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Rachel E. Berry

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# DEMOCRATIC NATIONAL COMMITTEE v. EDWARD J. ROLLINS: POLITICS AS USUAL OR UNUSUAL POLITICS?

Rachel E. Berry\*

## Introduction

The right to vote occupies a unique and privileged position in American jurisprudence. Voting rights are the subject of almost half of the constitutional amendments since the Civil War.<sup>1</sup> Federal laws passed pursuant to those amendments provide strong, comprehensive remedies for voting rights abuses.<sup>2</sup>

Notwithstanding the arsenal of federal laws protecting voting rights, the goal of full political participation by racial and ethnic minorities continues to be frustrated. Minorities continue to experience resistance at the polls, the voting strength of racial and ethnic minorities continues to be the target of illegal racial gerrymanders, and race continues to occupy a central, divisive position in political rhetoric.

Perhaps the most enigmatic example of the current problems plaguing minority political participation is the so-called "Rollins affair." According to press reports, Ed-

ward J. Rollins, the campaign manager for New Jersey gubernatorial candidate Christine Todd Whitman, bragged to a group of reporters that he had used \$500,000 of Whitman's campaign money to "suppress" black voting during the 1993 gubernatorial campaign. Specifically, Rollins claimed that he had approached black ministers known to be supporters of Whitman's Democratic opponent, James Florio, and promised to contribute to their favorite charities in exchange for the ministers' promises not to rally the vote for Florio.<sup>3</sup> Rollins' statements spurred a federal investigation and a federal lawsuit alleging voting rights abuses.<sup>4</sup> Rollins subsequently testified under oath,<sup>5</sup> however, that he had lied to the Washington reporters,<sup>6</sup> and the investigation and lawsuit were dropped.<sup>7</sup>

The Rollins affair is enigmatic largely because federal law does not appear to provide a remedy for a Rollins-type scheme.<sup>8</sup> His alleged scheme was not quite bribery — which includes paying someone to vote or

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\* Washington and Lee University School of Law, Candidate for Juris Doctor, May 1996. I would like to thank Gisella Erdody Berry, Louise Halper, and Daniel G. Schmedlen, Jr. for their helpful comments on earlier drafts of this article.

<sup>1</sup> U.S. CONST. amend. XXVI (setting minimum age for voting at eighteen); *Id.* amend. XXIV (eliminating poll taxes); *Id.* amend. XXIII (establishing right of residents of District of Columbia to participate in presidential elections); *Id.* amend. XIX (establishing that right to vote shall not be denied on account of sex); *Id.* amend. XVII (establishing requirements for election of senators); *Id.* amend. XV (establishing that right to vote shall not be denied on account of race). The Fourteenth Amendment also serves as a primary protector of the right to vote. See *Reynolds v. Sims*, 377 U.S. 533, 559-60 (1964) (establishing modern constitutional rule against vote dilution under Equal Protection Clause: one person-one vote).

<sup>2</sup> See 42 U.S.C. § 1971(a) (1988) (prohibiting discrimination on account of race in voting); *Id.* § 1971(b) (prohibiting intimidation, threats and coercion for purpose of interfering with right to vote); *Id.* § 1973(a) (proscribing voting qualifications or prerequisites which result in denial or abridgment of right to vote on account of race); *Id.* § 1983 (establishing liability for deprivation of rights, privileges and immunities secured by Constitution and laws of United States); *Id.* § 1985 (prohibiting conspiracies to prevent by force, intimidation or threats any person from voting).

<sup>3</sup> Thomas B. Edsall & Malcolm Gladwell, *Justice Said To Be Probing New York Vote Suppression*, WASH. POST, Nov. 12, 1993, at A2; John Goldman, *Probe Of Alleged Vote Suppression Asked In New Jersey: Campaign Manager For Whitman Retracts Statement That Ministers And Party Workers Were Paid To Not Rally Behind Florio*, L.A. TIMES, Nov. 11, 1993, at A17; Katharine Seelye, *What's Wrong With Suppressing An Opponent's Vote? The Tactic Is Just How The Game Is Played, Political Insiders Say. So Where Did Ed Rollins Go Astray?*, PHILA.

INQUIRER, Nov. 14, 1993, at D1 ("The idea was that, in exchange for the contributions, the ministers would forgo their traditional pre-Election Day sermons to their largely Democratic parishioners, thereby dampening the Florio turnout.").

<sup>4</sup> *Criminal Probe Of Jersey Campaign: Demos Also Sue Governor-Elect Over Black Vote*, S.F. CHRON., Nov. 13, 1993, at A3 [hereinafter *Criminal Probe*] (reporting investigations by U.S. Attorney in Newark); Thomas B. Edsall & Malcolm Gladwell, *Federal, State Probes Begin In N.J. Gubernatorial Vote*, WASH. POST, Nov. 13, 1993, at A2 (same).

<sup>5</sup> Thomas B. Rosenstiel, *Rollins' Comeback Turns Into A Nosedive*, L.A. TIMES, Nov. 20, 1993, at A1 (reporting that Rollins spent over seven hours giving sworn deposition testimony to lawyers from Democratic National Committee).

<sup>6</sup> *Rollins, Under Oath, Says He Lied About Racial Vote Tactics*, S.F. CHRON., Nov. 20, 1993, at A3 [hereinafter *Rollins, Under Oath*].

<sup>7</sup> *Democrats Drop Suit To Overturn N.J. Election; Not Enough Evidence Found*, THE LEGAL INTELLIGENCER, Nov. 30, 1993, at 7 [hereinafter *Democrats Drop Suit*]; Rachel E. Stassen-Berger, *U.S., New Jersey Drop Probes Of Rollins Claims; No Vote Suppression By Whitman Camp Found*, WASH. POST, Jan. 13, 1994, at A3.

<sup>8</sup> See Rorie Sherman, *Political, Not Legal?*, NAT'L L.J., Dec. 6, 1993, at 6 (reporting consensus that Democratic Party's case was based upon "strong politics" but "weak legal theory"). Michael W. McConnell, Professor of Law at the University of Chicago Law School, reportedly stated that the Democrat's suit did not have "much of a legal theory." Linda Bean, *Plaintiffs Face High Hurdles*, LEGAL TIMES, Nov. 29, 1993, at 2. Likewise, Laughlin McDonald, Director of the Atlanta-based Voting Rights Project of the American Civil Liberties Union, described the Democratic National Committee's arguments as "artful," but noted that the DNC was "clearly stretching" federal voting rights law. *Id.*

not to vote, but does not include a scheme in which the voter receives nothing of value.<sup>9</sup> His alleged scheme also did not compare to the strong-arm tactics that had prompted Congress to pass current federal voting rights laws.<sup>10</sup> Still, intuitively, observers sensed that a Rollins-type scheme would have caused harm — and not simply offense — to minority voters.<sup>11</sup>

This article examines federal voting rights law and the commitment the federal government has made to ensuring the full political participation of minority voters. It attempts to answer the following question: is a Rollins-type scheme “just politics as usual” or does such a scheme represent the kind of threat to minority voting rights that justifies federal intervention? *Part I* of this article describes the background of the Rollins affair, placing particular emphasis on the role played by the political parties in shaping the dynamics of New Jersey elections and voting rights litigation. *Part II* describes the evolution of the “right to vote.” The focus of *Part II* will be on two important sources of federal voting rights law: the Fifteenth Amendment<sup>12</sup> and the Voting Rights Act of 1965.<sup>13</sup> *Part III* argues that current voting rights jurisprudence tends to describe voting in unduly individual-oriented terms, and that such a narrow definition of the right to vote is inconsistent with early voting rights jurisprudence and inadequate to protect the civic function of voting in a democratic system. *Part III* also argues that the current unwillingness to view a Rollins-type scheme as vote “suppression” is a function of this individual-oriented definition of voting. *Part III* concludes by describing why, under a more civic-minded approach to voting, a Rollins-type scheme violates the basic principles of the right to vote.

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<sup>9</sup> See Pamela S. Karlan, *Not by Money But By Virtue Won? Vote Trafficking And The Voting Rights System*, 80 VA. L. REV. 1455, 1463 (1994) (arguing that Rollins-type scheme is conceptually different from bribery). Brenda Wright, Director of the Voting Rights Project of the Washington Lawyers’ Committee for Civil Rights and Urban Affairs, reportedly stated that although federal and state laws prohibit vote-buying, Rollins admitted “something else.” See Bean, *supra* note 8.

<sup>10</sup> See Bean, *supra* note 8 (reporting views of several commentators who believe that federal voting rights law does not cover Rollins-type scheme). Bernard Grofman, Professor of Political Science at the University of California at Irvine, reportedly stated that the Rollins affair had been “played up as a civil-rights case, but that is wrong, and it’s a mistake to tie it to racial impact.” *Id.* Laughlin McDonald reportedly stated that the Democrats would have a hard time convincing the court that the case merited an extension of existing federal laws prohibiting the intimidation and coercion of voters, *i.e.*, that the behavior alleged was “equivalent” to the kind of threats enjoined in other vote suppression cases. *Id.*

<sup>11</sup> See Karlan, *supra* note 9, at 1463-64 (noting that, intuitively, Ed Rollins’ alleged scheme was more akin to vote suppression than politics-as-usual, get-out-the-vote drives).

<sup>12</sup> U.S. CONST. amend. XV.

## PART I: THE FACTS SURROUNDING THE ROLLINS AFFAIR

### A. Rollins’ Statements To The Press

On November 9, 1993, just a few days after Governor Christine Todd Whitman’s narrow victory<sup>14</sup> over Democratic incumbent James Florio, Whitman’s campaign manager, Edward J. Rollins, boasted to a group of reporters in Washington that he had spent \$500,000 of Whitman’s campaign money in a scheme designed to reduce black voter turnout.<sup>15</sup> Specifically, Rollins stated:

[We] went into the black churches and basically said to the ministers who had endorsed Florio, “Do you have any special projects (charities)? We see you have already endorsed Florio. That’s fine. But don’t get up on the Sunday pulpit and say . . . it’s your moral obligation to vote on Tuesday, to vote for Jim Florio.”<sup>16</sup>

Rollins also claimed that members of the Whitman campaign had approached Democratic poll workers and offered them money to stay at home instead of helping in the “get out the vote” drive:

[We asked,] “How much have they paid you to do your normal duty. We’ll match it, go home, sit and watch television. And I think to a certain extent, we suppressed their vote.”<sup>17</sup>

### B. The Political Uproar And Rollins’ Denial

Rollins’ statements prompted a political uproar.<sup>18</sup> Many believed that, if true, Rollins’ scheme had crossed a forbidden line; his alleged scheme was more than “poli-

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<sup>13</sup> 42 U.S.C. § 1973 et seq. (1988).

<sup>14</sup> Whitman won 49% of the vote, as compared to Florio’s 48%, a margin of approximately 27,000 votes out of 2.4 million cast. Monte R. Young, *Feds Probe Charge Of N.J. Vote Buyoff, Democrats Moving To Overtake Election*, NEWSDAY, Nov. 13, 1993, at 6. Whitman’s victory over Florio was the second closest in New Jersey history. *Whitman’s Liaison Denies Rollins Claims*, THE LEGAL INTELLIGENCER, Nov. 23, 1993, at 39. The closest New Jersey gubernatorial election was in 1981, when James Florio lost to Republican Thomas Kean by one-twelfth of one percent of the vote. Linda Bean, *From Breakfast Chat To Deposition*, N.J. L.J., Nov. 22, 1993, at 32. With his defeat in 1993, Florio earned the unfortunate distinction of having lost the two closest gubernatorial elections in New Jersey history. See *id.*

<sup>15</sup> See *supra* note 3 and accompanying text.

<sup>16</sup> Edsall & Gladwell, *supra* note 3.

<sup>17</sup> *Id.*

<sup>18</sup> Bean, *supra* note 14 (stating that Rollins’ remarks provoked a fury of protest); Rocco Cammarere, *Unwelcome Political Fanfare Greets Whitman*, N.J. LAWYER, Nov. 22, 1993, at 25 (describing Rollins as at center of political fray); *Ministers Sue Rollins For Slander*, THE LEGAL INTELLIGENCER, Nov. 29, 1993 [hereinafter *Ministers Sue*] (stating that Rollins’ comments ig-

tics as usual" and was an attempt to suppress black voting. In short, it was the newest manifestation of illegal racism in the area of voting rights, and required a swift and forceful response. Elaine R. Jones, Director-Counsel of the NAACP Legal Defense Fund announced that Rollins' scheme, if true, would constitute "an outrageous, race-based manipulation of the electoral system."<sup>19</sup> Reverend Jesse Jackson and other black leaders announced their intention to file a slander suit against Rollins and the New Jersey GOP: "We marched too much, and bled too profusely, and died too young to either sell our vote or give it away."<sup>20</sup> An editorial in *The Washington Post* characterized the scheme as "reek[ing] of condescension and racial put down."<sup>21</sup> The editorialist found "troubling" the possibility that money would be spent with the goal of encouraging people not to exercise their right to vote.<sup>22</sup> Similarly, an editorial in *The Recorder* noted that:

Money paid to suppress voting disenfranchises voters. It makes our country less democratic. When vote suppression is based on race, it is all the worse; those who are already most alienated are driven further from the democratic process. If democracy is to hold any meaning at all to minority groups, we ought to

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nited political firestorm); *Strategist In Governor's Race Testifies In N.J. Grand Jury*, MIAMI HERALD, Nov. 19, 1993, at A23 [hereinafter *Strategist Testifies*] (stating that Rollins' remarks started political upheaval that reached from New Jersey to Washington).

<sup>19</sup> Goldman, *supra* note 3.

<sup>20</sup> Seelye, *supra* note 3.

<sup>21</sup> *The Boasting Of Ed Rollins*, WASH. POST, Nov. 12, 1993, Op. Ed., at A24 [hereinafter *Boasting*].

<sup>22</sup> *Id.*

<sup>23</sup> David B. Oppenheimer, *Voting Rights, Voting Wrongs*, THE RECORDER, Dec. 12, 1993, Commentary, at 7.

<sup>24</sup> Bean, *supra* note 14.

<sup>25</sup> *Id.* "Street money" or "walking around money" refers to money paid to individuals and groups during elections that is supposed to help "get out the vote." See, e.g., Russ Bleemer, *Rollins' Remarks Spark Bill Restricting "Street Money"*, N.J. L.J., Nov. 22, 1993, at 6 (describing function of street money in campaigns); John Aloysius Farrell, et al., "Street Money" Litters U.S. Politics, *Spreading Cash on Election Day Is Alive And Well And Quite Bipartisan*, BOSTON GLOBE, Nov. 28, 1993, § 3, at 1 (reporting on widespread practice of distributing walking around money during campaigns); Seelye, *supra* note 3 (describing history of street money in American politics).

<sup>26</sup> Oppenheimer, *supra* note 23. The Democratic Party's get-out-the-vote efforts in black neighborhoods can be crucial in close elections in New Jersey, largely because black voters tend to have extremely strong loyalty to the Democratic Party. It is not unusual for over 78% of black voters nationwide to self-identify with the Democratic Party. See Bob Drogin, *GOP Intensifies Its Effort To Appeal To Black Voters*, L.A. TIMES, Oct. 27, 1986, at 1 (reporting results of recent national Gallup survey). Democratic Party loyalty among black voters in Northern New Jersey districts can be as high as 90%. *Id.* Political strategists therefore recognize that black voters' party loyalty

scrupulously support minority participation in elections.<sup>23</sup>

The losing candidate, James Florio, called for an investigation, stating, "This sends a very distressing message about democracy in this country."<sup>24</sup> New Jersey Assembly Speaker Garabed Haytaian stated, "I am appalled at the notion that anyone would even consider exerting influence aimed at discouraging citizens of New Jersey from voting," and called for a ban on "street money."<sup>25</sup>

The news media began investigating, and reports of unusual election patterns poured in. The press reported that Democratic campaign officials had been unable to recruit the usual number of precinct workers for their get-out-the-vote drive in African-American neighborhoods.<sup>26</sup> Reverend Keith Owens of the Kaighns Avenue Baptist Church in Camden stated that several members of the Black Ministers Council of New Jersey had received offers from people identifying themselves as Republicans and making offers consistent with Rollins' description of the campaign tactics.<sup>27</sup> Daniel Todd, Whitman's brother, noted that the election turnout in Democratic voting districts was uncharacteristically low, and perhaps unwittingly attributed this to "the shoe-leather, street organization."<sup>28</sup>

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is often critical, if not decisive, in close New Jersey elections. For example, in an opinion piece in *USA Today*, Walter E. Fauntroy observed that the Rollins affair made sense on the level of "electoral arithmetic" because a large, loyal black vote is often the Democratic Party's margin of victory. Walter E. Fauntroy, *The Real Lessons Of The Rollins Affair*, USA TODAY, Dec. 1, 1993, Op. Ed., at A11. As a matter of political strategy, therefore, if the Democratic Party fails to use its best efforts to turn out loyal black Democrats, the party will lose close elections. *Id.* See also Young, *supra* note 15 (quoting statements by Whitman's former campaign manager, brother Daniel Todd: "The State of New Jersey is still a state that is very susceptible to a well-run shoe leather campaign.")

<sup>27</sup> *Boasting*, *supra* note 21 (reporting Owens' statement that he had "received word . . . that some of [his organization's] clergy had been approached"). But see *Ministers Sue*, *supra* note 18 (stating that to date no one had admitted being approached); *Strategist Testifies*, *supra* note 18 (reporting that no one had come forward with firsthand knowledge of being approached).

<sup>28</sup> Edsall & Gladwell, *supra* note 3 (quoting Todd as saying, "A Democratic statewide incumbent candidate doesn't come out of Hudson County [with] under 25,000 [votes]. A Democratic incumbent candidate doesn't come out of Camden with only 40,000 votes . . . There was a significant role played by the shoe-leather, street organizations."). Daniel Todd's statements were made prior to Rollins' November 9 remarks to the Washington reporters, and were viewed by the press as inadvertent corroboration of Rollins' account. See also *Demos Stalled In New Jersey Election Probe In New Denial That Black Voting Was Suppressed*, S.F. CHRON., Nov. 27, 1993, at A2 ("Explaining his sister's victory during a panel discussion two days after the election, Todd said, '[A well-run shoe leather campaign] is where a lot of our effort went and a lot of our planning — getting out the vote on one side and vote sup . . . ' breaking off before resuming, 'and keeping the vote light in other areas.'").

Whitman vehemently denied Rollins' statements,<sup>29</sup> a group of black ministers filed a slander action in federal court,<sup>30</sup> state and federal authorities launched investigations,<sup>31</sup> a grand jury questioned Rollins,<sup>32</sup> and the Democratic National Committee (DNC) filed a federal suit claiming violations of federal voting rights laws and asking the court to overturn the election.<sup>33</sup> Under oath,<sup>34</sup> Rollins told Democratic lawyers that he had lied to the Washington reporters<sup>35</sup> and that he had only been taunting his Democratic counterpart, James Carville, campaign manager for James Florio.<sup>36</sup> The investigations were terminated,<sup>37</sup> and the DNC dropped its federal suit without prejudice.<sup>38</sup>

### C. *Prior Attempts At Vote Suppression By The Republican National Committee*

The lawsuit filed by the DNC against Rollins was not the first time that the DNC accused the Republican Party of targeting black voting for "suppression" in New

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Further corroboration was provided by the statements of Carl Golden, Whitman's campaign spokesman, who was quoted in the press on November 4 as saying, "We cut the (Democratic) margin in Essex and Hudson (two urban counties with large black and Latino constituencies). Sometimes vote suppression is as important in this business as vote-getting." *Criminal Probe*, *supra* note 4.

<sup>29</sup> *Boasting*, *supra* note 21 ("Ms. Whitman, on hearing this, went ballistic. 'It didn't happen,' she said. 'I don't campaign that way. I urge people to vote. I don't suppress votes.'"); *Criminal Probe*, *supra* note 4 (quoting Whitman as stating that Rollins "flat-out lied"); Edsall & Gladwell, *supra* note 3 (reporting that Whitman vehemently denied Rollins' statements).

<sup>30</sup> Linda Bean, *Can Clergy Prove Slander In Rollins' Remarks*, N.J. L.J., Nov. 29, 1993, at 5 (reporting defamation suit by multiple plaintiffs, including Al Sharpton, Jesse Jackson, and ministers' division of Jackson's New York-based Rainbow Coalition); *Ministers Sue*, *supra* note 18 (same). Reverend Ezekiel Bey, President of the General Baptist Convention of New Jersey, subsequently filed a second federal slander lawsuit. *Second Lawsuit Filed Against Ed Rollins*, THE LEGAL INTELLIGENCER, Dec. 13, 1993, at 7.

<sup>31</sup> *Criminal Probe*, *supra* note 4 (reporting investigations by U.S. Attorney in Newark and New Jersey Attorney General); Edsall & Gladwell, *supra* note 4 (same).

<sup>32</sup> *Strategist Testifies*, *supra* note 18.

<sup>33</sup> *Criminal Probe*, *supra* note 4; Edsall & Gladwell, *supra* note 4.

<sup>34</sup> See Rosenstiel, *supra* note 5.

<sup>35</sup> See *Rollins, Under Oath*, *supra* note 6. During deposition, Rollins was also questioned about similar statements he allegedly made to GOP strategist Mary Matalin. Wade Lambert, *Legal Beat*, WALL ST. J., Nov. 24, 1993, at B1. Rollins denied that he had bragged to Matalin. *Id.* Rollins also denied widespread reports that he had made similar remarks at a Washington-area dinner party. *Id.*

<sup>36</sup> Bean, *supra* note 14 (reporting that Rollins testified he had only been "playing head games" with James Carville); *Rollins, Under Oath*, *supra* note 6 (same). See also Thomas B. Edsall, *Rollins: An "Inside-the-Beltway" Game: Deposition Of*

Jersey.<sup>39</sup> In 1981, Democratic gubernatorial candidate James Florio lost to Republican Thomas Kean in an election that produced the narrowest margin of victory in the history of the state.<sup>40</sup> Because New Jersey law allows candidates to become governor with only a single-vote margin of victory,<sup>41</sup> Florio requested a manual recount of voting in all districts.<sup>42</sup> Florio also demanded an investigation into charges that the Republican National Committee (RNC) had harassed and intimidated minority voters under the guise of an anti-fraud, "ballot security" program.<sup>43</sup> The recount produced virtually no change,<sup>44</sup> and prosecutors investigating the ballot security measures found no evidence that the election had been tainted.<sup>45</sup>

Although Florio eventually conceded defeat,<sup>46</sup> the Democratic State Committee (DSC), together with the DNC and various individual New Jersey voters, instituted a civil action in the federal district court for New Jersey.<sup>47</sup> The plaintiffs alleged that the RNC's ballot security program had discouraged qualified black and His-

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*fers Insight Into Consultant's Character, Thinking*, WASH. POST, Nov. 21, 1993, at A4 ("Rollins, by his account under oath, was just trying to get under Carville's skin, hoping that some reporters would call Carville to describe the vote suppression, telling him 'Rollins kicked your ass . . . and here's how he did it,' without ever writing about it. But as the breakfast meeting with reporters progressed, Rollins said in retelling under oath what happened: 'All of a sudden it became clear to me that this wasn't going to be one reporter calling Carville . . . If I thought for one single moment this was going to go this way, I would never have mentioned it. This is an inside-the-Beltway bullshit game that I've become the victim of.'")

<sup>37</sup> Stassen-Berger, *supra* note 7.

<sup>38</sup> *Democrats Drop Suit*, *supra* note 7.

<sup>39</sup> Karlan, *supra* note 9, at 1475 n.51. See also *Boasting*, *supra* note 21 (reporting that Republican Party has history of trying to reduce black voter turnout in close elections).

<sup>40</sup> See *supra* note 14.

<sup>41</sup> Richard J. Meislin, *Official Tallies Show Kean Leading In New Jersey*, N.Y. TIMES, Nov. 10, 1981, at A1.

<sup>42</sup> Joseph F. Sullivan, *Florio Asks For Recount Of All Votes*, N.Y. TIMES, Nov. 13, 1981, at B3.

<sup>43</sup> Selwyn Raab, *Jersey Inquiry Is Planned On Vote Security Force*, N.Y. TIMES, Nov. 14, 1981, §2, at 6 (reporting that Florio asked Essex County Prosecutor to coordinate statewide investigation to determine whether irregularities were caused by ballot security program).

<sup>44</sup> Joseph F. Sullivan, *Florio Concedes Governor's Race To Kean In New Jersey*, N.Y. TIMES, Dec. 1, 1981, at A1 (reporting that, after vote recount, Kean's lead remained virtually unchanged).

<sup>45</sup> David W. Dunlap, *Poll Team Chief In Jersey Leaves His G.O.P. Post*, N.Y. TIMES, Dec. 31, 1981, at B2 (reporting that Essex County Prosecutor would not bring charges against anyone involved in ballot security force).

<sup>46</sup> Sullivan, *supra* note 44 (reporting that, after 27 days of uncertainty, Florio conceded defeat to Kean).

<sup>47</sup> *Democratic Nat'l Comm. v. Republican Nat'l Comm.*, Civ. No. 81-3876 (D.N.J. filed Nov. 1, 1981).

panic voters from voting in the gubernatorial election<sup>48</sup> and averred that the conduct had violated New Jersey voters' Fourteenth and Fifteenth Amendment rights as well as voting rights protected by federal statutes.<sup>49</sup>

RNC officials defended the ballot security plan as an independent venture to identify and correct vote fraud and ensure the integrity of the election.<sup>50</sup> Apparently believing that the state's procedures for detecting vote fraud were inadequate, the RNC hired a team of consultants, the self-described "Ballot Security Task Force" (BSTF).<sup>51</sup> The anti-fraud procedures followed by the BSTF were strikingly similar to those followed by New Jersey election supervisors. They differed, however, in several critical details.

Under New Jersey law, election supervisors mail a non-forwardable sample ballot to all registered voters.<sup>52</sup> If the ballot is returned, the supervisor sends the voter a second letter (this one forwardable), stating that the sample ballot had been returned and requesting the voter's new address.<sup>53</sup> Voters who fail to respond are placed on a "challenge list," and may be challenged by designated officials at the polls.<sup>54</sup>

The BSTF, by contrast, based its initial mailing on an outdated voter registration list, and limited the scope of its mailing to predominantly black and Hispanic districts in New Jersey.<sup>55</sup> The envelopes stated that the letters should not be forwarded but should be returned to the sender if undelivered.<sup>56</sup> The BSTF received more than 45,000 returned letters.<sup>57</sup> Without making a second attempt to locate the missing voters at a different address,

the BSTF converted the 45,000 letters directly into a challenge list.<sup>58</sup>

Less than two weeks before the election, the RNC delivered its challenge list to the election supervisors and requested that the supervisors strike the persons on the list from voter registration rolls.<sup>59</sup> The Commissioners of Registration refused after discovering that the RNC had based its mailing on outdated information.<sup>60</sup> The RNC announced through the news media that the Committee would persist in its attempt to secure ballot integrity.<sup>61</sup>

On election day, the RNC posted large signs in polling areas, printed in red, reading:

WARNING  
THIS AREA IS BEING PATROLLED BY THE  
NATIONAL BALLOT  
SECURITY TASK FORCE  
IT IS A CRIME TO FALSIFY A BALLOT OR  
TO VIOLATE ELECTION LAWS<sup>62</sup>

The signs offered a reward of \$1,000 for information leading to the arrest and conviction of anyone violating New Jersey election laws.<sup>63</sup> The RNC posted the signs in violation of state law requiring political material to be kept at a distance from the polls.<sup>64</sup> The signs did not identify their source, and so appeared to be non-partisan announcements.<sup>65</sup>

In addition to posting signs, the RNC hired an "army of workers," including off-duty county deputy sheriffs and local policemen, to patrol the targeted black and

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<sup>48</sup> Plaintiff's Amended Complaint for Declaratory and Injunctive Relief at 1-2, *Democratic Nat'l Comm. v. Republican Nat'l Comm.* (D.N.J. 1981) (Civ. No. 81-3876).

<sup>49</sup> Plaintiff's Amended Complaint for Declaratory and Injunctive Relief at 2, *Democratic Nat'l Comm. v. Republican Nat'l Comm.* (D.N.J. 1981) (Civ. No. 81-3876). The DNC sought relief under 42 U.S.C. §§ 1971(a)(1), 1971(a)(2), 1973(i)(b), 1983, 1985(3). *Id.*

<sup>50</sup> Robert Joffe, *Democrats Accuse GOP Of Intimidating Minorities In N.J. Voting*, WASH. POST, Nov. 8, 1981, at A8 (reporting that RNC openly admitted to funding ballot security program, and quoting Richard Richards, GOP National Chairman, as saying that anyone opposed to ballot security obviously must be supportive of election fraud).

<sup>51</sup> Richard J. Meislin, *Jersey Vote Controversy Moves Further In Courts*, N.Y. TIMES, Nov. 8, 1981, at 34 (reporting that RNC coordinated and funded ballot security operations).

<sup>52</sup> N.J. STAT. ANN. §§ 19:31-6.6, 19:31-5 (West 1989).

<sup>53</sup> *Id.* § 19:31-15.

<sup>54</sup> *Id.*

<sup>55</sup> Plaintiff's Amended Complaint for Declaratory and Injunctive Relief at 9, *Democratic Nat'l Comm. v. Republican Nat'l Comm.* (D.N.J. 1981) (Civ. No. 81-3876).

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

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<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 10.

<sup>62</sup> *Id.*; see also David S. Broder, *Inquiry Asked In N.J. Election*, WASH. POST, Nov. 10, 1981, at A2 (describing Ballot Security Task Force activities); Joffe, *supra* note 50 (same); Richard J. Meislin, *Jersey Controversy Widens Over GOP Patrols At Polls*, N.Y. TIMES, Nov. 7, 1981, § 2, at 25 (same); Meislin, *supra* note 51 (same).

<sup>63</sup> Plaintiff's Amended Complaint for Declaratory and Injunctive Relief at 11, *Democratic Nat'l Comm. v. Republican Nat'l Comm.* (D.N.J. 1981) (Civ. No. 81-3876).

<sup>64</sup> *Id.* (citing N.J. STAT. ANN. § 19:34-15 (West 1989)). In fact, on election day the DNC successfully petitioned a Trenton judge to disband the Ballot Security efforts. Joffe, *supra* note 50 (reporting that on election day Trenton judge issued statewide order enjoining use of signs, which he said violated state law by failing to say who paid for them); Richard J. Meislin, *Jersey's Ballots Impounded With Tiny Margin Wavering; New York Prison Bonds Win*, N.Y. TIMES, Nov. 5, 1981, at A1 (reporting that New Jersey court found signs illegal).

<sup>65</sup> Plaintiff's Amended Complaint for Declaratory and Injunctive Relief at 11, *Democratic Nat'l Comm. v. Republican Nat'l Comm.* (D.N.J. 1981) (Civ. No. 81-3876); see also Meislin, *supra* note 62 (reporting that Trenton resident had called toll-free number listed on posters and had unsuccessfully attempted to determine who was behind security task force operations).

Hispanic polling places.<sup>66</sup> The off-duty law enforcement workers prominently displayed revolvers, two-way radios, and BSTF armbands.<sup>67</sup> They challenged voters at the polls, stopping and questioning prospective voters, and refusing to allow prospective voters to enter polling places. They also ripped down the signs of one candidate and forcibly restrained poll workers from assisting voters in casting their ballots.<sup>68</sup>

According to the DNC, the BSTF's tactics were part of a conspiracy designed to intimidate, harass and coerce black and Hispanic voters not to vote.<sup>69</sup> The DNC charged that the BSTF acted with the intent to deprive the voters — targeted because of their race — of their rights of equal protection under the law and their right to vote.<sup>70</sup> Two voters joined as plaintiffs in the lawsuit, alleging that the BSTF had intimidated and harassed them at voting sites.<sup>71</sup> One voter claimed that she did not vote because of the actions of the BSTF.<sup>72</sup> The DNC requested that the court issue an injunction ordering the RNC to refrain from undertaking similar ballot security measures across the country.<sup>73</sup>

The lawsuit filed by the DNC produced a 1982 settlement agreement between the parties and a consent order from Federal District Judge Dickinson R. Debevoise binding the RNC on a national level to refrain from further use of ballot integrity programs.<sup>74</sup> The DNC subsequently invoked the settlement order in 1986

when the RNC embarked on another highly publicized ballot security effort in Louisiana.<sup>75</sup> In that case, an RNC-financed ballot security team again used a letter campaign, allegedly to purge the state rolls of illegitimate voters and to ensure the integrity of the election.<sup>76</sup> The ballot security team sent non-forwardable, anonymous letters<sup>77</sup> to registered voters in districts that had voted over seventy-five percent for Walter F. Mondale, the Democratic Presidential candidate in 1984.<sup>78</sup> This voting pattern was confined almost exclusively to predominantly black districts.<sup>79</sup> Undelivered letters were returned to the RNC, which filed 30,000 voter challenges with state election authorities<sup>80</sup> in an effort to get the voters, most of them black,<sup>81</sup> purged from the rolls.<sup>82</sup>

After the primaries, Democratic voters challenged the ballot security measures in state court<sup>83</sup> where State District Judge Richard E. Lee called the ballot security measures "an insidious scheme by the Republican Party to remove blacks from voting rolls,"<sup>84</sup> and ordered registrars to refrain from using RNC information to purge voters from the rolls.<sup>85</sup> The DNC subsequently filed a \$10 million lawsuit with Judge Debevoise in Federal District Court in New Jersey, alleging violations of the Voting Rights Act of 1965 and the 1982 consent order.<sup>86</sup> According to the DNC, the ballot integrity program in Louisiana was part of an RNC effort in seven other states to illegally purge one million black and Hispanic voters

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<sup>66</sup> Plaintiff's Amended Complaint for Declaratory and Injunctive Relief at 11, *Democratic Nat'l Comm. v. Republican Nat'l Comm.* (D.N.J. 1981) (Civ. No. 81-3876).

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 12.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 4, 12.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 12.

<sup>74</sup> Settlement Agreement at 1-2, *Democratic Nat'l Comm. v. Republican Nat'l Comm.* (D.N.J. 1981) (Civ. No. 81-3876). The RNC agreed, among other things, to "refrain from undertaking any ballot security activities in polling places or election districts where the racial or ethnic composition of such districts is a factor in the decision to conduct . . . such activities and where a purpose or significant effect of such activities is to deter qualified voters from voting." *Id.*

<sup>75</sup> Bill Peterson, *Democrats Sue Over GOP's Voter Project*, WASH. POST, Oct. 8, 1986, at A4 (reporting that DNC had filed suit alleging RNC had violated Voting Rights Act and New Jersey consent decree).

<sup>76</sup> Nicholas M. Horrock, *GOP Turned 60,000 In To FBI*, CHI. TRIB., Oct. 24, 1986, at C8 (reporting that Republican leaders believed one of most serious national problems was vote fraud, and, accordingly, that RNC initiated ballot integrity program to prevent election process from being "desecrated").

<sup>77</sup> Thomas B. Edsall, *'Ballot Security' Effects Calculated; GOP Aide Said Louisiana Effort 'Could Keep The Black Vote Down'*, WASH. POST, Oct. 25, 1986, at A1.

<sup>78</sup> Peterson, *supra* note 75.

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<sup>79</sup> Paul Taylor, *RNC Agrees To End Ballot Security Plan*, WASH. POST, Oct. 21, 1986, at A1. See also Philip Lentz, *Lawsuit Bares GOP Bid To Bar Black Voters*, CHI. TRIB., Oct. 26, 1986, at C5 (reporting that Republicans targeted areas that voted eighty percent Democratic in 1984, and that blacks were only group of voters to vote so heavily Democratic).

<sup>80</sup> Michael J. Burns, *Judge Blocks Voter Purge, Calls It Plot Against Blacks*, ALEXANDRIA DAILY TOWN TALK, Sept. 25, 1986, at A1.

<sup>81</sup> George Andreassi, *Judge Orders Democrats To Withhold Evidence Embarrassing GOP*, UNITED PRESS INT'L, Oct. 20, 1986, General News.

<sup>82</sup> Edsall, *supra* note 77 (reporting that letters were turned over to election officials in effort to have names purged from voter rolls); Peterson, *supra* note 75 (reporting that letters returned to RNC triggered process likely to culminate in voter being challenged at polls); Taylor, *supra* note 79 (reporting that undelivered letters became basis for asking that names be purged from registration rolls).

<sup>83</sup> Marsha Shuler & Don Lewis, *Voter Purge Stopped*, BATON ROUGE MORNING ADVOCATE, Sept. 30, 1986, at B1.

<sup>84</sup> Burns, *supra* note 80 (reporting statements by District Court Judge Richard E. Lee in his injunction against ballot security program); Edsall, *supra* note 77 (same).

<sup>85</sup> Long v. Gremillion, Civ. No. 142,389 (D. La. decided Sept. 25, 1986) (Judgment and Preliminary Injunction). See also Taylor, *supra* note 79 (reporting that Louisiana judge issued preliminary injunction preventing registrars from purging names, after ruling that ballot security program had singled out blacks).

<sup>86</sup> Peterson, *supra* note 75.

from the rolls and to keep those voters away from the polls on election day.<sup>87</sup>

Although the RNC denied any wrongdoing,<sup>88</sup> their case was harmed by disclosure of a memo from Kris Wolfe, a Midwest regional director for the RNC, to Lanny Griffith, a Southern regional director for the Committee.<sup>89</sup> In a memo concerning the Louisiana ballot security program, Wolfe wrote:

I know this is really important to you. I would guess this program would eliminate at least 60,000 to 80,000 folks from the rolls. If this is a close race, which I assume it is, this could keep the black vote down considerably.<sup>90</sup>

The lawsuit was settled nine months after the election, when both parties agreed to amend the 1982 consent order to require the RNC to submit any ballot security plan to federal court for approval.<sup>91</sup>

In 1990, the DNC again complained to Judge Debevoise that the Republican Party was violating the court's order with ballot integrity mailings in North Carolina.<sup>92</sup> In this instance, the state Republican Party mailed 150,000 postcards, many of them to heavily black districts.<sup>93</sup> The postcards contained a false statement that new residents could not vote in the district for 30 days.<sup>94</sup> The postcards also threatened to prosecute any individual who voted fraudulently.<sup>95</sup> Judge Debevoise agreed that the conduct appeared to violate the order,<sup>96</sup> but told the DNC that he could not take action both because the alleged violations occurred outside the court's jurisdiction and because there was no conclusive proof that the Republican National Committee (as opposed to the North Carolina Republican State Committee) initiated the mailings.<sup>97</sup>

Finally, the DNC invoked the 1982 settlement agreement in the 1993 New Jersey litigation, *Democratic National Committee v. Rollins*. The DNC apparently be-

lieved that Rollins' alleged scheme should be viewed on a continuum with the RNC's prior attempts to "suppress" black voting — *i.e.*, Rollins' alleged scheme, like the RNC's scheme in 1980, targeted heavily black, Democratic strongholds for a demobilization effort. Accordingly, the DNC prepared a motion asking Judge Debevoise to consolidate the 1993 action with the 1981 action.<sup>98</sup> Judge Debevoise denied the motion for consolidation, stating, "Though both cases deal in a very general way with charges of attempts to reduce voting by minority voters, the facts are totally dissimilar."<sup>99</sup>

#### D. Conclusion

The battle between the RNC and the DNC over the RNC's efforts to "suppress" black voting does not have clear winners or losers. Although the 1982 consent order proved useful as a tool for curbing RNC ballot security measures on a national level, the instrument ultimately has little utility as a method for curing the unique form of race-based campaign behavior at issue in these elections. The 1982 consent order expressed no judicial opinion of the RNC's race-based efforts to demobilize Democratic voters, and, as a result, the disputes between the RNC and the DNC in the 1980's focused less upon principles of substantive voting rights law and focused more upon the rights of the parties under the terms of the consent order. Thus, not only did the consent order not add to the body of law delimiting unfair election practices, but it allowed contract principles to permeate and control the conduct of the parties.

In part, the pyrrhic victories produced by the 1982 consent order are a function of the highly political nature of party litigation,<sup>100</sup> a phenomenon which most likely would have influenced the 1993 lawsuit as well. For example, in *Democratic National Committee v. Rollins*,

<sup>87</sup> Andreassi, *supra* note 81; Horrock, *supra* note 77.

<sup>88</sup> See Taylor, *supra* note 79 (reporting that RNC insisted it had merely been trying to keep dead or nonexistent people from voting); Martin Tolchin, *GOP Memo Tells Of Black Vote Cut*, N.Y. TIMES, Oct. 25, 1986, § 1, at 7 (same).

<sup>89</sup> Philip Lentz, *GOP Bid To Bar Black Voters Bared In Democrat's Lawsuit*, CHI. TRIB., Oct. 25, 1986, at C1 (reporting release of memo during federal court hearing in Newark).

<sup>90</sup> Edsall, *supra* note 77; Lentz, *supra* note 89; Tolchin, *supra* note 88.

<sup>91</sup> Settlement Stipulation and Order of Dismissal at 2, *Democratic Nat'l Comm. v. Republican Nat'l Comm.* (D.N.J. 1986) (Civ. No. 86-3972) (modifying 1981 consent order to prohibit RNC from participating in any ballot security plan without express approval of federal court). See also Bill Peterson, *GOP Agrees To Settle 'Ballot Security' Suit*, WASH. POST, July 24, 1987, at A3 (reporting that RNC and DNC agreed to settle lawsuit); Bernard Weinraub, *Suit Charging GOP Sought To Cut Black Vote Is Settled*, N.Y. TIMES, July 24, 1987, at A15 (same).

<sup>92</sup> B. Drummond Ayres, Jr., *The 1990 Campaign; Judge Assails G.O.P. Mailing in Carolina*, N.Y. TIMES, Nov. 6, 1990,

at B9 (reporting DNC's effort to invoke settlement agreement against ballot security measures in North Carolina).

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> See *id.* (reporting that Judge Debevoise agreed with DNC and criticized RNC for not doing enough to ensure that Republican Party's ballot security program did not become effort to intimidate minority voters).

<sup>97</sup> *Id.*

<sup>98</sup> See Notice of Motion for Consolidation and Expedited Discovery at 2, *Democratic Nat'l Comm. v. Rollins* (D.N.J. 1993) (Civ. No. 93-4992).

<sup>99</sup> Transcript of Proceedings at 6, *Democratic Nat'l Comm. v. Rollins* (D.N.J. 1993) (Civ. No. 93-4992).

<sup>100</sup> See Robert M. Brill & James J. Bjorkman, *New York's Election Law*, N.Y. L.J., Dec. 15, 1993, at 2 (describing election law litigation as inherently political and observing that party litigation is little-known but central battleground of partisan politics).



the DNC charged Rollins with violating New Jersey citizens' federal voting rights, and yet the relief requested by the DNC was a new election.<sup>101</sup> The DNC's distinct interest in gaining another opportunity to win the gubernatorial election would therefore have governed the contours of the 1993 litigation and would have determined the strategy used by the Democratic Party to litigate the voters' claims. In particular, to succeed with its request for a new election, the DNC would have had to demonstrate that Rollins' alleged conduct had deterred a sufficient number of voters to overcome the margin of victory, approximately 27,000 votes. As a result, the litigation would have focused on the narrow issue of election outcome; the case would have centered around whether Rollins' alleged conduct had an impact upon a single election, the court's analysis would have focused upon whether the alleged scheme was sufficiently corrupting to merit a new election, and the parties most likely would have ignored the scheme's incremental or long-term harmful effect on voters' rights. In so far as the litigation would have failed to take a holistic view of the political process, the litigation would also have failed to discuss the broader significance of RNC efforts to demobilize black voters. The litigation therefore would likely have failed to adequately address qualitative (as opposed to quantitative) voter injury. Absent such a careful discussion of injury to the voter, the "claim" brought by the political party begins to look more like an election-based claim belonging to the politician rather than an anti-discrimination claim belonging to the voter.

In sum, litigation brought by one political party against another does not seem to be the most effective vehicle for protecting the full range of voter interests implicated by race-based political conduct. Both the 1981 and the 1993 litigation show that political parties have interests that are distinct from those of the voter and that litigation strategies employed by political parties may therefore focus on a select category of voting rights claims or remedies. As such, party litigation is self-serving, threatens to distract the court from a qualitative look at the nature of the voter injury, and fails to invoke the full range of protection offered to minority citizens under federal voting rights law.

## PART II: GIVING CONTENT TO THE RIGHT TO VOTE

### A. Constitutional Principles Of Liberty And Anti-Discrimination

#### 1. Federalizing Political Rights

The United States Supreme Court in *Yick Wo v. Hopkins* declared the right to vote to be a "fundamental political right because preservative of all other rights."<sup>102</sup> The Court in *Wesberry v. Sanders* elaborated by asserting, "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined."<sup>103</sup> Subsequent Supreme Court cases reaffirm the proposition that voting serves as a primary protector of the democratic process. *Reynolds v. Sims*<sup>104</sup> is a notable example. In *Reynolds*, the Court stated, "The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government."<sup>105</sup>

Thus, at the core of the right to vote is the interest in preserving the ideal of equality and the legitimacy of American government. Representative democracy is based upon the paradoxical premise that all citizens are equal, but that a comparatively small number of citizens are elected to make decisions binding upon the rest.<sup>106</sup> Voting serves as one crucial means of ensuring the continuing accountability and legitimacy of the government, and regular, fair elections provide citizens with an opportunity to register their agreement or disagreement.<sup>107</sup>

The American approach to government is premised upon the theory that, when citizens have the unfettered right to vote, public officials will make decisions by the democratic accommodation of competing beliefs, not by deference to the mandates of the powerful. The American approach to civil rights is premised on the complementary theory that the unfettered right to vote is preservative of all other rights.<sup>108</sup>

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<sup>101</sup> Complaint at 22, *Democratic Nat'l Comm. v. Rollins* (D.N.J. 1993) (Civ. No. 93-4992).

<sup>102</sup> *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).

<sup>103</sup> *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964).

<sup>104</sup> 377 U.S. 533 (1964).

<sup>105</sup> *Reynolds v. Sims*, 377 U.S. 533, 555 (1964).

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<sup>106</sup> See Kathryn Abrams, "Raising Politics Up": *Minority Political Participation And Section 2 Of The Voting Rights Act*, 63 N.Y.U. L. REV. 449, 479 (1988) (describing foundations of American system of elections and government).

<sup>107</sup> *Id.*

<sup>108</sup> *City of Mobile v. Bolden*, 446 U.S. 55, 140-41 (1980) (Marshall, J., dissenting).

## 2. Voting Rights Of Racial Minorities In The Civil War Era

For much of this nation's history, the right to vote has been abridged or denied on the basis of race.<sup>109</sup> The Fifteenth Amendment, ratified in 1870, mandated that "[t]he right of citizens of the United States to vote" no longer be "denied or abridged . . . by any State on account of race, color or previous condition of servitude."<sup>110</sup> A number of states, however, refused to obey the Amendment's command, and continued to circumvent the Fifteenth Amendment's prohibition.<sup>111</sup> Initially, the states used violence and other direct means to prevent blacks from voting.<sup>112</sup> Later, the states used ostensibly race-neutral devices such as literacy tests with "grandfather" clauses and "good character" provisos to interfere with black citizens' franchise rights.<sup>113</sup> All of these tactics were designed to thwart black citizens' political participation and to impair black voters' ability to influence political outcomes.<sup>114</sup>

Strong-arm resistance to minority voting persisted for nearly a century after the ratification of the Fifteenth Amendment.<sup>115</sup> During that time, the Court recognized that guaranteeing equal access to the polls would not suffice to root out racially discriminatory voting practices and began expanding the meaning of voting beyond "mere balloting."<sup>116</sup> Supreme Court precedent makes clear that the right to vote means more than the right to mark a piece of paper and drop it in a box,<sup>117</sup> and that violations of the right to vote are not confined to outright denials of the ballot but can occur when voting practices prevent the vote from being fully effective, such as when the vote is given unequal weight.<sup>118</sup> In *Lane*

*v. Wilson*, the Court recognized that the states would continue to develop increasingly complex methods of evading the Fifteenth Amendment.<sup>119</sup> The *Lane* Court stated unequivocally that the Fifteenth Amendment nullifies sophisticated as well as simple-minded modes of discrimination and affirmed the Court's commitment to striking down practices that effectively handicap the exercise of the franchise while leaving the abstract right to vote intact.<sup>120</sup>

## 3. Giving Content To The Fifteenth Amendment In The Post-Civil War Era

As the Supreme Court's Fifteenth Amendment jurisprudence evolved beyond the immediate concerns of the post-Civil War era, and as the Court invoked the Fifteenth Amendment to meet increasingly complex methods of interfering with the political opportunities of racial minorities, the Court justified the consequent expansion of the Amendment's scope by emphasizing principles of electoral legitimacy and full and fair political participation by all citizens — core principles of the right to vote. In *Terry v. Adams*, for example, the Court expanded the scope of the Fifteenth Amendment when it made clear that the Amendment's anti-discrimination guarantee was not limited to election day practices but extended to all phases of state elections.<sup>121</sup> In *Terry*, an independent, all white, political association, the Jaybirds, conducted a poll prior to Alabama's final elections, the results of which invariably determined the winner of the final election.<sup>122</sup> The Court held that this practice violated the Fifteenth Amendment rights of black voters.<sup>123</sup> The Jaybird primary effectively eliminated any genuine

<sup>109</sup> *Shaw v. Reno*, 113 S.Ct. 2816, 2822 (1993).

<sup>110</sup> U.S. CONST. amend. XV, § 1.

<sup>111</sup> *Shaw v. Reno*, 113 S.Ct. 2816, 2822-23 (1993).

<sup>112</sup> *Id.* at 2823.

<sup>113</sup> *Id.*

<sup>114</sup> See Steve Barber, et al., *The Purging Of Empowerment: Voter Purge Laws And The Voting Rights Act*, 23 HARV. C.R.-C.L. L. REV. 483, 485 (detailing barriers to voting encountered by black voters since Civil War, and observing that motivation behind these barriers was to impair black citizens' political participation); Chandler Davidson, *The Recent Evolution Of Voting Rights Law Affecting Racial And Language Minorities*, in QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT, 1965-1990 22 (Chandler Davidson & Bernard Grofman eds., 1994) (same).

<sup>115</sup> *Shaw v. Reno*, 113 S.Ct. 2816, 2822-23 (1993).

<sup>116</sup> *Id.*

<sup>117</sup> See *South v. Peters*, 339 U.S. 276, 279 (1950); *United States v. Saylor*, 322 U.S. 385, 388 (1944).

<sup>118</sup> See *United States v. Saylor*, 322 U.S. 385 (1944). In *Saylor* the Court held that ballot box stuffing violates the right to vote, and held that the right to vote is not limited to balloting but includes the right to have the ballot honestly counted. *Id.* at 388. The Court observed that the practice of ballot box stuffing has a corrupting effect upon elections because it di-

minishes the weight of votes actually cast in the district. *Id.* The Court further noted that the practice of ballot box stuffing violates the right to vote because it effectively denies a free and fair choice to the voters; the right to vote includes the voters' "right to have their expression of choice given full value and effect by not having their votes impaired, diminished, diluted and destroyed by fictitious ballots fraudulently cast and counted, recorded, returned, and certified." *Id.* at 386. Modern courts continue to recognize that the right to vote is violated by practices which diminish the strength of votes cast. See *Shaw v. Reno*, 113 S.Ct. 2816, 2823 (1993) (recognizing that dilution of voting power as well as absolute prohibition on balloting can affect right to vote); *Allen v. State Bd. of Elections*, 393 U.S. 544, 569 (1969) (same); *City of Mobile v. Bolden*, 446 U.S. 55, 126 (1980) (Marshall, J., dissenting) (observing that Fifteenth Amendment reaches diminutions as well as outright denials of exercise of franchise).

<sup>119</sup> *Lane v. Wilson*, 307 U.S. 268, 275 (1939).

<sup>120</sup> *Id.* at 275.

<sup>121</sup> *Terry v. Adams*, 345 U.S. 461, 470 (1953); accord *Gray v. Sanders*, 372 U.S. 368, 380 (1963) (citing *Terry* for proposition that Fifteenth Amendment's guarantee of political equality extends to all phases of elections).

<sup>122</sup> *Terry v. Adams*, 345 U.S. 461, 463 (1953).

<sup>123</sup> *Id.* at 470.

participation by black voters in the electoral process because black citizens' votes in regular elections were rendered meaningless by the pre-selection of candidates by the Jaybirds.<sup>124</sup> The fact that black citizens retained the "right to vote" in the state's final elections was immaterial to the Court's Fifteenth Amendment analysis. The Jaybird primaries had corrupted the political process by rendering black citizens' votes ineffective.

In reaching its decision, the *Terry* Court underscored the vital role of voting in a democratic system. The Court noted that the actual effect of the state's scheme was to deny black voters an "effective voice in the government affairs of their country, state or community."<sup>125</sup> Similarly, the Court described the function of voting in broad terms of influence and control:

The effect of the whole procedure, Jaybird primaries plus Democratic primary plus general election, is to do precisely what the Fifteenth Amendment forbids — strip Negroes of every vestige of influence in selecting the official who control the local county matters that intimately touch the daily lives of citizens.<sup>126</sup>

The Court's attentiveness to the democratic function of voting was similarly stressed in Justice Clark's concurring opinion, where he described the Jaybird primary as the *de facto* "locus of effective political choice."<sup>127</sup>

In *Smith v. Allwright*, the Supreme Court struck down a similar practice.<sup>128</sup> In *Allwright*, the Texas Democratic Party passed a resolution at a party convention that limited party membership to white voters.<sup>129</sup> The practice was successfully challenged by black voters who persuaded the Court that the primary elections operated as the exclusive method through which Texas state officials were chosen.<sup>130</sup> In a subsequent opinion, Justice Marshall noted the complex character of the claim in *Allwright*:

[Plaintiffs] did not question their access to the ballot for general elections. Instead they argued, and the Court recognized, that the value of their votes have been diluted by their exclusion from participation in primary elections and in the slating of candidates by political parties.<sup>131</sup>

Thus, according to Justice Marshall, the *Allwright* Court recognized that the underlying purpose of the Fifteenth Amendment is to ensure the full participation of minorities in the political process, and that guaranteeing voters the formal ability to cast a ballot is only one means of satisfying the Amendment's command. In cases where electoral practices seriously impair the "value" of black citizens' votes, the election is no longer free and the choice of black voters is unconstitutionally affected.

Finally, in 1960, the Court faced one of the most sophisticated methods of disenfranchisement: the racial gerrymander.<sup>132</sup> In *Gomillion v. Lightfoot*,<sup>133</sup> the Court considered the constitutionality of an Alabama apportionment scheme which altered the shape of Tuskegee from "a square to an uncouth twenty-eight sided figure" in a manner alleged to exclude black voters, and only black voters, from the city limits.<sup>134</sup> Petitioners argued that the apportionment scheme violated their Fifteenth Amendment rights by depriving them of their right to vote in Tuskegee.<sup>135</sup> Respondents argued that the voters had failed to state a claim for relief; the voters would still be permitted to vote in their new districts, and thus no "deprivation" of their right to vote would occur.<sup>136</sup> The *Gomillion* Court agreed with the voters and found that the apportionment scheme violated the voters' Fifteenth Amendment rights.<sup>137</sup> The Court observed that while the abstract right to vote might still belong to the voters, the inevitable effect of the scheme was to deprive the black citizens of their right to cast a ballot in Tuskegee and hence to deprive the black citizens

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<sup>124</sup> Mary T. Boyle, *Affirmative Action In The Democratic Party: An Analysis Of The Equal Division Rule*, 7 J.L. & POL. 559, — (1991).

<sup>125</sup> *Terry v. Adams*, 345 U.S. 461, 466 (1953).

<sup>126</sup> *Id.* at 469-70.

<sup>127</sup> *Id.* at 484 (Clark, J., concurring).

<sup>128</sup> 321 U.S. 649, 663-66 (1944) (finding that exclusion of black voters from Texas primaries violates Fifteenth Amendment).

<sup>129</sup> *Smith v. Allwright*, 321 U.S. 649, 656 (1944).

<sup>130</sup> *Id.* at 664.

<sup>131</sup> *City of Mobile v. Bolden*, 446 U.S. 55, 127 (1980) (Marshall, J., dissenting).

<sup>132</sup> See *Gomillion v. Lightfoot*, 364 U.S. 339, 342 (1960) (citing *Lane v. Wilson*, 307 U.S. 268 (1939), and noting complexity of voting rights issue before Court). Racial gerrymanders are deliberate and arbitrary distortions of district boundaries for racial purposes. *Shaw v. Reno*, 113 S.Ct. 2816, 2833

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(1993) (quoting *Davis v. Bandemer*, 478 U.S. 109, 164 (1986)). In the 1870's, for example, opponents of Reconstruction in Mississippi concentrated the bulk of the black population in a shoestring congressional district running the length of the Mississippi River, leaving five other districts with white majorities. *Shaw v. Reno*, 113 S.Ct. 2816, 2823 (1993) (citing Eric Foner, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863-1877* 590 (1988)). The Court has held that such schemes violate the Constitution when they are adopted with a discriminatory purpose. *Shaw*, 113 S.Ct. at 2823 (citing *Roberts v. Lodge*, 458 U.S. 613 (1982), and *White v. Register*, 412 U.S. 755 (1973)).

<sup>133</sup> 364 U.S. 339 (1960).

<sup>134</sup> *Gomillion v. Lightfoot*, 364 U.S. 339, 340 (1960).

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* at 346.

of the “consequent advantages” that Tuskegee balloting privileges afford.<sup>138</sup>

In short, the “fencing out”<sup>139</sup> of black voters in *Gomillion* violated the Fifteenth Amendment both because the reapportionment effected a political segregation of black voters and because the scheme was enacted for the purpose of “despoiling” black citizens of municipal benefits derived from balloting rights in Tuskegee.<sup>140</sup> Thus, not only did the *Gomillion* Court recognize that the Fifteenth Amendment protects values “beyond mere balloting,” but, consistent with *Wesberry v. Sanders*,<sup>141</sup> the *Gomillion* Court also implicitly recognized the larger, civic purpose of voting when it used the Fifteenth Amendment to strike down practices that threatened to corrupt the quality of post-election governance.

#### 4. Divergence Between The Fourteenth And Fifteenth Amendments

One year after deciding *Gomillion*, the Supreme Court held that the Fourteenth Amendment also serves as a basis for challenging racial gerrymanders.<sup>142</sup> In *Baker v. Carr*, the Court recognized for the first time that the Fourteenth Amendment protects against vote dilution.<sup>143</sup> In *Reynolds v. Sims*, the Court articulated the modern standard for evaluating vote dilution claims under the

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<sup>138</sup> *Id.* The *Gomillion* Court did not expressly define the “consequent advantages” of voting privileges. However, the opinion devotes several pages to distinguishing the case at bar from prior cases in which taxpayers sued to prevent a city from redistricting. *Id.* at 342-345. In those cases, the city had recently performed several “civic improvements” and the plaintiff taxpayers would have suffered a greatly increased tax burden under the proposed districting plan. *Id.* The inference, therefore, is that the *Gomillion* Court understood the “consequent advantages” of voting to include the opportunity to influence the distribution of municipal resources.

<sup>139</sup> *Id.* at 349 (Whittaker, J., concurring).

<sup>140</sup> *Id.* at 347. In a concurring opinion, Justice Whittaker argued that the apportionment scheme operated as an illegal geographic segregation, rather than as an abridgement of the right to vote, and that the black voters’ complaint should have been based upon the Equal Protection Clause of the Fourteenth Amendment rather than the Fifteenth Amendment. *Id.* at 349 (Whittaker, J., concurring). In other words, because the Equal Protection Clause prohibits racial segregation, and because the redistricting scheme effected a geographic “fencing out” of black voters for racial purposes, the scheme violated the Fourteenth Amendment. *Id.*

<sup>141</sup> 376 U.S. 1 (1964).

<sup>142</sup> See *Baker v. Carr*, 369 U.S. 186, 209 (1961) (holding that claim of debasement of right to vote through malapportionment presents justiciable controversy under Fourteenth Amendment). The Fourteenth Amendment requires the state to guarantee to all persons the privileges and immunities of United States citizenship, due process of law, and the equal protection of the laws. U.S. CONST. amend. XIV, § 2.

<sup>143</sup> *Baker v. Carr*, 369 U.S. 186, 209 (1961) (noting that

Equal Protection Clause: one person-one vote.<sup>144</sup> In *Reynolds*, an Alabama legislative apportionment scheme created districts with unequal numbers of voters.<sup>145</sup> The Court held that the Fourteenth Amendment guarantees an equally weighted vote to all who participate in state and federal elections.<sup>146</sup> Because the Alabama apportionment scheme diluted the votes of citizens in heavily populated districts, the scheme violated the Fourteenth Amendment.<sup>147</sup>

While the Court was developing modern standards for vote dilution claims under the Equal Protection Clause of the Fourteenth Amendment, the Court continued to apply the Fifteenth Amendment to racial gerrymander cases. Indeed, the principle of one person-one vote is actually derived from cases decided under the Fifteenth Amendment;<sup>148</sup> the *Reynolds* Court relied upon a long series of Fifteenth Amendment cases in reaching its conclusion that the Fourteenth Amendment provides a right to equal voting strength.<sup>149</sup> Thus, to the extent that the modern constitutional rule against vote dilution has as its source the Fifteenth Amendment (the explicit purpose of which is to protect against the “abridgment” of racial minorities’ voting rights), the Court implicitly recognized that the group-oriented claims of vote dilution are also within the scope of the Fifteenth Amendment.

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Court’s holding departed from precedent). Vote dilution occurs when laws or practices operate to diminish the voting strength of an identifiable group of voters. For example, where members of a racial minority group vote as a cohesive unit, practices such as multimember or at-large electoral systems can reduce or nullify minority voters’ ability as a group to elect the candidate of their choice. *Shaw v. Reno*, 113 S.Ct. 2816, 2823 (1993). See also Davidson, *supra* note 114, at 22. Davidson draws a distinction between disenfranchisement and dilution. *Id.* Disenfranchisement prohibits or discourages citizens from voting. *Id.* Dilution, by contrast, can operate even when all voters have full access to the polling place and are assured that their votes will be fairly tallied. *Id.*

<sup>144</sup> 377 U.S. 533, 559-60 (1964).

<sup>145</sup> *Reynolds v. Sims*, 377 U.S. 533, 537-41.

<sup>146</sup> *Id.* at 559-60.

<sup>147</sup> *Id.* at 568.

<sup>148</sup> See James U. Blacksher & Larry T. Menefee, *From Reynolds v. Sims To City Of Mobile v. Bolden: Have The White Suburbs Commandeered The Fifteenth Amendment?*, 34 HAST. L.J. 1, 62 (1982) (arguing that *Reynolds* Court relied upon Fifteenth Amendment in reaching its decision that Fourteenth Amendment contains analogous, unspoken, prohibition against undervaluation of black citizens’ votes).

<sup>149</sup> *Id.* at 3, 9. The *Reynolds* Court cited *Gomillion v. Lightfoot*, 364 U.S. 339 (1960); *Terry v. Adams*, 345 U.S. 461 (1953); *United States v. Saylor*, 322 U.S. 385 (1944); *Smith v. Allwright*, 321 U.S. 649 (1944); *United States v. Classic*, 313 U.S. 299 (1941); *Lane v. Wilson*, 307 U.S. 268 (1939); *Guinn v. United States*, 238 U.S. 347 (1915); *Ex parte Yarbrough*, 110 U.S. 651 (1884); *Ex parte Siebold*, 100 U.S. 371 (1880). *Reynolds v. Sims*, 377 U.S. 533, 554-55 (1964).

Subsequently, however, the Court began to rely increasingly upon the Fourteenth Amendment and the Voting Rights Act of 1965 (VRA) to adjudicate claims of racial vote dilution,<sup>150</sup> and plaintiffs in racial vote dilution cases now normally seek relief under the more favorable statutory standard of the VRA.<sup>151</sup> As a result, the Court has developed an extensive vote dilution jurisprudence under the Fourteenth Amendment and the VRA and has largely ignored the Fifteenth Amendment as a mechanism for challenging modern voting rights abuses.<sup>152</sup> Nevertheless, in spite of the diminished attention paid to the Fifteenth Amendment, the debate over the precise scope of the Fifteenth Amendment continues in contemporary Supreme Court cases, albeit in a position of lesser prominence.

### 5. *Recent Trends In Fifteenth Amendment Jurisprudence: Reading The Fifteenth Amendment Restrictively*

Most recently, Justice Thomas offered a highly restrictive reading of the Fifteenth Amendment in *Holder v. Hall*.<sup>153</sup> In *Holder*, Thomas argued that, properly understood, the Fifteenth Amendment secures only "access to the ballot."<sup>154</sup> The Fifteenth Amendment is not violated so long as members of racial minorities can "register and vote without hindrance."<sup>155</sup> Thus, the Fifteenth Amendment's command that the vote be fully effective refers only to practices that directly affect access to the ballot. Claims of vote dilution are simply not recognized in the context of Fifteenth Amendment jurisprudence.<sup>156</sup> The alternative, Thomas argued, only immerses federal courts in the "hopeless project of weighing questions of political theory."<sup>157</sup>

Justice Stevens disagreed, arguing that Thomas' characterization of precedent would effectively vitiate im-

portant principles established in early Fifteenth Amendment cases.<sup>158</sup> In particular, Stevens attacked Thomas' characterization of *Gomillion v. Lightfoot* as a ballot access case, rather than the racial gerrymander case that it was.<sup>159</sup> Stevens noted that, under Thomas' view, each time a district changed its boundaries in such a way as to prevent voters from casting ballots to re-elect an incumbent official, the redistricting plan would be illegal, a result which is clearly inconsistent with precedent and untenable as a matter of practice.<sup>160</sup>

The Court's current position on the scope of the Fifteenth Amendment is equivocal, as recent decisions have declined to discuss the reach of the Fifteenth Amendment.<sup>161</sup> Nevertheless, contrary to the view of Justice Thomas, Fifteenth Amendment precedent is not limited to practices directly related to balloting.<sup>162</sup> Precedent only establishes that the Supreme Court has yet to place express limitations on how far beyond balloting the Fifteenth Amendment's guarantee of an effective vote extends.<sup>163</sup>

### 6. *Conclusion*

*Baker v. Carr*<sup>164</sup> and *Reynolds v. Sims*<sup>165</sup> do not mark the "death" of the Fifteenth Amendment, as some have suggested.<sup>166</sup> Although modern courts have marginalized the Fifteenth Amendment, early Supreme Court cases clearly establish that the Fifteenth Amendment is not a limited-purpose Amendment, useful only so long as black citizens are prevented from registering and casting a ballot. Early voting rights cases used the Fifteenth Amendment to strike down the most sophisticated methods of abridging the right to vote, and Supreme Court cases during the 1960's applied the Fifteenth Amendment to vote dilution claims without reservation. Thus, the Fifteenth Amendment continues to hold great po-

the relationship between the Fifteenth Amendment and race-conscious districting"), cited in *Holder v. Hall*, 114 S.Ct. 2581, 2605 (1994); *Miller v. Johnson*, 115 S.Ct. 2475, 2493 (1995) (refusing to decide "troubling and difficult constitutional question" involving proper scope of Congress' authority under § 2 of Fifteenth Amendment).

<sup>162</sup> See *supra* notes 115-141 and accompanying text.

<sup>163</sup> Even Justice Thomas recognizes that the Court has not foreclosed a broader interpretation of voting rights claims: "We ourselves have tacitly acknowledged that our current view of what constitutes an effective vote may be subject to reevaluation, or at least that it may not provide an exclusive definition of effective voting power . . ." *Holder v. Hall*, 114 S.Ct. 2581, 2596 n.8 (1994) (Thomas, J., concurring in judgment).

<sup>164</sup> 369 U.S. 186 (1961).

<sup>165</sup> 377 U.S. 533 (1964).

<sup>166</sup> See *Reynolds v. Sims*, 377 U.S. 533, 612 (Harlan, J., dissenting) (1964) (describing impact of Court's decision as delegating Fifteenth Amendment to "limbo of constitutional anachronisms").

<sup>150</sup> N. Jay Shepherd, "Abridge" Too Far: Racial Gerrymandering, *The Fifteenth Amendment, And Shaw v. Reno*, 14 B.C. THIRD WORLD L.J. 337, 354-5 (1994).

<sup>151</sup> Pamela S. Karlan, *All Over The Map: The Supreme Court's Voting Rights Trilogy*, 1993 SUP. CT. REV. 245, 251.

<sup>152</sup> See Binny Miller, *Who Shall Rule And Govern? Local Legislative Delegations, Racial Politics, And The Voting Rights Act*, 102 YALE L.J. 105, 203 n.202 (1992) (characterizing Court's Fifteenth Amendment jurisprudence prior to passage of VRA as "halfhearted attempt to enforce" Amendment).

<sup>153</sup> 114 S.Ct. 2581, 2591 (1994) (Thomas, J., concurring in judgment).

<sup>154</sup> *Holder v. Hall*, 114 S.Ct. 2581, 2605 n.20 (Thomas, J., concurring in judgment).

<sup>155</sup> *Id.* at 2606 (Thomas, J., concurring in judgment).

<sup>156</sup> *Id.* at 2605, Thomas, J., concurring in judgment).

<sup>157</sup> *Id.* at 2592 (Thomas, J., concurring in judgment).

<sup>158</sup> *Id.* at 2625 (Stevens, J., separate opinion).

<sup>159</sup> *Id.* at 2625 n.1 (Stevens, J., separate opinion).

<sup>160</sup> *Id.*

<sup>161</sup> See, e.g., *Voinovich v. Quilter*, 113 S.Ct. 1149, 1158 (1993) (stating that Court's opinion "express[es] no view on

tential as an instrument for ensuring that the core principles of the right to vote are protected and for striking down race-based practices that interfere with the full enjoyment of those principles by minority voters.

### B. *The Doctrine Of State Action In The Context of Voting Rights*

The Fifteenth Amendment does not reach purely private conduct, but serves only as a limitation on the powers of the government, both state and federal.<sup>167</sup> As a threshold matter, therefore, prior to determining whether an election practice violates the substantive provisions of the Fifteenth Amendment, courts must determine whether the practice is fairly attributable to the government.<sup>168</sup> State action is most obvious in cases where a state law is being challenged.<sup>169</sup> States can also dominate an activity to such an extent that the activity's participants must be deemed to act with the authority of the government, and, as a result, fall under constitutional constraints.<sup>170</sup> In cases where the involvement of the state is less obvious, modern courts must make a fact-bound, case-by-case determination of whether there is a sufficient nexus between the state and the allegedly unconstitutional action.<sup>171</sup> Factors which militate in favor of finding state action include: the extent to which the actor relies upon government assistance and ben-

efits,<sup>172</sup> whether the state has so far insinuated itself into a position of interdependence with the actor that the state must be recognized as a joint participant in the activity,<sup>173</sup> whether the actor is performing a traditional government function,<sup>174</sup> and whether the injury caused is aggravated in a unique way by the incidents of governmental authority.<sup>175</sup>

The doctrine of state action is particularly problematic in the context of political parties and state elections.<sup>176</sup> Political parties have, until recently, been viewed as purely private entities, unconnected to the state and immune from the state action doctrine.<sup>177</sup> Political parties, however, have also become almost exclusively responsible for administering the electoral process, and, in that capacity, exercise state functions or operate as governmental agencies.<sup>178</sup> As a result, modern courts recognize that the conduct of political parties can, at times, constitute state action.<sup>179</sup> The hybrid character<sup>180</sup> of political parties, however, makes the precise scope of the state action doctrine in this context unclear.<sup>181</sup>

In *Democratic National Committee v. Rollins*, the DNC argued that Rollins' conduct constituted state action because the nexus between the state and the Republican State Committee ("RSC") was sufficiently close to justify treating Rollins as a state actor.<sup>182</sup> The money allegedly spent by Rollins represented a substantial portion of the funds expended by the Whitman campaign,

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<sup>167</sup> LAWRENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW*, § 18-1, at 147 (1978).

<sup>168</sup> See generally Erwin Chemerinsky, *Rethinking State Action*, 80 NW. U. L. REV. 503 (1985); TRIBE, *supra* note 167, § 18-1, at 147.

<sup>169</sup> TRIBE, *supra* note 167, § 18-1, at 1147, citing *Brown v. Board of Education*, 347 U.S. 483 (1954).

<sup>170</sup> *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 620 (1991).

<sup>171</sup> See *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 722 (1961) ("Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance."); *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 939 (1982) (suggesting that various tests articulated in Supreme Court precedent are in fact different ways of characterizing fact-bound inquiry that confronts Court in determining questions of state action). Modern courts frequently rely upon the two-prong test articulated in *Lugar*. See, e.g., *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991) (applying *Lugar*); see also Kevin R. Puvalowski, *Immune From Review?: Threshold Issues In Section 1983 Challenges To The Delegate Selection Procedures Of National Political Parties*, 62 *FORDHAM L. REV.* 409, 412-13 (1993) (surveying state action doctrine in context of political parties and noting Court's reliance on *Lugar*). First, courts must ask whether the claimed constitutional deprivation resulted from the exercise of a right or privilege having its source in state authority, and, second, courts must ask whether the private party charged with the deprivation can be described in all fairness as a state actor. *Lugar*, 457 U.S. at 939-41.

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<sup>172</sup> *Tulsa Professional Collection Servs., Inc. v. Pope*, 485 U.S. 478 (1988), cited in *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 621-22 (1991).

<sup>173</sup> *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961).

<sup>174</sup> *Terry v. Adams*, 345 U.S. 461 (1953); *Marsh v. Alabama*, 326 U.S. 501 (1946); cited in *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 621-22 (1991).

<sup>175</sup> *Shelley v. Kramer*, 334 U.S. 1 (1948), cited in *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 621-22 (1991); cf. *Leesville*, 500 U.S. at 632 (O'Connor, J., dissenting) (arguing that state action may only be found when actor carries badge of government authority and represents government in some capacity).

<sup>176</sup> See Puvalowski, *supra* note 171, at 415 (observing that Supreme Court has struggled to define limits of state regulation and judicial power with respect to actions of political parties); TRIBE, *supra* note 167, § 13-23, at 787 (stating that extent to which state action doctrine applies to political parties is uncertain).

<sup>177</sup> *Smith v. Allwright*, 321 U.S. 649 (1944); *United States v. Classic*, 313 U.S. 299 (1941).

<sup>178</sup> *Smith v. Allwright*, 321 U.S. 649 (1944); *United States v. Classic*, 313 U.S. 299 (1941).

<sup>179</sup> TRIBE, *supra* note 167, § 13-23, at 787.

<sup>180</sup> Political parties can function as both purely private political organizations as well as quasi-governmental entities. *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> Complaint at 12, *Democratic Nat'l Comm. v. Rollins*, (D.N.J. 1993) (Civ. No. 93-4992).

New Jersey state law extensively regulates campaign financing, and the RSC's overall campaign activities were a sufficiently integral part of the electoral process to constitute state action.<sup>183</sup> The RSC disagreed, characterizing the DNC's claim as naked assertion, unsubstantiated by current law.<sup>184</sup>

Individually, the factors listed by the DNC probably would not convert Rollins' alleged conduct into state action. A political party does not become a state actor merely because it is subject to state regulation,<sup>185</sup> or because it receives substantial state funding,<sup>186</sup> unless the state's involvement constitutes compulsion or encouragement of the party's action.<sup>187</sup> Taken together, however, these factors arguably show a substantial nexus between the state and the political party.

Additionally, the conduct at issue in the Rollins affair would have been "electoral" rather than "private" or "political," in the sense that the alleged scheme would have been designed to influence votes, *qua* votes. Offering to pay a group of ministers in an effort to reduce black voter turnout is not conduct undertaken to further political aspirations, but serves as an attempt to appropriate the process by which the people's representatives are elected. As such, the scheme represents conduct that is analytically closer to the party's quasi-governmental function. Thus, given the unique application of the state action doctrine in the context of state elections, given the close nexus between the state and the party, and given the scheme's close analogue to the party's quasi-governmental function, a Rollins-type scheme arguably constitutes state action.

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<sup>183</sup> *Id.*

<sup>184</sup> Defendant's Memorandum of Law in Support of Cross-Motion to Dismiss and to Obtain Other Relief, and in Opposition to Plaintiff's Motions at 7, *Democratic Nat'l Comm. v. Rollins*, (D.N.J. 1993) (Civ. No. 93-4992).

<sup>185</sup> Puvalowski, *supra* note 171, at 435 n.185.

<sup>186</sup> See *Rendell-Baker v. Kohn*, 457 U.S. 830, 840 (1982) (holding that financial support alone is insufficient to constitute state action).

<sup>187</sup> Barbara Rook Snyder, *Private Motivation, State Action And The Allocation Of Responsibility For Fourteenth Amendment Violations*, 75 CORNELL L. REV. 1053, 1079 (1990), cited in Puvalowski, *supra* note 171, at 435 nn. 177, 185-6.

<sup>188</sup> *Guinn v. United States*, 238 U.S. 347, 363 (1915).

<sup>189</sup> U.S. CONST. amend. XV, § 2. See also *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966) (stating that § 2 of Fifteenth Amendment grants Congress power to effectuate Amendment, and finding VRA to be legitimate exercise of that power).

<sup>190</sup> Initially, Congress assumed expansive authority to enforce the command of the Fifteenth Amendment. For example, Congress passed the Enforcement Act of 1870, 16 Stat. 140 (1870), which established criminal penalties for intimidating minority voters, and the Civil Rights Act of 1871, 17 Stat. 15 (1871) (current version at 42 U.S.C. § 1981), which protected "social" as well as "political" rights of racial minorities. *TRIBE*, *supra* note 167, § 5-12, at 257; *Shepherd*, *supra* note 150, at

### C. The Voting Rights Act Of 1965

#### 1. Historical Background: Section Two Of The Fifteenth Amendment And Federal Voting Rights Statutes Passed Pursuant Thereto

Section one of the Fifteenth Amendment is self-executing and may be enforced by private suit.<sup>188</sup> Section two grants Congress the authority to enforce the command of the Amendment by appropriate legislation.<sup>189</sup> Initial attempts by Congress to enforce Section two were frustrated by a series of restrictive Supreme Court opinions,<sup>190</sup> and, as a result, congressional activity under Section two of the Fifteenth Amendment was largely non-existent for the Amendment's first ninety years.<sup>191</sup> During the 1960's, however, Congress renewed its interest in protecting individual rights and sought once more to take advantage of the Fifteenth Amendment's grant of authority.<sup>192</sup> Congress' first major voting rights law during this period was the Civil Rights Act of 1964.<sup>193</sup> The Civil Rights Act of 1964 took the form of a regulation of interstate commerce and thus avoided constitutional controversy.<sup>194</sup> By 1965, however, the federal government decided that stronger federal laws were necessary to protect Fifteenth Amendment rights,<sup>195</sup> and, accordingly, Congress passed the Voting Rights Act of 1965 (VRA),<sup>196</sup> described by some as the most radical piece of civil rights legislation since Reconstruction.<sup>197</sup>

The VRA is a comprehensive federal guarantee of meaningful political participation and of an effective

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349. However, a series of restrictive Supreme Court cases limited the extent of Congress' authority. See, e.g., *United States v. Harris*, 106 U.S. 629 (1883) (invalidating Act in interest of preserving states' autonomy); *The Civil Rights Cases*, 109 U.S. 3 (1883) (holding unconstitutional several provisions of the Civil Rights Act of 1875); *United States v. Reese*, 92 U.S. 214 (1876) (holding unconstitutional several provisions in the Enforcement Act of 1870). See also *Shepherd*, *supra* note 150, at 349 (arguing that early enforcement legislation was eviscerated by unfavorable Supreme Court decisions narrowly construing Amendment); *Davidson*, *supra* note 114, at 21 (same).

<sup>191</sup> *Davidson*, *supra* note 114, at 22 (arguing that Fifteenth Amendment, ignored by racist southern officials and racist courts, was "dead letter").

<sup>192</sup> *TRIBE*, *supra* note 167, § 5-12, at 257.

<sup>193</sup> 42 U.S.C. § 2000a et seq. (1988).

<sup>194</sup> See *TRIBE*, *supra* note 167, § 5-12, at 257, citing *Katzenbach v. McClung*, 379 U.S. 294, 298 (1964) (finding provision in Act to be valid exercise of Congress' power to regulate interstate commerce).

<sup>195</sup> See *Karlan*, *supra* note 151, at 248 (quoting President Johnson when he announced his intention to introduce VRA as legislation: "Every device of which human ingenuity is capable has been used to deny [black citizens] the right to vote.")

<sup>196</sup> 42 U.S.C. § 1973 et seq. (1988).

<sup>197</sup> *TRIBE*, *supra* note 175, § 5-14, at 263.

voice in government for minority voters.<sup>198</sup> The VRA contains both permanent provisions directed at ensuring the long-term security of voting rights across the country, and temporary provisions directed at curbing the most frequent and severe abuses of minority voting rights, applicable only within a limited number of jurisdictions with a history of depressed minority participation.<sup>199</sup> The temporary provisions were initially controversial because they established a highly invasive federal administrative process directed at increasing minority voter registration as the principle means of enforcing the Fifteenth Amendment.<sup>200</sup> Section five was unsuccessfully challenged as being an unconstitutional exercise of Congress' authority to enforce the Fifteenth Amendment in *South Carolina v. Katzenbach*.<sup>202</sup>

In *Katzenbach*, in a five page summary of the states' efforts to circumvent the command of the Fifteenth Amendment, the Court detailed the wide-spread abuse of minority voting rights.<sup>203</sup> The Court concluded that private suits brought by citizens under Section one of the Fifteenth Amendment were simply inadequate to fully protect the rights of minority voters.<sup>203</sup> Individual adjudication of voters' claims had proved too time-consuming, resulted in piecemeal treatment of the right to vote, and was so cumbersome as to be a deterrent.<sup>204</sup> Comprehensive reform from Congress was welcome, and the Court quoted approvingly from the Act's legislative history: "The burden is too heavy — the wrong to our citizens is too serious — the damage to our national conscience is too great not to adopt more effective measures than exist today."<sup>205</sup>

The *Katzenbach* Court concluded by rejecting South Carolina's argument that Congress' authority under the

Fifteenth Amendment was limited to fashioning general remedies, and that courts retained the responsibility for carefully adjudicating claims of voting rights abuse.<sup>206</sup> The Court found that Congress' grant of authority under the Fifteenth Amendment is not circumscribed by any internal limitations and that the exercise of Congressional power to construe and protect the Fifteenth Amendment is to be measured against the highly deferential standard established in *McCulloch v. Maryland*.<sup>207</sup> Subsequent challenges to Congress' efforts to enforce the Fifteenth Amendment have been unsuccessful.<sup>208</sup>

Once installed, the VRA's federal scheme for monitoring state voting practices proved immediately successful in ensuring racial minorities access to the voting booth.<sup>209</sup> Whereas before the VRA registration of eligible black voters lagged as much as fifty percent behind that of whites, by the early 1970's the gap between black and white registration in several of the targeted southern states had fallen to well below ten percent.<sup>210</sup> Subsequently, however, it became increasingly apparent that guaranteeing poll access to minorities was not sufficient to guarantee meaningful political participation and an effective voice in government. As a result, Congress amended Section two of the VRA in 1982 to lower plaintiff's burden and to permit claims of vote dilution.<sup>211</sup> Specifically, Congress amended Section two (a) to require a "results" test rather than an "intent" test:

No voting qualification or prerequisite to voting or standard, practice or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color . . . .<sup>212</sup>

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<sup>198</sup> Lani Guinier, *The Triumph Of Tokenism*, in *THE TYRANNY OF THE MAJORITY* 49 (1994). See also Pamela S. Karlan, *Maps And Misreading: The Role Of Geographic Compactness In Racial Vote Dilution Litigation*, 24 HARV. C.R.-C.L. REV. 173, 183 (1989) (observing that VRA was designed not only to bring black voters into voting booth but also to bring concerns of black citizens into halls of government).

<sup>199</sup> 42 U.S.C. § 1973c (1988).

<sup>200</sup> See *South Carolina v. Katzenbach*, 383 U.S. 301, 323 (1966) (plaintiffs asserting unconstitutionality of Act on grounds that Act violated separations of powers by transferring judicial function to Attorney General). The Act authorizes the Attorney General to send federal officials into any state whose voter registration patterns meet certain criteria. 42 U.S.C. §§ 1973b, 1973d (1988). The Act does not require the Attorney General to make a detailed determination before granting a remedy, but rather creates a presumption in favor of the voter against certain "tests" or "devices." *Id.* § 1973b. The determinations of the Attorney General are final, subject to a narrow form of after-the-fact review. *Id.* § 1973b(a), (d).

<sup>201</sup> 383 U.S. 301 (1966).

<sup>202</sup> *South Carolina v. Katzenbach*, 383 U.S. 301, 310-15 (1966).

<sup>203</sup> *Id.* at 314-315.

<sup>204</sup> *Id.*

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<sup>205</sup> *Id.* at 314, quoting H.R. REP. NO. 439, 89th Cong., 1st Sess. — (1965), reprinted in 1965 U.S.C.C.A.N. 2437, 2442.

<sup>206</sup> *Id.* at 326-27.

<sup>207</sup> *Id.* at 326-27, quoting *McCulloch v. Maryland*, 17 U.S. 316, 421 (1819) ("Let the ends be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the constitution, are constitutional.")

<sup>208</sup> See, e.g., *Oregon v. Mitchell*, 400 U.S. 112, 118 (1970) (unanimously upholding constitutionality of provision in VRA Amendments of 1970); *Jewish Orgs. v. Carey*, 430 U.S. 144, 161 (1977) (plurality opinion upholding constitutionality of VRA provision requiring benign discrimination with respect to voting).

<sup>209</sup> *Shaw v. Reno*, 113 S.Ct. 2816, 2823 (1993).

<sup>210</sup> *Id.*

<sup>211</sup> See *id.*; Lani Guinier, *The Tyranny Of The Majority*, in *THE TYRANNY OF THE MAJORITY* 49 (1994) ("Although everyone had a vote, it was apparent that some people's votes were qualitatively less important than others. [This concern] led Congress to amend the Voting Rights Act.")

<sup>212</sup> Voting Rights Act of 1965 § 2(a), 42 U.S.C. § 1973(a) (1988).



Congress also amended Section two (b) to include a "totality of circumstances" test for assessing claims of voting rights abuse:

[Section 2(a) is violated where] . . . the political processes leading to nomination or election are not equally open to participation by members of [a protected class] . . . in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.<sup>213</sup>

Thus, the VRA's broad scrutiny of the circumstances leading to the voter's claim is more deferential towards minority voters than modern judicial standards under the Fifteenth Amendment and reflects Congress' view that abuses of minority voting rights should not be evaluated in isolation of other political and social processes.

## 2. *Dispute Over The Proper Scope Of The VRA*

Congress amended the VRA in order to ensure that the guarantee of the Fifteenth Amendment finally became reality,<sup>214</sup> and, consistent with this, early Supreme Court cases advocated the "broadest possible" reading of the VRA in order to ensure that the remedial purposes of the Act were met.<sup>215</sup> In recent years, however, the Supreme Court has taken a more restrictive approach to the VRA in an effort to limit federal intervention in political processes.<sup>216</sup> In particular, case law under the amended Section two has developed an elaborate set of rules for weeding out marginal Section two claims, which rules have severely limited the section's scope.<sup>217</sup>

Kathryn Abrams proposes that the Court's current interpretation of the VRA imposes an unjustifiably narrow view of the Act's mandate and therefore leaves the rights of minorities unprotected.<sup>218</sup> According to Abrams,

the Court recognizes only "election-outcome claims" and ignores clear statutory language that allows minority voters to bring claims for "impaired ability to participate" in the political process.<sup>219</sup> Participation claims are critical to a fully effective VRA, as the electoral process cannot by itself adequately translate minority preferences into substantive policy.<sup>220</sup> If the mandate of the VRA is to be fully realized, Abrams argues, Section two claims must protect not only the opportunity to cast a ballot in general elections but also the opportunity to participate in important consensus-building activities that precede and follow the ballot.<sup>221</sup>

One significant feature of Abrams' argument is her expansive understanding of the "political processes" protected by the VRA. For example, Abrams argues that neighborhood, union, or PTA gatherings at which people discuss their views on local issues are political processes which contribute to or detract from the political opportunities of minorities and must be included in the lens through which courts look for voter injuries.<sup>222</sup> These events are crucial to fostering the political interests of minority voters, and a failure to monitor these stages threatens to vitiate the advances gained in the area of minority voting rights.<sup>223</sup>

The scholarship of Kathryn Abrams provides a broad framework for arguing that Section two of the VRA prohibits a Rollins-type scheme. A Rollins-type scheme is designed to alienate black voters from the political process by reducing the number of contacts between black voters and the get-out-the-vote drive. In addition, church meetings would be included within the category of group activities identified by Abrams as important to the political opportunities of minority voters; at church meetings voters engage in informal exchanges through which partisans try to persuade one

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<sup>213</sup> Voting Rights Act of 1965 § 2(b), 42 U.S.C. § 1973(b) (1988).

<sup>214</sup> *Allen v. State Bd. of Elections*, 393 U.S. 544, 556 (1969). See also *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966) (observing that VRA was designed to banish blight of racial discrimination in voting, which had infected electoral process for a century).

<sup>215</sup> See *Allen v. State Bd. of Elections*, 393 U.S. 544, 567 (1969) (arguing that legislative history mandates that VRA be given "broadest possible scope").

<sup>216</sup> See Karlan, *supra* note 151, at 245 (arguing that *Grove v. Eminson*, 113 S.Ct. 1075 (1993), and *Voinovich v. Quilter*, 113 S.Ct. 1149 (1993), indicate Court's desire to distance itself from "political thicket").

<sup>217</sup> See Karlan, *supra* note 151, at 262-3 (describing Supreme Court case law under amended § 2, and observing that Court has developed bright-line test for weeding out marginal § 2 lawsuits).

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<sup>218</sup> Abrams, *supra* note 106, at 452; see also Pamela S. Karlan, *Undoing The Right Thing: Single-Member Offices And The Voting Rights Act*, 77 VA. L. REV. 1 (1991) (arguing that recent developments in voting rights law threaten to retrench notion of politics that VRA was intended to repudiate).

<sup>219</sup> Abrams, *supra* note 106, at 452.

<sup>220</sup> Abrams, *supra* note 106, at 488. See also Lani Guinier, *No Two Seats: The Elusive Quest For Political Equality*, 77 VA. L. REV. 1413, 1494 (1991) (arguing that modern Supreme Court measures black citizens' political participation solely by reference to number of black candidates, and that right to vote should include not simply group's ability to elect candidates of choice, but also ability to secure interests through legislative policy) cited in Davidson, *supra* note 114, at 22 n.5.

<sup>221</sup> Abrams, *supra* note 106, at 504.

<sup>222</sup> Abrams, *supra* note 106, at 489. Cf. Karlan, *supra* note 198, at 198-99 (describing political process as ranging "from voting to holding public office").

<sup>223</sup> See Abrams, *supra* note 106, at 449-50.

another, and during which informal political alliances are negotiated.<sup>224</sup> A Rollins-type scheme would operate as a covert, unilateral attempt to interfere with that process and would impair the meetings' productive normative features.

Abrams' scholarship, however, is often overly-expansive.<sup>225</sup> For example, the legislative history of Section two appears confined to a much narrower category of pre-election practices, and thus, the broad mandate Abrams finds in the Act is unsupported.<sup>226</sup> In addition, there is no obvious limiting principle to Abrams' arguments. For example, Abrams imagines courts' scrutiny as encompassing an exhaustive assessment of the electoral practices or procedures. In other words, courts are to examine political practices:

not simply for their impact on the ability to elect, but for their effect on the ability to interact with, and influence others in group-mediated ways. For example, courts would consider evidence that minorities had been excluded from caucuses or avoided by candidates, as well as the failure of legislators and legislative policy to respond to the articulated interests of those groups. In cases where direct evidence was not available, courts would look for factors that are likely to produce such failures of interactions. Such factors would include discriminatory attitudes and present effects of past discrimination which . . . often makes participants of one race reluctant to engage with participants of another.<sup>227</sup>

Under such a broad approach, "nothing but raw intuition" would be necessary to determine whether a Section two violation had occurred.<sup>228</sup>

### 3. Conclusion

The VRA represents Congress' view of how best to fulfill the promise of the Fifteenth Amendment. The plain language of the statute mandates strong measures

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<sup>224</sup> See Fauntroy, *supra* note 26. Fauntroy argues that church meetings play a pivotal role in elections and the mobilization of black voters. *Id.* Church meetings are regular, reliable gatherings. *Id.* The teachings of the church lend themselves to legitimate outrage with conditions of injustice and social wrongs. *Id.* As a result, church meetings are an excellent forum for mobilizing large numbers of voters for action on matters of public policy. *Id.*

<sup>225</sup> See Samuel Issacharoff, *Polarized Voting And The Political Process: The Transformation Of Voting Rights Jurisprudence*, 90 MICH. L. REV. 1833, 1875-1881 (1992) (criticizing Abrams' scholarship).

<sup>226</sup> See Abrams, *supra* note 106, at 459-60 (admitting that official legislative history does not support thesis, but that legislators "appear to have relied upon" testimony from advocates of increased minority participation when amending VRA).

<sup>227</sup> *Id.* at 493.

designed to achieve the full inclusion of minority voters in the American political system. Broadly understood, the VRA offers minority voters a "right" of political inclusion and punishes practices that interfere with minority citizens' participation in the political process. While modern courts appear reluctant to act on the broad implications of Section 2 of the VRA, voting rights scholars assert that the command of the VRA has not been met. So long as practices exist which prevent minority citizens from participating fully in all stages of the political process, fair and equal treatment of minority citizens by those who govern will remain an unfulfilled promise.

## PART III: THE RIGHT TO VOTE: CIVIC VALUES

### A. Individual Versus Group Values

The expansion of the right to vote beyond "mere balloting" represents a critical shift in the Court's conceptual framework for voting rights. In particular, when the Court recognized that voting serves a greater range of values than "marking a piece of paper," the Court also recognized that, even under circumstances where balloting is secure, the interests protected by the right to vote can still be impaired.<sup>229</sup> On its most basic level, the Court's expansion of the right to vote represents a conceptual shift away from an individual-oriented doctrine, towards a group-oriented doctrine.<sup>230</sup> Rather than thinking of voting as an act particular to the individual, the Court began to recognize that voting also implicates group interests, such as voting strength and the ability to influence government policymaking.<sup>231</sup> The scholarship of Pamela Karlan identifies three values, including both group-oriented and individual-oriented values, underlying the Court's conception of the right to vote.

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<sup>228</sup> *Gingles v. Edmonson*, 590 F. Supp. 345, 381 (E.D.N.C. 1984), cited in Abrams, *supra* note 106, at 466.

<sup>229</sup> See *supra* notes 115-120 and accompanying text.

<sup>230</sup> See Pamela S. Karlan, *The Right To Vote: Some Pessimism About Formalism*, 71 TEX. L. REV. 1705 (1993) (arguing that Court's voting rights jurisprudence implicitly recognizes non-individual values of voting); Karlan, *supra* note 198, at 178-83 (describing emergence of "civic inclusion" as value in voting rights jurisprudence).

<sup>231</sup> Karlan, *supra* note 230, at 1707-8; see also Note, *United Jewish Organizations v. Carey And The Need To Recognize Aggregate Voting Rights*, 87 YALE L.J. 571, 571-72 (1978) (arguing that right to vote was traditionally defined in individual terms, but that narrow definition of right to vote proved inadequate, and that as courts sought to remedy persistent problems they found themselves impelled to protect group aspects of voting as well).

## 1. *The Values Of Participation, Aggregation, And Governance*

Pamela Karlan argues that the Supreme Court's voting rights cases implicitly reflect three interrelated conceptions of voting.<sup>232</sup> First, the right to vote involves "participation": the right to cast a ballot that is counted.<sup>233</sup> The interest in participation is the most individual-oriented aspect of voting, and is implicated by restrictions on a person's ability to cast a vote, such as poll taxes, literacy tests, and residency requirements.<sup>234</sup>

Second, voting involves "aggregation," or the ability to combine individual voter preferences to reach some collective decision, such as the selection of a representative.<sup>235</sup> Unlike the "anonymous" value of participation, aggregation is interest-oriented: it rests upon the theory that voters should have a fair opportunity to elect a preferred representative, and it is undermined when the interests of a group of voters have been unfairly ignored.<sup>236</sup> For example, a group of voters that has distinct electoral preferences might claim that the group's voting strength is unfairly diluted by a districting plan that fractures the group among several districts.<sup>237</sup> Similarly, a group of voters that has distinct preferences might claim that winner-take-all elections unfairly impair the group's ability to elect a candidate who will represent those interests because majority interests submerge the interests of minority groups.<sup>238</sup>

Finally, voting serves as an integral part of "governance," the practice of decisionmaking through representatives.<sup>239</sup> Voting is more than a declaratory event—the expressive act of pulling a lever on election day.<sup>240</sup> Voting also serves as part of an ongoing conversation between the voters and their government.<sup>241</sup> Thus, in addition to being concerned with *who* represents the district (aggregation interest), voters are also concerned with *how effective* that representative will be as a champion of the group's interests (governance interest).<sup>242</sup> Election results powerfully influence how and to whom city contracts are awarded, on whose property the county

airport will be built, how high the tax rate will be, who is added to the city payroll, in whose neighborhood the waste treatment plant will be located, or how aggressively environmental regulations will be enforced.<sup>243</sup> In short, while it is important to have a committed advocate in the councils of government, it is equally important that the electoral process preserve the ability to influence government, generally.<sup>244</sup> Without such influence, voters will be unable to participate equally in the allocation of government resources.<sup>245</sup>

## 2. *Modern Voting Rights Jurisprudence: Submerging Civic Values*

All three of the values identified by Pamela Karlan are implicitly recognized in early Supreme Court voting rights jurisprudence.<sup>246</sup> For example, the Court in *Terry v. Adams*,<sup>247</sup> *Smith v. Allwright*,<sup>248</sup> and *Gomillion v. Lightfoot*<sup>249</sup> advanced a view of the political process that consisted not merely of an election (marking a ballot) but of a series of interrelated stages, any one of which could affect the quality of black citizens' votes.<sup>250</sup> In addition, the Court implicitly recognized governance claims when it alluded to municipal benefits<sup>251</sup> and control over community affairs.<sup>252</sup>

Similarly, the dispute between Justices Thomas and Stevens in *Holder v. Hall*<sup>253</sup> is, in essence, a debate over "participation" and "aggregation." Justice Thomas believes that the Fifteenth Amendment protects no more than the individual's symbolic right to "participate" in a balloting ritual.<sup>254</sup> By contrast, Justice Stevens believes that the Fifteenth Amendment protects a greater range of values,<sup>255</sup> and, presumably, Stevens would be more receptive to arguments that a Rollins-type scheme abridges the Fifteenth Amendment's right to an effective vote.

Notwithstanding the Supreme Court's implicit recognition that voting serves group-oriented values, the modern Supreme Court tends to discuss voting rights in

<sup>232</sup> Karlan, *supra* note 230, at 1707.

<sup>233</sup> *Id.* at 1708.

<sup>234</sup> *Id.*

<sup>235</sup> *Id.* at 1711.

<sup>236</sup> *Id.* at 1713.

<sup>237</sup> *Id.*

<sup>238</sup> *Id.*

<sup>239</sup> *Id.* at 1716.

<sup>240</sup> *Id.*

<sup>241</sup> *Id.*

<sup>242</sup> *Id.* at 1718. For example, the Court has overturned electoral systems that systematically biased the overall legislative composition in favor of identifiable groups (white, rural voters). *Id.* (citing *Reynolds v. Sims*, 377 U.S. 533 (1964)).

<sup>243</sup> Davidson, *supra* note 114, at 24.

<sup>244</sup> Karlan, *supra* note 230, at 1716.

<sup>245</sup> See Davidson, *supra* note 114, at 23 (arguing that voters' ability to influence government decisionmaking is crucial to ensuring fair allocation of "substantial benefits that government bestows on its citizens").

<sup>246</sup> Karlan, *supra* note 230, at 1708-1719.

<sup>247</sup> 345 U.S. 461 (1953).

<sup>248</sup> 321 U.S. 649 (1944).

<sup>249</sup> 364 U.S. 339 (1960).

<sup>250</sup> See Abrams, *supra* note 106, at 472 (describing view of political process advanced by *Allwright* Court).

<sup>251</sup> See *supra* notes 138-140 and accompanying text.

<sup>252</sup> See *supra* notes 125-127 and accompanying text.

<sup>253</sup> 114 S.Ct. 2581 (1994). See *supra* notes 154-160 and accompanying text.

<sup>254</sup> See *supra* notes 158-160 and accompanying text.

<sup>255</sup> See *supra* notes 158-160 and accompanying text.

unduly individual-oriented terms and thus has failed to elevate group-oriented interests to the level of doctrine.<sup>256</sup> The result is doctrinal confusion in voting rights jurisprudence. For example, Pamela Karlan asserts that much of federal voting rights law — both judicial and legislative — is superficially structured in an individual-oriented manner, and yet the purpose underlying these laws is to preserve the non-individual components of voting.<sup>257</sup> Federal laws regulating vote “trafficking”<sup>258</sup> provide the best illustration of the idea that federal law in fact serves non-individual interests.<sup>259</sup>

### 3. *Vote Trafficking And Federal Law*

According to Pamela Karlan, federal anti-trafficking laws have, as their primary purpose, the goal of protecting voters from economic influence and coercion.<sup>260</sup> Shielding voters serves two functions: first, it prevents those voters most susceptible to short-term, economic influence from vulnerability,<sup>261</sup> second, and more generally, it preserves voter autonomy, thereby ensuring that the vote cast on election day truly represents the voter’s political or ideological views.<sup>262</sup> Contrasted against these individual-oriented goals, however, federal anti-trafficking laws appear ill-structured to meet their protective purpose.

First, federal anti-trafficking laws prohibit person-to-person vote buying schemes,<sup>263</sup> but do not prohibit many other forms of vote trafficking which exert an analogous influence on voters’ allegiances.<sup>264</sup> For example, politicians are not allowed to bribe individual voters to vote for them, but politicians *are* permitted to promise economic benefits to voters, generally, during campaign speeches.<sup>265</sup> These promises, if delivered, resemble completed bribes<sup>266</sup> and arguably have an equal impact upon voter behavior; the politician promises an economic benefit to the voter in exchange for a vote, and thus the voter has been functionally “bought” with public funds.<sup>267</sup> If federal law were truly concerned with

shielding voters from coercion and influence, Pamela Karlan asserts, federal law could be better structured to achieve this end.<sup>268</sup>

Second, federal anti-trafficking laws also have the effect of decreasing, rather than increasing, voter autonomy.<sup>269</sup> For example, anti-intimidation laws expand voter autonomy by prohibiting the use of superior economic or social force to influence voter choice.<sup>270</sup> By contrast, anti-trafficking laws restrict the options available to voters and treat voting as a “market inalienable.”<sup>271</sup> If legislators were truly concerned with preventing voters from allowing their votes to be cheaply bought for short-term benefit, Karlan argues, then legislators might better structure federal law. For example, legislators might pay economically vulnerable voters to vote.<sup>272</sup> Such an alternative interferes less with the voters’ right to decide what to do with their ballots and increases voter turnout.<sup>273</sup>

Having identified these inconsistencies in federal anti-trafficking laws, Karlan proposes that the real purpose motivating federal anti-trafficking laws is to protect the integrity of the political process, a public function.<sup>274</sup> More precisely, to the extent that political pluralism is predicated upon the theory that voters will pursue their individual good through the political process,<sup>275</sup> and to the extent that the summation of these individual pursuits will further the collective welfare,<sup>276</sup> vote trafficking corrupts this process by distorting individual preferences away from what would be “honestly” expressed by citizens considering the public good rather than just their immediate economic welfare.<sup>277</sup> In short, person-to-person, “retail level” vote trafficking is outlawed because it impedes the aggregating function of voting, and also because it threatens the voters’ ability to take part in the post-election governance by the elected official.

By contrast, “wholesale level” vote trafficking does not impede either of these interests, and may even promote public purposes.<sup>278</sup> Because wholesale vote traf-

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<sup>256</sup> See Note, *supra* note 231, at 575 (observing that group-oriented analysis of voting rights is implicit in Supreme Court cases but has not ripened into doctrine); Karlan, *supra* note 230, at 1719 (arguing that Court’s failure to explicitly recognize group-oriented function of voting has led to doctrinal confusion in voting rights jurisprudence). Cf. *Wright v. Rockefeller*, 376 U.S. 52, 62 (1964) (Douglas, J. dissenting) (“I had assumed that since *Brown v. Board of Education* . . . no State may segregate people by race in the public areas. The design of voting districts involves one important public area — as important as schools, parks, and courtrooms.”).

<sup>257</sup> Karlan, *supra* note 230, at 1707.

<sup>258</sup> Karlan defines vote trafficking as “transacting with other individuals to buy or sell votes.” Karlan, *supra* note 9, at 1457.

<sup>259</sup> *Id.*

<sup>260</sup> *Id.*

<sup>261</sup> *Id.* at 1495.

<sup>262</sup> *Id.* at 1458.

<sup>263</sup> *Id.* at 1456.

<sup>264</sup> *Id.* at 1459.

<sup>265</sup> *Id.* Campaign promises and bribery are both forms of vote trafficking, the primary distinction being that one occurs on a “retail” level while the other occurs on a “wholesale” level. *Id.*

<sup>266</sup> *Id.* at 1460-62.

<sup>267</sup> *Id.* at 1462.

<sup>268</sup> *Id.* at 1459-60.

<sup>269</sup> *Id.* at 1458.

<sup>270</sup> *Id.* at 1457.

<sup>271</sup> *Id.* at 1458.

<sup>272</sup> *Id.* at 1472.

<sup>273</sup> *Id.*

<sup>274</sup> *Id.* at 1464-67.

<sup>275</sup> *Id.* at 1461.

<sup>276</sup> *Id.*

<sup>277</sup> *Id.* at 1467.

<sup>278</sup> *Id.* at 1467-70.

ficking involves promises which are made publicly, they pose less danger of corruption and covert dealmaking.<sup>279</sup> Voters are able to discuss and evaluate public promises, a process which encourages voters to make better informed choices at the polls.<sup>280</sup> Public promises are also subject to check from the voters because voters will hold the politicians accountable for undelivered campaign promises.<sup>281</sup> Finally, to the extent that campaign promises translate into improved public service from the government, these "bribes" inhere to the entire community; the beneficiaries of the politician's promise are the public, and not a targeted group of voters.<sup>282</sup>

In sum, federal anti-trafficking laws forbid retail level vote trafficking more because such practices detract from the public purposes of voting, and less because individual voters ought to be free from economic coercion. Retail level vote trafficking "transforms what should be a relational agreement and ongoing conversation between elected official and citizen into a discrete contract between candidate and voter."<sup>283</sup> Finally, because vote trafficking is most likely to occur among economically or politically powerless voters, who are relatively unable to extract and enforce more valuable commitments from candidates, the practice is particularly threatening to the quality of "more vulnerable" voters' representation and ability to participate in postelection governance.<sup>284</sup>

#### 4. Conclusion

A broad, civic-minded conception of the right to vote is critical to understanding how a Rollins-type scheme harms minority voting interests. In particular, the unwillingness to view a Rollins-type scheme as an abridgment of the right to vote, or as vote "suppression," is in large part the product of an individualistic vocabulary describing voting rights. The traditional, strong-arm image of vote suppression seems so unlike the indirect form of influence that a Rollins-type scheme would assert against individual voters, and yet this traditional image does not fully account for the non-individual dangers that such a scheme would pose to voting interests.

A Rollins-type scheme is harmful not so much because it impedes the individual voter's ability to express a political view or cast a vote, but because its primary purpose is to keep a group of voters with identifiable interests from voting. To the extent that elections serve to aggregate votes and register the strength of political beliefs, a Rollins-type scheme therefore frustrates the interest held by a community of voters in the aggregate value of the community's votes.

Even more troubling is the fact that such a scheme, if carried out, would have attempted to procure a non-

vote from black voters. Unlike a typical vote trafficking scheme where the transaction at least implicitly recognizes that the targeted group has political power and hence political value (which is being "channelled"), a Rollins-type scheme would have attempted to completely shut off the "signal" from a group of black constituents. Thus, to the extent that a Rollins-type scheme deliberately seeks to achieve the non-participation of a group of voters that have historically been excluded from the political process,<sup>285</sup> such a scheme frustrates the efforts of that group of voters to accumulate political strength. A Rollins-type scheme therefore impairs precisely the phenomenon within the minority voting community that is vital to guaranteeing full political participation, namely, the aggregation of minority votes and the commitment of those votes to a candidate who represents their interests in post-election governance.

Finally, the fact that political animus may be coextensive with racial animus in a Rollins-type scheme should not be used to obscure the fact that such a scheme is race-based. Dual motives aside, black voters are still the targeted group under a Rollins-type scheme, and the injury caused by such a scheme would still accrue to black voters only. The fact that a Rollins-type scheme may also be the product of bi-partisan bickering should not change the underlying issues. Voters choose their political parties and look to those parties to advance their interests. A scheme that targets black voters because of the voters' perceived political alliances to the Democratic Party still operates as a race-based attempt to impair black voters' efforts to advance and secure their political interests.

#### PART IV: CONCLUSION

The statements made by Ed Rollins were not simply the unfortunate statements of a politician with deeply cynical views about what it means to win an election. Rather, they serve as symptoms of a lingering impulse within politics to disenfranchise black voters and impede minority participation in the political process. To that extent, the Rollins affair indicates that the promises of the Fifteenth Amendment and the Voting Rights Act of 1965 have not been fulfilled and that the voting rights of racial and ethnic minorities remain unprotected. One critical factor contributing to the present gap in federal voting rights law is the modern Supreme Court's unduly individual-oriented vocabulary for describing voting rights injuries. Voting furthers both group and individual interests, and voting rights jurisprudence would be better served by an analytic framework which recognizes the group-oriented components of voting.

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<sup>279</sup> *Id.* at 1468.

<sup>280</sup> *Id.* at 1469.

<sup>281</sup> *Id.*

<sup>282</sup> *Id.*

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<sup>283</sup> *Id.* at 1470.

<sup>284</sup> *Id.*

<sup>285</sup> *Id.* at 1471.