

VOTING IS ASSOCIATION

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I. INTRODUCTION

What is the relationship between the First Amendment right to expressive association and the Fourteenth Amendment right to vote? It's closer than you probably think. The Supreme Court employs a balancing test in constitutional challenges to a wide variety of election practices, including ballot access rules, blanket primaries, and voter identification. This standard is commonly referred to as “*Anderson-Burdick*” for the two main cases from which it derives, *Anderson v. Celebrezze*¹ and *Burdick v. Takushi*.² Recent lower court decisions have applied this test in constitutional challenges to state laws restricting same day registration,³ provisional voting,⁴ and early voting.⁵

The *Anderson-Burdick* standard is the offspring of a union between the Fourteenth Amendment right to vote and the First Amendment right of association.⁶ This Article explores the origins, development, and subsequent obscuration of the relationship between these two rights. It argues for a renewed recognition of the voting–association link when it comes to the burdens on voting challenged in the current generation of voting rights litigation.

Central to this story are two opinions by Justice John Paul Stevens, one written early in his tenure on the Supreme Court and the other near the end. The first opinion is *Anderson*, a challenge to ballot access restrictions that were used to exclude independent candidate John Anderson from Ohio’s 1980 presidential ballot. *Anderson*

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1. 460 U.S. 780 (1983).

2. 504 U.S. 428 (1992).

3. *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224 (4th Cir. 2014), *cert. denied*, 135 S. Ct. 1735 (2015) (mem.); *Ohio State Conference of the NAACP v. Husted*, 768 F.3d 524 (6th Cir. 2014), *stay granted*, 135 S. Ct. 42 (2014) (mem.).

4. *Ne. Ohio Coal. for the Homeless v. Husted*, 696 F.3d 580 (6th Cir. 2012).

5. *Obama for Am. v. Husted*, 697 F.3d 423 (6th Cir. 2012).

6. This Article addresses the relationship between voting and the right to *expressive association*, not to be confused with the very different right to *intimate* association. See *Roberts v. U.S. Jaycees*, 468 U.S. 609, 617-18 (1984) (distinguishing the two rights).

and his supporters brought a hybrid claim, asserting both First Amendment associational rights and Fourteenth Amendment equal protection rights.⁷ The Court struck down Ohio's ballot access restrictions, citing the risk of discrimination "against those candidates and—of particular importance—against those voters whose political preferences lie outside the existing political parties."⁸ The Court thus suggested that restrictions on voting implicate First Amendment associational rights, insofar as it involves individual voters joining together with like-minded others as well as with political parties representing their views.

A quarter-century later, in *Crawford v. Marion County Election Board*,⁹ the Court upheld Indiana's voter ID law against a facial challenge under the Fourteenth Amendment. Justice Stevens' lead opinion adopts the balancing test articulated in *Anderson* and refined in *Burdick* to alleged burdens on voting.¹⁰ The dissenting Justices applied the same standard but reached a different conclusion. Since *Crawford*, lower courts have consistently used this standard in constitutional challenges to a wide variety election administration practices. But as in *Crawford*, plaintiffs have based their claims primarily on the Equal Protection Clause and not the First Amendment, despite the *Anderson-Burdick* standard's roots in the right of expressive association.¹¹

This Article urges recovery of the lost linkage between the First Amendment right of expressive association and the Fourteenth Amendment right to vote. Voting restrictions implicate expressive association to the extent they prevent voters from joining together with like-minded voters, candidates, and political parties. The First Amendment provides an appropriate vehicle for voting claims because it acknowledges the risk that the party in power will abuse its authority to impede association by voters favoring its rival. By affirming the centrality of intermediary organizations—especially political parties—the right of association affirms a decidedly pluralist perspective in democracy.¹²

Reviving the voting-association link would cast recent election administration cases, including *Crawford* and its lower-court progeny, in a different light—one that more accurately reflects the real-world dynamic in these cases. Disputes over voting rules are not

7. *Anderson v. Celebrezze*, 460 U.S. 780, 783 (1983).

8. *Id.* at 793-94.

9. 553 U.S. 181 (2008).

10. *Id.* at 189-91.

11. *See infra* Part II.

12. For an elaboration of this perspective, see generally BRUCE E. CAIN, *DEMOCRACY MORE OR LESS: AMERICA'S POLITICAL REFORM QUANDARY* (2015).

simply or even mainly about an individual's right to cast a ballot without impediment. They are better understood as inter-party disputes, in which political insiders seek to block political outsiders from aggregating their votes so as to challenge the dominant group. Like the seminal First Amendment association cases of the McCarthy and civil rights eras, recent voting controversies center on the risk that those in power will suppress groups challenging that power—be it the Communist Party in the 1950s, the NAACP in the 1960s, independent-minded voters in 1980, or Democrats in Texas today. Viewing the right of association as a component of the right to vote allows us to understand the constitutional problems inherent when political insiders manipulate election rules to stymie those collectively seeking to challenge their power.

This Article is not the first to suggest a link between the First Amendment and the Fourteenth Amendment right to vote. Abner Greene,¹³ Lori Ringhand,¹⁴ and Janai Nelson¹⁵ are among those who have written on the subject, as have I.¹⁶ But most previous scholarship on the subject focuses on free speech rather than association. The leading exception is Guy Charles who thoroughly explored the relationship between voting and associational rights in a 2003 article.¹⁷ My account differs from his in two respects. First, Professor Charles understood the *Anderson* line of cases as resting on the First Amendment right of association *instead of* the Equal Protection Clause. I view equal protection and association as mutually reinforcing. Second, Professor Charles emphasized *racial* association, while this Article sees *political parties* as the central association in contemporary politics and the constitutional law of elections.¹⁸

What are the implications of recognizing that voting is a form of association protected by the First Amendment? Reconnecting voting and association would reframe the central issue in future constitutional litigation. It would thus lead to a sharpened understanding of

13. See ABNER GREENE, UNDERSTANDING THE 2000 ELECTION: A GUIDE TO THE LEGAL BATTLES THAT DECIDED THE PRESIDENCY 132-33 (2001); Abner S. Greene, *Is There a First Amendment Defense for Bush v. Gore?*, 80 NOTRE DAME L. REV. 1643 (2005).

14. See Lori A. Ringhand, *Voter Viewpoint Discrimination: A First Amendment Challenge to Voter Participation Restrictions*, 13 ELECTION L.J. 288 (2014).

15. See Janai S. Nelson, *The First Amendment, Equal Protection, and Felon Disenfranchisement: A New Viewpoint*, 65 FLA. L. REV. 111 (2013).

16. See Daniel P. Tokaji, *First Amendment Equal Protection: On Discretion, Inequality, and Participation*, 101 MICH. L. REV. 2409, 2410 (2003).

17. Guy-Uriel E. Charles, *Racial Identity, Electoral Structures, and the First Amendment Right of Association*, 91 CALIF. L. REV. 1209 (2003).

18. Dan Lowenstein also addressed associational rights in an excellent article written more than two decades ago, although his focus was on then-recent decisions according associational rights to political parties. Daniel Hays Lowenstein, *Associational Rights of Major Political Parties: A Skeptical Inquiry*, 71 TEX. L. REV. 1741 (1993). I address Professor Lowenstein's views in Part III, *infra*.

the injury that the now ubiquitous *Anderson-Burdick* standard is designed to prevent. The State would have a heavier burden of justification to the extent that election rules have the effect of discriminating against voters supporting the opposing party. Associational rights provide an appropriate vehicle for understanding voting injuries, including not only ballot access and blanket primary issues to which the First Amendment has traditionally been deployed, but also election administration controversies to which it has not. Future litigants challenging burdens on voting should therefore add the First Amendment association claims to their arsenal. Doing so would hone in on the real injury in the current generation of voter ID, early voting, provisional voting, and voter registration cases: preventing non-dominant political parties and their supporters from challenging the party in power.

Part II of this Article traces the roots of the First Amendment right to expressive association, starting with the mid-century cases involving the NAACP and Communist Party and proceeding through later decisions involving compelled association and campaign finance regulation. Part III examines the relationship between voting and the associational rights through a close analysis of cases connecting these two rights, as well as more recent cases that overlook this connection. Part IV proposes the re-linking of voting and associational rights, arguing for a refinement of the *Anderson-Burdick* doctrine to focus on the disparate impact on non-dominant parties, and tracing how this refinement would play out in constitutional challenges to present-day voting restrictions.

II. THE ROOTS OF EXPRESSIVE ASSOCIATION

One of the leading statements of the core value underlying the First Amendment appears in Justice Thurgood Marshall's opinion for the Court in *Police Department v. Mosley*.¹⁹ "[A]bove all else," he wrote, "the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."²⁰ The Court has reiterated this admonition many times, doubling down on it in recent First Amendment cases.²¹ As Justice Scalia put it in one of his last dissents: "[T]he First

19. 408 U.S. 92 (1972).

20. *Id.* at 95. For the leading scholarly exposition of this idea, see Kenneth L. Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20, 26-29 (1975) (discussing *Mosley*); see also Geoffrey R. Stone, *Fora Americana: Speech in Public Places*, 1974 SUP. CT. REV. 233, 273-80 (discussing *Mosley*). I have expounded on the centrality of equality under the First Amendment at length. See Tokaji, *supra* note 16.

21. See *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015) (showing content-discriminatory sign regulations are subject to strict scrutiny).

Amendment is a kind of Equal Protection Clause for ideas.”²² It guards against government officials misusing their power to suppress points of view they disfavor. Most conspicuously, it prevents the dominant political group from trying to silence dissident groups that threaten its grip on power.

This conception of the First Amendment finds its most fulsome expression in the decisions in which the Supreme Court developed the right of association. From its beginnings, the main beneficiaries of this right have been groups advancing a political viewpoint contrary to that espoused by the powers-that-be.²³ The Supreme Court developed the First Amendment right of association in a series of mid-century cases, most of them arising from governmental interference with two types of groups.

One line of cases involves the NAACP and other groups advocating for civil rights in the South. The first and most important of these decisions was *NAACP v. Alabama ex rel. Patterson*.²⁴ An Alabama court had cited the NAACP for contempt after it refused to comply with an order that the group disclose its members in accordance with state law.²⁵ In holding that the NAACP had a First Amendment right to resist disclosure, Justice Harlan wrote for the Court:

Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly. It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the “liberty” assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech.²⁶

Compelled disclosure of the NAACP’s members, the Court concluded, would paralyze its attempt to advocate for racial justice. This was an entirely realistic appraisal at the time, when threats and

22. *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1680 (2015) (Scalia, J., dissenting).

23. There is a rich body of scholarly literature exploring the theory and doctrine of the First Amendment right to expressive association. For some leading examples, see Ashutosh Bhagwat, *Associational Speech*, 120 YALE L.J. 978, 981 (2011); Victor Brudney, *Association, Advocacy, and the First Amendment*, 4 WM. & MARY BILL RTS. J. 1 (1995); Erwin Chemerinsky & Catherine Fisk, *The Expressive Interest of Associations*, 9 WM. & MARY BILL RTS. J. 595 (2001); Tabatha Abu El-Haj, *Friends, Associates, and Associations: Theoretically and Empirically Grounding the Freedom of Association*, 56 ARIZ. L. REV. 53 (2014); William P. Marshall, *Discrimination and the Right of Association*, 81 NW. U. L. REV. 68 (1986); Jason Mazzone, *Freedom’s Associations*, 77 WASH. L. REV. 639, 645 (2002). I do not address most of this work in this brief Article, since my focus is primarily on the relationship between the rights of association and voting.

24. 357 U.S. 449 (1958).

25. *Id.* at 451.

26. *Id.* at 460 (citations omitted).

violence against those involved in the civil rights movement were routine in places like Alabama. Decisions following *NAACP v. Alabama* alarmingly gave like protection from disclosure to other civil rights groups and their members.²⁷

The other seminal line of expressive association cases involves the Communist Party and its members. Around the same time as the NAACP compelled disclosure cases, the Court decided two cases arising from convictions of Communist Party members. In *Scales v. United States*,²⁸ the Court upheld the conviction of a district chairman who not only knew of its illegal activities but also "specifically intend[ed] to accomplish [the aims of the organization] by resort to violence."²⁹ By contrast, in *Noto v. United States*,³⁰ the Court reversed a conviction of a party member whose specific intent to further illegal activities had not been proven. The upshot was that mere association with a political party, despite its illegal aims, was insufficient to convict. Later cases expanded this protection beyond criminal cases, prohibiting the denial of other benefits such as employment³¹ or bar membership³² based on party membership alone. These cases thus prevent the government from imposing either criminal penalties or other sanctions based on one's dissident political views absent evidence of an intent to promote illegal activity. The chief concern is that government-targeting of unpopular groups would discourage people from joining, thus impoverishing public debate.

Other cases extend protection to people associating as a way to advance their political beliefs through litigation. In this area, too, the groundbreaking case arose from the civil rights movement. In *NAACP v. Button*,³³ the Court struck down a Virginia law prohibiting lawyers from soliciting prospective clients, which had been used to stop the NAACP's efforts to organize civil rights lawsuits. Justice Brennan's opinion for the Court held that the litigation, in which the NAACP sought to engage, was not just a means of resolving private

27. See *Shelton v. Tucker*, 364 U.S. 479 (1960); see also *Gibson v. Fla. Legislative Investigation Comm.*, 372 U.S. 539 (1963) (holding that petitioner's conviction for failing to release information contained in the membership was a violation of the right of association protected by the First and Fourteenth Amendments).

28. 367 U.S. 203 (1961).

29. *Id.* at 229 (second alteration in original) (quotation omitted).

30. 367 U.S. 290 (1961).

31. See *United States v. Robel*, 389 U.S. 258 (1967); *Keyishian v. Bd. of Regents*, 385 U.S. 589 (1967); see also *Elfbrandt v. Russell*, 384 U.S. 11 (1966) (rejecting loyalty oath and prohibition on Communist Party membership for officeholders).

32. See *Baird v. State Bar of Ariz.*, 401 U.S. 1 (1971); *In re Stolar*, 401 U.S. 23 (1971). But see *Law Students Civil Rights Research Council, Inc. v. Wadmond*, 401 U.S. 154 (1971) (upholding a bar question asking whether applicants had joined a group knowing of its objective to overthrow the government by violence and, if so, whether they had specific intent to advance those ends).

33. 371 U.S. 415 (1963).

disputes but also “a form of political expression.”³⁴ While recognizing that the NAACP was “not a conventional political party,” its litigation sought to advance the collective interests of the African American community.³⁵ Virginia’s law thus infringed upon the associational rights of the NAACP, as well as its members and its lawyers. Later cases extended this protection to other groups engaged in impact litigation such as labor unions³⁶ and advocates for reproductive rights.³⁷ The unifying theme is that the State may not prevent people from associating in pursuit of ideological goals through litigation.

The freedom to associate in pursuit of shared political goals sometimes includes the freedom *not* to associate as well. An example is *Abood v. Detroit Board of Education*, in which the Court held that public employees could not be compelled to support a labor union’s ideological activities, though they could be required to pay for the union’s collective bargaining services.³⁸ The First Amendment’s protection against compelled association is not, however, absolute. In *Roberts v. United States Jaycees*,³⁹ the Court held that the First Amendment’s protections did not extend to a private club’s exclusion of women, which was a violation of a state civil rights statute, because the admission of women would do no discernible damage to the club’s expressive aims.⁴⁰ On the other hand, the Court struck down the application of a state law prohibiting discrimination on the basis of sexual orientation in *Boy Scouts of America v. Dale*.⁴¹ The Court accepted the Boy Scouts’ claim that accepting gays would undermine its antigay message and, accordingly, infringe on its right to expressive association.⁴² The right to be free from compelled association thus

34. *Id.* at 429.

35. *Id.* at 431.

36. See *United Transp. Union v. State Bar of Mich.*, 401 U.S. 576 (1971); *United Mine Workers, Dist. 12 v. Ill. State Bar Ass’n*, 389 U.S. 217 (1967).

37. *In re Primus*, 436 U.S. 412 (1978). On the other hand, the same day it handed down *Primus*, the Court held in another case that states may prohibit solicitation of purely commercial offers of legal assistance. *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447 (1978).

38. 431 U.S. 209 (1977); see also *Keller v. State Bar of Cal.*, 496 U.S. 1, 14-16 (1990) (finding that the bar association may require members to pay fees used for regulation of the profession, but not political advocacy). In recent years, the Roberts Court has extended the protection against compelled association further, requiring that workers “opt in” to support certain union political activities rather than allowing unions to charge them for such activities unless they “opt out.” *Knox v. Serv. Emps. Int’l Union, Local 1000*, 132 S. Ct. 2277, 2293 (2012). Currently before the Court is another First Amendment challenge to compelled support for a union’s collective bargaining services. *Friedrichs v. Cal. Teachers Ass’n*, 135 S. Ct. 2933 (2015) (granting certiorari petition).

39. 468 U.S. 609 (1984).

40. *Id.* at 626-27.

41. 530 U.S. 640 (2000).

42. *Id.* at 648, 651; see also *Hurley v. Irish-Am. Gay, Lesbian, & Bisexual Grp. of Bos.*, 515 U.S. 557 (1995) (holding that a private group organizing a St. Patrick’s Day parade had a right to exclude a group with an antithetical message).

extends only to those whose participation would interfere with the group's message.⁴³ As with other cases involving associational rights, the central question in the compelled association cases is whether state action has impeded a group's ability to express its ideological perspective.

Similar concerns are at play in cases involving campaign finance regulation, an area worthy of special note given its close connection to voting. Two aspects of campaign finance law implicate expressive association. The first is restrictions on political contributions, which *Buckley v. Valeo*⁴⁴ famously distinguished from restrictions on expenditures. While restrictions on the latter directly impede political speech, the Court reasoned, contribution limits are only a "marginal" restriction on speech.⁴⁵ *Buckley* viewed contribution limits as mainly affecting association, rather than speech,⁴⁶ and thus warranting less searching scrutiny than expenditure limits.⁴⁷ The other aspect of campaign finance law implicating associational rights is compelled disclosure of campaign contributions and expenditures. Since *Buckley*, the Supreme Court has recognized that mandatory disclosure has the potential to chill would-be donors and spenders, subjecting such requirements to "exacting scrutiny."⁴⁸ While generally upholding disclosure requirements,⁴⁹ the Court has recognized the need to accommodate groups and individuals that may suffer retaliation if contributions are made public.⁵⁰ Accordingly, it has held that individuals and groups may claim an exception where there is a "reasonable probability" that compelled disclosure will lead to threats, harassment, or reprisals.⁵¹ Following *NAACP v. Alabama*, this test is grounded in recognition that compelled disclosure can paralyze non-

43. Another example is *California Democratic Party v. Jones*, 530 U.S. 567 (2000), discussed *infra* note 104.

44. 424 U.S. 1 (1976).

45. *Id.* at 20-21.

46. *Id.* at 24-25 ("[T]he primary First Amendment problem raised by the [Federal Election Campaign] Act's contribution limitations is their restriction of one aspect of the contributor's freedom of political association.").

47. *Id.* at 25. Although *Buckley* itself is imprecise regarding the level of scrutiny, the Court later clarified that contribution limits need only be "closely drawn" to an important interest, while expenditure limits must satisfy strict scrutiny and be narrowly tailored to a compelling interest. See *McCutcheon v. FEC*, 134 S. Ct. 1434, 1445 (2014); *McConnell v. FEC*, 540 U.S. 93 (2003); *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 386-88 (2000).

48. 424 U.S. at 64.

49. See *Citizens United v. FEC*, 558 U.S. 310 (2010); *McConnell*, 540 U.S. at 93.

50. *Buckley*, 424 U.S. at 70-71.

51. *Id.* at 74. The Court later found this test satisfied in *Brown v. Socialist Workers '74 Campaign Committee*, 459 U.S. 87, 98-101 (1982). More recently, the Court has applied the same test to compelled disclosure of referendum signatories. *Doe v. Reed*, 561 U.S. 186, 200-01 (2010).

mainstream political groups, whose fundraising and therefore expression may be stymied if their supporters' identities are publicized.

Thus far, I have focused on cases that involve political association but do not directly concern the act of voting. There is, however, another line of cases in which the Court has extended the right of expressive association to voters, candidates, and parties joining together at the ballot box. Part III discusses those cases.

III. ASSOCIATION AND THE VOTE

The Supreme Court has long flirted with the idea that voting is a form of speech protected by the First Amendment, but has never adopted this position. It has, however, held that voting is a form of *expressive association* protected by the First Amendment.

Before exploring the connection between voting and association, it is worth considering the road *not* taken. The Court entertained the argument that voting was protected *speech* in *Harper v. Virginia Board of Elections*⁵² but wound up striking down the poll tax based solely on the fundamental right to vote under the Fourteenth Amendment.⁵³ Justice Douglas' opinion for the Court in *Harper* observed that "[w]ealth, like race, creed, or color, is not germane to one's ability to participate intelligently in the electoral process."⁵⁴ By denying the vote to citizens unable to pay the \$1.50 poll tax, Virginia was effectively discriminating against poor people in violation of the Equal Protection Clause. The *Harper* plaintiffs argued that voting is speech protected by the First Amendment, but the Court declined to rule on that ground.⁵⁵ Nor has it since then, though some Justices have occasionally toyed with the possibility.⁵⁶ The Court's closest brush with the idea since then was *Bush v. Gore*.⁵⁷ That opinion silently borrows from First Amendment cases, looking with suspicion

52. 383 U.S. 663, 665 (1966). For discussion of the drafting history of *Harper*, see RICHARD L. HASEN, *THE SUPREME COURT AND ELECTION LAW: JUDGING EQUALITY FROM BAKER V. CARR TO BUSH V. GORE* 36-38 (2003).

53. *Harper*, 383 U.S. at 665-70; see *Reynolds v. Sims*, 377 U.S. 533, 561-62 (1964) (holding that restrictions on voting must be "carefully and meticulously scrutinized" because the right to vote is fundamental); *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) (holding that voting is "a fundamental political right, because preservative [sic] of all rights").

54. 383 U.S. at 668; *accord id.* at 665.

55. *Id.* at 665.

56. Most notable is Justice Kennedy's concurring opinion in *Vieth v. Jubelirer*, in which he suggests that challenges to partisan gerrymandering might be grounded in the First Amendment. 541 U.S. 267, 314-17 (2004) (Kennedy, J., concurring). This decision is addressed *infra* Part IV.

57. 531 U.S. 98 (2000); see also *Citizens United v. FEC*, 558 U.S. 310, 425 & n.52 (2010) (Stevens, J., dissenting) (citing legal scholarship for the proposition that "voting is, among other things, a form of speech").

on schemes given to government officials to regulate speech,⁵⁸ but ultimately rested—at least explicitly—on the right to vote under the Equal Protection Clause.⁵⁹

While not viewing voting as speech, the Court has, for decades, held that some aspects of voting are protected forms of association under the First Amendment. The first case to recognize the voting-association link was *Williams v. Rhodes*,⁶⁰ decided two years after *Harper*. *Williams* involved a challenge to Ohio's requirement that new political parties file petition signatures, equal to fifteen percent of the ballots cast in the last gubernatorial election, by February in order to get on the presidential ballot.⁶¹ This restriction was challenged by the American Independent Party and the Socialist Labor Party.⁶²

In striking down Ohio's restrictions, Justice Black's opinion for the Court relied on both the Equal Protection Clause and the First Amendment. The Court cited the NAACP and Communist Party decisions on freedom of association, extending their principle to state laws restricting political parties' access to the ballot.⁶³ The problem, according to the opinion, was that the law advantaged political insiders over outsiders, "giv[ing] the two old, established parties a decided advantage over any new parties . . . and thus plac[ing] substantially unequal burdens on both the right to vote and the right to associate."⁶⁴ The Court thus required the State to provide a compelling interest justifying its restriction and then proceeded to reject the State's proffered justifications.⁶⁵ Most significantly, it rejected the stated interest in favoring a two-party system on the ground that Ohio's law went further, "favor[ing] two particular parties—the Republicans and the Democrats—and in effect tends to give them a complete monopoly."⁶⁶ Without a sufficient interest to justify the law, Ohio's ballot access restriction was held to impose an impermissible burden on voting and associational rights.⁶⁷

58. Tokaji, *supra* note 16, at 2487-95; see also GREENE, *supra* note 13, at 132-33 (discussing the suspicion of public officials discretion and the uncited First Amendment line of cases in *Bush v. Gore*). The Court has also considered the very different question of whether a legislator's vote is speech protected by the First Amendment, holding it is not. *Nev. Comm'n on Ethics v. Carrigan*, 131 S. Ct. 2343, 2350-51 (2011).

59. *Bush*, 531 U.S. at 104-05.

60. 393 U.S. 23 (1968).

61. *Id.* at 24-27.

62. *Id.* at 26.

63. *Id.* at 30, 31.

64. *Id.* at 31.

65. *Id.* at 31-34.

66. *Id.* at 32.

67. *Id.* at 34. The Court proceeded to hold that the Independent Party was entitled to be placed on the ballot, but not the Socialist Labor Party, which had asked to be added to the ballot later, on the ground that this relief would be too disruptive. *Id.* at 34-35. Justice

Williams was an important step forward in two respects. First, it explicitly recognized the link between the First Amendment right of expressive association and the Fourteenth Amendment right to vote. Second, *Williams* involved a positive claim to get something from the government, rather than a negative claim to be left alone. Most earlier cases involved the State's unwanted government intrusion on the affected group's liberty interest—for example, the government seeking a membership list in *NAACP v. Alabama* or restricting solicitation of clients in *NAACP v. Button*. By contrast, the *Williams* plaintiffs were demanding something from the State: a place on the ballot. That said, *Williams* is not as much of an extension of precedent as it might first appear. Some of the Communist Party cases likewise involved an affirmative claim to something from the government—a job or, later, admission to the bar—that was denied on account of party affiliation. There is still a difference, however, in that these benefits were expressly denied on account of belief or association in the earlier cases. By contrast, *Williams* relied on the *practical effect* of the State's restrictions on non-dominant political parties and their supporters.

Subsequent cases follow *Williams* in affirming the link between voting and association, while qualifying both rights. The Court would go on to uphold some restrictions on third party and independent candidates' access to the ballot, such as reasonable signature and disaffiliation requirements.⁶⁸ In other cases, it invalidated rules that imposed too great a burden on would-be voters or candidates, especially those seeking to challenge the two major parties' grip on power.⁶⁹ For example, in *Kusper v. Pontikes*, the Court struck down a requirement that voters be disaffiliated from one party for at least twenty-three months before voting in the primary of another, finding it too great a restriction on voters associating with the party of their

Douglas concurred, emphasizing the harm to dissident political parties from Ohio's rule, but would have granted relief to the Socialist Labor Party as well. *Id.* at 35-41 (Douglas, J., concurring). Justice Harlan concurred in the judgment, grounding his reasoning in the First Amendment and Due Process Clause of the Fourteenth Amendment, not the Equal Protection Clause. *Id.* at 41-48 (Harlan, J., concurring). Justice Stewart and Chief Justice Warren dissented. *Id.* at 48 (Stewart, J., dissenting); *id.* at 63 (Warren, C.J., dissenting).

68. See generally *Storer v. Brown*, 415 U.S. 724 (1974) (upholding the requirement that candidates be disaffiliated from political parties for a year before running as independents); *Jenness v. Fortson*, 403 U.S. 431 (1971) (upholding the requirement that third party and independent candidates obtain signatures from five percent of registered voters).

69. See e.g., *Ill. State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173 (1979) (striking down a requirement that new parties and independent candidates in Chicago obtain at least 25,000 petition signatures); *Lubin v. Panish*, 415 U.S. 709 (1974) (striking down a \$701.60 filing fee where there was no alternative means of getting on the primary ballot); *Bullock v. Carter*, 405 U.S. 134 (1972) (striking down filing fees as high as \$8900 to get on the primary ballot).

choice.⁷⁰ Some of these cases emphasize equal protection, others freedom of association, but none of them question the link between these rights that *Williams* recognized.

A critical development in the law of voting and association was Justice Stevens' opinion for the Court in *Anderson*, another challenge to Ohio ballot access rules. A state statute required that independent presidential candidates file papers in late March, seventy-five days before the primary election and more than seven months before the general election.⁷¹ The plaintiffs were John Anderson, an independent candidate for President in 1980, and three voters supporting his candidacy.⁷²

Justice Stevens' opinion in *Anderson* solidifies and develops the link between voting and association. Because "a candidate serves as a rallying-point for like-minded citizens," Justice Stevens wrote, restrictions on ballot access may hinder voters' freedom to associate with both candidates of their choice and one another.⁷³ The risk is particularly great where dominant parties make rules that exclude independent or minor party candidates. That does not mean that all state restrictions on ballot access are invalid. The Court reconciled *Williams*' requirement of a compelling interest with the more lenient standard suggested in later decisions, by articulating a balancing test. As a practical matter, Justice Stevens' opinion recognized that states must impose some regulations on elections. There is accordingly no "litmus-paper test" for separating valid and invalid ones.⁷⁴ Courts should instead weigh the "character and magnitude" of the harm to First and Fourteenth Amendment rights against the "precise interest put forward by the State."⁷⁵ While "reasonable, nondiscriminatory restrictions" are generally justified by the State's "important regulatory interests," stronger government interests are required to justify more serious burdens, including ones that are discriminatory.⁷⁶

Anderson's standard focuses mainly on the *impact* that the challenged practice has on voters favoring independent or non-dominant party candidates. At the center of the inquiry is the effect of the challenged practice on those likely to favor political outsiders. The Court emphasized that it is not just the "magnitude" or the burden but also its "character"⁷⁷—or, as stated at the end of the opinion, not just the

70. 414 U.S. 51 (1973).

71. *Anderson v. Celebrezze*, 460 U.S. 780, 782-83 (1983).

72. *Id.* at 783.

73. *Id.* at 787-88.

74. *Id.* at 789.

75. *Id.*

76. *Id.* at 788.

77. *Id.* at 789.

“extent” of the burden but also its “nature”—that is critical.⁷⁸ Especially problematic are burdens that “fall[] unequally on new or small political parties or on independent candidates,” because they “discriminate[] against those candidates and—of particular importance—against those voters whose political preferences lie outside the existing political parties.”⁷⁹ This framing puts the challenged practice’s disparate impact on certain groups at the center of the analysis. *Anderson* does not require proof of a discriminatory purpose, though such evidence would presumably be relevant in illuminating the character of the burden on voting.

Applying its newly formulated standard, the Court concluded that Ohio’s early filing deadline had a “substantial impact” on the associational rights of independent-minded voters.⁸⁰ By requiring independent candidates to file two and one-half months before the state primary, it would bar those driven to enter the fray by developments occurring during the parties’ nomination process. It therefore threatened to deny an adequate choice to voters disaffected by and dissatisfied with the choices offered by the major parties.⁸¹ The *Anderson* Court proceeded to find the State’s interests inadequate to justify this burden. Especially significant is its discussion of Ohio’s asserted interest in promoting political stability. The Court rejected the idea that the “desire to protect existing political parties from competition” could justify restrictions on independent and minor-party candidates’ ballot access.⁸² Protecting the major parties from competition was not an acceptable reason for “the virtual exclusion of other political aspirants from the political arena.”⁸³ Ohio’s rule was especially burdensome, the Court recognized, because independent and minor-party candidates often start as a “dissident group” attempting to exert influence within a major party.⁸⁴ To exclude them from the general election ballot through an extremely early filing deadline would deny such dissident groups any meaningful leverage.

In addition to providing a legal standard, *Anderson* deepened the connection between the rights of association and voting that *Williams* recognized. The Court expressly grounded its analysis in both, citing *NAACP v. Alabama*’s holding that association is a central aspect of the liberty protected by the First Amendment and *Williams*’ holding that voting and associational rights overlap when it comes to ballot

78. *Id.* at 806.

79. *Id.* at 793-94.

80. *Id.* at 790, 795.

81. *Id.* at 792.

82. *Id.* at 801, 805-06.

83. *Id.* at 802.

84. *Id.* at 805.

access.⁸⁵ And in the concluding paragraph of its opinion, the Court stressed that its “primary concern was not the interest of candidate Anderson, but rather, the interests of the *voters who chose to associate together* to express their support for Anderson’s candidacy and the views he espouse[s].”⁸⁶ This statement makes unmistakably clear that the Court viewed voting as a form of association, for which Anderson’s supporters collectively enjoyed constitutional protection.

The right that *Anderson* affirms is best understood as a hybrid, grounded in both the First Amendment and the Equal Protection Clause of the Fourteenth Amendment. In a footnote citing *Williams*, Justice Stevens’ opinion for the Court explained that the Court’s holding was premised on both the First and Fourteenth Amendments:

In this case, we base our conclusions directly on the First and Fourteenth Amendments and do not engage in a separate Equal Protection Clause analysis. We rely, however, on the analysis in a number of our prior election cases resting on the Equal Protection Clause of the Fourteenth Amendment. These cases, applying the “fundamental rights” strand of equal protection analysis, have identified the First and Fourteenth Amendment rights implicated by restrictions on the eligibility of voters and candidates, and have considered the degree to which the State’s restrictions further legitimate state interests.⁸⁷

Professor Charles understands *Anderson* to ground the Court’s analysis in the right of association under the First Amendment *instead of* the right to vote under the Equal Protection Clause of the Fourteenth Amendment. The better interpretation, in my view, is that *Anderson* is grounded in *both* voting and associational rights. Here and elsewhere in the opinion, the Court expressly states it is relying on both the First and Fourteenth Amendments.⁸⁸ Declining to engage in a “separate” equal protection analysis is not the same as rejecting the Equal Protection Clause as a source of the hybrid right it recognized. To the contrary, the Court elsewhere affirms that ballot access rules may affect both voting and associational rights. *Anderson* synthesizes associational and voting rights, rather than replacing the former with the latter.

85. *Id.* at 786-87.

86. *Id.* at 806 (emphasis added).

87. *Id.* at 786 n.7 (citations omitted).

88. The reference to the Fourteenth Amendment could be understood to refer to the Due Process Clause, which has long been thought to incorporate the First Amendment. But, *Anderson*’s references to the right to vote belie the argument that the Court was backing away from the Equal Protection Clause, the primary textual source of that right. See also *id.* at 787 (quoting *Williams v. Rhodes*, 393 U.S. 23, 30-31 (1968), for the proposition that voting and associational rights overlap when it comes to ballot access restrictions).

The Court refined the *Anderson* voting-association standard in *Burdick v. Takushi*, upholding a challenge to Hawaii's ban on write-in voting.⁸⁹ Justice White's opinion for the majority unambiguously reaffirmed *Anderson*'s "flexible" standard, reiterating that courts should weigh the "character and magnitude" of the challenged restriction against the "precise interests put forward by the State."⁹⁰ It also quotes *Anderson*'s statement that "reasonable, nondiscriminatory restrictions" may generally be supported by "the State's important regulatory interests."⁹¹ *Burdick*'s main doctrinal contribution is to clarify that only a restriction that is "severe" should receive strict scrutiny, requiring government to show it is narrowly tailored to a compelling interest.⁹² Finding the State's prohibition on write-in voting to be "slight" in magnitude and "politically neutral" in character, *Burdick* held that the State's interests in preventing factionalism and party raiding were sufficient to sustain it.⁹³ While the dissenting opinion by Justice Kennedy (joined by Justices Blackmun and Stevens) thought the burden more serious and the state interests more modest than the majority,⁹⁴ the dissent expressly agreed with the Court's "careful statement . . . of the test to be applied."⁹⁵ Thus, all nine Justices in *Burdick* agreed on the constitutional standard.

Other cases apply *Anderson*'s standard to restrictions on minor parties' access to the ballot. While usually exhibiting greater solicitude for the State's interests, they do not change the standard or the hybrid nature of the right *Anderson* recognized. An example is *Munro v. Socialist Workers Party*,⁹⁶ which upheld a state requirement that minor-party candidates receive at least one percent of primary votes to appear on the general election ballot. Another is *Timmons v. Twin Cities Area New Party*,⁹⁷ upholding a state ban on "fusion" candidates. Both cases find the burden on minor parties modest and the

89. 504 U.S. 428 (1992).

90. 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 789).

91. *Id.* (quoting *Anderson*, 460 U.S. at 788).

92. *Id.*

93. *Id.* at 438-40.

94. *Id.* at 442-50 (Kennedy, J., dissenting).

95. *Id.* at 445.

96. 479 U.S. 189, 193-99 (1986).

97. 520 U.S. 351, 356-70 (1997).

state interests adequate to justify that burden.⁹⁸ Yet they apply the same basic framework that the Court adopted in *Anderson*, reaffirming its fusion of voting and association claims.

The Court would later extend *Anderson*'s reasoning to disputes between the *major* parties. The first and still most important case to do so was *Tashjian v. Republican Party of Connecticut*.⁹⁹ Justice Marshall's opinion for the Court struck down Connecticut's prohibition on independent voters participating in primaries as applied to the state Republican Party, which had adopted a rule allowing independent voters to participate in its primary. At the time, Democrats controlled the state legislature and, in a party-line vote, refused to change state law to accommodate Republicans' desire to include independents in their primary. Applying the *Anderson* standard, the Court concluded that the State had imposed an impermissible burden on association.¹⁰⁰

Like the minor-party and independent-candidate decisions on which it builds, *Tashjian* reflects a concern with a dominant party seeking to diminish the strength of a rival group.¹⁰¹ Professor Lowenstein has criticized *Tashjian*, partly on the ground that "the major parties are grown-ups who, generally speaking, can be expected to take care of themselves."¹⁰² This may sometimes be true—but not always. After all, the dominant major party is more likely to have its grip on power threatened by the other major party than by minor

98. *Munro* defers to the State's interests in avoiding voter confusion, ballot overcrowding, and frivolous candidacies. *Timmons* adds the interest in promoting "political stability" to the list of those that may justify ballot access restrictions. My two casebook co-authors, Rick Hasen and Dan Lowenstein, have disagreed over the import of *Timmons*. Professor Hasen criticizes *Timmons* for recognizing the preservation of the two-party system as a legitimate interest. See Richard L. Hasen, *Entrenching the Duopoly: Why the Supreme Court Should Not Allow the States to Protect the Democrats and Republicans from Political Competition*, 1997 SUP. CT. REV. 331, 367-71 (1997). Professor Lowenstein's more sympathetic account is that *Timmons* affirmed the interest in a *healthy* two-party system rather than the promotion of the two-party system (and thus the exclusion of minor parties) per se. Daniel H. Lowenstein, *Legal Regulation and Protection of American Parties*, in HANDBOOK OF PARTY POLITICS 456, 464 (Richard S. Katz & William Crotty eds., 2006). While the Hasen-Lowenstein disagreement is peripheral to this Article, I agree with Professor Lowenstein's understanding of *Timmons*. Whoever is right, *Timmons* reaffirms *Anderson*'s holding that there are limits on the major parties' authority to restrict independent and minor-party candidates' ballot access. 520 U.S. at 367 (showing state interest in stability "does not permit a state to completely insulate the two-party system from minor parties' or independent candidates' competition and influence" (citing *Anderson v. Celebrezze*, 460 U.S. 780, 802 (1983))).

99. 479 U.S. 208 (1986).

100. *Id.* at 213-25. *But see* *Clingman v. Beaver*, 544 U.S. 581 (2005) (upholding semi-closed primary system under which party members and independent voters could vote in party primary, but other parties' members could not).

101. See generally Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643 (1998) (exploring the way dominant parties limit competition from weaker groups).

102. Lowenstein, *supra* note 18, at 1790.

parties or independent candidates. There was certainly a reasonable argument to be made for uniform rules in *Tashjian*, as Professor Lowenstein has observed.¹⁰³ But there is also good reason for judicial skepticism, where one major party controls the machinery of government and uses that power to make life difficult for its main competitor.¹⁰⁴

To recap, the *Anderson-Burdick* standard has been applied in a wide variety of electoral contexts, including state laws regulating ballot access, restricting write-in voting, and determining who may vote in party primaries. These cases affirm, explicitly or implicitly, the link between voting and association recognized in *Williams* and developed in *Anderson*. For the most part, the cases in which the Court has found a violation are ones in which a dominant major party uses its power to impede association among voters favoring the other major party, minor parties, or independent candidates.

The most recent doctrinal development involves a subject that, at first glance, seems quite dissimilar to the voting-association cases detailed above: voter identification. In *Crawford v. Marion County Election Board*,¹⁰⁵ a majority of Justices applied the *Anderson-Burdick* standard to an Indiana law requiring most voters to present government-issued photo ID at the polls. Unlike ballot access cases such as *Williams* and *Anderson*, *Crawford* did not involve a claim that voters were denied their First Amendment right to associate

103. *Id.*

104. See, e.g., Issacharoff & Pildes, *supra* note 101, at 654-59. Some later cases involving major-party associational rights are more difficult to justify on this ground. The Court would later extend *Anderson* from inter-party to intra-party disputes in *Eu v. San Francisco County Democratic Central Committee*, striking down California's ban on certain party endorsements and restrictions on internal party governance. 489 U.S. 214, 222-23 (1989). For a compelling critique of judicial intervention in this case, see Lowenstein, *supra* note 18, at 1777-87. It is not obvious why judicial intervention is necessary, absent evidence that one faction of a party has been locked out of its deliberations, as were African Americans from the Texas Democratic Party in the White Primary Cases. See *id.* at 1748-49. Also difficult to justify on this ground is the decision in *California Democratic Party v. Jones*, 530 U.S. 567, 572-86 (2000), striking down a state blanket primary in which non-party members were allowed to vote in a party primary over the major parties' objections. In contrast to *Tashjian*, this was not a case in which the dominant major party was frustrating voting and association rights of its main competitor. It was instead a dispute among different factions within the major parties, particularly the Republican Party. See Michael S. Kang, *The Hydraulics and Politics of Party Regulation*, 91 IOWA L. REV. 131, 164-65 (2005). In a later case, *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449-59 (2008), the Court would uphold, against a facial challenge, a different kind of blanket primary—one in which all candidates appeared on the ballot with their party affiliation and the top two vote-getters, regardless of party, would proceed to the general election. This Article leaves to one side the difficult question what role courts should play in resolving intra-party disputes, a question thoughtfully and comprehensively addressed—with different answers—in the above articles by Professors Lowenstein and Kang. My focus here is on disputes between, not within, political parties.

105. 553 U.S. 181, 185-86, 189-91 (2008).

with a party, candidate, or other voters. The *Crawford* plaintiffs grounded their claim solely on the Fourteenth Amendment right to vote, not the right of association.

The Justices were divided into three groups in *Crawford*. The narrowest ground for the decision appears in the lead opinion by Justice Stevens (joined by Chief Justice Roberts and Justice Kennedy). His legal analysis begins by noting that the Court of Appeals distinguished *Harper*, on the ground that voter ID is relevant to a voter's qualifications to vote, while the poll tax was not.¹⁰⁶ It proceeds to apply the constitutional standard of *Anderson* and its progeny, balancing the burden placed on voting against the precise interest put forward by the State.¹⁰⁷ According to Justice Stevens, the number of affected voters was "small" and the "magnitude of the burden" uncertain on the record before the Court.¹⁰⁸ Although the plaintiffs asserted that Indiana's law would have a negative effect on indigent voters, evidence of an excessive burden on them or any other identifiable class of voters was lacking.¹⁰⁹ Given the modest burden on voters, the State's claimed interests in fraud prevention, voter confidence, and election modernization were sufficient to sustain the statute against a facial challenge.

Under *Anderson* and the voting-as-association cases that followed, the central question is the impact of the challenged law on supporters of a non-dominant party or candidate. *Crawford's* discussion of this point is telling. Justice Stevens' lead opinion observed that Indiana's law was approved on a party-line vote, with Republicans uniformly supporting it and Democrats uniformly opposing it.¹¹⁰ From this fact, it could fairly be inferred that partisan considerations played a role in its passage. But the existence of such motivations—invariably present in any law regulating elections—was insufficient to invalidate the law on its face. Justice Stevens explained: "[I]f a *nondiscriminatory* law is supported by valid neutral justifications, those justifications should not be disregarded simply because partisan interests may have provided one motivation for the votes of individual legislators."¹¹¹

Justice Stevens' opinion did not explain precisely what was meant by "nondiscriminatory," but the context suggests that the negative effects of the law are paramount. This is consistent with *Anderson* and the other cases cited, which focus on the impact that a law has

106. *Id.* at 188.

107. *Id.* at 189-91.

108. *Id.* at 200.

109. *Id.* at 202.

110. *Id.* at 203.

111. *Id.* at 204 (emphasis added).

on voters favoring non-dominant parties or independent candidacies. It is also consistent with Justice Stevens' view in partisan gerrymandering cases, in which he has advocated attention to "whether the plan has a significant adverse impact on an identifiable political group."¹¹² The *Crawford* record was conspicuously devoid of evidence that Indiana's law would have a disproportionate impact on Democrats compared to Republicans.¹¹³ The lead opinion suggests that this omission was a serious one, undercutting the suggestion that Indiana's law was discriminatory and therefore subject to strict scrutiny.

Justice Scalia's concurrence (joined by Justices Thomas and Alito) purported to apply *Anderson* and *Burdick*, but read those cases differently. He urged a "two-track approach," applying strict scrutiny in cases where there is a severe burden and deferring to the states in other cases.¹¹⁴ As Justin Levitt has explained, Justice Scalia's approach is more like a light switch, while that of the other Justices is more like a dimmer with the State's burden of justification increasing with the burden on voters.¹¹⁵ Unlike the lead opinion—as well as the dissents—Justice Scalia would avoid any judicial inquiry into the "individual impacts" on voters.¹¹⁶ While this statement might be understood to imply that *collective* impacts are relevant, it appears that this group would find a severe burden only in cases where discriminatory intent to disadvantage a particular group is proven.¹¹⁷

Justice Souter's dissent (joined by Justice Ginsburg) applies the same standard as Justice Stevens, balancing the "character and magnitude" of the burden on voting against the "precise interests put forward by the state."¹¹⁸ But Justice Souter found the burden on voters to be more substantial than the majority, focusing especially

112. *Karcher v. Daggett*, 462 U.S. 725, 751 (1983) (Stevens, J., concurring).

113. 553 U.S. at 200-03.

114. *Id.* at 204-05 (Scalia, J., concurring).

115. Justin Levitt, *Crawford--More Rhetorical Bark Than Legal Bite?*, BRENNAN CTR. FOR JUSTICE (May 2, 2008), <http://www.brennancenter.org/blog/crawford-more-rhetorical-bark-legal-bite>.

116. *Crawford*, 553 U.S. at 205 (Scalia, J., concurring).

117. *Id.* at 207. This position is difficult to square with earlier cases in the *Anderson* line, in which the Court struck down restrictions on ballot access without finding an intent to disadvantage a particular group. A cryptic footnote in Justice Scalia's opinion suggests that economic burdens on voting—like the poll tax or filing fees—may warrant heightened scrutiny even without discriminatory intent. *See id.* at 207 n.* ("[I]t suffices to note that we have never held that legislatures must calibrate *all* election laws, *even those totally unrelated to money*, for their impacts on poor voters or must otherwise accommodate wealth disparities.") (second emphasis added). This does not, however, explain why the Court struck down ballot access requirements unrelated to money in cases such as *Williams* and *Anderson*. *See Anderson v. Celebrezze*, 460 U.S. 780 (1983); *Williams v. Rhodes*, 393 U.S. 23 (1968).

118. *Crawford*, 553 U.S. at 211, 223-24 (Souter, J., dissenting).

on voter IDs' effects on indigent voters.¹¹⁹ Justice Breyer's dissent applied a similar balancing standard, without expressly relying on *Anderson* and *Burdick*, focusing on the law's impact on voters who are poor, elderly, or disabled.¹²⁰

Despite the absence of a majority opinion, a majority of Justices in *Crawford* agreed on two key points. The first is that the constitutional standard drawn from *Anderson* and *Burdick* applies in challenges to voter ID laws, and presumably other barriers to voting. At least eight and possibly all nine Justices agree on this point.¹²¹ Second, a majority of Justices (those joining the lead opinion and dissents) agree that courts should balance the character and magnitude of the burden on voters against the precise interests put forward by the State.¹²² For these Justices, the impact of the law on a definable group of voters is germane to defining its character. Because the *Crawford* plaintiffs focused on voter ID's impact on poor people, that is the group on which the Justices' opinions primarily focus. Yet these opinions leave open the possibility—and the lead opinion strongly suggests—that the impact on adherents of a non-dominant political party might also be relevant.

There is a major difference between *Crawford* and previous cases I have discussed. Unlike the precedents upon which it relies, *Crawford* was based solely on the right to vote under the Equal Protection Clause, not the right of association under the First Amendment. Constitutional cases concerning voting barriers since *Crawford* have likewise been litigated and decided primarily if not exclusively as right-to-vote cases. Examples include two cases from Ohio decided during the 2012 election season. The first case, *Northeast Ohio Coalition for the Homeless v. Husted*,¹²³ challenged a state rule requiring the rejection of provisional ballots cast in the correct polling place but the wrong precinct—often referred to as “right church, wrong pew” ballots—due to poll worker error. Plaintiffs sought relief under the Equal Protection and Due Process Clauses of the Fourteenth Amendment. The Sixth Circuit affirmed a preliminary injunction requiring that these ballots be counted, focusing its analysis on the burden Ohio's rule imposed on voters who are not directed to the

119. *Id.* at 212, 220.

120. *Id.* at 237-41 (Breyer, J., dissenting).

121. Justice Breyer may not be in agreement; however, he seems to apply the *Anderson-Burdick* standard without expressly citing those cases.

122. That majority includes the three Justices signing on to the lead opinion (Justice Stevens, Chief Justice Roberts, and Justice Kennedy) along with the three dissenters (Justices Souter, Ginsburg, and Breyer). *Crawford*, 553 U.S. at 181-83.

123. 696 F.3d 580 (6th Cir. 2012). The Sixth Circuit reversed the district court's preliminary injunction as to provisional ballots with a deficient affirmation. *Id.* at 599-60.

correct precinct.¹²⁴ The other case is *Obama for America v. Husted*,¹²⁵ a challenge to Ohio's rule allowing only military and overseas voters to use in-person early voting during the last three days prior to the election. The Sixth Circuit affirmed the preliminary injunction in that case as well, finding that the unequal treatment of voters likely violated the Equal Protection Clause.¹²⁶ Both cases were thus litigated as Fourteenth Amendment voting cases, not First Amendment association cases.

The Sixth Circuit cases are typical of post-*Crawford* cases challenging state voting rules.¹²⁷ Plaintiffs have primarily based their claims on the Equal Protection Clause, sometimes adding a claim under the Due Process Clause of the Fourteenth Amendment.¹²⁸ They have generally not included First Amendment claims in their complaints. An exception is *Veasey v. Perry*, a challenge to Texas' voter ID requirement in which plaintiffs alleged violations of the First Amendment as well as the Due Process and Equal Protection Clauses of the Fourteenth Amendment.¹²⁹ That case, however, is unusual. The general rule has been for plaintiffs to ground their claims exclusively on the right to vote and not the right of association—despite the Supreme Court's recognition that voting is association protected by the First Amendment.¹³⁰

In summary, the Court has long recognized the linkage between the right to expressive association and the right to vote under the Equal Protection Clause of the Fourteenth Amendment. It first recognized that linkage in cases involving minor party and independent candidates' access to the ballot, later extending it to cases in which the dominant major party imposes burdens on the other major party.

124. *Id.* at 591-99.

125. 697 F.3d 423 (6th Cir. 2012).

126. *Id.* at 428-36.

127. For citations to some of those cases, see *supra* notes 3-5.

128. See, e.g., *Frank v. Walker*, 768 F.3d 744 (7th Cir. 2014) (challenging voter ID law under Equal Protection Clause and Voting Rights Act); *Hunter v. Hamilton Co. Bd. of Elections*, 635 F.3d 219, 225 (6th Cir. 2011) (challenging disparities in treatment of provisional ballots on due process and equal protection grounds); *N.C. State Conf. NAACP v. McCrory*, 2016 WL 204481 (M.D.N.C. 2016) (challenging voter ID law under Equal Protection Clause of the Fourteenth Amendment). But see *Veasey v. Abbott*, 796 F.3d 487 (5th Cir. 2014) (asserting equal protection claims, as well as claims under First Amendment, Fifteenth Amendment, Twenty-Fourth Amendment, and Voting Rights Act).

129. 71 F. Supp. 3d 627, 684-85 (S.D. Tex. 2014). A panel of the Fifth Circuit affirmed the district court's injunction against Texas' law based on section 2 of the Voting Rights Act, thus allowing it to avoid passing judgment on this constitutional claim. *Veasey v. Abbott*, 796 F.3d 487, 493 (5th Cir. 2015). The Fifth Circuit took the case en banc, affirming the district court's conclusion that the law violated section 2, without reaching the issue whether it imposed an unconstitutional burden under the First and Fourteenth Amendments. *Veasey v. Abbott*, No. 14-41127, 2016 WL 3923868 (5th Cir. July 20, 2016) (en banc).

130. See *supra* pp. 771-75.

Anderson developed a balancing test for voting-association cases, subsequently refined in *Burdick*. In *Crawford* and subsequent lower court cases, however, the connection between the right to vote and the right to expressive association was severed. Constitutional challenges to burdens on voting have mostly been litigated under the Equal Protection Clause of the Fourteenth Amendment, not the First Amendment right of association. The consequence has been to shift the focus away from the challenged laws' effects on different subgroups of voters, particularly those defined by party affiliation. Part IV argues for recovery of the voting-association link.

IV. RECONNECTING VOTING AND ASSOCIATION

Litigants and courts should rekindle the relationship between the constitutional rights of voting and association. Voting rights lawyers should allege violations of the First Amendment right of association in cases challenging burdens on voting such as ID requirements, restrictions on voter registration, and limitations on early voting. Courts entertaining these cases should focus on the disparate effect of these practices on different political groups. While disparate effects on racial groups, people with disabilities, and economic status are important, political party association is especially important. Accordingly, voting rights lawyers should present proof of a disparate impact on voters inclined to support the non-dominant party, and courts should consider this evidence in determining whether a given burden is "discriminatory" in character, thus demanding a higher burden of justification from the State.

To be clear, I am not arguing for abandonment of the voting-association doctrine recognized in *Williams*, defined in *Anderson*, clarified in *Burdick*, and applied to voting burdens in *Crawford*. I am instead calling for refinement of that doctrine. The *Anderson-Burdick* balancing test effectively captures the need for courts to focus on not only the "magnitude" of the restriction, but also its "character." While magnitude includes both the number of voters affected and the degree of burden on the individual voter, the character of the burden includes its discriminatory impact on particular subgroups of voters. It also captures the necessity of scrutinizing the specific interests proffered by the State in support of its restrictions, with stronger interests required to justify greater burdens.

The major problem with the *Anderson-Burdick* standard, as applied in voting cases since *Crawford*, is that it's unclear exactly what the inquiry into the "character" of the burden should entail. *Anderson* explicitly made discrimination relevant to the inquiry, but lower courts have struggled to figure out what kind of discrimination—specifically, discrimination against *whom*—is most significant. Dif-

ferent plaintiffs and judges have considered the impact on various groups of voters, including poor people, racial minorities, homeless people, people with disabilities, and elderly voters. In contrast to the voting-association cases from which the *Anderson-Burdick* standard derives, post-*Crawford* courts have not looked directly at the challenged practice's partisan impact.

The primary cost of forgetting the link between voting and association has been to lose focus on political parties. That focus was central to the line of decisions from which the *Anderson-Burdick* standard emerged. Why should political party be relevant in measuring the character of a voting restriction? The simple answer is that parties are the primary means through which democratic politics is organized, a reality long recognized by the voting-association cases in the *Anderson* line. What these cases have in common is the dominant party's adoption of rules that disadvantage voters supporting a non-dominant party or faction. Elected officials at the federal and state level almost always come to office through the nomination of their political party. Most voters register and vote as members of a party, while even independent voters tend to align with one major party or the other on a consistent basis.¹³¹ Party identity has become increasingly intense in the current age of hyperpolarized politics, not only among elected officials but also among voters.¹³²

To be sure, political parties are amorphous and multifarious entities, as political scientists have long understood. Over a half-century ago, V.O. Key characterized parties as comprising three distinct groups: the party-in-government, the party leadership, and the party-in-the-electorate.¹³³ Contemporary scholarship recognizes that it is even more complicated than that. A recent article by Joey Fishkin and Heather Gerken sums it up nicely: "[A] party today is best understood as a loose coalition of diverse entities, some official and

131. BRUCE E. KEITH ET AL., THE MYTH OF THE INDEPENDENT VOTER 4 (1992); PEW RESEARCH CTR., POLITICAL POLARIZATION IN THE AMERICAN PUBLIC: HOW INCREASING IDEOLOGICAL UNIFORMITY AND PARTISAN ANTI-PATHY AFFECT POLITICS, COMPROMISE AND EVERYDAY LIFE 18 (2014), <http://www.people-press.org/files/2014/06/6-12-2014-Political-Polarization-Release.pdf>.

132. There is vast literature on the subject of political polarization in the United States. For examples, see ALAN I. ABRAMOWITZ, THE DISAPPEARING CENTER: ENGAGED CITIZENS, POLARIZATION, AND AMERICAN DEMOCRACY (2010); Gary C. Jacobson, *Party Polarization in National Politics: The Electoral Connection*, in POLARIZED POLITICS: CONGRESS AND THE PRESIDENT IN A PARTISAN ERA (Jon R. Bond & Richard Fleisher eds., 2000); SOLUTIONS TO POLITICAL POLARIZATION IN AMERICA (Nathaniel Persily ed., 2015); SEAN M. THERIAULT, PARTY POLARIZATION IN CONGRESS (2008); Richard H. Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 CALIF. L. REV. 273, 276-81 (2011).

133. V.O. KEY, JR., POLITICS, PARTIES, AND PRESSURE GROUPS 163-65 (4th ed. 1958).

some not, organized around a popular national brand.”¹³⁴ Now more than ever, the major political parties are complex and fluid entities with lots of moving parts. Recognition of this reality does nothing to diminish the centrality of parties in organizing democratic politics and defining our political identities as citizens, voters, candidates, and officeholders. While party leadership may be weak, party attachment is stronger than ever.¹³⁵

Putting political parties at the center of the constitutional inquiry is therefore justified under both precedent and present-day reality. Equally important, a focus on political parties would also best capture the injury that underlies plaintiffs’ claims. The primary reason for concern with present-day restrictions on voting is that they are thinly disguised efforts at partisan manipulation, designed to help the dominant major party at the expense of its main competitor.¹³⁶ This is true not only of voter ID laws, but also restrictions on voter registration, early voting, and provisional voting that have since emerged as major issues. As the district judge in *Crawford* aptly put it, “[T]his is a partisan controversy that has spilled into the courts.” That is an accurate description of *Crawford* and many of the lower court cases since then. The lesson is not that courts should shy away from deciding such cases, but that they should directly address the partisan effects of the challenged practices. Their failure to do so is a direct consequence of forgetting the link between voting and associational rights.

For scholars and students of election law, the suggestion that constitutional litigation should be viewed through the prism of inter-party struggles may seem painfully obvious. The backdrop against which this litigation occurs, after all, is almost always a state’s dominant party enacting rules that make it more difficult for supporters of the opposing party to vote. Advocates of a “structural” approach to elections have long focused on barriers to fair competition,¹³⁷ while advocates of rights-based approaches also recognize the need for close judicial scrutiny of party-based discrimination.¹³⁸ While part of the backdrop, that is not how these cases have been litigated up until

134. Joseph Fishkin & Heather K. Gerken, *The Party’s Over: McCutcheon, Shadow Parties, and the Future of the Party System*, 2014 SUP. CT. REV. 175, 187 & n.45 (2014) (citing literature).

135. *Id.* at 183, 187.

136. See Samuel Issacharoff & Richard H. Pildes, *Epilogue: Bush v. Gore and the Constitutional Right to Vote* 7, 10 (N.Y. Univ. Sch. of Law Pub. Law & Legal Theory Research Paper Series, Working Paper No. 13-05, 2013), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2227062.

137. The leading example is the influential work of Issacharoff & Pildes, *supra* note 101.

138. Richard L. Hasen, *Race or Party?: How Courts Should Think About Republican Efforts to Make It Harder to Vote in North Carolina and Elsewhere*, 127 HARV. L. REV. F. 58, 70 (2014).

now. Litigants and courts have not focused directly on partisan disparate impact. Recognition of the associational rights implicated by voting cases would allow courts to focus on the real harm, the dominant political party disadvantaging supporters of its main rival.

My colleague Ned Foley has made a similar point, arguing that the constitutional inquiry should focus on whether voting rules are efforts at partisan manipulation.¹³⁹ But Professor Foley suggests that the *Anderson-Burdick* balancing be jettisoned entirely, favoring an approach that would expressly look to whether the challenged practice is “a ploy to achieve partisan advantage.”¹⁴⁰ I agree with his recognition of the underlying problem, though not with his proposed elimination of the established constitutional standard. Professor Foley’s new test suggests that courts focus on legislature’s partisan *intent*, while the clarification of the *Anderson-Burdick* I recommend would focus on partisan *impact*. My approach is more consistent with precedent, specifically the *Anderson-Burdick-Crawford* line of cases, which focus on effect rather than an intent to disadvantage political parties, while avoiding the difficulties that inevitably accompany intent- or purpose-based inquiries.¹⁴¹ It is also more practical. After all, partisan considerations are always—without exception—in play when political actors adopt a voting rule. Deciding how much of partisan purpose is too much is an impossible question. Perhaps most significant, Professor Foley’s proposed standard would put courts in the uncomfortable position of having to accuse the dominant party of partisan manipulation to find a constitutional violation. Judges may occasionally be willing to go out on this limb,¹⁴² but it is neither reasonable nor conducive to healthy inter-branch relations to require that they do so, even if it were a manageable inquiry.

An effects-based balancing standard, moreover, is better calibrated to address the competing interests that are almost invariably in play in cases involving burdens on the vote. On one side are the negative effects that a given practice will have on voters favoring a non-dominant party. The greater the disparate impact on voters affiliated with the non-dominant party, the stronger the State’s justification

139. Edward B. Foley, *Voting Rules and Constitutional Law*, 81 GEO. WASH. L. REV. 1836, 1861 (2013).

140. *Id.*

141. For an excellent analysis of the problem in a different context, specifically equal protection claims inquiring into whether race is the predominant factor in redistricting, see Daniel Hays Lowenstein, *You Don’t Have to Be Liberal to Hate the Racial Gerrymandering Cases*, 50 STAN. L. REV. 779 (1998).

142. A rare example is the dissenting opinion of Judge Evans from the Seventh Circuit’s decision upholding Indiana’s voter ID law in *Crawford v. Marion County Election Board*, 472 F.3d 949, 954 (7th Cir. 2007) (Evans, J., dissenting) (“Let’s not beat around the bush: The Indiana voter photo ID law is a not-too-thinly-veiled attempt to discourage election-day turnout by certain folks believed to skew Democratic.”).

should be. A refined version of the *Anderson-Burdick-Crawford* standard—one that puts partisan effects at the center of the analysis—is not only faithful to the voting-association precedents described in Part II, but it does the best job reconciling the competing interests involved in these cases. Balancing tests invariably involve some degree of indeterminacy, but not necessarily more than intent-based inquiries. The hard truth is that no bright-line rule will effectively address the concern with dominant parties adopting election laws that disadvantage their competitors. Any standard, whether focused on intent or effects, will be dependent on the evidence adduced in discovery and at trial, making it inherently difficult to predict the outcome in advance. That is as it should be. A balancing test that considers the disparate impact on voters favoring non-dominant parties will address this concern while taking into account the legitimate competing interests that voting cases implicate.

This is not to deny that other group associations may also be relevant under the *Anderson-Burdick* balancing standard. Of these, the most salient is race. That is partly because of the country's long and ugly history of racial exclusion, exemplified by the NAACP cases from which the right of association emerged.¹⁴³ While not formally a political party, the NAACP functioned like one in some respects, challenging the firm grip on power held by the dominant faction, the all-white Democratic Party. The exclusion of voters based on their race or ethnicity is not solely of historical concern. As Professor Charles has documented, race remains central to political identity today.¹⁴⁴ And minority voters, especially African Americans and Latinos, but also Asian Americans, lean strongly Democratic.¹⁴⁵ The Democratic voting preferences of most racial minorities provide a strong incentive for Republicans, when they control the levers of power, to improve their own electoral preferences by enacting laws that disproportionately exclude these groups. It is difficult—and practically meaningless—to ask whether race or party predominates where there is a high correlation between the two.¹⁴⁶ Elected officials of one party may very well be pursuing partisan ends by excluding minority voters who consistently support the other. While this phenomenon may seem most likely when Republicans are in power, it is at least conceivable that Democrats might also engage in such

143. See *supra* notes 24-27, 33-35 and accompanying text.

144. Charles, *supra* note 17, at 1232.

145. *Id.* at 1233-35; Hasen, *supra* note 138, at 62.

146. Hasen, *supra* note 138, at 61-62.

exclusion with respect to minority sub-groups that lean Republican.¹⁴⁷ Either way, the racially disparate impact of the law is relevant because it is closely related to its partisan effects.

On this point, I suggest a different emphasis than Professor Charles, the author of the most comprehensive analysis of the relationship between voting and associational rights to date. While Professor Charles emphasized racial identity as a basis for association,¹⁴⁸ I view parties as central because they are the primary associations through which we organize politically. This is not to deny that racially focused association groups (like the NAACP) are critical at certain places and times and may play a role very similar to parties. Nor is it to deny the possibility that the dominant racial group within a political party might try to diminish the clout of a minority racial group with the same party, warranting judicial intervention. But we no longer live in a world where racial minorities are excluded from political parties. The racial impact of a law is germane to its partisan intent and effect. In places with a high degree of racial polarization, the two are likely to be highly correlated. But the primary unit of analysis under the voting-association doctrine upon which this Article is focused should be party.

How would this play out in practice? The basic framework would be the same one that lower courts have applied since *Crawford*, requiring that the “character and magnitude” of the voting restriction be weighed against the “precise interest” proffered by the State. Courts would still consider the “magnitude” of the burden, including the number of voters affected and the degree to which each affected individual is burdened. The main difference would be an explicit recognition that a central component of the “character” of the burden is the impact on members of a non-dominant political party. For a voting rule adopted by Republicans, courts would look at its negative effect on Democratic voters; for a rule adopted by Democrats, courts would look at its negative effect on Republicans.¹⁴⁹ This question has

147. For example, Cuban Americans and Vietnamese Americans lean Republican, although by narrower margins in the last election. See Jens Manuel Krogstad, *After Decades of GOP Support, Cubans Shifting Toward the Democratic Party*, PEW RESEARCH CTR. (2014), <http://www.pewresearch.org/fact-tank/2014/06/24/after-decades-of-gop-support-cubans-shifting-toward-the-democratic-party/>; *New Findings: Asian American Vote in 2012 Varied by Ethnic Group and Geographic Location*, ASIAN AM. LEGAL DEF. & EDUC. FUND (Jan. 17, 2013), <http://aaldef.org/press-releases/press-release/new-findings-asian-american-vote-in-2012-varied-widely-by-ethnic-group-and-geographic-location.html>. It is also possible that Democrats in power might adopt voting practices that disproportionately exclude whites. Such cases are rare but not unheard of. See *United States v. Brown*, 561 F.3d 420 (5th Cir. 2009).

148. Charles, *supra* note 17, at 1231-39, 1279.

149. The latter category may seem less common, but there have been some instances in which Democrats have been accused of adopting rules that disadvantage Republicans. One example is Virginia's treatment of military and overseas voters during the 2008 election,

lurked in the background in post-*Crawford* voting rights cases, but plaintiffs have rarely put forward direct evidence of a disparate impact on voters associated with the non-dominant party. Under the *Anderson-Burdick* balancing standard, the larger the partisan disparity, the heavier the State's burden to justify the disparity. The analysis of state interests would be the same as under current law with fraud prevention, voter confidence, and administrative convenience among those that courts should consider. The more severe the burden—particularly its disparate impact on the non-dominant party—the heavier the State's burden of justification.

To this point, my consideration has been limited to the effect that revitalization of the voting-association link would have on election administration litigation. I close with a cautious suggestion regarding its potential impact on another highly contentious area of election law: partisan gerrymandering claims. In two cases last decade, a splintered Supreme Court rejected equal protection claims alleging excessive partisanship in drawing district lines.¹⁵⁰ In *Vieth v. Jubelirer*, four Justices would have rejected the claim as a nonjusticiable political question.¹⁵¹ The fifth vote to reject the claim was Justice Kennedy, who disagreed with the plurality's reasoning on the political question issue, but rejected the plaintiffs' proposed standard without specifying exactly what standard he thought should govern partisan gerrymandering claims.¹⁵² Justice Kennedy remained agnostic on the constitutional standard in *League of United Latin American Citizens v. Perry*,¹⁵³ joined on the fence by Chief Justice Roberts and Justice Alito.¹⁵⁴

Justice Kennedy's concurring opinion in *Vieth* contained the intriguing suggestion that the First Amendment might provide a more promising basis for these claims than the Equal Protection Clause.¹⁵⁵

which was challenged by John McCain's campaign. *McCain-Palin 2008 v. Cunningham*, ELECTION LAW @ MORITZ, <http://moritzlaw.osu.edu/electionlaw/litigation/mccain-palinv.cunningham.php> (last updated Mar. 23, 2011, 3:58 PM). Another is an Ohio case from the same election cycle, in which the Democratic Secretary of State declined to accept certain absentee ballot requests on a form provided by McCain's campaign. *State ex rel. Myles v. Brunner*, ELECTION LAW @ MORITZ, <http://moritzlaw.osu.edu/electionlaw/litigation/mylesv.brunner.php> (last updated June 29, 2011, 9:54 AM). Plaintiffs obtained relief in both cases, though not under the U.S. Constitution.

150. *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399 (2006); *Vieth v. Jubelirer*, 541 U.S. 267 (2004).

151. 541 U.S. at 267.

152. *Id.* at 306-17 (Kennedy, J., concurring).

153. 548 U.S. at 414 (Kennedy, J.).

154. *Id.* at 492 (Roberts, C.J., joined by Alito, J., concurring in part and dissenting in part).

155. 541 U.S. at 315; see also *Shapiro v. McManus*, No. 1:13-cv-03233-JKB, 2016 WL 4445320 (D. Md. Aug. 24, 2016) (three-judge court) (denying motion to dismiss partisan gerrymandering claim under the First Amendment).

He specifically mentioned several First Amendment cases burdening voters on the basis of party association including *Anderson*, suggesting a “pragmatic or functional assessment that accords some latitude to states.”¹⁵⁶ Commentary on Justice Kennedy’s suggestion has mostly been critical, questioning whether partisan motivations can ever be excised completely from redistricting.¹⁵⁷ But Justice Kennedy’s *Vieth* concurrence need not—and I think should not—be understood as requiring that redistricting be entirely free from partisan considerations any more than the *Anderson* line of cases requires that voting rules be entirely free from partisan considerations. He is better understood as suggesting that future partisan gerrymandering claimants focus on how great a burden the challenged plan imposes on the opposition, weighing that burden against the State’s proffered interests. Applying the *Anderson-Burdick-Crawford* balancing standard in the manner I have suggested here—with a special eye on the character and magnitude of the burden on non-dominant parties—might be the best approach to gerrymandering claims as well as barriers to the right to vote as such.

V. CONCLUSION

For almost a half-century, the Supreme Court has recognized the link between the First Amendment right to expressive association and the Fourteenth Amendment right to vote. In the *Anderson* line of cases, it transformed this recognition into a manageable doctrine, requiring courts to balance the burdens imposed by the challenged practice against the State’s asserted interests. At the heart of this inquiry is the extent to which the challenged rule has a disproportionate effect on non-dominant political parties and independent candidates. *Crawford* imported *Anderson*’s standard into the realm of election administration, without expressly recognizing its connection to the First Amendment right of association. The cost of losing the voting-association connection is to obscure the central question whether the challenged voting practice advantages the dominant party by impeding participation by those likely to support its main rival. The time has come to restore the severed link between the constitutional rights of voting and association. Doing so would not radi-

156. 541 U.S. at 315-16 (first citing *Eu v. S.F. Cty. Democratic Cent. Comm.*, 489 U.S. 214 (1989); then citing *Anderson v. Celebrezze*, 460 U.S. 780 (1983)).

157. Richard Briffault, *Defining the Constitutional Question in Partisan Gerrymandering*, 14 CORNELL J.L. & PUB. POL’Y 397, 407 (2005); Richard H. Pildes, *Foreword: The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 29, 58 (2004). But see David Schultz, *The Party’s Over: Partisan Gerrymandering and the First Amendment*, 36 CAP. U. L. REV. 1, 30 (2007) (arguing that partisan affiliation should not be considered in redistricting).

cally alter the existing constitutional standard, but it would focus litigants and courts on the right question.