ESSAY

THE RIDDLE OF RACE-BASED REDISTRICTING

*Travis Crum**

The Supreme Court has adopted divergent interpretations of the Equal Protection Clause as applied to race and redistricting. Vote dilution doctrine requires mapmakers to consider race to ensure that racial minorities are not packed or cracked. Congress, moreover, has embraced vote dilution doctrine in Section 2 of the Voting Rights Act. By contrast, racial gerrymandering doctrine triggers strict scrutiny if mapmakers subordinate traditional redistricting principles to race, thereby threatening Section 2's constitutionality.

To resolve this doctrinal riddle, this Essay examines whether, as originally understood, the Fourteenth or Fifteenth Amendment governed the use of race during redistricting. The Equal Protection Clause did not apply to political rights. Indeed, the Fifteenth Amendment enfranchised Black men nationwide. The Reconstruction Framers debated whether the Fifteenth Amendment also protected the right to hold office, but they barely discussed redistricting.

This Essay then turns to postratification evidence. The Enforcement Acts did not regulate the use of race during redistricting. During the 1870 and 1880 redistricting cycles, Republican Southern states empowered Black voters whereas Democratic Southern states packed and cracked them.

This Essay argues that, from an originalist perspective, the competing doctrines of vote dilution and racial gerrymandering are improperly grounded in the Equal Protection Clause. This Essay further claims that, under the Fifteenth Amendment, there is some historical evidence in favor of vote dilution doctrine but virtually no historical support for racial gerrymandering doctrine. The upshot is that Section 2 is valid legislation under Congress's Fifteenth Amendment enforcement authority to protect the rights to vote and hold office.

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* Associate Professor of Law, Washington University in St. Louis. For helpful comments and conversations, I thank Danielle D'Onfro, Dan Epps, David Gans, Heather Gerken, Sam Issacharoff, Michael Kang, Elizabeth Katz, Morgan Kousser, Ron Levin, Greg Magarian, Bertrall Ross, Josh Sellers, Arin Smith, Larry Solum, Franita Tolson, and Alex Tsesis, as well as participants at the Second Founding Conference at Tulane Law School, the Election Law Conference at Washington University in St. Louis, and faculty workshops at Northwestern Pritzker School of Law and Washington University in St. Louis. For outstanding librarian support, I thank Peter Hook. For excellent research assistance, I thank Dominique Alvarado-Holden, Jacqueline Beaulieu, Macy Cecil, and Andrew Englund. Finally, I thank the editors of the *Columbia Law Review* for their hard work on this Essay.

INTRODUCTION

In drawing redistricting plans, mapmakers are confronted with a Goldilocks problem when considering race. Mapmakers cannot consider race too much or too little. They must get it *just* right.

On the one hand, mapmakers must consider race to ensure that minorities' right to vote is not diluted by packing or cracking them into districts.[1] This doctrine—known as racial vote dilution—was first articulated as an equal protection violation by the Supreme Court in its 1973 decision in *White v. Regester*[2] and subsequently endorsed and expanded by Congress in the 1982 amendments to Section 2 of the Voting Rights Act (VRA).[3] Most importantly, Congress adopted a discriminatory results standard for Section 2, which mandates the creation of majority-minority districts under certain circumstances.[4]

On the other hand, mapmakers cannot rely too heavily on race. In its 1993 decision in *Shaw v. Reno*, the Court recognized an "analytically distinct" cause of action for racial gerrymandering under the Equal Protection Clause.[5] Under *Shaw*, "if racial considerations predominated over [traditional redistricting principles], the design of the district must

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1. See, e.g., Johnson v. De Grandy, 512 U.S. 997, 1007 (1994) ("[M]anipulation of district lines can dilute the voting strength of . . . minority group[s] . . . , whether by fragmenting the[m] . . . among several districts where a bloc-voting majority can routinely outvote them, or by packing them into one or a small number of districts to minimize their influence in the districts next door." (citing Voinovich v. Quilter, 507 U.S. 146, 153–54 (1993))).

2. 412 U.S. 755, 765–69 (1973).

3. See Chisom v. Roemer, 501 U.S. 380, 393–96 (1991) (discussing the Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 3, 96 Stat. 131, 134 (codified as amended at 52 U.S.C. § 10301 (2018))). To avoid confusion, this Essay refers to statutory provisions by Arabic numerals and to constitutional provisions by spelling them out. For example, this Essay refers to Section 2 of the VRA and Section Two of the Fifteenth Amendment.

4. See Bartlett v. Strickland, 556 U.S. 1, 10–13 (2009) (plurality opinion) (commenting that Section 2 may require the creation of majority-minority districts when a "minority group composes a numerical, working majority of the voting-age population" and there is racial bloc voting).

5. 509 U.S. 630, 652 (1993).

withstand strict scrutiny."[6] By subjecting districts to the strong medicine of strict scrutiny, *Shaw* limits the use of race in the redistricting process.

Thus, "a legislature attempting to produce a lawful districting plan is vulnerable to 'competing hazards of liability'" because the Equal Protection Clause simultaneously "restricts consideration of race and . . . demands consideration of race."[7] These two doctrines—racial vote dilution and racial gerrymandering—reflect conflicting interpretations of the Equal Protection Clause. Racial vote dilution doctrine harks back to an age when the Court was more comfortable with race-conscious decisionmaking, whereas *Shaw* embodies the current Court's colorblind interpretation of the Constitution. For decades, these doctrines have lived in an uneasy détente, and the Court has expressly declined to answer whether compliance with Section 2 is a compelling governmental interest.[8]

The Fifteenth Amendment is curiously missing from the Court's decisions recognizing vote dilution and racial gerrymandering claims.[9] The Court has repeatedly refused to answer whether the Fifteenth Amendment prohibits vote dilution.[10] Meanwhile, the *Shaw* Court briefly referenced the Fifteenth Amendment in a rhetorical flourish,[11] but it ultimately grounded the racial gerrymandering claim in the Equal Protection Clause.[12] This doctrinal ambiguity is counterintuitive given that the Fifteenth Amendment—not the Equal Protection Clause—was responsible for enfranchising Black men nationwide in 1870.[13] Put

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6. Cooper v. Harris, 137 S. Ct. 1455, 1464 (2017).

7. Abbott v. Perez, 138 S. Ct. 2305, 2315 (2018) (quoting Bush v. Vera, 517 U.S. 952, 977 (1996) (plurality opinion)).

8. See id. ("[W]e have assumed that compliance with the VRA may justify the consideration of race in a way that would not otherwise be allowed. In technical terms, we have assumed that complying with the VRA is a compelling state interest . . . .").

9. Cf. Eric Foner, The Second Founding: How the Civil War and Reconstruction Remade the Constitution 170 (2019) [hereinafter Foner, Second Founding] (observing that "the Fifteenth [Amendment] plays only a minor role in modern constitutional law").

10. The Court has reaffirmed this point even after a plurality concluded that the Fifteenth Amendment does not encompass vote dilution claims. 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 discriminatry denial or abridgment by government of the freedom to vote"), superseded by statute, Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 2, 96 Stat. 131, 134 (codified as amended at 52 U.S.C. § 10301 (2018)).

11. See Shaw v. Reno, 509 U.S. 630, 657 (1993) ("Racial gerrymandering . . . threatens to carry us further from the goal of a political system in which race no longer matters—a goal that the Fourteenth and Fifteenth Amendments embody, and to which the Nation continues to aspire.").

12. See id. at 642 (concluding that "appellants have stated a claim upon which relief can be granted under the Equal Protection Clause").

13. See Travis Crum, The Unabridged Fifteenth Amendment, 133 Yale L.J. 1039, 1055–56 (2024) [hereinafter Crum, Unabridged Fifteenth Amendment].

differently, the Fifteenth Amendment is the Constitution's original prohibition of racial discrimination in voting.

In two recent cases from the 2020 redistricting cycle, the Court grappled with the riddle of race-based redistricting. In its 2023 decision in *Allen v. Milligan*,[14] the Court confronted the tension between Section 2, *Shaw*, and the Reconstruction Amendments. In *Milligan*, civil rights groups brought a Section 2 challenge against Alabama's congressional redistricting plan, which had only one majority-Black district out of seven districts even though Alabama's population is twenty-seven percent Black.[15] In defending its redistricting plan, Alabama marshaled several arguments based on *Shaw*, seeking to minimize the use of race in the redistricting process and raising constitutional avoidance concerns about Section 2's application to single-member redistricting plans.[16]

In a shocking decision siding with the plaintiffs, the Court rebuffed "Alabama's attempt to remake . . . § 2 jurisprudence anew"[17] and "reject[ed] Alabama's argument that § 2 as applied to redistricting is unconstitutional under the Fifteenth Amendment."[18] The Court's characterization of Section 2 as Fifteenth Amendment enforcement legislation is particularly intriguing because the underlying doctrinal basis for vote dilution doctrine remains the Equal Protection Clause. On this point, the *Milligan* Court's reasoning contains an unexplained assumption. The Court skipped over whether the Fifteenth Amendment applies to redistricting, jumping instead to the question of whether Congress could enact a discriminatory results standard under its Fifteenth Amendment enforcement authority. *Milligan* nevertheless demonstrates the potential in viewing the Fifteenth Amendment as an independent constitutional provision—one that can justify more aggressive congressional action to protect the right to vote free of racial discrimination.[19]

But Section 2 is not out of the woods yet. In *Milligan*, Justice Clarence Thomas, joined by Justices Neil Gorsuch and Amy Coney Barrett, reiterated his long-standing belief that the VRA is unconstitutional as applied to vote dilution claims.[20] Even though Justice Brett Kavanaugh

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14. 143 S. Ct. 1487 (2023). In the interest of full disclosure, I filed an amicus brief in support of the plaintiffs in this case at the Supreme Court. See Brief for Professor Travis Crum as Amicus Curiae Supporting Respondents, *Milligan*, 143 S. Ct. 1487 (Nos. 21-1086 & 21-1087), 2022 WL 2873374.

15. See *Milligan*, 143 S. Ct. at 1502, 1553.

16. See Brief for Appellants at 31, 76, *Milligan*, 143 S. Ct. 1487 (Nos. 21-1086 & 21-1087), 2022 WL 1276146.

17. *Milligan*, 143 S. Ct. at 1506.

18. Id. at 1516.

19. See infra sections I.C, IV.B.1.

20. See *Milligan*, 143 S. Ct. at 1538–39 (Thomas, J., dissenting). Justice Samuel Alito did not join this portion of Thomas's dissent. In his own dissenting opinion, Alito focused on why the plaintiffs failed to satisfy the first *Gingles* prong. See id. at 1548–49 (Alito, J.,

sided with the plaintiffs, he declined to join a key part of Chief Justice John Roberts's opinion concerning the relationship between *Shaw*'s racial predominance standard and Section 2, thereby reducing it to a mere plurality.[21] And in a concurring opinion, Kavanaugh signaled his openness to an argument raised in Thomas's dissent: that Section 2 is invalid on the grounds that Congress's authority to require "race-based redistricting cannot extend indefinitely into the future."[22] The Court recently invoked a temporal argument to invalidate race-based affirmative action in college admissions programs,[23] foreshadowing that a similar claim could be used in a future *Shaw* case.[24] Predictably, states are already raising this temporal argument in the lower courts.[25] Thus, *Shaw* remains a looming threat to Section 2's constitutionality.

In 2024, the Court decided *Alexander v. South Carolina Conference of the NAACP*,[26] a *Shaw* claim brought by civil rights groups against a majority-white district. In an opinion by Justice Samuel Alito, the Court accepted South Carolina's "party not race" defense,[27] effectively greenlighting a strategy for mapmakers to raise partisan gerrymandering as a defense to *Shaw* claims.[28] Thomas's concurrence, however, makes *Alexander* far more remarkable. Despite being one of *Shaw*'s most vocal supporters for decades, Thomas renounced *Shaw*, declaring that racial gerrymandering claims were nonjusticiable political questions.[29] Intriguingly, one of

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dissenting); see also Thornburg v. Gingles, 478 U.S. 30, 50 (1986); infra section I.A.2 (explaining the *Gingles* factors).

21. See *Milligan*, 143 S. Ct. at 1510–11 (plurality opinion) (discussing the relationship between racial predominance and Section 2).

22. Id. at 1519 (Kavanaugh, J., concurring); see also id. (declining to reach this "temporal argument" because Alabama did not raise it); id. at 1543–44 (Thomas, J., dissenting) (criticizing Section 2 for lacking a termination date).

23. See Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 143 S. Ct. 2141, 2172 (2023) (citing Grutter v. Bollinger, 539 U.S. 306, 343 (2003)) (invoking *Grutter*'s twenty-five-year time limit as grounds for invalidating Harvard's and UNC's affirmative action programs); id. at 2222–23 (Kavanaugh, J., concurring) (arguing that affirmative action programs must have an end point).

24. Indeed, this temporal argument is a close cousin of the *Shelby County* Court's criticism that the VRA's coverage formula was based on outdated information. See Shelby County v. Holder, 570 U.S. 529, 556 (2013) ("There is no valid reason to insulate the coverage formula from review merely because it was previously enacted 40 years ago. If Congress had started from scratch in 2006, it plainly could not have enacted the present coverage formula."); Allison Orr Larsen, Do Laws Have a Constitutional Shelf Life?, 94 Tex. L. Rev. 59, 109–13 (2015) (critiquing *Shelby County*'s stale facts argument).

25. See Alpha Phi Alpha Fraternity, Inc. v. Raffensperger, No. 1:21-CV-5337-SCJ, 2023 WL 5674599, at *20 (N.D. Ga. July 17, 2023) (rejecting Georgia's temporal argument about Section 2's constitutionality).

26. 144 S. Ct. 1221 (2024).

27. See id. at 1240.

28. See id. at 1270 (Kagan, J., dissenting) ("The suspicion, and indeed derision, of suits brought to stop racial gerrymanders are self-evident; the intent to insulate States from those suits no less so.").

29. See id. at 1253 (Thomas, J., concurring in part).

Thomas's analytical moves was to reject the Equal Protection Clause's application to race and redistricting.[30] Thomas did not attempt to reconcile his new position with the VRA's constitutionality,[31] but this Essay shares his impulse to return to first principles.[32] Put simply, the Court's leading originalist is no longer willing to defend *Shaw*.

Given originalism's ascendancy on the Court,[33] this Essay investigates the original understanding of the role of race in the redistricting process. Here, the obvious touchstones are the Fourteenth and Fifteenth Amendments. After all, the Fourteenth Amendment is the contemporary jurisprudential font for voting rights. And the Fifteenth Amendment's guarantee that "[t]he right of citizens . . . to vote shall not be denied *or abridged* . . . on account of race"[34] clearly bans racially discriminatory voting qualifications but also suggests a broader application.

This Essay advances a multipronged argument concerning vote dilution, racial gerrymandering, and Section 2's constitutionality. At the outset, neither vote dilution nor racial gerrymandering claims are properly grounded in the original understanding of the Equal Protection Clause. Section One of the Fourteenth Amendment was understood to exclude political rights.[35] Section Two was a targeted provision that was intended to punish Southern states in the House and the Electoral College if they failed to enfranchise Black men.[36] Indeed, the Reconstruction Framers' decision to adopt the Fifteenth Amendment—instead of enfranchising Black men nationwide via statute—liquidated any

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30. See id. at 1260–61 (arguing that the Equal Protection Clause's text and the existence of the Fifteenth Amendment make the Equal Protection Clause "an unlikely source for claims about political districting").

31. See id. at 1252 ("This case is unique because it presents solely constitutional questions. The plaintiffs do not rely on the [VRA] for any of their claims. Nor do the South Carolina officials invoke the [VRA] as part of their defense.").

32. *Alexander* was decided after this Essay had been accepted for publication and had been workshopped four times. However, this Essay had not yet been posted on a publicly available site, like SSRN.

33. See Adam Liptak, Justice Jackson Joins the Supreme Court, and the Debate Over Originalism, N.Y. Times (Oct. 10, 2022), https://www.nytimes.com/2022/10/10/us/politics/jackson-alito-kagan-supreme-court-originalism.html (on file with the *Columbia Law Review*) (noting that Justices Elena Kagan and Ketanji Brown Jackson endorsed originalism during their confirmation hearings).

To be clear, this Essay recognizes that no Justice follows a consistently originalist methodology and that the very definition of originalism is hotly contested. See infra section II.A. Moreover, originalist arguments are oftentimes selectively, strategically, or even cynically deployed. See, e.g., Jack M. Balkin, Memory and Authority: The Uses of History in Constitutional Interpretation 70–73 (2024) (arguing that lawyers and judges are "cafeteria originalists" who pick and choose among originalist arguments). This Essay nevertheless takes originalist arguments seriously on their own terms, rather than critique the project itself.

34. U.S. Const. amend. XV, § 1 (emphasis added).

35. See infra section II.C.

36. See infra section II.C.

uncertainty surrounding the Fourteenth Amendment's application to voting rights.[37] Thus, from an originalist perspective, the Court has committed a grave category error: grounding two constitutional claims in the wrong amendment. This misstep is particularly damning for *Shaw*'s originalist defenders, as it suggests that racial gerrymandering claims are based on normative preferences for colorblindness rather than a faithful interpretation of the Equal Protection Clause.

Turning to the Fifteenth Amendment, the subject of redistricting did not feature prominently in its drafting or ratification. Instead, the Reconstruction Framers debated two key questions. First, whether to forbid additional voting qualifications, such as those based on property or education.[38] Second, whether the right to hold office should be explicitly protected and, once it was deleted from the text, whether it was nevertheless implicitly covered.[39] This history suggests that the Reconstruction Framers did not *intend* to regulate redistricting, but that does not fully answer the original public meaning of the Fifteenth Amendment's text.

In answering that question, this Essay looks at postratification practice as evidence of original understanding.[40] This Essay recounts how Congress declined to regulate race-based redistricting in the Reconstruction era Enforcement Acts and failed to enforce Section Two of the Fourteenth Amendment's apportionment penalty.[41] It also discusses how Congress imposed a one-person, one-vote standard for the 1870 redistricting cycle.[42] It then excavates congressional redistricting plans from Reconstruction and Redemption to determine how race was used by mapmakers.[43] These

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37. See Travis Crum, The Superfluous Fifteenth Amendment?, 114 Nw. U. L. Rev. 1549, 1617–22 (2020) [hereinafter Crum, Superfluous Fifteenth Amendment] ("Congress opted against the statutory option because neither the original Constitution nor the recently ratified Fourteenth Amendment provided sufficient authority. . . . The Fifteenth Amendment was thus a significant expansion of congressional authority to regulate voting rights in the states." (emphasis omitted)); infra section II.D.1.

38. See infra section II.D.3.

39. See infra sections II.D.2–.4.

40. See infra section III.A (discussing the relevance of postratification evidence).

41. See infra sections III.B.1–.2.

42. See infra section III.B.3.

43. For the underlying data, this Essay relies on Stanley B. Parsons, William W. Beach & Michael J. Dubin, United States Congressional Districts and Data, 1843–1883 (1986) [hereinafter Parsons et al., 1843–1883], and Stanley B. Parsons, Michael J. Dubin & Karen Toombs Parsons, United States Congressional Districts, 1883–1913 (1990) [hereinafter Parsons et al., 1883–1913]. Although the data are largely derived from these books, I uncovered a systematic error in the 1870-era redistricting tables that downplayed the percentage of Black inhabitants in each district. For Southern states, the 1870 Census contained two tables delineating the number of Black inhabitants across several decades. One was labeled "free colored" while the other was labeled "slave." After emancipation, the "slave" table zeroes out in 1870. See 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 14–16 (1872) [hereinafter 1870 Census]. It

practices are particularly probative of original understanding because the 1870 redistricting cycle was the first one conducted after the ratification of the Reconstruction Amendments and the widespread enfranchisement of Black men. At the time, voting was intensely racially polarized in the Southern states: Black voters overwhelmingly backed Republicans while white voters mostly supported Democrats.[44] Indeed, this political alignment was openly discussed and motivated the Reconstruction Framers—who were all Republicans—to pass the Fifteenth Amendment.[45] Mapmakers, therefore, could rely on race as a proxy for partisanship when drawing districts.[46] Unsurprisingly, both Republican and Democratic state legislatures did so.[47]

In light of this evidence, there is little historical support for *Shaw*'s racial gerrymandering cause of action under the Fifteenth Amendment. Even assuming the Fifteenth Amendment applies to redistricting, the Reconstruction Framers were comfortable with race-conscious decisionmaking, as evidenced by their frequent references to racial bloc voting. Moreover, there is postratification evidence that Republican legislatures in the South took race into account when drawing congressional districts.[48]

By contrast, Democrats packed and cracked Black voters when they seized power at the end of Reconstruction, thus providing a historical antecedent to contemporary vote dilution. On this point, the historical record on whether these actions were viewed as constitutional violations lacks clarity, as vote dilution was just one of many tools—including discriminatory voting qualifications and outright violence—employed by racist Southerners to neutralize the political power of Black men and effectively nullify the Fifteenth Amendment.[49]

Finally, given potential disagreement over the original understanding of the Fourteenth and Fifteenth Amendments' application to race-based redistricting, Section 2 of the VRA is best defended as an exercise of Congress's *Fifteenth* Amendment enforcement authority to remedy racial

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appears that Parsons, Beach, and Dubin continued using the "slave" table rather than the accurate "free colored" table for some counties. Compare id. at 25 (showing that Etowah County, Alabama, had 1,708 Black inhabitants in 1870), with Parsons et al., 1843–1883, supra, at 146 (showing Etowah County, Alabama, as having a total population of 10,109 inhabitants and 0.0% for the Black percentage of the population). This Essay corrects that error using census data and notes when doing so by citing to the 1870 Census.

44. See infra section II.B.

45. See infra section II.D.

46. See J. Morgan Kousser, Colorblind Injustice: Minority Voting Rights and the Undoing of the Second Reconstruction 29 (1999) ("Since voting was well known at the time to be extremely racially polarized—a conclusion borne out by extensive statistical analyses—a partisan gerrymander amounted to a racial gerrymander." (citation omitted)).

47. See infra section III.C.

48. See infra section III.C.

49. See infra section IV.B; see also Foner, Second Founding, supra note 9, at 144 (discussing the role of violence in the overthrow of Reconstruction).

discrimination in voting and protect the effective right of racial minorities to hold office.[50] Viewing Section 2 as Fifteenth Amendment enforcement legislation—as the Court did in *Milligan*—is critical because Congress has more leeway to pass enforcement legislation under that Amendment than the Fourteenth. Conversely, with little historical support for *Shaw*, the primary threat to Section 2's constitutionality evaporates.

In addition, under the Elections Clause, Congress has near plenary authority to regulate federal elections, which would include the power to set requirements for congressional redistricting.[51] Absent any race-based, external restraint from the Reconstruction Amendments, Congress would be free to impose Section 2 on the states for purposes of congressional redistricting.[52]

In articulating these claims, this Essay makes several contributions. The literature on the Fourteenth Amendment could fill a small library. The Fifteenth Amendment, however, has been largely ignored by legal scholars.[53] This Essay is the first to examine the Fifteenth Amendment's

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50. See infra Part IV.

51. See U.S. Const. art. I, § 4 ("Congress may at any time by Law make or alter [federal election] Regulations . . . .").

52. Under the Elections Clause, Congress can preempt state laws that regulate federal elections. See id. ("The Times, Places and Manner of holding Elections for . . . Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations . . . ."); Arizona v. Inter Tribal Council of Ariz., Inc., 570 U.S. 1, 13–15 (2013) (holding that there is no presumption against preemption under the Elections Clause).

53. Indeed, legal scholarship that primarily focuses on the Fifteenth Amendment's adoption can be summarized in a long footnote. See Earl M. Maltz, Civil Rights, the Constitution, and Congress, 1863–1869, at 142–56 (1990) [hereinafter Maltz, Civil Rights] (claiming that the Fifteenth Amendment prohibits only facially discriminatory laws); 2 The Reconstruction Amendments: The Essential Documents 435–597 (Kurt T. Lash ed., 2021) [hereinafter The Essential Documents] (compiling primary sources); Vikram David Amar & Alan Brownstein, The Hybrid Nature of Political Rights, 50 Stan. L. Rev. 915, 928–56 (1998) (arguing that the Reconstruction Framers had a race-conscious approach to adopting the Fifteenth Amendment); Vikram David Amar, Jury Service as Political Participation Akin to Voting, 80 Cornell L. Rev. 203, 222–41 (1995) [hereinafter Amar, Jury Service] (discussing the Fifteenth Amendment's drafting and its relevance to the right to serve on a jury); Alfred Avins, Literacy Tests and the Fifteenth Amendment: The Original Understanding, 12 S. Tex. L.J. 24, 64–66 (1970) (arguing that Congress could not ban literacy tests under its Fifteenth Amendment enforcement authority); Alfred Avins, The Right to Hold Public Office and the Fourteenth and Fifteenth Amendments: The Original Understanding, 15 U. Kan. L. Rev. 287, 304 (1967) (arguing that the Fifteenth Amendment does not protect the right to hold office); Henry L. Chambers, Jr., Colorblindness, Race Neutrality, and Voting Rights, 51 Emory L.J. 1397, 1425 (2002) ("[T]he Fifteenth Amendment should not be viewed as merely adding the right to vote to the list of other rights to be protected under the Constitution and . . . the Fourteenth Amendment."); 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, 263–64 (2004) (arguing that the Fifteenth Amendment effectively repealed Section Two of the Fourteenth Amendment); Travis Crum, The Lawfulness of the Fifteenth Amendment, 97 Notre Dame L. Rev. 1543, 1573–91 (2022) [hereinafter Crum, Lawfulness of the

application to redistricting through an originalist lens. My past work that canvassed the Fifteenth Amendment's adoption explicitly declined to resolve open doctrinal questions such as the Fifteenth Amendment's application to redistricting.[54] This Essay answers that question and is the first piece in a trilogy that examines the Fifteenth Amendment's application to redistricting, private action, and facially neutral voting qualifications. In a similar vein, this Essay is the first to thoroughly analyze the originalist underpinnings of both vote dilution and racial gerrymandering doctrine.[55] And although other scholars—particularly historians—have looked to redistricting during Reconstruction and Redemption to demonstrate how Jim Crow was established,[56] this Essay is

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Fifteenth Amendment] (discussing the irregularities in the Fifteenth Amendment's adoption); Travis Crum, Reconstructing Racially Polarized Voting, 70 Duke L.J. 261, 314–20 (2020) [hereinafter Crum, Racially Polarized Voting] (criticizing the Court's treatment of racially polarized voting as inconsistent with the Fifteenth Amendment's historical context); Crum, Superfluous Fifteenth Amendment, supra note 37, at 1602–17 (discussing the Fortieth Congress's decision to pass a constitutional amendment rather than a nationwide suffrage statute); Crum, Unabridged Fifteenth Amendment, supra note 13, at 1050 (arguing that the Fifteenth Amendment bans the use of racial proxies and protects the right to hold office); David P. Currie, The Reconstruction Congress, 75 U. Chi. L. Rev. 383, 452–56 (2008) (summarizing the history of the Fifteenth Amendment's adoption); Earl Maltz, The Coming of the Fifteenth Amendment: The Republican Party and the Right to Vote in the Early Reconstruction Era, 82 La. L. Rev. 395, 418–43 (2022) [hereinafter Maltz, Coming of the Fifteenth] (surveying the congressional debate over the Fifteenth Amendment); Richard M. Re & Christopher M. Re, Voting and Vice: Criminal Disenfranchisement and the Reconstruction Amendments, 121 Yale L.J. 1584, 1630–41 (2012) (discussing the Fifteenth Amendment's adoption and felon disenfranchisement laws).

54. See Crum, Unabridged Fifteenth Amendment, supra note 13, at 1123.

55. Two other papers have made similar—but more limited—claims. First, Vikram Amar and Alan Brownstein questioned *Shaw*'s doctrinal underpinnings on Fifteenth Amendment grounds. See Amar & Brownstein, supra note 53, at 919 (describing the contradiction between the reasons for the Fifteenth Amendment and the reasoning in *Shaw*). But their article gave "only brief consideration" to vote dilution doctrine over the course of two pages. Id. at 976–77. Second, in a prior article, I critiqued the Court's treatment of racial bloc voting as a constitutional taboo. See Crum, Racially Polarized Voting, supra note 53, at 310–11. That article gestured toward a holistic reassessment of voting rights jurisprudence based on the Fifteenth Amendment, but it "d[id] not purport to exhaustively address whether the Fifteenth Amendment prohibits vote dilution." Id. at 326.

56. See, e.g., Joseph H. Cartwright, The Triumph of Jim Crow: Tennessee Race Relations in the 1880s, at 223 (1976) (discussing vote dilution of Tennessee congressional districts); Eric Foner, Reconstruction: America's Unfinished Revolution: 1863–1877, at 590 (1988) [hereinafter Foner, Reconstruction] (discussing the packing of Mississippi's Black voters in a "'shoestring' Congressional district running the length of the Mississippi River"); Kousser, supra note 46, at 26–31 (discussing vote dilution in congressional districts in Mississippi, North Carolina, and South Carolina); Howard N. Rabinowitz, Race Relations in the Urban South, 1865–1890, at 270 (1978) ("Gerrymandering in its various forms was the most effective tactic used by sympathetic legislatures both to redeem the cities and to keep them in the hands of white Democrats."); Lawrence D. Rice, The Negro in Texas, 1874–1900, at 25 (1971) (discussing vote dilution in Texas's judicial districts); Sarah Woolfolk Wiggins, The Scalawag in Alabama Politics, 1865–1881, at 104 (1977) [hereinafter Wiggins,

the first to use those redistricting plans to shine light on the original understanding of the Fourteenth and Fifteenth Amendments. Finally, this Essay makes a novel argument that Section 2 can be reconceptualized as protecting the right of minority *politicians* to hold office, as opposed to focusing on the right of minority *voters* to elect their candidates of choice.

The Essay proceeds as follows. Part I canvasses the Court's doctrine on vote dilution and racial gerrymandering, highlighting the tension in how the Court has interpreted the Equal Protection Clause while ignoring the Fifteenth Amendment. Part II examines the original understanding of the Fourteenth and Fifteenth Amendments as applied to voting rights and redistricting. Part III excavates postratification evidence of how Congress and states approached the use of race in redistricting during Reconstruction and Redemption. Part IV reconciles vote dilution and racial gerrymandering doctrine with the original understanding of the Fourteenth and Fifteenth Amendments. Part IV concludes by arguing that Section 2 can be defended as an exercise of Congress's Fifteenth Amendment enforcement authority.

I. THE LAW OF RACE AND REDISTRICTING

Under the Fourteenth Amendment's Equal Protection Clause, mapmakers must consider race, just not too much. The Court's decision in *Regester* and Congress's 1982 amendments to Section 2 protect racial minorities from having their votes diluted. By contrast, *Shaw* restricts the use of race in redistricting. Meanwhile, the Fifteenth Amendment is absent from the doctrine. And therein lies the rub: The underlying cause of this doctrinal tension is that the Court has applied Fourteenth Amendment principles to what should be considered Fifteenth Amendment cases. The Court's recent decision in *Milligan* alleviates—but does not eliminate—this tension. And Thomas's *Alexander* concurrence calls for a wholesale reimagining of the doctrine based on originalist principles. This Part traces the development of the doctrine of race and redistricting from *Regester* to *Shaw* to the erasure of the Fifteenth Amendment to today's uneasy détente.

A. *Racial Vote Dilution*

Under current doctrine, the Equal Protection Clause and Section 2 of the VRA prohibit racial vote dilution. To understand vote dilution, it is helpful to first discuss a predicate condition: racially polarized voting. Also referred to as racial bloc voting, racially polarized voting occurs when racial minorities are "politically cohesive" and the "majority votes

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Alabama Politics] (discussing the Democratic gerrymander of Alabama's congressional districts); see also Carol M. Swain, Black Faces, Black Interests: The Representation of African Americans in Congress 20–29 (1993) (surveying the election of Black politicians to Congress during Reconstruction).

sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate."[57] There is no magic ratio for legally cognizable racial bloc voting, which "var[ies] according to a variety of factual circumstances."[58] Unfortunately, "racially polarized voting [is] not ancient history"[59] and remains a persistent feature of American politics.

When voting is racially polarized, "racial minorities are at risk of being systematically outvoted and having their interests underrepresented" because mapmakers can exploit racial differences to draw districts that entrench the dominant party in power.[60] For instance, mapmakers can pack or crack minority voters—that is, voters can be overconcentrated within a district or they can be spread out into multiple districts.[61] Alternatively, at-large and multi-member districts can submerge minority voters "in a larger white voting population," thereby diluting their votes.[62] Furthermore, certain "structural rules within an electoral jurisdiction . . . may enhance the winner-take-all aspects of at-large elections," such as numbered posts and anti-single-shot provisions.[63]

1. *Racial Vote Dilution Under the Constitution.* — Following the VRA's enactment, newly enfranchised Black voters in the South had to contend with these dilutive tactics, sparking a new wave of lawsuits.[64] In its 1973 decision in *White v. Regester*,[65] the Court held that racial vote dilution violates the Equal Protection Clause when "the political processes leading to nomination and election [a]re not equally open to participation by the group in question—that its members ha[ve] less opportunity . . . to participate in the political processes and to elect legislators of their

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57. Thornburg v. Gingles, 478 U.S. 30, 51 (1986).

58. Id. at 58 ("Consequently, there is no simple doctrinal test for the existence of legally significant racial bloc voting."); see also Christopher S. Elmendorf, Kevin M. Quinn & Marisa A. Abrajano, Racially Polarized Voting, 83 U. Chi. L. Rev. 587, 625–26 (2016) ("[T]here are no established quantitative cutoffs to distinguish polarized from nonpolarized communities . . . .").

59. Bartlett v. Strickland, 556 U.S. 1, 25 (2009) (plurality opinion).

60. Shelby County v. Holder, 570 U.S. 529, 578 (2013) (Ginsburg, J., dissenting).

61. See, e.g., Johnson v. De Grandy, 512 U.S. 997, 1007 (1994) ("[M]anipulation of district lines can dilute the voting strength of politically cohesive minority group members, whether by fragmenting . . . or by packing them . . . to minimize their influence in the districts next door." (citing Voinovich v. Quilter, 507 U.S. 146, 153–54))).

62. Growe v. Emison, 507 U.S. 25, 40 (1993).

63. Pamela S. Karlan, The Rights to Vote: Some Pessimism About Formalism, 71 Tex. L. Rev. 1705, 1714 (1993) [hereinafter Karlan, Pessimism About Formalism].

64. See Lani Guinier, The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success, 89 Mich. L. Rev. 1077, 1093–94 (1991) ("[T]he focus shifted to second generation, indirect structural barriers such as at large, vote-diluting elections. . . . Thus, second generation voting rights litigation focused on 'qualitative vote dilution.'").

65. 412 U.S. 755 (1973).

choice."[66] Adopting a "totality of the circumstances"[67] approach, the Court looked to several factors, including the number of minorities elected to office, the jurisdiction's history of racial discrimination in voting, racial inequities in socioeconomic indicators, racial campaign tactics, legislators' responsiveness to the minority community's interests, and racially polarized voting.[68] In establishing racial vote dilution as a claim under the Equal Protection Clause, the *Regester* Court made clear that racial minorities do *not* have a right to proportional representation.[69]

In the 1980 case of *City of Mobile v. Bolden*,[70] the Court entertained both constitutional and statutory vote dilution claims. A plurality interpreted Section 2 of the VRA to be limited to vote denial claims, thereby excluding vote dilution claims.[71] On the constitutional front, the *Bolden* plurality concluded that discriminatory intent was a necessary element of a vote dilution claim under the Fourteenth Amendment.[72] And in *Rogers v. Lodge*,[73] a majority of the Court made the *Bolden* plurality's equal protection conclusion a holding.[74] This development mirrored the Court's shift to requiring a showing of discriminatory intent to invalidate facially neutral laws.[75]

2. *Racial Vote Dilution Under Section 2.* — The *Bolden* Court's decision sparked immediate controversy.[76] Coincidentally, Congress had to reauthorize the temporary provisions of the VRA in 1982.[77] Congress,

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66. Id. at 766 (citing Whitcomb v. Chavis, 403 U.S. 124, 149–150 (1971)); see also *Whitcomb*, 403 U.S. at 141–44 (leaving open the possibility of racial vote dilution claims); James U. Blacksher & Larry T. Menefee, From *Reynolds v. Sims* to *City of Mobile v. Bolden*: Have the White Suburbs Commandeered the Fifteenth Amendment?, 34 Hastings L.J. 1, 22 (1982) (noting *Regester*'s unprecedented holding).

67. *Regester*, 412 U.S. at 769.

68. See id. at 766–79.

69. See id. at 765–66 ("To sustain such claims, it is not enough that the racial group allegedly discriminated against has not had legislative seats in proportion to its voting potential.").

70. 446 U.S. 55 (1980), superseded by statute, Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 2, 96 Stat. 131, 134 (codified as amended at 52 U.S.C. § 10301 (2018)).

71. See id. at 60–61 (plurality opinion).

72. See id. at 66–67.

73. 458 U.S. 613 (1982).

74. See id. at 617; see also infra section I.C (discussing how *Bolden* and *Rogers* also had implications for the Fifteenth Amendment).

75. See *Bolden*, 446 U.S. at 66; see also 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 [has] recast voting rights claims in the mold of *Washington v. Davis*" (citing 426 U.S. 229 (1976))).

76. See Allen v. Milligan, 143 S. Ct. 1487, 1499 (2023) (describing the media and civil rights community's immediate backlash to and criticism of *Bolden*).

77. See, e.g., Samuel Issacharoff, Pamela S. Karlan, Richard H. Pildes, Nathaniel Persily & Franita Tolson, The Law of Democracy: Legal Structure of the Political Process 524–30 (6th ed. 2022) (canvassing Section 2's legislative history).

therefore, seized on the opportunity to significantly revise Section 2 in two ways. First, Congress authorized vote dilution claims.[78] Second, Congress permitted a finding of liability based on discriminatory results.[79] In so doing, Congress expressly incorporated *Regester*'s "totality of [the] circumstances" standard and opportunity-to-elect language into Section 2's text.[80] Congress also adopted language disavowing a right to proportional representation.[81] And an influential committee report listed the so-called Senate Factors, which were "gleaned from the constitutional vote dilution jurisprudence of the 1970s" and would inform the totality of the circumstances analysis.[82] Congress relied on its Reconstruction Amendment enforcement authority in embracing a discriminatory results standard.[83]

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78. See Chisom v. Roemer, 501 U.S. 380, 394–95 (1991) (discussing the Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 2, 96 Stat. 131, 134 (codified as amended at 52 U.S.C. § 10301 (2018))).

79. See id. at 396. In recent years, controversy has arisen over whether Congress's adoption of a discriminatory results standard may have *excluded* Section 2 claims based on discriminatory intent. See League of Women Voters of Fla., Inc. v. Fla. Sec'y of State, 66 F.4th 905, 943 (11th Cir. 2023) (holding that "a finding of discriminatory impact is necessary to establish a violation of section 2 of the Voting Rights Act"); Amandeep S. Grewal, Discriminatory Intent Claims Under Section 2 of the Voting Rights Act, 2 Fordham L. Voting Rts. & Democracy F. 1, 4 (2023) (arguing that Section 2 lacks an intent test and advocating that Congress fix that oversight).

80. 52 U.S.C. § 10301(b); see also *Milligan*, 143 S. Ct. at 1500–01 (describing *Regester*'s role in Section 2's amendment).

81. 52 U.S.C. § 10301(b) ("[N]othing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." (emphasis omitted)); see also *Milligan*, 143 S. Ct. at 1500 (discussing this so-called "Dole compromise").

82. Elmendorf et al., supra note 58, at 597 (citing S. Rep. No. 97-417, at 28–29 (1982) (listing Senate Factors)).

83. See Nev. Dep't of Hum. Res. v. Hibbs, 538 U.S. 721, 727–28 (2003) ("Congress may enact so-called prophylactic legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct.").

On this point, it may be important to differentiate between the Fourteenth and Fifteenth Amendments, especially as this Essay investigates whether either Amendment was originally understood to apply to redistricting. The *Rogers* Court made clear that discriminatory intent is a necessary element of a vote dilution claim grounded in the Equal Protection Clause. See Rogers v. Lodge, 458 U.S. 613, 617 (1982) ("[A] showing of discriminatory intent has long been required in *all* types of equal protection cases charging racial discrimination." (citing Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977); Washington v. Davis, 426 U.S. 229 (1976); Wright v. Rockefeller, 376 U.S. 52 (1964))). But a majority of the Court has never held that the Fifteenth Amendment requires a showing of discriminatory intent. See *Milligan*, 143 S. Ct. at 1516 ("But we held over 40 years ago '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 [of the Fifteenth Amendment] outlaw voting practices that are discriminatory in effect.'" (alterations in original) (quoting City of Rome v. United States, 446 U.S. 156, 173 (1980))); Crum, Racially Polarized Voting, supra note 53, at 295 (distinguishing between Congress's Fourteenth and Fifteenth Amendment enforcement authority as to Section 2); Christopher S. Elmendorf, Making Sense of Section 2: Of Biased

The Court first addressed the revised Section 2 in its landmark decision in *Thornburg v. Gingles*.[84] There, the Court established three "necessary preconditions" that plaintiffs must satisfy to bring a racial vote dilution claim under Section 2.[85] First, the minority group must be "sufficiently large and geographically compact to constitute a majority in a single-member district."[86] Second, the minority group must be "politically cohesive."[87] And finally, majority bloc voting must "usually . . . defeat the minority's preferred candidate."[88] Thus, the *Gingles* factors require plaintiffs to establish residential segregation and racially polarized voting.[89] As the *Gingles* Court put it: "The essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives."[90] Although *Gingles* concerned multi-member districts, the Court would soon extend its preconditions to single-member redistricting plans.[91]

To be clear, the *Gingles* factors are necessary conditions for a vote dilution claim under Section 2, but they are not sufficient.[92] Once the *Gingles* factors are satisfied, courts turn to a totality of the circumstances inquiry, which draws on *Regester*'s factors.[93] At this stage of the inquiry, the Court has looked to the Senate Factors, which include, among others, whether the number of majority-minority districts is "*roughly* proportional to the minority voters' respective shares in the voting-age population."[94] This rough proportionality inquiry is in some tension with *Regester*'s rejection of proportional representation and with Section 2's textual disavowal of such a right.[95] The Court has reconciled this tension on the

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Votes, Unconstitutional Elections, and Common Law Statutes, 160 U. Pa. L. Rev. 377, 401 n.117 (2012) ("Section 2 may need the Fourteenth Amendment as its anchor insofar as it reaches injuries beyond simple vote denial, as it remains disputed whether the Fifteenth Amendment goes any further."); infra section I.C.

84. 478 U.S. 30, 34 (1986).

85. Id. at 50.

86. Id.

87. Id. at 51.

88. Id.

89. See, e.g., Nicholas O. Stephanopoulos, Race, Place, and Power, 68 Stan. L. Rev. 1323, 1327 (2016) (explaining "the two key determinants of minority representation under the Court's approach" are "racial segregation and racial polarization in voting").

90. *Gingles*, 478 U.S. at 47.

91. See Growe v. Emison, 507 U.S. 25, 40–41 (1993).

92. The Court has adopted a different approach for vote denial claims brought under Section 2. See Brnovich v. DNC, 141 S. Ct. 2321, 2338–40 (2021).

93. See, e.g., Johnson v. De Grandy, 512 U.S. 997, 1011–12 (1994).

94. Id. at 1000 (emphasis added).

95. See 52 U.S.C. § 10301(b) (2018) ("[N]othing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population."); White v. Regester, 412 U.S. 755, 765–66 (1973) ("To sustain such claims, it is not enough that the racial group allegedly discriminated against has not had legislative seats in proportion to its voting potential.").

grounds that Section 2 "speaks to the success of minority candidates[] as distinct from the political or electoral power of minority voters."[96]

As the *Milligan* Court recently explained: Because "[f]orcing proportional representation is unlawful and inconsistent with this Court's approach to implementing § 2,"[97] there are only three states and one state, respectively, in which Black- and Hispanic-preferred candidates win congressional seats proportionate to their share of the population.[98] According to the Court, "[t]he numbers bear the point out" because, as residential segregation decreases, it becomes more difficult to satisfy the compactness requirement.[99] In fact, "[s]ince 2010, plaintiffs nationwide have apparently succeeded in fewer than ten § 2 suits."[100]

To sum up, the constitutional and statutory standards differ. The constitutional standard requires a showing of discriminatory intent—a notoriously hard standard for plaintiffs to satisfy.[101] Indeed, the Court has not found a constitutional vote dilution violation since 1982, and it has never done so in a case involving a single-member redistricting plan.[102] By contrast, Section 2 may be satisfied with a showing of discriminatory results and, as interpreted by the Court, employs the *Gingles* preconditions.[103] And today, Section 2 is the primary vehicle for enforcing voting rights.[104]

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96. *De Grandy*, 512 U.S. at 1014 n.11.

97. Allen v. Milligan, 143 S. Ct. 1487, 1509 (2023).

98. See id.

99. See id.

100. Id. (citing Brief of Amici Curiae Professors Jowei Chen, Christopher S. Elmendorf et al. in Support of Appellees/Respondents at 7, *Milligan*, 143 S. Ct. 1487 (Nos. 21-1086 & 21-1087), 2022 WL 2873376).

101. See, e.g., 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) ("Given the minuscule size of the voting rights bar, requiring plaintiffs to prove intentional discrimination in cases involving complex election practices with lengthy and distant pedigrees would quite plausibly leave literally thousands of unconstitutional systems in place.").

102. Travis Crum, Deregulated Redistricting, 107 Cornell L. Rev. 359, 439 n.539 (2022) [hereinafter Crum, Deregulated Redistricting]; see also Bartlett v. Strickland, 556 U.S. 1, 20 (2009) (plurality opinion) (clarifying that its conclusion as to the first *Gingles* prong "does not apply to cases in which there is intentional discrimination against a racial minority"); League of United Latin Am. Citizens v. Perry (*LULAC*), 548 U.S. 399, 440 (2006) (remarking that Texas's mid-decade congressional redistricting plan "bears the mark of intentional discrimination that could give rise to an equal protection violation").

103. See 52 U.S.C. § 10301(b) (2018); supra notes 84–89 and accompanying text.

104. See Nathaniel Persily, The Promise and Pitfalls of the New Voting Rights Act, 117 Yale L.J. 174, 201–02 (2007) (noting the shift away from constitutional claims); see also Christopher S. Elmendorf & Douglas M. Spencer, Administering Section 2 of the Voting Rights Act After *Shelby County*, 115 Colum. L. Rev. 2143, 2152 (2015) (arguing that Section 2 is a "[w]eak [s]ubstitute" for the preclearance regime).

Although discriminatory results claims are far more prevalent, plaintiffs have started alleging discriminatory intent to attempt to "bail-in" jurisdictions back into the preclearance regime after *Shelby County*. See Crum, Deregulated Redistricting, supra note 102, at 390–93 (cataloging this development); Travis Crum, Note, The Voting Rights Act's Secret Weapon:

The upshot is that vote dilution doctrine requires mapmakers to take race into account during the redistricting process to avoid liability.[105]

B. *Racial Gerrymandering*

In reaction to aggressive interpretations of the VRA adopted by the DOJ, the Rehnquist Court developed *Shaw*'s racial gerrymandering claim, which allowed white plaintiffs to successfully challenge majority-minority districts. *Shaw* was initially viewed as a threat to the VRA. But in the 2010s, civil rights groups flipped the doctrine on its head and successfully used it to challenge packed majority-Black districts. Then, just this year, Thomas—the Court's most prominent originalist—rejected *Shaw* and concluded that racial gerrymandering claims are nonjusticiable political questions.

1. Shaw*'s First Wave*. — From the VRA's passage in 1965 through the Supreme Court's 2013 decision in *Shelby County v. Holder*, several Southern states were so-called "'covered' jurisdictions" subject to Section 5 of the VRA.[106] Because of their history of racial discrimination, covered jurisdictions had to preclear voting changes with the DOJ or a three-judge district court.[107] In the 1990 redistricting cycle, President George H.W. Bush's DOJ adopted a novel "[B]lack-maximization" interpretation of Section 5 that required covered jurisdictions to create the maximum possible number of majority-minority districts.[108] In response, the Democratic-controlled North Carolina General Assembly drew bizarrely shaped majority-Black districts to obtain preclearance.[109]

In *Shaw v. Reno*,[110] a group of white plaintiffs brought an equal protection challenge against North Carolina's congressional redistricting plan.[111] In agreeing that the plaintiffs had stated a claim, the Court recognized a new "analytically distinct"[112] racial gerrymandering cause of action under the Equal Protection Clause.[113] In contrast to vote dilution

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Pocket Trigger Litigation and Dynamic Preclearance, 119 Yale L.J. 1992, 2019–21 (2010) (arguing that bail-in suits could help respond to a decision invalidating the VRA's coverage formula even in the absence of congressional action).

105. Although outside this Essay's scope, there is ongoing controversy over whether Section 2 has an implied cause of action for private litigants. See Brnovich v. DNC, 141 S. Ct. 2321, 2350 (2021) (Gorsuch, J., concurring) (flagging the question); Ark. State Conf. NAACP v. Ark. Bd. of Apportionment, 86 F.4th 1204, 1206–07 (8th Cir. 2023) (holding that it does not); Robinson v. Ardoin, 86 F.4th 574, 588 (5th Cir. 2023) (holding that it does).

106. 570 U.S. 529, 537 (2013).

107. See id. at 537–40.

108. See Miller v. Johnson, 515 U.S. 900, 921 (1995).

109. See Richard L. Hasen, Racial Gerrymandering's Questionable Revival, 67 Ala. L. Rev. 365, 369 (2015) [hereinafter Hasen, Racial Gerrymandering].

110. 509 U.S. 630 (1993).

111. See id. at 636–38.

112. Id. at 652.

113. See id. at 642.

doctrine, *Shaw*'s "racial gerrymandering claim does not ask for a fair share of political power and influence . . . [but] asks instead for the elimination of a racial classification."[114]

According to the *Shaw* Court, "The Equal Protection Clause['s] . . . central purpose is to prevent the States from purposefully discriminating between individuals on the basis of race"[115] and therefore prohibits a "reapportionment plan [that] rationally cannot be understood as anything other than an effort to segregate citizens into separate voting districts on the basis of race without sufficient justification."[116] Alluding to the geopolitics of the 1990s, the Court claimed that race-based redistricting "bears an uncomfortable resemblance to political apartheid"[117] and "balkanize[s] us into competing racial factions."[118] Race-based redistricting, the Court elaborated, "threatens to carry us further from the goal of a political system in which race no longer matters."[119]

Initially, the *Shaw* Court focused on the "bizarre" and "highly irregular" shape of the challenged majority-minority district.[120] But in *Miller v. Johnson*,[121] the Court abandoned an aesthetics-based standard and adopted the "predominant factor" test.[122] Although a district's shape is still relevant evidence,[123] *Shaw* plaintiffs must "prove that the [mapmaker] subordinated traditional race-neutral redistricting principles, including but not limited to compactness, contiguity, and respect for political subdivisions[,] . . . to racial considerations."[124] For example, if a mapmaker moved a substantial number of voters into and out of a district in contradiction of traditional redistricting principles to achieve a racial target, then the racial predominance standard would be satisfied.[125] Critically, a mapmaker's "aware[ness] of racial demographics" is insufficient; race must "predominate[] in the redistricting process."[126] This distinction between awareness and motive opens the door to mapmakers arguing that,

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114. Rucho v. Common Cause, 139 S. Ct. 2484, 2502 (2019).

115. *Shaw*, 509 U.S. at 642 (citing Washington v. Davis, 426 U.S. 229, 239 (1976)).

116. Id. at 652.

117. Id. at 647.

118. Id. at 657.

119. Id.

120. Id. at 646.

121. 515 U.S. 900 (1995).

122. Id. at 916; see also Bethune-Hill v. Va. State Bd. of Elections (*Bethune-Hill I*), 137 S. Ct. 788, 798 (2017) (acknowledging this doctrinal shift); Heather K. Gerken, Understanding the Right to an Undiluted Vote, 114 Harv. L. Rev. 1663, 1692–93 (2001) [hereinafter Gerken, Undiluted Vote] (arguing that only Justice Sandra Day O'Connor appeared to endorse *Shaw*'s "expressive harm" theory).

123. See *Miller*, 515 U.S. at 916–17.

124. Id. at 916.

125. See Cooper v. Harris, 137 S. Ct. 1455, 1468–70 (2017); Ala. Legis. Black Caucus v. Alabama, 575 U.S. 254, 273–74 (2015).

126. *Miller*, 515 U.S. at 916 (citing Shaw v. Reno, 509 U.S. 630, 646 (1993)).

in jurisdictions with racial bloc voting, they were motivated by partisanship—not race—in moving voters between districts.[127]

"[I]f racial considerations predominated over [traditional redistricting principles], the design of the district must withstand strict scrutiny" and the mapmaker must "prove that its race-based sorting of voters serves a 'compelling interest' and is 'narrowly tailored' to that end."[128] For decades, the Court has refused to answer whether compliance with the VRA is a compelling governmental interest; instead, the Court has merely "assumed that one compelling interest is complying with operative provisions of the [VRA]."[129] On the narrow tailoring prong, mapmakers must have "'a strong basis' in evidence for concluding that the [VRA] required its action."[130] Put differently, a mapmaker needed "'good reasons' to think it would transgress the [VRA] if it did *not* draw race-based district lines."[131]

The *Shaw* Court's hostility to the VRA reflects a colorblind approach to the Constitution.[132] Moreover, *Shaw*-esque arguments started creeping into the conservative Justices' interpretation of the VRA.[133] Unsurprisingly, for its first two decades, *Shaw* was criticized by liberal Justices and legal scholars for its doctrinal incoherence and for threatening the VRA's constitutionality.[134]

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127. See *Cooper*, 137 S. Ct. at 1473 (rejecting an argument that a district was packed "with Democrats, not African-Americans"); Easley v. Cromartie, 532 U.S. 234, 253 (2001) (accepting party—not race—as a defense); Richard L. Hasen, Race or Party, Race as Party, or Party All the Time: Three Uneasy Approaches to Conjoined Polarization in Redistricting and Voting Cases, 59 Wm. & Mary L. Rev. 1837, 1838–39 (2018) (discussing the difficulty in disentangling race and party).

128. *Cooper*, 137 S. Ct. at 1464 (citing Bethune-Hill v. Va. State Bd. Of Elections (*Bethune-Hill I*), 137 S. Ct. 788, 800 (2017)).

129. Id.; see also *Bethune-Hill I*, 137 S. Ct. at 801 (assuming compliance with Section 5, when it was operative, was a compelling interest); Shaw v. Hunt (*Shaw II*), 517 U.S. 899, 915 (1996) (assuming compliance with Section 2 is a compelling governmental interest).

130. *Cooper*, 137 S. Ct. at 1464 (quoting Ala. Legis. Black Caucus v. Alabama, 575 U.S. 254, 278 (2015)).

131. Id. (quoting *Ala. Legis. Black Caucus*, 575 U.S. at 278).

132. See, e.g., Bush v. Vera, 517 U.S. 952, 1071–72 (1996) (Souter, J., dissenting) (critiquing *Shaw*'s colorblind rationale); Dale E. Ho, Something Old, Something New, or Something Really Old? Second Generation Racial Gerrymandering Litigation as Intentional Racial Discrimination Cases, 59 Wm. & Mary L. Rev. 1887, 1891 (2018) ("[T]he first-generation racial gerrymandering cases treated the mere consideration of race as a constitutional evil in itself.").

133. See, e.g., Holder v. Hall, 512 U.S. 874, 892 (1994) (Thomas, J., concurring in the judgment) ("[W]e have devised a remedial mechanism that encourages federal courts to segregate voters into racially designated districts to ensure minority electoral success. In doing so, we have collaborated in what may aptly be termed the racial 'balkaniz[ation]' of the Nation." (second alteration in original) (quoting Shaw v. Reno, 509 U.S. 630, 658 (1993))).

134. See *Shaw*, 509 U.S. at 680–82 (Souter, J., dissenting) (explaining how considering race in redistricting is different from relying on race in other contexts); Amar & Brownstein, supra note 53, at 919 (explaining that the Framers of the Reconstruction Amendments

2. Shaw*'s Second Wave*. — But things changed in 2015 when the Court heard *Alabama Legislative Black Caucus v. Alabama*,[135] the first case in which Black plaintiffs brought a *Shaw* claim.[136] During the 2010 redistricting process, the Republican-controlled Alabama state legislature asserted that, to obtain preclearance under Section 5, "it was required to maintain roughly the same black population percentage in existing majority-minority districts."[137] This interpretation—along with a tightening of the equi-population requirement—led to Alabama "deliberately cho[osing] additional black voters to move into underpopulated majority-minority districts."[138] The Supreme Court concluded that the three-judge district court had applied the wrong standard for determining predominance and strongly criticized "Alabama's mechanical interpretation of § 5."[139]

Curiously, the Court's 5-4 decision did not reflect the old *Shaw* lineup.[140] The Court's majority opinion was written by Justice Stephen Breyer, who was joined by the other three liberal Justices and Justice Anthony Kennedy.[141] So not only were Black plaintiffs now bringing *Shaw* claims,[142] but the liberal Justices were also embracing *Shaw*. By contrast, the Court's conservatives were now skeptical of *Shaw* claims.[143] Meanwhile, Kennedy was consistent in his openness to *Shaw* claims.[144]

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intended for race to be considered in implementing political rights); Gerken, Undiluted Vote, supra note 122, at 1742–43 ("[I]f we are going to recognize an aggregate harm like dilution, we must take into account its group-like qualities. If the Court refuses to do so, it is not only § 2 that will fall. Many claims, particularly civil rights claims, will be in constitutional jeopardy."); Pamela S. Karlan, All Over the Map: The Supreme Court's Voting Rights Trilogy, 1993 Sup. Ct. Rev. 245, 287 (detailing how *Shaw* limits governmental authority to enforce the VRA). But see Richard H. Pildes & Richard G. Niemi, Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After *Shaw v. Reno*, 92 Mich. L. Rev. 483, 509–10 (1993) (engaging with *Shaw*'s theory of expressive harm on its own terms).

135. 575 U.S. 254.

136. See Hasen, Racial Gerrymandering, supra note 109, at 365–66 (explaining how racial gerrymandering claims were used by white plaintiffs to dismantle majority-Black districts in the 1990s before being embraced by Black plaintiffs to challenge racially discriminatory redistricting schemes in the 2010s).

137. *Ala. Legis. Black Caucus*, 575 U.S. at 259–60.

138. Id. at 265.

139. See id. at 277.

140. See Hasen, Racial Gerrymandering, supra note 109, at 366 ("There was great irony in the use of the racial gerrymandering cause of action by minority voters who had rejected it in the 1990s, in its acceptance by liberal justices, and in the defense of race-based redistricting by Alabama Republicans and some conservative Supreme Court justices.").

141. *Ala. Legis. Black Caucus*, 575 U.S. at 257.

142. Id. at 258.

143. See id. at 294 (Thomas, J., dissenting) ("These consolidated cases are yet another installment in the 'disastrous misadventure' of this Court's voting rights jurisprudence." (quoting Holder v. Hall, 512 U.S. 874, 893 (1994) (Thomas, J., concurring in the judgment))).

144. See id. at 257; see also Miller v. Johnson, 515 U.S. 900, 903 (1995) (a first wave *Shaw* case authored by Kennedy).

After *Alabama Legislative Black Caucus*, a new wave of *Shaw* cases—which were brought by Black plaintiffs and backed by the Democratic Party—reached the Court in the late 2010s.[145] These cases were filed against other Southern states that had adopted interpretations of Sections 2 and 5 that packed Black voters.[146] Indeed, civil rights plaintiffs have had almost equal success in bringing *Shaw* claims as Section 2 claims in the past ten years or so, such that these second-wave *Shaw* claims have become a substitute for Section 2 claims.[147]

3. Shaw*'s Third Wave*. — During the 2020 redistricting cycle, *Shaw* claims remained part of the redistricting landscape. Once again, white plaintiffs brought traditional *Shaw* claims,[148] while civil rights groups filed more second wave cases.[149] Of relevance here, a third variant of *Shaw* emerged and one of *Shaw*'s most steadfast defenders—Thomas—renounced the doctrine.

Shaw's third wave began in South Carolina. For most of the 2010 cycle, South Carolina's Congressional District 1 was reliably Republican.[150] But

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145. See, e.g., Va. House of Delegates v. Bethune-Hill (*Bethune-Hill II*), 139 S. Ct. 1945, 1950 (2019) (dismissing appeal because a single house of the state legislature lacked standing to appeal); Cooper v. Harris, 137 S. Ct. 1455, 1481–82 (2017) (invalidating two North Carolina congressional districts); Bethune-Hill v. Va. State Bd. of Elections (*Bethune-Hill I*), 137 S. Ct. 788, 802 (2017) (upholding one state legislative district against a *Shaw* challenge but remanding for the district court to apply strict scrutiny as to several others); Wittman v. Personhuballah, 578 U.S. 539, 541 (2016) (dismissing appeal for lack of standing).

146. See Justin Levitt, Quick and Dirty: The New Misreading of the Voting Rights Act, 43 Fla. St. U. L. Rev. 573, 591 (2016) ("These jurisdictions deliberately sought to maintain supermajority quotas of minority voting-age or citizen voting-age population ostensibly to avoid retrogression, or to peg districts at a 50% minority-voter threshold ostensibly to satisfy section 2 . . . .").

147. As of October 2024, civil rights plaintiffs had prevailed in ten *Shaw* cases since *Alabama Legislative Black Caucus*, a comparable number to successful Section 2 lawsuits cited in *Milligan*. See North Carolina v. Covington, 138 S. Ct. 2548, 2553–55 (2018); Abbott v. Perez, 138 S. Ct. 2305, 2330 (2018); *Cooper*, 137 S. Ct. at 1481–82; Navajo Nation v. San Juan County, 929 F.3d 1270, 1293 (10th Cir. 2019); Finn v. Cobb Cnty. Bd. of Elec. & Reg., 1:22-CV-02300-ELR, 2023 WL 9184893, at *9 (N.D. Ga. Dec. 14, 2023); Jacksonville Branch of the NAACP v. City of Jacksonville, No. 22-cv-493-MMH-LLL, 2023 WL 4277423, at *1–2 (M.D. Fla. May 30, 2023); Grace, Inc. v. City of Miami, 674 F. Supp. 3d 1141, 1151, 1165 (S.D. Fla. 2023); Bethune-Hill v. Va. State Bd. of Elections, 326 F. Supp. 3d 128, 181 (E.D. Va. 2018); Ala. Legis. Black Caucus v. Alabama, 231 F. Supp. 3d 1026, 1348–49 (M.D. Ala. 2017); Page v. Va. State Bd. of Elections, No. 3:13cv678, 2015 WL 3604029, at *19 (E.D. Va. June 5, 2015); see also Allen v. Milligan, 143 S. Ct. 1487, 1509–10 (2023) ("Since 2010, plaintiffs nationwide have apparently succeeded in fewer than ten § 2 suits." (citing Brief of Amici Curiae Professors Jowei Chen et al. in Support of Appellees/Respondents, supra note 100, at 7)).

148. See, e.g., Callais v. Landry, No. 3:24-CV-00122 DCJ-CES-RRS, 2024 WL 1903930, at *6, *14 (W.D. La. Apr. 30, 2024) (detailing challenge brought by "non-Black voters" to congressional redistricting plan).

149. See, e.g., *Jacksonville*, 2023 WL 4277423, at *1–2 (approving a settlement agreement regarding the City of Jacksonville's electoral map).

150. See Alexander v. S.C. State Conf. of the NAACP, 144 S. Ct. 1221, 1236–37 (2024).

in the 2018 midterms, a Democrat prevailed, only to be narrowly defeated in 2020.[151] In 2021, the Republican-controlled South Carolina state legislature redrew the district, uniting two counties while dividing the city of Charleston.[152] The NAACP sued, claiming that District 1 was a racial gerrymander because South Carolina had employed a racial target—namely, a Black voting age population of seventeen percent.[153] In response, South Carolina argued that it had engaged in partisan—rather than racial—gerrymandering to make District 1 a safe Republican seat.[154]

In *Alexander v. South Carolina State Conference of the NAACP*, the Supreme Court heard its first *Shaw* challenge to a majority-white district. Thus, *Alexander* differed from both prior *Shaw* waves in that the challenged district was *not* majority-minority. In a 6-3 decision along ideological lines, the Court sided with South Carolina's partisan gerrymandering argument.[155] Although Alito's majority opinion seemed to disregard the deference due to a three-judge district court's factual findings,[156] the Court's "party-not-race" rationale was a frequent escape hatch in other *Shaw* cases, and one that commentators expected would become more common in a post-*Rucho* world.[157] Indeed, the *Alexander* Court's hostility to *Shaw* claims brought by civil rights groups—combined with a revived Section 2 after *Milligan*—may presage a shift back to Section 2 cases.[158]

The far more surprising development was Thomas's concurrence. Despite being one of *Shaw*'s most vocal supporters for decades, Thomas declared racial gerrymandering claims to be nonjusticiable political questions.[159] In other words, Thomas concluded that *Shaw* claims lack a

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151. See id.

152. See id. at 1236–38.

153. See id. at 1238.

154. See id. at 1240.

155. See id. at 1233.

156. See id. at 1275–76 (Kagan, J., dissenting) ("Normal clear-error review would lead to a different outcome. . . . That [factual] finding was reasonable, and deserves to be affirmed.").

157. See Crum, Deregulated Redistricting, supra note 102, at 427–28 ("If the Court wishes to further extricate itself, the clearest escape route is to follow the path set by *Easley* and take a broad view of what counts as partisan discrimination as opposed to racial discrimination."); Pamela S. Karlan, Exit Strategies in Constitutional Law: Lessons for Getting the Least Dangerous Branch Out of the Political Thicket, 82 B.U. L. Rev. 667, 687–88 (2002) (describing how *Shaw*'s first wave ended with a party-not-race "exit strategy").

158. The *Alexander* plaintiffs also brought an intentional vote dilution claim, and the three-judge district court sided with the plaintiffs on that claim as well based on "the 'same findings of fact and reasoning' that guided its racial-gerrymandering analysis." *Alexander*, 144 S. Ct. at 1251 (citing S.C. State Conf. of the NAACP v. Alexander, 649 F. Supp. 3d 117, 198 (D.S.C. 2023)). The Supreme Court remanded this claim based on its findings of clear error. See id. Moreover, the Supreme Court—correctly—determined that the district court "did not take into account the differences between vote-dilution and racial-gerrymandering claims." Id. at 1252.

159. Id. at 1253 (Thomas, J., concurring in part) ("[T]he Court has no power to decide these types of claims. . . . There are no judicially manageable standards for resolving claims

judicially manageable standard and that redistricting is committed to the political branches.

On the manageability prong, Thomas analogized to the Court's recent decision in *Rucho v. Common Cause*,[160] holding that partisan gerrymandering claims were nonjusticiable.[161] More fundamentally, Thomas's *Alexander* concurrence transplanted his skepticism of vote dilution doctrine—epitomized in his famous *Holder v. Hall* concurrence[162]—to racial gerrymandering: the absence of a neutral benchmark,[163] the entanglement of the Court in the political thicket,[164] and frustration with strategic lawyering.[165] Indeed, in proclaiming his new belief that racial gerrymandering claims were nonjusticiable, Thomas reiterated his "long maintained" belief that "vote dilution claims are also 'not readily subjected to any judicially manageable standard.'"[166]

Turning to whether redistricting is committed to a coordinate branch, Thomas emphasized that the Elections Clause gives Congress a "clear mandate . . . to supervise the States' districting efforts."[167] Thomas further claimed that federal courts lack the equitable authority to remedy racial gerrymanders by imposing new maps.[168]

Implicitly responding to originalist critiques of his jurisprudence, Thomas also argued that neither the Fourteenth nor the Fifteenth Amendments provide a constitutional basis for racial gerrymandering or vote dilution claims. Thomas started with the Equal Protection Clause—the Court's hook for both claims. Thomas claimed that the Equal Protection Clause "has no obvious bearing on districting" because it "'focus[es] on protection' . . . from violence" rather than "discriminatory

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about districting, and, regardless, the Constitution commits those issues exclusively to the political branches.").

160. 139 S. Ct. 2484, 2499–500 (2019).

161. See *Alexander*, 144 S. Ct. at 1253–54 (Thomas, J., concurring in part) (discussing *Rucho*).

162. 512 U.S. 874, 891 (1994) (Thomas, J., concurring in the judgment); see also Issacharoff et al., supra note 77, at 583 (referring to this concurrence as "the most sustained judicial critique of the enterprise of adjudicating vote dilution claims").

163. See *Alexander*, 144 S. Ct. at 1254 (Thomas, J., concurring in part) ("Determining how a legislature would have drawn district lines in a vacuum is a fool's errand.").

164. See id. at 1255 ("[T]hat analysis ensnarls courts in a political thicket.").

165. See id. at 1256 ("[T]he dissent's defense of the expert reports includes an exercise in armchair cartography.").

166. Id. at 1256–57 (quoting *Holder*, 512 U.S. at 901–02 (Thomas, J., concurring in the judgment)). Here, it is worth flagging that *Holder* involved a statutory vote dilution claim under Section 2. See *Holder*, 512 U.S. at 891. Thus, *Alexander* is an expansion of Thomas's previously expressed view about vote dilution to the constitutional realm.

167. *Alexander*, 144 S. Ct. at 1260 (Thomas, J., concurring in part). Because *Alexander* involved a congressional redistricting plan, the Elections Clause was implicated. But in a case involving state or local redistricting, the Elections Clause would be inapplicable. Presumably, Thomas would rely on the lack of judicially manageable standards in these cases.

168. See id. at 1264–66. This Article III question is outside the scope of this Essay.

legislative classifications."[169] Regarding the Fourteenth Amendment's structure, Thomas pointed out that Section Two "deals directly with [voting] rights" and an "express provision of a nonjudicial remedy for voting-rights violations in § 2 counsels against reading § 1 to allow judicial remedies implicitly in those same voting-rights disputes."[170] In addition, Thomas commented that "[r]eading the Equal Protection Clause to support claims for racial gerrymandering or vote dilution also makes the existence of the Fifteenth Amendment unexplainable."[171]

As for the Fifteenth Amendment itself, Thomas acknowledged that it "is the primary constitutional protection for the voting rights of racial minorities[,]" but it nevertheless cannot "justify racial gerrymandering or vote dilution claims in its own right."[172] That is because, in Thomas's view, "the Fifteenth Amendment 'address[es] only matters relating to access to the ballot.'"[173]

In sum, Thomas's concurrence in *Alexander* is extraordinary in several respects. First, the Court's leading originalist has rejected the Equal Protection Clause as the constitutional hook for voting rights decisions. Although Thomas hinted at this approach in a one-person, one-vote case from a few years ago,[174] his *Alexander* concurrence was unexpected.

Second, Thomas has repudiated *Shaw*'s racial gerrymandering claim and therefore decades of his votes in those cases. To be crystal clear, everyone—Justices included—is allowed to change their mind, and Thomas has shown an unusual willingness to be persuaded by originalist scholarship in other cases.[175] But it is difficult to overstate how crucial Thomas's prior views on the colorblind Constitution have been to voting rights.

Third, moving forward, Thomas's view that racial gerrymandering claims are nonjusticiable political questions has the potential to make strange bedfellows. In first wave *Shaw* cases, Thomas will vote to dismiss,

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169. Id. at 1260 (internal quotation marks omitted) (quoting United States v. Vaello Madero, 142 S. Ct. 1539, 1551 n.4 (2022) (Thomas, J., concurring)); see also id. at 1261 (arguing that Section One does not apply to voting rights because Section Two of that Amendment "deals directly with those rights").

170. Id. at 1261.

171. Id.

172. Id.

173. Id. (alteration in original) (quoting Holder v. Hall, 512 U.S. 874, 930 (1994) (Thomas, J., concurring in the judgment)). Thomas distinguished the Court's decision in *Gomillion* as a vote denial case rather than one "about the way minority voters were distributed between two districts." Id.; see also infra notes 182–188 (discussing Gomillion v. Lightfoot, 364 U.S. 339 (1960)).

174. See Evenwel v. Abbott, 578 U.S. 54, 87–88 (2016) (Thomas, J., concurring in the judgment).

175. See, e.g., Gamble v. United States, 139 S. Ct. 1960, 1980 (2019) (Thomas, J., concurring) ("I agree that the historical record does not bear out my initial skepticism of the dual-sovereignty doctrine.").

meaning that there is one less vote to invalidate the VRA in that case and aligning him with the liberal Justices.

Fourth and finally, Thomas's *Alexander* concurrence raises new questions. Most importantly, it is unclear how Thomas's position might change in a case brought under Section 2 of the VRA. Put differently, Thomas did not dwell on Congress's Reconstruction Amendment enforcement authority, and his ode to congressional authority under the Elections Clause would open the door to substantial deference to Congress's judgment as to congressional redistricting. These points are explored more below.[176]

* * *

Although *Shaw* has been embraced by civil rights groups and has been repudiated by Thomas, the doctrine continues to pose a threat to the VRA's constitutionality. After all, *Shaw* still mandates strict scrutiny when race predominates over traditional redistricting principles.[177] The *Milligan* dissents further demonstrate that *Shaw* continues to shape how some Justices interpret Section 2.[178]

As now-Judge Dale Ho observed when he was a voting rights lawyer: It could be "counterproductive for civil rights advocates to embrace colorblindness as a constitutional principle, which has been deployed to undermine race-conscious civil rights remedies in a range of areas."[179] *Shaw*'s racial gerrymandering claim "lies about like a loaded weapon ready for the hand" of a plaintiff willing to revive its original, 1990s vintage.[180]

C. *The Missing Fifteenth Amendment*

As the foregoing demonstrates, the Court has articulated two competing doctrines based on the Equal Protection Clause for regulating the use of race in the redistricting process. Intriguingly, the Fifteenth

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176. See infra Part IV.

177. In *Bethune-Hill I*, the Court upheld a district against a *Shaw* challenge and avoided answering the compelling-interest prong of strict scrutiny because that issue had not been raised by the plaintiffs. See Bethune-Hill v. Va. State Bd. of Elections (*Bethune-Hill I*), 137 S. Ct. 788, 800 (2017); see also id. at 804 (Thomas, J., concurring in the judgment in part and dissenting in part) ("This Court has never, before today, assumed a compelling state interest while *upholding* a state redistricting plan." (emphasis added)). If plaintiffs were to request this in the future and the Court were to agree, then *Shaw* is less of a threat in that particular case. But not all *Shaw* plaintiffs are friends of the VRA, and the Court has become more conservative since *Bethune-Hill I* was decided in 2017.

178. See Allen v. Milligan, 143 S. Ct. 1487, 1524 (2023) (Thomas, J., dissenting); id. at 1549–51 (Alito, J., dissenting).

179. Ho, supra note 132, at 1901.

180. Korematsu v. United States, 323 U.S. 214, 246 (1944) (Jackson, J., dissenting), overruled by Trump v. Hawaii, 138 S. Ct. 2392, 2423 (2018).

Amendment is missing from the Court's current approach to race and redistricting.[181]

In searching for the missing Fifteenth Amendment, the obvious starting point is the Court's 1960 decision in *Gomillion v. Lightfoot*.[182] In that case, the State of Alabama notoriously redefined the City of Tuskegee's boundaries from a square to a "strangely irregular twenty-eight-sided figure," which had the "inevitable effect of . . . remov[ing] from the city all save four or five of its 400 Negro voters while not removing a single white voter."[183] The Court characterized Alabama's action as "segregating white and colored voters by fencing Negro citizens out of town so as to deprive them of their preexisting municipal vote."[184] On these facts, the Court held that the plaintiffs had stated a claim that the law violated the Fifteenth Amendment.[185]

Gomillion establishes that the Fifteenth Amendment extends beyond voting qualifications.[186] But to be clear, *Gomillion*'s fact pattern—namely, a state changing an *entire* municipality's boundaries—does not invoke today's archetypal vote dilution scenario, in which a redistricting plan packs or cracks minority voters. That distinction would come to matter for some Justices.[187] Moreover, Justice Charles Whittaker's short, solo concurrence—which argued that the Equal Protection Clause was the proper basis for the Court's decision—would eventually play an outsized role in how *Gomillion* would be viewed.[188]

Over the next few decades, the Fifteenth Amendment disappeared from the Court's jurisprudence on race and redistricting. In *Wright v. Rockefeller*, the Court heard a Fourteenth and Fifteenth Amendment challenge to New York's congressional redistricting plan, which allegedly packed Black and Puerto Rican voters into one congressional district.[189] The Court did not reach the constitutional question because it affirmed the district court's factual finding that the plaintiffs had "failed to prove that the New York Legislature was either motivated by racial considerations or in fact drew the districts on racial lines."[190]

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181. For a discussion of how the Equal Protection Clause eclipsed the Fifteenth Amendment, see Crum, Superfluous Fifteenth Amendment, supra note 37, at 1557–64.

182. 364 U.S. 339 (1960).

183. Id. at 341.

184. Id.

185. See id. at 340, 347–48; see also id. at 346 ("When a legislature thus singles out a readily isolated segment of a racial minority for special discriminatory treatment, it violates the Fifteenth Amendment.").

186. See id. at 346.

187. See infra note 219.

188. See *Gomillion*, 364 U.S. at 349 (Whittaker, J., concurring) (arguing that Alabama's actions constituted "unlawful segregation of races of citizens").

189. 376 U.S. 52, 54–55 (1964).

190. Id. at 56.

Next, and as explained above,[191] the Court recognized vote dilution claims under the Equal Protection Clause in *White v. Regester*.[192] The Fifteenth Amendment was not even mentioned in *Regester*.[193] The *Regester* Court's decision marked the start of the Court's shift to the Equal Protection Clause in race and redistricting cases.

Then, in *United Jewish Organizations of Williamsburgh, Inc. v. Carey* (*UJO*), New York created several majority-Black legislative districts to comply with Section 5 of the VRA.[194] A group of Hasidic Jewish voters sued under the Fourteenth and Fifteenth Amendments, alleging unlawful cracking of their community. Interestingly, the plaintiffs' Fifteenth Amendment argument could be viewed as a hybrid vote dilution and racial gerrymandering claim: The plaintiffs "alleged that they were assigned to electoral districts solely on the basis of race, and that this racial assignment diluted their voting power in violation of the Fifteenth Amendment."[195]

In a deeply fractured opinion, a shifting plurality of the Court rejected the plaintiffs' claims.[196] As relevant here,[197] the plurality—consisting of Justices Byron White, John Paul Stevens, William Brennan, and Harry Blackmun—rejected the plaintiffs' claims that "the use of racial criteria in districting and apportionment is never permissible" and that "the use of a 'racial quota' in redistricting is never acceptable."[198] In reaching that conclusion, the plurality stated that "neither the Fourteenth nor the Fifteenth Amendment mandates any per se rule against using racial factors in districting"[199] and that "a reapportionment cannot violate the Fourteenth or Fifteenth Amendment merely because a State uses specific numerical quotas in establishing a certain number of black majority districts."[200] On this point, the plurality relied heavily on Section 5's constitutionality.[201] The plurality further concluded that New York's redistricting was permissible to comply with Section 5.[202] Finally, a *different* plurality—consisting of White, Stevens, and Justice William Rehnquist—determined that, even setting the VRA aside, New York's redistricting plan did not violate the Fourteenth or Fifteenth Amendments. Relying on *Gomillion* and *Regester*, the plurality stated that there "was no fencing out

191. See supra section I.A.

192. 412 U.S. 755 (1973).

193. Id.

194. 430 U.S. 144, 150–51 (1977).

195. Id. at 153.

196. Id. at 146 (plurality opinion).

197. The bulk of the plurality's reasoning concerned compliance with Section 5's retrogression principle. See id. at 155–62.

198. Id. at 156.

199. Id. at 161.

200. Id. at 162.

201. See id. at 161 (explaining that plaintiffs' argument would render Section 5 unconstitutional).

202. See id. at 164–65.

the white population from participation in the political processes of the county, and the plan did not minimize or unfairly cancel out white voting strength."[203] *UJO*'s splintered reasoning revealed a Court struggling with how to reconcile race and redistricting as well as how to handle a case brought by white voters.[204]

The Fifteenth Amendment's applicability to vote dilution claims was squarely raised in *City of Mobile v. Bolden*.[205] Recall that the *Bolden* plurality concluded that there was an intent element in vote dilution claims under the Fourteenth Amendment and that Section 2 was limited to vote denial cases.[206] On the latter point, the plurality reasoned that the Fifteenth Amendment and the original version of Section 2 were coextensive.[207] The *Bolden* plurality, therefore, determined that the Fifteenth Amendment merely covers vote denial claims—whether citizens can "register and vote without hindrance" regardless of race.[208] The *Bolden* plurality further decided that the Fifteenth Amendment "prohibits only purposeful[] discriminat[ion]."[209] Although the Court transformed *Bolden*'s plurality opinion on the *Fourteenth* Amendment into a holding in *Rogers v. Lodge*,[210] the Court "express[ed] no view on the application of the Fifteenth Amendment [in] th[at] case."[211]

Since *Bolden* and the 1982 amendments to Section 2, constitutional vote dilution claims have taken a back seat to statutory ones.[212] Because discriminatory result claims are easier to win under Section 2, the Court has not had to decide whether the Fifteenth Amendment encompasses vote dilution claims. Indeed, the Court has repeatedly stated that this question remains open.[213]

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203. Id. at 165 (citing White v. Regester, 412 U.S. 755, 765–67 (1973); Gomillion v. Lightfoot, 364 U.S. 339 (1960)).

204. Curiously, White's plurality opinion lumps Hasidic Jewish voters together with the larger white community, even though those voters "might themselves be thought of as a discrete and insular minority." Issacharoff et al., supra note 77, at 522.

205. 446 U.S. 55 (1980), superseded by statute, Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 2, 96 Stat. 131, 134 (codified as amended at 52 U.S.C. § 10301 (2018)).

206. See supra section I.A.

207. See *Bolden*, 446 U.S. at 60 (plurality opinion) ("[I]t is apparent that the language of § 2 no more than elaborates upon that of the Fifteenth Amendment . . . .").

208. Id. at 65 (internal quotation marks omitted).

209. Id.

210. 458 U.S. 613, 617 (1982).

211. Id. at 619 n.6.

212. See supra note 104 and accompanying text.

213. See Reno v. Bossier Par. Sch. Bd., 528 U.S. 320, 334 n.3 (2000) ("[W]e have never held that vote dilution violates the Fifteenth Amendment."); id. at 360 n.11 (Souter, J., concurring in part and dissenting in part) ("We have suggested, but have never explicitly decided, that the Fifteenth Amendment applies to dilution claims."); 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

Turning to the *Shaw* line of cases, the Court grounded the racial gerrymandering cause of action squarely in the Equal Protection Clause.[214] To be sure, the *Shaw* Court referenced the Fifteenth Amendment in rhetorical fashion.[215] But crucially, the *Shaw* Court reframed *Gomillion* as a Fourteenth Amendment case, highlighting "the correctness of Justice Whittaker's [concurrence]."[216] The Court also distinguished its prior decisions in *Wright* and *UJO*.[217] Once *Miller* established the predominance standard, the Fifteenth Amendment largely disappeared from the *Shaw* line of cases.[218]

To sum up, a majority of the Court has failed to clarify the Fifteenth Amendment's application to redistricting since its decision in *Gomillion*. Tellingly, the Justices have repeatedly disputed whether *Gomillion* provides support for vote dilution doctrine versus racial gerrymandering claims—or whether it is best classified as a Fourteenth Amendment case.[219] Indeed,

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scope of the Fifteenth Amendment's prohibition in this case." (citation omitted)); see also 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 [Fifteenth Amendment] claim . . . ." (citations omitted)).

The Court's recent cases on the Fifteenth Amendment's substantive scope have implicated vote denial claims. See Brnovich v. DNC, 141 S. Ct. 2321, 2348–50 (2021) (holding that Arizona's ballot-collection law was not enacted with discriminatory purpose); Rice v. Cayetano, 528 U.S. 495, 523–24 (2000) (striking down law that disenfranchised citizens who were of non-Hawaiian descent).

214. Shaw v. Reno, 509 U.S. 630, 642 (1993) (concluding that "appellants have stated a claim upon which relief can be granted under the Equal Protection Clause").

215. See id. at 657 ("Racial gerrymandering . . . threatens to carry us further from the goal of a political system in which race no longer matters—a goal that the Fourteenth and Fifteenth Amendments embody, and to which the Nation continues to aspire.").

216. Id. at 645.

217. See id. at 645–46 (emphasizing *Wright*'s affirmance on factual grounds); id. at 651–52 (downplaying *UJO* as a fractured decision that did not preclude a racial gerrymandering claim).

218. To be clear, the Court has referenced the Fifteenth Amendment in *Shaw* cases in relation to Congress's authority to pass the VRA. See Miller v. Johnson, 515 U.S. 900, 926–27 (1995); see also Bush v. Vera, 517 U.S. 952, 991 (1996) (O'Connor, J., concurring). The *Miller* Court also referenced the Fifteenth Amendment in a large block quote from *Shaw* about the desirability of a post-racial future. See *Miller*, 515 U.S. at 912 (quoting *Shaw*, 509 U.S. at 657); supra note 215 (quoting the relevant *Shaw* language). But after *Shaw*, the Court has not mentioned the Fifteenth Amendment as a potential *source* of the racial gerrymandering cause of action.

219. See Reno v. Bossier Par. Sch. Bd., 528 U.S. 320, 334–35 & n.3 (2000) (arguing that *Gomillion* "had nothing to do with racial vote dilution, a concept that does not appear in our voting-rights opinions until nine years later"); id. at 360 n.11 (Souter, J., concurring in part and dissenting in part) ("Changing political boundaries to affect minority voting power would be called dilution today. *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."); *Shaw*, 509 U.S. at 645 (viewing *Gomillion* as a Fourteenth Amendment case and as support for *Shaw*'s bizarreness inquiry); id. at 668–69 (White, J., dissenting) (arguing that *Gomillion* "cannot stand for the proposition that the intentional creation of

Gomillion has long stood as a *Rashomon* for the Court, with different Justices interpreting its holding to support their own conclusions about the Fifteenth Amendment's scope.[220]

D. *Doctrinal Tension*

The Court's vote dilution and racial gerrymandering doctrines have long been on a collision course. Typically, this tension is characterized as between the VRA and the Equal Protection Clause.[221] That is because Section 2's discriminatory results standard sweeps more broadly than *Regester*'s discriminatory intent requirement, thereby demanding greater consideration of race and teeing up more potential *Shaw* claims.

There are two ways to conceptualize this problem. First, there is the tension within Equal Protection doctrine between *Regester* and *Shaw*. Second, and contingent on the answer to the prior question, there is the issue of whether Section 2 is permissible enforcement legislation under the Reconstruction Amendments. This section unpacks each of these issues. It concludes by arguing that the Court's recent decision in *Allen v. Milligan* does not fully resolve them.

First, and most obviously, the Court has interpreted the Equal Protection Clause in diametrically opposite ways. To briefly recap, *Regester* demands that mapmakers consider race to ensure that racial minorities have an equal opportunity "to participate in the political processes and to elect legislators of their choice."[222] In encouraging race-conscious decisionmaking, *Regester* is a relic from a bygone era of constitutional law. But *Regester*'s doctrine has not been internally reworked or overturned in our new colorblind age.

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majority-minority districts, without more, gives rise to an equal protection challenge"); City of Mobile v. Bolden, 446 U.S. 55, 86 (1980) (Stevens, J., concurring in the judgment) (viewing *Gomillion* as a Fourteenth Amendment case), superseded by statute, Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 2, 96 Stat. 131, 134 (codified as amended at 52 U.S.C. § 10301 (2018)); South Carolina v. Katzenbach, 383 U.S. 301, 311 (1966) ("Racial gerrymandering was forbidden by *Gomillion v. Lightfoot*.").

220. The *Rashomon* effect is named for a famous 1950 Japanese movie in which four eyewitnesses recount a crime in mutually exclusive ways and "is used to describe those occasions when a single event is perceived in contradictory, although perhaps equally plausible, ways." Derek A. Webb, The *Somerset* Effect: Parsing Lord Mansfield's Words on Slavery in Nineteenth Century America, 32 Law & Hist. Rev. 455, 455 (2014); cf. Heather K. Gerken, *Rashomon* and the Roberts Court, 68 Ohio St. L.J. 1213, 1214 (2007) ("The authors' interpretations of *LULAC* are so different that at times one wonders whether they were reading the same opinion. This *Rashomon* effect is, again, just what one would expect from a Court in an inchoate state.").

221. See, e.g., Abbott v. Perez, 138 S. Ct. 2305, 2315 (2018) ("Since the Equal Protection Clause restricts consideration of race and the VRA demands consideration of race, a legislature attempting to produce a lawful districting plan is vulnerable to 'competing hazards of liability.'" (quoting Bush v. Vera, 517 U.S. 952, 977 (1996) (plurality opinion))).

222. White v. Regester, 412 U.S. 755, 766 (1973) (citing Whitcomb v. Chavis, 403 U.S. 124, 149–50 (1971)).

Instead, the Court adopted *Shaw*'s racial gerrymandering doctrine to push back on race-based redistricting. The *Shaw* Court's assertions that race-based redistricting entrenches racial differences is a familiar theme in colorblind jurisprudence.[223] *Shaw* is the colorblind Constitution applied to redistricting.

Second, once the VRA enters the equation, the question becomes one of congressional authority. Congress has power under the Fourteenth and Fifteenth Amendments to pass "appropriate" enforcement legislation.[224] As the Court has explained, "Congress may enact so-called prophylactic legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct."[225] As unpacked below,[226] the scope of Congress's power may very well depend on whether it is exercising its Fourteenth or Fifteenth Amendment enforcement authority.

After the *Milligan* Court's surprising decision, many scholars—understandably—celebrated that Section 2 remained on the books.[227] To be sure, Section 2 is on the firmest constitutional ground since *Shaw* was decided. Thomas's *Alexander* concurrence also takes one vote off the table to invalidate Section 2 when its constitutionality is challenged in a *Shaw* case. But one should also be realistic about *Milligan*'s limits and how a future majority could approach the question differently.

Recall that the Court rebuffed "Alabama's attempt to remake . . . § 2 jurisprudence anew"[228] and "reject[ed] Alabama's argument that § 2 as applied to redistricting is unconstitutional under the *Fifteenth* Amendment."[229] A few obvious points before concluding with the unacknowledged gap in the Court's reasoning.

First, at least based on Thomas's *Milligan* dissent, there are three votes to invalidate Section 2 as applied to vote dilution claims.[230] Curiously, Alito did not join this portion of Thomas's dissent. But, as noted, Kavanaugh's

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223. See, e.g., Johnson v. California, 543 U.S. 499, 507 (2005) ("[B]y insisting that inmates be housed only with other inmates of the same race, it is possible that prison officials will breed further hostility among prisoners and reinforce racial and ethnic divisions.").

224. U.S. Const. amend. XIV, § 5; id. amend. XV, § 2.

225. Nev. Dep't of Hum. Res. v. Hibbs, 538 U.S. 721, 727–28 (2003).

226. See infra Part IV.

227. These reactions ranged from victory lap to cautious optimism. See Nicholas Stephanopoulos, Early Thoughts on *Milligan*, Election L. Blog (June 8, 2023), https://electionlawblog.org/?p=136712 (on file with the *Columbia Law Review*) ("Finally, and maybe most importantly, *Milligan* resolved the question of Section 2's constitutionality."); Franita Tolson, A Few Preliminary Thoughts on *Allen v. Milligan*, Election L. Blog (June 8, 2023), https://electionlawblog.org/?p=136693 (on file with the *Columbia Law Review*) ("Does that mean that Section 2 is constitutional and won't go the way of preclearance? Maybe not, but I think Section 2 is okay for now.").

228. Allen v. Milligan, 143 S. Ct. 1487, 1506 (2023).

229. Id. at 1516 (emphasis added).

230. As discussed previously, Thomas's *Alexander* concurrence somewhat problematizes this count. See supra section I.B.3.

concurrence suggested that he might agree with Thomas's claim that "race-based redistricting cannot extend indefinitely into the future."[231]

Second, Kavanaugh did not join a portion of Roberts's opinion, downgrading it to a plurality for that section. That section grappled with how *Shaw*'s predominance standard interacts with Section 2. The plurality declared that "[w]hen it comes to considering race in the context of districting, we have made clear that there is a difference 'between being aware of racial considerations and being motivated by them.' The former is permissible; the latter is usually not."[232] Kavanaugh's reluctance to join the plurality's reconciliation of *Shaw* and *Gingles* is worrisome for the VRA's future constitutionality.

Third, the Court's decision could be read as an ode to statutory stare decisis,[233] a point that Kavanaugh emphasized in his concurrence.[234] Although Alabama advocated an aggressive rewriting of the *Gingles* factors and invoked constitutional avoidance concerns to limit Section 2's application to single-member redistricting plans, Alabama did *not* argue that *Gingles* should be overturned, only cabined. Moreover, the case's procedural posture—on appeal of a preliminary injunction—meant that the question was whether the plaintiffs were likely to succeed based on existing precedent.

Finally, the Court's reasoning on enforcement authority overlooked the question of whether the Fifteenth Amendment applies to redistricting. Here, it is worth quoting the Court's reasoning in full:

> We also reject Alabama's argument *that § 2 [of the VRA] as applied to redistricting is unconstitutional under the Fifteenth Amendment*. According to Alabama, that Amendment permits Congress to legislate against only purposeful discrimination by States. But we held over 40 years ago "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 [of the Fifteenth Amendment] outlaw voting practices that are discriminatory in effect." The VRA's "ban on electoral changes that are discriminatory in effect," we emphasized, "is an appropriate method of promoting the purposes of the Fifteenth Amendment." As *City of Rome* recognized, we had reached the

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231. *Milligan*, 143 S. Ct. at 1519 (Kavanaugh, J., concurring); id. at 1541 (Thomas, J., dissenting) (criticizing Section 2 for lacking a termination date).

232. Id. at 1510 (plurality opinion) (citations omitted) (quoting Miller v. Johnson, 515 U.S. 900, 916 (1995)).

233. See id. at 1515 (majority opinion) ("Congress is undoubtedly aware of our construing § 2 to apply to districting challenges. It can change that if it likes. But until and unless it does, statutory *stare decisis* counsels our staying the course.").

234. See id. at 1517–19 (Kavanaugh, J., concurring in part). To be sure, the Court can still overrule statutory precedents. See, e.g., Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2273 (2024) (overruling Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984)).

> very same conclusion in *South Carolina v. Katzenbach*, a decision issued right after the VRA was first enacted.[235]

The *Milligan* Court viewed the *sole* question as whether Congress may enact a discriminatory results standard pursuant to its Fifteenth Amendment enforcement authority. Relying on key precedents that had upheld prior versions of the VRA under a rationality standard—namely, *South Carolina v. Katzenbach*[236] and *City of Rome v. United States*[237]—the Court held that Congress may do so. The Court went even further in concluding that Congress may "authorize race-based redistricting as a remedy for § 2 violations."[238]

But the *Milligan* Court skipped over—indeed, failed to even flag—that it remains an open question whether the Fifteenth Amendment applies to redistricting. Tellingly, the *Milligan* Court recognized that *City of Rome* worked around the *Bolden* plurality's conclusion that the Fifteenth Amendment applies only to intentional discrimination.[239] Nonetheless, the *Milligan* Court conflated Section 2's discriminatory results standard with its application to vote dilution claims.

In some ways, the *Milligan* Court's analysis highlights just how much deference is given to Congress under *Katzenbach*'s rationality standard. Indeed, the Court cited *only* decisions applying *Katzenbach*'s rationality standard.[240] By contrast, Thomas's dissent relies on a mishmash of *Katzenbach*'s rationality standard, *City of Boerne v. Flores*'s congruence and proportionality test, and *Shelby County*'s equal sovereignty principle.[241] Thus, the relevant standard of review could ultimately determine the VRA's constitutionality. But the Court's analytical conflation merely highlights that Section One of the Fifteenth Amendment is underdeveloped in the Court's redistricting doctrine.

To his credit, Thomas's *Alexander* concurrence seeks to resolve this tension by returning to first principles.[242] But, as noted, Thomas's

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235. *Milligan*, 143 S. Ct. at 1516 (majority opinion) (second and third alterations in original) (emphasis added) (first quoting City of Rome v. United States, 446 U.S. 156, 173, 177 (1980), then citing South Carolina v. Katzenbach, 383 U.S. 301, 308–09 (1966)).

236. 383 U.S. at 327, 337.

237. 446 U.S. at 182.

238. *Milligan*, 143 S. Ct. at 1516.

239. See id. ("But we held over 40 years ago '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 . . . outlaw voting practices that are discriminatory in effect.'" (first alteration in original) (quoting *City of Rome*, 446 U.S. at 173)).

240. Id. at 1516–17.

241. Id. at 1539–46 (Thomas, J., dissenting) (arguing that the amended Section 2 lacks a nexus between "districting-related commands" and "any likely constitutional wrongs," is "not congruent and proportional," and is at odds "with the letter and spirit of the constitution" (internal quotation marks omitted)).

242. See Alexander v. S.C. State Conf. of the NAACP, 144 S. Ct. 1221, 1252 (2024) (Thomas, J., concurring in part) ("This case is unique because it presents solely

Alexander concurrence only answers the substantive scope question. His newfound view that racial gerrymandering and vote dilution claims are nonjusticiable political questions does not fully answer whether Congress can exercise its powers under the Elections Clause or Section Two of the Fifteenth Amendment to pass the VRA.[243]

By answering whether the Fifteenth Amendment applies to redistricting, this Essay seeks to answer the assumption underlying the *Milligan* Court's decision. It is to this question that this Essay now turns.

II. REDISTRICTING AND THE RECONSTRUCTION AMENDMENTS

Prior to the Reconstruction Amendments, the Constitution apportioned seats in the House of Representatives and the Electoral College according to the Three-Fifths Clause.[244] But the Constitution was silent as to redistricting within states. Indeed, state legislatures were given initial authority to set the time, place, and manner of congressional elections. Congress, however, could preempt that authority.

This Part investigates whether the Fourteenth and Fifteenth Amendments changed that Founding-era arrangement. This Part begins with a quick synopsis of originalist theory. It then discusses the constitutional politics of Reconstruction, emphasizing the role of racial bloc voting in the Republican Party's plans for transforming the South. It canvasses the Fourteenth Amendment's drafting and ratification. It concludes with a deep dive on the Fifteenth Amendment's adoption.

A. *Understanding Originalism*

There is a vast literature on originalism as a theory and methodology. By originalism, this Essay means a theory that views the original understanding of a constitutional provision as a fixed and binding authority for future generations.[245] This Essay acknowledges that originalist claims are not only contestable but also selectively marshaled by judges and lawyers.[246] This Essay, however, seeks to engage with originalism on its own terms, rather than critique it. In any event, even if one is not an

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constitutional questions. . . . There can be no more propitious occasion to consider the constitutional underpinnings of our voting-rights jurisprudence.").

243. See id. (explaining that neither the plaintiffs nor South Carolina relied on the VRA for their claims or defenses); infra section IV.B.1 (defending Section 2's constitutionality).

244. U.S. Const. art. I, § 2, abrogated by U.S. Const. amend. XIV, § 2.

245. See Lawrence B. Solum, Originalism and Constitutional Construction, 82 Fordham L. Rev. 453, 459–62 (2013) [hereinafter Solum, Originalism and Constitutional Construction] (discussing the fixation and constraint theses); see also infra Part III (discussing how postratification practice and liquidation factor into this analysis). For an argument that originalism "imperils democratic structures, practices, and norms that are essential to modern democratic self-government," see Joshua S. Sellers, Election Law, Originalism, and Democratic Self-Government, 76 Fla. L. Rev. (forthcoming 2024) (manuscript at 1) (on file with the *Columbia Law Review*).

246. See supra note 33 (discussing cafeteria originalists).

originalist, history plays an important role in constitutional interpretation.[247]

Today, "[o]riginalist theory has . . . largely coalesced around original public meaning as the proper object of interpretive inquiry."[248] In ascertaining original public meaning, originalists seek "the public meaning of the constitutional text at the time each provision was framed and ratified."[249] But there are other variants of originalism. When originalism was first developed as a theory in the 1970s and 1980s, the original intent of the Framers and ratifiers was the touchstone for divining the Constitution's meaning.[250] Although original intent has lost its talismanic quality, "intentionalism has never entirely disappeared."[251] In a related vein, original expected application looks to "how people living at the time the text was adopted would have expected it would be applied using language in its ordinary sense (along with any legal terms of art)."[252] Another variant is original-methods originalism, which interprets the Constitution "using the conventional legal interpretive rules that would have been deemed applicable to a document of its type at the time it was enacted."[253] Finally, another school of thought is "inclusive originalism," which posits that "the original meaning of the Constitution is the ultimate criterion for constitutional law" and that "judges can look to precedent, policy, or practice, but only to the extent that the original meaning incorporates or permits them."[254]

Most originalists believe in the distinction between interpretation and construction.[255] As Professor Lawrence Solum has explained, "interpretation recognizes or discovers the linguistic meaning of an authoritative legal text," whereas "construction gives legal effect to the semantic content

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247. See, e.g., Philip Bobbitt, Constitutional Fate: Theory of the Constitution 7 (1982) (listing history as one of the modalities of constitutional interpretation).

248. Keith E. Whittington, Originalism: A Critical Introduction, 82 Fordham L. Rev. 375, 380 (2013).

249. Lawrence B. Solum, Originalism Versus Living Constitutionalism: The Conceptual Structure of the Great Debate, 113 Nw. U. L. Rev. 1243, 1251 (2019) [hereinafter Solum, Great Debate].

250. See Thomas B. Colby & Peter J. Smith, Living Originalism, 59 Duke L.J. 239, 247–49 (2009).

251. Solum, Great Debate, supra note 249, at 1251.

252. Jack M. Balkin, Living Originalism 7 (2011) [hereinafter Balkin, Living Originalism].

253. John O. McGinnis & Michael B. Rappaport, Unifying Original Intent and Original Public Meaning, 113 Nw. U. L. Rev. 1371, 1373 (2019).

254. William Baude, Is Originalism Our Law?, 115 Colum. L. Rev. 2349, 2355 (2015) (emphasis omitted).

255. Cf. John O. McGinnis & Michael B. Rappaport, The Power of Interpretation: Minimizing the Construction Zone, 96 Notre Dame L. Rev. 919, 921 (2021) (arguing that "the construction zone is a small one" if one "consider[s] the legal character of the Constitution").

of a legal text."[256] Stated simply, the so-called construction zone is where one resolves ambiguous language or historical indeterminacy.[257] Inside the construction zone, arguments based on the modalities of constitutional interpretation—that is, text, history, structure, doctrine, prudence, and ethos—can help formulate the legal rule.[258] Furthermore, when the meaning of the Reconstruction Amendments is unclear, Congress has a special role to play in passing enforcement legislation.[259]

This Essay is agnostic as to which of these various theories represents the true essence of originalism. For the purposes of this Essay, the phrase "original understanding" serves as an umbrella term that captures these competing schools of originalist theory. As such, this Essay strives to ascertain the original understanding of the Fourteenth and Fifteenth Amendments as applied to race-based redistricting. And when that original understanding is indeterminate or debatable, this Essay utilizes the modalities of constitutional interpretation to craft the governing legal principle and ultimately turns to Congress's judgment in passing Section 2 of the VRA as enforcement legislation pursuant to the Fourteenth and Fifteenth Amendments.

B. *Contextualizing Reconstruction*

Pivoting to Reconstruction, a few points are worth emphasizing so that a modern reader can better understand that era's constitutional politics. First, the Reconstruction Framers believed in a hierarchy of rights that "plays no part in current interpretations of the Fourteenth

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256. Lawrence B. Solum, The Interpretation-Construction Distinction, 27 Const. Comment. 95, 100, 103 (2010).

257. See Michael W. McConnell, Time, Institutions, and Interpretation, 95 B.U. L. Rev. 1745, 1761 (2015) ("When history runs out, we have to use other methods of interpretation."); Solum, Originalism and Constitutional Construction, supra note 245, at 469 ("Construction becomes the focus of explicit attention when the meaning of the constitutional text is unclear, or the implications of that meaning are contested . . . [such as when faced with] irreducible ambiguity, vagueness, gaps, and contradictions."); see also Stephen E. Sachs, Originalism: Standard and Procedure, 135 Harv. L. Rev. 777, 816 (2022) ("What does give rise to debate is whether construction has a role to play in cases of uncertainty.").

258. See Bobbitt, supra note 247, at 93–94 (listing the modalities); Stephen M. Griffin, Pluralism in Constitutional Interpretation, 72 Tex. L. Rev. 1753, 1768 (1994) ("The pluralism that characterizes the Supreme Court's jurisprudence has deep roots in the nature of American constitutionalism . . . ."); see also Solum, Originalism and Constitutional Construction, supra note 245, at 482 (making a similar point but arguing that text, history, and structure are best viewed as influencing interpretation).

259. See Jack M. Balkin, The Reconstruction Power, 85 N.Y.U. L. Rev. 1801, 1809 (2010) [hereinafter Balkin, Reconstruction Power] ("[T]he enumerated powers of the Reconstruction Amendments allowed Congress to establish national standards to protect basic rights and liberties."); infra section IV.B.1 (arguing that Congress can pass rational enforcement legislation pursuant to its Fifteenth Amendment enforcement authority).

Amendment."[260] Relying on concepts developed during the antebellum period, "the drafters of the Reconstruction Amendments viewed political rights as qualitatively different from civil rights . . . ."[261]

Civil rights included the right to own property, to contract, to sue and be sued, and to equal treatment in civil and criminal matters.[262] Civil rights were inherent in citizenship.[263] By contrast, political rights were characterized as "more like privileges, reserved for a subset of people charged with making decisions for the whole community."[264] Thus, white women could exercise civil rights but not political rights.[265]

Instead of the modern phrase "voting rights," the Reconstruction era term "political rights" was frequently employed to capture a bundle of rights: the right to vote, to hold office, and to sit on juries.[266] As unpacked more below, the Reconstruction Framers debated whether the right to vote subsumed the right to hold office.[267]

To be sure, there were differences of opinion among the Reconstruction Framers, and the Republican Party's center of gravity shifted considerably over time. At the dawn of Reconstruction, some Radicals supported the political rights of Black men, but moderate Republicans did not.[268] For instance, President Abraham Lincoln, a moderate Republican, announced his support for limited Black male suffrage in his final speech before his assassination.[269] Moderate

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260. Michael W. McConnell, Originalism and the Desegregation Decisions, 81 Va. L. Rev. 947, 1025 (1995) [hereinafter McConnell, Desegregation]. This Essay does not delve into the robust scholarly debate over the distinction between civil and social rights. See id. at 1018–21 (grounding this distinction in the debate over Reconstruction-era antimiscegenation laws); see also Pamela Brandwein, Rethinking the Judicial Settlement of Reconstruction 70–86 (2011) (tracing the antebellum distinction between civil and political rights to the addition of social rights during Reconstruction); Maltz, Civil Rights, supra note 53, at 71–72 (noting that the civil–social rights divide persisted in debates over outlawing racial discrimination in places of public accommodation in the Civil Rights Act of 1964).

261. Amar & Brownstein, supra note 53, at 929; see also Foner, Reconstruction, supra note 56, at 230–31 (unpacking these distinctions and their intellectual history).

262. See Civil Rights Act of 1866, Pub. L. 39-31, § 1, 14 Stat. 27, 27 (codified at 42 U.S.C. §§ 1981-1982 (2018)) (defining civil rights to be enjoyed by all "citizens" regardless of race).

263. See Akhil Reed Amar, America's Constitution: A Biography 382 (2005) [hereinafter Amar, America's Constitution] (discussing the relationship between citizenship and civil rights during Reconstruction).

264. Kate Masur, Until Justice Be Done: America's First Civil Rights Movement, From the Revolution to Reconstruction 19 (2021).

265. See, e.g., Balkin, Living Originalism, supra note 252, at 223–24 (explaining that, although the Framers of the Fourteenth Amendment considered women "civil equals," they did not mandate women's enfranchisement).

266. See Amar, Jury Service, supra note 53, at 234–35.

267. See infra section II.D.4.

268. See Harold M. Hyman & William M. Wiecek, Equal Justice Under Law: Constitutional Development, 1835–1875, at 394 (1982) (observing that "in the 1860s only 'radicals' merged civil and political rights").

269. See Foner, Reconstruction, supra note 56, at 74 (noting that Lincoln supported the right to vote for Black men who were "very intelligent" or had served as soldiers).

Republican opposition to Black male suffrage explains why it was excluded from Section One of the Fourteenth Amendment and why the Fifteenth Amendment was a necessary addition to the Constitution.[270]

Second, notwithstanding Article V's high hurdle for ratification, the Reconstruction Amendments were hardly bipartisan measures. In fact, the Reconstruction Amendments were the Republican Party's de facto platform and vehemently opposed by the Democrats.[271] The Republican Party had won the Civil War and many of its leaders had been long active in abolitionist circles. Meanwhile, the Democratic Party was openly racist and sought to stymie Reconstruction.

Third, and relatedly, voting was racially polarized across the South, a fact that was well known because "[v]oting was public until 1888 when the States began to adopt the Australian secret ballot."[272] This political reality was openly acknowledged by the Reconstruction Framers. Indeed, it was marshaled as a key reason for enfranchising Black men nationwide and passing the Fifteenth Amendment.[273]

Black Southerners associated the Democratic Party with the Confederacy and the Republican Party with emancipation and the expansion of their civil and political rights.[274] In the 1867–1868 constitutional convention elections mandated by the First Reconstruction Act, Black men accounted for between 66% and 97% of votes in favor.[275] Indeed, in four Southern states, no Black man cast a ballot against the constitutional conventions.[276] Furthermore, as the Southern states began to reenter the Union, Black men's votes became even more important for Republican political success. In the 1868 election, Black men were decisive in President Ulysses S. Grant winning the popular vote and helped him win every readmitted Southern state except Georgia and Louisiana, where Klan-related violence suppressed the Black vote.[277]

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270. See infra section II.C.

271. See, e.g., Akhil Reed Amar, America's Unwritten Constitution: The Precedents and Principles We Live By 400 (2012) (observing that "all three Reconstruction Amendments were intensely partisan measures"); Crum, Unabridged Fifteenth Amendment, supra note 13, at 1107 ("[N]o Democrat in the Senate voted for [the Fifteenth Amendment], and only three in the House did. Conversely, 38 out of 54 Republicans voted for it in the Senate, and 140 out of 169 did so in the House.").

272. Doe v. Reed, 561 U.S. 186, 224 (2010) (Scalia, J., concurring in the judgment).

273. See Crum, Racially Polarized Voting, supra note 53, at 300 ("[T]he Reconstruction Framers turned to Black suffrage, predicting that Black voters would support the Republican Party and that empowering these voters would help transform the South.")

274. Conversely, Republicans viewed Black voters as loyal to the Union. See Mark A. Graber, Punish Treason, Reward Loyalty: The Forgotten Goals of Constitutional Reform After the Civil War 123 (2023) ("Much Republican rhetoric justified granting persons of color rights because they were loyal.").

275. Crum, Racially Polarized Voting, supra note 53, at 303.

276. Id.

277. See Ron Chernow, Grant 623 (2017).

By contrast, white Southerners tended to oppose Reconstruction and voted for Democrats. In the constitutional convention elections, white men's support ranged from 8.5% to 33.6% across different states.[278] Turning to partisan elections, "[i]n no Southern state did Republicans attract a majority of the white vote."[279] But to be clear, white men were less politically cohesive than Black men. That is because there were pockets of white Unionism in the South, mostly in more mountainous regions away from the plantation belts.[280] White Northerners who moved to the South—the original carpetbaggers—also backed Republicans.[281]

Finally, and in contrast to today's racial demographics, Black people were not necessarily racial *minorities* across the South. Due to slavery's labor-intensive nature, Black people were heavily concentrated in the Southern states: "Three Southern States—Louisiana, Mississippi, and South Carolina—were majority Black. In addition, Black people were above 45 percent of the population in Alabama, Florida, and Georgia, and around 40 percent in North Carolina and Virginia. Black people were about a quarter of the population in Arkansas and Texas."[282] Furthermore, due to their high registration rates and the disenfranchisement of ex-Confederates, Black men were "effective voting majorities in five Southern States—Alabama, Florida, Louisiana, Mississippi, and South Carolina."[283]

Given this level of racial polarization, the incentives for Southern states to employ race in the redistricting process were clear. Republican mapmakers would seek to create majority-Black districts that could elect Republican candidates to Congress, which was far easier then than it is today given contemporary demographics. Meanwhile, Democratic mapmakers would seek to pack or crack Black voters. That is, Democrats could overconcentrate Black voters in a supermajority-Black district, thereby bleaching the neighboring districts and enabling them to elect more Democrats. Alternatively, Democrats could spread out Black voters across multiple districts, denying them the ability to elect even a token representative.[284]

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278. Hanes Walton, Jr., Sherman C. Puckett & Donald R. Deskins, Jr., The African American Electorate: A Statistical History 240 tbl.13.4 (2012).

279. Foner, Reconstruction, supra note 56, at 297. Indeed, one could view the racial polarization in the Reconstructed South as a precursor to today's politics. Cf. Joshua S. Sellers, Election Law and White Identity Politics, 87 Fordham L. Rev. 1515, 1524–29 (2019) (discussing Nixon's Southern Strategy).

280. See Foner, Reconstruction, supra note 56, at 300 ("The most extensive concentration of white Republicans . . . lay in the upcountry bastions of wartime Unionism.").

281. See id. at 294–95 (discussing the southward migration of carpetbaggers and noting that the majority of those who served in Congress from the South were veterans of the Union army).

282. Crum, Racially Polarized Voting, supra note 53, at 302.

283. Id. at 302–03.

284. See supra section I.A (explaining redistricting strategies).

C. *The Fourteenth Amendment*

The Fourteenth Amendment was originally understood to permit the disenfranchisement of Black men. Given that this is the scholarly consensus,[285] this section briefly summarizes the historical record. This section discusses the constitutional politics surrounding the Fourteenth Amendment's adoption and the original understanding of that Amendment as applied to voting rights.

In the aftermath of the Civil War and emancipation, the Southern states sought to reestablish slavery in all but name only. To accomplish this goal, the Southern states passed strict anti-vagrancy and labor laws, known as the Black Codes.[286] Meanwhile, many Southern states sent unabashed rebels to Congress.[287]

Recognizing that immediate reconciliation would transform Appomattox into a Pyrrhic victory, the Thirty-Ninth Congress refused to seat Southern representatives and senators.[288] Seeking to eradicate the Black Codes, the Thirty-Ninth Congress passed the Civil Rights Act of 1866 over President Andrew Johnson's veto.[289] Accurately named, the Civil Rights Act protected a panoply of civil rights, but it did not extend political

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285. See, e.g., Amar, America's Constitution, supra note 263, at 392–93 ("Moderate Republicans feared they could not sell the equal-suffrage idea in the North, where white bigotry remained a stubborn fact of life."); Laura F. Edwards, A Legal History of the Civil War and Reconstruction: A Nation of Rights 108 (2015) (noting that the Fourteenth Amendment did not require the extension of political rights, like enfranchisement, to Black men); Foner, Second Founding, supra note 9, at 83 (explaining that "Section 2 [of the Fourteenth Amendment] did not enfranchise black men").

Some scholars have argued that Section One was capacious enough to *eventually* be read to encompass the right to vote. See Randy E. Barnett & Evan D. Bernick, The Original Meaning of the Fourteenth Amendment: Its Letter and Spirit 367–68 (2021) (arguing that, in light of the other voting rights amendments, the Privileges or Immunities Clause should be read to protect a fundamental right to vote); William W. Van Alstyne, The Fourteenth Amendment, the "Right" to Vote, and the Understanding of the Thirty-Ninth Congress, 1965 Sup. Ct. Rev. 33, 72–73 (claiming that "the open-ended phrases of § 1" left open the opportunity for future use of the Fourteenth Amendment to invalidate laws restricting Black suffrage). Moreover, Professor Franita Tolson has argued that Sections Two and Five of the Fourteenth Amendment should be read in tandem and as evidence of "the Reconstruction Congress's attempt to constitutionalize a mechanism that would allow Congress to all but legislate universal suffrage." Franita Tolson, What Is Abridgment?: A Critique of Two Section Twos, 67 Ala. L. Rev. 433, 458 (2015) [hereinafter Tolson, Abridgment]. But even these scholars do not claim that the Equal Protection Clause was originally understood to mandate the enfranchisement of Black men on its own force.

286. See Crum, Lawfulness of the Fifteenth Amendment, supra note 53, at 1555 ("Recognizing that the Union's victory on the battlefield was at risk, the Thirty-Ninth Congress excluded the South.").

287. See Foner, Reconstruction, supra note 56, at 196 (noting that Georgia appointed former Confederate Vice President Alexander Hamilton Stephens to the U.S. Senate).

288. See Crum, Lawfulness of the Fifteenth Amendment, supra note 53, at 1555.

289. See Foner, Reconstruction, supra note 56 at 250–51 (remarking that the Civil Rights Act of 1866 was "the first time in American history, [that] Congress enacted a major piece of legislation over a President's veto").

rights to Black men. Congress invoked its Thirteenth Amendment enforcement authority to pass the Civil Rights Act, but some moderate Republicans—most prominently, Representative John Bingham (R-OH)—questioned the Act's constitutionality.[290]

Those constitutional doubts helped prompt Congress to pass the Fourteenth Amendment. Section One was widely understood to constitutionalize the Civil Rights Act. Accordingly, it did not spark much controversy. Furthermore, Section One was drafted to avoid enfranchising Black men. A clause-by-clause analysis reveals why.

Section One's first sentence—the Citizenship Clause—established birthright citizenship and overturned *Dred Scott v. Sandford*'s holding that Black people could not be United States citizens.[291] But citizenship did not confer suffrage. Next, the Privileges or Immunities Clause borrowed from Article IV's protections for out-of-state citizens. The right to vote was not considered a privilege or immunity of citizenship. After all, Missouri did not have to grant the right to vote to a visiting Marylander.[292] Finally, the Due Process and Equal Protection Clauses reflect the distinction between civil and political rights. In contradistinction to the Privileges or Immunities Clause, these clauses apply to "person[s]," not just citizens.[293] Thus, if the Equal Protection Clause were to have been originally understood to protect the right to vote, then it would have mandated the enfranchisement of not only Black men but also women and noncitizens.[294]

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290. See Gerard N. Magliocca, American Founding Son: John Bingham and the Invention of the Fourteenth Amendment 120 (2013) ("Bingham's broader argument was that, while he agreed with the goals of the Civil Rights Act, he did not agree that Congress had the power to regulate the states in this way without a constitutional amendment.").

291. U.S. Const. amend. XIV, § 1; see also Dred Scott v. Sandford, 60 U.S. 393, 427 (1857) (enslaved party).

292. To be sure, this interpretation was contested at the time, and women's suffrage activists petitioned Congress and took a case all the way to the Supreme Court. But these efforts failed. See Minor v. Happersett, 88 U.S. 162, 178 (1875) (holding that women were not enfranchised by the Privileges or Immunities Clause); U.S. House, Judiciary Committee, Woodhull Report (1871), reprinted in The Essential Documents, supra note 53, at 609–20 (rejecting petition that argued women were enfranchised by the Privileges or Immunities Clause).

293. U.S. Const. amend. XIV, § 1.

294. In recent years, originalist scholars have examined the original understanding of the Equal Protection Clause, emphasizing that it requires equal treatment under existing laws. This Essay does not take sides in that debate, but it notes that even these theories do not dispute that voting rights were not covered by the Equal Protection Clause as originally understood. See Ilan Wurman, The Second Founding: An Introduction to the Fourteenth Amendment 139 (2020) (arguing that the Equal Protection Clause "does not establish any rights" and does not apply to political rights); Christopher R. Green, The Original Sense of the (Equal) Protection Clause: Pre-Enactment History, 19 Geo. Mason U. C.R. L.J. 1, 44 (2008) (arguing that the Equal Protection Clause's "text expresses an entitlement to the equal fulfillment of the government's remedial and enforcement functions, not a generic right against improper legislative classifications").

While the Fourteenth Amendment was being drafted in Congress, many Republicans insisted that its language ensure that Black men were *not* enfranchised. And during the ratification debate, many Radicals lamented that the Fourteenth Amendment would not extend the ballot to Black men. Indeed, Frederick Douglass "refused to support the Fourteenth Amendment precisely because of its failure to secure political rights for blacks."[295] These contemporary statements buttress the clause-by-clause analysis of Section One's original meaning.

Although relatively obscure to modern readers, Section Two of the Fourteenth Amendment was "far more polarizing and consumed far more political attention."[296] From the Founding through Reconstruction, the Three-Fifths Clause applied to the apportionment process and counted enslaved Black people as three-fifths of a person. One consequence of the Thirteenth Amendment was the effective nullification of the Three-Fifths Clause, which would have had the perverse result of *increasing* the South's share of seats in the House and, concomitantly, the Electoral College after the 1870 Census while Black men remained disenfranchised. Section Two, therefore, provided for a reduction in House seats—and Electoral College votes—if a State "denied" or "in any way abridged" the "right to vote" of its adult "male citizens."[297] As Professor Xi Wang has explained, Section Two "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."[298] During the drafting and ratification debate, Section Two was viewed as a penalty for disenfranchisement rather than a mandate for nationwide male suffrage.[299] From a structural perspective, Section Two's distinct treatment of the right to vote reinforces the claim that Section One's focus is civil rights.[300]

Critically for this Essay's focus, Section Two's linkage of the words "denied" or "abridge" to the phrase "right to vote" was novel and would provide the model for the Fifteenth Amendment.[301] Unfortunately, the

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295. The Essential Documents, supra note 53, at 435.

296. McDonald v. City of Chicago, 561 U.S. 742, 841 (2010) (Thomas, J., concurring in part and concurring in the judgment).

297. U.S. Const. amend. XIV, § 2.

298. Xi Wang, Black Suffrage and the Redefinition of American Freedom, 1860–1870, 17 Cardozo L. Rev. 2153, 2194–95 (1996).

299. See Bruce Ackerman, We the People: Transformations 107 (1998) (noting that this missing mandate for nationwide male suffrage came instead through the Fifteenth Amendment).

300. See Akhil Reed Amar, The Bill of Rights: Creation and Reconstruction 217–18 (1998) (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").

301. See Crum, Unabridged Fifteenth Amendment, supra note 13, at 1071–72 (explaining that Reconstruction era state constitutions did not use the phrase "denied or abridged" in connection with the right to vote); Franita Tolson, The Constitutional

Reconstruction Framers never "specifically discussed" the rationale for selecting the words "denied" or "abridged" in Section Two.[302] Nevertheless, scholars have identified Reconstruction era statutes or hypotheticals that the "deny" or "abridge" language might have addressed: laws that imposed different voting qualifications based on race, such as a property qualification that required Black voters to own more land than white voters.[303] Moreover, Professor Franita Tolson, whose work has focused on Section Two, has argued that "[a]bridgment does not mean purpose."[304] Tolson has further emphasized that Section Two's apportionment penalty is not tied to racial discrimination; rather, it applied to any denial or abridgment of the right to vote.[305] Section Two's connection of a "deni[al] . . . or . . . abridge[ment]" of the "right to vote" and a reduction in House seats indicates that the Reconstruction Framers recognized that political rights were exercised collectively.[306] Put differently, a restriction of a group's participation in the political process should result in an aggregate punishment.

D. *The Fifteenth Amendment*

In stark contrast to the voluminous literature on the Fourteenth Amendment, the Fifteenth Amendment is a scholarly afterthought. The Fifteenth Amendment is truly the forgotten Reconstruction Amendment.[307]

Structure of Voting Rights Enforcement, 89 Wash. L. Rev. 379, 414 (2014) [hereinafter Tolson, Structure] (noting the "textual and historical link" between the Apportionment Clause and the Fifteenth Amendment).

302. Van Alstyne, supra note 285, at 81.

303. See id. (arguing that abridgment would have prohibited States from implementing a property qualification and then banning Black people from owning property); see also Kousser, supra note 46, at 17 (arguing that the Reconstruction Framers likely had in mind New York's "widely known" law that imposed racially discriminatory residency, property, and taxpaying requirements); Michael T. Morley, Remedial Equilibration and the Right to Vote Under Section 2 of the Fourteenth Amendment, 2015 U. Chi. Legal F. 279, 310 (arguing that "the term 'abridge' . . . referred to the imposition of qualifications to vote for blacks, such as property or intelligence requirements, that did not also apply to white people").

304. Tolson, Abridgment, supra note 285, at 438.

305. See id.

306. See Crum, Racially Polarized Voting, supra note 53, at 325 (alterations in original) (internal quotation marks omitted) (quoting U.S. Const. amend. XIV, § 2) (expanding on this argument).

307. Compared to law professors, see supra note 53, historians have more thoroughly analyzed the Fifteenth Amendment. Their inquiries, however, have focused on motivations and causation rather than the Fifteenth Amendment's original understanding or modern doctrinal significance. See, e.g., Michael Les Benedict, A Compromise of Principle: Congressional Republicans and Reconstruction, 1863–1869, at 335–36 (1974) (arguing that "the chaos of the third session of the Fortieth Congress . . . portended the rupture of the party and the collapse of Republican Reconstruction policy"); Gregory P. Downs, After Appomattox: Military Occupation and the Ends of War 218 (2015) (arguing that "[r]atifying the Fifteenth Amendment depended upon the war powers"); Foner, Second Founding,

This section starts by explaining why and how the Fifteenth Amendment was added to the Constitution. Black men remained disenfranchised even after the Fourteenth Amendment's ratification, and Congress rejected Radical Republicans' attempts to pass a nationwide Black male suffrage statute. Next, this section provides an overview of the passing references to redistricting and apportionment during the Fifteenth Amendment's drafting and ratification. This section then pivots to the two main issues that confronted the Reconstruction Framers. First, what groups should be enfranchised? In other words, what characteristics should be the subject of an antidiscrimination provision? Second, should the right to hold office be explicitly protected and, if not, was it encompassed within the right to vote?

1. *The Path to the Fifteenth Amendment.* — While the states debated the Fourteenth Amendment, the lame-duck Thirty-Ninth Congress exercised its authority over areas of federal control to enfranchise Black men. Congress first enfranchised Black men in the District of Columbia and the federal territories.[308] Far more significantly, Congress next passed the First Reconstruction Act, which enfranchised Black men in ten of the eleven Southern states.[309] The First Reconstruction Act enfranchised approximately eighty percent of Black men in the country.[310] And because of the elections held under the First Reconstruction Act, the political fact of racial bloc voting became clear.[311]

Even after the Fourteenth Amendment was ratified in July 1868,[312] states continued to bar Black men from the polls. In the 1868 election,

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supra note 9, at 115 (observing that the "[r]atification of the Fifteenth Amendment marked the completion of the second founding"); William Gillette, The Right to Vote: Politics and the Passage of the Fifteenth Amendment 77 (2d ed. 1969) (arguing that the Fifteenth Amendment's primary purpose was to enfranchise Black men in the North); John Mabry Mathews, Legislative and Judicial History of the Fifteenth Amendment 21 (1909) (arguing that the "controlling motive" behind the Fifteenth Amendment was "supplying a new basis for the continuance of congressional control over the suffrage conditions of the Southern States"); Xi Wang, The Trial of Democracy: Black Suffrage and Northern Republicans, 1860–1910, at 39–48 (1997) (discussing the Fifteenth Amendment's passage as part of a larger project focused on enforcement legislation); LaWanda Cox & John H. Cox, Negro Suffrage and Republican Politics: The Problem of Motivation in Reconstruction Historiography, *in* Reconstruction: An Anthology of Revisionist Writings 156, 156 (Kenneth M. Stampp & Leon F. Litwack eds., 1969) (emphasizing the Radicals' ideological motivations).

308. See Act of Jan. 8, 1867, ch. 6, § 1, 14 Stat. 375, 375 (regulating the elective franchise in the District of Columbia); Act of Jan. 25, 1867, ch. 15, 14 Stat. 379, 379–80 (regulating the elective franchise in the territories of the United States).

309. See First Reconstruction Act, ch. 153, § 5, 14 Stat. 428, 428–29 (1867). Tennessee was excluded from the First Reconstruction Act's strictures because it voluntarily ratified the Fourteenth Amendment. See Crum, Superfluous Fifteenth Amendment, supra note 37, at 1595. Tennessee also voluntarily enfranchised Black men. Id.

310. Richard M. Valelly, The Two Reconstructions: The Struggle for Black Enfranchisement 24 (2004).

311. See supra notes 274–281.

312. See 15 Stat. 708 (1868).

voters in Iowa and Minnesota backed referenda enfranchising Black men, while Missouri voters rejected a similar referendum.[313] When the lame-duck Fortieth Congress convened in January 1869, the nation was bitterly divided. Black men could vote in seventeen states plus the soon-to-be readmitted Mississippi, Texas, and Virginia.[314] By contrast, Black men were disenfranchised in seventeen states.[315] If today's doctrine matched the original understanding of the Equal Protection Clause, Black men would have been enfranchised nationwide in 1868, two years prior to the Fifteenth Amendment's ratification.

At the start of the congressional debate on the Fifteenth Amendment, Representative George Boutwell (R-MA), a prominent Radical Republican, advocated passing *both* a federal statute and a constitutional amendment enfranchising Black men nationwide.[316] For authority, Boutwell cited the Elections Clause, the Guarantee Clause, the Fourteenth Amendment, and Congress's enforcement authority under the Fourteenth Amendment.[317] Tellingly, Boutwell relied on the Fourteenth Amendment's Privileges or Immunities Clause and the Apportionment Clause—not the Equal Protection Clause.[318]

Revealing his strategy, Boutwell claimed that the statute would immediately enfranchise Black men, who would then help get the Fifteenth Amendment ratified by three-fourths of the states. Boutwell's bill was opposed by moderate Republicans, who argued that Congress lacked constitutional authority to impose voting qualifications via statute.[319] The moderates prevailed, and Boutwell shelved the statute in favor of a constitutional amendment.[320]

This discussion was the first significant postratification debate about the Fourteenth Amendment's scope. Congress's failure to pass a nationwide Black suffrage statute reinforces that Section One of the Fourteenth Amendment, as originally understood, excluded political rights. Indeed, this debate helped liquidate that question.[321]

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313. See Gillette, supra note 307, at 26. In addition, Michigan voters rejected a new state constitution that would have enfranchised Black men. See id.

314. Crum, Unabridged Fifteenth Amendment, supra note 13, at 1065–66.

315. Id. In this count, New York is classified as a state with racially discriminatory laws because it imposed racially discriminatory property, tax, and residency requirements on Black men. See id. at 1063 n.125.

316. See Crum, Superfluous Fifteenth Amendment, supra note 37, at 1605.

317. See id. at 1606–08.

318. Id.

319. Id. at 1613.

320. See id. at 1604–14 (recounting the introduction and debate of Boutwell's Bill). A similar—but shorter—debate occurred in the Senate, well after the House had moved down the path of a constitutional amendment. See id. at 1614–16 ("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.").

321. See id. at 1617–22; see also infra section III.A (elaborating on liquidation).

2. *The Omission of Redistricting*. — Lawmakers barely addressed the question of redistricting during the Fifteenth Amendment's drafting and ratification.[322] One reference concerned a debate over whether Congress should submit the Fifteenth Amendment to state legislatures or to state conventions, an option afforded Congress under Article V.[323] As part of that debate, Senator James Dixon (R-CT) criticized the rotten boroughs that pervaded his home state.[324] According to Dixon, that malapportionment "work[ed] a grievance" and "sometimes sen[t] a Senator to this body who misrepresent[ed] the people of the State."[325]

Another reference was made in the debate over whether Congress had constitutional authority to enfranchise Black men nationwide via an ordinary statute.[326] As one of his many fonts of constitutional authority, Boutwell argued that the Elections Clause permitted Congress to regulate the "manner" of federal elections, which he construed to encompass voting qualifications.[327] In response, Representative Albert Burr (D-IL) argued that the word "manner" did not go to voting qualifications. Relying on Justice Joseph Story's Commentaries, Burr stated that "manner" meant "manner of electing," of which there was a "great diversity" of approaches by the States.[328] Those manners of electing included "the districts within which elections [were] held, the proportion of votes required by various States to elect, and the two ways of casting those votes by the elector."[329] As an example, Burr explained that, following the 1860 Census, Congress

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322. There are only a handful of clear references to redistricting or apportionment in the entire congressional debate over the Fifteenth Amendment. See infra notes 323–335. None of these references went to the Fifteenth Amendment's substantive scope.

323. See U.S. Const. art. V.

324. See Cong. Globe, 40th Cong., 3d Sess. 543 (1869) (statement of Sen. Dixon (R-CT)) ("In . . . Connecticut, our unfortunate, I may say rotten-borough system of representation, gives the city of New Haven, with fifty thousand inhabitants and nearly ten thousand voters, the same representation in the Legislature which the smallest town in the State has with only one hundred and fifty voters.").

325. Id. A former Republican, Senator Dixon backed the Democrats in the 1868 election, which the Democrats lost in Connecticut. Arguably, this defeat was attributable to the rotten-borough system, hence Dixon's animosity toward it. See id. at 905 (statement of Sen. Vickers (D-MD)) ("If I mistake not, that Senator lost his election in consequence of that system.").

326. See supra note 320.

327. See Cong. Globe, 40th Cong., 3d Sess. 556 (statement of Rep. Boutwell (R-MA)) (arguing that the Elections Clause includes "everything relating to an election, from the qualifications of the elector to the deposit of his ballot in the box").

328. Id. at 698 (statement of Rep. Burr (D-IL)) (internal quotation marks omitted) (quoting 2 Joseph Story, Commentaries on the Constitution of the United States § 824, at 290–91 (Boston, Hillard, Gray & Co. 1833)).

329. Id.

permitted Illinois to elect its new representative in an at-large district rather than redraw its congressional map.[330]

In a related vein, Burr responded to Boutwell's argument that Section Two empowered Congress to enfranchise Black men nationwide via statute.[331] On this point, Burr explained that Section Two imposed a penalty that linked enfranchisement and apportionment: "[I]f you see fit by State law to disfranchise one half of your inhabitants, we, by virtue of the power to apportion Representatives, will decrease your representation to one half of the present number."[332] Representative James Beck (D-KY) advocated a similar interpretation of Section Two.[333]

A final discussion of apportionment concerned an attempt by Senator Charles Buckalew (D-PA) to pass Electoral College reform alongside the Fifteenth Amendment. Buckalew's proposal provided that presidential electors be chosen by popular vote and that Congress could dictate how electors were apportioned within States—that is, Congress could require that states appoint electors via today's common winner-take-all approach or Maine's and Nebraska's modified system.[334] After Buckalew's proposal passed the Senate attached to the Fifteenth Amendment, Bingham briefly summarized this approach in the House. Bingham emphasized that Buckalew's approach did not reapportion electors between states.[335]

The question of redistricting was similarly muted during the ratification battle. The closest analogue is that Section Two's penalty was discussed as a reason for border states to ratify the Fifteenth Amendment, lest those states lose seats in Congress.[336] But that argument merely predicts how

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330. See id. ("Congress, adopting or rather not disturbing the thirteen districts created by State act, provided by joint resolution for the election of the fourteenth member by vote of the whole State [of Illinois].").

331. Id. at 559 (statement of Rep. Boutwell (R-MA)) ("If gentlemen will consider these two sections . . . they will see how . . . wholly unsupported is the doctrine that there is in this second section any concession to a State to abridge or deny to a citizen the right to vote."); Crum, Superfluous Fifteenth Amendment, supra note 37, at 1608–09 (elaborating on Boutwell's argument).

332. Cong. Globe, 40th Cong., 3d Sess. 699 (statement of Rep. Burr (D-IL)).

333. See id. at 692 (statement of Rep. Beck (D-KY)) ("If the first section secured the right to vote at all, the second was the most absurd and abortive effort to secure that right to the parties entitled to it that can well be conceived.").

334. See id. at 668 (statement of Sen. Buckalew (D-PA)) ("[E]lectors of President and Vice President shall be chosen by the people of the several States instead of being chosen as the Legislatures of the States may direct."); id. at 1041–42 (describing the passage of Buckalew's proposal as attached to the Fifteenth Amendment); Crum, Unabridged Fifteenth Amendment, supra note 13, at 1096–99 (summarizing Buckalew's proposal and its path through Congress); see also Chiafalo v. Washington, 140 S. Ct. 2316, 2321 & n.1 (2020) (discussing both the winner-take-all approach as well as Maine's and Nebraska's systems).

335. See Cong. Globe, 40th Cong., 3d Sess. 1224 (1869) (statement of Rep. Bingham (R-OH)).

336. See Crum, Unabridged Fifteenth Amendment, supra note 13, at 1109.

Section Two would have worked in a world in which states with sizable Black populations barred them entirely from the ballot.

Thus, the Reconstruction Framers did not focus on the question of redistricting when drafting and ratifying the Fifteenth Amendment. In originalist parlance,[337] this silence indicates that the Reconstruction Framers and ratifiers did not intend for the Fifteenth Amendment to apply to the redistricting process nor did they expect the Fifteenth Amendment to implicate the use of race in the redistricting process. But as unpacked below, the original public understanding of the Fifteenth Amendment's text suggests that it could apply to redistricting.

3. *Voting Qualifications.* — The bulk of the debate over the Fifteenth Amendment's language concerned which groups should be enfranchised. The Reconstruction Framers were united in their belief that Black men should be enfranchised nationwide. The original drafts of the Fifteenth Amendment proposed by Boutwell and Senator William Stewart (R-NV) were narrow antidiscrimination provisions that accomplished that goal by prohibiting discrimination on account of race, color, or previous condition of servitude.[338] And with some changes—most notably, the deletion of the Senate version's explicit protection for the right to hold office[339]—that language became the Fifteenth Amendment.

Some Republicans wanted to go further. Most prominently, several Radical Republicans sought to add characteristics to the Fifteenth Amendment's antidiscrimination list. The first version passed by the Senate would have protected against discrimination on account of "race, color, nativity, property, education, or religious creed."[340] Toward the end of the debate, the House passed a similarly broad version that barred discrimination on the basis of "race, color, nativity, property, creed, or previous condition of servitude."[341] These versions would have prohibited, for example, literacy tests or property qualifications.

As this debate has been thoroughly canvassed elsewhere,[342] this Essay will not belabor the point here. For present purposes, it suffices to say that the Reconstruction Framers' debate over who could cast a ballot sheds little light on questions of redistricting.

4. *Officeholding Requirements.* — The other major issue debated by the Reconstruction Framers was whether the right to hold office should be

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337. See supra section II.A.

338. Cong. Globe, 40th Cong., 3d Sess. 286 (reading the joint resolution as "[t]he 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"); id. at 379 (reading the joint resolution as "[t]he right of citizens of the United States to vote and hold office shall not be denied or abridged by the United States, or any State, on account of race, color, or previous condition of servitude").

339. See infra section II.D.4.

340. Cong. Globe, 40th Cong., 3d Sess. 1035.

341. Id. at 1428.

342. See Crum, Unabridged Fifteenth Amendment, supra note 13, at 1080–107.

explicitly protected by the Amendment and, once it was not, whether it was nevertheless implicitly covered.

The officeholding question sparked intense controversy because of contemporary events in Georgia. Recall that Congress enfranchised Black men in Georgia as part of the First Reconstruction Act of 1867.[343] Then, in July 1868, Georgia was readmitted to the Union following its ratification of the Fourteenth Amendment.[344] But in September 1868, "a coalition of white Republicans and Democrats voted to expel newly elected black officials from the [Georgia] House and Senate."[345] Adding insult to injury, the expelled Black state legislators were replaced by the white candidates they had defeated at the polls.[346] Concerns were also raised about whether several Georgia state legislators were disqualified by Section Three of the Fourteenth Amendment, which barred ex-Confederates from holding office.[347] In response to these developments, the lame-duck Fortieth Congress—that is, the same Congress that passed the Fifteenth Amendment—refused to seat Georgia's U.S. Senator and one of its seven representatives.[348]

Although the Georgia controversy thrust the right to hold office into the spotlight, Georgia was hardly alone in barring Black men from holding office.[349] Ten other states had racially discriminatory officeholding requirements for their state legislatures.[350] Eight states barred Black men from office by bootstrapping their officeholding requirements to their voting qualifications.[351] Missouri's officeholding requirement expressly discriminated on account of race. Iowa limited the right to hold office to

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343. See First Reconstruction Act, ch. 153, § 5, 14 Stat. 428, 429 (1867).

344. See Act of June 25, 1868, ch. 70, 15 Stat. 73, 73 (admitting Alabama, Florida, Georgia, Louisiana, North Carolina, and South Carolina to representation in Congress).

345. The Essential Documents, supra note 53, at 544–45.

346. See Cong. Globe, 41st Cong., 2d Sess. 176 (1870) (statement of Sen. Edmunds (R-VT)).

347. See Cong. Globe, 40th Cong., 3d Sess. 5 (1869) (statement of Sen. Thayer (R-NE)).

348. See Crum, Lawfulness of the Fifteenth Amendment, supra note 53, at 1580–82.

349. The Georgia Supreme Court ultimately ruled that the state constitution only required state legislators to be citizens. See White v. Clements, 39 Ga. 232, 266–68 (1869); see also Ga. Const. art. III, §§ 2–3 (1868) (requiring that state senators and representatives "be citizens of the United States"). Nonetheless, the Georgia officeholding controversy sparked a long conflict with Congress, culminating in Congress kicking Georgia out of the Union, placing it under military rule, and forcing it to ratify the Fifteenth Amendment as a fundamental condition of its second readmission to the Union. See Crum, Lawfulness of the Fifteenth Amendment, supra note 53, at 1580–89.

In February 1870, Democrats attempted to block the first Black U.S. Senator, Hiram Revels, on the grounds that he had not been a citizen for the requisite number of years. See Richard A. Primus, The Riddle of Hiram Revels, 119 Harv. L. Rev. 1681, 1682 (2006).

350. See Crum, Unabridged Fifteenth Amendment, supra note 13, at 1069–70 & map 2 (compiling these states' histories regarding racial discrimination in voting and officeholding); see also id. at 1146–50 (listing state constitutional provisions).

351. Crum, Unabridged Fifteenth Amendment, supra note 13, at 1069.

white male electors, even though the state had enfranchised Black men in an 1868 referendum.[352] Counterintuitively, Black men could technically hold office in eight states where they were barred from voting; the reason is that those states had decoupled their voting qualifications from their officeholding requirements, and the latter permitted any citizen or inhabitant to hold office.[353]

Given this background, the officeholding question was hotly contested during the drafting and ratification debate. At the outset, the original Senate version explicitly protected the "right to hold office" while the original House version failed to expressly do so.[354] That distinction, however, was not harped on until later in the drafting debate.

In the first round of the congressional debate, the House first passed a narrow antidiscrimination provision that lacked explicit officeholding language[355] while the Senate passed a broad antidiscrimination provision that included such language.[356] On February 15, the House held an abbreviated debate over the Senate's version and decisively rejected it.[357] By this point, neither the House nor the Senate had extensively discussed the officeholding question.

On February 17, the Senate convened to debate the House's actions,[358] and the officeholding debate ensued in earnest given the House's failure to expressly protect that right. Some Radicals pointed to the ongoing Georgia controversy as a harbinger of what was to come if the right to hold office was not explicitly protected.[359] These Radicals, therefore, advocated a clear statement rule in the Amendment's text that the right to hold office was protected.[360] By contrast, other Republicans argued that the right to vote implicitly encompassed the right to hold

352. Id.

353. Id.

354. See id. at 1084–85.

355. See id. at 1083, 1087–90.

356. See id. at 1103, 1090–91.

357. See id. at 1097, 1099–100.

358. See id. at 1100.

359. See Cong. Globe, 40th Cong., 3d Sess. 1296 (1869) (statement of Sen. Wilson (R-MA)) ("There is a controversy in Georgia about it, and why has that controversy arisen? Because it is not expressed in their constitution; it was left to be inferred . . . ."); id. at 1298 (statement of Sen. Sumner (R-MA)) (commenting that the House's version risked condoning Georgia's actions).

360. See id. at 1296 (statement of Sen. Wilson (R-MA)) ("[S]uppose we submit this imperfect proposition which says to seven hundred and fifty thousand colored men in this country, 'You shall have the right to vote, but you shall not have the right to sit upon a jury or the right to hold office' . . . ."); id. at 1298 (statement of Sen. Edmunds (R-VT)) (interpreting the House's version to mean that "while you give every citizen of a State a right to vote[,] you leave it to the majority of that State to determine whether he shall have any right to be voted for"); id. at 1300 (statement of Sen. Edmunds (R-VT)) (arguing that the House's version would create a "white aristocracy"); id. at 1301 (statement of Sen. Welch (R-FL)) ("By implication it deprives him of the right to hold office . . . .").

office, either as a theoretical matter or a practical one.[361] And some Republicans adopted a pragmatic approach: The Senate should accept the House's narrow version given the limited time remaining in the lame-duck session and the difficult ratification battle ahead.[362] The Senate failed to pass the House's version by a two-thirds majority, partly because several Radicals refused to support an amendment that lacked express protection for the right to hold office.[363] The Senate then passed a narrow anti-discrimination version that explicitly protected the right to hold office.[364]

At this juncture, the main substantive point of disagreement between the two chambers was the officeholding question.[365] On February 20, the House met to debate the Senate's version, and Boutwell—as floor manager—suggested that the discussion focus on the officeholding question.[366] As such, Representative John Logan (R-IL) moved to delete the officeholding protections from the Senate's version.

In support of his position, Logan echoed arguments first heard in the Senate. Logan claimed that "when we give [Black men] the right to vote they will take care of the right to hold office."[367] In other words, Logan thought that, as a practical matter, Black men would elect other Black men to office. Representative Benjamin Butler (R-MA) made the theoretical corollary to Logan's point in stating that "the right *to elect* to office carries with it the inalienable and indissoluble and indefeasible right *to be elected* to office."[368]

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361. See id. at 1296 (statement of Sen. Ferry (R-CT)) (disagreeing with Wilson's view and stating that "it says no such thing"); id. at 1300 (statement of Sen. Frelinghuysen (R-NJ)) ("I will only say that if you give seven hundred and fifty thousand men the right to the ballot they will look out for their own rights as to office."); id. at 1302 (statement of Sen. Howard (R-MI)) ("There is no danger that in the densely populated regions of the South, where the black population is so numerous, they will be deprived of the right of holding office though they may be voters.").

362. See id. at 1299 (statement of Sen. Stewart (R-NV)) ("You can carry the question of suffrage easier [in the states], and then after that you can carry the question of holding office easier than you can carry both together."); id. (statement of Sen. Sawyer (R-SC)) (saying that "[i]f the country is not ready for that proposition [i.e., officeholding] now, then let us wait"); id. at 1300 (statement of Sen. Frelinghuysen (R-NJ)) ("If we adopt that [i.e., the House's version], [then] we have a constitutional amendment.").

363. Id. at 1300 (failing by a vote of 31-27); see also id. at 1307 (statement of Sen. Wilson (R-MA)) ("I voted, therefore, against the House amendment . . . that did not secure to colored citizens the right to hold office . . . .").

364. See id. at 1318.

365. See Crum, Unabridged Fifteenth Amendment, supra note 13, at 1103.

366. See Cong. Globe, 40th Cong., 3d Sess. 1425–26 (statement of Rep. Boutwell (R-MA)).

367. Id. at 1426 (statement of Rep. Logan (R-IL)). Logan also pointed out that the federal constitution referred to "persons" as having the right to hold office, except for the natural-born citizen requirement to be President or Vice President. Id.

368. Id. (statement of Rep. Butler (R-MA)) (emphasis added).

Before Logan's motion could be voted on, Bingham hijacked the debate.[369] Bingham proposed additional protections against discrimination on the basis of nativity, property, and creed.[370] As relevant here, Bingham's draft deleted the words "the United States" from the Senate's version. According to Bingham, the inclusion of *both* "the United States" and a right to hold office "seems to intimate . . . that the Constitution . . . discrim-inated among natural-born citizens as to their eligibility to the office of President."[371]

Notwithstanding Bingham's interjection, Logan's motion to delete the officeholding language was voted on first, and it failed by a 70-95-57 margin.[372] Bingham then moved to substitute his version, which passed by a 92-70-60 vote.[373] Bingham's victory was attributable to several Radical Republicans switching their votes as well as bad-faith support from nineteen Democrats who thought the broader version would fail in the states.[374] Bingham's version then passed by the requisite two-thirds threshold with a 140-37-46 margin.[375]

Then, on February 23, both chambers requested a conference committee.[376] Two days later, on February 25, the conference committee released its proposed amendment: a narrow antidiscrimination provision that lacked explicit protections for the right to hold office.[377] The committee, however, was not unanimous; Senator George Edmunds (R-VT) refused to support the final version.[378] As House Rules prohibited debate on the conference committee's report,[379] the House moved quickly to pass the final version by a 144-44-35 vote.[380]

On February 26, the Senate convened to discuss the conference committee's report.[381] Senator Edmunds explained that he dissented from the conference committee's report because it unduly narrowed the Amendment's scope and deleted the officeholding protection.[382] Of particular importance here, Edmunds raised the specter that "the example of Georgia will be imitated in all the other States."[383] Edmunds

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369. See id. (statement of Rep. Bingham (R-OH)).

370. See id.

371. Id. at 1427.

372. Id. at 1428.

373. Id.

374. See Gillette, supra note 307, at 68–69 n.92 (compiling switched votes); Maltz, Coming of the Fifteenth, supra note 53, at 441 (discussing Democratic support).

375. Cong. Globe, 40th Cong., 3d Sess. 1428.

376. See id. at 1470 (House); id. at 1481 (Senate).

377. See id. at 1563.

378. See id.

379. See Gillette, supra note 307, at 73 (explaining House Rules).

380. Cong. Globe, 40th Cong., 3d Sess. 1563.

381. See id. at 1623.

382. See id. at 1625–26 (statement of Sen. Edmunds (R-VT)).

383. Id. at 1626.

further criticized the final version for "containing *half* of an inseparable, indivisible, and united truth" and "giving to the people the mere husk and shell of the feast of political equality."[384] Edmunds's remarks rehashed the prior debate over whether the term "right to vote" encompassed the right to hold office, either as a theoretical matter or a practical one.[385] Notwithstanding many Radical Senators' disappointment with the final language, the Senate passed the Fifteenth Amendment by a vote of 39-13-14.[386]

Even after the Fifteenth Amendment was sent to the states for ratification, the officeholding question was not fully resolved. Indeed, the commentary was scattershot and not necessarily related to whether the speaker supported or opposed ratification. The Virginia Republican Party's 1869 platform supported the Fifteenth Amendment's ratification so that states could not "deny to him who has the right to vote the twin privilege, the right to be voted for."[387] In arguing for ratification, one San Francisco newspaper noted that "[t]he right of any State to say who shall not be eligible to office is left just as it was before. Some will voluntarily establish an impartial rule in this matter, and others will long refuse to admit any to the privilege but white men."[388] By contrast, the California Democratic Party's 1869 platform invoked the prospect of Black and Chinese officeholding to oppose ratification.[389] In short, the officeholding question produced strange bedfellows and, even after explicit protections were removed, was not easily answered.

III. REDISTRICTING DURING RECONSTRUCTION AND REDEMPTION

Postratification evidence is often employed to elucidate the original understanding of a constitutional provision.[390] This Part begins with an

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384. Id. (emphasis added).

385. See id. at 1627 (statement of Sen. Wilson (R-MA)) ("Do not tell me, sir, that the right to vote carries with it the right to hold office. It does no such thing. . . . I believe, however, that if the black men have the right to vote they and their friends in the struggle of the future will achieve the rest."); see also id. at 1625 (statement of Sen. Howard (R-MI)) ("[A] person possessing the right of voting at the polls is inevitably in the end invested with the right to hold office . . . ."); id. at 1629 (statement of Sen. Stewart (R-NV)) ("If they can retain the ballot in Georgia they will force the power that exists there to give them the right to hold office."); William M. Stewart, Reminiscences of Senator William M. Stewart of Nevada 236 (George Rothwell Brown ed. 1908) ("I was willing to strike out [the words 'to hold office'] because I thought the right to vote carried with it the right to hold office. . . . Mr. Conkling agreed with me, making the majority of the committee . . . .").

386. See Cong. Globe, 40th Cong., 3d Sess. 1641.

387. Edward McPherson, The Political History of the United States of America During the Period of Reconstruction 485 (3d ed. 1871).

388. Ratifying the Amendment, Daily Evening Bull., Mar. 4, 1869, at 2, reprinted in The Essential Documents, supra note 53, at 548.

389. McPherson, supra note 387, at 479.

390. My past work that canvassed the Fifteenth Amendment's adoption gestured toward postratification practice but explicitly left that historical evidence for future work

overview of how postratification practice is incorporated in many originalist theories and as part of the historical modality of constitutional interpretation. It then pivots to the Enforcement Acts passed by Congress under its Fourteenth and Fifteenth Amendment enforcement authority. In so doing, it highlights areas in which Congress did—and did not—act vis-à-vis redistricting during Reconstruction.

On the redistricting front, this Essay limits its focus to the Southern states for several reasons. First, given the legacy of slavery, the Southern states had far greater Black populations—both in absolute numbers and as a percentage of the total population—than Northern states. For instance, Black men were effective political majorities in five Southern states—and near majorities in several others.[391] By contrast, the Northern states had relatively small Black populations, sometimes numbering less than 1,000 people.[392] Given this demographic reality, the creation of majority-minority congressional districts was only possible in the Southern states and border states. Second, the Reconstructed Southern states were often controlled by Republicans who could be expected to draw maps that favored their party by empowering Black voters. And, as those Reconstruction era governments were overthrown, it was in these states that one could expect to find new maps drawn by Democrats that would dilute the power of Black voters. Finally, as this Essay is a first cut at looking at redistricting plans during Reconstruction and Redemption, future work will examine plans enacted elsewhere in the United States and at the state and local level in the South.

A. *The Relevance of Postratification Practice*

In recent years, the Supreme Court and legal scholars have increasingly turned to postratification practices as evidence of original understanding.[393] These theories have been embraced by originalists, and like originalist theory more broadly,[394] this subfield of postratification

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that examined specific doctrinal questions. See Crum, Unabridged Fifteenth Amendment, supra note 13, at 1123.

391. See Crum, Racially Polarized Voting, supra note 53, at 302–03.

392. In Minnesota, for example, there were 759 Black people out of 446,056 people. See 1870 Census, supra note 43, at 20.

393. See, e.g., Moore v. Harper, 143 S. Ct. 2065, 2086–87 (2023) ("We have long looked to 'settled and established practice' to interpret the Constitution." (quoting The Pocket Veto Case, 279 U.S. 655, 689 (1929))); Chiafalo v. Washington, 140 S. Ct. 2316, 2326–28 (2020) (looking at two centuries of practice in holding that states could sanction faithless electors); Hosanna-Tabor Evangelical Lutheran Church & Sch. v. Equal Emp. Opportunity Comm'n, 565 U.S. 171, 184–85 (2012) (looking to events in the early 1800s in interpreting the Religion Clauses); McDonald v. City of Chicago, 561 U.S. 742, 769 (2010) (noting that "nine more States adopted state constitutional provisions protecting an individual right to keep and bear arms between 1789 and 1820"); McConnell, Desegregation, supra note 260, at 953–55 (looking to the Civil Rights Act of 1875 to argue that the original understanding of the Fourteenth Amendment prohibited segregated schools).

394. See supra section II.A.

practice has many flavors. As Barrett recently remarked, "Scholars have proposed competing and potentially conflicting frameworks for [postratification] analysis, including liquidation, tradition, and precedent."[395]

For instance, the concept of liquidation posits that postratification practice can "settle constitutional disputes."[396] According to James Madison, "All new laws, though penned with the greatest technical skill, and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications."[397] Stated simply, the ratifying generation can clarify ambiguous provisions when they are put into actual practice.

Other postratification evidence theories abound. In the separation of powers context, the Court has frequently looked to so-called historical gloss—namely, that "systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution . . . may be treated as a gloss on 'executive Power.'"[398] In construing the Second Amendment, the Court has adopted an "analogical reasoning"[399] approach that looks to "this Nation's historical tradition of firearm regulation."[400] And in some recent election law cases that implicate structural provisions of the Constitution, the Court has relied on history and tradition to guide its inquiry.[401] Moreover, nested within these various postratification approaches are a series of "unsettled questions" such as "[h]ow long after ratification may subsequent practice illuminate original public meaning" and whether "practice [can] settle the meaning of individual rights as well as structural provisions."[402]

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395. N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2162–63 (2022) (Barrett, J., concurring).

396. William Baude, Constitutional Liquidation, 71 Stan. L. Rev. 1, 4 (2019) [hereinafter Baude, Liquidation].

397. The Federalist No. 37, at 236 (James Madison) (Jacob E. Cooke ed., 1961); see also Baude, Liquidation, supra note 396, at 10 (elaborating on Madison's liquidation theory as applied to the First National Bank).

398. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring); see also Nat'l Lab. Rels. Bd. v. Noel Canning, 573 U.S. 513, 525 (2014) ("[T]his Court has treated practice as an important interpretive factor even when the nature or longevity of that practice is subject to dispute, and even when that practice began after the founding era."); Curtis A. Bradley & Trevor W. Morrison, Historical Gloss and the Separation of Powers, 126 Harv. L. Rev. 411, 416 (2012) (canvassing the "role of historical practice in the separation of powers context").

399. *Bruen*, 142 S. Ct. at 2132.

400. Id. at 2126; see also United States v. Rahimi, 144 S. Ct. 1889, 1903 (2024) (relaxing *Bruen*'s historical analogue requirement.).

401. See Moore v. Harper, 143 S. Ct. 2065, 2086–87 (2023); Chiafalo v. Washington, 140 S. Ct. 2316, 2326–28 (2020).

402. *Bruen*, 142 S. Ct. at 2163 (Barrett, J., concurring); see also Baude, Liquidation, supra note 396, at 49–66 (asking a series of similar questions).

One throughline of these postratification theories is that they apply most forcefully when the original understanding is ambiguous. Indeed, the Court has admonished that "'post-ratification adoption or acceptance of laws that are *inconsistent* with the original meaning of the constitutional text obviously cannot overcome or alter that text.'"[403] But given that constitutional text is often vague and that the historical record is frequently indeterminate, postratification practice has a big role to play in constitutional interpretation. And for nonoriginalist readers, this historical evidence is important on its own merit.[404]

This Essay ends its inquiry with the 1880 redistricting cycle. As one moves farther away from the relevant ratification period, the weight accorded to historical evidence decreases.[405] That is because the relevant actors are no longer in charge. This concern is particularly apt when discussing the Reconstruction Amendments, which were adopted by the Republican Party and vehemently opposed by Democrats. As Reconstruction waned, Democrats seized power across the South and implemented a panoply of policies to disempower Black voters. This creates a rich historical record of actions that skirted or crossed the constitutional line.[406] Redemption thus raises the difficult question of how to factor in the bad-faith interpretation of the Reconstruction Amendments by state actors.[407] Furthermore, Southern states adopted new constitutions in the 1890s and early 1900s that were unabashedly written to advance white supremacy and disenfranchise Black voters on a massive scale,[408] thereby creating a useful cut-off date.

B. *Postratification Congressional Practice*

After the ratification of the Fourteenth and Fifteenth Amendments, Congress passed four enforcement acts. None addressed race and redistricting. This section addresses the Enforcement Acts before discussing Congress's failure to enforce Section Two of the Fourteenth

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403. *Bruen*, 142 S. Ct. at 2137 (majority opinion) (quoting Heller v. District of Columbia, 670 F.3d 1244, 1274 n.6 (D.C. Cir. 2011) (Kavanaugh, J., dissenting)).

404. By contrast, for originalists who have concluded that the original understanding of the Fourteenth and Fifteenth Amendments as to race-based redistricting is unambiguous, then Part III carries little, if any, weight.

405. See, e.g., Aziz Z. Huq, The Function of Article V, 162 U. Pa. L. Rev. 1165, 1233 (2014) (claiming that "historical practice ought to matter if it emerged in the first few decades of constitutional history, but perhaps less so otherwise").

406. See infra section III.C.

407. The broader normative question of Redemption's interpretive impact on liquidation theory generally and the Reconstruction Amendments specifically will be addressed in future work. See Travis Crum, Liquidating Reconstruction (Oct. 6, 2024) (unpublished manuscript) (on file with author); cf. Michael W. McConnell, The Forgotten Constitutional Moment, 11 Const. Comment. 115, 115–16 (1994) [hereinafter McConnell, Forgotten] (critiquing Ackerman's constitutional moment theory by applying it to Jim Crow).

408. See Tolson, Abridgment, supra note 285, at 468–73 (detailing this history).

Amendment. It concludes with Congress's enactment of a one-person, one-vote standard under its Elections Clause authority.

1. *The Enforcement Acts.* — The Enforcement Act of 1870 was passed shortly after the Fifteenth Amendment's ratification.[409] In that statute, Congress reiterated that "all citizens . . . shall be entitled and allowed to vote at all . . . elections [by the people], without distinction of race, color, or previous condition of servitude."[410] To accomplish that goal, Congress banned racial discrimination by election officials, targeted private violence that interfered with elections, barred fraudulent election practices, and conferred jurisdiction on federal courts to hear these cases.[411]

Next, Congress passed the Enforcement Act of 1871,[412] which modified and strengthened the 1870 Act. Specifically, Congress provided for greater federal supervision of elections and mandated that "all votes for representatives in Congress shall hereafter be by written or printed ballot."[413] That same year, Congress also enacted the Ku Klux Klan (KKK) Act,[414] which, as its name suggests, was designed to clamp down on Klan-related violence in the Southern states. The KKK Act specifically targeted violence aimed at interfering with elections.[415]

Finally, near the end of Reconstruction, Congress passed the Civil Rights Act of 1875, which prohibited racial discrimination in public accommodations.[416] Unlike its predecessors, the 1875 Act did not regulate elections.[417] The 1875 Act, however, prohibited racial discrimination in juror qualifications.[418] Because the right to be a juror was often described as a political right, this provision could be viewed as enforcing the Fifteenth Amendment.[419]

There is substantial scholarship on these enforcement provisions. For the sake of brevity, this Essay will not even attempt to summarize this literature here. For present purposes, the key takeaway is that none of

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409. See Enforcement Act of 1870, ch. 114, 16 Stat. 140 (passed May 31, 1870); Cong. Globe, 41st Cong., 2d Sess. 2289–90 (1870) (proclaiming the Fifteenth Amendment's ratification on March 30, 1870).

410. Enforcement Act of 1870 § 1, 16 Stat. at 140.

411. See id. §§ 2–8; see also Xi Wang, The Making of Federal Enforcement Laws, 1870–1872, 70 Chi.-Kent L. Rev. 1013, 1021–34 (1995) (summarizing the 1870 Act's legislative history and provisions).

412. Enforcement Act of 1871, ch. 99, 16 Stat. 433.

413. Id. § 19; 16 Stat. at 440.

414. Ku Klux Klan Act, ch. 22, 17 Stat. 13 (1871).

415. Id. § 2; 17 Stat. at 13; see also Richard Primus & Cameron O. Kistler, The Support-or-Advocacy Clauses, 89 Fordham L. Rev. 145, 146 (2020) (arguing that Section 1985(3) can be used by plaintiffs to help safeguard elections).

416. Civil Rights Act of 1875, ch. 114, 18 Stat. 335.

417. See Enforcement Act of 1870, ch. 114, § 1, 16 Stat. 140; see also Enforcement Act of 1871 § 2, 16 Stat. at 433.

418. Civil Rights Act of 1875 § 4, 18 Stat. at 335–36.

419. See Amar, Jury Service, supra note 53, at 238–39.

these Acts purported to regulate the use of race in the redistricting process.

2. *Congress's Failure to Enforce the Apportionment Clause.* — It is also important to note what Congress did *not* enforce during Reconstruction: Section Two of the Fourteenth Amendment's apportionment penalty. Indeed, Section Two has never been enforced.[420] The reasons for Congress's failure to enforce Section Two during Reconstruction and Redemption were myriad.

As an initial matter, Section Two's intended targets were the Southern states. When Congress drafted Section Two in 1866, the Southern states disenfranchised Black men. But in 1867, Congress enfranchised Black men in ten of the eleven Southern states via the First Reconstruction Act.[421] By the time the 1870 apportionment occurred, Black men had been enfranchised nationwide by the Fifteenth Amendment.[422] Section Two, therefore, had far less work to do than initially intended by the early 1870s.[423]

In a related vein, Section Two proved to be unworkable following the Fifteenth Amendment's passage. In conducting the 1870 Census, the Interior Department attempted to capture practices that denied or abridged the right to vote, such as property qualifications and literacy tests.[424] Indeed, Arkansas and Rhode Island would each have lost one representative if Section Two had been enforced based on the Interior Department's study.[425] Congress nevertheless declined to pull the proverbial trigger because "the numbers of disenfranchised voters in each state according to the Census report, which was of dubious validity anyway, were too small to warrant stripping any states of representation."[426] Congress faced similar problems when it considered enforcing Section Two in 1901 while Jim Crow was being firmly established.[427] Put simply, the twin problems of political will and workability have plagued Section Two since its inception.

3. *The Emergence of One-Person, One-Vote.* — In contrast to Congress's failure to exercise its Reconstruction Amendment enforcement authority to regulate redistricting, the Reconstruction Congress invoked its

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420. See, e.g., Gerard N. Magliocca, Our Unconstitutional Reapportionment Process, 86 Geo. Wash. L. Rev. 774, 783 (2018).

421. First Reconstruction Act, ch. 152, 18 Stat. 428 (1867).

422. See supra sections II.C–.D.

423. See Morley, supra note 303, at 326 (noting that the Reconstruction Framers recognized this point during the 1870 Census).

424. See id. at 326–27.

425. See id. at 327.

426. Id. (citing George David Zuckerman, A Consideration of the History and Present Status of Section 2 of the Fourteenth Amendment, 30 Fordham L. Rev. 93, 113–14 (1961)).

427. See Tolson, Abridgment, supra note 285, at 474–77 (highlighting how Southern representatives opposed to enforcing Section Two argued it was "a relic of the Reconstruction era and too impractical to actually implement").

Elections Clause authority to impose novel requirements for congressional districts.[428] Most importantly, in 1872, Congress took the unprecedented step of requiring congressional districts to "contain[] as nearly as practicable an equal number of inhabitants."[429] In plain English, Congress adopted a one-person, one-vote requirement.

Despite this new requirement's potential import, scholars have been flummoxed that its origins are mysterious and that it proved relatively uncontroversial.[430] Indeed, the relevant discussion in the Congressional Globe spans less than a page.[431] The motion was submitted by Representative James H. Platt Jr. (R-VA), who argued that, under current law, "There is nothing to prevent a State, if it chooses to do so, from making half a State one congressional district and dividing the rest of the State among the other members."[432] Representative Ulysses Mercur (R-PA) concurred with Platt's motion.[433] The sole dissenting voice came from a fellow Republican, Representative William Stoughton (R-MI). Invoking his home state of Michigan, Stoughton argued that a one-person, one-vote rule would be unfair to fast-growing states, who should be trusted to take predicted population growth into account when drawing lines.[434] The House then voted on the measure, which passed *without* even a roll call vote.[435]

This Essay floats a potential explanation for Representative Platt's proposal. At the time, Platt's state of Virginia had eight seats in the House. Half of those districts were majority-Black, and they elected three Republicans to the Forty-Second Congress. The remaining five districts—

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428. See U.S. Const. art. I, § 4 ("The Times, Places and Manner of holding Elections for . . . Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations . . . .").

429. Act of Feb. 2, 1872, ch. 11, § 2, 17 Stat. 28; see also Pamela S. Karlan, Reapportionment, Nonapportionment, and Recovering Some Lost History of One Person, One Vote, 59 Wm. & Mary L. Rev. 1921, 1932 (2018) [hereinafter Karlan, Reapportionment] (noting the provision's novelty). Congress omitted the equi-population requirement in the 1929 Apportionment Act, and the Court ultimately held that Congress had impliedly repealed it. See Wood v. Broom, 287 U.S. 1, 6–7 (1932).

430. See Peter H. Argersinger, Representation and Inequality in Late Nineteenth-Century America: The Politics of Apportionment 14 (2012) ("This stipulation, although adopted by an overwhelmingly Republican Congress, provoked no discussion or dissension in either Congress or the press . . . ."); Karlan, Reapportionment, supra note 429, at 1933 n.65 ("I have been unable to find any discussion in the scholarly literature as to why this provision was added.").

431. See Cong. Globe, 42nd Cong., 2d Sess. 141 (1871).

432. Id. (statement of Rep. Platt (R-VA)).

433. See id. (statement of Rep. Mercur (R-PA)) ("I believe that is just, and I hope it will be adopted.").

434. See id. (statement of Rep. Stoughton (R-MI)) ("Take my own State of Michigan, for instance: in the southern part of the State the increase of population during the last decade has been comparatively small, while in some of the northern counties . . . the increase of population has been very rapid.").

435. Id.

including one majority-Black district—were represented by Democrats. The ideal district population would have been 151,416. Intriguingly, the two most overpopulated districts—District 1 (167,948 persons) and District 4 (161,545 persons)—were majority-Black. Meanwhile, the least populated district—District 8 (139,146 persons)—was the whitest district, with a population that was only 15.3% Black.[436] Given this political and demographic reality, Platt might have been concerned that Democratic-controlled Southern states could systematically overpopulate majority-Black districts while under-populating majority-white districts.[437]

To be sure, the 1872 Act was not a silver bullet. Perhaps because it lacked an enforcement mechanism,[438] the 1872 Act's statutory equi-population requirement was far looser than today's constitutional one-person, one-vote rule.[439] In the 1870s, the average population deviation for congressional districts was approximately seven percent.[440] By contrast, in 1983, the Court invalidated a congressional redistricting plan for having a population deviation of 0.6984%, or 3,724 people away from an ideal of 526,059.[441] Thus, there was considerable play in the joints in complying with the 1872 Act's requirements, a fact that would enable states to avoid redistricting under certain circumstances.[442]

C. *Reconstructing Redistricting*

This section turns to how states conducted congressional redistricting during Reconstruction and Redemption. It begins by outlining the ground rules for redistricting and emphasizing differences between today's norms and those of the late 1800s. Next, it provides a short primer on political developments between the Fifteenth Amendment's ratification in 1870 and the establishment of Jim Crow. Although the political winds shifted, voting remained racially polarized throughout the South. It then examines redistricting plans enacted by three Southern states: Alabama, Mississippi, and South Carolina. The latter two were redistricted by Republicans early

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436. See Parsons et al., 1843–1883, supra note 43, at 142–43 (providing demographic data); see also Kenneth C. Martis, The Historical Atlas of Political Parties in the United States Congress, 1789–1989, at 124–25 (1989) [hereinafter Martis, Political Parties] (providing partisanship data).

437. Mapmakers have exploited permissive one-person, one-vote rules for partisan gain. See, e.g., Cox v. Larios, 542 U.S. 947, 947–48 (2004) (Stevens, J., concurring) (explaining that mapmakers had systematically underpopulated Republican-leaning districts).

438. See Karlan, Reapportionment, supra note 429, at 1933.

439. See Reynolds v. Sims, 377 U.S. 533, 583 (1964) (one-person, one-vote rule for state legislative districts); Wesberry v. Sanders, 376 U.S. 1, 7–8 (1964) (one-person, one-vote rule for congressional districts).

440. See Erik J. Engstrom, Partisan Gerrymandering and the Construction of American Democracy 154 (2013).

441. See Karcher v. Daggett, 462 U.S. 725, 727–28 (1983).

442. See infra notes 448–454.

on during Reconstruction, and all three were gerrymandered once Democrats seized power.

1. *Contextualizing Redistricting*. — Before delving into the role of race-based redistricting during Reconstruction and Redemption, this Essay addresses a few preliminary matters about how the redistricting process operated in the late 1800s.

Starting with how redistricting worked, state legislatures drew congressional districts during Reconstruction and Redemption.[443] The first independent redistricting commissions for congressional districts were a century away.[444] Accordingly, politicians were in the driver's seat and could gerrymander to keep themselves and their party in power.

When politicians are involved in the redistricting process, it is quite common for mapmakers to use the last redistricting plan as a starting point.[445] Known as core retention, this practice makes sense: "[O]fficeholders typically prefer to keep their districts intact as a way to maximize the advantages of incumbency."[446] Of course, when states gain or lose seats in the House of Representatives after the decennial census, this practice becomes more difficult, as the old map's lines cannot simply be redrawn at the margins.[447]

This assumes, however, that the redistricting process actually occurred. That was not always the case in the late 1800s. To understand why, some context helps. Congress first mandated single-member districts in 1842.[448] That requirement lapsed for the 1850 cycle, but it was reimposed in the 1860 cycle.[449] Following the 1870 cycle, Congress maintained that requirement and further stipulated that, if a state *gained* congressional seats and failed to redistrict, any additional districts

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443. See U.S. Const. art. I, § 4 ("The Times, Places and Manner of holding Elections for . . . Representatives[] shall be prescribed in each State by the Legislature thereof . . . .").

444. See Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787, 793 (2015) (affirming the constitutionality of independent redistricting commissions against an Elections Clause challenge). In 1972, Montana became the first state to adopt an independent commission for congressional districts. See Nathaniel Persily, Samuel Byker, William Evans & Alon Sachar, When Is a Legislature Not a Legislature? When Voters Regulate Elections by Initiative, 77 Ohio St. L.J. 689, 711 (2016).

445. See Robert Yablon, Gerrylaundering, 97 N.Y.U. L. Rev. 985, 1006–10 (2022) (providing examples from the 2010 and 2020 redistricting cycles).

446. Id. at 1005.

447. See id. at 1006 (explaining that "when a state has gained or lost congressional seats, more adjustments are necessary, but substantial core retention often remains possible"); see also Peter Skerry, Counting on the Census?: Race, Group Identity, and the Evasion of Politics 137 (2000) (observing that redistricting battles are often sparked when states gain or lose seats in Congress).

448. See Rucho v. Common Cause, 139 S. Ct. 2484, 2495 (2019) (discussing the Apportionment Act of 1842, ch. 47, 5 Stat. 491 (codified as amended at 2 U.S.C § 2c (2018))).

449. See Justin Levitt & Michael P. McDonald, Taking the "Re" out of Redistricting: State Constitutional Provisions on Redistricting Timing, 95 Geo. L.J. 1247, 1251 n.18 (2007).

defaulted to at-large seats.[450] Alabama, for example, had two at-large congressional districts between 1873 and 1877.[451] This 1870 rule change invited strategic refusals to redistrict because the political party in power might prefer its chances in an at-large election,[452] and unlike under the prior rule, states were not at risk of losing the extra seat(s) if they failed to redistrict.[453] As Professor Michael Kang has explained, "[S]tates whose representation in the U.S. House had not changed following each decennial census had little incentive or need to change district[] lines unless the majority party in the state legislature saw political advantage in doing so."[454]

The norms around redistricting were also different. Unlike today's serpentine districts, "congressional districts in the 1800s typically were composed of whole towns and counties and rarely crossed their boundaries."[455] In addition, while mid-decade redistricting is rare today,[456] the practice was common during the late nineteenth century. In fact, "Between 1862 and 1896, there was *only one* election year in which at least one state *did not* redraw its congressional districts."[457]

As the foregoing suggests, the nature of congressional reapportionment and the redistricting process creates some difficulties for an apples-to-apples comparison across time. As an initial matter, the number of congressional districts apportioned to each state changed over time. Southern states, therefore, lost and gained congressional seats during Reconstruction and Redemption. That is because (1) population changes affected the apportionment of seats; (2) the nullification of the Three-Fifths Clause boosted the South's apportioned seats, and that impact was felt unevenly across the Southern states;[458] and (3) Congress expanded the size of the House of Representatives.[459] In addition, many

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450. See Engstrom, supra note 440, at 64.

451. See Parsons et al., 1843–1883, supra note 43, at 146–47.

452. See Engstrom, supra note 440, at 72–74.

453. See id. at 64 ("Congress attached a provision to the Apportionment Act allowing gaining states to keep their old plan intact and elect any new seats in a statewide, at-large election until a new redistricting plan could be passed.").

454. Michael S. Kang, Hyperpartisan Gerrymandering, 61 B.C. L. Rev. 1379, 1391 (2020).

455. Nicholas O. Stephanopoulos, Redistricting and the Territorial Community, 160 U. Pa. L. Rev. 1379, 1407 (2012).

456. See Levitt & McDonald, supra note 449, at 1248 (noting a handful of mid-decade redistrictings in the 2000s); see also League of United Latin Am. Citizens v. Perry (*LULAC*), 548 U.S. 399, 418–19 (2006) (opinion of Kennedy, J.) ("The text and structure of the Constitution and our case law indicate there is nothing inherently suspect about a legislature's decision to replace mid-decade a court-ordered plan with one of its own.").

457. Engstrom, supra note 440, at 61–62 (emphasis added).

458. See supra section II.C.

459. For a helpful graphical depiction of this trend, see Ed. Bd., Opinion, America Needs a Bigger House, N.Y. Times, https://www.nytimes.com/interactive/2018/11/09/opinion/expanded-house-representatives-size.html (on file with the *Columbia Law Review*) (last updated Nov. 15, 2018).

Southern states used at-large districts for parts of this period.[460] This Essay's goal is to ascertain the original understanding of the Fourteenth and Fifteenth Amendments based on postratification evidence; this Essay is not a quantitative analysis of these districts.[461]

One must also be attuned to the racial demographics of the era. Recall that Black people accounted for a far greater share of the South's population and were majorities in some states.[462] Whereas a majority-Black district is a majority-minority district *today*, that was not necessarily true during Reconstruction. Given this demographic reality, majority-Black districts in the South were far more likely to occur during Reconstruction. Finally, this Essay focuses on only three Southern states: Alabama, Mississippi, and South Carolina. These states had large Black populations, multiple congressional districts, and several rounds of redistricting during the 1860s through 1880s.[463]

2. *Shifting Politics.* — Voting was racially polarized in the South before the Fifteenth Amendment's ratification. Black voters overwhelmingly supported the Republican Party whereas a clear majority of white voters backed the Democratic Party. That fact remained true throughout Reconstruction.[464] As such, mapmakers could rely on race-based census data to draw lines that treated Republican voters and Black people interchangeably. Assuming fair elections, a majority-Black district was highly likely to elect Republicans to Congress. As Professor J. Morgan Kousser has explained, "Since voting was well known at the time to be extremely racially polarized . . . a partisan gerrymander amounted to a racial gerrymander."[465]

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460. See infra section III.C.3–.5 (discussing at-large congressional districts in Alabama and South Carolina).

461. A common Redeemers' strategy was to break up counties or redraw their boundaries. See Michael Greenberger, Redrawing the South: County Border Manipulation and the Process of Redemption 10–12 (2022), https://drive.google.com/file/d/1BHvykFcO_znQFIvlnaLsTpkxDrQRxag0/view [https://perma.cc/XWQ2-CRES] (unpublished manuscript) ("[T]he manipulation of county borders allowed local and state-level political actors to protect or harm the electoral security of local officeholders and pursue state-level political goals."). This fact makes it difficult to recreate old congressional districts using today's county lines. For Mississippi and South Carolina, this Essay has strived to recreate these maps below, but the precise boundaries should be taken with a grain of salt given the redrawing of county lines.

462. See Crum, Racially Polarized Voting, supra note 53, at 302 (noting that the populations of Louisiana, Mississippi, and South Carolina were majority Black; in Alabama, Florida, and Georgia, it was above forty-five percent Black; and in North Carolina and Virginia, it was around forty percent Black); see also supra notes 282–283.

463. A future book project will fully canvas—without the restriction of law review essays' word limits—congressional redistricting in the Southern states during this period.

464. See Foner, Reconstruction, supra note 56, at 508 (noting that Black voters continued to view the Republican party "as the only institution capable of securing the South's 'new order of freedom and civilization'"); see also Walton, supra note 278, at 257–77 (providing detailed statistics).

465. Kousser, supra note 46, at 29.

Yet the political grounds shifted considerably after the Fifteenth Amendment's ratification in 1870.[466] The Republican Party fractured "into Liberal and Radical branches. The Liberals supported reconciliation [with white Southerners], while the Radicals continued to press for complete equality."[467] Perhaps most surprising to modern readers accustomed to a two-party duopoly, the Liberal Republicans joined forces with the Democratic Party in backing Horace Greeley in the 1872 presidential race.[468] Greeley ultimately lost the race to President Grant in what was "the most peaceful election of the entire Reconstruction period."[469]

Following the Panic of 1873, Democrats took control of the House in the 1874 midterm elections "[i]n the greatest reversal of partisan alignments in the entire nineteenth century[.] [Democrats] erased the massive Congressional majority Republicans had enjoyed since the South's secession, transforming the party's 110-vote margin in the House into a Democratic majority of sixty seats."[470] As Professor Erik Engstrom has demonstrated, "gerrymandering strategies [in the North and the South] in the early 1870s helped bring Democrats to national power for the first time since the Civil War."[471] Shortly thereafter, the bitterly contested 1876 election between Republican Rutherford B. Hayes and Democrat Samuel Tilden culminated in the Compromise of 1877, under which Hayes became president and withdrew federal troops from the South.[472]

The conventional wisdom surrounding the Compromise of 1877 can be misleading. Democrats had seized control of several Southern states prior to the 1876 election.[473] Meanwhile, Black men continued to vote and hold office throughout the South until the 1890s, albeit at far lower rates

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466. See Michael Benedict, supra note 307, at 335–36 (arguing that the lame-duck Fortieth Congress foreshadowed the "rupture of the party and the collapse of Republican Reconstruction policy").

467. Alexander Tsesis, We Shall Overcome: A History of Civil Rights and the Law 106 (2008).

468. See Foner, Reconstruction, supra note 56, at 501–05 ("Greeley's nomination, declared Democratic National Chairman August Belmont, was 'one of those stupendous mistakes which it is difficult even to comprehend.' But . . . the party had no alternative if it hoped to defeat Grant.").

469. Id. at 508. To be clear, there was still election-related violence, particularly in Georgia. See id.

470. Id. at 523.

471. Engstrom, supra note 440, at 11.

472. See Foner, Second Founding, supra note 9, at 126 (noting how the "bargain of 1877" resolved the disputed election of 1876, awarded Hayes the presidency, and acknowledged Democratic control of all the southern states); see also Edward B. Foley, Ballot Battles: The History of Disputed Elections in the United States 117–49 (2016) (performing a deep dive on the 1876 election).

473. See infra sections III.C.3–.5.

than at the height of Reconstruction.[474] Jim Crow was not established overnight, and redistricting played a part in its creation.

3. *Alabama*. — After the Civil War, Alabama had six congressional districts.[475] Because Alabama had lost a seat during the 1860 reapportionment, the state legislature had to draw a new plan.[476] Initially, that task fell to the provisional state legislature elected under the 1865 Constitution by an all-white male electorate.[477] Alabama drew a map that cracked the Black Belt into four districts and produced two majority-Black districts. Based on the 1860 Census, Alabama's population was 45.4% Black—all of whom were disenfranchised.[478]

Alabama's representatives for the Thirty-Ninth Congress were never seated, as Congress declined to readmit the South.[479] The Thirty-Ninth Congress subsequently passed the First Reconstruction Act of 1867, which voided Alabama's provisional government, enfranchised Black men, and ordered a new constitutional convention.[480] Surprisingly, the constitutional convention maintained the congressional map adopted by the provisional government.[481]

When Alabama was readmitted to the Union in 1868,[482] newly enfranchised Black men helped Republicans win the governor's mansion and take control over the state legislature by a crushing majority.[483] But under the terms of the 1868 Constitution, the state legislature could not redistrict until after the 1870 Census.[484]

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474. See Foner, Second Founding, supra note 9, at 126 ("Yet the full imposition of the new system of white supremacy known as Jim Crow did not take place until the 1890s."); Kousser, supra note 46, at 19 fig.1.1 (showing Southern Black legislators from 1868–1900).

475. Parsons et al., 1843–1883, supra note 43, at 93.

476. See id. at 44 (showing Alabama's seven congressional districts during the 1850 reapportionment).

477. See Wiggins, Alabama Politics, supra note 56, at 12–13 (noting that on August 31, 1865, Governor Lewis Parsons called for an election of delegates to a constitutional convention, which then decided reapportionment of the legislature); see also Ala. Const. of 1865, art. VIII, § 1 (allowing only white males to vote).

478. 1870 Census, supra note 43, at 8, 12 (showing for the 1860 Census a Black population of 437,770 and a total population of 964,201). Once again, past is prologue: Alabama cracked the Black Belt in the 2020 redistricting cycle. See Allen v. Milligan, 143 S. Ct. 1487, 1504–05 (2023) (noting that the state's map split the Black Belt).

479. See John Harrison, The Lawfulness of the Reconstruction Amendments, 68 U. Chi. L. Rev. 375, 397–99 (2001).

480. See First Reconstruction Act, ch. 153, § 5, 14 Stat. 428, 429 (1867).

481. See Ala. Const. of 1868 art. VIII, § 6 ("Until a new apportionment of representatives to the Congress of the United States shall have been made, the Congressional Districts shall remain as stated in the Revised Code of Alabama . . . .").

482. See Act of June 25, 1868, ch. 70, 15 Stat. 73.

483. See Wiggins, Alabama Politics, supra note 56, at 38–39 (1977) (noting that Republicans had a 97-3 majority in the state house and a 32-1 majority in the state senate).

484. See Ala. Const. of 1868 art. VIII, § 1 (mandating that no redistricting could occur before the taking of a new census).

The 1870 election produced a divided government. Democrats won the gubernatorial race and state house. The state senate remained in Republican control because senators served four-year terms and were not up for reelection until 1872.[485]

Following the 1870 Census, Alabama was entitled to eight congressional districts. The divided state legislature failed to redraw the maps,[486] despite the Alabama Constitution's requirement that it do so.[487] The result was that the 1872 congressional elections were conducted using the six districts drawn by the provisional government and two at-large districts.[488] Following the 1872 congressional elections, Alabama's delegation to the Forty-Third Congress included two Democrats, one Liberal Republican, and five Republicans, two of whom were elected from the at-large seats.[489]

Meanwhile, in the 1872 state elections, Republicans bounced back. Republicans won the governor's race by a 53-47 margin.[490] The situation was trickier in the state legislature given that some election results were contested. After two competing state legislatures convened and in response to pressure from the Grant administration, Republicans ultimately took back the state house with a two-seat majority.[491] The evenly divided state senate fell back into Democratic control "after the death of a Republican senator in 1873."[492]

Given the closely divided political environment, the state legislature failed to redistrict once again.[493] Thus, the 1874 congressional elections were held using the same map with two at-large districts. This time, Republicans won only two seats while Democrats took six seats, including the two at-large districts.[494] The two Republicans were elected from

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485. See Wiggins, Alabama Politics, supra note 56, at 66–67; see also Sarah Woolfolk Wiggins, Alabama's Reconstruction after 150 Years, *in* The Yellowhammer War: The Civil War and Reconstruction in Alabama 177, 184 (Kenneth W. Noe ed., 2013) [hereinafter Wiggins, Yellowhammer] (attributing Democratic gains to the re-enfranchisement of former rebels).

486. See Parsons et al., 1843–1883, supra note 43, at 146–47.

487. See Ala. Const. of 1868 art. VIII, § 6 ("[A]fter each new apportionment, the General Assembly shall divide the State into as many districts as it is allowed representatives in Congress, making such Congressional Districts as nearly equal in the number of inhabitants as may be.").

488. See Parsons et al., 1843–1883, supra note 43, at 146–47; supra notes 450–454 and accompanying text (discussing at-large seats during Reconstruction).

489. See Martis, Political Parties, supra note 436, at 126–27; see also Wiggins, Alabama Politics, supra note 56, at 83 (explaining that the Liberal Republican won because two Black Republican candidates ran in the same district and split the vote).

490. See Wiggins, Alabama Politics, supra note 56, at 83.

491. See id. at 83–85.

492. Id. at 85.

493. See Parsons et al., 1843–1883, supra note 43, at 146–47.

494. See Martis, Political Parties, supra note 436, at 128–29.

Districts 1 and 4, both majority-Black and on the western end of the Black Belt.[495]

The 1874 elections also witnessed the Democrats seize unified control at the state level in a landslide election. As Alabama historian Sarah Woolfolk Wiggins has observed, "Race was *the* issue of the 1874 campaign and provoked the largest voter turnout in Alabama during Reconstruction."[496] Violence, intimidation, election fraud, and the defection of white Unionist voters helped bring the Democrats to power.[497]

In February 1875, the Democratic state legislature redrew Alabama's congressional map. Unsurprisingly, Democrats packed and cracked the Black Belt. Specifically, "the Democratic legislature gerrymandered five of the most populous counties into the fourth district . . . . The other black counties of central Alabama were distributed into districts where white voters outnumbered blacks."[498]

A visual and tabular display may prove helpful.[499] Map 1 displays Alabama's 1868–1877 congressional redistricting plan drawn by the provisional government and maintained by the 1867 constitutional convention. There were two at-large districts between 1873 and 1877 due to the state legislature's failure to redistrict.

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495. See id. (partisan data); Parsons et al., 1843–1883, supra note 43, at 146–47 (congressional district data).

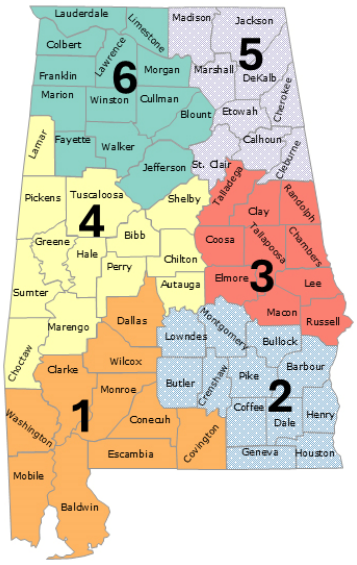
496. Wiggins, Alabama Politics, supra note 56, at 97.

497. See id. at 97–98.

498. Id. at 104; see also Foner, Reconstruction, supra note 56, at 590 ("Alabama parceled out portions of its black belt into six separate districts to dilute the black vote."); Wiggins, Yellowhammer, supra note 485, at 185 (noting that the state legislature also redrew legislative districts and increased bond requirements for holding office).

499. See 1870 Census, supra note 43, at 11–12 (providing state-level figures and accurate data for Black population in certain counties); see also Parsons et al., 1843–1883, supra note 43, at 93–94, 146–49 (providing district lines and demographic data); supra note 43 (explaining data correction).

MAP 1. ALABAMA CONGRESSIONAL DISTRICTS: 1868–1877



Map 2 displays Alabama's 1877–1883 congressional redistricting plan drawn by Democratic redeemers.

MAP 2: ALABAMA CONGRESSIONAL DISTRICTS: 1877–1883

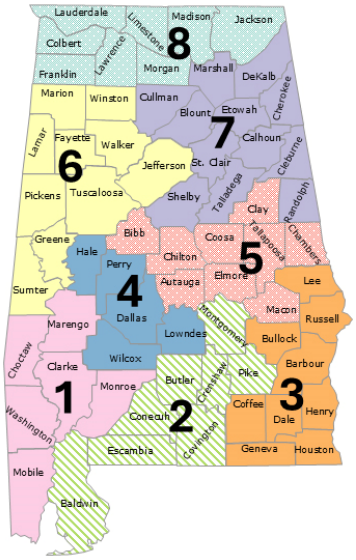


Table 1 displays the relevant demographic criteria.[500]

TABLE 1

	1873–1877 Population	1873–1877 Percent Black	1877–1883 Population	1877–1883 Percent Black
District 1	175,669	57.5	120,927	53.7
District 2	201,412	53.2	111,751	48.1
District 3	161,690	51.2	131,815	62.9
District 4	212,263	60.7	141,568	77.1
District 5	120,272	25.2	107,326	37.2
District 6	125,678	25.9	125,410	45.5
District 7	At-large (996,992)	At-large (47.7)	121,828	22.0
District 8	At-large (996,992)	At-large (47.7)	130,173	36.1

These maps and figures reveal a few things. First, even compared to the provisional government's plan, the Democratic gerrymander *further* fractured Alabama's Black Belt, which runs through the central part of the state. Of course, Democrats were aided by having two extra districts to draw, but the cracking of the Black Belt was not inevitable. Second, the Democratic gerrymander contained three majority-Black districts which is not surprising in a state in which nearly half the population was Black. However, District 4 heavily packed Black voters, both as a percentage of the population (77.1%) and based on one-person, one-vote principles. With 141,568 people, District 4 had nearly 10,000 *more* people than the second most-populous district. Indeed, District 4 showcases how malapportionment can reinforce race-based redistricting.[501]

The effect of the Democrats' 1875 redistricting was dramatic and predictable. Democrats won every congressional district in the 1876 election.[502] Democrats took seven of eight seats in the 1878 election, losing

500. Parsons et al., 1843–1883, supra note 43, at 146–49; 1870 Census, supra note 43, at 8, 12.

501. See supra notes 430–437 and accompanying text (discussing Representative Platt's potential motive in advocating a one-person, one-vote standard).

502. See Martis, Political Parties, supra note 436, at 130–31.

only District 8 in North Alabama to a politician from the Greenback Party.[503] And in the 1880 election, the last of the redistricting cycle, Democrats ultimately prevailed in seven of eight seats, with Republicans managing to capture the heavily packed District 4.[504] During the 1880 redistricting cycle, the Democratic state legislature made minor adjustments to the congressional map.[505] By that point, Democratic control was secure in Alabama.

4. *Mississippi.* — Mississippi's congressional redistricting during Reconstruction and Redemption may be the most infamous example of vote dilution from the period. And because both Republicans and Democrats conducted redistricting during Reconstruction, Mississippi is a prime candidate for understanding how both political parties treated race during the redistricting process.

Following the Civil War, Mississippi had five congressional districts, the same number that it had after the 1850 apportionment.[506] Given that it had the same number of districts, neither the provisional government nor the Reconstruction government redrew the lines for the 1860 redistricting cycle.[507] Mississippi, moreover, was readmitted to the Union relatively late in Reconstruction, meaning that its representatives and senators were seated in 1870.[508] Map 3 displays Mississippi's 1860s redistricting plan, a holdover from antebellum years.[509]

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503. See id. at 132–33.

504. District 5's election results were contested, but the seat was eventually awarded to a Democrat. See id. at 134–35.

505. Compare Parsons et al., 1843–1883, supra note 43, at 148–49, with Parsons et al., 1883–1913, supra note 43, at 3–4 (showing minor changes).

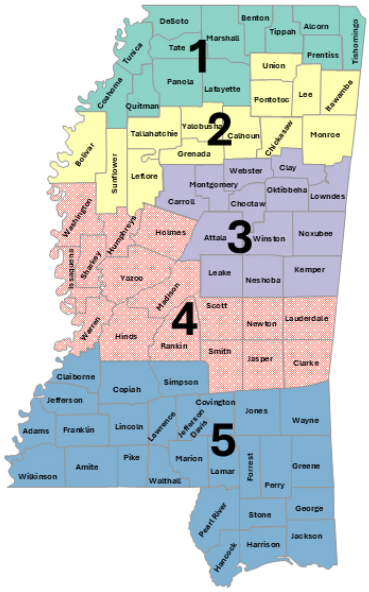
506. See Parsons et al., 1843–1883, supra note 43, at 69 (1850 apportionment); id. at 121 (1860 apportionment).

507. See Kenneth C. Martis, The Historical Atlas of United States Congressional Districts, 1789–1983, at 242 (1982) [hereinafter Martis, Congressional]. The Parsons book shows Pontotoc and Lee Counties moving from District 1 to District 2 during this time. See supra note 506. Parsons's inclusion of Pontotoc County in District 1 in the 1850 cycle is an error, and it appears to stem from Pontotoc being subdivided into Pontotoc and Lee Counties in the 1860s. See 1866 Miss. Laws 29, 34 (keeping the new Lee County in District 2); Martis, Congressional, supra note 507, at 242 (showing the movement of Pontotoc County from District 1 to District 2); see also supra note 461 (discussing county splits).

508. See Act of Jan. 18, 1869, ch. 19, 16 Stat. 67 (admitting Mississippi to representation in Congress).

509. See Parsons et al., 1843–1883, supra note 43, at 121.

MAP 3. MISSISSIPPI CONGRESSIONAL DISTRICTS: 1870–1873



After the 1870 apportionment, Mississippi was entitled to six representatives. The Republican-controlled state legislature redrew the congressional districts, which largely ran in an east–west direction and divided the Mississippi Delta into four districts.[510] This resulted in five majority-Black districts, ranging from 56.4% to 60.6% Black.[511] Here, it is important to keep in mind that Mississippi was 53.7% Black at the time.[512] In the 1872 elections, Republicans won all five majority-Black districts, losing only the majority-white district to a Democrat.[513] Map 4 displays the Republicans' post-1870 redistricting map.[514]

510. See Kousser, supra note 46, at 30 fig.1.3.
511. See Parsons et al., 1843–1883, supra note 43, at 184–85.
512. See 1870 Census, supra note 43, at 20.
513. See Martis, Political Parties, supra note 436, at 126–27.
514. See Parsons et al., 1843–1883, supra note 43, at 184–85.

MAP 4. MISSISSIPPI CONGRESSIONAL DISTRICTS: 1873–1877

The 1874 congressional elections, however, were a Democratic landslide across the country.[515] In Mississippi, Democrats won four seats, an "Independent Republican" was elected to another, and Republicans held on to one seat.[516] The consequences would be felt immediately, as "[w]hite Mississippians . . . interpreted the 1874 elections as a national repudiation of Reconstruction."[517]

The 1875 state elections were plagued by rampant violence.[518] Aided by even greater cohesion among white voters and depressed Black turnout, Democrats retook Mississippi's state government.[519] Shortly thereafter, Democrats redrew the congressional map.

As Professor Eric Foner has observed, "Mississippi Redeemers concentrated the bulk of the black population in a 'shoestring' Congressional district running the length of the Mississippi River . . . ."[520] Under the Democrats' plan, District 6—the proverbial shoestring—was 77.5% Black. Meanwhile, three other districts were barely over the 50% threshold, and

515. See Foner, Reconstruction, supra note 56, at 523.

516. See Martis, Political Parties, supra note 436, at 128–29.

517. Foner, Reconstruction, supra note 56, at 559.

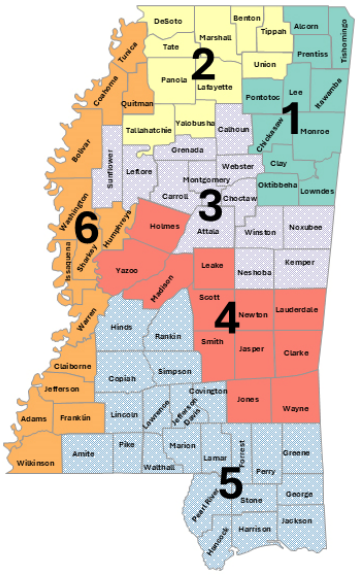
518. See id.

519. See id. at 561–62.

520. Id. at 590. Foner further claims that this left the "five other[] [congressional districts] with white majorities." Id. But as Table 2 reveals, three of the five other districts had bare Black majorities. See infra Table 2.

one was just below. Finally, District 1 was the whitest district with only a 40.1% Black population. Counterintuitively, District 1 was *overpopulated* compared to the other districts, with over 30,000 more people than the next most populous district.[521] The new map helped Democrats sweep the congressional delegation in the 1876 and 1878 elections.[522] In the 1880 election, the Democrats prevailed in five of six seats, with John Lynch, a Black Republican, winning District 6.[523] Map 5 displays the Democrats' 1875 redistricting plan.[524]

MAP 5. MISSISSIPPI CONGRESSIONAL DISTRICTS: 1877–1883



Following the 1880 Census, Mississippi was awarded a seventh congressional district.[525] Once again, Democrats redrew the map and packed Black voters into a Mississippi Delta district. Indeed, District 3 was 80.4% Black.[526] The nearby District 7 was 64.5% Black.[527] Four other districts were just over the 50% threshold, and one district was just below it.[528] Representative Lynch was technically kept in District 6, but the bulk

521. See infra Table 2.

522. See Martis, Political Parties, supra note 436, at 130–33.

523. See id. at 134–35 (providing partisan data); Swain, supra note 56, at 22 tbl.2.2 (identifying Lynch's race).

524. See Parsons et al., 1843–1883, supra note 43, at 186–87.

525. See Parsons et al., 1883–1913, supra note 43, at 68–70.

526. Kousser, supra note 46, at 30 fig.1.3.

527. Id.

528. Id.

of his voters were reallocated to Districts 3 and 7.[529] Map 6 displays the post-1880 redistricting plan.[530]

MAP 6. MISSISSIPPI CONGRESSIONAL DISTRICTS: 1883–1893

Combined with other disenfranchising tactics, the 1880 plan helped maintain Democratic supremacy in Mississippi. Representative Lynch was defeated in his reelection campaign, and Democrats lost only two races the entire decade.[531] In 1890, Mississippi became the first Southern state to rewrite its Reconstruction era constitution and thereby inaugurate a new period of Jim Crow.[532]

529. See id. at 29 (explaining that "Democrats retied the shoestring" and targeted Lynch for defeat); see also Michael S. Kang, The Bright Side of Partisan Gerrymandering, 14 Cornell J.L. & Pub. Pol'y 443, 450 n.35 (2005) (referring to this tactic as "kidnapping" a candidate during redistricting).

530. See Parsons et al., 1883–1913, supra note 43, at 68–70.

531. See Kousser, supra note 46, at 29 (discussing Lynch); Martis, Political Parties, supra note 436, at 136–45 (providing election data).

532. See Tolson, Abridgment, supra note 285, at 468.

Finally, Table 2 displays the relevant demographic figures for these four redistricting plans.[533]

TABLE 2

	1870–1873 Population	1870–1873 Percent Black	1873–1877 Population	1873–1877 Percent Black	1877–1883 Population	1877–1883 Percent Black	1883–1893 Population	1883–1893 Percent Black
District 1	139,749	47.9	136,353	26.1	174,002	40.1	139,112	49.2
District 2	127,367	49.0	148,910	60.6	129,470	52.5	168,844	53.7
District 3	148,355	52.9	134,800	59.4	127,537	48.6	129,910	80.4
District 4	213,255	63.3	147,173	57.1	129,336	52.0	195,735	53.8
District 5	162,579	58.2	127,346	56.4	133,413	52.0	192,642	51.6
District 6	N/A	N/A	142,928	57.3	143,782	77.5	125,860	52.6
District 7	N/A	N/A	N/A	N/A	N/A	N/A	179,494	64.5

5. *South Carolina.* — In the 1860 apportionment, South Carolina lost two congressional seats, going from six to four districts.[534] The state's 1868 constitutional convention—which was controlled by Republicans—adopted a new congressional redistricting plan.[535] This plan created three majority-Black districts, with the fourth district being 46.7% Black. Republicans swept the congressional delegation for the remainder of the decade.[536]

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533. See Parsons et al., 1843–1883, supra note 43, at 121, 185–87; Parsons et al., 1883–1913, supra note 43, at 68–70; 1870 Census, supra note 43, at 62–65.

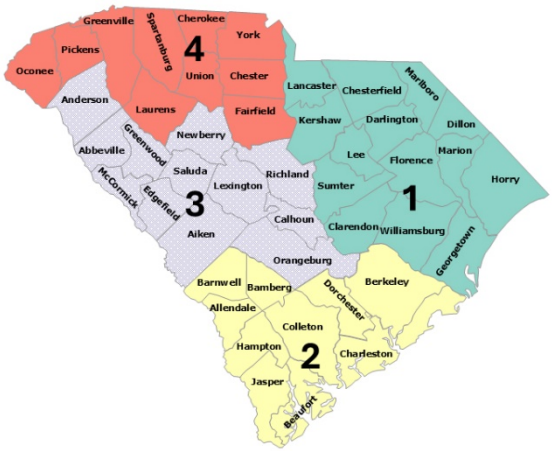
534. See Parsons et al., 1843–1883, supra note 43, at 84 (1850 apportionment); id. at 136 (1860 apportionment).

535. See S.C. Const. of 1868, An Ordinance to Divide the State Into Four Congressional Districts 41–42 ("[T]he State of South Carolina shall be . . . divided into four Congressional Districts . . . until the next apportionment be made by the Congress of the United States . . . .").

536. See Martis, Political Parties, supra note 436, at 120–25 (showing South Carolina's representatives in the Forty-First Congress were all Republican).

Following the 1870 Census, South Carolina was awarded a fifth congressional district.[537] But South Carolina failed to redistrict before the 1872 election, and the fifth representative ran in an at-large seat.[538] Once again, Republicans won all the congressional races.[539] Map 7 depicts the redistricting plan in place from South Carolina's readmission to the Union through the 1872 election.[540]

MAP 7. SOUTH CAROLINA CONGRESSIONAL DISTRICTS: 1868–1875



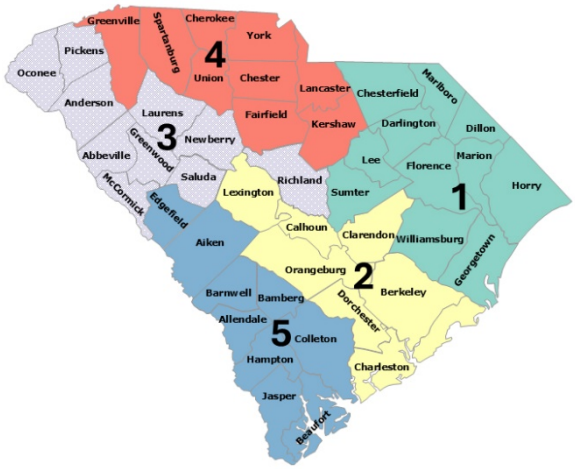
Prior to the 1874 election, Republicans redrew the congressional map. This time, *every* congressional district was majority-Black.[541] But given that South Carolina was 58.9% Black at the time, these were not majority-*minority* districts.[542] Notwithstanding the Democrats' wave election in 1874,[543] Republicans managed to win the entirety of South Carolina's congressional delegation.[544]

But in 1876, Republicans' hold on South Carolina began to slip. Democrats captured two congressional seats, which were barely majority-

537. See Parsons et al., 1843–1883, supra note 43, at 213.
538. See id.
539. See Martis, Political Parties, supra note 436, at 126–27.
540. See Parsons et al., 1843–1883, supra note 43, at 136, 212.
541. See id. at 213.
542. See 1870 Census, supra note 43, at 20.
543. See Foner, Reconstruction, supra note 56, at 523.
544. See Martis, Political Parties, supra note 436, at 128–29.

Black and were overpopulated.[545] Democrats also retook the state government in 1877 as Union troops left the South.[546] Then, in 1878, Democrats captured every congressional district.[547] But unlike in Alabama and Mississippi, Democrats did not redraw South Carolina's congressional districts until after the next apportionment. Map 8 displays the Republicans' plan from the 1874 through 1880 elections.[548]

MAP 8. SOUTH CAROLINA CONGRESSIONAL DISTRICTS: 1875–1883



After the 1880 Census, South Carolina gained two congressional districts.[549] Democrats redrew the map and created the infamous "boa constrictor," District 7, which pitted two incumbent Republicans against each other.[550] District 7 was also 81.7% Black. As shown below, the map broke apart several counties and split the city of Charleston. Indeed, the map was only contiguous because of Charleston Harbor; it was not contiguous by land. From the Library of Congress's archives, Map 9 displays the boa-constrictor map that Democrats drew for the 1880 redistricting cycle.[551]

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545. See id. at 130–31 (providing partisan data); see also Kousser, supra note 46, at 27–29 (noting overpopulation).

546. See McConnell, Forgotten, supra note 407, at 129 ("In April [1877], federal troops were removed from active intervention in the governments of Louisiana and South Carolina. The last Reconstruction governments collapsed.").

547. See Martis, Political Parties, supra note 436, at 132–33 (partisan data).

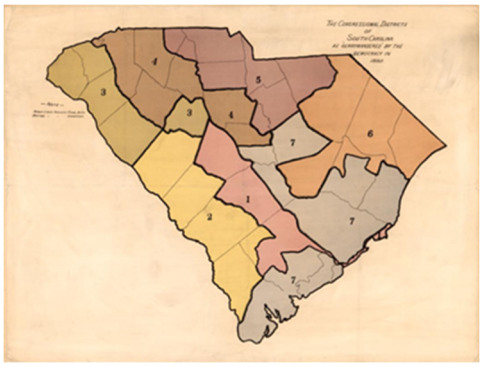
548. See Parsons et al., 1843–1883, supra note 43, at 213.

549. See Parsons et al., 1883–1913, supra note 43, at 138, 143.

550. See Kousser, supra note 46, at 27.

551. Given the sheer number of county splits—including of counties that no longer exist—this Essay does not use today's software to recreate this map. Instead, this Essay uses an 1880s era map in the public domain available through the Library of Congress. See The

MAP 9. SOUTH CAROLINA CONGRESSIONAL DISTRICTS: 1883–1893



Finally, Table 3 provides the relevant demographic data for South Carolina's congressional redistricting plans. Here, it is important to emphasize that the population figures and percentages for the post-1880 map are rough estimates because of the number of county splits.[552]

TABLE 3

	1868–1873 Population	1868–1873 Percent Black	1873–1875 Population	1873–1875 Percent Black	1875–1883 Population	1875–1883 Percent Black	1883–1893 Population	1883–1893 Percent Black
District 1	172,412	59.9	176,217	60.6	138,392	59.6	192,796	69.9
District 2	182,812	68.4	184,356	69.6	132,754	64.5	136,748	63.0
District 3	174,806	58.3	194,342	59.0	142,319	51.6	131,569	52.3
District 4	173,678	46.7	173,614	46.1	154,114	51.1	167,230	56.0
District 5	N/A	N/A	At-large (705,606)	At-large (58.9)	137,979	67.5	121,308	57.1
District 6	N/A	N/A	N/A	N/A	N/A	N/A	129,242	56.6
District 7	N/A	N/A	N/A	N/A	N/A	N/A	128,073	81.7

Congressional Districts of South Carolina as "Gerrymandered" by the Democracy in 1882, Libr. of Cong., https://www.loc.gov/item/2015588077/ [https://perma.cc/3S64-YC9E] (last visited Oct. 13, 2024).

552. See Parsons et al., 1843–1883, supra note 43, at 136, 212–13; Parsons et al., 1883–1913, supra note 43, at 138–43; 1870 Census, supra note 43, at 88–89. Given the bizarre shape of District 1, it is difficult to provide an accurate percentage of the Black population. But the City of Charleston, which contained the bulk of the district's population, was 69.9% Black. Parsons et al, 1883–1913, supra note 43, at 138. Moreover, the districts with split counties likely have higher populations than noted, as the underlying source does not fully allocate those counties. See id. at 138–43.

IV. RESOLVING THE RIDDLE OF RACE-BASED REDISTRICTING

When the Court's doctrine points in divergent directions, it can be helpful to return to first principles. This Part brings together the various threads outlined above to ascertain the original understanding of race-based redistricting under the Fourteenth and Fifteenth Amendments.

This Part begins by laying out the doctrinal options: whether *Regester* or *Shaw* are correctly decided and what that means for the VRA's constitutionality. This Part then argues that, as originally understood, the Equal Protection Clause did not regulate the use of race in the redistricting process. This Part further argues that the Fifteenth Amendment's original understanding does not support *Shaw*'s racial gerrymandering cause of action but does provide limited support for *Regester*'s vote dilution claim. This Part concludes by examining what this means for Section 2 and defending that statute's constitutionality.

A. *Menu of Options*

This brings us to whether *Regester* or *Shaw* comports with the original understanding of the Fourteenth or Fifteenth Amendments. And, depending on the answer to that question, what does that mean for the constitutionality of Section 2 of the VRA? This section sketches out potential answers to these questions.

The first option is that both *Shaw* and *Regester* are correct. In other words, the status quo reflects the original understanding of the Reconstruction Amendments. If that is true, then the *Milligan* Court's attempt to reconcile these doctrines is likely accurate as well.

The second option is that *Regester* is correct and *Shaw* is wrong. The Reconstruction Amendments protect against the dilution—that is, the abridgment—of racial minorities' right to vote. The Reconstruction Amendments also permit race-conscious decisionmaking during redistricting. If *Shaw*'s colorblind vision were rejected, Section 2 would be on firm constitutional ground.

The third option is that *Shaw* is correct and *Regester* is wrong. The Court's current colorblind intuitions, under this framework, reflect the original understanding of the Reconstruction Amendments. And if there is no constitutional grounding for vote dilution claims in *Regester*, then Section 2 is probably unconstitutional, as it would likely not qualify as a compelling governmental interest.

The final option is that neither *Regester* nor *Shaw* are correctly decided as a matter of original understanding. This would mean that neither the Fourteenth nor the Fifteenth Amendment applied to redistricting.

If that's the case, then there are no federal constitutional limits on using race during the redistricting process. There is no Goldilocks problem. As far as the Reconstruction Amendments are concerned, states could

engage in egregious racial gerrymanders, purposefully maximize the number of majority-minority districts, aim for proportional representation, or dilute racial minorities' political power. Thomas's *Alexander* concurrence comes close to this position. But rather than say that a plaintiff cannot state a claim under the Fourteenth or Fifteenth Amendment for racial gerrymandering or vote dilution, Thomas concluded that the issue is a nonjusticiable question.[553]

Of course, whether the Fourteenth or Fifteenth Amendment regulates race-based redistricting does not fully answer whether Section 2 is a permissible exercise of Congress's Reconstruction Amendment enforcement authority. The relevant standard of review would matter greatly in how deferential the Court would be to Congress's interpretations of the Fourteenth and Fifteenth Amendments. Setting aside the Reconstruction Amendments, Congress could regulate federal elections pursuant to its Elections Clause authority, under which it has near plenary power.[554] Absent any race-based, external restraint from the Reconstruction Amendments, Congress would be free to impose Section 2 on the states for purposes of congressional redistricting.[555]

One final point: In the past decade, several states have passed state voting rights acts (SVRAs) that go beyond the federal VRA's protections.[556] If there were no Fourteenth or Fifteenth Amendment restraints on race-

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553. See Alexander v. S.C. State Conf. of the NAACP, 144 S. Ct. 1221, 1253 (2024) (Thomas, J., concurring in part) (explaining that a racial gerrymandering claim is a nonjusticiable political question).

554. See supra note 52.

555. One wrinkle here is that the *Shelby County* Court invalidated the VRA's coverage formula even though it applied to voting changes pertaining to both state and federal elections. The Court did so notwithstanding an argument raised in an amicus brief filed by voting rights scholars arguing that the Elections Clause authorized the preclearance regime and coverage formula as applied to federal elections. See Brief of Gabriel Chin, Atiba Ellis et al. as Amici Curiae in Support of Respondents at 4–8, Shelby County v. Holder, 570 U.S. 529 (2013) (No. 12-96), 2013 WL 417743 ("The Elections Clause provides distinct, clear authority for Congress to enact Section 5's pre-clearance procedures for state laws concerning federal elections." (citation omitted)). Intriguingly, the Court did not comment on this argument. See Franita Tolson, The Spectrum of Congressional Authority Over Elections, 99 B.U. L. Rev. 317, 338 (2019) ("[T]he Court . . . disregarded amicus briefs filed in the case that offered a full range of constitutional alternatives that could have saved the VRA."). To the extent that the equal sovereignty principle is a freestanding federalism doctrine—rather than a specific limit on Congress's Reconstruction Amendment enforcement authority—it would function as an external restraint on Congress's Elections Clause authority. This framing explains why the Court would ignore the Elections Clause in *Shelby County*. See Crum, Deregulated Redistricting, supra note 102, at 410–12; Crum, Superfluous Fifteenth Amendment, supra note 37, at 1575–78.

556. See Crum, Deregulated Redistricting, supra note 102, at 420–21 (discussing the constitutionality of SVRAs); Ruth M. Greenwood & Nicholas O. Stephanopoulos, Voting Rights Federalism, 73 Emory L.J. 299, 301 (2023) (cataloguing SVRAs that have been enacted and proposed); see also Pico Neighborhood Ass'n v. City of Santa Monica, 534 P.3d 54, 59–60 (Cal. 2023) (holding that plaintiffs need not satisfy *Gingles* prong one under the California Voting Rights Act).

based redistricting, these SVRAs would likely be constitutional. Under this approach, there would be a two-tiered system for regulating redistricting for state and congressional elections.

B. *The Original Understanding of Race-Based Redistricting*

Given originalism's sway at the Supreme Court, constitutional law is undergoing seismic change based on the original understanding of a constitutional provision. Ascertaining the original understanding of race-based redistricting under the Fourteenth and Fifteenth Amendments matters not only for the underlying legitimacy of *Regester* and *Shaw* but also the constitutionality of Section 2 of the VRA. This section begins with a quick refutation of the Equal Protection Clause's application to voting rights before performing a deeper dive on the original understanding of the Fifteenth Amendment.

The scholarly consensus is that Section One of the Fourteenth Amendment was originally understood to exclude political rights.[557] Moreover, to the extent that any provision of Section One would have been viewed as protecting voting rights, it would have been the Privileges or Immunities Clause, not the Equal Protection Clause.[558] Section Two reinforces this point, as it was viewed as a targeted provision that punished Southern states in the House and the Electoral College if they failed to enfranchise Black men.[559] To the extent that there is any doubt, the Fortieth Congress's decision to pass the Fifteenth Amendment—rather than a nationwide Black male suffrage statute—liquidated the question. From an originalist perspective, the Equal Protection Clause is the wrong constitutional hook for *Regester* and *Shaw*. Indeed, Thomas has belatedly come around to this position.[560]

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557. See supra note 285.

558. Indeed, even those Radicals who claimed that the Fourteenth Amendment mandated enfranchisement looked to the Privileges or Immunities Clause. For instance, women's suffrage advocates based their claims on the Privileges or Immunities Clause. See supra note 292 (discussing the Woodhull Report and Minor v. Happersett, 88 U.S. 163, 178 (1875)). And recall that Representative Boutwell based his suffrage statute on the Privileges or Immunities Clause too. See supra note 320.

559. See supra notes 296–300.

560. See Alexander v. S.C. State Conf. of the NAACP, 144 S. Ct. 1221, 1261 (2024) (Thomas, J., concurring in part) (acknowledging that the Equal Protection Clause was originally understood to exclude voting rights); see also Evenwel v. Abbott, 578 U.S. 54, 76 (2016) (Thomas, J., concurring in the judgment) ("The Constitution does not prescribe any one basis for apportionment within States. It instead leaves States significant leeway in apportioning their own districts to equalize total population, to equalize eligible voters, or to promote any other principle consistent with a republican form of government.").

When the Warren Court interpreted the Equal Protection Clause to apply to malapportionment claims and non-race-based voting qualifications, Justice John Marshall Harlan II dissented on the grounds that the Equal Protection Clause, as originally understood, did not implicate the right to vote or redistricting. See, e.g., Oregon v. Mitchell, 400 U.S. 112, 166 (1970) (Harlan, J., concurring in part and dissenting in part) ("The 40th

Turning to the Fifteenth Amendment, the question becomes whether *Regester* or *Shaw* can be replanted in more fertile soil.[561] A striking feature of the ratification debate over the Fifteenth Amendment is the absence of evidence about redistricting. The Reconstruction Framers were aware of how redistricting could be abused, as their discussions about rotten boroughs reveal.[562] Moreover, after the Fifteenth Amendment's ratification, Congress failed to target race-based redistricting practices in any of the Enforcement Acts or to invoke Section Two's apportionment penalty, even though it established a one-person, one-vote requirement under its Elections Clause authority.[563] To be sure, one should not assume that the Reconstruction Congress "maximally exercised [its] power to regulate," as this risks "adopting a 'use it or lose it' view of legislative authority."[564] Nevertheless, this dearth of discussion and actions suggests that the Reconstruction Framers did not intend for the Fifteenth Amendment to apply to redistricting.

But as today's originalists frequently opine, intent is no longer the touchstone—it is the text's original public meaning.[565] On this front, the original public meaning of the Fifteenth Amendment suggests that it could apply to redistricting. Here, there are two potential textual hooks.

First, the Fifteenth Amendment prohibits the "deni[al] or abridg[ment]" of the right to vote.[566] The disjunctive phrasing implies that the text goes beyond the outright disenfranchisement of voters. As noted, the Reconstruction Framers failed to specify what, exactly, they meant by

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Congress, not content with enfranchisement in the South, proposed the Fifteenth Amendment to extend the suffrage to northern Negroes. This fact alone is evidence that they did not understand the Fourteenth Amendment to have accomplished such a result." (citation omitted)); Carrington v. Rash, 380 U.S. 89, 97 (1965) (Harlan, J., dissenting) ("[A]ll the history of the Fourteenth Amendment . . . plainly show[s] that the Equal Protection Clause was not intended to touch state electoral matters."); Reynolds v. Sims, 377 U.S. 533, 595 (1964) (Harlan, J., dissenting) ("The history of the adoption of the Fourteenth Amendment provides conclusive evidence that neither those who proposed nor those who ratified the Amendment believed that the Equal Protection Clause limited the power of the States to apportion their legislatures as they saw fit.").

561. It is not uncommon for the Court—or individual Justices—to advocate transplanting a doctrine from one constitutional provision to another. See Nat'l Pork Producers Council v. Ross, 143 S. Ct. 1142, 1153 (2023) (surveying alternative sources of the Dormant Commerce Clause); McDonald v. City of Chicago, 561 U.S. 742, 806 (2010) (Thomas, J., concurring in part and concurring in the judgment) (arguing that the incorporation of the Bill of Rights should proceed via the Privileges or Immunities Clause rather than through the Due Process Clause); Saenz v. Roe, 526 U.S. 489, 499–504 (1999) (regrounding the right to travel in the Privileges or Immunities Clause rather than the Equal Protection Clause).

562. See supra section II.D.2.

563. See supra section III.B.

564. United States v. Rahimi, 144 S. Ct. 1889, 1925 (2024) (Barrett, J., concurring).

565. See Solum, Great Debate, supra note 249, at 1251 (explaining that "the dominant form of originalism since the mid-1980s" has been "to recover the public meaning . . . at the time each provision was framed and ratified"); supra section II.A.

566. U.S. Const. amend. XV, § 1.

this turn of phrase. A common example of an abridgment of the right to vote might be a law, like New York's, that imposed differential qualifications on Black and white voters.[567] And as Justice Thurgood Marshall emphasized in his *Bolden* dissent, "[b]y providing that the right to vote cannot be discriminatorily 'denied *or* abridged,'" the Fifteenth Amendment "assuredly strikes down the diminution as well as the outright denial of the exercise of the franchise."[568]

Second, the term "right . . . to vote"[569] is not self-defining. It was viewed by many Reconstruction Framers as protecting the right to hold office. Indeed, some drafts of the Fifteenth Amendment—including one that passed the Senate by a two-thirds majority—used the phrase "elective franchise" in contradistinction to the "right to hold office."[570] In a similar vein, Congress's use of a fundamental condition on Nebraska's admission to the Union referred to the "elective franchise" rather than the "right to vote."[571] Turning to the states, the term "right to vote" appeared in only three state constitutions of that era, all from New England.[572] Thus, the relevant legal universe of statutes and constitutions lacked a clear meaning of "right to vote" and employed more specific language to refer to the casting of a ballot.

To be sure, multiple drafts of the Fifteenth Amendment used both the "right to vote" *and* "right to hold office" phrases. Some Radicals vehemently opposed the deletion of the phrase "right to hold office" by the conference committee.[573] But what is crucial is that the Reconstruction Congress and the ratifying generation continued to debate whether the right to hold office was implicitly protected by the "right to vote."[574] Those who advanced an "implicitly protected" argument differed on whether it was a theoretical truism or a political reality. But it remained a contested point during Reconstruction, and one that a modern Congress could weigh in on in Section 2 of the VRA.

Assuming, then, that the Fifteenth Amendment applies beyond discriminatory voting qualifications, how does it regulate the use of race during redistricting?

Let's start with *Shaw*. Here, the touchstones are historical context and postratification practice. *Shaw*'s colorblind instincts are missing from the

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567. See supra notes 303–315 and accompanying text.

568. City of Mobile v. Bolden, 446 U.S. 55, 126 (1980) (Marshall, J., dissenting) (quoting U.S. Const. amend. XV, § 1), superseded by statute, Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 2, 96 Stat. 131, 134 (codified as amended at 52 U.S.C. § 10301 (2018)).

569. U.S. Const. amend. XV, § 1.

570. Cong. Globe, 40th Cong., 3d Sess. 1059 (1869); see also Crum, Unabridged Fifteenth Amendment, supra note 13, at 1151–61 (compiling drafts).

571. Act of Feb. 9, 1867, ch. 36, § 3, 14 Stat. 391, 392 (admitting Nebraska as a state).

572. Crum, Unabridged Fifteenth Amendment, supra note 13, at 1071.

573. See supra section II.D.4.

574. See id.

debate over the Fifteenth Amendment. In advocating nationwide Black male suffrage, the Reconstruction Framers openly acknowledged that Black men overwhelmingly supported the Republican Party, that voting was racially polarized in the South, and that the ballot was the best means for Black men to protect their own interests.[575] Turning to Reconstruction era redistricting plans, Republican-controlled state legislatures were cognizant of race when drawing redistricting plans, seeking to create effective Black majorities in a highly polarized political environment.[576] As Professors Vikram Amar and Alan Brownstein once observed, "One cannot invalidate government race consciousness in the political rights realm on grounds that it reflects unconstitutional assumptions without dealing with the fact that the very constitutional provisions establishing political rights for minorities *were premised on those same assumptions*."[577] Put simply, *Shaw*'s colorblind intuitions—which were developed under the Equal Protection Clause—do not fare well under the Fifteenth Amendment.

As for *Regester*, there is some textual and historical evidence that vote dilution could violate the Fifteenth Amendment, but, admittedly, this is not an open-and-shut case. On the textual front, the terms "abridge" and "dilute" are close cousins.[578] During Reconstruction, dictionaries defined "abridge" as "[t]o contract," "to diminish," or "[t]o deprive of."[579] Today, the word "abridge" similarly means "to reduce in scope" or to "diminish."[580] And during Reconstruction, "dilute" was defined as "[t]o diminish," "to reduce," "to attenuate," and "to weaken."[581] Today, "dilute" likewise means "attenuate," "to diminish the strength, flavor, or brilliance of (something) by or as if by admixture" or "to decrease the per share value of (common stock) by increasing the total number of shares" or to

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575. See supra section II.B.

576. See Kousser, supra note 46, at 27 (discussing race-conscious redistricting by South Carolina Republicans); supra sections III.C.4–.5 (discussing Republican-led redistricting in Mississippi and South Carolina).

577. Amar & Brownstein, supra note 53, at 919 (emphasis added).

578. In defining these terms, this Essay ignores options that clearly apply to books. Although the Supreme Court frequently relies on dictionaries to establish the original understanding of a word, even these sources have their limitations. See Lawrence B. Solum, Originalist Methodology, 84 U. Chi. L. Rev. 269, 279 (2017) ("Dictionaries report usage, and these reports can be accurate or inaccurate. . . . When a word or phrase is used in its conventional sense, the relevant patterns of usage are those of the linguistic community to which the author belongs at the time the text is written.").

579. Abridge, Johnson's English Dictionary (J.R. Worcester, ed., Philadelphia, JAS B. Smith & Co. 1859); see also Abridge, William G. Webster & William A. Wheeler, A Dictionary of the English Language (New York & Chicago, Ivison, Blakeman, Taylor & Co. 1878) ("To deprive; to cut off."); Abridge, Joseph E. Worcester, A Dictionary of the English Language (Boston, Swan, Brewer & Tileston 1860) ("To curtail; to reduce; to contract; to diminish.").

580. Abridge, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/abridge [https://perma.cc/S4VV-FCTP] (last visited Aug. 4, 2024).

581. Dilute, Noah Webster, American Dictionary of the English Language (1880).

"weak[en]."[582] Thus, the concepts of abridgment and dilution both touch on situations in which a right is not outright denied but is curtailed or diminished in some fashion.

Moreover, Section Two of the Fourteenth Amendment's "textual and historical link" to the Fifteenth Amendment cannot be ignored.[583] Section Two also uses a variant of "denied" or "abridged."[584] Section Two imposes an *apportionment* penalty for violating its strictures, suggesting that the Reconstruction Framers associated what might be called a participatory vision of the right to cast a ballot with the aggregation of those preferences in a legislature.[585] Put differently, "abridgment" as it is used in connection to voting rights ties the casting of a ballot with representation—and thus power—in a legislature.

Finally, the postratification redistricting by Democratic state legislatures were classic examples of vote dilution.[586] On the one hand, one could argue that these actions reveal that the Fifteenth Amendment permitted vote dilution. But liquidation as a concept is problematized by the Democratic Party's "unremitting and ingenious defiance of the Constitution."[587] Put differently, the bad-faith, racist, and antidemocratic interpretation of constitutional provisions by Democratic Redeemers should not be accorded the same interpretive weight as Republicans' actions during that period.[588]

To sum up, the originalist account of race and redistricting requires a rethinking of the Court's doctrine if one stays true to original understanding. Grounding *Shaw* and *Regester* in the Fourteenth Amendment's Equal Protection Clause is deeply ahistorical and egregiously wrong. As for the Fifteenth Amendment, the historical context and postratification evidence suggest that *Shaw* finds no home in a more race-conscious Fifteenth Amendment. By contrast, there are textual and historical reasons to believe that vote dilution is prohibited by the Fifteenth Amendment. To the extent there is any remaining uncertainty about that point, Congress can clarify it via enforcement legislation. Tellingly, Congress has never embraced *Shaw*, whereas it endorsed vote dilution claims when it amended Section 2 in 1982. And it is to Section 2's constitutionality that this Essay finally turns.

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582. Dilute, Merriam-Webster Dictionary, http://www.merriam-webster.com/dictionary/dilute [https://perma.cc/BFG8-3KJP] (last visited Aug. 4, 2024).

583. Tolson, Structure, supra note 301, at 414.

584. Compare U.S. Const. amend. XIV, § 2 (imposing apportionment penalty if "the right to vote" is "denied . . . or in any way abridged"), with id. amend. XV, § 1 (protecting the "right . . . to vote" from being "denied or abridged . . . on account of race, color, or previous condition of servitude").

585. See Crum, Racially Polarized Voting, supra note 53, at 325–26 (describing the apportionment penalty).

586. See supra sections III.C.3–.5.

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

588. See supra note 407 and accompanying text.

C. *The Constitutionality of Section 2*

With the original understanding of race-based redistricting illuminated, this Essay concludes by turning to Section 2. At the outset, it is worth emphasizing two points. First, the answer to Section 2's constitutionality hinges on (1) whether and how the Reconstruction Amendments regulate race-based redistricting and (2) the governing standard for Congress's Reconstruction Amendment enforcement authority. The prior section sought to answer the first question. This section begins with an overview of *Katzenbach*, *Boerne*, and *Shelby County*. It ends by defending Section 2's constitutionality.

1. *Congress's Fifteenth Amendment Enforcement Authority.* — Congress has authority under the Fourteenth and Fifteenth Amendments to pass "appropriate" enforcement legislation.[589] During Reconstruction, the term "appropriate" was understood to embody the deferential approach to congressional authority articulated in *McCulloch v. Maryland*.[590] Nearly a century after the Fifteenth Amendment was ratified, Congress passed the VRA.[591] In upholding Section 5's preclearance provision, the Court concluded that Congress's use of the term "appropriate" in Section Two of the Fifteenth Amendment was a clear endorsement of *McCulloch*'s broad conception of congressional authority.[592] Under the *Katzenbach* standard, "Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting."[593]

In *City of Boerne v. Flores*, the Court established a new standard for adjudicating Congress's *Fourteenth* Amendment enforcement authority,[594] one that is widely viewed as contrary to the original understanding.[595] Under *Boerne*'s three-pronged congruence and proportionality test, the

589. U.S. Const. amend. XIV, § 5; id. amend. XV, § 2.

590. 17 U.S. (4 Wheat.) 316 (1819); see also Katzenbach v. Morgan, 384 U.S. 641, 650 (1966) ("By including § 5 the draftsmen sought to grant to Congress . . . the same broad powers expressed in the Necessary and Proper Clause." (citing U.S. Const. art I, § 8, cl. 18)); Michael W. McConnell, Institutions and Interpretation: A Critique of *City of Boerne v. Flores*, 111 Harv. L. Rev. 153, 188 (1997) [hereinafter McConnell, Institutions and Interpretation] (observing that the term "appropriate" "has its origins in the latitudinarian construction of congressional power in *McCulloch*").

591. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437.

592. *Katzenbach*, 383 U.S. at 325–26.

593. Id. at 324.

594. 521 U.S. 507, 520 (1997).

595. See, e.g., Tennessee v. Lane, 541 U.S. 509, 556–58 (2004) (Scalia, J., dissenting) (renouncing *Boerne*); Balkin, Reconstruction Power, supra note 259, at 1815 ("Nothing in the text of the Fourteenth Amendment justifies the *Boerne* standard . . . ."); Crum, Superfluous Fifteenth Amendment, supra note 37, at 1625 (arguing that the Framers of the Fifteenth Amendment viewed *McCulloch* as the governing standard); McConnell, Institutions and Interpretation, supra note 590, at 194 ("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.").

Court begins by "identify[ing] with some precision the scope of the constitutional right at issue."[596] The Court then "examine[s] whether Congress identified a history and pattern of unconstitutional [conduct] by the States."[597] 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 that end."[598] Since *Boerne*, the Court has continued applying the congruence and proportionality test.[599] With one exception,[600] all of these cases implicated Congress's power to abrogate state sovereign immunity. None involved race, racial discrimination in voting, or the Fifteenth Amendment.

In the two challenges to the 2006 reauthorization of the VRA—*Shelby County v. Holder*[601] and *Northwest Austin Municipal Utility District Number One v. Holder*[602]—the parties disputed whether *Katzenbach* or *Boerne* supplied the proper standard of review. In striking down the VRA's coverage formula, the *Shelby County* Court looked to two "basic principles" from *Northwest Austin* for guidance.[603] The first principle was *Northwest Austin*'s statement that the VRA's "current burdens . . . must be justified by current needs."[604] The second principle was *Northwest Austin*'s conclusion "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.'"[605] 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

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

597. Id. at 368.

598. *Boerne*, 521 U.S. at 520.

599. See Allen v. Cooper, 140 S. Ct. 994, 1004–05 (2020) (Copyright Remedy Clarification Act of 1990); Coleman v. Ct. of Appeals of Md., 566 U.S. 30, 43–44 (2012) (plurality opinion) (FMLA's self-care provision); *Lane*, 541 U.S. at 533–34 (Title II of the ADA's application to state courts); Nev. Dep't of Hum. Res. v. Hibbs, 538 U.S. 721, 733–35 (2003) (FMLA's family-care provision); *Garrett*, 531 U.S. at 374 (2001) (Title I of the ADA); United States v. Morrison, 529 U.S. 598, 627 (2000) (VAWA's civil-remedies provision); Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 91 (2000) (ADEA); Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 647 (1999) (Patent and Plant Variety Protection Act).

600. See *Morrison*, 529 U.S. at 627 (invalidating VAWA's civil remedies provision). In *Trump v. Anderson*, the Court opined that any congressional legislation that would disqualify federal officeholders under Section Three of the Fourteenth Amendment would be adjudicated under *Boerne*'s congruence and proportionality test. 144 S. Ct. 662, 670 (2024) (per curiam). The Court, however, did not determine the constitutionality of any such legislation, as the case involved Colorado's attempt to keep former President Trump off the ballot. See id. at 671 (explaining that "responsibility for enforcing Section 3 against federal officeholders and candidates rests with Congress and not the States").

601. 570 U.S. 529 (2013).

602. 557 U.S. 193 (2009).

603. *Shelby County*, 570 U.S. at 542.

604. Id. (internal quotation marks omitted) (quoting *Northwest Austin*, 557 U.S. at 203).

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

that makes sense in light of current conditions."[606] Thus, the Court determined that the current-conditions requirement is contingent on disparate treatment of the states.[607]

The Court's 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 coverage formula.[608] Nor does it cite to any of the *Boerne* line of cases. The words "congruent" and "proportional" do not appear either. Thus, on its face, *Shelby County* does not hold that *Boerne* applies to the Fifteenth Amendment.

To be sure, the *Shelby County* Court stated in a footnote that "[b]oth the Fourteenth and Fifteenth Amendments were at issue in *Northwest Austin*" and that decision "guides our review under both Amendments in this case."[609] This language, however, does not mandate that *Boerne* applies to the Fifteenth Amendment. In *Northwest Austin*, the Court concluded that it "need not resolve" the dispute over the proper standard of review given that the VRA's "preclearance requirements and its coverage formula raise serious constitutional questions under either test."[610]

Rather than being a restriction on Congress's Reconstruction Amendment enforcement authority, *Shelby County*'s equal sovereignty principle—that states retain equal political sovereignty under the Constitution and that Congress must justify differentiating between them—is best conceptualized as a freestanding federalism norm.[611] Indeed, the Court focused on the coverage formula's differentiation between the states, that is, the issue "in th[e] case."[612] If the equal sovereignty principle reflected a structural protection, then it would apply to statutes enacted under "both Amendments,"[613] just as it would apply to statutes enacted under any other constitutional provision, such as the Commerce Clause.

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606. Id. at 553.

607. 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.").

608. See id. at 534–57.

609. Id. at 542 n.1.

610. *Northwest Austin*, 557 U.S. at 204.

611. See Thomas B. Colby, In Defense of the Equal Sovereignty Principle, 65 Duke L.J. 1087, 1132–33 (2016); Crum, Deregulated Redistricting, supra note 102, at 410–12; Leah M. Litman, Inventing Equal Sovereignty, 114 Mich. L. Rev. 1207, 1259 (2016); see also John F. Manning, Federalism and the Generality Problem in Constitutional Interpretation, 122 Harv. L. Rev. 2003, 2005 (2009) (defining "freestanding federalism" as a structural argument that does not purport "to [be] ground[ed] . . . in any particular provision of the constitutional text"); Franita Tolson, Reinventing Sovereignty?: Federalism as a Constraint on the Voting Rights Act, 65 Vand. L. Rev. 1195, 1258–59 (2012) (making a similar claim about *Northwest Austin*).

612. *Shelby County*, 570 U.S. at 542 n.1.

613. Id.

The *Milligan* Court's analysis confirms that Congress's Fifteenth Amendment enforcement authority remains governed by *Katzenbach*'s rationality standard.[614] On the enforcement authority question, the *Milligan* Court cited only *Katzenbach* cases.[615] The *Milligan* Court also declined to cite *Shelby County* or any of the *Boerne* line of cases. By contrast, Thomas's dissent treated *Katzenbach*'s rationality standard, *Boerne*'s congruence and proportionality test, and *Shelby County*'s equal sovereignty principle as a constitutional mishmash.[616] The upshot is that the Court continues to rely on *Katzenbach*'s deferential standard, which makes defending Section 2's constitutionality far easier.

2. Defending Section 2. — Here, this Essay's focus is defending Section 2's application to vote dilution claims, rather than its discriminatory results standard. Recall that the Milligan Court skipped over the former question.[617]

Section 2 is usually defended as a rational means of protecting the right to vote.[618] As this argument is familiar, this Essay does not spend too much time on it. The right to vote is more than an atomized right to participate. To be effective, voters need to build coalitions and have their votes aggregated. Dilution can take many forms, from ballot box stuffing, to redrawing municipal boundaries as in *Gomillion*,[619] to the packing or cracking of voters in a redistricting plan. Congress need only make the rational choice that vote dilution is a "denial" or "abridgment" of the "right to vote." Moreover, if the Constitution *itself* prohibits vote dilution, then Section 2 is on firm constitutional footing. All that would need to be justified is the discriminatory results standard.

Moving beyond this familiar claim, this Essay makes a novel contribution: Section 2 can also be defended as a rational means of protecting the right to hold office. Elsewhere, I have argued that the Fifteenth Amendment protects a right to hold office.[620] Even if that right is not unambiguously protected by the Fifteenth Amendment, Congress can exercise its enforcement authority to clarify any ambiguity.

Critically for present purposes, the Court and Congress have conceptualized vote dilution doctrine as implicating the right to hold

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614. Moreover, the Fifteenth Amendment is a narrower provision than Section One of the Fourteenth Amendment, meaning that the *Boerne* Court's concerns about handing Congress too much power are reduced in this arena. See Crum, Deregulated Redistricting, supra note 102, at 410–12, 435–36; Crum, Superfluous Fifteenth Amendment, supra note 37, at 1567–78, 1625–26.

615. Allen v. Milligan, 143 S. Ct. 1487, 1516 (2023).

616. Id. at 1539–45 (Thomas, J., dissenting).

617. See supra section I.D. Given *Milligan*'s clear holding, Section 2's discriminatory results standard is valid Fifteenth Amendment enforcement legislation.

618. See, e.g., Gerken, Undiluted Vote, supra note 122, at 1681; Karlan, Pessimism About Formalism, supra note 63, at 1714.

619. See supra notes 182–183 and accompanying text.

620. See Crum, Unabridged Fifteenth Amendment, supra note 13, at 1138–42.

office. At the outset, the Court's decision in *Regester* looked to the number of minority officeholders and the candidate slating process as evidence of vote dilution.[621] To reiterate, this is not a right to proportional representation, but it is evidence that "the political process leading to nomination and election were not equally open to participation" and that racial minorities "had less opportunity . . . to participate in the political processes and to elect legislators of their choice."[622] In 1982, Congress adopted *Regester*'s framework in Section 2's text, and the influential Senate Report endorsed its references to the number of minority officeholders and discriminatory slating processes.[623] Thus, the vote dilution inquiry is inextricably intertwined with the right to hold office.

Furthermore, when Congress reauthorized the VRA's coverage formula and preclearance mechanism, it compiled evidence of minority officeholding as evidence of racial discrimination and political progress. And the Court took the evidence seriously—until *Shelby County*, that is.

In *City of Rome v. United States*,[624] the Court upheld the 1975 reauthorization of the VRA.[625] In so doing, the Court canvassed the evidence that Congress had compiled: "[T]hough the number of Negro elected officials had increased since 1965, most held only relatively minor positions, none held statewide office, and their number in the state legislatures fell far short of being representative of the number of Negroes residing in the covered jurisdictions."[626] This evidence of "undeniable" "minority political progress" was both "modest and spotty."[627] The Court credited this evidence while endorsing Congress's concern that new "measures may be resorted to which would *dilute* increasing minority voting strength."[628]

Fast forward to the 2006 reauthorization when Congress once again compiled this evidence. The *Shelby County* Court emphasized that "there ha[d] been 'significant increases in the number of African-Americans serving in elected offices'" and that there had been "approximately a 1,000 percent increase since 1965 in the number of African-American elected officials in the six States originally covered by the [VRA]."[629] The Court

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621. See White v. Regester, 412 U.S. 755, 766 (1973) ("[S]ince Reconstruction days, there have been only two Negroes in the Dallas County delegation to the Texas House of Representatives and that these two were the only two Negroes ever slated by the Dallas Committee for Responsible Government . . . .").

622. Id. at 766 (citing Whitcomb v. Chavis, 403 U.S. 124, 149–50 (1971)).

623. See S. Rep. No. 97-417, at 28–29 (1982).

624. 446 U.S. 156 (1980).

625. See id. at 180–82.

626. Id. at 180–81.

627. Id. at 181 (internal quotation marks omitted) (quoting H.R. Rep. No. 94–196, at 7 (1975)).

628. Id. (emphasis added) (internal quotation marks omitted) (quoting H.R. Rep. No. 94–196, at 10).

629. Shelby County v. Holder, 570 U.S. 529, 547 (2013).

also noted that "[c]overed jurisdictions ha[d] *far more* black officeholders as a proportion of the black population than d[id] uncovered ones."[630] The *Shelby County* Court focused on this progress in finding that the coverage formula and its burdens were irrational—but it still found the officeholding data probative of the VRA's constitutionality.

As a product of compromise, Section 2 requires consideration of race in the redistricting process, but it does not go so far as to require proportional representation. After all, its text explicitly disavows such a right. Nevertheless, Congress recognized that majority-minority districts are far more likely to elect minority officeholders than majority-white districts. Thus, by protecting against vote dilution, Section 2 helps safeguard an effective right to hold office. And because Congress is tasked with enforcing the Fifteenth Amendment, the Court should defer to Congress's reasoned judgment.

* * *

This Essay has strived to (1) ascertain the original public understanding of race and redistricting under the Fourteenth and Fifteenth Amendments and (2) given that original understanding, defend the constitutionality of Section 2 of the VRA's application to vote dilution. In so doing, this Essay has predominately worked within an originalist framework. Of course, there are competing frameworks for interpreting the Constitution—and those methods may yield different answers.

Furthermore, this Essay has not attempted to reconcile original understanding with principles of stare decisis. There is a vast scholarly literature on this question,[631] and the Court has taken inconsistent approaches to overturning precedent in recent years.[632] Nevertheless, it should be apparent that neither *Shaw* nor *Regester*—as they were written and decided under the Equal Protection Clause—are defensible on

630. Id. at 541–42 (first alteration in original) (internal quotation marks omitted) (quoting Shelby County v. Holder, 679 F.3d 848, 892 (D.C. Cir. 2012)).

631. For a sampling of the literature, see Amy Coney Barrett, Originalism and Stare Decisis, 92 Notre Dame L. Rev. 1921, 1922 (2017) (examining Justice Antonin Scalia's understanding of stare decisis and originalism); William Baude, Precedent and Discretion, 2019 Sup. Ct. Rev. 313, 313–14 (analyzing Thomas's and Alito's approach to precedent); John O. McGinnis & Michael Rappaport, An Originalist Approach to Prospective Overruling, 99 Notre Dame L. Rev. 425, 430 (2023) (arguing for an "originalist approach" to prospective overruling that "returns to the original meaning" of the Constitution); Nina Varsava, Precedent, Reliance, and *Dobbs*, 136 Harv. L. Rev. 1845, 1849–56 (2023) (exploring the importance of reliance interests underlying stare decisis).

632. See, e.g., Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2273 (2024) (overruling Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984)); Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll., 143 S. Ct. 2141, 2172–73 (2023) (invalidating race-based affirmative action in college admissions but declining to explicitly overrule Grutter v. Bollinger, 539 U.S. 306 (2003)); Trump v. Hawaii, 138 S. Ct. 2392, 2423 (2018) (stating that Korematsu v. United States, 323 U.S. 214 (1944), had been overruled by the "court of history").

originalist grounds. In particular, *Shaw* has the hallmarks of a precedent that should be overturned: It is egregiously wrong, it lacks textual and historical support, it is in considerable tension with prior constitutional and statutory precedent (*Regester* and *Gingles*), it cuts against Congress's interpretation of the Fifteenth Amendment as embodied in Section 2 of the VRA, it diverges from the usual intent requirement under the Equal Protection Clause, and its distinction between race and politics is unworkable. In an ideal world, *Shaw* would be overturned.

As for *Regester*, this Essay has argued that vote dilution doctrine can be transplanted from the Equal Protection Clause to the Fifteenth Amendment and stay true to originalist principles. But the Court need not—and should not—address that antecedent question. The reason is straightforward and consistent with originalism: Congress has endorsed *Regester* in Section 2 of the VRA, and under *Katzenbach*'s rationality standard, the Court must simply decide whether that is a reasonable construction of the Fifteenth Amendment.

CONCLUSION

The Court's competing doctrines on race and redistricting have come into conflict because they are based in the Equal Protection Clause. By regrounding voting rights in the Fifteenth Amendment, it becomes clear that *Shaw*'s racial gerrymandering claim rests on constitutional quicksand. Meanwhile, there is considerable ambiguity over how to treat vote dilution under the Fifteenth Amendment. Given the dearth of evidence about how the Reconstruction generation thought about race and redistricting, this Essay's claims are premised on original public meaning rather than original intent or expected application. After considering the original understanding of race-based redistricting and Congress's broad enforcement authority under the Fifteenth Amendment, there are no "competing hazards of liability."[633] Rather, Section 2 strikes the appropriate balance and provides the governing framework.

633. Abbott v. Perez, 138 S. Ct. 2305, 2315 (2018) (internal quotation marks omitted) (quoting Bush v. Vera, 517 U.S. 952, 977 (1996) (plurality opinion)).