The Fifteenth Amendment v. *Lochner*

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Introduction

In 1965, a group of activists journeyed from Selma, Alabama to Montgomery to demonstrate peacefully against state-sanctioned disenfranchisement of and violence towards Black people.[1] As the group walked across the Edmund Pettus Bridge, police officers waited with weapons ready.[2] When the demonstrators refused to dissipate, the police unleashed a devastating attack against them, resulting in what is now known as "Bloody Sunday."[3] In the wake of this violence and under immense pressure from activists, President Lyndon B. Johnson introduced the Voting

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1. *See* ARI BERMAN, GIVE US THE BALLOT: THE MODERN STRUGGLE FOR VOTING RIGHTS 5 (2015) (recounting that on the afternoon of March 7, 1965, John Lewis told reporters prior to the march "[w]e're marching today to dramatize to the nation and to the world that hundreds of thousands of Negro citizens of Alabama, particularly here in the Black Belt area, are denied the right to vote."); ROBERT A. PRATT, SELMA'S BLOODY SUNDAY: PROTEST, VOTING RIGHTS, AND THE STRUGGLE FOR RACIAL EQUALITY 1–4 (2017).

2. PRATT, *supra* note 1, at 1–2.

3. *Id.* at 1–3.

Rights Act (VRA).[4] Congress passed the measure to enforce the Fifteenth Amendment[5] and has since renewed the act with amendments five times, on each occasion with wide bipartisan margins.[6]

Almost fifty years later, five Supreme Court justices in *Shelby County v. Holder*[7] gutted a key provision of the VRA[8] and called into question the constitutionality of the entire act[9] despite an overwhelmingly developed record detailing racism and violence against Black people[10] who sought to exercise the basic right to vote.[11] The *Shelby County* Court struck down Section 5 of the VRA, a provision commonly referred to as the preclearance requirement.[12] The preclearance requirement mandated that certain covered jurisdictions, identified according to Section 4(b) of the act, preclear all voting changes with federal authorities.[13] Congress reauthorized the preclearance coverage formula under Section 4(b) in 2006 and reidentified the jurisdictions subject to the preclearance requirement.[14] In *Shelby County*, the Court did not invalidate Section 5 itself, but it effectively eviscerated it

4. BERMAN, *supra* note 1, at 5–6.

5. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 52 U.S.C. §§ 10101, 10301 to 10314).

6. Congress reauthorized the law with amendments in 1970, 1975, 1982, 1992, and 2006. *See History of Federal Voting Rights Law*, U.S. DEP'T OF JUST., (July 28, 2017), https://www.justice.gov/crt/history-federal-voting-rights-laws [https://perma.cc/G2Q9-ATNB] (discussing each reauthorization and the Act's amendments). The Court upheld the Act against numerous challenges throughout its lifetime. *See* Lopez v. Monterey Cnty., 525 U.S. 266, 269 (1999) (holding that the Voting Rights Act's 'preclearance requirements apply to measures mandated by a noncovered State" if those changes "will effect a voting change in a covered county"); City of Rome v. United States, 446 U.S. 156, 172 (1980) (holding that "Congress plainly intended that a voting procedure not be precleared unless [it lacked] both discriminatory purpose and effect"); Georgia v. United States, 411 U.S. 526, 531–35 (1973) (holding that reapportionment changes that could have the effect of decreasing minority voting power constitute "practices" subject to Section 5 protection); South Carolina v. Katzenbach, 383 U.S. 301, 308 (1966) (upholding Section 5 and other sections of the Voting Rights Act against a constitutional challenge).

7. 570 U.S. 529 (2013).

8. *Id*. at 557.

9. *Id.* at 556–57 ("[W]e took care to avoid ruling on the constitutionality of the Voting Rights Act when asked to do so, and instead resolved the case before us on statutory grounds. But in issuing that decision, we expressed our broader concerns about the constitutionality of the Act.").

10. *Id.* at 570–80 (Ginsburg, J., dissenting) (reviewing the record of the VRA's effectiveness in blocking voting changes that had disparate impacts on voters of color); *see also* Ellen D. Katz, *What Was Wrong with the Record?*, 12 ELECTION L.J. 329, 331 (2013) (discussing the historical impacts of racism on elections and how Congress tailored the VRA's coverage formula to address those impacts, including "second-generation" devices to disenfranchise voters).

11. Reynolds v. Sims, 377 U.S. 533, 561–62 (1964) ("[T]he right to suffrage is a fundamental matter in a free and democratic society."); Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886) ("[The right to vote] is regarded as a fundamental political right, because [it is] preservative of all rights.").

12. *Shelby Cnty.*, 570 U.S. at 537 (explaining the preclearance requirement under Section 4 of the VRA).

13. *Id.*

14. *Id*. at 539.

by invalidating Section 4(b)'s formula for determining which jurisdictions would be subject to preclearance.[15]

Before the decision came down, one scholar noted, "[A] decision striking down the VRA would be the most dramatic exercise of judicial review over a federal law since the *Lochner* era."[16] While not completely invalidating the VRA in its decision, the Court "dismantled the nation's long-established voting rights enforcement regime and, in turn, engendered a plethora of controversial state and local voting laws regarding voter identification, voter registration, and voter access that have resulted in racial and ethnic voter discrimination."[17] In 2021, the Court continued down this destructive path in *Brnovich v. Democratic National Committee*,[18] weakening Section 2 of the Act, which was designed to prevent states from passing laws that resulted in a denial or abridgment of the right to vote based on a totality of the circumstances.[19] The Court upheld two Arizona laws, an out-of-precinct voting policy and ballot-collection ban, even though the first disproportionately burdened Hispanic and Black voters and the second disproportionately burdened Native American voters.[20]

It may be impossible to underscore how these decisions devastated both the country writ large and those fighting for a legitimate, inclusive, and robust democracy. Days after the *Shelby County* decision, states rushed to pass controversial voting laws regarding voter identification, voter registration, and voter access that have disproportionately burdened minority voters.[21] A robust literature of criticism rose from these decisions' ashes.[22]

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15. *Id.* at 557.

16. Nathaniel Persily, *The Promise and Pitfalls of the New Voting Rights Act*, 117 YALE L.J. 174, 252 (2007).

17. Joshua S. Sellers, Shelby County *as a Sanction for States' Rights in Elections*, 34 ST. LOUIS U. PUB. L. REV. 367, 367 (2015).

18. 141 S. Ct. 2321 (2021).

19. *Id.* at 2337–40.

20. *Id.* at 2350.

21. *Id.* at 2355 (Kagan, J. dissenting); *see also* P.R. Lockhart, *How* Shelby County v. Holder *Upended Voting Rights in America*, VOX (Jan. 25, 2019, 7:49 PM), https://www.vox.com/policy-and-politics/2019/6/25/18701277/shelby-county-v-holder-anniversary-voting-rights-suppression-congress [https://perma.cc/RYA5-DD78]; BRENNAN CTR. FOR JUST., NEW VOTING RESTRICTIONS IN AMERICA (2019), https://www.brennancenter.org/sites/default/files/2019-11/New%20Voting%20Restrictions.pdf [https://perma.cc/H7KU-WLGR]; Jeremy Duda, *Supreme Court Ruling on Voting Rights Act Opened Floodgates for New Restrictions*, NC POL'Y WATCH (Oct. 7, 2020), http://www.ncpolicywatch.com/2020/10/07/supreme-court-ruling-on-voting-rights-act-opened-floodgates-for-new-restrictions [https://perma.cc/VDA2-QMRS].

22. *See, e.g.,* Steven D. Schwinn, Brnovich v. DNC*: Yet Another Blow to the Voting Rights Act*, 48 PREVIEW U.S. SUP. CT. CASES 11, 19–21 (2021) (reviewing the *Brnovich* decision and its implications on voting rights); Mahogane D. Reed, *First* Shelby County, *Now* Brnovich: *What's Left of the Voting Rights Act?*, BLOOMBERG L. (July 14, 2021, 3:00 AM) (calling Congress to pass federal voting rights legislation after *Shelby* and *Brnovich*), https://news.bloomberglaw.com/us-law-week/first-shelby-county-now-brnovich-whats-left-of-the-voting-rights-act [https://perma.cc/UZ6G-S8F7; Richard L. Hasen, Shelby County *and the Illusion of Minimalism,*

Because the decisions removed some of the most effective tools to prevent disenfranchisement, activists and advocates were forced to reinvent old and create new litigation paths to protect and strengthen the right to vote.[23] The decisions shed light on the hydraulic nature[24] of voting rights litigation—when courts close one route, advocates and activists seek to defend voting routes through another.[25]

Voting rights litigation faces a somewhat fractured jurisprudential landscape, as well as in the election law arena in general.[26] When faced with the doctrinal landscape of voting rights litigation, Justice Thurgood Marshall,

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22 WM. & MARY BILL RTS. J. 713, 726 (2014) (critiquing the *Shelby* decision as minimalism by purporting to "decide less than it could have" and glossing over the "serious jurisprudential hurdles" in the case); Samuel R. Bagenstos, *Universalism and Civil Rights (with Notes on Voting Rights After* Shelby), 123 YALE L.J. 2838, 2870–75 (2014) (explaining that the *Shelby County* decision does not address vote dilution because its universalist approach only tackles vote denial); Nicholas O. Stephanopoulos, *The South After* Shelby County, 2013 SUP. CT. REV. 55, 55–62 (2013) (discussing the differences between voting rights claims that will be brought under Section 2 of the VRA as opposed to under Section 5 after *Shelby County*); Katz, *supra* note 10, at 330–31 (critiquing the record of *Shelby County*); Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *State's Rights, Last Rites, and Voting Rights,* 47 CONN. L. REV. 481, 481–88 (2014) (describing the pessimistic reading of *Shelby County*, in which the Court destabilized key basic assumptions about modern election law and voting rights policy); Joel Heller, Shelby County *and the End of History*, 44 U. MEM. L. REV. 357, 380–85 (2013) (arguing that past discriminatory voting policies continue to influence modern voting policies and calls for congressional action). *See generally* CAROL ANDERSON, ONE PERSON, NO VOTE: HOW VOTER SUPPRESSION IS DESTROYING OUR DEMOCRACY (2018) (discussing how the right to vote is under assault in the form of voter ID laws, voter roll purges, and gerrymandering).

23. *See e.g.*, Cody Gray, *Savior Through Severance: A Litigation-Based Response to* Shelby County v. Holder, 50 HARV. C.R.-C.L. L. REV. 49, 48, 52–53 (2015) (discussing voting rights litigation in post-*Shelby County* world); Roseann R. Romano, *Devising a Standard for Section 3: Post-*Shelby County *Voting Rights Litigation*, 100 IOWA L. REV. 387, 403–408 (2014) (discussing how plaintiffs can litigate voting rights cases through Section 3(c) of the VRA); Dale E. Ho, *Voting Rights Litigation After* Shelby County*: Mechanics and Standards in Section 2 Vote Denial Claims*, 17 N.Y.U. J. L. PUB. POL'Y 676, 687–697 (2014) (discussing three models of Section 2 vote denial claims as an alternative to Section 5 litigation); Danielle Lang & J. Gerald Herbert, *A Post-*Shelby *Strategy: Exposing Discriminatory Intent in Voting Rights Litigation*, 127 YALE L.J. F. 779, 783–84 (2018) (explaining that litigants are adding Fourteenth and Fifteenth Amendment intentional discrimination claims to voting rights claims); Dale E. Ho, *Building an Umbrella in a Rainstorm: The New Vote Denial Litigation Since* Shelby County, 127 YALE L.J. F. 799, 802–08 (2018) (explaining litigation that seeks to apply a two-part standard for Section 2 of the VRA).

24. The hydraulics metaphor is borrowed from the context of campaign finance. *See* Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705, 1708 (1999) ("Our account [of campaign finance], then, is 'hydraulic' in two senses. First, we think political money, like water, has to go somewhere. It never really disappears into thin air. Second, we think political money, like water, is part of a broader ecosystem. Understanding why it flows where it does and what functions it serves when it gets there requires thinking about the system as a whole.").

25. *See* Gray, *supra* note 23, at 52–53; Romano, *supra* note 23, at 403–408; Lang & Herbert, *supra* note 23, at 783–84.

26. *See* Gray, *supra* note 23, at 52–53; Romano, *supra* note 23, at 403–408; Lang & Herbert, *supra* note 23, at 783–84; *see also* Terry Smith, *Autonomy Versus Equality: Voting Rights Rediscovered*, 57 ALA. L. REV. 261, 263 (2005) ("Nowhere has the effect of the piecemeal nature of the right to vote been more significant than in its impact on voters of color.").

dissenting in *City of Mobile v. Bolden,*[27] stated "[i]t is time to realize that manipulating doctrines and drawing improper distinctions under the Fourteenth and Fifteenth Amendments, as well as under Congress's remedial legislation enforcing those Amendments, make this Court an accessory to the perpetuation of racial discrimination."[28] Leading scholars have echoed Justice Marshall's insight with regard to the right to vote, vote dilution, and the Reconstruction Amendments.[29] One reason for this messy doctrine potentially lies in the Court's inability to engage with the underlying theory and concept of the right itself. As Richard Pildes has said, "The right to vote is a deceptively complex legal and moral right" and "is considerably more elusive and conceptually difficult than most constitutional rights."[30] Scholars have also argued that the destabilizing doctrine could be a result of the Court's muddying of the distinct features of the Fourteenth Amendment and Fifteenth Amendment in the field of voting rights.[31] For example, current doctrine might actually imply a clash between the two Amendments in modern constitutional law.[32]

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27. 446 U.S. 55 (1980).

28. *Id.* at 141 (Marshall, J., dissenting). Justice Marshall continued:

> The plurality's requirement of proof of *intentional discrimination*, so inappropriate in today's cases, may represent an attempt to bury the legitimate concerns of the minority beneath the soil of a doctrine almost as impermeable as it is serious. If so, the superficial tranquility created by such measures can be but short-lived. If this Court refuses to honor our long-recognized principle that the Constitution "nullifies sophisticated as well as simple-minded, modes of discrimination," it cannot expect the victims of discrimination to respect political channels of seeking redress. I dissent.

Id. (citing Lane v. Wilson, 307 U.S. 268, 275 (1939)).

29. *See* 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, 894 (1997) ("Alas, few areas of constitutional law are as maddeningly confused and starkly contradictory as the law governing the right to vote."); Joseph Fishkin, *Equal Citizenship and the Individual Right to Vote*, 86 IND. L.J. 1289, 1292 (2011) (describing the Court's framework of the individual-rights-versus-state interests doctrinal framework as the wrong approach in certain cases but might be right in others).

30. Richard H. Pildes, *What Kind of Right is "The Right to Vote"?*, 93 VA. L. REV. IN BRIEF 45, 45 (2008); *see also* Joshua A. Douglas, *Is the Right to Vote Really Fundamental?*, 18 CORNELL J. L. & PUB. POL'Y 143, 147–51 (2008) (discussing the Supreme Court's fractured and inconsistent treatment to the right to vote); Demian A. Ordway, *Disenfranchisement and the Constitution: Finding a Standard That Works*, 82 N.Y.U. L. REV. 1174, 1175 (2007) ("Considering the history of the 'right to vote' in American jurisprudence, today's confusion is hardly surprising.").

31. *See* Travis Krum, *The Superfluous Fifteenth Amendment?*, 114 NW. U. L. REV. 1449, 1557–67 (2020) (describing the Amendments and their respective reach and eventual conflation).

32. *See, e.g.*, *id.*; *see also* Emma Coleman Jordan, *Taking Voting Rights Seriously: Rediscovering the Fifteenth Amendment*, 64 NEB. L. REV. 389, 390–91 (1985) (urging for distinct theories of voting rights under the Fourteenth and Fifteenth Amendments because of the potential clash); Stephanie N. Kang, *Restoring the Fifteenth Amendment: The Constitutional Right to an Undiluted Vote*, 62 UCLA L. REV. 1392, 1421 (2015) ("The Fourteenth Amendment's demand for equal protection and colorblindness operates directly against the Fifteenth Amendment's race-conscious protections.").

Regardless of the cause of the Court's messy jurisprudence involving voting rights, one result of the doctrine remains clear: the need for a more robust and analytically sound theory of the Fifteenth Amendment—distinct from the Fourteenth Amendment—and Congress's power to enforce it.[33] Scholars have remarked that due to "constitutional amnesia, the Fifteenth Amendment is missing from current doctrine."[34] It has been called a "constitutional appendix"[35] and a "constitutional afterthought."[36] It remains "enigmatic" due to its anemic academic presence.[37]

This Article explores one of the many dimensions left to be fully understood regarding the Fifteenth Amendment and the reach of Congress's power under it.[38] For decades, the answer to these questions seemed settled. The Court first considered the constitutionality of the VRA's preclearance provision in its hallmark opinion, *South Carolina v. Katzenbach*,[39] where the Court used a deferential review to uphold it.[40] In upholding the VRA coverage formula, the Court held that Congress's Fifteenth Amendment enforcement power was the same as the *McCulloch*[41] standard.[42] The Court held:

> The language and purpose of the Fifteenth Amendment, the prior decisions construing its several provisions, and the general doctrines of constitutional interpretation, all point to one fundamental principle. As against the reserved powers of the States, Congress may use any

33. *See* Krum, *supra* note 31, at 1557 ("The Fifteenth Amendment has been reduced to a vestigial organ. It is a constitutional appendix, not an amendment . . . . [T]he Court has repeatedly relied on the Fourteenth Amendment—rather than the Fifteenth—to scrutinize racially discriminatory election laws."); Jordan, *supra* note 32, at 391 ("[A]fter *Mobile* . . . one could fairly conclude that the Court has sounded the death knell for the fifteenth amendment, thus confining its implementation to Congress under the Voting Rights Act. As a consequence, fourteenth amendment theory dominates the disposition of voting rights claims today."); Jeremy Amar-Dolan, *The Voting Rights Act and the Fifteenth Amendment Standard of Review*, 16 U. PA. J. CONST. L. 1477, 1480 (2014) ("[B]ecause the subject matter of the Fifteenth Amendment is so much narrower than that of the Fourteenth, the Court may grant more deference to Congress in enforcing it.").

34. Krum, *supra* note 31, at 1554.

35. *Id.* at 1557.

36. *Id.* at 1551.

37. Emma C. Jordan, *The Future of the Fifteenth Amendment*, 28 HOWARD L.J. 541, 541–42 (1985).

38. While some scholars have assumed, arguendo, that Congress possesses the same powers to enforce the Fifteenth Amendment that it has regarding the Fourteenth, the Supreme Court has not settled the matter. The Court avoided the question of the standard of review applicable to Fifteenth Amendment legislation. *See infra* Section I.D.

39. 383 U.S. 301 (1966).

40. *Id.* at 325–26 (finding that the term "appropriate" in Section 2 of the Fifteenth Amendment was a clear adoption of the *McCulloch* standard).

41. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).

42. South Carolina v. Katzenbach, 384 U.S. 301, 325–26 (1966).

> rational means to effectuate the constitutional prohibition of racial discrimination in voting.[43]

However, a revolution on the Court, starting with the Rehnquist Court and extending through the Roberts Court, has led to an active judiciary reigning in Congress's power. One defining feature of this era has been a reformulation of Congress's power to enforce the *Fourteenth*—as opposed to the Fifteenth—Amendment. Following a familiar pattern, the Court first interpreted Congress's power to enforce the Fourteenth Amendment in broad terms in *Katzenbach v. Morgan*.[44] It then retrenched. In *City of Boerne v. Flores*,[45] the Court held that for Congress to pass legislation pursuant to its power under the Fourteenth Amendment, it must "enforce" constitutional rights,[46] and the remedy chosen for enforcement must be "congruen[t] and proportional[]" to those rights.[47] This formulation is a far cry from the Court's previous interpretation in *Katzenbach v. Morgan*.[48] Importantly, however, the Court has not resolved the question of whether this reformulation of Congress's enforcement power under the Fourteenth Amendment mirrors that of the Fifteenth Amendment.[49] Some scholars have assumed, maybe practically, that the Court will transplant this standard to the Fifteenth Amendment context.[50] However, this would be a mistake as it

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43. *Id.* at 324.

44. 384 U.S. 641, 650–56 (1966) (describing that Congress sought to evoke the same broad enforcement powers announced in *McCulloch* in passing Section 5 of the Fourteenth Amendment and applying the deferential standard to Section 4(e) of the VRA).

45. 521 U.S. 507 (1997).

46. *Id.* at 517–18.

47. *Id.* at 519–20 ("There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end. Lacking such a connection, legislation may become substantive in operative effect. History and our case law support drawing the distinction, one apparent from the text of the Amendment.").

48. *See* Krum, *supra* note 31, at 1555 ("This doctrinal change [to the *Boerne* standard] would give Congress far more leeway in passing voting rights legislation."); *see also* Ellen D. Katz, *Enforcing the Fifteenth Amendment*, *in* THE OXFORD HANDBOOK OF THE U.S. CONSTITUTION 366, 384 (Mark Tushnet, Mark A. Graber & Sanford Levinson eds., 2015) (describing Congress's power after *Boerne* in the context of the Fifteenth Amendment and concluding that "Congress presently looks like it possesses less power to enforce the Fifteenth Amendment than it ever has had before").

49. *See* Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 204 (2009) ("[The] question [of the proper standard of review] has been extensively briefed in this case, but we need not resolve it."). In this case, a utility district in Texas challenged the constitutionality of the preclearance provision of the Voting Rights Act. *Id.* at 196. The Court did not decide this question in the *Shelby County* decision. Instead of ruling on the merits of the constitutionality of Section 5, the Court struck down the preclearance formula on a theory of "equal sovereignty." Shelby Cnty. v. Holder, 570 U.S. 529, 542–57 (2013).

50. *See, e.g.*, Pamela S. Karlan, *Two Section Twos and Two Section Fives: Voting Rights and Remedies After* Flores, 39 WM. & MARY L. REV. 725, 725 n.5 (1998) ("[B]ecause the two amendments are rough contemporaries and their enforcement power provisions are articulated in similar terms, the [*Boerne*] analysis surely carries over."); Hasen, *supra* note 22, at 730–31 ("Through the bootstrapping on the issue in the first footnote of *Shelby County*, the majority could

would sacrifice an opportunity to breathe life into the Fifteenth Amendment and flesh out its capacity for progress.[51]

The Fifteenth Amendment must shine distinctly from the Fourteenth Amendment's omnipresence. Voting rights advocates need as many tools as possible to advance the franchise in the face of a hostile judiciary.[52] The renewed focus on areas of congressional power to remedy and prevent voting rights violations has become extremely important as the House of Representatives has passed legislation to remedy the *Shelby County* decision[53] and create a more robust, proactive voting rights regime[54] that will likely run up against the Court's distrust for Congress.[55]

This is where theory meets reality. While this Article will argue that Congress should have great latitude to enforce the Fifteenth Amendment, the Court's Lochnerian turn in voting jurisprudence has cast doubt about the contours of congressional power in enforcing the right to vote.[56] However, that does not mean this theoretical development is fruitless. Indeed, normatively, just as the Court casted *Lochner* into the anti-canon,[57] it might do the same to *Shelby County* and *Brnovich*. The Court is not insular and responds to social movements and pressures from outside the granite halls of the Supreme Court building. As such, theoretical development, even in the

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well write in future cases that it had established the *Boerne* standard as applying to review of all voting laws Congress passes under its Fourteenth or Fifteenth Amendment enforcement powers.").

51. *Cf.* Jordan, *supra* note 32, at 443 (insisting that we should take the Fifteenth Amendment and its stake in voting rights litigation seriously).

52. *See, e.g.*, Adam Feldman, *Empirical SCOTUS: How the Court's Decisions Have Limited the National Electorate*, SCOTUSBLOG (Nov. 18, 2020, 3:05 PM), https://www.scotusblog.com/2020/11/empirical-scotus-how-the-courts-decisions-have-limited-the-national-electorate [https://perma.cc/S68J-U8B6].

53. Voting Rights Advancement Act, H.R. 4, 116th Cong. § 3 (2019) (proposing coverage formula for preclearance).

54. For the People Act, H.R. 1, 116th Cong. (2019) (addressing voter access, election integrity, election security, political spending, and ethics for the three branches of government).

55. Pamela S. Karlan, *The Supreme Court, 2011 Term — Forward: Democracy and Disdain*, 126 HARV. L. REV. 1, 12 (2012) ("The Roberts Court's approach reflects a combination of institutional distrust—the Court is better at determining constitutional meaning—and substantive distrust—congressional power must be held in check.").

56. While an accusation of *Lochner* typically implies a decision that one does not agree with or judicial activism, I use it here to describe a decision that captures a belief that market ordering under the common law was part of nature rather than a legal construct, and that it forms a baseline from which to measure the constitutionality of state action, rendering redistributive regulations unconstitutional. *See also* Ellen D. Katz, *Election Law's Lochnerian Turn*, 94 B. U. L. REV. 697, 698 (2014) (arguing that the Roberts Court approaches the regulation of the electoral process similar to the *Lochner* Court's approach to progressive wage and hour legislation).

57. *See generally* Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379 (2011) (identifying anti-canon cases, including Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857); Plessy v. Ferguson, 163 U.S. 537 (1896); Lochner v. New York, 198 U.S. 45 (1905); and Korematsu v. United States, 323 U.S. 214 (1944)).

face of hostility, charts a path forward for voting rights activism and jurisprudence.

In this Article, I seek to add to the hydraulic voting rights literature by developing a comprehensive theory that underlies congressional power to enforce the Fifteenth Amendment. Additionally, I plant the seeds for a descriptive understanding of why the Court has retrenched from, or is likely to rebuff, its original promulgation of congressional power to enforce the Fifteenth Amendment; I will argue that Congress faces a new era of *Lochner* election law jurisprudence. Unlike our great-great grandparent's *Lochner*, the new era in election law demonstrates why the Court is eager both to strike down legislation that seeks to expand the franchise in lock-step with the spirit of the Reconstruction Amendments and uphold those that burden minority voters to maintain a whiteness-as-neutral background principle in election law. This framework of voting rights law demonstrates the intimate connection between voting and economic rights, and allows us to best chart a path forward in the voting rights landscape.

In Part I, I will argue that while the enforcement sections of the two Amendments are textually almost identical,[58] Congress's power to enforce the Fourteenth and Fifteenth Amendments should be distinct. Previous scholarship outlines how the substance and history of the Amendments persuasively demonstrates that Congress should possess greater authority to enforce the text and spirit of the Fifteenth Amendment. In addition to the distinct histories and substance of the Amendments, I add to this literature by describing how the underlying theory of democracy embodied in the Fifteenth Amendment warrants an enforcement power distinct from that of the Fourteenth Amendment. I hope this addition furthers "the effort to reconstruct its purpose and determine the appropriate range of its application."[59] In Part II, I will discuss why the Court is unlikely to stay true to the precedent set in *Katzenbach* and instead impose a higher burden on Congress to pass legislation to enforce the Fifteenth Amendment. To demonstrate this reality, I argue that the hostility the Court has articulated towards remedial race-based legislation and the underlying "white identity" politics of election law further contributes to the Court's reluctance to extend protection to minorities. Further, the Court has been reluctant to defer to Congress and its judgement in creating legislation pursuant to its enforcement powers. At the core of this belief, I will argue that the Court has moved into *Lochner* territory for analyzing voting rights claims.[60] The Supreme Court has declared that "[t]he Fifteenth Amendment has

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58. *Compare* U.S. CONST. amend. XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."), *with* U.S. CONST. amend. XV, § 2 ("The Congress shall have power to enforce this article by appropriate legislation.").

59. Jordan, *supra* note 32, at 391.

60. *See* discussion *infra* Section II.

independent meaning and force."[61] If and when Congress passes voting rights legislation, litigators should be ready with a deep understanding of Congress's power to do so.

I. Detangling the Fourteenth and Fifteenth Amendments

One may wonder if it matters whether Congress or the courts have conflated the distinct features of the Fourteenth and Fifteenth Amendments. Arguably, the Fourteenth Amendment might have swallowed the types of cases that could have been decided on Fifteenth Amendment grounds.[62] However, the doctrinal development of "color blind" equal protection and due process jurisprudence[63] has created friction within the Fifteenth Amendment's explicitly race-conscious features.[64] The Court's reliance on the "color blind" Fourteenth Amendment and equal protection principles in deciding voting rights cases can harm the distinct protections of the Fifteenth Amendment.[65] A proper understanding of the underlying history and theory

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61. Rice v. Cayetano, 528 U.S. 495, 522 (2000).

62. *See* Robert J. Deichert, Rice v. Cayetano: *The Fifteenth Amendment at a Crossroads*, 32 CONN. L. REV. 1075, 1085 (2000) ("The Fourteenth Amendment Equal Protection Clause has been the source of most of the Supreme Court's voting rights jurisprudence, particularly since the early part of the 1900s.").

63. *See* Henry L. Chambers, Jr., *Colorblindness, Race Neutrality, and Voting Rights*, 51 EMORY L.J. 1397, 1398–99 (2002) ("Voting or electoral rules that stem from discriminatory intent (the intent to treat people differently based on their race) are subject to strict scrutiny and usually are unconstitutional; rules that do not stem from discriminatory intent are presumed constitutional. Thus, color-conscious rules are subject to strict scrutiny, as are colorblind rules that are enacted or administered with discriminatory intent. Conversely, colorblind rules that have discriminatory effects are constitutional as long as they are not enacted or applied with discriminatory intent.").

64. *See* Ian F. Haney Lopez, *Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination*, 109 YALE L.J. 1717, 1836 (2000) ("[Shaw v. Reno (*Shaw I*), 590 U.S. 630 (1993)] and other cases demonstrate that the Supreme Court increasingly views the open consideration of race as doctrinally akin to purposeful racism (irrespective of whether such consideration is necessary to remedy discrimination), thereby requiring heightened—and effectively fatal—scrutiny."); Pamela S. Karlan & Daryl J. Levinson, *Why Voting is Different*, 84 CAL. L. REV. 1201, 1202 (1996) ("[*Shaw I*] attempt[ed] to merge the analysis governing race-conscious districting back into general-purpose equal protection doctrine."); *see also* Miller v. Johnson, 515 U.S. 900, 922 (1995) (describing that the Court must have a presumptive skepticism of all racial classifications because the judiciary has an independent obligation to engage in the equal protection analysis). This Article does not directly discuss the VRA, but the Court also has indicated that the Equal Protection Clause is on a collision course with the VRA. *See* Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 HARV. L. REV. 1663, 1665, 1697–98 (2001) ("[S]trict scrutiny [in Shaw v. Hunt (*Shaw* II), 517 U.S. 899 (1996)] neatly illustrates the differences between the Rehnquist Court's highly individualistic conception of rights and an aggregate rights theory.").

65. *See* Chambers, *supra* note 63, at 1426 ("The conflation of Fourteenth and Fifteenth Amendments with respect to voting rights is not without harm. The conflation can effectively limit minority voting rights, as the Fourteenth Amendment protects voting rights by requiring colorblindness in some situations where requiring race-neutral results might be more appropriate under the Fifteenth Amendment."); *see also* Jordan, *supra* note 32, at 442 ("[T]he fifteenth amendment would permit explicit consideration of race if the following factors are present: first, a history or prior discrimination affecting the right of voting; second, a history of racial bloc voting;

of the Fifteenth Amendment can lay new groundwork for advocates to advance the franchise.

The following discussion of the history of the Fourteenth and Fifteenth Amendments reveals that the Reconstruction Congress intended for the Amendments to have similar enforcement powers with different substantive scopes. While Congress intended for the Amendments to have similar enforcement powers, the Supreme Court's fear of the substantive scope of the Fourteenth Amendment forced a wedge between the Fourteenth and the Fifteenth Amendments. Because the scope of the Fifteenth Amendment's substantive protection is more restrained, the Court's fear of congressional overreach should not apply. Finally, this Section analyzes the Court's preference for "communitarian" conceptions of democracy, which one can attribute to its focus on the Equal Protection Clause of the Fourteenth Amendment. This conception of democracy may limit a potentially more robust understanding of democracy that the right to vote entails under the Fifteenth Amendment; this Amendment offers a new path to persuade the Court to adopt a "protective" democracy paradigm. This Part will demonstrate that the Court's *Boerne* standard should not apply to the Fifteenth Amendment.

A. *History*[66]

Supreme Court opinions interpreting the Fourteenth and Fifteenth Amendments do not reveal the violent and terroristic history that led to their adoption.[67] On the coattails of the Civil War, the ex-Confederate states

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and third, the presence of geographical patterns that make it unlikely that a minority will ever emerge to be represented in proportion to their voting population percentages. These criteria have been proposed because they reflect a recognition that the political reaction of white to anything other than a carefully tailored remedy will ultimately undercut the effectiveness of any measures designed to correct the history of prior discrimination affecting the right to vote").

66. This Section will not give a historical recount of the proposal and passage of the Reconstruction Amendments. Instead, it pinpoints particular features of the history of the Amendments that demonstrate why congressional power under the Fifteenth Amendment is different from the Fourteenth Amendment. For a deep history of the Amendments and Reconstruction, see generally ERIC FONER, THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION (2019) (tracing the arc of the Thirteenth, Fourteenth, and Fifteenth Amendments of the Constitution from their origins and the subsequent Supreme Court opinions interpreting them). *See also* W.E. B. DU BOIS, BLACK RECONSTRUCTION IN AMERICA, 1860–1880 (Free Press 1993) (1935) (establishing the active role Black Americans played in the period immediately following the Civil War).

67. Slavery, the fight for civil liberties, the suppression of free speech and the press, and the disenfranchisement and obstruction of the right to vote loomed over the country during the Reconstruction era. Michael Kent Curtis, *The Klan, the Congress, and the Court: Congressional Enforcement of the Fourteenth and Fifteenth Amendments & the State Action Syllogism, a Brief Historical Overview*, 11 U. PA. J. CONST. L. 1381, 1382 (2009). *See generally* CHARLES LANE, THE DAY FREEDOM DIED: THE COLFAX MASSACRE, THE SUPREME COURT, AND THE BETRAYAL OF RECONSTRUCTION (2008) (describing how white men who fought in for the Confederation murdered freed slaves who attempted to assert their new rights in Louisiana after the Civil War).

quickly enacted the infamous and evil Black Codes that curtailed the freedoms and liberties of newly freed slaves.[68] Further, state sanctioned violence towards Black people reached endemic proportions[69] as southern states sought to enforce a de facto slavery system.[70]

In the aftermath of the 1866 midterms, Republicans dominated the Fortieth Congress and sought to neutralize these race-based policies and violent acts.[71] Congress wielded its newfound power to pass—and required the states seeking readmission into the union to adopt[72]—the Fourteenth Amendment, which was ratified in 1868.[73]

The Amendment contained five sections, but this Article is primarily concerned with the history regarding the fifth section. It reads, "Congress shall have power to enforce, by appropriate legislation, the provisions of this article."[74] The Reconstruction Congress deliberately used the word "appropriate" to evoke *McCulloch v. Maryland*'s broad enunciation of congressional power.[75] In *McCulloch*, the Court famously announced, "Let the end be legitimate, let it be within the scope of the [C]onstitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the [C]onstitution, are constitutional."[76] Congress also used the word "enforce" to effectuate the spirit of the Amendment, which "entails both a remedy for prior bad acts and a prophylaxis" for thwarting future unconstitutional behavior.[77] Therefore,

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68. ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877, at 198–201 (1988).

69. *Id.*

70. I cannot understate the violence and terror Black people faced in the Reconstruction South. For further support, see generally STEPHEN BUDIANSKY, THE BLOODY SHIRT: TERROR AFTER THE CIVIL WAR (2008) (detailing the terroristic violence in the South). *See also* EQUAL JUST. INITIATIVE, RECONSTRUCTION IN AMERICA: RACIAL VIOLENCE AFTER THE CIVIL WAR, 1865–1876, at 7 (2020), https://eji.org/wp-content/uploads/2020/07/reconstruction-in-america-report.pdf [https://perma.cc/S2LZ-BQHM] (exposing the lynching, assaults, rapes, and murders of Black people during Reconstruction).

71. Krum, *supra* note 31, at 1594–95.

72. An Act to Provide for the More Efficient Government of the Rebel States, ch. 153, § 5, 14 Stat. 428 (1867).

73. *See* Travis Crum, *The Lawfulness of the Fifteenth Amendment*, 97 NOTRE DAME L. REV. 1543, 1561–62 (2022) (discussing the ratification of the Fourteenth Amendment).

74. U.S. CONST. amend. XIV, § 5. The language is the same as the enforcement provision of the Thirteenth Amendment and Fifteenth Amendment. U.S. CONST. amend. XIII, § 2; U.S. CONST. amend. XV, § 2.

75. Krum, *supra* note 31, at 1590–91; *see also* Katzenbach v. Morgan, 384 U.S. 641, 650 (1966) ("By including § 5 the draftsmen sought to grant to Congress, by a specific provision applicable to the Fourteenth Amendment, the same broad powers expressed in the Necessary and Proper Clause. The classic formulation of the reach of those powers was established by Chief Justice Marshall in McCulloch v. Maryland.").

76. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819).

77. Krum, *supra* note 31, at 1591.

the purpose of Section 5 was to prescribe congressional action to restructure a pre-Civil War federalism that the Reconstruction Framers sought to upend.

After ratifying the Fourteenth Amendment, Republicans in Congress sought to ride the wave of their newfound dominance and turned their focus towards Black enfranchisement.[78] Without federal enforcement, Black suffrage did not exist in practice in either the South or North due to pervasive and staunch racism.[79] Congress sought to act, but it faced a dilemma: did it have the power to pass a nationwide Black suffrage statute pursuant to its Fourteenth Amendment Section 5 powers?[80] Radical Republicans ardently argued that Congress could. For example, Representative George Boutwell (R-MA) proposed such a bill, arguing that "[p]ower was given to Congress to remedy this evil, and that power Congress is now called upon to exercise."[81] Senator Sumner continued, arguing that "beyond all question the true rule under the national Constitution, especially since its additional amendments, is that *anything for Human Rights is constitutional*. Yes, sir; against the old rule, *anything for slavery*, I put the new rule, *anything for Human Rights*."[82] However, even with this broad conception of power at its fingertips, the Reconstruction Congress did not think that it could use its Fourteenth Amendment substantive power to extend suffrage to Black men.[83] Congress decided that it had to resort to a constitutional amendment to widen its power and authority to reach the ballot box. In passing the Fifteenth Amendment, Congress, again, included an enforcement clause that draws on the broad pronouncement of authority *McCulloch* dictated.[84]

The history of the proposal and passage of the Fifteenth Amendment demonstrates that the Framers sought to augment congressional power to regulate and protect voting rights—creating a new front of power. Temporally, it followed the Fourteenth Amendment, and it amended the

78. *Id.* at 1593–96. Before the 1866 midterm election, the push for Black suffrage in Congress stalled and had no successes. *Id.* at 1594.

79. *See* WILLIAM GILLETTE, THE RIGHT TO VOTE: POLITICS AND THE PASSAGE OF THE FIFTEENTH AMENDMENT 25–27 (John Hopkins U. Press 2019) (1965).

80. *See* Krum, *supra* note 31, at 1597 ("Several factors coalesced in 1869 to convince the Reconstruction Framers to support nationwide black suffrage. These factors can be grouped into three broad categories: ideological, partisan, and pragmatic.").

81. CONG. GLOBE, 40th Cong., 3d Sess. 559 (1869) (statement of Rep. Boutwell).

82. *Id.* at 902 (statement of Sen. Sumner).

83. EARL M. MALTZ, CIVIL RIGHTS, THE CONSTITUTION, AND CONGRESS, 1863–1869, at 147 (1990) ("Both Democrats and more moderate Republicans rose to challenge the assertion that Congress had authority to regulate suffrage without a constitutional amendment."). Representative Boutwell later conceded defeat and asked to vote on the amendment before his bill. CONG. GLOBE, 40th Cong., 3d Sess. 686 (1869) (statement of Rep. Boutwell). A similar bill in the Senate seeking to expand the right to vote based on the Fourteenth Amendment introduced by Senator Sumner was defeated 9-47. CONG. GLOBE, 40th Cong., 3d Sess. 5 (1868) (statement of Sen. Sumner); *id.* at 1041.

84. U.S. CONST. amend. XV, § 2 ("The Congress shall have power to enforce this article by *appropriate* legislation.") (emphasis added)).

power Congress had in the voting rights arena because the Reconstruction Congress did not originally understand the Fourteenth Amendment to encompass the right to vote or other political rights.[85] As this brief discussion demonstrates, Congress might have intended the two Amendments to have similar enforcement powers, which *McCulloch* granted; however, the next part details that the scope of the Fourteenth Amendment's substantive powers frightened the Rehnquist Court, which led to its decisions restraining congressional power in *Boerne*. Arguably, each Amendment's enforcement power is derived from the underlying substance Congress seeks to enforce.

B. Substance

The history of the substantive dimensions of the Amendments also illustrates the manifold reasons why the Court should defer more generously to Congress when enforcing the Fifteenth Amendment. Even though the Court extended Fourteenth Amendment protections to voting rights, the Reconstruction Congress specifically passed the Fifteenth Amendment because it did not think the substance of the Fourteenth included the right to vote.[86] In the 1860s, the term "civil rights" referred to few rights.[87] During Reconstruction, there existed a tripartite breakdown of rights between civil, social, and political rights.[88] The distinction between civil and political rights is what is most important for this discussion. The use of "civil rights" can be best captured in the Civil Rights Act of 1866 which included protections for the rights to: "make and enforce contracts; to buy, lease, inherit, hold and convey property; to sue and be sued and to give evidence in court; to legal protections for the security of person and property; and to equal treatment under the criminal law."[89] In contrast, political rights during Reconstruction

85. Krum, *supra* note 31, at 1592–1617.

86. *See* MALTZ, *supra* note 83, at 147. The Court first interpreted the Fourteenth Amendment's Equal Protection Clause to prohibit racial discrimination in voting in 1927. Nixon v. Herndon, 273 U.S. 536, 541 (1927) (striking down a Texas law that barred Black people from voting in the Democratic Party primary). The Court later applied the Amendment's protection to vote dilution cases. *See e.g.*, White v. Regester, 412 U.S. 755, 765–67 (1973) (requiring single-member districts for Dallas County and Bexar County in a 1970 redistricting plan in Texas).

87. CONG. GLOBE, 42d Cong., 2d Sess. 901 (1872) (statement of Sen. Trumbull) ("I thought under the constitutional amendment which made these persons who had been mere chattels men, we were bound to give them the rights of men. But that did not extend to political rights or to social rights. It was confined exclusively to the rights appertaining to man as man."); Krum, *supra* note 31, at 1579–80; Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 1016 (1995) ("Supporters and opponents of the bill alike agreed that the Fourteenth Amendment had no bearing on 'social rights.'").

88. *See generally* McConnell, *supra* note 87, at 957-62 (detailing the congressional discussion on the Fourteenth's Amendment capacity to extend to civil, social, or political rights).

89. McConnell, *supra* note 87, at 1027; Act of April 9, 1866, Ch. 31, § 1, 14 Stat. 27, 27 (codified as amended at 42 U.S.C. § 1981); Krum, *supra* note 31, at 1579–80.

included the right to vote, hold office, and sit on juries.[90] The debates surrounding the Fourteenth Amendment and Fifteenth Amendment highlight this historical division of rights. "[T]he Democrats argued that the Fourteenth Amendment did not [substantively] protect political rights," while Radical Republicans argued that it did.[91] Even though they were greatly outnumbered, the Democrats carried the day, winning over more moderate Republicans, so Congress amended the Constitution, as opposed to passing a bill, to expand its substantive protections to include suffrage through the Fifteenth Amendment.[92]

Congress amended the Constitution because it determined that it could pass a statute to enfranchise Black people under its Fourteenth Amendment, Section 5 powers. While both the Fourteenth and Fifteenth Amendments seek to protect minority voting rights now, they do so differently: the Fourteenth Amendment focuses largely on equal processes, and the Fifteenth focuses on the substantive right to vote.[93] Unlike the Fourteenth Amendment's broad language regarding equal protection and due process, which now encompasses broad federal protection of civil rights,[94] the Fifteenth Amendment's majesty lies in its simplicity: "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."[95]

As I argue below, this substantive difference is critical for distinguishing Congress's modern power to enforce the Fourteenth and Fifteenth Amendments, even if the Reconstruction Congress envisioned

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90. CONG. GLOBE, 39th Cong., 1st Sess. 1291 (1866) (statement of Sen. Bingham) (fearing that "civil rights" would be conflated with political rights, like voting and holding office, which were not "conferred upon any citizen of the United States save upon a white Citizen of the United States."). In his home state, Bingham remarked during the debates for the Civil Rights Act of 1866 that "by all authority the term 'civil rights' as used in this bill does not include and embrace every right that pertains to citizens as such. . . . A distinction taken, I know very well, in modern times, between civil and political rights." *Id.*; *see also* AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 48 (1998).

91. Krum, *supra* note 31, at 1612; *see, e.g.*, 2 Cong. Rec. app. 314 (1874) (statement of Sen. Merrimon); CONG. GLOBE, 42d Cong., 2d Sess. 843 (1872) (statement of Sen. Carpenter); *id.* at 844 (statement of Sen. Sherman); CONG. GLOBE, 40th Cong., 3d Sess. 558–60 (1869) (statement of Rep. Boutwell); *id.* at 721 (1869) (statement of Rep. Kelley); CONG. GLOBE, 40th Cong., 3d Sess. 654–58 (1869) (statement of Rep. Kerr); *id*. at 645 (statement of Rep. Eldridge); REED AMAR, *supra* note 90, at 216–18, 217.

92. Krum, *supra* note 31, at 1613.

93. Chambers, *supra* note 63, at 1398.

94. *See* Amar-Dolan, *supra* note 33, at 1499–1500 ("The Fourteenth Amendment's core guarantees . . . provide indispensable federal protection for civil rights. To prevent an abuse of this broad grant of power, the Supreme Court, as part of its movement towards a 'new federalism' has adopted a standard—congruence and proportionality—under which Congress's ability to enforce the Fourteenth Amendment's guarantees is carefully calibrated to the interpretation of tis meaning as articulated by the Court.").

95. U.S. CONST. amend. XV, § 1.

them to have parallel enforcement powers. The Court has retrenched from its broad reading of the Fourteenth Amendment's enforcement power because of its fear that Congress would evoke a virtual plenary police power. It would be a mistake for the Court to extend this fear into the extremely narrow ambit of the Fifteenth Amendment.

C. Boerne *Retrenchment*

The Court in *City of Boerne* reacted to congressional attempts to alter the Fourteenth Amendment's protections. The events leading up to the decision display a power struggle between the Court and Congress. In a previous decision, *Employment Division v. Smith*,[96] the Court held that a general law, while neutral on its face, does not violate the Free Exercise Clause, even if it disproportionately effects certain religions.[97] The decision retreated from the test established in *Sherbert v. Verner*,[98] which imposed strict scrutiny on laws that infringed free exercise rights.[99] Congress responded by passing the Religious Freedom Restoration Act of 1993 (RFRA).[100] Congress intended the RFRA to neutralize the impacts of *Smith* and force courts to apply strict scrutiny in free exercises challenges to federal *and* state laws—abrogating state sovereign immunity.[101] The Court read the law as a substantive change of the Fourteenth Amendment—a power that Congress did not have.[102] The Court held that "[i]f Congress could define its own powers by altering the Fourteenth Amendment's meaning, . . . it is difficult to conceive of a principle that would limit congressional power."[103] To respond to this fear, the Court adopted a three-part test: the Court first identifies the scope of the constitutional right at issue, examines whether Congress has identified a history and pattern of unconstitutional conduct by the states, and then determines whether the means are congruent and proportional with the ends.[104] This test seeks to respond to the Fourteenth Amendment's breadth and ensure that "[t]he ultimate interpretation and determination of the Fourteenth Amendment's substantive meaning remain[ed] the province of the Judicial Branch."[105] In *Boerne*, the Court

96. 494 U.S. 872 (1990).

97. *Id.* at 881.

98. 374 U.S. 398 (1963).

99. *Id.* at 410; *see also* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 693–95 (2014) (discussing the Court's use of the *Sherbert* test and the congressional intent behind the RFRA).

100. Pub. L. No. 103-141, 107 Stat. 1488 (1993) (codified at 42 U.S.C. § 2000bb–2000bb-4).

101. *Hobby Lobby*, 573 U.S. at 695–96.

102. City of Boerne v. Flores, 521 U.S. 507, 519 (1997). ("Legislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause. Congress does not enforce a constitutional right by changing what the right is.").

103. *Id.* at 529.

104. Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 365–68 (2001).

105. Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 81 (2000).

departed from its earlier reading of the power in *Morgan*, in which it held that Congress was a coequal interpreter of the Fourteenth Amendment's protection when adopting measures to enforce the Amendment.[106]

The Fifteenth Amendment, on the other hand, poses no such threat of substantive overreach. While Justice Frankfurter famously argued that the Fifteenth Amendment "nullifi[ed] sophisticated as well as simple-minded modes of discrimination,"[107] the reality was that "never ha[d] so specific of a constitutional directive been so plainly disregarded for so long."[108] As D. Grier Stephenson has argued,

> From ratification in 1870 through the second white primary case, the record of the fifteenth amendment is more an account of what the amendment did not do than what it accomplished. In one sense, the third of the Civil War amendments was a failure. In the South at least, black voting remained very low until the voting rights drives and new legislation of the 1960's.[109]

The retreat from the Fifteenth Amendment left a legacy of indifference and hostility that flourished until the political and social movements of the 1960s—culminating in the passage of the VRA.[110] The Act was arguably the most successful extension of Congress's power under the Fifteenth Amendment.[111]

The substance of the Fifteenth Amendment extends to a negative liberty of the right to vote, and when interpreting the VRA, the Court has repeatedly welcomed the use of congressional power to include a broad interpretation of the right to vote.[112] In effect, the Court has endorsed the view that the right

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106. Katzenbach v. Morgan, 384 U.S. 641, 651 n.10 (1966) ("We emphasize that Congress' power under [Section 5 of the Fourteenth Amendment] is limited to adopting measures to enforce the guarantees of the Amendment; [Section 5 of the Fourteenth Amendment] grants Congress no power to restrict, abrogate, or dilute these guarantees."); *see also* Krum, *supra* note 31, at 1573.

107. Lane v. Wilson, 307 U.S. 268, 275 (1939).

108. D. Grier Stephenson, Jr., *The Supreme Court, the Franchise, and the Fifteenth Amendment: The First Sixty Years,* 57 UMKC L. REV. 47, 47 (1988).

109. *Id.* at 64. (referring to the second white primary case in Grovey v. Townsend, 295 U.S. 45 (1935)).

110. PRATT, *supra* note 1, at 1–3; *see also* Jordan, *supra* note 32, at 548–49.

111. It is hard to overstate the VRA's success in extending the franchise to Black voters. For an account, see generally JOINT CTR. FOR POL. AND ECON. STUD., 50 YEARS OF THE VOTING RIGHTS ACT: THE STATE OF RACE IN POLITICS (2015), https://jointcenter.org/wp-content/uploads/2019/11/VRA-report-3.5.15-1130-amupdated.pdf [https://perma.cc/Y8CC-3LVM] (examining the effect the VRA had on minority voter registration and turnout, racially polarized voting, policy outcomes by race, and the number and share of minority elected officials); Shelby Cnty. v. Holder, 570 U.S. 529, 562 (2013) (Ginsburg, J. dissenting) ("[T]he Voting Rights Act became one of the most consequential, efficacious, and amply justified exercises of federal legislative power in our Nation's history.").

112. *See* Allen v. State Bd. of Elections, 393 U.S. 544, 565–66 (1969) ("The Voting Rights Act was aimed at the subtle, as well as obvious, state regulations which have the effect of denying

extends beyond simply the right to cast a ballot and extends to practices related to voting that are "necessary to make a vote effective."[113] However, the scope of the Fifteenth Amendment—as distinct from the VRA—remains unsettled.[114] This demonstrates further reason for scholarship to explore the precise contours of the Fifteenth Amendment's protections. Travis Krum has argued that, "[t]aking the Fifteenth Amendment seriously would also mean seeking answers to questions that the Court has expressly reserved: whether the Fifteenth Amendment encompasses a discriminatory-effects standard and prohibits racial vote dilution."[115] Regardless of the Fifteenth Amendment's substantive protections or those of the VRA, which are arguably an extension of the Fifteenth Amendment, Congress is solely empowered to prohibit racial discrimination in voting—a textually and conceptually defined sphere of rights.

The same fear that the substantive breadth of the Fifteenth Amendment would lead to congressional overreach seems far too distant to warrant the *Boerne* standard. Numerous scholars have identified that these substantive differences should lead to a distinct, more deferential enforcement power for the Fifteenth Amendment. Akhil Reed Amar has argued that that a more expansive interpretation of Congress's enforcement power under the Fifteenth Amendment is preferable because it, unlike the Fourteenth Amendment, is limited to the realm of voting.[116] Similarly, Evan H. Caminker remarked, "Section 2 [of the Fifteenth Amendment] could not possibly give rise to a legitimate fear that, if construed to require only *McCulloch*-style means-ends tailoring, it would functionally award Congress a virtually plenary police power."[117] Therefore, while the history indicates that the two amendments should have had similar enforcement powers, reflecting the *McCulloch* standard, the Court's fear of congressional abuse of its power is unfounded in the context of the Fifteenth Amendment.

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citizens their right to vote because of their race. Moreover, compatible with the decisions of this Court, the Act gives a broad interpretation to the right to vote. . . .").

113. *Id.* (quoting Reynolds v. Sims, 377 U.S. 533, 555 (1964)).

114. The Court "has not decided whether the Fifteenth Amendment applies to vote-dilution claims," absent the protections of the Voting Rights Act. Voinovich v. Quilter, 507 U.S. 146, 159 (1993). For an example of potentially conflicting takes on the Fifteenth Amendment and vote dilution claims, compare City of Mobile v. Bolden, 446 U.S. 55 (1980) (holding that disproportionate effects alone, absent purposeful discrimination, are insufficient to establish a claim of racial discrimination affecting voting), with Gomillion v. Lightfoot, 364 U.S. 339 (1960) (declining to distinguish between discriminatory effects and intent in finding an electoral district violated the Fifteenth Amendment).

115. Krum, *supra* note 31, at 1624.

116. Akhil Reed Amar, *The Lawfulness of Section 5 – And Thus of Section 5*, 126 HARV. L. REV. F. 109, 119–20 (2013) ("The Fifteenth Amendment is much more focused than the Fourteenth Amendment, which ranges far beyond voting. The Fourteenth speaks expansively to life, liberty, and property, and of unspecified privileges and immunities.").

117. Evan H. Caminker, *"Appropriate" Mean-Ends Constraints on Section 5 Powers*, 53 STAN. L. REV. 1127, 1190–91 (2001).

D. *Democratic Theory*[118]

Like the Court's struggle with understanding the precise meaning of the "right to vote," the Court's Justices throughout history have relied on competing conceptions of democracy [119] in determining the driving forces of what the Fifteenth and Fourteenth Amendment's protections entail.[120] To be fair, the concept of what democracy "is" or "should be" is contested.[121] One scholar has argued that the Court prefers to adjudicate claims involving communitarian theories of democracy instead of protective theories, even though the Court continually "speaks the language" of protective democracy.[122] In effect, when plaintiffs are able to argue that they have been "excluded" from a meaningful exercise of the franchise, the Court is more willing to rule in their favor than when plaintiffs argue that the Court should lean in when the political process arrangement deprives them of a proper politically representative polity.[123]

At the core of protective democracy lies the belief that voting "protects" one's liberties from government invasion. Under theories of protective

118. Importantly, this Section reflects the Court's understanding of democratic theory involving the Amendments and *not* the theory of democracy that the Amendments should ideally embody. The two theories of democracy discussed in this Section do not analyze the only theories of democracy, as there are many. Instead, this Section focuses on two distinct ideas utilized by both litigants and the Court in voting rights' litigation.

119. MARTIN EDELMAN, DEMOCRATIC THEORIES AND THE CONSTITUTION 1 (1984) ("The Justices must fall back upon extra-constitutional ideas, especially their conceptions of democracy, when interpreting the document. Yet the Justices have never reached agreement about the meaning of democracy. Hence different constitutional interpretations are most frequently based upon different theories of democracy.").

120. One scholar has posed that the voting rights landscape is fractured *because* of the Court's ability to grapple and understand the purpose of voting. Gardner, *supra* note 29, at 897 ("We can hardly expect to figure out what voting—or 'fair' voting, or 'meaningful' voting—means without some conception of what voting is *for,* what purpose it serves within a larger regime of democratic self-government. Such a conception can only be supplied by some theory of democracy itself.").

121. *See generally* DAVID HELD, MODELS OF DEMOCRACY (1987) (providing an introduction to models of democracy from classical Greek to the present); JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980) (arguing for the preservation of governmental structure through procedural due process); EDDIE S. GLAUDE JR., DEMOCRACY IN BLACK : HOW RACE STILL ENSLAVES THE AMERICAN SOUL (2016) (reflecting on political structure in America today); Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success*, 89 MICH. L. REV. 1077 (1991) (articulating a theory of black electoral success through meaningful enfranchisement); Miriam Galston, *Taking Aristotle Seriously: Republican-Oriented Legal Theory and the Moral Foundation of Deliberative Democracy*, 82 CAL. L. REV. 329 (1994).

122. Because the Justices rarely say, in explicit terms, which democratic theory is driving a particular decision, this observation leans on the Justices' responses to plaintiffs' arguments in voting rights litigation. *See* Gardner, *supra* note 29, at 982 ("Themes of liberty and community dominate the federal jurisprudence of voting rights in two competing theories of democracy, protective and communitarian. The courts have contributed to the confusion by often failing to distinguish between the two theories, or by speaking the language of one concept while acting according to the other.").

123. *Id.* at 898–900.

democracy, voting is valuable because it is how "members of society control the actions of government—specifically those actions that might threated" citizen's liberties.[124] In protective democracy, "the extent of the franchise is a measure of democratic government only in so far as the exercise of the franchise can make and unmake governments."[125] Similar language makes appearances in various Supreme Court opinions. For example, in *Yick Wo* the Court maintained that the right to vote is fundamental because it preserves all rights.[126] Exercising one's right to vote protects one's liberty by controlling the identify of officeholders and, indirectly, their actions.[127]

Communitarian democracy demands meaningful inclusion. The right to vote responds "to the visceral human need for inclusion."[128] Judith Shklar argued that understanding the right to vote requires deeply engaging with American slavery.[129] Voting is in stark contrast to slavery and that "[t]he ballot has always been a certificate of full membership in society."[130] A demand to vote incorporates a demand for inclusion in the polity.[131] This echoes what Pamela Karlan has called the "formal aspect of voting," which "announces that the voter is a full member of the political community."[132]

This conceptual framework logically extends to the belief that the Court is more receptive to "first generation" barriers to voting, typically termed "vote denial," compared to "second generation" barriers, typically referring to vote dilution.[133] There may be many reasons why the Court proceeds in this fashion, but James Gardner has argued that this is because "protective" democratic litigation forces the Court to come to grips with the Constitution's limits.[134] Gardner argues that the Court dislikes protective democracy-based claims because such claims "necessarily force it to decide precisely what political structures the Constitution creates for the effectuation of political influence."[135] One reason the Court may wish to avoid these questions is that avoidance reveals an unpleasant truth about the Constitution: "it provides

124. *Id.* at 902.

125. C.B. MACPHERSON, THE LIFE AND TIMES OF LIBERAL DEMOCRACY 23 (1977).

126. Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886).

127. Gardner, *supra* note 29, at 903.

128. *Id.* at 903.

129. JUDITH N. SHKLAR, AMERICAN CITIZENSHIP: THE QUEST FOR INCLUSION 389 (1991).

130. *Id.* at 2.

131. *Id*. at 3

132. Pamela S. Karlan, *Undoing the Right Thing: Single-Member Offices and the Voting Rights Act*, 77 VA. L. REV. 1, 5 (1991).

133. Pamela S. Karlan, *The Impact of The Voting Rights Act on African Americans: Second – and Third-Generation Issues, in* VOTING RIGHTS AND REDISTRICTING IN THE UNITED STATES 121 (Mark E. Rush ed., 1998); *compare* Shelby Cnty. v. Holder, 570 U.S. 529, 529–557 (2013), *with id.* at 559–594 (Ginsburg, J. dissenting).

134. Gardner, *supra* note 29, at 898–99.

135. *Id.* at 899.

scant protection [] for rights of political influence, including the right to vote."[136]

Arguably, the Court's "designation of the Equal Protection Clause as the primary repository of constitutionally protected voting rights . . . has facilitated the Court's substitution of communitarian for protective concepts of democracy."[137] As Gardner explains:

> The heart of a communitarian democracy claim is the contention that the government has given one plaintiff less than it has given others, a claim with obvious similarities to a prima facie claim of unequal treatment under equal protection principles. Communitarian democracy claims appeal to a powerful strand in equal protection doctrine that sees the Equal Protection Clause as intended to prevent demeaning social exclusions. [138]

Equal protection requires a comparison group *and* a baseline to measure the propriety of any challenged action regarding the allocation of political influence.[139] If the Court is unwilling to find such a baseline from the Constitution, "it must be drawn from elsewhere."[140] This gives rise to a tension where "[t]he move to equal protection analysis invites plaintiffs to use as a baseline, not the degree of political influence the Constitution officially provides, but the degree of influence *in fact held by others*."[141] As Gardner concludes, "the equal protection context has allowed the Court surreptitiously to import a theory of communitarian democracy as a *substantive* baseline for resolution of equal protection claims."[142]

What does this mean for the Fifteenth Amendment's enforcement power or the Fifteenth Amendment more broadly? The Court's turn to equal protection has made it "far more receptive to theories of communitarian democracy than it might otherwise have been."[143] Given the lack of intricate democratic scholarship available to understand the Fifteenth Amendment, work can be done to incorporate protective democracy principles at its core *or* recasting protective based claims as communitarian when litigating under the Fifteenth Amendment.[144] Arguably, evidence of the Fifteenth

136. *Id.*
137. *Id.* at 941.
138. *Id*. at 973.
139. *Id.* at 974.
140. Gardner, *supra* note 29, at 974.
141. *Id.*
142. *Id.*
143. *Id.* at 973.
144. *Cf.* Bertrall L. Ross II, *Democracy and Renewed Distrust: Equal Protection and the Evolving Judicial Conception of Politics*, 101 CAL. L. REV. 1565, 1575 (2013) (encouraging civil rights advocates who understand that the Court's jurisprudence is animated by a particular conception of politics to employ a litigation strategy of presenting evidence as to how politics operates with respect to the issue in question).

Amendment's protective democratic features can be found in its text. Political processes that abridge[145] the right to vote, either through vote dilution[146] or other attempts to dilute Black voter power, are an affront to both communitarian and protective democratic norms. These practices limit the value of a person's vote, thereby preventing proper representation, and it excludes a minority from the full features of the polity compared to others. Unlike the practices of the Equal Protection Clause, the history and substance of the Amendment can lead to an understanding that the Fifteenth Amendment's guarantee of the right to vote is not neutral.[147] "Viewed from the historical vantage point of the [F]ifteenth [A]mendment, minority electoral participation is different."[148] In terms of democratic theory, the Fifteenth Amendment can be understood as potentially creating a new path forward for protective democracy.

In addition to the need for development of Fifteenth Amendment theory, I argue that the Court's hesitancy to engage with protective claims demonstrates that Congress should be afforded greater deference in its Fifteenth Amendment power to deal with politically sensitive issues of processes that "abridge" the right to vote. This ensures that Congress has the power to actualize that the right to vote's substance extends beyond "formal" voting structures. The Court should defer to congressional power when enforcing the Fifteenth Amendment to a greater degree than the *Boerne* standard because the underlying theory of democracy that the Court has imputed on it requires no such court intervention to grapple with the Constitution's lack of political guarantees. Congress, in using its enforcement powers, acts to pursue protective democratic norms and is not inviting the Court to identify its own limitations. Congress can establish the baseline of political accountability and representation in adopting protective democratic norms without the Court having to overextend itself. As Amar-Dolan argued, "the scope of Congress's Fifteenth Amendment enforcement power has grown to include not only direct violations of the Amendment itself, but also any discriminatory practice relating to elections, including districting, whether that practice is discriminatory on its face, in its purpose, or in its effect."[149] As such, Congress, and not the Courts, has laid the groundwork for engaging with questions involving representative democracy and electoral success without forcing the Court to otherwise fly blind in its analysis.

145. There exists a deep need to understand exactly what "abridgement" means in the Fifteenth Amendment. Jordan, *supra* note 37, at 561 ("[We] have no precise references, or other guidelines concerning the meaning of abridgement.").

146. *See generally* Kang, *supra* note 32.

147. *See* Jordan, *supra* note 37, at 563.

148. *Id.*

149. Amar-Dolan, *supra* note 33, at 1497.

E. *Deference Deserved*

The forgoing discussion reveals three distinct features of the Fifteenth Amendment. First, the Reconstruction Congress pursued a constitutional amendment extending the right to vote, as opposed to simply passing a statute. As such, Congress amended its power in the field of voting rights to go beyond anything that previously existed in the Constitution while abiding by the *McCulloch* standard. Second, given the substantive difference between what protections the Amendments offer, the Court's fear of congressional overreach is unfounded given the Fifteenth Amendment's narrow ambit. Third, the underlying theory of communitarian democracy that permeates the Fourteenth Amendment's equal protection voting cases has accelerated and entrenched its presence. However, the Fifteenth Amendment's protections can be expanded to include—or repackage—protective democratic norms. The political realities of electoral processes are left to Congress to legislate, and its enforcement power actually ameliorates the Court's fear of engaging in uncomfortable political realities with the Constitution. In effect, Congress deserves deference in the field of voting rights to a degree that parallels that of the *McCulloch* standard and not that of *Boerne*.

Unfortunately, if the preceding arguments are true, the Court likely may limit Congress's power to enforce the Fifteenth Amendment. Even though the Court in *Shelby County* and *Brnovich* do not expressly apply the *Boerne* standard, any discussion of congressional power must confront the Court's hostility towards Congress's exertion of its legislating powers.[150] Therefore, while Congress should have great latitude to enforce the Fifteenth Amendment, the Court's Lochnerian turn in voting jurisprudence casts doubt about the contours of congressional power in enforcing the right to vote.

II. *Lochner* and Voting Rights

This Part details how the Court has taken a Lochnerian turn to its approach of adjudicating voting rights claims by discussing three of the Court's opinions: two that have upheld a restriction on the right to vote and one that struck down an effort to protect the right to vote. The Court has adopted a whiteness-as-neutral background principle that leads to these conclusions. These decisions and their intersection with *Lochner* reasoning directly implicates the function that the right to vote has in generating financial gain. The theory that Congress possesses highly deferential powers under the Fifteenth Amendment runs into this *Lochner* reality.

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150. *See* Karlan, *supra* note 55, at 12; *see also* discussion *infra* Section II.A.

A. *Lochnerism and Voting Rights*

In her analysis of the Roberts Court, Pamela Karlan argued that the Roberts Court "combines a very robust view of its interpretive supremacy with a strikingly restrictive view of Congress's enumerated powers."[151] Its approach to constitutional adjudication reflects "a combination of institutional distrust — the Court is better at determining constitutional meaning — and substantive distrust — congressional power must be held in check."[152] In concluding her review of the 2011 Supreme Court term, she astutely observed that "[a] Court with a transsubstantive distrust for the political process seems more likely to adopt a restrictive vision of the political branches' powers across the array of constitutional provisions."[153]

Karlan's observation of judicial distrust in voting rights legislation is not the first time the Court distrusted state action. In the now infamous *Lochner v. New York*[154] decision, the Court invalidated a New York law prohibiting bakery employees from working more than ten hours per day or sixty hours per week.[155] Basing its decision on the liberty of contract protected by the Due Process Clause of the Fourteenth Amendment, Justice Peckham held that, despite the legislature's record detailing the relationship between the health of workers and the number of hours they worked, the law was not necessary to protect the bakers from an imbalance of bargaining power, the public health, or the health of the bakers.[156] Cass Sunstein has pointed to two features that drove this decision: efforts to redistribute resources and the careful scrutiny of the relationship between the permissible end the state invoked and its fit with the means it chose.[157] The Court deployed this reasoning to usher in an era of rampant economic deregulation because the Court considered legislative attempts, even those based on record, to disrupt market ordering.[158] The era came to an end in *West Coast Hotel Co. v. Parrish*[159] when the Court upheld a law requiring a state

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151. *Id.*

152. *Id.*

153. *Id.* at 70.

154. Lochner v. New York, 198 U.S. 45 (1905).

155. *Id.* at 57.

156. *Id.* at 57–59.

157. Cass R. Sunstein, Lochner*'s Legacy*, 87 COLUM. L. REV. 873, 877 (1987).

158. *See id.* at 874 ("Market ordering under common law was understood to be a part of nature rather than a legal construct, and it formed the baseline from which to measure the constitutionally critical lines that distinguished action from inaction and neutrality from impermissible partisanship."). This Article provides a limited discussion of the Court's decision in *Lochner* because both academics and courts have covered the case thoroughly. For a deeper understanding of the decision and its history, see HOWARD GILLMAN, THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF *LOCHNER* ERA POLICE POWERS JURISPRUDENCE (1993).

159. 300 U.S. 379 (1937).

minimum wage.[160] However, as the below analysis details, like a latent virus, *Lochner* reasoning continues to infect other areas of law, including voting rights.

Because of its hostility towards state laws attempting to regulate labor laws, the *Lochner* Court is associated with judicial second-guessing of governmental action. The Court did not hesitate to "[strike] down progressive labor protections in the name of the freedom of contract and [had] a presumption against regulations that promoted the interests of particular constituencies such as workers—who to the Court seemed to be a vested interest rather than a group in need of regulatory protection."[161] The Court in *Ferguson v. Skrupa*[162] considered the era of *Lochner* as authorizing "courts to hold laws unconstitutional when they believe that the legislature has acted unwisely."[163]

Sunstein explained that "[t]he *Lochner* Court required government neutrality and was skeptical of government 'intervention;' it defined both notions in terms of whether the state had threatened to alter the common law distribution of entitlements and wealth, which was taken to be a part of nature rather than a legal construct."[164] Barry Cushman identified similar foundational reasoning in the era's decisions, arguing:

> Some *Lochnerian* decisions framed the right in question as one sounding in liberty . . . Other decisions, mostly prominently those involving price and rate regulation, emphasized a right sounding more in formally neutral treatment, prohibiting government from favoring one citizen over another by, for example, taking the property of A and giving it to B. Yet still other *Lochner*-era opinions . . . focused rather narrowly on whether the particular means employed by the regulation in question were reasonable under the circumstances.[165]

Thus, at the core of *Lochner*'s reasoning, then, was its descriptive concern of a background neutrality and attempts to redistribute property.[166]

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160. *Id.* at 398–400.

161. K. Sabeel Rahman, *From Economic Inequality to Economic Freedom: Constitutional Political Economy in the New Gilded Age*, 35 YALE L. & POL'Y REV. 321, 323 (2016).

162. 372 U.S. 726 (1963).

163. *Id.* at 730.

164. Sunstein, *supra* note 157, at 917.

165. Barry Cushman, *Some Varieties and Vicissitudes of Lochnerism*, 85 B.U. L. REV. 881, 998–99 (2005).

166. *See* Mila Sohoni, *The Trump Administration and the Law of the* Lochner *Era*, 107 GEO. L.J. 1323, 1333-34 (2019) ("The *Lochner*-era Court's commitments to natural rights and to the idea of neutrality underpinned this jurisprudence. The idea that courts should protect natural rights—such as the right to liberty of contract—figured prominently in the *Lochner*-era Court's decisions. The idea of neutrality also played an important role; the Court often regarded as illegitimate legislation that flowed from the impetus to enhance the bargaining power or wealth of certain groups at the expense of others.").

The *Lochner* decision has been subject to an unbelievable amount of scholarship and criticism. A common critique is that the decision was wrongly decided because it was a powerful and misguided exercise of judicial activism—"an illegitimate intrusion by the courts into a realm properly reserved to the [legislative] branches of government."[167] Normative judgments about why the Court was wrong to do what it did have invigorated thinkers across the political spectrum.[168] However, as David Bernstein points out, Sunstein's descriptive account of the opinion's and era's take on the deregulatory process, skepticism towards state evidence, and preference for "neutral" baselines has been consistently supported and accepted.[169] While the Court has declared that the decision's reasoning "has long been discarded,"[170] scholars have identified features of its resurgence under the Roberts Court's direction.[171]

One such account of *Lochner*'s revival has occurred in election law jurisprudence.[172] Analyzing the reasoning and result of *Citizens United v. Federal Election Commission*,[173] *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*,[174] and *Shelby County v. Holder*, Ellen Katz concluded that "[a]ll three decisions deemed efforts to regulate the electoral process impermissibly disruptive of the balance of power that would have prevailed in their absence."[175] Justices who constituted the majority in these opinions voiced their concerns during oral argument and in their opinions about windfalls, preferential treatment, and unjust enrichment.[176] Much like the

167. Sunstein, *supra* note 157, at 874.

168. *See* Thomas B. Colby & Peter J. Smith, *The Return of* Lochner, 100 CORNELL L. REV. 527, 529 (2015) (describing conservative, liberal, and progressive reasons for why *Lochner* was wrong).

169. *See* David E. Bernstein, Lochner's Legacy's *Legacy,* 82 TEX. L. REV. 1, 1 (2003) ("The understanding of the *Lochner* era adopted by Sunstein in *Lochner's Legacy* has been widely accepted in legal circles, including by four current Supreme Court Justices.").

170. Ferguson v. Skrupa, 372 U.S. 726, 730 (1963).

171. *See e.g.*, Amanda Shanor, *The New* Lochner, 2016 WISC. L. REV. 133, 133–36 (2016) (describing the parallels and potential differences between the use of the First Amendment as a deregulatory engine under the Court and *Lochner*); Rahman, *supra* note 161, at 323 (arguing that the Roberts Court has struck down progression protections in the name of a free market in cases involving campaign finance, voting rights, arbitration clauses, and economic regulation); Mimi Marziani, *A 21st-Century '*Lochner*'*, NAT. L.J. (Feb. 22, 2010, 12:00 A.M.), https://www.law.com/nationallawjournal/almID/1202443808752/ [https://perma.cc/X4WP-QHBX] (equating a campaign finance decision as a modern-day *Lochner* case).

172. *See* Katz, *supra* note 56, at 698–99 (comparing three voting rights and campaign finance cases to *Lochner* by structure and motivation).

173. 558 U.S. 310 (2010).

174. 564 U.S. 721 (2011).

175. Katz, *supra* note 56, at 705.

176. *Id.* at 707.

Lochner Court, "they mistrusted the motives underlying the challenged legislation."[177]

In a deeper way, however, I argue that the decision in *Shelby County* resembles that of *Lochner*—including the Court's hostility towards legislative attempts to equalize the electoral process that burdens particular participants (i.e., minorities). For voting rights specifically, as opposed to the campaign finance cases of *Citizens United* and *Arizona Free Enterprise Club*, the Court has *upheld* restrictions on the right to vote.[178] In what ways do court decisions that both hamper the right to vote and seek to equalize the right to an "effective"[179] vote incorporate *Lochner* era jurisprudence? I argue that cases involving the right to vote deal with a "whiteness-as-neutral-background" principle.[180] In this dimension, striking down laws that seek to strengthen or protect minority votes and upholding those that may restrict minority votes successfully revert to a court-approved neutral background that is synonymous with whiteness.

Any concept of neutrality in election law should be met with deep suspicion, because the United States has a history of excluding people of color from political participation.[181] Election law is dripping in whiteness-as-neutrality sentiment.[182] Whiteness is a pervasive feature of American democracy—possibly its defining feature.[183] Racial stratification and

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177. *Id.*

178. *See, e.g.*, Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 202–03. (2008) (holding that Indiana had a sufficient interest in requiring government photo identification to vote in person).

179. *See* 52 U.S.C. § 10301(a) (prohibiting voting laws or policies that result in the denial or abridgment of the right to vote on account of race or color).

180. *See* Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1713 (1993) ("Even though the law is neither uniform nor explicit in all instances, in protecting settled expectations based on white privilege, American law has recognized a property interest in whiteness that, although unacknowledged, now forms the background against which legal disputes are framed, argued, and adjudicated.").

181. *See e.g.,* Nikole Hannah-Jones, *Our Democracy's Founding Ideals Were False When They Were Written. Black Americans Have Fought to Make Them True*, N.Y. TIMES (Aug. 14, 2019), https://www.nytimes.com/interactive/2019/08/14/magazine/black-history-american-democracy.html [https://perma.cc/2354-9CDY] (explaining that American democratic ideals are built on lies, as Black Americans have been excluded from the democratic process).

182. *See* Joshua S. Sellers, *Election Law and White Identity Politics*, 87 FORDHAM L. REV. 1515, 1519 (2019) ("[R]acial bind spots are the norm. For all of the relevance election law doctrines give to African American and Hispanic voting patterns, historical patterns of discrimination, and the disparate impact of government actions on minorities, the immense political significance of white identity is largely ignored. This myopia renders the doctrines' governing frameworks faulty and undermines our ability to comprehensively evaluate the doctrines' democratic utility. Put differently, the doctrines rely upon sanguine theories of democracy uncorrupted by white identity–based political calculations, while in fact such calculations, made on the part of both voters and political parties, are pervasive.").

183. *See* Derrick Bell, *White Superiority in America: Its Legal Legacy, Its Economic Costs*, 33 VILL. L. REV. 767, 772 (1988) ("The Framers felt—and likely they were right—that a government committed to the protection of property could not have come into being with the race-based, slavery compromises placed in the Constitution. It is surely so that the economic benefits of slavery and the

terrorism has defined key elements of democracy in America.[184] Minorities have been locked out of the franchise for longer than they have been able to participate in it, linking American democracy from its infancy to an identity of whiteness.[185] George Lipsitz argues, "[a]s the unmarked category against which difference is constructed, whiteness never has to speak its name, never has to acknowledge its role as an organizing principle in social and cultural relations."[186] I argue that whiteness, even if unmentioned or colorblind,[187] presents the baseline by which the Court chooses to assess voting rights legislation against. As such, in Lochnerian terms, whiteness is the backdrop by which to evaluate deviations of "the norm" in American voting rights law.

In *Crawford*, when faced with speculations about voter fraud and no evidence, the Court deferred to the state that required photo identification to vote, even though the law almost surely disproportionately impacted voters of color compared to white voters.[188] However, faced with a robust legislative record recounting voting rights violations, the Court in *Shelby County* held the preclearance formula for Section 5 of the VRA—a measure intended to protect minority voting rights—unconstitutional.[189] In choosing to defer to the judgment of one legislature and not the other, the Court evinced *Lochner*'s reasoning that regulations should be judged according to neutral background distribution of entitlements, which is one of white neutrality. The extension of protection for exercising the right to vote via legislating intervention disrupted the white baseline of American democracy, and the Court did not seek to bless such a "racial entitlement"[190] even though it did

political compromises of black rights played a very major role in the nation's growth and development. In short, without slavery, there would be no Constitution to celebrate.").

184. *See generally* DERRICK BELL, FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM (1993) (arguing that racism is an integral part of American society).

185. *See* Harris, *supra* note 180, at 1744 (discussing how the Unites States has restricted citizenship to white racial identity in 1790).

186. George Lipsitz, *The Possessive Investment in Whiteness: Racialized Social Democracy and the "White" Problem in American Studies*, 47 AM. Q. 369, 369 (1995).

187. *See* Harris, *supra* note 180, at 1768 (arguing that whiteness is not just "there" as it is conceptualized into law because it is "enshrined and institutionalized as a property interest that accords [white people] a higher status than any individual claim to relief").

188. Crawford v. Marion County. Election Bd., 553 U.S. 181,193–97 (2008); Karlan, *supra* note 55, at 34 ("[S]peculations [of voter fraud were] based on virtually no data."); *see also* Theodore R. Johnson & Max Feldman, *The New Voter Suppression*, BRENNAN CTR. FOR JUST. (Jan. 16, 2020), https://www.brennancenter.org/our-work/research-reports/new-voter-suppression [https://perma.cc/7KZV-WSHE] (discussing the racial effects of photo voter identification laws).

189. *See supra* notes 7–15 and accompanying text.

190. Transcript of Oral Argument at 47, Shelby County v. Holder, 570 U.S. 529 (2013) (No. 12-96) ("This Court doesn't like to get involved in—in racial questions such as this one, It's something that can be left—left to Congress. . . . [The last enactment of the VRA] is attributable, very likely attributable, to a phenomenon that is called perpetuation of racial entitlement. It's been written about. Whenever a society adopts racial entitlements, it is very difficult to get out of them through the normal political process.").

so previously, signifying the Lochnerian shift that Congress now faces. Protecting the value of whiteness[191] in voting rights necessarily implies restricting or diluting minority enfranchisement—even if done through colorblind principles like "voter fraud"[192] or "equal sovereignty."[193] The Court turns to *Lochner*, even if subconsciously, to uphold voting restrictions or strike down efforts to ensure the franchise for all because the Court has a mistaken belief about neutrality in American voting rights history and seemingly belittles the Reconstruction Amendments that sought to change American government.

Similarly, the right to vote is intimately linked with economic freedom and liberty. Scholars have described in detail how the white majority has used democratic means or governance to maintain social control and wealth to prevent Black people from achieving social mobility.[194] Social scientists have found strong evidence supporting the relationship between the passage of the VRA and economic mobility for minorities.[195] This reality was not lost on those who fought for civil rights and the passage of the VRA.[196] While the right to vote might not necessarily equate to dollars and cents, its power is directly implicated in the realization of financial progress. Therefore, efforts to enfranchise through affirmative state action by equalizing the electoral field also redistribute literal wealth. Laws that might be seen to restrict the right to vote and those that attempt to ensure its exercise, then, directly implicate financial stakes in democracy. Upholding laws that restrict the right to vote and striking down those that protect, or extend, the right allow the Court to prevent the same "redistribution" of wealth the Court loathed in *Lochner*.

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191. Harris, *supra* note 180, at *passim*.

192. *Crawford*, 553 U.S. at 204.

193. *Shelby County*, 570 U.S. at 545.

194. *See generally* Harris, *supra* note 180; IRA KATZNELSON, WHEN AFFIRMATIVE ACTION WAS WHITE: AN UNTOLD HISTORY OF RACIAL INEQUALITY IN TWENTIETH-CENTURY AMERICA (2006); RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA (2017).

195. Abhay P. Aneja & Carlos F. Avenancio-Leon, *The Effect of Political Power on Labor Market Inequality: Evidence from the 1965 Voting Rights Act* 1 (Oct. 16, 2020) (unpublished manuscript) (on file with the WASH. CTR. FOR EQUITABLE GROWTH) ("Our analysis of mechanisms suggests that minority political influence improved blacks' relative position through increased public employment, fiscal redistribution, as well as through implementation and enforcement of group-favoring labor market policies, such as affirmative action and anti-discrimination laws.").

196. *See, e.g.*, Martin Luther King, Jr., I Have a Dream, (Aug. 28, 1963) in AVALON PROJECT, https://avalon.law.yale.edu/20th_century/mlk01.asp [https://perma.cc/N7R4-C8HK] ("We can never be satisfied as long as a Negro in Mississippi cannot vote and a Negro in New York believes he has nothing for which to vote.").

B. The Fifteenth Amendment

For purposes of the Fifteenth Amendment, I argue that this reality is likely to lead the Court to adopt the more restrictive *Boerne* standard even though it is doctrinally, historically, and democratically unsound. However, like the Court's move to cast *Lochner*, at least in name, into the anti-canon,[197] efforts to do the same for *Shelby County* and *Brnovich* will not be in vain. If, and hopefully when, that happens, there will be a need for a comprehensive understanding of the Fifteenth Amendment.

The Court is not immune from social movements. Lani Guinier and Gerald Torres have pointed to social movement activism to argue that, "it is the people in combination with the legal elite who change the fundamental normative understandings of our Constitution."[198] Social movements can create "the necessary conditions for a genuine 'community of consent.'"[199] In effect, "social and political movements change the constitution of the people, not the locus of legitimacy."[200] As Guinier argues, "[t]he wisdom of the people should inform the lawmaking enterprise in a democracy."[201] The Court gains new sources of legitimacy when its members "engage ordinary people in a productive dialogue," an external perspective of judicial interpretation of the law.[202] Scholars in this area have pointed to the social movements of the Civil Rights era, the women's rights movements, and the LGBTQ+ movement to demonstrate the power that movements can have in the Court's decisions.[203]

Theory cannot be sacrificed in the face of uncertainty. The Fifteenth Amendment, while facing an indeterminate future, needs a more robust presence in scholarship in the field of voting rights. That is not to say that it should be the only source of support underlying the right to vote. However, its absence from constitutional literature has led to a dearth of potential litigation, and a superficial meaning of the right to vote. Efforts to legislatively, socially, or judicially recast *Shelby County* will depend on a deeper understanding of the Fifteenth Amendment. The Court is not so

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197. Greene, *supra* note 57, at 380.

198. Lani Guinier & Gerald Torres, *Changing the Wind: Notes Toward a Demosprudence of Law and Social Movements*, 123 YALE L.J. 2740, 2743 (2014).

199. *Id*. at 2744.

200. Gerald Torres, *Social Movements and the Ethical Construction of Law*, 37 CAP. U. L. REV. 535, 536 (2009).

201. Lani Guinier, *Beyond Legislatures: Social Movements, Social Change, and the Possibilities of Demosprudence*, 89 B.U. L. REV. 539, 545 (2009).

202. *Id.*

203. *See generally* Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 CAL. L. REV. 1323 (2006); Ellen A. Andersen, *Transformative Events in LGBTQ Rights Movement*, 5 IND. J. L. & SOC. EQUITY 441 (2017).

insulated from accountability that social movements, scholarship, and activism cannot pressure it into charting a new path in voting rights litigation.

Conclusion

The Court should defer to Congress when it passes legislation to realize the spirit and text of the Fifteenth Amendment. However, the Court has potentially entered a new era of *Lochner* jurisprudence in regards to the right to vote. This turn to *Lochner* does not have to last; social movements, litigators, and elected officials have capacity to right this wrong. While a daunting task, attempts to flush out the Fifteenth Amendment's capacity would not be in vain, and would add to the arsenal of tools our society will have to expand the right to vote. This opportunity to engage with the Fifteenth Amendment, even in the face of a hostile judiciary, presents a fresh opportunity to protect "the most powerful nonviolent tool we have to create a more perfect union."[204]

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204. John Lewis, Remarks at the Democratic National Convention (Sept. 6, 2012).