

PROPHYLACTIC REDISTRICTING? CONGRESS'S SECTION 5
POWER AND THE NEW EQUAL PROTECTION RIGHT TO
VOTE

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ABSTRACT

The Voting Rights Act (VRA) has been an important mechanism for increasing participation by racial minorities in the electoral system. In recent years, however, the Supreme Court has demonstrated its willingness to reconsider the VRA's constitutionality. Due to the broad prophylactic scope of section 2 of the VRA, two main developments pose risks to its continued validity.

*First, the Supreme Court narrowed Congress's enforcement power under Section 5 of the Fourteenth Amendment in *City of Boerne v. Flores*, and is likely to interpret Section 2 of the Fifteenth Amendment similarly. Section 2 of the VRA features many key characteristics of statutes that the Court has held exceeded Congress's Enforcement Clause authority. The Court may nevertheless preserve section 2 by applying it in light of traditional remedial principles governing prophylactic injunctive relief. Section 2 would fit comfortably within Congress's authority if it were interpreted as prophylactically prohibiting constitutionally valid state laws, legislative maps, or other election-related measures only when those principles establish it is reasonably necessary to prevent violations of Fourteenth or Fifteenth Amendment rights.*

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Second, ongoing evolution in equal protection jurisprudence calls into question measures such as section 2 of the VRA that provide prophylactic protection for certain groups. The Court has historically adopted a “pro-voting” conception of equal protection under which laws protecting voting rights only for certain people were generally upheld under rational basis scrutiny. Bush v. Gore laid the foundation for a “pro-equality” approach emphasizing that, because voting is a fundamental right, any distinctions among people concerning the right to vote are subject to strict scrutiny and likely invalid. The ongoing shift from a “pro-voting” to “pro-equality” equal protection norm reflects the Court’s skepticism of legislative control over the electoral process, as well as its reformation of voting rights from a purely political issue into a constitutional one. A “pro-equality” conception of equal protection enhances courts’ power to protect voting rights while reducing the ability of Congress and legislatures to do so.

TABLE OF CONTENTS

INTRODUCTION	2056
I. UNPACKING THE “RIGHT TO VOTE”	2064
II. <i>BOERNE</i> ’S EFFECT ON CONGRESS’S SECTION 5 POWER TO ENFORCE THE RIGHT TO VOTE.	2072
III. THE NEW EQUAL PROTECTION RIGHT TO VOTE.	2088
A. <i>Voting and Elections as Predominantly Political Matters</i>	2090
B. <i>Into the Political Thicket: Equal Protection as a Pro-Voting, Rational Basis Norm</i>	2097
1. <i>The Creation of Voter Equality Rights Under the Equal Protection Clause</i>	2097
2. <i>Expansion of Equal Protection Voting Rights: Voter Eligibility Rights</i>	2098
3. <i>Rational Basis Scrutiny for Laws Helping Certain Groups Vote</i>	2101
C. <i>The New Equal Protection: Equal Protection as a Strict Equality, Strict Scrutiny Norm</i>	2108
CONCLUSION	2112

INTRODUCTION

The generally accepted purpose of a democratic election is to ascertain “the will of the people,” yet there often is not any such determinate will independent of the rules regulating the electoral process.¹ Consequently, the rules governing an election frequently play a tremendous role in shaping its outcome. For example, Arrow’s Paradox arises when people must make a series of binary choices from among various options and their collective preferences are cyclical rather than transitive.² In such cases, there is no single, definitive “will of the people” for an election to ascertain;³ the electorate’s ultimate decision will depend on the order in which voters are invited to choose between different pairs of options.⁴

The will of the people in a presidential election can look very different depending on whether it is measured by popular vote or the Electoral College.⁵ Similarly, determining the will of the people in legislative elections depends on whether the elections are conducted statewide or by district;⁶ in elections conducted on a

1. See SAMUEL ISSACHAROFF ET AL., *THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS* 1-2 (5th ed. 2016).

2. Bernard Grofman, *Public Choice, Civic Republicanism, and American Politics: Perspectives of a “Reasonable Choice” Modeler*, 71 TEX. L. REV. 1541, 1551-52 (1993).

3. See Daniel A. Farber & Philip P. Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873, 902 (1987); Richard H. Pildes & Elizabeth S. Anderson, *Slinging Arrows at Democracy: Social Choice Theory, Value Pluralism, and Democratic Politics*, 90 COLUM. L. REV. 2121, 2135-39 (1990).

4. KENNETH J. ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* 2-3 (2d ed. 1963). Arrow’s Paradox helps explain why a state’s transition from a traditional primary system to a top-two system can affect which candidates ultimately win general elections. Cf. Richard H. Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 CALIF. L. REV. 273, 301-02 (2011) (predicting likely consequences of California’s adoption of a “top-two” primary system).

5. See Jerry H. Goldfeder, *Election Law and the Presidency: An Introduction and Overview*, 85 FORDHAM L. REV. 965, 977, 982-84 (2016) (discussing elections in which the candidate who won the popular vote did not become President). Most recently, President Donald J. Trump beat Hillary Clinton in the 2016 presidential election despite the fact that she received nearly three million more votes nationwide. FED. ELECTION COMM’N, OFFICIAL 2016 PRESIDENTIAL GENERAL ELECTION RESULTS 1, 2, 6 (2017), <https://transition.fec.gov/pubrefe2016/2016presgeresults.pdf> [<https://perma.cc/7F8E-HVTT>].

6. Originally, states were free to award seats in the U.S. House of Representatives through at-large statewide elections. In 1842, Congress enacted a statute, pursuant to its authority under the Elections Clause, U.S. CONST. art. I, § 4, cl. 1, requiring that each House

district-by-district basis, the apparent will of the people depends on where district boundaries are drawn.⁷ Voters' apparent preferences and desires may even be influenced by the phrasing of a question in a referendum or the order in which candidates are listed on a ballot.⁸

The Voting Rights Act (VRA)⁹ is one of the most important constraints on the ability of states and localities to set the rules governing the electoral process.¹⁰ By limiting states' power to manipulate their policies to hinder minority voting, the VRA has played a major role in structuring the electoral process at all levels and led to dramatically increased participation rates for African Americans.¹¹ Most notably, it has been interpreted to require states to create majority-minority legislative districts to ensure that minority voters may elect the candidates of their choice.¹² In some cases,

race be conducted within its own contiguous single-member district. Act of June 25, 1842, ch. 47, § 2, 5 Stat. 491, 491 (codified as amended at 2 U.S.C. § 2c (2012)).

7. The importance of district lines to electoral outcomes is reflected in persistent efforts to persuade the Supreme Court to recognize a cause of action for political gerrymandering. See *Whitford v. Gill*, 218 F. Supp. 3d 837, 864 (W.D. Wis. 2016) (three-judge court), *argued*, No. 16-1161 (U.S. Oct. 3, 2017); *cf.* *Vieth v. Jubelirer*, 541 U.S. 267, 281 (2004) (plurality opinion) (holding that political gerrymandering claims are nonjusticiable due to a lack of judicially manageable standards).

8. See, e.g., Daniel E. Ho & Kosuke Imai, *Estimating Causal Effects of Ballot Order from a Randomized Natural Experiment: The California Alphabet Lottery, 1978-2002*, 72 PUB. OPINION Q. 216, 218 (2008). Some courts have struck down laws requiring incumbents to be listed first on ballots or that candidates' names be printed in alphabetical order on the grounds that they systematically advantaged certain candidates. See, e.g., *Gould v. Grubb*, 536 P.2d 1337, 1338, 1346 (Cal. 1975); *cf.* *Graves v. McElderry*, 946 F. Supp. 1569, 1581-82 (W.D. Okla. 1996) (striking down statute requiring that the Democratic candidate always be listed first). "Several jurisdictions perform ... lotteries to determine ballot order. Some states and localities take the additional step of rotating candidate names across election districts In still other states, far more pernicious practices determine the order." Laura Miller, Note, *Election by Lottery: Ballot Order, Equal Protection, and the Irrational Voter*, 13 N.Y.U. J. LEGIS. & PUB. POL'Y 373, 374-75 (2010) (footnotes omitted).

9. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 52 U.S.C. §§ 10101, 10301-10314, 10501-10508, 10701-10702 (Supp. III 2016)).

10. The VRA applies to both states and their political subdivisions. *E.g.*, 52 U.S.C. § 10301(a) (Supp. III 2016); *cf. id.* § 10304(a) (imposing preclearance restrictions on certain states and political subdivisions). For brevity, this Article will use the term "states" to refer collectively to all such entities.

11. ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* 264 (2000); *see also* *Shelby County v. Holder*, 133 S. Ct. 2612, 2625-26 (2013).

12. See *Thornburg v. Gingles*, 478 U.S. 30, 50 n.16 (1986) (noting that, under certain circumstances, section 2 of the VRA requires a "minority group that is sufficiently large and

states have been required to disaggregate multimember districts for state and local legislative bodies into single-member districts to compel the creation of predominantly minority districts.¹³ In recent years, section 2 of the VRA has been used as the basis for striking down a wide array of electoral reforms, including voter identification requirements,¹⁴ reductions in early voting periods,¹⁵ and attempts to eliminate same-day voter registration.¹⁶ Some courts have gone even further, invoking section 2 to invalidate measures such as the elimination of straight-ticket voting.¹⁷

The VRA has long been regarded as a “super-statute,”¹⁸ part of the firmament of American law virtually immune from challenge.¹⁹ As the Supreme Court’s ruling in *Shelby County v. Holder*²⁰ and dissenting opinions in other recent VRA cases²¹ vividly demonstrate,

compact” to be preserved within its own “single-member district”).

13. *See id.* at 80 (affirming the lower court’s finding “that use of a multimember electoral structure has caused black voters in the districts ... to have less opportunity than white voters to elect representatives of their choice”).

14. *See, e.g.,* *Veasey v. Abbott*, 830 F.3d 216, 225, 272 (5th Cir. 2016) (en banc) (holding Texas’s voter identification law violated section 2 of the VRA due to its effects), *cert. denied*, 137 S. Ct. 612 (2017), *on remand*, 249 F. Supp. 3d 868, 875-76 (S.D. Tex. 2017) (holding Texas’s voter identification law also violated section 2 of the VRA due to its purportedly discriminatory intent), *stay granted by* 870 F.3d 387 (5th Cir. 2017); *N.C. State Conference of the NAACP v. McCrory*, 831 F.3d 204, 235-39 (4th Cir. 2016), *cert. denied*, 137 S. Ct. 1399 (2017).

15. *See McCrory*, 831 F.3d at 236.

16. *See id.* at 237.

17. *Mich. State A. Philip Randolph Inst. v. Johnson*, 209 F. Supp. 3d 935, 949-54 (E.D. Mich. 2016), *stay denied*, 833 F.3d 656 (6th Cir. 2016).

18. *See* William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1216 (2001) (defining a “super-statute” as a law that imposes “a new normative or institutional framework for state policy,” becomes integrated into the culture, and has a “broad effect on the law” beyond its “four corners”).

19. *See* WILLIAM N. ESKRIDGE JR. & JOHN FERREJOHN, A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION 117-18 (2010) (identifying the VRA as a “classic example of a superstatute”); Tomiko Brown-Nagin, *Rethinking Proxies for Disadvantage in Higher Education: A First Generation Students’ Project*, 2014 U. CHI. LEGAL F. 433, 437 (explaining that the VRA is “rightly ... understood as [a] ‘superstatute[.]’”).

20. *See Shelby County v. Holder*, 133 S. Ct. 2612, 2625-26 (2013) (rejecting the statutory formula for identifying the jurisdictions to which the preclearance requirements of section 5 of the VRA apply); *see also* *Nw. Austin Mun. Util. Dist. No. One (NAMUDNO) v. Holder*, 557 U.S. 193, 202 (2009).

21. *See, e.g.,* *Bethune-Hill v. State Va. Bd. of Elections*, 137 S. Ct. 788, 807 (2017) (Thomas, J., concurring in the judgment in part and dissenting in part) (criticizing the Court’s refusal “to decide whether § 5 [of the VRA] is constitutional, despite having twice taken cases to decide that question”).

however, we are no longer in an “age of maintenance” concerning the VRA.²² To the contrary, the Court has demonstrated its willingness to reconsider both the VRA’s scope and constitutional legitimacy.²³ Professors Guy-Uriel E. Charles and Luis Fuentes-Rohwer cogently explain that, at least at the Supreme Court, “the consensus about racial discrimination that supported the VRA has dissolved.”²⁴ With the VRA’s preclearance requirements held in abeyance under *Shelby County*,²⁵ section 2 of the VRA—which prohibits states from adopting rules or engaging in actions that prevent racial minorities from electing candidates of their choice²⁶—assumes even greater importance.

In light of the skepticism toward the VRA the Supreme Court has manifested in recent years,²⁷ two major developments pose substantial threats to what remains of the statute. To help preserve this key protection for voting rights for all Americans, voting rights advocates must structure their arguments concerning the Act’s proper interpretation and scope to avoid or minimize such concerns. The VRA’s opponents, in contrast, are likely to use these developments as pressure points around which to craft future challenges.

First, the Supreme Court’s 1996 ruling in *City of Boerne v. Flores* marks a dramatic shift in the Court’s understanding of the scope of congressional authority under Section 5 of the Fourteenth Amendment.²⁸ Shortly after the VRA’s enactment, in *Katzenbach v. Morgan*, the Supreme Court easily affirmed that the statute was a valid exercise of Congress’s power under Section 5 and did not violate equal protection restrictions.²⁹ The Court analogized Section 5 to the Necessary and Proper Clause,³⁰ holding it grants Congress sweeping

22. Cf. Michael J. Pitts, *The Voting Rights Act and the Era of Maintenance*, 59 ALA. L. REV. 903, 984 (2008).

23. See, e.g., Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *The Voting Rights Act in Winter: The Death of a Superstatute*, 100 IOWA L. REV. 1389, 1391 (2015) (“*Shelby County* mark[ed] the death of the VRA as a superstatute.”).

24. *Id.* at 1439.

25. See *Shelby County*, 133 S. Ct. at 2625-26.

26. Voting Rights Act of 1965, Pub. L. No. 89-110, § 2, 79 Stat. 437, 437 (codified as amended at 52 U.S.C. § 10301 (Supp. III 2016)).

27. See Charles & Fuentes-Rohwer, *supra* note 23, at 1420-21.

28. 521 U.S. 507 (1997).

29. 384 U.S. 641, 650-52 (1966).

30. U.S. CONST. art. I, § 8, cl. 18.

authority to enact any laws it deems “appropriate” to enforce constitutional rights, including voting rights.³¹ The Court elsewhere held³² that Congress has similarly broad authority under Section 2 of the Fifteenth Amendment,³³ which permits Congress to enforce that Amendment’s prohibition against intentional racial discrimination concerning voting rights.³⁴

Under the Court’s original interpretation of these enforcement clauses, Congress could not only prevent states from violating the Constitution, but also enact purely prophylactic measures banning constitutionally valid state actions that Congress believed might lead to, or be a cover for, a potential constitutional violation.³⁵ When Congress acts under these provisions, it may even be able to authorize states to enact race-conscious measures that would otherwise be suspect.³⁶

Boerne, in contrast, adopted a much narrower conception of Section 5 of the Fourteenth Amendment, holding that a law enacted pursuant to that provision must be “congruent and proportional[.]” to actual constitutional violations that can be established in an evidentiary record.³⁷ *Boerne* raises questions as to whether: *Katzbach* remains good law; *Boerne*’s interpretation of Section 5 ap-

31. *Katzbach*, 384 U.S. at 650-51, 651 n.10 (quoting *Ex Parte Virginia*, 100 U.S. 339, 345-46 (1879)).

32. See *City of Rome v. United States*, 446 U.S. 156, 174-77 (1980) (analogizing the Fifteenth Amendment’s Enforcement Clause to the Necessary and Proper Clause), *abrogated* by *Shelby County v. Holder*, 133 S. Ct. 2612 (2013); *South Carolina v. Katzenbach*, 383 U.S. 301, 308, 324, 326 (1966).

33. U.S. CONST. amend. XV, § 2 (“The Congress shall have power to enforce this article by appropriate legislation.”).

34. *Id.* amend. XV, § 1 (“The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.”); see also *City of Mobile v. Bolden*, 446 U.S. 55, 62 (1980) (plurality opinion) (“[A]ction by a State that is racially neutral on its face violates the Fifteenth Amendment only if motivated by a discriminatory purpose.”).

35. *Katzbach*, 384 U.S. at 651 (“Correctly viewed, § 5 is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment.”); *South Carolina*, 383 U.S. at 327 (rejecting the argument that “Congress may appropriately do no more” under Section 2 of the Fifteenth Amendment “than to forbid violations of the Fifteenth Amendment in general terms”).

36. See *Georgia v. Ashcroft*, 539 U.S. 461, 491 (2003) (Kennedy, J., concurring) (“[C]onsiderations of race that would doom a redistricting plan under the Fourteenth Amendment or § 2 [of the Voting Rights Act] seem to be what save it under § 5 [of the Voting Rights Act].”).

37. *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997).

plies equally to Section 2 of the Fifteenth Amendment and other voting rights amendments' enforcement clauses;³⁸ and the VRA—either as currently interpreted³⁹ or under reasonable alternate interpretations—falls within this more limited conception of congressional authority.⁴⁰

Boerne threatens the VRA's validity because Section 5 of the Fourteenth Amendment and Section 2 of the Fifteenth Amendment are the constitutional cornerstones of congressional voting rights enforcement. They are the only provisions even potentially broad enough to support the VRA. Congress has virtually plenary authority⁴¹ to regulate congressional⁴² and presidential⁴³ elections. Apart from its power to induce states to voluntarily comply with federal standards by offering grants under the Spending Clause,⁴⁴ however, Congress's only authority to regulate elections at all levels of government (including state and local races) comes from Section 5 of the Fourteenth Amendment,⁴⁵ Section 2 of the Fifteenth

38. See *Shelby County v. Holder*, 133 S. Ct. 2612, 2636 n.2 (2013) (Ginsburg, J., dissenting); *infra* notes 45-47 (identifying enforcement clauses of the Constitution's voting rights amendments).

39. See *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986) (establishing a three-prong test for section 2 violations that effectively prohibits constitutionally permissible state voting laws that would have racially disparate impacts).

40. 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, 2346-47 (2003) (recognizing the serious potential threat *Boerne* poses to section 2 of the VRA).

41. As with all congressional powers, this authority may not be used to violate constitutional rights. See *Cook v. Gralike*, 531 U.S. 510, 523 (2001). Moreover, Congress may not attempt "to dictate electoral outcomes [or] to favor or disfavor a class of candidates." *Id.* (quoting *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 833-34 (1995)). Congress is also forbidden from establishing qualifications for running or voting for Congress. See Michael T. Morley, *Dismantling the Unitary Electoral System? Uncooperative Federalism in State and Local Elections*, 111 NW. U. L. REV. ONLINE 103, 106 (2017).

42. U.S. CONST. art. I, § 4, cl. 1; see *Smiley v. Holm*, 285 U.S. 355, 366-67 (1932).

43. The Supreme Court has held that, although no constitutional provision expressly grants Congress power to regulate presidential elections, its authority over them is as broad as its power over congressional elections. See *Burroughs v. United States*, 290 U.S. 534, 545 (1934). See generally Morley, *supra* note 41, at 109 (discussing the scope of Congress's constitutional authority over various types of elections).

44. See U.S. CONST. art. I, § 8, cl. 1; *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 580 (2012) (plurality opinion) (explaining the limits of Spending Clause authority).

45. See U.S. CONST. amend. XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.").

Amendment,⁴⁶ and other complementary voting rights enforcement provisions.⁴⁷ By narrowing the scope of Section 5, *Boerne* partly eroded the VRA's constitutional foundation.

Second, the judiciary's interpretation of the equal protection right to vote appears to be in the midst of an even more fundamental evolution. Traditionally, the Supreme Court adopted a "pro-voting" interpretation of equal protection. The Court would generally uphold measures that expanded the franchise or made it easier for certain segments of the electorate to vote, even though they did not apply to other, similarly situated individuals.⁴⁸ It construed the Constitution to facilitate efforts to expand voting rights, even on a piecemeal basis.

Later precedents, and circuit court cases building on them, adopt more of a "pro-equality" approach. A measure is no longer deemed constitutional simply because it selectively expands the franchise, makes it easier for some people to vote, or extends special protections to certain populations. Rather, modern equal protection doctrine appears to require that voting-related rights generally be conferred upon everyone (or all similarly situated people) or no one.⁴⁹

This "new" equal protection right to vote, arising from the Court's concept of voting as a fundamental right,⁵⁰ seems more in accord with the principles underlying the Equal Protection Clause than the pro-voting interpretation. One serious challenge of the pro-equality interpretation, however, is that measures such as section 2 of the VRA, which offer certain groups special protection even from constitutionally valid state laws that disadvantage them, become much harder to justify. This Article is among the first to recognize this "new" equal protection right to vote and consider its impact on the VRA, as well as congressional power under Section 5

46. *Id.* amend. XV, § 2.

47. *See id.* amend. XIX, § 2 (empowering Congress to enforce the constitutional prohibition on sex discrimination in voting); *id.* amend. XXVI, § 2 (empowering Congress to enforce the constitutional prohibition on age-based discrimination in voting, for people who are at least eighteen years old); *see also id.* amend. XXIV, § 2 (empowering Congress to enforce the constitutional prohibition on poll taxes in federal elections).

48. *See infra* Part III.B.

49. *See infra* Part III.C.

50. *See* *Bush v. Gore*, 531 U.S. 98, 104 (2000) (*per curiam*); *see also infra* Part III.C.

of the Fourteenth Amendment and Section 2 of the Fifteenth Amendment.

Part I begins by setting forth various conceptions of “the right to vote” under the Constitution and federal law. It contends that the phrase can be understood in at least five different senses, as referring to either: (1) the right to be recognized as an eligible voter; (2) the right of an eligible voter to cast a ballot without undue burden; (3) the right of an eligible voter who casts a ballot to have it counted and assigned weight equal to other people’s votes; (4) the claimed right of voters to be assigned to districts drawn according to specified criteria (whether those criteria are traditional redistricting principles, race-based considerations to enhance minority voting strength, partisan affiliation, or other such factors); and (5) the right of voters to not have their ballots be diluted or effectively nullified by fraudulent votes, improperly cast votes, or votes from ineligible people. Distinguishing among these competing senses of the phrase is critical to understanding the evolution of the Court’s equal protection jurisprudence and, more generally, the contexts in which the Court’s conservative turn poses the most substantial risk to section 2 of the VRA.

The remainder of this Article turns to the impending threats to the VRA. Part II explores the implications of, and potential responses to, the Court’s narrowing of Congress’s enforcement authority under Section 5 of the Fourteenth Amendment. It recommends that courts address the uncertainty introduced by *Boerne* by interpreting and applying section 2 of the VRA in light of traditional remedial principles applied in the context of injunctions. To the extent section 2 is a prophylactic measure that bars states from enacting laws or adopting policies that are not actually unconstitutional, Supreme Court doctrine governing injunctions provides an objective, well-established, principled basis for determining the proper scope of such prophylactic relief. Applying this body of remedial law to determine the circumstances under which, as a prophylactic measure, section 2 of VRA may be validly applied may help it survive scrutiny under *Boerne*.

Part III examines the judiciary’s continuing shift from a pro-voting to a pro-equality interpretation of equal protection. Historically, the Court has allowed Congress to confer special protection

for certain groups' voting rights beyond what the Constitution mandates to more fully incorporate people into the political process. "Pro-equality" equal protection case law that focuses on voting as a fundamental right, however, reduces Congress's ability to create special prophylactic protections for certain groups' voting rights, leaving primary responsibility for enforcing them to the courts. The Article then briefly concludes.

I. UNPACKING THE "RIGHT TO VOTE"

To understand the various contexts in which voter protection laws such as section 2 of the VRA may be applied, it is helpful to recognize that the phrase "right to vote" is ambiguous, susceptible to at least five different meanings. First, the "right to vote" can refer to a person's right to be recognized as an eligible voter. The U.S. Constitution's Voter Qualifications Clauses, for example, grant a person entitled to vote for the most populous house of her state legislature the right to vote for the U.S. House of Representatives⁵¹ and U.S. Senate,⁵² as well. This may be called "Voter Eligibility Rights": the constitutional right to vote restricts a state's ability to determine the composition of its electorate.⁵³

Section 2 of the Fourteenth Amendment substantially penalized states for refusing to allow adult citizens to vote,⁵⁴ but formally left them free to ultimately decide whether to extend the franchise.⁵⁵ Even after the enactment of the Fifteenth and Nineteenth Amendments, states retained most of their traditional broad discretion to determine voter eligibility for themselves.⁵⁶ As late as 1959, the

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

52. *Id.* amend. XVII, § 1.

53. Most voting rights amendments confer only a limited Voter Eligibility Right; while states are prohibited from denying a person the right to vote based on race, gender, or age—for those who are at least eighteen years old—those amendments do not affirmatively require the state to extend voting rights to anyone. See, e.g., *infra* notes 221-23 and accompanying text.

54. See U.S. CONST. amend. XIV, § 2.

55. Michael T. Morley, *Remedial Equilibration and the Right to Vote Under Section 2 of the Fourteenth Amendment*, 2015 U. CHI. LEGAL F. 279, 318-22. Congress has never implemented Section 2's penalty—reduction in representation in the U.S. House of Representatives and, by extension, the Electoral College—against states that abridged or denied the right to vote. *Id.* at 327.

56. See *infra* Part III.A.

Supreme Court affirmed states' authority to impose voter qualifications and shape their electorates.⁵⁷

During the Civil Rights Era, the Supreme Court dramatically expanded Voter Eligibility Rights,⁵⁸ concomitantly reducing states' discretion to limit the franchise. Most modern disputes concerning Voter Eligibility Rights center around felon disenfranchisement⁵⁹ (which the Constitution expressly permits)⁶⁰ and the voting rights of U.S. citizens living in the District of Columbia,⁶¹ U.S. territories and possessions,⁶² and foreign nations.⁶³

Second, the right to vote may refer to the right of an eligible voter to be permitted to cast a ballot without being subject to discriminatory or unduly burdensome procedures. This may be called "Voter Participation Rights": the right to vote restricts a state's power to regulate the electoral process. Voter Participation Rights are

57. See *Lassiter v. Northampton Cty. Bd. of Elections*, 360 U.S. 45, 51 (1959) (holding that a state may adopt "standards designed to promote intelligent use of the ballot").

58. See *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 668 (1966) ("To introduce wealth or payment of a fee as a measure of a voter's qualifications is to introduce a capricious or irrelevant factor.").

59. See, e.g., *Malnes v. Arizona*, No. 16-16208, 2017 WL 2829128, at *1 (9th Cir. June 30, 2017) (holding that the plaintiff "failed to allege facts sufficient to establish that Arizona's felon disenfranchisement statute reflects racial animus or discrimination"); *Johnson v. Gov. of Fla.*, 405 F.3d 1214, 1234 (11th Cir. 2005) (en banc) (upholding constitutionality of Florida's felon disenfranchisement provision).

60. See U.S. CONST. amend. XIV, § 2; see also *Richardson v. Ramirez*, 418 U.S. 24, 54 (1974).

61. See, e.g., *Adams v. Clinton*, 90 F. Supp. 2d 35, 55-56 (D.D.C. 2000) (three-judge court) ("[C]onstitutional text, history, and judicial precedent bar us from accepting plaintiffs' contention that the District of Columbia may be considered a state for purposes of congressional representation under Article I."), *aff'd*, 531 U.S. 941 (2000) (order); 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 District*, 60 ALA. L. REV. 783, 795 (2009) ("The failure of the original text of the Constitution to provide for congressional representation for the District was not the result of inadvertence.").

62. See, e.g., *Romeu v. Cohen*, 265 F.3d 118, 124 (2d Cir. 2001) (holding that the Equal Protection Clause does not guarantee U.S. citizens who moved to U.S. territories the right to vote); *Segovia v. Bd. of Election Comm'rs*, 218 F. Supp. 3d 643, 645 (N.D. Ill. 2016) (holding that Illinois was not constitutionally required to allow former residents who moved to Guam, Puerto Rico, or the U.S. Virgin Islands to continue voting even though it permits former residents who move to the Northern Mariana Islands, American Samoa, or a foreign country to continue voting), *aff'd in part and vacated in part sub nom. Sequoia v. United States*, 880 F.3d 384 (7th Cir. 2018).

63. See Uniformed and Overseas Citizens Absentee Voting Act, Pub. L. No. 99-410, 100 Stat. 924 (1986) (codified as amended at 52 U.S.C. §§ 20301-20311 (Supp. III 2016)).

generally governed by the *Anderson-Burdick* standard, which derives its name from the Supreme Court cases which established it.⁶⁴ Under this test,

a court begins by determining whether the challenged election law imposes “severe restrictions” on the right to vote, in which case the law is subject to strict scrutiny and generally invalidated. If the law does not impose such a burden—and most election laws do not—the court then balances the goals the law seeks to further against the resulting burden on constitutional rights.⁶⁵

Voter Participation Rights tend to be the focus of disputes concerning voter registration requirements,⁶⁶ voter identification laws, reductions in early voting periods, and other changes to regulations governing electoral procedures.⁶⁷

Third, the right to vote may refer to the right of a voter to have his ballot be counted and accorded the same weight as those of other voters in the election. This may be called “Voter Equality Rights”: the right to vote restricts a state’s power to ignore or devalue properly cast ballots,⁶⁸ such as by crafting legislative districts of disparate population sizes.⁶⁹ Voter Equality Rights apply both before an

64. See *Burdick v. Takushi*, 504 U.S. 428, 434 (1992); *Anderson v. Celebrezze*, 460 U.S. 780, 788 & n.9 (1983).

65. See Morley, *supra* note 55, at 281 (footnotes omitted). Elsewhere, I have argued that the *Anderson-Burdick* test is too *ad hoc* and subjective and suggested a more objective, constitutionally rooted alternative. See *id.* at 286, 297-98 (arguing that Section 2 of the Fourteenth Amendment, construed in light of remedial equilibration theory, offers more concrete guidance for identifying violations of Voter Participation Rights).

66. See, e.g., *League of Women Voters of the United States v. Newby*, 838 F.3d 1, 4, 9-10 (D.C. Cir. 2016) (holding that the National Voter Registration Act, 52 U.S.C. § 20508(b)(1), barred the Executive Director of the U.S. Election Assistance Commission from granting the Kansas Secretary of State’s request to change the state-specific instructions accompanying the federal voter registration form to require people seeking to register in Kansas to provide proof of U.S. citizenship).

67. See *supra* notes 14-16 (collecting cases).

68. See, e.g., *United States v. Classic*, 313 U.S. 299, 315 (1941) (“Obviously included within the right to choose, secured by the Constitution, is the right of qualified voters within a state to cast their ballots and have them counted at Congressional elections.”); *United States v. Mosley*, 238 U.S. 383, 386 (1915) (“[T]he right to have one’s vote counted is as open to protection by Congress as the right to put a ballot in a box.”).

69. See, e.g., *Karcher v. Daggett*, 462 U.S. 725, 732-33 (1983) (discussing “[t]he principle of population equality for congressional districts”).

election, in the drawing of legislative and congressional district lines, as well as during the ballot-counting process. This aspect of the right to vote rests on the time-honored “one-person, one-vote” principle.⁷⁰ Voter Equality Rights require that congressional districts within a state contain populations as equal as possible,⁷¹ while the populations of state legislative districts generally may diverge by no more than 10 percent.⁷²

Fourth, relatedly, the right to vote may refer to the (frequently contested) right of a voter to have districts be drawn according to certain criteria, whether those standards are “traditional race-neutral districting principles,”⁷³ party affiliation,⁷⁴ preservation of cohesive racial voting blocs,⁷⁵ or other such concerns. This may be called “Voter Associational Rights”: to the extent these rights are recognized, they restrict a state’s power to draw district boundaries, even among districts of equal populations.⁷⁶

Voter Associational Rights are among the most contested aspects of the right to vote, particularly in light of the Supreme Court’s

70. *Gray v. Sanders*, 372 U.S. 368, 381 (1963) (“The conception of political equality from the Declaration of Independence, to Lincoln’s Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote.”); *see also Reynolds v. Sims*, 377 U.S. 533, 555 (1964) (“[T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen’s vote just as effectively as by wholly prohibiting the free exercise of the franchise.”).

71. *See Karcher*, 462 U.S. at 732-33 (“[W]e have required that absolute population equality be the paramount objective of apportionment only in the case of congressional districts.”); *accord Kirkpatrick v. Preisler*, 394 U.S. 526, 531 (1969).

72. *See Harris v. Ariz. Indep. Redistricting Comm’n*, 136 S. Ct. 1301, 1307 (2016) (“[A]ttacks on deviations under 10% will succeed only rarely, in unusual cases.”); *Reynolds*, 377 U.S. at 579. The Supreme Court arguably diminished the practical protection afforded by Voter Equality Rights by holding that states may draw state legislative districts based on total population, rather than the number of people eligible to vote or become voters within each district. *See Evenwel v. Abbott*, 136 S. Ct. 1120, 1126-27 (2016) (“[I]t is plainly permissible for jurisdictions to measure equalization by the total population of state and local legislative districts.”). Under *Evenwel*, a voter living in a district disproportionately populated by active voters will be able to exercise relatively less control over an election’s outcome than a voter living in another district within the state populated by a large number of legal or undocumented immigrants who are ineligible to vote.

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

74. *See supra* note 7.

75. *See Thornburg v. Gingles*, 478 U.S. 30, 50 n.16 (1986).

76. *Cf. Ala. Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1271 (2015) (“[T]he requirement that districts have approximately equal populations is a background rule against which redistricting takes place,” rather than a “factor to be treated like other nonracial factors.”).

repeated insistence that the Constitution does not guarantee proportional representation of political, racial, or other social groups.⁷⁷ The Court is presently considering whether Voter Associational Rights prohibit states from engaging in political gerrymandering.⁷⁸ The Court has already established, however, that the Constitution's prohibition on intentional racial discrimination generally precludes a state from drawing congressional or legislative districts based primarily on racial considerations,⁷⁹ regardless of whether those districts are unusually shaped or instead accord with traditional redistricting principles.⁸⁰

Finally, the Court has recognized that an eligible voter who has validly cast a ballot has the fundamental right to have the ballot be given full weight and effect without being nullified or diluted by fraudulent votes, improperly cast votes, or votes cast by ineligible voters.⁸¹ Call this the "Defensive Right to Vote": a state is constitutionally required to assure the integrity of its elections by protecting valid votes against fraudulent or otherwise invalid ballots.⁸²

77. See *City of Mobile v. Bolden*, 446 U.S. 55, 79 (1980) (plurality opinion) ("[T]he Court has sternly set its face against the claim, *however phrased*, that the Constitution somehow guarantees proportional representation." (emphasis added)); see also *LULAC v. Perry*, 548 U.S. 399, 419 (2006) (plurality opinion) ("[T]here is no constitutional requirement of proportional representation."); *Chapman v. Meier*, 420 U.S. 1, 17 (1975) (holding that a constitutional violation does not arise from "a simple disproportionality between the voting potential and the legislative seats won by a racial or political group").

78. See *Whitford v. Gill*, 218 F. Supp. 3d 837, 864 (W.D. Wis. 2016) (three-judge court, argued, No. 16-1161 (U.S. Oct. 3, 2017)).

79. See *Miller v. Johnson*, 515 U.S. 900, 916 (1995) ("The plaintiff's burden is to show ... that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district."). Such claims of racial discrimination in redistricting were first recognized by *Shaw v. Reno*, 509 U.S. 630, 644 (1993).

80. See *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 799 (2017) (holding that a voter may "establish racial predominance in the absence of an actual conflict [with traditional redistricting criteria] by presenting direct evidence of the legislative purpose and intent").

81. See *Anderson v. United States*, 417 U.S. 211, 226 (1974) (holding that a person has the constitutional right to have his or her vote be "given full value and effect, without being diluted or distorted by the casting of fraudulent [or otherwise ineligible] ballots"); see also *Reynolds v. Sims*, 377 U.S. 533, 555 (1964) (holding that a person's right to vote is "denied by a debasement or dilution of the weight of [his or her] vote just as effectively as by wholly prohibiting the free exercise of the franchise"); *Baker v. Carr*, 369 U.S. 186, 208 (1962) (holding that the right to vote is violated by "dilution" of people's votes through means such as the "stuffing of the ballot box").

82. See Michael T. Morley, *De Facto Class Actions? Plaintiff- and Defendant-Oriented Injunctions in Voting Rights, Election Law, and Other Constitutional Cases*, 39 HARV. J.L. &

This concept is an important complement to other aspects of the right to vote, confirming that states have a constitutionally significant interest in the enforcement of reasonable voting restrictions, rather than always erring on the side of allowing people to vote despite doubts about their eligibility or the validity of their ballots. Election law must constantly strive to strike a balance between ensuring that all eligible voters are given an opportunity to cast their ballots, while simultaneously preventing legitimately cast votes from being diluted, nullified, or effectively cancelled out.

The Defensive Right to Vote is the hardest to litigate from a constitutional perspective because the threat of invalid votes usually presents a generalized grievance that does not inflict a particularized injury on any particular voter.⁸³ Voters sometimes assert the Defensive Right to Vote as a basis for intervening in litigation to defend the validity of election-related regulations,⁸⁴ particularly when a substantial risk exists that the state or locality will not do so vigorously or effectively. Certain statutes, such as the National Voter Registration Act (NVRA), also create causes of action that allow private plaintiffs to compel states to adequately maintain their voter registration lists to reduce the possibility of fraudulent or improper voting.⁸⁵

PUB. POL'Y 487, 528 (2016); Michael T. Morley, *Rethinking the Right to Vote Under State Constitutions*, 67 VAND. L. REV. EN BANC 189, 192-93 (2014) [hereinafter Morley, *Rethinking*].

83. See, e.g., *Landes v. Tartaglione*, No. Civ. A.04-CV-3164, 2004 WL 2397292, at *2-3 (E.D. Pa. Oct. 26, 2004) (dismissing a challenge to the use of absentee ballots in an election on the ground they facilitate fraud under the generalized grievance doctrine), *aff'd*, 153 F. App'x 131 (3d Cir. 2005); cf. *Lance v. Coffman*, 549 U.S. 437, 437-38, 442 (2007) (per curiam) (rejecting a claim that a state constitutional provision prohibiting the state legislature from redrawing congressional districts more often than once every decade violated the Elections Clause under the generalized grievance doctrine).

84. See, e.g., *League of Women Voters of Wis. Educ. Network, Inc. v. Walker*, 851 N.W.2d 302, 305-06 (Wis. 2014) (upholding a voter identification statute that voters intervened to help defend). The author represented the intervenor voters in this case.

85. 52 U.S.C. §§ 20507(a)(4), (b)(1), 20510(b) (Supp. III 2016). The Supreme Court has held that the Help America Vote Act's list maintenance requirements, 52 U.S.C. § 21083, in contrast, are unenforceable by private plaintiffs. See *Brunner v. Ohio Republican Party*, 555 U.S. 5, 6 (2008) (per curiam). The U.S. Department of Justice, particularly under Republican administrations, has entered into consent decrees with some states to ensure they comply with those provisions. See, e.g., Consent Decree, *United States v. Maine*, No. 06-86-B-W (D. Me. Aug. 1, 2006), <https://www.justice.gov/crt/united-states-district-court-district-maine-bangor-division> [<https://perma.cc/UYB3-BGQB>]; Consent Decree, *United States v. Indiana*, No. 1:06-cv-1000-RLY-TAB (S.D. Ind. July 5, 2006), <https://www.justice.gov/crt/consent-decree-and-order> [<https://perma.cc/SX5H-P7P6>].

Different conceptions of the right to vote may come into conflict with each other. For example, claims for greater Voter Participation Rights by eliminating proof-of-citizenship or identification requirements for voting might undermine the Defensive Right to Vote by increasing the possibility of invalid votes.⁸⁶ Similarly, different claimed Voter Associational Rights may support the establishment of conflicting sets of congressional or legislative district boundaries, depending on the particular criteria each proposed redistricting plan emphasizes.

The VRA prohibits states from denying or abridging the right to vote based on race.⁸⁷ Courts have recognized that section 2 of the VRA gives rise to both “vote denial” and “vote dilution” claims.⁸⁸ The VRA’s prohibition on discriminatory vote denial protects Voter Eligibility Rights (that is, the right to be recognized as an eligible voter) and Voter Participation Rights (that is, the right to cast a ballot without being subject to unduly burdensome procedures). Its ban on discriminatory vote dilution, in contrast, protects Voter Equality Rights (that is, the right to have one’s vote be counted and accorded weight equal to other people’s votes) and at least some forms of Voter Associational Rights (that is, rights concerning the composition of legislative districts).

Insofar as the VRA protects Voter Eligibility Rights and Voter Equality Rights, it is largely uncontroversial. States have generally extended the franchise, including in state and local races, to adult citizens who satisfy minimal residency requirements. In this respect, the VRA has been unabashedly successful: states no longer attempt to impose qualifications such as literacy tests or property requirements for being recognized as an eligible voter. The primary

86. See Morley, *supra* note 41, at 123-24.

87. See Voting Rights Act of 1965, Pub. L. No. 89-110, § 2, 79 Stat. 437, 437 (codified as amended at 52 U.S.C. § 10301(a) (Supp. III 2016)). The VRA has also been amended to protect against language-based discrimination in voting as well. See Voting Rights Amendment Act of 1975, Pub. L. No. 94-73, secs. 203, 206-207, 301, 89 Stat. 400, 401-03 (codified as amended at 52 U.S.C. § 10503 (Supp. III 2016)).

88. See *Shaw v. Reno*, 509 U.S. 630, 640 (1993) (“The right to vote can be affected by a dilution of voting power as well as by an absolute prohibition on casting a ballot.” (emphasis and alteration omitted) (quoting *Allen v. State Bd. of Elections*, 393 U.S. 544, 569 (1969))); Daniel P. Tokaji, *The New Vote Denial: Where Election Reform Meets the Voting Rights Act*, 57 S.C. L. REV. 689, 691 (2006); see, e.g., *Feldman v. Ariz. Sec’y of State’s Office*, 843 F.3d 366, 378-79 (9th Cir. 2016) (en banc), *stay granted* by 137 S. Ct. 446 (2016); *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 238-41 (4th Cir. 2014).

remaining disputes over Voter Eligibility Rights generally tend to concern felon disenfranchisement laws, which courts have held are valid under the VRA,⁸⁹ and whether particular voters such as college students or the homeless satisfy state residency requirements.⁹⁰ Thus, while the VRA imposes greater limits on states' power to impose voter qualifications than the Constitution itself,⁹¹ serious disputes concerning such applications of the statute are unlikely to arise.

Courts are similarly unlikely to question the VRA's applicability to Voter Equality Rights simply because the law seldom applies in such cases. Claims concerning Voter Equality Rights are typically brought directly under the Constitution on the ground that population disparities among congressional or legislative districts are too large.⁹² While the presence of a racially discriminatory intent or disparate impact bolsters such claims, their gravamen remains the numerical disparities among different districts. Consequently, the VRA typically adds little in such cases.

The Supreme Court's willingness to reassess the VRA's constitutionality makes the statute most potentially vulnerable in two critical contexts: vote denial claims enforcing Voter Participation Rights, and vote dilution claims asserting Voter Associational Rights. In cases involving Voter Participation Rights, the plaintiffs typically contend certain election-related rules, requirements, or procedures, such as proof-of-citizenship requirements, voter identification laws, or reductions in early voting periods, disproportionately impact minorities, making it harder for minorities to vote and elect the candidates of their choice. In many of these cases, the

89. See *supra* notes 59-60 and accompanying text.

90. See, e.g., *Ne. Ohio Coalition for the Homeless v. Husted*, 837 F.3d 612 (6th Cir. 2016), *cert. denied*, 137 S. Ct. 2265 (2017); *One Wis. Inst., Inc. v. Nichol*, 186 F. Supp. 3d 958 (W.D. Wisc. 2016).

91. Compare *Lassiter v. Northampton Cty. Bd. of Elections*, 360 U.S. 45, 50-53 (1959) (holding that literacy tests that are administered in a race-neutral manner are constitutionally permitted), with 52 U.S.C. § 10501 (Supp. III 2016) (prohibiting the use of literacy tests to determine voter eligibility).

92. Claims concerning state legislative districts are brought under the Equal Protection Clause. See, e.g., *Reynolds v. Sims*, 377 U.S. 533, 568 (1964); *Gray v. Sanders*, 372 U.S. 368, 379-80 (1963). Claims concerning congressional districts, in contrast, arise under Article I. U.S. CONST. art. I, § 2, cl. 1 ("The House of Representatives shall be composed of members chosen every second year by the people of the several States."); see *Wesberry v. Sanders*, 376 U.S. 1, 7-8 (1964).

challenged requirements are constitutionally valid; the plaintiffs must argue that Congress may nevertheless prohibit such electoral rules under the VRA as a purely prophylactic measure to protect against the possibility of an undetectable constitutional violation (such as hidden discriminatory intent).

Likewise, in cases involving Voter Associational Rights, the plaintiffs do not necessarily contend that a particular legislative or congressional redistricting scheme is unconstitutional. To the contrary, they effectively argue that the scheme violates the VRA because an alternate scheme would enhance minority voting power. In other words, the challenged map is invalid because the state could have created one or more additional majority-minority districts to allow more minorities to elect the candidates of their choice.⁹³ They seek to use the VRA to compel states to engage in prophylactic redistricting by drawing districts that are not actually constitutionally required as a means of preventing the possibility of discriminatory intent from infecting a legislative map. Both the Supreme Court's ruling in *City of Boerne v. Flores* and recent developments in equal protection jurisprudence render these applications of the VRA particularly susceptible to challenge.

II. *BOERNE'S* EFFECT ON CONGRESS'S SECTION 5 POWER TO ENFORCE THE RIGHT TO VOTE

Because the VRA applies to elections at all levels of government,⁹⁴ its validity hinges initially on the scope of Congress's power under Section 5 of the Fourteenth Amendment, which empowers Congress to enforce the Due Process and Equal Protection Clauses,⁹⁵ and Section 2 of the Fifteenth Amendment, which permits Congress to prevent racial discrimination in voting.⁹⁶ The Supreme Court's re-interpretation of Section 5 in *City of Boerne v. Flores* has jeopardized the VRA's constitutional underpinnings,⁹⁷ requiring careful

93. See *Thornburg v. Gingles*, 478 U.S. 30, 50 n.16 (1986).

94. See *Morley*, *supra* note 41, at 110.

95. See U.S. CONST. amend. XIV, §§ 1, 5.

96. See *id.* amend. XV. Even if the VRA falls within the scope of Congress's power under one or both of these provisions, it may still not exceed the Fifth Amendment's equal protection limits on Congress's power. See *infra* Part III.

97. 521 U.S. 507 (1997).

reassessment of the statute's proper scope and application to prevent the Court from invalidating it.

During the Civil Rights Era, the Court easily held that the VRA was a valid exercise of Congress's constitutional authority. It construed the Fourteenth and Fifteenth Amendments' enforcement clauses expansively, analogizing them to the Necessary and Proper Clause.⁹⁸ *Katzenbach v. Morgan* explains that Section 5 "authoriz[es] Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment."⁹⁹ The provision empowers Congress to enact any statutes that Congress itself deems to be "plainly adapted" to enforcing a Fourteenth Amendment right.¹⁰⁰

The Court stressed the need for deference to Congress's determinations in this regard.¹⁰¹ Section 5 grants Congress the prerogative "to assess and weigh the ... conflicting considerations—the risk or pervasiveness of the discrimination in governmental services, the effectiveness" of its proposed intervention, "the adequacy or availability of alternative remedies, and the nature and significance of the state[']s countervailing] interests."¹⁰² The Court declined to "review the congressional resolution of these factors."¹⁰³ Rather, the Court would uphold a challenged statute if it could "perceive a basis upon which the Congress might resolve the conflict as it did."¹⁰⁴

In *South Carolina v. Katzenbach*, the Court construed the Fifteenth Amendment's enforcement provision in the same manner.¹⁰⁵ It held, "Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting."¹⁰⁶ The Court added that the Enforcement Clause "indicate[s] that Congress

98. See U.S. CONST. art. I, § 8, cl. 18; *Katzenbach v. Morgan*, 384 U.S. 641, 650 (1966) ("By including § 5 the draftsmen sought to grant to Congress, by a specific provision applicable to the Fourteenth Amendment, the same broad powers expressed in the Necessary and Proper Clause."); *South Carolina v. Katzenbach*, 383 U.S. 301, 325-26 (1966) ("The basic test to be applied in a case involving § 2 of the Fifteenth Amendment is the same as" for the Necessary and Proper Clause).

99. 384 U.S. at 651.

100. *Id.*

101. *Id.* at 653.

102. *Id.*

103. *Id.*

104. *Id.*

105. See 383 U.S. 301 (1966).

106. *Id.* at 324.

was to be chiefly responsible for implementing the rights created in § 1.¹⁰⁷ This construction of the Fourteenth and Fifteenth Amendments' enforcement clauses gave Congress broad authority to protect against the prospect of racial discrimination in the electoral process, leaving courts little power to overrule its determinations. Importantly, the enforcement clauses permitted Congress to prohibit state action even if it did not actually violate the underlying substantive constitutional prohibitions.¹⁰⁸ Thus, while the Fourteenth and Fifteenth Amendments prohibit only intentional racial discrimination in voting,¹⁰⁹ Congress could prohibit electoral rules, requirements, and procedures that had only a racially disparate impact, even in the absence of intentional discrimination.¹¹⁰

In *City of Boerne v. Flores*, the Court adopted a much narrower interpretation of Section 5 of the Fourteenth Amendment.¹¹¹ It began by emphasizing the judiciary's exclusive role in determining the scope and meaning of constitutional rights.¹¹² When Congress exercises its Enforcement Clause authority, it is bound by the judiciary's interpretation of the Due Process Clause and Equal Protection

107. *Id.* at 326; *see also id.* ("Congress has full remedial powers to effectuate the constitutional prohibition against racial discrimination in voting.")

108. *See City of Rome v. United States*, 446 U.S. 156, 176 (1980) ("Congress may, under the authority of § 2 of the Fifteenth Amendment, prohibit state action that, though in itself not violative of § 1, perpetuates the effects of past discrimination."), *abrogated by* *Shelby County v. Holder*, 133 S. Ct. 2612 (2013); *see also Katzenbach*, 384 U.S. at 649 (holding that Congress may enact legislation under the Fourteenth Amendment's Enforcement Clause to prohibit state action that threatens voting rights "[w]ithout regard to whether the judiciary would find that the Equal Protection Clause itself" renders the state's conduct unconstitutional).

109. *See City of Mobile v. Bolden*, 446 U.S. 55, 62, 66 (1980) (plurality opinion) ("[A]ction by a State that is racially neutral on its face violates the Fifteenth Amendment only if motivated by a discriminatory purpose.... [O]nly if there is purposeful discrimination can there be a violation of the Equal Protection Clause of the Fourteenth Amendment." (citing *Washington v. Davis*, 426 U.S. 229 (1976)); *see also Lassiter v. Northampton Cty. Bd. of Elections*, 360 U.S. 45, 50-53 (1959).

110. *City of Rome*, 446 U.S. at 173 ("[E]ven if § 1 of the [Fifteenth] Amendment prohibits only purposeful discrimination, the prior decisions of this Court foreclose any argument that Congress may not, pursuant to § 2, outlaw voting practices that are discriminatory in effect." (footnote omitted)).

111. 521 U.S. 507 (1997).

112. *See id.* at 519.

Clause.¹¹³ As the Court explained, “Congress does not enforce a constitutional right by changing what the right is.”¹¹⁴

Boerne reaffirmed that Congress may go beyond merely prohibiting unconstitutional conduct to ban other, constitutionally permissible state actions in order to deter or remedy constitutional violations.¹¹⁵ In *Boerne*’s key passage, the Court held, “There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.”¹¹⁶ Purely prophylactic prohibitions that extend to constitutionally valid state laws “may be appropriate when there is reason to believe that many of the laws affected by the congressional enactment have a significant likelihood of being unconstitutional.”¹¹⁷ Legislation that goes beyond these restrictions cannot be deemed remedial, but rather constitutes an attempted redefinition of the underlying substantive right and exceeds Congress’s Enforcement Clause authority.¹¹⁸

The Court has applied this standard across a wide range of cases. In *Boerne* itself, the Court struck down the Federal Religious Freedom Restoration Act (RFRA),¹¹⁹ insofar as it applied to state and local laws and policies, because the “legislative record lack[ed] examples of modern instances of generally applicable laws passed because of religious bigotry.”¹²⁰ Moreover, “RFRA [wa]s so out of

113. *See id.* (“The design of the [Fourteenth] Amendment and the text of § 5 are inconsistent with the suggestion that Congress has the power to decree the substance of the Fourteenth Amendment’s restrictions on the States.”).

114. *Id.*

115. *See id.* at 518 (“Legislation which deters or remedies constitutional violations can fall within the sweep of Congress’ enforcement power even if in the process it prohibits conduct which is not itself unconstitutional.”); *see also* *Lopez v. Monterey County*, 525 U.S. 266, 282-83 (1999).

116. *City of Boerne*, 521 U.S. at 520; *see also* *Coleman v. Court of Appeals of Md.*, 566 U.S. 30, 43 (2012) (plurality opinion) (holding that, to invoke its Section 5 power, “Congress must identify a pattern of constitutional violations and tailor a remedy congruent and proportional to the documented violations”); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Savs. Bank*, 527 U.S. 627, 639 (1999) (“[F]or Congress to invoke § 5, it must identify conduct transgressing the Fourteenth Amendment’s substantive provisions, and must tailor its legislative scheme to remedying or preventing such conduct.”).

117. *See City of Boerne*, 521 U.S. at 532.

118. *See id.* at 527.

119. 42 U.S.C. § 2000bb-1 (1993), *invalidated by City of Boerne*, 521 U.S. 507.

120. *City of Boerne*, 521 U.S. at 530; *see also Fla. Prepaid*, 527 U.S. at 640, 647 (relying in part on the fact that “Congress came up with little evidence of infringing conduct on the part of the States” to invalidate a patent protection statute as exceeding Congress’s Section 5 power).

proportion to a supposed remedial or preventive object that it [could not] be understood as responsive to, or designed to prevent, unconstitutional behavior.”¹²¹ In the years since *Boerne*, the Court has held that numerous other federal laws likewise exceeded the scope of Congress’s Section 5 powers, including the civil remedy provision of the Violence Against Women Act¹²² and the Patent Remedy Act,¹²³ as well as the self-care provision of the Family Medical Leave Act (FMLA),¹²⁴ the Age Discrimination in Employment Act (ADEA),¹²⁵ and Title I of the Americans with Disabilities Act (ADA),¹²⁶ insofar as they apply to state employers. To date, the only laws to survive the Court’s scrutiny under Section 5 have been the FMLA’s family care provisions as they apply to state employers¹²⁷ and Title II of the ADA as applied to public access to courthouses and prison conditions.¹²⁸

In considering whether a law satisfies *Boerne*’s congruence-and-proportionality standard, the Court scrutinizes a variety of factors. Most importantly, the Court assesses whether a record of actual constitutional violations exists.¹²⁹ It also considers whether the state

121. *City of Boerne*, 521 U.S. at 532.

122. *United States v. Morrison*, 529 U.S. 598, 625-27 (2000) (citing 42 U.S.C. § 13981 (1994)).

123. *Fla. Prepaid*, 527 U.S. at 631, 640, 645-47 (citing 35 U.S.C. §§ 271(h), 296(a) (1994)).

124. *Coleman v. Court of Appeals of Md.*, 566 U.S. 30, 33, 37 (2012) (plurality opinion) (citing 29 U.S.C. § 2612(a)(1)(D) (2006)) (holding that there is no “evidence of a pattern of state constitutional violations” for which the FMLA’s self-care provision is a “remedy drawn in narrow terms”).

125. *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 82-83 (2000) (citing 29 U.S.C. § 216(b) (1994)).

126. *Bd. of Trs. v. Garrett*, 531 U.S. 356, 364, 374 (2001) (citing 42 U.S.C. §§ 12201-12202 (2012)).

127. *See Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 724-25, 740 (2003).

128. *See Tennessee v. Lane*, 541 U.S. 509, 513, 533-34 (2004); *see also* *United States v. Georgia*, 546 U.S. 151, 153, 158-59 (2006) (allowing an inmate to bring a claim against the state under Title II of the ADA based on statutory violations that also amounted to violations of the Eighth Amendment, as incorporated through the Fourteenth Amendment’s Due Process Clause).

129. *See, e.g., Coleman*, 566 U.S. at 41-42 (holding that the challenged FMLA provision exceeded Congress’s Section 5 power because it was based on “supposition and conjecture” rather than evidence in the legislative record of unconstitutional sex discrimination); *Garrett*, 531 U.S. at 368 (“The legislative record of the ADA, however, simply fails to show that Congress did in fact identify a pattern of irrational state discrimination in employment against the disabled.”); *Kimel*, 528 U.S. at 89 (holding that the ADEA exceeded Congress’s Section 5 power because “Congress never identified any pattern of age discrimination by the States, much less any discrimination whatsoever that rose to the level of constitutional

conduct Congress targeted is intentional, and hence potentially unconstitutional, or instead merely negligent, and therefore does not amount to a constitutional violation.¹³⁰ Additionally, the availability of state-level remedies undermines the need for a federal law under Section 5.¹³¹

Especially concerning from a voting rights perspective, the Court has taken a dim view of statutes aimed primarily at eliminating disparate impacts that do not themselves violate the Fourteenth Amendment. For example, the *Coleman* Court held that Congress could not grant state employees a prophylactic right to take self-care leave to alleviate the disparate impact that their employers' facially neutral leave policies had against women (who were purportedly more likely to exhaust their leave).¹³² Such disparate impacts do not violate the Fourteenth Amendment, the Court explained, stating, "To the extent, then, that the self-care provision addresses neutral leave policies with a disparate impact on women, it is not directed at a pattern of constitutional violations."¹³³ Likewise, in *Kimel v. Florida Board of Regents*, the Court held that Section 5 does not allow Congress to extend the ADEA to state employers because the Fourteenth Amendment does not prohibit age-based discrimination.¹³⁴ These precedents confirm that the less a law is targeted to constitutional violations (that is, the wider its purely prophylactic breadth), the less likely the Court is to uphold it.¹³⁵

violation").

130. See, e.g., *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Savs. Bank*, 527 U.S. 627, 645 (1999) (holding that the Patent Remedy Act exceeds Congress's Section 5 powers in part because "Congress did not focus on instances of intentional or reckless [patent] infringement" by states that would amount to due process violations).

131. See, e.g., *Coleman*, 566 U.S. at 39 (holding that the FMLA's self-care provision was not a proportionate response to a constitutional violation since, at the time of the statute's enactment, nearly all states already offered employees sick leave and short-term disability benefits); *Fla. Prepaid*, 527 U.S. at 643 ("Congress, however, barely considered the availability of state remedies for patent infringement and hence whether the States' conduct might have amounted to a constitutional violation under the Fourteenth Amendment.").

132. *Coleman*, 566 U.S. at 39.

133. *Id.* at 43.

134. 528 U.S. at 83-84, 86.

135. See *Coleman*, 566 U.S. at 43 (holding that, because most states' leave policies were not unconstitutional, a federal law requiring states to provide additional self-care leave is a disproportionate remedy); *Kimel*, 528 U.S. at 86 (holding that the ADEA exceeded Congress's Section 5 power because it "prohibits substantially more state employment decisions and

Boerne's congruence-and-proportionality test likely applies with equal force to Section 2 of the Fifteenth Amendment. Both Section 5 of the Fourteenth Amendment and Section 2 of the Fifteenth Amendment have materially identical language, empowering Congress to "enforce" the respective provisions of each Amendment "by appropriate legislation."¹³⁶ They were enacted barely a half year apart from each other as part of Reconstruction. The Court has previously interpreted both provisions in an identical manner, analogizing both provisions to the Necessary and Proper Clause.¹³⁷ And both provisions raise the same separation-of-powers concerns about the respective roles of Congress and the courts in constitutional interpretation. Consequently, the Court is likely to extend *Boerne's* congruence-and-proportionality test to Section 2 of the Fifteenth Amendment.

Numerous critics have attacked *Boerne*. Jack Balkin contends that the text of the Fourteenth Amendment, its purpose, and its Framers' intentions all suggest that its Enforcement Clause should be read as congruent with the Necessary and Proper Clause.¹³⁸ Robert Post and Reva Siegel lament that *Boerne* marginalizes Congress in defining the scope of the Equal Protection Clause's anti-discrimination protections because Congress is better situated than courts "to perceive and express evolving cultural norms."¹³⁹ And Douglas Laycock has powerfully contended that the Reconstruction Amendments altered not only the relationship between the federal government and the states, but between Congress and the courts.¹⁴⁰ Laycock reads Section 5 against the backdrop of Congress's distrust

practices than would likely be held unconstitutional under the applicable equal protection, rational basis standard"); *Fla. Prepaid*, 527 U.S. at 646-47 (noting that "Congress did nothing to limit the coverage of the Act to cases involving arguable constitutional violations").

136. Compare U.S. CONST. amend XIV, § 5, with *id.* amend. XV, § 2.

137. Compare *Katzenbach v. Morgan*, 384 U.S. 641, 650 (1966) (construing Section 5 of the Fourteenth Amendment), with *South Carolina v. Katzenbach*, 383 U.S. 301, 308, 326 (1966) (construing Section 2 of the Fifteenth Amendment).

138. Jack M. Balkin, *The Reconstruction Power*, 85 N.Y.U. L. REV. 1801, 1810, 1814-15 (2010).

139. Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After Morrison and Kimel*, 110 YALE L.J. 441, 520, 522, 525-26 (2000). Balkin also defended Congress's power to interpret constitutional provisions as conferring greater rights than the Court chooses to recognize. See Balkin, *supra* note 138, at 1827.

140. See Douglas Laycock, *Conceptual Gulfs in City of Boerne v. Flores*, 39 WM. & MARY L. REV. 743, 763-66 (1998).

of the Supreme Court due to *Dred Scott*.¹⁴¹ He views Section 5 as itself a prophylactic measure that empowers Congress to ensure that the federal courts do not construe Fourteenth Amendment rights too narrowly.¹⁴² Thus, in addition to empowering federal courts to check the states, he contends that the Amendment was intended to allow Congress to check the courts.

The Court shows no sign of abandoning the *Boerne* standard, however, and has applied it across numerous statutory contexts, including to antidiscrimination laws. Moreover, *Boerne* reinforces the structural constitutional notion of limited powers,¹⁴³ by preventing Congress from deciding for itself the proper scope of its own authority. The federal judiciary is typically regarded as the primary guarantor of constitutional rights in the modern era.¹⁴⁴ *Boerne* enables it to play the same role in policing the limits of Congress's power to enforce those rights under Section 5 of the Fourteenth Amendment as it does with regard to Congress's Article I and other powers. While Laycock convincingly relates the skepticism that some of the Fourteenth Amendment's drafters expressed toward the Court, it would be a radical upheaval—one unsupported by the fairly limited legislative history he offers—to construe the amendment as either authorizing departmentalism or requiring judicial deference to a particular Congress's interpretation of certain constitutional provisions. Indeed, the entire endeavor of judicial review is premised in part on the notion that the Constitution would be reduced to a mere parchment barrier if Congress were left to determine the bounds of its own power.¹⁴⁵

Some commentators have cautioned that section 2 of the VRA is susceptible to a *Boerne* challenge.¹⁴⁶ Many others, however, have

141. *See id.* at 765 (citing *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857)).

142. *See id.* at 765-66.

143. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 533-34, 588 (2012).

144. *See United States v. Grace*, 461 U.S. 171, 185 (1983) (Marshall, J., concurring in part and dissenting in part) (identifying the judiciary as having "the chief responsibility for protecting constitutional rights").

145. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 178 (1803) (holding that allowing Congress to decide the meaning of the Constitution "would subvert the very foundation of all written constitutions" and "giv[e] to the legislature a practical and real omnipotence").

146. *See, e.g., Luis Fuentes-Rohwer, The Future of Section 2 of the Voting Rights Act in the Hands of a Conservative Court*, 5 DUKE J. CONST. L. & PUB. POL'Y 125, 138 (2010) ("Once the Court focuses on the constitutionality of section 2, it will find arguments for striking it down close at hand."); Katz, *supra* note 40, at 2346-47. Others have argued that Congress's 2006

offered spirited defenses of the VRA despite *Boerne's* limits on Congress's power. Professor Joshua Sellers argues that section 2 easily satisfies *Boerne* because, despite the 1982 amendments extending it to many types of disparate impact cases,¹⁴⁷ courts nevertheless still require evidence of discriminatory intent.¹⁴⁸ As a descriptive matter, this claim is highly debatable. More importantly, this argument defends section 2's validity only at the expense of effectively nullifying the 1982 amendments, which eliminated discriminatory intent as an element of section 2 claims.

Professor Christopher Elmendorf offers a related defense.¹⁴⁹ He contends that section 2 is a congruent and proportionate response to intentional racial discrimination by voters themselves in how they cast their ballots.¹⁵⁰ When a person votes, Elmendorf contends, she is performing an official state action under color of law and is therefore subject to Fourteenth Amendment restrictions.¹⁵¹ Many voters, he maintains, may be unconstitutionally influenced by racial considerations when deciding how to vote.¹⁵² While courts have no practical way of targeting such unconstitutional conduct, Congress may enact laws, such as section 2 of the VRA, pursuant to its Section 5 enforcement power to remediate such potential discrimination.

Professor Elmendorf's creative approach ties the validity of section 2 of the VRA to courts' willingness to assume that a substantial

amendments expanding the scope of section 5 of the VRA might have rendered that provision more susceptible to a *Boerne* challenge as well, though *Shelby County* has at least temporarily mooted such concerns. 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, 179 (2005); Samuel Issacharoff, *Is Section 5 of the Voting Rights Act a Victim of Its Own Success?*, 104 COLUM. L. REV. 1710, 1714-15 (2004); Michael J. Pitts, *Section 5 of the Voting Rights Act: A Once and Future Remedy?*, 81 DENV. U. L. REV. 225, 227-28 (2003) (arguing that an extension of "Section 5 will not survive the congruence and proportionality test" and recommending it be narrowed); cf. Nathaniel Persily, *The Promise and Pitfalls of the New Voting Rights Act*, 117 YALE L.J. 174, 253 (2007).

147. See Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 2, 96 Stat. 131, 134 (June 29, 1982) (codified as amended at 52 U.S.C. § 10301 (Supp. III 2016)).

148. Joshua S. Sellers, *The Irony of Intent: Statutory Interpretation and the Constitutionality of Section 2 of the Voting Rights Act*, 76 LA. L. REV. 43, 46 (2015).

149. See Christopher S. Elmendorf, *Making Sense of Section 2: Of Biased Votes, Unconstitutional Elections, and Common Law Statutes*, 160 U. PA. L. REV. 377, 448-56 (2012).

150. See *id.* at 385.

151. See *id.* at 432, 436.

152. See *id.* at 437-41.

fraction of the electorate is reasonably likely to be racially motivated when voting. His argument raises difficult questions about whether it is constitutionally impermissible—even if that prohibition is unenforceable—for women or minorities to take into account the fact that a candidate is female or a minority when voting. Moreover, it is unclear how plaintiffs would be able to persuasively demonstrate such widespread bias, and whether courts would be willing to effectively label a substantial fraction of the population as racist.¹⁵³ This argument may offer an even more precarious basis for section 2 of the VRA than it currently rests upon.

Professor Pamela Karlan, expanding upon Elmendorf's approach, offers one of the most powerful and comprehensive defenses of section 2 of the VRA.¹⁵⁴ She contends that section 2 is defensible under three separate "models": the internal model, in which the law is used to combat intentional racial discrimination within the electoral system itself; the external model, in which it is used to alleviate the effects of intentional discrimination outside the electoral system that impacts minorities' ability to participate in elections; and the prospective model, under which it is used to prevent potential future discrimination.¹⁵⁵

Professor Karlan further points out that, although section 2 of the VRA does not contain a sunset provision, the Supreme Court has held it applies only when racial bloc voting exists.¹⁵⁶ Consequently, the VRA will cease having any effect when voters no longer engage in racial bloc voting, meaning that members of all races have an equal opportunity to elect the candidates of their choice.

Despite the appeal of her arguments, the current conservative majority in the Court could easily reject them. Just as the Court found the link between the possession of guns in school zones and

153. Such a potential holding may be comparable to the infamous "basket of deplorables" comment from the 2016 presidential election cycle and raise similar concerns. Aaron Blake, *Voters Strongly Reject Hillary Clinton's 'Basket of Deplorables' Approach*, WASH. POST (Sept. 26, 2016), https://www.washingtonpost.com/news/the-fix/wp/2016/09/26/voters-strongly-reject-hillary-clintons-basket-of-deplorables-approach/?utm_term=.362b9074e31b [<https://perma.cc/72PQ-6F3T>].

154. See Pamela S. Karlan, *Section 5 Squared: Congressional Power to Extend and Amend the Voting Rights Act*, 44 HOUS. L. REV. 1 (2007) [hereinafter Karlan, *Section 5 Squared*]; Pamela S. Karlan, *Two Section Twos and Two Section Fives: Voting Rights and Remedies After Flores*, 39 WM. & MARY L. REV. 725 (1998) [hereinafter Karlan, *Two Section Twos*].

155. Karlan, *Two Section Twos*, *supra* note 154, at 728-29.

156. *Id.* at 738-39, 741 (citing *Thornburg v. Gingles*, 478 U.S. 30, 53 n.21 (1986)).

interstate commerce too attenuated and speculative in *United States v. Lopez*,¹⁵⁷ so too might the Court find the link between societal discrimination in housing, employment, and education, and certain voters' challenges in casting their ballots or having the candidates of their choice prevail, too remote or tenuous. More fundamentally, however, *Shelby County* demonstrates that the current Court sees the problem of racial discrimination relating to voting as ebbing, rather than simply mutating.¹⁵⁸ Buoyed in part by high minority voter registration and participation rates, as well as the success of minority officials, the Court may continue to be unpersuaded by arguments turning on the existence of widespread intentional discrimination or generalized societal discrimination.

Professor Franita Tolson offers an equally compelling argument.¹⁵⁹ She points out that Section 2 of the Fourteenth Amendment subjects states to reduction in representation in the U.S. House of Representatives if they improperly abridge or deny the right to vote.¹⁶⁰ Given the extremity of this remedy, she contends, Congress surely may take the lesser step of enacting prophylactic measures such as section 2 of the VRA to prevent violations of that right.¹⁶¹ Though I agree with much of Professor Tolson's analysis, I draw a different conclusion from the severity of section 2's penalty. Courts should consider the uniquely severe consequences that the Constitution expressly authorizes—the political death penalty—in deciding whether a state has denied or abridged the right to vote, rather than applying the subjective, *ad hoc Anderson-Burdick* balancing test.¹⁶² It is difficult to read section 2's penalty provision, which was deliberately crafted to leave southern states with the choice of either extending the franchise to freed slaves or losing representation in Congress,¹⁶³ as implicitly authorizing Congress to

157. See 514 U.S. 549, 561 (1995).

158. See *Shelby County v. Holder*, 133 S. Ct. 2612, 2625-29 (2013).

159. See Franita Tolson, *The Constitutional Structure of Voting Rights Enforcement*, 89 WASH. L. REV. 379, 425-38 (2014) [hereinafter Tolson, *Constitutional Structure*]; Franita Tolson, *What Is Abridgement?: A Critique of Two Section Twos*, 67 ALA. L. REV. 433, 457-59 (2015) [hereinafter Tolson, *What Is Abridgement?*].

160. See Tolson, *Constitutional Structure*, *supra* note 159, at 425; Tolson, *What Is Abridgement?*, *supra* note 159, at 457.

161. See Tolson, *Constitutional Structure*, *supra* note 159, at 425.

162. See Morley, *supra* note 55, at 296-97.

163. See *infra* notes 216-19 and accompanying text.

take other steps to compel states to expand voting rights, so long as those measures are less severe.

Some commentators have sought to avoid potential constitutional problems by urging adjustments in the prevailing judicial interpretation of section 2 of the VRA. Professor Daniel Tokaji, for example, argues that a plaintiff should prevail in a vote denial claim if she demonstrates that a challenged election procedure has a disparate impact against members of a minority group, that disparate impact is traceable to social and historical discrimination against that group, and the law is not justified by a sufficiently important government interest.¹⁶⁴ Others maintain that enough racially discriminatory voting laws exist to build an evidentiary record to satisfy *Boerne*.¹⁶⁵

Encouragingly, *Boerne* and its progeny frequently cited various VRA provisions as examples of laws that fall within the scope of

164. Daniel P. Tokaji, *Applying Section 2 to the New Vote Denial*, 50 HARV. C.R.-C.L. L. REV. 439, 441, 474 (2015); see also Daniel P. Tokaji, *Intent and Its Alternatives: Defending the New Voting Rights Act*, 58 ALA. L. REV. 349 (2006) (recognizing that “backup theories” are necessary to ensure the Court does not invalidate the VRA).

165. Victor Andres Rodriguez, Comment, *Section 5 of the Voting Rights Act of 1965 After Boerne: The Beginning of the End of Preclearance?*, 91 CALIF. L. REV. 769, 815 (2003) (“[M]odern examples of voting rights abuses continue to accumulate today.”). Relying on the prevalence of implicit racial bias, Professor Janai Nelson contends that Section 5 of the Fourteenth Amendment allows Congress to prevent racial discrimination in voting, “even if such discrimination is not purposeful.” Janai S. Nelson, *The Causal Context of Disparate Vote Denial*, 54 B.C. L. REV. 579, 637 (2013). As noted earlier, however, the Court has elsewhere rejected the notion that Section 5 allows Congress to target state practices giving rise to disparate impacts, since such disparate impacts are not unconstitutional. See *supra* notes 132-35 and accompanying text.

In the context of section 5 of the VRA, Professor Rick Hasen suggested that Congress may attempt to rely on the Guarantee Clause, U.S. CONST. art. IV, § 4, rather than the Fourteenth Amendment, as the basis for its authority. Hasen, *supra* note 146, at 204-05. Such reasoning could apply with equal force to section 2 of the VRA, though the Court might conclude such a measure goes far beyond what is necessary to ensure a state has a “Republican form of Government.”

Other critical commentary on the issue includes Evan H. Caminker, “*Appropriate*” Means-Ends Constraints on Section 5 Powers, 53 STAN. L. REV. 1127 (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); Michael J. Pitts, *Congressional Enforcement of Affirmative Democracy Through Section 2 of the Voting Rights Act*, 25 N. ILL. U. L. REV. 185, 187-88 (2005); Jennifer G. Presto, *The 1982 Amendments to Section 2 of the Voting Rights Act: Constitutionality After City of Boerne*, 59 N.Y.U. ANN. SURV. AM. L. 609, 614-20 (2004); 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, 71 (2003).

Congress's powers under Section 5 of the Fourteenth Amendment and Section 2 of the Fifteenth Amendment.¹⁶⁶ The Court declared, for example, that laws prohibiting literacy tests and other practices that the Constitution allows come "within Congress' power to enforce the Fourteenth and Fifteenth Amendments, despite the burdens those measures placed on the States."¹⁶⁷ It noted that literacy tests in particular had "a long history as a 'notorious means to deny and abridge voting rights on racial grounds."¹⁶⁸

Boerne also pointed to several aspects of section 5 of the VRA that helped ensure its constitutionality: the act was "confined to those regions of the country where voting discrimination had been most flagrant," it affected only "state voting laws," and states could bail out of VRA coverage.¹⁶⁹ While *Boerne* emphasized that laws enacted under Section 5 of the Fourteenth Amendment do not "require[] termination dates, geographic restrictions, or egregious predicates," such limits help ensure that a federal statute is "proportionate" to preventing constitutional violations.¹⁷⁰

Despite these trenchant and impassioned defenses of the VRA, *Boerne* raises several concerns that remain largely unaddressed. First, the post-*Boerne* cases pointing to the VRA as a permissible exercise of congressional power under Section 5 of the Fourteenth Amendment refer exclusively to provisions other than section 2 of the VRA. These precedents extol the virtues of the VRA's narrow, specific provisions, such as its abolition of literacy tests, as well as section 5 of the VRA, which was geographically limited, subject to

166. See, e.g., *Bd. of Trs. v. Garrett*, 531 U.S. 356, 373 (2001) ("[T]he [VRA] is a detailed but limited remedial scheme designed to guarantee meaningful enforcement of the Fifteenth Amendment in those areas of the Nation where abundant evidence of States' systematic denial of those rights was identified."); *Lopez v. Monterey County*, 525 U.S. 266, 283-85 (1999) ("[W]e have specifically upheld the constitutionality of § 5 of the [VRA] against a challenge that this provision usurps powers reserved to the States.... [T]he [VRA] ... intrudes on state sovereignty. The Fifteenth Amendment permits this intrusion."); see also *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 736 (2003).

167. *City of Boerne v. Flores*, 521 U.S. 507, 518 (1997).

168. *Id.* at 533 (quoting *South Carolina v. Katzenbach*, 383 U.S. 301, 355 (1966) (Black, J., concurring and dissenting)).

169. See *id.* at 532-33; see also *United States v. Morrison*, 529 U.S. 598, 626-27 (2000) (holding that the Violence Against Women Act exceeded Congress's Section 5 power in part because it "applie[d] uniformly throughout the Nation," rather than just in certain jurisdictions in which Congress had identified a history of constitutional violations).

170. *City of Boerne*, 521 U.S. at 533.

a sunset provision, and contained a bailout provision¹⁷¹—and yet still was effectively nullified in *Shelby County*.¹⁷² Section 2, in contrast, applies nationally and is subject to neither a sunset provision nor bailout.¹⁷³ As Ellen Katz ominously notes, “[T]he *Boerne* cases appear to be doctrinally irreconcilable with the earlier VRA precedent they purport to preserve.”¹⁷⁴

Second, section 2 applies to a nearly limitless range of state voting laws. Almost any voting requirement, restriction, or limitation may have a racially disparate impact. In other contexts, the Supreme Court has held that Congress may not use its power under Section 5 of the Fourteenth Amendment to eliminate disparate impacts that are constitutionally permissible.¹⁷⁵ The sheer sweep of the statute raises questions about its validity.

Third, the history of section 2 is disconcertingly similar to that of RFRA. In both cases, the Court had issued rulings narrowly construing a constitutional amendment: *Employment Division v. Smith*, which rejected disparate impact theory under the First Amendment,¹⁷⁶ and *City of Mobile v. Bolden*, which rejected disparate impact theory under the Fifteenth Amendment.¹⁷⁷ In both cases, Congress passed a statute in disagreement with that ruling, seeking to prohibit state actions that caused disparate impacts.¹⁷⁸ While other provisions of the VRA may raise no concerns under *Boerne*, section 2 seems to squarely run afoul of it.

Fourth, at least in the modern era, many of the laws targeted by section 2 are not the result of invidious racial discrimination, but rather partisan motivations. Given the substantial overlap between

171. Voting Rights Act of 1965, Pub. L. No. 89-110, §§ 4(a), 5, 79 Stat. 437, 438-39 (codified as amended at 52 U.S.C. §§ 10303(a), 10304 (Supp. III 2016)); see also *City of Boerne*, 521 U.S. at 532-33.

172. See *Shelby County v. Holder*, 133 S. Ct. 2612, 2619-20, 2627, 2631 (2013).

173. See Voting Rights Act of 1965 § 2.

174. Katz, *supra* note 40, at 2369.

175. See *supra* notes 132-35 and accompanying text.

176. See 494 U.S. 872, 876-78 (1990), *superseded by statute*, Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (codified as amended at 42 U.S.C. §§ 2000bb, 2000bb-1 to -4 (1993)), *invalidated by City of Boerne*, 521 U.S. 507.

177. See 446 U.S. 55, 62 (1980) (plurality opinion).

178. Compare Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (codified as amended at 42 U.S.C. §§ 2000bb, 2000bb-1 to -4 (1993)), *invalidated by City of Boerne*, 521 U.S. 507, with Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131 (codified as amended at 52 U.S.C. §§ 10301, 10303, 10503, 10508 (Supp. III 2016)).

race and party identification,¹⁷⁹ many election-related statutes that lead to racially disparate impacts are often explicable primarily in terms of partisan intent, which does not presently trigger strict scrutiny under the Fourteenth Amendment.¹⁸⁰ Thus, the Court may not consider section 2 well-calibrated to prevent constitutional violations, even as a prophylactic measure.

Finally, and perhaps most significantly, section 2 requires a degree of race consciousness in crafting legislative districts and electoral rules that not only is constitutionally unnecessary, but also raises serious constitutional questions.¹⁸¹ Districts that are otherwise constitutionally and legally permissible may violate section 2 solely based on the race of the people who reside in them. In attempting to enforce Fourteenth Amendment equal protection rights, section 2 might compel considerations of race that run afoul of them.¹⁸² Unless voting rights advocates develop a more defensible construction of section 2 that lacks these vulnerabilities, there is a serious risk the Court may continue what it started in *Shelby County* and conclude that section 2 of the VRA exceeds the scope of Congress's power under Section 5 of the Fourteenth Amendment and Section 2 of the Fifteenth Amendment.

One way the Court could attempt to reconcile section 2 of the VRA with *Boerne* is to interpret and apply it in light of traditional remedial principles. The Court has recognized that the Fourteenth and Fifteenth Amendments' enforcement clauses empower Congress to not only prohibit state laws and actions that are actually unconstitutional,¹⁸³ but also impose certain other prophylactic measures to prevent constitutional violations from occurring.¹⁸⁴ The principles the Court has developed for determining the proper scope of prophylactic injunctions offer a well-established, objective standard for determining the proper prophylactic sweep of section 2 of the VRA.

179. See Richard L. Hasen, *Race or Party, Race as Party, or Party All the Time: Three Uneasy Approaches to Conjoined Polarization in Redistricting and Voting Cases*, 59 WM. & MARY L. REV. 1837 (2018); see also *Hunt v. Cromartie (Cromartie I)*, 526 U.S. 541, 551 (1999).

180. See *Cromartie I*, 526 U.S. at 551; *Shaw v. Reno*, 509 U.S. 630, 647 (1993).

181. See generally *Easley v. Cromartie (Cromartie II)*, 532 U.S. 234 (2001); *Shaw*, 509 U.S. 630.

182. See, e.g., *Cooper v. Harris*, 137 S. Ct. 1455, 1469, 1472 (2017); cf. *Ricci v. DeStefano*, 557 U.S. 557, 579-80 (2009).

183. *United States v. Georgia*, 546 U.S. 151, 158 (2006).

184. *City of Boerne v. Flores*, 521 U.S. 507, 532 (1997).

Injunctions, like statutes enacted under the Fourteenth and Fifteenth Amendments' enforcement clauses, may not only prohibit a defendant from engaging in illegal conduct, but also forbid a range of other, otherwise legal conduct to ensure that violations of the underlying core prohibition do not occur.¹⁸⁵ Such prophylactic relief is appropriate when necessary to ensure an underlying right is fully enforced.¹⁸⁶

Numerous factors can establish the need for, and hence the legitimacy of, prophylactic relief in a particular case. It is often necessary when the boundary between permissible and impermissible conduct is hazy, or it is hard to detect or prove violations of the legal provisions at issue.¹⁸⁷ Prophylactic injunctions are also appropriate where the defendant has a history of willfully violating the underlying legal restrictions.¹⁸⁸ They are frequently used to prohibit certain otherwise permissible acts that increase the likelihood of a legal violation occurring.¹⁸⁹ Conversely, because the main purpose of prophylactic relief is to fully and effectively enforce an underlying right, it cannot be divorced from that right. The Court has repeatedly invalidated prophylactic injunctions imposing restrictions that were "too far removed from the [underlying] harm to be an acceptable remedial means."¹⁹⁰

185. DOUGLAS LAYCOCK, *MODERN AMERICAN REMEDIES: CASES AND MATERIALS* 287-93 (4th ed. 2010); Brian K. Landsberg, *Safeguarding Constitutional Rights: The Uses and Limits of Prophylactic Rules*, 66 TENN. L. REV. 925, 936-38 (1999); Tracy A. Thomas, *The Prophylactic Remedy: Normative Principles and Definitional Parameters of Broad Injunctive Relief*, 52 BUFF. L. REV. 301, 314-15 (2004).

186. See Landsberg, *supra* note 185, at 967 ("The legitimacy of a prophylactic rule flows from finding a risk to a core right."); Thomas, *supra* note 185, at 309 ("Prophylactic remedies have been upheld only where the enjoining of affiliated conduct is necessary to achieve the aim of remedying an illegality."); see, e.g., *Hutto v. Finney*, 437 U.S. 678, 687 & n.9 (1978) (holding that prophylactic relief against prison officials was permissible to ensure prison conditions immediately returned to constitutionally permissible levels).

187. David S. Schoenbrod, *The Measure of an Injunction: A Principle to Replace Balancing the Equities and Tailoring the Remedy*, 72 MINN. L. REV. 627, 679-80 (1988) (arguing that an injunction may require actions going "beyond the plaintiff's rightful position ... [w]hen the judge cannot easily demarcate a clear boundary between legal and illegal conduct" or it is "necessary to prevent falling short of the plaintiff's rightful position"); see Thomas, *supra* note 185, at 372-79.

188. See *Hutto*, 437 U.S. at 687 & n.9; Thomas, *supra* note 185, at 356-57.

189. See Thomas, *supra* note 185, at 322-23, 346.

190. *Id.* at 344 (citing *Missouri v. Jenkins*, 515 U.S. 70, 94-95, 100 (1995)); see, e.g., *Lewis v. Casey*, 518 U.S. 343, 357-60 (1996) (invalidating injunction requiring a prison to make extensive legal library resources available to inmates because it went far beyond the limited

Courts should assess whether section 2 of the VRA may be applied prophylactically to prohibit particular state election laws, policies, and procedures that do not violate the Fourteenth or Fifteenth Amendments by applying the remedial principles governing injunctions. Section 2 may be applied more aggressively as a preventive measure to defendant entities and officials that have a recent history of constitutional violations. Courts should also be more willing to apply it in circumstances where detecting an actual constitutional violation would be impracticable or impossible, particularly where the government defendants cannot affirmatively dispel substantial doubts about the constitutionality of its actions (that is, whether they were impermissibly motivated by unconstitutional racial considerations).

Likewise, courts should ensure that remedies under section 2 of the VRA are tailored so they are no broader than necessary to achieve their prophylactic purposes. For example, rather than completely enjoining constitutionally valid state voter identification laws that violate section 2, a court could impose the narrower relief of requiring states to make voter identification cards widely available for free under specified circumstances as a condition of continuing to enforce the identification requirement. By interpreting and applying section 2 of the VRA in accordance with traditional remedial principles, the Court can establish an objective boundary to the statute's prophylactic reach and eliminate concerns about whether it is a congruent and proportional means of enforcing constitutional voting rights.

III. THE NEW EQUAL PROTECTION RIGHT TO VOTE

Another increasingly important restriction on Congress's power to regulate elections is the presently evolving line of equal protection jurisprudence treating voting as a fundamental right that must be enforced equally for all constitutionally qualified voters.¹⁹¹

constitutional violations the plaintiffs established).

191. "Constitutionally qualified" refers to people for whom Section 2 of the Fourteenth Amendment, as modified by subsequent amendments, recognizes a right to vote. It refers to inhabitants of a state who are U.S. citizens and at least eighteen years old, and have not been convicted of a felony. *See infra* notes 221-23 and accompanying text.

Section A explains that the Constitution was not historically understood as limiting state discretion over most aspects of the electoral process. While the Reconstruction Amendments prohibited intentional racial discrimination,¹⁹² states were largely left free to determine the scope of their respective electorates, legislative district boundaries, and electoral processes and regulations.¹⁹³

Section B examines the Court's early voting rights jurisprudence under the Equal Protection Clause. The Court subjected laws expanding the right to vote to members of certain groups to rational basis scrutiny, leaving Congress broad leeway under Section 5 of the Fourteenth Amendment to make voting easier for favored constituencies. While the rational basis test offered less judicial protection for voting rights, it afforded Congress greater flexibility to extend voting protections one step at a time. In many senses, applying the rational basis test in this context led to a pro-voting construction of the Equal Protection Clause: laws that facilitated voting would be upheld, even if they did so on a limited basis, only for members of certain groups.

Finally, Section C contends that modern voting rights case law rejects this traditional conception of equal protection. A still-developing line of authority strongly suggests that, since voting is a fundamental right, laws selectively facilitating voting only by members of certain groups are subject to strict scrutiny and therefore generally unconstitutional. Under this voting-as-a-fundamental-right approach, Congress generally may not establish special protections for voting rights on a piecemeal basis. This reconceptualization of equal protection as it applies to voting effectively limits the scope of Congress's power under Section 5 of the Fourteenth Amendment. Even if a statute would be valid under *Boerne*,¹⁹⁴ Congress may no longer have discretion to single out certain groups of voters for additional or special prophylactic protection.

This evolution of voting rights doctrine, although salutary in many respects, may pose unexpected challenges for voting rights advocates. While this emerging new approach strengthens judicial-

192. See, e.g., U.S. CONST. amends. XIV, XV.

193. See Morley, *Rethinking*, *supra* note 82, at 193-97 (explaining that state supreme courts generally rejected challenges under state constitutions to nondiscriminatory election-related regulations).

194. *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997).

ly enforceable voting rights, it concomitantly constrains Congress's ability to protect them legislatively.

A. Voting and Elections as Predominantly Political Matters

As originally enacted, the Constitution conferred surprisingly limited voting rights, leaving states virtually unlimited latitude over the matter. Although states were required to maintain a republican form of government,¹⁹⁵ the Constitution did not compel them to extend the right to vote for state or local offices to any particular people.¹⁹⁶ And the Constitution conferred a limited right to vote only for a single federal office: anyone who a state permitted to vote for the most numerous house of a state's legislature was also entitled to vote for the U.S. House of Representatives.¹⁹⁷

Other than this contingent right to participate in House elections, the Constitution did not establish a right to vote for any other constitutional office. State legislatures directly appointed U.S. Senators.¹⁹⁸ The President was chosen by presidential electors, rather than directly by voters,¹⁹⁹ and state legislatures were free to decide for themselves how presidential electors would be selected.²⁰⁰ And the President nominated Supreme Court Justices and other federal judges.²⁰¹

The Constitution's general failure to recognize voting as an enforceable right is underscored by the fact that most aspects of the electoral process were left to the apparently exclusive discretion of the political branches of both the federal and state governments. The Constitution specifically empowered state legislatures and Congress to regulate the time, place, and manner of federal elections.²⁰²

195. U.S. CONST. art. IV, § 4 ("The United States shall guarantee to every State in this Union a republican form of government.").

196. See Morley, *supra* note 41, at 106.

197. U.S. CONST. art. I, § 2, cl. 1 ("[T]he electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature.").

198. *Id.* art. I, § 3, cl. 1.

199. *Id.* art. II, § 1, cls. 2-3.

200. *Id.* art. II, § 1, cl. 2 ("Each State shall appoint, in such manner as the legislature thereof may direct, a number of electors.").

201. *Id.* art. II, § 2, cl. 2.

202. *Id.* art. I, § 4, cl. 1.

As noted above, state legislatures likewise had authority to decide how to select their respective presidential electors.²⁰³

The political branches were also responsible for determining the results of federal elections. Each house of Congress determines “the elections, returns, and qualifications of its own members.”²⁰⁴ Congress also was responsible for counting presidential electoral votes.²⁰⁵ If no candidate for President received a majority of electoral votes, the House selected the President; if a tie occurred among the top candidates for Vice President, the Senate determined which of those candidates should prevail.²⁰⁶ Again, such surprisingly pervasive political control over the conduct and outcomes of federal elections confirms that the Constitution originally treated elections as a primarily political issue rather than a matter of constitutional right.²⁰⁷

This view of elections persisted into the twentieth century. Although the Twelfth Amendment restructured the presidential selection process,²⁰⁸ the houses of Congress remained firmly in charge of counting electoral votes.²⁰⁹ The Electoral Count Act, enacted in the late 1800s, expressly recognized the power of the chambers of Congress to determine the validity of electoral votes and choose between competing slates of presidential electors from a state.²¹⁰

The Reconstruction Amendments expressly mention voting rights but, as originally intended and understood, left Congress largely in control. Section 1 of the Fourteenth Amendment contains the Due Process and Equal Protection Clauses, which have come to be construed as the primary constitutional sources of the right to vote.²¹¹ Neither Clause mentions voting, however. Section 2, in contrast, contains the Constitution’s only express reference to an affirmative

203. *Id.* art. II, § 1, cl. 2.

204. *Id.* art. I, § 5, cl. 1.

205. *Id.* art. II, § 1, cl. 3.

206. *Id.*

207. See Michael T. Morley, *The New Elections Clause*, 91 NOTRE DAME L. REV. ONLINE 79, 90-91 (2016) (arguing the Framers “believed that Congress was the only entity that could be ‘trusted’ with control over the electoral process” (quoting 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 220 (Legal Classics Library 1986) (1826))).

208. Compare U.S. CONST. art. II, § 1, cl. 3, with *id.* amend. XII.

209. *Id.* amend. XII.

210. 3 U.S.C. § 15 (2012); *cf. id.* § 5 (providing that, if a state appoints its electors by a specified safe-harbor deadline, its choice shall be binding on Congress).

211. See U.S. CONST. amend. XIV, § 1.

right to vote. It states, “[W]hen the right to vote at any election” for federal or state office “is denied to any of the male inhabitants of [a] 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” proportionally.²¹² This provision’s gender restriction has been eliminated,²¹³ and its age restriction modified,²¹⁴ by subsequent amendments.²¹⁵

Section 2 underscores the primacy of the political branches concerning the right to vote. The Senate had repeatedly rejected proposed language that would have directly required states to extend the franchise.²¹⁶ Rather than compelling states to expand their electorates, the Amendment was specifically crafted to leave them discretion about whether to do so.

From the perspective of the congressional Republicans who enacted it, the Amendment created a win-win situation. Senator Thaddeus Stevens explained, “The effect of this provision will be *either* to compel the [southern] States to grant universal suffrage or so to shear them of their power as to keep them forever in a hopeless minority in the national Government, both legislative and executive.”²¹⁷ If southern states expanded the franchise to former slaves, those new voters would join with white Republican sympathizers in those states and elect Republican politicians.²¹⁸ Conversely, if southern states declined to allow former slaves to vote, they would lose seats in the House of Representatives and Electoral College, and Republicans would dominate the federal government.²¹⁹ The amendment vested responsibility for implementing such reductions in

212. *Id.* amend. XIV, § 2.

213. *Id.* amend. XIX, § 1.

214. *Id.* amend. XXVI, § 1.

215. Morley, *supra* note 55, at 291 (“[A]s modified by subsequent amendments, § 2 pertains to the right to vote of U.S. citizens (regardless of gender) who are at least 18 years old, and have not been disenfranchised for committing a crime or participating in rebellion.” (footnote omitted)).

216. *Id.* at 315.

217. CONG. GLOBE, 39th Cong., 1st Sess. 2459 (1866) (statement of Rep. Stevens) (emphasis added).

218. *See id.*

219. *See id.* at 2459-60.

representation in Congress, as part of its standard reapportionment responsibilities.²²⁰

The Fifteenth Amendment—like subsequent voting rights amendments²²¹—does not affirmatively grant anyone the right to vote. Rather, it specifies only that states may not “den[y] or abridg[e]” the right to vote “on account of race, color, or previous condition of servitude.”²²² Although the Fifteenth Amendment prohibits states from denying the right to vote for race-related reasons, it does not limit a state’s power to restrict the franchise on other grounds.²²³

Together, Section 2 of the Fourteenth Amendment and the Fifteenth Amendment suggest that the Equal Protection Clause was not originally intended to create or protect a judicially enforceable right to vote. It would have made little sense for Congress to leave states discretion under Section 2 of the Fourteenth Amendment to refuse to extend voting rights to former slaves or other minorities if Section 1 of that same Amendment compelled them to do so,²²⁴ whether as a result of its prohibition of racial discrimination or of discrimination concerning fundamental rights. Moreover, if the Framers of the Equal Protection Clause believed that it prohibited racial discrimination in voting, the Fifteenth Amendment would have been mere surplusage.²²⁵

220. See U.S. CONST. amend. XIV, § 2; Morley, *supra* note 55, at 324-29 (discussing efforts of the 41st Congress to implement Section 2).

221. See U.S. CONST. amend. XIX, § 1 (prohibiting discrimination concerning the right to vote based on sex); *id.* amend. XXIV, § 1 (prohibiting discrimination concerning the right to vote in federal elections based on failure to pay a poll tax); *id.* amend. XXVI, § 1 (prohibiting discrimination concerning the right to vote based on age, for people who are at least eighteen years old).

222. *Id.* amend. XV, § 1.

223. See, e.g., *Lassiter v. Northampton Cty. Bd. of Elections*, 360 U.S. 45, 53-54 (1959) (holding that the Fifteenth Amendment does not prohibit states from using literacy tests).

224. *Cf. Reynolds v. Sims*, 377 U.S. 533, 594 (1964) (Harlan, J., dissenting) (“The comprehensive scope of the second section [of the Fourteenth Amendment] ... preclude[s] the suggestion that the first section was intended” to create a judicially enforceable right to vote); Morley, *supra* note 55, at 298 (“Section 1’s general language should not be read as implicitly creating a broader right to vote than the finely tuned provisions in § 2 that specifically and directly address the issue.”).

225. See Henry L. Chambers, Jr., *Colorblindness, Race Neutrality, and Voting Rights*, 51 EMORY L.J. 1397, 1435 n.158 (2002) (“That voting is a fundamental right would make any infringement on it subject to Fourteenth Amendment scrutiny and would seem to make additional Fifteenth Amendment scrutiny redundant.”); Sanford Levinson, *Gerrymandering and the Brooding Omnipresence of Proportional Representation: Why Won’t It Go Away?*, 33 UCLA L. REV. 257, 269 n.43 (1985) (“[A]nalyz[ing] voting rights as proceeding from the four-

Post-Civil War jurisprudence confirms that, notwithstanding the Reconstruction Amendments, control over the right to vote remained with the political branches. In *Minor v. Happersett*, decided only a few years after the Fourteenth Amendment's ratification, the Court unanimously held that states could continue to deny women the right to vote.²²⁶ It declared, "[T]he Constitution of the United States does not confer the right of suffrage upon any one."²²⁷ The Court noted that, if Section 1 of the Fourteenth Amendment "had been intended to make all citizens of the United States voters, the framers of the Constitution would not have left it to implication. So important a change ... would have been expressly declared."²²⁸

A few decades later, the court upheld a one-year residency requirement for voting, declaring,

The privilege to vote in any State is not given by the Federal Constitution, or by any of its amendments.... [T]he privilege to vote in a State is within the jurisdiction of the State itself, to be exercised as the State may direct, and upon such terms as to it may seem proper.²²⁹

teenth amendment" renders the Fifteenth and Nineteenth Amendments "thoroughly superfluous"); see also *Nixon v. Herndon*, 273 U.S. 536, 540-41 (1927) (finding it "unnecessary to consider the Fifteenth Amendment, because it seems to us hard to imagine a more direct and obvious infringement of the Fourteenth" than a law prohibiting African Americans from participating in the Democratic Party's primary elections); *Minor v. Happersett*, 88 U.S. 162, 175 (1874) (noting that the Fifteenth Amendment would have been unnecessary if voting were a privilege or immunity of national citizenship); cf. Mark R. Killenbeck & Steve Sheppard, *Another Such Victory? Term Limits, Section 2 of the Fourteenth Amendment, and the Right to Representation*, 45 HASTINGS L.J. 1121, 1181 (1994) ("[T]he Fifteenth Amendment made Section 2 unnecessary *only* if Section 2's sole objective was to enfranchise the freedmen by exacting a penalty for the failure to do so.").

226. 88 U.S. at 178 ("[T]he constitutions and laws of the several States which commit that important trust [of voting] to men alone are not necessarily void.").

227. *Id.*

228. *Id.* at 173. The Court further pointed out that Section 2 of the Fourteenth Amendment allowed a state to have its representation in Congress reduced only if it denied male citizens the right to vote. *Id.* at 174. If the Fourteenth Amendment required states to permit women to vote, the Court asked rhetorically, "why inflict the penalty for the exclusion of males alone?" *Id.*

229. *Pope v. Williams*, 193 U.S. 621, 632 (1904), *abrogated by* *Dunn v. Blumstein*, 405 U.S. 330 (1972); see also *Mason v. Missouri*, 179 U.S. 328, 335 (1900) ("The general right to vote in the State of Missouri is primarily derived from the State.").

The Court concluded that the residency requirement did not deny new residents “equal protection of the laws, nor is it repugnant to any fundamental or inalienable rights of citizens of the United States, nor a violation of any implied guaranties of the Federal Constitution.”²³⁰ Applying such reasoning, the Court also upheld a state law imposing special voter registration requirements and procedures just for residents of cities above a certain population, of which the state had only one.²³¹

Most major cases involving the constitutional right to vote in the decades after the Reconstruction Amendments were ratified were brought under the Fifteenth Amendment rather than the Equal Protection Clause, further confirming a general understanding that the Equal Protection Clause focused on civil, rather than political, rights.²³² The Court repeatedly reiterated that the Fifteenth Amendment did not affirmatively guarantee to anyone a right to vote,²³³ suggesting that states could condition the franchise on “age, property, or education” requirements.²³⁴ It did not mention whether such restrictions would implicate Section 2 of the Fourteenth Amendment.

The Court reaffirmed this principle as late as 1959 in *Lassiter v. Northampton County Board of Elections*, upholding the constitutionality of literacy tests for voting.²³⁵ It recited, “The States have long

230. *Pope*, 193 U.S. at 633.

231. *Mason*, 179 U.S. at 333, 335 (“[T]he circumstance that the registration law in force in the city of St. Louis was made to differ in essential particulars from that which regulates the conduct of elections in other cities in the State of Missouri, does not in itself deny to the citizens of St. Louis the equal protection of the laws.”).

232. JACK M. BALKIN, *LIVING ORIGINALISM* 222-23 (2011).

233. *Guinn v. United States*, 238 U.S. 347, 362-63 (1915) (“[T]he [Fifteenth] Amendment gives no right of suffrage.”); *United States v. Cruikshank*, 92 U.S. 542, 555 (1875) (“[T]he Constitution of the United States has not conferred the right of suffrage upon any one.”); *United States v. Reese*, 92 U.S. 214, 217 (1875) (“The Fifteenth Amendment does not confer the right of suffrage upon any one.”). The Court elaborated that

[the Fifteenth] Amendment does not take away from the state governments in a general sense the power over suffrage which has belonged to those governments from the beginning and without the possession of which power the whole fabric upon which the division of state and national authority under the Constitution ... rest[s] would be without support.

Guinn, 238 U.S. at 362; *see also id.* (“[T]he [Fifteenth] Amendment does not change, modify or deprive the States of their full power as to suffrage except of course as to the subject with which the Amendment deals.”).

234. *Reese*, 92 U.S. at 217-18.

235. 360 U.S. 45, 53-54 (1959).

been held to have broad powers to determine the conditions under which the right of suffrage may be exercised, absent of course the discrimination which the Constitution condemns.”²³⁶ The Court held that, although literacy was not a perfect proxy for intelligence, “[t]he ability to read and write ... has some relation to standards designed to promote intelligent use of the ballot.”²³⁷ So long as a literacy test was neither adopted with a discriminatory purpose, nor implemented in a discriminatory manner, the Court concluded, it is valid.²³⁸

The Court’s conceptualization of voting as a primarily political matter controlled by legislatures and Congress, rather than a judicially enforceable fundamental right, is epitomized in Justice Felix Frankfurter’s well-known opinion in *Colegrove v. Green*.²³⁹ *Colegrove* held that constitutional challenges to population differences among congressional districts are nonjusticiable.²⁴⁰ Justice Frankfurter explained, “It is hostile to a democratic system to involve the judiciary in the politics of the people.”²⁴¹ The Constitution makes Congress responsible for ensuring “fair representation by the States”; if it fails in that task, “the remedy ultimately lies with the people.”²⁴² He famously emphasized, “Courts ought not to enter this political thicket.”²⁴³ Even *Gomillion v. Lightfoot*, in which the Court struck down an intentional racial gerrymander of the boundaries of Tuskegee, Alabama, into “an uncouth twenty-eight-sided figure” to exclude Black voters, was based solely on the Fifteenth Amendment, rather than the Equal Protection Clause.²⁴⁴

236. *Id.* at 50-51 (citations omitted).

237. *Id.* at 51.

238. *Cf. Louisiana v. United States*, 380 U.S. 145, 151-56 (1965) (holding that a voting registration test which required a person to give a reasonable interpretation of any constitutional provision was unconstitutional because examiners had broad discretion in administering it, and they did so in a discriminatory manner to prevent Blacks from registering); *Guinn*, 238 U.S. at 365, 367 (holding that a literacy test with a grandfather clause was unconstitutional because its only purpose was to perpetuate the discrimination that the Fifteenth Amendment outlawed).

239. 328 U.S. 549 (1946) (plurality opinion), *abrogated by Baker v. Carr*, 369 U.S. 186 (1962).

240. *See id.* at 555-56.

241. *Id.* at 553-54.

242. *Id.* at 554.

243. *Id.* at 556.

244. 364 U.S. 339, 340, 346-48 (1960).

B. Into the Political Thicket: Equal Protection as a Pro-Voting, Rational Basis Norm

1. The Creation of Voter Equality Rights Under the Equal Protection Clause

Gray v. Sanders heralded a new era in voting rights jurisprudence under the Equal Protection Clause.²⁴⁵ The previous year, *Baker v. Carr* had held that an equal protection challenge to population disparities among legislative districts was justiciable, strongly suggesting that the Equal Protection Clause protected voting rights in addition to civil rights.²⁴⁶ In *Gray*, the Court held that the Equal Protection Clause precluded Georgia from applying its “county unit” voting rule in statewide party primaries, because it gave each resident of a sparsely populated county nearly one hundred times the influence over the outcome of a primary as a resident of a densely populated county.²⁴⁷

The *Gray* Court explained, “Once the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote This is required by the Equal Protection Clause of the Fourteenth Amendment.... [E]very voter is equal to every other voter in his State.”²⁴⁸ *Reynolds v. Sims* went on to apply this principle to conclude that the Equal Protection Clause requires legislative districts to be drawn with roughly equal populations, unless a disparity is necessary to further a strong state interest.²⁴⁹

245. See 372 U.S. 368, 379-80 (1963).

246. See 369 U.S. 186, 227, 232 (1962) (“But because any reliance on the Guaranty Clause could not have succeeded it does not follow that appellants may not be heard on the equal protection claim which in fact they tender.”). Following *Baker*, the Court held that Article I of the Constitution, U.S. CONST. art. I, § 2, cl. 1 (“The House of Representatives shall be composed of members chosen every second year by the people of the several States.”), requires states to ensure that congressional districts contain as equal populations as possible. *Wesberry v. Sanders*, 376 U.S. 1, 7-8 (1964) (“[A]s nearly as is practicable one man’s vote in a congressional election is to be worth as much as another’s.”). *Wesberry* rejected the notion that this issue was committed to the political branches, declaring that “[t]he right to vote is too important in our free society to be stripped of judicial protection.” *Id.* at 7.

247. *Gray*, 372 U.S. at 371, 379, 381.

248. *Id.* at 379-80.

249. 377 U.S. 533, 576, 579 (1964).

2. *Expansion of Equal Protection Voting Rights: Voter Eligibility Rights*

Building on its “one-person, one-vote” precedents, the Court went on to hold that the Equal Protection Clause also protects another, more fundamental aspect of the right to vote: Voter Eligibility Rights. In *Carrington v. Rash*, the Court held that the Equal Protection Clause prohibits a state from categorically forbidding active-duty servicemembers who are stationed there from registering to vote.²⁵⁰ Citing *Lassiter*, it recognized that states have the right to establish “qualifications for the exercise of the franchise.”²⁵¹ The *Carrington* Court nevertheless ruled that the Equal Protection Clause places substantive restrictions—beyond those of subsequent voting rights amendments—on a state’s discretion to set voter qualifications.

The majority claimed it was applying rational basis scrutiny. It explained, “The courts must reach and determine the question whether the classifications drawn ... are reasonable in light of [the State’s] purpose.”²⁵² The State’s first asserted interest in barring servicemembers from voting was “prevent[ing] ... a ‘takeover’ of the civilian community.”²⁵³ The Court rejected that rationale, declaring that the Constitution prohibits states from “[f]encing out’ ... a sector of the population” from voting “because of the way they may vote.”²⁵⁴ *Carrington* presents this principle, without citation, as an unremarkable, self-evident proposition,²⁵⁵ rather than a dramatic limitation on states’ traditional power to determine the scope of their own electorates.²⁵⁶

The State’s other claimed justification for excluding servicemembers from voting was “the transient nature of service in the Armed Forces.”²⁵⁷ Had the Court truly been applying traditional rational basis scrutiny, as the opinion contends,²⁵⁸ this rationale

250. 380 U.S. 89, 96 (1965).

251. *Id.* at 91 (citing *Lassiter v. Northampton Cty. Bd. of Elections*, 360 U.S. 45, 50 (1959)).

252. *Id.* at 93 (quoting *McLaughlin v. Florida*, 379 U.S. 184, 191 (1964)).

253. *Id.*

254. *Id.* at 94.

255. *See id.*

256. *See supra* Part III.A.

257. *Carrington*, 380 U.S. at 94.

258. *See id.* at 96; *see also id.* at 99 (Harlan, J., dissenting) (“The question here is simply

would have been sufficient. A legislative classification is valid even if it is over- or underinclusive, or based on legislative assumptions or generalizations rather than precise evidence.²⁵⁹ The *Carrington* Court nevertheless invalidated the State's conclusive presumption that active servicemembers are not domiciled there.²⁶⁰ It explained, "States may not casually deprive a class of individuals of the vote because of some remote administrative benefit to the State. By forbidding a soldier ever to controvert the presumption of nonresidence, the Texas Constitution imposes an invidious discrimination."²⁶¹ *Carrington* might be best characterized as an example of "rational basis with bite."²⁶²

Regardless of the level of scrutiny applied, *Carrington* marked a much greater departure from the Court's equal protection jurisprudence than the opinion itself suggests.²⁶³ As discussed above, previous equal protection cases concerned legislative district boundaries and the weight to be afforded eligible voters' ballots. *Carrington* appears to be the first time that the Court ever held that a person who was ineligible to vote due to a state legal provision that neither drew racial classifications nor was racially motivated could nevertheless assert a federal constitutional right to vote.²⁶⁴

The magnitude of *Carrington's* seismic shift in equal protection jurisprudence is apparent from Justice John Marshall Harlan's

whether the differentiation in voting eligibility requirements which Texas has made is founded on a rational classification.").

259. See, e.g., *Williamson v. Lee Optical, Inc.*, 348 U.S. 483, 487-89 (1955) ("[T]he law need not be in every respect logically consistent with its aims to be constitutional.... The legislature may select one phase of one field and apply a remedy there, neglecting the others."); *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 & n.4 (1938).

260. See *Carrington*, 380 U.S. at 94, 96-97.

261. *Id.* at 96 (citing *Oyama v. California*, 332 U.S. 633 (1948)).

262. The phrase "rational basis with bite" is most commonly used to characterize the Court's precedents concerning discrimination against the mentally disabled, see *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 441-42, 446, 450 (1985), and homosexuals, see *Romer v. Evans*, 517 U.S. 620, 632-33, 635 (1996). Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 18-19 (1972); see also Raphael Holoszyc-Pimentel, Note, *Reconciling Rational-Basis Review: When Does Rational Basis Bite?*, 90 N.Y.U. L. REV. 2070, 2093-95 (2015).

263. See *Carrington*, 380 U.S. at 97 (Harlan, J., dissenting) (lamenting that the majority opinion treats the notion that "state laws governing the qualifications of voters are subject to the limitations of the Equal Protection Clause" as "an established constitutional tenet").

264. See *id.* at 96 (majority opinion) (holding that a state "may not casually deprive a class of individuals of the vote because of some remote administrative benefit to the State").

emphatic dissent. After briefly pointing out that the Equal Protection Clause “was not intended to touch state electoral matters,” he noted that the Court’s “one-person, one-vote” rulings did not require it to apply the Equal Protection Clause to voter qualifications.²⁶⁵ He added that Texas’s distinction between servicemembers and other voters could survive rational basis scrutiny.²⁶⁶

The Court enforced Voter Eligibility Rights under the Equal Protection Clause again in *Harper v. Virginia Board of Elections*, holding that states may not impose poll taxes for state and local elections.²⁶⁷ The opinion is somewhat inconsistent as to the level of scrutiny the Court applied. On the one hand, the Court stated, “[W]here fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined.”²⁶⁸ These references to “fundamental rights” and “close[] scrutin[y]” suggest strict scrutiny.²⁶⁹ On the other hand, the Court stated several times that the Equal Protection Clause prohibits poll taxes²⁷⁰ because there is no relationship between voter qualifications and either wealth or payment of a tax.²⁷¹ This analysis is more reminiscent of rational basis review. A rational basis interpretation is also

265. *Id.* at 97-98, 98 n.1 (Harlan, J., dissenting) (explaining that previous rulings “were concerned with methods of constituting state legislatures; this case involves state voter qualifications”).

266. *Id.* at 99, 101 (“The question here is simply whether the differentiation in voting eligibility requirements which Texas has made is founded on a rational classification.”). Empirically, Harlan explained, few servicemembers stationed in Texas actually intended to establish a permanent domicile there. *See id.* at 100. Likewise, conceptually, people compelled to live in Texas by military orders seemed categorically less likely to wish to remain than those who chose to move there. *See id.* at 99-100. Perhaps most controversially, he concluded that Texas had a valid interest in protecting itself “against the influences of military voting strength.” *See id.* at 101.

267. 383 U.S. 663, 670 (1966). The Twenty-Fourth Amendment prohibits the federal government and states from imposing poll taxes only on federal elections. *See* U.S. CONST. amend. XXIV, § 1.

268. *Harper*, 383 U.S. at 670.

269. *Id.*

270. *Id.* at 666 (“[A] State violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard.”).

271. *Id.* (“Voter qualifications have no relation to wealth nor to paying or not paying this or any other tax.”); *id.* at 668 (“Wealth, like race, creed, or color, is not germane to one’s ability to participate intelligently in the electoral process.”); *id.* at 670 (“[W]ealth or fee paying has, in our view, no relation to voting qualifications.”).

more consistent with later case law concluding that wealth-based distinctions do not receive any type of heightened scrutiny.²⁷²

By the Court's 1969 ruling in *Kramer v. Union Free School District No. 15*, however, the doctrine had crystallized that restrictions on voter qualifications or eligibility are subject to strict scrutiny.²⁷³ *Kramer* is particularly noteworthy because it sets forth a highly revisionist interpretation of Voter Eligibility Rights under the Equal Protection Clause. It cites *Carrington* for the proposition that voter qualifications are subject to strict scrutiny, despite the fact that *Carrington* called for only rational basis scrutiny (or, more accurately, rational basis with bite).²⁷⁴ Thus, over the course of only a few years, voting rights under the Equal Protection Clause grew from just Voter Equality Rights to Voter Eligibility Rights, as well.

3. Rational Basis Scrutiny for Laws Helping Certain Groups Vote

In the late 1960s, the Court went on to extend its equal protection voting rights jurisprudence yet again, this time to Voter Participation Rights. Whereas *Kramer* had endorsed strict scrutiny for laws that burdened Voter Eligibility Rights by prohibiting certain people from voting, the Court applied only rational basis scrutiny in equal protection challenges to laws that facilitated voting only by members of certain groups. In *McDonald v. Board of Election Commissioners*, a class of pretrial detainees who were jailed in their home

272. See *Maher v. Roe*, 432 U.S. 464, 471 (1977) (“[T]his Court has never held that financial need alone identifies a suspect class for purposes of equal protection analysis.”); *Dandridge v. Williams*, 397 U.S. 471, 484-85 (1970) (applying rational basis scrutiny to restrictions in welfare law). *But see McDonald v. Bd. of Election Comm’rs*, 394 U.S. 802, 807 (1969) (noting that “lines ... drawn on the basis of wealth or race” are “highly suspect and thereby demand a more exacting judicial scrutiny”).

273. 395 U.S. 621, 627 (1969) (“[I]f a challenged state statute grants the right to vote to some bona fide residents of requisite age and citizenship and denies the franchise to others, the Court must determine whether the exclusions are necessary to promote a compelling state interest.” (citing *Carrington v. Rash*, 380 U.S. 89, 96 (1965))); *see also Dunn v. Blumstein*, 405 U.S. 330, 334, 342-43 (1972) (subjecting a yearlong state residency requirement and three-month county residency requirement for voting to strict scrutiny).

274. See *Kramer*, 395 U.S. at 627 (citing *Carrington*, 380 U.S. at 96); *cf. Dunn*, 405 U.S. at 362 (Blackmun, J., concurring) (noting “that *Kramer* appears to have elevated the standard” of scrutiny for voting rights claims, because *Carrington* had required only that “voting requirements be reasonable”).

counties, and had either been charged with nonbailable offenses or were unable to afford bail, argued that the Equal Protection Clause entitled them to vote by absentee ballot.²⁷⁵ Illinois law allowed a voter to cast an absentee ballot only if the person was absent from his or her county of residence, medically incapacitated, unable to vote due to observance of a religious holiday, or serving as a poll watcher on Election Day.²⁷⁶ The inmates claimed that the law drew two sets of irrational distinctions: first, between medically incapacitated voters who were permitted to vote absentee, and voters who were physically incapacitated due to pretrial detention; and second, between inmates held in jails outside their home county, who were permitted to vote absentee, and those held within their home county, who did not qualify for absentee ballots.²⁷⁷

Although the challenged restrictions concerned voting, the Court concluded they were subject only to rational basis review.²⁷⁸ It held that the law did not restrict “the fundamental right to vote,” but rather only “a claimed right to receive absentee ballots.”²⁷⁹ It went

275. 394 U.S. 802, 803 (1969).

276. *Id.* at 803-04.

277. *Id.* at 806.

278. *Id.* at 809.

279. *Id.* at 807. The Court added—oddly, given that the plaintiffs were incarcerated—that it could not “assume, with nothing in the record to support such an assumption, that Illinois has in fact precluded appellants from voting.” *Id.* at 808. The Court speculated, without any evidentiary basis in the record, that the State might “possibly furnish the jails with special polling booths or facilities on election day, or provide guarded transportation to the polls themselves for certain inmates, or entertain motions for temporary reductions in bail to allow some inmates to get to the polls on their own.” *Id.* at 808 n.6. If such measures existed, of course, it is unlikely that inmates would have sued to obtain absentee ballots; moreover, the State undoubtedly would have pointed to such alternatives in its briefs. Indeed, if the State had a policy of implementing any such measures or had done so in past elections, the Court likely could have taken judicial notice of it. *Cf.* FED. R. EVID. 1101(a) (providing that the Federal Rules of Evidence do not apply to the Supreme Court). The Court’s willingness to hypothesize such extremely unlikely possibilities appears to have been an attempt to dodge the main issue in the case by assuming the prisoners would be able to vote. When the Court was squarely and unavoidably confronted with pretrial detainees who alleged and proved they had no alternate means of voting, in *O’Brien v. Skinner*, the Court unanimously concluded that the State’s refusal to provide absentee ballots was “whole arbitrary” and therefore voided the Equal Protection Clause. 414 U.S. 524, 530-31 (1974); *see also* *Am. Party of Texas v. White*, 415 U.S. 767, 794-95 (1974) (“[P]ermitt[ing] absentee voting by some classes of voters and denying the privilege to other classes of otherwise qualified voters in similar circumstances, without affording a comparable alternative means to vote, is an arbitrary discrimination violative of the Equal Protection Clause.”); *Goosby v. Osser*, 409 U.S. 512, 521-22 (1973) (finding that plaintiffs presenting such a claim raised a substantial federal question

on to explain that, while the absentee ballot laws were “designed to make voting more available to some groups who cannot easily get to the polls,” they did not “deny [anyone] the exercise of the franchise.”²⁸⁰ Consequently, they were subject only to rational basis review.²⁸¹ Applying such scrutiny, the Court held that restrictions on absentee voting “will be set aside only if no grounds can be conceived to justify them,” regardless of the legislature’s actual basis for enacting them.²⁸² It easily hypothesized rationales for the limits in the state’s absentee voting law.²⁸³

McDonald established a core principle that would play a major role in early equal protection voting rights jurisprudence: when a law makes voting easier for members of some groups, but not others, its limitations are subject only to rational basis scrutiny.²⁸⁴ The Court specifically lauded the state’s “policy of adding, over a 50-year period, groups to the absentee coverage as their existence comes to the attention of the legislature.”²⁸⁵ Critically, the Court emphasized, “That Illinois ha[d] not gone still further, as perhaps it might, should not render void its remedial legislation, which need not ... ‘strike at all evils at the same time.’”²⁸⁶

Later cases endorsed and applied the principle that Congress may facilitate or reinforce the right to vote only for members of certain groups without triggering any form of heightened scrutiny.²⁸⁷ In

that warranted convening a three-judge court under 28 U.S.C. § 2281 (2012)).

280. *McDonald*, 394 U.S. at 807-08.

281. *Id.* at 809.

282. *Id.*

283. The Court found the distinction between medically incapacitated voters and pretrial detainees “quite reasonable.” *Id.* It likewise held that allowing detainees jailed outside their home counties to vote absentee, while prohibiting those detained within their home counties from doing so, was rational because local officials might be more likely to influence the votes of the latter group. *Id.* at 810.

284. *See, e.g., id.* at 809 (“Illinois could, of course, make voting easier for all concerned by extending absentee voting privileges to those in appellants’ class. Its failure to do so, however, hardly seems arbitrary.”).

285. *Id.* at 811.

286. *Id.* (quoting *Semler v. Dental Exam’rs*, 294 U.S. 608, 610 (1935)).

287. *See, e.g., Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 626 n.6 (1969); *see also Hill v. Stone*, 421 U.S. 289, 304 (1975) (Rehnquist, J., dissenting) (“[S]crutiny under this Clause is triggered only where restrictions have a real and appreciable impact on [the] ability to exercise the franchise.”); *Bullock v. Carter*, 405 U.S. 134, 143 (1972) (“[N]ot every limitation or incidental burden on the exercise of voting rights is subject to a stringent standard of review.” (citing *McDonald v. Bd. of Election Comm’rs*, 394 U.S. 802 (1969))).

Prigmore v. Renfro, the Supreme Court unanimously summarily affirmed a three-judge district court ruling holding that a state may validly allow absentee voting only by certain categories of voters.²⁸⁸ Relying primarily on *McDonald*, the district court had held:

The right to vote is unquestionably basic to a democracy, but the right to an absentee ballot is not. Historically, the absentee ballot has always been viewed as a privilege, not an absolute right. It is a purely remedial measure designed to afford absentee voters the privilege as a matter of convenience, not of right. [Restrictions on who may cast absentee ballots create] no bar to the right to vote nor to the right to travel.²⁸⁹

The Court's application of rational basis scrutiny to laws selectively expanding or protecting voting rights gave Congress substantial leeway to enact voting reforms under Section 5 of the Fourteenth Amendment. In *Katzenbach v. Morgan*, the Court rejected an equal protection challenge to section 4(e) of the VRA,²⁹⁰ which provides that a person who completes the sixth grade in a school in Puerto Rico that teaches in a language other than English may not be denied the right to vote based on their inability to speak English.²⁹¹ The State of New York required people to be able to read and write English in order to vote.²⁹²

The Court recognized that Congress enacted section 4(e) of the VRA "to secure for the Puerto Rican community residing in New

288. 410 U.S. 919 (1973), *aff'g* 356 F. Supp. 427 (N.D. Ala. 1972) (three-judge court).

289. *Prigmore v. Renfro*, 356 F. Supp. 427, 432 (N.D. Ala. 1972) (three-judge court) (citations omitted). *Griffin v. Roupas*, 385 F.3d 1128 (7th Cir. 2004), is a more recent variation of *Prigmore*. The plaintiffs were "working mothers who contend[ed] that because it [wa]s a hardship for them to vote in person on election day, the U.S. Constitution require[d] Illinois to allow them to vote by absentee ballot." *Id.* at 1129. Although Illinois recognized several categories of voters eligible to cast absentee ballots, the plaintiffs did not fall within any of them. *Id.* The Seventh Circuit held that the availability of absentee voting "is quintessentially a legislative judgment with which ... judges should not interfere unless strongly convinced that the legislative judgment is grossly awry." *Id.* at 1131. Illinois was entitled to draw the balance that it did "between concern with fraud and concern with turnout by allowing only certain classes of voter to cast an absentee ballot." *Id.*

290. 384 U.S. 641, 643, 646-47 (1966).

291. Voting Rights Act of 1965, Pub. L. No. 89-110, § 4(e), 79 Stat. 437, 439 (codified as amended at 52 U.S.C. § 10303(e) (Supp. III 2016)).

292. *Katzenbach*, 384 U.S. at 643-45.

York nondiscriminatory treatment by government” concerning voting rights.²⁹³ After ruling that the statute was a valid exercise of Congress’s enforcement power under Section 5 of the Fourteenth Amendment,²⁹⁴ the Court went on to hold that it did not violate the Equal Protection Clause.²⁹⁵ It recognized that section 4(e) protected voting rights for Spanish speakers educated in Puerto Rican schools, but not Spanish speakers educated elsewhere, illiterates born in the United States, or anyone else unable to satisfy New York’s English-language requirements.²⁹⁶ It held that the statute’s classification was subject only to rational basis scrutiny, however, because rather than “restrict[ing] or deny[ing] the franchise[,] ... [it] extends the franchise to persons who otherwise would be denied it by state law.”²⁹⁷

The Court elaborated that section 4(e) would have been subject to strict scrutiny only if it “den[ie]d fundamental rights.”²⁹⁸ It easily upheld section 4(e) under rational basis scrutiny, despite the statute’s limited scope. The Court reasoned:

[A] statute is not invalid under the Constitution because it might have gone farther than it did [A] legislature need not strike at all evils at the same time, and ... reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind.²⁹⁹

Katzenbach’s holding is remarkable in ways that are often overlooked. In an effort to combat discrimination concerning the right to vote, Congress enacted a statute that expressly discriminated with regard to the right to vote. The fact that the law was written in terms of extending voting rights to a certain favored constituency, rather than limiting them for a disfavored constituency, is of limited

293. *Id.* at 652.

294. *Id.* at 651.

295. *Id.* at 652, 658.

296. *See id.* at 654-56.

297. *Id.* at 657.

298. *Id.*

299. *Id.* (internal quotation marks omitted) (first quoting *Roschen v. Ward*, 279 U.S. 337, 339 (1929); then quoting *Semler v. Or. State Bd. of Dental Exam’rs*, 294 U.S. 608, 610 (1935); and then quoting *Williamson v. Lee Optical Co.*, 348 U.S. 483, 489 (1955)).

functional relevance. Either way, a statutory classification results in differential voting rights for members of the affected electorate.

Thus, the Court's equal protection jurisprudence concerning voting rights has historically been two-pronged: laws restricting the right to vote for certain people were subject to strict scrutiny, while laws expanding or protecting the right to vote only for certain people were subject to rational basis scrutiny. This structure embodies a pro-voting bias: laws seen as expanding the franchise were generally upheld, while laws restricting it were generally invalidated.

This interpretation of the Equal Protection Clause is both unstable and dangerous. Unstable, because there is no firm baseline distinguishing laws restricting the franchise from laws expanding it. The same statutory scheme could be enacted either as a broad restriction on voting, with exceptions facilitating voting by certain groups (which presumably would be reviewed under a rational basis standard) or a general authorization of voting with exceptions prohibiting voting by certain groups (which presumably would be reviewed under strict scrutiny). Moreover, whether a law is framed as a restriction on voting or a liberalization of voting, the categories it creates separate those who are permitted to vote from those prohibited from doing so. There is no convincing rationale for subjecting some laws conferring disparate Voter Eligibility Rights or Voter Participation Rights to rational basis scrutiny, and others to strict scrutiny.

Perhaps most importantly, rational basis scrutiny for purportedly pro-voting provisions yields unavoidable opportunities for political manipulation. A political party in power may easily craft reasons why constituencies favorable to it deserve special consideration in registering to vote or voting, giving it a structural advantage in the electoral process. The Seventh Circuit's ruling in *Griffin v. Roupas* shows one consequence of this pro-voting, rational-basis approach.³⁰⁰ The court upheld Illinois's selective absentee voting statute, which permitted only certain categories of people to cast absentee ballots.³⁰¹ Absentee voting has become an increasingly critical aspect of the electoral process; in 2016, nearly a quarter of the ballots in

300. 385 F.3d 1128 (7th Cir. 2004).

301. *See id.* at 1129.

the presidential election were cast absentee via mail.³⁰² The power to allow certain groups of people to vote absentee is almost as significant as the ability to define the scope of the electorate. While the plaintiffs in *Griffin* did not allege or prove any particular partisan or other invidious intent, the potential for manipulation is unavoidable.

If voting is recognized as a fundamental right under the Equal Protection Clause, then not only should people's votes be weighted equally,³⁰³ but also their opportunities to vote should be equal within an electoral jurisdiction as well. When a state's legislature enacts laws governing the electoral process, it should generally treat voters across the state equally. To the extent such power is devolved on county election officials, they should presumptively treat voters within each county equally. A state typically should not be permitted to give certain favored classes of voters additional protection for their right to vote, whether by establishing alternate means of voting for them (such as absentee ballots), granting them additional time, exempting them from certain requirements, or otherwise. Special voting opportunities may be made selectively available to certain people only when they face restrictions or burdens directly created by the government itself, such as military voters protected by the Uniformed and Overseas Citizens Absentee Voting Act³⁰⁴ and the Uniform Military and Overseas Voters Act.³⁰⁵

Perhaps the most obvious objection to such an interpretation is that it would hinder efforts to help elderly and disabled voters.³⁰⁶ Such laws may be underinclusive, however, as people who do not qualify as elderly or disabled may face comparable hardships or obstacles in voting. Moreover, some supposedly ameliorative measures raise a substantial risk that mentally fragile or elderly voters may be exploited by supposed "helpers" who provide "assistance" in voting and, in some cases, transport physically incapacitated voters' absentee ballots back to election officials. Finally, and perhaps most

302. See U.S. ELECTION ASSISTANCE COMM'N, THE ELECTION ADMINISTRATION AND VOTING SURVEY: 2016 COMPREHENSIVE REPORT 10 (2017).

303. See *supra* note 246 and accompanying text.

304. Uniformed and Overseas Citizens Absentee Voting Act, Pub. L. No. 99-410, 100 Stat. 924 (1986) (codified as amended at 52 U.S.C. §§ 20301-20311 (Supp. III 2016)).

305. UNIF. MILITARY & OVERSEAS VOTERS ACT (UMOVA), 13 pt. 2 U.L.A. 141 (Supp. 2017).

306. See, e.g., Voting Accessibility for the Elderly and Handicapped Act, Pub. L. No. 98-435, 98 Stat. 1678 (1984) (codified as amended at 52 U.S.C. §§ 20101-20107 (Supp. III 2016)).

importantly, once the government singles out certain groups such as the elderly or disabled as particularly deserving of special consideration in the voting process, it becomes easier for legislatures and election officials to facilitate voting by other favored constituencies and supporters.

C. The New Equal Protection: Equal Protection as a Strict Equality, Strict Scrutiny Norm

Recent equal protection cases concerning voting rights suggest an abandonment of this pro-voting, rational basis approach.³⁰⁷ Courts seem to be applying the Equal Protection Clause differently: because voting is a fundamental right, distinctions among voters are subject to strict scrutiny, regardless of whether the underlying measure may be characterized as expanding or limiting the franchise. *Bush v. Gore* supports this reinterpretation of equal protection voting rights.³⁰⁸ The Court began by declaring that states must accord “equal weight ... to each vote and ... equal dignity ... to each voter.”³⁰⁹ It went on to state that equal protection principles apply to both the “allocation of the franchise ... [and] the manner of its exercise.”³¹⁰ By treating voting as a fundamental right that must be administered equally for all votes, the Court seems to be signaling an expansion of strict scrutiny.

The holding of *Bush v. Gore* confirms this interpretation. The Court held the Equal Protection Clause prohibited recount boards in different counties, as well as election officials within the same room, from applying different standards in determining whether a ballot qualified as a valid vote, even though the ongoing recount process would have resulted in at least some additional ballots being counted that would otherwise have been discarded.³¹¹ The Court attempted to limit its holding “to the present circumstances,”

307. *But see* Samuel R. Bagenstos, *Universalism and Civil Rights (with Notes on Voting Rights After Shelby)*, 123 YALE L.J. 2838, 2873-74 (2014) (questioning whether such retrenchment has occurred).

308. 531 U.S. 98 (2000) (per curiam).

309. *Id.* at 104.

310. *Id.*

311. *See id.* at 109-10; *see also id.* at 106 (“[T]he standards for accepting or rejecting contested ballots might vary not only from county to county but indeed within a single county from one recount team to another.”).

emphasizing that “the problem of equal protection in election processes generally presents many complexities.”³¹² *Bush v. Gore* nevertheless marked a pivotal moment in the development of election law, however, and its interpretation of the Equal Protection Clause could not be confined.³¹³

The Sixth Circuit—home of Ohio, the perennial presidential battleground state—has been the epicenter of the evolution of equal protection law governing voting rights from a pro-voting, rational basis standard to a more comprehensive, strict scrutiny, fundamental rights paradigm.³¹⁴ In the 2008 case *League of Women Voters of Ohio v. Brunner*, the Sixth Circuit quoted extensively from *Bush v. Gore* to hold that the plaintiffs had stated a valid claim that Wisconsin’s 2004 elections violated the Equal Protection Clause.³¹⁵ The court pointed to disparities in waiting times among polling locations, differences in the percentages of provisional ballots counted, and other related factors.³¹⁶

The Sixth Circuit took this approach even further in *Obama for America v. Husted*.³¹⁷ As a result of a series of legislative changes, the Ohio Election Code ended in-person early voting for the general public on the Friday before Election Day, but allowed military voters to continue casting ballots in person through Election Day itself.³¹⁸ Under the *McDonald-Katzenbach* standard, such a scheme should have easily been upheld. The state’s decision to grant extra opportunities for early voting to military voters should have

312. *Id.* at 109.

313. See RICHARD L. HASEN, *THE VOTING WARS* 134 (2012).

314. See also *Hussey v. City of Portland*, 64 F.3d 1260, 1262, 1266 (9th Cir. 1995) (applying strict scrutiny to a local law requiring any homeowners living outside a municipality’s boundaries to vote in favor of annexation as a condition of receiving a subsidy for compulsory sewer connections); *One Wis. Inst., Inc. v. Thomsen*, 198 F. Supp. 3d 896, 946-48 (W.D. Wis. 2016) (holding that a state law prohibiting “municipal clerks from faxing or emailing absentee ballots, except to military or overseas electors ... violates the First and Fourteenth Amendments”), *argued*, Nos. 16-3083 & 16-3091 (7th Cir. Feb. 24, 2017).

315. 548 F.3d 463, 476-77 (6th Cir. 2008).

316. *Id.* at 467-69.

317. 697 F.3d 423 (6th Cir. 2012). The author represented a coalition of military and veterans groups that intervened in this case to defend the constitutionality of the challenged statute.

318. *Id.* at 425.

triggered only rational basis scrutiny because the state was making it easier for them to vote.³¹⁹

The Sixth Circuit, however, held that this statutory scheme violated the Equal Protection Clause.³²⁰ During the previous election cycle, the court pointed out, one hundred thousand voters—including many poor, female, elderly, and minority voters—had chosen to cast their votes over the weekend before Election Day.³²¹ Based on their decision to vote at that time during a previous election, the court hypothesized that they would decline to vote at any other time.³²² In other words, the court assumed that, were the state to prevent those voters from voting over the weekend before Election Day, they would not cast an absentee ballot, vote at some other point during the month-long early voting period, or vote on Election Day.³²³ The court elevated voter choice and convenience into a matter of fundamental right.³²⁴

Obama for America makes it difficult for the federal government or states to extend special voting opportunities to, or otherwise act to protect the voting rights of, only certain populations. Its reasoning harkens back to *Harper* and *Kramer*, which had applied strict scrutiny to statutory classifications concerning voting rights. The Court disregarded *Katzenbach*'s admonition that a legislature need not tackle every aspect of a problem simultaneously when it seeks to expand voting opportunities.³²⁵ Emphasizing the need for equality among voters, *Obama for America* concluded that the state had violated the Equal Protection Clause by creating special opportunities for members of the military to vote in person without extending them to other members of the general public who were purportedly "similarly situated" with regard to in-person voting.³²⁶

319. See *supra* Part III.B.3.

320. *Obama for Am.*, 697 F.3d at 436.

321. *Id.* at 431.

322. *Id.*

323. See *id.* at 427, 431.

324. See *id.* at 429-31; *cf. id.* at 440 (White, J., concurring in part and dissenting in part) ("[T]hrough the record clearly establishes that a significant number of Ohio voters found it most convenient to vote after hours and the weekend before the election, the study did not consider the extent to which these voters would or could avail themselves of other voting options Convenience cannot be equated with necessity without more.").

325. *Katzenbach v. Morgan*, 384 U.S. 641, 657 (1966).

326. *Obama for Am.*, 697 F.3d at 435.

Obama for America's application of *Bush v. Gore's* treatment of voting as a fundamental right portends potentially substantial restrictions on the practical scope of Congress's power under Section 5 of the Fourteenth Amendment. Requiring equal treatment among voters concerning Voter Eligibility Rights, Voter Participation Rights, and Voter Equality Rights limits Congress's ability to create special protections for certain members of the electorate. Congress may no longer single out particular voters, such as members of racial minority groups, for special prophylactic protection of their voting rights beyond what the Constitution itself requires. Section 2 of the VRA, in particular, goes beyond the requirements of the Equal Protection Clause by granting special protections to members of racial minority groups who choose to engage in racial bloc voting.³²⁷ Even putting aside potential concerns over the statute's race consciousness, protecting only certain voters' ability to elect the candidate of their choice raises serious questions from the perspective of voting as a fundamental right.

At root, the decision between equal protection as a pro-voting norm triggering rational basis enforcement and equal protection as a voter equality norm triggering strict scrutiny is an institutional choice question. If rational basis scrutiny is applied, Congress may exercise broad authority under Section 5 of the Fourteenth Amendment to enforce voting rights, but such reduced scrutiny greatly curtails the power of courts to invalidate differential treatment of voters. Conversely, if strict scrutiny is applied, courts may vigorously ensure equal treatment of voters, but that inherently limits Congress's authority to grant protections to certain groups on a piecemeal basis.

Congress was originally entrusted with responsibility for enforcing voting rights under Section 2 of the Fourteenth Amendment.³²⁸ It failed.³²⁹ Rulings such as *Arizona State Legislature v. Arizona Independent Redistricting Commission*³³⁰ suggest that the modern Court is reluctant to entrust the political branches with control over

327. Voting Rights Act of 1965, Pub. L. No. 89-110, § 2, 79 Stat. 437, 437 (codified as amended at 52 U.S.C. § 10301(b) (Supp. III 2016)); see *Thornburg v. Gingles*, 478 U.S. 30, 50 & n.16 (1986).

328. U.S. CONST. amend. XIV, § 2.

329. See *Morley*, *supra* note 55, at 324-29.

330. 135 S. Ct. 2652, 2674 (2015).

the electoral process and voting rights—even when the plain text of the Constitution expressly grants it to them.³³¹ The political gerrymandering case presently before the Court gives it yet another opportunity to promote judicial oversight over the electoral process and curtail the political branches' discretion.³³² From an institutional choice perspective, the less courts trust the political branches to regulate the electoral process, the more equality among voters courts will mandate as a matter of constitutional interpretation. To the extent the Equal Protection Clause limits congressional authority to selectively protect the right to vote or requires that measures such as section 2 of the VRA be construed more narrowly, it may more than compensate by enabling greater judicial protection for all voters.

CONCLUSION

The Fourteenth Amendment grants Congress the power to regulate elections at all levels of government while simultaneously limiting that authority in a variety of ways. Scholars have focused, for the most part, on the impact of *Boerne's* “congruence and proportionality” test on the scope of Congress's authority to enact voting rights legislation, such as the VRA.³³³ Far less attention has been paid to evolving equal protection norms.

Traditionally, the Supreme Court construed the Equal Protection Clause in a pro-voting light, subjecting statutes that extend or protect voting rights for certain groups to only rational basis scrutiny and generally upholding them.³³⁴ More recent jurisprudence suggests courts may be shifting to a voting-as-a-fundamental-right paradigm under the Equal Protection Clause.³³⁵ From this perspective, laws that single out certain groups to receive additional opportunities to vote or protection for their voting rights are generally subject to strict scrutiny. While this new equal protection paradigm facilitates greater judicial enforcement of voter equality, it can

331. Morley, *supra* note 207, at 90-91.

332. See *Whitford v. Gill*, 218 F. Supp. 3d 837 (W.D. Wis. 2016) (three-judge court), *argued*, No. 16-1161 (U.S. Oct. 3, 2017).

333. See, e.g., *supra* notes 146-65 and accompanying text.

334. See *supra* Part III.B.3.

335. See *supra* Part III.C.

substantially constrain Congress's ability to enact special protections for disadvantaged groups.

To help preserve section 2 of the VRA against possible constitutional challenges, voting rights advocates can press for reasonable reinterpretations of the law. Rather than institutionalizing and helping to perpetuate racial balkanization or polarization in voting, redistricting challenges should be levied where a likelihood of intentional racial discrimination exists. Courts should avoid treating section 2 of the VRA as a ratchet, akin to section 5, that prevents states from amending or eliminating voting reforms, such as extended early voting periods, simply because certain segments of the electorate chose to take advantage of them. Courts should also be reluctant to find statutory (or constitutional) violations simply because voters are unable to take advantage of their preferred method or procedure for voting when other alternatives are reasonably available.

More broadly, to survive constitutional scrutiny from a conservative Court, section 2—as a prophylactic statute—should be construed and applied in light of the traditional remedial principles courts rely upon in the context of prophylactic injunctions. Courts may apply section 2 more aggressively to defendant jurisdictions or officials that have a recent history of engaging in intentional racial discrimination concerning the right to vote. They should also be more willing to allow prophylactic applications of section 2 in circumstances where direct evidence of constitutional violations (that is, intentional discrimination) would be impracticable or impossible to uncover. Finally, remedies under section 2 should not be broader than necessary to achieve its important prophylactic purposes. Section 2 runs a risk: the more it deviates from the mandates of the Court's developing conception of equal protection, and does so in a race-conscious manner that almost invariably inures to the benefit of a particular political party, the greater skepticism it will trigger in the courts. It places courts in the difficult position of reshaping both the rules of elections and the shape of electoral districts to attempt to replicate what a fair electoral outcome in the absence of past and present societal discrimination would look like. Such awesome power demands careful use.

