

## RECONSTRUCTING RACIALLY POLARIZED VOTING

TRAVIS CRUM†

### ABSTRACT

*Racially polarized voting makes minorities more vulnerable to discriminatory changes in election laws and therefore implicates nearly every voting rights doctrine. In Thornburg v. Gingles, the Supreme Court held that racially polarized voting is a necessary—but not a sufficient—condition for a vote dilution claim under Section 2 of the Voting Rights Act. The Court, however, has recently questioned the propriety of recognizing the existence of racially polarized voting. This colorblind approach threatens not only the Gingles factors but also Section 2’s constitutionality.*

*The Court treats racially polarized voting as a modern phenomenon. But the relevant starting point is the 1860s, not the 1960s. Prior to the Fifteenth Amendment’s passage, Republicans received overwhelming support from newly enfranchised Black voters in the former Confederate States and expected that support to continue. The Reconstruction Framers were thus attentive to the realities of racially polarized voting and openly recognized that extending the franchise would empower Black voters to mobilize politically and protect their*

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*own interests. Racially polarized voting was a feature—not a bug—in the passage and ratification of the Fifteenth Amendment. Accordingly, this Article argues that the Court’s treatment of racially polarized voting as a constitutional taboo is historically unfounded and doctrinally incoherent.*

*There are significant implications for acknowledging the role of racially polarized voting during Reconstruction. This historical insight moves vote dilution claims—and their predicate finding of racially polarized voting—far closer to the heart of the Reconstruction Amendments and challenges the Court’s hostility to race-based redistricting. It is powerful evidence that Congress is well within its enforcement authority to remedy and deter dilutive measures that exploit racially polarized voting. Finally, reconstructing racially polarized voting helps reorient voting rights doctrine toward a Fifteenth Amendment framework.*

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## INTRODUCTION

Racially polarized voting stalks our democracy. A half century after the civil rights movement, race remains a central fault line in elections across the country. In fact, polarization between Black and White voters has increased nationwide since the mid-1990s and is particularly high in the South.<sup>1</sup> Racially polarized voting “increases the vulnerability of racial minorities to discriminatory changes in voting law.”<sup>2</sup> That is because a law designed to diminish minority voting strength will not have its intended discriminatory effect unless racial groups vote as a bloc.<sup>3</sup> In other words, gerrymanderers can exploit racially polarized voting when drawing maps to reduce or effectively eliminate minority political power. Racially polarized voting thus implicates nearly every voting rights doctrine.

Perhaps most prominently, Section 2 of the Voting Rights Act (“VRA”)<sup>4</sup> ensures that minority voters are not “packed” or “cracked” in a redistricting plan, thereby diluting their voting strength.<sup>5</sup> Under *Thornburg v. Gingles*,<sup>6</sup> racially polarized voting is a necessary—but not a sufficient—condition for a statutory vote dilution claim.<sup>7</sup> The so-

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1. Nicholas O. Stephanopoulos, *Race, Place, and Power*, 68 STAN. L. REV. 1323, 1349 (2016) [hereinafter Stephanopoulos, *Race, Place, and Power*].

2. *Shelby County v. Holder*, 570 U.S. 529, 578 (2013) (Ginsburg, J., dissenting); see also *N.C. State Conf. of the NAACP v. McCrory*, 831 F.3d 204, 222 (4th Cir. 2016) (“Racially polarized voting is not, in and of itself, evidence of racial discrimination. But it does provide an incentive for intentional discrimination in the regulation of elections.”).

3. See, e.g., *McCrory*, 831 F.3d at 222 (“It is the political cohesiveness of the minority groups that provides the political payoff for legislators who seek to dilute or limit the minority vote.”).

4. 52 U.S.C. § 10301 (2018). Section 2 is a “permanent, nationwide ban on racial discrimination in voting.” *Shelby County*, 570 U.S. at 557. Section 2 covers both vote denial and vote dilution claims and imposes liability based on a finding of discriminatory intent or effect. See *Veasey v. Abbott*, 830 F.3d 216, 229, 243–44 (5th Cir. 2016) (en banc). For a discussion of how to establish liability under Section 2, see *infra* Part I.C.

5. See Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 HARV. L. REV. 1663, 1671–72 (2001) [hereinafter Gerken, *Undiluted Vote*].

6. *Thornburg v. Gingles*, 478 U.S. 30 (1986).

7. See *id.* at 48–51. Vote dilution can also occur if districts violate the one-person, one-vote principle. See *Reynolds v. Sims*, 377 U.S. 533, 563 (1964). This Article uses vote dilution as a shorthand for racial vote dilution.

called *Gingles* factors thus require plaintiffs to establish that racial minorities are “politically cohesive” and that the “majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority’s preferred candidate.”<sup>8</sup>

Notwithstanding its centrality under *Gingles*, the role of racial bloc voting under current doctrine is hotly contested—a debate that reflects the colorblind concerns now animating equal protection doctrine. This view was perhaps best captured in Justice Thomas’s concurring opinion in *Holder v. Hall*,<sup>9</sup> where he declared that “[t]he assumptions upon which our vote dilution decisions have been based should be repugnant to any nation that strives for the ideal of a color-blind Constitution.”<sup>10</sup> In addition, a plurality of the Court cast doubt on Section 2’s constitutionality when it cautioned against an interpretation that “unnecessarily infuse[d] race into virtually every redistricting” plan.<sup>11</sup> Justices have also questioned whether Congress can exercise its Reconstruction Amendment enforcement authority to remedy racial bloc voting, which they have characterized as private action by voters.<sup>12</sup> The Court thus views Section 2’s race-conscious predicate for liability with suspicion.

These colorblind sentiments have surfaced outside the four corners of vote dilution doctrine. In *Shaw v. Reno*,<sup>13</sup> the Court created an “analytically distinct”<sup>14</sup> racial gerrymandering cause of action under the Fourteenth Amendment’s Equal Protection Clause to challenge majority-minority districts.<sup>15</sup> Under *Shaw*, if “race was the predominant factor motivating the legislature’s decision to place a

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8. *Gingles*, 478 U.S. at 51. This Article uses the terms “racially polarized voting” and “racial bloc voting” interchangeably. There is no magic ratio for racial bloc voting, and the legally sufficient ratio “will vary according to a variety of factual circumstances.” *Id.* at 57–58; see also Christopher S. Elmendorf, Kevin M. Quinn & Marisa A. Abrajano, *Racially Polarized Voting*, 83 U. CHI. L. REV. 587, 611 (2016) [hereinafter Elmendorf et al., *Racially Polarized Voting*] (finding that “the lower courts have been very reluctant to establish quantitative cutoffs for what is, or is not, legally significant minority cohesion”); *infra* notes 41–44 and accompanying text.

9. *Holder v. Hall*, 512 U.S. 874 (1994).

10. *Id.* at 905–06 (Thomas, J., concurring in the judgment).

11. *Bartlett v. Strickland*, 556 U.S. 1, 21 (2009) (plurality opinion) (quoting *League of United Latin Am. Citizens v. Perry (LULAC)*, 548 U.S. 399, 446 (2006) (opinion of Kennedy, J.)).

12. See *City of Rome v. United States*, 446 U.S. 156, 216–17 (1980) (Rehnquist, J., dissenting); *infra* Parts II.B–C.

13. *Shaw v. Reno*, 509 U.S. 630 (1993).

14. *Id.* at 652.

15. See *id.* at 658.

significant number of voters within or without a particular district,”<sup>16</sup> then the legislature must establish that the “district . . . withstand[s] strict scrutiny.”<sup>17</sup> In justifying this new cause of action, the Court harshly criticized the purposeful creation of majority-minority districts. According to the Court, “the perception that members of the same racial group . . . think alike, share the same political interests, and will prefer the same candidates at the polls” is an “impermissible racial stereotype[.]”<sup>18</sup> Because Section 2 ties liability to the presence of racial bloc voting and mandates the creation of majority-minority districts under certain circumstances, *Shaw* has long been viewed as being on a collision course with the VRA.<sup>19</sup>

At the core of the Court’s anxiety about race and voting is a belief that race-based redistricting “balkanize[s] us into competing racial factions” and “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.”<sup>20</sup> Despite its invocation of the Reconstruction Amendments, the Court implicitly treats racially polarized voting as a recent development, one that emerged after the passage of the VRA and the widespread reenfranchisement of Black voters in the South. Compounding this error, the Court assumes that the Constitution uniquely empowers the judiciary to push our nation toward a post-racial politics. Put simply, the Court presumes that the Reconstruction Amendments envision a society where racially polarized voting no longer exists. But the Court has reached this conclusion only by ignoring the historical context of the Reconstruction Amendments and by transplanting its colorblind jurisprudence from the Equal Protection Clause to the political realm.<sup>21</sup>

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

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

18. *Shaw*, 509 U.S. at 647.

19. See Gerken, *Undiluted Vote*, *supra* note 5, at 1696–98.

20. *Shaw*, 509 U.S. at 657; see also *id.* at 648 (commenting that “a racial gerrymander may exacerbate the very patterns of racial bloc voting that majority-minority districting is sometimes said to counteract”).

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

My central claim is that the Reconstruction Framers recognized the realities of racially polarized voting and that, given the prominent role of originalism on the Court today,<sup>22</sup> this fact complicates the application of colorblind principles to vote dilution claims. At the outset, it is important to dispel the myth that the Constitution is oblivious of political parties. Whereas the Founders failed to foresee the rise of party politics,<sup>23</sup> the Reconstruction Framers were intimately familiar with partisanship. Indeed, the Reconstruction Amendments were passed and ratified along nearly uniform party-line votes.<sup>24</sup>

Prior to the Fifteenth Amendment, Republicans received overwhelming support from newly enfranchised Black voters in the former Confederate States and expected that support to continue.<sup>25</sup> Racially polarized voting was a feature—not a bug—in the passage and ratification of the Fifteenth Amendment. Accordingly, the Court's apprehension about acknowledging the existence of racially polarized voting is misplaced.

Recognizing the role of racially polarized voting in the ratification of the Fifteenth Amendment has significant doctrinal and normative implications. This historical insight moves vote dilution claims—and their predicate finding of racial bloc voting—far closer to the heart of the Reconstruction Amendments. At a minimum, it is powerful evidence that Congress is well within its Reconstruction Amendment

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22. See, e.g., William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349, 2352–53 (2015).

23. See, e.g., *Chiafalo v. Washington*, 140 S. Ct. 2316, 2320–21 (2020); Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2313 (2006).

24. See AKHIL REED AMAR, *AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY* 398–400 (2012) [hereinafter AMAR, *UNWRITTEN CONSTITUTION*]; see also Michael S. Kang, *Hyperpartisan Gerrymandering*, 61 B.C. L. REV. 1379, 1393–94 (2020) [hereinafter Kang, *Hyperpartisan Gerrymandering*] (discussing partisanship in the nineteenth century).

25. See 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* 236 (1998) [hereinafter ACKERMAN, *TRANSFORMATIONS*] (attributing President Grant's popular-vote victory in the 1868 election to Black voters in the former Confederacy); Vikram David Amar & Alan Brownstein, *The Hybrid Nature of Political Rights*, 50 STAN. L. REV. 915, 943 (1998) (“New black voters were expected to vote Republican . . .”); Travis Crum, *The Superfluous Fifteenth Amendment?*, 114 NW. U. L. REV. 1549, 1597 (2020) [hereinafter Crum, *Superfluous*] (discussing the Reconstruction Framers' “ideological, partisan, and pragmatic” motives for supporting the Fifteenth Amendment).

enforcement authority to remedy and deter dilutive measures that exploit racially polarized voting.<sup>26</sup>

In addition, viewing racially polarized voting from the perspective of Reconstruction challenges the Court's hostility toward race-based redistricting. After all, if the Fifteenth Amendment was ratified on the premise that racially polarized voting exists, then the Court's treatment of racially polarized voting as constitutionally taboo is historically unfounded. And it is especially difficult to square the Court's self-proclaimed power to push our nation toward a post-racial politics with the Reconstruction Framers' understanding about both the judiciary's proper role and the persistence of racial bloc voting.

Perhaps most ambitiously, reconstructing racially polarized voting reorients voting rights doctrine away from the tired debates surrounding the Equal Protection Clause. The Reconstruction Framers demonstrated a sophisticated understanding of the intersection of race and politics. The Court's refusal to even acknowledge these insights has contributed to the tension within current doctrine between vote dilution and racial gerrymandering claims. Rather than embodying a colorblind worldview, the central premise of the Fifteenth Amendment was to empower racial minorities through the ballot. And although other scholars correctly point out that voting rights are distinct from civil rights and thus deserve a different doctrinal framework, these accounts are derived from political theory and statutory interpretation, rather than a historical and contextual understanding of the Reconstruction Amendments.<sup>27</sup> To be clear, I am not arguing that racially polarized voting is a desirable or inevitable characteristic of our democracy. Rather, my claim is that contemporary doctrine should account for the fact that the Reconstruction Framers were aware of

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26. The Court has declined to decide whether vote dilution claims are cognizable under the Fifteenth Amendment. See *Voinovich v. Quilter*, 507 U.S. 146, 159 (1993). The Court, however, has recognized such claims under the Fourteenth Amendment. See *White v. Regester*, 412 U.S. 755, 765–67 (1973); see also *infra* Part I.C.1.

27. See, e.g., Gerken, *Undiluted Vote*, *supra* note 5, at 1671 & n.9 (focusing on Section 2 in analyzing vote dilution claims); Michael S. Kang, *Race and Democratic Contestation*, 117 *YALE L.J.* 734, 736–38 (2008) [hereinafter Kang, *Democratic Contestation*] (discussing the concept of democratic contestation in relation to the VRA); Pamela S. Karlan & Daryl J. Levinson, *Why Voting is Different*, 84 *CALIF. L. REV.* 1201, 1202 (1996) (“We believe that the Court’s attempt to integrate voting rights law into its more general approach to affirmative action is both misguided and incoherent.”). *But see* Amar & Brownstein, *supra* note 25, at 919 (arguing that the *Shaw* “Court’s approach directly contradicts the reasoning and objectives of the framers and ratifiers of the Fifteenth Amendment”).

racially polarized voting and developed their political and constitutional strategies in its shadow.

Finally, this Article's revitalization of the Fifteenth Amendment is especially timely given that 2020 marks the Amendment's 150th anniversary.<sup>28</sup> The Fifteenth Amendment has been largely overshadowed by the Fourteenth Amendment and the VRA,<sup>29</sup> but it played a vital role in establishing and then restoring our nation's multiracial democracy.<sup>30</sup> Moreover, this summer's Black Lives Matter protests have forced a reckoning with our nation's racist past and present on a scale not witnessed since the civil rights movement.<sup>31</sup> And the recent passing of civil rights icon John Lewis has reignited calls to revise and expand the VRA.<sup>32</sup>

This Article proceeds as follows. Part I surveys the existence of racially polarized voting today and then explains how racially polarized voting is treated as part of a racial vote dilution claim under the Constitution and the VRA. Part II outlines the most frequent criticisms of considering racially polarized voting as part of a vote dilution claim. Part III examines racially polarized voting during Reconstruction and its central role in the Fifteenth Amendment's passage and ratification. Part IV argues that recognizing the role of racial bloc voting during Reconstruction not only strengthens the *Gingles* factors but also helps reconceptualize vote dilution claims under the Fifteenth Amendment.<sup>33</sup>

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28. 16 Stat. 1131 (1870). The Fifteenth Amendment provides that “[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude,” U.S. CONST. amend. XV, § 1, and empowers Congress to “enforce [it] by appropriate legislation,” *id.* § 2.

29. See Crum, *Superfluous*, *supra* note 25, at 1550–51.

30. See *id.* at 1621–22.

31. See Larry Buchanan, Quoc Trung Bui & Jugal K. Patel, *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. TIMES (July 3, 2020), <https://nyti.ms/2ZqRyOU> [<https://perma.cc/WX2R-62RP>] (discussing the extraordinary scale of the Black Lives Matter protests).

32. See Ari Berman, *Senators Introduced a Bill To Restore the Voting Rights Act. It's Named After John Lewis*, MOTHER JONES (July 22, 2020), <https://www.motherjones.com/politics/2020/07/senators-just-introduced-a-bill-to-restore-the-voting-rights-act-its-named-after-john-lewis> [<https://perma.cc/S7PZ-FGMY>] (explaining the newly introduced John Lewis Voting Rights Advancement Act).

33. Before moving on, a couple caveats. I primarily discuss Black–White polarization for three reasons. First, although the rights of other minorities were discussed during Reconstruction, the principal debate over the Fifteenth Amendment concerned the enfranchisement of Black citizens. See WILLIAM GILLETTE, *THE RIGHT TO VOTE: POLITICS AND THE PASSAGE OF THE FIFTEENTH AMENDMENT* 46, 58 (2d ed. 1969). Second, Black–White polarization is currently and

## I. UNDERSTANDING RACIAL VOTE DILUTION

This Part defines racially polarized voting and provides a brief overview of its role in contemporary American politics. It then charts the development of racial vote dilution doctrine under both the Constitution and the VRA and discusses the doctrinal relevance of racially polarized voting.

### A. *Defining Racially Polarized Voting*

Racially polarized voting and vote dilution are intertwined concepts. Racially polarized voting has legal significance because it can be exploited by gerrymanderers to dilute minority voting power.<sup>34</sup> In jurisdictions with racially polarized voting, politicians can predict that certain redistricting schemes—such as “packing” or “cracking” minority voters or using numbered posts in an at-large election—will dilute minority voting strength.<sup>35</sup> Racially polarized voting thus “increases the vulnerability of racial minorities to discriminatory changes in voting law” by putting them “at risk of being systematically outvoted and having their interests underrepresented in legislatures”

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has historically been more severe than polarization between White voters and other minorities. See Stephanopoulos, *Race, Place, and Power*, *supra* note 1, at 1357. And third, the overwhelming majority of Section 2 suits have been brought by Black plaintiffs. See Ellen Katz, Margaret Aisenbrey, Anna Baldwin, Emma Cheuse & Anna Weisbrodt, *Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982*, 39 U. MICH. J.L. REFORM 643, 656 (2006) [hereinafter Katz et al., *Documenting Discrimination*] (finding that Black plaintiffs brought 82.2 percent of Section 2 cases between 1982 and 2006).

Furthermore, even though the Fifteenth Amendment enfranchised only men of color and left women of color without the right to vote, I will generally avoid using gendered terms to streamline the reading process and to focus on race. For a thorough discussion of the women’s suffrage movement, see generally Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947 (2002). For a recent academic account of the intersection of race and sex in the Fifteenth and Nineteenth Amendments, see generally Catherine Powell & Camille Gear Rich, *The “Welfare Queen” Goes to the Polls: Race-Based Fractures in Gender Politics and Opportunities for Intersectional Coalitions*, 108 GEO. L.J. 105 (2020).

Finally, although the norms on this issue are still evolving, I have opted to capitalize both Black and White when used as racial identifiers. See Kwame Anthony Appiah, *The Case for Capitalizing the B in Black*, ATLANTIC (June 18, 2020), <https://www.theatlantic.com/ideas/archive/2020/06/time-to-capitalize-blackand-white/613159> [<https://perma.cc/K988-5YVY>] (“Black and white are both historically created racial identities—and whatever rule applies to one should apply to the other.”).

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

35. See, e.g., *N.C. State Conf. of the NAACP v. McCrory*, 831 F.3d 204, 222 (4th Cir. 2016); Gerken, *Undiluted Vote*, *supra* note 5, at 1672.

and by creating “an incentive to prevent changes in the existing balance of voting power.”<sup>36</sup> As explained below,<sup>37</sup> vote dilution—that is, the redistricting map or electoral scheme that prevents minorities from having an opportunity to elect their candidates of choice—violates both the Constitution and the VRA. Racially polarized voting *itself* is neither a constitutional nor a statutory violation but is rather a predicate condition for vote dilution.<sup>38</sup>

Although racially polarized voting is an intuitive concept, it defies easy doctrinal definition. There is no fixed formula for ascertaining when voting is racially polarized.<sup>39</sup> Rather, the inquiry is whether minorities are “politically cohesive” and whether the “majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority’s preferred candidate.”<sup>40</sup> The legally sufficient ratio “will vary according to a variety of factual circumstances,”<sup>41</sup> including the percentage of registered voters who are minorities, the presence of majority-vote requirements, the use of designated posts in multimember elections, and the size of the district.<sup>42</sup> Moreover, racial bloc voting need not occur in every election in the district, and the victory of a minority candidate in a particular election does not foreclose a finding of racially

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36. *Shelby County*, 570 U.S. at 578 (Ginsburg, J., dissenting).

37. *See infra* Part I.C.

38. *See Shelby County*, 570 U.S. at 578 (Ginsburg, J., dissenting). Professor Chris Elmendorf has a distinct take on racially polarized voting. He raises the provocative thesis that certain “election outcome[s] [are] unconstitutional owing to the racial basis for the electorate’s verdict” and that “Section 2 prevents or compensates for a type of constitutional violation that the courts cannot remedy through ordinary constitutional litigation.” Christopher S. Elmendorf, *Making Sense of Section 2: Of Biased Votes, Unconstitutional Elections, and Common Law Statutes*, 160 U. PA. L. REV. 377, 456 (2012) [hereinafter Elmendorf, *Biased Votes*]. My argument does not go so far. My claim differs from Elmendorf’s in at least two salient ways. First, I examine the role of racially polarized voting during Reconstruction—a period that Elmendorf ignores—to argue that the Court’s treatment of racial bloc voting as a legal taboo is historically inaccurate and doctrinally incoherent. And second, I disagree with Elmendorf that certain elections are *themselves* unconstitutional due to racial bloc voting. My focus, instead, is on the dilutive measures that exploit racial bloc voting. As Professors Pam Karlan and Daryl Levinson argue, even though citizens’ voting preferences are assuredly protected and “the government cannot reach and regulate directly the private decisionmaking that produces a disparate racial impact,” the law should not give those preferences effect through electoral mechanisms that predictably dilute the votes of politically cohesive racial minorities. Karlan & Levinson, *supra* note 27, at 1228.

39. *See Thornburg v. Gingles*, 478 U.S. 30, 58 (1986) (“[T]here is no simple doctrinal test for the existence of legally significant racial bloc voting.”).

40. *Id.* at 51.

41. *Id.* at 57–58.

42. *See id.* at 57.

polarized voting.<sup>43</sup> In light of this doctrinal uncertainty, one recent study found that “lower courts have been very reluctant to establish quantitative cutoffs for what is, or is not, legally significant minority cohesion.”<sup>44</sup>

In addition, “the race of the candidate *per se* is irrelevant to racial bloc voting analysis.”<sup>45</sup> A White politician can be the candidate of choice of minorities and, conversely, a minority candidate is not necessarily the minority community’s candidate of choice. To cite one prominent example from the case law: Henry Bonilla, a Hispanic Republican Congressman from Texas, was not the candidate of choice for Hispanics living in his district.<sup>46</sup>

For litigation purposes, racially polarized voting is usually demonstrated “through the use of bivariate statistical analyses such as . . . ecological regression, instead of multiple regression analyses that try to control for the influence of nonracial factors.”<sup>47</sup> Put simply, racial bloc voting is established using statistical methods that look for correlation, not causation.<sup>48</sup> That is because most courts do not require plaintiffs to prove the underlying causes of racially polarized voting.<sup>49</sup>

Although disentangling these causal factors is outside the scope of this Article,<sup>50</sup> racial bloc voting has numerous potential causes.<sup>51</sup> These include racist sentiments among White voters,<sup>52</sup> in-group favoritism

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43. *Id.*

44. Elmendorf et al., *Racially Polarized Voting*, *supra* note 8, at 611.

45. *Gingles*, 478 U.S. at 67 (plurality opinion).

46. *See* League of United Latin Am. Citizens v. Perry (*LULAC*), 548 U.S. 399, 428 (2006).

47. John M. Powers, Note, *Statistical Evidence of Racially Polarized Voting in the Obama Elections, and Implications for Section 2 of the Voting Rights Act*, 102 GEO. L.J. 881, 889 (2014).

48. *See id.*

49. *See id.*; *see also infra* notes 108–13 and accompanying text.

50. Also outside the scope of this Article is the so-called “race or party” question: When a law disproportionately impacts both minorities and a particular political party in a jurisdiction with racial bloc voting, how should a court determine whether race or party motivated the law’s enactment? *See* 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, 1840–41 (2018) [hereinafter Hasen, *Race or Party*].

51. *See* Karlan & Levinson, *supra* note 27, at 1229 (observing that “present-day racial bloc voting may itself be the product of past de jure race discrimination”).

52. *See, e.g.*, Christopher S. Elmendorf & Douglas M. Spencer, *The Geography of Racial Stereotyping: Evidence and Implications for VRA Preclearance After Shelby County*, 102 CALIF. L. REV. 1123, 1127 (2014) [hereinafter Elmendorf & Spencer, *Racial Stereotyping*] (“[O]ur ranking of states by anti-black stereotyping correlates very highly—but not perfectly—with rankings based on black population share and racially polarizing voting in the 2008 presidential election.”).

within minority groups,<sup>53</sup> as well as stark racial divides in important indicators like socioeconomic status,<sup>54</sup> educational attainment,<sup>55</sup> and incarceration rates.<sup>56</sup> The decades-long exodus of socially conservative White southerners from the Democratic Party is also frequently identified as a major factor in contemporary racially polarized voting.<sup>57</sup> Racial bloc voting remains an undeniable feature of political life in twenty-first century America.

### B. *Racially Polarized Voting Today*

Despite “[t]he historic accomplishments of the Voting Rights Act,”<sup>58</sup> “racially polarized voting [is] not ancient history.”<sup>59</sup> Indeed, racially polarized voting is well-known to even a casual political observer. Any cable news show recapping an election will focus on the intersection of race, geography, and partisanship in predicting and reporting election results. The fact that Black voters almost uniformly support Democrats and that White southerners tend to vote for Republicans is a political truism—entire campaigns are built around this principle.<sup>60</sup>

This political truism is borne out by the data. Consider the most recent presidential election. In 2016, White voters backed Donald

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53. See, e.g., Tasha S. Philpot & Hanes Walton, Jr., *One of Our Own: Black Female Candidates and the Voters Who Support Them*, 51 AM. J. POL. SCI. 49, 50 (2007) (“Black voting behavior, especially as it relates to support for black candidates, is thought to be a function of a sense of group identification. . . . Consequently, research has found that blacks in particular use what happens to the group as a proxy for individual self-interests.”).

54. See, e.g., Courtney E. Martin, Opinion, *Closing the Racial Wealth Gap*, N.Y. TIMES (Apr. 23, 2019), <https://nyti.ms/2W3AE66> [<https://perma.cc/7M8P-AQHY>] (“The median white family has 41 times more wealth than the median African-American family . . .”).

55. See, e.g., *Schuette v. Coal. to Def. Affirmative Action*, 572 U.S. 291, 334 (2014) (Breyer, J., concurring in the judgment) (“[L]ow educational achievement continues to be correlated with income and race.”).

56. See, e.g., MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 7 (2012) (“In some states, black men have been admitted to prison on drug charges at rates twenty to fifty times greater than those of white men.”).

57. See, e.g., Bruce E. Cain & Emily R. Zhang, *Blurred Lines: Conjoined Polarization and Voting Rights*, 77 OHIO ST. L.J. 867, 875 (2016).

58. *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 201 (2009).

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

60. See, e.g., Jack M. Balkin, *What Brown Teaches Us About Constitutional Theory*, 90 VA. L. REV. 1537, 1554–55 (2004) (discussing Nixon’s Southern Strategy to appeal to White southerners disaffected with busing, desegregation, and the civil rights movement).

Trump over Hillary Clinton by a 21-point margin,<sup>61</sup> and Black voters preferred Clinton by an 80-point margin.<sup>62</sup> Or take the 2008 election. Although the election of Barack Obama, the United States' first Black president, is frequently celebrated as a post-racial moment, "racial polarization . . . actually *increased* in the 2008 election."<sup>63</sup>

These examples are not outliers. In fact, since the passage of the VRA in 1965, Republicans have won at least a plurality of the White vote and Democrats have overwhelmingly won the Black vote in *every* presidential election.<sup>64</sup> These election results, therefore, reflect racial divisions that are long-standing—and worsening. As Professor Nick Stephanopoulos recently found, Black–White polarization “gradual[ly] declin[ed] from the mid-1980s to the mid-1990s and [it has] slow[ly] ascen[ded] ever since.”<sup>65</sup>

Unsurprisingly then, racial polarization runs deeper than presidential politics. Racial bloc voting occurs in legislative elections at the federal, state, and local level.<sup>66</sup> The existence of racially polarized voting in these elections is especially relevant because Section 2 litigation has historically challenged the drawing of districts.<sup>67</sup>

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61. Alec Tyson & Shiva Maniam, *Behind Trump's Victory: Divisions by Race, Gender, Education*, PEW RSCH. CTR. (Nov. 9, 2016), <https://www.pewresearch.org/fact-tank/2016/11/09/behind-trumps-victory-divisions-by-race-gender-education> [<https://perma.cc/KYN6-RHHP>].

62. *Id.*

63. Stephen Ansolabehere, Nathaniel Persily & Charles Stewart III, *Regional Differences in Racial Polarization in the 2012 Presidential Election: Implications for the Constitutionality of Section 5 of the Voting Rights Act*, 126 HARV. L. REV. F. 205, 205 (2013) (emphasis added). Before the 2008 general election, Obama benefited from significant cohesion among Black voters in the Democratic primaries. See, e.g., Powers, *supra* note 47, at 909.

64. See Stephen Ansolabehere, Nathaniel Persily & Charles Stewart III, *Race, Region, and Vote Choice in the 2008 Election: Implications for the Future of the Voting Rights Act*, 123 HARV. L. REV. 1385, 1401 (2010) [hereinafter Ansolabehere et al., *2008 Election*] (examining racial voting patterns in the 1968 through 2008 elections); Powers, *supra* note 47, at 883 (2012 election); Tyson & Maniam, *supra* note 61 (2016 election).

65. Stephanopoulos, *Race, Place, and Power*, *supra* note 1, at 1349.

66. See Katz et al., *Documenting Discrimination*, *supra* note 33, at 756–70 tbl.B (compiling cases where the *Gingles* factors were satisfied).

67. See Ansolabehere et al., *2008 Election*, *supra* note 64, at 1391. In the past decade, there has been an increase in vote denial cases brought under Section 2 as states have enacted discriminatory voter-suppression laws. See, e.g., *Veasey v. Abbott*, 888 F.3d 792, 804 (5th Cir. 2018) (upholding Texas's revised voter ID law); N.C. State Conf. of the NAACP v. McCrory, 831 F.3d 204, 242 (4th Cir. 2016) (invalidating North Carolina's post-*Shelby County* voter-suppression law). For recent academic discussions of Section 2's application to vote denial claims, see generally Pamela S. Karlan, *Turnout, Tenuousness, and Getting Results in Section 2 Vote Denial Claims*, 77 OHIO ST. L.J. 763 (2016); Nicholas O. Stephanopoulos, *Disparate Impact, Unified Law*, 128 YALE L.J. 1566 (2019) [hereinafter Stephanopoulos, *Disparate Impact*]; Daniel P. Tokaji,

Moreover, several studies have found that racism and racially polarized voting are worse in the Southern States.<sup>68</sup> These findings are borne out in judicial decisions. In Professor Ellen Katz's famous survey of Section 2 decisions, courts found racially polarized voting in 105 cases between 1982 and 2006.<sup>69</sup> Half of these suits were in jurisdictions then covered by Section 5 of the VRA, where only a quarter of the nation's population resides.<sup>70</sup> Given that racially polarized voting is a precondition for liability under Section 2 and that the covered jurisdictions were mostly in the Deep South, these decisions support the conclusion that racially polarized voting remains higher in the South than in the rest of the country.<sup>71</sup>

Thus, over fifty years after the passage of the VRA, discriminatory barriers to vote have fallen, but racially polarized voting persists.

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*Applying Section 2 to the New Vote Denial*, 50 HARV. C.R.-C.L. L. REV. 439 (2015); and Daniel P. Tokaji, *The New Vote Denial: Where Election Reform Meets the Voting Rights Act*, 57 S.C. L. REV. 689 (2006).

68. See, e.g., H.R. REP. NO. 109-478, at 34 (2006) (noting that “the degree of racially polarized voting in the South is increasing, not decreasing”); Elmendorf & Spencer, *Racial Stereotyping*, *supra* note 52, at 1127 (finding that “the recently invalidated coverage formula actually did a remarkably good job of picking out states whose non-black residents harbor exceptionally negative stereotypes of African Americans”); Stephanopoulos, *Race, Place, and Power*, *supra* note 1, at 1349 (“Between 1972 and 2012, I find that black-white polarization was higher in the South than in the non-South . . .”).

69. See Katz et al., *Documenting Discrimination*, *supra* note 33, at 665.

70. See *id.* at 655, 665. Section 5 required certain covered jurisdictions—largely in the South—to preclear all voting changes with federal authorities. In 2006, Congress reauthorized Section 4(b)'s coverage formula for determining which jurisdictions were subject to Section 5's preclearance requirement. See *Shelby County v. Holder*, 570 U.S. 529, 537–39 (2013). The *Shelby County* Court invalidated Section 4(b)'s coverage formula for violating the equal sovereignty principle but “issue[d] no holding on § 5 itself.” *Id.* at 557.

71. Voting is also racially polarized between White people and other minority groups, though to a lesser extent than between White and Black voters. See LAUGHLIN McDONALD, AMERICAN INDIANS AND THE FIGHT FOR EQUAL VOTING RIGHTS 263 (2010) (attributing Native American support for Democratic victories in the 2002 South Dakota Senate race, the 2004 Montana gubernatorial race, and the 2006 Montana Senate race); Stephanopoulos, *Race, Place, and Power*, *supra* note 1, at 1357 (“Turning to Hispanic-white polarization, it was markedly lower than black-white polarization from 1972 to 2012. It drifted around 25% in the average state, compared to a black-white polarization mean of roughly 50%.”); Hansi Lo Wang, *Trump Lost More of the Asian-American Vote than the National Exit Polls Showed*, NPR (Apr. 18, 2017, 2:19 PM), <https://www.npr.org/2017/04/18/524371847/trump-lost-more-of-the-asian-american-vote-than-the-national-exit-polls-showed> [https://perma.cc/BZA2-EA4N] (estimating that Clinton won between 65 percent to 79 percent of the Asian American vote).

C. *Racial Vote Dilution Under the Constitution and the VRA*

Vote dilution claims can be brought under the Fourteenth Amendment and Section 2 of the VRA, though the latter is the driving force of most voting rights litigation. Constitutional and statutory vote dilution claims require different types of proof because they target distinct dilutive schemes. Both inquiries look at the totality of the circumstances to determine whether minorities have an opportunity to elect their candidates of choice. But a constitutional vote dilution claim requires a showing of invidious intent whereas Section 2 does not. Furthermore, the Court's adoption of the *Gingles* factors has shifted the vote dilution inquiry away from a totality-of-the-circumstances inquiry and moved a showing of racial bloc voting to center stage. The upshot is that Section 2 mandates the creation of majority-minority districts when a significant number of minorities are residentially segregated and voting is racially polarized.

This Section discusses vote dilution claims under the Constitution and Section 2 of the VRA as well as the themes that emerge from the doctrine's development.

1. *The Development of the Doctrine.* Notwithstanding the history recounted below,<sup>72</sup> the Court has interpreted the Fourteenth Amendment to largely subsume the Fifteenth Amendment's protections against racial discrimination in voting.<sup>73</sup> Indeed, the Court has repeatedly declined to decide whether vote dilution claims are cognizable under the Fifteenth Amendment.<sup>74</sup> The Court, however, has recognized racial vote dilution claims under the Fourteenth Amendment.

The Court first invoked the Equal Protection Clause to invalidate a redistricting scheme on racial vote dilution grounds in its 1973

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72. See *infra* Part III.

73. See Henry L. Chambers, Jr., *Colorblindness, Race Neutrality, and Voting Rights*, 51 EMORY L.J. 1397, 1424 (2002) (“[T]he Fifteenth Amendment’s requirement of equal voting rights often appears to go no further than the protection now afforded by the Fourteenth Amendment.”); Crum, *Superfluous*, *supra* note 25, at 1557–64 (canvassing how the Court’s current doctrine conflates the Fourteenth and Fifteenth Amendments).

74. See *Reno v. Bossier Par. Sch. Bd. (Bossier Parish II)*, 528 U.S. 320, 334 n.3 (2000) (“[W]e have never held that vote dilution violates the Fifteenth Amendment.”); *Voinovich v. Quilter*, 507 U.S. 146, 159 (1993) (“This Court has not decided whether the Fifteenth Amendment applies to vote-dilution claims.”); *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.”).

decision in *White v. Regester*.<sup>75</sup> According to the Court, plaintiffs bringing vote dilution claims must show that “the political processes leading to nomination and election were not equally open to participation by the group in question—that its members had less opportunity . . . to participate in the political processes and to elect legislators of their choice.”<sup>76</sup> In so holding, the Court expressly rejected the notion that minorities are entitled to proportional representation.<sup>77</sup> Instead, the Court adopted a “totality of the circumstances”<sup>78</sup> standard and identified a variety of relevant factors. These included the number of minorities elected to office, the jurisdiction’s history of racial discrimination in voting, racial inequities in several socioeconomic indicators, racial campaign tactics, discriminatory candidate slating, the use of numbered posts in at-large elections, and legislators’ responsiveness to the minority community’s concerns.<sup>79</sup> Most importantly for present purposes, the *White* Court also identified racially polarized voting as a relevant factor.<sup>80</sup>

Although *White* heralded a new era of racial vote dilution claims under the Fourteenth Amendment, developments in the 1980s resulted in such claims being brought under the VRA. In *City of Mobile v. Bolden*,<sup>81</sup> a plurality of the Court concluded that plaintiffs must prove discriminatory intent to establish a racial vote dilution claim under the Fourteenth Amendment,<sup>82</sup> a point a majority of the Court later

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75. *White v. Regester*, 412 U.S. 755, 765–69 (1973); see also 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 *White*’s unprecedented holding). Although *White* was the first case where the Court struck down a plan on racial vote dilution grounds, the Court had left open the possibility in *Whitcomb v. Chavis*, 403 U.S. 124, 141–44 (1971).

76. *White*, 412 U.S. at 766.

77. 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.”).

78. *Id.* at 769.

79. See *id.* at 766–69.

80. The Court did not use the magic words “racially polarized voting” or “racial bloc voting,” but the point is clear. See *id.* at 766–67 (explaining that the “white-dominated” Democratic Party in Dallas County “did not need the support of the Negro community to win elections in the county”); *id.* at 767 (describing “racial campaign tactics in white precincts to defeat candidates who had the overwhelming support of the black community” (quoting *Graves v. Barnes*, 343 F. Supp. 704, 726–27 (W.D. Tex. 1972) (per curiam))).

81. *City of Mobile v. Bolden*, 446 U.S. 55 (1980).

82. See *id.* at 66–67 (plurality opinion).

confirmed in *Rogers v. Lodge*.<sup>83</sup> On this front, the Court's approach mirrored a broader turn in equal protection jurisprudence toward an intent requirement.<sup>84</sup>

In addition, the *Bolden* plurality determined that the Fifteenth Amendment, like the Fourteenth, has an intent requirement.<sup>85</sup> The *Bolden* plurality, however, determined that the Fifteenth Amendment does *not* encompass vote dilution claims.<sup>86</sup> And because Section 2 of the VRA “no more than elaborate[d] upon . . . the Fifteenth Amendment,”<sup>87</sup> the *Bolden* plurality reasoned that the two were coextensive.<sup>88</sup>

After *Bolden*, “a good deal of voting rights litigation ground to a halt.”<sup>89</sup> Concerned about *Bolden*'s dramatic impact,<sup>90</sup> Congress revised Section 2 in 1982 to eliminate the intent requirement and to authorize vote dilution claims.<sup>91</sup> In recognizing a discriminatory effects claim, Congress relied on its Reconstruction Amendment enforcement authority to enact prophylactic legislation.<sup>92</sup>

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83. *Rogers v. Lodge*, 458 U.S. 613, 617 (1982).

84. *See Bolden*, 446 U.S. at 66 (plurality opinion) (citing *Washington v. Davis*, 426 U.S. 229, 248 (1976)); Issacharoff, *Polarized Voting*, *supra* note 21, at 1845 (arguing that *Bolden* “recast voting rights claims in the mold of *Washington v. Davis*”). *But see* Daniel R. Ortiz, *The Myth of Intent in Equal Protection*, 41 STAN. L. REV. 1105, 1127–28 (1989) (arguing that the intent analysis employed in racial vote dilution cases differs from civil rights cases).

85. *See Bolden*, 446 U.S. at 62 (plurality opinion).

86. *See id.* at 65. Although *Rogers* transformed *Bolden*'s conclusion on the Fourteenth Amendment into a holding, the *Rogers* Court “express[ed] no view on the application of the Fifteenth Amendment to th[e] case.” *Rogers*, 458 U.S. at 619 n.6.

87. *Bolden*, 446 U.S. at 60 (plurality opinion).

88. *See id.* at 60–61.

89. Adam B. Cox & Thomas J. Miles, *Judging the Voting Rights Act*, 108 COLUM. L. REV. 1, 7 (2008).

90. *Bolden*'s timing was propitious for defenders of minority voting rights. The VRA's coverage formula and Section 5 were set to expire in 1982, and Congress used that opportunity to amend Section 2. *See id.* at 7 n.22.

91. *See id.* at 7–8 (discussing Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 3, 96 Stat. 131, 134); *see also* 52 U.S.C. § 10301(a) (2018) (prohibiting election laws that “result[] in a denial or abridgment of [the] right . . . to vote on account of race”).

92. *See Chisom v. Roemer*, 501 U.S. 380, 383–84 (1991) (“In 1982, Congress amended § 2 of the Voting Rights Act to make clear that certain practices and procedures that *result* in the denial or abridgment of the right to vote are forbidden even though the absence of proof of discriminatory intent protects them from constitutional challenge.” (footnote omitted)); Michael T. Morley, *Prophylactic Redistricting? Congress's Section 5 Power and the New Equal Protection Right to Vote*, 59 WM. & MARY L. REV. 2053, 2072–74 (2018) (discussing how the VRA is an exercise of Congress's Reconstruction Amendment enforcement authority); *see also* *Nev. Dep't of Hum. Res. v. Hibbs*, 538 U.S. 721, 727–28 (2003) (“Congress may enact so-called prophylactic

The 1982 amendments to Section 2 clearly borrowed from *White*'s approach. Echoing *White*, Section 2's text refers to a "totality of [the] circumstances" standard that examines whether minorities "have less opportunity . . . to participate in the political process and to elect representatives of their choice."<sup>93</sup> Like *White*, Section 2 identifies as a relevant factor "[t]he extent to which members of a protected class have been elected to office."<sup>94</sup> The accompanying Senate Report lists several additional factors drawn from *White*, including racially polarized voting.<sup>95</sup> And, following *White*, Section 2's text disavows a proportionality standard.<sup>96</sup>

But the resurrection of *White*'s totality-of-the-circumstances standard proved fleeting. In its 1986 decision in *Thornburg v. Gingles*, the Court announced three "necessary preconditions" for statutory vote dilution claims.<sup>97</sup> First, the minority group must be "sufficiently large and geographically compact to constitute a majority in a single-member district."<sup>98</sup> Second, the minority group must be "politically cohesive."<sup>99</sup> And third, White bloc voting must "usually . . . defeat the minority's preferred candidate."<sup>100</sup> Although technically three factors,

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legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct."). Parsing the Reconstruction Amendments, Congress did not need to rely on its Fourteenth Amendment enforcement authority to prohibit *intentionally* discriminatory vote dilution. However, Congress arguably relied on its Fifteenth Amendment enforcement authority to the extent that those claims have not yet been recognized under that Amendment. For more on this point, see *infra* notes 204–05 and accompanying text.

93. 52 U.S.C. § 10301(b).

94. *Id.*

95. See S. REP. NO. 97-417, at 28–29 (1982); see also Elmendorf et al., *Racially Polarized Voting*, *supra* note 8, at 597 (commenting that the Senate Report borrowed factors "from the constitutional vote dilution jurisprudence of the 1970s"); Issacharoff, *Polarized Voting*, *supra* note 21, at 1848 ("The legislative history of the 1982 amendments introduces the formal recognition of racially polarized voting patterns as a crucial ingredient of a vote dilution claim."). The Senate Report also drew from *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973) (en banc), a leading pre-*Bolden* case.

96. 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.").

97. *Thornburg v. Gingles*, 478 U.S. 30, 50 (1986).

98. *Id.*

99. *Id.* at 51.

100. *Id.* The *Gingles* Court borrowed this test from an article written by two prominent voting rights attorneys. See Blacksher & Menefee, *supra* note 75, at 50–64 (proposing the soon-to-be *Gingles* factors); Elmendorf et al., *Racially Polarized Voting*, *supra* note 8, at 597 (crediting Blacksher and Menefee with developing the *Gingles* factors).

*Gingles* boils down to whether a minority group is residentially segregated and whether there is racially polarized voting.<sup>101</sup>

By focusing on residential segregation, the *Gingles* Court reinforced the relationship between geography and representation.<sup>102</sup> Put simply, “[t]he more residentially segregated a minority group is, the more geographically compact the group is too, and so the easier it should be for the group to satisfy *Gingles*’s first prong.”<sup>103</sup> The compactness requirement also bolsters Section 2’s manageability and constitutionality by narrowing the statute’s scope. Without the compactness inquiry, courts could be forced to draw bizarrely shaped or geographically expansive districts or to accommodate minority groups with miniscule populations.<sup>104</sup> And in the long run, as residential segregation (hopefully) decreases,<sup>105</sup> minorities will find it harder to satisfy *Gingles*’s first prong, since it becomes more difficult to draw a compact single-member district.<sup>106</sup>

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101. See Stephanopoulos, *Race, Place, and Power*, *supra* note 1, at 1327.

102. See Gerken, *Undiluted Vote*, *supra* note 5, at 1706 (“[T]he compactness requirement in *Gingles* does not necessarily stem from the nature of the injury itself.”).

This linkage between geography and representation is not preordained, as demonstrated by the California Voting Rights Act (“CVRA”), CAL. ELEC. CODE §§ 14025–14032 (West, 2020). Unlike its federal counterpart, the CVRA “does not require that the plaintiff prove a ‘compact majority–minority’ district is possible for *liability* purposes,” though it does take that fact into account “in developing a remedy.” *Jauregui v. City of Palmdale*, 226 Cal. App. 4th 781, 789 (2014) (quoting *Sanchez v. City of Modesto*, 145 Cal. App. 4th 660, 669 (2006)); see also Kareem U. Crayton, *Reinventing Voting Rights Preclearance*, 44 IND. L. REV. 201, 239–40 (2010) (observing that the CVRA “entitles groups to sue even when they are too geographically dispersed to elect a candidate of choice from a single member district in a county”). The upshot is that the CVRA imposes a “lower standard” than the federal VRA. Joshua S. Sellers & Erin A. Scharff, *Preempting Politics: State Power and Local Democracy*, 72 STAN. L. REV. 1361, 1383 (2020).

103. Stephanopoulos, *Race, Place, and Power*, *supra* note 1, at 1365.

104. See *id.* at 1338; Gerken, *Undiluted Vote*, *supra* note 5, at 1708. If the *Shaw* cause of action had stayed tied to a bizarreness inquiry, the compactness requirement may have helped reconcile the two doctrines, since a compact district would be unlikely to trigger strict scrutiny. See *Shaw v. Reno*, 509 U.S. 630, 647 (1993) (observing that “reapportionment is one area in which appearances do matter”); see also *Miller v. Johnson*, 515 U.S. 900, 915 (1995) (abandoning bizarreness as the touchstone); *id.* at 920 (adopting the predominance standard).

105. See *Tex. Dep’t of Hous. & Cmty. Affs. v. Inclusive Cmty. Project, Inc.*, 576 U.S. 519, 546 (2015) (noting that “many cities have become more diverse” since the 1960s); Nicholas O. Stephanopoulos, *Civil Rights in a Desegregating America*, 83 U. CHI. L. REV. 1329, 1339 (2016) (“Black-white segregation has declined sharply since 1970.”).

106. See Pamela S. Karlan, *Two Section Twos and Two Section Fives: Voting Rights and Remedies After Flores*, 39 WM. & MARY L. REV. 725, 741 (1998) [hereinafter Karlan, *Two Section Twos*].

The second and third *Gingles* factors are essentially an inquiry into whether voting is racially polarized.<sup>107</sup> But despite its importance under Section 2, there are still several open questions about what constitutes legally significant racial bloc voting.

The *Gingles* Court, for example, failed to reach consensus on the relevance of causation to the polarization inquiry. Under Justice Brennan's plurality opinion, the inquiry into racial bloc voting focuses on correlation—not causation.<sup>108</sup> According to Justice Brennan, courts need not examine the underlying causes of racially polarized voting because “the reasons black and white voters vote differently have no relevance” under Section 2's discriminatory effects standard.<sup>109</sup> After all, Brennan reasoned, the “critical question” under Section 2 is whether the challenged practice “results in members of a protected group having less opportunity . . . to participate in the political process and to elect representatives of their choice.”<sup>110</sup> By contrast, in her concurring opinion, Justice O'Connor argued that courts should examine the reasons for racial bloc voting.<sup>111</sup> As O'Connor put it, “[i]n a community that is polarized along racial lines, racial hostility may bar . . . indirect avenues of political influence to a much greater extent than in a community where racial animosity is absent although the interests of racial groups diverge.”<sup>112</sup> This causation question remains open, and the circuits are split on it.<sup>113</sup>

And although there is no magic ratio for racial bloc voting under *Gingles*,<sup>114</sup> the Supreme Court has hinted at imposing strict quantitative cutoffs for racial bloc voting. In so doing, it has indicated that the *Gingles* factors are not hermetically sealed. In *Bartlett v. Strickland*,<sup>115</sup>

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107. See Katz et al., *Documenting Discrimination*, *supra* note 33, at 664 (“[C]ourts that consider racial bloc voting generally engage in one inquiry.”).

108. See *Thornburg v. Gingles*, 478 U.S. 30, 63 (1986) (plurality opinion) (stating that the touchstone is the “correlation between race of voter and the selection of certain candidates”).

109. *Id.*

110. *Id.* (emphasis added).

111. See *id.* at 100 (O'Connor, J., concurring in the judgment) (“I believe Congress also intended that explanations of the reasons why white voters rejected minority candidates would be probative of the likelihood that candidates elected without decisive minority support would be willing to take the minority's interests into account.”).

112. *Id.*

113. See Elmendorf et al., *Racially Polarized Voting*, *supra* note 8, at 614–15 (explaining that the First and Fifth Circuits require a showing of causation whereas other circuits do not).

114. See *supra* notes 39–44 and accompanying text.

115. *Bartlett v. Strickland*, 556 U.S. 1 (2009).

the Court considered a question left open by *Gingles*: whether Section 2 requires the creation of a so-called crossover district, “one in which minority voters make up less than a majority of the voting-age population” but are still large enough to elect their candidate of choice with White crossover voters.<sup>116</sup> Because the State in *Bartlett* had conceded the third *Gingles* factor, the Court could not resolve the case on those grounds.<sup>117</sup> Nonetheless, the plurality stated that it was “skeptical that the bloc-voting test could be satisfied . . . where minority voters . . . cannot elect their candidate of choice without support from almost 20 percent of white voters.”<sup>118</sup> The plurality then concluded that *Gingles*’s first prong is satisfied only when a minority group constitutes a majority in a single-member district.<sup>119</sup> Thus, just as *Gingles* acknowledged that “the percentage of registered voters in the district who are . . . minorit[ies]”<sup>120</sup> could impact the legally significant ratio of racial bloc voting, the obverse is also true. The level of racially polarized voting informed the scope of the compactness requirement, resulting in a bright-line cutoff.

The *Gingles* factors do not end the doctrinal analysis. The *Gingles* factors were developed in a case challenging multimember districts.<sup>121</sup> However, in the early 1990s, the Court started applying the *Gingles* factors to single-member redistricting plans.<sup>122</sup> But simply applying the *Gingles* factors to this new context raised its own questions. As Professor Heather Gerken explains, “[t]he problem with extending *Gingles* [to single-member districts] is that there is no clear baseline for

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116. *Id.* at 13 (plurality opinion); see also *Gingles*, 478 U.S. at 46 n.12 (reserving judgment on this point); Heather K. Gerken, *Second-Order Diversity*, 118 HARV. L. REV. 1099, 1119 (2005) [hereinafter Gerken, *Second-Order*] (defining a crossover or coalition district as one “with a thirty-three to thirty-nine percent population of voters of color”). The Court had previously held that so-called influence districts—where “a minority group can influence the outcome of an election even if its preferred candidate cannot be elected”—were not required by Section 2. *Bartlett*, 556 U.S. at 13 (plurality opinion) (citing *League of United Latin Am. Citizens v. Perry (LULAC)*, 548 U.S. 399, 445 (2006) (opinion of Kennedy, J.)).

117. See *Bartlett*, 556 U.S. at 16 (plurality opinion) (noting concession).

118. *Id.*; see also *id.* at 24 (“In areas with substantial crossover voting it is unlikely that the plaintiffs would be able to establish the third *Gingles* precondition . . . .”); Elmendorf et al., *Racially Polarized Voting*, *supra* note 8, at 602 (discussing oral argument in *Bartlett* and remarking that “at least five justices were open to the idea of numeric cutoffs for group cohesion”).

119. See *Bartlett*, 556 U.S. at 26 (plurality opinion).

120. *Gingles*, 478 U.S. at 56.

121. See *id.* at 34.

122. See *Grove v. Emison*, 507 U.S. 25, 40–41 (1993).

determining how many *additional* majority-minority districts a state can fairly be expected to create under § 2.”<sup>123</sup>

The Court sought to resolve that dilemma in *Johnson v. De Grandy*.<sup>124</sup> There, the Court made clear that the *Gingles* factors are necessary but not sufficient to establish a vote dilution claim under Section 2.<sup>125</sup> The *De Grandy* Court reinvigorated the totality-of-the-circumstances inquiry and the opportunity-to-elect standard—but with a twist. Despite Section 2’s textual disavowal of a right to proportionality, the Court focused extensively on whether the number of majority-minority districts was “*roughly* proportional to the minority voters’ respective shares in the voting-age population.”<sup>126</sup> Although disclaiming the creation of a “safe harbor,”<sup>127</sup> the Court nevertheless gave proportionality priority within the totality-of-the-circumstances inquiry.<sup>128</sup>

Today, the *Gingles* factors—as supplemented by *De Grandy*—continue to govern vote dilution litigation, and Section 2 is the driving force for vote dilution claims. Indeed, after *Gingles*, constitutional vote dilution claims are rare.<sup>129</sup> This development is unsurprising given that it is far easier for plaintiffs to prove discriminatory effects under Section 2 than discriminatory intent,<sup>130</sup> and courts are reluctant to reach a constitutional question when a case can be resolved on statutory

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123. Gerken, *Undiluted Vote*, *supra* note 5, at 1675 (emphasis added).

124. *Johnson v. De Grandy*, 512 U.S. 997 (1994).

125. *See id.* at 1011 (“But if *Gingles* so clearly identified the three as generally necessary to prove a § 2 claim, it just as clearly declined to hold them sufficient in combination . . .”).

126. *Id.* at 1000 (emphasis added); *see also id.* at 1024 (“[T]he totality of circumstances appears not to support a finding of vote dilution here, where both minority groups constitute effective voting majorities in a number of . . . districts substantially proportional to their share in the population . . .”).

127. *Id.* at 1018; *see also id.* at 1020–21 (“No single statistic provides courts with a shortcut to determine whether a set of single-member districts unlawfully dilutes minority voting strength.”).

128. *See* Gerken, *Undiluted Vote*, *supra* note 5, at 1676 (explaining that, since *De Grandy*, proportionality “has become the preeminent measure of fairness in redistricting”). This development is likely due to the fact that “[a]n antidiscrimination results test necessarily presupposes some benchmark conception of neutrality or fairness against which an allegedly discriminatory result may be measured,” Elmendorf, *Biased Votes*, *supra* note 38, at 390, and proportionality provided a manageable standard for single-member redistricting plans.

129. *See* Nathaniel Persily, *The Promise and Pitfalls of the New Voting Rights Act*, 117 YALE L.J. 174, 201–02 (2007).

130. *See* Karlan, *Two Section Twos*, *supra* note 106, at 735; *cf.* Jessica A. Clarke, *Explicit Bias*, 113 NW. U. L. REV. 505, 539 (2018) (“Judges are wary of accusing discriminators of bigotry.”).

grounds.<sup>131</sup> But in the aftermath of the Supreme Court’s invalidation of the VRA’s coverage formula in *Shelby County v. Holder*,<sup>132</sup> plaintiffs have started bringing constitutional claims.

This is because plaintiffs are now requesting bail-in relief under Section 3(c) of the VRA. Pursuant to the bail-in provision, courts may require states and political subdivisions that have violated the Fourteenth or Fifteenth Amendments to preclear all voting changes with federal authorities.<sup>133</sup> Section 3(c)’s constitutional trigger for coverage means that plaintiffs must go above and beyond a discriminatory effects claim and prove discriminatory intent.<sup>134</sup> Although the most high-profile decisions have not ordered bail-in,<sup>135</sup> a district court recently concluded that the city of Pasadena, Texas, engaged in intentionally discriminatory vote dilution and ordered bail-in.<sup>136</sup> And even though it declined to order bail-in,<sup>137</sup> the Fourth Circuit invalidated North Carolina’s post-*Shelby County* voter-suppression law on intentional discrimination grounds rather than reach Section 2’s application to vote-denial claims.<sup>138</sup> Thus, even though Section 2

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131. See *League of United Latin Am. Citizens v. Perry (LULAC)*, 548 U.S. 399, 440 (2006) (invalidating congressional district as violative of Section 2 while observing that Texas’s actions bore “the mark of intentional discrimination that could give rise to an equal protection violation”); *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) (“The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of.”).

132. *Shelby County v. Holder*, 570 U.S. 529, 557 (2013).

133. 52 U.S.C. § 10302(c) (2018). Put simply, Section 3(c) is an alternative means of imposing preclearance. See Travis Crum, Note, *The Voting Rights Act’s Secret Weapon: Pocket Trigger Litigation and Dynamic Preclearance*, 119 YALE L.J. 1992, 2006–09 (2010) [hereinafter Crum, *Pocket Trigger*].

134. See Crum, *Pocket Trigger*, *supra* note 133, at 2009.

135. See *Veasey v. Abbott*, 888 F.3d 792, 804 (5th Cir. 2018) (holding that Texas’s revised voter ID law meant that “there is no equitable basis for subjecting Texas to ongoing federal election scrutiny under Section 3(c)”); *N.C. State Conf. of the NAACP v. McCrory*, 831 F.3d 204, 241–42 (4th Cir. 2016) (declining to bail-in North Carolina notwithstanding a finding of intentional discrimination); *Perez v. Abbott*, 390 F. Supp. 3d 803, 807 (W.D. Tex. 2019) (finding intentional discrimination in enactment of redistricting plan but declining request for Section 3(c) relief); see also Travis Crum, *The Prospect of Bailing-in Texas: Recent Bail-in Litigation*, ELECTION L. BLOG (Sept. 14, 2018, 9:39 AM) [hereinafter Crum, *Recent Bail-in Litigation*], <https://electionlawblog.org/?p=101137> [<https://perma.cc/EYE5-TL68>] (surveying cases).

136. See *Patino v. City of Pasadena*, 230 F. Supp. 3d 667, 729–30 (S.D. Tex. 2017) (ordering bail-in of city in Texas); see also *Allen v. City of Evergreen*, No. 13-0107-CG-M, 2014 WL 12607819, at \*2 (S.D. Ala. Jan. 13, 2014) (granting consent decree bailing-in city in Alabama).

137. See *McCrory*, 831 F.3d at 241–42.

138. See *id.* at 215; see also Michael J. Pitts, *Rethinking Section 2 Vote Denial*, 46 FLA. ST. U. L. REV. 1, 21 n.85 (2018) (discussing *McCrory*’s discriminatory intent holding and commenting

remains the primary defender of minority voting rights, there may be a resurgence of constitutional vote dilution litigation in the coming years.<sup>139</sup>

2. *Themes from Racial Vote Dilution Doctrine.* A few themes emerge from this history. First, racially polarized voting has always been a factor for adjudicating constitutional and statutory racial vote dilution claims. Undoubtedly, racially polarized voting features more prominently in statutory cases than constitutional ones. It is but one of many factors for a constitutional vote dilution claim under *White*'s totality-of-the-circumstances inquiry. By contrast, racial bloc voting serves a gatekeeping function for a statutory claim. Indeed, "*Gingles* brought the racially polarized voting inquiry into the undisputed and unchallenged center of the Voting Rights Act."<sup>140</sup>

Second, constitutional vote dilution doctrine is underdeveloped. In fact, *White* is one of the only decisions where the Court has invalidated a districting scheme on constitutional vote dilution grounds.<sup>141</sup> The Court, moreover, has repeatedly punted on whether the Fifteenth Amendment applies to vote dilution claims.<sup>142</sup> As discussed more below,<sup>143</sup> the scope and source of constitutional vote dilution claims is not trivial and will matter in the inevitable constitutional challenge to Section 2.

Third, although both constitutional and statutory vote dilution doctrines look ultimately to whether minorities have an opportunity to

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that it was "odd given that one would think that reversing the trial court on its discriminatory-results analysis would be easier than on its discriminatory-purpose analysis"); Crum, *Recent Bail-in Litigation*, *supra* note 135 ("[T]he Fourth Circuit . . . avoided a contentious legal question—the appropriate standard under Section 2 for showing discriminatory effects in vote-denial litigation—by making an inherently fact-bound discriminatory-intent finding.").

139. See SAMUEL ISSACHAROFF, PAMELA S. KARLAN, RICHARD H. PILDES & NATHANIEL PERSILY, *THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS* 644 (5th ed. 2016) (observing that plaintiffs rarely pressed constitutional claims after the 1982 amendments but predicting that such claims will increase post-*Shelby County* because of Section 3(c)).

140. Issacharoff, *Polarized Voting*, *supra* note 21, at 1851.

141. The Court also struck down an at-large plan on constitutional vote dilution grounds in *Rogers v. Lodge*, 458 U.S. 613, 628 (1982). There, it emphasized that "[t]he minority's voting power in a multimember district is particularly diluted when bloc voting occurs and ballots are cast along strict majority-minority lines." *Id.* at 616; see also Luke P. McLoughlin, *Section 2 of the Voting Rights Act and City of Boerne: The Continuity, Proximity, and Trajectory of Vote-Dilution Standards*, 31 VT. L. REV. 39, 46 (2006) (noting that "the Court [has] decided no claims of unconstitutional minority vote dilution after its opaque decision in *Rogers v. Lodge* in 1982").

142. See *supra* note 74 and accompanying text.

143. See *infra* Parts II.C & IV.B.3.

elect their candidate of choice, the *Gingles* factors are widely viewed as bringing much-needed order to vote dilution litigation. Even at the time, *White*'s totality-of-the-circumstances standard was controversial—including among voting rights attorneys—for failing to provide a predictable and workable rule.<sup>144</sup> As Professor Sam Issacharoff observes, “the best that *White/Zimmer* could muster was the need to examine the ‘totality of the circumstances,’ an inquiry as empty as the resigned ‘I know it when I see it’ approach to obscenity under the First Amendment.”<sup>145</sup> The *Gingles* factors provided an easily administrable means of implementing Section 2's opportunity-to-elect standard.<sup>146</sup>

Fourth, Section 2 prohibits a wider swath of dilutive schemes than the Fourteenth Amendment. As noted, Congress relied on its enforcement authority in adopting a discriminatory effects standard and thereby dispensing with the Equal Protection Clause's intent requirement.<sup>147</sup> To be clear, Section 2's discriminatory effects standard is not entirely decoupled from a showing of intent. As in other areas of anti-discrimination law,<sup>148</sup> Section 2's discriminatory effects standard is designed to ferret out ways in which a particular electoral practice “interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their

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144. See Blacksher & Menefee, *supra* note 75, at 22 (criticizing *White* for “not articulat[ing] uniform, manageable standards for determining when dilution violates the equal protection clause” and for “largely recapitulat[ing] the district court's factual findings”); Stephanopoulos, *Race, Place, and Power*, *supra* note 1, at 1333 (“The conventional wisdom is that vote dilution doctrine was formless mush before *Gingles*, rendering it arbitrary whether electoral arrangements were struck down or upheld.”).

145. Issacharoff, *Polarized Voting*, *supra* note 21, at 1845.

146. See Justin Driver, *Rethinking the Interest-Convergence Thesis*, 105 NW. U. L. REV. 149, 186 (2011) (arguing that *Gingles* created a “manageable, three-part test for proving vote dilution”); 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, 1915 (2018) (arguing that the *Gingles* preconditions were “intended to create a judicially manageable standard for (and limit the reach of) a statutory claim for discriminatory results”); Richard H. Pildes, *Is Voting-Rights Law Now at War with Itself? Social Science and Voting Rights in the 2000s*, 80 N.C. L. REV. 1517, 1549 n.93 (2002) (discussing *Gingles*'s “reduction of the complex statutory conception of vote dilution into a far more manageable three-prong test”).

147. See *supra* notes 91–92 and accompanying text.

148. See, e.g., *Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmty. Project, Inc.*, 576 U.S. 519, 521 (2015) (“Recognition of disparate-impact liability under the [Fair Housing Act] plays an important role in uncovering discriminatory intent: it permits plaintiffs to counteract unconscious prejudices and disguised animus that escape easy classification as disparate treatment.”).

preferred representatives.”<sup>149</sup> The *Gingles* preconditions and the Senate Factors borrowed from *White* and *Zimmer v. McKeithen*<sup>150</sup> examine how present and past discrimination impact the electoral opportunities of minority voters.<sup>151</sup> But regardless of the exactness of the fit between the statutory standard and the Fourteenth Amendment, Congress relied on its enforcement authority to enact Section 2’s discriminatory effects standard.<sup>152</sup>

Fifth, vote dilution litigation has profoundly impacted our nation’s politics. Many early vote dilution cases were challenges to multimember or at-large districts.<sup>153</sup> These suits were incredibly effective at dismantling these districts.<sup>154</sup> As a result of this litigation and *Gingles*’s application to single-member districts,<sup>155</sup> the number of Black representatives has increased dramatically over the past few decades.<sup>156</sup>

Finally, by making racially polarized voting a threshold requirement to a statutory vote dilution claim, the *Gingles* Court

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149. *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986); *see also* Stephanopoulos, *Disparate Impact*, *supra* note 67, at 1566–67 (arguing that Section 2 should be construed consistently with other disparate impact provisions).

150. *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973) (en banc).

151. *Id.* at 1305–06; *see supra* note 95 and accompanying text.

152. The closeness of that fit and how the discriminatory effects standard is conceptualized will matter for the inevitable constitutional challenge to Section 2. *See* Gerken, *Undiluted Vote*, *supra* note 5, at 1674; *see also infra* notes 212–20 and accompanying text (explaining the congruence and proportionality test from *City of Boerne v. Flores*, 521 U.S. 507 (1997)).

153. *See Gingles*, 478 U.S. at 34; *Rogers v. Lodge*, 458 U.S. 613, 614 (1982); *City of Mobile v. Bolden*, 446 U.S. 55, 58 (1980) (plurality opinion); *White v. Regester*, 412 U.S. 755, 765 (1973); *see also* Elmendorf et al., *Racially Polarized Voting*, *supra* note 8, at 596 (noting that “[n]early all of the [constitutional vote dilution] cases concerned at-large elections”).

154. *See Cox & Miles*, *supra* note 89, at 15 (finding that challenges to multimember districts were over half of all Section 2 cases until the 2000s); Samuel Issacharoff, *The Constitutional Contours of Race and Politics*, 1995 SUP. CT. REV. 45, 48 (“With the 1982 Amendments to the Voting Rights Act, Congress ushered in a decade-long period in which multimember and at-large electoral arrangements ceded to minority-controlled single-member districts.”). The *Dillard* lawsuit is the most dramatic example of second-generation litigation. There, over 160 county- and city-level bodies were reorganized into single-member districts. *See Dillard v. Baldwin Cty. Bd. of Educ.*, 686 F. Supp. 1459, 1461 (M.D. Ala. 1988) (Thompson, J.) (discussing the history of these cases); Pamela S. Karlan, *The Alabama Foundations of the Law of Democracy*, 67 ALA. L. REV. 415, 430 (2015) (describing *Dillard* as the “most transformative single section 2 lawsuit”).

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

156. *See* Stephanopoulos, *Race, Place, and Power*, *supra* note 1, at 1395 (“In the average southern state, the share of black state house members has jumped from about 13% before [*Gingles*] to roughly 20% today. In the average nonsouthern state with a sizeable black population, this proportion has grown from around 9% to close to 14%.” (footnote omitted)).

fashioned a de facto sunset date for Section 2. In seeking to reinforce Section 2 against an inevitable constitutional attack, several scholars emphasize that minority plaintiffs will no longer be able to bring Section 2 claims as the level of racially polarized voting decreases.<sup>157</sup> It may seem counterintuitive to argue that a statute's future obsolescence bolsters its constitutionality. However, this argument dovetails with the doctrinal point that statutes enacted pursuant to Congress's Fourteenth Amendment enforcement authority are more likely to be upheld if they have termination dates.<sup>158</sup> This insight also appeals to the Court's intuition that it is the institution best situated to move our nation toward 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."<sup>159</sup>

## II. RACIAL VOTE DILUTION AND ITS DISCONTENTS

There are several criticisms of vote dilution doctrine generally and of Section 2 in particular. In this Part, I focus on constitutional critiques of the role of racial bloc voting in the vote dilution inquiry, rather than on the contentions that Section 2 lacks a workable benchmark,<sup>160</sup>

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157. See, e.g., Heather K. Gerken, *A Third Way for the Voting Rights Act: Section 5 and the Opt-in Approach*, 106 COLUM. L. REV. 708, 745 (2006) [hereinafter Gerken, *Third Way*] ("When people cease to vote along racial lines, section 2 will become a paper tiger."); Karlan, *Two Section Twos*, *supra* note 106, at 741 (characterizing the *Gingles* factors as a "durational limit on section 2's operation").

158. See, e.g., *City of Boerne v. Flores*, 521 U.S. 507, 533 (1997) (listing "termination dates" as an indicia of congruent and proportional legislation). The fact that the VRA's coverage formula had a termination date did not prevent the Court from invalidating it on equal sovereignty grounds. See *Shelby County v. Holder*, 570 U.S. 529, 538–39, 557 (2013).

159. *Shaw v. Reno*, 509 U.S. 630, 657 (1993).

160. See *Holder v. Hall*, 512 U.S. 874, 902–03 (1994) (Thomas, J., concurring in the judgment) ("[I]n selecting the proportion that will be used to define the undiluted strength of a minority—the ratio that will provide the principle for decision in a vote dilution case—a court must make a political choice.").

In holding that partisan gerrymandering claims are nonjusticiable, the Court recently observed that the Constitution does not mandate proportional representation for political parties. See *Rucho v. Common Cause*, 139 S. Ct. 2484, 2499 (2019). The *Rucho* Court's animosity toward proportional representation has led some scholars to worry that a similar logic could be applied to Section 2 and *De Grandy's* rough proportionality standard. See Travis Crum, *Rucho and Section 2 of the Voting Rights Act*, TAKE CARE BLOG (June 27, 2019), <https://takecareblog.com/blog/rucho-and-section-2-of-the-voting-rights-act> [<https://perma.cc/ZW98-UKMX>] ("*Rucho* channels concerns similar to those articulated in Justice Thomas's concurring opinion in *Holder v. Hall*, where he criticized Section 2 for lacking a legitimate and manageable benchmark."); Nicholas Stephanopoulos, *The Erasure of Racial Vote Dilution Doctrine*, ELECTION L. BLOG

protects only Democratic-leaning districts,<sup>161</sup> or does not encompass vote dilution claims as a matter of statutory interpretation.<sup>162</sup>

The Court's unease with racially polarized voting crops up in various doctrinal contexts across election law. The first and most prominent criticism is that Section 2 requires the consideration of race during the redistricting process. This critique reflects the Court's more general shift toward a colorblind Constitution and is essentially a cross-application of the theories underlying the *Shaw* cause of action. The second critique is that racially polarized voting is private action and therefore outside the purview of the Reconstruction Amendments. The final complaint is that Congress exceeded its Reconstruction Amendment enforcement authority when it adopted Section 2's discriminatory effects standard. I address each criticism in turn.

### A. *Race-Based Redistricting*

The most straightforward pronouncements of the Court's preference for race-blind redistricting are found not in Section 2 cases, but rather in the *Shaw* line of cases. In contrast with vote dilution 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."<sup>163</sup> Thus, *Shaw* claims are

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(June 28, 2019, 10:18 AM), <https://electionlawblog.org/?p=105855> [<https://perma.cc/V5FP-SHS2>] (criticizing the Court for failing to engage with racial vote dilution doctrine).

161. See Cox & Miles, *supra* note 89, at 2 (noting the criticism that the VRA's "prohibition of minority vote dilution [is] a Democratic Party protection provision"); Kang, *Democratic Contestation*, *supra* note 27, at 744–45 ("The close association between African American voters and Democrats means that representational guarantees for African Americans under the VRA inevitably produce safe districts for Democrats that are almost completely insulated from partisan competition."). This criticism of the VRA was perhaps more forceful when Section 5's preclearance requirement was operative, since its retrogression principle generally prohibited a reduction in the number of majority-minority districts. See *Georgia v. Ashcroft*, 539 U.S. 461, 466 (2003).

162. Justice Thomas has long argued that Section 2's text does not encompass vote dilution claims. See *Holder*, 512 U.S. at 922–23 (Thomas, J., concurring in the judgment). Justice Scalia also adhered to this view. See *id.* at 891. Justice Gorsuch recently concurred with Thomas's approach. See *Abbott v. Perez*, 138 S. Ct. 2305, 2335 (2018) (Thomas, J., concurring). Although Thomas's critique is difficult to square with Section 2's plain language, the 1982 amendments' legislative history, the VRA's statutory history, and principles of stare decisis, this statutory argument is outside the scope of this Article. For a scholarly defense of Section 2's application to vote dilution claims, see Lani Guinier, (*E*)*racing Democracy: The Voting Rights Cases*, 108 HARV. L. REV. 109, 118–25 (1994).

163. See *Rucho*, 139 S. Ct. at 2502.

“analytically distinct”<sup>164</sup> from—and in doctrinal tension with—vote dilution doctrine and Section 2’s requirement of race-based redistricting.

In creating the racial gerrymandering cause of action, the *Shaw* Court explained that:

[R]eapportionment is one area in which appearances do matter. A reapportionment plan that includes in one district individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries, and who may have little in common with one another but the color of their skin, *bears an uncomfortable resemblance to political apartheid*. It reinforces the perception that members of the same racial group . . . think alike, share the same political interests, and will prefer the same candidates at the polls. We have rejected such perceptions elsewhere as *impermissible racial stereotypes*.<sup>165</sup>

The *Shaw* Court proclaimed that race-based redistricting “balkanize[s] us into competing racial factions”<sup>166</sup> and speculated that “racial gerrymander[ing] may exacerbate the very patterns of racial bloc voting that majority-minority districting is sometimes said to counteract.”<sup>167</sup> The *Shaw* line of cases analogizes the purposeful creation of majority-minority districts to Jim Crow-style segregation.<sup>168</sup>

Under *Shaw*, if “race was the predominant factor”<sup>169</sup> in the creation of a particular district, then that “district must withstand strict scrutiny.”<sup>170</sup> That is, the jurisdiction must “prove that its race-based sorting of voters serves a ‘compelling interest’ and is ‘narrowly tailored’

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164. *Shaw v. Reno*, 509 U.S. 630, 652 (1993); see also 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, 494 (1993) (“To begin to understand *Shaw*, one must first note that vote dilution is not involved in the case. The plaintiffs could not prove—and the Court acknowledged that they did not allege—vote dilution.”).

165. *Shaw*, 509 U.S. at 647 (emphases added).

166. *Id.* at 657.

167. *Id.* at 648; see also ABIGAIL THERNSTROM, *VOTING RIGHTS—AND WRONGS: THE ELUSIVE QUEST FOR RACIALLY FAIR ELECTIONS* 217 (2009) (“Majority-minority districts appear to reward political actors who consolidate the minority vote by making the sort of overt racial appeals that are the staple of invidious identity politics.”).

168. See *Miller v. Johnson*, 515 U.S. 900, 911 (1995) (“Just as the State may not, absent extraordinary justification, segregate citizens on the basis of race in its public parks, buses, golf courses, beaches, and schools, so did we recognize in *Shaw* that it may not separate its citizens into different voting districts on the basis of race.” (citations omitted)).

169. *Id.* at 916.

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

to that end.”<sup>171</sup> The Court has “long *assumed* that complying with the VRA is a compelling interest”<sup>172</sup> but has not given its full blessing that Section 2 would survive strict scrutiny. As for the narrow-tailoring prong, the Court has “give[n] States ‘breathing room’ to adopt reasonable compliance measures that may prove, in perfect hindsight, not to have been needed.”<sup>173</sup> A state can satisfy the narrow-tailoring requirement if it “establish[es] that it had ‘good reasons’ to think that it would transgress the [VRA] if it did *not* draw race-based district lines.”<sup>174</sup> In other words, if the state has a “strong basis in evidence” for believing that the VRA mandated the creation of a majority-minority district, it can avoid liability under *Shaw*.<sup>175</sup>

Here, it should be emphasized that *Shaw* does not trigger strict scrutiny when mapmakers are merely aware of race.<sup>176</sup> Rather, the “plaintiff must prove that the legislature *subordinated traditional race-neutral districting principles*, including but not limited to compactness, contiguity, and respect for political subdivisions or communities defined by actual shared interests, to racial considerations.”<sup>177</sup> And in jurisdictions with racial bloc voting, line drawers frequently claim that partisanship—not race—explains their redistricting choices,<sup>178</sup> a defense that is likely to be raised even more often in the wake of the Supreme Court’s recent decision holding that partisan gerrymandering claims are nonjusticiable political questions.<sup>179</sup>

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171. *Id.* (quoting *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 800 (2017)).

172. *Id.* at 1469 (emphasis added); *see also Bethune-Hill*, 137 S. Ct. at 801 (assuming that compliance with Section 5, when it was operative, was a compelling state interest); *Shaw v. Hunt (Shaw II)*, 517 U.S. 899, 915 (1996) (assuming that compliance with Section 2 is a compelling interest).

173. *Cooper*, 137 S. Ct. at 1464 (quoting *Bethune-Hill*, 137 S. Ct. at 802).

174. *Id.* (quoting *Ala. Legis. Black Caucus v. Alabama*, 575 U.S. 254, 278 (2015)).

175. *Id.* Defendants in Title VII cases can raise a similar “strong basis in evidence” defense to a disparate treatment claim. *See Ricci v. DeStefano*, 557 U.S. 557, 584–85 (2009).

176. *See Bethune-Hill*, 137 S. Ct. at 797.

177. *Miller v. Johnson*, 515 U.S. 900, 916 (1995) (emphasis added).

178. *See Cooper*, 137 S. Ct. at 1473; *see also Hasen, Race or Party, supra* note 50, at 1838–39 (discussing this problem and using *Cooper* as an illustrative example).

179. *See Rucho v. Common Cause*, 139 S. Ct. 2484, 2506–08 (2019); Kristen Clarke & Jon Greenbaum, *Gerrymandering Symposium: The Racial Implications of Yesterday’s Partisan Gerrymandering Decision*, SCOTUSBLOG (June 28, 2019, 2:01 PM), <https://www.scotusblog.com/2019/06/gerrymandering-symposium-the-racial-implications-of-todays-partisan-gerrymandering-decision> [https://perma.cc/B84L-64Z4].

*Shaw* casts a long shadow over Section 2.<sup>180</sup> Indeed, the *Shaw* Court's concerns about the use of race have surfaced even in situations where race did *not* predominate in the redistricting process. For example, Justice Thomas's concurring opinion in *Holder v. Hall* is the most forceful criticism of incorporating racial bloc voting into the Section 2 analysis.<sup>181</sup>

In *Hall*, Thomas noted that the “underlying premise” of “every minority vote dilution claim” is “that the group asserting dilution is not merely a racial or ethnic group, but a group having distinct political interests as well.”<sup>182</sup> On this point, Thomas directly criticized *Gingles*'s requirement that voting be racially polarized.<sup>183</sup> According to Thomas, the premises underlying *Gingles* “should be repugnant to any nation that strives for the ideal of a color-blind Constitution.”<sup>184</sup> In so claiming, Thomas recycled many of *Shaw*'s criticisms and opined that Section 2's “drive to segregate political districts by race can only serve to deepen racial divisions by destroying any need for voters or

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180. In the 1990s, *Shaw* claims were brought by White plaintiffs to dismantle majority-minority districts, but following the 2010 redistricting cycle, Black plaintiffs started bringing *Shaw* claims too. See Richard L. Hasen, *Racial Gerrymandering's Questionable Revival*, 67 ALA. L. REV. 365, 365–66 (2015) (discussing Ala. Legis. Black Caucus v. Alabama, 575 U.S. 254, 262–70 (2015)). In this second wave of *Shaw* cases, Black plaintiffs challenged Southern States' adoption of strict quotas for the percentage of minority voters in certain districts, purportedly to comply with Section 5 of the VRA. See Travis Crum, *The Prospect of Bailing-in Texas: The Constitutional Argument for Bail-in*, ELECTION L. BLOG (Sept. 16, 2018, 9:43 AM) (noting the differences between 1990s and 2010s *Shaw* claims), <https://electionlawblog.org/?p=101141> [<https://perma.cc/Y9TK-MXFE>].

Scholars and lawyers have debated the salience of this development. According to Professor Rick Hasen, *Shaw*'s “racial gerrymandering cause of action has been repurposed for new partisan warfare in cases in which the vote dilution claim under section 2 is not strong enough to stand on its own.” Hasen, *Race or Party*, *supra* note 50, at 1854. By contrast, prominent voting rights attorney Dale Ho argues that the 1990s *Shaw* cases “sought to turn the redistricting process away from race” whereas the 2010s *Shaw* cases sought “to root out intentional efforts to discriminate on the basis of race.” Ho, *supra* note 146, at 1891–92.

Resolving this debate is a task left for a future article. In any event, because the Court refuses to acknowledge any distinction between these two waves of *Shaw* cases, the requirement that race-based redistricting triggers strict scrutiny means that Section 2 is still in peril.

181. Cf. ISSACHAROFF ET AL., *supra* note 139, at 870 (“Justice Thomas's concurrence in *Holder* is in some ways the most extraordinary voting rights opinion of modern times.”).

182. *Holder v. Hall*, 512 U.S. 874, 903 (1994) (Thomas, J., concurring in the judgment).

183. See *id.* at 903–05.

184. *Id.* at 905–06.

candidates to build bridges between racial groups or to form voting coalitions.”<sup>185</sup>

These colorblind concerns are not limited to Justice Thomas’s sometimes idiosyncratic jurisprudence. The Court has repeatedly interpreted the VRA to narrow its protections, often prompted by concerns about its use of race.<sup>186</sup> Most relevant here, in *Bartlett*, a plurality of the Court cautioned against an expansive interpretation of Section 2, lest race become “unnecessarily infuse[d] . . . into virtually every redistricting [plan], raising serious constitutional questions.”<sup>187</sup> Chief Justice Roberts, moreover, famously described the Court’s vote dilution jurisprudence as “a sordid business, this divvying us up by race.”<sup>188</sup>

Outside the voting rights realm, the Court has repeatedly questioned—and frequently prohibited—the explicit use of race in affirmative action programs.<sup>189</sup> In a similar vein, the Court has voiced

185. *Id.* at 907; *see also id.* (“The ‘black representative’s’ function, in other words, is to represent the ‘black interest.’” (citing *Shaw v. Reno*, 509 U.S. 630, 650 (1993))).

186. *See* *Shelby County v. Holder*, 570 U.S. 529, 549–50, 557 (2013) (invalidating the VRA’s coverage formula); *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 211 (2009) (permitting political subdivisions to bail-out of the VRA’s coverage formula); *Georgia v. Ashcroft*, 539 U.S. 461, 482–83 (2003) (allowing influence and coalition districts to count as majority-minority districts under Section 5’s retrogression analysis); *Reno v. Bossier Par. Sch. Bd. (Bossier Parish II)*, 528 U.S. 320, 341 (2000) (holding that “§ 5 does not prohibit preclearance of a redistricting plan enacted with a discriminatory but nonretrogressive purpose”); *Holder*, 512 U.S. at 885 (plurality opinion) (concluding that Section 2 could not be used to challenge the size of a governing body); *Presley v. Etowah Cty. Comm’n*, 502 U.S. 491, 503–08 (1992) (holding that rules altering the allocation of power within an elected body are not subject to the VRA’s preclearance requirement); *see also* Christopher S. Elmendorf & Douglas M. Spencer, *Administering Section 2 of the Voting Rights Act After Shelby County*, 115 COLUM. L. REV. 2143, 2158 (2015) (“The Supreme Court has issued a string of decisions narrowing section 2 on the basis of the constitutional avoidance canon.”). These decisions were frequently the confluence of numerous concerns about the VRA’s constitutionality, in particular its federalism costs. *See* Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *Race, Federalism, and Voting Rights*, 2015 U. CHI. LEGAL F. 113, 114 (2015) (“*Northwest Austin* and *Shelby County* have thrust federalism into the heart of voting rights disputes.”); Franita Tolson, *Reinventing Sovereignty?: Federalism as a Constraint on the Voting Rights Act*, 65 VAND. L. REV. 1195, 1259 (2012) [hereinafter Tolson, *Reinventing*] (criticizing *Northwest Austin* for relying on a “free-floating federalism norm”).

187. *Bartlett v. Strickland*, 556 U.S. 1, 21 (2009) (plurality opinion) (quoting League of United Latin Am. Citizens v. Perry (*LULAC*), 548 U.S. 399, 446 (2006) (opinion of Kennedy, J.)).

188. *LULAC*, 548 U.S. at 511 (Roberts, C.J., concurring in part and dissenting in part).

189. *See, e.g.*, *Fisher v. Univ. of Tex. at Austin*, 136 S. Ct. 2198, 2215 (2016) (upholding an affirmative-action plan but noting “the University’s ongoing obligation to engage in constant deliberation and continued reflection regarding its admissions policies”); *Gratz v. Bollinger*, 539 U.S. 244, 275 (2003) (invalidating the University of Michigan’s affirmative-action policy for undergraduate admissions).

constitutional concerns about the predictable use of race to comply with the disparate-impact provisions of anti-discrimination laws.<sup>190</sup> These decisions all reveal the Court's deep suspicion of the explicit—or predictable—consideration of race.<sup>191</sup> The *Gingles* precondition that plaintiffs must establish racial bloc voting to prevail on a statutory vote dilution claim is no exception.

### B. Private Action

Before delving into the second criticism of the *Gingles* factors, a quick primer on state action is helpful. It is well established that the Fourteenth Amendment prohibits only state action.<sup>192</sup> Given this limitation, Congress cannot exercise its Fourteenth Amendment enforcement authority to target private conduct.<sup>193</sup> By contrast, it is less settled whether the state action doctrine applies to the Fifteenth

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190. See *Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmty. Project, Inc.*, 576 U.S. 519, 543 (2015) (“Courts should avoid interpreting disparate-impact liability to be so expansive as to inject racial considerations into every housing decision.”); *Ricci v. DeStefano*, 557 U.S. 557, 594 (2009) (Scalia, J., concurring) (predicting that “the Court will have to confront the question: Whether, or to what extent, are the disparate-impact provisions of [anti-discrimination statutes] consistent with the Constitution’s guarantee of equal protection?” (citing Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493 (2003))).

191. See Issacharoff, *Polarized Voting*, *supra* note 21, at 1845.

192. See *United States v. Morrison*, 529 U.S. 598, 621 (2000) (noting the “time-honored principle that the Fourteenth Amendment, by its very terms, prohibits only state action”).

193. See *id.* at 627 (invalidating civil remedies provision of the Violence Against Women Act); *United States v. Harris*, 106 U.S. 629, 640 (1883) (invalidating Section 2 of the Civil Rights Act of 1871 for being “directed exclusively against the action of private persons, without reference to the laws of the State”). For a dissenting view on the state action doctrine, see Jack M. Balkin, *The Reconstruction Power*, 85 N.Y.U. L. REV. 1801, 1819–21 (2010) [hereinafter Balkin, *Reconstruction*].

Rather than rely on the Fourteenth Amendment, Congress has invoked its Commerce Clause authority to regulate discrimination in the economic sphere. See *Katzenbach v. McClung*, 379 U.S. 294, 305 (1965) (upholding Title II of the Civil Rights Act under the Commerce Clause); Christopher W. Schmidt, *Section 5’s Forgotten Years: Congressional Power to Enforce the Fourteenth Amendment Before Katzenbach v. Morgan*, 113 NW. U. L. REV. 47, 73–83 (2018) (surveying the debate over whether Title II should be defended under the Fourteenth Amendment or the Commerce Clause). Congress, however, cannot rely on the Commerce Clause to protect the right to vote free of racial discrimination.

Amendment<sup>194</sup> and, if it does, how broadly.<sup>195</sup> This point will be unpacked more below,<sup>196</sup> but suffice it to say that the critics of *Gingles* do not parse the Fourteenth and Fifteenth Amendments on this score.

With this background in mind, now for the critique. In a dissenting opinion, then-Justice Rehnquist asserted that racially polarized voting was “private rather than governmental discrimination.”<sup>197</sup> Thus, according to Rehnquist, vote dilution “results from bloc voting” and is not “traceable to the discrimination of governmental bodies.”<sup>198</sup> Because private action falls outside the Reconstruction Amendments’ scope, Rehnquist’s argument goes, vote dilution is not a cognizable injury and thus Congress may not use its enforcement authority to remedy the effects of racial bloc voting.<sup>199</sup> More recently, Justice Thomas similarly asserted that “racially polarized voting is not evidence of unconstitutional discrimination [and] is not state action” while arguing that Section 5’s preclearance provision and coverage formula were unconstitutional.<sup>200</sup> Even though defenders of the VRA acknowledge that “racially polarized voting *alone* does not signal a constitutional violation,”<sup>201</sup> Rehnquist and Thomas would simply ignore racially polarized voting and the schemes that can predictably dilute minority votes under those conditions.

### C. Congress’s Reconstruction Amendment Enforcement Authority

The final critique of the *Gingles* factors is that Congress exceeded its enforcement authority when it expanded Section 2 to embrace a discriminatory effects standard.<sup>202</sup>

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194. See Franita Tolson, *The Spectrum of Congressional Authority over Elections*, 99 B.U. L. REV. 317, 337 (2019) [hereinafter Tolson, *Spectrum*] (“[T]he Court initially enforced the Fifteenth Amendment against both private individuals and the states . . . [but] later imposed a state action requirement on the Fifteenth Amendment in 1903.”).

195. See *Terry v. Adams*, 345 U.S. 461, 469–70 (1953) (plurality opinion) (concluding that the Jaybird Association’s exclusion of Black voters from its Democratic Party straw poll qualified as state action and thus violated the Fifteenth Amendment).

196. See *infra* Part IV.B.2.

197. *City of Rome v. United States*, 446 U.S. 156, 216–17 (1980) (Rehnquist, J., dissenting). Justice Stewart, the author of the *Bolden* plurality, joined Rehnquist’s dissent. See *id.* at 206.

198. *Id.* at 216.

199. See *id.* at 216–17.

200. *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 228 (2009) (Thomas, J., concurring in the judgment in part and dissenting in part) (citation omitted).

201. *Shelby County v. Holder*, 570 U.S. 529, 578 (2013) (Ginsburg, J., dissenting) (emphasis added).

202. See *supra* notes 89–92 and accompanying text.

In many ways, the enforcement authority argument builds off the previous two critiques. If the *Shaw* Court is correct that the Equal Protection Clause imposes outer limits on race-based redistricting, then the *Gingles* factors are constitutionally suspect for injecting race into the redistricting process and forcing line drawers to determine whether racial bloc voting exists in their jurisdiction. Under the critics' view, *Gingles*'s precondition that voting be racially polarized is an inappropriate means of remedying racial discrimination in voting. And if Rehnquist and Thomas are right on the state action issue, then Congress cannot combat the discriminatory effects of racial bloc voting, nor can it rely on high rates of racially polarized voting as part of a legislative record to justify Section 2.

On the enforcement authority question, the distinction between the Fourteenth and Fifteenth Amendments matters significantly. Recall that the Court has recognized vote dilution claims under the Fourteenth Amendment but has remained agnostic on whether the Fifteenth Amendment also encompasses such claims.<sup>203</sup> As such, under current doctrine, Section 2 is arguably best conceptualized as an exercise of Fourteenth Amendment enforcement authority, since Congress would need to justify only its adoption of a discriminatory effects standard.<sup>204</sup> In other words, under the Fourteenth Amendment, Congress merely abrogated the intent requirement when it revised Section 2 in 1982. But under the Fifteenth Amendment, Congress may have needed to proscribe a whole new set of discriminatory voting practices—namely, dilutive schemes—in addition to eliminating the intent requirement.<sup>205</sup>

Presuming that Section 2 should be defended under the Fourteenth Amendment—rather than the Fifteenth—is fraught with peril, however. For decades, the Court followed the deferential

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203. See *supra* notes 73–74 and accompanying text.

204. See *City of Rome v. United States*, 446 U.S. 156, 207 n.1 (1980) (Rehnquist, J., dissenting) (“The Voting Rights Act is generally viewed as an exercise of Fifteenth Amendment power. Since vote ‘dilution’ devices are in issue in this case, the rights at stake are more properly viewed as Fourteenth Amendment rights.” (citation omitted)); Elmendorf, *Biased Votes*, *supra* note 38, at 401 n.117 (“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.”).

205. Throughout this Article, I assume *arguendo* that the Fifteenth Amendment has an intent requirement. See *City of Mobile v. Bolden*, 446 U.S. 55, 62 (1980) (plurality opinion). That said, many of the arguments pertaining to the word “abridge” are applicable to whether the Fifteenth Amendment covers discriminatory effects. See *infra* Part IV.B.1.

rationality standard articulated in *Katzenbach v. Morgan*<sup>206</sup> and *South Carolina v. Katzenbach*<sup>207</sup> to review legislation passed pursuant to Congress's Fourteenth and Fifteenth Amendment enforcement authority.<sup>208</sup> In those decisions, the Court held that “[a]s against the reserved powers of the States, Congress may use any *rational* means to effectuate the constitutional prohibition of racial discrimination in voting.”<sup>209</sup> And under the *Katzenbach* standard, the Court also gave Congress leeway to independently interpret the Reconstruction Amendments.<sup>210</sup> The *Katzenbach* standard is thus “a broad statement of congressional authority in relation to *both* the powers of the states and the Court.”<sup>211</sup>

But in *City of Boerne v. Flores*,<sup>212</sup> the Court significantly curbed Congress's interpretive and remedial authority under the *Fourteenth* Amendment.<sup>213</sup> At the first step of *Boerne's* congruence and proportionality test, the Court “identif[ies] with some precision the scope of the constitutional right at issue.”<sup>214</sup> The Court then examines the legislative record to ascertain “whether Congress identified a history and pattern of unconstitutional [conduct] by the States.”<sup>215</sup> And at the final step, the Court determines whether “[t]here [is] a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.”<sup>216</sup> Because the *Boerne* Court arrogated to itself the sole responsibility of interpreting the Constitution and required a much tighter fit between the evil to be

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206. *Katzenbach v. Morgan*, 384 U.S. 641 (1966).

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

208. See Ellen D. Katz, *Reinforcing Representation: Congressional Power To Enforce the Fourteenth and Fifteenth Amendments in the Rehnquist and Waite Courts*, 101 MICH. L. REV. 2341, 2365–74 (2003) [hereinafter Katz, *Reinforcing Representation*] (surveying several decisions applying *Katzenbach's* rationality standard).

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

210. See *Morgan*, 384 U.S. at 648; see also Michael W. McConnell, *Institutions and Interpretation: A Critique of City of Boerne v. Flores*, 111 HARV. L. REV. 153, 184 (1997) [hereinafter McConnell, *Institutions*] (noting that, under *Katzenbach*, the question is “whether the congressional interpretation is within a reasonable range of plausible interpretations—not whether it is the same as the Supreme Court’s”).

211. Crum, *Superfluous*, *supra* note 25, at 1571 (footnotes omitted).

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

213. See *id.* at 519; Katz, *Reinforcing Representation*, *supra* note 208, at 2395.

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

215. *Id.* at 368.

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

remedied and the means employed,<sup>217</sup> several commentators have questioned whether a post-*Boerne* Court would uphold the VRA as an appropriate exercise of Congress's Reconstruction Amendment enforcement authority.<sup>218</sup>

It remains an open question whether *Boerne* applies to Congress's Fifteenth Amendment enforcement authority,<sup>219</sup> a point discussed more below.<sup>220</sup> Because the above-referenced critiques are more forceful under *Boerne* than *Katzenbach*, the answer to that question may determine Section 2's constitutionality.

### III. RACIALLY POLARIZED VOTING DURING RECONSTRUCTION

Racially polarized voting is not a modern phenomenon. In fact, the relevant starting point is the 1860s, not the 1960s. Contrary to what contemporary doctrine dictates,<sup>221</sup> the Fourteenth Amendment did not enfranchise *any* Black citizens during Reconstruction.<sup>222</sup> The Reconstruction Framers differentiated between civil and political rights and did not equate citizenship with suffrage.<sup>223</sup> This latter point

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217. See Katz, *Reinforcing Representation*, *supra* note 208, at 2362–68; Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After Morrison and Kimel*, 110 YALE L.J. 441, 444–45 (2000). To be sure, under *Boerne*, the Court “appear[s] to give Congress even greater latitude to craft remedial legislation in areas of traditional equal protection strict scrutiny.” Samuel Issacharoff, *Is Section 5 of the Voting Rights Act a Victim of Its Own Success?*, 104 COLUM. L. REV. 1710, 1715 (2004); see also Crum, *Pocket Trigger*, *supra* note 133, at 2022 (describing *Boerne* as having “a built-in sliding scale”). Thus, it is possible the Court may be more deferential in reviewing Section 2 because Congress has legislated on the topics of race and voting.

218. See, e.g., Gerken, *Undiluted Vote*, *supra* note 5, at 1736–37; Karlan, *Two Section Twos*, *supra* note 106, at 725–26.

219. See, e.g., Tolson, *Spectrum*, *supra* note 194, at 337.

220. See *infra* Part IV.B.3 (discussing *Boerne* and *Shelby County*).

221. See *Hunter v. Underwood*, 471 U.S. 222, 233 (1985) (applying the Fourteenth Amendment to intentionally discriminatory vote denial laws); *Nixon v. Herndon*, 273 U.S. 536, 541 (1927) (similar).

222. See Crum, *Superfluous*, *supra* note 25, at 1602 & n.362 (explaining that seventeen States prohibited Black suffrage even after the Fourteenth Amendment's ratification).

223. The Reconstruction debates were “based on a tripartite division of rights, universally accepted at the time but forgotten today, between civil rights, political rights, and social rights.” Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 1016 (1995) [hereinafter McConnell, *Desegregation*]; see also AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 382 (2005) [hereinafter AMAR, AMERICA'S CONSTITUTION] (observing that the right to vote “lay outside the domain of mere citizenship”); Amar & Brownstein, *supra* note 25, at 929 (“[T]he drafters of the Reconstruction Amendments viewed political rights as qualitatively different from civil rights . . .”).

is underscored by the disenfranchisement of women, who were treated as second-class citizens who could exercise civil rights but not political rights.<sup>224</sup> Based on this rights framework, the Reconstruction Framers designed the Fourteenth Amendment to exclude protections for political rights<sup>225</sup> because they feared that inclusion of Black suffrage in the Amendment would doom its ratification.<sup>226</sup> “Even Republicans who favored black suffrage acknowledged that they lacked the votes to secure it” in the Fourteenth Amendment.<sup>227</sup>

In this Part, I discuss the role of racially polarized voting during Reconstruction, both in the early days of Black suffrage in the South and in the lead-up to the Fifteenth Amendment’s passage and ratification.

### A. *Racially Polarized Voting Before the Fifteenth Amendment*

Prior to the Fifteenth Amendment’s passage in 1869 and ratification in 1870,<sup>228</sup> Black suffrage was already part of our nation’s political life—just not nationwide.<sup>229</sup> Several Northern and Midwestern

224. See AMAR, *AMERICA’S CONSTITUTION*, *supra* note 223, at 382.

225. See, e.g., Amar & Brownstein, *supra* note 25, at 928 (“The framers of the Fourteenth Amendment did not intend its Equal Protection, Due Process, and Privileges and Immunities Clauses to interfere with state regulation of political rights.”); McConnell, *Desegregation*, *supra* note 223, at 1024 (“It was generally understood that the nondiscrimination requirement of the Fourteenth Amendment applied only to ‘civil rights.’ Political and social rights, it was agreed, were not civil rights and were not protected.”); David A. Strauss, *Foreword: Does the Constitution Mean What It Says?*, 129 HARV. L. REV. 1, 38 (2015) (“[A] straightforward reading of the text makes it clear that the Equal Protection Clause does not require equality in voting.”). *But see* Franita Tolson, *What is Abridgment?: A Critique of Two Section Twos*, 67 ALA. L. REV. 433, 458 (2015) [hereinafter Tolson, *Abridgment*] (“Section 2 of the Fourteenth Amendment was the Reconstruction Congress’s attempt to constitutionalize a mechanism that would allow Congress to all but legislate universal suffrage . . .”).

226. See AMAR, *AMERICA’S CONSTITUTION*, *supra* note 223, 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.”); McConnell, *Desegregation*, *supra* note 223, at 1106 (“In 1866, the Radicals were unable to secure enough votes to guarantee black political rights in the Fourteenth Amendment . . .”).

227. MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* 28 (2004); see also ERIC FONER, *RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION, 1863-1877*, at 260 (1988) (“The [Fourteenth] Amendment supplied Republicans with a platform for the [1866] campaign, while leaving to the future the issue of black suffrage.”).

228. CONG. GLOBE, 40th Cong., 3d Sess. 1563 (1869) (passage in the House); *id.* at 1641 (passage in the Senate); 16 Stat. 1131–32 (1870) (ratification).

229. For an overview of the expansion of Black suffrage before the Fifteenth Amendment, see Crum, *Superfluous*, *supra* note 25, at 1593–97.

States had already extended the franchise to Black men.<sup>230</sup> In 1867, Congress enacted a series of laws to enfranchise Black men in areas of federal control. Congress first enfranchised Black men in the District of Columbia<sup>231</sup> and the federal territories.<sup>232</sup> Congress also required Nebraska to enfranchise Black citizens as a “fundamental condition” of its admission to the Union.<sup>233</sup> And, most importantly, Congress passed the First Reconstruction Act, which imposed Black suffrage on ten of the eleven ex-Confederate States and compelled them to hold new constitutional conventions chosen with an all-male electorate.<sup>234</sup> In a similar vein, Congress adopted two fundamental conditions for these Southern States’ readmission to the Union: that they never amend their state constitutions to disenfranchise Black citizens and that they ratify the Fourteenth Amendment.<sup>235</sup>

The plight of the freedmen motivated Congress to enfranchise Black southern men for several reasons.<sup>236</sup> First, the postwar southern governments quickly demonstrated that they could not be trusted to

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230. See AMAR, *AMERICA’S CONSTITUTION*, *supra* note 223, 610 n.88 (noting that Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont all permitted Black suffrage by the end of the Civil War); GILLETTE, *supra* note 33, at 26–27 (stating that voters in Iowa and Minnesota endorsed Black suffrage in referenda in 1868 and that the Wisconsin Supreme Court issued a ruling enfranchising Black citizens in 1866).

231. See An Act To Regulate the Elective Franchise in the District of Columbia, ch. 6, 14 Stat. 375 (1867).

232. See An Act To Regulate the Elective Franchise in the Territories of the United States, ch. 15, 14 Stat. 379 (1867).

233. See An Act for the Admission of the Territory of Nebraska into the Union, ch. 36, 14 Stat. 391 (1867). During Reconstruction, the use of fundamental conditions for admission was controversial, even among Republicans. See EARL M. MALTZ, *CIVIL RIGHTS, THE CONSTITUTION, AND CONGRESS, 1863-1869*, at 127 (1990) (discussing Republican opposition to “the idea that Congress could set suffrage-related conditions for admission to statehood that would bind erstwhile territories after the admission process was completed”); Thomas B. Colby, *In Defense of the Equal Sovereignty Principle*, 65 *DUKE L.J.* 1087, 1163–64 (2016) (noting doubts about the validity of fundamental conditions).

234. See First Reconstruction Act, ch. 153, § 5, 14 Stat. 428, 429 (1867) (requiring ten ex-Confederate States to enfranchise male citizens over twenty-one years of age, regardless of “race, color, or previous condition”). The one Confederate State left out of the First Reconstruction Act was Tennessee, which enacted legislation enfranchising Black citizens in February 1867 after its readmission to the Union. See W.E. BURGHARDT DU BOIS, *BLACK RECONSTRUCTION IN AMERICA, 1860-1880*, at 575 (2d ed. 1962).

235. See JOHN MABRY MATHEWS, *LEGISLATIVE AND JUDICIAL HISTORY OF THE FIFTEENTH AMENDMENT* 18 (1909).

236. Congress relied on the Guarantee Clause as its source of authority to enfranchise Black citizens in the Reconstructed South. See U.S. CONST. art. IV, § 4; AMAR, *AMERICA’S CONSTITUTION*, *supra* note 223, at 374–75.

protect the freedmen.<sup>237</sup> The Southern States enacted the notorious Black Codes, which attempted to reestablish a system of de facto slavery via strict vagrancy and labor-contract laws.<sup>238</sup> In addition, the Southern States—with the exception of Tennessee—initially rejected the Fourteenth Amendment by huge margins.<sup>239</sup> Congress attributed these decisions to the recalcitrance of the all-White southern electorate.<sup>240</sup> Second, and relatedly, the postwar southern governments were dubiously loyal to the Union. Although the South generally sent Unionists to Congress, their hold on power was tenuous, as prominent Confederates came close to winning several elections and lesser-known rebels occupied lower posts.<sup>241</sup> And third, the abolition of slavery meant that the Constitution’s infamous Three-Fifths Clause would no longer result in Black people being undercounted for apportionment purposes. The perverse upshot was that the Southern States would *increase* their share of seats in the House of Representatives—and concomitantly in the Electoral College—even though Black southerners remained disenfranchised.<sup>242</sup> Despite losing the Civil War, White southerners’ political power would have been amplified at the federal level.

Faced with these problems, the 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.<sup>243</sup> Upon reflection, the reasons for racial bloc

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237. See Gabriel J. Chin, *The Voting Rights Act of 1867: The Constitutionality of Federal Regulation of Suffrage During Reconstruction*, 82 N.C. L. REV. 1581, 1590 (2004).

238. FONER, *supra* note 227, at 198–201. Congress enacted the Civil Rights Act of 1866 in direct response to the Black Codes. See *id.* at 244.

239. See 1 HANES WALTON, JR., SHERMAN C. PUCKETT & DONALD R. DESKINS, JR., *THE AFRICAN AMERICAN ELECTORATE: A STATISTICAL HISTORY* 235 tbl.13.2 (2012).

240. See *id.* at 235.

241. See FONER, *supra* note 227, at 196–97. Some prominent rebels were placed in positions of power. Georgia, for example, appointed former Confederate Vice President Alexander Hamilton Stephens to the U.S. Senate. *Id.* at 196.

242. See Chin, *supra* note 237, at 1589–90. Section Two of the Fourteenth Amendment also addressed this problem by reducing a state’s seats in the House of Representatives if it “denied” or “abridged” the “right to vote” of its adult “male” “citizens.” U.S. CONST. amend. XIV, § 2; see also Pamela S. Karlan, *Reapportionment, Nonapportionment, and Recovering Some Lost History of One Person, One Vote*, 59 WM. & MARY L. REV. 1921, 1931 (2018) (discussing the rationale behind Section Two). Section Two has never been enforced. Gerard N. Magliocca, *Our Unconstitutional Reapportionment Process*, 86 GEO. WASH. L. REV. 774, 783 (2018).

243. See MALTZ, *supra* note 233, at 132 (characterizing Black southerners as a “loyal counterweight to the potential political power of the rebellious whites”); Amar & Brownstein, *supra* note 25, at 939 (“Republicans anticipated that the black populations in the South would be

voting during Reconstruction are quickly apparent. Between 1860 and 1868, the Republican Party abolished slavery,<sup>244</sup> supported and won the Civil War,<sup>245</sup> militarily occupied the South,<sup>246</sup> passed the Freedmen's Bureau Bill and the Civil Rights Act of 1866,<sup>247</sup> and adopted two constitutional amendments that protected the civil rights of Black people.<sup>248</sup> The Republican Party also enfranchised Black men across the South<sup>249</sup> and advocated Black suffrage at the state level in the North.<sup>250</sup>

By contrast, the Democratic Party represented the old slave order and aligned itself with unabashed racists.<sup>251</sup> Democrats vehemently opposed Black suffrage for racist and partisan reasons, predicting that Black voters would support Republicans.<sup>252</sup> These White supremacist beliefs revealed themselves in other policy areas: no Democrat in either house of Congress voted for the Civil Rights Act of 1866 or the Fourteenth Amendment.<sup>253</sup>

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under siege and believed that political influence and voting power would be their sole means of defense.”); *id.* at 943 (“New black voters were expected to vote Republican . . .”).

244. See FONER, *supra* note 227, at 2–3 (emphasizing the significance of the abolitionist movement and the Emancipation Proclamation); *id.* at 66–67 (discussing the ratification of the Thirteenth Amendment).

245. Black soldiers were an essential part of the Union's war effort. See *id.* at 8 (“By the war's end, some 180,000 blacks had served in the Union Army — over one fifth of the nation's adult male black population under age forty-five.”); MICHAEL WALDMAN, *THE FIGHT TO VOTE* 61 (2016) (noting that Black soldiers accounted for ten percent of the Union army). Black soldiers' military service was frequently invoked to justify the extension of suffrage. See Amar & Brownstein, *supra* note 25, at 932.

246. See *supra* note 234 and accompanying text (discussing First Reconstruction Act).

247. See FONER, *supra* note 227, at 247–50.

248. See AMAR, *UNWRITTEN CONSTITUTION*, *supra* note 24, at 398–400 (detailing Republican support for the Thirteenth and Fourteenth Amendments).

249. See *supra* note 233–234 and accompanying text.

250. See GILLETTE, *supra* note 33, at 25–27.

251. See, e.g., FONER, *supra* note 227, at 293 (“[B]lack identified the old [Democratic] political leaders with slavery.”); *id.* at 340–41 (discussing the Democratic Party's racial appeals in the 1868 campaign); Amar & Brownstein, *supra* note 25, at 946 (“Democrats' opposition to black suffrage would certainly have cemented the allegiance of the new voters to the party of Lincoln.”). To provide just one example of the racism espoused by Democratic politicians, a Democratic senator stated during the debate over the Fifteenth Amendment that, “[w]hile the white man for two thousand years past has been going upward and onward, the negro race wherever found dependent upon himself has been going downward or standing still.” CONG. GLOBE, 40th Cong., 3d Sess. 989 (1869) (statement of Sen. Hendricks).

252. See Amar & Brownstein, *supra* note 25, at 947–48.

253. J. MORGAN KOUSSER, *COLORBLIND INJUSTICE: MINORITY RIGHTS AND THE UNDOING OF THE SECOND RECONSTRUCTION* 39 tbl.1.2 (1999). Even beyond issues of race and civil rights, there was less ideological overlap between political parties in the nineteenth century than in the

In light of these divergent worldviews, the Reconstruction Framers' political predictions proved prescient.<sup>254</sup> But to fully appreciate the impact of the First Reconstruction Act, it is useful to consider the country's racial demographics during Reconstruction. Given slavery's labor-intensive nature and the fact that many Northern States prohibited Black migration prior to the Civil War,<sup>255</sup> Black people were heavily concentrated in the South. 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.<sup>256</sup> Between 1866 and 1867, the percentage of the nation's Black men that could vote went from 0.5 percent to 80.5 percent,<sup>257</sup> a massive increase largely attributable to the First Reconstruction Act.<sup>258</sup>

Black voters thus constituted effective voting majorities in five Southern States—Alabama, Florida, Louisiana, Mississippi, and South

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twentieth century. See Kang, *Hyperpartisan Gerrymandering*, *supra* note 24, at 1393–94 (describing the mid- to late-nineteenth century as an era of extreme partisanship in Congress).

254. These predictions were not uniformly shared. At the dawn of Reconstruction, some southerners—including avowed racist President Andrew Johnson—believed that the freedmen would “vote with their former owners.” FONER, *supra* note 227, at 186.

255. See LAURA F. EDWARDS, *A LEGAL HISTORY OF THE CIVIL WAR AND RECONSTRUCTION* 83 (2015) (noting that Black people were denied entry to several Midwestern States).

256. See FONER, *supra* note 227, at 294; see also AMAR, *AMERICA'S CONSTITUTION*, *supra* note 223, at 374 (providing similar figures but estimating that Black people were just shy of a majority in Louisiana).

257. RICHARD M. VALELLY, *THE TWO RECONSTRUCTIONS: THE STRUGGLE FOR BLACK ENFRANCHISEMENT* 24 (2004).

258. During Reconstruction, Black people represented 12.7 percent of the population. See GILLETTE, *supra* note 33, at 82 tbl.1 (providing statistics for 1870). That figure is comparable to today's 13.4 percent. *Quick Facts*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/US/RHI225218> [<https://perma.cc/358E-DUJZ>]. However, compared to Reconstruction, Black people are now less concentrated in the South. See SONYA RASTOGI, TALLESE D. JOHNSON, ELIZABETH M. HOEFFEL & MALCOM P. DREWERY, JR., U.S. CENSUS BUREAU, *THE BLACK POPULATION: 2010*, at 7 (2011), <https://www.census.gov/prod/cen2010/briefs/c2010br-06.pdf> [<https://perma.cc/RB82-RDPX>] (finding that 55 percent of Black people live in the South); *id.* at 9 (finding that California, Illinois, Ohio, and New York have substantial Black populations). And unlike during Reconstruction, there are currently no majority-Black States. See *id.* at 8 tbl.5. Four States, however, are majority-minority. See *2010 Census Shows America's Diversity*, U.S. CENSUS BUREAU (Mar. 24, 2011), [https://www.census.gov/newsroom/releases/archives/2010\\_census/cb11-cn125.html](https://www.census.gov/newsroom/releases/archives/2010_census/cb11-cn125.html) [<https://perma.cc/D8Z5-NJ6K>] (listing California, Hawaii, New Mexico, and Texas).

Carolina—given their high registration rates and the disenfranchisement of ex-Confederates pursuant to the First Reconstruction Act.<sup>259</sup> And these were not slim majorities. In 1867, Black men were over 60 percent of registered voters in Alabama, Louisiana, and South Carolina.<sup>260</sup> Looking at the South as a whole, Black registered voters outpaced White registered voters by a wide margin.<sup>261</sup>

These newly empowered Black voters quickly reshaped southern and national politics in the multiracial elections that occurred prior to the Fifteenth Amendment—namely, the 1867–68 elections associated with the southern constitutional conventions, which were mandated by the First Reconstruction Act, as well as the 1868 general election. Black voters demonstrated their strong support for the Republican Party and its agenda.

In the southern state-level elections, Black voters decisively backed the new constitutional conventions. Across the South, Black voters accounted for between 66 percent and 97 percent of the votes in favor of the constitutional conventions.<sup>262</sup> And in a remarkable degree of unanimity, not a *single* Black voter cast a ballot against the constitutional conventions in Alabama, Florida, North Carolina, and South Carolina.<sup>263</sup> Black turnout was also high, ranging from 70 percent to nearly 90 percent.<sup>264</sup> Furthermore, for the first time in our nation's history, Black politicians were elected to office,<sup>265</sup> though not in proportion to their percentage of the population.<sup>266</sup> Republicans

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259. See FONER, *supra* note 227, at 294 n.27; VALELLY, *supra* note 257, at 32–33 tbl.2.1; see also WALTON ET AL., *supra* note 239, at 244 tbl.13.7 (showing that over 47,000 ex-Confederates were disenfranchised in Florida, Georgia, North Carolina, South Carolina, and Virginia).

260. See WALTON ET AL., *supra* note 239, at 239 tbl.13.3.

261. The scholarly estimates vary somewhat. See VALELLY, *supra* note 257, at 32 (reporting a 703,000 to 627,000 Black–White registration gap); WALTON ET AL., *supra* note 239, at 246 tbl.13.9 (highlighting a 772,850 to 727,424 Black–White registration gap); Xi Wang, *Black Suffrage and the Redefinition of American Freedom, 1860-1870*, 17 CARDOZO L. REV. 2153, 2213 (1996) [hereinafter Wang, *Black Suffrage*] (pointing to a 735,000 to 635,000 Black–White registration gap). Black voters also outnumbered White voters in several southern cities. See HOWARD N. RABINOWITZ, *RACE RELATIONS IN THE URBAN SOUTH, 1865-1890*, at 264 (1978).

262. See WALTON ET AL., *supra* note 239, at 241 fig.13.2.

263. See *id.* at 241.

264. See FONER, *supra* note 227, at 314.

265. *Id.* at 316.

266. See *id.* at 318 (showing that Black officials were underrepresented in most States). *But see* DU BOIS, *supra* note 234, at 372 (showing that Black delegates accounted for 61 percent, 50

controlled the new southern governments formed by these conventions<sup>267</sup> and quickly ratified the Fourteenth Amendment, helping it get over Article V's three-fourths hurdle.<sup>268</sup>

At the federal level, the 1868 election results vividly demonstrated the importance of Black voters to Republican electoral success. President Grant's slim popular-vote victory—300,000 out of 5.7 million votes—was attributed to the support of 500,000 Black voters, mostly in the South.<sup>269</sup> Moreover, due to Black voters' support, Grant won every readmitted ex-Confederate State except Georgia and Louisiana, where Klan violence suppressed the Black vote.<sup>270</sup> The southern Black voting bloc also elected 250 Black state legislators in 1868.<sup>271</sup>

Conversely, White southerners generally opposed the constitutional conventions and voted for Democrats.<sup>272</sup> But to be clear, White southerners were not uniformly Democrats. Those White southerners who remained loyal to the Union—alternatively called Unionists or scalawags, depending on the speaker's viewpoint—tended to vote Republican.<sup>273</sup> And White northerners who moved to the South during Reconstruction—known as carpetbaggers—supported the Republican Party.<sup>274</sup> White Republicans in the South, however, lacked the numbers to exercise real political power and needed the help of Black voters to win elections.<sup>275</sup> The alliance between Black and White Republicans was sometimes fraught. Many Unionists, for example,

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percent, and 40 percent of delegates at the South Carolina, Louisiana, and Florida conventions, respectively).

267. See RICHARD H. ABBOTT, *THE REPUBLICAN PARTY AND THE SOUTH, 1855-1877*, at 108, 164 (1986).

268. See ACKERMAN, *TRANSFORMATIONS*, *supra* note 25, at 197–98, 211.

269. See *id.* at 236; Wang, *Black Suffrage*, *supra* note 261, at 2214–15.

270. See RON CHERNOW, *GRANT* 623 (2017).

271. See KOUSSER, *supra* note 253, at 19 fig.1.1. Throughout Reconstruction, several Black officials served on the city councils in Atlanta, Montgomery, Nashville, and Raleigh. RABINOWITZ, *supra* note 261, at 265.

272. See FONER, *supra* note 227, at 297 (“In no Southern state did Republicans attract a majority of the white vote.”); WALTON ET AL., *supra* note 239, at 240 tbl.13.4 (showing White voters' support for the constitutional conventions ranging from 8.5 percent to 33.6 percent).

273. See FONER, *supra* note 227, at 294 (discussing scalawags); *id.* at 300 (“The most extensive concentration of white Republicans . . . lay in the upcountry bastions of wartime Unionism.”).

274. See *id.* at 294–95.

275. See Amar & Brownstein, *supra* note 25, at 942 (“Loyal white Unionists in the South, acting alone, lacked the ability to protect themselves. They certainly did not have the power to transform the region. Republicans believed that, together, newly freed black men and loyal whites could wrest governmental authority from rebel leadership.”).

were “reluctan[t] . . . to vote for black candidates,” meaning that most Black officials were elected from overwhelmingly Black districts located in former plantation areas.<sup>276</sup> Overall, Black voters almost uniformly supported the Republican Party whereas White southerners leaned Democratic.<sup>277</sup>

The reality of racially polarized voting was known during Reconstruction—and known by Congress.<sup>278</sup> Of course, there were obvious reasons for partisan divides along racial lines and the election results spoke for themselves. But critically, the House and the Senate each commissioned reports on voter turnout and registration rates in the southern constitutional convention elections.<sup>279</sup> The Senate Report even catalogued these statistics by race and identified the number of White and Black men voting for and against the constitutional conventions.<sup>280</sup> This data collection was possible because voting was not yet by secret ballot<sup>281</sup> and the Union Army—tasked with keeping an uneasy peace in the South—adopted a policy of using different lines and registrars for Black and White voters in many southern jurisdictions.<sup>282</sup>

#### *B. Racially Polarized Voting and the Fifteenth Amendment*

These election results were not lost on the Reconstruction Framers, who candidly recognized the role of racial bloc voting in debating the Fifteenth Amendment. As in any group decision-making process,<sup>283</sup> the Reconstruction Framers had numerous reasons for advocating nationwide Black suffrage when the lame-duck Fortieth

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276. FONER, *supra* note 227, at 355; *see also id.* at 331 (noting that Black voters’ “very unanimity as Republicans meant their ballots could be taken for granted by party leaders seeking the white vote”); SARAH WOOLFOLK WIGGINS, *THE SCALAWAG IN ALABAMA POLITICS, 1865–1881*, at 71 (1977) (attributing Unionist defections in Alabama in 1870 to the presence of a Black candidate running statewide).

277. To be sure, there were some Black Democrats. *See* FONER, *supra* note 227, at 291 (“The few black Democrats (mostly individuals dependent for a livelihood on white patronage) were considered ‘enemies to our people.’”).

278. *See* AMAR, *AMERICA’S CONSTITUTION*, *supra* note 223, at 397–98.

279. *See* WALTON ET AL., *supra* note 239, at 237–40.

280. *See id.* at 237.

281. *See* *Doe v. Reed*, 561 U.S. 186, 224 (2010) (Scalia, J., concurring in the judgment) (“Voting was public until 1888 when the States began to adopt the Australian secret ballot.”).

282. *See* WALTON ET AL., *supra* note 239, at 240.

283. *Cf.* Ryan D. Doerfler, *Who Cares How Congress Really Works?*, 66 *DUKE L.J.* 979, 981–82 (2017) (noting the “common refrain” that “Congress is a ‘they,’ not an ‘it’”).

Congress convened in early 1869. The goal here is not to demonstrate which motive was primary but rather to show that racial bloc voting was a widely shared and openly acknowledged assumption motivating the Fifteenth Amendment's passage.

On the ideological front, many Radical Republicans started their careers as abolitionists and viewed Black suffrage as the next logical step in that struggle.<sup>284</sup> Most relevant here, these Radicals believed that the right to vote would empower Black citizens to mobilize politically and defend their own interests. As Senator Edmund Ross (R-KS) eloquently stated, “[t]he ballot is as much the bulwark of liberty to the black man as it is to the white.”<sup>285</sup> Or as Frederick Douglass would later put it: “What does this fifteenth amendment mean to us? I will tell you. It means that the colored people are now and will be held to be, by the whole nation, responsible for their own existence and their well or ill being.”<sup>286</sup>

Undergirding this theory was the explicit belief that Black and White southerners had starkly divergent interests. Senator Henry Corbett (R-OR), for example, stated that Black voters were “pretty much the only people in those States who were loyal” and that the ballot would allow them to “protect themselves in the southern reconstructed States.”<sup>287</sup> This view was widely shared in the Republican caucus in light of the Black Codes passed in the early days of Reconstruction and the virulent racism of the Democratic Party.<sup>288</sup> The racial bloc voting in the 1868 election further reinforced this point.<sup>289</sup>

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284. See FONER, *supra* note 227, at 448.

285. CONG. GLOBE, 40th Cong., 3d Sess. 983 (1869) (statement of Sen. Ross); *see also id.* (“No class, no race is truly free until it is clothed with political power sufficient to make it the peer of its kindred class or race and enable it to resist the contingencies of popular commotion.”).

286. XI WANG, THE TRIAL OF DEMOCRACY: BLACK SUFFRAGE & NORTHERN REPUBLICANS, 1860-1910, at 51 (1997) (quoting a speech by Frederick Douglass).

287. CONG. GLOBE, 40th Cong., 3d Sess. 1008 (1869) (statement of Sen. Corbett).

288. *See id.* at 983 (statement of Sen. Ross) (“The only sure protection of this nation against the ultimate reestablishment of that [peculiar] institution, is by the adoption and rigid maintenance in all the States of the doctrine of impartial suffrage.”); *id.* at 693 (statement of Rep. Shanks) (“No man is safe in his person or property in a community where he has no voice in the protection of either.”); MALTZ, *supra* note 233, at 132 (observing that Republicans viewed Black southerners as a “loyal counterweight to the potential political power of the rebellious whites”); Amar & Brownstein, *supra* note 25, at 939 (arguing that the Reconstruction Framers believed that “black people needed the right to vote in order to be able to protect themselves against the enactment of pernicious laws by white southerners”).

289. *See* CONG. GLOBE, 40th Cong., 3d Sess. 983 (1869) (statement of Sen. Ross) (“The history of the last presidential canvass ought to be a warning to prompt and decisive action.”).

Thus, the Republicans' ideological argument hinged on an empowerment philosophy: the ballot would give Black people the means to participate in the political arena and thereby protect their own interests.<sup>290</sup> Or, to foreshadow the Supreme Court's often-cited formulation, Republicans believed that the right to vote is "preservative of all rights."<sup>291</sup>

On the partisan front, the Reconstruction Framers recognized that nationwide Black suffrage would unlock a large Republican-leaning voting bloc.<sup>292</sup> By 1869, Black men could vote in only seventeen of the thirty-four states.<sup>293</sup> Even though the vast majority of Black men in the nation had already been enfranchised by the First Reconstruction Act,<sup>294</sup> it was estimated at the time that 150,000 Black men would be enfranchised by the Fifteenth Amendment.<sup>295</sup> Many of these potential Black voters lived in the four Border States—Delaware, Kentucky, Maryland, and Missouri—which had sizable Black populations due to their recent history as Slave States.<sup>296</sup> And in other closely divided Northern States—namely, Connecticut, New Jersey, Ohio, and Pennsylvania—the influx of reliably Republican Black voters was expected to tip certain elections.<sup>297</sup>

Responding to concerns that nationwide Black suffrage would alienate White people and cost Republicans votes, Representative George Boutwell (R-MA), who introduced the Fifteenth Amendment in the House,<sup>298</sup> declared:

There are one hundred and fifty thousand citizens of the United States who by this bill will be entitled to the elective franchise but who are now disfranchised—seventeen hundred in Connecticut, ten

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290. Cf. Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713, 723–28 (1985) (arguing that discrete and insular minorities have advantages within the political system).

291. *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886); see also *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964) (“Other rights, even the most basic, are illusory if the right to vote is undermined.”).

292. See Amar & Brownstein, *supra* note 25, at 943–46 (highlighting the Reconstruction Framers' vehement belief that Black voters would support the Republican party).

293. See Crum, *Superfluous*, *supra* note 25, at 1602 & n.362.

294. See VALELLY, *supra* note 257, at 24.

295. See CONG. GLOBE, 40th Cong., 3d Sess. 561 (1869) (statement of Rep. Boutwell) (reporting the estimated number of newly-enfranchised Black voters in different states).

296. Black people represented the following percentages of the population in these States: Delaware (18.2 percent); Kentucky (16.8 percent); Maryland (22.5 percent); and Missouri (6.9 percent). GILLETTE, *supra* note 33, at 82 tbl.1.

297. See Amar & Brownstein, *supra* note 25, at 945 n.84.

298. See CONG. GLOBE, 40th Cong., 3d Sess. 285 (1869).

thousand in New York, five thousand in New Jersey, fourteen thousand in Pennsylvania, seven thousand in Ohio, twenty-four thousand in Missouri, forty-five thousand in Kentucky, four thousand in Delaware, thirty-five thousand in Maryland—who will rally to the support of this constitutional amendment if by the law they are enfranchised.<sup>299</sup>

Senator Charles Sumner (R-MA), one of the most prominent and persistent Radicals in Congress,<sup>300</sup> echoed this sentiment in promoting Black suffrage:

You need votes in Connecticut, do you not? There are three thousand fellow-citizens in that State ready at the call of Congress to take their place at the ballot-box. You need them also in Pennsylvania, do you not? There are at least fifteen thousand in that great State waiting for your summons. Where you most need them, there they are; and be assured they will all vote for those who stand by them in the assertion of Equal Rights.<sup>301</sup>

Suffice it to say, it was widely assumed during Reconstruction that newly enfranchised Black voters would support the Republican Party.<sup>302</sup> Thus, not only was racially polarized voting known during Reconstruction, but the Reconstruction Framers deliberately capitalized on it. As Boutwell and Sumner made abundantly clear, the Republican Party knew it was expanding its voter base when it enacted the Fifteenth Amendment. This does not denigrate the Republicans' intentions. Rather, it explains their motivation. Like their ideological goals, the Radicals' self-interested argument hinged on an

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299. *Id.* at 561 (statement of Rep. Boutwell). Boutwell made this statement during a debate over whether nationwide Black suffrage should be achieved via federal statute or constitutional amendment. For more on this debate, see Crum, *Superfluous*, *supra* note 25, at 1604–16.

300. See McConnell, *Desegregation*, *supra* note 223, at 987.

301. CONG. GLOBE, 40th Cong., 3d Sess. 904 (1869) (statement of Sen. Sumner); see also CONG. GLOBE, 40th Cong., 1st Sess. 614 (1867) (statement of Sen. Sumner) (raising a similar point). It is unclear why Boutwell and Sumner had different estimates of the Black populations of Connecticut and Pennsylvania.

302. See, e.g., CONG. GLOBE, 40th Cong., 3d Sess. 724 (1869) (statement of Rep. Ward) (estimating that 250,000 Black people were disenfranchised in the Border States and that 600,000 Black people were disenfranchised in the North); AMAR, AMERICA'S CONSTITUTION, *supra* note 223, at 397 (“[T]his infusion of new voters might give Republicans extra electoral security in the coming years.”); GILLETTE, *supra* note 33, at 113 (“In New Jersey 4,200 potential Negro voters might well overturn an 1868 Democratic presidential majority of 2,800.”). Republicans also recognized that some White voters may become alienated by nationwide Black suffrage but expected that such defections would be outweighed by new Black voters. See AMAR, AMERICA'S CONSTITUTION, *supra* note 223, at 398.

empowerment philosophy: the right to vote would allow Black voters to mobilize and support the Republican Party, which, in turn, would protect their interests.

Racially polarized voting, moreover, was critical to the Fifteenth Amendment's ratification. All ten states that Congress put under military Reconstruction ratified the Fifteenth Amendment,<sup>303</sup> though Congress compelled ratification by four of those states as a fundamental condition for their readmission to the Union.<sup>304</sup> The Southern States were thus instrumental in pushing the Fifteenth Amendment over Article V's three-fourths requirement for ratification—a threshold that would not have been reached but for the southern Black electorate.<sup>305</sup>

Republicans also recognized that the Fifteenth Amendment was necessary for Congress to protect Black southerners in the future, further evidencing the party's belief that racially polarized voting would persist. Recall that the Reconstruction Congress conditioned the readmittance of ten Southern States on their inclusion of Black suffrage in their state constitutions.<sup>306</sup> But as the Southern States rejoined the Union, there was considerable uncertainty as to whether Congress possessed constitutional authority to protect Black voters. As an initial matter, Democrats asserted—and some Republicans agreed—that fundamental conditions violated the equality of the states.<sup>307</sup> Even setting aside that problem, the consensus view was that the Fourteenth Amendment did not protect political rights.<sup>308</sup> As such, Congress was left without options for revising voter qualifications of the readmitted Southern States.<sup>309</sup> The Fifteenth Amendment

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303. See First Reconstruction Act, ch. 153, 14 Stat. 428 (1867); GILLETTE, *supra* note 33, at 84–85 tbl.2.

304. Mississippi, Texas, and Virginia were all required to ratify the Fifteenth Amendment as part of their readmission to the Union. See GILLETTE, *supra* note 33, at 100–01. Georgia was required to ratify the Fifteenth Amendment for its second readmission to the Union. See *id.* at 84–85 tbl.2 & 101–03.

305. See *id.* at 84–85 tbl.2; Chin, *supra* note 237, at 1587–88.

306. See *supra* notes 233–35 and accompanying text.

307. See Colby, *supra* note 233, at 1162–64; *cf.* *Shelby County v. Holder*, 570 U.S. 529, 557 (2013) (striking down the VRA's coverage formula as violative of the equal sovereignty principle).

308. See *supra* notes 222–27 and accompanying text.

309. Congress could have stripped backsliding states of their seats in the House under Section Two of the Fourteenth Amendment, but that provision has never been enforced. See *supra* note 242.

therefore significantly expanded “congressional authority to regulate voting rights in the states” and sought to ensure that Black men would not be disenfranchised after the Southern States re-joined the Union.<sup>310</sup>

Tragically, the Fifteenth Amendment would prove insufficient to protect the rights of Black voters. It is well-known that violence, fraud, and outright disenfranchisement helped establish Jim Crow, but dilutive schemes and gerrymandering also played a significant role in its creation.<sup>311</sup> Toward the end of Reconstruction, “Mississippi Redeemers concentrated the bulk of the black population in a ‘shoestring’ Congressional district running the length of the Mississippi River, leaving five others with white majorities.”<sup>312</sup> Other Southern States followed suit and drew gerrymandered congressional districts to reduce Black political power.<sup>313</sup> Similar dilutive schemes were also enacted at the state and local level.<sup>314</sup> Like all dilutive tactics, these Redemption-era gerrymanders relied on racially polarized voting to diminish minority voting power. Thus, racially polarized voting was not only a central motivating factor in the Fifteenth Amendment’s passage but was also exploited to dilute minority political power at the end of Reconstruction.

This evidence clearly demonstrates that Black citizens voted as a near-uniform bloc for Republicans, that White southerners leaned heavily in favor of the Democratic Party, and that these political realities were acknowledged and well-known during Reconstruction. The Fifteenth Amendment attempted to address the root cause of the

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310. Crum, *Superfluous*, *supra* note 25, at 1621 (emphasis omitted).

311. See FONER, *supra* note 227, at 590.

312. *Id.*

313. See JOSEPH H. CARTWRIGHT, *THE TRIUMPH OF JIM CROW: TENNESSEE RACE RELATIONS IN THE 1880S*, at 223 (1976) (discussing gerrymander of Tennessee congressional district); KOUSSER, *supra* note 253, at 26–31 (discussing gerrymanders of congressional districts in North Carolina, Mississippi, and South Carolina). For a series of helpful color-coded maps showing how gerrymandering at the end of Reconstruction shifted political power to the Democrats, see KENNETH C. MARTIS, *THE HISTORICAL ATLAS OF POLITICAL PARTIES IN THE UNITED STATES CONGRESS, 1789-1989*, at 123–31 (1989).

314. See CARTWRIGHT, *supra* note 313, at 158 (describing the 1889 redistricting of Chattanooga that packed Black voters into two of eight districts); FONER, *supra* note 227, at 422, 590 (discussing municipal gerrymandering in Alabama, North Carolina, and Virginia); KOUSSER, *supra* note 253, at 31 (discussing gerrymandering at the state level); RABINOWITZ, *supra* note 261, at 270 (“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 the gerrymandering of Texas’s judicial districts).

problem: widespread private discrimination that was transformed into state power by an all-White and largely racist electorate. Rather than representing an “impermissible racial stereotype[],”<sup>315</sup> this political reality motivated the Fifteenth Amendment’s passage. Unlike today, racially polarized voting was not a constitutional taboo during Reconstruction.

#### IV. RECONSTRUCTING RACIAL VOTE DILUTION

In defending *Gingles* and Section 2, scholars recognize that voting rights are distinct from civil rights and that vote dilution claims are premised on group-based conceptions of the right to vote. Professors Pam Karlan and Daryl Levinson, for example, emphasize that “[r]acial identification in the electoral context . . . is essentially ‘bottom-up,’ produced by the choices of members of the black community to unite politically.”<sup>316</sup> And Professor Heather Gerken argues that vote dilution is best conceptualized as an “aggregate harm” rather than purely a violation of a voter’s individual rights.<sup>317</sup> Although these scholars correctly point out that voting rights deserve a distinctive framework, their claims are premised on political theory or an interpretation of the VRA, rather than a historical and contextual understanding of the Reconstruction Amendments. This Article fills this gap in the literature.<sup>318</sup>

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315. *Shaw v. Reno*, 509 U.S. 630, 647 (1993).

316. Karlan & Levinson, *supra* note 27, at 1218.

317. Gerken, *Undiluted Vote*, *supra* note 5, at 1681. According to Gerken, aggregate rights differ from individual rights in three ways: (1) “fairness is measured in group terms”; (2) an individual’s right “rises and falls with the . . . group”; and (3) “the right is unindividuated among members of the group.” *Id.*

318. The closest academic account to my claim is an article published over two decades ago by Professors Vikram Amar and Alan Brownstein, which examines the debates over the Fifteenth Amendment and contends that the *Shaw* Court erred in its treatment of race-based redistricting. *See* Amar & Brownstein, *supra* note 25, at 919. Amar and Brownstein’s argument differs from mine in several important respects. First and foremost, Amar and Brownstein do not engage with vote dilution doctrine; in fact, they do not even cite *Gingles*. *See id.* at 976–77 (spending two pages discussing vote dilution doctrine and acknowledging that they give it “only brief consideration”). Nor do they attempt to defend *Gingles* in particular or vote dilution doctrine more generally under the Fifteenth Amendment. Furthermore, Amar and Brownstein advance a less doctrinal and more theoretical claim about political rights, directing their attention to debates over women’s suffrage and the jury-exclusion cases. *See id.* at 956–72 (women’s suffrage); *id.* at 981–1005 (jury exclusion). And given the vast changes in election law that have transpired since 1998, Amar and Brownstein do not engage with recent and significant decisions, including the *Boerne* Court’s curtailment of Congress’s Fourteenth Amendment enforcement authority.

Acknowledging the role of racially polarized voting during Reconstruction has significant implications for modern vote dilution doctrine. Indeed, this historical insight demonstrates that the Court's colorblind critiques<sup>319</sup> misapprehend Congress's Reconstruction Amendment authority to remedy and deter dilutive schemes that exploit racially polarized voting. And given several Justices' professed adherence to originalism, the Reconstruction Framers' views and candid discussions of racial bloc voting are particularly relevant. This is especially salient because the same Justices who purport to be originalist are the biggest supporters of *Shaw* and the most fervent critics of *Gingles*. In many ways, these Justices' application of colorblind principles—originally developed under the Equal Protection Clause—to Fifteenth Amendment cases appears to reflect modern normative preferences more than fidelity to the original understanding of the Reconstruction Amendments.

In this Part, I advance two ways to reconceptualize racial vote dilution claims and the *Gingles* factors. The first argument builds off the Court's holding that the Fourteenth Amendment prohibits intentional racial vote dilution and then rebuts the colorblind concerns that have been articulated in the *Shaw* line of cases and smuggled into Section 2 jurisprudence. Put simply, the Court's unease with recognizing racial bloc voting is totally detached from how the issue was viewed during Reconstruction.

My second claim is that reimagining vote dilution claims as violations of the Fifteenth Amendment is doctrinally defensible, historically justified, normatively preferable, and strategically savvy. This doctrinal reshuffling is not pointless formalism. As Professors Guy-Uriel Charles and Luis Fuentes-Rohwer suggest, when “voting rights lawyers and scholars begin to think of a response to *Shelby County*, they will need to provide a compelling account of what constitutes racial discrimination in voting in the 21st century,” including whether it covers “only state action” or also encompasses “[r]acially polarized voting by the electorate.”<sup>320</sup> This Article answers that call by taking the Fifteenth Amendment seriously as an independent constitutional provision and thinking through how vote dilution doctrine would work under that Amendment.

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319. See *supra* Part II.

320. Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *The Voting Rights Act in Winter: The Death of a Superstatute*, 100 IOWA L. REV. 1389, 1423–24 (2015).

Recall that the Reconstruction Framers differentiated between political and civil rights.<sup>321</sup> Based on that hierarchy of rights, the Reconstruction Framers understood that the Fourteenth Amendment primarily protected civil rights and did not mandate the enfranchisement of any Black voters during Reconstruction.<sup>322</sup> Hence, the need for the Fifteenth Amendment.<sup>323</sup> Modern doctrine, however, papers over the Reconstruction-era understanding of rights.<sup>324</sup>

Reorienting voting rights doctrine toward the Fifteenth Amendment would correct this problem and avoid transplanting the colorblind concerns emanating from the Fourteenth Amendment to the Fifteenth Amendment, where they are an ill fit. This intervention is also important because state action under the Fifteenth Amendment has been traditionally understood to cast a wider net than the Fourteenth Amendment,<sup>325</sup> thus creating more doctrinal breathing room for considering contemporary levels of racial bloc voting and combatting the dilutive schemes that exploit it. Finally, because it is an open question whether *Boerne*'s congruence and proportionality test applies outside the Fourteenth Amendment, Section 2 may be more defensible under the Fifteenth Amendment.

To be clear, my argument in this Article is *not* that the Reconstruction Framers specifically intended to prohibit vote dilution under the Fifteenth Amendment or that the original expected application of that Amendment was to prohibit vote dilution.<sup>326</sup> Rather, my claim is that that the original public meaning of the Fifteenth Amendment does not foreclose an examination of racially polarized voting as part of a vote dilution claim and that, at a minimum, vote dilution claims are within Congress's Fifteenth Amendment enforcement authority.

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321. See *supra* notes 221–27 and accompanying text.

322. See Amar & Brownstein, *supra* note 25, at 928.

323. See Crum, *Superfluous*, *supra* note 25, at 1621.

324. See McConnell, *Desegregation*, *supra* note 223, at 1025 (“[T]he Reconstruction Framers’ categorization of rights plays no part in current interpretation of the Fourteenth Amendment. The distinction between civil and political rights has been utterly obliterated.”).

325. See *supra* Part II.B.

326. See *infra* note 374 and accompanying text. In other words, I am not making an argument based on original intent or original expected application. Cf. Vasam Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution’s Secret Drafting History*, 91 GEO. L.J. 1113, 1114 (2003) (surveying the different schools of originalism).

A. *Reconstructing Shaw and Gingles*

The Reconstruction Framers recognized that a South without Black suffrage was a South with the Black Codes. In the early days of Reconstruction, White southerners' racist preferences were enacted into law through a discriminatory electoral system,<sup>327</sup> albeit one that barred Black citizens from the polls rather than diluted their votes. In seeking to transform the South, the Reconstruction Framers enfranchised Black men in the First Reconstruction Act, assuming that they would vote en masse to support the Republican Party and protect their political interests.

By the time the Reconstruction Framers were debating and passing the Fifteenth Amendment, they had witnessed landslide multiracial elections across the South. The Reconstruction Framers' predictions proved accurate and Black voters overwhelmingly supported Republicans. The upshots were the ratification of the Fourteenth and Fifteenth Amendments, the first-ever Black elected officials, Republican control of the southern constitutional conventions, and the election of President Grant.

And most importantly for present purposes, the Reconstruction Framers did not shy away from recognizing the existence of racial bloc voting. Numerous Republicans—including Representative Boutwell, who introduced the Fifteenth Amendment in the House—were explicit about their belief that Black voters would mobilize as a bloc.<sup>328</sup> The Reconstruction Framers' "arguments in favor of extending the franchise" were thus "grounded on the perceived need for and anticipated benefits of blacks voting *as a coherent force*."<sup>329</sup>

If the Court were to view racially polarized voting through the lens of Reconstruction, the doctrinal tension between *Shaw* and *Gingles* would evaporate. Here, given that *Shaw*'s concerns bled into the criticisms of the *Gingles* factors, they can be treated as two sides of the same coin.

Under the colorblind worldview, Section 2's mandate for creating majority-minority districts threatens to "unnecessarily infuse race into virtually every redistricting [plan], raising serious constitutional

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327. *See supra* Part III.A.

328. *See supra* Part III.B.

329. Amar & Brownstein, *supra* note 25, at 929 (emphasis added).

questions.”<sup>330</sup> The Court’s suspicion of the mere acknowledgement of racial bloc voting under *Gingles* is misguided. For starters, *Shaw* triggers strict scrutiny only if the use of race *predominates* during the redistricting process.<sup>331</sup> The critics of *Gingles*, however, do not limit their complaints about race-based redistricting to those situations.<sup>332</sup> This hair-trigger approach to race would have seemed totally alien during Reconstruction. The Reconstruction Framers frankly discussed the humanitarian—and partisan—importance of Black suffrage.<sup>333</sup> Racial bloc voting was instrumental in the Fifteenth Amendment’s passage and ratification. It would be beyond ironic if those same concerns could no longer be acknowledged under that Amendment.<sup>334</sup>

Underlying the doctrine, the Court seems particularly troubled by the presumption that “members of the same racial group . . . think alike, share the same political interests, and will prefer the same candidates at the polls.”<sup>335</sup> But “[t]he voluntariness of racial and ethnic

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330. *Bartlett v. Strickland*, 556 U.S. 1, 21 (2009) (plurality opinion).

331. *See supra* notes 169–75 and accompanying text. Outside the political realm, the Court has left the door open to situations where race is clearly considered in the decision-making process but explicit racial classifications are not employed. *See Tex. Dep’t of Hous. & Cmty. Affs. v. Inclusive Cmty. Project, Inc.*, 576 U.S. 519, 545 (2015) (“When setting their larger goals, local housing authorities may choose to foster diversity and combat racial isolation with race-neutral tools, and mere awareness of race in attempting to solve the problems facing inner cities does not doom that endeavor at the outset.”); *see also Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 789 (2007) (Kennedy, J., concurring in part and concurring in judgment) (“School boards may pursue the goal of bringing together students of diverse backgrounds and races through other means, including strategic site selection of new schools” and “drawing attendance zones with general recognition of the demographics of the neighborhoods . . .”).

332. *See supra* notes 180–88 and accompanying text.

333. *See supra* Part III.B.

334. *See Amar & Brownstein, supra* note 25, at 919 (“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.”).

335. *Shaw v. Reno*, 509 U.S. 630, 647 (1993). As a doctrinal matter, *Gingles* does no such thing. Plaintiffs bear the burden of establishing the *Gingles* factors and must prove that voting is, in fact, racially polarized. *See Thornburg v. Gingles*, 478 U.S. 30, 50–51 (1986). And indeed, plaintiffs have demonstrated racial bloc voting in numerous lawsuits. *See Katz et al., Documenting Discrimination, supra* note 33, at 756–70 tbl.B (collecting cases). But even this burden of proof is insufficient for *Gingles*’s critics, who claim that, “as practically applied,” the preconditions are “little different from a working assumption that racial groups can be conceived largely as political interest groups.” *Holder v. Hall*, 512 U.S. 874, 905 (1994) (Thomas, J., concurring in the judgment). Of course, defendants sometimes concede certain *Gingles* factors in Section 2 litigation. *See Bartlett*, 556 U.S. at 16 (plurality opinion). But in *Shaw* cases, line drawers must have a “strong basis in evidence” for treating voting as racially polarized. *Cooper v. Harris*, 137 S. Ct. 1455, 1464 (2017); *see also supra* notes 173–75 and accompanying text. This requirement

group affiliation in the political process requires that [racial] groups be recognized as expressing legitimate interests; not to do so would be to denigrate the autonomy of those individuals who choose to affiliate themselves along this axis.”<sup>336</sup> The Reconstruction Framers recognized this fact.<sup>337</sup> The current Court does not. Rather than follow the Reconstruction generation’s view of racial bloc voting, the Court is putting forth its own normative vision of how politics should be organized, how electoral coalitions should be formed, and how citizens should vote.

The Court’s teleological account of racial politics is also divorced from the Constitution.<sup>338</sup> According to the Court, race-based redistricting “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.”<sup>339</sup> Contrary to the Court’s rose-colored view, the Reconstruction Framers assumed that racial bloc voting would persist into the future. Indeed, the Reconstruction Framers pushed through the Fifteenth Amendment because they did not trust White southerners to protect the rights of the freedmen—a concern that was heightened after the Southern States were readmitted to the Union and Congress lacked authority to regulate their suffrage qualifications.<sup>340</sup> And once again, the Reconstruction Framers’ prediction proved tragically correct. The end to Reconstruction revealed the dark side of racial bloc voting, as the Redeemers gerrymandered Black voters out of political power.<sup>341</sup>

Moreover, the Court’s self-aggrandized role in leading our nation to a post-racial future is difficult to square with the historical context of Reconstruction. The Reconstruction Amendments were designed to

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bolsters Section 2’s constitutionality by preventing jurisdictions from merely assuming racial bloc voting.

336. Karlan & Levinson, *supra* note 27, at 1217 (emphasis omitted).

337. *See supra* Part III.B.

338. *See Gerken, Third Way, supra* note 157, at 744–45 (observing that the Court’s cases reflect “a search for the right strategy to bring us closer to the world of normal politics”).

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

340. *See* JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 33 (1980) (discussing the Reconstruction Framers’ distrust of southern legislatures); KLARMAN, *supra* note 227, at 29 (explaining that, after the Southern States were readmitted to the Union, “Congress did not clearly possess alternative, constitutionally permissible means of mandating black suffrage by statute”).

341. *See supra* notes 311–14 and accompanying text.

empower Congress—not the Court—to enforce their provisions.<sup>342</sup> And in 1982, Congress, following much deliberation and after considering evidence of racially polarized voting,<sup>343</sup> revised Section 2 of the VRA to prohibit vote dilution and to encompass a discriminatory effects standard.<sup>344</sup> Congress has determined that racially polarized voting and vote dilution remain serious problems. The Court’s overt skepticism of that choice is inappropriate under the Reconstruction Amendments.

Given the Court’s institutional role, its diagnosis of racial politics is—unsurprisingly—dubious. In seeking to test *Shaw*’s underlying premises, a recent study by Professors Stephen Ansolabehere and Nate Persily concluded that “residents of [majority-minority districts] are indistinguishable from residents of other districts in their answers to questions attempting to measure belief in racial stereotypes.”<sup>345</sup> The study further concluded that “[t]o the extent [that there are] statistically significant differences across districts, those differences are not among racial minorities, but among Whites, and can be explained by the relative conservatism of Southern Whites.”<sup>346</sup> In other words, race-based redistricting has not “balkanize[d] us into competing racial factions.”<sup>347</sup> Or consider the *Shelby County* Court’s claim that “[t]hings have changed in the South,”<sup>348</sup> which was quickly rebutted by a wave of voter-suppression laws enacted after the VRA’s coverage formula was invalidated.<sup>349</sup>

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342. See AMAR, AMERICA’S CONSTITUTION, *supra* note 223, at 361–63 (describing the Reconstruction Framers’ decision to adopt *McCulloch*’s deferential standard for Congress’s Reconstruction Amendment enforcement authority); Balkin, *Reconstruction*, *supra* note 193, at 1805 (“Congress gave itself these powers because it believed it could not trust the Supreme Court to protect the rights of the freedmen.”); McConnell, *Institutions*, *supra* note 210, at 182 (“Section Five of the Fourteenth Amendment was born of the fear that the judiciary would frustrate Reconstruction by a narrow interpretation of congressional power.”).

343. See S. REP. NO. 97-417, at 28–29 (1982) (listing the Senate Factors).

344. See *supra* notes 89–92 and accompanying text.

345. Stephen Ansolabehere & Nathaniel Persily, *Testing Shaw v. Reno: Do Majority-Minority Districts Cause Expressive Harms?*, 90 N.Y.U. L. REV. 1041, 1043 (2015).

346. *Id.* By contrast, the VRA’s “coverage formula actually did a remarkably good job of picking out states whose non-black residents harbor exceptionally negative stereotypes of African Americans.” Elmendorf & Spencer, *Racial Stereotyping*, *supra* note 52, at 1127.

347. *Shaw v. Reno*, 509 U.S. 630, 657 (1993).

348. *Shelby County v. Holder*, 570 U.S. 529, 540 (2013) (alteration in original) (quoting *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 202 (2009)).

349. See, e.g., *Democratic Nat’l Comm. v. Hobbs*, 948 F.3d 989, 999 (9th Cir. 2020) (en banc) (invalidating Arizona’s restrictions on out-of-precinct ballots and third-party ballot collectors),

To be clear, “a political system in which race no longer matters”<sup>350</sup> is a laudable goal. It is also a quintessentially *modern* goal, one at odds with how the Reconstruction Framers viewed the issue. Thus, if the Court thinks that it is the best-positioned institution in our democracy to decouple race and politics, then it needs a different, non-originalist theory for questioning the VRA’s protections and for second-guessing Congress’s solution to the problem of racial discrimination in voting. Or to put it more bluntly, to the extent *Gingles*’s critics think that vote dilution doctrine raises “questions of political philosophy, not questions of law,”<sup>351</sup> they are guilty of the same sin—imposing their own political preferences instead of following their purported adherence to originalism.<sup>352</sup>

Focusing now on *Gingles* and the VRA, recall that Congress relied on its Reconstruction Amendment enforcement authority to adopt Section 2’s discriminatory effects standard.<sup>353</sup> Thus, the “distinction between the constitutional [vote dilution] claim, which requires proof of intent, and the statutory claim, which demands only proof of discriminatory results, will be quite important when the constitutionality of § 2 is challenged.”<sup>354</sup> The greater the overlap

*cert. granted sub nom.* Brnovich v. Democratic Nat’l Comm., No. 19-1257, 2020 WL 5847130 (U.S. Oct. 2, 2020); N.C. State Conf. of the NAACP v. McCrory, 831 F.3d 204, 242 (4th Cir. 2016) (striking down North Carolina’s post-*Shelby County* voter-suppression law); Patino v. City of Pasadena, 230 F. Supp. 3d 667, 673–74 (S.D. Tex. 2017) (finding that city’s post-*Shelby County* redistricting plan intentionally diluted the votes of Hispanic voters).

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

351. *Holder v. Hall*, 512 U.S. 874, 901 (1994) (Thomas, J., concurring in the judgment).

352. Justice Thomas is the Court’s most prominent and uncompromising originalist. He recently questioned the Court’s one-person, one-vote precedent on the grounds that “[t]he Constitution does not prescribe any one basis for apportionment within States.” *Evenwel v. Abbott*, 136 S. Ct. 1120, 1133 (2016) (Thomas, J., concurring in the judgment). Despite his willingness to reconsider some aspects of the Fourteenth Amendment’s application to voting rights, Thomas continues to follow *Shaw*, a doctrine based solely on the Equal Protection Clause. *See Cooper v. Harris*, 137 S. Ct. 1455, 1485–86 (2017) (Thomas, J., concurring) (defending *Shaw*); *Shaw*, 509 U.S. at 649 (holding that the *Shaw* cause of action is premised on the Equal Protection Clause). And in arguing that Section 5 and the VRA’s coverage formula were unconstitutional, Thomas invoked *Boerne* notwithstanding its dubious originalist pedigree. *See Nw. Austin*, 557 U.S. at 225–26 (Thomas, J., concurring in the judgment in part and dissenting in part) (relying on *Boerne*); *Tennessee v. Lane*, 541 U.S. 509, 564 (2004) (Scalia, J., dissenting) (renouncing *Boerne*); McConnell, *Institutions*, *supra* note 210, at 194 (criticizing *Boerne* on originalist grounds). The selectivity of Thomas’s application of originalism to election law cases appears—pardon the pun—gerrymandered.

353. *See supra* Part I.C.

354. Gerken, *Undiluted Vote*, *supra* note 5, at 1674.

between the constitutional and statutory standard, the more likely it is that Section 2 will survive that inevitable constitutional challenge.

Although *Gingles* puts greater emphasis on racial bloc voting in the statutory vote dilution analysis,<sup>355</sup> it has always been part of the constitutional inquiry.<sup>356</sup> The *Gingles* factors, therefore, are a refinement of the constitutional standard, not an abandonment of it. Both the constitutional and statutory tests look to whether minority voters have an equal opportunity to elect candidates of their choice. The *Gingles* factors brought much-needed order and predictability to vote dilution litigation by prioritizing compactness and racial bloc voting in the inquiry.<sup>357</sup>

Finally, under my view, supporters of Section 2 could point to high levels of racially polarized voting—nationwide and especially in the South<sup>358</sup>—to defend against the inevitable constitutional challenge.<sup>359</sup> Put simply, jurisdictions with “racial polarization in voting have a greater need for prophylactic measures to prevent purposeful race discrimination.”<sup>360</sup> And here, it is important to distinguish between the Court’s misconception of the Reconstruction Amendments and the function of the *Gingles* preconditions. Notwithstanding that the Reconstruction Framers assumed racial polarization would continue into the future, the *Gingles* factors do, in fact, place a de facto sunset

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355. Issacharoff, *Polarized Voting*, *supra* note 21, at 1851.

356. See *Rogers v. Lodge*, 458 U.S. 613, 616 (1982) (“The minority’s voting power in a multimember district is particularly diluted when bloc voting occurs and ballots are cast along strict majority-minority lines.”); *supra* Part I.C (discussing *White*’s totality-of-the-circumstances standard).

357. See *supra* note 144–146 and accompanying text.

358. See *supra* Part I.B.

359. The *Shelby County* Court refused to credit evidence of higher rates of racially polarized voting in the South. See *Shelby County v. Holder*, 570 U.S. 529, 578 (2013) (Ginsburg, J., dissenting) (discussing congressional findings about racial bloc voting). Under my theory, Congress could also point to disparate levels of racially polarized voting in crafting a new coverage formula. See Elmendorf & Spencer, *Racial Stereotyping*, *supra* note 52, at 1128 (arguing in favor of a new coverage formula that “treat[s] racial discrimination by voters as the linchpin for coverage”). However, given *Shelby County*’s equal sovereignty principle and its hostility to proxies for unconstitutional conduct, see *Shelby County*, 570 U.S. at 550–51, a coverage formula based solely on racially polarized voting may raise constitutional concerns. See Travis Crum, *The Voting Rights Advancement Act of 2019*, TAKE CARE BLOG (Mar. 1, 2019), <https://takecareblog.com/blog/the-voting-rights-advancement-act-of-2019> [<https://perma.cc/9ENA-FH7L>] (explaining that coverage formulas based on proxies are more open to constitutional challenge).

360. *Shelby County*, 570 U.S. at 578 (Ginsburg, J., dissenting).

date on Section 2.<sup>361</sup> If our nation ever does achieve a post-racial politics, then Section 2 will no longer have a role to play in vote dilution litigation.

Instead of refusing to even acknowledge the realities of racially polarized voting, the Court should recognize that Section 2 plays an invaluable role in ensuring that minority voters' political power is not diminished by the use of redistricting plans and dilutive schemes that predictably exploit racial bloc voting.

### *B. Reconstructing the Fifteenth Amendment*

The Court has repeatedly declined to decide whether the Fifteenth Amendment encompasses vote dilution claims.<sup>362</sup> But if such claims are cognizable under the Fifteenth Amendment's substantive scope or within Congress's Fifteenth Amendment enforcement authority, then there are good reasons *not* to transplant the Fourteenth Amendment's colorblind principles to vote dilution doctrine. This reorientation of voting rights doctrine to the Fifteenth Amendment responds to each of the concerns articulated above concerning *Gingles* in particular and vote dilution doctrine more generally.<sup>363</sup>

1. *Race-Based Redistricting.* At the risk of repetition, the Court has voiced concern that Section 2 will entrench racial divisions and compel the overt consideration of race in redistricting.<sup>364</sup> These concerns mirror the Court's hostility to race-conscious laws and represent yet another instantiation of "[t]he idea that equal protection might affirmatively prohibit the use of statutory disparate impact standards."<sup>365</sup> This criticism of Section 2 stems from the Court's conflation of the Fourteenth and Fifteenth Amendments as well as its

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361. See Gerken, *Third Way*, *supra* note 157, at 745; Karlan, *Two Section Twos*, *supra* note 106, at 741.

362. See, e.g., *Voinovich v. Quilter*, 507 U.S. 146, 159 (1993).

363. See *supra* Part II. There are two ways litigants could establish that the Fifteenth Amendment encompasses vote dilution claims. They could wait and defend Section 2 against a future constitutional challenge under a Fifteenth Amendment theory. Alternatively, they could go on the offense and bring constitutional claims as part of an attempt to "bail-in" a jurisdiction under the VRA. See Crum, *Pocket Trigger*, *supra* note 133, at 2035 (arguing that Section 3(c) could be used to "relitigate the outer limits of the Fourteenth and Fifteenth Amendments"). This latter strategy has the potential upshot of creating precedent that could later be invoked to defend Section 2.

364. See *supra* Part II.A.

365. Primus, *supra* note 190, at 495.

refusal to acknowledge the differences between political and civil rights.<sup>366</sup> In other words, the Court has improperly transplanted colorblind principles from its equal protection jurisprudence to the voting rights realm. But the well-worn debate between proponents of the anticlassification and antisubordination principles is an odd fit for the Fifteenth Amendment.<sup>367</sup>

For the Reconstruction Framers, the relevant touchstone was equal access to suffrage and the empowerment of Black voters,<sup>368</sup> not the colorblind notion that race and politics should not intersect. The Reconstruction Framers were well aware that Black and White voters in the former Confederacy had dramatically divergent interests and that these differences would be reflected in their preferred political parties. As such, the Reconstruction Framers recognized that political rights were exercised by *groups*, not just individuals.

And rather than treat racial bloc voting as a taboo, the Reconstruction Framers repeatedly referenced it as a *reason* to pass the Fifteenth Amendment. To be sure, that reason mingled altruistic concerns with partisan self-interest. But everyone—including opponents—recognized what was at stake in passing the Fifteenth Amendment: the empowerment of a new Black voter base in the Border States and additional federal protections for already enfranchised Black voters in the South.<sup>369</sup>

Moreover, the political power wielded by Black voters during Reconstruction was substantial. After the passage of the First Reconstruction Act, Black voters were effective majorities in five states.<sup>370</sup> Racial bloc voting thus allowed Black voters to push through

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366. See, e.g., Issacharoff, *Polarized Voting*, *supra* note 21, at 1845; Crum, *Superfluous*, *supra* note 25, at 1564–65.

367. Cf. Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L.J. 1278, 1280–81 (2011) (outlining this debate). To simplify somewhat, the colorblind, or anticlassification, school of thought believes that explicit racial classifications are unconstitutional “except as a remedy for specific wrongdoing,” *id.*, and has begun to question the constitutionality of “race-conscious, facially neutral initiatives,” *id.* at 1282. By contrast, the antisubordination school of thought “would allow (or require) government to remedy practices that entrench historic inequalities among racial groups.” *Id.* Professor Reva Siegel goes beyond this classic dichotomy and identifies a third school of thought—the antibalkanization school—which “understands that race-conscious, facially neutral interventions may promote social cohesion by promoting equal opportunity.” *Id.* at 1283.

368. See, e.g., CONG. GLOBE, 40th Cong., 3d Sess. 983 (1869) (statement of Sen. Ross) (“The ballot is as much the bulwark of liberty to the black man as it is to the white.”).

369. See *supra* Part III.

370. See FONER, *supra* note 227, at 294 n.27; VALELLY, *supra* note 257, at 32–33 tbl.2.1.

the new southern constitutions and ensured that Republicans controlled all of those conventions. Although relegated to minority status in the country as a whole, Black voters could control governments in the South, where they were demographically concentrated at the time.<sup>371</sup> Given our nation's federal structure, Black suffrage "create[d] a distinct type of political space . . . where [nationwide] electoral minorities [could] enjoy the dignity to decide" their own fate.<sup>372</sup> By mobilizing as a group, Black voters were able to protect their own interests.<sup>373</sup>

This theoretical account raises the question: Does the Fifteenth Amendment protect against vote dilution? Turning to the Fifteenth Amendment's text, two key phrases signal the Amendment's broad potential application.<sup>374</sup> First, the Fifteenth Amendment protects the "right . . . to vote."<sup>375</sup> That term, however, is not self-defining.<sup>376</sup> On a narrow view, the right to vote means the basic mechanics of registering, casting a ballot, and having it counted.<sup>377</sup> But on a broader view, the right to vote could mean the right to cast a *meaningful* ballot. In other words, the right to vote encompasses the right to not have one's vote

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371. See *supra* notes 256–61 and accompanying text (discussing demographics of Reconstruction). That said, Black voters were rarely represented in proportion to their percentage in the population, see *supra* notes 265–66, and "their very unanimity as Republicans meant their ballots could be taken for granted by party leaders seeking the white vote," FONER, *supra* note 227, at 331.

372. Gerken, *Second-Order*, *supra* note 116, at 1104; see also Heather K. Gerken, *Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4, 48–59 (2010) (arguing that federalism allows racial minorities to control certain institutions).

373. As is well-known, Reconstruction ended in tragedy. In addition to the exploitation of racial bloc voting by Redemption-era gerrymanders, Black voting power was nullified by an unrelenting campaign of terror, fraud, and outright disenfranchisement. See FONER, *supra* note 227, at 590; see also *supra* notes 311–14 and accompanying text. Moreover, as recent partisan gerrymandering cases have demonstrated, it is possible to dilute the votes of a majority party. See *Gill v. Whitford*, 138 S. Ct. 1916, 1925 (2018) (observing that Wisconsin "Democrats [would] need[] 54% of the statewide vote to secure a majority in the legislature").

374. In keeping with this Article's attempt to engage *Gingles's* critics, I advance mainly originalist and textualist arguments. In the discussion that follows, I am not purporting to fully address the metes and bounds of the Fifteenth Amendment. See *infra* notes 375–96 and accompanying text. That is a task for a future article.

375. U.S. CONST. amend. XV, § 1.

376. Cf. Pamela S. Karlan, *The Rights To Vote: Some Pessimism About Formalism*, 71 TEX. L. REV. 1705, 1719 (1993) (conceptualizing the right to vote as a participatory right, an aggregative right, and a right of governance).

377. See *City of Mobile v. Bolden*, 446 U.S. 55, 65 (1980) (plurality opinion) (construing the Fifteenth Amendment as limited to whether racial minorities can "register and vote without hindrance").

diluted—an opportunity to elect one’s candidate of choice.<sup>378</sup> The Fifteenth Amendment, moreover, does not specify that the “right to vote” is tied to any particular election, and the Court has construed that phrase to apply broadly.<sup>379</sup>

Second, the Fifteenth Amendment prohibits the “deni[al] or abridg[ement]” of the right to vote.<sup>380</sup> The fact that the Reconstruction Framers selected two verbs is telling. An interpretation of the Fifteenth Amendment limited to mere vote denial claims would “render[] some words altogether redundant.”<sup>381</sup> Indeed, as Justice Marshall explained 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.”<sup>382</sup>

But this is more than just disjunctive phrasing. The Reconstruction Framers’ use of the word “abridged” militates in favor of broadly protecting the right to vote. At the time, dictionaries defined “abridge” as “to contract,” “to diminish,” or “[t]o deprive of.”<sup>383</sup> Today, the word “abridge” similarly means “to reduce in scope” or to “diminish.”<sup>384</sup> And since the term “denied” adequately captures the scenario where a voter is prevented from casting their ballot, the term “abridge” presumably carries this broader meaning.

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378. See 52 U.S.C. § 10301(b) (2018); *White v. Regester*, 412 U.S. 755, 766 (1973).

379. See *Rice v. Cayetano*, 528 U.S. 495, 523 (2000) (“The [Fifteenth] Amendment applies to ‘any election in which public issues are decided or public officials selected.’” (quoting *Terry v. Adams*, 345 U.S. 461, 468 (1953) (plurality opinion))); see also *Davis v. Guam*, 932 F.3d 822, 830 (9th Cir. 2019) (“The text of the Fifteenth Amendment states broadly that the right ‘to vote’ shall not be denied. It does not qualify the meaning of ‘vote’ in any way.” (citation omitted)).

380. U.S. CONST. amend. XV, § 1.

381. *Gustafson v. Alloyd Co.*, 513 U.S. 561, 574 (1995); see also *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803) (“It cannot be presumed that any clause in the constitution is intended to be without effect.”); ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 174–79 (2012) (discussing the surplusage canon).

382. *Bolden*, 446 U.S. at 126 (Marshall, J., dissenting).

383. JOHNSON’S ENGLISH DICTIONARY 58 (J.R. Worcester ed., Phila., Jas. B. Smith & Co. 1859); see also JOSEPH E. WORCESTER, *A DICTIONARY OF THE ENGLISH LANGUAGE* 6 (Bos., Swan, Brewer & Tileston 1860) (“To curtail; to reduce; to contract; to diminish.”); WILLIAM G. WEBSTER & WILLIAM A. WHEELER, *A DICTIONARY OF THE ENGLISH LANGUAGE* 2 (N.Y. & Chi., Ivison, Blakeman, Taylor & Co. 1878) (“To deprive; to cut off.”). Here, I avoid citing the definitions that clearly reference the abridged version of a published work and focus instead on the more generic definitions.

384. *Abridge*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/abridge> [<https://perma.cc/3XK4-YHKR>].

Moreover, “[w]hen seeking to discern the meaning of a word in the Constitution, there is no better dictionary than the rest of the Constitution itself.”<sup>385</sup> Prior to the Fifteenth Amendment’s passage, the word “abridge”—or its variations—appeared three times in the Constitution.<sup>386</sup>

Most famously, the First Amendment provides that “Congress shall make no law . . . abridging the freedom of speech.”<sup>387</sup> Of course, there is substantial case law interpreting the First Amendment to broadly protect free speech.<sup>388</sup> Just as the First Amendment has been expansively construed to protect free expression, so too should the Fifteenth Amendment be read to protect the right to vote free of racial discrimination.

In addition, the Fourteenth Amendment uses the word “abridge” not once, but twice. Section One provides that “[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.”<sup>389</sup> Unlike the First Amendment, there is scant doctrine on the meaning of the word “abridge” in the Fourteenth Amendment. The Privileges or Immunities Clause is essentially a

385. *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 135 S. Ct. 2652, 2681 (2015) (Roberts, C.J., dissenting); *see also* Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 748 (1999) (defining intratextualism as “read[ing] a contested word or phrase that appears in the Constitution in light of another passage in the Constitution featuring the same (or a very similar) word or phrase”).

386. Since the Fifteenth Amendment, the word “abridged” has been used in every subsequent voting rights amendment that has prohibited discriminatory voter qualifications. *See* U.S. CONST. amend. XIX (concerning women’s suffrage); U.S. CONST. amend. XXIV (concerning poll tax); U.S. CONST. amend. XXVI (concerning age).

As this Article was in the penultimate stage of publication, a divided panel of the Fifth Circuit held that “an election law abridges a person’s right to vote for the purposes of the Twenty-Sixth Amendment only if it makes voting *more difficult* for that person than it was before the law was enacted or enforced.” *Tex. Democratic Party v. Abbott*, No. 20-50407, 2020 WL 5422917, at \*15 (5th Cir. Sept. 10, 2020). For critiques of this badly reasoned decision, *see* Travis Crum, *Abridging the Right to Vote in the Fifth Circuit*, TAKE CARE BLOG (Sept. 15, 2020), <https://takecareblog.com/blog/abridging-the-right-to-vote-in-the-fifth-circuit> [<https://perma.cc/LY55-2YP5>], and Joshua A. Douglas, Opinion, *A Texas Federal Court Decision is the Latest Hit to Voting Rights in America*, CNN (Sept. 12, 2020, 7:56 PM), <https://www.cnn.com/2020/09/12/opinions/voting-rights-texas-26th-amendment-election-douglas/index.html> [<https://perma.cc/T5YS-T73M>].

387. U.S. CONST. amend. I.

388. *See, e.g.,* *Police Dep’t of Chi. v. Mosley*, 408 U.S. 92, 95 (1972) (“[T]he First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.”).

389. U.S. CONST. amend. XIV, § 1.

doctrinal dead letter, though not because of the word “abridge.”<sup>390</sup> Section Two authorizes a reduction of a state’s seats in the House of Representatives if “the right to vote” of any adult male citizens is “denied . . . or in any way abridged.”<sup>391</sup> Section Two’s apportionment penalty has never been enforced by Congress,<sup>392</sup> but the connection between the “deni[al] . . . or . . . abridg[ment]”<sup>393</sup> of the right to vote and a reduction in House seats underscores the Reconstruction Framers’ understanding that political rights were exercised collectively. Given the temporal closeness between the Fourteenth and

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390. See *McDonald v. City of Chicago*, 561 U.S. 742, 758–59 (2010) (plurality opinion) (declining to revive the Privileges or Immunities Clause); *The Slaughter-House Cases*, 83 U.S. 36, 78–79 (1872) (narrowly construing the Privileges or Immunities Clause as protecting rights associated with federal citizenship).

391. U.S. CONST. amend. XIV, § 2. Scholars have recently turned their attention to Section Two and debated its ongoing relevance. See AMAR, UNWRITTEN CONSTITUTION, *supra* note 24, at 188 (arguing that Section Two “provides the missing foundations for the general ‘right to vote’ championed by the Warren [Court] majority”); Gabriel J. Chin, *Reconstruction, Felon Disenfranchisement, and the Right To Vote: Did the Fifteenth Amendment Repeal Section 2 of the Fourteenth Amendment?*, 92 GEO. L.J. 259, 260 (2004) (arguing that Section Two was “repealed upon ratification of the Fifteenth Amendment”); Michael Hurta, Note, *Counting the Right To Vote in the Next Census: Reviving Section Two of the Fourteenth Amendment*, 94 TEX. L. REV. 147, 170–73 (2015) (arguing that the Census Bureau or a court should enforce Section Two); Magliocca, *supra* note 242, at 776 (arguing that the current statutory scheme for apportioning representatives violates Section Two); Earl M. Maltz, *The Forgotten Provision of the Fourteenth Amendment: Section 2 and the Evolution of American Democracy*, 76 LA. L. REV. 149, 178 (2015) (“[C]haracterizing Section 2 as fully embracing the modern ideal of one person, one vote would be a mistake.”); Michael T. Morley, *Remedial Equilibration and the Right to Vote Under Section 2 of the Fourteenth Amendment*, 2015 U. CHI. LEGAL F. 279, 310 (2015) (“A requirement that applied to persons of all races did not ‘abridge’ anyone’s right to vote on account of race.”); Tolson, *Abridgment*, *supra* note 225, at 458 (“Section 2 of the Fourteenth Amendment was the Reconstruction Congress’s attempt to constitutionalize a mechanism that would allow Congress to all but legislate universal suffrage . . .”).

In July 2020, the Trump Administration sought to exclude undocumented immigrants from the congressional apportionment process on the grounds that those undocumented immigrants are not “inhabitants” for purposes of Section Two. See Hansi Lo Wang, *With No Final Say, Trump Wants To Change Who Counts For Dividing Up Congress’ Seats*, NPR (July 21, 2020, 6:34 PM), <https://www.npr.org/2020/07/21/892340508/with-no-final-say-trump-wants-to-change-who-counts-for-dividing-up-congress-seat> [https://perma.cc/85GK-3XLN] (discussing a Trump Administration memorandum calling for “the exclusion of unauthorized immigrants from the numbers used to divide up seats in Congress among the states”); see also *New York v. Trump*, 20-CV-5770, 2020 WL 5422959, at \*32 (S.D.N.Y. Sept. 10, 2020) (holding that the Trump Administration memorandum violates two statutory provisions governing reapportionment). Alabama has also filed a lawsuit seeking to exclude undocumented immigrants from the reapportionment process. See *Alabama v. U.S. Dep’t of Com.*, 396 F. Supp. 3d 1044, 1046 (N.D. Ala. 2019). At the time of writing, these disputes have not been fully resolved.

392. See Magliocca, *supra* note 242, at 783.

393. U.S. CONST. amend. XIV, § 2.

Fifteenth Amendments and that “abridged” in Section Two is tied to voting rights, a similar inference should be applied to the Fifteenth Amendment.<sup>394</sup>

Here, I do not purport to exhaustively address whether the Fifteenth Amendment prohibits vote dilution.<sup>395</sup> Rather, my claim is that the Fifteenth Amendment permits mapmakers, courts, and Congress to consider racially polarized voting and that, even if the Fifteenth Amendment does not *itself* proscribe vote dilution, Congress may take that additional step under its enforcement authority.<sup>396</sup>

2. *Private Action.* Reframing vote dilution as a Fifteenth Amendment injury provides a powerful response to the criticism that racial bloc voting is private action. Although the Fifteenth Amendment’s text refers to the states and the federal government, the Court has interpreted the Amendment to prohibit certain private actions that interfere with the right to vote free of racial discrimination. Shortly after the Fifteenth Amendment’s ratification, Congress passed laws prohibiting private electoral violence,<sup>397</sup> and the Supreme Court upheld those laws.<sup>398</sup> It was not until 1903 that the Court imposed a

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394. See Franita Tolson, *The Constitutional Structure of Voting Rights Enforcement*, 89 WASH. L. REV. 379, 414 (2014) (“[T]he textual and historical link between section 1 of the Fifteenth Amendment and section 2 of the Fourteenth Amendment . . . mandate that they be interpreted in light of each other in determining the scope of congressional authority.”).

395. See *supra* note 374.

396. See *infra* Part IV.B.3.

397. An Act To Enforce the Right of Citizens of the United States To Vote in the Several States of this Union, ch. 114, § 5, 16 Stat. 140, 141 (1870); cf. McConnell, *Desegregation*, *supra* note 223, at 984 (“The actions taken by Congress from 1868 through 1875 to enforce the Fourteenth Amendment and the congressional deliberations over those measures thus present the best available evidence of the original understanding of the meaning of the Amendment . . .”). The statute that was proposed simultaneously with the Fifteenth Amendment also covered private action. See Crum, *Superfluous*, *supra* note 25, at 1605 n.379 (discussing H.R. 1667, 40th Cong. (1869)).

398. See *Ex parte Yarbrough*, 110 U.S. 651, 665–66 (1884) (holding that Congress could prohibit private interference with the right to vote free of racial discrimination under the Fifteenth Amendment). In *United States v. Reese*, 92 U.S. 214 (1875), the Court invalidated two provisions of the Enforcement Act of 1870. Section 3 imposed criminal penalties on election officials who “wrongfully refuse[d] or omit[ted] to receive [or] count . . . the vote of such citizen.” *Id.* at 217. Section 4 imposed criminal penalties on “any *person* who shall, by force, bribery, threats, intimidation, or other unlawful means, hinder [or] delay . . . any citizen from doing any act required to be done to qualify him to vote, or from voting, in any election.” *Id.* (emphasis added). Section 3 thus targeted state actors whereas Section 4 proscribed public and private conduct. The Court invalidated both provisions because Congress had not specified that the denial of the right to vote needed to be based on race, color, or previous condition of servitude—not because Section

state action requirement on the Fifteenth Amendment.<sup>399</sup> Nonetheless, the Court subsequently adopted an expansive interpretation of state action under the Fifteenth Amendment, including primaries held by private clubs.<sup>400</sup> Read together, these cases “provide[] precedent for congressional proscription of private conduct under the [F]ifteenth [A]mendment.”<sup>401</sup>

The Court, therefore, conceives of state action more broadly under the Fifteenth Amendment than under the Fourteenth.<sup>402</sup> This creates much-needed doctrinal space for considering high levels of racially polarized voting as part of the *Gingles* inquiry and for defending Section 2 more generally. And the fact that the Reconstruction Framers repeatedly referenced racial bloc voting in passing the Fifteenth Amendment means that it should remain proper to take that phenomenon into account today.

To be sure, even if racial bloc voting is deemed private action, that is a separate question from whether Congress and the judiciary can consider its existence when determining the legality of a particular electoral scheme. A redistricting plan itself is state action; it is, after all, a law passed by a state or locality.<sup>403</sup> Rehnquist and Thomas therefore err in focusing on racial bloc voting because the relevant action for vote dilution purposes is the dilutive scheme itself.

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4 criminalized private action. *See id.* at 218 (“It is only when the wrongful refusal at such an election is because of race, color, or previous condition of servitude, that Congress can interfere, and provide for its punishment.”); *see also* Katz, *Reinforcing Representation*, *supra* note 208, at 2360 (“*Reese* . . . establish[es] definitively that Congress can broadly reach private action when acting to enforce the Fifteenth Amendment’s proscription on race-based discrimination in voting.”).

399. *See* James v. Bowman, 190 U.S. 127, 138–39 (1903); Tolson, *Spectrum*, *supra* note 194, at 337 (discussing *James*’s unprecedented holding).

400. *See* Terry v. Adams, 345 U.S. 461, 469–70 (1953) (plurality opinion) (concluding that the Jaybird Association’s exclusion of Black people from its Democratic Party straw poll qualified as state action and thus violated the Fifteenth Amendment).

401. Note, *The Strange Career of “State Action” under the Fifteenth Amendment*, 74 YALE L.J. 1448, 1459 (1965). Similar questions about state action arose under the VRA, and the Court took an expansive view of state action there as well. *See* Morse v. Republican Party of Va., 517 U.S. 186, 219 (1996) (plurality opinion) (determining that a change to political party’s nominating process had to be precleared under Section 5 of the VRA).

402. The Fourteenth Amendment does not cover private action. *See supra* Part II.B.

403. *See* Karlan & Levinson, *supra* note 27, at 1203 (“Although states cannot prohibit racially polarized voting directly, race-conscious districting offers an effective technique for combating its effects.”). This point applies to both the Fourteenth and Fifteenth Amendments.

3. *Congress's Fifteenth Amendment Enforcement Authority.* Finally, reconceptualizing vote dilution claims under the Fifteenth Amendment will help rebut arguments that Congress exceeded its enforcement authority when it revised Section 2 in 1982. Even if vote dilution claims fall outside the Fifteenth Amendment's substantive scope, that is not the end of the matter.<sup>404</sup> After all, Congress may pass "appropriate" legislation to enforce the Fifteenth Amendment.<sup>405</sup> As the above discussion demonstrates, the Fifteenth Amendment contains ambiguous language.<sup>406</sup> Although "Congress may enact so-called prophylactic legislation"<sup>407</sup> under *Boerne's* court-centric view of constitutional interpretation,<sup>408</sup> it would have greater leeway to independently interpret the scope of the "right . . . to vote" and the meaning of "abridge" under *Katzenbach's* rationality standard.<sup>409</sup> Thus, Section 2 is on far firmer constitutional ground if *Katzenbach* supplies the governing constitutional standard.

Although the Reconstruction Amendments contain "virtually identical" enforcement clauses,<sup>410</sup> there are good reasons for differentiating between them in light of current doctrine. The Fifteenth Amendment's targeted protections against racial discrimination in voting raise far fewer separation-of-powers concerns than the Fourteenth Amendment's capacious language.<sup>411</sup> The Court, moreover, has never decided whether *Boerne's* congruence and proportionality test applies to the Fifteenth Amendment. None of the *Boerne* line of cases "involve[] race, voting, the Fifteenth Amendment,

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404. Strictly speaking, it is unnecessary for the Court to clearly define the substantive scope of the underlying constitutional right under *Katzenbach's* rationality standard. See *Katzenbach v. Morgan*, 384 U.S. 641, 645, 648 (1966). The same is not true under *Boerne*. See *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 365 (2001).

405. U.S. CONST. amend. XV, § 2.

406. See *supra* Part IV.B.1.

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

408. See *City of Boerne v. Flores*, 521 U.S. 507, 527 (1997) ("Any suggestion that Congress has a substantive, non-remedial power under the Fourteenth Amendment is not supported by our case law.").

409. See McConnell, *Institutions*, *supra* note 210, at 184 (noting that, under *Katzenbach*, the question is "whether the congressional interpretation is within a reasonable range of plausible interpretations—not whether it is the same as the Supreme Court's").

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

411. See Akhil Reed Amar, *The Lawfulness of Section 5—And Thus of Section 5*, 126 HARV. L. REV. F. 109, 119–20 (2013); Evan H. Caminker, "Appropriate" Means-Ends Constraints on Section 5 Powers, 53 STAN. L. REV. 1127, 1190–91 (2001); Crum, *Superfluous*, *supra* note 25, at 1626.

or Congress's authority to remedy racial discrimination in voting."<sup>412</sup> Furthermore, the *Shelby County* Court did not hold that *Boerne* applies to the Fifteenth Amendment.<sup>413</sup>

Rather, "*Shelby County*'s equal sovereignty principle is an example of freestanding federalism and is thus limited to laws that differentiate between the states."<sup>414</sup> In *Allen v. Cooper*,<sup>415</sup> the Court confronted its first post-*Shelby County* case concerning Congress's Fourteenth Amendment enforcement authority.<sup>416</sup> In striking down a nationwide statute,<sup>417</sup> the *Allen* Court applied *Boerne*'s congruence and proportionality test and failed to even cite *Shelby County*.<sup>418</sup> The omission of *Shelby County*'s equal sovereignty language was perhaps unsurprising given that the challenged statute did not differentiate between the states. However, *Allen* also omitted any reference to *Shelby County*'s requirement that "a statute's 'current burdens' must

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412. Crum, *Superfluous*, *supra* note 25, at 1575. Some Justices may be open to applying *Katzenbach*'s rationality standard to statutes enacted under Congress's Fourteenth Amendment enforcement authority to remedy racial discrimination. Indeed, Justice Scalia adhered to this position. See *Tennessee v. Lane*, 541 U.S. 509, 564 (2004) (Scalia, J., dissenting) (renouncing *Boerne* and stating that "principally for reasons of *stare decisis*, I shall henceforth apply the permissive *McCulloch* standard to congressional measures designed to remedy racial discrimination by the States").

413. See Elmendorf & Spencer, *Racial Stereotyping*, *supra* note 52, at 1129 ("*Shelby County* dodged an important question about the standard of review . . ."); Richard L. Hasen, *Shelby County and the Illusion of Minimalism*, 22 WM. & MARY BILL RTS. J. 713, 727 (2014) (criticizing "the Court's decision to sidestep the standard of review" question in *Shelby County*); Tolson, *Spectrum*, *supra* note 194, at 337 ("It is unclear if *City of Boerne* also applies to the Fifteenth Amendment . . .").

414. Crum, *Superfluous*, *supra* note 25, at 1575–76 (quotation marks and footnote omitted). Coined by Professor John Manning, the concept of freestanding federalism describes cases where the Court employs a structural argument to invalidate a federal statute "without purporting to ground its decision[] in any particular provision of the constitutional text." John F. Manning, *Federalism and the Generality Problem in Constitutional Interpretation*, 122 HARV. L. REV. 2003, 2005 (2009). Other scholars have argued that *Shelby County* is an example of freestanding federalism. See Colby, *supra* note 233, at 1168; Leah M. Litman, *Inventing Equal Sovereignty*, 114 MICH. L. REV. 1207, 1259 (2016); cf. Tolson, *Reinventing*, *supra* note 186, at 1259 (predicting after *Northwest Austin* that its "free-floating federalism norm [ould] raise the evidentiary threshold so high that Congress could never amass enough evidence of voting discrimination to justify the renewal of section 5 or develop a coverage formula").

415. *Allen v. Cooper*, 140 S. Ct. 994 (2020).

416. See Travis Crum, *The Curious Disappearance of Shelby County*, ELECTION L. BLOG (Mar. 27, 2020, 7:03 AM), <https://electionlawblog.org/?p=110263> [<https://perma.cc/4DXZ-2NLF>].

417. See *Allen*, 140 S. Ct. at 1007 (finding that Congress's abrogation of state sovereign immunity in the Copyright Remedy Clarification Act of 1990 was unconstitutional).

418. See *id.* at 1004–05.

be justified by ‘current needs,’”<sup>419</sup> demonstrating that this prong of the test is contingent on a differentiation between the states.<sup>420</sup> *Allen* thus established that *Shelby County* is limited to coverage formulas. Given that Section 2 is a “nationwide ban on racial discrimination,”<sup>421</sup> *Shelby County*’s equal sovereignty principle is simply not implicated.

Accordingly, defending Section 2 under the Fifteenth Amendment and *Katzenbach*’s rationality standard is not only doctrinally open but also strategically savvy because Congress would be given far greater interpretive and remedial authority to protect the right to vote. And that is true regardless of whether the Fifteenth Amendment *itself* prohibits vote dilution.

To sum up, there are several doctrinal payoffs for reconceptualizing vote dilution claims under the Fifteenth Amendment. First, grounding racial vote dilution claims in the Fifteenth Amendment is more historically appropriate given the Reconstruction Framers’ views on the Fourteenth and Fifteenth Amendments’ protections for distinct bundles of rights. And because the Court’s colorblind vision of the Equal Protection Clause ignores the key differences between voting rights and other rights, defending racial vote dilution claims under the Fifteenth Amendment will encourage jurists to rethink how they have applied Fourteenth Amendment principles to Fifteenth Amendment cases. Second, the Fifteenth Amendment casts a wider net than the Fourteenth Amendment for what qualifies as state action. As such, the Court can properly look at the interaction between racial bloc voting and dilutive schemes in adjudicating redistricting suits and determining whether Section 2 is constitutional. And finally, because Congress has greater leeway under current doctrine to enforce the Fifteenth Amendment than the Fourteenth Amendment, Section 2 is on firmer ground against the inevitable constitutional challenge.

## CONCLUSION

The Supreme Court’s aversion to acknowledging the reality of racially polarized voting and its hostility to race-based redistricting have shaped voting rights doctrine for over twenty-five years. The

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419. *Shelby County v. Holder*, 570 U.S. 529, 550 (2013) (quoting *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 204 (2009)).

420. See Crum, *Superfluous*, *supra* note 25, at 1576 (arguing that *Shelby County* “melled these two principles into one standard”).

421. *Shelby County*, 570 U.S. at 557.

Court's approach, however, ignores the historical context of Reconstruction and the important differences between the Fourteenth and Fifteenth Amendments.

Racial bloc voting was not a taboo that went unmentioned by the Reconstruction Framers. Rather, it was a key reason motivating the Fifteenth Amendment's passage and ratification. And because racially polarized voting is a prerequisite to a vote dilution claim, reconstructing racially polarized voting moves those claims far closer to the heart of the Reconstruction Amendments and bolsters the constitutionality of the *Gingles* factors and Section 2. This historical intervention also reorients voting rights doctrine toward the Fifteenth Amendment and away from the colorblind concerns that have animated equal-protection and voting-rights jurisprudence for the past few decades.