETT NEWS SERV., TABLE 6, July 6, 2003 (arguing that female Senators in the United States currently enjoy the ability to influence policymaking despite the fact they do not numerically constitute a critical mass).

3. See PIPPA NORRIS, *ELECTORAL ENGINEERING: VOTING RULES AND POLITICAL BEHAVIOR* 191 (Cambridge U. Press 2004) (distinguishing between statutory gender quotas, voluntary gender quotas, and reserved seats).

4. See INT’L IDEA & STOCKHOLM U., *GLOBAL DATABASE OF QUOTAS FOR WOMEN* (defining constitutional quotas as provisions established in a country’s constitution, election law quotas as provisions established in the regulations or national legislation of a country, and party level quotas as political party measures used to ensure a percentage of female candidates or female party leaders), at <http://www.quotaproject.org/aboutQuotas.cfm> (last visited Apr. 25, 2005).

5. See, e.g., NORRIS, *supra* note 3, at 192-98 (summarizing the various affirmative action measures implemented in Europe, Latin America, and Africa to increase women’s political representation).

6. See DEMOCRATIC NAT’L COMM., *THE CHARTER AND BYLAWS OF THE DEMOCRATIC PARTY OF THE UNITED STATES*, art. II, § 4 (as amended Jan. 19, 2002) [hereinafter DEMOCRATIC PARTY CHARTER] (requiring gender-balanced state delegations at national conventions), available at <http://www.democrats.org/pdfs/charter.pdf> (last visited Feb. 25, 2005).

7. See *id.* at art. VII, § 6 (mandating that equal division of delegate and committee positions fails to breach the Party’s nondiscrimination policy).

8. See Miki Caul, *Political Parties and the Adoption of Candidate Gender Quotas: A Cross-National Analysis*, 63 J. POL. 1214, 1226 (2001) (asserting that parties may adopt candidate quotas to superficially demonstrate their adherence to gender equality).

gender quotas does not automatically guarantee the election of women.⁹ Theoretically, political parties could place women in the lowest available spots on party lists, thus minimizing their chances of winning office despite the parties' official compliance with the gender quota.¹⁰ Equal division rules, on the other hand, like reserved seats, guarantee women half of the available slots in institutions.¹¹

This Comment defends the Democratic Party's Equal Division Rule as constitutionally sound.¹² Part I addresses the history of gender-balance legislation in the two major American political parties.¹³ Part II examines the Equal Division Rule's validity with regard to freedom of association, voting rights, political question doctrine, and state action.¹⁴ Part III discusses Equal Protection defenses of the Rule according to gender-based discrimination and affirmative action law.¹⁵

The successful establishment of political party gender quotas in the United States proves remarkable in light of both the controversy surrounding affirmative action¹⁶ and constitutional and statutory provisions prohibiting discrimination based on sex.¹⁷ Judicial

9. See, e.g., Garance Franke-Ruta, *Liberté, Egalité, Sororité*, LEGAL AFF., Jan./Feb. 2003, at 32 (noting that the French parity law requiring gender-balanced candidate lists resulted in a mere 1.4% increase in the proportion of female parliamentarians).

10. See, e.g., Mark P. Jones, *Increasing Women's Representation Via Gender Quotas: the Argentine Ley de Cupos*, 16 WOMEN & POL. 75, 87-88 (1996) (finding that Argentinian parties either have disregarded quota law requirements or have complied minimally, placing women in the lowest permissible slots).

11. See, e.g., Pippa Norris, *Breaking the Barriers: Positive Discrimination Policies for Women*, in HAS LIBERALISM FAILED WOMEN? ASSURING EQUAL REPRESENTATION IN EUROPE AND THE UNITED STATES 89, 93-94 (Jytte Klausen & Charles S. Maier eds., 2001) (noting the advantages and disadvantages of reserved seat systems, which several countries have implemented to benefit women, ethnic groups, and religious minorities).

12. See *infra* notes 71-217 and accompanying text (asserting that the Rule withstands freedom of association, voting rights, political question, state action, and gender-based Equal Protection scrutiny, but may falter under affirmative action analysis).

13. See *infra* notes 20-70 and accompanying text (reviewing Democratic and Republican Party initiatives intended to attract female electors and party members).

14. See *infra* notes 71-170 and accompanying text (concluding that the Equal Division Rule does not violate electors' freedom of association and voting rights). Rather, the Rule constitutes a non-justiciable political question. *Id.* Alternatively, the Rule does not involve state actors, thus precluding the validity of Equal Protection claims targeting the Equal Division Rule. *Id.*

15. See *infra* notes 171-217 and accompanying text (arguing that proponents should rely on gender-based classification analysis rather than affirmative action analysis to defend the Rule).

16. See, e.g., Terry M. Neal & David S. Broder, *Affirmative Action Tears at Fla. GOP*, WASH. POST, May 15, 1999, at A1 (acknowledging affirmative action as a divisive issue among the electorate, capable of determining voters' political affiliation).

17. See, e.g., U.S. CONST. amend. XIV, § 1 (mandating states' provision of "equal protection of the laws" to all citizens); 42 U.S.C. § 2000e-2(a) (2000) (prohibiting

deference to political parties has enabled the continued implementation of measures requiring gender-balanced party leadership and state delegations.¹⁸ The persistence of such measures suggests that, in certain circumstances, courts apply a lenient level of scrutiny, guaranteeing the preservation of benign gender discrimination measures.¹⁹

I. THE ORIGINS OF EQUAL DIVISION RULES

A. Democratic and Republican Party Charters, Bylaws, and Rules

The Democratic and Republican Parties,²⁰ as well as select states,²¹ have long required gender-balanced national or state committees.²² The Republican Party rule concerning state delegations, however, is worded more loosely than its Democratic Party counterpart,²³ potentially explaining the disproportionate number of challenges to

employment discrimination based on sex); 20 U.S.C. § 1681(a) (2000) (barring gender discrimination in education).

18. See, e.g., *Ripon Soc’y, Inc. v. Nat’l Republican Party*, 525 F.2d 567, 588 (D.C. Cir. 1975) (applying rational basis analysis, the most deferential level of analysis, to uphold party delegate selection formula).

19. See, e.g., *Bachur v. Nat’l Democratic Party*, 836 F.2d 837, 842-43 (4th Cir. 1987) (upholding the Maryland Democratic Party’s Equal Division Rule and declaring that political parties’ private associational rights trump an individual’s freedom to vote).

20. See DEMOCRATIC PARTY CHARTER, *supra* note 6, at art. IX, § 16 (adopting gender-balanced national, executive, and state committees, conventions, and commissions); REPUBLICAN NAT’L COMM.: ABOUT THE GOP, REPUBLICAN PARTY RULE 1 (allocating National Committee membership to one man, one woman, and the state party chair), *available at* <http://www.gop.com/About/default.aspx?Section=13> (last visited Feb. 24, 2005); REPUBLICAN NAT’L COMM.: ABOUT THE GOP, REPUBLICAN PARTY RULE 5 (mandating gender-balance for National Committee Chair and Vice-Chair positions), *available at* <http://www.gop.com/About/default.aspx?Section=13> (last visited Feb. 24, 2005).

21. See, e.g., IOWA CODE ANN. § 69.16A (West 2004) (ordering gender-balanced state appointive boards, commissions, committees, and councils); MONT. CODE ANN. § 2-15-108 (2003) (requiring “positive action” to attain gender-balanced state government boards, commissions, committees, and councils); N.H. REV. STAT. ANN. § 21:33-a (2004) (listing gender-balance as one factor to consider in appointments to state offices, agencies, commissions, and boards); N.D. CENT. CODE § 54-06-19 (2003) (recommending gender-balanced appointive boards, commissions, committees, and councils).

22. See *Marchioro v. Chaney*, 582 P.2d 487, 489 (Wash. 1978) (noting that state laws mandating gender-balanced state committee leadership originated in 1927 and 1939).

23. Compare REPUBLICAN NAT’L COMM.: ABOUT THE GOP, REPUBLICAN PARTY RULE 14(D) (“Each state *shall endeavor* to have equal representation of men and women in its delegation to the Republican National Convention.”) (emphasis added), *available at* <http://www.gop.com/About/default.aspx?Section=32> (last visited Feb. 24, 2005), with DEMOCRATIC PARTY CHARTER, *supra* note 6, at art. II, § 4 (“The National Convention *shall be composed of* delegates equally divided between men and women.”) (emphasis added).

the latter.²⁴ Nevertheless, the Republican Party's activism in the post-suffrage era galvanized Democratic Party members and contributed to the latter's eventual adoption of the Equal Division Rule.²⁵

B. Pre-Suffrage: 1895-1919

Equal division or "fifty-fifty" rules first appeared in political parties in Colorado a full quarter-century before American women attained full suffrage.²⁶ In 1895, two years after Colorado women received voting rights, the Colorado Populist Party required gender-balanced committees, as did the Democratic Party for its county and state central committees.²⁷ The Colorado Democratic and Republican Parties enacted gender-balance rules for party committees in 1906.²⁸ In 1910, the state legislature included gender-balanced party committees in the new primary law.²⁹ Several other states, including Idaho, Michigan, and Nebraska, quickly followed suit.³⁰

As the prospect of women's suffrage became imminent, both major national political parties expressed an interest in equal division rules.³¹ A 1919 Republican Party proposal for a gender-balanced

24. See, e.g., *Bachur*, 836 F.2d at 842-43 (affirming the validity of the Democratic Party's Equal Division Rule); *Ricard v. State*, 544 So. 2d 1310, 1314 (La. Ct. App. 1989) (upholding the Democratic Party's Equal Division Rule); *Levine v. Millsbaugh*, 180 N.Y.S.2d 470, 471 (N.Y. 1958) (permitting the Democratic State Committee's rules requiring gender-balanced state committees). *But see In re Cavallier*, 287 N.Y.S. 739, 742 (N.Y. 1936) (rejecting the Democratic Party's requirement of gender-balanced state committees). Although this Comment focuses primarily on the Democratic Party Equal Division Rule due to the large number of relevant cases, conclusions apply to both political parties.

25. See generally Richard E. Matland & Donley T. Studlar, *The Contagion of Women Candidates in Single-Member District and Proportional Representation Electoral Systems: Canada and Norway*, 58 J. POL. 707 (1996) (proposing a "contagion theory," whereby a party's adoption of gender quotas caused competing parties to adopt similar measures to increase women's representation).

26. See JO FREEMAN, *A ROOM AT A TIME: HOW WOMEN ENTERED PARTY POLITICS* 110-11 (2000) (noting that the 1894 predecessor to the Colorado Equal Division Rule called for at least one woman to sit on precinct committees). However, many county committees refused to follow this rule. *Id.*

27. See *id.* (revealing the Populist Party's trendsetting actions).

28. *But see id.* (observing that gender-balance rules did not always translate to equal representation).

29. See *id.* at 111 (arguing that Colorado women's organization and activism, particularly in small towns across the state, enabled them to take their demand of equal representation on party committees to the state legislature).

30. See *id.* (observing that the two main Idaho political parties brought equally divided central committees to the 1898 state party convention, Michigan mandated two men and one woman on Congressional party committees, and Nebraska required gender-balanced district representation).

31. See KRISTI ANDERSEN, *AFTER SUFFRAGE: WOMEN IN PARTISAN AND ELECTORAL POLITICS BEFORE THE NEW DEAL* 81-105 (1996) (examining the state and national parties' adoption, advocacy, and enforcement of "fifty-fifty" rules).

National Committee failed;³² however, the Party agreed to increase the number of seats on the Executive Committee from ten to fifteen, and to recommend reserving seven of the seats for female Committee members.³³ The Democratic Party, on the other hand, successfully adopted a proposal to double the Democratic National Committee, thereafter including one male and one female member per state.³⁴ Democrats, in particular, viewed women as a political resource and potential electoral goldmine.³⁵ Both parties publicized their respective gender-related policies to attract women's votes.³⁶

C. Post-Suffrage: 1920-1950

The Nineteenth Amendment, ratified in 1920, granted women full voting rights.³⁷ Political parties subsequently began wooing women in earnest, seeking to double their constituencies.³⁸ "Fifty-fifty" rules represented one strategy parties employed to attract female voters at both the national and state levels.³⁹ The Republican Party became the political trendsetter for equal division rules during the era.⁴⁰ In

32. See *id.* at 81 (noting that the Rules Committee denied the request, despite the fact that Republican women proposed "adequate" instead of "equal" representation).

33. See *id.* at 81-82 (revealing that female Republican Party elites acquiesced to this arrangement both to prevent the Democratic Party from using the issue for political gain and to prove their leadership efficacy to male Republican Party elite).

34. See *Committee Votes for Full Hearing*, N.Y. TIMES, June 25, 1920, at 2 (explaining the logistics of the decision, according to which male delegates initially elected female delegates, and thereafter, voters chose female delegates).

35. *But see* ANDERSEN, *supra* note 31, at 82 (asserting that in 1920, the Republican Party sought to capitalize on women's votes).

36. See App. WOMAN CITIZEN, Sept. 11, 1920, at 399 (lauding the gender-balanced Democratic National Committee and highlighting the dearth of a similar rule in the Republican Party); WOMAN CITIZEN, Oct. 9, 1920, at 513 (distinguishing the Republican Party National Executive Committee as the "REAL COMMITTEE of real power" from the comparatively powerless Democratic National Committee).

37. See U.S. CONST. amend. XIX ("The rights of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex."). See *generally* VOTES FOR WOMEN: THE STRUGGLE FOR SUFFRAGE REVISITED (Jean H. Baker ed., 2002) (depicting the achievement of women's suffrage as "the story of nation-building and citizen-making").

38. See ANNA L. HARVEY, VOTES WITHOUT LEVERAGE: WOMEN IN AMERICAN ELECTORAL POLITICS, 1920-1970 111-35 (1998) (detailing the Democratic and Republican Parties' efforts to attract female votes by establishing women's party organizations and emphasizing issues related to women's domestic and maternal duties).

39. *But see* CHRISTINA WOLBRECHT, THE POLITICS OF WOMEN'S RIGHTS: PARTIES, POSITIONS, AND CHANGE 26-27 (2000) (acknowledging the parties' lax enforcement of such rules given the small minority of women in party delegations and male dominance in appointments to leadership positions, even within the parties' women's organizations).

40. See ANDERSEN, *supra* note 31, at 105 (revealing that equal division rules disproportionately benefited women with "traditional policy concerns" who were likely to belong to the Republican Party).

1924, the Republican Party adopted Rule 14, which permitted states to send one man and one woman to the National Committee.⁴¹ Throughout the 1920s, the Republican Party, bolstered by its majority presence in many state legislatures, lobbied for the passage of “fifty-fifty” statutes.⁴² The Party’s efforts proved successful; in 1929, eighteen states possessed “fifty-fifty” rules at various levels in both major political parties.⁴³

In the 1930s, the Democratic Party took a more active role in the fight for equal division at the behest of Molly Dewson, the head of the Democratic National Committee’s Women’s Division.⁴⁴ Dewson perceived gender-balance requirements as the most effective mechanism to increase women’s participation and leadership in political parties.⁴⁵ Her tactical decision to frame the issue as providing women with opportunities, rather than limiting those of men, and to emphasize women’s maternal responsibilities as the justification for women’s inclusion rendered her efforts largely successful.⁴⁶ Women’s enhanced electoral power as the majority of registered voters further spurred the drive for gender-balance party rules.⁴⁷ By 1950, only eight states lacked equal division laws or party rules.⁴⁸

Despite the prevalence of equal division rules, female party members soon realized that such provisions provided for physical

41. See FREEMAN, *supra* note 26, at 112 (noting the rule’s demise in 1952).

42. See *id.* at 110-11, 115 (noting the increasing popularity of equal division laws after Colorado’s legislative and party actions).

43. *But see* Emily Newell Blair, *Women in the Political Parties*, 143 ANNALS AM. ACAD. POL. & SOC. SCI. 217, 223 (1929) (acknowledging that at least “some” women became active in party organizations in states without “fifty-fifty” rules).

44. See *infra* App. for a political cartoon printed in DEMOCRATIC DIG., June 1935, reprinted in Jacqueline R. Braitman, *Legislated Parity: Mandating Integration of Women into California Political Parties, 1930s-1950s*, in WE HAVE COME TO STAY: AMERICAN WOMEN AND POLITICAL PARTIES, 1880-1960, at 174, 174 (Melanie Gustafson et al. eds., 1999) (depicting Molly Dewson’s efforts to enhance women’s political participation and representation).

45. See FREEMAN, *supra* note 26, at 116 (revealing that Dewson, as head of the Women’s Division, drafted model “fifty-fifty” statutes for state party adoption).

46. See *id.* at 117 (attributing Dewson’s effective advocacy of “fifty-fifty” rules to her public acceptance of “male predominance”).

47. See Marguerite J. Fisher, *Women in the Political Parties*, 251 ANNALS AM. ACAD. POL. & SOC. SCI. 87, 93 (1947) (noting that male party elites accorded women influential positions, such as Republican Party National Committee Assistant Chair and Democratic Party National Committee Secretary, to win women’s votes).

48. See Braitman, *supra* note 44, at 180 (explaining women’s political advances after World War I, as women’s war-time employment prepared them to pursue political posts). The eight states in which parties failed to pursue “fifty-fifty” laws or party rules were Arizona, Georgia, Maryland, Mississippi, Nevada, North Dakota, Virginia, and Wisconsin. *Id.* at 178, 180.

representation, but not effective authority.⁴⁹ In fact, regardless of their designation as “fifty-fifty” rules, the laws did not guarantee equal representation.⁵⁰ Quantitatively and qualitatively, female party members remained second class citizens.⁵¹

D. Women’s Movement: 1960s-1970s

The advent of the second wave of the women’s movement in the late 1960s and early 1970s highlighted women’s social, economic, and political inequality.⁵² Both major political parties undertook reform measures intended to redress women’s lackluster participation rates.⁵³ The Democratic Commission on Delegate Selection and Party Reform, also known as the McGovern-Fraser Commission, mandated state party action to remedy past sex discrimination and to achieve “reasonable representation” of women as national convention delegates.⁵⁴ The reforms initially proved successful: at the 1972 national convention, women accounted for approximately forty

49. See ELISABETH ISRAELS PERRY, BELLE MOSKOWITZ: FEMININE POLITICS AND THE EXERCISE OF POWER IN THE AGE OF ALFRED E. SMITH 195 (1987) (revealing that male Democratic Party National Committee members selected female vice chairs without first seeking advice from female committee members); Eunice Fuller Barnard, *The Woman Voter Gains Power*, N.Y. TIMES MAG., Aug. 12, 1928, at 1-2, 20 (describing the Republican National Committeewomen’s exclusion from a strategy meeting attended by their male colleagues).

50. See Anna L. Harvey, *Culture or Strategy? Women in New York State Parties, 1917-1930*, in WE HAVE COME TO STAY: AMERICAN WOMEN AND POLITICAL PARTIES, 1880-1960 87, 92-94 (Melanie Gustafson et al. eds., 1999) (noting male party leaders’ refusal to acknowledge or abide by equal division rules for Republican State and Democratic National Committees).

51. *But see* Braitman, *supra* note 44, at 179 (contending that party rosters identified women by their own names, rather than by their marital names, and that women acted independently and not as pawns of male relatives or acquaintances).

52. See *generally* THE FEMINIST MEMOIR PROJECT: VOICES FROM WOMEN’S LIBERATION (Rachel Blau DuPlessis & Ann Snitow eds., 1998) (addressing the experiences, aspirations, and achievements of feminist activists during the 1960s and 1970s).

53. See WOLBRECHT, *supra* note 39, at 34-35 (reviewing disputes between moderate and conservative Republicans concerning the necessity of including women in the Party’s affirmative action efforts); Bella Abzug et al., *Women in the Democratic Party: A Review of Affirmative Action*, 6 COLUM. HUM. RTS. L. REV. 3, 11-12 (1974) (discussing the Mikulski Commission’s strategies to attract female members with financial and educational assistance and targeted recruitment).

54. See JANET A. FLAMMANG, WOMEN’S POLITICAL VOICE: HOW WOMEN ARE TRANSFORMING THE PRACTICE AND STUDY OF POLITICS 136 (1997) (revealing that Democratic and Republican delegates perceived gender discrimination as a significant obstacle to women’s participation as party members, leaders, and candidates); DENIS G. SULLIVAN ET AL., THE POLITICS OF REPRESENTATION: THE DEMOCRATIC CONVENTION 1972, at 17 (1974) (summarizing the McGovern-Fraser Commission reforms, which sought to enhance the participation of African-Americans, youths, and women). *But see* Jeane Kirkpatrick, *Representation in the American National Conventions: The Case of 1972*, 5 BRIT. J. POL. SCI. 265, 275-77 (1975) (criticizing the McGovern-Fraser Commission as emphasizing diversity of delegates rather than diversity of perspectives).

percent of the Democratic delegation.⁵⁵

The Republican Party, as well, relied on Commission investigations and reports to formulate a party policy regarding women's participation at national conventions.⁵⁶ The Republican Committee on Delegations and Organizations issued a report in 1971, which the Rules Committee later adopted, recommending states "endeavor" to present gender-balanced delegations at the 1972 convention.⁵⁷ The proposal to include sex in Rule 32, which addressed the Party's commitment to use "positive action to achieve the broadest possible participation"⁵⁸ of various underrepresented groups, proved much more contentious.⁵⁹ Although the moderate party members prevailed and oversaw the addition of sex to the rule, the lack of enforcement provisions weakened its overall effectiveness.⁶⁰ Despite the Party's resistance to commit to sex-based affirmative action measures, women accounted for almost thirty percent of the delegates at the 1972 Republican convention, almost twice the proportion present at the previous national convention.⁶¹

The 1976 national conventions sparked continued debate regarding women and affirmative action.⁶² Feminist and African-American Democratic caucus members lobbied for an equal division rule for state delegations after observing a decrease in the selection of

55. See WOLBRECHT, *supra* note 39, at 36 (comparing the 1972 convention to the 1968 convention, in which thirteen percent of the delegates were women). *But see* Abzug et al., *supra* note 53, at 12 (asserting that the Democratic delegation at the 1972 national convention was forty-nine percent female).

56. See Jo Freeman, *Whom You Know Versus Whom You Represent: Feminist Influence in the Democratic and Republican Parties*, in *THE WOMEN'S MOVEMENTS OF THE UNITED STATES AND WESTERN EUROPE* 215, 223 (Mary Fainsod Katzenstein & Carol McClurg Mueller eds., 1987) (noting that Rosemary Ginn, the chair of the Republican Committee on Delegates and Organizations, supported the National Women's Political Caucus (NWPC)). The NWPC championed "fifty-fifty" rules for delegates. *Id.* at 222-23.

57. See *id.* (observing that the Republican Party National Committee declined to specify what actions would satisfy this recommendation, instead permitting the exercise of state party discretion).

58. TANYA MELICH, *THE REPUBLICAN WAR AGAINST WOMEN: AN INSIDER'S REPORT FROM BEHIND THE LINES* 25-26 (1996).

59. See WOLBRECHT, *supra* note 39, at 34-44 (acknowledging the dispute as one of many between moderate and conservative party members); MELICH, *supra* note 58, at 26 (noting that Rule 32 encompassed women, youth, minority and "heritage" groups, and senior citizens).

60. See WOLBRECHT, *supra* note 39, at 38 (contrasting the Republican regulation with similar Democratic measures permitting delegates to hold the party accountable for inadequate gender representation).

61. See PAUL ALLEN BECK & FRANK J. SORAUF, *PARTY POLITICS IN AMERICA* 286 (7th ed. 1992) (categorizing the percentage of female delegates at party conventions between 1968 and 1988).

62. See Freeman, *supra* note 56, at 228 (noting that Democratic feminists focused on achieving a "fifty-fifty" rule at the 1976 convention).

female delegates when compared with the previous delegation.⁶³ Then-Democratic nominee Jimmy Carter's opposition to fifty-fifty rules for delegates in 1976 prevented their establishment; however, Carter mollified feminist activists by promising to endorse equal division in the future and to increase the opportunities for women in the Democratic Party, his presidential campaign, and his administration.⁶⁴

Unlike their Democratic counterparts, whose advocacy of equal division in 1976 conclusively demonstrated their influence within the Party,⁶⁵ Republican feminists seeking greater participation of women received rebukes for attempting to "McGovernize" the party by requiring gender quotas.⁶⁶ Nevertheless, the proportion of female Republican delegates increased slightly to thirty-six percent, while that of female Democratic delegates decreased to thirty-four percent.⁶⁷

In 1978, in time for the mid-term convention, the Democratic Party established the Equal Division Rule, mandating gender-balanced delegations at national conventions.⁶⁸ Continued feminist advocacy and the death of AFL-CIO President George Meaney, an outspoken quota foe, contributed to the party's adoption of the "fifty-fifty" rule, almost sixty years after the Democratic National Committee first considered the proposal.⁶⁹ The rule remains in effect today.⁷⁰

63. See *id.* (asserting that midway through the process, election of African-American, Hispanic, young, and female delegates in 1976 lagged fifteen to thirty-five percent behind the 1972 count).

64. See Mary L. Clark, *Changing the Face of the Law: How Women's Advocacy Groups Put Women on the Federal Judicial Appointments Agenda*, 14 YALE J.L. & FEMINISM 243, 243-52 (2002) (revealing President Carter's precedent-setting appointment of women to the federal judiciary). During his four years in office, President Carter appointed forty women to federal courts, five times as many as all prior presidential appointments. *Id.* at 245.

65. See Jo Freeman, *The Political Culture of the Democratic and Republican Parties*, 101 POL. SCI. Q. 327, 341 (1986) (arguing that Democratic feminist leaders lost the equal division battle but ultimately won the war by proving their efficacy, organization, and determination).

66. See WOLBRECHT, *supra* note 39, at 41 (observing that female Party members' protests at the convention resulted in the weakening of the Republican rule prohibiting discriminatory delegate selection).

67. See Freeman, *supra* note 56, at 228 (contending that the decrease in female delegates from 1972 to 1976 renewed support for the "50-50 rule," which the Democratic Party adopted in 1978).

68. See *id.* at 229 (noting that around the time the Equal Division Rule passed, women accounted for more than half of the Democratic electorate).

69. See *id.* (observing that Carter's staffers yielded the fight upon relentless feminist activism).

70. See DEMOCRATIC PARTY CHARTER, *supra* note 6, at art. II, § 4 (requiring gender-balanced state delegations at national conventions).

II. DOCTRINAL CHALLENGES TO THE EQUAL DIVISION RULE

A. Freedom of Association

Political parties enjoy broad First Amendment protections, including freedoms of speech and association.⁷¹ This freedom of association encompasses a person's right to associate with a party,⁷² a party's right to determine standards for membership,⁷³ and the party and members' right to choose candidates to represent the party.⁷⁴ Courts generally respect parties' autonomy and do not require parties to treat all voters and party members equally.⁷⁵

Nevertheless, prospective Democratic Party delegates could allege that the Equal Division Rule infringes upon their ability to "peaceably . . . assemble" at conventions by arbitrarily restricting their attendance as delegates at the convention.⁷⁶ However, such freedom of association challenges of the Equal Division Rule will likely prove fruitless.⁷⁷ Courts generally interpret freedom of association allegations broadly, assessing the impact of the rule at issue on the organization's ability to further its overall mission.⁷⁸ Just as courts have held that the admission of women members will not detrimentally affect, but in fact, may enhance private service organizations' goals,⁷⁹ so too will enforcing parity among male and

71. See *Kusper v. Pontikes*, 414 U.S. 51, 56-57 (1973) (linking the right to unite to promote political ideas with the freedom to associate with a preferred political party).

72. See *Williams v. Rhodes*, 393 U.S. 23, 30 (1968) (proclaiming the freedom to assemble and endorse political views as one of "our most precious freedoms").

73. See *Democratic Party v. Wis. ex rel. La Follette*, 450 U.S. 107, 122 (1981) (deducing freedom to limit party membership as inherent in parties' freedom to associate).

74. See *Ripon Soc'y*, 525 F.2d at 601 n.9 (Tamm, J., concurring) (explaining that although delegates select the nominee, ballot inclusion occurs only after state party certification).

75. See *id.* at 583-84 (noting that parties restrict voters' ability to select delegates to various conventions and grant automatic delegate status to certain party officials).

76. See U.S. CONST. amend. I ("Congress shall make no law respecting . . . the right of the people peaceably to assemble . . .").

77. See, e.g., *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 224 (1989) (asserting that the First Amendment protects political parties' processes for selecting party leaders).

78. See, e.g., *Bd. of Dirs. of Rotary Int'l v. Rotary Club*, 481 U.S. 537, 548 (1987) (holding that requiring California Rotary Clubs to accept women members fails to infringe on the Club's right of association or to impact the Club's public service goals); *Roberts v. United States Jaycees*, 468 U.S. 609, 627 (1984) (noting that admission of women as members fails to prevent the Jaycees from achieving their political and social objectives).

79. See *Rotary Int'l*, 481 U.S. at 548-49 (positing that the Rotary Club's admission of female members will enhance the organization's community service capabilities).

female delegates further the Democratic Party's objectives.⁸⁰ In *Board of Directors of Rotary International v. Rotary Club*, the Court required Rotary Clubs to admit women members, observing that expanding the membership base would strengthen the organization's productivity.⁸¹ Similarly, requiring gender-balanced delegations at national conventions advances Democratic Party goals of equality, justice, and democracy by providing male and female party members the ability to directly participate in the political process.⁸² As long as courts continue to grant parties expansive associational rights, freedom of association challenges of party procedures stand little chance of success.

B. Voting Rights

Democratic Party members have challenged the Equal Division Rule as an infringement of their voting rights.⁸³ Courts acknowledge the right to vote as a fundamental right reflective of the liberties enjoyed in a democratic nation.⁸⁴ This right extends to primary elections.⁸⁵ The significance of the right to freely cast one's ballot has led courts to apply strict scrutiny to alleged state interference with electoral processes; thus, courts frequently strike down statutes as encroaching upon political party liberties.⁸⁶ As the Supreme Court recently reaffirmed, the extension of First Amendment protections to political parties largely insulates them from state regulation.⁸⁷ Unlike

80. See *Marchioro*, 582 P.2d at 494 (concluding that equal division of party leadership positions does not substantially burden party members' abilities to pursue party goals).

81. *Rotary Int'l*, 481 U.S. at 549 (noting that admitting female members would provide Rotary Clubs with "a more representative cross section of community leaders with a broadened capacity for service").

82. See DEMOCRATIC PARTY CHARTER, *supra* note 6, at art. IX, § 17 (outlining the Democratic Party Credo); see also *Cousins v. Wigoda*, 419 U.S. 477, 489-90 (1975) (asserting that convention delegates perform a "task of supreme importance" in selecting the parties' Presidential and Vice Presidential candidates).

83. See, e.g., *Bachur v. Democratic Nat'l Party*, 666 F. Supp. 763, 769 (Md. 1987) (arguing that the Equal Division Rule violated Bachur's right to vote for delegates to the national convention), *rev'd*, *Bachur v. Democratic Nat'l Party*, 836 F.2d 837 (4th Cir. 1987).

84. See *Reynolds v. Sims*, 377 U.S. 533, 555 (1964) (heralding the right to vote as "the essence of a democratic society"); see also *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) (lauding the right to vote as "preservative of all rights").

85. See *United States v. Classic*, 313 U.S. 299, 320 (1941) (identifying primary elections as essential to the electoral process of electing members of Congress).

86. See, e.g., *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 217 (1986) (using strict scrutiny analysis to reject Connecticut's closed primary statute as beyond the state's delegated authority to control the "times, places, and manner" of elections).

87. See *Cal. Democratic Party v. Jones*, 530 U.S. 567, 575 (2000) (commending political parties' "special" First Amendment protections regarding member selection of nominees).

state statutes, party regulations receive the most deferential judicial analysis.⁸⁸ Therefore, party actions may trump the right to vote, which, although fundamental, is not absolute.⁸⁹

Thus, participants in the delegate selection process possess restricted voting rights.⁹⁰ The Supreme Court has failed to definitively apply the one person, one vote standard to national nominating conventions.⁹¹ Furthermore, while no circuit courts have ruled affirmatively in the matter, two appellate courts have explicitly rejected such claims.⁹² In *Ripon Society, Inc. v. National Republican Party*, the D.C. Circuit reasoned that the one person, one vote standard failed to uniformly apply to all elections,⁹³ and noted that such a rule contradicted the less-than-democratic governing style of political parties.⁹⁴ In *Irish v. Democratic-Farmer-Labor Party*, the Eighth Circuit, reiterating judicial reluctance to interfere with internal party matters, refrained from applying the one person, one vote standard to district, county, and state party conventions.⁹⁵

Even if a court concluded that equal division rules infringed upon electors' voting rights, the court could still find such limitations permissible.⁹⁶ As the Fourth Circuit acknowledged in *Bachur v.*

88. See, e.g., *Bachur*, 836 F.2d at 842 (approving, under rational basis analysis, the Democratic Party's use of gender-balanced delegations to enhance women's participation in national conventions); *Ripon Soc'y*, 525 F.2d at 586-87 (upholding, based on rational basis analysis, the Republican Party's delegate selection procedure, which awarded "victory bonuses" to states based on their electoral results).

89. See *Ripon Soc'y*, 525 F.2d at 580 (cautioning against blind reliance on the "one person, one vote" standard and asserting that constitutional guarantees of representation hinge on the governmental entity at issue).

90. See *Wymbs v. Republican State Exec. Comm.*, 719 F.2d 1072, 1088 n.40-41 (11th Cir. 1983) (articulating the limited scope of the one person, one vote standard, which is inapplicable in state judicial elections, "special purpose assemblies," state constitutional conventions, and, in certain circumstances, party nominating conventions).

91. See *Cousins*, 419 U.S. at 483 n.4 (declining to broaden the scope of inquiry beyond the determination of whether state law or party rules establish delegate qualification for participation in the national convention).

92. See *Ripon Soc'y*, 525 F.2d at 578-87 (holding that the Equal Protection Clause of the Fourteenth Amendment requires only that the representational system further a legitimate party interest); see also *Irish v. Democratic-Farmer-Labor Party*, 399 F.2d 119, 119-21 (8th Cir. 1968) (refusing to strike a party rule allowing selection of national convention delegates from malapportioned districts).

93. See *Ripon Soc'y*, 525 F.2d at 579-80 (observing the inapplicability of the one person, one vote standard to state judiciary elections and various special assemblies).

94. See *id.* at 580-85 (recognizing the inherent inequity of various party institutions, including the electoral college, the National Committee, and party caucuses and conventions).

95. See *Irish*, 399 F.2d at 120 (limiting judicial examination of the one person, one vote standard to precinct level elections).

96. See *Bachur*, 836 F.2d at 841-42 (distinguishing voting for delegates from voting for candidates and noting that parties may restrict an elector's participation or discontinue the use of primaries altogether).

Democratic National Party, parties retain the right to determine delegate selection methods and to implement party rules that dilute electors' votes.⁹⁷

The judiciary's relative leniency towards political parties,⁹⁸ combined with parties' ability to dictate delegate selection procedure,⁹⁹ indicate that equal division rules do not infringe upon party members' voting rights.¹⁰⁰ Such rules constitute internal party decisions judicially recognized as within the scope of party authority.¹⁰¹ Generally, as long as parties ensure that elections are conducted in a fair, impartial manner, they will fulfill their obligation to rationally promote legitimate party goals.¹⁰²

The establishment and implementation of gender-balanced delegations fails to detrimentally affect the integrity of delegate elections.¹⁰³ Ballots list delegate candidates by sex, and instruct voters to select equal numbers of male and female delegates.¹⁰⁴ States enjoy the discretion to determine how to treat ballots that fail to conform to the Equal Division Rule requirements.¹⁰⁵ To ensure party members'

97. See *id.* at 842 (explaining that many states employ means other than primaries to select convention delegates, and that electors' and delegates' votes do not unilaterally control the selection of the party's presidential candidate).

98. Compare *Ripon Soc'y*, 525 F.2d at 586-87 (holding that parties' delegate selection formulas must merely "rationally advance" a "legitimate" party objective to withstand judicial scrutiny), with *Tashjian*, 479 U.S. at 225 (using heightened scrutiny to strike a Connecticut statute requiring registered party members to choose delegates in primary elections).

99. See *Bachur*, 836 F.2d at 842 (employing the rational basis standard to uphold Maryland's Equal Division Rule, despite its encroachment on an individual's right to vote for the delegate of his choice). The court held that the Rule's representational scheme rationally advanced the legitimate state interest in "stimulat[ing] greater female participation" within the Democratic Party. *Id.*

100. See *id.* at 841-42 (reasoning that no infringement exists because the right to vote for a delegate is far removed from the fundamental right to vote in elections for candidates for public office).

101. See *Eu*, 489 U.S. at 229, 231 (accepting parties' rights to determine electoral procedures and candidate selection while acknowledging that states may intervene to protect electoral fairness). But see *Am. Party of Tex. v. White*, 415 U.S. 767, 781 (1974) (holding that states may mandate party primaries); *Rosario v. Rockefeller*, 410 U.S. 752, 760-62 (1973) (permitting states to require party registration before primaries to discourage party raiding, whereby non-party members register to influence primary results); *Jeness v. Fortson*, 403 U.S. 431, 442 (1971) (concluding that states may restrict candidate participation to those with "a significant modicum of support").

102. See *Ripon Soc'y*, 525 F.2d at 588 (upholding a Republican Party formula providing "victory bonuses" based on state party electoral performance as properly furthering the Party's goal of political success).

103. See *Eu*, 489 U.S. at 231 (permitting state involvement in internal party matters only when necessary to ensure the integrity of the electoral system).

104. See Paul W. Valentine, *Maryland Democrats Lose in Court; Sex-Based Delegate Selection Struck Down*, WASH. POST, July 30, 1987, at D1 (explaining the Equal Division Rule ballot procedure).

105. Telephone Interview with Alicia Kolar Prevost, Deputy Director, Party Affairs

voting rights, parties could collect all ballots, tabulate results, and then award the top female and male vote selections the delegate positions.¹⁰⁶ This option, however, provides little incentive for voters to comply with the Equal Division Rule; those who either innocently or deliberately ignore the Rule may not be penalized. The Equal Division Rule and its objectives, then, are rendered toothless.¹⁰⁷ A more stringent alternative might involve parties' discarding ballots that fail to comply with the Equal Division Rule.¹⁰⁸

It is unlikely that a disgruntled voter could successfully challenge the Democratic Party's decision to disregard ballots that do not act in accord with Equal Division Rule requirements. Courts apply a deferential test to a party's allocation formula, generally guaranteeing the validity of the policy.¹⁰⁹ To withstand scrutiny, parties need only provide "legitimate justifications" for formulas that produce "substantial deviations from equality of voting power."¹¹⁰ All voters who comply with the ballot instructions enjoy the right to vote and have their votes tabulated.¹¹¹ If a court found that the Democratic Party's disregard of ballots that failed to comply with the Equal Division Rule constituted a substantial deviation from equal voting power,¹¹² the court should still conclude that the Party proffered a legitimate justification for the Rule.¹¹³ The Democratic Party's history of gender-based discrimination, coupled with previous fruitless

and Delegate Selection, Democratic National Committee (Oct. 14, 2003); *see, e.g., Bachur*, 666 F. Supp. at 769 (explaining that Maryland's ballot requirements prohibit tabulating ballots that fail to comply with the Equal Division Rule), *rev'd*, *Bachur v. Democratic Nat'l Party*, 836 F.2d 837 (4th Cir. 1987).

106. *See Levine*, 180 N.Y.S.2d at 470-71 (upholding the election of a female candidate receiving three votes). Though two male candidates received 427 and 423 votes respectively, party rules required one male and one female committee member. *Id.*

107. *See Abzug et al., supra* note 53, at 23 (describing the objectives of affirmative action as enhancing women's participation and representation within all levels of the party).

108. *See, e.g., Bachur*, 666 F. Supp. at 769 (observing that in Maryland, ballots that do not conform with the Equal Division Rule are disregarded).

109. *Compare Georgia v. Nat'l Democratic Party*, 447 F.2d 1271, 1278 (D.C. Cir. 1971) (upholding parties' allocation policies using rational basis analysis), *with La Follette*, 450 U.S. at 126 (employing heightened scrutiny to reject Wisconsin's delegate selection method, which violated Democratic Party rules).

110. *See Georgia*, 447 F.2d at 1279 (upholding party formulas that did not provide equal state delegations at conventions based on differing levels of state party constituencies).

111. *See Gray v. Sanders*, 372 U.S. 368, 380 (1963) (equating the right to cast a ballot with the right to have one's vote counted in both Congressional and preliminary elections).

112. *See Bachur*, 666 F. Supp. at 769 (stating that the party would not count ballots not in compliance with the Equal Division Rule).

113. *See Bachur*, 836 F.2d at 842 (concluding that the Equal Division Rule "manifestly" satisfies rational basis analysis).

attempts to remedy the problem,¹¹⁴ validate the enactment of the Equal Division Rule.¹¹⁵

In general, judicial resolution of freedom of association and voting rights challenges to the Equal Division Rule reveals the superiority of political parties' rights over those of individual members.¹¹⁶ Furthermore, parties' interests in controlling the selection of representatives outranks states' interests in ensuring the integrity of the electoral process.¹¹⁷ Thus, parties enjoy relative immunity from intense judicial scrutiny when they use certain mechanisms to determine candidate selection.¹¹⁸

C. Political Question Doctrine

Parties' delegate selection methods arguably constitute non-justiciable political questions.¹¹⁹ Generally, courts will refrain from intervening in cases challenging party convention actions regarding delegates unless the convention decision appears capricious, unfair, or deceitful.¹²⁰ Courts have further restricted this rule by reasoning that conventions are best suited to assess the qualifications of potential delegations.¹²¹ In formulating the Equal Division Rule, the Democratic Party sought to remedy more than fifty years of party discrimination against women.¹²² Despite previous party attempts to

114. See Abzug et al., *supra* note 53, at 4-5 (explaining the Party's general reluctance to assist female candidates); see also FREEMAN, *supra* note 26, at 110-12 (acknowledging that male party elites granted female members committee positions, but not effective power to influence party decisions); Kirkpatrick, *supra* note 54, at 278 (speculating that women's under-representation among party elite resulted not only from party discrimination, but also from societal discrimination).

115. See *Bachur*, 836 F.2d at 842 (upholding the Equal Division Rule as rationally related to achievement of the Party's legitimate interest in electoral success and constituency expansion).

116. See, e.g., *Democratic-Farmer-Labor State Cent. Comm. v. Holm*, 33 N.W.2d 831, 836-37 (Minn. 1948) (concluding that the legislature ceded control of conventions to political parties, which exercise discretion in seating delegates).

117. See *Cousins*, 419 U.S. at 549 (elevating the "vital" national interest of selecting Presidential and Vice-Presidential candidates accomplished at national party conventions over state interests in unilaterally determining delegate selection procedure).

118. See, e.g., *Eu*, 489 U.S. at 230 (acknowledging parties' discretion regarding internal governance, structure, and activities). *But see Ripon Soc'y*, 525 F.2d at 588 (cautioning heightened analysis of parties' use of invidious classifications).

119. See generally *Baker v. Carr*, 369 U.S. 186 (1962) (describing factors that render an issue a political question, including constitutional designation to a political branch, unclear resolution criteria, or necessity of assistance from other branches of government).

120. See, e.g., *Holm*, 33 N.W.2d at 837 (refusing jurisdiction where the state statute granted the state central committee control over presidential electors).

121. See *id.* at 833-34 (classifying delegates' rights as political rather than legal, and generally outside the realm of judicial scrutiny).

122. See Abzug et al., *supra* note 53, at 4-5 (summarizing the poor treatment of

increase women's intra-party stature,¹²³ party leaders remained predominantly male.¹²⁴ The Rule passed only after contentious debates, feminist activism, and the favorable recommendation of the McGovern-Fraser Commission.¹²⁵ Under such circumstances, courts could not reasonably conclude that the Equal Division Rule reflected capricious, unfair, or deceitful conduct.¹²⁶

Could a claim alleging that the Equal Division Rule represented gender-based political gerrymandering succeed? Courts generally accept group complaints about voting rights based on racial and political gerrymandering.¹²⁷ In *Davis v. Bandemer*, Indiana Democrats charged that a legislative reapportionment plan proposed and passed by the Republican-dominated state legislature represented political gerrymandering and infringed upon the Democrats' Equal Protection rights.¹²⁸ In the first election held pursuant to the redistricting plan, the proportion of Democrats elected to office did not reflect—and was significantly less than, in some cases—the proportion of votes cast for Democratic candidates.¹²⁹ While finding political gerrymandering claims, like racial claims, justiciable under the Equal Protection Clause, the Court cautioned that to have merit, complaints must demonstrate that the structure of the electoral

women by party leaders, who relegated female candidates to hopeless races and provided female candidates with less financial and organizational assistance than their male counterparts).

123. See *Bachur*, 836 F.2d at 842 (acknowledging the party's failure to enhance women's participation prior to enactment of the Equal Division Rule); WOLBRECHT, *supra* note 39, at 27 (revealing that early gender-balance rules accorded women little effective authority).

124. See *Abzug et al.*, *supra* note 53, at 5 (denouncing the "virtual absence" of women from Democratic leadership positions in 1968). Only one of the fifty-five state and territorial parties, Oregon, possessed a female chairperson. *Id.* See also David Niven, *Party Elites and Women Candidates: The Shape of Bias*, 19 *WOMEN & POL.* 57, 61 (1998) (observing the prevalence of male party elites, who account for ninety-seven percent of party leaders in certain states).

125. See SULLIVAN ET AL., *supra* note 54, at 17 (explaining the McGovern-Fraser reforms, which required a "reasonable relationship" between the proportion of African-Americans, women, and youth in the state population and the state party delegation); WOLBRECHT, *supra* note 39, at 42 (describing feminist and minorities' advocacy of "fifty-fifty" rules).

126. See *Holm*, 33 N.W.2d at 834 (ruling that judicial intervention will result only where conventions act "arbitrarily, oppressively, or fraudulently" in the candidate selection process).

127. See, e.g., *Davis v. Bandemer*, 478 U.S. 109, 119 (1986) (affirming the justiciability of cases brought pursuant to the equal protection clause that involve the placement of district boundaries in a manner designed to affect racial or political groups).

128. See *id.* at 113-15 (discussing Indiana's legislative structure and the House and Senate reapportionment plans).

129. See *id.* at 115 (noting that Democratic House candidates won 51.9% of the vote, but only 43% of the seats, and that in two counties, Democratic House candidates received 46.6% of the vote, but only 14% of the seats).

system repeatedly restricts voters' abilities to influence the political process.¹³⁰

Whereas racial and political gerrymandering plans affect all voters in the relevant districts, the Equal Division Rule affects only those individuals who voluntarily decide to affiliate with the Democratic Party for the purpose of participating in primary elections.¹³¹ Furthermore, racial and political gerrymandering claims arise in the context of direct election of candidates, while the Equal Division Rule encompasses only the delegate—and not the candidate—selection process, a process in which courts have traditionally proven reluctant to intrude.¹³²

Given that the Equal Division Rule represents an internal rule applicable only to party affiliates voluntarily participating in primary elections, courts should hold challenges non-justiciable. In *Democratic-Farmer-Labor State Central Committee v. Holm*, the court emphasized the political nature of delegate selection determination, refusing to intervene in an internal party dispute involving competing groups of presidential electors.¹³³ Similarly, in *Wymbs v. Republican State Executive Committee*, the Eleventh Circuit declined to determine the constitutionality of a local party's convention delegate selection procedure.¹³⁴ The court found that judicial involvement would necessitate improper policy decisions and would fail to properly settle the matter.¹³⁵ Challenges to the Equal Division Rule implicate analogous issues of judicial encroachment in political realms.¹³⁶ Political parties, rather than the judiciary, govern

130. See *id.* at 132-33 (requiring "specific supporting evidence" from which the Court may infer impermissible vote dilution).

131. See *Kusper*, 414 U.S. at 56-57 (heralding the right to associate oneself with a political party as an essential constitutional liberty protected by the First and Fourteenth Amendments).

132. See *Whitcomb v. Chavis*, 403 U.S. 124, 149 (1971) (mandating the presentation of evidence establishing the minority challenger's restricted ability to elect legislators); *Bachur*, 836 F.2d at 841 (describing Bachur's election of delegates as "some steps removed" from election of "actual candidates").

133. See *Holm*, 33 N.W.2d at 834 (finding political conventions best situated to ascertain delegates' qualifications and noting the undefined scope of judicial scrutiny in convention matters).

134. See *Wymbs*, 719 F.2d at 1080, 1086 (concluding that *Wymbs*'s failure to sue the Republican Party National Committee, political parties' broad associational rights, and the Court's inability to enforce the proposed "one Republican, one vote" rule precluded judicial intervention).

135. See *id.* at 1083 n.28 (articulating permissible party policies as addressing party ideology, candidate nomination, and member recruitment, particularly of underrepresented groups such as minorities, women, and youth). The court also noted the inability of injunctive relief to affect future conventions' acceptance of improperly elected delegates. *Id.* at 1085.

136. See *id.* at 1081, 1085 (stating factors relevant to justiciability determinations, including the necessity of non-judicial policy pronouncements and the availability of

in cases involving delegate selection disputes.¹³⁷ A court's perception of selection methods as illogical or unreasonable does not justify judicial intrusion into party domain.¹³⁸ Suits questioning the validity of the Equal Division Rule would require courts to assess the suitability of internal party decisions to expand party membership and participation, blatantly infringing on the parties' liberty to institute positive measures.¹³⁹

Furthermore, party decisions regarding the electoral processes for selecting candidates fail to include leeway for judicial intervention and conflict resolution.¹⁴⁰ Determination of damages would prove difficult in an electoral context; had equal division rules not applied, participants might have selected partially or entirely different delegates.¹⁴¹ Ascertaining the type of damages that would sufficiently compensate the wronged party also would prove complicated.¹⁴² If courts award expectation damages, how should judges determine the value of attending a national nominating convention?¹⁴³ Could a court adequately compensate individuals for the lost opportunities of participating in a political tradition, networking with fellow delegates, and influencing the party's political platform?¹⁴⁴

In addition, judicial participation in delegate elections would require judicial intrusion into matters best left to the discretion of more politically knowledgeable groups.¹⁴⁵ Political branches, rather than legal branches, determine a state's electoral representation.¹⁴⁶

established guidelines for adjudication).

137. See *La Follette*, 450 U.S. at 124 (asserting that parties' overriding interest in deciding delegate disputes derives from parties' freedom of association).

138. See *id.* at 124 n.27 (precluding both the state legislature and judiciary from formulating the rules that govern party members' participation in the candidate nomination process).

139. See *Tashjian*, 479 U.S. at 214 (describing party efforts to attract new members as "undeniably central" to their First Amendment liberties).

140. See *Baker*, 369 U.S. at 217 (identifying political questions as those issues that lack guidelines for judicial solutions); *Tashjian*, 479 U.S. at 224 (reinforcing parties' control over organizational structure and conduct).

141. See *Bachur*, 836 F.2d at 840 (noting Bachur's disinclination to reveal his preferred set of delegates).

142. See *Bachur*, 666 F. Supp. at 774 (reserving judgment on whether Bachur's request for one dollar in nominal damages effectively protected the suit upon failure of his request for injunctive and declaratory relief).

143. See *Cousins*, 419 U.S. at 489 (characterizing the delegates' responsibility to select the Party's presidential candidate as "a task of supreme importance").

144. See *Bachur*, 836 F.2d at 841-42 (acknowledging the importance of serving as a delegate, formulating party rules, adopting a party platform, and nominating a presidential candidate).

145. See *Baker*, 369 U.S. at 217 (noting that non-judicial branches are best situated to make preliminary judgments and interpret political questions).

146. See, e.g., *Smith v. McQueen*, 166 So. 788, 791 (Ala. 1936) (asserting that party conventions determine party candidates).

Even a court that rejected the constitutionality of the Equal Division Rule conceded that internal party requirements of gender-balanced committees might survive judicial scrutiny for this reason.¹⁴⁷

The controversial Presidential elections in November 2000 and the ensuing political and legal turmoil fail to undermine this analysis. The implications of the contentious legal wrangling resulting from the 2000 elections remain unclear;¹⁴⁸ in fact, both political parties geared up for similar battles before, during, and after the 2004 Presidential elections.¹⁴⁹ The current Supreme Court majority's reverence for state's rights and federalist principles, however, suggests the Court's continued reluctance to intrude into the political process.¹⁵⁰ Furthermore, any challenges to the Equal Division Rule would implicate non-justiciable internal party decisions, rather than justiciable state action.¹⁵¹

D. State Action

If, despite the previous analysis, a court finds an Equal Protection claim justiciable, it must then determine whether the claim involves state action.¹⁵² Constitutional rights such as freedom of association and equal protection limit only state actors and not private individuals or entities.¹⁵³ If political parties are not state actors, then individuals may not bring constitutional challenges against them, thus precluding

147. See *Bachur*, 666 F. Supp. at 786 (distinguishing party decisions regarding delegate selection from party decisions concerning internal committees).

148. See *Bush v. Gore*, 531 U.S. 98, 109 (2000) (specifying that the Court's reasoning was "limited to the present circumstances" due to the difficulties presented by the parties' equal protection challenges to election laws).

149. See, e.g., Zachary Coile, *Legal Battles Could Cloud Outcome in Swing States*, S.F. CHRON., Oct. 23, 2004, at A1 (detailing the plethora of legal challenges to voting machines, provisional ballots, and voter registration processes in swing states and parties' large-scale recruitment of lawyers to monitor voting procedures); Linda Kleindienst et al., *Lawsuits Fly Before Voting Even Starts*, S. FLA. SUN-SENTINEL, Oct. 14, 2004, at A1 ("In Florida, presidential elections and lawsuits seem to go together like peanut butter and jelly.").

150. See Gregory P. Magarian, *How Bush Won*, COMMONWEAL, Nov. 8, 2002, at 36 ("[E]ven the rare sympathizers with the majority's equal protection analysis . . . acknowledge that the analysis lacked precedential support and sharply violated the conservative judicial ethos of its five adherents."). See generally Timothy J. Conlan & Francosi Vergniolle De Chantal, *The Rehnquist Court and Contemporary American Federalism*, 116 POL. SCI. Q. 253 (2001) (noting the expansion of state's rights and concurrent restriction of Congressional authority under the current Supreme Court).

151. See discussion *supra* Part II.B (explaining judicial reluctance to intrude into internal party decisions regarding matters within the realm of party authority); see also discussion *infra* Part II.D (asserting the dearth of either state actors or state action in Equal Division Rule processes).

152. See *Wymbs*, 719 F.2d at 1077 (highlighting courts' reluctance to identify state action in political rights cases that do not involve racial discrimination).

153. See *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948) (noting the inapplicability of the Fourteenth Amendment to private acts, regardless of their discriminatory nature).

the validity of Equal Protection suits targeting the Equal Division Rule.¹⁵⁴

Courts have established that primary elections constitute state action.¹⁵⁵ In *Smith v. Allwright*, the Court held that party primaries represent state action because a state statute required parties to conduct electoral procedures, including primaries.¹⁵⁶ In *Terry v. Adams*, the Court extended the scope of state action to encompass a private political association's pre-primary elections because the association's candidates almost invariably received the Democratic Party nomination.¹⁵⁷ Subsequent appellate cases have reinforced the state action doctrine, concluding that party procedures represent state action when integrally related to the electoral process.¹⁵⁸ Thus, courts consider political parties state actors when conducting elections, but view them as private organizations when performing internal party business.¹⁵⁹

Some courts have interpreted the Democratic Party's implementation of the Equal Division Rule in primary elections as an internal party decision, rather than as state action.¹⁶⁰ First, voting for delegates and voting for candidates represent vastly different acts; while delegates perform party duties such as rule establishment, platform deliberation, and candidate nomination, their candidate

154. See *Republican Party of Tex. v. Dietz*, 940 S.W.2d 86, 92 (Tex. 1997) (indicating the duality of political parties, which don and cast off state actor status depending on the nature of their conduct).

155. See, e.g., *Terry v. Adams*, 345 U.S. 461, 469-70 (1953) (holding that a private political association's primary election constituted state action); *Smith v. Allwright*, 321 U.S. 649, 663-64 (1944) (finding party primaries an essential component of the electoral process, and thus state action).

156. See *Smith*, 321 U.S. at 663-64 (emphasizing that the statutory requirements, not the party's performance, rendered the party an agent of the state).

157. See *Terry*, 345 U.S. at 469 (dismissing the Democratic Party primary and election as merely "perfunctory ratifiers" of the Jaybird Democratic Association's candidate selection).

158. See, e.g., *Banchy v. Republican Party of Hamilton County*, 898 F.2d 1192, 1196 (6th Cir. 1990) (asserting that the election of a party ward chairman did not represent state action because there was no evidence that chairmen played an "integral part" in the political appointment process); *Kay v. N.H. Democratic Party*, 821 F.2d 31, 33 (1st Cir. 1987) (determining that a presidential candidate's forum is not an integral part of the electoral process and thus did not constitute state action); *Seergy v. Kings County Republican County Comm.*, 459 F.2d 308, 314 (2d Cir. 1972) (invalidating a state statute requiring a weighted voting system for use in internal party affairs, but requiring equal voting where committee members performed public duties); *Lynch v. Torquato*, 343 F.2d 370, 372 (3d Cir. 1965) (upholding the voting system for electing party county chairmen).

159. See, e.g., *Dietz*, 940 S.W.2d at 92-93 (distinguishing party platforms as beyond the electoral sphere and thus outside the realm of state action where state election laws did not mandate or regulate platforms).

160. See, e.g., *Bachur*, 836 F.2d at 842 (interpreting the Equal Division Rule as an internal policy to expand women's participation in party events).

preference may not become the party's nominee.¹⁶¹ Alternatively, courts cannot validly consider delegate selection of a party's nominee an "integral part of the electoral process" when the identity of the victor is a foregone conclusion long before the convention occurs.¹⁶²

In addition to selecting the party's presidential nominee, national convention delegates also influence the rules, platform, and overall agenda of the party.¹⁶³ Courts do not consider formation of the party platform a component of the election process.¹⁶⁴ Party candidates may accept, reject, or completely disregard the party platform, with no repercussions.¹⁶⁵ Delegates' involvement with the party platform, an essential element of the delegates' duties, thus fails to represent state action.¹⁶⁶

Examination of the key players involved in primary elections lends further credence to the assertion that courts should not view such events as state action.¹⁶⁷ Courts have ruled that presidential electors, party committee members, national convention delegates, and state party chairs do not constitute state officers.¹⁶⁸ Such individuals represent party, but not public, officials.¹⁶⁹ In summary, interpreting primary elections as state action regardless of the fact that most, if not all, of the essential participants fail to constitute state actors and fail to

161. See *id.* at 841-42 (suggesting that party policies may influence the nominee selection process).

162. See, e.g., *Dietz*, 940 S.W.2d at 93 (identifying state action when party policies or practices constituted "an integral part of the election process"); see also Joan Vennochi, Editorial, *Hub Must Mend its Conventional Ways*, BOSTON GLOBE, Nov. 14, 2002, at A19 (criticizing present-day conventions as "totally scripted, no-news-is-good-news" affairs).

163. See *Wymbs*, 719 F.2d at 1083 n.30 (describing delegates' duties at national conventions).

164. See, e.g., *Dietz*, 940 S.W.2d at 93 (positing that the Texas Election Code does not mandate party platforms). But see MELICH, *supra* note 58, at 22 (lauding platforms as blueprints of parties' "promises and dreams" that "invariably" become the parties' agendas).

165. See *Dietz*, 940 S.W.2d at 93 (linking a candidate's independence regarding platform provisions with Texas' failure to require or regulate party platforms).

166. See *Ripon Soc'y*, 525 F.2d at 601 (Tamm, J., concurring) (reasoning that the First Amendment protects government infringement of delegates' duties of platform adoption, rule formulation, and nominee selection).

167. See, e.g., *Smith v. State Exec. Comm.*, 288 F. Supp. 371, 373 (Ga. 1968) (finding that the state party chair does not constitute a state officer); *Sears v. Sec'y of the Commw.*, 341 N.E.2d 264, 269 (Mass. 1975) (concluding that party members and national convention delegates do not represent state officers); *Stanford v. Butler*, 181 S.W.2d 269, 273 (Tex. 1944) (holding that presidential electors are not state officers).

168. See *id.* But see *Ripon Soc'y*, 525 F.2d at 574-76 (suggesting that a national party's selection of convention delegates might constitute state action based on federal funding of national committees, conventions, and primary elections).

169. See, e.g., *Morris v. Peters*, 46 S.E.2d 729, 734 (Ga. 1948) (noting that statutory regulation of state party chair responsibilities does not indicate legislative intent to render the chairman a state actor).

perform solely state functions is illogical and erroneous.¹⁷⁰

III. EQUAL PROTECTION ANALYSIS

Since *Craig v. Boren*,¹⁷¹ courts have examined gender discrimination claims by applying intermediate scrutiny analysis.¹⁷² To survive such scrutiny, gender-based classifications must be “substantially related” to the achievement of “important governmental objectives.”¹⁷³ The Supreme Court later amended this standard to require “exceedingly persuasive” justifications for such classifications.¹⁷⁴

While *Adarand Constructors, Inc. v. Peña* established that both invidious and benign racial classifications would receive strict judicial scrutiny,¹⁷⁵ courts have not issued a similar ruling regarding the proper level of analysis for benign gender classifications.¹⁷⁶ According to the logic in *Adarand Constructors, Inc.*, which emphasized the incompatibility of national ideals of equality and

170. See *id.* (recognizing general judicial reluctance to identify party officials as state actors, even where state statutes regulate political parties).

171. 429 U.S. 190 (1976).

172. See, e.g., *Nguyen v. I.N.S.*, 533 U.S. 53, 60-71 (2001) (upholding statute imposing additional citizenship qualification criteria for children born abroad and out of wedlock to male American citizens as substantially related to the important government objectives of confirming the biological relationship between the man and the child and guaranteeing the opportunity for the parent and child to cultivate a genuine relationship); *U.S. v. Virginia*, 518 U.S. 515, 535-40 (1996) (concluding that the Commonwealth of Virginia failed to demonstrate an exceedingly persuasive justification for excluding women from the Virginia Military Institute). “However ‘liberally’ this plan serves the Commonwealth’s sons, it makes no provision whatever for her daughters. That is not equal protection.” *Id.* at 540. See also *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 137 n.6 (1994) (prohibiting gender-based peremptory challenges due to the insufficient relationship between such acts and a state’s interest in holding fair and impartial trials); *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 730-31 (1982) (striking a public university’s policy prohibiting males from enrolling for credit in its nursing school based on the university’s failure to establish a substantial relationship between the policy and the goal of remedying past educational discrimination against women). The university also failed to establish an exceedingly persuasive justification for the gender-based classification. *Id.* at 731.

173. See *Craig*, 429 U.S. at 200 (striking down an Oklahoma statute prohibiting beer sales to men under twenty-one and women under eighteen as insufficiently related to achievement of its objectives of traffic safety).

174. See *Miss. Univ. for Women*, 458 U.S. at 732 (sustaining the male plaintiff’s equal protection challenge of a public university’s refusal to permit male students to enroll for credit in nursing school).

175. See 515 U.S. 200, 227 (1995) (requiring heightened scrutiny of government-imposed racial classifications to protect the individual right to equal protection guaranteed by the Fifth and Fourteenth Amendment Equal Protection Clauses).

176. See Christopher D. Totten, *Constitutional Precommitments to Gender Affirmative Action in the European Union, Germany, Canada, and the United States: A Comparative Approach*, 21 BERKELEY J. INT’L. L. 27, 53-54 (2003) (noting that previous cases, such as *United States v. Virginia*, 518 U.S. 515 (1996), and *Nguyen v. I.N.S.*, 533 U.S. 53 (2001), involved invidious gender-based classifications).

differential race-based treatment,¹⁷⁷ courts would likely apply intermediate scrutiny, presently used to analyze invidious gender classifications, to benign gender classifications as well.¹⁷⁸ Relevant political party case law, however, fails to substantiate this hypothesis.¹⁷⁹ Courts appear to apply a standard of scrutiny less rigorous than intermediate scrutiny to such cases, ensuring the survival of rules requiring gender-balanced party positions.¹⁸⁰ Particularly given the judiciary's hesitance to interfere in political party matters, equal division rules would likely withstand intermediate scrutiny analysis.¹⁸¹

A. Gender Based Discrimination Analysis

Equal Protection challenges of the Equal Division Rule brought by disgruntled voters against the Democratic Party require the latter to prove that the gender classification is substantially related to an important party objective.¹⁸² The Rule may survive scrutiny even if it does not further such objectives with every application.¹⁸³ Remedying past economic discrimination and encouraging equal employment opportunity represent permissible bases for gender-based classifications.¹⁸⁴ The Equal Division Rule and gender-balance cases¹⁸⁵ extend this framework to permit compensation of women for

177. See *Adarand Constructors, Inc.*, 515 U.S. at 227 (asserting that equal protection requires identical, stringent analysis of all racial classifications, regardless of their intent).

178. See *Califano v. Webster*, 430 U.S. 313, 316-17 (1977) (sustaining, under intermediate scrutiny, a Social Security benefits formula that awarded women higher monthly benefits than men).

179. See *Bachur*, 836 F.2d at 842 (applying rational basis analysis to uphold the Democratic Party Equal Division Rule); *Ricard*, 544 So.2d at 1313-14 (applying rational basis analysis to uphold Democratic Party Equal Division Rule); *Hartman v. Covert*, 696 A.2d 788, 790-91 (N.J. 1997) (applying strict scrutiny and invalidating a New Jersey statute requiring gender-balanced party leadership); *Marchioro*, 582 P.2d at 492 (applying rational basis and intermediate scrutiny analysis to uphold a Washington statute mandating gender-balanced party committees).

180. See, e.g., *Ripon Soc'y*, 525 F.2d at 586-87 (requiring rational basis analysis of delegate allocation formulas).

181. See, e.g., *Holm*, 33 N.W.2d at 833-34 (asserting that political, rather than legal, entities are best suited to determine the legitimacy of state delegations).

182. See *Craig*, 429 U.S. at 197 (introducing such scrutiny, thereafter labeled "intermediate scrutiny," as the proper analysis for gender-based classification cases).

183. See *Nguyen v. Immigration and Naturalization Serv.*, 533 U.S. 53, 70 (2001) (qualifying that gender classification equal protection cases do not always require statutes to achieve the anticipated objective to withstand judicial review).

184. See *United States v. Virginia*, 518 U.S. 515, 533 (1996) (positing that the Virginia Military Institute may not use sex classifications to maintain women's legal, social, or economic inferiority).

185. See, e.g., *Bachur*, 836 F.2d at 837 (challenging the Equal Division Rule as infringing Party members' voting rights); *Marchioro*, 582 P.2d at 489 (asserting that statutes mandating election of committee members and chairs of opposite sexes

past political discrimination.¹⁸⁶

The Democratic Party adopted the Equal Division Rule not only to rectify past discrimination against women, but also to encourage women's active participation as delegates, committee members, and party leaders.¹⁸⁷ The Party sought to increase women's presence within the organization to parallel the proportion of registered female party members.¹⁸⁸ More implicitly, the involvement of diverse individuals effectively advances Party goals of equality, fairness, and liberty.¹⁸⁹ The Party's goals constitute important party objectives.¹⁹⁰

Courts will likely acquiesce in the use of the Equal Division Rule to accomplish these objectives because of the direct relationship between the Rule and its goals.¹⁹¹ In *Craig v. Boren*, the Court struck down an Oklahoma statute permitting women, but not men, between the ages of eighteen and twenty-one to purchase beer.¹⁹² The Court emphasized the fatally tenuous link between limiting beer sales, but not consumption, and enhancing traffic safety where young men were responsible for many traffic violations and accidents.¹⁹³ In *Califano v. Webster*, on the other hand, the Court upheld Social Security benefit awards calculated using a formula more favorable to female workers.¹⁹⁴ The comparatively advantageous benefits that women

violated the Washington Equal Rights Amendment and the First Amendment).

186. See *Bachur*, 836 F.2d at 839, 842 (recognizing women's lack of success in delegate elections and "notably deficient" participation in party affairs before implementation of the Equal Division Rule). But see *Hartman*, 696 A.2d at 792 (concluding that federal and state anti-discrimination laws have eliminated the necessity of statutes mandating gender-balanced party leadership).

187. See *Bachur*, 666 F. Supp. at 767 (explaining the origins of the Equal Division Rule). See generally *Abzug et al.*, *supra* note 53 (tracing women's participation in the Democratic Party and Party attempts to increase women's involvement).

188. See *Bachur*, 836 F.2d at 838 (explaining the motivations behind the enactment of the Equal Division Rule).

189. See DEMOCRATIC PARTY CHARTER, *supra* note 6, at art. IX, § 17 ("At the heart of our party lies a fundamental conviction, that Americans must not only be free, but they must live in a fair society."). The Democratic Party Credo celebrates the ideals of respect, equality, opportunity, democracy, education, and safety. *Id.*

190. See *Wymbs*, 719 F.2d at 1083 n.28 (asserting that advocacy of party beliefs, nomination of candidates, and recruitment of minorities, women, and youth constitute permissible party goals).

191. See *id.*

192. 429 U.S. 190 (1975); see also OKLA. STAT. tit. 37, §§ 241, 245 (1958 and Supp. 1976) (barring the sale of "non-intoxicating" beer containing 3.2% alcohol to men under twenty-one and women under eighteen).

193. See *Craig*, 429 U.S. at 201-04 (questioning the validity of the gender classification where statistics revealed that police arrested only two percent of men in the relevant age group for driving under the influence and where the studies focused on alcoholic beverages, rather than beer containing 3.2% alcohol).

194. See *Califano*, 430 U.S. at 314-16 (explaining the formula, which permitted women to discount three additional low earning years from their benefits calculations). But see *Polelle v. Sec'y of Health, Educ., & Welfare*, 386 F. Supp. 443,

received attempted to remedy the comparatively disadvantageous salaries women earned.¹⁹⁵ The Equal Division Rule mirrors the benefit payments upheld in *Califano* in attempting to remedy past discrimination.¹⁹⁶ The Equal Division Rule, by mandating parity among delegates at national conventions, will directly increase women's party activism and further Party goals of equality.¹⁹⁷

The Democratic Party's exceedingly persuasive justification for the implementation of the Equal Division Rule derives from the Party's desire to remedy its longstanding discrimination against women.¹⁹⁸ Previous gender balance attempts fell short of their desired goals, and Party leadership ranks remained predominantly male, despite the fact that women accounted for around half of the Party membership and a majority of the Party's lower-level staffers.¹⁹⁹ In fact, requiring proportional representation among delegates serves several beneficial functions beyond remedying past discrimination. First, it provides women the opportunity to vote for the party's presidential nominee.²⁰⁰ Because women are more likely than men to support women candidates, increasing the proportion of women delegates may thus increase the proportion of Democratic women candidates.²⁰¹ In addition, female delegates and candidates reveal

444 (N.D. Ill. 1974) (noting that despite the differential treatment, men continued to earn higher monthly benefits than women).

195. See *Califano*, 430 U.S. at 317 (noting that eradication of economic disparities between men and women constitutes an "important governmental objective"); see also *Kahn v. Shevin*, 416 U.S. 351, 353, 355 (1974) (upholding an annual \$500 property tax exemption granted to widows, but not widowers, based on the unique economic obstacles confronting widows).

196. See *Califano*, 430 U.S. at 318 (explaining that because past earnings determine retirement benefit awards, increasing the latter balances out discriminatory restraints on the former); see also *Bachur*, 836 F.2d at 842 (observing that the Equal Division Rule legitimately redresses previous discrimination at national conventions by ensuring female participation at such events reflects female party membership); see also Angela High-Pippert & John Comer, *Female Empowerment: The Influence of Women Representing Women*, 19 WOMEN & POL. 53, 60 (1998) (asserting that when women represent women, women are more likely to vote and engage in political activities).

197. See Abzug et al., *supra* note 53, at 20, 23 (articulating the Democratic Party's goal of enhancing women's participation and representation throughout the organization).

198. See *generally id.* (examining the Democratic Party's poor treatment of women politically, financially, and organizationally, and summarizing attempts to redress such conduct and increase women's participation).

199. See FREEMAN, *supra* note 26, at 121 (condemning the entrenched discrimination, which restricted women to "making coffee but not policy"); see also WOLBRECHT, *supra* note 39, at 27 (crediting female volunteers as the "grassroots backbone" of both major parties, while noting their exclusion from influential positions).

200. See *Cousins*, 419 U.S. at 489-90 (touting the selection of parties' Presidential and Vice Presidential candidates as "a task of supreme importance").

201. See Niven, *supra* note 124, at 69, 72 (finding that chairwomen demonstrated

distinct policy priorities and would thus broaden the Party's agenda to include health care, social service, family, and education issues.²⁰² Finally, the increased proportion of female delegates will encourage other women to become more politically active.²⁰³

B. Affirmative Action Analysis

In general, judicial disapproval of affirmative action measures focuses on practices that create invidious rather than benign discrimination.²⁰⁴ On the whole, courts disapprove of quotas, preferring flexibility over rigid numerical formulas.²⁰⁵ Courts exercise greater lenience when reviewing voluntarily implemented affirmative action programs.²⁰⁶ Nevertheless, it is unlikely that the

a greater inclination than chairmen to perceive female candidates as likely to succeed and thus worthy of endorsement).

202. See generally Susan J. Carroll, *The Politics of Difference: Women Public Officials as Agents of Change*, 5 STAN. L. & POL'Y REV. 11, 12-13 (1994) (finding that in the 103d Congress, Congresswomen were more inclined than Congressmen to support policies concerning families, health care, and education); Julie Dolan, *Support for Women's Interests in the 103rd Congress: The Distinct Impact of Congressional Women*, 18 WOMEN & POL. 81, 89 (1997) (finding that Congresswomen are more prone than Congressmen to support women's interests); Eleanor Holmes Norton, *Elected to Lead: A Challenge to Women in Public Office*, in THE DIFFERENCE DIFFERENCE MAKES: WOMEN AND LEADERSHIP 109, 118 (Deborah L. Rhode ed., 2003) (attributing the responsibility for legislation regarding family leave, pregnancy discrimination, child support enforcement, and breast and cervical cancer to female House members); Thomas H. Little et al., *A View from the Top: Gender Differences in Legislative Priorities Among State Legislative Leaders*, 22 WOMEN & POL. 29, 44 (2001) (revealing that female state legislators tend to prioritize health care, family issues, and social services more than their male colleagues); Mark J. Rozell & Clyde Wilcox, *A GOP Gender Gap? Motivations, Policy, and Candidate Choice*, 19 WOMEN & POL. 91, 98 (1998) (finding that female Republican delegates are more liberal than their fellow male delegates on gender and sexual orientation issues, but are more conservative regarding education and pornography).

203. See Pippert & Comer, *supra* note 196, at 60, 62 (stating that women represented by women tend to be more politically involved, adept, and knowledgeable than women represented by men).

204. See, e.g., *Rogers v. Lodge*, 458 U.S. 613, 617 (1982) (noting that plaintiffs may establish their equal protection claim by linking the "invidious quality" of the law at issue to a racially discriminatory purpose); *Pers. Adm'r of Mass. v. Feeny*, 442 U.S. 256, 274 (1979) (establishing that the Court may strike down neutral classifications if the statute's effect reveals invidious gender discrimination). *But see Gratz v. Bollinger*, 539 U.S. 244, 275 (2003) (striking an admissions policy that granted additional points to minority applicants to achieve a diverse student body).

205. See, e.g., *Gratz*, 539 U.S. at 273 (rejecting an admissions formula that granted twenty points based on race where the points usually guaranteed the admission of minority applicants). *But see United States v. Paradise*, 480 U.S. 149, 171, 177-78 (1987) (permitting a system in which black employees received half of the promotions awarded); *United Steelworkers*, 443 U.S. at 208 (upholding a program reserving half of the spots in an internal training program for black employees). See generally *Hi-Voltage Wire Works, Inc. v. San Jose*, 12 P.3d 1068, 1073-80 (Cal. 2000) (tracing the judicial transition from steadfast opposition to gradual acceptance of benign discrimination measures).

206. See, e.g., *Johnson v. Transp. Agency*, 480 U.S. 616, 640 (1987) (acknowledging judicial and legislative praise of voluntary action taken to ensure non-

Equal Division Rule would survive affirmative action analysis based on its strict numerical standards,²⁰⁷ its indefiniteness,²⁰⁸ and, arguably, its present lack of necessity.²⁰⁹

When examining affirmative action programs, courts consider the purpose of the program, the conditions under which the program is implemented, the interests of the affected groups, and the duration of the program.²¹⁰ Courts also scrutinize the availability of alternative remedies, the necessity for relief, the flexibility of the program, and the relationship of any numerical goals to the applicable market.²¹¹ In *Johnson v. Transportation Agency*, the Court proved receptive to the Transportation Agency's affirmative action plan due to its voluntary adoption, its consideration of gender as one of many relevant factors, its short-term goal of attaining a more gender-balanced labor force, its flexibility, and its negligible effect on third parties.²¹²

Similarly, courts would approve of the voluntary establishment of the Equal Division Rule after the failure of alternative strategies to increase women's political participation.²¹³ In addition, courts would

discrimination); *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 201 (1979) (chastising Respondent's failure to acknowledge the organization's unilateral decision to implement affirmative action measures to eradicate race discrimination); *see also* Affirmative Action Appropriate Under Title VII of the Civil Rights Act of 1964, *as amended*, 29 C.F.R. § 1608.1(c) (1994) ("Voluntary affirmative action to improve the opportunities for minorities and women must be encouraged and protected in order to carry out the Congressional intent embodied in Title VII.").

207. *See, e.g., Gratz*, 539 U.S. at 273-74 (rejecting an admissions point system because the additional points automatically granted to minority applicants precluded examination of applicants' experiences and ability to enhance student body diversity).

208. *See Back v. Carter*, 933 F. Supp. 738, 759 (N.D. Ind. 1996) (warning that quotas lacking a specified end date may become outdated because they may extend past the time for which they are justified).

209. *Cf. id.* at 758 (noting that women's participation as candidates in the county judicial nominating commission increased as the percentage of women lawyers in the county increased).

210. *See, e.g., United Steelworkers*, 443 U.S. at 197-98, 208 (upholding an affirmative action plan implemented to eradicate a racially imbalanced workforce where the plan was adopted pursuant to collective bargaining procedures, permitted white and black workers to attend the craft training program, and was intended as a temporary mechanism).

211. *See, e.g., Paradise*, 480 U.S. at 171 (permitting an affirmative action plan that mandated the promotion of equal numbers of white and black workers where other proposed remedies failed to address persistent discrimination, the program was necessary to eradicate discrimination and spur compliance, the program was adaptable, the program appropriately reflected the racial composition of the workforce, and the program did not unduly burden white applicants).

212. *See Johnson*, 480 U.S. at 634-42 (emphasizing the program's establishment to combat women's under-representation in certain positions, incorporation of labor force factors into formation of appropriate goals, and emphasis on the qualifications of all applicants, regardless of gender).

213. *See Harvey, supra* note 50, at 92-94 (detailing the Democratic and Republican

favorably perceive the direct relationship between the Rule's goal of parity in leadership, committee, and delegate positions and women's proportionate representation in the Party's electoral base.²¹⁴ However, courts would disapprove of the Rule's strict gender-balance requirements, questioning the continued need for the Rule given women's political gains over the past two decades.²¹⁵ The indefinite tenure of the Rule would also attract judicial notice.²¹⁶ Although the Democratic Party could note that Party Charter amendment policies provide for removal of unwanted provisions, this argument will carry little weight due to the relatively onerous task of winning the required votes for such a change.²¹⁷ On the whole, affirmative action jurisprudence fails to support the establishment of gender balance rules.

CONCLUSION

Legal analysis of the Equal Division Rule demonstrates the necessity of relying on gender-based classification arguments, rather than affirmative action logic, to successfully withstand judicial scrutiny.²¹⁸ Proponents should emphasize that the Equal Division Rule does not infringe freedom of association or voting rights.²¹⁹ In fact, parties' delegate selection methods represent non-justiciable political

Parties' lax enforcement of targeted recruitment efforts).

214. See Abzug et al., *supra* note 53, at 20 (asserting that the Party's affirmative action measures apply to all state parties and at all levels of the party hierarchy).

215. See Marie Cocco, Editorial, *A Symbolic Candidate Does NOW Little Good*, NEWSDAY, Sept. 4, 2003, at A35 (noting women's appointments as cabinet secretaries and election as governors, senators, and state officials since 1984); Connie Lauerman, *Against Great Odds, a Run for the White House: Moseley-Braun's Campaign Puts Her in Select Company*, CHI. TRIB., Feb. 19, 2003, at C1 (recounting the female presidential candidates since Victoria Chalfin Woodhull in 1872, including Shirley Chisholm, Lenora Fulani, Patsy Mink, and Elizabeth Dole); Liz Marlantes, *She's Not a Candidate . . . Probably*, CHRISTIAN SCI. MONITOR, Sept. 25, 2003, at 1 (reporting speculation regarding Senator Hillary Clinton's presidential chances in the 2004 elections).

216. See *Bachur*, 666 F. Supp. at 772 (noting that the Democratic Party Charter, which includes provisions similar to the Equal Division Rule, "remains effective and binding on the Party").

217. See DEMOCRATIC PARTY CHARTER, *supra* note 6, at art. X, § 1 (delineating the Charter's amendment procedure, which may occur by majority vote of all delegates to the National Convention, pending ratification by a majority of National Committee membership; a two-thirds vote of the entire committee membership; or a two-thirds vote of the Party Conference membership).

218. See *supra* notes 171-217 and accompanying text (contrasting judicial acceptance of gender-balance rules to remedy past discrimination with judicial rejection of fixed quotas established for an indefinite duration).

219. See *supra* notes 71-118 and accompanying text (concluding that political parties' expansive associational freedoms encompass party control over candidate selection procedures).

questions inappropriate for judicial intervention.²²⁰ Even if a court finds such a claim justiciable, the dearth of state actors will preclude judicial condemnation of the Rule.²²¹ Such arguments, however, do not ensure the Rule's survival, given the increasingly conservative composition of the federal courts²²² and the corresponding willingness to strike affirmative action policies as overbroad.²²³

The Equal Division Rule enhances the diversity of members and perspectives among Party membership and elites.²²⁴ In the context of the worldwide gender quota movement, such rules provide the most realistic option for enhancing women's political participation in United States. The American electoral system is ill-equipped for the establishment of a gender quota law for national office.²²⁵ Furthermore, the controversy surrounding such legislation, as well as the desire of the predominantly male Congress to protect their electoral opportunities, would discourage many legislators from approving such a law.²²⁶ In addition, gender quota laws do not guarantee women's electoral success, as demonstrated by the failure of the French parity law in the 2002 National Assembly elections.²²⁷

The Equal Division Rule, however, successfully targets grassroots political participation in party conventions.²²⁸ The Rule encourages

220. See *supra* notes 119-151 and accompanying text (finding political parties best suited to resolve delegate selection disputes, and noting the difficulty of fashioning relief in such matters).

221. See *supra* notes 152-170 and accompanying text (characterizing the Equal Division Rule as an internal party decision rather than state action and observing that most party leaders involved in primary elections do not constitute state actors).

222. See Deborah Sontag, *The Intellectual Heart of Conservative America*, N.Y. TIMES MAG., Mar. 9, 2003, at 40 (reporting that President Bush's judicial nominees will exacerbate the conservative tilt of the federal courts initially established under Presidents Reagan and Bush, Sr.).

223. See David A. Strauss, Editorial, *Affirmative Action: A Conservative Victory*, CHI. TRIB., June 27, 2003, at 27 (contending that the Supreme Court rulings in the Michigan affirmative action cases represented exceedingly conservative ideology and lacked a coherent legal basis).

224. See Abzug et al., *supra* note 53, at 24 (positing the expected consequences of the Equal Division Rule as an increase in the Party's accessibility for, responsiveness to, and representation of the Party constituency, and women in particular).

225. See NORRIS, *supra* note 3, at 208 (contending that party list proportional representation electoral systems prove most amenable to implementation of gender quotas).

226. See generally JOHN M. CAREY, *TERM LIMITS AND LEGISLATIVE REPRESENTATION* (Cambridge U. Press 1996) (articulating the significance of election to political office, even for politicians confronting term limits).

227. See NORRIS, *supra* note 3, at 196 (attributing women's minimal political increases to loopholes in the parity law that permitted parties to run women in hopeless districts and that provided parties funding even if they disregarded the parity requirement).

228. See DEMOCRATIC PARTY CHARTER, *supra* note 6, at art. II, § 4 (mandating gender-balanced state delegations at national conventions).

political activism at local and state levels, permitting women to gain political experience and expertise and develop personal political aspirations.²²⁹ Indeed, since 1972, the proportion of female Democratic delegates has consistently exceeded that of female Republican delegates.²³⁰ The Democratic Party also boasts a higher percentage of female legislators, despite the current Republican Congressional majority.²³¹ The Equal Division Rule, then, provides balanced representation and creates realistic opportunities for women to ascend the political hierarchy.

229. See Georgia Duerst-Lahti, *The Bottleneck: Women Becoming Candidates*, in *WOMEN AND ELECTIVE OFFICE: PAST, PRESENT, AND FUTURE* 15, 20-21 (Sue Thomas & Clyde Wilcox eds., 1998) (identifying civic experience as an important characteristic for an aspiring candidate).

230. See generally BECK & SORAUF, *supra* note 61, at 286 (listing the percentage of female delegates between 1968 and 1988); Jo Freeman, *Feminist Activities at the 1988 Republican Convention* (reporting that women accounted for approximately thirty-five percent of the Republican delegates at the 1988 convention), available at <http://jofreeman.com/conventions/repub88.htm> (last visited Feb. 24, 2005); Jo Freeman, *Women at the 1988 Democratic Convention* (recording approximately fifty percent female Democratic delegates at the 1988 convention), available at <http://jofreeman.com/conventions/dem88.htm> (last visited Feb. 24, 2005); Jo Freeman, *Feminism vs. Family Values: Women at the 1992 Democratic and Republican Conventions* (stating that women represented fifty percent of the Democratic delegates and approximately forty-two percent of the Republican delegates at the 1992 conventions), available at <http://jofreeman.com/conventions/1992conven.htm> (last visited Feb. 24, 2005); Jo Freeman, *Change and Continuity for Women at the 1996 Republican and Democratic Conventions* (observing that women accounted for fifty percent of the Democratic delegates and thirty-four percent of the Republican delegates at the 1996 conventions), available at <http://jofreeman.com/conventions/1996conven.htm> (last visited Feb. 24, 2005); Jo Freeman, *Lots of Show but Little Substance at the 2000 Republican and Democratic Conventions* (estimating female delegates' attendance rates at approximately fifty percent at the Democratic convention and thirty-five percent at the Republican convention in 2000), available at <http://jofreeman.com/conventions/2000conven.htm> (last visited Feb. 24, 2005); Ann McFeatters, *Political Parties Work to Put Pizazz in Conventions*, *PITT. POST-GAZETTE*, July 14, 2004, at A11 (reporting that women represented half of the delegates at the 2004 Democratic convention); *2004 Republican National Convention* (asserting that women accounted for forty-four percent of the delegates at the 2004 Republican convention), available at <http://www.gopconvention.com/contents/delegates/diversity/> (last visited Mar. 20, 2005).

231. See Center for American Women and Politics, *Women in Elected Office 2005 Fact Sheet Summaries* (calculating fourteen female Senators, including nine Democrats and five Republicans, and sixty-six Representatives, including forty-three Democrats and twenty-three Republicans), available at <http://www.cawp.rutgers.edu/Facts/Officeholders/cawpfs.html> (last visited Mar. 20, 2005).

APPENDIX

