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Enforcement of the Reconstruction Amendments

Alexander Tsesis

Loyola University Chicago School of Law, atsesis@luc.edu

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Enforcement of the Reconstruction Amendments

Alexander Tsesis*

Abstract

This Article analyzes the delicate balance of congressional and judicial authority granted by the Reconstruction Amendments. The Thirteenth, Fourteenth, and Fifteenth Amendments vest Congress with powers to enforce civil rights, equal treatment, and civic participation. Their reach extends significantly beyond the Rehnquist and Roberts Courts' narrow construction of congressional authority. In recent years, the Court has struck down laws that helped secure voter rights, protect religious liberties, and punish age or disability discrimination. Those holdings encroach on the amendments' allocated powers of enforcement.

Textual, structural, historical, and normative analyses provide profound insights into the appropriate roles of the Supreme Court and Congress in achieving aspirations of the Second Founding. The framework that emerges requires the judiciary to defer to legitimate legislative functions in enforcing racial equality, dignitary justice, and access to the ballot box.

* Raymond & Mary Simon Chair in Constitutional Law, Professor of Law, Loyola University Chicago School of Law; General Series Editor of Cambridge Studies on Civil Rights and Civil Liberties; General Series Editor of Oxford Theoretical Foundations in Law. I am grateful for the thoughtful comments on earlier drafts kindly tendered by Enrique Armijo, Jack Balkin, Rachel Bayefsky, Eric Berger, Joseph Blocher, Michael Kent Curtis, Richard Fallon, Eric Foner, Marie-Amélie George, Shannon Gilreath, David Han, Jessie Hill, Cynthia Ho, Andrew Koppelman, Corinna Lain, Sanford Levinson, James Lindgren, Juan Perea, Stephen Rushin, Matthew Sag, Richard Schragger, Simone Rose, Larry Solum, Mark Tushnet, and Andrew Verstein. Thanks are due to participants in faculty colloquia at Loyola, Northwestern, and Wake Forest.

Congress's discretion extends to safeguards for fundamental rights, civil liberties, and political representation. Rational basis review is appropriate when Congress advances autonomy, equality, and franchise. However, when courts safeguard equal enjoyment of fundamental rights against legislative encroachments, those three amendments require heightened judicial scrutiny of adverse state actions.

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INTRODUCTION

The Reconstruction Amendments realigned the balance of power between the judicial and legislative branches. The Thirteenth and Fourteenth Amendments empowered Congress to enforce national civil rights policies. They broke with the protections of slavery that had been built into the original Constitution,¹ which the Supreme Court had upheld.² The Fifteenth Amendment, in turn, advanced anti-racist civic participation.

Despite the monumental alterations to the Constitution, less than a decade after their ratification, the Supreme Court began to chip away at legislative authority to enforce federal civil rights law.³ In recent cases, such as *City of Boerne v. Flores*⁴ and *Shelby County v. Holder*,⁵ the Court continued to interfere with core structural features of constitutional reconstruction.⁶ The Court has further prevented lawmakers from enforcing laws pertaining to civil remedies for the victims of sexual violence,⁷ age and handicap discrimination,⁸ minority voting

1. See Alexander Tsesis, *Furthering American Freedom: Civil Rights & the Thirteenth Amendment*, 45 B.C. L. REV. 307, 321 (2004) (discussing clauses of the Constitution that protected the institution of slavery).

2. See, e.g., *Prigg v. Pennsylvania*, 41 U.S. 539, 625–26 (1842) (overturning Edward Prigg’s conviction under state law for kidnapping a Black mother and her children in order to return them to a Maryland owner).

3. See *The Civil Rights Cases*, 109 U.S. 3, 25 (1883) (holding unconstitutional the Civil Rights Act of 1875).

4. 521 U.S. 507 (1997).

5. 570 U.S. 529 (2013).

6. *City of Boerne*, 521 U.S. at 536 (holding that the Religious Freedom Restoration Act of 1993 exceeded Congress’s power under the Fourteenth Amendment because it “contradicts vital principles necessary to maintain separation of powers and the federal balance”); *Shelby County*, 570 U.S. at 557 (holding that § 4(b) of the Voting Rights Act of 1965 was unconstitutional).

7. See *United States v. Morrison*, 529 U.S. 598, 627 (2000).

8. See *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 360 (2001); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 62 (2000).

preclearance,⁹ campaign financing,¹⁰ and matching campaign contributions.¹¹

The Reconstruction Amendments augmented legislative powers and were meant to check the judiciary from repeating the monumental injustice of *Dred Scott v. Sandford*.¹² Contrary to their framing purposes, the Court has continued to erode the Reconstruction Amendments' enforcement authority in cases like *United States v. Cruikshank*,¹³ the *Civil Rights Cases*,¹⁴ and *Shelby County v. Holder*.¹⁵ Alexander Hamilton long ago pointed out that the judiciary should exercise judgment but not impose its will on the people.¹⁶ The Court often acts without due constitutional restraints in matters where the Constitution appears to grant Congress the leading role in formulating policies.¹⁷ Justice Kagan commented on this phenomenon in a dissent, asserting that by reserving to itself exclusive

9. See *Shelby County*, 570 U.S. at 557.

10. See *McCutcheon v. Fed. Election Comm'n*, 134 S. Ct. 1434, 1442 (2014).

11. See *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 728 (2011).

12. 60 U.S. (19 How.) 393, 418–19 (1857) (holding that Blacks were not citizens of the United States).

13. 92 U.S. 542, 559 (1875) (holding unconstitutional a federal criminal statute that prevented Blacks from exercising their constitutional rights).

14. 109 U.S. 3, 25 (1883) (holding unconstitutional the desegregation provisions of Civil Rights Act of 1875).

15. 570 U.S. at 535 (striking the § 4(b) coverage formula of the Voting Rights Act because the law violated the “principle that all States enjoy equal sovereignty”).

16. Alexander Hamilton set out the theory of judicial review in *Federalist* 78. See Christopher L. Eisgruber, *Marbury, Marshall, and the Politics of Constitutional Judgment*, 89 VA. L. REV. 1203, 1209–10 (2003) (contrasting Hamilton's competence and Marshall's institutional, textual defense of judicial review).

17. The doctrine of constitutional review requires courts to neither “anticipate a question of constitutional law in advance of the necessity of deciding it” nor to “formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.” *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450 (2008) (quoting *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 346–47 (1936) (Brandeis, J., concurring)).

interpretive authority, the Supreme Court has turned the Justices into “black-robed rulers overriding citizens’ choices.”¹⁸

As matters currently stand, the Supreme Court’s interpretive exclusivity of Reconstruction powers lacks meaningful checks against judicial supremacy.¹⁹ Instead, Congress should be able to define and follow through with policy priorities consistent with constitutional text, structure, history, and norms. The Court cannot act as the philosophical guardian of constitutional morality.²⁰ It is, rather, a branch of government that requires checks and balances to limit its encroachment into legitimate lawmaking.²¹ The Reconstruction Amendments

18. *Janus v. Am. Fed’n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2502 (2018) (Kagan, J., dissenting).

19. U.S. CONST. art. V. On the difficulty of amending the United States Constitution see Sanford Levinson, *Still Complacent After All These Years: Some Ruminations on the Continuing Need for a “New Political Science” (Not to Mention A New Way of Teaching Law Students About What Is Truly Most Important About the Constitution)*, 89 B.U. L. REV. 409, 422 (2009) (“Article V makes amendment extraordinarily difficult if not functionally impossible.”).

20. 1 PLATO, *The Republic*, in THE DIALOGUES OF PLATO 503, 764 (B. Jowett trans., Random House 1937) (1892); *Plyler v. Doe*, 457 U.S. 202, 242 (1982) (Burger, C.J., dissenting) (“[T]he Constitution does not constitute us as ‘Platonic Guardians’ nor does it vest in this Court the authority to strike down laws because they do not meet our standards of desirable social policy, ‘wisdom,’ or ‘common sense.’”); LEARNED HAND, THE BILL OF RIGHTS 73 (1958)

For myself it would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which I assuredly do not. If they were in charge, I should miss the stimulus of living in a society where I have, at least theoretically, some part in the direction of public affairs.

The journalist Linda Greenhouse quotes Ruth Bader Ginsburg during her Senate confirmation hearings, “we must always remember that we live in a democracy that can be destroyed if judges take it upon themselves to rule as Platonic guardians.” Linda Greenhouse, *The Supreme Court: A Sense of Judicial Limits*, N.Y. TIMES (July 22, 1993), at A1.

21. Richard A. Posner, *Foreword: A Political Court*, 119 HARV. L. REV. 31, 39–40 (2005)

[T]he U.S. Supreme Court is well on its way to becoming a political court Constitutional cases in the open area are aptly regarded as “political” because the Constitution is about politics and because cases in the open area are not susceptible of confident evaluation on the basis of professional legal norms. They can be decided only on the basis of a political judgment, and a political judgment cannot be called right or wrong by reference to legal norms.

provide that the American people's representatives in Congress take the lead in the advancement of life, liberty, and the pursuit of freedom. This Article has significant implications to federal civil rights and civil liberties laws affecting indigent, elderly, and handicapped litigants.

Part I reviews leading methods of constitutional interpretation, beginning with the popular constitutionalism of Mark Tushnet and Jeremy Waldron. Their arguments against judicial interpretive exclusivity are juxtaposed with David Strauss's common law constitutionalism and Ronald Dworkin's moral constitutionalism. After critiquing those approaches, the Article argues for a balanced interpretation of Reconstruction powers.

Part II explains Reconstruction power in the context of heightened judicial scrutiny. It focuses on three areas of review related to the Thirteenth, Fourteenth, and Fifteenth Amendments. Predicates for heightened judicial review are modulated by the antecedents, principles, enumerations, and liberal equality norms consistent with the Reconstruction Amendments.

Part III surveys Supreme Court rulings that undermine congressional enforcement of those three constitutional amendments. It discusses cases of judicial supremacy that prevent Congress from enacting robust civil rights and civil liberties laws. Part IV explores the limits of interpretive finality in those two areas. It describes when judicial deference must give way to congressional policies consistent with the structure, history, text, and norms of constitutional reconstruction.

I. WEAK OR STRONG JUDICIAL REVIEW

The Supreme Court has been the final arbiter of constitutional interpretation since the Early Republic, but it only declared its interpretational supremacy during the Civil Rights Era. *Marbury v. Madison*²² set the basic structure of judicial review and articulated the seminal statement of constitutional interpretation.²³ However, nowhere in *Marbury*

22. 5 U.S. (1 Cranch) 137 (1803).

23. *Id.* at 177.

did Chief Justice Marshall assert that the Supreme Court is or should be the exclusive interpreter of the Constitution. In the alternative, each department of government may be said to have the institutional competence to make rational decisions toward legitimate ends.

The Court took a definitive step toward exercising judicial supremacy in its 1958 *Cooper v. Aaron*²⁴ decision, in a case that was essential for desegregation in Arkansas and throughout the South, declaring “the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution.”²⁵ Thereafter, a muscular version of judicial review functioned as a two-edged sword that later decisions wielded to both advance and repel civil and political freedoms.²⁶ This Part of the Article explains how the Court developed several doctrines consistent with the principles of political and civil Reconstruction. Part III then turns to cases where, to the contrary, the Justices pared down Congress’s efforts to safeguard autonomy, equality, and franchise. Part IV reconciles the polarities by offering a theory to balance structural, normative, textual, and historical features of constitutional reconstruction that best preserves judicial review without compromising legislative civil rights enforcement. Before turning to how the Court has expanded and contracted the aspirational enforcement of reconstruction

24. 358 U.S. 1 (1958).

25. *Id.* at 18. *Cooper* relied on judicial supremacy to advance civil rights, requiring a public school to desegregate pursuant to the equal protection ruling in *Brown v. Board of Education II*, 349 U.S. 294 (1955). *Id.* at 4. The Court followed up with a series of per curiam desegregation opinions that often cited *Brown*, but rarely provided any depth of analysis. *See, e.g.*, *Johnson v. Virginia*, 373 U.S. 61, 61–62 (1963) (per curiam) (relying on *Brown* to find that the segregation of public facilities, such as courtrooms, is constitutionally impermissible); *Turner v. City of Memphis*, 369 U.S. 350, 351, 353 (1962) (per curiam) (holding that public segregation in airport dining facilities violates the Fourteenth Amendment); *Holmes v. City of Atlanta*, 223 F.2d 93, 94–95 (5th Cir. 1955), *vacated*, 350 U.S. 879 (1955) (per curiam) (vacating a decision that had declared the segregation of public golf courses to be constitutional); *Dawson v. Mayor of Balt.*, 220 F.2d 386, 387 (4th Cir. 1955), *aff’d*, 350 U.S. 877 (1955) (per curiam) (finding that racial segregation of public beaches and bathhouses was not constitutionally permissible); *Bynum v. Schiro*, 219 F. Supp. 204, 205–06 (E.D. La. 1963), *aff’d*, 375 U.S. 395 (1964) (per curiam) (granting injunctive relief for the desegregation of a city auditorium).

26. *See infra* Part I.B.

norms, the Article addresses arguments made by the skeptics of strong judicial review²⁷ and proponents of it.²⁸ The truth lies somewhere in between, explicitly and implicitly in the altered structure of government created by the Reconstruction Amendments. The premise of this Article is that the virtual judicial veto that strict scrutiny review represents is valid when the Court protects civil rights but not when it strikes civil rights legislation. The first section of Part I begins by scrutinizing divergent schools of thought on judicial review. The second section then proposes an original approach grounded in Reconstruction principles of representative democracy. Deference, not judicial veto, is needed in cases reviewing representative governments' efforts to address injustices or discriminations.

A. *Popular Constitutionalism*

Mark Tushnet formulates a theory for “taking the Constitution away from the courts.”²⁹ His book on the subject advocates to “reject the general theory of judicial supremacy.”³⁰ He suggests retaining legislative authority in constitutional enforcement but offers little explanation of what constitutional changes would need to be made. He does not, for example, point to specific portions of the Constitution that set limits on Congress. Nor does he explain how federalist considerations would play a role. It may be that amending the existing Constitution is the only option, but Article V creates significant barriers against passing and then ratifying any textual changes

27. See generally MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999). For further study on popular constitutionalism see generally LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004); Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346 (2006) [hereinafter *The Core of the Case*].

28. See generally DAVID A. STRAUSS, THE LIVING CONSTITUTION (2010); RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION (1996).

29. TUSHNET, *supra* note 27, at i.

30. *Id.* at 13.

to the Constitution.³¹ Tushnet speculates only so far as to say “[p]erhaps defiance may be appropriate only when the Declaration [of Independence’s] human rights principles are at stake.”³² Tushnet further asserts that the principles of the Declaration remain foundational to constitutional structure that has the people conducting “thin Constitution’s meaning” through their representatives.³³ Tushnet does not, however, provide details about how reconstructed judicial review would be constituted and operationalized.³⁴ Nor does he explain to what extent *stare decisis* and doctrines generally would be honored in a system without judicial finality.

An alternative criticism of judicial review is tendered by Jeremy Waldron. He begins with the premise that “quite apart from the outcomes it generates, judicial review is democratically illegitimate.”³⁵ In his most expositive work on the matter, *Law and Disagreement*, Waldron writes that distrusting the people’s political will is inconsistent with “the idea of rights” that “is based on a view of the human individual as essentially a thinking agent.”³⁶ Society’s decisionmaking must be built on “the imperative that one be treated as an equal . . .”³⁷ In a democracy, the people’s capacity “of evolving a shared and reliable sense of right and wrong, justice and injustice, in their conversations with one another” is inconsistent with

31. See U.S. CONST. art. V (providing that a constitutional amendment requires two thirds of both houses of Congress to propose amendment and three fourths of the states to approve it); Richard H. Fallon, Jr., *Constitution Day Lecture: American Constitutionalism, Almost (but Not Quite) Version 2.0*, 65 ME. L. REV. 77, 92 (2012); Levinson, *supra* note 19, at 422 (“Article V makes amendment extraordinarily difficult if not functionally impossible . . .”).

32. TUSHNET, *supra* note 27, at 13.

33. *Id.* at 14, 51–53. See generally ALEXANDER TESIS, FOR LIBERTY AND EQUALITY: THE LIFE AND TIMES OF THE DECLARATION (2012).

34. Tushnet’s suggestion appears to be the unlikely solution of an “override” of judicial holdings by “two-thirds majority in both houses” of Congress. TUSHNET, *supra* note 27, at 175.

35. *The Core of the Case*, *supra* note 27, at 1346.

36. JEREMY WALDRON, LAW AND DISAGREEMENT 250 (1991) [hereinafter LAW AND DISAGREEMENT].

37. *The Core of the Case*, *supra* note 27, at 1375.

“announc[ing] that the products of any deliberative process are to be mistrusted.”³⁸

Waldron’s criticism homes in on the disconnect between democratic institutions and judicial finality. The review of the judiciary might, to the contrary, be said to be democracy enforcing. Indeed, that is a critical point of John Hart Ely’s “representation-reinforcing mode” of interpretation.³⁹ Waldron’s theory thus does not adequately address circumstances in which courts get right the representation-reinforcing facets of government for the people. Waldron recognizes that the legislative process may be “more complex and laborious” but is confident that the extra time needed to resolve constitutional matters “is not like the affront to democracy involved in removing issues from a vote altogether and assigning them to a separate non-representative forum like a court.”⁴⁰ The Supreme Court can itself slow a rush to popular legislation harming the very matters *Carolene Products*⁴¹ recognized in the judicial province. Those being protection of discrete and insular minorities, fundamental rights, and democratic equality.⁴²

Balance should be drawn to reflect the nature and function of political institutes. In some cases Waldron is undoubtedly correct to say that the legislative process should be “a noisy scenario in which men and women of high spirit argue passionately and vociferously about what rights we have, what justice requires, and what the common good amounts to, motivated in their disagreement not by what’s in it for them but by a desire to get it right.”⁴³ Here we may think of law struck down in *United States v. Morrison*⁴⁴ or *Shelby County v. Holder*.⁴⁵ Missing is recognition that the Supreme Court itself often advances civil rights against local prejudices and political intolerance. Into this second group must be grouped *Brown v.*

38. LAW AND DISAGREEMENT, *supra* note 36, at 222.

39. John Hart Ely, *Toward a Representation-Reinforcing Mode of Judicial Review*, 37 MD. L. REV. 451, 474 (1978).

40. LAW AND DISAGREEMENT, *supra* note 36, at 305–06.

41. *United States v. Carolene Prods. Co.*, 304 U.S. 144 (1938).

42. *See infra* notes 86–88 and accompanying text.

43. LAW AND DISAGREEMENT, *supra* note 36, at 305.

44. 529 U.S. 598 (2000).

45. 570 U.S. 529 (2013); *see infra* Part IV.C.1–2.

Board of Education,⁴⁶ *Heart of Atlanta Motel v. United States*,⁴⁷ *Katzenbach v. McClung*,⁴⁸ and *Obergefell v. Hodges*.⁴⁹ And Waldron's and Tushnet's theories leave courts too weak to check unbridled uses of state or federal powers.⁵⁰

B. *Muscular Judicial Interpretation*

While Tushnet and Waldron argue that constitutional democracy requires legislatures to be the final arbiters of constitutional meaning, there can be little doubt that any drastic change to the current system of judicial finality could lead to instability of social order.⁵¹ Among those arguing for the stability of retaining judicially driven constitutional meaning, Professor David Strauss stresses that the current system “works well enough, and it would be too costly and risky to reopen the question whether, abstractly considered, it is the best possible arrangement.”⁵² Far from needing to be rectified, he argues that a common law process for interpreting the Constitution best

46. 347 U.S. 483, 495 (1954) (stating that “such segregation is a denial of the equal protection of the laws”).

47. 379 U.S. 241, 261 (1964) (enforcing application of the Civil Rights Act to a motel by denying their ability to discriminate based on race).

48. 379 U.S. 294, 305 (applying *Heart of Atlanta Motel* to a desegregation case involving a local restaurant).

49. 576 U.S. 644, 675 (2015) (concluding that under the Equal Protection Clause “couples of the same-sex may not be deprived” of the right to marry).

50. *But see The Core of the Case*, *supra* note 27, at 1351 (“[A] core argument against judicial review that is independent of both its historical manifestations and questions about its particular effects . . .”).

51. Tushnet admits as much, writing, “We really cannot know how Congress would perform if the courts exited . . .” TUSHNET, *supra* note 27, at 55. For other scholars, stability of stare decisis rationalizes its continued reliance on judicial review. Professor Richard Fallon, for example, argues that the dysfunctionality of the legislative process justifies judicial veto. *See* RICHARD FALLON JR., *THE NATURE OF CONSTITUTIONAL RIGHTS: THE INVENTION AND LOGIC OF STRICT JUDICIAL SCRUTINY* 199 (2019) (arguing that “courts are likely to be more reliable in identifying relevant moral and legal rights”). Missing from Fallon’s account, however, is recognition that the court too can be dysfunctional.

52. David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 913–14 (1996).

sheds light on actual constitutional practice.⁵³ He contends that the U.S. constitutional system “has become a common law system, one in which precedent and past practices are, in their own way, as important as the written U.S. Constitution itself.”⁵⁴ This is not only a call for continuing current judicial supremacy but for embracing it as indispensable to an evolving Constitution.⁵⁵

Strauss provides few details about the conditions appropriate for deviating from precedent. His formula relies on good faith in judges, removed from the partisanship of legislative policy making.⁵⁶ Ultimately, he is ambiguous about how to apply and alter opinions that encroach on the power of other branches of government. Courts “should think twice about . . . judgments of right and wrong when they are inconsistent with what has gone before”; interpretive shifts are justified when, “on reflection, we are sufficiently confident that we are right, and . . . the stakes are high enough.”⁵⁷ Left unexplained is how to determine that the stakes are high enough, how judges can eschew subjective judgments, to what extent popular values should play a role, the extent to which shifts in precedents should take place, how the public will accept the shifts, whether the shifts in judgments can be based on shifts of members on the court, and more. Strauss’s account leaves finality to judges, irrespective of whether they are expanding rights—as in *Brown v. Board of Education*⁵⁸—or contracting them—as in *Shelby County v. Holder*.⁵⁹

53. See *id.* at 887 (“[W]hen people interpret the Constitution, they rely not just on the text but also on the elaborate body of law that has developed . . .”).

54. STRAUSS, *supra* note 28, at 3.

55. See *id.* at 35 (“Those precedents, traditions, and understandings form an indispensable part of . . . the [C]onstitution as it actually operates, in practice.”).

56. Strauss, *supra* note 52, at 898.

57. *Id.* at 896–97.

58. 347 U.S. 483, 495 (1954) (expanding the rights of Black students by finding segregated schools “inherently unequal”).

59. 570 U.S. 529, 556–57 (2013) (contracting the protections provided under the Voting Rights Act).

Likewise, he leaves largely unelaborated the attitude and ideology judges should take in interpreting the Constitution with scant fleshing out of what Strauss calls the “attitudes of humility and cautious empiricism.”⁶⁰ It leaves uncertainty in how to assess the Court’s work and how to rectify judicial overreaching. The judiciary engages in what Strauss characterizes as an evolutionary process that relies heavily on earlier precedents and demonstrates “unmistakable concern with matters of policy and political morality.”⁶¹ This statement relates to how judges go about creating constitutional common law in areas like free speech, but process, precedent, and political morality lack concreteness to render them immune from legislative correction. In his common law constitutional order, the people have little role in the unfolding of constitutional change; indeed, judicial finality disempowers them from effectively relying on representative politics.

Judges must rely on reason in matters of constitutional interpretation. “We are not final because we are infallible, but we are infallible only because we are final,” as Justice Jackson jocosely put it.⁶² And we know that reason is fallible. With no meaningful inter-branch oversight, the Justices make final pronouncements on matters as consequential as process, equal protection, and voting.⁶³ Appellate review can correct judicial error, but the Supreme Court remains atop a hierarchy of interpretation. The legislature plays no significant role in constitutional development in Strauss’s scheme.⁶⁴ This runs counter to the Reconstruction Amendments’ grants of necessary and proper authority in § 2 of the Thirteenth Amendment, § 5 of the Fourteenth Amendment, and § 2 of the Fifteenth Amendment.⁶⁵ The judiciary is left to rely on reason alone to

60. STRAUSS, *supra* note 28, at 40.

61. *Id.* at 62.

62. *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring).

63. See, e.g., *Holder*, 570 U.S. at 553 (stating that the protections of the Voting Rights Act are no longer justified).

64. See STRAUSS, *supra* note 28, at 62–76 (emphasizing the role of the Court in First Amendment application and describing the current standard as a “product of common law evolution”).

65. See *supra* notes 3–11 and accompanying text.

determine what is “fair or is better policy,”⁶⁶ with no congressional ability to right judicial overreaching.

Constitutional common law leaves uncertainty about the meaning of the nation’s fundamental documents. Supporters of judicial finality notoriously arrive at divergent conclusions about cases that often reflect prior political choices.⁶⁷ Ronald Dworkin, another prominent advocate of strong judicial finality, argues that judges should identify the theory that, among conflicting alternatives, “is morally the strongest.”⁶⁸ He writes that courts are designed to function as “forums of principle.”⁶⁹ Drawing from the Fourteenth Amendment, Dworkin argues that the central political ideal embodied in the Constitution is justice in a “society of citizens both equal and free,”⁷⁰ where judges must be constrained by the principle of “equal concern and respect.”⁷¹ Where there is social disagreement about the principled outcome of cases, he argues that “courts should take final authority to interpret the Constitution.”⁷²

Dworkin’s approach fails in an important respect to justify a Supreme Court’s veto. On why the judiciary should have the last say in constitutional interpretation, his argument is circular and unconvincing, “[J]udicial review is not available to check the decision of the highest appellate court; if it were the

66. David A. Strauss, *Why Conservatives Shouldn’t Be Originalists*, 31 HARV. J.L. & PUB. POL’Y 969, 974 (2008)

A common law approach insists that judges are sharply limited by precedent, but it does not suggest that precedent always determines the outcome of a case—obviously not—and, more important, a common law approach to constitutional interpretation allows judges and other interpreters to say that part of the reason for a result is that that result is more fair or is better policy.

67. See Susan R. Burgess, *Beyond Instrumental Politics: The New Institutionalism, Legal Rhetoric, & Judicial Supremacy*, 25 POLITY 445, 455 (1993) (“Leading scholars as disparate as Raoul Berger, Ronald Dworkin, Robert Bork, John Hart Ely, and Michael Perry disagree about what the Court should say when it speaks, but they agree that once spoken, the Court’s words are final.”).

68. RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 404 (2013).

69. RONALD DWORKIN, *A MATTER OF PRINCIPLE* 69–71 (1985).

70. DWORKIN, *supra* note 28, at 73.

71. *Id.* at 74.

72. *Id.* at 12.

court would not be the highest”;⁷³ to rephrase it, the highest court is the highest court because it is the highest court. That begs the question why judicial error cannot or should not be appealed to the legislature in cases of abuse of judicial authority. Where the government is by the people, through their elected representatives, it at least follows that their voice is relevant to the evolving meaning of the Constitution. Dworkin postulates that, “It might seem natural to say at least this: the Due Process and Equal Protection Clauses give the court no power to strike down statutes that no reasonable person could think deeply unjust.”⁷⁴ But what mechanism there is to overturn judicial overreaching, Dworkin does not say.

Dworkin’s view of judges’ articulation of law is idealistic. They are not to be willful, subjective, nor capricious. Adjudication, rather, involves moral and political considerations that do not allow for arbitrary judgements.⁷⁵ A judge’s function is as a moral philosopher who makes value judgements while seeking to articulate the “objectively best account that can be given of all the concepts, values, and ideas that the law instructs him to consider.”⁷⁶ Like legislators, judges are prone to errors. As Dworkin recognizes, even “an authoritative court makes the wrong decision about what the democratic conditions require.”⁷⁷

Under a system where judicial interpretation is inevitably subject to judges’ human foibles and lapses, absolute finality is neither the only nor necessarily the best approach. Legislative judgements should be measured against fundamental principles of constitutional law’s commitment to equality, liberty, and the general welfare. The judicial branch need not always hold a trump card in the matter. A balance is needed between the branches rather than automatic conclusiveness. The proportional evaluation of judicial review and legislative policies

73. Ronald Dworkin, *Response*, 90 B.U. L. REV. 1059, 1086 (2010).

74. RONALD DWORIN, JUSTICE IN ROBES 210 (2006).

75. See RONALD DWORIN, LAW’S EMPIRE 235–58 (1986) (explaining that a judge “must choose between eligible interpretations . . . from the standpoint of political morality”).

76. Jeremy Waldron, *Planning for Legality*, 109 MICH. L. REV. 883, 900 (2011) (discussing Dworkin’s views on objective adjudication that involve judicial moral sensibility and precedential analogy).

77. DWORIN, *supra* note 28, at 32.

is possible, as I show in Part IV, in one that allows for a review protecting rights against the overreaching of both courts and Congress. There is no fault to wanting courts to be “forums of principle,”⁷⁸ but that is merely ideal. In practice, there are many circumstances under which decisions are based on principles of inequality. *Ableman v. Booth*,⁷⁹ *Dred Scott*,⁸⁰ *Plessy v. Ferguson*,⁸¹ and *Bradwell v. Illinois*,⁸² come most readily to mind. And some mechanism should allow popular majorities to overturn adjudications detrimental to equal rights, autonomy, and the common good.

Having discussed leading theories of judicial review, Parts II and III next turn to existing doctrines. Neither renunciation of judicial review—as Tushnet and Waldron advocate⁸³—nor judicial exclusivity—as Strauss and Dworkin suggest⁸⁴—suffice. Separation-of-powers concerns inform observers and courts about when heightened scrutiny is appropriate and, on the other hand, when rational basis review best achieves principles of constitutional reconstruction. The Court’s mixed record on civil rights demonstrates that a balance of power is needed for the judiciary and Congress to help achieve the aspirations of Reconstruction.

78. RONALD DWORKIN, *The Forum of Principle*, in *A MATTER OF PRINCIPLE* 33 (1985).

79. 62 U.S. 506, 522–26 (1858) (holding constitutional the Fugitive Slave Act of 1850 with its provision requiring state citizens to help to arrest fugitives).

80. 60 U.S. (19 How.) 393, 404, 426 (1857) (denying both the validity of Black citizenship and the congressional authority to prohibit state sanctioned forms of racial discrimination).

81. 163 U.S. 537, 548 (1896) (deciding that forced segregation on public carriers did not violate the Equal Protection Clause).

82. 83 U.S. (16 Wall.) 130, 139 (1873) (holding that the Privileges or Immunities Clause of the Fourteenth Amendment does not grant the federal government the authority to control states’ licensing regulations, even when they discriminated between men and women).

83. See *supra* notes 27–36 and accompanying text.

84. See *supra* notes 28–55, 68–72 and accompanying text.

II. RECONSTRUCTED JUDICIAL AUTHORITY

Tushnet and Waldron go too far in resisting judicial review given the many cases that protect individual rights.⁸⁵ The cases that follow demonstrate how popular interests can be advanced by judicial interpretation. They show the relevance of judicial review to the people's interest in a government ruled by the legal principle consistent with equal protection and republican governance. The judiciary has played an important role in advancing the constitutional policies behind the Reconstruction Amendments.

To that end, the Supreme Court has articulated key doctrines to safeguard fundamental rights, equality, and voting privileges through analysis of the Thirteenth, Fourteenth, and Fifteenth Amendments. This Part parses judicial reliance on Reconstruction principles, structures, and norms. It surveys judicial reliance on Reconstruction Amendment principles to strengthen rights, equality, and voting doctrines.

A. *Early Developments*

The Court's power to closely scrutinize matters concerning autonomy, equality, and franchise stems from three conditions the Court first set forth in footnote 4 of *United States v. Carolene Products Co.*⁸⁶ That identified three circumstances under which the Court might subject law "to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation."⁸⁷ Special constitutional concerns arise, wrote Justice Stone for the Supreme Court, when at stake are "specific prohibition of the Constitution, such as those of the first ten Amendments," "prejudice against discrete and insular minorities," or "political processes ordinarily to be relied upon to protect minorities."⁸⁸ That statement, which is directly relevant to a Reconstruction Amendment-based review, reflects textual, structural,

85. *See supra* Part I.A.

86. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

87. *Id.*

88. *Id.*

normative, and historical reasons for closely scrutinizing state actions.

The Court maintains constitutional norms as a necessary component of representative democracy by checking majorities from abusing individuals' equal rights to enjoy personal autonomy and general welfare. Justice Blackmun characterized the famous footnote's formula as being the grand "moment the Court began constructing modern equal protection doctrine."⁸⁹ The footnote 4 signaled even broader implications for civil rights and civil liberties enforcement. Professor Richard Fallon explains that the footnote set in motion a complicated system of analysis: "Even after triggering rights are identified, determining whether they are outweighed by competing governmental interests often requires a serious, sometimes difficult comparison of individual interests with potentially countervailing governmental interests."⁹⁰

Pursuant to the *Carolene Products* formula, the Warren Court developed a body of law for reviewing state actions that encroached on personal liberties, just treatment, and political engagement. A variety of cases relied on searching scrutiny to overturn special burdens on marginalized groups with claims for equality, substantive liberty, and effective political representation.⁹¹ In those cases, judicial review operates as a corrective mechanism returning power to people whose vital concerns have not been met through ordinary political channels.

In an early case of increased judicial review, the Court did not rely on heightened scrutiny in *Brown v. Board of Education*; rather, it categorically found that segregated public schools violated the Equal Protection Clause of the Fourteenth Amendment.⁹² With that holding the Court was empowered to act against state practices degrading persons because of race.

89. *Toll v. Moreno*, 458 U.S. 1, 23 (Blackmun, J., concurring); *see id.* at 17 (majority opinion) (holding that the state university violated the Supremacy Clause by policy, denying in-state tuition to nonimmigrant resident aliens).

90. FALLON, *supra* note 51, at 149 (criticizing Professor John Hart Ely's interpretation of *Carolene Products* as being "thin").

91. *See, e.g., Brown v. Bd. of Educ.*, 347 U.S. 483, 490 n.5 (1954) (noting that the Fourteenth Amendment provides a "positive immunity" from "unfriendly legislation").

92. *See id.* at 495.

Many progressive decisions followed. The Court relied on substantive due process and equal protection review to strike down bans against the sale of contraceptives.⁹³ The same autonomy principle led the Court to rely on competent reason to find a rational basis with a bite to strike anti-gay sodomy laws⁹⁴ and restrictions on same-sex marriage.⁹⁵ The Court held unconstitutional laws inconsistent with the enjoyment of political speech.⁹⁶ Out of the synthetic recipe first articulated by *Carolene Products Co.* also came decisions against unfair apportionment of voters.⁹⁷ “One person, one vote” became a key principle against elective inequalities.⁹⁸

I turn to several examples to illustrate how the Court’s role in adjudicating civil rights cases is justified on the context of American constitutional reconstruction. After exploring these cases, the Article turns in Part III to judicial encroachment on congressional Reconstruction powers.

B. *Heightened Judicial Review*

The fourth footnote of *Carolene Products* identified three justifications for non-deferential judicial review: the protection of equality, the security of fundamental rights, and the operation of representative political processes.⁹⁹ Later holdings established that in cases where those concerns arise, judges are to rely on strict scrutiny, intermediate scrutiny, or some

93. See *Eisenstadt v. Baird*, 405 U.S. 438, 446 (1972) (finding unconstitutional a contraception statute that violated the equal protection of unmarried people).

94. See *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (finding that the Texas anti-sodomy statute furthered “no legitimate state interest”).

95. See *Obergefell v. Hodges*, 576 U.S. 644, 675 (2015) (noting that the laws against same-sex couples “abridge central precepts of equality”).

96. See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 267–68 (1964) (establishing an “actual malice” requirement for defamation against public officials).

97. *Baker v. Carr*, 369 U.S. 186, 209–11 (1962).

98. See *Reynolds v. Sims*, 377 U.S. 533, 568 (1964) (noting that the Equal Protection Clause requires “substantially equal state legislative representation for all citizens”).

99. See *supra* notes 86–98 and accompanying text.

categorical rule.¹⁰⁰ On closer examination, constitutional analysis relies not on simple tests but on text, history, value, and precedent. These factors identify whether heightened review is warranted to protect a discrete and insular group, a right secured by the Constitution, or representative government. The cases below help demonstrate why rejection of judicial review, for which Mark Tushnet and Jeremy Waldron argue,¹⁰¹ would be an unwarranted disruption of judicial and legislative equilibrium.

1. Fundamental Rights

The Supreme Court first altered *Carolene Products*'s "more exacting judicial scrutiny" into "strict scrutiny," which it first articulated in *Skinner v. Oklahoma*¹⁰² to strike down a criminal sterilization statute.¹⁰³ But Justice Douglas, who wrote the majority opinion in the latter, left to later cases to parse out the meaning of "strict scrutiny" review.¹⁰⁴ The structure of the test was fleshed out further in the 1969 *Shapiro v. Thompson*¹⁰⁵ opinion, where the Court relied on strict scrutiny to strike down

100. See Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1303–05, 1312–14 (2007) (comparing strict scrutiny analyses and categories).

101. See *supra* Part I.

102. 316 U.S. 535 (1942).

103. See *id.* at 541. Chief Justice Stone and Justice Jackson allude to *Carolene Products* in their concurrences. See *id.* at 544 (Stone, C.J., concurring); *id.* at 546 (Jackson, J., concurring) (agreeing that the proposed Act "denies equal protection of the law"). While *Carolene Products* rejected substantive due process analysis, which had by the Second New Deal gone into disrepute, it offered a way of retaining judicial relevance in matters involving normative judgments. See David A. Strauss, *The Modernizing Mission of Judicial Review*, 76 U. CHI. L. REV. 859, 894–95 (2009) (arguing that footnote four of *Carolene Products* "was an effort to bury substantive due process while maintaining a role for the courts"). The Court returned to substantive due process in the late 1960s. See Bradley P. Jacob, *Back to Basics: Constitutional Meaning and "Tradition"*, 39 TEX. TECH L. REV. 261, 280 (2007). But see Jesse H. Choper & Stephen F. Ross, *The Political Process, Equal Protection, and Substantive Due Process*, 20 U. PA. J. CONST. L. 983, 1012 (2018) (arguing that "*Carolene Products* . . . was in part a substantive due process case").

104. See *Skinner*, 316 U.S. at 543 (leaving the precise solution of the equal protection issue to the Oklahoma court).

105. 394 U.S. 618 (1969).

a restriction on the “fundamental right of interstate movement.”¹⁰⁶ Justice Brennan, writing for the Court in the latter case, found the state lacked compelling state reasons to exclude indigents from entering the state seeking to receive valuable public resources.¹⁰⁷ While the narrow tailoring test had not yet made its way into the *Shapiro* opinion, there was a resonance to Justice Stone’s awareness in *Carolene Products* that the Court must give more careful consideration to legislation that negatively impacts individuals’ abilities to exercise rights under “the first ten Amendments, which are deemed equally specific when held to be embraced within the Fourteenth.”¹⁰⁸

More than merely a doctrinal test, *Shapiro* announced the structural vision of Reconstruction that incorporated the Bill of Rights. The majority asserted that the right to travel existed by “nature of our Federal Union and our constitutional concepts of personal liberty.”¹⁰⁹ But it mistakenly traced that right to antebellum precedent written by Chief Justice Taney, “We are all citizens of the United States; and, as members of the same community, must have the right to pass and repass through every part of it without interruption, as freely as in our own states.”¹¹⁰ The Reconstruction Amendments altered the federal structure of government by expanding the rights of Americans irrespective of race. The history of Reconstruction is critical to defining the right to travel.

As early as the 1864 Senate debates on the Civil Rights Act of 1866, passed pursuant to Congress’s Thirteenth Amendment authority, Senator John Sherman of Ohio argued that liberty was more than mere emancipation and extended to the right to travel.¹¹¹ This counterposed the antebellum status of

106. *Id.* at 638.

107. *See id.* at 631, 634.

108. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

109. *Shapiro*, 394 U.S. at 629.

110. *Id.* at 630 (quoting *The Passenger Cases*, 48 U.S. (7 How.) 283, 492 (1849)).

111. *See* CONG. GLOBE, 39th Cong., 1st Sess. 41 (1865) (“This clause gives to the citizen of Massachusetts, whatever may be his color, the right of a citizen of South Carolina, to come and go precisely like any other citizen.”).

restrictions on slave travel.¹¹² Travel was among the rights guaranteed by constitutional removal of the badges and incidents of slavery.¹¹³

Moreover, the Thirteenth Amendment granted federal powers beyond the realm of chattel slavery. Even free Southern Blacks lived in a world so legally constricted by racial domination that it offered only a deceptive shadow of freedom. Their movement was severely restricted. Some Southern states forbade free Blacks from entering at all, coupling the prohibition with the imposition of severe fines against offenders. Prior to the Civil War, South Carolina, Louisiana, Mississippi, and Alabama were among states that prohibited free Black sailors to disembark from ships.¹¹⁴ North Carolina forbade them from traveling beyond the county where they resided.¹¹⁵ Even the paternalistic form of kindness Southerners gave their slaves was not afforded to free Blacks. They lived under constant surveillance, lest they become educated and organized enough to rebel. Laws throughout the South prohibited them from assembling, not even for religious services or charitable purposes.¹¹⁶ Free Blacks often worked in the most menial jobs,

112. See KENNETH M. STAMPP, *THE PECULIAR INSTITUTION: SLAVERY IN THE ANTE-BELLUM SOUTH* 192–236 (1956) (discussing a range of restrictions under slavery codes).

113. See HERMAN BELZ, *A NEW BIRTH OF FREEDOM: THE REPUBLICAN PARTY AND FREEDMEN'S RIGHTS, 1861 TO 1866*, at 120 (1976); *CONG. GLOBE*, 42nd Cong., 2nd Sess. 844 (1872); *id.* at 3192 (relating the right to travel to national citizenship).

114. See MICHAEL A. SCHOEPPNER, *MORAL CONTAGION: BLACK ATLANTIC SAILORS, CITIZENSHIP, AND DIPLOMACY IN ANTEBELLUM AMERICA* 146 (2019); MICHELE REID-VAZQUEZ, *THE YEAR OF THE LASH* 73 (2011) (describing South Carolina's "Negro Seaman's Act" which gave port cities the authority to incarcerate Black sailors when they arrived in port until their ship was ready to disembark); JUDITH KELLEHER SCHAFFER, *BECOMING FREE, REMAINING FREE* 132–33 (2003); Daniel J. Flanigan, *The Criminal Law of Slavery and Freedom, 1800–1868*, at 206 (1973) (Ph.D. dissertation, Rice University) (on file with the Rice University Electronic Theses and Dissertations Collection).

115. STEPHEN A. VINCENT, *SOUTHERN SEED, NORTHERN SOIL* 11 (1999).

116. See *id.* (noting that following Nat Turner's rebellion, North Carolina restricted free Blacks from preaching the gospel and required that Black religious services occur "under White supervision").

excluded from professions either by cultural or statutory barriers.¹¹⁷

These nominally free people suffered from many of the same burdens inflicted on slaves, and the Thirteenth Amendment sought to end restrictions on movement and their concomitant denigrations. Its sweep, therefore, stretched to Northern discriminations as well since free Blacks in the North were saddled with many of the same discriminations as their Southern counterparts. During his U.S. tour, Alexis de Tocqueville remarked that race prejudice was stronger in the North than it was in the South.¹¹⁸ As with free Blacks in the South, the movement of Northern Blacks was severely curtailed. The Court's power to review restrictions on travel comes from the historical, structural, and ethical change wrought by the Reconstruction Amendments.

In 1859, Oregon was the only free state to enter the Union with a constitutional prohibition against Blacks residing there.¹¹⁹ In 1851, an Iowa statute prohibited any free Blacks from entering the state or subjected them to fines, but in a show of faux compassion the state allowed law-abiding Blacks living there to remain.¹²⁰ Iowa followed an established line of Northern legislation designed to keep Blacks from moving about the expanding country. Ohio, from 1803, effectively limited the number of free Blacks who could enter because it was practically impossible for them to pay the required \$500 bond of good

117. See JOHN HOPE FRANKLIN, *FROM SLAVERY TO FREEDOM* 216–17 (2d ed. 1956).

118. See James L. Crouthamel, *Tocqueville's South*, 2 J. EARLY REPUBLIC 381, 396 (1982); Richard W. Resh, *Alexis De Tocqueville and the Negro: Democracy in America Reconsidered*, 48 J. NEGRO HIST. 251, 256–57 (1963) (“Tocqueville described the free Negro’s burdens in his discussion of the tyranny of public opinion. Theoretically the free Negro could vote, but an attempt to cast the ballot would result in reprisals.”).

119. See 2 JOHN C. HURD, *THE LAW OF FREEDOM AND BONDAGE IN THE UNITED STATES* 217 (Negro Univ. Press 1968) (1862); HENRY H. SIMMS, *A DECADE OF SECTIONAL CONTROVERSY, 1851–1861*, at 129 (Greenwood Press 1978) (1942) (explaining that in addition to not being permitted to reside in the state, Blacks “could not hold any real estate, maintain a suit or make a contract”).

120. See 2 HURD, *supra* note 119, at 177 (explaining that “free negroes” living in Iowa are allowed to remain in the state so long as they “have[] complied with the laws now in force”); SIMMS, *supra* note 119, at 129.

behavior.¹²¹ The Illinois Constitution of 1848, prohibited entry to free Black folks.¹²² An 1853 Illinois law gave this provision effect, making it a misdemeanor for Blacks and “mulattos” to enter the state for the purpose of residing there and subjecting them to a fine or, if unable to pay the \$100 to \$500 dollars, sale to forced labor to pay off the fine and court costs.¹²³ Then, just a month before President Lincoln’s Emancipation Proclamation, during the state’s 1862 constitutional convention, Illinois adopted a constitutional article prohibiting Blacks from immigrating to the state, which passed by a majority of 100,590 popular votes.¹²⁴ Similar exclusionary provisions were found in Indiana law.¹²⁵ Northern Blacks needed the liberating provisions of the Thirteenth, Fourteenth, and Fifteenth Amendment almost as much as Southern slaves.

Reconstruction altered the federal structure of government by giving Blacks free egress and ingress into states. *Shapiro* and similar right to travel cases reflect the history and structure of Reconstruction.¹²⁶ They identify the national norm of free interstate passage, ingress, egress, migration, welfare, and fair dealing. In *Saenz v. Roe*,¹²⁷ the Court recognized the right to travel as a feature of the Privileges or Immunities and Privileges

121. SIMMS, *supra* note 119, at 128; see FRANK U. QUILLIN, THE COLOR LINE IN OHIO: A HISTORY OF RACE PREJUDICE IN A TYPICAL NORTHERN STATE 20–24, 38–40, 88 (1913).

122. SIMMS, *supra* note 119, at 128.

123. See 2 HURD, *supra* note 119, at 136 (explaining that after facing this initial punishment, the free Black person must remove themselves from the state or continue to face fines or forced labor).

124. See ALLAN NEVINS, ORDEAL OF THE UNION, SELECTED CHAPTERS 39 (1973); N. DWIGHT HARRIS, THE HISTORY OF NEGRO SERVITUDE IN ILLINOIS AND OF THE SLAVERY AGITATION IN THAT STATE, 1719–1864, at 235–36, 239 (1904).

125. See 2 HURD, *supra* note 119, at 136 (citing an 1853 Indiana law which made it a “[m]isdemeanor for negro or mulatto, bond or free, to come [to the state] with intention of residing,” and that such individual may be “prosecuted and fined or sold, for time, for fine and cost”); NEVINS, *supra* note 124, at 39.

126. See generally *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Saenz v. Roe*, 526 U.S. 489 (1999); *United States v. Guest*, 383 U.S. 745 (1966); *Edwards v. California*, 314 U.S. 160 (1941).

127. 526 U.S. 489 (1999).

and Immunities Clauses.¹²⁸ In future cases the Court should more clearly detail the historical basis of fundamental rights, such as travel.

2. Equal Protection

The Equal Protection Clause added norms into constitutional structure that the Court has effectively adopted into doctrine. The history of the Clause speaks to significant constitutional change, including judicial review to enforce norms of fairness its brief text implies. The second founders did not fathom its breadth of applications from race, to sexual orientation, and handicap status.

Nevertheless, the historical record evinces some, albeit limited, understanding of the Equal Rights Clause's breadth of application. Even congressional opponents of the Clause, such as Representative Samuel Randall, conceived the extent to which the Fourteenth Amendment portended change to the Constitution: "The first section proposes to make an equality in every respect between the two races, notwithstanding the policy of discrimination which has hitherto been exclusively exercised by the States."¹²⁹ The power to enjoin inequality applied to all three branches. It expanded legislative authority to pass statutes, the executive's to regulate, and the judiciary's to review. Judicial review became crucial for identifying discriminatory actions and for fashioning equitable remedies. Enforcement powers have evolved but remain grounded in the nation's founding norm in the Declaration of Independence "that all men are created equal."¹³⁰ Following Reconstruction, the Declaration's statements about human rights, equality, and self-government establish, what Senator Charles Sumner called, a "sovereign rule of interpretation."¹³¹

Structural changes lay dormant until the Supreme Court, in *Brown v. Board of Education*, expanded the interpretive

128. See *id.* at 500–03 (discussing three types of the right to travel in the contexts of both the Privileges and Immunities Clause and the Privileges or Immunities Clauses).

129. CONG. GLOBE, 39th Cong., 1st Sess. 2530 (1866).

130. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

131. CONG. GLOBE, 42d Cong., 2d Sess. 828 (1872).

value of the Equal Protection Clause.¹³² Justice Oliver Wendell Holmes infamously called that portion of the Constitution, “the usual last resort of constitutional arguments.”¹³³ The fault lay in the Court itself for so diminishing the value of the Equal Protection Clause in earlier cases such as *Slaughter-House*¹³⁴ and the *Civil Rights Cases*.¹³⁵ Holmes failed to recognize that the Equal Protection Clause was part of this broader effort, linked to emancipation and abolitionism before it, which pushed to constitutionalize equal status under law. Anti-slavery movements had moved for radical change to constitutional order—the elimination of slavery—while searching for change consistent with the Declaration of Independence. Those principles foreshadowed the civil rights movement’s reliance on the Court by organizations like the NAACP.¹³⁶ Charles Sumner in the late 1840s had argued that separate but unequal education is stigmatic.¹³⁷ Chief Justice Warren adopted a similarly normative concept into his finding that segregated schools violate equal protection and communicated a “sense of inferiority [that] affects the motivation of a child to learn.”¹³⁸

In Warren’s hands in *Brown*, the Clause was recognized for its normative statement. Its integration of equality into doctrine led to desegregation throughout society.¹³⁹ He explained the

132. See *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) (holding that the Equal Protection Clause of the Fourteenth Amendment prohibits segregation in public schools).

133. *Buck v. Bell*, 274 U.S. 200, 208 (1927). In the case, Holmes’s refusal to recognize Carrie Buck’s Equal Protection claim led to one of the most distasteful holdings in the history of the Supreme Court. See *id.* at 207 (asserting that state sterilization did not violate a woman’s rights because “three generations of imbeciles are enough”).

134. See 83 U.S. 36, 81–82 (1872) (construing the Equal Protection Clause to not apply to any actions outside of direct discrimination by a State against Black individuals as a class).

135. See *infra* Part III.B.

136. See ALEXANDER TESIS, *WE SHALL OVERCOME: A HISTORY OF CIVIL RIGHTS AND THE LAW* 202–05 (2008) [hereinafter *WE SHALL OVERCOME*].

137. See *Roberts v. City of Boston*, 59 Mass. (5 Cush.) 198, 203 (1849).

138. *Brown*, 347 U.S. at 494.

139. See, e.g., *Johnson v. Virginia*, 373 U.S. 61, 61–62 (1963) (per curiam) (relying on *Brown* to find that the segregation of public facilities, such as courtrooms, is constitutionally impermissible); *Turner v. City of Memphis*, 369 U.S. 350, 351, 353 (1962) (per curiam) (holding that public segregation in

point in a speech, which identified how he regarded the integration of principle, history, and structure:

What is the American ideal? It is simply and precisely stated thusly in the Declaration of Independence—"We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain inalienable rights, that among these are life, liberty and the pursuit of happiness. []" . . . This noble language, fortified by the implementing language of the 14th Amendment, makes the picture complete.¹⁴⁰

For him an aspiration had been made substantive by the Reconstruction.

It is also no wonder that recent cases interweave equality and autonomy interests. For example, in *Obergefell* Justice Kennedy engaged in a sophisticated explanation, writing that the right to raise a family safeguards self-definition and fairness.¹⁴¹ The interweaving of freedom and equality in the case is consistent with the historical record. As Kenneth Karst points out,

[t]here was no serious effort to differentiate the functions of the various clauses—privileges and immunities, due process, equal protection—of section 1 of the proposed amendment. With or without the privileges and immunities clause, the section in its entirety was taken to guarantee equality in the enjoyment of the rights of citizenship.¹⁴²

airport dining facilities violates the Fourteenth Amendment); *Holmes v. City of Atlanta*, 223 F.2d 93, 94–95 (5th Cir. 1955), *vacated*, 350 U.S. 879 (1955) (per curiam) (vacating a decision that had declared the segregation of public golf courses to be constitutional); *Dawson v. Mayor & City Council of Balt. City*, 220 F.2d 386, 387 (4th Cir. 1955), *aff'd*, 350 U.S. 877 (1955) (per curiam) (finding that racial segregation of public beaches and bathhouses was not constitutionally permissible); *Bynum v. Schiro*, 219 F. Supp. 204, 205–06 (E.D. La. 1963), *aff'd*, 375 U.S. 395 (1964) (per curiam) (granting injunctive relief for the desegregation of a city auditorium).

140. *Civil Rights & the Warren Court*, EBONY, Feb. 1, 1970, at 28.

141. See *Obergefell v. Hodges*, 576 U.S. 644, 673–75, 681 (2015) (“These considerations lead to the conclusion that the right to marry is a fundamental right inherent in the liberty of the person.”).

142. Kenneth L. Karst, *Forward: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 15 (1977).

The idea of the Equal Protection Clause, and the rest of the Fourteenth Amendment, was to make citizenship a matter of entitlements and guaranteed rights of free people. The newly acquired power provided for judicial review, just as it did for legislative enforcement, sufficient to address various infringements on individuals' rights.

3. Political Processes

The ability of the Court to secure fundamental rights, equality, and the franchise demonstrate that Professors Tushnet and Waldron overplay their hands in arguing that the judiciary is undemocratic.¹⁴³ We have already seen that the Supreme Court has advanced principles of democracy as to fundamental rights and equality.¹⁴⁴ So too with voting. The Fifteenth Amendment dramatically altered the structure of American government. History helps to understand this as do the norms behind its ratification.

Ratification occurred in a country riddled with voting inequality. A national solution was necessary. The Court has relied on reconstruction powers to protect democratic participation. The point could be illustrated by a whole group of cases. *Kramer v. Union Free School District No. 15*,¹⁴⁵ for instance, ruled that voting rights are protected under the Equal Protection Clause.¹⁴⁶ The Court used heightened scrutiny to recognize the “one person, one vote” principle even before Congress had adopted the Voting Rights Act of 1965.¹⁴⁷ Warren thought *Baker v. Carr*¹⁴⁸ was “the most vital decision” of his

143. See *supra* Part I.A.

144. See *supra* Part II.B.1–2.

145. 395 U.S. 621 (1969).

146. See *id.* at 622 (striking down a New York law that only allowed individuals to vote in school district elections if they owned “taxable real property” in the district or were the parents of “children enrolled in the local public schools”).

147. See *Gray v. Sanders*, 372 U.S. 368, 381 (1963) (“The conception of political equality from the Declaration of Independence, to Lincoln’s Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote.”).

148. 369 U.S. 186 (1962).

career.¹⁴⁹ Justice Brennan wrote the opinion, holding for the first time malapportionment justiciable.¹⁵⁰ The Court followed with *Wesberry v. Sanders*¹⁵¹ where the Court held population disparities among districts “grossly discriminate[] against voters.”¹⁵²

Indeed in some areas, such as politically manipulative gerrymandering, the Court might exert even greater democratic oversight. *Davis v. Bandemer*¹⁵³ first recognized political gerrymandering to be justiciable and not a purely political matter.¹⁵⁴ Yet, a lack of judicial standards has plagued this area of law. In *Vieth v. Jubelirer*,¹⁵⁵ for example, five Justices found no judicially manageable standard to evaluate the constitutionality of a gerrymander.¹⁵⁶ More to date, as we will see in Part III.C.2, the Court in a 2019 case, *Rucho v. Common Cause*,¹⁵⁷ almost abrogated its power to protect against political gerrymandering.¹⁵⁸

III. JUDICIAL OVERREACH IN MATTERS OF CIVIL RIGHTS

Part II discussed several doctrinal realizations of Reconstruction. There is reason, nevertheless, not to adopt the strong judicial review found in Strauss and Dworkin.¹⁵⁹ The Enforcement Clauses of the Reconstruction Amendments

149. POLLY PRICE, JUDGE RICHARD S. ARNOLD 57 (2019).

150. See *Baker*, 369 U.S. at 237 (“We conclude that the complaint’s allegations of a denial of equal protection present a justiciable constitutional cause of action The right asserted is within the reach of judicial protection under the Fourteenth Amendment.”).

151. 376 U.S. 1 (1964).

152. *Id.* at 7–9; see *Reynolds v. Sims*, 377 U.S. 533, 560–61 (1964).

153. 478 U.S. 109 (1986).

154. See *id.* at 143.

155. 541 U.S. 267 (2004) (plurality opinion).

156. See *id.* at 293; *id.* at 311 (Kennedy, J., concurring in the judgment).

157. 139 S. Ct. 2484 (2019).

158. See *id.* at 2506–07 (“[T]he fact that such gerrymandering is incompatible with democratic principles . . . does not mean that the solution lies with the federal judiciary. We conclude that partisan gerrymandering claims present political questions beyond the reach of the federal courts.” (internal quotations omitted)).

159. See *supra* Part I.B.

empower Congress with discretionary power over civil rights and civil liberties. Judicial veto over such reasonable policies works against the written text, aspirations, ideals, principles of justice, and equality concerns.

This Part of the Article scrutinizes legislative authority to fulfill the aspirations of liberty, equality, and franchise through reasonable legislation. Several cases recognize congressional authority to enforce the Reconstruction Amendments. The enforcement clauses of the Reconstruction Amendments (§ 2 of the Thirteenth, § 5 of the Fourteenth, and § 2 of the Fifteenth Amendments, each granting enforcement powers) explicitly augmented Congress's powers to promulgate civil rights and civil liberties legislation.¹⁶⁰

Judicial deference is adhered to in the landmark Thirteenth Amendment case, *Jones v. Alfred H. Mayer*,¹⁶¹ which upheld a law protecting property rights against private discrimination.¹⁶² The Court reviewed and upheld congressional use of the § 2 enforcement power.¹⁶³ The opinion, drafted by Justice Stewart, found a civil rights law, 42 U.S.C. § 1982, to be “necessary and proper” for preventing discrimination in real estate transactions.¹⁶⁴ The Court recognized that the text of the Amendment explicitly gave Congress broad latitude to enact laws against legislatively identified rights violations: “Surely Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation.”¹⁶⁵ Stewart extensively surveyed historical sources, finding evidence that the Thirteenth Amendment extended congressional authority to protect

160. See generally U.S. CONST. amend. XIII, § 2; *id.* amend. XIV, § 5; *id.* amend. XV, § 2.

161. 392 U.S. 409 (1968).

162. *Id.* at 440–41.

163. *Id.* at 438–44.

164. See *id.* at 439 (ruling that the Enabling Clause “clothed ‘Congress with power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States’” (quoting *The Civil Rights Cases*, 109 U.S. 3, 20 (1883))).

165. *Id.* at 440.

property rights.¹⁶⁶ Then, the Court in *Runyon v. McCrary*¹⁶⁷ further deferred to congressional authority to criminalize private racial discrimination in contractual matters.¹⁶⁸

For a time, the Court was likewise deferential about Congress's reliance on Fourteenth Amendment, § 5 authority. *Katzenbach v. Morgan*¹⁶⁹ found that "[b]y 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."¹⁷⁰ The Amendment does not require congressional complacency; nothing in the text, history, or structure of § 5 indicates that it narrowed congressional powers to those first identified by the Court. To the contrary, its wording indicates enhanced legislative leadership in ethical efforts to advance liberty and equality for all. The liberal Justice Brennan wrote in *Morgan* that the Court is not exclusive in the expansion of rights. Congress can rely on § 5 power to strengthen protections of rights; to think otherwise would be to relegate the legislative branch "to the insignificant role of abrogating only those state laws that the judicial branch was prepared to adjudge unconstitutional."¹⁷¹ "[B]y including § 5," the Reconstruction Congress "sought to grant to Congress . . . the same broad powers expressed in the Necessary and Proper Clause."¹⁷² On this there was conservative and liberal consensus; Justice Brennan in *Morgan* and Justice Stewart in *Jones* identified the enforcement clauses of the Reconstruction Amendments to be grants of broad authority to advance policies for enacting civil rights-related laws.¹⁷³ Similarly, a separate lead opinion written

166. *See id.* at 423–28.

167. 427 U.S. 160 (1976).

168. *See id.* at 163, 168–73 (finding that Congress had the authority to prohibit private schools from excluding qualified children purely because they are Black).

169. 384 U.S. 641 (1966).

170. *Id.* at 650.

171. *Id.* at 648–49.

172. *Id.* at 650.

173. *See id.* (quoting *McCulloch v. Maryland*, 17 U.S. 316, 421 (1819), which established the current scope of Necessary and Proper Clause authority).

by Justice Black drew attention to the Fifteenth Amendment grant of power to Congress: “[E]xemption from discrimination in the exercise of the elective franchise.”¹⁷⁴ Black, in *Terry v. Adams*,¹⁷⁵ found that the Enforcement Clause of the Fifteenth Amendment granted a more robust “congressional power to protect this new constitutional right” than even the rational basis authority long related to the Necessary and Proper Clause.¹⁷⁶

Those cases bucked the more common pattern of judicial supremacy, rooted in antebellum jurisprudence, which came at the expense of congressional initiative, experimentation, and representation.¹⁷⁷ The Rehnquist and Roberts Courts chose interpretive routes that denied the expansive reach of Congress’s enforcement authority. In recent years, the Court has thwarted legislative efforts to provide federal redress for gender-motivated violence,¹⁷⁸ to create monetary penalties for states’ violations of the Americans with Disabilities Act¹⁷⁹ and Age Discrimination in Employment Act,¹⁸⁰ and to reform campaign finance laws.¹⁸¹ The Article now turns to cases that limited congressional authority over fundamental rights and liberties. While we previously saw that Professors Waldron’s and Tushnet’s opposition to judicial review would stymie Court efforts to advance constitutional reconstruction, this Part

174. *Terry v. Adams*, 345 U.S. 461, 467 (1953).

175. 345 U.S. 461 (1953).

176. *Id.* at 468; see *Lopez v. Monterey County*, 525 U.S. 266, 294 (1999) (Thomas, J., dissenting) (writing of precedent that “compared Congress’ Fifteenth Amendment enforcement power to its broad authority under the Necessary and Proper Clause”).

177. Repeated rejection of congressionally defined rights puts into doubt Professor Barry Friedman’s claim that the Court tends to follow the popular will. See Barry Friedman, *Mediated Popular Constitutionalism*, 101 MICH. L. REV. 2596, 2599 (2003) (“[O]ur system is one of popular constitutionalism, in that judicial interpretations of the Constitution reflect popular will over time.”).

178. See *United States v. Morrison*, 529 U.S. 598, 627 (2000).

179. See *Bd. of Tr. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 (2001).

180. See *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 67 (2000).

181. See, e.g., *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 319 (2010); *McCutcheon v. Fed. Election Comm’n*, 572 U.S. 185, 227 (2014) (plurality opinion).

demonstrates that strong judicial review, of the type advocated by Professors Strauss and Dworkin, would undermine legislative enforcement of structural, historical, principled, and textual aspects of constitutional reconstruction.

A. *Antebellum Misdirection*

During the antebellum period, *Dred Scott v. Sanford* protected the institution of chattel slavery against congressional authority. It came to be the quintessential example of judicial overreach into congressional prerogatives. Its outcome illustrates why the Reconstruction Amendments were needed to secure legislative enforcement in the aftermath of Civil War. The case held unconstitutional the Missouri Compromise Act, which had prohibited slavery from extending into northern territory of the United States.¹⁸²

Chief Justice Taney wrote the fractured opinion. *Dred Scott* included six concurrences and two dissents. He infamously wrote that persons of African heritage could never be U.S. citizens and that the Declaration of Independence's statement of natural rights applied only to Whites.¹⁸³ Taney furthermore rejected the claim that Black slaves who had lived part of their lives in free states, as had Dred Scott and his wife, Harriet, could vindicate their freedom in federal courts.¹⁸⁴

Taney's belief that he could resolve from the bench the sectional conflict over slavery proved gravely mistaken.¹⁸⁵ Southern Congressmen relied on Taney's lead opinion¹⁸⁶ to rail

182. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 452 (1857).

183. *Id.* at 407, 410.

184. *Id.* at 400.

185. See Earl M. Maltz, *The Last Angry Man: Benjamin Robbins Curtis and the Dred Scott Case*, 82 CHI.-KENT L. REV. 265, 272 (2007); JAMES F. SIMON, LINCOLN AND CHIEF JUSTICE TANEY: SLAVERY, SECESSION, AND THE PRESIDENT'S WAR POWERS 127 (2006) ("[Taney] thought that he was performing a great service for his country by eliminating the divisive issues of African-American citizenship and the Missouri Compromise from the national debate. Like President Buchanan, he hoped that the Court's decision would silence abolitionist agitation and preserve the Union.").

186. See *Dred Scott*, 60 U.S. at 404, 426 (overturning the Missouri Compromise and stating "[t]he Government of the United States had no right to interfere for any other purpose but that of protecting the rights of the [slave] owner").

against claims that Congress had sole administration over the Missouri Territory.¹⁸⁷ Rather than permanently resolving the question of slavery, the *Dred Scott* opinion proved to be a principal catalyst for civil war.

Without doing necessary historical research into the subject, the Chief Justice claimed that neither the framers nor the states had meant for Black inhabitants to be citizens.¹⁸⁸ Writing in dissent, Justice Curtis exposed Taney's misleading fallacy: At the time of the founding, free Blacks had been citizens of New Hampshire, Massachusetts, New York, New Jersey, and North Carolina.¹⁸⁹ African Americans also had voting privileges in those states.¹⁹⁰ Relying on this history, Curtis argued that Blacks had then gained national citizenship by virtue of their state citizenship.¹⁹¹ His view, however, did not extend to persons of African descent who had throughout their entire lives resided in slave states.

The Court proved a dangerous branch when its final decision denied the universal enjoyment of rights. By the time of Reconstruction, it was clear that Congress needed to be a check against judicial error on matters of such gravity as liberty, equality, and citizenship. Taney was wrong to claim that the framers thought the Declaration of Independence did not apply to persons of African descent.¹⁹² While that narrow-mindedness

187. See Anthony V. Baker, *The Authors of All Our Troubles—The Press, the Supreme Court, and the Civil War*, 8 J.S. LEGAL HIST. 29, 57 (2000); Stuart A. Streichler, *Justice Curtis's Dissent in the Dred Scott Case: An Interpretive Study*, 24 HASTINGS CONST. L.Q. 509, 539 (1997).

188. See *Dred Scott*, 60 U.S. at 411 (“Two clauses in the Constitution which point directly and specifically to the negro race as a separate class of persons, and show clearly that they were not regarded as a portion of the people or citizens of the Government then formed.”).

189. *Id.* at 572–73 (Curtis, J., dissenting).

190. *Id.*

191. *Id.* at 576.

192. Taney discounted the Declaration of Independence's statement of universal values. He wrote that if the framers had wanted to include Blacks in the documents statement of national principles, then “the conduct of the distinguished men who framed the Declaration of Independence would have been utterly and flagrantly inconsistent with the principles they asserted.” *Id.* at 410 (majority opinion).

was certainly true of some of the documents' signers, it certainly was untrue of the Continental Congress as a whole.

Examination of revolutionary pamphlets, correspondences, and news stories reveals a more nuanced record.¹⁹³ An influential American jurist wrote in 1778 that the rights people "possess at birth are equal, and of the same kind."¹⁹⁴ John Adams, a member of the committee of four assigned by the Second Continental Congress to draft the Declaration, stated that inalienable rights are divinely granted and they cannot be "repealed or restrained by human laws" because they are antecedent "to all earthly government."¹⁹⁵ Benjamin Franklin, who was probably the best known of the Declaration's signers, went on to be President of the Pennsylvania Abolition Society.¹⁹⁶ Furthermore, even the writings of Southern luminaries of the caliber of George Mason and Patrick Henry evince realization that their hypocritical retention of slaves violated the natural law philosophy of the Revolution.¹⁹⁷ In the North, emancipation laws gave practical application to the Declaration's statement of

193. For a discussion of how the Declaration of Independence's recognition of inalienable human rights informed the founding generation's debates about abolishing slavery, see TESIS, *supra* note 33, at 65–74 (discussing contemporaries who believed in Black innate inferiority). For representative voices of that racist genre, see 2 EDWARD LONG, *THE HISTORY OF JAMAICA OR, GENERAL SURVEY OF THE ANTIEN AND MODERN STATE OF THAT ISLAND* 353–73 (2d ed., Frank Cass & Co. Ltd. 1970) (1774) (taxonomizing Blacks somewhere between humans and simians); see also JOHN DUNLAP, *PERSONAL SLAVERY ESTABLISHED, BY THE SUFFRAGES OF CUSTOM AND RIGHT REASON* 18 (Philadelphia 1773).

194. *Result of the Convention of Delegates Holden at Ipswich in the County of Essex (1778)*, reprinted in THEOPHILUS PARSONS, *MEMOIR OF THEOPHILUS PARSONS* 359, 365 (Boston, Ticknor & Fields 1861).

195. JOHN ADAMS, *A DISSERTATION ON THE CANON AND FEUDAL LAW*, in 3 *THE WORKS OF JOHN ADAMS* 477, 480 (Charles F. Adams ed., 1851) (1782).

196. For a sophisticated and nuanced discussion of Franklin and U.S. slavery, see DAVID WALDSTREICHER, *RUNAWAY AMERICA: BENJAMIN FRANKLIN, SLAVERY AND THE AMERICAN REVOLUTION* 225 (1st ed. 2004).

197. Letter from Patrick Henry to Robert Pleasants (Jan. 18, 1773), in GEORGE S. BROOKES, *FRIEND ANTHONY BENEZET* 443–44 (1937) ("Would any one believe that I am Master of Slaves of my own purchase! I am drawn along by ye general Inconvenience of living without them; I will not, I cannot justify it."); 2 *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 370 (Max Farrand ed., 1911) (writing an indicting statement of Col. George Mason of his own hypocrisy by stating that "every master of slaves is born a petty tyrant").

inalienable rights.¹⁹⁸ *Dred Scott* contained a series of errors that could only be rectified through constitutional change in favor of congressional enforcement.

B. *Postbellum Reconstruction*

Reconstruction was partly a response to *Dred Scott*, but, far more so, it was an affirmation of federal interests in matters involving liberty, equality, and voting. Ratification of the Thirteenth, Fourteenth, and Fifteenth Amendments augmented congressional powers. Congress was given explicit, enumerated powers to enforce principles of inalienable rights that from the nation's founding had been embedded in the Declaration of Independence and Preamble to the Constitution.¹⁹⁹ They altered the structure of American governance by empowering Congress to enforce laws that would prevent the Court from again undercutting federal protections of rights.²⁰⁰

By adopting the Reconstruction Amendments, the nation committed itself to throwing off the yoke of slavery and incidents of bondage; securing due process, equal protection, the privileges or immunities of citizenship; and advancing the franchise. But by 1883, in the *Civil Rights Cases*, the Supreme Court had overstepped its Article III bounds, donned the mantle of interpretive supremacy, and effectively thwarted the reconstruction of civil rights and civil liberties in the United States.

The holding remains, never having been overturned, a landmark for narrow reading of congressional enforcement powers. The *Civil Rights Cases* curtailed congressional authority even more forcefully than *Dred Scott*. The Court held

198. See *WE SHALL OVERCOME*, *supra* note 136, at 32.

199. Professor Charles Black pointed out that the Declaration of Independence and the Preamble are “[t]he two best sources” for “striving toward rational consistency, . . . keeping the rules of legal decision in tune with the society’s structures and relationships, . . . [and] reaching toward higher goals.” CHARLES L. BLACK, JR., ON READING AND USING THE NINTH AMENDMENT, *in* POWER AND POLICY IN QUEST OF LAW: ESSAYS IN HONOR OF EUGENE VICTOR ROSTOW 187, 192 (Myers S. McDougal & W. Michael Reisman eds., 1985).

200. See *TESIS*, *supra* note 33, at 179–201.

the Civil Rights Act of 1875 to be unconstitutional.²⁰¹ The full name of the statute identified the breadth of its commitment to racial justice: An Act To Protect All Citizens in Their Civil and Legal Rights.²⁰² The first section entitled “all persons within the jurisdiction of the United States” to “the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters, and other places of public amusement.”²⁰³ Other portions of the law created civil and criminal penalties; it also granted exclusive jurisdiction to federal courts.²⁰⁴ Congress had relied on Thirteenth and Fourteenth Amendment enforcement powers to make a structural break from the antebellum model of federalism, wherein states enjoyed exclusive control over property and civil rights. Those two Amendments prohibited state laws from interfering with the enjoyment of public places of accommodation, irrespective of local and state prejudices.²⁰⁵ They were principled reforms that undertook to end the long history of racial prejudice. Instead of recognizing them to be augmentations of congressional powers, the Court narrowed the Amendments’ significance, reach, and force. Thereby, the majority rendered postbellum changes to the Constitution almost dead letters.

The *Civil Rights Cases* thwarted radical constitutional revision of federalism.²⁰⁶ Ordinary contract, property, criminal,

201. The Civil Rights Cases, 109 U.S. 3, 26 (1883).

202. Civil Rights Act of 1875, 18 Stat. 335, §§ 1–4.

203. *Id.* § 1.

204. *Id.* §§ 2–3.

205. See Robert J. Kaczorowski, *Congress’s Power to Enforce Fourteenth Amendment Rights: Lessons from Federal Remedies the Framers Enacted*, 42 HARV. J. ON LEGIS. 187, 263 (2005)

[T]he framers of the Fourteenth Amendment . . . understood the Fourteenth Amendment, at a minimum, as a delegation to Congress of the plenary power to define and enforce in the federal courts the substantive rights of U.S. citizens that they had just exercised in enacting the Civil Rights Act of 1866.

206. Reconstruction had come to a near halt by the time the cases that challenged the 1875 Act had reached the Justices. Parts of the South had turned to new methods of oppression after the abolition of slavery. Citizenship rights were curtailed through a mix of private customs that included the sharecropping, segregation, peonage, and convict lease. JACQUELINE JONES, *THE DISPOSSESSED: AMERICA’S UNDERCLASSES FROM CIVIL WAR TO THE PRESENT*

and family matters remained within states' general powers, but such laws could no longer be used to prevent anyone from the full and equal enjoyment of enumerated businesses.²⁰⁷ The Court blew an indelible hole in the structure of constitutional reconstruction. The Thirteenth and Fourteenth Amendments empowered Congress to pass civil rights legislation without judicial interference. At a minimum, those two amendments sought to prevent another national trauma brought on by *Dred Scott*, in which the Supreme Court had cut the legs out from a the Missouri Compromise of 1820.

Consolidated into the *Civil Rights Cases* were five separate causes of action. Each contested various forms of segregation in public accommodations, including access to a hotel and railroad coach.²⁰⁸ The Court found the Civil Rights Act of 1875 to be facially unconstitutional. It held that the Fourteenth Amendment did not grant Congress the authority to pass a law that regulated private conduct.²⁰⁹ The Court found the 1883 law was not "corrective legislation."²¹⁰ Because the majority found it was "primary and direct," it held Congress had "superseded and displaced state legislation."²¹¹

107 (1992). *See generally* DAVID M. OSHINSKY, *WORSE THAN SLAVERY* (1996); ALEX LICHTENSTEIN, *TWICE THE WORK OF FREE LABOR: THE POLITICAL ECONOMY OF CONVICT LABOR IN THE NEW SOUTH* (1996); KARIN A. SHAPIRO, *A NEW SOUTH REBELLION: THE BATTLE AGAINST CONVICT LABOR IN THE TENNESSEE COAL FIELDS, 1871–1896* (1998).

207. *See* Civil Rights Act of 1875 § 1.

208. *The Civil Rights Cases*, 109 U.S. at 4–5. For more context see James Madison, *San Francisco Theatrical Memories*, MUSEUM CITY S.F., <https://perma.cc/76GU-TC77> (concerning Maguire's Opera House); *Grand History: In the Beginning*, GRAND OSHKOSH, <https://perma.cc/YEQ2-DRJB> (detailing the history of the Grand Opera House).

209. *See The Civil Rights Cases*, 109 U.S. at 11 ("It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the amendment.")

210. *Id.* at 13.

211. *Id.* at 19 ("This is not corrective legislation; it is primary and direct; it takes immediate and absolute possession of the subject of the right of admission to inns, public conveyances, and places of amusement. It supersedes and displaces state legislation on the same subject, or only allows it permissive force."). The state action doctrine, which prohibits Congress from relying on the Fourteenth Amendment to directly regulate private conduct, eventually prompted Congress to look to the Commerce Clause to pass civil rights laws

The Court refused to defer to Congress's five years' worth of investigations and hearings, which had illustrated the harms of segregation and the need for federal remedies.²¹² Justice Bradley, who wrote the majority opinion, also denied that segregation and racial discrimination by businesses were continued incidents of slavery.²¹³

The lone dissent by Justice Harlan took the majority to task, writing that federal legislation could regulate discrimination by state-licensed companies.²¹⁴ Harlan compared the Court's decision in the *Civil Rights Cases* with that of *Dred Scott* because both so significantly encroached on congressional powers. As Justice Harlan stated in dissent, the majority prevented Congress from acting at "its own discretion, and independently of the action or non-action of the states."²¹⁵ Harlan argued that businesses could be regulated by federal civil rights legislation. That is, the Act controlled economic intercourse, not private relations.

The law provided federal protections to advance the reconstruction values of racial equality and meaningful liberty. But the majority shifted away from the values of constitutional change, foreclosing the nation's ability to enforce civil reconstruction. The Court had not only failed to advance the changed Constitution, it prevented Congress from doing so. The results of the opinion were entirely contrary to the abolitionist vision from which those two amendments sprang.

and the Court to channel much of its civil rights decisions through the Commerce Clause rather than the Thirteenth or Fourteenth Amendments.

212. See Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 984–1092 (1995) (detailing congressional debates preceding passage of the Civil Rights Act of 1875).

213. See *The Civil Rights Cases*, 109 U.S. 3, 24 (1883).

214. See *id.* at 36 (Harlan, J., dissenting)

Congress, therefore, under its express power to enforce that amendment, by appropriate legislation, may enact laws to protect that people against the deprivation, because of their race, of any civil rights granted to other freemen in the same State; and such legislation may be of a direct and primary character, operating upon States, their officers and agents, and also upon, at least, such individuals and corporations as exercise public functions and wield power and authority under the state.

215. *Id.* at 57.

The eight-Justice majority did more than put a stop to nationwide desegregation. It diminished congressional authority despite the explicit grant of lawmaking powers in the Thirteenth and Fourteenth Amendments. The history of systemic national racism that led to ratification of liberty and equality norms was ignored. Outcry about the Supreme Court's self-aggrandizing opinion was caustic. A newspaper columnist wrote that after the holding in the *Civil Rights Cases* "it is safe to say that no other decision of the court since the famous *Dred Scott* decision . . . has created so much excitement and discussion."²¹⁶ The analogy between the two cases was not lost on other authors in the months after the 1883 decision.²¹⁷

The Supreme Court had put a nail into the heart of Reconstruction. And southern states were glad to take advantage of the Court's axe job to congressional power, tearing the heart out of the constitutional reconstruction, finding unconstitutional the crown jewel of Reconstruction. From there the nation slid into further separation of the races. Less than half a month after the *Civil Rights Cases* decision was announced, the Governor of Texas asked rail companies to separate Black and White passengers.²¹⁸ The Supreme Court's effects on national reconstruction became evident almost immediately. By 1891, various Jim Crow laws had been passed in Florida (1887), Mississippi (1888), Texas (1889), Louisiana (1890), Alabama (1891), Arkansas (1891), Kentucky (1891), and Georgia (1891).²¹⁹

Additional cases of the post-Reconstruction period also relied on a strong judicial finality to undermine federal civil rights. During that era, the Court positioned itself as a powerful opponent to legislative authority. To thwart congressional action, the Court became a bulwark for state power, which deprived citizens of the ability to effectively petition representatives to end racial discrimination.

216. THE STEVENS POINT JOURNAL (Stevens Point, WI), Oct. 27, 1883, at 2.

217. See, e.g., *There Is No Reason To Doubt . . .*, ROCKY MOUNTAIN NEWS (Denver, Colorado), Oct. 21, 1883, at 2.

218. See Norman J. Colman, COLMAN'S RURAL WORLD, Nov. 1, 1883, at 4, <https://perma.cc/HJ2K-6ZGN> (PDF).

219. C. VANN WOODWARD, ORIGINS OF THE NEW SOUTH, 1877–1913, at 211–12 (1951).

*United States v. Cruikshank*²²⁰ involved an appeal from three convictions under the First Enforcement Act of 1870, popularly known as the Civil Rights Act of 1870 or the First Ku Klux Klan Act.²²¹ The Justice Department secured convictions for terrorist acts perpetrated against Black protestors who had gathered at a local courthouse to protest the outcome of a municipal election.²²² Seventy to 165 freemen and three White men were murdered in the melee. The White militia set fire to the courthouse and shot or captured protestors who fled the conflagration. Many of those captured were marched away and later executed.²²³

The Supreme Court overturned all three convictions, holding no one accountable for the racial injustice.²²⁴ Chief Justice Waite, writing for the majority, found the government's complaints to be deficient.²²⁵ While the Court recognized a national right to peaceful assembly,²²⁶ it foreclosed reliance on congressional policy to punish privately perpetrated racial violence.²²⁷ The Court left enforcement of civil rights to the

220. 92 U.S. 542 (1876).

221. *Id.* at 43–44; see 16 Stat. 140 (1870) (“An Act to enforce the Right of Citizens of the United States to vote in the several States of this Union, and for other Purposes.”); the small number was disappointing after the government had secured nearly one hundred indictments. ROBERT J. KACZOROWSKI, *THE POLITICS OF JUDICIAL INTERPRETATION: THE FEDERAL COURTS, DEPARTMENT OF JUSTICE, AND CIVIL RIGHTS, 1866–1876*, at 176–77 (1985).

222. *Cruikshank*, 92 U.S. at 43–44.

223. See JAMES K. HOGUE, *UNCIVIL WAR: FIVE NEW ORLEANS STREET BATTLES AND THE RISE AND FALL OF RADICAL RECONSTRUCTION* 109–11 (2006); LEEANNA KEITH, *THE COLFAX MASSACRE: THE UNTOLD STORY OF BLACK POWER, WHITE TERROR AND THE DEATH OF RECONSTRUCTION* 109–10 (2008).

224. The jury had acquitted six other defendants. See James Gray Pope, *Snubbed Landmark: Why United States v. Cruikshank (1876) Belongs at the Heart of Constitutional Canon*, 49 HARV. C.R.-C.L. L. REV. 385, 385 (2014) (“*Cruikshank* played a crucial role in terminating Reconstruction and launching the one-party, segregationist regime of ‘Jim Crow’ that prevailed in the South until the 1960s.”).

225. Despite the momentous nature of the case, Waite found that the indictments were incomplete because they did not enumerate the civil rights that the federal government sought to vindicate. See *Cruikshank*, 92 U.S. at 552–53.

226. See *id.* at 552–53.

227. See *id.* at 554

exclusive control of states, which was meaningless where law enforcement agents sometimes participated in vigilante violence or refused to mobilize adequate police protections against racist attackers.²²⁸ Judicial finality, in *Cruikshank*, amounted to the further establishment of a states' rights doctrine that prevented federal authorities from quelling racially motivated violence. It rejected a broad reading of the nation's changed relationship between the states and federal government, which had expanded national standards for the enforcement of civil rights.

Other cases also weakened Congress's Reconstruction powers. The Court even undercut the legislature's power to safeguard voting in the federal elections. *United States v. Reese*²²⁹ held that the Fifteenth Amendment does not secure the right to vote,²³⁰ a decision with lasting repercussions.²³¹ *Reese* struck down a criminal federal statute that prohibited state elections officials from denying the right to vote to eligible persons.²³²

The fourteenth amendment prohibits a State from depriving any person of life, liberty, or property, without due process of law, and from denying to any person within its jurisdiction the equal protection of the laws; but it adds nothing to the rights of one citizen as against another. It simply furnishes an additional guaranty against any encroachment by the States upon the fundamental rights which belong to every citizen as a member of society.

228. See *id.* at 553.

229. 92 U.S. 214 (1875).

230. See *id.* at 217 ("The Fifteenth Amendment does not confer the right of suffrage upon any one. It prevents the States, or the United States, however, from giving preference, in this particular, to one citizen of the United States over another on account of race, color, or previous condition of servitude.").

231. See *Bush v. Gore*, 531 U.S. 98, 104 (2000) ("The individual citizen has no federal constitutional right to vote for electors for the President of the United States unless and until the state legislature chooses a statewide election . . ."); *Minor v. Happersett*, 88 U.S. 162, 178 (1874) ("Being unanimously of the opinion that the Constitution of the United States does not confer the right of suffrage upon any one . . .").

232. See 16 Stat. 140. While the majority in *Reese* claimed the statute was not limited to the language of the Fifteenth Amendment—which prohibits discrimination in franchise based on race, color, and prior condition of servitude—the text of the statute explicitly states those three conditions. *Id.* §§ 1, 2 ("[All persons eligible] shall be entitled and allowed to vote at all such elections, without distinction of race, color or previous condition of servitude . . .").

A final example will demonstrate how inimical the postbellum Supreme Court was in jettisoning federal civil rights initiatives. As with the other cases in this section, it demonstrates why congressional oversight is necessary to prevent Justices from undermining legislative efforts to advance the general welfare. *United States v. Harris*²³³ held Congress had exceeded its Fourteenth Amendment § 5 authority by passing a section of the Ku Klux Klan Act of 1871 that was “directed exclusively against the action of private persons, without reference to the laws of the State or their administration by her officers,” and therefore “not warranted by any clause in the Fourteenth Amendment to the Constitution.”²³⁴ In consequence, Congress was left to regulating only direct actions by government officials, their policies, or some law.²³⁵ Here too, as Jack Balkin has pointed out, the Court prevents Congress from identifying what private acts have a close enough nexus to state action—such as government contracting and transportation companies—to warrant Fourteenth Amendment enforcement.²³⁶ The power to pass federal law recognizing civil violations was upended.

C. *Rehnquist & Roberts Courts’ Restraints on Legislative Powers*

1. Rehnquist Court

Several Rehnquist Court precedents further imbedded the strong version of judicial finality. We have already seen that part of this must be attributed to an absolute reading of *Cooper v. Aaron*.²³⁷ Professor Alexander Bickel hyperbolically critiqued

233. 106 U.S. 629 (1883).

234. *Id.* at 640.

235. *See id.* at 643.

236. *See* Jack M. Balkin, *The Reconstruction Power*, 85 N.Y.U. L. REV. 1801, 1856–60 (2010).

237. For a discussion on *Cooper*, see *supra* note 25 and accompanying text. *See also* Michael W. McConnell, Comment, *Institutions and Interpretation: A Critique of City of Boerne v. Flores*, 111 HARV. L. REV. 153, 163 (1997) (“Justice Kennedy’s opinion adopted a startlingly strong view of judicial supremacy. . . . *Boerne* . . . adopted the most judge-centered view of constitutional law since *Cooper v. Aaron*.”).

the holding: “Whatever the Court lays down is right, even if wrong, because the Court and only the Court speaks in the name of the Constitution.”²³⁸ Professor Gerald Gunther (albeit with less sarcasm) also asserted that the Court in *Cooper* mistook “Marshall’s assertion [in *Marbury*] of judicial authority to interpret the Constitution with judicial exclusiveness.”²³⁹ The Rehnquist Court redefined *Cooper*, a case meant to assert judicial power to protect civil rights against states’ recalcitrance, into precedent for diminishing congressional reconstruction authority in *City of Boerne v. Flores*.

The holding and reasoning of *Boerne* demonstrate how the modern Court augmented its power as sole interpreter of the reconstructed Constitution. It relegated Congress to a reactive role, a sort of small brother rather than a coequal branch of government.²⁴⁰ This violated simple checks and balances as the enforcement powers of the Fourteenth Amendment granted to national legislators. The *Boerne* majority found that even when Congress acted pursuant to an enumerated constitutional right, free exercise of religion in the First Amendment, it overstepped its enforcement power.²⁴¹ This makes it much more difficult than *Katzenbach v. Morgan* had envisioned for Congress to identify rational means to achieve textually grounded constitutional objectives.²⁴² The majority, drafted by Justice Kennedy, held that a significant portion of the Religious Freedom Restoration Act (RFRA) was unconstitutional because it was “so out of proportion to a supposed remedial or preventive object that it [could not] be understood as responsive to, or designed to prevent, unconstitutional behavior.”²⁴³

238. ALEXANDER M. BICKEL, *LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 264 (1962).

239. Gerald Gunther, *The Subtle Vices of the “Passive Virtues”—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1, 25 n.155 (1964).

240. See *City of Boerne v. Flores*, 521 U.S. 507, 508 (1997) (stating that Congress has no power to interpret its enforcement authority, provided under the Fourteenth Amendment).

241. See *id.*

242. For a study of core constitutional principles see generally ALEXANDER TESIS, *CONSTITUTIONAL ETHOS* (Oxford Univ. Press 2017).

243. *City of Boerne*, 521 U.S. at 519.

Boerne relied on the holdings in the *Civil Rights Cases* and *United States v. Harris* (not bothering to mention how those cases helped to drive a stake into the civil rights movement of the late-nineteenth century) for the postulate that Congress is limited to remedying past patterns of state discrimination.²⁴⁴ Kennedy found lawmakers have no independent authority for enforcing fundamental rights.²⁴⁵ Just as in the late nineteenth century, the Court augmented its interpretive power to the detriment of Congress's enforcement of religious liberties against state encroachments. Professor Jack Balkin notes that the Court lacked any structural, textual, or historical reasons to thereby limit Congress's § 5 enforcement power.²⁴⁶

As things stand, the Supreme Court continues interpreting the Fourteenth Amendment as a restraint rather than a broad grant of congressional powers sufficient to prevent judicial overreach of the type quintessentially evident in *Dred Scott*.

Congress passed the RFRA to expand the fundamental right to exercise religion, which is guaranteed under the First Amendment.²⁴⁷ The statute required courts to rely on strict judicial scrutiny in reviewing alleged burdens on the exercise of religious freedoms. That standard of review sought to displace the Court's use of rational basis scrutiny to review laws of general applicability that had only an incidental effect on religious worship.²⁴⁸ *Boerne* denied Congress the ability to act on its initiative, relegating the nation's lawmakers to a remedial role rather than treating them as members of a coequal branch

244. See *id.* at 532.

245. See *id.* at 520 ("The Fourteenth Amendment's history confirms the remedial, rather than substantive, nature of the Enforcement Clause."); *id.* at 524 (citing *The Civil Rights Cases*, 109 U.S. 3 (1883)); *id.* at 525 (relying on *United States v. Harris*, 106 U.S. 629 (1883)).

246. See Balkin, *supra* note 236, at 1815.

247. See *City of Boerne*, 521 U.S. at 519 ("Legislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause.").

248. Congress had sought to overturn a previous Supreme Court case, *Employment Division v. Smith*, 494 U.S. 872 (1990), and to reinstate the strict scrutiny test from *Sherbert v. Verner*, 374 U.S. 398 (1963). See H.R. Rep. No. 103-88, at 14 (1993) (recommending the passage of RFRA to reinstate strict scrutiny in freedom of religion cases); S. Rep. No. 103-111, at 12-13 (1993) (same).

of government. This Rehnquist Court holding only recognized lawmakers' Fourteenth Amendment powers to make laws responsive to the Court's prior interpretations.²⁴⁹ In the words of the Court, Congress has no mandate "to decree the substance of the Fourteenth Amendment's restrictions on the States."²⁵⁰ This effectively disarmed Congress from being able to pass initiatives more protective of religious liberty than the Court had previously identified. As Professor Michael McConnell points out, Congress was not trying to define its own powers under the Fourteenth Amendment, rather it sought to correct what it regarded to be the Court's mistaken interpretation of the Free Exercise Clause.²⁵¹

The Court expanded its judicial finality rationale, striking down bipartisan civil rights legislation.²⁵² In *Boerne*, the Court reinforced its claim to be the only branch of government able to identify the scope of constitutional reconstruction, this despite the Fourteenth Amendment § 5's explicit grant of enforcement power to the national legislature rather than the judiciary. The holding intruded into Congress's ability to pass uniform laws narrowly tailored to safeguard religious liberties. In effect, the unelected branch devalued the fundamental liberty of religion in favor of a judicially contrived test. In the name of preserving the Constitution, the Court abridged authority that the text of the Fourteenth Amendment granted to legislators.

Boerne returned to the post-Reconstruction understanding of legislative authority and away from the Warren Court's more deferential approach to congressional civil rights and civil liberties initiatives. The Court abandoned recognition of congressional authority to advance but not curtail rights. The majority explicitly denied its Civil Rights Era conclusion in *Morgan* that "§ 5 of the Fourteenth Amendment . . . is a positive grant of legislative power authorizing Congress to exercise its

249. See *City of Boerne*, 521 U.S. at 524–25, 536.

250. *Id.* at 519.

251. See McConnell, *supra* note 237, at 173.

252. The statute was sponsored by Senators Kennedy and Hatch and passed in the Senate on a vote of 97–3 and in the House by unanimous voice vote. William L. Saunders et al., *Religious Liberty After Hobby Lobby: A Panel of the 2014 Federalist Society National Lawyers Convention*, 48 CONN. L. REV. 969, 974 (2016).

discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment.”²⁵³ In *Boerne*, to the contrary, the Court construed § 5 as a narrow grant of legislative authority, while asserting broad judicial powers.²⁵⁴

The Court’s reasoning took a constitutional provision, containing a legislative enforcement provision and designed to prevent overreaching similarly disastrous as *Dred Scott*, and found it inadequate to secure religious liberty, guaranteed by the First Amendment and incorporated by the Fourteenth Amendment.

The *Boerne* doctrine of exclusivity in interpretation and congressional remediation under § 5 hampers congressional initiatives on how and when it should exercise its Fourteenth Amendment authority. In effect, short of resorting to Article V mechanisms for amending the Constitution, judicial exclusivity in interpretation stripped the enforcement mechanism built into the Fourteenth Amendment to advance equal protection of individual rights and ability to advance the general welfare.²⁵⁵ Section 5, which authorizes Congress to enforce the Due Process Clause over matters like the free exercise of religion, was stripped down by a judicial power grab.²⁵⁶ The Court is certainly responsible for interpreting the Constitution in toto, including substantive due process, equal protection, and citizenship in the Fourteenth Amendment. But § 5 is also a clear grant of

253. *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966).

254. *See City of Boerne v. Flores*, 521 U.S. 507, 508 (1997).

255. *See* Alexander Tsesis, *Maxim Constitutionalism: Liberal Equality for the Common Good*, 91 TEX. L. REV. 1609, 1613 (2013).

256. *See* Robin West, *Constitutional Culture or Ordinary Politics: A Reply to Reva Siegel*, 94 CAL. L. REV. 1465, 1478 n.40 (2006) (asserting that “the U.S. Congress has an obligation under Section Five of the Fourteenth Amendment” to ensure states uphold the “duty to protect all citizens’ natural rights”); *cf.* Robert J. Kaczorowski, *Congress’s Power to Enforce Fourteenth Amendment Rights: Lessons from Federal Remedies the Framers Enacted*, 42 HARV. J. ON LEGIS. 187, 263 (2005)

[T]he framers of the Fourteenth Amendment . . . understood the Fourteenth Amendment, at a minimum, as a delegation to Congress of the plenary power to define and enforce in the federal courts the substantive rights of U.S. citizens that they had just exercised in enacting the Civil Rights Act of 1866.

increased authority to Congress to pass federal civil rights laws without judicial interference. Rather than follow constitutional text, the *Boerne* Court also created a loosely defined congruence and proportionality test, granting itself final power to review policy decisions better left to political rather than judicial fact gathering.²⁵⁷

The Fourteenth Amendment's Enforcement Clause logically goes to the core function of representative governance. The Second Founding elevated the people's ability to petition their elected officials to define rights intrinsic to liberty, equality and citizenship.

The Constitution nowhere gives the judiciary exclusive authority to define the full range of federal civil rights, such as free exercise of religion, nor does it reserve that authority for unelected judges. The judiciary's role in preventing majorities from undermining minorities' constitutional interests is not implicated where Congress passes safeguards of essential interests in matters such as worship.

The Court further eroded legislative, Reconstruction authority in *United States v. Morrison*, where it struck down the civil remedy provided by the Violence Against Women Act (VAWA).²⁵⁸ The punishments provided under the federal law did not limit state criminal enforcement, but created federal, civil

257. See F. Andrew Hessick, *Rethinking the Presumption of Constitutionality*, 85 NOTRE DAME L. REV. 1447, 1487 (2010)

Under the current regime, the courts have control over the scope of their power and the power of the legislature. The Court has exercised that power in controversial ways. For example, in *City of Boerne* the Court limited Congress's power to enforce the protections of the Fourteenth Amendment, holding that the Court, not Congress, has the power to determine the scope of rights protected by the Amendment.

William W. Buzbee & Robert A. Schapiro, *Legislative Record Review*, 54 STAN. L. REV. 87, 97 n.27 (2001)

[W]hile the existence of judicial review has been well established since . . . the task of assessing societal conditions and determining policy responses, particularly where the Constitution allocates lawmaking power to Congress to regulate commerce or implement Section Five of the Fourteenth Amendment, has been allocated not to the courts, but to Congress.

258. *United States v. Morrison*, 529 U.S. 598, 617, 627 (2000).

cause of action for gender-motivated crimes.²⁵⁹ As it had in *Boerne*, the majority in *Morrison* adopted and gave a contemporary gloss to the state action doctrine that was a deciding factor in the *Civil Rights Cases*, *Cruikshank*, and *Harris*.²⁶⁰ Those cases had undermined congressional authority in the post-Reconstruction terms, and the Court relied on them as precedents in *Morrison*.²⁶¹ The majority found the private remedy to be unconstitutional because it targeted private rather than state action.²⁶² *Morrison* is yet another example of the state action doctrine, a contrivance of the Court's interpretation, relied on to thwart congressional reliance on its enforcement power.

Congress had relied on two enumerated powers to pass the law; here I'm only dealing with the use of Fourteenth Amendment § 5 authority, not the Commerce Clause.²⁶³ The case followed *Boerne*'s congruence and proportionality test to deny the operation of VAWA, which had been passed by bipartisan congressional majorities.²⁶⁴ The Act created a private federal cause of action for the victims of sexual and domestic violence.²⁶⁵ *Morrison* further augmented judicial power at the expense of the legislature by prohibiting Congress to identify substantive rights, allowing it only to remedy wrongs that the Court had previously defined.²⁶⁶ The Court left ambiguous how broadly civil rights violations must occur in states before

259. *See id.* at 605–06.

260. *See id.* at 621 (“Foremost among these limitations is the time-honored principle that the Fourteenth Amendment, by its very terms, prohibits only state action.”).

261. *Id.* at 621–23.

262. *Id.* at 621.

263. *Id.* at 627 (“Congress’s effort in § 13981 to provide a federal civil remedy can be sustained neither under the Commerce Clause nor under § 5 of the Fourteenth Amendment.”).

264. *See supra* note 257 and accompanying text.

265. The majority in *Morrison* continued to limit Congress’s § 5 power to the enactment of laws congruent and proportional between the means chosen and the policy end to be achieved. *Morrison*, 529 U.S. at 625–26 (citing *Fla. Prepaid Postsecondary Ed. Expense Bd. v. College Sav. Bank*, 527 U.S. 627, 639 (1999)); *City of Boerne v. Flores*, 521 U.S. 507, 526 (1997).

266. *See Morrison*, 529 U.S. at 625–26 (stating that Congress’s power is limited to prophylactic legislation).

Congress can pass congruent and proportional laws against them.

Without being able to act directly against a select group of bad state actors, *Morrison* severely hampered Congress's ability to pass laws for the general welfare under § 5. Prior to passing VAWA, Congress created a massive legislative record, which established the importance of a national solution to many instances of states' inadequate responses to gender-based violence.²⁶⁷ The collected "mountain of data" included findings of twenty-one state task forces and nine congressional hearings.²⁶⁸ But even that did not convince the Court of the commensurability between the federal remedy and the finding that states regularly failed to adequately prosecute sexual violence.

Moreover, VAWA enjoyed federal and state support, showing the extent to which it was well within the bounds of social morality as it has developed in the aftermath of Reconstruction.²⁶⁹ The majority's expression of interpretive exclusivity discounted congressional policy and outright rejected benign congressional reasoning.

Additional Rehnquist Court decisions further expanded the scope of judicial authority to thwart congressional reliance on beyond constitutionally reasonable grounds. *Kimel v. Florida Board of Regents*²⁷⁰ held that state sovereign immunity prohibited Congress from relying on its § 5 authority to create a remedy for state employees to sue for monetary damages under

267. *See id.* at 653–54 (Souter, J., dissenting) (explaining the array of states' executive and legislative branch entities that support the passage of VAWA).

268. *Id.* at 628–31.

269. That social morality against gender discrimination is evident from the development of Equal Protection cases. *See United States v. Virginia*, 518 U.S. 515, 558 (1996) (holding Virginia Military Institute's categorical refusal to accept female applicants unconstitutional under Equal Protection Clause); *Craig v. Boren*, 429 U.S. 190, 210 (1976) (striking down Oklahoma law on equal protection grounds for arbitrarily differentiating between males and females); *Reed v. Reed*, 404 U.S. 71, 76–77 (1971) (ruling that law distinguishing between male and female administrators of estates violated Equal Protection Clause).

270. 528 U.S. 62 (2000).

the Age Discrimination in Employment Act (ADEA).²⁷¹ The majority relied on a doctrine of sovereign immunity, which it revived through the Eleventh Amendment, to thwart Congress's rational use of Reconstruction power for the benefit of elderly Americans.²⁷² A law based on the conscience of the nation toward its older citizens became largely ineffective because of judicial veto. The Court simply interpreted the doctrine of sovereign immunity to expand state rights and judicial, interpretive prerogatives. Given its self-proclaimed interpretive supremacy, the Court rendered an interpretation that effectively superseded the people's sovereign right, through their representatives, to pass effective civil rights legislation.²⁷³

The Court likewise denied Congress the right to rely on its power to abide by national norms for the treatment of the disabled in *University of Alabama v. Garrett*,²⁷⁴ where it found unconstitutional a key provision of the Americans with Disabilities Act (ADA).²⁷⁵ There too, as in *Boerne* and *Kimel*, the Court stifled congressional use of Fourteenth Amendment authority.²⁷⁶ Thereby, the Court weakened a law of such consequence that President George H. W. Bush likened it to the Declaration of Independence.²⁷⁷

271. See *id.* at 82–83 (“Applying the same ‘congruence and proportionality’ test in these cases, we conclude that the ADEA is not ‘appropriate legislation’ under § 5 of the Fourteenth Amendment.”); *id.* at 91.

272. See *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 183–84 (1996) (Souter, J., dissenting) (asserting that while “[t]he Hans doctrine was erroneous . . . it has not previously proven to be unworkable or to conflict with later doctrine” and hence is a part of *stare decisis*, but arguing that where Congress clearly abrogated that sovereign immunity, as it did with the ADEA, the restriction against federal courts hearing private suits does not govern); *Hans v. Louisiana*, 134 U.S. 1, 14–15 (1890) (holding that states are immune from federal suits brought by private parties who are citizens of that state); *cf.* *Alden v. Maine*, 527 U.S. 706, 733 (1999) (“Although the sovereign immunity of the States derives at least in part from the common-law tradition, the structure and history of the Constitution make clear that the immunity exists today by constitutional design.”).

273. See *Kimel*, 528 U.S. at 92.

274. 531 U.S. 356 (2001).

275. See *id.* at 379 (Breyer, J., dissenting).

276. *Id.* at 374–75.

277. *Presidential Statement on Signing the Americans with Disabilities Act of 1990*, 26 WEEKLY COMP. PRES. DOC. 1166 (July 26, 1990).

2. Roberts Court

The Roberts Court has continued to expand the judicial grip on interpretive exclusivity. In the area of free speech, for instance, the lack of deference is reminiscent of *Lochner* era overreach.²⁷⁸ The Court has also struck state consumer- and health-related regulations with little explanation for superseding federalist principles.²⁷⁹ This Part of the Article focuses only on congressional power over racial voting discrimination; and in this area, the Court has also continued to bevel away at congressional powers provided by the Reconstruction Amendments.

In *Shelby County v. Holder*, a majority turned back one of Congress's efforts to rely on Fifteenth Amendment enforcement power to regulate state and local jurisdictions with histories of racial discrimination.²⁸⁰ The Court held that the 2006 coverage formula, found in § 4(b) of the Voting Rights Act (VRA), was unconstitutional because it identified and listed covered states based on data the majority found to be outdated.²⁸¹ Following the decision, formerly designated voting districts can change voting laws without prior notice to the U.S. Attorney General. After *Shelby*, § 2 of the VRA continues to permit individual litigants to file suits challenging race-based restrictions on

278. See Morton J. Horowitz, *The Constitution of Change*, 107 HARV. L. REV. 30, 109–16 (1993). For arguments that protection of commercial speech revived *Lochner*-era intrusions into legislative economic prerogatives see Thomas H. Jackson & John C. Jeffries, Jr., *Commercial Speech: Economic Due Process and the First Amendment*, 65 VA. L. REV. 1, 8, 40 (1979).

279. See, e.g., *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 558–59, 565 (2011) (striking as unconstitutional a Vermont state law protecting health-related privacy); *McCullen v. Coakley*, 573 U.S. 464, 496–97 (2014) (finding a law protecting women's access to reproductive services to be unconstitutional).

280. 570 U.S. 529, 556 (2013) (“[I]t would have been irrational to base coverage on the use of voting tests 40 years ago, when such tests have been illegal since that time. But that is exactly what Congress has done.”).

281. See *id.* at 557 (“Congress could have updated the coverage formula at that time, but did not do so. Its failure to act leaves us today with no choice but to declare § 4(b) unconstitutional.”).

voting.²⁸² Such private § 2 litigation, however, is more difficult to pursue because it is highly costly and time-consuming.²⁸³

The states, municipalities, and counties covered by the § 4(b) formula had been required to obtain preclear permission from the federal government before altering their political districts.²⁸⁴ Congress had created a list based on their ongoing histories of voter discrimination.²⁸⁵ “Congress knew that some of the States . . . had resorted to the extraordinary stratagem of contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination in the face of adverse federal court decrees.”²⁸⁶ Nevertheless, the Court held that the 2006 re-authorization of the statute failed to account for listed jurisdictions’ made strides at ending voter discrimination.²⁸⁷ Such drafting imprecision the majority regarded to be congressional overreach that violated the “fundamental principle of equal sovereignty” among the states.²⁸⁸

The dissent to *Shelby County* pointed out that the majority misstated the record. As Justice Ginsburg demonstrated, Congress had collected extensive evidence to re-pass the 2006 preclearance requirement.²⁸⁹ She pointed out that legislative

282. 52 U.S.C. § 10301(a)–(b).

283. See NAACP Legal Def. Fund, *THE COST (IN TIME, MONEY, AND BURDEN) OF SECTION 2 OF THE VOTING RIGHTS ACT LITIGATION*, <https://perma.cc/4U34-VA2Y> (PDF) (“A huge amount of resources is needed to bring a Section 2 complaint.”); Hearing Before Subcomm. on the Const., 109th Cong. 65 (2006), <https://perma.cc/2N6Q-QYYD> (“I would estimate that the cost of a vote dilution case . . . runs close to half a million dollars in costs.”); Hearing Before Subcomm. on the Const., 109th Cong. 73 (2005), <https://perma.cc/2YW3-Z9B6> (“A full section 2 case litigated just through the end of trial is at least 2 years. You can’t do it any faster than that. There are always the outliers [sic], the 15-year cases. But 2 to 5 years is a rough average.”).

284. See *Shelby County*, 570 U.S. at 534 (“[Section] 4 of the Act applied that requirement only to some States—an equally dramatic departure from the principle that all States enjoy equal sovereignty.”).

285. Voting Rights Act of 1965, Pub. L. 89-110, 79 Stat. 437 §§ 3(c), 4(b).

286. *South Carolina v. Katzenbach*, 383 U.S. 301, 335 (1966).

287. See *Shelby County*, 570 U.S. at 547.

288. *Id.* at 544.

289. See *id.* at 564–65 (Ginsburg, J., dissenting) (“As the 1982 reauthorization approached its 2007 expiration date, Congress again considered whether the VRA’s preclearance mechanism remained an

policy had been made before the backdrop of hearings that the Senate had conducted in April, June, and July 2006. Thereafter, the bill was debated on the floor of the House, where “extensive hearings” had also been conducted.²⁹⁰ The findings were, moreover, consistent with holdings of liability for violating minority voters’ rights in decisions rendered by courts in covered jurisdictions.²⁹¹

By relying on its Fifteenth Amendment power, Congress had unambiguously enforced the American people’s will to safeguard voting equality by reauthorizing § 4(b) of the Voting Rights Act (VRA) in 2006. The House voted for it by a huge margin, 390 yeas to 33 nays, and the Senate voted 98–0 in favor.²⁹² In this age of political gridlock, such bipartisan consensus is rare. It demonstrates the civic possibilities of constitutional reconstruction with increased federal enforcement authority. But the Court relied on judicial exclusivity to intrude against express enforcement power granted to Congress by the Fifteenth Amendment for ending racial barriers to voting.²⁹³

The judicial doctrine of equal state sovereignty for the Court in *Shelby County* displaced explicit § 2 power for Congress to identify and implement the means for ending certain voting rights violations. This holding was counter to the Fifteenth Amendment’s alteration to the structure of constitutional government. It granted to national lawmakers the ability to pass legislation rationally designed to end enumerated forms of

appropriate response to the problem of voting discrimination in covered jurisdictions.”).

290. *Id.*

291. See *Miller v. Johnson*, 515 U.S. 900, 920–22 (1995); *Hunter v. Underwood*, 730 F.2d 614, 617 (11th Cir. 1984), *aff’d*, 471 U.S. 222 (1985); *Brown v. Bd. of Sch. Comm’rs.*, 706 F.2d 1103, 1107 (11th Cir. 1983); *Common Cause v. Billups*, 406 F. Supp. 2d 1326, 1376 (N.D. Ga. 2005); *Dillard v. City of Foley*, 926 F. Supp. 1053, 1067 (M.D. Ala. 1995). For a fuller list of cases see 152 CONG. REC. S7954 (July 20, 2006).

292. *Shelby County v. Holder*, 570 U.S. 529, 565 (2013) (Ginsburg, J., dissenting).

293. See *id.* at 556 (majority opinion) (“It would have been irrational for Congress to distinguish between States in such a fundamental way based on 40-year-old data, when today’s statistics tell an entirely different story.”).

voting discrimination.²⁹⁴ Its provisions granted Congress power to enforce laws against any state or locality that continues to deny the franchise to persons based on race. The text granted Congress the power to make racially conscious policies likely to rectify and remedy civic inequalities. As Chief Justice Warren articulated it, the Fifteenth Amendment principle is: “As against the reserved powers of the States, Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting.”²⁹⁵ It is this principle that *Shelby County* abrogated.

The Fifteenth Amendment addition to the Constitution was consistent with another Reconstruction-era guarantee of “fair and effective representation for all citizens.”²⁹⁶ While the final Reconstruction Amendment did not guarantee a general right to vote,²⁹⁷ it empowered Congress to prevent states from denying political representation based on racially invidious qualifications. The risk that Congress will intrude into traditional areas of federalism are alleviated because of the Amendment’s exacting language.²⁹⁸ The VRA’s preclearance

294. As ratified, the Fifteenth Amendment proved inadequate to end many types of states’ interferences with voting. Senators Oliver Morton, Willard Warner, and Henry Wilson decried the failure to grant Congress the power to prevent states from deploying literacy, property, and educational qualifications to disfranchise Blacks. CONG. GLOBE, 40th Cong. 861–62 (1869) (Warner); *id.* at 863 (Morton); *id.* at 1626–27 (Wilson). Moreover, feminists, especially Elizabeth Cady Stanton and Susan B. Anthony, decried the Fifteenth Amendment’s failure to secure women the vote. ERIC FONER, RECONSTRUCTION 447 (1988).

295. *South Carolina v. Katzenbach*, 383 U.S. 301, 324 (1966).

296. *Reynolds v. Sims*, 377 U.S. 533, 565 (1964) (stated in the context of the Equal Protection Clause of the Fourteenth Amendment).

297. See *Bush v. Gore*, 531 U.S. 98, 104 (2000) (“The individual citizen has no federal constitutional right to vote for electors for the President of the United States unless and until the state legislature chooses a statewide election as the means to implement its power to appoint members of the electoral college.”); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 101 (1973) (White, J., dissenting) (“[T]he right to vote in state elections has itself never been accorded the stature of an independent constitutional guarantee.”).

298. See Evan H. Caminker, “Appropriate” Means-Ends Constraints on Section 5 Powers, 53 STAN. L. REV. 1127, 1190–91 (2001) (“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.”).

requirement was consistent with the normative and structural changes to the Constitution that came in after a bloody civil war.

The Fifteenth Amendment, as the Thirteenth and Fourteenth Amendments before it, changed the federalist structure in favor of legislative authority to pass national laws safeguarding civil rights and civil liberties. At a minimum the Enforcement Clauses were drafted to give Congress power to act against state racial discrimination.²⁹⁹ Section 4(b) of the VRA served just that rational function.³⁰⁰ Review of the preclearance requirement should have received deferential review from the Court of the congressional enforcement of a law whose scope was limited to voting discriminations based on racial, color, and previous conditions status. Congress adhered to the Amendment's textual restraints on its power to abide by the democratic principle of minority voting. Ginsburg pointed out that "Congress approached the 2006 reauthorization of the VRA with great care and seriousness," in light of continuing voter discriminations in the State of Alabama, including in Shelby County.³⁰¹ But the *Shelby County* majority depreciated and diminished congressional enforcement authority.

The decision came at a time when Americans, especially those living in Black and Latino neighborhoods, have found it more difficult to locate a polling place to cast their ballots. Leadership Conference on Civil and Human Rights reports that between 2012 and 2018 almost 1,700 polling stations were closed in states that had followed pre-clearance requirements.³⁰²

299. *Katzenbach*, 383 U.S. at 325–36 (“[Section] 2 of the Fifteenth Amendment expressly declares that ‘Congress shall have power to enforce this article by appropriate legislation.’ By adding this authorization, the Framers indicated that Congress was to be chiefly responsible for implementing the rights created in § 1.”).

300. Frankly, strong arguments can be made for the most exacting scrutiny: that § 4(b) was a necessary means for government to achieve the compelling interest of preventing racial discrimination in the franchise. But more work would be needed to prove up that point than the rational scrutiny method in support of which this Article argues.

301. *Shelby County*, 570 U.S. at 581 (Ginsburg, J., dissenting).

302. See THE LEADERSHIP CONFERENCE EDUCATION FUND, DEMOCRACY DIVERTED: POLLING PLACE CLOSURE AND THE RIGHT TO VOTE, <https://perma.cc/24NA-9HSW> (PDF).

Three battleground states of the 2020 election—Texas, Arizona, and Georgia—experienced the greatest number of closures.³⁰³

In a case challenging two states' gerrymandering schemes, *Rucho v. Common Cause*, the Court refused to even adjudicate to advance political equality in voting.³⁰⁴ Voters brought suits in North Carolina and Maryland, claiming that their states' congressional districts were politically gerrymandered to dilute votes of the minority political party in both states.³⁰⁵ The majority refused to rule in favor of a First Amendment and Equal Protection challenge to two highly partisan voting district plans, one fashioned by a state's Democratic majority and the other by a different state's Republican majority.³⁰⁶ The Supreme Court refused to review partisan gerrymandering for lack of a judicially manageable standard.³⁰⁷

The Court held the matter was non-justiciable.³⁰⁸ Among the findings, wrote Chief Justice Roberts, the Guarantee Clause does not provide a cognizable claim in this matter.³⁰⁹ Justice Kagan asserted in dissent that the majority was “throwing up its hands” without providing direction.³¹⁰

The doctrine of equal voting rights might have given the *Rucho* Court a starting point to draft a clearly articulated test for fairly designing voting districts. Indeed, the lower court had found that the Equal Protection Clause, the First Amendment,

303. See *A House Divided*, *ECONOMIST* (Sept. 5, 2020), <https://perma.cc/QJ83-WRDJ>.

304. 139 S. Ct. 2484, 2506 (2019) (“Excessive partisanship in districting leads to results that reasonably seem unjust. But the fact that such gerrymandering is ‘incompatible with democratic principles,’ does not mean that the solution lies with the federal judiciary.” (citation omitted)).

305. *Id.* at 2491.

306. *Id.* at 2506–07.

307. See *id.* at 2494, 2508 (finding lack of subject matter jurisdiction for lack of limits on a case and controversy capable of resolution through judicial process).

308. *Id.*

309. See *id.* at 2506; U.S. CONST. art. IV, § 4. For an elaboration on Guarantee Clause relevance to gerrymandering review see generally David S. Louk, *Reconstructing the Congressional Guarantee of Republican Government*, 73 *VAND. L. REV.* 673 (2020).

310. Lower federal courts had “largely converged on a standard for adjudicating partisan gerrymandering claims.” *Rucho*, 139 S. Ct. at 2516 (Kagan, J., dissenting).

and the Elections Clause are relevant to the adjudication of partisan gerrymandering claims.³¹¹ The majority in *Rucho*, however, held that the First Amendment does not supply “a serious standard for separating constitutional from unconstitutional partisan gerrymandering.”³¹² The same claim of ambiguity might be leveled at every free speech issue resolved under the the First Amendment, given the paucity of its text. On the Fourteenth Amendment side, the Court’s firm holding to *City of Boerne*, placing the onus on Congress to pass statutes only when a judge finds the enforcement to be remedial and congruent and proportional, erodes the likelihood that congressional action against political gerrymandering, unlikely as it is in today’s political climate, will withstand judicial scrutiny.³¹³

Shelby County and *Rucho* stifle both congressional and judicial actions to guarantee voting and representative government under the Fourteenth and Fifteenth Amendments. By not allowing Congress to take the lead in the former and not taking the lead in the latter, the Court hamstrung federal initiatives. Under both decisions Congress can intervene to protect equal and fair representation and to guard against group discrimination. The ratification process of the Reconstruction Amendments, to include the historical mode of analysis, makes clear the need for federal legislative policy.³¹⁴ The Roberts Court, on the other hand, has (as had the Rehnquist Court before it) weakened the powers critical to reconstruction of federal government, affecting congressional initiatives to protect rights, equality, and voting.³¹⁵

311. *Common Cause v. Rucho*, 279 F. Supp. 3d 587, 597–98, 608–09 (M.D.N.C. 2018); see U.S. CONST. amend. XIV, § 1; *id.* amend. I; *id.* art. I, § 4.

312. *Rucho*, 139 S. Ct. at 2504–05.

313. See *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997). For an extensive discussion of that case’s limitations on congressional enforcement see *supra* notes 240–241 and accompanying text.

314. See Akhil Reed Amar, *The Lawfulness of Section 5—and Thus of Section 5*, 126 HARV. L. REV. F. 109, 112 (2013) (detailing the “Reconstruction Republicans” aims during debates on ratification).

315. The Court has also allowed states to undermine voting through restrictive initiatives. During the 2019–2020 term, in *Raysor v. DeSantis*, Justice Sotomayor wrote in dissent from denial of application to vacate stay that the majority “continues a trend of condoning disfranchisement,” No.

IV. LEGISLATIVE RECONSTRUCTION

Rather than the weak and strong forms of judicial review suggested by scholarship reviewed in Part I, what is needed is a balance of powers between the Supreme Court and Congress. Each can function as an independent branch of authority to enforce the Reconstruction Amendments. This Part reflects on the extent to which the judiciary must defer to federal policies that advance civil rights and civil liberties. It argues that as a matter of legislative prerogative and a vestige of Reconstruction history, Congress has authority to pass laws reasonably related to the enforcement of enumerated autonomy, equality, or voting rights. The Reconstruction Amendments empowered Congress, not the Court, to be the primary branch of government for identifying rights, setting policies, and promulgating laws consistent and implicit in their texts. Moreover, their substantive provisions—the prohibition against the incidents of slavery and involuntary servitude; the provisions on citizenship, privileges or immunities, due process, and equal protection; and the safeguards against racist voting requirements—are value rich. The powers of Congress to identify and pass laws affecting civil and civic rights are tied to the first principles of government found in the Declaration of Independence and Preamble to the Constitution.

19A1071, 2020 WL 4006868, at *4 (U.S. July 16, 2020) (Sotomayor, J., dissenting from denial of application to vacate stay), making clear allusion to *Shelby County*. She criticized the Court's decision in *Raysor* to allow a state law to effectively disenfranchise 800,000 otherwise-eligible voters. A state constitutional ballot initiative had granted voting privileges to persons who had completed the term of their sentence for felony conviction, except persons convicted of murder and sex offense. *Jones v. DeSantis*, No. 19CV300, 2020 WL 2618062, at *3 (N.D. Fla. May 24, 2020) (quoting FLA. CONST. art. VI, § 4), *hearing en banc ordered sub nom. McCoy v. Governor of Fla.*, No. 20-12003, 2020 WL 4012843 (11th Cir. July 1, 2020). The majority of the Court allowed a state legislative initiative meant to undermine the state constitution, which provided that ex-felons would only be restored their voting rights upon payment of fees, fines, costs, and restitution. *Id.* at *4. Thereby, the legislature created a wealth requirement, analogous to poll taxes, which the majority allowed to stand.

A. *Congressional Discretion & Judicial Deference*

After the Civil War, the Constitution expanded congressional enforcement. The Thirteenth, Fourteenth, and Fifteenth Amendments bolstered the national legislature's authority to rebuild the country according to first principles, while radically expanding the powers of the federal government from those granted at the founding.³¹⁶ National government remained limited, however; contracts, torts, family, criminal, and testamentary law remained under the auspices of the states.

The change in government powers was, nevertheless, dramatic. From the ratification of the Thirteenth Amendment, Congress was granted authority to pass laws rationally related to core values necessary for dismantling remaining badges and incidents of slavery, thereby establishing national norms for the enjoyment of liberty. Early laws, passed shortly after the Thirteenth Amendment's ratification, restructured the government by prohibiting racial discriminations in contracting and purchasing.³¹⁷ Federal laws securing these freedoms, irrespective of race, demonstrated the breadth of implied authority.³¹⁸ It has been understood since *McCulloch v. Maryland* that Congress enjoys power implicitly arising from enumerated constitutional provisions to pass "appropriate

316. Republican supporters of ratification sought "a practical application of that self-evident truth that [all men] are endowed by their creator with certain unalienable rights." CONG. GLOBE, 38th Cong., 2d Sess. 142 (1865).

317. Four statutes initially emerged to enforce the Amendment: The Civil Rights Act of 1866, the Slave Kidnapping Act of 1866, the Peonage Act of 1867, and the 1867 amendment to the Judiciary Act. *See* Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (codified as amended at 42 U.S.C. §§ 1981–82 (1994)) (requiring all people born in U.S. to have some rights in property, contracts and personal security); Slave Kidnapping Act of 1866, ch. 86, 14 Stat. 50 (holding as criminal anyone who kidnaps or induces any person to board a vessel or go any place for purpose of making him or her a slave); Peonage Act of 1867, Act of February 5, 1867, ch. 27, 14 Stat. 385 (expanding scope of habeas corpus statutes).

318. *See* *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 438–44 (1968). The concept of freedom for those who ratified the Constitution was not solely abstract but tied to the institution of slavery and its opposite. *See* Michael Vorenberg, *Citizenship and the Thirteenth Amendment*, in *THE PROMISES OF LIBERTY: THE HISTORY AND CONTEMPORARY RELEVANCE OF THE THIRTEENTH AMENDMENT* 58, 64 (Alexander Tsesis ed. 2010).

legislation” for achieving legitimate ends.³¹⁹ This applies not only to Article I, § 8 grants but also to those enforcement clauses ratified after the Civil War. Those three grant the same degree of discretionary powers for adopting the “appropriate legislation” for the advancement of civil rights and civil liberties.³²⁰

The Reconstruction Amendments empowered Congress to confirm the republican ideal envisioned by the general welfare provisions of the Preamble to the Constitution.³²¹ Opponents to those constitutional changes advocated states’ rights to support racism that had predominated since constitutional ratification.³²² They understood the radical restructuring of government that constitutional amendments forebode and

319. *McCulloch v. Maryland*, 17 U.S. 316, 421 (1819) (“Let the end be legitimate, let it be within the scope of the constitution, 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 constitution, are constitutional.”); see *Katzenbach v. Morgan*, 384 U.S. 641, 650–51 (1966) (“Section 2 of the Fifteenth Amendment grants Congress a similar power to enforce by ‘appropriate legislation’ the provisions of that amendment.”).

320. See Balkin, *supra* note 236, at 1807 (“The framers of the Reconstruction Amendments sought to ensure that the test of *McCulloch* would apply to the new powers created by the Reconstruction Amendments; that is why they included the word ‘appropriate’ in the text of all three enforcement clauses.”); see Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 822–27 (1999) (writing of Congress’s authority to pass appropriate legislation under the Thirteenth and Fourteenth Amendments); McConnell, *supra* note 237, at 178 n.153 (1997) (asserting that the framers of § 5 of the Fourteenth Amendment and § 2 of the Thirteenth Amendment expected them to be interpreted pursuant to the Necessary and Proper analysis of *McCulloch v. Maryland*).

321. See, e.g., CONG. GLOBE, 38th Cong., 2d Sess. 222 (1865) (stating that the Preamble is a repository of moral and political truths which should guide formulation to any amendments); CONG. GLOBE, 38th Cong., 1st Sess. 2955 (1864) (asserting that constitutional Reconstruction were to achieve the “object of this Constitution . . . admirably expressed in its preamble”).

322. Several opponents to the Thirteenth Amendment adopted racist ideology. For example, Democratic Senator Lazarus Powell believed the U.S. government “was made by white men and for white men.” CONG. GLOBE, 38th Cong., 1st Sess. 1484 (1864). Sometimes this racial prejudice would adopt religious overtone such as when Delaware Senator Willard Saulsbury pronounced that God’s “providence is inequality.” *Id.* at 1442.

sought to retain state control over slavery and its incidents of unfreedom.³²³

Congress's powers to pass laws, such as the Religious Freedom and Restoration Act³²⁴ or Voting Rights Act,³²⁵ arise from its power to secure the fundamental freedoms. In such matters, implicitly connected to enumerated powers of the First Amendment and Fifteenth Amendment, the Reconstruction Amendments require the Court to defer to Congress.³²⁶ Judicial finality in striking legislative civil rights and civil liberties policies undermines the text, structure, values, and history of § 2 of the Thirteenth Amendment, § 5 of the Fourteenth Amendment, and § 2 of the Fifteenth Amendment. Contrary to the Court's recent interpretive exclusivity in cases like *City of Boerne*, *Morrison*, and *Shelby County*, Congress should enjoy the prerogatives of setting rational policies to enact laws for freedom, equal rights, and voting privileges.

When Congress expands civil rights pursuant to appropriate legislation reasonably crafted to enforce the Reconstruction Amendments, principles of constitutional reconstruction and their text require the judiciary to defer. Those three additions to the Constitution critically diminished the Court's ability to thwart civil rights legislation as it had prior to the Civil War, in *Dred Scott*.

Judiciary power, as we saw in Part II, is critical to protecting discrete and insular minorities, fundamental rights, and democratic voting. On the other hand, as Part III demonstrated, the Supreme Court overstepped its review function by vetoing statutes that reasonably advanced the legitimate government ends of safeguarding the free exercise of religion, providing causes of action for disability discrimination,

323. See, e.g., CONG. GLOBE, 38th Cong., 1st Sess. 104 (1864) (noting the statement of Senator Garrett Davis of Kentucky, who argued that State legislatures had the power to define "joining the rebel arms . . . which produces the forfeiture of the right of suffrage" as a crime).

324. 42 U.S.C. § 2000bb-1.

325. 52 U.S.C. § 10101.

326. See, e.g., Balkin, *supra* note 236, at 1822 ("The framers of the Thirteenth Amendment assumed that Congress would define the badges and incidents of slavery and decide what legislation was appropriate to eliminate them, and that the courts would defer to any reasonable construction.").

protecting voting rights against racial redistriction, and preventing sex discrimination. The judiciary should be deferential in cases reviewing congressional expansion of civil and political rights. On the other hand, heightened scrutiny is appropriate where legislators strip a judicially created protection.³²⁷ That balance is lacking in *Tushnet* and *Waldron*; nor is proportional thinking of those coequal branches adequately accounted for in *Strauss* or *Dworkin*.³²⁸

Both the judiciary and Congress make policy decisions that must be consistent with the post-Reconstruction structure of government, traditions and the people's collective conscience about fundamental principles,³²⁹ and grants of authority. The Constitution, in the words of Justice Brennan, is a "living charter."³³⁰ Both the legislature and judiciary are responsible for its evolution from a document that protected slavery to one that guarantees fundamental liberties, equal protection, and racially neutral voting. The Constitution did not grant to the Court a monopoly on the exercise of "reasoned judgment"³³¹ on such matters. As a legal phenomenon, the Court's encroachments are instances of judicial hubris that undermine explicit reconstruction powers to pass laws in matters arising from the principles of fairness, equality, and representative democracy.

Congress is often better able to quickly address public matters because lawmakers are not constrained by judicial rules of standing, ripeness, mootness, evidence, and the like. In many contexts, this enables Congress to deliberate on information for formulating laws that would be unavailable to courts under rules of evidence, including a large variety of top secret intelligence reports, constituent letters and petitions, and empirical data. The added depth not only allows legislators to

327. See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (discussing when heightened scrutiny applies).

328. See *supra* Part I.

329. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 493 (1965) (Goldberg, J., concurring) (discussing the Court's protection of fundamental rights).

330. *Michael H. v. Gerald D.*, 491 U.S. 110, 141 (1989) (Brennan, J., dissenting).

331. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992) (plurality opinion) (discussing the judicial role in interpreting personal autonomy); *Obergefell v. Hodges*, 576 U.S. 644, 663 (2015) (same).

amass more information than a judicial record reveals, but also to rely on theories of political science, education, financing, philosophy, literature, sociology, anthropology, economics, and so forth that are outside the purview of judicial competence. These conditions of governance enable Congress to rely on the enforcement powers of the Reconstruction Amendments without heightened scrutiny.

Enforcement legislation should be judged by whether it is a reasonable interpretation of the Thirteenth, Fourteenth, and Fifteenth Amendments. None of these confine legislative enforcement to judicial definitions. To the contrary, they are broad grants for enacting legislation consistent with the aspiration ideal of constitutional reconstruction, which includes structural mechanism against the judicial overreach of *Dred Scott*. Congress does not have plenary power but is limited by the substantive provisions of those three amendments.³³² This does not, however, justify the Court's automatic rejection of legislative initiatives not grounded in existing jurisprudence.

B. *Proportionality of Review and Enforcement*

A method of interpretation is needed that falls neither into the populist indeterminacy offered by Tushnet and Waldron nor the judicial supremacy tendered by Strauss and Dworkin.³³³ Both courts and legislatures should play a role in protecting fundamental rights.

There are good reasons to distrust all three branches of government. Judicial finality is not immune from error. The Reconstruction Amendments were meant to cure the defect in the early Constitution by providing the people's representatives with power to pass laws consistent with freedom and equality

332. The Reconstruction powers over civil rights are not all encompassing; there is much that remains to discuss in future work. Among the most pressing are true conflicts between separate state claims of rights, speech, and religion. This topic must be addressed not by looking, as does this article, to the Reconstruction Amendments, which give power to the United States Congress, but to state powers over civil rights laws of general applicability. No cases better exemplify this issue than *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018) and *State v. Arlene's Flowers, Inc.*, 389 P.3d 543 (Wash. 2017), *vacated*, 138 S. Ct. 2671 (2018).

333. See *supra* Part I.

principles.³³⁴ As Part III of this Article highlighted, the Court has often relied on formalistic modes of interpretation to prevent the exercise of congressional civil rights authority. Although space constraints limit the ability to discuss with as great detail, suffice to say that it is self-evident that legislatures too can pass inimical legislation such as the Fugitive Slave Acts of 1793 and 1850³³⁵ and to a different degree the Defense of Marriage Act. (DOMA)³³⁶ Without adequate judicial review, the Court upheld the former during antebellum times.³³⁷ But the Court demonstrated the importance of *Carolene Products* heightened review in *United States v. Windsor*,³³⁸ which found DOMA to be unconstitutional on Equal Protection grounds.³³⁹

The enforcement clauses of the Reconstruction Amendments empower Congress with enumerated and incidental authority to pass laws for advancing liberal equality for the common good, as mandated by the Declaration of Independence and Preamble to the Constitution.³⁴⁰ Congress and the Supreme Court are at their maximum authority when advancing civil rights and civil liberties.³⁴¹ Thus, when the Court's definition of rights is broader and more protective than the legislatures, judicial review should favor heightened standards of scrutiny. On the other hand, when Congress's enactment protects equality, liberty and advances the general welfare, then courts must defer to the people's legislative representatives. The Reconstruction Amendments granted Congress power to formulate and enact policies advancing the

334. See *supra* note 329 and accompanying text.

335. Fugitive Slave Act of 1793, ch. 7, 1 Stat. 302; Fugitive Slave Act of 1850, ch. 60, 9 Stat. 462.

336. Defense of Marriage Act (DOMA), Pub. L. No. 104-199, 110 Stat. 2419 (1996).

337. See *Prigg v. Pennsylvania*, 41 U.S. 539, 625–26 (1842) (invalidating a Pennsylvania law and upholding the constitutionality of the Fugitive Slave Act of 1793); *Ableman v. Booth*, 62 U.S. 506, 522–26 (1858) (upholding the constitutionality of the Fugitive Slave Act of 1850).

338. 570 U.S. 744 (2013).

339. *Id.* at 775.

340. Tesis, *supra* note 255, at 1626–42.

341. See *id.* at 1678 (“It is . . . essential that neither the Court nor Congress hamstring the other’s authority to safeguard essential rights for pursuing the common good.”).

equal enjoyment of fundamental rights and citizenship. Such a scheme retains the judicial function of protecting individual rights, while allowing Congress to act on initiatives crafted to advance policies for the people's general welfare.

To best secure constitutional rights, courts should apply heightened scrutiny to cases set out in footnote 4 of *Carolene Products*, which I elaborated upon in Part II. The strong form of judicial veto reviewed in Part III, however, undercuts the enforcement mandates of the Reconstruction Amendments; thereby, the judiciary regularly thwarts Congress's civil rights initiatives. In *City of Boerne*, the majority diminished lawmakers' ability to protect free exercise rights under the Religious Freedom Restoration Act of 1993.³⁴² Congress relied on § 5 of the Fourteenth Amendment to pass the RFRA.³⁴³ The aim of the legislation was to protect the free exercise of religion under the First Amendment.³⁴⁴ Congress's power to pass law to advance the people's entitlements under the Bill of Rights was no match to judicial supremacy. Also in *Shelby County*, which struck Congress's § 4(b) formula to enforce the Voting Rights Act, the Court shattered decades of political compromises made by coalitions of lawmakers.³⁴⁵

As with *Shelby* and *City of Boerne*, *Kimel*, and *Garrett*, the Court has overstepped its interpretive prerogative to halt congressional efforts that were structurally, textually, and normatively consistent with the principles of constitutional reconstruction. Congress has the enforcement authority to pass appropriate laws reasonably likely to protect the free exercise of religion, monetary damages for state discrimination, and preclearance review against anti-discrimination.

342. See *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997) (ruling that the Enforcement Clause of the Fourteenth Amendment does not grant Congress substantive but only remedial enforcement authority).

343. *Id.* at 516.

344. *Id.* at 515–16.

345. See *Shelby County v. Holder*, 570 U.S. 529, 557 (2013) (holding that the Voting Rights Act § 4(b) was unconstitutional, rendering § 5 only constitutional by private suits rather than by defined preclearance proceedings).

C. *Historical Evidence*

The judicial supremacy of *Cooper v. Aaron*, ruled on for civil rights purposes, has morphed into a doctrine of exclusivity that includes *Boerne*, *Kimel*, *Garrett*, and *Shelby County* expanded. All four cases ignore the history of the Reconstruction Amendments by depriving Congress of its prerogative to pass rational legislation to enforce principles of fundamental rights, equality, and franchise. The shift to legislative power that the Thirteenth, Fourteenth, and Fifteenth Amendments established is evident from the Reconstruction Congress's monumental achievements, such as the Enforcement Acts of 1870;³⁴⁶ the Second Enforcement Act of 1871;³⁴⁷ and, the same year, the Third Enforcement Act of 1871, also known as the Ku Klux Klan Act.³⁴⁸ These statutes were passed in the immediate aftermath of the Reconstruction Amendments' ratification, before the holding in the *Civil Rights Cases* dismissed meaningful national civil rights reform. They point to the framers' intent to meaningfully restructure federalism, where Congress is supreme in the enforcement of reasonable legislation for equality, due process, and general welfare. These aims are proportionate; the Court retains the jurisdiction to strike laws passed with animus or other irrelevant reasons tending to harm persons or groups.³⁴⁹

The terms of these statutes demonstrate the expanded federal role in securing rights through the Reconstruction Amendments. Historical analysis is consistent with U.S. legal semantics.³⁵⁰

While my account is not exclusively historical—the method of this article has also been structural, textual, and value

346. First Enforcement Act, ch. 114, 16 Stat. 140 (1870) (codified as amended at 18 U.S.C. § 241).

347. Second Enforcement Act, ch. 99, 16 Stat. 433 (1871) (codified as amended at 2 U.S.C. § 9; 28 U.S.C. §§ 1357, 1442, 1446–47, 1449–50).

348. Third Enforcement Act, ch. 22, 17 Stat. 13 (1871) (codified as amended at 10 U.S.C. §§ 51–55).

349. See, e.g., *Griffin v. Breckenridge*, 403 U.S. 88, 100 (1971) (stating that the Ku Klux Klan Act requires a finding of some racial or class-based animus).

350. See PHILIP BOBBITT, *CONSTITUTIONAL INTERPRETATION* 12 (1991) (describing “constitutional modalities—the ways in which legal propositions are characterized as true from a legal point of view”).

rich—the appeal to history is undeniable.³⁵¹ The Supreme Court has often relied on narratives of how Congress acted during Reconstruction to identify the range of changes created by constitutional reconstruction.³⁵² This Article follows this precedential methodology to understand the range of options available to elected officials guiding the course of civil rights reforms. But it also recognizes something more. Professors Michael McConnell and Bruce Ackerman have argued severally that Reconstruction was one of those precise constitutional moments of social change and upheaval.³⁵³ It is only logical to examine what powers Congress exercised in the immediate aftermath of the three amendments' ratifications of 1865, 1868, and 1870. Study of those statutes provides historical evidence of what the Reconstruction Congress understood about its own

351. This is not the Article for any extensive discussion of originalism, which I have discussed in some detail in Alexander Tsesis, *Footholds of Constitutional Interpretation*, 91 TEX. L. REV. 1593, 1597–98 (2013). For more thorough discussions of the issue, see Thomas B. Colby, *The Sacrifice of the New Originalism*, 99 GEO. L.J. 713, 716–36 (2011) (discussing the varying theoretical approaches that fall under the rubrics of Old and New Originalism); JACK M. BALKIN, LIVING ORIGINALISM 339 (2011) (arguing that living originalism “offer[s] us the means to prevent bad decisions from occurring in the first place”); Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 225 (1980).

352. See, e.g., *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 741 (1989) (Brennan, J., dissenting) (reviewing the history that led to the enactment of the Civil Rights Act of 1866); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 423–35 (1968) (discussing 1833 congressional debates about injustices against Black people).

353. Michael W. McConnell, *The Forgotten Constitutional Moment*, 11 CONST. COMMENT. 115, 122 (1994) (citing BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 83 (1991)). Congressional debates on the Reconstruction Amendments demonstrated national determination to enforce legislative initiatives in a new federalist structure with significantly increased national powers. Alexander Tsesis, *Reconstructing the American Dream, in WE SHALL OVERCOME: A HISTORY OF CIVIL RIGHTS AND THE LAW* 83 (2008). The House and Senate debates on the three amendments never even mentioned the possibility of Supreme Court overrides staying legislative authority. Prior to 1866 the Justices had only twice found federal laws unconstitutional. See *generally* *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 180 (1803); *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 452 (1856). The degree of judicial activism from the post-Reconstruction period to today would have been entirely foreign to Congressmen who debated the meaning of the three amendments.

powers before the Supreme Court began to bevel away at its authority.

The 1870 Enforcement Act prohibited states from using race, color, or previous condition of involuntary servitude to interfere with the right to vote.³⁵⁴ Criminal penalties were provided against election officers who refused to receive a vote, obstructed, or intimidated citizens from voting.³⁵⁵ The first act further prohibited conspirators from using disguises to prevent others from exercising constitutional rights.³⁵⁶ A further sign of the shift to nationalism was the granting of subject matter jurisdiction to district courts of the United States, which they held concurrently with state courts.³⁵⁷ Another crucial provision reenacted the Civil Rights Act of 1866, with its protections of access to courts, contracts, and ownership.³⁵⁸

The Second Enforcement Act of 1871 regulated unencumbered voting.³⁵⁹ Here too Congress granted subject matter jurisdiction to federal district courts.³⁶⁰ The Act was directed “primarily at Democratic practices in the North, focused on combating irregularities in voting in large cities.”³⁶¹

Of the three enforcement acts, the last passed has had the most enduring impact on American civil rights law.³⁶² The Ku Klux Klan Act of 1871 created private liability against “any

354. 16 Stat. 140, § 1.

355. *Id.* §§ 3–5.

356. *Id.* §§ 6–7.

357. *Id.* §§ 8, 23. The current jurisdiction aspect indicates the extent to which Congress was willing to retain previously overlapping jurisdiction over subject matter.

358. *Id.* § 18.

359. 16 Stat. 433 (1871) (codified as amended at 2 U.S.C. § 9; 28 U.S.C. §§ 1357, 1442, 1446–47, 1449–50).

360. *Id.* § 3.

361. ERIC FONER, *THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION* 118 (1st ed. 2019).

362. Plaintiffs in *Sines v. Kessler* claimed Defendants had “formed a conspiracy to commit the racial violence that led to the Plaintiffs’ varied injuries” in violation of 42 U.S.C. § 1985(3). 324 F. Supp. 3d 765, 773–74, 780–81 (W.D. Va. 2018). A district court found it a plausible allegation that defendants were motivated by specific invidious animus. *Id.* at 773, 780. In *Sines*, the court found that Plaintiffs had a plausible case to pursue under the Thirteenth Amendment to vindicate the right against racial violence under federal law. *Id.* at 782.

person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall . . . depriv[e] of any rights, privileges, or immunities secured by the Constitution . . . law, statute, ordinance, regulation, custom, or usage.”³⁶³ The Third Enforcement Act also reiterated the prohibition against conspiring with others or putting on a disguise to perpetrate vigilante violence.³⁶⁴ And the statute also granted a wrongful death cause of action to surviving “legal representatives of . . . [a] deceased person.”³⁶⁵ Anyone interfering with another’s “equal privileges and immunities” or who conspires to intentionally impede hinder, obstruct, or defeat the equal protection of laws is subject to penalty.³⁶⁶ This is clearly a private action Congress regarded as necessary to parse federal action against racist conduct. So broad was the effect on changing federalism from exclusive state civil actions to a federal scheme that the Third Enforcement Act remains the source of § 1983 practice.³⁶⁷

With the enforcement of those three laws, Congress expanded rights beyond any judicial mandate.³⁶⁸ Passage of these laws immediately after ratification of the Reconstruction Amendments demonstrates the increased empowerment granted to Congress before the Court began thwarting federal civil rights statutes in *Cruikshank* and *Harris*, both cases the Court relied on in *Boerne*.³⁶⁹ These three enforcement statutes from the Second Founding showed a marked increase in Congress’s authority to pass legislation of criminal law that had been reserved to the states under the original Constitution. They were each to allow for national efforts against state prejudices. The judiciary thwarted Reconstruction, striking a

363. 17 Stat. 13, § 1 (1871).

364. *Id.* § 2.

365. *Id.* § 6.

366. *Id.* § 2. On the relevance of the intent component of the statute see Balkin, *supra* note 236, at 1842.

367. *City of Okla. City v. Tuttle*, 471 U.S. 808, 817 (1985).

368. See Eric Foner, *The Supreme Court and the History of Reconstruction—and Vice-Versa*, 112 COLUM. L. REV. 1585, 1597 (2012) (criticizing the Court’s state action doctrine).

369. 521 U.S. 507, 525 (1997).

law of national desegregation, the Civil Rights Act of 1875.³⁷⁰ The same veto was used to strike the critically important preclearance provision out of the Voting Rights Act of 1965.³⁷¹

D. *Correcting Judicial Overreach*

The Court's assertion of supremacy over congressional enforcement intrudes into legislators' constitutionally granted prerogatives.³⁷² The Rehnquist and Roberts Courts have tightened the reins of power to steer constitutional interpretation in a direction contrary to the explicit language of the enforcement clauses. Under current doctrine,³⁷³ the Court deploys its power of review to restrict Congress from defining its own powers under the Reconstruction Amendments. This undermines legislators' ability to enact policies consistent with the ethics behind their ratifications. The structure of government changed to expand national authority to pass legislation conducive to the equal dignity of persons in a representative and constitutional democracy. The judicial and legislative branches are jointly and severally responsible to protect fundamental liberties, equal protections, and non-discriminatory voting rights.³⁷⁴ These three can be further boiled down to equal liberty and associational rights, or liberal equality for the common good. However, as things stand, consistent with the holdings in *Boerne* and *Shelby County*, the Court can veto any prophylactic law regardless of congressional reasoning.

The current doctrine does not square with the text of the enforcement clauses. The enforcement clauses of the Reconstruction Amendments granted Congress powers as broad as the Necessary and Proper Clause.³⁷⁵ The first of the ratified

370. The Civil Rights Cases, 109 U.S. 3, 25 (1883).

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

372. See *supra* notes 50–53, 218–227 and accompanying text.

373. See *supra* Part III.

374. I have argued elsewhere that all three branches of government should be governed by the principle of liberal equality for the common good established by the Preamble to the Constitution and the Declaration of Independence. See Tsesis, *supra* note 255, at 1626–42.

375. U.S. CONST. art. I, § 8, cl. 18.

Amendments, in 1865, the § 2 of the Thirteenth Amendment provided that, “Congress shall have power to enforce this article by appropriate legislation.”³⁷⁶ The Fourteenth Amendment’s fifth section authorizes similarly that, “Congress shall have power to enforce, by appropriate legislation, the provisions of this article.”³⁷⁷ And § 2 of the Fifteenth Amendment provides, in the same spirit and letter, “[t]he Congress shall have power to enforce this article by appropriate legislation.”³⁷⁸ All this sounds like the Necessary and Proper Clause with its well known deferential test. They closely resemble the Necessary and Proper Clause’s grant of “the foregoing powers [in Article I, § 8 and] all other powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”³⁷⁹ The enforcement clauses of the Reconstruction Amendments were modeled from the same deferential norm to Congress in matters of civil rights. They grant Congress pro-active authority, not merely the power to respond to judicially defined harms. Hence, in cases involving statutes passed pursuant to congressional enforcement authority only rational basis scrutiny is appropriate. This conclusion is based on the norms, history, structure, and text of the Reconstruction Amendments, but it calls for a reworking of doctrine.

CONCLUSION

The Reconstruction Amendments altered the structure of U.S. government in the realms of judicial review and legislative enforcement. They augmented the federal government’s power to guarantee individual liberties, civil rights, and racially nondiscriminatory voting. Their provisions provide legislative powers for achieving the national creed of liberal equality for the common good first articulated in the Declaration of Independence and the Preamble to the Constitution. The Second Founding envisioned a federal judiciary and legislature

376. *Id.* amend. XII, § 2.

377. *Id.* amend. XIV, § 5.

378. *Id.* amend. XV, § 2.

379. *Id.* art. I, § 8, cl. 18.

committed to fundamental rights; equal justice; and representative governance, untainted by America's history with inequality. But by the late-nineteenth century the Supreme Court had weakened the mandates of legislative reconstruction. More recently, the Rehnquist and Roberts Court have further hobbled congressional enforcement powers while bolstering judicial veto powers.³⁸⁰

This Article seeks a way forward to make strides in civil rights and civil liberties laws. A progressive balance between adjudication and legislation is essential to maintain appropriate checks and balances. Judicial review supplies levels of scrutiny for identifying rights, competing interests, and proportionate scrutiny. Heightened judicial scrutiny relies on the analytical abilities of judges to synthesize precedents, principles, and pragmatic judgments.³⁸¹ Yet judges are not alone. Congress, like the judiciary, is obligated to carry out constitutional mandates, such as those found in the Reconstruction Amendments.

Relying on judicial finality to override Thirteenth, Fourteenth, and Fifteenth Amendment legislation began during the post-Reconstruction period, when the Court struck laws such as the national desegregation provisions in the *Civil Rights Cases*. Even today, the Court's veto over rights, equality, and voting—in cases such as *City of Boerne* and *Shelby County*—undercuts meaningful efforts to enforce the principles of America's constitutional reconstruction.

380. See *supra* Part III.

381. See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (discussing heightened judicial review).