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# Federal Oversight of State Primaries: The Troubling Drift from Equal Protection to Association

by Jacob Eisler\*

## I. INTRODUCTION

The latter half of the twentieth century saw a dramatic transformation in the degree and quality of federal judicial oversight of the voting process. With the one-person, one-vote jurisprudence, the Supreme Court of the United States imposed a basic requirement of personal equality in district line-drawing. In the context of race, *Gomillion v. Lightfoot*<sup>1</sup> became the beachhead in the premise that racial discrimination will not be tolerated in voting procedure.<sup>2</sup> A few decades later, *Davis v. Bandemer*<sup>3</sup> suggested that fair district line-drawing could require non-discrimination on the grounds of party identification.<sup>4</sup> In each of these domains of court-led intervention, one constitutional right emerged as the linchpin: the Equal Protection Clause.<sup>5</sup>

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1. 364 U.S. 339 (1960).

2. *Id.* at 347.

3. 478 U.S. 109 (1986).

4. *Id.* at 143. Of course, as *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019), has indicated, the quest to prevent partisan gerrymandering may well have been only sound and fury, as a thin conservative majority deemed the practice non-justiciable; and before the Supreme Court, no single partisan gerrymander was ever deemed unconstitutional (including in *Davis* itself).

5. U.S. CONST. amend. XIV, § 2. This is not to say this trend was immediately apparent. The initial one-person one-vote jurisprudence did not clearly identify a

Given the importance of party primaries in the process of voting, it is not surprising that they have been a subject of federal judicial oversight. Nor is the timing of the Supreme Court's entry into the area surprising; the topic was subject to broad judicial scrutiny shortly after its boldest entry into the realm of democratic design with *Baker v. Carr*.<sup>6</sup> Yet the constitutional character of the intervention into primaries has deviated from the general trend in the oversight of voting process. As the modern jurisprudence of primary regulation has evolved over the past fifty years, the Supreme Court has come to focus almost exclusively on the right to associate as the activated constitutional interest. This has correlated with a focus on party integrity as the dominant locus of consideration. The Court's current approach has reinforced the stranglehold that parties have on the political process, as well as neglected a sufficiently broad analysis of the question at hand: what conditions create desirable (or at least sufficiently viable) primaries? This question in turn hangs upon the need for primaries described above: to serve as an initial step that can effectively winnow the slate of candidates, such that the final ballot and the intermediate steps that precede it give all voters a fair choice.

This piece begins by establishing the historical drift towards domination by associational rights. It observes that early jurisprudence applied both equal protection and associational reasoning to the constitutional review of primary design, but in the 1980s associational rights emerged as the sole basis for review. The piece then explores the substantive consequences and pathologies of the Court's reasoning. In particular the Court has come to protect parties, which are themselves well-entrenched quasi-public entities in scant need of judicial sympathy. It then culminates with the argument that a return to the (much-contested) principle underlying the entry into the political thicket itself, the Equal Protection Clause, provides a starting point for helpfully broadening and diversifying the interrogation of primary design. While far from a panacea (in particular because of the need to avoid judicial over-determination of democratic autonomy), renewed attentiveness to the Equal Protection Clause would push courts to

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constitutional provision to support the principle, and it was only “[f]uture cases [that] placed the right to vote squarely within the Fourteenth Amendment’s Equal Protection Clause.” Joshua A. Douglas, *The Right to Vote Under State Constitutions*, 67 VAND. L. REV. 89, 97 (2014). Likewise, it was only over time that the Fourteenth Amendment, rather than the Fifteenth, became the linchpin of the prohibition against racial discrimination (as it was Justice Whittaker’s concurrence that invoked the Fourteenth Amendment). See SAMUEL ISSACHAROFF, PAMELA S. KARLAN, AND RICHARD H. PILDES, *THE LAW OF DEMOCRACY* 575 (2012).

6. 369 U.S. 186 (1962).

consider the full breadth of possible legal interests invoked in primary design. The Article concludes by exploring the broader question of whether the Court best operates as another standard power player in political contestation (a role supported by the invocation of associational rights) or as a unique institution with a distinct capacity to transform the unfolding of politics.

## II. THE DRIFT TOWARDS ASSOCIATION IN THE LAW OF PRIMARY PARTY AFFILIATION

The narrowing of legal imagination by the Supreme Court to wholly focus on associational rights has occurred gradually. This reflects a progression away from the initial foray into the political thicket, which opened elections to broader judicial regulation on the basis of the equal right to the political franchise. However, the first limitations the Supreme Court imposed on primary design—like the first rules imposed on drawing of district boundaries<sup>7</sup> enforced the Fifteenth Amendment's<sup>8</sup> prohibition against race-based discriminatory voting laws.<sup>9</sup> In *Smith v. Allwright*,<sup>10</sup> the Supreme Court held that the refusal of the state electoral apparatus to deny a Black citizen access to a primary ballot on account of race violated the Fifteenth Amendment;<sup>11</sup> in *Terry v. Adams*,<sup>12</sup> where a dominant political association held a primary that determined official primary candidates (in effect, a shadow primary), that association's prohibition against black participation was likewise unconstitutional.<sup>13</sup> Insofar as this line of cases simply expresses the indubitable proposition that racial voting restrictions are illegal, it does relatively little to inform the contemporary law of primaries, which is directed towards terms of partisan competition and appropriate conceptualization of political identity. Yet the race-and-primary cases did establish an initial judicial foray into the regulation of primaries, and *Terry* established the principle that political associations (including parties) that perform quasi-state functions can be subject to the same judicial scrutiny as states themselves.<sup>14</sup>

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7. *Gomillion*, 364 U.S. at 347–48.

8. U.S. CONST. amend. XV.

9. For a seminal history of the evolution of racial anti-discrimination law applied to primaries, see LEON EPSTEIN, *POLITICAL PARTIES IN THE AMERICAN MOLD* 174–79 (1986).

10. 321 U.S. 649 (1944).

11. *Id.* at 666.

12. 345 U.S. 461 (1953).

13. *Id.* at 470.

14. See *Gomillion*, 364 U.S. 339; *Smith*, 321 U.S. 649; *Terry*, 345 U.S. 461.

Fifteen years after *Terry* and in the wake of the foray into the political thicket with the one-person, one-vote jurisprudence,<sup>15</sup> the modern lineage<sup>16</sup> of Supreme Court primary regulation began with *Williams v. Rhodes*.<sup>17</sup> The state election laws at issue made it almost impossible for minor parties to gain access to the final state ballot for presidential elections, in large part because status as a new party with ballot access required a number of signatures equal to 15% of the number of ballots cast in the previous gubernatorial election, followed by the holding of a highly structured party primary. The Supreme Court deemed the regulations to infringe the right to an effective vote protected by the Equal Protection Clause as well as the right to realize political association protected by the First Amendment.<sup>18</sup> The higher-order argument advanced by the state—that states have a constitutional remit to design elections as they choose<sup>19</sup>—was categorically struck down, effectively a prerequisite for this type of judicial intervention. The more practical claim that the extensive restrictions on party formation were served by compelling interests—advancing the stability afforded by a two-party system, but also more generally ensuring administrability of the electoral system<sup>20</sup>—was also rejected. The Court refused to accept that two parties should have a monopoly on power, and concluded that general administrability failed to justify the extensiveness of the “burden on voting and associational rights” effected by the measures.<sup>21</sup> In a case driven by similar substantive concerns, *Bullock v. Carter*,<sup>22</sup> the Court likewise deemed prohibitively high filing fees for candidate access to the primary ballot to be a violation of equal liberty.<sup>23</sup> However, the Court would soon thereafter confirm in *Jeness v. Fortson*<sup>24</sup> that general administrability considerations can justify a rule that restricts the candidates on a ballot

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15. *Baker*, 369 U.S. 186.

16. See Oliver Hall, *Death by a Thousand Signatures: The Rise of Restrictive Ballot Access Laws and the Decline of Electoral Competition in the United States*, 29 SEATTLE U. L. REV. 407, 424 (2006) (observing that while there had been one Supreme Court case regarding ballot access, *MacDougall v. Green*, 335 U.S. 281 (1948), it has largely been left behind by precedent; moreover it was overruled in part by a case that implemented one-person one-vote, *Moore v. Ogilvie*, 394 U.S. 814 (1969)).

17. 393 U.S. 23 (1968).

18. U.S. CONST. amend. I.; *Williams*, 393 U.S. at 30.

19. U.S. CONST. art II, § 1, cl. 2; *Williams*, 393 U.S. at 28–29.

20. *Williams*, 393 U.S. at 31–32.

21. *Id.* at 34.

22. 405 U.S. 134 (1972).

23. *Id.*

24. 403 U.S. 431 (1971).

to a reasonable number, and that laws justified by such reasons will survive judicial review when the constitutional burden is not too great. In *Jeness*, a state law required a non-major-party candidate to submit a petition signed by 5% of eligible voters to gain access to a statewide general election ballot.<sup>25</sup> This effectively served as an alternative to winning a party primary as a mechanism for gaining general ballot access. The law was deemed to pass equal protection and associational muster, in part because the requirements were less onerous<sup>26</sup> than those at issue in *Williams* and in part because the regulations advanced other interests—such as maintaining a manageable general ballot—on reasonable terms.<sup>27</sup>

These early cases on the opportunities of candidates to gain access to ballots could easily be understood as raising concerns that are fundamentally associational. Reasonable access to elections provides a critical mechanism by which groups of voters can realize their collective political potential; measures that unreasonably obstruct this are thus a clear violation of associational rights. Yet the Court relied on both the broader right to equal voting power as well as associational rights; indeed, in *Bullock*, it characterized deprivation of access to the ballot wholly as an equal protection wrong.<sup>28</sup> The predilection for invoking the Fourteenth Amendment<sup>29</sup> may be reflective of the historical proximity to judicial fashioning of the one-person, one-vote principle (which invoked the Equal Protection Clause to justify the court's entry into the political thicket), but regardless it is reflective of the character of the Court's reasoning during its early reviews of primary regulation. Such an approach tended to inspire the Court to make more systemically general enquiries. The question was not merely if voters were harmed specifically in their capacity as members of associations, but if the constraining effects of the legislation generally fit the political end it allegedly served; ensuring fair and legitimate access to the democratic process.<sup>30</sup>

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25. *Id.* at 432.

26. In particular, unlike the electoral scheme at issue in *Williams*, in *Jeness* there were no restrictions on write-in votes. 403 U.S. at 438.

27. *Id.* at 442.

28. 405 U.S. at 141. Indeed, the Court's own reasoning teed it up for an associational wrong when it observed "laws that affect candidates always have at least some theoretical, correlative effect on voters." *Id.* at 143.

29. U.S. CONST. amend. XIV.

30. *Williams*, 393 U.S. at 34 (looking to the "totality" of the restrictive effect of laws to determine if the cost is justified by political circumstances); *Bullock*, 405 U.S. at 146 (monetary constraints through filing limits "ill-fitting" to winnowing of candidates).

Subsequent cases continued to balance constitutional rights against asserted state interests in administrability and political welfare, but began to subtly structure its queries around associational harms. This proclivity for associational analysis alone came at the cost of reducing the comprehensiveness of the Court's analysis, a point apparent in a pair of 1970s cases concerned with advance party registration requirements. In *Rosario v. Rockefeller*,<sup>31</sup> the Court permitted a restriction that required party registration thirty days prior to the preceding general election to vote in the subsequent primary because of the benefit of preventing "raiding" by voters who are not genuinely members of a party to shift the primary outcome.<sup>32</sup> Even though such time limits impose some burden on the ability of voters to influence primaries of their choice, the Court found the advance registration in *Rosario* to be neither an equal protection violation of the franchise nor a heavy burden upon the opportunity to associate.<sup>33</sup> Yet in *Kusper v. Pontikes*,<sup>34</sup> a statute that prohibited a voter from participating in the primary of a new party for twenty-three months after voting in the primary of another party was found to illegitimately infringe associational rights (but did not make the same enquiry into general access to the electoral franchise). The Court treated the law at issue in *Kusper* as substantively dissimilar from that in *Rosario*, insofar as it required voters to skip participating in at least one primary before realizing the full participatory benefits of the new party affiliation (that is, voting in a primary).<sup>35</sup> Yet, if limited to the associational question, the Court's differentiation between these cases is structurally specious. The laws at issue in both *Rosario* and *Kusper* balance the same competing interests of voters' wish to participate and affiliate freely against the benefit of constraining party participation to genuinely committed voters. *Kusper* merely strikes a different (and starker) balance; one could argue that a "tax" of one primary to switch party affiliation would simply confer a more intense version of the associative benefit that allows the law at issue in *Rosario* to survive. In effect, the distinction between the two cases—decided within a year of each other—appears arbitrary, even aesthetic, if asked wholly as a question of associational legitimacy. It seems as though an authoritative answer requires a more foundational query: how does one set of primary designs serve the ends not merely of party association, but of fair

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31. 410 U.S. 752 (1973).

32. *Id.* at 761.

33. *Id.* at 760.

34. 414 U.S. 51 (1973).

35. *Id.* at 60–61.

democratic process (and particularly equal opportunities of voters to influence such process)? The outcomes of the cases may well remain the same under this more generalized analysis—the regulation at issue in *Kusper* did more aggressively constrain flexible franchise access, and this could be seen as upsetting equal voting rights—but considering equal protection reasoning as well as associational effect would more fully capture the political stakes at issue.

The Court's preference for associational analysis would soon be made explicit, and would ironically make the virtue of equal protection's substantive impulse a vice. In *Storer v. Brown*,<sup>36</sup> the Court faced the parallel question with regards to independent candidates: what general thresholds might be demanded of them before they can access the general ballot? In *Storer*, the Court upheld a state regulation that required a one-year disaffiliation from another party before a candidate could run as an independent candidate.<sup>37</sup> Because of the anti-splintering, factionalism-inhibiting benefit of the regulation, the law survived challenges under both the First Amendment and the Equal Protection Clause. The state interest evoked clearly bears on the associational question—the law prevents disgruntled party members from breaking off and running as independents, and thus confers a benefit that bears directly on the associational question—but the equal protection question is more slippery. Does such a limitation impair equal franchise power for some (marginal) party members? The challenge of that query perhaps led the Court in *Storer* to make a statement that anticipated the coming disfavoring of the Equal Protection Clause in primary jurisprudence:

It is very unlikely that all or even a large portion of the state election laws would fail to pass muster under our cases; and the rule fashioned by the Court to pass on constitutional challenges to specific provisions of election laws provides no litmus-paper test for separating those restrictions that are valid from those that are invidious under the Equal Protection Clause. The rule is not self-executing and is no substitute for the hard judgments that must be made. Decision in this context, as in others, is very much a "matter of degree."<sup>38</sup>

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36. 415 U.S. 724 (1974).

37. *Id.* at 733–34.

38. *Id.* at 730 (internal citation omitted). For a critique of 'sore loser' laws such as those upheld in *Storer*, see Michael S. Kang, *Sore Loser Laws and Democratic Contestation*, 99 GEO. L. J. 1013 (2011).



This statement suggests the challenging nature of applying the Equal Protection Clause to judicial review of electoral process. Courts face an abstract and challenging task in determining what are minimally satisfactory electoral rules from an equality standpoint, particularly since the very point of democratic politics is to select majoritarian winners and losers. Determining if equality of voter liberty is excessively burdened by the statutory design of the electoral process (unless the regulation is of an explicitly unconstitutional character, such as racially discriminatory statutes) seems like an inevitably substantive query. Courts can only perform the analysis by adverting to a substantive theory of just, popular self-rule. It may be this quality that has led to a preference for using the more conceptually tractable associational right for querying the nature of primary design. The concept of unburdened association, at least, can be analyzed with some degree of isolation from the demand for a broader concept of politics.

The affinity for associational analysis seemed to reach high tide in *Cousins v. Wigoda*<sup>39</sup> and *Democratic Party of Wisconsin v. La Follette*,<sup>40</sup> in which the Court, pointing to associational rights, concluded that party autonomy trumps state law in determining the rules by which state delegates are seated at a national party convention. While the associational right is certainly the appropriate legal gloss for challenging the laws at issue, the Court's unflinching rejection of the countervailing interests of ensuring suffrage<sup>41</sup> or prohibiting "unwise or irrational"<sup>42</sup> practice suggests the degree to which associational interests had become the touchstone for judicial review of primaries. Thus, the constitutional inquiry into primaries has become dominated by a question that lends itself to the protection of voters organized into institutions, rather than the independent query as to the liberty afforded individual voters, or more general political efficacy as a matter of collective interest. In the thematically related *Eu v. San Francisco County Democratic Central Committee*,<sup>43</sup> the Supreme Court struck down internal state regulations of party matters (such as internal endorsements in primaries), on similar grounds of democratic self-determination.<sup>44</sup>

Thus, by the time the Supreme Court turned to the issue that has been most prominent in contemporary primary regulation—the degree

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39. 419 U.S. 477 (1975).

40. 450 U.S. 107 (1981).

41. *Cousins*, 419 U.S. at 489.

42. *La Follette*, 450 U.S. at 124.

43. 489 U.S. 214 (1989).

44. *Id.* at 233.

to which states may dictate to parties the political affiliation of voters in primary participation—the associational interest had emerged as dominant. The seminal question has been if states may impose voter affiliation requirements with regards to primary participation. There is a dizzying array of such alternatives. Under a closed primary, only those voters who are members of the party holding the primary may vote on nominees. Under an open primary, a voter may select primary candidates for any party, but can only select one candidate from all offices, and thus is committed to having a voice in the nominees for only one party.<sup>45</sup> In a blanket primary, voters may cast primary votes for any candidate from any party for any office. Thus, in a blanket primary, a voter may be most interested in the question of who will be the Democratic nominee for governor, and cast her primary vote for governor for the Democratic primary; but most interested in the Republican nominee for Attorney-General, and cast her primary vote for the attorney-general race for the Republican primary. Under a blanket primary a voter may influence any matrix of primary races without limit as to party (though may only support one candidate per position); under an open primary, may influence any party regardless of voter affiliation, but a voter may only influence one party; and under a closed primary must have a formal voter affiliation with the party in order to participate.<sup>46</sup> There are further variations on these as well; a so-called modified blanket primary, for example, allows voters to pick freely among candidates regardless of party affiliation, and then the top two candidates for an office advance to the final electoral round (even if both are from the same party).<sup>47</sup>

The Supreme Court's first discussion<sup>48</sup> on the topic was in *Tashjian v. Republican Party of Connecticut*,<sup>49</sup> which queried if a state law could mandate closed primaries, when a state party wishes to allow independent voters to participate in its primaries. In deeming the law to be an impermissible infringement of associational rights, the Court provided its clearest articulation yet of the currently dominant constitutional principle with regards to regulation of state primaries:

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45. *California Democratic Party v. Jones*, 530 U.S. 567, 576 n. 6 (2000).

46. See Burt Neuborne, *Felix Frankfurter's Revenge: An Accidental Democracy Built by Judges*, 35 N.Y.U. REV. L. & SOC. CHANGE 602, 638 (2011).

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

48. Ironically enough, a decade prior to *Tashjian*, the Supreme Court summarily upheld the same statute against a challenge by an independent voter; the key being in that case the Republican Party and state government agreed regarding the desirability of a closed primary. *Nader v. Schaffer*, 417 F.Supp. 837 (D. Conn. 1976), *summarily aff'd*, 429 U.S. 989 (1976).

49. 479 U.S. 208 (1986).

persons (and the parties they comprise) have a right to define the terms of their own association.<sup>50</sup> The majority opinion worked through and dismissed the force of the state interests (such as anti-raiding or clarity of party labels),<sup>51</sup> largely because it saw the measure at issue as trying to overdetermine the Republican Party's right to determine the terms of its own composition rather than as serving a universal interest in advancing functional state politics. Yet the Court's judgment regarding the interests advanced by the state ultimately hung upon its substantive assessment of political realities: can voters be misled by party labels?<sup>52</sup> Is there a concrete and material benefit to mandated closed primaries?<sup>53</sup> These are precisely the types of substantive concerns that the Court has acknowledged when permitting restrictions to stand (as in *Storer*, *Rosario*, and *Jeness*), and which are part of a broader query into the necessary terms for legitimate democratic politics. In readily dismissing them in *Tashjian*, the Court affirmed its protectiveness of party self-determination, understood through the associational right.<sup>54</sup>

At the beginning of the 2000s, another wave of cases regarding state regulation of voter affiliation and primary participation worked its way through the Supreme Court. In *California Democratic Party v. Jones*,<sup>55</sup> a state law (approved by referendum) dictated blanket primaries, with the explicit goal of encouraging moderation of political views as candidates drifted towards the mean to appeal to all voters.<sup>56</sup> In finding the measure unconstitutional, the Court indicated that the "right to exclude" (in this case, non-party members) in the nomination process is a central aspect of the right to association.<sup>57</sup> The various structural interests asserted by those advocating for the measure were dismissed as lacking constitutional heft, especially given the lack of narrow tailoring in the measure.<sup>58</sup> Together with *Tashjian*, it establishes a general right of parties to determine their own composition,<sup>59</sup> whether it is by preferring a more expansive or more restrictive approach to

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50. *Id.* at 215–16.

51. *Id.* at 219–24.

52. *Id.* at 220.

53. *Id.* at 223–24.

54. *Id.* at 229.

55. 530 U.S. 567 (2000).

56. *Id.* at 570.

57. *Id.* at 575–76.

58. *Id.* at 585–86.

59. That parties truly deserve such constitutional protection (as if they were voters who could suffer government oppression) has been critiqued. See Richard L. Hasen, *Do the Parties or the People Own the Electoral Process?*, 149 U. PA. L. REV. 815 (2001).

determining the content of the party's identity, it is fundamentally the right of those who comprise the association, not the government. This right is not absolute, however. In *Clingman v. Beaver*,<sup>60</sup> the Court refused to strike down a state statute requiring a semi-closed primary (ostensibly justified by typical anti-raiding and anti-fragmentation rationales).<sup>61</sup> Voters registered as independents were permitted to vote in any primary they wished, but voters registered with a party could only vote in that party's primary. The Court concluded that (in contrast with the mandated closed primary at issue in *Tashjian*) the burden on association was relatively light, especially since parties could still recruit and communicate with voters freely, thus determining terms of their own association. The only associational impairment was that parties could not seek to associate, ironically enough, with voters who had actively selected to associate with another party.<sup>62</sup> Likewise, in *Washington State Grange v. Washington State Republican Party*,<sup>63</sup> a state primary design that allowed candidates to self-designate as whichever party they wished and then moved the top two vote-getters to a general election survived a facial challenge brought by the state Republican party. The Court, in effect, said that the only harm suggested was confusion of voters, which, in the absence of evidence such confusion was only a hypothetical possibility, was not strong enough to activate strict scrutiny.<sup>64</sup> In the absence of such constitutional burden, a state's right to regulate its own affairs will justify "reasonable, nondiscriminatory restrictions."<sup>65</sup> *Washington State Grange* suggests the Court will be hesitant to invalidate a "popularly enacted election process" that on its face imposes no heavy constitutional burden, and has "never been carried out."<sup>66</sup>

Throughout the development of the jurisprudence, the Court has made various postulations regarding the viable operation of politics as well as appropriate norms of democratic practice. This touches on both the explicit constitutional weighting and the assessments of the various burdens, as well as the interpretation of countervailing state interests. For example, the *Rosario/Kusper* pairing is based on a theory of what level of preemptive autonomous action is appropriate for voters to

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60. 544 U.S. 581 (2005).

61. *Id.* at 595–96.

62. *Id.* at 589. One must also wonder if the fact that the challenging party was a minor party was of relevance to the Court's reasoning.

63. 552 U.S. 442 (2008).

64. *Id.* at 455.

65. *Id.* at 452.

66. *Id.* at 458.

sustain appropriate party coherence. Likewise, the tolerance of the anti-splintering rationale advanced in *Storer* suggests intrinsic value of party coherence. Most notably in the current law, the valuation of party self-selection in the primary process weights rule-based group coherence over collectively chosen rules determining terms of access to the political process. The result is a functional, albeit fragmentary and obscurely presented, political theory.

### III. DRIFTING ASTRAY BY ASSOCIATION: PARTY PROTECTION AND ITS ANALYTIC LIMITS

The political theory the Court has advanced in the context of primaries derives from the interplay of two broad principles: a constitutional right of voters (and thus, by extension, parties) to set the terms of their own association; and the interest of states in managing electoral process, which is, ironically enough, often assessed by if the subsequent procedures facilitate the functioning appropriate terms of party integrity. While challenges to a law are phrased in terms of constitutional rights, even the state interests used to justify regulation typically involve the same substantive enquiry regarding the impact on party coherence and continuity.<sup>67</sup> The Court's first broad forays into primary regulation may have been inspired by a broad desire to maximize electoral access and break down structures that impair legitimate democratic expression (much as one-person one-vote sought to generally protect a type of voting equality), but the sweep of the Court's analysis—and imagination—has narrowed. Its approach to primary regulation has become dominated by one question—does a law help or harm the ability of citizens to sustain parties as associations?

This narrowing has had two substantive effects. The first has been to clip the extent of jurisprudential analysis to only primarily enquire into the effect on parties, rather than the broader impact on democratic access and fairness.<sup>68</sup> Correspondingly, the second trend has been a drift away from the generality of fairness in democracy in the Court's reasoning. These two trends seem linked. The exclusive focus on associational rights has resulted in legal thinking drifting from the broader interest in political fairness that characterized the initial entry into the political thicket.

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67. See *Clingman*, 544 U.S. at 594–95.

68. See *N.Y. State Bd. of Elections v. Lopez Torres*, 552 U.S. 196 (2008); another example from a related domain is *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 359 (1997), which performed only an associational analysis to conclude that a state fusion ban survived constitutional review, even as it cited cases invoking political freedom more generally.

This focus on parties (both as the primary locus of constitutional interest, and as the primary basis for justifying a constitutional burden) and associational rights is particularly peculiar given major parties' structural centrality and political dominance. In an influential account, Leon Epstein characterized parties as "public utilities" rather than typical private organizations on account of their close and mutually beneficial relationship to governance, their functional integration with the public apparatus, and generally open-facing civic character.<sup>69</sup> Given the modern nature of US politics, it is scarcely possible to imagine it operating without major parties possessing significant authority. Scholars have further emphasized that the influence and stature of major parties means that they are scarcely the sort of institution that needs judicial protection from state action.<sup>70</sup> While the Supreme Court has rejected protection of two-party dominance as a legitimate state interest and indicated a (bounded) interest in ensuring that minor parties retain some viability, its substantive and doctrinal concern with association as the fundamental interest activated by primary design mean that political parties remain the locus of constitutional protection. And ironically enough, in *Clingman*, where the law was challenged by minor parties as being especially disadvantageous to minor parties, the Court was broadly unsympathetic (and cited political realities that would be of greater benefit to a major party if they were trying to bring such a claim).<sup>71</sup>

That treatment of primaries has come to service already well-positioned and quasi-public major parties, which is particularly paradoxical given that the ultimate purpose of judicial review of election law is to protect the broader fairness of the democratic practice. Earlier cases regarding primary regulation and ballot access reflected this general political interest more strongly. This is elegantly illustrated by the relationship between write-in votes and access to the general ballot. In *Williams* and *Jenness*, the availability of write-in votes was scrutinized by the Court in determining if an electoral setup was so constraining as to be unconstitutional. This had a pendent analysis in *Burdick v. Takushi*,<sup>72</sup> where the Court upheld a state ban on general election write-in votes because of the logistical ease by which

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69. This terminology has been widely adopted by leading scholars of law and parties. Nathaniel Persily, *Toward a Functional Defense of Political Party Autonomy*, 76 N.Y.U. L. REV. 750, 751 (2001); Nancy L. Rosenblum, *Primus Inter Pares: Political Parties and Civil Society*, 75 CHICAGO-KENT L. REV. 493 (2000); Daniel Hayes Lowenstein, *Associational Rights of Major Political Parties: A Skeptical Inquiry*, 71 TEX. L. REV. 1741 (1993).

70. See Persily, *supra* note 69; Hasen, *supra* note 59.

71. 544 U.S. at 594–97.

72. 504 U.S. 428 (1992).

candidates could gain access to the ballot.<sup>73</sup> The Court in these cases appropriately considered rights of both association and liberty.<sup>74</sup> The underlying question was the viability of the measure at issue *given the broader configuration of the state electoral regime*. In *Williams* and *Jenness*, the constitutionality of restrictions on ballot access turned on the broader ability of voters to express their preferences at the polls, with the ability to freely express a write-in candidate being a pivotal element. In *Burdick*, the constitutionality of a write-in ban required a like contextualizing analysis, and thus considering accessibility of access to the general ballot through other means. In constitutional terms, the comprehensiveness of this analysis necessitated considering how the regime impacted equal ability to express political preferences for each voter as well as the effect on the ability of voters to achieve coordination with other voters to maximize political efficacy. Thus, both Fourteenth Amendment equal protection liberty and First Amendment associational interests were appropriately considered.

Yet the generality of the Court's review has faded with time, and it has developed something of an associational tunnel vision, as is particularly clear in the primary affiliation cases. This crabbed constitutional view has led to neglect of the underlying question: how should the expression of democratic will occur during the primary process? Primaries are important precisely because, in a democracy of large scale and with a dizzying array of candidates, some form of pre-selection is necessary prior to general elections. The American system has evolved to rely on the 'public utilities' of parties for this pre-selection, with certain administrative facilitation and oversight provided by state governments.<sup>75</sup> Whether the primary process works well is ultimately a question that devolves upon deeper questions regarding the legitimate and effective democratic process; yet the evolution of the law has somehow led to prioritization of associational aspects of this question.<sup>76</sup> Yet ironically enough the associational gloss itself tends to benefit powerful quasi-state actors who are likely least in need of protection from government action.

The distortive consequences of the Court's proclivity for associational analysis manifest in cases such as *Lopez Torres*, in which a primary

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73. *Id.* at 441–442.

74. *Burdick* observed the "limited burden on voters' rights to make free choices and to associate politically through the vote." *Id.* at 439.

75. See EPSTEIN, *supra* note 9, at 162–67, for a description of the introduction of the Australian ballot and how it attempted to curb some of the excesses of machine politics.

76. See Samuel Issacharoff, *Private Parties with Public Purposes: Political Parties, Associational Freedoms, and Partisan Competition*, 101 COLUM. L. REV. 274, 290 (2001) (describing the emergence of a 'structural' view of the First Amendment).

candidate argued a party's internal selection procedures too heavily favored insiders.<sup>77</sup> The Court did not merely dismiss the claim (which may have been a substantively valid outcome); it suggested that elite or insider domination within a party is not a matter of general justiciability.<sup>78</sup> The wrong asserted by the claimant can only be so readily dismissed if there are alternate mechanisms available by which she could seek to achieve political self-actualization, not merely (or even primarily) for her own end, but for the benefit of rank-and-file voters whose political will might be overly channeled or constrained by elite party control. Opportunities for genuine voter control of the selection of candidates seems a crucial part of primary legitimacy; else the process becomes nothing other than a means of elite conflict. The question of *Lopez Torres* should not be if the plaintiff's asserted harm can be conceptualized as associational, but rather if she invokes a general failure of primaries as an aspect of democracy that is appropriately solved by judicial intervention.

Scholars have not been blind to the fact that the Court's analysis of primaries has been dissatisfying. Some have noticed the oddness of the Court adopting a constitutional posture that protects parties, which, in addition to being among the most powerful and politically savvy of entities, have a uniquely close relationship to the state; as such the Court's drift towards rights protection that prizes party integrity, given they can likely fend for themselves, is a curious move.<sup>79</sup> It can be usefully contrasted with J.H. Ely's influential argument<sup>80</sup> that judicial application of constitutional principles is justified when it protects structurally vulnerable groups in a democracy; yet in a two-party system, the major parties "*are* the dominant groups, and the Court has . . . no reason to believe that they are incapable of fending for themselves through the political process."<sup>81</sup> Others have observed the failure of the Court to consistently advance theoretical foundations for their profoundly political intervention; Issacharoff has more specifically stated the Court has omitted "any recognition of a thick right of autonomy that a party may claim against adverse state regulation."<sup>82</sup>

77. *Lopez Torres*, 552 U.S. at 204–05.

78. *Id.* at 209.

79. See Hasen, *supra* note 59, at 815 ("courts generally should not protect the two major political parties, the Democrats and Republicans, except from interference in each party's internal governance and from one party's attempt to gain partisan advantage over the other").

80. JOHN HART ELY, *DEMOCRACY AND DISTRUST* 101 (1980).

81. *Davis*, 478 U.S. at 152 (O'Connor, J., concurring) (discussing the related problem of judicial intervention in partisan gerrymandering).

82. Issacharoff, *supra* note 76, at 288.



These high-theoretical approaches have generally advanced philosophical or social scientific principles as the new fulcrum for judicial regulation of primaries. As advanced by Issacharoff,<sup>83</sup> Michael Kang,<sup>84</sup> and Nathaniel Persily,<sup>85</sup> adopting postures that facilitate effective party competition may be the most popular structural value, though others have advanced more general models.<sup>86</sup>

Given that primaries are a fundamental part of the mechanism by which individual will and collective preferences are transformed into electoral outcomes, such a generally structuralist spirit is wholly appropriate. Perhaps more curious is the broader acceptance of First Amendment associational rights as the fitting lens for judicial evaluation of such primary design.<sup>87</sup> Even Issacharoff's analysis of the associational right with regards to regulation of political parties, while recognizing the dilemma facing courts given that parties possess both public and private attributes,<sup>88</sup> does not challenge the basic reliance on association rights. Yet for the reasons this piece has revealed, associational rights are an odd foundation for considering party primaries. Associational rights make parties the *sine qua non* of assessing primary regulation, and tend to exclude other considerations of how primary regulations impact democratic efficacy. Even if the scholarly turn towards functionalist analysis is accepted, thanks to the role of precedent judges would likely to continue to orient their analysis of primary regulation around laws' effect on parties. Yet this interest in primary regulation is only legitimate as a facet of broader judicial remit to advance fair terms for democratic politics.

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83. *Id.* at 300.

84. Kang, *supra* note 38, at 1025, 1059 (challenging the purported anti-factionalist benefits of sore loser laws by failing to give sufficient leverage to continuing negotiating with primary winners during intraparty candidate selection).

85. Persily, *supra* note 69, at 753 (arguing for a functional defense of party organizational autonomy on the grounds that it enhances competition and ensures a voice for vulnerable groups).

86. See Nathaniel Persily & Bruce E. Cain, *The Legal Status of Political Parties: A Reassessment of Competing Paradigms*, 100 COLUM. L. REV. 775, 796 (2000) (arguing for particularized application of differing paradigms to address particular legal contexts); Michael S. Kang, *The Hydraulics and Politics of Party Regulation*, 91 IOWA L. REV. 131, 173–74 (2005) (arguing courts should adopt a more generalized structuralist view of managing political conflict). For a review of these theories, see Michael R. Dimino, Sr., *It's My Party and I'll Do What I Want To: Political Parties, Unconstitutional Conditions, and the Freedom of Association*, 12 FIRST. AMEND. L. REV. 65, 92 (2013).

87. See Persily, *supra* note 69, at 816 (“the First Amendment remains the most legitimate source for analogous principles of autonomy and association”).

88. Issacharoff, *supra* note 76, at 294.

The jurisprudence would be better served—in terms of both substance and clarity—by starting with a right more generally oriented towards popular autonomy, rather than autonomy as filtered through dominant institutions in the political process. This is not to say that judicial assessment of primaries should consist of unvarnished judicial imposition of terms of democratic institutional design. Such an approach would raise a host of problems, including problems of standing and justiciability and contravening the political question doctrine. More generally, it would threaten to turn the courts into purely political institutions, which would both raise a theoretical problem of non-democratic rule and expose courts to the risk of institutional retaliation by the intrinsically more powerful legislature and executive;<sup>89</sup> both of these possibilities would weaken the rule of law. Any such risks can be mitigated, however, by continuing to interpret the legality of primary regulation through the matrix of constitutional rights. The question, subsequently, is what right offers the most appropriate framework.

#### IV. A THOUGHT EXPERIMENT IN RENEWING JUDICIAL OVERSIGHT OF PRIMARIES: A RETURN TO EQUAL PROTECTION

The most straightforward way to shake off the dogmatic focus on associational rights is to turn to the Equal Protection Clause. This is not the only right that could perform this function. Michael McConnell has argued that the political thicket would have been better entered by advancing republican government through the Guaranty Clause,<sup>90</sup> and it might be possible, through a “thick” conception of political rights, to adapt substantive due process to this purpose. It would also be possible to stretch the concept of association to cover integrity of governance generally, though this would involve distortion of the concept as it stands in the doctrine. Yet “political” equal protection has a number of virtues to recommend it: it has an established legacy in the regulation of politics, including, before the Court adopted a narrower approach to regulation, in the context of primaries; and it has a natural relationship to the democratic process regarding the issue of how to assess the appropriate government treatment of electoral procedure. Democracy is distinguished as a political system by a commitment to a certain type of structural equality of citizen political power. How this equality must be realized has been the subject of a vast and contentious debate, but before the court the principle of non-discrimination in the Equal

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89. See generally ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH* (1962).

90. Michael W. McConnell, *The Redistricting Cases: Original Mistakes and Current Consequences*, 24 HARV. J.L. & PUB. POL’Y 103, 105–07 (2000).

Protection Clause is the most natural mechanism for fully exploring this.

Of course, many have observed that the attempts by the Supreme Court to develop the Equal Protection Clause into a coherent vehicle for protecting democracy have been theoretically underdeveloped<sup>91</sup> and at worst practically self-defeating.<sup>92</sup> One major aspect of the deficiency in its judicial implementation has been what Heather Gerken has suggested is a lack of mid-range theory:<sup>93</sup> an explanation of what deeper political aim or vision of democratic structure the Court hopes to achieve through the application of one-person, one-vote. Indeed, in *Storer* the Court seemed to concede the intractability of answering the middle theory problem with its hand-waving denial of any “litmus-paper”<sup>94</sup> test for a state regulation (in the primary context) passing constitutional muster.

Yet if judges and scholars wished to take up the challenge of adjusting the Equal Protection Clause to address electoral justice, the delimited role and structured character of primary analysis might offer a helpful point of entry. Performing an equal protection analysis of primaries would require juggling of a complex constellation of factors and entities: the right of voters to realize their equal political autonomy; the right of the state (as ultimately empowered by voters) to set terms of self-rule; and the right of parties to facilitate the realization of voter will, even as they often occupy a state like space in some aspects of the political process. Yet that the Court would have to explicitly take into account these structures might facilitate the development of richer theorization of how the Equal Protection Clause applies to political structure. In an opaque and fragmentary manner, this has already occurred in the existing case law—while the Court has overvalued the associational right to form parties and only developed a partial account of countervailing state interests (which, themselves, treat party integrity as the driving consideration),<sup>95</sup> it has at least developed aspects of a theory of political operation in the context of primary regulation.

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91. See Sanford Levinson, *One Person, One Vote: Mantra in Search of a Meaning*, 80 N.C. L. REV. 1269 (2002); Heather K. Gerken, *The Costs and Causes of Minimalism in Voting Cases: Baker v. Carr and its Progeny*, 80 N.C. L. REV. 1411 (2002).

92. See Richard H. Pildes, *Is Voting Rights Law Now at War with Itself? Social Science and Voting Rights in the 2000s*, 80 N.C. L. REV. 1517 (2002).

93. Heather K. Gerken, *Lost in the Political Thicket: The Court, Election Law, and the Doctrinal Interregnum*, 153 U. PA. L. REV. 503 (2004).

94. 415 U.S. at 730.

95. See *Timmons*, 520 U.S. at 367; *Clingman*, 544 U.S. at 596.

Thus, the very factor that makes primary regulation challenging—the presence of multiple types of actors, one of which (the party) has ambiguous status as both a quasi-governmental entity that can effect unconstitutional action and a private association deserving constitutional protection—makes it an appropriate candidate for clarifying the role of equal protection in electoral design. The substantive complexity would discipline the Court to engage with the substantive questions that would answer the clamor for mid-range theory. The treatment of association in the existing jurisprudence has shown this will take place; however, the associational gloss has resulted in less comprehensive norms guiding the law's priorities. Equal protection analysis, conversely, would require direct confrontation with the question of the form of democratic equality that the law has so far evaded.

There is arguably a deeper theoretical reason to embrace the Equal Protection Clause to assess the design of an electoral practice as important as primaries. While the principle of association certainly may have first-order value, its greatest importance in the political sphere—and the central importance the Court has assigned in its reasoning—is as a tool for expressing political views. Due to its importance in coalition-forming and view development, association is certainly necessary for a large-scale democracy to function, and thus a Court should protect it as a right. But the relevant type of political equality in electoral process is both deontologically foundational to democracy, and uncompromisingly essential to its realization. In effect, associational rights are facultative of the democratic process—but equality is obligatory. Of course, the Equal Protection Clause does not guarantee general or universal equality; typically it protects against suspect classes. The challenge with primary regulation—and arguably with partisan gerrymandering as well—is that it seems difficult to classify political status (whether party affiliation or status as a dissatisfied 'outsider' with regards to a given party) as a suspect class. Thus, applying the Equal Protection Clause to primaries will require significant conceptual innovation. Yet this is precisely the source of the benefits of this approach. It would both force the Court to adopt a more thorough and well-reasoned perspective towards primary regulation rather than one that only protects a slice of the structural concerns, and will likely push towards a more general interpretation of how the Equal Protection Clause should be interpreted in the electoral design context (a project valuable for partisan gerrymandering and one-person, one-vote as well).

This innovation would of course retain protection of other constitutional rights. When a government regulation overly impairs the

ability of a group of voters to organize (or, for that matter, has racial animus), it faces a high level of scrutiny in terms of the appropriate constitutional right. Relying on equal protection as another standard for assessing primary organization, however, will force the Court to consider the broader political principles, and their more general ramifications, it wishes to advance as an institution, and what aspect of democratic practice deserve legal protections. It may also produce conflicts between differing principles, as the advancement of 'political' equal protection and of associational opportunities might come into points of conflict. Yet this is nothing new in election law, as is apparent in the race-and-districting jurisprudence. In the case of tension between equal protection and association, it could well clarify the ultimate values which the Court ought to advance when plunging into the political thicket. Indeed, as Ronald Dworkin would observe in his analysis of hard cases, it is the very defining feature of judging that it involves making, and justifying, difficult decisions between such competing values.<sup>96</sup>

While the evolution of the law itself in response to the re-introduction of the Equal Protection Clause might be difficult to predict with precision—it is the job of the Courts, after all—two general trends seem possible. The first is that a focus on equal protection would force the Court to moderate its focus on parties as the sole locus of constitutional assessment of primary regulation. Yet given that parties in the two-party system are typically powerful, savvy entities with sufficient institutional and structural resources such that judicial protection may not be necessary, this seems like far from a problematic development. Secondly, and perhaps predictably, a focus on equal protection would unsettle some of the particular doctrinal outcomes. For example, in *Jones*, the Court considered if a state could justify mandated blanket primaries on the grounds that it would broaden access to the relevant elections where a single party is dominant.<sup>97</sup> While it brushed aside the inability “to participate in what amounts to the determinative election” by recharacterizing the interest in associative terms,<sup>98</sup> the question might be raised if equal access to determinative elections might be supported by equal protection—

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96. See RONALD DWORIN, *TAKING RIGHTS SERIOUSLY* 81 (1997). For a discussion of the types of weighing that equality of political access and associational rights might bring into conflict, see John D. Inazu, *The Unsettling “Well-settled” Law of Freedom of Association*, 43 CONN. L. REV. 149, 153 (2010); though the White Primaries cases might bound how effectively, at least, major parties would be able to engage in discriminatory association.

97. *Jones*, 530 U.S. at 569.

98. *Id.* at 583.

particularly if other elements, such as a delay (even a moderate one) in registration as sustained in *Rosario* are present. This in turn points to the second possibility. A focus on equal protection might thus result in greater approbation of certain types of political arrangements—though the ultimate answers would require substantive engagement with some political realities. For example, if blanket primaries ultimately did unsettle or disrupt expression of preferences by impairing effective selection of candidates in a two-party system, it might comprise an equal election harm as well as raise associational concerns. But the very need to face the substance that already so influences the jurisprudence would be a virtue of greater reflection on equal protection concerns.

#### V. CONCLUSION: JUDICIAL POLITICKING AS BUSINESS AS USUAL, OR THE TRANSFORMATIVE POTENTIAL OF THE COURTS?

An apologist to the switch to associational rights might argue that the feature this piece has critiqued is, in fact, a virtue; it transformed the Courts from an entity that simply worked at the margins of politics to one that has the potential to reshape the heart of party contestation. The engagement with major party politics that has accompanied the associational lens allows the Court to act as a mainline institutional player in the structuring of elections, and in determining the character of parties. This is precisely the type of engagement that some of the leading lights in election law have called for in both general<sup>99</sup> and specific terms.<sup>100</sup> If Courts are engaging with primaries to debate appropriate conditions of party formation (as in *Clingman*, *Tashjian*, and *Washington State Grange*), they are engaged in the meaty questions of politics that allows for practical judicial structuring (whether or not critics might agree with the substantive outcomes of any particular such engagement). Conversely, the earlier, equal-protection-question engagement had less direct substantive force, insofar as it operated at the margins simply to prevent formal exclusion (as in *Williams* and *Jeness*).

Underlying this argument is an acceptance of business as usual in politics. As the Court has used the associational lens to regulate major party politics, it has implicitly accepted the basic political structures that dominate the contemporary electoral process. The relevance of its

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99. Samuel Issacharoff & Richard H. Pildes, *Law and the Political Process: Politics as Markets: Partisan Lockups of Democratic Process*, 50 STAN. L. REV. 643, 681 (1998) (arguing that Courts should uniquely develop a theory of 'partisan political competition').

100. Samuel Issacharoff, *Outsourcing Politics: The Hostile Takeover of Our Hollowed-Out Political Parties*, 54 HOUS. L. REV. 845 (2017).

engagement as an institutional player in major party structuring is to some degree premised on the dominance of such parties. To obtain such immediate relevance, the Court must internalize the status quo.

Such a judicial posture mitigates the transformative capacity of judicial intervention. By intervening in a manner that accepts the broad contours of existing political structures, it minimizes the radical potential of judicial lawmaking. This potential was, ironically, more apparent, at least in principle, when the Court was deploying the Equal Protection Clause to break up racial monopolies and ensure outsider access to machines. Thus, even as the switch from the Equal Protection Clause to associational rights seemingly allowed the Court to become a more central player in the day-to-day struggles among established political institutions, it may have defanged the Court of its ability to introduce radically new principles or patterns into elections. This may be because equality, compared to association, is itself an extraordinarily contestable concept, and can serve as a playing field for fundamental normative disputes.<sup>101</sup>

Thus, querying which constitutional doctrine should serve as the Supreme Court's lodestar in assessing party primaries may well lead to a much deeper question: what is the appropriate high-level institutional role for the Court? Ought it to enter politics as another agonist participant in power struggles (a role that might raise concerns given the emergence of the Court as a locus of partisan conflict)? Ought it adopt a minimalist approach in the context of voting, as it seemed prior to the voting rights revolution, allowing democratic struggle to play out on its own terms? Or should its unique institutional posture lead it to play a unique and occasionally disruptive (or rejuvenating) role in politics, as it seemed at the inception of modern voting law?

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101. For some examples of how equality can be a battleground, see, Reva B. Siegel, *Equality Divided*, 127 HARV. L. REV. 1, 4 (2013); Cass R. Sunstein, *Political Equality and Unintended Consequences*, 94 COLUM. L. REV. 1390, 1392 (1994).