# PARTICIPATION IN PRIMARY ELECTIONS AND THE DISPOSITIVE ELECTION TEST

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## INTRODUCTION

Political parties drive candidate nominations in the United States.[1] In particular, party primary elections have become the most common means by which candidates for general election are determined.[2] Yet despite the critical impor-

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[1] *See* Lesniak v. Budzash, 626 A.2d 1073, 1076–77 (N.J. 1993) ("The selection of nominees by political parties plays a crucial role in the electoral system. Indeed, the nomination of candidates by the major parties has been called the 'most critical stage' of the electoral process." (quoting *Developments—Election Law*, 88 HARV. L. REV. 1111, 1151 (1975))). *But see* Paul Frymer & Albert Yoon, *Political Parties, Representation, and Federal Safeguards*, 96 NW. U. L. REV. 977, 985–86 (2002) ("Parties have been faced with the real threat of irrelevance in a political system dominated by interest group money, the media, and individual candidates not beholden to either party.").

[2] *See* Leonard P. Stark, *The Presidential Primary and Caucus Schedule: A Role for Federal Regulation?*, 15 YALE L. & POL'Y REV. 331, 332–34 (1996).

tance of primary elections in selecting the nation's leaders, few people vote in them.[3] In a 2006 *New York Times* Op.-Ed., Norman Ornstein suggested that the Connecticut Democratic primary was "arguably the most important race in the nation and not even half of registered Democrats bothered to vote. [Democratic primary voters] in turn made up barely fifteen percent of the voting-age population of the state."[4] One reason for such low turnout in primary elections is that countless independent or unaffiliated voters cannot vote in primary elections without being forced to identify with a political party.[5] Many states have "closed" primary elections where only registered party members are permitted to vote.[6] As of 2014, eleven states have primary elections that are completely closed to independent and unaffiliated voters, while twenty-four have primaries with at least some restrictions on non-party members.[7] In some of these states, the primary election of one party is the only politically relevant election.[8] While voting may be one of the defining factors of American Democracy, closed primary elections have generally been upheld as constitutional despite their disenfranchising effect.[9]

In Part II, this Note outlines the current jurisprudence regarding closed primary elections. This section argues that there is conflicting legal precedent for determining when a voter may, or may not, be excluded from a primary election. Part III proposes a theory that attempts to reconcile the conflicting law. Specifically, this Note proposes a "dispositive elections test" and argues that when a primary election is the only politically meaningful election, it would be unconstitutional to exclude independent or unaffiliated voters from that primary election. In proposing the test, this Note examines the results and competitiveness of elections surrounding the cases discussed in Part II. Part III.B relies on

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[3] *See* Elisabeth R. Gerber & Rebecca B. Morton, *Primary Election Systems and Representation*, 14 J.L. ECON. & ORG. 304, 306–09 (1998); Mike Maciag, *Voter Turnout Plummeting in Local Elections*, GOVERNING (Oct. 2014), http://www.governing.com/topics/politics/gov-voter-turnout-municipal-elections.html; Norman Ornstein, Op.-Ed., *Vote—or Else*, N.Y. TIMES, Aug. 10, 2006, at A23.

[4] Ornstein, *supra* note 3.

[5] *See* Trevor Potter & Marianne H. Viray, *Barriers to Participation*, 36 U. MICH. J.L. REFORM 547, 558–62 (2003).

[6] Kristin Kanthak & Rebecca Morton, *The Effects of Electoral Rules on Congressional Primaries*, *in* CONG. PRIMARIES AND THE POLITICS OF REPRESENTATION 118–20 (Peter F. Galderisi et al. eds., 2001).

[7] *State Primary Election Types*, NAT'L CONF. OF STATE LEGISLATURES (June 24, 2014), http://www.ncsl.org/research/elections-and-campaigns/primary-types.aspx.

[8] For example, Democrats have dominated Hawaiian elections to such an extent that the Democratic nominee is essentially guaranteed success in the general election. *See* Burdick v. Takushi, 504 U.S. 428, 443–47 (1992) (Kennedy, J., dissenting); *see generally* CQ PRESS, GUIDE TO U.S. ELECTIONS (5th ed. 2005) (containing historical election returns for House, Senate, Gubernatorial, and Presidential elections, including Senate primary elections).

[9] *See generally* Robin Miller, Annotation, *Constitutionality of Voter Participation Provisions for Primary Elections*, 120 A.L.R. 5TH 125 (2004).

election returns and results compiled in the *Guide to U.S. Elections*.[10] This Note argues that courts have already effectively been operating under the dispositive election test. Further, this Note explores how this test may be constitutionally rooted.[11] Finally, it addresses some unresolved questions concerning practical aspects of the test.[12]

## II. LEGAL BACKGROUND

### A. *Types of Primary Elections*

Primary elections can be categorized into several types: closed, semi-closed, open, and blanket.[13] In a closed primary election, only members of a particular political party who registered at a point before the election may vote in the party's primary.[14] The amount of time required for a voter to register varies by state and "ranges from the day of the primary to several weeks before the primary."[15] In semi-closed primaries, independent or unaffiliated voters do not need to affiliate with a party before the election; instead, they may choose to vote in a particular party's primary at the polls, whereas voters who have affiliated with a political party may only vote in their own party's primary.[16] In an open primary, any voter, regardless of party affiliation, may vote in any party's primary.[17] In a blanket primary, all candidates for election appear on a single ballot and voters may "choose freely among them."[18] That is, for each office, a voter can choose which party's primary to vote in; one could vote in the Democratic primary for Governor and the Republican primary for Treasurer.[19] The blanket primary can be further distinguished into non-partisan and partisan varieties.[20] In the partisan blanket primary, "the top finisher in each party [and

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[10] CQ PRESS, *supra* note 8.

[11] *See* discussion *infra* Part III.B.2.

[12] *See* discussion *infra* Part III.B.4.

[13] Charles E. Borden, *Primary Elections*, 38 HARV. J. ON LEGIS. 263, 263–64 n.7 (2001) (noting that Justice Marshall recognized the first four categories in Tashjian v. Republican Party of Conn., 479 U.S. 208, 222 n.11 (1986) and the Court later distinguished nonpartisan and blanket primaries in California Democratic Party v. Jones, 530 U.S. 567 (2000)).

[14] *Tashjian*, 479 U.S. at 222 n.11 (1986) (describing classic closed primaries as events where voters must be registered party members at some point before the election); Kanthak & Morton, *supra* note 6.

[15] Borden, *supra* note 13, at 264.

[16] *Tashjian*, 479 U.S. at 222 n.11; Kanthak & Morton, *supra* note 6.

[17] Kirtsen Kanthak and Rebecca Morton distinguish open primaries into two subcategories: semi-open and pure-open. Kanthak & Morton, *supra* note 6. In a semi-open primary, voters are required to publicly, but temporarily, declare their affiliation with a political party or request a particular ballot. *Id.* In a pure-open primary, voters choose the ballot of the party they would like to cast in private. *Id.*

[18] *Jones*, 530 U.S. at 570.

[19] *Id.*; Borden, *supra* note 13, at 267.

[20] *Jones*, 530 U.S. at 585–86; Borden, *supra* note 13, at 267.

office] advances to the general election."[21] In a non-partisan blanket primary, a candidate receiving a majority of the primary vote is declared the general election winner; if no candidate receives a majority, the top two finishers for each office "advance to the general elections, regardless of their party affiliation."[22]

B. *The Constitutional Landscape of Primary Elections*

1. Associational Rights of Political Parties.

Political parties have the same rights under the First Amendment to the United States Constitution as their members have individually, including the right to free association and freedom from compelled associations.[23] The jurisprudence on the implications of political parties' right to associate in primary elections is well laid out in *California Democratic Party v. Jones*[24] and *Tashjian v. Republican Party of Connecticut*.[25]

*Jones* addressed a 1996 California citizens' initiative—Proposition 198—that changed the state's primary election method from a closed system to blanket one.[26] In *Jones*, four of California's political parties challenged the Proposition's constitutionality.[27] The Court began its analysis by discussing the role a state may play in regulating primary elections.[28] Specifically, the Court noted that "[s]tates have a major role to play in . . . the election process, including primaries," but that states could not freely regulate party nomination procedures as if they were public affairs; the states are constrained by the First Amendment.[29]

The *Jones* Court then pointed to case law supporting the idea that political parties have First Amendment rights to be free from compelled association.[30] The *Jones* Court determined that California's blanket primary raised serious

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[21] Borden, *supra* note 13, at 267. The partisan blanket primary was declared unconstitutional in *Jones*, 530 U.S. 567.

[22] Borden, *supra* note 13, at 267.

[23] *Jones*, 530 U.S. at 572–73.

[24] *See id.*

[25] *See* Tashjian v. Republican Party of Conn., 479 U.S. 208, 213–17 (1986).

[26] *Jones*, 530 U.S. at 570.

[27] The California Democratic Party, the California Republican Party, the Libertarian Party of California, and the Peace and Freedom Party brought suit. Each party had a rule prohibiting members of other political parties from voting in the primary. *Id.* at 571.

[28] *Id.* at 572–73.

[29] *Id.* (first citing Burdick v. Takushi, 504 U.S. 428, 433 (1992); then citing *Tashjian*, 479 U.S. at 217).

[30] *Id.* (first citing Eu v. S.F. Cnty. Democratic Cent. Comm., 489 U.S. 214, 224 (1989); then citing *Tashjian*, 479 U.S. at 217; then citing Timmons v. Twin Cities Area New Party, 520 U.S. 351, 359 (1997); and then citing Democratic Party of U.S. v. Wisconsin *ex rel.* La Follette, 450 U.S. 107, 126 (1981)). The theory relied on in *Jones* is well stated in *Eu*: "Freedom of association means not only that an individual voter has the right to associate with the political party of her choice, but also that a political party has a right to 'identify the

issues of compelled association under the First Amendment because the scheme allowed unaffiliated and opposing party members to vote for candidates in any party of their choice.[31] In order for California's blanket primary to survive, California would need to demonstrate that the blanket system is "narrowly tailored to serve a compelling state interest."[32]

The *Jones* Court addressed seven interests advanced by respondents to determine if they were compelling state interests.[33] The interests were: (1) "producing elected officials who better represent the electorate"; (2) "expanding candidate debate beyond the scope of partisan concerns"; (3) "ensuring disenfranchised persons enjoy the right to an effective vote"; (4) "promoting fairness"; (5) "affording voters greater choice"; (6) "increasing voter participation"; and (7) "protecting privacy."[34] Justice Antonin Scalia, writing for the Court, dismissed the first two interests as being fundamentally at odds with the political parties' First Amendment rights because their purpose was to change the choices of the party.[35] Specifically, Justice Scalia stated, "[b]oth of these supposed interests . . . reduce to nothing more than a stark repudiation of freedom of political association: Parties should not be free to select their own nominees because those nominees, and the positions taken by those nominees, will not be congenial to the majority."[36]

Justice Scalia found the third interest—ensuring disenfranchised persons enjoy the right to an effective vote—similarly unpersuasive.[37] California had argued that independent and unaffiliated voters were barred from voting in the primary election and were therefore disenfranchised.[38] Further, they argued that members of the minority party in districts solidly controlled by the opposing party had no say in the outcome of the election.[39] That is, some districts virtually always elect a member of one party during the general election; a member of the minority party who cannot vote in the majority's primary has effectively no say in the final outcome of the election. In rejecting such an interest, Justice Scalia noted:

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people who constitute the association,' and to select a 'standard bearer who best represents the party's ideologies and preferences.'" *Eu*, 489 U.S. at 224 (internal citations omitted).

[31] *Jones*, 530 U.S. at 581–82 ("In sum, Proposition 198 forces petitioners to adulterate their candidate-selection process . . . by opening it up to persons wholly unaffiliated with the party.").

[32] *Id.* at 581–83; *see also Timmons*, 520 U.S. at 359 (discussing the scrutiny used when addressing restrictions on the associational rights of political parties).

[33] *Jones*, 530 U.S. at 582.

[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] *Id.* at 583.

[38] *Id.*

[39] Brief in Opposition to Writ of Certiorari at 15, Cal. Democratic Party v. Jones, 530 U.S. 567 (2000) (No. 99-401), 1999 U.S. S. Ct. Briefs LEXIS 1230, at *15–16.

> We have said, however, that a "nonmember's desire to participate in the party's affairs is overborne by the countervailing and legitimate right of the party to determine its own membership qualifications." . . . The voter's desire to participate does not become more weighty simply because the State supports it. Moreover, even if it were accurate to describe the plight of the non-party-member in a safe district as "disenfranchisement," Proposition 198 is not needed to solve the problem. The voter who feels himself disenfranchised should simply join the party. That may put him to a hard choice, but it is not a state-imposed restriction upon *his* freedom of association, whereas compelling party members to accept his selection of their nominee *is* a state-imposed restriction upon theirs.[40]

Thus, California's asserted interest in protecting the rights of minority party, independent, and unaffiliated voters was found insufficient, because voters *could* participate in the primary if they so choose and because the constitutional interests of political parties in keeping out certain voters outweighed the constitutional interests of people to have an effective vote.[41] The Court relied, in part, on statements in *Tashjian v. Republican Party*,[42] *Rosario v. Rockefeller*,[43] and *Nader v. Shaffer*[44] when determining that the interests of the political parties in excluding nonmembers outweighed the interests of potential voters.[45]

After dismissing California's first three asserted interests, Justice Scalia determined that while the remaining four interests—"promoting fairness, affording voters greater choice, increasing voter participation, and protecting privacy"—are not automatically insufficient, they failed to be compelling in the circumstances presented by *Jones*.[46] Promoting fairness and increasing voter choice, according to the Court, is simply another way of arguing that certain voters should be allowed in party primaries despite the rights of political parties.[47] Likewise, the Court determined that increasing voter participation followed the same apparently flawed reasoning.[48] Finally, protecting the privacy of one's affiliation with a political party could not be compelling, the Court argued, because it is not the type of "sacrosanct" information typically associated with a need for privacy.[49]

*Tashjian* involved a Connecticut statute prohibiting independent and unaffili-

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[40] *Jones*, 530 U.S. at 583–84 (citations omitted) (emphasis in original).

[41] *Id.* at 583–85.

[42] 479 U.S. 208 (1986).

[43] 410 U.S. 752 (1973).

[44] 417 F. Supp. 837 (D. Conn. 1976), *aff'd*, 429 U.S. 989 (1976).

[45] *Jones*, 530 U.S. at 583–84.

[46] *Id.* at 584–85.

[47] *Id.*

[48] *Id.* at 585.

[49] *Id.* Justice Scalia pointed to several federal statutes that require a person to disclose his or her party affiliation in order to hold certain federal offices. *Id.*

ated voters from participating in party primaries.[50] In 1984, the Republican Party of Connecticut adopted a rule allowing independent voters to participate in its primary elections.[51] The rule, however, conflicted with a Connecticut statute prohibiting nonmembers from voting in a party primary.[52] The party brought suit alleging that the statute violated its First Amendment rights to freely associate.[53] Connecticut advanced several possible compelling interests in defense of the statute: (1) "ensuring the administrability of the primary system"; (2) "preventing raiding"; (3) "avoiding voter confusion"; (4) "protecting the responsibility of party government"; and (5) reducing costs.[54] The Court quickly rejected administrative costs and convenience as compelling interests.[55] Justice Thurgood Marshall pointed out that administrative convenience does not justify restrictions on First Amendment rights, and the state would not accommodate a new political party in the same way it would accommodate additional voters participating in the Republican primary.[56]

The *Tashjian* opinion next dismissed Connecticut's argument that closed primaries were required to prevent "raiding."[57] Raiding occurs when "voters in sympathy with one party designate themselves as voters of another party so as to influence or determine the results of the other party's primary."[58] For example, a Democrat might vote in the Republican primary hoping to nominate an unqualified candidate who is likely to lose in the general election against the Democrat. Thus, a raider does not cast a vote for his or her preferred candidate, but rather for the candidate that maximizes the chance of the preferred candidate becoming elected. While *Tashjian* determined that states may have a compelling interest in preventing raiding, that interest only applies when members of a different political party change their affiliations: a "raid" by independent voters who could not otherwise vote in the primary is hardly the type of harm associated with typical compelling state interests.[59]

Connecticut also advanced an argument contending that the closed primary

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[50] Tashjian v. Republican Party of Conn., 479 U.S. 208, 210–11 (1986).

[51] *Id.* at 210–12. The statute at issue in *Tashjian* had previously been challenged by an independent voter and upheld. *Id.*; Nader v. Schaffer, 417 F. Supp. 837 (D. Conn. 1976), *aff'd*, 429 U.S. 989 (1976). The Republican Party changed its position on independent voters partly in response to political pressures. *Tashjian*, 479 U.S. at 210–12.

[52] *Tashjian*, 479 U.S. at 210–12.

[53] *Id.*

[54] *Id.* at 217–18.

[55] *Id.*

[56] *Id.* at 218.

[57] *Id.* at 219.

[58] Rosario v. Rockefeller, 410 U.S. 752, 760 (1973).

[59] *Tashjian*, 479 U.S. at 219 ("Yet a raid on the Republican Party primary by independent voters, a curious concept only distantly related to the type of raiding discussed in [other cases], is not impeded by [the statute]; the independent raiders need only register as Republicans and vote in the primary.").

statute was necessary to protect the state's compelling interest in avoiding voter confusion.[60] Essentially, Connecticut argued that party names assist voters in determining the general political and ideological positions of candidates.[61] If independents were allowed to vote, those party titles would have less meaning.[62] Justice Marshall responded by dismissing the state's argument and declaring that "[Connecticut's] argument depends upon the belief that voters can be 'misled' by party labels. But '[o]ur cases reflect a greater faith in the ability of individual voters to inform themselves about campaign issues.'"[63] While the state does have a legitimate interest in encouraging an informed electorate, such an interest does not allow the state to police the purity of the political parties against the will of the parties themselves.[64]

Finally, the Court addressed whether Connecticut had a compelling interest in preserving the integrity of the party system.[65] Justice Marshall first affirmed that the state certainly has a compelling interest in preserving the political parties from disruptive actions derived from sources outside of the party itself; however, the issue in *Tashjian* was distinguishable because *Tashjian* dealt with a party's internal decision to change, rather than a party being forced to change by the state.[66] Marshall went on to note that even if Connecticut was correct about the effect of independent voters on the integrity of the party system, the state "may not constitutionally substitute its own judgment for that of the party."[67]

2. Constitutionality of Closed Primary Elections

Neither *Jones* nor *Tashjian* address the constitutionality of closed primary

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[60] *Id.* at 220.

[61] *Id.*

[62] *Id.* ("Appellant contends that '[t]he legislature could properly find that it would be difficult for the general public to understand what a candidate stood for who was nominated in part by an unknown amorphous body outside the party, while nevertheless using the party name.'" (citing Brief for Appellant, 59)).

[63] *Id.* (citation omitted) (alteration in original). Justice Marshall also suggested that any possible alteration of the meaning of party identity is unrealistic because the parties would still play a significant role in nominee selection both at the ballot box and at the party's nominating convention. *Id.* at 220–21.

[64] *See id.* at 220–22.

[65] *Id.* at 222.

[66] *Id.* at 224 ("This protection . . . is undertaken to prevent the disruption of the political parties from without, and not, as in this case, to prevent the parties from taking internal steps affecting their own process for the selection of candidates."). The arguments in support of the statute are insubstantial, which is why the court found the statute unconstitutional in this case as it applied to the Party. *Id.* at 225.

[67] *Id.* (citing Democratic Party of the U.S. v. Wisconsin *ex rel.* La Follette, 450 U.S. 107, 123–24 (1981)).

elections as a standalone issue outside of the context of state regulation.[68] The Supreme Court has yet to specifically rule on the constitutionality of closed primary elections.[69] However, the Supreme Court has affirmed, without opinion, a circuit court judgment addressing this issue.[70]

In *Nader*, plaintiffs challenged the constitutionality of Connecticut's closed primary statute.[71] Plaintiffs were prohibited from voting in the Democratic or Republican primaries because they chose not to affiliate with either political party.[72] The complaint alleged that: (1) plaintiffs' Fourteenth Amendment right to equal protection was violated by the state's exclusion of unaffiliated voters from primary elections; (2) plaintiffs were forced to affiliate with a political party against their wishes or else they would lose their ability to vote at all; and (3) plaintiffs' right to vote under Article I, the Fourteenth, and Seventeenth Amendments was unconstitutionally infringed by the closed primary system.[73]

The *Nader* Court determined that closed primaries do not violate the plaintiffs' asserted rights.[74] In its analysis, *Nader* began by emphasizing that being unable to vote in a primary election "does not prevent [plaintiffs] from working in support of or contributing money to their favorite candidates within these Parties or candidates in other major or minor parties."[75] The Court further indicated that even if plaintiffs could not vote in a party primary, there remains enough competition between candidates that "no one party's primary election is completely determinative of the outcome."[76]

The Court went on to address the equal protection issues raised by the plaintiffs.[77] The *Nader* plaintiffs claimed that a closed primary election "deprives them of the equal protection of the laws by denying to them the right to participate in elections in which they are 'interested' and by which they are 'affected,'

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[68] *Jones* does briefly mention that the interests of the party in keeping nonmembers out is greater than the interest of voters who want to participate but does not analyze the issue in any detail. Cal. Democratic Party v. Jones, 530 U.S. 567, 583–84 (2000); *see Tashjian*, 479 U.S. 208.

[69] *See* Robin Miller, Annotation, *Constitutionality of Voter Participation Provisions for Primary Elections*, 120 A.L.R. 5TH 125 (2014).

[70] Nader v. Schaffer, 417 F. Supp. 837 (D. Conn. 1976), *aff'd*, 429 U.S. 989 (1976).

[71] *Id.* at 840.

[72] *Id.*

[73] *Id.*

[74] *Id.*

[75] *Id.* at 842. The *Nader* decision included a discussion of the plaintiff's ability to support minor parties and independent candidates; such candidates did not face the same regulation as the major political parties. *Id.* The court also noted that one need not support a Democratic or Republican candidate in order to be involved in the candidate nomination process. *Id.* at 842–43.

[76] *Id.* at 843. Furthermore, the court noted, minor party or independent candidates can be successful at the local level even if they generally fail to reach national level offices. Therefore, plaintiffs are not denied the opportunity to effectively participate in elections. *Id.*

[77] *Id.* at 843–49.

to the same extent as those persons who *may* vote, solely because plaintiffs do not enroll in political parties."[78] The plaintiffs supported their arguments by citing to a line of Supreme Court cases that held, "in an election of general interest, restrictions on the franchise other than residence, age, and citizenship must promote a compelling state interest in order to survive constitutional attack."[79] *Nader* distinguished the plaintiffs' cases, arguing that primary elections are not elections of general interest; rather, they are elections of particular interest to party members because they are concerned with "nominating the candidate who presents the best chance of winning the general election while remaining most faithful to party policies and philosophies."[80] In response to claims of compelled association, *Nader* found that the burden placed on voters was minimal.[81] Rather than apply strict scrutiny, *Nader* determined that primary election systems need only pass the Court's less rigorous tests, because the burden placed on the plaintiffs' associational and voting rights was minimal.[82]

While it does not specifically address closed primary elections, the Supreme Court's *Rosario* decision contains language and analysis addressing the interests of voters.[83] In *Rosario*, the Court considered the constitutionality of New York's waiting period for party registrations.[84] New York required voters to register with a party—either eight months for a presidential primary, or eleven months for a non-presidential primary—before the election.[85] The plaintiffs were newly registered voters who wished to be able to associate with a political party during the primary elections, but were not permitted to do so because they failed to register before the statutory cutoff date.[86] The case contains three important analyses.[87] First, though the majority found plaintiffs' arguments unpersuasive, the dissent emphasized the importance of protecting voters from restrictions on the right to vote in primary elections:

> Voting in a party primary is as protected against state encroachment as voting in a general election. And the Court has said quite explicitly that "if

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[78] *Id.* at 848.

[79] Hill v. Stone, 421 U.S. 289, 295 (1975) (discussing Kramer v. Union Free School District No. 15, 895 U.S. 621 (1969)); *see Nader*, 417 F. Supp. at 848.

[80] *Nader*, 417 F. Supp. at 848.

[81] *Id.* at 843–44 ("But enrollment in Connecticut imposes absolutely no affirmative party obligations on the voter, in terms of time or money, and it does not even obligate him to vote for the party's positions or candidates or to vote at all.").

[82] *Id.* at 849 ("There must be more than a minimal infringement on the rights to vote and of association, therefore, before strict judicial review is warranted. . . . We, therefore, conclude that [Connecticut's closed primary election system] is reasonably related to the accomplishment of legitimate state goals.").

[83] Rosario v. Rockefeller, 410 U.S. 752 (1973).

[84] *Id.* at 760.

[85] *Id.*

[86] *Id.*

[87] *Id.* at 756–69.

a challenged statute grants the right to vote to some citizens and denies the franchise to others, 'the Court must determine whether the exclusions are *necessary* to promote a *compelling* state interest.'" Likewise, the Court has asserted that "the right of individuals to associate for the advancement of political beliefs" is "among our most precious freedoms," and must be carefully protected from state encroachment.[88]

Second, the plaintiffs cite several cases suggesting that denial of the franchise is unconstitutional.[89] The *Rosario* Court dismissed plaintiffs' arguments, noting that the New York law did not completely deny them the franchise, and instead simply regulated the procedures required for voting.[90] The Court placed particular emphasis on the fact that plaintiffs *could* have registered with their preferred political parties before the deadline had they chosen to do so.[91] Finally, *Rosario* suggested that the lengthy waiting period was justified by a need to prevent raiding.[92]

There are several instructive cases that consider the constitutionality of closed primary elections that failed to reach the Supreme Court.[93] One such case, *Ferency v. Secretary of State*,[94] contains a somewhat more rigorous analysis than the others.[95] In *Ferency*, the Michigan court addressed the question of whether closed primary elections violated either the Michigan State Constitution or the U.S. Constitution.[96] *Ferency* first addressed the plaintiff's claims under the Michigan Constitution.[97] To determine the meaning of the Michigan

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[88] *Id.* at 768 (Powell, J., dissenting) (citations omitted).

[89] *Id.* at 756–57. Plaintiffs cite to Carrington v. Rash, 380 U.S. 89 (1965); Kramer v. Union School District, 395 U.S. 621 (1969); Cipriano v. City of Houma, 395 U.S. 701 (1969); Evans v. Cornman, 398 U.S. 419 (1970); City of Phoenix v. Kolodziejski, 399 U.S. 204 (1970); and Dunn v. Blumstein, 405 U.S. 330 (1972) in support of their arguments.

[90] *Rosario*, 410 U.S. at 757.

[91] *Id.* at 757–58.

[92] *Id.* at 760–61 ("The purpose of New York's delayed-enrollment scheme, we are told, is to inhibit party 'raiding,' . . . . This purpose is accomplished . . . not only by requiring party enrollment several months in advance of the primary, on the theory that 'long-range planning in politics is quite difficult . . . ,' but also by requiring enrollment prior to a general election." (citations omitted)).

[93] *See, e.g.*, Ziskis v. Symington, 47 F.3d 1004, 1004–05 (9th Cir. 1995); Van Allen v. Democratic State Comm. of N.Y., 771 N.Y.S.2d 285, 287 (N.Y. Sup. Ct. 2003); *In re* Barkman, 726 A.2d 440, 441 (Pa. Commw. Ct. 1999).

[94] 476 N.W.2d 417 (Mich. App. 1991), *judgment vacated in part on other grounds*, 486 N.W.2d 664 (Mich. 1992).

[95] *See* cases cited *supra* note 93.

[96] *Ferency*, 476 N.W.2d at 417–18.

[97] The Michigan Constitution states, "Every citizen of the United States who has attained the age of 21 years, who has resided in this state six months, and who meets the requirements of local residence provided by law, shall be an elector and qualified to vote in any election except as otherwise provided in this constitution." MICH. CONST. art. 2, § 1. Plaintiffs argued that the state constitution forbid adding any additional requirements for voting,

Constitution, *Ferency* analyzed whether the original drafters of the election provision would have construed it to prohibit closed primary elections.[98] The court concluded that the intent of the Michigan Constitution was not to prohibit closed primary elections.[99] Importantly, *Ferency* supported the idea that a party primary "is not an election to public office. It is merely the selection of candidates for office by the members of a political party in a manner having the form of an election."[100] *Ferency* next considered the implications of closed primary elections on First Amendment associational rights.[101] In rejecting the plaintiff's claims, *Ferency* emphasized, "[a]ny voter is lawfully entitled to associate with any political party and participate in any major political party's presidential preference primary by merely publicly declaring party affiliation as part of the voter registration process."[102]

3. Unconstitutional Primary Elections

Despite often holding closed primary elections constitutional, the Court has invalidated primary elections for excluding particular classes of people.[103] These cases are derived from the Jim Crow era when many jurisdictions attempted to disenfranchise African-American voters.[104] Collectively, the cases are often referred to as the "White Primary" cases.[105] The two principal cases from this line are *Smith v. Allwright*[106] and *Terry v. Adams*.[107] In *Smith*, the Texas Democratic Party adopted a rule allowing only white citizens to be mem-

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especially requiring party affiliation. *Ferency*, 476 N.W.2d at 419–20. Plaintiffs also argued that the state constitution required preservation of the secrecy of one ballot and that requiring political party affiliation violated that secrecy. *Id.* at 422–24; *see also* MICH. CONST. art. II, § 4 ("The legislature shall enact laws to preserve the purity of elections, to preserve the secrecy of the ballot, to guard against abuses of the elective franchise, and to provide for a system of voter registration and absentee voting.").

[98] *Ferency*, 476 N.W.2d at 420–21 ("Thus, the question posed is whether the people in adopting Const.1963, art. 2, § 1 understood that constitutional provision as including a prohibition on the adoption of the closed primary system.").

[99] *Id. Ferency* also concluded that the protection of the secrecy of the ballot did not require secrecy of political party support. *Id.* at 424–25.

[100] *Id.* at 424 (quoting Line v. Bd. of Election Canvassers of Menominee Co., 117 N.W. 730, 731 (1908)).

[101] *Id.* at 425–28.

[102] *Id.* at 428.

[103] *See, e.g.*, Terry v. Adams, 345 U.S. 461 (1953); Smith v. Allwright, 321 U.S. 649 (1944); Nixon v. Condon, 286 U.S. 73 (1932) (holding that the Executive Committee's action amounted to a delegation of state power and was invalid under the Fourteenth Amendment); Nixon v. Herndon, 273 U.S. 536 (1927).

[104] *See* cases cited *supra* note 89.

[105] SAMUEL ISSACHAROFF ET AL., THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS 237 (4th ed. 2012).

[106] 321 U.S. 649 (1944).

[107] 345 U.S. 461 (1953).

bers of the party.[108] The plaintiff in *Smith* challenged the party's rule under the Fourteenth Amendment's Equal Protection Clause, the Fifteenth Amendment, and the Seventeenth Amendment.[109] The Democratic Party defended itself using the familiar logic presented in the cases discussed above:

> As such a voluntary organization, it was claimed, the Democratic [P]arty is free to select its own membership and limit to whites participation in the party primary. Such action, the answer asserted, does not violate the Fourteenth, Fifteenth or Seventeenth Amendment as officers of government cannot be chosen at primaries and the Amendments are applicable only to general elections where governmental officers are actually elected. Primaries, it is said, are political party affairs, handled by party, not governmental, officers.[110]

The court in *Smith*, however, rejected the Democratic Party's arguments, declaring that a political party acts under statutory authority.[111] This authority "makes the party . . . 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 . . . ."[112] As state actors, political parties are subject to the Fourteenth and Fifteenth Amendments.[113] Having made these determinations, *Smith* concluded that the Texas Democratic Party's rule violated the Fifteenth Amendment.[114] While the *Smith* decision technically rested only on the Fifteenth Amendment, the Supreme Court has come to similar conclusions under the Fourteenth Amendment.[115]

In *Terry*, the Court addressed another, albeit more veiled, attempt to prevent African-Americans from voting in primary elections.[116] The Jaybird Democratic Association was an organization of exclusively white individuals that took many of the same actions as a political party.[117] The organization would host the "Jaybird Primary" where only white members could select a political nominee.[118] The winner of the Jaybird Primary would then enter the actual Demo-

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[108] *Smith*, 321 U.S. at 656–57.

[109] *Id.* at 651–52.

[110] *Id.* at 657.

[111] *Id.* at 663.

[112] *Id.*

[113] *Id.* at 662–65.

[114] *Id.*

[115] *Id.* at 658–60 ("[D]enying the ballot to Negroes by statute was in violation of the equal protection clause of the Fourteenth Amendment . . . . The Nixon Cases were decided under the equal protection clause of the Fourteenth Amendment without a determination of the status of the primary as a part of the electoral process." (citing Nixon v. Herndon, 273 U.S. 536 (1927); then citing Nixon v. Condon, 286 U.S. 73 (1932))).

[116] Terry v. Adams, 345 U.S. 461, 463–65 (1953).

[117] *Id.* at 461–64.

[118] *Id.*

cratic Primary and ran unopposed in virtually every election.[119] White voters would abide by unwritten rules and generally supported the Jaybird Association and its candidates.[120] The Jaybird Primary was essentially a method to avoid constitutional mandates against discrimination based on race.[121] Like *Smith*, *Terry* relied on the Fifteenth Amendment to reach its final conclusion; however, the issue was also analyzed under the Fourteenth Amendment because state action had occurred.[122] The plurality determined that state action had occurred because Texas had set up the primary system, and it was "[t]he right of all citizens to share in it and not to be excluded by unconstitutional bars."[123] Specifically, Justice Frankfurter, a member of the plurality ruling against the Jaybird Democratic Association, relied on the fact that "in Texas[,] nomination in the Democratic primary [was] tantamount to election."[124] Because winners of the Democratic primary were virtually guaranteed to win the election in Texas, the primary was the only meaningful way to participate in the election.[125]

In the dissent for *Burdick v. Takushi*, Justice Kennedy took up the issue of one-party states, where primary elections function as the only politically relevant election.[126] In *Takushi*, a voter challenged Hawaii's ban on write-in ballots for all elections, arguing that the ban infringed on the plaintiff's right to vote for the candidate of his choice.[127] Justice Kennedy asserted, in part, that Hawaii's political climate of single party dominance created a situation where a voter who wished to support an independent candidate could be disenfranchised.[128] He stated:

> [E]ach primary voter can choose only a single ballot for all offices. Hence, a voter who wishes to vote for an independent candidate for one office must forgo the opportunity to vote in an established party primary in every other race. Since there might be no independent candidates for most of the other offices, in practical terms the voter who wants to vote for one

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[119] *Id.* at 463 ("While there is no legal compulsion on successful Jaybird candidates to enter Democratic primaries, they have nearly always done so and with few exceptions since 1889 have run and won without opposition in the Democratic primaries and the general elections that followed.").

[120] *Id.* at 465 ("[T]he majority of white voters generally abide by the results of its primaries and support in the Democratic primaries the persons endorsed by the Jaybird primaries . . . .").

[121] *See id.* ("[T]he chief object of the Association has always been to deny Negroes any voice or part in the election . . . .").

[122] *Id.* at 476 (Frankfurter, J.).

[123] *Id.*

[124] *Id.*

[125] *Id.* (emphasizing the "exclusion of the Negroes from meaningful participation in the only primary scheme set up by the State . . . .").

[126] Burdick v. Takushi, 504 U.S. 428, 443–47 (1992) (Kennedy, J., dissenting).

[127] *Id.* at 430 (majority opinion).

[128] *Id.* at 443–44 (Kennedy, J., dissenting).

> independent candidate forfeits the right to participate in the selection of candidates for all other offices. This rule, the very ballot access rule that the Court finds to be curative, in fact presents a substantial disincentive for voters to select the nonpartisan ballot. A voter who wishes to vote for a third-party candidate for only one particular office faces a similar disincentive to select the third party's ballot.

The dominance of the Democratic Party magnifies the disincentive because the primary election is dispositive in so many races. In effect, a Hawaii voter who wishes to vote for any independent candidate must choose between doing so and participating in what will be the dispositive election for many offices. This dilemma imposes a substantial burden on voter choice.[129]

While Justice Kennedy did not precisely argue that dispositive primary elections should be treated as a general election for the purposes of constitutional analysis, his dissent does suggest that a voter's choice to vote for an independent candidate should not prevent access to a primary election ballot.[130]

4. The right to an equal vote

The jurisprudence on the constitutionality of primary elections contains few, if any, detailed discussions of a primary election's influence on a citizen's voting power.[131] However, the courts have developed a robust framework for evaluating voter equality in elections through several redistricting cases.[132]

*Reynolds v. Sims*[133] involved a challenge to the Alabama legislature's district apportionments under the Fourteenth Amendment and the Alabama Constitution.[134] At the time the suit was brought, Alabama districts were based on census information from 1900; almost sixty years had passed since the districts were drawn.[135] The plaintiffs argued that population growth had been uneven and resulted in districts with different levels of representation.[136] Because some districts had greater populations than others, the more populous districts had less representation per person in the legislature.[137] In deciding the case, the Court considered the Constitutional implications of systems that impact participation in politics.[138]

First, the Court noted that "[i]t would appear extraordinary to suggest that a

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[129] *Id.*

[130] *Id.* at 443–47, 449–50.

[131] *See infra* Part 4.

[132] *See, e.g.*, Karcher v. Daggett, 462 U.S. 725 (1983); Reynolds v. Sims, 377 U.S. 533 (1964); Baker v. Carr, 369 U.S. 186 (1962).

[133] 377 U.S. 533 (1964).

[134] *Id.* at 537.

[135] *Id.* at 539–41.

[136] *Id.* at 540.

[137] *Id.*

[138] *Id.* at 562–68.

State could be constitutionally permitted to enact a law providing that certain of the State's voters could vote two, five, or ten times for their legislative representatives, while voters living elsewhere could vote only once."[139] The Court went on to note that systems that have the effect of giving one citizen more votes than another also run afoul of the Constitution.[140] The problem was that "overvaluation of the votes of those living here has the certain effect of dilution and undervaluation of the votes of those living there."[141] Vote dilution, in turn, offends the Constitution because:

> [E]ach and every citizen has an inalienable right to full and effective participation in the political processes of his State's legislative bodies. . . . Full and effective participation by all citizens in state government requires, therefore, that each citizen have an equally effective voice in the election of members of his state legislature.[142]

Because of Alabama's failure to redistrict in light of changes to their population, the Court held that Alabama's district apportionment violated the Equal Protection Clause.[143]

While the facts of *Reynolds* focused on state legislative districts, the inalienable right that the Court articulated extends beyond the limited factual context of *Reynolds*.[144] Importantly, *Reynolds* included a citation to *MacDougall v. Green*,[145] which addressed the right to equal voting power.[146] In his dissent in *MacDougall*, Justice William Douglas wrote, "None would deny that a state law giving some citizens twice the vote of other citizens in *either the primary or general election* would lack that equality which the Fourteenth Amendment guarantees."[147] With this, he suggested that the Fourteenth Amendment principles articulated in *Reynolds* apply not only across jurisdictions, but to different forms of elections as well.[148]

The Court first began applying the equal-population principle around the

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[139] *Id.* at 562.

[140] *Id.* at 562–63.

[141] *Id.* at 563.

[142] *Id.* at 565.

[143] *Id.* at 577.

[144] The equal-population principle has been applied in a number of other cases dealing with varying factual scenarios other than a longstanding failure to redistrict. *See* Wesberry v. Sanders, 376 U.S. 1, 23 (1964) (applying the equal population requirement to federal elections); Lucas v. Forty-Fourth Gen. Assembly of the State of Colo., 377 U.S. 713, 715–16 (1964) (considering whether other interests, such as district integrity, could be used to draw district lines).

[145] 335 U.S. 281 (1948).

[146] *Reynolds*, 377 U.S. at 564, n.41 (1964) (quoting MacDougall v. Green, 335 U.S. 281, 288, 290 (1948) (Douglas, J. dissenting)).

[147] *MacDougall*, 335 U.S. at 288 (Douglas, J., dissenting) (emphasis added).

[148] *Id.*

time *Reynolds* was decided. At its inception, the rule was somewhat flexible.[149] *Reynolds* noted that "[s]o long as the divergences from a strict population standard are based on legitimate considerations incident to the effectuation of a rational state policy, some deviations from the equal-population principle are constitutionally permissible . . . ."[150] Over time, however, the Court slowly began to move away from the flexible approach expressed in *Reynolds* towards a much stricter standard requiring virtually absolute mathematical equality.[151]

*Karcher v. Daggett* is perhaps one of the most extreme cases demonstrating the mathematical equality requirement for districts .[152] *Karcher* considered the extent to which districts are required to have equal populations.[153] Based on the 1980 census, New Jersey lost one Congressional seat and was thus forced to redistrict as a result of population changes.[154] The New Jersey legislature proposed a plan that contained fourteen districts with an average population of 526,059 per district.[155] Each district, however, did not have the same population and the difference between actual district population and the statistically ideal population was approximately 0.138%.[156] The difference between the largest district and smallest district was approximately 0.698%.[157] New Jersey argued that the district lines should be upheld because the population differences were less than the statistically predictable error of census data.[158]

Despite the small disparity in population—and therefore in relative voting power—the plurality held that the district lines failed to adhere to the Court's standards.[159] Defending the Court's decision in the face of voting power disparities that were statistically insignificant, Justice Brennan reasoned:

> Adopting any standard other than population equality, using the best census data available would subtly erode the Constitution's ideal of equal representation. If state legislators knew that a certain *de minimis* level of population differences was acceptable, they would doubtless strive to achieve that level rather than equality.[160]

For Justice Brennan, in the choice between "equality or something-less-than equality," the only voting schemes that are permitted by the Constitution are

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[149] *See* Kirkpatrick v. Preisler, 394 U.S. 526, 530 (1969); *see generally Reynolds*, 377 U.S. 533.

[150] *Reynolds*, 377 U.S. at 579.

[151] *See* Karcher v. Daggett, 462 U.S. 725, 729, 744 (1983); *Kirkpatrick*, 394 U.S. at 530–31.

[152] *Karcher*, 462 U.S. at 730–31.

[153] *Id.*

[154] *Id.* at 727.

[155] *Id.* at 727–28.

[156] *Id.* at 728.

[157] *Id.*

[158] *Id.* at 731.

[159] *Id.*

[160] *Id.* (citation omitted).

those that make "absolute population equality . . . the paramount objective."[161] While Justice Brennan makes sweeping pronouncements, the holding in *Karcher* is technically limited to congressional districts.[162] The primary distinguishing characteristic is that Article II of the Constitution governs federal districts, whereas the Equal Protection Clause governs state legislative plans, like those at issue in *Reynolds*.[163] *Karcher* signals that the Court is unwilling to accept interference, however insignificant, with a person's right to vote.[164]

While the redistricting cases did not discuss primary elections, issues of vote dilution and voter equality are addressed in some redistricting cases pertaining to the interpretation of the Voting Rights Act.[165] Under the Voting Rights Act, courts apply a "totality of the circumstances" test, in addition to considering multiple factors.[166] One factor is the presence of a candidate slating process designed to discriminate.[167] This can include discrimination in primary elections or other unofficial processes, like those employed by the Jaybird Democratic Association.[168] Furthermore, the totality of the circumstances test allows courts to consider primary elections in determining whether the rights of minorities have been denied in violation of the Voting Rights Act.[169] Cases considering statutory protections of voting rights suggest that courts can—and perhaps should—examine primary elections' effects when evaluating voters' constitutional rights.

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[161] *Id.* at 732.

[162] *Id.* at 732–33.

[163] *See id.* at 725; Reynolds v. Sims, 377 U.S. 533, 537 (1964); Wesberry v. Sanders, 376 U.S. 1, 23 (1964).

[164] ISSACHAROFF ET AL., *supra* note 105, at 181.

[165] 42 U.S.C. § 1973 (2012). *See, e.g.*, Thornburg v. Gingles, 478 U.S. 30, 36–38 (1986).

[166] *See, e.g.*, *Gingles*, 478 U.S. at 36–37. The factors are non-exclusive and others may be considered. *Id.* The factors include: (1) the extent of historical discrimination; (2) the extent to which voting is racially polarized; (3) the extent to which voting practices or procedures enhance the opportunity for discrimination; (4) whether there is a candidate slating process and whether minority groups have been excluded from it; (5) the extent to which discrimination in areas like education and employment limit the ability of minorities to participate; (6) whether political campaigns have been characterized by overt racial appeals; (7) the extent to which minority candidates have been elected; (8) whether there is a lack of responsiveness of elected officials to a minority group; and (9) whether voting qualifications or standards are tenuous. *Id.*; S. REP. NO. 97-417, at 26–31 (1982), *as reprinted in* 1982 U.S.C.C.A.N. 177, 204.

[167] *Gingles*, 478 U.S. at 37.

[168] *See id.*; Ellen Katz, *Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982 Final Report of the Voting Rights Initiative, University of Michigan Law School*, 39 U. MICH. J.L. REFORM 643, 699–702 (2006); *supra* Part II.B.3.

[169] *See infra* Part III.B. *See also Gingles*, 478 U.S. at 39–43.

## III. ARGUMENT

### A. *Conflicting Precedent*

There are several conflicting lines of precedent concerning primary elections that this Note attempts to resolve by proposing a test based on dispositive elections.[170] The *Jones* line holds that political parties are private entities with associational rights under the First Amendment.[171] They cannot be compelled to associate with those they do not wish to without a compelling state interest, and the courts have yet to find a sufficiently compelling interest.[172]

A second line of cases is based on the reasoning of *Nader*.[173] These cases suggest that closed primaries do not violate the rights of voters, because primary elections are not true elections from a constitutional standpoint.[174] As a result, a citizen's right to vote in a primary election does not outweigh a political party's right to freely associate.[175]

Finally, the White Primary cases from Texas suggest that in some instances, party primaries can, in fact, qualify as state action and be subject to the requirements of the Fourteenth and Fifteenth Amendments.[176]

Decisions finding the actions of informal organizations—like the Jaybird Democratic Association—to be unconstitutional are in direct conflict with some of the Court's more recent rulings.[177] If the racially charged primaries held in Texas were deemed protected elections and not private meetings, why then would the primary at issue in *Nader* not be the type of election protected by the Constitution?

### B. *The Dispositive Election Test*

#### 1. The Test

Despite these conflicts, it is possible to reconcile the various approaches to primary election participation.[178] This Note proposes a test inspired by Justice Kennedy's *Takushi* dissent that could both reconcile the conflicting precedent and provide a tool to be employed by courts when determining the constitutionality of closed primary elections.[179]

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[170] *See, e.g.*, Terry v. Adams, 345 U.S. 461, 462–63 (1953); Smith v. Allwright, 321 U.S. 649, 651–52 (1944); Nader v. Schaffer, 417 F. Supp. 837, 849 (D. Conn.), *aff'd*, 429 U.S. 989 (1976); Ferency v. Sec'y of State, 476 N.W.2d 417, 420–21 (Mich. Ct. App. 1991).

[171] *See supra* Part II.B.1.

[172] *See supra* Part II.B.1.

[173] *See Nader*, 417 F. Supp. at 840.

[174] *Id.*

[175] *See supra* Part II.B.2.

[176] *See supra* Part II.B.3.

[177] *Compare Nader*, 417 F. Supp. at 837 *with* Smith v. Allwright, 321 U.S. 649, 651 (1944).

[178] *See Nader*, 417 F. Supp. at 848–50; *Allwright*, 321 U.S. at 656–57.

[179] Burdick v. Takushi, 504 U.S. 428, 443–50 (1992) (Kennedy, J., dissenting).

A common theme runs through many of the opinions discussing primary participation: some party primaries are activities of the state, while others are private events organized by groups with associational protections.[180] Justice Kennedy argued that independent Hawaiian voters were denied a meaningful opportunity to participate in the only election that mattered if they wanted to support an independent candidate.[181] He reasoned that Hawaii's political climate so favored Democrats that the Democratic primary winner was virtually guaranteed victory in the general election.[182] In effect, the primary election acted as a proxy for the general election; to deny someone the chance to participate in such an election merely because of the voter's political preferences might create constitutional questions.[183] The Court's inconsistent classification of primaries as state action is the result of what this Note calls the "dispositive election test."[184]

The dispositive election test asks whether the election being challenged is the only politically meaningful election in a particular jurisdiction.[185] Specifically, does the outcome of a party primary—or some kind of other informal election, like the Jaybird Primary—also determine the outcome of the general election? If so, the challenged election is a dispositive election and should be treated as if it were the general election for purposes of constitutional analysis and determination of the presence of state action.

2. The Constitutional Sources of the Test

The dispositive election test is primarily derived from the Fourteenth Amendment and the Court's interpretations of its applicability to primary elections. The test is most fundamentally based on the ideas articulated by the Court in the redistricting cases.[186] While cases like *Reynolds* and *Karcher* do not directly discuss primary elections, they do express the idea that votes should be of equal weight and have equal impact on the outcome of an election.[187] Specifically, the Court determined in *Reynolds* that the Fourteenth Amendment guarantees every citizen "an inalienable right to full and effective participation in the political processes of his legislative body . . . [and] an

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[180] *See, e.g.*, *Nader*, 417 F. Supp. at 848–49; *Allright*, 321 U.S. at 656–57; Terry v. Adams, 345 U.S. 461, 476 (1953) (Frankfurter, J., concurring).

[181] *Takushi*, 504 U.S. at 443–50.

[182] *Id.*

[183] *See id.*

[184] *See* discussion *infra* Part III.B.2.

[185] This theory began as an attempt to challenge the reasoning of *Jones*. The analysis included a historical survey of cases considering constitutional questions in primary elections. This Author then attempted to reconcile the White primary cases with the Court's other precedents and proposed the dispositive election test after considering Justice Kennedy's statements in *Takushi*.

[186] *See supra* Part II.B.4.

[187] *See supra* Part II.B.4.

equally effective voice in the election of members of his state legislature."[188] While *Reynolds* and other redistricting cases concerned the statistical weight of voters by population, there is little reason to think that the principles outlined by the Court would not apply to other areas.[189] If a voter is denied access to the only politically meaningful election, it may be unreasonable to say that such voter has an "equally *effective* voice" in the election.[190] When some of the most politically important elections are primary elections, voters in primary elections arguably have a greater influence over the outcome of a general election than non-primary voters. In the election at issue in *Takushi*, the winner of the Democratic primary was guaranteed to win the general election.[191] Therefore, any votes cast in the Republican primary had no effect in determining what candidate would represent Hawaii.[192] Anyone who voted in the Republican primary essentially cast a meaningless vote.[193] Because those votes could not influence the candidate to represent Hawaii they were not equally effective as votes cast in the Democratic primary.[194] If the Constitution is offended when a voter has 0.13% less voting power in a general election because of slightly different district sizes, how could the Constitution permit the exclusion of voters from dispositive elections?[195] In a situation where the winner of a primary election is always the winner of a general election, voters who did not participate in the relevant primary have less voting power relative to their party-affiliated counterparts. If there is a right to equal voting power and equal ability to participate, it is inconsistent to apply the right only to population and not to other systems that could dilute the value of one's vote.[196] The dispositive election test seeks to address some of these issues by articulating a method by which a court could enforce the right to equal participation without destroying the associational rights of political parties.

The ability of the Constitution, and the Fourteenth Amendment in particular, to reach party primary elections is, however, uncertain. In *Jones* and *Tashjian* the Court indicated that political parties have associational rights and are entities separate from the state.[197] More importantly, *Nader* held that primary elections are not the constitutional equivalent of general elections and do not prevent voters from supporting the candidate of their choice.[198] *Nader* further held

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[188] Reynolds v. Sims, 377 U.S. 533, 565 (1964).

[189] *Id.*

[190] *Id.* (emphasis added).

[191] *See* discussion *supra* Part III.B.1.

[192] *Id.*

[193] *Id.*

[194] *Id.*

[195] *See* Karcher v. Daggett, 462 U.S. 725 (1983).

[196] *See supra* Part II.B.4.

[197] Cal. Democratic Party v. Jones, 530 U.S. 567, 572–73 (2000); Tashjian v. Republican Party of Conn., 479 U.S. 208 (1986).

[198] Nader v. Schaffer, 417 F. Supp. 837, 840–42 (D. Conn.), *aff'd*, 429 U.S. 989 (1976).

that primary elections should not face the same kind of constitutional scrutiny as general elections despite the precedents set by the White Primary cases.[199] Although one might argue race played a critical difference, the White Primary cases are concerned with state action, rather than the type of discrimination.[200] Furthermore, some of the White Primary cases are decided under the Fourteenth, as opposed to the Fifteenth, Amendments.[201] More likely, the facts distinguished *Nader* from the White Primary cases.[202]

In the White Primary cases, voters challenged the constitutionality of the Texas Democratic Primary.[203] Addressing the state action problem, the Court specifically noted that victory in the Texas Democratic primary was "tantamount to election," because the Democratic nominees were virtually guaranteed success against the Republican nominee in the general election.[204] In *Terry*, the Jaybird Democratic Association's election essentially acted as the general election.[205] The problem for the Court was that "the Jaybird-endorsed nominee meets no opposition in the Democratic Primary, 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 it count."[206] Expressing its serious concern with the Jaybird system, the Court noted, "[w]hile there is no legal compulsion on successful Jaybird candidates to enter Democratic primaries, they have nearly always done so and with few exceptions since 1889 have run and won without opposition in the Democratic primaries and the general elections that followed."[207] The Texas elections were not at all competitive between the political parties.[208] Instead, one party dominated, making the primary election the only politically meaningful election.[209] After the Court prohibited Texas from discriminating in the primary election, the Jaybird Democratic Association's election became the only politically meaningful election. In both cases, the Court found an election *other than* the general election to violate the requirements of the Fourteenth and Fifteenth Amendments.[210]

In contrast to the elections during the White Primary cases, the primary at issue in *Nader* was upheld as constitutional despite excluding certain voters.[211] What was important for the *Nader* Court was that the primary was not an elec-

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[199] *Id.* at 840–42, 847–48.

[200] *See supra* notes 103–125 and accompanying text.

[201] *Id.*

[202] *Id.*

[203] Terry v. Adams, 345 U.S. 461, 476 (1953); Smith v. Allwright, 321 U.S. 649 (1944).

[204] *Terry*, 345 U.S.at 476.

[205] *Id.* at 463.

[206] *Id.* at 484 (Clark, J., concurring).

[207] *Id.* at 463 (majority opinion).

[208] *Id.* at 461–64.

[209] *Id.*

[210] *Id.*; Smith v. Allwright, 321 U.S. 649 (1944).

[211] Nader v. Schaffer, 417 F. Supp. 837, 842–44 (D. Conn.), *aff'd*, 429 U.S. 989 (1976).

tion of general interest.[212] Instead, *Nader* characterized primary elections as processes for "nominating the candidate . . . most faithful to party policies and philosophies."[213] Unlike in the White Primary cases, no single party dominated the election at issue in *Nader.* Instead, the election was competitive between both Democrats and Republicans.[214] In fact, the *Nader* opinion explicitly indicated that "no one party's primary election is completely determinative of the outcome,"[215] suggesting the competitive nature of elections in Connecticut influenced the Court's decision.[216] *Nader*'s language also suggests the negative implication that if one party's primary *were* determinative, the Court would be concerned about the primary's constitutionality.[217] Perhaps more importantly, *Nader* indicated that minor party candidates or independent candidates could be successful at the local level even if the candidates generally fail to reach national level offices.[218] The plaintiffs in *Nader,* the Court argued, were therefore not denied the opportunity to effectively participate in elections.[219]

None of the cases addressing primary elections discussed the "inalienable" right to equal participation created in the redistricting cases.[220] Fortunately, Justice Douglas' dissent in *MacDougall* suggests that the Fourteenth Amendment's protections extend to both primary elections and general elections.[221]

Thus, the dispositive election test is derived from several different trends in the constitutional election law framework. First, the Fourteenth Amendment seems to demand equality in population to avoid even the slightest dilution of voting power.[222] Second, the Fourteenth Amendment seems to also treat primary elections differently.[223] Some primary elections are treated as private affairs that cannot be reached by the Equal Protection Clause's prohibition that "no state shall," yet other elections that barely have any resemblance to a party primary are considered state action and struck down.[224] Third, the First Amendment prohibits compelled association among differing viewpoints for political

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[212] *Id.* at 848.

[213] *Id.*

[214] *Id.* at 843.

[215] *Id.*

[216] *Id.*

[217] *Id.*

[218] *Id.*

[219] *Id.*

[220] Reynolds v. Sims, 377 U.S. 533, 565 (1964).

[221] MacDougall v. Green, 335 U.S. 281, 288 (1948) (Douglas, J., dissenting) ("None would deny that a state law giving some citizens twice the vote of other citizens in *either the primary or general election* would lack that equality which the Fourteenth Amendment guarantees.") (emphasis added).

[222] *See supra* Part II.B.4.

[223] *Compare Nader*, 417 F. Supp. 837, *with* Smith v. Allwright, 321 U.S. 649 (1944).

[224] *See supra* Parts II.B.1, II.B.2 (discussing primary elections as private affairs); Part II.B.3 (discussing the White Primary cases).

parties.[225] The dispositive election test takes each of these seemingly diverging trends and creates a consistent approach. By asking whether a political party's primary election is dispositive, the test allows political parties to keep their associational rights and to treat their activities as private affairs only when their primary elections do not infringe on the ability of others to fairly participate.

3. The Dispositive Election Test and Election Return Data

Not only is the dispositive election test grounded in the constitutional jurisprudence concerning elections and voting, it is also supported by empirical evidence.[226] An examination of election return data compared to judicial decisions regarding the validity of primary election can serve to both verify the dispositive election test and predict its use by courts. When courts have examined the Constitutionality of primary elections, they tend to uphold elections as valid when the general elections leading up to the legal challenge were competitive.[227] Comparably, those primary elections that were held invalid preceded general elections that tended to lack any semblance of competition.[228]

*Nader* contains the most developed analysis of this trend.[229] In *Nader*, Connecticut's Senate races from 1972 up to the time of the decision were split between the two political parties: two Democratic victories and two Republican victories.[230] Similarly, Connecticut's races for the House of Representatives saw victories by candidates from both parties; between 1972 and 1974 Democrats were victorious in eleven House elections while Republicans secured seven seats.[231]

The logic of the dispositive election test supports the Court's holding that the party primary at issue in *Ferency* was constitutional.[232] Prior to the *Ferency* decision in 1991, members of both major political parties had won recent House elections.[233] Of the fifty-four Michigan House elections from 1986 to 1990, Republicans won twenty-one and Democrats won thirty-three.[234] Because candidates from more than one political party can achieve electoral success, it is not surprising that the Court found the primary election at issue in *Ferency* not to be state action.[235] The dispositive election test would have correctly pre-

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[225] *See supra* Part II.B.1.

[226] *See infra* notes 215–238 and accompanying text.

[227] *See infra* notes 215–238 and accompanying text.

[228] *See supra* Part II.B.3.

[229] Nader v. Schaffer, 417 F. Supp. 837 (D. Conn.), *aff'd*, 429 U.S. 989 (1976).

[230] CQ PRESS, *supra* note 8, at 1326.

[231] *See id.* at 1991, 1996, 1201, 1206.

[232] *See supra* Part II, notes 94–100; Ferency v. Sec'y of State, 476 N.W.2d 417 (Mich. App. 1991).

[233] CQ PRESS, *supra* note 8, at 1232, 1237, 1242–43.

[234] *Id.*

[235] *Ferency*, 476 N.W.2d at 420–21.

dicted the Court's holding in *Ferency*.[236]

Similar patterns of competitive elections can be seen in other cases upholding closed primary elections.[237] In *Van Allen v. Democratic State Committee of New York*,[238] the New York Supreme Court in 2003 held that the state's closed primary system was constitutional.[239] An examination of election results for the House of Representatives in New York from 1998 to 2002 reveals competition between the Democratic and Republican parties.[240] There were eighty-nine general elections for the House in New York between 1998 and 2002.[241] Of those eighty-nine elections, Republicans won thirty-four and Democrats won fifty-five.[242] The election returns of the *Van Allen* decision also support the dispositive election test.[243] While Republicans were victorious in less than half of these elections, there was clear competition between the parties.[244] Neither party's primary elections were dispositive during this time in New York.[245] Before *In re Barkman*[246] was decided, the election results in Pennsylvania also demonstrated competition.[247]

The White Primary cases stand in contrast to these cases. Between 1922 and 1952, the Texas Democratic Nominee won 296 of the 300 elections for House of Representative seats in Texas.[248] In virtually every instance, Democratic nominees would receive nearly 100% of the vote.[249]

Unfortunately, election returns do not fit the prediction of the dispositive election test in every case. *Ziskis v. Symington*[250] does not fit the model of the dispositive election test as accurately as the other cases presented thus far.[251] In *Ziskis*, the Ninth Circuit held that Arizona's exclusion of certain voters from party primary elections was constitutional.[252] However, an examination of the

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[236] *Id.*

[237] *See, e.g.*, Van Allen v. Democratic State Committee of New York, 771 N.Y.S.2d 285 (N.Y. Sup. Ct. 2003); *In re* Barkman, 726 A.2d 440 (Pa. Commw. Ct. 1999).

[238] *Van Allen*, 771 N.Y.S.2d at 291–92.

[239] *Id.*

[240] CQ PRESS, *supra* note 8, at 1264, 1269, 1274.

[241] *Id.*

[242] *Id.*

[243] *Id.*

[244] *Id.*

[245] *Id.*

[246] *In re* Barkman, 726 A.2d 440, 441 (Pa. Commw. Ct. 1999).

[247] There were eighty general elections for the House of Representatives where candidates faced an opponent between 1990 and 1998 in Pennsylvania. CQ PRESS, *supra* note 8, at 1244, 1249, 1254, 1259. Of those elections, Republicans won thirty-six, while Democrats won forty-four. *Id.*

[248] *Id.* at 1079–1150.

[249] *Id.*

[250] *See* Ziksi v. Symington, 47 F.3d 1004 (9th Cir. 1995).

[251] *Id.*

[252] *Id.* at 1005.

results of House of Representatives elections in the twelve years before *Ziskis* was decided shows that Republican candidates were met with much greater success.[253] There were thirty-two elections for the House of Representatives in Arizona between 1984 and 1994.[254] Of those elections, only eight, or 25%, saw Democratic victories.[255]

*Ziskis* therefore suggests that election returns alone cannot be the only measure of the dispositive election test. It implies that courts may need to consider other factors in addition to simple returns when determining if a given primary election is dispositive.[256] Considering the complexities that could be associated with the application of the test, it is reasonable that at least one case would imply a need to consider additional factors.

*Ziskis* raises another important question: at what point does a state have a sufficiently competitive election to permit the exclusion of independent voters? The answer is likely somewhere between the level of competition seen in *Ziskis* and that of Texas from the 1920s to 1950s. One case that is instructive in identifying the line is *Takushi*.[257] While *Takushi* did not address the constitutionality of a primary election, the case is significant because the dispositive election test is derived from Justice Kennedy's dissent.[258] Thus, *Takushi* may help narrow the range of competitiveness. Hawaii is a much smaller state than Arizona or Texas and only had two Congressional districts in the years before *Takushi* was decided.[259] In the ten years before *Takushi*, Hawaii had twelve races for House of Representatives, of which only two, or roughly 17%, witnessed Republican victories.[260] Thus, the percentage of House elections won by Hawaiian Republicans over a ten-year period before *Takushi* was less than the percentage of House elections won by Democrats in Arizona in the ten years before *Ziskis*.[261] These results suggest that a primary election will be the dispositive election if minority party candidates win at least 17%—but less than 25%—of elections.[262] Of course, a court applying the dispositive election test is not limited to examining only a ten-year period, nor only House elections. Instead, a court must consider more local elections and the character of elections generally.[263]

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253 *See* CQ PRESS, *supra* note 8, at 1226, 1231, 1236, 1241, 1246, 1251.

254 *Id.*

255 *Id.*

256 *Zisksi*, 47 F.3d at 1005.

257 Burdick v. Takushi, 504 U.S. 428, 443–50 (1992) (Kennedy, J., dissenting).

258 *Id.*

259 CQ PRESS, *supra* note 8, at 1217, 1222, 1226, 1232, 1237.

260 *Id.*

261 *Id.* at 1217, 1222, 1226, 1232, 1237, 1231, 1236, 1241, 1246, 1251.

262 *See* data and analysis *supra* notes 255, 260 and accompanying text.

263 *See* Burdick v. Takushi, 504 U.S. 428, 442–43 (1992) (considering statistics for state legislative offices before concluding that the Democratic primary was the dispositive election in Hawaii).

4. Application of the dispositive election test and remaining questions.

Assuming that the dispositive election test is an accurate reflection of the Constitution, or at the very least, a tool for reconciling conflicting constitutional decisions, there are some questions that may arise when the test is applied. In particular, those questions may include: what is the scope of the test, or does it apply only to a single type of election—Congressional, state, or local elections, or does the test apply to an entire state? It may be impossible to answer such questions until the test is actually adopted and applied by a court in some form; however, the information presented in this Note may be able to provide a starting point.

One instructive example of a state where an application of the test could prove problematic is Massachusetts. In Massachusetts, Democratic candidates almost exclusively win elections for Congress, yet Gubernatorial races frequently see Republican victors.[264] Since primary ballots can be cast for both gubernatorial and congressional elections, it may be possible for a plaintiff to successfully challenge a primary under the dispositive election test based on elections for only one of these offices.

A partial answer may rest with *Nader*.[265] Specifically, *Nader* addressed the issue of multiple elections in reaching its conclusion that Connecticut was not a "one-party" state.[266] In addressing the claims that only major party elections were meaningful, the *Nader* court argued that "[w]hile plaintiffs' contention may generally hold true for national and many statewide elections, both minor party and independent candidates may reasonably anticipate a measure of success in local elections."[267] A court applying the dispositive election test may very well look to elections across the entire state for multiple offices before making a determination about whether an election is dispositive or not. *Nader* also suggests that a state's primary election system should be evaluated as a whole rather than looking at individual elections.[268] Nevertheless, ambiguity remains.

This ambiguity might potentially be resolved by looking at factors other than election results. The dispositive election test's failure to accurately predict the outcome of *Ziskis* based on election returns for Congress suggests as much.[269] Discussing what factors a court should, could, or might use in addition to election returns would amount to mere speculation given the small number cases available to draw upon. Perhaps a court applying the test will look to other sources for answers, such as the totality of the circumstances approach applied

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[264] CQ PRESS, *supra* note 8, at 1242, 1248, 1252, 1257, 1263, 1268, 1273, 1278, 1458.

[265] Nader v. Schaffer, 417 F. Supp. 837, 843 (D. Conn.), *aff'd*, 429 U.S. 989 (1976).

[266] *Id.*

[267] *Id.* at 842–43.

[268] *Id.*

[269] *See supra* Part III.B.3.

in cases analyzing elections under the Voting Rights Act.[270]

## IV. CONCLUSION

As is evident from an examination of the constitutional framework concerning political parties and primary elections, there is conflicting precedent for determining when a voter may, or may not, be excluded from a primary election.[271] The associational rights of political parties as private organizations sometimes trump the desire of individuals to vote.[272] Yet, in other cases party primaries are treated as state action resulting in the application of constitutional protections that prevent voter exclusions.[273] The inconsistent treatment of party primaries is complicated by a series of cases treating equality in voting power as paramount.[274]

In an attempt to resolve the conceptual disparity, this Note proposes the dispositive election test as a method of reconciling contradictory cases.[275] The test asks whether or not any particular election acts as the only politically meaningful election in a jurisdiction. If a primary, or other informal election, is found to be the only relevant election, a court should conclude that the election constitutes state action regardless of the status of its organizers as private entities. The dispositive election test is derived from precedents describing the rights of voters.[276] The judiciary has concluded that all votes must be weighted equally.[277] Case law suggests that when elections are not competitive and one party dominates, the rights of voters may require greater protection than in competitive scenarios.[278] The test is not only derived from constitutional precedent, but also finds support in empirical elections returns.[279] By preserving the associational rights of political parties as private entities only when the parties are not interfering in a person's ability to fully and equally participate in the political process, the dispositive election test is able to resolve some of the inconsistencies in primary election jurisprudence.

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[270] *See* Thornburg v. Gingles, 478 U.S. 30 (1986).

[271] *See supra* Part II.

[272] *See supra* Part II.B.1.

[273] *See supra* Part II.B.3.

[274] *See supra* Parts II.B.4, III.A.

[275] *See supra* Part III.

[276] *See supra* Part III.

[277] *See supra* Part II.B.4.

[278] *See supra* Part III.B.2.

[279] *See supra* Part III.B.3.