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Constitutional Law: Conventional Reluctance or Doctrinal Departure? The Political Question Doctrine

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to member chains; and, because of geographical separation, the members are not natural competitors. But even if some direct competition should arise as a result of the expansion of some of the members, there remains a competitive advantage, albeit shared, over the nonmember chains operating in the area of overlap. Also, since the reason for the formation of the association was to provide the member *retail* chains with private labels so that they might better compete with the larger chains, it would seem that wholesaling should amount to a relatively insignificant part of the members' sales.

The significance of *Topco* is that it reaffirms the Court's commitment to *per se* rules of the illegality of certain agreements and practices under the Sherman Act and establishes to a certainty that horizontal territorial restraints and customer restrictions are *per se* illegal *even when not accompanied by price fixing.*[46] It appears that the Court has followed a more or less straight course in arriving at the *Topco* decision. When faced with this pure case of horizontal territorial restraints and customer restrictions, the Court did just what it had indicated it would do. Now, with *Topco* placed beside *Schwinn,* it seems clear that division of territories among competitors or restrictions upon the customers to whom they may sell are *per se* violations of the Sherman Act whether the arrangement is brought about horizontally or vertically.

D. STEVE ROBBINS

Constitutional Law: Conventional Reluctance or Doctrinal Departure? The Political Question Doctrine.

Shortly before the 1972 Democratic National Convention, the Supreme Court was asked to consider a suit, *O'Brien v. Brown,*[1] filed by California delegates who had been excluded from the Convention by a ruling of the Democratic Credentials Committee.[2] The Court, uncomfortably confined by lack of time, issued a brief opinion which both delayed action on the petition for certiorari and stayed the Court of

[46]*See generally Case Comment, Horizontal Territorial Restraints and the Per Se Rule, 28 Wash. & Lee L. Rev. 457 (1971).*

[1]92 S. Ct. 2718 (1972) (per curiam). The petition for certiorari was filed on July 6, 1972 and the full convention began July 10th.

[2]The 1972 Credentials Committee had issued its decision on June 29, 1972. Brown v. O'Brien, No. 72-1628, at 4 (D.C. Cir. July 5, 1972).

Appeals' intervening judicial hand. Thus the Convention was left to its own devices.

In its opinion the Court chose to stress "grave doubts" about the judiciary's power to review such matters, saying that "[h]ighly important questions are presented concerning justiciability, . . . state action, and . . . the reach of the Due Process clause."[3] In light of the vigorous expansion of the justiciability[4] and state action[5] doctrines in the past decade, particularly in voting rights cases,[6] one might have assumed those considerations would pose no barrier. Until the Court subsequently develops and clarifies its doubts, however, the applicability of the doctrines to national political party affairs, and perhaps to a range of other cases, is shrouded in uncertainty.[7]

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[3]92 S. Ct. at 2719.

[4]*See* Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 YALE L.J. 517 (1966); Tollett, *Political Questions and the Law*, 42 U. DET. L.J. 439 (1965); Note, *Constitutional Safeguards in the Selection of Delegates to Presidential Nominating Conventions*, 78 YALE L.J. 1228 (1969). For earlier but still valuable opinion *see generally* Field, *The Doctrine of Political Questions in the Federal Courts*, 8 MINN. L. REV. 485 (1924); Finkelstein, *Judicial Self-Limitation*, 37 HARV. L. REV. 338 (1924).

[5]*See* Black, *The Supreme Court, 1966 Term, Foreword: "State Action," Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69 (1967); Chambers & Rotunda, *Reform of Presidential Nominating Conventions*, 56 VA. L. REV. 179, 194 (1970); Comment, *Constitutional Reform of State Delegate Selection to National Political Party Conventions*, 64 NW. J.L. REV. 915, 918 (1970); Note, *The Presidential Nomination: Equal Protection at the Grass Roots*, 42 S. CAL. L. REV. 169 (1968).

[6]Avery v. Midland County, 390 U.S. 474 (1968); Reynolds v. Sims, 377 U.S. 533 (1964); Wesberry v. Sanders, 376 U.S. 1 (1964); Gray v. Sanders, 372 U.S. 368 (1963); Baker v. Carr, 369 U.S. 186 (1962); *see* Bode v. National Democratic Party, 452 F.2d 1302 (D.C. Cir. 1971), *cert. denied*, 92 S. Ct. 684 (1972); Georgia v. National Democratic Party, 447 F.2d 1271 (D.C. Cir.) (per curiam), *cert. denied*, 404 U.S. 858 (1971); *cf.* Moore v. Ogilvie, 394 U.S. 814 (1969); Williams v. Rhodes, 393 U.S. 23 (1968).

[7]This note will not deal with state action and the reach of the due process clause, though some of the cases examined bear on those issues. Regarding state action we may observe briefly that though no state or national laws impinged directly on the convention itself, all delegates were selected subject to state laws. Further, in view of the white primary cases, the delegate selection procedures, if not the entire convention, should be subject to scrutiny at least where allegations of constitutional impropriety relate directly to the selection of a presidential candidate. Similar arguments have been heard with favor by the courts in cases cited note 73 *infra*.

The alleged due process violation in *O'Brien*, moreover, was a fundamental one—that rules of delegate selection were altered after the selection process was completed. The authority of the various Democratic bodies who first approved California's procedures and then disapproved them may be difficult to ascertain, but the product of their disagreement was a violation of the expectations of all who cast ballots in California. A holding that the due process clause could not reach this *ex post facto* reversal of voting procedures, if justiciability and state action were found, would be unjustified.

THE DECISION IN O'BRIEN V. BROWN

After a plurality victory in the California presidential primary,[8] Senator George McGovern seemed to have captured all 271 delegates to the National Convention.[9] Subsequently, however, challengers sought a partial ouster of his delegates, insisting that California's "winner-take-all" primary procedure violated the mandate for a "full, meaningful and timely opportunity to participate" in delegate selection[10] which had been adopted by the 1968 Democratic Convention.[11] When the Credentials

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[8]N.Y. Times, June 7, 1972, at 1, col. 8.

[9]*See* CAL. ELECTIONS CODE §§ 6300-98 (West Supp. 1972), especially § 6386. The California State Democratic Party had been assured by National Party Chairman Lawrence O'Brien in a February 1, 1972, letter that the state laws were in "full compliance" with Democratic guidelines. B. Marshall, Hearing Officer, In the Matter of the Challenges to the California Delegation to the 1972 Democratic National Convention: Findings, June 27, 1972, at 3 [hereinafter cited as *Hearing*].

[10]It is understood that a State Democratic Party in selecting and certifying delegations to the National Convention thereby undertakes to assure that such delegates have been selected through a process in which all Democratic voters have had a full and timely opportunity to participate.

In determining whether a state party has complied with this mandate, the convention shall require that:

(1) The unit rule not be used in any stage of the delegate selection process; and

(2) All feasible efforts have been made to assure that delegates are selected through party primary, convention, or committee procedures open to public participation within the calendar year of the National Convention.

Transcript of Proceedings: The 35th Quadrennial Convention of the Democratic National Convention, Aug. 26-29, 1968, at 269 [transcript errors corrected], *quoted in* Segal, *Delegate Selection Standards: The Democratic Party's Experience,* 38 GEO. WASH. L. REV. 873, 879 (1970).

[11]Except for loyalty and anti-discrimination requirements, the Democrats operated until 1968 largely without imposing rules of delegate selection on state organizations. Segal, *supra* note 10, at 876-77. At the 1968 Convention, however, the Party adopted its mandate and authorized a commission to "aid State Democratic Parties in fully meeting the responsibilities and assurances thus required", *Id.* at 878; this gave the national apparatus greatly expanded powers of scrutiny over state selection processes. *See generally* Schmidt & Whalen, *Credentials Contests at the 1968—and 1972—Democratic National Conventions,* 82 HARV. L. REV. 1438 (1969). The commission, under the chairmanship of Senator George McGovern, decided that guidelines were necessary to enforce the mandate. Guidelines were therefore developed and promulgated to state parties, and it was on the basis of such guidelines that the California challengers first disputed the primary results. When a hearing officer appointed by the Credentials Committee found that the winner-take-all arrangement did not violate the guidelines, *Hearing* 7-8, the challengers switched to the argument that the primary had violated the 1968 mandate itself. Brown v. O'Brien, No. 72-1628, at 8-9 (D.C. Cir. July 5, 1972).

The California delegates argued that the 1968 mandate did not require abolition of winner-take-all primaries; indeed, they argued that the 'legislative history' of the mandate led to the contrary conclusion. *Id.* at 9. The delegates said further that the acceptance of the guidelines by all the candidates, and by national and state party officials, as well as explicit national party approval of California's arrangement, *Hearing* 3, prevented the Credentials Committee from altering or re-interpreting the rules after the election.

Committee sustained this challenge and unseated 151 of McGovern's delegates,[12] the ousted Californians sought judicial relief, alleging that the Credentials Committee and the national party had violated their fourteenth amendment rights to due process[13] and equal protection of the laws.[14] (They were joined by ousted delegates from Illinois, who had sued separately but whose case was decided jointly by the courts.[15])

The complaint was dismissed by the district court.[16] The court of appeals then affirmed the dismissal of the Illinois complaint but reversed the dismissal of the California complaint, remanding to the district court with instructions to declare the Credentials Committee ruling null and void and to enjoin the Party from excluding the McGovern delegates.[17] Justiciability was not even addressed by the appellate court. Nor did the court of appeals' opinion appear to have difficulty in finding requisite state action[18] on the authority of *Terry v. Adams*[19] and *Georgia v. Natinal Democratic Party*.[20] Instead, the court examined the force of 1968 mandate and the McGovern guidelines[21] and held that the Credentials Committee had violated due process of law by defying these guidelines.[22]

The California challengers and the Democratic Party immediately

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[12]The intraparty authority as to the McGovern Guidelines is somewhat unclear. The National Democratic Committee had adopted the guidelines at a February, 1971 meeting. Brown v. O'Brien, No. 72-1628, at 6 (D.C. Cir. July 5, 1972). It was they who had assured the state party that the winner-take-all primary was in full compliance. Yet Eli Segal, who had served as counsel for the McGovern Commission, wrote in 1970 that the National Committee had no right to approve the guidelines after their development. "In essence," he wrote, "the National Convention should be viewed as a self-contained legal system. . . . [t]he legality of the [mandate] and the Commission's efforts to implement it are subject to judicial review by the 1972 Credentials Committee and the Convention itself." Segal, *supra* note 10, at 883 n.58.

[13]Brown v. O'Brien, No. 72-1628, at 5-6 (D.C. Cir. July 5, 1972).

[14]Plaintiffs asserted that delegates from twelve states were selected pursuant to some variant of the winner-take-all principle. *Id.* at 12 n.4.

[15]Fifty-nine Illinois delegates were excluded when challengers alleged violation of several guidelines involving open and fair processes for delegate selection. The challengers' allegations were supported by a hearing officer and affirmed by the full Committee. In their suit, the ousted Illinois delegates urged that each of the guidelines as applied to them was unconstitutional, either abridging their rights as delegates under Illinois law or, insofar as they imposed quotas, violating their rights under the equal protection clause. *Id.* at 12-22. Though the case was considered jointly with the California challenge, this note will not discuss the issues it raised.

[16]92 S. Ct. at 2719.

[17]Brown v. O'Brien, No. 72-1628 (D.C. Cir. July 5, 1972).

[18]*Id.* at 6.

[19]345 U.S. 461 (1953).

[20]477 F.2d 1271 (D.C. Cir.) (per curiam), *cert. denied*, 404 U.S. 858 (1971).

[21]The guidelines are discussed in notes 11-12 *supra*.

[22]No. 72-1628, at 10-12.

petitioned the Supreme Court for a writ of certiorari, asking for an expedited hearing and a temporary stay of the court of appeals' order. The Court convened but did not hear the parties or ask for briefs. Instead they granted a stay of the appellate decision until a subsequent date. The effect was to "unseat" the elected McGovern delegates. The Court's *per curiam* decision expressed reluctance to permit judicial interference in the "internal determinations of a national political party."[23] The Court asserted that such action would be unprecedented, distinguishing *Terry v. Adams* and *Smith v. Allwright*[24] as cases "in which claims are made that injury arises from invidious discrimination based on race in a primary contest within a single State."[25] Noting that the Convention itself was a "forum" for possible redress, the Court gave the Democrats responsibility for untangling the combatants and settling the fight.[26]

Justice Marshall, joined by Justice Douglas, registered a strong dissent.[27] He quarreled with the intimation that the issue was nonjusticiable as a political question, recalling that "[h]alf a century ago, Justice Holmes . . . made it clear that a question is not 'political' in the jurisdictional sense, merely because it involves the operations of a political party . . ."[28] Marshall argued that the separation-of-powers considerations which underlay the doctrine were inapplicable to political parties; that judicially manageable standards, mandated by *Baker v. Carr*,[29] were clearly available to judge the merits of the claim; and that the involvement of the state at all levels of the primary and general election for President provided the necessary state action.[30]

THE SUPREME COURT AND THE POLITICAL QUESTION DOCTRINE

According to *Powell v. McCormack*,[31] justiciability resolves itself into two considerations: "whether the claim presented and the relief sought are of the type which admit of judicial resolution [and] whether

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[23]92 S. Ct. at 2720.

[24]321 U.S. 649 (1944).

[25]92 S. Ct. at 2720 n.1.

[26]The full Convention subsequently reversed the decision of the Credentials Committee for reasons not altogether judicial or deliberate. N.Y. Times, July 11, 1972, at 1, col. 8.

[27]92 S. Ct. at 2721.

[28]*Id.* at 2723. Justice Marshall was referring to Justice Holmes' remarks in Nixon v. Herndon, 273 U.S. 536, 540 (1927).

[29]369 U.S. 186, 217 (1962).

[30]92 S. Ct. at 2724.

[31]395 U.S. 486 (1969).

the structure of the Federal Government renders the issue presented a 'political question'. . . ."[32] It is not surprising that the political question doctrine has been the subject of much disagreement, for it is closely tied to fundamental constitutional debates on the justification and purpose of judicial review in a democratic society.[33] The Supreme Court has favored a separation-of-powers interpretation of the doctrine in recent cases.[34] In fact, it has departed from that interpretation only in the direction of greater judicial intervention.

A leading case interpreting the political question doctrine is *Baker v. Carr*.[35] The appellants in *Baker* sued complaining that the Tennessee legislature, contrary to its own constitution,[36] had not reapportioned itself at regular intervals to reflect population changes.[37] Alleging that they were without other means of relief, appellants claimed they had been denied equal protection of the laws under the fourteenth amendment.[38] A three-judge district court invoked procedural grounds, including nonjusticiability, to forego a decision on the merits.

The Supreme Court remanded the case to the district court, partly because of its misinterpretation of justiciability. It was not a case's *political flavor* which brought it within the doctrine, but whether the

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[32]*Id.* at 516-17.

[33]Those who follow Chief Justice Marshall's reasoning in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), that judicial review is a duty imposed by the Constitution tend to see justiciability as a question of the separation of powers. Thus Professor Wechsler insisted in his grand defense of this "classical" tradition," [A]ll the doctrine can defensibly imply is that the courts are called upon to judge whether the Constitution has committed to another agency of government the autonomous determination of the issue raised, a finding that itself requires an interpretation." Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 7-8 (1959).

This view has been strongly attacked for the rigidity of its insistence on the necessity of judicial intervention. Learned Hand argued that courts had the positive duty to intervene only where there was a particular reason to do so, even when another agency had exceeded its constitutional authority. L. HAND, THE BILL OF RIGHTS 1-30 (1958). In this analysis, the political question doctrine became proof of the court's discretion to intervene or remain apart. Alexander Bickel's influential theory of the role of the judiciary similarly assigned justiciability a place among devices to postpone, on procedural grounds, certain difficult questions which the Court judged might strain its social legitimacy to decide. Bickel, *The Supreme Court 1960 Term, Foreword: The Passive Virtues*, 75 HARV. L. REV. 40 (1961). For a more complete discussion of the underpinnings of the political question doctrine, *see* Scharpf, *supra* note 4.

[34]*See generally* note 6 *supra*.

[35]369 U.S. 186 (1962).

[36]*Id.* at 188-89.

[37]*Id.* at 191.

[38]The logic was that insofar as a representative from an urban area might represent thousands more voters than one from a rural area, the voting power of the urban dweller was debased relative to that of the rural voter.

configuration of circumstances made it a threat to separation of powers.[39] In an extensive review of cases, the majority carefully demonstrated that no litmus paper test sufficed to explain justiciability decisions. "[S]weeping statements to the effect that all questions touching foreign relations are political questions"[40] as with generalizations about other ostensibly proscribed judicial areas, were simply inaccurate.

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherance to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[41]

Despite the highly charged political issue of the apportionment of political power between urban and rural residents in Tennessee, the majority in *Baker* saw nothing to deter the district court from reaching a decision on the merits. The Tennessee legislature was not a coordinate political department at the crucial federal level, and judicial standards were available to decide the issue.[42]

Frankfurter and Harlan strongly dissented from the *Baker* decision.[43] Frankfurter read the plaintiff's claim as a covert use of the Guaranty Clause,[44] which the Court had long held to be nonjusticiable.[45] Further, and more important for purposes of this discussion, he insisted

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[39]369 U.S. at 209-10.

[40]*Id.* at 211.

[41]*Id.* at 217.

[42]This was in fact not a procedural argument but a substantive one. Brennan, Black, Warren and Douglas eventually came to insist that extra-mathematical factors, such as a balance between geographical regions within a state, were impermissible if they led to a debasement of comparative voting strength. Reynolds v. Sims, 377 U.S. 533 (1964); Wesberry v. Sanders, 376 U.S. 1 (1964).

[43]Frankfurter echoed many of the arguments he had advanced in an earlier redistricting case, Colegrove v. Green, 328 U.S. 549 (1946), which had been controlling until *Baker.*

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

[45]The original case on the Guaranty Clause was Luther v. Borden, 48 U.S. (7 How.) 1 (1849). While agreeing with Frankfurter that Guaranty cases were nonjusticiable, the *Baker* majority saw the Guaranty Clause as defining the judiciary's relation to Congress, not its relation to the states, 369 U.S. at 210, and rejected Frankfurter's claim that any complaint which could be restated as a Guaranty case was thereby barred from review. *Id.* at 227.

the question was the sort of complex political decision in which the courts had no business engaging.[46]

The majority of the Court, however, was able, consistent with separation of powers, not only to intervene in *Baker v. Carr,* but to sanction a series of reapportionment cases at the state,[47] county,[48] even municipal[49] levels—both in general and in primary elections—in which similar claims of voting debasement were voiced.

Among these cases was *Wesberry v. Sanders*[50] in which the Court affirmed both its strong commitment to protect voting rights and its boldness in the face of difficult political situations. Appellants in *Wesberry* were members of Georgia congressional districts who claimed that malapportionment gave less populous districts far greater proportional influence in Congress. The respondents countered that article I, section 4 of the Constitution gave the states authority over such districting, subject to Congressional legislation.[51] In a decision which some observers interpreted as a move beyond a separation-of-powers theory,[52] Justice Black saw support in *Baker* for the proposition that "nothing in the language of that article gives support to a construction that would immunize state congressional apportionment laws which debase a citizen's right to vote from the power of the courts . . . a power recognized at least since our decision in *Marbury v. Madison.*"[53]

Recently, in a case decided under another provision of the Constitution, the Supreme Court again displayed the same kind of judicial assertiveness in a justiciability dispute. In *Powell v. McCormack,*[54] black congressman Adam Clayton Powell sought to be seated in the

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[46]In *Colegrove* Frankfurter had written: "Nothing is clearer than that this controversy concerns matters that bring courts into immediate and active relations with party contests. . . . It is hostile to a democratic system to involve the judiciary in the politics of the people." 328 U.S. at 553-54.

[47]*E.g.,* Lucas v. Forty-Fourth Gen. Assembly, 377 U.S. 713 (1964); Davis v. Mann, 377 U.S. 678 (1964); WMCA, Inc. v. Lomenzo, 377 U.S. 633 (1964).

[48]*E.g.,* Avery v. Midland County, 390 U.S. 474 (1968); Simon v. Lafayette Parish Police Jury, 226 F. Supp. 301 (W.D. La. 1964); Bianchi v. Griffing, 217 F. Supp. 166 (E.D.N.Y. 1963).

[49]Ellis v. Mayor & City Council, 352 F.2d 123 (4th Cir. 1965).

[50]376 U.S. 1 (1964).

[51]The Times, Places, and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or altar such Regulations, except as to the Places of chusing Senators.

[52]Kauper, *Some Comments on the Reapportionment Cases,* 63 MICH. L. REV. 243, 244 (1964); Tollett, *supra* note 4, at 459.

[53]376 U.S. at 6.

[54]395 U.S. 486 (1969).

House of Representatives after being excluded by a decision of House members angry over Powell's misuse of funds. Powell's opponents claimed that article I, section 5 of the Constitution[55] gave Congress the power to judge its membership and made the issue of seating him nonjusticiable. The Court responded that it alone possessed supreme authority to interpret the Constitution, even those sections that involved "textually demonstrable constitutional commitments" to other branches.[56] The Court also directly confronted the argument that decision of the case had involved a "potentiality of embarrassment from multifarious pronouncements by various departments" or expressed a "lack of the respect due coordinate branches" within *Baker's* definition of justiciability. With ironic modesty, Chief Justice Warren wrote that reaching the merits "would require no more than an interpretation of the Constitution . . . ."[57]

It should be clear from *Baker, Wesberry,* and *Powell* that the Court has not seen the political question doctrine as a warning to tread gingerly when political passions are aroused and partisan voices are raised. The doctrine appears more theoretical than prudential; it is grounded in the Court's interpretation of its proper function as limited by inherent judicial capacity and by constitutional delegation of responsibilities to other branches at the federal level.

THE POLITICAL QUESTION DOCTRINE AND THE POLITICAL PARTIES

Having established the doctrinal framework, we must now examine its specific application to political parties to determine if the courts have found any general grounds to exempt party affairs from review. As the majority in *O'Brien* intimated, *Smith v. Allwright* and *Terry v. Adams* strongly suggest that the Supreme Court has not regarded *all* political party affairs as nonjusticiable where they affect constitutionally protected activity.[58] The *Smith* court insisted that blacks be allowed a vote in the state Democratic Party primary, even though the Party Convention had voted to exclude them.[59] In *Terry,* the Court saw through an

[55]"Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members . . . . Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member."

[56]395 U.S. at 521, *quoting* Baker v. Carr, 369 U.S. 186, 217 (1962).

[57]395 U.S. at 548. "Such a determination falls within the traditional role accorded courts to interpret the law, and does not involve a 'lack of the respect due [a] coordinate [branch] of government'. . . . The alleged conflict that such an adjudication may cause cannot justify the courts' avoiding their constitutional responsibility." *Id.* at 548-49.

[58]92 S. Ct. at 2720 n.1.

[59]321 U.S. at 656-63.

insidious twist on this "white primary" arrangement. Hoping to escape judicial scrutiny, a private "Jaybirds Association" had been formed which held its own primary prior to the officially sanctioned Democratic primary. The Jaybird winners almost without exception ran for Democratic office and were perennially successful. In finding that this ostensibly private political activity was subject to judicial review, the Court proclaimed its unwillingness to be mocked by subterfuge.[60]

The O'Brien reference to *Smith* and *Terry* seems to imply, however, that *only* where race is involved will the Court overcome a traditional reluctance to disturb political parties. This note will examine the four cases the *O'Brien* majority cited for its theory of judicial noninterference, attempting to show that even they refute the Court's inference.

One of those cases, *Lynch v. Torquato*,[61] involved a complaint by residents of a Pennsylvania county that their Democratic County Chairman was chosen under state law by precinct leaders representing precincts of widely varying population. The appellants argued that under *Gray v. Sanders*[62] such a "unit system" denied them equal protection of the laws. Additionally, they argued that the Democratic Chairman's right personally to select a stand-in whenever a candidate in a Democratic primary withdrew also denied them equal protection. The circuit court dismissed the appeal and distinguished between the right to select *general* governmental representatives and the right to select other kinds of representatives. The court, however, reserved judgment on the alleged undemocratic process by which the Chairman appointed a stand-in candidate.[63] In fact, although the court refused to intervene in the election of the party's internal manager, it confessed that it *might enjoin* the selection of a stand-in by the unrepresentative Chairman if the question arose in concrete form.[64]

In *Ray v. Blair*,[65] the Supreme Court refused to grant mandamus to force certification by the Alabama Democratic Executive Chairman of a candidate for presidential elector who refused to sign a loyalty oath to the Democratic Party. Again, the Court's reason for the denial was not that it eschewed all party primary disputes but that such disputes were immaterial *unless* they violated some constitutional or statutory

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[60] 345 U.S. at 469-70.
[61] 343 F.2d 370 (3d Cir. 1965).
[62] 372 U.S. 368 (1963).
[63] 343 F.2d at 372.
[64] *Id.* at 372-73.
[65] 343 U.S. 214 (1952).

provision.[66]

The other two cases on which the *O'Brien* majority relied both involved claims that procedures used in the selection of delegates to state party conventions violated strict one-man, one-vote standards. In *Irish v. Democratic-Farmer-Labor Party,*[67] the court seemed to grasp at a myriad of reasons for deciding against the appellant. It mentioned judicial reluctance to enter intra-party disputes. It declared the issue nonjusticiable, both because of a lack of judicially manageable standards—offering no explanation why the Supreme Court's insistent progression of decisions from *Baker* to *Gray* were inapposite—and "perhaps" because of a lack of respect due coordinate branches of government.[68] Not content to rest on these grounds, however, the court, admitting that the judiciary had properly intervened in party affairs for racial *and constitutional principles,* held that there was nothing of constitutional significance in the alleged malapportionment of the Democratic state convention.[69]

Smith v. State Executive Committee[70] involved a claim that the Democratic Party's method of selection of delegates to the Georgia state convention violated equal protection. The court found that since party officials had invoked their discretion to permit open attendance at the last convention, the rules *as applied* were not actionable. It thus avoided the decision whether it would have intervened had an actual violation occurred. Nevertheless, the court urged the party to find better procedures, quoting *Lynch's* speculation that despite hesitation about meddling in party affairs, a violation of constitutionally protected rights might require it.[71]

These last two cases, which have received serious criticism in more recent court decisions,[72] were essentially rearguard actions to protect state party conventions from the logic of *Baker* and *Gray.*[73] Neverthe-

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[66]*Id.* at 227.

[67]399 F.2d 119 (8th Cir. 1968).

[68]*Id.* at 121.

[69]*Id.* at 120.

[70]288 F. Supp. 371 (N.D. Ga. 1968).

[71]*Id.* at 376.

[72]Georgia v. National Democratic Party, 477 F.2d 1271 (D.C. Cir.) (per curiam), *cert. denied,* 92 S. Ct. 109 (1971); Maxey v. State Democratic Committee, 319 F. Supp. 673 (W.D. Wash. 1970); *see* Bode v. National Democratic Party, 452 F.2d 1302 (D.C. Cir. 1971), *cert. denied,* 92 S. Ct. 684 (1972).

[73]The courts worked to find reasons why equal protection principles, although they applied to presidential party primaries, did not apply to delegate selection which occurred at party conventions. The history of Supreme Court decisions involving voting rights, as we have seen, argues that such loopholes should not be tolerated. *See* cases cited notes 6, 47 *supra.*

less, each was careful to admit that in circumstances other than those they adjudicated, intervention would be permissible, even mandatory.

CONCLUSION

The *O'Brien* majority correctly noted general judicial reluctance to become involved in political party disputes. However, even those cases they cited for this proposition indicate intervention is proper when party practices violate the Constitution. This determination is not surprising; indeed, the theoretical foundations of the political question doctrine seem to forbid any other conclusion. Political parties, however influential in national affairs, are not a coordinate branch of government entitled to deference because of separation of powers. Furthermore, if party voting arrangements are justiciable when they violate one provision of the Constitution (as in *Smith* and *Terry*), it is difficult to conceive why they may be held nonjusticiable when they allegedly contravene another.

Such considerations combine to make the Court's "grave doubts" puzzling. One explanation for the doubts is that the Court plans to abandon the separation-of-powers interpretation for a prudential theory. If the Court's remarks in *O'Brien* portend an imminent about-face of such major proportions, it is understandable that they have preferred to await a more propitious opportunity to expound their change.

A second possible conclusion is that the Court would distinguish between state parties and national parties for purposes of the justiciability doctrine. Yet the considerations which *Baker* cited as determinative of justiciability[74] seem irrelevant to any distinction between state and national parties. More important, at least since *United States v. Classic*,[75] the Court has recognized that an election is a fabric of a single piece; there is no rational point at which the courts should cease their vigilant protection of the right of suffrage.

A better conclusion, one to which the Court several times made allusion, is that the intricate relations between the various Democratic "players"—the McGovern Commission, the National Committee, the Credentials Committee—and the pressure of time prevented the Court

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[74]369 U.S. at 217; *see* note 41 and accompanying text *supra*.

[75]313 U.S. 299, 318 (1941): "Where the state law has made the primary an integral part of the procedure of choice . . . the right of the elector to have his ballot counted at the primary is likewise included in the right protected by Article I, § 2. And this right of participation is protected just as is the right to vote at the election . . . ."

from reaching a rapid decision on the merits.[76] Only an explanation grounded in momentary reticence rather than absolute refusal is consonant with the nature of the doctrine and the history of its application.

Constitutional Law—First Amendment—The Balancing Process for Free Exercise Needs a New Scale

Personal freedoms have been affected substantially by the steadily increasing scope of governmental regulation.[1] In *Wisconsin v. Yoder*,[2] the Supreme Court granted the Amish people an exemption from the compulsory education laws of the state, basing its decision on first amendment free exercise of religion grounds. The potential tension between the free exercise of religion and extensive regulation is exacerbated in *Yoder* by a contemporary emphasis on education, by the interests of minors whose educational and religious futures are directly affected by the Court's ruling, by the question of survival of a devout separatist sect, and by the political reality that numerous exemptions will make a regulatory scheme unworkable.

Three sets of Amish parents in Wisconsin,[3] believing it sinful to expose their children to the worldliness of the county consolidated high school, held their children out of public school in violation of the Wisconsin compulsory education law, which requires attendance to the age of sixteen.[4] They were prosecuted, found guilty, and were fined five dollars each.[5] The convictions were affirmed by the state circuit court,

[76]The Court recently granted certiorari and vacated judgment, remanding to the court of appeals with instructions to dismiss as moot. 41 U.S.L.W. 3182 (U.S. Oct. 10, 1972).

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[1]A good example of this tension is a requirement that all children in a school salute the American flag and pledge allegiance. Such an exercise is forbidden to Jehovah's Witnesses by a literal reading of the Ten Commandments. In Board of Educ. v. Barnette, 319 U.S. 624 (1943), the Supreme Court held this requirement an unconstitutional infringement of free exercise.

[2]92 S. Ct. 1526 (1972).

[3]Respondents in the case were Jonas Yoder, Ardin Yutzy, members of the Old Order Amish Religion, and Wallace Miller, a member of the Conservative Amish Mennonite Church. Their children, Frieda Yoder, aged fifteen, Barbara Miller, aged fifteen and Vernon Yutzy, aged fourteen, were all graduates of the eighth grade of public school. *Id.* at 1529 n. 1.

[4]WIS. STAT. ANN. § 118.15 (1972). The pertinent provisions of the statute are:

> (1) (a) Unless the child has a legal excuse or has graduated from high school, any person having under his control a child who is between the ages of 7 and 16 years shall cause such child to attend school regularly during the full period and hours, religious holidays excepted, that the public or private school in which such child should be enrolled is in session until the end of the school term, quarter or semester of the school year in which he becomes 16 years of age.

[5]92 S. Ct. at 1529-30.