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LET ALL VOTERS VOTE: INDEPENDENTS AND THE EXPANSION OF VOTING RIGHTS IN THE UNITED STATES

Jeremy Gruber, Michael A. Hardy,** & Harry Kresky****

The right to vote—who can vote and how—has been central to the American experiment. In the midst of the Civil War when the existence of the United States was at stake and, with it the continuation of slavery, Abraham Lincoln began his historic Gettysburg Address with the words, “Fourscore and seven years ago our fathers brought forth, on this continent, a new nation, conceived in liberty, and dedicated to the proposition that all men are created equal.”¹ He ended with, “that this nation, under God, shall have a new birth of freedom, and that government of the people, by the people, for the people, shall not perish from the earth.”² “Government by the people” raised and still raises the question of who are the people and to whom is the right to vote extended.

For Americans, the issue of sovereignty and the legitimacy of government rests on the consent of the people and that consent is expressed through the ballot box. Indeed, the right to vote is deeply valued by the public: An overwhelming 91% say that they consider the

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¹ Abraham Lincoln, President of the United States of America, The Gettysburg Address (Nov. 19, 1863), http://rmc.library.cornell.edu/gettysburg/good_cause/transcript.htm (transcript of Cornell University’s copy).

² *Id.*

right to vote as essential to their own personal sense of freedom.³ Though nowhere mentioned in our Constitution, the two major political parties occupy the dominant position in our electoral system. Both parties have been guilty of gerrymandering districts to benefit their electoral prospects. And when it comes to the voting rights of unaffiliated voters, now the largest group of voters in the country, there is also bipartisan unity over blocking their participation in primary elections unless allowing them access to the primary will benefit the parties.

Our judiciary, independent of the political branches of government, and the final arbiters of this nation's Constitution, is, we submit, insufficiently sensitive to the rights of these unaffiliated voters and to the impact of their disenfranchisement. This Article seeks to demonstrate that the closed partisan primary system, under which only members of the two major parties can participate in the selection of the candidates who will appear on the general election ballot, is at odds with fundamental principles of equality and freedom of association, "[t]he identification and protection of fundamental rights is an enduring part of the judicial duty to interpret the Constitution."⁴ The recognition of the rights of unaffiliated voters is a new frontier in the civil rights/voting rights struggle.

Consider the following. Over the past quarter-century, the demographic profile of the United States has changed substantially.⁵ The country has become more racially and ethnically diverse, and better educated.⁶ Citizens are significantly less likely to affiliate with a political party.⁷ In fact, a larger percentage of American voters now identify as independents (42%) than as Democrats (29%) or Republicans (26%).⁸ That is especially true for Millennials, who now

³ *Public Supports Aim of Making It 'Easy' for All Citizens to Vote: Only One-in-Five Back Mandatory Voting*, PEW RES. CTR. (June 28, 2017), <http://www.people-press.org/2017/06/28/public-supports-aim-of-making-it-easy-for-all-citizens-to-vote/>.

⁴ *Obergefell v. Hodges*, 135 S. Ct. 2584, 2598 (2015).

⁵ William H. Frey, *Diversity Defines the Millennial Generation*, BROOKINGS INST. (June 28, 2016), <https://www.brookings.edu/blog/the-avenue/2016/06/28/diversity-defines-the-millennial-generation/>.

⁶ *Id.*

⁷ Renata Sago et al., *Sick of Political Parties, Unaffiliated Voters Are Changing Politics*, NPR (Feb. 28, 2016), <http://www.npr.org/2016/02/28/467961962/sick-of-political-parties-unaffiliated-voters-are-changing-politics>.

⁸ Jeffrey M. Jones, *Democratic, Republican Identification Near Historical Lows*, GALLUP (Jan. 11, 2016), <http://news.gallup.com/poll/188096/democratic-republican-identification-near-historical-lows.aspx>.

comprise as large a voting block as baby boomers, half of whom identify as independents.⁹ That is a big shift from as recently as 2004, when the electorate was nearly evenly divided into thirds by the three groups.¹⁰ The number of voters exercising their right not to affiliate with a political party is growing steadily, both as an absolute number and as a percentage of all registered voters.¹¹ These numbers suggest that the growth will continue and possibly even accelerate in the years to come.

In 2016, 26.3 million unaffiliated voters were barred from participating in the presidential primary, and millions more registered Democrats and Republicans were prevented from voting for the candidate of their choice because of a patchwork of restrictive registration rules.¹² From New York to Arizona, voters—whose tax dollars fund the primary process—were denied the right to fully participate.¹³ In an electoral system that provides voters with limited choices and sets up additional barriers to voter participation, it is not hard to understand why Americans are one of the least active voting populations among developed countries.¹⁴ The structure of our political process discourages challenges to the dominant parties and their prevailing ideological viewpoints.

Despite these shifts in the electorate, the U.S. Congress and state legislatures consist almost entirely of Democrats and Republicans and there are only two independent governors.¹⁵ Of 535 members of Congress, only two U.S. Senators are independents.¹⁶ Bernie Sanders and Angus King affiliate as independents.¹⁷ On the state level, 7,330

⁹ *Millennials in Adulthood: Detached from Institutions, Networked with Friends*, PEW RES. CTR. (Mar. 7, 2014), <http://www.pewsocialtrends.org/2014/03/07/millennials-in-adulthood/>.

¹⁰ *Party Identification Trends, 1992-2014*, PEW RES. CTR. (Apr. 7, 2015), <http://www.people-press.org/2015/04/07/party-identification-trends-1992-2014/#total>.

¹¹ *Party Affiliation*, GALLUP, <http://www.gallup.com/poll/15370/party-affiliation.aspx> (last visited Mar. 17, 2019).

¹² *DNC Chair Tom Perez & RNC Chair Ronna Romney McDaniel: Open the Primaries, NOW!*, OPEN PRIMARIES, <http://www.openprimaries.org/unrig-it-2020> (last visited Mar. 17, 2019).

¹³ *Id.*

¹⁴ Drew Desilver, *U.S. Trails Most Developed Countries in Voter Turnout*, PEW RES. CTR. (May 21, 2018), <http://www.pewresearch.org/fact-tank/2017/05/15/u-s-voter-turnout-trails-most-developed-countries/>.

¹⁵ *Current Third Party and Independent State Officeholders*, BALLOTPEdia, https://ballotpedia.org/Current_third_party_state_officeholders (last visited May 8, 2019).

¹⁶ *116th United States Congress*, BALLOTPEdia, https://ballotpedia.org/116th_United_States_Congress (last visited May 8, 2019).

¹⁷ *List of Current Members of the U.S. Congress*, BALLOTPEdia, <https://ballotpedia.org/List>

legislators are affiliated with either the Republican or Democratic parties; and only 53 are independents or affiliated with a minor party.¹⁸

The lack of competitive races in the United States is an additional sad hallmark of the existing electoral regime. Across the country, an increasing number of congressional and state elections are largely pro forma because of partisan gerrymandering and a patchwork of restrictive ballot access laws. Indeed, election competitiveness across the country is at a forty year low, with only five percent of Americans living in districts with elections won by five percent or less.¹⁹ Similarly, more and more Americans live in areas with uncontested elections than ever before: 36.7%.²⁰ In these noncompetitive or “safe” races, candidates only compete for votes, if at all, in primary elections, which more often than not decide the winner of the general election. Current law nevertheless permits the exclusion of a sizeable minority of the district’s electorate from participating at this pivotal point. This dilemma is exacerbated in electoral districts where the Republican and Democratic parties have worked together to push unaffiliated voters out of the primary election process. Such a state-run system disenfranchises millions of voters, gives the two dominant political parties unfair access and control over our democracy, and forces legislators to be accountable only to their partisan base and not the general electorate. It is at odds with the reality of the present-day electorate; and the consequences of this imbalance are real and immediate.

The general electorate does not benefit from limiting voter participation and states do not have an interest in perpetuating this growing imbalance. Meaningful political participation requires the opportunity to influence electoral outcomes and cannot be predicated on one’s membership in one of the two major political parties. Voters, in our view, have a fundamental right to not associate with a political party. This right is violated when a state conditions the right to full participation in the electoral process on joining a private political party. Equal protection, whether rooted in the Fourteenth Amendment

_of_current_members_of_the_U.S._Congress (last visited May 8, 2019).

¹⁸ *Partisan Composition of State Legislatures*, BALLOTPEdia, https://ballotpedia.org/Partisan_composition_of_state_legislatures (last visited May 8, 2019).

¹⁹ Carl Klarner, *Competitiveness in State Legislative Elections: 1972-2014*, BALLOTPEdia (May 6, 2015), https://ballotpedia.org/Competitiveness_in_State_Legislative_Elections:_1972-2014.

²⁰ *Id.*

or the roughly parallel requirements of the Fifth Amendment, provides the principal constitutional paradigm for analyzing the curtailment of this fundamental right to an equally meaningful vote. This is because equal protection is violated “when the electoral system is arranged in a manner that will consistently degrade a voter’s or a group of voters’ influence on the political process as a whole.”²¹ To an extent, these issues have also been analyzed under the First Amendment.

Part I of this Article provides a brief history of the direct primary and an outline of the jurisprudence regarding primary elections. Part II then examines the history of suffrage in the United States and discusses the jurisprudence regarding voting, including the fundamental nature of the franchise. Part III discusses the Supreme Court’s test for evaluating voting regulations. Part IV examines the conflicting jurisprudence for determining when a voter may, or may not, be excluded from a primary election. Part V analyzes the evolving electorate and political landscape in the United States. Part VI then argues that closed primaries are unconstitutional.²² In Part VII, this Article concludes that a review of historic junctures (*i.e.*, allowing former slaves to vote, the direct primary, woman’s suffrage, reapportionment and the dismantling of Jim Crow) suggests that the full integration of unaffiliated voters into the process and the rejection of party membership as a qualifier to vote in an integral part of the electoral process are the next step in the further development of our democracy.

I. PRIMARY ELECTIONS

A. The Historical Underpinnings of the Direct Primary

Since their founding, political parties have become “the preeminent political organizations of mass, popular democracy.”²³ Although some of the founders of this country, George Washington among them, thought that political parties could lead only to pernicious factionalism, parties quickly came into being soon after the founding of the republic.²⁴ During the nineteenth century, political parties

²¹ *Davis v. Bandemer*, 478 U.S. 109, 132 (1986).

²² *Terry v. Adams*, 345 U.S. 461, 474 (1953) (Frankfurter, J., concurring).

²³ PAUL ALLEN BECK, *PARTY POLITICS IN AMERICA* 26 (8th ed. 1997).

²⁴ *Id.* at 20-22.

usually nominated their candidates by convention or caucus, with varying levels of participation by party activists.²⁵ By the end of the century, however, there was widespread belief that these processes were corrupt.²⁶

The direct primary was one of several measures instituted by the Progressive movement in the early twentieth century to destroy what they viewed as “the corrupt alliance” between wealthy special interests and the political machine.²⁷ Robert La Follette, a Progressive movement leader in Wisconsin, made the following argument in support of the direct primary:

Under our form of government the entire structure rests upon the nomination of candidates for office. This is the foundation of the representative system. If bad men control the nominations we cannot have good government. Let us start right. The life principle of representative government is that those chosen to govern shall faithfully represent the governed. . . . With the nominations of all candidates absolutely in control of the people, under a system that gives every member of a party equal voice in making that nomination, the public official who desires re-nomination will not dare seek it, if he has served the machine and the lobby and betrayed the public trust.²⁸

La Follette and his fellow reformers would be shocked at how successful the major parties have become over the years in manipulating primary elections to maintain ideological conformity and top-down control. No wonder so many Americans believe “the system is rigged.”²⁹

Today, all states either require or make available primary elections for nomination of candidates for elections to the U.S. Congress and for most state legislative and executive positions. These

²⁵ MALCOLM E. JEWELL, *PARTIES AND PRIMARIES: NOMINATING STATE GOVERNORS* 6 (1984).

²⁶ *Id.*

²⁷ RICHARD HOFSTADTER, *THE AGE OF REFORM: FROM BRYAN TO F.D.R.* 257 (1955).

²⁸ JEWELL, *supra* note 26, at 7.

²⁹ See Hannah Fingerhut, *Trump Supporters Far Less Confident Than Clinton Backers That Votes Will Be Counted Accurately*, PEW RES. CTR. (Aug. 19, 2016), <http://www.pewresearch.org/fact-tank/2016/08/19/trump-supporters-far-less-confident-than-clinton-backers-that-votes-will-be-counted-accurately/>.

systems vary considerably in their degree of “openness,” measured by the ability of every voter to cast a ballot in the primary election for his or her candidate of choice for each elected office. However, about a third of the states still use caucuses for one or both parties’ nomination of presidential candidates.

B. Legal Background

The Supreme Court has addressed challenges to a blanket primary;³⁰ a “top-two” primary;³¹ a closed primary;³² a semi-closed primary;³³ and prohibitions on “fusion” candidates.³⁴ The Supreme Court has yet to address directly the constitutionality of an open primary.³⁵ As a result, challenges are being resolved inconsistently across the United States.³⁶ There has been litigation in Alaska,³⁷ Idaho,³⁸ South Carolina,³⁹ Hawaii,⁴⁰ Montana,⁴¹ New Jersey,⁴² New Mexico,⁴³ Oregon⁴⁴ and Utah,⁴⁵ as well as an increasing number of voter initiative efforts concerning the way our primary process is conducted.⁴⁶

³⁰ Cal. Democratic Party v. Jones, 530 U.S. 567 (2000).

³¹ Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442 (2008).

³² Tashjian v. Republican Party of Conn., 479 U.S. 208 (1986); Nader v. Schaffer, 417 F. Supp. 837 (D. Conn. 1976), *aff'd*, 429 U.S. 989 (1976).

³³ Clingman v. Beaver, 544 U.S. 581 (2005).

³⁴ Timmons v. Twin Cities Area New Party, 520 U.S. 351 (1997).

³⁵ See Robin Miller, Annotation, *Constitutionality of Voter Participation Provisions for Primary Elections*, 120 A.L.R. Fed. 5th 125 (2014).

³⁶ *Id.*

³⁷ Alaskan Indep. Party v. Alaska, 545 F.3d 1173 (9th Cir. 2008).

³⁸ Idaho Republican Party v. Ysursa, 765 F. Supp. 2d 1266 (D. Idaho 2011).

³⁹ Greenville Cty. Republican Party Exec. Comm. v. South Carolina, 824 F. Supp. 2d 655 (D.S.C. 2011).

⁴⁰ Democratic Party of Haw. v. Nago, 982 F. Supp. 2d 1166, 1176 (D. Haw. 2013), *aff'd*, 833 F.3d 1119 (9th Cir. 2016), *cert denied*, 137 S. Ct. 2114 (2017).

⁴¹ Ravalli Cty. Republican Cent. Comm. v. McCulloch, 154 F. Supp. 3d 1063 (D. Mont. 2015), *aff'd sub nom.* Ravalli Cty. Republican v. McCulloch, No. 16-35375 (9th Cir. May 4, 2016), *and appeal dismissed*, 655 F. App'x 592 (9th Cir. 2016).

⁴² Balsam v. Sec'y of N.J., 607 F. App'x 177, 179 (3d Cir. 2015), *cert. denied sub nom.* Balsam v. Guadagno, 136 S. Ct. 189 (2015).

⁴³ Chavez v. Oliver, No. S-1-SC-37371 (N.M. Sup. Ct. Nov. 13, 2018).

⁴⁴ Conant v. Brown, 248 F. Supp. 3d 1014 (D. Or. 2017).

⁴⁵ Utah Republican Party v. Herbert, 144 F. Supp. 3d 1263 (D. Utah 2015).

⁴⁶ See, e.g., James Nord, *South Dakota Voters May See Open Primaries Amendment in 2018*, U.S. NEWS & WORLD REP. (May 9, 2017), <https://www.usnews.com/news/best-states/south-dakota/articles/2017-05-09/south-dakota-voters-may-see-open-primaries-amendment-in-2018>.

I. *Freedom of Association*⁴⁷

The First Amendment's guarantee of freedom of association has been interpreted by courts to include two distinct and sometimes conflicting interests.⁴⁸ First, the right of an individual to associate with the political party of her choice as a voter and as a candidate for office;⁴⁹ and second, the right of a political party to limit participation in their processes to those voters who choose to affiliate with it.⁵⁰ These interests have been accorded different levels of protection by the Supreme Court.⁵¹ Indeed, the jurisprudence of association is one of the least developed concepts in constitutional law.⁵² There is conflicting precedent over a party's right to limit participation in its primaries that will be reviewed below. The inconsistent treatment of party primaries stands in contrast to cases treating equality in voting power as paramount.

i. **Party Autonomy and the "Right Not to Associate"**

In *Cousins v. Wigoda*,⁵³ the Supreme Court applied the right of free association to political parties. *Cousins* confronted the issue whether the states or the national party should govern the seating of delegates at the Democratic Party's national nominating convention.⁵⁴ Based on the political associational rights of the National Democratic Party and its members, the Court held that the party and not the state should determine the rules governing the seating of convention

⁴⁷ This article will engage the less recognized, but important, right of a voter not to associate with a political party.

⁴⁸ See *Kusper v. Pontikes*, 414 U.S. 51, 57 (1973).

⁴⁹ See *Democratic Party of the U.S. v. Wis. ex rel. La Follette*, 450 U.S. 107, 122 (1981) ("[T]he freedom to associate . . . necessarily presupposes the freedom to identify the people who constitute the association."); *Eu v. S.F. Cty. Democratic Cent. Comm.*, 489 U.S. 214, 224 (1989) ("[A] political party has a right . . . to select a 'standard bearer who best represents the party's ideologies and preferences.'" (citation omitted)).

⁵⁰ See *Sweezy v. New Hampshire ex rel. Wyman*, 354 U.S. 234, 250 (1957) ("Any interference with the freedom of a party is simultaneously an interference with the freedom of its adherents.").

⁵¹ John R. Labbé, *Louisiana's Blanket Primary After California Democratic Party v. Jones*, 96 NW. U. L. REV. 721, 727 (2002).

⁵² Frances R. Hill, *Constitutive Voting and Participatory Association: Contested Constitutional Claims in Primary Elections*, 64 U. MIAMI L. REV. 535, 536 (2010).

⁵³ 419 U.S. 477 (1975).

⁵⁴ *Id.*

delegates.⁵⁵ Accordingly, the Court concluded that the dispute concerning the seating of delegates was an intraparty struggle that should be resolved at the party's convention.⁵⁶ The Court further stated that the state's interest in protecting the effectiveness of votes cast in the primary elections and its interest in protecting the overall integrity of the electoral process did not constitute a compelling state interest in the context of selecting national party convention delegates.⁵⁷

The Supreme Court held that the decision in *Cousins* controlled in *Democratic Party of the United States v. Wisconsin ex rel. La Follette*.⁵⁸ In *La Follette*, the Court was faced with a conflict between the state-mandated open primary, which required delegates to a party's convention to vote in accordance with the primary's outcome, and the party rule that, contrary to state law, required a closed primary election.⁵⁹ In holding that states may not force a party to honor the results of an open primary by requiring delegates to vote in accord with those primary results,⁶⁰ the Court made clear that it was not deciding the constitutional validity of open primaries; rather its decision addressed only whether a state, once it has chosen an open primary format in which non-party members may vote, may force a national political party to honor the results of that primary, when those results were reached in violation of national party rules.⁶¹ Relying on its decision in *Cousins*, the Court found this violation of party rules to be impermissible under the First and Fourteenth Amendments.⁶² In language that the Court has invoked repeatedly,⁶³ *La Follette* asserted that free association to advance political beliefs "necessarily presupposes the freedom to identify the people who constitute the association, and to limit the association to those people only."⁶⁴

Whether the heightened associational protection for the convention would apply to a primary election remained for the Court

⁵⁵ *Id.* at 487-91.

⁵⁶ *Id.* at 491.

⁵⁷ *Id.* at 489-91.

⁵⁸ 450 U.S. 107 (1981).

⁵⁹ *See id.* at 112.

⁶⁰ *Id.* at 126.

⁶¹ *Id.* at 120.

⁶² *Id.* at 121-24.

⁶³ *See, e.g.,* Cal. Democratic Party v. Jones, 530 U.S. 567, 574 (2000); Tashjian v. Republican Party of Conn., 479 U.S. 208, 214 (1986).

⁶⁴ *La Follette*, 450 U.S. at 122.

to decide in *Tashjian v. Republican Party of Connecticut*.⁶⁵ In *Tashjian*, the Republican Party of Connecticut adopted a rule permitting independent voters to vote in Republican primaries for federal and state offices,⁶⁶ “[m]otivated in part by the demographic importance of independent voters in Connecticut politics.”⁶⁷ Relying on *La Follette*, the Court found a Connecticut closed primary that required voters in any primary to be registered as party members, contrary to the Republican Party of Connecticut’s rule inviting independents to vote in its primaries, unconstitutional.⁶⁸ The Court reasoned that the closed primary “impermissibly burdens the right of [the party’s] members to determine for themselves with whom they will associate, and whose support they will seek, in their quest for political success.”⁶⁹ “The Party’s attempt to broaden the base of public participation in and support for its activities is conduct undeniably central to the exercise of the right of association.”⁷⁰ The Court concluded that no substantial state interest supported Connecticut’s decision to limit the primary election to registered party members.⁷¹

Although *Tashjian* addressed a closed primary, it demonstrated that the constitutional analysis in a primary election law challenge—whether a state’s primary system “severely burdens” a party’s associational rights—depends fundamentally on the party’s own views as to who it wants to associate with because it is “the right of [a party’s] members to determine for themselves with whom they will associate.”⁷² Thus, after *Tashjian*, it was clear that the state could not force a party to restrict participation in its primary to party members. The question whether a state could force a party to expand participation in its primary, however, remained unanswered by our country’s highest court.

The Supreme Court’s next confrontation with state laws regulating party primaries came in *Eu v. San Francisco County Democratic Central Committee*.⁷³ Unlike other cases that challenged state qualifications for voter participation in primary elections, *Eu*

⁶⁵ 479 U.S. 208 (1986).

⁶⁶ *Id.* at 210.

⁶⁷ *Id.* at 212.

⁶⁸ *Id.* at 214.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.* at 225.

⁷² *Id.* at 214.

⁷³ 489 U.S. 214 (1989).

involved laws that barred political parties from endorsing candidates in primary elections and regulated parties' internal organizational structure. The Court struck down a California statute prohibiting political parties from endorsing candidates in party primaries,⁷⁴ noting that it “hampers the ability of a party to spread its message and hamstrings voters seeking to inform themselves about the candidates and the campaign issues.”⁷⁵ Citing the parties' right of free association, the Court held that the freedom to associate gives the party the right to “select a standard-bearer who best represents the party's ideologies and preferences.”⁷⁶ The Court's holding in *Eu* was consistent with *La Follette* in that it upheld the right of a party to regulate its internal affairs, like a party convention. With regard to the endorsement of candidates, *Eu* simply accorded the party organization the right to make its views publicly known.

2. State Regulation of Primary Elections

The associational rights of political parties are not absolute.⁷⁷ States are not required to run its primary elections exactly as the parties dictate. Courts have already rejected such arguments.⁷⁸ When they engage in the nominating process, established political parties are subject to a wide range of state regulation,⁷⁹ and do not have unfettered control over who can vote in primary elections.⁸⁰ To determine whether a state election law is constitutional, a court must first determine the magnitude of injury to a party's First Amendment rights, and then balance that injury against the state's interests in the regulation.⁸¹ If the burden on First Amendment rights is severe, the state regulation must be “narrowly tailored and advance a compelling state interest.”⁸² Where a law imposes less than severe burdens on

⁷⁴ *Id.* at 216-17.

⁷⁵ *Id.* at 223.

⁷⁶ *Id.* at 224.

⁷⁷ *Storer v. Brown*, 415 U.S. 724, 730 (1974).

⁷⁸ *Lightfoot v. Eu*, 964 F.2d 865 (9th Cir. 1992), *cert. denied*, 507 U.S. 919 (1993) (upholding direct primary over party's objection); *Smith v. Allwright*, 321 U.S. 649 (1944) (striking down party's exclusion of blacks from primary).

⁷⁹ *See Morse v. Republican Party of Va.*, 517 U.S. 186 (1996); *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 157-58 (1978).

⁸⁰ *See Terry v. Adams*, 345 U.S. 461 (1953).

⁸¹ *See Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 214 (1986).

⁸² *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997).

associational rights, however, the state need only have “important regulatory interests” to justify the law.⁸³

i. The Tension Between Associational Rights and State Regulation of Primary Elections

The Constitution guarantees “to every State in the Union a Republican Form of Government.”⁸⁴ The Constitution, however, does not define what it means to have a “[R]epublican form of government.”⁸⁵ In fact, the original text of the Constitution is virtually silent about the rules governing elections at the state and local level.⁸⁶ It has been noted that one historic reason there is no mention of political parties is there were no parties in existence when the Constitution was conceived and ratified.⁸⁷ Indeed, the Constitution was designed and intended to govern without political parties.⁸⁸

The Supreme Court has long recognized that states have a compelling interest in regulating elections to ensure that the democratic process is open and fair.⁸⁹ The Constitution grants states “broad power to prescribe the ‘Time, Places and Manner of holding Elections for Senators and Representatives,’⁹⁰ which power is matched by state control over the election for state offices.”⁹¹ “Common sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections; ‘as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic process.’”⁹² Six amendments,⁹³ and several decisions

⁸³ *Id.*

⁸⁴ U.S. CONST. art. IV, § 4.

⁸⁵ *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849).

⁸⁶ Brief for the Brennan Center for Justice at New York University School of Law as Amicus Curiae in Support of Neither Party at 2, *Cal. Democratic Party v. Jones*, 530 U.S. 567 (2000) (No. 99-401), 2000 WL 245529.

⁸⁷ RICHARD HOFSTADTER, *THE IDEA OF A PARTY SYSTEM: THE RISE OF LEGITIMATE OPPOSITION IN THE UNITED STATES 1780-1840*, at 40 (1969).

⁸⁸ *Id.*

⁸⁹ *Storer v. Brown*, 415 U.S. 724, 730 (1974).

⁹⁰ U.S. CONST. art. I, § 4, cl. 1.

⁹¹ *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 217 (1986).

⁹² *Burdick v. Takushi*, 504 U.S. 428, 443 (1992) (citation omitted).

⁹³ The Fifteenth Amendment guarantees the right to vote to racial minorities. The Seventeenth Amendment requires popular election of Senators. The Nineteenth Amendment guarantees the right to vote to women. The Twenty-Third Amendment permits residents of

of the Supreme Court, have helped define the modern contours of the right to vote, the right to run for office, and the right to fair representation.⁹⁴ Within this framework, states remain free to experiment and decide how best to protect their citizens' rights.⁹⁵

With significant exceptions, state election regulation of elections has been held to be constitutionally permissible.⁹⁶ The test adopted by the Supreme Court to evaluate state election regulations is a flexible one: although election regulations that impose severe burdens on political party associational rights must be narrowly tailored and advance a compelling state interest, lesser burdens require less exacting review, and a state's important regulatory interests will usually suffice to justify reasonable, nondiscriminatory restrictions.⁹⁷ Cases involving challenges by a political party to interference with its associational rights indicate that the Supreme Court is willing to extend greater protection to a political party's right of association than to an individual's.⁹⁸

I. Permissible Burdens on an Individual's Right of Association

In *Kusper v. Pontikes*,⁹⁹ the Supreme Court considered an Illinois law prohibiting a person from voting in the primary election of a political party if the person had voted in the primary election of another political party within the past twenty-three months.¹⁰⁰ Relying on the constitutional right of free association, the Court held that "the right to associate with the political party of one's choice is an integral part of this basic constitutional freedom."¹⁰¹ First, the Court found that Illinois's rule placed a substantial restriction on a person's ability to

the District of Columbia to vote for President. The Twenty-Fourth Amendment bars the poll tax in federal elections. The Twenty-Sixth Amendment grants the vote to persons over the age of 18.

⁹⁴ See SAMUEL ISSACHAROFF ET AL., *THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS* (4th ed. 2012).

⁹⁵ *Id.*

⁹⁶ See *Burdick*, 504 U.S. at 438.

⁹⁷ *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997).

⁹⁸ Shannon L. Spangler, *Freedom of Association—Explanation of the Underlying Concepts*—Republican Party of Connecticut v. Tashjian, 34 U. KAN. L. REV. 841, 849 (1986).

⁹⁹ 414 U.S. 51 (1973).

¹⁰⁰ *Id.* at 52.

¹⁰¹ *Id.* at 57.

change party affiliation, and therefore to associate with the party of her choice.¹⁰² More importantly for the Court, however, the Illinois rule substantially interfered with free association because although a voter may be able to immediately change party affiliation, she is effectively disenfranchised for a twenty-three month period thereafter and unable to effectively participate in her party of choice.¹⁰³

In addition to protecting a voter's right to associate with her party of choice, the Supreme Court has recognized the right of a candidate to associate with a particular political party, but it has permitted substantial regulation of this right.¹⁰⁴ In *Storer v. Brown*,¹⁰⁵ the Court examined a California election code that required a person to wait twelve months after leaving one political party before running for office as an independent or member of another party.¹⁰⁶ In upholding the state's requirement, the Court noted that it required little foresight for a candidate to switch parties in time to run as a member of a different party.¹⁰⁷ The Court also suggested that it did not need to protect the right of a candidate to associate with a party as strongly as the right of a voter to associate with a party.¹⁰⁸ Furthermore, the Court found that with the state's restriction fulfilled a number of compelling state interests including keeping losers off an already crowded ballot, reducing party factionalism, and maintaining the stability of the state election process.¹⁰⁹

Similarly, in *Rosario v. Rockefeller*,¹¹⁰ the Court upheld a limit on an individual's right to change party affiliation.¹¹¹ To enroll as a party member in New York, a voter at that time was required to submit her enrollment at least thirty days before the general election immediately preceding the first primary election in which the voter wanted to participate.¹¹² Therefore, a voter was required to change her registration between eight and eleven months before the primary in

¹⁰² *Id.*

¹⁰³ *See id.* at 58.

¹⁰⁴ Labbé, *supra* note 51, at 728.

¹⁰⁵ 415 U.S. 724 (1974).

¹⁰⁶ *Id.* at 734.

¹⁰⁷ *Id.*

¹⁰⁸ *See id.*

¹⁰⁹ *Id.* at 735-36.

¹¹⁰ 410 U.S. 752 (1973).

¹¹¹ *Id.* at 762.

¹¹² *Id.* at 752.

which she wanted to participate.¹¹³ The Court rejected the argument that this system violated a voter's right of free association.¹¹⁴ The Court noted that under New York's system a voter was free to change party affiliation on an annual basis,¹¹⁵ and the state had an interest in enforcing a waiting period to prevent party raiding.¹¹⁶

II. Permissible Burdens on a Political Party's Right of Association

In *Williams v. Rhodes*,¹¹⁷ the Supreme Court confronted a state electoral framework that effectively prevented any party other than the Democratic and Republican parties from qualifying for a position on the ballot.¹¹⁸ The Court held that "only a compelling state interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms."¹¹⁹ The Ohio election law required a new party to obtain a petition signed by a number of voters equal to at least fifteen percent the number of ballots cast in the last preceding gubernatorial election.¹²⁰ Rejecting the state's asserted interest in promoting a two-party system in order to promote stability in the election process, the Court found that "[c]ompetition in ideas and governmental policies is at the core of our electoral process and of the First Amendment freedoms."¹²¹ The Court also could not identify any state interest where there was no evidence that permitting third party access to the ballot would result in "a choice so confusing that the popular will could be frustrated."¹²²

The Supreme Court narrowed the scope of political parties' freedom of association in *Timmons v. Twin Cities Area New Party*.¹²³

¹¹³ *Id.* at 760.

¹¹⁴ *Id.* at 758.

¹¹⁵ *Id.* at 759.

¹¹⁶ *Id.* at 760-61. Party raiding is the process whereby voters not affiliated with a particular party vote in that party's primary in an attempt to nominate a weak candidate from the opposing party. *See* Cal. Democratic Party v. Jones, 984 F. Supp. 1288, 1297 (E.D. Cal. 1997). By doing so, the raiders attempt to secure an easy victory in the general election. *See id.*

¹¹⁷ 393 U.S. 23 (1968).

¹¹⁸ *Id.* at 24-26.

¹¹⁹ *Id.* at 31.

¹²⁰ *Id.* at 24-25.

¹²¹ *Id.* at 32.

¹²² *Id.* at 33.

¹²³ 520 U.S. 351 (1997).

In *Timmons*, a state law prohibited candidates from appearing on the ballot for more than one political party—a process known as fusion.¹²⁴ The New Party brought suit when its candidate for office, also the candidate of the Democratic-Farmer-Labor Party, was denied access to the ballot.¹²⁵ The New Party claimed that its First Amendment right to freedom of association was violated.¹²⁶ “Regulations imposing severe burdens on plaintiffs’ [associational] rights,” the Court said, “must be narrowly tailored and advance a compelling state interest.”¹²⁷ However, “[l]esser burdens . . . trigger less exacting review, and a State’s ‘important regulatory interests’ will usually be enough to justify ‘reasonable nondiscriminatory restrictions.’”¹²⁸ Using this standard, the Court held that the burdens in question were less than severe and thus justified by the State’s “correspondingly weighty” valid state interests in ballot integrity and political stability.¹²⁹

II. THE RIGHT TO VOTE

A. Background

The history of the right to vote in the United States has been one marked by intense conflict over who has the right and how it can be secured. During the early days of the Republic, franchise rights were vested only in white, male property owners over the age of 21.¹³⁰ By the end of the 1850s most states had abolished property requirements.¹³¹ Over time, voting privileges were extended through struggle, and ultimately through legislation, to larger segments of the population.¹³² In 1870, the Fifteenth Amendment enfranchised African American men, but grandfather clauses, literacy tests, and poll taxes still barred most freed men from the voting booth.¹³³ Fifty years later,

¹²⁴ *Id.* at 353.

¹²⁵ *Id.* at 354.

¹²⁶ *Id.* at 355.

¹²⁷ *Id.* at 358.

¹²⁸ *Id.* (citation omitted).

¹²⁹ *See id.* 369-70.

¹³⁰ ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* 24 (2000).

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

the Nineteenth Amendment extended the right to vote to women.¹³⁴ By the mid-1950s most states had extended suffrage to Native Americans.¹³⁵ In 1964, the Twenty-Fourth Amendment abolished the poll tax, and the following year the Voting Rights Act outlawed literacy tests and other measures of the Jim Crow South that had long been used to suppress the African American vote.¹³⁶ Relying on the Fourteenth and Fifteenth Amendments, the Supreme Court has also been active in expanding the franchise, even in the absence of congressional enactment.¹³⁷

B. Legal Background

In a voting rights case, a court's preliminary task is to choose the appropriate standard with which to measure the extent of an individual's right to vote. Though the Supreme Court has determined that the right to vote is a fundamental right, the Court has also concluded that states may regulate and restrict access to the polls in order to administer fair and legitimate elections.

I. *The Post-Civil War Voting Rights Cases: Congressional Regulation of Elections*

Immediately after the Civil War, the Supreme Court had the occasion to explain why and how voting mattered in response to violence, electoral fraud and corruption to circumvent the post-Civil War amendments granting citizenship, voting rights, and equal protection to former slaves.¹³⁸ These cases raised the question of the nature and scope of the federal government's authority to protect the right to vote consistent with the Fourteenth and Fifteenth Amendments to the Constitution.¹³⁹

In *Ex parte Siebold*,¹⁴⁰ the Court considered the constitutional authority of a federal statute providing for federal election monitors, appointed by local judges, to observe and protect the polling places.¹⁴¹

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ Hill, *supra* note 52, at 543.

¹³⁹ *Id.*

¹⁴⁰ 100 U.S. 371 (1879).

¹⁴¹ *Id.* at 379-82.

Writing for the Court, Justice Bradley reasoned that “[i]n the light of recent history, and of the violence, fraud, corruption, and irregularity which have frequently prevailed at such elections . . . the exertion of the power, if it exists, may be necessary to the stability of our frame of government.”¹⁴² The Court’s majority opinion, while primarily confined to an analysis of the balance between federal and state power, described for the first time the extensive power of Congress to assure that state governments did not interfere with a citizen’s federal right to vote.¹⁴³ Because Congress has such authority, the Court held that Congress necessarily has the authority to enforce its regulations.¹⁴⁴ The majority held:

We hold it to be an incontrovertible principle, that the government of the United States may, by means of physical force, exercised through its official agents, execute on every foot of American soil the powers and functions that belong to it. This necessarily involves the power to command obedience to its laws, and hence the power to keep the peace to that extent.¹⁴⁵

In *Ex parte Yarbrough*,¹⁴⁶ the Court considered the constitutional authority for federal legislation concerning the franchise in general, and the right to vote in congressional elections specifically.¹⁴⁷ Here, the petitioners were not state officials but private persons.¹⁴⁸ The Court held that the right to vote for a member of Congress is “fundamentally based upon the [C]onstitution which created the office of member of [C]ongress, and declared it should be elective, and pointed to the means of ascertaining who should be electors.”¹⁴⁹ In upholding the congressional power, the Court noted “[t]he exercise of the right [to vote] . . . is guaranteed [sic] by the [C]onstitution, and should be kept free and pure by Congressional enactments whenever that is necessary.”¹⁵⁰

¹⁴² *Id.* at 382.

¹⁴³ *Id.* at 385-87.

¹⁴⁴ *Id.* at 387.

¹⁴⁵ *Id.* at 395.

¹⁴⁶ 110 U.S. 651 (1884).

¹⁴⁷ *Id.* at 652, 654.

¹⁴⁸ *Id.* at 662.

¹⁴⁹ *Id.* at 664.

¹⁵⁰ *Id.* at 665.

The Court took the position that its newly articulated state-action doctrine did not apply to issues arising in the context of voting and the conduct of elections, reasoning that:

The reference to cases in this court in which the power of congress under the first section of the fourteenth amendment has been held to relate alone to acts done under state authority can afford petitioners no aid in the present case. For, while it may be true that acts which are mere invasions of private rights, which acts have no sanction in the statutes of a state, or which are not committed by any one exercising its authority, are not within the scope of that amendment, it is quite a different matter when congress undertakes to protect the citizen in the exercise of rights conferred by the constitution of the United States, essential to the healthy organization of the government itself.¹⁵¹

In *Siebold and Yarborough*, the Court upheld the preeminent authority of the U.S. government to enforce its own laws ensuring citizens' right to vote in congressional elections, which was protected by the Fifteenth Amendment. This line of cases continued with *United States v. Mosley*.¹⁵² Writing for the Court, Justice Holmes stated that “[w]e regard it as equally unquestionable that the right to have one’s vote counted is as open to protection by Congress as the right to put a ballot in a box.”¹⁵³

2. *The Voting as a “Fundamental Right” Cases*

At the Constitution’s founding, “[v]oting was in no sense a federal constitutional right.”¹⁵⁴ The Supreme Court first alluded to the right to vote as fundamental as far back as 1886 in *Yick Wo v. Hopkins*.¹⁵⁵ In discussing the concept of sovereignty, the Court noted that the right to vote, although not “strictly” a “natural right,” “is [still] regarded as a fundamental political right, . . . preservative of all

¹⁵¹ *Id.* at 665-66.

¹⁵² 238 U.S. 383 (1915).

¹⁵³ *Id.* at 386.

¹⁵⁴ Richard Briffault, *The Contested Right to Vote*, 100 MICH. L. REV. 1506, 1512 (2002).

¹⁵⁵ 118 U.S. 356, 370 (1886).

rights.”¹⁵⁶ The Court reiterated this theme in 1932 in *Smiley v. Holm*,¹⁵⁷ noting that the Constitution provides authority for the state to “enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved.”¹⁵⁸ The Supreme Court, however, did not affirmatively address the constitutional protection of the right to vote until the 1940s.

In *United States v. Classic*,¹⁵⁹ the issue presented itself in the context of criminal allegations of voter fraud in a federal election.¹⁶⁰ The Court framed the constitutional issue as “whether the right of qualified voters to vote in the Louisiana primary and to have their ballots counted is a right ‘secured . . . by the Constitution.’”¹⁶¹ The Court held that federal primary elections fall within the reach of the constitutional provision and are thus subject to congressional regulation.¹⁶² Observing the text of Article I, Section 2, which provides that congressional representatives are to be chosen by the people of the states by electors, the Court reasoned that “[t]he right of the people to choose, whatever its appropriate constitutional limitations, . . . is a right established and guaranteed by the Constitution and hence is one secured by it to those citizens and inhabitants of the state entitled to exercise the right.”¹⁶³

The constitutional protection of the right to vote in federal elections was upheld in *Reynolds v. Sims*,¹⁶⁴ in which the Court held that, under the Equal Protection Clause, both houses of a bicameral legislature have to be apportioned on the basis of population.¹⁶⁵ The plaintiffs alleged that the Alabama legislature failed to reapportion state voting districts despite uneven population growth.¹⁶⁶ As a result, they argued, voters were denied equal suffrage in violation of the Equal Protection Clause.¹⁶⁷ In its equal protection analysis, the Court focused on whether the record displayed any discrimination that impermissibly

¹⁵⁶ *Id.*

¹⁵⁷ 285 U.S. 355, 366 (1932).

¹⁵⁸ *Id.* at 366; *see also* *Cook v. Gralike*, 531 U.S. 510, 524 (2001).

¹⁵⁹ 313 U.S. 299 (1941).

¹⁶⁰ *Id.* at 307.

¹⁶¹ *Id.* (alteration in original).

¹⁶² *Id.* at 320.

¹⁶³ *Id.* at 314.

¹⁶⁴ 377 U.S. 533 (1964).

¹⁶⁵ *Id.* at 568.

¹⁶⁶ *Id.* at 540.

¹⁶⁷ *Id.*

interfered with the plaintiffs' constitutionally protected right to vote.¹⁶⁸ The Court stated:

Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.¹⁶⁹

The Supreme Court's decisions in *Classic* and *Reynolds* established that the right to vote in federal elections is protected by the Constitution.¹⁷⁰ Later, in *Harper v. Virginia State Board of Elections*,¹⁷¹ the questions regarding the constitutional protection of voting in state elections, the nature of the right to vote, and the appropriate standards of scrutiny were answered. In *Harper*, the Supreme Court struck down a poll tax of \$1.50 in Virginia state elections. Justice Douglas, writing for the majority, found that "a State violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard."¹⁷² Recognizing that the Court was overturning a practice that had never been before thought to be inconsistent with the Equal Protection Clause, Justice Douglas maintained that "the Equal Protection Clause is not shackled to the political theory of a particular era."¹⁷³ In support of this proposition, he invoked the Court's decision in *Brown v. Board of Education of Topeka*.¹⁷⁴ He further noted: "Notions of what constitutes equal treatment for the purposes of the Equal Protection Clause *do* change."¹⁷⁵

By 1970, the Court had recognized voting as a fundamental right protected under the Fourteenth Amendment.¹⁷⁶ For example, in

¹⁶⁸ *Id.* at 561.

¹⁶⁹ *Id.* at 561-62.

¹⁷⁰ Kelly E. Brilleaux, *The Right, the Test, and the Vote: Evaluating the Reasoning Employed in Crawford v. Marion County Election Board*, 70 LA. L. REV. 1023, 1029 (2010).

¹⁷¹ 383 U.S. 663 (1966).

¹⁷² *Id.* at 666.

¹⁷³ *Id.* at 669.

¹⁷⁴ 347 U.S. 483 (1954).

¹⁷⁵ *Harper*, 383 U.S. at 669 (emphasis added).

¹⁷⁶ *See, e.g., Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 626-28 (1969).

Kramer v. Union Free School District No. 15,¹⁷⁷ the Court invalidated a statute which allowed only owners or lessees of taxable realty and parents or guardians of children in public schools a right to vote in school board elections.¹⁷⁸ The Court held that “[s]tatutes granting the right to vote to residents on a selective basis always pose the danger of denying some citizens any effective voice in the governmental affairs which substantially affect their lives.”¹⁷⁹ Similarly, *Carrington v. Rash*,¹⁸⁰ 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.¹⁸¹ The Court rejected this interest, holding that “[f]encing out’ from the franchise a sector of the population because of the way they may vote is constitutionally impermissible.”¹⁸² The right to vote “cannot constitutionally be obliterated because of a fear of the political views of a particular group of bona fide residents.”¹⁸³ Likewise, in *Dunn v. Blumstein*,¹⁸⁴ the Court struck down durational residency requirements imposed by the states as a precondition to voting. In this type of case, the Court recognized that when states deny some citizens the right to vote, those citizens are essentially deprived of a fundamental political right safeguarding all rights.¹⁸⁵

3. *The White Primary Cases*

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.¹⁸⁶ Central to this line of cases (the so-called White Primary cases) was “the idea that the right to vote in a political party primary is constitutionally protected, and the

¹⁷⁷ 395 U.S. 621 (1969).

¹⁷⁸ *Id.* at 632-33.

¹⁷⁹ *Id.* at 626-27.

¹⁸⁰ 380 U.S. 89 (1965).

¹⁸¹ *Id.* at 93.

¹⁸² *Id.* at 94.

¹⁸³ *Id.*

¹⁸⁴ 405 U.S. 330 (1972).

¹⁸⁵ *Id.* at 336.

¹⁸⁶ Ellen D. Katz, *Resurrecting the White Primary*, 153 U. PA. L. REV. 325, 332 (2004).

state cannot statutorily delegate to a political party or its membership the effective right to discriminate on the basis of race.”¹⁸⁷

In the first of the White Primary cases, *Nixon v. Herndon*,¹⁸⁸ the Court held that the protections of the Fourteenth Amendment extend to primary elections, as well as general elections.¹⁸⁹ Thus, a statute that barred African Americans from voting in a party primary was a “direct and obvious infringement of the Fourteenth [Amendment].”¹⁹⁰ Justice Holmes, writing for the Court, reasoned that it was unnecessary to consider the Fifteenth Amendment, “because it seems to us hard to imagine a more direct and obvious infringement of the Fourteenth.”¹⁹¹

In *Nixon v. Condon*,¹⁹² the second of the White Primary cases, the Court found that when a state delegates the authority to restrict eligibility to vote in a primary election to a group that is part of a private association, and the group then acts under that state authority but independently of the association’s membership, the group is acting as an agent of the state rather than as a private association.¹⁹³ Thus a resolution by the Texas Democratic Party Executive Committee that adopted a discriminatory provision concerning the party’s membership and voting requirements violated the Fourteenth Amendment.¹⁹⁴

Nine years later in *Smith v. Allwright*,¹⁹⁵ the third of the White Primary cases, the Court found state action in a primary election conducted by a private “voluntary association” when the election process included duties imposed upon the party by state law.¹⁹⁶ The fact that a state convention created the discriminatory nature of the election process at issue was held to be irrelevant.¹⁹⁷ Relying heavily on *United States v. Classic*,¹⁹⁸ in which the Court held that Congress

¹⁸⁷ Jamin Raskin & John Bonifaz, *Equal Protection and the Wealth Primary*, 11 YALE L. & POL’Y REV. 307 (1993).

¹⁸⁸ 273 U.S. 536 (1927).

¹⁸⁹ *Id.* at 540.

¹⁹⁰ *Id.* at 540-41.

¹⁹¹ *Id.*

¹⁹² 286 U.S. 73 (1932).

¹⁹³ *Id.* at 88-89.

¹⁹⁴ *Id.* at 89.

¹⁹⁵ 321 U.S. 649 (1944)

¹⁹⁶ *Id.* at 654.

¹⁹⁷ *Id.* at 663.

¹⁹⁸ 313 U.S. 299 (1941). This decision expressly overturned *Grove v. Townsend*, 295 U.S. 45 (1935), which had held that discriminatory policy created by a state convention of the

could regulate primary and general elections “where the primary is by law made an integral part of the election machinery,”¹⁹⁹ the Court held that *Classic* effectively overruled *Grove v. Townsend* (which held that primary elections were not state action under the Fourteenth and Fifteenth Amendments) because “the recognition of the place of the primary in the electoral scheme makes clear that state delegation to a party of the power to fix qualification of primary elections is delegation of a state function that may make the party’s action the action of the state.”²⁰⁰ The Court put the right to vote in the center of its decision to overrule *Grove*.²⁰¹ Because the general public election was so dependent upon the private primary, the Court held that there was no reason to distinguish the state functions respecting the general election from the private functions respecting the primary.²⁰²

But in 1953, only a year before the Court decided *Brown v. Board of Education of Topeka*, the Court went further in the last of the so-called White Primary cases, *Terry v. Adams*,²⁰³ and found state action where a state permits a wholly private but race-exclusionary political organization to meet before a party primary.²⁰⁴ In *Terry*, the Court struck down the Jaybird primary after finding that it was always determinative of the general election. Despite finding that “the state does not control that part of this elective process which it leaves for the [party] to manage,”²⁰⁵ the Court, relying on the net effect of denying blacks the right to vote,²⁰⁶ held that the process was violative of the Fifteenth Amendment.²⁰⁷ In its reasoning, the Court noted that for fifty years preceding the case the Jaybird primary had been controlling for both the Democratic primary and the general election,²⁰⁸ and that the admitted purpose of the Jaybird Party was to deny blacks the opportunity to vote.²⁰⁹

Democratic Party did not constitute state action for the purposes of the Fourteenth and Fifteenth Amendments.

¹⁹⁹ *Classic*, 313 U.S. at 318.

²⁰⁰ *Allwright*, 321 U.S. at 660.

²⁰¹ *Id.* at 664.

²⁰² *Id.* at 660.

²⁰³ 345 U.S. 461 (1953).

²⁰⁴ *Id.* at 469.

²⁰⁵ *Id.* at 469.

²⁰⁶ *Id.* at 469-70.

²⁰⁷ *Id.* at 469.

²⁰⁸ *Id.* The Jaybird Party was an all-white Democratic ‘club’ that functioned as a subgroup of the state Democratic Party.

²⁰⁹ *Id.* at 464-65.

4. *The Malapportionment Cases*

In *Baker v. Carr*,²¹⁰ the Supreme Court announced that claims having to do with redistricting and the apportionment of legislative seats by geographic area were justiciable under the Equal Protection Clause.²¹¹ In holding that the Court had jurisdiction over the subject matter, the Court cited the White Primary cases,²¹² finding that “[a]n unbroken line of our precedents sustains the federal courts’ jurisdiction of the subject matter of federal constitutional claims of this nature.”²¹³ Although *Baker* decided that a voter’s challenge to an apportionment scheme is justiciable, it did not resolve the claim’s merits. The Supreme Court first addressed that question one year later in *Gray v. Sanders*.²¹⁴ In *Gray*, the Court held unconstitutional a “county unit” system for counting votes, under which votes in rural counties were weighted more heavily than those cast in urban counties.²¹⁵ Justice Douglas, writing for the Court, declared, “[t]he conception of political equality from the Declaration of Independence, to Lincoln’s Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote.”²¹⁶

The following year the Supreme Court decided *Wesberry v. Sanders*.²¹⁷ In *Wesberry*, the Court built on its previous ruling in *Gray v. Sanders* to hold that all federal congressional districts within each state had to be made up of a roughly equal number of voters. Demonstrating the importance of the right to vote, the Court noted:

No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined. Our Constitution leaves no room

²¹⁰ 369 U.S. 186 (1962).

²¹¹ *Id.* at 237.

²¹² *Id.* at 200 & n.19 (citing *Smith v. Allwright*, 321 U.S. 649 (1944); *Nixon v. Condon*, 286 U.S. 73 (1932); *Nixon v. Herndon*, 273 U.S. 536, 540 (1927)).

²¹³ *Id.* at 201.

²¹⁴ 372 U.S. 368 (1963).

²¹⁵ *Id.* at 379-80.

²¹⁶ *Id.* at 381.

²¹⁷ 376 U.S. 1 (1964).

for classification of people in a way that unnecessarily abridges this right.²¹⁸

Within four months of *Wesberry*, the Supreme Court decided *Reynolds v. Sims*.²¹⁹ In *Reynolds*, the Court was confronted with a challenge to the malapportionment of the Alabama state legislature.²²⁰ In deciding the case, the Court considered the constitutional implications of systems that impact participation in politics.²²¹ First, the Court noted that “[i]t would appear extraordinary to suggest that a State could be constitutionally permitted to enact a law providing that certain of the State’s voters could vote two, five, or 10 times for their legislative representatives, while voters living elsewhere could vote only once.”²²² The Court went on to note that systems that have the effect of giving one citizen more votes than another also run afoul of the Constitution.²²³ The problem was that “overvaluation of the votes of those living here has the certain effect of dilution and undervaluation of the votes of those living there.”²²⁴ Vote dilution, in turn, offends the Constitution because:

[E]ach and every citizen has an inalienable right to full and effective participation in the political processes of his State’s legislative bodies. . . . Full and effective participation by all citizens in state government requires, therefore, that each citizen have an equally effective voice in the election of members of his state legislature.²²⁵

Because of Alabama’s failure to redistrict in light of changes to its population, the Court held that Alabama’s district apportionment violated the Equal Protection Clause.²²⁶ The *Reynolds* decision marked the expansion of the class of people protected by the

²¹⁸ *Id.* at 17-18.

²¹⁹ 377 U.S. 533, 562 (1964).

²²⁰ *Id.*

²²¹ *Id.* at 562-68.

²²² *Id.* at 562.

²²³ *Id.* at 562-63.

²²⁴ *Id.* at 563.

²²⁵ *Id.* at 565.

²²⁶ *Id.* at 577.

Fourteenth Amendment's Equal Protection Clause in apportionment to all citizens—not just racial minorities.²²⁷

5. *The Ballot Access Cases*

In *Williams v. Rhodes*,²²⁸ the Supreme Court struck down a series of Ohio ballot access laws that made it virtually impossible for any candidate of a party except the Republican or Democratic parties to qualify for the ballot.²²⁹ In its opinion, the Court noted that a state must demonstrate a compelling government interest to justify a law that places an unequal burden on minority voting groups.²³⁰ Similarly, in *Illinois State Board of Elections v. Socialist Workers Party*,²³¹ the Court invalidated a state law that imposed a different signature requirement for access to the ballot for new political parties in statewide elections as opposed to elections in political subdivisions.²³² In so holding, the Court noted that laws that restrict access to the ballot also “implicate the right to vote” because these laws “limit[] the choices available to voters,” and that the law under consideration was not the “least restrictive means” of achieving the state’s goal of ensuring that candidates on a ballot are actually serious candidates who have a modicum of support.²³³ Thus, when the “vital individual right[]” to vote is at stake, “a State must establish that its classification is necessary to serve a compelling interest.”²³⁴

Likewise, in *Bullock v. Carter*,²³⁵ the Supreme Court struck down on equal protection grounds a series of filing fees that the state of Texas required primary candidates to pay to their political parties.²³⁶ Invalidating the system on equal protection grounds, the Court found that, with the high filing fees, “potential office seekers lacking both personal wealth and affluent backers are in every practical sense

²²⁷ Carroll Rhodes, *Changing the Constitutional Guarantee of Voting Rights from Color-Conscious to Color-Blind: Judicial Activism by the Rehnquist Court*, 16 MISS. C. L. REV. 309, 339 (1996).

²²⁸ 393 U.S. 23 (1968).

²²⁹ *Id.* at 31.

²³⁰ *Id.*

²³¹ 440 U.S. 173 (1979).

²³² *Id.* at 187.

²³³ *Id.* at 175-77, 187.

²³⁴ *Id.* at 184, 186.

²³⁵ 405 U.S. 134 (1972).

²³⁶ *Id.* at 137-38.

precluded from seeking the nomination of their chosen party, no matter how qualified they might be, and no matter how enthusiastic their popular support.”²³⁷ The “exclusionary character” of the system also violated the constitutional rights of non-affluent voters.²³⁸ “We would ignore reality,” the Court stated, “were we not to recognize that this system falls with unequal weight on voters, as well as candidates, according to their economic status.”²³⁹ The Court concluded:

By requiring candidates to shoulder the costs of conducting primary elections through filing fees and by providing no reasonable alternative means of access to the ballot, the State of Texas has erected a system that utilizes a criterion of ability to pay as a condition to being on the ballot, thus excluding some candidates otherwise qualified and denying an undetermined number of voters the opportunity to vote for candidates of their choice.²⁴⁰

III. VALIDITY OF VOTING RESTRICTIONS

In *Harper v. Virginia State Board of Elections*,²⁴¹ the Supreme Court applied a “stricter standard” than rational basis to invalidate a poll tax under the Equal Protection Clause of the Fourteenth Amendment.²⁴² In *Harper*, the Court relied on the invidiously discriminatory nature of the poll tax to justify the application of heightened scrutiny.²⁴³ The Court first noted that the right to vote was a “fundamental political right, because preservative of all rights,”²⁴⁴ and “where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined.”²⁴⁵ Thus, under *Harper*, while the State had the right to impose “reasonable residence restrictions” on the ability to vote, “even rational restrictions

²³⁷ *Id.* at 143.

²³⁸ *Id.* at 144.

²³⁹ *Id.*

²⁴⁰ *Id.* at 149.

²⁴¹ 383 U.S. 663 (1966).

²⁴² *Id.* at 670; *see also* Crawford v. Marion Cty. Election Bd., 553 U.S. 181, 189 (2008).

²⁴³ *See Harper*, 383 U.S. at 666.

²⁴⁴ *Id.* at 667.

²⁴⁵ *Id.* at 670.

on the right to vote are invidious if they are unrelated to voter qualifications.”²⁴⁶ Although it stopped short of adopting a strict scrutiny requirement in all cases, the Court gave the impression that future restrictions on voting rights would be analyzed rigorously.

The next landmark case in voting and election-related jurisprudence was *Anderson v. Celebrezze*,²⁴⁷ which dealt primarily with the issue of ballot access.²⁴⁸ In *Anderson*, the petitioner was an independent presidential candidate who, because of an early filing requirement for independent candidates in the Ohio Revised Code, was precluded from appearing on the Ohio ballot.²⁴⁹ The Court framed the issue as whether the early filing requirement placed an “unconstitutional burden on the voting and associational rights of Anderson’s supporters.”²⁵⁰ Although the deadline directly impacted only the independent candidate himself, the Court asserted that “the rights of voters and the rights of candidates do not lend themselves to neat separation; laws that affect candidates always have at least some theoretical, correlative effect on voters.”²⁵¹ The Court stated that “[a]lthough these rights of voters are fundamental, not all restrictions imposed by the States on candidates’ eligibility for the ballot impose constitutionally-suspect burdens on voters’ rights to associate or to choose among candidates.”²⁵² It supported this assertion by reasoning that a certain amount of election regulation is required by the government in order to assist the democratic process.²⁵³ The Court reasoned that the issue should be examined in light of its impact on voters because the restrictions reduce the choices available to them.²⁵⁴ Discussing these implications, the Court added in a footnote that it based its conclusions “directly on the First and Fourteenth Amendments” and did not “engage in a separate Equal Protection Clause analysis.”²⁵⁵

Reasoning that challenges to state election laws cannot be resolved with a “litmus paper test,” the Court set forth a new balancing

²⁴⁶ *Crawford*, 553 U.S. at 189.

²⁴⁷ 460 U.S. 780 (1983).

²⁴⁸ *Id.*

²⁴⁹ *Id.* at 782-83.

²⁵⁰ *Id.* at 782.

²⁵¹ *Id.* at 786 (quoting *Bullock v. Carter*, 405 U.S. 134, 143 (1972)).

²⁵² *Id.* at 788.

²⁵³ *Id.*

²⁵⁴ *Id.* at 786.

²⁵⁵ *Id.* at 786 n.7.

test to analyze “challenges to specific provisions of a [s]tate’s election laws”.²⁵⁶

Instead, a Court must resolve such a challenge by an analytical process that parallels its work in ordinary litigation. It must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It must then identify and evaluate the precise interests put forward by the [s]tate as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests, it must also consider the extent to which those interests make it necessary to burden the plaintiff’s rights. Only after weighing all these factors is the reviewing Court in a position to decide whether the challenged provision is unconstitutional.²⁵⁷

Applying this balancing test, the Court held that the burdens placed on the Ohio voters’ freedom of choice and freedom of association outweighed the state’s minimal interests.²⁵⁸ *Anderson* thus initiated the Court’s shift from a heightened to a more flexible standard of scrutiny in election-related cases.²⁵⁹ Even though the facts of *Anderson* dealt with the issue of a political candidate’s ballot access,²⁶⁰ the open-ended language of its new balancing test allowed for varying applications with regard to voting in subsequent jurisprudence.²⁶¹

²⁵⁶ *Id.* at 789 (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974)). The Court stated that such challenges cannot be resolved by a test “that will separate valid from invalid restrictions.” *Id.*

²⁵⁷ *Id.*

²⁵⁸ *Id.* at 806.

²⁵⁹ Brilleaux, *supra* note 170, at 1032.

²⁶⁰ *Anderson*, 460 U.S. at 782-83.

²⁶¹ Brilleaux, *supra* note 170, at 1032.

IV. CONFLICTING PRECEDENT**A. The Blanket Primary: *California Democratic Party v. Jones***

In *California Democratic Party v. Jones*,²⁶² the Supreme Court invalidated a blanket primary system adopted by a referendum of California voters in 1996. California's blanket primary system listed every candidate regardless of party affiliation on each ballot.²⁶³ A voter could choose freely among the candidates for each office regardless of a candidate's or a voter's party.²⁶⁴ The highest vote-winner of each party received that party's nomination for the general election.²⁶⁵ The Court began with a discussion of the importance of political parties' First Amendment right to exclude, holding that Proposition 198 contravenes this right because it "forces political parties to associate with—to have their nominees, and hence their positions, determined by—those who, at best, have refused to affiliate with the party, and at worst, have expressly affiliated with a rival."²⁶⁶ In so reasoning, the Court referred to the fact that in some primary races, votes totaled more than twice the number of registered party members.²⁶⁷ The Court concluded that the effect of these non-party votes would ultimately change the message and direction of the party and was thus severe.²⁶⁸ Because the Court "[c]ould] think of no heavier burden on a political party's associational freedom," it required that the blanket primary survive strict scrutiny.²⁶⁹ Proposition 198 failed strict scrutiny because none of the seven articulated objectives of the law advanced were sufficiently compelling.²⁷⁰ Even having found no compelling state interest, the Court considered whether the blanket primary laws were narrowly tailored to the state interest and concluded that they were not.²⁷¹ The Court suggested that a nonpartisan primary would serve the state's interest without imposing severe burdens on

²⁶² 530 U.S. 567 (2000).

²⁶³ *Id.*

²⁶⁴ *Id.*

²⁶⁵ *Id.*

²⁶⁶ *Id.* at 574, 577.

²⁶⁷ *Id.* at 578.

²⁶⁸ *Id.* at 579.

²⁶⁹ *Id.* at 582.

²⁷⁰ *Id.* at 582-85.

²⁷¹ *Id.*

political parties' freedom of association right.²⁷² The Court also noted, however, that associational rights of political parties should be construed neither, as absolute, nor as comprehensive, as rights enjoyed by wholly private associations.²⁷³

Justice Stevens, joined by Justice Ginsburg, dissented from the Court's decision.²⁷⁴ In his dissent, Justice Stevens implied that political parties' status as either private or public was determined according to the functions they were performing.²⁷⁵ Thus,

[w]hen a political party defines the organization and composition of its governing units, when it decides what candidates to endorse, and when it decides whether and how to communicate those endorsements to the public, it is engaged in the kind of private expressive associational activity that the First Amendment protects.²⁷⁶

Justice Stevens distinguished those activities from involvement in primary elections that were “quintessential forms of state action” because they were elections to public office paid for and administered by the states.²⁷⁷ Drawing on the White Primary cases, Justice Stevens considered California's primary, funded as it is by public money and conducted by state officials, the “quintessential [form] of state action” and “an election, unlike a convention or a caucus, . . . a public affair.”²⁷⁸ According to Justice Stevens, party associational rights thus take on a completely different character in this context, as opposed to a case, such as *Eu*, where the law implicated political parties' “internal processes” and the parties' core First Amendment right to expression was at stake.²⁷⁹ Moreover, the motivation behind the law—to encourage electoral participation—distinguished this case from *Tashjian*, where the law sought to restrict participation.²⁸⁰ “When a State acts not to limit democratic participation but to expand the ability of individuals to participate in the democratic process,” Justice Stevens

²⁷² *Id.* at 585-86.

²⁷³ *Id.* at 593 (citing *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 360 (1997)).

²⁷⁴ *Id.* at 590 (Stevens & Ginsburg, JJ., dissenting).

²⁷⁵ *See id.* at 591-96 (Stevens & Ginsburg, JJ., dissenting).

²⁷⁶ *Id.* at 592 (Stevens & Ginsburg, JJ., dissenting).

²⁷⁷ *Id.* at 594 (Stevens & Ginsburg, JJ., dissenting).

²⁷⁸ *Id.* at 594-95 (Stevens & Ginsburg, JJ., dissenting).

²⁷⁹ *Id.* at 593 (Stevens & Ginsburg, JJ., dissenting).

²⁸⁰ *Id.* at 601 (Stevens & Ginsburg, JJ., dissenting).

argued, “it is acting not as a foe of the First Amendment but as a friend and ally.”²⁸¹ “Although it may have limited the power of party activists to control primary outcomes, the blanket primary expanded expression by allowing all voters the opportunity to pledge their support to the candidate of their choice.”²⁸² “That same pro-participation justification underlies virtually every state’s decision to intrude on party autonomy by mandating the primary as the form of nomination method or allowing some nonmembers to choose the ballot of the party of their choice on election day.”²⁸³ Justice Stevens therefore warned, “[t]he Court’s reliance on a political party’s ‘right not to associate’ as a basis for limiting a State’s power to conduct primary elections will inevitably require it either to draw unprincipled distinctions among various primary configurations or to alter voting practices throughout the Nation in fundamental ways.”²⁸⁴

B. The Closed Primary: *Nader v. Schaffer*

In *Nader v. Schaffer*,²⁸⁵ the Supreme Court summarily affirmed a lower court ruling rejecting voters’ claims that closed primaries violated their First and Fourteenth Amendment rights. In its analysis, the district court, which was later affirmed without opinion by the Supreme Court, began by emphasizing that being unable to vote in a primary election “does not prevent [plaintiffs] from working in support of or contributing money to their favorite candidates within these Parties or candidates in other major or minor parties.”²⁸⁶ The district court further indicated that even if plaintiffs could not vote in a party primary, there remains enough competition between candidates that “no one party’s primary election is completely determinative of the outcome.”²⁸⁷ The district court in *Nader* went on to address the equal protection issues raised by the plaintiffs.²⁸⁸ The plaintiffs claimed that a closed primary election “deprives them of equal protection of the laws by denying them the right to participate in elections in which they

²⁸¹ *Id.* at 595-96 (Stevens & Ginsburg, JJ., dissenting).

²⁸² VOTING AT THE POLITICAL FAULT LINE: CALIFORNIA’S EXPERIMENT WITH THE BLANKET PRIMARY 314 (Bruce E. Cain & Elisabeth R. Gerber eds., 2002).

²⁸³ *Id.*

²⁸⁴ Cal. Democratic Party v. Jones, 530 U.S. 567, 597 (2000).

²⁸⁵ 417 F. Supp. 837 (D. Conn. 1976), *aff’d without opinion*, 429 U.S. 989 (1976).

²⁸⁶ *Id.* at 842.

²⁸⁷ *Id.* at 843.

²⁸⁸ *Id.* at 843-49.

are ‘interested’ and by which they are ‘affected,’ to the same extent as those persons who may vote, solely because plaintiffs do not enroll in political parties.”²⁸⁹ In support of their arguments, the plaintiffs cited to a line of Supreme Court cases that held, “in an election of general interest, restrictions on the franchise other than residence, age, and citizenship must promote a compelling state interest in order to survive constitutional attack.”²⁹⁰ The district court distinguished the plaintiffs’ cases, arguing that primary elections are not elections of general interest; rather, they are elections of particular interest to party members because they are concerned with “nominating the candidate who presents the best chance of winning the general election while remaining most faithful to party policies and philosophies.”²⁹¹ In response to claims of compelled association, the court found that the burden placed on voters was minimal.²⁹² Rather than apply strict scrutiny, the *Nader* court determined that primary election systems need only pass the court’s less rigorous test, because the burden placed on the plaintiffs’ associational and voting rights was minimal.²⁹³ The district court concluded that the closed primary was reasonably related to the legitimate goal of protecting the associational rights of party members.

Ten years later the Supreme Court was presented with a challenge to the very same closed primary statute in *Tashjian v. Republican Party of Connecticut*.²⁹⁴ In *Tashjian*, the Court held that Connecticut’s establishment of a primary closed to nonparty voters, given the party’s desire to have a primary open to independents, violated the party’s First Amendment associational rights and was thus unconstitutional.²⁹⁵ The Court, however, expressly cautioned that its holding was limited to the particular set of circumstances before it.²⁹⁶ The Court thus “had no occasion to address either the State’s interests

²⁸⁹ *Id.* at 848.

²⁹⁰ *Id.*; *see, e.g.*, *Hill v. Stone*, 421 U.S. 289, 295 (1975); *City of Phoenix v. Kolodziejski*, 399 U.S. 204, 207-13 (1970); *Cipriano v. City of Houma*, 395 U.S. 701, 706 (1969) (*per curiam*); *Kramer v. Union Free Sch. Dist.*, 395 U.S. 621, 632-33 (1969).

²⁹¹ *Nader*, 417 F. Supp. at 848.

²⁹² *Id.* at 843-44.

²⁹³ *Id.* at 849.

²⁹⁴ 479 U.S. 208 (1968).

²⁹⁵ *Id.* at 214.

²⁹⁶ *Id.* at 224 n.13 (“Our holding today does not establish that state regulation of primary voting qualifications may never withstand challenge by a political party or its membership.”).

in an open or blanket primary or the burdens imposed on a political party by such a primary system.”²⁹⁷

C. The Semi-Closed Primary: *Clingman v. Beaver*

In *Clingman v. Beaver*,²⁹⁸ the Supreme Court held that, although under *Tashjian* parties have a right to invite independents to vote in their primaries, parties do not have a right to invite members of other parties if the state chooses to run a semi-closed primary.²⁹⁹ Writing for the Court, Justice Thomas held that any burden the semi-closed primary law might impose on the associational rights of voters was “minor and justified by legitimate state interests.”³⁰⁰ Justice Thomas distinguished *Tashjian* solely on the ground that the Connecticut law required a voter to register with a party to vote in that party’s primary, whereas the Oklahoma law only required that the same voter deregister from another party and declare himself an independent.³⁰¹ The Oklahoma statute imposed a less severe burden on voters because it did not require them to affiliate publicly with a party in order to vote in that party’s primary; instead, the statute required voters only to disaffiliate from any other party and declare themselves independents.³⁰² Further, any burden that the statute’s party registration requirement imposed on voters was not by itself a severe burden because electoral regulations often require voters to take some affirmative action.³⁰³ Justice Thomas concluded that these “minor barriers” to association imposed by the statute did not warrant the strict scrutiny review applied in *Tashjian*.³⁰⁴ Rather, Justice Thomas found that the statute withstood ordinary scrutiny because the semi-closed primary law advanced “a number of regulatory interests” including “‘preserv[ing] [political] parties as viable and identifiable interest groups,’ enhanc[ing] parties’ electioneering and party-building efforts, and guard[ing] against party raiding and ‘sore loser’

²⁹⁷ Cal. Democratic Party v. Jones, 984 F. Supp. 1288, 1293 (E.D. Cal. 1997).

²⁹⁸ 544 U.S. 581 (2005).

²⁹⁹ *Id.* at 593-94.

³⁰⁰ *Id.* at 587.

³⁰¹ *Id.* at 591-92.

³⁰² *Id.*

³⁰³ “Election laws invariably ‘affec[t]—at least to some degree—the individual’s right to vote and his right to associate with others for political ends.’” *Id.* at 593 (citation omitted).

³⁰⁴ *Id.*

candidacies by spurned primary contenders.”³⁰⁵ Justice Thomas declined to consider the cumulative effect of the semi-closed primary law and other Oklahoma election laws on plaintiffs’ associational rights because plaintiffs had raised that issue for the first time before the Court.³⁰⁶

Justice Stevens dissented,³⁰⁷ declaring that the semi-closed primary law imposed a heavy burden on the Libertarian Party’s associational rights³⁰⁸ and that “in the ordinary case the State simply has no interest in classifying voters by their political party and in limiting the elections in which voters may participate as a result of that classification.”³⁰⁹ He found that Oklahoma’s asserted interests were “either entirely speculative or simply protectionist measures that benefit the parties in power.”³¹⁰ He also stated that the Court’s “undue deference to the interest in preserving the two-party system” had harmed “all participants in the political market,” including small political parties, independent candidates, and voters.³¹¹

V. THE MODERN POLITICAL LANDSCAPE IN THE UNITED STATES

A. Primary Elections

As of the 2016 election cycle, nine states have closed primaries, where participation in a party’s primary election is limited to voters who have registered as members of that party a specified period of time prior to the primary election.³¹² Fifteen states have open primaries, in which a registered voter, regardless of party affiliation, can vote freely in any party’s primary.³¹³ Twenty-two states have a hybrid system,

³⁰⁵ *Id.* at 594 (citations omitted).

³⁰⁶ *Id.* at 597-98.

³⁰⁷ Justice Ginsburg joined the dissent in full; Justice Souter joined in part.

³⁰⁸ *Clingman*, 544 U.S. at 611 (Stevens, J., dissenting).

³⁰⁹ *Id.*

³¹⁰ *Id.* at 619.

³¹¹ *Id.* at 619-20. Justice Souter declined to join this portion of Justice Steven’s opinion.

³¹² *State Primary Election Types*, NAT’L CONFERENCE OF STATE LEGISLATORS, <http://www.ncsl.org/research/elections-and-campaigns/primary-types.aspx> (last updated June 26, 2018). Delaware, Florida, Kentucky, Maryland, Nevada, New Mexico, New York, Pennsylvania and Oregon have closed primaries. *Id.*

³¹³ *Id.* Alabama, Arkansas, Georgia, Hawaii, Michigan, Minnesota, Mississippi, Missouri, Montana, North Dakota, South Carolina, Texas, Vermont, Virginia and Wisconsin have open primaries. *Id.*

with some variation between open and closed primaries for handling unaffiliated voters and changing registration.³¹⁴ Four states have nonpartisan or “top-two” primaries, in which all candidates are listed on the same ballot, with the two candidates receiving the most votes overall advancing to the general election.³¹⁵

B. The 2016 Election

Gone are the old style backroom deals and party bosses.³¹⁶ Yet, “[t]he increased power that voters now exert over presidential nominees has not, however, been allocated equally among all voters.”³¹⁷ Recently, studies have demonstrated that as much as 78% of Americans have not been encouraged to participate in their state’s primary or caucus.³¹⁸ Illustrative of this point is the 2016 presidential primary, wherein 14% of eligible voters—9% of the whole nation—voted for either Donald Trump or Hillary Clinton as the nominees, but half of the primary voters chose other candidates.³¹⁹ Indeed, tens of millions of registered voters did not participate in the 2016 presidential election, and the share of who cited a “dislike of the candidates or campaign issues” as their main reason for not casting a ballot reached a new high.³²⁰ In other recent presidential elections, the share of registered voters who said they did not participate because they

³¹⁴ *Id.* Alaska, Arizona, Colorado, Connecticut, Idaho, Illinois, Indiana, Iowa, Kansas, Massachusetts, Maine, New Hampshire, New Jersey, North Carolina, Ohio, Oklahoma, Rhode Island, South Dakota, Tennessee, Utah, West Virginia and Wyoming have a hybrid system. *Id.*

³¹⁵ *Id.* California, Louisiana, Nebraska (for nonpartisan legislative races only) and Washington have top-two primaries. *Id.*

³¹⁶ Sean Wilentz & Julian E. Zelizer, *A Rotten Way to Pick a President*, WASH. POST (Feb. 17, 2008), <http://www.washingtonpost.com/wp-dyn/content/article/2008/02/14/AR2008021401595.html>.

³¹⁷ *Underenfranchisement: Black Voters and the Presidential Nominating Process*, 117 HARV. L. REV. 2318, 2318 (2004).

³¹⁸ CRAIGCONNECTS & BRENNAN CTR. FOR JUSTICE, *WHY IS IT SO HARD TO VOTE IN AMERICA? AND WHAT WE CAN DO TO FIX IT.* (2016), <https://www.brennancenter.org/sites/default/files/analysis/voting-in-america-infographic-FINAL.pdf>.

³¹⁹ Alicia Parlapiano & Adam Pearce, *Only 9% of America Chose Trump and Clinton as the Nominees*, N.Y. TIMES (Aug. 1, 2016), https://www.nytimes.com/interactive/2016/08/01/us/elections/nine-percent-of-america-selected-trump-and-clinton.html?_r=0.

³²⁰ Gustavo López & Antonio Flores, *Dislike of Candidates or Campaign Issues Was Most Common Reason for Not Voting in 2016*, PEW RES. CTR. (June 1, 2017), <http://www.pewresearch.org/fact-tank/2017/06/01/dislike-of-candidates-or-campaign-issues-was-most-common-reason-for-not-voting-in-2016/>.

disliked the candidates or campaign issues was considerably lower.³²¹ Regardless of the purported benefits of closed partisan primary systems, a process that discourages millions of voters from participating is worthy of reconsideration. Simply put, unaffiliated voters in the general election are denied a meaningful right to vote because their preferred candidate, or at least a larger, diverse pool of candidates, dissipates after primary elections.

C. Changing Demographics

As discussed above the profile of the United States has changed, and unaffiliated voters are now a plurality of the electorate.

D. Low Voter Turnout

Low voter turnout is another sad hallmark of the existing electoral regime in the United States. For decades, participation in presidential elections has ranged from about 50 to 60% of eligible voters,³²² and in midterm elections has averaged between 25 and 45%.³²³ Voter turnout in state and local elections³²⁴ is generally much worse,³²⁵ and sometimes in the single digits.³²⁶ Beyond statistics, low voter turnout also has the effect of skewing politics and policymaking towards the preference of groups most likely to turn out: whites, older Americans, the affluent, and those with more education by significant-to-wide margins.³²⁷ As a result, those who have historically faced, and continue to face, active suppression of their right to vote are substantially underrepresented in the electoral process and in policy

³²¹ *Id.*

³²² *Voter Turnout: National Turnout Rate, 1787-2016*, U.S. ELECTIONS PROJECT, <http://www.electproject.org/home/voter-turnout/voter-turnout-data> (last visited Mar. 17, 2019).

³²³ *Voter Turnout*, FAIRVOTE, http://www.fairvote.org/voter_turnout#voter_turnout_101 (last visited Mar. 17, 2019).

³²⁴ Kriston Capps, *In the U.S., Almost No One Votes in Local Elections*, CITYLAB (Nov. 1, 2016), <https://www.citylab.com/equity/2016/11/in-the-us-almost-no-one-votes-in-local-elections/505766/>.

³²⁵ Mike Maciag, *Voter Turnout Plummeting in Local Elections*, GOVERNING (Oct. 2014), <http://www.governing.com/topics/politics/gov-voter-turnout-municipal-elections.html>.

³²⁶ Neal Caren, *Big City, Big Turnout? Electoral Participation in American Cities*, 29 J. URBAN AFF. 31 (2007).

³²⁷ Sean McElwee, *Why Voting Matters: Large Disparities in Turnout Benefit the Donor Class*, DEMOS (Sept. 16, 2015), <http://www.demos.org/publication/why-voting-matters-large-disparities-turnout-benefit-donor-class>.

making.³²⁸ We need an election system that engages and encourages more people of color, low-income people, young people, and LGBT individuals to participate in the political process, in order to ensure greater balance in electoral and policy outcomes, so that our democracy is more just.

E. Harvard Business Report

A report of the Harvard Business School brings a new analytical lens to understand the performance of our political system: the lens of industry competition, used for decades to understand competition and performance in other industries.³²⁹ This industry competition lens sheds new light on the failure of politics in America, which has become a major business in its own right. It demonstrates that political problems are not due to a single cause, but instead the result of the nature of the political competition that the actors (*i.e.*, the political parties) have created. The report challenges the conventional wisdom about why gridlock is the norm (the political system is not broken; it is doing what it is designed to do) and questions the wisdom of allowing private organizations—the political parties—to control the rules of the game. Most significantly, the report also puts forth a strategy for reinvigorating our democracy by addressing the root causes of the political dysfunction and prescribes a number of structural remedies, beginning with moving to nonpartisan open primaries.

VI. ANALYSIS: PARTY RIGHTS, VOTING RIGHTS AND THE CONSTITUTION

In their defense of closed primaries and their efforts to shut down the various forms of open primaries, the parties, major and minor, have relied on the assertion that they are private associations free to define the parameters of association with them.³³⁰ This position

³²⁸ Sean McElwee et al., *How Oregon Increased Voter Turnout More Than Any Other State*, NATION (July 27, 2017), <https://www.thenation.com/article/how-oregon-increased-voter-turnout-more-than-any-other-state/>.

³²⁹ KATHERINE M. GEHL & MICHAEL E. PORTER, WHY COMPETITION IN THE POLITICS INDUSTRY IS FAILING AMERICA: A STRATEGY FOR REINVIGORATING OUR DEMOCRACY (2017), <https://www.hbs.edu/competitiveness/Documents/why-competition-in-the-politics-industry-is-failing-america.pdf>.

³³⁰ *Id.*

carried the day in *Jones* where Justice Scalia, writing for the majority, cited *Hurley v. Irish–American Gay, Lesbian and Bisexual Group of Boston*,³³¹ a case in which the Court held that the South Boston Allied War Veterans Council had the right to exclude openly gay and lesbian organizations from participating in its annual St. Patrick’s Day parade under their own banner.³³² The Court held that a private association had the right to control the message articulated in its parade.

The parties followed up on their success in *Jones* by challenging primary systems in Washington, Idaho, South Carolina, Hawaii and Montana.

A. Washington

The *Jones* decision forced the State of Washington to discard its identical partisan blanket primary that had been in place since 1935.³³³ After the Ninth Circuit invalidated Washington’s primary as “materially indistinguishable from the California scheme,”³³⁴ I-872 was introduced specifically to fit within the legal confines articulated in *Jones*.³³⁵ This initiative implemented a top-two primary in Washington, which provides that all candidates for a “partisan office” appear together on the primary ballot which is voted on by all voters, with the two candidates receiving the most votes overall advancing to the general election.³³⁶ The initiative passed in 2004 with over 60% of the vote.³³⁷

The Washington State Republican Party, joined by the Washington State Democratic Central Committee and Libertarian Party of Washington, filed a facial challenge against I-872,³³⁸ claiming that the new system violated its associational rights by depriving the organization of its ability to nominate its own candidates and by forcing it to associate with candidates it did not endorse.³³⁹ The district court granted the parties’ motion for summary judgment and enjoined

³³¹ 515 U.S. 557 (1995).

³³² *Id.* at 578.

³³³ *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 445 (2008).

³³⁴ *Id.* at 446.

³³⁵ *Cal. Democratic Party v. Jones*, 530 U.S. 567, 598 n.8 (2000).

³³⁶ *Wash. State Grange*, 552 U.S. at 447-48.

³³⁷ *Id.* at 447.

³³⁸ *Id.* at 448.

³³⁹ *Id.*

implementation of I-872.³⁴⁰ The Ninth Circuit affirmed, finding that I-872 was facially invalid because the party-preference designation created the risk that the primary winners would be perceived as the parties' nominees—therefore creating an “impression of associational ties”—even if the party did not want to be associated with the candidate.³⁴¹

In a 7-2 vote, the Supreme Court rejected the notion that I-872 was similar to California's blanket primary because the ballot initiative did not choose parties' nominees; rather, the primary was a process of cutting down the list of candidates for the general election.³⁴² The Court also rejected arguments regarding voter confusion because they did not depend on facial requirements, but on possible factual scenarios inappropriate for a facial challenge.³⁴³ Writing for the majority, Justice Thomas emphasized the right of the State and its voters to determine what electoral system they wanted to implement. Chief Justice Roberts concurred on the ground that there was no right to stop an individual from associating with a party, even if a party does not want that association.³⁴⁴ However, he agreed with the possibility of this case being litigated again if evidence of voter confusion surfaced as a result of ballot design.³⁴⁵

B. Idaho

In *Idaho Republican Party v. Ysursa*,³⁴⁶ the Idaho Republican Party brought suit against the Idaho Secretary of State alleging that Idaho's use of an open primary system to determine nominees for the general election violated the Idaho Republican Party's First Amendment rights.³⁴⁷ Under Idaho law, political party candidates for the general election were required to be chosen by the Idaho open primary election.³⁴⁸ Idaho's open primary required voters to choose

³⁴⁰ Wash. State Republican Party v. Logan, 377 F. Supp. 2d 907, 932 (W.D. Wash. 2005).

³⁴¹ Wash. State Republican Party v. Wash., 460 F.3d 1108, 1119 (9th Cir. 2006).

³⁴² Wash. State Grange, 552 U.S. at 455.

³⁴³ *Id.* at 453.

³⁴⁴ *Id.* at 461 (Roberts, C.J., concurring).

³⁴⁵ *Id.* at 460-61 (Roberts, C.J., concurring).

³⁴⁶ 765 F. Supp. 2d 1266 (D. Idaho 2011).

³⁴⁷ *Id.* at 1268-69.

³⁴⁸ *Id.*

one party's ballot.³⁴⁹ Idaho voters did not register a party affiliation.³⁵⁰ After a bench trial in which the court received substantial evidence related to actual voter conduct and expert testimony concerning cross-over voting, the court concluded that the Idaho open primary statute "is unconstitutional as applied to the Idaho Republican Party."³⁵¹ The court relied on the Supreme Court's reasoning in *Jones*.³⁵² The court determined that no "meaningful distinction" existed between the open primary in Idaho and the blanket primary in *Jones*.³⁵³ On appeal, the Ninth Circuit vacated the district court's judgment with instructions to dismiss the case as moot, after Idaho's legislature changed its primary system.³⁵⁴

C. South Carolina

In *Greenville County Republican Party Executive Committee v. South Carolina*,³⁵⁵ a local Republican Party asserted a facial challenge to South Carolina's open primary system. The court recognized that any election law will "impose some burden upon individual voters [and political organizations]."³⁵⁶ The mere fact that a state's system "creates barriers . . . does not of itself compel close scrutiny."³⁵⁷ The court acknowledged that under South Carolina's open primary system, non-partisan registration system, a registered voter may request, on election day, the ballot for any party's primary in which the voter intends to vote, regardless of whether the voter previously had registered as a member of the party.³⁵⁸ The court noted, however, that "the voter may only vote in one party's primary election."³⁵⁹ The court declined to uphold a facial challenge to the South Carolina law that would contradict precedent that generally requires an evidentiary record to assess the burden imposed on the

³⁴⁹ *Id.*

³⁵⁰ *Id.*

³⁵¹ *Id.* at 1277.

³⁵² *Id.* at 1269-75.

³⁵³ *Id.* at 1275.

³⁵⁴ See *Idaho Republican Party v. Yursa*, No. 11-35251 (9th Cir. Sept. 19, 2011) (Order granting Appellees' Motion to Dismiss Appeal).

³⁵⁵ 824 F. Supp. 2d 655 (D.S.C. 2011).

³⁵⁶ *Id.* at 662 (alteration in original) (citing *Burdick v. Takushi*, 504 U.S. 428, 430 (1992)).

³⁵⁷ *Id.* (alteration in original) (quoting *Burdick*, 504 U.S. at 433).

³⁵⁸ *Id.* at 663.

³⁵⁹ *Id.*

political party's associational rights.³⁶⁰ The court also stressed the public nature of participation in the process of nominating candidates for public office, in a manner that echoes Justice Stevens' dissent in *Jones*. Nonetheless, the district court allowed the case to proceed to trial. Prior to trial, however, the State Republican Party withdrew as a party, and the court granted the State's motion to dismiss on the ground that the Greenville County Republican Organization lacked standing. The Fourth Circuit upheld the dismissal on appeal.³⁶¹

D. Hawaii

In *Democratic Party of Hawaii v. Nago*,³⁶² the district court addressed a facial challenge to Hawaii's open primary election non-partisan registration system brought by the Democratic Party of Hawaii ("DPH").³⁶³ Hawaii law required candidates to be nominated by primary election.³⁶⁴ Voters could cast votes in a primary election without declaring a party preference.³⁶⁵ The court denied the facial challenge for two reasons: (1) the DPH failed to show that the open primary should be considered "unconstitutional in all of its applications"; and (2) the DPH "failed to *prove* a severe burden."³⁶⁶ "Proving a severe burden must be done 'as-applied,' with an evidentiary record."³⁶⁷ The evidence in *Jones* indicated that "the impact of voting by non-party members is much greater upon minor parties."³⁶⁸ The court declined to import the California evidence in *Jones* due to questions about its applicability to a major party in Hawaii.³⁶⁹ The court could not determine that the DPH had been "severely" burdened based on the mere assertion that "it will be, or can be, forced to 'associate' with voters who are 'adherents of opposing parties.'"³⁷⁰ The court recognized the possibility that crossover voting

³⁶⁰ *Id.* at 664.

³⁶¹ *Greenville Cty. Republican Party Exec. Comm. v. Greenville Cty. Election Comm'n*, 604 F. App'x 244 (4th Cir. 2015).

³⁶² 982 F. Supp. 2d 1166, 1170 (D. Haw. 2013), *aff'd*, 833 F.3d 1119 (9th Cir. 2016), *cert denied*, 137 S. Ct. 2114 (2017).

³⁶³ *Id.* at 1168.

³⁶⁴ *Id.* at 1169.

³⁶⁵ *Id.*

³⁶⁶ *Id.* at 1177.

³⁶⁷ *Id.*

³⁶⁸ *Id.* at 1176 (quoting *Cal. Democratic Party v. Jones*, 530 U.S. 567, 578 (2000)).

³⁶⁹ *Id.* at 1182-83.

³⁷⁰ *Id.* at 1182.

exists in Hawaii, but also recognized the possibility that “a large percentage of primary voters who were not formally registered with the DPH” but who affiliated with the DPH by voting in the Democratic primary “fully considered themselves to be Democrats.”³⁷¹ The court pointed out that the DPH lacked “empirical evidence” that had been present in *Jones*.³⁷² The Ninth Circuit affirmed, holding “[t]he [s]everity of the [b]urden [t]hat a [p]rimary [s]ystem [i]mposes on [a]ssociational [r]ights [i]s a [f]actual [i]ssue on [w]hich the [p]laintiff [b]ears the [b]urden of [p]roof” and “[t]he Democratic Party [h]as failed to [a]dduce [e]vidence [s]howing the [e]xtent of the [b]urden on [i]ts [a]ssociational [r]ights.”³⁷³ The court further found that the choosing of a Democratic Party ballot by a primary voter constituted a sufficient act of affiliation with the party to blunt the DPH’s claim that its associational rights were violated.³⁷⁴ The Supreme Court denied the plaintiffs’ petition for *certiorari*.³⁷⁵

E. Montana

In *Ravalli County Republican Central Committee v. McCulloch*,³⁷⁶ the Republican Party and its county committees contested Montana’s open primary law on grounds similar to those presented by the Democratic Party in *Nago*.³⁷⁷ The Montana district court reached the same conclusion as the Hawaii district court in *Nago*, and indeed, cited *Nago*.³⁷⁸

F. New Jersey

In the litigation described above, the two major political parties squared off against the State, with voters sometimes participating as intervenors, in support of the open primary. In *Balsam v. Secretary of*

³⁷¹ *Id.*

³⁷² *Id.*

³⁷³ *Democratic Party of Haw. v. Nago*, 833 F.3d 1119, 1122, 1124 (9th Cir. 2016), *cert. denied*, 137 S. Ct. 2114 (2017).

³⁷⁴ *Id.*

³⁷⁵ *Democratic Party of Haw. v. Nago*, 137 S. Ct. 2114 (2017).

³⁷⁶ 154 F. Supp. 3d 1063 (D. Mont. 2015), *aff’d sub nom. Ravalli Cty. Republican v. McCulloch*, No. 16-35375 (9th Cir. May 4, 2016), *appeal dismissed*, 655 F. App’x 592 (9th Cir. 2016).

³⁷⁷ *Id.* at 1066.

³⁷⁸ *Id.* at 1075-80.

New Jersey,³⁷⁹ the Third Circuit considered a challenge brought by unaffiliated voters to New Jersey's closed primary system, which like that at issue in *Nader*, required party registration as a pre-requisite to voting in a primary election. Rejecting the voters' argument that the closed primary system violated their rights under the First and Fourteenth Amendments, the court determined that the "reasoning of *Nader* is directly applicable here" because "*Nader* [considered] the countervailing rights of individuals who were not members of a political party, and it found that the associational rights of party members and the regulatory interests of the state outweighed those rights."³⁸⁰ The court thus applied a rational basis test and upheld the constitutionality of New Jersey's closed primary system.³⁸¹ The Third Circuit ignored the significant growth in the number of unaffiliated voters since *Nader* was decided some 40 years earlier. It also ignored that *Nader* was a district court decision affirmed without opinion by the U.S. Supreme Court. The voters' application for certiorari to the Supreme Court was denied.³⁸²

As things currently stand, until the Supreme Court decides to more fully address the constitutional status of open and closed primaries, a State has the right to force a party to accept an open one in which unaffiliated voters can participate, and voters do not have the right to overturn a closed one. Significantly, however, the voice of the voters, in particular unaffiliated voters, is beginning to be heard.

In New Mexico litigation was commenced by writ of mandamus raising the issue of whether it is constitutional for a state to tax unaffiliated voters to pay for closed primaries in which they are not allowed to participate.³⁸³ Most states have "anti-donation clauses" in their constitutions, such as that in New Mexico which states in Article IX, Section 14 of the state's constitution:

Neither the state nor any county, school district or municipality, except as otherwise provided in this constitution, shall directly or indirectly lend or pledge its credit or make any donation to or in aid of any person, association or public or private corporation or in aid of any private enterprise for the construction of

³⁷⁹ 607 F. App'x 177 (3d Cir. 2015).

³⁸⁰ *Id.* at 183.

³⁸¹ *Id.*

³⁸² *Balsam v. Guadagno*, 136 S. Ct. 189 (2015).

³⁸³ *See Chavez v. Oliver*, No. S-1-SC-37371 (N.M. Sup. Ct. Nov. 13, 2018).

any railroad except as provided in Subsections A through G of this section.³⁸⁴

This challenge sought to resolve the tension between party rights and voters' rights in favor of the voters. If a party sought to have the government fund the process by which it nominates its candidates, it must allow all voters, regardless of party affiliation or non-affiliation to participate. The New Mexico Supreme Court dismissed the writ without reaching the merits.³⁸⁵

Questions of remedies remain open as well. For example, can a state satisfy both the unaffiliated voters' claims to equal protection and full participation, and the rights of the parties by funding and administering a primary election open to unaffiliated voters to select a candidate who will appear on the general election ballot as an "independent." This would leave the parties free to nominate by members only, and give independents a way to participate in the primary round as well.

VII. CONCLUSION

The developments outlined above can be understood as the dialectic between eliminating barriers to participation by particular groupings and the commitment to full and equal voting rights for all. After the Nineteenth Amendment granted women the right to vote in 1920 and Native Americans were granted that right by statute in 1924, the franchise included every citizen, at least legally. The focus shifted to overcoming efforts to limit or take away what the Constitution granted.

In the "white primary cases" the Supreme Court struck down manipulation of the primary system in southern states to disenfranchise African Americans. Literacy tests, poll taxes and voter identification laws have been the subject of litigation and legislation such as the 1965 Voting Rights Act. There have, of course, been setbacks, most notably, the invalidation of the "pre-clearance" provisions of the Voting Rights Act in *Shelby County v. Holder*.³⁸⁶ The two major parties have tended to approach these issues from the vantage point of what best contributes to outcomes they favor. Thus, Republicans have

³⁸⁴ N.M. CONST. art. IX, § 14.

³⁸⁵ *Chavez*, No. S-1-SC-37371 (N.M. Sup. Ct. Feb. 4, 2019).

³⁸⁶ 570 U.S. 529 (2013).

used voter identification laws to suppress the vote in poor communities of color. Restoring voting rights to person convicted of felonies, including those still incarcerated, has been a cause for some Democratic politicians.

The malapportionment cases have a particular legal significance. There, those seeking legal protection were not members of a disfavored class of citizens with a status dependent on circumstances over which they had no control such as race and gender. In the gay rights movement, the achievement of legal equality was coupled with the position that sexual preference was not a matter of choice, but the result of an innate personal characteristic.

It is not surprising, therefore, that a principal argument in support of closed primaries has been that if you want to vote in a party's primary election, then join the party. In *Democratic Party of Hawaii v. Nago*, the Court of Appeals upheld the open primary in part on the rationale that a voter's choosing of the Democratic Party ballot on primary election day was a sufficient measure of affiliation to satisfy the Party's freedom of association rights.

What is significant about the reapportionment cases is that they rested on the proposition that each and every voter was entitled to equal treatment. A voter's status was independent of race, gender or sexual preference. The Court did not say if you want your vote to count more, then move to farm country. Voter equality was recognized as an undeniable right of citizenship. If that is the case, then the choice to remain free of party affiliation cannot deprive a voter of full participation in every phase of the electoral process. The state can no more condition a voter's right to vote in the primary phase of the electoral process on party affiliation than it could condition it on race, gender or sexual preference. The only status that matters is citizenship. And all citizens must be treated equally and as fully enfranchised.

We believe it is incumbent on the courts to address the issues discussed in this article with a view to continuing the more than two centuries effort to achieve full voting rights for all American citizens. They will not be resolved until the U.S. Supreme Court takes them up. The Court's duty is to apply long standing principles in a manner that allows justice to prevail in circumstances that have recently been placed on the judicial and historical agenda by the rise of the unaffiliated voter and the assertion of her rights as such. Thus, in

Obergefell v. Hodges,³⁸⁷ the Supreme Court, in ruling that same sex marriages are constitutionally protected, looked at the historical expanse of the history of marriage in this nation and the world and stated:

The identification and protection of fundamental rights is an enduring part of the judicial duty to interpret the Constitution. That responsibility, however, has not been reduced to any formula. Rather, it requires courts to exercise reasoned judgment in identifying interests of the person so fundamental that the State must accord them its respect. That process is guided by many of the same considerations relevant to analysis of other constitutional provisions that set forth broad principles rather than specific requirements. History and tradition guide and discipline this inquiry but do not set its outer boundaries. That method respects our history and learns from it without allowing the past alone to rule the present.

The nature of injustice is that we may not always see it in our own times. The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning. When new insight reveals discord between the Constitution's central protections and a received legal stricture, a claim to liberty must be addressed.³⁸⁸

In addressing the fundamental rights of unaffiliated voters, we urge and challenge our courts to consider their plight as the next step on the long road towards achieving the fair and equal right to vote that forms the core of our constitutional and democratic process. As a nation, we cannot afford to ignore the assault on this process undertaken by the two major political parties in recent decades.

As the nation continues to undergo the demographic and political changes referenced earlier, new demands are placed on our

³⁸⁷ 135 S. Ct. 2584 (2015) (internal quotation marks omitted).

³⁸⁸ *Id.* at 2598.

electoral process. Our history as a nation has evolved into a “two-party” system (Democrats and Republicans) whose primaries are the first step for the election of those who govern us. We cannot allow the parties’ claim that they are private associations to insulate them from the interests of unaffiliated voters and state government in the electoral process they fund and administer. There can be no meaningful participation in American democracy unless you are entitled to vote in the major party primaries.

The authors submit that the legal status of unaffiliated voters must be engaged by our courts if we are to be true to the best traditions of American justice. Unaffiliated voters are treated as second class citizens. This Article has, we hope, demonstrated that the right of unaffiliated voters to vote, and to vote in what are now closed primaries, is a fundamental right inherent in the liberty of the person and her rights to freedom of speech and association under the First Amendment, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment.³⁸⁹ This Article has, we hope, demonstrated that in the field of voting the doctrine of “separate but equal” has no place. Segregating unaffiliated voters, preventing them from meaningful participation in the primaries, is inherently unequal and deprives them of what is due them under the Constitution.

It is our hope that courts will use this Article to enhance their understanding of the issues that will come before them regarding free and fair elections. It is also our hope that litigants will use this Article to continue to push the courts of this nation to live up to their duty as the guarantor of our constitutional liberties.

³⁸⁹ See *id.* at 2604.