

THE SUPERFLUOUS FIFTEENTH AMENDMENT?

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ABSTRACT—This Article starts a conversation about reorienting voting rights doctrine toward the Fifteenth Amendment. In advancing this claim, I explore an unappreciated debate—the “Article V debate”—in the Fortieth Congress about whether nationwide black suffrage could and should be achieved through a statute, a constitutional amendment, or both. As the first significant post-ratification discussion of the Fourteenth Amendment, the Article V debate provides valuable insights about the original public understandings of the Fourteenth and Fifteenth Amendments and the distinction between civil and political rights.

The Article V debate reveals that the Radical Republicans’ initial proposal for nationwide black suffrage included both a statute and an amendment. Moderate Republicans rejected the statutory option because they believed that Congress lacked enforcement authority under the Fourteenth Amendment to impose voting qualifications on the states and that an amendment was the only politically viable option.

Given this historical evidence, this Article argues that the Fifteenth Amendment was a significant expansion of congressional authority to regulate voting rights in the states and that Congress’s Fifteenth Amendment enforcement authority is distinct from—and broader under current doctrine than—its Fourteenth Amendment enforcement authority. The Article V debate offers a persuasive reason for overturning *Boerne*’s congruence and proportionality test or, at a minimum, cabinining it to the Fourteenth Amendment. Accordingly, laws enacted under Congress’s Fifteenth Amendment enforcement authority should be reviewed under *Katzenbach*’s rationality standard and the Voting Rights Act (VRA) would be on firmer constitutional ground.

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INTRODUCTION

The Fifteenth Amendment lives in the Fourteenth Amendment’s shadow. The Supreme Court expansively interprets the Fourteenth

Amendment to prohibit a wide range of racial discrimination in voting.¹ By contrast, the Court has failed to clarify the Fifteenth Amendment's scope in voting rights cases.² Contemporary doctrine thus treats the Fourteenth Amendment as the font for voting rights, whereas the Fifteenth Amendment is a constitutional afterthought—a superfluous amendment.

There is an irony here. Despite its broad language, the Fourteenth Amendment was originally understood by the Reconstruction generation to *not* encompass the right to vote.³ As the second Justice Harlan once remarked, the Fifteenth Amendment's *existence* “alone is evidence that [Congress] did not understand the Fourteenth Amendment to have” “extend[ed] the suffrage.”⁴

Passed by the lame-duck Fortieth Congress in 1869 and ratified by the states in 1870, the Fifteenth Amendment was the final act in the trilogy of Reconstruction Amendments.⁵ Its broad prohibition of racial discrimination in voting⁶ and its clause empowering “Congress . . . to enforce [its provisions] by appropriate legislation”⁷ represent the crowning achievement of Reconstruction. In less than a decade, the United States fought a bloody Civil War to preserve the Union and transformed itself from a slaveholding nation to a multiracial democracy.⁸

This Article aims to bring the Fifteenth Amendment out of the shadows—an endeavor particularly appropriate given that this year marks

¹ See *Cooper v. Harris*, 137 S. Ct. 1455, 1463 (2017) (racial gerrymanders); *White v. Regester*, 412 U.S. 755, 765–67 (1973) (vote dilution); *Nixon v. Herndon*, 273 U.S. 536, 540–41 (1927) (vote denial).

² See *Voinovich v. Quilter*, 507 U.S. 146, 159 (1993) (“This Court has not decided whether the Fifteenth Amendment applies to vote-dilution claims.”); *City of Mobile v. Bolden*, 446 U.S. 55, 65 (1980) (plurality opinion) (concluding that the Fifteenth Amendment “prohibits only purposefully discriminatory denial or abridgment by government of the freedom to vote ‘on account of race, color, or previous condition of servitude’” (quoting U.S. CONST. amend. XV, § 1)).

³ See *infra* Part II.

⁴ *Oregon v. Mitchell*, 400 U.S. 112, 166 (1970) (Harlan, J., concurring in part and dissenting in part).

⁵ Proposing an Amendment to the Constitution of the United States, Joint Res. 14, 40th Cong., 15 Stat. 346 (1869) (sent to the states for ratification); 16 Stat. 1131–32 (1870) (ratification); see also CONG. GLOBE, 40th Cong., 3d Sess. 1563 (1869) (passage in the House); *id.* at 1641 (passage in the Senate).

⁶ U.S. CONST. amend. XV, § 1 (“The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.”).

⁷ *Id.* § 2.

⁸ See ERIC FONER, RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION, 1863–1877, at xxiii, 448 (Henry Steele Commager & Richard B. Harris eds., updated ed. 2014) (1988). Although this experiment was tragically cut short by the rise of Jim Crow in the late 1800s, it was a remarkable accomplishment.

the Amendment's 150th anniversary. This Article argues that the Reconstruction Framers' deliberate decision to pass the Fifteenth Amendment as an *amendment*—as opposed to a statute—provides a powerful reason for differentiating between the Reconstruction Amendments. In particular, this decision sheds light on the scope of Congress's Fourteenth and Fifteenth Amendment enforcement authorities and provides a historical and textual basis for differentiating between them, namely, the civil versus political rights divide.

In making this claim, this Article highlights an unappreciated debate—which I call the Article V debate—in the lame-duck Fortieth Congress about whether nationwide black suffrage could and should be achieved through a statute, a constitutional amendment, or both. To underscore that debate's importance, this Article asks a deceptively complicated question: Why did Congress pass the Fifteenth Amendment instead of the Voting Rights Act of 1869?

Given our contemporary understanding of the Fourteenth Amendment, this is a difficult question. By the time the Fifteenth Amendment was sent to the states for ratification, Congress had already passed legislation enfranchising Blacks in the District of Columbia, the federal territories, and the Reconstructed South.⁹ Blacks, however, remained disenfranchised in several Northern and Border States. The Reconstruction Framers—all of whom were Republicans—backed nationwide black suffrage as both morally imperative and politically expedient given the expected support of newly enfranchised black voters.¹⁰ If the Court's current doctrine accurately reflects the Reconstruction Framers' understanding of the Fourteenth Amendment, the Fortieth Congress would have been well within its newly established enforcement authority to enact a nationwide black suffrage statute.

One potential answer is that the Fifteenth Amendment is an entrenchment device. Given the Fourteenth Amendment's lack of explicit language protecting the right to vote, and the possibility that a nationwide suffrage statute could be repealed by a future Congress or struck down by a hostile Supreme Court, a suffrage amendment makes perfect sense. An amendment would also prevent the readmitted Southern States from disenfranchising Blacks at the first opportunity.¹¹

But this narrative only explains why there is a Fifteenth Amendment. A suffrage statute would have needed only two-thirds of both houses of

⁹ See *infra* Section III.B.

¹⁰ See *infra* Section III.C.

¹¹ See WILLIAM GILLETTE, *THE RIGHT TO VOTE: POLITICS AND THE PASSAGE OF THE FIFTEENTH AMENDMENT* 49–50 (1965).

Congress to overcome the inevitable veto by President Andrew Johnson,¹² and would not have needed to overcome Article V's additional requirement of ratification by three-fourths of the states. Thus, the Reconstruction Congress could have *first* passed legislation enfranchising Blacks in the Border States and the North and *then* relied on this newly empowered and loyal voter base to help ratify the Fifteenth Amendment. Moreover, the statute–amendment two-step had already proven successful during Reconstruction: the Civil Rights Act of 1866 is rightly viewed as the statutory predecessor of the Fourteenth Amendment.¹³ Given these political realities, why did Congress not follow the path already taken by the passage of the Civil Rights Act of 1866 and the subsequent ratification of the Fourteenth Amendment?

This inquiry is not merely hypothetical. The first substantive discussions about nationwide black suffrage in the lame-duck Fortieth Congress explicitly addressed whether Congress could and should enact a statute regulating voting rights in the states. In fact, the Radical Republicans' initial proposal included both a suffrage statute and an amendment. Congress, however, ultimately rejected the statutory option and chose to pass a constitutional amendment via Article V.¹⁴

An examination of the motives and actions of the Reconstruction Framers reveals two explanations for that choice: one constitutional, one political. Turning first to the Constitution, moderate Republicans believed that Congress lacked authority to impose voting qualifications on the states under the Fourteenth Amendment.¹⁵ Put simply, the Fortieth Congress did not believe it had the power to enforce civil rights by expanding the right to vote. This logic may seem alien today, but the Fortieth Congress's actions comport with Reconstruction-era views of citizenship and the hierarchy of rights. Under prevailing Republican ideology, civil and political rights were conceptualized as distinct spheres and the Fourteenth Amendment guaranteed *civil* rights but not *political* rights. Given this understanding of the Fourteenth Amendment, it is unsurprising that, prior to the Fifteenth

¹² President Johnson vetoed numerous civil rights and voting rights bills during Reconstruction. See FONER, *supra* note 8, at 247–50 (discussing Johnson's vetoes of the Freedmen's Bureau Bill and the Civil Rights Act of 1866); EARL M. MALTZ, CIVIL RIGHTS, THE CONSTITUTION, AND CONGRESS, 1863–1869, at 131 (1990) (discussing Johnson's veto of the First Reconstruction Act of 1867).

¹³ See *McDonald v. City of Chicago*, 561 U.S. 742, 775 (2010) (“Today, it is generally accepted that the Fourteenth Amendment was understood to provide a constitutional basis for protecting the rights set out in the Civil Rights Act of 1866.”).

¹⁴ See *infra* Section III.D.

¹⁵ See *infra* Section III.D.

Amendment, Congress limited suffrage legislation to areas of federal control and never imposed suffrage requirements on the states.

On the political front, Republicans were constrained by their prior positions. During the Fourteenth Amendment ratification debates, “[m]oderate Republicans feared they could not sell the equal-suffrage idea in the North, where white bigotry remained a stubborn fact of life.”¹⁶ The Republicans’ campaign to ratify the Fourteenth Amendment thus contained a crucial promise: the Amendment would not mandate voting rights for Blacks. Despite this pledge, Radical Republicans—most prominently Representative George Boutwell and Senator Charles Sumner—later advocated for a suffrage statute. The moderate wing of the party, however, concluded that an amendment was the only politically viable option and scuttled the Radicals’ attempt to pass a suffrage statute.¹⁷

Unfortunately, this history has been virtually forgotten. Partly because of this constitutional amnesia, the Fifteenth Amendment is missing from current doctrine. One could read the U.S. Reports and conclude that the Fifteenth Amendment was superfluous; the Fourteenth Amendment provides the same—indeed, even greater and more defined—protections against racial discrimination in voting than the Fifteenth Amendment.¹⁸

But there is risk in relying solely on the Fourteenth Amendment as the guarantor of minority voting rights. While the Fourteenth Amendment’s scope was expanded to encompass voting rights during the twentieth century, its protections have been weakened in recent decades. The Court’s penchant for a colorblind Fourteenth Amendment, for example, has drawn into question the constitutionality of majority-minority districts.¹⁹ Moreover, in *City of Boerne v. Flores*, the Court substantially curbed Congress’s Fourteenth Amendment enforcement authority.²⁰ These doctrinal shifts have

¹⁶ AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 392–93 (2005) [hereinafter AMAR, *AMERICA’S CONSTITUTION*].

¹⁷ See *infra* Section III.D.

¹⁸ See *infra* Section I.A.

¹⁹ See *Bartlett v. Strickland*, 556 U.S. 1, 21 (2009) (plurality opinion) (“If § 2 were interpreted to require crossover districts throughout the Nation, ‘it would unnecessarily infuse race into virtually every redistricting, raising serious constitutional questions.’” (quoting *League of United Latin Am. Citizens v. Perry (LULAC)*, 548 U.S. 399, 446 (2006) (opinion of Kennedy, J.))); *Shaw v. Reno*, 509 U.S. 630, 642 (1993) (recognizing a cause of action to challenge racial gerrymanders under the Equal Protection Clause).

²⁰ 521 U.S. 507, 530 (1997).

contributed to the invalidation of the VRA's coverage formula²¹ and could spell trouble for the constitutionality of Sections 2 and 3(c) of the VRA.²²

As the Court established a colorblindness regime in antidiscrimination law and cut back on Congress's Fourteenth Amendment enforcement authority, it neglected the Fifteenth Amendment. That neglect, in some ways, is benign, as it has left undefined an area of doctrine upon which courts can now expand. Reinvigorating the constitutional legacy and protections of the Fifteenth Amendment could thus provide a powerful response to the Court's recent Fourteenth Amendment jurisprudence and help preserve the VRA.

By showing that the Fifteenth Amendment is not superfluous, this Article starts a conversation about reorienting voting rights doctrine toward the Fifteenth Amendment. Indeed, the Reconstruction-era distinction between civil and political rights continues to have relevance today, particularly for Congress's enforcement authority. As a first step in this new conversation, this Article claims that Congress's Fifteenth Amendment enforcement authority is distinct from—and broader under current doctrine than—its Fourteenth Amendment authority. The Article V debate further provides a persuasive reason for overturning *Boerne's* congruence and proportionality test or, at a minimum, cabining it to the Fourteenth Amendment. This doctrinal change would give Congress far more leeway in passing voting rights legislation.

²¹ *Shelby County v. Holder*, 570 U.S. 529, 557 (2013). Section 5 of the VRA required certain covered jurisdictions to preclear all voting changes with federal authorities. *See id.* at 537. In 2006, Congress reauthorized Section 4(b)'s formula for determining which jurisdictions were subject to Section 5's preclearance requirement. *See id.* at 539. When the Court invalidated Section 4(b), coverage was based on data from the 1964, 1968, and 1972 elections. *See id.* at 537–39. The Court did not invalidate Section 5 itself. *See id.* at 557.

²² Section 2 is a “permanent, nationwide ban on racial discrimination in voting.” *Id.*; *see* 52 U.S.C. § 10301 (2012). Section 2 covers both vote-denial and vote-dilution claims and imposes liability based on a finding of discriminatory intent or effect. *See Veasey v. Abbott*, 830 F.3d 216, 243–44 (5th Cir. 2016) (en banc). Section 2's discriminatory-effects standard is broader than the Fourteenth and Fifteenth Amendments' standards and normally easier to prove in litigation than a constitutional claim. *See infra* Section I.A.5.

Also known as the bail-in provision, Section 3(c) authorizes federal courts to require states and political subdivisions that have violated the Fourteenth or Fifteenth Amendments to preclear all voting changes with federal authorities. 52 U.S.C. § 10302(c); *see also* Travis Crum, Note, *The Voting Rights Act's Secret Weapon: Pocket Trigger Litigation and Dynamic Preclearance*, 119 YALE L.J. 1992, 2006–10 (2010) [hereinafter Crum, *The Voting Rights Act's Secret Weapon*] (discussing Section 3(c)). Since *Shelby County*, numerous lawsuits have been filed seeking to bail-in jurisdictions. *See* Travis Crum, *The Prospect of Bailing-in Texas: Recent Bail-in Litigation*, ELECTION L. BLOG (Sept. 14, 2018, 9:39 AM), <https://electionlawblog.org/?p=101137> [<https://perma.cc/88Y4-ZVGJ>] [hereinafter Crum, *Recent Bail-in Litigation*] (discussing lawsuits against North Carolina and Texas and bail-ins of municipalities in Alabama and Texas).

This Article makes several contributions to the field.²³ First, it provides an unprecedented account of the Article V debate over the Fifteenth Amendment, which, unlike the Civil Rights Act of 1866 and the Fourteenth Amendment, has received scant attention in the literature.²⁴ Second, as one of the first opportunities for Congress to interpret the Fourteenth Amendment after its ratification, the Article V debate provides valuable insights into the Reconstruction-era understanding of the Fourteenth and Fifteenth Amendments. Third, and relatedly, the Article V debate shows that the substantive scopes and enforcement authorities of the Reconstruction Amendments can be analytically distinguished: the Fourteenth Amendment safeguards civil rights and the Fifteenth Amendment preserves political rights. Finally, this Article argues that Congress's Fifteenth Amendment enforcement authority should be governed by the deferential standard articulated in *McCulloch v. Maryland*²⁵ and *South Carolina v. Katzenbach*.²⁶ If the Court were to follow the original understanding of Congress's Fifteenth Amendment enforcement authority, the VRA would be on far firmer constitutional ground.

This Article proceeds as follows. Part I provides an overview of current doctrine on the Fourteenth and Fifteenth Amendments' substantive scopes as well as their enforcement authorities. Part II canvasses the Reconstruction-era understanding of the Fourteenth Amendment's application to voting rights. Part III examines the expansion of black suffrage from 1865 to 1869 and then analyzes the Article V debate in the lame-duck Fortieth Congress. Part IV discusses the historical, normative, and doctrinal significance of the Article V debate and shows how these insights help insulate the VRA from constitutional challenge.²⁷

²³ As part of a larger project to revitalize the Fifteenth Amendment, this Article starts—unsurprisingly—at the beginning. This Article, however, ends its historical journey at the conclusion of the Article V debate—that is, when Congress rejected the suffrage statute and decided to pursue a constitutional amendment to enfranchise Blacks nationwide. This Article does not purport to provide an exhaustive account of the Fifteenth Amendment's drafting and ratification. Accordingly, this Article does not claim to identify the precise metes and bounds of the Fifteenth Amendment's substantive scope.

²⁴ See *infra* note 469 and accompanying text.

²⁵ 17 U.S. (4 Wheat.) 316, 421 (1819).

²⁶ 383 U.S. 301, 326 (1966).

²⁷ Two points about language. First, the Fifteenth Amendment prohibits *all* racial discrimination in voting, but this Article focuses on racial discrimination against Blacks. Although the rights of other minorities were discussed during the Fifteenth Amendment's ratification, the struggle for black suffrage was at the center of the debate. See GILLETTE, *supra* note 11, at 58 (discussing moderate Republican opposition to enfranchising “naturalized citizens of Chinese or Irish descent”); *id.* at 46 (“[T]hroughout the congressional debate there was little question that the enfranchisement of the Negro was the object of [the] proposed constitutional amendment . . .”). Second, this Article focuses on questions of race—not sex—even though the struggle for black suffrage shattered the longstanding coalition between the

I. THE CONFLATION OF THE FOURTEENTH AND FIFTEENTH AMENDMENTS

The Fifteenth Amendment has been reduced to a vestigial organ. It is a constitutional appendix, not an amendment. To provide useful background information, this Part establishes that the Fifteenth Amendment is superfluous under current doctrine by examining how the Court has repeatedly relied on the Fourteenth Amendment—rather than the Fifteenth—to scrutinize racially discriminatory election laws. As the remainder of this Article demonstrates, current doctrine ignores the Reconstruction Framers’ original intent.

This Part first establishes that the Court views the Fourteenth Amendment as the principal protector of voting rights. It then addresses how the Court treats Congress’s Reconstruction Amendment enforcement authority.

A. *The Substantive Scopes of the Reconstruction Amendments*

Today, the Equal Protection Clause is interpreted to prohibit racial discrimination in voting whereas the Fifteenth Amendment is largely overlooked. Because the Fourteenth Amendment’s substantive scope is settled, a massive shift in the doctrine would require expressly overturning, severely cabining, or outright ignoring numerous Supreme Court decisions.²⁸ It would also require changes across the entire landscape of contemporary civil rights jurisprudence. By contrast, the doctrine on the Fifteenth Amendment’s substantive scope is littered with unanswered questions. This gap in the doctrine creates possibilities for reframing voting rights doctrine under the Fifteenth Amendment.

1. *The Fourteenth Amendment and Racial Discrimination in Voting*

The Court first interpreted the Fourteenth Amendment’s Equal Protection Clause to prohibit racial discrimination in voting in its 1927 decision in *Nixon v. Herndon*.²⁹ Striking down a Texas law that barred Blacks from voting in the Democratic Party primary, the Court “[ou]nd it

women’s suffrage movement and the (former) abolitionist community. See Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 968–70 (2002). Although the Fifteenth Amendment enfranchised only men of color and left women of color without the right to vote, I will generally avoid using gendered terms for ease of reading.

²⁸ For a helpful menu of options available to Supreme Court Justices who are interested in changing precedent, see generally Richard L. Hasen, *Anticipatory Overrulings, Invitations, Time Bombs, and Inadvertence: How Supreme Court Justices Move the Law*, 61 EMORY L.J. 779 (2012).

²⁹ 273 U.S. 536, 541 (1927); see also David A. Strauss, *Does the Constitution Mean What It Says?*, 129 HARV. L. REV. 1, 37 (2015) [hereinafter Strauss, *Constitution*] (noting *Nixon*’s unprecedented holding).

unnecessary to consider the Fifteenth Amendment, because it seem[ed] . . . hard to imagine a more direct and obvious infringement of the Fourteenth.”³⁰ Without specifically addressing whether the Equal Protection Clause protects political rights, the Court noted that the Fourteenth Amendment “was passed . . . with a special intent to protect . . . blacks from discrimination.”³¹ Building off this premise, the Court held that the statute irrationally “discriminat[ed] . . . by the distinction of color alone” and was therefore invalid.³² Since *Nixon*, the Court has continued to interpret the Equal Protection Clause to prohibit racial discrimination in vote-denial cases.³³

In addition to covering “first generation” barriers like racially discriminatory voter-qualification laws, the Court has construed the Fourteenth Amendment to encompass “second generation” claims, such as vote dilution.³⁴ Second generation claims involve “packing” or “cracking” minority voters, which dilutes their voting strength and effectively prevents them from electing the candidates of their choice.³⁵ At its core, “[d]ilution doctrine is designed to ensure that a group cannot obtain an unfair share of political power by manipulating district lines.”³⁶

Since the early 1970s, the Court has recognized that intentional racial vote dilution violates the Equal Protection Clause.³⁷ But despite this constitutional imprimatur, the Court has narrowed the VRA’s statutory protections and voiced apprehension about the role of race in the purposeful creation of majority-minority districts.³⁸ As Professor Heather Gerken has

³⁰ *Nixon*, 273 U.S. at 540–41.

³¹ *Id.* at 541.

³² *Id.* The Court’s decision in *Nixon* was the first of the *White Primary Cases*. See *Terry v. Adams*, 345 U.S. 461 (1953); *Smith v. Allwright*, 321 U.S. 649 (1944); *Nixon v. Condon*, 286 U.S. 73 (1932).

³³ See, e.g., *Hunter v. Underwood*, 471 U.S. 222, 233 (1985) (invalidating the felon-disenfranchisement provision of the Alabama Constitution on intentional discrimination grounds under the Equal Protection Clause).

³⁴ Here, I borrow Professor Lani Guinier’s oft-used first- and second-generation terminology. LANI GUINIER, *THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY* 49 (1994). Throughout this Article, I use the term “vote dilution” to refer to *racial* vote dilution, unless the context indicates otherwise.

³⁵ See Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 HARV. L. REV. 1663, 1672 (2001) [hereinafter Gerken, *Undiluted Vote*].

³⁶ *Id.* at 1680.

³⁷ See *White v. Regester*, 412 U.S. 755, 765–67 (1973); see also *LULAC*, 548 U.S. 399, 440 (2006) (suggesting that a congressional district bore “the mark of intentional discrimination that could give rise to an equal protection violation”).

³⁸ See *Bartlett v. Strickland*, 556 U.S. 1, 21 (2009) (plurality opinion) (“If § 2 were interpreted to require crossover districts throughout the Nation, ‘it would unnecessarily infuse race into virtually every redistricting, raising serious constitutional questions.’” (quoting *LULAC*, 548 U.S. at 446)); *Georgia v.*

remarked, these cases reflect “a concern that the VRA not dissolve into a system of racial spoils, [and] a worry that voting rights protections will entrench rather than undermine racial divisions.”³⁹

These concerns have found their most prominent expression in *Shaw v. Reno*⁴⁰ and its progeny. In *Shaw*, the Court interpreted the Equal Protection Clause to prohibit racial gerrymandering, that is, “separating . . . citizens into different voting districts on the basis of race.”⁴¹ Under *Shaw*, courts first look to whether “race was the predominant factor motivating the legislature’s decision to place a significant number of voters within or without a particular district.”⁴² If race predominated, the state must show that “the design of the district . . . withstand[s] strict scrutiny.”⁴³ Because the VRA is frequently cited by states to justify the creation of majority-minority districts and the *Shaw* cause of action has been invoked by plaintiffs to challenge those districts, *Shaw*’s requirement that these districts satisfy strict scrutiny puts the Equal Protection Clause on a collision course with the VRA.⁴⁴

To be sure, the Court’s anxieties about race are not limited to voting rights cases and are found throughout contemporary equal protection doctrine—perhaps most prominently in cases concerning Congress’s authority to impose disparate impact liability.⁴⁵ Indeed, *Shaw*’s hostility to

Ashcroft, 539 U.S. 461, 482–83 (2003) (allowing influence and coalition districts to count as majority-minority districts under Section 5’s retrogression test); *Holder v. Hall*, 512 U.S. 874, 885 (1994) (plurality opinion) (concluding that Section 2 suits could not challenge the size of a governing body); *Presley v. Etowah Cty. Comm’n*, 502 U.S. 491, 506–08 (1992) (holding that rules altering the allocation of power within an elected body are not subject to preclearance).

Here, I use the term “majority-minority district” as a shorthand to “mean a district in which the minority population is large enough . . . to exercise electoral control by voting cohesively.” Gerken, *Undiluted Vote*, *supra* note 35, at 1667 n.3. This broad definition encompasses influence or crossover districts, even though minority voters are not a numerical majority in such districts and even though such districts are not mandatory under Section 2. *See id.*; *see also Bartlett*, 556 U.S. at 13 (plurality opinion) (citing *LULAC*, 548 U.S. at 445). As the above-recited cases in this footnote demonstrate, the Court’s skepticism toward such districts is not necessarily tied to a minority group being a numerical majority.

³⁹ Heather K. Gerken, *A Third Way for the Voting Rights Act: Section 5 and the Opt-in Approach*, 106 COLUM. L. REV. 708, 745 (2006).

⁴⁰ 509 U.S. 630 (1993).

⁴¹ *Cooper v. Harris*, 137 S. Ct. 1455, 1463 (2017) (quoting *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 797 (2017)); *see also* 509 U.S. at 649.

⁴² *Miller v. Johnson*, 515 U.S. 900, 916 (1995).

⁴³ *Cooper*, 137 S. Ct. at 1464.

⁴⁴ *See* Gerken, *Undiluted Vote*, *supra* note 35, at 1697–98.

⁴⁵ *See, e.g., Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2512 (2015) (“Courts should avoid interpreting disparate-impact liability to be so expansive as to inject racial considerations into every housing decision.”); *Ricci v. DeStefano*, 557 U.S. 557, 594 (2009) (Scalia, J., concurring) (“[T]he Court will have to confront the question: Whether, or to what extent, are the disparate-impact provisions of [antidiscrimination statutes] consistent with the Constitution’s

race-conscious redistricting epitomizes the Court's move toward a colorblind Equal Protection Clause. Viewed from this perspective, the Court's decisions cutting back on the VRA's protections and creating the *Shaw* cause of action are attributable to its treatment of voting rights under the Equal Protection Clause.

2. *The Fifteenth Amendment's Unclear Scope*

The Court has long held that the Fifteenth Amendment forbids racially discriminatory laws that limit access to the ballot.⁴⁶ But whereas the Court has squarely held that the Equal Protection Clause prohibits racial discrimination in both vote-denial and vote-dilution cases, the Court has declined to decide whether the Fifteenth Amendment forbids vote dilution. Under the Court's plurality opinion in *City of Mobile v. Bolden*,⁴⁷ the Fifteenth Amendment prohibits racial discrimination only in vote-denial cases.⁴⁸ In other words, the Fifteenth Amendment is *solely* concerned with whether citizens can "register and vote without hindrance" regardless of race.⁴⁹ Thus, the Fifteenth Amendment—unlike the Fourteenth Amendment—does not protect against vote dilution under current doctrine.⁵⁰

To be sure, the Court's 1960 decision in *Gomillion v. Lightfoot* could be read for the proposition that the Fifteenth Amendment encompasses vote-dilution claims.⁵¹ In *Gomillion*, the State of Alabama infamously redrew the City of Tuskegee's boundaries from a square to a "strangely irregular twenty-eight-sided figure," an act that had the "inevitable effect of . . . remov[ing] from the city all save four or five of its 400 Negro voters while

guarantee of equal protection?"); Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 495 (2003) (predicting that the Court will one day address "whether equal protection could *prohibit* the passage of [disparate impact] statutes because of their overt concern with race").

⁴⁶ See *Rice v. Cayetano*, 528 U.S. 495, 523–24 (2000) (striking down a law that restricted suffrage to citizens of Hawaiian descent); *Guinn v. United States*, 238 U.S. 347, 356, 367–68 (1915) (invalidating a grandfather clause that exempted from a mandatory literacy test any individual or their "lineal descendant" who could vote prior to January 1, 1866).

⁴⁷ 446 U.S. 55 (1980).

⁴⁸ *Id.* at 65.

⁴⁹ *Id.*

⁵⁰ See *Reno v. Bossier Par. Sch. Bd. (Bossier Parish II)*, 528 U.S. 320, 334 n.3 (2000) ("[W]e have never held that vote dilution violates the Fifteenth Amendment."); *Voinovich v. Quilter*, 507 U.S. 146, 159 (1993) ("This Court has not decided whether the Fifteenth Amendment applies to vote-dilution claims; in fact, we never have held any legislative apportionment inconsistent with the Fifteenth Amendment. Nonetheless, we need not decide the precise scope of the Fifteenth Amendment's prohibition in this case." (citation omitted)).

⁵¹ See 364 U.S. 339, 341, 347–48 (1960).

not removing a single white voter or resident.”⁵² In response to this egregious gerrymander, the Court held that the plaintiffs had stated a claim that the law violated the Fifteenth Amendment.⁵³

On the one hand, *Gomillion* resembles more recent vote-dilution cases. Although *Gomillion* does not involve the archetypal vote-dilution scenario where a jurisdiction packs or cracks minority voters in a redistricting plan, Alabama effectively diluted the voting power of Tuskegee’s black residents by redrawing the city’s boundaries. As Justice Souter later explained, “*Gomillion* shows that the physical image evoked by the term ‘dilution’ does not encompass all the ways in which participation in the political process can be made unequal.”⁵⁴ According to Justice Souter, *Gomillion* fits comfortably within the Court’s vote-dilution cases because “[c]hanging political boundaries to affect minority voting power would be called dilution today.”⁵⁵

On the other hand, the *Gomillion* Court focused on the near total denial of Blacks’ right to vote in Tuskegee elections.⁵⁶ Furthermore, the Court explicitly distinguished its result from *Colegrove v. Green*, where it had declined to entertain a one-person, one-vote claim.⁵⁷ The Court conceptualized *Colegrove* as a malapportionment case whereas *Gomillion* was a racial vote-denial case.⁵⁸ And in subsequent decisions, the Court has expressly declined to read *Gomillion* as a vote-dilution case.⁵⁹

⁵² *Id.* at 341.

⁵³ *See id.* at 347–48.

⁵⁴ *Bossier Parish II*, 528 U.S. at 360 n.11 (Souter, J., concurring in part and dissenting in part).

⁵⁵ *Id.*

⁵⁶ *See* 364 U.S. at 341 (“The result of the Act is to deprive the Negro petitioners discriminatorily of the benefits of residence in Tuskegee, including, inter alia, the right to vote in municipal elections.”).

⁵⁷ *See* 328 U.S. 549, 556 (1946) (plurality opinion) (stating that the Court would not “enter th[e] political thicket”).

⁵⁸ According to the *Gomillion* Court, the *Colegrove* and *Gomillion* plaintiffs alleged distinct forms of discrimination: population-based and race-based, respectively. *Compare Gomillion*, 364 U.S. at 346 (“The complaint [in *Colegrove*] rested upon the disparity of population between the different districts which rendered the effectiveness of each individual’s vote in some districts far less than in others.”), *with id.* (“When a legislature thus singles out a readily isolated segment of a racial minority for special discriminatory treatment, it violates the Fifteenth Amendment.”). The Court, moreover, explained that the *Colegrove* plaintiffs “complained only of a dilution of the strength of their votes,” whereas the *Gomillion* plaintiffs asserted that Alabama had “deprive[d] them of their votes and the consequent advantages that the ballot affords.” *Id.*

⁵⁹ *See Bossier Parish II*, 528 U.S. at 334 n.3 (rejecting Justice Souter’s interpretation of *Gomillion* as a vote-dilution case); *Beer v. United States*, 425 U.S. 130, 142 n.14 (1976) (“There is no decision in this Court holding a legislative apportionment or reapportionment violative of the Fifteenth Amendment. The case closest to so holding is *Gomillion v. Lightfoot*, in which the Court found that allegations of racially motivated gerrymandering of a municipality’s political boundaries stated a claim under that Amendment.” (citations omitted)).

3. *Methods of Proof Under the Reconstruction Amendments*

It is well established that a plaintiff must prove intentional discrimination to state a claim under the Equal Protection Clause.⁶⁰ The intent requirement stems from the Court's 1976 decision in *Washington v. Davis*, which rejected an equal protection challenge to the use of a written personnel test that had a disparate racial impact on black police officers.⁶¹ In that decision, the Court openly engaged in results-oriented reasoning, stating that a constitutional discriminatory-effects standard "would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes."⁶² Although "[d]isproportionate impact is not irrelevant" under *Washington*, it does not, "[s]tanding alone," trigger strict scrutiny.⁶³

The discriminatory intent requirement has profoundly impacted how statutes are written and cases are litigated. After racial classifications became subject to strict scrutiny, jurisdictions started enacting laws that used proxies for race as a means of perpetuating Jim Crow.⁶⁴ Today, explicit racial classifications are rare and largely relegated to affirmative action programs.⁶⁵ In the absence of an explicit racial classification, proving discriminatory intent often involves time- and resource-intensive discovery.⁶⁶ The discriminatory intent requirement has thus made it more problematic to enact race-conscious laws that are intended to benefit minorities. Moreover, requiring a showing of discriminatory intent makes it far more difficult for plaintiffs to trigger strict scrutiny in cases challenging facially neutral laws that were motivated by discriminatory intent or have a disparate impact on minorities.

⁶⁰ See, e.g., *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977) ("Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause.").

⁶¹ 426 U.S. 229, 232 (1976).

⁶² *Id.* at 248; see also Aziz Z. Huq, *What Is Discriminatory Intent?*, 103 CORNELL L. REV. 1211, 1228 (2018) ("*Washington* explicitly rested on a concern about the destabilizing effects of a constitutional effects rule.").

⁶³ 426 U.S. at 242; see also *id.* ("[A]n invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another.").

⁶⁴ See Daniel R. Ortiz, *The Myth of Intent in Equal Protection*, 41 STAN. L. REV. 1105, 1117–18 (1989).

⁶⁵ See, e.g., *Fisher v. Univ. of Tex. at Austin*, 136 S. Ct. 2198, 2207 (2016) (upholding a public university's use of race in college admissions).

⁶⁶ See Pamela S. Karlan, *Two Section Twos and Two Section Fives: Voting Rights and Remedies After Flores*, 39 WM. & MARY L. REV. 725, 735–36 (1998) [hereinafter Karlan, *Two Section Twos*] (discussing the cost-, time-, and fact-intensive nature of proving intentional discrimination in a voting rights case).

Although the Court has plainly held that discriminatory intent is a necessary ingredient of an equal protection claim, it has been far less clear about whether the intent requirement applies to the Fifteenth Amendment. Once again, *Bolden* is instructive. In the Court's plurality decision, four Justices concluded that discriminatory intent is necessary to establish a violation under the Fifteenth Amendment.⁶⁷ Therefore, the *Bolden* plurality is an extension of *Washington v. Davis* and its requirement that plaintiffs prove discriminatory intent to trigger strict scrutiny.⁶⁸

The Court's most recent discussion of the Fifteenth Amendment's substantive scope is its 2000 decision in *Rice v. Cayetano*.⁶⁹ There, the Court invalidated a provision of the Hawaii Constitution that limited the right to vote for trustees of the Office of Hawaiian Affairs to "Hawaiians," i.e., "those persons who are descendants of people inhabiting the Hawaiian Islands in 1778."⁷⁰ Concluding that the Hawaii Constitution used ancestry as a proxy for race,⁷¹ the Court held that this "explicit, race-based voting qualification"⁷² was "a clear violation of the Fifteenth Amendment."⁷³ Because the Hawaii Constitution included an *explicit* racial classification, the *Rice* Court had no need to address the analytically distinct question of whether and how a plaintiff could challenge a facially neutral law on Fifteenth Amendment grounds.

Under current doctrine, Congress must rely on its enforcement authority to justify Section 2 of the VRA's discriminatory-effects test because both the Fourteenth and Fifteenth Amendments prohibit only intentionally discriminatory conduct.⁷⁴

4. *The Fourteenth Amendment's Application to Non-Race Voting Cases*

In addition to prohibiting racial discrimination in voting, the Fourteenth Amendment is now construed to protect voting rights in non-race situations.

⁶⁷ *City of Mobile v. Bolden*, 446 U.S. 55, 62 (1980) (plurality opinion) ("[R]acially discriminatory motivation is a necessary ingredient of a Fifteenth Amendment violation.").

⁶⁸ *See id.* at 63 n.10 (citing *Washington* favorably).

⁶⁹ 528 U.S. 495 (2000).

⁷⁰ *Id.* at 499.

⁷¹ *See id.* at 514 ("Ancestry can be a proxy for race. It is that proxy here.").

⁷² *Id.* at 498.

⁷³ *Id.* at 499; *see also* *Davis v. Guam*, 932 F.3d 822, 843 (9th Cir. 2019) (holding that "Guam's limitation on the right to vote in its political status plebiscite to 'Native Inhabitants of Guam' violates the Fifteenth Amendment").

⁷⁴ *See, e.g.*, Nicholas O. Stephanopoulos, *Disparate Impact, Unified Law*, 128 YALE L.J. 1566, 1593 (2019) (Section 2 "prohibits a broad swath of conduct that is constitutionally innocuous: government activity that lacks a discriminatory purpose but produces a disparate impact").

Perhaps most famously, the Court has imposed a one-person, one-vote requirement on state legislative districts.⁷⁵ The Court has also relied on the Equal Protection Clause to invalidate several laws and regulations—from ballot-recount standards to the poll tax—on non-race-based grounds.⁷⁶ And the Court has entertained challenges to numerous election laws on the grounds that they infringe the fundamental right to vote under the Fourteenth Amendment, even though it has frequently upheld those laws.⁷⁷ The Equal Protection Clause was also at the heart of recent attempts to recognize partisan gerrymandering as a justiciable question, though the Court ultimately declined to wade into that political thicket.⁷⁸ Because these cases all involve non-race-based voting rights claims, they fall outside the Fifteenth Amendment’s scope.

5. *The Problem with Conflating the Reconstruction Amendments*

As the foregoing discussion demonstrates, the Fourteenth Amendment has eclipsed the Fifteenth Amendment in shaping modern election law doctrine. These doctrinal developments have gone relatively unnoticed because the Court expanded the Fourteenth Amendment’s ambit to prohibit racial discrimination in voting while neglecting the Fifteenth Amendment. In other words, the Fourteenth Amendment subsumed the types of cases that could have been decided on Fifteenth Amendment grounds and eventually became the one-size-fits-all constitutional prohibition on racial discrimination—no matter the sphere of public life.

The VRA is another reason this doctrinal development has flown under the radar. Specifically, Section 5 of the VRA blocked and deterred numerous

⁷⁵ See, e.g., *Reynolds v. Sims*, 377 U.S. 533, 583 (1964) (“[T]he Equal Protection Clause requires that both houses of a state legislature be apportioned on a population basis . . .”). Although the Court relied on the Equal Protection Clause to impose an equi-population requirement on state legislative districts, it invoked Article I, Section Two for the same requirement for congressional districts. See U.S. CONST. art. I, § 2 (“The House of Representatives shall be composed of Members chosen every second Year by the People of the several States . . .” (emphasis added)); *Wesberry v. Sanders*, 376 U.S. 1, 7–8 (1964) (construing this provision to mean that “one man’s vote in a congressional election is to be worth as much as another’s”).

⁷⁶ See *Bush v. Gore*, 531 U.S. 98, 109–10 (2000) (ballot-recount standards); *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 666, 670 (1966) (poll tax); see also J. MORGAN KOUSSER, *COLORBLIND INJUSTICE: MINORITY VOTING RIGHTS AND THE UNDOING OF THE SECOND RECONSTRUCTION* 35 (1999) (discussing the racist origins of poll taxes in the South).

⁷⁷ See, e.g., *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 204 (2008) (plurality opinion) (upholding voter ID law); *Burdick v. Takushi*, 504 U.S. 428, 441–42 (1992) (rejecting a challenge to a ban on write-in candidates); *Anderson v. Celebrezze*, 460 U.S. 780, 805–06 (1983) (invalidating an early filing deadline for independent candidates).

⁷⁸ See *Rucho v. Common Cause*, 139 S. Ct. 2484, 2491, 2506–07 (2019). Plaintiffs also cited the First Amendment, the Elections Clause, and Section Two of Article I in their attempt to combat partisan gerrymandering, but the Court similarly rejected those arguments. See *id.* at 2491.

election law changes that would have violated the Fifteenth Amendment.⁷⁹ In 1982, Congress amended Section 2 to prohibit vote dilution and to encompass a discriminatory-effects standard, overturning the Court's plurality decision in *Bolden*.⁸⁰ This revision allowed plaintiffs to bring statutory rather than constitutional claims in most voting rights cases. In particular, Section 2's discriminatory-effects standard is broader than the Fourteenth and Fifteenth Amendment standards and thus easier to prove in litigation.⁸¹

The primacy of both the Fourteenth Amendment and the VRA in election law is so deeply engrained in our jurisprudence that it produces odd ideological inconsistencies. Staunch originalists like Justice Thomas are consistent defenders of *Shaw*'s interpretation of the Equal Protection Clause,⁸² even though the Fourteenth Amendment was originally understood to *not* protect political rights.⁸³ And defenders of minority voting rights frequently fail to ground their theories in the Fifteenth Amendment.⁸⁴ But if the Fourteenth Amendment and the VRA now protect against racial discrimination in voting, the obvious question arises: does it matter that the Fifteenth Amendment is now superfluous?

One response is that our Constitution should not be construed to render an amendment redundant. In the statutory realm, it is well established that a

⁷⁹ See Peyton McCrary, Christopher Seaman & Richard Valelly, *The End of Preclearance as We Knew It: How the Supreme Court Transformed Section 5 of the Voting Rights Act*, 11 MICH. J. RACE & L. 275, 278–79 (2006) (surveying objections and showing that federal oversight deters discriminatory changes).

⁸⁰ See Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 2(b)(4), 96 Stat. 131, 131; Stephanopoulos, *supra* note 74, at 1576 (explaining that Congress “amended section 2 in 1982 to make clear the provision could be violated even in the absence of discriminatory intent”).

⁸¹ See Karlan, *Two Section Twos*, *supra* note 66, at 735.

⁸² See, e.g., *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 803 (2017) (Thomas, J., concurring in the judgment) (“[The State] concede[s] that the legislature intentionally drew all 12 districts as majority-black districts. That concession, in my view, mandates strict scrutiny as to each district.” (citation omitted)); *Bush v. Vera*, 517 U.S. 952, 1000 (1996) (Thomas, J., concurring in the judgment) (stating that strict scrutiny applies to race-based redistricting).

⁸³ See *infra* Part II.

⁸⁴ See Heather K. Gerken, *Second-Order Diversity*, 118 HARV. L. REV. 1099, 1118–21 (2005) (discussing the VRA); Gerken, *Undiluted Vote*, *supra* note 35, at 1671 & n.9 (discussing Section 2's standard for vote dilution); Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 646 (1998) (drawing on insights from economics to argue in favor of a pro-competition approach to election law); Michael S. Kang, *Race and Democratic Contestation*, 117 YALE L.J. 734, 736–38 (2008) (discussing the concept of democratic contestation in relation to the VRA rather than the Constitution); Franita Tolson, *What Is Abridgment?: A Critique of Two Section Twos*, 67 ALA. L. REV. 433, 458 (2015) [hereinafter Tolson, *Abridgment*] (arguing that Section Two of the Fourteenth Amendment is the touchstone for Congress's authority over voting rights).

word, phrase, or provision should be interpreted to avoid superfluities.⁸⁵ Courts generally assume Congress selected multiple words “because it intended each term to have a particular, nonsuperfluous meaning.”⁸⁶ In addition, statutory amendments are read against background understandings of the law’s ambit and interpreted to accomplish an objective in light of that background.⁸⁷ These principles are equally applicable to constitutional interpretation. The Court explained as early as *Marbury v. Madison*⁸⁸ that “[i]t cannot be presumed that any clause in the constitution is intended to be without effect.”⁸⁹

Furthermore, even assuming that the Fourteenth Amendment’s broad terms encompass racial discrimination in voting, the Court’s voting rights jurisprudence runs counter to the principle that “the specific governs the general.”⁹⁰ If the Fourteenth Amendment’s Equal Protection Clause adopts a different doctrinal framework—namely, a colorblind approach—than the Fifteenth Amendment, the latter should control over the former.

The conflation of the Reconstruction Amendments has resulted in mechanical application of Fourteenth Amendment principles to what would otherwise be considered Fifteenth Amendment cases.⁹¹ While the Court began interpreting the Fourteenth Amendment to cover racial discrimination in voting in the early twentieth century, it has shown hostility to race-based redistricting and the application of the VRA’s discriminatory-effects standard in recent decades. In other words, even though the Court now interprets the Fourteenth Amendment to prohibit racial discrimination in voting, it has been steadily cutting back on those substantive protections. These doctrinal shifts have already contributed to the invalidation of the

⁸⁵ See, e.g., *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (“It is our duty ‘to give effect, if possible, to every clause and word of a statute.’” (quoting *United States v. Menasche*, 348 U.S. 528, 538–39 (1955))).

⁸⁶ *Bailey v. United States*, 51 U.S. 137, 146 (1995).

⁸⁷ See, e.g., *Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2520 (2015) (“The [1988] amendments [to the Fair Housing Act] included three exemptions from liability that assume the existence of disparate-impact claims. The most logical conclusion is that the three amendments were deemed necessary because Congress presupposed disparate impact under the [Fair Housing Act] as it had been enacted in 1968.”).

⁸⁸ 5 U.S. (1 Cranch) 137 (1803).

⁸⁹ *Id.* at 174; see also *United States v. Jones*, 565 U.S. 400, 405 (2012) (“The text of the Fourth Amendment reflects its close connection to property, since otherwise it would have referred simply to ‘the right of the people to be secure against unreasonable searches and seizures’; the phrase ‘in their persons, houses, papers, and effects’ would have been superfluous.”).

⁹⁰ *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992).

⁹¹ See Samuel Issacharoff, *Polarized Voting and the Political Process: The Transformation of Voting Rights Jurisprudence*, 90 MICH. L. REV. 1833, 1845 (1992) (commenting that “[t]he Court recast voting rights claims in the mold of *Washington v. Davis*”).

VRA's coverage formula and could also threaten the constitutionality of Sections 2 and 3(c) of the VRA.⁹²

This failure to recognize the independent constitutional significance of the Fifteenth Amendment is increasingly untenable.⁹³ Given that *Shaw* portends a clash between the Equal Protection Clause and the VRA and that the Court has repeatedly questioned discriminatory-effects standards, the relevant distinctions between these two Amendments becomes more important. So, too, does Congress's enforcement authority under each Amendment, to which this Article now turns.

B. Congress's Reconstruction Amendment Enforcement Authority

Another salient reason to avoid conflating the Reconstruction Amendments is that the governing standard for Congress's enforcement authority is more forgiving under the Fifteenth Amendment. This is no small point. Much like strict scrutiny is "strict in theory, but fatal in fact,"⁹⁴ the relevant standard for Congress's enforcement authority is often outcome determinative.⁹⁵ The level of deference given to Congress—whether framed as a question of interpretive or remedial authority—will likely determine whether Section 2 of the VRA's discriminatory-effects standard survives the inevitable constitutional attack.⁹⁶

To provide context for this argument and helpful background for the Article V debate, this Section provides an overview of the Court's decisions on Congress's Reconstruction Amendment enforcement authority. The Reconstruction Amendments contain "virtually identical"⁹⁷ enforcement clauses. Pursuant to Section Five of the Fourteenth Amendment and Section Two of the Fifteenth Amendment, Congress has the "power to enforce" "by appropriate legislation" the rights guaranteed by that Amendment.⁹⁸ As such,

⁹² See Gerken, *supra* note 35, at 1696–98 (discussing Section 2); Crum, *The Voting Rights Act's Secret Weapon*, *supra* note 22, at 2027 (discussing Section 3(c)).

⁹³ For how to resolve this problem, see *infra* Part IV.

⁹⁴ Fullilove v. Klutznick, 448 U.S. 448, 519 (1980) (Marshall, J., concurring in the judgment).

⁹⁵ See, e.g., Richard L. Hasen, *Congressional Power to Renew the Preclearance Provisions of the Voting Rights Act After Tennessee v. Lane*, 66 OHIO ST. L.J. 177, 196–202 (2005) (predicting that the *Boerne* standard for Congress's enforcement authority may be dispositive in litigation over Section 5's constitutionality).

⁹⁶ See Gerken, *Undiluted Vote*, *supra* note 35, at 1696–98.

⁹⁷ Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 373 n.8 (2001).

⁹⁸ U.S. CONST. amend. XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."); *id.* amend. XV, § 2 ("The Congress shall have power to enforce this article by appropriate legislation."). The Thirteenth Amendment's Enforcement Clause is also similar. *Id.* amend. XIII, § 2 ("Congress shall have power to enforce this article by appropriate legislation.").

courts and commentators frequently treat Congress's enforcement authorities under the Reconstruction Amendments as coextensive, even if they acknowledge that there might be arguments for differentiating between the two.⁹⁹

From Reconstruction through the civil rights movement, the Court applied a rationality standard to Congress's Fourteenth and Fifteenth Amendment enforcement authority.¹⁰⁰ But since the federalism revolution in the 1990s, the Court has applied a congruence and proportionality test to Congress's Fourteenth Amendment enforcement authority. The Court has never applied that standard in a case involving the Fifteenth Amendment—or any case involving race or voting rights—and thus the deferential rationality standard for Congress's Fifteenth Amendment enforcement authority remains good law. This Article argues that, even though Congress's enforcement authorities under the Reconstruction Amendments were

⁹⁹ See, e.g., *City of Rome v. United States*, 446 U.S. 156, 207 n.1 (1980) (Rehnquist, J., dissenting) (“[T]he nature of the enforcement powers conferred by the Fourteenth and Fifteenth Amendments has always been treated as coextensive.”); Karlan, *Two Section Twos*, *supra* note 66, at 725 n.5 (explaining that “because the two amendments are rough contemporaries and their enforcement power provisions are articulated in similar terms, the [*Boerne*] analysis surely carries over”); Leah M. Litman, *Inventing Equal Sovereignty*, 114 MICH. L. REV. 1207, 1258 n.329 (2016) (discussing “the Reconstruction Amendments collectively” but recognizing that “[t]here may be reasons why *Boerne*’s congruence-and-proportionality requirement would not apply to the Fifteenth Amendment”); Michael T. Morley, *Prophylactic Redistricting? Congress’s Section 5 Power and the New Equal Protection Right to Vote*, 59 WM. & MARY L. REV. 2053, 2078 (2018) [hereinafter Morley, *Prophylactic*] (“*Boerne*’s congruence-and-proportionality test likely applies with equal force to Section 2 of the Fifteenth Amendment.”); Stephanopoulos, *supra* note 74, at 1592–93, 1593 n.146 (discussing *Boerne* as the standard under the Reconstruction Amendments but acknowledging that, “[s]trictly speaking, *City of Boerne* dealt only with the Fourteenth Amendment, leaving the Fifteenth Amendment standard undetermined”). To be sure, some courts and scholars have concluded that *Katzenbach* remains the appropriate standard under the Fifteenth Amendment. See *Nw. Austin Mun. Util. Dist. No. One v. Mukasey*, 573 F. Supp. 2d 221, 241–46 (D.D.C. 2008), *rev’d on statutory grounds*, *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 211 (2009); Akhil Reed Amar, *The Lawfulness of Section 5—And Thus of Section 5*, 126 HARV. L. REV. F. 109, 119–20 (2013) (arguing that a more expansive interpretation of Congress’s enforcement power under the Fifteenth Amendment is preferable because that Amendment, unlike the Fourteenth, is limited to the realm of voting); Evan H. Caminker, “Appropriate” Means-Ends Constraints on Section 5 Powers, 53 STAN. L. REV. 1127, 1190–91 (2001) (“Section 2 [of the Fifteenth Amendment] could not possibly give rise to a legitimate fear that, if construed to require only *McCulloch*-style means-ends tailoring, it would functionally award Congress a virtually plenary police power.”); Jeremy Amar-Dolan, Note, *The Voting Rights Act and the Fifteenth Amendment Standard of Review*, 16 U. PA. J. CONST. L. 1477, 1497–1501 (2014) (“[T]he Court should maintain separate standards for Fourteenth and Fifteenth Amendment enforcement legislation.”); cf. Richard L. Hasen & Leah M. Litman, *Thin and Thick Conceptions of the Nineteenth Amendment Right to Vote and Congress’s Power to Enforce It*, 108 GEO. L.J. (forthcoming 2020) (manuscript at 39), <https://papers.ssrn.com/a=3501114> [<https://perma.cc/68CC-SBQ4>] (distinguishing between Congress’s Fourteenth and Nineteenth Amendment enforcement authority).

¹⁰⁰ See Christopher W. Schmidt, *Section 5’s Forgotten Years: Congressional Power to Enforce the Fourteenth Amendment Before Katzenbach v. Morgan*, 113 NW. U. L. REV. 47, 82–83 (2018).

originally intended to be coextensive, the Court has driven a doctrinal wedge between them.

I. Katzenbach's Rationality Standard

In two landmark 1966 decisions, the Court upheld key provisions of the VRA and adopted a deferential standard for Congress's enforcement authority under the Fourteenth and Fifteenth Amendments.¹⁰¹

In *South Carolina v. Katzenbach*, the Court upheld the VRA's coverage formula and preclearance provision as permissible exercises of Congress's Fifteenth Amendment enforcement authority.¹⁰² The Court concluded that the standard for Congress's Fifteenth Amendment enforcement authority was the same as the *McCulloch* standard.¹⁰³ In upholding the constitutionality of the Second Bank of the United States in *McCulloch*,¹⁰⁴ Chief Justice John Marshall famously established the test for Congress's power under the Necessary and Proper Clause: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are *appropriate*, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."¹⁰⁵ According to the *Katzenbach* Court, Congress's use of the term "appropriate" in Section Two of the Fifteenth Amendment was a clear adoption of the *McCulloch* standard.¹⁰⁶

In endorsing the *McCulloch* standard, the Court gave Congress significant leeway in crafting enforcement legislation. The Court found Congress acted appropriately in "shift[ing] the advantage of time and inertia from the perpetrators of the evil to its victims"¹⁰⁷ and putting election laws on hold before their implementation. The Court also upheld the VRA's coverage formula, which confined the statute's most stringent provisions to those jurisdictions with egregious records of racial discrimination in voting.¹⁰⁸ And in doing so, the Court expressly rejected South Carolina's invocation of "[t]he doctrine of the equality of States" on the grounds that

¹⁰¹ The Court subsequently endorsed the *McCulloch* standard for Congress's Thirteenth Amendment enforcement authority. See *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 443–44 (1968).

¹⁰² 383 U.S. 301, 329, 334–37 (1966). For an overview of the VRA's coverage formula and preclearance provision, see *supra* note 21.

¹⁰³ See *Katzenbach*, 383 U.S. at 326.

¹⁰⁴ *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

¹⁰⁵ *Id.* at 421 (emphasis added).

¹⁰⁶ See *Katzenbach*, 383 U.S. at 325–26.

¹⁰⁷ *Id.* at 328.

¹⁰⁸ See *id.*

the doctrine “applies only to the terms upon which States are admitted to the Union.”¹⁰⁹

In addition to the VRA’s provisions targeting racial discrimination in the South, Congress enacted Section 4(e), which provides that individuals who have completed the sixth grade at an “American-flag school[]” cannot be denied the right to vote based on their inability to understand English.¹¹⁰ This provision was enacted to protect the voting rights of Puerto Ricans living in New York City, many of whom were disenfranchised by English language requirements.¹¹¹ Unlike the VRA’s preclearance provisions, Congress enacted Section 4(e) under its Fourteenth Amendment enforcement authority because it protected a language minority rather than a racial group *per se*.¹¹²

In *Katzenbach v. Morgan*, the Court upheld Section 4(e) under Congress’s Fourteenth Amendment enforcement authority.¹¹³ By 1966, the Court had already crossed the constitutional Rubicon of interpreting the Fourteenth Amendment to encompass voting rights, so Congress’s reliance on it was not unprecedented.¹¹⁴ As in *South Carolina v. Katzenbach*, the *Morgan* Court defined the *McCulloch* standard as synonymous with the phrase “appropriate legislation.”¹¹⁵

But whereas *Katzenbach* focuses on Congress’s enforcement authority vis-à-vis the states, *Morgan* more directly addresses Congress’s authority to interpret the Constitution. That is because New York argued that Section 4(e) could not be “appropriate legislation to enforce the Equal Protection Clause unless the judiciary decides . . . that the application of the English literacy requirement . . . is forbidden by the Equal Protection Clause itself.”¹¹⁶ The Court rejected this claim because it would “confine the legislative power . . . to the insignificant role of abrogating only those state laws that the judicial branch was prepared to adjudge unconstitutional.”¹¹⁷ The Court explained

¹⁰⁹ *Id.* at 328–29. The equal sovereignty principle would rear its head again in the early twenty-first century. *See infra* Section I.B.3.

¹¹⁰ 52 U.S.C. § 10303(e) (2012).

¹¹¹ *See Katzenbach v. Morgan*, 384 U.S. 641, 645 n.3 (1966).

¹¹² *See* 52 U.S.C. § 10303(e)(1); *infra* note 533 (discussing Section 4(e)’s legislative history).

¹¹³ 384 U.S. at 646.

¹¹⁴ *See id.* at 647 & n.6 (collecting cases).

¹¹⁵ *See id.* at 650–51.

¹¹⁶ *Id.* at 648.

¹¹⁷ *Id.* at 648–49. The Court had previously upheld the facial constitutionality of literacy tests. *See Lassiter v. Northampton Cty. Bd. of Elections*, 360 U.S. 45, 53–54 (1959); *see also* Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *The Voting Rights Act in Winter: The Death of a Superstatute*, 100 IOWA L. REV. 1389, 1401 (2015) (discussing *Morgan*’s relationship to *Lassiter*). In a companion case to *Morgan*,

that it would defer to Congress's interpretation not only of the rights protected by the Fourteenth Amendment but also the means adopted to remedy and prevent those violations.¹¹⁸

In response to Justice Harlan's criticism that the Court "read[] § 5 of the Fourteenth Amendment as giving Congress the power to define the *substantive* scope of the Amendment[,]""¹¹⁹ the Court famously articulated the one-way ratchet theory: although Congress is free to expand on rights protected by the Fourteenth Amendment, it cannot "restrict, abrogate, or dilute these guarantees."¹²⁰ In other words, the Court's interpretation of the Fourteenth Amendment sets a floor, which Congress may raise if it so chooses.

The standard announced in *Katzenbach* and *Morgan* is a ringing endorsement of *McCulloch* and a broad statement of congressional authority in relation to *both* the powers of the states¹²¹ and the Court.¹²² To be sure, the *Katzenbach* Court refined *McCulloch* to the issue at hand. The Court explained that "[a]s against the reserved powers of the States, Congress may use any *rational* means to effectuate the constitutional prohibition of racial discrimination in voting."¹²³ And the Court upheld "the coverage formula [a]s *rational* in both practice and theory."¹²⁴

For decades, the Court appropriately adhered to this doctrinal framework and recognized Congress's broad Reconstruction Amendment enforcement authority. Indeed, the Court subsequently upheld numerous

the Court declined to decide whether New York's English language requirement violated the Constitution on the grounds that the plaintiff's complaint failed to allege whether she completed the sixth grade and therefore might be rendered moot by *Morgan*. See *Cardona v. Power*, 384 U.S. 672, 674 (1966).

¹¹⁸ See *Morgan*, 384 U.S. at 648 ("A construction of § 5 that would require a judicial determination that the enforcement of the state law precluded by Congress violated the Amendment . . . would depreciate both congressional resourcefulness and congressional responsibility for implementing the Amendment.").

¹¹⁹ *Id.* at 668 (Harlan, J., dissenting).

¹²⁰ *Id.* at 651 n.10 (majority opinion); see also Jeffrey L. Yablon, *Congressional Power Under Section Five of the Fourteenth Amendment*, 25 STAN. L. REV. 885, 894 (1973) ("[T]he section five powers of Congress operate like a ratchet: once the Court has found that an enactment or practice is violative of the fourteenth amendment, Congress is powerless to turn the wheel backwards.").

¹²¹ See *South Carolina v. Katzenbach*, 383 U.S. 301, 325 (1966) ("The gist of the matter is that the Fifteenth Amendment supersedes contrary exertions of state power.").

¹²² See *Morgan*, 384 U.S. at 653 ("It was for Congress . . . to assess and weigh the various conflicting considerations It is enough that we be able to perceive a basis upon which the Congress might resolve the conflict as it did.").

¹²³ *Katzenbach*, 383 U.S. at 324 (emphasis added).

¹²⁴ *Id.* at 330 (emphasis added). The *Katzenbach* standard is often referred to as a "rationality" or "rational means" standard even though those terms do not appear in *McCulloch*'s oft-quoted formulation. See, e.g., *Shelby County v. Holder*, 570 U.S. 529, 568–69 (2013) (Ginsburg, J., dissenting).

reauthorizations of the VRA under the Fifteenth Amendment and *Katzenbach*'s rationality standard.¹²⁵ But the Court went rogue in 1997.

2. *Boerne's Congruence and Proportionality Test*

The curtailment of Congress's Fourteenth Amendment enforcement authority began not with a decision involving racial discrimination but rather with a First Amendment case. In *Employment Division v. Smith*, the Court held that neutral, generally applicable laws do not violate the Free Exercise Clause.¹²⁶ The *Smith* Court abandoned the so-called *Sherbert* test that applied strict scrutiny to laws infringing free exercise rights.¹²⁷ Congress responded by passing the Religious Freedom Restoration Act of 1993 (RFRA),¹²⁸ which purported to overturn *Smith* by forcing courts to apply strict scrutiny in adjudicating free exercise challenges to state and federal laws.¹²⁹

In *City of Boerne v. Flores*, the Court held that Congress could not impose RFRA on the states.¹³⁰ The *Boerne* Court established a new standard for determining Congress's *Fourteenth* Amendment enforcement authority. Under *Boerne*'s three-part congruence and proportionality test, the Court begins by "identify[ing] with some precision the scope of the constitutional right at issue."¹³¹ The Court next "examine[s] whether Congress identified a history and pattern of unconstitutional [conduct] by the States."¹³² The Court concludes by determining whether there is "a congruence and proportionality between the injury to be prevented or remedied and the means adopted to

¹²⁵ See *Lopez v. Monterey County*, 525 U.S. 266, 283–85 (1999) (upholding the 1982 reauthorization); *City of Rome v. United States*, 446 U.S. 156, 182–83 (1980) (upholding the 1975 reauthorization); *Georgia v. United States*, 411 U.S. 526, 535 (1973) (upholding the 1970 reauthorization); see also *Shelby County*, 570 U.S. at 539 ("We upheld each of these reauthorizations against constitutional challenge."). When Congress reauthorized the VRA in 1975, it added protections for language minorities to the coverage formula and relied on its Fourteenth and Fifteenth Amendment enforcement authorities—a reliance that continued in the 1982 and 2006 reauthorizations. See Act of Aug. 6, 1975, Pub. L. No. 94-73, § 203, 89 Stat. 400, 401; Nathaniel Persily, *The Promise and Pitfalls of the New Voting Rights Act*, 117 YALE L.J. 174, 195–96 (2007) (discussing the coverage formula's evolution). The Court did not dwell on this point in affirming the VRA's constitutionality under the Fifteenth Amendment in *Lopez* and *City of Rome*. See *Lopez*, 525 U.S. at 284–85 (discussing only the Fifteenth Amendment); *City of Rome*, 446 U.S. at 179–83 (discussing Fourteenth and Fifteenth Amendment precedents interchangeably but upholding the VRA under the Fifteenth Amendment).

¹²⁶ See 494 U.S. 872, 881 (1990).

¹²⁷ See *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 693 (2014) (discussing *Smith*'s analysis as it relates to *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Wisconsin v. Yoder*, 406 U.S. 205 (1972)).

¹²⁸ Pub. L. No. 103-141, 107 Stat. 1488 (1993) (codified at 42 U.S.C. § 2000bb (2012)).

¹²⁹ See *Hobby Lobby*, 573 U.S. at 694–95.

¹³⁰ See 521 U.S. 507, 511 (1997). RFRA still applies to the federal government because that application does not raise federalism concerns. See *Hobby Lobby*, 573 U.S. at 695.

¹³¹ *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 365 (2001).

¹³² *Id.* at 368.

that end.”¹³³ Although the Court purported to follow precedent,¹³⁴ *Boerne*’s congruence and proportionality test represents a decisive break with *McCulloch* and *Katzenbach*.¹³⁵

The *Boerne* Court restricted both Congress’s interpretive and remedial authorities. On the interpretive front, the *Boerne* Court arrogated to itself the sole authority to interpret the Constitution. As the Court explained:

The design of the [Fourteenth] Amendment and the text of § 5 are inconsistent with the suggestion that Congress has the power to decree the substance of the Fourteenth Amendment’s restrictions on the States. Legislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause. Congress does not enforce a constitutional right by changing what the right is.¹³⁶

This language is facially inconsistent with *Katzenbach*’s rationality standard, which treats Congress as a coequal interpreter of the Fourteenth Amendment’s protections. Instead of following precedent and deferring to Congress’s interpretation, the *Boerne* Court viewed RFRA as improperly “alter[ing] the *meaning* of the Free Exercise Clause.”¹³⁷

To be sure, the *Boerne* Court was confronted with a direct challenge to its interpretive authority. But under *Morgan*’s one-way ratchet,¹³⁸ Congress would have been well within its Fourteenth Amendment enforcement authority to enact RFRA. Congress disagreed with the floor set in *Smith*—namely, that neutral, generally applicable laws do not violate the Free Exercise Clause—and responded by raising the relevant standard of review to strict scrutiny.

Recognizing this doctrinal inconsistency, the *Boerne* Court reconceptualized—and arguably, implicitly overruled—*Morgan*’s one-way ratchet.¹³⁹ According to the *Boerne* Court, *Morgan* contains language that “could be interpreted as acknowledging a power in Congress to enact legislation that expands the rights contained in § 1 of the Fourteenth

¹³³ *Boerne*, 521 U.S. at 520.

¹³⁴ See *id.* at 532–33 (contrasting RFRA unfavorably to the VRA); Ellen D. Katz, *Reinforcing Representation: Congressional Power to Enforce the Fourteenth and Fifteenth Amendments in the Rehnquist and Waite Courts*, 101 MICH. L. REV. 2341, 2345 (2003) (“All the *Boerne* cases . . . self-consciously preserve precedent upholding provisions of the Voting Rights Act . . . against constitutional challenge.”).

¹³⁵ See, e.g., Jack M. Balkin, *The Reconstruction Power*, 85 N.Y.U. L. REV. 1801, 1815 (2010); Katz, *supra* note 134, at 2395.

¹³⁶ *Boerne*, 521 U.S. at 519; see also *id.* at 527 (“Any suggestion that Congress has a substantive, non-remedial power under the Fourteenth Amendment is not supported by our case law.”).

¹³⁷ *Id.* at 519 (emphasis added).

¹³⁸ See *Katzenbach v. Morgan*, 384 U.S. 641, 651 n.10 (1966).

¹³⁹ See, e.g., Katz, *supra* note 134, at 2395.

Amendment.”¹⁴⁰ This interpretation, as the *Boerne* Court saw it, was neither “necessary . . . [n]or even the best one.”¹⁴¹ The *Boerne* Court then reimagined *Morgan* as a case where Congress was solely remedying unconstitutional conduct,¹⁴² even though *Morgan* was agnostic on the underlying constitutional question.¹⁴³ In rejecting the one-way ratchet, the *Boerne* Court worried that granting Congress any interpretive authority lacked a limiting principle and would risk the Constitution’s status as “superior, paramount law.”¹⁴⁴

The *Boerne* Court not only restricted Congress’s interpretive authority but also significantly hindered Congress’s ability to craft remedial legislation. The *Boerne* Court’s requirement of a lengthy legislative record of unconstitutional conduct treats Congress more like an administrative agency than a coequal branch of government.¹⁴⁵ At the final step of the analysis, the *Boerne* Court remarked that “termination dates, geographic restrictions, [and] egregious predicates”¹⁴⁶ are hallmarks of congruent and proportional legislation. *Boerne* thus requires a closer fit between the constitutional wrong and the legislative remedy than the *Katzenbach* standard demanded.¹⁴⁷

Boerne has been roundly criticized from both sides of the aisle.¹⁴⁸ Nevertheless, the Court has applied the congruence and proportionality test in several cases concerning Congress’s Fourteenth Amendment enforcement

¹⁴⁰ *Boerne*, 521 U.S. at 527–28.

¹⁴¹ *Id.* at 528.

¹⁴² *See id.* (“Both rationales for upholding § 4(e) rested on unconstitutional discrimination by New York and Congress’ reasonable attempt to combat it.”).

¹⁴³ *See supra* note 117 (discussing *Morgan* and *Cardona*).

¹⁴⁴ 521 U.S. at 529 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

¹⁴⁵ *See Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 376 (2001) (Breyer, J., dissenting) (criticizing the Court for “[r]eviewing the congressional record as if it were an administrative agency record”).

¹⁴⁶ 521 U.S. at 533.

¹⁴⁷ *See Katz, supra* note 134, at 2362–68. To be clear, even under *Boerne*, “Congress [has] even greater latitude to craft remedial legislation in areas of traditional equal protection strict scrutiny.” Samuel Issacharoff, *Is Section 5 of the Voting Rights Act a Victim of Its Own Success?*, 104 COLUM. L. REV. 1710, 1715 (2004).

¹⁴⁸ *See, e.g., Balkin, supra* note 135, at 1815 (“Nothing in the text of the Fourteenth Amendment justifies the *Boerne* standard or its departure from the test of appropriateness announced in *McCulloch v. Maryland* [T]he language of *McCulloch* is actually embedded in the text of Section 5”); Michael W. McConnell, *Institutions and Interpretation: A Critique of City of Boerne v. Flores*, 111 HARV. L. REV. 153, 194 (1997) [hereinafter McConnell, *Institutions*] (“The historical record shows that the framers of the [Fourteenth] Amendment expected Congress, not the Court, to be the primary agent of its enforcement, and that Congress would not necessarily consider itself bound by Court precedents in executing that function.”). Indeed, Justice Scalia renounced the congruence and proportionality test in a 2004 dissent. *Tennessee v. Lane*, 541 U.S. 509, 556–58 (2004) (Scalia, J., dissenting).

authority.¹⁴⁹ Nearly all of these cases implicated Congress’s power to abrogate state sovereign immunity.¹⁵⁰ None involved race, voting, the Fifteenth Amendment, or Congress’s authority to remedy racial discrimination in voting.

3. Shelby County’s *Equal Sovereignty Principle*

The foregoing overview of *Katzenbach* and *Boerne* frames the discussion about the Article V debate and its modern doctrinal significance. The Court’s decision in *Shelby County v. Holder*, which invalidated the 2006 reauthorization of the VRA’s coverage formula,¹⁵¹ adds another wrinkle to this analysis. Although some scholars have accused the Court of changing the standard of review for Congress’s Reconstruction Amendment enforcement authority,¹⁵² I argue that *Shelby County*’s equal sovereignty principle is an example of “freestanding federalism”¹⁵³ and is thus limited to

¹⁴⁹ See *Coleman v. Court of Appeals of Md.*, 566 U.S. 30, 43–44 (2012) (plurality opinion) (holding that Congress did not validly abrogate state sovereign immunity in enacting the FMLA’s self-care provisions); *Lane*, 541 U.S. at 533–34 (upholding Title II of the ADA’s abrogation of state sovereign immunity for “the class of cases implicating the fundamental right of access to the courts”); *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 734–35 (2003) (upholding the FMLA’s family-care provision’s abrogation of state sovereign immunity); *Garrett*, 531 U.S. at 374 (invalidating Title I of the ADA’s abrogation of state sovereign immunity); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 91 (2000) (striking down the ADEA’s abrogation of state sovereign immunity); *United States v. Morrison*, 529 U.S. 598, 627 (2000) (holding that Congress’s Fourteenth Amendment enforcement authority “does not extend” to VAWA’s civil remedies provision); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 647 (1999) (holding that Congress did not validly abrogate state sovereign immunity in the Patent and Plant Variety Protection Act).

¹⁵⁰ See *Coleman*, 566 U.S. at 43–44; *Lane*, 541 U.S. at 533–34; *Hibbs*, 538 U.S. at 734–35; *Kimel*, 528 U.S. at 91; *Fla. Prepaid*, 527 U.S. at 647.

¹⁵¹ See 570 U.S. 529, 557 (2013).

¹⁵² See Reva B. Siegel, *Equality Divided*, 127 HARV. L. REV. 1, 70 (2013) (accusing the *Shelby County* Court of “chang[ing] both the framework of review and the principle on which it is exercised”); cf. Richard L. Hasen, *Shelby County and the Illusion of Minimalism*, 22 WM. & MARY BILL RTS. J. 713, 730–31 (2014) [hereinafter Hasen, *Minimalism*] (expressing concern that the Court will use *Shelby County* to “bootstrap[]” *Boerne* to the Fifteenth Amendment).

¹⁵³ John F. Manning, *Federalism and the Generality Problem in Constitutional Interpretation*, 122 HARV. L. REV. 2003, 2029 (2009). According to Professor Manning, the Court’s freestanding federalism cases have “restricted or displaced Acts of Congress without purporting to ground [those] decisions in any particular provision of the constitutional text.” *Id.* at 2005. Put simply, freestanding federalism is a structural argument that the Constitution “as a whole . . . preserve[s] a significant element of state sovereignty.” *Id.* at 2006.

Published the same month as *Northwest Austin*, Professor Manning’s article does not mention the equal sovereignty principle, though he identifies the clear statement rule and the anticommandeering doctrine as examples of freestanding federalism. See *id.* at 2029. Other scholars, however, have argued that the equal sovereignty principle is an example of freestanding federalism. See Thomas B. Colby, *In Defense of the Equal Sovereignty Principle*, 65 DUKE L.J. 1087, 1132–33 (2016) (“It is true that there is no clause in the Constitution that explicitly articulates an equal sovereignty principle When it comes to fundamental principles of constitutional federalism, a lack of specific textual support is actually par

laws that differentiate between the states. In other words, *Shelby County* is inapplicable to nationwide statutes like Sections 2 and 3(c) of the VRA.

Although *Shelby County* had a dramatic real-world impact,¹⁵⁴ its future doctrinal importance is likely minimal.¹⁵⁵ That is because the Court did not decide whether *Katzenbach* or *Boerne* supplied the relevant standard of review. Instead, the Court relied on its decision in *Northwest Austin Municipal Utility District Number One v. Holder*,¹⁵⁶ which resolved a previous constitutional challenge to the VRA on constitutional avoidance grounds.¹⁵⁷

The *Shelby County* Court looked to two “basic principles” from *Northwest Austin* for guidance.¹⁵⁸ The first principle was the Court’s statement that “the [VRA] imposes current burdens and must be justified by current needs.”¹⁵⁹ The second principle was *Northwest Austin*’s “conclu[sion] that ‘a departure from the fundamental principle of equal sovereignty requires a showing that a statute’s disparate geographic coverage is sufficiently related to the problem that it targets.’”¹⁶⁰ In a key passage, the Court melded these two principles into one standard: “Congress—if it is to divide the States—must identify those jurisdictions to be singled out on a basis that makes sense in light of current conditions.”¹⁶¹ Indeed, the opinion proceeds by first discussing how the coverage formula differentiates between

for the course.”); Litman, *supra* note 99, at 1259 (“*Shelby County* described equal sovereignty as a freestanding and fundamental principle not specifically tied to any particular congressional power.”).

¹⁵⁴ See generally THE THURGOOD MARSHALL INST., NAACP LEGAL DEF. & EDUC. FUND, INC., DEMOCRACY DIMINISHED: STATE AND LOCAL THREATS TO VOTING POST-SHELBY COUNTY, ALABAMA V. HOLDER (2016), <https://www.naacpldf.org/wp-content/uploads/Democracy-Diminished-State-and-Local-Threats-to-Voting-Post-Shelby-County-Alabama-v.-Holder.pdf> [<https://perma.cc/3NJW-MVAY>] (cataloging racially discriminatory election laws passed after *Shelby County*).

¹⁵⁵ *Shelby County* would apply to any future coverage formula that Congress enacts. See 570 U.S. at 557 (“Congress may draft another formula based on current conditions.”); see also Voting Rights Advancement Act of 2019, H.R. 4, 116th Cong. (2019) (proposed coverage formula). *Shelby County* also applies to Section 203 of the VRA, a less-famous coverage formula that requires covered jurisdictions to provide bilingual election materials. 52 U.S.C. § 10503 (2012); see also Matthew Higgins, Note, *Language Accommodations and Section 203 of the Voting Rights Act: Reporting Requirements as a Potential Solution to the Compliance Gap*, 67 STAN. L. REV. 917, 920–21 (2015) (providing an overview of Section 203).

¹⁵⁶ 557 U.S. 193 (2009); see also *Shelby County*, 570 U.S. at 536.

¹⁵⁷ See 557 U.S. at 211. For persuasive critiques of *Northwest Austin*’s constitutional avoidance holding, see Eric S. Fish, *Constitutional Avoidance as Interpretation and as Remedy*, 114 MICH. L. REV. 1275, 1277 (2016), and Neal Kumar Katyal & Thomas P. Schmidt, *Active Avoidance: The Modern Supreme Court and Legal Change*, 128 HARV. L. REV. 2109, 2129–33 (2015).

¹⁵⁸ *Shelby County*, 570 U.S. at 542.

¹⁵⁹ *Id.* (quoting *Northwest Austin*, 557 U.S. at 203).

¹⁶⁰ *Id.* (quoting *Northwest Austin*, 557 U.S. at 203).

¹⁶¹ *Id.* at 553.

the states, and then analyzes whether its burdens are justified in light of current conditions.¹⁶² The *Shelby County* Court thus interpreted *Northwest Austin*'s current burden requirement as contingent on a violation of the equal sovereignty principle.

To be clear, the *Shelby County* Court still relied on *Katzenbach*. The Court harkened back to *McCulloch*'s famous passage¹⁶³ and *Katzenbach*'s conclusion that the original coverage formula was “rational in both practice and theory.”¹⁶⁴ And in responding to the dissent, the Court stated that:

If Congress had started from scratch in 2006, it plainly could not have enacted the present coverage formula. It would have been *irrational* for Congress to distinguish between States in such a fundamental way based on 40-year-old data, when today's statistics tell an entirely different story. And it would have been *irrational* to base coverage on the use of voting tests 40 years ago, when such tests have been illegal since that time. But that is exactly what Congress has done.¹⁶⁵

This language gestures toward the *Katzenbach* standard. Justice Ginsburg's dissenting opinion—which expressly relied on *Katzenbach*'s rationality standard—picked up on this point. She noted that the Court “d[id] not purport to alter settled precedent establishing that the dispositive question is whether Congress has employed rational means.”¹⁶⁶

By contrast, the Court's majority opinion in *Shelby County* does not even cite *Boerne*—not for the standard of review, not for its application, and not for its praise of previous versions of the VRA.¹⁶⁷ The words “congruent” and “proportional” do not appear either.¹⁶⁸ Thus, *Shelby County* lacks language holding that *Boerne* applies to the Fifteenth Amendment.

To be sure, the Court commented in a footnote that “[b]oth the Fourteenth and Fifteenth Amendments were at issue in *Northwest Austin*”

¹⁶² See *id.* at 550 (“The provisions of § 5 apply only to those jurisdictions singled out by § 4. We now consider whether that coverage formula is constitutional in light of current conditions.”).

¹⁶³ See *id.* at 555 (discussing *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819)).

¹⁶⁴ *Id.* at 550 (quoting *South Carolina v. Katzenbach*, 383 U.S. 301, 330 (1966)).

¹⁶⁵ *Id.* at 556 (emphasis added).

¹⁶⁶ *Id.* at 569 (Ginsburg, J., dissenting) (internal quotation marks omitted).

¹⁶⁷ Others have noticed this glaring omission. See Hasen, *Minimalism*, *supra* note 152, at 723; Litman, *supra* note 99, at 1259.

¹⁶⁸ One explanation for *Boerne*'s absence is Justice Scalia. He renounced *Boerne* in a 2004 dissent, see *supra* note 148 for a discussion of *Lane*, and he adhered to that position in a separate concurrence in 2012. See *Coleman v. Court of Appeals of Md.*, 566 U.S. 30, 44–45 (2012) (Scalia, J., concurring in the judgment). Indeed, Scalia's refusal to join an opinion relying on *Boerne* resulted in a plurality opinion in *Coleman*. *Id.* at 33 (plurality opinion).

and that decision “guides our review *under both Amendments* in this case.”¹⁶⁹ Although there is certainly some risk that a future Court could cite this language to “bootstrap[.]” *Boerne* into the Fifteenth Amendment,¹⁷⁰ that result is not required. The *Shelby County* Court focused on the coverage formula’s differentiation between the states, i.e., the issue “in th[e] case.”¹⁷¹ If the equal sovereignty principle is an example of freestanding federalism, then it would apply to statutes enacted under “both Amendments,”¹⁷² just as it would apply to statutes enacted under any other constitutional provision.

The Court’s self-imposed limits on its holding elucidate this point. The Court made clear that its holding applied “only [to] the coverage formula[.]” not to “§ 5 itself.”¹⁷³ The Court also stated that its “decision in *no way affects the permanent, nationwide ban on racial discrimination in voting found in § 2.*”¹⁷⁴ If *Shelby County* changed the standard of review for all statutes enacted under the Reconstruction Amendments, then these statements cannot be taken at face value. A more stringent constitutional standard obviously “affects” a neighboring statutory provision. Moreover, the Court’s description of Section 2 as both permanent and nationwide strongly indicates that these are distinguishing criteria and, therefore, *Shelby County*’s current burden requirement applies only to statutes that differentiate between the states.¹⁷⁵

¹⁶⁹ *Shelby County*, 570 U.S. at 542 n.* (emphasis added).

¹⁷⁰ Hasen, *Minimalism*, *supra* note 152, at 730–31.

¹⁷¹ 570 U.S. at 542 n.*.

¹⁷² *Id.*

¹⁷³ *Id.* at 557. This aspect of the Court’s decision was underscored by Justice Thomas’s concurring opinion, which argued that the Court should have also invalidated Section 5. *See id.* (Thomas, J., concurring).

¹⁷⁴ *Id.* (majority opinion) (emphasis added).

¹⁷⁵ Other scholars have thoroughly critiqued the equal sovereignty principle. *See* Litman, *supra* note 99, at 1211 (“*Shelby County* broadened the equal sovereignty principle beyond how it had been used in prior cases.”); Zachary S. Price, *NAMUDNO’s Non-Existent Principle of State Equality*, 88 N.Y.U. L. REV. ONLINE 24, 30–39 (2013) (criticizing *Northwest Austin*’s invocation of the equal sovereignty principle). *But see* Colby, *supra* note 153, at 1168 (defending the equal sovereignty principle but arguing that Congress should be given more leeway to enact statutes under the Reconstruction Amendments).

As this Article went to print, the Supreme Court issued its first post-*Shelby County* decision interpreting Congress’s Reconstruction Amendment enforcement authority. *See* *Allen v. Cooper*, 140 S. Ct. 994 (2020). In striking down a nationwide statute that abrogated state sovereign immunity, the Court relied exclusively on *Boerne*’s congruence and proportionality test and did not even cite *Shelby County*. *See id.* at 1004–05. This glaring omission further reinforces the point that the equal sovereignty principle is an example of freestanding federalism. *See* Travis Crum, *The Curious Disappearance of Shelby County*, ELECTION L. BLOG (Mar. 27, 2020, 7:03 AM), <https://electionlawblog.org/?p=110263> [<https://perma.cc/P2ZZ-M33Z>].

II. THE FOURTEENTH AMENDMENT AND VOTING RIGHTS DURING RECONSTRUCTION

This Part focuses on two distinct questions concerning the Fourteenth Amendment: one of substantive scope and one of enforcement authority. Regarding substantive scope, this Part addresses whether the Fourteenth Amendment was understood during Reconstruction to encompass political rights. As this Part will show, the Fourteenth Amendment was originally understood *not* to mandate suffrage for the freedmen. Regarding Congress's enforcement authority, this Part will demonstrate that the Fourteenth Amendment was originally understood to endorse *McCulloch's* deferential standard.

A. *The Reconstruction-Era Hierarchy of Rights*

To understand how the Reconstruction generation viewed the Fourteenth Amendment, one must first examine the language employed during that period. The Reconstruction generation conceptualized rights as distinct spheres, and the Reconstruction debates were “based on a tripartite division of rights . . . between civil rights, political rights, and social rights.”¹⁷⁶ This nuance is especially important to flag for the contemporary reader, as the twentieth century civil rights movement collapsed the rhetorical and intellectual distinctions employed during Reconstruction.¹⁷⁷ Indeed, the Reconstruction Framers’ “categorization of rights plays no part in current interpretations of the Fourteenth Amendment.”¹⁷⁸

In the 1860s, “civil rights” represented a far narrower category than that term connotes today.¹⁷⁹ The Civil Rights Act of 1866, for example, identified “the rights to make and enforce contracts; to buy, lease, inherit, hold and convey property; to sue and be sued and to give evidence in court; to legal protections for the security of person and property; and to equal treatment

¹⁷⁶ Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 1016 (1995) [hereinafter McConnell, *Desegregation*]; see also PAMELA BRANDWEIN, *RETHINKING THE JUDICIAL SETTLEMENT OF RECONSTRUCTION* 70–71 (2011) (discussing this framework); FONER, *supra* note 8, at 230–31 (same). To be sure, even at the dawn of Reconstruction, some Radicals believed that Blacks were entitled to civil and political rights. See WILLIAM E. NELSON, *THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE* 127 (1988) (explaining that some Radicals refused to distinguish between civil and political rights); see also *infra* Section III.D.

¹⁷⁷ See AMAR, *AMERICA'S CONSTITUTION*, *supra* note 16, at 445 n.*.

¹⁷⁸ McConnell, *Desegregation*, *supra* note 176, at 1025; cf. BRANDWEIN, *supra* note 176, at 71 (“After the passage of the Fifteenth Amendment, the right to vote began a slow and uneven migration into the category of civil rights.”).

¹⁷⁹ See HAROLD M. HYMAN & WILLIAM M. WIECEK, *EQUAL JUSTICE UNDER LAW: CONSTITUTIONAL DEVELOPMENT, 1835–1875*, at 395 (1982).

under the criminal law.”¹⁸⁰ Other civil rights included the rights to freedom of movement and to be free from private violence.¹⁸¹ During Reconstruction, the concept of civil rights was employed to demand equal treatment by government in civil and criminal matters.

By contrast, political rights were defined as the rights to vote, to hold office, and to sit on juries.¹⁸² The Reconstruction vision of citizenship intersected with this hierarchy of rights. Although civil rights were inherent in citizenship, the right to vote “lay outside the domain of *mere* citizenship.”¹⁸³ Suffrage was often labeled a privilege, reinforcing the distinction between citizenship and political rights.¹⁸⁴ Throughout Reconstruction, white women were often cited—by both sides of the debate—as the quintessential example of second-class citizens who were entitled to own property but could not vote.¹⁸⁵ White women were thus permitted to exercise civil rights but not political rights.

By far the most nebulous category, social rights concerned “participation in social life.”¹⁸⁶ This broad category included not only rights to use public transportation, accommodations, and education, but also the right to choose one’s personal associations.¹⁸⁷ Given its conceptual breadth, social rights are oftentimes divided into “public” and “private” subcategories.¹⁸⁸

But even with the public/private distinction in mind, the definition of social rights is still blurry for—at least—two reasons. First, “public conveyances, inns, and the like were viewed as a kind of hybrid—privately owned but possessing public attributes.”¹⁸⁹ Second, and relatedly, *public* social rights were sometimes categorized as civil rights because they

¹⁸⁰ McConnell, *Desegregation*, *supra* note 176, at 1027 (discussing the Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27).

¹⁸¹ See HYMAN & WIECEK, *supra* note 179, at 395–96.

¹⁸² See AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 48 (1998) [hereinafter AMAR, *BILL OF RIGHTS*].

¹⁸³ AMAR, *AMERICA’S CONSTITUTION*, *supra* note 16, at 382 (emphasis added).

¹⁸⁴ See HYMAN & WIECEK, *supra* note 179, at 394–95.

¹⁸⁵ See AMAR, *BILL OF RIGHTS*, *supra* note 182, at 260 & n.*.

¹⁸⁶ Samuel R. Bagenstos, *The Unrelenting Libertarian Challenge to Public Accommodations Law*, 66 *STAN. L. REV.* 1205, 1210 (2014).

¹⁸⁷ See HYMAN & WIECEK, *supra* note 179, at 396; Bagenstos, *supra* note 186, at 1210.

¹⁸⁸ See McConnell, *Desegregation*, *supra* note 176, at 1022 (“The individual’s social rights included his own choice of associates, but did not include a right to expect that other persons whom he found undesirable . . . would be denied access to common carriers or public accommodations . . .”).

¹⁸⁹ MALTZ, *supra* note 12, at 71.

involved the provision of government services or licenses.¹⁹⁰ Construed as such, social rights were merely a claim for social equality.¹⁹¹ Under this view, the government must issue a marriage license to an interracial couple (a civil right) but cannot mandate that interracial couples be perceived as societal equals (a social right).¹⁹²

Further complicating matters, the boundaries between civil, political, and social rights were malleable and shifted over time.¹⁹³ So, too, were public views on these rights. Over the course of Reconstruction, the political center of the Republican Party shifted to support black suffrage and the enforcement of social rights, as evidenced by the Fifteenth Amendment and the Civil Rights Act of 1875, respectively.¹⁹⁴ But at the beginning of Reconstruction, “only ‘radicals’ merged civil and political rights.”¹⁹⁵ For purposes of this Article, the category that matters is political rights—and the right to vote was not considered a civil or social right, nor was it viewed as inherent in citizenship.

B. Constitutional Two-Steps

During the Civil War and Reconstruction, Radical Republicans pushed an abolitionist agenda, which culminated in the enfranchisement of the freedmen. Along the way, the Radicals’ victories followed a two-step pattern: an initial subconstitutional rule would later be expanded upon and entrenched via a constitutional amendment.

The initial constitutional two-step was the abolition of slavery. The first move was President Lincoln’s Emancipation Proclamation in January 1863.

¹⁹⁰ See Bagenstos, *supra* note 186, at 1211 (discussing the Civil Rights Act of 1875, which relied on a broad understanding of civil rights in prohibiting racial discrimination in public accommodations); McConnell, *Desegregation*, *supra* note 176, at 1022–23 (“The effect of the Fourteenth Amendment was not to alter the boundary between civil and social rights, but to make race an unreasonable basis for discrimination within the civil sphere.”).

¹⁹¹ See Rebecca J. Scott, *Public Rights, Social Equality, and the Conceptual Roots of the Plessy Challenge*, 106 MICH. L. REV. 777, 786–87 (2008).

¹⁹² See McConnell, *Desegregation*, *supra* note 176, at 1018–20; see also MALTZ, *supra* note 12, at 72 (“Given the special nature of public accommodations, the drafters [of the Fourteenth Amendment] might well have envisioned a regime in which racial discrimination in such facilities was prohibited . . .”).

¹⁹³ See AMAR, BILL OF RIGHTS, *supra* note 182, at 258–59 (discussing the transformation of the right to keep and bear arms from a political right to a civil right).

¹⁹⁴ See HYMAN & WIECEK, *supra* note 179, at 397–98.

¹⁹⁵ *Id.* at 394. For example, Senator Charles Sumner, one of the most Radical Republicans, “introduced a series of resolutions calling for civil and political equality” during the Thirty-Ninth Congress. FONER, *supra* note 8, at 240; see also *infra* Section III.B.2 (discussing Sumner’s proposals in the Fortieth Congress).

But that decree applied only to the Confederate States.¹⁹⁶ The second step occurred in December 1865—nearly eight months after Appomattox—when the Thirteenth Amendment abolished slavery in two of the loyal Border States and ensured that it would not return in the former Confederacy.¹⁹⁷ The Thirteenth Amendment thus expanded the states covered by the Emancipation Proclamation’s abolition of slavery and entrenched that decision against any post-war backsliding.

Unfortunately, emancipation did not result in freedom in the South. The ex-Confederate States quickly enacted the notorious Black Codes, which severely curtailed the liberty of the newly freed slaves by limiting their right to contract and their freedom of movement.¹⁹⁸ Moreover, “violence against blacks reached staggering proportions in the immediate aftermath of the war.”¹⁹⁹ It soon became apparent that the Southern States sought to reestablish a de facto system of slavery.

In order to eradicate the Black Codes,²⁰⁰ Congress enacted the Civil Rights Act of 1866 pursuant to its Thirteenth Amendment enforcement authority.²⁰¹ True to its name, the Civil Rights Act protected civil rights—such as the rights to own property and sign a contract—but not political rights.²⁰² Indeed, Republicans disclaimed that political rights were implicated by the Civil Rights Act.²⁰³ The goal was to protect the civil rights of the freedmen, not extend the franchise.

As the first major legislation passed over a presidential veto,²⁰⁴ the constitutionality of the Civil Rights Act was contested at the time. Although the Emancipation Proclamation had been justified as an exercise of the

¹⁹⁶ See David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 HARV. L. REV. 1457, 1480 (2001).

¹⁹⁷ See AMAR, AMERICA’S CONSTITUTION, *supra* note 16, at 359 (noting that Delaware and Kentucky “were the Union’s only remaining slave states”).

¹⁹⁸ See FONER, *supra* note 8, at 198–201.

¹⁹⁹ *Id.* at 119.

²⁰⁰ See *id.* at 244.

²⁰¹ See AMAR, AMERICA’S CONSTITUTION, *supra* note 16, at 362 (“Reconstructors insisted that the Abolition Amendment’s ‘appropriate’ clause allowed Congress to legislate not merely against slavery itself, but against all the ‘badges’ and relics of a slave system.”); Steven A. Engel, Note, *The McCulloch Theory of the Fourteenth Amendment: City of Boerne v. Flores and the Original Understanding of Section 5*, 109 YALE L.J. 115, 119 (1999) (“The substance of the [Thirteenth A]mendment prohibited slavery, yet under the Enforcement Clause the Republicans claimed the authority to enact the Civil Rights Act, which protected against state infringement a range of civil liberties, such as the rights of contract and property and the right to sue in court.”).

²⁰² See RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 30–31 (2d ed. 1997); McConnell, *Desegregation*, *supra* note 176, at 1027.

²⁰³ See David P. Currie, *The Reconstruction Congress*, 75 U. CHI. L. REV. 383, 398 & n.95 (2008).

²⁰⁴ See FONER, *supra* note 8, at 250–51.

President’s war powers, the same font of authority was more questionable over a year after hostilities had ceased. Accordingly, leading Republicans recommended waiting until the Thirteenth Amendment’s ratification to enact the Civil Rights Act.²⁰⁵ Even then, a handful of Republicans—perhaps most prominently Representative John Bingham of Ohio—expressed reservations about the Act’s constitutionality.²⁰⁶ And, of course, Democrats and President Johnson repeatedly questioned the Act’s constitutionality.²⁰⁷

The Thirty-Ninth Congress ultimately chose the Article V route to “provide an incontrovertible constitutional foundation for the act.”²⁰⁸ The Civil Rights Act of 1866 thus served as a basis for and was constitutionalized by the Fourteenth Amendment. Given this relationship, the Civil Rights Act provides strong initial evidence that the Fourteenth Amendment encompasses civil rights.²⁰⁹

C. *The Substantive Scope of the Fourteenth Amendment*

Throughout the Fourteenth Amendment debates, Republicans in Congress distinguished between civil and political rights.²¹⁰ While introducing the Fourteenth Amendment, Senator Jacob Howard (R-MI) remarked that the Privileges or Immunities Clause protected “the personal rights guarant[eed] and secured by the first eight amendments of the Constitution.”²¹¹ Senator Howard made clear that the Radical Republicans’

²⁰⁵ See Currie, *supra* note 203, at 394–95.

²⁰⁶ See GERARD N. MAGLIOCCA, *AMERICAN FOUNDING SON: JOHN BINGHAM AND THE INVENTION OF THE FOURTEENTH AMENDMENT* 120 (2013); Engel, *supra* note 201, at 133. Some scholars concur with Bingham’s assessment. See Currie, *supra* note 203, at 396 (“The Thirteenth Amendment forbade slavery, not racial discrimination; it did not authorize Congress to legislate equal civil rights.”); Jonathan F. Mitchell, *Textualism and the Fourteenth Amendment*, 69 *STAN. L. REV.* 1237, 1260 (2017) (“Congressional supporters claimed that the Thirteenth Amendment authorized [the Civil Rights Act of 1866], but the Thirteenth Amendment gets them only part of the way there.” (footnote omitted)).

²⁰⁷ See AMAR, *AMERICA’S CONSTITUTION*, *supra* note 16, at 362.

²⁰⁸ *Id.*

²⁰⁹ See, e.g., *McDonald v. City of Chicago*, 561 U.S. 742, 775 (2010) (“Today, it is generally accepted that the Fourteenth Amendment was understood to provide a constitutional basis for protecting the rights set out in the Civil Rights Act of 1866.”); BERGER, *supra* note 202, at 23 (“[T]he [Fourteenth] Amendment was designed to ‘constitutionalize’ the [Civil Rights] Act . . . so as to remove doubt as to its constitutionality and to place it beyond the power of a later Congress to repeal.”). Congress reenacted the Civil Rights Act of 1866 after the Fourteenth Amendment’s ratification to resolve any doubt about its constitutionality. See Civil Rights Act of 1870, ch. 114, § 18, 16 Stat. 140, 144; see also Jennifer Mason McAward, *The Scope of Congress’s Thirteenth Amendment Enforcement Power After City of Boerne v. Flores*, 88 *WASH. U. L. REV.* 77, 115–16 (2010) (discussing this history and its relationship to Congress’s Thirteenth Amendment enforcement authority).

²¹⁰ See AMAR, *BILL OF RIGHTS*, *supra* note 182, at 216–18, 217 n.* (citing dozens of statements by members of Congress).

²¹¹ *CONG. GLOBE*, 39th Cong., 1st Sess. 2765 (1866) (statement of Sen. Howard).

goal was to overturn *Barron v. Baltimore*²¹² and incorporate the Bill of Rights against the states.²¹³ Of course, those rights did not include the ballot. As Senator Howard explained:

[T]he first section of the proposed amendment does not give to either of these classes [Whites or Blacks] the right of voting. The right of suffrage is not, in law, one of the privileges or immunities thus secured by the Constitution. It is merely the creature of law. It has always been regarded in this country as the result of positive local law, not regarded as one of those fundamental rights lying at the basis of all society and without which a people cannot exist except as slaves, subject to a despotism.²¹⁴

Representative John Bingham—the “Madison”²¹⁵ of the Fourteenth Amendment—agreed with this interpretation, stating that the Joint Committee on Reconstruction believed that “the exercise of the elective franchise . . . is exclusively under the control of the States.”²¹⁶ Other Republicans concurred in this construction of the Fourteenth Amendment.²¹⁷

Furthermore, moderate Republicans were not “enthusiastic about the prospect of black suffrage, either in the North, where it represented a political liability, or the South, where it seemed less likely to provide a stable basis for a new Republican party than a political alliance with forward-looking white Southerners.”²¹⁸ And throughout the 1866 campaign and the ratification battle, Republicans emphasized that the Fourteenth Amendment did not encompass voting rights.²¹⁹ This limitation was no minor point: Democrats attempted to exploit fears of black suffrage in arguing against the Fourteenth Amendment’s ratification, thus forcing Republicans to reject those claims.²²⁰

²¹² 32 U.S. (7 Pet.) 243 (1833).

²¹³ See AMAR, *AMERICA’S CONSTITUTION*, *supra* note 16, at 386–87.

²¹⁴ CONG. GLOBE, 39th Cong., 1st Sess. 2766 (1866) (statement of Sen. Howard).

²¹⁵ *Adamson v. California*, 332 U.S. 46, 74 (1947) (Black, J., dissenting).

²¹⁶ CONG. GLOBE, 39th Cong., 1st Sess. 2542 (1866) (statement of Rep. Bingham); *see also id.* at 431 (“[W]hy not go for a constitutional amendment which will declare, once for all, that no State . . . shall make any distinction in the right of voting between male citizens of the United States . . . ? I will answer with all my heart that I am ready to go for that. But a majority of those with whom I am associated think that this is all that is needed at present . . . I am content with that.”).

²¹⁷ *See, e.g., id.* at 1159 (statement of Rep. Windom (R-MN)) (commenting that the Fourteenth Amendment “does not . . . confer the privilege of voting, for that is a political right”).

²¹⁸ FONER, *supra* note 8, at 241.

²¹⁹ *See id.* at 260.

²²⁰ *See, e.g., MALTZ, supra* note 12, at 118 (“Both in and out of Congress, opponents of the [the Fourteenth Amendment] charged again and again that it was meant to allow Congress to mandate black suffrage. Supporters, however, emphatically denied the allegation.” (footnote omitted)); George C. Thomas III, *Newspapers and the Fourteenth Amendment: What Did the American Public Know About*

Both the Republicans' and Democrats' strategies are unsurprising given the continued unpopularity of black suffrage in the North and the defeat of five suffrage referenda in 1865.²²¹ Indeed, it is difficult to overstate the vehemence of Northern racism.²²² As recently as 1853, Illinois adopted a criminal statute prohibiting Blacks from residing in the state.²²³ The desire to avoid the black suffrage issue was so strong that “no speaker during the debates on the Fourteenth Amendment pursued the contention that § 1 would be construed to include the franchise.”²²⁴

Even Radical Republican supporters of black suffrage openly lamented that the Fourteenth Amendment lacked protections for political rights,²²⁵ and Republican newspapers commented that the Radicals failed to secure black suffrage.²²⁶ Perhaps most telling, Radical Republicans pledged to *continue* fighting for black suffrage on the 1866 campaign trail.²²⁷ Representative George Boutwell (R-MA) and Senator Charles Sumner (R-MA)—who would later lead the Radicals in their attempt to pass a nationwide black suffrage statute pursuant to Congress's Fourteenth Amendment enforcement authority²²⁸—admitted in 1866 that the Amendment did *not* mandate black suffrage. Congressman Boutwell, who was also a member of the Joint Committee on Reconstruction,²²⁹ conceded that “[t]he proposition in the matter of suffrage falls short of what I desire, but so far as it goes it tends to

Section 1?, 18 J. CONTEMP. LEGAL ISSUES 323, 347 (2009) (discussing Democratic newspapers' assertion that the Fourteenth Amendment granted nationwide black suffrage).

²²¹ See GILLETTE, *supra* note 11, at 25–26; see also *infra* Section III.A (discussing suffrage referenda).

²²² See LAURA F. EDWARDS, A LEGAL HISTORY OF THE CIVIL WAR AND RECONSTRUCTION 83 (2015) (listing restrictions on the civil and political rights of Blacks in several Northern and Midwestern States).

²²³ See MALTZ, *supra* note 12, at 2. That statute was repealed near the end of the Civil War. See *id.* at 6.

²²⁴ *Oregon v. Mitchell*, 400 U.S. 112, 163 (1970) (Harlan, J., concurring in part and dissenting in part); see also GARRETT EPPS, DEMOCRACY REBORN: THE FOURTEENTH AMENDMENT AND THE FIGHT FOR EQUAL RIGHTS IN POST-CIVIL WAR AMERICA 104 (2006) (“[T]he majority of Republicans . . . were still mired in the old view of the vote as a political privilege granted to a few citizens rather than as a right belonging to all.”); JOHN MABRY MATHEWS, LEGISLATIVE AND JUDICIAL HISTORY OF THE FIFTEENTH AMENDMENT 12 (1909) (“There was a feeling too widespread to be safely antagonized that the regulation of the suffrage was a matter properly belonging to the state governments.”).

²²⁵ See CONG. GLOBE, 39th Cong., 1st Sess. 2469 (1866) (statement of Rep. Kelley (R-PA)) (stating that the Fourteenth Amendment “d[id] not go far enough[,] and propos[ing] to at once enfranchise every loyal man in the country”); MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 28 (2004).

²²⁶ See FONER, *supra* note 8, at 256.

²²⁷ See JOSEPH B. JAMES, THE FRAMING OF THE FOURTEENTH AMENDMENT 178 (1956).

²²⁸ See *infra* Section III.D.

²²⁹ See MAGLIOCCA, *supra* note 206, at 111.

the equalization of the inequality at present existing.”²³⁰ And in 1866 campaign speeches, Senator Sumner “openly declared that the [Fourteenth A]mendment was not enough, that impartial suffrage must come.”²³¹

1. Section One

In addition to the Reconstruction Framers’ intent and the original public understanding of the Amendment at the time, Section One of the Fourteenth Amendment provides further textual evidence of the exclusion of political rights. Indeed, Section One’s capacious language does not expressly reference political rights at all. Nor does the language employed indicate that it would have been understood to encompass the right to vote.

Section One’s first sentence—the Citizenship Clause—overturned *Dred Scott* and conferred citizenship on the freedmen.²³² But as conceptualized in the eighteenth century, citizenship was not coextensive with the right to vote. As noted previously, women were the paradigmatic example of nonvoting citizens during Reconstruction.²³³

Moving on to the Privileges or Immunities Clause,²³⁴ the Reconstruction Framers borrowed from Article IV’s protections for out-of-state citizens. Article IV, however, had never been read to compel New Hampshire to grant a Virginian the right to vote. Article IV therefore protected civil rights, not political rights.²³⁵ Whatever the metes and bounds of “privileges or immunities,” those terms did not encompass political rights during Reconstruction.²³⁶ Indeed, toward the end of Reconstruction, the Court held that women were not entitled to the right to vote under the Privileges or Immunities Clause.²³⁷

²³⁰ CONG. GLOBE, 39th Cong., 1st Sess. 2508 (1866) (statement of Rep. Boutwell); *see also id.* (“I demand and shall continue to demand the franchise for all loyal male citizens of this country . . .”).

²³¹ JAMES, *supra* note 227, at 173. Although these comments occurred after the Fourteenth Amendment passed Congress, they were made during the ratification debate.

²³² *See* AMAR, AMERICA’S CONSTITUTION, *supra* note 16, at 380–81.

²³³ *See supra* Section II.A.

²³⁴ U.S. CONST. amend. XIV, § 1 (“No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . .”).

²³⁵ *See* AMAR, AMERICA’S CONSTITUTION, *supra* note 16, at 391–92.

²³⁶ *See* BERGER, *supra* note 202, at 31–32.

²³⁷ *Minor v. Happersett*, 88 U.S. 162, 178 (1875). The *Minor* Court noted that the Fifteenth Amendment provided a compelling reason *not* to confer suffrage rights via the Fourteenth Amendment, pointing out that “[i]f suffrage was one of the[] [Fourteenth Amendment’s] privileges or immunities, why amend the Constitution to prevent its being denied on account of race?” *Id.* at 175.

The Due Process and Equal Protection Clauses further reinforce the civil–political rights dichotomy.²³⁸ Because both clauses apply to “person[s]”²³⁹—not merely citizens—they cover a broader class of individuals than the Privileges or Immunities Clause or the Fifteenth Amendment. This distinction is best illustrated by the fact that the Constitution permits the disenfranchisement of aliens.²⁴⁰ The Due Process and Equal Protection Clauses’ use of the word “person” cuts against the Court’s voting rights jurisprudence.²⁴¹

2. *The Apportionment Clause*

Given the close relationship between the Civil Rights Act of 1866 and the Fourteenth Amendment, Section One “inspired relatively little discussion.”²⁴² By contrast, Section Two’s Apportionment Clause sparked real debate.²⁴³ “[L]ess familiar”²⁴⁴ than its sectional sibling, Section Two provides for a reduction in House seats if a state “denied” or “abridged” the “right to vote” of its adult “male” “citizens.”²⁴⁵

Section Two was crafted as a response to an unintended consequence of the Thirteenth Amendment: the Southern States that had previously received three-fifths representation in the House for every slave would now be entitled to five-fifths for every disenfranchised freedmen.²⁴⁶ At the time,

²³⁸ See John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1438–40 (1992) (observing that several of the Reconstruction Framers believed that the Equal Protection Clause did not apply to voting rights).

²³⁹ U.S. CONST. amend. XIV, § 1.

²⁴⁰ See Vikram David Amar, *Jury Service as Political Participation Akin to Voting*, 80 CORNELL L. REV. 203, 227 (1995). *But see* Jamin B. Raskin, *Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage*, 141 U. PA. L. REV. 1391, 1397 (1993) (noting that white male aliens “exercised the right to vote in at least twenty-two states or territories during the nineteenth century”).

²⁴¹ As noted above, the Court has applied the Fourteenth Amendment to non-race voting rights claims in a series of equal protection decisions as well as cases treating the right to vote as a fundamental right. *See supra* Section I.A.4.

²⁴² FONER, *supra* note 8, at 257.

²⁴³ *See id.*

²⁴⁴ *Richardson v. Ramirez*, 418 U.S. 24, 42 (1974).

²⁴⁵ U.S. CONST. amend. XIV, § 2. Section Two’s apportionment penalty has never been enforced. *See, e.g.*, Gerard N. Magliocca, *Our Unconstitutional Reapportionment Process*, 86 GEO. WASH. L. REV. 774, 783 (2018).

²⁴⁶ *See* Pamela S. Karlan, *Reapportionment, Nonapportionment, and Recovering Some Lost History of One Person, One Vote*, 59 WM. & MARY L. REV. 1921, 1931–32 (2018); Franita Tolson, *The Constitutional Structure of Voting Rights Enforcement*, 89 WASH. L. REV. 379, 405 (2014) [hereinafter Tolson, *Structure*].

it was estimated that this would give the South an *additional* fifteen House seats.²⁴⁷

Even though the Reconstruction Framers attempted to rectify the malapportionment wrought by the disenfranchisement of the freedmen, Section Two addressed the five-fifths problem without enfranchising Blacks nationwide. As a compromise provision, Section Two evidenced a political calculation: “[I]t protected the North against an increase in Southern white political power and punished the South for withholding suffrage from Blacks but allowed Northern states to do so with impunity, since their black population was too small to make a difference in representation.”²⁴⁸ The solution to the five-fifths problem did not require the extension of voting rights to black men but merely provided a “strong inducement”²⁴⁹ to do so. Indeed, Section Two’s specific remedy—a reduction in House seats—undermines the argument that Section One banned racial discrimination in voting.²⁵⁰

Despite the inclusion of the Apportionment Clause, the congressional consensus was uniform in viewing the entire Fourteenth Amendment as a civil rights provision. Representative Bingham stated that “[t]he amendment does not give, as the second section shows, the power to Congress of regulating suffrage in the several states. The second section excludes the

²⁴⁷ See GILLETTE, *supra* note 11, at 25; see also Michael T. Morley, *Remedial Equilibration and the Right to Vote Under Section 2 of the Fourteenth Amendment*, 2015 U. CHI. LEGAL F. 279, 306 [hereinafter Morley, *Equilibration*] (“[I]f Representatives were allocated based on total population, then 127,000 white people in New York would be entitled to a single representative, while an equal number of whites in Mississippi would have three representatives, due to the large number of disenfranchised blacks there.”). For context, the Thirty-Ninth Congress had 193 representatives. See *Congress Profiles*, U.S. HOUSE OF REPRESENTATIVES: HISTORY, ART & ARCHIVES, <https://history.house.gov/Congressional-Overview/Profiles/39th/> [https://perma.cc/3298-KEP5].

²⁴⁸ Xi Wang, *Black Suffrage and the Redefinition of American Freedom, 1860–1870*, 17 CARDOZO L. REV. 2153, 2194–95 (1996).

²⁴⁹ KLARMAN, *supra* note 225, at 28; see also 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* 107 (1998) [hereinafter ACKERMAN, *TRANSFORMATIONS*] (describing the Apportionment Clause as providing “a serious penalty” but also “transparently presuppos[ing] the continued constitutional legitimacy of such exclusionary practices”).

²⁵⁰ See Morley, *Prophylactic*, *supra* note 99, at 2093 (“It would have made little sense for Congress to leave states discretion under Section 2 of the Fourteenth Amendment to refuse to extend voting rights to former slaves or other minorities if Section 1 of that same Amendment compelled them to do so”); Strauss, *Constitution*, *supra* note 29, at 39 (“Section 2 refers explicitly to voting, and it provides both a detailed right . . . and a specific remedy. Section 1 does not refer to voting at all Read naturally, the amendment does not seem to provide dual remedies.” (footnotes omitted)). *But see* Tolson, *Abridgment*, *supra* note 84, at 458 (arguing that, when combined with Section Five, the Apportionment Clause “was the Reconstruction Congress’s attempt to constitutionalize a mechanism that would allow Congress to all but legislate universal suffrage”). See *infra* notes 479–481 and accompanying text for an argument against Professor Tolson’s position.

conclusion that by the first section suffrage is subjected to congressional law”²⁵¹ Similarly, Senator Jacob Howard commented that “[t]he second section leaves the right to regulate the elective franchise still with the States, and does not meddle with that right.”²⁵²

Furthermore, the Thirty-Ninth Congress specifically rejected attempts to include a right to vote in Section Two. Activist Robert Dale Owen submitted a proposal that would have established black suffrage on July 4, 1876.²⁵³ Even though this proposal would have delayed black suffrage for a decade, it was deemed too radical and created a stalemate in the Joint Committee on Reconstruction that was only broken when Congressman Thaddeus Stevens (R-PA) abandoned his support for including black suffrage in the Amendment’s scope.²⁵⁴ Other proposals endorsing black suffrage were also voted down.²⁵⁵ The Reconstruction Framers, therefore, did not view Section Two as transforming the substance of Section One.

Section Two’s treatment of gender further demonstrates the Reconstruction-era distinction between citizenship and political rights. Section Two introduced a new word to the Constitution: male.²⁵⁶ The rationale for this inclusion is deceptively straightforward given contemporary demographics. Due to Western migration, the Eastern States had far greater proportions of women—none of whom could vote.²⁵⁷ If Section Two had penalized states for disenfranchising all citizens, the burden would have fallen on the Eastern States. A gender-neutral Section Two would have thereby created incentives for enfranchising women,²⁵⁸ adding further controversy to the ratification battle.²⁵⁹ A provision thus designed to

²⁵¹ CONG. GLOBE, 39th Cong., 1st Sess. 2542 (1866) (statement of Rep. Bingham); *see also id.* at 431 (describing an early draft of Section Two as “nothing but a penalty”).

²⁵² *Id.* at 2766 (statement of Sen. Jacob Howard); *see also* Tolson, *Structure*, *supra* note 246, at 406 (“But there is little doubt that few in the thirty-ninth Congress intended to explicitly grant the right to vote through the Fourteenth Amendment’s provisions . . .”).

²⁵³ *See* Wang, *supra* note 248, at 2192 & n.156.

²⁵⁴ *See* GILLETTE, *supra* note 11, at 24.

²⁵⁵ *See* ALLAN J. LICHTMAN, *THE EMBATTLED VOTE IN AMERICA: FROM THE FOUNDING TO THE PRESENT* 77 (2018) (“By a wide margin, the Joint Committee on Reconstruction rejected drafts of section 1 designed to assure political equality for citizens of color.”); MATHEWS, *supra* note 224, at 12 (noting that Senator Henderson’s black suffrage proposal lost by a vote of 10–37); Morley, *Equilibration*, *supra* note 247, at 300–04 (surveying various drafts of Section Two).

²⁵⁶ *See* AMAR, *AMERICA’S CONSTITUTION*, *supra* note 16, at 393–94.

²⁵⁷ *See id.* at 393.

²⁵⁸ *See id.*

²⁵⁹ *See* Siegel, *supra* note 27, at 968–76 (describing the women’s suffrage movement’s battles over Section Two).

address racial discrimination expressly injected gender into the Constitution in order to retain the distinction between citizenship and political rights.

Overall, the Thirty-Ninth Congress deliberately structured the Fourteenth Amendment to protect civil and political rights in distinct sections. Section One protects civil rights whereas Section Two provides a penalty for disenfranchisement. This sectional separation provides strong evidence that Section One was not a general grant of suffrage.²⁶⁰

D. Congress's Fourteenth Amendment Enforcement Authority

Section Five of the Fourteenth Amendment provides that “Congress shall have power to enforce, by *appropriate* legislation, the provisions of this article.”²⁶¹ The key term here is “appropriate,” which the Reconstruction Framers first included in the Thirteenth Amendment’s Enforcement Clause and used again in the Fifteenth Amendment’s Enforcement Clause.²⁶²

During Reconstruction, the term “appropriate” was understood to embody the deferential approach to congressional authority articulated in *McCulloch v. Maryland*.²⁶³ It is well established that the Reconstruction Framers’ selection of the term “appropriate” was a deliberate adoption of

²⁶⁰ See AMAR, BILL OF RIGHTS, *supra* note 182, at 217–18 (commenting that the “overall architecture of the Fourteenth Amendment . . . [has] civil rights at the core of section 1 and political rights featured separately in section 2”).

Section Two is not the only provision of the Fourteenth Amendment that implicates political rights. Section Three prohibited rebels who had previously sworn an oath to defend the Constitution from holding federal or state office—a paradigmatic political right—absent a two-thirds congressional amnesty. U.S. CONST. amend. XIV, § 3. The impact was intentionally decapitating: “[T]he Amendment made virtually the entire political leadership of the South ineligible for office.” FONER, *supra* note 8, at 259.

In many ways, the disqualification of ex-rebels by Section Three is an early example of “militant democracy.” As Professor Karl Loewenstein argued while fascist and communist governments gained power in Europe in the 1930s, liberal democracies must sometimes take steps to protect themselves from antidemocratic forces that participate in the political process. See Karl Loewenstein, *Militant Democracy and Fundamental Rights, I*, 31 AM. POL. SCI. REV. 417, 422–23 (1937); Karl Loewenstein, *Militant Democracy and Fundamental Rights, II*, 31 AM. POL. SCI. REV. 638, 656–58 (1937); see also Gregory H. Fox & Georg Nolte, *Intolerant Democracies*, 36 HARV. INT’L L.J. 1, 59 (1995) (arguing that a democracy “may defend itself against anti-democratic actors”); Samuel Issacharoff, *Fragile Democracies*, 120 HARV. L. REV. 1405, 1467 (2007) (“Virtually all democratic societies define some extremist elements as beyond the bounds of democratic tolerance.”). Indeed, the United States would use similar tactics in its de-Nazification and de-Baathification campaigns in Germany and Iraq. See, e.g., FREDERICK TAYLOR, EXORCISING HITLER: THE OCCUPATION AND DENAZIFICATION OF GERMANY 253–54 (2011); Shane Harris, *The Re-Baathification of Iraq*, FOREIGN POL’Y (Aug. 21, 2014, 11:51 PM), <https://foreignpolicy.com/2014/08/21/the-re-baathification-of-iraq/> [<https://perma.cc/X7JJ-BBTM>].

²⁶¹ U.S. CONST. amend. XIV, § 5 (emphasis added).

²⁶² *Id.* amend. XIII, § 2; *id.* amend. XV, § 2.

²⁶³ 17 U.S. (4 Wheat.) 316 (1819).

McCulloch's broad conception of congressional authority.²⁶⁴ The Reconstruction Framers' borrowing of the *McCulloch* standard may be the most significant example of the old adage that "if a word is obviously transplanted from another legal source . . . it brings the old soil with it."²⁶⁵

In addition to the acknowledged legal significance of the word "appropriate," the Reconstruction Framers' selection of the term "enforce" signals a broad delegation of power to Congress. "To 'enforce' a provision meant the same thing in 1868 as it does today: to ensure compliance with the provision and make it effective."²⁶⁶ Enforcement entails both a remedy for prior bad acts and a prophylaxis for preventing and deterring future unconstitutional conduct.²⁶⁷

The Reconstruction Framers' choice of words reveals Section Five's underlying purpose: to empower Congress vis-à-vis the states and the Supreme Court. In passing the Fourteenth Amendment, the Reconstruction Framers sought to upend the Founding's federalism balance. The Reconstruction Framers were concerned that the ex-Confederate States were trampling on the rights of the newly freed slaves by enacting the notorious Black Codes.²⁶⁸ Under antebellum jurisprudence, states were not bound by the Bill of Rights.²⁶⁹ By granting citizenship to newly freed slaves and protecting their civil rights, the Fourteenth Amendment imposed substantial

²⁶⁴ See, e.g., *Katzenbach v. Morgan*, 384 U.S. 641, 650 (1966) ("By including § 5 the draftsmen sought to grant to Congress, by a specific provision applicable to the Fourteenth Amendment, the same broad powers expressed in the Necessary and Proper Clause. The classic formulation of the reach of those powers was established by Chief Justice Marshall in *McCulloch v. Maryland* . . ." (footnote omitted)); AMAR, AMERICA'S CONSTITUTION, *supra* note 16, at 362 ("*McCulloch* was read in the nineteenth century as providing a generous understanding of congressional power."); Balkin, *supra* note 135, at 1810 ("The framers of the Reconstruction Amendments assumed that the *McCulloch* test would apply to Congress's new Reconstruction Powers, and the use of the term 'appropriate' in the text of all three enforcement clauses reflects this assumption."); McConnell, *Institutions*, *supra* note 148, at 188 (noting that the term "appropriate" "has its origins in the latitudinarian construction of congressional power in *McCulloch*"); Engel, *supra* note 201, at 118 ("In drafting Section 5 of the Fourteenth Amendment, the Republicans borrowed explicitly from *McCulloch* in granting Congress the power to enforce the provisions of the amendment by *appropriate* legislation.").

²⁶⁵ Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 537 (1947).

²⁶⁶ Balkin, *supra* note 135, at 1815.

²⁶⁷ See Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 823 (1999) (arguing that the Reconstruction Congress believed that its enforcement authority went beyond "mere remedial legislation"); Balkin, *supra* note 135, at 1815 (defining enforcement to mean that Congress can "remedy past violations and prevent future ones").

²⁶⁸ See *supra* Section II.B.

²⁶⁹ *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243, 249–51 (1833).

new obligations on the states.²⁷⁰ And Section Five ensured that these obligations would not only be imposed by the Constitution but also enforced by federal statutes.

The Reconstruction Framers were also deeply skeptical of the Supreme Court, which had accelerated the nation's descent into civil war with its decision in *Dred Scott v. Sandford*. Section Five responded to the legitimate and prevailing “fear that the judiciary would frustrate Reconstruction by a narrow interpretation of congressional power.”²⁷¹ Given this, Section Five embodies the Reconstruction Framers’ desire to give Congress—not the Supreme Court—primary authority in enforcing the Fourteenth Amendment.²⁷²

III. THE PATH TO THE FIFTEENTH AMENDMENT

In this Part, I chart the advancement of black suffrage at the state level and through congressional action, culminating in the Fifteenth Amendment. In the early years of Reconstruction, black suffrage expanded from New England to the District of Columbia, the federal territories, the Reconstructed South, and parts of the Midwest. As with the abolition of slavery and the protection of civil rights,²⁷³ progress on black suffrage was incremental. It was not until after the 1868 election that nationwide black suffrage became a realistic possibility. Although moderate Republicans ultimately agreed with their Radical colleagues that Blacks should be enfranchised nationwide, the Republican Party was split as to the best means of achieving that goal. This Part concludes by excavating the Article V debate and the Reconstruction Framers’ reasons for rejecting a black suffrage statute and opting only for a constitutional amendment. Because the Article V debate was the first sustained post-ratification discussion of the Fourteenth Amendment, this history sheds new light on the original understanding of both the Fourteenth and Fifteenth Amendments.

²⁷⁰ See *City of Boerne v. Flores*, 521 U.S. 507, 524 (1997) (“As enacted, the Fourteenth Amendment confers substantive rights against the States which . . . are self-executing.”).

²⁷¹ McConnell, *Institutions*, *supra* note 148, at 182. Congress’s concern about the Court also proved prescient. See Balkin, *supra* note 135, at 1850 & n.186 (discussing Reconstruction-era legislation invalidated or narrowed by the Supreme Court).

²⁷² See Balkin, *supra* note 135, at 1805 (“Congress gave *itself* these powers because it believed it could not trust the Supreme Court to protect the rights of the freedmen” (emphasis added)).

²⁷³ See *supra* Section II.B.

A. *Limited Progress at the Northern Polls*

At the end of the Civil War, only five New England states—Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont—enfranchised black voters.²⁷⁴ New York technically permitted Blacks to vote, but it imposed racially discriminatory property and residency qualifications that left virtually all Blacks disenfranchised.²⁷⁵ Around that time, “blacks comprised less than 2 percent of the North’s population,”²⁷⁶ but in Border States like Maryland and Delaware, they were approximately one-fifth of the population.²⁷⁷ Thus, the potential political power of Blacks varied across the Northern and Border States.

Republican attempts to enfranchise Blacks in statewide referenda met with limited success in the North and Midwest. First held in 1865, black suffrage referenda were defeated by substantial majorities in five jurisdictions: Colorado, Connecticut, Wisconsin, Minnesota, and Washington, D.C.²⁷⁸ In 1866, Nebraska voters rejected black suffrage.²⁷⁹ And in 1867, black suffrage referenda met the same fate in Ohio, Kansas, and Minnesota.²⁸⁰ It was not until 1868 that the Radical Republican enfranchisement agenda won at the polls, when Iowa and Minnesota endorsed black suffrage.²⁸¹ That same year, however, Missouri voters rejected black suffrage in a referendum.²⁸²

Racism toward Blacks, therefore, remained a pervasive feature of Northern politics. Indeed, “[b]y the end of 1868, . . . no northern state with a relatively large Negro population had voluntarily accepted full Negro suffrage.”²⁸³ Minnesota’s experience underscores the persistence of Northern racism: in 1870, the state had a miniscule black population—759 out of

²⁷⁴ See AMAR, *AMERICA’S CONSTITUTION*, *supra* note 16, at 393, 610 n.88.

²⁷⁵ See *id.*; CHRISTOPHER MALONE, *BETWEEN FREEDOM AND BONDAGE: RACE, PARTY, AND VOTING RIGHTS IN THE ANTEBELLUM NORTH* 54–55 (2008).

²⁷⁶ FONER, *supra* note 8, at 25.

²⁷⁷ See GILLETTE, *supra* note 11, at 82 tbl.1.

²⁷⁸ See *id.* at 25–26; see also *infra* note 294 and accompanying text (discussing Washington, D.C. suffrage legislation passed in 1867).

²⁷⁹ GILLETTE, *supra* note 11, at 26.

²⁸⁰ *Id.*

²⁸¹ *Id.*

²⁸² *Id.* In addition, Michigan voters rejected a new state constitution that would have enfranchised Blacks. *Id.*

²⁸³ *Id.* at 27. In 1866, the Wisconsin Supreme Court issued a decision enfranchising Blacks under state law. See *id.*; see also *Gillespie v. Palmer*, 20 Wis. 544 (1866).

446,056 people—but only adopted black suffrage in its *third* referendum.²⁸⁴ One explanation for this reluctance is the bigoted fear among Northern voters that enfranchising Blacks would “induce a massive influx of new blacks into the state.”²⁸⁵ This collective action problem militated in favor of a nationwide solution to Northern racism.

B. *Expanding Black Suffrage Through Federal Legislation*

Before the 1866 midterm election, the push for black suffrage in Congress was met with no success. In 1865, a bill to enfranchise Blacks in Washington, D.C. passed the House but languished in the Senate.²⁸⁶ A similar bill to enfranchise Blacks in the territories failed in early 1866.²⁸⁷ The situation, however, changed dramatically after the 1866 election.

Running on a platform to ratify the Fourteenth Amendment,²⁸⁸ Republicans won the 1866 election in a landslide.²⁸⁹ The resounding victory “strengthened the position of the radical wing of the party,”²⁹⁰ and the Fourteenth Amendment was ratified in July 1868.²⁹¹ But in the interim, the lame-duck Thirty-Ninth Congress pushed through several black suffrage laws in early 1867.²⁹² However, subsequent efforts to expand black suffrage nationwide stalled in the first and second sessions of the Fortieth Congress.

1. *Victories in the Thirty-Ninth Congress*

Energized by their recent electoral success, the Radicals in the lame-duck Thirty-Ninth Congress first turned to federal domains, where

²⁸⁴ FRANCIS A. WALKER, A COMPENDIUM OF THE NINTH CENSUS (JUNE 1, 1870): COMPILED PURSUANT TO A CONCURRENT RESOLUTION OF CONGRESS, AND UNDER THE DIRECTION OF THE SECRETARY OF THE INTERIOR 20 (1872).

²⁸⁵ AMAR, AMERICA’S CONSTITUTION, *supra* note 16, at 399; *see also* ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 89 (2000) (attributing the referenda defeats to the deeply rooted Northern fear of black migration).

²⁸⁶ FONER, *supra* note 8, at 240. Around the same time, a Washington, D.C. suffrage referendum lost by a margin of 35 to 6951. *Id.*

²⁸⁷ *See* GILLETTE, *supra* note 11, at 30.

²⁸⁸ *See, e.g.*, Balkin, *supra* note 135, at 1847.

²⁸⁹ *See, e.g.*, ACKERMAN, TRANSFORMATIONS, *supra* note 249, at 178–82.

²⁹⁰ MALTZ, *supra* note 12, at 123.

²⁹¹ *See* ACKERMAN, TRANSFORMATIONS, *supra* note 249, at 211; *see also id.* at 182 (noting that Republicans controlled every state legislature in the North after the 1866 election).

²⁹² Prior to the ratification of the Twentieth Amendment, presidents and Congresses ended their terms in March, as opposed to January. *See* U.S. CONST. amend. XX, § 1; BRUCE ACKERMAN, THE FAILURE OF THE FOUNDING FATHERS: JEFFERSON, MARSHALL, AND THE RISE OF PRESIDENTIAL DEMOCRACY 116–19 (2005).

Congress's power was at its zenith.²⁹³ In January 1867, Congress overcame President Johnson's veto and mandated black suffrage in Washington, D.C.²⁹⁴ That same month, Congress also enfranchised Blacks in the territories.²⁹⁵ In addition, Congress overrode President Johnson's veto when it required Nebraska to abolish its racially discriminatory suffrage requirements as a condition of statehood.²⁹⁶ This tactic was the first of the so-called "fundamental conditions" that Congress would impose related to black suffrage and the admission—and readmission—of states to the Union.²⁹⁷ The constitutionality of these fundamental conditions, however, was controversial, including within the Republican Party.²⁹⁸

Congress then turned its attention to the South.²⁹⁹ The First Reconstruction Act of 1867 imposed black suffrage on the ex-Confederate States, with the exception of Tennessee.³⁰⁰ Congress also compelled the Southern States to ratify the Fourteenth Amendment as a fundamental

²⁹³ Congress may "exercise exclusive Legislation in all Cases whatsoever" in the "Seat of the Government of the United States." U.S. CONST. art I, § 8, cl. 17. And under the Territory Clause, Congress has the "Power to . . . make all needful Rules and Regulations respecting the Territor[ies] . . . [of] the United States." *Id.* art. IV, § 3.

²⁹⁴ See An Act to Regulate the Elective Franchise in the District of Columbia, ch. 6, 14 Stat. 375 (1867); Wang, *supra* note 248, at 2200.

²⁹⁵ See An Act to Regulate the Elective Franchise in the Territories of the United States, ch. 15, 14 Stat. 379 (1867). Compliance with this statute varied depending on which party controlled the territorial government. Republican-controlled Colorado and Dakota allowed Blacks to vote, but Democratic-controlled Washington continued to discriminate based on race. See GILLETTE, *supra* note 11, at 30 n.13.

²⁹⁶ See An Act for the Admission of the State of Nebraska into the Union, ch. 36, § 3, 14 Stat. 391, 392 (1867); Wang, *supra* note 248, at 2204–05 (discussing veto override). A companion bill would have imposed the same condition on the Colorado territory, but the Senate failed to overcome President Johnson's veto. See *id.* at 2205.

²⁹⁷ See MALTZ, *supra* note 12, at 127 (discussing Nebraska); *id.* at 140 (noting the use of "fundamental conditions" on the readmission of seven ex-Confederate States in 1868).

²⁹⁸ For example, Senator Jacob Howard—who introduced the Fourteenth Amendment in the Senate—"was also one of the most persistent critics of the idea that Congress could set suffrage-related conditions for admission to statehood that would bind erstwhile territories after the admission process was completed." *Id.* at 127; see also Colby, *supra* note 153, at 1162–64 (discussing doubts about the validity of these fundamental conditions to statehood and their role in the passage of the Fifteenth Amendment).

²⁹⁹ For a discussion of Congress's motives in passing the Reconstruction Acts, see Gabriel J. Chin, *The "Voting Rights Act of 1867": The Constitutionality of Federal Regulation of Suffrage During Reconstruction*, 82 N.C. L. REV. 1581, 1589–90 (2004).

³⁰⁰ See First Reconstruction Act, ch. 153, § 5, 14 Stat. 428, 429 (1867). Tennessee enacted legislation enfranchising Blacks in February 1867 after its readmission to the Union. See W.E. BURGHARDT DUBOIS, *BLACK RECONSTRUCTION IN AMERICA: AN ESSAY TOWARD A HISTORY OF THE PART WHICH BLACK FOLK PLAYED IN THE ATTEMPT TO RECONSTRUCT DEMOCRACY IN AMERICA, 1860–1880*, at 575 (2d ed. 1962).

condition for readmission.³⁰¹ The Republicans' logic was straightforward: enfranchising Blacks would provide a new voter base to govern and transform the South.³⁰² Reforming the South would prove difficult, and Congress needed help getting the Fourteenth Amendment ratified.³⁰³

In passing these black suffrage statutes, the Thirty-Ninth Congress differentiated between its sources of authority. Congress relied on the District of Columbia's and the territories' status as federal domains to justify its first extension of suffrage.³⁰⁴ And when acting in the former Confederacy, the Radicals invoked the Guarantee Clause³⁰⁵—the “sleeping giant in the Constitution”³⁰⁶—as their font of authority on the grounds that those states' substantial black populations mandated black suffrage.³⁰⁷ Congress, however, declined to apply its Guarantee Clause authority to the loyal states, all of which had smaller black populations.³⁰⁸ The Thirty-Ninth Congress adhered to this limiting principle as it extended suffrage in 1867, setting a precedent that would remain relevant in the Fortieth Congress even after the Fourteenth Amendment's ratification.

2. *The First and Second Sessions of the Fortieth Congress*

When the Fortieth Congress convened in March 1867, Republicans outnumbered Democrats three-to-one in the House and were well above the two-thirds veto threshold in the Senate.³⁰⁹ The Fortieth Congress would eventually pass the Fifteenth Amendment during its lame-duck session in February 1869. But before that—and even prior to the Fourteenth Amendment's ratification in July 1868—there were repeated calls by

³⁰¹ See First Reconstruction Act § 5; see also FONER, *supra* note 8, at 276 (“A precedent existed for requiring a state to ratify an amendment to gain representation in Congress, for Johnson had done precisely the same thing with regard to the Thirteenth.”); *supra* notes 296–298 and accompanying text.

³⁰² See Vikram David Amar & Alan Brownstein, *The Hybrid Nature of Political Rights*, 50 STAN. L. REV. 915, 919 (1998).

³⁰³ See ACKERMAN, TRANSFORMATIONS, *supra* note 249, at 196–98.

³⁰⁴ See Wang, *supra* note 248, at 2201–02; see also *supra* notes 293–295 and accompanying text (discussing Congress's power in federal domains).

³⁰⁵ U.S. CONST. art. IV, § 4. The Guarantee Clause is also referred to as the Republican Form of Government Clause.

³⁰⁶ CONG. GLOBE, 40th Cong., 1st Sess. 614 (1867) (statement of Sen. Sumner).

³⁰⁷ See Akhil Reed Amar, *The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem*, 65 U. COLO. L. REV. 749, 780–81 (1994) [hereinafter Amar, *Central Meaning*].

³⁰⁸ See AMAR, AMERICA'S CONSTITUTION, *supra* note 16, at 373–76; Amar, *Central Meaning*, *supra* note 307, at 780–81.

³⁰⁹ See ACKERMAN, TRANSFORMATIONS, *supra* note 249, at 182 (House); FONER, *supra* note 8, at 267 (Senate).

Radical Republicans to pass a nationwide black suffrage statute.³¹⁰ None of these attempts were met with any success, nor was the debate on these proposals as sophisticated or lengthy as the Article V debate in the lame-duck Fortieth Congress.³¹¹

In March 1867, Senator Henry Wilson (R-MA) introduced a bill that, upon the Fourteenth Amendment's ratification, would have prohibited the "denial of the elective franchise to any male citizen of the United States by any State on account of color or race or previous condition."³¹² Senator Sumner was another vocal advocate for nationwide black suffrage both in and out of Congress.³¹³ Sumner also introduced a nationwide black suffrage bill in March 1867, though his proposal relied on Congress's authority under the Guarantee Clause, the Thirteenth Amendment, and the not-yet-ratified Fourteenth Amendment.³¹⁴ Sumner waited until July 1867 to attempt to bring his bill to the floor, but he lost a procedural vote 12–22, with fifteen Republicans joining the Democrats in defeating the motion.³¹⁵ That same month, Representative John Broomall (R-PA) also introduced a nationwide black suffrage bill premised solely on the Guarantee Clause.³¹⁶ Broomall later gave a speech in March 1868 expounding on the Radicals' theory concerning that clause,³¹⁷ but the bill never came to a vote.³¹⁸

C. *Embracing Nationwide Black Suffrage*

Several factors coalesced in 1869 to convince the Reconstruction Framers to support nationwide black suffrage. These factors can be grouped into three broad categories: ideological, partisan, and pragmatic.³¹⁹

On the ideological front, Radicals had long advocated for black suffrage, viewing the right to vote "as a triumphant conclusion to four

³¹⁰ See MALTZ, *supra* note 12, at 131–36.

³¹¹ See *infra* Section III.D.

³¹² S. 111, 40th Cong. (1867); see also CONG. GLOBE, 40th Cong., 1st Sess. 292 (1867) (statement of Sen. Wilson) (introducing bill); MALTZ, *supra* note 12, at 132 (noting Wilson's introduction of the bill).

³¹³ See JAMES, *supra* note 227, at 173 (in Boston); Wang, *supra* note 248, at 2211 (in Congress).

³¹⁴ See S. 115, 40th Cong. (1867); see also CONG. GLOBE, 40th Cong., 1st Sess. 345 (1867) (statement of Sen. Sumner) (introducing bill); MALTZ, *supra* note 12, at 132 (noting Sumner's introduction of the bill).

³¹⁵ See CONG. GLOBE, 40th Cong., 1st Sess. 615 (1867); MALTZ, *supra* note 12, at 134.

³¹⁶ H.R. 126, 40th Cong. (1867).

³¹⁷ See CONG. GLOBE, 40th Cong., 2d Sess. 1955–60 (1868) (statement of Rep. Broomall).

³¹⁸ MALTZ, *supra* note 12, at 136.

³¹⁹ Historians have debated which of these motivations was predominant, see Amar & Brownstein, *supra* note 302, at 955 & n.104, but this Article need not pick sides in that debate.

decades of agitation on behalf of the slave.”³²⁰ After all, numerous Radicals—including Boutwell and Sumner—had tried to extend the franchise to Blacks during the Fourteenth Amendment’s drafting process.³²¹ Radical Republican ideology, therefore, was a powerful influence in the push for nationwide black suffrage.

The role of black soldiers in fighting the Civil War was also a major motivating factor. Black soldiers accounted for 10% of the Union army,³²² and their bravery and sacrifice eventually convinced many moderate Republicans to support their right to vote.³²³ In a related vein, the safety of southern black voters was another significant concern. Throughout Reconstruction, terrorism against black voters was rampant and severe, particularly during the 1868 election.³²⁴ And this violence occurred despite the Union Army’s role in registering voters and overseeing elections.³²⁵ The army, moreover, was a temporary solution; it was politically impossible for it to remain in the South for a generation—or more—to advance racial equality. As the means to securing political power, black suffrage was seen as the best non-military means of achieving racial equality and preventing violence in the South.³²⁶

Turning to partisan self-interest, the 1868 election results provided a strong impetus for enfranchising Blacks in the Northern and Border States. Although President Grant decisively defeated Democratic candidate Horatio Seymour in the Electoral College,³²⁷ his popular-vote victory was slim: only 300,000 out of 5.7 million votes.³²⁸ This narrow margin proved particularly worrisome for future Republican success: “Since more than a half-million black Americans voted under the terms of the Reconstruction Acts, this meant that most whites voted for Democrats Horatio Seymour and Frank

³²⁰ FONER, *supra* note 8, at 448.

³²¹ See *supra* Section II.C.

³²² See MICHAEL WALDMAN, *THE FIGHT TO VOTE* 61 (2016).

³²³ See Amar & Brownstein, *supra* note 302, at 933 & n.50.

³²⁴ See RON CHERNOW, *GRANT* 623 (2017) (discussing violence in Georgia and Louisiana); Grant, *Reconstruction and the KKK*, PBS: AM. EXPERIENCE, <https://www.pbs.org/wgbh/americanexperience/features/grant-kkk/> [https://perma.cc/SR5M-6CHF] (“In Arkansas, over 2,000 murders were committed in connection with the election. In Georgia, the number of threats and beatings was even higher. And in Louisiana, 1000 blacks were killed as the election neared. In those three states, Democrats won decisive victories at the polls.”).

³²⁵ See ACKERMAN, *TRANSFORMATIONS*, *supra* note 249, at 202.

³²⁶ See RICHARD M. VALELLY, *THE TWO RECONSTRUCTIONS: THE STRUGGLE FOR BLACK ENFRANCHISEMENT* 32 (2004).

³²⁷ See CHERNOW, *supra* note 324, at 623 (noting that Grant won “all but eight states and trounced Seymour in an electoral landslide of 214 to 80”).

³²⁸ See Wang, *supra* note 248, at 2214–15.

Blair.”³²⁹ The results in Congress were also concerning: Republicans lost eleven seats in the House but gained two Senators.³³⁰

Radical Republicans recognized that unlocking the black vote nationwide could swing future elections.³³¹ Indeed, the black electorate voted almost uniformly for the Republican Party and helped Grant win every readmitted, ex-Confederate State except “Georgia and Louisiana, where Klan violence was rife.”³³² During the Article V debate, Boutwell estimated that 150,000 Blacks would be enfranchised by a nationwide suffrage statute.³³³ Republicans believed that enfranchisement of Blacks in the Border States in particular would provide a new voter base and potentially forestall the gains made by the Democrats in the 1868 election.³³⁴

In the South, the goal was entrenching the tremendous impact of the First Reconstruction Act of 1867. In December 1866, only 0.5% of the nation’s black male population could vote. A year later, 80.5% of black males were eligible to vote.³³⁵ With the assistance of the Union army, black voter registration in 1867 was over 85% in nine of the eleven ex-Confederate States and over 95% in Alabama, Louisiana, Texas, and Virginia.³³⁶ Black turnout was also exceptionally high in several Southern States notwithstanding violence aimed at suppressing the vote.³³⁷

Because Blacks represented majorities or sizable minorities in the South, they quickly became a formidable electorate. Three Southern States had black majorities: Louisiana, Mississippi, and South Carolina. Blacks were just shy of a majority in three others—Alabama, Florida, and Georgia—and about 40% of the population in North Carolina and Virginia. And Blacks were approximately one-quarter of the population in Arkansas, Tennessee, and Texas.³³⁸ Across the South as a whole, black registration outpaced white registration.³³⁹ Given these demographic realities, the

³²⁹ ACKERMAN, *TRANSFORMATIONS*, *supra* note 249, at 236.

³³⁰ *See* Wang, *supra* note 248, at 2214.

³³¹ *See id.* at 2215.

³³² CHERNOW, *supra* note 324, at 623; *see also* Amar & Brownstein, *supra* note 302, at 943–46.

³³³ *See* CONG. GLOBE, 40th Cong., 3d Sess. 561 (1869) (statement of Rep. Boutwell).

³³⁴ *See id.* (providing specific numbers of black voters in Border States); Amar & Brownstein, *supra* note 302, at 943–46.

³³⁵ VALELLY, *supra* note 326, at 24.

³³⁶ *Id.* at 33 & tbl.2.1.

³³⁷ *See* CHERNOW, *supra* note 324, at 601 (noting that in 1867, black turnout was 70% in Georgia and nearly 90% in Virginia and that black voters outnumbered white voters in Alabama).

³³⁸ *See* FONER, *supra* note 8, at 294.

³³⁹ *See, e.g.*, Wang, *supra* note 248, at 2213 (estimating a black-to-white registration gap of 735,000 to 635,000).

Southern black voting bloc elected just over 250 black legislators in 1868,³⁴⁰ and Blacks held statewide offices in Florida, Louisiana, and South Carolina.³⁴¹ Republicans thus viewed Southern Blacks as a “loyal counterweight to the potential political power of the rebellious whites.”³⁴²

Notwithstanding the impact of the First Reconstruction Act, Congress did not “trust the existing [or] future legislatures of Southern States.”³⁴³ Indeed, as the price of readmission to the Union, Congress had imposed the fundamental condition that the constitutions of the Southern States not be amended to deny Blacks the right to vote.³⁴⁴ But as Congress’s constitutional power over the Southern States waned, Republicans worried—and Democrats asserted—that these fundamental conditions violated the equality of the states and would become practically and constitutionally unenforceable.³⁴⁵

Moreover, the Republican Party’s double standard on the suffrage issue appeared “ideologically inconsistent, politically expedient, and constitutionally awkward.”³⁴⁶ The 1868 Republican Convention produced a party platform that compromised on the issue of black suffrage.³⁴⁷ Although the platform praised the new Southern constitutions for “securing equal civil and *political* rights,”³⁴⁸ the convention declined to extend both bundles of rights to Northern Blacks. Drafted behind closed doors, the compromise provision read: “The guaranty by Congress of equal suffrage to all loyal men at the South was demanded by every consideration of public safety, of gratitude, and of justice, and must be maintained; while the question of

³⁴⁰ KOUSSER, *supra* note 76, at 19 fig.1.1.

³⁴¹ FONER, *supra* note 8, at 353 & tbl.

³⁴² MALTZ, *supra* note 12, at 132.

³⁴³ JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 33 (1980).

³⁴⁴ *See, e.g.*, MATHEWS, *supra* note 224, at 18.

³⁴⁵ *See id.*; Colby, *supra* note 153, at 1162–64; *see also infra* note 347 and accompanying text (discussing the Democratic Party platform).

³⁴⁶ Wang, *supra* note 248, at 2214.

³⁴⁷ Unsurprisingly, the 1868 Democratic Party platform rejected black suffrage. The Democratic platform demanded “the regulation of the elective franchise in the States, by their citizens.” Gerhard Peters & John T. Woolley, *1868 Democratic Party Platform*, AM. PRESIDENCY PROJECT (July 4, 1868), <http://www.presidency.ucsb.edu/ws/index.php?pid=29579> [https://perma.cc/83MB-U4RK]. Foreshadowing the Article V debate over the Fifteenth Amendment, the Democratic platform declared that “any attempt by congress, on any pretext whatever, to deprive any State of this right, or to interfere with its exercise, is a flagrant usurpation of power, which can find no warrant in the Constitution.” *Id.* The Democratic platform also called for an end to Reconstruction. *See id.*

³⁴⁸ Gerhard Peters & John T. Woolley, *Republican Party Platform of 1868*, AM. PRESIDENCY PROJECT (May 20, 1868) (emphasis added), <http://www.presidency.ucsb.edu/ws/index.php?pid=29622> [https://perma.cc/XW3D-CNAT].

suffrage in all the loyal States properly belongs to the people of those States.”³⁴⁹

Some Radicals—such as Thaddeus Stevens—were angered by the Northern concession.³⁵⁰ But the platform’s double standard mirrored the Guarantee Clause argument employed throughout Reconstruction: the ex-Confederate States with their large black populations must guarantee suffrage whereas the Northern States would be left to their own devices.³⁵¹ For their part, Democrats argued that disenfranchising Blacks in the Northern and Border States while simultaneously requiring black suffrage in the ex-Confederate States was evidence that the Republicans did not genuinely care about Blacks’ rights but rather sought to exploit their loyalty to the party for political gain.³⁵² By enfranchising Blacks in the Northern and Border States, Republicans could finally harmonize their position and defuse this Democratic talking point. Some moderate Republicans even viewed nationwide black suffrage as the best means of putting the debate over Reconstruction to rest and turning the Party’s attention to economic issues.³⁵³

Turning to pragmatic reasons for moderate Republican support for nationwide black suffrage, Congress’s failure to enforce Section Two was a key factor. Ironically, by 1869, the states at risk of losing seats due to Section Two were in the North.³⁵⁴ If the Republican Congress sought to enforce the Apportionment Clause, consistency demanded that the Border States face the same fate as any other state. In fact, some Border States were disenfranchising approximately one-fifth of their populations.³⁵⁵ Even if Republicans had decided to risk being labeled hypocrites and selectively strip states of House seats, members of Congress from the Border States may

³⁴⁹ *Id.*; see also GILLETTE, *supra* note 11, at 37 (discussing the drafting process).

³⁵⁰ See GILLETTE, *supra* note 11, at 38; see also MALTZ, *supra* note 12, at 138 (describing the party platform as “deliberately evad[ing] th[e] key issue” of black suffrage in the North).

³⁵¹ See *supra* notes 305–308 and accompanying text (discussing the Guarantee Clause).

³⁵² See MALTZ, *supra* note 12, at 132.

³⁵³ See MICHAEL LES BENEDICT, *Reform Republicans and the Retreat from Reconstruction*, in PRESERVING THE CONSTITUTION: ESSAYS ON POLITICS AND THE CONSTITUTION IN THE RECONSTRUCTION ERA 168, 182 (2006).

³⁵⁴ Cf. AMAR, AMERICA’S CONSTITUTION, *supra* note 16, at 397 (noting that Blacks could vote in the former Confederacy but not in many Northern States).

³⁵⁵ The percentage of the black voters in Kentucky, Delaware, and Maryland was 16.8%, 18.2%, and 22.5%, respectively. These states were well above the national average of 12.7%. GILLETTE, *supra* note 11, at 82 tbl.1.

have hesitated to go along with the plan out of fear of setting a precedent that would one day be used against them.³⁵⁶

Furthermore, Republicans recognized that many Northern Whites still harbored racist beliefs and feared that black suffrage would encourage Blacks to move to their states. Thus, some Republicans supported a nationwide solution that could eliminate the collective action problems facing the ad hoc statewide referenda.³⁵⁷

Finally, when it met for a third session in January 1869, the lame-duck Fortieth Congress had only two months remaining in its term,³⁵⁸ and “seventeen Republican state legislatures were still in session in March, and these legislatures could act on [any] Amendment before elections.”³⁵⁹ By acting quickly, Republicans could maximize the constitutionally determined time before the next federal elections and delay any potential electoral backlash.³⁶⁰ Thus, the Radicals were in a “race against the constitutional clock”³⁶¹ to enfranchise Blacks before the next election.

D. *The Article V Debate*

Contrary to what current doctrine would dictate, the Fourteenth Amendment’s ratification in July 1868 did not enfranchise any black voters at the time. When the lame-duck Fortieth Congress convened in January 1869, the country was evenly divided: seventeen states permitted black suffrage whereas seventeen did not. Racially discriminatory laws remained on the books in the Border States, the Mid-Atlantic, parts of the Midwest, and the West.³⁶² By contrast, black suffrage had expanded from New England to states in the Midwest and the former Confederacy.³⁶³ Black suffrage also

³⁵⁶ Section Two was also a half-measure: it applied only to the House and would not have impacted Senate representation even if senators were selected by a state legislature elected solely by white male voters. *See* U.S. CONST. amend. XV, § 2.

³⁵⁷ *See supra* note 285 and accompanying text (discussing failed black suffrage referenda).

³⁵⁸ *See supra* note 292 and accompanying text.

³⁵⁹ GILLETTE, *supra* note 11, at 79.

³⁶⁰ *See* AMAR, AMERICA’S CONSTITUTION, *supra* note 16, at 398.

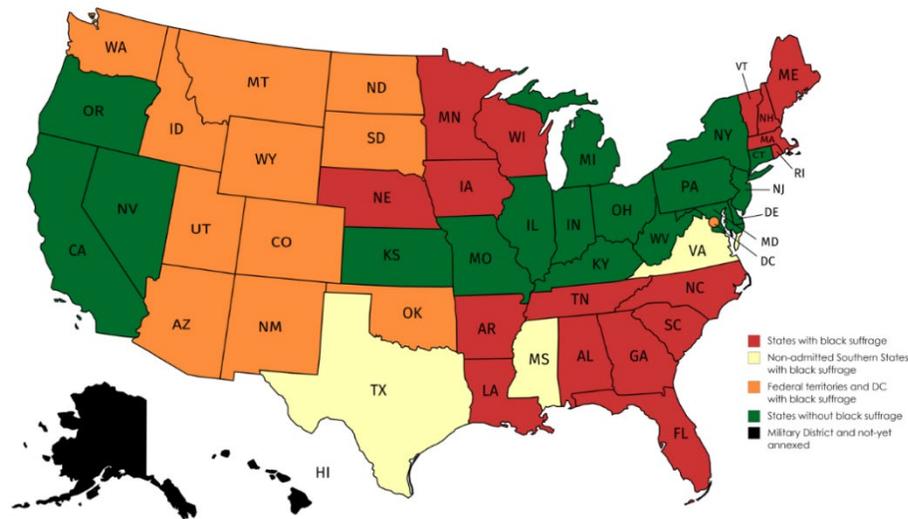
³⁶¹ ACKERMAN, TRANSFORMATIONS, *supra* note 249, at 235. Professor Ackerman uses this phrase to describe the Fourteenth Amendment, not the Fifteenth. *Id.*

³⁶² To be specific, the following states had racially discriminatory suffrage laws: California, Connecticut, Delaware, Illinois, Indiana, Kansas, Kentucky, Maryland, Michigan, Missouri, Nevada, New Jersey, New York, Ohio, Oregon, Pennsylvania, and West Virginia. *See supra* Sections III.A–III.B.

³⁶³ The right to vote free of racial discrimination existed in the following states: Alabama, Arkansas, Florida, Georgia, Iowa, Louisiana, Maine, Massachusetts, Minnesota, Nebraska, New Hampshire, North Carolina, South Carolina, Tennessee, Rhode Island, Vermont, and Wisconsin. In addition, the ex-Confederate States that had not been readmitted—Mississippi, Texas, and Virginia—had black suffrage. *See supra* Sections III.A–III.B.

existed in the District of Columbia and the federal territories.³⁶⁴ The map below depicts the status of black suffrage laws in January 1869.

FIGURE 1: STATUS OF BLACK SUFFRAGE LAWS IN JANUARY 1869



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Note: Figure created with mapchart.net.

But even this categorization of states obscures the precarious position of black suffrage. Of the former Confederate States, only Tennessee had voluntarily enfranchised Blacks.³⁶⁵ The remaining ten states had black suffrage imposed via the First Reconstruction Act.³⁶⁶ Mississippi, Texas, and Virginia remained under congressional supervision, as they had not yet been readmitted to the Union.³⁶⁷ But by January 1869, Arkansas, Louisiana,

³⁶⁴ At the time, the federal territories were Arizona, Colorado, Idaho, Montana, New Mexico, Oklahoma, Utah, Washington, Wyoming, and (the unified) Dakota. In 1869, Alaska had recently been purchased from Russia and was treated as a military district. See ERIC SANDBERG, *ALASKA DEP'T OF LABOR & WORKFORCE DEV., A HISTORY OF ALASKA POPULATION SETTLEMENT 7–8* (2013), <http://live.laborstats.alaska.gov/pop/estimates/pub/pophistory.pdf> [https://perma.cc/993X-D3JT]. Hawaii was not annexed until 1898. *Rice v. Cayetano*, 528 U.S. 495, 505 (2000) (“In 1898, President McKinley signed a Joint Resolution, sometimes called the Newlands Resolution, to annex the Hawaiian Islands as territory of the United States.”).

³⁶⁵ See DUBOIS, *supra* note 300, at 575.

³⁶⁶ First Reconstruction Act, ch. 153, § 6, 14 Stat. 428, 429 (1867).

³⁶⁷ See FONER, *supra* note 8, at 452.

Alabama, Georgia, Florida, South Carolina, and North Carolina had been readmitted to the Union.³⁶⁸ Although Congress had imposed pro-black-suffrage fundamental conditions in those states' constitutions,³⁶⁹ the legal validity and practical longevity of those provisions remained in doubt. And outside the South, Nebraska's black suffrage law was also a fundamental condition,³⁷⁰ and Wisconsin's black suffrage law was attributable to a judicial decision.³⁷¹

By 1869, the Republican Party supported the once-radical idea of nationwide black suffrage. The choice of means, however, was still undecided. It is often assumed that once the Southern States were readmitted to the Union, "Congress did not clearly possess alternative, constitutionally permissible means of mandating black suffrage by statute."³⁷² But many Radicals contested this point, and the issue was hotly debated during the lame-duck Fortieth Congress. In fact, the first nationwide black suffrage proposal considered by the lame-duck Fortieth Congress was a "double-barreled approach,"³⁷³ favoring both a statute and an amendment. The principal debate occurred over a bill introduced in the House by Representative George Boutwell, while a speech by Senator Charles Sumner provoked a brief discussion of the issue in the Senate.³⁷⁴ The Fortieth Congress ultimately selected the Article V route, but the reasons for that choice uncover important evidence about the original meanings of the Fourteenth and Fifteenth Amendments.

1. *The House Debate*

The Article V debate in the House was led by Congressman George Boutwell of Massachusetts, a Radical who "had been an early backer of the Republican Party and a stout supporter of Reconstruction."³⁷⁵ On January 11,

³⁶⁸ See MALTZ, *supra* note 12, at 140.

³⁶⁹ See *id.* (discussing how "universal suffrage became a fundamental condition for . . . readmission" to the Union).

³⁷⁰ See *id.* at 126–27.

³⁷¹ *Gillespie v. Palmer*, 20 Wis. 544 (1866).

³⁷² KLARMAN, *supra* note 225, at 29; see also MATHEWS, *supra* note 224, at 21 ("This condition of affairs emphasized the need of supplying a new basis for the continuance of congressional control over the suffrage conditions of the Southern States. This basis could be surely and safely supplied only by means of a new grant of power from the nation in the form of a suffrage amendment to the Constitution . . .").

³⁷³ GILLETTE, *supra* note 11, at 51.

³⁷⁴ *Id.*

³⁷⁵ CHERNOW, *supra* note 324, at 634. Boutwell had previously served as the Governor of Massachusetts and the Commissioner of Internal Revenue during the Civil War. He would soon become Secretary of the Treasury in the Grant Administration. See *id.* at 634–35; see also McConnell, *Institutions*, *supra* note 148, at 183 (describing Boutwell as "one of the most radical of Republicans").

1869, Boutwell introduced both a suffrage bill and an amendment.³⁷⁶ Boutwell's proposed amendment was nearly identical to what would eventually become the Fifteenth Amendment.³⁷⁷ Boutwell's bill, H.R. 1667, was intended "[t]o secure equal privileges and immunities to citizens of the United States, and to enforce the provisions of article fourteen of the amendments to the Constitution."³⁷⁸ The first section of Boutwell's bill provided:

That no State shall abridge or deny the right of any citizen of the United States to vote for electors of President and Vice President of the United States, or for Representatives in Congress, or for members of the legislature of the State in which he may reside, by reason of race, color, or previous condition of slavery; and any provisions in the laws or constitution of any State inconsistent with this section are hereby declared to be null and void.³⁷⁹

A few differences between the bill and the proposed amendment are noteworthy.³⁸⁰ First, the bill applied solely to the states, whereas the amendment prohibited racial discrimination in voting at both the state and federal level. Second, and relatedly, the bill protected the right to vote only in certain elections—namely, federal elections and state legislative races. Under Boutwell's bill, Blacks could still be barred from voting for state executive branch officials, state judges, and local officials. The proposed

³⁷⁶ CONG. GLOBE, 40th Cong., 3d Sess. 285 (1869) (statement of Rep. Boutwell). The bill was originally introduced as H.R. 1463, but the number was changed to H.R. 1667 on January 23, 1869. *See id.* at 285, 555.

³⁷⁷ The substantive provisions of Boutwell's proposed amendment and the Fifteenth Amendment are largely coextensive. *Compare id.* at 286 ("The right of *any* citizen of the United States to vote shall not be denied or abridged by the United States or any State *by reason of the* race, color, or previous condition of *slavery of any citizen or class of citizens of the United States.*" (emphasis added)), with U.S. CONST. amend. XV, § 1 ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."). The enforcement provisions of the proposed and final amendments are also substantially similar. *Compare* CONG. GLOBE, 40th Cong., 3d Sess. 286 (1869) (statement of Rep. Boutwell) ("The Congress shall have power to enforce by proper legislation the provisions of this article."), with U.S. CONST. amend. XV, § 2 ("The Congress shall have power to enforce this article by appropriate legislation.").

³⁷⁸ H.R. 1667, 40th Cong. (1869); *see also* CONG. GLOBE, 40th Cong., 3d Sess. 555 (1869) (statement of Speaker Colfax) (introducing the suffrage statute).

³⁷⁹ H.R. 1667, 40th Cong. (1869). Section 2 required voter registrars to comply with the bill's substantive provision. Section 3 criminalized private interference with the right to vote on the basis of race, color, or previous condition of servitude. Section 4 enforced Section Three of the Fourteenth Amendment's ban on office-holding for ex-Confederates. Section 5 conferred exclusive jurisdiction on federal courts to hear claims arising under the statute. *Id.*

³⁸⁰ Given the similarities between Boutwell's proposed amendment and the actual Fifteenth Amendment, the salient distinctions apply to both.

amendment, by contrast, was not limited to elections to specific offices.³⁸¹ Boutwell specifically addressed this point, stating that “there must be power in the national Government to provide whatever is necessary for its own preservation.”³⁸² According to Boutwell, the federal government could regulate its own elections and also the elections of state legislatures given their role in selecting United States senators.³⁸³

Debate over Boutwell’s bill would occur several days after its introduction. On January 23, 1869, Boutwell defended his statute–amendment two-step and specifically addressed those “who are of opinion that the subject is not within the proper scope of legislative power, and that the only way to secure equality of suffrage . . . without distinction of race or color[] is by an amendment.”³⁸⁴ Boutwell’s argument hinged on four sources of congressional authority, each of which he viewed as independently sufficient.³⁸⁵

First, as hinted at above, Boutwell argued that the federal government was authorized to regulate its own elections.³⁸⁶ He claimed that this “general principle[]” was supported by the “friends of the Constitution” during its ratification.³⁸⁷ Boutwell speculated that without such a power, the states could refuse to hold elections for the House or decline to choose senators or presidential electors.³⁸⁸ Congress, according to Boutwell, could step in to ensure that elections occurred with the electorate it so desired.

Second, Boutwell looked to Article I. He argued that Section Two, Clause One—which requires that voters for the House of Representatives “shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature”³⁸⁹—does not confer exclusive power over suffrage to the states. Rather, Boutwell read the clause as ambiguous about whether the states or the federal government could set suffrage

³⁸¹ *Cf.* *Rice v. Cayetano*, 528 U.S. 495, 523 (2000) (“The [Fifteenth] Amendment applies to ‘any election in which public issues are decided or public officials selected.’” (quoting *Terry v. Adams*, 345 U.S. 461, 468 (1953))).

³⁸² CONG. GLOBE, 40th Cong., 3d Sess. 556 (1869) (statement of Rep. Boutwell).

³⁸³ *See id.*

³⁸⁴ *Id.* at 555.

³⁸⁵ *See id.* at 560 (arguing that any one of these sources was “sufficient justification” to pass his bill, but also speculating that Congress may have a “cumulative power” under the various sources of authority).

³⁸⁶ *See id.* at 556.

³⁸⁷ *Id.*

³⁸⁸ *See id.*

³⁸⁹ *See* U.S. CONST. art. I, § 2, cl. 1.

qualifications.³⁹⁰ To resolve that ambiguity, Boutwell turned to the Elections Clause. Under that clause, states may prescribe the “Times, Places, and Manner of holding Elections for Senators and Representatives” unless Congress “make[s] or alter[s] such Regulations.”³⁹¹ Boutwell claimed that the federal government was authorized to regulate suffrage in the states because of the scope of the word “manner.”³⁹² Citing a debate between James Madison and Patrick Henry, Boutwell relied on Henry’s expansive view of federal authority under the Elections Clause—a view that he claimed was not expressly denied by Madison.³⁹³

Third, Boutwell invoked the Guarantee Clause—the Radicals’ favorite font of authority against the Reconstructed South.³⁹⁴ Boutwell stated that the purpose of the Guarantee Clause was to empower the federal government to prevent the establishment of an aristocracy in a state. Boutwell claimed that “[t]he essence of an aristocracy is in this, that the Government is in certain families made hereditary to the exclusion of others.”³⁹⁵ Under this definition, Boutwell argued that any state that disenfranchised any class of men was an aristocracy and specifically named Delaware, Kentucky, Maryland, Ohio, and Pennsylvania as examples of states that disenfranchised Blacks and therefore violated the Guarantee Clause.³⁹⁶ When pressed whether his theory would require the enfranchisement of women or universal suffrage, Boutwell dodged the question.³⁹⁷

³⁹⁰ See CONG. GLOBE, 40th Cong., 3d Sess. 556 (1869) (statement of Rep. Boutwell) (“But there is no declaration in this section that either [the States or the federal government] has the power, and certainly not that either has the power to the exclusion of the other.”).

³⁹¹ U.S. CONST. art I, § 4, cl. 1.

³⁹² See CONG. GLOBE, 40th Cong., 3d Sess. 556 (1869) (statement of Rep. Boutwell) (“[C]an anything be more clear than that the Congress of the United States has all the power which the States could exercise, except merely as to declaring where the Senators shall be chosen?”); *id.* (“It includes . . . everything relating to an election, from the qualifications of the elector to the deposit of his ballot in the box.”).

³⁹³ See *id.* at 556–57. Contrary to Boutwell’s argument, the Court has subsequently held that the power to “[p]rescrib[e] voting qualifications” falls outside the Elections Clause. *Arizona v. Inter-Tribal Council of Ariz., Inc.*, 570 U.S. 1, 17 (2013). The Court has also held that Congress’s authority under the Elections Clause is not subject to the presumption against preemption. See *id.* at 13–14.

³⁹⁴ See *supra* notes 305–307 and accompanying text. But see Ryan C. Williams, *The “Guarantee” Clause*, 132 HARV. L. REV. 602, 610–11 (2018) (looking to eighteenth-century treaties to argue that the Guarantee Clause confers no authority on the federal government to intervene in state affairs).

³⁹⁵ CONG. GLOBE, 40th Cong., 3d Sess. 557 (1869) (statement of Rep. Boutwell).

³⁹⁶ See *id.* at 558.

³⁹⁷ See *id.* at 557 (statement of Rep. Niblack (D-IN)) (asking about female suffrage); *id.* at 557–58 (statement of Rep. Boutwell) (“I will listen most attentively to any argument . . . in favor of the right of women to vote.”).

Finally, and most importantly for this Article, Boutwell relied on the recently ratified Fourteenth Amendment.³⁹⁸ Boutwell's first textual hook was the Privileges or Immunities Clause, which he claimed encompassed the right to vote. In support of this assertion, he produced a Kentucky Supreme Court case about a Pennsylvania slave living in Kentucky when Pennsylvania abolished slavery. Boutwell read aloud a lengthy portion of the opinion, which mentioned once in dicta that "civil, political, and religious" rights were among the "rights and privileges" of citizenship.³⁹⁹ In addition, Boutwell emphasized that the enactment of the Fourteenth Amendment allowed Blacks to exercise some political rights, such as the right to hold office. Boutwell specifically cited the qualifications for President, arguing that the office could be held by a disenfranchised, thirty-five-year-old, native-born, black citizen.⁴⁰⁰ For Boutwell, this "anomaly" militated in favor of viewing suffrage as a privilege or immunity of citizenship.⁴⁰¹

Boutwell also relied on Section Two. He characterized the Apportionment Clause as a "political penalty for doing that which in the first section it is declared the State has no right to do."⁴⁰² Boutwell claimed that the Thirty-Ninth Congress was well aware that the Border States were disenfranchising Blacks and that the Fourteenth Amendment was intended to rectify that problem.⁴⁰³ Boutwell failed to explain, however, why he advocated nationwide black suffrage instead of Section Two's explicit punishment of the loss of House seats.⁴⁰⁴

Boutwell's argument about the Fourteenth Amendment ultimately hinged on Section Five, which he characterized as a broad grant of authority. Congress could invoke Section Five to enforce Section One and expand upon

³⁹⁸ In contrast to current doctrine, which views the Equal Protection Clause as the principal source of voting rights protections in the Fourteenth Amendment, *see supra* Section I.A, Boutwell did not rely on the Equal Protection Clause for his argument. *See* Harrison, *supra* note 238, at 1440.

³⁹⁹ CONG. GLOBE, 40th Cong., 3d Sess. 558–59 (1869) (statement of Rep. Boutwell). Although Boutwell did not provide a citation, the decision is *Amy v. Smith*, 11 Ky. (1 Litt.) 326, 332 (1822). The case did not involve the right to vote. Rather, it was an action for trespass, assault and battery, and false imprisonment, and the question presented concerned whether the plaintiff was a slave at the time of the torts. *See id.* at 327.

⁴⁰⁰ *See* CONG. GLOBE, 40th Cong., 3d Sess. 559 (1869) (statement of Rep. Boutwell).

⁴⁰¹ *Id.*

⁴⁰² *Id.*

⁴⁰³ *See id.* ("We knew that Kentucky, Maryland, and Delaware were doing what they were inhibited from doing by the first section of the article, and we said that they should suffer in representation for so doing.").

⁴⁰⁴ U.S. CONST. amend. XIV, § 2 ("But when the right to vote at any election . . . is denied to any of the male inhabitants of such State . . . the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.").

Section Two’s remedy: “Power was given to Congress to remedy this evil, and that power Congress is now called upon to exercise.”⁴⁰⁵ Boutwell rationalized Section Two as an interim penalty because “[i]t was uncertain when Congress would exercise the power conferred by the fifth section of the fourteenth amendment, and in order that the States should not take advantage of their own wrong during the period while Congress might be inactive a penalty [Section Two] was provided.”⁴⁰⁶ Put simply, Boutwell’s vision of congressional enforcement authority mirrored—and even surpassed—the *McCulloch* standard:

[B]y the fifth section of the fourteenth article, Congress has power to enforce by appropriate legislation the provisions of the article. Does anybody doubt—in the presence of this provision of the Constitution, in view of the *unlimited power* under the fourteenth article to legislate so as to secure to citizens of the United States the privileges and immunities of citizens of any one of the States—does anybody doubt our duty?⁴⁰⁷

Boutwell concluded his speech by expressly defending his statute–amendment two-step. Boutwell stated that the Fourteenth Amendment’s text did not prohibit the federal government from limiting the franchise along racial lines and that an amendment was therefore needed to prevent future federal abuses.⁴⁰⁸ And while maintaining that Congress possessed authority under Section Five to ban racial discrimination in voting in *all* state elections, he believed that the proposed Fifteenth Amendment would remove any doubt about this power and would go beyond the offices specified in his bill.⁴⁰⁹

To be clear, Boutwell was distorting some of the facts. When asked about his own prior statements that the Fourteenth Amendment did not encompass political rights, Boutwell either dodged or lied: “I have no recollection of anything of that sort, though it may be that some persons did make such a concession . . . [A]nd I cannot say but that some members on this side of the House may have disavowed that construction; but I was not

⁴⁰⁵ CONG. GLOBE, 40th Cong., 3d Sess. 559 (1869) (statement of Rep. Boutwell).

⁴⁰⁶ *Id.*

⁴⁰⁷ *Id.* (emphasis added).

⁴⁰⁸ *See id.* at 560 (“Why, then, not submit a bill alone? Because there is no provision in the Constitution by which the United States is denied the power of abridging the right of citizens to vote.”).

⁴⁰⁹ *See id.* (“[A]lthough I am myself persuaded of the existence of the power, and that it covers all State officers, still a different argument may be made against the proposition to legislate in reference to State officers from that which can be made against the proposition contained in this bill.”); *id.* at 555 (acknowledging that the bill did not cover all state and local offices but asserting that “the powers of Congress are probably broader than those set forth” in the bill).

one of them.”⁴¹⁰ Notwithstanding this change of position, Boutwell was not alone. Several Radical Republicans spoke in favor of Boutwell’s bill.⁴¹¹

The Democrats’ response to Boutwell’s bill was predictably negative. Even setting aside the universal Democratic opposition to black suffrage in general,⁴¹² Democrats cried foul over the suffrage statute in particular. Democrats repeatedly attacked Boutwell’s bill on the grounds that it was a blatant violation of the Republican Party’s platform.⁴¹³ Representative James Beck (D-KY), for example, asserted that the platform was “intended to delude and deceive the people” and that Boutwell’s bill “cannot be supported by any man who did not publicly disavow the published principles of his party.”⁴¹⁴ Democrats even tried to scuttle the bill by proposing a poison pill that would have added protections for “sex, nativity, or age when over *twelve* years.”⁴¹⁵

⁴¹⁰ *Id.* at 559. *But see* CONG. GLOBE, 39th Cong., 1st Sess. 2508 (1866) (statement of Rep. Boutwell) (conceding that “[t]he proposition in the matter of suffrage falls short of what I desire, but so far as it goes it tends to the equalization of the inequality at present existing”); *id.* (“I demand and shall continue to demand the franchise for all loyal male citizens of this country . . .”).

⁴¹¹ *See* CONG. GLOBE, 40th Cong., 3d Sess. 692 (1869) (statement of Rep. Shanks (R-IN)) (“I will vote for the bill and proposed amendment of the gentleman from Massachusetts . . .”); *id.* at 694 (statement of Rep. McKee (R-KY)) (“Without a law to enforce that constitutional amendment it stands upon your statute-book to-day as a simple declaration.”); *id.* at 696 (“[W]hen this fourteenth amendment was adopted, which made all these people citizens, and declared that they should be entitled to all the rights and privileges of citizens, and declared that they should be entitled to all the rights and privileges of citizens, I had no longer any doubt as to the constitutional right of the Congress of the United States to declare that these men shall be voters in any and every State on the same footing with white men.”); *id.* at 721 (statement of Rep. Kelley) (“[T]he Constitution vests in Congress the right to regulate the suffrage . . .”); *id.* at app. 94 (statement of Rep. Corley (R-SC)) (citing the Privileges or Immunities Clause and stating that a “citizen of the United States is the political equal of every other citizen, and cannot be constitutionally denied the right to the ballot in any State except for rebellion or crime”); *id.* at app. 102 (statement of Rep. Broomall (R-PA)) (“[T]he bill is intended to produce immediately the same result which it may require the amendment several years to accomplish . . . I shall therefore support the bill . . .”).

⁴¹² *See* GILLETTE, *supra* note 11, at 73 n.111, 75 (showing that no Democrats voted for the Fifteenth Amendment).

⁴¹³ This criticism applied not only to the statute, but also the proposed amendment. *See* KLARMAN, *supra* note 225, at 29.

⁴¹⁴ CONG. GLOBE, 40th Cong., 3d Sess. 691 (1869) (statement of Rep. Beck (D-KY)); *see also id.* at 645 (statement of Rep. Eldredge (D-WI)) (“How many States would the party have carried upon the measure now being urged?”); *id.* at 658 (statement of Rep. Kerr (D-IN)) (“[T]his bill is justly subject to the same charge of bad faith . . .”); *id.* at 697 (statement of Rep. Burr (D-IL)) (criticizing the Boutwell bill as violating the 1868 platform).

⁴¹⁵ *Id.* at 561 (statement of Rep. Brooks (D-NY)) (emphasis added).

Democrats also argued that Boutwell’s bill was unconstitutional.⁴¹⁶ On January 27, 1869, Representatives Charles Eldredge (D-WI)⁴¹⁷ and Michael Kerr (D-IN)⁴¹⁸ gave lengthy speeches during which they offered detailed critiques of Boutwell’s bill’s constitutionality.⁴¹⁹ In response to Boutwell’s assertion that the federal government had an inherent authority to impose suffrage qualifications in federal and certain state elections,⁴²⁰ Eldredge argued that the states’ authority over suffrage qualifications was “almost unquestioned ever since and before the adoption of the Constitution” and that any supposed federal authority on the subject was “long-conceded.”⁴²¹

Regarding Article I, Eldredge claimed that the Qualifications Clause unambiguously gave states exclusive authority to establish suffrage qualifications.⁴²² Indeed, as Eldredge pointed out, Boutwell’s interpretation of the Qualifications Clause reversed the typical presumption that the federal government is one of enumerated powers and all other powers are reserved to the states.⁴²³ Regarding the Elections Clause, Eldredge produced his own lengthy list of Founding-era quotes and noted that Boutwell relied on Henry’s formulation of the clause even though Henry opposed the Constitution’s ratification.⁴²⁴ For his part, Kerr stated that the word “manner” in the Elections Clause gave Congress authority to decide whether to use

⁴¹⁶ See *id.* at 687–92 (statement of Rep. Beck) (criticizing Boutwell’s bill); *id.* at 697 (statement of Rep. Burr) (stating that the Elections Clause gives Congress power over “the time and manner of electing members of Congress—nothing more”); *id.* at 699 (claiming that the Fourteenth Amendment’s supporters “held that the whole article affirmed the right of a State to act on suffrage, and that because they would not all act alike it was necessary to equalize representation”).

⁴¹⁷ Eldredge was a member of the House Judiciary Committee. See *id.* at 555. The Congressional Globe misspelled Eldredge’s name as “Eldridge.” See Currie, *supra* note 203, at 453 & n.403.

⁴¹⁸ Kerr would go on to become the first post-Civil War Democratic Speaker of the House in 1875. See *List of Speakers of the House*, U.S. HOUSE OF REPRESENTATIVES: HISTORY, ART & ARCHIVES, <https://history.house.gov/People/Office/Speakers-List/> [<https://perma.cc/BLE6-B99J>].

⁴¹⁹ See CONG. GLOBE, 40th Cong., 3d Sess. 642–45 (1869) (statement of Rep. Eldredge); *id.* at 553–62 (statement of Rep. Kerr).

⁴²⁰ See *supra* notes 389–393 and accompanying text.

⁴²¹ CONG. GLOBE, 40th Cong., 3d Sess. 642 (1869) (statement of Rep. Eldredge); see also *id.* (arguing that the federal government had “acquiesced” to the states setting suffrage qualifications).

⁴²² See *id.* at 643 (“This right of the State to determine the qualification of the electors of the members of its Legislature is older than the Constitution . . . There is nothing in the Constitution . . . granting the power to the Federal Government or prohibiting it to the State.”).

⁴²³ Eldredge made this point during Boutwell’s speech. See *id.* at 556 (asking Boutwell whether “the States possess no powers except those which are granted to them in and by the Constitution” and remarking that he “supposed the rule to be entirely the other way”).

⁴²⁴ See *id.* at 642–44 (statement of Rep. Eldredge). Boutwell interjected and effectively conceded this point. See *id.* at 644 (statement of Rep. Boutwell).

single-member districts or to require a secret ballot—but not over suffrage qualifications.⁴²⁵

As to the Guarantee Clause, Eldredge claimed that Boutwell’s argument lacked any limiting principle. He explained that, when taken to its logical conclusion, there were “no republican States, because no[t] one of the States does allow all its citizens to exercise this privilege.”⁴²⁶ On this point, Eldredge remarked that the franchise was denied “to our citizens’ wives and daughters”⁴²⁷ without raising concerns under the Guarantee Clause.

And most importantly for this Article, the Democrats argued that the Fourteenth Amendment did not protect political rights. Kerr explained why suffrage was not a privilege or immunity of citizenship under Section One. According to Kerr, “American citizenship does not depend upon or coexist with the legal capacity to hold office and the right of suffrage.”⁴²⁸ Kerr pointed out that women were denied the right to vote whereas several states had enfranchised aliens.⁴²⁹ In addition, Eldredge emphasized that the Thirty-Ninth Congress’s Republican caucus interpreted the Fourteenth Amendment to exclude political rights.⁴³⁰ Eldredge further remarked that Section Two was conclusive proof that suffrage regulations remained a state prerogative.⁴³¹ Eldredge also accused the Republicans of hypocrisy and changing their position for political gain.⁴³² Neither Eldredge nor Kerr contested that *McCulloch* provided the governing standard under Section Five.⁴³³ This omission is telling because Eldredge and Kerr responded to every other argument marshalled by Boutwell.

⁴²⁵ See *id.* at 657 (statement of Rep. Kerr).

⁴²⁶ *Id.* at 644 (statement of Rep. Eldredge).

⁴²⁷ *Id.*

⁴²⁸ *Id.* at 654 (statement of Rep. Kerr).

⁴²⁹ See *id.* (discussing alien suffrage); *id.* at 658 (noting that women were disenfranchised and conceding that “[s]ex is no disqualification” for office).

⁴³⁰ See *id.* at 645 (statement of Rep. Eldredge) (“The power of the States to regulate and determine the qualification of voters was not questioned . . . and no gentleman can truthfully deny the fact.”); see also *supra* Section II.C.

⁴³¹ See CONG. GLOBE, 40th Cong., 3d Sess. 645 (1869) (statement of Rep. Eldredge) (“It was understood to be optional with the State to grant this right of suffrage to its negroes or have its representation in Congress proportionately diminished. Hon. Thaddeus Stevens, the late leader of the Republican party in this House, urged this view of the matter with peculiar emphasis.”).

⁴³² See *id.* at 645 (arguing that the Republican Party platform “let the loyal States alone”); *id.* (“How many States would the party have carried upon the measure now being urged?”); *id.* (criticizing Boutwell for claiming that “this bill will add one hundred and fifty thousand voters to his party”).

⁴³³ In fact, Kerr appears to concede that *McCulloch* applies. See *id.* at 654 (statement of Rep. Kerr) (“The language of the fourteenth amendment seems to have been intended to give Congress the power to enforce [its] provisions.”); see also *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). Kerr,

As they were outnumbered three-to-one,⁴³⁴ Democrats could not stop Boutwell’s bill. Rather, moderate Republicans held the balance of power and blocked it. The Ohio House Republican delegation—led by future President James Garfield—declared its opposition to the suffrage statute on constitutional grounds and backed an amendment instead.⁴³⁵ President Grant voiced “doubt about the power of Congress to regulate suffrage by law, but said that there could be no sound objection to submitting a constitutional amendment to the people.”⁴³⁶ Republican newspapers also expressed concern that Boutwell’s bill was unconstitutional while endorsing the Fifteenth Amendment.⁴³⁷ Within Congress, Bingham reminded the chamber that he believed suffrage was outside the Fourteenth Amendment,⁴³⁸ and Representative Samuel Shellabarger (R-OH) contested Boutwell’s view of the Qualifications Clause and Guarantee Clause.⁴³⁹ And on the pragmatic front, even Radical Republicans worried about the prospect of Boutwell’s bill passing and the amendment failing, meaning that a future Congress could simply repeal nationwide black suffrage.⁴⁴⁰

On January 28, 1869, Representative Boutwell announced that he “underst[oo]d there has been a general agreement that some amendment to the Constitution should be proposed.”⁴⁴¹ Boutwell conceded defeat and asked that the amendment be voted on before the bill.⁴⁴² The next day, after continued discussion of the statute by other representatives, Boutwell again recognized the political reality that “there is a very general agreement that it

however, did not dwell on the question and turned his attention to his narrower interpretation of the Privileges or Immunities Clause. CONG. GLOBE, 40th Cong., 3d Sess. 654 (1869).

⁴³⁴ See ACKERMAN, TRANSFORMATIONS, *supra* note 249, at 182.

⁴³⁵ See GILLETTE, *supra* note 11, at 51. Boutwell’s bill had been printed in full or discussed in-depth in newspapers around the country. See *Congress*, LOWELL DAILY CITIZEN & NEWS, Jan. 25, 1869; *Impartial Suffrage*, MILWAUKEE DAILY SENTINEL, Jan. 25, 1869; *The Suffrage Question*, DAILY CLEVELAND HERALD, Jan. 18, 1869; see also *Reconstruction and Suffrage in the House*, DAILY CLEVELAND HERALD, Jan. 25, 1869 (discussing Boutwell’s position).

⁴³⁶ Editorial, *From Washington*, LOWELL DAILY CITIZEN & NEWS, Feb. 3, 1869 (noting that the interview occurred with Boston’s *Advertiser* newspaper). Grant later endorsed the Fifteenth Amendment in his Inauguration Address. See CHERNOW, *supra* note 324, at 631–32.

⁴³⁷ See, e.g., *The Suffrage Question in the House*, MILWAUKEE DAILY SENTINEL, Jan. 26, 1869.

⁴³⁸ See CONG. GLOBE, 40th Cong., 3d Sess. 727 (1869) (statement of Rep. Bingham) (describing his position on the Fourteenth Amendment and stating that a new amendment was needed to “establish impartial suffrage”); *supra* note 216 and accompanying text (discussing Bingham’s prior statements).

⁴³⁹ CONG. GLOBE, 40th Cong., 3d Sess. 560 (1869) (statement of Rep. Shellabarger).

⁴⁴⁰ See GILLETTE, *supra* note 11, at 51–52 (“If the bill succeeded but the amendment failed, it was argued, then a mere bill could repeal what the Boutwell bill extended—namely, Negro suffrage.”).

⁴⁴¹ CONG. GLOBE, 40th Cong., 3d Sess. 686 (1869) (statement of Rep. Boutwell).

⁴⁴² See *id.*

is desirable to submit an amendment.”⁴⁴³ After this announcement, the House turned its attention to passing nationwide black suffrage via an amendment.

2. *The Senate Debate*

Senator Charles Sumner, a prominent abolitionist advocate and martyr,⁴⁴⁴ had long argued that Congress had the authority to impose black suffrage on the states via statute.⁴⁴⁵ On December 7, 1868, Sumner introduced Senate Resolution 650, a bill “to enforce the several provisions of the Constitution abolishing slavery, declaring the immunities of citizens, and guarantying a republican form of government, by securing the elective franchise to citizens deprived of it by reason of race, color, or previous condition.”⁴⁴⁶ Sumner’s statute resembled Boutwell’s bill, though it was broader in scope. Its core provision provided that:

[N]o citizen of the United States shall be deprived of the elective franchise by reason of race, color, or previous condition, but all citizens, without regard to race, color, or previous condition, shall have the right, if not otherwise disqualified, to be registered, and to vote at all elections for members of Congress, presidential electors, representatives, and senators to State or territorial legislatures, for all State, county, city, town, and other officers of every kind, upon equal terms and conditions, and every provision of any constitution, statute, and ordinance, and every custom in any State or Territory inconsistent herewith, are declared null and void.⁴⁴⁷

Sumner’s statute was short-lived. It was indefinitely postponed on January 15, 1869—a few days before Boutwell’s bill met the same fate.⁴⁴⁸ Compared to the House, there was not as lengthy a debate about whether Congress could and should adopt *both* a statute and an amendment.⁴⁴⁹

⁴⁴³ *Id.* at 725.

⁴⁴⁴ Sumner was an acclaimed orator and Congress’s “leading proponent” of black rights. DAVID DONALD, CHARLES SUMNER AND THE RIGHTS OF MAN 7–9 (1970). After giving an 1856 speech denouncing slavery, Sumner was brutally caned on the floor of the U.S. Senate by South Carolina Representative Preston Brooks. *See id.* at 7–8.

⁴⁴⁵ *See supra* Section III.C (discussing previous bills introduced by Sumner).

⁴⁴⁶ CONG. GLOBE, 40th Cong., 3d Sess. 5 (1868) (statement of Sen. Sumner).

⁴⁴⁷ S. 650, 40th Cong. (1868). Like Boutwell’s bill, Sumner’s statute prohibited disenfranchisement based on race, color, or previous condition of servitude; imposed obligations on voter registrars; criminalized private interference with the right to vote; and created a cause of action to sue in federal court. *See id.* Sumner’s statute, however, applied to a broader set of state and local elections. *See id.*; *supra* Section III.D.1 (discussing Boutwell’s bill).

⁴⁴⁸ *See* CONG. GLOBE, 40th Cong., 3d Sess. 378 (1869).

⁴⁴⁹ Boutwell introduced both a statute and an amendment and served as floor manager of both. *See supra* Section III.D.1.

Nevertheless, Sumner and other Radical Republicans voiced their belief that Congress could enact nationwide black suffrage via statute.⁴⁵⁰

On February 5, 1869, a week after Boutwell's bill died in the House, Sumner gave a speech endorsing federal power to regulate suffrage in the states. His arguments echoed Boutwell's and addressed many of the same points.⁴⁵¹ But Sumner's vision of congressional power was arguably even broader than Boutwell's, and his views on the Reconstruction Amendments merit attention. Sumner collapsed the political versus civil rights divide into the general concept of human rights.⁴⁵² He declared that, under the Reconstruction Amendments, "*anything for Human Rights is constitutional*. Yes, sir; against the old rule, *anything for slavery*, I put the new rule, *anything for Human Rights*."⁴⁵³ Sumner's conception of congressional power was holistic, combining the Guarantee Clause and the Thirteenth and Fourteenth Amendments into a robust enforcement authority.⁴⁵⁴

Sumner expressly compared his suffrage statute to the Civil Rights Act of 1866, which had been authorized under Congress's Thirteenth Amendment enforcement authority and subsequently constitutionalized as Section One of the Fourteenth Amendment. Sumner extolled congressional power under the Thirteenth Amendment: "[a]lready Congress, in the exercise of this power, has passed a *civil rights act*. It only remains, that it should now pass a *political rights act*, which, like the former, shall help consummate the abolition of slavery."⁴⁵⁵ In support of this interpretation, Sumner invoked "a *familiar* rule of interpretation, expounded by Chief Justice Marshall in his most masterly judgment,"⁴⁵⁶ which can only be a reference to *McCulloch*.⁴⁵⁷

⁴⁵⁰ Indeed, Sumner went so far as to argue that an amendment was unnecessary because Congress's power under the Guarantee Clause, Thirteenth Amendment, and Fourteenth Amendment was "too clear [to] question" and because a suffrage statute would "never be repealed" and would "be as lasting as the National Constitution itself." CONG. GLOBE, 40th Cong., 3d Sess. 903 (1869) (statement of Sen. Sumner). Despite these assurances, Sumner questioned whether there were enough "States whose votes can be counted on to assure its ratification within any reasonable time." *Id.* at 904.

⁴⁵¹ Regarding the Qualifications Clause, Sumner asserted that "[c]olor cannot be a 'qualification'" because it is "derived from nature," whereas a qualification is attained. *Id.* at 902. In addition, Sumner invoked the Guarantee Clause as a source of authority. Sumner defined "[a] Republic [a]s where taxation and representation go hand in hand." *Id.* at 903. Based on this definition, Sumner believed that denying suffrage based on race created a "Caste or Oligarchy" in violation of the Guarantee Clause. *Id.*

⁴⁵² *See id.* at 902 ("[A] State transcends its proper function, when it interferes with those equal rights, whether civil or political, which . . . are under the safeguard of the nation."); *id.* ("Whatever you enact for Human Rights is constitutional. There can be no State Rights against Human Rights.").

⁴⁵³ *Id.*

⁴⁵⁴ *See id.* at 903.

⁴⁵⁵ *Id.*

⁴⁵⁶ *Id.* (emphasis added).

⁴⁵⁷ *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

According to Sumner, “The Civil Rights act came under the head of ‘means’ selected by Congress, and a Political Rights act will have the same authority.”⁴⁵⁸ Turning briefly to the Fourteenth Amendment’s text, Sumner claimed that suffrage was covered by the Privileges or Immunities Clause.⁴⁵⁹ Given “the *plenary* powers of Congress to *enforce* the guarantee of a republican government, the abolition of slavery, and that final clause guarding the rights of citizens,” Sumner believed that his suffrage statute was constitutional.⁴⁶⁰ Sumner thus conceptualized Congress’s authority to enforce the Reconstruction Amendments as broader than the *McCulloch* standard.

Sumner’s statute made a brief reappearance on February 9, 1869, when Sumner proposed that the Fifteenth Amendment’s language be replaced with the text of his original bill.⁴⁶¹ Because Sumner’s statute included several specific provisions—including criminal punishments and a federal cause of action⁴⁶²—it was immediately pointed out that “the matter under consideration is an amendment to the Constitution, and this is a bill.”⁴⁶³ Although some Radical Republicans shared Sumner’s interpretation of the Fourteenth Amendment,⁴⁶⁴ this support did not run deep. Sumner’s proposal was defeated 9–47.⁴⁶⁵

3. *The Fifteenth Amendment’s Drafting and Ratification*

Following the Article V debate, the Fortieth Congress passed the Fifteenth Amendment. Although other proposals were considered,⁴⁶⁶ the Reconstruction Framers eventually settled on language that was remarkably similar to Boutwell’s initial proposal.⁴⁶⁷ As ratified, the Fifteenth Amendment prohibits the denial or abridgment of the right to vote on the

⁴⁵⁸ CONG. GLOBE, 40th Cong., 3d Sess. 903 (1869) (statement of Sen. Sumner).

⁴⁵⁹ *See id.* (“Colored persons are citizens . . . and no State can abridge their privileges and immunities.”).

⁴⁶⁰ *Id.* (emphasis added).

⁴⁶¹ *See id.* at 1041.

⁴⁶² *See* S. 650, 40th Cong. (1868).

⁴⁶³ CONG. GLOBE, 40th Cong., 3d Sess. 1041 (1869) (statement of Sen. Morrill (R-VT)).

⁴⁶⁴ *See id.* at 982 (statement of Sen. Ross (R-KS)) (arguing that Congress had Fourteenth Amendment enforcement authority to enfranchise Blacks); *id.* at 1000 (statement of Sen. Edmunds (R-VT)) (asserting that the right to vote was a privilege or immunity of citizenship).

⁴⁶⁵ *Id.* at 1041.

⁴⁶⁶ For example, one proposal rejected by the House would have expressly protected the right to hold political office and prohibited discrimination based on “race, color, nativity, property, education, or creed.” *Id.* at 1224–26.

⁴⁶⁷ *See supra* notes 377–383 and accompanying text (comparing Boutwell’s proposal to the Fifteenth Amendment).

basis of race, color, or previous condition of servitude and empowers Congress to enforce its provisions by “appropriate legislation.”⁴⁶⁸ Once again, the Reconstruction Framers adopted the *McCulloch* standard.

IV. THE CONTEMPORARY SIGNIFICANCE OF THE ARTICLE V DEBATE

The Article V debate has been largely overlooked in the historical literature⁴⁶⁹ and has no doctrinal relevance to how the Court interprets the Fifteenth Amendment—in stark contrast to the prominent role of the Civil Rights Act of 1866.⁴⁷⁰ This Part identifies the historical and normative takeaways from the Article V debate. It then addresses how these insights relate to modern doctrine on the Reconstruction Amendments’ substantive scopes and enforcement authorities. Finally, this Part addresses how a more expansive view of Congress’s Fifteenth Amendment enforcement authority would help insulate numerous provisions of the VRA from constitutional challenge. Even though the Article V debate occurred 150 years ago, it still has relevance today.

A. *The Article V Debate’s Historical and Normative Significance*

The Article V debate illuminates several key points. The first is further confirmation that the Reconstruction generation understood that the Fourteenth Amendment did not protect political rights.⁴⁷¹ The Article V debate is particularly persuasive evidence because it was Congress’s first

⁴⁶⁸ U.S. CONST. amend. XV, § 2.

⁴⁶⁹ To take a few examples from the literature: Professor William Gillette’s seminal work on the Fifteenth Amendment devotes only a few pages to the Article V debate and draws no doctrinal conclusions. See GILLETTE, *supra* note 11, at 50–53. Professor John Mabry Mathews’s book on the Fifteenth Amendment ignores the Article V debate and assumes that a constitutional amendment was the starting point of the analysis. See MATHEWS, *supra* note 224, at 20–21. Professor Eric Foner’s canonical account of Reconstruction largely ignores the Article V debate. See FONER, *supra* note 8, at 445–50; see also ERIC FONER, *THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION* 97, 100 (2019) (discussing only briefly Sumner’s and Boutwell’s belief that Congress could impose nationwide black suffrage via statute). Professor Kurt Lash’s forthcoming documentary history of the Reconstruction Amendments sheds some additional light on the Article V debate. See 1 KURT T. LASH, *THE RECONSTRUCTION AMENDMENTS (13TH, 14TH & 15TH): ESSENTIAL DOCUMENTS* 60–62 (forthcoming June 2020). Finally, Professor Earl Maltz highlights the Article V debate in his forthcoming paper on the Fifteenth Amendment. See Earl M. Maltz, *The Coming of the Fifteenth Amendment: The Republican Party and the Right to Vote in the Early Reconstruction Era*, 69 CATH. U. L. REV. (forthcoming 2020) (manuscript at 29–30), <https://papers.ssrn.com/a=3317813> [<https://perma.cc/Y45L-DF3K>].

⁴⁷⁰ See, e.g., *McDonald v. City of Chicago*, 561 U.S. 742, 775 (2010).

⁴⁷¹ The Article V debate also sheds light on how the Reconstruction Framers interpreted other constitutional provisions, such as the Guarantee Clause. Because the Fortieth Congress’s views on the original Constitution’s provisions are entitled to less interpretive weight than its views on the Fourteenth Amendment, see *infra* note 472, this Article does not dwell on those provisions.

sustained post-ratification deliberation on the Fourteenth Amendment's substantive scope and enforcement authority.⁴⁷² To be sure, the Article V debate shows that the Fourteenth Amendment's application to political rights was contested at the time. But the Radicals lost that fight *twice*. The Radicals failed to expressly expand the franchise when the Fourteenth Amendment passed Congress—a fact that they conceded at the time.⁴⁷³ And the Radicals failed again when they could not convince moderate Republicans to pass a nationwide black suffrage statute during the lame-duck Fortieth Congress.⁴⁷⁴ The lines drawn by the Thirty-Ninth Congress when it passed the Fourteenth Amendment and enfranchised Blacks in areas under federal control were not crossed by the Fortieth Congress.

This new historical evidence concerning the Article V debate also undercuts recent scholarly attempts to transform Section Two of the Fourteenth Amendment into an affirmative right to vote or—when combined with Section Five—a source of authority for Congress to enact laws targeting racial discrimination in voting.⁴⁷⁵ Most prominently, Professor Franita Tolson has argued that “Section 2 of the Fourteenth Amendment was the Reconstruction Congress’s attempt to constitutionalize a mechanism that would allow Congress to all but legislate universal suffrage.”⁴⁷⁶ According

⁴⁷² See Balkin, *supra* note 135, at 1850 (looking at enforcement acts passed by the Reconstruction Congresses to “give us a sense of how a Congress using the *McCulloch* standard believed it could draft enforcement legislation”); McConnell, *Desegregation*, *supra* note 176, at 984 (“The actions taken by Congress from 1868 through 1875 to enforce the Fourteenth Amendment and the congressional deliberations over those measures thus present the best available evidence of the original understanding of the meaning of the Amendment”); cf. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 184–85 (2012) (looking to events in the early 1800s in interpreting the Religion Clauses); District of Columbia v. Heller, 554 U.S. 570, 605–10 (2008) (discussing post-ratification commentary in interpreting the Second Amendment).

⁴⁷³ See *supra* Section II.C; cf. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 586 (1952) (concluding that the President lacked authority to seize steel mills because, *inter alia*, “[w]hen the Taft-Hartley Act was under consideration in 1947, Congress rejected an amendment which would have authorized such governmental seizures in cases of emergency”).

⁴⁷⁴ See *supra* Section III.D.

⁴⁷⁵ Recall that Section Two—also known as the Apportionment Clause—penalizes states that disenfranchise their male citizens by reducing their number of seats in the House. See *supra* Section II.C.2.

⁴⁷⁶ Tolson, *Abridgment*, *supra* note 84, at 458; see also AKHIL REED AMAR, *AMERICA’S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY 188* (2012) (arguing that Section Two “provides the missing foundation for the general ‘right to vote’ championed by the Warren majority”); Mitchell, *supra* note 206, at 1267–68 (arguing that the text of the Fourteenth Amendment does not differentiate based on civil or political rights and therefore Congress may legislate to protect voting rights of citizens). Other scholars have read Section Two narrowly. See, e.g., Morley, *Equilibration*, *supra* note 247, at 331 (“Section 2 does not, and was not intended to, permit Congress to compel states to expand their electorates.”); Strauss, *Constitution*, *supra* note 29, at 39 (arguing that Section Two provides a “specific remedy” of decreased representation).

to Professor Tolson, Section Two is an all-purpose suffrage provision—not limited to race-based concerns. She claims that it covers not only intentionally discriminatory laws but also laws that have a disparate impact. She further claims that Section Two is concerned not only with vote denial but also vote dilution.⁴⁷⁷ And because Section Two authorizes the “extreme penalty” of reducing a state’s representation in the House, Professor Tolson contends that Section Five authorizes Congress to impose “lesser penalties” below Section Two’s “ceiling.”⁴⁷⁸

But if these theories were an accurate account of the Reconstruction-era public understanding of the Fourteenth Amendment, then the Article V debate would probably have come out differently because moderate Republicans would have agreed with the Radicals’ statutory proposal on constitutional grounds and because the political climate would have been much different if the Fourteenth Amendment were presumed to encompass political rights.⁴⁷⁹ Indeed, these theories mirror Boutwell’s view of Section Two during the Article V debate,⁴⁸⁰ an opinion that not only failed to convince his fellow Republicans but was also at odds with his own prior statements about the Fourteenth Amendment during that ratification debate.⁴⁸¹

The second takeaway is that the Fortieth Congress assumed that *McCulloch* provided the standard for Congress’s Fourteenth Amendment enforcement authority during the Article V debate. In arguing that Congress could pass a nationwide black suffrage statute, Boutwell and Sumner invoked Congress’s *McCulloch* power, albeit a plenary conception of that authority.⁴⁸² Significantly, neither moderate Republicans nor Democrats contested that *McCulloch* was the touchstone. Rather, their criticism focused on the exclusion of political rights from the Fourteenth Amendment’s scope.

⁴⁷⁷ See Tolson, *Abridgment*, *supra* note 84, at 457–58.

⁴⁷⁸ Tolson, *Structure*, *supra* note 246, at 401; *see also id.* at 404 (“[C]ourts can use [the Apportionment Clause] as the reference point for determining whether Congress has exceeded the scope of its enforcement authority in enacting voting rights legislation.”).

⁴⁷⁹ *See supra* Section III.D. In addition, these theories fail to adequately grapple with the compromises underlying Section Two in particular and the Fourteenth Amendment in general. *See supra* Section II.C.2. These theories also cannot avoid the doctrinal wrinkle that *Boerne* supplies the governing standard for Congress’s Fourteenth Amendment enforcement authority, *see supra* Section I.B.2, a strict standard that may prove problematic for such an expansive interpretation of Section Two’s never-enforced penalty provision.

⁴⁸⁰ *See supra* notes 402–403 and accompanying text.

⁴⁸¹ *See supra* notes 230 & 410 and accompanying text. Two decades after the Fourteenth Amendment’s ratification, Boutwell claimed that the Fifteenth Amendment repealed Section Two of the Fourteenth Amendment. *See Tolson, Structure*, *supra* note 246, at 418–19.

⁴⁸² *See supra* Section III.D.

Of course, moderate Republicans had partisan reasons for sticking to their prior position that the Fourteenth Amendment did not protect political rights. Democrats, for their part, opposed any extension of black suffrage. However, the central debate was not whether *McCulloch* was applicable but rather what *rights* were protected by the Fourteenth Amendment.⁴⁸³ In framing the debate in such a way, the Fortieth Congress implicitly rejected Boutwell's and Sumner's contention that the *McCulloch* power was plenary, since such authority would not be bound by the distinction between civil and political rights. In other words, *McCulloch* applies, but has limits.

By conceptualizing civil and political rights as distinct spheres, Congress placed a self-imposed limit on its enforcement authority. It could not *enforce* the Fourteenth Amendment by mandating political equality. Boutwell and Sumner's attempt to collapse the civil versus political rights distinction was resoundingly defeated. The Article V debate reveals that the Fortieth Congress still believed in bundles of rights and that citizenship was not synonymous with suffrage.⁴⁸⁴

The third, and related, point is that the Fifteenth Amendment was a new font of federal authority. During Reconstruction, the political branches engaged in a two-step process for eradicating slavery and protecting the rights of the newly freed slaves. By abolishing slavery nationwide and ensuring that the Emancipation Proclamation's validity would not be challenged in peacetime, the Thirteenth Amendment expanded and entrenched federal authority. Moreover, the Civil Rights Act of 1866 was constitutionalized by the Fourteenth Amendment—a key decision given the

⁴⁸³ This is not the only occasion when “opponents of civil rights legislation conceded that the enforcement power under Section Five was equivalent to congressional power under the Necessary and Proper Clause.” McConnell, *Institutions*, *supra* note 148, at 178 n.153. The same was true during the passage of the Civil Rights Act of 1875. *See id.*; McConnell, *Desegregation*, *supra* note 176, at 990 & n.194 (arguing that the Civil Rights Act of 1875 was “appropriate” enforcement legislation).

⁴⁸⁴ Near the end of Reconstruction, Congress passed the Civil Rights Act of 1875, which prohibited racial discrimination in public transportation and accommodations. Ch. 114, 18 Stat. 335, 335–37. On the one hand, this legislation—which was invalidated by the Supreme Court in the *Civil Rights Cases*, 109 U.S. 3 (1883)—could be viewed as the first step of a failed statute–amendment two-step and as a cautionary tale of what could have happened if the Radical Republicans had enacted only a suffrage statute and had failed in amending the Constitution. On the other hand, Congress's careful parsing of its Fourteenth Amendment enforcement authority during the Article V debate is powerful evidence that Congress can be trusted to self-regulate its enforcement authority. That argument is particularly compelling because of the closeness in time between the Reconstruction Amendments and the Civil Rights Act of 1875. Viewed from this perspective, Congress's decision to invoke the Fourteenth Amendment to pass the Civil Rights Act of 1875 is entitled to substantial deference. *See* McConnell, *Institutions*, *supra* note 148, at 175 (“[S]upporters of the [Civil Rights] Act [of 1875] insisted that it merely enforced rights already established by the Fourteenth Amendment.”); McConnell, *Desegregation*, *supra* note 176, at 984 (discussing enforcement acts passed by the Reconstruction Congress).

belief among prominent moderate Republicans that the statute's constitutionality was questionable when it was enacted.⁴⁸⁵ In both situations, the Reconstruction Framers entrenched a subconstitutional principle and expanded federal and congressional authority through a constitutional amendment.

So too with the Fifteenth Amendment. The Thirty-Ninth Congress went to the outer limits of its perceived constitutional authority in enfranchising Blacks in the District of Columbia, the federal territories, and the Reconstructed South. In so doing, the Reconstruction Framers invoked distinct sources of authority. For the District of Columbia and federal territories, Congress acted pursuant to its Article I and Article IV authorities, respectively. Regarding the conquered South, the Reconstruction Framers invoked the Guarantee Clause. Although the Radicals believed that a Voting Rights Act of 1869 would have been constitutional, Congress opted against the statutory option because neither the original Constitution nor the recently ratified Fourteenth Amendment provided sufficient authority. Put simply, the Fortieth Congress continued to adhere to the distinction between civil and political rights. The Fifteenth Amendment was thus a significant *expansion* of congressional authority to regulate voting rights in the states. And as an independent source of authority, the Fifteenth Amendment should be treated as such under modern doctrine.

Furthermore, the Article V debate speaks to an ongoing scholarly discussion over the validity of Section Two of the Fourteenth Amendment. According to Professor Jack Chin, the Apportionment Clause “was repealed upon ratification of the Fifteenth Amendment.”⁴⁸⁶ Professor Chin forcefully argues that the Fifteenth Amendment was passed, in part, because Section Two’s “indirect approach” had failed to achieve nationwide black suffrage.⁴⁸⁷ Professor Chin claims that “the Fifteenth Amendment repudiated [the Apportionment Clause]’s theoretical and structural approach to African-American suffrage”⁴⁸⁸ and that the two constitutional provisions “cannot simultaneously regulate voting discrimination.”⁴⁸⁹ The upshot, as Professor Chin argues, is that Section Two’s endorsement of felon disenfranchisement is no longer good law.⁴⁹⁰

⁴⁸⁵ See *supra* notes 205–206 and accompanying text.

⁴⁸⁶ Gabriel J. Chin, *Reconstruction, Felon Disenfranchisement, and the Right to Vote: Did the Fifteenth Amendment Repeal Section 2 of the Fourteenth Amendment?*, 92 GEO. L.J. 259, 260 (2004).

⁴⁸⁷ See *id.* at 261.

⁴⁸⁸ *Id.* at 262.

⁴⁸⁹ *Id.* at 263.

⁴⁹⁰ See *id.* at 263–64.

The Article V debate supports Professor Chin's contention that Section Two was viewed as an insufficient penalty, but not his conclusion that it has been repealed. On this specific point, I agree with Professor Tolson that "the Fifteenth Amendment was meant to complement rather than replace [the Apportionment Clause] as a source of congressional authority."⁴⁹¹ Indeed, the unsuccessful attempts to strip states of their House seats after the Fifteenth Amendment's ratification demonstrate that Section Two was not viewed as a dead letter.⁴⁹² It is also possible to reconcile the two provisions: Section Two imposes a severe federal-level penalty—reduction in House seats that would otherwise be allocated pursuant to Article I—whereas the Fifteenth Amendment mandates black enfranchisement and gives Congress additional authority to enact prophylactic legislation.

Finally, the Reconstruction Framers' decision to pursue a constitutional amendment proved fortuitous. In the 1870s and 1880s, the Supreme Court invalidated or severely curtailed laws that enforced the Fourteenth Amendment.⁴⁹³ In 1894, Congress repealed several Reconstruction-era laws that protected the right to vote.⁴⁹⁴ It is not difficult to imagine a similar fate befalling a Voting Rights Act of 1869 if passage of that statute had backfired politically and doomed the Fifteenth Amendment's ratification. By enshrining the right to vote free of racial discrimination in the Constitution, the Reconstruction Framers preserved a powerful legal and rhetorical tool that proved immensely valuable during the civil rights movement and served as Congress's font of authority when it first enacted Section 5 of the VRA.⁴⁹⁵

B. *The Article V Debate and Current Doctrine*

By establishing that the Fifteenth Amendment was considered an expansion of federal authority during Reconstruction, the Article V debate demands that we rethink the erasure⁴⁹⁶ of the Fifteenth Amendment by the Fourteenth Amendment.

⁴⁹¹ Tolson, *Structure*, *supra* note 246, at 405.

⁴⁹² See Magliocca, *supra* note 245, at 786–89 (describing the 1871 attempt to invoke Section Two); Tolson, *Abridgment*, *supra* note 84, at 474–77 (discussing the 1901 attempt to invoke Section Two).

⁴⁹³ See, e.g., *The Civil Rights Cases*, 109 U.S. 3 (1883) (invalidating the Civil Rights Act of 1875); *supra* note 484 and accompanying text.

⁴⁹⁴ See Tolson, *Abridgment*, *supra* note 84, at 467.

⁴⁹⁵ See *supra* notes 101–109 and accompanying text.

⁴⁹⁶ Here, I borrow the concept of erasure from Bruce Ackerman & Jennifer Nou, *Canonizing the Civil Rights Revolution: The People and the Poll Tax*, 103 NW. U. L. REV. 63, 119–23 (2009). Professors Ackerman and Nou use the concept to describe the Court's invocation of the Fourteenth Amendment—rather than the VRA and the Twenty-Fourth Amendment—to invalidate the poll tax in *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966).

I. Rethinking the Substantive Scopes of the Reconstruction Amendments

Imagine a world where we take the Fifteenth Amendment seriously. Suppose we looked *first* to how a voting rights case should be resolved under the Fifteenth Amendment before turning to the relevant precedent under the Fourteenth Amendment. This doctrinal order of operations accords not only with the original public understanding of the two Amendments, but also follows the canons against surplusage and that the specific controls over the general.

Treating the Fifteenth Amendment as an independent constitutional provision would force a reassessment of *Shaw* and its hostility to race-conscious redistricting. Recall that the *Shaw* line of cases is based solely on the Equal Protection Clause.⁴⁹⁷ Yet, the most adamant defenders of *Shaw* on the Court are originalists,⁴⁹⁸ even though the Equal Protection Clause was originally understood to exclude political rights. The insights gleaned from the Article V debate would presumably be particularly relevant to these Justices.⁴⁹⁹

To be sure, it might be doctrinally feasible to defend *Shaw* under the Fifteenth Amendment. But that presumes the debate over the colorblind and anti-subordination theories of the Equal Protection Clause is applicable to the Fifteenth Amendment.⁵⁰⁰ After all, if we are to confront originalist Justices on their own terms, then the fact that the Reconstruction generation continued to adhere to the civil versus political rights distinction might mean that different concerns apply to the franchise than to, say, the right to sign a contract. And instead of a well-worn argument over whether equality is best achieved through race-neutral or race-conscious means, the Fifteenth Amendment may embody a distinctively different framework, such as the empowerment of racial minorities through the ballot and their fair representation at various levels of government. And after taking into account that, during Reconstruction, Blacks were majorities or sizable pluralities of

⁴⁹⁷ See *Shaw v. Reno*, 509 U.S. 630, 649 (1993); *supra* Section I.A.1.

⁴⁹⁸ See *supra* note 82 and accompanying text (discussing Justice Thomas's support for *Shaw*).

⁴⁹⁹ Notwithstanding the position of originalist Justices on the colorblind Equal Protection Clause, see, e.g., *Fisher v. Univ. of Tex. at Austin*, 136 S. Ct. 2198, 2215 (2016) (Thomas, J., dissenting); *id.* at 2220–21 (Alito, J., dissenting), there is substantial evidence that the Reconstruction Framers were comfortable with race-conscious laws. See generally Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753 (1985) (collecting examples of Reconstruction-era race-conscious laws).

⁵⁰⁰ Cf. Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L.J. 1278, 1286–89 (2011) (discussing the debate between advocates of colorblindness and anti-subordination and identifying a middle-ground antibalkanization principle).

the Southern and Border States and racially polarized voting was a fact of political life, the Article V debate and the Fifteenth Amendment could reshape how we think about *Shaw*.⁵⁰¹

Taking the Fifteenth Amendment seriously would also mean seeking answers to questions that the Court has expressly reserved: whether the Fifteenth Amendment encompasses a discriminatory-effects standard and prohibits racial vote dilution.⁵⁰² If the answer to either of these questions is “yes,” then Section 2 of the VRA is on firmer constitutional ground and Congress would have more flexibility to enact voting rights legislation.⁵⁰³ On this front, relevant considerations include, *inter alia*, the meaning of the terms “right . . . to vote” and “denied or abridged,”⁵⁰⁴ the various draft amendments considered during the Fortieth Congress, and post-ratification enforcement legislation.

Of course, there are legitimate reasons for not upending the entirety of voting rights doctrine based on the distinction between the Fourteenth and Fifteenth Amendments. A lot of water has gone under the proverbial Fourteenth Amendment bridge, and *stare decisis* strongly counsels against overturning certain doctrines—such as one-person, one-vote for state legislative districts—that have proven workable and have engendered reliance interests. And even though the distinction between citizenship and suffrage still had salience during Reconstruction, it has been substantially weakened by the expansion of the franchise via the Nineteenth Amendment (women’s suffrage), Twenty-Fourth Amendment (poll taxes), and Twenty-Sixth Amendment (age).⁵⁰⁵ Now that citizenship and suffrage are mostly coextensive, the civil versus political rights divide may have less force as well. Reconciling the living Fourteenth Amendment and the forgotten Fifteenth Amendment is no easy interpretive task. Indeed, it is a task left to future articles that examine the Fifteenth Amendment’s drafting and

⁵⁰¹ See *supra* Section III.C. For an answer to this question, see Travis Crum, *Reconstructing Racially Polarized Voting*, 70 DUKE L.J. (forthcoming 2020), <https://papers.ssm.com/a=3541863>. [<https://perma.cc/PZL8-LFPX>].

⁵⁰² To be clear, the Court currently interprets the Fourteenth Amendment to prohibit intentional racial vote dilution. See *supra* Section I.A.1. Accordingly, that question is not as salient as the discriminatory-effects issue. However, there is the possibility the Court would apply *Boerne* to Congress’s attempts to remedy intentional racial vote dilution under the Fourteenth Amendment.

⁵⁰³ There is also an available avenue for civil rights groups to force courts to reach these underlying constitutional questions: the VRA’s bail-in provision, which authorizes courts to impose preclearance based on a violation of the Fourteenth or Fifteenth Amendment. See *supra* note 22 (discussing Section 3(c)).

⁵⁰⁴ U.S. CONST. amend. XV, § 1.

⁵⁰⁵ *Id.* amend. XIX; *id.* amend. XXIV; *id.* amend. XXVI.

ratification, as well as the relationship between the Reconstruction Amendments.

2. Rethinking Congress's Enforcement Authority

The Article V debate provides additional evidence that *Boerne* is wrongly decided. And even assuming that the Court refuses to overturn *Boerne*, the Article V debate provides a reason for cabinining *Boerne* to the Fourteenth Amendment.

Recall that the Reconstruction Framers' deliberate and repetitious borrowing of the term "appropriate" sent a clear signal that Congress's enforcement authority was broad and uniform across the Reconstruction Amendments.⁵⁰⁶ This Article has uncovered additional evidence to reinforce this point: that both sides of the Article V debate believed that *McCulloch* provided the applicable standard for Congress's Fourteenth Amendment enforcement authority and that moderate Republicans declined to enact a nationwide black suffrage statute because they believed that Congress could not enforce civil rights by expanding political rights. The Reconstruction Congress conceptualized the Fourteenth and Fifteenth Amendments' substantive scopes and enforcement provisions as discrete protections and grants of authority. The Article V debate thus shows that the *McCulloch* standard—while broad—is not plenary. And therein lies the rub.

The Article V debate shows that, even under the *McCulloch/Katzenbach* standard, there is a limiting principle for Congress's Fourteenth Amendment enforcement authority. This is significant because the *Boerne* Court fretted that "[i]f Congress could define its own powers by altering the Fourteenth Amendment's meaning, . . . it is difficult to conceive of a principle that would limit congressional power."⁵⁰⁷ The Article V debate demonstrates that Congress can self-police its Fourteenth Amendment enforcement authority. The Fortieth Congress's decision to respect the distinction between civil and political rights undermines *Boerne*'s concern that Congress will improperly "decree the substance of the Fourteenth Amendment's restrictions on the States."⁵⁰⁸ Congress, in other words, can be trusted with the *McCulloch* power—an authority that, after all, it expressly conferred upon itself.⁵⁰⁹

And even if, for reasons of stare decisis, *Boerne* continues to apply to the Fourteenth Amendment, it should not apply to the Fifteenth Amendment.

⁵⁰⁶ See *supra* Section II.D.

⁵⁰⁷ *City of Boerne v. Flores*, 521 U.S. 507, 529 (1997).

⁵⁰⁸ *Id.* at 519.

⁵⁰⁹ See Balkin, *supra* note 135, at 1805.

Notwithstanding the passage of time, the Reconstruction Amendments continue to protect distinct bundles of rights, and the Court can easily differentiate between civil and political rights.

The Court has interpreted the Fourteenth Amendment's broad language to protect a panoply of rights. The Court, for example, has incorporated nearly all of the protections enumerated in the Bill of Rights.⁵¹⁰ In addition, the Court has held that "the 'liberty' specially protected by the Due Process Clause includes the rights to marry; to have children; to direct the education and upbringing of one's children; to marital privacy; to use contraception; to bodily integrity; and to abortion."⁵¹¹ And in a similar vein, under the Fourteenth Amendment's Equal Protection Clause, suspect or quasi-suspect classes include not only race⁵¹² but also alienage,⁵¹³ sex,⁵¹⁴ and, in some circuits, sexual orientation.⁵¹⁵ In light of the Fourteenth Amendment's breadth, *Boerne's* congruence and proportionality test seeks to ensure that "[t]he ultimate interpretation and determination of the Fourteenth Amendment's substantive meaning remain[ed] the province of the Judicial Branch."⁵¹⁶

These separation of powers concerns have little force in the Fifteenth Amendment context. Under the Fifteenth Amendment, Congress is solely empowered to prohibit racial discrimination in voting—a textually and conceptually defined sphere of rights.⁵¹⁷ Giving the Fifteenth Amendment independent meaning for Congress's enforcement authority not only avoids a superfluity, but also follows the principle that the specific should control over the general. Although it is possible to imagine scenarios that would likely overstep Congress's Fifteenth Amendment authority—such as mandating, as many countries do, that political parties have a certain percentage of minority candidates⁵¹⁸—*Katzenbach's* rationality standard should provide an ample check on Congress.

⁵¹⁰ See *Duncan v. Louisiana*, 391 U.S. 145, 147–48 (1968) (enumerating provisions of the Bill of Rights which have been incorporated).

⁵¹¹ *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (citations omitted).

⁵¹² See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995).

⁵¹³ See *Graham v. Richardson*, 403 U.S. 365, 372 (1971).

⁵¹⁴ See *United States v. Virginia*, 518 U.S. 515, 532–33 (1996).

⁵¹⁵ See *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 484 (9th Cir. 2014).

⁵¹⁶ *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 81 (2000).

⁵¹⁷ The Fifteenth Amendment's targeted language also alleviates the federalism concern that Congress could invoke it to exercise "virtually plenary police power." Caminker, *supra* note 99, at 1191.

⁵¹⁸ See Mona Lena Krook & Diana Z. O'Brien, *The Politics of Group Representation: Quotas for Women and Minorities Worldwide*, 42 COMP. POL. 253, 257–58 tbl.2 (2010) (collecting examples of such mandates).

C. *Congress's Fifteenth Amendment Enforcement Authority and the VRA*

If *Katzenbach* supplies the governing standard for Congress's Fifteenth Amendment enforcement authority, the VRA would be on firmer constitutional ground. That is because *Katzenbach*'s rationality standard gives Congress far greater authority to interpret the Constitution and fashion remedial schemes.⁵¹⁹

Under *Boerne*, the Court is the sole interpreter of “what the law is.”⁵²⁰ By contrast, under *Katzenbach*, Congress and the Court share interpretive responsibilities, and so long as Congress's construction of an ambiguous constitutional provision is reasonable—that is, appropriate—the Court should defer even if it would have interpreted the relevant provision differently.⁵²¹ Moreover, at the first step of the congruence and proportionality test, the Court must “identify with some precision the scope of the constitutional right at issue.”⁵²² The *Katzenbach* standard does not require the Court to make that precise determination. Recall that the *Morgan* Court declined to decide whether New York's English language literacy requirements violated the Fourteenth Amendment.⁵²³ And in upholding the 1975 reauthorization of the VRA in *City of Rome v. United States*, the Court assumed, without deciding, that the Fifteenth Amendment prohibited only intentional racial discrimination in vote-denial cases.⁵²⁴ The *Katzenbach* standard thus accords with judicial minimalism: the Court need not definitively expound on the meaning of the Constitution and can defer to a coordinate branch. And, significantly for this Article's breadth, if there is no need to fully ascertain the precise metes and bounds of the underlying right, then a comprehensive account of the Fifteenth Amendment's scope is unnecessary.

Katzenbach and *Boerne* also diverge on Congress's remedial authority.⁵²⁵ Under both lines of cases, Congress may enact prophylactic

⁵¹⁹ See *supra* Section I.B.

⁵²⁰ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803); see also Schmidt, *supra* note 100, at 101–03 (discussing *Boerne*).

⁵²¹ See Balkin, *supra* note 135, at 1827–28; McConnell, *Institutions*, *supra* note 148, at 172, 194–95.

⁵²² *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 365 (2001).

⁵²³ See *supra* notes 116–118 and accompanying text.

⁵²⁴ See 446 U.S. 156, 173 (1980) (“We hold that, even if § 1 of the [Fifteenth] Amendment prohibits only purposeful discrimination, the prior decisions of this Court foreclose any argument that Congress may not, pursuant to § 2, outlaw voting practices that are discriminatory in effect.” (footnote omitted)).

⁵²⁵ Under a strictly remedial view, Congress's enforcement authority is limited to actual constitutional violations. See *Tennessee v. Lane*, 541 U.S. 509, 559 (2004) (Scalia, J., dissenting) (“Nothing in § 5 allows Congress to go *beyond* the provisions of the Fourteenth Amendment to proscribe,

legislation that prohibits conduct that is not per se unconstitutional.⁵²⁶ *Katzenbach*, however, gives Congress far greater leeway in crafting the remedial scheme, as *Boerne* limits Congress to remedying violations of constitutional rights as those rights are defined by the Court and requires a far tighter fit between the constitutional wrong and the remedy.⁵²⁷

Congress has exercised its interpretive and remedial authority in enacting, revising, and reauthorizing the VRA. Indeed, Congress has repeatedly reaffirmed its commitment to protecting voting rights and has responded to Supreme Court decisions that unduly narrowed the Fifteenth Amendment's protections. Perhaps most famously, Congress statutorily overrode the Court's plurality opinion in *Bolden*. In that decision, four Justices concluded that Section 2 of the VRA was coextensive with the Fifteenth Amendment, which, in turn, they construed as limited to intentional discrimination in vote-denial cases.⁵²⁸ In the 1982 amendments to the VRA, Congress revised Section 2 in two significant ways. First, Congress established a discriminatory-effects standard.⁵²⁹ Second, Congress expanded Section 2 to prohibit racial discrimination in vote-dilution cases.⁵³⁰ Thus, in revising Section 2, Congress exercised its Fifteenth Amendment enforcement authority to decide when "the right . . . to vote" has been "denied or abridged . . . on account of race."⁵³¹ Under *Katzenbach*, the Court should defer to Congress's finding that the right to vote is denied or abridged on account of race by laws with a discriminatory effect—or, alternatively

prevent, or 'remedy' conduct that does not *itself* violate any provision of the Fourteenth Amendment. So-called 'prophylactic legislation' is reinforcement rather than enforcement."); *id.* at 559–60 (endorsing the enactment of federal cause-of-action statutes and disclosure provisions).

⁵²⁶ *Id.* at 520 (majority opinion) ("When Congress seeks to remedy or prevent unconstitutional discrimination, § 5 [of the Fourteenth Amendment] authorizes it to enact prophylactic legislation proscribing practices that are discriminatory in effect, if not in intent, to carry out the basic objectives of the Equal Protection Clause."). Congress, for example, can ban literacy tests on the grounds that they were likely enacted with a discriminatory intent and have a disproportionate impact on racial minorities notwithstanding precedent holding that those tests are facially constitutional. Compare *Oregon v. Mitchell*, 400 U.S. 112, 132 (1970) (opinion of Black, J.) (upholding the VRA's nationwide ban on literacy tests), and *South Carolina v. Katzenbach*, 383 U.S. 301, 333–34 (1966) (upholding the VRA's geographically and temporarily limited ban on literacy tests), with *Lassiter v. Northampton Cty. Bd. of Elections*, 360 U.S. 45, 50–53 (1959) (holding that literacy tests are facially constitutional).

⁵²⁷ See *City of Boerne v. Flores*, 521 U.S. 507, 527 ("Any suggestion that Congress has a substantive, non-remedial power under the Fourteenth Amendment is not supported by our case law."); Katz, *supra* note 134, at 2362–68 (discussing remedial authority).

⁵²⁸ See *City of Mobile v. Bolden*, 446 U.S. 55, 60–61 (1980) (plurality opinion) (interpreting Section 2 as coextensive with the Fifteenth Amendment); *id.* at 65 (discussing the Fifteenth Amendment's scope).

⁵²⁹ See Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131 (codified at 52 U.S.C. § 10301 (2012)).

⁵³⁰ See *id.*; see also Stephanopoulos, *supra* note 74, at 1576 (discussing the 1982 amendments).

⁵³¹ U.S. CONST. amend. XV, § 1.

framed, that a discriminatory-effects standard is appropriate prophylactic legislation given the difficulty in ferreting out discriminatory intent. The Court should similarly defer to Congress’s determination that vote dilution is an abridgment of the right to vote.

The *Katzenbach* standard would also help bolster the constitutionality of the various VRA provisions that protect language minorities.⁵³² Under current doctrine, the voting rights of language minorities are often treated under the Fourteenth Amendment, as that is the approach Congress and the Court took in *Morgan*.⁵³³ But if Congress is given leeway to define what constitutes discrimination “on account of race[] [or] color” under the Fifteenth Amendment,⁵³⁴ then it could reasonably find that language is a proxy for race. Indeed, the Court made a similar logical inference in *Rice v. Cayetano*,⁵³⁵ where it concluded that “[a]ncestry can be a proxy for race” in striking down a Hawaiian constitutional provision that limited suffrage based on whether a prospective voter was of Hawaiian descent.⁵³⁶ Congress, for its part, could conclude that English language requirements enacted in response to a recent increase of minority voters is discrimination on the basis of race or color—not just language. And if Congress could make that finding under the Fifteenth Amendment, it would be given deference under *Katzenbach*’s rationality standard.

Finally, the *Katzenbach* standard would further strengthen Section 3(c)’s bail-in provision, which authorizes courts to impose preclearance based on a violation of the Fourteenth or Fifteenth Amendment.⁵³⁷ Since *Shelby County*, numerous lawsuits have been filed seeking to bail-in jurisdictions, including high-profile cases against North Carolina and

⁵³² As discussed above, *see supra* notes 110–112, Section 4(e) protects language minorities. So does Section 2. 52 U.S.C. § 10301. Section 203’s coverage formula for providing bilingual election materials also protects language minorities. *See id.* § 10503. That latter provision, however, would be reviewed under *Shelby County*. *See supra* note 155 (discussing *Shelby County* and Section 203).

⁵³³ *Katzenbach v. Morgan*, 384 U.S. 641, 646–47 (1966). Because Section 4(e) was added toward the end of the drafting process, there is nothing in the legislative history about why Congress chose to rely on its Fourteenth Amendment enforcement authority. One potential explanation is that federal courts had rejected challenges to New York’s English language requirements on the grounds that the Fifteenth Amendment permits language-based discrimination. *See* JAMES THOMAS TUCKER, *THE BATTLE OVER BILINGUAL BALLOTS: LANGUAGE MINORITIES AND POLITICAL ACCESS UNDER THE VOTING RIGHTS ACT* 33 (2009); Warren M. Christopher, *The Constitutionality of the Voting Rights Act of 1965*, 18 STAN. L. REV. 1, 24–25 (1965). In my view, Congress would have been well within its Fifteenth Amendment enforcement authority to enact Section 4(e).

⁵³⁴ U.S. CONST. amend. XV, § 1.

⁵³⁵ 528 U.S. 495, 514 (2000).

⁵³⁶ *Id.*; *see also supra* notes 69–73 (discussing *Rice*).

⁵³⁷ 52 U.S.C. § 10302(c).

Texas.⁵³⁸ And although the *Shelby County* Court issued no decision on preclearance itself,⁵³⁹ it is probable that, at some point, a bailed-in jurisdiction will challenge Section 3(c)'s constitutionality.⁵⁴⁰ By giving Congress greater leeway in fashioning a remedial scheme, the *Katzenbach* standard would ensure that preclearance remains a viable remedy in voting rights litigation.

CONCLUSION

The Supreme Court has declared that “[t]he Fifteenth Amendment has independent meaning and force.”⁵⁴¹ But on the Fifteenth Amendment’s sesquicentennial, the Court’s doctrine belies that grand statement. By examining why the Fortieth Congress passed the Fifteenth Amendment instead of a Voting Rights Act of 1869, this Article has taken the first step toward reconceptualizing the Fifteenth Amendment as a truly independent constitutional provision. The Article V debate problematizes the Court’s current doctrine in numerous ways, perhaps most significantly in the realm of enforcement authority. The doctrinal upshot of the Article V debate is that *Katzenbach*’s rationality standard should apply to nationwide statutes—such as Sections 2 and 3(c) of the VRA—that are enacted pursuant to Congress’s Fifteenth Amendment enforcement authority.

⁵³⁸ See *Veasey v. Abbott*, 888 F.3d 792, 804 (5th Cir. 2018) (holding that Texas’s revised voter ID law meant that “there is no equitable basis for subjecting Texas to ongoing federal election scrutiny under Section 3(c)”; *N.C. State Conference of the NAACP v. McCrory*, 831 F.3d 204, 241 (4th Cir. 2016) (declining to bail-in North Carolina notwithstanding a finding of intentional discrimination); *Perez v. Abbott*, 390 F. Supp. 3d 803, 807 (W.D. Tex. 2019) (finding intentional discrimination in the enactment of a redistricting plan but declining a request for Section 3(c) relief); see also Crum, *Recent Bail-in Litigation*, *supra* note 22 (discussing *Veasey* and *McCrory*).

⁵³⁹ See *Shelby County v. Holder*, 570 U.S. 529, 557 (2013). For why *Shelby County*’s equal sovereignty principle is inapplicable to a nationwide statute like Section 3(c), see *supra* Section I.B.3.

⁵⁴⁰ In the post-*Shelby County* cases, no state or jurisdiction has facially challenged Section 3(c). Cf. Travis Crum, *The Prospect of Bailing-in Texas: The Constitutional Argument for Bail-in*, ELECTION L. BLOG (Sept. 16, 2018, 9:43 AM), <https://electionlawblog.org/?p=101141> [<https://perma.cc/4GG7-4R2U>] (“It’s telling that Texas lacked the chutzpah to argue that Section 3(c) was facially invalid.”).

⁵⁴¹ *Rice*, 528 U.S. at 522.