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NOTES

JUDICIAL INTERVENTION IN NATIONAL POLITICAL CONVENTIONS: AN IDEA WHOSE TIME HAS COME

It is the recognized position in this country that courts . . . have no power to interfere with political parties in the choice of their candidates nor to regulate or control the methods and agencies by which they are selected.

Brown v. Costen, 176 N.C. 63,
65-66, 96 S.E. 659, 660-61
(1918) (Hoke, J.)

The right to vote is too important in our free society to be stripped of judicial protection

Wesberry v. Sanders, 376 U.S. 1, 7
(1964) (Black, J.)

In the early morning hours of July 11, 1972, the Democratic National Convention refused to seat fifty-nine members of the Illinois delegation elected in that state's primary of March 21, 1972.¹ In so doing, the Convention approved the finding of its Credentials Committee² that these delegates were selected in violation of Democratic Party rules,³ even though they were elected in accordance with Illinois law.⁴

¹ N.Y. Times, July 12, 1972, § 1, at 18, col. 7; see T. WHITE, *THE MAKING OF THE PRESIDENT* 1972, at 174-76 (1973).

² N.Y. Times, July 12, 1972, § 1, at 18, col. 7-8; see T. WHITE, *supra* note 1, at 164-66.

³ 1968 Democratic Guideline C-6 provided:

In mandating a full and meaningful opportunity to participate in the delegate selection process, the 1968 Convention meant to prohibit any practice in the process of selection which made it impossible for Democrats to participate. Since the process by which individuals are nominated for delegate positions and slates of potential delegates are formed is an integral and crucial part of the process by which delegates are actually selected, the Commission requires State Parties to extend to the nominating process all guarantees of full and meaningful opportunity [*sic*] to participate in the delegate selection process.

117 CONG. REC. 32,917 (1971) (remarks of Senator McGovern). A hearing officer engaged by the Credentials Committee found that the procedures used to select these 59 members of the Illinois delegation violated that guideline because the delegates were

selected outside the arena of public participation by, and given the massive support and endorsement of, the Democratic organization in Chicago . . . to the exclusion of

A few days before the Convention opened (but several days after the Credentials Committee recommendation was made) the challenged delegates brought suit for declaratory and injunctive relief in the District Court for the District of Columbia.⁵ The delegates asked the court to: (1) declare that they, the winners of the March primary, were the only legitimate delegates to the Miami Convention from the City of Chicago and (2) enjoin the Convention from adopting the recommendation of the Credentials Committee to the effect that a rival slate of Chicago delegates be seated.⁶

The district court dismissed the complaint for lack of a justiciable question.⁷ On appeal, the Court of Appeals for the District of Columbia ruled that the case presented a justiciable question, but sustained the Credentials Committee decision on the merits.⁸ Then, within hours of the opening of the Convention, the plaintiffs asked the Supreme Court to stay the court of appeals judgment. The Court granted the plaintiffs' request on the grounds that on matters of such "great delicacy" it preferred to defer decision to the Convention.⁹

other candidates not favored by the organization . . . [Moreover, the procedures used by the Democratic organization to endorse particular candidates for delegate positions in the Illinois primary did not involve] written and publicized rules . . . [or] notice to the public such as would permit interested Democratic electors to participate [in the party's pre-primary endorsement procedure].

O'Brien v. Brown, 409 U.S. 1, 7-8 (1972).

⁵ ILL. ANN. STAT. ch. 46, § 7-5 (Smith-Hurd 1972).

⁶ Brown v. O'Brien, 469 F.2d 563 (D.C. Cir.), *judgment stayed*, 409 U.S. 1 (1972).

⁷ See O'Brien v. Brown, 409 U.S. 1, 10 (1972). The Illinois plaintiffs claimed that the reform guidelines were unconstitutional. See *The Supreme Court, 1971 Term*, 86 HARV. L. REV. 1, 221 (1972).

⁸ See O'Brien v. Brown, 409 U.S. 1, 10 (1972); Keane v. National Democratic Party, Civil No. 1320-72 (D.D.C. July 3, 1972) (unreported), *rev'd*, 469 F.2d 563 (D.C. Cir.), *judgment stayed*, 409 U.S. 1 (1972).

⁹ O'Brien v. Brown, 409 U.S. 1, 2 (1972).

⁹ *Id.* at 5. The Illinois challenge was only one half of the *Brown* case. The other half involved a suit brought by a group of California delegates elected in that state's primary, but whose credentials were also rejected by the Committee.

Senator George McGovern had won the California presidential primary of June 6, 1972, with 45% of the popular vote. N.Y. Times, June 8, 1972, § 1, at 1, col. 7. Under California's winner-take-all system, however, the entire California delegation to the Democratic Convention was pledged to the winner of the primary, regardless of the winning candidate's percentage of the vote. CAL. ELECTIONS CODE § 6201 (West 1961). After losing the primary, Senator McGovern's major opponents, Senators Hubert Humphrey and Edmund Muskie, objected to this procedure, claiming that California Democrats who had expressed a preference for candidates other than Senator McGovern would have no voice at the Convention. Such a result would have been contrary to the spirit of the Call to the 1972 Convention which, in part, provided:

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

Schmidt & Whalen, *Credentials Contests at the 1968—and 1972—Democratic National Conventions*, 82 HARV. L. REV. 1438, 1456 (1969). But see T. WHITE, *supra* note 1, at 27-28.

The Supreme Court's per curiam decision in *O'Brien v. Brown*¹⁰ was predictable. Until the court of appeals decision in *Brown*, no federal court had ever injected itself into the deliberative processes of a national political convention.¹¹ In past years, both federal and state courts had assumed that intraparty disputes were essentially struggles for political power, involving no questions of constitutional import.¹²

The action of the 1972 Convention in unseating the Illinois delegates challenged this judicial assumption. It revealed the power of a national political convention to restrict a citizen's access to the machinery for electing the President of the United States.¹³ And, at the very least, it called for a re-examination of those doctrines of law and perceptions of history which have prevented the courts from applying constitutional standards to the workings of national political conventions.¹⁴

The district court refused to disturb the Credentials Committee decision, but the court of appeals voted two-one to reverse the judgment below. *Brown v. O'Brien*, 469 F.2d 563 (D.C. Cir.), judgment stayed, 409 U.S. 1 (1972). The Supreme Court stayed the judgment of the circuit court in the California challenge at the same time that it stayed the circuit court's decision on the Illinois question. *O'Brien v. Brown*, 409 U.S. 1 (1972). However, in the case of the California delegates, the Convention refused to follow the advice of its Credentials Committee and avoided any further confrontation with the courts on the California question. *N.Y. Times*, July 12, 1972, § 1, at 19, col. 5.

¹⁰ 409 U.S. 1 (1972). In addition to requesting that the Supreme Court stay the judgment of the court of appeals, the Illinois plaintiffs also petitioned the Court for a writ of certiorari to review the court of appeals judgment on the merits. *Id.* at 2. Although the Court granted the petitioners' request to stay the lower court judgment, it took no immediate action on their request for certiorari. *Id.* at 3-5. The Supreme Court apparently preferred to wait until the beginning of the new term and consider this petition at the regular time. Justice Douglas, in his dissenting opinion, pointed out that, of course,

[T]he petitions for certiorari [would] not be voted on until October, at which time everyone knows the [case would] be moot. So the action [of the Court] granting the stays [when combined with the denial of certiorari is] an oblique and covert way of deciding the merits.

Id. at 6 (Douglas, J., dissenting). *But see* notes 135-40 and accompanying text *infra*.

¹¹ 409 U.S. at 5; *see* *Smith v. State Executive Comm. of the Democratic Party*, 288 F. Supp. 371, 376 (N.D. Ga. 1968).

In recent years, some lower courts have ventured far enough into internal party processes to oversee state managed procedures for the selection of delegates to the national convention. *See Bode v. National Democratic Party*, 452 F.2d 1302 (D.C. Cir. 1971); *Georgia v. National Democratic Party*, 447 F.2d 1271 (D.C. Cir. 1971); *Ripon Soc'y v. National Republican Party*, 343 F. Supp. 168 (D.D.C. 1972); *Maxey v. Washington State Democratic Comm.*, 319 F. Supp. 673 (W.D. Wash. 1970). *But see* *Stassen for President Comm. v. Jordan*, 377 U.S. 914 (1964); *Irish v. Democratic-Farmer-Labor Party*, 399 F.2d 119 (8th Cir.), *aff'g* 287 F. Supp. 794 (D. Minn. 1968). For a possible explanation of the different results in these cases, *see* note 26 *infra*.

¹² *See* *Smith v. State Executive Comm. of the Democratic Party*, 288 F. Supp. 371, 375 (N.D. Ga. 1968); *Irish v. Democratic-Farmer-Labor Party*, 287 F. Supp. 794, 805 (D. Minn. 1968). *See generally* R. HANSON, *THE POLITICAL THICKET: REAPPORTIONMENT AND CONSTITUTIONAL DEMOCRACY* (1966).

¹³ 409 U.S. at 10.

¹⁴ This Note will also explore the question of how a court could apply constitutional standards to nominating conventions once it decides that it should do so. *See* notes 75-128 and accompanying text *infra*.

I

LEGAL OBSTACLES TO JUDICIAL INTERVENTION IN PARTY AFFAIRS

The right of political parties to manage their own affairs has been protected by the courts through at least two techniques. When courts have been asked to intervene in intraparty disputes, they have claimed that issues arising from such controversies were political questions and therefore nonjusticiable.¹⁵ Or, on occasion, they have avoided this procedural device¹⁶ entirely and have simply contended that the Constitution includes substantive protections for political party autonomy.¹⁷ If a court were freshly to re-examine the immunity,

¹⁵ *Irish v. Democratic-Farmer-Labor Party*, 399 F.2d 119, 121 (8th Cir. 1968). A finding by a court that a question is nonjusticiable does not mean that the court lacks jurisdiction to hear it. The issues of jurisdiction and justiciability are distinguishable. See *Baker v. Carr*, 369 U.S. 186, 198 (1962).

In the instance of nonjusticiability, consideration of the cause is not wholly and immediately foreclosed; rather, the Court's inquiry necessarily proceeds to the point of deciding whether the duty asserted can be judicially identified . . . its breach judicially determined, and whether protection for the right can be judicially molded. In the instance of lack of jurisdiction the cause . . . [simply] does not "arise under" the Federal Constitution, laws . . . treaties . . . [or] jurisdictional statute . . . [or is not] a case or controversy [within the meaning of the Constitution].

Id. The question of jurisdiction, then, is one of judicial power; the question of justiciability is only one of judicial policy.

A further policy limitation on the exercise of jurisdiction by the federal courts is the doctrine of abstention. A federal court may abstain from exercising its jurisdiction (1) when it is asked to decide a case on federal constitutional grounds when that case can be decided on the basis of state law (*Railroad Comm'n v. Pullman Co.*, 312 U.S. 496 (1941)), (2) when federal judicial action would place the federal courts in needless conflict with a state's administration of its own affairs (*Martin v. Creasy*, 360 U.S. 219 (1959)), and (3) in order to allow a state the opportunity to resolve an unsettled question on its own law (*Compare Thompson v. Magnolia Petroleum Co.*, 309 U.S. 478 (1940), with *Meredith v. Winter Haven*, 320 U.S. 228 (1943)). See generally C. WRIGHT, *LAW OF FEDERAL COURTS* § 52, at 196-208 (1970).

Like the doctrine of justiciability, the abstention doctrine represents a policy determination by the federal courts that under certain circumstances, jurisdiction should not be exercised, even though it could be. *But see Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1824). The *Brown* case does not appear to fit into any category of cases to which the abstention doctrine applies.

¹⁶ *But see Note, The Presidential Nomination: Equal Protection at the Grass Roots*, 42 S. CAL. L. REV. 169, 181 (1969).

¹⁷ See *Note, Freedom of Association and the Selection of Delegates to National Political Conventions*, 56 CORNELL L. REV. 148, 153 (1970); cf. *Scales v. United States*, 367 U.S. 203, 228-30 (1961); *Gerende v. Board of Supervisors of Elections*, 341 U.S. 56 (1951).

When state courts have dealt with the question, the results have been similar, but the rationale has been ambiguous. The general rule in state courts has been that, in the absence of statutory authority, the judiciary cannot intervene in internal party affairs. See *Foster v. Ponder*, 235 Ark. 660, 361 S.W.2d 538 (1962); *Morris v. Peters*, 203 Ga. 350, 46 S.E.2d 729 (1948); *State ex rel. Padgett v. Vanderburgh Circuit Court*, 236 Ind. 43, 138 N.E.2d 143 (1956); *Wallace v. Cash*, 328 S.W.2d 516 (Ky. 1959); *Democratic-Farmer-Labor State Cent. Comm. v. Holm*, 227 Minn. 52, 33 N.W.2d 831 (1948); *Phillips v. Gallagher*, 73 Minn. 528, 76 N.W. 285 (1898); *State ex rel. McCurdy v. DeMaioribus*, 9 Ohio App. 2d 280, 224 N.E.2d 353 (1967); *Wagoner County Election Bd. v. Plunkett*, 305 P.2d 525 (Okla. 1956); *Wall v. Currie*, 147 Tex. 127, 213 S.W.2d

of political parties from judicial intervention, it would first have to determine whether these traditional theories are still viable.

A. *The Political Question Doctrine*

No court will attempt to settle "political questions."¹⁸ The judicial definition of that term, however, is not necessarily consistent with its popular meaning. The fact that *Brown* raises the issue of the right to participate in the "political" process does not automatically mean that the case presents a nonjusticiable political question.¹⁹

In *Baker v. Carr*,²⁰ the Supreme Court defined a political question as one which would involve the judiciary in a conflict with another branch of the federal government.²¹ "The nonjusticiability of a political question [then] is primarily a function of the separation of powers."²² The Court even provided several variations of the doctrine in order to illustrate how it might be applied in various situations:

It is apparent that several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each has one or more elements which identify it as essentially a function of the separation of powers. 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 a court's undertaking independent resolution without expressing lack of respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.²³

816 (1948); *State ex rel. Smith v. Bosworth*, 145 W. Va. 753, 117 S.E.2d 610 (1960).

The cases do not always make clear whether state courts feel they have no power to oversee party affairs without statutory authorization, or whether they feel they have the power, but do not think that it is appropriate to use it.

¹⁸ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 164-66 (1803); see *Powell v. McCormack*, 395 U.S. 486 (1969); *Baker v. Carr*, 369 U.S. 186 (1962); *Colegrove v. Green*, 328 U.S. 549 (1946). See generally A. BICKEL, *THE LEAST DANGEROUS BRANCH* 183-98 (1962); Friedelbaum, *Baker v. Carr: The New Doctrine of Judicial Intervention and Its Implications for American Federalism*, 29 U. CHI. L. REV. 673 (1962); Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 YALE L.J. 517 (1966).

¹⁹ See *Nixon v. Herndon*, 273 U.S. 536, 540 (1927). See also *Nixon v. Condon*, 286 U.S. 73 (1932).

²⁰ 369 U.S. 186 (1962).

²¹ *Id.* at 210; see C. WRIGHT, *supra* note 15, at 45, 47-48.

²² 369 U.S. at 210; see C. WRIGHT, *supra* note 15, at 45. Questions involving the guaranty clause (U.S. CONST. art. IV, § 4) are also considered political questions. See 369 U.S. at 218-37. See also Kirby, *The Constitutional Right to Vote*, 45 N.Y.U.L. REV. 995, 1004-06 (1970).

²³ 369 U.S. at 217 (emphasis added).

This restatement has been used recently to hold that issues involving the internal workings of a political party are nonjusticiable political questions.²⁴ Although no court has ever argued that the actions of a political party are due the same judicial deference as the actions of either the President or the Congress, it has been held in *Irish v. Democratic-Farmer-Labor Party*,²⁵ that delegate selection disputes are political questions solely because they provide no judicially discoverable and manageable standards for their resolution.²⁶

The *Irish* analysis is a misapplication of the *Baker* rationale. The phrase "lack of judicially manageable standards" was not meant to give lower courts *carte blanche* to avoid deciding delicate questions.²⁷ The phrase must be used only in the context of the basic *Baker* definition of a political question, that is, one which is essentially a function of the separation of powers within the federal government.²⁸ A lack of judicially manageable standards is not an independent criterion for a finding of a "political question." Rather, the phrase is meant to be a possible explanation of judicial refusal to act when confronted with a potential conflict with Congress or the President and *not* with a political party.²⁹

Of course, even if a court were to insist upon adopting the *Irish* interpretation of *Baker*,³⁰ it still does not automatically follow that there are no judicially manageable standards for the resolution of a controversy stemming from a political convention. The issues raised in *Brown* involve fundamental first and fourteenth amendment rights.³¹ And the Supreme Court has clearly stated that judicial standards for dealing with *these* questions "are well developed and familiar."³²

²⁴ See *Irish v. Democratic-Farmer-Labor Party*, 287 F. Supp. 794, 804 (D. Minn.), *aff'd*, 399 F.2d 119 (8th Cir. 1968). *But see* *Bode v. National Democratic Party*, 452 F.2d 1302, 1305 (D.C. Cir. 1971); *Georgia v. National Democratic Party*, 447 F.2d 1271, 1277 (D.C. Cir.), *cert. denied*, 404 U.S. 858 (1971).

²⁵ 287 F. Supp. 794 (D. Minn.), *aff'd*, 399 F.2d 119 (8th Cir. 1968).

²⁶ 399 F.2d at 121; 287 F. Supp. at 805. This was not the only reason why the *Irish* court refused to intervene in the dispute. The plaintiffs brought suit within weeks of the opening of the convention, leaving little time for the court to decide the matter and no time to give the state party a chance to correct the alleged unconstitutional delegate selection procedures.

²⁷ See 369 U.S. at 229; Comment, *O'Brien v. Brown: The Politics of Avoidance*, 58 IOWA L. REV. 432, 439-40 (1972); Note, *Constitutional Law: Conventional Reluctance or Doctrinal Departure? The Political Question Doctrine*, 51 N.C.L. REV. 290, 298-301 (1972).

²⁸ Thus, it might be argued that a reason why a confrontation between the courts and one of the other branches of government is to be avoided is that if such a conflict did arise, there would be no "judicially manageable standards for its resolution."

²⁹ See notes 22-26 and accompanying text *supra*. *But see* Scharpf, *supra* note 18, at 517.

³⁰ See, e.g., *Richardson v. United States*, 465 F.2d 844, 873 (3d Cir. 1972), *cert. granted*, 410 U.S. 953 (1973); *Atlee v. Laird*, 347 F. Supp. 689, 700 (E.D. Pa. 1972), *aff'd mem. sub nom. Atlee v. Richardson*, 411 U.S. 911 (1973).

³¹ See notes 103-28 and accompanying text *infra*.

³² 369 U.S. at 226.

B. *Constitutional Protections of Political Party Autonomy*

Political parties are not mentioned in the Constitution. Yet their obvious importance to the American political system has compelled the courts to develop a variety of constitutional theories to protect parties from unwarranted governmental interference.³³ For example, courts have found that the right of individuals to organize and manage a political party is protected by the right of suffrage³⁴ or the right of assembly.³⁵ Once it was even held that the right of citizens to form a political party was guaranteed simply as an inherent right of a free people.³⁶ More recent holdings, that political activities are protected by the first amendment guarantee of free political association, buttress the earlier theories.³⁷

These constitutional protections of a party's right to conduct its own affairs are premised upon a judicial conception of political parties as essentially private voluntary associations.³⁸ This traditional view of political parties, however, does not accurately reflect the nature of political organizations in the twentieth century. For that

³³ The constitutional theories designed to protect the integrity of political parties have been developed to keep party management free from state regulatory legislation. See notes 42-44 and accompanying text *infra*. The political question doctrine, on the other hand, is primarily a tool used by the courts to deny requests for judicial intervention in party matters when *individual* litigants request the court to take some action relating to political parties. See notes 19-31 and accompanying text *supra*. Since both theories have been used to safeguard political party autonomy, it is not surprising that many courts confuse the two rationales. See cases cited in note 18 *supra*.

³⁴ See, e.g., *Sarlls v. State ex rel. Trimble*, 201 Ind. 88, 166 N.E. 270 (1929); *Ex parte Wilson*, 7 Okla. Crim. 610, 125 P. 739 (1912); *State ex rel. McGrael v. Phelps*, 144 Wis. 1, 128 N.W. 1041 (1910). For a more recent treatment of the constitutional right to vote, see Kirby, *supra* note 22, at 995-1014.

³⁵ See, e.g., *Britton v. Board of Election Comm'rs*, 129 Cal. 337, 61 P. 1115 (1900); *Riter v. Douglass*, 32 Nev. 400, 109 P. 444 (1910). See also G. ABERNATHY, *THE RIGHT OF ASSEMBLY AND ASSOCIATION* (1961).

³⁶ *Davidson v. Hanson*, 87 Minn. 211, 219, 92 N.W. 93, 95 (1902).

³⁷ See Note, *supra* note 17, at 152-60. See also D. FELLMAN, *THE CONSTITUTIONAL RIGHT OF ASSOCIATION* 38-42 (1963); G. ABERNATHY, *supra* note 35, at 190-96.

The modern right of free association has developed primarily as a response to certain state attempts to prevent black citizens from joining pressure groups such as the NAACP. See *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958). See also H. KALVEN, *THE NEGRO AND THE FIRST AMENDMENT* 65-121 (1965). The right to participate in political party affairs is similarly guaranteed. *United Pub. Workers v. Mitchell*, 330 U.S. 75, 94 (1947). Political participation is, of course, subject to some limitations. *United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers*, 41 U.S.L.W. 5122 (U.S. June 25, 1973) (Hatch Act restrictions on partisan political activities of federal civil servants reaffirmed); *Scales v. United States*, 367 U.S. 203 (1961) (protection of national security against subversive organizations); *Gerende v. Board of Supervisors of Elections*, 341 U.S. 56 (1951) (same); *United States v. CIO*, 335 U.S. 106 (1948) (political contributions made by labor unions subject to restriction).

³⁸ See Friedman, *Reflection Upon the Law of Political Parties*, 44 CALIF. L. REV. 65 (1956); Starr, *The Legal Status of American Political Parties*, 34 AM. POL. SCI. REV. 439 (1940). But see *Rice v. Elmore*, 165 F.2d 387 (4th Cir. 1947), *cert. denied*, 333 U.S. 881 (1948).

reason, the historic judicial recognition of general party autonomy is no longer warranted.

1. *The Evolution of American Political Parties*

The first political parties were hardly more than informal groups of men clustered around the philosophies of Hamilton or Jefferson.³⁹ These associations behaved quite differently from their modern counterparts. They had no continuing organization, they fixed no membership criteria, they wrote no platforms.⁴⁰ Candidates were nominated by "caucuses" or secret meetings of influential men.⁴¹

With the growth of Jacksonian democracy the character of American political parties changed.⁴² Party organization and nominating procedures became more complex, and the impact of national political parties on the political process grew more profound.⁴³ Yet, in spite of these changes, the courts continued to treat political parties as if they were still the private clubs of the revolutionary period. Indeed, throughout most of the nineteenth century, state attempts to establish minimal regulation of political parties were continuously struck down.⁴⁴

It was not until the Progressive Era (1880-1920) that the courts began to tolerate some governmental interference in political party affairs.⁴⁵ Evidence of widespread political corruption convinced the courts that reforms in this area were legitimate exercises of state police power.⁴⁶ As a result, extensive state regulation of selected phases of the political process became commonplace.⁴⁷

³⁹ Friedman, *supra* note 38, at 65.

⁴⁰ *Id.*

⁴¹ Samuel Adams described one such gathering as follows:

This day learned that the Caucus Club meets at certain times in the garret of Tom Hawes, the Adjutant of the Boston Regulars. He has a large house . . . and the whole club meets in one room. There they smoke tobacco till you cannot see from one end of the garret to the other. They drink flip I suppose and they choose a moderator who puts questions to the vote regularly; and selectmen, assessors, collectors, firewards, and representatives are regularly chosen before they are chosen in town

Id. at 65-66.

⁴² See S. LORANT, *THE GLORIOUS BURDEN* 13-128 (1968).

⁴³ See A. SCHLESINGER, *THE AGE OF JACKSON* 30-44 (1945).

⁴⁴ See, e.g., *Britton v. Board of Election Comm'rs*, 129 Cal. 337, 61 P. 1115 (1900). See also P. DAVID, R. GOLDMAN & R. BAIN, *THE POLITICS OF NATIONAL PARTY CONVENTIONS* 17-31 (1960); Friedman, *supra* note 38, at 66.

⁴⁵ See, e.g., *Ransom v. Black*, 54 N.J.L. 446, 24 A. 489 (1892); *State ex rel. Plimmer v. Poston*, 58 Ohio St. 620, 51 N.E. 150 (1898); *DeWalt v. Bartley*, 146 Pa. 529, 24 A. 185 (1892). See Friedman, *supra* note 38, at 67-68; Note, *Limitations on Access to the General Election Ballot*, 37 COLUM. L. REV. 86, 90 (1937).

⁴⁶ See, e.g., *State ex rel. Nordin v. Erickson*, 119 Minn. 152, 156, 137 N.W. 385, 386 (1912); *State ex rel. McCarthy v. Moore*, 87 Minn. 308, 311, 92 N.W. 4, 5 (1902); *People ex rel. Coffey v. Democratic Gen. Comm.*, 164 N.Y. 335, 340, 58 N.E. 124, 125 (1900); R. HORN, *GROUPS AND*

The Progressive Era reforms created a tension between the traditional notion of political party autonomy and the newly created, albeit limited, interest of the state in party affairs. This friction was reflected in the ambivalent manner in which national parties conducted their business in the years following the Progressive Era.⁴⁸ Convention orators were quite willing to proclaim their party's supremacy over state law.⁴⁹ Yet, until the 1960's, conventions of both parties carefully avoided actions which might ignite a confrontation with state courts.⁵⁰

This willingness of the national conventions to avoid testing the limits of their self-proclaimed supremacy had two consequences. First, procedures by which delegates were chosen to the national convention were rarely attacked by the national party.⁵¹ These procedures were established by state law and administered by state agencies. Challenging them would only have led to further state-party conflict.⁵² Second, the legal status of political parties was frozen. By

THE CONSTITUTION 96 (1956); Mitau, *The Status of Political Party Organization in Minnesota Law*, 40 MINN. L. REV. 561, 576-78 (1956).

Such institutions as the Australian [secret] ballot and the direct primary could be upheld only if the courts approved of state regulation of matters heretofore regulated by the parties themselves. Friedman, *supra* note 38, at 66.

⁴⁷ See generally V. KEY, *POLITICS, PARTIES AND PRESSURE GROUPS* 168-78 (5th ed. 1964); C. MERRIAM & L. OVERACKER, *PRIMARY ELECTIONS* (1928); L. OVERACKER, *THE PRESIDENTIAL PRIMARY* (1926).

⁴⁸ Segal, *Delegate Selection Standards: The Democratic Party's Experience*, 38 GEO. WASH. L. REV. 873, 874 (1970).

⁴⁹ In the heat of the Eisenhower-Taft credentials fights during the 1952 Republican National Convention, Governor Alfred Driscoll of New Jersey proclaimed:

I have spent the best years of my life strengthening the judicial system in my State. I have a healthy respect for the American judicial system. I have also a healthy respect for the judicial system of Georgia. But I submit to you that this is the supreme court of Republicanism and is the proper tribunal before which the issues raised by the contest must be settled.

Id. at 874 n.5.

⁵⁰ Thus, in 1912, the Democratic Convention modified its long-standing practice of enforcing the unit rule when to do so would have violated a newly enacted Ohio primary law. And in 1916, the Republican Convention modified its rules calling for delegates to be selected by congressional district in order to avoid a clash with states whose laws provided for delegate selection on an at-large basis. *Id.* at 874-75.

⁵¹ *Id.* at 875. Segal argues that until 1964, the Republicans were less willing to accede to state regulation of every aspect of delegate selection. *Id.* However, until 1964 it does not appear that either party was willing to make a frontal assault on such laws. Schmidt & Whalen, *supra* note 9, at 1446-50.

⁵² Although the convention is theoretically free to disregard such laws, individual delegates are answerable to state authorities. See *Cousins v. Wigoda*, 409 U.S. 1201 (Rehnquist, Circuit Justice, 1972). See also Segal, *supra* note 48, at 874 n.7.

In addition to the historical rationale, there are a number of other possible explanations for the willingness of past conventions to accept state regulation of the delegate selection process. Some political scientists have argued that convention acquiescence in this area is merely a

avoiding conflict with state laws, the parties gave the courts no further opportunities to delineate the right of national parties to manage their own affairs—especially in the context of a national convention.⁵³

Thus, until the mid-1960's, credentials contests at national conventions arose only over the loyalty of individual delegates to the national party.⁵⁴ The fact that a delegate (or delegation) was chosen "undemocratically" was not relevant. These earlier challenges raised only political issues, revolving around the question of what a national party could do "within a framework which recognizes the claims of individual conscience" to maintain itself as a viable entity.⁵⁵

In 1964, however, this entire pattern changed.⁵⁶ In the context of the civil rights movement of the mid-1960's, a number of Mississippi delegates to the Democratic Convention were challenged because state party selection procedures were drawn to prevent blacks from participating in the nominating process.⁵⁷ In response to the challenge, the Convention seated a token number of challengers and demanded that the regular Mississippi Democratic Party stop its discriminatory practices.⁵⁸

This challenge raised a number of deeper questions that had not been raised in the loyalty disputes. In a political system which makes

recognition of the concept of state sovereignty. P. DAVID, R. GOLDMAN & R. BAIN, *supra* note 44, at 176-78. One political scientist traces the Democratic Party's acceptance of state involvement to a Jacksonian [*sic*] belief in the importance of local government. Truman, *Federalism and the Party System*, in *FEDERALISM: MATURE AND EMERGENT* 115-36 (MacMahon ed. 1955). Finally, it has been argued that conventions have relied on state procedures because (1) the state regulations seemed to reflect a general commitment to "due process" and (2) the credentials committee was not equipped to look behind the form of those procedures. See Chambers & Rounda, *Reform of Presidential Nominating Conventions*, 56 VA. L. REV. 179, 211 (1970); Schmidt & Whalen, *supra* note 9, at 1447-48. Of course, the proponents of this last analysis would point out that when state procedures lose the appearance of "due process" the Convention is obligated to investigate them in spite of the limitations of the Credentials Committee as a forum for deciding such disputes.

⁵³ See note 50 *supra*. But see Williams, *The Twilight of State Action*, 41 TEXAS L. REV. 347, 361 (1963).

⁵⁴ See Schmidt & Whalen, *supra* note 9, at 1440. See generally R. BAIN, *CONVENTION DECISIONS AND VOTING RECORDS* (1960).

Probably the most extensive debate on the loyalty question in modern times occurred at the 1952 Democratic Convention. In the aftermath of the Dixiecrat defection to Strom Thurmond in 1948, an oath to support the nominees of the party was imposed upon all national convention delegates. Schmidt & Whalen, *supra* note 9, at 1440-42. In spite of some harsh rhetoric, loyalty pledges do not seem to have much practical significance in the Democratic Party. *Id.* at 1442-45; see Comment, *The Democratic Party's Approach to Its Convention Rules*, 50 AM. POL. SCI. REV. 553 (1956).

⁵⁵ Schmidt & Whalen, *supra* note 9, at 1445.

⁵⁶ T. WHITE, *THE MAKING OF THE PRESIDENT 1964*, at 277-82 (1965); Segal, *supra* note 48, at 877.

⁵⁷ Schmidt & Whalen, *supra* note 9, at 1450 n.50.

⁵⁸ *Id.* at 1450.

the two major parties the only effective means of achieving national power, the process of selecting delegates to the major national political conventions becomes crucial. For a convention to make decisions on delegate credentials solely on the basis of whether delegates were chosen in accordance with its conception of democracy allows it to effectively control that important aspect of the right to vote.⁵⁹

The 1968 Convention did not reflect on the issues raised in 1964,⁶⁰ but merely broadened the 1964 precedent. In Chicago, the Democratic Party adopted an entirely novel approach to delegate selection. It abandoned its traditional laissez-faire attitude toward state party selection machinery and authorized a special commission to set extensive guidelines for future conventions to follow.⁶¹ To some extent the

⁵⁹ *Id.* at 1456.

⁶⁰ See T. WHITE, *THE MAKING OF THE PRESIDENT 1968*, at 274-85 (1969).

⁶¹ The Convention's action was prospective in nature and did not affect delegates elected in 1968. Schmidt & Whalen, *supra* note 9, at 1438-40.

The decision to adopt new delegate selection guidelines was made after an extended and bitter debate reflecting rather fundamental divisions in the party about the extent to which rank and file members should take part in the nominating process. The majority report of the 1968 Credentials Committee recommended that the Call to the 1972 Convention include the following language:

It is the further understanding that a State Democratic Party in selecting and certifying delegates and alternates to the Democratic National Convention there[by] undertakes to assure that all Democrats of the state will have meaningful and timely opportunities to participate fully in the election or selection of such delegates and alternates.

Id. at 1455.

In addition, the Credentials Committee recommended the adoption of the following resolution to accompany the Call:

[T]he Chairman of the Democratic National Committee shall establish a special committee to aid the State Democratic Parties in fully meeting the responsibilities and assurances thus required for inclusion in the Call for the 1972 Convention, said Committee to report to the Democratic National Committee concerning its efforts and findings and said report to be available to the 1972 Democratic National Convention and the committees thereof.

Segal, *supra* note 48, at 878.

Both of the recommendations of the Credentials Committee were adopted. However, a number of delegates felt that the Call recommended by the Committee was too weak and proposed adding the following language to the Call:

It is understood that a State Democratic Party in selecting and certifying delegates to the National Convention thereby undertakes to assure that such delegates have been selected through a process in which all Democratic voters 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;
- (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.

Id. at 878-79. See also T. WHITE, *supra* note 1, app. B. It was over the addition of this language to

notion of "state sovereignty" was abandoned in 1964, when the Convention insisted that the state parties live up to a standard of full racial equality, and that they modify state laws and party rules when necessary. But the 1964 ruling affected comparatively few states. The new 1968 "democratic selection" rule, on the other hand, [required] a large number of states to reform their selection procedures or risk having their delegations unseated at the 1972 Convention.⁶²

The Illinois delegates involved in *Brown* were unseated because they were found to have been chosen in violation of procedures established in accordance with the 1968 mandate.⁶³

The handling of credentials challenges by the last three Democratic National Conventions raises questions about the wisdom of the traditional judicial policy of noninterference in intraparty disputes. The refusal of the courts to intervene in those controversies is based on the assumption that political parties are private, voluntary associations whose autonomy is constitutionally protected. Although that principle is well established,⁶⁴ the courts have also recognized that many of the functions performed by political parties are public in nature.⁶⁵ If political parties are now allowed to use uninhibited dis-

the Call that the most bitter fight over delegate selection procedures occurred. The additional language was adopted by the narrow margin of 1350 to 1206. Segal, *supra* note 48, at 879.

The passage of this minority report was the single vote on which the McCarthy-Kennedy-McGovern reform forces prevailed in the [1968] Convention. Although Vice President Humphrey has since supported the new rule, he had not done so at the time, and the dominant Humphrey majority on the . . . Committee opposed it. The passage of the minority report . . . was surprising at the time, and the explanation for it remains unclear. The following factors probably were involved: (1) confusion on the Convention floor which caused several delegations to ask the chairman to tell them what they were voting on; (2) a desire on the part of delegates who had just voted down the last of the minority reports on credentials to effect meaningful party reform and to satisfy the Convention minority; and (3) a key Convention vote from Missouri, a solidly Humphrey state, which cast all 60 of its votes for the minority report—apparently reflecting a strong personal appeal from Governor [now Senator] Harold Hughes of Iowa and, perhaps, a commitment to support rules reform made earlier when McCarthy supporters in the state abandoned a credentials challenge and a lawsuit attacking the state's use of the unit rule.

Schmidt & Whalen, *supra* note 9, at 1456 n.83. *But see* T. WHITE, *supra* note 1, at 18-21.

It is not clear whether the Convention actually contemplated that future conventions could unseat delegates elected in a primary under the guise of enforcing procedures for "democratic" selection of delegates. Schmidt & Whalen, *supra* note 9, at 1457.

⁶² Schmidt & Whalen, *supra* note 9, at 1456. For a further discussion of the meaning of the Call (as amended), see *id.* at 1457-65.

⁶³ See note 3 *supra*. The procedures established to implement the mandate of the 1968 Convention were drafted by the Commission on Party Structure and Delegate Selection, popularly known as the McGovern Commission. For the text of the reform guidelines, see 117 CONG. REC. 32,908 (1971) (remarks of Senator McGovern).

⁶⁴ See Bellamy, *Applicability of the Fourteenth Amendment to the Allocation of Delegates to the Democratic National Convention*, 38 GEO. WASH. L. REV. 892 (1970).

⁶⁵ See notes 45-47 and accompanying text *supra*.

cretion in the manner in which they conduct their internal affairs, they could effectively impair the opportunities for citizen participation in the political process just as drastically as an election official who refused "either to count [a citizen's] vote or to permit him access to the ballot box."⁶⁶

2. *The Evolution of the Internal Party Affair*

In assaying the history of American political parties, some courts have facetiously concluded that the judiciary has traditionally not become involved in "internal party affairs."⁶⁷ This conclusion is troublesome, for courts have involved themselves in party functions when particular abuses have required judicial attention.⁶⁸

The problem here is one of terminology. When political parties were private clubs, all party affairs could be considered "internal" and therefore beyond the scope of judicial review.⁶⁹ However, as political parties evolved from private associations into public institutions, and official supervision of some of their affairs became inevitable, the courts did not admit that their approval of government intervention in party matters represented a fundamental change in judicial attitude. Rather, the public regulation of specific party functions was justified on the somewhat obtuse ground that intervention was limited to regulating only the "external manifestations of party conduct" and not the party's internal management.⁷⁰

The relatively recent decision in *Lynch v. Torquato*⁷¹ illustrates this approach. There, the Court of Appeals for the Third Circuit had to decide whether to apply the Supreme Court's one-man-one-vote principle to the election of a Democratic County Chairman in Pennsylvania.⁷² The court refused to apply that standard. More significantly, the court used language that reveals both the logic and limitations of the internal-external rationale.

The people, when engaged in primary and general elections for the selection of their representatives in their government, may rationally be viewed as the "state" in action, with the consequence that the organization and regulation of these enterprises must be such

⁶⁶ Bellamy, *supra* note 64, at 892.

⁶⁷ See *Irish v. Democratic-Farmer-Labor Party*, 287 F. Supp. 794, 805 (D. Minn.), *aff'd*, 399 F.2d 119 (8th Cir. 1968). The *Brown* Court carefully avoided this overstatement. 409 U.S. at 4-5.

⁶⁸ See notes 45-47 and accompanying text *supra*.

⁶⁹ See notes 39-44 and accompanying text *supra*.

⁷⁰ Freidman, *supra* note 38, at 69.

⁷¹ 343 F.2d 370 (3d Cir. 1965).

⁷² See *Reynolds v. Sims*, 377 U.S. 533 (1964); *Wesberry v. Sanders*, 376 U.S. 1 (1964); *Gray v. Sanders*, 372 U.S. 368 (1963).

as accord each elector equal protection of the laws. In contrast, the normal role of party leaders in conducting internal affairs of their party, other than primary or general elections, does not make their party offices governmental offices or the filling of these offices state action which must satisfy the requirements of [the Constitution]⁷³

While this functional approach to internal party affairs might still have some utility when applied to a state party, its flaws become apparent when applied to current issues arising from a national political convention. National convention delegates nominate their party's candidates for the highest offices in the land and have the final word on all questions relating to the management of the national party itself. A delegate is, therefore, both a "government" and "non-government" official within the *Lynch* rationale. Indeed, the *Lynch* court frankly admitted the difficulties in applying the traditional internal-external rationale to a national convention.⁷⁴

A clearer approach to the problem would be to return to the old definition of an "internal party affair" as being *any* subject within the ambit of a political party's responsibility. Courts (and commentators) would then not have to wrestle with technical and confusing distinctions between external and internal party matters, but could frankly tackle the real question—when does the Constitution limit the autonomy of political parties in the management of their own affairs?

II

LEGAL PROTECTION FOR THE RIGHT OF POLITICAL PARTICIPATION

Once a court is willing to consider adjudicating a dispute arising from the presidential nominating process of a national political party, it will then have to apply substantive constitutional standards to individual cases. Obviously, there are no direct precedents to guide a court now willing to enter this unique and complex field.⁷⁵ The Supreme Court, however, has occasionally stepped into the nominating procedures of *state* parties when particularly invidious types of discrimination (combined with legislative inaction) have compelled a judicial remedy.

Two suits are most significant in this regard. In *Smith v. Allwright*,⁷⁶ discrimination against black voters in the Texas Demo-

⁷³ 343 F.2d at 372 (footnotes omitted).

⁷⁴ *Id.* at 372 n.5.

⁷⁵ See note 11 and accompanying text *supra*.

⁷⁶ 321 U.S. 649 (1944).

cratic primary justified Supreme Court intervention.⁷⁷ More recently, in *Gray v. Sanders*,⁷⁸ the Supreme Court applied what was to become the rationale of the reapportionment cases⁷⁹ to a peculiar Georgia nominating procedure which potentially disenfranchised urban voters.⁸⁰ In both of these cases, the Court found that party

⁷⁷ On May 24, 1932, the Democratic Party of Texas passed the following resolution:

Be it resolved that all white citizens of the State of Texas who are qualified to vote under the Constitution and laws of the State shall be eligible to [sic] membership in the Democratic party and, as such, entitled to participate in its deliberations.

Id. at 656-57.

In compliance with this resolution, election judges in Harris County, Texas, refused to allow the petitioner, a black citizen of the county, to vote in the 1932 Texas primary. The Supreme Court found that the petitioner had been denied his right to vote by virtue of his race in violation of the fifteenth amendment. *Id.* at 664-66. Accordingly, the Court allowed his claim for damages under 8 U.S.C. §§ 31, 43 (now codified at 42 U.S.C. §§ 1973, 1983 (1970), respectively).

⁷⁸ 372 U.S. 368 (1963).

⁷⁹ *Avery v. Midland County*, 390 U.S. 474 (1968); *Reynolds v. Sims*, 377 U.S. 533 (1964); *Wesherry v. Sanders*, 376 U.S. 1 (1964); *Gray v. Sanders*, 372 U.S. 368 (1963); *Baker v. Carr*, 369 U.S. 186 (1962).

⁸⁰ Candidates for state-wide office in Georgia were nominated by a two-step process. After party members voted in the regular primary (step one), the Democratic Party employed a "county unit system" to make the final determination on the party's nominee for various offices (step two).

Candidates for nominations who received the highest number of popular votes in a county were considered to have carried the county and were entitled to two votes for each representative to which the county was entitled in the lower house of the Georgia General Assembly. A majority of county unit votes nominated a United States Senator or Governor, a "plurality of the county unit vote nominated [other state officers]." 372 U.S. at 371.

The difficulty with this system was that a candidate who received fewer popular votes than a competitor could, through the improper apportionment of legislative districts, receive the nomination.

A different result was reached on somewhat similar facts in *Forston v. Morris*, 385 U.S. 231 (1966). The *Forston* dispute arose out of the 1966 gubernatorial election in Georgia. Three candidates competed in that election: Howard Callaway (Republican); Lester G. Maddox (Democrat); and Ellis Arnall (Independent). No candidate received a majority of the votes, although Mr. Callaway led the field with 47.07% of the popular vote. *Id.* at 236.

According to a Georgia constitutional provision in effect in 1966, when no gubernatorial candidate received a majority of the vote, the Georgia General Assembly selected a governor from among the top two candidates. *Id.* at 232. As a result, the heavily Democratic General Assembly elected Mr. Maddox governor even though he had received fewer popular votes than his Republican opponent. Mr. Callaway's supporters then brought suit, claiming, on the basis of *Gray*, that those who voted for Mr. Callaway would be disenfranchised if Mr. Maddox were allowed to assume the governor's chair. By a five-four vote the Supreme Court rejected the plaintiff's prayer. *Id.* at 236.

One commentator explained the different results in *Gray* and *Forston* this way:

[T]here were strong political reasons for not overturning the Georgia legislature's choice of Lester Maddox. *Forston* was argued on December 5, 1966; on that same day, the Court held that the Georgia legislature had violated the first amendment rights of Julian Bond in disqualifying him from membership. *Bond v. Floyd*, 385 U.S. 116 (1966). The Court's decision in *Forston* was announced just one week later, on December 12, 1966, and its political impact was lost on no one.

Note, *Constitutional Safeguards in the Selection of Delegates to Presidential Nominating Conventions*, 78 YALE L.J. 1228, 1241 n.49 (1969). See generally Chambers & Rotunda, *supra* note 52, at 199-200.

procedures were actually public functions⁸¹ and that therefore they were governed by the fourteenth or fifteenth amendments.⁸² Since the fourteenth amendment is an appropriate vehicle for court action in the context of presidential nominations,⁸³ the principles of *Smith* and *Gray* serve as excellent points of departure for a discussion of the application of constitutional standards to national political conventions.⁸⁴

A. State Action

In both *Smith* and *Gray*, the Court found state action, citing three factors. First, both nominating procedures effectively limited the choice of the electorate at the general election.⁸⁵ Second, both procedures were part of the machinery for choosing public officials.⁸⁶ Third, both procedures were regulated by the state.⁸⁷ For these reasons, the Texas and Georgia systems constituted integral parts of the election process, making the actions of the respective state parties state action.⁸⁸ These same characteristics are also present in the *presidential* nominating process.

1. The Effect of the Nominating Process on the General Election

The clearest point of similarity between the state and national nominating procedures is the fact that the nomination of presidential

⁸¹ See generally *Evans v. Newton*, 382 U.S. 296 (1966); *Marsh v. Alabama*, 326 U.S. 501 (1946).

⁸² *Smith* was decided on the basis of the fifteenth amendment (321 U.S. at 666); *Gray* was based on the fourteenth (372 U.S. at 376-81). However, both amendments demand a finding of state action before their protections can be invoked, so on the state action issue both cases are directly in point.

⁸³ See notes 103-28 and accompanying text *infra*.

⁸⁴ Some commentators question whether there is much validity left in the state action concept as a limitation on either the fourteenth or fifteenth amendments. See, e.g., Silard, *A Constitutional Forecast: Demise of the "State Action" Limit on the Equal Protection Guarantee*, 66 COLUM. L. REV. 855 (1966). Rather imprecise notions of state involvement (e.g., *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961); *Shelley v. Kraemer*, 334 U.S. 1 (1948)) and state regulation (cf. *Public Util. Comm'n v. Pollak*, 343 U.S. 451, 461-66 (1952)) have been used in such a way that the concept is "circumscribed by very liberal borders." Note, *One Man, One Vote and Selection of Delegates to National Nominating Conventions*, 37 U. CHI. L. REV. 536, 538 (1970). See also Black, *The Supreme Court—Foreword*, 81 HARV. L. REV. 69, 95 (1967). However, in the area of judicial regulation of a national convention, these concepts do present some difficulties, if only because of the historic notion that the Constitution protects political party autonomy. See notes 33-66 and accompanying text *supra*.

⁸⁵ *Gray v. Sanders*, 372 U.S. at 374-76; *Smith v. Allwright*, 321 U.S. at 659-62. Compare *United States v. Classic*, 313 U.S. 299 (1941), with *Grovey v. Townsend*, 295 U.S. 45 (1935).

⁸⁶ *Gray v. Sanders*, 372 U.S. at 371; *Smith v. Allwright*, 321 U.S. at 653.

⁸⁷ *Gray v. Sanders*, 372 U.S. at 370; *Smith v. Allwright*, 321 U.S. at 663.

⁸⁸ *Gray v. Sanders*, 372 U.S. at 375; *Smith v. Allwright*, 321 U.S. at 659. The "integral relation" of a primary and a general election remains the same regardless of whether the general election is contested or uncontested. *United States v. Classic*, 313 U.S. 299, 318 (1941).

candidates by the major political parties limits the effective choice of the electorate at the general election to at least as great a degree as it does on the state level. Indeed, the choice of the voter at the national level is even more restricted than it is in a state or local election.⁸⁹

2. *National Convention Delegates as Public Officials*

Because political parties are no longer private associations of individuals, it must follow that convention delegates are not members of an exclusive club. Rather, they are officers of a public institution.⁹⁰ Although the position of convention delegates is not mentioned in the Constitution, delegates have nevertheless been chosen to perform a most significant public function—the nomination of the President and Vice President of the United States.⁹¹ They are the medium through which sovereign power is exercised by the people.⁹² As such, they are public officials in a very real sense.

3. *State Involvement in the National Convention*

The actions of national political conventions are not governed by the election laws of any state.⁹³ However, the institution of the national convention could not exist without state acquiescence and approval.

The Constitution provides that the legislatures of each state shall select that state's delegation to the electoral college "in such Manner

⁸⁹ [T]he great mass of the American electorate is grouped into political parties, to one or the other of which voters adhere with tenacity, due to their divergent views on questions of public policy, their interests, their environment, and various other influences, sentimental and historical. So strong with the great majority of voters are party associations, so potent the party slogan, so effective the party organization, that the likelihood of a candidate succeeding in an election without a party nomination is practically negligible. As a result, every voter comes to the polls on the day of the general election confined in his choice to those few candidates who have received party nominations, and constrained to consider their eligibility, in point of personal fitness, as affected by their party associations and their obligation to pursue more or less definite lines of policy, with which the voter may or may not agree. As a practical matter, the ultimate choice of the mass of voters is predetermined when the nominations have been made.

Newberry v. United States, 256 U.S. 232, 285-86 (1921) (Pitney, J., concurring); see Maxey v. Washington State Democratic Comm., 319 F. Supp. 673, 678 (W.D. Wash. 1970). See also Banzhaf, *One Man, 3.312 Votes: A Mathematical Analysis of the Electoral College*, 13 VILL. L. REV. 303 (1968); Note, *supra* note 16, at 172-74.

⁹⁰ See notes 65-66 and accompanying text *supra*. But see 29 C.J.S. *Elections* § 85 (1965).

⁹¹ See generally *Evans v. Newton*, 382 U.S. 296 (1966); *Marsh v. Alabama*, 326 U.S. 501 (1946); *Rice v. Elmore*, 165 F.2d 387, 391 (4th Cir. 1947).

⁹² Of course, not all public officials must be chosen by popular vote. Administrative officials may be appointed to public positions without regard to popular sentiment. *Sailors v. Board of Educ.*, 387 U.S. 105 (1967). Presumably, national convention delegates would not be classified as "administrative" under the *Sailors* rationale. See Note, *supra* note 80, at 1244.

⁹³ See generally A. REITMAN & R. DAVIDSON, *THE ELECTION PROCESS: VOTING LAWS AND PROCEDURES* (1972).

as the Legislature thereof may direct."⁹⁴ All states have adopted a procedure whereby state party central committees—or their equivalents—in each state nominate a slate of electors who are loyal to that party's national ticket.⁹⁵ The election of one of the two slates to the electoral college will depend, of course, upon the popular vote for President in that state.⁹⁶

If each state party did not have the power to nominate presidential electors, the national conventions would have little significance. The names of its nominees would simply not appear on the ballots which are printed under state auspices. Thus, each state has carefully tailored its electoral process to enable the national convention to nominate a presidential ticket.⁹⁷

The relationship of the national convention to each of its affiliates in the individual states is analogous to the relationship between the Jaybird Association and the Democratic Party of Texas, examined by the Supreme Court in *Terry v. Adams*.⁹⁸ In that case, the Court held that the Jaybird Association was a public agency,⁹⁹ even though it was free from state regulation. The private election which it conducted prior to the state-run Democratic primary consistently dictated the winner of that primary. The Jaybird election thereby made the state-operated nominating machinery perfunctory¹⁰⁰ just as the action of the national convention makes the official procedure for the designation of slates of electors a mere formality.

What distinguishes the national convention from the Jaybird primary is that the former is a meeting of representatives from all the states, but the Jaybird Association was composed of members from only one state. Even though each state party chooses the person who will head its ticket in concert with all the other state parties, the national convention, like the Jaybird primary, has "become an integral part, indeed the only effective part, of the [nominating]

⁹⁴ U.S. CONST. art. II, § 1, cl. 2.

⁹⁵ L. LONGLEY & A. BRAUN, *THE POLITICS OF ELECTORAL COLLEGE REFORM* 29, 188 n.18 (1972). Loyalty to the party is usually the most important qualification for appointment to the electoral college. "[A]s one well-known 1968 elector reported: 'My finest credentials were that each year I contributed what money I could to the party.'" *Id.* at 28-29.

⁹⁶ Electors are not legally bound to vote in a manner consistent with their pledges, and on rare occasions pledges are violated. *Id.* at 4-5. The method by which electors are chosen by the parties has a certain "chilling effect" on elector independence, however. *See* note 95 *supra*.

⁹⁷ In recent years some states have permitted slates of "unpledged electors" to be placed on the ballot, thereby allowing voters to circumvent the nominees of the major parties. L. LONGLEY & A. BRAUN, *supra* note 95, at 4-5. However, this phenomenon is still quite rare. *Id.*

⁹⁸ 345 U.S. 461 (1953).

⁹⁹ *Id.* at 466.

¹⁰⁰ *Id.* at 469.

process."¹⁰¹ This difference means only that on the presidential level all states act simultaneously on one phase of the question of "who shall rule and [who shall] govern."¹⁰²

B. *Substantive Constitutional Standards*

A court should have no difficulty in applying substantive constitutional standards to convention deliberations. The Supreme Court's attitude on questions involving political participation has been concisely summarized: "Any restriction on a person's ability to participate in the political process must be carefully scrutinized in a society where basic decisions are made and gain acceptability through the political mechanisms of a representative democracy."¹⁰³

The heart of political participation is the right to vote.¹⁰⁴ The equal protection clause of the fourteenth amendment provides the most significant safeguard for this fundamental right¹⁰⁵ by protecting it against unreasonable discrimination.¹⁰⁶ The due process clause of the fourteenth amendment might also be applicable, for procedural guarantees are inherent in any effective protection of voting rights.¹⁰⁷

The action of the 1972 Convention arguably infringed upon the right of a majority of Chicago primary voters to have their votes

¹⁰¹ *Id.*

¹⁰² *Id.*; see *Bode v. National Democratic Party*, 452 F.2d 1302 (D.C. Cir. 1971).

¹⁰³ *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1129 (1969); see *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 667 (1966).

¹⁰⁴ See *Williams v. Rhodes*, 393 U.S. 23, 30-31 (1968). See generally Kirby, *supra* note 22, at 1003-14.

The right of political association is also included within the ambit of the right of political participation. However, the right to vote clearly takes precedence over associational guarantees: No right is more precious in a free country than that of having a voice in the election of those who make the laws under which . . . we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.

Wesberry v. Sanders, 376 U.S. 1, 17 (1964).

¹⁰⁵ See *Reynolds v. Sims*, 377 U.S. 533, 554-55 (1964); *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964).

¹⁰⁶ A. BICKEL, *THE NEW AGE OF POLITICAL REFORM* 43-44 (1968). The right to vote has been protected against numerous abuses. See, e.g., *Gomillion v. Lightfoot*, 364 U.S. 339 (1960) (racially biased gerrymandering); *Smith v. Allwright*, 321 U.S. 649 (1944) (outright racial discrimination in party primary); *United States v. Classic*, 313 U.S. 299 (1941) (vote fraud); *Lane v. Wilson*, 307 U.S. 268 (1939) (destruction or alteration of voting lists); *Ex parte Yarbrough*, 110 U.S. 651 (1884) (physical coercion).

The Congress has also acted vigorously to protect the right to vote, especially in the face of racial discrimination. See Voting Rights Act of 1965, 42 U.S.C. §§ 1971, 1973a-p (1970). See generally U.S. COMM'N ON CIVIL RIGHTS, *POLITICAL PARTICIPATION* (1968).

¹⁰⁷ See *Pope v. Williams*, 193 U.S. 621 (1904); *Chambers & Rotunda*, *supra* note 52, at 203-04. *But see* Note, *supra* note 80, at 1237-38.

counted.¹⁰⁸ Whether those voters' rights were violated depends on the answer to two questions. First, is the right to vote in a presidential primary included in the right to participate in the political process?¹⁰⁹ Second, if the right of political participation is applicable to *Brown*, does it limit the rights of the states (and therefore the conventions) to choose presidential electors under article II of the Constitution?

1. *The Right To Vote in a Presidential Primary*

The right of a citizen to vote in a *state* primary was guaranteed in the white primary cases.¹¹⁰ The essential justification for this result was that the primaries formed an integral part of the election process.¹¹¹ The heart of these decisions was the conclusion by the Court that for political participation by any citizen to be meaningful, rank and file party members must have some voice in the nomination of candidates by the major parties. The Court held that the right to

¹⁰⁸ The Chicago delegation which was actually seated by the Convention was composed of party members who had run for delegate positions in the Illinois primary, but who had been defeated by the very people whose seats they were attempting to occupy. *N.Y. Times*, July 12, 1973, § 1, at 18, col. 8.

¹⁰⁹ Not all convention delegates are chosen by presidential primaries. However, the arguments for political participation applied to primary states are equally applicable in states where rank and file members choose delegates by other means (*e.g.*, state conventions).

The idea of Presidential primary elections is so naturally tailored to the American experience in democracy that no one can name its father or date its origins—except that it was born before the turn of this century somewhere “out west,” as a periodic wave of American restlessness came to crest in the Populist-Progressive movement. People, ordinary people—so ran the thought—should have the right to go into closed voting booths and there accept or repudiate the party bosses in naming the party's candidates to govern them.

T. WHITE, *supra* note 1, at 70. In 1972, 22 states held various types of Presidential primaries. *Id.* at 72 n.2.

¹¹⁰ *Terry v. Adams*, 345 U.S. 461 (1953); *Smith v. Allwright*, 321 U.S. 649 (1944); *United States v. Classic*, 313 U.S. 299 (1941); *Grovey v. Townsend*, 295 U.S. 45 (1935); *Nixon v. Condon*, 286 U.S. 73 (1932); *Nixon v. Herndon*, 273 U.S. 536 (1927); *Baskin v. Brown*, 174 F.2d 391 (4th Cir. 1949); *Rice v. Elmore*, 165 F.2d 387 (4th Cir. 1947), *cert. denied*, 333 U.S. 875 (1948).

The abuse which the Court sought to curb in the white primary cases was racial discrimination. However, as the reapportionment cases indicate, the right to participate in the political process is not protected against racial discrimination alone. *See Avery v. Midland County*, 390 U.S. 474 (1968); *Reynolds v. Sims*, 377 U.S. 533 (1964); *Gray v. Sanders*, 372 U.S. 368 (1963); *Baker v. Carr*, 369 U.S. 186 (1962). Rather, “the denial to the voter of an effective voice at the effective locus of effective decision-making is equally impermissible” regardless of the discrimination involved. Note, *supra* note 80, at 1246-48. Rather than the racial minorities involved in the white primary cases and the urban minorities in the reapportionment cases, delegates representing a *majority* of Chicago Democratic voters sought relief in *Brown*, but this did not make the deprivation of voting rights any less severe.

¹¹¹ *United States v. Classic*, 313 U.S. 299 (1941). This reasoning was also used by the Court in holding that primaries were public functions. *See* notes 70-81 and accompanying text *supra*. The finding of state action and the finding of a violation of substantive constitutional rights are, of course, “integrally related.”

exercise a choice between the *faits accomplis* of the major parties in the general election was not an effective means of political expression.¹¹²

The logic of the white primary cases applies with even greater force to the presidential nominating process. Because the selection of a president is the most important decision the electorate makes,¹¹³ the impact of the major party nominations is more profound,¹¹⁴ and the weight of one vote is more limited, in the general election than in elections on the state level.¹¹⁵ It follows that participation in the selection of a presidential nominee deserves even higher priority than participation in the nomination of lesser officials. In applying the rationale of the white primary cases to the problem raised by *Brown*, the comment of Mr. Justice Fortas, dissenting in *Forston v. Morris*,¹¹⁶ is especially relevant:

We have not heretofore been so beguiled by changes in the scenery that we have lost sight of principle. Here, too, we are dealing at least with the "impairment" of the vote—indeed, with the obliteration of its effect. It is not merely the casting of the vote or its mechanical counting that is protected by the Constitution. It is the function—the office—the effect given to the vote, that is protected.¹¹⁷

2. State Discretion Under Article II

Assuming the right to participate in the political process extends to voters in a presidential primary, one argument might still be used to maintain that this right can be limited by a political convention. The action of a national convention is state action because it forms an integral part of the process by which states select electors to the electoral college.¹¹⁸ However, the broad language of the constitutional provisions conferring that responsibility on the states might be interpreted as meaning that the discretion of the states in this area is unlimited.¹¹⁹ If this is so, then the latitude of the national convention as the arm of the state would be unlimited as well.¹²⁰

¹¹² Chambers & Rotunda, *supra* note 52, at 197-98; see note 89 and accompanying text *supra*.

¹¹³ See Note, *supra* note 80, at 1245-46.

¹¹⁴ P. DAVID, R. GOLDMAN & R. BAIN, *supra* note 44, at 70.

¹¹⁵ See note 89 *supra*.

¹¹⁶ 385 U.S. 231 (1966).

¹¹⁷ *Id.* at 249-50 (citations omitted).

¹¹⁸ See notes 85-102 and accompanying text *supra*.

¹¹⁹ "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress. . . ." U.S. CONST. art. II, § 1, cl. 2.

¹²⁰ The national convention is an agent of the state for the purpose of making the effective choice of presidential electors. See notes 87-95 and accompanying text *supra*.

The Supreme Court reviewed the power of the states to choose presidential electors in *Williams v. Rhodes*.¹²¹ In that case, the Ohio affiliate of Governor George Wallace's American Independent Party brought suit to challenge an Ohio statute that required third-party presidential candidates to obtain the signatures of a number of registered voters equal to fifteen percent of the votes cast in the last gubernatorial election in order to get his name on the ballot.¹²² The Court found the Ohio statute unconstitutional because "no State can pass a law regulating elections that violates the Fourteenth Amendment . . ."¹²³ Indeed, it was in *Rhodes* that Justices Black and Harlan clearly enunciated the right of effective political participation.¹²⁴

Although *Rhodes* did not specifically deal with the presidential nominating process, the impact of its logic on that subject may be significant. The *Rhodes* Court recognized that during the 1968 election, the views of a substantial minority of Ohio voters seemed to have been ignored by the major parties.¹²⁵ If these voters had been prohibited from voting for Governor Wallace, their right to effectively participate in the political process would have been seriously impaired.

As a practical matter, truly effective political participation is rarely achieved through third-party movements.¹²⁶ Even the most charismatic of third-party leaders is unlikely to prevent one of the two-party candidates from achieving a majority in the electoral college.¹²⁷ Effective political participation is the objective that *Rhodes* found in the Constitution, and that goal can best be realized when participation *within* the two major parties is guaranteed. As Governor Wallace's experience in 1972 amply demonstrated, the process of compromise and coalition-forming which takes place as the major conventions approach, offers the most substantial opportunity for real political impact.¹²⁸

¹²¹ 393 U.S. 23 (1968).

¹²² OHIO REV. CODE ANN. § 3517.01 (Anderson 1967).

¹²³ 393 U.S. at 29. The Court did not indicate the extent to which the states could legitimately limit the access of presidential candidates to the ballot. See Note, *One Person One Vote: The Presidential Primaries and Other National Convention Delegate Selection Processes*, 24 HASTINGS L.J. 256, 259-60 (1973).

¹²⁴ 393 U.S. at 30-34, 41-48; see Kirby, *supra* note 22, at 1003.

¹²⁵ 393 U.S. at 32-33.

¹²⁶ V. KEY, *supra* note 47, at 254-81.

¹²⁷ George Wallace's experience in 1968 illustrates the limits on the possible effectiveness of third-party movements within the American political system. T. WHITE, *supra* note 60, at 400-01. The experience of the Progressive ("Bull Moose") Party, captained by former President Theodore Roosevelt in 1912, proves the same point. V. KEY, *supra* note 47, at 263-65.

¹²⁸ [A] primary function of a political party in a democracy is the direction and control

III

REMEDIES

The courts have the power to oversee the activities of a national political convention.¹²⁹ There are a number of practical problems, however, which might limit court involvement. The most obvious of these is time.¹³⁰ As *Brown* vividly illustrates, lawsuits in this area are likely to arise on the eve of the national convention since most delegates are not selected very far in advance.¹³¹ This presents a court with a dilemma. If it decides the case immediately, it will not have had much of an opportunity to reflect upon the issues raised. If it considers the case carefully, however, the court might hand down its opinion during, or even after, the convention. In that situation, judicial intervention could throw the entire political process into chaos.¹³²

The injuries which can arise out of a national convention, however, may recur every four years; controversies like those surrounding *Brown* are therefore continuing ones. Consequently, a court may want to decide the merits of a case even though it is unable to grant

of the struggle for political power among men who may have contradictory interests and often mutually exclusive hopes of securing them. This the parties do by institutionalizing the struggle and emphasizing positive measures to create a strong and general agreement on policies.

Irish v. Democratic-Farmer-Labor Party, 287 F. Supp. 794, 805 (D. Minn.), *aff'd*, 399 F.2d 119 (8th Cir. 1968).

¹²⁹ See notes 85-128 and accompanying text *supra*.

¹³⁰ A remedy also might not be granted if it is too difficult to administer or if it is unlikely to be obeyed. See Note, *Regulation of Political Parties: Vote Dilution in the Presidential Nomination Procedure*, 54 IOWA L. REV. 471, 485 (1968).

In addition, if a suit is brought close to the time that the convention is scheduled to convene, a court probably will be in summer recess, thereby creating another practical problem. *Chambers & Rotunda*, *supra* note 52, at 205.

¹³¹ Indeed, one of the reforms mandated by the 1968 Convention was the requirement that all delegates to future conventions be chosen in the same calendar year that the convention is to be held. *Schmidt & Whalen*, *supra* note 9, at 1456.

¹³² If a decision on a credentials challenge were handed down during a convention, the court might be forced to stop the convention "in midstream." 409 U.S. at 10. If the court reached a decision a few weeks after the convention adjourned, it might be forced to declare the convention null and void and require that another convention be convened. *Id.* More ominously, if the court reversed a convention decision after the presidential election, it theoretically could be forced to declare the entire election invalid.

These eventualities, of course, will probably not occur. Courts are most unlikely to adopt such drastic remedies. This is not to say that such remedies are totally inconceivable.

[T]he court may direct a re-assembling of any [state nominating] convention or the holding of a new primary election where a [state] convention or primary election has been characterized by such frauds or irregularities as to render impossible a determination as to who rightfully was nominated or elected

N.Y. ELECTION LAW § 330(2) (McKinney 1964). See *Lowenstein v. Larkin*, 40 App. Div. 2d 604, 335 N.Y.S.2d 799 (2d Dep't), *aff'd*, 31 N.Y.2d 654, 288 N.E.2d 133, 336 N.Y.S.2d 249 (1972). See generally *The Supreme Court, 1971 Term*, *supra* note 6, at 223-28.

relief in the instant election.¹³³ "By restricting relief to subsequent [conventions], the courts would increase the availability of potential [equitable] remedies since the time factor is eliminated as a significant limitation."¹³⁴

Arguably, if a court heard a preconvention lawsuit but then allowed the convention to pass before decreeing (prospective) relief, there would be some question of mootness. However, the Supreme Court's decision in *Moore v. Ogilvie*¹³⁵ suggests that mootness need not present a problem here. In *Ogilvie*, a group of independent elector candidates sought relief against the enforcement of an Illinois statute which made it nearly impossible for the names of independent elector candidates to be placed on the ballot.¹³⁶ Notwithstanding that the case was argued and decided after the 1968 election had been held,¹³⁷ the Court found for the plaintiffs on the merits.¹³⁸ On the question of mootness, the Court held that when a "problem is 'capable of repetition, yet evading review,'" ¹³⁹ mootness will not preclude adjudication. Thus, even if time prevents judicial relief for particular litigants in a preconvention dispute, a prospective (equitable) remedy is still available.¹⁴⁰

In past years, the courts believed that the best way to facilitate participation in the political process was by remaining aloof from it. However, as the demand for political participation has grown stronger without a corresponding increase in the ability of the major parties to cope with it, this laissez-faire attitude of the courts has been shown to be misplaced. Indeed, by speaking eloquently on the right of

¹³³ Chambers & Rotunda, *supra* note 52, at 205 n.109.

¹³⁴ See Note, *supra* note 130, at 485. Prospective relief may raise a question of standing. A court will act only when a plaintiff has been harmed or is immediately threatened with harm. *Poe v. Ullman*, 367 U.S. 497, 504 (1961). Thus, it is unlikely that a plaintiff would have standing to sue unless and until there is some real possibility of a convention denying him the right to participate in the nominating process. This prospect might arise too late for the court to give relief. See, e.g., *Irish v. Democratic-Farmer-Labor Party*, 399 F.2d 119, 120 (8th Cir. 1968). However, a plaintiff might have standing to bring a suit well in advance of the convention if he could show that he has regularly participated in the nominating process in the past and plans to continue doing so in the future. Cf. *Bode v. National Democratic Party*, 452 F.2d 1302 (D.C. Cir. 1971); *Georgia v. National Democratic Party*, 447 F.2d 1271 (D.C. Cir.), *cert. denied*, 404 U.S. 858 (1971); *Maxey v. Washington State Democratic Comm.*, 319 F. Supp. 673 (W.D. Wash. 1970); *Smith v. State Executive Comm. of the Democratic Party*, 288 F. Supp. 371 (N.D. Ga. 1968). See also Note, *supra* note 30, at 473.

¹³⁵ 394 U.S. 814 (1969).

¹³⁶ *Id.* at 815.

¹³⁷ *Id.* at 814.

¹³⁸ *Id.* at 819.

¹³⁹ *Id.* at 816, quoting *Southern Pac. Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911).

¹⁴⁰ The remedies relied upon in the reapportionment cases might be helpful if a court chose to review state regulation of the delegate selection process (as opposed to the action of the national convention). See Note, *supra* note 130, at 485-86.

political participation and then refusing to protect that right in the most important arena of all, the Supreme Court has effectively undercut its own precedent.

If a court is unable or unwilling to grant prospective relief, it could consider the possibility of granting monetary damages to those whose right to vote has been infringed.¹⁴¹ Since the action of a convention is state action, party leaders who deny rank and file party members the right to vote, deprive those voters of a right guaranteed to them by the Constitution.¹⁴² Such an infringement may be compensated by monetary damages.¹⁴³ This remedy may be particularly valuable if a court finds that a convention dispute is not recurring and therefore not a proper subject for equitable relief.

To supplement judicial supervision, Congress could provide additional assistance to those wishing to participate in the nominating process. Congress has inherent power to regulate presidential elections.¹⁴⁴ Indeed, federal regulation of such matters as campaign contributions to presidential candidates¹⁴⁵ has been sustained on the basis of this inherent power.¹⁴⁶

In addition, Congress could exercise its power under section 5 of the fourteenth amendment¹⁴⁷ to guarantee an equal and effective voice in the electoral process to all party members.

Finally, the impact of the national party conventions on interstate commerce might be sufficient to justify congressional action in the field.¹⁴⁸

IV

CONCLUSION

As American political parties have evolved from private associations to public institutions, many of their functions have fallen within

¹⁴¹ 42 U.S.C. § 1983 (1970).

¹⁴² See *Smith v. Allwright*, 321 U.S. 649, 650, 661-62 (1944).

¹⁴³ See note 141 *supra*.

¹⁴⁴ *Oregon v. Mitchell*, 400 U.S. 112, 124 n.7 (1970); *Burroughs v. United States*, 290 U.S. 534 (1934).

¹⁴⁵ Federal Election Campaign Act of 1971, 86 Stat. 3 (codified in scattered sections of 2, 18 & 47 U.S.C.A. (Supp. 1973)).

¹⁴⁶ *Burroughs v. United States*, 290 U.S. 534 (1934).

¹⁴⁷ "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5; see *Katzenbach v. Morgan*, 384 U.S. 641 (1966) (Congress has wide latitude to determine whether state procedures violate equal protection clause). See generally Cox, *Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91, 99-108 (1966).

¹⁴⁸ Since *United States v. Darby*, 312 U.S. 100 (1941), overruled *Hammer v. Dagenhart*, 247 U.S. 251 (1918), Congress has had the power to regulate noncommercial activities if they affect interstate commerce. See *Chambers & Rotunda, supra* note 52, at 207.

the orbit of government regulation. National political conventions, however, have not been affected by this trend and have been able to conduct their vitally important business without outside interference. Although convention autonomy may have been valuable in the past, the events surrounding *O'Brien v. Brown* illustrate the danger which such unlimited discretion now poses for the rights of rank and file party members. The time has come for the courts to take a fresh look at their old notions of party independence and recognize the full breadth of the individual citizen's right of political participation.¹⁴⁹

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¹⁴⁹ For a discussion of the possible scope of judicial review once the courts enter the field of political conventions, see *The Supreme Court, 1971 Term, supra* note 6, at 229-34.