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IMMUNE FROM REVIEW?: THRESHOLD ISSUES IN
SECTION 1983 CHALLENGES TO THE DELEGATE
SELECTION PROCEDURES OF NATIONAL
POLITICAL PARTIES

KEVIN R. PUVALOWSKI

INTRODUCTION

Consider the following hypothetical political party policies. First, in a continuing effort to emphasize strong "family values," the Republican Party prohibits atheists from serving as delegates to its 1996 national convention.¹ To be eligible to serve, each prospective convention delegate must profess a devout faith in God. In addition, the party designates certain splinter religious groups as "cults;" cult members also are not welcome to serve as delegates.

At the same time, the Democratic Party expands the "Equal Division Rule,"² its affirmative action program, so that it becomes a strict quota system. Under this new policy, the Democratic National Committee will decide how many persons of each race, gender, religion and sexual orientation will serve as delegates to the 1996 convention. Non-minority party members in many areas will be unable to serve as delegates to the convention.

In general, individuals like the atheist Republican or the non-minority Democrat who are excluded from serving as delegates to their party's convention in the hypotheticals above cannot mount successful constitutional challenges to their party's actions. Most courts have interpreted Supreme Court precedent to mean that political parties are immune from judicial review—either because party action does not constitute state action,³ or because the claim against the party is a nonjusticiable political question.⁴ Indeed, the current "Equal Division Rule" of the Democratic Party was upheld by the Fourth Circuit partly because the claim was

1. The 1992 Republican National Platform stated that "America must remain neutral toward particular religions, but we must not remain neutral toward religion itself or the values religion supports." *The Platform: Party Stresses Family Values, Decentralized Authority*, Cong. Q., Aug. 22, 1992, at 2560, 2563 (text of the Republican National Platform). In addition, in 1989, President Bush responded to a question regarding the patriotism of atheists: "I don't know that atheists should be considered citizens, nor should they be considered patriots. This is one nation under God." Jennifer Spevacek, *Atheist Drops By to Wave the Flag*, Wash. Times, July 27, 1989, at A4.

2. The "Equal Division Rule" was adopted by a resolution of the 1976 Democratic National Convention. This rule requires that each state delegation contain an equal number of men and women delegates and alternates. The rule was embodied in the Party Charter at the 1980 convention and now applies to all organs of the party. See Bachur v. Democratic Nat'l Party, 836 F.2d 837, 838-39 (4th Cir. 1987); Mary T. Boyle, Note, *Affirmative Action in the Democratic Party: An Analysis of the Equal Division Rule*, 7 J.L. & Pol. 559, 583-85 (1991).

3. See *infra* notes 138-40 and accompanying text.

4. See *infra* notes 145-62 and accompanying text.

held to be a political question.⁵

Section 1983 of Title 42 of the United States Code⁶ provides a vehicle through which an individual can bring a constitutional challenge to a national political party's delegate selection procedures. Two threshold questions arise in an action brought against a political party under section 1983. The first⁷ considers whether the party's act of selecting delegates arises "under color of law"⁸ or, to put it differently, whether the action constitutes "state action."⁹ Courts use the state action doctrine to examine whether the relationship between a private actor and the state is sufficient to make constitutional scrutiny appropriate.¹⁰ The second threshold question addresses whether the claim is nonjusticiable under the political question doctrine.¹¹ The political question doctrine tests whether the federal judiciary is the appropriate forum in which to resolve the controversy.¹² Traditionally, federal courts have employed this doctrine to avoid deciding cases that do not lend themselves to normal judicial standards or that involve policy determinations that should be decided by the legislative or executive branches.¹³

This Note examines whether an individual should be able to bring a constitutional challenge to a political party's delegate selection procedures under 42 U.S.C. § 1983. In particular, this Note explores the role that the threshold issues of state action and justiciability¹⁴ play within such an inquiry. Part I provides an overview of the state action and

5. See *Bachur*, 836 F.2d at 841.

6. See 42 U.S.C. § 1983 (1988). Section 1983 imposes liability in law or equity upon any person who, while acting under color of state law, deprives another person of a constitutional or federal statutory right. See *id.* Therefore, to state a claim under this statute, "plaintiffs must allege: 1) that they have been deprived of a federal right, and 2) that the person who deprived them of that right acted under color of state or territorial law." *Jackson v. Michigan State Democratic Party*, 593 F. Supp. 1033, 1044 (E.D. Mich. 1984).

7. See Ronald D. Rotunda, *Constitutional and Statutory Restrictions on Political Parties in the Wake of Cousins v. Wigoda*, 53 Tex. L. Rev. 935, 951-52 (1975); Barbara Rook Snyder, *Private Motivation, State Action and the Allocation of Responsibility for Fourteenth Amendment Violations*, 75 Cornell L. Rev. 1053, 1093 (1990).

8. 42 U.S.C. § 1983 (1988).

9. Courts have generally discussed the principles of the "under color of law" requirement of section 1983 and the "state action" doctrine interchangeably. The Supreme Court has recently held that "the two inquiries are the same." *Georgia v. McCollum*, 112 S. Ct. 2348, 2356 n.9 (1992). For an overview of this issue see Lawrence S. Kahn, *State Action and the "Under Color of Law" Requirement of 42 U.S.C. Section 1983*, in Section 1983 Civil Rights Litigation and Attorneys' Fees 1992: Current Developments, at 339, 339 (PLI Litig. & Admin. Practice Course Handbook Series No. 449, 1992).

10. See *infra* notes 16-32 and accompanying text.

11. See *United States Dep't of Commerce v. Montana*, 112 S. Ct. 1415, 1425 (1992) ("When a court concludes that an issue presents a nonjusticiable political question, it declines to address the merits of that issue."); *Wymbs v. Republican State Executive Comm.*, 719 F.2d 1072, 1076-77 (11th Cir. 1983) (plaintiff must cross threshold of justiciability), *cert. denied*, 465 U.S. 1103 (1984).

12. See *infra* notes 33-46 and accompanying text.

13. See *infra* notes 33-46 and accompanying text.

14. Throughout this Note the terms "justiciability" and "political question doctrine" are used interchangeably. Although justiciability also includes other doctrines such as

political question doctrines. Part II traces the Supreme Court's treatment of challenges to political party behavior. Part III examines the conflicting approaches used by lower courts in addressing the threshold issues in section 1983 challenges to a political party's delegate selection procedures. Part IV argues that a closer look at the Supreme Court's state action and justiciability jurisprudence suggests that political parties should not be insulated from constitutional challenges to their delegate selection activities. Finally, this Note concludes that, despite the differing approaches taken by the lower courts, Supreme Court precedent in related contexts suggests that the courts should proceed beyond the threshold issues of state action and justiciability to adjudicate the merits of challenges to the delegate selection procedures of political parties.

I. THE STATE ACTION AND POLITICAL QUESTION DOCTRINES

Courts use the state action and political question doctrines to analyze whether the judiciary has the power to resolve a particular constitutional claim. The state action doctrine considers whether the Constitution applies to the challenged conduct; the political question doctrine analyzes whether the judiciary is the proper forum for resolving a particular controversy. This section discusses these threshold issues.¹⁵

A. *The Requirements of State Action Under Section 1983*

In general, the Constitution does not apply to private conduct. Except for the Thirteenth Amendment, the provisions of the Constitution are binding only on the federal and state governments.¹⁶ For example, the First Amendment provides that "*Congress shall make no law*"¹⁷ that infringes on certain rights, and section 1 of the Fourteenth Amendment provides that "[n]o *State shall*"¹⁸ fail to protect certain rights.¹⁹ Therefore, only the federal or a state government, or a government or state

standing, mootness, and ripeness, the Supreme Court and many authorities often use the term to refer to only the political question doctrine.

15. A more comprehensive survey of the state action and political question doctrines is beyond the scope of this Note. For a fuller explanation of the doctrines see John E. Nowak & Ronald D. Rotunda, *Constitutional Law* §§ 2.15, 12.1 to 12.5 (4th ed. 1991); Laurence H. Tribe, *American Constitutional Law* § 18-1 (2d ed. 1988).

16. See *Edmonson v. Leesville Concrete Co.*, 111 S. Ct. 2077, 2082 (1991); *Ripon Soc'y v. National Republican Party*, 525 F.2d 567, 574 (D.C. Cir. 1975), *cert. denied*, 424 U.S. 933 (1976); Tribe, *supra* note 15, § 18-1, at 1689 & n.1; Henry C. Strickland, *The State Action Doctrine and the Rehnquist Court*, 18 *Hastings Const. L.Q.* 587, 591 (1991).

17. U.S. Const. amend. I (emphasis added). In full, the First Amendment provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." *Id.*

18. U.S. Const. amend. XIV, § 1 (emphasis added). In full, section 1 provides:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive

agent, can violate a citizen's constitutional rights.²⁰

Under section 1983, if a plaintiff alleges that a private party violated one of his constitutional rights, the plaintiff must demonstrate some connection between the state and the private action in order to show that the defendant acted "under color of law."²¹ Courts use the state action doctrine²² to determine whether that connection between the state and the private action is sufficient to transform the private act into an act of the state. If a plaintiff shows a sufficient nexus between a defendant and the government²³ or if the private party is carrying out a function traditionally reserved to the government,²⁴ the private party is treated as having taken on the qualities of, and therefore the responsibilities of, the state.²⁵

Although the state action analysis is not mathematically precise and must be made on a case-by-case basis,²⁶ the Supreme Court recently has enunciated a two-pronged test for determining whether an action may be

any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Id.

19. The Thirteenth Amendment, however, has no similar qualifier and, therefore, is binding on individuals as well as the government. Section 1 provides that: "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." U.S. Const. amend. XIII, § 1.

20. *See Georgia v. McCollum*, 112 S. Ct. 2348, 2354 (1992) (discrimination violates Constitution only when attributable to the state); *Edmonson v. Leesville Concrete Co.*, 111 S. Ct. 2077, 2082 (1991) (Constitution's protections generally apply only to government action).

21. 42 U.S.C. § 1983 (1988).

22. The analysis of the "under color of law" requirement of section 1983 and the "state action" doctrine are identical. *See supra* note 9.

23. *See, e.g., Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 716-17, 726 (1961) (nexus between private coffee shop and government agency sufficient to warrant finding of state action).

24. *See, e.g., Marsh v. Alabama*, 326 U.S. 501, 509 (1946) (private company that controlled entire town performed a public function sufficient to warrant finding of state action).

25. *See Edmonson v. Leesville Concrete Co.*, 111 S. Ct. 2077, 2082 (1991) ("Although the conduct of private parties lies beyond the Constitution's scope in most instances, governmental authority may dominate an activity to such an extent that its participants must be deemed to act with the authority of the government and, as a result, be subject to constitutional constraints.")

26. Professor Laurence H. Tribe, for example, recognized that state action cases cannot be placed into neat categories. He wrote:

The Court itself has acknowledged the stubborn individuality of the state action cases. "[F]ormulating an infallible test" of state action, the Court has said, is "an impossible task." "Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance." Professor Charles Black no doubt spoke for the consensus in concluding that, viewed doctrinally, the state action cases are "a conceptual disassembling area."

Tribe, *supra* note 15, § 18-1 at 1690 (alteration in original) (footnotes omitted) (quoting *Reitman v. Mulkey*, 387 U.S. 369, 378 (1967), *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 722 (1961), and Charles L. Black, Jr., Foreword, "State Action," *Equal Protection, and California's Proposition 14*, 81 Harv. L. Rev. 69, 95 (1967), respectively).

deemed the action of the state. In *Lugar v. Edmondson Oil Co.*,²⁷ for example, the Court held that state action was present when two requirements were satisfied. First, the deprivation of constitutional rights must be caused by "the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible."²⁸ Second, the deprivation must be caused by someone who fairly can be called a "state actor."²⁹ Whether a particular case satisfies this standard is often a factual inquiry,³⁰ and the Court has done little more than suggest certain relevant factors that lower courts should consider.³¹ The factors that militate in favor of a finding of state action are a reliance on government assistance, the performance of a "traditional government function," and an aggravation of the injury "in a unique way by the incidents of governmental authority."³²

B. *The Justiciability of Political Questions*

Courts use the political question doctrine to examine whether it is appropriate for the judiciary to decide a particular issue. Separation of powers concerns make courts wary of infringing on the executive and legislative branches' policy-making prerogatives.³³ Although several commentators have argued that the political question doctrine is no longer viable,³⁴ as recently as January 1993 the Supreme Court has invoked the doctrine in refusing to decide an issue that concerned the impeachment powers of Congress.³⁵

The Supreme Court has enunciated a two-pronged test³⁶ for determin-

Tribe thereafter argued that the "chaos" and "anarchy" surrounding state action cases makes state action an "anti-doctrine." See Tribe, *supra* note 15, § 18-1, at 1691.

27. 457 U.S. 922 (1982).

28. *Id.* at 937.

29. *See id.*

30. *See Edmonson v. Leesville Concrete Co.*, 111 S. Ct. 2077, 2083 (1991) (citing *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 939 (1982)).

31. *See id.*; *see also Georgia v. McCollum*, 112 S. Ct. 2348, 2355 (1992) (citing *Edmonson's* list of relevant factors).

32. *See Edmonson*, 111 S. Ct. at 2083; *Georgia v. McCollum*, 112 S. Ct. 2348, 2355 (1992); *see, e.g., Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961) (relationship between private coffee shop and government agency sufficiently close to warrant finding of state action); *Marsh v. Alabama*, 326 U.S. 501 (1946) (private company that controlled entire town performed a sufficient public function to warrant finding of state action).

33. *See Nixon v. United States*, 113 S. Ct. 732, 747-48 (1993) (Souter, J., concurring); *United States v. Munoz-Flores*, 495 U.S. 385, 394 (1990); *Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221, 230 (1986).

34. *See Robert F. Nagel, Political Law, Legalistic Politics: A Recent History of the Political Question Doctrine*, 56 U. Chi. L. Rev. 643, 649 (1989). *But see J. Peter Mulhern, In Defense of the Political Question Doctrine*, 137 U. Pa. L. Rev. 97 (1988).

35. *See Nixon*, 113 S. Ct. at 735, 740 (refusing to decide claim relating to the impeachment powers of Congress because it presented a nonjusticiable political question).

36. *See id.* at 735; *Davis v. Bandemer*, 478 U.S. 109, 125 (1986); *see also Wymbs v. Republican State Executive Comm.*, 719 F.2d 1072, 1082 (11th Cir. 1983), *cert. denied*, 465 U.S. 1103 (1984).

ing whether a case presents a nonjusticiable political question.³⁷ The first prong of this doctrine considers whether the courts must make an impermissible policy determination to resolve the case.³⁸ In applying this prong, courts analyze whether one of the other branches of government has the exclusive authority to resolve the issue.³⁹ To make this determination, courts interpret the constitutional provision at issue⁴⁰ and ask whether the Constitution has reserved the resolution of the issue to an-

37. The leading case on the political question doctrine is *Baker v. Carr*, 369 U.S. 186 (1962). One commentator has stated that subsequent political question doctrine "cases have done little to expand or improve upon" Justice Brennan's work in *Baker*. Mulhern, *supra* note 34, at 105; *see, e.g.*, *Davis v. Bandemer*, 478 U.S. 109, 121 (1986) ("The outlines of the political question doctrine were described and to a large extent defined in *Baker v. Carr*.").

In *Baker*, the Supreme Court reviewed the voter apportionment scheme for electing representatives to the Tennessee state legislature. The district lines had not been redrawn for over 60 years and several areas, urban centers in particular, were significantly under-represented in the legislature. *See Baker*, 369 U.S. at 191-93. The Court concluded that the political question doctrine was not implicated because the doctrine only affected the relationship between the federal judiciary and the other branches of the federal government, *see id.* at 226, and held that the Equal Protection Clause claim could be sustained. *See id.* at 237.

In *Baker*, the Court articulated the concerns present in any suit involving a political question:

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 adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Unless one of these formulations is inextricable from the case at bar, there should be no dismissal for nonjusticiability on the ground of a political question's presence.

Id. at 217. Every major political question decision has quoted at least a portion of this passage. *See Nixon v. United States*, 113 S. Ct. 732, 735 (1993); *United States v. Munoz-Flores*, 495 U.S. 385, 389 (1990); *Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221, 229 (1986); *Davis*, 478 U.S. at 121; *Goldwater v. Carter*, 444 U.S. 996, 998 (1979) (Powell, J., concurring); *Powell v. McCormack*, 395 U.S. 486, 516-18 (1969).

Although the Court has largely "rested on this statement of the political question doctrine," Mulhern, *supra* note 34, at 106, it has often condensed the above formulation into the two-pronged test mentioned in the text. *See Nixon*, 113 S. Ct. at 735; *Davis*, 478 U.S. at 125; *see also Wymbs v. Republican State Executive Comm.*, 719 F.2d 1072, 1082 (11th Cir. 1983), *cert. denied*, 465 U.S. 1103 (1984).

38. *See Nixon*, 113 S. Ct. at 735.

39. *See id.*; *Davis*, 478 U.S. at 125; *Goldwater*, 444 U.S. at 998 (Powell, J., concurring).

40. Justice Brennan, writing for the Court in *Baker v. Carr*, explained it this way: "Deciding whether a matter has in any measure been committed by the Constitution to another branch of government . . . is itself a delicate exercise in constitutional interpretation . . ." 369 U.S. at 211. *See Goldwater*, 444 U.S. at 998 (Powell, J., concurring); *Powell*, 395 U.S. at 519.

other branch.⁴¹

Courts use the second prong of the test to examine whether there are judicially manageable standards for resolving the controversy.⁴² The Court has explained that lower courts should use this prong to determine whether “the duty asserted can be judicially identified and its breach judicially determined, and whether protection for the right asserted can be judicially molded.”⁴³ Whether a particular case satisfies this two-pronged test cannot be determined with absolute precision—this standard does not provide a catalogue of instances in which the doctrine may be invoked. Rather, a court must analyze “the precise facts and posture of the particular case”⁴⁴ to determine whether the claim presents a nonjusticiable political question. Moreover, the concepts that these prongs address are not completely distinct.⁴⁵ It may be that a case has no judicially manageable standards because it involves a policy determination that must be decided by another branch.⁴⁶

II. PAST CHALLENGES TO POLITICAL PARTY BEHAVIOR

For over fifty years,⁴⁷ the Supreme Court has struggled to define the limits of state regulation and judicial power with respect to the actions of political parties. The Supreme Court has examined this area of law in three lines of cases. First, in the *White Primary Cases*,⁴⁸ the Court struck down the Texas Democratic Party’s attempts to exclude African-Americans from voting in the Democratic primary election. Second, in *O’Brien v. Brown*⁴⁹ and *Cousins v. Wigoda*,⁵⁰ the Court specifically addressed challenges to the delegate selection procedures of a political party. Finally, in several recent decisions⁵¹ the Court has considered the propriety of state attempts to regulate party activity.

A. *The White Primary Cases*

The *White Primary Cases* were the first instances of judicial intervention into political party affairs. In a series of decisions spanning twenty-six years,⁵² the Supreme Court struck down the Texas Democratic

41. See *Nixon v. United States*, 113 S. Ct. 732, 735 (1993); *Goldwater*, 444 U.S. at 998 (Powell, J., concurring); *Powell*, 395 U.S. at 518; *Baker v. Carr*, 369 U.S. 186, 217 (1962).

42. See *Nixon*, 113 S. Ct. at 735; *Goldwater*, 444 U.S. at 998 (Powell, J., concurring); *Powell*, 395 U.S. at 517-18; *Baker*, 369 U.S. at 217.

43. *Powell v. McCormack*, 395 U.S. 486, 517 (1969) (quoting *Baker*, 369 U.S. at 198).

44. *Nixon*, 113 S. Ct. at 747 (Souter, J., concurring) (quoting *Baker*, 369 U.S. at 217).

45. See *id.* at 735.

46. See *id.*

47. The first of the *White Primary Cases* was decided in 1927. See *Nixon v. Herndon*, 273 U.S. 536 (1927).

48. See discussion *infra* part II.A.

49. 409 U.S. 1 (1972) (per curiam).

50. 419 U.S. 477 (1975).

51. See *infra* notes 111-32 and accompanying text.

52. The first case was decided in 1927. See *Nixon v. Herndon*, 273 U.S. 536 (1927). The final case was decided in 1953. See *Terry v. Adams*, 345 U.S. 461 (1953).

Party's repeated attempts to exclude African-Americans from voting in state Democratic primary elections. In so doing, the Court held for the first time that political parties could be considered state actors for some purposes.

In *Nixon v. Herndon*,⁵³ the first of the *White Primary Cases*, the Supreme Court invalidated a Texas statute that explicitly excluded African-Americans from voting in Democratic Party primary elections.⁵⁴ The Court relied on the Equal Protection Clause of the Fourteenth Amendment⁵⁵ to strike down the state's election law that expressly prohibited African-Americans from voting in primary elections.⁵⁶ Because the plaintiff was challenging only the state election law, state action was explicit and, therefore, no state action analysis was necessary.

The Texas legislature responded to the Court's decision by enacting a statute that authorized each party's executive committee to determine primary voter qualifications;⁵⁷ the Democratic Party's Executive Committee promptly passed a resolution barring African-Americans from voting in the party's primaries. The Court invalidated the party's action in *Nixon v. Condon*,⁵⁸ reasoning that because the executive committee's authority came from the state rather than from the party, the committee was a representative of the state and, therefore, a state actor.⁵⁹ As such, the party's actions were subject to Equal Protection Clause scrutiny and were invalidated on those grounds.⁶⁰

The Texas Democratic Party then adopted a resolution at the state party convention that excluded African-Americans from party membership.⁶¹ In *Grove v. Townsend*,⁶² the Supreme Court concluded that, because the convention itself made the decision to exclude, there was no state action present.⁶³ Unlike *Nixon v. Condon*, the convention's authority came solely from the party and not from the state. The discrimination was wholly private action and, therefore, not subject to constitutional challenge.⁶⁴

Nine years later, in *Smith v. Allwright*,⁶⁵ the Supreme Court overruled *Grove*, concluding that the party's regulation of the primary election constituted state action.⁶⁶ The Court in *Allwright* relied on its decision in

53. 273 U.S. 536 (1927).

54. *See id.* at 540-41.

55. U.S. Const. amend. XIV, § 1.

56. *See Nixon v. Herndon*, 273 U.S. 536, 541 (1927).

57. *See Nixon v. Condon*, 286 U.S. 73, 81-82 (1932).

58. 286 U.S. 73 (1932).

59. *See id.* at 88.

60. *See id.* at 88-89.

61. *See Grove v. Townsend*, 295 U.S. 45, 47 (1935).

62. 295 U.S. 45 (1935).

63. *See id.* at 54-55.

64. *See id.* at 55.

65. 321 U.S. 649 (1944).

66. *See id.* at 664.

United States v. Classic,⁶⁷ a case holding that Congress could regulate primary elections for Representatives to Congress.⁶⁸ The *Allwright* Court expanded on *Classic*'s reasoning,⁶⁹ holding that when the primary election is by law an integral part of the general election process, the party's regulation of that primary constitutes state action under the Fifteenth Amendment.⁷⁰

Finally, in *Terry v. Adams*,⁷¹ the last of the *White Primary Cases*, the Supreme Court struck down a parallel voting structure whereby white members of a county party would hold a private election to select a candidate *before* the official primary.⁷² Although there was no majority opinion, the plurality relied on *Smith v. Allwright* and concluded that, because the winner of the private primary was the *de facto* winner of the general election, the private primary was an integral enough part of the general election machinery to constitute state action for purposes of the Fifteenth Amendment.⁷³

It is noteworthy that the Court never mentioned the political question doctrine in the *White Primary Cases*. Although the Court invoked the political question doctrine in other cases during that same time period,⁷⁴ each of the *White Primary Cases* was decided on its merits. By implica-

67. 313 U.S. 299 (1941).

68. *See id.* at 316-18.

69. The *Allwright* Court explained that:

Classic bears upon *Grovey v. Townsend* not because exclusion of Negroes from primaries is any more or less state action by reason of the unitary character of the electoral process but because the recognition of the place of the primary in the electoral scheme makes clear that state delegation to a party of the power to fix the qualifications of primary elections is delegation of a state function that may make the party's action the action of the State.

Smith v. Allwright, 321 U.S. 649, 660 (1944).

70. *See id.* at 664. It should be noted that the *Allwright* Court found that the party was a state actor for purposes of the Fifteenth, not Fourteenth, Amendment. Section 1 of the Fifteenth Amendment provides: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." U.S. Const. amend. XV, § 1.

The Court has never ruled expressly whether the state action analysis is the same for the two Amendments. Justice Frankfurter believed that there were two different standards, either because the Fifteenth Amendment specifically addresses race discrimination, or because it specifically addresses voting rights. *See* Philip B. Kurland, Mr. Justice Frankfurter and the Constitution 70 (1971) ("The mandate of the Fifteenth Amendment, however, was clearer for Mr. Justice Frankfurter than those of the Fourteenth Amendment."); *see also supra* note 17 and accompanying text (text of Fourteenth Amendment). Moreover, because voting rights are now guaranteed by statute under the Voting Rights Act of 1965, it is unlikely that the Court will ever have occasion to consider whether there may be a distinction in the state action analysis for voting cases.

71. 345 U.S. 461 (1953).

72. *See id.* at 463.

73. *See id.* at 469.

74. *See, e.g.,* *Colegrove v. Green*, 328 U.S. 549, 552 (1946) (malapportionment case held nonjusticiable because of the political question doctrine). This decision effectively was overruled by *Baker v. Carr*, 369 U.S. 186 (1962).

tion, the Court found that each case presented a justiciable claim.⁷⁵

B. *The Delegate Selection Cases: O'Brien v. Brown and Cousins v. Wigoda*

The Supreme Court did not again have occasion to consider the state action or political question doctrines as they related to political parties until the early 1970s when two cases arose from disputes at the 1972 Democratic National Convention. As a result of conflicts between state election laws and party rules, two sets of delegates were selected to serve at the convention for each of several states.⁷⁶ After the convention's credentials committee selected one set of delegates (the "chosen delegates") over the other (the "excluded delegates"), the excluded delegates sought injunctions in both federal and state courts. These related cases, *O'Brien v. Brown*⁷⁷ and *Cousins v. Wigoda*,⁷⁸ reached the Supreme Court on appeals from a federal court injunction and a state court injunction, respectively.

In *O'Brien v. Brown*,⁷⁹ in a special term just three days before the convention was scheduled to begin,⁸⁰ the Supreme Court stayed an injunction issued by the Court of Appeals for the District of Columbia Circuit.⁸¹ The Court of Appeals had affirmed a decision of the district court to enjoin the chosen delegates from participating in convention activities, despite the fact that the party had deemed them the most fit to serve.⁸² In staying the injunction, the Supreme Court sternly warned lower courts not to interfere with a political party's affairs:

[N]o holding of this Court up to now gives support for judicial intervention in the circumstances presented here, involving as they do relationships of great delicacy that are essentially political in nature. Judicial intervention in this area traditionally has been approached with great caution and restraint. . . . [T]he convention itself is the proper forum for determining intra-party disputes as to which delegates shall be seated.⁸³

The Court was concerned about the "[h]ighly important questions"⁸⁴ of justiciability and whether the actions of the party's credentials committee constituted state action.⁸⁵ The Court reserved final resolution of the

75. See Rotunda, *supra* note 7, at 960 (*White Primary Cases* are examples of cases involving political issues that the Court found justiciable).

76. For a more detailed explanation of the facts relating to the controversy, see *Cousins v. Wigoda*, 419 U.S. 477, 478-81 (1975).

77. 409 U.S. 1 (1972) (per curiam).

78. 419 U.S. 477 (1975).

79. 409 U.S. 1 (1972) (per curiam).

80. See *id.* at 2.

81. See *id.*; see also *Brown v. O'Brien*, 469 F.2d 563 (1972).

82. See *Brown v. O'Brien*, 469 F.2d 563, 575 (1972).

83. *O'Brien*, 409 U.S. at 4 (emphasis added) (citations omitted).

84. *Id.*

85. See *id.*

threshold issues of justiciability and state action, however, until it could receive a full briefing.⁸⁶

Although the *O'Brien* Court did not overrule the earlier findings of state action in the *White Primary Cases*,⁸⁷ the Court limited these cases to their facts.⁸⁸ For example, the Court distinguished *Smith v. Allwright*⁸⁹ and *Terry v. Adams*⁹⁰ as cases involving "invidious discrimination based on race in a primary contest within a single State."⁹¹

In *Cousins v. Wigoda*,⁹² the Court again declined to decide the threshold issues of state action and justiciability.⁹³ In *Cousins*, the Court reviewed the propriety of a state court injunction that prohibited the chosen delegates from serving at the convention even though the party had selected them.⁹⁴ The excluded delegates had obtained both federal and state court injunctions enjoining the chosen delegates from participating in convention activities.⁹⁵ Although the Supreme Court had stayed the federal injunction in *O'Brien*, the Illinois appellate court upheld the state court injunction.⁹⁶ The chosen delegates ignored the state injunction, however, and consequently were held in contempt of court.⁹⁷ When the case reached the Supreme Court three years later, the Court concluded that the state court did not have the authority to enjoin the party in this manner because the party's constitutional right of political association⁹⁸ protected it from such interference.⁹⁹

As it had done in *O'Brien*, however, the Court in *Cousins* declined to decide the state action and political question issues. Because *Cousins* involved a controversy concerning the state judiciary's power over a political party,¹⁰⁰ as opposed to a controversy between an individual and a

86. See *id.* at 4-5. As will be shown below, the Court again refused to decide these issues even after fuller briefing in *Cousins*. See *infra* note 104 and accompanying text.

87. See *supra* notes 52-73 and accompanying text.

88. See *O'Brien v. Brown*, 409 U.S. 1, 4 n.1 (1972).

89. 321 U.S. 649 (1944).

90. 345 U.S. 461 (1953).

91. *O'Brien*, 409 U.S. at 4 n.1.

92. 419 U.S. 477 (1975).

93. See *id.* at 484 n.4.

94. See *id.* at 478-81.

95. See *Cousins v. Wigoda*, 419 U.S. 477 (1975); *O'Brien v. Brown*, 409 U.S. 1 (1972) (per curiam).

96. See *Wigoda v. Cousins*, 302 N.E.2d 614 (Ill. App. Ct. 1973).

97. See *id.*

98. The *Cousins* Court explained:

The National Democratic Party and its adherents enjoy a constitutionally protected right of political association. "There can no longer be any doubt that freedom to associate with others for the common advancement of political beliefs and ideas is a form of 'orderly group activity' protected by the First and Fourteenth Amendments. . . . The right to associate with the political party of one's choice is an integral part of this basic constitutional freedom."

419 U.S. at 487 (quoting *Kusper v. Pontikes*, 414 U.S. 51, 56-57 (1973)).

99. See *id.* at 489-91.

100. In *Cousins*, the Court only decided the narrow issue of whether the state court could enforce its contempt order against the party members who participated at the con-

political party, the decision did not require resolution of the state action and justiciability issues.¹⁰¹ Accordingly, the Court once again reserved judgment on these issues.¹⁰²

Cousins may represent a retreat from some of the sweeping language of *O'Brien*.¹⁰³ Even after receiving a full briefing,¹⁰⁴ the *Cousins* Court refused *O'Brien's* invitation to resolve the threshold issues. The *White Primary Cases*, for example, limited to their facts in *O'Brien*,¹⁰⁵ were cited favorably by the Court in *Cousins*.¹⁰⁶ The *Cousins* Court listed the *White Primary Cases* as examples of cases that may be used to determine whether state action exists in delegate selection challenges.¹⁰⁷ In his concurring opinion, Justice Rehnquist bitterly complained¹⁰⁸ that *Cousins* constituted a "virtual repudiation"¹⁰⁹ of *O'Brien*. In particular, he questioned the majority's apparent resurrection of the *White Primary Cases*.¹¹⁰

C. Recent Cases Involving Political Parties

Although the Court in *O'Brien* and *Cousins* failed to resolve the state

vention. Because coercive judicial action is undoubtedly state action, the Court did not have to go through a state action analysis in this case. The Court refused to decide the broader issue inherent in the suit—whether the party was a state actor. *See id.* at 483 n.4. Moreover, because *Cousins* involved a review of a state court decision, the separation of powers concerns inherent in the political question doctrine also were not implicated. *See id.*; *supra* note 33 and accompanying text.

101. Because the parties in a criminal contempt proceeding are the state against an individual, state action is explicit. The *Cousins* Court noted "that '[i]n the context of the instant case, it is not necessary to determine whether Convention action is 'state action.'" *Cousins*, 419 U.S. at 483 n.4.

102. *See id.* The Court still has not resolved these issues. *See Boyle, supra* note 2, at 563 n.20.

103. *See Rotunda, supra* note 7, at 959 ("*Cousins*, however, now seems to have effectively repudiated any broad reading of *O'Brien*."); Tribe, *supra* note 15, § 13-22, at 1113 ("The Court apparently recognized that its comments in *O'Brien* were questionable[] in *Cousins v. Wigoda*.").

Interestingly, the seemingly different approaches taken by the Court in these decisions cannot be attributed to a change in the Court's makeup—the same nine justices that decided *O'Brien* also decided *Cousins*.

104. Because *O'Brien* was decided in a special term only three days before the convention was scheduled to begin, the Court in that case declined to decide the state action and justiciability issues "without [the benefit of] full briefing and argument and adequate opportunity for deliberation." *O'Brien v. Brown*, 409 U.S. 1, 5 (1972) (per curiam).

105. *See supra* note 91 and accompanying text.

106. *See Cousins v. Wigoda*, 419 U.S. 477, 483 n.4 (1975).

107. *See id.*

108. Justice Rehnquist wrote:

Footnote 4 of the Court's opinion disclaims any intimation of views on [state action and justiciability] But immediately following the disclaimer, the Court proceeds to cite numerous opinions of courts of appeals and district courts, as well as law review commentaries, which to the unsophisticated mind might seem to portend an answer to each of these questions.

Cousins v. Wigoda, 419 U.S. 477, 492-93 (1975) (Rehnquist, J., concurring in judgment).

109. *Id.* at 494 (Rehnquist, J., concurring in the judgment).

110. *See id.* at 493-94.

action and political question issues, these decisions reaffirmed the strength of the associational rights of political parties.¹¹¹ Since *Cousins*, the Supreme Court has decided several cases concerning the extent to which a state can regulate a political party's actions. These cases established that a state can only regulate political party activity when it has a compelling interest to do so.¹¹² Although these cases do not provide any guidance on the threshold issues of state action and justiciability, they have nevertheless reinforced the primacy of a political party's associational rights.¹¹³

For example, in *Democratic Party of the United States v. Wisconsin ex rel. La Follette*,¹¹⁴ the Court addressed a conflict between party rules and state election laws. Wisconsin election laws, which provided for an open primary system,¹¹⁵ contradicted Democratic Party rules, which provided that only publicly declared Democrats could participate in the selection of delegates.¹¹⁶ The Wisconsin Supreme Court held that the party could not disqualify the delegates selected under the election law.¹¹⁷ The United States Supreme Court reversed, holding that the state's asserted interests were not sufficiently compelling to outweigh the associational rights of the party.¹¹⁸

The Supreme Court again emphasized the importance of a political party's First Amendment associational rights in *Tashjian v. Republican Party of Connecticut*.¹¹⁹ Here, Connecticut election laws provided for closed primaries.¹²⁰ Seeking a broader base, the Republican Party wanted to allow independent voters to participate in its primary election.¹²¹ The party sought a declaratory judgment that it could conduct a

111. See *supra* note 98 and accompanying text.

112. See *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 225 (1989) ("Because the ban burdens appellees' rights to free speech and free association, it can only survive constitutional scrutiny if it serves a compelling government interest."); *Democratic Party of the United States v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 124-26 (1981) (because interests advanced by the state are not compelling, intrusion into the party's affairs is not justified).

113. Although these cases demonstrate the Court's basic unwillingness to intervene into party affairs, ironically, they also decrease the need for strict threshold standards because they provide parties with added protection on the merits. See *infra* notes 225-28 and accompanying text.

114. 450 U.S. 107 (1981).

115. See *id.* at 110-12. An "open primary" is a primary election in which a voter does not have to be a party member to participate. An independent voter or even a member of a different party, therefore, can vote in an open primary.

116. See *id.* at 109-10.

117. See *State ex rel. La Follette v. Democratic Party of the United States*, 287 N.W.2d 519, 543 (Wis. 1980).

118. See *Democratic Party of the United States v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 125-26 (1981).

119. 479 U.S. 208, 214 (1986).

120. See *id.* at 210-12. A "closed primary" is a primary election in which only declared members of a particular political party may participate. Independent voters and members of other parties cannot vote in a closed primary.

121. See *id.*

primary open to independent voters.¹²² The district court held for the party,¹²³ and the Second Circuit affirmed.¹²⁴ The Supreme Court also affirmed, holding that the state did not have a compelling interest sufficient to justify interference with the party's associational rights.¹²⁵

The Court addressed another controversy between a political party and a state in *Eu v. San Francisco County Democratic Central Committee*.¹²⁶ In *Eu*, California election laws forbade political parties from endorsing candidates in a primary election.¹²⁷ These statutes also regulated certain aspects of a party's organization and composition.¹²⁸ The Court invalidated these laws because they unnecessarily burdened political speech and the associational rights of political parties.¹²⁹

These cases demonstrate that states may regulate political party activity only if there is a compelling state interest.¹³⁰ A court will weigh the rationale underlying any attempt to interfere with party affairs against the significant associational rights of the party.¹³¹ Although weighing the relative constitutional interests of the litigants does not directly affect the resolution of the threshold issues of state action and justiciability, the fact that a political party's associational rights will ordinarily protect it from interference on the *merits* of a dispute may eliminate the need for strict *threshold* standards.¹³² Because the party's associational rights have been strengthened, only the most egregious examples of party conduct will be enjoined; the risk of inappropriate judicial interference, therefore, has been lessened.

In sum, the Supreme Court's jurisprudence concerning challenges to political parties has been inconsistent. The *White Primary Cases* demonstrated that political parties may be considered state actors for some purposes. *O'Brien v. Brown* suggested that courts should use the state action and political question doctrines to insulate parties from judicial re-

122. *See id.* at 213.

123. *See* *Republican Party of Conn. v. Tashjian*, 599 F. Supp. 1228, 1241 (D. Conn. 1984).

124. *See* *Republican Party of Conn. v. Tashjian*, 770 F.2d 265, 286 (2d Cir. 1985).

125. *See* *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 229 (1986).

126. 489 U.S. 214 (1989).

127. *See id.* at 216-19.

128. *See id.*

129. *See id.* at 231-32.

130. *See supra* note 112 and accompanying text.

131. *See* *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 214 (1986) ("The freedom of association protected by the First and Fourteenth Amendments includes partisan political organization."); *Democratic Party of the United States v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 122 (1981) ("[T]he freedom to associate for the 'common advancement of political beliefs,' necessarily presupposes the freedom to identify the people who constitute the association, and to limit the association to those people only." (citations omitted)).

132. Because a challenge to party behavior must implicate a compelling interest in order to prompt judicial intervention into party affairs, there is little danger of unwarranted judicial interference. Strict threshold standards, therefore, are not necessary and the merits may be reached. *See infra* notes 225-28 and accompanying text.

view.¹³³ The Court seemed to retreat from *O'Brien*, however, in *Cousins v. Wigoda*.¹³⁴ Although recent cases have made it clear that political parties have strong associational rights that will protect them from most judicial interference on the merits of a dispute,¹³⁵ these cases did nothing to resolve the status of the threshold questions of state action and justiciability. As we shall see, this inconsistent treatment by the Supreme Court has led to differing approaches in the lower courts.

III. ANALYSIS OF LOWER COURT DECISIONS

The inconsistent messages that the Supreme Court has provided on the issues of state action and justiciability have been reflected in lower court decisions. Although no party has lost a delegate selection challenge after *O'Brien* and *Cousins*, the conflicting approaches used by the Court in these decisions has produced inconsistent applications by the lower courts. Accordingly, an examination is warranted into how the lower courts have addressed delegate selection challenges since *Cousins v. Wigoda*.¹³⁶

A. Lower Courts' Resolution of State Action Issues

Lower courts have arrived at different conclusions as to whether delegate selection constitutes state action. The Second Circuit has hinted that state action may be present in political party delegate selection. On two occasions, that circuit has indicated in dicta that the delegate selection procedures of a political party will constitute state action if a state grants the party's candidate automatic access to the general election ballot.¹³⁷

Other courts, however, have held that a political party's delegate selection activities do not constitute state action.¹³⁸ These courts have reasoned that the mere fact that a state law authorizes the selection of a candidate is insufficient to turn the private selection decision into state action.¹³⁹ They conclude that the party's private action can touch on the state's interest in elections without rising to the level of state action.¹⁴⁰

133. See *supra* notes 79-91 and accompanying text.

134. See *supra* notes 92-102 and accompanying text.

135. See *supra* note 113 and accompanying text.

136. See *supra* notes 79-91 and accompanying text.

137. See *Mrazek v. Suffolk County Bd. of Elections*, 630 F.2d 890, 895 n.8 (2d Cir. 1980); *Montano v. Lefkowitz*, 575 F.2d 378, 383 n.7 (2d Cir. 1978) (citing Laurence H. Tribe, *American Constitutional Law* 788, 790 (1978)); see also *Bachur v. Democratic Nat'l Party*, 836 F.2d 837, 839-40 (4th Cir. 1987) (district court's finding of state action not addressed on appeal). *But see Cavallo v. Elk Grove Township Republican Cent. Comm.*, No. 85 C 1501, 1985 WL 3921, at *4 (N.D. Ill. Nov. 20, 1985) (declining to follow *Mrazek*).

138. See *Cavallo*, 1985 WL 3921, at *4; *Jackson v. Michigan State Democratic Party*, 593 F. Supp. 1033, 1045 (E.D. Mich. 1984); *Ferency v. Secretary of State*, 362 N.W.2d 743, 748 (Mich. Ct. App. 1984).

139. See *Cavallo*, 1985 WL 3921, at *4.

140. See *id.*

Several lower courts presented with state action questions in delegate selection challenges have refused to decide the issue. Following the Supreme Court's example,¹⁴¹ they have reserved judgment on the state action issue¹⁴² and instead either have decided the cases on justiciability grounds¹⁴³ or have ignored the threshold issues of state action and justiciability altogether and decided the cases on the merits.¹⁴⁴

B. Lower Courts' Resolution of Justiciability Issues

The question of whether delegate selection challenges pose nonjusticiable political questions is also unsettled. Several courts, including the Eleventh Circuit, have expressly held that a delegate selection challenge is a nonjusticiable political question.¹⁴⁵ These courts follow *O'Brien's* reasoning¹⁴⁶ that a party convention—and not a courtroom—is the proper place for resolving intra-party disputes such as delegate selection challenges.¹⁴⁷ Also relying on *O'Brien*, the Eleventh Circuit distinguished the *White Primary Cases* of *Smith v. Allwright*¹⁴⁸ and *Terry v. Adams*,¹⁴⁹ arguing that the Court's quick intervention in those cases was attributable to the political party's invidious discrimination.¹⁵⁰

In contrast, the Sixth Circuit reached opposite conclusions concerning justiciability in two cases decided just one year apart.¹⁵¹ One suit challenged a delegate selection mechanism contained in the state election law,¹⁵² while the other challenged the selection procedures contained in

141. See *supra* notes 76-102 and accompanying text.

142. See *Wymbs v. Republican State Executive Comm.*, 719 F.2d 1072, 1077 (11th Cir. 1983), *cert. denied*, 465 U.S. 1103 (1984); *Ripon Soc'y, Inc. v. National Republican Party*, 525 F.2d 567, 578 n.28 (D.C. Cir. 1975) (en banc), *cert. denied*, 424 U.S. 933 (1976).

143. See *Wymbs*, 719 F.2d at 1077.

144. The District of Columbia Circuit noted, for example: "We recognize that 'state action' and 'justiciability' are often regarded as threshold issues. We see nothing illogical about passing over them, however, and we certainly do not lack authority for doing so." *Ripon Soc'y, Inc. v. National Republican Party*, 525 F.2d 567, 578 n.28 (D.C. Cir. 1975) (en banc), *cert. denied*, 424 U.S. 933 (1976).

Although Professor Laurence H. Tribe suggests that the Supreme Court is increasingly using threshold issues to dispose of difficult cases, see Tribe, *supra* note 15, § 13-22, at 1113 n.9, cases like *O'Brien* and *Cousins* may simply be examples of cases in which the threshold issues are more difficult to resolve than the merits.

145. See *Wymbs*, 719 F.2d at 1082; *Guy v. Delaware Democratic Party*, Civ.A.No. 12482, 1992 WL 58515, at *2 (Del. Ch. March 24, 1992); *Stuckey v. Richardson*, 372 S.E.2d 458, 460 (Ga. Ct. App.), *cert. denied*, 188 Ga. App. 912 (Ga. 1988).

146. See *supra* note 83 and accompanying text.

147. See *Wymbs*, 719 F.2d at 1082-83; *Stuckey*, 372 S.E.2d at 460.

148. 321 U.S. 649 (1944). See *supra* notes 65-70 and accompanying text.

149. 345 U.S. 461 (1953). See *supra* notes 71-73 and accompanying text.

150. See *Wymbs*, 719 F.2d at 1082 n.27.

151. See *Heitmanis v. Austin*, 899 F.2d 521, 526 (6th Cir. 1990); *Thompson v. Kentucky Democratic Party*, 872 F.2d 1029, No. 88-6114, *text available in WESTLAW*, 1989 WL 40176, at *1 (6th Cir. April 13, 1989).

152. See *Heitmanis*, 899 F.2d at 522-23.

party rules.¹⁵³ The former case was determined to be justiciable¹⁵⁴ while the latter was not.¹⁵⁵ While the Sixth Circuit's distinction would certainly be relevant for state action analysis,¹⁵⁶ its application to the political question doctrine is dubious—the political question doctrine traditionally has reflected separation of powers conflicts and concerns over the policy determinations necessary to resolve a controversy, rather than the identity of the parties involved.¹⁵⁷

Yet another analysis has been suggested by the District of Columbia Circuit¹⁵⁸ and the Fourth Circuit.¹⁵⁹ These courts have argued that the analysis required to determine the justiciability issue is similar to the analysis required to determine the claim on its merits. These courts have concluded that they cannot determine the justiciability issue without first analyzing the implicated constitutional rights of the litigants.¹⁶⁰ In each instance, recognizing the Supreme Court's silence on the matter,¹⁶¹ these courts likewise reserved the justiciability issue and concluded on the merits that the party's associational rights outweighed the challenger's interests.¹⁶²

IV. JUDICIAL REVIEW OF A POLITICAL PARTY'S NOMINATION ACTIVITIES

As the previous section pointed out, the lower courts have taken different approaches to the resolution of the state action and justiciability questions following the Supreme Court's reservation of these issues in *O'Brien* and *Cousins*. More recent Supreme Court state action and justiciability decisions in other contexts, however, shed significant light on these issues. These decisions make it clear that the courts should not use the threshold issues of state action and justiciability to insulate political

153. See *Thompson*, 1989 WL 40176, at *1 (claim that delegate selection procedures were *per se* racially discriminatory held nonjusticiable).

154. See *Heitmanis*, 899 F.2d at 526.

155. See *Thompson v. Kentucky Democratic Party*, 872 F.2d 1029, No. 88-6114, text available in WESTLAW, 1989 WL 40176, at *1 (6th Cir. April 13, 1989).

156. For example, if the state election law is being challenged, state action is explicitly present—the adoption of the statute is the action of the state. If the party rule is being challenged, the state action doctrine analysis must be employed to determine whether the party is deemed a state actor. See *supra* notes 16-32 and accompanying text.

157. See *United States v. Munoz-Flores*, 495 U.S. 385, 394 (1990); *Davis v. Bandemer*, 478 U.S. 109, 125 (1986). See also *supra* notes 33-46 and accompanying text; *infra* notes 212-18 and accompanying text.

158. See *Ripon Soc'y, Inc. v. National Republican Party*, 525 F.2d 567 (D.C. Cir. 1975) (en banc), cert. denied, 424 U.S. 933 (1976).

159. See *Bachur v. Democratic Nat'l Party*, 836 F.2d 837, 841-42 (4th Cir. 1987).

160. See *id.*; *Ripon Soc'y*, 525 F.2d at 578.

161. See *Bachur*, 836 F.2d at 841; *Ripon Soc'y*, 525 F.2d at 576.

162. See *Bachur*, 836 F.2d at 840-42; *Ripon Soc'y*, 525 F.2d at 578. See also Boyle, *supra* note 2, at 573 ("By concluding that the merits of the dispute were indistinguishable from the justiciability issue, the court of appeals merely avoided resolving an issue upon which the Supreme Court has yet to give guidance." (citations omitted) (commenting on the Fourth Circuit's decision in *Bachur*)).

parties from judicial review. Moreover, several important doctrinal developments have emerged since *O'Brien* and *Cousins* that decrease the need to dismiss cases on threshold issues. Furthermore, important policy considerations support reaching the merits in challenges to a political party's nomination activities so that a fair electoral process can be better ensured.

A. Delegate Selection as State Action

Recent Supreme Court decisions interpreting the Court's two-prong state action test¹⁶³ suggest that a political party's delegate selection procedures constitute state action under section 1983. The Supreme Court has interpreted the first prong of the state action test as considering "whether the claimed constitutional deprivation resulted from the exercise of a right or privilege having its source in state authority."¹⁶⁴ For example, in *Edmonson v. Leesville Concrete Co.*,¹⁶⁵ the Court held that a private litigant was a state actor while carrying out a peremptory strike of a prospective juror in a civil suit.¹⁶⁶ In *Georgia v. McCollum*,¹⁶⁷ the Court extended the application of this state action rationale to criminal cases.¹⁶⁸ In each case, the first prong of the state action test was satisfied because the peremptory challenge of a potential juror held "no significance outside a court of law."¹⁶⁹ Because peremptory challenges have no significance outside of court, the Supreme Court concluded that the peremptory strikes were the result of "the exercise of a right or privilege having its source in state authority."¹⁷⁰

Applying the above analysis, the nomination procedures of a political party, including the selection of convention delegates, may be viewed as constituting state action—nomination activities hold no significance outside the context of electing representatives to government office.¹⁷¹ When a party nominates a candidate for government office, it exercises "a right or privilege having its source in state authority."¹⁷² Nominating a candidate for public office simply has no relevance outside the government sanctioned election process. Accordingly, under the reasoning of

163. See *supra* notes 26-32 and accompanying text.

164. *Edmonson v. Leesville Concrete Co.*, 111 S. Ct. 2077, 2082-83 (1991).

165. 111 S. Ct. 2077 (1991).

166. See *id.* at 2083.

167. 112 S. Ct. 2348 (1992).

168. See *id.* at 2354-57.

169. *Edmonson v. Leesville Concrete Co.*, 111 S. Ct. 2077, 2083 (1991); see also *Georgia v. McCollum*, 112 S. Ct. 2348, 2354-55 (1992).

170. *Edmonson*, 111 S. Ct. at 2082-83.

171. One lower court has used the *Edmonson* analysis in the same way: "Just as litigants exercising peremptory challenges are serving an important function within the government and acting with its substantial assistance, banks drafting conversion plans are in a limited sense also called upon to perform the government's protective function by preparing plans that meet the statutory fairness requirements." *Lovell v. Peoples Heritage Sav. Bank*, 776 F. Supp. 578, 588 (D. Me. 1991) (citation omitted).

172. *Edmonson*, 111 S. Ct. at 2082-83.

Edmonson, a political party's delegate selection procedures satisfy the first prong of the state action test.

Delegate selection activities also satisfy the second prong of the state action test.¹⁷³ By applying this second prong a court determines whether a party can be fairly deemed to be a state actor. Although this test is largely a factual inquiry,¹⁷⁴ the Court has pointed out that several characteristics are particularly relevant to this analysis.¹⁷⁵ Among the factors that militate in favor of a finding of state action are a reliance on government assistance, a performance of a traditional government function, and an aggravation of the injury through incidents of governmental authority.¹⁷⁶

The non-financial¹⁷⁷ support that major political parties receive is sufficient to satisfy the second prong of the state action test and thereby transform the party into a state actor. This finding of state action is most supported by the so-called "state non-financial facilitation"¹⁷⁸ line of cases.¹⁷⁹ In these cases, state action was found where the government facilitated the private action, or provided the context in which the private action took place. The rule of these cases is that state action exists when a private party makes use of a state procedure with the assistance of state officials.¹⁸⁰ Courts applying this rationale have found state action in cases that involved jury peremptory challenges,¹⁸¹ state pre-judgment at-

173. See *supra* notes 26-32 and accompanying text.

174. See *Edmonson v. Leesville Concrete Co.*, 111 S. Ct. 2077, 2083 (1991); see also *supra* note 30 and accompanying text.

175. See *Edmonson*, 111 S. Ct. at 2083.

176. See *id.* at 2083; see also *Georgia v. McCollum*, 112 S. Ct. 2348, 2355 (1992).

177. Although government assistance is one of the relevant characteristics of the state action test, financial assistance by itself is insufficient to transform the aid recipient into a state actor. The Court in *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982), a case involving a private school that received much of its funding from government contracts, held that financial support alone is insufficient to constitute state action. See *id.* at 840-41. "As long as the financial benefit is not provided according to constitutionally impermissible criteria," *Snyder, supra* note 7, at 1079, the assistance does not transform the private party into a state actor unless it "constitutes compulsion or encouragement of that private action." *Id.* The mere fact that political parties receive large amounts of financial assistance from the states and federal governments is, therefore, insufficient to constitute state action.

178. This is Professor Rotunda's term. See Ronald D. Rotunda, *Modern Constitutional Law: Cases and Notes* 461-76 (1989).

179. See, e.g., *Georgia v. McCollum*, 112 S. Ct. 2348 (1992) (criminal defendants who strike jurors due to their race are state actors because the state has provided a context in which to act); *Edmonson v. Leesville Concrete Co.*, 111 S. Ct. 2077 (1991) (private litigants in a civil suit who strike jurors in peremptory challenges are state actors); *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457 (1982) (non-neutral allocation of government power transforms private parties into state actors); *Reitman v. Mulkey*, 387 U.S. 369 (1967) (statute making it easier to discriminate violates Equal Protection Clause and transforms private action into state action).

180. See *Tulsa Professional Collection Servs., Inc. v. Pope*, 485 U.S. 478, 486 (1988); *Barnes v. Maytag Corp.*, 799 F. Supp. 926, 930 (S.D. Ill. 1992).

181. See *Georgia v. McCollum*, 112 S. Ct. 2348 (1992); *Edmonson v. Leesville Concrete Co.*, 111 S. Ct. 2077 (1991).

tachment procedures,¹⁸² private action taken under statutes that facilitated discrimination,¹⁸³ and instances in which a bank engaged in conduct pursuant to statutory authorization.¹⁸⁴ In contrast, mere financial assistance¹⁸⁵ or state regulation of an activity¹⁸⁶ is not enough to result in a finding of state action.

Non-financial facilitation giving rise to state action results where the state gives the nominee of a political party automatic access to the general election ballot.¹⁸⁷ By affording this automatic access, the state provides sufficient non-financial assistance so as to allow a political party to be fairly considered a state actor.¹⁸⁸ Doctrinal justification for this conclusion may be traced to *Smith v. Allwright*,¹⁸⁹ in which the Supreme Court employed this rationale to transform a political party's regulation of a primary election into state action.¹⁹⁰ Applying the Supreme Court's reasoning to other political party actions, it follows that *all* nomination activities, including the selection of convention delegates, should constitute state action. Professor Laurence Tribe has advocated extending the

182. Compare *Tulsa Professional Collection Servs., Inc. v. Pope*, 485 U.S. 478, 486 (1988) (substantial involvement of probate court in functioning of nonclaim statute warrants finding of state action) and *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982) (finding state action where state official assists in attachment procedures) with *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149 (1978) (refusing to find state action when property was attached without the assistance of state officials).

183. See *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 462 (1982); *Reitman v. Mulkey*, 387 U.S. 369 (1967).

184. See *Lovell v. Peoples Heritage Sav. Bank*, 776 F. Supp. 578, 581-82 (D. Me. 1991).

185. Financial assistance without more is insufficient to justify a finding of state action. See *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982) (private school that received nearly all of its funding from the state was not a state actor as long as the decision was not made nor compelled by the state); *Blum v. Yaretsky*, 457 U.S. 991, 992 (1982) (private nursing home that received nearly all of its funds from government sources not a state actor unless decision made or compelled by government).

186. The Court has demonstrated that regulation does not imply state action as long as the regulation does not mandate the unconstitutional action. See Tribe, *supra* note 15, § 13-23, at 1120 (recent Court decisions cast doubt on whether state regulation of the nominating process is sufficient to constitute state action); see, e.g., *Blum v. Yaretsky*, 457 U.S. 991 (1982) (involving the transfer of Medicaid patients); *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974) (involving a state-regulated utility monopoly); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972) (involving a state-licensed establishment).

187. The nominee of the each major political party is given automatic access to the general election ballot in every state. See Tribe, *supra* note 15, § 13-23, at 1121; see, e.g., *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 211 (1986) (major party candidates automatically accorded general election ballot access).

188. See *Mrazek v. Suffolk County Bd. of Elections*, 630 F.2d 890, 895 n.8 (2d Cir. 1980); *Montano v. Lefkowitz*, 575 F.2d 378, 383 n.7 (2d Cir. 1978); Tribe, *supra* note 15, § 13-23, at 1121; see also *O'Brien v. Brown*, 409 U.S. 1, 12-13 (1972) (per curiam) (Marshall, J., dissenting) (as long as state recognizes "fruits" of party selection, nomination activities are state action).

189. 321 U.S. 649, 663 (1944).

190. In *Allwright*, the Court held that, because the state first compelled the party to select a candidate for inclusion on the ballot, and thereafter accepted the party's selection for inclusion on the general election ballot, the party's actions constituted state action. See *id.* at 664.

Allwright state action analysis to the context of delegate selection¹⁹¹ and the Second Circuit has agreed with this position in dicta.¹⁹²

Furthermore, because the selection of a candidate through the primary election system could be construed as a public function, parties may be considered state actors in their nominating processes even if the state has not afforded the benefit of ballot access.¹⁹³ For example, in *Edmonson v. Leesville Concrete Co.*,¹⁹⁴ the Court cited *Terry v. Adams*¹⁹⁵ as a case in which a private party performed a traditional government function.¹⁹⁶ In *Terry*, the last of the *White Primary Cases*, the Supreme Court found state action to exist because the party's action had become "an integral part, indeed the only effective part, of the elective process that determines who shall rule and govern."¹⁹⁷ Because the nominating activities of the major political parties have such a significant impact on the general election result,¹⁹⁸ it can be argued that a party's procedure to select a candidate is "an integral part . . . of the elective process," and therefore should be considered a public function. It follows that all integral steps of the nomination process, including the selection of convention delegates, should be subjected to constitutional scrutiny.¹⁹⁹

In light of the above analysis, the state action doctrine retains its vitality in defining the limits of appropriate judicial intervention. Under this formulation, the only political party activities that would constitute state action are nomination activities and the regulation of primary elections. Professor Tribe has argued that the *White Primary Cases* and later state action decisions support the proposition that, while nomination activities

191. See Tribe, *supra* note 15, § 13-23, at 1121.

192. See *Mrazek v. Suffolk County Bd. of Elections*, 630 F.2d 890, 894 n.8 (2d Cir. 1980); *Montano v. Lefkowitz*, 575 F.2d 378, 383 n.7 (2d Cir. 1978). But see *Cavallo v. Elk Grove Township Republican Cent. Comm.*, No. 85 C 1501, 1985 WL 3921, at *4 (N.D. Ill. Nov. 20, 1985) (declining to follow *Mrazek*).

193. Professor Rotunda wrote:

Terry v. Adams supports the argument that even if the state withdrew from such regulation, the pre-election selection process might still be an integral part of the election. It is immaterial under *Terry* whether or not the state has given a preferred position on the ballot to the nominee of a completely private primary.

Rotunda, *supra* note 7, at 956 n.114 (citation omitted).

194. 111 S. Ct. 2077 (1991).

195. 345 U.S. 461, 469 (1953).

196. See *Edmonson*, 111 S. Ct. at 2083 (1991); see also *Georgia v. McCollum*, 112 S. Ct. 2348, 2355-2356 (1992) (citing *Terry* in support of the proposition that the state cannot avoid its constitutional responsibilities by delegating a public function to a private party).

197. 345 U.S. at 469 (Black, J., announcing the judgment of the Court).

198. See Paul Carman, Comment, *Cousins and La Follette: An Anomaly Created by a Choice Between Freedom of Association and the Right to Vote*, 80 Nw. U. L. Rev. 666, 683, 691 (1985) (electoral success without party nomination unlikely); Tribe, *supra* note 15, § 13-22, at 1115 (nomination processes of major parties have great influence on general election).

199. See Rotunda, *supra* note 7, at 956 (because convention delegates are responsible for nominating a candidate, the selection of delegates is an integral enough part of the nomination process to support a finding of state action); Carman, *supra* note 197, at 691 (arguing that *Smith v. Allwright* and *Terry v. Adams* support finding of state action).

of a party are state action,²⁰⁰ all other party activities constitute private action—and are, therefore, beyond the reach of constitutional challenge.²⁰¹ Accordingly, the state action doctrine still plays its traditional role of determining the boundary between public and private action.

B. *The Justiciability of Delegate Selection Challenges*

The political question doctrine also should not prohibit courts from examining challenges to the delegate selection procedures of political parties. As previously discussed,²⁰² the Supreme Court has developed a two-prong test for determining whether a claim is nonjusticiable under the political question doctrine. Because challenges to political party action do not offend either prong of the political question doctrine test, courts should reach the merits in claims against political parties.

The first concern of the political question doctrine is whether an impermissible policy determination must be made to resolve the dispute.²⁰³ A policy determination is deemed inappropriate if it is the type of decision that should be made by one of the other branches of government.²⁰⁴ The Court has tested this concern by inquiring whether there is “a textually demonstrable constitutional commitment of the issue to a coordinate political department.”²⁰⁵ A challenge to a political party’s delegate selection procedures does not infringe on the rights of the executive branch or Congress. The separation of powers concerns that underlie this doctrine are simply not implicated.²⁰⁶ Justice Marshall pointed out that “the full

200. See Tribe, *supra* note 15, § 13-23, at 1119. Professor Tribe wrote:

Read in the context of other state action cases, the White Primary Cases seem to support the proposition that all activities of political parties that are closely related to the nomination of a candidate who will receive some preferential state treatment as the nominee of a political party are deemed the state’s responsibility; other activities of political parties constitute private action.

Id. (footnote omitted); see also Rotunda, *supra* note 7, at 952 (“An analysis of the *White Primary Cases* and their progeny indicates that . . . all integral steps in an election for public office are public functions and therefore state action subject to some constitutional scrutiny.”).

201. See Tribe, *supra* note 15, § 13-23, at 1119; Boyle, *supra* note 2, at 570; see also *Banchy v. Republican Party*, 898 F.2d 1192, 1196 (6th Cir. 1990) (party not subject to suit for filling internal position); *Blank v. Heineman*, 771 F. Supp. 1013, 1018-19 (D. Neb. 1991) (internal affairs of party not state action); *McMenamin v. Philadelphia County Democratic Executive Comm.*, 405 F. Supp. 998, 1003 (E.D. Pa. 1975) (internal party affairs not state action).

202. See *supra* notes 37-46 and accompanying text.

203. See *supra* notes 38-41 and accompanying text.

204. See *United States v. Munoz-Flores*, 495 U.S. 385, 394 (1990) (“[The] doctrine is designed to restrain the judiciary from inappropriate interference in the business of the other branches of Government.”); *Japan Whaling Ass’n v. American Cetacean Soc’y*, 478 U.S. 221, 230 (1986) (“The political question doctrine excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch.”)

205. *Nixon v. United States*, 113 S. Ct. 732, 735 (1993) (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)).

206. One author, commenting on a Fourth Circuit delegate selection case, argued that

convention of the National Democratic Party . . . is most assuredly not a coordinate branch of government to which the federal courts owe deference within the meaning of the separation of powers or the political question doctrine."²⁰⁷ Indeed, far from infringing on Congress's prerogatives, the Court has concluded that Congress designed section 1983 to provide for the private enforcement of federal rights.²⁰⁸

Constitutional challenges to the acts of political parties also do not offend the second prong of the political question doctrine test. The test's second prong examines whether judicially manageable standards exist for resolving the controversy.²⁰⁹ In a constitutional challenge to a political party's delegate selection procedures, a court would have to weigh the constitutional rights of the challenger against the associational rights of the party. Such a balancing of the litigants' relative constitutional and statutory rights implicates standards that are applied by federal courts every day.²¹⁰ Far from being unmanageable, challenges based on free exercise, establishment, equal protection, due process, and many other constitutional rights have long histories of judicial resolution with standards rooted in established doctrines. A court may not avoid deciding a particular case simply because the case's resolution will have political ramifications.²¹¹

Some authorities have argued that only challenges to political party actions based upon claims of race discrimination or Fifteenth Amendment violations are justiciable. Both Justice Frankfurter²¹² and Justice

"it is doubtful that a political question was raised since . . . the separation of powers doctrine . . . [is not] implicated." Boyle, *supra* note 2, at 573 (commenting on *Bachur v. Democratic Nat'l Party*, 836 F.2d 837 (4th Cir. 1987)).

207. *O'Brien v. Brown*, 409 U.S. 1, 12 (1972) (Marshall, J., dissenting). There is an indication that the Court later agreed with Justice Marshall and retreated from its *O'Brien* language in *Cousins v. Wigoda*, 419 U.S. 477 (1975). See *supra* notes 103-10 and accompanying text. It is important to note that Justice Marshall joined the majority in *Cousins*.

208. See *Wyatt v. Cole*, 112 S. Ct. 1827, 1830 (1992) ("The purpose of § 1983 is to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails."); *Allen v. McCurry*, 449 U.S. 90, 100-01, 110 (1980).

209. See *supra* notes 42-43 and accompanying text.

210. See, e.g., *United States v. Munoz-Flores*, 495 U.S. 385, 395 (1990) ("[T]he inquiry, which involves the analysis of statutes and legislative materials, is one that is familiar to the courts and often central to the judicial function."); *Goldwater v. Carter*, 444 U.S. 996, 999 (1979) (Powell, J., concurring in the judgment) ("Resolution of the question may not be easy, but it only requires us to apply normal principles of interpretation to the constitutional provisions at issue."); *O'Brien v. Brown*, 409 U.S. 1, 12 (1972) (Marshall, J., dissenting) ("Both these determinations are well within the range of questions regularly presented to courts for decision, and capable of judicial resolution.").

211. See *Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221, 230 (1986) ("[O]ne of the Judiciary's characteristic roles is to interpret statutes, and we cannot shirk this responsibility merely because our decision may have significant political overtones."); *Baker v. Carr*, 369 U.S. 186, 209 (1962) ("[T]he mere fact that the suit seeks protection of a political right does not mean it presents a political question.").

212. See Philip B. Kurland, *Mr. Justice Frankfurter and the Constitution* 74 (1971). Justice Frankfurter concurred in *Terry v. Adams*, 345 U.S. 461 (1953), a Fifteenth

O'Connor,²¹³ for example, have advocated the use of different justiciability standards for race and non-race cases.²¹⁴ Recently, however, the Supreme Court held that the same justiciability standard should apply to both race and non-race cases. In *Davis v. Bandemer*,²¹⁵ a redistricting challenge based on non-racial grounds, the majority²¹⁶ expressly rejected a two-tiered approach and held that the characteristics of the complaining group were irrelevant.²¹⁷ The Court has since reaffirmed this holding.²¹⁸

C. Doctrinal Developments

Since *O'Brien v. Brown*,²¹⁹ several important developments have demonstrated that courts can proceed beyond the threshold issues of state action and justiciability in challenges to political party nomination activities. These developments show that the merits in these disputes can be reached without offending the basic policy interests inherent in *O'Brien's* admonishment to lower courts to avoid interfering with party affairs.²²⁰ Several factors demonstrate that current Supreme Court jurisprudence can adequately protect political parties from inappropriate interference without requiring a dismissal of the case on threshold issues.

First, judicial experience since *O'Brien* has shown that political parties have repeatedly prevailed in these challenges even when the merits have

Amendment race discrimination challenge and wrote the majority opinion in *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), a case involving a Fifteenth Amendment challenge to a redistricting scheme that obviously discriminated on the basis of race. Outside the context of racial discrimination, however, he was much more likely to find a nonjusticiable political question. For example, two years after *Gomillion*, Justice Frankfurter authored a dissenting opinion in *Baker v. Carr*, 369 U.S. 186 (1962), in which he argued that this non-racial malapportionment challenge presented a nonjusticiable political question. See *id.* at 266 (Frankfurter, J., dissenting).

213. Justice O'Connor had suggested the adoption of a two-tiered analysis with different standards for race-based cases and non-race-based cases. See *Davis v. Bandemer*, 478 U.S. 109, 151-52 (1986) (O'Connor, J., concurring). The Court, however, expressly rejected Justice O'Connor's argument. See *id.* at 125-27.

214. Recall also that *O'Brien v. Brown* distinguished the *White Primary Cases* of *Smith v. Allwright* and *Terry v. Adams* as cases involving "invidious discrimination based on race in a primary contest within a single State." *O'Brien v. Brown*, 409 U.S. 1, 4 n.1 (1972) (per curiam); see also *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 232 (1989) (distinguishing *Allwright* as a case involving derogation of the litigant's civil rights).

215. 478 U.S. 109 (1986) (involving a dilution of voting rights that did not produce a racially discriminatory effect).

216. See *id.* at 125. Indeed, this was the only part of the opinion which commanded a majority.

217. See *id.*

218. Writing for the Court in *United States v. Munoz-Flores*, 495 U.S. 385 (1990), Justice Marshall explained that the political question doctrine "is designed to restrain the Judiciary from inappropriate interference in the business of the other branches of Government; the identity of the *litigant* is immaterial to the presence of these concerns in a particular case." *Id.* at 394.

219. See *supra* notes 79-91 and accompanying text.

220. See *O'Brien v. Brown*, 409 U.S. 1, 4 (1972); *supra* note 83 and accompanying text.

been reached.²²¹ In fact, *Cousins v. Wigoda* is an example of a case in which the Court was able to protect a political party's prerogatives without dismissing the case on a threshold issue.²²² Moreover, several lower courts have reached the merits of delegate selection challenges, either by refusing to resolve the threshold issues of state action and justiciability,²²³ or by holding that the threshold issues and the merits cannot be separated.²²⁴ In each case, the political party's associational rights have protected it from inappropriate judicial intervention.

Second, because the Court has made it clear in cases since *O'Brien* that political parties have strong associational rights,²²⁵ there is less danger of inappropriate judicial meddling into party business. Three recent Supreme Court decisions²²⁶ involving state attempts to regulate political party behavior have shown that only the most compelling interests will justify interference into party affairs.²²⁷ Ironically, although these cases demonstrate the Court's basic unwillingness to inject itself into party matters, the added protection that these cases provide to a party on the merits decreases the need for strict threshold standards. By resolving cases on their merits instead of resorting to formulaic threshold standards, courts will have the flexibility to address cases involving outrageous party behavior. Therefore, courts will be capable of remedying instances of invidious discrimination, such as those in the hypotheticals about the atheist Republican and the non-minority Democrat, while, at the same time, the party's strong associational rights will protect it against judicial overreaching.²²⁸

221. See *supra* notes 111-32, 144, 162 and accompanying text.

222. See *supra* notes 92-102 and accompanying text.

223. See *Ferency v. Austin*, 666 F.2d 1023, 1028 (6th Cir. 1981).

224. See *Ripon Soc'y, Inc. v. National Republican Party*, 525 F.2d 567, 578 (D.C. Cir. 1975) (en banc) (arguing that the issue of justiciability is inseparable from determination of the merits of the case), *cert. denied*, 424 U.S. 933 (1976); *Bachur v. Democratic Nat'l Party*, 836 F.2d 837, 840 (4th Cir. 1987) ("[W]e do not think that the questions of justiciability and the merits may, in this case, be approached and decided as separate and distinct issues.").

225. See *Bachur*, 836 F.2d at 842.

226. See *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214 (1989); *Tashjian v. Republican Party of Conn.*, 479 U.S. 208 (1986); *Democratic Party of the United States v. Wisconsin ex rel. La Follette*, 450 U.S. 107 (1981); *supra* notes 114-29 and accompanying text.

227. See David Lubecky, Comment, *Setting Voter Qualifications for State Primary Elections: Reassertion of the Right of State Political Parties to Self-Determination*, 55 U. Cin. L. Rev. 799, 803-04 (1987); Jeffrey L. Anderson, Note, *March Fong Eu v. San Francisco County Democratic Central Committee: Tension Between Associational Rights of Political Parties and Fair Elections*, 16 J. Contemp. L. 381, 384 (1990).

228. See *Mrizek v. Suffolk County Bd. of Elections*, 630 F.2d 890, 896-97 n.11 (2d Cir. 1980) (party decisions should not be overturned unless they disadvantage discrete groups or minorities); *Ripon Soc'y v. National Republican Party*, 525 F.2d 567, 589 n.66 (D.C. Cir. 1975) (en banc) (refusing to hold no state action and no justiciability because such a holding would leave no room to address cases of invidious discrimination), *cert. denied*, 424 U.S. 933 (1976); *Stuckey v. Richardson*, 372 S.E.2d 458, 461 (Ga. Ct. App. 1988) (Deen, J., dissenting in part) (case involves a compelling interest, therefore, party action

D. Additional Policy Considerations

An additional factor that should not be overlooked is that the American system of government may be adversely affected if delegate selection challenges are summarily dismissed on threshold issues. Some authorities have argued that it is antidemocratic to allow a lifetime-tenured federal judge the power to intervene into party affairs.²²⁹ Because the two major political parties in this country hold an oligopoly on opportunities for political expression at the national level,²³⁰ however, allowing the Democratic and Republican parties free reign to act in contravention of the Constitution is itself antidemocratic.²³¹ As Professor Ronald D. Rotunda has persuasively argued, the *White Primary Cases* should govern delegate selection challenges because "there is a proper and necessary place for the courts as overseers of the political process."²³² The courts will be unable to perform adequately their role as overseers unless they can proceed beyond the threshold issues and reach the merits of a challenge.

CONCLUSION

Although the Supreme Court has struggled for over fifty years to define the scope of judicial review of political party behavior, it has never

should be invalidated), *cert. denied*, 188 Ga. App. 912 (Ga. 1988); *see also* Rotunda, *supra* note 7, at 939-40.

229. Justice O'Connor wrote:

The preservation and health of our political institutions, state and federal, depends to no small extent on the continued vitality of our two-party system, which permits both stability and measured change. . . . To turn these matters over to the federal judiciary is to inject the courts into the most heated partisan issues. . . . The consequences of this shift will be as immense as they are unfortunate.

Davis v. Bandemer, 478 U.S. 109, 145 (1986) (O'Connor, J., concurring); *see also* *Colegrove v. Green*, 328 U.S. 549, 553-54 (1946) (Frankfurter, J.) ("It is hostile to a democratic system to involve the judiciary in the politics of the people.").

These authorities argue that improper acts by political parties will self-correct in the marketplace of the electorate. *See Davis*, 478 U.S. at 152 (political gerrymandering is a self-limiting exercise) (O'Connor, J., concurring); Lubecky, *supra* note 227, at 827 (even without judicial oversight, parties do not have unfettered discretion); Philip B. Kurland, Mr. Justice Frankfurter and the Constitution 64 (1971) (when people have demanded democracy in the past, they have received it without judicial intervention).

230. *See supra* note 197 and accompanying text.

231. Professor Rotunda wrote:

Having based *Cousins* on the transcending importance of national political parties and their candidate selection process, it would be anomalous for the Court to look with favor on the argument that national parties may discriminate on the basis of some suspect classification. Nor would the *Cousins* Court be charmed by an assertion that a disenfranchised minority need only join some other, more tolerant party.

Rotunda, *supra* note 7, at 946.

232. *Id.* at 963; *see also* *Stuckey v. Richardson*, 372 S.E.2d 458, 461 (Ga. Ct. App. 1988) (Deen, J., dissenting in part) (judiciary has duty to require fair political process to ensure a meaningful right to vote), *cert. denied*, 188 Ga. App. 912 (Ga. 1988).

clearly articulated the roles that the state action and political question doctrines play in this context. Lower courts at times have used the threshold issues of state action and justiciability to immunize political parties from judicial review.

A close examination of Supreme Court state action and political question doctrine decisions, however, suggests that a political party's delegate selection procedures should not be immune from constitutional challenge. Political party nominating activities, including delegate selection, constitute state action. Moreover, because separation of powers concerns simply are not implicated, challenges to party actions do not present non-justiciable political questions. Rather, challenges to political party action should be resolved on the merits of each case; on the merits, the party's strong associational rights will protect it from judicial interference in all but the most egregious instances of party behavior. By proceeding beyond the threshold issues of state action and justiciability, the courts will best be able to discharge their responsibility of assuring that our electoral system is administered fairly.

