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Repository Citation

Crum, Travis, "Voting Under the Federal Constitution" (2023). *Scholarship@WashULaw*. 24.
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VOTING UNDER THE FEDERAL CONSTITUTION

The Oxford Handbook of American Election Law (forthcoming 2023)

Travis Crum*

There is no explicit, affirmative right to vote in the federal Constitution. At the Founding, States had total discretion to choose their electorate. Although that electorate was the most democratic in history, the franchise was largely limited to property-owning White men. Over the course of two centuries, the United States democratized, albeit in fits and starts. The right to vote was often expanded in response to wartime service and mobilization.

A series of constitutional amendments prohibited discrimination in voting on account of race (Fifteenth), sex (Nineteenth), inability to pay a poll tax (Twenty-Fourth), and age (Twenty-Sixth). These amendments were worded as anti-discrimination provisions with nearly identical language. Although they vastly expanded who was eligible to vote, these constitutional amendments' negative framing permits States to disenfranchise voters through facially neutral requirements, such as felon disenfranchisement laws.

Starting in the 1960s, the Supreme Court relied on the Equal Protection Clause—rather than the voting rights amendments themselves—to protect the “fundamental” right to vote, applying strict scrutiny to voting qualifications. This line of cases comes closest to recognizing an affirmative right to vote that receives protection even absent an invidious facial classification. These decisions, combined with the Voting Rights Act of 1965 (VRA) and the civil rights movement, helped eradicate Jim Crow.

This chapter charts how the United States democratized, and its focus is on voting *qualifications* under the federal Constitution. As this chapter demonstrates, democratization has been accomplished through federal constitutional amendments, state-law changes, judicial decisions, and popular support during or shortly after wartime.

I. The Original Constitution

As originally written, the Constitution was democratic for its time, but it implicitly approved of racist, sexist, and classist barriers to casting a ballot. And compared to today, the original Constitution was far less democratic in terms of what offices could be voted for. This constitutional design reflected the Founders’ mistrust of unchecked democracy.¹

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¹ See CHILTON WILLIAMSON, AMERICAN SUFFRAGE: FROM PROPERTY TO DEMOCRACY,

1. The House of Representatives

At the Founding, the House was the only directly elected branch of the federal government. The original Constitution, however, did not establish a federal standard for who had the right to vote for representatives. The Founders failed to reach agreement on a nationwide standard—such as a property qualification—given the plethora of approaches followed by the States.² Instead, Article I, Section Two provided that “Electors … shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature,” which in practice was the lower house.³ Thus, States controlled who could vote for the federal House.

As a general matter, the franchise was limited to White men who owned property or satisfied taxpaying requirements.⁴ Estimates vary but “[b]y 1790 … roughly 60 to 70 percent of adult white men (and very few others) could vote.”⁵ To put this in context, the Founders selected “the broadest franchise operating in the states, as opposed to more restricted electorates for various state upper houses and governorships.”⁶ And because landownership was more common in the United States, a greater percentage of the White male population could vote than in England.⁷

But by relying on state suffrage qualifications, the original Constitution baked in significant discriminatory barriers to casting a ballot. However, there were a few exceptions: women could vote in New Jersey, and free Black men were technically permitted to vote in a handful of States.⁸ Some States enfranchised aliens.⁹ And during the Founding, religious qualifications were abandoned in all but one State.¹⁰ Ultimately, these racist, sexist, and classist barriers would require constitutional amendments to be eliminated.

1760-1860, at 124-25 (1960).

² See *id.*

³ U.S. CONST. art. I, § 2.

⁴ ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 306-07 tbl. A.1 (rev. ed. 2009) (cataloging these requirements).

⁵ See *id.* at 20-21.

⁶ AKHIL REED AMAR, AMERICA’S CONSTITUTION: A BIOGRAPHY 65 (2005).

⁷ See *id.*

⁸ See KEYSSAR, *supra* note 4, at 21.

⁹ See Jamin B. Raskin, *Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage*, 141 U. PA. L. REV. 1391, 1400-01 (1993).

¹⁰ The exception was South Carolina, which required voters to pledge that they believed in God. See WILLIAMSON, *supra* note 1, at 115.

2. *The Senate*

Unlike Representatives, Senators were originally chosen by state legislatures.¹¹ For many decades, however, voters could express their preferences for senators through a variety of mechanisms. The best-known example is the 1858 contest between Abraham Lincoln and Stephen Douglas for Illinois's U.S. Senate seat. Rather than appear on the ballot themselves, Lincoln and Douglas urged voters to elect Republicans and Democrats, respectively, to the state legislature, who, in turn, would select their partisan ally for the U.S. Senate.¹² In 1913, the Seventeenth Amendment was ratified and provided for the direct election of Senators. As with U.S. Representatives, the Seventeenth Amendment defines the electorate as those who can vote for "the most numerous branch of the state legislature[]." ¹³

3. *The President and the Electoral College*

As the 2000 and 2016 elections made abundantly clear, the United States does not hold a popular vote for President. Part of "an eleventh-hour compromise,"¹⁴ Article II establishes an indirect method known as the Electoral College, which gives each State a slate of electors based on their number of representatives and senators.¹⁵ Article II further provides that each State shall "appoint" electors "in such manner as the Legislature thereof may direct."¹⁶ In the earliest presidential elections, "state legislatures mostly picked the electors,"¹⁷ but that practice was virtually abandoned by 1832 in favor of awarding electors based on the popular vote.¹⁸ Today, all but two States have a winner-take-all approach to awarding their electors.¹⁹ However,

¹¹ U.S. CONST. art. I, § 3.

¹² Other mechanisms involved party primaries and the so-called Oregon Plan in which voters selected U.S. Senators in a preference poll and state legislators would pre-commit themselves to vote for the winner. *See AMAR, AMERICA'S CONSTITUTION, supra* note 6, at 410-12.

¹³ U.S. CONST. amend. XVII.

¹⁴ *Chiafalo v. Washington*, 140 S. Ct. 2316, 2320 (2020).

¹⁵ Following the Twenty-Third Amendment's ratification in 1961, the District of Columbia is included in the Electoral College and receives the number of electors it "would be entitled if it were a State, provided in no event more than the least populous State." U.S. CONST. amend. XXIII, § 1.

¹⁶ *Id.* art. II, § 1.

¹⁷ *Chiafalo*, 140 S. Ct. at 2321.

¹⁸ *Id.* The lone hold-out was South Carolina, which appointed electors until the Civil War. *See Arizona v. Inter Tribal Council of Arizona, Inc.*, 570 U.S. 1, 35 n.2 (2013) (Thomas, J., dissenting). In addition, the Florida legislature appointed electors in 1868 and Colorado did so in 1876. *See id.*

¹⁹ The exceptions are Maine and Nebraska, which award two electors to the winner of

in contrast to the U.S. Senate, no constitutional amendment has explicitly provided for a right to vote for president.

4. States

Within States, the original Constitution provided little direct guidance. Article I, Section Two's requirement that the federal House have the same electorate as the "most numerous" house of the state legislature presumes—indeed, arguably requires—that there be state-level elections. Furthermore, Congress may preempt state laws concerning the "Times, Places, and Manner of holding Elections" for congressional elections.²⁰ That power, however, does not extend to setting voting qualifications.²¹

Known alternatively as the Guarantee Clause or the Republican Form of Government Clause, Article IV, Section Four provides that "the United States shall guarantee to every State in this Union a Republican Form of Government."²² This enigmatic language has spawned a host of theories over the years. Several scholars have latched onto the Guarantee Clause as a source of authority for regulating malapportionment and partisan gerrymandering.²³ Other academics have been far more skeptical of using the Guarantee Clause as a vehicle for protecting individual rights.²⁴

the statewide vote and one elector to the winner of each congressional district. *See Chiafalo*, 140 S. Ct. at 2321 & n.1.

²⁰ U.S. CONST. art I, § 4

²¹ See *Inter Tribal Council*, 570 U.S. at 16-17 (majority opinion). As discussed below, see *infra* Section II.4, Justice Black's opinion announcing the judgment in *Oregon v. Mitchell*, 400 U.S. 112, 119-25 (1970) (opinion of Black, J.), concluded that the Elections Clause authorized Congress to establish voting qualifications for federal elections. However, the *Inter Tribal Council* Court deemed that opinion as having "minimal precedential value" given that no rationale commanded a majority. *Inter Tribal Council*, 570 U.S. at 16 n.8.

For scholarly accounts of how Congress could wield its Elections Clause authority to advance a reform agenda, see Samuel Issacharoff, *Beyond the Discrimination Model on Voting*, 127 HARV. L. REV. 95, 108-09 (2013), Richard H. Pildes, *The Future of Voting Rights Policy: From Anti-Discrimination to the Right to Vote*, 49 HOW. L.J. 741, 756-58 (2006), and Franita Tolson, *The Spectrum of Congressional Authority Over Elections*, 99 B.U. L. REV. 317, 367-68 (2019).

²² U.S. CONST. art. IV, § 4.

²³ See, e.g., AKHIL REED AMAR, AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY 190 (2012) (malapportionment); Carolyn Shapiro, *Democracy, Federalism, and the Guarantee Clause*, 62 ARIZ. L. REV. 183, 218-19 (2020) (partisan gerrymandering).

²⁴ See, e.g., Richard L. Hasen, *Leaving the Empty Vessel of "Republicanism" Unfilled: An Argument for the Continued Nonjusticiability of Guarantee Clause Cases*, in THE POLITICAL QUESTION DOCTRINE AND THE SUPREME COURT OF THE UNITED STATES, at 84-88 (Nada Mountada-Sabbah & Bruce E. Cain, eds., 2007) (advocating that the Guarantee Clause remain a non-justiciable political question); Ryan C. Williams, *The "Guarantee" Clause*, 132 HARV. L. REV. 602, 610-11 (2018) (arguing that the Guarantee Clause borrows from

Notwithstanding robust scholarly interest, the Guarantee Clause has garnered scant attention from the courts and the political branches. For its part, the Supreme Court has construed the Guarantee Clause as raising non-justiciable political questions and has therefore declined to adjudicate disputes under that Clause.²⁵ During Reconstruction, Radical Republicans cited the Guarantee Clause as Congress's source of authority for imposing military rule on the Southern States on the theory that the disenfranchisement of Black men resulted in a majority or near majority of free men being unable to vote.²⁶ In modern times, Congress has not relied on the Guarantee Clause to enact voting rights legislation.

II. The Voting Rights Amendments

From the Founding to Reconstruction, enfranchisement occurred via changes in state law, rather than through constitutional amendment. Most notably, Jacksonian democracy helped eliminate property requirements and expanded the number of state and local offices that were elected.²⁷ But it would take a series of constitutional amendments to enfranchise people of color, women, the poor, and young adults. In many ways, these amendments were direct responses to the Civil War, World War I, and the Vietnam War. Given the centrality of race to U.S. history, legal doctrine, and contemporary struggles over the right to vote, this Section focuses heavily on the Fourteenth and Fifteenth Amendments.

1. The Reconstruction Amendments

Following the Civil War, Congress passed and the States ratified three constitutional amendments: the Thirteenth abolished slavery; the Fourteenth protected civil rights and imposed an apportionment penalty for States that disenfranchised their adult male residents; and the Fifteenth prohibited racial discrimination in voting. To understand why the Fifteenth Amendment was necessary, a brief historical survey is helpful.²⁸

Emancipation had a perverse unintended consequence. With the infamous Three-Fifths Clause effectively repealed, freedpersons would count as full

international law principles that counsel against interpreting it as an individual rights provision).

²⁵ See *Luther v. Bolden*, 48 U.S. 1, 42 (1849).

²⁶ See AMAR, AMERICA'S CONSTITUTION, *supra* note 6, at 374-75.

²⁷ See KEYSSAR, *supra* note 4, at 24-25.

²⁸ For those interested in primary sources concerning the drafting and ratification of these amendments, see 1 THE RECONSTRUCTION AMENDMENTS: THE ESSENTIAL DOCUMENTS (Kurt T. Lash ed., 2021), and 2 THE RECONSTRUCTION AMENDMENTS: THE ESSENTIAL DOCUMENTS (Kurt T. Lash ed., 2021).

persons for purposes of congressional reapportionment. Given that the Southern States disenfranchised freedpersons, the practical effect was that Southern White men's political power in the House and Electoral College would be bolstered. This put the Union's victory at risk, as most Southern White men were supporters of the Confederacy.²⁹ Indeed, following the war's end, the reconstituted Southern governments passed the notorious Black Codes, which used strict labor and vagrancy laws to re-establish slavery in all but name only.³⁰

Congress responded to the Black Codes by passing the Civil Rights Act of 1866, which, true to its name, protected the civil rights of freedpersons. The Act's constitutionality, however, was questioned, including in the Republican Caucus. Accordingly, Congress passed the Fourteenth Amendment in June 1866 and the States ratified it in July 1868.³¹

Here, it is important to keep in mind that the Reconstruction Framers differentiated between civil and political rights.³² The Reconstruction-era conception of civil rights included, *inter alia*, the rights to own property, to contract, and to equal treatment under the criminal law.³³ By contrast, political rights included not only the right to vote but also the right to hold office and to serve on a jury. Civil rights were inherent in citizenship; political rights were not.³⁴

Section One's text reflected this distinction. The Privileges or Immunities Clause was borrowed from Article IV's protections for out-of-state citizens and, whatever the outer limits of privileges and immunities during Reconstruction, that term did not extend as far as the franchise. In addition, the Due Process and Equal Protection Clauses applied to persons—not merely citizens—and thus were viewed to exclude political rights. If the Equal Protection Clause originally applied to political rights, it would not only have invalidated racially discriminatory voting qualifications but also enfranchised women, children, and aliens.³⁵

Moreover, the Reconstruction Framers repeatedly stated that Section One did not confer voting rights and rejected language that would have explicitly accomplished that goal. Even supporters of Black suffrage recognized that

²⁹ See Franita Tolson, *The Constitutional Structure of Voting Rights Enforcement*, 89 WASH. L. REV. 379, 405 (2014).

³⁰ See ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877, at 198-201 (1988).

³¹ See, e.g., McDonald v. City of Chicago, 561 U.S. 742, 675 (2010).

³² See Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 1016 (1995).

³³ See *id.* at 1027.

³⁴ See AMAR, AMERICA'S CONSTITUTION, *supra* note 6, at 391.

³⁵ See *id.* at 391-92.

such a proposal would likely doom ratification in the North.³⁶ Thus, as originally understood, Section One as a whole and the Equal Protection Clause, in particular, excluded political rights.

Although obscure today, Section Two's Apportionment Clause sought to incentivize the enfranchisement of the freedmen. Section Two provides for a reduction in House seats—and concomitantly, in the Electoral College—if a State “denied” or “abridged” the “right to vote” of its adult “male” “citizens.”³⁷ Given contemporary suffrage laws and racial demographics, this penalty would have disproportionately impacted the South compared to the Northern and the Border States.³⁸

Section Two is also noteworthy for introducing the word “male” into the Constitution. Because western migration was predominantly led by men, many Eastern States had far greater proportions of women.³⁹ A sex-neutral Section Two, therefore, would have incentivized enfranchising women. Section Two's exclusion of women created a fissure between the abolitionist and suffragette movements—one that was deepened by failed attempts to include protections for sex in the Fifteenth Amendment.⁴⁰

Section Two was not—and never has been—enforced.⁴¹ By the time of the post-1870 apportionment, a series of state laws, federal statutes, and the Fifteenth Amendment had enfranchised Black men nationwide.

At the end of the Civil War, only five States had enfranchised Black men—all in New England and with minuscule Black populations. Shortly thereafter, Black men were enfranchised via a judicial decision in Wisconsin and via referenda in Iowa and Minnesota. Tennessee's state legislature enfranchised Black men following its re-admission to the Union, becoming the only ex-Confederate State to do so voluntarily.⁴²

In 1867, Congress enfranchised Black men in areas of federal control. Congress mandated Black male suffrage in the District of Columbia and the federal territories. Congress also required that Nebraska adopted universal

³⁶ See Travis Crum, *The Superfluous Fifteenth Amendment?*, 114 NW. U. L. REV. 1549, 1584-85 (2020).

³⁷ U.S. CONST. amend. XIV, § 2.

³⁸ See AMAR, AMERICA'S CONSTITUTION, *supra* note 6, at 394.

³⁹ See William W. Van Alstyne, *The Fourteenth Amendment, the “Right” to Vote, and the Understanding of the Thirty-Ninth Congress*, 1965 S. CT. REV. 33, 47 (“[B]ecause pioneer California had a far higher percentage of males over the age of twenty-one than did Vermont, 58 per cent of the California population consisted of voters as against only 19 per cent in Vermont.”).

⁴⁰ See ERIC FONER, THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION 82-83 (2019).

⁴¹ See Gerard N. Magliocca, *Our Unconstitutional Reapportionment Process*, 86 GEO. WASH. L. REV. 774, 783 (2018).

⁴² See Crum, *Superfluous*, *supra* note 36, at 1593-94.

male suffrage as a fundamental condition of its admission to the Union.⁴³

Most importantly, Congress passed the First Reconstruction Act, which drastically transformed the South. The Act imposed military rule and declared the existing Southern governments—which had all White male electorates—to be null and void. Congress mandated Black male suffrage, correctly predicting that Black voters would defend their own interests by overwhelmingly supporting the Republican Party.⁴⁴ As Professor Eric Foner has observed, the First Reconstruction Act inaugurated “a stunning and unprecedented experiment in interracial democracy.”⁴⁵

Following the 1868 presidential election, Republicans recognized that *nationwide* Black male suffrage was both a moral and political necessity.⁴⁶ Some Radicals, such as those with deep roots in the abolitionist movement, had long been committed to political rights for Black men. Others were persuaded by the military service of Black men, who accounted for ten percent of the soldiers in the Union army. Some had more partisan motivations, believing that Black men would help the Republican Party win elections.⁴⁷

When Congress started debating the Fifteenth Amendment in early 1869, the States were evenly divided: seventeen States permitted Black male suffrage; seventeen did not.⁴⁸ At first, Radical Republicans in Congress

⁴³ See *id.* at 1594-95.

⁴⁴ See *id.* at 1595-96. Tennessee was excluded from the Act’s strictures because it had ratified the Fourteenth Amendment and was re-admitted to the Union.

⁴⁵ FONER, RECONSTRUCTION, *supra* note 40, at 278.

⁴⁶ Scholars have debated whether the primary motive to pursue a constitutional amendment was to enfranchise Black men in the North or to provide Congress with authority to prevent backsliding in the re-admitted Southern States. Compare WILLIAM GILLETTE, THE RIGHT TO VOTE: POLITICS AND PASSAGE OF THE FIFTEENTH AMENDMENT 77 (2d ed. 1969) (arguing the former), with JOHN MABRY MATHEWS, LEGISLATIVE AND JUDICIAL HISTORY OF THE FIFTEENTH AMENDMENT 21 (1909) (arguing the latter).

⁴⁷ See Travis Crum, *Reconstructing Racially Polarized Voting*, 70 DUKE L.J. 261, 304-08 (2020).

⁴⁸ This disparity existed even though the Fourteenth Amendment had been ratified in 1868. This state of affairs is further evidence that Section One of the Fourteenth Amendment was originally understood to not apply to political rights. See Crum, *Superfluous*, *supra* note 36, at 1602.

To be specific, these States barred Black men from voting: California, Connecticut, Delaware, Illinois, Indiana, Kansas, Kentucky, Maryland, Michigan, Missouri, Nevada, New Jersey, Ohio, Oregon, Pennsylvania, and West Virginia. See *id.* at 1602-03 n.362. In addition, New York technically permitted Black men to vote, but racially discriminatory property and residency qualifications disenfranchised virtually all of them. See *id.* at 1593.

The right to vote free of racial discrimination existed in these States: Alabama, Arkansas, Florida, Georgia, Iowa, Louisiana, Maine, Massachusetts, Minnesota, Nebraska, New Hampshire, North Carolina, South Carolina, Tennessee, Rhode Island, Vermont, and Wisconsin. See *id.* at 1602 n.363. Black men could vote in Mississippi, Texas, and Virginia, but those States had not yet been re-admitted to the Union. See *id.* at 1603; see also Travis

argued that a federal statute was sufficient to mandate nationwide Black male suffrage. After constitutional and political concerns were raised by moderate Republicans, the statutory proposal was defeated in favor of a constitutional amendment.⁴⁹

The metes and bounds of the proposed amendment's language were hotly contested. Many versions included explicit protections for not only the right to vote but also the right to hold office. However, a last-minute change by the conference committee omitted the officeholding language.⁵⁰ Other proposals were race conscious. Senator Jacob Howard introduced an amendment that would have protected the right to vote of "[c]itizens of the United States of African descent."⁵¹ Most radically, some proposals came tantalizingly close to adopting an affirmative right to vote for adult men of "sound mind," with an exception for felon disenfranchisement laws.⁵²

Most proposals, however, were framed in the negative. And here, the debate centered on what characteristics merited an anti-discrimination provision. On one end of the spectrum was a targeted approach that singled out race, color, and previous condition of servitude. At the other end were proposals that would have also included sex, nativity, property, education, and creed.⁵³ After suffragettes failed to include sex-based protections in the Fifteenth Amendment, prominent leaders, such as Susan B. Anthony and Elizabeth Cady Stanton, opposed the amendment's ratification.⁵⁴

Ultimately, the narrowest approach passed Congress on a party-line vote, with some Radical Republicans boycotting the final vote because they believed that the amendment's protections were too narrow.⁵⁵ The Fifteenth Amendment was ratified by States in New England, the Midwest, and the South. It was opposed by the Border States and the West Coast, which opposed enfranchising Black men and Chinese-American men, respectively.⁵⁶

Crum, *The Lawfulness of the Fifteenth Amendment*, 97 NOTRE DAME L. REV. 1543, 1580-89 (2022) (discussing Georgia's unique position as only partially re-admitted to Congress).

⁴⁹ See Crum, *Superfluous*, *supra* note 36, at 1602-16.

⁵⁰ The reason for this deletion is the subject of scholarly debate. Compare Vikram David Amar, *Jury Service as Political Participating Akin to Voting*, 80 CORNELL L. REV. 203, 228-34 (1995) (arguing that the right to vote includes the right to hold office), with EARL M. MALTZ, CIVIL RIGHTS, THE CONSTITUTION, AND CONGRESS, 1863-1869, at 154 (arguing that the officeholding provision was deleted out of fear that its inclusion would doom ratification).

⁵¹ CONG. GLOBE, 40th Cong. 3d Sess. 828 (1869).

⁵² *Id.* at 728.

⁵³ See *id.* at 1224-26;

⁵⁴ See LAURA FREE, SUFFRAGE RECONSTRUCTED: GENDER, RACE, AND VOTING RIGHTS IN THE CIVIL WAR ERA 162-66 (2015).

⁵⁵ See GILLETTE, *supra* note 46, at 73-76.

⁵⁶ See *id.* at 81-85; Crum, *Lawfulness*, *supra* note 48, at 1572.

All three of the Reconstruction Amendments contain clauses giving Congress the power to “enforce” their provisions through “appropriate legislation.” This terminology was a purposeful borrowing of *McCulloch*’s test for Congress’s broad authority under the Necessary and Proper Clause. Put simply, in the aftermath of *Dred Scott*, the Reconstruction Framers viewed the Supreme Court as part of the problem and put itself in the proverbial driver’s seat for protecting the newfound civil and political rights of freedpersons.⁵⁷ The Reconstruction Congress would subsequently pass several acts enforcing the Fourteenth and Fifteenth Amendments.⁵⁸

Unfortunately, the Fifteenth Amendment proved to be a parchment promise in the Jim Crow South. The Amendment’s failure to affirmatively guarantee the right to vote or to explicitly protect against additional forms of discrimination opened the door to recalcitrant Southern States enacting literacy tests and poll taxes to disenfranchise Black voters. Following the withdrawal of federal troops from the South in 1877 and the adoption of new Southern constitutions in the 1890s and early 1900s, Black men were disenfranchised on a wide scale.⁵⁹ Congress’s decision to reserve robust enforcement power to itself would prove crucial during the civil rights movement, when the VRA would help make the dream of the Fifteenth Amendment a reality.

2. *The Nineteenth Amendment*

The exclusion of women’s suffrage from the Fourteenth and Fifteenth Amendments would have longstanding consequences. Toward the end of Reconstruction, the Court’s decision in *Minor v. Happersett* rejected a claim brought by suffragettes that the Privileges or Immunities Clause conferred the right to vote on women.⁶⁰ Indeed, the Court referenced the necessity of passing the Fifteenth Amendment as one reason why the Privileges or Immunities Clause did not encompass the franchise.⁶¹ Following *Minor*,

⁵⁷ See Jack M. Balkin, *The Reconstruction Power*, 85 N.Y.U. L. REV. 1801, 1805-06 (2010).

⁵⁸ See XI WANG, THE TRIAL OF DEMOCRACY: BLACK SUFFRAGE AND NORTHERN REPUBLICANS, 1860-1910, at 57-68, 78-92 (1997).

⁵⁹ See FONER, SECOND FOUNDING, *supra* note 40, at 126. Going beyond the Jim Crow South, Native Americans faced widespread disenfranchisement until Congress passed the Indian Citizenship Act of 1924, which granted them citizenship regardless of their tribal affiliation or whether they continued to live on reservations. See LAUGHLIN McDONALD, AMERICAN INDIANS AND THE FIGHT FOR EQUAL VOTING RIGHTS 18 (2010). Here, one should avoid anachronism. At the time of the Fourteenth Amendment’s ratification, “most Indians did not want national citizenship if it meant dissolving tribal sovereignty and making their land available to encroachment by whites.” FONER, SECOND FOUNDING, *supra* note 40, at 72.

⁶⁰ See *Minor v. Happersett*, 88 U.S. 162, 178 (1875).

⁶¹ See *id.* at 175.

suffragettes recalibrated their strategy and pushed for a constitutional amendment.⁶²

Meanwhile, women were winning the right to vote, starting in Wyoming Territory in 1869. The vanguard of women's enfranchisement were Western States and territories, a reform motivated, at least in part, by a desire to encourage women to move there in the late 1800s.⁶³ After the so-called "doldrums" of the suffragette movement at the turn of the twentieth century, the 1910s witnessed a rapid succession of victories.⁶⁴ Women's mobilization in support of World War I helped provide the final push over the finish line.⁶⁵ When the Nineteenth Amendment was ratified in 1920, fifteen States had fully enfranchised women. Several more States and territories had enfranchised women in certain elections, such as for President or for school boards.⁶⁶

Although Reconstruction-era drafts sometimes looked to the Fourteenth Amendment for inspiration,⁶⁷ the Nineteenth Amendment's text was modeled on the Fifteenth Amendment. Some of the most vociferous debates—such as over the right to hold office—were “noticeably absent” during Congress’s deliberations.⁶⁸ The Nineteenth Amendment Framers’ decision to borrow the Fifteenth Amendment’s “denied or abridged” language has been followed ever since for the Constitution’s voting rights amendments.

Even though the electorate “nearly doubled in size” between 1910 and 1920, “voting patterns and partisan alignments were little affected.”⁶⁹ Put differently, unlike Black men during Reconstruction, the political preferences of women did not materially differ from the pre-existing electorate. Those racial differences persisted into the 1920s, and racially discriminatory laws in the Jim Crow South disenfranchised Black men and women alike.⁷⁰

3. The Twenty-Fourth Amendment

Although property qualifications withered during Jacksonian democracy, the role of class did not disappear from voting qualifications. A “poll tax” is

⁶² See Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 973-75 (2002).

⁶³ See Elizabeth D. Katz, *Sex, Suffrage, and State Constitutional Law: Women’s Legal Right to Hold Office*, 33 YALE J. L. & FEM. 110, 137 (2022).

⁶⁴ See *id.* at 177-78.

⁶⁵ See KEYSSAR, *supra* note 4, at 173-75.

⁶⁶ See *id.* at 365-68.

⁶⁷ See Siegel, *supra* note 62, at 974.

⁶⁸ Katz, *supra* note 63, at 185.

⁶⁹ KEYSSAR, *supra* note 4, at 175.

⁷⁰ See MARTHA S. JONES, *VANGUARD: HOW BLACK WOMEN BROKE BARRIERS, WON THE VOTE, AND INSISTED ON EQUALITY FOR ALL* 184-85 (2020).

a head tax that applies to all adults, and by the twentieth century, poll taxes were employed as barriers to the right to vote rather than as a revenue generator.⁷¹

During the New Deal, “progressives framed their opposition to the poll tax as an issue of class, not race.”⁷² The poll tax was part of the Southern States’ toolkit to disenfranchise Black voters, but other measures, such as literacy tests, also played a role.⁷³ Although estimates vary based on the relevant decade and the particular law, it is likely that substantial numbers of White voters were also disenfranchised by the poll tax.⁷⁴ Efforts to eliminate poll taxes stalled following the Court’s 1937 decision in *Breedlove v. Suttles*, which rejected a Fourteenth Amendment challenge to poll taxes.⁷⁵

By the 1960s, the poll tax was once again in the limelight. However, opponents differed in their strategies and motivations. The NAACP and other civil rights groups called for Congress to eliminate poll taxes via legislation enacted pursuant to its Reconstruction Amendment enforcement authority. Civil rights groups feared that using a constitutional amendment would set a dangerous modern precedent that Congress could not legislate as to voting qualifications. By contrast, Senator Holland of Florida advocated for a constitutional amendment. Holland was a notorious segregationist who opposed the poll tax for class-based reasons. Ultimately, Holland’s strategy prevailed for poll taxes in *federal* elections.⁷⁶

Ratified in 1964, the Twenty-Fourth Amendment prohibits the denial or abridgement of the right to vote in federal elections for failure to pay a poll tax. The Twenty-Fourth Amendment’s language differs in two ways from the other voting rights amendments. First, the Twenty-Fourth Amendment’s scope is limited to federal elections, rather than all elections. Second, the Twenty-Fourth Amendment explicitly applies to presidential primaries, recognizing the relatively recent development of those elections.⁷⁷

As explained more below,⁷⁸ the Twenty-Fourth Amendment was absent

⁷¹ See Louis B. Boudin, *State Poll Taxes and the Federal Constitution*, 28 VA. L. REV. 1, 1-2 (1941).

⁷² Bruce Ackerman & Jennifer Nou, *Canonizing the Civil Rights Revolution: The People and the Poll Tax*, 103 NW. U. L. REV. 63, 71 (2009).

⁷³ See *id.* at 72-73.

⁷⁴ See V.O. KEY, JR. SOUTHERN POLITICS IN STATE AND NATION 608 (1949) (estimating that between five and ten percent of White voters were disenfranchised by the poll tax during the 1920s through 1940s); see also J. MORGAN KOUSSER, THE SHAPING OF SOUTHERN POLITICS: SUFFRAGE RESTRICTIONS AND THE ESTABLISHMENT OF THE ONE-PARTY SOUTH, 1880-1910, at 71 (1974) (estimating that Georgia’s poll tax disenfranchised between a quarter and a third of White men in the 1880s).

⁷⁵ 302 U.S. 277 (1937).

⁷⁶ See Ackerman & Nou, *supra* note 72, at 69-73.

⁷⁷ See AMAR, AMERICA’S CONSTITUTION, *supra* note 6, at 443.

⁷⁸ See Section III.2.

from the Court’s decision in *Harper*, which just two years later invoked the Equal Protection Clause to prohibit poll taxes in state and local elections.⁷⁹

4. The Twenty-Sixth Amendment

The Twenty-Sixth Amendment’s history is intimately linked to wars. The first congressional proposal to lower the voting age to eighteen was introduced in 1942, shortly after the U.S. entered World War II and the military decreased the draft age to eighteen. The Vietnam War, along with an unpopular draft and student mobilization, led to more successful efforts to enfranchise young adults.⁸⁰

In 1970, Congress reauthorized the temporary provisions of the VRA, which largely targeted the Jim Crow South. In that Act, Congress also lowered the voting age to eighteen for federal and state elections.⁸¹ At the time, only four States had voting ages lower than twenty-one.⁸² Congress’s actions here thus stand out for two reasons. First, Congress passed a statute regulating voter qualifications rather than pursue a constitutional amendment. Second, unlike those prior amendments, Congress was not policing outliers. In other words, very few States had already adopted more lenient voter qualifications. Unsurprisingly, the 1970 VRA was immediately challenged.

In *Oregon v. Mitchell*, a deeply fractured Court upheld Congress’s power to lower the voting age in federal elections but denied it that power in state elections.⁸³ In a solo opinion announcing the judgment of the Court, Justice Black reasoned that “Congress has ultimate supervisory power over congressional elections” in light of the Elections Clause and the Necessary and Proper Clause.⁸⁴ In Black’s view, Congress lacked similar oversight over state elections under Section Five of the Fourteenth Amendment given that the Equal Protection Clause was originally understood to exclude voting rights and that Congress was legislating against age—rather than racial—discrimination.⁸⁵ In four other opinions, the Justices sparred over whether the

⁷⁹ See Ackerman & Nou, *supra* note 72, at 68. Congress eventually followed the NAACP’s preferred strategy in Section 10 of the VRA, which declared that all poll taxes were unconstitutional and authorized the Department of Justice to bring suits against them. *See id.* at 108-11.

⁸⁰ See KEYSSAR, *supra* note 4, at 225-26; Yael Bromberg, *Youth Voting Rights and the Unfulfilled Promise of the Twenty-Sixth Amendment*, 21 U. PA. J. CONST. L. 1105, 1120-24 (2019).

⁸¹ Voting Rights Amendment Act of 1970, Pub. L. No. 91-285, tit. III, 84 Stat. 314, 318.

⁸² Those States were Alaska (19), Georgia (18), Hawaii (20), and Kentucky (18). *See Oregon v. Mitchell*, 400 U.S. 112, 245 n.28 (1970) (opinion of Brennan, White, and Marshall, JJ.).

⁸³ *See id.* at 117-18 (opinion of Black, J.).

⁸⁴ *Id.* at 124.

⁸⁵ *See id.* at 125-27.

original meaning of the Equal Protection Clause and the propriety of recent precedents—discussed below—extending that Clause to protect the fundamental right to vote.⁸⁶ Put simply, the *Mitchell* Court was unable to coalesce around a single rationale for its parsing of Congress’s power to impose voting qualifications.⁸⁷

Following *Mitchell*, the Twenty-Sixth Amendment was quickly adopted out of concerns that running the 1972 election with different minimum voting ages for federal and state elections would prove too bureaucratically costly and difficult.⁸⁸ In effect, the Twenty-Sixth Amendment lowered the voting age from twenty-one to eighteen nationwide.⁸⁹

III. The Fundamental Right to Vote

Notwithstanding this history of voting rights amendments, the Court currently interprets the Fourteenth Amendment’s Equal Protection Clause to encompass the right to vote. The Court first invoked the Equal Protection Clause to strike down a voting qualification in the 1927 case of *Nixon v. Herndon*, which invalidated Texas’s White primary.⁹⁰ But in the 1960s, the Warren Court radically changed its approach to the right to vote under the Equal Protection Clause. Although race was often a subtext of these decisions, the Court’s jurisprudence adopted universalist protections for the right to vote.⁹¹

1. The Old Regime

To see how quickly and dramatically the Court’s jurisprudence changed, consider its 1959 decision in *Lassiter v. Northampton County Board of Elections*.⁹² There, Black plaintiffs challenged North Carolina’s literacy test,⁹³ a common Jim Crow voter-suppression tool. As the case reached the Court, the key issue was whether the literacy test was *facially* invalid under

⁸⁶ See Eric S. Fish, *The Twenty-Sixth Amendment Enforcement Power*, 121 YALE L.J. 1168, 1190-93 (2012) (summarizing these opinions); see also *infra* Section III.2.

⁸⁷ For how the *Inter Tribal Council* Court would subsequently give *Mitchell* little precedential weight, see *supra* note 21.

⁸⁸ See KEYSSAR, *supra* note 4, at 227-28.

⁸⁹ For recent efforts to further lower the voting age at the local level, see Joshua A. Douglas, *The Right to Vote Under Local Law*, 85 GEO. WASH. L. REV. 1039, 1052-62 (2017).

⁹⁰ 273 U.S. 536, 541 (1927); see also *Hunter v. Underwood*, 471 U.S. 222, 233 (1985) (invalidating the felon-disenfranchisement provision of the Alabama Constitution on intentional-discrimination grounds under the Equal Protection Clause).

⁹¹ Because this chapter’s focus is on voter qualifications, it does not dwell on decisions that implicate Congress’s enforcement authority.

⁹² 360 U.S. 45 (1959).

⁹³ See *id.* at 45.

the Fourteenth Amendment; the plaintiffs did not raise a discriminatory intent claim.⁹⁴

In a unanimous opinion by Justice Douglas, the Court rejected the plaintiffs' challenge. Remarking that "States ... have broad powers" to set voter qualifications,⁹⁵ the Court explained that "[r]esidence requirements, age, [and] previous criminal record [were] obvious examples" of valid restrictions.⁹⁶ As for literacy tests, the Court observed that "[t]he ability to read and write likewise has some relation to standards designed to promote intelligent use of the ballot" and that "a State might conclude that only those who are literate should exercise their franchise."⁹⁷ Thus, as the civil rights movement entered its defining decade, *Lassiter* made clear that rational-basis review governed non-race-based challenges to voter qualifications under the Equal Protection Clause.⁹⁸

2. *The Warren Court*

In 1965, the tide began to turn. In *Carrington v. Rash*, the Court invalidated a Texas law that prohibited U.S. servicemembers who moved to the State from voting.⁹⁹ In defending the law, Texas cited its interest in stopping "concentrated balloting of military personnel" from overwhelming "small local civilian communit[ies]" as well as its interest in preventing mere "transients" from voting.¹⁰⁰ Acknowledging that States may "impose reasonable residence restrictions,"¹⁰¹ the Court concluded that Texas violated the Equal Protection Clause because it targeted servicemembers out of "fear of the[ir] political views"¹⁰² and "invidious[ly] discriminat[ed]" against them by imposing heightened residency requirements.¹⁰³ *Carrington* was the first time the Court invoked the Fourteenth Amendment to invalidate a voter qualification in a non-race case.¹⁰⁴ The harshness of Texas's ban on

⁹⁴ See *id.* at 50. The plaintiffs also brought their challenge under the Fifteenth and Seventeenth Amendments. See *id.*

⁹⁵ *Id.*

⁹⁶ *Id.* at 51 (internal citation omitted).

⁹⁷ *Id.* at 51-52.

⁹⁸ Congress would later prohibit the use of literacy tests, and the Court upheld that legislation as valid Fifteenth Amendment enforcement legislation. See *South Carolina v. Katzenbach*, 383 U.S. 301, 333-34 (1966) (upholding ban on literacy tests in covered jurisdictions); *Oregon v. Mitchell*, 400 U.S. 112, 132 (1970) (opinion of Black, J.) (upholding nationwide ban on literacy tests).

⁹⁹ 380 U.S. 89, 89 (1965).

¹⁰⁰ *Id.* at 93.

¹⁰¹ *Id.* at 91.

¹⁰² *Id.* at 94.

¹⁰³ *Id.* at 96.

¹⁰⁴ See *id.* at 97 (Harlan, J., dissenting).

servicemembers registering to vote may have played a role in the Court finding it irrational, but a series of later decisions would make plain that the standard of review was being ratcheted up.

In its 1966 decision in *Harper v. Virginia State Board of Elections*, the Court invalidated the poll tax on equal protection grounds.¹⁰⁵ Recall that, just two years earlier, the Twenty-Fourth Amendment banned poll taxes in *federal* elections. But *Harper* involved a challenge to Virginia's poll tax in state elections and therefore fell outside the recently ratified Amendment's plain text. Interestingly, Justice Douglas's majority opinion did not even acknowledge the Twenty-Fourth Amendment's existence.

The *Harper* Court adopted what is perhaps the most candidly living-constitutionalist reasoning contained in the U.S. Reports. Relying on the one-person, one-vote cases and *Brown*'s repudiation of segregated schools, the Court declared that "the Equal Protection Clause is not shackled to the political theory of a particular era" and that unconstitutional discrimination "ha[s] never been confined to historic notions of equality."¹⁰⁶ According to the Court, "once the franchise is granted to the electorate, lines may not be drawn that are inconsistent with the Equal Protection Clause."¹⁰⁷ In other words, the right to vote was a "fundamental right[] ... under the Equal Protection Clause" and any classification "must be closely scrutinized and carefully confined."¹⁰⁸ Building off this point, the Court explained that "[w]ealth, like race, creed, or color, is not germane to one's ability to participate intelligently in the electoral process."¹⁰⁹ The *Harper* Court thus overturned *Breedlove*¹¹⁰ and distinguished *Lassiter*'s approval of literacy tests on the grounds that the ability to read and write was germane to voting.¹¹¹

The Court's new approach to protecting voter qualifications came into "full flower"¹¹² in its 1969 decision in *Kramer v. Union Free School District*.¹¹³ In that case, "a 31-year old college-educated stockbroker who live[d] in his parents' home"¹¹⁴ challenged a New York law that limited the right to vote for school board elections to owners/lessee's of taxable property (or their spouses) and parents/guardians of children enrolled in public

¹⁰⁵ 383 U.S. 663 (1966).

¹⁰⁶ *Id.* at 669.

¹⁰⁷ *Id.* at 665.

¹⁰⁸ *Id.* at 670.

¹⁰⁹ *Id.* at 668.

¹¹⁰ *Id.* at 669.

¹¹¹ See *id.* 666.

¹¹² *Dunn v. Blumstein*, 405 U.S. 330, 362 (1972) (Blackmun, J., concurring in the result).

¹¹³ 395 U.S. 699 (1969).

¹¹⁴ *Id.* at 624.

schools.¹¹⁵ In one of Chief Justice Warren's final opinions, the Court held that strict scrutiny applies whenever a State "grants the right to vote to some bona fide residents of requisite age and citizenship and denies the franchise to others."¹¹⁶ The Court further explained that rational-basis review's deferential approach "assum[es] that the institutions of state government are structured so as to represent fairly all the people" and that challenges to voter qualification laws are "challenge[s] of this basic assumption."¹¹⁷ Thus, in invalidating New York's voting qualification,¹¹⁸ the *Kramer* Court went farther than *Harper* in applying strict scrutiny even in the absence of a classification like wealth.¹¹⁹

To be clear, the Court's new approach to the Equal Protection Clause did not go unchallenged. In a series of lengthy dissenting opinions, the second Justice Harlan argued that "the Equal Protection Clause was not intended to touch state electoral matters."¹²⁰ In defending what he viewed as the original public understanding of the Fourteenth Amendment, Harlan criticized the Court for "impos[ing] upon America an ideology of unrestrained egalitarianism."¹²¹ According to Harlan, the Court should have adhered to the rational-basis standard and respected the traditional role that States have played in setting voting qualifications.¹²²

Within a decade, the Court went from upholding the facial validity of literacy tests under a rational-basis standard to invalidating voting qualifications under strict scrutiny. The Court's arc from *Carrington* to *Harper* to *Kramer* is often categorized as the fundamental rights strand of equal protection.¹²³ This line of cases comes closest to acknowledging and

¹¹⁵ *Id.* at 623.

¹¹⁶ *Id.* at 627.

¹¹⁷ *Kramer*, 395 U.S. at 628.

¹¹⁸ See *id.* at 633.

¹¹⁹ The Warren and Burger Courts invalidated several other voter qualifications on Equal Protection grounds. See *Dunn v. Blumstein*, 405 U.S. 330, 336-37 (1972) (invalidating Tennessee's requirement that voters reside in the State for at least a year); *Phoenix v. Kolodziejski*, 399 U.S. 204, 212 (1970) (invalidating state law that restricted right to vote in general-obligation-bond elections to real property taxpayers); *Evans v. Corman*, 398 U.S. 419, 426 (1970) (requiring States to enfranchise residents of a federal enclave); *Cipriano v. City of Houma*, 395 U.S. 701, 706 (1969) (invalidating state law that restricted right to vote in municipal-bond elections to property taxpayers).

¹²⁰ *Carrington*, 380 U.S. at 97 (Harlan, J., dissenting); see also *Harper*, 383 U.S. at 681 (Harlan, J., dissenting); *Reynolds v. Sims*, 377 U.S. 533, 591-92 (1964) (Harlan, J., dissenting).

¹²¹ *Harper*, 383 U.S. at 686 (Harlan, J., dissenting).

¹²² See *id.* at 683-84.

¹²³ See, e.g., James A. Gardner, *Liberty, Community, and the Constitutional Structure of Political Influence: A Reconsideration of the Right to Vote*, 145 U. PA. L. REV. 893, 967 (1997). Beyond the voting rights context, this strand of equal protection jurisprudence has largely withered. See, e.g., *San Antonio Independent School District v. Rodriguez*, 411 U.S.

protecting an affirmative right to vote, even absent an explicit textual basis for that right.

3. Concurrent and Subsequent Developments

Although outside this chapter's scope, two concurrent developments should be mentioned to provide full context. First, the Court also applied the Equal Protection Clause in the redistricting context, initially to malapportionment¹²⁴ and then to racial vote dilution.¹²⁵ Second, Congress enacted the VRA, which the Court upheld as valid Fifteenth Amendment enforcement legislation.¹²⁶ Within a few years, the VRA helped to quickly enfranchise Black voters and narrow—but not close—the racial registration gap in the Southern States.¹²⁷ Viewing all of these changes as a whole and in context, the United States in the early 1970s was the most democratic it had ever been in its history.

One final point about current controversies. A contemporary reader might wonder what relevance the fundamental right to vote cases have to voter-suppression laws that have been passed in recent years, especially after the Supreme Court invalidated the VRA's coverage formula in *Shelby County v. Holder*.¹²⁸ These voter-suppression laws have raised *barriers* to the right to vote rather than changes to voting qualifications. In this context, the Court employs the so-called *Anderson/Burdick* balancing test.¹²⁹ If a burden on the right to vote is “severe,” then the law needs to satisfy strict scrutiny; but if the state “imposes only reasonable, nondiscriminatory restrictions … the State’s important regulatory interests are generally sufficient to justify the

1, 40 (1973) (declining to apply strict scrutiny in challenge to funding scheme for public K-12 education).

¹²⁴ See, e.g., *Reynolds v. Sims*, 377 U.S. 533, 568 (1964). Technically, the Equal Protection Clause is only relevant to the one-person, one-vote requirement for state-legislative districts. For congressional districts, the Court relied on Article I's requirement that representatives be elected by the people. See *Wesberry v. Sanders*, 376 U.S. 1, 7-8 (1964).

¹²⁵ See *White v. Regester*, 412 U.S. 755, 765-66 (1973). In the 1990s, the Court would also apply the Equal Protection Clause to racial gerrymanders. See *Shaw v. Reno*, 509 U.S. 630, 649 (1993).

¹²⁶ See *South Carolina v. Katzenbach*, 383 U.S. 301, 337 (1966); see also *Katzenbach v. Morgan*, 384 U.S. 641, 646 (1966) (upholding Section 4(e) of the VRA, which protected the voting rights of Puerto Ricans living in New York, as valid Fourteenth Amendment enforcement legislation).

¹²⁷ See, e.g., S. Rep. No. 94-295, at 13 (1975).

¹²⁸ 570 U.S. 529, 557 (2013).

¹²⁹ See *Burdick v. Takushi*, 504 U.S. 428, 551-42 (1992); *Anderson v. Celebreeze*, 460 U.S. 780, 805-06 (1983); see also Derek T. Muller, *The Democracy Ratchet*, 94 IND. L.J. 451, 474-81 (2019).

restrictions.”¹³⁰ As a general matter, the *Anderson/Burdick* balancing test has not prevented States from adopting restrictive measures like photo ID laws.¹³¹

IV. Contextualizing the Right to Vote

In this final Section, I identify a few themes that emerge from this historical narrative and chart paths for future research into the voting rights amendments.

1. Themes

Three themes emerge from the constitutional expansion of the right to vote. First, the electorate has often been broadened in response to military conflict.¹³² Black men’s service in the Union Army proved critical to their enfranchisement via the First Reconstruction Act and the Fifteenth Amendment. Women’s mobilization in support of the war effort during World War I helped secure support for the Nineteenth Amendment. And the draft during the Vietnam War was the major impetus for the Twenty-Sixth Amendment.

Second, federalism has been a virtue and a vice. On the one hand, federalism has allowed for experimentation at the state-level. Western States and territories blazed a path forward on women’s enfranchisement. The Twenty-Fourth Amendment was an exercise in policing outliers in the Jim Crow South. Our federal system also leaves some room for Congress. Congress’s role was perhaps most prominent during Reconstruction. Recall that Congress exercised its authority to prohibit racial discrimination in voting in areas of federal control, which, given the recent Civil War, included the Reconstructed South.

But on the other hand, the Constitution’s federal structure has repeatedly limited Congress’s ability to protect the right to vote from State infringement. The Reconstruction Congress declined to enact a nationwide Black male suffrage *statute* against the States. The subsequent lack of congressional oversight during Jim Crow allowed several Southern States to backslide and effectively disenfranchise their Black populations. And although Congress attempted to lower the voting age in 1970, a fractured Court upheld that authority only as to federal elections and without agreeing on a single rationale.

¹³⁰ *Burdick*, 504 U.S. at 434 (internal quotation marks omitted).

¹³¹ See *Crawford v. Marion County Election Board*, 553 U.S. 181, 203-04 (2008) (plurality opinion).

¹³² See, e.g., Pamela S. Karlan, *Ballots and Bullets: The Exceptional History of the Right to Vote*, 71 U. CIN. L. REV. 1345 (2003).

Finally, the Court has played a prominent part in this narrative. The Court's decisions in *Minor*, *Breedlove*, and *Mitchell* were setbacks in the expansion of the right to vote but, ultimately, those decisions helped set in motion the adoption of targeted constitutional amendments—as opposed to mere statutes—that expanded the right to vote. It was not until the Warren Court's expansive interpretation of the Equal Protection Clause that anything close to a universal, affirmative right to vote has been recognized under our federal Constitution.

2. Paths Forward

To be crystal clear, the fact that the Equal Protection Clause was originally understood to exclude voting rights is not the equivalent of saying that the Warren Court's decisions were wrongly decided or indefensible as precedent. After all, law is “methodologically eclectic.”¹³³ But given the ascendancy of originalism and the disrespect for *stare decisis* on the current Supreme Court, many of these decisions are at serious risk of reconsideration. Indeed, Justice Thomas, often at the vanguard of the Court's originalists, has signaled his support for Harlan's approach in malapportionment cases.¹³⁴ So how should the academy respond?

For starters, there are other potential fonts for protecting the fundamental right to vote than the original understanding of the Equal Protection Clause. In response to the Warren Court's decisions, Professor John Hart Ely famously advanced his political-process theory, arguing that courts should invalidate laws to open the channels of political change.¹³⁵ More recently, Professors Randy Barnett and Evan Bernick have claimed that, in light of the voting rights amendments, the Privileges or Immunities Clause should now be read to protect a fundamental right to vote.¹³⁶ Professor Pam Karlan has argued that substantive due process is a more appropriate doctrinal hook than equal protection.¹³⁷ Professor Franita Tolson has advocated reading Sections Two and Five of the Fourteenth Amendment in tandem and as evidence of “the Reconstruction Congress's attempt to constitutionalize a mechanism that

¹³³ Heather K. Gerken, *Resisting the Theory/Practice Divide: Why the “Theory School” is Ambitious about Practice*, 132 HARV. L. REV. FORUM 134, 144 (2019).

¹³⁴ See *Evenwel v. Abbott*, 578 U.S. 54, 87 (2016) (Thomas, J., concurring in the judgment); see also Travis Crum, *Deregulated Redistricting*, 107 CORNELL L. REV. 359, 428-34 (2022) (discussing open questions in the malapportionment context).

¹³⁵ See JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 99 (1980).

¹³⁶ See RANDY E. BARNETT & EVAN D. BERNICK, THE ORIGINAL MEANING OF THE FOURTEENTH AMENDMENT: ITS LETTER AND SPIRIT 367-68 (2021).

¹³⁷ See Pamela S. Karlan, *Unduly Partial: The Supreme Court and the Fourteenth Amendment in Bush v. Gore*, 29 FLA. ST. U. L. REV. 587, 593-99 (2001).

would allow Congress to all but legislate universal suffrage.”¹³⁸

Another path is a revival of the forgotten voting rights amendments. Given the current interpretation of the Fourteenth Amendment and given that most racial discrimination cases are litigated under the VRA, the voting rights amendments are relatively underdeveloped. Consider the Fifteenth Amendment, which has received the most judicial attention. The Court has not answered two key questions about the Fifteenth Amendment: whether the Fifteenth Amendment extends to redistricting or includes an intent requirement. As for redistricting, a plurality found that the Fifteenth Amendment does not extend that far, but the Court has subsequently stated that the issue remains open.¹³⁹ As to the second question, a plurality concluded there is an intent element,¹⁴⁰ but a majority has never held that. As I have written elsewhere, a doctrinal approach that takes the Fifteenth Amendment seriously as an independent constitutional provision would have a distinctive flavor than the Court’s colorblind intuitions in equal protection cases.¹⁴¹

Lower courts have adopted narrow readings of the other voting rights amendments. For instance, the Eleventh Circuit recently held that the Nineteenth Amendment has an intent element.¹⁴² And the Fifth Circuit concluded that the Twenty-Sixth Amendment was not violated when Texas permitted senior citizens to obtain no-excuse mail-in ballots. According to the Fifth Circuit, “the right to vote in 1971 did not include a right to vote by mail” and therefore extending the right to no-excuse mail-in ballots only to senior citizens did not “abridge” that right.¹⁴³

Courts have often read the voting rights amendments *in pari materia* and therefore whatever interpretation is adopted for one is likely to be adopted for all. Given the sheer number of open doctrinal questions in this area, scholars have ample room to engage in historical research and normative argumentation about the voting rights amendments.

¹³⁸ Franita Tolson, *What is Abridgment?: A Critique of Two Section Twos*, 67 ALA. L. REV. 433, 458 (2015).

¹³⁹ See *City of Mobile v. Bolden*, 446 U.S. 55, 65 (1980) (plurality opinion) (interpreting the Fifteenth Amendment as limited to “register[ing] and vot[ing] without hindrance”); *Voinovich v. Quilter*, 507 U.S. 146, 159 (1993) (“This Court has not decided whether the Fifteenth Amendment applies to vote-dilution claims.”).

¹⁴⁰ See *Bolden*, 446 U.S. at 62 (plurality opinion).

¹⁴¹ See Crum, *Superfluous*, *supra* note 36, at 1623-29; Crum, *Reconstructing*, *supra* note 47, at 320-30.

¹⁴² See *Jones v. Governor of Florida*, 15 F.4th 1062, 1067-68 (11th Cir. 2021) (rejecting Nineteenth Amendment challenge to Florida law that required ex-felons to pay all legal financial obligations before restoring their right to vote).

¹⁴³ *Texas Democratic Party v. Abbott*, 978 F.3d 168, 188 (5th Cir. 2020).

BIBLIOGRAPHY

- Ackerman, Bruce & Jennifer Nou, *Canonizing the Civil Rights Revolution: The People and the Poll Tax*, 103 NW. U. L. REV. 63 (2009).
- Amar, Akhil Reed, AMERICA'S CONSTITUTION: A BIOGRAPHY (2005).
- AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY (2012).
- Amar, Vikram David, *Jury Service as Political Participating Akin to Voting*, 80 CORNELL L. REV. 203 (1995).
- Balkin, Jack M., *The Reconstruction Power*, 85 N.Y.U. L. REV. 1801 (2010).
- Barnett, Randy E. & Evan D. Bernick, THE ORIGINAL MEANING OF THE FOURTEENTH AMENDMENT: ITS LETTER AND SPIRIT (2021).
- Boudin, Louis B., *State Poll Taxes and the Federal Constitution*, 28 VA. L. REV. 1 (1941).
- Bromberg, Yael, *Youth Voting Rights and the Unfulfilled Promise of the Twenty-Sixth Amendment*, 21 U. PA. J. CONST. L. 1105 (2019).
- Crum, Travis, *Deregulated Redistricting*, 107 CORNELL L. REV. 359, 428-34 (2022).
- *The Lawfulness of the Fifteenth Amendment*, 97 NOTRE DAME L. REV. 1543 (2022).
- *The Superfluous Fifteenth Amendment?*, 114 NW. U. L. REV. 1549 (2020).
- *Reconstructing Racially Polarized Voting*, 70 DUKE L.J. 261 (2020).
- Douglas, Joshua A., *The Right to Vote Under Local Law*, 85 GEO. WASH. L. REV. 1039 (2017).
- Ely, John Hart, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980).
- Fish, Eric S., *The Twenty-Sixth Amendment Enforcement Power*, 121 YALE

L.J. 1168 (2012).

Free, Laura, SUFFRAGE RECONSTRUCTED: GENDER, RACE, AND VOTING RIGHTS IN THE CIVIL WAR ERA (2015).

Foner, Eric, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877 (1988).

----- THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION (2019).

Gardner, James A., *Liberty, Community, and the Constitutional Structure of Political Influence: A Reconsideration of the Right to Vote*, 145 U. PA. L. REV. 893 (1997).

Gerken, Heather K., *Resisting the Theory/Practice Divide: Why the “Theory School” is Ambitious about Practice*, 132 HARV. L. REV. FORUM 134 (2019).

Gillette, William, THE RIGHT TO VOTE: POLITICS AND PASSAGE OF THE FIFTEENTH AMENDMENT (2d ed. 1969).

Hasen, Richard L., *Leaving the Empty Vessel of “Republicanism” Unfilled: An Argument for the Continued Nonjusticiability of Guarantee Clause Cases*, in THE POLITICAL QUESTION DOCTRINE AND THE SUPREME COURT OF THE UNITED STATES (Nada Mourtada-Sabbah & Bruce E. Cain, eds., 2007).

Issacharoff, Samuel, *Beyond the Discrimination Model on Voting*, 127 HARV. L. REV. 95 (2013).

Jones, Martha S., VANGUARD: HOW BLACK WOMEN BROKE BARRIERS, WON THE VOTE, AND INSISTED ON EQUALITY FOR ALL (2020).

Karlan, Pamela S., *Ballots and Bullets: The Exceptional History of the Right to Vote*, 71 U. CIN. L. REV. 1345 (2003).

----- *Unduly Partial: The Supreme Court and the Fourteenth Amendment in Bush v. Gore*, 29 FLA. ST. U. L. REV. 587 (2001).

Katz, Elizabeth D., *Sex, Suffrage, and State Constitutional Law: Women's Legal Right to Hold Office*, 33 YALE J. L. & FEM. 110 (2022).

Key, Jr., V.O., SOUTHERN POLITICS IN STATE AND NATION (1949).

KEYSSAR, ALEXANDER, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES (rev. ed. 2009).

Kousser, J. Morgan, THE SHAPING OF SOUTHERN POLITICS: SUFFRAGE RESTRICTIONS AND THE ESTABLISHMENT OF THE ONE-PARTY SOUTH, 1880-1910 (1974).

Lash, Kurt, ed., 1 THE RECONSTRUCTION AMENDMENTS: THE ESSENTIAL DOCUMENTS (2021).

----- 2 THE RECONSTRUCTION AMENDMENTS: THE ESSENTIAL DOCUMENTS (2021).

Magliocca, Gerard N., *Our Unconstitutional Reapportionment Process*, 86 GEO. WASH. L. REV. 774 (2018).

Maltz, Earl M., CIVIL RIGHTS, THE CONSTITUTION, AND CONGRESS, 1863-1869 (1990).

Mathews, John Mabry, LEGISLATIVE AND JUDICIAL HISTORY OF THE FIFTEENTH AMENDMENT (1909).

McConnell, Michael W., *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947 (1995).

McDonald, Laughlin, AMERICAN INDIANS AND THE FIGHT FOR EQUAL VOTING RIGHTS (2010).

Muller, Derek T., *The Democracy Ratchet*, 94 IND. L.J. 451 (2019).

Pildes, Richard H., *The Future of Voting Rights Policy: From Anti-Discrimination to the Right to Vote*, 49 HOW. L.J. 741 (2006).

Raskin, Jamin B., *Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage*, 141 U. PA. L. REV. 1391 (1993).

Siegel, Reva B., *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947 (2002).

Shapiro, Carolyn, *Democracy, Federalism, and the Guarantee Clause*, 62 ARIZ. L. REV. 183 (2020).

Tolson, Franita, *What is Abridgment?: A Critique of Two Section Twos*, 67 ALA. L. REV. 433 (2015).

----- *The Constitutional Structure of Voting Rights Enforcement*, 89 WASH. L. REV. 379 (2014).

----- *The Spectrum of Congressional Authority Over Elections*, 99 B.U. L. REV. 317 (2019).

Van Alstyne, William W., *The Fourteenth Amendment, the “Right” to Vote, and the Understanding of the Thirty-Ninth Congress*, 1965 S. CT. REV. 33 (1965).

Williams, Ryan C., *The “Guarantee” Clause*, 132 HARV. L. REV. 602 (2018).

Williamson, Chilton, AMERICAN SUFFRAGE: FROM PROPERTY TO DEMOCRACY, 1760-1860 (1960).

Wang, Xi, THE TRIAL OF DEMOCRACY: BLACK SUFFRAGE AND NORTHERN REPUBLICANS, 1860-1910 (1997).

CASES CITED

Anderson v. Celebreeze, 460 U.S. 780 (1983).

Arizona v. Inter Tribal Council of Arizona, Inc., 570 U.S. 1 (2013).

Breedlove v. Suttles, 302 U.S. 277 (1937).

Burdick v. Takushi, 504 U.S. 428 (1992).

Carrington v. Rash, 380 U.S. 89 (1965).

Chiafalo v. Washington, 140 S. Ct. 2316 (2020).

Cipriano v. City of Houma, 395 U.S. 701 (1969).

City of Mobile v. Bolden, 446 U.S. 55 (1980).

Crawford v. Marion County Election Board, 553 U.S. 181 (2008).

Dunn v. Blumstein, 405 U.S. 330 (1972).

Evans v. Corman, 398 U.S. 419 (1970).

Evenwel v. Abbott, 578 U.S. 54 (2016).

Harper v. Virginia State Board of Elections, 383 U.S. 663 (1966).

Hunter v. Underwood, 471 U.S. 222 (1985).

Jones v. Governor of Florida, 15 F.4th 1062 (11th Cir. 2021).

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

Kramer v. Union Free School District, 395 U.S. 699 (1969).

Lassiter v. Northampton County Board of Elections, 360 U.S. 45 (1959).

Luther v. Bolden, 48 U.S. 1 (1849).

McDonald v. City of Chicago, 561 U.S. 742 (2010).

Minor v. Happersett, 88 U.S. 162 (1875).

Nixon v. Herndon, 273 U.S. 536 (1927).

Oregon v. Mitchell, 400 U.S. 112 (1970).

Phoenix v. Kolodziejksi, 399 U.S. 204 (1970).

Reynolds v. Sims, 377 U.S. 533 (1964).

San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973).

Shaw v. Reno, 509 U.S. 630 (1993).

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

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

Texas Democratic Party v. Abbott, 978 F.3d 168 (5th Cir. 2020).

Voinovich v. Quilter, 507 U.S. 146 (1993).

Wesberry v. Sanders, 376 U.S. 1 (1964).

White v. Regester, 412 U.S. 755 (1973).