LAW OF DEMOCRACY

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Pickup Dates: Pick up 8:30-9:30 a.m., May 8-10; May 13-17.
Returns: Exam is to be returned 3:30-4:30 p.m. on same day of pickup.

FINAL EXAM

This is an open-book examination. You may consult any written material you wish, although references to cases or articles that were not read or discussed in class will not strengthen your answer. The answer must be entirely your own work. You may not discuss the examination with anyone, either while taking it, or thereafter until after the last day of exams. This rule is very strictly enforced.

YOUR ANSWER MUST NOT EXCEED 3000 WORDS – *I.E.*, NO MORE THAN TWELVE, DOUBLE-SPACED PAGES WITH ONE-INCH MARGINS. Please double space your answers and begin each question on a new page.

You will have 8 hours to complete the exam. There are three questions on the exam. I have noted the points (on a scale of 100 points) accorded to each answer below.

If at any point you believe some important fact has been omitted, please make a reasonable assumption with respect to that fact, state that assumption explicitly, and answer the question on that basis. Similarly, if you believe the question is ambiguous, identify the ambiguity explicitly, make a reasonable assumption about how to resolve it, and answer the question on that basis. To the extent possible, please also discuss relevant, non-frivolous arguments that you ultimately decide to discard and state your reasons for discarding them.

Good luck with the rest of your exams.

Question 1
30 points

Daniel Lowenstein has recently written that "the Supreme Court's decisions in election cases reflect no theory of electoral politics, and that is a good thing." Daniel H. Lowenstein, "The Supreme Court has No Theory of Politics — and Be Thankful for Small Favors," *in The U.S. Supreme Court and the Electoral Process* (David Ryden, ed. 2001).

Choose one or more (but no more than 3) of the following lines of Supreme Court decisions (the partisan gerrymander claims, Section 2 claims, the White Primary cases, the *Shaw* line, the party exclusion cases, and the campaign finance decisions). Evaluate (1) whether Professor Lowenstein is right that the Supreme Court doesn't have a theory of electoral politics, and (2) evaluate whether or not the Supreme Court *ought* to have a theory of electoral politics in deciding election law cases.

Question 2
30 points

The Supreme Court has just granted certiorari on the following question:

Is it constitutional for the State of Ames to require all major political parties that enjoy automatic access to the ballot (specifically, the Democratic Party and the GOP) to conduct an open primary in selecting their nominees for the general election? Recall that an open primary is one where a voter may request the ballot of any party, whether registered in that party or not, but may vote only for the primary candidates of that party.

A. In light of its prior precedent, discuss how the Court is likely to resolve this question. What is it likely to offer as a rationale for its holding?

B. Setting precedent aside, how *should* the Court resolve this question, and why?

Question 3
40 points/10 points each

For each pairing of opinions below, identify one tension or inconsistency in their approaches and explain how you would resolve that inconsistency. Do not simply describe the holdings in these cases; instead, discuss the salient differences in the theories, assumptions, and principles behind each holding.

A. *Lassiter v. Northampton County Board of Elections* (text p. 46) and *Harper v. Virginia Board of Elections* (text p. 48)

B. *Miller v. Johnson* (coursepack) and *Hunt v. Cromartie* (text p. 946)

C. ***California Democratic Party v. Jones*** **(text p. 391) and** ***FEC v. Colorado Republican Federal Campaign Committee/Colorado II*** **(text p. 487)**

D. **Justice Thomas's dissent in** ***Holder v. Hall*** **(text p. 836) and Justice Thomas's dissent in** ***Nixon v. Shrink*** **(text p. 468)**

END OF EXAM

2977 total words. Each question has a word count. Total word count excludes section headings.

Question I: (1132) words

A. Partisan Gerrymandering

In *Gaffney*, the Court upheld a state redistricting plan that evenly divided up districts between the two major parties. Justice White's power-dividing result seemed "fair," because districting "inevitably has and is intended to have" political consequences. Over a decade later, in *Bandemer*, Justice White found justiciable a claim that the Indiana GOP's redistricting plan had diluted Democratic voting strength (although the Court ultimately found no violation). The decision held unconstitutional electoral arrangements that "consistently degrade a voter's or a group of voters' influence on the political process."

Gaffney and *Bandemer* aptly demonstrate the Court's theoretically impoverished view of democracy. In *Gaffney*, the two principal harms are equal vote weight and political competition (lockup). In *Davis*, the harm done is to the Democratic Party. If the gerrymander is successful, Democratic voters systematically will have less chance to elect candidates of their choice. This presents a majority-rule problem and a potential lockup problem: if the GOP can continually redraw lines to its advantage, the Democrats will never have an equal chance to win elections.

Plainly, the problem is not majority-rule. The *Gaffney* Court found partisan distortion of districts perfectly acceptable. Practices such as packing and fracturing upset majority rule in the communities they disrupt, even if they protect a roughly proportional partisan balance statewide. Moreover, the Court invoked virtual representation as its justification, suggesting that minorities do not suffer lack of representation.

Perhaps the Court's theory is the idea of an equally-weighted vote. Yet *Gaffney* authorizes deliberate manipulation to create "safe" party districts. A democratic voter in a 70% GOP district has a vote worth much less than the same voter in a 52% GOP district. The evisceration of competition enacted by legal bipartisan-gerrymandering precludes any serious claim that equal voting power is the Court's raison d'etre.

Is lockup the answer? Not in *Bandemer*. Justice O'Connor's *Bandemer* concurrence states: "members of the [major] Parties cannot claim that they are a discrete and insular group vulnerable to exclusion from the political process by some dominant group; [they] are the dominant groups." If the GOP abuses its districting power too much, it may suffer at the polls either by weakening its "safe" districts or by inviting corruption-criticism from the Democrats. The winner-take-all system makes two-party balance inevitable. The real danger of lockup is *Gaffney*, when two parties collude at the expense of the 14th Amendment's intended beneficiaries: "citizens." *See Baker v. Carr* (Clark's concurrence) ("The people have been rebuffed at the hands of the Assembly....").

B. Shaw Cases

The *Shaw* cases started off on the right foot. *Gomillion* invalidated a redistricting plan clearly designed to fence blacks citizens out of Tuskegee, Alabama. Things began to worsen after the 1982 Voting Rights Act (VRA) Amendments encouraged the creation of numerous majority-minority districts (MMDs). The post-1990 redistricting round fatefully coincided with the ascension of surface-level colorblindness on the Rehnquist Court. *Shaw* and its progeny held that governments, when drawing districts, may not use

race as the predominating factor that subordinates "traditional districting principles" (*Hunt*); this despite §2's unambiguous mandate that states draw districts with race in mind in certain (*Zimmer*) circumstances.

What explains the *Shaw* line? The Court explained first a representational harm: explicitly race-drawn districts send a signal that only blacks are important to black candidates. Justice Stevens rightly points out the hypocrisy in this argument – blacks frequently constitute filler voters in majority-white districts without even so much as a raised eyebrow from the Court. The Court quickly discarded this theory.

Perhaps the theory is of expressive harms. *See Shaw; Bush v. Vera*. There are a few problems with the expressive harm theory. First, compactness doesn't necessarily avoid sending an overtly racial signal when districts are predominately composed of one racial group. Moreover, the idea of the government expressing a harmful race-based message is at odds with the Court's emphasis on "individual" rather than polity-based rights, *cf. Colegrove, Gaffney, Burdick*; *but cf. Bellotti*, for there is no individual-based harm to a generally applicable government message. Finally, shape alone is not dispositive, suggesting that there is something more than mere appearances at stake. *See Miller; Cromartie.*

Lockup and majority-rule do not appear to be problems. These districts are the center of a competitive political give-and-take. The answer seems to be none of the explanations familiar to democratic theory. Instead, the Court – at Justice O'Connor's behest – seems to have adopted a racial opacity view. States may use race to redistrict, but they can't use it too overtly.

C. To Theorize, or Not To Theorize?

The Court's inability to settle on a theory has led to an incoherent line of gerrymandering cases. State parties may collude to maintain district duopolies and intentionally deny meaningful choice to minority-party voters on a theory of virtual representation. *Gaffney*. Yet if one party plays unfairly with the other party, the Court steps in, even though voters would still be virtually represented. *Bandemer*. States may not draw MMDs to protect racial minority voters – even in areas where there is racially polarized voting – when they subordinate traditional districting factors on a theory that appearances do matter. *Shaw; Hunt*. Yet States may draw uncouth districts to protect partisan interests, and they may even draw MMDs so long as they act not to protect minorities but instead to protect incumbents. *See Shaw; Cromartie; Vera*.

The Court need not lock itself into a specific definition of "quality representation" or define with academic elegance the meaning of an "undiluted right to vote." At the same time, not all cases may be "resolved by consulting a dictionary... judges may not invoke judicial modesty to avoid difficult questions." *Holder* (Stevens' dissent). One baseline to which the Court might return is the "controlling command" of the Civil War Amendments: "[a]n end of discrimination against the Negro." *Baker* (Frankfurter's dissent). *See also Whitcomb*. Justice O'Connor made the case in her *Bandemer* concurrence; Justice Stevens made a more robust defense in his *Mobile* and *Karcher concurrences*. The theory, to modify Justice O'Connor's *Bandemer* opinion, should be that dilution occurs when a group -- especially a group that has suffered historic exclusion from the franchise -- "is vulnerable to exclusion from the political process, [ ] voters who belong to that group [should be protected] against intentional [or unintentional] dilution of their group voting strength by means of racial [or political]

gerrymandering." Political parties are not vulnerable to exclusion. Neither are members of the dominant majority, even though that majority is more complex than its "white" label admits. Intervening on behalf of majorities does not solve the counter-majoritarian difficulty. The Court should recall that voting is about aggregation; elections are opportunities for communities to pool together to elect candidates of their choice. When states shape the political process in a way that prevents minority groups from aggregating effectively, states engage in the very activity the Civil War Amendments and VRA were designed to eradicate.

Question II (951) Words

Jones and *LaFollette* suggest that the Court would strike down this open primary requirement. There is clear state action. What is the nature and severity of the harm? I assume for the purpose of precise analysis that both the "party faithful" and "leadership" dislike the open primary system (OPS). The harm thus might be seen as moderating the party's choice of candidate. Open primaries allow opposing party members and independents to influence the outcome of the Party's selection of its candidate, a selection that occurs at the "critical juncture" for the party. *Tashjian*. Parties have associational rights that include "the right not to associate." *Jones*. Mandating open primaries, then, requires the party to associate with non-members at what Justice Scalia thinks is the party's defining moment. *Id.* Moreover, some might argue that the OPS violates individual associational rights by forcing GOP faithful to associate with crossover voters even if only for a day.

Reasoning from the Court's rationales, open primaries clearly allow for the "clear and present danger" of party raiding. *Jones*. The OPS party-raider must give up her vote in her party's primary. At the same time, only one – if any – party's primary is likely to be competitive in most elections, creating a significant risk of crossover voting. Forcing a non-loyalist to choose one primary does not diminish the party's desire to limit its candidate selection exclusively to its members. The associational interest is no less invaded by forcing choice. Moreover, an OPS most likely "adulterates" the party's identity. *Jones*. Candidates would have an ex ante incentive to seek swing voters, generally in the center, to insulate themselves from a potential raid. Even though the

purpose of this law is not as evident as was the law in *Jones*, the Court would likely view it as cut from the same cloth.

LaFollette held that states may not bind national parties to honor state open primary results. Yet this law does not bind a National Party Convention; it focuses on the privilege of access to the state ballot. This OPS does not force association. It gives parties a choice: participate in an open primary or forfeit automatic ballot access. The law thus might be seen as less intrusive than the *Jones* law, which required all parties to submit to the blanket system. Moreover, *Timmons* held "that a particular individual may not appear on the ballot as a particular party's candidate does not severely burden that party's associational rights." The party has an associational right, not a right to attach its name to candidates on the state's property. Were the Court faithful to *Timmons'* words, it might find only a minor burden on the party's rights. At the same time, the Court might use the status quo as a baseline, and argue that the OPS forces the two major parties either to sacrifice associational rights or to give up ballot access they have already "earned." That choice might constitute an unconstitutional condition.

Ames would have several state interest arguments. It could not claim the desire to elect more centrist candidates. The Court flatly rejected that rationale as a clear associational rights violation in *Jones*. *Jones* similarly dismissed the state's interest in enfranchising independents and minority party members from safe districts. The state could make arguments about fairness, choice, participation, and privacy after *Jones*, but it would have to demonstrate that specific "aspect" of the interest "addressed by the law" is compelling. *Jones*. The state might argue that there is a crisis in participation that has resulted largely from a lack of fairness, competition, and choice; it might cite financial or

social barriers to entering political parties that necessitate allowing election-day entry. Either way, the State should emphasize that conditioning automatic ballot access on an open primary is a "reasonable, politically neutral regulation[]" designed to channel "expressive activity at the polls." *Burdick.*

Finally, the law might not be able to pass narrow tailoring analysis. The law would certainly fail Scalia's *Jones* test. The State could come up with more narrow and direct ways to regulate competition and improve participation. *See Jones.* The Court generally believes that the appropriate remedy for party dissatisfaction should be internal party changes. *See Jones; Tashjian.* On the other hand, States cannot force parties to increase competition; collusion between parties is not actionable under *Gaffney.* The State has a strong argument that the only way it can regulate the harms of participation, competition, and the like, is to condition privileges to its property (the ballot). Grating the privilege alone might be reason enough to regulate. *Cf. Condon; Allwright.*

The Court's stability-fetish would probably cause it to strike down the requirement and distinguish *Timmons.* That case, the opinion might write, dealt with the traditional and compelling state interests of preventing voter confusion and factionalism. This case, it might reason, involves a direct assault on the stability of the two-party system and the associational rights on which that system depends.

That holding would be a mistake. Parties should have associational rights. But parties should not have the right to place any candidate on the state's ballot. The state may regulate access to its ballot with threshold requirements, *Munro*, fusion bans, *Timmons*, and write-in bans, *Burdick.* So should the State be able to condition access to its extraordinarily powerful privilege of automatic ballot placement with an OPS

requirement. Justice Stevens' *Jones* dissent is correct: primaries are state action. Moreover, parties are like corporations – they receive tremendous benefits from the police power of the State that justify regulation. *Cf. Austin*. If parties are engaging in a pattern of anti-competitive behavior that erodes competition and denies true electoral choice, *see* Issacharoff & Pildes, states should be able to respond by withdrawing unconditional ballot access.

Question III

A. *Lassiter* and *Harper*: (232) Words

Lassiter upheld literacy tests under rational basis review, affirming the state's rational interest in promoting participation by intelligent voters. Political debate often occurs in written materials, and a state might rationally conclude that illiterates should either educate themselves or forfeit their participation rights. *Harper* struck down a state poll tax, rejecting the assumption that people with property were more likely to be "interested" or "capable" voters. The cases differ over whether a State should be able to exclude "civic slackers" from its elections.

The conflict is central to voting rights law. In the area of campaign finance, expenditure limitations are often justified by arguing that voters cannot accurately detect corruption. In *Bush v. Gore*, Justice Rehnquist's concurrence emphasized that the right to vote extends only to those people intelligent enough to follow directions. An underlying assumption of *Shaw's* expressive harm is that voters are incapable of making below-surface distinctions between benign and invidious racial classifications – hence, "appearances do matter."

These assumptions are dangerous in a democracy. Our nation once denied women the vote for lack of interest. Some conservatives argue that all liberals lack sufficient self-interest to be considered "rational." This demonstrates the lack of a limiting principle between interested and disinterested. Interest exclusions only allow the powerful to exclude its disfavored group. The only principled way to avoid this is to insist on equal access to the franchise, regardless of interest.

B. *Miller* and *Cromartie*: (238) Words

Justice Kennedy's *Miller* opinion is a defense of colorblindness and anti-essentialism. He argues that any State classification of voters on the basis of race makes impermissible assumptions that "treat individuals as the product of their race." Justice Breyer's *Cromartie* opinion is more pluralistic. It recognizes the fallacy of colorblindness in districting ("legislatures will almost always be aware of racial demographics"), noting that racial identification will often "correlate[] highly with political affiliation."

There is no doubt that race-consciousness exacts a price on the polity. But this game is worth the candle. Slavery did not end with the Civil War. Its legacy of white supremacy continued in the state laws challenged in *Giles, Harper*, and the *White Primary Cases*. Its legacy persists in modern practices such as felon disenfranchisement and voter intimidation. *See Baker v. Pataki;* book squib on Election 2000. Moreover, race correlates with voting preferences. Anti-essentialism powerfully demonstrates a lack of causation; it does not disprove correlation. Polarized voting exists. Wishing racial polarization away in the name of colorblindness, when numerous states advanced racism's cause for decades after passage of the Civil War Amendments (even after the VRA), is as backwards as it is irresponsible. There is no empirical evidence that colorblindness reduces racially polarized voting, but there is evidence that MMDs do. *See* David Cannon. The Court should build on Justice Breyer's *Cromartie* opinion and begin to move away from its doctrinaire requirement of formal race neutrality.

C. *Jones* and *Colorado II*: (238) words

Jones and *Colorado II* reveal two distinct views of political parties. In *Jones*, Justice Scalia strikes down a mandatory blanket primary system as a violation of parties' associational rights; the decision defends parties as havens for political expression, and creatures that have their own associational and speech rights. In *Colorado*, Justice Souter justifies campaign finance regulations on the grounds that parties are like PACs – they are places where individuals can aggregate money and power behind specific candidates.

Justice Scalia's libertarian paradigm fails to describe accurately the role of modern political organizations. First, his vision of parties as a cohesive organization for speech and message breaks down when party leadership, party loyalists, and the party centrists all disagree on the party's message. *See LaFollette; Tashjian.* The Court then is forced to choose – often incomprehensibly and *always* arbitrarily – who controls the organization's "voice." The Constitution does not guide a Justice when she determines when a party's associational interest is legitimate, her political philosophy does. *Cf. Tashjian* (Scalia's dissent). Second, modern political organizations focus primarily on fund raising and marketing. The goal is power and electoral results. Third, political parties mostly perform an intermediary role. Corporations contribute to parties not to persuade people to change their minds about corporate regulations, but to elect candidates who will protect their interests directly. Courts should abandon the legal fiction of "party as speaker" and intimate association and allow states more deference to regulate parties.

D. Thomas' *Holder* and *Shrink* dissents: (186) words

In *Shrink*, Justice Thomas argues that the Court should reject the expenditure/contribution distinction because contributions provide the most effective route to individual participation. Justice Thomas thinks that direct contributions allow individuals to aggregate their money and voice "in a manner that maximizes the power of [their] messages." In *Holder*, Justice Thomas defends a thin right to vote that includes only the right to cast a ballot and have it counted. To Thomas, emphasizing aggregation and effective voice in voting creates standards "from an abstract evaluation of political philosophy."

Justice Thomas' philosophy privileges judicial protection of speech rights over voting rights. But "money is property; it is not speech." *Nixon* (Stevens' dissent). And even if money is speech, it is difficult to understand why speech rights depend on aggregation when voting rights do not. An individual can speak by herself and be heard. One vote generally is insufficient for expressive purposes, *see Burdick*, or to have any practical impact on an election. Ultimately, both rights are meaningless without the right to be heard. *Cf. Bellotti*. Justice Thomas should recognize that voting, like speech, requires aggregation for efficacy.

(1) Partisan Gerrymandering, Vote Dilution, and *Shaw v. Reno*

In gerrymandering cases, the Supreme Court practices a thin process theory of judicial intervention that assumes and encourages healthy pluralist competition, while intervening only for clear process failure. The Court assumes that political competition among interests provides adequate, fair representation, because it prudently hopes to avoid articulating more than a paper-thin account of democratic theory. Only when virtually all democratic perspectives agree a group suffers from unfair representation will the Court intervene. The Court tries to stay away from regulating outcomes and safeguards process integrity without managing political competition. However, even thin process theory requires intervention when the process is fundamentally exclusionary because of the tight connection between institutional arrangements and outcomes. It is here that process theory shows weakness and the Court has struggled for coherence.

Partisan gerrymandering best illustrates the Court's approach. The Court realizes that the parties compete over not only policy, but the rules of the competition like districting, and finds no neutral baseline by which to judge how district lines should be drawn. The Court turned its back on the proportional representation answer suggested in *Gaffney* because disproportionality in a winner-take-all districting system results from the Cube Law and this does not make districting unfair. Politics should be competitive, and parties are capable of competing with one another. Thus, the *Bandemer* partisan gerrymandering standard, as it has been applied, is exceedingly difficult to meet. *Bandemer* requires consistent degradation over a long period of time to establish objective institutional unfairness before courts intervene, and even then courts will subsequently withdraw if circumstances hint at a taste of victory.

Of course, *Bandemer* closes judicial discretion so tightly that only vote dilution under §2

would meet the standard. Discrimination against African-Americans presented the clearest case of process injuries and triggered judicial intervention. In this area, the Court identified an objectively obvious pattern of process unfairness for which it would impose special intrusions upon the political process. First, unlike the *UJO* Hasidim or groups under Stevens's formulation, there was no difficulty determining that African-Americans constituted a politically relevant, coherent group subject to undeniable discriminatory exclusion, a conclusion bolstered by the legislative commitment of the VRA. Second, race in this case served as a perfect proxy for political interests because polarized voting evidenced how race and political interests coincide. This was dissimilar from other political groups for whom political interests might overlap with others, so the injury to the subordinated group is limited by virtue of sharing those interests with a dominant group (e.g., Hasidim with whites). Third, substantive representation would not suffice, and the Court felt comfortable enough that no theory of representation could justify racial exclusion.

However, even in the case of vote dilution, the Court struggled to find a neutral baseline. The early qualitative inquiries (*White*, *Whitcomb*) were confusing. *Gingles* offered a useful means of attacking at-large districting by comparing to the ready alternative of single-member districting. *Gingles* began breaking down as applied to single-member districts because it wasn't clear whether maximization would be proper. *DeGrandy* offered rough PR as a neutral baseline, but resisted guaranteeing PR, encouraged minorities to engage in coalitions, and repudiated descriptive representation. *DeGrandy* demonstrated how a non-Footnote-Four minority group (Cubans) might exploit *Gingles* to leverage greater political gain rather than to protect against racial discrimination. Moreover, the consensus of the Court on racial vote dilution disintegrated

by *Shaw*, when the Court felt that vote dilution was no longer needed.

Shaw reflects a rejection of the original consensus for judicial intervention on race. The *Shaw* majority does not believe that judicial action to provide race-conscious districting is necessary to provide adequate representation. *Shaw* cases resist the idea that race ought to be treated preferentially to other political minorities. Vote dilution goes beyond protecting minorities from unfairness–it ensures a certain result in a way thought necessary given systemic unfairness–but *Shaw* cases argue that this is unnecessary today and the guarantee embodied by *Gingles* districts exempts minorities from the political competition all other minorities face. *Shaw* makes little sense but signals breakdown on race consensus that reconciled vote dilution with thin process theory. *Shaw* cases display fractured reasoning because the Court is dividing along all representation theories and values, which suggests that vote dilution now sits outside the process failure window for judicial action.

Shaw highlights how judicial identification with overarching theory leads to breakdown. Going beyond the expressive, constitutive values of ballot access, *Gingles* emphasized electing representatives because the Court saw special need, but *Shaw* challenged its choice of values, asking why substantive representation was not sufficient. Agreement on normative goals breaks down on particular facts. Unfortunately, there is no method of aggregating preferences that is a priori is more fair or more neutral in an objective sense. There are many ways of aggregating preferences, each arguably fair in the abstract, under certain conditions. As a result, it is extremely difficult to devise a theoretically optimal way of determining public choice purely with reference to abstract values. Advocacy for a particular institutional design is driven not by theory, but by preference for what outcomes it is apt to yield and whether those outcomes look

fair to you.

The necessity of justifying electoral methodology with reference to outcomes tempts judges with the opportunity to pick institutions that yield favored outcomes. The Court has attempted to abstain from intervention and rightly so. Although thin process theory leaves the Court's reasoning inconsistent and underenforces certain notions of fairness, particularly in favor of the status quo, there is no objective way of adjudicating competing claims of democratic theory except to act only when there is significant consensus.

(2)

The Ames primary's constitutionality turns on the degree to which it intrudes upon the parties' First Amendment right to self-definition. Jurisprudence on party self-definition holds that the parties generally are free to exclude participation from party activity, except when it excludes along quasi-suspect class lines (race-White Primary cases; class-*Bullock*, *Rhodes*). *Nader* (summary affirmance) held that the parties had self-definition rights that extended at least to exclude voters who had not publicly registered as members. *Jones* struck a blanket primary requirement, reasoning that it forced the parties to associate with, and have their nominees chosen in part by, nonmembers of the party. *Nader* and *Jones* signify that the state's interest and the parties' constitutional rights include protection of party self-definition from non-party members.

At least part of the concern in party self-definition is the party-raiding problem, because *Tashjian* held that the state's interest in protecting party integrity did not permit the state to prohibit a party from opening its primary to independent voters. *Tashjian* is distinguishable from *Jones* because the GOP wanted to include independents, but not members of other parties. The threat to party integrity was arguably less in *Tashjian* than in *Jones* because independents are benevolent raiders who are less antagonistic to the party and less likely to engage in mischief.

The Ames law is not a blanket primary requirement like Prop 198 in *Jones*. Ames requires a voter to pick a single party's ballot on election day and choose among candidates all from a single party for each office. Whereas Prop 198 permitted primary voters to vote for any candidate, regardless of party, the Ames law forces voters to pick a party before participating in the primary. Thus, the Ames law requires a weak declaration of party affiliation before the party

is forced to include the voter. This declaration is not very different from publicly registering as a party member before the election, because party registration typically requires little more than just such a nominal declaration, which appears sufficient to protect the party's rights of self-definition (*Nader*, *Jones*). The Ames law does not present the threat to party self-definition and integrity that Prop 198 did.

However, the Court's suspicion of mischief would lead it to strike it. The Court might analogize party registration to voting registration in that pre-election registration imposes just enough of an extra burden that voters are less likely to engage in strategic behavior. By requiring party registration before the election, rather than allowing voters to declare affiliation on election day, registration requirements make party raiding less likely and make it more likely that voters will be true members of the party. The Court also is likely to sense and seek to thwart any attempt by the parties or intraparty factions from using Ames state law to lock in a political victory. As in *LaFollette*, *Tashjian*, and *Eu*, the Court will be reluctant to permit state law to trump party autonomy when it appears that some faction uses state government control to get what it wants. Perhaps (i) the elected officials in one or both parties are trumping party activists (*Eu*); (ii) the controlling party is seeking to gain or maintain some electoral advantage over the other (*Tashjian*); (iii) the general public is imposing change on the party leadership (*Jones*).

The Court should uphold the law. State law already favors the major parties in way that makes democratic input outside the two parties very difficult. Automatic ballot access for the two parties, with restrictions on ballot access for third parties, makes it difficult for third parties to compete. The first-past-the-post system (Duverger's Law) encourages participation through the two parties. Under the Voice/Exit paradigm, exit is very difficult, so courts need to enhance

capacity for voice through the parties by opening the primary.

The theory behind Prop 198 and the Ames law is that the parties serve a winnowing function and the centrist voter (plurality of public) needs to have input on which candidates survive the primary. This locates democratic compromise within the party primaries rather than the general election because party memberships might produce ideologically extreme nominees that give centrist little voice. Given that electoral institutions favor the two parties so much, attempts like the Ames law to enable the centrist electorate to have input through the party system offer compromise that intrudes to some degree on party autonomy without trampling it.

(3a) *Lassiter* and *Harper*

The Court in both cases faced a traditional franchise restriction not based on suspect-class lines, but came out differently in result. *Lassiter* upheld literacy tests under rational basis review. It found the literacy test to be rationally related to the goal of ensuring intelligent voting, even if under- and overinclusive. However, in *Harper*, the Court struck down a poll tax and indicated that any infringement on the "'fundamental political right'" (citing *Reynolds*). *Harper* applied certainly more than the rational-basis scrutiny required in *Lassiter*. Poll taxes ostensibly were designed to weed out uninterested and uneducated voters. The poll tax was a poor test for identifying civically upstanding voters, but as Harlan noted, it was sufficient under rational basis, particularly given favorable precedent.

First, the Court became more willing between *Lassiter* and *Harper* to dive into the "political thicket." *Harper* cited the one person, one vote cases *Reynolds* and *Gray v. Sanders* to justify closely scrutinizing voting restrictions. Before *Baker*, the Court was unwilling to explore "political rights" and deferred to political branches on determining voting issues (*Colegrove*, *Giles*). *Lassiter* reflected that deference.

Second, once it assumed the authority to decide political rights, it likewise accepted the authority to decide between theories and values of democratic participation. *Harper* reflects this willingness to reject legislative decisions on democratic values and instead make its own choices to bolster certain values at the expense of others. After *Baker*, the Court was willing to reject the value tradeoff struck by the poll tax. The poll tax undermined substantive and interest representation of poor people to gain (ostensibly) civic republican benefits of a presumably more engaged and smarter electorate. Rick Pildes explains *Harper* as not about fundamental rights,

but about expressive values. Requiring literacy expresses positive civic republican ideals for voters of intelligence and deliberation, whereas wealth requirement were unhealthy expressions of exclusion based on class differences.

(3b) *Miller* and *Cromartie*

Miller and *Cromartie* appear inconsistent because of their normative assessments of race-conscious districting. *Miller* shifted the *Shaw v. Reno* inquiry from an expressive harm focus based on shape to a traditional equal protection perspective. *Miller* identifies the use of race as a predominant, overriding factor in districting as unconstitutional because it essentializes individuals and "draws the very stereotypical assumptions the Equal Protection Clause forbids." However, *Cromartie* seems to reverse *Shaw* because it effectively suggests that using race in districting is always permissible. *Cromartie* merely requires that race-conscious districting was done with political motivations and upholds the districting provided that an alternative scheme could not be drawn that satisfies the same political objectives. Since partisanship, political preferences, and race are nearly inextricably tied together for polarized voting (*Gingles*), *Cromartie* suggests virtually any race-conscious districting is permissible because race lines are identical to political lines.

The treatment of race in these two cases reflects the fact of racialized voting patterns and ambivalence about it (see *LULAC* opinions, *Gingles* debate, *Whitcomb* problem). Disaggregating politics and race is impossible because African-Americans and whites vote in such a polarized manner that the colinearity is nearly perfect in *Gingles* districts. When districting treats African-Americans, it cannot be decided whether it is because of race or because African-Americans are overwhelmingly Democratic. *Miller* deems recognition of this connection between politics and race as essentialization that subordinates districting principles based on politics. *Cromartie* deals matter-of-factly with it as impossible to disentangle from political districting principles. Race can be considered if it serves as a proxy for politics. The difference outcomes reflect different

emphases on the meaning of race.

Cromartie, however, addresses *Shaw* concerns raised by O'Connor that race can matter in districting, as it must, but it cannot matter too obviously. *Cromartie* forces districters to articulate justification in terms of politics rather than race and thus eases discomfort about essentialization and overemphasizing race. *Cromartie* also may leave room for continuation of *Shaw* claims when majority-minority districts do not make best sense on partisan grounds because Democrats might benefit more from dispersing minority voters among several districts.

(3c) *Jones* and *Colorado Republican II*

Jones and *Colorado Republican II* are in tension as a result of their disparate treatment of the role of political parties. *Jones* envisions the political parties' role in politics to define a particular ideological position and stand independently from candidates. *Jones* protected party self-definition out of respect for parties' roles as political associations that represent ideological substance besides an empty label that simply attaches to whatever candidates emerge from a nomination process. *Colorado* runs in the opposite direction because it treats parties as having little independent role apart from funneling money to candidates. By limiting party coordinated spending in Progressive fashion, *Colorado* repudiates the view that the party-as-political-association ought to be treated as independent from candidates and empowered to police and discipline candidates to toe the party line (Thomas in dissent).

The cases represent different views of the parties' roles, but the inconsistency arises from tension within the *Buckley* framework for campaign-financing. *Colorado* could not have treated coordinated party spending as independent expenditures without compromising the artificial *Buckley* distinction between contributions and expenditures. Tallying permitted contributors to give to parties, who then spent in support of particular candidates, thereby permitting contributors to evade contribution limits to candidates. By making coordinated expenditures unlimited, *Colorado* would have made it too easy for contributors to undermine the *Buckley* distinction by giving to the parties, even if one accepts the view that the parties have an independent ideological role to play. Reifying party-as-political-association might have come at the cost of the campaign-finance system. Like *Buckley*, *Colorado* struck a formalistic compromise, winking at so-called independent expenditures while drawing an artificial line at

coordinated expenditures.

(3d) Thomas's concurrence in *Holder* and dissent in *Shrink Missouri Gov't*

Justice Thomas's dissents seem contradictory about the First Amendment interests of individuals' ability to aggregate political resources for collective action. *Buckley* gives campaign contributions less protection than direct expenditures on advocacy because it treats contributing as a mere speech by proxy, a less expressive form of speech. In *Shrink*, Thomas criticizes *Buckley* for its atomistic view of First Amendment activity that sees political spending as mere expression and neglects its instrumental value. Under his view, contributions deserve strict protection because of the instrumental benefits to aggregating funds with likeminded contributors for more effective speech. Candidates are their own best advocates, so the optimal political spending is contributing. By limiting contributions, *Buckley* relegates contributors to "less effective modes of communication" and "curtails individual participation."

However, in his *Holder* concurrence, Thomas takes a similarly atomistic view of central First Amendment activity–voting. He argues that constitutional protection of the vote extends no further than the individual casting of one's vote. This reduces voting's meaning to mere expression of a electoral preference and ignores the instrumental value of voting–aggregating votes with likeminded citizens to elect representatives. He neglects instrumental utility and does not ponder whether his position would relegate certain voters to less effective modes of political participation and curtail individual participation in electoral politics. Thomas supports protection of aggregating campaign funds for the instrumental purpose of supporting candidates, but opposes protection of aggregating votes for the instrumental purpose of electing candidates.

Inconsistency arises from Thomas's concerns about judicial intervention into political

theory. He believes that courts have no objective guide for their decisions on what constitutes fair and effective representation. Like Harlan on this question, Thomas advocates judicial abstention from second-generation claims because he finds the judiciary ill-equipped and democratically illegitimate as an institution for structuring the political system beyond ballot access. To him, *DeGrandy* rough proportionality for vote dilution is a political choice that the Court shouldn't have made and that there is no neutral baseline. However, on campaign spending, Thomas sees a neutral baseline that courts can accept rather than theorize. Thomas thinks the objective baseline is government noninterference with campaign spending, like judicial content-neutrality and reluctance to suppress free speech. While reform advocates disagree that government noninterference is a neutral baseline (Strauss), Thomas endorses a free market of campaign spending that does not require courts affirmatively to intervene or develop theories about fairness, except to strike down government interference.