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UNDERENFRANCHISEMENT: BLACK VOTERS AND THE PRESIDENTIAL NOMINATION PROCESS

In 1968, Hubert Humphrey secured the Democratic presidential nomination without entering any of the fifteen primary contests held that year. The notorious Chicago convention that culminated in Humphrey’s nomination revealed deep cleavages within the party over the Vietnam War and President Lyndon Johnson’s Great Society programs. Along with the televised havoc created by those cleavages, the convention was dogged by suspicions that party powerbrokers simply installed Humphrey at the top of the ticket and that his nomination did not accurately reflect popular preference. As disastrous as that convention may have been in the short term, however, it also spurred the party to make long-term, fundamental reforms that devolved power in selecting presidential nominees from party leaders to party members. Following the 1968 convention, the Democratic Party required every state to amend its rules governing delegate selection in ways that relinquished power to rank-and-file members. Some states had, of course, held presidential primaries or caucuses prior to the 1972 election, and sometimes those events actually had a discernible impact on the presidential nomination. Nonetheless, the reforms enacted in 1972 altered the very foundation of the presidential nomination process, elevating primaries and caucuses to a level of paramount importance.

That the process is more democratic as a result of these reforms is clear: it is now unthinkable that a presidential nominee could follow Humphrey’s lead and altogether avoid his party’s nomination events. The increased power that voters now exert over presidential nominees has not, however, been allocated equally among all voters. Iowa and

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3 See SHAFER, supra note 2, at 6.
4 See, e.g., JAMES W. DAVIS, PRESIDENTIAL PRIMARIES: ROAD TO THE WHITE HOUSE 3 (1980) (describing how John F. Kennedy’s victory in the 1960 West Virginia primary demonstrated that the Catholic Kennedy could find support among non-Catholic voters).
5 The term “nomination events” refers to both primaries and caucuses.
New Hampshire, which hold the first caucuses and primary of the presidential nomination season, respectively, exert disproportionately strong influence in selecting presidential nominees. This Note suggests that Iowa's and New Hampshire's undue influence — coupled with the low percentages of African Americans in those states — renders the presidential nomination system potentially vulnerable to legal action under the results test of section 2 of the Voting Rights Act, as the system provides blacks with "less opportunity than other members of the electorate to participate in the political process." In 2000, African Americans comprised 12.3% of the U.S. population, but just 2.1% of Iowa's and 0.7% of New Hampshire's. The negligible impact of black voters on the presidential nomination process is particularly stark in the Democratic Party, as blacks account for approximately twenty percent of Democratic votes cast in recent presidential elections. When one considers that Hispanics also account for about twelve percent of the total U.S. population and extremely low percentages in Iowa and New Hampshire, the discrepancy in political influence becomes all the more stark.

6 42 U.S.C. § 1973 (2000). The full text of section 2 reads as follows:
(a) 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 abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.
(b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section 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. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

8 See WILLIAM G. MAYER & ANDREW E. BUSCH, THE FRONT-LOADING PROBLEM IN PRESIDENTIAL NOMINATIONS 162 (2004). This Note concentrates on the Democratic Party because it is in this context that trends in African-American party identification most starkly reveal the power inequity in the presidential nomination process.
9 According to the 2000 U.S. Census, Hispanics make up 2.8% of the population in Iowa and 1.7% in New Hampshire. See IOWA PROFILE, supra note 7; NEW HAMPSHIRE PROFILE, supra note 7.
10 Admittedly, Hispanics do not vote for Democratic candidates in the same overwhelming percentages as do African Americans. Considering the sheer number of African Americans and
Political scientists,11 journalists,12 and even the occasional latenight comedian13 have bemoaned the racially unrepresentative composition of Iowa and New Hampshire.14 Yet legal observers have dedicated strikingly little attention to the presidential nomination system's racial inequities. The Supreme Court's concentration on redistricting disputes, which in turn shapes research agendas, explains much of this inattention. Furthermore, even the small amount of legal writing that does concentrate on the presidential nomination system either altogether ignores the modern racial dynamic15 or misunderstands how presidential primaries work in practice.16 This Note seeks to shift the Voting Rights Act's focus from local districts to the national stage, from electing black officials to realizing equal political participation.

By emphasizing nationwide political participation, this Note illustrates how the current presidential nomination system "underenfranchises"17 black voters in the Democratic Party. Part I establishes the unrivalled importance of Iowa and New Hampshire in the presidential

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11 See, e.g., MAYER & BUSCH, supra note 8, at 162.
13 Rob Corddry, a correspondent for The Daily Show, sarcastically addressed critics of New Hampshire's lack of diversity given its prominent position in the presidential election: "I'd like to point out to them [that] there are many shades of white people here . . . I saw a guy with a tan today . . . It's a melting pot — a creamy, creamy melting pot." “The Daily Show” Tunes In for the Push, UNION LEADER (Manchester, NH), Jan. 25, 2004, at A1, LEXIS, News Library, U.S. Newspapers File (second omission in original) (quoting Corddry) (internal quotation mark omitted).
14 The unrepresentative character of Iowa and New Hampshire extends beyond racial composition, as neither state contains a major metropolitan area. See MAYER & BUSCH, supra note 8, at 162.
16 See, e.g., Matthew M. Hoffman, The Illegitimate President: Minority Vote Dilution and the Electoral College, 105 YALE L.J. 935, 936 (1996) (“Although [black voters] often exert considerable influence in presidential primaries, their status as a racial minority ensures that, in the general election, their voices are frequently drowned out by the majority.” (emphasis added)). Hoffman is, in theory, correct: the absence of a winner-take-all system in presidential nomination contests should permit black voters to play an influential role in determining the Democratic nominee. As implemented, however, the racially unrepresentative character of Iowa and New Hampshire affords black voters considerably less influence on the process than Hoffman's statement suggests.
17 This Note coins this term in part to get beyond the "vote dilution" paradigm. The term "vote dilution" appears nowhere in section 2 of the Voting Rights Act and is coherent only if one concentrates on the instrumental (as opposed to the expressive) purpose of voting. See generally Heather K. Gerken, Understanding the Right to an Undiluted Vote, 114 HARV. L. REV. 1663 (2001). The term "underenfranchisement" better captures the injury inflicted by the current presidential primary, and better portends the coming battles in voting rights law.
nomination process and explains how past efforts to dislodge those states have proven ineffective. Part I further explores how the first-in-the-nation statutes in those states effectively "lockup" the presidential nomination process, making it a plausible target for judicial intervention. Part II acknowledges that the dominant framework for intervention — the Gingles vote dilution test — makes judicial action initially appear unlikely, but argues that Gingles's theoretical framework and section 2's core purpose support such action. Part III identifies the harm caused by a front-loaded process that begins in racially homogeneous states — a harm that is captured by neither the term "vote dilution" nor the term "disenfranchisement." Employing a term that describes the space between these two familiar concepts, Part III labels the expressive harm in the presidential nomination context one of "underenfranchisement." Part IV offers a brief conclusion. By identifying the actual injury caused by the racial inequities of Iowa's and New Hampshire's primacy, this Note highlights more systemic problems with the fundamentally antidemocratic nature of the current method of presidential nomination. Rather than speculating about potential remedies, however, this Note takes the initial step of revealing the inequitable distribution of influence in selecting presidential nominees. In doing so, this Note seeks to spark dialogue about the impact of race on presidential politics — a dialogue well worth beginning as Congress reconsiders the Voting Rights Act, currently set to expire in 2007.

I. THE STRANGLEHOLD OF IOWA AND NEW HAMPSHIRE

A. Distortion of the Presidential Campaign

The Iowa caucuses and New Hampshire primary profoundly influence the selection of the nation's leader, as those two states establish the tone for the presidential campaign. A candidate who achieves consecutive victories in these states establishes an aura of invincibility. Of the eighteen presidential nominees selected from 1972 through 2004, only two emerged from Iowa lower than second place. This trend does not imply, of course, that subsequent primaries serve merely as an echo chamber for Iowa and New Hampshire voters' prefer-

19 See Buell & Davis, supra note 1, at 6 ("Back-to-back wins in Iowa and New Hampshire can make a front-runner seemingly unstoppable, but a defeat in either place immediately raises grave questions about the candidate's future.").
20 See Stark, supra note 15, at 341. This Note presumes, as is nearly certain, that George W. Bush and John Kerry will accept the nominations of their respective parties at the 2004 conventions.
ences. Indeed, New Hampshire voters not infrequently favor a different candidate from the one whom a plurality of Iowans supported. Nonetheless, the ability to vote first in a staggered nomination system establishes the conventional wisdom that subsequent states must either confirm or reject.

Perhaps more important than Iowa's and New Hampshire's ability to produce frontrunners is their ability to exercise what is in essence a veto over the presidential bids of some candidates. As Washington Post columnist David Broder contends, "what happens in Iowa and New Hampshire is more than conversation; it's an elimination contest." This veto power is arguably most pronounced with respect to those candidates who hail from the Midwest and perform poorly in Iowa or those who hail from the Northeast and perform poorly in New Hampshire. In the quest for the 2004 Democratic nomination, for instance, despite having secured impressive labor endorsements and having previously run a credible presidential bid, U.S. Representative Gephardt of Missouri felt compelled to exit the campaign after the voters of neighboring Iowa demonstrated only lukewarm support for his candidacy.

In addition to this veto power, Iowa's and New Hampshire's primacy in the nomination system distorts the content of the debate among presidential hopefuls. The racial homogeneity of the early-voting states, along with their lack of a major metropolitan area, establishes a domestic agenda that often overlooks issues that strongly affect African Americans. Although candidates are all but forced to support family farm subsidies as a sop to Iowans and to support various pork projects for New Hampshirites, black voters have few opportunities to extract similar commitments. As a result of the agenda-setting function of Iowa and New Hampshire, candidates pay minimal

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21 It is worth remembering, after all, that U.S. Senator Edmund Muskie emerged victorious from the 1972 Iowa caucuses and yet did not secure the Democratic nomination. See SHAFER, supra note 2, at 3.

22 A candidate need not necessarily win either of those states to become the frontrunner, as the media and donors calibrate their electoral expectations according to the geographic proximity of the candidate's home state to Iowa or New Hampshire.

23 It seems possible to develop a mathematical model to determine how the value of a vote decreases with each successive stage of the presidential nomination process. Cf. John F. Banzhaf III, One Man, 3.312 Votes: A Mathematical Analysis of the Electoral College, 13 VILL. L. REV. 304, 306 (1968) (contending that "the current Electoral College system falls short of even an approximation of equality in voting power" because "a voter in New York State has 3.312 times the voting power of a citizen in another part of the country").


26 One could imagine Democratic candidates courting black voters by, for example, decrying mandatory minimum sentences for nonviolent drug offenders, or by promising to earmark funds for urban locales in an effort to enact a domestic Marshall Plan.
attention at the outset of their campaigns to issues that particularly affect black citizens. Even presidential candidates setting out to make race a principal issue can effectively be silenced on racial matters by the overwhelmingly white early-voting electorate. For example, when U.S. Senator Bill Bradley announced his presidential candidacy in 1998, he trumpeted the central role that race would play in his campaign. During the ensuing campaign season, however, Bradley dedicated little time to addressing racial issues, presumably because doing so would not have appealed to many voters in Iowa and New Hampshire.

B. Iowa's and New Hampshire's Struggle To Maintain Primacy

Iowa and New Hampshire have maintained their primacy not because other states willingly defer, but because their legislatures have passed statutes requiring them to kick off the caucus and primary season. When other states have attempted to displace them, the pair have tenaciously (and successfully) fended off competitors by wielding the influence garnered by their traditional first-in-the-nation status, which allows them to lure major candidates away from interloping states and to monopolize media coverage.

Political scientist Emmett Buell has ably detailed the most rancorous of these challenges, which occurred in the period leading up to the

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27 This lack of Democratic attention to African Americans is all the more striking because it contravenes the conventional wisdom that candidates play to the party’s base during the nomination season and move toward the center during the general election.


29 See MAYER & BUSCH, supra note 8, at 163 (“The principal reason [Bradley] did not talk much about race was that he did so much of his early campaigning in Iowa and New Hampshire, two states with almost no black residents.”).

30 IOWA CODE ANN. § 43.4 (West 1999) (“The date [of the caucuses] shall be at least eight days earlier than the scheduled date for any meeting, caucus or primary which constitutes the first determining stage of the presidential nominating process in any other state ...”); N.H. REV. STAT. ANN. § 653:9 (Michie 1996) (“The presidential primary election shall be held on the second Tuesday in March or on the Tuesday at least 7 days immediately preceding the date on which any other state shall hold a similar election, whichever is earlier ...”).

1984 presidential campaign.\textsuperscript{32} When the national Democratic Party announced in early 1983 that it intended to schedule New Hampshire’s primary on the same day as Vermont’s, New Hampshire’s elected officials charged that this plan violated state law and threatened state tradition.\textsuperscript{33} Forming a coalition,\textsuperscript{34} New Hampshire and Iowa risked party sanctions to hold their events first and thus avoid sharing the political spotlight with other states. After the two states announced that they intended to override the national party’s schedule, presidential candidates — not surprisingly — proved unwilling to alienate voters in these crucial states for the sake of abiding by party rules.\textsuperscript{35} In its staring contest with Iowa and New Hampshire, the Democratic Party blinked first and sanctioned neither the states nor their delegates to the 1988 convention. Buell concludes his analysis with a pessimistic prediction that, regrettably, has proved all too prescient: “Regardless of what [nomination] process evolves, . . . Iowa and New Hampshire will probably do all in their power to remain first-in-the-nation.”\textsuperscript{36}

Advocates of Iowa’s and New Hampshire’s primacy typically cite three principal benefits of the current order. First, advocates of the current system stress the value of having candidates compete in states with relatively small populations, where politicians are forced to engage in “retail politics” by providing voters with an opportunity to take the measure of the candidates. Having a highly populated state like New York or California host the initial events, advocates argue, would deny voters a chance to look candidates in the eye, as presidential nomination contests would largely degenerate into media wars. Second, advocates claim that the small populations of the initial states afford nonfrontrunner candidates a meaningful opportunity to win the nomination even if they have not amassed a sizable war chest. The thinking here is that long-shot candidates would be longer-shots still if frontrunners had the luxury of saturating major media markets with commercials. Third, rather than viewing the repeat-player status of Iowa and New Hampshire as a liability, advocates of the current system extol the value of tradition,\textsuperscript{37} contending that the attention candidates lavish on voters every election cycle results in an unusually sophisticated and savvy electorate. If less informed citizens sifted


\textsuperscript{33} See id. at 339.

\textsuperscript{34} Maine was also a part of the coalition because it sought to hold its caucuses on a day that fell outside of the window approved by the national Democratic Party. \textit{See id.} at 326.

\textsuperscript{35} \textit{See id.} at 327-28.

\textsuperscript{36} \textit{Id.} at 342.

\textsuperscript{37} New Hampshire has held the first presidential primary since 1920; Iowa has held the first caucuses of any consequence since 1972. \textit{MAYER & BUSCH, supra} note 8, at 160.
through the candidates, advocates contend, the surviving candidates may not be as qualified.

These justifications for the current nomination system prove too much. Neither of the first two arguments for the status quo is specific to Iowa and New Hampshire; indeed, both arguments would be applicable to any state that has a relatively small population. Although it is true that no state provides a perfect microcosm of the United States, several other states have the benefit of a small population without being racially homogeneous. Similarly, the argument that Iowans and New Hampshirites are unusually sophisticated and savvy voters — in addition to perhaps being racially coded — fails to prove that other voters would be incapable of fulfilling such a role. If voters in Iowa and New Hampshire are more sophisticated, they are so by virtue of the experience of having presidential candidates quadrennially lavish attention on them. At best, this is an argument for the value of primacy in general, not for the primacy of New Hampshire and Iowa in particular. Indeed, other states should be permitted to partake in the civic invigoration that accompanies primacy in the presidential nomination process, an invigoration that is currently reserved exclusively for the citizens of two sparsely populated, racially unrepresentative states.

C. Lockup: The Case for Judicial Intervention

Reform of the presidential nomination system would preferably come directly from the national Democratic Party or through the political process. In the past, however, such efforts have proven unsuccessful. Following the 1984 confrontation noted above, for instance, Iowa and New Hampshire secured an agreement from the national Democratic Party enabling those states to hold their nomination events first, without interference from other states. As the 1988 election year approached, however, Minnesota and South Dakota attempted to circumvent the agreement, scheduling their primaries to coincide with New Hampshire’s intended date. After the national Democratic

38 Iowa’s total population (2.9 million) is much larger than Delaware’s (783,600) and comparable to Connecticut’s (3.4 million) and South Carolina’s (4.0 million). In contrast to Iowa’s low percentage of African Americans (2%), however, these other states have significantly higher percentages: Delaware (19%), Connecticut (9%), and South Carolina (29%). IOWA PROFILE, supra note 7, at 2; U.S. CENSUS BUREAU, U.S. DEP’T OF COMMERCE, CONNECTICUT: 2000: CENSUS 2000 PROFILE 2 (2002); U.S. CENSUS BUREAU, U.S. DEP’T OF COMMERCE, DELAWARE: 2000: CENSUS 2000 PROFILE 2 (2002); U.S. CENSUS BUREAU, U.S. DEP’T OF COMMERCE, SOUTH CAROLINA: 2000: CENSUS 2000 PROFILE 2 (2002).

39 See Buell & Davis, supra note 1, at 5.

40 See id.
Party proved unable to convince the would-be interlopers to abandon the date, New Hampshire moved its primary up one week.\footnote{See id. This shift prompted Iowa, too, to reschedule its primary so that it could, consistent with its statute, hold its caucuses eight days before any other nominating event. See id.}

More recently, the 1996 presidential campaign presented significant threats to the primacy of Iowa and New Hampshire, but both states emerged with their first-in-the-nation status intact. Even though Alaska and Louisiana held their Republican caucuses before Iowa’s, the media continued to regard the old stalwart as the first significant voting indicator of the presidential nomination process,\footnote{RHODES COOK, THE PRESIDENTIAL NOMINATING PROCESS: A PLACE FOR US? 95 (2004) (describing how the media largely failed to take notice of the caucuses that preceded Iowa’s). Buell and Davis describe a similar phenomenon that occurred during the 1988 GOP caucuses: “Even though Republican caucuses in Michigan, Hawaii, and Kansas preceded those in Iowa (the Michigan process began in August 1986), the news media clearly regarded Iowa’s precinct caucuses as the first real test of the 1988 nominating process.” Buell & Davis, supra note 1, at 5.} thereby curtailing the influence of the Alaska and Louisiana caucuses on the electorate. On the primary front, meanwhile, when Delaware scheduled its 1996 primary to fall only four days after New Hampshire’s, the Granite State’s governor charged that Delaware’s lack of deference represented nothing less than an “attack on the people of New Hampshire and the tradition of the political primary system in this nation.”\footnote{Richard L. Berke, Arizona Moves Up Its Primary To Catch Political Limelight, N.Y. TIMES, Jan. 30, 1995, at A10 (internal quotation mark omitted).} In addition to affecting these histrionics, New Hampshire convinced most of the presidential candidates to skip Delaware’s primary altogether.\footnote{Id. Although most presidential candidates did not actively campaign in Delaware, the ballot in that state nonetheless included the names of all candidates who received federal matching funds. Still, New Hampshire construed Delaware’s primary as insufficiently “similar” to its own later primary and therefore could avoid rescheduling without contravening its own statute. See id.}

Given the inefficacy of these self-help and congressional reform efforts, judicial intervention may well be the most promising alternative. Although the Court has long expressed reluctance about entering what Justice Frankfurter famously dubbed the “political thicket,”\footnote{Colegrove v. Green, 328 U.S. 549, 556 (1946) (plurality opinion).} it has historically been willing to intervene when two conditions are met: when intervention is necessary to correct deprivations of political power that cut along racial lines and when the political market malfunctions. The current presidential nomination system presents an instance in which these two considerations converge, making the prospect of judicial intervention promising.

Of particular importance here is the current system’s antidemocratic elements, a glaring example of which is the severely limited in-
fluence of black voters in selecting presidential nominees. Despite constituting a substantial portion of the national population, black voters are severely underrepresented in the state electorates that exert the most influence on presidential nominations. Moreover, having input on the Democratic nominee is the most vital part of the process for African Americans, as they are likely to vote for the Democratic nominee in large numbers, regardless of who he or she is.46 This uneven influence is problematic not only from the standpoint of participatory democracy,47 but also from the standpoint of influence — that is, the current nomination system deprives blacks and other racial minorities of a substantial voice in the selection of the Democratic nominee and impairs their ability to shape the nominee's agenda.

Viewed through the lens of the marketplace — a form of analysis championed by Professors Samuel Issacharoff and Richard Pildes48 — Iowa and New Hampshire have essentially monopolized the most important aspects of the presidential nomination process. Building on the process-based theories of Professor John Hart Ely,49 Issacharoff and Pildes argue that it is appropriate to view “democratic politics as akin in important respects to a robustly competitive market — a market whose vitality depends on both clear rules of engagement and on the ritual cleansing born of competition.”50 Although buying into the market metaphor wholesale makes for an impoverished view of democracy,51 Issacharoff and Pildes accurately note that the judiciary is most willing to intervene to combat anticompetitive political structures. The state statutes that confer first-in-the-nation status on Iowa and New Hampshire should be viewed by the judiciary as impermissibly locking up the presidential nomination system. Given the racial composition of these states, their monopolization of the system essentially ignores the votes of the black electorate.

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46 See supra p. 2319.
49 See JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 117 (1980) (“[U]nblocking stoppages in the democratic process is what judicial review ought preeminently to be about, and denial of the vote seems the quintessential stoppage.”).
50 Issacharoff & Pildes, supra note 48, at 646.
51 For a thoughtful critique of Issacharoff and Pildes that argues that the value of the market metaphor can be overstated, see Pamela S. Karlan, Politics by Other Means, 85 VA. L. REV. 1697 (1999).
The archetypal instances of judicial intervention in the context of market failure, according to Issacharoff and Pildes, arose in the disputes known as the White Primary Cases. In these cases, which originated in Texas, the Supreme Court invalidated a series of increasingly elaborate schemes designed to prevent blacks from casting ballots in the primary contests that, for all practical purposes, determined the winner of the general election. In Terry v. Adams, the last of the White Primary Cases, the Court noted that "no election machinery could be sustained if its purpose or effect was to deny Negroes on account of their race an effective voice in the governmental affairs of their country, state, or community." The Democratic primary and the general election, the Court reasoned, were "no more than the perfunctory ratifiers" of the choices made during the white primaries. This perfunctory ratification left blacks with "an empty vote cast after the real decisions [were] made." Issacharoff and Pildes contend that the White Primary Cases have become "untouchable icons in the legal world." Given the iconic status of those cases, it is odd that many citizens remain unaware of the problems that currently diminish black input in the presidential nomination process. The theme sounded in Terry — focusing on "voice" and influence in addition to the mere casting of ballots — has been echoed in more recent Supreme Court decisions. Yet the modern presidential nomination system effectively mutes the voices of black voters, severely limiting their participation in the political process.

Consequently, the lockup that Issacharoff and Pildes identify in the White Primary Cases persists today, albeit in an admittedly less overt form. To be sure, unlike in Texas during the White Primary era, the

53 345 U.S. at 461.
54 Id. at 466 (plurality opinion). Justice Black's controlling opinion in Terry spoke for an unusually fractured Court, and both Justice Frankfurter and Justice Clark wrote concurring opinions that focused on locating a conceptual peg on which to base a finding that the Jaybird primary constituted state action. See id. at 470-77 (opinion of Frankfurter, J.); id. at 477-84 (Clark, J., concurring). In dissent, Justice Minton argued that the Jaybirds's actions made them merely an unusually effective interest group and could not properly be conceived of as state action. Id. at 484-94 (Minton, J., dissenting).
55 Id. at 469 (plurality opinion).
56 Id. at 484 (Clark, J., concurring).
58 See, e.g., Georgia v. Ashcroft, 123 S. Ct. 2498, 2511 (2003) (trumpeting the importance of "influence" in electoral districts); Davis v. Bandemer, 478 U.S. 109, 132 (1986) (plurality opinion) ("The power to influence the political process is not limited to winning elections."); see also Johnson v. De Grandy, 512 U.S. 997, 1020 (1994) (focusing on the voters' duty "to pull, haul, and trade to find common political ground").
Democratic Party today faces intense competitive pressure from the Republican Party to produce a viable candidate for the general election. These competitive pressures are ineffective, however, as Iowa and New Hampshire play the Democratic and Republican parties off of each other by arguing that whichever party challenges the order of nomination events will lose subsequent elections. Just as Texas once prevented Negroes from casting meaningful ballots in its elections, Iowa’s and New Hampshire’s stranglehold on the presidential nomination system prevents the overwhelming majority of African Americans from casting ballots at the most meaningful stage of the process. In sum, the absolutely all-white primary of yesteryear has metamorphosed into the nearly all-white primary of today.

II. THE APPLICATION OF SECTION 2 TO THE NATIONAL NOMINATION SYSTEM

Section 2 provides that members of protected groups must not “have less opportunity than other members of the electorate to participate in the political process.” Before addressing the substantive provisions of section 2, it is essential to establish how the Democratic National Committee’s actions might be construed to fulfill section 2’s state action requirement. The Court has never specifically addressed whether conduct of the national parties constitutes state action under the Voting Rights Act or the Reconstruction Amendments. Indeed, the Court has twice explicitly reserved judgment on this issue. Nonetheless, if the Court is willing to view a state Republican Party as a state actor, as it has done recently, it follows that the national Democratic Party — which can plausibly be viewed as an aggregation of the state parties — could be conceived of as a state actor. The U.S. Court of Appeals for the D.C. Circuit deployed this transitive reasoning in Bode

60 Alternatively, one could argue that section 2 applies directly to Iowa’s and New Hampshire’s primacy statutes. First, Iowa and New Hampshire, acting through their legislatures in adopting these statutes and through their executives in enforcing them, have clearly engaged in state action. Second, section 2 outlaws the abridgment of the right to vote “of any citizen of the United States.” Id. The statute thus seems to contemplate the possibility of a state abridging the voting rights of another state’s residents rather than the rights of its own residents.
61 See Cousins v. Wigoda, 419 U.S. 477, 483 n.4 (1975) (leaving open the question “whether the decisions of a national political party in the area of delegate selection constitute state or governmental action”); O’Brien v. Brown, 409 U.S. 1, 4–5 (1972) (per curiam) (expressing reservation about intervening in the internal affairs of political parties). To be sure, judicial intervention in the presidential nomination process would need to grapple with the freedom of association protections of the First Amendment that the Court sometimes extends to political parties. Such concerns, however, extend beyond the scope of this Note. Suffice it to say for present purposes that it is far from clear that courts would find that the First Amendment rights trump the countervailing interests at stake.
v. National Democratic Party\textsuperscript{63} by holding that “if the action of the individual state parties in selecting delegates to participate in the presidential-nominating process constitutes state action, the collective activity of all the states’ delegates at the national convention can be no less readily classified as state action.”\textsuperscript{64} Indeed, pressure from the Iowa and New Hampshire state parties exerts a strong influence over the national parties’ ordering of presidential nomination events.\textsuperscript{65}

Aside from having the Democratic National Committee satisfy the state action requirement, an additional hurdle stands in the way of applying section 2 analysis to the nomination system. Over the last two decades, the Court’s section 2 analysis has strayed from multifarious applications and become increasingly synonymous with the three-pronged test for determining vote dilution that the Court announced in \textit{Thornburg v. Gingles}.

The \textit{Gingles} test is a set of three mechanically applied factors for determining whether cognizable vote dilution has occurred in a multimember district. First, plaintiffs charging vote dilution must form a racial minority group that “is sufficiently large and geographically compact to constitute a majority in a single-member district.”\textsuperscript{67} Second, the racial minority in question must demonstrate “that it is politically cohesive.”\textsuperscript{68} Third, the racial minority must show “that the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority’s preferred candidate.”\textsuperscript{69} The \textit{Gingles} test, therefore, premises the finding of harm on the availability of a remedy, which has traditionally been defined as the possibility of creating a single majority-minority district.

The \textit{Gingles} test provided some much-needed clarity to lower courts, which had previously employed the nebulous “totality of the circumstances” test in section 2 cases.\textsuperscript{70} Indeed, the factors have

\textsuperscript{63} 452 F.2d 1302 (D.C. Cir. 1971).
\textsuperscript{64} Id. at 1304 (quoting \textit{Georgia v. National Democratic Party}, 447 F.2d 1271, 1275 (D.C. Cir. 1971)).
\textsuperscript{65} \textit{See}, e.g., Spencer S. Hsu, \textit{D.C.'s Early Primary Attracts Its First Voters}, WASH. POST, Dec. 30, 2003, at B1 (“At the demand of Democrats in Iowa and New Hampshire, the national party has refused to sanction any official effort to preempt those states' first-in-the-nation caucus and primary, Jan. 19 and Jan. 27, respectively.”).
\textsuperscript{66} 478 U.S. 30 (1986).
\textsuperscript{67} Id. at 50.
\textsuperscript{68} Id. at 51.
\textsuperscript{69} Id.
proven so magnetic that it has become unusual to bring section 2 claims that fall outside the scope of Gingles.\textsuperscript{71} This trend is problematic because Gingles's "geographic compactness" requirement, which has evoked the ire of critics as applied even to local districts,\textsuperscript{72} is absolutely meaningless in the context of the nationwide presidential election. It is crucial to remember, however, that section 2 as amended in 1982 was designed to address (and has invalidated) a range of political practices that extend well beyond vote dilution and redistricting claims.

The inapplicability of the specific factors outlined in Gingles should not be taken to mean that the opinion — or the Voting Rights Act generally — offers no grounds for toppling Iowa's and New Hampshire's primacy. Rather than fixating exclusively on the multimember district context of Gingles, courts should focus on the theoretical framework that animated the opinion. In both the majority opinion and his own separate opinion, Justice Brennan counselled that section 2 requires a "functional" approach.\textsuperscript{73} Adopting a functional approach in the presidential nomination context would require jettisoning the "geographic compactness" component, focusing instead on the textual core of section 2: equal participation in the political process.\textsuperscript{74} Gingles located an injury by determining the circumstances under which a majority-minority district can be drawn. But vote dilution is not the injury at

\textsuperscript{71} See J. Morgan Kousser, Colorblind Injustice: Minority Voting Rights and the Undoing of the Second Reconstruction 343 (1999) (labeling the Gingles test "the fulcrum of voting rights cases").

\textsuperscript{72} See, e.g., Pamela S. Karlan, Maps and Misreadings: The Role of Geographic Compactness in Racial Vote Dilution Litigation, 24 HARV. C.R.-C.L. L. REV. 173, 174 (1989) ("The courts often focus on geography as if it were more than a means of providing representation, and they ignore effective access to the political process"); see also Lani Guinier, The Tyranny of the Majority: Fundamental Fairness in Representative Democracy 127-29 (1994) (arguing that geographically based representation — though deeply rooted in history — will not accurately reflect the preferences of all voters within that district).

\textsuperscript{73} See, e.g., Gingles, 478 U.S. at 48 n.15 ("Under a 'functional' view of the political process mandated by § 2 . . ."); id. at 66 (opinion of Brennan, J.) ("A test for racially polarized voting that denies the fact that race and socioeconomic characteristics are often closely correlated permits neither a practical evaluation of reality nor a functional analysis of vote dilution."); id. at 73 ("All that matters under § 2 and under a functional theory of vote dilution is voter behavior, not its explanations.").

The functional approach in voting rights cases — if not the terminology — stretches at least as far back as Terry v. Adams, 345 U.S. 461 (1953). Writing for himself and two other Justices, Justice Black adopted the functional view in finding that the Jaybird primary satisfied the state action requirement: "When it produces the equivalent of the prohibited election, the damage has been done." Id. at 469 (plurality opinion).

\textsuperscript{74} Although section 2's text does not contain the words "vote dilution," it does say that it is designed to address situations that extend protected classes "less opportunity than other members of the electorate to participate in the political process." 42 U.S.C. § 1973(b) (2000).
issue in the presidential nomination system — rather, that injury is underenfranchisement, which is analytically distinct from the injury in Gingles but could nonetheless be construed to fit into section 2's framework. By looking beyond the descriptively representative goal of electing minority officials\textsuperscript{75} and instead taking a cue from the Court's recent emphasis on electoral influence,\textsuperscript{76} courts could interpret the Voting Rights Act as remedying a harm on the national level.

III. A NEW EXPRESSIVE HARM: THE PRESIDENTIAL NOMINATION SYSTEM AS UNDERENFRANCHISEMENT

A. Underenfranchisement Defined

The term "underenfranchisement" attempts to describe the space between disenfranchisement, on the one hand, and vote dilution, on the other. Although many scholars believe that the line between the two concepts can be drawn cleanly,\textsuperscript{77} historian J. Morgan Kousser contends that "disenfranchisement and vote dilution are not pure concepts. They not only merge into each other, they are complementary, each increasing the other's force . . . ."\textsuperscript{78} Whereas disenfranchisement and

\textsuperscript{75} See Lani Guinier, Voting Rights and Democratic Theory — Where Do We Go from Here?, in CONTROVERSIES IN MINORITY VOTING: THE VOTING RIGHTS ACT IN PERSPECTIVE 283, 283 (Bernard Grofman & Chandler Davidson eds., 1992) ("The strategy of voting rights litigation, preoccupied as it has been with creating districts in which black representatives can be elected, has traded genuine protection of minority rights for a claim of fairness based on electing a few minorities simply to promote an ideal of descriptive representation.").

\textsuperscript{76} See Georgia v. Ashcroft, 123 S. Ct. 2498, 2512 (2003) ("[A] court must examine whether a new plan adds or subtracts 'influence districts' — where minority voters may not be able to elect a candidate of choice but can play a substantial, if not decisive, role in the electoral process."); see also Terry, 345 U.S. at 469-70 (plurality opinion) (finding that the primary system "strip[ped] Negroes of every vestige of influence in selecting [elected] officials").

\textsuperscript{77} See, e.g., 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, at 21, 22 (Chandler Davidson & Bernard Grofman eds., 1994) ("The distinction between disfranchisement and dilution can be made as follows. Disfranchisement prohibits or discourages a group from voting — for example, through making it difficult to register, intimidating would-be voters from entering the polling booth, declaring ballots invalid for specious reasons, stuffing the ballot box, or inaccurately tallying votes. Dilution, on the other hand, can operate even when all voters have full access to the polling place and are assured that their votes will be fairly tallied.").

\textsuperscript{78} J. Morgan Kousser, The Voting Rights Act and the Two Reconstructions, in CONTROVERSIES IN MINORITY VOTING: THE VOTING RIGHTS ACT IN PERSPECTIVE, supra note 75, at 135, 174. Kousser explains:

The white primary, for instance, formally disfranchised no one. Blacks could, under its rules, register and vote freely in the general election. What it did was to debase their suffrage, to dilute it, by banning them from having a chance to influence the outcome in the only election that mattered, just as at-large elections in areas with racially polarized voting patterns do.
vote dilution both have shortcomings in describing the current racial voting dynamic, underenfranchisement combines the concepts behind these two terms to describe a voting rights injury that particularly affects African Americans in the modern era. The term disenfranchise-ment is descriptively lacking because blacks are no longer regularly disenfranchised on racial grounds. Although black votes continue to be diluted, however, the Court has shown little enthusiasm for dilution claims in recent years. In addition, the term "vote dilution" is mired in the instrumental approach to voting, which concentrates on the tangible impact of a vote. The theory of underenfranchisement, in contrast, reflects an expressive and constitutive view of voting that concentrates on the more symbolic dimensions of a vote.

Groups of voters are underenfranchised, then, when they are differentially prevented from participating in the political process, regardless of whether their votes would otherwise have had a decisive impact on the election. Given this definition, underenfranchisement could be applied to many troubling aspects of black suffrage, including the disenfranchisement of felons, a disproportionate number of whom are racial minorities. Similarly, claims challenging high rates of voting equipment malfunction could also be understood as underenfranchisement claims, as many older voting machines (which tend to mal-

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Id.; see also Gomillion v. Lightfoot, 364 U.S. 339, 349 (1960) (Whittaker, J., concurring) (arguing that the majority was mistaken in using the Fifteenth Amendment to strike down Tuskegee's redistricting scheme, as blacks had not actually been disenfranchised).


80 The framework established in Gingles views black votes as being diluted only if racial bloc voting occurs and a minority of black voters are consistently overwhelmed by a white majority. See supra p. 2330.

81 See Ellen D. Katz, Race and the Right To Vote After Rice v. Cayetano, 99 Mich. L. Rev. 491, 512–14 (2000) (distinguishing the expressive value of voting, which stems from being fully included in the political community, from the constitutive value of voting, which stems from the self-identification inherent in exercising the franchise).

82 See 42 U.S.C. § 1973(b) (2000) (providing that African Americans cannot "have less opportunity than other members of the electorate to participate in the political process").

83 See Farrakhan v. Washington, 338 F.3d 1009, 1020 (9th Cir. 2003) (holding that "racial bias in the criminal justice system may very well interact with voter disqualifications to create the kinds of barriers to political participation on account of race that are prohibited by Section 2"). But see Farrakhan v. Washington, No. 01-35032, 2004 WL 343523, at *2, *6 (9th Cir. Feb. 24, 2004) (Kozinski, J., dissenting from denial of rehearing en banc) (arguing that "statistical disparities [are] not enough to establish vote denial under section 2" and that "extending the VRA to reach felon disenfranchisement laws . . . seriously jeopardizes its constitutionality" (citing Smith v. Salt River Project Agricultural Improvement & Power District, 109 F.3d 586, 595 (9th Cir. 1997))).
function more frequently) can be found in poor areas with high percentages of racial minorities.\textsuperscript{84}

Applying underenfranchisement to the presidential nomination process helps to elucidate the term. African Americans cannot be said to be disenfranchised in the presidential nomination process, as neither Iowa nor New Hampshire turns away black residents from the polls on the basis of their skin color. Nonetheless, very few African Americans are eligible to cast ballots in those all-important contests — an unfortunate circumstance that has the effect of muting black voices in the nomination process. Using the expressiveness of underenfranchisement rather than the instrumentality of vote dilution makes it irrelevant whether the preferences of African Americans diverge completely from or align perfectly with white preferences for particular presidential nominees. Rather, the very fact that a disproportionately small percentage of blacks are eligible to vote during the early, vital stages of the presidential nomination process constitutes the underenfranchisement injury.

\textbf{B. Analyzing Underenfranchisement Under Section 2}

The current method of selecting Democratic presidential nominees constitutes an expressive harm to African Americans. In \textit{Shaw v. Reno},\textsuperscript{85} the Supreme Court invalidated a majority-minority district that roughly traced the path of an interstate highway because its boundaries betrayed what the Court viewed as the legislature's impossibly excessive attention to the racial composition of its districts. Writing for the majority, Justice O'Connor stated "that we believe that reapportionment is one area in which appearances do matter."\textsuperscript{86} Reapportionment plans that fixate on the electorate's racial composition, she explained, and that appear to ignore traditional districting criteria such as compactness, "bear[] an uncomfortable resem-

\textsuperscript{84} Cf. Southwest Voter Registration Educ. Project v. Shelley, 344 F.3d 882 (9th Cir. 2003) (reversing the district court's denial of preliminary injunction and enjoining California's gubernatorial recall election on the ground that plaintiffs demonstrated a likelihood of success on the merits of their claim alleging that statistical disparities in voting technology violated the Equal Protection Clause, without addressing plaintiffs' section 2 claim), \textit{rev'd en banc}, 344 F.3d 914 (9th Cir. 2003). In reversing the case \textit{en banc}, the Ninth Circuit noted that although plaintiffs' section 2 claim was "stronger" than their equal protection claim, "[t]here was significant dispute in the record ... as to the degree and significance of the disparity," which precluded a finding of a strong likelihood of success on the merits. \textit{Shelley}, 344 F.3d at 918–19. See generally Spencer Overton, \textit{A Place at the Table: Bush v. Gore Through the Lens of Race}, 29 FLA. ST. U. L. REV. 469 (2001) (arguing that racial disparity in the voting context conveys an expressive harm of exclusion that may cause democratic instability).

\textsuperscript{85} 509 U.S. 630 (1993).

\textsuperscript{86} \textit{Id.} at 647.
blance to political apartheid.” Justice O’Connor warned against such plans by further deploying charged language: “Racial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions; it threatens to carry us further from the goal of a political system in which race no longer matters.”

Professors Richard Pildes and Richard Niemi argue that the harms articulated in Shaw v. Reno can be understood only as making “expressive harms” constitutionally cognizable in the reapportionment context. Pildes and Niemi define an expressive harm as “one that results from the ideas or attitudes expressed through a governmental action, rather than from the more tangible or material consequences the action brings about. On this view, the meaning of a governmental action is just as important as what the action does.” Thus, when Justice O’Connor worried about “[t]he message that such [gerrymandered] districting [sent]” in Shaw, she articulated an archetypal conception of expressive harm.

Professors Pildes and Niemi’s seminal article, in its effort to explain the Court’s jurisprudence, has in turn shaped the Court’s views and vocabulary. In the wake of Pildes and Niemi’s Shaw exegesis, various Justices have explicitly adopted the “expressive harms” approach in voting rights cases. In Bush v. Vera, for instance, Justice O’Connor’s plurality opinion invoked “expressive harms” in explaining why the usage of race as the predominant factor in drawing district lines rendered the plan subject to strict scrutiny. Dissenting in Vera, moreover, Justice Souter contended that the injury in Shaw “is probably best understood as an ‘expressive harm.’”

C. Reclaiming the Expressiveness Paradigm

Although the invocation of expressive harms has thus far worked to prevent African Americans from gaining more political power, the presidential nomination system illustrates how the Court’s adoption of an expressive harms approach could serve not to constrain black po-

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87 Id.
88 Id. at 657.
90 Id. at 506–07.
91 Shaw, 509 U.S. at 648.
93 Id. at 984.
94 Id. at 1053 (Souter, J., dissenting).
itical power but to expand it.\footnote{95} Under an expressive harms approach, the Court would reason that because Iowa and New Hampshire exert disproportionate influence on the presidential nomination process, the scheme communicates the idea that black voters are not as important as white voters. If one were to envision the geographic landmass that comprises the United States as one large district for the presidency, one could view the national Democratic Party as essentially carving out two overwhelmingly white sections to serve as the barometers of popular opinion. The expressive harms approach in the presidential nomination system, then, would address a harm reminiscent of that invalidated in \textit{Gomillion v. Lightfoot},\footnote{96} in which Tuskegee, Alabama, redrew its municipal boundaries in order to exclude all but a handful of black voters. To be sure, the current presidential nomination system lacks the animus that motivated \textit{Gomillion}'s redistricting. Despite this important distinction, however, the presidential nomination process — as with the redrawing of municipal boundaries in \textit{Gomillion} — communicates to many African Americans that they are not fully-valued members of the political community.\footnote{97}

Justice O'Connor's vote has often been determinative in equal protection cases over the last fifteen years, and there is no reason to believe that she would not play a similarly central role in a legal challenge to the current presidential nomination system. The infinitesimal percentages of African Americans in Iowa and New Hampshire threaten Justice O'Connor's commitment to "racial opacity."\footnote{98} Justice

\footnote{Cf. Jamin B. Raskin, \textit{Is This America?: The District of Columbia and the Right To Vote}, 34 Harv. C.R.-C.L. L. Rev. 39, 65–70 (1999) (arguing that the denial of congressional representation to citizens of Washington, D.C., constitutes an expressive harm).}

\footnote{364 U.S. 339 (1960).}

\footnote{Cf. Darlene Clark Hine, \textit{Black Victory: The Rise and Fall of the White Primary in Texas} 235 (1979) ("To the black Texans the white primary symbolized their powerlessness, their second-class citizenship, their caste-like position within the total society."). Regardless of whether one finds Justice O'Connor's "political apartheid" analogy in \textit{Shaw} illuminating, the expressive harms approach can be utilized meaningfully in the presidential nomination context. In \textit{Shaw}, recognition of the expressive harm requires individuals to conceive of themselves in unusual fashions; that is, \textit{Shaw} perceives people (and groups of people) from the bird's-eye view of an electoral map. The people most directly affected by the districting scheme in \textit{Shaw} (black voters along the I-85 corridor) seem unlikely to have perceived the scheme as an injury. In the presidential nomination context, however, black voters are quite likely to perceive Iowa's and New Hampshire's primacy as an injury, because of their weak electoral voice.

\footnote{Professor Issacharoff identifies "racial opacity" as "the heart of Justice O'Connor's jurisprudence," which he places between the commitment to "racial neutrality" that typifies the jurisprudence of Chief Justice Rehnquist and Justices Scalia, Kennedy, and Thomas and the commitment to "racial pluralism" that captures the approach of Justices Stevens, Souter, Ginsburg, and Breyer. Samuel Issacharoff, \textit{The Constitutional Contours of Race and Politics}, 1995 Sup. Ct. Rev. 45, 63–65. "Unwilling to call a halt to all beneficial uses of racial classifications to remediate societal inequities," Issacharoff argues, "but also deeply troubled by the increasing evidence of racial factionalism, O'Connor demands primarily that the use of race not be excessive. Where race or racialism is visible to the casual eye, it is constitutionally infirm." \textit{Id.} at 64. Justice O'Connor's}
O'Connor invalidated the appearance of the electoral district in Shaw, it seems fair to conclude, because she thought that the district resembled the "uncouth," twenty-eight-sided Gomillion district. In both instances, race was a visible factor, and one could deduce that information merely by eyeballing the districts. To put the matter plainly, the districts simply did not look right. Similarly, in the eyes of many black voters, giving such disproportionate power to Iowa and New Hampshire just does not look right. Appearances matter not only when reapportioning districts, but also when nominating presidents. The extremely skewed racial composition of the most powerful states in the presidential nomination contests could plausibly be perceived as yet another voting structure that "threatens to carry us further from the goal of a political system in which race no longer matters." It would be more than a bit odd were the Court to recognize expressive harms in circumstances designed to improve black political participation (racially gerrymandered districts) while simultaneously ignoring expressive harms in an instance that constrains black political participation (the presidential nomination system).

Admittedly, the Court's recognition of an expressive harm in the presidential nomination context would represent a departure from its recent applications of that term. In Shaw and Vera, the Court found expressive harms because it perceived the state as intentionally elevating race above all other concerns in drawing district boundaries. Intent thus poses a stumbling block in transferring the expressive harms analysis to the presidential nomination context. An inability to demonstrate intent in the presidential nomination context is hardly fatal, however, considering that intent is not required under section 2. Indeed, the statute was amended in 1982 specifically to circumvent the seemingly insurmountable intent requirement imposed in City of Mobile v. Bolden. Thus, a voting practice that results in underenfranchisement should trigger section 2 regardless of intent. The Court inquired whether race predominated under Shaw because the expressive harm rose to the level of an equal protection violation; here, the underenfranchisement injury poses a section 2 statutory violation. Although

position on the University of Michigan affirmative action cases confirms Issacharoff's point. She was willing to abide a pluralistic approach when race was used loosely at the law school, see Grutter v. Bollinger, 123 S. Ct. 2325 (2003), but not when there was a rigid numerical application to the undergraduate program, see Gratz v. Bollinger, 123 S. Ct. 2411 (2003).


100 It would not, however, be the first time that the Court failed to distinguish between efforts to improve black political power and efforts to impede such power. Cf., e.g., Shaw v. Hunt (Shaw II), 517 U.S. 899, 918 (1996) (Stevens, J., dissenting) ("A majority's attempt to enable the minority to participate more effectively in the process of democratic government should not be viewed with the same hostility that is appropriate for oppressive and exclusionary abuses of political power.").

the Court has thus far identified expressive harms only in cases arising under the Constitution, there is no reason to believe that the Court would resist importing that concept to section 2 of the Voting Rights Act. Given that the statute was designed to enforce the constitutional protections afforded by the Fourteenth and Fifteenth Amendments, it would be striking if the Court refused to take that modest step.

It is important to note, moreover, that a lack of explicit racial animus toward African Americans by the national Democratic Party (in scheduling the calendar of nomination events) or by legislators from Iowa and New Hampshire (in passing their statutes) does not indicate that racial considerations played no role in establishing the presidential nomination system. Professor David Strauss has suggested a particularly helpful way to smoke out latent racial considerations by performing what he has dubbed the “reversing the groups” test, which might also be termed the “disparate regard” standard. Under this standard, Strauss asks whether decisionmakers “would have made the same decision” if the adverse effects of the decision fell on whites rather than on blacks.

Applying the disparate regard standard to the presidential nomination system, one might locate a subterranean racial discrepancy by imagining whether the same level of deference would be accorded to the initial nomination contests if, say, Louisiana held the first caucuses and Mississippi held the first primary. It seems unlikely that presidential candidates and the media would continue to place such emphasis on the initial contests if it meant according so much power to black voters in those heavily African-American states. The reason why politicians, the media, and the electorate accord so much deference to Iowa and New Hampshire could be because whiteness is viewed as largely neutral and therefore capable of meaningful extrapolation.

102 Cf. Karlan, supra note 72, at 174 (“Unlike the white suburban plaintiffs in Reynolds whose voting strength was diluted because of where they lived, the political power of black citizens is diluted because of who they are.” (footnote omitted) (citing Reynolds v. Sims, 377 U.S. 533 (1964))).


104 Thanks go to Professor Margo Schlanger for this phrasing of Strauss’s concept. Strauss, supra note 103, at 957.

106 According to the 2000 Census, Louisiana was 32.5% black and Mississippi was 36% black. U.S. CENSUS BUREAU, U.S. DEP’T OF COMMERCE, LOUISIANA: 2000: CENSUS 2000 PROFILE 2 (2002); U.S. CENSUS BUREAU, U.S. DEP’T OF COMMERCE, MISSISSIPPI: 2000: CENSUS 2000 PROFILE 2 (2002). Consequently, in a multi-candidate field for the Democratic nomination, having those deep Southern states vote first would permit a black candidate with meager white support to emerge as the prohibitive frontrunner if voters in Louisiana and Mississippi engaged in racially polarized voting. The point here is not to suggest that Democratic voters would never elect a black candidate as their presidential nominee, only that they would be unlikely to do so for a candidate who garnered little cross-racial support.
The harm, then, is not the stigmatization of blackness, but the naturalization of whiteness. This perspective, though admittedly a good deal more palatable than the nakedly anti-Negro ideology that dominated the politics of yesteryear, nonetheless stems from unfortunate racial considerations—a problem revealed by counterfactually substituting Louisiana and Mississippi for Iowa and New Hampshire. The question, then, is not whether to be color-conscious about the presidential nomination system, but rather how to be color-conscious.  

Applying black underenfranchisement as an expressive harm supports a view of the presidential nomination system as a betrayal of the "civic inclusion" model of democratic participation. The system prevents African Americans from feeling included because the process seems to elevate the status of white voters, thereby resulting in an unequal distribution of political dignity. African Americans consistently and overwhelmingly support the Democratic nominee for President; at the very least, they should be afforded the opportunity to voice an opinion about who that nominee will be.

IV. CONCLUSION

This Note has argued that Iowa's and New Hampshire's primacy in the presidential nomination process could be challenged under section 2 of the Voting Rights Act as the process underenfranchises black voters. As is often the case, the presence of racial inequities highlights more fundamental problems within political and social structures.

107 See David A. Strauss, The Myth of Colorblindness, 1986 SUP. CT. REV. 99, 114 ("[W]e do not have a choice between colorblindness and race-consciousness; we only have a choice between different forms of race-consciousness.").

108 Professor Pamela Karlan explains that the civic inclusion model offers a range of benefits: "a sense of connectedness to the community and of equal political dignity; greater readiness to acquiesce in governmental decisions and hence broader consent and legitimacy; and more informed, equitable and intelligent governmental decisionmaking." Karlan, supra note 72, at 180; see also LEARNED HAND, THE BILL OF RIGHTS 73–74 (1958) ("Of course I know how illusory would be the belief that my vote determined anything; but nevertheless when I go to the polls I have a satisfaction in the sense that we are all engaged in a common venture.").

109 See KENNETH L. KARST, BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION 94 (1989) ("Voting is the preeminent symbol of participation in the society as a respected member, and equality in the voting process is a crucial affirmation of the equal worth of citizens."); cf. Rice v. Cayetano, 528 U.S. 495, 517 (2000) ("One of the principal reasons race is treated as a forbidden classification is that it devalues the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities.").

110 But see Lynette Clemetson, Younger Blacks Tell Democrats To Take Notice, N.Y. TIMES, Aug. 8, 2003, at A1 (describing how black voters have become increasingly disenchanted with the Democratic Party); JoAnn Wypijewski, Black and Bruised, N.Y. TIMES, Feb. 1, 2004, § 6 (Magazine), at 20.

111 See LANI GUINIER & GERALD TORRES, THE MINER'S CANARY: ENLISTING RACE, RESISTING POWER, TRANSFORMING DEMOCRACY 12 (2002) ("Racialized communities signal problems with the ways we have structured power and privilege.").
African Americans are the group most visibly disadvantaged by the presidential nomination scheme, but the scheme ought to concern citizens of any color who are residents of neither Iowa nor New Hampshire. The citizens of those two states exert influence on the method of selecting presidential nominees in ways that contravene the equipopulation principle underlying the "one person, one vote" ideal. As Chief Justice Warren wrote in *Reynolds v. Sims*,\(^\text{112}\) "[w]eighting the votes of citizens differently, by any method or means, merely because of where they happen to reside, hardly seems justifiable."\(^\text{113}\) It is not at all clear that Warren’s dictum — which became the basis of the “one person, one vote” principle — was meant to apply exclusively to state or local elections. Indeed, it would be odd if the Court meant to exempt (even at the nomination stage) the country’s sole nationwide election from this foundational principle.\(^\text{114}\) Although some commentators argue that white suburbanites have wielded the equipopulation principle to commandeer voting rights protections intended to protect African Americans,\(^\text{115}\) in the presidential nomination context the interests of black voters and the “one person, one vote” ideology converge.

The current presidential nomination system reveals an anemic conception of democratic participation,\(^\text{116}\) as the input of a minuscule slice of the electorate exerts a profound impact on determining the eventual nominees. Although this Note contemplates the possibility of judicial intervention, it must be conceded that the prospect of Court action is inextricably connected to the popular will.\(^\text{117}\) Just as the unrest of ordinary citizens spurred the initial reforms of the presidential nomination system in the 1960s, the public must once again express discontent to ensure that popular will plays a meaningful role in selecting presidential nominees.

\(^{112}\) 377 U.S. 533 (1964).

\(^{113}\) Id. at 563.

\(^{114}\) Cf. Anderson v. Celebrezze, 460 U.S. 780, 795 (1983) (noting that “the President and the Vice President of the United States are the only elected officials who represent all the voters in the Nation”).

\(^{115}\) See, e.g., 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 HASTINGS L.J. 1, 4 (1982) (arguing that the constitutionalization of the equipopulation principle has overshadowed the Fourteenth and Fifteenth Amendment protections for black voters and thus “has created an intolerable inversion of historical and constitutional priorities”).

\(^{116}\) For an argument that courts ought to be alert to and remove such restraints on the political energy of ordinary people, see Richard D. Parker, *Here, the People Rule*: A CONSTITUTIONAL POPULIST MANIFESTO (1994).

\(^{117}\) See Armand Derfner, *Racial Discrimination and the Right To Vote*, 26 VAND. L. REV. 523, 583–84 (1973) (“The right to vote cannot be protected or advanced solely in the courts; notwithstanding recent judicial history, courts traditionally trail, not lead, democratic advances. In the last analysis, the equal right to vote will be protected only if our nation believes in it.”).