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THE CONSTITUTIONAL STRUCTURE OF VOTING RIGHTS ENFORCEMENT

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Abstract: Scholars and courts have hotly debated whether the preclearance regime of the Voting Rights Act is constitutional under the Reconstruction Amendments. In answering this question, this Article is the first to consider the effect of section 2 of the Fourteenth Amendment on the scope of Congress’s enforcement authority. Section 2 allows Congress to reduce the size of a state’s delegation in the House of Representatives if the state abridges the right to vote in state and federal elections for any reason, “except for participation in rebellion, or other crime.” This Article contends that section 2 influences the scope of congressional authority under section 5 of the Fourteenth Amendment, which gives Congress the power to enforce the amendment through appropriate legislation. Section 2—with its low threshold for violations (i.e., abridgment on almost any grounds) that trigger a relatively extreme penalty (reduced representation)—illustrates the proper means-ends fit for congressional legislation passed pursuant to section 5 to address voting rights violations. Renewed focus on section 2 also sheds light on the textual and historical links between the Fourteenth and Fifteenth Amendments, links that provide a broad basis for Congress to regulate state and federal elections. Contrary to the Supreme Court’s recent decision in *Shelby County v. Holder*, this Article concludes that requiring preclearance of all electoral changes instituted by select jurisdictions under the Voting Rights Act is actually a lesser penalty than reduced representation under section 2, and thus is consistent with Congress’s broad authority to regulate voting and elections under the Fourteenth and Fifteenth Amendments.

INTRODUCTION	380
I. CONGRUENCE, PROPORTIONALITY, AND THE INTERPRETIVE FRAMEWORK OF SECTION 2 OF THE FOURTEENTH AMENDMENT	387
A. Reevaluating the Congruence and Proportionality Standard in the Context of Voting and Elections	389

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B.	“The Greater Includes the Lesser”: The Relationship Between Sections 2 and 5 of the Fourteenth Amendment..	394
1.	Section 2 in the Legal Scholarship	395
2.	The Spectrum of Congressional Authority over Elections	398
II.	THE PRESCIENCE OF THE THIRTY-NINTH CONGRESS: VOTING, STATE SOVEREIGNTY, AND THE FOURTEENTH AND FIFTEENTH AMENDMENTS.....	404
A.	Discovering the Framers’ Intent: Section 2 of the Fourteenth Amendment as the Baseline for Voting Rights Remedies.....	405
B.	Discovering the Framers’ Intent: The Scope of Congressional Enforcement Authority over Voting Rights	413
1.	The Historical Link Between Section 2 of the Fourteenth Amendment and Section 1 of the Fifteenth Amendment.....	414
2.	The Enforcement Act of 1870 as a Model for Voting Rights Legislation Under the Fourteenth and Fifteenth Amendments	422
III.	THE INTRATEXTUAL LEGACY OF THE FOURTEENTH AND FIFTEENTH AMENDMENTS: ASSESSING THE CONSTITUTIONALITY OF PRECLEARANCE	425
A.	Preventing Circumvention Through the Overbreadth of Preclearance.....	426
B.	New Coverage Formula?: Discriminatory Intent and the Fallacy of Equal Sovereignty	432
	CONCLUSION	438

INTRODUCTION

The Voting Rights Act of 1965 (VRA or the Act) is one of the most important pieces of civil rights legislation ever enacted, reflecting Congress’s expansive authority to regulate state and federal elections post-Reconstruction.¹ The Act is responsible for eradicating much of the discrimination in voting that had long relegated minorities to second-class citizenship. In 2009, the Supreme Court declined to resolve a constitutional challenge to section 5 of the Act,² which requires certain covered states and jurisdictions to preclear all changes to their election

1. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (2006)).

2. See *Nw. Austin Mun. Util. Dist. No. One v. Holder (NAMUDNO)*, 557 U.S. 193, 197 (2009).

laws with the federal government before the changes can go into effect.³ But just four years later, in *Shelby County v. Holder*,⁴ the Court invalidated the VRA's coverage formula in section 4(b), essentially rendering section 5 void by eliminating the mechanism through which coverage under the preclearance regime is determined.⁵ The Court held that the coverage formula intrudes on the Constitution's principle of "equal sovereignty" by subjecting certain states to the preclearance requirement based on "decades old data and eradicated practices."⁶ However, in invalidating the coverage formula, the Court failed to address precisely why Congress had the authority to reauthorize section 5 but not section 4(b),⁷ despite being vocal in 2009 that section 5 could impermissibly intrude on state sovereignty.⁸

The Court may have avoided this question because it was playing politics in striking down the coverage formula but not the preclearance provision,⁹ placing the onus on a gridlocked Congress to develop a new trigger. Or perhaps the Court was trying to be more precise in identifying the provision of the VRA that was actually of constitutional concern.¹⁰ In reality, the doctrinal confusion in *Shelby County* persists

3. 42 U.S.C. § 1973c(a).

4. ___ U.S. ___, 133 S. Ct. 2612 (2013).

5. *Id.* at 2631 (stating that the "formula is an initial prerequisite to a determination that exceptional conditions still exist justifying [section 5's] 'extraordinary departure from the traditional course of relations between the States and the Federal Government'" (quoting *Presley v. Etowah Cnty. Comm'n*, 502 U.S. 491, 500–01 (1992))).

6. *Id.* at 2624, 2627.

7. *See id.* at 2627, 2631. The Court says that Congress "may draft another formula based on current conditions," *id.* at 2631, a statement that appears to reluctantly concede the constitutionality of section 5, at least for the time being. But it is clear that the Court may take a different view of section 5's constitutionality if faced with this issue in the future. *See id.* at 2625 (noting that *Shelby County's* arguments that "the preclearance requirement, even without regard to its disparate coverage, is now unconstitutional . . . have a good deal of force"); *id.* at 2632 (Thomas, J., concurring) ("While the Court claims to 'issue no holding on § 5 itself,' its own opinion compellingly demonstrates that Congress has failed to justify 'current burdens' with a record demonstrating 'current needs.'" (quoting *id.* at 2622, 2631 (majority opinion))).

8. *See NAMUDNO*, 557 U.S. 193, 202–03 (2009) (avoiding the constitutional question but suggesting that section 5 is potentially unconstitutional on federalism grounds). Whether section 5 actually intrudes on state sovereignty, broadly defined, is contestable. As I have argued previously, states retain only limited sovereignty over elections after the adoption of the Fourteenth and Fifteenth Amendments. *See* Franita Tolson, *Reinventing Sovereignty?: Federalism as a Constraint on the Voting Rights Act*, 65 VAND. L. REV. 1195 (2012).

9. *See* Richard L. Hasen, *The Chief Justice's Long Game*, N.Y. TIMES (June 25, 2013), <http://www.nytimes.com/2013/06/26/opinion/the-chief-justices-long-game.html>.

10. *See Shelby Cnty.*, 133 S. Ct. at 2627 (noting the potential constitutional problems with section 5 but invalidating section 4(b) because "[t]he provisions of § 5 only apply to those jurisdictions singled out by § 4").

because neither the Court nor the legal scholarship has a clear sense of the scope of congressional authority over elections.¹¹ This inconsistency in the doctrine is problematic because challenges to the constitutionality of preclearance as a remedy to address voting rights violations are still on the horizon given that there are currently lawsuits to “bail in” jurisdictions for preclearance using the “pocket trigger” of section 3(c) of the VRA.¹² Instead of providing clarity on these issues, however, *Shelby County* does little to resolve the tension between Congress’s authority to protect voting rights and the states’ sovereignty over elections.¹³

This tension between the states and the federal government exists because the states have the primary responsibility of crafting the laws that govern state and federal elections. The U.S. Constitution allows states to choose the “Times, Places and Manner” of federal elections,¹⁴

11. Indeed, a nontrivial amount of the post-*Shelby County* coverage has focused on the Court’s argument that section 4(b) violates the equal-sovereignty principle. See, e.g., Eric Posner, *John Roberts’ Opinion on the Voting Rights Act is Really Lame*, SLATE (June 25, 2013, 1:44 PM), http://www.slate.com/articles/news_and_politics/the_breakfast_table/features/2013/supreme_court_2013/supreme_court_on_the_voting_rights_act_chief_justice_john_roberts_struck.html; Nina Totenberg, *Whose Term Was It? A Look Back at the Supreme Court Term*, NPR (July 5, 2013, 3:35 AM), <http://www.npr.org/2013/07/05/198708325/whose-term-was-it-a-look-back-at-the-supreme-court>. Even if Congress updates the formula to address this concern about treating the sovereign states differently, this would not address the potential federalism problems presented by the preclearance regime itself. *NAMUDNO*, 557 U.S. at 203.

12. 42 U.S.C. § 1973a(c) (2006) (authorizing federal courts to place jurisdictions that have violated the Fourteenth and Fifteenth Amendments into preclearance); see also Adam Liptak & Charlie Savage, *U.S. Asks Court to Limit Texas on Ballot Rules*, N.Y. TIMES (July 25, 2013), <http://www.nytimes.com/2013/07/26/us/holder-wants-texas-to-clear-voting-changes-with-the-us.html>.

13. Although they are the most controversial, sections 4(b) and 5 of the VRA are not the only voting-rights provisions that Congress has enacted that implicate matters of state sovereignty. See, e.g., Kevin K. Green, *A Vote Properly Cast? The Constitutionality of the National Voter Registration Act of 1993*, 22 J. LEGIS. 45, 82 (1996) (noting that the National Voter Registration Act “in some ways does impinge upon state sovereignty”); Pamela S. Karlan, *Two Section Twos and Two Section Fives: Voting Rights and Remedies after Flores*, 39 WM. & MARY L. REV. 725, 728–29 (1998) (assessing whether section 2 of the VRA is an appropriate use of congressional authority); Michael E. Waterstone, Lane, *Fundamental Rights, and Voting*, 56 ALA. L. REV. 793 (2005) (discussing whether the Help America Vote Act can be amended to include a private cause of action against the states without violating principles of federalism). Indeed, the Supreme Court decided a case this term holding that the National Voter Registration Act preempts portions of Arizona’s voter-identification law. See *Arizona v. Inter Tribal Council of Ariz., Inc.*, __U.S.__, 133 S. Ct. 2247, 2260 (2013). Thus, the analysis presented herein sheds light on the constitutionality of various federal election laws, not just section 5.

14. The Elections Clause provides: “The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.” U.S. CONST. art. I, § 4, cl. 1.

which, in conjunction with the states' power under the Tenth Amendment,¹⁵ amounts to a plenary authority to structure and design elections at every level. Nonetheless, this allocation of authority is premised on the assumption that the states will act in good faith. The Framers initially worried that unfettered state control over elections could lead to the Union's destruction,¹⁶ and later, that the states would use their control over voter qualifications to disenfranchise large portions of their population for illegitimate reasons.¹⁷

It is this latter concern that prompted the passage of the VRA after Congress developed an extensive evidentiary record showing that racial discrimination in voting was widespread in certain jurisdictions and impervious to case-by-case litigation.¹⁸ Preclearance under section 5 therefore ensures that any changes to election laws within these jurisdictions "neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color."¹⁹ Critics argue that section 5 infringes on state sovereignty because minority voter registration and turnout in jurisdictions singled out for coverage through the trigger of section 4(b) parallel that of noncovered jurisdictions,²⁰ and the very act of preclearance requires the affected areas to submit *all* changes for federal approval, including those regulations that govern state elections having few, if any, federal implications.²¹

15. See U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

16. THE FEDERALIST NO. 59, at 363 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("Nothing can be more evident than that an exclusive power of regulating elections for the national government, in the hands of the State legislatures, would leave the existence of the Union entirely at their mercy. They could at any moment annihilate it by neglecting to provide for the choice of persons to administer its affairs.").

17. See *infra* Part II.

18. See *South Carolina v. Katzenbach*, 383 U.S. 301, 315–16 (1966).

19. 42 U.S.C. § 1973c(a) (2006).

20. Section 4(b) of the Act imposed section 5's preclearance regime on those jurisdictions that used a test or device as a prerequisite to voting as of November 1964, and had less than fifty percent voter registration or turnout in the 1964 Presidential election. *Id.* § 1973b(b). In 1970, the coverage formula was extended to those jurisdictions that maintained a test or device as of November 1, 1968 and had less than fifty percent turnout or registration in the 1968 presidential election. Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, 84 Stat. 314, 315. Congress later extended section 5 to states that discriminated against language minorities. Voting Rights Act Amendments of 1975, Pub. L. No. 94-73, 89 Stat. 400, 401. Nine states—mostly in the deep South, along with a few jurisdictions scattered throughout several other states—were covered by section 5. *Jurisdictions Previously Covered by Section 5*, U.S. DEP'T OF JUSTICE, http://www.justice.gov/crt/about/vot/sec_5/covered.php (last visited Apr. 22, 2014).

21. See *Shelby Cnty. v. Holder*, ___ U.S. ___, 133 S. Ct. 2612, 2624 (2013) ("States must beseech the Federal Government for permission to implement laws that they would otherwise have the right

This Article argues that these criticisms cannot be squared with the structure of the Fourteenth and Fifteenth Amendments, which, when read together, strongly support the constitutionality of the VRA's preclearance regime in its entirety.²² The Amendments, which govern the same subject (voting) and share a drafting history, have textual and historical connections that are the basis for broad federal authority to regulate state elections, authority that is sufficient to overcome any disquietude about disturbing the sovereignty that states retain.²³ In particular, the extreme penalty in section 2 of the Fourteenth Amendment,²⁴ which allows Congress to reduce a state's delegation in the House of Representatives for abridging the right to vote in both state and federal elections for reasons not limited to race discrimination, influences the scope of penalties that Congress can impose pursuant to its enforcement authority under the Fourteenth and Fifteenth

to enact and execute on their own"); *NAMUDNO*, 557 U.S. 193, 202 (2009) (expressing similar concerns). When I refer to regulations that affect only state elections, it does not matter if a state adopts the same regulation for both state and federal elections. Conceivably, preclearance of the regulation could be constitutional as it applies to federal elections and unconstitutional as it applies to state elections. *See Oregon v. Mitchell*, 400 U.S. 112, 130–31 (1970) (invalidating minimum-age requirement as it applies to state and local, but not federal, elections), *superseded by constitutional amendment*, U.S. CONST. amend. XXVI, § 1.

22. The Fourteenth Amendment protects the right to vote as a fundamental interest, *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 670 (1966); *see also* Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, 84 Stat. 314 (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (2006)) (passed under the Fourteenth Amendment), and the Fifteenth Amendment prohibits abridging the right to vote on the basis of race, U.S. CONST. amend. XV, § 1; *see also* Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (2006)) (passed under the Fifteenth Amendment).

23. My interpretive approach here is a variation of Akhil Amar's theory of intratextualism, in which he compares the operative terms of a specific clause of the Constitution with other clauses that employ the same or similar language. Akhil Amar, *Intratextualism*, 112 HARV. L. REV. 747, 791–92 (1999). Similarly, John Hart Ely looks to the broader themes in the Constitution to interpret specific clauses. *See generally* JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980). This Article loosely adopts these techniques through its reading of the Fourteenth and Fifteenth Amendments. *See infra* Part II.B.1; *see also* Tolson, *supra* note 8 (applying a variation of intratextualism to interpret the Elections Clause and the Fourteenth and Fifteenth Amendments).

24. Section 2 of the Fourteenth Amendment provides that:

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

U.S. CONST. amend. XIV, § 2.

Amendments.²⁵ The legislative debates in 1866 over the language of section 2 demonstrate that Congress viewed its enforcement authority over voting and elections broadly, although its intent was not to completely displace state sovereignty in this area.²⁶ Section 2, which strikes a balance between protecting the franchise and respecting state sovereignty, illustrates the proper means-ends fit for federal voting rights legislation.²⁷ Because of concerns that states will circumvent the protections of the Fourteenth Amendment through their authority over elections,²⁸ this provision sets a very low threshold for violations to trigger federal action (abridgment on almost any grounds) while giving Congress substantial authority to impose an extreme penalty to remedy such violations. Therefore, lesser penalties, like the preclearance regime imposed on certain jurisdictions by sections 4(b) and 5 of the VRA, are an “appropriate” means of protecting the right to vote because such remedies are less intrusive of state sovereignty than reduced representation under section 2.²⁹

There is no body of literature discussing section 2 of the Fourteenth Amendment and its effect on Congress’s enforcement authority to regulate elections. This absence is even more glaring in scholarly debates over whether the VRA is consistent with the congruence-and-proportionality standard of *City of Boerne v. Flores*,³⁰ which is the test that courts use to assess the constitutionality of legislation passed

25. There is a clear textual link between sections 2 and 5 of the Fourteenth Amendment because “Congress’ power under § 5 . . . extends . . . to ‘enforc[ing]’ the provisions of the Fourteenth Amendment,” which, by its terms, includes section 2. *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997) (quoting U.S. CONST. amend. XIV, § 5). However, this Article argues that the Fourteenth and Fifteenth Amendments should be read together, which means that section 2 also influences the scope of penalties that can be adopted pursuant to the enforcement clause of section 2 of the Fifteenth Amendment. See *infra* Part II.B.2 (viewing the Enforcement Act of 1870 as a product of section 2’s influence on the Fourteenth and Fifteenth Amendments).

26. See *infra* Part II.

27. See *infra* Part II.

28. I refer to this as an “anti-circumvention” norm that is implicit in section 2. See *infra* Part I.B. The norm is also prominent in the Court’s case law. See *infra* Part III.

29. See Akhil Reed Amar, *The Lawfulness of Section 5—and Thus of Section 5*, 126 HARV. L. REV. F. 109 (2013) (arguing that if section 5 of the VRA is unconstitutional then section 5 of the Fourteenth Amendment is also unconstitutional, as it was adopted pursuant to a mechanism that used selective preclearance like that imposed by the VRA by excluding southern states from deliberating on its terms); Michael Halberstam, *The Myth of “Conquered Provinces”*: *Probing the Extent of the VRA’s Encroachment on State and Local Autonomy*, 62 HASTINGS L.J. 923, 948 (2011) (arguing that under the VRA, states retain decision-making authority over the design of elections, and, so long as their choices are nondiscriminatory, do not receive any substantive federal input).

30. 521 U.S. 507 (1997).

pursuant to section 5 of the Fourteenth Amendment.³¹ Instead, the legal scholarship and the courts have narrowly focused on the relationship between the substantive protections of section 1 of the Fourteenth Amendment and the enforcement provision of section 5 in determining the scope of congressional authority.³² As a result, debates over whether the Voting Rights Act is constitutional miss the key insight that any interpretation of congressional authority over voting and elections should be assessed by reading the Fourteenth and Fifteenth Amendments together, with renewed emphasis on section 2 of the Fourteenth Amendment.³³

This Article proceeds as follows. Part I provides an overview of Supreme Court precedent regarding Congress's power to enforce the mandates of the Fourteenth and Fifteenth Amendments, highlighting the difficulty of applying the congruence-and-proportionality standard to Congress's authority over elections. The fit that the standard requires for congressional legislation to address particular harms generally has been contextual,³⁴ and if applied to voting rights legislation, application of the

31. *Id.* at 508 (applying the congruence-and-proportionality standard to invalidate the Religious Freedom Restoration Act (RFRA) as it applies to the states). It is not clear, after *Shelby County*, if the congruence-and-proportionality test also applies to the Fifteenth Amendment. For discussion in the legal scholarship regarding the standard, see, for example, Evan H. Caminker, "Appropriate" Means-Ends Constraints on Section 5 Powers, 53 STAN. L. REV. 1127, 1132 (2001); 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, 47-48 (2006); Daniel P. Tokaji, *Intent and Its Alternatives: Defending the New Voting Rights Act*, 58 ALA. L. REV. 349 (2006); Gabriel J. Chin, *Section 5 of the Voting Rights Act and the 'Aggregate Powers' of Congress over Elections* (UC Davis Legal Studies Research Paper Series, Research Paper No. 313, 2012), available at <http://ssrn.com/abstract=2132158>.

32. See, e.g., Robert J. Kaczorowski, *Congress's Power to Enforce Fourteenth Amendment Rights: Lessons from Federal Remedies the Framers Enacted*, 42 HARV. J. ON LEGIS. 187 (2005); Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943 (2003).

33. Recognizing that application of the congruence-and-proportionality standard could invalidate the VRA, some scholars have attempted to outline an alternative basis of constitutionality for section 5. See, e.g., Richard L. Hasen, *Congressional Power to Renew the Preclearance Provisions of the Voting Rights Act after Tennessee v. Lane*, 66 OHIO ST. L.J. 177, 204-06 (2005) (arguing that congressional authority to enact section 5 could potentially derive from the Guarantee Clause); Pamela S. Karlan, *Section 5 Squared: Congressional Power to Amend and Extend the Voting Rights Act*, 44 HOUS. L. REV. 1, 13-16 (2007). But in advocating for the constitutionality of preclearance, none of these scholars adequately account for the fact that congressional power is at its lowest ebb when regulating state elections and when prohibiting conduct that lacks a discriminatory purpose. See Tolson, *supra* note 8.

34. Compare *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 737 (2003) (upholding the Family and Medical Leave Act (FMLA) under the congruence-and-proportionality standard because it involved a gender-based classification), with *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 373-74 (2001) (invalidating portions of the Americans with Disabilities Act (ADA) because disability discrimination is assessed under rational-basis review).

standard has to be consistent with section 2 and the structure of the Fourteenth and Fifteenth Amendments. Part II illustrates that this structural reading of the Amendments is justified through a discussion of the legislative debates surrounding the adoption of section 2 and Congress's enactment of the Enforcement Act of 1870, one of the earliest pieces of voting-rights legislation.³⁵ Section 2's influence on Congress's enforcement authority extends beyond the penalty of reduced representation to imposing lesser penalties, like the Enforcement Act, which protected African-Americans from being disenfranchised at the state level through direct and indirect means.³⁶ Part III assesses the constitutionality of the VRA in light of these considerations, concluding that, contrary to the recent decision of *Shelby County*, the preclearance regime is constitutional.

I. CONGRUENCE, PROPORTIONALITY, AND THE INTERPRETIVE FRAMEWORK OF SECTION 2 OF THE FOURTEENTH AMENDMENT

In *Shelby County v. Holder*, the Supreme Court invalidated the coverage formula of section 4(b) of the Voting Rights Act, but provided little guidance regarding the appropriate standard of review for assessing the constitutionality of voting-rights legislation under the Fourteenth and Fifteenth Amendments.³⁷ The Court relegated its discussion of the Fourteenth Amendment to a mere footnote with little explanation of how either Amendment resolves the constitutional issues present in the

35. Enforcement Act of 1870, ch. 114, 16 Stat. 140, *invalidated by* United States v. Reese, 92 U.S. 214, 219–22 (1875). Originally passed pursuant to the Fifteenth Amendment, the Enforcement Act of 1870 required that all citizens be able to vote “at any election by the people in any State,” making no distinction between state and federal elections. *Id.* at 140. Section 4 of the Act imposed a criminal penalty on “any person [who] by . . . unlawful means, shall hinder, delay, prevent, or obstruct . . . any citizen from doing any act required to be done to qualify him to vote or from voting at any election,” but it imposed this penalty without any requirement that the vote denial be based on race. *Id.* at 141.

36. *See generally* ERIC FONER, RECONSTRUCTION (Henry Steele Commager & Richard B. Morris eds., 1988) (discussing the challenges faced by ex-slaves in gaining political and civil rights during Reconstruction).

37. In its grant of certiorari, the Court acknowledged that the preclearance regime is based on dual sources of constitutional authority:

Whether Congress' decision in 2006 to reauthorize Section 5 of the Voting Rights Act under the pre-existing coverage formula of Section 4(b) of the Voting Rights Act exceeded its authority under the Fourteenth and Fifteenth Amendments and thus violated the Tenth Amendment and Article IV of the United States Constitution.

Shelby Cnty. v. Holder, ___ U.S. ___, 133 S. Ct. 594, 594 (2012) (order granting petition for a writ of certiorari).

case.³⁸ Instead, the Court contended that section 4(b) failed both rational-basis review³⁹ and the standard of review derived from its decision in *NAMUDNO*, which “guides [its] review under both [the Fourteenth and Fifteenth] Amendments.”⁴⁰ The latter statement is the most perplexing given that *NAMUDNO* did not articulate a standard of review under these provisions.⁴¹ Nevertheless, the *Shelby County* Court’s obscure and vague pronouncements left a clear opening for later assertions that the more exacting congruence-and-proportionality test applies to legislation passed pursuant to the Fifteenth Amendment.⁴²

Shelby County provides little hope that this more-restrictive test will not apply if litigants challenge other provisions of the VRA including section 3(c), section 5, or even section 2 of the Act.⁴³ Strict application of the congruence-and-proportionality standard is incompatible with protecting voting rights under either the Fourteenth or the Fifteenth Amendments. America’s decentralized system of elections gives states substantial legislative discretion to engage in acts that might otherwise infringe the fundamental right to vote and disadvantage racial minorities, complicating the means-ends analysis applied to voting rights legislation designed to address these harms.⁴⁴ Since section 2 of the Fourteenth Amendment gives Congress substantial authority to legislate in this area, the congruence-and-proportionality standard has to be interpreted in light of this provision.

38. See *Shelby Cnty. v. Holder*, __U.S.__, 133 S. Ct. 2612, 2622 n.1 (2013).

39. See *id.* at 2629–30. But see *South Carolina v. Katzenbach*, 383 U.S. 301, 327 (1966) (applying this standard to assess section 5 of the VRA).

40. *Shelby Cnty.*, 133 S. Ct. at 2622 n.1.

41. See *NAMUDNO*, 557 U.S. 193, 204 (2009) (“The parties do not agree on the standard to apply in deciding whether, in light of the foregoing concerns, Congress exceeded its Fifteenth Amendment enforcement power in extending the preclearance requirements That question has been extensively briefed in this case, but we need not resolve it. The Act’s preclearance requirements and its coverage formula raise serious constitutional questions under either [the congruent-and-proportional or rational-basis] test.”).

42. See Richard Hasen, *The Curious Disappearance of Boerne and the Future Jurisprudence of Voting Rights and Race*, SCOTUSBLOG (June 25, 2013, 7:10 PM), <http://www.scotusblog.com/2013/06/the-curious-disappearance-of-boerne-and-the-future-jurisprudence-of-voting-rights-and-race/>.

43. Section 2 forbids any “qualification, prerequisite, standard, practice, or procedure” that has “the purpose [or] effect of denying or abridging the right to vote on account of race or color” and, unlike section 5, applies nationwide. See 42 U.S.C. § 1973a(c) (2006).

44. Karlan, *supra* note 33, at 10–12.

A. *Reevaluating the Congruence and Proportionality Standard in the Context of Voting and Elections*

In *City of Boerne v. Flores*, the Court changed its standard from the more permissive rational-basis review outlined in cases like *South Carolina v. Katzenbach*⁴⁵ to the congruence-and-proportionality test, which requires that Congress establish a record of constitutional violations before it can legislate a remedy pursuant to section 5 of the Fourteenth Amendment.⁴⁶ At least initially, the Court held that the VRA passed muster under the more-rigorous standard. Justice Kennedy, writing for the majority in *City of Boerne*, noted that the Act was “confined to those regions of the country where voting discrimination had been most flagrant and affected a discrete class of state laws,”⁴⁷ which ensured that it is the type of “[r]emedial legislation under [section] 5 . . . ‘adapted to the mischief and wrong which the [Fourteenth] [A]mendment was intended to provide against.’”⁴⁸ Despite this language, however, the quantum of proof that Congress must amass to show that legislation is “appropriate” is inconsistent with more deferential pre-*City of Boerne* precedent, posing a problem for all federal voting-rights legislation.

The place of disagreement between *Katzenbach*’s broad view of congressional authority and *Shelby County*’s more narrow approach goes to the question of fit—*Katzenbach* took a very liberal view of how well the remedy has to fit the wrong to be addressed.⁴⁹ In contrast, the congruence-and-proportionality standard requires a much tighter fit, but

45. 383 U.S. 301 (1966).

46. *City of Boerne v. Flores*, 521 U.S. 507, 519–20 (1997). To determine whether there is a fit between the remedy imposed by Congress and the evil to be addressed, the Court will “identify with some precision the scope of the constitutional right at issue,” and then the Court will “examine whether Congress identified a history and pattern of unconstitutional . . . discrimination.” *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 365, 368 (2001).

47. *City of Boerne*, 521 U.S. at 532–33 (citation omitted).

48. *Id.* at 532 (quoting *The Civil Rights Cases*, 109 U.S. 3, 13 (1883) (alteration in original)).

49. In *South Carolina v. Katzenbach*, the Court noted:

By adding this authorization [in section 2 of the Fifteenth Amendment], the Framers indicated that Congress was to be chiefly responsible for implementing the rights created in § 1 Accordingly, in addition to the courts, Congress has full remedial powers to effectuate the constitutional prohibition against racial discrimination in voting.

383 U.S. at 325–26. Remedial does not, in the eyes of the *City of Boerne* Court, mean that Congress has the authority to decree the substance of rights; rather, Congress can only enforce them, which is why the Court requires a record of constitutional violations to support Congress’s exercise of this authority. 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, 2363–67 (2003).

the nature of voting rights makes it difficult for the Court, with its limited fact-finding ability, to have the sole responsibility of resolving issues of fit. Notably, the Court has never found a civil-rights law unconstitutional based on facts external to the congressional record.⁵⁰ For example, in *Lassiter v. Northampton County*,⁵¹ the Court held that requiring prospective voters to take literacy tests as a prerequisite for voting was not a per se violation of the Constitution because the tests were reasonably related to exercising the franchise.⁵² However, the Court later upheld Congress's decision to ban literacy tests because Congress developed an evidentiary record illustrating that such tests were being used in a discriminatory manner.⁵³

In the years since *City of Boerne*, however, the Court has been decidedly less deferential to Congress in its decision to reauthorize the preclearance regime of the Voting Rights Act.⁵⁴ Given this precedent, it is not surprising that there is anxiety among legal scholars about the constitutionality of preclearance as a remedy going forward.⁵⁵ Coverage formula aside, the Court did not directly address Shelby County's argument that preclearance is justified only if the congressional record shows that racial discrimination is as rampant now as it was in 1965, when Congress first passed the Act.⁵⁶

50. See Mark A. Posner, *Time Is Still on Its Side: Why Congressional Reauthorization of Section 5 of the Voting Rights Act Represents a Congruent and Proportional Response to Our Nation's History of Discrimination in Voting*, 10 N.Y.U. J. LEGIS. & PUB. POL'Y 51, 56 (2006) ("[T]he Court has never held that a civil rights law that was constitutional when enacted may lose its constitutional status because of the passage of time and a change in the factual circumstances that pertain to the law.").

51. 360 U.S. 45 (1959).

52. See *id.* at 51–54.

53. *South Carolina v. Katzenbach*, 387 U.S. at 327.

54. See, e.g., *Shelby Cnty. v. Holder*, __U.S.__, 133 S. Ct. 2612 (2013); *NAMUDNO*, 557 U.S. 193, 201 (2009).

55. See, e.g., Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *Mapping a Post-Shelby County Contingency Strategy*, 123 YALE L.J. ONLINE 131 (2013) (arguing that no matter what the outcome in *Shelby County*, voting-rights advocates should prepare for a future without section 5); Ellen D. Katz, *How Big is Shelby County?*, SCOTUSBLOG (June 25, 2013, 6:31 PM), <http://www.scotusblog.com/2013/06/how-big-is-shelby-county/> ("[T]he Court[] refus[ed] to defer in any significant way to Congress's judgment that the preclearance regime remains necessary . . .").

56. See Petition for a Writ of Certiorari at 24–25, *Shelby Cnty.*, 133 S. Ct. 2612 (No. 12–96). The Court invalidated the coverage formula because of the lack of overt discrimination, but did not resolve whether the same type of record is required in order to impose the remedy of preclearance more generally. See *Shelby Cnty.*, 133 S. Ct. at 2629 (noting that, with respect to the congressional record, "no one can fairly say that it shows anything approaching the 'pervasive,' 'flagrant,' 'widespread,' and 'rampant' discrimination that faced Congress in 1965" (quoting *NAMUDNO*, 557 U.S. at 201; *Katzenbach*, 387 U.S. at 308, 315, 331)). Much of the evidence of discrimination amassed by Congress in 2006 is based on violations of section 2 of the Voting Rights Act and

Section 5 of the VRA operates to block unconstitutional conduct ex ante, so, understandably, Congress has had difficulty compiling a record of discrimination similar to that present in prior reauthorizations.⁵⁷ It is difficult to square the reality of improved racial circumstances with *Shelby County's* suggestion that a showing of pervasive and widespread discrimination might be required to impose the remedy of preclearance,⁵⁸ but other precedents corroborate this position.⁵⁹ In *Board of Trustees of the University of Alabama v. Garrett*,⁶⁰ the Court held that the legislative history of Title I of the ADA, which prohibited disability discrimination in public employment, did not reveal “a marked pattern of unconstitutional action by the States.”⁶¹ Rather, Title I represented Congress’s “judgment that there should be a ‘comprehensive national mandate for the elimination of discrimination against individuals with disabilities,’” a determination that, in the Court’s view, falls in the realm

administrative denials of preclearance by the Attorney General, neither of which requires a finding that the jurisdiction acted with discriminatory intent. Nevertheless, there are some instances in the legislative record of official actions taken with discriminatory intent. *See, e.g., Shelby Cnty.*, 133 S. Ct. at 2639 (Ginsburg, J., dissenting) (noting that “between 1982 and 2006, DOJ objections blocked over 700 voting changes based on a determination that the changes were discriminatory” and “Congress found that the majority of DOJ objections included findings of discriminatory intent”); *Modern Enforcement of the Voting Rights Act: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 6 (2006) (statement of Wan J. Kim, Assistant Att’y Gen., Civil Rights Division, Department of Justice); *id.* at 21, 82 (statement of Robert McDuff, Attorney, Jackson, Mississippi).

57. Ellen D. Katz, *Congressional Power to Extend Preclearance: A Response to Professor Karlan*, 44 HOUS. L. REV. 33, 53 (2007) (arguing that the standard “must be adjusted to reflect the status of section 5 as an operational statute” designed to “target political processes that continue to be compromised by race”); *see also* Hasen, *supra* note 33, at 179 (noting that states do not engage in widespread discrimination because section 5 has been in effect for over forty years).

58. *Shelby Cnty.*, 133 S. Ct. at 2625 (noting the parity between covered and noncovered jurisdictions in minority voter turnout and registration); *NAMUDNO*, 557 U.S. at 203–04; *see also* Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 91 (2000) (striking down provisions of the Age Discrimination in Employment Act (ADEA) on the grounds that the evidence relied on by Congress was too anecdotal and too narrow geographically to justify extension of the ADEA to all of the states); Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 643, 647 (1999) (accepting that state infringement of patents could violate the Fourteenth Amendment, but invalidating the Patent Remedy Act because Congress did not show that states had been engaging in this behavior).

59. Samuel Issacharoff, *Is Section 5 of the Voting Rights Act a Victim of Its Own Success?*, 104 COLUM. L. REV. 1710, 1715 (2004) (“[T]he [*City of Boerne*] Court repeatedly distinguished the [RFRA] from the VRA on the basis of the greater factual justification for the latter, [but] the passage of time might bode poorly for a clear legislative finding of the continued need for section 5.”); *see also* Travis Crum, Note, *The Voting Rights Act’s Secret Weapon: Pocket Trigger Litigation and Dynamic Preclearance*, 119 YALE L.J. 992 (2010) (suggesting that the pocket trigger of section 3(c)’s bail-in provision is more congruent and proportional than section 5 because section 3(c) requires a showing of intentional discrimination).

60. 531 U.S. 356 (2001).

61. *Id.* at 373.

of defining constitutional rights rather than enforcing them.⁶² Similarly, the *Shelby County* Court insinuates that, like Title I of the ADA, section 5 is also a policy preference rather than a remedy designed to address a specific pattern of racial discrimination in voting.⁶³

Nonetheless, there are many occasions—both before and after *City of Boerne*—in which the Court has endorsed the congressional record underlying the VRA, despite evidence that it is not based on the type of record envisioned by *City of Boerne* and its progeny.⁶⁴ These cases present a slightly more optimistic answer to the question of whether preclearance can ever be a congruent-and-proportional remedy,⁶⁵ recent applications of the standard also underscore this point. In *Tennessee v. Lane*⁶⁶ and *Nevada Department of Human Resources v. Hibbs*,⁶⁷ the Court applied a more deferential variation of the congruence-and-proportionality standard because the legislation in these cases implicated fundamental rights that the Court evaluates under heightened scrutiny.⁶⁸

62. *Id.* at 374.

63. See *Shelby Cnty.*, 133 S. Ct. at 2625 (noting that “[b]latantly discriminatory evasions of federal decrees are rare,” “minority candidates hold office at unprecedented levels,” and the “tests and devices that blocked access to the ballot have been forbidden nationwide for over 40 years”).

64. *Lopez v. Monterey Cnty.*, 525 U.S. 266, 282 (1999) (holding that a covered jurisdiction in a noncovered state had to preclear all changes to their election laws, even if the change is mandated by state law because Congress has the power to regulate nondiscretionary conduct that lacks discriminatory intent); *Oregon v. Mitchell*, 400 U.S. 112, 132–33 (1970) (detailing the general evidence before Congress when it imposed the nationwide literacy test ban including “this country’s history of discriminatory educational opportunities,” “a long history of the discriminatory use of literacy tests,” and “statistics which demonstrate that voter registration and voter participation are consistently greater in States without literacy tests”); *Katzenbach v. Morgan*, 384 U.S. 641, 652–53 (1966) (refusing to look for specific evidence in the record justifying section 4(e) of the VRA, which prohibits English literacy as a prerequisite for voting, and concluding that “is enough that we be able to perceive a basis upon which the Congress might resolve the conflict as it did”); see also Hasen, *supra* note 33, at 200 (reading *Lopez v. Monterey County* to confirm that “there was enough evidence to support the 1982 preclearance decision,” which may support 2006 renewal); Katz, *supra* note 57, at 42 (“*Lopez* certainly offers support for the claim that section 5 is entitled to a different form of review than that employed in the *City of Boerne* cases. In *Lopez*, Justice O’Connor cites *City of Boerne* only once, and then solely for the proposition that Congress’ enforcement power includes the power to prohibit constitutional conduct and to intrude deeply into state sovereign processes.”).

65. See Michael C. Dorf & Barry Friedman, *Shared Constitutional Interpretation*, 2000 SUP. CT. REV. 61, 90 (“*Boerne* nonetheless recognized that Section 5 [of the Fourteenth Amendment] grants Congress a remedial ratchet power . . . to enact remedial or preventative measures for what the Court itself would consider to be violations of the Fourteenth Amendment, even if the Court would not itself require the specific remedial or preventative measures. That recognition was necessary to reconcile *Boerne* with *Morgan* and other cases, and more importantly, to avoid rendering Section 5 nugatory.”).

66. 541 U.S. 509 (2004).

67. 538 U.S. 721 (2003).

68. *Lane*, 541 U.S. at 522–23 (upholding Title II of the ADA because plaintiff’s lack of access to

Arguably, the Voting Rights Act presents a stronger case than both *Hibbs* and *Lane*, given that it protects both a suspect class and a fundamental interest,⁶⁹ but questions remain as to the sufficiency of the record established by Congress since at least some of the justices are convinced that the decline in overt discrimination makes the Act's intrusion on state sovereignty unprecedented and unwarranted.⁷⁰ The *Shelby County* decision suggests that the Court is gravitating away from a broad interpretation of Congress's enforcement authority that would allow it to regulate otherwise constitutional conduct in order to deter constitutional violations.⁷¹

Also problematic for the VRA is a case decided two terms ago, *Coleman v. Court of Appeals*,⁷² which retreated from the more lax application of the congruence-and-proportionality standard present in *Lane* and *Hibbs*, and suggested that the presence of a fundamental right may not be sufficient, in and of itself, to reduce the level of scrutiny in

the courts due to disability violated the Due Process Clause and is therefore subject to "more searching judicial review" than discrimination on the basis of disability); *Hibbs*, 538 U.S. at 736 (holding that that the family-care leave portion of the FMLA is a congruent-and-proportional remedy to address gender discrimination because "the standard for demonstrating the constitutionality of a gender-based classification is more difficult to meet than [the] rational-basis test . . . [therefore] it was easier for Congress to show a pattern of state constitutional violations"); Issacharoff, *supra* note 59, at 1715 ("[I]n *Hibbs*, the Court appeared to back off the sterner implications of *City of Boerne*, indicating that it might very well carve out a protected area for discrimination concerns along the classic frontiers of suspect classes.").

69. The Court has yet to invalidate congressional legislation that can be justified based on multiple grounds. See Hasen, *supra* note 33, at 201-02 ("A renewed preclearance provision involves race discrimination, so strict scrutiny already applies. But it also involves the right to vote, itself a fundamental right. The tone of the Court's opinion in *Lane* . . . suggests that the Court is willing to defer more to Congress to remedy the more that Congress seeks to protect fundamental rights.").

70. *Shelby Cnty. v. Holder*, __U.S.__, 133 S. Ct. 2612, 262527 (2013) (suggesting that preclearance is unconstitutional for this reason); *NAMUDNO*, 557 U.S. 193, 203-04 (2009) (same).

71. See *Coleman v. Court of Appeals*, __U.S.__, 132 S. Ct. 1327, 1338 (2012) (Scalia, J., concurring) (arguing that congressional authority under section 5 of the Fourteenth Amendment should be limited "to the regulation of conduct that *itself* violates the Fourteenth Amendment" (emphasis in original)). Compare *Shelby Cnty.*, 133 S. Ct. at 2626-27 (suggesting that the decline in overt discrimination makes the preclearance regime non-remedial), with *City of Boerne v. Flores*, 521 U.S. 507, 518 (1997) (observing that Congress may pass legislation under its enforcement authority that prohibits acts that do not violate the Constitution in order to prevent constitutional violations), and *City of Rome v. United States*, 446 U.S. 156, 173 (1980) (same). But see Tolson, *supra* note 8, at 1235 (arguing that congressional authority under the Reconstruction Amendments is "no less broad than its authority under the Necessary and Proper Clause," capable of addressing state action that has a discriminatory purpose, that has a discriminatory effect, and that may not even violate the substantive provisions of the Amendments" (quoting *City of Rome*, 446 U.S. at 176)).

72. __U.S.__, 132 S. Ct. 1327 (2012).

these cases.⁷³ Thus, the congruence-and-proportionality standard, as it has developed in the case law, does not appear amenable to arguments that voting-rights legislation should be treated differently from other exercises of Congress's enforcement authority. Voting is *sui generis* because section 2 of the Fourteenth Amendment embodies a textual commitment to broad access to the franchise, a distinction that is germane to the judicial review of voting-rights legislation passed pursuant to section 5.

B. *"The Greater Includes the Lesser": The Relationship Between Sections 2 and 5 of the Fourteenth Amendment*

The *Shelby County* Court purportedly assessed the constitutionality of the VRA's preclearance regime under the Fourteenth and Fifteenth Amendments; in reality, the Court did not properly balance these dual justifications for congressional authority against the state's power over elections, especially in light of section 2 of the Fourteenth Amendment.⁷⁴ Section 2 provides that:

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.⁷⁵

73. *See id.* at 1338 (holding that the self-care provisions of the FMLA are not a congruent-and-proportional remedy because Congress did not amass enough evidence of sex discrimination in sick-leave policies).

74. *See supra* text accompanying notes 39–42. Besides the Fourteenth and Fifteenth Amendments, congressional authority over voting also has been expanded through several other constitutional amendments. *See* U.S. CONST. amend. XIX (prohibiting the abridgement of the right to vote on the basis of sex); U.S. CONST. amend. XXIV, § 1 (prohibiting the use of poll taxes in federal elections); U.S. CONST. amend. XXVI, § 1 (prohibiting the abridgement of the right to vote for those eighteen and older on the basis of age).

75. U.S. CONST. amend. XIV, § 2.

Section 2 is an example that courts can draw on in assessing whether congressional legislation in this area is “appropriate,” and therefore should dictate what “congruent and proportional” means in the context of voting and elections.⁷⁶ Yet, in determining the scope of congressional authority, the *Shelby County* Court ignored both the importance of section 2 and its influence on the remaining provisions of the Fourteenth Amendment, contrary to the case law. In *Richardson v. Ramirez*,⁷⁷ for example, the Supreme Court held that states do not violate the Equal Protection Clause by disenfranchising felons.⁷⁸ The Court concluded that, because section 2 expressly exempts disenfranchisement grounded on prior conviction of a felony, states do not violate section 1 of the Fourteenth Amendment by excluding these individuals from the franchise.⁷⁹ The Court looked to section 2 for guidance in determining the scope of the substantive protections of section 1.⁸⁰ Under the same rationale, Congress’s ability to reduce a state’s representation for abridging the right to vote in both state and federal elections under section 2 influences the scope of remedies that Congress can adopt under section 5.

1. *Section 2 in the Legal Scholarship*

Despite *Ramirez*, courts and commentators have not carefully analyzed section 2, an assessment of which would have revealed that *Shelby County*’s reliance on state sovereignty in this context is misplaced. Jack Balkin discusses section 2 very briefly in his most recent book, referring to it as a “clear rule about how to resolve key unsettled issues of the [Civil] [W]ar,” a description that presumably means that there is no need to refer to the constitutional structure or legislative history in order to ascertain its meaning.⁸¹ Balkin assumes

76. See, e.g., *Reynolds v. Sims*, 377 U.S. 533, 593–94 (1964) (Harlan, J., dissenting) (arguing that section 2, not section 1, regulates voting rights).

77. 418 U.S. 24 (1974).

78. *Id.* at 54–55.

79. *Id.*

80. *Id.* (referring to section 2 as an “affirmative sanction” of state felon-disenfranchisement laws and thereby exempting them from the scope of section 1); see also *Hayden v. Pataki*, 449 F.3d 305, 316–17 (2d Cir. 2006) (stating that section 2 of the Fourteenth Amendment and the legislative debate surrounding the VRA show that Congress did not intend the VRA to apply to felon disenfranchisement laws, which would have altered the constitutional balance between the states and the federal government).

81. JACK M. BALKIN, *LIVING ORIGINALISM* 26 (2011); see also *id.* at 14 (“When the text provides an unambiguous, concrete, and specific rule, the principles or purposes behind the text cannot override the textual command.”).

that, unlike section 1, section 2 is “unambiguous,” leaving no open questions to be answered by courts or Congress in interpreting its provisions.⁸² However, Balkin’s interpretation is not true to the text given that section 5 gives Congress the “power to enforce, by appropriate legislation, the provisions of this article.”⁸³ This language arguably refers to all of the provisions of the Fourteenth Amendment, and not just section 1.⁸⁴

Similarly, Akhil Amar spends a few pages of his recent work on section 2, but unlike Balkin, he concludes that the provision, by virtue of its penalty, creates an affirmative right to vote.⁸⁵ Any time that a state disenfranchises its residents in violation of section 2, according to Amar, the penalty of reduced representation *must* be imposed.⁸⁶ If Congress fails to implement the penalty, as it has for well over a century, Amar believes that section 2 still creates a general right to vote because “there can be no disenfranchisement imposed upon the group of presumptive voters textually specified by section 2.”⁸⁷

Although they take different views on the meaning of section 2, Balkin and Amar make a mistake similar to much of the legal scholarship by assuming that the specificity of section 2’s penalty ends all inquiry into its interpretive impact on the scope of congressional authority under section 5.⁸⁸ Amar, in particular, views the failure of

82. *Id.* at 26 (contrasting “the glittering generalities of section 1” with the “more rule-bound and hardwired features of sections 2, 3, and 4”).

83. U.S. CONST. amend. XIV, § 5.

84. Note that my argument is not that the Framers explicitly viewed section 5 as an avenue for imposing penalties other than reduced representation at the time the Fourteenth Amendment was adopted; most of the focus in the legislative debates was on the harshness of the penalty rather than discerning if Congress had the authority to pass other penalties to further section 2’s substantive protections. Indeed, discussions leading up to the Fifteenth Amendment seem to indicate that there were some in Congress who believed that section 2’s penalty was exclusive. *See, e.g.*, CONG. GLOBE, 40th Cong., 2d. Sess. 2606 (1868) (statement of Sen. William Stewart). Post-enactment legislation and political realities later forced Congress to embrace a broad reading of its authority under both the Fourteenth and the Fifteenth Amendments, a view that is consistent with the constitutional text. *See infra* Part II.

85. *See* AKHIL REED AMAR, AMERICA’S UNWRITTEN CONSTITUTION 188 (2012).

86. *Id.*

87. *Id.* at 189.

88. Besides Balkin and Amar, other scholars have focused on different aspects of section 2, such as its exemption of felon disenfranchisement. *See, e.g.*, Janai S. Nelson, *The First Amendment, Equal Protection, and Felon Disenfranchisement: A New Viewpoint*, 65 FLA. L. REV. 111 (2013). Scholars have also debated whether Washington, D.C., is constitutionally entitled to a voting member in the House because of section 2’s language that representatives are “apportioned among the several states.” *See* Mark S. Scarberry, *Historical Considerations and Congressional Representation for the District of Columbia: Constitutionality of the D.C. House Voting Rights Bill in Light of Section Two of the Fourteenth Amendment and the History of the Creation of the*

Congress to impose section 2's penalty as an opening for the courts to intervene since "there shall be no disenfranchisement without the apportionment penalty"; thus, Congress's failure to impose the penalty led the Warren Court to embrace section 2's mandate through its voting-rights cases.⁸⁹ What Amar overlooks, however, is that the interpretive difficulties arise, not from disagreement over who should enforce section 2, but from the general language in section 5 giving Congress the power to enforce the Fourteenth Amendment by "appropriate" means.

The scope of this authority cannot be determined by reference to the text of section 5 of the Fourteenth Amendment, which, for example, says nothing about section 5 being remedial in nature or lacking a substantive component. Yet the Court derived these limitations on congressional authority by interpreting the text in light of the legislative history and the principles and norms underlying the document as a whole.⁹⁰ As John Hart Ely recognized over three decades ago, the provisions of the Constitution range from the specific to the general, and it is impossible to supply the content of the more general provisions through clause-bound interpretivism.⁹¹ For example, we know that the Equal Protection Clause forbids inequality, but the Court has interpreted its provisions in light of current political disputes because of the indeterminacy of its words.⁹² The Clause also has been interpreted in light of other provisions

District, 60 ALA. L. REV. 783 (2009). Some debate also has been triggered by section 2's limitation to male citizens, see, for example, Reva Siegel, *She the People: the Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947 (2002), but there has been no in-depth consideration of how section 2 influences the scope of congressional enforcement authority under section 5. William Van Alstyne has touched on this issue tangentially, arguing that section 2 is not the exclusive remedy for voting rights violations such that Congress is precluded from relying on section 1 of the Fourteenth Amendment to regulate voting rights. See William W. Van Alstyne, *The Fourteenth Amendment, the "Right" to Vote, and the Understanding of the Thirty-Ninth Congress*, 1965 SUP. CT. REV. 33, 45 (arguing that there was no consensus in the Thirty-Ninth Congress that "§ 2 would preclude Congress (or the courts) from employing sources of constitutional authority other than § 2 to affect state suffrage power"). Nonetheless, the trend is that most scholars have overlooked the importance of section 2 to modern day debates about voting rights.

89. AMAR, *supra* note 85, at 189 (arguing that the penalty of section 2 lives through "Warren Court right-to-vote case law" and provides a sound textual basis for a general right to vote).

90. See *City of Boerne v. Flores*, 521 U.S. 507, 512–36 (1997).

91. ELY, *supra* note 23, at 11–41 (discussing the implausibility of a "clause-bound" interpretivism).

92. See, e.g., *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 670 (1966) (holding that the right to vote is a fundamental interest under the Equal Protection Clause, despite the fact that the Framers of the Fourteenth Amendment never intended to create an explicit right to vote); *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) (holding that the separate-but-equal doctrine of racial segregation violates the Equal Protection Clause, despite the lack of historical evidence that the Framers intended the Fourteenth Amendment to apply to segregation in schools).

in the Constitution because, as Ely observes, “we are left with a provision whose general concern—equality—is clear enough but whose content beyond that cannot be derived from anything within its four corners or the known intentions of its framers.”⁹³ Ely focuses on the constitutional structure and procedural values derived therefrom in order to provide guidance to courts in implementing the substantive policies that the text is meant to protect but is simply not clear about.⁹⁴ More recently, Akhil Amar has employed a similar methodology that views the clauses holistically, determining the meaning of a word based on how the word is used in different constitutional provisions.⁹⁵

As with Balkin, Ely, and Amar, the constitutional text and structure are the starting point here. Like many of the substantive provisions of the Constitution, the meaning and scope of Congress’s enforcement authority is also indeterminate, and what legislation is “appropriate” can be determined only by reference to sources outside the four corners of the text.⁹⁶ To answer this question, this Article looks at how the Constitution in its entirety delegates authority over elections to the states and the federal government in order to determine the scope of the congressional authority in this area.

2. *The Spectrum of Congressional Authority over Elections*

The Constitution is relatively unambiguous that the states have broad authority over elections, but it is also apparent from the text that Congress has the authority to intervene in certain instances. The Elections Clause of article I, section 4 provides that the states shall choose “[t]he Times, Places, and Manner of holding elections,” for representatives and senators, but subject to Congress’s ability to “make

93. ELY, *supra* note 23, at 31; *see also* BALKIN, *supra* note 81, at 12–13 (“[W]hen we ask about the ‘meaning’ of the equal protection clause, we could be asking (1) what concepts the words in the clause point to; (2) how to apply the clause; (3) the purpose or function of the clause; (4) the intentions behind the clause; or (5) what the clause is associated with in our minds . . .”).

94. ELY, *supra* note 23, at 101 (arguing that the Constitution, with only a few exceptions, “has been a process of government, not a governing ideology” (footnotes omitted)).

95. Amar, *supra* note 23, at 779 (“Ely does not specifically suggest that we attend to the patterns of words and phrases that repeat themselves in the document. But if his general methodological prescription is not quite intratextualism, as I have defined it, it is rather close. Like intratextualism, Ely’s approach invites textualists to read clauses holistically, rather than in isolated, clause-bound fashion.”); *see also id.* at 764 (using intratextualism to bolster Chief Justice Marshall’s judicial-review analysis in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803)).

96. *See, e.g., infra* Part II.B (discussing the disagreement among the Framers about whether the Fifteenth Amendment would address facially neutral laws that have the effect, but not the intent, of abridging the right to vote on racial grounds).

or alter such Regulations.”⁹⁷ As I have argued elsewhere, this provision forms the basis of our system of federal elections by giving states plenary authority to set the ground rules while Congress retains a veto power over state regulations.⁹⁸ This framework of decentralized control exists throughout the Constitution. In article I, section 2 and the Seventeenth Amendment, respectively, the people elect members of the House of Representatives and the Senate. While the states choose the “Qualification requisite for Electors,” for both state and federal elections,⁹⁹ Congress retains the ability, under article I, section 5, to be “the Judge of the Elections, Returns, and Qualifications of its own Members.”¹⁰⁰ Because of its veto authority under the Elections Clause and the Qualifications Clause over both who is elected and the manner of their selection, Congress retains final say over the composition of the federal government, making Congress, not the states, sovereign with respect to federal elections.¹⁰¹

More difficult questions surround the relationship between the states and the federal government over the regulation of state elections. The states, consistent with their authority under the Tenth Amendment, are arguably sovereign with respect to state elections,¹⁰² but this sovereignty is limited by the Fourteenth and Fifteenth Amendments.¹⁰³ Specifically,

97. U.S. CONST. art. I, § 4.

98. Tolson, *supra* note 8; *see also* *Arizona v. Inter Tribal Council of Ariz., Inc.*, __U.S.__, 133 S. Ct. 2247, 2253 (2013) (noting that the Elections Clause is a “default provision” that “invests the States with responsibility for the mechanics of congressional elections, but only so far as Congress declines to pre-empt state choices” (quoting *Foster v. Love*, 522 U.S. 67, 69 (1997))); Derek T. Muller, *Invisible Federalism and the Electoral College*, 44 ARIZ. ST. L.J. 1237 (2012) (arguing against a national-popular-vote initiative for presidential elections because eliminating the role of the states in selecting the President through the electoral college would undermine our system of federalism).

99. U.S. CONST. art. I, § 2, cl. 1; U.S. CONST. amend. XVII.

100. U.S. CONST. art. I, § 5, cl. 1.

101. *See generally* Tolson, *supra* note 8.

102. *Shelby Cnty. v. Holder*, __U.S.__, 133 S. Ct. 2612, 2623 (2013) (“[E]ach State has the power to prescribe the qualifications of its officers and the manner in which they shall be chosen.” (quoting *Boyd v. Nebraska ex rel. Thayer*, 143 U.S. 135, 161 (1892))); *see also Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. at 2263 (noting that the states, not Congress, have the authority to set voter qualifications for state and federal elections).

103. Besides the Amendments’ explicit nondiscrimination principle, another basis for federal intervention in state elections is where, for example, “the election process itself reaches the point of patent and fundamental unfairness” and therefore implicates the Due Process Clause of the Fourteenth Amendment. *Roe v. Alabama ex rel. Evans*, 43 F.3d 574, 580 (11th Cir. 1995) (internal quotation marks omitted); *see also* *Bush v. Gore*, 531 U.S. 1060 (2000). Otherwise, states retain control over their own elections. *Compare* Karlan, *supra* note 33, at 17 (reading the Elections Clause as a plenary grant of authority over all elections), *with* Tolson, *supra* note 8 (recognizing that Congress’s authority under the Elections Clause is not sufficient to justify the scope of section 5

section 2 of the Fourteenth Amendment, by preventing abridgment of the right to vote on nonspecified grounds, represents an abrogation of the sovereignty that the states retained via the Elections Clause and the Tenth Amendment. Thus, the pertinent question is this: how much of this sovereignty has been delegated to the federal government? The answer is not readily discoverable from the constitutional text alone, but assessing sections 2 and 5 of the Fourteenth Amendment together helps illuminate the scope of this authority.¹⁰⁴

In particular, Congress's authority to enact lesser penalties than reduced representation under section 5 respects the sovereignty that states retain over elections, recognizes expanded federal power under the Reconstruction Amendments, and is consistent with a principle of statutory construction employed by the Court that construes a grant of authority to include lesser powers.¹⁰⁵ Pursuant to this maxim, one can

because the states retain limited sovereignty over state and local elections that have no direct federal interest).

104. See BALKIN, *supra* note 81, at 14 (“[W]here the text offers an abstract standard or principle, we must try to determine what principles underlie the text in order to build constructions that are consistent with it.”); *id.* at 260–62 (arguing that history should be used to derive the underlying principles of the text and to resolve underlying ambiguities); PHILIP BOBBITT, *CONSTITUTIONAL INTERPRETATION* 12–13 (1991) (identifying the various modalities of constitutional interpretation including the text, structure, precedent, prudential concerns, moral commitments, and history). I am not attempting to debate the weight that should be given to each of these considerations or the merits of various theories of constitutional interpretation, but it is clear that I am making my case largely based on the constitutional text, structure, and legislative history, which most of the various theories agree is the starting point for constitutional interpretation. See, e.g., Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980); Richard H. Fallon, *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189 (1987); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 862 (1989); David Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996).

105. Because of the Necessary and Proper Clause, the presence of an explicit power in the Constitution has not, to my knowledge, been interpreted to prevent Congress from adopting lesser regulations that are incidental to furthering the aims of the primary grant of power. See GARY LAWSON, GEOFFREY P. MILLER, ROBERT G. NATELSON & GUY I. SEIDMAN, *THE ORIGINS OF THE NECESSARY AND PROPER CLAUSE* 119 (2010) (arguing that the Necessary and Proper Clause grants incidental powers defined as “lesser in importance than the principal power” but is not a general grant of authority). Similarly, section 5 of the Fourteenth Amendment, which the Court had previously interpreted as similar in scope to the Necessary and Proper Clause, allows Congress to impose lesser penalties than section 2’s reduction in representation. The ability to impose lesser penalties is still possible post-*City of Boerne* so long as the congruence-and-proportionality test is met, but arguably, the presence of the words “shall enforce” in section 5 gives Congress significant authority to determine what means are “appropriate.” See Gary Lawson & Patricia B. Granger, *The “Proper” Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267, 277–79 (1993) (discussing various power-granting provisions of the Constitution that include phrases such as “shall think,” “shall judge,” and “shall deem,” and concluding that these provisions expressly make a political actor’s judgment—rather than objective necessity, propriety, or expediency—the test of constitutionality).

view section 2 as a broad grant of authority to Congress but, because of the specificity of its penalty, it also can function as a ceiling on congressional authority to address abridgments of the right to vote rather than a floor.¹⁰⁶ In other words, Congress can do no more than reduce a state's delegation, but it has substantial authority under section 5 to impose lesser penalties.¹⁰⁷ That section 2 represents an extreme penalty and therefore a ceiling on congressional authority is based on the view that, prior to the Reconstruction Amendments, the states enjoyed broad authority over their electoral mechanisms, even with respect to federal elections.¹⁰⁸ Given this, a lesser penalty arguably is one that intrudes on state sovereignty less than the penalty of reduced representation.¹⁰⁹ Section 5's grant of authority to further the Amendment's aims through "appropriate" legislation incorporated both the strong medicine of reduced representation and the ability to impose lesser penalties through ordinary legislation.¹¹⁰

106. *See, e.g., Nat'l Fed. of Indep. Bus. v. Sebelius*, __U.S.__, 132 S. Ct. 2566, 2629–42 (2012) (Ginsburg, J., concurring in part and dissenting in part) (relying on the reasoning that a grant of authority includes the lesser powers to reject the invalidation of the Medicaid expansion because Congress's authority to repeal the program altogether necessarily includes the power to alter or amend it); *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 762–63 (1988) (reasoning that the power to prohibit speech includes the lesser power to license it); *Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 345–46 (1986) (holding that "the greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling"); *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 368 (1981) (Rehnquist, J., dissenting) (invoking "the common-sense maxim that the greater includes the lesser").

107. Limiting Congress to imposing "lesser penalties" respects the original framework of section 2 while recognizing that the open-ended language of section 5 delegates some questions of application to future generations. *See* BALKIN, *supra* note 81, at 15 ("Constitutional doctrines created by courts, and institutions and practices created by the political branches, flesh out and implement the constitutional text and underlying principles.").

108. *See infra* Part II.A; *see also Arizona v. Inter Tribal Council of Ariz., Inc.*, __U.S.__, 133 S. Ct. 2247, 2271 (2013) (Alito, J., dissenting) ("Under the Elections Clause, the States have the authority to specify the times, places, and manner of federal elections except to the extent that Congress chooses to provide otherwise. And in recognition of this allocation of authority, it is appropriate to presume that the States retain this authority unless Congress has clearly manifested a contrary intent."); Franita Tolson, *Partisan Gerrymandering as a Safeguard of Federalism*, 2010 UTAH L. REV. 859, 884–87 (discussing the federalism concerns raised by the 1842 Reapportionment Act, despite the fact that it required single-member districts for House elections and did not affect state and local elections).

109. *Cf. Halberstam, supra* note 29, at 948 (noting that section 5 is "nothing like the categorical, one-size-fits-all rule of strict equality imposed by the one-person/one-vote cases").

110. *Cf. McConnell v. FEC*, 251 F. Supp. 2d 176, 418 n.174 (D.D.C. 2003) (Henderson, J., concurring in the judgment in part and dissenting in part) (rejecting the Tenth Amendment challenge to a provision of Bipartisan Campaign Reform Act of 2002 that allegedly "restrict[s] the activities of federal officeholders and candidates with respect to state and local election campaigns and processes" because "the broader, more invasive power of the federal government to regulate *municipal securities professionals* who solicit funds for state officials includes the narrower power

Determining whether penalties are less intrusive of state sovereignty is admittedly difficult given that congressional authority to regulate elections falls along a spectrum.¹¹¹ On the one hand are the regulations that govern the time, place, and manner of federal elections, which is when congressional authority is at its apogee.¹¹² Pursuant to this authority, Congress also can regulate so-called mixed elections, where its regulations can encompass any part of an election involved in the selection of congressmen.¹¹³

On the other end of the spectrum are regulations that govern voter qualifications and state elections, instances in which congressional power is arguably at its lowest.¹¹⁴ In *Oregon v. Mitchell*,¹¹⁵ for example, the Court held that the 1970 Amendments to the Voting Rights Act, which lowered the voting age to eighteen, were unconstitutional as applied to state and local elections because the Amendments impermissibly intruded on state sovereignty.¹¹⁶ The Court reasoned that, unlike the discriminatory use of literacy tests, which can be prohibited in all elections consistent with the Fifteenth Amendment, states retain the ability to determine the qualifications of electors in state and local

to regulate *federal candidates* who solicit funds for state officials” (emphasis in original), *aff’d in part and rev’d in part*, 540 U.S. 93 (2003).

111. In certain instances, there may be a fundamental difference between punishing state officials through the criminalization of certain activities and punishing the states as states through reduced representation, but I do not think this is dispositive here, given the penalty of reduced representation could be triggered through the discriminatory actions of state officials who, in the context of voter registration, election design, and ballot access, are usually acting under color of state law, 42 U.S.C. § 1983 (2006).

112. See *Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. at 2253–54 (“The power of Congress over the ‘Times, Places and Manner’ of congressional elections ‘is paramount, and may be exercised at any time, and to any extent which it deems expedient; and so far as it is exercised, and no farther, the regulations effected supersede those of the State which are inconsistent therewith.’” (quoting *Ex Parte Siebold*, 100 U.S. 371, 392 (1880))).

113. See *In re Coy*, 127 U.S. 731, 752 (1888) (holding that Congress’s power to regulate mixed elections under the Constitution “cannot be questioned”); *United States v. McCranie*, 169 F.3d 723, 727 (11th Cir. 1999) (noting that both the Necessary and Proper Clause and the Elections Clause empower Congress to regulate mixed elections even where federal candidates run unopposed).

114. *Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. at 2258 (“Prescribing voting qualifications, therefore, ‘forms no part of the power to be conferred upon the national government’ by the Elections Clause, which is ‘expressly restricted to the regulation of the *times*, the *places*, and the *manner* of elections.’” (quoting THE FEDERALIST NO. 60, at 369 (Alexander Hamilton) (Clinton Rossiter ed., 2003) (emphasis in original))).

115. 400 U.S. 112 (1970).

116. *Id.* 124–25 (“No function is more essential to the separate and independent existence of the States and their governments than the power to determine within the limits of the Constitution the qualifications of their own voters for state, county, and municipal offices and the nature of their own machinery for filling local public offices.”).

elections absent race discrimination.¹¹⁷ The Court acknowledged that “the original design of the Founding Fathers was altered by the Civil War Amendments and various other amendments to the Constitution,”¹¹⁸ but declined to find that these changes deprived the states of all sovereignty over state and local elections.¹¹⁹ Similarly, the recent case of *Arizona v. Inter Tribal Council of Arizona, Inc.*¹²⁰ sharply limited Congress’s ability to regulate voter qualifications in both state and federal elections, finding that “the Elections Clause empowers Congress to regulate how federal elections are held, but not who may vote in them.”¹²¹

Remedies that fall somewhere between these two extremes, such as the VRA’s preclearance regime, necessarily involve a subjective determination about their intrusiveness on state sovereignty as a part of the means-ends calculus.¹²² One relevant factor in the case law in assessing fit has been an under-enforced constitutional principle that I term the “anti-circumvention norm.” This norm clarifies what it means for the right to vote to be “denied . . . or in any way abridged”¹²³ in the context of section 2 by allowing Congress to regulate certain voting requirements that are presumptively constitutional but would otherwise circumvent the protections of the Fourteenth Amendment.¹²⁴ For example, Congress could arguably preempt a state law that lacks discriminatory intent if there is significant evidence that the regulation would effectuate broad disenfranchisement and undermine the

117. *Id.*

118. *Id.* at 126.

119. *Id.* at 129.

120. *—U.S.—*, 133 S. Ct. 2247 (2013).

121. *Id.* at 2257.

122. Amar, *supra* note 29, at 117 (“Congress itself has hesitated to impose the draconian sanction of reduced apportionment on offending states. So Congress, via the VRA, has done something far gentler—something altogether proportionate to the core purposes of the right to vote explicitly set forth in section 2.”); *see also infra* Part III.

123. U.S. CONST. amend. XIV, § 2.

124. This notion of an “underenforced norm” is borrowed from Lawrence Sager, who views the Equal Protection Clause as embodying such a norm and argues that it is constitutional for legislation to push equal-protection norms to their full conceptual boundaries, even if it is beyond the Court’s interpretation of the Clause. Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1215–16 (1978). This norm is not intended to undermine the Court’s test in *City of Boerne v. Flores*, but should be a consideration in whether that standard is met. *Cf.* ELY, *supra* note 23 (using the value of representation-reinforcement to fill interpretive gaps in the Constitution); CASS SUNSTEIN, *THE PARTIAL CONSTITUTION* (1993) (using the norm of deliberative democracy to do the same).

protections of the Amendment.¹²⁵ Fidelity to this norm, which is derived from the case law and implicit in section 2, helps determine which remedies, other than reduced representation, are appropriate to address abridgments of the right to vote.¹²⁶ A review of the legislative history of the Fourteenth and Fifteenth Amendments illustrates that this approach to assessing the scope of Congress's authority to enforce voting rights, which relies on text, structure, and principle, is not only justified, but required.

II. THE PRESCIENCE OF THE THIRTY-NINTH CONGRESS: VOTING, STATE SOVEREIGNTY, AND THE FOURTEENTH AND FIFTEENTH AMENDMENTS

The legislative debates over the Fourteenth and Fifteenth Amendments reveal that Congress, in adopting section 2 of the Fourteenth Amendment, balanced the core values of expanding voting rights and retaining state sovereignty over elections. Because of this balancing, section 2 stands as the textual archetype of congressional remedial power over voting. Thus, rather than relying on abstract principles designed to limit the interpretive authority of Congress, as the Court did in *City of Boerne*,¹²⁷ courts can use section 2 as the reference point for determining whether Congress has exceeded the scope of its enforcement authority in enacting voting rights legislation. Moreover, section 2 remains a viable source of congressional power since section 1

125. Compare *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 202 (2008) (upholding Indiana's voter-identification law because there was no evidence in the record that the law would result in broad disenfranchisement of indigent voters in the state), with *Applewhite v. Commonwealth*, No. 330 M.D. 2012, 2012 Pa. Commw. Unpub. LEXIS 749 (Pa. Commw. Ct. Oct. 2, 2012) (granting a preliminary injunction enjoining Pennsylvania's voter-identification law because the lack of state-issued identification cards would have resulted in broad voter disenfranchisement during the November 2012 election even though the law could validly be enforced in the future). Arguably, if the state imposes a voter identification law to address an actual problem with voter fraud, but makes it fairly easy for individuals to obtain free identification or to vote provisionally, then the law would not run afoul of section 2, even if in practice the law results in broad disenfranchisement. See Franita Tolson, *What is Abridgment? A Critique of Two Section Twos* (Jan. 15, 2014) (unpublished manuscript) (on file with author). Generous and easy access to photo identification rebuts arguments that the law undermines the protections of the Amendments even if, technically, a photo identification-card requirement constitutes an "abridg[ment]." See *Crawford*, 553 U.S. at 197–99.

126. See *infra* Part III.

127. See, e.g., Michael McConnell, *Institutions and Interpretation: A Critique of City of Boerne v. Flores*, 111 HARV. L. REV. 153, 176 (1997) ("The historical evidence presented in the *Boerne* opinion proves only that Congress was not intended to have authority to pass general legislation determining what the privileges and immunities of citizens should be. It does not support the more extreme claim that Congress lacks independent interpretive authority.").

of the Fifteenth Amendment was meant to complement rather than replace it as a source of congressional authority, giving Congress broad power to protect the right to vote.¹²⁸

A. *Discovering the Framers' Intent: Section 2 of the Fourteenth Amendment as the Baseline for Voting Rights Remedies*

The Framers of the Fourteenth Amendment drafted section 2 to address a unique problem presented by the abolition of slavery: the conquered South's representation in the House would increase by at least fifteen seats even if, as expected, southern states would deny the franchise to African-Americans.¹²⁹ African-Americans no longer counted as three-fifths of a person, giving the southern states more representation in Congress than they had before the war.¹³⁰ In addressing this issue, Congress wanted to protect the franchise from abridgement under discriminatory state laws, but without completely displacing the constitutional text and principles of federalism that delegated authority over elections to the states.¹³¹

128. The courts and the legal scholarship have overlooked section 2 because Congress has never used it to reduce a state's congressional delegation. By the twentieth century, many states in the former confederacy, including Mississippi, Louisiana, South Carolina, and North Carolina, legally disfranchised African-Americans. See Virginia E. Hench, *The Death of Voting Rights: The Legal Disfranchisement of Minority Voters*, 48 CASE W. RES. L. REV. 727, 768 n.215 (1998). Scholars have attributed this failure to the view that the Fifteenth Amendment has rendered obsolete the penalty of section 2, a position that does not fully appreciate the historical circumstances surrounding the adoption of the Fourteenth and Fifteenth Amendments. See *infra* Part II.B. Compare JOHN MABRY MATHEWS, LEGISLATIVE AND JUDICIAL HISTORY OF THE FIFTEENTH AMENDMENT 12, 16 (1909) (rejecting this argument), with Gabriel J. Chin, *Reconstruction, Felon Disfranchisement, and the Right to Vote: Did the Fifteenth Amendment Repeal Section 2 of the Fourteenth Amendment?*, 92 GEO. L.J. 259 (2004) (making this argument).

129. JOSEPH B. JAMES, THE FRAMING OF THE FOURTEENTH AMENDMENT 23 (1956) (“[T]he representation of fourteen former slave states would be increased from eighty-four, on the three-fifths basis, to one hundred, based on total population. But, if an amendment were passed to base representation on qualified voters, those states would lose eighteen representatives instead of gaining sixteen.”); see also CONG. GLOBE, 39th Cong., 1st Sess. 141 (1866) (statement of Rep. James Blaine) (proposing that “suffrage instead of population [be] the basis of apportioning Representatives” so as to “deprive the lately rebellious States of the unfair advantage of a large representation in this House, based on their colored population, so long as that population shall be denied political rights by the legislation of those States”).

130. JAMES, *supra* note 129, at 23; see also FONER, *supra* note 36, at 252 (noting that the prewar system in which blacks would go from three fifths of a person to being counted in full would, if left unchanged, “allow ‘unrepentant . . . traitors,’ in alliance with Northern Democrats, to gain control of Congress, compensate slaveowners for emancipation, and elect Robert E. Lee President in 1868” (alternation in original) (quoting an unidentified representative)).

131. MATHEWS, *supra* note 128, at 12 (“There was little real difference in opinion among the leaders in Congress as to the desirability of enlarging the sphere of political liberty for the negro race. The chief difficulty in accomplishing this result lay in the fact that it could apparently be done

Because of this concern, Congress had considerable debate over what means would be appropriate to ensure that southern states granted civil and political rights to African-Americans. Arguably, most of those congressmen involved in the drafting of the Fourteenth Amendment wanted to impose a nondiscrimination principle on the states and require that they extend suffrage to all qualified males, regardless of race. But there is little doubt that few in the thirty-ninth Congress intended to explicitly grant the right to vote through the Fourteenth Amendment's provisions, a move widely viewed as raising federalism concerns.¹³² Instead, Representative Thaddeus Stevens offered an amendment to John Bingham's proposed text of section 1¹³³ that would "[s]ecure to all citizens of the United States, in every state, the same political rights and privileges; and to all persons in every State, equal protection in the enjoyment of life, liberty and property."¹³⁴ Indeed, this amendment and

only by limiting the sphere of governmental action in all the States to a corresponding extent. There was a feeling too widespread to be safely antagonized that the regulation of the suffrage was a matter properly belonging to the state governments."); *see also* CONG. GLOBE, 40th Cong., 2d Sess. 2665 (1868) (statement of Sen. Roscoe Conkling) ("Without going back of the fourteenth amendment to the Constitution, be it ratified now or about to be ratified, it seems to me clear that by the unmistakable force of its language the regulation of suffrage in the States belongs to the States themselves.").

132. Some radicals like Senator Charles Sumner and Representative Thaddeus Stevens hoped that the penalty in section 2 would have the practical effect of mandating universal suffrage, but all recognized that the Fourteenth Amendment, on its face, did not confer this right. The criticism that the Framers were trying to achieve indirectly what they could not obtain directly—African-American suffrage—was repeated throughout the debates in Congress and in public. *See, e.g.*, JAMES, *supra* note 129, at 129 ("[Representative] Rogers averred that by the second section the committee majority had been trying to obtain Negro suffrage.").

133. Representative John Bingham proposed the following language as a possible section 5, although it later became the basis for section 1:

The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States, and to all persons in the several States equal protection in the rights of life, liberty, and property.

CONG. GLOBE, 39th Cong., 1st Sess. 1034 (1866) (statement of Rep. John Bingham). Whether Representative Bingham intended the right to vote be included as a part of the privileges or immunities of citizens is contestable, *see* Kurt Lash, *The Origins of the Privileges or Immunities Clause, Part II: John Bingham and the Second Draft of the Fourteenth Amendment*, 99 GEO. L.J. 329, 334 (2011) (arguing that the "federal privileges and immunities were those 'defined in the Constitution,' such as the liberties enumerated in the first eight amendments to the Constitution" and that "Bingham expressly limited his efforts to enforcing textually enumerated rights"), but arguably, Representative Thaddeus Stevens's amendment to Representative Bingham's proposed text was designed to add an explicit nondiscrimination principle, *see generally* Randy E. Barnett, *Whence Comes Section One? The Abolitionist Origins of the Fourteenth Amendment*, 3 J. LEGAL ANALYSIS 165 (2011) (arguing that, unlike Representative Stevens's proposal, Representative Bingham's proposal was not limited to nondiscrimination).

134. JAMES, *supra* note 129, at 81 (quoting BENJAMIN B. KENDRICK, *THE JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION: 39TH CONGRESS, 1895-1867*, at 51 (1914)); *see also id.* ("It is obvious that the 'political rights' part of the proposed change was intended to open

its focus on “equal protection” and granting everyone “the same political rights and privileges” was embraced in principle by the Military Reconstruction Act of 1867, and represented one of Congress’s first attempts to impose equal suffrage in the south through ordinary legislation. The Military Reconstruction Act made the governments of the southern states established under presidential reconstruction provisional until they ratified the Fourteenth Amendment and held constitutional conventions staffed by delegates “elected by the male citizens of said state, twenty-one years old and upward, of whatever race, color, or previous condition.”¹³⁵

Initially, draft section 2 focused on the denial of “civil and political rights,”¹³⁶ but the Joint Committee on Reconstruction opted to remove this language and focus solely on discriminatory denials of the franchise:

Representatives and direct taxes shall be apportioned among the several States which may be included within this Union according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed; *Provided*, That whenever the elective franchise shall be denied or abridged in any State on account of race or color, all persons of such race or color shall be excluded from the basis of representation.¹³⁷

Congress’s motivation, first in preserving civil and political rights in drafts of both sections 1 and 2 of the Fourteenth Amendment, then later in explicitly imposing a penalty for vote denial in section 2, was to address the “black codes” adopted across the South following the end of the Civil War.¹³⁸ The black codes created a separate criminal justice

the way for Negro voting on a national scale.”); Stephen B. Weeks, *The History of Negro Suffrage in the South*, 9 POL. SCI. Q. 671, 684 (1894) (noting that the Fourteenth Amendment “had only sought to stimulate the states to grant the suffrage to the negro”).

135. Military Reconstruction Act of 1867, ch. 153, 14 Stat. 428, 429.

136. CONG. GLOBE, 39th Cong., 1st Sess. 141 (1866) (statement of Rep. James Blaine). Representative Blaine proposed the following language for section 2:

Representatives and direct taxes shall be apportioned among the several States which may be included within this Union according to their respective numbers, which shall be determined by taking the whole number of persons except those to whom civil or political rights or privileges are denied or abridged by the constitution or laws of any state on account of race or color.

Id. at 141–42.

137. *Id.* at 351.

138. See FONER, *supra* note 36, at 341–42 (noting that Democrats in the South employed violence and threats including “cutting off credit to blacks attending Republican meetings,” “landlords threaten[ed] to evict from plantations” African-Americans who voted for Republicans, and the Ku Klux Klan instituted a “‘reign of terror’ against Republican leaders black and white”); Joe M. Richardson, *Florida Black Codes*, 47 FL. HIST. Q. 365, 373 (1969) (noting that African-Americans

system for the former slaves, extensively regulated their labor, disenfranchised them, and provided little redress for injustices committed against them by whites.¹³⁹ Violence erupted once state leaders sympathetic to radical reconstruction began to endorse plans to convene constitutional conventions to enfranchise African-Americans.¹⁴⁰ The black codes and the violence that persisted in the post-war South justified the passage of a constitutional amendment allowing Congress to intervene in state electoral processes at every level because wrongful denial of the vote had become a systemic problem that was not limited to federal elections.¹⁴¹

The remedy imposed by section 2, which sought to disincentivize broad disenfranchisement, was appropriately tailored to address this harm, particularly given the underlying federalism issues. In the view of the Republicans, the draft amendment, by penalizing those states with the highest levels of African-American male voters, was the most politically palatable and constitutionally tolerable way of protecting access to the franchise—and guaranteeing the future of the Republican Party—in the South.¹⁴² An affirmative guarantee of the right to vote

had no political rights, could not carry firearms, and could not testify against whites).

139. See FONER, *supra* note 36, at 121 (“Freedmen were assaulted and murdered for attempting to leave plantations, disputing contract settlements, not laboring in the manner desired by their employers, attempting to buy or rent land, and resisting whippings.”); Richardson, *supra* note 138, at 377 (“The passage of black codes by Florida and other southern states was unfortunate and unwise. They insured what Florida wanted to avoid—intercession by the federal government.”).

140. FONER, *supra* note 36, at 263; see also *id.* at 412–15 (discussing how some Republicans enfranchised ex-Confederates in order to gain power at the state level).

141. CONG. GLOBE, 41st Cong., 2d Sess. app. at 472 (1870) (statement of Sen. Eugene Casserly) (“‘The right to vote’ of that class of persons [i.e., African-Americans] had been ‘denied or abridged’ in many, perhaps most of the States, and might be again in all. Hence there was an evil, real or supposed, to be remedied and prevented.”); CONG. GLOBE, 39th Cong., 1st Sess. 39 (1865) (discussing restrictive laws to regulate the labor of blacks in Georgia, Mississippi, and Louisiana and proposing a bill that would invalidate all laws in the former confederacy that maintain “inequality of civil rights and immunities . . . by reason or in consequence of any distinctions or differences in color”); see also FONER, *supra* note 36, at 277 (“The astonishingly rapid evolution of Congressional attitudes that culminated in black suffrage arose both from the crisis created by the obstinacy of Johnson and the white South, and the determination of Radicals, blacks, and eventually Southern Unionists not to accept a Reconstruction program that stopped short of this demand.”).

142. CONG. GLOBE, 39th Cong., 1st Sess. 358 (1866). In debating whether representation should be based on qualified voters rather than population, Representative Roscoe Conkling argued that making qualified voters the basis of representation was less constitutionally problematic than depriving states of the power to disqualify voters on the basis of race:

The second plan mentioned, the proposition to prohibit States from denying civil or political rights to any class of persons, encounters a great objection on the threshold. It trenches upon the principle of existing local sovereignty. It denies to the people of the several States the right to regulate their own affairs in their own way. It takes away a right which has been always supposed to inhere in the States and transfers it to the General Government. It meddles with a right reserved to the States when the Constitution was adopted, and to which they will long

would have created political backlash in the North, where many people were against African-American suffrage, and in the South, where ex-Confederates could easily abridge this right, mandating federal oversight for the foreseeable future.¹⁴³ Instead, the Framers addressed the South's attempt to garner the benefit of increased representation in Congress while instituting a legal regime that placed African-Americans in a quasi-bondage state by linking representation to eligible voters rather than population to deter future wrongdoing.¹⁴⁴ The Committee's draft and proposed amendments to section 2 all proceeded from the premise that states still had, under the Elections Clause, the authority to choose the time, place, and manner of elections, to set the qualifications of electors under article I, section 2, and to govern state elections pursuant to the Tenth Amendment. However, the South's denial of basic rights to African-Americans meant that this power could no longer be unencumbered.¹⁴⁵

cling before they surrender it.

Id.; see also JAMES, *supra* note 129, at 22 (“[S]uch great emphasis on representation in 1865 seems to have been prompted by a desire for Negro votes in the near future as an aid to national Republican power . . .”).

143. See FONER, *supra* note 36, at 241 (noting that moderate Republicans were not “enthusiastic about the prospect of black suffrage, either in the North, where it represented a political liability, or the South, where it seemed less likely to provide a stable basis for a new Republican party than a political alliance with forward-looking white Southerners”).

144. Unsurprisingly, attempts to enfranchise African-Americans made the Republican Party unpopular with southern whites, and the hope was that section 2 would help account for this lack of support in elections going forward by ensuring that African-Americans remained enfranchised. See William A. Russ, Jr., *The Negro and White Disenfranchisement During Radical Reconstruction*, 19 J. NEGRO HIST. 171, 177 (1934) (“The existence of the Republican party is bound up with the establishment of Negro suffrage. If it fails here its career as a national party is closed. If it falters in this course it must die.” (quoting ANTI-SLAVERY STANDARD, Oct. 19, 1867)). Moderate Republicans like Representative Bingham did not necessarily endorse this position. JAMES, *supra* note 129, at 130 (noting that Representative Bingham claimed that section 2 “only equalized representation among the states”). But by 1866, Representative Bingham believed that the southern states should be readmitted once they ratified the Fourteenth Amendment and established black suffrage. *Id.* at 274; see also MATHEWS, *supra* note 128, at 17–18 (“[T]he national legislature endeavored by every means in its power to make negro suffrage in the South as permanent as a constitutional amendment would make it, without in any way affecting the control of the Northern States over the qualifications of their voters.”).

145. This concern about state sovereignty has to be placed in the broader context of Reconstruction, where the federal government was already intervening in southern life to an unprecedented extent. To minimize the intrusion, many Democrats, ex-Confederates, and Moderate Republicans expressed their willingness to extend suffrage to African-Americans in order to punish ex-confederates, avoid reduced representation in Congress, and to change the terms of the national debate from African-American suffrage to other issues, but once the political tides changed, many of these individuals planned to use their new political capital to undo the gains made by African-Americans. FONER, *supra* note 36, at 271. Section 2 gave Congress the authority to prevent backsliding.

That Congress made the proper means-ends determination with respect to section 2 is best illustrated by the debate over its scope. Despite the substantial record of civil-rights violations in the South, there still was considerable disagreement over how the penalty in section 2 would punish those states that abridged the right to vote. During discussions in the House, for example, some representatives noted that limiting the penalty in section 2 to abridgments on the basis of race could easily be circumvented by the states. As one scholar observed, the debates over early drafts of section 2 reflected this concern:

Thomas Jenckes of Rhode Island . . . objected that Southern States by property qualifications could easily get around the Reconstruction Committee's bill, though not depriving Negroes of the right to vote because of race or color. He asserted that if South Carolina adopted a requirement that voters own fifty acres of land, the Negroes would be just as easily disfranchised as by a law based on race or color. The objection that property qualifications were not covered by the bill was also raised by Thomas Eliot of Massachusetts, and by Jehu Baker of Illinois, who declared that "no State should reserve in her basis of representation persons disfranchised and not represented, no matter on what ground she so excludes them."¹⁴⁶

Other representatives also questioned how property and educational qualifications would operate given draft section 2's limitation to abridgments based on race. Representative Roscoe Conkling, a member of the Committee on Reconstruction, responded that both of these qualifications would be permissible "if framed to operate impartially on both races,"¹⁴⁷ implying that neutral criteria discriminately applied could trigger the penalty of section 2.

Nevertheless, the Senate rejected the language in the House version, which excluded "all persons of such race or color . . . from the basis of representation" whenever the right to vote is abridged.¹⁴⁸ Pursuant to this language, discrimination against one African-American conceivably could remove the entire population of African-Americans from the state's basis of representation.¹⁴⁹ Many Republicans viewed this

146. George David Zuckerman, *A Consideration of the History and Present Status of Section 2 of the Fourteenth Amendment*, 30 *FORDHAM L. REV.* 93, 97-98 (1961) (citing *CONG. GLOBE*, 39th Cong., 1st Sess. 376, 385, 406 (1866)).

147. JAMES, *supra* note 129, at 61-62; *see also id.* at 133 (noting that Senator Sherman found section 2 of the proposed Fourteenth Amendment "as the most objectionable feature because under it intelligence tests as a voting qualification would be discouraged").

148. *Id.* at 60.

149. *Id.* at 57, 60.

outcome as disproportionate to the harm to be addressed and the equivalent of forcing African-American suffrage on the South.

In contrast, leading radical Charles Sumner condemned the language in section 2 for “acknowledging that states were entitled to limit suffrage on racial grounds” since the provision implicitly countenanced the South’s ability to discriminate on the basis of race or color by not directly forbidding it.¹⁵⁰ After the Senate rejected the House proposal, members of the Joint Committee on Reconstruction proposed an alternative draft. Notably, the key differences from the earlier proposal, addressing the concerns raised by Sumner and others, is the proportional reduction of representation for abridging the right to vote and the elimination of racial discrimination as the sole basis for reduction:

[W]henever in any State the elective franchise shall be denied to any portion of its male citizens, not less than twenty-one years of age, or in any way abridged, except for participation in rebellion or other crime, the basis of representation of such States shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens not less than twenty-one years of age.¹⁵¹

In removing the reference to “race or color,” the proposed amendment embraced two important insights ultimately endorsed in the final version.¹⁵² First, it embraced that discrimination in voting could occur by proxy and the express reference to “race or color” limited Congress’s ability to act when such discrimination occurs.¹⁵³ While some in the Senate wanted to remove this language in order to avoid placing any

150. FONER, *supra* note 36, at 253, 255; *see also* JAMES, *supra* note 129, at 73 (noting that Senator Sumner objected “to bringing inequalities into the language of the Constitution;” that the amendment “sanctioned taxation without representation;” and finally, that the amendment “made concessions to state rights” while compromising “human liberty” on the basis of color).

151. JAMES, *supra* note 129, at 112; *see also* Zuckerman, *supra* note 146, at 101 (“[T]he debates in Congress had shown that qualifications based on race or color were not the only way Negroes could be disfranchised; property or educational qualifications might also operate to achieve the same result. Thus the committee searched for language extending beyond qualifications based on race or color in determining the basis of representation. The committee searched also for language which, in form at least, would be applicable to all states and avoid charges of sectionalism and which would be strong enough to satisfy the radicals who claimed that the previous amendment sanctioned disfranchisement based on race or color.”).

152. James contends that the exclusion of the term “race or color” was an oversight, JAMES, *supra* note 129, at 113, but this does not square with the fact that a resolution introduced by a senate member of the Joint Committee also excluded the term “race or color,” *id.* at 92, and that the final version added the language “in any way abridged,” which intentionally provides a broader basis for which the penalty of reduced representation would be exacted.

153. Zuckerman, *supra* note 146, at 97–98 (discussing how some Republicans did not want to limit section 2’s penalty solely to abridgment on the basis of race or color).

obligation on the northern states to enfranchise African-American voters, its removal also gave Congress authority under section 2 to penalize states for discrimination on grounds other than race.¹⁵⁴

Second, the exemption of abridgments based on “treason or crime” from the penalty of section 2 is Congress’s assessment that it could not remove all authority from the states to regulate the franchise, especially since commission of a crime had long served as a basis for disenfranchisement in the states. Although “treason or crime” could serve as a proxy for racial discrimination similar to property and educational qualifications,¹⁵⁵ this exemption promoted African-American suffrage in the short term by allowing states to disenfranchise ex-confederates and prevent them from regaining power.¹⁵⁶

Arguably, Congress’ analytical exercise in crafting section 2, a penalty that balanced the states authority over elections against extending the right to vote on a nondiscriminatory basis, represents the proper baseline from which to assess congressional legislation enacted pursuant to section 5. Section 2, although clearly designed to change the status quo, embraces a nondiscrimination principle rather than an explicit right to vote to respect federalism.¹⁵⁷ Functionally, this means that states can still choose the qualifications of electors, so long as they do so in a nondiscriminatory manner.

Section 2’s influence also extends beyond the context of the

154. *Id.* at 98–102.

155. See Richard M. Re & Christopher M. Re, *Voting and Vice: Criminal Disenfranchisement and the Reconstruction Amendments*, 121 *YALE L.J.* 1584, 1591 (2012) (noting that legislation adopted contemporaneously to section 2 used language narrower than the provision’s “other crime” language in order to “combat racist disenfranchisement” based on crime); *id.* at 1628 (noting that the Military Reconstruction Act permitted disenfranchisement only for the commission of “a felony at common law”).

156. Russ, *supra* note 144, at 171 (observing that “one of the chief reasons in the minds of idealists of the radical party for disabling white leaders [was] that blacks should be permitted to function unhampered”). Another possible reason for inclusion of the “treason, or other crime” language but not other grounds is because this is the only language which would receive a majority of the votes in the Senate. See JAMES, *supra* note 129, at 68 (stating that although “[r]epresentation based on voters would be unfair to the East and to border states like Missouri in which disenfranchised ex-Confederates constituted a large part of the population,” the principal merit of the amendment, according to at least one representative and supported by others, “lay in its possibility of adoption; for it ‘accomplishes indirectly what we may not have the power to accomplish directly’” (quoting *CONG. GLOBE*, 39th Cong., 1st Sess. 705 (1866) (statement of Sen. William Fessenden))).

157. FONER, *supra* note 36, at 259 (“The Fourteenth Amendment can only be understood as a whole, for while respecting federalism, it intervened directly in Southern politics, seeking to conjure into being a new political leadership that would respect the principle of equality before the law.”); cf. AMAR, *supra* note 85, at 188 (arguing that because of the nature of its penalty it effectively operates as an affirmative grant).

Fourteenth Amendment. Because of their shared drafting history, section 2 of the Fourteenth Amendment and section 1 of the Fifteenth Amendment stand as aggregate sources of authority for voting rights legislation, a fact best illustrated by the Enforcement Act of 1870.

B. Discovering the Framers' Intent: The Scope of Congressional Enforcement Authority over Voting Rights

Section 2 of the Fourteenth Amendment, in its final form, reflects a series of political compromises balancing Congress's concerns over intruding on the state's authority over elections against its desire to expand access to the franchise.¹⁵⁸ The Framers adopted section 2 to protect the newly freed slaves from being disenfranchised through direct and indirect means once the southern states were allowed back into the union.¹⁵⁹ Once it became evident that disenfranchisement would proceed on a massive scale if southern whites regained power, the Framers passed the Fifteenth Amendment.¹⁶⁰ The breadth of section 2, and its extension to both state and federal elections, gave Congress significant authority to regulate the franchise through indirect pressure; however, section 2 has to be read in conjunction with the Fifteenth Amendment in order to illuminate the actual scope of Congress's enforcement authority.

This interpretive approach is supported by Supreme Court precedent contemporaneous to the Framing that relied on intratextualism to derive the meaning of the Fourteenth Amendment.¹⁶¹ For example, in the *Slaughter-House Cases*,¹⁶² a group of individuals challenged a law creating a state-authorized monopoly requiring all butchers to slaughter their livestock at one central location.¹⁶³ The Court held that this monopoly did not violate the Privileges or Immunities Clause of the Fourteenth Amendment because the Clause protects only those rights

158. FONER, *supra* note 36, at 251–61.

159. JAMES, *supra* note 129, at 22.

160. See CONG. GLOBE, 40th Cong., 3d Sess. 672 (1869) (statement of Sen. Henry Wilson) (“The crowning act of emancipation, the great constitutional amendment, was sternly resisted. The fourteenth article of amendment to the Constitution, the civil rights bill, the Freedman’s Bureau bill, every measure that we have passed to enlarge the rights of privileges of that emancipated race, to protect them, to life them, has encountered not only the sternest opposition of those who were against us politically, but it has encountered the prejudices of a portion of those who ordinarily vote with us.”); FONER, *supra* note 36, at 412–59 (discussing how some Southern Democrats tried to convince the nation that they were beyond racial issues, but that most still refused to accept the reality of Reconstruction and African-American suffrage).

161. Amar, *supra* note 23.

162. 83 U.S. 36 (1873).

163. *Id.* at 59–60.

belonging to “citizens of the United States” rather than “citizens of a state.”¹⁶⁴ Notably, the *Slaughter-House Cases* Court looked to the Articles of Confederation, the Privileges and Immunities Clause of article I, and the case law in making a distinction between those rights protected by United States citizenship and those belonging to citizens of a state.¹⁶⁵

Like the Privileges and/or Immunities Clauses of the Fourteenth Amendment and article I, the textual and historical link between section 1 of the Fifteenth Amendment and section 2 of the Fourteenth Amendment, both dealing with abridgments of the right to vote and linked by the drafting history, mandate that they be interpreted in light of each other in determining the scope of congressional authority.¹⁶⁶ In particular, since section 2 of the Fourteenth Amendment predates section 1 of the Fifteenth Amendment, section 2 is instructive in determining what Congress understood the scope of the Fifteenth Amendment to be, and what that provision added to Congress’s ability to enforce the nondiscrimination principle of the Fourteenth Amendment.¹⁶⁷ Less clear are the prudential considerations that are relevant to interpreting congressional authority jointly under these Amendments, as Congress has never utilized the penalty of section 2.¹⁶⁸ Nevertheless, the legislative history indicates that section 2 of the Fourteenth Amendment and section 1 of the Fifteenth Amendment were supposed to complement each other as sources of congressional authority over voting, and thus should be read together.

1. The Historical Link Between Section 2 of the Fourteenth Amendment and Section 1 of the Fifteenth Amendment

There is a historical and textual link between the Fourteenth and Fifteenth Amendments because language originally proposed for section 2 of the Fourteenth Amendment ultimately became the basis for section 1 of the Fifteenth Amendment.¹⁶⁹ In addition to the committee’s draft

164. *Id.* at 74.

165. *Id.* at 75.

166. *See* Amar, *supra* note 23.

167. MATHEWS, *supra* note 128, at 14 (arguing that section 2 of the Fourteenth Amendment, “[a]s far as subject matter is concerned[,] is really more germane to the Fifteenth Amendment than to the other sections of the Fourteenth Amendment”).

168. *See* BOBBITT, *supra* note 104, at 13 (identifying prudential concerns as one of the modalities of constitutional interpretation).

169. *See* MATHEWS, *supra* note 128, at 11–12 (arguing that section 2 of the Fourteenth Amendment is consistent with the Fifteenth Amendment).

section 2 that passed the House, there were two alternative proposals on the table in early 1866 that would have prevented, or alternatively, penalized states for denying the right to vote on the basis of race of color. The first proposal, put forth by Senator Fessenden of Maine, provided that:

All provisions in the Constitution or laws of any State whereby any distinction is made in political . . . rights or privileges on account of race . . . or color shall be inoperative and void.¹⁷⁰

In contrast, the Blaine proposal stated that:

[W]henever the elective franchise shall be denied or abridged on account of race . . . or color, all persons of such race . . . or color shall be excluded from the basis of representation.¹⁷¹

Looking at the text of the Fifteenth Amendment, it is clear that Fessenden's draft influenced the basis of that Amendment,¹⁷² and Blaine's proposal is closest to the text adopted by the House as the basis for section 2's "indirectly coercive" method of protecting the franchise.¹⁷³ The House favored this language because, unlike Fessenden's proposal, it would not disturb the states' plenary authority to choose the qualifications of electors.¹⁷⁴

Notwithstanding the potential federalism costs of the Fifteenth Amendment, many of the Framers viewed it, standing alone, as applying only to disenfranchisement on the three specified grounds (race, color, or previous condition of servitude) and therefore inadequate to address the ingenious ways in which states could potentially disenfranchise African-Americans.¹⁷⁵ Indeed, the Framers had concerns that listing specified

170. *Id.* at 11.

171. *Id.* at 11–12.

172. The Fifteenth Amendment provides: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." U.S. CONST. amend. XV; *see also* MATHEWS, *supra* note 128, at 12 ("The Fessenden plan, which involved the idea that finally took definite shape in the Fifteenth Amendment, was intended to secure the right of suffrage to negroes by a direct guarantee."); *cf.* Chin, *supra* note 128, at 261 (overlooking the connection between the language of section 2 of the Fourteenth Amendment and section 1 of the Fifteenth Amendment).

173. MATHEWS, *supra* note 128, at 12 ("The Blaine plan . . . aimed at the same object [as the Fessenden plan] by the indirectly coercive method of minatory inducements.").

174. *Id.*; *see also* Zuckerman, *supra* note 151, at 97.

175. MATHEWS, *supra* note 128, at 45 ("Williams of Oregon thought that if a State should pass disenfranchising legislation not based on any of the three specified grounds it would be valid legislation as far as the Amendment was concerned. . . . The white people of a State might decide that the negroes were disloyal, or were disturbers of the public peace, and on that account should not be allowed to vote."); *see also id.* at 46–47 ("Conkling of New York also considered the Amendment utterly inadequate and ineffective on account of its omissions. One obvious method by

grounds upon which a state may not disenfranchise in the Fifteenth Amendment impliedly authorized a state to disenfranchise on other grounds.¹⁷⁶ Yet this language of the Fifteenth Amendment, substantively narrower but broader in the scope of available penalties than section 2 of the Fourteenth, is consistent with the view that the states retained some of their sovereignty over elections post-Reconstruction.¹⁷⁷ The Fifteenth Amendment directly intruded on the ability of states to choose the qualification of electors, but unlike the substantive provisions of section 2, it does not contain the broad language that prohibits states from abridging the right to vote on almost any grounds.¹⁷⁸

Given this, the structure of section 2 of the Fourteenth Amendment and section 1 of the Fifteenth Amendment are best viewed as two halves of a whole: under section 2 of the Fourteenth Amendment, Congress can reduce representation for almost any abridgment whereas under section 1 of the Fifteenth Amendment, Congress could impose almost any penalty for abridgment on three specified grounds.¹⁷⁹ The history of the

which it could be evaded, he said, was the full power which it allowed any State to provide by law that 'disingenuousness of birth' [i.e., birth out of wedlock] should be deemed a disqualification to exercise the right to vote."). Other Framers believed that the use of proxies in and of themselves could be discrimination based on race in violation of the Fifteenth Amendment. *See* CONG. GLOBE, 41st Cong., 2d Sess. 3655 (1870) (statement of Sen. Jacob Howard) (noting that some courts may construe the Fifteenth Amendment narrowly because it "forbids a certain thing to be done . . . and that thing is denial or abridgment of the right to vote on account of race, color, or previous condition of servitude" and "[t]hat is all there is of it").

176. *See* MATHEWS, *supra* note 128, at 45 ("To provide in the Constitution that the States should not disenfranchise for the three specified causes [race, color, previous condition of servitude] was impliedly to authorize them to disenfranchise for all other conceivable causes. Thus the Amendment would operate as a virtual legalization of disfranchisement. Under it an aristocracy of property, of intellect, or of sect might be established. Although the animus of the Amendment was a desire to protect and enfranchise the colored people, yet it was anticipated that under it nine tenths of them might be prevented from voting by the requirement on the part of the States of intelligence or property qualifications."). Arguably, this interpretation of the Fifteenth Amendment is avoided if it is read in conjunction with section 2 of the Fourteenth Amendment, with its prohibition on abridging the right to vote on grounds beyond race discrimination.

177. Some representatives pointed to section 2 as evidence that the states retained their authority over the qualification of electors and therefore Congress could not prohibit states from altering their state constitutions in order to disenfranchise African-Americans. CONG. GLOBE, 40th Cong., 2d Sess. 2606 (1868) (statement of Sen. John Henderson) (making this point); *id.* at 2665 (statement of Sen. Roscoe Conkling) (same); *infra* text accompanying notes 194–98. *But see* CONG. GLOBE, 40th Cong., 2d Sess. 2606 (1868) (statement of Sen. William Stewart) (denying that section 2 expressly authorizes states to deny its citizens the right to vote).

178. CONG. GLOBE, 41st Cong., 2d Sess. 3665 (1870) (statement of Sen. Garrett Davis) (making this point); *see also id.* app. at 472 (statement of Sen. Eugene Casserly) (noting that the Fifteenth Amendment "is more limited in its language" than the Thirteenth or Fourteenth Amendments).

179. *See* Chin, *supra* note 31, at 263 (conceding that "[s]ection 2 could still have an independent role if it were construed to cover suffrage restrictions other than race" but concluding that it cannot play this role because it has been narrowly construed by the courts). *But see* AMAR, *supra* note 85,

Fourteenth and Fifteenth Amendments indicates that the Framers were primarily concerned with expanding federal power while still retaining a substantial amount of state sovereignty;¹⁸⁰ they were not trying to limit their authority by replacing Section 2 of the Fourteenth Amendment with Section 1 of the Fifteenth.

Congress passed the Fifteenth Amendment in order to provide additional authority for direct intervention in state electoral processes for several important practical and political reasons.¹⁸¹ The first is the recalcitrance of the ex-Confederates in denying African-Americans basic rights, a state of affairs unlikely to be corrected through indirect coercion.¹⁸² Congress hoped, but could not guarantee, that the penalty of reduced representation would induce states to extend the vote equally. Second, the Fifteenth Amendment, in conjunction with the Fourteenth, provided broad enforcement authority, allowing Congress to reinforce the gains secured by the Military Reconstruction Act of 1867 and prevent post-Reconstruction governments from altering their state constitutions to abridge the right to vote on the basis of race.¹⁸³

Most important, the Fifteenth Amendment was less dependent on the vagrancies of politics than section 2 of the Fourteenth.¹⁸⁴ Because of the

at 189 (arguing that section 2 creates an affirmative right to vote).

180. See, e.g., EARL M. MALTZ, *CIVIL RIGHTS, THE CONSTITUTION, AND CONGRESS, 1863–1869*, at 135 (1990) (noting that moderate and conservative Republicans endorsed a “constitutional amendment dealing with suffrage [that] would admittedly be an infringement on states’ rights, but at the same time, it could be a narrowly defined federal encroachment that would leave the balance of power between the state and the federal governments otherwise unaltered”).

181. Congress passed the Fifteenth Amendment on February 26, 1869, and it was ratified by the states on March 30, 1870, four years after the Fourteenth Amendment. MATHEWS, *supra* note 128, at 34, 75.

182. See, e.g., Raoul Berger, *The Fourteenth Amendment: Light from the Fifteenth*, 74 NW. U. L. REV. 311, 321–23 (1979).

183. There is a strong argument that, although the Military Reconstruction Act emerged from Committee with the Fourteenth Amendment, the Act was likely unconstitutional. See David Currie, *The Reconstruction Congress*, 75 U. CHI. L. REV. 383, 412–14 (2008). However, the Fifteenth Amendment arguably could prevent states from amending their Constitutions to discriminate in voting on the basis of race.

184. See Paolo E. Coletta, *The Democratic Party 1884–1910*, in 2 HISTORY OF U.S. POLITICAL PARTIES 987, 987 (Arthur M. Schlesinger, Jr. ed., 1973) (“Once the southern states were readmitted to the Union, the Democrats staged a strong comeback, winning the House of Representatives in 1874, the popular vote for the presidency in 1876 and the Senate in 1878.”). The Republicans won a huge victory in 1872, winning both the presidency and 196 of 281 congressional races that year, but this win could be attributed to votes from the ex-slaves in the former confederacy. Indeed, the size of the Republican victory masked a split in the party between prominent Republican leaders and President Ulysses S. Grant over alleged corruption and economic policy that would ultimately lead to huge losses for Republicans in the 1874 mid-term elections. See MICHAEL F. HOLT, *BY ONE VOTE: THE DISPUTED PRESIDENTIAL ELECTION OF 1876*, at 17 (2008).

politics of the time, implementation of section 2's penalty depended on both Houses of Congress having a Republican supermajority. After the election of 1868, Congress realized that once the South was fully integrated back into the union, the ex-confederates would move quickly to abolish African-American suffrage despite the dictates of the Fourteenth Amendment and restrictions in their state constitutions.¹⁸⁵ Congress could no longer unilaterally ensure the success of Reconstruction. Thus, the political penalty of section 2 reflected Congress's distrust of the courts and the President in 1866,¹⁸⁶ whereas the Fifteenth Amendment embraced Congress's realization, by 1869, that it may need the courts as well as additional sources of authority for itself to continue Reconstruction.¹⁸⁷

Although the Fifteenth Amendment arguably supplements Congress's authority under the Fourteenth, some scholars contend that the Fifteenth Amendment repealed section 2 of the Fourteenth Amendment upon its adoption.¹⁸⁸ Admittedly, several moderate Republicans supported this reading of section 2 during the debates over the Fifteenth Amendment.¹⁸⁹ Similarly, George Boutwell and James G. Blaine, writing about the Fourteenth Amendment almost two decades after its adoption, argued that section 1 of the Fifteenth Amendment repealed section 2 of the Fourteenth Amendment.¹⁹⁰ However, these Framers,

185. Republicans waited until after the election of 1868 to propose the Fifteenth Amendment, so that it would not be an election year issue, but they believed the Amendment was necessary because, as one scholar noted, "the attitude of southern whites left no doubt that if . . . no additional warrant should exist for the further interference of Congress in the Southern States, negro suffrage would be doomed." MATHEWS, *supra* note 128, at 20–21.

186. See 6 CHARLES FAIRMAN, HISTORY OF THE SUPREME COURT OF THE UNITED STATES 89 (1971) ("[The Reconstruction was a] dark period [when t]hose who lost in battle early sought sanctuary in appeals to the Court; the portents it gave out were such as to bring upon it the menaces of Congress. For a season, judicial authority was openly defied.").

187. By 1869, the Republicans were only five years (or two elections) away from losing control of the House of Representatives. Coletta, *supra* note 184, at 987. Even those Framers who believed that the Fifteenth Amendment repealed section 2 of the Fourteenth Amendment recognized that, at the very least, the Fifteenth Amendment brought the courts back into the role of enforcer, but there is no evidence that the Framers believed that the court was the only entity charged with playing this role.

188. See, e.g., Chin, *supra* note 128, at 263 ("Section 2 is like the Fifteenth Amendment, except that it covers fewer people, fewer elections, and offers more limited remedies. Lesser in every way, Section 2 could never provide the rule of decision once the Fifteenth Amendment became law.").

189. See, e.g., CONG. GLOBE, 41st Cong., 2d Sess. 2720 (1870) (statement of Sen. John Pool) (arguing that the "necessity for [section 2] has since been entirely superseded by the fifteenth amendment").

190. See Chin, *supra* note 128, at 272–73 (discussing Representatives George Boutwell and James Blaine).

writing at a time when African-Americans had been disenfranchised in the south despite the penalty of section 2, likely made this argument to show that the burden had shifted from Congress to the courts to enforce the Amendments.¹⁹¹ Arguably, Boutwell and Blaine try to minimize Congress' impotence in the wake of clear constitutional violations by the states in the decades following the ratification of the Fourteenth Amendment. In addition, Boutwell argued at the time of the framing that the Fifteenth Amendment was necessary because the Fourteenth Amendment only limited the power of the states to abridge the right to vote, not the power of the United States government;¹⁹² this suggests that his support for the repeal theory developed well after the framing of the Amendments. Indeed, there is little evidence that the consensus view was that, upon its adoption, the Fifteenth Amendment would supersede or repeal section 2 of the Fourteenth.

Before the Joint Committee introduced the Fifteenth Amendment in Congress in January 1869, there were proposals on the table that would have prevented states from altering their state constitutions to disenfranchise individuals or a class of persons.¹⁹³ The legislative history surrounding these proposals offers significant evidence that very few people actually believed section 2 was a dead letter upon the adoption of the Fifteenth Amendment; in fact, opponents of the legislation pointed to section 2 as evidence that states retained the authority to choose the

191. Compare GEORGE S. BOUTWELL, *THE CONSTITUTION OF THE UNITED STATES AT THE END OF THE FIRST CENTURY* 389 (1895) ("By virtue of the Fifteenth Amendment the last sentence of Section two of the Fourteenth Amendment is inoperative wholly, for the Supreme Court of the United States could not do otherwise than declare a State statute void which should disenfranchise any of the citizens described."), with CONG. GLOBE, 40th Cong., 3d Sess. 559 (1869) (statement of Rep. George Boutwell) (reading section 1 and section 2 of the Fourteenth Amendment together in order to prohibit states from abridging the right to vote on the basis of race), and 2 JAMES G. BLAINE, *TWENTY YEARS OF CONGRESS* 418–19 (1886) ("Before the adoption of the Fifteenth Amendment, if a State should exclude the negro from suffrage the next step would be for Congress to exclude the negro from the basis of apportionment. After the adoption of the Fifteenth Amendment, if a state should exclude the negro from suffrage, the next step would be for the Supreme Court to declare that the act was unconstitutional, and therefore null and void.").

192. See CONG. GLOBE, 40th Cong., 3d Sess. 560 (1869) (statement of Rep. George Boutwell) ("[T]here is no provision in the Constitution by which the United States is denied the power of abridging the right of citizens to vote. There is, in the fourteenth article of amendments to the Constitution, a limitation upon the power of the States in that respect, but none upon the power of the United States. The amendment which we propose secures the people against any abridgment of their electoral power, either by the United States or by the States. In that alone there is sufficient reason to justify the amendment.").

193. When Arkansas sought readmission back into the union, the following bill, for example, was proposed as a condition of readmission: "That the constitution of Arkansas shall never be so amended or changed as to deprive any citizen or class of citizens of the United States of the right to vote." CONG. GLOBE, 40th Cong., 2d Sess. 2609 (1868) (statement of Sen. John Sherman).

qualification of electors and Congress could not prevent states from altering their constitutions in matters of voting.¹⁹⁴

During these debates, supporters of the Fifteenth Amendment made two interrelated arguments illustrating the continued validity of section 2. First, they argued that section 1 and section 2 of the Fourteenth Amendment, when viewed together, “declared [that] the State has no right” to “abridge or deny to a citizen the right to vote.”¹⁹⁵ In other words, “[b]y the second section there is a political penalty for doing that which in the first section it is declared the State has no right to do,” supporting the view that section 2 is still operative.¹⁹⁶ Second, these proponents of the Fifteenth Amendment explicitly conceded the validity of section 2, some framing it as a necessary stopgap measure designed to penalize the states until Congress could intervene pursuant to its authority under section 5,¹⁹⁷ while others took a more expansive view of its provisions.¹⁹⁸ Thus, both proponents (including later supporters of the repeal theory) and opponents of the Fifteenth Amendment assumed that section 2 of the Fourteenth Amendment would continue to be valid after the Fifteenth Amendment was ratified.

Sectional politics also undermines arguments that section 2 of the

194. *Id.* at 2698 (statement of Sen. James Doolittle) (“The constitutional amendment [section 2] thus expressly recognizes in, if it does not confer on, the States the power to disqualify persons from exercising the right of suffrage on account of race or color, or any other reason they choose. The only faculty which it attaches to a State doing so is that it shall be reduced proportionally in its representation. And now for gentlemen to come in here with a bill which on the very face of it insists first, that the State shall adopt the constitutional amendment which recognizes the right of the State to fix for itself the qualification of voters, and then contains in the same bill a fundamental provision that the State shall never exercise the right which your constitutional amendment gives, is a monstrous piece of absurdity!”); *see also* CONG. GLOBE, 40th Cong., 3d Sess. 642, 644–45 (1869) (statement of Rep. Charles Eldridge) (same); *id.* at 2741 (statement of Sen. Oliver Morton) (“[T]he fourteenth article, the amendment of the Constitution, which we insist shall be made part of the Constitution, distinctly recognizes that this power [to choose the qualifications of electors] does belong to the States”)

195. CONG. GLOBE, 40th Cong., 3d Sess. 559 (1869) (statement of Rep. George Boutwell); *see also id.* (“If the right to vote for certain officers be denied or abridged, then certain political consequences follow [under section 2]; but in the first section there is a distinct declaration this cannot lawfully be done.”).

196. *Id.*

197. *See id.* (“It is here provided [in section 1] that there shall be no abridgment of the privileges and immunities of citizens; and in the second section there is a penalty provided for a State that disregards the inhibition It was uncertain when Congress would exercise the power conferred by the fifth section of the fourteenth amendment, and in order that the States should not take advantage of their own wrong during the period while Congress might be inactive a penalty was provided.”).

198. *See, e.g.*, CONG. GLOBE, 40th Cong., 3d Sess. 1625 (1869) (statement of Sen. Jacob Howard) (arguing that Congress can grant the right to vote under section 2 through ordinary legislation).

Fourteenth Amendment and section 1 of the Fifteenth Amendment either have the same scope, or that the latter supersedes the former.¹⁹⁹ Many northern states did not allow African-Americans to vote, but because this group was such a small percentage of the population, there was not a great deal of northern opposition to section 2.²⁰⁰ In addition, Congress broadened the scope of section 2 by eliminating the reference to race, which allowed it to avoid accusations that it was trying to affirmatively enfranchise African-Americans while indirectly trying to achieve that goal. The Fifteenth Amendment, on the other hand, was politically unfeasible at the time the Fourteenth Amendment was adopted because many feared its language would be construed as an affirmative guarantee of the right to vote, thereby upsetting northern states.²⁰¹

Despite the different concerns underlying their respective adoptions, post-enactment legislation suggests that congressional authority derived from both Amendments, especially given the controversy over whether Congress could regulate facially neutral state laws that had the effect, but not the intent, of abridging the right to vote on the basis of race.²⁰² The Court did in fact invalidate such legislation in *United States v. Reese*,²⁰³ despite the fact that a collective assessment under both Amendments would have rendered the Enforcement Act of 1870, which broadly protected the right to vote from both discriminatory and neutral abridgements, constitutionally valid.

199. See MATHEWS, *supra* note 128, at 17 (“If it had been possible to propose an amendment similar in principle to the Fifteenth Amendment which could be made to apply only to the Southern States, there is little doubt that it would have been done in 1866.”).

200. See *id.* at 13 (“There was no demand by either [political] party that the local autonomy of the Northern States should be abridged by depriving them of the power to withhold suffrage from negroes, yet this deprivation would be a necessary consequence of enacting a negro suffrage amendment to the Constitution. Thus at the outset was encountered the difficulty of dealing with a sectional problem by means of constitutional amendment, which, from its necessary generality in operation, is apt to produce undesigned results.”).

201. See *id.* at 17 (“The extension of suffrage to negroes in 1866 by a direct constitutional guarantee was prevented . . . by the opposition to such a measure encountered in the Northern States.”).

202. See *id.* at 44–48; see also CONG. GLOBE, 41st Cong., 2d Sess. app. at 421 (1870) (statement of Sen. Joseph Fowler) (noting that the “second section [of the Fifteenth Amendment] may go further [than the first section, but it] is a question of doubt whether any more power is conferred by the auxiliary than by the primary”); CONG. GLOBE, 40th Cong., 3d Sess. 561 (1869) (statement of Rep. George Boutwell) (conceding that nothing in the Fifteenth Amendment would prevent states from requiring property or educational qualifications as a precondition to voting); *supra* text accompanying note 175.

203. 92 U.S. 214, 221–22 (1875).

2. *The Enforcement Act of 1870 as a Model for Voting Rights Legislation Under the Fourteenth and Fifteenth Amendments*

Although most scholars believe that congressional authority under section 2 is limited to the penalty listed in the provision, both the text of section 5 of the Fourteenth Amendment as well as post-enactment legislation suggests that there is a more plausible reading available. Throughout the congressional debates, several representatives argued that the enforcement clauses included authority to not only enforce the substantive provisions of the Amendments on their terms, but also legislate broadly to enforce their guarantees. For example, during the debates over the Thirteenth Amendment, Congress discussed whether it had authority under the Amendment to legislate with respect to the black codes instituted throughout much of the South.²⁰⁴ As Senator Sherman observed:

Here is not only a guarantee of liberty to every inhabitant of the United States, but an express grant of power to Congress to secure this liberty by appropriate legislation. Now, unless a man may be free without the right to sue and be sued, to plead and be impleaded, to acquire and hold property, and to testify in a court of justice, then Congress has the power, by the express terms of this amendment, to secure all of these rights.²⁰⁵

The consensus view in Congress seemed to be that the enforcement clauses operated in a manner similar to the Necessary and Proper Clause of article I,²⁰⁶ a position endorsed by the Court in its pre-*City of Boerne* case law.²⁰⁷ Even John Bingham, the primary drafter of section 1 of the Fourteenth Amendment, sanctioned this idea, arguing that “adding an amendment to the Constitution to operate on all the States of this Union alike [will give] Congress the power to pass all laws necessary and

204. See CONG. GLOBE, 39th Cong., 1st Sess. 40–43 (1865) (statements of Sens. John Sherman, Lyman Trumbull, and Henry Wilson).

205. *Id.* at 41 (statement of Sen. John Sherman); see also *id.* at 43 (statement of Sen. Lyman Trumbull) (“The second clause of [the Thirteenth] amendment was inserted for some purpose, and I would like to know of the Senator from Delaware for what purpose? Sir, for the purpose, and none other, of preventing State Legislatures from enslaving, under any pretense, those whom the first clause declared should be free. It was inserted expressly for the purpose of conferring upon Congress authority by appropriate legislation to carry the first section into effect What that ‘appropriate legislation’ is, is for Congress to determine, and nobody else.”).

206. See, e.g., CONG. GLOBE, 41st Cong., 2d Sess. 3663 (1870) (statement of Sen. Allen Thurman) (“[T]hat provision about appropriate legislation is nothing more than the old provision in the Constitution which gives Congress power to pass all necessary and proper laws for carrying the provisions of the Constitution into effect, and is to be interpreted in the same light.”).

207. See *supra* Part I.A.

proper to secure to all persons . . . their equal personal rights.”²⁰⁸

Similarly, other representatives believed that, with respect to voting rights, Congress’s authority to legislate broadly was not limited to addressing discrimination based on race.²⁰⁹ Indeed, the Enforcement Act of 1870, which Congress passed pursuant to its authority under the Fifteenth Amendment, included language similar to section 2 of the Fourteenth Amendment extended beyond discriminatory denials of the ballot based solely on race.²¹⁰

The Enforcement Act of 1870 required that all citizens be able to vote “at any election by the people in any State, Territory, district, county, city, parish, township, school district, municipality, or other territorial subdivision” without regard to “race, color, or previous condition of servitude.”²¹¹ Section 3 of the Act provided criminal penalties for “any judge, inspector, or other officer of election whose duty it is or shall be to . . . give effect to the vote of any such citizen who shall wrongfully refuse [to] give effect to the vote of such citizen,”²¹² and section 2 penalized any such person or officer for failing to “give to all citizens of the United States the same and equal opportunity to perform such prerequisite, and to become qualified to vote without distinction of race, color, or previous condition of servitude.”²¹³ Notably, section 4 extended this criminal penalty to “any person [who] by force, bribery, threats, intimidation, or other unlawful means, shall hinder, delay, prevent, or obstruct . . . any citizen from doing any act required to be done to qualify him to vote or from voting at any election” but without the limitation that the vote denial be based on race, color, or previous condition of servitude.²¹⁴

Although most of the legislative debates surrounding the Enforcement Act centered on Congress’s authority to “enforce” the provisions of the Fifteenth Amendment,²¹⁵ the text of the Act, encompassing the

208. CONG. GLOBE, 39th Cong., 1st Sess. 158 (1866) (statement of Rep. John Bingham).

209. *See id.* at 358 (statements of Reps. Roscoe Conkling and Andrew Rogers).

210. Enforcement Act of 1870, ch. 114, 16 Stat. 140.

211. *Id.* § 1.

212. *Id.* § 3.

213. *Id.* § 2.

214. *Id.* § 4.

215. *See, e.g.,* CONG. GLOBE, 41st Cong., 2d Sess. app. at 473 (1870) (statement of Sen. Eugene Casserly) (arguing that, if the Fifteenth Amendment reaches individuals, “it is only on those who are officers, and hence the agents of the State”); *id.* at 355 (statement of Sen. William Hamilton) (disputing that Congress can impose criminal penalties under the Fifteenth Amendment because “the denial of the exercise of a certain power by the Constitution to a State does not thereby confer upon Congress power over the subject-matter of such denial”).

substantive protections of both section 2 of the Fourteenth Amendment and section 1 of the Fifteenth Amendment, reflects Congress's aggregate authority under the Amendments. While it is certainly possible that section 4 of the Enforcement Act was poorly drafted,²¹⁶ the Supreme Court could have endorsed a plausible reading of the Act that would have given effect to the general purpose behind the Amendments: Congress was enforcing the guarantees of both section 2 of the Fourteenth Amendment (via section 5) and the Fifteenth Amendment in order to protect not only voters, but differential treatment that undermines the integrity of the ballot.

Indeed, the Supreme Court ignored that section 2 protects the right of suffrage from abridgment, independent of the Fifteenth Amendment's protection of minority voters as a class, when it invalidated the Enforcement Act on the grounds that the statute criminalized the actions of state officials for any discriminatory denial of the ballot rather than just race-based denials.²¹⁷ The Court reasoned that an elector could prove a discriminatory denial of the ballot even if, for example, an inspector of elections makes an honest mistake in denying the elector the ballot.²¹⁸ Yet it makes no logical sense that Congress can, consistent with section 2 of the Fourteenth Amendment, reduce a state's congressional representation for the same behavior, but cannot pass a penalizing statute that would allow the inspector to prevail by showing that the denial was in error.²¹⁹

Instead, the Court focused on whether the inspector would know that his denial of the ballot was wrongful, absent the statute's express limitation to race.²²⁰ This narrow focus is somewhat understandable, given that Congress passed the statute under the Fifteenth Amendment, but the language of section 2 allows Congress to penalize denials of the ballot for reasons other than race. Since the *Reese* Court analyzed the Fifteenth Amendment in isolation from the Fourteenth, it overlooked

216. Some representatives believed that section 4 of the Enforcement Act was limited to race-based denials, despite the absence of this language in the provision. *See* CONG. GLOBE, 41st Cong., 2d Sess. 3663 (1870) (statement of Sen. John Sherman) (arguing that the fourth section of the Enforcement Act is "badly worded," but the use of the word "'aforesaid,' referring to the previous section, shows clearly enough that the intention of its framers was to confine the operation of that section to offenses against the fifteenth amendment").

217. *United States v. Reese*, 92 U.S. 214, 221 (1875); *see id.* at 219 (holding that section 4 of the Act interfered with the state's authority to choose the qualification of electors).

218. *Id.* at 220.

219. The Court could have achieved this result by construing the statute to require that the vote denial be "willful" rather than just "wrongful." *See id.*

220. *Id.*

this key fact. Similarly, in *United States v. Cruikshank*,²²¹ the Court dismissed the indictment against the defendant election inspectors because it did not appear that “the intent of the defendants was to prevent these parties from exercising their right to vote on account of their race,” a conclusion that also assumes, contrary to section 2, that Congress is limited to preventing denials of the ballot only on this ground.²²²

Given its broad authority under both Amendments, Congress could have justified the Enforcement Act on the grounds that, if it can reduce state representation for abridging the right to vote on any grounds in both state and federal elections, it could also criminalize official behavior that does the same. In order to achieve broad access to the franchise, Congress had to have the power to employ a variety of means to further the Fourteenth Amendment’s nondiscrimination principle.

Unfortunately, the Court’s failure to acknowledge both the text and the historical connection between the Fourteenth and Fifteenth Amendments also has led it to engage in an interpretive sleight of hand to justify extensions of the VRA in the last four decades.²²³ In reality, no such subterfuge is required because the VRA continues to be a constitutional exercise of congressional authority.

III. THE INTRATEXTUAL LEGACY OF THE FOURTEENTH AND FIFTEENTH AMENDMENTS: ASSESSING THE CONSTITUTIONALITY OF PRECLEARANCE

An intratextual reading of the Fourteenth and Fifteenth Amendments as a matter of constitutional text, structure, and history illustrates that the recent Supreme Court decision in *Shelby County v. Holder* was wrongly decided. Section 2’s penalty of reduced representation serves as the baseline from which to assess the constitutionality of voting rights legislation passed pursuant to Congress’s enforcement authority; selective preclearance arguably falls within the range of penalties that Congress can adopt to “enforce” the Amendments. Nevertheless, in

221. 92 U.S. 542 (1875).

222. *Id.* at 556; *see also id.* (“The right to vote in the States comes from the States; but the right of exemption from the prohibited discrimination comes from the United States. The first has not been granted or secured by the Constitution of the United States; but the last has been.”).

223. *See NAMUDNO*, 557 U.S. 193, 205, 211 (2009) (resolving the challenge to the bailout mechanism of the VRA on questionable statutory grounds in order to avoid ruling on the constitutionality of section 5); *Katzenbach v. Morgan*, 384 U.S. 641, 658 (1966) (concluding that the New York’s English literacy requirement for voters could discriminate against New York’s large Puerto Rican community, but not requiring congressional findings that prove this proposition).

NAMUDNO v. Holder and *Shelby County v. Holder*, respectively, the Chief Justice expressed two points of concern with respect to the constitutionality of section 5 of the VRA that are likely to be relevant in any future litigation: (1) it imposes a preclearance requirement that suspends *all* changes to a state's election laws;²²⁴ and (2) it treats similarly situated sovereigns differently by requiring some states to preclear changes to their election laws but not others.²²⁵ I take each of these arguments in turn.

A. *Preventing Circumvention Through the Overbreadth of Preclearance*

The analysis contained herein regarding the scope of congressional authority, premised on the link between sections 2 and 5 of the Fourteenth Amendment, can provide a sound constitutional justification for the imposition of a preclearance regime that suspends all election-related changes. Preclearance is a lesser penalty than reducing a state's congressional delegation pursuant to section 2 because it is less intrusive of state sovereignty. However, since states have to preclear changes that regulate state elections and voter qualifications, preclearance falls closer to the end of the regulatory spectrum where congressional power is at its lowest ebb.²²⁶

Notably, the legislative record of the Fourteenth and Fifteenth Amendments is clear that many state laws regulating access to the franchise would not count as an abridgment within the context of section 2, yet these are the very laws that are required to be precleared under section 5.²²⁷ For example, many representatives in Congress believed that imposing durational residency requirements is consistent with the

224. *NAMUDNO*, 557 U.S. at 202 (“Section 5 goes beyond the prohibition of the Fifteenth Amendment by suspending *all* changes to state election law—however innocuous—until they have been precleared by federal authorities in Washington, D.C. The preclearance requirement applies broadly, and in particular to every political subdivision in a covered State, no matter how small.” (citations omitted)); *see also* *Shelby Cnty. v. Holder*, __U.S.__, 133 S. Ct. 2612, 2626–27 (2013) (describing section 5's increased incursion on state sovereignty since its original enactment and implying that the provision has constitutional problems independent of the coverage formula).

225. *NAMUDNO*, 557 U.S. at 203 (“The Act also differentiates between the States, despite our historic tradition that all the States enjoy ‘equal sovereignty.’ Distinctions can be justified in some cases. . . . But a departure from the fundamental principle of equal sovereignty requires a showing that a statute's disparate geographic coverage is sufficiently related to the problem that it targets.” (citations omitted) (quoting *United States v. Louisiana*, 363 U.S. 1, 16 (1960))).

226. Halberstam, *supra* note 29, at 948; *see also supra* Part I.B (discussing the spectrum of congressional authority over elections).

227. I argue in a related piece that section 2 of the Fourteenth Amendment would not, for example, render voter identification laws per se unconstitutional. *See* Tolson, *supra* note 125.

state's authority over elections.²²⁸ Some Framers also believed that educational requirements and literacy tests are valid so long as they are rational and both African-Americans and whites are subject to these qualifications.²²⁹ Indeed, John Bingham proposed a version of the Fifteenth Amendment that would have created an affirmative right to vote in which “[n]o State shall make or enforce any law which shall abridge or deny to any male citizen . . . the equal exercise . . . of the elective franchise,” but subject to the citizen being male, of sound mind, twenty-one years or older, a resident for at least a year, and most notably, “subject to such registration laws as the State may establish.”²³⁰ The Framers thus viewed many voting rights regulations as fairly pedestrian and not per se unconstitutional under the Amendments.²³¹

Although the VRA required many regulations that did not raise constitutional concerns to be precleared, this remedy prevented states from implementing ostensibly neutral laws or taking other official actions that had the effect of circumventing the protections of the Fourteenth and Fifteenth Amendments.²³² For example, states were often more derelict in submitting changes that governed state and local elections for preclearance than those that governed federal elections,²³³ many of which were later deemed to be discriminatory and denied preclearance. Local governments have been some of the most brazen

228. See CONG. GLOBE, 40th Cong., 2d Sess. 2609 (1868) (statement of Sen. John Sherman) (arguing that Congress could not prevent voting restrictions “aimed at all persons who had not resided within the State for a certain length of time”). This does not mean that suffrage qualifications that are generally constitutional can never be invalidated if unreasonable or unrelated to the franchise. See, e.g., *Dunn v. Blumstein*, 405 U.S. 330, 360 (1972) (invalidating a durational residency requirement that did not adequately promote the state’s interest in preventing fraudulent voting or having knowledgeable voters); CONG. GLOBE, 39th Cong., 1st Sess. 358 (1866) (statement of Rep. Roscoe Conkling) (noting that these regulations can violate the Fourteenth Amendment if not applied to everyone equally).

229. See CONG. GLOBE, 40th Cong., 2d Sess. 2701 (1868) (statement of Sen. John Henderson); *id.* app. at 350 (statement of Sen. Richard Yates) (“Exclusions from suffrage for a time, and which apply to all men alike, are allowable. If all men are excluded, men of all races, unless they are of suitable age, from voting, I do not see anything which would conflict with its being a republican form of government. Equality is the basis of a republican government.”).

230. CONG. GLOBE, 40th Cong., 3d Sess. 728 (1869).

231. This does not mean that facially neutral laws that have a discriminatory effect were beyond the purview of section 2. See Tolson, *supra* note 125.

232. The Framers were also concerned that states would use their authority over elections to circumvent the protections of the Amendments. See *supra* text accompanying notes 146–47.

233. See *Clark v. Roemer*, 500 U.S. 646, 658–59 (1991) (holding that the state of Louisiana was required to submit every judgeship created under state law for preclearance through the Department of Justice, rather than sporadically submitting some judgeships for preclearance as had been the state’s practice).

violators of the Voting Rights Act, on occasion implementing discriminatory laws that the Department of Justice has refused to preclear under section 5.²³⁴ Shelby County itself has shamelessly violated section 5, notably when Calera, Alabama (located within the county) held elections under a redistricting plan that the Department of Justice refused to preclear because the city eliminated the only majority-minority district.²³⁵ Limiting the preclearance regime to only federal elections would not only allow violations such as these to slip through the cracks, but also could have the foreseeable effect of deterring minority voter turnout in all local, state, and federal elections.²³⁶

The anti-circumvention norm can resolve constitutional concerns that might otherwise require a lopsided preclearance regime, as this norm has justified the extension of federal authority into areas that are firmly within the province of state power. In *City of Rome v. United States*,²³⁷ for example, the Court observed that Congress can pass legislation under section 2 of the Fifteenth Amendment in order to prohibit acts that do not violate section 1 of the Amendment, “so long as the prohibitions attacking racial discrimination in voting are ‘appropriate,’ as that term is defined in *McCulloch v. Maryland*.”²³⁸ Similarly, in *Katzenbach v. Morgan*,²³⁹ the Court held that legislation enacted pursuant to section 5 of the Fourteenth Amendment would be upheld “so long as the Court could find that the enactment ‘is plainly adapted to [the] end’ of enforcing the Equal Protection Clause and ‘is not prohibited by but is consistent with the letter and spirit of the constitution,’ regardless of whether the practices outlawed by Congress in themselves violated the

234. See, e.g., Michael J. Pitts, *Watch Out in the Covered Jurisdictions*, REUTERS (Feb. 7, 2013), <http://blogs.reuters.com/great-debate/2013/02/07/watch-out-in-the-covered-jurisdictions/> (noting “a disproportionate number of pre-clearance denials involved vote dilution on the local level” over the past thirty years).

235. *Shelby Cnty. v. Holder*, __U.S.__, 133 S. Ct. 2612, 2642 (Ginsburg, J., dissenting). Justice Ginsburg also noted other examples of misconduct by state and local governments including the cancellation of elections and early voting days to prevent the election of African-Americans in local elections; the enactment of a voting scheme for a school board election that earlier had been invalidated by a federal court; and voter purges that would have disqualified many voters from participating in local elections. *Id.* at 2640–41.

236. See, e.g., Michelle Miller & Phil Hirschorn, *Voter ID Bill Raises Controversy in North Carolina*, CBS NEWS (Aug. 13, 2013, 5:22 AM), http://www.cbsnews.com/8301-18563_162-57595791/voter-id-bill-raises-controversy-in-north-carolina/ (discussing legislation in North Carolina, which had been partially covered under section 5, that would roll back early voting, impose a very strict voter identification law, outlaw Sunday voting, and repeal same day registration).

237. 446 U.S. 156 (1980).

238. *Id.* at 177.

239. 384 U.S. 641 (1966).

Equal Protection Clause.”²⁴⁰ In these cases, the Court recognized that its interpretation regarding the breadth of congressional enforcement authority makes it inevitable that some level of constitutional state action will be deterred or affected, yet the risk that this state action will undermine the protections of the Fourteenth and Fifteenth Amendments is paramount.²⁴¹

The Court’s willingness to allow Congress to regulate otherwise-constitutional behavior and intrude on state sovereignty so as to prevent constitutional violations has deep roots in the case law. For example, in a series of decisions collectively known as the *White Primary Cases*, the Supreme Court invalidated a succession of Texas laws that prohibited African-American voters from participating in the Democratic Party’s primary despite the fact that there was no direct state action that ran afoul of the Fourteenth Amendment.²⁴² The Court rightly recognized that African-Americans were being disenfranchised indirectly through the state apparatus because the Democratic Party effectively controlled the state government. Thus, in *Smith v. Allwright*,²⁴³ the Court held that, although the “privilege of membership in a party may be . . . no concern of a State,” when that “privilege is . . . the essential qualification for voting in a primary to select nominees for a general election, the State makes the action of the party the action of the State.”²⁴⁴ In other words, the Democratic Party could not rely on its First Amendment right of association in order to exclude African-Americans because the party, in choosing its nominees for office, was functioning as the state. The Court found that the anti-circumvention norm justified abrogating the First Amendment rights of a private association because the state was using the Democratic Party to circumvent the protections of the Fourteenth and Fifteenth Amendments.²⁴⁵

240. *City of Rome v. United States*, 446 U.S. 156, 176 (1980) (quoting *Morgan*, 384 U.S. at 651).

241. *See id.* at 177 (holding that “Congress could rationally have concluded that, because electoral changes by jurisdictions with a demonstrable history of intentional racial discrimination in voting create the risk of purposeful discrimination, it was proper to prohibit changes that have a discriminatory impact” even though such changes do not violate the Constitution (footnote omitted)).

242. The Court resolved the constitutionality of the all-white primary in a series of cases from 1927 to 1953. *See Terry v. Adams*, 345 U.S. 461 (1953); *Smith v. Allwright*, 321 U.S. 649 (1944); *Grovey v. Townsend*, 295 U.S. 45 (1935), *overruled in part by Allwright*, 321 U.S. 649; *Nixon v. Condon*, 286 U.S. 73 (1932); *Nixon v. Herndon*, 273 U.S. 536 (1927).

243. 321 U.S. 649.

244. *Smith*, 321 U.S. at 664–65; *see also United States v. Classic*, 313 U.S. 299 (1941).

245. Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 653–54 (1998) (“Throughout the period of the *White Primary Cases*, the Democratic Party had a complete monopoly on politics in Texas. Thus, when

Similarly, the Court has invalidated government practices that burden the right to vote but without requiring discriminatory intent like that present in the *White Primary Cases*, an analytical leap justified by concerns that states were undermining the protections of the Amendments through indirect means.²⁴⁶ In *Harper v. Virginia State Board of Elections*,²⁴⁷ for example, the Court invalidated the poll tax because it bore no rational relationship to voter qualifications.²⁴⁸ Invidiousness was premised not on the presence of racially discriminatory intent, but rather on the burden that the government regulation placed on the right to vote without adequate justification.²⁴⁹

In *Harper*, the Fourteenth Amendment functioned as a basis for liability since voting is a fundamental right under the Equal Protection Clause and the law burdened this right, and it also supplemented the Fifteenth Amendment's proscription against racial discrimination in voting by focusing on one of the most obvious proxies for race: wealth.²⁵⁰ There was no evidence in the record that the poll tax had been passed with discriminatory intent, but arguably the law had a disproportionate effect on minorities in a way that offended the spirit of the Fifteenth Amendment.²⁵¹ Despite the fact that the poll tax was a longstanding historical practice, the Court invalidated it because the country had turned a corner on civil rights with the passage of the Voting Rights Act and the end of public school segregation in *Brown v. Board of Education*,²⁵² most important, the Twenty-Fourth Amendment eliminated the use of poll taxes for federal elections.²⁵³ Allowing a poll

'the State' acted here, this was tantamount to the Democratic Party using state law to self-regulate.'").

246. *But see* Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 372–73 (2001) (holding that evidence of discriminatory impact is insufficient to justify the ADA's abrogation of state sovereign immunity).

247. 383 U.S. 663 (1966).

248. *Id.* at 668.

249. *Id.*

250. *Id.*

251. *Id.*; *cf.* Cardona v. Power, 384 U.S. 672, 676 (1966) (Douglas, J., dissenting) (arguing that New York denies equal protection by requiring voters to be literate in English). Arguably, the problem with the English literacy requirement is that it has a disproportionate effect on Hispanics. As Archibald Cox recognized, "No one could conscientiously make the a priori assertion that English literacy bears no rational relationship whatever to ability to vote wisely in an election in New York." Archibald Cox, *Forward: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91, 96 (1966).

252. 347 U.S. 483 (1954).

253. Cox, *supra* note 251, at 96 ("The evidence of original intent is flatly inconsistent with the theory that rich and poor must have an equal voice in elections. Originally, the ownership of

tax for state elections would have circumvented the protections of the Fifteenth and Twenty-Fourth Amendments, a justification that provided the requisite links in the chain to justify the invalidation of a longstanding historical practice under the Fourteenth Amendment.²⁵⁴

The Voting Rights Act, in many ways, is of similar scope to the Enforcement Act of 1870—extending beyond discriminatory denials of the ballot—because of the sobering reality that the regime cannot function just by focusing on federal elections, or alternatively, discriminatory denials of the ballot.²⁵⁵ The Court has ignored that overbreadth is necessary, given that the state is responsible for enacting regulations that govern both state and federal elections.²⁵⁶ Redistricting, in particular, illustrates the conflation of the regulatory apparatus governing state and federal elections—one political party will gerrymander both state legislative and congressional districts in order to win more elections than the other party.²⁵⁷ What states cannot accomplish directly with respect to federal elections can be facilitated through regulations that govern state elections if the preclearance regime is divided.²⁵⁸ Given that a disproportionate amount of preclearance denials in recent years can be laid at the door of local governments, the risk of circumvention is very real in this context, justifying the preclearance remedy as it applies to state and local elections.

property was regarded as a highly relevant qualification for voting as a measure of responsibility and material interest in government affairs. The poll tax itself was sanctioned by age, usage, and legal precedent.”).

254. In *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), a Fifteenth Amendment case decided a few years earlier than *Harper*, the Court inferred discriminatory intent from the twenty-eight-sided figure that placed all African-Americans outside of the municipal boundaries of Tuskegee, Alabama. *Id.* at 341, 347. Unlike *Gomillion*, there was no evidence of discriminatory intent present in *Harper*, despite the racially discriminatory use of the poll tax in most southern states at the time.

255. The Voting Rights Act requires preclearance of any change to ensure that it has not been used “for the purpose or with the effect” of making minorities worse off than under the prior rule. Like the Enforcement Act of 1870, the VRA’s focus on intent and effect is designed to capture any change, even the most innocuous, that could abridge the right to vote. 42 U.S.C. § 1973a(b) (2006).

256. See *Oregon v. Mitchell*, 400 U.S. 112 (1970) (upholding the nationwide ban on literacy tests even though Congress relied on its original findings that the tests were being used in a discriminatory manner in the nine states in the deep south in extending the ban); cf. *Smith v. Allwright*, 321 U.S. 649, 664–65 (1944) (recognizing the symbiotic relationship between the state and the Democratic Party).

257. See *Vieth v. Jubelirer*, 541 U.S. 267, 272 (2004); Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2312, 2313 (2006); Tolson, *supra* note 108, at 863 (arguing that states can influence federal policy through their control over congressional redistricting).

258. Cf. Levinson & Pildes, *supra* note 257, at 2313 (noting how the American system of separation of powers is undermined by a similar dynamic because of political parties).

B. *New Coverage Formula?: Discriminatory Intent and the Fallacy of Equal Sovereignty*

Despite Congress's interest in preventing behavior that could circumvent the protections of the Amendments, it is questionable after *Shelby County* if the presence of discriminatory effect—rather than intent—is sufficient to justify voting rights legislation that distinguishes between the sovereign states.²⁵⁹ Indeed, one of the biggest landmines facing the Voting Rights Act is that it basically has functioned since 1982 as an effects-based regime. Although section 2 of the Fourteenth Amendment illustrates that the fit of voting rights legislation does not have to be perfect, allowing for some over- and under-inclusiveness in the coverage formula, application of the congruence-and-proportionality test or, as the Court asserts in *Shelby County*, the basic guiding principles of *NAMUDNO*,²⁶⁰ still could result in the invalidation of both section 5 and any newly devised formula designed to trigger coverage.

Section 5 liability is premised on retrogression, which asks whether the proposed change has the purpose or effect of making minorities worse off than under the prior law, and a claim under section 2 of the VRA can be established by showing discriminatory effect as well. Neither requires that the state act with discriminatory purpose in order to face liability.²⁶¹ In cases invalidating legislation that exceeded the scope of Congress's authority under section 5 of the Fourteenth Amendment, the Court has explicitly looked for a pattern of constitutional violations, and some indication that the statute is operating to stop those violations.²⁶² Yet the fact that effect, not intent, is at the heart of the statute makes it unlikely that much of the conduct underlying a

259. Compare *South Carolina v. Katzenbach*, 383 U.S. 301, 328–29 (1966) (“The doctrine of the equality of States . . . applies only to the terms upon which States are admitted to the Union, and not to the remedies for local evils which have subsequently appeared.”), with *NAMUDNO*, 557 U.S. 193, 203 (2009) (“[A] departure from the fundamental principle of equal sovereignty requires a showing that a statute’s disparate geographic coverage is sufficiently related to the problem that it targets.”).

260. *Shelby Cnty. v. Holder*, __U.S.__, 133 S. Ct. 2612, 2622 n.1 (2013) (stating that “*Northwest Austin* guides our review under both Amendments in this case”).

261. Discriminatory purpose is sufficient but not necessary to deny preclearance under section 5. See 42 U.S.C. § 1973c(a) (2006).

262. See, e.g., *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 639–40, 47 (1999) (holding that the Patent Remedy Act failed to meet the congruence-and-proportionality test because “Congress identified no pattern of patent infringement by the States, let alone a pattern of constitutional violations,” and because “it simply cannot be that ‘many of [the acts of patent infringement] affected by the congressional enactment have a significant likelihood of being unconstitutional!’” (quoting *City of Boerne v. Flores*, 521 U.S. 507, 532 (1997))).

preclearance denial is unconstitutional. The focus on discriminatory effect, rather than purpose, impacts the caliber of evidence that Congress can amass in showing that section 5 of the VRA continues to be needed.²⁶³

Notably, it is the Court that decoupled discriminatory intent from the retrogression analysis in *Reno v. Bossier Parish School Board*.²⁶⁴ In *Reno*, the Court justified this move on the grounds that “[t]o deny preclearance to a plan that is *not* retrogressive—*no matter how unconstitutional it may be*—would risk leaving in effect a status quo that is even worse”; it would “blur the distinction between [section] 2 and [section] 5”; and most importantly, it would “exacerbate the ‘substantial’ federalism costs that the preclearance procedure already exacts,” presumably by providing an alternative basis for preclearance denial.²⁶⁵

In *Shelby County*, the Court pointed to Congress’s rejection of *Bossier Parish* as further evidence of section 5’s potential unconstitutionality,²⁶⁶ what the Court overlooks, however, is that the 2006 amendments reintroduced the possibility of an intent analysis in the context of preclearance, implicitly helping to build a record of violations that would otherwise justify congressional action under section 5 of the Fourteenth Amendment.²⁶⁷ Indeed, the *Bossier Parish* case contributed to the constitutional problems that surround section 5 of the VRA because it pushed the preclearance inquiry to focus solely on retrogression, which essentially requires an effects analysis,²⁶⁸ rather than discriminatory purpose. The 2006 Amendments, allowing the Department of Justice to deny preclearance because of either discriminatory intent or retrogression, actually addressed one of the core

263. See Bertrall L. Ross II, *The Representative Equality Principle: Disaggregating the Equal Protection Intent Standard*, 81 *FORDHAM L. REV.* 175, 180 (2012) (noting that the VRA is potentially unconstitutional because of the general “account of the Equal Protection Clause as merely prohibiting intentional discrimination [which] suggests that congressional authority to enact the Voting Rights Act is questionable, since the Act invalidates a whole host of state actions that would be found constitutional under the intent standard”).

264. 528 U.S. 320 (2000).

265. *Id.* at 336.

266. *Shelby Cnty. v. Holder*, __U.S.__, 133 S. Ct. 2612, 2627 (2013) (stating that allowing preclearance denial based on discriminatory purpose would raise “the bar that covered jurisdictions must clear” even though “conditions . . . have dramatically improved”).

267. *Cf. Busbee v. Smith*, 549 F. Supp. 494, 518 (D.D.C. 1982) (denying section 5 preclearance to a Georgia redistricting plan that was nonretrogressive but had a discriminatory purpose). Indeed, a district court recently found that the state of Texas engaged in intentional discrimination against minority legislators and voters during the 2010–2011 round of redistricting. *Texas v. United States*, 887 F. Supp. 2d 133, 178 (D.D.C. 2012), *vacated*, __U.S.__, 133 S. Ct. 2885 (2013).

268. See generally *Georgia v. Ashcroft*, 539 U.S. 461 (2003).

criticisms of the preclearance regime—its focus on discriminatory effect—by tying preclearance to the constitutional standard of intentional discrimination.

Nevertheless, the complexities of the VRA's statutory scheme negatively affect Congress's ability to build a record showing a pattern of constitutional violations;²⁶⁹ instead, the record shows a series of regulations, mostly constitutional, that make it more difficult for minorities to vote or less likely that minorities can elect their candidate of choice.²⁷⁰ Using section 2 of the Fourteenth Amendment as a baseline reveals that these regulations, like those that are facially discriminatory or passed with discriminatory intent, can lead to circumvention of the constitutional protections of the Fourteenth and Fifteenth Amendments and therefore count as abridgments of the right to vote.

Section 2 analysis could also refute one of the key criticisms of the coverage formula, namely that minority voter registration and turnout in noncovered states parallels that in covered states, thereby undermining the primary justification for singling out certain jurisdictions.²⁷¹ The statute has two provisions that address concerns about the over- and under-inclusiveness of the coverage and bailout procedures,²⁷²

269. Compare *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 204 (2008) (finding Indiana's voter identification law is constitutional), with *Texas v. Holder*, 888 F. Supp. 2d 113, 144 (D.D.C. 2012), *vacated*, ___U.S.___, 133 S. Ct. 2886 (2013) (denying preclearance to Texas's voter identification law under section 5 of the VRA).

270. See *Shelby Cnty. v. Holder*, 679 F.3d 848, 875 (D.C. Cir. 2012) (relying on the higher incidence of section 2 litigation in covered versus noncovered jurisdictions, rather than incidents of intentional discrimination, in sustaining section 5 of the Voting Rights Act), *rev'd*, ___U.S.___, 133 S. Ct. 2612 (2013). Although Congress found that the majority of DOJ objections included findings of discriminatory intent, *Shelby Cnty.*, 133 S. Ct. at 2639 (Ginsburg, J., dissenting), it is not clear that these changes were made with discriminatory intent sufficient to violate the Constitution, *see id.* at 2629 (majority opinion).

271. The discussion of the coverage and bailout procedures here omits the potential concerns raised by the partisan use of section 5, but I do not think that this undermines the constitutionality of the provision since partisanship does not violate the constitution in the same way that racial bias does. Compare Daniel P. Tokaji, *If It's Broke, Fix It: Improving Voting Rights Act Preclearance*, 49 *How. L.J.* 785, 830 (2006) ("[T]he argument *for* preclearance hinges on state and local governments abusing their discretion based on racial bias, while the argument *against* preclearance hinges on the federal government abusing its discretion based on partisan bias . . . the solution would seem to be amending the preclearance process so as to curb the risk of partisan manipulation." (emphasis in original)), with Franita Tolson, *Benign Partisanship*, 88 *NOTRE DAME L. REV.* 395 (2012) (exploring the constitutional implications of the fact that partisanship violates the Constitution only if used excessively).

272. See Michael P. McDonald, *Who's Covered? Coverage Formula and Bailout*, in *THE FUTURE OF THE VOTING RIGHTS ACT* 255, 256 (David Epstein et al. eds., 2006) ("Congress recognized that although many jurisdictions were appropriately covered, the coverage formula was to some extent arbitrary—it did not even consider the percentage of minorities within a jurisdiction—and that it might not cover all jurisdictions that discriminated or that it might capture jurisdictions that had not

provisions that the Court did not pay significant attention to in invalidating the coverage formula.²⁷³ First, section 4(a) of the VRA allows jurisdictions to obtain bailout if they have not used a test or device “for the purpose or with the effect of denying or abridging the right to vote on account of race or color.”²⁷⁴ Second, section 3(c) permits the federal courts to require preclearance for any noncovered jurisdictions that violate the Fourteenth or Fifteenth Amendments.²⁷⁵ Most covered jurisdictions have not been able to successfully bailout from under the statute,²⁷⁶ but the *NAMUDNO* Court addressed this concern to some extent by broadening the bailout provisions of the Act.²⁷⁷ In addition, section 3(c) has always been a viable solution to the problem of under-inclusiveness, a fact that the Court ignored in striking down the coverage formula, but that has gained renewed attention in recent months.²⁷⁸

Given that the means-ends analysis of section 2 of the Fourteenth Amendment incorporates a broad anti-circumvention norm, both the bail out provision of section 4(a) and the bail in provision of section 3(c) should have been a significant part of the analysis in determining “fit,” particularly in light of the accuracy by which the formula actually captures errant jurisdictions. Instead, the Court focused on the process

discriminated.”).

273. See *Shelby Cnty.*, 133 S. Ct. at 2628 (focusing on the government’s defense of the formula as “reverse-engineered” rather than the sufficiency of provisions in the statute that address the formula’s over and under inclusiveness).

274. 42 U.S.C. § 1973b(d) (2006).

275. *Id.* § 1973a(c).

276. McDonald, *supra* note 272, at 261 (noting that after the amendment to the bailout formula in 1982, few jurisdictions have bailed out).

277. Tolson, *supra* note 8, at 1213 (“The Court expanded the scope of the bailout provisions in order to allow *NAMUDNO*, which did not conduct voter registration, to bail out so as to avoid ruling on the constitutional questions surrounding the preclearance provisions of section 5. Yet, had the Court acknowledged that Congress has expansive power over elections, it would have recognized that the constitutional problems did not emerge from an application of section 5 to the utility district, but rather from the limited scope of section 4(a) in allowing the district to bail out.”); see also Christopher B. Seaman, *An Uncertain Future for Section 5 of the Voting Rights Act: The Need for a Revised Bailout System*, 30 ST. LOUIS U. PUB. L. REV. 9, 46 (2010) (arguing that the *NAMUDNO* Court found that the section 4(a) bailout satisfied both *Katzenbach*’s “more permissive ‘rational basis’ test” and *City of Boerne*’s “more stringent ‘congruence and proportionality’ standard”).

278. See, e.g., Defendant-Intervenors’ Motion for Leave to File Amended Answer and Counterclaim, *Texas v. Holder*, No. 1:11-cv-1303 (D.D.C. 2013), available at <http://electionlawblog.org/wp-content/uploads/241-motion-sec-3redux.pdf> (motion by defendant-intervenors seeking leave to amend in order to have Texas bailed in under section 3(c) of the VRA because of an earlier judicial finding that the state committed intentional discrimination in crafting its 2011 redistricting plan).

by which Congress developed the formula (“reverse-engineering”) rather than the effectiveness of the preclearance regime itself in targeting bad actors, an analysis that suggests that Congress could have imposed the same formula that it developed in 1965 so long as the formula purposely, rather than coincidentally, reflects current conditions. Under a *NAMUDNO*/congruence-and-proportionality analysis, it ultimately does not matter, from the Court’s perspective, that the trigger of section 4(b) would capture the same states even if Congress had updated it in 2006.²⁷⁹ Under a section 2 analysis, all of these factors—bail in, bail out, effectiveness and accuracy of the coverage formula—would be relevant in assessing how intrusive the preclearance regime is on state sovereignty.

The *Shelby County* Court’s focus on the fact that Congress did not develop the coverage formula in light of current conditions, rather than the reality that voting discrimination still exists in the covered jurisdictions, is a vast departure from prior precedent that focused instead on reading the Act broad enough to effectuate the protections of the Fourteenth and Fifteenth Amendments.²⁸⁰ In reality, *Shelby County*’s reliance on the principle of state equality is a concept that has very little legitimacy, as Congress often enacts legislation that treats states differently.²⁸¹ Furthermore, the Constitution eschews a state-equality principle by virtue of the way it structures the House and the Electoral College, giving some states greater power on the national stage than others.²⁸² Notably, the Framers initiated the penalty of section 2 with the

279. *Shelby Cnty. v. Holder*, ___U.S.___, 133 S. Ct. 2612, 2650 (2013) (Ginsburg, J., dissenting) (arguing that the legislative record shows that “the formula accurately identifies the jurisdictions with the worst conditions of voting discrimination”).

280. For example, in *United States v. Board of Commissioners of Sheffield, Alabama*, 435 U.S. 110 (1978), the Court rejected the argument that political subdivisions that did not conduct registration for voting were not covered by section 5 because this circumvented the purpose of the statute. The Court reasoned that, in order for the VRA to be an effective remedial scheme that can address abridgments of the right to vote on the basis of race in all contexts, it is plausible to extend the Act’s protections to all jurisdictions within a covered state involved in electoral processes, even if the jurisdiction itself did not conduct registration for voting. *Id.* at 117–18.

281. See Zachary S. Price, *NAMUDNO’s Non-Existent Principle of State Equality*, 88 N.Y.U. L. REV. ONLINE 24, 27 (2013) (pointing to the Clean Air Act as an example in which, “under a rational basis framework, Congress might properly choose . . . to permit one state to take the lead in setting more stringent vehicle emissions standards, even if this choice is under-inclusive”).

282. See Joseph Fishkin, *The Dignity of the South*, 123 YALE L.J. ONLINE 175, 192 (2013) (noting that “the Court should find a way to reason about [*Shelby County*] that avoids inscribing into the Constitution a principle of . . . ‘equal dignity’ of the states” because “the roots of such a principle are to be found in the losing arguments of Reconstruction’s opponents”); Price, *supra* note 281, at 27 (“The text of the Constitution . . . implies the absence of a general principle of state equality by mandating some forms of equal treatment but not others.”).

intent that it apply selectively, penalizing those southern states with the largest number of African-American voters while leaving the north substantially untouched.²⁸³ To say that Congress cannot pass legislation singling out the worst offenders, a circumstance that should justify a departure from this equality principle, would mean that Congress is constitutionally obligated to pass legislation that is overbroad so as to maintain this principle of state equality. Although overbreadth is appropriate in certain circumstances, this argument not only strains credulity, but also would run afoul of the Court's own congruent-and-proportionality standard.²⁸⁴

Indeed, the most persuasive evidence justifying the coverage formula is the fact that, as the lower court in *Shelby County* pointed out, there is still meaningful evidence that discrimination is more widespread in covered jurisdictions than in noncovered ones. Both the *Shelby County* and *NAMUDNO* Courts focused on voter registration rates, finding that “the racial gap in voter registration and turnout is lower in the States originally covered by [section] 5 than it is nationwide.”²⁸⁵ The district court, in a finding supported by the court of appeals, instead pointed to “several significant pieces of evidence suggesting that the 21st century problem of voting discrimination remains more prevalent in those jurisdictions that have historically been subject to the preclearance requirement”—including the disproportionate number of successful suits under section 2 of the VRA in covered jurisdictions and the “continued prevalence of voting discrimination in covered jurisdictions notwithstanding the considerable deterrent effect of [s]ection 5.”²⁸⁶ In

283. *See supra* Part II.

284. This is precisely why suggestions that preclearance be extended nationwide would only exacerbate, rather than fix, the constitutional issues surrounding section 5. *See* Fishkin, *supra* note 282, at 193 (“[T]o apply an equal dignity of the states principle in *Shelby County* . . . would be to assert that the *one* salient difference in circumstances among the states that the Constitution requires Congress to ignore is the fact that certain states recently spent most of a century openly defying the Reconstruction Amendments . . .” (emphasis in original)); *cf. Shelby Cnty.*, 133 S. Ct. at 2626–27 (chastising Congress for broadening the scope of section 5 in 2006 despite the Court’s warning that it could undermine the provision’s constitutionality).

285. *Shelby Cnty.*, 133 S. Ct. at 2626 (comparing voter registration numbers in the six originally covered states in 1965 and 2004); *NAMUDNO*, 557 U.S. 193, 203–04 (2009).

286. *Shelby Cnty. v. Holder*, 679 F.3d 848, 857 (D.C. Cir. 2012), *rev’d*, ___ U.S. ___, 133 S. Ct. 2612 (2013); *see also* Erwin Chemerinsky, *Uphold Section 5 of the Voting Rights Act*, NAT’L L.J. (Feb. 25, 2013), <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202589186037&slreturn=20130122180432> (noting one study that “found that covered jurisdictions have only 25 percent of the country’s population, but account for 56 percent of the successful suits under Section 2” and another study, “which included published and unpublished decisions, found that 81 percent of all successful Section 2 cases were in the covered jurisdictions even though they only hold 25 percent of the nation’s population”).

addition, a recent study has documented that the levels of racial bloc voting in covered jurisdictions is not only higher than noncovered jurisdictions, but has increased over the past decade.²⁸⁷ Incorporating section 2 of the Fourteenth Amendment into the analysis, with its very low threshold for violations to trigger congressional enforcement efforts, reveals that this evidence is more than sufficient to validate Congress's decision to reauthorize the VRA's preclearance and coverage mechanism.²⁸⁸

CONCLUSION

Sixteen years ago, the Supreme Court pointed to the Voting Rights Act as the paradigmatic example of a remedial scheme appropriately tailored to address harmful discrimination in voting. In *Shelby County v. Holder*, the Court backtracked on this position, finding that the preclearance regime lacks the same constitutional foundation that existed when the Act was first passed in 1965.

The Court's decision to invalidate the coverage formula of section 4(b) rather than the preclearance regime in its entirety leaves the door open for further litigation should Congress choose to pass a new coverage formula, or alternatively, if the Department of Justice increases its use of the section 3(c) bail in mechanism, which also has its own preclearance regime. This Article addresses these concerns by engaging in a structural reading of the Fourteenth and Fifteenth Amendments, premised on section 2 of the Fourteenth Amendment, which illustrates that Congress has broad authority to impose the remedy of preclearance. This reading reveals that *City of Boerne's* congruence-and-

287. Stephen Ansolebehere, 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, 210 (2013) (arguing that "racial polarization is higher, on average, in the covered areas than the noncovered areas" and "the extent of racial polarization in presidential elections increased over the past decade" (emphasis in original)).

288. Nathaniel Persily, *The Promise and Pitfalls of the New Voting Rights Act*, 117 YALE L.J. 174, 193-94 (2007) ("To prove [section 5] was necessary, the best evidence would be data concerning the extent of voting rights violations in the covered jurisdictions, especially if such violations were more prevalent in covered than in noncovered jurisdictions. However, if the Act was working well, then few such examples should exist. Conversely, if widespread voting rights violations continued in the covered jurisdictions, then the law arguably was not working, and it would be difficult to justify it as a congruent and proportional remedy."). See generally Paul Winke, *Why the Preclearance and Bailout Provisions of the Voting Rights Act are Still a Constitutionally Proportional Remedy*, 28 N.Y.U. REV. L. & SOC. CHANGE 69 (2003) (noting that discrimination in voting, and in particular the presence of racial bloc voting, make section 5 congruent and proportional).

proportionality standard as well as the “guiding principles” of *NAMUDNO* that the Court relied on in *Shelby County* have to be interpreted in light of section 2’s broad scope and extreme penalty.

The legislative debates over section 2 illustrate Congress’s attempt to preserve some remnant of the pre-Civil War understanding of state sovereignty over elections—illustrated by the lack of a positive right of suffrage—while embracing increased federal power in this area during Reconstruction. Because of this balancing between state sovereignty and congressional power, section 2 represents the proper baseline from which to assess voting rights legislation enacted pursuant to section 5 of the Fourteenth Amendment. Contrary to *Shelby County*, the VRA’s preclearance regime is constitutional in its entirety because it is consistent with the fit of section 2; in other words, selective preclearance is less intrusive of state sovereignty than reducing a state’s congressional delegation. The imposition of lesser penalties both respects the original framework of section 2 while recognizing that Congress, pursuant to section 5, has enforcement discretion with respect to *all* of the provisions of the Fourteenth Amendment. Future litigation over the constitutionality of preclearance as a remedy, which is highly likely given all that remains unresolved following the *Shelby County* decision, has to account for section 2 and its influence on the Fourteenth and Fifteenth Amendments in order to fully illuminate the scope of congressional authority over elections.

