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Constitutive Voting and Participatory Association: Contested Constitutional Claims in Primary Elections

FRANCES R. HILL

On January 29, 2008, Florida held closed primaries for the Democratic and Republican Party nominees for president.¹ Over 1.8 million Florida voters who had registered as Republicans voted in the Republican Party primary and over 1.7 million Florida voters who had registered as Democrats voted in the Democratic Party primary.² In marked contrast to the 2000 presidential election, the votes were counted without controversy, the winners were announced without incident, and no riots by outraged young political operatives broke out anywhere in the state.³

This should have been the end of the story of the presidential primaries in Florida, but it proved to be only the beginning. Florida voters who registered properly, voted lawfully, and had their votes counted without controversy found that their rights as voters would be negated by their lack of rights as members of their respective political parties. The Florida primary votes would not count for determining the parties' nominees, not because of any dysfunction in the Florida process but because of the unresolved tension between their rights as voters and the rights of national party managers to determine which votes count. The Florida primary did not conform to the national parties' directives on the timing and sequencing of presidential primaries.⁴ In contrast to the 2000 general election, when Florida's dysfunction imposed political burdens on the rest of the country, the 2008 presidential primary saw national

1. Closed primaries permit only persons registered as members of a political party to vote in that party's primary. See FLA. STAT. § 101.021 (2008).

2. For the official results of Florida's 2008 Presidential Preference Primaries, see Florida Department of State, Division of Elections, Election Results, <https://doe.dos.state.fl.us/elections/resultsarchive/Index.asp?ElectionDate=1/29/2008&DATAMODE=> (select "US President (Statewide)" under "Republican Primary"; then select "US President (Statewide)" under "Democratic Primary") (last visited Nov. 18, 2009).

3. The Brooks Brothers riot of 2000 involved Republican Party staffers, many of whom have subsequently put their participation on their resumes for other party or government positions. See, e.g., Al Kamen, *Miami 'Riot' Squad: Where Are They Now?*, WASH. POST, Jan. 24, 2005, at A13.

4. See, e.g., Brendan Farrington, *Fla. Democrats Set to Stick to Jan. 29 Vote*, WASH. POST, Sept. 23, 2007, at A15; Michael Luo & John M. Broder, *Delegate Battle Embroil 2 States*, N.Y. TIMES, Mar. 15, 2008, at A1.

jurisprudential dysfunction impose political burdens on Florida voters' rights as both voters and as members of political parties.

The 2008 Florida primary brought into sharp relief the collision course of two principles of election-law jurisprudence. The first principle is the protection of voting and voters' rights, including the right to vote, the right to have one's vote counted, and the right to have one's vote taken into account. These principles are summarized in the concept of one person, one vote crystallized in *Baker v. Carr*⁵ and its progeny. The second principle is the protection of associational rights of political parties and the exercise of those associational rights in organizing primary elections. The jurisprudence of association is one of the least developed concepts in constitutional law. The elements of association that have yet to be developed include whether the right of association attaches to persons who associate or to the entities that result from this process of association or both. The fundamental question of whether organizations derive rights from their members or whether organizations have rights independent of their members has never been seriously addressed. Instead of addressing issues that would link the First Amendment right of association to a right of participation in public life, the Court has generally focused on the right of the association, not on the rights of those who associate. The Court has crafted the concept of expressive association to devise a constitutional predicate for nonparticipatory association that has the practical effect of consolidating the power of organization managers at the expense of members.

The 2008 presidential primaries in Florida resulted in a head-on collision between these two principles. Voters saw their properly cast votes not merely diluted but negated by party managers who controlled the party national committees. The issue was the party national committees' authority to control the scheduling of primary elections. How did this become an issue of the parties' right of association? All of the disenfranchised voters were registered Democrats or Republicans who voted in the appropriate party primary.⁶ The voters were all members of the parties by virtue of their registration. There was no threat to expressive associational rights of the parties themselves. Why did the votes not count? What rights did the national party managers claim as the basis for negating over 3 million votes and thereby eliminating all of primary voters from an entire state from having their votes taken into account in

5. 369 U.S. 186 (1962).

6. Florida does not permit registration on election day. Indeed, registration closes before the day of the election. FLA. STAT. § 97.055(1)(a) (2008). In the 2008 primaries there were no concerns before or after the election about efforts to undermine party identity or disrupt party voting.

the selection of the two major parties' presidential candidates?⁷ Why does this still matter long after a president has been elected?

Vote negation or vote dilution by the national committees of the political parties still matters because it was fundamentally inconsistent with the constitutional role of voters. The sacrifice of the principle of one person, one vote to the principle of party managers' monopoly of political parties' associational rights was not only a violation of voters' rights but also a violation of a fundamental element of constitutional structure. This article argues that voters play a constitutional role defined by the first sentence of the Constitution, which states that "[w]e the People of the United States . . . do ordain and establish this Constitution for the United States of America."⁸ This language is not a metaphor. It defines a core element of the Constitution,⁹ the idea that the Constitution established a government based on the consent of its citizens. The legitimacy of the government is based on consent. Voting is the only means of constituting the government and affirming its continuing legitimacy. Ratification through consent is a continuing operational reality.¹⁰ Viewed as a matter of constitutional structure, the clash between voters' rights and party managers' monopoly of parties' associational rights matters because it goes to the heart of the continuing legitimacy of the United States government.

The concept of constitutive voting is not inconsistent with the political parties' claims to rights as associations. The issue of the nature and extent of the associational rights of political parties is particularly important with respect to parties' roles in primary elections. Political parties contest general elections but they play important roles in structuring primary elections. Yet, political parties play this role in partnership with state and local governments, and the federal government retains authority to ensure the integrity of voting. Primary elections are not the private activity of party managers. Indeed, primary elections were intended to dilute, if not break, the control of party bosses over candidate selection. The Court appears to have forgotten its own history in resolving the tension between voters' rights and party rights with the result that it has now embraced a narrow concept of voters' rights and an expansive and

7. This article does not address what made the national party managers think that any of this was a good idea politically or what made them persist in this course of action even if they were not persuaded that this was a good idea in political terms. It also avoids any discussion of the campaign strategies and tactics of the leading candidates.

8. U.S. CONST. pmbl. See also AKIL REED AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY* 471 (2005) (analyzing the preamble as the Founders' foundation and devoting the first chapter of the book to the significance of the preamble).

9. Frances R. Hill, *Putting Voters First: An Essay on the Jurisprudence of Citizen Sovereignty in Federal Election Law*, 60 U. MIAMI L. REV. 155 (2006).

10. See AMAR, *supra* note 8, at 5–11.

potentially unbounded concept of party managers' rights. This article argues that constitutive voting in primary elections depends on participatory association as the core principle of political party associational rights. Vote negation and vote dilution in Florida in the 2008 primaries undermined constitutive voting and violated the associational rights of party members.

This article explores the clash between voters' rights and party managers' associational claims as an issue of constitutional structure. It will both distinguish the facts in Florida in the 2008 primaries from the case law in this area and use the questions raised by the effort to understand the Florida case to raise broader questions about the associational rights of parties, party managers, party members, and voters. The article begins with a brief chronology of events that made Florida controversial in 2008. Part II examines voting as an element of constitutional structure as well as an individual right and suggests a concept of constitutive voting. Part III considers whether primary elections are elections or whether they are private-association preference-ordering processes that do not implicate constitutive voting and thus are not subject to constitutional scrutiny. Part IV examines political parties' claims that they are either private associations or expressive associations or both. Separately or together these claims have the practical effect of consolidating managers' control of political parties and of primary elections at the expense of voters and ordinary party members. Part V examines the tension between the concept of constitutive voting and parties' association claims in the Florida primary. It shows how the jurisprudence of associational rights as managerial control sustained vote negation or dilution and, in the process, undermined voting as an element of constitutional structure. The article concludes with suggestions for resolving these tensions by developing a more central and robust concept of constitutive voting and a new concept of participatory association based on the principle of consent at the heart of the Constitution.

I. THE PATH TO VOTE NEGATION: FRONTLOADING PRESIDENTIAL PRIMARIES

The controversy over Florida began with Iowa and New Hampshire, as everything relating to presidential primaries always begins.¹¹ In

11. There is no reason for this that appears to be constitutionally compelling. Iowa does derive substantial revenue from the presence of the campaigns and the national press. Being first means that the campaigns and the press spend more time in Iowa than in any other state. For a discussion on how Iowa politicians and civic boosters "have figured out how to turn their first-in-the nation caucus status into a money-raising device and a tool for economic development," see Leslie Wayne, *Iowa Turns its Presidential Caucuses into a Cash Cow, and Milks Furiously*, N.Y. TIMES, Jan. 5, 2000, at A16.

August 2006 the Democratic National Committee ("DNC") enacted bylaws providing that Iowa, New Hampshire, South Carolina, and Nevada were the only states permitted to hold primaries or caucuses before February 5, 2008.¹² The DNC offered no reason for this decision. On May 3, 2007, the Florida legislature passed House Bill 537 setting January 29, 2008, as the date of the state presidential primaries for both parties.¹³ From May through August 2007 Florida and the DNC engaged in a process seeking accommodation but failed.¹⁴ In mid-August 2007 Michigan set the date of its presidential primary for January 15, 2008.¹⁵

The Florida legislature determined the date of the state's presidential primary, which was held on the same day for all political parties.¹⁶ The national committees of the two major parties had issued directives inconsistent with the date set by the state legislature. Florida voters were presented with a choice of not participating in the primary in deference to the position of the two parties or of participating because they would have no other opportunity to influence their party's choice of a presidential candidate. There is no way to determine whether or to what extent the positions of the parties' national committees suppressed voting turnout. The focus here is on what rights those Florida voters who opted for participation could reasonably expect under the United States Constitution. How are the rights of Florida primary voters balanced against the rights of their parties' national committees?

II. VOTING AND ELECTIONS IN CONSTITUTIONAL PERSPECTIVE: ELEMENTS OF A CONCEPT OF CONSTITUTIVE VOTING

What is voting and why does it matter? Does the Constitution protect the right to vote and, if so, on what grounds, in what circumstances, and to what extent? This section of the article explores a concept of constitutive voting. The concept of constitutive voting is derived from the principle that the Constitution locates the basis of government

12. DEMOCRATIC NAT'L COMM., DELEGATE SELECTION RULES FOR THE 2008 DEMOCRATIC NATIONAL CONVENTION 12 (2006), <http://a9.g.akamai.net/7/9/8082/v001/democratic1.download.akamai.com/8082/pdfs/2008delegateselectionrules.pdf>.

13. The bill number was the same as George W. Bush's margin of victory in the 2000 general election. See Karen L. Thurman, Congresswoman, Party Statement on Primary Situation, http://www.fladems.com/content/w/party_statement_on_primary_situation (last visited Nov. 18, 2009).

14. See Adam Nagourney, *Democrats take a Tough Line on Florida*, N.Y. TIMES, Aug. 26, 2007, at A18.

15. This article does not focus on the Michigan primary because the particular facts of the primary in that state meant that few voters in fact participated. Their votes were discouraged and suppressed, while the votes in Florida were negated and discounted. There may have been some vote suppression in Florida as well, but the turnout figures do not suggest that this was a major factor.

16. H.R. 537, 109th Leg., Reg. Sess. (Fla. 2007).

authority in consent. The first sentence of the Constitution provides that “[w]e the People of the United States . . . do ordain and establish this Constitution for the United States of America.”¹⁷ The United States Constitution was the first such governing document to be ratified by the people.¹⁸ It is difficult to sustain the idea that initial ratification was the last opportunity for consent. Both the initial ratification and the process of continuing consent are expressed through voting. Voting is not simply a choice among candidates. It is first and foremost the foundational structural element of the Constitution. It is the basis of legitimate government authority.

Viewed in this light, it is no accident that controversies over voting and the rights of voters emerge in historical periods in which the legitimacy of government authority is questioned and when consent expressed through voting is understood as the basis of legitimacy.¹⁹ This section of the article considers voting jurisprudence in three such eras—the post-Civil War cases addressing voter intimidations and exclusion through fraud and violence against former slaves seeking to vote, the White Primary cases addressing exclusion of African-American voters through discriminatory state statutes and political party rules extending into the twentieth century, and the protection of voter equality and defenses against vote dilution in the later third of the twentieth century

17. U.S. CONST. pmbl.

18. See AMAR, *supra* note 8, at 8. This is not to say that the right to vote was available to all of the people when the Constitution was initially ratified. For a detailed history of the contests and controversies that marked the expansion of the right to vote, see ANDREW KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* (2000). For a thoughtful review of Keyssar and commentary on the meaning of the right to vote, see Richard Briffault, *The Contested Right to Vote*, 100 MICH. L. REV. 1506 (2002). Briffault observes that “[e]ven as the equal right to vote has expanded, the substantive meaning of the right to vote has remained undeveloped and the relationship between voting and other mechanisms that shape our political process and structure our democracy remains contested.” *Id.* at 1527.

19. Political science in the past sixty years has largely ignored the idea of voting as the foundation of legitimate government, in part because political scientists seemed incapable of imagining that the United States government might not be legitimate despite the upheavals of that era and in part because the dominant analytical framework of voting was based on psychological profiling of voters. Relying on survey research and mathematical modeling, political scientists sought to understand voting as a personal, individual act and to find ways of manipulation of voters’ psychological profiles. This was a significant intellectual contribution. It is not clear why this insightful research could not have been integrated with theories of the structural significance of voting as well as with studies of election administration. For a critique of this imbalance, see WALTER DEAN BURNHAM, *CRITICAL ELECTIONS AND THE MAINSPRINGS OF AMERICAN POLITICS*, ix-xii (1970) (conceptual limitations of “American political science mainstream” that ignores macro-system issues and analytical implications of the time dimension in favor of an ahistoric psychological analysis of voting behavior). For a more recent critique by a scholar who was a student of some of the pioneers of the use of survey research for voter profiling, see SAMUEL L. POPKIN, *THE REASONING VOTER: COMMUNICATION AND PERSUASION IN PRESIDENTIAL CAMPAIGNS* (1991) (theory of voting decisions as “low-information rationality” and what this means for campaigns).

and continuing to this day. Each of these eras involved a distinctive mix of issues that can be summarized in terms of who votes, what votes are counted, and how are votes taken into account. A democratic theory of constitutive voting rests on ensuring that all eligible voters are able to vote, that all the votes are counted, and that all the votes are accorded the same salience in deciding the election.

Each of the three eras of voting jurisprudence addressed different elements of a theory of constitutive voting in response to distinctive challenges posed by the social, economic, cultural, and political conditions of the time. Immediately after the Civil War, the issue was establishing the legitimacy of the union that had been preserved by the military defeat of the Confederacy. The issue was who would be permitted to vote and specifically whether former slaves would be permitted to vote. This issue 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.

In the second era, the era of the White Primary cases, questions of who could vote faced a countervailing claim by political parties that they could determine who would vote in primary elections. This claim was based on the characterization of political parties as private associations and the characterization of primary elections as party activities. As a result, those seeking to undermine the constitutional rights of African Americans argued that primary elections were not subject to federal government enforcement of civil rights statutes because the primaries did not constitute state action. Assertion of this claim transformed the progressive reform represented by primary elections into a mechanism for denying African-American voters the opportunity to have their votes taken into account in any meaningful sense when a primary determined the outcome of the general election. Political-party claims to control voting in the primaries made the right to vote in general elections, which remained subject to substantial barriers, a formal right that could be reconciled with the separate but equal jurisprudence based on *Plessy v. Ferguson*.²⁰ Voting jurisprudence turned on questions of whether primaries were elections subject to the requirements of the Fourteenth and Fifteenth Amendments and whether political parties were private associations subject to federal government regulation.

In the third era of voting jurisprudence, the era of vote equality under *Baker v. Carr*, the issue was how votes were taken into account even when all eligible voters could cast a ballot and all the ballots were

20. 163 U.S. 537 (1896) *overruled by* *Brown v. Bd. Of Educ.*, 347 U.S. 483 (1954) (Louisiana statute requiring equal but racially segregated railway carriages was not unconstitutional).

properly counted. This new constitutional claim, the claim that votes must be taken into account equally, addressed both equality in the number of voters in legislative districts and broader issues of the significance and salience of votes.

Positing “eras” in voting jurisprudence carries the risk of obscuring historical complexity and the importance of the many competing jurisprudential frameworks that shape the law in any era. The discussion here is no exception. The claim here is not that these historical eras culminated in a concept of constitutive voting. The immediate post–Civil War era produced very mixed results in terms of protecting the right to vote.²¹ While the Court ended White Primaries and the various indirect mechanisms for excluding African-American voters, one cannot conclude that the Court showed an unwavering commitment to excluding Jim Crow from the voting booth. *Baker v. Carr* and its progeny resulted in numerical equality but other forms of vote dilution remain controversial and unaddressed.

Referring to “eras” in the law also poses the risk that these historical and jurisprudential periods are treated as self-contained periods with little resonance in or relevance to each other or to the future. This article illustrates the continuing precedential value of the post–Civil War cases to the White Primary cases and the cases on vote equality and the continuing relevance of the White Primary cases to the vote equality cases. At the same time, the controversies over the nature and role of political parties in primaries remain at the center of contemporary jurisprudence of political parties as private associations and expressive associations. Much of the hostility to the White Primary cases in academic analyses arises from unresolved controversies over the roles of political parties in primary elections and in democratic governance. This article does not suggest that each era resolved a particular issue or that, taken together, the cases in these three eras resolved the important voting-rights issues. Such a claim would certainly not be tenable in light of the controversy surrounding the 2008 primaries in Florida. Rather, this article claims that considering the voting jurisprudence of these three eras contribute to an understanding of how vote negation and vote dilution happened in Florida in 2008.

Two themes run through the voting jurisprudence of these historical voting cases. The first is that the Court looked at voting as an element of legitimate government. When voting rights were undermined by fraud, violence, state statutes, or political party stratagems, a concept of voting as both an individual right and the foundation of legitimate government became the factor on which the Court relied in deciding in favor of pro-

21. For a discussion of post–Civil War cases, see discussion *infra* Part II.A.

tecting voters' rights. The second theme is that associational claims by political party managers has been a significant impediment to voting considered as an individual right or as a structural element of the constitutional design. These two themes collided in the 2008 presidential primaries in Florida and could do so again.

A. *Voting as Consent: Establishing the Legitimacy of the Union
After the Civil War*

The Court had begun to articulate at least some elements of a concept of constitutive voting in the years immediately following the Civil War in response to electoral fraud and corruption as a means of circumventing the post-Civil War amendments granting citizenship, voting rights, and equal protection to former slaves.²² This electoral fraud included in some cases physical violence against African-American voters who were legally entitled to vote.²³ In other cases the electoral fraud included refusal to count the votes cast in precincts in which African-Americans had voted or stuffing the ballot boxes with votes of no voters at all.²⁴

In the Supreme Court these cases commonly took the form of habeas corpus petitions from state election officials or private citizens who had been convicted of criminal acts under the post-Civil War statutes enacted to address the rise of the Ku Klux Klan and other forms of opposition to the post-Civil War amendments guaranteeing the rights of citizens to freed slaves.²⁵ These cases are about a range of issues, including the standards for habeas corpus petitions, the constitutionality of the criminal statutes under which the petitioners had been convicted, federalism and the roles of the state and federal governments in elections for

22. See e.g., *United States v. Mosley*, 238 U.S. 383 (1915); *Ex parte Yarbrough*, 110 U.S. 651 (1884); *United States v. Cruikshank*, 92 U.S. 542 (1875); *United States v. Reese*, 92 U.S. 214 (1875); *Ex parte Siebold*, 100 U.S. 371 (1880).

23. See *Cruikshank*, 92 U.S. at 544–545; see also *Yarbrough*, 110 U.S. at 657 (physical violence used to intimidate African-Americans against exercising their right to vote).

24. See *Reese*, 92 U.S. at 215 (refusal of election officials to receive and count the votes of an African-American); see also *Siebold*, 100 U.S. at 377–79 (election judges convicted of stuffing ballot boxes). For a carefully researched argument that the violence of the Reconstruction South should be understood a “political terror” that was “a key weapon used to undermine biracial democracy in the South” and that “any account of the attack on Reconstruction is grossly misleading to the extent that it emphasizes race to the exclusion of majority rule, democracy, and political freedom,” see Michael Kent Curtis, *The Klan, the Congress, and the Court: Congressional Enforcement of the Fourteenth and Fifteenth Amendments & the State Action Syllogism, a Brief Historical Overview*, 11 U. PA J. CONST. L. 1381, 1382 (2009).

25. See *Yarbrough*, 110 U.S. at 652, 654, 662 (habeas petition by private citizens); *Siebold*, 100 U.S. at 373–374 (habeas petition by election officials). For a list of these statutes and citations to those that remain in the criminal law, see KATHLEEN M. SULLIVAN & GERALD GUNTHER, *CONSTITUTIONAL LAW* 675–77 (16th ed. 2007).

members of the United States Congress, and the larger issues of racial equality and the meaning of citizenship.

What is too often overlooked on the rare occasions that these cases are now considered is that these cases are about elections and voting. What is an election? Is voting simply an individual right, which would be fundamentally important in itself, or are there larger issues of constitutional structure at issue as well? Why is stuffing a ballot box, even if done without violence to the person of any voter, subject to criminal sanctions? What is the harm? Who is harmed? These early cases arising in that post-Civil War resetting of the terms of citizenship, including the eligibility to vote, became the occasion for the Court to explain why and how voting mattered.²⁶

In *Ex parte Siebold*, election judges had been convicted of interfering with federal supervisors and adding ballots to the ballot box in an election for members of the House of Representatives from a Congressional district in Baltimore, Maryland.²⁷ The election judges had been convicted under a federal statute imposing federal criminal penalties for these acts.²⁸ Their habeas corpus petitions rested on the claim that Congress lacked the authority to enact such statutes and, therefore, their convictions were void.²⁹

The Court held that Congress possessed express constitutional authority under the "time, place, and manner" provision of Article I, Section 4 of the Constitution, which applies to elections of members of the United States House of Representatives.³⁰ The Court further held that such elections are examples of concurrent authority of the state government and the federal government, and affirmed the primacy of Congressional provisions in such cases.³¹ Because Congress has such authority, the Court held that Congress necessarily has the authority to enforce its regulations.³² The Court rejected claims that Congress lacked the authority to punish state officials, particularly when state officials violate the laws of their own states, when federal election laws are vio-

26. As discussed *infra* Part II.C., the Court availed itself of the same kind of opportunity in deciding *Baker v. Carr* and its progeny.

27. 100 U.S. at 377-79.

28. *Id.* at 379-82.

29. *Id.* at 374.

30. *See id.* at 383 (quoting Article I, Section 4 of the Constitution).

31. *Id.* at 386.

32. *Id.* at 387. 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." *Id.* at 395.

lated.³³ In the context of its discussion of concurrent federal and state authority, the Court addressed the shared interest of the state and federal governments in elections, stating:

It is the duty of the States to elect representatives to Congress. The due and fair election of these representatives is of vital importance to the United States. The government of the United States is no less concerned in the transaction than the State government is. It certainly is not bound to stand by as a passive spectator, when duties are violated and outrageous frauds are committed. It is directly interested in the faithful performance, by the officers of election, of their respective duties. Those duties are owed as well to the United States as to the State. This necessarily follows from the mixed character of the transaction,—State and national. A violation of duty is an offence against the United States, for which the offender is justly amenable to that government. No official position can shelter him from this responsibility.³⁴

The concept of election fraud as an offense against the United States implicates the concept of the legitimacy of the composition of the government. It is a violation of the idea of consent at the heart of the Constitution. This theme carried forward in the other cases addressing election fraud in the immediate post-Civil War era.

Ex parte Yarbrough involved physical violence against a freed slave eligible to vote.³⁵ Again, the petitioners had been convicted under federal statutes and filed habeas corpus petitions claiming that their convictions were void because the statutes exceeded the constitutional authority of Congress.³⁶ The difference in this case was that the petitioners here were not state officials but private persons, which meant that the Court's newly articulate state action concept reverberated through the Court's reasoning.³⁷

33. *Id.* at 387–88. It is certainly not surprising that the Court would have emphasized the paramount authority of the federal government and the complexities of concurrent authority in our federal system in the years immediately following the Civil War. The Court explained that in the case of electing representatives to Congress: “The State may make regulations on the subject; Congress may make regulations on the same subject, or may alter or add to those already made. The paramount character of those made by Congress has the effect to supersede those made by the State, so far as the two are inconsistent, and no farther.” *Id.* at 386.

34. *Id.* at 388.

35. *Ex parte Yarbrough*, 110 U.S. 651, 657 (1884).

36. *Id.* at 652, 654.

37. *Id.* at 662. *Yarbrough* was decided in 1884, a year after the Court decided the *Civil Rights Cases*, 109 U.S. 3 (1883), which articulated a state action limitation on Congressional enforcement authority under the Fourteenth Amendment. Curtis, *supra* note 24, at 1402 has summarized this doctrine in a “state action syllogism” in the following terms:

the Fourteenth Amendment only prohibited state action; private Klansmen were not the state; therefore the enforcement of the Amendment could not reach private persons. By this view, the Fourteenth Amendment (and the Fifteenth) did not create

The petitioners claimed that the statutes under which they were convicted were not within the constitutional competence of Congress because the Constitution contained no express authority for enacting such statutes.³⁸ The Court responded to this argument with an assertion of the importance of implied authority based on the Necessary and Proper Clause, Article I, Section 8, Clause 18 of the Constitution.³⁹ The Court applied this reasoning directly to elections,⁴⁰ and, in so doing, affirmed the constitutive function of elections in the constitutional structure:

"That a government whose essential character is republican, whose executive head and legislative body are both elective, whose most numerous and powerful branch of the legislature is elected by the people directly, has no power by appropriate laws to secure this election from the influence of violence, of corruption, and of fraud, is a proposition so startling as to arrest attention and demand the gravest consideration.

"If this government is anything more than a mere aggregation of delegated agents of other States and governments, each of which is superior to the general government, it must have the power to protect the elections on which its existence depends from violence and corruption.

"If it has not this power it is left helpless before the two great natural and historical enemies of all republics, open violence and insidious corruption."⁴¹

The idea that the government's existence depends on elections is the core of the principle of constitutive voting. The Court explained the concept in greater detail when it took the position that an individual's right to vote in fair, honest elections is not only a fundamental individual right but also a requisite of legitimate government.⁴²

In responding to the petitioners' claims that Congress had no authority to regulate their conduct because they were private persons, not state government officials with the duty to conduct elections, the

rights. They only imposed limits on government. Since people had no rights under these Amendments, there were no federal rights to enforce.

For an insightful analysis of the voluminous literature on state action, see Charles L. Black, Jr., "State Action," *Equal Protection, and California's Proposition 13*, 81 HARV. L. REV. 69 (1967) (suggesting that the state action doctrine be consigned to an "honored retirement"). Despite Professor Black's sensible suggestion, state-action controversies and their role in the White Primary cases continue in controversies over the scope of government authority to regulate the role of political parties in structuring primary elections. These issues are discussed *infra* Part V.

38. *Yarborough*, 110 U.S. at 658.

39. *Id.*

40. *Id.* at 657-58.

41. *Id.*

42. *Id.* at 662.

Court found that the government's duty to protect voters from violence and to preserve the integrity of elections did not depend solely on this distinction, in part because elections implicate both the rights of voters and the legitimacy of the government.⁴³ The Court found that the government's duty

does not arise solely from the interest of the party concerned, but from the necessity of the government itself, that its service shall be free from the adverse influence of force and fraud practiced on its agents, and that the votes by which its members of Congress and its President are elected shall be the *free* votes of the electors, and the officers thus chosen the free and uncorrupted choice of those who have the right to take part in that choice.⁴⁴

In rejecting the claim that the state-action requirement of the Fourteenth Amendment applied to the Fifteenth Amendment as well, the Court held that the Fifteenth Amendment was intended to ensure that African-Americans had the right to vote even in those states that had not removed the words "white man" from their state constitutions in defining the right to vote.⁴⁵ The Court interpreted the Fifteenth Amendment broadly as regulating election and voting rights, reasoning:

This new constitutional right was mainly designed for citizens of African descent. The principle, however, that the protection of the exercise of this right is within the power of Congress, is as necessary to the right of other citizens to vote as to the colored citizen, and to the right to vote in general as to the right to be protected against discrimination.⁴⁶

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

43. *Id.*

44. *Id.*

45. *Id.* at 665. The Court did not finally hold directly that its state action concept applied to the Fifteenth Amendment as well as to the Fourteenth Amendment until 1903, when it decided *James v. Bowman*, 190 U.S. 127 (1903).

46. *Yarbrough*, 110 U.S. at 665.

itself.”⁴⁷

The Court then made it clear that distinctions between the Fourteenth Amendment and the Fifteenth Amendment were not constitutionally significant when the issue was voting rights, stating unequivocally that “it is a waste of time to seek for specific sources of the power to pass these laws.”⁴⁸ The Court based its assertion on the claim that voting is structural and constitutive.⁴⁹ The Court then elaborated on this concept of voting and elections as constitutive of legitimate government, reasoning:

“It is as essential to the successful working of this government that the great organisms of its executive and legislative branches should be the free choice of the people as that the original form of it should be so. In absolute governments, where the monarch is the source of all power, it is still held to be important that the exercise of that power shall be free from the influence of extraneous violence and internal corruption.

“In a republican government, like ours, where political power is reposed in representatives of the entire body of the people, chosen at short intervals by popular elections, the temptations to control these elections by violence and by corruption is a constant source of danger.”⁵⁰

The Court concluded that if the federal government has no authority over the conduct of elections,

if the very sources of power may be poisoned by corruption or controlled by violence and outrage, without legal restraint, then, indeed, is the country in danger, and its best powers, its highest purposes, the hopes which it inspires, and the love which enshrines it, are at the mercy of the combinations of those who respect no right but brute force, on the one hand, and unprincipled corruptionists on the other.⁵¹

47. *Id.* at 665–66.

48. *Id.* at 666.

49. *Id.* The Court cited Chancellor Kent’s *Commentaries on the Constitution*:

The government of the United States was created by the free voice and joint will of the people of America for their common defense and general welfare. Its powers apply to those great interests which relate to this country in its national capacity, and which depend for their protection on the consolidation of the Union.

Id. (citing 1 Kent’s Comm. at 201).

50. *Id.* The Court made it very clear that it regarded increasing inequality of wealth and the deployment of wealth in pursuit of political power as corrosive to legitimate republican government as violence, observing:

If the recurrence of such acts as these prisoners stand convicted of are too common in one quarter of the country, and give omen of danger from lawless violence, the free use of money in elections, arising from the vast growth of recent wealth in other quarters, presents equal cause for anxiety.

Id. at 667.

51. *Id.* at 667.

The Court in *Ex parte Yarbrough* cabined the reach of the state-action doctrine in the context of voting rights protected under the Fifteenth Amendment. The Court treated voting as the basis of government legitimacy, as the mechanism through which the government's legitimacy is affirmed through consent of the voters. The state-action doctrine was not permitted to undermine the foundational constitutional principle that government must be based on consent. This reasoning articulates important elements of a concept of constitutive voting as an operational expression of continuing consent.

This line of cases treating voting as the basis of government legitimacy continued in 1915 with *United States v. Mosley*.⁵² The case involved a criminal conspiracy to violate the voting rights of African Americans who were eligible to vote by not counting the vote from certain precincts.⁵³ 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."⁵⁴

The post-Civil War cases certainly did not offer unmixed support for African-American voting rights.⁵⁵ Application of the judicially created state-action doctrine to some voting-rights cases undermined African-American voting rights. The Court held in *United States v. Cruikshank* that criminal prosecution of private persons for a criminal conspiracy to deny African Americans the right to vote could not be maintained because there was no state action.⁵⁶ The violence at issue was the infamous Colfax Massacre resulting in the deaths of over sixty African-American citizens of the United States.⁵⁷ The majority opinion by Chief Justice Waite held that the United States government lacked authority to protect the lives of African-American voters because this was a responsibility solely of the states. Under this reasoning, the United States government could act to enforce the rights provided in the post-Civil War Amendments only if a state denies these rights to an individual.⁵⁸ The majority asserted that no person is a voter of the

52. 238 U.S. 383 (1915).

53. *Id.* at 385.

54. *Id.* at 386.

55. See Curtis, *supra* note 24 (Congress provided greater support than did the courts).

56. *U.S. v. Cruikshank*, 92 U.S. 542 (1875).

57. Curtis, *supra* note 24, at 1420–23. See also CHARLES LANE, *THE DAY FREEDOM DIED: THE COLFAX MASSACRE, THE SUPREME COURT, AND THE BETRAYAL OF RECONSTRUCTION* (2008).

58. *Cruikshank*, 92 U.S. at 554–55. The majority reasoned:

The fourteenth amendment prohibits a State from denying to any person within its jurisdiction the equal protection of the laws; but this provision does not, any more than the one which precedes it, and which we have just considered, add any thing to the rights which one citizen has under the Constitution against another. The equality

United States and that the Constitution of the United States does not give any person the right to vote.⁵⁹ The majority did admit that the Fifteenth Amendment “has invested the citizens of the United States with a new constitutional right, which is exemption from discrimination in the exercise of the elective franchise on account of race, color, or previous condition of servitude.”⁶⁰ The majority then took the untenable position that “[f]rom this it appears that the right of suffrage is not a necessary attribute of national citizenship; but that exemption from discrimination in the exercise of that right on account of race, &c., is.”⁶¹ The application of the state-action doctrine was tied to analyses of federalism carefully crafted to limit the reach of the United States Constitution. Chief Justice Waite asserted that “[t]he right to vote in the States comes from the States; but the right of exemption from the prohibited discrimination comes from the United States. The first has not been granted or secured by the Constitution of the United States; but the lat has been.”⁶² Under this reasoning, African-Americans could vote only if the states permitted them to vote, but, if the states did permit them to vote, they could not discriminate against them on racial grounds. In effect, denial of the right to vote by a state would not constitute discrimination and would not constitute state action that would trigger federal enforcement authority.

Another argument in the majority opinion in *Cruikshank* has had a more enduring impact on the law than did its convoluted state-action and federalism reasoning. This was the suggestion that the Ku Klux Klan and other private groups using violence to prevent African Americans from voting could assert as a defense against criminal conspiracy

of the rights of citizens is a principle of republicanism. Every republican government is in duty bound to protect all its citizens in the enjoyment of this principle, if within its power. That duty was originally assumed by the States; and it still remains there. The only obligation resting upon the United States is to see that the States do not deny the right. This the amendment guarantees, but no more. The power of the national government is limited to the enforcement of this guaranty.

Curtis, *supra* note 24, at 1402, n.108 describes *Cruikshank* as “a judicial statement of the state action syllogism.”

59. *Cruikshank*, 92 U.S. at 544–56. The majority cited *Minor v. Happersett*, 88 U.S. 162 (1874) for the proposition that “we decided that the . . . United States [has] no voters of their own creation in the States.” *Id.* at 555. The petitioners in *Minor v. Happersett* were women seeking the right to vote under the Fourteenth Amendment. The Court’s narrow holding can be explained in terms of the gender of the plaintiffs and the inability and unwillingness of the male justices to imagine women as having this right.

60. *Cruikshank*, 92 U.S. at 555.

61. *Id.* at 555–56.

62. *Id.* at 556. For a critique of the Waite Court’s interpretation of federalism as a central tenet of its opposition to the post–Civil War Amendments and a comparison with the federalism asserted by the Rehnquist Court, see Ellen D. Katz, *Reinforcing Representation: Congressional Power to Enforce the Fourteenth and Fifteenth Amendments in the Rehnquist and Waite Courts*, 101 MICH. L. REV. 2341, 2347–89 (2003).

charges a right of association.⁶³ This analysis was a response to the charges in the indictment that the defendants banded together and conspired. The majority held that the defendants could not be charged under federal law with associating together because the right to associate was a right that predated the Constitution and was a right protected by the States as well as a right under the First Amendment of the United States Constitution. This became a convoluted argument that the First Amendment served only to limit the powers of the federal government while the Fourteenth Amendment “assumes the existence of the right of the people to assemble for lawful purposes, and protects it against encroachment by Congress.”⁶⁴

The idea that the plaintiffs were being denied the right to associate is strained at best given the facts of the case, although it is noteworthy that the Court did not find it necessary to recount the facts. The violence alleged in the indictment would not appear to have been a matter of “peaceably” assembling. As a result, the majority simply rewrote the first Amendment to exclude the word, stating that “[t]he first amendment to the Constitution prohibits Congress from abridging ‘the right of the people to assemble and to petition the government for a redress of grievances.’”⁶⁵ The Court then interpreted this redrafted language in terms of a limit on federal government authority, stating that “[t]his, like the other amendments proposed and adopted at the same time, was not intended to limit the powers of the State governments in respect to their own citizens, but to operate upon the National government alone.”⁶⁶ Because the Waite Court sought to limit the authority of the federal government relative to the authority of state governments, it put itself in the untenable position of arguing that individuals must look to their state governments for protection of their rights to assemble because the First Amendment served only to limit the actions of the federal government except in cases where the purpose of assembling was “connected with the powers or the duties of the national government.”⁶⁷ The Waite Court excluded claims of voting rights under the Fourteenth Amendment from the powers and duties of federal government for this purpose.⁶⁸

Much of the *Cruikshank* reasoning has deservedly not survived. Unfortunately, the suggestion that a private association can claim unbounded rights of association has not only survived but flourished. The doctrines of private association find a precedent in *Cruikshank*,

63. *Cruikshank*, 92 U.S. at 551–53.

64. *Id.* at 552.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.* at 552–53.

although it is not one which courts in more recent times have been eager to cite. Nevertheless, voters in the 2008 Florida presidential primaries heard its echoes in the action of the national committees of the two major parties when they negated or diluted the votes of Florida voters.

In 1903 in *Giles v. Harris* the Court held in a 6-3 decision that the Fifteenth Amendment did not support claims of African-Americans qualified to vote who had been denied the right to register to vote by the county board of election registrars.⁶⁹ Writing for the majority, Justice Holmes offered little reasoning to support this position and made no reference to the Court's cases protecting voting rights. Justice Holmes took the position that "[i]f the sections of the Constitution concerning registration were illegal in their inception, it would be a new doctrine in constitutional law that the original invalidity could be cured by an administration which defeated their intent."⁷⁰ The majority moved from sophistry to invocation of political reality, as it saw it, when it took the position that a judicial order would have little if any practical effect when a "conspiracy of a State" has been alleged.⁷¹ Justice Holmes observed:

The circuit court has no constitutional power to control its action by any direct means. And if we leave the state out of consideration, the court has as little practical power to deal with the people of the state in a body. . . . Unless we are prepared to supervise the voting in that state by officers of the court, it seems to us that all that the plaintiff could get from equity would be an empty form. Apart from damages to the individual, relief from a great political wrong, if done, as alleged, by the people of a state and the state itself, must be given by them or by the legislative and political department of the government of the United States.⁷²

What Holmes left unsaid is that the federal government would not have enforced any such judicial order.⁷³ Only a week later, the Court issued an opinion in *James v. Bowman* holding that the Fifteenth Amendment is limited to state action.⁷⁴ In so holding, the Court relied on the opinion in *Cruikshank*.

69. *Giles v. Harris*, 189 U.S. 475 (1903). For insightful analyses of this case, see Richard H. Pildes, *Democracy, Anti-Democracy, and the Canon*, 17 CONST. COMMENT. 295 (2000); Samuel Brenner, Note, "Airbrushed Out of the Constitutional Canon": *The Evolving Understanding of Giles v. Harris, 1903-1925*, 107 MICH. L. REV. 853 (2009).

70. *Giles*, 189 U.S. at 487. See also Pildes, *supra* note 69, at 306 describes this reasoning as "the most legally disingenuous analysis in the pages of the U.S. Reports."

71. *Giles*, 189 U.S. at 488.

72. *Id.*

73. *Id.* Pildes, *supra* note 69, at 307 concludes that "it is the very fear or recognition that any Court order would not be supported by other branches of the national government that underlies the Court's own self-abnegation."

74. *James v. Bowman*, 190 U.S. 127 (1903). Justice Holmes joined the majority.

In his dissent in *Giles v. Harris* Justice Brewer took the position that the only question in the case was whether the Circuit Court had jurisdiction.⁷⁵ Citing *Ex parte Siebold* and *Ex parte Yarbrough*, Justice Brewer concluded that jurisdiction should “result inevitably” from these precedents.⁷⁶

The majority opinion in *Giles v. Harris* is justly deplored for both its result and its reasoning. Although it is rarely discussed in election-law scholarship,⁷⁷ it serves as a stark example of the Court’s uncertain course in protecting voting rights. It is also a stark example of the Court’s tendency to remain silent on voting as a structural element of the constitutional design in cases limiting or failing to protect voting rights. In this case, the Court may well have been more concerned with protecting itself as an institution because the justices feared adverse reaction from the public as well as from the other branches of the federal government.⁷⁸

African-American voters were all too often left unprotected by the federal courts just as they were left unprotected by the other branches of the federal government. At the same time, the Court, in its better moments, crafted precedents based on voting as a structural element of the constitutional design. The relationship between consent and government legitimacy was the core principle relied upon by the Court when it did protect voting rights.

B. *The White Primary Cases: Progressive Reform Confronts Jim Crow*

The White Primary Cases developed amidst multiple paradoxes, one of which was at the core of the vote negation and vote dilution in the 2008 presidential primaries in Florida. Primary elections were intended as a progressive alternative to the role of party bosses in selecting a party’s candidates for the general election. The idea of permitting voters to cast ballots for their preferred candidate, it was thought, would foster not only good government but also party accountability. Instead, primary elections soon became mechanisms for increasing the power of

75. *Giles*, 189 U.S. at 488–93 (Brewer, J., dissenting). Justice Brewer wrote the Court’s opinion in *James*, 190 U.S. at 127.

76. *Giles*, 189 U.S. at 493. Justice Brewer concluded that “[i]t seems to me nothing need be added to these decisions, and, unless they are to be considered as overruled, they are decisive of this case.”

77. HASEN’s description *infra* note 198, at 19 of *Giles* as “a case that would be more notorious if more people paid attention to it” seems to capture the current place of the case in election-law scholarship.

78. Pildes, *supra* note 69, at 317 suggests that *Giles* “poses in their most primordial form questions of the relationship among law, politics, and culture, as well as the relationship of national to state power in the fundamental sphere of democracy itself.”

party bosses,⁷⁹ negating votes, and even entrenching racial discrimination in the exercise of the franchise. Selecting party candidates through primary elections required party managers to pay greater attention to who was permitted to vote in the party's primary and, in consequence, called upon party managers to develop new means of controlling who was considered eligible to vote in primaries. In addition, political parties necessarily worked closely with state and local governments that were actually responsible for conducting elections. This working relationship took various forms, but it inescapably brought political parties closer to a position that supported claims that the parties themselves were engaged in state action. This produced the paradox that the state-action doctrine, which had been crafted to limit the scope of the Fourteenth and Fifteenth Amendments, now became the foundation for finding that the parties themselves were engaged in state action, which extended the Fourteenth and Fifteenth Amendments to primary elections. In response to this paradox, political parties began to assert a countervailing claim under the First Amendment but growing out of the state-action doctrine, namely, that they were private associations with First Amendment rights to associate that could not be abridged by the federal government.

These intertwined paradoxes were not fully apparent when primary elections began to appear in the early twentieth century. The White Primary Cases addressed the paradox of a Progressive era reform—primary elections to permit ordinary voters to displace party bosses in the selection of party candidates—that was adapted to serve the goals of Jim Crow. Political scientists of that period generally hailed the progressive intent of primary elections.⁸⁰ They focused on the abuses of the party bosses and political machines. Professors Merriam and Overacker summarized the prevailing critique:

The abuses that arose under a system that staked the immense spoils of party victory on the throw of a caucus held without legal regulation of any sort were numerous and varied. They ranged from brutal violence and coarse fraud to the most refined and subtle cunning, and included every method that seemed adapted to the all-important object of securing the desired majority and controlling the

79. For a portrait of United States political bosses that still resonates today in its understanding of party leaders' quest for both power and prosperity, see Max Weber, *Politics as a Vocation*, in FROM MAX WEBER: ESSAYS IN SOCIOLOGY 77 (H. H. Gerth & C. Wright Mills eds., 1948).

80. The seminal work on party primaries was written by one of the most eminent political scientists of the day, Charles Edward Merriam, a professor of political science at the University of Chicago and a president of the American Political Science Association. C. EDWARD MERRIAM, *PRIMARY ELECTIONS* (1909). See also CHARLES EDWARD MERRIAM & LOUISE OVERACKER, *PRIMARY ELECTIONS* (1928). Louise Overacker was an assistant professor of History & Government at Wellesley College.

convention.⁸¹

It was certainly not a surprise that elections could be manipulated by either fraud or by the more subtle method of defining the primary election rules. Mirriam and Overacker noted that “if we are considering for a moment the prediction that boss and machine would automatically disappear with the advent of the primary, it is perfectly clear that this was not the case.”⁸² What became clearer over time was the role of associational claims by political parties in limiting voting rights and the significance accorded voting.

This emerging understanding of primary elections involved three sets of issues—issues relating to voting rights, the issue of whether primaries are elections, and the issue of whether political parties are private associations. These issues are all present in the White Primary cases, but each of them has developed continuing significance and the patterns of their intersection have shifted overtime. The White Primary cases resolved the immediate issue of the right of African American voters to participate in primary elections. The White Primary cases did not resolve the issue of the rights of political parties to determine what voters can vote in their primaries, the issue of whether the party has the exclusive role in making this determination, the issue of whether the state government or the federal government or both have any role in making this determination, and the issue of whether individuals, whether as voters or as party members, have any effective claims to protect their right to vote in the face of political parties’ claims of associational rights. Over time the constitutional predicate of political-party claims has shifted from the state-action doctrine and party claims that they are purely private associations to the First Amendment and claims that political parties have their own constitutionally protected rights of association, whether because political parties are private associations or because they are expressive associations. The legacy of the state-action doctrine as the foundation of Jim Crow lingers as the foundation of First Amendment claims by political parties allowing them to shape voting rights. This was the basis for the Democratic National Committee’s confidence that it could negate the votes cast in the 2008 Florida primary.

What recourse might be available to voters? The White Primary cases are, above all, cases about voting and the place of voting in the structure of the Constitution. Analyzing the White Primary cases chronologically and taking each of their three elements separately, it becomes clear that the Court could not protect voting rights by minimal procedu-

81. MERRIAM & OVERACKER, *supra* note 80, at 5.

82. *Id.* at 213. The authors presented detailed proposals for addressing the problems they found with the operation of primary elections. *Id.* at 275–358.

ral analyses of the roles of political parties to determine whether their roles in primary elections constituted state action. Instead, when the Court appeared to have capitulated to the misuse of law to deny justice and to have found no way to keep the state-action doctrine from undermining the clear purposes of the Fourteenth and Fifteenth Amendments, the Court reduced the salience of the doctrinal limitations of the state-action doctrine and returned to the purposes of voting in the constitutional structure. The cases in which the Court assured that African-American citizens would be able to vote in primary elections were all based primarily on the Fifteenth Amendment, which explicitly protects the right to vote, as well as on Article I, Sections 2 and 4, which define a role for the both the federal and state governments in ensuring the integrity of elections. Rights of voters, considered not simply as rights of individual voters but also as part of the structure of constitutional legitimacy, balanced the barriers to election participation and voters' rights bottomed on the state-action doctrine. Whether a political party was a private association or a delegate of state authority simply mattered less than the right to vote and less than the constitutional principle that legitimate government is based on consent. It is in this sense that the White Primary cases remain important precedents in our own times.

The White Primary cases are attracting new attention from academic commentators⁸³ and generating controversy yet again. Some commentators find these cases largely irrelevant, as civil rights icons from a bygone era but analytically irrelevant to the contemporary jurisprudence of election law.⁸⁴ Others find the White Primary Cases doctrinally insuf-

83. Michael J. Klarman, *The White Primary Rulings: A Case Study in the Consequences of Supreme Court Decision Making*, 29 FLA. ST. U. L. REV. 55, 56 (2001) provides a detailed history of the White Primary Cases, shows how history shaped the Court's responses, including its response to the state-action issue, and concludes that "The Court's most important white primary decision, *Smith v. Allwright*, inaugurated a political revolution in the urban South." Klarman documents the markedly different impact of the White Primary cases in rural and urban areas in the South.

84. Daniel Hays Lowenstein, *Associational Rights of Major Political Parties: A Skeptical Inquiry*, 71 TEX. L. REV. 1741 (1993) notes the dilemma created by the determination in the White Primary cases that political parties are "public" with respect to their role in conducting primary elections. This permitted the Court to find state action for purposes of the Fourteenth and Fifteenth Amendments, but undercut parties' later claims that they were private associations for purposes of their own association claims under the First Amendment. *Id.* at 1748-49. Lowenstein suggests that not much would be lost if we would simply "disavow" or ignore the White Primary cases. He reasons:

The proposal is not monstrous, because the *White Primary Cases* had only modest success in extending the franchise to African-Americans in the southern states and, more importantly, because federal voting rights legislation and greatly changed mores make it extremely unlikely that parties would seek to exclude primary voters on grounds of race in the foreseeable future. Renunciation now of the *White Primary Cases* would have no tangible cost in racial discrimination, would bring

ficient in their consideration of the state-action requirement of the Fourteenth and Fifteenth Amendments and suggest that the cases be disregarded.⁸⁵ Some academics have argued that the White Primary cases are wrongly decided with respect to political parties' associational rights and claim that they have no further precedential value in light of *Dale* and other cases that have developed the concept of expressive association.⁸⁶ More recently, a greater appreciation of the White Primary Cases as voting-rights cases has begun to appear, with some tendency to find in these cases concepts of voting and elections that should play a more important role in contemporary jurisprudence.⁸⁷

This article analyzes the White Primary Cases as voting-rights cases. The White Primary cases are linked with the post-Civil War voting cases in this respect. The Court was able to avoid the use of a primary election to disenfranchise African-American voters because it focused on the purpose of the Fourteenth and Fifteenth Amendments rather than on the confines of a judicially created doctrine meant to hobble enforcement of these amendments. The path was not by any means straight or easy. But, the difficulties encountered and addressed in the White Primary cases suggest constitutional bases for rejecting the vote negation that occurred in the 2008 Florida primaries.

The first of the White Primary Cases, *Nixon v. Herndon*, involved

constitutional doctrine into accord with the common sense notion that parties are not government agencies, and would clear the way for a full extension of constitutional freedoms to parties. However, the *White Primary Cases*, despite their limited effectiveness, are rightly remembered as one of the bright spots in the history of the Supreme Court and the struggles for racial equality. For the Supreme Court now to declare that the cases were wrong would be unpleasant, even disillusioning. Most of us would never believe the Court anyway.

Id. at 1749. In effect, Lowenstein tried to limit the White Primary Cases to questions of race and Equal Protection but could not avoid acknowledging, at least indirectly, the tension between political parties' claims that they are private associations and voters' rights.

85. Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 652–68 (1998) (calling the White Primary Cases “untouchable icons in the legal world” but finding that the cases were based on unsustainable reasoning about the public nature of political parties).

86. Nathaniel Persily, *Toward a Functional Defense of Political Party Autonomy*, 76 N.Y.U. L. REV. 750 (2001) (White Primary Cases as “brooding omnipresence” that impede insightful analysis and undermine the associational rights of political parties). Party-autonomy theories focus on the role of political parties in orderly democratic government but not on questions relating to the roles and rights of voters and the concept of party members. They do not ask what relationships between political parties and voters are consistent with the democratic values they seek to advance. In their concern with articulating a conceptual basis for the autonomy of political parties from government, they have helped sustain arguments that political parties properly claim autonomy from voters and party members as well.

87. Ellen D. Katz, *New Issues in Minority Representation: Resurrecting the White Primary*, 153 U. PA. L. REV. 325, 326 (2004) (focus on “the core holding of the White Primary Cases, namely that the Constitution requires that all voters have access to a jurisdiction’s sole juncture of meaningful electoral decision making”).

an African-American member of the Democratic Party of Texas whose attempt to vote in the Democratic primary was denied by the state election judges acting on the basis of a 1923 Texas statute that expressly denied African-Americans the right to vote in a Democratic Party primary in Texas.⁸⁸ The issue before the Court was whether the state statute was lawful.⁸⁹ Because denial of the right to vote in the primary was based expressly on a state statute, there was no room for dispute over state action. The Court held that the state statute violated the Fourteenth Amendment.⁹⁰ Writing for the Court, Justice Holmes reasoned that:

We find it unnecessary to consider the Fifteenth Amendment, because it seems to us hard to imagine a more direct and obvious infringement of the Fourteenth. That Amendment, while it applies to all, was passed, as we know, with a special intent to protect the blacks from discrimination against them. . . . The statute of Texas in the teeth of the prohibitions referred to assumes to forbid negroes to take part in a primary election the importance of which we have indicated, discriminating against them by the distinction of color alone. States may do a good deal of classifying that it is difficult to believe rational, but there are limits, and it is too clear for extended argument that color cannot be made the basis of a statutory classification affecting the right set up in this case[.]⁹¹

In the absence of a credible claim based on the absence of state action, the election judges asserted that a primary election is not an election subject to federal government regulation. The Court refused to distinguish between primary and general elections.⁹² Justice Holmes found no significant difference between a vote in a general election and “a vote at the primary election that may determine the final result.”⁹³ The concept of primary elections as determinative of the general-election result became a core concept in a functional concept of state action treating primaries and the general election as components of a single process.⁹⁴ This approach is consistent with treating elections as structural elements of governance rather than simply a choice among candidates intended to pick winners and losers.

The second of the White Primary Cases, *Nixon v. Condon*, grew out

88. *Nixon v. Herndon*, 273 U.S. 536, 540 (1927).

89. *Id.* Klarman, *supra* note 83, at 58 states that the Texas statute was the only such state statute in the United States.

90. *Herndon*, 273 U.S. at 540–41 (citing *Yick Wo v. Hopkins*, 118 U.S. 356, 374 (1886) and *Buchanan v. Warley*, 245 U.S. 60, 77 (1917)).

91. *Id.*

92. *Id.* at 540. For a discussion of this issue, see *infra* Part IV.

93. *Herndon*, 273 U.S. at 540.

94. Compare *id.*, with *United States v. Classic*, 313 U.S. 299, 314 (1941); See discussion *infra* Part II.B.

of the response of the State of Texas and the Texas Democratic Party to *Nixon v. Herndon*.⁹⁵ The Texas legislature enacted legislation on an expedited, emergency basis authorizing the state executive committee of any political party to determine the party's membership criteria.⁹⁶ The Executive Committee of the Texas State Democratic Party promptly adopted a resolution limiting party membership and thus participation in party primary elections to qualified white voters. This resolution of the Texas Democratic Party Executive Committee replaced the Texas statute at issue in *Nixon v. Herndon*.⁹⁷

In a five-four decision, the majority, in an opinion written by Justice Cardozo, held that the Executive Committee of the Texas Democratic Party lacked the authority to define membership because this was a function of the State Party convention.⁹⁸ As a result, "[w]hatever power of exclusion has been exercised by the members of the committee has come to them, therefore, not as the delegates of the party, but as the delegates of the State."⁹⁹

The Court based this conclusion on a functional concept of state action intertwined with elements of a concept of constitutive voting. In this analysis, the concept of constitutive voting was invoked to explain why state action, interpreted as a limit on the discretion of state officials, mattered in voting-rights cases. Observing that the action taken by the party executive committee rested on a state statute, the Court reasoned the state legislature's determination that such a statute was necessary supports a finding of state action.¹⁰⁰ This action by the state legislature supported treatment of the Democratic Party Executive Committee as a state agency, with the consequence that

They are not acting in matters of merely private concern like the directors or agents in business corporations. They are acting in matters of high public interest, matters intimately connected with the capacity of government to exercise its functions unbrokenly and

95. See *Nixon v. Condon*, 286 U.S. 73, 81 (1932).

96. For the language of this statute, see Part IV.A., which deals with political parties as private associations.

97. *Condon*, 286 U.S. at 81–82.

98. *Id.* at 85.

99. *Id.* The reasoning continued:

Indeed, adherence to the statute leads to the conclusion that a resolution once adopted by the committee must continue to be binding upon the judges of election though the party in convention may have sought to override it, unless the committee, yielding to the moral force of numbers, shall revoke its earlier action and obey the party will. Power so entrenched is statutory, not inherent. If the State had not conferred it, there would be hardly color of right to give a basis for its exercise.

Id.

100. *Id.* at 88.

smoothly.¹⁰¹

This description of primary elections in terms of the public interest is an element of a concept of constitutive voting. This concept of a primary election resonates in the controversy over whether primaries are elections¹⁰² and the claim that political parties are private association.¹⁰³

The force of this functional theory of state action, intertwined as it was with elements of a theory of constitutive voting, was blunted by the Court's emphasis on the role of the party executive committee in contrast to the role of the state party convention. The Court addressed this procedural issue in purely formal terms. The Court expressed no curiosity about the practical operation of the Texas Democratic Party and provided no indication that it considered any information beyond formal party documents relevant to its deliberations. This formalistic proceduralism allowed the majority to claim that it had sidestepped the issue of the rights of the Texas State Democratic Party as a private association.¹⁰⁴ This claim becomes less credible in looking back from the present time as the Court's functional approach to state action is placed in the context of later approaches to state action in both election law cases and in a broader context as well. Seen in the short-term, by contrast, the formalist proceduralism provided a roadmap and a rationale for the continuing efforts by the Texas legislature and the Texas Democratic Party to exclude African-American voters from primary elections.

Only three years later in *Grove v. Townsend*, the Court, which consisted of the same justices who had decided *Nixon v. Condon*, held unanimously that the State Convention of the Texas Democratic Party had the authority to exclude African-American voters from membership and thereby from the right to vote in the party primary.¹⁰⁵ Because the state party convention acted under party rules and not under any state statute, the Court held that "this action upon its face is not state action."¹⁰⁶ The functional approach to state action and its relationship to the orderly operation of the government had no resonance in this reasoning, which represented instead an application of the formalist proceduralist elements of *Nixon v. Condon*.

This opinion provided a guide to avoiding the intentions of the

101. *Id.*

102. *See infra* Part III.

103. *See infra* Part IV.A.

104. *Id.* at 83 (stating: "Whether a political party in Texas has inherent power today without restraint by any law to determine its own membership, we are not required at this time to affirm or deny."); *See discussion infra* Part IV.A.

105. *Grove v. Townsend*, 295 U.S. 45, 48, 54-55 (1935), *overruled by* *Smith v. Allwright*, 321 U.S. 649 (1944).

106. *Grove*, 295 U.S. at 48.

post-Civil War amendments and to entrenching Jim Crow in the South. The claim was generally that the Fifteenth Amendment did not control because a primary is not an election and participation in a primary is not constitutionally protected voting.¹⁰⁷ Both the Fourteenth and Fifteenth Amendments required state action, but a political party was a purely private association even when it organized primary elections. This is a circular argument based on the assertion that because primaries are not elections a political party is a private association and is not engaged in state action when it structures primary elections and then the assertion that because political parties are private association primaries are not elections. Under this reasoning, an African-American who shared the political beliefs of the Texas Democratic Party could be denied membership in the party and thus the right to vote in the party primary. Although *Grovey* was subsequently overruled, its reasoning lives on the associational claims of political parties and the Court's readiness to accord party managers full discretion in asserting these claims.¹⁰⁸

The Court in *Grovey* attempted to neutralize claims that voting rights should be accorded independent significance and that the concept of voting encompasses the concept of casting a vote that may make a difference to the eventual outcome of the election. In *Nixon v. Herndon* the Court had accorded independent significance to the idea of participation in a competitive election.¹⁰⁹ Without referring to its prior decision, the Court in *Grovey* rejected this claim:

The argument is that as a negro may not be denied a ballot at a general election on account of his race or color, if exclusion from the primary renders his vote at the general election insignificant and useless, the result is to deny him the suffrage altogether. So to say is to confuse the privilege of membership in a party with the right to vote for one who is to hold a public office. With the former the state need have no concern, with the latter it is bound to concern itself, for the general election is a function of the state government and discrimination by the state as respects participation by negroes on account of their race or color is prohibited by the Federal Constitution.¹¹⁰

Grovey shows the jurisprudential error of the proceduralist formalism of *Nixon v. Condon* and the consequences of failing to understand voting as an element of constitutional structure. The persistent echoes of *Grovey* through the years should, at the very least, be cause for reassessment of

107. *Id.* See *infra* Part IV.A. for a discussion of whether a primary is an election and whether participation in a primary constitutes voting.

108. *Grovey* can be seen as the wellspring of the cases that ground discrimination by organization managers against particular persons seeking to become members, most notably *Dale*. See *infra* Part IV for a discussion of these cases.

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

110. *Grovey*, 295 U.S. at 54–55.

the cases in which the Court all too readily embraced the associational claims of party managers at the expense of the rights of voters.

Six years later in a four-to-three decision, the Court reversed course and held in *United States v. Classic* that voters have a right to have their votes counted in a primary election.¹¹¹ The United States charged that commissioners of elections in Louisiana conspired to alter and falsely count and certify votes cast in a state primary.¹¹² The District Court sustained a demurrer to two counts of the indictment.¹¹³ The United States appealed to the Supreme Court, which reversed the District Court.¹¹⁴

The Supreme Court reasoned that the issue was controlled by Article I, Sections 2 and 4.¹¹⁵ Although state action did not apply to these constitutional predicates, the Court addressed elements of the case in terms that would have sustained state action had it been constitutionally relevant. This was particularly apparent in the Court's determination that a primary is an election subject to regulation under the Constitution.¹¹⁶ The majority observed that the primary was "conducted by the state at public expense" and was "subject to numerous statutory regulations."¹¹⁷ The Court observed that the practical effect of the primary election was to determine who would become the member of Congress from the Second District of Louisiana¹¹⁸ and found that

[i]nterference with the right to vote in the Congressional primary in the Second Congressional District for the choice of Democratic candidate for Congress is thus, as a matter of law and in fact, an interference with the effective choice of the voters at the only stage of the election procedure when their choice is of significance, since it is at the only stage when such interference could have any practical effect on the ultimate result, the choice of the Congressman to represent the district. The primary in Louisiana is an integral part of the procedure for the popular choice of Congressman. The right of qualified voters to vote at the Congressional primary in Louisiana and to have their

111. 313 U.S. 299, 314 (1941).

112. *Id.* at 307.

113. *United States v. Classic*, 35 F. Supp. 66, 69 (E.D. La. 1940), *rev'd*, 313 U.S. 299 (1941). In so holding, the District Court relied on early negative cases, particularly *United States v. Gradwell*, 243 U.S. 476 (1917) and *Newberry v. United States*, 256 U.S. 232 (1921).

114. *Classic*, 313 U.S. at 329.

115. *Id.* at 311. The primary at issue was a primary to select a candidate for Congress, which brought this primary within the language of section 2 and 4 of Article I.

116. For an analysis of this issue, see discussion *infra* Part III.

117. *Classic*, 313 U.S. at 311.

118. *Id.* at 313-14. The Court based these observations on contemporary political-science studies. See *Id.* at 314, n.2. More recently, the Court has challenged the use of political-science studies in campaign-finance cases. See *McConnell v. FEC*, 540 U.S. 93, 354 (2003) (Rehnquist, C.J., dissenting); *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 467 n.4 (2007).

ballots counted is thus the right to participate in that choice.¹¹⁹

The Court's emphasis on "effective choice" echoes the language in *Nixon v. Herndon* relating to the right to vote in that part of the electoral process that controls the final outcome.

The Court held that this right to choose representatives is guaranteed to the people under the Constitution.¹²⁰ Citing Article I, Section 2 for the proposition that the Constitution "commands that Congressmen shall be chosen by the people of the several states by electors," the Court reasoned that

[t]he right of the people to choose, whatever its appropriate constitutional limitations, where in other respects it is defined, and the mode of its exercise is prescribed by state action in conformity to the Constitution, 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.¹²¹

The Court cited the post-Civil War voting-rights cases, *Ex parte Yarbrough* and *United States v. Mosley*, in support of its reading of the Constitution.¹²² The Court then distinguished its post-Civil War precedents denying voting rights, including *Minor v. Happersett*,¹²³ by observing that

[w]hile, in a loose sense, the right to vote for representatives in Congress is sometimes spoken of as a right derived from the states, . . . this statement is true only in the sense that the states are authorized by the Constitution, to legislate on the subject as provided by § 2 of Art. I, to the extent that Congress has not restricted state action by the exercise of its powers to regulate elections under § 4 and its more general power under Article I, § 8, clause 18 of the Constitution "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers."¹²⁴

The Court then addressed the specific action at issue in this case, the alleged conspiracy to exclude and not count the votes of all qualified voters. The Court concluded that "[o]bviously included within the right to choose, secured by the Constitution, is the right of qualified voters within a state to cast their ballots and have them counted at Congress-

119. *Classic*, 313 U.S. at 314.

120. *Id.* at 314–15.

121. *Id.* at 314.

122. *Id.* These cases are discussed *supra* Part II.A.

123. *Classic*, 313 U.S. at 315 (citing *Minor v. Happersett*, 88 U.S. 162 (1874); *United States v. Reese*, 92 U.S. 214, 217–18 (1875); *McPherson v. Blacker*, 146 U.S. 1, 38–39 (1892); *Breedlove v. Suttles*, 302 U.S. 277, 283 (1937)).

124. *Classic*, 313 U.S. at 315 (citing *Breedlove*, 302 U.S. at 283; *McPherson*, 146 U.S. at 38–39; *Reese*, 92 U.S. at 217–18; *Happersett*, 88 U.S. at 162).

sional elections.”¹²⁵ In so holding, the Court rejected the relevance of the state-action doctrine. The Court reasoned with respect to Article I, Section 2, that “since the constitutional command is without restriction or limitation, the right, unlike those guaranteed by the Fourteenth and Fifteenth Amendments, is secured against the action of individuals as well as of states.”¹²⁶

Instead of relying on a formalistic state-action analysis, the Court articulated a jurisprudential framework focusing on constitutional purposes derived from Chief Justice Marshall’s observation in *McCulloch v. Maryland*, “it is a Constitution we are expounding.”¹²⁷ The Court reasoned:

That the free choice by the people of representatives in Congress, subject only to the restrictions to be found in §§ 2 and 4 of Article I and elsewhere in the Constitution, was one of the great purposes of our constitutional scheme of government cannot be doubted. We cannot regard it as any the less the constitutional purpose, or its words as any the less guarantying the integrity of that choice, when a state, exercising its privilege in the absence of Congressional action, changes the mode of choice from a single step, a general election, to two, of which the first is the choice at a primary of those candidates from whom, a second step, the representative in Congress is to be chosen at the election.¹²⁸

The Court extended the same reasoning to Article I, Section 4, which gives Congress the authority to regulate the “time, place, and manner” of elections to federal office.¹²⁹ Observing that the ways that the people chose their representatives had changed over time even

125. *Classic*, 313 U.S. at 315 (citing *United States v. Mosley*, 238 U.S. 383 (1915), *Ex parte Yarbrough*, 110 U.S. 651 (1884), and *Ex parte Siebold*, 100 U.S. 371 (1880)).

126. *Classic*, 313 U.S. at 315 (citing *Yarbrough*, 110 U.S. at 651).

127. *Classic*, 313 U.S. at 316. The Court embraced the concept of a living Constitution, and applied it to Article I, Section 2 in the following terms:

We may assume that the framers of the Constitution in adopting that section, did not have specifically in mind the selection and elimination of candidates for Congress by the direct primary any more than they contemplated the application of the commerce clause to interstate telephone, telegraph and wireless communication, which are concededly within it. For in setting up an enduring framework of government they undertook to carry out for the indefinite future and in all the vicissitudes of the changing affairs of men, those fundamental purposes which the instrument itself discloses. Hence we read its words, not as we read legislative codes which are subject to continuous revision with the changing course of events, but as the revelation of the great purposes which were intended to be achieved by the Constitution as a continuing instrument of government. If we remember that ‘it is a Constitution we are expounding,’ we cannot rightly prefer, of the possible meanings of its words, that which will defeat rather than effectuate the constitutional purpose.

Id. at 315–16. (citations omitted).

128. *Id.* at 316–17.

129. *Id.* at 317; U.S. CONST. art. I, § 4.

before the ratification of the Constitution, the Court concluded that the framers could not have intended to adopt a narrow reading of either Section 2 or Section 4 of Article I when the issue was the protection of the people's right to choose.¹³⁰

The dissent by Justice Douglas, joined by Justice Black and Justice Murphy, turned on the issue of whether the criminal penalties enacted by Congress had been defined with sufficient precision.¹³¹ Nevertheless, the dissent was careful to endorse the majority's position on the constitutional significance of voting. The dissent began with the observation that "[f]ree and honest elections are the very foundation of our republican form of government," citing *Ex parte Yarbrough* on the dangers posed by efforts to control elections through violence and corruption.¹³²

Three years later in *Smith v. Allwright*¹³³ the Court overruled *Grovey v. Townsend*¹³⁴ in yet another case in which an African-American voter had been denied the right to vote in the Democratic Party primary. The claims in this case were based on the Fourteenth and Fifteenth Amendment.¹³⁵ The Court held that any doubt that primary elections involved state action had been resolved by *United States v. Classic*, which the Court in *Smith v. Allwright* linked with *Ex parte Yarbrough*.¹³⁶ In the end, the Court put the right to vote at the center of its decision to overrule *Grovey v. Townsend*, reasoning:

The United States is a constitutional democracy. Its organic law grants to all citizens a right to participate in the choice of elected officials without restriction by any State because of race. This grant to the people of the opportunity for choice is not to be nullified by a State through casting its electoral process in a form which permits a private organization to practice racial discrimination in the election. Constitutional rights would be of little value if they could be thus

130. *Classic*, 313 U.S. at 318, 320.

131. *Id.* at 331–32 (Douglas, J., dissenting). The dissent took the position that the criminal statute did not set forth the criminal offense with "the requisite specificity." *Id.* at 340. The issue of criminal penalties has been a pervasive theme in the dissents in the cases upholding statutes regulation campaign finance in elections to federal office. See *Buckley v. Valeo*, 424 U.S. 1, 237 (1976) (Burger, C.J., concurring in part and dissenting in part); see also *McConnell v. FEC*, 540 U.S. 93, 338 (2003) (Kennedy, J., dissenting).

132. *Classic*, 313 U.S. at 329. For an analysis of *Ex parte Yarbrough*, see *Supra* Part I.A.

133. 321 U.S. 649, 666 (1944). Klarman, *supra* note 83, at 64–66, finds that this is the most important of the White Primary Cases in terms of its practical effect on African-American voting rights.

134. 295 U.S. 45 (1935), overruled by *Smith v. Allwright*, 321 U.S. 649 (1944). This case is discussed *supra* Part II.B and *infra* Part III.

135. *Smith*, 321 U.S. at 650–51. The primary at issue in this case involved both federal and state offices, which meant that reliance on sections 2 & 4 of Article I would have raised questions of whether they applied to the non-federal offices. The Court made no reference to the difference in constitutional predicates in its reliance on *Classic*.

136. *Id.* at 661–62.

indirectly denied.¹³⁷

Justice Roberts dissented, in part on grounds of the factual differences between the Texas and Louisiana primaries, but primarily on grounds of the undesirability of the rapid overruling of precedent.¹³⁸ He observed that overruling a decision announced nine years earlier "tends to bring adjudications of this tribunal into the same class as a restricted railroad ticket, good for this day and train only."¹³⁹ Justice Roberts insisted that stability was a constitutional virtue and a duty of the Court, a duty that the Court, in his view, had failed to discharge.¹⁴⁰

The last of the White Primary cases, *Terry v. Adams*, was decided by a fragmented Court nine years later, in 1953,¹⁴¹ only a year before the Court decided *Brown v. Board of Education*.¹⁴² *Terry v. Adams* remains the most controversial of the White Primary Cases, with critics claiming that none of the three opinions for the majority articulated a principled analysis sustaining a determination that the activities at issue constituted state action.¹⁴³ This article suggests that prevailing interpretations of *Terry v. Adams* should be reconsidered. It is entirely possible to conclude that the very difficulty posed by the facts for what had become standard analyses of state action helped the majority in its three opinions to move to a functional analysis of state action in the specific context of primary elections. The article also suggests that the tendency to view the result in *Terry v. Adams* as an example of unprecedented judicial willfulness based on a laudable result but unsustainable reasoning is itself untenable. Such an interpretation results from reading "lines" of cases dealing with a particular topic without considering the other jurisprudential developments that had been decided in the same time frame and which make the decision appear more grounded in a broader jurisprudence of equal protection.

Terry v. Adams is best understood not solely as one of the White Primary cases but also in terms of shifts in the Court's concept of state

137. *Id.* at 664.

138. *Id.* at 666, 669–70.

139. *Id.* at 669.

140. *Id.* at 670. Justice Roberts concluded his dissent with the observation that

[i]t is regrettable that in an era marked by doubt and confusion, an era whose greatest need is steadfastness of thought and purpose, this court, which has been looked to as exhibiting consistency in adjudication, and a steadiness which would hold the balance even in the face of temporary ebbs and flows of opinion, should now itself become the breeder of fresh doubt and confusion in the public mind as to the stability of our institutions.

Id.

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

142. 347 U.S. 483 (1954).

143. Klarman, *supra* note 83, at 68–69; Issacharof & Pildes, *supra* note 85, at 655–60.

action. The most notable such shift took place in the landmark case of *Shelley v. Kraemer*,¹⁴⁴ which was decided five years before *Terry v. Adams* and four years after *Smith v. Allwright*. In *Shelley v. Kraemer*, in which the Court struck down racially restrictive covenants in deeds of residential property, the Court found sufficient state action to sustain a claim under the Fourteenth Amendment in the enforcement of these covenants by state courts.¹⁴⁵ Even though the covenants themselves were set forth in private contracts between private parties, the Court held that the petitioners' rights under the Fourteenth Amendment had been violated because "but for the active intervention of the state courts, supported by the full panoply of state power, petitioners would have been free to occupy the properties in question without restraint."¹⁴⁶ The Court found that

State action, as that phrase is understood for the purposes of the Fourteenth Amendment, refers to exertions of state power in all forms. And when the effect of that action is to deny rights subject to the protection of the Fourteenth Amendment, it is the obligation of this Court to enforce the constitutional commands.¹⁴⁷

It is true, of course, that state action continued to prove challenging and nettlesome to the Court in specific cases. But, it is also true that Chief Justice Vinson's opinion in *Shelley v. Kraemer* grounds the reasoning of the three opinions written by members of the majority in *Terry v. Adams* in a functional, contextual concept of state action in a way that is easily missed if one considers it only in the White Primary Cases themselves.

Terry v. Adams involved an association, the Jaybird Democratic Association or Jaybird Party, which held a primary election for candidates for county offices prior to the official primary election of the county Democratic Party.¹⁴⁸ Membership in the Jaybird Association was automatically extended to all whites who registered to vote as members of the Democratic Party. Registration was conducted by county government officials, not by either the Jaybird Association or by the Democratic Party. The Jaybird Association claimed that it was not a political party and, in consequence, was not subject to government regulation at all because its activities did not constitute state action.¹⁴⁹

Justice Black, joined by Justice Douglas and Justice Burton, cited testimony from the Jaybird Association president stating that one of the

144. 334 U.S. 1 (1948).

145. *Id.* 13–14.

146. *Id.* at 19.

147. *Id.* at 20.

148. *Terry v. Adams*, 345 U.S. 461, 463 (1953).

149. *Id.* at 462–63.

purposes of the organization was to exclude African-Americans from voting and that this was the reason that the Jaybird primary was held before the Democratic Party primary. Justice Black concluded that "[t]he Jaybird Party thus brings into being and holds precisely the kind of election that the Fifteenth Amendment seeks to prevent."¹⁵⁰ Justice Black found state action in the existence of a duplicate, parallel primary operated by the Jaybird Party, reasoning that

For a state to permit such a duplication of its election processes is to permit a flagrant abuse of those processes to defeat the purposes of the Fifteenth Amendment. The use of the county-operated primary to ratify the result of the prohibited election merely compounds the offense. It violates the Fifteenth Amendment for a state, by such circumvention, to permit within its borders the use of any device that produces an equivalent of the prohibited election.¹⁵¹

Calling the Jaybird primary "an integral part, indeed the only effective part, of the elective process that determines who shall rule and govern in the county," Justice Black concluded that:

The effect of the whole procedure, Jaybird primary plus Democratic primary plus general election, is to do precisely that which the Fifteenth Amendment forbids—strip Negroes of every vestige of influence in selecting the officials who control the local county matters that intimately touch the daily lives of citizens.¹⁵²

This reasoning expresses a concept of consent expressed through voting in a meaningful election as the basis of government legitimacy. Denial of an opportunity for such consent based on the race of the voter was inconsistent with the Fifteenth Amendment.

Justice Frankfurter observed that "[t]his case is for me by no means free of difficulty."¹⁵³ His difficulty centered on state action. Justice Frankfurter noted that membership was open only to registered white voters as determined by the election rolls maintained by the county and that the balloting rules generally paralleled those set forth in the state statute regulating the conduct of primary elections. Nevertheless, Justice Frankfurter found that "formal State action, either by way of legislative recognition or official authorization, is wholly wanting."¹⁵⁴ This was, however, only the beginning of Justice Frankfurter's analysis, which has been mischaracterized and even ridiculed as resting primarily on the observation that county officials participated in the Jaybird primary by

150. *Id.* at 469.

151. *Id.*

152. *Id.* at 469–70.

153. *Id.* at 472.

154. *Id.* at 471.

simply voting in it.¹⁵⁵

Justice Frankfurter's critique of such participation is that it was "a wholly successful effort to withdraw significance from the State-prescribed primary, to subvert the operation of what is formally the law of the State for primaries in this country."¹⁵⁶ Justice Frankfurter found state action in the relationship of the Jaybird primary to the official state primary. Observing that "[t]he State of Texas has entered into a comprehensive scheme of regulation of political primaries, including procedures by which election officials shall be chosen,"¹⁵⁷ he found the long history through which county election officials "participated in and condoned a continued effort to exclude Negroes from voting" violated the Fifteenth Amendment as part of a "scheme to subvert the operation of the official primary."¹⁵⁸ The existence of this larger plan or scheme, made the various separate steps in the plan unlawful under the Fifteenth Amendment. Justice Frankfurter reasoned as follows:

The State here devised a process for primary elections. The right of all citizens to share in it, and not to be excluded by unconstitutional bars, is emphasized by the fact that in Texas nomination in the Democratic primary is tantamount to election. The exclusion of the Negroes from meaningful participation in the only primary scheme set up by the State was not an accidental, unsought consequence of the exercise of civic rights by voters to make their common viewpoint count. It was the design, the very purpose of this arrangement that the Jaybird primary in May exclude Negro participation in July. That it was the action in part of the election officials charged by Texas law with the fair administration of the primaries, brings it within reach of the law. The officials made themselves party to means whereby the machinery with which they are entrusted does not discharge the function for which it was designed.¹⁵⁹

For Justice Frankfurter, then, this betrayal of the duties of public office constituted state action. The public trust at issue here was the opportunity for African-Americans eligible to vote to participate in constituting the government of the county through voting. No government that conspires to condone a scheme that subverts the opportunity for participa-

155. *Id.* at 473–74. Justice Frankfurter did note that county election officials "join the white voting community in proceeding with elaborate formality, in almost all respects parallel to the procedures dictated by Texas law for the primary itself." Contrary to the interpretation of some commentators, Justice Frankfurter found state action in the consequences of this participation, not in the participation itself. *Id.*

156. *Id.* at 474.

157. *Id.* at 475.

158. *Id.* at 476.

159. *Id.* at 476–77.

tion and consent can escape the reach of the Fifteenth Amendment according to this reasoning.

Justice Frankfurter was grappling with the difficult matter of form and substance in legal analysis. In this enterprise, he relied on cases that "have pierced the various manifestations of astuteness."¹⁶⁰ He clearly regarded the Jaybird Association as one of these form based "manifestations of astuteness" that should be "pierced" by an analysis of the substance of its operations. In this case, he argued that the Jaybird Association's apparent independence from the Democratic Party could not obscure its important role in the electoral process. It was this matter of substance, the Jaybird Association's role in elections, not local official's participation in the Jaybird primary, that provided the legal basis of Justice Frankfurter's conclusion that the Jaybird Association primary was state action subject to constitutional requirements of equal protection for African-American voters.

Justice Clark, joined by Chief Justice Vinson, Justice Reed, and Justice Jackson, based his opinion on the concept in *Smith v. Allwright* that elections are multistep processes and each step is subject to the constitutional prohibitions on racial discrimination.¹⁶¹ Describing the Jaybird Democratic Association as "part and parcel of the Democratic Party"¹⁶² or as "an auxiliary of the local Democratic Party organization,"¹⁶³ Justice Clark focused on what the Jaybird Association did and not on an essentialist analysis of what is inherently was determined by applying abstract legal doctrine. From this perspective, Justice Clark described the Jaybird Association as "selecting its [the Democratic Party's] nominees and using its machinery for carrying out an admitted design of destroying the weight and effect of Negro ballots in Fort Bend County."¹⁶⁴ Under Justice Clark's activity-focused functional analysis, whether the Jaybird Association was a political party or not was constitutionally irrelevant because it had become "the locus of effective political choice" and "the decisive power in the county's recognized electoral process."¹⁶⁵ As a result, permitting African-Americans to vote in the official Democratic Party primary and the general election offered only "an empty vote cast after the real decisions are made" and "the Negro minority's vote is nullified at the sole stage of the local political process where the bargaining and interplay of rival political forces would make

160. *Id.* at 474. Justice Frankfurter cited *Smith v. Allwright*.

161. *Id.* at 481-82.

162. *Id.* at 482.

163. *Id.* at 483.

164. *Id.* at 483-84.

165. *Id.* at 484.

it count.”¹⁶⁶

Justice Clark addressed state action directly, citing the Court’s determination in *Shelley v. Kraemer* that the Fourteenth Amendment “refers to exertions of state power in all forms.”¹⁶⁷ Justice Clark extended this analysis to the Fifteenth Amendment as well.¹⁶⁸ Justice Clark then reasoned:

Accordingly, when a state structures its electoral apparatus in a form which devolves upon a political organization the uncontested choice of public officials, that organization itself, in whatever disguise, takes on those attributes of government which draw the Constitution’s safeguards in play.¹⁶⁹

Justice Clark’s opinion rested on the constitutional significance of consent by voters. There can be no consent without meaningful choice and unobstructed participation. Voting as an element of constitutional structure was accorded precedence over adherence to any particular interpretation of a judicially created doctrine when it conflicted with voting as a means of constituting legitimate government.

It is noteworthy that Justice Jackson joined the majority and that he joined the opinion authored by Justice Clark, with its functional interpretation of state action. Justice Jackson’s law clerk, William Rehnquist, had urged Justice Jackson to dissent on grounds that the draft opinions for the majority misconstrued the state-action doctrine.¹⁷⁰ Rehnquist took the position that Justice Black’s opinion “simply assumes the whole point of the issue,” which Rehnquist took to be the state-action doctrine and which he interpreted as a limit on the authority of Congress to enlarge the scope of the Fifteenth Amendment.¹⁷¹ He concluded that “the Black opinion utterly fails to face the problem of state action.”¹⁷² Rehnquist saw Justice Black’s opinion as result driven, an approach he found unprincipled because it ignored doctrine. Rehnquist concluded that “[s]urely the justices of this Court do not sit here to ruthlessly frustrate results which they consider undesirable, regardless of the working

166. *Id.*

167. *Id.* (citing *Shelley v. Kraemer*, 334 U.S. 1, 20 (1948)).

168. *Terry*, 345 U.S. at 484. Justice Clark began the relevant sentence with the observation, “[c]onsonant with the broad and loft aims of its Framers, the Fifteenth Amendment, as the Fourteenth,” followed by the language quoted in the text.

169. *Id.* (citing *Smith v. Allwright*, 321 U.S. 649, 664 (1944) and *United States v. Classic*, 313 U.S. 299, 324 (1941)).

170. William H. Rehnquist, *Re: Opinions of Black and FF in Terry v. Adams (Memorandum for Justice Robert Jackson)*, in SAMUEL ISSACHAROFF, PAMELA S. KARLAN, & RICHARD H. PILDES, *THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS* 114, 114–15 (Rev. 2d ed. 2002). There appear to have been only two “majority opinions” when Rehnquist prepared his memorandum.

171. *Id.* at 114.

172. *Id.*

of the Constitution.”¹⁷³

Rehnquist was briskly dismissive of the Frankfurter draft opinion, finding his support for his finding of state action as “skimpy.”¹⁷⁴ While it is useful to remember that Rehnquist was reacting to a draft and that the draft he referenced may have differed substantially, Rehnquist described Frankfurter’s concept of support for state action as consisting solely of the fact that “the county election officials voted in the Jaybird primary.”¹⁷⁵ Rehnquist leveled three charges against this reasoning:

In the first place, they voted not in their capacity as election officials, but as private citizens. Secondly, it was not their voting which effected the discrimination; it was the previously adopted rules, with which they may have had nothing to do. Thirdly, if this is the vice, why not simply enjoin the officials from voting? When one must strain this hard to reach a result, the chances are that something is the matter with the result.¹⁷⁶

As discussed above, the final Frankfurter opinion took a much richer and more nuanced approach to state action based on a framework of constitutive voting and the purposes of the Fifteenth Amendment. Rehnquist clearly took greater interest in judicial doctrine, at least when the doctrine at issue served his own interests in limiting the scope of federal-government authority.

The final section of the Rehnquist memorandum to Justice Jackson was introduced by the caption “[y]our ideas” and began with the observation that “the Constitution does not prevent the majority from banding together, nor does it attain success in the effort.”¹⁷⁷ Rehnquist then urged that “[i]t is about time the Court faced the fact that white people in the South don’t like colored people.”¹⁷⁸ The jurisprudential principle that Rehnquist derived from this observation was that “the Supreme Court is not a watchdog to rear up every time private discrimination raises its admittedly ugly head.”¹⁷⁹ Rehnquist expressed his fundamental concern about the two draft opinions in terms of freedom of association for the majority, concluding that “[t]o the extent that this decision advances the frontier of state action and ‘social gain’, it pushes back the frontier of freedom of association and majority rule.”¹⁸⁰ As is discussed

173. *Id.* at 115.

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.* Rehnquist observed pointedly: “Liberals should be the first to realize, after the past twenty years, that it does not do to push blindly through towards one constitutional goal without paying attention to other equally desirable values that are being trampled on in the process.”

in Part IV, William Rehnquist, during his long tenure on the Court, dedicated himself to developing a concept of freedom of association indistinguishable from nonparticipatory association in which party organizations and voluntary associations were equated with the views of their leaders and offered no scope for members to express their views about the direction of the organization. All of that was in the future in 1953, when Rehnquist urged Justice Jackson to adopt this position, arguing that “[t]his is a position that I am sure ought to be stated; but if stated by Vinson, Minton, or Reed it just won’t sound the same way as if you state it.”¹⁸¹ In the end, Justice Jackson, along with Justice Reed and Chief Justice Vinson, joined the majority opinion written by Justice Clark, which is discussed above.

The lone dissenter was Justice Minton, who made it clear that his dissent turned on the state-action doctrine.¹⁸² Beginning his dissent with the observation that “I am not concerned in the least as to what happens to the Jaybirds or their unworthy scheme,” he then stated that “I am concerned about what this Court says is state action within the meaning of the Fifteenth Amendment.”¹⁸³ Justice Minton found that Justice Black simply ignored the question of state action because he wanted to address the wrong, a position that Justice Minton described as “praiseworthy” but “not in accord with the Constitution.”¹⁸⁴ In terms closely akin to the analysis in the Rehnquist memorandum to Justice Jackson, he rejected Frankfurter’s opinion out of hand. In this case, there is no doubt that Justice Minton would have seen Justice Frankfurter’s fully developed argument, which is not represented in the reference in the dissent. While Justice Minton acknowledged that “Mr. Justice Clark seems to recognize that state action must be shown,” he concluded that “[h]e finds state action in assumption, not in facts.”¹⁸⁵ Justice Minton took specific aim at Justice Clark’s analysis of the relationship between the Jaybird Association and the Democratic Party as a “gratuitous assumption.”¹⁸⁶ After a review of stipulations from the record, Justice Minton found “the complete absence of any compliance with the state law or practice, or cooperation by or with the State.”¹⁸⁷ He then rejected the claim that the State of Texas’ failure to prevent the exclusion of African-American voters from the Jaybird primary constitute state action.¹⁸⁸ Justice Minton

181. *Id.*

182. *Terry v. Adams*, 345 U.S. at 484–94 (Minton, J., dissenting).

183. *Id.* at 484–85.

184. *Id.* at 485.

185. *Id.*

186. *Id.* at 486.

187. *Id.* at 489.

188. *Id.* Justice Minton conceded that the Jaybird primary “is not forbidden by the law of the State of Texas” and asked: “Does such failure of the State to act to prevent individuals from doing

rejected the a functional concept of state action, taking instead the position that

It is only when the State by action of its legislative bodies or action of some of its officials in their official capacity cooperates with such political party or gives it direction in its activities that the Federal Constitution may come into play. A political organization not using state machinery or depending upon state law to authorize what it does could not be within the ban of the Fifteenth Amendment.¹⁸⁹

This presentation of his view of the facts provided the basis for Justice Minton's claim that *Smith v. Allwright*, where he found that "the State of Texas made the Democratic Party its agent for the conducting of a Democratic primary," did not control the outcome in *Terry v. Adams*.¹⁹⁰ In this case, Justice Minton characterized the Jaybird primary as a "straw vote," which he described in the following terms:

What the Jaybird Association did here was to conduct as individuals, separate and apart from the Democratic Party or the State, a straw vote as to who should receive the Association's endorsement for county and precinct offices. It has been successful in seeing that those who receive its endorsement are nominated and elected. That is true of concerted action by any group. In numbers there is strength. In organization there is effectiveness. Often a small minority of stockholders control a corporation. Indeed, it is almost an axiom of corporate management that a small, cohesive group may control, especially in the larger corporations where the holdings are widely diffused.¹⁹¹

Justice Minton's use of analogy to corporate control is not persuasive because it fails to address the idea that voting is a distinctive activity through which ordinary citizens constitute legitimate government. The same can be said of his observation that the Jaybird primary was indistinguishable from other pressure group activity and his conclusion that the Court does not review the activities of pressure groups.¹⁹² In the end, Justice Minton found that the majority had treated the Jaybird primary as state action because they disliked the Jaybird Association's goals.¹⁹³ This was the same conclusion reached by William Rehnquist, albeit in harder-edged terms.

what they have the right as individuals to do amount to state action? "Justice Minton responded to his own question: "I venture the opinion it does not." *Id.*

189. *Id.* at 490.

190. *Id.* at 492.

191. *Id.* at 493.

192. *Id.* at 494.

193. *Id.* Justice Minton concluded:

In this case the majority have found that this pressure group's work does constitute state action. The basis of this conclusion is rather difficult to ascertain. Apparently it derives mainly from a dislike of the goals of the Jaybird Association. I share that dislike. I fail to see how it makes state action.

Terry v. Adams retains its relevance to contemporary controversies over the role of political parties in structuring primary elections. Its fragmented opinions set forth the foundations of the controversies pitting voting rights against political-party associational claims that provided the predicates for vote negation in the 2008 Florida primaries.

The White Primary Cases are complex cases that address voting rights, the question of whether primaries are elections, and the origin of the idea that political parties are private associations. While the White Primaries ended the dispute over whether primaries are elections, the issue of whether political parties are private associations had not yet taken its modern form. During the White Primary Cases, the issue was state action, which was at the heart of *Terry v. Adams*. This issue was to be transformed into a First Amendment claim that political parties have associational claims that can legitimately serve as a counterweight to claims of voting rights. The role of William Rehnquist, who then served as a law clerk but who would serve on the Court when the cases entrenching the idea of parties as private associations and extending this reasoning to claims that political parties are expressive associations were decided, provides a link between the reasoning in the minority and what became the majority position in the cases addressing the associational claims of political parties. Neither Rehnquist, the law clerk, nor Justice Minton, the author of the dissent, took account of the structural constitutional role of voting. The three majority opinions in *Terry v. Adams* all did. This was the difference between *Grovey v. Townsend* and the other White Primary Cases as well.

The White Primary Cases defined elements of a concept of constitutive voting that drew upon the reasoning in the post-Civil War cases discussed in Part IIA. The White Primary Cases focused on why competitiveness matters in elections, on why access to participation matters, and why all voters' votes should be taken into account.

As is discussed in Part IIC, the Court extended this reasoning to vote dilution in the redistricting cases. These cases deal directly with the issue of equality in public affairs, which encompassed equality in constituting legitimate government. The voting-dilution cases did not raise issues of state action or issues of the associational claims of political parties. They address instead an additional element of constitutive voting, the idea that votes should be taken into account equally, that each voter's vote should have equal significance.

C. *One Person, One Vote: The Struggle Against Vote Dilution*

Baker v. Carr is the seminal vote-dilution case.¹⁹⁴ The issue here was not fraud or violence or corruption. The rights of voters did not clash with the associational claims of political parties. The issue here was the weight and significance of each vote determined by the number of persons in each legislative district. While the focus on the significance of each vote may initially appear less dramatic than the facts in the post-Civil War cases or the White Primary Cases, it goes to the heart of the concept of consent as the foundation of legitimate government. This is the enduring legacy of *Baker v. Carr*, and it remains the core issue in contemporary disputes over gerrymanders of all types.

The vote-dilution cases have another legacy as well. Instead of a focus on the role and rights of all voters, the vote-dilution cases address the significance of one vote weight against other votes. This unavoidable comparison threatens at times to obscure the fundamental point, the relationship of equal significance of votes to consent in ensuring the legitimacy of government authority. *Baker v. Carr* and the cases decided in the following two years addressed this element of vote dilution, sometimes directly but more often indirectly, in a series of essays on political theory. While these essays may seem only tangentially relevant, they underscore the justice's efforts to transcend arithmetic equality and to address the reasons that this kind of equality matters to democracy. The post-Civil War voting-rights cases and the White Primary Cases serve as precedents in these opinions.

This case involved two oral arguments and multiple opinions—a majority opinion on a narrow but seminal issue, three concurring opinions, and two dissents. In the year after it was decided, over one-hundred cases based on its reasoning were filed in the United States District Courts. The next year the Court decided another seminal case based on Equal Protection claims against vote dilution, *Gray v. Sanders*.¹⁹⁵ The year after that the Court decided two additional seminal cases striking down vote dilution on Equal Protection grounds, *Reynolds v. Sims*¹⁹⁶ and *Wesberry v. Sanders*.¹⁹⁷ Much of the contemporary discussion of these cases deals with the degree of equality that can be achieved and at what price.¹⁹⁸ These are important ongoing issues, to be sure. But, they are not the focus here. The focus here is on the vote-dilution cases as part of

194. 369 U.S. 186 (1962).

195. 372 U.S. 368 (1963).

196. 377 U.S. 533 (1964).

197. 376 U.S. 1 (1964).

198. See RICHARD L. HASEN, *THE SUPREME COURT AND ELECTION LAW: JUDGING EQUALITY FROM Baker v. Carr to Bush v. Gore* (New York University Press 2003).

the jurisprudence of voting and the rights of voters and the role of the federal and state government to ensure these rights to the people of the United States.

Baker v. Carr involved the failure to reapportion the Tennessee General Assembly, which consisted of a Senate with thirty-three members and a House of Representatives with ninety-nine members, between 1901 and 1961,¹⁹⁹ despite the substantial relocation of the population from rural to urban areas.²⁰⁰ Voters claimed that this failure to reapportion violated their rights under the Equal Protection Clause of the Fourteenth Amendment.²⁰¹

The District Court dismissed the case for lack of subject matter jurisdiction.²⁰² The Supreme Court, after two oral arguments, reversed the District Court and remanded the case to the District Court, which was charged with devising a remedy. The Supreme Court did not consider the merits directly, although it discussed the merits in some considerable detail.²⁰³ The Court instead addressed three issues that had served as the basis for limiting the Court's involvement in voting-rights cases since it had decided the White Primary cases. The three issues are subject matter jurisdiction,²⁰⁴ standing,²⁰⁵ and justiciability.²⁰⁶

In holding that the Court had jurisdiction over the subject matter, the Court cited the White Primary cases for the proposition that the District Courts have subject matter jurisdiction under the criminal statutes enacted to redress deprivations of rights under the Equal Protection Clause of the Fourteenth Amendment,²⁰⁷ 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."²⁰⁸

The issue of justiciability turned on the relevance of the political-question doctrine, which had formed the basis of the District Court's holding.²⁰⁹ The Court observed that "the mere fact that the suit seeks protection of a political right does not mean it presents a political ques-

199. *Baker v. Carr*, 369 U.S. 186, 188 (1962).

200. *Id.* at 192-93.

201. *Id.* at 193-94.

202. *Id.* at 196; *Baker v. Carr*, 179 F. Supp. 824, 828 (M.D. Tenn. 1959) (per curiam), *rev'd*, 369 U.S. 186 (1962).

203. *Baker*, 369 U.S. at 197.

204. *Id.* at 198-204.

205. *Id.* at 204-08 (the Court determined that it did not have to resolve the standing issue).

206. *Id.* at 208-28.

207. *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)).

208. *Baker*, 369 U.S. at 201.

209. *Id.* at 209.

tion.”²¹⁰ The Court held that the District Court had misinterpreted and misapplied *Colegrove v. Green* as compelling this result.²¹¹ The Court read *Colegrove* as standing for the proposition that the only constitutional predicate for a redistricting claim is the Guaranty Clause of Article IV, Section 4, which is a nonjusticiable political question, but does not address the possibility that any other constitutional predicate would also make the issue here a political question.²¹² The Court then reasoned that the Equal Protection Clause does not pose an issue of justiciability and that the political-question doctrine itself has been interpreted in a far more flexible manner with respect to various issues than the District Court understood.²¹³ In disposing of the political-question doctrine as a barrier against judicial consideration of voting-rights issues when these raise constitutional rights other than those of a republican form of government under the Guarantee Clause, the Court entered the “political thicket” against the advice of Justice Frankfurter, who had written the majority opinion in *Colegrove*²¹⁴ and in the face of his dissent here.²¹⁵ Having removed the political-question doctrine as a barrier to judicial consideration of vote-dilution claims, the Court remanded the matter to the District Court.²¹⁶ While it may appear that the Court decided very little, it proved to have decided the issue that mattered by opening federal courts to voters when it held that the political-question doctrine did not preclude federal courts’ hearing vote-dilution cases.

In his concurring opinion, Justice Douglas emphasized the fundamental structural nature of voting rights.²¹⁷ Observing that “[s]o far as voting rights are concerned, there are large gaps in the Constitution,” Justice Douglas found that “[y]et the right to vote is inherent in the republican form of government envisaged by Article IV, Section 4 of the Constitution.”²¹⁸ He based his analysis in substantial part on both the early post-Civil War voting-rights cases and on the White Primary cases.²¹⁹ Justice Douglas sought both to limit the scope of the political-question doctrine²²⁰ and to establish the Equal Protection Clause as the

210. *Id.* (citing *Herndon*, 273 U.S. at 540 (stating that such an objection to justiciability “is little more than a play upon words.”)).

211. *Baker*, 369 U.S. at 209.

212. *Id.* at 209–10.

213. *Id.* at 209–29.

214. For a discussion of efforts to craft a majority opinion that would have avoided a dissent by Frankfurter, see Stephen Ansolabehere & Samuel Issacharoff, *The Story of Baker v. Carr*, in CONSTITUTIONAL LAW STORIES 297 (Michael C. Dorf ed., Foundation Press 2004).

215. *Baker*, 369 U.S. at 266–330 (Frankfurter, J., dissenting).

216. *Id.* at 237.

217. *Id.* at 241–50 (Douglas, J., concurring).

218. *Id.* at 242.

219. *Id.* at 242–50.

220. *See id.* at 241–46.

constitutional predicate for redistricting claims.²²¹ These two objectives were related to Justice Douglas' reasoning relating to the scope of the federal government's role with respect to protecting voting rights, including voting rights in state elections, and the role of the judicial branch in the protection of voting rights.²²² Justice Douglas found that a state may not base its election laws on qualifications based on factors that discriminate based on race, gender, or any other violation of Equal Protection.²²³ To this end, Justice Douglas cited the post-Civil War voting-rights cases and the White Primary cases in support of his observation that "[t]he right to vote in both federal and state elections was protected by the judiciary long before that right received the explicit protection it is now accorded in § 1343(4)."²²⁴ He also used these cases to establish that "[i]ntrusion of the Federal Government into the election machinery of the States has taken numerous forms" including investigations, criminal proceedings, collection of penalties, suits for declaratory relief and for an injunction, and suits under the Civil Rights Act to enjoin discriminatory practices.²²⁵

Justice Douglas rejected claims that legislative-apportionment issues were too complex for courts:

It is said that any decision in cases of this kind is beyond the competence of courts. Some make the same point as regards the problem of equal protection in cases involving racial segregation. Yet the legality of claims and conduct is a traditional subject for judicial determination. Adjudication is often perplexing and complicated. An example of the extreme complexity of the task can be seen in a decree apportioning water among the several States. *Nebraska v. Wyoming*, 325 U.S. 589, 665. The constitutional guide is often vague, as the decisions under the Due Process and Commerce Clauses show. The problem under the Equal Protection Clause is no more intricate.²²⁶

That having been said, Justice Douglas appeared untroubled by the refusal or failure of the Court to devise a remedy but simply to remand the case to the District Court. He clearly thought that establishing the justiciability of the claims was the major concern, concluding that "[t]he

221. *See id.* at 244–49.

222. *Id.* at 245–50.

223. *Id.* at 244–45.

224. *Id.* at 247 (citing *Terry v. Adams*, 345 U.S. 461 (1953); *Smith v. Allwright*, 321 U.S. 649 (1944); *Nixon v. Herndon*, 273 U.S. 536 (1927); *Ex parte Yarbrough*, 110 U.S. 651 (1884)). Justice Douglas was addressing Justice Frankfurter's claim in his dissent that these historic voting-rights cases had no bearing on redistricting and that they dealt only with fraud and violence in elections. *See id.* at 266–330 (Frankfurter, J., dissenting).

225. *Baker*, 369 U.S. at 249 (citing *Terry*, 345 U.S. at 461; *Smith*, 321 U.S. at 649; *United States v. Classic*, 313 U.S. 299 (1941); *United States v. Mosley*, 238 U.S. 383 (1915); *Yarbrough*, 110 U.S. 651 (1884); *Ex parte Siebold*, 100 U.S. 371 (1880)).

226. *Baker*, 369 U.S. at 245.

justiciability of the present claims being established, any relief accorded can be fashioned in the light of well-known principles of equity.”²²⁷ He noted that prior dispositions of apportionment cases suggested that he foresaw remedies based on “substantial equality” that eliminated “egregious injustices.”²²⁸

Justice Clark wrote a separate concurring opinion²²⁹ to press the argument that “an appropriate remedy may be formulated.”²³⁰ Calling the Tennessee apportionment “a topsy-turvical of gigantic proportions,” and “a crazy quilt without rational basis,”²³¹ Justice Clark attached charts of each county in the state and the effect of his plan contrasted with Justice Harlan’s plan, which Justice Harlan claimed proved that continuing inequality was unavoidable.²³² As had Justice Douglas, Justice Clark took the position that “mathematical equality among voters is required by the Equal Protection Clause.”²³³ Justice Clark found that “certainly there must be some rational design to a State’s districting.”²³⁴ Justice Clark, alone among the justices, pointed out that alternative to judicial action as a means of relief from invidious discrimination.²³⁵

Justice Clark concluded his concurring opinion with an analysis of constitutive voting and the role of equality of representation in it.²³⁶ He

227. *Id.* at 250 (footnote omitted). Justice Douglas reasoned that “[w]ith the exceptions of *Colegrove v. Green*, 328 U.S. 549; *MacDougall v. Green*, 335 U.S. 281; *South v. Peters*, 339 U.S. 276, and the decisions they spawned, the Court has never through that protection of voting rights was beyond judicial cognizance. Today’s treatment of those cases removes the only impediment to judicial cognizance of the claims stated in the present complaint.” *Id.* at 249–50.

228. *Id.* at 250, n.5.

229. *Id.* at 251–64 (Clark, J., concurring).

230. *Id.* at 251.

231. *Id.* at 254.

232. *Id.* at 262–64.

233. *Id.* at 258.

234. *Id.* at 258.

235. *Id.* at 258–59. Justice Clark summarized the situation in which the people of Tennessee found themselves:

Tennessee has an “informed, civically militant electorate” and “an aroused popular conscience,” but it does not sear “the conscience of the people’s representatives.” This is because the legislative policy has riveted the present seats in the Assembly to their respective constituencies, and by the votes of their incumbents a reapportionment of any kind is prevented. The people have been rebuffed at the hands of the Assembly; they have tried the constitutional convention route, but since the call must originate in the Assembly it, too, has been fruitless. They have tried Tennessee courts with the same result, and Governors have fought the tide only to flounder. It is said that there is recourse in Congress and perhaps that may be, but from a practical standpoint this is without substance. To date Congress has never undertaken such a task in any State. We therefore must conclude that the people of Tennessee are stymied and without judicial intervention will be saddled with the present discrimination in the affairs of their state government.

Id. at 259 (footnote omitted).

236. *Id.* at 260–62.

thereby placed this case and the issue of equal representation in the history of the Court's protection of the constitutional value of democratic government, stating:

As John Rutledge (later Chief Justice) said 175 years ago in the course of the Constitutional Convention, a chief function of the Court is to secure the national rights. Its decision today supports the proposition for which our forebears fought and many died, namely, that to be fully conformable to the principle of right, the form of government must be representative. That is the keystone upon which our government was founded and lacking which no republic can survive. It is well for this Court to practice self-restraint and discipline in constitutional adjudication, but never in its history have those principles received sanction where the national rights of so many have been so clearly infringed for so long a time. National respect for the courts is more enhanced through the forthright enforcement of those rights rather than by rendering them nugatory through the interposition of subterfuges. In my view the ultimate decision today is in the greatest tradition of this Court.²³⁷

Justice Frankfurter's passionate dissent rejected the majority's linkage between population and representation and found this linkage "a wholly different matter from denial of the franchise to individuals because of race, color, religion or sex."²³⁸ He accused the majority of "asserting destructively novel judicial power," that could well undermine the Court's authority.²³⁹ He dismissed the majority opinion as "[a] hypothetical claim resting on abstract assumptions . . . affording illusory relief."²⁴⁰ The immediate result was to lead the lower federal courts into a "mathematical quagmire" without "accepted legal standards or criteria or even reliable analogies to draw upon for making judicial judgments."²⁴¹

237. *Id.* at 261–62 (footnote omitted).

238. *Id.* at 267.

239. *Id.* Justice Frankfurter reasoned:

Disregard of inherent limits in the effective exercise of the Court's "judicial Power" not only presages the futility of judicial intervention in the essentially political conflict of forces by which the relation between population and representation has time out of mind been and now is determined. It may well impair the Court's position as the ultimate organ of "the supreme Law of the Land" in that vast range of legal problems, often strongly entangled in popular feeling, on which this Court must pronounce. The Court's authority—possessed of neither the purse nor the sword—ultimately rests on sustained public confidence in its moral sanction. Such feeling must be nourished by the Court's complete detachment, in fact and in appearance, from political entanglements and by abstention from injecting itself into the clash of political forces in political settlements.

Id. at 267.

240. *Id.*

241. *Id.* at 268.

To Justice Frankfurter, vote dilution was a political question, not because it dealt with elections or voting but because he saw vote dilution as a "Guarantee Clause claim masquerading under a different label."²⁴² What was at issue, according to Justice Frankfurter, was the structure of a state's chosen means of representation, a question he argued was not a question of equal protection under the Fourteenth Amendment but a question of the guarantee of a republican form of government under section 4 of Article IV. Justice Frankfurter reasoned:

What, then, is this question of legislative apportionment? Appellants invoke the right to vote and to have their votes counted. But they are permitted to vote and their votes are counted. They go to the polls, they cast their ballots, they send their representatives to the state councils. Their complaint is simply that the representatives are not sufficiently numerous or powerful—in short, that Tennessee has adopted a basis of representation with which they are dissatisfied. Talk of "debasement" or "dilution" is circular talk. One cannot speak of "debasement" or "dilution" of the value of a vote until there is first defined a standard of reference as to what a vote should be worth. What is actually asked of the Court in this case is to choose among competing bases of representation—ultimately, really, among competing theories of political philosophy—in order to establish an appropriate frame of government for the State of Tennessee and thereby for all the States of the Union.²⁴³

To Justice Frankfurter, "to divorce 'equal protection' from 'Republican Form' is to talk about half a question."²⁴⁴ This was not, in Justice Frankfurter's view, an appropriate task for the judicial branch.²⁴⁵

Justice Harlan, who joined Justice Frankfurter's dissent, wrote a separate dissent, which Justice Frankfurter joined, focused on the right of a state to consider multiple factors in defining the representation in its state legislature.²⁴⁶ Observing that "what lies at the core of this controversy is a difference of opinion as to the function of representative government," Justice Harlan concluded that "[i]t is surely beyond argument that those who have the responsibility for devising a system of representation may permissibly consider that factors other than bare numbers should be taken into account."²⁴⁷ Justice Harlan, too, expressed concern about the role of the Court, calling the majority opinion "an adventure in

242. *Id.* at 297.

243. *Id.* at 299–300.

244. *Id.* at 301.

245. *Id.* at 323–24.

246. *Id.* at 332–34.

247. *Id.* at 333.

judicial experimentation.”²⁴⁸

Baker v. Carr and its progeny cited both the post-Civil War voting-rights cases and the White Primary cases in their linkage between voting rights and democracy. In *Gray v. Sanders*, Justice Douglas wrote for the majority that “[t]he concept of ‘we the people’ under the Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications.”²⁴⁹ The majority cited the post-Civil War cases and the White Primary Cases in support of this analysis.²⁵⁰ The majority concluded that “[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.”²⁵¹ In his dissent Justice Harlan, citing Justice Frankfurter’s dissent in *Baker v. Carr*, rejected the concept of one person, one vote.²⁵²

Justice Black, writing for the majority in *Wesberry v. Sanders*, responded to Justice Harlan by attributing to the Framers a concern with vote equality.²⁵³ The majority interpreted vote equality in structural terms as an integral element of democratic government:

We hold that, construed in its historical context, the command of Art. I, s 2, that Representatives be chosen “by the People of the several States” means that as nearly as is practicable one man’s vote in a congressional election is to be worth as much as another’s. This rule followed automatically, of course, when Representatives are chosen as a group on a statewide basis, as was a widespread practice in the first 50 years of our Nation’s history. . . . We do not believe that the Framers of the Constitution intended to permit the same vote-diluting discrimination to be accomplished through the device of districts containing widely varied numbers of inhabitants. To say that a vote is worth more in one district than in another would not only run counter to our fundamental ideas of democratic government, it would cast

248. *Id.* at 339. This kind of experimentation was, in Justice Harlan’s view, inconsistent with the role of the courts. He predicted that:

Those observers of the Court who see it primarily as the last refuge for the correction of all inequality or injustice, no matter what its nature or source, will no doubt applaud this decision and its break with the past. Those who consider that continuing national respect for the Court’s authority depends in large measure upon its wise exercise of self-restraint and discipline in constitutional adjudication, will view the decision with deep concern.

Id. at 339–40.

249. *Gray v. Sanders*, 372 U.S. 368, 379–80 (1963) (county unit system as a basis for counting votes in a primary election for U.S. Senator and statewide offices violated the Equal Protection clause).

250. *Id.* at 379–81.

251. *Id.* at 381.

252. *Id.* at 384 (Harlan, J., dissent).

253. *Wesberry v. Sanders*, 376 U.S. 1, 7–18 (1964) (congressional districts in Georgia).

aside the principle of a House of Representatives elected by "the People," a principle tenaciously fought for and established at the Constitutional Convention. The history of the Constitution, particularly that part of it relating to the adoption of Art. I, s. 2, reveals that those who framed the Constitution meant that, no matter what the mechanics of an election, whether statewide or by districts, it was population which was to be the basis of the House of Representatives.²⁵⁴

Here, too, the majority cited post-Civil War cases and White Primary Cases in support of the concept of equality in voting and a rejection of vote dilution.²⁵⁵ The majority in *Wesberry v. Sanders* understood the concept of one person, one vote as an element of constitutive voting at the core of legitimate government.

Although the contemporary legacy of the seminal antidilution cases has become focused on comparisons between districts and has tended to consider voting primarily in terms of the rights of individuals voters, recapturing the structural concept of voting equality is part of crafting a concept of constitutive voting. *Baker v. Carr* made questions of the significance and salience of each vote a core element of the concept of constitutive voting.

III. ARE PRIMARIES ELECTIONS?

The antidilution cases involved both general elections and primaries. The White Primary cases addressed the issue of whether primaries are elections or whether they are simply a procedure for determining intraparty preferences. Before this issue was resolved in *United States v. Classic*, the Court's embrace of formalistic proceduralism in *Condon* and *Grove* created uncertainty and confusion that resulted in a decision that threatened to deprive African-Americans of the right to vote in primaries.²⁵⁶

In 1921, before it began hearing the White Primary Cases, the Court heard a campaign-finance case in which it held that primaries are not elections that support Congressional authority to intervene.²⁵⁷ The Court held that primaries were "unknown" when the Constitution was drafted and ratified and "[m]oreover, they are in no sense elections for an office but merely methods by which party adherents agree upon candidates whom they intend to offer and support for ultimate choice by all qualified voters."²⁵⁸ The Court held that "[g]eneral provisions touching

254. *Id.* at 7-9 (footnotes omitted).

255. *Id.* at 17-18.

256. *See supra* Part II.B.

257. *Newberry v. U.S.*, 256 U.S. 232 (1921) (considering whether the Federal Corrupt Practices Act of 1910 applied to primary elections and holding that it did not).

258. *Id.* at 250.

elections in Constitutions or statutes are not necessarily applicable to primaries—the two things are radically different.”²⁵⁹ The White Primary Cases, over time, reversed this result and the reasoning on which it was based. The first of the White Primary cases, *Nixon v. Herndon*, treated a “primary election that may determine the final result” as the equivalent of a “final election.”²⁶⁰ This concept provided the analytical framework for understanding the significance of primary elections in structural constitutional terms and enabled the Court to put substance over form in protecting the concept of consent at the heart of the Constitution.

The next case, *Nixon v. Condon*, was brought by the same plaintiff who challenged the Texas Democratic Party’s response to *Nixon v. Herndon*.²⁶¹ The Court held that the next case was controlled by *Herndon*, although the Court focused on the narrow procedural issue of whether the Executive Committee of the party could make a determination excluding African-Americans registered as Democrats from party membership for purposes of determining eligibility to vote in party primaries.²⁶² In adopting this procedural minimalism as the basis for its opinion, the Court provided the Texas Democratic Party invaluable guidance for excluding African-Americans who were registered Democrats from the right to vote in the Democratic Party primary for federal offices. This approach illustrates the shifting balances between form and substance in the ensuing cases.

It should have been no surprise that the Texas Democratic Party promptly followed this advice.²⁶³ The State Convention declared African-American voters who were otherwise eligible to vote ineligible for membership in the Texas Democratic Party. It is perhaps not surprising but certainly disappointing that the Court upheld this approach. In explaining its position in *Grovey v. Townsend*, the Court found that “the primary is a party primary”²⁶⁴ and then blended the concept of a primary as purely party activity with the concept of a political party as a private

259. *Id.*

260. *Nixon v. Herndon*, 273 U.S. 536, 540 (1927).

261. *Nixon v. Condon*, 286 U.S. 73, 81 (1932).

262. *Id.* at 83–84.

263. *Grovey v. Townsend*, 295 U.S. 45, 46 (1935), *overruled by* *Smith v. Allwright*, 321 U.S. 649 (1944).

264. *Id.* at 50. The Court reasoned:

While it is true that Texas has by its laws elaborately provided for the expression of party preference as to nominees, has required that preference to be expressed in a certain form of voting, and has attempted in minute detail to protect the suffrage of the members of the organization against fraud, it is equally true that the primary is a party primary; the expenses of it are not borne by the state, but by members of the party seeking nomination; the ballots are furnished not by the state, but by the agencies of the party; the votes are counted and the returns made by instrumentalities created by the party; and the state recognizes the state convention

association. The Court noted that the complaint stated that the primary election determines who will hold federal office because "nomination by the Democratic party is equivalent to election."²⁶⁵ The Court dismissed this claim in the following terms:

The argument is that as a negro may not be denied a ballot at a general election on account of his race or color, if exclusion from the primary renders his vote at the general election insignificant and useless, the result is to deny him the suffrage altogether. So to say is to confuse the privilege of membership in a party with the right to vote for one who is to hold a public office. With the former the state need have no concern, with the latter it is bound to concern itself, for the general election is a function of the state government and discrimination by the state as respects participation by negroes on account of their race or color is prohibited by the Federal Constitution.²⁶⁶

In blending its distinction between primary and general elections with the concept of a political party as a private association, the Court began to lay the groundwork for subsequent claims that the rights of political parties took precedence over the rights of voters.

This distinction between primary elections and general elections endured for six years. The Court in *United States v. Classic* upheld "the right of the voters at the primary to have their votes counted."²⁶⁷ The Court emphasized the fundamental nature of the right of the people to choose their representative, finding this right part of the constitutional structure and one of the purposes of the Constitution.²⁶⁸ The Court held that:

[u]nless the constitutional protection of the integrity of "elections" extends to primary elections, Congress is left powerless to effect the constitutional purpose, and the popular choice of representatives is stripped of its constitutional protection save only as Congress, by taking over the control of state elections, may exclude from them the influence of the state primaries.²⁶⁹

The Court did not limit constitutional protection of voting only if the primary determined the outcome of the general election but extended very broadly, stating:

Where the state law has made the primary an integral part of the procedure of choice, or where in fact the primary effectively controls

as the organ of the party for the declaration of principles and the formulation of policies.

Id. (citations omitted).

265. *Id.* at 54.

266. *Id.* at 54-55.

267. *Id.* at 54.

268. *Id.* at 54-55.

269. *Classic*, 313 U.S. at 319 (footnote omitted).

the choice, the right of the elector to have his ballot counted at the primary is likewise included in the right protected by Article I, § 2. And this right of participation is protected just as is the right to vote at the election . . . whether the voter exercises his right in a party primary which invariably, sometimes or never determines the ultimate choice of the representative.²⁷⁰

The Court addressed the inconsistency between *Classic* and *Grovey* three years later in *Smith v. Allwright*, where the Court took the position that “[i]t may now be taken as a postulate that the right to vote in such a primary for the nomination of candidates without discrimination by the State, like the right to vote in a general election, is a right secured by the Constitution.”²⁷¹ It expressly overruled *Grovey v. Townsend*.²⁷² As is discussed in the following section of the article, the Court then addressed the next issue, namely, the question of whether a political party is a private association and the implications of the possible responses to that question for determining whether, how, or to what extent voters’ rights are protected by the Constitution.²⁷³

The last of the White Primary cases, *Terry v. Adams*, treated elections as processes that may consist of several steps that are discrete in form but not in substance.²⁷⁴ The Court held that the Fifteenth Amendment applied to “any election in which public issues are decided or public officials selected.”²⁷⁵ The Court held that the preference vote held by the Jaybird Association was “an integral part” of the election process²⁷⁶ and concluded that “[t]he effect of the whole procedure, Jaybird primary plus Democratic primary plus general election, is to do precisely that which the Fifteenth Amendment forbids—strip Negroes of every vestige of influence in selecting the officials who control the local county matters that intimately touch the daily lives of citizens.”²⁷⁷

Much of the controversy in *Terry v. Adams* centered on the state-action question. Because the election at issue here was an election for county offices, the state action question became much more central here than it was in the cases dealing with primary elections for federal office, which relied on Article I, Sections 2 and 4, which did not raise the state-action issue. Much of the academic criticism of *Terry v. Adams*, and, by extension, the other White Primary cases, is based on concern about the

270. *Id.* at 318.

271. *Smith v. Allwright*, 321 U.S. 649, 661–62 (1944).

272. *Id.* at 666.

273. *See Terry v. Adams*, 345 U.S. 461, 462–63 (1953).

274. *See id.* at 468–70.

275. *Id.* at 468.

276. *Id.* at 469.

277. *Id.* at 469–70.

low threshold for finding state action. The majority took the position that state action arose based on the relationship among the Jaybird primary, the formal Democratic Party primary, and the general election.²⁷⁸ The Court held that, given these relationships, "[i]t is immaterial that the state does not control that part of this elective process which it leaves for the Jaybirds to manage."²⁷⁹ The concurring opinions took issue with the scope of this analysis,²⁸⁰ while the dissent rejected it.²⁸¹

The Florida primary was, of course, a presidential primary, and it raised the issue of disregarding all votes, not discrimination based on race, nationality, or gender. The state-action dispute is relevant to due process claims under the Fourteenth Amendment, but not to claims under Article I, Sections 2 and 4.

The controversy over state action has receded as the Court has turned to the question of whether political parties are private associations with First Amendment rights. This claim emerged in two phases. The initial phase focused on whether political parties are private associations.²⁸² The second phase focused on rights of association claims that can be raised by the organization even when this claim limits the claims of association that can be raised by members of the association.²⁸³

IV. POLITICAL PARTIES' ASSOCIATIONAL CLAIMS

While the Court has recognized a right of association, it has not developed a stable or coherent jurisprudence related to that right. Indeed, very little is settled with respect to association as a constitutionally protected right. This article does not purport to offer a theory of association or a comprehensive conceptual framework for analyzing claims arising from the right of association. The aims here are more modest but still daunting—to understand what associational claims parties have made, whether these claims are made in the name of the party entity or the party members or both, and the implications of these various approaches to association for voting rights.

While the Constitution does not refer expressly to a right of associ-

278. *See id.* at 469.

279. *Id.*

280. Justice Frankfurter agreed, rather tentatively and reluctantly, that "the State authority has come into play," *id.* at 475, but he took the position that the federal courts had no authority to devise and impose a remedy. *See id.* at 477. Justice Clark's concurrence took the position that "the Jaybird Democratic Association operates as part and parcel of the Democratic Party, an organization existing under the auspices of Texas law." *Id.* at 482 (Clark, J., concurring) (footnote omitted).

281. In his dissent, Justice Minton claimed that the majority had no constitutional basis for finding state action in this case. *See id.* at 484-94 (Minton, J., dissenting).

282. *See* discussion *infra* Part IV.A.

283. *See* discussion *infra* Part IV.B.

ation and does not use the words association or associate, the Court has long recognized that the reference in the First Amendment to the right to “peaceably assemble” encompasses a much broader right to associate. Indeed, the Court has recognized that a right to associate in order to exercise such other constitutionally protected rights as speech is not only necessary but also so fundamental that the right to associate is inherent in these other rights.

Political parties have asserted two distinct but interrelated associational claims. The first was the claim that political parties are private associations that cannot be regulated by the government under the state-action doctrine. This claim emerged from the White Primary Cases where political parties were asserting their status as private associations to protect their rules and procedures designed to exclude African-American voters from participating in primary elections. Over time, the claim that political parties are private associations became a claim under the First Amendment right of association that was controlled exclusively by party managers as an association right of the party, not a right that involved associational rights of members. The second claim was a more powerful claim under the First Amendment, a claim that political parties have a right to exclude voters based on a right of expressive association. This right of expressive association has been relied upon by the Court to uphold discrimination against persons that an organization claims are inconsistent with its image and message and to prohibit various types of primaries in which voters may vote for any candidate from any party for any office. In the 2008 Florida primaries, the national party committees negated the votes of persons who shared the ideals of the party to the extent that they registered as members of their respective parties.

Taken together, the claims under the First Amendment that political parties are private associations with their own First Amendment rights and the claim under the First Amendment that political parties are expressive associations that can exclude whomever the party managers choose provide a powerful but misguided basis for negating the votes of primary voters. Both are doctrines of voter exclusion that conflict fundamentally with both the right to vote and the concept of voting as a structural element of the Constitution. The private-association claims remain important because they apply to cases in which the only issue is the primacy of party managers whatever the issue. These claims by party managers could potentially be limited by treating various activities of party managers as subject to greater or lesser constitutional protection. The expressive-association claims are not subject to such limitations because they are claims that the entire identity of the party is threatened. These two types of First Amendment claims are now in the process of

being blended into a claim that party managers are not accountable to either voters or party members.

A. *Political Parties as Private Associations*

The claims in the White Primary Cases were based on the Fourteenth and Fifteenth Amendments, which meant that questions of state action were part of the deliberations. These cases were brought by voters against political parties, party managers, and election officials. Political parties claimed that they were private associations and thus not subject to claims brought under the Fourteenth or Fifteenth Amendments with their state-action requirement. In the second phase of its development, the claim that political parties are private associations was brought by the political parties under the First Amendment as a defense against action by the state. In this second phase, voters were not parties to the litigation and little attention was given to voting or to elections.

1. PARTIES AS PRIVATE ASSOCIATIONS: THE WHITE PRIMARY CASES

The issue of whether political parties were private associations for purposes of the state-action doctrine is present in all of the White Primary cases because only state action was subject to regulation under the Fourteenth and Fifteenth Amendments. The first of the White Primary cases, *Nixon v. Herndon*, presented a clear instance of state action because an African-American doctor who was a member of the Democratic Party and a qualified voter had been denied the right to vote in a Democratic Party primary for state and federal offices pursuant to a state statute.²⁸⁴ Writing for a unanimous Court, Justice Holmes found that “[w]e find it unnecessary to consider the Fifteenth Amendment, because it seems to us hard to imagine a more direct and obvious infringement of the Fourteenth.”²⁸⁵

The Court faced an only slightly more difficult issue in the second White Primary case, *Nixon v. Condon*.²⁸⁶ In response to the Court’s decision in *Nixon v. Herndon*, the Texas legislature had enacted on an emergency basis a statute providing that a political party’s executive committee had the authority to determine party membership, which, in turn, determined who could vote in the party’s primary.²⁸⁷ It was no

284. 273 U.S. 536, 537 (1927). See *supra* Part II.B.

285. *Herndon*, 273 U.S. at 540–41.

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

287. *Id.* at 82. The new statute provided that

every political party in this State through its State Executive Committee shall have the power to prescribe the qualifications of its own members and shall in its own way determine who shall be qualified to vote or otherwise participate in such political party; provided that no person shall ever be denied the right to participate

surprise that the State Executive Committee of the Democratic Party promptly adopted a resolution providing that “‘all white democrats who are qualified under the constitution and laws of Texas’” would be permitted to vote in the party primary.²⁸⁸

The arguments of the petitioner and respondent in *Nixon v. Condon* addressed the core issue of whether a political party had inherent authority apart from the state statute to determine its own membership or whether the party depended on the state for statutory authority to determine its membership.²⁸⁹ This was an argument over state action in the guise of an argument over the relationship between the party and the state government. While the Court identified the Fourteenth Amendment as the constitutional predicate for its decision, it did so only in the last sentence and then without any reference to state action.

The petitioner, Dr. Nixon, argued that he had been denied the right to vote in the Democratic Party primary solely on the basis of race and that this action violated the Fourteenth Amendment.²⁹⁰ The petitioner argued that several provisions of Texas election law were inconsistent with claims that political parties are purely private association but that “parties and their representatives have become the custodians of official power.”²⁹¹ The Court characterized the petitioner’s argument regarding political parties as claiming that “if heed is to be given to the realities of political life, they are now agencies of the State, the instruments by which government becomes a living thing.”²⁹² The Court concluded its paraphrase of the petitioner’s argument in terms that echo in the arguments over expressive association: “In that view, so runs the argument, a party is still free to define for itself the political tenets of its members, but to those who profess its tenets there may be no denial of its privileges.”²⁹³

The respondents claimed that the Fourteenth Amendment does not apply to private associations and that the Democratic Party of Texas was a private association.²⁹⁴ As summarized by the Court, respondents developed this argument in the following terms:

in a primary in this State because of former political views or affiliations or because of membership or non-membership in organizations other than the political party.

Id.

288. *Id.* at 82.

289. *Id.* at 83–84.

290. *Id.* at 83.

291. *Id.* at 84.

292. *Id.*

293. *Id.* The dispute over expressive association is whether the authority to determine the characteristics of participants apart from sharing the party’s beliefs is part of the right of expressive association. See discussion *infra* Part IV.B.

294. *Id.* at 83.

This line of demarcation drawn, we are told that a political party is merely a voluntary association; that it has inherent power like voluntary associations generally to determine its own membership; that the new article of the statute, adopted in place of the mandatory article of exclusion condemned by this court, has no other effect than to restore to the members of the party the power that would have been theirs if the lawmakers had been silent; and that qualifications thus established are as far aloof from the impact of constitutional restraint as those for membership in a golf club or for admission to a Masonic lodge.²⁹⁵

These arguments resonate in contemporary controversies taking place far removed from the historic controversies over the state-action doctrine. Controversies over the implications for voting, elections, and democracy are now taking under the First Amendment, which, like state action in the White Primary Cases, is being used as a grounds for denying both voters' rights and claims of the constitutional significance of voting.

The Court in *Nixon v. Condon* chose quite deliberately to decide the case on procedural grounds. The reasons for this choice are not explained by the Court's reasoning in the case. The Court sidestepped the respondent's argument that a political party is simply a voluntary association like any other voluntary association with the observation that "[w]hether a political party in Texas has inherent power today without restraint by any law to determine its own membership, we are not required at this time to either affirm or to deny."²⁹⁶ In response to the petitioner's argument that a political party is an agency of the state, the Court found that "[a] narrower base will serve for our judgment in the cause at hand."²⁹⁷ Indeed, the Court was careful to explain that it was not following the petitioner's reasoning with respect to the transformation of a political party from a voluntary association to a state agency.²⁹⁸ The Court based its decision on the state's delegation of authority to determine party membership to the state party executive committee. The Court held that this authority rested exclusively in the state party con-

295. *Id.*

296. *Id.*

297. *Id.* at 84.

298. *Id.* The Court stated:

the effect of Texas legislation has been to work so complete a transformation of the concept of a political party as a voluntary association, we do not now decide. Nothing in this opinion is to be taken as carrying with it an intimation that the court is ready or unready to follow the petitioner so far. As to that, decision must be postponed until decision becomes necessary.

Id. Whether the Court has yet decided this issue or whether it has become necessary for the Court to do so remains a matter of some considerable dispute, but that dispute is no longer directly framed by the historic dimensions of the state-action doctrine.

vention, not in the party executive committee.²⁹⁹ Because the Court found that this delegation of authority to the state executive committee was not consistent with the operating rules of the party and because the state convention had never enacted a resolution to bar African-Americans who were otherwise qualified to vote from voting in the state party primary, the state executive committee had acted solely on the basis of authority delegated by the state, not on the basis of any inherent authority it may have had.³⁰⁰ The Court held that “[w]hatever power of exclusion has been exercised by the members of the committee has come to them, therefore, not as the delegates of the party, but as the delegates of the State.”³⁰¹ The Court made it clear that it did not question the authority of the state legislature to delegate authority to the state party executive committee.³⁰² The Court focused solely on the political party that had been the subject of the legislation and reasoned as follows:

The pith of the matter is simply this, that when those agencies are invested with an authority independent of the will of the association in whose name they undertake to speak, they become to that extent the organs of the State itself, the repositories of official power. They are then the governmental instruments whereby parties are organized and regulated to the end that government itself may be established or continued. What they do in that relation, they must do in submission to the mandates of equality and liberty that bind officials everywhere. They are not acting in matters of merely private concern like the directors or agents of business corporations. They are acting in matters of high public interest, matters intimately connected with the capacity of government to exercise its functions unbrokenly and smoothly.³⁰³

The emphasis on the will of the party alluded to here was the will of the state party convention, but the Court did not link this line of reasoning to any concept of the rights of party members to vote for convention delegates. The Court did not advance a concept of participatory association but relied instead on the relation between the respective roles of the executive committee and the convention as set forth in the party rules. This narrow procedural ground for a voting-rights decision took voting off the table and opened the way not only for the next move by the State of Texas and its Democratic Party but also for much later cases that turned on the rights of party managers to claim exclusive rights to decide what votes are counted.

299. *Id.* at 84–85.

300. *Id.*

301. *Id.* at 85.

302. *Id.* at 88.

303. *Id.*

The dissent exposed the limitations of the majority's reasoning.³⁰⁴ The dissent argued that the state statute did not discriminate against African-Americans on its face, unlike the state statute at issue in *Nixon v. Herndon*.³⁰⁵ In addition, a primary election in Texas, according to the dissent, is a party activity financed by the political party and conducted under party rules.³⁰⁶ The dissent concluded that "[p]olitical parties are fruits of voluntary action."³⁰⁷ As such, the dissent took the position that the state statute "refrained from interference with the essential liberty of party associations and recognized their general power to define membership therein."³⁰⁸ This issue echoes in the expressive association cases in which party associational rights have become the rationale for permitting invidious exclusions. The result of adopting the dissent's reasoning here would have been to deny an otherwise qualified African-American voter the right to vote. The dissent did not address this element of its reasoning or the constitutional predicate that would have provided for such an outcome. Instead, the dissent confined its reasoning to the lack of facially discriminatory language in the state statute and the rights of a political party. In this sense, the dissent foreshadows the controversies surrounding the expressive association jurisprudence of our own day.

In *Grove v. Townsend* the Court held that an African-American who was qualified to vote in the state party primary except for his race, could be constitutionally denied a ballot for the primary election simply because the exclusionary policy had been adopted by the state party convention.³⁰⁹ The Court declared that "[w]e are not prepared to hold that in Texas the state convention of a party has become a mere instrumentality or agency for expressing the voice or will of the state."³¹⁰ The petitioner claimed that the national Democratic Party had never adopted a policy excluding African-Americans.³¹¹ The Court dismissed this claim on grounds that it was irrelevant to the question of whether the State of Texas had discriminated against African-American voters but instead "it assumes merely that a state convention, the representative and agent of a

304. *Id.* at 89–106. The dissent was written by Justice McReynolds, joined by Justice VanDevanter, Justice Sutherland, and Justice Butler. *Id.* at 89 (McReynolds, J., dissenting).

305. *Id.* at 94.

306. *Id.* at 96–104.

307. *Id.* at 104. The dissent described the operational implications of this characterization of a political party as a voluntary association in the following terms: "Where there is no unlawful purpose, citizens may create them at will and limit their membership as seems wise. The State may not interfere. White men may organize; blacks may do likewise. A woman's party may exclude males. This much is essential to free government." *Id.*

308. *Id.* at 105.

309. *Grove v. Townsend*, 295 U.S. 45 (1935).

310. *Id.* at 54.

311. *Id.* at 55.

state association, has usurped the rightful authority of a national convention which represents a larger and superior country-wide association.”³¹² The Court found no reason to consider this case, which later became a central issue in the cases in which political-party national committees claimed that they were private associations with associational rights under the First Amendment, even when state committees or state conventions or state primaries had reached a different result.³¹³

Grovey represents the conceptual sterility of the formalist proceduralism that the Court embraced in *Condon*. The result was that the Court found no countervailing interest to the claims of political parties that they were private associations and that party primaries were not elections. The unanimous opinion in *Grovey* made virtually no reference to any constitutional predicate. There is no better example than *Grovey* of the negative consequences of a failure or refusal to consider both the rights of voters and the role of voting as an element of constitutional structure.

The Court began to change course in *United States v. Classic*.³¹⁴ Unlike the prior White Primary cases, this was a case brought by the United States alleging violation of criminal statutes defining criminal sanctions for violation of the duty to count duly cast votes. In this respect, *Classic* looked back to the post-Civil War cases which also involved federal statutes imposing criminal penalties for interfering with the right to vote.³¹⁵ The constitutional predicates in *Classic* as in these earlier cases were sections 2 and 4 of Article I, which did not involve state-action limitations. Because state action was not at issue, the question of whether political parties are public entities or private associations was not at issue. Nevertheless, *Classic* was an important case in addressing this issue in the two remaining White Primary cases.

The Court expressly overruled *Grovey* in *Smith v. Allwright*.³¹⁶ An individual African-American citizen was denied the right to vote in a primary election solely because of his race. The Court held that Article I, section 4, authorized Congress to regulate both primary and general elections³¹⁷ and that the Fourteenth and Fifteenth Amendments protected voters from discrimination on the basis of race. In so ruling, the Court held that treating the political party that played a role, however substantial, in organizing the primary election, did not deprive voters of the protection provided in the Fourteenth and Fifteenth Amendments.

312. *Id.*

313. See discussion *infra* Part IV.A.2.

314. *United States v. Classic*, 313 U.S. 299 (1941).

315. For a discussion of these cases, see *supra* Part II.A.

316. *Smith v. Allwright*, 321 U.S. 649, 666 (1944).

317. For a discussion of this part of the holding, see *supra* Part III.

The Court in *Smith v. Allwright* held that “[p]rimary elections are conducted by the party under state statutory authority.”³¹⁸ The Court reasoned:

We think that this statutory system for the selection of party nominees for inclusion on the general election ballot makes the party which is required to follow these legislative directions an agency of the State in so far as it determines the participants in a primary election. The party takes its character as a state agency from the duties imposed upon it by state statutes; the duties do not become matters of private law because they are performed by a political party.³¹⁹

The Court made it clear that it reached this conclusion based on the role of voting in the constitutional structure. Any characterization of a political party as a private association cannot be relied upon to sustain discrimination in the context of voting. The Court reasoned:

The United States is a constitutional democracy. Its organic law grants to all citizens a right to participate in the choice of elected officials without restriction by any State because of race. This grant to the people of the opportunity for choice is not to be nullified by a State through casting its electoral process in a form which permits a private organization to practice racial discrimination in the election. Constitutional rights would be of little value if they could be thus indirectly denied.³²⁰

The Court observed that “[t]he privilege of membership in a party may be, as this Court said in *Grovey v. Townsend*, 295 U.S. 45, 55, no concern of the State. But when, as here, that privilege is also the essential qualification for voting in a primary to select nominees for a general election, the State makes the action of the party the action of the State.”³²¹ The Court held:

Here we are applying, contrary to the recent decision in *Grovey v. Townsend*, the well-established principle of the Fifteenth Amendment, forbidding the abridgement by a State of a citizen’s right to vote. *Grovey v. Townsend* is overruled.³²²

Smith v. Allwright put voting rights and protection afforded the right to vote at the center of any election-law case involving either a primary or a general election. Any claim that a political party is a private association cannot be used as the constitutional predicate for denying the right to vote.

The dissent by Justice Roberts referred in passing to the Court’s

318. *Smith*, 321 U.S. at 663.

319. *Id.*

320. *Id.* at 664.

321. *Id.* at 664–65.

322. *Id.* at 666.

refusal in *Nixon v. Herndon* to decide whether a political party had the authority, apart from the state statute at issue in that case, to determine its membership and used that as the basis for the Court's unanimous opinion in *Grovey*.³²³

Terry v. Adams involved an organization, the Jaybird Association, which might appear to be a private association but which the Court held was engaged in the same activities as a political party.³²⁴ The Court found that it did not need to decide whether the Jaybird Association was a political party on essentialist grounds but that it could resolve the case by determining whether the voting in the Jaybird Association determined the result of the Democratic Party primary.³²⁵ This functional approach marked the end of direct claims that political parties are private association on essentialist grounds and the beginning of the turn to finding a constitutional predicate for very similar claims in the First Amendment.

2. PARTIES AS PRIVATE ASSOCIATIONS: FIRST AMENDMENT CLAIMS

The cases raising claims by political parties that they are private associations for purposes of the First Amendment rights of speech and association are distinguished from the White Primary cases by their consequences for voting rights. While the White Primary Cases protected voting rights, the contemporary First Amendment claims of political parties have protected only the unfettered discretion of political party managers and, in the process, have repeatedly negated voters rights and the significance of voting. The result has been a jurisprudence that has come very close to treating primary elections as private activities by private associations. Indeed, the Court has never squarely faced the conceptual issues of treating primaries as public activities of private associations. Although the Court has come to conflate registering to vote as a member of a particular party with party membership for purposes that do not involve voting, it has not developed a concept of party membership and has not found any constitutional significance in the absence of such a concept. The concept of a political party has become coterminous with party managers.

It is perhaps not surprising that the Court was receptive to the claims of political parties in an era of sociocultural turmoil based on renewed claims to civil rights by African-Americans and women, oppo-

323. *Id.* at 667–68 (Roberts, J., dissenting). Justice Roberts' main argument was based on the need to preserve continuity in judicial decisions. See discussion *supra* Part II.B.

324. *Terry v. Adams*, 345 U.S. 461 (1953). For a more detailed discussion of the facts in this case, see discussion *supra* Part II.B.

325. *Terry*, 345 U.S. at 474–75.

sition to an unpopular war, and dismissal of cultural constraints in personal lives that seemed to have survived longer than was rational. The result was a pervasive challenge to the prevailing order of things and to the people who made and benefited from that order. The members of the Court were not in the forefront of this new sociocultural assertion. While the justices understood African-Americans' claims as having a firm constitutional basis, they struggled with the claims of newly assertive women who were not at all content, even though they had been given the right to vote, and with the claims of young people in general for a political system that would not send them to needless wars abroad and limit their lives to the old order at home. In this milieu, political parties seemed like forces for order and stability, and the Court reacted accordingly by upholding the associational claims of parties as associations but not the claims of individuals to a right to associate.

The foundational case in the development of the use of the First Amendment is *Cousins v. Wigoda*, which presented a fact pattern that inverts the facts in the White Primary cases.³²⁶ Here, the party national committee wanted to increase diversity among the delegates to the party's national convention, while the Illinois primary produced a slate of delegates controlled by the Daley machine in Chicago.³²⁷ The legal issue was whether the party national committee rules or the Illinois state statute controlled the determination of which Illinois delegation would be seated.³²⁸ The case thus presented a clash of two constitutionally protected values—voting rights and equal protection. The case was decided by the Supreme Court three years after the party's 1972 national convention³²⁹ at which the party had seated the Cousins delegates, reflecting the national committee's rules rather than the Wigoda delegates elected by the primary voters and representing the Daley political machine in Chicago.³³⁰ The party national committee seated the Cousins delegates despite an injunction issued by the Illinois Circuit Court two days before the convention and subsequently upheld by the Illinois Appellate Court.³³¹ In its opinion, the Illinois Appellate Court held that "[the] right to sit as a delegate representing Illinois at the national nominating convention is governed exclusively by the Illinois Election Code."³³² The Illinois Appellate Court also held that "the law of the state is supreme

326. 419 U.S. 477 (1975).

327. *Id.* at 478–80.

328. *Id.* at 483.

329. This was the 1972 Democratic National Convention held in Miami, which followed the tumultuous 1968 Democratic Convention held in Chicago, which featured a violent confrontation between protesters and Chicago police.

330. *Cousins*, 419 U.S. at 478–80.

331. *Id.* at 481.

332. *Wigoda v. Cousins*, 302 N.E.2d 614, 626 (Ill. App. Ct. 1973), *rev'd* 419 U.S. 477 (1975).

and party rules to the contrary are of no effect.”³³³

The Supreme Court granted certiorari “to decide the important question presented [of] whether the Appellate Court was correct in according primacy to state law over the National Political Party’s rules in the determination of the qualifications and eligibility of delegates to the Party’s National Convention.”³³⁴ The Court distinguished this question from related questions, observing that

There are not before us in this case, and we intimate no views upon the merits of, such questions as:

- (1) whether the decisions of a national political party in the area of delegate selection constitute state or governmental action, and, if so, whether or to what extent principles of the political question doctrine counsel against judicial intervention
- (2) whether national political parties are subject to the principles of the reapportionment decisions, or other constitutional restraints, in their methods of delegate selection and allocation
- (3) whether or to what extent national political parties and their nominating conventions are regulable by, or only by, Congress.³³⁵

By narrowing the question to exclude the prior cases relating to the public or private character of elections and by treating nominating conventions apart from voting, the Court shifted its jurisprudence from that it had set forth in the White Primary cases and moved association to a right that could be used to denigrate other rights and to redraft the role of voting in the structure of constitutional legitimacy.

The Court reversed the Illinois court and held that “[t]he National Democratic Party and its adherents enjoy a constitutionally protected right of political association.”³³⁶ The Court never explained why or how this right resulted in negation of the vote of the participating voters in the Illinois Democratic primary. Instead, the Court treated voting and voters’ rights as a potential compelling governmental interest rather than a structural element of the Constitution that sustained a right to cast a ballot, have that ballot counted, and have the vote count for its stated purpose, in this case the selection of delegates to the party’s national nominating convention.³³⁷ There is a profound difference between asking whether the conduct of elections is a compelling government interest that can overcome another right that is, by the structure of the inquiry, presumed to have primacy, and asking how two rights are to be recon-

333. *Id.* at 627.

334. *Cousins*, 419 U.S. at 483.

335. *Id.* at 483–84, n.4 (citations omitted).

336. *Id.* at 487.

337. *Id.* at 489.

ciled under the Constitution when there is no constitutional basis for any presumption about relative importance.

The Court finessed the entire issue it had set for itself by responding to the assertion by the State of Illinois as a matter of federalism.³³⁸ The Court did not find that protecting the right of voters is not important. Instead, it found that protecting the right to vote is too important to be left to any one state.³³⁹ By default, this left the matter in the hands of the Credential Committee of the Democratic National Committee. The Court made only the most tenuous First Amendment case for this outcome and no case at all for its novel interpretation of federalism. The Court's reasoning deserves to be stated in its own terms:

Respondents argue that Illinois had a compelling interest in protecting the integrity of its electoral processes and the right of its citizens under the State and Federal Constitutions to effective suffrage. They rely on the numerous statements of this Court that the right to vote is a "fundamental political right, because preservative of all rights." *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886); *Reynolds v. Sims*, 377 U.S. 533, 562 (1964); *Williams v. Rhodes*, 393 U.S., at 31; *Kramer v. Union School District*, 395 U.S. 621, 626 (1969); *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972). But respondents overlook the significant fact that the suffrage was exercised at the primary election to elect delegates to a National Party Convention. Consideration of the special function of delegates to such a Convention militates persuasively against the conclusion that the asserted interest constitutes a compelling state interest. Delegates perform a task of supreme importance to every citizen of the Nation regardless of their State of residence. The vital business of the Convention is the nomination of the Party's candidates for the offices of President and Vice President of the United States. To that end, the state political parties are "affiliated with a national party through acceptance of the national call to send state delegates to the national convention." *Ray v. Blair*, 343 U.S. 214, 225 (1952). The States themselves have no constitutionally mandated role in the great task of the selection of Presidential and Vice-Presidential candidates. If the qualifications and eligibility of delegates to National Political Party Conventions were left to state law "each of the fifty states could establish the qualifications of its delegates to the various party conventions without regard to party policy, an obviously intolerable result." *Wigoda v. Cousins*, 342 F. Supp. 82, 86 (ND Ill. 1972). Such a regime could seriously undercut or indeed destroy the effectiveness of the National Party Convention as a concerted enterprise engaged in the vital process of choosing Presidential and Vice-Presidential candidates—a process which usually involves

338. *Id.* at 489–90.

339. *Id.*

coalitions cutting across state lines. The Convention serves the pervasive national interest in the selection of candidates for national office, and this national interest is greater than any interest of an individual State. The paramount necessity for effective performance of the Convention's task is underscored by Mr. Justice Pitney's admonition "that the likelihood of a candidate succeeding in an election without a party nomination is practically negligible. . . . As a practical matter, the ultimate choice of the mass of voters is predetermined when the nominations have been made." *Newberry v. United States*, 256 U.S. 232, 286 (1921) (dissenting opinion).³⁴⁰

The majority in *Cousins v. Wigoda* summarized its position as follows: "Illinois' interest in protecting the integrity of its electoral process cannot be deemed compelling in the context of the selection of delegates to the National Party Convention."³⁴¹ Instead, the Court characterized the issue as an "intra-party dispute" that is properly resolved within the party convention.³⁴² In effect, the majority embraced the minimalism of the early White Primary cases that reached a constitutionally unsustainable position in *Grovey v. Townsend*.³⁴³ Unlike the Court's rapid retreat from its untenable position, the idea that a party national convention takes precedence over the rights of voters persists.

The concurring and dissenting opinions in *Cousins v. Wigoda* acknowledged the issue, but failed to articulate a framework for addressing it. Justice Rehnquist, joined by Chief Justice Berger and Justice Stewart, observed that the injunction issued by the Illinois Circuit Court "was as direct and severe an infringement of the right of association as can be conceived"³⁴⁴ but then immediately stated that "[w]e would by no means downplay the legitimacy of the interest of the State in assuring that delegates to the Party Convention chosen pursuant to its electoral processes, and presumably representing the view of the majority of the party's electors in that State, are seated at the Convention."³⁴⁵ The concurrence then simply concluded that the state's interest was not "sufficient" to counterbalance the party's right of association. The reason for writing a concurring opinion was to object to the breadth of the majority opinion, particularly in its positing a national interest that took precedence over the interest of the states.³⁴⁶ The concurring opinion never questions whether the role of an ostensibly private association, a politi-

340. *Id.* (footnotes omitted).

341. *Id.* at 491.

342. *Id.* (citing *O'Brien v. Brown*, 409 U.S. 1 (1972)).

343. See discussion *supra* Part II.B.

344. *Cousins*, 419 U.S. at 491-92 (Rehnquist, J., concurring).

345. *Id.* at 492.

346. The concurring opinion states that "the dissenting opinion of Mr. Justice Pickney in *Newberry v. United States*, 256 U.S. 232, 285 (1921) without more, does not establish for us that

cal party, or a national convention of a political party, might represent a national interest that takes precedence over the interest of a state in protecting the structural constitutional role of its voters.

In his dissent Justice Powell claimed that the National Convention could have seated the dissenting delegates as at-large delegates but that it had no authority to seat them as delegates representing districts that had chosen to be represented by other delegates in the primary election.³⁴⁷ This approach to balancing the associational rights of political parties and party national conventions, the rights of primary voters, and the rights to states to protect the integrity of primary elections has not been applied or even considered in subsequent cases or academic analyses. The potentially interesting point here is not Justice Potter's specific recommendation but his analytical framework that takes account of the specific rules and procedures of the national convention.

The Court applied *Cousins v. Wigoda* as the controlling precedent in a case involving Wisconsin's open primary, which had been state law since 1903, and the conflict created with National Democratic Committee rules for delegate selection for the 1980 national convention.³⁴⁸ In 1979 the Wisconsin State Democratic Party submitted its state statute for review by the Compliance Review Commission of the National Party, which rejected delegate chosen according to state law.

The Court majority framed the issue in this case in the following terms:

The question in this case is not whether Wisconsin may conduct an open primary election if it chooses to do so, or whether the National Party may require Wisconsin to limit its primary election to publicly declared Democrats. Rather, the question is whether, once Wisconsin has opened its Democratic Presidential preference primary to voters who do not publicly declare their party affiliation, it may then bind the National Party to honor the binding primary results, even though those results were reached in a manner contrary to national party rules.³⁴⁹

there is a 'national interest' which standing alone, apart from valid congressional legislation or constitutional provision, would override state regulation in this situation." *Id.* at 495.

347. *Id.* at 496. Justice Powell reasoned: "The National Convention of the Party may seat whomever it pleases, including petitioners, as delegates at large. The State of Illinois, on the other hand, has a legitimate interest in protecting its citizens from being *represented* by delegates who have been rejected by these citizens in a democratic election. Accordingly, I would affirm the injunctions of the trial court insofar as they barred petitioners from purporting, contrary to Illinois law, to represent certain election districts of that State." *Id.* at 497.

348. *Democratic Party of the U.S. v. Wis. ex rel. La Follette*, 450 U.S. 107 (1981). The Wisconsin statute permitted any registered voter to vote in the primary of any political party and required delegates chosen in the primary to vote in accordance with the results of the open primary. *Id.* at 109-12.

349. *Id.* at 120.

The Court was not establishing a constitutional principle based on the content of the rule. It was rather addressing the question of whether the state or the national party could define the rule. As the Court stated: "The issue is whether the State may compel the National Party to seat a delegation chosen in a way that violates the rules of the Party."³⁵⁰ The Court then held that this issue was resolved in *Cousins v. Wigoda*. This was the kind of formalistic proceduralism that produced the denial of voting rights in *Grove*.

The dissent by Justice Powell, joined by Justice Blackmun and Justice Rehnquist, framed the question in the case differently, stating that "[t]he question in this case is whether, in light of the National Party's rule that only publicly declared Democrats may have a voice in the nomination process, Wisconsin's open primary law infringes the National Party's First Amendment rights of association."³⁵¹ The dissent found that the state statute "does not impose a substantial burden on the associational freedom of the National Party, and actually promotes the free political activity of the citizens of Wisconsin."³⁵² Like the majority, the dissent makes no reference to the reasons for voting. Unlike the majority, the dissent based its reasoning in part on the purpose of primary elections, namely, to enable ordinary citizens, not party bosses, to control political parties.³⁵³ The dissent described the recently enacted national party rule as having a similar purpose of opening up popular participation in the party but also noted that the party rule "has the ironic effect of calling into question a state law that was intended itself to open up participation in the nominating process and minimize the influence of 'party bosses.'"³⁵⁴

Having considered the purpose of Wisconsin's primary-election statute, it would have seemed logical to consider the importance attached to voting as a structural element of the Constitution in the post-Civil War cases and the White Primary cases. The dissent did not take this logical step. Instead, it followed a conventional First Amendment analysis that first determined whether there was a burden on the party's associational rights and then considered whether the state could establish a compelling interest for maintaining its statute.³⁵⁵ The dissent provided no evidence of having considered an analytical framework that would begin with voting and then ask whether the party rule burdened the role of voting and voters in the constitutional structure. In the end,

350. *Id.* at 121.

351. *Id.* at 127 (Powell, J., dissenting).

352. *Id.*

353. *Id.* at 127–28.

354. *Id.* at 128.

355. *Id.* at 128–38.

the dissent based its position on a finding that the Wisconsin state statute involved "relatively minimal state regulation of party membership requirements."³⁵⁶ The dissent seemed to understand that the majority opinion came close to First Amendment absolutism, and rejected the conclusion that "every conflict between state law and party rules concerning participation in the nomination process creates a burden on associational rights."³⁵⁷ The dissent found that "[t]he history of state regulation of the major political parties suggests a continuing accommodation of the interests of the parties with those of the State and their citizens."³⁵⁸ Describing the majority opinion as a departure from this history of accommodation, the dissent described the majority as "upholding a First Amendment claim by one of the two major parties without any serious inquiry into the extent of the burden on associational freedoms and without due consideration of the countervailing state interests."³⁵⁹ This could have been an analytically powerful dissent if the dissent had confronted the implications of voting in constitutional structure. Instead, the dissent referred only in passing to *Smith v. Allwright* and *Terry v. Adams* and did so without any reference to voters or voting.³⁶⁰

Subsequent cases treating political parties with First Amendment associational rights controlled by party managers made it clear that the Court was protecting the right of party managers to decide and not any particular decision that they might make. It was also clear that any disagreement between state or local party managers and national party managers, the national party managers would prevail. Voters, whether in their roles as voters or their role as party members, had no associational rights within their parties. The First Amendment right to associate had become the right of unaccountable party managers to decide whatever and however they chose.

In *Tashjian v. Republican Party of Connecticut*, the Court held that the state's enforcement of its closed primary burdened the party's associational right by denying it the right to decide to hold an open primary.³⁶¹ Republicans had attempted to amend the state statute, but Democrats controlled the state legislature.³⁶² The Republican Party then

356. *Id.* at 130.

357. *Id.*

358. *Id.* at 137.

359. *Id.* at 138.

360. *Id.* at 134, n.9 the dissent observes: "It cannot be denied that these parties play a central role in the electoral process in this country, to a degree that had led this Court on occasion to impose constitutional limitations on party activities. See *Smith v. Allwright*, 321 U.S. 649 (1944); *Terry v. Adams*, 345 U.S. 461 (1953)."

361. *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986).

362. *Id.* at 212-13.

turned to the federal courts, claiming that the right to decide was part of its First Amendment right of association. The Court reasoned that public identification with the party was not a necessary requirement for voting in the party's primary. Noting that various people played various roles in political parties, the Court concluded that "the act of formal enrollment or public affiliation with the Party is merely one element in the continuum of participation in Party affairs, and need not be in any sense the most important."³⁶³ The Court extended its reasoning to the claim that "acts of public affiliation may subject the members of political organizations to public hostility or discrimination; under those circumstances an association has a constitutional right to protect the privacy of its membership rolls."³⁶⁴

The Court found no compelling state interest in regulating the Republican Party's decision to permit independent voters to participate in its party primary election.³⁶⁵ The majority appeared to question the very idea that a government could have a compelling state interest in matters relating to a party primary, or at least with respect to the relative merits of open and closed primaries, where the Court found no consensus on the relation between the form of primary elections, the integrity of the election process, and responsible party government.³⁶⁶ The majority observed that "[u]nder these circumstances, the views of the State, which to some extent represent the views of one political party transiently enjoying majority power, as to the optimum methods for preserving party integrity lose much of their force."³⁶⁷ The majority opinion attempted to limit the scope and force of this observation by asserting in a footnote that "[o]ur holding today does not establish that state regulation of primary voting qualifications may never withstand challenge by a political party or its members" and concluding that "[t]he analysis of these situations derives much from the particular facts involved."³⁶⁸

In a vigorous dissent, Justice Scalia, joined by Chief Justice Rehnquist and Justice O'Connor, provided an alternative analysis of the issue before the Court:

Both the right of free political expression and the State's authority to establish arrangements that assure fair and effective party participation in the election process are essential to democratic government.

363. *Id.* at 215. The reasoning here is inconsistent with the reasoning in the expressive-association cases discussion *infra* Part IV.B.

364. *Tashjian*, 479 U.S. at 215, n.5 (citing *NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449 (1958) (state could not require disclosure of membership list as condition for granting a corporate charter under state law)).

365. *Tashjian*, 479 U.S. at 217–25.

366. *Id.* at 223, n.11 (survey of state primary election laws).

367. *Id.* at 224.

368. *Id.* at 225, n.13.

Our cases make it clear that the accommodation of these two vital interests does not lend itself to bright-line rules but requires careful inquiry into the extent to which the one or the other interest is inordinately impaired under the facts of the particular case. . . . Even so, the conclusion reached on the individuated facts of one case sheds some measure of light upon the conclusion that will be reached on the individuated facts of the next. Since this is an area, moreover, in which the predictability of decisions is important, I think it worth noting that for me today's decision already exceeds the permissible limit of First Amendment restrictions upon the States' ordering of elections.³⁶⁹

In the instant case, Justice Scalia questioned the existence of any association interest, concluding that "[i]t seems to me fanciful to refer to this as an interest in freedom of association between the members of the Republican Party and the putative independent voters."³⁷⁰ Analogizing the association between a voter registered as an independent created by voting in the Republican Party primary to that created by a registered Democrat who responds to questions by a Republican Party pollster, Justice Scalia concluded that "[i]f the concept of freedom of association is extended to such casual contacts, it ceases to be of any analytic use."³⁷¹

Justice Scalia then questioned the process by which the Republican Party decided to open its primary to voters registered as independents, suggesting that the decision had been taken by party managers and officeholders, not by party members. He observed that "I had always thought it was a major purpose of state-imposed party primary requirements to protect the general party membership against this sort of minority control."³⁷² He concluded that a state "may lawfully require that significant elements of the democratic election process be democratic—whether the Party wants that or not."³⁷³ Although Justice Scalia made no reference to the White Primary cases, this is what the Court held in these cases.³⁷⁴

369. *Id.* at 234–35.

370. *Id.* at 235.

371. *Id.* at 235 (citing Justice Powell's dissent in *Democratic Party of the U.S. v. Wis. ex rel. La Follette*, 450 U.S.107, 130–31 (1981), calling for careful consideration of what activities are at issue in cases involving party primaries.)

372. *Tashjian*, 479 U.S. at 236. Justice Scalia's solicitude for party members is inconsistent with his position in the campaign-finance cases that organization members have no rights to question the use of an organization's general treasury funds for campaign expenditures. For an analysis of these issue in the campaign finance cases, see Frances R. Hill, *Corporate Political Speech and the Balance of Powers: A New Framework for Campaign Finance Jurisprudence in Wisconsin Right To Life*, 27 ST. LOUIS U. PUB. L. REV. 267 (2008).

373. *Id.* at 237.

374. Why Justice Thurgood Marshall, who had devised the litigation strategy in the White Primary cases, took the position he did in writing the majority opinion is beyond the scope of this

The Court's deference to political-party managers continued in *Eu v. San Francisco County Democratic Central Committee*.³⁷⁵ In a unanimous opinion written by Justice Marshall, the Court held that California statutes prohibiting party endorsements in primary elections and defining governance requirements for political parties violated the political parties' rights of association. In this case the Court found that "the associational rights at stake are much stronger than those we credited in *Tashjian*."³⁷⁶ In this case, in contrast to the case in *Tashjian*, "party members do not seek to associate with nonparty members, but only with one another in freely choosing their party leaders."³⁷⁷

These First Amendment cases entrench the concept that a party's associational rights are an end in itself. They leave no doubt that these cases are entrenching the rights of party managers with no regard for voters or for the role of voting. What had begun in the White Primary cases as a response to claims that political parties are private associations that cannot be regulated because they do not engage in state action has become a constitutionalized deference to party managers' unfettered discretion based on the First Amendment right of association. The analysis has shifted from whether the party is engaged in state action that may be regulated to whether the state can establish a compelling state interest in regulating any choices made by party managers. The cases decided to date suggest that this is highly unlikely, even if the statute is protecting the rights of voters.³⁷⁸ The voters have disappeared from the calculus and voting is no longer a constitutionally protected activity at the core of government legitimacy.

The potential weakness in these cases was that association itself has no substantive content as a constitutional doctrine. This has been quite evident in the political-party cases, where the Court briefly considered but did not pursue the enthusiasm of professional political scientists that deference to party managers strengthened the party system in ways that enhanced good government.³⁷⁹

This potential weakness in the First Amendment jurisprudence of deference to party managers was addressed by the jurisprudence of expressive association that began as a challenge to organization manag-

article, but adds to the complexity of understanding the relationship between the White Primary cases and the later political-party associational rights cases.

375. 489 U.S. 214 (1989).

376. *Id.* at 230.

377. *Id.* at 230–31.

378. For this principle in action, see the analysis of *Nelson v. Dean*, 528 F. Supp. 2d 1271 (N.D. Fla. 2007), *infra* Part V.

379. See theme in *Cousins v. Wigoda*, 419 U.S. 477 (1975) and *Democratic Party of the U.S. v. Wis. ex rel. La Follette*, 450 U.S. 107 (1981).

ers who claimed the right to control membership in their organizations. In the early cases, discussed below, women successfully claimed the right to participate in organizations that had previously excluded them. These cases provided some basis for an inclusive and participatory jurisprudence of association, but the Court took a very different turn and blended expressive association with the exclusionary and nonparticipatory jurisprudence of the private-association cases. When the expressive-association doctrine was applied to political parties, it had the result of entrenching the rights of party managers even if this result meant limitations on individual voters' rights as both voters and as party members. The expression that was being protected provided the content, or at least the illusion of content, to the right of association. This right was protected even if it resulted in constitutionally suspect discrimination.

B. *Political Parties as Expressive Associations*

Political parties have claimed not only that they are private associations but also that they are expressive associations. While the parties' claims that they are private associations are defensive claims designed to forestall the Fourteenth and Fifteenth Amendment claims of voters, the parties' expressive-association claims allow the parties to play offense by asserting specific First Amendment rights. The expressive-association claims clash with voters' claims as both voters and as party members. This is a claim based on a concept of a political party as a nonparticipatory association that has expressive associational rights independently of the associational rights the party may derive from the associational rights of its members or voters or contributors. In this sense, expressive association is well designed to entrench the authority of party managers.

The jurisprudence of expressive association was consolidated in a series of cases striking down discrimination on the basis of gender in the membership of certain types of private associations. This was a rapidly evolving jurisprudence, changing from a recognition of expressive association as a right of both members and the organization to the assertion that organization managers controlled the content of the organization's expressive association. A series of cases that began with protection against discrimination culminated in a case that established an organization's expressive associational rights as a constitutionally permissible rationale for discrimination. Although none of these associations was itself a political party or even an advocacy organization, the Court cited cases dealing with political parties throughout its development of the doctrine of expressive association. In 2000, two days apart the Court

announced both *Dale*, which held that Dale's claims of discrimination must give way to the organization managers' claims based on the Boy Scouts' claim of expressive associational rights,³⁸⁰ and *California Democratic Party v. Jones*, which relied on the party managers' claims invoking the right of expressive association against voters who wished to vote in the Democratic Party primary.³⁸¹ The result in *Jones* might well have been the same under the post-Civil War voting-rights cases and the White Primary Cases, but it is significant going forward that the Court relied in part on the expressive associational claims made by the party managers.³⁸² By 2000, expressive associational claims had been allocated by the Court to organizations, which is to say to their managers, and had been denied to the members or voters.³⁸³ This was not an inevitable trajectory for expressive-association jurisprudence.

The first case in the contemporary development of expressive association involved two chapters of the Jaycees that decided to admit women to full membership in 1974 and 1975.³⁸⁴ The national organization threatened to revoke the charters of these two chapters, both of which were in Minnesota, which had enacted a state statute prohibiting discrimination based on gender.³⁸⁵ The United States Jaycees brought suit in federal district court claiming that the state statute violated the rights of its members under the First and Fourteenth Amendments.³⁸⁶

Writing for the Court, Justice Brennan described freedom of expressive association as "a right to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion."³⁸⁷ He found that "[t]he Constitution guarantees freedom of association of this kind as an indispensable means of preserving other individual liberties."³⁸⁸ Justice Brennan underscored the character of expressive association as a right of individuals when he observed that:

An individual's freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to

380. *Boy Scouts of America v. Dale*, 530 U.S. 640, 659–60 (2000).

381. *Jones*, 530 U.S. at 571.

382. *See id.* at 581–82.

383. *See id.*; *Dale*, 530 U.S. at 656; *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984) ("implicit in the right to engage in activities protected by the First Amendment [is] a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends").

384. *See Roberts*, 468 U.S. at 609.

385. *Id.* at 614–16 (discussing the Minnesota Human Rights Act, MINN. STAT. § 363.03(3)).

386. *Roberts*, 468 U.S. at 612.

387. *Id.* at 618.

388. *Id.*

engage in group effort toward those ends were not also guaranteed. . . . According protection to collective effort on behalf of shared goals is especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority.³⁸⁹

The majority held that the Minnesota statute addressed a compelling state interest in combating discrimination, including discrimination on the basis of gender, and did so by the least-restrictive means of achieving this purpose.³⁹⁰

Justice O'Connor concurred in the judgment but not in the Court's reasoning with respect to expressive association.³⁹¹ She found that the majority opinion "accords insufficient protection to expressive associations and places inappropriate burdens on groups claiming the protection of the First Amendment."³⁹² She took exception to the requirement that an organization make "a 'substantial' showing that admission of unwelcome members 'will change the message communicated by the group's speech'" on grounds that this requirement would allow commercial associations to claim protection under the First Amendment as expressive associations to defend against claims that they engaged in discriminatory practices.³⁹³

Justice O'Connor took the position that the first step in the analysis of expressive associational claims should be whether the organization making the claim "is an association whose activities or purposes should engage the strong protections that the First Amendment extends to expressive associations."³⁹⁴ She contrasted rights of expressive associations with the "minimal constitutional protection of the freedom of *commercial* association."³⁹⁵

Justice O'Connor would also have distinguished among the various activities in which an organization might engage, reasoning that "[t]he dichotomy between rights of commercial association and rights of expressive association is also found in the more limited constitutional protections accorded an association's recruitment and solicitation activities and other dealings with its members and the public."³⁹⁶ She gave the example of regulations of labor unions, where "a State may compel association for the commercial purposes of engaging in collective bar-

389. *Id.* at 622 (citations omitted).

390. *Id.* at 628.

391. *Id.* at 631-40 (O'Connor, J., concurring in part and concurring in the judgment).

392. *Id.* at 632.

393. *Id.*

394. *Id.* at 633.

395. *Id.* at 634.

396. *Id.*

gaining, administering labor contracts, and adjusting employment-related grievances,” but “[t]he State may not, on the other hand, compel association with a union engaged in ideological activities.”³⁹⁷ She recognized that “[d]etermining whether an association’s activity is predominantly protected expression will often be difficult, if only because a broad range of activities can be expressive.”³⁹⁸ In making this determination, she would have looked at the “purposes of an association, and the purposes of its members in adhering to it.”³⁹⁹

Consistent with this analysis, Justice O’Connor characterized the Jaycees as a commercial organization based on the “commercial nature of the Jaycees’ activities.”⁴⁰⁰ She noted that the Court of Appeals had found that the Jaycees’ advocacy of political and public causes was a significant activity.⁴⁰¹ Justice O’Connor did not dispute these findings, but noted that individuals tended to join the Jaycees for business reasons, that the focus on membership recruitment was presented as training in “solicitation and management,”⁴⁰² that businesses sometimes paid their employees’ dues in the Jaycees, and that “[t]he Jaycees itself refers to its members as customers and membership as a product it is selling.”⁴⁰³ She concluded that because the Jaycees is a commercial association it may not claim First Amendment protection from the Minnesota antidiscrimination law.⁴⁰⁴

Justice O’Connor’s analysis is consistent with the Court’s reasoning in looking at both the organization and its members’ association rights. She focused both on the overall character of the organization’s activities and on whether the statute at issue regulated commercial or expressive activities.⁴⁰⁵

The second case involved the revocation by the Board of Directors of Rotary International of the charter of the Rotary Club of Duarte, California, because it admitted women to full membership.⁴⁰⁶ The Court held that the Board of Directors of Rotary International could not rely on an expressive-association claim to sustain discrimination against women contrary to the requirements of a California statute prohibiting discrimi-

397. *Id.* at 638 (citing *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977)) (noting that the Court applied the commercial-ideological distinction in *Ellis v. Brotherhood of Ry. Clerks*, 466 U.S. 435 (1984)).

398. *Roberts*, 468 U.S. at 636.

399. *Id.*

400. *Id.* at 639.

401. *Id.*

402. *Id.*

403. *Id.* (citing *U.S. Jaycees v. McClure*, 534 F. Supp. 766, 769 (Minn. 1982)).

404. *Roberts*, 468 U.S. at 640.

405. *Id.* at 638–40.

406. *Bd. of Dirs. of Rotary Int’l v. Rotary Club of Duarte*, 481 U.S. 537, 541 (1987).

nation against women by business associations.⁴⁰⁷ The Court held that Rotary was a business association to which the California statute applied because business concerns are a motivating factor in joining local Rotary clubs.⁴⁰⁸

The most interesting feature of this case was the attempt made by Rotary International to rely on the expressive-association concept as developed in *Roberts*.⁴⁰⁹ Although this attempt was rejected, subsequent cases would see the same use not only of expressive association as a general principle, but also the effort to adapt *Roberts* to the defense of discrimination that became fully entrenched in the law in *Dale*.⁴¹⁰

In *Dale* the Court allocated the right of expressive association to the organization, which is to say, to the managers of an organization.⁴¹¹ As in the other expressive-association cases, the issue was whether an organization could invoke its right of expressive association as protection against claims that the organization had discriminated against a potential member.⁴¹² The discrimination claims at issue here were claims of discrimination based on sexual orientation.⁴¹³

The Supreme Court held that the Boys Scouts enjoyed a First Amendment right of expressive association protecting the organization's right to select its members and to exclude those whose membership would be inconsistent with the organization's expression of its values.⁴¹⁴ The Court found that the Boy Scouts are an expressive association and that permitting Dale to remain a member would impair its expression.⁴¹⁵ It then determined that applying the New Jersey public-accommodation statute to require that the Boy Scouts reinstate Dale would violate the

407. *Id.* at 549. The California statute at issue was the Unruh Civil Rights Act, CAL. CIV. CODE § 51 (West 2006).

408. *Rotary Club*, 481 U.S. at 543 (citing *Rotary Club of Duarte v. Bd. of Dirs. of Rotary Int'l*, 224 Cal. Rptr. 213, 226 (Ct. App. 1986)).

409. *Rotary Club*, 481 U.S. at 544–46.

410. 530 U.S. 640 (2000). For an analysis of associational claims and discrimination, see Erwin Chemerinsky & Catherine Fisk, *The Expressive Interest of Associations*, 9 WM. & MARY BILL. RTS. J. 595 (2001).

411. *Dale*, 530 U.S. at 650.

412. *Id.* at 644; see also *Rotary Club*, 481 U.S. at 539; *Roberts v. U.S. Jaycees*, 468 U.S. 609, 612 (1984).

413. *Dale*, 530 U.S. at 644–47. James Dale was an Eagle Scout who then became an assistant scoutmaster. *Id.* at 644. Dale's membership in the Boy Scouts was revoked a month after he was identified in the press as the co-president of the Rutgers University Lesbian/Gay Alliance. *Id.* at 645. Dale brought suit in New Jersey state court claiming that the Boy Scouts had violated the New Jersey public accommodation statute. *Id.* (citing N.J. STAT. ANN. §§ 10:5–4 (West 2007) and 10:5–5 (West 2008)).

414. The Court split 5–4, with Chief Justice Rehnquist writing for the majority consisting of Justices O'Connor, Scalia, Kennedy, and Thomas. *Id.* at 643. Justices Stevens, Souter, Ginsburg, and Breyer dissented. *Id.* at 663.

415. *Id.* at 647–56.

organization's freedom of expressive association.⁴¹⁶

The problem the Court faced was that it was far from clear that the Boy Scouts in fact had a policy of any kind relating to sexual identity.⁴¹⁷ The New Jersey Supreme Court had found that "Boy Scout members do not associate for the purpose of disseminating the belief that homosexuality is immoral; Boy Scouts discourages its leaders from disseminating *any* views on sexual issues; and Boy Scouts includes sponsors and members who subscribe to different views in respect of homosexuality."⁴¹⁸ The Court did not directly contradict these findings but instead it relied on the briefs filed with the Court by the Boy Scouts as evidence⁴¹⁹ and, based on this unorthodox evidence, it then redefined the nature and extent of the evidentiary showing necessary to establish that the organization was an expressive association and that its freedom of expressive association would be impaired.⁴²⁰ By treating statements in briefs as evidence, the Court took the position that members had no role in shaping or adopting policies, in receiving notice of or information about policies, or even in being aware of policies.⁴²¹ In so doing, the Court ignored or discounted the associational rights and claims of members and made expressive association an arena in which only the views of managers, whether or not formally expressed as part of the organization's docu-

416. *Id.* at 656–61.

417. In his dissent, Justice Souter, which Justices Ginsberg and Breyer joined, took the position that the Boy Scouts "has not made out an expressive association claim . . . because of its failure to make sexual orientation the subject of any unequivocal advocacy, using the channels it customarily employs to state its message." *Id.* at 701. Justice Stevens, in his dissent, which Justices Souter, Ginsburg, and Breyer joined, took the same position, stating that "[a]n expressive association claim, however, normally involves the avowal and advocacy of a consistent position on some issue over time." *Id.* at 696. Justice Stevens devoted a substantial portion of his dissent to the point that the Boys Scouts as an organization had never adopted a policy relating to homosexuality. *Id.* at 683–97.

418. *Id.* at 654–55 (quoting *Dale v. Boy Scouts of America*, 734 A. 2d 1196, 1223 (N.J. 1999)).

419. *Dale*, 530 U.S. at 651. Justice Stevens in his dissent took vigorous exception to this approach, concluding that "[t]his is an astounding view of the law." *Id.* at 686. He observed that "I am unaware of any previous instance in which our analysis of the scope of a constitutional right was determined by looking at what a litigant asserts in his or her brief and inquiring no further." *Id.* He reasoned that "we must inquire whether the group is, in fact, expressing a message (whatever it may be) and whether that message (if one is expressed) is significantly affected by a State's antidiscrimination law. More critically, that inquiry requires our *independent* analysis, rather than deference to a group's litigating posture." *Id.* For an academic critique of the majority's approach, see Daniel A. Farber, *Speaking in the First Person Plural: Expressive Associations and the First Amendment*, 85 MINN. L. REV. 1483 (2001).

420. *Dale*, 530 U.S. at 651. The Court held that "even if the Boy Scouts discourages Scout leaders from disseminating views on sexual issues . . . the First Amendment protects the Boy Scouts' method of expression. If the Boy Scouts wishes Scout leaders to avoid questions of sexuality and teach only by example, this fact does not negate the sincerity of its belief discussed above." *Id.* at 655.

421. *See id.* at 651.

ments and records, were relevant. This approach introduces an element of opacity amounting to lawlessness into the internal governance of associations and then makes this kind of opacity the basis of a constitutional claim. The Court dismissed these concerns with the observation that “the First Amendment simply does not require that every member of a group agree on every issue in order for the group’s policy to be ‘expressive association.’”⁴²² The Court found that the nexus between the organization’s purposes and the message at the core of its claims to the right of expressive association need be tenuous at best.⁴²³ The Court held that “associations do not have to associate for the ‘purpose’ of disseminating a certain message in order to be entitled to the protections of the First Amendment.”⁴²⁴ Instead, the Court held that “[a]n association must merely engage in expressive activity that could be impaired in order to be entitled to protection.”⁴²⁵

The Court not only relied on evidence unavailable to and thus unknowable by members, but it also articulated a highly deferential standard based on such evidence for determining whether the Boy Scouts’ expression would be impaired by complying with the requirements of the New Jersey statute.⁴²⁶ The Court held that “[a]s we give deference to an association’s assertions regarding the nature of its expression, we must also give deference to an association’s view of what would impair its expression.”⁴²⁷ What, then, remains of the judicial role? The Court

422. *Id.* at 655. The Court found “irrelevant” Dale’s argument that the Boy Scouts did not revoke the membership of heterosexual Scout leaders who openly disagreed with the Boy Scouts policy, reasoning:

The presence of an avowed homosexual and gay rights activist in an assistant scoutmaster’s uniform sends a distinctly different message from the presence of a heterosexual assistant scoutmaster who is on record as disagreeing with Boy Scouts policy. The Boy Scouts has a First Amendment right to choose to send one message but not the other. The fact that the organization does not trumpet its view from the housetops, or that it tolerates dissent within its ranks, does not mean that its views receive no First Amendment protection.

Id. at 655–56.

423. *Id.* at 655.

424. *Id.* This is a response to the contrary finding of the New Jersey Supreme Court. *Id.*

425. *Id.* In so holding, the Court relied on *Hurley*, reasoning that “the purpose of the St. Patrick’s Day parade in *Hurley* was not to espouse any views about sexual orientation, but we held that the parade organizers had a right to exclude certain participants nonetheless.” *Id.* The excluded participant was an Irish gay and lesbian organization. *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 561 (1995). The Court, without comment, treated the Irish identity of the excluded group as irrelevant to a claim to march in a St. Patrick’s Day parade. *Id.* at 570.

426. *Dale*, 530 U.S. at 653.

427. *Id.* In his dissent Justice Stevens emphatically rejected this degree of deference to the organization’s characterization of its own positions, reasoning:

If this Court were to defer to whatever position an organization is prepared to assert in its briefs, there would be no way to mark the proper boundary between genuine

observed that “[t]hat is not to say that an expressive association can erect a shield against antidiscrimination laws simply by asserting that mere acceptance of a member from a particular group would impair its message” but then proceeded to argue that accepting Dale as a member would impair the Boy Scouts’ message.⁴²⁸ In making this argument, the Court equated the Boy Scouts’ message to opposition to homosexual conduct and made no reference to the activities that had been the basis for Dale’s having become an Eagle Scout.⁴²⁹ As described by the Court, the Boy Scouts appear to be indistinguishable from a single-issue advocacy organization. As a result, the nexus between the organization’s purposes and the expression it is claiming would be impaired need only be tenuous, and yet the member claiming rights of association can and will be denied any First Amendment rights of association even if that member does not comply with every element of the organization’s policies, even if those policies are tenuous and not publicly promulgated by the organization.⁴³⁰ The asymmetry between the members’ rights and the organization’s rights could not be starker or more encompassing.⁴³¹ It is difficult to see how *Dale* can be reconciled with *Roberts* or *Rotary Club of Duarte*.

The same can be said of the Court’s analysis of preventing discrimination in public accommodation in *Dale*.⁴³² The Court acknowledged that it had found a compelling state interest in preventing discrimination against women in the state public-accommodation laws in *Roberts* and *Rotary Club of Duarte*, but then created a new test that balanced the state interest against the severity of the intrusion into the organization’s expressive association.⁴³³ The Court found that its prior opinions involving discrimination against women “would not materially interfere with

exercises of the right to associate, on the one hand, and sham claims that are simply attempts to insulate nonexpressive private discrimination, on the other hand. Shielding a litigant’s claim from judicial scrutiny would, in turn, render civil rights legislation a nullity, and turn this important constitutional right into a farce. Accordingly, the Court’s prescription of total deference will not do.

Id. at 687.

428. *Id.* at 653.

429. *Id.*

430. “The New Jersey Supreme Court analyzed the Boy Scouts’ beliefs” comprehensively “and found that ‘exclusion of members solely on the basis of their sexual orientation’” was inconsistent with its other goals and beliefs. *Id.* at 650–51 (citing *Dale v. Boy Scouts of America*, 734 A. 2d 1196, 1226 (N.J. 1999)). The Court then curtly dismissed this approach and this finding by observing that “it is not the role of the courts to reject a group’s expressed values because they disagree with those values or find them internally inconsistent.” *Id.* at 651 (citation omitted).

431. Chemerinsky & Fisk, *supra* note 410, at 604–09 (critique of the Court’s “corporate-governance model” that ignores members and looks only to the views of managers).

432. *See id.* at 656–59.

433. *Id.* at 657–59.

the ideas that the organization sought to express,”⁴³⁴ but that in *Dale* “[t]he state interests embodied in New Jersey’s public accommodations law do not justify such a severe intrusion on the Boy Scouts’ rights to freedom of expressive association.”⁴³⁵

Two days after it issued its opinion in *Dale*, the Court issued *California Democratic Party v. Jones*, which applied expressive-association claims to hold that a California statute mandating blanket primaries rather than closed primaries.⁴³⁶ A blanket primary permits any voter to vote for any candidate of any party. This system did not apply to presidential primaries under the California statute.⁴³⁷ Four California political parties challenged the state statute on First Amendment grounds.⁴³⁸ *Jones* is important not because it addressed a blanket primary or even because the Court overturned a blanket primary approved by the voters in a referendum but because it consolidated political parties’ ability to assert a First Amendment claim that a state statute violated a party’s right of association in the context of a primary election. The Court in *Jones* did not address such questions as whether a political party is a private association or whether the primary is an election. Instead, the Court simply ignored these questions. It did not distinguish between types of associations or the setting in which the activity took place. The First Amendment right of association as set forth in *Jones* is absolute and undifferentiated. It is difficult to imagine any situation in which a political party could not rely on this version of expressive association to defeat claims by voters, provided only that the claims did not involve issues of racial discrimination. As in *Dale*, the Court defined the issue as the right of political party managers to define the party and, in the process, ignored or rejected any claims made by or on behalf of voters or party members.

The Court, in an opinion written by Justice Scalia, acknowledged that “[s]tates have a major role to play in structuring and monitoring the election process, including primaries.”⁴³⁹ But, the Court then limited the reach of its precedents by finding that “[w]hat we have not held, however, is that the process by which political parties select their nominees are, as respondents would have it, wholly public affairs that States may

434. *Id.* at 657.

435. *Id.* at 659. In this analysis the Court relied on *Hurley*, even though it noted that it had never found in that case that the parade was an expressive association. *Id.* The Court observed that “[a]lthough we did not explicitly deem the parade in *Hurley* an expressive association, the analysis we applied there is similar to the analysis we apply here.” *Id.*

436. 530 U.S. 567, 586 (2000).

437. *Id.* at 570, n.2.

438. *Id.* at 571.

439. *Id.* at 572.

regulate freely.”⁴⁴⁰ In the next sentence, Justice Scalia put primary elections into a framework that treats party primaries as just another internal process of a political party, stating that “[t]o the contrary, we have continually stressed that when States regulate parties’ internal processes they must act within limits imposed by the Constitution.”⁴⁴¹ The majority does not address what these constitutional limits might be. Instead, the majority simply cites *Eu* and *LaFollette* with no discussion of what elements of these cases might be relevant.⁴⁴²

In order to maintain this position, the Court faced the difficulty of what to do about the White Primary cases, which created a record of regulation of state primaries on the grounds that primaries are integral parts of the election process and that regulation of primaries was essential to the maintaining the role of the people in the constitutional structure. Justice Scalia limited the White Primary cases to situations in which “a State prescribes an election process that gives a special role to political parties,” the result is that the parties’ actions become state action under the Fifteenth Amendment.⁴⁴³ Justice Scalia, writing for the majority, then found that “[t]hey do not stand for the proposition that party affairs are public affairs, free of First Amendment protections—and our later holdings make that entirely clear.”⁴⁴⁴ The reasoning here is a bootstrap that rests on adjectives. The Court does not explain what constitutes a “special role” for a political party and how the specialness of the party’s role in a primary election might relate to the rights and roles of voters in primary elections. His casual reference to “party affairs” does not address the issue of whether a primary is purely a ‘party affair’ or the constitutional significance of finding either that primary elections are or are not ‘party affairs’ rather than ‘public affairs’. He avoids addressing the Court’s evolving understanding in the White Primary Cases that primary elections are elections and its evolving understanding that political parties play a public role constituting state action when they organize primary elections.⁴⁴⁵ He avoids considering the implications of the purpose of the White Primary Cases, which was to protect the rights of voters. He observes, correctly, that the White Primary Cases are not First Amendment cases and, in consequence, reliance on the White Primary Cases, particularly *Terry v. Adams* and *Smith*

440. *Id.* at 572–73.

441. *Id.* at 573 (citing *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214 (1989) and *Democratic Party of the U.S. v. Wis. ex rel. La Follette*, 450 U.S. 107 (1981), both of which are discussed *supra* at Part IV.).

442. *Id.*

443. *Jones*, 530 U.S. at 573.

444. *Id.*

445. See *supra* Part II.B., Part III, and Part IV.A.1.

v. Allwright is “misplaced.”⁴⁴⁶ The legerdemain of this assertion is bold and breathtaking. A primary election is now some undefined private affair in which political parties play an undefined ‘special’ role that parties can protect with the full force of associational claims under the First Amendment. Justice Scalia’s reliance on the private-association cases and the expressive-association cases supports the interpretation that primaries have become private party activities as they were prior to the White Primary cases based simply on the parties’ ‘special’ roles in organizing primary elections. Expressive association, linked with claims that political parties are private associations, have eliminated state government, the federal government, party members, and voters from any constitutionally significant role in primary elections.

In response to claims that a primary is a “state-run election” that is a “public affair,” Justice Scalia responded that “[o]f course it is, but when the election determines a party’s nominee it is a party affair as well, and . . . the constitutional rights of those composing the party cannot be disregarded.”⁴⁴⁷ Justice Scalia then addressed the dissent’s arguments based on *Allwright* and *Terry* that a political party’s associational claims based on the First Amendment do not support a party’s right to exclude nonmembers from voting in primary elections. He dismissed *Allwright* and *Terry* by concluding that “[t]hose cases simply prevent exclusion that violates some independent constitutional proscription.”⁴⁴⁸ What Justice Scalia leaves unsaid is that he does not include voting as a constitutional right or an element of constitutional structure in his reasoning.

Instead, Justice Scalia, writing for a broad majority of the Court, focuses on the right of a political party to exclude voters from a primary election, finding that “a corollary of the right to associate is the right not to associate.”⁴⁴⁹ Justice Scalia supported this assertion by citing *La Follette* and *Roberts*.⁴⁵⁰ In so doing, he nearly illustrates the blend of the renewed claims that political parties are private associations and the claims that political parties have associational rights indistinguishable from those of any other private association, even when the party is involved in a primary election. Indeed, Justice Scalia takes the position that “[i]n no area is the political association’s right to exclude more important than in the process of selecting its nominee.”⁴⁵¹

446. *Jones*, 530 U.S. at 573.

447. *Id.* at 573, n.4.

448. *Id.* at 573, n.5.

449. *Id.* at 574.

450. *Id.*

451. *Id.* at 575. The reason he gave illustrates a fundamental confusion about the organizational character of a political party and about the relationship between the political party

This reasoning reached its inevitable point of absurdity in the 2008 Florida primary when the political parties sought to exclude the entire electorate of registered voters who participated in a closed primary. A political party by this reasoning consists of party managers who have no need of and no responsibility to voters. *Jones* provides this absurd result unbounded protection under the First Amendment. Voters have disappeared from elections and consent has disappeared from the structure of the Constitution.

In his dissent, Justice Stevens focused on voting rights and the right and duty of state governments to protect voters.⁴⁵² He took the position that “[t]his case is about the State of California’s power to decide who may vote in an election conducted, and paid for, by the State.”⁴⁵³ He reasoned that:

The United States Constitution imposes constraints on the States’ power to limit access to the polls, but we have never before held or suggested that it imposes any constraints on States’ power to authorize additional citizens to participate in any state election for a state office. In my view, principles of federalism require us to respect the policy choice made by the States voters in approving Proposition 198 [approving the blanket primary].⁴⁵⁴

Justice Stevens took the position that political parties’ First Amendment associational rights are not absolute across all activities but instead vary with the nature of the activities in which the party engages.⁴⁵⁵ Based on this approach, Justice Stevens distinguished the right of a political party to control its internal operations from its claims to exclude voters from a primary election. He observed that “the primary serves an essential public function”⁴⁵⁶ He further noted that he cited *Allwright* and *Terry* “because our recognition that constitutional proscrip-

and the party’s nominee. Justice Scalia argued that “[t]hat process often determines the party’s positions on the most significant public policy issues of the day, and even when those positions are predetermined it is the nominee who becomes the party’s ambassador to the general electorate in winning it over to the party’s views.” *Id.* The critique of this reasoning is not that Justice Scalia is not wrong about the party as a reflection of the views of the nominee but that he has failed to consider the implications of this possibility, or even probability, for his assertions about the right to exclude. If the party itself has no views, the case for exclusion of voters from primaries erodes.

452. *Id.* at 590–603 (Stevens, J., dissenting).

453. *Id.* at 590 (footnote omitted).

454. *Id.* at 590–91. Justice Stevens has consistently confronted Justice Rehnquist’s new federalism with his own claims relating to the rights of states when this would produce a result inconsistent with the substantive preferences of the new federalism majority of the Rehnquist Court. Justice Stevens was not the only justice to use this case for a larger agenda. Justice Kennedy’s concurrence focused on the relationship he saw between the right to exclude voters from primaries and the right to use party treasury funds in elections. *Id.* at 586–90 (Kennedy, J., concurring).

455. *Id.* at 593–97.

456. *Id.* at 594, n.4.

tions apply to primaries illustrates that primaries—as integral parts of the election process by which the people select their government—are state affairs, not internal party affairs.”⁴⁵⁷ Justice Stevens made voting and voters the central issue, just as the Court had done in extricating itself from *Grove* in *Classic*, *Smith v. Allwright*, and *Terry v. Adams*.

Nevertheless, Justice Stevens found himself enmeshed in a problem arising from the Court’s contemporary cases treating political parties as private associations.⁴⁵⁸ In these cases the Court held that a variety of decisions by national party managers or state party managers should, based on a First Amendment right of association, take precedence over state statutes. There is no substantive coherence to these decisions. The Court made no arguments about why independents should vote in Connecticut primaries or why particular delegates should be seated at a party national convention. The only commonality in these cases was the procedural decision that the party managers should decide, that party rules took precedence over voting consistent with state statutes. Confronting this conceptual morass, Justice Stevens, who had been in the majority in all of these cases, tried unsuccessfully to find coherence where none existed. He first suggested that national conventions are private activities while primary elections are public activities. This approach cannot be sustained without overruling the White Primary Cases or robbing them of any significance as voting-rights cases. With this approach Justice Stevens falls into the trap of procedural formalism that led to *Grove*. Primaries matter because they involve voting. If the results of primary elections can be negated by party managers’ control over party nominating conventions, then voting is an empty gesture rather than a constitutive act that sustains government legitimacy.

Justice Stevens then tries to avoid this result by embracing cases that uphold party managers’ rights to control political parties as private associations if the outcome of their actions is increased participation in primary elections. This approach is neither principled nor administrable. The Court cannot possibly know what impact its decisions or the actions of party managers will have on voter participation.

Justice Stevens found his way out of this morass by curtailing, albeit indirectly, his prior positions on the associational rights of the political parties. He stated flatly that “[i]n my view, the First Amendment does not mandate that a putatively private association be granted the power to dictate the organizational structure of state-run, state-financed primary elections.”⁴⁵⁹ He rejected the idea that the Court in the

457. *Id.* at 594, n.5.

458. For a discussion of these cases, see *supra* Part IV.A.2.

459. *Jones*, 530 U.S. at 598.

prior cases or in this case had endorsed a theory of democracy, asserting that “[i]t is not this Court’s constitutional function to choose between the competing visions of what makes democracy work—party autonomy and discipline versus progressive inclusion of the entire electorate in the process of selecting their public officials—that are held by the litigants in this case.”⁴⁶⁰ He concluded “[t]hat choice belongs to the people.”⁴⁶¹

Justice Stevens relied on the structure of First Amendment jurisprudence to resolve the difficulty presented by his prior positions upholding rights of political parties as private associations and his discomfort with the consequences of absolutism in this area. He called for a balance between the claims of the association and the interests of the state, an approach which had been lost in the expressive-association cases. Justice Stevens then found that in *Jones* the claims of the party autonomy proponents were weak and empirically debatable and concluded “[i]n my view, an empirically debatable assumption about the relative number and effect of likely crossover voters in a blanket primary, as opposed to an open primary or a nominally closed primary with only a brief preregistration requirement, is too thin a reed to support a credible First Amendment distinction.”⁴⁶² On the other side, Justice Stevens agreed with the District Court in finding the state’s interest in “fostering democratic government” by increasing the choice offered to voters and increasing voter turnout and participation “‘substantial, indeed compelling.’”⁴⁶³ He observed that “[t]he Court’s glib rejection of the State’s interest in increasing voter participation . . . is particularly regrettable.”⁴⁶⁴ He then noted that “I would also give some weight to the First Amendment associational interests of nonmembers of a party seeking to participate in the primary process.”⁴⁶⁵ Even Justice Stevens, however, made no reference to a consideration of voting as constitutive as a counterbalancing consideration. The post-Civil War cases and the White Primary Cases did not become part the balance. Had Justice Stevens expanded his concept of participation to include the importance of consent, his balancing of interests would have been more compelling and less enmeshed in the jurisprudence of party managers’ associational claims. The Supreme Court has not considered a subsequent case that raises directly the associational rights of political parties in structuring primary elections. It did, however, apply its expressive association framework in *Washington State Grange v. Washington State Republican*

460. *Id.* at 598–99.

461. *Id.* at 599.

462. *Id.* at 600.

463. *Id.*

464. *Id.* at 600–01.

465. *Id.* at 601.

Party.⁴⁶⁶ Writing for a majority that included the dissenting justices in *Jones*, Justice Thomas held that a state law enacted pursuant to a state referendum could state candidates' party preferences, despite the objections of the political parties, because the vote involved did not select the parties' candidates but simply "winnow[ed] the number of candidates."⁴⁶⁷ In addition, the listing of the candidate's party preference created, according to the majority, only the "impression of association"⁴⁶⁸ and not what Justice Thomas described as "actual association."⁴⁶⁹ This places enormous weight on two undefined adjectives. It may be more important that the majority held that "[t]he State's asserted interest in providing voters with relevant information about the candidates on the ballot is easily sufficient to sustain I-872" [the ballot measure at issue].⁴⁷⁰ This holding may represent a willingness to consider a compelling state interest less demanding than that previously required in expressive-association cases. But, there is now little doubt that expressive association is the analytical framework in primary-election cases. In his strangely convoluted concurring opinion attempting to accommodate Justice Scalia's angry dissent and the majority's position, which he appears to have joined primarily to buy time and preserve his options in future cases, Chief Justice Roberts relied on his interpretation of voters' perceptions.⁴⁷¹ Although he does not explain how the Court would ascertain voters' perceptions or locate this concept in Justice Thomas' distinction between actual association and the impression of association, Chief Justice Roberts left no doubt that he regards *Dale* as controlling authority if the issue is framed in terms of voters' impressions.⁴⁷² Justice Scalia rejected Chief Justice Roberts' temporizing because he rejected the idea that a political party would ever have to produce evidence in claiming associational rights under the First Amendment.⁴⁷³ Justice Scalia similarly rejected, then dismissed the majority's finding of a compelling state interest as "undeserving of credence."⁴⁷⁴

There can now be little doubt that expressive association controls the Court's approach to political-party rights and that *Dale* provides the

466. 128 S. Ct. 1184 (2008).

467. *Id.* at 1192.

468. *Id.* at 1194, n.9.

469. *Id.* Citing *Hurley* and *Dale*, Justice Thomas reasoned: "In those cases, *actual* association threatened to distort the groups' intended messages. We are aware of no case in which the mere *impression* of association was held to place a severe burden on a group's First Amendment rights, but we need not decide that question here." *Id.* (emphasis in original).

470. *Id.* at 1195.

471. *Id.* at 1196–97.

472. *Id.* at 1196.

473. *Id.* at 1202.

474. *Id.* at 1203.

framework of the Court's approach to expressive association. The result is a constitutionalized deference to political-party managers. The Court remains silent on the role and rights of voters in primary elections. Managers of nonparticipatory associations can negate the votes of their own members in primary elections conducted without claims of voting irregularity. This is precisely what happened in Florida in 2008.

V. THE 2008 FLORIDA PRIMARIES: VOTE NEGATION AND POLITICAL PARTIES' ASSOCIATIONAL CLAIMS

The vote negation of the Florida primaries is a logical but by no means inevitable result of according party managers' roles in structuring primary elections First Amendment protection while not according voters any constitutionally significant role. The result has been an imbalance in constitutional jurisprudence that accords party managers discretion to impose party discipline on voters while ignoring the role of voters in sustaining the legitimacy of the government. Voters have been deprived of their constitutional role to "ordain and establish this Constitution for the United States of America."⁴⁷⁵ In the process, the idea of consent as the basis of government has been obscured if not lost. The jurisprudence of voting is no longer structural. The result is a paradox that places voters at the greatest risk of vote negation when elections are conducted in a procedurally regular manner under applicable federal and state law but in a manner that violates internal rules of political parties.

The 2008 Florida presidential primary was an election in which Florida voters voted. Both major parties then excluded their votes in the determination of who would serve as delegates to the parties' national nominating conventions. The voters in the Florida presidential primaries were as effectively disenfranchised as the voters in the post-Civil War cases and in the White Primary cases whose votes were simply not counted. How could this have happened?

The party managers negated the votes of their duly registered members in a properly conducted primary election solely on grounds of a timing mismatch between a state statute and parties' rules relating to the scheduling of primaries. This claim by party managers can be taken seriously only in the analytical framework of expressive association that treats the parties as coterminous with their managers and ignores associational rights of members or voters. The logical result is political parties with neither members nor voters, only managers. Parties' claims that they are both private associations and expressive associations lead to absurd results. In the process, the First Amendment has become an

475. U.S. CONST. pmbl.

instrument protecting, not prohibiting, discrimination against any “other” whom party managers or associational leaders wish to exclude. While these claims cannot prevail in the case of racial discrimination, *Dale* shows that other forms of discrimination will find no countervailing protection under the Equal Protection Clause or any other constitutional predicate that the Court has been willing to consider. Because the Court has moved so far away from its prior jurisprudence of voting as structural and constitutive, voters have no countervailing claim as voters. A political party can negate the vote of all of its voters. Party discipline has become a First Amendment right of party managers that will sustain their determination to disenfranchise all voters.

This result became a judicial precedent in the one case arising from the 2008 Florida primaries, *Nelson v. Dean*.⁴⁷⁶ The court described the issue in this case in the following terms: “The issue is whether the Democratic national convention must seat Florida delegates chosen on the basis of a binding state primary conducted in open defiance of the national party’s scheduling rules.”⁴⁷⁷ The court concluded in the following sentence that “[t]he answer is no.”⁴⁷⁸ The court’s reasoning is a classic expression of the conflation of private association and expressive association creating a First Amendment right to create parties without members and elections without voters, as well as an unintended restructuring of both federalism and the balance of powers as unconsidered collateral damage.

The court based its ruling on a finding that political parties are private associations and relied primarily on *Cousins v. Wigoda*.⁴⁷⁹ As a preliminary matter, the court sought to limit the force as it had in the White Primary cases by ruminating about whether their state-action reasoning applies to this case.⁴⁸⁰ Having taken this path, the court found that the defendant political parties “would be entitled to prevail even if it were held that the DNC delegate selection rules and the decision to

476. 528 F. Supp. 2d 1271 (N.D. Fla. 2007).

477. *Id.* at 1272.

478. *Id.*

479. *Id.* at 1277–78.

480. *Id.* at 1276–77. The court suggested several possibilities:

Perhaps the white primary cases should be distinguished based on the implicit state approval of the explicitly-racist machinations the party pursued. Or perhaps the cases should be seen simply as an instance of hard cases making bad law (or, perhaps more accurately, seemingly easy cases making law that will not be followed in less compelling circumstances). Or perhaps one could conclude that the Fifteenth Amendment—with its specific focus on racial discrimination in voting—has a broader state action sweep than the Fourteenth. . . . But the white primary cases at least give some reason to question whether the state action concept is as narrow as the DNC and Dr. Dean would have it.

Id. at 1277 (citation omitted).

exclude Florida delegates were sufficiently entwined with state-run primaries to constitute state action within the meaning of the Fourteenth Amendment.”⁴⁸¹ What the court did not do is to consider the voting as a constitutional structural element of the White Primary cases and instead focused solely on the role political parties.⁴⁸²

With the White Primary cases read partially and narrowly, the court turned to the Democratic Party’s First Amendment rights and found that “*Cousins* is fatal to plaintiffs’ position in the case at bar.”⁴⁸³ The court found that under the First Amendment “[a] national party has a compelling interest in setting a schedule and requiring compliance.”⁴⁸⁴ It is not at all clear what this interest might be. The court found that alterations in the primary schedule makes a “substantive difference” but did not address the nature of this substantive difference.⁴⁸⁵ A state that wants to alter this schedule established by the national party is acting “for its own selfish reasons.”⁴⁸⁶ The court concluded that

it is the *state* that must have a compelling interest in order to override the party’s First Amendment right to seat delegates of its choice. The *party* need not have a compelling interest in its own rules.⁴⁸⁷

By focusing on the party and the government through a state-action prism that it had previously found inapplicable, the court made this case much easier than it is and produced an opinion that is the kind of “bad law” the court suggested might have resulted from the Supreme Court’s decisions in the White Primary cases.

The bad law in this case arises from the court’s easy dismissal of any rights or interests that voters might have in primary elections. The court found that “the party has a First Amendment right to exclude delegates selected in derogation of the schedule.”⁴⁸⁸ At this point the court begins to incorporate concepts from the jurisprudence of expressive association without acknowledging what it is doing or citing any of the expressive-association precedents.⁴⁸⁹ When it addresses the rights of voters in primaries, the court simply transforms the issue from an issue of voters’ right to vote, have their votes counted, and have their vote count to an issue of whether the delegates were chosen in a manner that

481. *Id.*

482. *Id.* at 1281.

483. *Id.* at 1278.

484. *Id.* at 1280.

485. *Id.* It appears that the court might be referring obliquely to electoral outcomes, a substantive difference to candidates.

486. *Id.*

487. *Id.*

488. *Id.*

489. *Id.* 1280–81.

conforms to the party rules.⁴⁹⁰ Because they were not, they become “nonconforming delegates,” which places the issue in the framework of expressive-association jurisprudence.⁴⁹¹ This issue arose in the context of plaintiffs’ claim that the exclusion of all of the delegates was unduly harsh. This is scarcely the heart of the issue. So framed, plaintiffs’ claim afforded the court an easy path to its oblique incorporation of expressive association by reasoning as follows:

Plaintiffs say that Florida’s Democratic voters are being disenfranchised. The decisive answer is that the decision whether to exclude nonconforming delegates rests with the party, not with the Florida legislature or plaintiffs or this court. This is the essence of the First Amendment right of association recognized in *Cousins* and *La Follete* and *O’Brien* and *Wymbs* and *Bachur* and *Ripon*. Indeed, the square import of *La Folette* was that the Democratic Party could properly exclude a state’s entire delegation for failure to comply with party rules. That is what the DNC proposes to do here.⁴⁹²

The court never explains how the delegates themselves are “nonconforming” apart from their manner of selection in a properly conducted primary election that did not conform to the DNC’s primary schedule. There was no claim in this case that the delegates were not Democrats who would otherwise have been considered perfectly acceptable delegates. Their subsequent seating at the Democratic National Convention admits of no other explanation. This fact pattern is not the common fact pattern of an expressive-association case. In its invocation of an unacknowledged expressive-association claim in the facts of this case, the opinion could be read as substantially expanding the scope of expressive-association claims from substantive differences between the organization and the aspiring participants to cases where there are no substantive differences between the organization and its aspiring members but are simply disputes over procedures for affiliation and participation. It seems likely that the court never considered this. It simply imported a concept of a “nonconforming delegate” to bolster its analysis of a party as a private association with a First Amendment right to define its procedures. The court held that the party had no duty to prove a compelling interest in adopting its rule and rejected any claim that the state had a compelling state interest. The court held that “[t]he party need not have a compelling interest in its rules.”⁴⁹³ It then held that the party did have a compelling interest in the schedule of primaries, claiming that the schedule made a “substantive difference” but not addressing

490. *Id.* at 1281.

491. *Id.*

492. *Id.* at 1280.

493. *Id.* (emphasis in original).

the nature of this substantive difference.⁴⁹⁴ It never considered that the voters had a compelling interest in having their votes accorded appropriate significance in the selection of their parties' presidential candidates.

The central flaw is the court's failure to consider voters and voting. The court's interest in the White Primary cases did not permit it to read these cases as structural constitutive-voting cases. When given an opportunity to consider voters as voters, the court retreated to an unacknowledged expressive-association analysis that excludes voters from consideration.⁴⁹⁵ At the same time, this analysis excludes any consideration of voters as party members.⁴⁹⁶ The party is simply equated with the DNC.⁴⁹⁷ Even the state party does not merit separate consideration. These analytical flaws are important because they reflect the state of the jurisprudence, not because this court made any particularly distinctive contribution to it. In the end, the court returns to the White Primary cases to suggest that there are some limits on what a political party can do, but it finds that nothing in this case reaches these limits.⁴⁹⁸

These broad concerns about voting and association explain why the events of the Florida primaries matter and why the issues surrounding the Florida primaries were not cured by seating the entire Florida delegation at the national conventions. This solution addressed the right of state party activists to attend the convention that decided nothing but it did not address the rights of voters whose votes had been negated. Seating the delegates made voters' rights utterly dependent on the decision of party managers, not on their right and duty to play their constitutional role.

VI. TOWARD A JURISPRUDENCE OF PARTICIPATORY ASSOCIATION AND CONSTITUTIVE VOTING

The improbable use of the First Amendment to negate votes in pri-

494. *Id.*

495. *Id.* at 1283.

496. *Id.*

497. *Id.* at 1281.

498. *Id.* at 1281. The court observed:

This does not mean, of course, that a party can do whatever it wishes with respect to delegate selection in general or the schedule in particular. The white primary cases make clear that there are at least some limits with respect to delegate selection. I assume without deciding that there are limits on a party's scheduling discretion. But the discretion is surely broad—at least broad enough to cover any scheduling decision that is not wholly unreasonable. The DNC's schedule easily passes muster. Neither the State of Florida nor the Florida Democratic Party have a right to override the schedule. And plaintiffs have no right to compel the DNC to seat nonconforming delegates.

Id.

mary elections is not an inescapable result of political parties' First Amendment claims. The First Amendment itself provides part of the solution. Including members of political parties in the calculus of association rights and recovering and building upon the Court's prior jurisprudence of constitutive voting provide the remaining building blocks of a jurisprudence of participatory association and constitutive voting. A sterile jurisprudence of ill-considered First Amendment absolutism would give way to a balancing approach that encompasses the multiple constitutional predicates implicated in primary elections.

Developing a jurisprudence of constitutive voting for the contemporary era is the first step. The fundamental principle is that legitimate government depends on consent of the governed. In much of our national history, thinking about the legitimacy of our government would have appeared incongruous, but that is not the case at this point in our national history. The legacy of *Bush v. Gore* is a legacy of questioning government legitimacy and the role of the Supreme Court in determining the outcome of a presidential election.⁴⁹⁹ This is not to say that the Court itself is necessarily inclined to embrace this approach, but the boundaries of thought are not determined by the Court. This is especially true in current circumstances when the Court is pursuing a jurisprudence of First Amendment absolutism protecting corporations' speech rights in campaign finance but not voters' rights in primary elections.⁵⁰⁰

Activists, academics, and the Court should rediscover its post-Civil War and White Primary Cases. In both instances, the Court turned to voting as an integral element of constitutional structure when doctrinal complexities threatened to overwhelm the Court's duty to protect voting rights. The post-Civil War cases have been almost totally lost, relegated to the status of historical remnants of Reconstruction. Yet, these are not cases solely about race. They are also cases about voting, and that is why they are relevant to understanding vote negation in the 2008 Florida primary.

The same can be said about the contemporary treatment of the White Primary cases, which have been variously forgotten or ignored or criticized for their state-action jurisprudence. What has not been done

499. See *Bush v. Gore*, 531 U.S. 98 (2000).

500. As this article was being completed, the Court decided *Citizens United v. FEC* (Jan. 21, 2009) (putting corporate rights at the heart of campaign finance jurisprudence). Compare *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449 (2007) (holding that the Bipartisan Campaign Reform Act's ban on the use of corporate funds for political advertisements in the days leading up to an election was unconstitutional as applied to advertisements not explicitly supporting a candidate) with *Bush*, 531 U.S. at 103, 110 (holding that the Florida Supreme Court's method for recounting votes violated the Equal Protection Clause and there was no time to implement an alternate method).

has been to read the White Primary cases as containing elements from which a concept of constitutive voting could be developed.

The next challenge is to redefine the concept of association under the First Amendment from a nonparticipatory to a participatory framework. This would need to address the core issue of when it is constitutionally appropriate to treat political parties as entities with their own First Amendment rights that give party managers an operational monopoly of First Amendment claims and when it would be constitutionally appropriate to treat political parties as deriving First Amendment rights from their members who have their own First Amendment rights. The party has a First Amendment right to be an association. Members have First Amendment rights to associate.

The way forward is to treat any activity of the party that implicates constitutive voting as outside the exclusive control of party managers. This concept of participatory association presents a host of operational issues. It is as muddled as democracy. It is the path to ensuring the continuing consent which is the promise of the Constitution and foundation of government legitimacy.

Fortunately, the structure of First Amendment jurisprudence provides for the balancing of interests consistent with both participatory association and constitutive voting. Providing for electoral participation should be considered a compelling state interest just as it was considered state action in the White Primary cases. This kind of judicial reasoning would have been inconsistent with vote negation in the 2008 Florida primary.

The larger issue may be the more pragmatic operational issue of participatory association. The effort to craft a realistic concept of participatory association is hampered by the absence of contemporary studies of how political parties operate and what they, in fact, do. It is difficult for the courts to develop standards in the absence of any common understanding of political parties and other associations. Yet, such mistakes as the managers' monopoly of associational claims can be addressed by developing a jurisprudence of association that treats association as both a noun and a verb, as an organization and a process, as a First Amendment right of the entity and as a First Amendment right of members. This the courts can achieve on their own. It would be a contribution to restoring participation to a central role in all our institutions.

In the case of political parties, this development of First Amendment jurisprudence is consistent with taking voting seriously as an element of constitutional structure. This development of First Amendment jurisprudence reconciles associational claims with consent as provided in the first sentence of the Constitution stating that "we the people . . .

do ordain and establish this Constitution for the United States of America.”⁵⁰¹ Vote negation, whether by a branch of government or by political party managers, is not part of the concept of consent at the heart of our Constitution.

501. U.S. CONST. pmbl.