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## Election Law and White Identity Politics

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# ELECTION LAW AND WHITE IDENTITY POLITICS

*Joshua S. Sellers\**

*The role of race in American politics looms large in several election law doctrines. Regrettably, though, these doctrines' analyses of race, racial identity, and the relationships between race and politics often lack sophistication, historical context, or foresight. The political status quo is treated as race-neutral, when in fact it is anything but. Specifically, the doctrines rely upon sanguine theories of democracy uncorrupted by white identity-based political calculations, while in fact such calculations, made on the part of both voters and political parties, are pervasive.*

*In this Article, I appraise the doctrine pertaining to majority-minority voting districts, racial gerrymandering doctrine, the doctrine governing ballot access disputes, and campaign finance doctrine through the lens of white identity politics. Drawing from research in political science, sociology, and history, I argue that these doctrines are blighted by what I identify as "racial blind spots" that are inconsonant with political reality. Given the role that courts play in enunciating these doctrines, their failure to meaningfully engage with the significance of white identity politics renders their governing frameworks and remedial prescriptions inapt. The Article concludes by offering a number of suggestions, both doctrinal and legislative, for how to mitigate white identity politics.*

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#### INTRODUCTION

The role of race in American politics looms large in several election law doctrines. In the racial gerrymandering doctrine, for example, a state acting “without sufficient justification”<sup>1</sup> may not use race as the “predominant factor” when designing voting districts.<sup>2</sup> The doctrine interpreting section 2 of the Voting Rights Act of 1965 (VRA)<sup>3</sup>—the principal tool for the creation of majority-minority voting districts<sup>4</sup>—demands judicial inquiry into the political cohesion of plaintiff minority groups as well as the collective

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1. *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 797 (2017).

2. *Miller v. Johnson*, 515 U.S. 900, 916 (1995).

3. 52 U.S.C. § 10301 (2012) (prohibiting states from applying any “standard, practice, or procedure . . . 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”).

4. See Christopher S. Elmendorf, *Making Sense of Section 2: Of Biased Votes, Unconstitutional Elections, and Common Law Statutes*, 160 U. PA. L. REV. 377, 379 (2012) (“Enacted by Congress in 1982, the Section 2 ‘results test’ was the basis for a hugely successful litigation campaign against multimember districts and at-large elections, arrangements said to ‘dilute[] minority voting strength.’” (alteration in original) (footnote omitted) (quoting *Thornburg v. Gingles*, 478 U.S. 30, 91 (1986) (O’Connor, J., concurring in the judgment))).

tendencies of white voters.<sup>5</sup> An additional and still unsettled section 2 doctrine involving ballot access issues incorporates an inquiry into the racial motivations of state actors.<sup>6</sup> Even doctrines that appear racially innocuous might be understood to have racial implications.<sup>7</sup> As such, questions about the significance of race occupy center stage in many election law disputes.<sup>8</sup>

Regrettably, though, these doctrines' analyses of race, racial identity, and the relationships between race and politics often lack sophistication, historical context, or foresight. In this Article, I explore the consequences of these deficiencies for both election law and American politics more broadly. The picture that emerges is alarming. By and large, election law doctrines obfuscate the degree to which race has fractured our politics. The result is a set of doctrines that set the terms of political engagement while ignoring political reality.

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5. See *Thornburg v. Gingles*, 478 U.S. 30, 48–51 (1986); BERNARD GROFMAN ET AL., *MINORITY REPRESENTATION AND THE QUEST FOR VOTING EQUALITY* 49–51 (1992); see also Christopher S. Elmendorf, Kevin M. Quinn & Marisa A. Abrajano, *Racially Polarized Voting*, 83 U. CHI. L. REV. 587, 589 (2016) (“Voting is polarized when (1) the political preferences of majority-race and minority-race voters diverge substantially and (2) the racial majority votes with enough cohesion to usually defeat the minority’s candidates of choice.”); D. James Greiner, *Re-Solidifying Racial Bloc Voting: Empirics and Legal Doctrine in the Melting Pot*, 86 IND. L.J. 447, 449 (2011) (“Indeed, it is difficult to overstate the importance of the concept of racial bloc voting to the law and theory in this area; for whatever the phrase means, it defines the dilution injury under widely disparate accounts of voting and democracy, justifies entry into the ‘racial thicket’ by a reluctant judiciary, and distinguishes official use of race in redistricting from official use of race in other settings.”).

6. See, e.g., N.C. State Conference of the NAACP v. McCrory, 831 F.3d 204, 222–23 (4th Cir. 2016) (“But intentionally targeting a particular race’s access to the franchise because its members vote for a particular party, in a predictable manner, constitutes discriminatory purpose. This is so even absent any evidence of race-based hatred and despite the obvious political dynamics. A state legislature acting on such a motivation engages in intentional racial discrimination in violation of the Fourteenth Amendment and the Voting Rights Act.”); see also Samuel Issacharoff, *Voter Welfare: An Emerging Rule of Reason in Voting Rights Law*, 92 IND. L.J. 299, 313–17 (2016); Nicholas O. Stephanopoulos, *The South After Shelby County*, 2013 SUP. CT. REV. 55, 107–10; Daniel P. Tokaji, *Applying Section 2 to the New Vote Denial*, 50 HARV. C.R.-C.L.L. REV. 439, 451–55 (2015).

7. See, e.g., Samuel Issacharoff, *Race and Campaign Finance Reform*, 79 N.C. L. REV. 1523, 1529 (2001) (“There are serious reasons to resist the claim that black political participation can only be enhanced by campaign finance reform, given that black voters and candidates are greatly outspent and outmuscled in the struggle for campaign dollars.”); Spencer Overton, *But Some Are More Equal: Race, Exclusion, and Campaign Finance*, 80 TEX. L. REV. 987, 987 (2002) (“Legal academics who call for campaign finance reform—let us call them ‘Reformers’—have overlooked the significance of race, and as a result their critiques of constitutional jurisprudence and reform proposals remain woefully incomplete.”).

8. See Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *Race and Representation Revisited: The New Racial Gerrymandering Cases and Section 2 of the VRA*, 59 WM. & MARY L. REV. 1559, 1571 (2018) (“Racial classifications that are not tolerated in other domains, such as education and employment, are viewed as necessary in the context of race and voting. Moreover, they are not just viewed as necessary, sometimes they are even celebrated.”); see also Samuel R. Bagenstos, *Universalism and Civil Rights (with Notes on Voting Rights After Shelby)*, 123 YALE L.J. 2838, 2842 (2014) (arguing in response to others that “the voting rights regime must also provide robust protection against race discrimination specifically”).

Take the example of Chief Justice Roberts's 5-4 majority opinion in *Shelby County v. Holder*,<sup>9</sup> the case that invalidated section 4(b) of the Voting Rights Act.<sup>10</sup> Invalidation of section 4(b) effectively also invalidated section 5, the so-called "preclearance" provision, which requires select state and local jurisdictions with a history of voting-related discrimination ("covered" jurisdictions) to get federal approval before making any voting-related changes.<sup>11</sup>

In *Shelby County*, the Chief Justice characterized the preclearance regime as an anachronism, a remnant of a distant past.<sup>12</sup> Narrowly focused on minority voting rates and the number of minority officeholders,<sup>13</sup> he failed to thoroughly engage with the voluminous record evidence indicating that racial and ethnic minorities remain vulnerable to political suppression tactics.<sup>14</sup> He provided only a perfunctory synopsis of the gross legacy of minority disenfranchisement in the South.<sup>15</sup> And his claims regarding the preclearance regime's deterrent effect were excessively assured, as was immediately evident.<sup>16</sup>

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9. 570 U.S. 529 (2013).

10. *Id.* at 557. Section 4(b) was the provision used to identify which jurisdictions were subject to the Act's "preclearance" regime under section 5.

11. 52 U.S.C. § 10304 (2012).

12. *Shelby County*, 570 U.S. at 535 ("There is no denying, however, that the conditions that originally justified these measures no longer characterize voting in the covered jurisdictions."); see Ellen D. Katz, *What Was Wrong with the Record?*, 12 ELECTION L.J. 329, 330 (2013) ("*Shelby County* suggests that Congress may employ a remedy like preclearance only to reach the extreme Jim Crow variety, but not to address the more contained type of unconstitutional conduct we see today. That is, it suggests that Congress may not select what it reasonably believes is the most effective way to remedy unconstitutional racial discrimination in voting when that discrimination falls short of the type that defined Alabama in 1965.").

13. *Shelby County*, 570 U.S. at 540.

14. See *id.* at 577 (Ginsburg, J., dissenting); see also Samuel Issacharoff, *Beyond the Discrimination Model on Voting*, 127 HARV. L. REV. 95, 99 (2013) (summarizing the record evidence).

15. Chief Justice Roberts based his opinion in part on the "fundamental principle of equal sovereignty," the notion that states are equal in dignity and, accordingly, are to be treated equally. *Shelby County*, 570 U.S. at 544. The preclearance regime, in the majority's view, violated this principle. A number of scholars have criticized the majority opinion for implying that the South has moved beyond its dark past. See, e.g., Joshua S. Sellers, *Shelby County as a Sanction for States' Rights in Elections*, 34 ST. LOUIS U. PUB. L. REV. 367, 372 (2015) ("More convincing, in my view, are arguments that the *Shelby County* decision represents a rejection of the principal ideational presumption of the civil rights era—namely, that absent federal oversight, state governments, and particularly state governments in the Deep South, cannot be trusted to equalize civil and voting rights for minorities."); see also Joseph Fishkin, *The Dignity of the South*, 123 YALE L.J. ONLINE 175, 179 (2013); Issacharoff, *supra* note 14, at 101. Even former Justice John Paul Stevens felt compelled to criticize the majority opinion's discussion of the South's racist past in a "dissent" published in the *New York Review of Books*. John Paul Stevens, *The Court & the Right to Vote: A Dissent*, N.Y. REV. BOOKS (Aug. 15, 2013), <https://www.nybooks.com/articles/2013/08/15/the-court-right-to-vote-dissent/> [<https://perma.cc/8F6E-T7UX>].

16. *Shelby County*, 570 U.S. at 550–51; Ellen D. Katz, *The Shelby County Problem*, in ELECTION LAW STORIES 505, 533 (Joshua A. Douglas & Eugene D. Mazo eds., 2016) ("Previously covered jurisdictions moved, some within hours of the decision, to impose

The Chief Justice's *Shelby County* opinion, I argue, exemplifies a problematic feature of election law doctrines more broadly—namely, the near complete inattention to the role of white identity politics. I define white identity politics as the creation of beliefs and alliances intended to advance the collective political interests of white voters.<sup>17</sup> Collective political interests include policies that whites believe advantage them both materially and psychologically.<sup>18</sup>

The doctrinal inattention to the role of white identity politics is what I identify as a “racial blind spot.” This is the norm. Further, in the scarce election law doctrines in which courts have arguably shown some cognizance of white identity politics, that cognizance has waned over time.<sup>19</sup> In other words, white identity politics has been treated as a temporary concern rather than as an enduring feature of American politics.

But again, racial blind spots are the norm. For all of the relevance election law doctrines give to African American and Hispanic voting patterns, historical patterns of discrimination, and the disparate impact of government actions on minorities, the immense political significance of white identity is largely ignored. This myopia renders the doctrines' governing frameworks faulty and undermines our ability to comprehensively evaluate the doctrines' democratic utility. Put differently, the doctrines rely upon sanguine theories of democracy uncorrupted by white identity-based political calculations, while in fact such calculations, made on the part of both voters and political parties, are pervasive.

In what follows, I appraise the doctrine pertaining to majority-minority voting districts, racial gerrymandering doctrine, the doctrine governing ballot access disputes, and campaign finance doctrine through the lens of white identity politics. Drawing from research in political science, sociology, and history, I argue that the racial blind spots that blight these doctrines are inconsonant with political reality. The doctrines' formalism ignores, and thereby conceals, a distressing truth: key segments of the modern Republican Party strategically foment and exploit white identity for political gain.<sup>20</sup>

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electoral restrictions that preclearance had, or would have, blocked.”); Sellers, *supra* note 15, at 381–83.

17. My definition of white identity politics relies on the work of the psychology professor Eric Knowles. Somewhat surprisingly, the nuances of white identity have not been extensively studied in the social sciences. This is largely explained by the longstanding belief among researchers that white identity is not salient to whites and therefore difficult to study. See generally Eric D. Knowles & Christopher K. Marshburn, *Understanding White Identity Politics Will Be Crucial to Diversity Science*, 21 PSYCHOL. INQUIRY 134 (2010); Cara Wong & Grace E. Cho, *Two-Headed Coins or Kandinskys: White Racial Identification*, 26 POL. PSYCHOL. 699 (2005); Eric D. Knowles & Linda R. Tropp, *Donald Trump and the Rise of White Identity in Politics*, CONVERSATION (Oct. 20, 2016), <http://theconversation.com/donald-trump-and-the-rise-of-white-identity-in-politics-67037> [<https://perma.cc/SKP2-6CBC>].

18. Knowles & Marshburn, *supra* note 17, at 135–36.

19. *Infra* Part II.B.

20. One hesitates when casting aspersions on just one of the two major political parties, but the evidence in support of this claim is overwhelming. There are certainly instances one could raise of the Democratic Party exploiting white identity, but the imbalance between the parties on this point is substantial. Related partisan imbalances are well-documented. See,

Much of the Republican electorate is motivated by white identity politics as well. As put by Professor Ian Haney López: “The rise of a racially-identified GOP is *not* a tale of latent bigotry in that party. It is instead a story centered on the strategic decision . . . to become ‘the White Man’s Party.’”<sup>21</sup> That strategic decision includes the conscious manipulation of electoral laws and structures.

Consider again Chief Justice Roberts’s opinion in *Shelby County*, which provides a striking illustration of how white identity politics are concealed. As noted above, the opinion relied in part on the number of African American elected officials in the covered jurisdictions as a basis for finding section 4(b) of the VRA unconstitutional.<sup>22</sup> Yet this statistic alone obscures the fact that those elected officials have been systematically impaired as part of a Republican Party strategy premised on reinforcing white identity politics. Take account of the following finding by the researcher David Bositis: “Following the 2011 elections, only 4.8 percent of black state legislators in the South serve in the majority, and 95.2 percent serve in the minority.”<sup>23</sup> Revealingly, as late as the mid-1990s the opposite was true—over 90 percent of black state legislators in the South served in the majority.<sup>24</sup>

What caused this extraordinary reversal of fortune? Simply put, Republican Party gamesmanship. As summarized by Thomas Edsall in the *New York Times*:

Where possible, Republican redistricting strategists have reduced the number of blacks in white Democratic legislative districts in order to render the incumbent vulnerable to Republican challenge. In other areas of the state, where it has not been . . . possible to “bleach” a district, Republicans have sharply increased the percentage of blacks to over 50 percent in order to encourage a successful black challenge to the white Democratic incumbent. In private discussions, Republicans in the South talk explicitly about their goal of turning the Democratic Party into a black party, and in many Southern states they have succeeded.<sup>25</sup>

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*e.g.*, E. J. DIONNE JR. ET AL., ONE NATION AFTER TRUMP: A GUIDE FOR THE PERPLEXED, THE DISILLUSIONED, THE DESPERATE, AND THE NOT-YET DEPORTED 65–93 (2017); THOMAS E. MANN & NORMAN J. ORNSTEIN, IT’S EVEN WORSE THAN IT LOOKS: HOW THE AMERICAN CONSTITUTIONAL SYSTEM COLLIDED WITH THE NEW POLITICS OF EXTREMISM 51–58 (2012). See generally Joseph Fishkin & David E. Pozen, *Asymmetric Constitutional Hardball*, 118 COLUM. L. REV. 915 (2018).

21. IAN HANEY LÓPEZ, DOG WHISTLE POLITICS: HOW CODED RACIAL APPEALS HAVE REINVENTED AND WRECKED THE MIDDLE CLASS 18 (2014).

22. *Shelby County v. Holder*, 570 U.S. 529, 540, 547 (2013).

23. David A. Bositis, *Research Brief: Resegregation in Southern Politics?*, JOINT CTR. FOR POL. & ECON. STUD., Nov. 2011, at 1, 2.

24. *Id.* (“[P]rior to the 1994 elections, 99.5 percent of black state legislators [in the South] served in the majority and after 1994, . . . 91.0 percent served in the majority.”).

25. Thomas B. Edsall, *The Decline of Black Power in the South*, N.Y. TIMES: OPINIONATOR (July 10, 2013, 9:34 PM), <https://opinionator.blogs.nytimes.com/2013/07/10/the-decline-of-black-power-in-the-south/> [https://perma.cc/982G-G8F7].

Not all of the discussions are private.<sup>26</sup> Perceived in this broader context, the increased number of African American elected officials in the covered jurisdictions—cited by the Chief Justice as compelling proof of racial equality—is not evidence of an absence of discrimination. Instead, understood in context, it is evidence of the opposite: a campaign to manipulate voting structures along racial lines.

This Article joins an emerging body of scholarship asserting that American law and politics cannot be accurately understood today without understanding white identity politics. Social scientists have offered a multitude of highly instructive findings. One such finding, perhaps unsurprisingly, is that political identities are substantially intertwined with other social identities, including race and religion. As summarized by the political scientists Lilliana Mason and Julie Wronski, “partisan identities, like their racial and religious counterparts, are social and visceral, and they work together with other social identities to drive political judgment.”<sup>27</sup> For many white Americans, racial resentment also informs their political judgment.

Moreover, the researchers Adam Enders and Jamil Scott found that although overall white racial resentment has remained steady for decades, its political significance has grown immensely.<sup>28</sup> So, in short, partisan identity—which is itself intimately connected with racial identity<sup>29</sup>—coupled with feelings of racial resentment, have been shown to affect white Americans’ political judgments. The political scientist Michael Tesler offers the sobering observation that “racial attitudes are now more closely aligned with white Americans’ partisan preferences than they have been at any time in the history of polling.”<sup>30</sup>

The partisan aspect cannot be overstated. The Republican Party, long populated by whites,<sup>31</sup> is now a predominantly white party:

26. Justin Levitt, *Quick and Dirty: The New Misreading of the Voting Rights Act*, 43 FLA. ST. U. L. REV. 573, 609–10 (2016) (citing a sworn affidavit from a South Carolina state representative endorsing the elimination of white Democrats).

27. Lilliana Mason & Julie Wronski, *One Tribe to Bind Them All: How Our Social Group Attachments Strengthen Partisanship*, 39 ADVANCES POL. PSYCHOL. 257, 259–60 (2018).

28. Adam M. Enders & Jamil S. Scott, *White Racial Resentment Has Been Gaining Political Power for Decades*, WASH. POST (Jan. 15, 2018), <https://www.washingtonpost.com/news/monkey-cage/wp/2018/01/15/white-racial-resentment-has-been-gaining-political-power-for-decades/> [<https://perma.cc/9Z85-CH5R>] (“By 2016, you could much more accurately predict . . . white voters’ attitude[s] toward almost everything we measured based on how racially resentful they might be than you could have in 1988. These results suggest that white voters use their attitudes toward race to guide political decisions three times as much today as they did just 30 years ago.”).

29. See, e.g., Mason & Wronski, *supra* note 27, at 274 (“What we find is that Republican ‘purity’ applies to in-party social homogeneity. A Republican who does not fit the White, Christian mold is far less attached to the Republican Party than one who does fit the mold.”).

30. Michael Tesler, *Views About Race Mattered More in Electing Trump Than in Electing Obama*, WASH. POST (Nov. 22, 2016), <https://www.washingtonpost.com/news/monkey-cage/wp/2016/11/22/peoples-views-about-race-mattered-more-in-electing-trump-than-in-electing-obama/> [<https://perma.cc/D4WX-FERM>].

31. See PAUL FRYMER, *UNEASY ALLIANCES: RACE AND PARTY COMPETITION IN AMERICA* 103 (1999) (“By late 1970, however, Nixon and the Republicans clearly believed that



Together with black enfranchisement, immigration has transformed American political parties. These new voters have disproportionately supported the Democratic Party. The non-white share of the Democratic vote rose from 7 percent in the 1950s to 44 percent in 2012. Republican voters, by contrast, were still nearly 90 percent white into the 2000s. So as the Democrats have increasingly become a party of ethnic minorities, the Republican Party has remained almost entirely a party of whites.<sup>32</sup>

Political scientists Marisa Abrajano and Zoltan Hajnal, in a comprehensive analysis of the issue, found that “[p]arty identification—the most influential variable in U.S. politics—is at least in part a function of the way individual white Americans view Latinos and undocumented immigrants.”<sup>33</sup> The racialization of partisanship is similarly pronounced at the state level, where “among state-level elected Republican officials nationwide, 98 percent are white.”<sup>34</sup>

This explanatory background is indispensable for two reasons. First, it accentuates the empirically verified relationship that exists between white identity and political outcomes. I mean to avoid grandiose theories of racism under which white Americans are inherently viewed with suspicion and the Republican Party is categorically denounced as irredeemably racist.<sup>35</sup> And second, it rebuts any allegation that white identity politics is tangential to election law doctrines.

Election law is, of course, inseparable from politics as practiced.<sup>36</sup> Accordingly, the arousal and activation of white identity politics by Republican Party leaders would seem to be of central significance to any judicious theory of contemporary American democracy.<sup>37</sup> When

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appealing to blacks would hamper broader coalition-building efforts.”); *see also* THOMAS B. EDSALL & MARY D. EDSALL, CHAIN REACTION: THE IMPACT OF RACE, RIGHTS, AND TAXES ON AMERICAN POLITICS 172 (1991).

32. STEVEN LEVITSKY & DANIEL ZIBLATT, HOW DEMOCRACIES DIE 171 (2018).

33. MARISA ABRAJANO & ZOLTAN L. HAJNAL, WHITE BACKLASH, IMMIGRATION, RACE, AND AMERICAN POLITICS 85 (2015).

34. HANEY LÓPEZ, *supra* note 21, at 1.

35. Although I avoid such theories in this Article, it is worth noting that grandiose theories of racism often enjoy popular acclaim. *See, e.g.*, Ta-Nehisi Coates, *The First White President: The Foundation of Donald Trump’s Presidency Is the Negation of Barack Obama’s Legacy*, ATLANTIC (Oct. 2017), <https://www.theatlantic.com/magazine/archive/2017/10/the-first-white-president-ta-nehisi-coates/537909/> [<https://perma.cc/6PHR-SHWX>].

36. SAMUEL ISSACHAROFF ET AL., THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS 2 (5th ed. 2016) (“Because democratic politics is not autonomous of existing law and institutions, those who control existing arrangements have the capacity to shape, manipulate, and distort democratic processes.”).

37. HANEY LÓPEZ, *supra* note 21, at 212 (“Conservatives cannot simply walk away from racial pandering, as they’ve been too successful in making race integral to modern conservatism.”); LEVITSKY & ZIBLATT, *supra* note 32, at 9 (“The weakening of our democratic norms is rooted in extreme partisan polarization—one that extends beyond policy differences into an existential conflict over race and culture. America’s efforts to achieve racial equality as our society grows increasingly diverse have fueled an insidious reaction and intensifying polarization.”); *see also* Mason & Wronski, *supra* note 27, at 274 (positing that “the Republican Party, being the less socially complex of the two parties, could relatively easily remind voters of their White and Christian identities to enhance partisan identity strength”); Paul M. Sniderman et al., *The Politics of Race*, in RACIALIZED POLITICS: THE DEBATE ABOUT

establishing political ground rules—a defining objective of many election law doctrines—courts should be observant of what the likely impact of their mandates will be.<sup>38</sup> Such speculation is already common among judges when deciding election law cases. But such speculation is often flawed when white identity politics goes unacknowledged.

My argument has much in kind with the work of Richard Pildes, who, more than anyone in the field, has considered the appropriate balance between institutional formalism and institutional realism. He articulates the inquiry as one into “the systemic organization of political power and the ways that legal doctrines and frameworks, as well as institutional structures, determine the modes through which political power is effectively mobilized, organized, and encouraged or discouraged.”<sup>39</sup> Pildes’s principal aspiration is the development of political structures that invigorate political competition.<sup>40</sup> I build on his approach by stressing the extent to which white identity politics undermines the prospect of a well-functioning democracy.<sup>41</sup>

It is important to note that race and racial analysis are conspicuous in election law doctrines. White identity politics, however, is not. The VRA doctrine pertaining to the creation of majority-minority voting districts, racial gerrymandering doctrine, and the doctrine encompassing both ballot access and what are known as “election administration” issues all address race, yet are inattentive to the significance of white identity politics.

One might ask whether it is plausible that alternative election law doctrines would mitigate the pernicious effects of white identity politics, if in fact it is as entrenched as I have suggested. This is a reasonable question to ask, and I cannot be certain of the answer.<sup>42</sup> Politics is messy and unpredictable, and political identities are complex. But these realities do not negate the value of

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RACISM IN AMERICA 236, 236 (2000) (“Citizens, it seems to us essential to recognize, get to choose only from among the choices on offer. How they go about making choices on public policy hinges on how these choices are organized by political institutions and presented by public leaders.”); Enders & Scott, *supra* note 28 (“[P]olitical elites—politicians, party leaders, the political media and so on—have increasingly indulged in what scholars call ‘racial priming.’ Those are the subtle and not-so-subtle messages that encourage citizens to base their opinions at least in part on racial considerations.”).

38. Richard H. Pildes, *Romanticizing Democracy, Political Fragmentation, and the Decline of American Government*, 124 YALE L.J. 804, 806 (2014) (“This focus on the organization, structure, and exercise of actual political power in elections and in governance is what, in my view, characterizes ‘the law of democracy’—a systematic field of study in law schools for only the last twenty years or so.”).

39. *Id.* For an earlier version of an approach in the same spirit, see KEITH J. BYBEE, *MISTAKEN IDENTITY: THE SUPREME COURT AND THE POLITICS OF MINORITY REPRESENTATION* 170–72 (1998).

40. See generally Richard H. Pildes, *The Supreme Court, 2003 Term—Foreword: The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 29 (2004).

41. This is not to suggest that Pildes is not interested in or attuned to how race informs politics “on the ground.” See, e.g., *id.* at 86–99 (discussing the institutional realism exhibited in *Georgia v. Ashcroft*, 539 U.S. 461 (2003)).

42. A similar debate is underway about whether changes to campaign finance doctrine would lessen political polarization. See generally Heather K. Gerken, *Playing Cards in a Hurricane: Party Reform in an Age of Polarization*, 54 HOUS. L. REV. 911 (2017).

critiquing the doctrines to the degree that their fundamental premises and analyses, given readily available evidence, are misguided.

The Article proceeds as follows: Part I offers a brief sketch of white identity politics from the mid-twentieth century to the present. Part II describes the myopia of several election law doctrines. Part II.A describes the VRA doctrine pertaining to the creation of majority-minority voting districts, racial gerrymandering doctrine, portions of the doctrines regulating ballot access and election administration issues, and campaign finance doctrine, with an emphasis on how these doctrines presently attend to the nexus between race and politics. These doctrines, I argue, exhibit myopia regarding the significance of white identity politics. Part II.B describes two doctrines—the 1970s constitutional vote dilution doctrine and the political restructuring doctrine—that initially exhibited cognizance of white identity politics but which, over time, have been minimized to the point of irrelevance. Part III then revisits the myopic doctrines, fully explicating their racial blind spots and how they, in some instances, threaten to intensify white identity politics. Part IV contains suggestions, both doctrinal and legislative, for how to mitigate white identity politics.

## I. WHITE IDENTITY IN AMERICAN POLITICS

Race has defined the contours of American political history, and it continues to have a profound effect on electoral outcomes. An accurate telling of the racialization of our politics is no less than a national indictment.<sup>43</sup> In this Part, I offer a brief sketch of white identity politics from the mid-twentieth century to the present.

### A. *White Identity and Political Realignment*

Just after 6:00 p.m. on the evening of June 18, 1964, Arizona Senator and then-presidential contender Barry Goldwater (his nomination would follow in July) took the Senate floor. His speech, “the most closely watched . . . of his political career,”<sup>44</sup> exposed the fractured state of the Republican Party. Though Goldwater emphasized that he was “unalterably opposed to discrimination or segregation on the basis of race, color or creed, or any other basis,” he voiced his opposition to the Civil Rights Act of 1964.<sup>45</sup> His objections, he asserted, were not based on racism, but on a principled

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43. For classic statements to this effect see W. E. B. DuBois, *Problem of 20th Century Is Problem of Color Line*, PITT. COURIER, Jan. 14, 1950, at 8; Frederick Douglass, Speech, What to the Slave Is the Fourth of July? (July 5, 1852) (transcript available at <http://teachingamericanhistory.org/library/document/what-to-the-slave-is-the-fourth-of-july/> [<https://perma.cc/X6ZF-X7B7>]); and see also HOWARD ZINN, DECLARATIONS OF INDEPENDENCE: CROSS-EXAMINING AMERICAN IDEOLOGY 231–58 (1990). For a more modern critique, see generally DESMOND S. KING & ROGERS M. SMITH, STILL A HOUSE DIVIDED: RACE AND POLITICS IN OBAMA’S AMERICA (2012).

44. RICK PERLSTEIN, BEFORE THE STORM: BARRY GOLDWATER AND THE UNMAKING OF THE AMERICAN CONSENSUS 364 (2001).

45. Charles Mohr, *Goldwater Says He’ll Vote ‘No’ on the Rights Measure*, N.Y. TIMES, June 19, 1964, at 1.

understanding of the Constitution.<sup>46</sup> Goldwater's position was not shared by the Republican Party establishment,<sup>47</sup> which viewed African American voters, predominantly in the North, as an important electoral constituency.<sup>48</sup>

Goldwater's deviation from the emerging orthodoxy was viewed as politically foolish, yet even contemporaneous commenters observed the prospective benefits of what would come to be known as the "Southern strategy."<sup>49</sup> One columnist for the *New York Times* noted that Goldwater, "if nominated, may win votes from whites who are disgruntled over Negro militancy on civil rights."<sup>50</sup> Another reported the judgment that "the Republicans' best chance of besting the Democrats in November is to ride the wave of sentiment in the South and North against the pace of Negro equality."<sup>51</sup> The influential writer and political reporter Walter Lippmann described Goldwater's aim as the creation of "a white man's party [that is] not conservative at all, but radically reactionary."<sup>52</sup> And the famed historian Richard Hofstadter wrote of how Goldwater and his supporters "committed themselves not merely to a drive for a core of Southern states in the Electoral College but to a strategic counterpart in the North which required the search for racist votes."<sup>53</sup>

That the Southern strategy was perceived to have *any* nationwide political traction demonstrates the discernable hostility many whites harbored against African American political advancement. Such sentiments are unsurprising, given the completeness of the exclusionary regime African Americans

46. *Id.* (quoting Goldwater's assertion that the Act's public accommodations and fair employment provisions "fly in the face of the Constitution"). Goldwater's constitutional arguments were vetted and endorsed by future Chief Justice William Rehnquist and then-Professor Robert Bork. PERLSTEIN, *supra* note 44, at 363.

47. James Reston, *Deeper Split in GOP: Goldwater Decision to Vote Against Civil Rights Bill Seems to Attack the Senate*, N.Y. TIMES, June 19, 1964, at 18 ("Senator Barry Goldwater's decision to vote against the civil rights bill has clearly widened the split in the Republican party and may very well have strengthened those who oppose his nomination as the Republican Presidential candidate.").

48. See FRYMER, *supra* note 31, at 101 ("As recently as 1960, nearly a majority of middle-class blacks and a third of all black voters had given their support to Richard Nixon against John Kennedy. Although by 1964, fewer than a fifth of black voters supported Barry Goldwater, they continued to selectively offer support to Republican candidates at the state and local level.").

49. See Walter Lippmann, *The Goldwater Southern Strategy: All-White GOP*, STAN. DAILY, Oct. 8, 1964, at 6, <https://stanforddailyarchive.com/cgi-bin/stanford?a=d&d=stanford19641008-01.2.41> [<https://perma.cc/HU4G-FFSX>] ("When Sen. Barry Goldwater went campaigning in the South, his purpose, it appears, was not so much to win this election, but to inaugurate the so[-]called southern strategy in order to lay the foundations for a radically new Republican Party.").

50. Mohr, *supra* note 45, at 18.

51. Reston, *supra* note 47, at 18.

52. Lippmann, *supra* note 49, at 6.

53. RICHARD HOFSTADTER, *THE PARANOID STYLE IN AMERICAN POLITICS* 99 (First Vintage Books ed. 2008). Hofstadter arguably underestimated the strategy. See Rick Perlstein, *I Thought I Understood the American Right. Trump Proved Me Wrong.*, N.Y. TIMES MAG. (Apr. 11, 2017), <https://www.nytimes.com/2017/04/11/magazine/i-thought-i-understood-the-american-right-trump-proved-me-wrong.html> [<https://perma.cc/X7NG-M7WB>] (suggesting that Hofstadter "didn't take the self-identified conservatives of his own time at all seriously").

confronted in the preceding decades. African American men did enjoy a brief period of political inclusion following the ratification of the Fifteenth Amendment.<sup>54</sup> The promise of increased inclusion, though, proved illusory,<sup>55</sup> and the South regressed into a racist aristocracy.<sup>56</sup> When President Taft assumed the presidency in 1909, he disclaimed any responsibility for effectuating the Reconstruction Amendments.<sup>57</sup> The U.S. Supreme Court was also an unreliable enforcer of African American political rights.<sup>58</sup>

Suppression tactics were not limited to the South, and those sympathizing with white supremacist ideologies could be found at all levels of the social hierarchy. As detailed in Linda Gordon's recent study of the reemergence of the Ku Klux Klan in the 1920s, a number of such sympathizers held national political office.<sup>59</sup> These historical truths provide important context for understanding why Goldwater and his aides saw opposition to civil rights measures as politically profitable.

The overall effect of Goldwater's nomination was far-reaching:

In the national election of 1964, overwhelming numbers of African American voters cast their ballots in favor of the Democratic party candidate, Lyndon Johnson. . . . Since that election, black voters have consistently supported Democratic candidates in presidential elections at rates of over 80 to 90 percent. National Republican leaders, meanwhile, have made only sporadic and often halfhearted efforts to court black voters.

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54. J. MORGAN KOUSSER, *COLORBLIND INJUSTICE: MINORITY VOTING RIGHTS AND THE UNDOING OF THE SECOND RECONSTRUCTION* 18–20 (1999); RICHARD M. VALELLY, *THE TWO RECONSTRUCTIONS: THE STRUGGLE FOR BLACK ENFRANCHISEMENT* 99–109 (2004).

55. FRYMER, *supra* note 31, at 72 (“By the 1880s, with black Republican leaders marginalized and with fewer and fewer black voters participating in elections, national Republican leaders were able to further legitimate the pursuit of electoral strategies that largely excluded black interests.”); J. MORGAN KOUSSER, *THE SHAPING OF SOUTHERN POLITICS: SUFFRAGE RESTRICTIONS AND THE ESTABLISHMENT OF THE ONE-PARTY SOUTH, 1880–1910*, at 139–81 (1974).

56. V. O. KEY, JR., *SOUTHERN POLITICS IN STATE AND NATION* 5 (5th prt. 2001) (“In its grand outlines the politics of the South revolves around the position of the Negro. It is at times interpreted as a politics of cotton, as a politics of free trade, as a politics of agrarian poverty, or as a politics of planter and plutocrat. Although such interpretations have a superficial validity, in the last analysis the major peculiarities of southern politics go back to the Negro. Whatever phase of the southern political process one seeks to understand, sooner or later the trail of inquiry leads to the Negro.”).

57. IRA KATZNELSON, *FEAR ITSELF: THE NEW DEAL AND THE ORIGINS OF OUR TIME* 133 (2013).

58. *See, e.g.*, *Giles v. Harris*, 189 U.S. 475 (1903).

59. LINDA GORDON, *THE SECOND COMING OF THE KKK: THE KU KLUX KLAN OF THE 1920S AND THE AMERICAN POLITICAL TRADITION* 164 (2017) (“No one has been able to count all the Klan candidates elected to state and local offices, and the exercise would probably not be worthwhile in any case because so many non-members shared Klan ideology. We can, however, note the members elected to high offices: sixteen senators, scores of congressmen (the Klan claimed seventy-five), and eleven governors, pretty much equally divided between Democrats and Republicans.”).

Just as often, the party has utilized negative racial code words to appeal to swing voters and increase its base of primarily white voters.<sup>60</sup>

Goldwater's unsuccessful 1964 campaign is properly viewed as a precursor to President Richard Nixon's full-scale embrace of the Southern strategy. While aspects of Nixon's record have been cited as pro-civil rights—his support for the “Philadelphia Plan,” an affirmative action construction policy, for instance—even those actions have been interpreted as part of a larger effort to entice white voters.<sup>61</sup>

What is apparent is that Nixon came to see racial pandering as his best path to victory. Drawing lessons from the success of the outwardly racist presidential contender George Wallace, Nixon embraced the Republican Party's sharp rightward shift on the issue of race.<sup>62</sup> The shift was completed

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60. FRYMER, *supra* note 31, at 87; see DOUG MCADAM & KARINA KLOOS, DEEPLY DIVIDED: RACIAL POLITICS AND SOCIAL MOVEMENTS IN POSTWAR AMERICA 97 (2014) (“It now seems clear that Goldwater’s candidacy represents an important early source of centrifugal pressure that helps to set in motion the ideological makeover so evident in today’s Republican Party.”); see also HANEY LÓPEZ, *supra* note 21, at 21 (“The anti-New Deal Republican carried Louisiana, Georgia, Alabama, Mississippi, and South Carolina, states in which whites had never voted for a Republican president in more than miniscule numbers. This was a shocking transformation, one that can only be explained by Goldwater’s ability to transmit a set of codes that white voters readily understood as a promise to protect racial segregation.”).

61. See, e.g., Chris Bonastia, *Why Did Affirmative Action in Housing Fail During the Nixon Era? Exploring the “Institutional Homes” of Social Policies*, 47 SOC. PROBS. 523, 528 (2000) (“The following year, the Nixon Administration revived the Philadelphia Plan for the integration of the construction trades. Some scholars view this decision as a politically crafted strategy to divide two core Democratic constituencies, African-Americans and labor; indeed, top domestic policy aide John Ehrlichman highlights this political calculation as a major reason for Nixon’s support of the Philadelphia Plan.” (citations omitted)); Thomas J. Sugrue, *Affirmative Action from Below: Civil Rights, the Building Trades, and the Politics of Racial Equality in the Urban North, 1945–1969*, 91 J. AM. HIST. 145, 172 (2004) (“Many Nixon aides also saw electoral benefits to the [Philadelphia] plan: it would mortally wound the New Deal coalition by dividing working-class whites and blacks—a division that had been foreshadowed in the acrimonious construction site protests.”).

62. MICHAEL C. DAWSON, BEHIND THE MULE: RACE AND CLASS IN AFRICAN-AMERICAN POLITICS 106 (1994) (“The Nixon administration and its Southern strategy, combined with the defection of large numbers of supporters of racist Alabama governor George Wallace to the Republican party . . . helped seal the racial cleavage within the American party system.”); EDSALL & EDSALL, *supra* note 31, at 98 (“Race was central, Nixon and key Republican strategists began to recognize, to the fundamental conservative strategy of establishing a new, non-economic polarization of the electorate, a polarization isolating a liberal, activist, culturally-permissive, rights-oriented, and pro-black Democratic Party against those unwilling to pay the financial and social costs of this reconfigured social order.”); FRYMER, *supra* note 31, at 103 (“By late 1970, however, Nixon and the Republicans clearly believed that appealing to blacks would hamper broader coalition-building efforts.”); LEVITSKY & ZIBLATT, *supra* note 32, at 36 (“Wallace’s message, which mixed racism with populist appeals to working-class whites’ sense of victimhood and economic anger, helped him make inroads into the Democrats’ traditional blue-collar base.”); MCADAM & KLOOS, *supra* note 60, at 112–13 (“The significance of the Wallace candidacy and the broader white resistance movement he represented for the future electoral prospects of both parties was clear on the face of the 1968 election returns. With the two major parties evenly dividing 86 percent of the popular vote, the remaining 14 percent, which had gone for Wallace, clearly loomed as the balance of power in future elections.”); RICK PERLSTEIN, NIXONLAND: THE RISE OF A PRESIDENT AND THE FRACTURING OF AMERICA 464–68 (describing Nixon’s Southern strategy and attempts to derail Wallace); Frank Rich, *After Trump*, N.Y. MAG. (Nov. 13, 2017), <http://nymag.com/>

under President Reagan, who routinely pandered to the concerns of white voters.<sup>63</sup> The resulting political realignment was sweeping. As noted by Thomas and Mary Edsall:

In 1984, the precincts in white, working-class neighborhoods in the urban North joined the South in propelling a presidential realignment, as the eroding Democratic loyalty of these voters transformed itself from ambivalence to outright rejection. The 1984 election demonstrated that the policy agenda developed by the Reagan administration once in office—an agenda designed to sustain the racial and economic polarization that had emerged in force in the 1980 election—had worked to nurture and enlarge the Republican presidential voting base established in 1980.<sup>64</sup>

The Democratic Party, to the chagrin of party officials, was seen as the party for minorities.<sup>65</sup>

The party's image persists through the present. Despite calculated attempts by President Bill Clinton to attract white voters and reintegrate them into the Democratic Party,<sup>66</sup> the reliance of the party on minority voters and, accordingly, its commitment to serving their interests, repels a significant portion of the white electorate. The election of President Barack Obama

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daily/intelligencer/2017/11/frank-rich-trumpism-after-trump.html [https://perma.cc/XCF5-D3PU] (“Both in 1968 and 1972, with the race-baiting Spiro Agnew on the ticket, Nixon worked hard to usher Wallace’s disaffected white Democrats into the GOP en masse by pandering to their racial and cultural resentments with respectable code words (‘silent majority,’ ‘law and order’) rather than rants like Wallace’s clarion call for ‘segregation forever.’”).

63. HANEY LÓPEZ, *supra* note 21, at 56 (“In the 1980 campaign, Ronald Reagan would come out firing on racial issues, and would blast past Carter. Just 36 percent of whites, only slightly better than one in three, voted for Carter in 1980.”); LEVITSKY & ZIBLATT, *supra* note 32, at 169 (“The racial appeals of Nixon’s ‘Southern Strategy’ and, later on, Ronald Reagan’s coded messages about race communicated to voters that the GOP was the home for white racial conservatives.”); MCADAM & KLOOS, *supra* note 60, at 190 (“But it was Reagan, through his words and his record, far more than the two platforms, who spoke most directly and effectively to the white South in 1980. He proved to be a master of speaking in code about racial matters of long-standing concern to the white South. At campaign stops in the region he reassured voters that he had long opposed government ‘interference’ in ‘states’ rights,’ reminding them that he had refused to back either the Civil Rights Act in 1964 or the Voting Rights Act in 1965.”); *see also* DAWSON, *supra* note 62, at 97 (“In the 1980s, Ronald Reagan led the Republican party to a series of victories that reversed long-standing economic and racial policies. The great majority of African Americans believe Reagan’s policy reversals represented a severe blow to African-American racial interests.”).

64. EDSALL & EDSALL, *supra* note 31, at 172; *see* Reva B. Siegel, *The Supreme Court, 2012 Term—Foreword: Equality Divided*, 127 HARV. L. REV. 1, 32–34 (2013).

65. FRYMER, *supra* note 31, at 112 (referring to a speech in the wake of the 1984 election in which “Senator Daniel Moynihan claimed that the party was now seen by national voters as primarily one for minority voters”).

66. BILL CLINTON, MY LIFE 395 (“I spoke . . . [to] Reagan Democrats . . . voters [who] had begun voting Republican in the 1960s, because they thought the Democrats no longer shared their values of work and family, and were too concerned with social programs, which they tended to see as taking their tax money and giving it to blacks and wasteful bureaucrats. I told a full house [of these voters] that I would give them a new Democratic Party . . . .”); FRYMER, *supra* note 31, at 4–6 (describing examples of Clinton’s efforts to appeal to disaffected white voters, such as calling for welfare reform and explicitly “distan[cing] himself from representatives of the party’s African American constituency”).

further exacerbated many whites' racial anxieties. In their study of the rise of the Tea Party movement—a nearly all-white movement—political scientists Theda Skocpol and Vanessa Williamson found that hatred of Obama explained many members' participation.<sup>67</sup> In 2012:

Romney won the votes of three out of every five white voters; won among white men, white women, and white youth; and won a majority of the white vote in every state in the union save four. Only two candidates have done notably better among whites since dog whistling began: Richard Nixon in his 1972 landslide and Ronald Reagan in his 1984 re-election.<sup>68</sup>

White identity politics, then, is a uniquely important variable in understanding the nation's most recent political realignment.

### B. Trump and White Identity Politics

Writing in 2013, the historian and urban theorist Mike Davis questioned whether the modern Republican Party could alter its agenda “to encompass the minimal share of American ethnic and racial diversity that henceforth will be required to occupy the White House.”<sup>69</sup> The “Southernization” of the party, as he called it, was “beginning to terrify many Old School Republicans.”<sup>70</sup> The fear Davis described had long troubled Party leaders. Ed Gillespie, while chairman of the Republican National Committee, authored an op-ed in the *Wall Street Journal* admonishing Party members about the electoral consequences of the party's anti-immigrant disposition.<sup>71</sup>

Former Republican congressman Mick Mulvaney<sup>72</sup> sounded a similar note in speaking to his South Carolina constituents in 2015:

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67. Erin O'Donnell, *Tea Party Passions*, HARV. MAG. (Jan.–Feb. 2012), <https://harvardmagazine.com/2012/01/tea-party-passions> [<https://perma.cc/5LMT-VPRE>]; see also HANEY LÓPEZ, *supra* note 21, at 152 (“The vast majority of those identifying with the Tea Party were not dyed-in-the-wool Goldwaterites and last-gasp Birchers. They were Wallace voters and Reagan Democrats. They were persons stampeded by racial anxieties into fearing government and demonizing liberalism.”).

68. HANEY LÓPEZ, *supra* note 21, at 166.

69. Mike Davis, *The Last White Election?*, 79 NEW LEFT REV. 5, 11 (2013).

70. *Id.*

71. Edward Gillespie, Opinion, *Populists Beware! The GOP Must Not Become an Anti-Immigration Party*, WALL ST. J. (Apr. 2, 2006, 12:01 AM), <https://web.archive.org/web/20061111031332/http://www.opinionjournal.com/editorial/feature.html?id=110008173> [<https://perma.cc/2T58-P7QK>] (“The Republican Party cannot become an anti-immigration party. Our majority already rests too heavily on white voters, given that current demographic voting percentages will not allow us to hold our majority in the future.”).

72. As of this writing, Mulvaney is currently President Trump's Acting Chief of Staff and the Director of the Office of Management and Budget. Michael Tackett & Maggie Haberman, *Trump Names Mick Mulvaney Acting Chief of Staff*, N.Y. TIMES (Dec. 14, 2018), <https://www.nytimes.com/2018/12/14/us/politics/mick-mulvaney-trump-chief-of-staff.html> [<https://perma.cc/QQE8-YLNA>]. He also served as the Acting Director of the Consumer Financial Protection Bureau in the Trump administration. See Glenn Thrush & Alan Rappaport, *'Like a Mosquito in a Nudist Colony': How Mick Mulvaney Found Plenty to Target at Consumer Bureau*, N.Y. TIMES (May 7, 2018), <https://www.nytimes.com/2018/05/07/us/mick-mulvaney-budget-director-consumer-bureau.html> [<https://perma.cc/8FN9-XGVN>].



At some point we're going to have to figure out that if you take the entire African American community and write them off. Take the entire Hispanic community and write them off. Take the entire Libertarian community and write them off. Take the entire gay community and write them off. What's left? About 38 percent of the country. You cannot win with 38 percent of the country. We need to stop celebrating the absurd in our party. And stop rewarding the outrageous and the stupid. We have to figure out how to deal with it as a party. We're losing too many elections; we're writing off too many people. Umm, I'll give you one last number. Mitt Romney won Texas by 900,000 votes. Pretty good. There are three million Hispanic people in Texas who will be able to register to vote before the next election, 2016, three million new Hispanic voters who are not eligible to vote in 2012 but will be eligible to vote in 2016. If the next Republican candidate for President gets the same percentage of the Hispanic vote that Mitt Romney got, we will lose Texas. Not in 2024, not in 2020, but in 2016. And if we lose Texas folks, I've got news for you, we're never gonna elect a Republican president again.<sup>73</sup>

However sincere the consternation of Gillespie and Mulvaney, the election and continued support of President Donald Trump signifies acceptance on the part of much of the Republican Party establishment and base of an aggressively racist and anti-immigrant agenda. Relevant here are actions Trump has taken and statements he has made that intensify white identity politics.<sup>74</sup>

Trump, as is well known, was a prominent skeptic of President Obama's citizenship, and he used the so-called "birther" issue to build momentum for his campaign.<sup>75</sup> Those susceptible to the birther conspiracy, as shown by political scientist Philip Klinkner, were both white and Republican.<sup>76</sup> Trump notoriously announced his campaign with a speech in which he referred to Mexican immigrants as "rapists,"<sup>77</sup> and he has fomented xenophobia in defense of his immigration-related actions, including the issuance of an executive order barring entry to those from predominantly Muslim countries.<sup>78</sup> Such actions are more than just theater. Studies confirm that

73. Frontline PBS, *Rep. Mick Mulvaney Chastises Fellow Republicans on Immigration*, YOUTUBE (Oct. 26, 2015), <https://www.youtube.com/watch?v=6T5IMHncPUI> [<https://perma.cc/E96H-SNYY>] (statement at timestamp 2:17).

74. These actions and statements are of a piece with a broader threat to the Republic that Trump presents. *See generally* Jamal Greene, *Trump as Constitutional Failure*, 93 IND. L.J. 93 (2018); Richard Primus, *The Republic in Long-Term Perspective*, 117 MICH. L. REV. ONLINE 1 (2018).

75. *See* Michael D. Shear, *With Document, Obama Seeks to End 'Birther' Issue*, N.Y. TIMES (Apr. 27, 2011), <https://www.nytimes.com/2011/04/28/us/politics/28obama.html> [<https://perma.cc/68AS-BGHW>].

76. Philip Klinkner, *The Causes and Consequences of "Birtherism"* (2014) (unpublished manuscript) (on file with author).

77. *See* Alexander Burns, *Choice Words from Donald Trump, Presidential Candidate*, N.Y. TIMES (June 16, 2015, 2:01 PM), <https://www.nytimes.com/politics/first-draft/2015/06/16/choice-words-from-donald-trump-presidential-candidate/> [<https://perma.cc/6MVK-Q7QT>].

78. *See generally* Brief of the Roderick and Solange MacArthur Justice Center as Amicus Curiae in Support of Respondents, *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080

“residents of a diminishing number of decisively white American towns and small cities—even those which supported Barack Obama in 2008 and 2012—can now be politically mobilized around race, ethnicity, multiculturalism and immigration.”<sup>79</sup>

Trump has disparaged Africans,<sup>80</sup> selectively castigated African American football players for protesting racial injustice,<sup>81</sup> and defended white nationalist marchers.<sup>82</sup> He provocatively nominated Alabama Senator Jeff Sessions to be Attorney General, despite compelling allegations of racism in his past.<sup>83</sup> He has granted executive office space to avowed white nationalists<sup>84</sup> and praised and endorsed slavery apologists.<sup>85</sup>

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(2017) (Nos. 16-1436, 16-1540); Nicholas Kulish, Caitlin Dickerson & Charlie Savage, *Court Temporarily Blocks Trump’s Travel Ban, and Airlines Are Told to Allow Passengers*, N.Y. TIMES (Feb. 3, 2017), <https://www.nytimes.com/2017/02/03/us/visa-ban-legal-challenge.html> [<https://perma.cc/XM4W-FBJW>].

79. Thomas B. Edsall, *White-on-White Voting*, N.Y. TIMES (Nov. 16, 2017), <https://www.nytimes.com/2017/11/16/opinion/trump-white-voting.html> [<https://perma.cc/XXJ6-FF54>].

80. See, e.g., Josh Dawsey, *Trump Derides Protections for Immigrants from ‘Shithole’ Countries*, WASH. POST (Jan. 12, 2018), [https://www.washingtonpost.com/politics/trump-attacks-protections-for-immigrants-from-shithole-countries-in-oval-office-meeting/2018/01/11/bfc0725c-f711-11e7-91af-31ac729add94\\_story.html](https://www.washingtonpost.com/politics/trump-attacks-protections-for-immigrants-from-shithole-countries-in-oval-office-meeting/2018/01/11/bfc0725c-f711-11e7-91af-31ac729add94_story.html) [<https://perma.cc/MYQ6-9BST>]; Michael D. Shear & Julie Hirschfeld Davis, *Stoking Fears, Trump Defied Bureaucracy to Advance Immigration Agenda*, N.Y. TIMES (Dec. 23, 2017), <https://www.nytimes.com/2017/12/23/us/politics/trump-immigration.html> [<https://perma.cc/PR6K-DSGC>] (“Forty thousand had come from Nigeria, Mr. Trump added. Once they had seen the United States, they would never ‘go back to their huts’ in Africa . . .”).

81. See Adam Serwer, *Trump’s War of Words with Black Athletes*, ATLANTIC (Sep. 23, 2017), <https://www.theatlantic.com/politics/archive/2017/09/trump-urges-nfl-owners-to-fire-players-who-protest/540897/> [<https://perma.cc/PG5X-JXUX>].

82. See Michael D. Shear & Maggie Haberman, *Trump Defends Initial Remarks on Charlottesville; Again Blames ‘Both Sides,’* N.Y. TIMES (Aug. 15, 2017), <http://www.nytimes.com/2017/08/15/us/politics/trump-press-conference-charlottesville.html> [<https://perma.cc/X92M-NK2V>].

83. See Eric Lichtblau & Matt Flegenheimer, *Jeff Sessions Confirmed as Attorney General, Capping Bitter Battle*, N.Y. TIMES (Feb. 8, 2017), <https://www.nytimes.com/2017/02/08/us/politics/jeff-sessions-attorney-general-confirmation.html> [<https://perma.cc/Y4Z5-9FVM>]; Nina Totenberg, *Jeff Sessions Previously Denied Federal Judgeship amid Racism Controversy*, NPR (Jan. 9, 2017), <https://www.npr.org/2017/01/09/509001314/jeff-sessions-previously-denied-federal-judgeship-amid-racism-controversy> [<https://perma.cc/VE3H-GUTF>]. Sessions resigned the day after the 2018 midterm elections. Devlin Barret et al., *Jeff Sessions Forced Out as Attorney General*, WASH. POST (Nov. 7, 2018), [https://www.washingtonpost.com/world/national-security/attorney-general-jeff-sessions-resigns-at-trumps-request/2018/11/07/d1b7a214-e144-11e8-ab2c-b31dcd53ca6b\\_story.html](https://www.washingtonpost.com/world/national-security/attorney-general-jeff-sessions-resigns-at-trumps-request/2018/11/07/d1b7a214-e144-11e8-ab2c-b31dcd53ca6b_story.html) [<https://perma.cc/3TGF-GHUB>].

84. See William D. Cohan, *How Stephen Miller Rode White Rage from Duke’s Campus to Trump’s West Wing*, VANITY FAIR (Summer 2017), <https://www.vanityfair.com/news/2017/05/stephen-miller-duke-donald-trump> [<https://perma.cc/M8LP-QMCZ>]; Amanda Taub, *‘White Nationalism,’ Explained*, N.Y. TIMES (Nov. 21, 2016), <https://www.nytimes.com/2016/11/22/world/americas/white-nationalism-explained.html> [<https://perma.cc/4STJ-D7HB>].

85. See Michelle Goldberg, Opinion, *The White Supremacy Caucus*, N.Y. TIMES (Dec. 11, 2017), <http://www.nytimes.com/2017/12/11/opinion/white-supremacy-caucus.html> [<http://perma.cc/V8QF-5HBW>]; Gabriel Pogrund, *Trump Calls on Blacks to ‘Honor’ Him with Votes, Then Praises Confederate General Robert E. Lee*, WASH. POST (Oct. 12, 2018), <https://www.washingtonpost.com/politics/trump-calls-on-blacks-to-honor-him-with-votes->

Collectively, these actions and statements communicate a sympathy for white Americans who are disconcerted by “a growing sense of racial or global threat.”<sup>86</sup> The political scientists John Sides, Michael Tesler, and Lynn Vavreck, based on their research, have concluded that “white identity mattered a great deal for voter behavior in the 2016 election, and this appears tied to Donald Trump’s candidacy in particular.”<sup>87</sup> To offer a final example, at the height of the debate over the Trump administration’s decision to divide undocumented immigrant children from their parents, Trump’s approval rating among Republicans was at 90 percent.<sup>88</sup> In sum, white identity politics is more than just an aberrational feature of partisan politics; it is a recurrent, durable driver of political outcomes.<sup>89</sup> Yet despite its undoubted importance, the realities of white identity politics carry little weight in election law doctrines.

## II. RACE AND POLITICS IN ELECTION LAW

Given the significance of white identity politics in late twentieth-century and early twenty-first-century American politics, one might expect that election law doctrines, observant as they are of political realities, might routinely engage the issue. Such consideration, however, is glaringly absent. This Part details what I identify as “racial blind spots” in several election law doctrines. It then considers two doctrines that initially exhibited cognizance of white identity politics but that, over time, have been minimized to the point of irrelevance.

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86. See Niraj Chokshi, *Trump Voters Driven by Fear of Losing Status, Not Economic Anxiety, Study Finds*, N.Y. TIMES (Apr. 24, 2018), <https://www.nytimes.com/2018/04/24/us/politics/trump-economic-anxiety.html> [https://perma.cc/ZD9K-34B5]; see also Thomas B. Edsall, *Why Is It So Hard for Democracy to Deal With Inequality?*, N.Y. TIMES (Feb. 15, 2018), <http://www.nytimes.com/2018/02/15/opinion/democracy-inequality-thomas-piketky.html> [https://perma.cc/RW8J-93SE] (quoting the economist Daron Acemoglu and the political scientist Jacob Hacker).

87. John Sides, Michael Tesler & Lynn Vavreck, *Donald Trump and the Rise of White Identity Politics* 21 (2017) (unpublished manuscript), <https://mershoncenter.osu.edu/media/media/publications/misc-pdfs/sides.pdf> [https://perma.cc/B6ZP-PW4A]; see also Isaac Chotiner, *The Disturbing, Surprisingly Complex Relationship Between White Identity Politics and Racism*, NEW YORKER (Jan. 19, 2019), <https://www.newyorker.com/news/the-new-yorker-interview/the-disturbing-surprisingly-complex-relationship-between-white-identity-politics-and-racism> [https://perma.cc/LHG2-5C82] (interviewing political scientist Ashley Jardina, who noted that “[r]acial attitudes, racial resentment did a great job predicting support for Republican candidates and their primaries across the board, but Trump was the only candidate [in the 2016 Republican primaries] who also appealed to whites who were high on white identity” (second alteration in original)).

88. Jeremy W. Peters, *As Critics Assail Trump, His Supporters Dig in Deeper*, N.Y. TIMES (June 23, 2018), <https://www.nytimes.com/2018/06/23/us/politics/republican-voters-trump.html> [https://perma.cc/CFR9-WSQJ].

89. See generally Joel Olson, *Whiteness and the Polarization of American Politics*, 61 POL. RES. Q. 704 (2008).

### A. Myopia

This section describes several election law doctrines that can be categorized as myopic on the issue of white identity politics. These doctrines—the VRA doctrine pertaining to the creation of majority-minority voting districts, racial gerrymandering doctrine, the doctrine encompassing ballot access and election administration issues, and campaign finance doctrine—fail to engage with the significance of white identity politics. Though the first three doctrines expressly address race, they do not address white identity politics.

#### 1. The Voting Rights Act and Majority-Minority Districts

The Reverend Martin Luther King, Jr.’s 1963 “I Have a Dream” speech, delivered from the steps of the Lincoln Memorial, stands as canonical American oratory. Few listeners know, however, that King improvised the “dream” portion. He had used the same peroration in earlier speeches, but it was not part of what he had planned for that afternoon.<sup>90</sup> King’s improvisation, undetectable to the listener, reveals his skill at adaptation. Whether the nation itself was prepared to adapt was a different matter.

The particular setting would have been familiar to him. Six years earlier, King had led a “Prayer Pilgrimage for Freedom” to Washington, D.C., during which he delivered a speech from the same location.<sup>91</sup> In that speech, King implored the federal government to act to protect African American voting rights.<sup>92</sup> As he knew, and as history revealed, without the vote, African American political advancement was an impossibility.

For decades, the southern-dominated Democratic Party limited participation in primary elections, which were often dispositive, to white voters. It was not until 1944 that the Supreme Court declared such exclusion unconstitutional.<sup>93</sup> Poll tax laws, upheld by the Court in 1937,<sup>94</sup> suppressed both African American and white votes<sup>95</sup> until they were finally invalidated in the mid-1960s.<sup>96</sup> Literacy tests were a particular source of evil, arbitrarily

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90. DAVID J. GARROW, BEARING THE CROSS: MARTIN LUTHER KING, JR., AND THE SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE 283 (1986).

91. Jay Walz, *Negroes Hold Rally on Rights in Capital*, N.Y. TIMES, May 18, 1957, at 1.

92. See GARROW, *supra* note 90, at 93; ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 206–07 (rev. ed. 2009).

93. *Smith v. Allwright*, 321 U.S. 649, 661–66 (1944).

94. See generally *Breedlove v. Suttles*, 302 U.S. 277 (1937).

95. See KEYSSAR, *supra* note 92, at 189–90.

96. U.S. CONST. amend. XXIV (invalidating federal poll taxes); *Harper v. Va. Bd. of Elections*, 383 U.S. 663 (1966) (invalidating state poll taxes); Bruce Ackerman & Jennifer Nou, *Canonizing the Civil Rights Revolution: The People and the Poll Tax*, 103 NW. U. L. REV. 63, 66 (2009) (“[B]etween 1962 and 1966 a cascading wave [of legislative and legal victories] swept away the poll tax once and for all . . .”).

used to turn African Americans away from the polls.<sup>97</sup> They were upheld by the Court as late as 1959<sup>98</sup> and were not categorically eliminated until 1970.<sup>99</sup>

The comprehensiveness of the exclusionary regime convinced reformers that federal action was imperative.<sup>100</sup> The foundational aspiration of the Voting Rights Act of 1965 was, then, to integrate African Americans into mainstream politics by way of the vote; to remedy African Americans' political eviction through extension of the franchise. To that end, the Act was remarkably successful. African American voter registration rates markedly rose,<sup>101</sup> and in time, African American candidates found electoral success.<sup>102</sup>

The Act itself was instrumental in the achievement of this success. Section 5, introduced above, targeted jurisdictions with a demonstrated history of "unremitting and ingenious defiance of the Constitution"<sup>103</sup> by prohibiting any voting-related changes that made minorities worse off.<sup>104</sup> Section 2 of the Act, unlike section 5, is geographically unrestricted and places the primary evidentiary burden on plaintiffs. It forbids any "standard, practice, or procedure . . . 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."<sup>105</sup> Taken in

97. KEYSAR, *supra* note 92, at 207 ("The widespread resistance to integration only underscored the black community's need for political rights, but throughout the 1950s their efforts to vote were thwarted more often than not. In seven states (Alabama, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, and Virginia), literacy tests kept African Americans from the polls: failure of the test could result simply from misspelling or mispronouncing a word.").

98. *Lassiter v. Northampton Cty. Bd. of Elections*, 360 U.S. 45 (1959).

99. *Oregon v. Mitchell*, 400 U.S. 112, 131–34 (1970).

100. See Chandler Davidson & Bernard Grofman, *The Voting Rights Act and the Second Reconstruction*, in *QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT: 1965–1990*, at 378, 378–79 (Chandler Davidson & Bernard Grofman eds., 1994) ("Continued white resistance in the 1960s to school desegregation, the widespread violence against blacks who attempted to desegregate public accommodations, the ominous election of racist demagogues calling for an end to federal pressure for change, and the failure of the Civil Rights acts of 1957, 1960, and 1964 to end systematic exclusion of blacks from the voter rolls in the Deep South convinced civil rights leaders, Congress, and President Lyndon B. Johnson that only extraordinary measures would guarantee black southerners the rights they had long been denied.").

101. See, e.g., Chandler Davidson, *The Voting Rights Act: A Brief History*, in *CONTROVERSIES IN MINORITY VOTING: THE VOTING RIGHTS ACT IN PERSPECTIVE* 7, 21 (Bernard Grofman & Chandler Davidson eds., 1992).

102. KATHERINE TATE, *BLACK FACES IN THE MIRROR: AFRICAN AMERICANS AND THEIR REPRESENTATIVES IN THE U.S. CONGRESS* 55 (2003).

103. *South Carolina v. Katzenbach*, 383 U.S. 301, 309 (1966).

104. *Beer v. United States*, 425 U.S. 130, 141 (1976) ("In other words the purpose of § 5 has always been to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise.").

105. 52 U.S.C. § 10301 (2012). For the history of section 2 and its evolution from a rarely used provision to the central VRA litigation tool, see generally Thomas M. Boyd & Stephen J. Markman, *The 1982 Amendments to the Voting Rights Act: A Legislative History*, 40 WASH. & LEE L. REV. 1347 (1983); Adam B. Cox & Thomas J. Miles, *Judicial Ideology and the Transformation of Voting Rights Jurisprudence*, 75 U. CHI. L. REV. 1493 (2008); Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 HARV. L. REV. 1663 (2001).

combination, these provisions comprised the core of the VRA and codified a unique statutory remedy for the democratic marginalization of voters of color.<sup>106</sup>

By no means, however, was enforcement of the Act uncontested. The VRA's protection of "the right to vote" invited interpretive disputes over what that phrase encompasses. More precisely, the mere ability to cast a vote does not ensure that one's vote holds meaning if a meaningful vote is defined as one with the potential to influence electoral outcomes. There are myriad ways in which electoral structures may be designed so as to dilute the votes of minority voters (whether racial, ethnic, or numeric).<sup>107</sup>

Jurisdictions opposed to the VRA's directives implemented a wide variety of institutional changes antithetical to the Act's purpose.<sup>108</sup> In response, and across years of litigation, the Court interpreted the VRA's protections to prohibit a multitude of such schemes, including the replacement of district-based election systems (under which minorities can plausibly achieve electoral success) with at-large election systems,<sup>109</sup> strategic polling place adjustments,<sup>110</sup> and redistricting plans designed to minimize minority voting influence.<sup>111</sup> The most impactful judicial remedy for these dilutive schemes was the creation of single-member, majority-minority voting districts.<sup>112</sup>

Aside from its extension of the franchise, the legally mandated creation of majority-minority districts is the principal legacy of the VRA. In fact, a large number of the minority members of Congress owe their election to the

106. See Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *The Voting Rights Act in Winter: The Death of a Superstatute*, 100 IOWA L. REV. 1389, 1390 (2015) ("From the moment the Supreme Court first addressed the constitutionality of the [Voting Rights] Act in *South Carolina v. Katzenbach*, the Court has generally treated the VRA like a special statute, a superstatute." (footnote omitted)); Pamela S. Karlan, *The Supreme Court, 2011 Term—Foreword: Democracy and Disdain*, 126 HARV. L. REV. 1, 19 (2012) ("In *South Carolina v. Katzenbach* and *Katzenbach v. Morgan*, the Court upheld several 'inventive' provisions of the Act that essentially bypassed the normal process of constitutional adjudication, in which courts play a primary role, in favor of categorical legislation and executive branch enforcement." (footnotes omitted)).

107. See Chandler Davidson, *Minority Vote Dilution: An Overview*, in MINORITY VOTE DILUTION 1, 5–9 (Chandler Davidson ed., 1984) (describing dilutionary mechanisms).

108. 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, 184 (1989) ("Starting in 1966, in the wake of the massive influx of black voters brought about by the Act's registration machinery, jurisdiction after jurisdiction adopted measures designed to minimize the impact of the increased black vote.").

109. *Allen v. State Bd. of Elections*, 393 U.S. 544, 569 (1969).

110. *Perkins v. Matthews*, 400 U.S. 379 (1971).

111. *Georgia v. United States*, 411 U.S. 526, 534–35 (1973).

112. Many of these districts were initially created after the 1990 U.S. Census. DAVID LUBLIN, *THE PARADOX OF REPRESENTATION* 6 (1997) ("The Voting Rights Act did not strictly require the creation of new black districts, but court decisions combined with the provisions of the act forced states to draw new majority-minority districts or face opposition to their redistricting plans from the Justice Department and the courts."); see also Adam B. Cox & Richard T. Holden, *Reconsidering Racial and Partisan Gerrymandering*, 78 U. CHI. L. REV. 553, 576–77 (2011).

creation of such districts.<sup>113</sup> The use of majority-minority districts as a remedy for minority vote dilution—a direct outgrowth of Justice William Brennan’s framework-establishing opinion in *Thornburg v. Gingles*<sup>114</sup>—reflects what might be designated the consensus approach to minority political empowerment, which was embraced by both political parties and all three branches of the federal government. Under the consensus approach, the principal metric for assessing VRA success is the election of minority candidates. The cause and effect of that consensus warrants a detailed explanation.

The foundation of the consensus is *Gingles*. The case arose following the North Carolina General Assembly’s enactment of a state legislative districting plan that, through its use of multimember electoral districts, was alleged to dilute minority votes in violation of section 2 of the VRA. This arrangement prevented minority voters from electing their preferred candidates.<sup>115</sup> Dilution claims, it should be noted, are premised on the enduring fact that African American, Hispanic, and white voters generally favor different candidates. Consequently, the use of at-large or multimember electoral districts is a reliable means of preventing minority voters from electing candidates of choice. Put differently, absent some degree of racial crossover voting, minority voters are unlikely to see their preferred candidates in office.<sup>116</sup>

Faced with this conundrum in *Gingles*, Justice Brennan endeavored to condense earlier vote dilution precedents and the VRA’s legislative history into a workable framework.<sup>117</sup> A successful claim, he explained, depends upon both the need and the possibility of minority electoral success. That is, “a bloc voting majority must *usually* be able to defeat candidates supported by a politically cohesive, geographically insular minority group.”<sup>118</sup>

These three prerequisites—(1) geographic compactness and a population sufficient to comprise the majority in a single-member district; (2) political cohesion; and (3) the existence of racially polarized voting—form “the linchpin of the [section 2] liability inquiry.”<sup>119</sup> While earlier cases, the text

113. See FRYMER, *supra* note 31, at 174; LUBLIN, *supra* note 112, at 6–7, 22; KENNY J. WHITBY, THE COLOR OF REPRESENTATION: CONGRESSIONAL BEHAVIOR AND BLACK INTERESTS 116–17 (1997); Lisa Handley & Bernard Grofman, *The Impact of the Voting Rights Act on Minority Representation: Black Officeholding in Southern State Legislatures and Congressional Delegations*, in QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT: 1965–1990, *supra* note 100, at 335, 339–40 (“Action by the Justice Department, as well as by private litigants (particularly in the 1980s, when civil rights and minority groups made use of the newly amended provisions of section 2 of the Voting Rights Act), accounts for most of the growth in black legislative representation in the South.”).

114. 478 U.S. 30 (1986).

115. *Id.* at 34–35.

116. Karlan, *supra* note 108, at 177.

117. *Gingles*, 478 U.S. at 35, 48; see also GROFMAN ET AL., *supra* note 5, at 31–42.

118. *Gingles*, 478 U.S. at 48–49.

119. Cox & Miles, *supra* note 105, at 1501; see Samuel Issacharoff, *Polarized Voting and the Political Process: The Transformation of Voting Rights Jurisprudence*, 90 MICH. L. REV. 1833, 1849 (1992) (“When stripped to its essentials, the paradigmatic claim of minority vote dilution . . . incorporate[s] three basic features: (1) structural obstacles to the electoral success

of section 2, and the VRA's legislative history also advise consideration of the "totality of the circumstances"—which includes the history of official discrimination in a given jurisdiction and the past and present use of racial appeals in campaigns<sup>120</sup>—satisfaction of the three prerequisites generally determines liability.<sup>121</sup>

In *Gingles* itself, the Court invalidated the challenged districts,<sup>122</sup> finding the African American community to be of sufficient size,<sup>123</sup> and finding racially polarized voting—the most important evidentiary component—to be extant.<sup>124</sup> The upshot of the decision was the introduction of a relatively simple framework for adjudicating vote dilution claims. Lower courts, the executive branch, political parties, and the voting rights bar followed the Court's lead, thereby establishing the consensus. As summarized by Professor J. Morgan Kousser, "Seemingly uncomplicated, this 'three-pronged *Gingles* test' became the fulcrum of voting rights cases for the rest of the decade and strongly influenced the 1990s round of redistricting, being interpreted by people of nearly all political persuasions as mandating the drawing of minority opportunity districts wherever possible."<sup>125</sup>

In addition, though, what the decision enunciated, and what was augmented in the profusion of subsequent cases,<sup>126</sup> was what Professor Lani

of minorities, such as at-large elections; (2) behavioral patterns that interact with the structural obstacles to exaggerate the political power of the majority—i.e., racially polarized voting; and (3) a resulting underrepresentation or even complete lack of representation of the minority community relative to its proportion of the population.”).

120. See, e.g., 52 U.S.C. § 10301(b) (2012); *Zimmer v. McKeithen*, 485 F.2d 1297, 1305–07 (5th Cir. 1973). See generally S. REP. NO. 97-417 (1982).

121. Cox & Miles, *supra* note 105, at 1519–20 (providing data in support of the “conventional wisdom that satisfaction of the *Gingles* factors correlates strongly with liability”).

122. *Gingles*, 478 U.S. at 80 (“The District Court in this case carefully considered the totality of the circumstances and found that in each district racially polarized voting; the legacy of official discrimination in voting matters, education, housing, employment, and health services; and the persistence of campaign appeals to racial prejudice acted in concert with the multimember districting scheme to impair the ability of geographically insular and politically cohesive groups of black voters to participate equally in the political process and to elect candidates of their choice.”). Justice Byron White, in concurrence, objected to Justice William Brennan’s statement that when assessing racially polarized voting the race of the candidate is irrelevant. *Id.* at 83 (White, J., concurring). Justice Sandra Day O’Connor rejected Justice Brennan’s three-part vote dilution framework on the grounds that it would effectively require proportional representation, despite Congress’s express desire to the contrary. *Id.* at 96 (O’Connor, J., concurring in the judgment).

123. *Id.* at 50 n.16 (majority opinion).

124. *Id.* at 56 (“The purpose of inquiring into the existence of racially polarized voting is twofold: to ascertain whether minority group members constitute a politically cohesive unit and to determine whether whites vote sufficiently as a bloc usually to defeat the minority’s preferred candidates.”); see also Issacharoff, *supra* note 119, at 1851 (“*Gingles* brought the racially polarized voting inquiry into the undisputed and unchallenged center of the Voting Rights Act . . .”).

125. KOUSSER, *supra* note 54, at 343.

126. See Ellen Katz et al., *Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982*, 39 U. MICH. J.L. REFORM 643, 660 (2006) (“Since the Court decided *Gingles*, 169 lawsuits have addressed its preconditions, and 68 lawsuits found them to be satisfied.”).



Guinier famously called the “triumph of tokenism.”<sup>127</sup> Guinier presciently deciphered the disadvantages of the doctrine’s prioritization of electoral success at the expense of other correctives.<sup>128</sup> When the “ability to elect” became the preeminent aspiration, alternate ideas about how to effectuate minority political empowerment were marginalized. Put differently, the consensus created an ideational inflection point that narrowly demarcated the realm of the possible.<sup>129</sup>

The deficiencies of the consensus were immediately apparent in the lower courts. For instance, in Florida, African American plaintiffs challenged the use of an at-large district system for the election of county commissioners and county school board members.<sup>130</sup> County officials conceded a VRA violation and agreed to replace the at-large system with a system of single-

127. LANI GUINIER, *THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY* 41 (1994).

128. *See id.* at 49 (“Litigation to enforce the Voting Rights Act transformed the original goals of broad-based voter participation, reform, and responsive representation into the shorthand of counting elected black officials. In addition, judicial interpretation of the statute compressed the civil rights movement’s capacious conception of political representation, redistribution, and participation into a narrow electoral focus on black representation.”).

129. *Id.* (“Issues of voter participation, effective representation, and policy responsiveness are omitted from the calculus.”). Professor Karlan, for instance, encouraged the consideration of limited or cumulative voting systems as judicial remedies, along with structural remedies to legislative bodies that would foster minority political empowerment. Karlan, *supra* note 108, at 213–48. An immensely rich scholarly literature emerged on the question of whether the presence of minority elected officials in legislative bodies (descriptive representation) resulted in policies and practices beneficial to minorities (substantive representation). *See, e.g.*, DAVID T. CANON, *RACE, REDISTRICTING, AND REPRESENTATION: THE UNINTENDED CONSEQUENCES OF BLACK MAJORITY DISTRICTS* 244 (1999) (“The race of the representative has important implications for the type of representation that is provided to a district with a significant number of black constituents.”); LUBLIN, *supra* note 112, at 119 (“Efforts to maximize the number of black elected members of the House and pro-black congressional legislation work at cross-purposes.”); MICHAEL D. MINTA, *OVERSIGHT: REPRESENTING THE INTERESTS OF BLACKS AND LATINOS IN CONGRESS* 125 (2011) (highlighting “the important role that racial and ethnic minorities play in improving the policymaking process through strategic group uplift and by bringing distinctive perspectives to policymaking and congressional oversight”); ADOLPH REED, JR., *STIRRINGS IN THE JUG: BLACK POLITICS IN THE POST-SEGREGATION ERA* 121 (1999) (“The new regime of race relations management as realized through the four-pronged dynamic of incorporation that I have discussed has exerted a demobilizing effect on black politics precisely by virtue of its capacities for delivering benefits and, perhaps more important, for defining what benefits political action can legitimately be used to pursue.”); CAROL M. SWAIN, *BLACK FACES, BLACK INTERESTS: THE REPRESENTATION OF AFRICAN AMERICANS IN CONGRESS* 19 (enlarged ed. 2006) (“[W]hite Democrats also appear to represent blacks well.”); MELISSA S. WILLIAMS, *VOICE, TRUST, AND MEMORY: MARGINALIZED GROUPS AND THE FAILINGS OF LIBERAL REPRESENTATION* 223 (1998) (“[O]ne hope is that the mere presence of representatives from historically marginalized groups will produce changes in legislative dynamics.”); Charles Cameron, David Epstein & Sharyn O’Halloran, *Do Majority-Minority Districts Maximize Substantive Black Representation in Congress?*, 90 AM. POL. SCI. REV. 794, 798 (1996) (“The overall efficacy of majority-minority districts in advancing black interests, therefore, remains unresolved. These districts certainly increase the number of minority candidates elected to office, that is, the descriptive representation of minorities. But it is unclear that concentrated minority districts augment the substantive representation of minorities or the chance that legislation favored by the minority community will be enacted by Congress.”).

130. *See Potter v. Washington County*, 653 F. Supp. 121, 122 (N.D. Fla. 1996).

member districts.<sup>131</sup> Plaintiffs sought the creation of a majority-minority district as a remedy, but the district court judge found that “there is no provision in the Voting Rights Act that minorities must be afforded proportionate representation on a legislative body.”<sup>132</sup> This finding concluded the case; alternative means of affording plaintiffs an effective voice in the community were not considered.

The preeminence of the consensus was similarly evident in a challenge brought by African American voters to an at-large aldermanic election system in Mississippi.<sup>133</sup> The facts of the case were unusual in that African Americans constituted over 60 percent of the jurisdiction’s voting-age population, yet they had largely failed to elect any of their preferred candidates to the four-member board of aldermen.<sup>134</sup> Given the demographics, and no doubt assured by the belief that the prospect of electoral success was self-evident, the city officials conceded liability under the VRA: “The city nonetheless contends that, even though *arguendo* it deprives blacks of their right to participate equally in the political process, the substantial black majority of [the city’s] voting-age population prevents the district court from ordering relief under the Act.”<sup>135</sup> This audacious concession is unintelligible without an understanding of how narrow the VRA’s remedial breadth was perceived to be.<sup>136</sup>

The consensus also enabled political opportunism. As has been well-documented, one of the great ironies of the consensus was the opportunity it presented to the Republican Party. The party perceived an advantage in creating majority-minority districts; in “packing” minority voters—who by this point reliably voted for Democrats—into a limited number of districts, thereby strengthening the party’s electoral prospects elsewhere. The political calculation was succinctly captured by the political scientists Edward Carmines and Robert Huckfeldt, who, writing in 1992, concluded that “[t]he coalition of blacks and new white liberals that is often able to win elections in local politics is doomed to failure in national politics because there are not enough white liberals.”<sup>137</sup> Once the Republican Party apprehended the advantage to be gained by packing, it fully embraced the consensus and advocated the use of both section 5 and section 2 to mandate the creation of majority-minority districts wherever possible.<sup>138</sup>

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131. *See id.*

132. *Id.* at 127.

133. *See Monroe v. City of Woodville*, 819 F.2d 507, 508 (5th Cir. 1987).

134. *See id.* at 508.

135. *Id.* at 510.

136. Though not to the judge deciding the case. *See id.* at 510 (“We find the city’s concession of a violation of the Voting Rights Act to be both logically and factually inconsistent with its stance that [the city] is already a safe district.”).

137. Edward G. Carmines & Robert Huckfeldt, *Party Politics in the Wake of the Voting Rights Act*, in *CONTROVERSIES IN MINORITY VOTING: THE VOTING RIGHTS ACT IN PERSPECTIVE*, *supra* note 101, at 117, 134.

138. KOUSSER, *supra* note 54, at 409 (noting that the Republican Party “propos[ed] to pack minorities into as few seats as possible and to turn white and minority Democrats against each other by making gains for one group come at the expense of the other”); LUBLIN, *supra* note

In retrospect, the VRA might have helped curtail the growth of white identity politics. This is perhaps wishful thinking, but it is at least plausible that use of the VRA to combat concerted efforts to “abridge” the right to vote might have stemmed some of the worst occurrences. Alternatively, there might have been greater creativity on the part of judges during the remedial stage of litigation. Instead, white identity politics took firm hold during the Reagan years and have informed Republican Party politics ever since.

This section might be summarized as follows: in recent decades, the judiciary has expressed a clear commitment to the diversification of legislative bodies. This commitment, arguably coming at the expense of alternative, more capacious means of effectuating minority political empowerment, has been instrumental in helping minorities obtain elected office. In furtherance of this aspiration, courts have adopted a pluralist theory of democracy, which regards minorities as specialized interest groups that warrant judicial solicitude, yet ultimately bear the obligation to advance their interests through traditional democratic channels.<sup>139</sup> This approach was conducive to integrating minorities into mainstream politics, but it was inherently limited in scope and consequently failed to respond to the institutionalization of white identity politics by the Republican Party.

In addition to enabling political opportunism, the consensus obstructed from view the ways in which white identity politics was operating in the electorate. For instance, Professors Stephen Ansolabehere and Nathaniel Persily identify a sizable racial divide in public opinion on the merits of majority-minority districting: “Clear racial differences can be seen concerning approval of [majority-minority districts]: 83% of Blacks and 74% of Hispanics, but only 44% of Whites, approve of the creation of [majority-minority districts].”<sup>140</sup> Though any definite conclusions would be premature, the findings raise the question of whether majority-minority districts inspire racial resentment among whites.

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112, at 30 (“*Thornburg v. Gingles* paved the way for minorities, the Department of Justice, and Republicans to successfully press state legislators to create new majority-minority constituencies during the 1990 redistricting cycle with the full force of the Voting Rights Act behind them.”); Cox & Holden, *supra* note 112, at 586–87 (describing the Republican Party’s “max black” agenda).

139. See generally DAVID TRUMAN, *THE GOVERNMENTAL PROCESS: POLITICAL INTERESTS AND PUBLIC OPINION* (1951) (discussing pluralism and the role of specialized interest groups in the political process); Bertrall L. Ross II, *Democracy and Renewed Distrust: Equal Protection and the Evolving Judicial Conception of Politics*, 101 CALIF. L. REV. 1565 (2013) (discussing the U.S. Supreme Court’s traditionally pluralist views of minority groups in politics and noting the ways that these views have changed in recent years). Pluralism is but one theory of democracy informing election law. See, e.g., David Schultz, *The Case for a Democratic Theory of American Election Law*, 164 U. PA. L. REV. ONLINE 259, 264–67 (2016) (analyzing the Madisonian democracy, pluralist, and progressivist theories).

140. Stephen Ansolabehere & Nathaniel Persily, *Testing Shaw v. Reno: Do Majority-Minority Districts Cause Expressive Harms?*, 90 N.Y.U. L. REV. 1041, 1063 (2015).

## 2. Racial Gerrymandering Doctrine

The embrace of the consensus approach notwithstanding, not everyone perceived the legally mandated creation of majority-minority districts as a positive development. A challenge brought by white plaintiffs in North Carolina, in response to the construction of two oddly shaped majority African American congressional districts in the early 1990s, allowed for the recognition of a new type of constitutional claim. This claim, what Professors Richard Pildes and Richard Niemi later labeled an “expressive harm” claim, was a bit of a curiosity.<sup>141</sup> The plaintiffs argued that the state’s reliance on race in the construction of the districts violated the Equal Protection Clause.<sup>142</sup> The Supreme Court’s resolution of this challenge in *Shaw v. Reno*<sup>143</sup> is principally known for the majority’s validation of the plaintiffs’ claim by way of a novel conception of harm.<sup>144</sup>

What exactly was the harm suffered by the white plaintiffs? After all, no white voters were deprived of the right to vote. No white voters suffered a dilution of their votes. The plaintiffs’ claim, in fact, was premised on the notion that the mere use of race in the redistricting process constituted an affront that warranted invalidation of North Carolina’s redistricting plan. Reconciling this type of claim with contemporaneous election law doctrine was no easy task given the VRA doctrine, described in the prior section, which required a degree of race-consciousness in redistricting.<sup>145</sup> Justice Sandra Day O’Connor’s majority opinion in *Shaw* is best understood as an announcement that the degree to which race may be taken into account when redistricting has limits. Most relevantly, it offers a compelling illustration of how racial gerrymandering doctrine, though expressly engaged with race, is decidedly myopic about white identity politics.

Justice O’Connor’s decision classified the North Carolina plan as “so highly irregular that, on its face, it rationally cannot be understood as anything other than an effort to ‘segregat[e] . . . voters’ on the basis of race.”<sup>146</sup> Racial gerrymandering, Justice O’Connor argued, “bears an uncomfortable resemblance to political apartheid.”<sup>147</sup> Accordingly, she reasoned, it problematically signals to both voters and elected representatives that race is and should be the overriding factor in political decision-

141. Richard H. Pildes & Richard G. Niemi, *Expressive Harms, Bizarre Districts, and Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno*, 92 MICH. L. REV. 483, 506–07 (1993).

142. See *Shaw v. Reno*, 509 U.S. 630, 642, 649 (1993).

143. 509 U.S. 630 (1993).

144. See Pildes & Niemi, *supra* note 141, at 493 (“*Shaw* now recognizes a distinct type of claim. This new claim entails a distinct conception of constitutional harms as well as a distinct, implicit theory of political representation.”).

145. It is, in fact, impossible to conceive of a congressional redistricting effort that would not consider race to some degree. See *Miller v. Johnson*, 515 U.S. 900, 916 (1995) (“Redistricting legislatures will, for example, almost always be aware of racial demographics; but it does not follow that race predominates in the redistricting process.”).

146. *Shaw*, 509 U.S. at 646–47 (alterations in original) (quoting *Gomillion v. Lightfoot*, 364 U.S. 339, 341 (1960)).

147. *Id.* at 647.

making.<sup>148</sup> Because, in Justice O'Connor's view, race-driven politics is deeply undesirable, courts must sanction government action suggesting otherwise. For her, the Court's recognition of racial gerrymandering claims was a progressive undertaking, one that instigated the country's move toward greater tolerance and unity:

Racial classifications of any sort pose the risk of lasting harm to our society. They reinforce the belief, held by too many for too much of our history, that individuals should be judged by the color of their skin. Racial classifications with respect to voting carry particular dangers. 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—a goal that the Fourteenth and Fifteenth Amendments embody, and to which the Nation continues to aspire. It is for these reasons that race-based districting by our state legislatures demands close judicial scrutiny.<sup>149</sup>

Many scholars have questioned the coherence of Justice O'Connor's opinion, finding her application of traditional equal protection analysis in the voting-rights context to be confused.<sup>150</sup> Moreover, the harm that so troubled her—the prospect of racial gerrymandering exacerbating racial division—was abstract, it was divorced from any realist inquiry into the actual political environment. For example, despite having a sizable African American community, North Carolina had not sent an African American to Congress in over ninety years.<sup>151</sup> The challenged districts were a justifiable means of responding to that fact. The congressional districts in which the plaintiffs lived were themselves fairly integrated, a fact that, again, raises questions

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148. *Id.* at 647–48; see also Richard H. Pildes, *Diffusion of Political Power and the Voting Rights Act*, 24 HARV. J. L. & PUB. POL'Y 119, 121 (2000) (“On this view, a practice of self-consciously creating black, Hispanic, or Asian-majority districts, or white-majority districts, expresses a view of political identity inconsistent with democratic ideals.”); Michael J. Pitts, *What Has 25 Years of Racial Gerrymandering Doctrine Achieved?*, 9 U.C. IRVINE L. REV. 229, 231 (2018) (“First, the Court expressed a view that the [racial gerrymandering] doctrine could foster a political environment with less racially polarized voting. Second, the Court thought the doctrine would lead to the election of government officials who would serve their constituency more holistically.”).

149. *Shaw*, 509 U.S. at 657.

150. See, e.g., RICHARD L. HASEN, *THE SUPREME COURT AND ELECTION LAW: JUDGING EQUALITY FROM BAKER V. CARR TO BUSH V. GORE* 142 (2003) (“In short, although the *Shaw* Court used the label of equal protection, there does not appear to be any political equality problem at issue in these cases. Even when the government ‘sends a message with its conduct’ in a political equality case, we should view that message as irrelevant if it has no bearing on real political power relationships.”); Pamela S. Karlan & Daryl J. Levinson, *Why Voting Is Different*, 84 CALIF. L. REV. 1201, 1202 (1996) (“We believe that the Court’s attempt to integrate voting rights law into its more general approach to affirmative action is both misguided and incoherent.”). But see Charles & Fuentes-Rohwer, *supra* note 8, at 1573 (“However, particularly as refracted through the lens of time and the benefit of hindsight, we can also see that Justice O’Connor was committed, even if comparatively less so, to a competing principle, which was that racial equality also demanded some modicum of race consciousness.”).

151. KOUSSER, *supra* note 54, at 243.

about the ostensible legal injury.<sup>152</sup> Even a partial look into North Carolina's political history would have uncovered the longstanding salience of white identity politics.

In his remarkably rich historical study, *Colorblind Injustice*, J. Morgan Kousser devoted a chapter to what he called "a century of electoral discrimination in North Carolina."<sup>153</sup> He documented the state's strategic decisions, over decades, to stifle African American political advancement. He also cited a study conducted at the time of *Shaw*, which demonstrated that African American and white public opinion differed markedly on questions about the continued presence of discrimination.<sup>154</sup>

In addition, he found Justice O'Connor's presumption that racial gerrymandering would increase racial bloc voting to be faulty, because, among other things, "racial bloc voting in congressional elections was already extremely high."<sup>155</sup> Further, after examining the congressional roll call votes of North Carolina's delegation, both past and present, he concluded that "white politicians in North Carolina have overwhelmingly considered their 'primary obligations' to be to whites, while they have largely ignored the opinions of the black members of their constituencies."<sup>156</sup>

Taking account of this information presents *Shaw* in a different light. In considering the actual political environment in North Carolina at the time, the Department of Justice's mandated construction of the challenged districts appears well-considered. And the information refutes Justice O'Connor's antibalkanization thesis, under which racial gerrymandering expands the racial divide, whereas curtailing it holds the promise of racial unification.<sup>157</sup>

Thus, the racial gerrymandering doctrine is properly labeled myopic because of its inattention to the actual racial consequences of its commands. Importantly, it is not that the doctrine eschews consequentialist reasoning altogether—Justice O'Connor's core presumption is that racial gerrymandering will worsen race relations. Rather, the reasoning it employs is unjustifiably optimistic about the declining significance of race and, therefore, fails to pursue or assign value to findings that undermine its premises.

The indifference to such findings became a feature of the doctrine. For instance, "the Court struck down Georgia's, Texas', and North Carolina's reapportionment plans without reference to *any* findings that the representatives elected from the majority-black and majority-Hispanic

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152. *Id.* ("[T]he districts were in fact the least segregated, most nearly racially balanced congressional districts in the state in the twentieth century."); Pamela S. Karlan, *All over the Map: The Supreme Court's Voting Rights Trilogy*, 1993 SUP. CT. REV. 245, 282.

153. KOUSSER, *supra* note 54, at 243. This chapter spans pages 243 to 276.

154. *Id.* at 271–73.

155. *Id.* at 273.

156. *Id.* at 276.

157. See Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L.J. 1278, 1357 (2011) ("Antibalkanization, as we have seen, is distinctively concerned about the appearance of race-conscious interventions—the risk that race-conscious civil rights interventions will heighten conflict or resentment.").

districts ignored the needs of their white constituents.”<sup>158</sup> With no searching judicial inquiry required, a redistricting plan’s constitutionality came to turn on the question of whether “race was the predominant factor motivating the legislature’s decision to place a significant number of voters within or without a particular district.”<sup>159</sup> Tellingly, this “predominant factor” inquiry scrutinizes the cosmetic features of a district while assigning no importance to the subtleties of the district’s racial politics.<sup>160</sup> Judges, in adherence to the doctrine, are thus “willfully blind to the messy realities of the political process.”<sup>161</sup>

The Court’s disinterest in considering the racial implications of politics as practiced was reinforced by its decision in *Easley v. Cromartie*.<sup>162</sup> The case concerned a renewed challenge to one of the same North Carolina congressional districts that was at issue in *Shaw*. In *Cromartie*, though, Justice O’Connor joined the liberal wing of the Court in upholding the district, crediting the state’s defense that politics, not race, explained its design.<sup>163</sup> The notion that courts can sensibly disaggregate racial from political justifications is a fiction that continues to cause confusion. Nonetheless, *Cromartie* communicated to states that they can avoid *Shaw* violations by playing up the political reasons for their districting choices.<sup>164</sup>

*Shaw* litigation largely ceased for nearly twenty years,<sup>165</sup> only to recently reemerge in a new fashion.<sup>166</sup> Its resurrection abounds with ironies. First, unlike the initial wave of *Shaw* cases in which the plaintiffs were white, the plaintiffs in the latest series of cases have been African American.<sup>167</sup> Second, rather than alleging that states’ use of race in redistricting is per se a violation of the Equal Protection Clause, the recent plaintiffs have alleged that

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158. Karlan & Levinson, *supra* note 150, at 1212.

159. *Miller v. Johnson*, 515 U.S. 900, 916 (1995).

160. ISSACHAROFF ET AL., *supra* note 36, at 924 (“After *Shaw I* and *Miller*, it seemed that strict scrutiny could be triggered by either direct or circumstantial evidence of a line drawer’s intent, with district shape and adherence to ‘traditional districting principles’ as particularly powerful circumstantial evidence.”); Karlan & Levinson, *supra* note 150, at 1214 (“Ultimately, the Court has proceeded on the assumption that the very use of race—and not some additional adverse effect—constitutes the injury.”).

161. Karlan & Levinson, *supra* note 150, at 1217.

162. 532 U.S. 234 (2001).

163. *Id.* at 245 (“A legislature trying to secure a safe Democratic seat is interested in Democratic voting behavior. Hence, a legislature may, by placing reliable Democratic precincts within a district without regard to race, end up with a district containing more heavily African-American precincts, but the reasons would be political rather than racial.”).

164. Charles & Fuentes-Rohwer, *supra* note 8, at 1564 (“The Court sent a clear message to legislatures drawing majority-minority districts that they would have a safe harbor from such claims so long as they could plausibly claim they were motivated by political considerations as opposed to racial considerations when they drew the district lines.”).

165. ISSACHAROFF ET AL., *supra* note 36, at 937–38 (examining why *Shaw* litigation slowed); KEYSSAR, *supra* note 92, at 241–42.

166. *See generally* *Cooper v. Harris*, 137 S. Ct. 1455 (2017); *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788 (2017); *Ala. Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257 (2015).

167. *See Cooper*, 137 S. Ct. at 1466; *Bethune-Hill*, 137 S. Ct. at 794; *Ala. Legislative Black Caucus*, 135 S. Ct. at 1262.

Republican-controlled redistricting bodies have unnecessarily overpopulated majority-minority districts to the detriment of minority voters.<sup>168</sup>

Consider the facts of *Cooper v. Harris*,<sup>169</sup> one such case from 2017. Following the most recent reapportionment, the North Carolina legislature increased the percentage of African Americans of voting age (the “Black Voting Age Population,” or “BVAP”) in two of its congressional districts. In District 1, the BVAP was increased from 48.6 percent to 52.7 percent. In District 12, it was increased from 43.8 percent to 50.7 percent.<sup>170</sup> Plaintiffs claimed that the state unjustifiably packed African American voters into these districts, thereby diminishing African American political influence elsewhere.<sup>171</sup> The state argued in response that its decision was based, not on a nefarious motive, but on its obligation to avoid potential liability under section 2 of the VRA.<sup>172</sup> In other words, the state claimed that failure to design the districts as it did might have resulted in liability for minority vote dilution. Importantly, the Court has previously found compliance with the VRA to be a compelling justification for the consideration of race in redistricting.<sup>173</sup> With regard to District 12, the state also claimed that politics, not race, best explained its design.<sup>174</sup>

The Court rejected both of the state’s justifications and invalidated both districts. For District 1, Justice Kagan’s opinion concluded that the state’s concern about avoiding section 2 liability was unfounded.<sup>175</sup> For District 12, it concluded that the district court’s determination that race predominated over politics did not constitute clear error.<sup>176</sup> On one level, the recent *Shaw* cases read as promising—the Court has acted to prohibit states’ use of VRA compliance as a pretext for the packing of minority voters.<sup>177</sup> But the new *Shaw* doctrine is no less myopic than its earlier version, and there is reason to doubt courts’ ability to meaningfully mitigate white identity politics through its application.

First, despite its novelty, the doctrine is at its core simply an amalgamation of the original racial gerrymandering doctrine and the VRA doctrine pertaining to the creation of majority-minority districts: minority plaintiffs allege unconstitutional reliance on race in the packing of minority voters in

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168. See *Cooper*, 137 S. Ct. at 1466; *Bethune-Hill*, 137 S. Ct. at 802; *Ala. Legislative Black Caucus*, 135 S. Ct. at 1279 (Scalia, J., dissenting).

169. 137 S. Ct. 1455 (2017).

170. *Id.* at 1466.

171. See *id.*

172. *Id.* at 1469.

173. *Shaw v. Hunt*, 517 U.S. 899, 915 (1996).

174. *Cooper*, 137 S. Ct. at 1473.

175. *Id.* at 1470 (“Here, electoral history provided no evidence that a § 2 plaintiff could demonstrate the third *Gingles* prerequisite—effective white bloc-voting.”).

176. *Id.* at 1474 (“The evidence offered at trial, including live witness testimony subject to credibility determinations, adequately supports the conclusion that race, not politics, accounted for the district’s reconfiguration.”).

177. See Levitt, *supra* note 26, at 576 (“Several states purportedly sought to comply with the Act when they redrew legislative district lines in 2011. Yet their version of compliance appears premised purely on demographic percentages—and thus, on demographic stereotype.”).



a district; states, in turn, argue that they did so in order to avoid VRA liability; courts are then tasked with assessing whether race did in fact predominate in the design of the district and, if so, whether VRA liability, absent the state's design, was a live possibility. Thus, the evidentiary factors of the greatest significance are the same as what are currently found in section 2 cases applying *Gingles*.<sup>178</sup> As detailed in Part II.A.1, those factors ascertain the prospect of minority electoral success, not necessarily the overall political engagement of minority constituents.

Second, the traditional *Gingles* factors only come into play once a plaintiff has established that race was the “predominant factor” in the packing of minority voters.<sup>179</sup> As many have observed, and despite the findings in *Cooper*, savvy redistricting bodies are likely to have little difficulty raising political justifications for their decisions.<sup>180</sup> As long as the Court refuses to police political gerrymandering,<sup>181</sup> the reach of racial gerrymandering doctrine will be inherently delimited.

Third, and more ominously, *Cooper* and the other recent *Shaw* cases can be read as the latest manifestation of the Court's “long-running project of winding down unnecessary racial redistricting.”<sup>182</sup> If this is an accurate diagnosis, the Court is, if anything, institutionally disinclined to develop doctrinal understandings that might account for white identity politics.<sup>183</sup> Others see greater promise,<sup>184</sup> but, to date, the new *Shaw* doctrine, much like its compositional doctrines, serves to remedy only a narrow range of racially regressive practices.

### 3. Election Administration Issues

An increasing number of election law disputes involve what are referred to as election administration issues. These are disputes over administrative matters implicating the right to vote. Most prominent has been the question

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178. See Richard L. Hasen, *Racial Gerrymandering's Questionable Revival*, 67 ALA. L. REV. 365, 379–80 (2015) (describing this form of racial gerrymandering claim as a convenient alternative to a vote dilution claim).

179. *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 794 (2017) (quoting *Miller v. Johnson*, 515 U.S. 900, 916 (1995)).

180. Hasen, *supra* note 178, at 384 (“[T]here will still be plenty of ways for states to draw district lines for partisan advantage without running afoul of the rules barring racial gerrymanders.”).

181. See, e.g., *Gill v. Whitford*, 138 S. Ct. 1916 (2018).

182. Richard H. Pildes, *Symposium: The Court Continues Winding Down Unnecessary Racial Redistricting*, SCOTUSBLOG (May 22, 2017, 6:01 PM), <http://www.scotusblog.com/2017/05/symposium-court-continues-winding-unnecessary-racial-redistricting/> [<https://perma.cc/84FC-WCS3>].

183. Some scholars see *Cooper* as an even greater threat, reading it as a harbinger of section 2's demise. See, e.g., Charles & Fuentes-Rohwer, *supra* note 8, at 1567, 1596.

184. See, e.g., Justin Levitt, *Race, Redistricting, and the Manufactured Conundrum*, LOYOLA L.A. L. REV. (forthcoming 2019) (manuscript at 47) (reading *Cooper* as “a renewed warning against shoddy homework and a nudge toward local nuance, both for those who seek to serve minority citizens and those who do not, in a sphere too often globally caricatured as simply black and white”).

of whether voters can be required to show identification when voting.<sup>185</sup> Other matters, including the extent of states' authority to purge voters from their voter rolls,<sup>186</sup> and the authority of a state to reduce voters' early voting opportunities, are similarly contentious.<sup>187</sup>

Constitutional challenges to election administration issues are evaluated under a balancing test. If a state enacts a severe restriction on the right to vote—that is, a restriction that is wholly unrelated to voter qualifications—that restriction will be subject to strict scrutiny.<sup>188</sup> If, however, the state's restriction is “evenhanded” and “protect[s] the integrity and reliability of the electoral process,”<sup>189</sup> courts weigh the injury to the voter “against ‘the precise interests put forward by the State as justifications for the burden imposed by its rule.’”<sup>190</sup> This balancing test has been unkind to plaintiffs in the Roberts Court.<sup>191</sup>

*Crawford v. Marion County Election Board*,<sup>192</sup> the 2008 Supreme Court case upholding Indiana's voter identification law, illustrates the point. Justice John Paul Stevens's majority opinion concluded that for most voters “the inconvenience of making a trip to the [Bureau of Motor Vehicles], gathering the required documents, and posing for a photograph surely does not qualify as a substantial burden on the right to vote, or even represent a significant increase over the usual burdens of voting.”<sup>193</sup> The Court gave great credence to Indiana's claimed interests in defense of the law, namely, the modernization of its election procedures, the prevention of voter fraud, and the safeguarding of voter confidence.<sup>194</sup> The same justifications were successfully relied upon by other states when their voter identification laws were challenged as constitutionally defective.<sup>195</sup> Further, Justice Stevens

185. See, e.g., *Greater Birmingham Ministries v. Merrill*, 284 F. Supp. 3d 1253, 1256 (N.D. Ala. 2018), *appeal docketed*, No. 18-10151 (11th Cir. Jan. 12, 2018); see also Atiba R. Ellis, *Economic Precarity, Race, and Voting Structures*, 104 KY. L.J. 607, 609 (2015) (“Voter identification laws and other laws that diminish the scope of access to the vote fall in the second-generation category because they serve a facially neutral general purpose, yet there is genuine disagreement as to whether their effect is discriminatory by virtue of their mounting cumulative burden.”).

186. *Husted v. A. Philip Randolph Inst.*, 138 S. Ct. 1833 (2018).

187. *NAACP v. McCrory*, 831 F.3d 204, 226 (4th Cir. 2016).

188. *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 189–90 (2008).

189. *Id.* (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788 n.9 (1983)).

190. *Id.* at 190 (quoting *Burdick v. Takushi*, 504 U.S. 428, 434 (1992)).

191. See Issacharoff, *supra* note 6, at 308 (“States could regulate with little judicial oversight so long as they stayed within the familiar boundaries of generally applicable rules on voter registration, polling-site hours, and the like.”); Ellen D. Katz, *Withdrawal: The Roberts Court and the Retreat from Election Law*, 93 MINN. L. REV. 1615, 1631 (2009) (“The approach gives States license to structure electoral processes to impose barriers to participation, subject only to the most limited constraint that they not be *legally* impossible to traverse.”).

192. 553 U.S. 181 (2008).

193. *Id.* at 198.

194. *Id.* at 191.

195. See, e.g., *Frank v. Walker*, 768 F.3d 744, 751 (7th Cir. 2014) (“We have said enough to demonstrate that *Crawford* requires us to reject a constitutional challenge to Wisconsin's statute.”); *Greater Birmingham Ministries v. Merrill*, 284 F. Supp. 3d 1253, 1277–78 (N.D. Ala. 2018), *appeal docketed*, No. 18-10151 (11th Cir. Jan. 12, 2018).

rejected the plaintiffs' argument that the law's unanimous support by Republicans and unanimous opposition by Democrats was enough on its own to warrant invalidation.<sup>196</sup>

In the lower courts, and in election administration cases not involving voter identification, the balancing test has been unpredictably applied.<sup>197</sup> It is a self-consciously "flexible standard."<sup>198</sup> That said, it provides space for courts to undertake a "pragmatic" inquiry into whether "there is an identifiable burden on the franchise and, if so, whether it is really necessary."<sup>199</sup> To date, the doctrine has only tepidly engaged with race, treating evidence of the racially disparate impact of a given voting restriction as "part of a preliminary determination of whether a burden of production would shift to the defendant."<sup>200</sup>

In sum, the constitutional test for evaluating noninvidious election administration issues is a pragmatic balancing test that weighs the injury to the voter against the state's proffered justifications. It has been applied quite deferentially to states by the Roberts Court,<sup>201</sup> though more unpredictably by lower courts. It eschews partisan motivation as an independently significant factor in assessing voting restrictions, assuming the existence of any other justification,<sup>202</sup> and engages race only indirectly, by viewing the racially disparate impact of a given voting restriction not as cause for invalidation, but as an evidentiary finding that states must rebut.

What about statutory challenges to election administration laws? These challenges, so-called "vote denial" challenges, typically are brought under section 2 of the VRA. Race plays a much more central role in section 2 vote denial cases, but even here white identity politics is not addressed head-on. Some background to section 2 vote denial cases is necessary. Part II.A.1 described the history of how section 2, following *Gingles*, evolved to combat vote dilution—the systematic dilution of minority votes. Recall that section 2 provides that:

[n]o 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 . . . .<sup>203</sup>

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196. *Crawford*, 553 U.S. at 204 ("But if 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.").

197. *Compare, e.g.,* *Ohio Democratic Party v. Husted*, 834 F.3d 620, 627 (6th Cir. 2016) (employing specific "guidelines" for evaluating a restriction under the balancing test and finding in favor of the state), *with* *Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012) (using a broad gloss on the language of the balancing test and finding in favor of the plaintiff).

198. *Burdick v. Takushi*, 504 U.S. 428, 434 (1992).

199. *Issacharoff, supra* note 6, at 313.

200. *Id.* at 318.

201. Joshua A. Douglas, *(Mis)trusting States to Run Elections*, 92 WASH. U. L. REV. 553, 554 (2015) (describing both substantive and procedural forms of deference).

202. *Cf. Issacharoff, supra* note 6, at 317–18 (citing "one-party exclusive control of the election administration process" as a factor that courts have considered).

203. 52 U.S.C. § 10301(a) (2012).

*Gingles* interpreted this language to prohibit the use of dilutive electoral structures that made it either impossible or unlikely for minority voters to elect candidates of choice.

But in recent years section 2 has been used as a tool for challenging ballot access or election administration laws. Because the section 2 doctrine initially evolved in response to vote *dilution* challenges, courts have had to develop a new section 2 doctrine to address its application in the context of vote *denial*.<sup>204</sup> The Supreme Court has never decided a section 2 vote denial case, leaving the evolving doctrine in a state of uncertainty.

The doctrine that has emerged from the lower courts includes a two-element test. First, plaintiffs must demonstrate that the challenged practice “imposes a discriminatory burden on members of a protected class, meaning that members of the protected class ‘have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.’”<sup>205</sup> Second, the challenged practice “must in part be caused by or linked to ‘social and historical conditions’ that have or currently produce discrimination against members of the protected class.”<sup>206</sup>

In addition, courts have revived the centrality of a “totality of the circumstances” inquiry,<sup>207</sup> undertaken in reliance on a list of nine factors listed in the Senate report on the VRA that are an important component of its legislative history.<sup>208</sup> Historically, these factors were of minimal importance

204. Pamela S. Karlan, *Turnout, Tenuousness, and Getting Results in Section 2 Vote Denial Claims*, 77 OHIO ST. L.J. 763, 766 (2016) (describing the “confluence of forces” leading to section 2’s use as a tool for challenging vote denial).

205. *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 245 (4th Cir. 2014) (quoting 52 U.S.C. § 10301).

206. *Id.* at 240 (quoting *Ohio State Conference of the NAACP v. Husted*, 768 F.3d 524, 554 (6th Cir. 2014), *vacated as moot*, No. 14–3877, 2014 WL 10384647 (6th Cir. Oct. 1, 2014)).

207. *See, e.g., Veasey v. Abbott*, 830 F.3d 216, 246 (5th Cir. 2016); *League of Women Voters*, 769 F.3d at 240 (quoting *Ohio State Conference*, 768 F.3d at 554); *Ohio State Conference*, 768 F.3d at 550, 554.

208. The nine factors are:

1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;
2. the extent to which voting in the elections of the state or political subdivision is racially polarized;
3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;
4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;
5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;
6. whether political campaigns have been characterized by overt or subtle racial appeals;

given the degree to which the three *Gingles* prerequisites came to define section 2 vote dilution litigation, but were nonetheless intended to guide the inquiry that accompanies satisfaction of the prerequisites. In the context of section 2 vote denial cases, where the *Gingles* prerequisites are inapposite, the totality of the circumstances inquiry is paramount.<sup>209</sup>

The nascent section 2 vote denial doctrine has been a topic of interest for scholars largely because its relationship to longstanding constitutional and statutory voting rights doctrines is unclear. What constitutes a discriminatory burden under the first element? What qualifies as a meaningful “social or historical condition” under the second element? Is the current test so constitutionally vulnerable that it should be refined?<sup>210</sup> A number of insightful suggestions have been offered in response to these questions.

Professor Nicholas Stephanopoulos supports applying existing law governing disparate impact liability in other contexts to vote denial challenges.<sup>211</sup> Professor Samuel Issacharoff queries whether vote denial jurisprudence might be guided by a “rule of reason” akin to that which exists in antitrust law.<sup>212</sup> Professor Pamela Karlan provides a sophisticated analysis of how courts have incorporated the Senate report factors to date, highlighting in particular the emerging importance of the final factor, which assesses whether the policy underlying a given restriction is “tenuous.”<sup>213</sup> Karlan contends that an initial showing of partisan motivation should function as a “strong presumption” that a section 2 violation has occurred.<sup>214</sup>

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7. the extent to which members of the minority group have been elected to public office in the jurisdiction[;]

[8.] whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group[; and]

[9.] whether the policy underlying the state or political subdivision’s use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.

S. REP. NO. 97-417, at 28–29 (1982) (footnotes omitted).

209. Issacharoff, *supra* note 6, at 320 (“As voter access has returned to the forefront, so too have the older roots of voting-rights law. Particularly in cases that invoke the Voting Rights Act, courts have largely spurned the post-*Gingles* analysis on polarized voting and returned voting-rights law to its original emphasis on historical disadvantage.”); Karlan, *supra* note 204, at 767 (describing the revitalized totality of the circumstances inquiry as “an important gloss on the emerging framework, which otherwise might render virtually every electoral rule vulnerable in any jurisdiction where registration or turnout rates differ by race and plaintiffs can identify some potential improvement to the system that would reduce that disparity”).

210. *See, e.g.*, Tokaji, *supra* note 6, at 489 (“[T]he judicial test does not give adequate consideration to state interests, a shortcoming that is likely to raise constitutional concerns with the conservative majority of the Supreme Court.”).

211. Nicholas O. Stephanopoulos, *Disparate Impact, Unified Law*, 128 YALE L.J. (forthcoming 2019) (manuscript at 26–32).

212. Issacharoff, *supra* note 6, at 302, 324–25.

213. S. REP. NO. 97-417, at 29; Karlan, *supra* note 204, at 784–85.

214. Karlan, *supra* note 204, at 786; *see id.* at 788 (“Once plaintiffs show that political consequences were a motivation for a voting restriction, the burden should shift to the jurisdiction to show it would have adopted the restriction in the absence of any political consequences. With respect to the recent restrictions on the franchise, that is likely to prove impossible.”).

Professor Daniel Tokaji, raising a concern that the current test is constitutionally vulnerable, advocates adding a third element to the test, one that permits defendants to justify their laws by clear and convincing evidence.<sup>215</sup>

To this Article's argument, the nascent section 2 vote denial doctrine holds substantial promise for mitigating white identity politics. Though the doctrine is underdeveloped at this point—hence my categorization of it as myopic—there is a loose correspondence between some of the Senate report factors and the harms inflicted by white identity politics. As further developed in Part IV, the emphasis the current test places on social and historical conditions, coupled with the revitalization of the Senate report factors, offer openings for the realist consideration of politics this Article endorses.

#### 4. Campaign Finance Doctrine

For all of its complexity, campaign finance doctrine does not directly attend to race. The questions that have shaped the doctrine—such as which entities may spend money in relation to elections; what constitutes “coordination” between outside groups and political campaigns; should the right to speak through the strength of one's wallet, which is protected by the First Amendment, give way to reform efforts designed to effectuate greater equality in political participation as ensured by the Fourteenth Amendment<sup>216</sup>—are in essence debates about free expression and political equality, not about racial discrimination. There are no laws, for instance, that permit one racial group to spend more money than another in campaigns or elections. Nor are there laws alleged to have a disparate impact on minority groups. Accordingly, it is unsurprising that campaign finance doctrine is myopic when it comes to race.

Nonetheless, the doctrine is worth a brief mention for two reasons. First, as is now painfully obvious, money plays an immensely important role in American politics and particularly so when it comes to the dissemination of political advertisements.<sup>217</sup> The deregulatory turn in the campaign finance doctrine has incentivized the giving of money to so-called “outside” groups, namely, super political action committees (super PACs) and 501(c)(4) organizations.<sup>218</sup> These groups, which are unaccountable to the American public, are often able to obscure where their money comes from and often run racially charged advertisements that foment white identity politics. So, while the doctrine itself is agnostic on the issue of race, one consequence of

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215. Tokaji, *supra* note 6, at 474.

216. See Joshua S. Sellers, *Contributions, Bribes, and the Convergence of Political and Criminal Corruption*, 45 FLA. ST. U. L. REV. 657, 691–95 (2018) (examining these debates).

217. See Danielle Kurtzleben, *2016 Campaigns Will Spend \$4.4 Billion on TV Ads, but Why?*, NPR (Aug. 19, 2015, 9:57 AM), <https://www.npr.org/sections/itsallpolitics/2015/08/19/432759311/2016-campaign-tv-ad-spending> [<https://perma.cc/5V8N-3NWE>].

218. Sellers, *supra* note 216, at 676–83; see also Richard Briffault, *Super PACs*, 96 MINN. L. REV. 1644, 1646–50 (2012) (offering detailed definitions of super PACs and related independent political organizations).

the doctrine's recent trajectory is the exacerbation of white identity politics. In Part III.C, I explore this development and the question of whether campaign finance reform may have the supplemental benefit of mitigating white identity politics.

A second reason for discussing campaign finance doctrine and race is that the topic has received influential treatment in the literature. More precisely, scholars have already recognized the doctrine's racial myopia and offered arguments for reform that expressly take race into account. While I am dubious of the remedial aspects of these arguments, they are worth consideration.

The principal advocate for a revised understanding of campaign finance doctrine and race is Professor Spencer Overton. Overton criticizes courts' reliance on the First Amendment to "undermine legislative restrictions on the use of political money."<sup>219</sup> This approach, he asserts, disadvantages African Americans insofar as it "enshrine[s] the existing distribution of property as a baseline for political advantage."<sup>220</sup> In doing so, he notes, courts ignore the fact that "past discriminatory laws inevitably impair the ability of people of color to exercise rights over economic resources to participate in the political process."<sup>221</sup>

While Overton is undoubtedly correct that any electoral system that allocates influence based on wealth is disadvantageous to African Americans, it is difficult to conceive of a constitutional interest that, at least under existing doctrine, gives this observation legal significance.<sup>222</sup> While racial equality might be invoked, it alone provides no recognizable constitutional basis for remedying wealth disparities between whites and others. Moreover, as Professor Issacharoff has argued, "the infusion of equality concerns drawn from equal protection law is unlikely to push aside the ongoing force of deep-seated First Amendment considerations in campaign finance law."<sup>223</sup> As for the VRA, Overton himself concedes its inadequacy as a remedial tool for the problem he examines.<sup>224</sup>

In short, campaign finance doctrine is doctrinally divorced from traditional equal protection concerns pertaining to racial classifications and from disparate impact analysis under the VRA. In contrast, legislation is evaluated under a First Amendment analysis that assigns great weight to the speech rights of individuals, corporate entities, and unions. While some scholars have argued that race should play a larger role in both judicial analysis and reform efforts, to date, this has not occurred. Yet, while race is not directly implicated in the doctrine, the trajectory of the doctrine has, I argue,

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219. Overton, *supra* note 7, at 989.

220. *Id.*

221. Spencer Overton, *Racial Disparities and the Political Function of Property*, 49 *UCLA L. REV.* 1553, 1566 (2002).

222. Sellers, *supra* note 216, at 664 ("Disparities in political influence are derivative of societal disparities in resources, political intensity, and political acumen that are beyond the purview of campaign finance reform efforts.").

223. Issacharoff, *supra* note 7, at 1525.

224. Overton, *supra* note 7, at 1036–39.

exacerbated white identity politics, and existing calls for reform hold the potential to serve a mitigating function.

### *B. Minimization*

While myopia regarding white identity politics is the norm in election law doctrines, there are examples of doctrines that, at one point, scrupulously engaged the issue. This section describes two doctrines—the constitutional vote dilution doctrine and the political restructuring doctrine—that initially exhibited cognizance of white identity politics, yet, over time, have been minimized to the point of irrelevance. Evaluating these doctrines is helpful in understanding courts’ capacity for undertaking probative, contextual inquiries into how race informs political decision-making.

#### 1. Constitutional Vote Dilution

In the wake of the 1970 U.S. Census, Texas, like every other state, adopted a new reapportionment plan.<sup>225</sup> The plan’s design for the Texas House of Representatives contained a mix of both single-member and multimember districts.<sup>226</sup> Two of the proposed multimember districts were constructed in Dallas and Bexar Counties, each of which contained sizable minority communities. In constructing multimember districts in those counties, as opposed to the single-member alternative, the state effectively precluded the possibility of minority voters electing their preferred candidates. Because racially polarized voting was so consistent, state officials knew that the white majority within the multimember districts would unfailingly elect only white legislators.

Seeing their voting strength diminished, minority voters in both counties challenged the construction of the multimember districts as a violation of the Equal Protection Clause, alleging invidious discrimination.<sup>227</sup> A three-judge district court held in their favor, and the state appealed directly to the Supreme Court.<sup>228</sup> Justice Byron White’s unanimous opinion in *White v. Regester*,<sup>229</sup> affirming the district court’s ruling, compiled a host of findings exemplifying the extent to which courts, at one point in time, exhibited cognizance of the pervasiveness of white identity politics.

Turning first to Dallas County, Justice White commented on “the history of official racial discrimination in Texas, which at times touched the right of Negroes to register and vote and to participate in the democratic processes.”<sup>230</sup> He went on to note that “since Reconstruction days, there have only been two Negroes in the Dallas County delegation to the Texas House of Representatives.”<sup>231</sup> Moreover, those two individuals were specifically

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225. *White v. Regester*, 412 U.S. 755, 756 (1973).

226. *Id.* at 758.

227. *Id.* at 756–59.

228. *Id.* at 759–60.

229. 412 U.S. 755 (1973).

230. *Id.* at 766.

231. *Id.*



chosen by a gatekeeper entity, the Dallas Committee for Responsible Government, an entity that, “as recently as 1970,”<sup>232</sup> had “rel[ie]d upon ‘racial campaign tactics in white precincts to defeat candidates who had the overwhelming support of the black community.’”<sup>233</sup>

The comparison between Justice White’s perspicacious inquiry in *White* and the formulaic approach seen in the section 2 and racial gerrymandering doctrines described above is noteworthy. Rather than narrowly focusing on frustrated electoral success, Justice White’s expanded frame more comprehensively considered the political lives of African Americans in Dallas County. He considered white identity politics in the electorate, in government, and in Texas’s political parties.<sup>234</sup> His inquiry into the Mexican American community in Bexar County was equally probing.

There, Justice White acknowledged that the Mexican American community, not only in Bexar County, but in Texas itself, “had long ‘suffered from, and continues to suffer from, the results and effects of invidious discrimination and treatment in the fields of education, employment, economics, health, politics and others.’”<sup>235</sup> State legislators were “insufficiently responsive to Mexican-American interests.”<sup>236</sup> Describing life in “the Barrio,”<sup>237</sup> the Court took as significant the “poor housing” and “high rate of unemployment” among the residents.<sup>238</sup> These accumulated disadvantages, the Court found, are compounded by “a cultural and language barrier that makes . . . participation in community processes extremely difficult.”<sup>239</sup>

All of these factors informed the Court’s determination that the construction of a dilutive multimember district in Bexar County was discriminatory. Replacing it with a set of single-member districts, the Court reasoned, would help “to bring the community into the full stream of political life of the county and State by encouraging their further registration, voting, and other political activities.”<sup>240</sup> *White* offers one of the strongest examples of the Court honestly examining the vastness of white identity politics. It was the interaction between past discrimination, the lingering effects of that discrimination, political marginalization, and the multimember electoral structure, that, in combination, justified the holding.<sup>241</sup>

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232. *Id.* at 767.

233. *Id.* at 767 (quoting *Graves v. Barnes*, 343 F. Supp. 704, 727 (W.D. Tex. 1972), *aff’d in part, rev’d in part sub nom. White v. Regester*, 412 U.S. 755 (1973)).

234. *Id.* at 766–67.

235. *Id.* at 768 (quoting *Graves*, 343 F. Supp. at 728).

236. *Id.* at 769.

237. *Id.* at 768.

238. *Id.*

239. *Id.*

240. *Id.* at 769.

241. See Davidson, *supra* note 101, at 37 (“*White*’s ‘totality of the circumstances’ approach encouraged plaintiffs to hire experts of various kinds to gather mountains of statistical and historical evidence on government unresponsiveness, long-term patterns of race relations within the jurisdiction, the effects of voting laws and practices on minority candidates’ chances, voter registration and turnout over the years, and voting patterns within ethnic enclaves and in the community as a whole.”).

To be sure, the imprecision of the standard for establishing constitutional vote dilution gave many pause,<sup>242</sup> a shortcoming that was only partially improved upon in subsequent case law.<sup>243</sup> But the general approach, nonetheless, proved functional over the course of several years.<sup>244</sup> In *Mobile v. Bolden*,<sup>245</sup> however, the doctrine's utility was considerably minimized.

In *Bolden*, a plurality of the Court held that a successful constitutional vote dilution claim requires plaintiffs to show proof of discriminatory intent.<sup>246</sup> At issue in the case was the constitutionality of an at-large system for electing city commissioners in Mobile, Alabama.<sup>247</sup> Justice Potter Stewart's plurality decision held that "only if there is purposeful discrimination can there be a violation of the Equal Protection Clause of the Fourteenth Amendment."<sup>248</sup> As noted by one expert, "the Supreme Court's *Bolden* decision changed what had been a formidable burden of proof for plaintiffs to an impossible one in many instances."<sup>249</sup>

*Bolden*'s replacement of the capacious approach taken in *White* with a narrower, intent-based approach marks an important shift in the doctrine. No longer was the sort of historical, circumstantial evidence relied on in *White* of much legal significance.<sup>250</sup> Such evidence, the plurality noted, was "most assuredly insufficient to prove an unconstitutionally discriminatory purpose in the present case."<sup>251</sup> *Bolden* inspired a response in the civil and voting rights communities, which successfully lobbied Congress to amend section 2 of the VRA to include a "results" test.<sup>252</sup>

It was that amendment, as interpreted in *Gingles*, that established section 2 as the principal tool for challenging vote-dilutive structures. That doctrine's focus on minority electoral success, detailed in Part II.A.1, curbed courts' interest in rigorously appraising the many permutations of white identity

242. See, e.g., James Blacksher & Larry Menefee, *At-Large Elections and One Person, One Vote: The Search for the Meaning of Racial Vote Dilution*, in MINORITY VOTE DILUTION, *supra* note 107, at 203, 215–16.

243. See *Zimmer v. McKeithen*, 485 F.2d 1297, 1305 (5th Cir. 1973); Davidson, *supra* note 101, at 34.

244. GROFMAN ET AL., *supra* note 5, at 34.

245. 446 U.S. 55 (1980).

246. *Id.* at 62.

247. *Id.* at 58.

248. *Id.* at 66.

249. Davidson, *supra* note 107, at 17.

250. A subsequent case, *Rogers v. Lodge*, 458 U.S. 613 (1982), suggested that such circumstantial evidence still has probative value when alleging constitutional vote dilution, and scholars have debated the precise contours of its intent standard. *Rogers*, though, has not been of any jurisprudential significance. See Elmendorf, *supra* note 4, at 402 n.120; Bertrall L. Ross II, *The Representative Equality Principle: Disaggregating the Equal Protection Intent Standard*, 81 FORDHAM L. REV. 175, 191–201 (2012) (describing *Rogers* and its scholarly treatment).

251. *Bolden*, 446 U.S. at 73.

252. Cox & Miles, *supra* note 105, at 1499 n.25 ("Prior to 1982, the provision prohibited states from using any voting practice 'to deny or abridge' minority voting rights. The 1982 Amendment changed § 2's language from active to passive voice, so that it prohibited states from using any voting practice 'in a manner which results in a denial or abridgement of' minority voting rights.").

politics. In addition, it deflected attention from *Bolden*'s minimization of constitutional vote dilution doctrine—a doctrine that for a brief period justly treated race as a central variable in understanding a range of political choices.

## 2. Political Restructuring Doctrine

A second doctrine, though orthogonal to traditional election law doctrines, provides another example of how the import of white identity politics has been judicially minimized over time. The so-called “political restructuring,” or “political process” doctrine, is characterized by close judicial scrutiny of political restructurings that work to the disadvantage of racial minorities.<sup>253</sup> Like the constitutional vote dilution doctrine, the political restructuring doctrine initially exhibited cognizance of the nefariousness of white identity politics, yet has been substantially minimized over time.

The political restructuring doctrine, as many have noted, bears an awkward relationship to traditional equal protection doctrine.<sup>254</sup> Rather than evaluate the facial impermissibility of a government classification by way of the traditional levels of scrutiny, the doctrine calls for examination of whether a political restructuring—most commonly a voter initiative—places “special burdens on racial minorities within the governmental process.”<sup>255</sup> In two cases, *Hunter v. Erickson*<sup>256</sup> and *Washington v. Seattle School District No. 1*,<sup>257</sup> the Supreme Court invalidated facially nondiscriminatory political restructurings that were seen as disadvantageous to minorities.<sup>258</sup> More recently, though, in *Schuette v. Coalition to Defend Affirmative Action*,<sup>259</sup> the Court minimized the political restructuring doctrine to the point of irrelevance.

*Hunter* involved an amendment to Akron, Ohio's city charter, passed by way of citizen initiative, which repealed an open housing law.<sup>260</sup> In addition, the charter amendment “prevent[ed] the city council from implementing any ordinance dealing with racial, religious, or ancestral discrimination in housing without the approval of the majority of the voters in Akron.”<sup>261</sup> By its terms, then, the charter amendment drew no racial distinctions that, under traditional equal protection doctrine, would subject it to strict scrutiny. The Court nevertheless struck it as racially discriminatory.

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253. See generally *Schuette v. Coal. to Defend Affirmative Action*, 134 S. Ct. 1623 (2014); *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457 (1982) (plurality opinion); *Hunter v. Erickson*, 393 U.S. 385 (1969).

254. See, e.g., Cass R. Sunstein, *Public Values, Private Interests, and the Equal Protection Clause*, 1982 SUP. CT. REV. 127, 145; Daniel P. Tokaji, *First Amendment Equal Protection: On Discretion, Inequality, and Participation*, 101 MICH. L. REV. 2409, 2476 (2003).

255. *Hunter*, 393 U.S. at 391.

256. 393 U.S. 385 (1969).

257. 458 U.S. 457 (1982).

258. See *Seattle Sch. Dist.*, 458 U.S. at 487; *Hunter*, 393 U.S. at 391–93.

259. 134 S. Ct. 1623 (2014).

260. *Hunter*, 393 U.S. at 386.

261. *Id.*

The charter amendment's unconstitutionality lay in its creation of "a distinction between those groups who sought the law's protection against racial, religious, or ancestral discriminations in the sale and rental of real estate and those who sought to regulate real property transactions in the pursuit of other ends."<sup>262</sup> The "reality," the Court stated, "is that the law's impact falls on the minority."<sup>263</sup> As such, "[t]he classification in *Hunter* was not quite a racial classification on its face; but, by its very nature, it gave rise to suspicion that an impermissible motive was at work."<sup>264</sup>

From where did the Court's suspicions arise? Partially from the inadequacy of the city's justifications.<sup>265</sup> But the Court also drew a contextually informed inference about the motives of the charter amendment's endorsers. In a key passage, Justice White looked to the actual living conditions of Akron's minority residents:

The preamble to the open housing ordinance which was suspended by [the charter amendment] recited that the population of Akron consists of "people of different race, color, religion, ancestry or national origin, many of whom live in circumscribed and segregated areas, under sub-standard, unhealthful, unsafe, unsanitary and overcrowded conditions, because of discrimination in the sale, lease, rental and financing of housing." Such was the situation in Akron. It is against this background that the referendum required by [the charter amendment] must be assessed.<sup>266</sup>

This background informed the Court's conclusion that the charter amendment was impermissibly motivated.<sup>267</sup>

The Court's skepticism of the city's justifications is notable. The decision contains no express allegations of racism on the part of Akron's white electorate. Yet one can presume invidious intent, the Court suggests, through acknowledgment of the plight endured by Akron's minority communities. Particularly instructive is the Court's invocation of *Anderson v. Martin*,<sup>268</sup> a case invalidating a Louisiana law that required political candidates to reveal their race in nominating papers and on ballots.<sup>269</sup> In striking the law in *Anderson*, the Court condemned the transparent attempt to "furnish[] a vehicle by which racial prejudice may be so aroused as to operate against one group because of race and for another."<sup>270</sup> Reliance on *Anderson* in resolving

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262. *Id.* at 390.

263. *Id.* at 391; see Stephen M. Rich, Note, *Ruling by Numbers: Political Restructuring and the Reconsideration of Democratic Commitments After Romer v. Evans*, 109 YALE L.J. 587, 599–600 (1999) ("The *Hunter* doctrine embodies the democratic principle that democratic majorities retain the right to restructure the political process so long as they do so by neutral rather than discriminatory means.").

264. Sunstein, *supra* note 254, at 149.

265. *Hunter*, 393 U.S. at 392.

266. *Id.* at 391.

267. Sunstein, *supra* note 254, at 150 ("The true lesson of *Hunter* is that there is a category of classifications that qualify neither as facially neutral nor as facially discriminatory and that, while not as suspicious as the latter, ought not to receive the deference due to the former.").

268. 375 U.S. 399 (1964).

269. *Hunter*, 393 U.S. at 391.

270. *Anderson*, 375 U.S. at 402.

*Hunter*, therefore, indicates recognition that white identity politics were at work.<sup>271</sup>

The import of white identity politics in *Seattle School District* is less apparent, yet the Court was nonetheless willing to draw inferences about its materiality. The case involved a citizen initiative in Washington State, which prohibited local school boards from implementing a desegregation plan, a component of which mandated the busing of students to alleviate racial imbalances.<sup>272</sup> The initiative—supported by 66 percent of the voters<sup>273</sup>—was invalidated by the district court, which likened it to the charter amendment struck down in *Hunter*.<sup>274</sup> As in *Hunter*, the political process was restructured such that it was made more difficult for racial minorities to obtain government action thought to advance their interests. The contextual evidence of racism, however, was by comparison less discernible.

Justice Harry Blackmun’s 5-4 opinion asserted that “there is little doubt that the initiative was effectively drawn for racial purposes.”<sup>275</sup> In support of that statement he noted that “the text of the initiative was carefully tailored to interfere only with desegregative busing.”<sup>276</sup> It was evident that “desegregation of the public schools, like the Akron open housing ordinance, at bottom inures primarily to the benefit of the minority, and is designed for that purpose.”<sup>277</sup> Moreover, “busing for integration . . . now engenders considerably more controversy than does the sort of fair housing ordinance debated in *Hunter*.”<sup>278</sup> These observations alone were sufficient for the Court to infer that the initiative was impermissibly motivated.

In *Seattle School District*, as in *Hunter*, the Court demonstrated a willingness to censure efforts to activate white identity politics. Steve Sanders captures the point in his examination of the opinion’s language: “Verbs like ‘drawn,’ ‘tailored,’ and ‘singled out’ indicate that the Court thought the voters of Washington had made a conscious choice to adopt a busing policy because of, not in spite of, its anticipated effect of frustrating racial desegregation.”<sup>279</sup> *Hunter* and *Seattle School District* demonstrate that the judicial oversight of white identity politics has precedent. Where the political restructuring doctrine stands at present, however, is another matter entirely.

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271. Steve Sanders, *Race, Restructurings, and Equal Protection Doctrine Through the Lens of Schuette v. BAMN*, 81 BROOK. L. REV. 1393, 1414 (2016) (“To be sure, the Justices did not say that the supporters of the Akron charter amendment had employed messages of white supremacy or other forms of overtly racist appeal. But by invoking *Anderson*—and thus in effect analogizing the events in Akron to the machinations of white supremacists in the Deep South—as well as other cases that involved infamous examples of naked racial discrimination, the *Hunter* Court took a substantial step in that direction.”).

272. *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 460–61 (1982).

273. *Id.* at 463.

274. *Id.* at 465.

275. *Id.* at 471.

276. *Id.*

277. *Id.* at 472.

278. *Id.* at 473.

279. Sanders, *supra* note 271, at 1418.

The Court's most recent application of the political restructuring doctrine seemingly marks its demise. At issue in *Schuette v. Coalition to Defend Affirmative Action* was the constitutionality of an initiative that, through amendment to the state of Michigan's constitution, banned the use of racial preferences by the state in "public employment, public education, or public contracting."<sup>280</sup> The challenge that reached the Court was to the initiative's operation with regard to state universities, which, under the authority granted to independent boards of trustees, took race into account in admissions. The Sixth Circuit, in both panel<sup>281</sup> and en banc<sup>282</sup> decisions, found the initiative invalid under the political restructuring doctrine. The en banc decision was then reversed by the Court.

Justice Anthony Kennedy, writing only for himself, Chief Justice Roberts, and Justice Alito, distinguished both *Hunter* and *Seattle School District*.<sup>283</sup> *Hunter*, Justice Kennedy noted, involved "a demonstrated injury on the basis of race that, by reasons of state encouragement or participation, became more aggravated."<sup>284</sup> *Seattle School District* involved a ban on busing which "had the serious risk, if not purpose, of causing specific injuries on account of race."<sup>285</sup> Because, Justice Kennedy reasoned, Seattle had a history of enforced school segregation,<sup>286</sup> the Court was justified in invalidating an attempt to restructure the political process so as to disadvantage those African Americans who supported mandatory busing.<sup>287</sup>

In contrast, a ban on the use of racial preferences in university admissions does not involve "infliction of a specific injury of the kind at issue in . . . *Hunter* and in the history of the Seattle schools."<sup>288</sup> In drawing this conclusion, Justice Kennedy circumscribed the breadth of the political restructuring doctrine, limiting its relevance to instances in which intentional discrimination is rather pronounced. With regard to the initiative itself, he presented an analytically disputable string of arguments that ignored the

280. *Schuette v. Coal. to Defend Affirmative Action*, 134 S. Ct. 1623, 1629 (2014) (plurality opinion).

281. *Coal. to Defend Affirmative Action v. Regents of Univ. of Mich.*, 652 F.3d 607, 610 (6th Cir. 2011), *aff'd*, 701 F.3d 466 (6th Cir. 2012) (en banc), *rev'd*, 134 S. Ct. 1623 (2014).

282. *Coal. to Defend Affirmative Action v. Regents of Univ. of Mich.*, 701 F.3d 466, 470 (6th Cir. 2012) (en banc), *rev'd*, 134 S. Ct. 1623 (2014).

283. Justices Antonin Scalia and Thomas concurred in the decision, arguing for the complete elimination of the political restructuring doctrine. *Schuette*, 134 S. Ct. at 1643 (Scalia, J., concurring) ("Patently atextual, unadministrable, and contrary to our traditional equal-protection jurisprudence, *Hunter* and *Seattle* should be overruled.").

284. *Id.* at 1632 (plurality opinion).

285. *Id.* at 1633.

286. *Id.* ("[I]t appears as though school segregation in the district in the 1940's and 1950's may have been the partial result of school board policies that 'permitted white students to transfer out of black schools while restricting the transfer of black students into white schools.'" (quoting *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 807–08 (2007) (Breyer, J., dissenting))).

287. *Id.* ("The *Seattle* Court, accepting the validity of the school board's busing remedy as a predicate to its analysis of the constitutional question, found that the State's disapproval of the school board's busing remedy was an aggravation of the very racial injury in which the State itself was complicit.").

288. *Id.* at 1636.

racial overtones of the affirmative action debate altogether. Rather than honestly appraise the debate as one in which white identity politics are routinely exploited<sup>289</sup> and acknowledge that access to higher education remains out of reach for many black and brown youths, Justice Kennedy portrayed the initiative process as the manifestation of a healthy democracy.<sup>290</sup> After *Schuette*, the political restructuring doctrine is obsolete.<sup>291</sup>

In both the constitutional vote dilution and political restructuring doctrines, the Supreme Court, at one time, demonstrated an interest in scrutinizing the particular ways in which white identity politics undermines political equality. Whether considering the lingering effects of past discrimination, the political marginalization of minorities through structural means, or the tendency of particular public issues to activate race-based decision-making, the Court exhibited an awareness of the actual role of race in public life. That cognizance is now absent from both doctrines, both of which have been minimized to the point where they are functionally indistinguishable from traditional equal protection doctrine. And the prospect of reclaiming what has been lost is dim.

### III. WHITE IDENTITY POLITICS, DOCTRINAL DISREGARD, AND THE THREAT OF INTENSIFICATION

An optimism pervades election law jurisprudence. The Supreme Court pays lip service to the nation's history of discrimination while administering formalist doctrines that are unjustifiably sanguine about the state of American politics. As explained above, white identity politics is a pervasive political feature, one that is habitually exploited by the Republican Party. This assessment runs contrary to that to which the Court aspires and is generally not relevant under traditional doctrines, hence the existence of what I have labeled racial blind spots.

This Part explicates those blind spots, showing how the doctrines I have categorized as myopic adopt defective theories of politics, obscure more than they clarify, and, in some instances, threaten to intensify white identity politics. In making this argument, the following enumeration may be helpful. Of initial concern is the doctrines' treatment of the Republican Party as a race-neutral political actor. A quick point of clarification: in referring to the

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289. See generally Samuel Weiss & Donald Kinder, *Schuette and Antibalkanization*, 26 WM. & MARY BILL RTS. J. 693 (2018). Weiss and Kinder provide empirical evidence that the initiative served to "undermine social cohesion and stoke racial antagonism." *Id.* at 734.

290. *Schuette*, 134 S. Ct. at 1637 (plurality opinion) ("It is demeaning to the democratic process to presume that the voters are not capable of deciding an issue of this sensitivity on decent and rational grounds.").

291. See ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 731 (5th ed. 2015) ("As for *Hunter* and *Washington*, they have not been overruled, but they have been limited and it is uncertain what remains of the so-called political restructuring doctrine that they created."); Weiss & Kinder, *supra* note 289, at 731 (suggesting that the doctrines may be "resting in the graveyard alongside other doctrines created to advance civil rights objectives while avoiding addressing racism directly"); *The Supreme Court, 2013 Term—Leading Cases*, 128 HARV. L. REV. 281, 281 (2014); cf. Sanders, *supra* note 271, at 1450–56.

Republican Party here, I mean party members holding public office, for instance, those in state legislatures. Public officials, of course, do not comprise the entirety of a political party.<sup>292</sup> A second concern is the doctrines' treatment of the electorate as race neutral. And the final concern is the doctrines' treatment of those whom we might conceive of as "external" political actors as race neutral. I consider each aspect of the doctrines in turn.

#### A. *The Republican Party as Race Neutral*

One of the more striking political developments of the past century is the near extinction of white Democratic elected officials in the South.<sup>293</sup> This phenomenon, a consequence of party realignment and persistent racially polarized voting, forms the backdrop for much of the region's racial politics. Republican-controlled redistricting bodies operate with the knowledge that race and partisanship are exceedingly correlated and, accordingly, create majority-white districts that guarantee electoral success.

This tactic is lost on no one. It is openly acknowledged by both courts and scholars.<sup>294</sup> Yet, in multiple doctrines, race and party are treated as distinguishable.<sup>295</sup> Adherence to that fiction frustrates the development of a realist jurisprudence. The point to be emphasized is that in many

292. See Daniel Hays Lowenstein, *Associational Rights of Major Political Parties: A Skeptical Inquiry*, 71 TEX. L. REV. 1741, 1759–60 (1993) (describing different dimensions of political parties).

293. Harry Enten, *It's Much Harder to Protect Southern Black Voters' Influence Than It Was 10 Years Ago*, FIVETHIRTYEIGHT (Dec. 5, 2016), <https://fivethirtyeight.com/features/its-much-harder-to-protect-southern-black-voters-influence-than-it-was-10-years-ago/> [<https://perma.cc/7FFY-GKTY>]; Deirdre Walsh, *Last White Democrat from Deep South Loses Congressional Seat*, CNN (Nov. 5, 2014), <https://www.cnn.com/2014/11/05/politics/last-southern-white-democrat-in-congress/index.html> [<https://perma.cc/2C8C-XUNM>].

294. See, e.g., *Abbott v. Perez*, 138 S. Ct. 2305, 2314 (2018) ("For one thing, because a voter's race sometimes correlates closely with political party preference . . . it may be very difficult for a court to determine whether a districting decision was based on race or party preference."); *N.C. State Conference of the NAACP v. McCrory*, 831 F.3d 204, 222 (4th Cir. 2016) ("Using race as a proxy for party may be an effective way to win an election. But intentionally targeting a particular race's access to the franchise because its members vote for a particular party, in a predictable manner, constitutes discriminatory purpose."); *Patino v. City of Pasadena*, 230 F. Supp. 3d 667, 727–28 (S.D. Tex. 2017) ("Pasadena officials supporting Proposition 1, and doing so on behalf of Mayor Isbell and at the direction of his appointed officials, understood race and party as interchangeable proxies. By clearly and explicitly intending to diminish Latinos' voting power for partisan ends, Pasadena officials intentionally discriminated on the basis of race."); Richard L. Hasen, *Race or Party, Race as Party, or Party All the Time: Three Uneasy Approaches to Conjoined Polarization in Redistricting and Voting Cases*, 59 WM. & MARY L. REV. 1837, 1839 (2018) ("The idea that in southern states . . . it is possible to separate considerations of race from those of party is ludicrous."); Karlan & Levinson, *supra* note 150, at 1209 ("This distinction is both incoherent in theory and unadministrable in practice.").

295. This is broadly true, though, as Professor Hasen has noted, one can read certain cases as treating "race as party." The distinction between constitutional and statutory claims is important in considering this issue. Compare Hasen, *supra* note 294, at 1864–75, with Christopher S. Elmendorf & Douglas M. Spencer, *Administering Section 2 of the Voting Rights Act After Shelby County*, 115 COLUM. L. REV. 2143, 2174 (2015) ("[T]he Supreme Court has been wary about applying the anti-stereotyping logic of equal protection doctrine in cases about political discrimination.").



jurisdictions, the Republican Party's redistricting decisions are themselves manifestations of white identity politics.

White identity politics, as defined above, involves the creation of beliefs and alliances intended to advance the collective political interests of white voters. The creation of majority-white districts intended to immunize white voters from electoral competition satisfies this definition. Moreover, the officials elected from these predominantly white districts have a diminished incentive to serve the small percentage of minority constituents they represent, an outcome that also accrues to the benefit of white communities.<sup>296</sup> To the point, across the South at present, Republican politicians, backed by strong support from white voters, oppose social policies they perceive as benefitting minorities.<sup>297</sup> Yet the VRA vote dilution and racial gerrymandering doctrines rarely treat partisan behavior as corroborative of racial intent.

This approach, at a minimum, severely complicates the doctrines' utility. The point is perhaps best illustrated by examining how courts evaluate legislative purpose. Take the recent voting rights litigation arising from Texas. Historically, Texas has spawned a sizable share of the voting rights doctrine cases that pertain to race.<sup>298</sup> Shifting demographics have, as of late, threatened Republican Party control,<sup>299</sup> a development that has generated voter suppression efforts<sup>300</sup> and resulted in further litigation.

In resolving the latest dispute—involving racial gerrymandering and racial vote dilution that a district court deemed impermissible—Justice Samuel Alito's 5-4 decision in *Abbott v. Perez*<sup>301</sup> adverted to “the presumption of legislative good faith.”<sup>302</sup> In denying deference to the district court's determination that the redistricting plans at issue, though since amended,

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296. Ironically, avoiding the racialization of representation was one of Justice O'Connor's rationales for striking the majority African American district in *Shaw*. *Shaw v. Reno*, 509 U.S. 630, 648 (1993) (“When a district obviously is created solely to effectuate the perceived common interests of one racial group, elected officials are more likely to believe that their primary obligation is to represent only the members of that group, rather than their constituency as a whole.”).

297. Thomas B. Edsall, *Why Don't We Always Vote in Our Own Self-Interest?*, N.Y. TIMES (July 19, 2018), <https://www.nytimes.com/2018/07/19/opinion/voting-welfare-racism-republicans.html> [<https://perma.cc/9TFT-8J53>].

298. Perhaps most infamously are the “White Primary” cases. *See, e.g.*, *Terry v. Adams*, 345 U.S. 461 (1953); *Smith v. Allwright*, 321 U.S. 649 (1944); *Nixon v. Condon*, 286 U.S. 73 (1932); *Nixon v. Herndon*, 273 U.S. 536 (1927).

299. *See* Susan Milligan, *Could Changing Demographics Turn Texas Politically Purple?*, U.S. NEWS (Oct. 11, 2018, 1:48 PM), <https://www.usnews.com/news/best-states/articles/2018-10-11/in-texas-changing-demographics-could-have-political-implications> [<https://perma.cc/3H9J-PPQV>].

300. *See* Michael Barajas, *In the Midterms, Texans Face a 'Panoply of Voter Suppression'*, TEX. OBSERVER (Nov. 5, 2018, 3:54 PM), <https://www.texasobserver.org/in-the-midterms-texans-face-a-panoply-of-voter-suppression/> [<https://perma.cc/DB85-H7TF>]; Danny Hakim & Michael Wines, *'They Don't Really Want Us to Vote': How Republicans Made It Harder*, N.Y. TIMES (Nov. 3, 2018), <https://www.nytimes.com/2018/11/03/us/politics/voting-suppression-elections.html> [<https://perma.cc/8QX7-B3YM>].

301. 138 S. Ct. 2305 (2018).

302. *Id.* at 2324.

were marred by their discriminatory origin, the Court struck a markedly credulous tone. The state's explanations, to Justice Alito's eye, were "entirely reasonable and certainly legitimate."<sup>303</sup> That was not the view of the district court, which found that Republican officials had strategically reassigned Hispanic voters in Travis County for partisan gain.<sup>304</sup> To the extent that the VRA and racial gerrymandering doctrines even indirectly assign legal significance to such evidence absent supplemental evidence of intentional discrimination, that allowance stands in doubt following *Abbott*. Justice Alito's opinion assigns no apparent weight to the conventionality of white identity politics in either the districts at issue or Texas more generally.<sup>305</sup>

Virginia provides another illustrative case study. The state's 2011 redistricting process produced a spate of litigation, with challenges brought against the design of both a dozen state legislative districts and the Third Congressional District.<sup>306</sup> Of particular note is that the state legislature, in designing the districts—all of which were predominantly African American—chose to assign them no less than a 55 percent BVAP.<sup>307</sup> This was despite the fact that some of the districts had previously contained lower BVAPs.

In accordance with racial gerrymandering doctrine, the reviewing courts were first tasked with assessing whether race was the predominant motive in the state's choices.<sup>308</sup> In both cases, that was found to be true.<sup>309</sup> Yet the state legislature justified its use of the racial threshold by appealing to section 5 of the VRA (still operative in Virginia at the time). The VRA, the state argued, prohibited the state from designing districts that would have a

303. *Id.* at 2327.

304. *Id.* at 2354–55 (Sotomayor, J., dissenting) ("The District Court found that Texas had moved Travis County Hispanics from their pre-2011 district, CD25, to the newly constituted CD35, not to comply with § 2, but 'to use race as a tool for partisan goals . . . to intentionally destroy an existing district with significant minority population (both African American and Hispanic) that consistently elected a Democrat (CD25).'" (alteration in original) (quoting *Perez v. Abbott*, 274 F. Supp. 3d 624, 683 (W.D. Tex. 2017), *rev'd*, 138 S. Ct. 2305 (2018))).

305. Justice Alito expressly discredited the district court's reliance on statewide evidence of discrimination. *Id.* at 2333 (majority opinion). For a discussion of white identity politics and relevant patterns of discrimination in Texas, see Ari Berman, *Texas's Voter-Registration Laws Are Straight Out of the Jim Crow Playbook*, NATION (Oct. 6, 2016), <https://www.thenation.com/article/texas-voter-registration-laws-are-straight-out-of-the-jim-crow-playbook/> [<https://perma.cc/JQ24-W3CW>]; Lawrence Wright, *America's Future Is Texas*, NEW YORKER (July 10 & 17, 2017), <https://www.newyorker.com/magazine/2017/07/10/americas-future-is-texas> [<https://perma.cc/5A6S-QNWD>].

306. *Bethune-Hill v. Va. State Bd. of Elections*, 326 F. Supp. 3d 128, 136–37 (E.D. Va. 2018); *Page v. Va. State Bd. of Elections*, No. 3:13cv678, 2015 WL 3604029, at \*1 (E.D. Va. June 5, 2015).

307. *Bethune-Hill*, 326 F. Supp. 3d at 137; *Page*, 2015 WL 3604029, at \*28.

308. *Miller v. Johnson*, 515 U.S. 900, 916 (1995).

309. *Bethune-Hill*, 326 F. Supp. 3d at 173 ("In summary, after 'exercis[ing] [the] extraordinary caution' required of our predominance inquiry, we find as a matter of fact that the legislature subordinated traditional districting criteria to racial considerations." (quoting *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 797 (2017) (alterations in original))); *Page*, 2015 WL 3604029, at \*8 ("[R]ace was the legislature's paramount concern.").

retrogressive effect on minority voters, and the use of the racial threshold confirmed that there would be no such effect. The courts found this defense baseless and determined that section 5 compliance did not require use of a racial threshold.<sup>310</sup>

At first glance, the courts' holdings appear astute. The Republican-controlled state legislature's optimal course of action would have been to pack as many African American voters as possible into as few majority-minority districts as were required to be constructed in order to avoid VRA liability. The arbitrary use of the racial threshold betrayed, at a minimum, the lack of an evidentiary basis for the districts and, at worst, white identity politics in action. The courts, then, appropriately prevented this impropriety.

But a closer look at the decisions leaves cause for concern.<sup>311</sup> In the challenge to the state legislative districts, the court made adverse credibility findings with regard to two of the experts defending the plan.<sup>312</sup> And the use of the racial threshold was not in dispute. Moreover, in its assessment of whether race or partisanship best explained the plan, the court noted that a third expert, also defending the plan, "explicitly endorsed [the] use of race, due to the correlation between race and political preference, as the foundation for 'partisan' line-drawing decisions."<sup>313</sup> In short, the record evidence strongly supported a finding that race was not only predominant, but crudely relied upon as a proxy for partisanship.

The same can be said in the challenge to the Third Congressional District. The plan's chief sponsor was outspoken in his view that race was the predominant motive in the district's design,<sup>314</sup> a finding, again, bolstered by the use of the racial threshold. And the state's political justifications were "post-hoc"<sup>315</sup> and in conflict with the rest of the record evidence. In sum, the evidence in both cases was heavily favorable to the plaintiffs.

I offer this case analysis in support of my larger claim. The doctrines, as currently applied, are not attuned to white identity politics. So, whether one agrees with the particular case outcomes in *Abbott* or in the Virginia cases is inapposite. In all of the cases, one can see the limits of the current approach. What if Virginia had not used a precise numerical threshold? What if the

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310. *Bethune-Hill*, 326 F. Supp. 3d at 180 ("Here, however, the legislature did not undertake *any* individualized functional analysis in *any* of the 11 remaining challenged districts to provide 'good reasons to believe' that the 55% threshold was appropriate." (quoting *Ala. Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1274 (2015))); *Page*, 2015 WL 3604029, at \*17 ("Defendants show no basis for concluding that an augmentation of the Third Congressional District's BVAP to 56.3% was narrowly tailored when the district had been a safe majority-minority district for two decades.").

311. *See* Hasen, *supra* note 294, at 1863 (cautioning that the doctrine "obscures concerns about the political power effects of gerrymandering efforts through a quixotic quest for legislative motive").

312. *Bethune-Hill*, 326 F. Supp. 3d at 173–74 ("Critical to our analysis is our decision not to credit Jones' testimony, and our determination that Morgan's testimony was wholly lacking in credibility.").

313. *Id.* at 175.

314. *Page*, 2015 WL 3604029, at \*9 (noting that the legislation's author "considered race the single 'nonnegotiable' redistricting criterion").

315. *Id.* at \*14.

legislative sponsors of the plans had been less forthcoming about their use of race in meeting the demands of the VRA? What if the state advanced more compelling political justifications? The fact that a given redistricting plan's constitutionality turns on such doctrinal imprecision is discomfiting.

Finally, it should be noted that the Republican Party is treated as race neutral in areas other than redistricting, as in cases involving election administration issues. This is so despite the fact that, as Professor Issacharoff has written, “the single predictor necessary to determine whether a state will impose voter-access restrictions is whether Republicans control the ballot-access process.”<sup>316</sup> Voter-access and related restrictions predominantly burden African American and Latino voters.<sup>317</sup> Yet their partisan origin does not centrally factor into challenges brought against them.<sup>318</sup> As discussed earlier, the fact that Indiana's voter identification law was unanimously supported by Republicans and unaminously opposed by Democrats did not meaningfully influence the Court's decision to uphold the law.<sup>319</sup> Overall, therefore, the relationship between white identity politics and the Republican Party's systematic imposition of voter-access restrictions receives no serious doctrinal acknowledgement.

#### B. *The Electorate as Race Neutral*

A number of complexities accompany consideration of election law doctrines' treatment of the electorate as race neutral. For one, as has been established throughout, race intersects with partisanship to such an extent that it is hard to draw conclusions about when race independently motivates political behavior. Courts are not ideally suited to perform the requisite analysis. Second, the characterization is plainly untrue in certain areas, as in the doctrines governing racial redistricting, where the inquiry into racially polarized voting is paramount.<sup>320</sup> Third, voters are, of course, not state actors, and their political activity is protected under the First Amendment. Accordingly, no matter how pronounced the political divide between whites and minorities, courts have no basis for adjudicating claims involving white

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316. Samuel Issacharoff, *Ballot Bedlam*, 64 DUKE L.J. 1363, 1370 (2015).

317. Daniel P. Tokaji, *The New Vote Denial: Where Election Reform Meets the Voting Rights Act*, 57 S.C. L. REV. 689, 701 (2006).

318. Edward B. Foley, *The Separation of Electoral Powers*, 74 MONT. L. REV. 139, 142–43 (2013) (“Nor has the Court exhibited an eagerness to invalidate other forms of election laws, like voter ID requirements, that have a veneer of a policy justification—even when the evidence overwhelmingly indicates that the desire to secure a partisan advantage actually motivated the enactment of these laws.”); Issacharoff, *supra* note 6, at 321 (“For voting-rights law, however, assessing improper partisan motivation has proved the third rail of electoral challenges.”); *see also* Feldman v. Ariz. Sec’y of State’s Office, 208 F. Supp. 3d 1074, 1094 (D. Ariz. 2016) (commenting on “the dearth of authority for treating party affiliation as a suspect class”). *But see* Michael S. Kang, *Gerrymandering and the Constitutional Norm Against Government Partisanship*, 116 MICH. L. REV. 351, 401 (2017).

319. Crawford v. Marion Cty. Election Bd., 553 U.S. 181, 204 (2008).

320. League of United Latin Am. Citizens v. Perry, 548 U.S. 399, 427 (2006); Elmendorf et al., *supra* note 5, at 589; Greiner, *supra* note 5, at 448–49.

identity politics in the electorate. The observation nevertheless remains important.

To understand why, it is necessary to revisit the way in which courts scrutinize states' election administration laws, first outlined in Part II.A.3. Recall the approach: If a state enacts a severe restriction on the right to vote—that is, a restriction that is wholly unrelated to voter qualifications—that restriction will be subject to strict scrutiny.<sup>321</sup> If, however, the state's restriction is “evenhanded” and “protect[s] the integrity and reliability of the electoral process itself,”<sup>322</sup> courts weigh the injury to the voter against the “precise interests put forward by the State as justifications for the burden imposed by its rule.”<sup>323</sup> Recall as well that this is the approach used to evaluate, *inter alia*, voter identification laws.

Professor Joshua Douglas has highlighted how extraordinarily deferential the Supreme Court has been to states' noninvidious restrictions and how it has given enormous credence to their stated interest in protecting “election integrity.”<sup>324</sup> Election integrity, in turn, often rests on what the Court has labeled “voter confidence.”<sup>325</sup> Others have rightly questioned the dubious nature of the Court's solicitude about voter confidence,<sup>326</sup> but a related concern arising from the existence of white identity politics in the electorate has gone unaddressed.

Consider the following: In a leading study on public perceptions of voter identification laws, researchers found a sizable partisan split: “In 2012, Democratic support for photo ID laws had fallen to 54.4%; by 2014 it had fallen even further, to 51.8%. Republican support measured 88.4% in 2012 and 91.2% in 2014.”<sup>327</sup> Because voter identification laws are a low-salience issue within the electorate, the researchers additionally measured the opinions of “high-information partisans.”<sup>328</sup> Between 2008 and 2012, support for voter identification laws among high-information Democrats

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321. *Crawford*, 553 U.S. at 189–90.

322. *Id.* (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788 n.9 (1983)).

323. *Id.* at 190 (quoting *Celebrezze*, 460 U.S. at 789).

324. Douglas, *supra* note 201, at 561.

325. *Crawford*, 553 U.S. at 191; *Common Cause/Ga. v. Billups*, 554 F.3d 1340, 1353 (11th Cir. 2009); *Greater Birmingham Ministries v. Merrill*, 284 F. Supp. 3d 1253, 1277–78 (N.D. Ala. 2018) (“Thus, Secretary Merrill is not required to prove that voter fraud exists (although he has done so), that the Photo ID Law helps deter voter fraud, or that the law increases confidence in elections. Supreme Court precedent mandates that Alabama's justifications for the law are valid.”), *appeal docketed*, No. 18-10151 (11th Cir. Jan. 12, 2018).

326. Stephen Ansolabehere & Nathaniel Persily, *Vote Fraud in the Eye of the Beholder: The Role of Public Opinion in the Challenge to Voter Identification Requirements*, 121 HARV. L. REV. 1737, 1760 (2008); Christopher S. Elmendorf, *Empirical Legitimacy and Election Law*, in RACE, REFORM, AND REGULATION OF THE ELECTORAL PROCESS: RECURRING PUZZLES IN AMERICAN DEMOCRACY 117, 128 (Guy-Uriel E. Charles et al. eds., 2011) (“[T]he Supreme Court's confidence-oriented interventions in the electoral process have been based entirely on conjecture about the functional relationships of interest.”).

327. Charles Stewart III et al., *Revisiting Public Opinion on Voter Identification and Voter Fraud in an Era of Increasing Partisan Polarization*, 68 STAN. L. REV. 1455, 1463 (2016).

328. *Id.* at 1465.

dropped to 37 percent, whereas support among high-information Republicans remained above 90 percent.<sup>329</sup>

Consider as well the research of the social scientists Keith Bentele and Erin O'Brien, who found "a very substantial and significant association between the racial composition of a state's residents or active electorate and both the proposal and passage of voter restriction legislation."<sup>330</sup> Such legislation, they argue, was part of "an elite countermovement"<sup>331</sup> staged in response to "the broader demographic changes widely viewed as troublesome for Republicans and strong minority turnout and support for the first non-white major party presidential nominee."<sup>332</sup>

A third study, conducted by the political scientists David Wilson and Paul Brewer, found that "[s]upport for voter ID laws is strongest among Republicans, conservatives, and those with higher levels of racial resentment, as well as with regular Fox News viewers and those who perceive voting fraud as common."<sup>333</sup> The debate over voter identification laws and voter fraud, therefore, appears to be imbued with racial concerns.<sup>334</sup> More recently, of course, President Trump has himself racialized the debate, arguing that millions of undocumented immigrants cast illegal ballots that cost him the popular vote.<sup>335</sup>

In light of these studies, the fundamental concern is that "light-touch judicial review"<sup>336</sup> that upholds voter identification laws based on states' invocation of voter confidence substantiates racial hostility. In other words, judicial deference based on states' stated desire to preserve voter confidence—by passing a voter identification law—ignores the animus animating public opinion on this topic. Because the interplay between race, partisanship, and voter confidence in this context is so fraught, courts should not grant deference based on voter confidence.

329. *Id.* at 1464–65.

330. Keith G. Bentele & Erin E. O'Brien, *Jim Crow 2.0? Why States Consider and Adopt Restrictive Voter Access Policies*, 11 PERSP. ON POL. 1088, 1103 (2013).

331. *Id.* at 1105.

332. *Id.*

333. David C. Wilson & Paul R. Brewer, *The Foundations of Public Opinion on Voter ID Laws: Political Predispositions, Racial Resentment, and Information Effects*, 77 PUB. OPINION Q. 962, 980 (2013); see also Antoine J. Banks & Heather M. Hicks, *Fear and Implicit Racism: Whites' Support for Voter ID Laws*, 37 POL. PSYCHOL. 641, 653 (2016) ("Consistent with Wilson and Brewer's results (2013), we also find that explicit racism is a strong predictor of Whites' opinions toward voter ID laws.").

334. See Bagenstos, *supra* note 8, at 2874–75 (suggesting that the voter identification debate is racially coded).

335. Michael D. Shear & Peter Baker, *After His Claim of Voter Fraud, Trump Vows 'Major Investigation'*, N.Y. TIMES (Jan. 25, 2017), <https://www.nytimes.com/2017/01/25/us/politics/trump-voting-fraud-false-claim-investigation.html> [<https://perma.cc/CCA9-3WVR>]; Michael Wines & Maggie Haberman, *Trump Closes Voter Fraud Panel That Bickered More Than It Revealed*, N.Y. TIMES (Jan. 4, 2018), <https://www.nytimes.com/2018/01/04/us/voting-fraud-commission.html> [<https://perma.cc/432S-NW6E>].

336. Douglas, *supra* note 201, at 553.

Were courts to follow this advice there would be little remaining justification for voter identification laws.<sup>337</sup> The same logic should apply in other election administration contexts. Troublingly, at present, courts are granting deference without requiring states to introduce any evidence in support of their claim that a given law will improve electoral integrity or improve voter confidence. This, disturbingly, threatens to intensify white identity politics. It is disconcerting to think that state legislatures and party officials might engage in race-baiting as a means of building support for a given measure, then present that public support as a valid state interest when in litigation. At any rate, the first step, as Douglas notes, is simply to require states to make an evidentiary showing.<sup>338</sup> My argument here advises courts, once that requirement is imposed, to ignore voter confidence data when it can fairly be traced to racial animus. Despite the fact that private animus is not legally actionable, courts should avoid substantiating the artifacts of white identity politics.

### C. External Political Actors as Race Neutral

Election law doctrines devote scant attention to those we might think of as “external” political actors: lobbyists, CEOs, partisan media figures, and principals in super PACs. The same is true for election law scholars.<sup>339</sup> Some of this is explained by the fact that they, like the electorate, are not state actors. But these figures are of immense importance to the election law environment. To the extent that they are referenced in the doctrines at all, their race is irrelevant.

In Part II.A.4, this Article started to outline a connection between the deregulatory turn in campaign finance doctrine and white identity politics. There, I acknowledged that campaign finance doctrine understandably does not attend to race, yet suggested that there is nonetheless a relationship between the doctrine and white identity politics that is worth at least brief consideration. I return to that topic here.

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337. In *Crawford*, the majority rested its holding on three state interests. *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 191 (2008). First, “the interest in deterring and detecting voter fraud.” *Id.* at 191. That justification has been thoroughly discredited. Second, the “interest in orderly administration and accurate recordkeeping.” *Id.* at 196. This interest is caused in part by the states’ own inefficiencies. And third, the “interest in protecting public confidence” in the integrity of the process. *Id.* at 197. As this Article has argued, this inchoate interest is premised on a problematic foundation. See *supra* notes 324–26 and accompanying text.

338. Douglas, *supra* note 201, at 601 (“Often a state will have a valid regulatory or economic need for an election law that ties directly to its ability to administer an election fairly and efficiently. But a court should require a state to articulate that need with specificity, instead of resting on generalized and amorphous notions of ‘election integrity’ without any evidence of the harm the state is actually trying to combat.”).

339. For exceptions, see generally Richard Briffault, *Lobbying and Campaign Finance: Separate and Together*, 19 STAN. L. & POL’Y REV. 105 (2008); Robert Yablon, *Campaigns, Inc.*, 103 MINN. L. REV. 151 (2018).

Campaign finance doctrine draws a dividing line between contributions and expenditures.<sup>340</sup> The former may be regulated based on the government interest in preventing corruption; the latter, which in the eyes of the Court does not pose a threat of corruption, may not.<sup>341</sup> It was this divide that informed the Court's decision in *Citizens United v. FEC*,<sup>342</sup> which struck down limits on corporate-financed independent expenditures.<sup>343</sup> A subsequent D.C. Circuit case, *SpeechNow.org v. FEC*,<sup>344</sup> further established that super PACs—organizations that make only independent expenditures—may receive unlimited contributions.<sup>345</sup> In short, campaign finance doctrine has evolved in a way that has greatly strengthened these “outside” organizations.<sup>346</sup>

Candidates for both federal and state offices heavily rely on outside organizations, which are unaccountable to the public. One of the more memorable instances of an outside organization playing a role in an election was when the Swift Boat Veterans for Truth—a 527 organization—ran an advertisement questioning the military service of then–Democratic presidential nominee John Kerry.<sup>347</sup> The ad severely weakened Kerry's image and cost his campaign substantial time and money to refute.

A robust body of academic work has examined the hazards presented by an electoral system that relies so heavily on democratically unaccountable outside groups for candidate selection and that has such an impact on governance. An associated problem is the incitement of white identity politics by organizations that can operate with impunity. Disclosure laws, while in place, are easy to circumvent, resulting in the airing of racially inflammatory, though anonymous, advertisements. Even when funders are known, they can disclaim association with a candidate or elected official, as was the case with William Johnson, a Los Angeles attorney who ran pro-Trump advertisements designed to “resonate with white nationalists and similar groups.”<sup>348</sup>

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340. *Buckley v. Valeo*, 424 U.S. 1, 19–26 (1976).

341. Sellers, *supra* note 15, at 372.

342. 558 U.S. 310 (2010).

343. *Id.* at 365.

344. 599 F.3d 686 (D.C. Cir. 2010).

345. *Id.* at 694 (“[I]ndependent expenditures do not corrupt or create the appearance of *quid pro quo* corruption, [so] contributions to groups that make only independent expenditures also cannot corrupt or create the appearance of corruption.”).

346. Scholars even refer to these organizations as “shadow parties.” See, e.g., Joseph Fishkin & Heather K. Gerken, *The Party's Over: McCutcheon, Shadow Parties, and the Future of the Party System*, 2014 SUP. CT. REV. 175, 177.

347. See Kate Zernike, *Kerry Pressing Swift Boat Case Long After Loss*, N.Y. TIMES (May 28, 2006), <https://www.nytimes.com/2006/05/28/washington/28kerry.html> [<https://perma.cc/K9MF-JPC3>].

348. Lisa Mascaro, *White Nationalist Super PAC Funds New Radio Ads Urging Votes for Donald Trump*, L.A. TIMES (Oct. 6, 2016, 5:54 PM), <http://www.latimes.com/nation/politics/trailguide/la-na-live-updates-trailguide-1475796706-htmstory.html> [<https://perma.cc/UKS2-EF55>]; see also Jane Mayer, *Attack Dog*, NEW YORKER (Feb. 13 & 20, 2012), <http://www.newyorker.com/magazine/2012/02/13/attack-dog> [<http://perma.cc/A6C5-XJNY>] (describing an Islamophobic advertisement).



In thinking through this issue, one might conclude that a more robust regulatory apparatus, backed by campaign finance doctrines that were less libertarian in orientation, might serve to mitigate white identity politics in this sphere. Such a view would nicely dovetail with the scholarly arguments in favor of reconstituting political parties as potentially unifying entities.<sup>349</sup> There are, however, two serious rebuttals to this line of thought.

First, as recited in Part I, the Republican Party is increasingly brazen in its employment of white identity politics, suggesting that it is no less inclined to run racially charged advertisements under its own banner. The party's most recent nominee for governor of Virginia essentially admitted to doing so in his failed effort to win.<sup>350</sup> And such advertisements were ubiquitous in the lead-up to the 2018 midterms.<sup>351</sup>

Second, a seemingly much larger threat exists in internet media, a landscape that is currently largely unregulated. Therefore, any doctrinal shift that might indirectly weaken outside political groups, and thereby, as the argument goes, additionally mitigate white identity politics, must contend with the fact that online advertisements swamp the figurative marketplace. Many online advertisements are intended to foment white identity politics. A study of the 3517 Facebook advertisements bought by the Russia-based Internet Research Agency found that over half made express references to race.<sup>352</sup> It is likely the case, then, that while important to acknowledge, the indirect relationship this Article has sketched between campaign finance doctrine and white identity politics is of little practical significance.<sup>353</sup>

#### IV. DAMPENING WHITE IDENTITY POLITICS

With regard to what has been described, what options exist for mitigating white identity politics? In this final Part, this Article suggests some interventions. Some are significantly more plausible than others, and the inquiry is not meant to be exhaustive. But we should think broadly as we contend with the racialization of our politics.

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349. Pildes, *supra* note 38, at 828 (“Of the various organizational entities that exist or that I can envision, the political parties, driven by the need to appeal to the widest electorate, remain the broadest aggregators of diverse interests.”).

350. Ed Kilgore, *Ed Gillespie Is Sad He Was Forced to Run Racist Ads in Virginia's Governor's Race*, N.Y. MAG. (Dec. 12, 2017), <http://nymag.com/daily/intelligencer/2017/12/ed-gillespie-is-sad-he-was-forced-to-run-racist-ads.html> [<https://perma.cc/RY8W-M7J3>].

351. See Sheryl Gay Stolberg, *Two Years and Hundreds of Inflammatory Ads Later, the G.O.P. Is the Party of Trump*, N.Y. TIMES (Nov. 6, 2018), <https://www.nytimes.com/2018/11/06/us/politics/republicans-midterms-trump-racial-division.html> [<https://perma.cc/4BB3-69KM>].

352. Nick Penzenstadler, Brad Heath & Jessica Guynn, *We Read Every One of the 3,517 Facebook Ads Bought by Russians. Here's What We Found*, USA TODAY (May 13, 2018, 5:58 PM), <https://www.usatoday.com/story/news/2018/05/11/what-we-found-facebook-ads-russians-accused-election-meddling/602319002/> [<https://perma.cc/3W3M-LS2D>].

353. Erwin Chemerinsky, *False Speech and the First Amendment*, 71 OKLA. L. REV. 1, 14 (2018) (“I also worry at how the internet and the ease with which it allows speech may be increasing the polarization within the United States. I believe that such polarization is the greatest threat to American democracy.”).

*A. Modifying the Constitutional Standard*

Current equal protection doctrine requires plaintiffs alleging intentional discrimination based on race to support those allegations with proof of a discriminatory purpose.<sup>354</sup> In determining whether “a discriminatory purpose has been a motivating factor in [the government’s] decision,” courts consider a range of “circumstantial and direct evidence.”<sup>355</sup> Traditionally, the most probative evidence has been the discriminatory “impact of the official action,” the “historical background,” the “specific sequence of events leading up to the challenged decision,” deviations from “the normal procedural sequence,” and the relevant “legislative or administrative history.”<sup>356</sup>

Might the deleterious effects of white identity politics justify a modification of this constitutional standard in certain contexts? For instance, could the mere fact that a voting regulation or redistricting plan will have a disparate impact on minorities and received predominant support from Republican legislators prove sufficient to presume its unconstitutionality?

Judge Nelva Gonzales Ramos embraced a standard of this sort in her decision striking down Texas’s voter identification law as intentionally discriminatory. Despite the absence of any “smoking gun” evidence, she found the legislative session in which the law was enacted to be a “racially charged environment.”<sup>357</sup>

In an insightful article in the *Columbia Law Review*, Professors Christopher Elmendorf and Douglas Spencer offer a similar suggestion. Though their suggestion is tethered to section 2 of the VRA rather than the Constitution itself, they understand section 2 to require plaintiffs to establish a connection between disparate impact and “the present-day risk of unconstitutional race discrimination in the electoral process.”<sup>358</sup>

Specifically, they advocate for an inquiry focused on both disparate impact and political incentives:

Th[e] political incentive to discriminate most clearly arises when there is a strong correlation between voters’ race and their reliability as partisan voters (or as consistent voters for any other established political faction). Blacks, for example, are reliable Democratic voters. So when Republicans hold the reins of power, they have political incentives to diminish black turnout. In recognition of this incentive, courts might deem the [plaintiffs’ burden] presumptively satisfied in cases brought by black voters against Republican-enacted voting requirements or redistricting plans so long as the plaintiffs show disparate impact and establish that the political incentive

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354. *Washington v. Davis*, 426 U.S. 229, 239 (1976).

355. *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265–66 (1977).

356. *Id.* at 266–68.

357. *Veasey v. Perry*, 71 F. Supp. 3d 627, 702 (S.D. Tex. 2014), *aff’d in part, vacated in part, rev’d in part sub nom. Veasey v. Abbott*, 830 F.3d 216 (5th Cir. 2016).

358. Elmendorf & Spencer, *supra* note 295, at 2148.

to discriminate holds in the defendant jurisdiction, not just in the nation generally.<sup>359</sup>

This approach would require courts to dispense with the presumption of legislative good faith.<sup>360</sup> And it would resuscitate the debate over how to best understand the Court's decision in *Rogers v. Lodge*.<sup>361</sup> But it would be one means of responding to the salience of white identity politics.

### B. Permitting Minority Aggregation Claims

Courts are divided on the question of whether two or more minority groups may collectively bring claims under section 2 of the VRA. Recall that *Gingles* introduced three prerequisites that continue to structure VRA vote dilution doctrine. The first of those prerequisites requires plaintiffs to establish that they are sizable enough to constitute a majority in a single-member district.<sup>362</sup> The second requires a showing of political cohesion.<sup>363</sup> The Supreme Court has never provided a definitive answer to the question of whether two or more minority groups may aggregate their numbers in satisfaction of the first prerequisite,<sup>364</sup> and, with regard to the second, courts have struggled to evaluate political cohesiveness between minority groups.<sup>365</sup>

A judicial commitment to mitigating white identity politics would permit minority aggregation claims. It would reflect the fact that measuring intraracial political cohesion is less significant than section 2's commitment to combatting race-based political inequality.<sup>366</sup> Thus, *Gingles*'s political-cohesion prong should be thoroughly relaxed when two or more minority groups align, with courts considering simply whether both groups are vulnerable to the effects of white identity politics.

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359. *Id.* at 2172.

360. *See* *Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018).

361. 458 U.S. 613 (1982); *supra* note 250 and accompanying text. *See generally* Luke P. McLoughlin, *Section 2 of the Voting Rights Act and City of Boerne: The Continuity, Proximity, and Trajectory of Vote-Dilution Standards*, 31 VT. L. REV. 39 (2006); Michael J. Pitts, *Congressional Enforcement of Affirmative Democracy Through Section 2 of the Voting Rights Act*, 25 N. ILL. L. REV. 185 (2005).

362. *Bartlett v. Strickland*, 556 U.S. 1, 11 (2009) (plurality opinion).

363. *Id.*

364. *Grove v. Emison*, 507 U.S. 25, 41 (1993) (assuming the satisfaction of the first prerequisite without deciding the issue).

365. *Compare, e.g.,* *Campos v. City of Baytown*, 840 F.2d 1240, 1244 (5th Cir. 1988) (allowing minority aggregation), *with* *Nixon v. Kent County*, 76 F.3d 1381, 1393 (6th Cir. 1996) (en banc) (disallowing minority aggregation).

366. *See* *Nixon*, 76 F.3d at 1399 (Keith, J., dissenting) ("The majority opinion mistakenly focuses upon the *origins* of discrimination plaguing African-Americans and Hispanic-Americans, rather than the *results* of such discrimination."); *League of United Latin Am. Citizens v. Midland Indep. Sch. Dist.*, 812 F.2d 1494, 1500 (5th Cir. 1987) ("The records in too many cases show that Anglos do discriminate against both Blacks and Mexican-Americans for anyone to deny that these two groups may ever be aggregated in a voting dilution case.").

C. *Encouraging the Construction of Crossover Districts*

A “crossover district” is a district in which “the minority population, at least potentially, is large enough to elect the candidate of its choice with help from voters who are members of the majority and who cross over to support the minority’s preferred candidate.”<sup>367</sup> Under existing law, redistricting bodies are not required to create crossover districts in order to avoid section 2 VRA litigation.<sup>368</sup> In other words, minority voters may not use the VRA to create districts in which they have substantial, though not dispositive, influence. Nor may states replace effective crossover districts—that is, districts that have in the past elected minority-preferred candidates—with majority-minority districts.<sup>369</sup> If a crossover district is performing, there is no reason to further pack it with minority voters. Yet redistricting bodies retain legal permission to create such districts.

The puzzles presented by crossover districts are nothing new.<sup>370</sup> In theory, such districts hold several benefits. White voters will, ideally, develop trust in minority legislators and perceive them as effective representatives. In time, racially polarized voting will diminish. Either counts as a means of mitigating white identity politics. None other than Representative John Lewis, the famed African American civil rights hero from Georgia, supported the construction of crossover districts in his home state in lieu of “safe” districts that included unnecessarily high numbers of African Americans.<sup>371</sup>

While not judicially mandated, crossover districts should be promoted by voting and civil rights organizations and, perhaps most importantly, Democrats with input into redistricting decisions. There is precedent for this.<sup>372</sup> Crossover districts might have a stronger chance of being constructed were redistricting to be turned over to independent redistricting commissions. While the complexities of this issue warrant contextual analysis from jurisdiction to jurisdiction, on balance, crossover districts should be supported.

D. *Continuing the Development of the VRA Vote Denial Doctrine*

As described in Part II.A.3, section 2 of the VRA—traditionally used as a means of challenging vote dilution—has of late been used to challenge practices that actually deny individuals the right to vote, either entirely, in the case of voter identification, or temporarily, as in the case of states’

367. *Bartlett*, 556 U.S. at 13.

368. *Id.* at 14.

369. *Cooper v. Harris*, 137 S. Ct. 1455, 1472 (2017) (“North Carolina’s belief that it was compelled to redraw District 1 (a successful crossover district) as a majority-minority district rested not on a ‘strong basis in evidence,’ but instead on a pure error of law.” (quoting *Ala. Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1274 (2015))).

370. *See generally* *Georgia v. Ashcroft*, 539 U.S. 461 (2003); Richard H. Pildes, *Is Voting-Rights Law Now at War with Itself?* *Social Science and Voting Rights in the 2000s*, 80 N.C. L. REV. 1517, 1551 (2002) (“The legal role of reasonably compact [crossover] districts under the VRA will arise in a dizzying array of forms.”).

371. *See* Pildes, *supra* note 370, at 1538.

372. *Id.* at 1569 n.143.

elimination of early voting days.<sup>373</sup> Recall that courts have started to develop a two-element test to adjudicate these matters. First, plaintiffs must demonstrate that the challenged practice “impose[s] a discriminatory burden on members of a protected class, meaning that members of the protected class ‘have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.’”<sup>374</sup> Second, the challenged practice “must in part be caused by or linked to ‘social and historical conditions’ that have or currently produce discrimination against members of the protected class.”<sup>375</sup>

In applying the second element, courts have turned to the Senate report that accompanied the 1982 amendments to section 2 for guidance.<sup>376</sup> In particular, they have relied on the final Senate factor—“[w]hether the policy underlying the state or political subdivision’s use of such voting qualification, prerequisite to voting, or standard, practice or procedure is *tenuous*.”<sup>377</sup>

The emergence of “tenuousness” as a factor of note in vote denial cases holds promise as a means of mitigating white identity politics. It not only shifts the burden to the state to justify a given practice,<sup>378</sup> it crucially provides an avenue for examining the nexus between race and politics. The synonymy between white and Republican voters in most jurisdictions substantiates Professor Karlan’s argument that “[a] policy of pursuing partisan advantage through restricting the right to vote should be held tenuous as a matter of law and should create a strong presumption that a plaintiff who has satisfied the two elements of the emerging framework has established a violation of section 2.”<sup>379</sup>

I would further highlight two additional Senate factors—“whether political campaigns have been characterized by overt or subtle racial appeals”<sup>380</sup> and “whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group”<sup>381</sup>—as factors that could be refined so as to respond to white identity politics.

373. Derek T. Muller, *The Democracy Ratchet*, 94 IND. L.J. (forthcoming 2019) (manuscript at 3–4); see *supra* Part II.A.3.

374. See, e.g., *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 240 (4th Cir. 2014) (quoting *Ohio State Conference of the NAACP v. Husted*, 768 F.3d 524, 553 (6th Cir. 2014)).

375. *Id.* (quoting *Husted*, 768 F.3d at 553).

376. Issacharoff, *supra* note 6, at 316 (“As it happens, there is a largely disregarded section of the VRA Senate report factors that lists a series of additional considerations that would not typically be included in a Section 2 case.”).

377. S. REP. NO. 97-417, at 29 (1982) (emphasis added).

378. Issacharoff, *supra* note 6, at 316 (“But in the emerging voting-rights cases, tenuousness becomes the statutory hook for shifting the inquiry onto the state’s justification for the proposed reform of electoral practices.”).

379. Karlan, *supra* note 204, at 786.

380. S. REP. NO. 97-417, at 29.

381. *Id.*

### E. Encouraging Open Primaries

Those who strongly identify with the Republican Party are most likely to be participants in white identity politics. And the same individuals are also most likely to participate in primary elections, which, as has been documented by both scholars and journalists, tend to attract more staunchly ideological voters.<sup>382</sup> As a result, closed primary elections—that is, primaries in which only registered partisans may participate—have been found to produce more extreme candidates. In contrast, the use of semiclosed (where registered partisans and independents may participate) or open primaries (where all registered voters may participate) increase the chances of the opposite occurring.<sup>383</sup> And if effective in this regard, they would have the ancillary benefit of reducing white identity politics.

### F. Broadening the Electorate

Though ultimately an empirical question, many political observers believe that an expansion of the electorate would result in decreased polarization and political contention. The argument, as put by Thomas Mann and Norm Ornstein, is that “[h]igher turnout would pull more citizens with less-fixed partisan and ideological commitments into the electorate.”<sup>384</sup> If true, there would be less incentive for the Republican Party to inflame white identity politics. Indeed, this was a pillar of the party’s plan to absorb the rapidly increasing Hispanic share of the electorate. Only time will tell if this opportunity has been lost.<sup>385</sup>

In general, though, efforts at both the federal and state levels to expand the electorate should be encouraged. These include enforcement of existing voter registration laws,<sup>386</sup> experimentation with methods of making voting easier, whether by mail or online, and the fostering of a culture in which voting is valued.

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382. MANN & ORNSTEIN, *supra* note 20, at 148 (“Not surprisingly, closed primaries tend to produce lower turnout, attract more ideologically extreme voters, and select fewer moderate candidates.”).

383. See Stephen J. Dubner, *Ten Ideas to Make Politics Less Rotten*, FREAKONOMICS (July 27, 2016, 11:00 PM), <http://freakonomics.com/podcast/idea-must-die-election-edition/> [<https://perma.cc/RME7-LH4Z>] (“So far, political scientists are split on whether open primaries really help. Some research shows that moderate candidates don’t do any better in an open primary; others argue the change in California has already led to more competitive elections and a more functional state legislature.”).

384. MANN & ORNSTEIN, *supra* note 20, at 132; Morris P. Fiorina, *Parties, Participation, and Representation in America: Old Theories Face New Realities*, in POLITICAL SCIENCE: STATE OF THE DISCIPLINE 511, 537 (Ira Katznelson & Helen V. Milner eds., 2002) (“One of the features of the turnout decline that has not been adequately recognized is that it largely reflects the nonparticipation of moderates.”).

385. See Alec MacGillis, *How Republicans Lost Their Best Shot at the Hispanic Vote*, N.Y. TIMES MAG. (Sept. 15, 2016), <https://www.nytimes.com/2016/09/18/magazine/how-republicans-lost-their-best-shot-at-the-hispanic-vote.html> [<https://perma.cc/4FZR-3TNC>].

386. Justin Weinstein-Tull, *Election Law Federalism*, 114 MICH. L. REV. 747, 755–56 (2016) (describing the National Voter Registration Act).

## CONCLUSION

One of the primary lessons of our current moment is that race continues to inform our political and social relations in complex and often poignant ways. In the current state of election law doctrines, that complexity is lost. A presumption of good faith is afforded to political actors, even when unjustified based on past and present behavior. Politics and race relations are segregated in judicial doctrines, despite their increased coalescence. These racial blind spots are an accomplice to the perpetuation of white identity politics.

However, there is no single judicial antidote to be found. In fact, much of what I have documented demonstrates how adaptive white identity politics is in response to doctrinal change. The institutionalization of majority-minority electoral districts was followed by political profiteering and the increased racialization of the political parties.<sup>387</sup> The VRA is now used as an expedient for further segmenting the population on racial lines beyond what is needed.<sup>388</sup> Election restrictions abound in the shadow of a doctrine under which racial motivations are unlikely to be detected.<sup>389</sup> There is a risk, then, of unfairly assigning blame to courts, when in fact the heart of the problem lies elsewhere.

While true, this view is too charitable. Whatever the institutional orientation courts may have toward formalism, election law is a context in which realism “at the retail level”<sup>390</sup> is essential. As long as white identity politics continues to play such a defining role, we will be reliant on courts’ ability to discern both when and how it operates when adjudicating election law disputes. Litigants and scholars should therefore work to uncover and expose its existence and, in turn, develop legal theories under which it might be dampened. This Article has sought to do both. Further efforts to these ends are critical as we continue the unending journey toward democratic excellence.

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387. *Supra* Part II.A.1.

388. *Supra* Part II.A.2.

389. *Supra* Part III.B.

390. Richard H. Pildes, *Institutional Formalism and Realism in Constitutional and Public Law*, 2013 SUP. CT. REV. 1, 19.