

NEW ISSUES IN MINORITY REPRESENTATION

RESURRECTING THE WHITE PRIMARY

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INTRODUCTION

An unprecedented number of noncompetitive or “safe” electoral districts operate in the United States today.¹ Noncompetitive districts elect officials with more extreme political views and foster more polarized legislatures than do competitive districts.² More fundamentally, they inhibit meaningful political participation. That is because participating in an election that is decided before it begins is an empty exercise. Voting in a competitive election is not, even though a single vote will virtually never decide the outcome. What a competitive election offers to each voter is the opportunity to be the coveted swing voter, the one whose support candidates most seek, the one for whom they modify policy proposals and offer the political spoils that gener-

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¹ See, e.g., Sam Hirsch, *The United States House of Unrepresentatives: What Went Wrong in the Latest Round of Congressional Redistricting*, 2 ELECTION L.J. 179, 184-90 (2003) (collecting and analyzing statistical evidence of declining electoral competition); Lani Guinier, *Supreme Democracy: Bush v. Gore Redux*, 34 LOY. U. CHI. L.J. 23, 58 n.152 (2002) (attributing noncompetitive districts to gerrymandering by incumbents); Richard S. Dunham et al., *Does Your Vote Matter?*, BUS. WK., June 14, 2004, at 60, 62 (reporting that in House elections “only 35 seats at best out of 435 are even remotely in play this year”).

² See, e.g., Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593, 627-28 (2002) [hereinafter Issacharoff, *Gerrymandering*] (linking noncompetitive districts with political polarization); Dunham et al., *supra* note 1, at 66 (reporting that noncompetitive districts elect less centrist candidates “who prefer head banging to compromise”).

ate loyalty. Simply put, a competitive election offers every voter the potential to be this year's "NASCAR Dad."³

In safe electoral districts, candidates compete for votes, if at all, only in the majority party's primary.⁴ Such primaries accordingly function as the only juncture for meaningful political participation in these jurisdictions. Current law nevertheless permits the exclusion of a sizeable minority of the district's electorate from participating at this pivotal point. The Supreme Court has recently reinvigorated a political party's associational right to exclude nonmembers from participating in the party's primary.⁵ This right itself is not novel, as a generation's worth of precedent celebrates the associational rights of political parties to define racially inclusive membership qualifications.⁶ What is new is the Court's insistence that this associational right trumps the participatory interests of nonmembers even when the primary reliably determines the ultimate victor in the general election.⁷

This rule repudiates what this Article argues is the core holding of the *White Primary Cases*, namely that the Constitution requires that all voters have access to a jurisdiction's sole juncture of meaningful electoral decision making. As discussed in Part I.A, scholars have long

³ See Elizabeth Drew, *Bush: The Dream Campaign*, N.Y. REV. OF BOOKS, June 10, 2004, at 23, 24 (defining the demographic captured by the phrase "NASCAR Dad" and discussing its importance in the presidential election).

⁴ See Nathaniel Persily, *In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders*, 116 HARV. L. REV. 649, 661-62 (2002) [hereinafter Persily, *In Defense*] (noting that competitive primaries operate in non-competitive districts).

⁵ See *Cal. Democratic Party v. Jones*, 530 U.S. 567, 586 (2000) (striking down California's blanket primary).

⁶ See, e.g., *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 229 (1986) (striking down state law that excluded independent voters from party primaries); *Democratic Party of United States v. Wisconsin ex rel. LaFollette*, 450 U.S. 107, 126 (1981) (holding that national party need not accept delegates to national convention elected in a state-mandated open primary); cf. *Nader v. Schaffer*, 417 F. Supp. 837, 850 (D. Conn. 1976) (upholding state statute prohibiting nonmembers from voting in a party primary), *aff'd mem.*, 429 U.S. 989 (1976). For two views on how *Jones* relates to this precedent, see Nathaniel Persily, *Toward a Functional Defense of Political Party Autonomy*, 76 N.Y.U. L. REV. 750, 769 (2001) [hereinafter Persily, *Functional Defense*] ("[*Jones*] was the natural consequence of a series of decisions . . . over the last half-century."); Samuel Issacharoff, *Private Parties with Public Purposes: Political Parties, Associational Freedoms, and Partisan Competition*, 101 COLUM. L. REV. 274, 286 (2001) [hereinafter Issacharoff, *Private Parties*] (arguing that the blanket primary at issue in *Jones* "does not fit doctrinally within any of the categories of cases in which a claim of freedom of expressive association had previously held sway under the First Amendment").

⁷ See *Jones*, 530 U.S. at 584 (stating that exclusion from a party primary does not constitute disenfranchisement where nonmembers may join the party); *infra* notes 175-76 and accompanying text (discussing *Jones*).

criticized the *White Primary Cases*, and in particular *Smith v. Allwright*⁸ and *Terry v. Adams*,⁹ for applying constitutional constraints to the private actors who orchestrated white primaries.¹⁰ *Smith* and *Terry* have broad ramifications, but they neither expand the state action doctrine nor damage associational freedom to the extent these scholars allege. Instead, *Smith* and *Terry* posit that access to a competitive election is an essential component of the right to vote.¹¹ They recognize that meaningful political participation requires the opportunity to influence electoral outcomes. The white primaries that *Smith* and *Terry* invalidated denied this opportunity not simply because they were racially exclusive, but because they enforced their exclusivity in the context of determinative primary elections.¹²

⁸ 321 U.S. 649 (1944).

⁹ 345 U.S. 461 (1953).

¹⁰ See *infra* notes 38-44 and accompanying text (discussing the state action question in the *White Primary Cases*).

¹¹ For a sampling of scholarship describing the importance of fostering electoral competition, see Richard Briffault, *Nixon v. Shrink Missouri Government PAC: The Beginning of the End of the Buckley Era?*, 85 MINN. L. REV. 1729, 1764-70 (2001); Bruce E. Cain, *Garrett's Temptation*, 85 VA. L. REV. 1589, 1603 (1999); Elizabeth Garrett, *Is the Party Over? Courts and the Political Process*, 2002 SUP. CT. REV. 95, 98 [hereinafter Garret, *Is the Party Over?*]; Elizabeth Garrett, *The Law and Economics of "Informed Voter" Ballot Notations*, 85 VA. L. REV. 1533, 1554 (1999); Richard L. Hasen, *Entrenching the Duopoly: Why the Supreme Court Should Not Allow the States to Protect the Democrats and Republicans from Political Competition*, 1997 SUP. CT. REV. 331, 342-44; Richard L. Hasen, *The "Political Market" Metaphor and Election Law: A Comment on Issacharoff and Pildes*, 50 STAN. L. REV. 719, 724-28 (1998); Issacharoff, *Gerrymandering*, *supra* note 2, at 626-30; Samuel Issacharoff, *Oversight of Regulated Political Markets*, 24 HARV. J.L. & PUB. POL'Y 91, 98-100 (2000); Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 646-48 (1998); Issacharoff, *Private Parties*, *supra* note 6, at 276; Pamela S. Karlan, *Politics by Other Means*, 85 VA. L. REV. 1697, 1698-99 (1999); Daryl J. Levinson, *Market Failures and Failures of Markets*, 85 VA. L. REV. 1745 (1999); Daniel H. Lowenstein, *The Supreme Court Has No Theory of Politics—And Be Thankful for Small Favors*, in *THE U.S. SUPREME COURT AND THE ELECTORAL PROCESS* 283, 285-86 (David K. Ryden ed., 2d ed. 2002); Daniel R. Ortiz, *Duopoly Versus Autonomy: How the Two-Party System Harms the Major Parties*, 100 COLUM. L. REV. 753, 754 (2000); Nathaniel Persily, *Candidates v. Parties: The Constitutional Constraints on Primary Ballot Access Laws*, 89 GEO. L.J. 2181, 2190-91 (2001); Persily, *Functional Defense*, *supra* note 6, at 793-805; Nathaniel Persily & Bruce E. Cain, *The Legal Status of Political Parties: A Reassessment of Competing Paradigms*, 100 COLUM. L. REV. 775, 788-91 (2000). This scholarship generally focuses more on background electoral structures and organization than on claims of individual rights or entitlements. See, e.g., Issacharoff & Pildes, *supra*, at 645 (describing this approach); Persily & Cain, *supra*, at 778-82 (same). This Article locates within a more traditional rights-centered approach a commitment to electoral competition similar to the one recent scholarship advances.

¹² *Infra* note 113 and accompanying text.

After *Smith* and *Terry*, the Court recognized the right to vote to be a fundamental right protected by the Fourteenth Amendment.¹³ Part I.B argues that, as a doctrinal matter, this development should have outlawed ideologically based exclusions from determinative party primaries, just as *Smith* and *Terry* prohibited racially motivated ones.¹⁴ Insofar as the Fourteenth Amendment protects the right to vote, and access to a competitive election is an essential component of that right, Republicans excluded from the Democratic primary in a district that is safely Democratic are denied the right to vote for the office at issue. Such an exclusive primary is functionally equivalent to a general election in which only registered Democrats may participate. The latter restriction undeniably denies Republican voters their right to vote. A Democratic primary that both excludes Republicans and dictates the victor in the general election should be no different.

To be sure, Republicans could simply switch parties and thereby gain access to the Democratic primary. Republicans on Manhattan's Upper West Side today are obviously not in the same situation as African Americans in Fort Bend, Texas circa 1950. Yet the mutability of party affiliation should be of no consequence as a matter of doctrine. Fourteenth Amendment precedent makes clear that the right to vote cannot be made contingent on ideological commitments. Otherwise qualified voters may not be carved out of the electorate simply because they do not share the values or perspectives of the majority of other voters.¹⁵ Accordingly, where the majority party's primary is the only locus of meaningful electoral decision making, that primary should be the election in which all voters are entitled to participate regardless of party affiliation.

This proposition is, of course, not law. It stands in tension with three decades of precedent in which the Supreme Court has demonstrated ever-increasing solicitude for the associational rights of political parties.¹⁶ Not until *California Democratic Party v. Jones*,¹⁷ however, did the Court expressly repudiate the notion that meaningful political participation requires access to a competitive electoral process. *Jones* flatly denies that voters have a right to participate in the primary of a

¹³ See *infra* notes 133-44 and accompanying text (discussing this case law).

¹⁴ *Infra* notes 145-46 and accompanying text.

¹⁵ See *infra* notes 139-44 and accompanying text (discussing *Dunn v. Blumstein*, 405 U.S. 330 (1972), and *Carrington v. Rash*, 380 U.S. 69 (1965)).

¹⁶ See *infra* notes 147-60 and accompanying text (reviewing Supreme Court precedent discussing parties' associational rights).

¹⁷ 530 U.S. 567 (2000).

party in which they are not members, regardless of whether the general election is a competitive or a perfunctory affair.¹⁸ *Jones* thereby makes clear that a party's associational freedom to define its primary electorate need not be sacrificed when that primary is the determinative election. This associational right trumps any interest minority-party voters possess in influencing electoral outcomes.¹⁹ In short, *Jones* holds that *Smith* and *Terry* do not extend beyond racially exclusive primary elections.²⁰

Part II argues that even if *Smith* and *Terry* are limited to instances of racial discrimination, the Court's present disregard for the importance of electoral competition significantly erodes those decisions. Assuming *Smith* and *Terry* do no more than prevent a political party from manipulating the racial composition of its primary electorate, the associational right underlying decisions like *Jones* restores the ability to do just that.

This power devolves to the Democratic Party in particular because African Americans vote overwhelmingly for Democratic candidates.²¹ And this power is a significant one, given that the racial composition of Democratic primaries often dictates the influence racial minorities exert in the political process, particularly as competitive districts become more scarce and racial bloc voting among Democrats declines.²²

¹⁸ See *id.* at 573 n.5 (spurning the notion that “the ‘fundamental right’ to cast a meaningful vote [is] really at issue in this context”); *infra* notes 162-64 and accompanying text (discussing *Jones*).

¹⁹ See *Jones*, 530 U.S. at 583 (rejecting contention that inability “to participate in what amounts to the determinative election” constitutes disenfranchisement); *infra* notes 175-76 and accompanying text (discussing *Jones*).

²⁰ See *Jones*, 530 U.S. at 583-84 (stating that exclusion from a party primary does not constitute disenfranchisement); see also *infra* text accompanying notes 168, 175-78 (discussing *Jones*'s relation to *Smith* and *Terry*).

²¹ See, e.g., *infra* note 189.

²² Vast attention has been paid to the question of how the racial makeup of an electoral district affects the political power of racial minorities, specifically of the African American community. See generally SAMUEL ISSACHAROFF, PAMELA S. KARLAN & RICHARD H. PILDES, *THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS* 673-981 (Rev. 2d ed. 2002); DANIEL HAYS LOWENSTEIN & RICHARD L. HASEN, *ELECTION LAW* 163-354 (2d ed. 2001). Less studied, but just as crucial, is the fact that the choice of primary structure and the resulting racial composition of the district's primary electorate shapes the scope of minority influence. For examples of scholarship addressing the pivotal role of the primary, see Bernard Grofman et al., *Drawing Effective Minority Districts: A Conceptual Framework and Some Empirical Evidence*, 79 N.C. L. REV. 1383, 1409-11 (2001); Richard H. Pildes, *Is Voting-Rights Law Now at War with Itself? Social Science and Voting Rights in the 2000s*, 80 N.C. L. REV. 1517, 1534 (2002) [hereinafter Pildes, *Is Voting-Rights Law Now at War with Itself?*].

The Democratic Party may assert its associational interest in excluding nonmembers from its primary to increase the proportion of black voters in the primary electorate. There are two reasons why the Democratic Party might want to manipulate the racial composition of its primary electorate in this manner. First, as explained in Part II.A, doing so enables the Party to create an electorate likely to elect an African American representative. And a black presence in the legislature, and not simply a Democratic one, may be necessary to produce policies black voters generally support and hence to maintain black support for the Democratic Party. Black candidates and legislators may also be essential to energize black voters and to ensure that they turn out on election day.²³

The Democratic Party may consequently want to promote descriptive black representation. For more than a decade, the majority-minority district (as opposed to the majority-minority primary) has been a dominant method of doing this. Yet, concentrating black voters in majority-black districts tends to place fewer Democrats in office than does dispersing these voters among several districts.²⁴ The majority-minority primary, in contrast to the majority-minority district, constitutes a vehicle by which the party may foster descriptive black representation (and its consequent benefits for the party) without generating the political losses often associated with the majority-minority district.²⁵

Part II.B discusses the second reason why the Democratic Party might invoke the associational interest underlying *Jones* to concentrate black voters in the primary electorate. To minimize Democratic influence, a districting plan produced by Republicans will concentrate in a single district the maximum number of black voters possible within constitutional and statutory constraints.²⁶ Democrats may respond by excluding nonmembers from the party primary in such districts, thereby concentrating black voters even more. This Part argues that in a safe Democratic district, concentrating black voters in this manner may result in racial vote dilution through “packing,” and thus may require redistricting to resolve the clash between the party’s asso-

²³ See *infra* notes 204-06 and accompanying text (discussing the link between Democratic electoral success and the black electorate).

²⁴ See *infra* notes 201-03 and accompanying text (noting that dispersing black voters might increase substantive representation at the cost of descriptive representation).

²⁵ See HANNA FENICHEL PITKIN, *THE CONCEPT OF REPRESENTATION* 60-61, 142 (1967) (defining descriptive and substantive representation); see also *Georgia v. Ashcroft*, 123 S. Ct. 2498, 2512, 539 U.S. 461 (2003) (citing PITKIN, *supra*, at 60-91, 114).

²⁶ See *infra* note 231 and accompanying text (discussing *Ashcroft*).

ciational right and the minority voters' right to protection from racial vote dilution. The Democratic Party may thereby force redistricting and thus disperse among several districts the minority voters a Republican-controlled legislature has concentrated in a single district. In other words, it may use its power to manipulate the racial composition of its primary electorate to counter an unfavorable partisan gerrymander.²⁷

Part II.C evaluates a recent case in light of these observations. It discusses Congresswoman Cynthia McKinney's 2002 defeat in the Democratic primary in Georgia's Fourth Congressional District and the lawsuit that followed, which unsuccessfully sought to establish that the state's open primary caused racial vote dilution within the meaning of the Voting Rights Act.

The Conclusion draws a parallel between the authority the Democratic Party now enjoys to control the partisan and racial composition of its primary and the power it exercised a century ago to operate the white primary. It explores the ramifications of this parallel in light of the Court's decision last Term in *Vieth v. Jubelirer*,²⁸ in which it refused to impose meaningful curbs on partisan gerrymandering.

The white primary, as originally incarnated, is not coming back. The Supreme Court decisions outlawing the practice have become "untouchable icons" of civil rights history,²⁹ such that even their staunchest critics do not call for their reversal.³⁰ Recent developments nevertheless give rise to a legal regime much like the one that supported the exclusion of African American voters from determinative party primaries in the Jim Crow South.

²⁷ See, e.g., *infra* notes 250-51 and accompanying text (noting that a closed Democratic primary might result in "packing" and racial vote dilution).

²⁸ 124 S. Ct. 1769 (2004).

²⁹ Issacharoff & Pildes, *supra* note 11, at 652.

³⁰ See, e.g., *id.* at 652 n.24 (citing Daniel Hays Lowenstein, *Associational Rights of Major Political Parties: A Skeptical Inquiry*, 71 TEX. L. REV. 1741, 1749 (1993)); Lowenstein, *supra*, at 1748-52 (describing the *White Primary Cases* as being doctrinally problematic).

I. CONTROLLING THE PARTISAN COMPOSITION OF THE PRIMARY ELECTORATE

A. *The Right to Vote in Primary Elections*

Between 1927 and 1953, the Supreme Court struck down as unconstitutional four attempts to block African American voters from participating in primary elections in Texas. The first two of these *White Primary Cases*, *Nixon v. Herndon*³¹ and *Nixon v. Condon*,³² read the Fourteenth Amendment to proscribe a white primary expressly mandated by state law and one authorized by the Texas Democratic Party's Executive Committee pursuant to a state law granting the committee authority to define party membership. Texas Democrats responded by restoring the white primary through a mechanism less directly tied to legislative action, namely as the decision of the party's state convention, ostensibly made wholly independently of the state legislature.³³ While the Court initially upheld the practice, failing to locate discriminatory action by any state official,³⁴ *Smith v. Allwright*³⁵ struck it down as a violation of the Fifteenth Amendment. *Terry v. Adams*³⁶ followed thereafter, holding the Fifteenth Amendment to proscribe the all-white "preprimary" sponsored by a group called the Jaybird Democratic Association.

Scholars have long studied the *White Primary Cases*, both because they constitute a "bright spot" in federal anti-discrimination law prior to *Brown v. Board of Education*,³⁷ and because they set forth an expan-

³¹ 273 U.S. 536 (1927).

³² 286 U.S. 73 (1932).

³³ This independence is highly questionable given that Texas, like much of the South at the time, was a one-party State. As a result, actions of the Democratic Party cannot be easily separated from those of the Texas government. See Robert Bischetto et al., *Texas*, in *QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT 1965-1990*, at 234 (Chandler Davidson & Bernard Grofman eds., 1994) (describing the Democratic Party's longstanding domination of Texas politics).

³⁴ See *Grovey v. Townsend*, 295 U.S. 45, 53 (1935) (declaring an inability to "characterize the managers of the primary election as state officers" whose acts satisfied the state action requirement).

³⁵ 321 U.S. 649 (1944).

³⁶ 345 U.S. 461 (1953).

³⁷ 347 U.S. 483 (1954); see Lowenstein, *supra* note 30, at 1749 (offering this characterization); see also JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* § 14.33(a) (4th ed. 1991) ("The *White Primary Cases* represented the major effort by the court prior to the 1960's to prevent racial discrimination in voting." (citation omitted)).

sive and difficult conception of state action.³⁸ The statute at issue in *Nixon v. Herndon* expressly barred black participation in Democratic Party primaries and accordingly presented a relatively straightforward example of discriminatory state action.³⁹ The subsequent cases, however, involved less readily apparent instances of discriminatory action by a state actor and left the Court divided as to whether sufficient state action existed upon which to identify a constitutional violation.

Focusing largely on *Smith* and *Terry*, scholars have chastised the Court for manipulating the state action doctrine and damaging both associational rights and constitutional interpretation in the process.⁴⁰ According to this critique, the decisions leave vulnerable to constitutional attack the membership practices of varied private entities.⁴¹

³⁸ See, e.g., MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS 204 (2004) [hereinafter KLARMAN, JIM CROW] (arguing that the Justices in *Terry* “subordinated their understanding of law to politics in order to protect black suffrage”); Stephen E. Gottlieb, *Rebuilding the Right of Association: The Right to Hold a Convention as a Test Case*, 11 HOFSTRA L. REV. 191, 200-203 (1982) (describing a Supreme Court retreat from the murky standards of *Smith* and *Terry*); Michael J. Klarman, *The White Primary Rulings: A Case Study in the Consequences of Supreme Court Decisionmaking*, 29 FLA. ST. U. L. REV. 55, 68-69 (2001) [hereinafter Klarman, *White Primary*] (noting criticism of *Terry*); Alan R. Madry, *Private Accountability and the Fourteenth Amendment; State Action, Federalism and Congress*, 59 MO. L. REV. 499, 508 (1994) (“The justification for this stretch [treating political parties as state actors] is no less mysterious than the miracle of transubstantiation.”); Michael L. Stokes, *When Freedoms Conflict: Party Discipline and the First Amendment*, 11 J.L. & POL. 751, 769-72 (1995) (arguing that post-*Terry* Supreme Court decisions have attempted to cabin the “unwanted consequence” of applying the Bill of Rights to private political parties); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 26-29 (1959) (arguing that *Smith* and *Terry* were not based on “neutral principles,” however desirable the result of black enfranchisement); Issacharoff & Pildes, *supra* note 11, at 666 (criticizing *Terry v. Adams* for striking down the Jaybird primary based on “a wholly fantastical conception of state action”).

³⁹ See *Nixon v. Herndon*, 273 U.S. 536, 540 (1927) (noting that the right to vote in the Democratic primary derived from a Texas statute); cf. Brief for the State of Texas at 4, *Nixon v. Herndon*, 273 U.S. 536 (1927) (No. 117), reprinted in 25 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES 361 (Philip B. Kurland & Gerhard Casper eds., 1975)) (arguing that the Democratic primary was a private affair and that the statute authorizing white participation did not alter this status).

⁴⁰ See, e.g., KLARMAN, JIM CROW, *supra* note 38, at 202 (discussing *Terry*’s “poorly reasoned opinions”); John G. Kester, *Constitutional Restrictions on Political Parties*, 60 VA. L. REV. 735, 758 (1974) (arguing that *Terry* “went too far” and that “[f]or the judiciary now to place constitutional limitations on endorsements by a private group simply because the electorate respects and normally follows the group’s endorsements is nothing less than a judicial subversion of the American political process.”). But see Ronald D. Rotunda, *Constitutional and Statutory Restrictions on Political Parties in the Wake of Cousins v. Wigoda*, 53 TEX. L. REV. 935, 955 (1975) (defending the *White Primary Cases* as consistent with public function analysis).

⁴¹ See, e.g., *Terry*, 345 U.S. at 484, 494 (Minton, J., dissenting) (stating that the Jaybirds’ “unworthy scheme” exerted pressure no different from that routinely exerted on

More specifically, they strip political parties of most, if not all, associational rights.⁴² They curtail the mechanisms by which parties establish their identities and implement their agendas,⁴³ and thus the decisions fail to adequately appreciate the institutional role political parties play within the electoral system.⁴⁴

The difficulty presented by *Smith* and *Terry* stems from the dramatic consequences that follow from designating a primary as the product of state action. The cases have traditionally been understood to present an all-or-nothing proposition: either a party primary constitutes state action such that all constitutional constraints apply to all of the primary's rules and procedures, or a party primary is private action wholly immune from constitutional attack. By invalidating the racially exclusive white primaries, *Smith* and *Terry* may certainly be read to embrace the former proposition.

Judges and scholars dissatisfied with this rule, but nonetheless loathe to repudiate *Smith* and *Terry* entirely,⁴⁵ have attempted to read

"elections and other public business . . . by carefully organized groups"); *Nixon v. Condon*, 286 U.S. 73, 103-04 (McReynolds, J., dissenting) (arguing that the Court's approach left vulnerable to constitutional invalidation the "rules and by-laws of social or business clubs, corporations, and religious associations . . . organized under charters or general enactments"); see also Klarman, *White Primary*, *supra* note 38, at 68 (arguing that the various rationales for state action in *Terry* are unpersuasive and that "[t]he principal difficulty for the Justices involved drawing a line between the Jaybirds' discriminatory political scheme . . . and the discriminatory political preferences of private individuals"); cf. Persily, *Functional Defense*, *supra* note 6, at 765 (arguing that party organizations differ from other private organizations in that their membership rules are typically the product of state law).

⁴² See, e.g., Garrett, *Is the Party Over?*, *supra* note 11, at 111 ("[T]he Court's reasoning in the *White Primary Cases* does not have a logical stopping-place that would allow courts to differentiate among political actors."); Kester, *supra* note 40, at 737-60 (criticizing judicial intervention into primaries as too far-reaching).

⁴³ See, e.g., GEOFFREY R. STONE ET AL., *CONSTITUTIONAL LAW* 1549 (4th ed. 2001) (suggesting that the Jaybirds might have had "a plausible first amendment complaint" had the state attempted to regulate participation in their preprimary, and questioning why the "Jaybirds' 'freedom to identify the people who constitute[d] the association' [was not] constitutionally protected"); Lowenstein, *supra* note 30, at 1748 (arguing that the *White Primary Cases* appear to strip political parties "of the protections of the Bill of Rights").

⁴⁴ See, e.g., Persily, *Functional Defense*, *supra* note 6, at 753 (arguing that laws limiting a party's right to exclude impair the ability of parties generally to "enhanc[e] competition and foster[] representation of minorities and interest groups").

⁴⁵ See, e.g., Issacharaoff & Pildes, *supra* note 11, at 652 (describing the *White Primary Cases* as "untouchable icons"); Lowenstein, *supra* note 30, at 1749 (noting that "few commentators and no courts have suggested the disavowal of the *White Primary Cases*" and arguing that "to declare that the cases were wrong would be unpleasant, even disillusioning"). But see James S. Fay, *The Legal Regulation of Political Parties*, 9 J. LEGIS. 263, 277-78 (1982) (suggesting the cases be rejected).

the holdings more narrowly and thereby cabin the seeming expansiveness of their state action analyses. Some deem the decisions incoherent but necessary holdings limited to the “unique” circumstances in which the cases arose.⁴⁶ Some posit that political parties are distinct from other types of private organizations to which the state actor designation remains inapplicable.⁴⁷ Finally, some insist the decisions are doctrinally confined to instances of racial discrimination.⁴⁸

A promising alternative reading is available. Underlying *Smith* and *Terry* is a vibrant understanding of the right to vote and a conception of political participation that recognizes and rejects the core purpose of the racially exclusive primary. The white primary was meant to deny black voters the opportunity to influence electoral outcomes. *Smith* and *Terry*, in turn, recognized that the right to vote must encompass this opportunity for influence.

Professors Issacharoff and Pildes have explained that the white primary emerged a century ago as a “precommitment pact” among white voters, an agreement that even when they vehemently disagreed with one another, white voters would not “seek to prevail through making common cause with black voters.”⁴⁹ The prospect of such alliances was hardly illusory. The state constitutional conventions held throughout the former Confederacy at the turn of the twentieth cen-

⁴⁶ See Persily, *Functional Defense*, *supra* note 6, at 755-58 (discussing this reading of the *White Primary Cases*).

⁴⁷ See Issacharoff & Pildes, *supra* note 11, at 655 (arguing that the statutory system for selection of party nominees in cases such as *Smith* rendered the party a state actor); Persily, *Functional Defense*, *supra* note 6, at 765-66 (distinguishing membership practices of political parties from practices of other types of organizations).

⁴⁸ See, e.g., *Cal. Democratic Party v. Jones*, 530 U.S. 567, 573 (2000) (viewing the cases as limited to the Fifteenth Amendment context); *Wymbs v. Republican State Executive Comm. of Fla.*, 719 F.2d 1072, 1077 (11th Cir. 1983) (finding that courts have been reluctant to characterize party activity as state action absent racial discrimination); *Ripon Soc’y, Inc. v. Nat’l Republican Party*, 525 F.2d 567, 598 (D.C. Cir. 1975) (en banc) (Tamm, J., concurring) (emphasizing that the *White Primary Cases* involved racial discrimination); see also Bruce E. Cain, *Party Autonomy and Two-Party Electoral Competition*, 149 U. PA. L. REV. 793, 802, 805 (2001) (arguing that the only exceptions to a *laissez faire* approach to party regulation should be to prevent racial discrimination and to ensure well-ordered balloting); 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, 809 n.57 (1987) (reading *Smith* and *Terry* to be primarily about race).

⁴⁹ Issacharoff & Pildes, *supra* note 11, at 662-63. Thus, “[f]ar from being driven solely by racial ideology . . . the white primary was a vehicle through which existing partisan forces leveraged their current political power into a state-imposed lockup that would channel emergent partisan challenges into the least threatening form, namely, internal Democratic Party factional struggle.” *Id.*

tury expressly sought to disenfranchise black voters.⁵⁰ The political reality that preceded the conventions, however, was far more fluid than the conventioners' rhetoric suggested.⁵¹ The Solid South had yet to emerge,⁵² and repeated third-party challenges threatened any promise of Democratic hegemony.⁵³ The Populists were but one of several insurgent political movements that, at least initially, courted black voters as a potentially decisive voting block.⁵⁴ The Democrats themselves were an amalgam of factions, divided over a variety of economic and political issues.⁵⁵

Confronted with internal division and the prospect of viable third-party challenges, the Democratic Party sought to channel policy disagreements among white voters through party-controlled mecha-

⁵⁰ See, e.g., *Hunter v. Underwood*, 471 U.S. 222, 229 (1985) (noting historical assessment that the "Alabama Constitutional Convention of 1901 was part of a movement that swept the post-Reconstruction South to disenfranchise blacks"); *Harman v. Forssenius*, 380 U.S. 528, 543 (1965) ("The Virginia poll tax was born of a desire to disenfranchise the Negro."); *United States v. Louisiana*, 225 F. Supp. 353, 363 (E.D. La. 1963) ("[T]he State[] [had a] historic policy and the dominant white citizens[] [had a] firm determination to maintain white supremacy in state and local government by denying to Negroes the right to vote."), *aff'd*, 380 U.S. 145 (1965); see also *ISSACHAROFF ET AL.*, *supra* note 22, at 101 ("Every state in the Deep South adopted a new constitution between 1890 and 1908, and every constitution employed at least one, and often several . . . disenfranchising devices.").

⁵¹ See, e.g., Richard H. Pildes, *Democracy, Anti-Democracy, and the Canon*, 17 CONST. COMMENT. 295, 312 (2000) ("[H]istorical moments are often more contingent than they look generations down the road . . . [T]he political culture of disfranchisement was more fluid and precarious, in some states even more than others, than it appears in hindsight . . .").

⁵² See William E. Forbath, *The New Deal Constitution in Exile*, 51 DUKE L.J. 165, 170 (2001) (discussing the Solid South from 1937 to 1945).

⁵³ See, e.g., *ISSACHAROFF ET AL.*, *supra* note 22, at 98 ("[O]n the very eve of disenfranchisement in North Carolina, there were still substantial, interracial political coalitions that allowed a fusion of political parties, with black and white support, to control the North Carolina legislature as late as 1894-1898."); Lawrence C. Goodwyn, *Populist Dreams and Negro Rights: East Texas as a Case Study*, 76 AM. HIST. REV. 1435, 1438-39 (1971) (describing Populist appeal to both black and white voters that allowed temporary victories over Democrats).

⁵⁴ See STEVEN F. LAWSON, *BLACK BALLOTS: VOTING RIGHTS IN THE SOUTH, 1944-1969*, at 23-24 (1976) (noting that there were "counties where blacks remained on the rolls and white candidates actively competed for their ballots"); Goodwyn, *supra* note 53, at 1437, 1448 (describing populist appeal); *Issacharoff & Pildes*, *supra* note 11, at 663 (describing the heavily fractured political climate that marked the rise of the southern populist movement); Burton D. Wechsler, *Black and White Disenfranchisement: Populism, Race, and Class*, 52 AM. U. L. REV. 23, 25-26 (2002) (same).

⁵⁵ See, e.g., *ISSACHAROFF ET AL.*, *supra* note 22, at 117 ("Historically, the Texas Democratic Party was a rather diverse and unstable mix of both conservative and populist currents that divided quite sharply over issues such as the New Deal.").

nisms.⁵⁶ According to Issacharoff and Pildes, the white primary was “a sustained effort to preserve to white voters exclusive control over the locus of decisional power.”⁵⁷ And, while it lasted, the white primary was hugely successful in establishing and maintaining the hegemony of the Democratic Party.⁵⁸

This success necessarily depended upon noncompetitive general elections. So long as the racially restrictive Democratic primary was the only juncture for meaningful electoral decision making, cross-racial appeals and political alliances served little purpose. White Democrats resolved all disputes among themselves. A competitive general election would have undermined this system by providing an arena in which black and white voters could “mak[e] common cause” with one another.⁵⁹ The white primary accordingly was specifically designed “to ensure that black voters could not influence the decisive political issues of the day.”⁶⁰

Smith and *Terry* recognized this purpose and held that the constitutionally protected right to vote encompasses precisely this opportunity to influence outcomes.⁶¹ The decisions offer a conception of vot-

⁵⁶ See DEWEY W. GRANTHAM, *THE LIFE AND DEATH OF THE SOLID SOUTH* 22 (1988) (“The primary provided a vehicle for intraparty competition, and it helped abolish the minority party’s last remaining resource, its monopoly of opposition.”); *id.* at 28 (The primary facilitated the reabsorption of Populists and other dissidents into Democratic ranks); V.O. KEY, JR., *POLITICS, PARTIES, AND PRESSURE GROUPS* 609 (3d ed. 1952) (describing the white primary as a means “by which battles between the Whites could be fought out within the Democratic Party, from which the Negro could be excluded”); Issacharoff & Pildes, *supra* note 11, at 663 (describing how Populists engaged in the white primary as a means to avoid the “albatross” of reliance on black votes); *cf.* WARD E. Y. ELLIOTT, *THE RISE OF GUARDIAN DEMOCRACY* 72 (1974) (“[T]he white primary did not of itself defeat the Republicans and Populists, did not turn the tide against the blacks and upcountry whites, but consolidated a victory already won.”).

⁵⁷ Issacharoff & Pildes, *supra* note 11, at 653; *see also* ALEXANDER KEYSSAR, *THE RIGHT TO VOTE* 247 (2000) (“[S]ince electoral outcomes invariably were determined in primaries, [the white primary] was an extremely tidy and efficient vehicle for black disfranchisement.”).

⁵⁸ See J. MORGAN KOUSSER, *THE SHAPING OF SOUTHERN POLITICS* 72 (1974) (noting that the white primary was a chief reason for the failure of a two-party system in the South).

⁵⁹ Issacharoff & Pildes, *supra* note 11, at 662-63; *see also supra* note 49 and accompanying text (describing the use of the white primary to avoid the factionalization of the Democratic Party).

⁶⁰ Issacharoff & Pildes, *supra* note 11, at 653.

⁶¹ From the initial challenge in *Nixon v. Herndon*, 273 U.S. 536 (1927), the NAACP viewed the determinative nature of the white primary as the central reason for its unconstitutionality. *See, e.g.,* LAWSON, *supra* note 54, at 25-26 (quoting NAACP Executive Secretary James Weldon Johnson as saying that “[s]ince the Democratic primary con-

ing that transcends the mechanical act of casting a ballot in the general election and embraces instead the opportunity to participate meaningfully in the electoral process. So conceived, the right to vote requires an opportunity to engage in political debate with others at the juncture of the electoral process where participation can matter.⁶² At this juncture, candidates vie for a voter's support, modifying policy proposals and offering the political spoils that generate loyalty. Here, voters determine and reorder priorities, debate and refine policy preferences, and confront the obligation to "pull, haul, and trade," to borrow the phrase the Court used much later to describe the essence of political participation.⁶³ In short, *Smith* and *Terry* suggest that the right to vote, as protected by the Constitution, is the right to vote in a competitive election.⁶⁴

This conception of the right to vote originated in *United States v. Classic*, a 1941 decision that held that election fraud committed during a congressional primary in Louisiana violated a federal statute barring interference with "any right or privilege secured to [a U.S. citizen] by the Constitution or laws of the United States."⁶⁵ The difficult

stitutes the entire machinery of election to office in most Southern states, this case involves the only effective way of striking a blow for the Negro's right to vote").

⁶² This juncture need not be the general election. See Persily, *In Defense*, *supra* note 4, at 661-62 ("There is no obvious reason why competitive primaries would not produce the same advantages of responsiveness, accountability, and 'ritual cleansing' . . . attribut[ed] to competitive general elections.").

While a meeting in the fabled smoke-filled room may dictate electoral outcomes, *Smith* and *Terry* fall short of requiring that all voters have access to that room. Such a meeting is less obviously part of the electoral process than is a party primary in which voters cast ballots. The ability, moreover, of such limited action to control electoral results signals the existence of fundamental defects in the electoral process as it is conventionally understood.

⁶³ *Johnson v. De Grandy*, 512 U.S. 997, 1020 (1994).

⁶⁴ The first white primary decision, *Herndon*, 237 U.S. at 536, alluded to the centrality of the Democratic primary within the State's electoral system, emphasizing the importance of primary elections, and noting that they "may determine the final result" in general elections. *Id.* at 540; see also *S.F. County Democratic Cent. Comm. v. Eu*, 826 F.2d 814, 826 n.21 (9th Cir. 1987) (noting that the *White Primary Cases* are limited to an "unusual context: a state-mandated racially discriminatory primary scheme in a one-party state where nomination is tantamount to election"), *aff'd*, 489 U.S. 214 (1989); *Ripon Soc'y, Inc. v. Nat'l Republican Party*, 525 F.2d 567, 598 (D.C. Cir. 1975) (en banc) (Tamm, J., concurring) (emphasizing that the Democratic Primary "was the election" in Texas at the time); *Republican Party of Conn. v. Tashjian*, 599 F. Supp. 1228, 1233 (D. Conn. 1984) (noting that victory in the Democratic primary in Texas was "tantamount to election to public office"), *aff'd*, 479 U.S. 208 (1986).

⁶⁵ 313 U.S. 299, 309 (1941) (quoting section 19 of the Criminal Code, then codified at 18 U.S.C. § 51). The defendants in *Classic* were also charged with violating section 20 of the Criminal Code, then codified at 18 U.S.C. § 52, which prohibited anyone

issue in *Classic* was identifying the federal right or privilege with which the fraud had interfered. Twenty years earlier, the Supreme Court had split four to four on the question whether a primary election constituted an election within the meaning of Article I, Section 4 of the Constitution.⁶⁶ *Classic* dispensed with this uncertainty. It held that the right of voters participating in a congressional primary “to have their votes counted is . . . a right or privilege secured by the Constitution,”⁶⁷ where either state law makes the congressional primary “an integral part of the procedure of choice, or where in fact the primary effectively controls the choice [of representative].”⁶⁸

Classic undermined *Grove v. Townsend*,⁶⁹ which had unanimously held that state regulation alone was insufficient to render the all-white Democratic primary authorized by the party’s state convention a public affair subject to constitutional limitations.⁷⁰ To be sure, *Classic* did not mention *Grove*, and its focus on congressional elections as governed by Article I, sections 2 and 4,⁷¹ did not directly speak to the question of state action under the Fourteenth and Fifteenth Amendments.⁷² The earlier decision, however, was nevertheless “doomed,” as

acting “under color of any law” from “willfully subject[ing], or caus[ing] to be subjected, any inhabitant of any State . . . to the deprivation of any rights, privileges, and immunities secured and protected by the Constitution and laws of the United States.” 313 U.S. at 309-10 (quoting 18 U.S.C. § 52 (1940) (current version at 18 U.S.C. § 242 (2000))).

⁶⁶ *Newberry v. United States*, 256 U.S. 232 (1921); see *Classic*, 313 U.S. at 317 (describing Court’s vote breakdown in *Newberry*); see also U.S. CONST. art I, § 4, cl. 1 (“The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.”).

⁶⁷ 313 U.S. at 325.

⁶⁸ *Id.* at 318.

⁶⁹ 295 U.S. 45 (1935).

⁷⁰ *Id.* at 53-54.

⁷¹ See U.S. CONST. art. I, § 2, cl. 1 (“[T]he Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.”); U.S. CONST. art. I, § 4, cl. 1 (“The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.”).

⁷² See KLARMAN, JIM CROW, *supra* note 38, at 198 (“*Grove* involved the question of whether party regulation of primaries constituted state action under the Fifteenth Amendment, whereas *Classic* raised the question of whether primaries were elections under Article I, section 4.”); LAWSON, *supra* note 54, at 363 n.75 (“Stone based his conclusion on Article I . . . and not on the Fourteenth and Fifteenth Amendments. Article I applies to both private and state action.”).

Chief Justice Stone subsequently remarked, as soon as *Classic* came down.⁷³

Classic's first prong, whether state law makes the congressional primary "an integral part of the procedure of choice,"⁷⁴ provided a framework to overcome the state action obstacles identified in *Grovey*.⁷⁵ The same factors that rendered the primary integral to the election in *Classic* suggested that the white primary authorized by the Democratic Party's convention was integral to the election in Texas.⁷⁶ For the decision in *Classic*, this link sufficed to implicate the constitutional right to choose a congressional representative. For the decision in *Smith*, this link would now suffice to constitute state action: indeed, *Smith* invoked "the place of the primary in the electoral scheme" and its similarity in structure to the Louisiana regime at issue in *Classic* as providing the state action deemed lacking in *Grovey*.⁷⁷

This conclusion would have sufficed to overturn *Grovey*. Based on this state action finding alone, the Court could have struck down the Texas primary as embodying invidious racial discrimination in violation of the Fourteenth Amendment. Such a holding would have followed plainly from the first two white primary decisions, *Nixon v. Herndon* and *Nixon v. Condon*.⁷⁸ Both of these earlier decisions involved express discrimination based on race that could be traced to a state actor and struck down the challenged white primary without ad-

⁷³ KLARMAN, JIM CROW, *supra* note 38, at 198; *see also* LAWSON, *supra* note 54, at 38, 41 (noting that *Classic* "laid the foundation for getting the *Grovey* ruling overturned" and stating that "only the myopic missed Stone's handwriting on the wall").

⁷⁴ *Classic*, 313 U.S. at 318.

⁷⁵ *Grovey*, 295 U.S. at 48.

⁷⁶ These factors included whether the primary was conducted at public expense, whether the State regulated the time, place, and manner of the primary, and whether "an unsuccessful candidate at the primary may . . . offer himself as a candidate at a general election, and that votes for him may . . . lawfully be written into the ballot or counted at such an election." *Classic*, 313 U.S. at 313.

⁷⁷ *See Smith v. Allwright*, 321 U.S. 649, 660 (1944) (noting that the integral nature of the primary "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").

⁷⁸ *See Nixon v. Condon*, 286 U.S. 73, 84, 89 (1932) (holding that the white primary authorized by the Democratic Party's State Executive Committee pursuant to state law constituted invidious racial discrimination in contravention of the Fourteenth Amendment, and declining to address the white primary's impact on voting rights in particular); *Nixon v. Herndon*, 273 U.S. 536, 540-41 (1927) (describing the state statute barring black participation in Democratic Party primaries as "a direct and obvious infringement of the Fourteenth [Amendment]," so clear as to render consideration of the plaintiffs' Fifteenth Amendment claim unnecessary).

addressing the question whether the practice implicated constitutionally protected voting rights.⁷⁹

Classic did more, however, than simply offer the Court a roadmap around the state action barrier from *Grove*. *Classic*'s second prong, whether "in fact the primary effectively controls the choice [of representative],"⁸⁰ provided the groundwork for finding more specifically that the white primary abridged the right to vote. *Classic* held that a determinative congressional primary implicates the constitutional right to choose one's representative, regardless of how pervasively or negligibly the state regulates the primary process.⁸¹ *Classic* thus posited a conception of constitutionally protected political participation in a competitive electoral process. Both *Smith* and *Terry* relied on this conception in holding that the white primary violated the Fifteenth Amendment. These holdings required the Court to find not only discriminatory state action, but discriminatory state action that denied or abridged the right to vote.

Smith rested on both prongs of *Classic*'s test for assessing whether a form of political participation is constitutionally protected. *Smith* concluded that state law made the Democratic primary an integral part of its electoral machinery.⁸² But *Smith*'s identification of a Fifteenth Amendment violation did not only stem from this conclusion. *Smith* also suggested that the primary implicated the constitutionally protected right to vote because it operated in conjunction with a state re-

⁷⁹ See *Smith*, 321 U.S. at 660 (noting that the *Nixon* cases were decided under the Fourteenth Amendment "without a determination of the status of the primary as a part of the electoral process"); Brief for the State of Texas at 3, *Nixon v. Herndon*, 237 U.S. 536 (1927) (No. 117) reprinted in 25 LANDMARK BRIEFS, *supra* note 39, at 361 ("Participation in a nominating primary of a political party is not protected nor guaranteed by the Fifteenth Amendment to the Constitution of the United States."); see also ELLIOTT, *supra* note 56, at 73 (stating that the Court's reliance on the Fourteenth Amendment held "some tactical advantage" by providing a remedy without requiring the Court to decide whether a primary was an "election" within the meaning of the Fifteenth Amendment).

⁸⁰ *Classic*, 313 U.S. at 318; see also LAWSON, *supra* note 54, at 50 (noting emphasis by NAACP in its challenge to South Carolina's unregulated white primary in *Rice v. Elmore* that *Classic* offered two independent tests for assessing whether the Constitution applied to a primary election, namely whether the primary was integral or whether it "in fact . . . effectively controls choice") (quoting Brief for Appellees at 7, 8, 13, 14, *Rice v. Elmore*, 165 F.2d 387 (4th Cir. 1948) (No. 5664)).

⁸¹ See, e.g., Brief for the United States at 9, 24, *United States v. Classic*, 313 U.S. 299 (1941) (No. 618) (emphasizing that the Democratic primary determines the victor in the general election).

⁸² See LOWENSTEIN & HASEN, *supra* note 22, at 453 ("Texas' detailed regulation and involvement in the primary process turned that process into a state function, even though it was conducted by the ostensibly private Democratic Party.").

gime that made the primary election the determinative election. *Smith* spoke of the constitutional right “to participate in the choice of elected officials,”⁸³ free from racial discrimination, and emphasized that this “opportunity for choice is not to be nullified by a state through casting its electoral process in a form which permits a private organization to practice racial discrimination in the election.”⁸⁴

At the time, of course, the Democratic primary in Texas constituted the only election of consequence. Insofar as the Texas government could be distinguished from the Democratic Party itself,⁸⁵ the State had not directly mandated the racially discriminatory primary at issue in *Smith*. It had, nevertheless, “cast[] its electoral process in a form” that permitted the Democratic Party to exclude African American voters from the only opportunity meaningfully to choose representatives.⁸⁶ The State had accordingly “nullified” the “opportunity for choice” that the Constitution protects.⁸⁷ By focusing on this lost “opportunity for choice,” *Smith* suggested that the right to vote transcends participation in the general election where elected officials are in fact chosen elsewhere.

This suggestion became the core of *Terry*’s holding. Every white Democratic voter in Fort Bend County was automatically eligible to participate in the Jaybird primary.⁸⁸ Thus, to the extent that the Democratic primary was integral to the county’s electoral system, the Jaybird Association’s preprimary could have been deemed so as well. By the time *Terry* reached the Court, however, the Justices saw that meaningful black participation in party primaries would not be realized if the invalidity of the white primary rested exclusively on the integral nature of the primary within an electoral system. South Carolina had responded to *Smith* by eliminating state regulation of the

⁸³ 321 U.S. at 664.

⁸⁴ *Id.*

⁸⁵ See Issacharoff & Pildes, *supra* note 11, at 653-54 (noting that the Democratic Party “had a complete monopoly on politics in Texas” and that when the “State” acted, “this was tantamount to the Democratic Party using state law to self-regulate”).

⁸⁶ *Smith*, 321 U.S. at 664.

⁸⁷ *Id.*

⁸⁸ During the late 1880s, white residents in Fort Bend County formed the Young Men’s Democratic Club of Fort Bend County, an organization designed to end black political participation in the county. The Club split shortly after forming into the Jaybirds and Woodpeckers, with the Jaybirds soon emerging as the dominant group by 1890. DARLENE CLARK HINE, *BLACK VICTORY: THE RISE AND FALL OF THE WHITE PRIMARY IN TEXAS* 34 (Harold M. Hyman ed., 1979); see also Issacharoff & Pildes, *supra* note 11, at 656-57 (describing the Jaybirds’ domination of the county’s politics).

state primary entirely.⁸⁹ The white primary the Democratic Party predictably implemented in response ostensibly operated independently of state regulation. The State provided no funding, and issued no edicts about participation in the primary, either for candidates or voters.⁹⁰ The primary nevertheless provided the decisive juncture for electoral decision making. Like its predecessor, it blocked black participation at the only point where it could have mattered. For this reason, the district court and the Fourth Circuit struck it down under the Fifteenth Amendment.⁹¹

The Supreme Court followed suit in *Terry*.⁹² The Jaybird primary lacked the trappings of direct state regulation that had supported *Smith's* finding that the Democratic primary was integral to the Texas electoral process.⁹³ Justice Clark's concurring opinion charged that the Jaybird primary was "an auxiliary" of the Democratic primary, but that relationship stemmed more from the role performed by the Jaybird regime within the electoral system than from direct formal control by the Democratic Party.⁹⁴ Indeed, the plurality opinions in *Terry* largely abandon any search for regulatory control of the sort typically deemed sufficient to implicate constitutional requirements. The Jus-

⁸⁹ See *Rice v. Elmore*, 165 F.2d 387, 388 (4th Cir. 1947) ("[T]he primary laws of the state were repealed and the Democratic primary was conducted thereafter under rules prescribed by the Democratic party."); see also *King v. Chapman*, 62 F. Supp. 639, 649-50 (M.D. Ga. 1945) (holding that a party primary is part of the "election machinery" subject to state and federal law even though the state did not require parties to hold primaries and the primaries were privately regulated), *aff'd*, 154 F.2d 460 (5th Cir. 1946).

⁹⁰ See *Rice*, 165 F.2d at 388 (noting that the State no longer regulated primary elections).

⁹¹ See *id.* at 391-92 (stating that because "the choice of candidates at the Democratic primary determines the choice of the elected representative," the white primary denies the African American voter "any effective voice in the government of his country" (quoting *United States v. Classic*, 313 U.S. 299, 319 (1941))); *Elmore v. Rice*, 72 F. Supp. 516, 527-28 (D.S.C.) (finding that the Constitution mandated black participation in the Democratic primary so long as that primary was "the only material and realistic election"), *aff'd*, 165 F.2d 387 (4th Cir. 1947).

⁹² *Terry* was the product of a divided court, and no single opinion garnered the support of five justices.

⁹³ See *Smith v. Allwright*, 321 U.S. 649, 662-63 (1944) (noting elected officials' involvement in and statutory regulation of the white primary at issue).

⁹⁴ See *Terry v. Adams*, 345 U.S. 461, 483-84 (1953) (Clark, J., concurring) (stating that "the Jaybird Democratic Association operate[d] as an auxiliary of the local Democratic Party organization" and "[was] the decisive power in the county's recognized electoral process").

tics were concerned instead with the Jaybird primary's critical function within the county's electoral system.⁹⁵

Justice Black's opinion, joined by Justices Douglas and Burton, recognized that the Jaybird primary was "[t]he only election that ha[d] counted in this Texas county for more than fifty years."⁹⁶ The subsequent Democratic primary and general election were "perfunctory ratifiers of the choice that ha[d] already been made in Jaybird elections."⁹⁷ The system functioned "to deny Negroes on account of their race an effective voice in the governmental affairs of their country, state, or community."⁹⁸ Justice Black thereby equated the right to vote with the right to an "effective voice" in governance, meaning that constitutional limitations would apply when the effect of an electoral regime would be to thwart that voice. Direct state regulation of the primary is not essential. It is sufficient that the State "permit within its borders" a regime like the Jaybird primary, which functioned as "the only effective part[] of the elective process that determines who shall rule and govern in the county."⁹⁹ The consequence of this system "is to do precisely that which the Fifteenth Amendment forbids—strip Negroes of every vestige of influence in selecting the officials who control the local county matters that intimately touch the daily lives of citizens."¹⁰⁰

Justice Clark's concurring opinion, joined by Chief Justice Vinson and Justices Reed and Jackson, substantially agreed. Acknowledging that the Democratic primary was "nominally open" to black voters, Justice Clark wrote that a vote at this juncture "must be an empty vote cast after the real decisions are made."¹⁰¹ Because the party primary and general election were noncompetitive, "the Negro minority's vote [was] nullified at the sole stage of the local political process where the bargaining and interplay of rival political forces would make it count."¹⁰² The Jaybird primary constituted "the locus of effective political choice."¹⁰³ Constitutional constraints applied because the State

⁹⁵ See ELLIOTT, *supra* note 56, at 81 ("[T]he Court in *Terry* acted on the strength of function plus [party] membership to apply the Fifteenth Amendment.").

⁹⁶ *Terry*, 345 U.S. at 469.

⁹⁷ *Id.*

⁹⁸ *Id.* at 466.

⁹⁹ *Id.* at 469.

¹⁰⁰ *Id.* at 470.

¹⁰¹ *Id.* at 484 (Clark, J., concurring).

¹⁰² *Id.*

¹⁰³ *Id.*

had structured its electoral regime to “devolve[] upon a political organization the uncontested choice of public officials.”¹⁰⁴

Professors Issacharoff and Pildes argue that the Jaybird primary was distinct from the white primaries struck down in the three earlier white primary decisions because it did “not involve any use at all of the state election machinery to lock up power for existing forces.”¹⁰⁵ As they point out, the exclusionary rules at issue in *Herndon*, *Condon*, and *Smith* stymied robust political competition because the State had rendered the cost of challenging the Democratic primary victor prohibitive.¹⁰⁶ State law accorded the primary winner a privileged position on the ballot, and left those dissatisfied with the Democratic candidate with the formidable task of creating a viable new party to nominate a competitor.¹⁰⁷ The cost of defection from the winner of the Jaybird primary was less, given that those unhappy with the Jaybird-endorsed candidate could, at least in principle, challenge that candidate within the existing party structure.¹⁰⁸ Insofar as the state’s poll tax and other measures effectively blocked meaningful competition in the elections that followed the Jaybird primary, legal challenges might be brought against them, while still respecting the not inconsequential associational claims inhering in the Jaybirds’ “unworthy scheme.”¹⁰⁹ Issacharoff and Pildes conclude that the Court in *Terry* should have inquired why the elections subsequent to the Jaybird primary were noncompeti-

¹⁰⁴ *Id.*; see also *id.* at 472 (Frankfurter, J., concurring) (“For the sixty years of the Association’s existence, the candidate ultimately successful in the Democratic primary for every county-wide office was the man indorsed by the Jaybird Association.”).

¹⁰⁵ Issacharoff & Pildes, *supra* note 11, at 665.

¹⁰⁶ *See id.* at 664-65 (“By raising the costs of challenge to insuperable heights, political insiders were able to lock up the market for control.”).

¹⁰⁷ *See id.* at 665 (“To get on the general ballot, a candidate had to be nominated by qualified voters who did not participate in any other party’s primary.”).

¹⁰⁸ *See id.* (“Because the Jaybirds merely endorsed a candidate at the county party primary, every decision could be undone at the party level.”).

¹⁰⁹ *See id.* at 665-66; STONE ET AL., *supra* note 43, at 1549 (questioning whether the “Jaybirds [might] have had a plausible first amendment complaint”); see also *Terry*, 345 U.S. at 484 (Minton, J., dissenting) (describing the Jaybird primary as an “unworthy scheme” but asserting that the activities of the Jaybirds constituted private, rather than state, action); LAWSON, *supra* note 54, at 23 (noting that prior to the imposition of the white primary, “[i]n most areas Negroes had already lost their suffrage through intimidation and the inability to pay a poll tax and pass a literacy test”); Persily, *Functional Defense*, *supra* note 6, at 758 (“It is pure folly to discuss party rights or the right to vote in a primary election when the state indirectly or directly prohibits virtually all African Americans in the jurisdiction from participating in the general election.”).

tive, and that had it done so, it would have preserved both the Jaybird primary and a less “fantastical conception of state action.”¹¹⁰

Terry need not, however, be dismissed as incoherent. The Court’s failure to examine the reasons why the elections that followed the Jaybird primary were noncompetitive suggests that it was less concerned with *why* the Jaybird primary was determinative than with the fact that it *was*. The constitutional defect arose because the system functioned as the critical juncture of electoral decision making, regardless of the reasons why the Jaybirds were able to provide the only competitive election in the county. To be sure, had it been so inclined, Fort Bend County could have structured its electoral process in a manner that would have fostered competitive elections at points subsequent to the Jaybird primary.¹¹¹ So too, the State of Texas might have facilitated competition in the general election following the all-white Democratic primary at issue in *Smith* by, for example, relaxing the rules that hindered independent and third-party candidacies.¹¹² The failure of these jurisdictions to take such actions rendered the white primaries sponsored by the Democratic Party and the Jaybirds state action.

So understood, the *Smith* and *Terry* decisions expand the concept of state action without leaving it wholly untethered. The decisions fall short of applying the Constitution to all party activity or even to all party primaries.¹¹³ Instead, *Smith* and *Terry* more narrowly held that the Constitution bars a competitive, racially exclusive party primary where subsequent elections are noncompetitive. The state action designation and the accompanying constitutional command apply because the primary functions as the locus of electoral decision making. The right to vote is understood to encompass the right to participate at this juncture.

Paradoxically, the broad conception of the right to vote that underlies *Smith* and *Terry* suggests the Court’s unwillingness to countenance the consequences that a more expansive state action doctrine

¹¹⁰ Issacharoff & Pildes, *supra* note 11, at 666.

¹¹¹ See, e.g., LAWSON, *supra* note 54, at 23-24 (discussing the structure of southern electoral processes).

¹¹² See Issacharoff & Pildes, *supra* note 11, at 665 (describing rules that allowed the Democratic Party to retain control).

¹¹³ See J. WOODFORD HOWARD, JR., MR. JUSTICE MURPHY: A POLITICAL BIOGRAPHY 356 (1968) (noting Chief Justice Stone’s emphasis at conference that *Smith* involved “not all primaries but this primary”); cf. Persily, *Functional Defense*, *supra* note 6, at 767 (arguing that minor-party primaries are more difficult to characterize as state action because such parties enjoy fewer state-bestowed benefits, play less of a role in crafting electoral rules, and adhere to a more ideological agenda).

might have produced. The first two white primary decisions, *Nixon v. Herndon*¹¹⁴ and *Nixon v. Condon*,¹¹⁵ relied exclusively on the Fourteenth Amendment to invalidate the exclusionary practices at issue. Significantly, those cases did not address whether these practices implicated the right to vote, finding instead that they constituted invidious discrimination independent of any voting claim.¹¹⁶ *Smith* and *Terry* might have followed *Herndon* and *Condon* and held that the challenged white primaries violated the Equal Protection Clause, regardless of whether they involved the right to vote at all. *Smith* and *Terry*, however, involved a weaker link between the challenged practice and state action than had *Herndon* and *Condon*. And since the Justices had yet to recognize expressly that the Fourteenth Amendment protected the right to vote,¹¹⁷ a Fourteenth Amendment holding in *Smith* and *Terry* could not have rested on the inclusive conception of meaningful political participation that both decisions located under the Fifteenth. Instead, in order to find state action in *Smith* and *Terry* and still ground the holding in the Fourteenth Amendment, the Court needed a theory of state action that transcended the electoral realm. A Fourteenth Amendment holding would have required a broader principle of equal opportunity, and therefore one that might have directly destabilized the Jim Crow regime.

The Court's reliance on the Fifteenth Amendment in *Smith* and *Terry* may have reflected its reluctance to make this move, at least in the years prior to *Brown v. Board of Education*.¹¹⁸ This reluctance, however, need not be interpreted as the Court's indifference to claims of racial discrimination not implicating the right to vote. Indeed, *Smith* and *Terry* may well illustrate the Court's eagerness to announce broad antidiscrimination principles during World War II and the Cold War as a means of distinguishing American practice from that of fascist regimes abroad.¹¹⁹ Yet the Court's reliance in *Smith* and *Terry* on the Fif-

¹¹⁴ 273 U.S. 536 (1927).

¹¹⁵ 286 U.S. 73 (1932).

¹¹⁶ See *supra* notes 31-33 and accompanying text (discussing *Herndon* and *Condon*).

¹¹⁷ See *infra* notes 134-38 and accompanying text (summarizing Equal Protection Clause cases involving the right to vote).

¹¹⁸ 347 U.S. 483 (1954).

¹¹⁹ See, e.g., Arthur Krock, *Self Re-Examination Continues in the Supreme Court*, N.Y. TIMES, Apr. 4, 1944, at 20 (stating that the "real reason" for *Smith* was that "the common sacrifices of wartimes have turned public opinion and the court against previously sustained devices to exclude minorities from any privilege of citizenship"); see also MARY DUDZIAK, *COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY* 104 (2000) (arguing that national security concerns influenced the Court's *Brown* decision); HINE, *supra* note 88, at 236-37 ("The white primary was one of

teenth Amendment, instead of the Fourteenth, suggests a commitment to racial equality tempered by a strong allegiance to principles of federalism.¹²⁰ Basing *Smith* and *Terry* exclusively on the Fifteenth Amendment held promise as a mechanism to revamp discriminatory electoral practices and thereby foster effective and representative governance at the state level. Such governance, in turn, offered the promise that the states themselves would combat discrimination prevailing in other state institutions. Thus, it might render more intrusive and extensive federal regulation unnecessary and be thought to comport more faithfully with the federal structure.¹²¹

Implicit in this view is a belief in the transformative power of the vote. A meaningful opportunity to participate in the electoral process promises not only instrumental benefits bestowed by sympathetic legislators and favorable policies,¹²² but also more intrinsic benefits derived from the exercise of the franchise itself.¹²³ Meaningful participation in the electoral process enables voters to constitute themselves as full citizens. One perspective on federal power would limit federal intervention in state affairs to ensuring that minority voters are able to secure the constitutive and instrumental values of voting. Affirm their citizenship in this manner and they will be able to secure for themselves the benefits that derivatively follow.¹²⁴

the casualties of World War II.”); KEYSSAR, *supra* note 57, at 248 (“[T]he justices were not immune to events transpiring in the world around them . . . [and] were well aware of the links between the ideological dimensions of World War II and the exclusion of blacks from voting in the South.”); KLARMAN, JIM CROW, *supra* note 38, at 200 (“[T]he justices cannot have missed the contradiction between a war purportedly being fought for democratic ends and the pervasive disfranchisement of southern blacks.”); RICHARD A. PRIMUS, THE AMERICAN LANGUAGE OF RIGHTS 204 (1999) (arguing that during the 1940s, “anti-Nazism fostered thicker rights against racial discrimination . . . [and] the Court began construing the state action requirement extremely liberally when doing so was necessary to vindicating the equal rights of blacks”).

¹²⁰ Cf. ELLIOTT, *supra* note 56, at 74 (describing the Equal Protection Clause as a “weak constitutional foundation” for *Herndon*).

¹²¹ See Ellen D. Katz, *Reinforcing Representation: Congressional Power to Enforce the Fourteenth and Fifteenth Amendments in the Rehnquist and Waite Courts*, 101 MICH. L. REV. 2341, 2346 (2003) (arguing that this view may explain the Rehnquist and Waite Courts’ approach to congressional measures addressing racial discrimination in voting).

¹²² See LAWSON, *supra* note 54, at 24 (noting that blacks in the South at the turn of the century were rewarded for their support of white Democratic candidates with community improvements “including paved streets, new schools, a library, and a public auditorium”).

¹²³ See Ellen D. Katz, *Race and the Right to Vote After Rice v. Cayetano*, 99 MICH. L. REV. 491, 512-14 (2000) (discussing these intrinsic benefits).

¹²⁴ See Katz, *supra* note 121, at 2388 (discussing the assumption that individual liberty is best protected by democratically accountable local governments).

The whole purpose of the white primary, of course, was to block meaningful black participation in the electoral process. Divisions among white Democratic voters meant that the preferences of even a relatively small black population could be decisive, and thus the white primary arose to keep black voters from swinging an election.¹²⁵ White Democrats averse to policies holding appeal for potential black voters easily supported this regime.¹²⁶ More puzzling, however, is the commitment of white Democrats more inclined to align with black voters on select policy issues. To be sure, participation in interracial coalitions subjected white participants to charges of supporting “Negro rule,” a charge that could generate a loss in support among white voters greater than that gained by courting black support.¹²⁷ Still, a structural rule systematically barring black participation in party primaries should not have been necessary to block this occurrence. A white faction inclined to seek black support because of shared policy goals would ostensibly decline to do so where such appeals would prompt white defections of sufficient scope to cause electoral defeat.

If, however, the franchise is understood not only as a vehicle to implement policy preferences, but also as a means to experience full citizenship within the polity, the breadth of white support for the white primary finds more ready explanation. While some white Democrats shared the same (or portions of the same) political agenda as the black community, they remained overwhelmingly unwilling to accept the consequences of full black political participation. The specter of black empowerment produced by meaningful black participation overshadowed the tangible gains that favored policies would yield. White Democrats accordingly supported the white primary even when it appeared to harm their own immediate interests.

¹²⁵ See *supra* notes 49-60 and accompanying text (discussing the pervasive disenfranchisement of blacks in the South and the role the white primary played in sustaining it).

¹²⁶ See V.O. KEY, JR., *SOUTHERN POLITICS IN STATE AND NATION* 621 (1949) (noting how a Democratic faction that did not benefit from black support agitated for a white primary law).

¹²⁷ See Issacharoff & Pildes, *supra* note 11, at 663 (recounting Populist appeals to black voters); see also KEY, *supra* note 56, at 262-63 (discussing how opponents of agrarianism fomented the fear that “white disunity might restore carpetbagger or Negro government”); Goodwyn, *supra* note 53, at 1454 (providing text of September 1900 warning notice by East Texas White Man’s Union to those who would “perpetuate [N]egro rule” (citation omitted)).

B. *Transcending Race and the Fifteenth Amendment*

Smith and *Terry* held that the right to vote encompasses the right to participate in a determinative party primary free from racial discrimination. The African American voters excluded from the white primaries were registered Democrats and were, but for their race, eligible to participate in the primaries. The Court accordingly did not confront the permissibility of primary exclusions based on factors other than race, such as gender, religion, or partisan affiliation. This Part argues that the decisions nevertheless posit a conception of political participation under which exclusions based on such criteria become suspect as well.¹²⁸ *Smith* and *Terry* recognized that access to a competitive election is an essential component of the right to vote and that a determinative party primary constitutes state action, implicating that right. State officials may not deny the right to vote in a general election based on gender, religion, or partisan affiliation. A determinative party primary is the functional equivalent of a general election and as a result its electorate must be as inclusive as the general election electorate.

Of course, the Court that decided *Smith* and *Terry* would not have agreed. At the time, the Justices had not yet expressly recognized the Fourteenth Amendment to protect the quintessentially “political” right to vote.¹²⁹ What is more, between *Smith* and *Terry*, the Court de-

¹²⁸ See, e.g., Persily, *Functional Defense*, *supra* note 6, at 758 (suggesting that the *White Primary Cases* may be read to establish that “parties’ state actor status even outside the context of race discrimination remains intact Thus, the Constitution . . . requires that primaries pass all the tests of nondiscrimination applicable to other forms of state action”); Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 64 (1987) (suggesting that strict scrutiny should apply to a state open primary law).

¹²⁹ See, e.g., AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 216, 217 & n.*, 218 (1998) (“Reconstructors in 1866 declared that Section 1 [of the Fourteenth Amendment] focused on ‘civil rights,’ not ‘political rights’ like voting and military service.”); HAROLD M. HYMAN & WILLIAM W. WIECEK, *EQUAL JUSTICE UNDER LAW: CONSTITUTIONAL DEVELOPMENT 1835-1875*, at 395-97 (1982) (distinguishing among civil, political, and social rights); EARL MALTZ, *CIVIL RIGHTS, THE CONSTITUTION, AND CONGRESS 1863-1869*, at 118-20 (1990) (arguing that the drafters of the Fourteenth Amendment did not intend for it to federalize power over suffrage); Roderick M. Hills, Jr., *Back to the Future? How the Bill of Rights Might Be About Structure After All*, 93 NW. U. L. REV. 977, 993 (1999) (reviewing and citing AMAR, *supra*) (“[Its] framers . . . argued repeatedly that section 1 of the Fourteenth Amendment would not protect political rights such as the right to vote.”); Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1120 (1997) (“Distinctions among civil, political, and social rights functioned more as a framework for debate than a conceptual scheme of any legal precision.”); PRIMUS, *supra* note 119, at 153-174 (describing the fluidity with which the terms civil, political and social rights were used during Reconstruction). *But cf.* Katz,

cided *Colegrove v. Green*,¹³⁰ which deemed nonjusticiable a challenge to unequal apportionment of voting populations and thereby suggested that the right to vote falls outside the Fourteenth Amendment's ambit. That suggestion is significant because it implies that nonracial exclusions from a determinative party primary are of no constitutional concern. The right to vote may require access to such a primary, but absent Fourteenth Amendment protection for that right, the Fifteenth Amendment is the only applicable constitutional provision and it requires nothing more than racially inclusive participatory rules.

To be sure, race-based exclusions from a determinative primary likely contravene the Equal Protection Clause even if the right to vote is not protected by the Fourteenth Amendment. Assuming state action may be found absent a claimed interference with the right to vote,¹³¹ enforcing a race-based exclusion from a determinative party primary undoubtedly constitutes invidious discrimination lacking any cognizable justification, regardless of whether anyone has been denied the right to vote. By contrast, circumscribing a primary electorate based on nonracial criteria such as partisan affiliation seems perfectly reasonable. Such an exclusion would be a reasonable regulation furthering the institutional roles of political parties.¹³² Within this doctrinal framework, *Smith* and *Terry* radiate no further than the Fifteenth Amendment's specific context of race and the vote. They have no direct bearing on the validity of ideologically based exclusions from a determinative party primary.

Nine years after *Terry*, however, the Court overcame its aversion to the "political thicket,"¹³³ and recognized its authority to adjudicate apportionment questions.¹³⁴ Shortly thereafter, it relied on the Equal Protection Clause of the Fourteenth Amendment to establish the one person, one vote principle.¹³⁵ By 1970, the Court had recognized voting as a

supra note 121, at 2390-93 (arguing that *Ex parte Yarbrough*, 110 U.S. 651 (1884), suggests the Fourteenth Amendment protects the right to vote).

¹³⁰ 328 U.S. 549 (1946) (plurality opinion).

¹³¹ For example, insofar as the fact of regulation, independent of its relationship to the right to vote, was the key to the state action determination in *Smith*, the white primary there implicated Fourteenth Amendment concerns. *Cf. supra* notes 82-84 and accompanying text.

¹³² *See infra* note 172 (discussing this institutional role).

¹³³ *Colegrove*, 328 U.S. at 556.

¹³⁴ *See Baker v. Carr*, 369 U.S. 186, 226-37 (1962) (holding reapportionment challenges to be justiciable).

¹³⁵ *Reynolds v. Sims*, 377 U.S. 533, 568 (1964). Scholars consider *Baker* and the subsequent reapportionment decisions among the most significant decisions of the twentieth century. *See, e.g., ISSACHAROFF ET AL.*, *supra* note 22, at 161 ("*Baker* was per-

fundamental right protected under the Fourteenth Amendment.¹³⁶ It began subjecting regulations that narrow the electorate for the general election to the most rigorous judicial scrutiny,¹³⁷ and struck down efforts to limit the franchise based on ideological commitments or depth of ostensible interest in the election.¹³⁸

Carrington v. Rash,¹³⁹ for example, invalidated a Texas law that barred military personnel from participating in local elections. The State defended the exclusion, in part, on the ground that it was necessary to protect the distinct interests of the civilian community, interests the State asserted military voters would not share. The Court rejected this interest, holding that “‘fencing out’ from the franchise a sector of the population because of the way they may vote is constitutionally impermissible.”¹⁴⁰ The right to vote “cannot constitutionally be obliterated because of a fear of the political views of a particular group of bona fide residents.”¹⁴¹ Similarly, *Dunn v. Blumstein*¹⁴² struck down Tennessee’s durational residency requirement which the State claimed helped assure voters shared a “common interest” in local governance.¹⁴³ *Dunn* states that

haps the most profoundly destabilizing opinion in the Supreme Court’s history.”). *But see* ELLIOTT, *supra* note 56, at 72 (arguing that the *White Primary Cases* “probably worked a greater overall change in the political structure of the states affected than [did] reapportionment”).

¹³⁶ *E.g.*, *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 626-28 (1969) (applying strict scrutiny to a law denying some district residents the right to vote in school board elections).

¹³⁷ *See id.* at 632 (applying close scrutiny); *Carrington v. Rash*, 380 U.S. 89, 95 (1965) (same).

¹³⁸ *See, e.g.*, *Dunn v. Blumstein*, 405 U.S. 330, 357-58 (1972) (“[D]urational residence requirements . . . founder because of their crudeness as a device for achieving the articulated state goal of assuring the knowledgeable exercise of the franchise.”); *Kramer*, 395 U.S. at 632 (concluding that the restriction did not achieve, “with sufficient precision,” the aim of defining an informed electorate); *Carrington*, 380 U.S. at 95-97 (invalidating a Texas law that denied military personnel the vote in local elections). Exceptions have emerged with time, of course. *See, e.g.*, *Ball v. James*, 451 U.S. 355, 370 (1981) (upholding restrictions on the electorate for a water district because the district had only government “functions . . . of the narrow, special sort”); *Holt v. Civic Club of Tuscaloosa*, 439 U.S. 60, 69-70 (1978) (permitting a municipality to deny the right to vote to nonresidents subject to the municipality’s police jurisdiction); *Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719, 728-29 (1973) (upholding restriction limiting the franchise to landowners for a water district with “relatively limited governmental authority”).

¹³⁹ 380 U.S. 89.

¹⁴⁰ *Id.* at 94.

¹⁴¹ *Id.*

¹⁴² 405 U.S. 330 (1972).

¹⁴³ *Id.* at 345 (citation omitted).

“[d]ifferences of opinion’ may not be the basis for excluding any group or person from the franchise.”¹⁴⁴

These doctrinal developments suggested that *Smith* and *Terry*’s conception of meaningful political participation might find application even in the absence of allegations of racial discrimination. *Smith* and *Terry* hold that the determinative election in a jurisdiction is necessarily infused with state action and that the right to vote must encompass the right to participate at this juncture. Those administering such determinative elections must not only refrain from racial discrimination, but are bound by all other constitutional constraints that limit state actors.¹⁴⁵ And, as *Carrington* and *Dunn* attest, one of those constraints is the inability to exclude voters from participating in an election because of their political views. The right to vote cannot be made to hinge on ideological or political commitments.

A determinative party primary that excludes nonmembers, however, does precisely that. It makes partisan affiliation a prerequisite to participating in the jurisdiction’s sole juncture of meaningful electoral decision making. Given that *Smith* and *Terry* recognize that the right to vote encompasses the right to participate at this juncture, excluding nonmembers from a determinative primary becomes no different from limiting the general election to voters from one party. Both deny those excluded the right to vote.

A voter denied access to either election could simply join the dominant party and thereby cast a ballot. That fact, however, ought to be of no consequence as a matter of doctrine. State actors may consider partisan affiliation when engaging in a host of regulatory activities, from the drawing of district lines to setting the requirements for participation in party primaries.¹⁴⁶ Once, however, that primary be-

¹⁴⁴ *Id.* at 355 (quoting *Cipriano v. City of Houma*, 395 U.S. 701, 705-06 (1969)).

¹⁴⁵ This assumes that the same standards define state action under the Fourteenth and Fifteenth Amendments. See *James v. Bowman*, 190 U.S. 127, 136-40 (1903) (discussing state action standard for Fourteenth Amendment and Fifteenth Amendment interchangeably); 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, 677-81 (1986) (suggesting that the same tests determine state action under the Fourteenth and Fifteenth Amendments). But see Kevin R. Puvalowski, Note, *Immune from Review?: Threshold Issues in Section 1983 Challenges to the Delegate Selection Procedures of National Political Parties*, 62 FORDHAM L. REV. 409, 417 n.70 (1993) (“The Court has never ruled expressly whether the state action analysis is the same for the two Amendments.”).

¹⁴⁶ See *Vieth v. Jubelirer*, 124 S. Ct. 1769, 1792 (2004) (plurality opinion) (deeming partisan gerrymandering claims nonjusticiable); *Nader v. Schaffer*, 417 F. Supp. 837, 847 (D. Conn.), *aff’d mem.*, 429 U.S. 989 (1976) (“[A] state legitimately may condi-

comes the determinative election in a jurisdiction, partisan affiliation should no longer dictate participatory rights. Otherwise, the right to vote becomes dependent on ideological commitments.

The Supreme Court, of course, has never embraced this view. Indeed, several decisions after 1970 celebrate the associational rights of political parties in a manner that suggests that the evolution of Fourteenth Amendment doctrine did not extend *Smith* and *Terry* beyond the Fifteenth Amendment's proscription against racial discrimination in voting.

Nader v. Schaffer,¹⁴⁷ for example, permits a traditional state actor to assist political parties in discriminating based on political affiliation when deciding who gets to participate in party primaries. *Nader* upholds a state-mandated closed primary based, in part, on the paradoxical finding that the protection of party autonomy justifies regulating party activity. The state can block independent voters from participating in a party primary "to protect the party 'from intrusion by those with adverse political principles.'"¹⁴⁸ *Nader* acknowledges that "constitutional standards must be satisfied in primary . . . elections," but insists that there is no "right to vote in primary elections [when] the voter refuses to comply with constitutionally legitimate rules and requirements of party membership."¹⁴⁹ The decision locates nothing to the contrary in *Smith v. Allwright*, in which the petitioner "did not question the party membership requirement, but successfully challenged as unconstitutional his exclusion from Democratic Party membership on the basis of race."¹⁵⁰

In a similar vein, *Democratic Party of United States v. Wisconsin ex rel. LaFollette*¹⁵¹ upheld party autonomy to adopt and enforce rules governing national conventions that disregard state laws restricting the election of convention delegates. In language that the Court has invoked repeatedly,¹⁵² *LaFollette* asserted that free association to advance political beliefs

tion one's participation in a party's *nominating* process on some showing of loyalty to that party.").

¹⁴⁷ 417 F. Supp. 837, 850 (D. Conn.), *aff'd mem.*, 429 U.S. 989 (1976).

¹⁴⁸ *Id.* at 845 (quoting *Ray v. Blair*, 343 U.S. 154, 221-22 (1952)).

¹⁴⁹ *Id.* at 842 n.4.

¹⁵⁰ *Id.*; see also *Eu v. S.F. County Democratic Cent. Comm.*, 489 U.S. 214, 232 (1989) (holding that state-mandated restrictions on the organization of party governing bodies interfere with the right of political parties to free association, and rejecting arguments seeking to justify the state regulations by citing *Smith* and stating, "[t]his . . . is not a case where intervention is necessary to prevent the derogation of the civil rights of party adherents").

¹⁵¹ 450 U.S. 107 (1981).

¹⁵² For examples of this, see *California Democratic Party v. Jones*, 530 U.S. 567, 574 (2000); *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 214 (1986).

“necessarily presupposes the freedom to identify the people who constitute the association, and to limit the association to those people only.”¹⁵³ Ideological discrimination thereby emerges not as unconstitutional conduct but instead as the exercise of a constitutionally protected right. In this context, *Smith* and *Terry* apparently pose no obstacle, and indeed did not even earn a citation in the majority opinion.¹⁵⁴

In *Tashjian v. Republican Party of Connecticut*,¹⁵⁵ a concern for party autonomy prompted the Court to invalidate a state statute that blocked the Republican Party from including independent voters in its party primary.¹⁵⁶ *LaFollette* had already deemed free association to require party freedom to define membership qualifications. *Tashjian* followed suit by deeming the party’s attempt “to broaden public participation in and support for its activities [as] conduct undeniably central to the exercise of the right of association.”¹⁵⁷ By blocking the party from inviting a group of voters to participate in the “‘basic function’ of selecting the Party’s candidates,” the state statute “limit[ed] the Party’s associational opportunities at the crucial juncture at which the appeal to common principles may be translated into concerted action, and hence to political power in the community.”¹⁵⁸

Tashjian did not explicitly reconcile its holding with *Smith* and *Terry* but nevertheless suggested that the earlier cases involved distinct concerns. *Tashjian* asserted that the Constitution’s grant of state power to regulate congressional elections “does not justify, without more, the abridgment of fundamental rights, such as the right to vote . . . or, as here, the freedom of political association.”¹⁵⁹ The Court thus deemed

¹⁵³ *LaFollette*, 450 U.S. at 122.

¹⁵⁴ *Cf. id.* at 134 n.9 (Powell, J., dissenting) (suggesting that nonideological character of the major political parties explains why *Smith* and *Terry* impose “constitutional limitations on party activities”).

¹⁵⁵ 479 U.S. 208 (1986).

¹⁵⁶ *See id.* at 225 (holding that a state mandated closed primary burdened the associational rights of a party desiring to include independent voters in its primary).

¹⁵⁷ *Id.* at 214 (“[T]he freedom to join together in furtherance of common political beliefs ‘necessarily presupposes the freedom to identify the people who constitute the association.’” (quoting *LaFollette*, 450 U.S. at 122)).

¹⁵⁸ *Id.* at 215-16 (quoting *Kusper v. Pontikes*, 414 U.S. 51, 58 (1973)).

¹⁵⁹ 479 U.S. at 217 (citation omitted); *see also* U.S. CONST. Art. I, § 4, cl. 1 (granting the states broad power to prescribe the “Times, Places and Manner of holding Elections for Senators and Representatives”).

Tashjian also rejected as inapposite the argument that the statute only minimally burdened the associational right because nonmembers could participate in the party primary by joining the party. *Tashjian* deemed the “public act of affiliation” that such participation would require suspect under free expression cases such as *Wooley v. Maynard*, 430 U.S. 705, 714-15 (1977), and *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 633-634

the State's effort to restrict primary participation based on ideological criteria an interference with freedom of political association, but not, apparently, with the right to vote.¹⁶⁰ *Smith* and *Terry*, of course, based their Fifteenth Amendment holdings on the conclusion that race-based exclusions from the primaries at issue denied the right to vote to those excluded. *Tashjian* posited that seemingly similar ideological discrimination does not, but failed to explain why.

Like *Tashjian*, *California Democratic Party v. Jones* maintained that a partisan primary does not infringe on an individual's "fundamental" right to vote as protected by the Fourteenth Amendment.¹⁶¹ In striking down California's blanket primary as an interference with the associational rights of political parties,¹⁶² Justice Scalia's majority opinion explained that *Smith* and *Terry* do not block political parties from excluding nonmembers from party primaries, but instead "simply prevent exclusion that violates some independent constitutional proscription."¹⁶³ The decision found that excluding nonmembers from participating in a party primary violates no such proscription. More specifically, *Jones* expressly denied that "the 'fundamental right' to cast a meaningful vote [is] really at issue in this context."¹⁶⁴ Were it implicated "in this context," Justice Scalia wrote, the state law authorizing the blanket primary "would be not only constitutionally permissible but constitutionally required."¹⁶⁵

(1943). *Tashjian*, 479 U.S. at 216 n.7. Insofar as voting in a party primary implicates the right to vote, however, mandating party affiliation as prerequisite to primary voting arguably also runs afoul of precedent such as *Carrington v. Rash*, 380 U.S. 89 (1965), which bars states from limiting the electorate to like-minded voters. *Tashjian*, only identified tensions with the free expression cases. *Tashjian*, 479 U.S. at 216 n.7. This reasoning does not deny that voting in a party primary implicates the right to vote, but, by identifying tension only with the free expression cases, nevertheless implies that the invalidated statute did not so interfere.

¹⁶⁰ For this reason, *Nader v. Schaffer* survives *Tashjian*. An independent voter has no constitutionally protected right to participate in a party primary, while the party has a protected associational interest in inviting independents to participate, an interest that renders a contrary state law unconstitutional.

¹⁶¹ 530 U.S. 567 (2000); see also *infra* note 175 and accompanying text.

¹⁶² Like an open primary, a blanket primary permits primary voters to select candidates from any party, but, unlike an open primary, lets them make this selection for each office on the ballot. See CAL. ELEC. CODE § 2001 (West Supp. 2000) ("All persons entitled to vote, including those not affiliated with any political party, shall have the right to vote . . . for any candidate regardless of the candidate's political affiliation."), quoted in *Jones*, 530 U.S. at 570. Thus, in a statewide primary, a blanket primary allows a voter to select a Democratic candidate for governor, a Republican for attorney general, and a Libertarian for secretary of state.

¹⁶³ *Jones*, 530 U.S. at 573 n.5.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

Not so, of course, under the reading of *Smith* and *Terry* set forth in this Article. Under these decisions, the fundamental right to cast a meaningful ballot encompasses the right to participate in a competitive electoral process. This right, however, does not always necessitate non-member access to a partisan primary. Only when a district is noncompetitive does the right to meaningful political participation trump a party's claim to free political association. Indeed, a political party unwilling to bear the associational burden that follows from such compulsory access need only forgo its politically safe districts to restore its associational autonomy to exclude nonmembers.¹⁶⁶ In other words, closed primaries in competitive districts do not infringe the right to vote.¹⁶⁷

Jones, however, rejected this understanding of political participation, and instead reads *Smith* and *Terry* as applying only to race-based exclusions from primary elections. *Jones* stated:

These cases held only that, when a State prescribes an election process that gives a special role to political parties, it “endorses, adopts, and enforces the discrimination against Negroes” that the parties (or, in the case of the Jaybird Democratic Association, organizations that are “part and parcel” of the parties) bring into the process—so that the parties’ discriminatory action becomes state action under the Fifteenth Amendment.¹⁶⁸

The Fifteenth Amendment accordingly provides the “independent constitutional proscription” violated by the exclusions at issue in *Smith* and *Terry*, with the race-based exclusion constituting the essential element of the constitutional injury identified. In short, the Court suggests that racially exclusive party primaries implicate the right to vote while ideologically exclusive ones do not.

As argued above,¹⁶⁹ however, the white primaries at issue in *Smith* and *Terry* both became state action and infringed the right to vote not simply because they involved racial discrimination, but because they enforced such discrimination at the sole competitive juncture in the electoral process. The absence of subsequent electoral competition is a

¹⁶⁶ In this way, the conception of political participation underlying *Smith* and *Terry* might help curb the excesses of partisan gerrymandering and reduce the number of noncompetitive districts such gerrymandering produces. *Cf. infra* text following note 301.

¹⁶⁷ *See supra* note 113 and accompanying text (arguing that *Smith* and *Terry* do not render all primaries subject to constitutional constraints).

¹⁶⁸ 530 U.S. at 573 (quoting *Terry v. Adams*, 345 U.S. 461, 482 (Clark, J., concurring) (1953)).

¹⁶⁹ *See supra* note 113 and accompanying text (arguing that primaries become state action when subsequent elections are noncompetitive).

critical component of the holdings. It rendered the white primaries the only point in time where meaningful political participation could occur and, for this reason, rendered them state action infringing the right to vote. The later emergence of voting as a fundamental right protected by the Fourteenth Amendment suggests an analogous right to participate in a jurisdiction's sole competitive election regardless of one's race or ideological convictions.¹⁷⁰

Decisions like *Nader*, *LaFollette*, and *Tashjian* do not foreclose this understanding. To be sure, they celebrate associational freedom and the ideological discrimination its enjoyment entails, and, in the process, intimate that a racially inclusive party primary does not implicate the right to vote. Yet these decisions do not address partisan primaries that function as “the only effective part of the elective process,”¹⁷¹ and do not suggest that their analysis necessarily applies where a party primary is the determinative election. Indeed, the district court in *Nader* qualified its holding sustaining a state-mandated closed primary by expressly noting that the primary at issue did not operate in “a ‘one-party’ state—and thus no one party’s primary election [was] completely determinative of the outcome.”¹⁷² Likewise, the district court in *Tashjian* emphasized that when the Court decided the *White Primary Cases*, Texas was a one-party state and winning the Democratic primary “was tantamount to election to public office.” No one “could . . . seriously contend that anything resembling that situation is true of Connecticut at this time.”¹⁷³

Like *Nader* and *Tashjian*, *California Democratic Party v. Jones* did not confront a wholly noncompetitive electoral system. While “safe” districts certainly exist in California, numerous local and statewide elections in-

¹⁷⁰ See *supra* note 145 and accompanying text.

¹⁷¹ *Terry v. Adams*, 345 U.S. 461, 469-70 (1953).

¹⁷² *Nader v. Schaffer*, 417 F. Supp. 837, 843 (D. Conn. 1976). State action was, of course, present in *Nader*, even though the general election was competitive. State law, as opposed to party policy, mandated the exclusion of independent voters from party primaries. The Court nevertheless permits the state to discriminate among voters based on partisan affiliation and ideological commitment. The presence of electoral competition supports this holding. In a competitive electoral arena, political parties need to enforce the boundaries of membership for party adherents to come together and form opinions, and to allow the party to perform its institutional role within the electoral arena. The state law in *Nader* reinforced this institutional role. Absent competition, however, a determinative primary performs a wholly different function, such that state efforts to exclude voters from this critical juncture undermine, rather than support, the institutional role the primary performs.

¹⁷³ *Republican Party v. Tashjian*, 599 F. Supp. 1228, 1233 (D. Conn. 1984).

volve competitive races among candidates from various parties.¹⁷⁴ Justice Scalia's insistence, moreover, that the "fundamental right to vote [is not] really at issue in this context" rests, at least in part, on his observation that "[s]electing a candidate is quite different from voting for the candidate of one's choice."¹⁷⁵ The opinion thus implies that distinct concerns arise when these two acts cannot be distinguished. And in a determinative party primary, they cannot. Where a competitive primary is followed by a noncompetitive general election, selecting the party's candidate represents the only meaningful juncture to vote for the candidate of one's choice.

Jones nevertheless denied expressly that the decisiveness of a primary election alters the constitutional analysis. Defenders of the blanket primary argued that the practice was needed to prevent the disenfranchisement of independent and minority-party voters in districts where the majority party's primary was the determinative election. Justice Scalia's opinion, however, flatly rejected the notion that "nonparty members' keen desire to participate in selection of the party's nominee . . . [constitutes] 'disenfranchisement' if that desire is not fulfilled."¹⁷⁶

The decision thereby replaced the vibrant conception of the right to vote underlying *Smith* and *Terry* with a more narrow understanding. The white primaries sought to block African American voters from engaging politically with their fellow citizens, being courted as the coveted swing voters in a tight election, and influencing electoral outcomes.¹⁷⁷ The right to vote must encompass the opportunity to be the swing voter, *Smith* and *Terry* reasoned, and accordingly both decisions found state action and a consequent constitutional violation. *Jones* disagreed, and, erasing the core rationale for *Smith* and *Terry*, identi-

¹⁷⁴ See generally California Election Results, at <http://vote96.ss.ca.gov/Vote96/html/vote/vote.htm> (last visited Oct. 9, 2004) (showing participation in statehouse races by Libertarian and Natural Law Party candidates); cf. John Harwood, *No Contests: House Incumbents Tap Census, Software to Get a Lock on Seats*, WALL ST. J., June 19, 2002, at A1 (noting expectation that redistricting would produce no competitive congressional elections among California's fifty-three member congressional delegation).

¹⁷⁵ Cal. Democratic Party v. Jones, 530 U.S. 567, 573 n.5 (2000) (internal quotation marks omitted).

¹⁷⁶ *Id.* at 583. *Jones* concludes that the blanket primary was unnecessary even if the Court deemed non-party-members disenfranchised in "safe" districts, given that such voters "should simply join the party." *Id.* at 584. Distinguishing *Tashjian's* concern that this "public act of affiliation" raised First Amendment concerns, see *supra* note 159, *Jones* states that joining the party may present "a hard choice, but it is not a state-imposed restriction" on freedom of association. *Jones*, 530 U.S. at 584.

¹⁷⁷ See *supra* notes 49-60 and accompanying text.

fied no right to participate in a determinative partisan primary so long as it is racially inclusive. Ultimately, the associational interests of political parties emerge as the sole constitutional interest at stake. Non-party members excluded from such primaries suffer no constitutional injury. In short, *Smith* and *Terry* remain good law, but only as applied to race-based exclusions.

Narrowing *Smith* and *Terry* in this manner is doctrinally puzzling, particularly given *Jones*'s insistence that a partisan primary does not implicate the "fundamental right" to cast a meaningful vote.¹⁷⁸ After all, a violation of the Fifteenth Amendment requires not only race-based discrimination, but also interference with the right to vote.¹⁷⁹ But if a race-based exclusion from a determinative (or, indeed, nondeterminative) partisan primary implicates the right to vote, an ideologically based one ought to as well, given the protection the Fourteenth Amendment now accords to the right to vote.

Yet *Jones*'s sense that racial discrimination differs from other types of discrimination is hardly unprecedented. In several cases, the Court has identified both state action and constitutional infringements when it confronted instances of racial discrimination, but it has declined to find either when faced with other types of discrimination in seemingly analogous circumstances.¹⁸⁰

¹⁷⁸ *Jones*, 530 U.S. at 574 n.5.

¹⁷⁹ See U.S. CONST. amend. XV, § 1 ("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.").

¹⁸⁰ See, e.g., *Vieth v. Jubelirer*, 124 S.Ct. 1769, 1781, 1792 (2004) (plurality opinion) (rejecting claim that partisan and racial gerrymanders should be subject to the same judicial scrutiny and holding partisan gerrymandering claims to be nonjusticiable); *id.* at 1793 (Kennedy, J., concurring) (refusing to hold partisan gerrymandering claims nonjusticiable but agreeing that race and politics were so distinct that the racial gerrymandering cases had no application); see also LOWENSTEIN & HASEN, *supra* note 22, at 459 (discussing *Republican Party of Texas v. Dietz*, 940 S.W.2d 86 (Tex. 1997), and suggesting that state action might be more readily found if a state party were to refuse to lease a booth at a party convention to a particular racial group than to a group supporting policies favorable to gays and lesbians); Cain, *supra* note 48, at 802 (arguing that states may infringe on party autonomy only "to prevent racial discrimination and maintain the orderly management of the ballot"); Neal Troum, *Expressive Association and the Right to Exclude: Reading Between the Lines in Boy Scouts of America v. Dale*, 35 CREIGHTON L. REV. 641, 684 (2002) ("If James Dale had been excluded because he was black, it is less clear that BSA would have won its expressive association claim."); J. Craig Buchan, Note, *Boy Scouts of America v. Dale: The Scout Oath and Law Survive Government Intrusion*, 55 OKLA. L. REV. 153, 171 (2002) ("[T]he Court [in *Dale*] . . . did provide a clear distinction between discrimination based on sexual preference and that based on race, gender, national origin, or ethnicity in quasi-private organizations."). Compare *Shelley v. Kraemer*, 334 U.S. 1, 20 (1948) (locating state action in judicial en-

Similarly, *Rice v. Cayetano*¹⁸¹ held that defining an electorate based on race infringes the fundamental right to vote even though, absent the racial classification, that right would not be at issue. *Rice* struck down as a violation of the Fifteenth Amendment a state law providing that only “Hawaiians” could vote for the trustees of Hawaii’s Office of Hawaiian Affairs (OHA), a public agency that oversees programs designed to benefit the state’s native people.¹⁸² In defending the electoral restriction, Hawaii had argued, inter alia, that the OHA’s limited powers rendered it a “special purpose” district and thus one for which an electorate limited to those deemed most affected by district governance is permissible.¹⁸³ The Court has reasoned that such districts do not exercise general governmental powers and, as a result, that their restrictive voting regimes do not implicate the fundamental right to vote.¹⁸⁴ *Rice*, however, surprisingly accepted the proposition that the OHA might constitute a special purpose district,¹⁸⁵ but nevertheless held that its voting regime infringed upon the right to vote as protected by the Fifteenth Amendment.

The reason, *Rice* stated, was that the OHA’s electoral restriction embodied a racial classification. *Rice* held that, while a special purpose district that restricts the electorate to property owners does not implicate the right to vote, a similarly empowered district that classifies voters by race does implicate this right. Property owners who select the board of directors for a water management district are engaged in an administra-

forcement of racially restrictive covenant), with *Girard v. 94th St. & Fifth Ave. Corp.*, 530 F.2d 66, 69-70 (2d Cir. 1976) (finding no state action where plaintiffs alleged sex-based denial of right to assign according to facially neutral contract).

¹⁸¹ 528 U.S. 495 (2000).

¹⁸² The state laws at issue distinguish among Hawaiians, who include any descendant of a person living on the Hawaiian Islands in 1778; Native Hawaiians, who include any descendent of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands before 1778; and implicitly, all other citizens of Hawaii. See HAW. CONST., art. XII, § 5 (establishing board of trustees to be “elected by qualified voters who are Hawaiians”); *Rice v. Cayetano*, 528 U.S. 495, 513 (2000) (“The Fifteenth Amendment was quite sufficient to invalidate a scheme which did not mention race but instead used ancestry in an attempt to confine and restrict the voting franchise.”).

¹⁸³ See Brief for Respondent at 41-45, *Rice v. Cayetano*, 528 U.S. 495 (1999) (No. 98-818) (arguing that the OHA’s limited powers rendered it analogous to a special purpose district).

¹⁸⁴ See, e.g., *Ball v. James*, 451 U.S. 355, 371 (1981) (applying deferential rational basis review to voting regime restricting vote to property owners); *Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719, 729 (1973) (same).

¹⁸⁵ See *Rice*, 528 U.S. at 522 (“The question before us is not the one-person, one-vote requirement of the Fourteenth Amendment, but the race neutrality command of the Fifteenth Amendment.”).

tive act subject only to the most deferential judicial review, but the “Hawaiian” voters electing OHA trustees exercise a fundamental right, restrictions on which are subject to the most exacting review. The explanation is not that the OHA enjoys powers that may be distinguished doctrinally from those possessed by a water district, but instead that the State’s use of a race-based classification to define its electorate transformed an administrative electoral system into a highly significant one implicating the fundamental right to vote. That is, the use of a racial classification to define an electorate elevates the act of participation in an election from an administrative act into one implicating constitutional concerns.¹⁸⁶

A similar conception of the transformative power of racial classifications may explain the Court’s effort to distinguish a racially exclusive primary from a partisan one. Decisions like *Jones* view a racially inclusive partisan primary as a largely private forum in which political parties exercise their associational rights. The existence of racial discrimination, however, suffices to transform such primaries into highly significant electoral systems implicating the fundamental right to vote. In this realm, the associational claims of political parties must yield to vindicate the voting rights of those excluded.

Jones, accordingly, maintained that *Smith* and *Terry* remain good law, but law addressing the distinct problem of racial discrimination. The race-based exclusion creating the white primary became the essential component of *Smith*’s and *Terry*’s holdings. The result, however, is a substantial revision of the decisions’ scope and import. The white primary was designed to deny black voters the opportunity to influence electoral outcomes and thereby to block them from enjoying the benefits of citizenship that follow from meaningful political participation. Yet the existence of racial discrimination does not suffice to transform any electoral system into state action implicating the right to vote.¹⁸⁷ Rather, the white primaries at issue in *Smith* and *Terry*

¹⁸⁶ See Katz, *supra* note 123, at 521 (arguing that *Rice v. Cayetano* similarly conceives of race such that “[w]hat previously might have been perceived of as a process ill-suited to the formation of the ‘self-constitutive values of citizenship’ now becomes a forum self-consciously designed and understood to promote a very specific type of self and community identity” (quoting Frank Michelman, *Conceptions of Democracy in American Constitutional Argument: Voting Rights*, 41 FLA. L. REV. 443, 469 (1989))).

¹⁸⁷ Indeed, *Smith* and *Terry* may be read to permit at least some race-based exclusions from party primaries, even those subject to state regulation. For example, *Smith* and *Terry* need not require that a white supremacist party always allow black voters to participate in its primary or that a black nationalist party should necessarily be required to include white participants. Instead, the decisions require racially inclusive rules for participation in party primaries only when such primaries function as the sole

violated the Fifteenth Amendment because they operated as the determinative elections in their respective jurisdictions.

II. CONTROLLING THE RACIAL COMPOSITION OF THE PRIMARY ELECTORATE

Legislators, judges, and scholars have long debated how the racial composition of an electoral district shapes the political influence that racial minorities wield. In noncompetitive districts, however, minority influence depends more specifically on the racial composition of the electorate for the majority party's primary.¹⁸⁸ That electorate may, but need not, mirror the demographic composition of the district as whole. Just as a district boundary may constitute a racial gerrymander or give rise to racial vote dilution, a determinative primary may be structured so as to give rise to analogous harms. As a result, the same complex web of federal statutory and constitutional rules governing the racial composition of electoral districts should govern primary structures as well.

An additional rule, however, applies in the primary context, namely the associational right defined by decisions such as *Jones*. This Part explains how a political party may invoke this right to manipulate the racial composition of its primary electorate. Because African American voters are among the most loyal Democratic voters,¹⁸⁹ this

locus of meaningful decision making within electoral system. When competitive elections follow primaries, parties are free to impose discriminatory participatory rules.

¹⁸⁸ See, e.g., Grofman et al., *supra* note 22, at 1409-1411 (discussing the importance of primary elections in evaluating minority political power and noting that "the highest percentage [of the] black [vote] needed to win is not always found in the general election"); Pildes, *Is Voting-Rights Law Now at War with Itself?*, *supra* note 22, at 1534 (noting that in safe Democratic districts, "if black voters have effective control of the primary election, those voters will determine who represents the district, even if black voters are not a majority of the district overall").

¹⁸⁹ See, e.g., *Easley v. Cromartie*, 532 U.S. 234, 245 (2000) (stating that in North Carolina African Americans "register and vote Democratic between 95% and 97% of the time"); Maxine Burkett, *Strategic Voting and African-Americans: True Vote, True Representation, True Power for the Black Community*, 8 MICH. J. RACE & L. 425, 430 (2003) (discussing the "unwavering allegiance to the Democratic Party by the Black community and leaders alike"); Pamela S. Karlan, *Georgia v. Ashcroft and the Retrogression of Retrogression*, 3 ELECTION L.J. 21, 25 n.38 (2004) [hereinafter Karlan, *Retrogression of Retrogression*] ("According to the state's expert, '[u]pward of 90% of black voters support Democrats, while over 60% of white voters cast their ballots for Republicans.'). But see Lynette Clemetson, *Younger Blacks Tell Democrats to Take Notice*, N.Y. TIMES, Aug. 8, 2003, at A1 (reporting increased tendency among African American voters aged eighteen to thirty-five to affiliate as Independents rather than as Democrats); Juan Williams, *Bush Shouldn't Write Off the Black Vote*, N.Y. TIMES, June 16, 2004, at A21 (arguing that Presi-

power devolves primarily to the Democratic Party. As explained in more detail below, Democrats may use this power for partisan advantage either to generate a violation of federal voting rights law or to ensure the legality of their chosen primary structure. This power further erodes the *White Primary Cases* by restoring to a political party the power to control the racial composition of its primary electorate for partisan gain.

Part II.A explains how excluding nonmembers from a determinative Democratic primary increases the proportion of the primary electorate comprised by black voters and may produce a majority-minority primary. While Democrats today have little affection for the majority-minority district given its linkage with Democratic electoral defeats, the majority-minority primary offers a vehicle to maintain or enlarge descriptive black representation without diminishing party influence. This Part explains how the associational right recognized in *Jones* offers the Democratic Party a mechanism to create such primaries without generating the expressive harms that led to the invalidation of the majority-minority districts in the racial gerrymandering cases.

Part II.B maintains that a determinative primary may dilute minority voting strength, and that a closed majority-minority primary may do so by “packing” black voters into the primary electorate. It argues that excluding nonmembers from a determinative Democratic primary may generate racial vote dilution in violation of the Voting Rights Act (VRA),¹⁹⁰ and that resolution of the resulting conflict between the party’s associational right and federal voting rights law may require redistricting to adjust the racial balance of the district, and by extension of the primary. The associational interest defined in *Jones* may accordingly enable the Democratic Party to destabilize an unfavorable partisan gerrymander and “unpack” districts in which a Republican-controlled legislature has concentrated minority voters.

Part II.C describes and evaluates a recent case that challenged the operation of Georgia’s open primary in a safe Democratic district on the ground that it caused racial vote dilution.

dent Bush could attract as much as 20% of the black vote in the 2004 presidential election).

¹⁹⁰ Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (2002)).

A. *The Majority-Minority Primary and Racial Gerrymandering*

Numerous studies report that the creation of majority-minority districts during the 1990s led to an overall decrease in the power of the Democratic Party.¹⁹¹ As a result, the Democratic Party today will disperse minority voters among several electoral districts if it has the power to do so.¹⁹²

The Court's 2003 decision in *Georgia v. Ashcroft*¹⁹³ approved this practice. It held that the VRA does not require that jurisdictions draw majority-minority districts when a smaller population of black voters can elect representatives of choice or otherwise influence the electoral

¹⁹¹ For a sampling of these studies, see DAVID LUBLIN, *THE PARADOX OF REPRESENTATION* 114 (1997) (estimating that majority-minority districts cost Democrats eleven congressional seats they would have won absent such districts); Mark F. Bernstein, *Racial Gerrymandering*, PUB. INT., Winter 1996, at 59, 60-64 (discussing "Democratic decline following the creation of black-majority districts" and claiming that racial gerrymandering "directly cost" the Democrats a dozen congressional seats); Charles Cameron et al., *Do Majority-Minority Districts Maximize Substantive Black Representation in Congress?*, 90 AM. POL. SCI. REV. 794, 810 (1996) (commenting that in Georgia the congressional delegation changed from nine Democrats and one Republican to three black Democrats and eight white Republicans in only two years); Bernard Grofman & Lisa Handley, *1990s Issues in Voting Rights*, 65 MISS. L.J. 205, 263-65 (1995) (estimating that between two and eleven of the congressional seats lost by Democrats between 1990 and 1994 might have been kept absent the creation of minority-majority districts); Kevin A. Hill, *Does the Creation of Majority Black Districts Aid Republicans? An Analysis of the 1992 Congressional Elections in Eight Southern States*, 57 J. POL. 384, 395 (1995) (explaining that a "change in the proportion of African Americans residing in a district is a strong predictor of the vote in that district"); David Lublin, *Racial Redistricting and African-American Representation: A Critique of "Do Majority-Minority Districts Maximize Substantive Black Representation in Congress?"*, 93 AM. POL. SCI. REV. 183, 186 (1999) (noting that the removal of African Americans from white districts creates a greater likelihood that a Republican candidate will be elected); John J. Miller, *Race to Defeat: How the Black Caucus Elected Newt Gingrich Speaker*, REASON, Feb. 1995, at 23 (stating that the creation of thirteen new majority-black districts after the 1990 census "guaranteed the election of black Democrats to the new seats, but it also 'whitened' neighboring districts and made them more Republican"). *But see* Richard L. Engstrom, *Voting Rights Districts: Debunking the Myths*, CAMPAIGNS & ELECTIONS, Apr. 1995, at 24 (arguing that new black districts, particularly in the South, have not benefited the Republican Party); Pamela S. Karlan, *Loss and Redemption: Voting Rights at the Turn of a Century*, 50 VAND. L. REV. 291, 302-07 (1997) [hereinafter Karlan, *Loss and Redemption*] (arguing that redistricting practices in the 1990s do not wholly explain southern Democratic losses).

¹⁹² *See, e.g., Georgia v. Ashcroft*, 123 S. Ct. 2498, 2506 (2003) (discussing effort by Georgia Democrats to "unpack" majority-African-American districts and disperse black influence); *see also* Melissa L. Saunders, *A Cautionary Tale: Hunt v. Cromartie and the Next Generation of Shaw Litigation*, 1 ELECTION L.J. 173, 193 (2002) (anticipating that *Hunt v. Cromartie*, 526 U.S. 541 (1999), would spur Democrats to "unpack" former majority-minority districts); Jason Zengerle, *Color Line: Whitening Black Districts*, NEW REPUBLIC, Aug. 2001, at 12 (describing the "unpacking" efforts in North Carolina).

¹⁹³ 539 U.S. 461, 123 S. Ct. 2498 (2003).

process.¹⁹⁴ At issue in the case was whether Georgia could permissibly replace some majority-minority districts with so-called “coalition” and “influence” districts.¹⁹⁵ In coalition districts, black voters need not comprise the majority of a district’s population to be able to elect representatives of choice,¹⁹⁶ while influence districts permit minority voters to exert some sway in the electoral process, but not necessarily to elect representatives of their choice. All nine Justices agreed that a coalition district was a viable substitute for a majority-minority district,¹⁹⁷ and a majority thought that an influence district could likewise adequately preserve minority voting strength.¹⁹⁸

Commentators have viewed *Ashcroft* as a victory for the Democratic Party.¹⁹⁹ It eliminates the perception that the VRA requires jurisdic-

¹⁹⁴ The Court cited Pildes with approval in ruling that section 5 of the VRA “leaves room for States to use . . . influence and coalitional districts” of the described type. *Id.* at 2513; see also Pildes, *Is Voting-Rights Law Now at War With Itself?*, *supra* note 22, at 1522 (defining coalition districts as districts “with a significant population and [with] white voters who are willing to form interracial political coalitions in support of minority candidates”).

¹⁹⁵ See *Ashcroft*, 123 S. Ct. at 2511-13 (describing district forms). As a “covered” jurisdiction under the VRA, Georgia must demonstrate to the Attorney General or the District Court for the District of Columbia that changes to its electoral system are discriminatory in neither purpose nor effect. This inquiry turns on whether the changes “would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise.” *Id.* at 477-80 (quoting *Beer v. United States*, 425 U.S. 130, 141 (1976)).

¹⁹⁶ See Pildes, *Is Voting-Rights Law Now at War With Itself?*, *supra* note 22, at 1522 (explaining that in coalition districts, white voters “form interracial coalitions in support of minority candidates”); see also *Ashcroft*, 123 S. Ct. at 2511-12 (discussing coalition districts); *Page v. Bartels*, 144 F. Supp. 2d 346, 354 (D.N.J. 2001) (accepting the argument that certain majority-minority districts “wasted” African American votes because black-preferred candidates “would have been elected in any event with a much diminished minority population”); Grofman et al., *supra* note 22, at 265 (noting that districts with black voting age populations of thirty-five to forty percent suffice to give minority voters an equal opportunity to elect candidates of choice).

¹⁹⁷ *Ashcroft*, 123 S. Ct. at 2511-12. The dissent agreed with the majority that: The prudential objective of § 5 is hardly betrayed if a State can show that a new districting plan shifts from supermajority districts, in which minorities can elect their candidates of choice by their own voting power, to coalition districts, in which minorities are in fact shown to have a similar opportunity when joined by predictably supportive nonminority voters.

Id. at 2517 (Souter, J., dissenting).

¹⁹⁸ *Id.* at 2512-13 (2003). The dissenters feared that influence districts were ill-defined, offered minority voters insufficient avenues for political participation, and that the majority’s reliance on such districts will provide “greater opportunity to reduce minority voting strength in the guise of obtaining party advantage.” *Id.*

¹⁹⁹ See, e.g., LOWENSTEIN & HASEN, *supra* note 22, at 33 (suggesting that the decision might benefit the Democratic party “who can spread more reliably Democratic voters across a larger number of districts”); Adam Clymer, *Court Allows New Approach to*

tions to create majority-minority districts whenever possible within constitutional constraints, and enables Democratic legislators to spread the party's most reliable voters among several districts instead of concentrating black voters within a single majority-black district.²⁰⁰

Dispersing black voters in this manner tends to place more Democrats in office. Their greater number yields official policy that is generally thought to be more responsive to black interests than that produced by a legislature comprised of districts in which black voters are more concentrated and more Republicans are elected.²⁰¹ The Democrats elected, however, are more likely to be white,²⁰² and thus maxi-

Redrawing Districts by Race, N.Y. TIMES, June 27, 2003, at A20 (characterizing *Ashcroft* as "endors[ing] a tactic Democrats employed in several states"); Rhonda Cook, *Court: Georgia Can Spread Out Minority Voters*, ATLANTA J.-CONST., June 27, 2003, at A8 (quoting election law practitioner Sam Hirsch as viewing *Ashcroft* in the Democrat's favor); Jonathan Ringel, *High Court Revives Democrats' Redistricting Plan*, FULTON COUNTY DAILY REP., June 27, 2003, at 1 (describing *Ashcroft* as "a major victory for Georgia Democrats").

²⁰⁰ LOWENSTEIN & HASEN, *supra* note 22, at 33; *see also* Bernstein, *supra* note 191, at 64 ("Clearly, drawing the most loyal part of the Democratic constituency out of a district will make it harder for the Democrats to hold the district.").

²⁰¹ *See, e.g.*, LUBLIN, *supra* note 191, at 99 ("Black majority districts usually conflict with efforts to maximize African-American substantive representation. Doing the utmost to advance black interests necessitates destroying most black majority districts."); CAROL M. SWAIN, *BLACK FACES, BLACK INTERESTS: THE REPRESENTATION OF AFRICAN AMERICANS IN CONGRESS 19* (1993) (stating that "Republicans are less responsive to black interests than are Democrats"); Bernstein, *supra* note 191, at 68 (suggesting that black interests were not better represented when Congress fell under Republican control, even though black participation in Congress was "at an all-time high"); Abigail Thernstrom, *More Notes from a Political Thicket*, 44 EMORY L.J. 911, 939 (1995) (blasting racial gerrymandering as promoting the idea that blacks are a "nation within our nation"); Adam Cohen, *Why Republicans Are Shamelessly in Love with the Voting Rights Act*, N.Y. TIMES, Mar. 24, 2002, § 4, at 14 (describing Georgia Republican outcry in favor of black voting rights as possessing a "special cravenness"); Miller, *supra* note 191, at 23 (arguing that the election of black representatives from majority black districts produced Republican control of Congress and harmed interests supported by African American voters); CAROL M. SWAIN, *The Future of Black Representation*, AM. PROSPECT, Fall 1995, at 78, 80 ("African Americans lost substantive representation in 1994: The new Republican Congress represents their interests less than the previous Democratic one even though the new Congress has more black members."); *see also* Richard H. Pildes, *Principled Limitations on Racial and Partisan Redistricting*, 106 YALE L.J. 2505, 2531 (1997) ("[D]escriptive representation might in theory enhance the likelihood of substantive representation, [but] as a practical matter . . . more proportional descriptive representation might be achievable only at the weighty cost of declining substantive representation.").

²⁰² *See* LUBLIN, *supra* note 191, at 99 ("Maximizing black substantive representation exacts a heavy price in terms of descriptive representation.").

mizing Democratic success tends to diminish so-called descriptive black representation.²⁰³

That decline is cause for concern to both the African American community and the Democratic Party. Black candidates and legislators may be essential to energize black voters and ensure that they turn out on election day.²⁰⁴ As important, a black presence in the legislature, and not simply a Democratic one, may be necessary to produce policies favorable to black interests and hence to maintain black support for the Democratic Party.²⁰⁵ Professor Karlan has described the leverage that even a small number of black elected officials may wield in a legislature that is closely divided between Democrats and Republicans. Such a divide means that white Democrats need the support of black Democrats to implement any partisan policy initiative and black Democrats can condition their cooperation on party support for policies that black voters tend to favor.²⁰⁶

Democratic electoral success, however, need not hinge on a reduction in descriptive black representation. The coalition districts upheld in *Ashcroft* allow black voters to elect black candidates to office even when these voters do not comprise a majority of the population. Black electoral success here depends on the increased willingness of

²⁰³ See *id.*

²⁰⁴ See, e.g., KATHERINE TATE, FROM PROTEST TO POLITICS: THE NEW BLACK VOTERS IN AMERICAN ELECTIONS 81 (1993) ("Black officeseeking, particularly in elections involving Blacks as political newcomers, seems to be associated with astoundingly high Black turnouts."); Kathryn Abrams, "Raising Politics Up": *Minority Political Participation and Section 2 of the Voting Rights Act*, 63 N.Y.U. L. REV. 449, 501 (1988) (arguing that minority office holders are necessary for "political morale" and minority empowerment); cf. LANI GUINIER, THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY 85 (1994) (noting that a black candidate seeking to displace a white officeholder may energize black voters, but that this support tends to dissipate after the election and rarely exists in reelection campaigns); Grofman & Handley, *supra* note 191, at 268-69 ("The 'blackening' of the Democratic party in the South has precipitated a 'chain reaction' effect, making it less and less likely that Democrats will ever regain white support as the center of gravity within the Democratic party in the South shifts toward black interests.").

²⁰⁵ See, e.g., KENNY J. WHITBY, THE COLOR OF REPRESENTATION: CONGRESSIONAL BEHAVIOR AND BLACK INTERESTS 96-97 (1997) (linking benefits of descriptive and substantive representation); Karlan, *Loss and Redemption*, *supra* note 191, at 302-07 (noting that "white Republican legislators are far less friendly to black interests"); cf. GUINIER, *supra* note 204, at 56 (noting that black officials may share in the policy preferences of most African Americans).

²⁰⁶ See Karlan, *Loss and Redemption*, *supra* note 191, at 302-07 (explaining that one reason for "southern black voters to support the Democratic candidate is . . . because when there is a partisan divide the Democrat will align with the party most sympathetic to black interests").

white Democrats to support black candidates, at least in the general election.²⁰⁷ It also typically requires black voters to comprise a majority of the primary electorate, given that racial bloc voting persists among Democrats at the primary stage.²⁰⁸ For Democrats, the majority-minority primary is preferable to the majority-minority district as a vehicle to elect black representatives. It allows Democrats to preserve and expand descriptive black representation without hindering Democratic electoral success.

Creating a majority-minority primary, however, raises constitutional concerns much like those associated with the majority-minority district. In a safe Democratic district where blacks comprise a minority of the population, the electorate for the Democratic primary will be majority black only if Republican voters are denied access. Excluding Republicans from voting in such a primary generally increases the proportion of the primary electorate black voters comprise and, in some districts, sufficiently so as to give rise to a majority-minority primary. Considerations of race inform the creation of such a primary and indeed may well predominate over other considerations when a majority-minority primary is created to increase the proportion of black voters in the primary electorate, thereby enhancing descriptive black representation.

A majority-minority primary may accordingly be subject to challenges much like the ones brought against a variety of majority-minority districts in *Shaw v. Reno*²⁰⁹ and its progeny, which mandate the application of strict scrutiny to districting plans when considerations of race predominate over traditional districting principles.²¹⁰ A

²⁰⁷ See Pildes, *Is Voting-Rights Law Now at War With Itself?*, *supra* note 22, at 1530 (citing evidence that some white southern Democrats regularly vote for black Democratic candidates).

²⁰⁸ See, e.g., *Session v. Perry*, 298 F. Supp. 2d 451, 478 (E.D. Tex. 2004) (noting that “blacks and Hispanics do not vote cohesively in primary elections, where their allegiance is free of party affiliation”); Karlan, *Retgression of Retgression*, *supra* note 189, at 26 n.42 (noting an absence of evidence showing “substantial white crossover voting in Democratic primaries in majority-white districts where white Democrats have a choice between white and black Democratic candidates and can attain both descriptive and substantive representation”).

²⁰⁹ 509 U.S. 630 (1993).

²¹⁰ See, e.g., *Bush v. Vera*, 517 U.S. 952, 959 (1996) (plurality opinion) (subjecting Texas district to strict scrutiny when “other, legitimate districting principles were ‘subordinated’ to race” (citation omitted)); *Shaw v. Hunt*, 517 U.S. 899, 905 (1996) (finding constitutional violation in North Carolina redistricting “when race became the ‘dominant and controlling’ consideration” (citation omitted)); *Miller v. Johnson*, 515 U.S. 900, 910-915 (1995) (allowing Georgia plaintiff to challenge district as racially categorizing despite the absence of a “bizarre” district shape); *Shaw v. Reno*, 509 U.S. at

districting plan that “cannot be understood as anything other than an effort to ‘segregat[e] . . . voters’ on the basis of race”²¹¹ is understood to impose an expressive harm on district residents. The *Shaw* decisions fretted that unjustified racially predominant districting resembles “political apartheid” and “may exacerbate the very patterns of racial bloc voting that majority-minority districting is sometimes said to counteract.”²¹²

Development and application of the *Shaw* doctrine occupied an immense amount of the Court’s time during the 1990s. However, the deluge of *Shaw* challenges expected after the post-2000 round of redistricting has not materialized.²¹³ The reason stems largely from the last of the Court’s *Shaw* decisions. *Easley v. Cromartie*²¹⁴ declined to apply to strict scrutiny to an oddly shaped district in which African Americans comprised 47% of the district’s population.²¹⁵ After reviewing the record’s most minute details, the Court concluded that partisanship best explained the district lines, and therefore that race had not predominated in the districting process.²¹⁶ Commentators reacted to *Cromartie* with skepticism,²¹⁷ with some predicting that the Court’s

657 (“[R]ace-based districting by our state legislatures demands close judicial scrutiny.”).

²¹¹ See *Bush*, 517 U.S. at 1053 (1996) (Souter, J., dissenting) (accepting the characterization of the *Shaw* injury as expressive); *Shaw v. Reno*, 509 U.S. at 646-47 (“In some exceptional cases, a reapportionment plan may be so highly irregular that, on its face, it rationally cannot be understood as anything other than an effort to ‘segregat[e] . . . voters’ on the basis of race.” (quoting *Gomillion v. Lightfoot*, 364 U.S. 339, 341 (1960))); Richard H. Pildes & Richard G. Niemi, *Expressive Harms*, “Bizarre Districts,” and *Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno*, 92 MICH. L. REV. 483, 506-16 (1993) (describing the *Shaw* injury as an expressive one).

²¹² *Shaw v. Reno*, 509 U.S. at 647-48. As a descriptive matter, the Court’s fear may be misplaced, at least as applied to many of the majority-minority districts drawn during the 1990s. Said to comprise some of the most integrated political communities in the United States, see, for example, Bernstein, *supra* note 191, at 60, these majority-black districts have repeatedly elected candidates supported by cross-racial coalitions in competitive elections in which minority-preferred candidates aggressively courted nonminority voters. See, e.g., DAVID T. CANON, *RACE, REDISTRICTING AND REPRESENTATION* 19 (1999).

²¹³ See Issacharoff, *Gerrymandering*, *supra* note 2, at 638 (arguing that *Shaw* created “perverse incentives . . . that encourage the racialization of all claims of improper manipulation of the redistricting process”).

²¹⁴ 532 U.S. 234 (2001).

²¹⁵ *Id.* at 240, 258.

²¹⁶ See *id.* at 243, 244 (acknowledging that in North Carolina “racial identification is highly correlated with political affiliation” while rejecting the argument that race rather than party politics explained the districting plan).

²¹⁷ See, e.g., John Hart Ely, *Confounded by Cromartie: Are Racial Stereotypes Now Acceptable Across the Board or Only When Used in Support of Partisan Gerrymanders?*, 56 U.

fact-intensive approach would invite more litigation.²¹⁸ The tight connection between race and political affiliation, however, has enabled informed districters to immunize most districting plans from *Shaw* challenges.

Similarly, the associational interest underlying decisions like *Jones* supports the creation of a majority-black electorate without generating the exacting review applied in the *Shaw* cases. The associational interest a party may assert as the justification for closing a primary is facially race neutral. *Jones*, along with *LaFollette* and *Tashjian* before it, celebrated the right to free political association as “necessarily presup[ing] the freedom to identify the people who constitute the association, and to limit the association to those people only.”²¹⁹ *Jones* stopped short of invalidating the open primary as an interference with this right,²²⁰ but nevertheless provides support for parties to demand primary closure as a necessary component of the right to free political association.²²¹ Race-based considerations may still inform the decision to close

MIAMI L. REV. 489, 496 (2002) (lambasting the Court’s “predominant purpose” test as “indeterminate to the point of incoherence”); Pamela S. Karlan, *Exit Strategies in Constitutional Law: Lessons for Getting the Least Dangerous Branch Out of the Political Thicket*, 82 B.U. L. REV. 667, 677 (2002) [hereinafter Karlan, *Exit Strategies*] (“[*Cromartie*] cannot be explained in any sort of principled terms that provide guidance for future cases.”).

²¹⁸ See, e.g., Issacharoff, *Gerrymandering*, *supra* note 2, at 640 (describing disentanglement of race from politics as a motivating factor as “inherently problematic, because a racially motivated legislature and one concerned only with politics could easily produce identical results”); Karlan, *Exit Strategies*, *supra* note 217, at 684 (noting that *Cromartie* offers little “guidance to future plan drawers,” and that the decision, “with its aggressive review of the record . . . suggests the Court is committed to remaining engaged in adjudicating *Shaw* claims.”).

²¹⁹ *Democratic Party of United States v. Wisconsin ex rel. LaFollette*, 450 U.S. 107, 122 (1981).

²²⁰ See *Cal. Democratic Party v. Jones*, 530 U.S. 567, 577 n.8 (2000) (“[T]he blanket primary also may be constitutionally distinct from the open primary . . . in which the voter is limited to one party’s ballot. . . . This case does not require us to determine the constitutionality of open primaries.”).

²²¹ See, e.g., *Osburn v. Cox*, 369 F.3d 1283, 1288-89 (11th Cir. 2004) (dismissing, for lack of standing and failure to state a claim, challenge to open primary based on *Jones*); *Beaver v. Clingman*, 363 F.3d 1048, 1061 (10th Cir.) (holding that state interests do not justify burden imposed on associational freedom by Oklahoma’s semi-closed primary system), *cert. granted*, 2004 U.S. LEXIS 5007 (Sept. 28, 2004); *Ariz. Libertarian Party, Inc. v. Bayless*, 351 F.3d 1277, 1283 (9th Cir. 2003) (per curiam) (remanding for district court evaluation as to whether Arizona might require the Libertarian Party “to allow nonmembers to select party candidates”); see also Garrett, *Is the Party Over?*, *supra* note 11, at 126-27 (noting that *Jones* did not resolve whether a state mandated open primary was valid, but that aspects of the decision call it into question); Richard L. Hasen, *Do the Parties or the People Own the Electoral Process?*, 149 U. PA. L. REV. 815, 830 n.60 (2001) (noting that “[t]he logic of *Jones* . . . implies that a state may not” foist “an open primary on a political party without its consent”); Issacharoff, *Private Parties*, *supra* note

the primary, but the strength of the associational interest identified in *Jones* suggests that such considerations need not predominate over non-racial factors. Closing the primary may leave minority voters as the majority or even the supermajority of the primary's electorate. So long as the party claims an associational interest in closure, however, race should not be the predominant reason for creating a majority-minority primary.

The result is that voters participating in such a majority-minority primary need not sustain the injury the Court understands unconstitutional racial gerrymandering to produce. The Court's concern about balkanization and polarization in *Shaw* and its progeny does not necessarily transfer to a closed majority-minority primary in a safe district. To be sure, the *Shaw* cases are concerned about how district boundaries shape political participation, a concern that seemingly focuses on the effects districting decisions produce as opposed to the motivations that lay behind them. Doctrinally, however, the *Shaw* cases render suspect only those districting decisions (and, by extension, choices of primary systems) propelled predominantly by race. The districting process may produce an oddly shaped district that suggests a particular intent dictated its contours.²²² Ultimately, however, the expressive injury identified in *Shaw* stems, as a matter of law, from the intent of those creating the plan, not the results the plan produces.²²³

The right to free political association provides an impetus for primary closure that prevents race from being the predominant motive for the action. The racially predominant intent propelling concerns about "political apartheid" in the majority-minority districts is thus absent. Despite the similarities between the primary's electorate and those in the *Shaw* districts, voters should not suffer an expressive injury.

6, at 284 (arguing that the Court's analysis in *Jones* cannot "sustain the distinction as between the various primary systems").

²²² See, e.g., *Gomillion v. Lightfoot*, 364 U.S. 339, 341 (1960) (striking down a re-districting plan that changed a district from a square "into a strangely irregular twenty-eight-sided figure" for the implied purpose of redistributing black voters).

²²³ See, e.g., Issacharoff, *Gerrymandering*, *supra* note 2, at 636-37 (noting that *Shaw*'s progeny now mandate a "robust evidentiary hunt for any trace of controlling racial considerations in the drawing of legislative boundaries" and that "the Court has now come to believe that the appearances that matter are no longer the district lines but the formalities of the legislative record").

B. *The Majority-Minority Primary, Racial Vote Dilution, and Partisan Gerrymandering*

Last spring, the Court refused to impose meaningful limits on partisan gerrymandering. Justice Scalia's plurality opinion in *Vieth v. Jubelirer*²²⁴ maintained that partisan gerrymander claims are nonjusticiable because no discernible and manageable standard against which to measure them exists.²²⁵ Justice Kennedy thought a manageable standard might ultimately be discerned, and thus refused to hold these claims nonjusticiable.²²⁶ He was, however, unable to articulate such a standard, and the dissenters disagreed among themselves as to how such claims might be adjudicated.²²⁷

The consequence is that *Vieth* preserved the status quo. Even assuming justiciability, challenges to partisan gerrymanders remain doomed to fail, at least in federal court. And, as before, losers in the redistricting process will continue to recast partisan defeats as legal injuries under case law pertaining to one person, one vote;²²⁸ racial gerrymandering;²²⁹

²²⁴ 124 S. Ct. 1769 (2004).

²²⁵ While the question whether claims of partisan gerrymandering should be justiciable lies outside the scope of this Article, the Court's refusal to give bite to such claims is reason enough for the justices to rethink their narrowing of *Smith* and *Terry*. See text following note 301.

²²⁶ See *Vieth*, 124 S. Ct. at 1795 (Kennedy, J., concurring) ("That no such standard has emerged in this case should not be taken to prove that none will emerge in the future.").

²²⁷ See *id.* at 1812 (Stevens, J., dissenting) ("I would apply the standard set forth in the *Shaw* cases and ask whether the legislature allowed partisan considerations to dominate and control the lines drawn, forsaking all neutral principles."); *id.* at 1817 (Souter, J., dissenting) ("I would adopt a political gerrymandering test analogous to the summary judgment standard [in employment discrimination law]."); *id.* at 1827-29 (Breyer, J., dissenting) (providing examples of "strong indicia of abuse" in partisan gerrymandering that would violate the Equal Protection Clause).

²²⁸ See, e.g., *Larios v. Cox*, 300 F. Supp. 2d 1320, 1326, 1352 (N.D. Ga.) (per curiam) (holding that a state legislative apportionment plan which deviated from population equality by 9.98% violated the one person, one vote principle), *aff'd*, 124 S. Ct. 2806 (2004).

²²⁹ See, e.g., Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *Challenges to Racial Redistricting in the New Millennium: Hunt v. Cromartie as a Case Study*, 58 WASH. & LEE L. REV. 227, 309 (2001) (arguing that racial gerrymandering cases "are about politics" and not race); Issacharoff, *Gerrymandering*, *supra* note 2, at 638 ("[P]artisan battles for the spoils of redistricting were successfully recast as racial gerrymandering claims [following *Shaw*]."); Megan Creek Frient, Note, *Similar Harm Means Similar Claims: Doing Away with Davis v. Bandemer's Discriminatory Effect Requirement in Political Gerrymandering Cases*, 48 CASE W. RES. L. REV. 617, 655 (1998) ("Because . . . a political gerrymander cannot be invalidated unless plaintiffs allege the scheme is a racial gerrymander, parties both bringing and defending these claims have incentives to attempt to emphasize or

and racial vote dilution.²³⁰ The associational interest underlying decisions like *Jones* offers another claim for redistricting losers, and specifically, for Democrats to exploit.

Republicans unsurprisingly do not share the Democrats' desire to disperse African American voters, and thus seek to concentrate the maximum number of these voters within as few districts as lawfully possible.²³¹ *Ashcroft* permits Republicans to do so, just as it permits Democrats to unpack majority-minority districts.²³²

Jones enables Democrats to counter this effort when they lack control of the districting process. *Jones* also allows Democrats to demand the closure of the Democratic primary in Republican-created majority-minority districts and thereby force the further concentration of black voters in the primary electorate. Such action may seem contrary to Democratic interests, given the party's desire to disperse African American voting strength. Yet closing the Democratic primary in these circumstances may prompt precisely this result, when, as explained below, closure sufficiently increases the proportion of black voters in the primary electorate to give rise to racial vote dilution.

1. Racial Vote Dilution and the Partisan Primary

Thirty years ago, the Supreme Court recognized that inadequate access to primary elections may contribute to racial vote dilution in an electoral district. *White v. Regester*²³³ affirmed the existence of such dilution based, in part, on the finding that a white-dominated organization had "effective control of Democratic Party candidate slating" and that the local "black community has been effectively excluded from

downplay the degree to which considerations of race and political affiliation played a role in enacting a reapportionment plan.").

²³⁰ See, e.g., *Session v. Perry*, 298 F. Supp. 2d 451, 474, 515 (E.D. Tex. 2004) (rejecting partisan gerrymander claim, vote dilution claim, and other challenges to "re-districting" in Texas).

²³¹ See, e.g., *id.* at 518 (Ward, J., concurring in part and dissenting in part) ("[T]he changes to [the district] were not intended to increase minority voter participation either by strengthening the district or 'unpacking' the minority voters into adjoining districts to maximize the overall political strength of Hispanics. These changes were designed to crush these minority voters' participation in the political process."); Saunders, *supra* note 192, at 193 (surmising that Republicans will challenge "unpacking" as a VRA violation).

²³² See *Georgia v. Ashcroft*, 123 S. Ct. 2498, 2513 (2003) (noting that states retain substantial discretion to select which among various electoral structures they think best protects minority voting strength); see also Karlan, *Retgression of Retgression*, *supra* note 189, at 30-31 (discussing the novelty of *Ashcroft's* holding).

²³³ 412 U.S. 755 (1973).

participation in the Democratic primary selection process.”²³⁴ Yet a racially inclusive primary does not itself ensure that a minority community can aggregate its voters effectively. District boundaries influence minority voting strength in the general election even if access to the ballot box is guaranteed.²³⁵ So too, primaries in a safe district may be structured in a manner that denies minority voters an equal opportunity to participate in the electoral process and thereby dilutes their vote.

The paradigmatic example of racial vote dilution occurs when a jurisdiction employs an at-large system governing the election of representatives to a multimember governing body.²³⁶ A politically cohesive racial minority group with a distinct socioeconomic profile, historically African Americans, comprises a percentage of the population sufficiently large that it could elect a representative of its choice if candidates for the governing body ran from geographically based districts. Persistent white bloc voting, however, means that black-preferred candidates have not prevailed in the at-large system and are unlikely to do

²³⁴ *Id.* at 766 (internal quotation marks omitted); *see also* Zimmer v. McKeithan, 485 F.2d 1297, 1305 (5th Cir. 1973) (listing “a lack of access to the process of slating candidates” to be among the “panoply of factors” that inform the inquiry into racial vote dilution), *aff’d sub nom.* E. Carroll Parish Sch. Bd. v. Marshall, 424 U.S. 636 (1976) (per curiam); S. Rep. No. 97-417, at 28-29 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 206-07 (listing, among factors shaping dilution inquiry under 1982 amendments to section 2 of the VRA, the extent to which “[i]f there is a candidate slating process, . . . the members of the minority group have been denied access to that process”).

²³⁵ *See, e.g.*, Dillard v. Crenshaw County, 640 F. Supp. 1347, 1356-59 (M.D. Ala. 1986) (discussing the systemic diminution of black political power in Alabama); *see also* Lani Guinier, *No Two Seats: The Elusive Quest for Political Equality*, 77 VA. L. REV. 1413, 1424, 1481-82 (1991) (distinguishing “first generation” voting rights, those revolving around basic suffrage, from “second generation” voting rights, those involving the freedom from representative dilution, and identifying the existence of a “third generation” of voting rights, those dealing with the evils of tokenism); Pamela S. Karlan, *The Rights to Vote: Some Pessimism About Formalism*, 71 TEX. L. REV. 1705, 1709-20 (1993) (delineating a “continuum” of voting rights of three types: “participatory,” “aggregative,” and “governance”).

²³⁶ *See, e.g.*, Thornburg v. Gingles, 478 U.S. 30, 47-48 (1986) (“This Court has long recognized that multimember districts and at-large voting schemes may operate to minimize or cancel out the voting strength of racial [minorities in] the voting population.” (internal quotation marks omitted)); Rogers v. Lodge, 458 U.S. 613, 616 (1982) (holding that a county’s at-large system of elections unconstitutionally diluted the voting power of its black citizens), *cited in* Gingles, 478 U.S. at 48; Goosby v. Town Bd., 180 F.3d 476, 481 (2d Cir. 1999) (affirming district court’s decision to abolish at-large election and replace it with six single-member districts to remedy minority vote dilution).

so.²³⁷ In this circumstance, the at-large regime dilutes African American voting strength in violation of Section 2 of the VRA.²³⁸

In a safe district marked by racial bloc voting, an open primary may function like a dilutive at-large electoral system, submerging the votes of a cohesive racial minority.²³⁹ If party affiliation strongly correlates with race, nonmember participation in a determinative party primary can flood the primary electorate and thereby diminish or eliminate entirely the opportunity for meaningful political participation by members of the minority racial group. The absence of competition in the general election denies minority voters a venue for political participation that might offset the lack of opportunity to influence the primary.

A closed primary in a safe district may also give rise to racial vote dilution, albeit of a different sort. District boundaries typically dilute minority voting strength by placing members of a geographically cohesive minority community in two or more districts, thereby “fracturing” the community and replicating the dilution caused by the at-large regime. A districting plan, however, may also be dilutive by “packing” an excessive number of minority voters into a single district, even

²³⁷ See *Gingles*, 478 U.S. at 50-51 (requiring that, to prove that a districting plan dilutes the vote of a racial minority, plaintiffs must show that a minority group “is sufficiently large and geographically compact to constitute a majority in a single-member district,” that the group is “politically cohesive,” and that the “white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority’s preferred candidate” (citations omitted); see also *Goosby*, 180 F.3d at 494 (discussing aspects of at-large elections in large districts that disproportionately impair the ability of black candidates to campaign effectively).

²³⁸ See Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131 (codified at 42 U.S.C. §§ 1973a-1973b (1994)) (prohibiting any voting “standard, practice, or procedure” that “results in a denial or abridgement of the right . . . to vote on account of race or color” and defining a statutory violation to occur “if, based on the totality of circumstances . . . the political processes leading to the nomination or election . . . are not equally open” to members of a protected class, such that these members “have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice”). The vast majority of legal challenges brought under amended Section 2 have addressed the form or configuration of an electoral districting plan. See, e.g., *Whitfield v. Democratic Party of Ark.*, 890 F.2d 1423, 1427 (8th Cir. 1989) (noting that “challeng[es] [to] at-large election schemes and districting matters . . . [comprise] most of the previous section 2 cases”), *on reh’g*, 902 F.2d 15 (1990).

²³⁹ See ISSACHAROFF ET AL., *supra* note 22, at 770 (“[P]roof of racial bloc voting [is] the touchstone of a section 2 claim of dilution through submergence.”).

though the minority population is sufficiently large to exert meaningful influence in more than one district.²⁴⁰

Packing has long been a form of racial vote dilution in the districting context. The practice predates the Voting Rights Act, and was a particularly effective dilutive device in the years before the Court articulated the one person, one vote principle. State officials could minimize black voting strength by placing a large black community within one voting district while spreading an equal number of white voters among several more sparsely populated districts. Notorious examples during the late nineteenth century include North Carolina's "Black Second," Mississippi's "shoestring district," Alabama's Fourth, and South Carolina's "boa constrictor" Seventh District.²⁴¹

These packed districts "wasted" black votes by minimizing the influence of African American voters in other districts. They also functioned to deny black and white voters alike the opportunity to engage in meaningful cross-racial dialog within a district and to form alliances when their interests coincided.²⁴² The district lines that separated black and white voters severed the most natural means for voters to interact and find common ground, while the disproportionately low population among white districts meant white voters controlled the

²⁴⁰ See, e.g., *Georgia v. Ashcroft*, 123 S.Ct. 2498, 2506 (2003) (discussing "packing"); *Voinovich v. Quilter*, 507 U.S. 146, 153-54 (1993) (describing how "packing" dilutes minority votes); *Gingles*, 478 U.S. at 46 n.11 (stating that the minority vote becomes less effective if states concentrate minority voters "into districts where they constitute an excessive majority"); W. Mark Crain, *The Constitutionality of Race-Conscious Redistricting: An Empirical Analysis*, 30 J. LEGAL STUD. 193, 209-210 (2001) (inferring from statistical evidence that creating majority-minority districts makes minority voters less influential); Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 HARV. L. REV. 1663, 1713 (2001) (arguing that packing harms a minority group by "robbing the group of an opportunity to influence electoral outcomes in other districts").

²⁴¹ See, e.g., ERIC ANDERSON, RACE AND POLITICS IN NORTH CAROLINA 1872-1901: THE BLACK SECOND (1981); J. Morgan Kousser, *How to Determine Intent: Lessons from L.A.*, 7 J.L. & POL. 591, 598-606 (1991) (discussing racial gerrymandering in Alabama, Mississippi, and South Carolina during the 1870s and 1880s); J. Morgan Kousser, *Shaw v. Reno and the Real World of Redistricting and Representation*, 26 RUTGERS L.J. 625, 670 (1995) [hereinafter Kousser, *Real World*] (noting that between 1872 and 1900, North Carolina's Second District was "packed" with a substantial black majority and disproportionately high overall population that "effectively confined black control in a state that was approximately a third African-American to a maximum of one district in eight or nine . . . and minimized black influence and Republican representation in all the other congressional districts").

²⁴² See, e.g., GUINIER, *supra* note 204, at 135 (arguing that racially homogenous districts decrease opportunities for cross-racial appeals among voters and among the legislators elected from such districts).

electoral process, even in states with sizable black populations.²⁴³ In this sense, the packed district and the white primary were part and parcel of the same program. They kept white voters in control of the electoral process by preventing white and black voters from “making common cause.”²⁴⁴

In a safe district, the majority’s party primary may function like a packed district. If the primary is open, its electorate should mirror that of the district as a whole. Insofar as minority voters represent a disproportionate share of the district population, they will similarly pack the primary. If the primary is closed, its electorate may also be packed with minority voters, even if the district itself has a racial composition that would not be characterized as packed. Given African American affiliation with the Democratic Party, closing the Democratic primary in a safe Democratic district may increase the proportion of black voters in the primary electorate so extensively as to render the primary packed and thereby give rise to racial vote dilution.

As with the open primary, the dilutive device here is not the closed primary operating alone, but instead the operation of that primary structure within a safe district. A competitive general election permits a closed primary to function without contributing to racial vote dilution. The packing that results from closure occurs only because the primary constitutes the sole opportunity for electoral decision making in the district. If the general election is competitive, the minority votes otherwise “wasted” by packing in the primary become essential for minority influence in the general election. And for white and black voters alike, competition at the general election offers the opportunity for cross-racial dialogue sacrificed by packing at the primary stage. Absent competition, however, the primary structure gives rise to racial vote dilution.

2. The Majority-Minority Primary as a Redistricting Tool

Racial vote dilution is typically remedied by redistricting. For example, a districting plan comprised of single-member districts may remedy the dilution caused by an at-large voting regime.²⁴⁵ Each dis-

²⁴³ See, e.g., Kousser, *Real World*, *supra* note 241, at 670 (discussing late nineteenth century North Carolina).

²⁴⁴ Issacharoff & Pildes, *supra* note 11, at 663.

²⁴⁵ See, e.g., *Rogers v. Lodge*, 458 U.S. 613, 616 (1982) (stating that, where minority-preferred candidates consistently fail to be elected in multimember districts, they may be successful in single-member districts); *Goosby v. Town Bd.*, 180 F.3d 476, 481

trict contains fewer overall voters than did the at-large system, and, when the districts are properly drawn, minority voters in some districts will comprise a greater proportion of the district's electorate than they did in the electorate of the at-large regime. This increase provides minority voters a greater opportunity to participate and elect representatives of their choice.

In a safe district, a closed primary may similarly remedy the dilution evident when an open primary is used. Where minority voters substantially share a single party affiliation, closing that party's primary reduces the overall number of voters participating in that process, and thereby increases the relative influence of minority voters.

*California Democratic Party v. Jones*²⁴⁶ insisted that meaningful political participation does not require nonmember access to a determinative primary,²⁴⁷ and thereby made clear that a majority party in a safe district may close its primary without interfering with the right to vote.²⁴⁸ *Jones*, however, did more than give its stamp of approval to an electoral practice of longstanding use. Its broader import lies in the power its reconceptualization of political participation lodges in a political party, and the Democratic Party in particular. Where an open primary reveals racial vote dilution, closure at the party's request not only promotes the party's interest in free association, but may also increase the proportion of minority voters in the primary electorate to sufficiently cure the dilution. A closed Democratic primary is most likely to yield this result.²⁴⁹ Accordingly, the Democratic Party may forestall redistricting that otherwise would be necessary to address racial vote dilution by asserting an associational interest in closing its primary.

A Democratic district, however, may already contain a sizeable minority population, particularly when the districting process lies

(2d Cir. 1999) (affirming a district court's minority vote dilution remedy of substituting six single-member election districts for an at-large district).

²⁴⁶ 530 U.S. 567 (2000).

²⁴⁷ See *supra* notes 174-76 and accompanying text (discussing the Court's statement in *Jones* that exclusion from determinative party primaries does not constitute disenfranchisement).

²⁴⁸ See Hasen, *supra* note 221, at 816 (“[*Jones*] giv[es] the parties the last word on the form of political primaries used to pick party nominees to run in the general election.”).

²⁴⁹ See *supra* note 189 and accompanying text (discussing African American voters' loyalty to the Democratic Party).

within Republican control.²⁵⁰ Here, closing the Democratic primary may not simply result in a majority-minority primary, but in a packed primary, and hence one that gives rise to racial vote dilution instead of curing it.²⁵¹ In this context, too, *Jones* cedes to the party power to control the racial composition of its primary electorate. The conflict between the party's constitutional right to free association and the federal statutory right of minority voters to be protected from racial vote dilution need not be inexorable. Resolution lies in a new redistricting effort, one that sufficiently disperses minority voters among neighboring districts so that primary closure no longer yields a packed electorate. Put differently, the Democratic Party can force a new redistricting effort by asserting its associational interest in a closed primary, thereby obtaining a districting plan that better advances its partisan goals.

Jones accordingly provides an additional phase to the partisan redistricting process. It offers the opportunity to destabilize the prevailing plan, albeit not by direct challenge, but instead by articulating an independent interest, the assertion of which renders the adopted plan defective. It enables the Democratic Party effectively to "unpack" districts in which a Republican-controlled legislature has concentrated minority voters.

C. Cynthia McKinney and Georgia's Open Primary

A recent case from Georgia helps make this discussion more concrete, albeit largely by counterexample. On August 20, 2002, five-term U.S. Congresswoman Cynthia McKinney lost the Democratic primary in Georgia's Fourth Congressional District to former state court judge Denise Majette. According to McKinney's supporters, McKinney received the majority of the Democratic votes cast, but Majette allegedly won because approximately 37,500 Republicans voted against McKinney in the district's Democratic primary.²⁵² Under Georgia law, a voter

²⁵⁰ See *supra* notes 191-92, 231 and accompanying text (recognizing Republican incentive to preserve majority-minority districts).

²⁵¹ See *supra* notes 240-44 and accompanying text (analyzing packing).

²⁵² Ben Smith & David A. Milliron, *Vote Analysis: GOP Not Key in McKinney Loss*, ATLANTA J.-CONST., Oct. 15, 2002, at A1 (reporting allegations of crossover voting but disputing their significance); see Thomas B. Edsall, *Impact of McKinney Loss Worries Some Democrats*, WASH. POST, Aug. 22, 2002, at A4 [hereinafter Edsall, *Impact of McKinney Loss*] (reporting that Majette defeated McKinney "58 percent to 42 percent" in a Democratic primary dominated by Jewish-Muslim tension, with "many" Republicans voting). The history of the disputed primary is also briefly summarized in *Osburn v. Cox*, 369 F.3d 1283, 1285 (11th Cir. 2004).

may participate in a party primary regardless of party affiliation.²⁵³ McKinney's supporters responded to her defeat by filing suit in federal court. The complaint in *Osburn v. Cox*²⁵⁴ claimed that "malicious" crossover voting by Republicans in the August Democratic primary combined with bloc voting by white Democrats to dilute the District's cohesive black vote.²⁵⁵ While both McKinney and Majette are African American, the *Osburn* plaintiffs insisted that black voters overwhelmingly favored McKinney, and that white bloc voting in the primary prevented her nomination and ultimate election.²⁵⁶ Because Democrats comprise nearly 70% of the voters in the Fourth District, the Democratic nominee wins the general election.²⁵⁷

The *Osburn* complaint was inartfully presented and rightly dismissed.²⁵⁸ Nevertheless, the allegation that Georgia's open primary

²⁵³ Voters in Georgia do not identify a political party affiliation when they register to vote and may vote in any particular partisan primary. See GA. CODE ANN. § 21-2-224(d) (2003) (allowing electors "to vote in any primary or election"). Once a voter participates in a party's primary during a particular election cycle, that voter may not then vote in another party's primary during the same cycle. *Id.*

²⁵⁴ No. 1:02-CV-2721-CAP (N.D. Ga. Aug. 1, 2003), *aff'd*, 393 F.3d 1283 (11th Cir. 2004).

²⁵⁵ See Complaint at 1-12, *Osburn v. Cox*, No. 1:02-CV-2721-CAP (N.D. Ga. Aug. 1, 2003), filed Oct. 4, 2002. The complaint also alleged that the crossover Republican vote constituted forced political association that violated the First and Fourteenth Amendments of the Democratic Party. *Id.* at 9.

A subsequent study sponsored by the *Atlanta Journal-Constitution* took issue with these allegations. Since voters in Georgia do not register to vote based on party affiliation, the study traced back to 1990 the voting histories of DeKalb County voters who participated in the August 20th primary. The newspaper concluded that no more than 3,118 of the 68,612 votes Majette received could be clearly identified as having been cast by Republican voters. The vast majority of the voters who participated in the primary had voted too infrequently, or switched parties so often that the newspaper concluded they could not be fairly characterized as Democrats or Republicans. Smith & Milliron, *supra* note 252, at A1. The *Osburn* plaintiffs rejected these findings as flawed. See *id.* (quoting the attorney for the *Osburn* plaintiffs as saying he did not give credence to the newspaper's research).

²⁵⁶ See Complaint at 4, *Osburn v. Cox*, No. 1:02-CV-2721-CAP (N.D. Ga. Aug. 1, 2003) (alleging that McKinney won all but one precinct in majority-black South DeKalb County, and received seventy-five percent of the vote in that region).

²⁵⁷ See, e.g., Georgia Election Results, at <http://www.sos.state.ga.us/elections/election-results/default.htm> (last visited Sep. 6, 2004) (providing links to statistics demonstrating that Democrats have won the congressional election in the Fourth District since it was redrawn in 1995); see also William Douglas, *Mideast Issue Infuses Georgia Race*, NEWSDAY, Aug. 18, 2002, at A8.

²⁵⁸ See *Osburn v. Cox*, 369 F.3d 1283, 1286 (11th Cir. 2004) (affirming dismissal for lack of standing and failure to state a claim for a violation of the Fourteenth or Fifteenth Amendments, or section 2 of the VRA); see also *infra* note 262 and accompanying text (discussing racial bloc voting allegation).

gave rise to racial vote dilution was hardly trivial. At bottom, the *Osburn* plaintiffs were claiming that voting among white and black Democrats in the Fourth Congressional District was racially polarized when party affiliation was not at issue. That is, white and black Democrats favored different candidates in the primary even though they consistently supported the Democratic nominee in the general election.²⁵⁹ The plaintiffs alleged that the Democratic primary electorate would have been safely majority-minority had nonmembers been excluded, and would have nominated the candidate most preferred by the cohesive black community.²⁶⁰

According to the plaintiffs, the open primary enabled white Democrats to join forces with white Republicans to defeat the black-preferred candidate. The dilution claim accordingly posited that the open primary operated in Georgia's Fourth District much like an at-large electoral system, diluting the influence a minority community could otherwise exert in districted elections. Like an at-large system, the open primary flooded the primary electorate with white voters and thereby blocked the cohesive black community from electing its representative of choice.²⁶¹

Or so they alleged: while cogent in principle, the *Osburn* plaintiffs' claim ran afoul of the facts. Most significantly, voting in the Fourth District was not racially polarized to the degree the plaintiffs alleged. To be sure, the district that first enabled Cynthia McKinney to become Georgia's first African American congresswoman was 64% black.²⁶² Back in 1992, the Eleventh District was one of three majority African American districts the Georgia legislature had drawn after the 1990 Census.²⁶³ It consisted of portions of several counties, extending

²⁵⁹ See generally Edsall, *Impact of McKinney Loss*, *supra* note 252, at A4 ("Majette is strongly favored to win the Nov. 5 general election in the solidly Democratic district . . ."); Edsall, *Questions Raised About Donors to Georgia Lawmaker's Campaign*, WASH. POST, Aug. 13, 2002, at A2 [hereinafter Edsall, *Questions Raised*] (stating that the victor in the Democratic primary "is almost certain to win the general election").

²⁶⁰ As redrawn following the 2000 census, the Fourth District was only nominally a majority-minority district, with black voters comprising 50.02% of the voting age population. *Georgia v. Ashcroft*, 195 F. Supp. 2d 25, 44 (D.D.C. 2002), *vacated by* 123 S. Ct. 2498 (2003).

²⁶¹ See *supra* note 239 and accompanying text (discussing vote dilution in at-large and open primary systems).

²⁶² See *Johnson v. Miller*, 864 F. Supp. 1354, 1366 n.12 (S.D. Ga. 1994) (listing the Eleventh District as having a sixty-four percent black population and a sixty percent black voting age population), *aff'd*, 515 U.S. 900 (1995).

²⁶³ *Id.*

from the rural center of the state to more urban communities in Augusta, Savannah, and southern DeKalb County.²⁶⁴

After the Supreme Court struck down that district as an unconstitutional racial gerrymander,²⁶⁵ McKinney ran for office in 1996 from the Fourth District. She won with fifty-eight percent of the vote, even though blacks represented only thirty-three percent of the District's voting-age population.²⁶⁶ The Fourth District returned McKinney to Congress in 1998 and again in 2000.²⁶⁷ She emerged on the national stage as one of several African American representatives originally elected from majority-black districts, but who subsequently garnered support among white residents in newly drawn white-majority districts.²⁶⁸

²⁶⁴ See *Johnson*, 864 F. Supp. at 1367 (describing the geographical reach of the district).

²⁶⁵ *Miller v. Johnson*, 515 U.S. 900, 922-28 (1995). McKinney's Eleventh District was reconfigured. See *Johnson v. Miller*, 922 F. Supp. 1556, 1561-69 (S.D. Ga. 1995) (describing a court-drawn plan that was not subject to preclearance under section 5 of the VRA), *aff'd sub nom. Abrams v. Johnson*, 521 U.S. 74 (1997) (upholding the legality of the new districting plan). For discussions of the *Abrams* litigation, see Pamela S. Karlan, *The Fire Next Time: Reapportionment After the 2000 Census*, 50 STAN. L. REV. 731, 745-53 (1998); Thalia L. Downing Carroll, Casenote, *One Step Forward or Two Steps Back? Abrams v. Johnson and the Voting Rights Act of 1965*, 31 CREIGHTON L. REV. 917, 917-26, 939-51 (1998); Lindsay Ryan Errickson, Note, *Threading the Needle: Resolving the Impasse Between Equal Protection and Section 5 of the Voting Rights Act*, 54 VAND. L. REV. 2057, 2064-65 (2001).

²⁶⁶ See Kevin Sack, *Victory of 5 Redistricted Blacks Recasts Gerrymandering Dispute*, N.Y. TIMES, Nov. 23, 1996, at 1 [hereinafter Sack, *Victory of 5*] (noting McKinney's success in the new district).

²⁶⁷ See Georgia Election Results, at <http://www.sos.state.ga.us/elections/results/default.htm> (last visited Sep. 6, 2004) (providing links to election results that show that in 1998 and 2000, McKinney won 61.1% and 60.7% of the vote, respectively); see also Samuel Issacharoff, *Why Elections?*, 116 HARV. L. REV. 684, 692 n.52 (2002) (discussing McKinney's success).

²⁶⁸ See Kevin Sack, *In the Rural White South, Seeds of a Biracial Politics*, N.Y. TIMES, Dec. 30, 1998, at A1 [hereinafter Sack, *Rural White South*] (identifying McKinney as one of nine black representatives elected to Congress in 1998 from white-majority districts). After the 2000 census, the Georgia General Assembly produced new districting plans for the state's congressional delegation and for the State House and Senate. The Fourth Congressional District emerged with an increased percentage of African American residents, and with an increase in the district's black voting age population. African Americans thereafter comprised 54.69% of McKinney's district and 50.02% of its voting age population. See *Georgia v. Ashcroft*, 195 F. Supp. 2d 24, 44 (D.D.C. 2002) (citing voter statistics in the Fourth District), *vacated by* 123 S. Ct. 2498 (2003). The federal district court in Washington, D.C. precleared Georgia's congressional plan in April 2002. 195 F. Supp. 2d at 97. Georgia challenged the court's refusal to preclear the Georgia Senate plan before the Supreme Court. 123 S. Ct. 2498, 2517 (2003).

McKinney, however, alienated many of her supporters—white and black alike—by making a series of controversial statements following the September 11, 2001 terrorist attacks. In a radio interview, she suggested that the Bush administration knew in advance that the attacks were coming and that “persons close to this administration [were] poised to make huge profits off America’s new war.”²⁶⁹ After New York City’s then-mayor, Rudy Giuliani, declined a \$10 million donation from a Saudi prince critical of U.S. Middle East policy, McKinney wrote the prince directly and suggested a range of Georgia-based projects that could use the money.²⁷⁰ Subsequently, after Majette accused McKinney of accepting campaign contributions from Arab Americans linked to terrorism, McKinney responded that she would not “racially profile” campaign contributors.²⁷¹

The McKinney-Majette primary battle became national news. Both candidates obtained support from outside the district. The Yale-educated Majette courted and raised \$1.1 million from a host of Jewish and Republican groups, while several Muslim associations lent their support to McKinney.²⁷² Republican leaders and conservative commentators encouraged Republican voters to vote for Majette in the open Democratic primary.²⁷³ Prominent black leaders, including

²⁶⁹ See Barr, *McKinney Lose in Georgia Primaries*, CNN, Aug. 21, 2002, at www.CNN.com/2002/allpolitics/08/21/elec02.ga.primary.results/index.html (quoting the September 11th remark); see also Lynette Clemetson, *For Black Politicians, 2 Races Suggest a Rise of New Tactics*, N.Y. TIMES, Aug. 22, 2002, at A1 (reporting on the controversy and quoting a McKinney supporter as saying that McKinney’s September 11th comments made voters “a little apprehensive”); Editorial, *McKinney’s Call For Probe Is Nutty*, ATLANTA J.-CONST., Apr. 15, 2002, at A9 (criticizing McKinney for her comment); Smith & Milliron, *supra* note 252, at A1 (paraphrasing the remark).

²⁷⁰ See Barr, *McKinney Lose in Georgia Primaries*, *supra* note 269 (relating McKinney’s attempt to attract funds from a Saudi prince).

²⁷¹ For news accounts of the campaign controversy, see *id.*; Clemetson, *supra* note 269; Edsall, *Questions Raised*, *supra* note 259, at A2. See also Jake Tapper, *Keeping the New Black Candidate Down*, SALON.COM, June 18, 2002, at http://archive.salon.com/politics/feature/2002/06/18/davis/index_np.html (last visited Oct. 9, 2004) (reporting that McKinney’s “controversial approach to the Middle East conflict” included hiring a press secretary with links to Hamas who publicly stated that “Israeli occupation of all territories must end, including Congress”).

²⁷² For news accounts of the primary as a manifestation of black-Jewish tensions, see Clemetson, *supra* note 269; Julie Hirschfeld Davis, *Rift Between Blacks, Jews Worries Democrats for Fall; Strain Over Middle East Could Threaten Chances of Winning Back Congress*, BALTIMORE SUN, Aug. 26, 2002, at 1A; Edsall, *Impact of McKinney Loss*, *supra* note 252; Dahleen Glanton, *Demographics, Apathy Blamed in McKinney Defeat*, CHI. TRIB., Aug. 22, 2002, at 8; Tapper, *supra* note 271; Shawn Zeller, *Tough Sell*, NAT’L J., Dec. 14, 2002.

²⁷³ Bill Rankin, *Name McKinney Victor, Crossover Voting Suit Asks*, ATLANTA J.-CONST., Oct. 5, 2002, at 2E; Jim Wooten, *Republicans Can Help Boot McKinney*, ATLANTA J.-CONST., Aug. 4, 2002, at H4 (arguing that Republicans in the Fourth District “don’t

those who had supported McKinney in previous campaigns, refused to endorse her,²⁷⁴ while more controversial black leaders like Al Sharpton and Louis Farrakhan supported her candidacy.²⁷⁵ The campaign became acrimonious as primary day approached.²⁷⁶ The night before the primary, state representative Billy McKinney stated on live television that his daughter's campaign difficulties had been caused by the "J-E-W-S," spelling out the word.²⁷⁷

McKinney was defeated the next day. The controversy she generated explains her loss better than racial bloc voting.²⁷⁸ While white voters, including numerous Republicans, indisputably preferred Majette to McKinney,²⁷⁹ McKinney had received considerable white sup-

really have to put up with a liberal Democrat who's also contemptuous of them" because "[w]hile they don't matter in November, they can matter in August").

²⁷⁴ Clemetson, *supra* note 269, at A1 (reporting that NAACP Chairman Julian Bond and former Atlanta Mayor Maynard Jackson "distanced" themselves from McKinney, despite having supported her in the past); Edsall, *Impact of McKinney Loss*, *supra* note 252, at A4 (reporting that McKinney's campaign produced a "split among Atlanta's most prominent blacks" and that former Atlanta Mayor Andrew Young and baseball hero Hank Aaron refused to endorse McKinney).

²⁷⁵ Eli Kintisch, *The Crossover Candidate*, AM. PROSPECT, Sept. 23, 2002 (documenting the McKinney defeat), available at <http://www.prospect.org/web/printfriendly-view.ww?id=6524>.

²⁷⁶ See Rhonda Cook, *McKinney Hits Opponent's Court Record*, ATLANTA J.-CONST., July 27, 2002, at 3H (describing McKinney campaign radio ads likening Majette to an "angry, out-of-control police officer beating up a prisoner"); Richmond Eustis, *Welcome to the Campaign Trail*, FULTON COUNTY DAILY REP., July 29, 2002, at 1 (stating that McKinney's ads called Majette "a bad judge who trampled the rights of defendants"); Tapper, *supra* note 271 (claiming McKinney portrayed Majette as "a tool of whiteness," and quoting a McKinney campaign statement as saying "Denise Majette's candidacy is a Trojan Horse for the good old boys from the bad old days").

²⁷⁷ The spelling incident is reported in Edsall, *Impact of McKinney Loss*, *supra* note 252, at A4; Steve Miller, *McKinney Blames Ouster on Crossover; Angry GOP, Jewish Voters Prove Deciding Factor in Georgia Primary*, WASH. TIMES, Aug. 22, 2002, at A04; Smith & Milliron, *supra* note 252, at A1.

²⁷⁸ See Kintisch, *supra* note 275 (noting that McKinney had previously "won enough white support to give her comfortable margins" but lost in 2002 "because she gave her opponents plenty of grist"). McKinney herself may have recognized as much. After Majette announced she would give up her House seat and run for the Senate, McKinney entered and won the July 2004 Democratic primary in Georgia's Fourth District. This time, McKinney employed less contentious rhetoric and successfully appealed to suburban voters. See *Two Years Is a Short Time*, THE ECONOMIST, July 24, 2004, at 40 (reporting McKinney's victory and noting that she ran "a much smarter campaign than she had in 2002" and that "[s]he kept her head down, shunning the media"). Growing concern about the intervening war in Iraq, moreover, made McKinney's prior comments about the Bush Administration seem less controversial. See *id.* (noting McKinney's "success also reflects the souring of opinion about the Iraq war").

²⁷⁹ See Edsall, *Impact of McKinney Loss*, *supra* note 252, at A4 (detailing McKinney's loss to Majette).

port in previous elections.²⁸⁰ So too, African American support for McKinney diminished as well in 2002, notwithstanding the *Osburn* plaintiffs' claim to the contrary.²⁸¹ After the primary, one McKinney supporter summed up black apprehensions about her candidacy, noting that "[s]ome in our community . . . thought our congresswoman was too boisterous, and they carried that thought with them to the polls."²⁸²

But even if the *Osburn* plaintiffs could have established racial bloc voting, they would have confronted an additional difficulty. The remedy they sought would have replaced one form of racial vote dilution with another. The plaintiffs sought a court order excluding nonmembers from participating in the Democratic primary in the Fourth District. Such an order would have reduced the number of voters eligible to participate in the primary while ensuring that African Americans comprised a greater proportion of those eligible. Based on the *Osburn* plaintiffs' allegations, excluding nonmembers from the 2002 Democratic primary in the Fourth District would have given rise to a majority-minority primary in which African Americans comprised more than seventy percent of the primary electorate.²⁸³ If voters were

²⁸⁰ See, e.g., Pildes, *Is Voting-Rights Law Now at War With Itself?*, *supra* note 22, at 1532 n.41 (concluding that McKinney gained white supporters between 1992 and 1996); Sack, *Rural White South*, *supra* note 268, at A12 (noting that McKinney won the 1998 general election from a majority-white district and with "notable white support"); Sack, *Victory of 5*, *supra* note 266 (reporting that McKinney won the 1996 general election with 58% of the vote even though blacks represented only 33% of her district's voting-age population and McKinney was not an incumbent in that district); cf. D. Stephen Voss & David Lublin, *Black Incumbents, White Districts: An Appraisal of the 1996 Congressional Elections*, 29 AM. POL. RES. 141, 170 (2001) ("McKinney certainly did not win extra White support in the precincts she previously represented.")

²⁸¹ See Complaint at 4, *Osburn v. Cox*, No. 1:02-CV-2721-CAP (N.D. Ga. Aug. 1, 2003) (alleging that McKinney won all but one precinct in majority-black South DeKalb county, and received seventy-five percent of the vote in that county).

²⁸² Clemetson, *supra* note 269, at A16; see Edsall, *Impact of McKinney Loss*, *supra* note 252, at A4 (noting failure of the McKinney campaign to produce a high turnout among black supporters); Tapper, *supra* note 271 (suggesting that Majette appealed more to the black, middle class, suburban voters "long ignored" by McKinney). *But see* Kintisch, *supra* note 275 (claiming McKinney retained support among middle class blacks).

²⁸³ Based on the *Osburn* plaintiffs' allegations, closing the 2002 Democratic primary would have reduced the number of participating voters to 70,670 from 117,670 who actually cast ballots. If true racial bloc voting existed, moreover, the 49,058 votes McKinney received came from black Democrats, who, in a closed primary, would have controlled the outcome with more than seventy percent of the primary vote. Complaint at 4, *Osburn v. Cox*, No. 1:02-CV-2721-CAP (N.D. Ga. Aug. 1, 2003).

Moreover, the proportion of black voters eligible to participate in the 2002 Democratic primary would have been even higher had the primary been closed, given evi-

racially polarized in the manner the *Osburn* plaintiffs alleged, this primary would have nominated the black-preferred candidate, who would have then prevailed in the general election.

Had Georgia's Fourth Congressional District been drawn to include an electorate that was 70% black, it almost certainly would have been deemed dilutive within the meaning of the VRA. Racial vote dilution in this context would stem not from "cracking" or "fracturing" a minority community, but instead from packing more black voters within the district than are needed to ensure meaningful influence, thereby preventing some of these voters from exerting influence elsewhere. Packing, as noted earlier, also skews the dialog among voters within the district.²⁸⁴ To be sure, no single fixed percentage establishes that a district is "packed" with minority voters. Twenty-five years ago, the Court suggested that a minority population must comprise sixty-five percent of a district's population to enjoy a meaningful opportunity to participate in the electoral process.²⁸⁵ But by 1995, when the Supreme Court struck down the congressional district that originally sent McKinney to Congress, it held that black residents need not comprise sixty-four percent of the district's population to prevent racial vote dilution.²⁸⁶ Today, in jurisdictions where partisan affiliation fosters cross-racial coalitions, much smaller minority populations are able to participate meaningfully in the electoral process.²⁸⁷ The *Osburn* lawsuit implied that Georgia's Fourth Congressional District was one such jurisdiction, with white and black Democrats joining forces in the general election and racial bloc voting being relegated to the primary stage.²⁸⁸

dence that turnout among African American voters was relatively low. *See Edsall, Impact of McKinney Loss, supra* note 252 (noting the failure of the McKinney campaign to produce a high turnout among supporters).

²⁸⁴ *See supra* notes 240-44 and accompanying text (discussing packing).

²⁸⁵ *See United Jewish Orgs. of Williamsburgh, Inc. v. Carey*, 430 U.S. 144, 164 (1977) (finding reasonable the conclusion that "a substantial nonwhite population majority in the vicinity of sixty-five percent would be required to achieve a nonwhite majority of eligible voters"); ISSACHAROFF ET AL., *supra* note 22, at 896 ("*UJO v. Carey* was cited for many years in the scholarly literature as the source of the so-called '65% rule.'").

²⁸⁶ *See Miller v. Johnson*, 515 U.S. 900, 906, 922-24 (1995) (holding that Section 5 of the VRA did not require an oddly configured district with a black population of sixty-four percent).

²⁸⁷ *See supra* note 196 (discussing *Page v. Bartels*).

²⁸⁸ *See supra* notes 255-59 and accompanying text (discussing the merits of the complaint in *Osburn*).

African American voters need not constitute seventy percent of the primary electorate to overcome such white bloc voting. Indeed, even if voting in the Democratic primary is racially polarized, African Americans need only comprise a bare majority of the primary electorate to secure the nomination of their preferred candidate. In Georgia's Fourth Congressional District, that nominee will prevail in the general election because the District is a safe Democratic district in which white Democrats support the Democratic nominee in the general election.²⁸⁹

By contrast, making the Fourth District's Democratic primary not simply majority-minority, but a seventy percent black primary, skews the primary electorate far more than is necessary for black voters to participate and elect a representative of choice. Voters who would be essential for meaningful black influence in an open primary become superfluous once the primary is closed. As a result, excluding nonmembers from the Democratic primary in the Fourth District may well give rise to racial vote dilution through packing, just as the Fourth District as a whole would if African Americans comprised seventy percent of the district electorate. This concentration of black voters diminishes the influence black voters might otherwise exert in other districts and distorts the political dialog within the Fourth District's Democratic primary.

Had Georgia's Democratic Party asserted an associational interest in excluding nonmembers from the Fourth District's Democratic primary, it would have generated a conflict between its associational freedom and the federal prohibition on racial vote dilution. Dispersing black voters through redistricting would have been necessary to resolve this conflict. The Democratic Party could have accordingly asserted its associational interest strategically to destabilize a districting plan that failed to promote the party's interests.²⁹⁰

Back in 2002, Georgia's Democratic Party had no interest in making this claim because it had no interest in redistricting.²⁹¹ Democrats liked the Fourth District because Democrats drew it. As configured at the time, the Fourth District was the product of Georgia's post-2000

²⁸⁹ See *supra* note 257 and accompanying text (explaining Democratic dominance in the Fourth Congressional District).

²⁹⁰ See *supra* note 251 and accompanying text (commenting on packing and its relationship to a closed primary).

²⁹¹ As Democratic voters, the *Osburn* plaintiffs asserted an associational interest in excluding nonmembers from the Democratic party, a claim dismissed for lack of standing. *Osburn v. Cox*, 369 F.3d 1283, 1288 (11th Cir. 2004).

redistricting process, a process controlled by Democrats.²⁹² Not surprisingly, Republicans, rather than Democrats, led the challenges to this districting plan in *Georgia v. Ashcroft*.²⁹³

Like the Democratic Party, the *Osburn* plaintiffs had no interest in altering district lines, but for a different reason. Their concern was not maximizing black or Democratic influence. Instead, they wanted Cynthia McKinney reelected, and understood that, at the time, only a closed primary with an overwhelming black electorate could make that happen. They needed a packed primary because McKinney generated far less enthusiasm among black voters than the *Osburn* suit suggested. In fact, by August 2002, McKinney needed a primary electorate that mirrored demographically the electorate that first brought her to Congress a decade earlier. After all, that district, with its 64% black population, would not have selected Denise Majette over Cynthia McKinney.²⁹⁴

The Supreme Court struck down that district as a racial gerrymander in *Miller v. Johnson*,²⁹⁵ and the *Osburn* plaintiffs' attempt to create its functional equivalent might well have been rejected on similar grounds. The *Osburn* plaintiffs lacked the ostensibly race-neutral associational interest the Democratic Party might have asserted to justify closing the primary. Instead, race was not just the predominant reason but the sole reason the *Osburn* plaintiffs cited to exclude nonmembers from participating in the Fourth District's Democratic primary. The racial polarization the Court associates with racial gerrymanders may not have been fully manifest in the old Eleventh

²⁹² See Ringel, *supra* note 199, at 1 (noting that Democrats drew the 2001 Georgia Senate map).

²⁹³ See, e.g., Brief for Appellees at 4, 8, *Georgia v. Ashcroft*, 123 S. Ct. 2498 (2003) (No. 02-182) (showing that the redistricting plan was drawn by a legislature with a Democratic majority and challenged by the Justice Department); Pildes, *Is Voting-Rights Law Now at War With Itself?*, *supra* note 22, at 1561 (noting that minority voters challenging the plan were "represented by lawyers associated with the Republican Party"); Ringel, *supra* note 199, at 1 (describing efforts by Georgia Governor George E. "Sonny" Perdue III, a Republican, to compel the state Attorney General, Thurbert E. Baker, a Democrat, to drop Georgia's case defending the districting plan in the Supreme Court); see also *Georgia v. Ashcroft*, 195 F. Supp. 2d 25, 41 (D.D.C. 2002) (noting that "[n]o Republicans in either the [Georgia] House or Senate voted for any of [the] reapportionment plans" adopted for the State House, State Senate, and Congressional delegations), *vacated by* 123 S. Ct. 2498 (2003).

²⁹⁴ See, e.g., Issacharoff, *supra* note 267, at 692 ("[W]ould Denise Majette have chosen to run against the incumbent Cynthia McKinney had court intervention not altered the racial and political composition of McKinney's district?").

²⁹⁵ 515 U.S. 900 (1995).

District.²⁹⁶ Nor was racial polarization certain to materialize had the *Osburn* plaintiffs prevailed. And yet, in seeking to close the primary in the Fourth District, the *Osburn* plaintiffs sought to generate and exploit precisely such polarization to aid their candidate.

The Democratic Party could have salvaged this effort by asserting an associational interest in support of the endeavor. It did not do so. The party did not share the plaintiffs' enthusiasm for McKinney,²⁹⁷ but, more importantly, it was satisfied with the racial composition of Georgia's Fourth District. The associational interest defined in *Jones* offered the party a tool to adjust the racial balance in the primary to maximize partisan advantage.²⁹⁸ Partisan control of the redistricting process that produced Georgia's Fourth District meant the Democrats did not need to assert this interest to restructure it. The party already manipulated the racial composition of the district to maximize Democratic interests.²⁹⁹

CONCLUSION

Ten years ago, Professor Lowenstein suggested that disavowal of the *White Primary Cases* would be of little consequence. Deeming the decisions doctrinally problematic, he argued that the federal VRA and "greatly changed mores" make race-based exclusions from party primaries "extremely unlikely," and thus that renunciation of the decisions "would have no tangible cost in racial discrimination."³⁰⁰

A decade later, the Court has come close to implementing this suggestion. *California Democratic Party v. Jones* built on precedent celebrating the associational rights of political parties to identify an associational interest and, more broadly, a conception of political participation that sacrifices the core components of the *White Primary Cases*. After *Jones*, political parties may exclude nonmembers from party primaries, even when the primary functions as the sole locus of meaning-

²⁹⁶ See *supra* notes 262-64 and accompanying text (referring to the *Osburn* case).

²⁹⁷ See, e.g., Miller, *supra* note 277, at A4 (quoting McKinney as stating that "it looks like the Republicans wanted to beat me more than the Democrats wanted to keep me").

²⁹⁸ See *supra* note 212 and accompanying text (discussing the Democrats' potential to take advantage of *Jones*).

²⁹⁹ See, e.g., Larios v. Cox, 300 F. Supp. 2d 1320, 1325-31 (N.D. Ga. 2004) (per curiam) (discussing the tactics used by Georgia legislators to favor the election of Democrats), *aff'd*, 124 S. Ct. 2806 (2004).

³⁰⁰ Lowenstein, *supra* note 30, at 1749. Professor Lowenstein nevertheless concluded reversal, while not "monstrous," would be "unpleasant, even disillusioning" and hence ill-advised. *Id.*

ful electoral decisionmaking. So too, *Jones* offers a political party, and the Democratic Party in particular, the power to manipulate the racial composition of its primary electorate through use of the majority-minority primary.

A century ago, the Democratic Party used similar authority to exclude black voters from its primary in order to keep them from influencing debate and forming biracial coalitions. Today, the party views black voting strength as an asset that it seeks to exploit for maximum partisan gain. Without doubt, the spirit propelling this endeavor differs dramatically from that which implemented the white primary. Remarkably, however, the legal regimes that authorize both efforts are strikingly similar, leaving one political party in charge of defining the racial make-up of a determinative party primary.

This similarity is cause for concern, particularly in light of the Court's recent refusal to give bite to claims of partisan gerrymandering. Propelling last Term's plurality opinion in *Vieth v. Jubelirer*³⁰¹ was the belief that no discernible or workable standard existed to identify unconstitutional partisan gerrymandering, even though the Justices were unanimous in finding that excessive partisan gerrymandering damages the democratic process.

Much of that damage might be remedied by returning to the conception of individual political participation set forth in the *White Primary Cases*. The right to vote in a competitive electoral process belongs to the individual voter, not to Democrats or Republicans as a group or to the polity as a whole. It therefore constitutes the type of right the Court is comfortable enforcing. While the question of what constitutes a competitive election might certainly be debated, districting authorities know full well which districts they draw will be safe and which will be competitive. Defining parameters for a competitive race need not be a judicially unmanageable task.

Put differently, the fundamental problem with the districting plan at issue in *Vieth* is not that too many Republicans win elections in Pennsylvania. Instead, the problem is that too many voters, Republican and Democrat alike, live in districts where they have no opportunity for meaningful political participation. The combination of the disputed districting plan and Pennsylvania's closed primary system means that Democrats in safe Republican districts and Republicans in safe Democratic districts are effectively shut out of the decision-making process. Readjusting district boundaries so that more Demo-

³⁰¹ 124 S. Ct. 1769 (2004).

crats are elected will not resolve the problem: only ensuring access to a competitive race somewhere within this electoral process will. That is where we should be turning our attention.