Reinforcing Representation: Enforcing the Fourteenth and Fifteenth Amendments in the Rehnquist and Waite Courts

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REINFORCING REPRESENTATION: CONGRESSIONAL POWER TO ENFORCE THE FOURTEENTH AND FIFTEENTH AMENDMENTS IN THE REHNQUIST AND WAITE COURTS

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INTRODUCTION

A large body of academic scholarship accuses the Rehnquist Court of “undoing the Second Reconstruction,” just as the Waite Court has

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1. See, e.g., J. MORGAN KOUSSE, COLORBLIND INJUSTICE: MINORITY VOTING RIGHTS AND THE UNDOING OF THE SECOND RECONSTRUCTION 2, 67-68, 368 (1999) (arguing that Shaw v. Reno, 509 U.S. 630 (1993), and its progeny “threaten[] to reverse the course of minority political success during the Second Reconstruction”); Jack M. Balkin & Sanford Levinson, Understanding the Constitutional Revolution, 87 VA. L. REV. 1045, 1097-99 (2001) (arguing that “in may ways, the constitutional vision of the conservative [members of the Rehnquist Court] resembles the interpretation of the Northern Democrats who were hostile to Reconstruction”); Lisa Cardyn, Sexualized Racism/Gendered Violence: Outraging the Body Politic in the Reconstruction South, 100 MICH. L. REV. 675, 859 (2002) (arguing that decisions by the Rehnquist and Waite Courts similarly restrict civil-rights laws); Neil Gotanda, A Critique of “Our Constitution Is Color-Blind,” 44 STAN. L. REV. 1, 68 (1991) (describing the 1989 civil-rights decisions of the Supreme Court as “the equivalent of the Compromise of 1877, which ended the first Reconstruction”); Virginia E. Hench, The Death of Voting Rights: The Legal Disenfranchisement of Minority Voters, 48 CASE W. RES. L. REV. 727, 755 & nn.131-32 (1998) (arguing that the Rehnquist Court is “squarely at the forefront of 19th Century jurisprudence, adopting the rationales that were used to strike down the original post-Civil War Civil Rights Statutes”); John E. Nowak, The Gang of Five and the Second Coming of an Anti-Reconstruction Supreme Court, 75 NOTRE DAME L. REV. 1091, 1093, 1096 (2000) (stating that specific Rehnquist Court decisions reflect an “Anti-Reconstruction . . . philosophy” that has been adopted and imposed on our country by the Gang of Five” and arguing that “we are witnessing the return of an Anti-Reconstruction Supreme Court”); James Thomas Tucker, Tyranny of the Judiciary: Judicial Dilution of Consent Under Section 2 of the Voting Rights Act, 7 WM. & MARY BILL RTS. J. 443, 561 (1999) (arguing that the end of the Second Reconstruction has resulted from “judicial intransigence” similar to that which ended the First); Pamela S. Karlan, End of the Second Reconstruction? Voting Rights and the Court, NATION, May 23, 1994, at 698, 700 [hereinafter Karlan, End of the Second Reconstruction?] (arguing that “the Supreme Court has relentlessly chipped away at the foundations of the Second Reconstruction”).
long been blamed for facilitating the end of the First. This critique captures much of what is meant by those generally charging the Rehnquist Court with "conservative judicial activism." It posits that the present Court wants to dismantle decades' worth of federal antidiscrimination measures that are aimed at the "reconstruction" of public and private relationships at the local level. It sees the Waite Court as having similarly nullified the civil-rights initiatives enacted by Congress following the Civil War to reconstruct the former Confederacy. And it maintains that both Courts' willingness to invalidate federal statutes and limit congressional power evinces the view that much

2. See sources cited infra note 36 and accompanying text.


4. For claims that the Rehnquist Court engages in conservative judicial activism, see, for example, Balkin & Levinson, supra note 1, at 1081; Erwin Chemerinsky, The Religious Freedom Restoration Act Is a Constitutional Expansion of Rights, 39 WM. & MARY L. REV. 601, 602 (1998) [hereinafter Chemerinsky, The Religious Freedom Restoration Act Is a Constitutional Expansion of Rights] (describing various federalism decisions as displaying "conservative judicial activism"); Scott Fruehwald, If Men Were Angels: The New Judicial Activism in Theory and Practice, 83 MARQ. L. REV. 435, 441 (1999) (stating that "the new judicial activism... employ[s] general notions of federalism that are not anchored in the Constitution's words" and "ignore[s] some of its basic principles in certain cases [and] produce[s] results... that are unprincipled and even ideologically biased"); Steven A. Light, Too (Color)blind to See: The Voting Rights Act of 1965 and the Rehnquist Court, 8 GEO. MASON U. CIV. RTS. L.J. 1, 3 (1997-1998) (stating that "the convergence of judicial activism and ideological conservatism that characterizes the Rehnquist Court... suggests that the Second Reconstruction is at a turning point" (internal citation omitted)); Peter M. Shane, Federalism's "Old Deal": What's Right and Wrong with Conservative Judicial Activism, 45 VILL. L. REV. 201 (2000); and Larry D. Kramer, No Surprise. It's an Activist Court, N.Y. TIMES, Dec. 12, 2000, at A33 (arguing that "[t]he Rehnquist Court has been using law to reshape politics for at least a decade" and that "conservative judicial activism is the order of the day").

federal civil-rights legislation represents an impermissible redistributive project and an unconstitutional interference with state and local autonomy.  

This Article argues that the critique that the Rehnquist Court is "undoing the Second Reconstruction" is too simple, but not only because it fails to account for last Term's relatively "moderate" decisions. A parallel indeed exists between the Rehnquist Court's response to the Second Reconstruction and the Waite Court's reaction to the First. Decisions by both Courts, however, respond to Reconstruction not with undifferentiated hostility, but instead in a more complex manner. This Article attempts to show that these decisions posit a two-tiered vision of Congress's enforcement powers under the Reconstruction-era Amendments. Under this vision, Congress possesses broad discretion to free state political processes of racial discrimination, but enjoys far more limited authority to combat other forms of discrimination at the state and local level.  

This disaggregation of Congress's enforcement powers may be understood to reflect the view that individual liberty is best protected at the state level, but only so long as the "healthy organization of the government itself" is maintained. State government must represent "the free choice of the people," but racial discrimination in voting prevents States from fulfilling this function. Decisions by both Courts accord deference to congressional efforts to block such discrimination and thereby to reinforce representative governance at the state level. They countenance this broad congressional power in order to preserve the primacy of state authority elsewhere.

6. See, e.g., Balkin & Levinson, supra note 1, at 1052-61 (arguing that "[i]n the past ten years, the Supreme Court of the United States has begun a systematic reappraisal of doctrines concerning federalism, racial equality, and civil rights that, if fully successful, will redraw the constitutional map as we have known it"); Fruehwald, supra note 4, at 441; Nowak, supra note 1, at 1098 (stating that "the Gang of Five cannot disguise the fact that they have nothing but disdain for the federal system that our country adopted both in 1787 and following the Civil War"); Jed Rubenfeld, The Anti Anti-Discrimination Agenda, 111 YALE L.J. 1141, 1144 (2002) (stating that "some of the Court's federalism cases are not really federalism cases at all"); see also Ernest A. Young, Judicial Activism and Conservative Politics, 73 U. COLO. L. REV. 1139 (2002) (discussing elements thought to comprise conservative judicial activism).

7. See, e.g., Grutter v. Bollinger, 123 S. Ct. 2325 (2003); Nevada Dep't of Human Res. v. Hibbs, 123 S. Ct. 1972 (2003); see also Tony Mauro, A Timeout for Conservative Agenda, LEGAL TIMES, June 30, 2003, at 1; Editorial, A Moderate Term on the Court, N.Y. TIMES, June 29, 2003, § 4, at 12 (stating "the highest court of all has surprised many people with its moderation").

8. See infra Parts I & II.

9. Ex parte Yarbrough, 110 U.S. 651, 666 (1884); see also infra note 293 and accompanying text.

10. Yarbrough, 110 U.S. at 666.

11. See infra Part III.
The first two Parts of this Article seek to establish that decisions by both Courts defer more to congressional efforts to rid local political processes of racial discrimination than to other types of congressional antidiscrimination measures. These Parts do not argue that both Courts deliberately set out to recognize a special realm in which they would defer to congressional power and indeed take no position on the justices' subjective motivation on this point. Nor do they maintain that deference in this realm necessarily precludes deference to Congress in other arenas. Instead, they locate within decisions by both Courts evidence that both defer considerably to Congress in the realm of race and the vote.

Part I discusses a series of Waite Court decisions that circumscribe congressional authority to enforce the Reconstruction-era Amendments. Scholars frequently cite United States v. Reese, United States v. Cruikshank, United States v. Harris, and the Civil Rights Cases as evidence of the Waite Court's resistance to the First Reconstruction's political project. The Waite Court threw out federal indictments, opined unnecessarily on a host of constitutional questions, and invalidated federal enforcement legislation as falling outside congressional
authority. And yet the Court left open significant opportunities for Congress to reach deeply into local affairs to protect black-voting strength.18

Part II identifies a similar proclivity in a series of Rehnquist Court decisions that address Congress's power to frame antidiscrimination measures. *City of Boerne v. Flores*19 circumscribes congressional power to enforce the Reconstruction-era Amendments.20 *Boerne* and nearly all of its progeny21 invalidate congressional statutes, exhibit a preference for state and local power over federal authority,22 and evince a seeming antipathy to federal civil-rights initiatives and the social engineering they represent.23 All the *Boerne* cases, however, self-consciously preserve precedent upholding provisions of the Voting Rights Act (“VRA”) against constitutional challenge.24 They do so notwithstanding the displacement of local autonomy that results from enforcement of the VRA’s race-conscious antidiscrimination principles,25 and the seeming doctrinal inconsistencies that exist between these cases and the *Boerne* doctrine.26

The Rehnquist Court’s careful preservation of the VRA precedent becomes even more puzzling when juxtaposed with much of the Court’s contemporary voting-rights decisions. The constitutional injury recognized in *Shaw v. Reno*27 and its progeny28 hinders the easy deployment of

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18. *See infra* Part I.


22. *See infra* notes 115-123 and accompanying text.

23. *See, e.g.*, Post & Siegel, *supra* note 5, at 525; *see also infra* notes 115-123 and accompanying text.


25. *See infra* notes 143-145 and accompanying text.

26. *See infra* notes 160-165 and accompanying text (discussing the doctrinal inconsistencies between the early VRA precedent and the *Boerne* decisions).

27. *509 U.S. 630 (1993).*

race-conscious districting practices. Miserly readings of the VRA in several cases over the past decade accord Congress insufficient deference. Read together, these decisions appear to manifest hostility to the VRA and to the larger federal project of which it is a central component. And yet, as Part II argues, they do not disavow broad congressional power to block racial discrimination in voting. Instead, they reflect the Court’s judgment that the United States Department of Justice (“DOJ”) and state officials have relied too prominently and rigidly on race when regulating political processes and have misconstrued the VRA as providing authority to do so.

Parts III and IV offer and evaluate an explanation for why decisions by both the Rehnquist and Waite Courts might recognize a distinctly broad congressional power to address racial discrimination in voting. The goal is not to establish subjective motivation, but instead to offer a conceptual framework grounded in decisional text that might explain the doctrinal path followed by both Courts.

Part III argues that decisions by both the Waite and Rehnquist Courts defer to congressional power in the realm of race and the vote as a means to reinforce representative governance at the state level. Implicit in these decisions is the conviction that state governments best protect individual liberty, and that only inclusive electoral procedures enable the State to perform this protective role. Fostering effective state governance is thought to render unnecessary more intrusive and extensive federal regulation, and thus most faithfully to comport with the federal structure.

Part IV explores the limits of the Rehnquist Court’s deferential stance toward Congress. The constitutionality of section 2 of the Voting Rights Act is currently an open question. This Part argues that the Court should uphold its validity insofar as the deference it presently accords Congress reflects a functional understanding of congressional power to reinforce representation in the states. Nevertheless, the realm in which racial discrimination affects the political process is potentially vast, and numerous competing and controversial techniques are available to address such discrimination. Left unchecked, congressional power in this realm might easily become

29. See infra notes 205-206 and accompanying text.


31. See infra Section II.B.

32. See infra notes 221-225 and accompanying text.

33. See infra note 276-277 and accompanying text.

34. See sources cited infra note 356 and accompanying text.
plenary over an immense range of conduct. Precedent suggests that the Rehnquist Court will not countenance such an expansion of congressional power. The Court may accordingly seek to cabin congressional authority by decreeing only limited conduct to be sufficiently voting-related to warrant congressional proscription. And, as *Bush v. Gore* indicates, it may be willing to identify new substantive constitutional norms governing democratic structure. These norms, in turn, may curtail congressional discretion to regulate the political process. Such efforts may render section 2 invalid, and, more broadly, eliminate entirely the realm in which the Court presently defers to Congress. Were the Court to do so, it would indeed “undo” the Second Reconstruction.

I. THE WAITE COURT AND THE ENFORCEMENT ACTS

The critique that the Rehnquist Court is undoing the Second Reconstruction evokes the longstanding assessment that the Waite Court contributed significantly to the end of the First. Read together, decisions such as *United States v. Reese*, *United States v. Cruikshank*,

35. 531 U.S. 98 (2000).

36. For this critique of the Waite Court, see, for example, HAROLD M. HYMAN & WILLIAM W. WIECEK, EQUAL JUSTICE UNDER LAW: CONSTITUTIONAL DEVELOPMENT, 1835-1875, at 488 (1982) (crediting the Waite Court with leading “the judicial retreat from Reconstruction”); RAYFORD W. LOGAN, THE BETRAYAL OF THE NEGRO 105-06 (enlarged ed. 1965) (noting role of Waite Court in the demise of Reconstruction); Davidson & Grofman, supra note 5, at 378 (characterizing “the complicity of the federal courts” as a necessary component of southern redemption); Eugene Gressman, The Unhappy History of Civil Rights Legislation, 50 Mich. L. Rev. 1323, 1336-37 (1952) (describing Waite Court decisions along with the Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873), as a “[j]udicial coup d’[é]tat” in which “the bold motives and the brave arguments of the architects of the constitutional revolution in civil rights were forgotten under the din of a judicial rewriting of their efforts”); and Karlan, End of the Second Reconstruction?, supra note 1, at 698 (arguing that during the 1870s and 1880s, “the Court gutted the First Reconstruction by invalidating or misconstruing a series of critical Congressional protections of black political and economic rights”). See also infra note 54 and accompanying text (discussing historians’ assessment of Reese and Cruikshank).

But see WILLIAM E. NELSON, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE 148-85 (1988) (characterizing various decisions by the Waite Court as moderate and balanced); Michael Les Benedict, Preserving Federalism: Reconstruction and the Waite Court, 1978 SUP. CT. REV. 39, 63 (“[W]hat is remarkable is the degree to which the [Waite] Court sustained national authority to protect rights rather than the degree to which [it] restricted it.”); Earl M. Maltz, The Waite Court and Federal Power to Enforce the Reconstruction Amendments, in THE SUPREME COURT AND THE CIVIL WAR 75, 80-81 (Jennifer M. Lowe ed., 1996) (stating that “to describe the analysis of the Waite Court as unremittingly conservative would be a mistake” and arguing that the Court’s “jury discrimination and voting rights cases reflect sympathy for the major elements of the Republican theory of federal power”). Cf. Randall Kennedy, Reconstruction, the Waite Court and the Politics of History, in THE SUPREME COURT AND THE CIVIL WAR, supra, at 99, 102 (noting the revisionist argument that “far from betraying the political values of the Republicans who fashioned the Reconstruction Amendments, the Waite Court Justices rather faithfully mirrored those values”); infra notes 85-111 and accompanying text.

37. 92 U.S. 214 (1876).
United States v. Harris, 39 and the Civil Rights Cases 40 undeniably restricted congressional power to enforce the newly ratified Reconstruction-era Amendments. And yet, the Waite Court’s resistance to congressional reconstruction was not steadfast. As Reese and Cruikshank make clear, the Waite Court did not hesitate to overturn federal convictions and invalidate congressional enforcement legislation. But even as it did so, the Waite Court left open opportunities for the exercise of broad congressional power to reach deeply into local affairs to block efforts meant to curb or eliminate black-voting strength.

At issue in United States v. Reese were federal indictments charging two municipal-election inspectors with violating sections 3 and 4 of the Enforcement Act of 1870.41 The indictments alleged that the inspectors refused to accept payment of a poll tax proffered by an otherwise qualified black voter “because of [his] race.”42 Chief Justice Waite’s majority opinion construes sections 3 and 4 of the 1870 Act to transcend race-based denials of the vote and to encompass wrongful denials of the vote more generally.43 Based on this interpretation, Reese holds that the statutory provisions exceeded Congress’s enforcement power under section 2 of the Fifteenth Amendment.44 “Congress can interfere” in state elections, Reese states, only when a State “wrongful[ly] refus[es] to receive the vote of a qualified elector . . . because of race, color, or previous condition of servitude.”45

38. 92 U.S. 542 (1876).
39. 106 U.S. 629 (1883).
40. 109 U.S. 3 (1883).
41. In relevant part, section 3 provides that “the offer” of a citizen to carry out a statemandated prerequisite to voting “be deemed and held as performance in law of such act” if the offer “fail[s] to be carried into execution by reason of the wrongful act or omission aforesaid of the person or officer charged with the duty of receiving or permitting such performance” and establishes a federal criminal offense for “any judge, inspector, or other officer of election . . . wrongfully [to] refuse or omit to receive, count, certify, register, report, or give effect to the vote of such citizen.” Section 4, in relevant part, establishes a criminal offense for “any person, by force, bribery, threats, intimidation, or other unlawful means . . . [to] hinder, delay, prevent, or obstruct, or . . . [to] combine and confederate with others to [do the same], any citizen from doing any act required to be done to qualify him to vote or from voting at an election as aforesaid.” Act of May 31, 1870, ch. 114, §§ 3, 4, 16 Stat. 140–41, repealed by 28 Stat. 36, 37 (1894).
43. See Reese, 92 U.S. at 218, 220.
44. Id.
45. Id. at 218.
United States v. Cruikshank\textsuperscript{46} upholds the release of three white men convicted under section 6 of the 1870 Act\textsuperscript{47} for their participation in the Grant Parish Massacre. Following the contested gubernatorial election in Louisiana in 1872, and the parallel governments it produced, a group of black Republicans assembled in Colfax to defend Republican control of the Grant Parish seat. On April 13, 1873, fighting broke out between these forces and white Democrats from the countryside. Two white men and dozens, and perhaps hundreds, of black men died. Many of the black men were killed after they surrendered to the white forces.\textsuperscript{48} Federal prosecutors indicted ninety-nine of the white men involved, prosecuted nine, and obtained convictions against three. The trial judges, Circuit Judge Woods and Associate Justice Bradley, disagreed over the legality of the convictions, resulting in that court granting the defendant’s motion to arrest judgment.\textsuperscript{49}

Cruikshank holds that the indictments failed to charge an interference with “any right or privilege granted or secured” by the Constitution, as required by section 6. According to Chief Justice Waite’s opinion for the Court, charges alleging interference with the victims’ voting rights fell short because the indictments did not assert racial motivation.\textsuperscript{50} Alleged deprivations of due process and equal protection failed because those Fourteenth Amendment guarantees did not “add any thing [sic] to the rights which one citizen has under the Constitution against another.”\textsuperscript{51} Alleged denials of the right to assemble and the right to bear arms were deficient because the Constitution guaran-

\footnotesize{\textsuperscript{46} 92 U.S. 542 (1876).}

\footnotesize{\textsuperscript{47} Section 6 of the 1870 Act provides:}

That if two or more persons shall band or conspire together, or go in disguise upon the public highway, or upon the premises of another, with intent to violate any provisions of this act, or to injure, oppress, threaten, or intimidate any citizen, with intent to prevent or hinder his free exercise and enjoyment of any right or privilege granted or secured to him by the Constitution or laws of the United States, or because of his having exercised the same, such persons shall be held guilty of felony . . . .


\footnotesize{\textsuperscript{49} See United States v. Cruikshank, 25 F. Cas. 707, 708 (C.C.D. La. 1874) (No. 14,897).}

\footnotesize{\textsuperscript{50} See United States v. Cruikshank, 92 U.S. 542, 556 (1876) (noting that “[w]e may suspect that race was the cause of the hostility; but it is not so averred”).}

\footnotesize{\textsuperscript{51} Id. at 554-55.}
teed those rights only against congressional encroachment.52 Other counts were simply too vague.53

According to scholars of divergent viewpoints, Reese and Cruikshank thwarted federal power to protect the southern black population and facilitated the end of Reconstruction.54 The two decisions,

52. Id. at 552-53.
53. Id. at 557-58.
54. See, e.g., Keith J. Bybee, Mistaken Identity 15 n.15 (1998) (stating that Reese and Cruikshank “gutted the enforcement acts”); Michael Kent Curtis, No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights 179-80 (1986) (describing Cruikshank as holding that “the government could do nothing about a politically motivated armed attack by whites that killed sixty blacks” and that Reese “seriously restrict[ed] the power of Congress to protect blacks under the Fourteenth and Fifteenth Amendments”); John Hope Franklin, From Slavery to Freedom 330-31 (3d ed. 1967) (arguing that Reese and Cruikshank “hasten[ed] the end of Reconstruction”); William Gillette, Retreat from Reconstruction 1869-79, at 295 (1979) (stating that Reese “made future enforcement vastly more difficult, and in some cases clearly impossible”); Hyman & Wieck, supra note 36, at 488-89; Issacharoff et al., supra note 24, at 90-91 (citing Reese and Cruikshank as decisions that “eviscerated various federal protections of black voting rights” and thus as evidence of the Court’s “pivotal role” in disenfranchisement); Kaczorowski, supra note 48, at 217; Richard Kluger, Simple Justice 60-61 (1975) (stating that Reese “made the federal guarantee of the right to vote all but worthless” and that Cruikshank “doubled the strength of the Court’s blow”); Kousser, supra note 1, at 49-50 (citing Reese and Cruikshank as evidence of the Supreme Court’s “poten[cy] in protecting white supremacy in the late nineteenth century”); C. Peter Magrath, Morrison R. Waite: The Triumph of Character 132 (1963) (noting that Reese and Cruikshank “arrang[ed] one of the essential conditions for North-South reconciliation: the ending of meaningful political participation by the Negro” and made “clear that the Supreme Court regarded the Reconstruction era as over”); James M. McPherson, Ordeal by Fire 638 (3d ed. 2001) (stating that “[t]he effect of the Reese and Cruikshank decisions, combined with the Northern loss of will to carry out reconstruction, was to inhibit further enforcement efforts”); Loren Miller, The Petitioners: The Story of the Supreme Court of the United States and the Negro 109-14, 150-54 (1966) (describing Reese and Cruikshank as damaging to black rights); Tunnell, supra note 48, at 193 (describing Cruikshank as a “racist and morally opaque decision [that] reduced the Fourteenth Amendment and the Force Acts to meaningless verbiage as far as the civil rights of Negroes were concerned”); Charles Warren, The Supreme Court in United States History 326-27, 330 (1922) (stating that Reese and Cruikshank “seriously reclassified the provisions of the Fourteenth and Fifteenth Amendments”); Michael W. McConnell, The Forgotten Constitutional Moment, 11 Const. Comment. 115, 134 (1994) [hereinafter McConnell, The Forgotten Constitutional Moment] (describing Reese and Cruikshank as “major steps toward dismantling the federal power to enforce Reconstruction”); Everett Swinney, Enforcing the Fifteenth Amendment, 28 J. S. Hist. 202, 209 (1962) (stating that “[t]he effect of [Reese and Cruikshank] was to bring to a close the active policy of the government to enforce the Fifteenth Amendment.”).

But see Goldman, supra note 42, at 100, 106 (arguing that Reese and Cruikshank reflect “moderation in regard to the relationship between the federal government and the states,” that Reese accepted neither the “strong nationalist position . . . [nor] extreme states’ rights constitutionalism,” and that Cruikshank “was even more narrow in its result than Reese”); Benedict, supra note 36, at 69, 72-74 (describing Reese and Cruikshank to be among decisions in “which the Supreme Court tried to sustain national authority to protect individual rights directly without permitting precedents that might later destroy the established limits between State and national power”); Maltz, supra note 36, at 77, 80 (arguing that Reese
Charles Warren wrote, rendered "the Federal statutes almost wholly ineffective to protect the Negro,"55 and "entirely demolished the Radical Reconstructionist plan of protecting the rights of the negro by direct Federal legislation."56 John Braeman called Reese "a death blow to the already faltering efforts to prosecute voting rights violations."57 Eric Foner described Cruikshank as "[e]ven more devastating" than the Slaughter-House Cases, rendering "national prosecution of crimes committed against blacks virtually impossible, and [giving] a green light to acts of terror where local officials either could not or would not enforce the law."58

Reese and Cruikshank indisputably hindered ongoing federal efforts to enforce the newly ratified Fourteenth and Fifteenth Amendments.59 To be sure, neither decision precluded future federal prosecutions under a new statute or a properly crafted indictment.60 But even a Court steadfastly opposed to Reconstruction might have thought political expediency counseled against wholesale invalidation of the statutes.61 Both Reese and Cruikshank comport with such a stance. They dismiss federal indictments at a time when political support for federal intervention in the South was waning. They preserve opportunities for future congressional action of the sort the Court knew full well Congress would not pursue.62 Absent Reese and

__forged a middle ground that "avoided the political consequences of upholding the prosecution, while preserving the possibility that a future Congress could intervene on behalf of African-American voters if political circumstances changed" and that Cruikshank "strongly reaffirmed the principle that the Fourteenth Amendment prevents states from interfering with preexisting fundamental rights"__.

55. 3 WARREN, supra note 54, at 326.

56. Id. at 324; see also id. at 326-27 (stating that all but the most radical viewed the decisions "to be wise and to open the door for more sane and liberal methods of dealing with the negro problem in the South").


58. FONER, supra note 48, at 531.

59. See WANG, supra note 48, at 130 (stating Reese and Cruikshank "clearly jeopardized and discouraged enforcement"); Kennedy, supra note 36, at 100 (noting that "Cruikshank and related cases ... made federal prosecutions of violent white supremacists considerably more difficult to sustain"); Earl Warren, Fourteenth Amendment: Retrospect and Prospect, in THE FOURTEENTH AMENDMENT: CENTENNIAL VOLUME 212, 218 (Bernard Schwartz ed., 1970) (noting that Reese and Cruikshank "frustrated federal efforts to bring prosecutions for interferences with the Negro's right to vote").

60. See Benedict, supra note 36, at 73.

61. See, e.g., Caminker, "Appropriate" Means-Ends Constraints on Section 5 Powers, supra note 20, at 1163 (noting that a series of congressional proposals during the late 1860s sought to impose supermajority requirements on Supreme Court adjudication and thereby limit the Court's ability to invalidate federal legislation).

62. See DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS 402 (1985); FAIRMAN, supra note 42, at 278 (noting that after Reese, "Congress would not mend the statute in accord with the Court's instruction"); GILLETTE, supra note 54, at 298 (arguing that Reese and Cruikshank "served to rationalize and legiti-
Cruikshank, other branches of the federal government would have curbed vigorous federal enforcement actions.63 Through these opinions, the Court facilitated this withdrawal by providing a semblance of legal justification as support for prevailing political sentiments.64 As Professor Currie has explained, “the Court went out of its way to incapacitate the enforcement authorities after it was too late politically to expect Congress to fill the gap by enacting narrower statutes.”65

Reese, moreover, set free defendants who the Court recognized violated the Constitution. It did so based on a strained reading of the statute that forced the Court unnecessarily to confront a constitutional question.66 The first section of the 1870 Act recognized a right to be free of racial discrimination in voting, providing that citizens otherwise qualified to vote “shall be entitled and allowed to vote ... without distinction of race, color, or previous condition of servitude.”66 Sections 3 and 4 described statutory offenses based on the wrongful conduct “aforesaid.”68 The statute, accordingly, could have been read

mize the earlier retreat during the decisive 1870s when unfavorable public opinion, local sabotage, and federal inaction had achieved the overthrow of reconstruction”); WANG, supra note 48, at 131; Maltz, supra note 36, at 77 (stating that aggressive federal enforcement efforts were unlikely after Republican electoral defeats in 1874); McConnell, The Forgotten Constitutional Moment, supra note 54, at 134 (“The practical effect [of Reese] was to undo a major underpinning of Reconstruction. The supposed defect in the statute could be easily remedied, but by 1876 it no longer would be...”); see also KACZOROWSKI, supra note 48, at 208 (arguing that the Grant administration wanted to abandon “the civil rights enforcement efforts that had become so politically debilitating” and thus limited its appeal in Cruikshank to voting issues so that “[t]he Justice Department could withdraw gracefully from an undesirable policy under the semblance of a judicial mandate”).

63. See Gillette, supra note 54, at 299; KACZOROWSKI, supra note 48, at 208; MAGRATH, supra note 54, at 130 (“Cruikshank and Reese would have provoked outraged howls in the 1860’s; in 1876 Congress accepted them with the mildest of taps on the Court’s wrist.”); GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 436 (4th ed. 2001) (“At the same time that the Court was dismantling much of the Reconstruction legislation, the political coalition behind Reconstruction was also collapsing.”); Maltz, supra note 36, at 77.

64. MAGRATH, supra note 54, at 133 (noting that the Court “marched in step with the national mood”).

65. CURRIE, supra note 62, at 402.


67. In full, section 1 provided:

That all citizens of the United States who are or shall be otherwise qualified by law to vote at any election by the people in any State, Territory, district, county, city, parish, township, school district, municipality, or other territorial subdivision, shall be entitled and allowed to vote at all such elections, without distinction of race, color, or previous condition of servitude; any constitution, law, custom, usage, or regulation of any State or Territory, or by or under its authority, to the contrary notwithstanding.

Act of May 31, 1870, ch. 114, § 1, 16 Stat. 140, 140.

68. See supra note 41.
to establish a criminal offense, an element of which was a denial of the vote based on a "distinction of race," and not more broadly any wrongful denial of the vote.69 The Court held otherwise only by disregarding the statute's legislative history,70 and the interpretative canons both that penal statutes be strictly construed71 and that all statutes be construed to preserve their validity.72 At a minimum, the Court's view that the defendants had blocked a voter based on a "distinction of race" and thus that statutory provisions were constitutional as applied to the defendants should have counseled against invalidating the statute in its entirety.73

Cruikshank, too, opined on constitutional issues the Court might have avoided.74 The Grant administration presented the Court with a narrow challenge to the lower-court ruling dismissing the indictments, taking issue only with the deficiency found in the charges alleging interference with the victims' voting rights.75 The defendants filed a

69. See United States v. Reese, 92 U.S. 214, 241-45 (1876) (Hunt, J., dissenting); see also FAIRMAN, supra note 42, at 278 (describing as "regrettable" that the Court did not agree with Justice Hunt, and stating that, under the statute, "[n]o person accused would be taken unawares"); MAGRATH, supra note 54, at 129 (describing Justice Hunt's dissent as forceful); Maltz, supra note 36, at 76 (describing Waite's reading as "questionable at best").

70. See Reese, 92 U.S. at 241 (Hunt, J., dissenting) (stating that congressional intent that the Act protected newly enfranchised black voters from racial discrimination "is too plain to be discussed"); CONG. GLOBE, 41st Cong., 2d Sess. 3663 (1870) (remarks of Sen. Sherman) (noting that the statute contains "no provision . . . but what is intended simply to prevent a discrimination on account of race, color, or previous condition of servitude" and that the use of "aforesaid" in section 4 "shows clearly enough that the intention of its framers was to confine the operation of that section to offenses against the fifteenth amendment"); FAIRMAN, supra note 42, at 231, 235 n.55, 250 (noting that the legislative history "would not sustain" the claim that sections 3 and 4 transcended race); Maltz, supra note 36, at 76-77 (stating that the debates on the 1870 Act indicate that the statute proscribed only racially motivated acts).

71. Cf. United States v. Raines, 362 U.S. 17, 21 (1960) (noting rule that "one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional").

72. See CURRIE, supra note 62, at 402 (stating that the Court "manipulat[ed] the statutory issues of coverage and severability"); McConnell, The Forgotten Constitutional Moment, supra note 54, at 134 (describing Reese's "reasoning" as "transparently faulty").

73. THOMAS COOLEY, CONSTITUTIONAL LIMITATIONS 180-81 (1868); CURRIE, supra note 62, at 395 n.175 (arguing that "[a]s an original matter of statutory interpretation, it would seem odd to conclude that a Congress legislating to protect voting rights would rather have no statute at all than a statute limited to offenses based on race" (citing Robert L. Stern, Separability and Separability Clauses in the Supreme Court, 51 HARV. L. REV. 76, 99 (1937)); McConnell, The Forgotten Constitutional Moment, supra note 54, at 134 n.64; cf. Benno C. Schmidt, Jr., Principle and Prejudice: The Supreme Court and Race in the Progressive Era: Part 3: Black Disfranchisement from the KKK to the Grandfather Clause, 82 COLUM. L. REV. 835, 840 n.12 (1982) (arguing that the Court's refusal to limit the statute by construction to racially motivated offenses "was certainly defensible").


75. Brief for the United States at 3, United States v. Cruikshank, 92 U.S. 542 (1876) (No. 609) (stating that "we will confine ourselves to the 14th and 16th counts" of the indictment), reprinted in 7 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF
comprehensive brief arguing that each count of the indictment was inadequate. In response the Waite Court issued its sweeping exegesis not just on the voting counts but also on a host of other issues, including equal protection, due process, and incorporation.

_Cruikshank_ launched the Waite Court's constriction of Congress's enforcement powers under the newly ratified Reconstruction-era Amendments. _Cruikshank_ asserts that the Equal Protection Clause governs state action alone and suggests that Congress may not regulate private action pursuant to its enforcement powers. Chief Justice Waite's opinion states that "[t]he only obligation resting upon the United States is to see that the States do not deny the right . . . . The power of the national government is limited to enforcement of this guaranty." While arguably dictum in _Cruikshank_, the Waite Court gave this suggestion precedential effect in _United States v. Harris_ and

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76. Brief for Defendants, United States v. Cruikshank, 92 U.S. 542 (1876) (No. 609), reprinted in _7 LANDMARK BRIEFS AND ARGUMENTS_, supra note 75, at 347.

77. See supra text accompanying notes 50-53.

78. The Supreme Court's narrow reading of the Reconstruction-era Amendments and the congressional legislation enforcing them predates the Waite Court. See, e.g., The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 78 (1873) (denying that the Fourteenth Amendment "radically changes the whole theory of the relations of the State and Federal governments to each other"); Bylew v. United States, 80 U.S. (13 Wall.) 581 (1872) (holding that a black murder victim was not "affect[ed]" by the prosecution of white defendants charged with the killing, and hence that the case was not entitled to removal to federal court under § 3 of the Civil Rights Act).

79. _Cruikshank_, 92 U.S. at 555.

80. Sections 3 and 4 of the 1870 Act prohibited interference only with rights "granted or secured" by the Constitution and as such arguably did not proscribe private conduct, at least in connection with claimed denials of equal protection and due process. See CURRIE, supra note 62, at 396 & n.184 (arguing that "Congress had forbidden only violations of the Constitution" and that the statutory formulation was "properly broad enough to allow Congress to see to it that private persons do not induce or assist the state in denying fourteenth amendment rights" but did not extend to purely private action); Laurent B. Frantz, _Congressional Power to Enforce the Fourteenth Amendment Against Private Acts_, 73 YALE L.J. 1353, 1377-78 (1964) (asserting that _Cruikshank_ "does not say, nor does it clearly imply that Congress has no power to impose new duties on private individuals"); Maltz, _supra_ note 36, at 79 (stating that the _Cruikshank_ Court "had been careful to leave open the question of whether Congress possessed broad authority to regulate private racially motivated activity"); cf. McConnell, _The Forgotten Constitutional Moment_, _supra_ note 54, at 135 (arguing that _Cruikshank_ rests on the proposition that private persons cannot violate the Fourteenth Amendment and "[t]hus, the federal government had no power to protect against the private violence that was the principal means by which white Democrats sought to nullify the protections of the law").

81. 106 U.S. 629 (1883).
the Civil Rights Cases. These latter decisions do not categorically bar Congress from reaching private action in this realm, but, in notable contravention of the Framers’ intent, significantly narrow the contexts in which such action may be pursued.

These characteristics notwithstanding, Reese and Cruikshank are more narrow, and indeed less damaging to the First Reconstruction, than the prevailing critique suggests. With regard to blocking racial
discrimination in voting in particular, both *Reese* and *Cruikshank* suggest that the Waite Court thought Congress enjoys considerably more power than it possesses in other realms. To be sure, *Reese* holds that the Fifteenth Amendment prohibits race-based discrimination in voting and permits Congress to proscribe only similarly motivated acts. This suggests that “appropriate” federal legislation in this realm must require proof of racially discriminatory intent. When viewed through the lens of contemporary doctrine, the implication is that Congress may not proscribe facially race-neutral conduct for which racial animus is the likely motivation. More generally, *Reese* implies that Congress may not proscribe constitutional conduct even where it deems such proscriptions necessary to remedy a constitutional violation.

The Waite Court was not, however, committed to this proposition, as *Cruikshank* and *Reese* themselves indicate. *Reese* strikes down the statutory provisions because the Court understood them to proscribe wrongful conduct that denied the vote for reasons wholly unrelated to race and accordingly unrelated to conduct violating the Fifteenth Amendment. The United States’ brief in the Supreme Court stated in circumstances that would have plausibly allowed for a different outcome”); Maltz, *supra* note 36, at 81 (arguing that the Waite Court’s voting and jury cases “reflect sympathy for major elements of the Republican theory of federal power”); see also *Currie*, *supra* note 62, at 402 (rejecting as too extreme the critique that the Waite Court undermined Congress’s enforcement powers and “abandon[ed] blacks to the mercies of Southern hostility”); *Kaczorowski*, *supra* note 48, at 213 (arguing that *Reese* “implicitly reject[s] the defense’s narrow interpretation of state action”).

86. *See Goldman*, *supra* note 42, at 106 (noting that “[b]oth decisions agreed that the Fifteenth Amendment did protect citizens from voter discrimination based on race . . . [and both] clearly and explicitly confirmed congressional authority to protect that right from discrimination based on race”); *Wang*, *supra* note 48, at 132 (arguing that *Reese* and *Cruikshank* preserved the federal government’s “power to enforce the Fifteenth Amendment” and both agreed that “Congress had the power to protect . . . the right to be exempt from voting discrimination on account of race”).

87. Cf. McConnell, *The Forgotten Constitutional Moment*, *supra* note 54, at 134 (suggesting that insofar as the statutory provisions in *Reese* applied “to denials of the right to vote on grounds other than race,” they “exceeded” Congress’s powers under Section 2 of the Fifteenth Amendment).

88. Nearly a century later, the Court would reject this suggestion by upholding congressional power to proscribe seemingly race-neutral electoral practices for which Congress suspects racially discriminatory intent is the motivation. *See Oregon v. Mitchell*, 400 U.S. 112 (1970); *Katzenbach v. Morgan*, 384 U.S. 641 (1966); *see also Currie*, *supra* note 62, at 393-94 (noting that while *Reese*’s conclusion that the congressional enforcement power extends only to racially motivated electoral practices “seems obvious from the language and evident purpose of the enforcement provision,” the principle requires “some qualification to prevent evasion”).

89. *See Caminker, Remedies for Public Wrongs Under Section 5, supra* note 83, at 1362 (distinguishing permissible means from permissible ends of Section 5 legislation).

90. *See United States v. Reese*, 92 U.S. 214, 218-20 (1876); *see also Fairman, supra* note 42, at 249 (suggesting that the Court held the statute to be “inappropriate” legislation because it understood it to target conduct regarding which “there was no design to thwart the enforcement of the Fifteenth Amendment”); *Warren*, *supra* note 59, at 219 (stating that
that the statute transcended race-based denials of the vote, notwithstanding evidence that Congress meant for the proscription to block only racially motivated conduct.\textsuperscript{91} The Solicitor General wrote that the statutory provisions prohibited "unlawful hindrances . . . upon any account and by any person," and accordingly "have a much wider application than is needed for the case before us."\textsuperscript{92} The Court accepted this construction and thus did not address whether Congress had power to proscribe race-neutral conduct in order to block race-based discrimination in voting.

\textit{Reese} and \textit{Cruikshank} moreover decline to resolve whether Congress may more easily proscribe private, and thus constitutional, conduct pursuant to its enforcement powers under the Fifteenth Amendment than it may under the Fourteenth. \textit{Reese} invalidates sections 3 and 4 of the 1870 Act for failing to require racial motivation, stating that "Congress can interfere" in state elections only when a State "wrongful[ly] refus[es] to receive the vote of a qualified elector . . . because of race, color, or previous condition of servitude."\textsuperscript{93} So too, \textit{Cruikshank} dismisses indictment counts pertaining to voting because the indictment counts alleging interference with the victims' voting rights did not assert a racial motivation.\textsuperscript{94} In so doing, neither decision suggests any constitutional infirmity stemming from the application of the relevant statutes to purely private conduct in connection with voting.\textsuperscript{95}

To be sure, this omission may reflect nothing more than that the Court had already dispensed with the voting claims on intent grounds

\textit{Reese} "did not take from Congress the power to legislative against racially motivated interferences with the right to vote").

\textsuperscript{91}. See supra note 69 and accompanying text.

\textsuperscript{92}. See Brief for the United States at 29, United States v. Reese, 92 U.S. 214 (1876) (No. 145); see also FAIRMAN, supra note 42, at 237 (arguing that the government's brief in \textit{Reese} "was working in effect against the possibility that the Court might read [the statute] more narrowly and, so construed, sustain it"); GOLDMAN, supra note 42, at 79.

\textsuperscript{93}. Reese, 92 U.S. at 218.

\textsuperscript{94}. See United States v. Cruikshank, 92 U.S. 542, 556 (1875) (noting that "[w]e may suspect that race was the cause of the hostility; but it is not so averred").

\textsuperscript{95}. See BRAINTON, supra note 57, at 65, 68; Benedict, supra note 36, at 72; Maltz, supra note 36, at 79. But see HYMAN & WIECEK, supra note 36, at 489 (reading \textit{Reese} and \textit{Cruikshank} as placing the Court "well on a state-action-only path of interpretation"); MCPHERSON, supra note 54, at 638 (reading \textit{Reese} and \textit{Cruikshank} as "narrow[ing] the scope of the Fourteenth and Fifteenth Amendments" and establishing that the Amendments "empowered Congress to legislate only against discrimination by states"); TUNNELL, supra note 48, at 193 (reading \textit{Cruikshank} to hold that "because a private army and not the State of Louisiana committed the massacre, the federal government was powerless to act"); Schmidt, supra note 73, at 840 n.14 (arguing that \textit{Cruikshank} rested on state action under the Fourteenth Amendment and had clear implications for federal power to protect black voters from private violence under the Fifteenth, given that it too was directed at the States).
and thus was not required to address state action as well.\textsuperscript{96} It certainly falls short of affirmatively establishing federal power to proscribe private conduct.\textsuperscript{97} Still, the Court's refusal to pass on the question of private action suggests a receptivity to congressional power in this realm incompatible with steadfast opposition to Reconstruction. The Fourteenth and Fifteenth Amendments both proscribe state action.\textsuperscript{98} But in his circuit court decision in \textit{Cruikshank},\textsuperscript{99} Justice Bradley expressly distinguished the two Amendments on state action grounds.\textsuperscript{100} The lower court in \textit{Reese} split on whether Congress could punish private individuals who interfered with voting rights secured by the Fifteenth Amendment.\textsuperscript{101} Counsel for the defendants in both \textit{Reese} and \textit{Cruikshank} challenged congressional power to reach private action under the Fifteenth Amendment.\textsuperscript{102} And yet, in both cases, the Court opted to resolve the voting claims on intent grounds, even

\textsuperscript{96} See, e.g., \textsc{Currie}, supra note 62, at 395-96 n.182 (rejecting reading \textit{Reese} and \textit{Cruikshank} to embrace congressional power to reach private conduct under the Fifteenth Amendment because it "seems to confuse deciding with refusing to decide"); Sarah B. Lasky, \textit{Note, A Nineteenth Amendment Defense of the Violence Against Women Act}, 109 \textsc{Yale L.J.} 783, 805-06 n.142 (2000) (stating that "[t]o conclude that there is no state action requirement for the Fifteenth Amendment because the Court chose different grounds on which to invalidate the statutes in question seems an unwarranted leap — an extraordinarily strong version of \textit{expressio unius est exclusio alterius}").

\textsuperscript{97} See \textsc{John Mabry Mathews, Legislative and Judicial History of the Fifteenth Amendment} \textsuperscript{103} (1909) (noting that \textit{Cruikshank} "neither affirmed nor denied Bradley's opinion that the Amendment inhibits the acts of private individuals"). \textit{But see} \textsc{Braeman, supra} note 57, at 68 (stating that "[d]icta in \textit{Cruikshank} and \textit{Reese} had upheld the power of Congress to reach racially motivated violations of voting rights — whether privately or official done — in state and local elections"); Benedict, \textit{supra} note 36, at 72 (arguing that \textit{Reese} and \textit{Cruikshank} "endorsed Bradley's expansive view of congressional authority to enforce the Fifteenth Amendment against individual infringements of the rights to vote . . . [and] agree[d] that Congress could punish private offenses against citizens' voting rights so long as they were motivated by race or previous condition of servitude"); \textit{see also} \textsc{Maltz, supra} note 36, at 85 (finding support in \textit{Ex parte Yarbrough}, 110 U.S. 651 (1884), for this same proposition). For evidence that at least some of the Justices understood Congress to possess this power, see \textit{United States v. Butler}, 25 F. Cas. 213 (C.C.D. S.C. 1877) (No. 14,700) (opinion of Waite, C.J.); \textit{United States v. Cruikshank}, 25 F. Cas. 707, 712-13 (C.C.D. La. 1874) (No. 14,897) (opinion of Bradley, J.).

\textsuperscript{98} \textit{Compare} U.S. \textsc{Const.} amend. XIV, § 1 ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."); \textit{with} U.S. \textsc{Const.} amend. XV, § 1 ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.").

\textsuperscript{99} \textit{Cruikshank}, 25 F. Cas. 707 (C.C.D. La. 1874).

\textsuperscript{100} \textit{Id.} at 712-13 (stating that, in contrast to the Fourteenth Amendment, the Fifteenth Amendment created a "positive right" and conferred on Congress "the power to secure that right not only as against the unfriendly operation of state laws, but against outrage, violence, and combinations on the part of individuals, irrespective of the state laws").

For a discussion of Justice Bradley's opinion, see \textsc{Goldman, supra} note 42, at 55-57; \textsc{Kaczorowski, supra} note 48, at 182-83; \textsc{Wang, supra} note 48, at 126-27; Benedict, \textit{supra} note 36, at 71-74; Michael G. Collins, \textit{Justice Bradley's Civil Rights Odyssey Revisited}, 70 \textsc{Tul. L. Rev.} 1979, 1992-95 (1996).

\textsuperscript{101} See \textsc{Kaczorowski, supra} note 48, at 202.

\textsuperscript{102} See \textit{id.}
though *Cruikshank* relied on state action to dismiss the Fourteenth Amendment counts.\(^{103}\) Both cases squarely presented the Court with the question whether Congress can reach private action under the Fifteenth Amendment and in both cases the Court declined to resolve it.\(^{104}\)

*Reese*'s analysis of section 3 of the Enforcement Act of 1870 also suggests that the Waite Court thought that Congress enjoys notably broad power to remedy Fifteenth Amendment violations. Section 3 provided that a citizen's offer to perform a state-mandated prerequisite to voting shall "be deemed and held as a performance in law of such act" insofar as the offer "fail[s] to be carried into execution by reason of the wrongful act or omission aforesaid" of the person charged with giving it effect.\(^{105}\) As *Reese* explains, the provision effected a dramatic change in state electoral practice. Not only had Congress prescribed electoral rules "not provided by the laws of the States," but the Act "substitutes, under certain circumstances, performance wrongfully prevented for performance itself."\(^{106}\) In the circumstances described, state-voting inspectors were required to treat the citizen's submission of attempted compliance "as the equivalent of the specified requirement."\(^{107}\) In other words, Congress had assumed for itself the institutional role of state-election inspector, implementing by force of law the rules of decision it had prescribed for state elections and binding other state actors to honor the results.

*Reese*, of course, strikes down this statutory provision as unconstitutional. But it does so because the Court perceived a lack of clarity as to what the provision proscribed and not because the remedy prescribed was deemed to intrude too greatly into state sovereignty. Reading the statute to apply to wrongful refusals not motivated by race, or at a minimum to be vague on this point,\(^{108}\) *Reese* states that a change in practice as "radical" as the one section 3 attempted "should be explicit in its terms .... The law ought not to be in such a condition that the elector may act upon one idea of its meaning, and the inspec-


\(^{104}\) The Court affirmatively held that Congress lacked the power to reach private action under the Fifteenth Amendment in *James v. Bowman*, 190 U.S. 127 (1903). Cf. Voting Rights Act § 11(b), 42 U.S.C. § 1973(i)(b) (2000) (barring any person "whether acting under color of law or otherwise" from intimidating actual or prospective voters); *Nipper v. Smith*, 39 F.3d 1494, 1549 n.2 (11th Cir. 1994) (en banc) (Hatchett, J., dissenting) (stating that the constitutionality of § 11(b) is "questionable"); *United States v. Harvey*, 250 F. Supp. 219 (D.C. La. 1966) (invalidating application of § 11(b) to landlords who evicted black tenants who had registered to vote).


\(^{107}\) *Id.*

\(^{108}\) *Id.* at 219-20.
tor upon another." Reese thus asserts that the statute provided inspectors and voters alike insufficient guidance regarding the scope of its proscription. Had the statute more explicitly limited the triggering state action to racially motivated conduct, Reese implies that Congress could constitutionally have assumed the institutional role set forth in section 3, that is, Congress could "substitute...performance wrongfully prevented for performance itself.”

Reese does not hold that Congress may assume this role any more than Reese and Cruikshank establish definitively that Congress can broadly reach private action when acting to enforce the Fifteenth Amendment's proscription on race-based discrimination in voting. Instead, both decisions set forth narrow legal holdings that carefully leave open the possibility that Congress possesses such broad and intrusive power. The Court’s willingness to leave this possibility open is noteworthy, particularly given the lack of restraint displayed elsewhere in the same opinions. The Court’s refusal to foreclose these opportunities for congressional action temper the charge that Reese and Cruikshank evince the Court’s determination to end Reconstruction and “protect[] white supremacy.”

II. THE REHNQUIST COURT AND CONGRESS’S ENFORCEMENT POWERS

Like those of the Waite Court, decisions of the Rehnquist Court circumscribe Congress’s authority to frame antidiscrimination measures pursuant to the Reconstruction-era Amendments. They nevertheless accord Congress significant deference when it acts to address racial discrimination in voting. This Part identifies this deference in *City of Boerne v. Flores* and its progeny. The *Boerne* decisions significantly limit Congress’s enforcement powers, but nevertheless preserve seemingly contrary precedent upholding provisions of the Voting Rights Act (“VRA”) against constitutional challenge. This Part then argues that this deference may be reconciled with the seem-

109. Id. at 219; cf. Kaczorowski, supra note 48.

110. Reese, 92 U.S. at 219. But see Schmidt, supra note 73, at 840 n.12 (arguing that this language from Reese “reveal[s] a general hostility to federal intervention in state elections.”).

111. Kousser, supra note 1, at 49-50; see also supra note 54.


114. Hibbs is the exception. See supra note 12.
ing antipathy several recent voting-rights decisions display toward the VRA and Congress.

A. The Boerne Decisions and the VRA Precedent

City of Boerne v. Flores announced the now familiar requirement that congressional legislation enforcing the Reconstruction Amendments must exhibit “congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.” In four years, six federal statutes fell under this standard, notwithstanding the nominally “wide latitude” the Court maintains Congress enjoys in framing enforcement legislation. Applying rigorous review, the Court has deemed linkages between statutory proscriptions and constitutional injuries too attenuated, statutory remedies too broad, and underlying congressional findings too skimpy to render various statutory provisions valid exercises of Congress’s enforcement power.

Elements of the Boerne decisions offer support for the view that the Rehnquist Court is hostile to the Second Reconstruction and that it engages in “conservative activism” to dismantle it. Nearly all of

115. Boerne, 521 U.S. at 520.
116. Id.
118. See, e.g., Kimel, 528 U.S. at 98-99 (Stevens, J., dissenting in part and concurring in part) (stating that “[t]he kind of judicial activism manifested” in various federalism cases including the Florida Prepaid and College Savings Bank decisions “represents such a radical departure from the proper role of this Court that it should be opposed whenever the opportunity arises”); Balkin & Levinson, supra note 1, at 1054; Judith Olans Brown & Peter D. Enrich, Nostalgic Federalism, 28 HASTINGS CONST. L.Q. 1, 1-2, 40 (2000) (describing federalism decisions as “signal[ing] a newly activist role for the courts in patrolling the boundaries of federal authority” and the Boerne doctrine, as applied in Kimel, as embodying a “radical restriction on congressional power to determine its own agenda in matters pertaining to individual rights”); Chemerinsky, The Religious Freedom Restoration Act Is a Constitutional Expansion of Rights, supra note 4, at 602 (describing Boerne as displaying “conservative judicial activism”); Ruth Colker & James J. Brudney, Dissing Congress, 100 MICH. L. REV. 80, 87 (2001) (arguing that decisions like Kimel and Morrison embody “judicial activism in which disrespect for Congress is a fundamental element”); Douglas Laycock, The Supreme Court and Religious Liberty, 40 CATH. L. 25, 39-40 (2000) (drawing parallels between Boerne and Lochner v. New York, 198 U.S. 45 (1905)); Cass Sunstein, A Hand in the Matter, LEGAL AFF., Mar./Apr. 2003, at 27-28 (suggesting that in striking down portions of the ADA, ADEA, and VAWA, “[t]he Rehnquist Court has been engaged in right-wing judicial activism”). But see Marci A. Hamilton, Nine Shibboleths of the New Federalism, 47 WAYNE L. REV. 931, 932 (2001) (arguing that Boerne “is far from being wildly activist”).
these decisions diminish the scope of federal regulation by invalidating federal statutes and circumscribing congressional power to enforce the Fourteenth Amendment. *Boerne* eliminated the Religious Freedom Restoration Act's ("RFRA") broad application to virtually all types of state and local governmental decisions. Florida Prepaid, College Savings Bank, *Kimel*, and *Garrett* shield states from potential financial liability and the dignitary affront said to accompany the abrogation of state immunity that Congress had attempted. *Morrison* ensured exclusivity of state power in a realm in which VAWA sought to provide a supplemental federal remedy. *Boerne*, *Kimel*, *Morrison*, and *Garrett* all strike down statutes that may aptly be deemed antidis- crimination or civil-rights measures of the type thought to constitute the core of the Second Reconstruction. And while *Hibbs* seems to break this trend by upholding the Family Medical Leave Act, it does so without casting doubt on the doctrinal validity of the preceding *Boerne* cases.

As a group, the *Boerne* cases announce new principles defining congressional power that appear inconsistent with precedent and historical understandings of the scope of that power. *Boerne* holds that Congress lacks authority to engage in independent constitutional interpretation and that its Section 5 power is limited to remedying

120. Cf. Ernest A. Young, *State Sovereign Immunity and the Future of Federalism*, 1999 SUP. CT. REV. 1, 52-56 [hereinafter Young, *State Sovereign Immunity and the Future of Federalism*] (criticizing the view that state dignitary interests justify sovereign immunity, and stating that “[i]t is simply an extraordinary statement, in our political tradition, to suggest that any governmental entity has a ‘dignity’ intrinsically superior to that of the individual. There are no kings here.”).
121. See, e.g., Catharine A. MacKinnon, *Disputing Male Sovereignty: On United States v. Morrison*, 114 HARV. L. REV. 135, 136, 149 (2000) (stating that VAWA “duplicated no state law in theory, design, or remedy,” that it was a law “with federalism-friendly concurrent jurisdiction,” and that it “provided merely a supplementary civil option while leaving state criminal remedies in place”).
122. Id. at 135; Post & Siegel, supra note 5, at 486-502, 513-22.
124. See, e.g., Vikram David Amar & Samuel Estreicher, *Conduct Unbecoming of a Co-ordinate Branch: The Supreme Court in Garrett*, 4 GREEN BAG (2d ser.) 351, 354-55 (2001) (describing the "new-fangled congruence and proportionality test" set forth in the *Boerne* decisions and accusing the Court of "making up new rules that Congress could not reasonably have anticipated"); Reva B. Siegel, *Text in Context: Gender and the Constitution from a Social Movement Perspective*, 150 U. PA. L. REV. 297, 349 (2001) (noting that “*Boerne* and its progeny break with the doctrinal frameworks — and institutional understandings — through which the Court has defined Congress’s power to enact civil rights legislation since the beginning of the second Reconstruction”).
violations of constitutional rights as defined by the Court.\textsuperscript{125} This holding expressly rejects \textit{Katzenbach v. Morgan}'s suggestion that Congress may "ratchet up" constitutional protections as construed by the Court,\textsuperscript{126} and historical evidence indicating that the Framers of the Fourteenth and Fifteenth Amendments intended for Congress to have this authority.\textsuperscript{127}

As the measure of the "appropriateness" of remedial legislation, moreover, the congruence-and-proportionality test represents a new and substantial hurdle that renders congressional action in this realm inherently suspect, much in the way that use of a racial classification triggers strict scrutiny.\textsuperscript{128} The Court has examined the disputed statutes

\textsuperscript{125} City of Boerne v. Flores, 521 U.S. 507, 527 (1997) ("Any suggestion that Congress has a substantive, non-remedial power under the Fourteenth Amendment is not supported by our case law.").

\textsuperscript{126} Id. at 527-28 (noting language in \textit{Morgan} that "could be interpreted as acknowledging a power in Congress to enact legislation that expands the rights contained in § 1 of the Fourteenth Amendment" but stating that "[t]his is not a necessary interpretation, however, or even the best one"); see also \textit{Katzenbach v. Morgan}, 384 U.S. 641, 648-49 (1966); Shane, supra note 4, at 207 n.37 (arguing that \textit{Morgan} was no longer good precedent when \textit{Boerne} was decided); Young, \textit{State Sovereign Immunity and the Future of Federalism}, supra note 120, at 13-14.

\textsuperscript{127} See, e.g., Akhil Reed Amar, \textit{Intratextualism}, 112 HARV. L. REV. 747, 822-23 & n.292 (1999) (arguing that the Framers intended for Congress to exercise broad enforcement powers under the Thirteenth and Fourteenth Amendments and that this power was not limited to remedial legislation); Akhil Reed Amar, \textit{The Supreme Court, 1999 Term — Foreword: The Document and the Doctrine}, 114 HARV. L. REV. 26, 118 (2000) (arguing that the "Reconstruction Republicans aimed to give Congress broad power to declare and define the fundamental rights — the privileges and immunities — of American citizens above and beyond the floor set by courts"); Caminker, "Appropriate" Means-Ends Constraints on Section 5 Powers, supra note 20, at 1132 (characterizing as plausible the view that "Section 5 is best understood as contemplating some participation by Congress in the definition of constitutional norms"); Laycock, supra note 118, at 39 & n.55; Michael W. McConnell, \textit{Institutions and Interpretation: A Critique of City of Boerne v. Flores}, 109 YALE L.J. 115, 133 (1999) [hereinafter McConnell, \textit{Institutions and Interpretation}](suggesting that \textit{Boerne} conflicts with the Framers' intent); see also Steven A. Engel, \textit{Note, The McCulloch Theory of the Fourteenth Amendment: City of Boerne v. Flores and the Original Understanding of Section 5}, 109 YALE L.J. 115, 133 (1999) (arguing that \textit{Boerne}'s historical analysis "does not hold up under scrutiny" and that the Fourteenth Amendment's legislative history "do[es] not provide any support for a narrowing of Congress's power to enforce" the Amendment). But see Hamilton, supra note 118, at 934-35 (arguing that "[t]he constitutional structure feature that is enforced in the federalism cases is not inherently at odds with the Fourteenth Amendment").

\textsuperscript{128} See, e.g., 1 LAURENCE H. TRIBE, \textit{AMERICAN CONSTITUTIONAL LAW} § 5-16, at 959 (3d ed. 2000); Caminker, "Appropriate" Means-Ends Constraints on Section 5 Powers, supra note 20, at 1147 (arguing that \textit{Boerne}'s congruence-and-proportionality test "clearly deviated from the Court's longstanding articulation and application of the more deferential \textit{McCulloch} means-ends standard"); Michael C. Dorf & Barry Friedman, \textit{Shared Constitutional Interpretation}, 2000 SUP. CT. REV. 61, 91 (noting that "congruence and proportionality is a demanding standard"); Stephen Gardbaum, \textit{The Federalism Implications of Flores}, 39 WM. & MARY L. REV. 665, 682 (1998) (stating that \textit{Boerne} establishes a "more rigorous" test for determining whether legislation is appropriate under Section 5); McConnell, \textit{Institutions and Interpretation}, supra note 127, at 166 (noting congruence and proportionality elevates level of scrutiny applied to Section 5 legislation); Post & Siegel, supra note 5, at 477
with considerable rigor and has demanded extensive findings of underlying unconstitutional conduct to validate congressional enforcement legislation.\(^{129}\)

The *Boerne* decisions establish that Congress cannot rely on either general assertions or isolated examples of unconstitutional conduct,\(^{130}\) but instead must document a widespread pattern of such conduct by entities of the precise sort being subject to suit.\(^{131}\) *Boerne, Florida Prepaid, College Savings Bank, Kimel, Morrison,* and *Garrett* each reject as inadequate the findings underlying the disputed statutes on the grounds that Congress documented too few instances of unconstitutional conduct.\(^{132}\) Even the sizable record Congress amassed regarding the inadequacy of state attempts to combat gender-motivated violence proved insufficient to save VAWA because

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129. See infra notes 130-135.

130. See, e.g., Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 370 (2001) (dismissing “unexamined, anecdotal accounts of ‘adverse, disparate treatment by state officials,’” when found outside the formal legislative findings); Kimel v. Florida Bd. of Regents, 528 U.S. 62, 90 (2000) (rejecting as insufficient “assorted sentences... cobble[d] together from a decade’s worth of congressional reports and floor debates” as either general unsubstantiated assertions or isolated anecdotal examples). While the Court has not wholly rejected anecdotal evidence suggesting unconstitutional conduct, it has treated such examples with considerable skepticism and indicated its preference for examples of adjudicated constitutional violations. See, e.g., Garrett, 531 U.S. at 375-76 (Kennedy, J., concurring) (noting absence of “confirming judicial documentation” in the form of court decisions addressing unconstitutional discrimination by States against people with disabilities).


132. See, e.g., Garrett, 531 U.S. at 370 (finding that the lengthy legislative record documenting employment discrimination against the disabled included few instances of invidious state activities and noting that even if six specific record examples involving contemporary state action amounted to unconstitutional discrimination, they “fall far short of even suggesting the pattern of unconstitutional discrimination on which §5 legislation must be based”); Morrison, 529 U.S. at 626 (holding record inadequate for failing to identify violations in every State); Kimel, 528 U.S. at 89 (finding legislative findings underlying the abrogation of state immunity in the ADEA so wanting as to render Congress’ extension of the Act to the States “an unwarranted response to a perhaps inconsequential problem”); Coll. Sav. Bank, 527 U.S. at 645-46 (“Congress appears to have enacted this legislation in response to a handful of instances of state patent infringement that do not necessarily violate the Constitution.”); City of Boerne, 521 U.S. at 530-31 (noting that documented instances of state-sponsored religious bigotry dated back forty years or more, while more recent examples involved benignly motivated laws of general applicability that placed only “incidental burdens” on religion and reflected neither “animus [n]or hostility to burdened religious practices”).
Congress had not compiled findings of unconstitutional conduct in every State. Garrett subsequently cited neither a state-by-state requirement nor Morrison at all, but likewise dismissed a lengthy record of legislative findings for failure to identify unconstitutional conduct expressly by States. And while Hibbs again seems to depart from this trend by deeming the congressional record underlying the FMLA adequate, the decision is careful to emphasize "the extent and specificity" of unconstitutional state conduct found in that record and to affirm the continuing validity of Boerne's demanding "means-ends" approach.

This rigorous approach contrasts significantly with that taken by the Court in a quartet of earlier decisions upholding provisions of the VRA challenged as enactments exceeding Congress's enforcement power. South Carolina v. Katzenbach upholds congressional power to suspend literacy tests and other voting qualifications in jurisdictions that historically engaged in voting discrimination. It also affirms Congress's power to block such jurisdictions from changing their electoral practices

133. Morrison, 529 U.S. at 626 (stating "that the problem of discrimination against the victims of gender-motivated crimes does not exist in all States, or even most States"); Post & Siegel, supra note 5, at 478.

134. Garrett, 531 U.S. at 368-69; see also Kimel, 528 U.S. at 90 (finding that even if a state report established unconstitutional age discrimination by that State, it was not sufficient to establish that unconstitutional age discrimination "had become a problem of national import." (quoting Florida Prepaid, 527 U.S. at 641)).

Garrett moreover suggests that supportive evidence found in documents outside the formal legislative record should be disregarded. The opinion disregards "a host of incidents" that purported to represent unconstitutional state discrimination in employment based on disability because those incidents consisted "not of legislative findings, but of unexamined, anecdotal accounts" that did not necessarily rise to constitutional dimension and that were submitted "not directly" to Congress but instead to a task force that did not specifically address state discrimination in employment. See Garrett, 531 U.S. at 370-71.

135. Hibbs, 123 S. Ct. at 1981-82 & n.11. To be sure, Hibbs acknowledges that the record underlying the FMLA was not markedly more comprehensive than the records Garrett and Kimel deemed inadequate. Id. at 1981. Hibbs nevertheless insists that Congress may more easily demonstrate a pattern of state constitutional violations when it targets gender-based distinctions than when it addresses nonsuspect classifications. The reason, Hibbs states, is that the heightened judicial scrutiny triggered by gender discrimination makes defending gender-based distinctions more difficult. Id. at 1982; supra note 12. Hibbs leaves unanswered, however, why this heightened scrutiny did not establish the sufficiency of the more-extensive record underlying VAWA in United States v. Morrison. See 529 U.S. 598 (2000) (rejecting congressional power to subject private parties to liability under VAWA); see also Coyle, supra note 12 (noting tensions between Hibbs and Morrison). And to the extent that the Court does accord Congress greater deference in the realm of gender discrimination, Hibbs makes clear that it will continue to require specific and extensive supporting congressional findings. Thus while Hibbs is certainly more deferential to legislative judgments than was Kimel or Garrett, the decision hardly accords Congress the tremendous leeway displayed in the earlier VRA cases. See infra notes 149-153 and accompanying text.


137. 383 U.S. 301 (1966).
absent prior federal preclearance certifying that the proposed changes were discriminatory neither in purpose nor in effect. Katzenbach v. Morgan affirms Congress's authority to bar English literacy as a prerequisite to voting for graduates of designated non-English-language schools. Oregon v. Mitchell upholds congressional power to suspend the use of the literacy tests nationwide for a five-year period. City of Rome v. United States affirms the constitutionality of the VRA’s preclearance process, as extended in 1975, and expressly approves congressional power to ban within that process practices that are discriminatory in effect, even if evidence of underlying discriminatory intent is absent. Read together, these decisions embrace expansive federal authority to intrude deeply into state sovereign processes, to prohibit conduct the Constitution permits, and to promote the race-conscious policies that inhere in the VRA. They support the creation and maintenance of the large federal bureaucracy needed to implement the VRA’s provisions.

138. For a description of the preclearance process under § 5 of the VRA, see infra notes 169-171 and accompanying text.

139. See Katzenbach v. Morgan, 384 U.S. 641 (1966); infra notes 147-153 and accompanying text (discussing Katzenbach v. Morgan). Congress intended for the provision to over-ride New York’s English literacy requirements, which functioned to disenfranchise thousands of the State’s Puerto Rican residents. See STONE ET AL., supra note 63, at 222.


141. 446 U.S. 156 (1980).

142. City of Rome, 446 U.S. at 173.

143. See Pamela S. Karlan, Undoing the Right Thing: Single-Member Offices and the Voting Rights Act, 77 VA. L. REV. 1, 2 (1991) (noting that the VRA “demands the intimate involvement of the courts in state and local electoral systems, even to the extent of setting aside longstanding political arrangements”).

144. See, e.g., Ellen D. Katz, Federalism, Preclearance, and the Rehnquist Court, 46 VILL. L. REV. 1179, 1205 (2001) [hereinafter Katz, Federalism, Preclearance, and the Rehnquist Court] (noting that compliance with a ban on racially discriminatory effects require those governed by it to consider race expressly or risk violating the proscription); Daniel Hays Lowenstein, You Don’t Have to be Liberal to Hate the Racial Gerrymandering Cases, 50 STAN. L. REV. 779, 825 (1998) (noting that under both § 2 and § 5 of the VRA “race is a privileged criterion” and that “[t]he legislature and everyone who participates in the process must begin with race”); Peter J. Rubin, Reconnecting Doctrine and Purpose: A Comprehensive Approach to Strict Scrutiny After Adarand and Shaw, 149 U. PA. L. REV. 1, 107 (2000) (describing the Court’s “implicit recognition that race-based districting to avoid retrogression may well be required to satisfy the effect prong of section 5 preclearance scrutiny”); Lisa Erickson, Comment, The Impact of the Supreme Court’s Criticism of the Justice Department in Miller v. Johnson, 65 MISS. L.J. 409, 421 (1995) (noting that § 5 requires covered jurisdictions to “consider race in implementing new voting practices in order to achieve equal opportunity in voting rights”).

Most notably, they accord considerable deference to congressional judgments regarding the necessity of the measures. Katzenbach v. Morgan, for example, upheld as appropriate enforcement legislation section 4(e) of the VRA of 1965. The statute blocked New York from administering an English literacy requirement that functioned to disenfranchise large segments of New York City’s Puerto Rican community. Morgan states that Congress could have concluded both that New York’s requirement itself constituted “invidious discrimination in establishing voter qualifications,” and that it fostered “discrimination in governmental services.” Morgan did not require specific congressional findings supporting these conclusions, nor did it even mandate that Congress had in fact reached such conclusions about section 4(e)’s necessity. Instead, the Court deemed it sufficient that Congress “might well have questioned” the facially neutral justifications the State proffered for its law, and that the Court could “perceive a basis upon which the Congress might resolve the conflict as it did.” Morgan states: “It is not for us to review the congressional resolution” of the factors that informed that judgment.

This deference, which several of the opinions in Oregon v. Mitchell echo, and Boerne appears to condone, contrasts noticeably with

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146. See, e.g., Nowak, supra note 1, at 1110 (noting that these decisions “granted great deference to Congress in controlling actions of state governments and private persons related to racial discrimination in voting”).
150. Id. at 653.
151. Id. at 654-55.
152. Id. at 653.
153. Id.
154. Oregon v. Mitchell, 400 U.S. 112, 132 (1970) (opinion of Black, J.) (stating that Congress “could have found” that literacy tests had racially disparate effects and “could have concluded” that “condition[ing]” the vote on literacy violates the Equal Protection Clause); id. at 147 (Douglas, J., dissenting in part, concurring in part) (stating that Congress “need not make findings as to the incidence of literacy,” and that the legislative history revealed that Congress was “influenced” by a host of relevant factors); id. at 216 (Harlan, J., dissenting in part, concurring in part) (finding the issue “not free from difficulty,” and concluding that “[d]espite lack of evidence of specific instances of discriminatory application or effect, Congress could have determined that racial prejudice is prevalent throughout the Nation, and that literacy tests unduly lend themselves to discriminatory application”); id. at 216 n.94 (Harlan, J., dissenting in part, concurring in part) (stating that legislative history from the 1965 Act sufficed to justify the 1970 ban on literacy tests and noting that “[w]hether to engage in a more particularized inquiry into the extent and effects of discrimination, either as a condition precedent or as a condition subsequent to suspension of literacy tests, was a choice for Congress to make”); id. (Harlan, J., dissenting in part, concurring in part) (noting that “[w]hile a less sweeping approach in this delicate area might well have been appropriate, the choice which Congress made was within the range of reasonable.”); id. at 233 (Brennan, J., dissenting in part, concurring in part) (stating that “[c]ongressional power to remedy the evils resulting from state-sponsored racial discrimination
the increasingly rigorous review employed in the Boerne cases. And yet, the Boerne cases do not purport to overrule the VRA precedent. Indeed, they self-consciously leave this precedent largely intact. Boerne cites each of the provisions upheld in the VRA quartet from South Carolina v. Katzenbach through City of Rome as permissible enforcement legislation, despite both "the burden those measures placed on the States" and their proscription of constitutional conduct. Boerne's progeny, with perhaps somewhat less vigor, likewise invoke the earlier VRA provisions as examples of permissible congressional action, and cite the decisions upholding them as so establishing.

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155. City of Boerne v. Flores, 521 U.S. 507, 528 (1997) (stating that "[b]oth rationales for upholding § 4(e) rested on unconstitutional discrimination by New York and Congress' reasonable attempt to combat it"); see also infra Part III.


159. Hibbs, 123 S. Ct. at 1982 (citing the VRA provisions upheld in South Carolina v. Katzenbach as examples of permissible congressional measures to address a serious problem); Garrett, 531 U.S. at 373 (stating that the ADA's "constitutional shortcomings are apparent" when compared with the VRA provisions upheld in South Carolina v. Katzenbach);
The Court has nevertheless been unable to distinguish convincingly the statutory regimes the VRA decisions upheld from those struck down under the *Boerne* doctrine. Geographic restrictions,160 statutorily mandated expiration dates,161 and documented examples of flagrant and pervasive underlying unconstitutional conduct162 distinguish some, but not all, of the provisions preserved. And *Boerne* itself insists that valid Section 5 legislation does not require "termination dates, geographic restrictions, or egregious predicates."163 None of these elements, moreover, explains the markedly different degrees of deference employed by the Court in the earlier VRA cases, on the one hand, and the *Boerne* cases, on the other.164 In short, the *Boerne* cases appear to be doctrinally irreconcilable with the earlier VRA precedent they purport to preserve.165

To be sure, in *Boerne* and its progeny, the Court's preservation of the cases from *South Carolina v. Katzenbach* through *City of Rome* may signify nothing more than its unwillingness to overrule these

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*Morrison*, 529 U.S. at 626 (describing VAWA as "unlike" the remedies upheld in *Katzenbach v. Morgan* and *South Carolina v. Katzenbach*); *Kimel*, 528 U.S. at 89 (contrasting congressional record supporting ADEA's abrogation of state immunity with that underlying the VRA provisions upheld in *South Carolina v. Katzenbach*); *Coll. Sav. Bank*, 527 U.S. at 639 n.5 (invoking *Boerne*'s discussion of the VRA quartet to distinguish the statutory provision in dispute).


162. *Mitchell*, 400 U.S. at 132 (opinion of Black, J.) (noting that "[i]n enacting the literacy test ban... Congress had before it a long history of the discriminatory use of literacy tests to disfranchise voters on account of their race"); *South Carolina v. Katzenbach*, 383 U.S. at 308-29 (noting extensive congressional findings of discriminatory conduct supporting imposition of preclearance requirement on covered jurisdictions). But compare *Morrison*, 529 U.S. at 626 (rejecting as inadequate extensive congressional findings of state misconduct in criminal justice administration where findings did not document misconduct in every State), with *Mitchell*, 400 U.S. at 284 (Stewart, J., concurring in part and dissenting in part) (upholding nationwide ban on literacy tests despite absence of state-by-state findings), and *Katzenbach v. Morgan*, 384 U.S. at 646-47 (upholding nationwide prohibition on English literacy tests despite absence of specific findings supporting unconstitutional use of such tests). See generally Samuel Estreicher & Margaret H. Lemos, *The Section 5 Mystique*, Morrison, and the Future of Antidiscrimination Law, 2000 SUP. CT. REV. 109, 156 (noting tension between *Morrison* and *Mitchell*); Post & Siegel, supra note 5, at 478-79 (same).


164. See sources cited supra notes 146 and 156 and accompanying text.

165. See supra note 157 and accompanying text.
older, historically resonant decisions. \(^{166}\) And yet, the Court’s nearly unanimous post-Boerne affirmation of the constitutionality of a broad construction of section 5 of the VRA compels a more broad understanding of the Court’s preservation of these prior decisions. At issue in *Lopez v. Monterey County* \(^{167}\) was whether a jurisdiction subject to section 5 of the VRA must seek and obtain preclearance prior to implementing nondiscretionary electoral changes. \(^{168}\) Monterey County is a covered jurisdiction under the VRA, \(^{169}\) meaning that it may not enact or seek to administer electoral rules unless it receives federal judicial or administrative preclearance. \(^{170}\) It must demonstrate, either to the Attorney General or to the federal district court in Washington, D.C., that a proposed change “does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color” or membership in a language-minority group. \(^{171}\) The dispute in *Lopez* arose because Monterey County had not obtained preclearance prior to implementing changes to its system for electing judges.

*Lopez* holds that section 5 of the VRA requires preclearance of the changes, even if state law mandated them and the County exercised no discretion in implementing them. Justice O’Connor’s majority opinion holds that nondiscretionary conduct by a covered jurisdiction must be precleared because it may produce a racially discriminatory effect. \(^{172}\) Nondiscretionary conduct, however, necessarily lacks the discriminatory motivation needed to violate the Constitution. \(^{173}\) Thus a

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166. Pamela S. Karlan, *Easing the Spring: Strict Scrutiny and Affirmative Action After the Redistricting Cases*, 43 WM. & MARY L. REV. 1569, 1594 (2002) [hereinafter Karlan, *Easing the Spring*] (describing the VRA as the “crown jewel of the Second Reconstruction” and suggesting that the Court “has been unwilling to use strict scrutiny to dismantle [it]”).


168. See generally Katz, *Federalism, Preclearance, and the Rehnquist Court*, supra note 144, at 1202-03 (discussing relationship of *Boerne* and *Lopez*).

169. See *Lopez* v. Monterey County, 525 U.S. 266, 271 (1999) (interpreting the Voting Rights Act of 1965, Pub. L. No. 89-110, §§ 4-5, 79 Stat. 437, 438-39 (codified as amended at 42 U.S.C. §§ 1973(b)(b), (c), 1973c (2000))). A jurisdiction was “covered” if, on the date the VRA became effective, it employed as a prerequisite to voting devices such as a literacy, understanding, subject-matter, or moral-character test, and less than fifty percent of the voting-age population was registered or actually voted in the presidential election of 1964. See § 4(b), (c), 79 Stat. at 438-39 (defining which jurisdictions were covered). As Congress extended § 5 in 1970, 1975, and 1982, dates subsequent to 1964 were selected for comparative measurements.


172. See *Lopez*, 525 U.S. at 283.

173. See Mobile v. Bolden, 446 U.S. 55, 61-62 (1980) (plurality opinion of Stewart, J.) (holding that “action by a State that is racially neutral on its face violates the Fifteenth
proscription against such conduct, even where discriminatory in effect, seemingly lacks any linkage to unconstitutional action. Under *Boerne* and its progeny, such a proscription would appear to be beyond Congress’s enforcement powers.\(^{174}\) To be sure, the prior bad acts that trigger the coverage designation under section 5 suggest a linkage between discriminatory effects and invidious intent.\(^{175}\) Section 5 eliminates the presumption of validity that typically attaches to governmental decisionmaking and shifts “the burden of inertia” to covered jurisdictions to justify the legality of their conduct.\(^{176}\) Within this framework, invidious intent may be assumed to underlie discretionary conduct that produces a racially discriminatory effect. And yet, that assumption is not plausible where the conduct in question is nondiscretionary.

The Court in *Lopez* dismisses this concern. Justice O’Connor states simply “that Congress has the constitutional authority to designate covered jurisdictions and to guard against changes that give rise to a discriminatory effect in those jurisdictions.”\(^{177}\) Nondiscretionary changes can have such an effect, and thus Congress may require covered jurisdictions to obtain preclearance of them. “[T]he Voting Rights Act, by its nature, intrudes on state sovereignty,” she concludes. “The Fifteenth Amendment permits this intrusion . . . and our holding today adds nothing of constitutional moment to the burdens that the Act imposes.”\(^{178}\) In other words, this process may be intrusive,\(^{179}\) but it falls well within Congress’s enforcement powers to mandate. The section 5 preclearance process infringes on state sovereignty and *Lopez* affirms that this infringement is constitutionally permissible.\(^{180}\)

Amendment only if motivated by a discriminatory purpose”); Washington v. Davis, 426 U.S. 229, 239-41 (1976) (discussing the Fourteenth Amendment’s intentionality requirement).

174. *See supra* text accompanying note 128.

175. *See Lopez*, 525 U.S. at 294-95 (Thomas, J., dissenting) (discussing this justification for § 5 of the VRA).

176. *See Beer v. United States*, 425 U.S. 130, 140 (1976) (noting that Congress passed § 5 in response to the practice of some jurisdictions of passing new discriminatory voting laws as soon as the old ones had been struck down, and accordingly “to shift the advantage of time and inertia from the perpetrators of the evil to its victim” by “freezing election procedures in the covered areas unless the changes can be shown to be nondiscriminatory”).


178. *Id.* at 284-85.

179. *See also* Lowenstein, *supra* note 144, at 790 (describing preclearance process as “an unprecedented federal intrusion into the governing processes of the states.”).

The Court had previously upheld congressional authority to enact section 5. It had not addressed, however, the constitutionality of the statute as extended in 1982 or its validity under the Boerne framework. These latter developments had significantly called into question the validity of section 5's application to nondiscretionary conduct, and, more broadly, the validity of the preclearance process itself. And yet, Lopez blithely dispenses with them. Justice O'Connor cites Boerne but once, and then for the proposition that Congress's enforcement power includes the power to prohibit constitutional conduct and intrude deeply into state sovereign process. Lopez ignores the factors that have emerged as central to Boerne's congruence-and-proportionality inquiry, making no mention, for example, of the congressional findings underlying the 1982 extension of section 5. Instead, Justice O'Connor affirms the validity of section 5 based on South Carolina v. Katzenbach and City of Rome, both of which upheld earlier versions of section 5 based on distinct legislative findings and historical circumstances.

Remarkably, Justice O'Connor's opinion is joined not only by Justices Stevens, Souter, Ginsburg, and Breyer, all of whom dissented in

181. See City of Rome v. United States, 446 U.S. 156, 183 (1980); South Carolina v. Katzenbach, 383 U.S. 301, 308 (1966); see also Guard, Impotent Figureheads, supra note 156, at 357 (arguing that principles of stare decisis support the Court's holding in Lopez).


183. Lopez, 525 U.S. at 282-83:

As the Court recently observed with respect to Congress' power to legislate under the Fourteenth Amendment "[l]egislation 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 and intrudes into legislative spheres of autonomy previously reserved to the States."

Id. (quoting City of Boerne v. Flores, 521 U.S. 507, 518 (1997)) (alteration in original).

184. To be sure, the adequacy of congressional findings has become increasingly central in the Court's congruence-and-proportionality analysis in decisions post-dating Lopez. See Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 370-74 (2001); id. at 380-85 (Breyer, J., dissenting); United States v. Morrison, 529 U.S. 598, 626 (2000); Kimel v. Florida Bd. of Regents, 528 U.S. 62, 89-91 (2000); see also supra notes 122-124 and accompanying text (discussing treatment of legislative findings in the Boerne decisions). Even so, Boerne addresses the congressional findings underlying the RFRA in some detail, and months after Lopez, Florida Prepaid again considered such findings to be of significant import. See Florida Prepaid, 527 U.S. at 639; Boerne, 521 U.S. 507, 530-31 (1997).

185. See Lopez, 525 U.S. at 282-84; see also City of Rome, 446 U.S. at 180-82 (discussing congressional findings supporting the 1975 extension of the Act and agreeing that the need for the extension was "unsurprising and unassailable" and that it was "plainly a constitutional method of enforcing the Fifteenth Amendment"); South Carolina v. Katzenbach, 383 U.S. at 308-09 (noting extensive congressional findings underlying the 1965 VRA).
Boerne's progeny, but also by Justice Scalia, who voted with the majority in all of the Boerne decisions. So too, the Chief Justice and Justice Kennedy, who concur in Lopez, and Justice Thomas, who dissents, express no qualms about the validity of section 5, as amended in 1982. The Chief Justice and Justice Kennedy disagree with the majority that section 5 of the VRA applies to nondiscretionary electoral changes. They concur in the judgment because they thought Monterey had exercised discretionary judgments in the case before the Court. Justice Kennedy's opinion identifies no constitutional difficulty with section 5, so construed. Justice Thomas dissents alone, arguing that the Court's construction of section 5 contravenes Boerne's congruence-and-proportionality standard. Requiring preclearance of nondiscretionary changes, he states, fails to remedy any constitutional wrong. But even Justice Thomas did not suggest that section 5 itself, as amended in 1982, is suspect under the Boerne doctrine. Lopez's affirmation of section 5 was not, accordingly, the product of a divided Court.

Of course, this affirmation could be of only limited significance. Lopez, after all, was primarily a case about a relatively narrow question of statutory interpretation and did not present a direct challenge to the constitutionality of the statute. The case was not litigated as a vehicle to explore the scope of congressional power under the Constitution. At the time, the Boerne decision was nearly two-years old, and while the Florida Prepaid cases were pending, the Court might not yet have appreciated the potential breadth of the Boerne doctrine. Justice Thomas nevertheless alerted the Court that its construction of section 5 of the VRA implicated serious constitutional questions under Boerne and the Court responded with sweeping language affirming exceptionally broad congressional power.

186. See Garrett, 531 U.S. at 376 (Breyer, J., dissenting); Morrison, 529 U.S. at 655 (Breyer, J., dissenting); Kimel, 528 U.S. at 92 (Stevens, J., dissenting); Coll. Sav. Bank, 527 U.S. at 691 (Stevens, J., dissenting); id. at 693 (Breyer, J., dissenting); Florida prepaid, 527 U.S. at 648 (Stevens, J., dissenting).


188. Lopez, 525 U.S. at 288 (Kennedy, J., concurring in the judgment); id. at 289-98 (Thomas, J., dissenting).

189. Id. at 288-89 (Kennedy, J., concurring in the judgment).

190. See id. at 295-96 (Thomas, J., dissenting) (arguing that nondiscretionary actions cannot be motivated by unconstitutional conduct, and accordingly that Congress cannot reach them through enforcement legislation).

191. See, e.g., State Appellee's Brief on the Merits, Lopez v. Monterey County, 525 U.S. 266 (1999) (No. 97-1396); Brief for Appellee Monterey County, Lopez (No. 97-1396); Brief on the Merits for Appellant, Lopez (No. 97-1396).
As a result, *Lopez* magnifies the import of the Court’s preservation of the VRA quartet in the *Boerne* decisions.[^192] Like the VRA decisions and in contrast to the *Boerne* cases themselves, *Lopez* defers to congressional judgments regarding how best to enforce the Reconstruction Amendments.[^193] It suggests that stare decisis alone does not explain the Court’s insistence that the cases from *South Carolina v. Katzenbach* to *City of Rome* remain good law. Instead, *Lopez* suggests that the Rehnquist Court not only accepts the measures upheld in the VRA quartet but actually prospectively embraces congressional power to intervene intrusively into state affairs to block racial discrimination in the political process.

**B. Attempting Reconciliation: Voting Rights “Proper” in the Rehnquist Court**

The Rehnquist Court’s determined preservation of the VRA precedent and its broad affirmation of federal power in *Lopez* appear even more puzzling given much of the Court’s other contemporary voting-rights jurisprudence. The Court has repeatedly, albeit not exclusively,[^194] read the VRA parsimoniously.[^195] These narrow readings of the VRA contrast with prior precedent[^196] and adopt strained readings of congressional intent.[^197] These decisions thus seem to ignore the deference the *Boerne* decisions and *Lopez* suggest Congress enjoys.


[^193]: See supra note 183 and accompanying text.

[^194]: See, e.g., *Lopez*, 525 U.S. 266 (1999) (adopting a broad construction of § 5 to require preclearance of nondiscretionary electoral changes implemented by a covered jurisdiction); *Young v. Fordice*, 520 U.S. 273, 290 (1997) (requiring preclearance of a State’s implementation of separate registration systems for federal and state elections after the National Voter Registration Act had set parameters for federal elections); *Lopez v. Monterey County*, 519 U.S. 9 (1996) (construing broadly § 5 to block elections planned under an unprecleared statute, even when the result may leave the jurisdiction without an electoral system); *Clark v. Roemer*, 500 U.S. 646, 652 (1991) (adopting broad construction of § 5 to hold that judicial elections held pursuant to unprecleared statutes should have been enjoined).

[^195]: See, e.g., *Bossier Parish II*, supra note 30, 528 U.S. 320 (2000) (construing the purpose prong of the VRA’s § 5 to proscribe retrogressive intent and not an intent to dilute or invidious intent more generally); *Bossier Parish I*, supra note 30, 520 U.S. 471 (1997) (holding that § 5 does not block preclearance of voting changes that violate § 2 of the VRA); *Abrams v. Johnson*, 521 U.S. 74 (1997) (adopting narrow construction of § 5 that deemed nonretrogressive a districting plan under which a black-majority district went from representing one-tenth of the State’s delegation to one-eleventh); *Holder v. Hall*, 512 U.S. 874 (1994) (holding § 2 of the VRA inapplicable to a challenge to the size of a local governing structure); *Presley v. Etowah County Comm’n*, 502 U.S. 491 (1992) (holding § 5 of the VRA inapplicable to reallocation of authority among elected officials).

[^196]: See, e.g., *Allen v. Bd. of Elections*, 393 U.S. 544, 566-67 (1969) (finding that Congress intended § 5 to have “the broadest possible scope” and to reach “any state enactment which altered the election law of a covered State in even a minor way”).

[^197]: See infra note 225 and text accompanying note 243.
when legislating to block racial discrimination in voting.\textsuperscript{198} Shaw v. Reno\textsuperscript{199} and its progeny,\textsuperscript{200} moreover, hinder the easy imposition of race-conscious districting practices that are central to the VRA's plan to foster political participation by racial minorities. Several scholars have charged that the Shaw cases manifest hostility to the political gains made by African Americans and other racial minorities as a consequence of the VRA and the Second Reconstruction more generally.\textsuperscript{201}

These cases may be understood, however, as expressing a more particular concern. They manifest the Court's resistance to a particular type of race-conscious decisionmaking within the political process. The Court seeks not to mandate colorblindness,\textsuperscript{202} but instead to

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  \item \textsuperscript{198} See supra notes 180-185 and accompanying text.
  \item \textsuperscript{199} 509 U.S. 630 (1993).
  \item \textsuperscript{201} See, e.g., KOUSSER, supra note 1; A. Leon Higginbotham Jr. et al., Shaw v. Reno: A Mirage of Good Intentions with Devastating Racial Consequences, 62 FORDHAM L. REV. 1593, 1603 (1994) (suggesting that Shaw might be the “equivalent for the civil-rights jurisprudence of our generation to what Plessy v. Ferguson and Dred Scott v. Sandford were for prior generations”); Karlan, End of the Second Reconstruction?, supra note 1, at 699 (arguing that Shaw “perversely used the equal protection clause . . . to make it harder for blacks to reap the benefits of reapportionment available to other cohesive groups”); Laughlin McDonald, The Counterrevolution in Minority Voting Rights, 65 Miss. L.J. 271, 273-74 (1995) (arguing the Court “has launched a counterrevolution which threatens to overthrow the gains in minority office holding so laboriously accumulated over the past 30 years”); Nowak, supra note 1, at 1113 (arguing that the Shaw decisions “made it impossible for the Attorney General to order or even encourage a state or local legislature to create legislative district lines in a way that would strengthen minority race voting power”); Jamie B. Raskin, Affirmative Action and Racial Reaction, 38 HOW. L.J. 521, 526-28 (1995) (describing Shaw’s “naked and unprincipled pursuit of inequality” and arguing that “[u]nless it is assumed that whites have a presumptive constitutional right to be in a political majority, Shaw makes no sense”)
  \item \textsuperscript{202} The Rehnquist Court periodically celebrates colorblind decisionmaking, and some Justices laud it as a virtue and a constitutional mandate. See, e.g., Rice v. Cayetano, 528 U.S. 495, 512 (2000) (discussing the Fifteenth Amendment’s “mandate of neutrality”); Vera, 517 U.S. at 999 (Thomas, J., concurring in judgment) (disagreeing that “strict scrutiny is not invoked by the intentional creation of majority-minority districts”); Miller, 515 U.S. at 904 (noting that the “central mandate” of the Equal Protection Clause “is racial neutrality in governmental decisionmaking”); see also Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 239 (1995) (Scalia, J., concurring in part and concurring in judgment) (stating that “government can never have a ‘compelling interest’ in discriminating on the basis of race in order to ‘make up’ for past racial discrimination in the opposite direction”); Metro Broad., Inc. v. FCC, 497 U.S. 547, 636 (1990) (Kennedy, J., dissenting) (discussing “the cardinal rule that our Constitution protects each citizen as an individual, not as a member of a group”); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 520 (1989) (Scalia, J., concurring in judgment) (same); id. at 518 (Kennedy, J., concurring in part and concurring in judgment) (noting that “[t]he moral imperative of racial neutrality is the driving force of the Equal Protection Clause”)

Shaw and its progeny do not, however, require race-neutral districting. Racially predominant districting is subject to strict scrutiny, while racially informed districting practices do not even trigger heightened review. See Easley, 532 U.S. 234 (2001) (finding that race was considered in the redistricting process, but that it was not the predominant factor and thus that strict scrutiny was not required); see also Karlan, Easing the Spring, supra note 166, at
restrict what it sees as excessive reliance on racial factors. To date, it has deemed such reliance excessive when it has found that race had been used mechanically, visibly, and decisively in the absence of congressional authorization.203

Shaw and its progeny identify an "analytically distinct" cause of action under the Equal Protection Clause that calls for the application of strict scrutiny when legislatures subordinate traditional districting factors to racial considerations, that is, when race is the predominant factor motivating the districting decision.204 Shaw itself focused on the unusual or "bizarre" shape of the challenged district, emphasizing that "reapportionment is one area in which appearances do matter."205 Subsequent decisions hold that the inquiry focuses on whether race-based intent trumps other districting concerns, with district shape offering probative (but not necessary) evidence of such intent.206

The Court has never, however, struck down a districting plan under Shaw that it thought Congress meant to require. The state defendants in each of the Shaw cases claimed that the dictates of the VRA mandated and thus justified the districting plans under challenge.207 In response, Shaw's progeny are careful to hold that the VRA, as enacted, amended, and subsequently interpreted by the Court,208 did not require the districting choice disputed in each case.209

203. The Court's recent decision in Georgia v. Ashcroft, 123 S. Ct. 2498 (2003), supports this view. See infra notes 226-228 and accompanying text.

204. Miller, 515 U.S. at 916.


209. See Vera, 517 U.S. at 976-79; Hunt, 517 U.S. at 911-16; Miller, 515 U.S. at 923-27. Admittedly narrow readings of the statute enabled the Court to so hold. See, e.g., Rubin, supra note 144, at 106; cf. Dillard v. Baldwin County Bd. of Educ., 686 F. Supp. 1459, 1465-66 (M.D. Ala. 1988) (rejecting, prior to Shaw, the notion that "a proposed district must meet, or attempt to achieve, some aesthetic absolute, such as symmetry or attractiveness")
Indeed, five Justices expressly held, and the remaining four assumed, that compliance with the VRA constitutes an interest sufficiently compelling to justify the predominately racial-districting practices that would otherwise violate the Equal Protection Clause.

Absent this assumption, the Shaw cases would significantly narrow the realm in which congressional action is permissible. Recognition of a new claim under the Equal Protection Clause might seemingly be thought to enlarge the realm in which Congress may act by giving it an additional right to enforce. But absent power to define compelling interests within the Shaw framework, any additional authority derived from the Shaw decisions would necessarily encroach upon Congress’s existing Section 5 power to combat racial vote dilution and other defects in the political process. The result would be not simply a reallocation of congressional power under Section 5, but a significant curtailment of it, much in the same way that the obligation to comply with both the Shaw decisions and the VRA circumscribes the range of districting options available to state districting authorities.

The assumption that compliance with the VRA constitutes a compelling interest under Shaw suggests that race may predominate in districting decisions when Congress mandates it. Put differently, the Shaw decisions suggest that what otherwise might be deemed unconstitutional conduct becomes lawful when authorized by Congress to block racial discrimination in voting. To be sure, the Shaw decisions and that “compactness” within the meaning of Gingles, and § 2 of the VRA is a “functional concept” that is met when “effective[] representation” is possible).

210. See Vera, 517 U.S. at 977 (plurality opinion) (“[W]e assume without deciding that compliance with the [§ 2] results test . . . can be a compelling state interest); id. at 990, 990-92 (O’Connor, J., concurring) (stating that “compliance with the results test of VRA § 2(b) is a compelling state interest”); id. at 1004 (Stevens, J., dissenting) (stating that “[e]ven if strict scrutiny applies, I would find these districts constitutional, for each considers race only to the extent necessary to comply with the State’s responsibilities under the Voting Rights Act while achieving other race-neutral political and geographical requirements”); id. at 1046 (Souter, J., dissenting) (describing as significant Justice O’Connor’s concurring position “that compliance with § 2 of the Voting Rights Act is a compelling state interest”); Hunt, 517 U.S. at 915 (“We assume, arguendo, for the purpose of resolving this suit, that compliance with § 2 could be a compelling interest . . . .”).

211. See, e.g., Stevens’s dissent in Vera: Given the difficulty of reconciling these competing legal responsibilities, the political realities of redistricting, and the cost of ongoing litigation, some States may simply step out of the redistricting business altogether, citing either frustration or hopes of getting a federal court to resolve the issues definitively in a single proceeding. Vera, 517 U.S. at 1036-38 (Stevens, J., dissenting) (citation omitted); see also id. at 1045-46 (Souter, J., dissenting) (“The price of Shaw I, indeed, may turn out to be the practical elimination of a State’s discretion to apply traditional districting principles, widely accepted in States without racial districting issues as well as in States confronting them.”).

212. See Karlan, Easing the Spring, supra note 166, at 1586-87 (stating that the assumption that compliance with the VRA can constitute a compelling interest “raise[s] the possibility that congressional or executive understandings of equality that go beyond what the Constitution itself requires can provide a justification for race-conscious state action”).
hardly accord Congress unlimited discretion in this realm. They strongly imply, for example, that the mandates of the Equal Protection Clause preclude Congress from requiring purely race-based districting.\textsuperscript{213} The Shaw decisions nevertheless imply that the Court thinks special solicitude is appropriate when Congress frames measures to block racial discrimination in voting.

This solicitude is absent, however, when decisionmakers act in the absence of congressional authorization. In the Shaw cases, the Court found that the state defendants permitted race to predominate in the absence of congressional authorization. Instead, the Court concluded that each districting plan had been shaped by the actual or anticipated demands of the Department of Justice within the preclearance process. As noted earlier,\textsuperscript{214} under section 5 of the VRA, covered jurisdictions must demonstrate, either to the Attorney General or to the federal district court in Washington, D.C., that a proposed change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color" or membership in a language minority group.\textsuperscript{215} The effects-based prong of this standard, in contrast to its prohibition on intentional racial discrimination, necessarily requires racially informed decisionmaking.\textsuperscript{216} But while the Rehnquist Court accepts as permissible race-consciousness of this sort,\textsuperscript{217} it has long thought that the DOJ has relied excessively on race in exercising its authority within the section 5 preclearance process.\textsuperscript{218} Several decisions charge that the DOJ has impermissibly required covered jurisdictions to create the maximum number of black-majority districts possible, regardless of whether such districts captured communities of interest.\textsuperscript{219} The Court has held that the DOJ's pursuit of

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213. See, e.g., \textit{Miller}, 515 U.S. at 915-16.

214. \textit{See supra} note 170 and accompanying text.


216. \textit{See supra} note 144.

217. See, e.g., \textit{Lopez v. Monterey County}, 525 U.S. 266 (1999); \textit{supra} notes 165-178 and accompanying text.

218. \textit{See Katz, Federalism, Preclearance, and the Rehnquist Court, supra} note 144, at 1180-81, 1212-14 (discussing the Rehnquist Court's mistrust of the Department of Justice).

219. See, e.g., \textit{Abrams v. Johnson}, 521 U.S. 74, 85-86 (1997) (noting that the Georgia legislature had "yielded to the Justice Department's threats, [and] it also adopted the Justice Department's entirely race-focused approach to redistricting — the max-black policy"); \textit{id.} at 87 (finding "strong support . . . for finding the second majority-black district . . . resulted in substantial part from the Justice Department's policy of creating the maximum number of majority-black districts"); \textit{Shaw v. Hunt}, 517 U.S. 899, 913 (1996) (stating that "[i]t appears that the Justice Department was pursuing in North Carolina the same policy of maximizing the number of majority-black districts that it pursued in Georgia"); \textit{Miller v. Johnson}, 515 U.S. 900, 917 (1995) (noting evidence of Georgia's "predominant, overriding desire" to create three black-majority districts to satisfy Department of Justice); \textit{id.} at 924 (noting that
\end{footnotesize}
this “black-max” policy violates the VRA and the Constitution.220

Concerned that the Department of Justice has relied excessively on race within the preclearance process, the Court has sought to rein in its powers. It has construed the VRA narrowly in several recent cases addressing DOJ’s section 5 powers. For example, the Court’s two decisions in the Bossier Parish cases limit the discretionary judgments available to DOJ when evaluating preclearance submissions. The first Bossier Parish decision holds that section 5 permits implementation of electoral changes that violate section 2 of the VRA.221 It thereby largely removes from the ambit of the section 5 inquiry the multi-factored queries into the existence of racial vote dilution that occur under section 2.222 The second Bossier Parish decision holds that sec-

220. See, e.g., Shaw, 517 U.S. at 913 (noting that the Court “again reject[s] the Department’s expansive interpretation of § 5”); Miller, 515 U.S. at 921 (noting that “compliance with federal antidiscrimination law cannot justify race-based districting where the challenged district was not reasonably necessary under a constitutional reading and application of those laws”); id. at 925 (stating that “[i]n utilizing § 5 to require States to create majority-minority districts wherever possible, the Department of Justice expanded its authority beyond what Congress intended and we have upheld”); see also Katz, Federalism, Preclearance, and the Rehnquist Court, supra note 144, at 1212-13.

221. Bossier Parish I, supra note 30, 520 U.S. 471 (1997). Section 2 prohibits any voting “standard, practice, or procedure” that “results in a denial or abridgment of the right . . . to vote on account of race or color.” 42 U.S.C. § 1973(a) (2000). A voting practice is dilutive and violates § 2,

if, based on the totality of circumstances, it is shown that the political processes leading to the nomination or election in the State or political subdivision are not equally open to [members of the protected class] in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. 42 U.S.C. § 1973(b) (1994).

tion 5 permits implementation of electoral changes implemented with a discriminatory, albeit nonretrogressive, intent. It thus limits review to the facially straightforward assessment of retrogression, that is, whether the proposed change worsens the condition of members of a racial minority. Both decisions reflect the Court's hope that by curbing the discretion exercised by DOJ under the statute, it will block the DOJ from relying too heavily on race and thereby overstepping its authority in the future. 

223. See Bossier Parish II, supra note 30, 528 U.S. 320 (2000); see also Katz, Federalism, Preclearance, and the Rehnquist Court, supra note 144, at 1186-90 (discussing decision).

224. The Court's past affinity for retrogression may have reflected its view that the measure is objective, clear, and easy to administer. See, e.g., Bush v. Vera, 517 U.S. 952, 983 (1996) (noting that "[n]onretrogression . . . merely mandates that a minority's opportunity to elect representatives of its choice not be diminished, directly or indirectly, by the State's actions"); Holder v. Hall, 512 U.S. 874, 883-84 (1994) (noting "there is little difficulty in discerning the two voting practices to compare to determine whether retrogression would occur"); Shaw v. Reno, 509 U.S. 630, 655 (1993) (stating that "[a] reapportionment plan would not be narrowly tailored to the goal of avoiding retrogression if the State went beyond what was reasonably necessary to avoid retrogression"). The standard, however, is more malleable than these decisions acknowledge. See, e.g., Abrams, 521 U.S. at 97 (holding nonretrogressive plan that reduces black-majority district from representing one-tenth of the State's congressional delegation to representing one-eleventh); Pamela S. Karlan, The Fire Next Time: Reapportionment After the 2000 Census, 50 Stan. L. Rev. 731, 745-47, 749 (1998) (arguing that plan deemed nonretrogressive in Abrams left State's African-American population "quantitatively worse off" and that the Court's treatment of retrogression makes no sense). Georgia v. Ashcroft, 123 S. Ct. 2498 (2003), the Court's most recent section 5 decision, adopts a far more fluid understanding of retrogression, but nevertheless one that continues to curtail DOJ authority. See infra notes 226-233 and accompanying text.

225. See Katz, Federalism, Preclearance, and the Rehnquist Court, supra note 144, at 1213-16. Without doubt, these constructions of section 5 accord Congress far less deference than the Boerne decisions and Lopez suggest Congress should receive in the realm of race and the vote. See also supra notes 192-193 and accompanying text (discussing deference). The Court did not simply suspend Chevron deference sub silentio, but also circumscribed DOJ discretion beyond what Congress intended. See, e.g., Katz, Federalism, Preclearance, and the Rehnquist Court, supra note 144, at 1192-1200 (identifying ways in which the statutory constructions adopted in both decisions appear contrary to congressional intent); Rubin, supra note 144, at 92 (critiquing as "remarkable" and implausible the Court's assessment of congressional intent in the second Bossier Parish decision). It did so, however, not in resistance to congressional power to block racial discrimination in voting but instead to block the DOJ from violating the statute. The decisions do not themselves restrict congressional power to mandate the more broad readings of the statute rejected in each case. But see Bossier Parish II, 528 U.S. at 336 (speculating that the rejected construction of § 5 "perhaps . . . raise[s] concerns about § 5's constitutionality" but resting its holding on its finding that this construction "finds no support in the language of § 5"); cf. Nowak, supra note 1, at 1119 n. 114 (arguing that the Court in Bossier Parish II did not rule on the scope of Con-
The Court’s recent decision in *Georgia v. Ashcroft*\(^{226}\) may be similarly understood. At issue in the case was whether Georgia could permissibly replace some majority-minority districts with so-called “coalition” and “influence” districts.\(^{227}\) In coalition districts, black voters need not comprise the majority of a district’s population to be able to elect representatives of choice, while influence districts permit minority voters to exert some sway in the electoral process, but not necessarily elect representatives of choice.\(^{228}\) The Court in *Georgia v. Ashcroft* was unanimous in holding that the VRA does not require that covered jurisdictions like Georgia mechanically retain majority-minority districts whenever possible within constitutional constraints. All nine justices agreed that section 5 instead allows use of coalition districts as an alternative.\(^{229}\) A majority of the Court, moreover, held that the VRA permits covered jurisdictions to rely as well on influence districts to preserve minority voting strength.\(^{230}\)

*Georgia v. Ashcroft* holds that covered jurisdictions have the discretion to select among these districting devices,\(^{231}\) and that a jurisdiction’s decision to replace majority-minority districts with a mixture of influence, coalition, and majority-minority districts need not be regressive.\(^{232}\) The Court accordingly relies on a far more malleable conception of retrogression than it espoused in the *Bossier Parish* cases, which deemed the very rigidity of the retrogression to be among its primary virtues.\(^{233}\) *Georgia v. Ashcroft* nevertheless follows the *Bossier Parish* decisions by continuing to circumscribe the discretion of the Justice Department within the preclearance process. *Georgia v. Ashcroft* cedes to covered jurisdictions discretion unprecedented within the preclearance process to shape their electoral districts, and thereby restricts the ability of the Justice Department to use the newly identified fluidity in the retrogression standard to manipulate districting decisions. That retrogression remains a meaningful curb on racial

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228. *Id.*
229. *See Georgia v. Ashcroft*, 123 S. Ct. at 2511-12; *id.* at 2518 (Souter, J., dissenting).
230. *Id.* at 2512-13.
231. *See id.* at 2511-13 (noting that, as between majority-minority and coalition districts, “[s]ection 5 does not dictate that a State must pick one of these methods of redistricting over another.”); *id.* at 2513 (“Section 5 leaves room for States to use these types of influence and coalition districts . . . . [T]he State’s choice ultimately may rest on a political choice of whether substantive or descriptive representation is preferable.”).
232. *Id.* at 2515 (suggesting that Georgia “likely met its burden of showing nonretrogression”).
233. *See supra* notes 221-225 and accompanying text.
discrimination remains to be seen. What is clear is that the ability of the DOJ to demand fixed numbers of majority-minority districts is greatly diminished.

Finally, *Holder v. Hall* and *Presley v. Etowah County Commission* appear to evince hostility to the VRA, but in fact rest on constructions of congressional intent that leave room for statutory amendments authorizing the proscriptions rejected in each case. At issue in *Holder* was the allegation that county governance by a single commissioner instead of by multiple commissioners elected from districts diluted the vote of the County's African-American community, and thereby had a racially discriminatory result within the meaning of section 2 of the VRA. *Holder* holds section 2 inapplicable to the challenge, finding that “[t]here is no principled reason why one size should be picked over another as the benchmark for comparison.” *Presley* holds that laws altering the powers exercised by elected county commissioners are not changes “with respect to voting” within the meaning of section 5 of the VRA, and hence not changes for which preclearance is required. *Presley* states that subjecting such changes to preclearance “would work an unconstrained expansion of [section 5’s] coverage,” and noted “appellants fail to give any workable standard to determine when preclearance is required.”

The Court could have held otherwise in both cases, at least on the facts presented. The law altering the commissioners’ powers in *Presley* had been adopted following a voting-rights lawsuit that altered the structure of the commission and resulted in the election of an African-American commissioner. The contested law, accordingly, appeared to resemble the type of law section 5 was meant to address. In *Holder*, the

236. *Holder*, 512 U.S. at 876-79 (noting African Americans constituted twenty percent of the county's population and that this community was sufficiently concentrated and cohesive to elect one representative to a five-person commission, if districts were drawn to allow black voters to do so).
237. See id. at 881 (plurality opinion of Kennedy, J.).
238. See *Presley*, 502 U.S. at 503-08 (construing VRA § 5, 42 U.S.C. § 1973c (requiring preclearance if a covered jurisdiction “shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect” on designated dates)).
239. *Id.* at 504-05.
241. *See Beer v. United States, 425 U.S. 130, 140 (1996*) (stating that “Section 5 was a response to a common practice in some jurisdictions of staying one step ahead of the federal courts by passing new discriminatory voting laws as soon as the old ones had been struck
predominant statewide practice of county governance by five-member commissions offered a potential benchmark against which to evaluate the County's reliance on a single commissioner to govern.242 Instead, the Court adopted narrow readings of the VRA in each case and thereby departed from prior decisions expressing the Court's view that Congress intended for the VRA to be given "the broadest possible scope."243 And yet, Holder's concern about the absence of a meaningful benchmark and Presley's wariness of the slippery slope reflect the Court's conviction that Congress had not intended the broad statutory construction proffered in each case. Both decisions hold only that Congress did not authorize the restructuring of local governance plaintiffs sought in each case; they do not hold that Congress could not require such restructuring.244

III. BREACHING STATE AUTONOMY TO ASSURE STATE PRIMACY

The Rehnquist Court, like the Waite Court before it, appears to recognize distinct congressional power to address racial discrimination in the political process. It painstakingly preserved the VRA precedent in the Boerne cases245 and affirmatively embraced sweeping congressional power in Lopez.246 In developing the Shaw doctrine, it suggested that Congress possesses unique authority to require race-based decisionmaking,247 and, even when it read the VRA narrowly, it preserved the possibility for the broad exercise of congressional power.248 The

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242. Holder v. Hall, 512 U.S. 874, 955 (1994) (Blackmun, J., dissenting) (arguing that five-person commission used widely throughout the State offered an appropriate benchmark); see also Lani Guinier, The Supreme Court, 1993 Term — Foreword: [E]racing Democracy: The Voting Rights Cases, 108 HARV. L. REV. 109, 114 (1994) (arguing that Holder "undermines Congress's decision to override local majorities whose election structures result in minority group exclusion"); Tucker, supra note 1, at 574 (arguing that Holder "substantially cut back on the 'broad construction' of the Voting Rights Act given by the Court in cases such as Allen and endorsed by Congress").


244. Congress has previously enacted more expansive statutes in response to narrow judicial constructions of them. See generally William N. Eskridge, Jr., Overriding Supreme Court Statutory Interpretation Decisions, 101 YALE L.J. 331 (1991); Abner J. Mikva & Jeff Bleich, When Congress Overrules the Court, 79 CAL. L. REV. 729 (1991). That it will do so in connection with the VRA and specifically with section 5 when it expires in 2007 remains to be seen.

245. See supra notes 157-159 and accompanying text.

246. See supra notes 178-193 and accompanying text.

247. See supra notes 210-213 and accompanying text.

248. See supra note 244 and accompanying text.
Court has not, however, expressly explained why it seems to think that Congress enjoys special power to block racial discrimination in state political processes.

While several rationales may explain the Court’s approach, this Part argues that it is best understood in functional terms. Like the Waite Court, the Rehnquist Court accepts the deep intrusion into state sovereignty that results from the exercise of congressional intervention to address racial discrimination in voting. It views such power as necessary to ensure state primacy over the protection of individual rights more generally.

A. Reasons for Deference: Text, History, and the Functional View

The Fifteenth Amendment expressly addresses racial discrimination in voting. It provides that a citizen’s right to vote “shall not be denied or abridged” based on race, and, in Section 2, cedes to Congress “power to enforce this article by appropriate legislation.” It thus ostensibly offers a textual basis to explain judicial deference to congressional power in this realm. Reese and Cruikshank suggest that Congress has more power to address private conduct under the Fifteenth Amendment than under the Fourteenth and thereby appear to distinguish congressional powers under the two Amendments. Lopez v. Monterey County arguably suggests a similar distinction by invoking the Fifteenth Amendment alone as providing constitutional authority for the enactment of section 5 of the VRA.

The language of Section 2 of the Fifteenth Amendment, however, parallels that of Section 5 of the Fourteenth Amendment, and the modern Court has repeatedly insisted that congressional power under both sections is “coextensive.” Accordingly, whether deferential or

249. U.S. CONST. amend. XV.
250. See supra notes 93-104 and accompanying text.
252. U.S. CONST. amend. XIV, § 5 (“The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.”); U.S. CONST. amend. XV, § 2 (“The Congress shall have power to enforce this article by appropriate legislation.”).
253. See, e.g., Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 373 n.8 (2001) (noting that the two enforcement clauses are “virtually identical”); City of Boerne v. Flores, 521 U.S. 507, 518 (1997) (citing precedent addressing Congress’s enforcement powers under the Fourteenth, Fifteenth, and Eighteenth Amendments without distinguishing among these grants of authority); Katzenbach v. Morgan, 384 U.S. 641, 651 (1966) (noting similarity between Fourteenth and Fifteenth Amendments enforcement powers); South Carolina v. Katzenbach, 383 U.S. 301, 326 (1966) (“The basic test to be applied in a case involving § 2 of the Fifteenth Amendment is the same as in all cases concerning the express powers of Congress with relation to the reserved powers of the States.”); see also Lopez, 525 U.S. at 294 n.6 (Thomas, J., dissenting) (“Although Boerne involved the Fourteenth Amendment enforcement power, we have always treated the nature of the enforcement powers conferred by the Fourteenth and Fifteenth Amendments as coextensive.”); City of Rome v. United States, 446 U.S. 156, 208 n.1 (1980) (Rehnquist, J., dissenting) (“[T]he nature of the enforcement powers conferred by the Fourteenth and Fifteenth Amendments is the same as in all cases concerning the express powers of Congress with relation to the reserved powers of the States.”).
rigorous, review of legislation enacted pursuant to either section should be based on the same standard. The Court, moreover, has expressly held that both Amendments protect voting rights, and has deferred to congressional efforts to address racial discrimination in voting, regardless of the Amendment under which the Court understood Congress to have acted. Constitutional text, standing alone, thus does not explain judicial deference to Congress in this realm.

The long history of racial discrimination in voting in the United States certainly informs the Court’s deferential stance. Professors Dorf and Friedman point out that when Congress enacted the VRA in 1965, “it was entirely plausible” for the legislature to conclude that racial animus motivated voting rules having a disparate racial impact, even where specific proof of invidious intent was unavailable. This plausible conclusion, in turn, permits judicial deference to federal legislation proscribing racially discriminatory effects in the voting realm, even absent detailed legislative findings linking intent and effect. The Boerne decisions permit Congress to assume this linkage for voting-rights legislation enacted not just in 1965, but also in 1970 and 1975, while Lopez v. Monterey County assumes the linkage for the 1982 Amendments to section 5, as applied in the 1990s.

Still, history alone does not explain the Court’s deferential approach. Racial discrimination in voting is not limited to the distant
but neither are other types of longstanding unconstitutional discrimination such as gender discrimination. The Court, however, routinely defers to congressional efforts to address racial discrimination in voting, but its treatment of congressional attempts to address gender discrimination is decidedly mixed. Whereas the Court in *Nevada Department of Human Resources v. Hibbs* upheld the FMLA as an effort to protect against unconstitutional gender discrimination, the Court in *United States v. Morrison* did not find the long and continuing history of gender discrimination in state criminal-justice systems sufficient to defer to Congress’s assessment of the magnitude of the constitutional injury or to its selection of the appropriate remedy. Historical and persistent discrimination is accordingly not sufficient to trigger the Court’s deference.

Congressional efforts to address racial discrimination outside the voting context likewise consistently fail to elicit judicial deference. To be sure, blocking discrimination based on race is at the core of the Reconstruction-era Amendments. Described by the *Slaughter-House Cases* as their “one pervading purpose,” this aim arguably suggests a two-tiered approach in which Congress enjoys greater power to block racial discrimination under these Amendments than it does to regulate other types of conduct. A generation ago, Justice Black espoused this view, stating that “[w]here Congress attempts to remedy racial discrimination under its enforcement powers, its authority is enhanced by the avowed intention of the framers of the Thirteenth, Fourteenth, and Fifteenth Amendments.” The *Boerne* decisions support this approach insofar as they invalidate statutes, including some seemingly traditional civil-rights measures, which did not address racial discrimination, while preserving the VRA precedent, which did. Still,


261. *United States v. Morrison*, 529 U.S. 598, 615, 625-26 (2000); id. at 630-31 n.7 (Souter, J., dissenting) (citing Gender Bias Task Force reports that Congress considered); id. at 666 (Breyer, J., dissenting) (citing congressional reports documenting unconstitutional gender bias in state-court systems); see also supra notes 121 and 133 and accompanying text.

262. The *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 71 (1873) (describing the aim of the new Amendments to be “the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him”).

263. *Stone et al.*, supra note 63, at 434 (noting that *Slaughter-House* can be read to suggest such a two-tiered approach, with the Fourteenth Amendment read expansively to provide comprehensive federal protection of the newly freed slaves, but otherwise leaving “state resident’s primary recourse for protection of rights [] to his own state government”).


265. See supra Part II.A.
decisions by both the Rehnquist and Waite Courts refuse to accord special deference to Congress’s efforts to address racial discrimination not directly implicating the political process. The Civil Rights Cases strike down Congress’s effort to reach private racial discrimination in public accommodations while United States v. Harris invalidates similar efforts to block privately orchestrated, racially motivated assaults.266 So too, Adarand Constructors, Inc. v. Pena267 holds that race-based classifications authorized by Congress are subject to the same strict scrutiny City of Richmond v. J.A. Croson Co.268 applies to race-based decisionmaking by state and local actors.269 Congressional efforts to grapple with racial discrimination do not, alone, trigger judicial deference.

Congressional authority to address racial discrimination in voting appears relatively circumscribed when compared with its power to protect a host of property and liberty interests under the Fourteenth Amendment. While in fact potentially quite broad,270 the power to address racial discrimination in voting still seems unlikely to devolve into a plenary power.271 The Court could accordingly view deference to Congress here as less damaging to federalism values than is deference to other types of enforcement legislation.272 To be sure, to the

266. See The Civil Rights Cases, 109 U.S. 12 (1883) (invalidating ban on racial discrimination in public accommodations found in the Civil Rights Act of 1875); United States v. Harris, 106 U.S. 629 (1883) (invalidating a federal antilynching statute meant to address widespread, unremediated violence against black southerners, applicable regardless of state dereliction of the guardianship role).

267. 515 U.S. 200 (1995) (holding strict scrutiny applicable to a federal statute that presumed African Americans and other racial minorities to be “disadvantaged” and thus eligible for federal affirmative-action contracting program).


269. Adarand potentially leaves room for judicial deference to congressional judgments regarding the need to rely on race in a decisionmaking process, but the Court has yet to so hold. See Adarand, 534 U.S. 103 (2001) (dismissing case as improvidently granted).

270. See infra notes 369-370 and accompanying text.

271. Cf. Caminker, “Appropriate” Means-Ends Constraints on Section 5 Powers, supra note 20, at 1190-91 (noting that “[t]he ends authorized by this Section 2 [of the Fifteenth Amendment] are far more constrained than those authorized by Section 5 . . . the latter touch upon a wide a variety of liberty and property interests in a wide variety of contexts;” and arguing that deferential review of § 2 legislation would not “functionally award Congress a virtually plenary police power”); Dorf & Friedman, supra note 128, at 91 n.126 (evaluating whether the “narrower subject matter” of the Fifteenth Amendment means that the Court can “afford” to accord Congress greater deference).

272. Professors Dorf and Friedman suggest, but ultimately reject, this explanation for the Court’s approach to voting cases. Because Congress’s enforcement power under the Thirteenth Amendment could become plenary, they argue that “the difference in wording and subject matter among the Thirteenth, Fourteenth, and Fifteenth Amendments does not justify the narrower approach that the Court has lately taken toward the Fourteenth.” See Dorf & Friedman, supra note 128, at 91 n.126. This conclusion depends on how the Court will address congressional power under the Thirteenth Amendment in the post-Boerne world, something it has yet to do. Cf. United States v. Nelson, 277 F.3d 164 (2d Cir. 2002),
extent that congressional power here is not tethered exclusively to the Fifteenth Amendment, it is not necessarily more circumscribed than Congress's power to remedy age discrimination in state employment or gender bias in the criminal-justice system, problems over which the Court has accorded Congress little deference when structuring enforcement measures.

The bounded character of Congress's power to block racial discrimination in voting may nevertheless help explain judicial deference to congressional efforts to address racial discrimination in voting. The congressional power may be seen as bounded insofar as its exercise renders more extensive federal legislation unnecessary. As Professor Issacharoff explains, "process-based claims can relieve a conservative judiciary of any obligation to police substantive distributional outcomes of the policy decisions of elected political bodies." Judicial deference to Congress in this realm reflects the assumption that individual liberty is best protected at the state and local level, but only so long as state and local governments are democratically accountable. The next two Sections attempt to establish that this assumption about state power and democratic representation underlies decisions by both the Waite and Rehnquist Courts.

273. See supra notes 252-255 and accompanying text.
275. Samuel Issacharoff, Polarized Voting and the Political Process: The Transformation of Voting Rights Jurisprudence, 90 MICH. L. REV. 1833, 1869 (1992); see also Karlan, Easing the Spring, supra note 166, at 1591:

Regulation of the political process represents a decision to combat the risk of unconstitutional discrimination on the wholesale level, by providing all citizens with an equal opportunity to participate effectively in the political process, rather than leaving all enforcement to the retail level by enacting laws that impose equal-treatment obligations in indiscrete areas of state-government activity such as schools, public employment, or housing.

276. See, e.g., Nelson Lund, Federalism and Civil Liberties, 45 U. KAN. L. REV. 1045 (1997); see also David J. Barron, The Promise of Cooley's City: Traces of Local Constitutionalism, 147 U. PA. L. REV. 487, 491 (1999) (arguing that local governments "are often uniquely well positioned to give content to the substantive constitutional principles ... better positioned in some instances, that is, than either federal or state institutions"); cf. BRAEMAN, supra note 57, at 59 (noting post-Civil War Republican "hope ... that the southern states would do the job of protecting all their citizens' rights").

277. See, e.g., Kramer v. Union Free Sch. Dist., 395 U.S. 621, 628 (1969) ("The presumption of constitutionality and the approval given 'rational' classifications in other types of enactments are based on the assumption that the institutions of state government are structured so as to represent fairly all the people."); Yick Wo v. Hopkins, 118 U.S. 356, 370 (1880) (describing the right to vote as the "preservative of all rights").
B. Reinforcing Representation in the Waite Court

Sixty years before Justice Stone’s famous footnote four,[278] the Waite Court understood that racial discrimination inhering in the political process may prevent state governments from adequately protecting individual rights. *Ex parte Yarbrough*[279] sustains Congress’s power to block privately orchestrated, racially motivated violence affecting congressional elections. The decision is typically read to uphold virtually plenary congressional power to regulate federal elections, but to offer no support for analogous authority over state and local elections.[280]

*Yarbrough*, however, posits a functional understanding of congressional power that suggests Congress also enjoys considerable authority to protect the integrity of nonfederal elections. *Yarbrough* assumes nontextual authority for Congress’s power to regulate federal elec-

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278. United States v. Carolene Products Co., 304 U.S. 144, 153 n.4 (1938) (noting that “prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities”).

279. 110 U.S. 651 (1884). *Yarbrough* sustained convictions obtained based on indictments charging a private conspiracy to “intimidate” a black man, “on account of his race,” “in the exercise of his right to vote for a member of congress,” even though the underlying statutory provision blocked such intimidation without regard to racial motivation. Id. at 657.

280. See, e.g., Fairman, supra note 42, at 490 (stating that *Yarbrough* avoided the state-action constraints of the Fourteenth and Fifteenth Amendments “by determining that the right of a qualified voter to cast his ballot in a federal election was based on Article I, and the power of Congress to protect it did not depend on the post-Civil War Amendments”); Charles A. Kent, *Constitutional Development in the United States, as Influenced by the Decisions of the Supreme Court Since 1865, in Constitutional History of the United States as Seen in the Development of American Law: A Course of Lectures Before the Political Science Association of the University of Michigan* 201, 226 (1889) (reading *Yarbrough* to be exclusively about federal elections); Michael J. Klarman, *The White Primary Rulings: A Case Study in the Consequences of Supreme Court Decisionmaking*, 29 FLA. ST. U. L. REV. 55, 62 n.42 (2001) (citing *Yarbrough* as precedent upholding congressional power under Article I, Section 4, to regulate individual action interfering with the right to vote in federal elections); Lawsky, supra note 96, at 806 n.142 (*Yarbrough* addresses the right to vote in congressional elections); Nowak, supra note 1, at 1107 & nn.54-55 (same); Michael S. Steinberg, Note, *A Critique of the Current Method of Scheduling Primary Elections and a Discussion of Potential Judicial Challenges*, 69 GEO. WASH. L. REV. 453, 462 (2001) (citing *Yarbrough* as authority for “Congress’s unique ability, indeed responsibility, to regulate the fair conduct of federal elections”); cf. CHARLES FAIRMAN, *MR. JUSTICE MILLER AND THE SUPREME COURT, 1862-1890*, at 308 (1939) (discussing *Yarbrough* and stating that based on Article I, Section 4 “and from other provisions, a power is deduced to insure free and pure elections”).

Historians dispute the significance of *Yarbrough* insofar as the decision is limited to federal elections. Compare Maltz, supra note 36, at 85 (noting that even if *Yarbrough* reached no further than federal elections, it offered Congress “substantial power” to block private efforts to prevent African Americans from voting; those seeking to interfere with registration would not distinguish federal from state elections, and many state and federal elections were held at the same time), with Braeman, supra note 57, at 66 & 152 n.42 (reading *Yarbrough* as limited to congressional elections, and arguing that congressional power in this regard was inadequate given that “state and local elections were where the officeholders most directly affecting people’s lives were chosen”).
tions. Article I, Section IV permits Congress to regulate congressional elections, but says nothing about presidential elections.\(^2\)\(^{281}\) *Yarbrough* nevertheless insists that “[i]t is essential to the successful working of this government that the great organisms of its executive and legislative branches should be the free choice of the people.”\(^2\)\(^{282}\) It deems critical congressional power to ensure that both the federal executive and legislative branches represent “the free choice of the people,”\(^2\)\(^{283}\) notwithstanding the absence of textual support for this broad power.

When *Yarbrough* was decided, moreover, the Court’s concern for the representative quality of the federal legislature would have provided the basis for congressional power to reach state elections. At that time, state legislatures still selected United States Senators. Accordingly, the capacity of the U.S. Senate to represent “the free choice of the people” rested exclusively on the representative quality of the state legislatures selecting Senators.\(^2\)\(^{284}\) To be effective, congressional power to protect the representative character of the Senate seemingly needed to encompass regulatory power over state legislative elections as well.\(^2\)\(^{285}\)

Most significant, however, is *Yarbrough*’s discussion of the Fourteenth Amendment. The *Yarbrough* petitioners relied on Fourteenth Amendment precedent restricting Congress’s ability to reach private

\(^{281}\) U.S. CONST. art. I, § 4 (“The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.”).

\(^{282}\) *Yarbrough*, 110 U.S. at 666.

\(^{283}\) Id.; see id. at 657 (noting that the government’s “executive head and legislative body” are both elective and speaking of the federal government’s “power to protect the elections on which its existence depends from violence and corruption”); see also Dan T. Coenen & Edward J. Larson, *Congressional Power over Presidential Elections: Lessons from the Past and Reforms for the Future*, 43 WM. & MARY L. REV. 851, 887-88 (2002) (arguing that *Yarbrough* “planted the seed” for recognizing congressional power to regulate the processes for the selection of presidential electors); James A. Gardner, *Liberty, Community and the Constitutional Structure of Political Influence: A Reconsideration of the Right to Vote*, 145 U. PA. L. REV. 893, 984 (1997) (citing *Yarbrough* and stating that “the Court held that Congress has the power to regulate presidential elections because it must — because such a power must exist in a republic”); Albert J. Rosenthal, *The Constitution, Congress, and Presidential Elections*, 67 MICH. L. REV. 1, 33 (1968) (noting that “[w]hile the indictment in *Yarbrough* involved only a congressional election and was based on intimidation of Negro voters — undoubtedly a special case under the fifteenth amendment — the reasoning of the Court went much further”); Steinberg, *supra* note 280, at 461-62 (arguing that *Yarbrough*’s reasoning does not distinguish between congressional and presidential elections).

\(^{284}\) U.S. CONST. amend. XVII (“The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof . . . .” (amending Art. I, Section 3, which provided that “the Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof”)).

\(^{285}\) *Yarbrough*, 110 U.S. at 658, 666 (noting that Congress “must have the power to protect the elections on which its existence depends from violence and corruption” and that it needs such authority to retain its legitimacy as “the free choice of the people,” a condition that is “essential to the successful working of this government”)

action to support their claim that Congress could not block privately initiated assaults on black voters.\footnote{286} This reliance on the Fourteenth Amendment precedent seems misplaced. The assault at issue in \textit{Yarbrough} occurred during a congressional election. Article I, Section IV provides Congress ample authority to regulate such elections;\footnote{287} and thus any strictures on congressional action taken pursuant to the Fourteenth Amendment simply did not pertain. The assault, moreover, occurred because the victim had exercised his right to vote. Prior to \textit{Yarbrough}, the Fourteenth Amendment was generally not thought to protect the quintessentially "political" right to vote.\footnote{288} Accordingly, the Fourteenth Amendment's proscription on state action and any limitation on congressional action that might follow from it ostensibly had no bearing on the question of congressional power to bar privately initiated assaults on voters in congressional elections.\footnote{289}

Justice Miller's opinion for the Court in \textit{Yarbrough} dismisses the defendants' reliance on the Fourteenth Amendment precedent. But it ignores both of these readily available grounds for doing so. \textit{Yarbrough} elsewhere recognizes distinct federal power to regulate and protect federal elections,\footnote{289} but makes no mention of this authority as a reason to reject the defendants' Fourteenth Amendment claims. And while the "political" nature of the right to vote might similarly have offered grounds to distinguish Fourteenth Amendment precedent,
Justice Miller’s opinion instead suggests that this right is within the Amendment’s ambit. Nearly a century before the Court expressly recognized the Fourteenth Amendment to protect voting rights, Yarbrough states that “while it may be true that acts which are mere invasions of private rights” are, absent state action, “not within the scope” of the Fourteenth Amendment, “it is quite a different matter when Congress undertakes to protect the citizen in the exercise of rights conferred by the Constitution of the United States essential to the healthy organization of government itself.”

According to the Court’s opinion in Yarbrough, the defendants’ reliance on Fourteenth Amendment precedent was misplaced because the types of rights at issue in cases like the Civil Rights Cases and United States v. Harris are distinct from the one at issue in Yarbrough. The opinion implicitly categorizes the rights to nondiscriminatory use of public accommodations and to freedom from racially motivated assaults as “private rights” over which the states retain the primary authority and responsibility to protect. Precedent addressing such rights afforded the defendants “no aid in the present case,” because a black voter’s right to participate in the political process free of racial discrimination is seen to constitute a constitutionally protected right “essential to the healthy organization of government itself.”

Yarbrough accordingly posits the view that the Fourteenth Amendment protects a hierarchy of rights. Regardless of the constraints that limit congressional power to reach private action in other realms, “it is quite a different matter” when Congress acts to protect these essential ones. Yarbrough suggests that Congress may prohibit private assaults on black voters in federal and state elections alike, because, absent such authority, “the very sources of power may be poisoned by corruption or controlled by violence and outrage, without legal restraint.”

Justice Miller’s opinion is not concerned with identifying a textual source for this congressional power, noting that “it is a waste of time

292. Yarbrough, 110 U.S. at 666.
293. See Maltz, supra note 36, at 86 (arguing that Yarbrough and Cruikshank “posit a set of preexisting rights whose protection is remitted to the state governments”).
294. Yarbrough, 110 U.S. at 666.
295. Id.
296. The basis upon which Yarbrough rejected the defendants’ reliance on the Fourteenth Amendment precedent indicates the Court did not think this congressional power was limited to federal elections.
297. Yarbrough, 110 U.S. at 667. Justice Miller’s general reference to the “sources of power,” as opposed to a more specific reference to the sources of congressional power or even federal power, supports reading Yarbrough as recognizing congressional authority to protect state and federal elections from racial discrimination.
to seek specific sources of power to pass these laws.\textsuperscript{298} The opinion is more interested in identifying the necessity of this federal power in functional terms. Whatever the difficulties that may follow from "invasions of private rights," racial discrimination affecting voting rights is understood to work a distinct harm and to require a distinct remedy. According to \textit{Yarbrough}, such discrimination interferes with the "healthy organization of government" and thereby renders states ill-equipped to protect individual rights and govern properly.

\textit{Yarbrough} does not question \textit{Cruikshank}'s assertion that the "duty of protecting all its citizens in the enjoyment of an equality of rights was originally assumed by the states, and it remains there."\textsuperscript{299} By 1884, however, the Court recognized that performance of this state function depended on the "healthy organization of government." Congress needed broad power to create the state and federal institutions necessary for healthy representative governance within the federal system. The hope is that this power to reinforce representation at the local level will render unnecessary massive federal intervention supplanting state primacy in the protection of individual liberty.

In this sense, \textit{Yarbrough} builds on the Waite Court's decision four years earlier in \textit{Strauder v. West Virginia}.\textsuperscript{300} \textit{Strauder} holds that a state law blocking blacks from jury service violates the Equal Protection Clause. Justice Strong's opinion for the Court suggests that the West Virginia statute might function to deny black defendants impartial treatment within the criminal-justice system.\textsuperscript{301} So understood, the law represents a straightforward violation of the Fourteenth Amendment.\textsuperscript{302} The Court, however, also appears to identify an equal protec-

\textsuperscript{298} Id. at 666.

\textsuperscript{299} United States v. Cruikshank, 92 U.S. 542 (1876); see United States v. Cruikshank, 25 F. Cas. 707, 710 (C.C.D. La. 1874) (No. 14, 899) (opinion of Bradley, J.) ("The affirmative enforcement of the rights and privileges themselves, unless something more is expressed, does not devolve upon [the United States], but belongs to the state government as a part of its residuary sovereignty."); see also \textit{STONE ET AL., supra} note 63, at 435 (arguing that the Court's reading of the Equal Protection Clause in the \textit{Civil Rights Cases} grew out of the same view of the states as the primary protector of individual rights that the Court expressed in \textit{Slaughter-House"); \textit{BRAEMAN, supra} note 57, at 65 (stating that \textit{Cruikshank} held that the Fourteenth Amendment had not "taken from the states primary responsibility for the protection of basic individual rights"); \textit{Kennedy, supra} note 36, at 102 (noting that "the Waite Court sought to protect blacks within the framework of constitutional modifications that preserved a state-centered nationalism").

\textsuperscript{300} 100 U.S. 303 (1879).

\textsuperscript{301} \textit{Strauder}, 100 U.S. at 309 (noting that "prejudices often exist against particular classes in the community, which sway the judgment of jurors, and which, therefore, operate in some cases to deny to persons of those classes the full enjoyment of that protection which others enjoy"); see also \textit{AMAR, supra} note 288, at 272 & n.162; \textit{Hills, supra} note 288, at 998-99.

\textsuperscript{302} \textit{See MALTZ, supra} note 288, at 103-04 (noting view that the Equal Protection Clause "requires that the states make available on equal terms the mechanism necessary to enforce the rights created either by other provisions of the Constitution or by state law");
tion injury suffered not by Strauder, but by the potential black jurors the state law excluded from jury service. Justice Strong's opinion states that West Virginia's express exclusion of blacks from the jury denied them "the privilege of participating equally ... in the administration of justice" and "all right to participate in the administration of the law, as jurors." The exclusion operated expressively as "practically a brand upon them, affixed by the law, an assertion of their inferiority." It worked functionally as "a stimulant to that race prejudice which is an impediment to securing individuals of the race that equal justice which the law aims to secure to all others."304

Prior to Strauder, the Fourteenth Amendment was not generally thought to guarantee black men the right to sit on juries. Strauder nevertheless holds that the Amendment provides this guarantee. The decision recognizes what Professor Hills calls the "tight unity" between defendant Strauder's right to an impartial trial and the participatory rights of potential black jurors. Justice Strong's opinion, Professor Hills explains, upholds the rights of these excluded jurors in order to protect Strauder's right to a fair trial. Since reviewing every jury verdict for impermissible racial discrimination is neither feasible nor desirable, Strauder seeks "to create the institutions necessary for the vindication of private rights."307

Yarbrough, like Strauder, suggests that racial discrimination affecting state political institutions precludes States from adequately protecting individual rights. Institution building at the state level was essential to vindicate the rights guaranteed by the new Amendments while still preserving the federal structure. Events at the time demonstrated that "private rights" would not be protected absent political institutions dedicated to their defense. Strauder shows the Waite

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Hills, supra note 288, at 997 ("[I]mpartiality in criminal trials is the quintessential civil right guaranteed by the Fourteenth Amendment.").

303. Strauder, 100 U.S. at 308.

304. Id.


306. Hills, supra note 288, at 999; see also AMAR, supra note 288, at 272 (noting that Strauder "straddled the question of whose rights this scheme violated").

307. Hills, supra note 288, at 997; id. at 1000 ("Judicial regulation of the structure of juries seems like the only way in which a court can vindicate the civil rights that the [Fourteenth Amendment's] framers unquestionably wished to protect.").

308. Hills, supra note 288, at 980, 1001 (stating that "private rights divorced from governmental structures were futile 'parchment barriers.' In order to be effective, rights must be
Court's willingness to mandate institutional change through direct constitutional interpretation. *Yarbrough* agrees that such institutions needed to be established, but does not itself reform the state institution. Instead, *Yarbrough* welcomes congressional participation in the endeavor.

C. Reinforcing Representation in the Rehnquist Court

*City of Boerne v. Flores* rejects *Katzenbach v. Morgan*'s suggestion that Congress may enact legislation that "expands" Fourteenth Amendment rights.\(^{209}\) It is careful, however, to affirm two related rationales for *Morgan*'s holding. One recognizes congressional power to ban New York's English literacy test as a remedial measure for discrimination in establishing voter qualifications.\(^{310}\) The other, of more relevance here, upholds congressional power to ban the test as a mechanism to address discrimination in public services. *Morgan* states that the congressional ban offered New York's Puerto Rican community "enhanced political power [that] will be helpful in gaining nondiscriminatory treatment in public services for the entire Puerto Rican community."\(^{311}\) Articulating what Professor Karlan has labeled the "prospective model of constitutionally corrigible invidious discrimination,"\(^{312}\) *Morgan* upholds section 4(e) of the VRA because it "enables the Puerto Rican minority better to obtain 'perfect equality of civil rights and the equal protection of the laws.'"\(^{313}\) *Boerne* affirms the validity of this rationale, stating that the exercise of congressional power "rested on unconstitutional discrimination in New York."\(^{314}\)

That this "unconstitutional discrimination" had in fact occurred was essential neither to the Court in *Morgan* nor, notably, to the Rehnquist Court in *Boerne*. *Morgan* and *Boerne* cite no evidence suggesting that such discrimination had taken place and require no specific congressional findings corroborating speculation about such discrimination. Instead, *Morgan* invokes the extreme deference to Congress for which the decision is remembered, finding it sufficient that Congress could have found that such discrimination exists. *Morgan* insists that "[i]t is enough that we be able to perceive a basis embedding in a network of political institutions — juries, legislatures, constitutional conventions, etc. — that help to define and enforce those rights" (footnote omitted)).

\(^{209}\) *See supra* notes 126-127 and accompanying text.


\(^{311}\) *Katzenbach v. Morgan*, 384 U.S. at 652.

\(^{312}\) *See Karlan, Two Section Twos and Two Section Fives, supra* note 136, at 729.

\(^{313}\) *Katzenbach v. Morgan*, 384 U.S. at 653 (quoting *Ex parte* Virginia, 100 U.S. 339, 345-46 (1879)).

\(^{314}\) *Boerne*, 521 U.S. at 528.
upon which the Congress might resolve the conflict as it did." So too, *Boerne* is apparently satisfied with the unsubstantiated assertion that section 4(e)’s effort to avert prospective discrimination “rested on unconstitutional discrimination in New York.”

Even so, *Boerne* and its progeny hardly embrace the deferential stance *Morgan* employs. *Morgan* refuses to assess whether eliminating New York’s literacy test is an effective means to address invidious discrimination in public services. *Morgan* states that only Congress can make such determinations. The *Boerne* decisions, however, establish that Congress does not have such unbounded discretion to craft remedies. Under *Boerne* and its progeny, Congress may not diminish the prospect of invidious discrimination in public services by, for example, abrogating New York’s immunity from private suits alleging such discrimination. The *Boerne* cases bar Congress from creating such a regime, at least insofar as it acts in the absence of concrete and substantial evidence documenting such discrimination.

The Rehnquist Court nevertheless expressly affirms *Morgan*’s embrace of congressional power to regulate state political processes as a means to diminish the prospect that invidious discrimination might occur. While *Morgan* suggests virtually complete congressional discretion to select among a host of remedies, section 4(e) of the VRA looks good to the Court in *Boerne* because Congress selected precisely the remedy that it did. Section 4(e), *Boerne* explains, is a vehicle “to give Puerto Ricans ‘enhanced political power’ that would be ‘helpful in gaining nondiscriminatory treatment in public services.’” *Boerne* sees section 4(e) as an effort to fix the state’s political processes in order to facilitate more responsive governance by the state itself. The statute is entitled to deferential judicial review because it is structured to maintain state primacy in the protection of individual rights. *Boerne* thus asserts that the Fourteenth Amendment’s Framers refused to “giv[e] Congress primary responsibility for enforcing legal equality.”

317. *Katzenbach v. Morgan*, 384 U.S. at 653 (stating that “[i]t was for Congress ... to assess and weigh the various conflicting considerations” including “the effectiveness of eliminating the state restriction on the right to vote as a means of dealing with the evil” and noting “[i]t is not for us to review the congressional resolution of these factors”).
318. See supra note 128 and accompanying text.
319. See supra notes 129-135 and accompanying text.
321. See id. at 521. For an argument that the Second Reconstruction achieves such primacy, see Michael W. McConnell, *Federalism: Evaluating the Founders’ Design*, 54 U. Chi. L. Rev. 1484, 1501 (1987) (arguing that “[a]fter Brown v. Board of Education and the various civil rights acts, after the revolution in criminal procedure fostered by federal law and federal courts, after the imposition of uniform federal standards for basic liberties under the Bill of Rights, and after the proliferation of novel statutory ‘rights’ arising from the interven-
while its preservation of *Morgan* suggests a willingness to defer to congressional judgments regarding the measures and institutions thought necessary to facilitate state fulfillment of this responsibility.

The Court, of course, need not rely on Congress to reform state political institutions when a perceived defect in the political process threatens to prevent a state from adequately protecting individuals from discriminatory treatment. *Bush v. Gore*\(^2\) is but the latest in a series of the Court's decisions that dramatically restructure the processes of state governance based on newly derived constitutional mandates.\(^3\) To be sure, absent longstanding precedent and established practice, the Rehnquist Court might have agreed with Justices Frankfurter and Harlan that the Court should not enter the "political thicket" for fear of undermining the Court's moral authority,\(^4\) and decide cases based on political philosophy rather than law.\(^5\) The door, however, was already open and the Rehnquist Court made no attempt to close it.\(^6\) Indeed, it has extended the foray into the thicket by articulating new ways in which the Constitution mandates particular political structures at the state level.\(^7\) As Professor Pildes recently...
observed, the Court "now routinely deploys constitutional law to
circumscribe the forms democracy can take... [and] almost reflexively acts as if it were appropriate for constitutional law always to pro-
vide ready answers as to what makes democracy 'best.' "328

Decisions such as Bush v. Gore and California Democratic Party v. Jones329 display the Court's confidence in its institutional capacity to
identify constitutional rules governing democratic participation. Bush v. Gore reads the Equal Protection Clause to mandate consistent stan-
dards for assessing voter intent on disputed ballots.330 California Democratic Party holds that the First and Fourteenth Amendments
prohibit a state-mandated blanket primary, a practice that permits
collectors to vote, office by office, for any candidate on the ballot,
regardless of the collector's or candidate's party affiliation.331 These deci-
sions necessarily limit congressional power to regulate state and local
political processes pursuant to Section 5 of the Fourteenth Amend-
ment.332 After Bush v. Gore, for example, Congress could not mandate
that different standards govern the counting of dangling chads from
disputed ballots in different jurisdictions, just as it is precluded from
mandating unequal apportionment among electoral districts.333 So too,
after California Democratic Party, Congress may neither authorize nor
mandate a blanket primary.

Even so, the decisions do not entirely foreclose congressional
action. Bush v. Gore appears to leave open the possibility that

328. Richard H. Pildes, Constitutionalizing Democratic Politics, in A BADLY FLAWED
ELECTION: DEBATING BUSH V. GORE, THE SUPREME COURT, AND AMERICAN
DEMOCRACY 156 (Ronald Dworkin ed., 2002) [hereinafter Pildes, Constitutionalizing
Democratic Politics].


rules to determine intent based on these recurring circumstances is practicable and, we
conclude, necessary.").


332. Article I, section 4 permits Congress to regulate federal elections without regard to
the constraints of section 5 of the Fourteenth Amendment. See U.S. CONST. art. I, § 4 ("The
Times, Places and Manner of holding Elections for Senators and Representatives, shall be
prescribed in each State by the Legislature thereof; but the Congress may at any time by
Law make or alter such Regulations, except as to the Places of chusing Senators.").


By holding that as a federal constitutional requisite both houses of a state legislature must be
apportioned on a population basis, we mean that the Equal Protection Clause requires that a
State make an honest and good faith effort to construct districts, in both houses of its legisla-
ture, as nearly of equal population as is practicable.

Id.; Wesberry v. Sanders, 376 U.S. 1, 7-8 (1964) (holding that Article I, section 2 "means that
as nearly as is practicable one man's vote in a congressional election is to be worth as much
as another's.").
Congress could mandate specific technology or a uniform federal standard to govern the recounts of disputed ballots. Such measures could arguably be deemed to enforce the right to equal treatment articulated in *Bush v. Gore*, and thus to satisfy *Boerne*’s congruent and proportional standard.\(^{334}\) So too, *California Democratic Party* would seemingly allow Congress to prohibit the open primary, a practice that resembles the blanket primary except for the fact that it requires voters to select among the candidates from only one party in any given primary election.\(^{335}\) While *California Democratic Party* expressly declined to address the constitutionality of the open primary, the similarity between the blanket primary and the open primary suggests that Congress could bar the latter practice as a prophylactic measure to enforce the associational rights of political parties.\(^{336}\)

These decisions stand in curious relation to *Shaw v. Reno* and its progeny. Like *Bush v. Gore* and *California Democratic Party*, the *Shaw* decisions read the Constitution to set forth a rule structuring democratic governance. They locate within the Equal Protection


335. *California Democratic Party*, 530 U.S. at 576 n.6:

An open primary differs from a blanket primary in that, although as in the blanket primary any person, regardless of party affiliation, may vote for a party’s nominee, his choice is limited to that party’s nominees for all offices. He may not, for example, support a Republican nominee for Governor and a Democratic nominee for attorney general.


336. *California Democratic Party*, 530 U.S. at 577 n.8. Commentators have noted that the structural similarities between the open and blanket primaries leave the more widely used open primary subject to constitutional attack. *See, e.g.*, Richard L. Hasen, *Point/Counterpoint: Do the Parties or the People Own the Electoral Process?*, 149 U. PA. L. REV. 815, 830 n.60 (2001); Issacharoff, *Private Parties With Public Purposes*, supra note 335, at 284-85; Richard H. Pildes, *Democracy and Disorder*, 68 U. CHI. L. REV. 695, 705-06 (2001). *But see* Elizabeth Garrett, *Law and Economics*, 31 N.M. L. REV. 107, 131 (2001) (noting that open primaries pose less of a threat to associational rights than do blanket primaries); *The Supreme Court, 1999 Term Leading Cases*, 114 HARV. L. REV. 259, 278 & n.78 (2000) (arguing that “open primaries appear to represent not a raid on the party by outsiders, but merely an extreme loosening of the requirements for affiliation with a party” and that this “affiliation, though temporary, was the touchstone for the *Jones* Court.” (internal citations omitted)).

Clause a prohibition against districting plans in which race predominates over traditional districting principles, absent narrow tailoring to a compelling governmental interest. And like Bush v. Gore and California Democratic Party, they limit congressional power while still preserving a realm for continued congressional action. The Shaw decisions block Congress from authorizing racially predominant districting absent a compelling justification, but nevertheless assume that compliance with the VRA constitutes a compelling interest.

The Shaw decisions, Bush v. Gore, and California Democratic Party, accordingly all articulate constitutional holdings that restructure democratic governance at the state and local level while leaving to Congress at least some authority to develop related rules. Given that Shaw and its progeny directly implicate racial concerns while Bush v. Gore and California Democratic Party do not, these decisions collectively might suggest a degree of judicial receptivity to broad congressional regulation of state voting regimes, regardless of whether the local practices involve issues of racial representation.

To be sure, the Shaw decisions more expressly invite congressional participation in the federal project of reinforcing representation at the state level than do Bush v. Gore and California Democratic Party. But this facet of Shaw and its progeny may stem simply from the fact that the state defendants in these cases expressly invoked the federal VRA as justification for their districting decisions, and thus may not signal greater congressional authority in the realm of race and the vote. If so, underlying the Boerne doctrine’s preservation of the VRA precedent may be an as yet evolving theory that Congress has considerable leeway to devise measures influencing state voting and representational regimes even outside the race context. Indeed, Boerne’s affirmation of Morgan’s observation that state governments may be insufficiently responsive to those excluded from the political process suggests a willingness to defer to Congress when it acts to address such exclusions, regardless of whether racial discrimination is the cause. Put differently, the Court’s confidence in its own institutional competence to “constitutionalize democracy” does not necessarily preclude congressional power to legislate at the margins with prophylactic rules.

338. See supra note 210 and accompanying text.
339. See supra note 210 and accompanying text.
341. See City of Boerne v. Flores, 521 U.S. 507, 528 (1997) (affirming Morgan’s “rationale” upholding § 4(e) of the VRA on the ground that Congress may bar literacy tests as a mechanism to address discrimination in public services); see also supra notes and accompanying text and infra notes and accompanying text.
And yet, the *Shaw* decisions suggest that the Court is more receptive to congressional participation in regulating state political processes when Congress acts to address racial discrimination affecting voting rights. *Shaw* and its progeny suggest that Congress may authorize rules structuring the political process that the Court would deem unconstitutional if authorized by another governmental entity. *Bush v. Gore* and *California Democratic Party* do not appear to recognize a distinct congressional power of this sort. In this sense, these decisions suggest that Congress is entitled to more deference when it legislates in the realm of race and the vote than when it acts elsewhere.\(^3\)

Such divergent receptivity appears puzzling. The warrant for exclusive judicial action defining rules of democratic participation seems strongest in cases involving both racial discrimination and the right to vote. After all, when racial discrimination affects the right to vote, it implicates two distinct grounds long thought independently to warrant rigorous judicial review.\(^4\)

Insofar as the Court is more receptive to congressional power in this realm, the nature of the rules regarding which the Court looks to Congress offers an explanation. Rules governing political participation necessarily affect political outcomes. As a leading casebook explains, "the election process emerges from previously fixed — and often carefully orchestrated — institutional arrangements that influence the range of possible outcomes that formal elections and subsequent policymaking can achieve."\(^5\)

But while all rules sounding in electoral "process" invariably shape substantive outcomes, only some rules predictably redistribute political spoils among identifiable groups. The Rehnquist Court may look to Congress to create the mechanisms needed to address racial discrimination in the political process because

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342. So too, the Court's decision in *Rice v. Cayetano*, 528 U.S. 495 (2000), implicitly preserves a realm for concurrent congressional action. *Rice* struck down as a violation of the Fifteenth Amendment a state law that provided that only "Hawaiians" could vote for trustees of the State's Office of Hawaiian Affairs ("OHA"), a public agency that oversees programs designed to benefit the State's native people. The Court held that the restriction limiting the OHA electorate to descendants of the 1778 inhabitants of the Hawaiian Islands embodied a racial classification that denied non-Hawaiians the right to vote within the meaning of the Fifteenth Amendment. See generally Ellen D. Katz, *Race and the Right to Vote After Rice v. Cayeteno*, 99 Mich. L. Rev. 491 (2000) (discussing *Rice*). *Rice* invalidates a state program that did not implicate the federal government's unique relationship and obligation toward its native people, and thus potentially leaves room for congressional action.

343. See United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (suggesting that courts should rigorously review "legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation" as well as conduct reflecting "prejudice against discrete and insular minorities . . . which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities").

it views those mechanisms to be unavoidably outcome-based in this redistributive sense. That is, it may see these mechanisms not simply as procedural regulations, but as devices for deciding winners and losers within the political system. Electoral rules derived to address racial vote dilution, for example, purposefully shift political power to a discrete and identifiable group of voters.

By contrast, decisions such as *Bush v. Gore* and *California Democratic Party* articulate process-based holdings that less clearly redistribute political benefits to identifiable groups. For all the charges of partisanship *Bush v. Gore* generated, the legal rule it announces — in contrast to the remedy it forecloses — appears to be a neutral and objective one. More so than one-person, one-vote, the requirement that a uniform standard govern the assessment of recounted ballots does not facially favor any particular substantive outcome. So too, even if, as its supporters contend, the blanket primary favors more moderate candidates, this result does not consistently redistribute power among identifiable groups in the same sense that racial vote dilution claims do.

IV. CONCLUSION: KEEPING A NONPLENARY POWER NONPLENARY

Recognition of congressional power to address racial discrimination in state political processes, if understood in functional terms, arguably demands recognition of congressional power to target political-process disruptions that transcend racial discrimination. In *United States v. Reese*, the Waite Court appeared to reject expressly the possibility that Congress may intervene in state political processes absent racial discrimination. But by the time the Court decided *Yarbrough*, the Waite Court appeared more receptive to that prospect, equating the corruption stemming from the “free use of money in elections” with the racially motivated “lawless violence... outrage,” and suggesting that both endanger good government.

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347. See Thomas L. Friedman, Foreign Affairs: A Tally of Two Countries, N.Y. TIMES, Dec. 12, 2000, at A33 (discussing the importance of uniform standard for recounts).

348. See supra note 45 and accompanying text.

349. See Ex parte Yarbrough, 110 U.S. 651, 661 (1884).
observation implied previously unacknowledged congressional power, but the Waite Court ended before it could explore the doctrinal consequences. The Fuller Court that followed proved far less receptive to congressional action in the electoral arena.\textsuperscript{350}

So too, the scope of the Rehnquist Court's deference to congressional action in the electoral arena remains unclear. The deference accorded Congress in the realm of race and the vote suggests deference of a broader sort to electoral regulation more generally. Recent decisions addressing the constitutional contours of democratic participation can be reconciled with such deference, but hardly establish it.\textsuperscript{351} The extent of judicial deference to congressional power to regulate elections will be determined by future decisions by this Court, or its successor.

Existing precedent nevertheless makes clear that while extensive, Congress's power to block racial discrimination in voting is far from plenary.\textit{Boerne} states that Congress may not expand the rights protected by Section 1 of the Fourteenth Amendment.\textsuperscript{352} Thus, deference notwithstanding, the Court would not permit Congress to mandate a departure from the one-person, one-vote principle as a mechanism to remedy racial discrimination in the electoral process\textsuperscript{353} An attempt to authorize purely race-based districting, without regard to the existence of communities of interest, is likewise sure to fail. Even if the \textit{Shaw} cases could be read to leave open the possibility that Congress retains such authority,\textsuperscript{354} the Court would no doubt view congressional legislation of this sort to embody the type of race-conscious decisionmaking it understands the Equal Protection Clause to proscribe.\textsuperscript{355}

Section 2 of the VRA will test the limits of the Court's deference to Congress's efforts to block racial discrimination in voting. As amended in 1982, section 2 prohibits any voting "standard, practice, or procedure" that "results in a denial or abridgement of the right... to vote on account of race or color."\textsuperscript{356} The constitutionality of the statute is an open question.\textsuperscript{357} In significant respects, section 2 resembles the

statutory provisions the Court invalidated in *Boerne* and its progeny. As it did with RFRA, Congress amended section 2 to "restore" a legal standard expressly rejected by the Court as not constitutionally mandated. Congress amended section 2 to create a results-based test for racial discrimination because it disagreed with *Mobile v. Bolden*, which construed the Fifteenth Amendment to proscribe intentional discrimination only. Also like RFRA, section 2 is based on relatively sparse findings of intentional discrimination, applies nationwide, has no termination date, and proscribes substantially more conduct than does the Constitution.

None of these characteristics, however, appears problematic if the Court evaluates section 2 under the VRA precedent preserved in the *Boerne* decisions and with the deference accorded in *Lopez*. Indeed, in 1982, the adequacy of congressional authority to adopt a results-based test for racial discrimination after *Mobile* prompted relatively little discussion. The five pages the Senate Report devoted to the subject invoke the VRA precedent later preserved in the *Boerne* cases. They attest to congressional authority to enact measures "going beyond"

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359. *See City of Mobile v. Bolden, 446 U.S. 55 (1980); S. REP. NO. 97-417 (1982). As originally enacted, § 2 of the VRA tracked the language of the Fifteenth Amendment, and thus was thought to add nothing to the constitutional prohibition itself. See Chisom v. Roemer, 501 U.S. 380, 392 (1991) (Section 2 as originally enacted "was unquestionably coextensive with the coverage provided by the Fifteenth Amendment"); Guard, Impotent Figureheads, supra note 156; Mobile, 446 U.S. at 60-61 ("It is apparent that the language of § 2 no more than elaborates upon that of the Fifteenth Amendment, . . . [and] that it was intended to have an effect no different from that of the Fifteenth Amendment itself."); see also ISSACHAROFF ET AL., supra note 24.*


361. *See supra notes 221-222.*

362. *See Karlan, Two Section Twos and Two Section Fives, supra note 136; see also supra notes and accompanying text.*

363. *But see Joan F. Hartman, Racial Vote Dilution and Separation of Powers: An Exploration of the Conflict Between the Judicial "Intent" and Legislative "Results" Standards, 50 GEO. WASH. L. REV. 689, 739-52 (1982).*

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direct constitutional requirements so long as such measures are "appropriately and reasonably adapted to protect citizens" from a constitutional violation.\textsuperscript{365} The results test was so adapted, the Report continued, given the difficulties plaintiffs encounter in proving discriminatory intent on a case-by-case basis, and the fact that practices that violate the results test "perpetuate the effects of past purposeful discrimination."\textsuperscript{366} At the time, the Court did not even deem the question of congressional authority worthy of full consideration and summarily affirmed a lower-court decision that held the amended statute to be appropriate enforcement legislation.\textsuperscript{367} In recent years, however, individual justices have raised questions about section 2's validity.\textsuperscript{368}

Section 2's survival accordingly depends on whether the Court thinks the statute better resembles the VRA provisions upheld in the VRA precedent and \textit{Lopez} than it does the statutory provisions challenged in the \textit{Boerne} decisions. A functional understanding of congressional power to block racial discrimination in voting would permit the Court to deem section 2 appropriate enforcement legislation.

The Court may, however, be unwilling to do so. If understood in purely functional terms, the Court's preservation of the VRA precedent in the \textit{Boerne} cases and its affirmation of the VRA in \textit{Lopez v. Monterey County} suggest a congressional power that is potentially quite expansive. Preserving state primacy to protect individual rights through the regulation of the political process logically encompasses more than the corruption caused by racial discrimination. But even if the task were so limited, the realm in which racial discrimination corrupts political processes is not naturally circumscribed. What constitutes a racial classification is itself a contested question,\textsuperscript{369} while the conduct that affects political processes is neither self-evident nor necessarily bounded.\textsuperscript{370} The Court may well find

\textsuperscript{365} Id. at 40.
\textsuperscript{366} Id.


\textsuperscript{368} See Bush v. Vera, 517 U.S. 952, 992 (1996) (O'Connor, J., concurring) (noting that the Court has "assume[d], but never directly address[ed]" the constitutionality of § 2 and that § 2 is to be assumed constitutional "unless and until current lower court precedent is reversed and it is held unconstitutional"); Johnson v. DeGrandy, 512 U.S. 997, 1028-29 (1994) (Kennedy, J., concurring); Chisom v. Roemer, 501 U.S. 380, 418 (1991) (Kennedy, J., dissenting) (writing separately to emphasize decision is one of statutory interpretation and that "[n]othing in today's decision addresses the question whether § 2... is consistent with the requirements of the United States Constitution").

\textsuperscript{369} See, e.g., Rice v. Cayetano, 528 U.S. 495, 512 (2000) (stating that not all classifications based on ancestry are race based, but the one before the Court is).

\textsuperscript{370} See, e.g., Reva Siegel, \textit{She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family}, 115 HARV. L. REV. 947 (2002); Lawsky, \textit{supra} note 96, at 786 (arguing that VAWA is a valid enactment under the Nineteenth Amendment because politi-
that the seemingly limited realm in which it presently defers to congressional action is not so limited at all.

Indeed, the Court may already think so. The Court has recently insisted that the Fifteenth Amendment does not proscribe racial vote dilution, a claim that largely eliminates the Amendment as a source for congressional authority to enact section 2 of the VRA. Locating the proscription against racial vote dilution solely within the Fourteenth Amendment should be of no consequence if, in fact, Congress’s enforcement powers under the Fourteenth and Fifteenth Amendments are “coextensive.” The Court, however, may be moving toward distinguishing the two powers in order to narrow the realm in which it will defer to congressional action.

The Court’s goal may be to accord deference only when Congress legislates pursuant to the Fifteenth Amendment. Such a move would repudiate considerable precedent and largely abandon the functional understanding of Congress’s enforcement powers that has marked the Court’s approach to date. If the Court adheres to its recent claim that intentional vote dilution does not deny or abridge the right to vote within the meaning of the Fifteenth Amendment, it would mean the demise of section 2 of the VRA. By both limiting its deferential stance to the Fifteenth Amendment and excluding racial vote dilution from that Amendment’s ambit, the Court would almost certainly render section 2, with its proscription against such dilution, invalid under the Boerne precedent. To be sure, the Court would still confront occasional claims of intentional racial vote dilution brought directly under the Fourteenth Amendment. Eliminated would be the far more numerous result-based dilution claims now brought under Section 2.

Distinguishing congressional power under the Fourteenth and Fifteenth Amendments evokes the approach taken by Justice Kennedy’s plurality opinion in Presley v. Etowah County Commission to limit the reach of the VRA. Presley holds that laws altering the powers exercised by elected county commissioners are not changes “with respect to voting” under section 5 of the VRA and accordingly not changes for which preclearance is required. Justice Kennedy’s opinion insists that laws “with respect to voting” may be distinguished from the operational provisions that render local governance possible. The distinction is a

cal citizenship “requires the ability to participate, free from domination, as a self-determined individual”).

371. See Bossier Parish II, supra note 30, 528 U.S. 320 (2000) (stating that the Fifteenth Amendment does not proscribe vote dilution).
372. See supra note 253 and accompanying text.
373. See supra note 253 and accompanying text.
374. See White v. Regester, 412 U.S. 755 (1973); Gerken, supra note 222, at 1737.
376. See Presley, 502 U.S. at 494; supra note 239 and accompanying text.
formal one that is difficult to defend in functional terms, or to reconcile with the precedent. 377 Instead, it reflects the perception that the VRA was not meant to supplant local governance entirely. The Court thought a line needed to be drawn and accordingly drew it. 378

The Court might similarly distinguish between Congress’s enforcement powers under the Fourteenth and Fifteenth Amendments in order to narrow the realm in which it will defer to congressional judgments. But even if the Court adheres to precedent and retains its view that Congress’s powers under the Fourteenth and Fifteenth Amendments are coextensive, section 2 of the VRA remains vulnerable. The Court may well be uneasy with the manner in which Congress exercises its power to address racial discrimination within the political process. Critics of John Hart Ely’s argument that courts should police and cure defects within political processes charge that the endeavor is impossible absent an outcome-based view of what the political process should produce. 379 Absent such a view, the argument goes, courts will have no way of knowing whether the political process is failing. The same, of course, may be said about congressional efforts to reinforce representative governance at the local level. Such efforts might as easily be creating defects in the political process as curing them.

Equality in the political process is no more easily defined than equality in political outcomes. The formal equality to make contracts and own property hardly gives rise to equality in wealth or business opportunity. So too, formal equality to cast a ballot — indeed, even an undiluted ballot — does little to ensure equality in the distribution of political resources like money and incumbency. 380 Efforts to rectify either practi-

377. A law that replaces an elected office with an appointed one is arguably a change “with respect to voting” because voters no longer influence a decision they previously controlled. See Allen v. State Bd. of Elections, 393 U.S. 544 (1969). A law that diminishes the powers exercised by an elected officials arguably implicates a similar interest.

378. See Presley, 502 U.S. at 509 (stating that “[t]he Voting Rights Act is not an all-purpose antidiscrimination statute.”).

379. See, e.g., Paul Brest, The Substance of Process, 42 OHIO ST. L.J. 131 (1981) (arguing that “most instances of representation-reinforcing review demand value judgments not different in kind or scope from the fundamental values sort . . . [and] the parties’ claims in fundamental values case are often directly translatable into representation-reinforcing claims”); Laurence H. Tribe, The Puzzling Persistence of Process-Based Constitutional Theories, 89 YALE L.J. 1063, 1064 (1980) (“[T]he constitutional theme of perfecting the processes of governmental decisions . . . by itself determines almost nothing unless its presuppositions are specified, and its content supplemented, by a full theory of substantive rights and values — the very sort of theory the process-perfecters are at such pains to avoid.”); Mark Tushnet, Darkness on the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory, 89 YALE L.J. 1037, 1045 (1980) (“[I]dentifying functional obstacles [to the assertion of political power] both permits manipulation, which violates the restraint principle, and requires the use of objective values.”). See generally JOHN HART ELY, DEMOCRACY AND DISTRUST (1980).

cal inequality may offend the formal equality in each context. Redis-
tributing wealth threatens interference with contract or property rights while creating special districts or increasing the number of votes cast by the politically disadvantaged arguably conflicts with formal political equality.

Such concerns may lead the Court to extend the constitutionaliza-
tion of democratic governance employed in cases like *Bush v. Gore* and *California Democratic Party*. Most dramatically, the Court could hold that the substantive dictates of the Equal Protection Clause bar the race-consciousness that inheres in section 2's ban on discriminatory results and indeed in any law barring racially discriminatory effects. Such prohibitions require those governed by them to consider race expressly or risk violating the proscription. Decreeing the Fourteenth Amendment to proscribe such considerations would overrule considerable precedent, and invalidate numerous civil-rights measures. It would constrict Congress's enforcement powers to unprecedented levels.

The acceptance of race-conscious decisionmaking evident in several recent decisions suggests the Court is unlikely to hand down such a sweeping decision. Even so, other decisions energetically locate within the Constitution's text substantive norms dictating specific democratic structures. These newly articulated constitutional rules suggest a mechanism to limit congressional regulatory power over the political process. Novel constructions of the Equal Protection Clause that constrict such power are accordingly not implausible. The "constitutionalization of democracy" may well be an ill-advised institutional endeavor in its own right. As a vehicle for limiting congressional power, it threatens to obliterate it entirely.

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381. Cf. Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 884 (1987) (arguing that in both *Lochner* and *Buckley* "the existing distribution of wealth is seen as natural, and failure to act is treated as no decision at all. Neutrality is inaction, reflected in a refusal to intervene in markets or to alter the existing distribution of wealth").

382. See, e.g., *Katz, Federalism, Preclearance, and the Rehnquist Court*, supra note 144, at 1205 (making this point); *Lowenstein*, supra note 144, at 825 (noting that under both § 2 and § 5 of VRA "race is a privileged criterion" and that "[t]he legislature and everyone who participates in the process must begin with race"); *Erickson*, supra note 144, at 421.


384. See, e.g., *Ragin v. N.Y. Times*, 923 F.2d 995, 1000, 1001 (2d Cir. 1991) (discussing how Fair Housing Act's effect-based ban on racial preference in advertisements permissibly leads to race-conscious decisionmaking).

385. See Pildes, *Constitutionalizing Democratic Politics*, supra note 328, at 159.