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COLORBLINDNESS, RACE NEUTRALITY, AND VOTING RIGHTS

Henry L. Chambers, Jr.*

ABSTRACT

The Reconstruction Amendments' guarantee of civil rights and political equality for racial minorities means that with respect to voting and representation, race-neutral results should be as much a constitutional imperative as colorblind process. As such, a colorblind electoral rule that unintentionally lessens the ability of a minority group to vote or to choose its candidate of choice should be deemed unconstitutional under the Fifteenth Amendment, not merely unlawful under the Voting Rights Act, unless the jurisdiction can provide a strong justification for the rule focused on why such a rule is reasonably necessary to safeguard the electoral process. This change could result in significant restructuring of voting qualifications and districting plans.

INTRODUCTION

"[Voting] is regarded as a fundamental political right, because [it is] preservative of all rights."

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

"A representative legislature should be an exact portrait, in miniature, of the people at large, as it should think, feel, reason and act like them."

—John Adams¹

When the current round of reapportionment spawns voting rights cases, courts will interpret the Voting Rights Act. The Supreme Court's apparent

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¹ Quoted in HANNA FENICHEL PITKIN, REPRESENTATION 73 (1969).

willingness to reexamine and overturn portions of civil rights statutes that it believes are improper exercises of congressional power suggests the possibility that the Voting Rights Act, or at least some part of it, may not survive the court's scrutiny.² This possibility requires that we consider anew what protections are or should be provided to voting rights directly by the Constitution, an issue that has largely been moot since the passage of the expansive 1982 Amendments to the Voting Rights Act which provide more protection to voting rights than the Constitution.³ Consequently, this Article focuses on the constitutional imperatives that should inform voting rights jurisprudence.

The Fourteenth and Fifteenth Amendments protect minority voting rights. The Fourteenth Amendment requires the racially equal distribution of rights—including voting rights. The Fifteenth Amendment protects the right to vote from race-based infringement. Though their protections appear quite similar, the Fourteenth Amendment focuses largely on equal process as the Fifteenth Amendment focuses on the substance of providing former slaves and their progeny the equal right to vote and affect elections. This difference should yield different ways of protecting minority voting rights under each amendment.

The basics of constitutional voting rights jurisprudence are simple. Voting or electoral rules that stem from discriminatory intent (the intent to treat people differently based on their race) are subject to strict scrutiny and usually are unconstitutional; rules that do not stem from discriminatory intent are presumed constitutional. Thus, color-conscious rules are subject to strict scrutiny, as are colorblind rules that are enacted or administered with discriminatory intent. Conversely, colorblind rules that have discriminatory

² See, e.g., *United States v. Morrison*, 529 U.S. 598 (2000); *City of Boerne v. Flores*, 521 U.S. 507 (1997); see also 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, 896 (1997) (suggesting that a reconsideration of the constitutionality of portions of the Voting Rights Act might be in the offing); Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 HARV. L. REV. 1663, 1674 (2001) (noting that *City of Boerne v. Flores* may have an impact on continued vitality of parts of the Voting Rights Act); Pamela S. Karlan, *Two Section Twos and Two Section Fives: Voting Rights and Remedies After Flores*, 39 WM. & MARY L. REV. 725, 726 (1998) (mounting a defense of the Voting Rights Act that appears to be prompted by *City of Boerne v. Flores*).

³ See Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131 (codified as amended at 42 U.S.C. §§ 1973, 1973b, 1973aa-1a & 1973aa-6 (2000)) (providing an effects test making electoral rules yielding racial effects unlawful).

effects are constitutional as long as they are not enacted or applied with discriminatory intent.⁴

This structure of protecting voting rights stems from a Fourteenth Amendment vision that views equality of process as the constitutional touchstone. Many commentators have addressed colorblindness and the discriminatory intent requirement under the Fourteenth and Fifteenth Amendments generally, and specifically in the context of whether race-based solutions providing equal representation are constitutional.⁵ However, fewer have commented on how or whether a single-minded focus on process—which currently underlies the constitutional analysis of voting rights—is sensible given the rights the Amendments are to provide or protect. At issue is whether a voting rights structure incorporating a Fifteenth Amendment vision of substantive political equality for former slaves and their progeny is or should be different than the Fourteenth Amendment-based structure that currently exists. This Article examines how minority voting rights ought to be protected by both the Fifteenth and Fourteenth Amendments.

This Article challenges the Court's preference for a Fourteenth Amendment colorblindness (procedural equality) vision over a Fifteenth Amendment race neutrality (substantive equality) vision respecting electoral rules and makes two points. First, with respect to minority voting rights, race neutrality must be as much a constitutional imperative as colorblindness. Second, any electoral rule that lessens the likelihood of substantive political equality for a minority group should be deemed unconstitutional under the Fifteenth Amendment subject to a state's strong justification for having the rule. This Article's structure is simple. Part I briefly analyzes the Thirteenth and Fourteenth Amendments and how those amendments generally protect rights. Part II discusses how the Reconstruction Amendments protect voting rights.

⁴ However, such rules are made unlawful by the Voting Rights Act. See 42 U.S.C. § 1973(a):

No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color

⁵ Some commentators have noted that race should be a factor in districting when necessary to provide substantive equality. See, e.g., Bernard Grofman, *The Supreme Court, the Voting Rights Act, and Minority Representation*, in *AFFIRMATIVE ACTION AND REPRESENTATION: SHAW V. RENO AND THE FUTURE OF VOTING RIGHTS* 199 (Anthony A. Peacock ed., 1997) ("In a world of race-conscious voting, race-conscious remedies are needed. But we must be careful that a zeal to purge race from the districting process not retard the integration of the halls of our legislatures."); Emma Coleman Jordan, *Taking Voting Rights Seriously: Rediscovering the Fifteenth Amendment*, 64 NEB. L. REV. 389, 442 (1985) (noting circumstances under which race should be allowed as districting factor).

Part III suggests a new method of assessing the constitutionality of electoral rules and outlines implications of using this new method to protect voting rights.

I. THE THIRTEENTH AND FOURTEENTH AMENDMENTS, COLORBLINDNESS, AND RACE NEUTRALITY

The Constitution, most directly through the Reconstruction Amendments (Thirteenth, Fourteenth, and Fifteenth Amendments),⁶ ensures that all citizens enjoy the same legal and political rights, including voting rights.⁷ However, it is impossible to understand voting rights jurisprudence fully without first understanding the rights the Thirteenth and Fourteenth Amendments provide and how the Amendments protect those rights. The Thirteenth and Fourteenth Amendments were passed in the wake of the Civil War to make former slaves and their progeny first-class citizens and full participants in the life of the country.⁸ However, in requiring racial equality with respect to legal rights granted under the Constitution and by federal and state governments, the Thirteenth and Fourteenth Amendments as passed did not provide full political and social equality.⁹

⁶ The Reconstruction Amendments can be read separately, but should be read together and mutually inform each other. See, e.g., Akhil Reed Amar, *The Supreme Court 1999 Term, Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 62-63 (2000) (arguing that the Thirteenth Amendment's call for equality among citizens provides the context for interpreting the Fourteenth and Fifteenth Amendments).

⁷ Other amendments passed after the Reconstruction Amendments provide support for a near-universal right to vote. See U.S. CONST. amend. XIX (ending sex-based restrictions on the right to vote); *id.* amend. XXIV (eliminating the poll tax); *id.* amend. XXVI (lowering the voting age to 18).

⁸ See *The Slaughterhouse Cases*, 83 U.S. (16 Wall.) 36, 71 (1872):

We repeat, then, in the light of this recapitulation of events, almost too recent to be called history, but which are familiar to us all; and on the most casual examination of the language of these amendments, no one can fail to be impressed with the one pervading purpose found in them all, lying at the foundation of each, and without which none of them would have been even suggested; we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him.

See also Herman Belz, *The Constitution and Reconstruction*, in THE FACTS OF RECONSTRUCTION 190 (Eric Anderson & Alfred A. Moss, Jr. eds., 1991) ("Reconstruction, in the sense that is most pertinent to us today, consisted in the civil rights settlement embodied in the Thirteenth, Fourteenth, and Fifteenth amendments, which together nationalized civil liberty in the United States."); Douglas L. Colbert, *Liberating the Thirteenth Amendment*, 30 HARV. C.R.-C.L. L. REV. 1, 5 (1995) ("These debates [regarding the Thirteenth Amendment] reveal Congress's intent to define the Amendment's core values as freedom rights. During Reconstruction, legislators overwhelmingly approved a series of affirmative measures necessary to include African Americans as full members of civil society.").

⁹ See James U. Blacksher, *Dred Scott's Unwon Freedom: The Redistricting Cases as Badges of Slavery*,

A. *The Thirteenth Amendment*

The Thirteenth Amendment abolishes slavery and allows Congress to enforce the amendment through legislation,¹⁰ including that which outlaws badges and incidents of slavery.¹¹ By outlawing slavery,¹² the Thirteenth Amendment arguably created a single class of citizens to whom legal equality was to be provided,¹³ thereby extending basic constitutional principles of freedom to all former slaves.¹⁴ What positive rights, if any, were granted as a result of the Thirteenth Amendment is not clear,¹⁵ and depends largely on whether slavery is defined as a set of specific limitations on an individual or the more general condition of not having the rights of a free person.¹⁶ If

39 How. L.J. 633, 647 (1996) (“The essential holding of the *Civil Rights Cases* was that the Enforcement Clauses of the Thirteenth and Fourteenth Amendments had not given Congress the authority affirmatively to force whites to accept blacks as social equals . . .”); *infra* note 34.

¹⁰ The first section of the Thirteenth Amendment reads:

Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

U.S. CONST. amend. XIII, § 1.

¹¹ See *The Civil Rights Cases*, 109 U.S. 3, 22-23 (1883) (allowing that the Thirteenth Amendment provides Congress the right to outlaw the badges and incidents of slavery). The Court apparently recognized that it would be pointless to tell black citizens that they were not slaves if they could be treated as slaves. Whether the Thirteenth Amendment automatically outlawed the badges and incidents of slavery or whether Congress must affirmatively outlaw them is arguably still open to question. See Jacobus tenBroek, *Thirteenth Amendment to the Constitution of the United States*, 39 CAL. L. REV. 171, 172 (1951) (suggesting that the early decisions of the Supreme Court indicated that the Thirteenth Amendment had not automatically outlawed badges and incidents of slavery).

¹² See *The Civil Rights Cases*, 109 U.S. at 20 (“This [Thirteenth] Amendment, as well as the Fourteenth, is undoubtedly self-executing without any ancillary legislation, so far as its terms are applicable to any existing state of circumstances. By its own unaided force and effect it abolished slavery, and established universal freedom.”).

¹³ See Colbert, *supra* note 8, at 6 (“The congressional debates accompanying the Thirteenth Amendment and the Civil Rights Act of 1866 reveal Congress’s understanding of freedom and the constitutional guarantees that accompanied slavery’s abolition.”); tenBroek, *supra* note 11, at 177-78 (noting that the point of the Thirteenth Amendment was to grant real equality to former slaves and that that was to be done by eliminating the incidents of slavery).

¹⁴ See HERMAN BELZ, *ABRAHAM LINCOLN, CONSTITUTIONALISM AND EQUAL RIGHTS IN THE CIVIL WAR ERA 174-75* (1998) (arguing that one purpose of the Thirteenth Amendment “was to complete the American system of liberty and constitutionalize the Declaration of Independence”).

¹⁵ See *id.* at 177-78 (arguing that the framers of the Thirteenth Amendment intended it to abrogate the master-slave relationship, as the ban on slavery in the Northwest Ordinance did, but did not necessarily intend that it would provide additional rights).

¹⁶ See *The Civil Rights Cases*, 109 U.S. at 22 (suggesting that the Civil Rights Act of 1866, passed pursuant to the Thirteenth Amendment, attempted to secure for former slaves every right “as is enjoyed by white citizens”); Colbert, *supra* note 8, at 8-9 (suggesting that protecting specific rights of free men, rather than outlawing the general notion of slavery was the Thirteenth Amendment’s goal); tenBroek, *supra* note 11,

slavery is the former, the Thirteenth Amendment merely allowed the outlawing of particular practices that were part and parcel of the institution of slavery and provided the right not to be subject to such practices. This position finds support in the *Civil Rights Cases*, where the Supreme Court noted:

The long existence of African slavery in this country gave us very distinct notions of what it was, and what were its necessary incidents. Compulsory service of the slave for the benefit of the master, restraint of his movements except by the master's will, disability to hold property, to make contracts, to have a standing in court, to be a witness against a white person, and such like burdens and incapacities, were the inseparable incidents of the institution.¹⁷

Focusing on what chattel slavery entailed suggests that the Thirteenth Amendment may have only provided former slaves a set of rights necessary to raise them to nonslave status,¹⁸ but not necessarily the rights sufficient to raise them to the status of white citizens in general and white men in particular.¹⁹

Conversely, if slavery is the absence of freedom, being provided the legal rights of a free citizen is the measure of whether one is or is not a slave.²⁰

at 194 (“The Thirteenth Amendment’s abolition of slavery, therefore, is a declaration ‘that all persons in the United States should be free.’ But what is freedom? Freedom is the possession of those rights which were denied to the slave, i.e., natural or civil rights.”); see also *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 443 (1968):

At the very least, the freedom that Congress is empowered to secure under the Thirteenth Amendment includes the freedom to buy whatever a white man can buy, the right to live wherever a white man can live. If Congress cannot say that being a free man means at least this much, then the Thirteenth Amendment made a promise the Nation cannot keep.

¹⁷ See *The Civil Rights Cases*, 109 U.S. at 22.

¹⁸ Though the Thirteenth Amendment clearly affords some level of freedom, see *id.* (suggesting that the Thirteenth Amendment, or Congress’s conception of it, existed to help “vindicate those fundamental rights which appertain to the essence of citizenship, and the enjoyment or deprivation of which constitutes the essential distinction between freedom and slavery”), that freedom may be minimal. Indeed, a broad reading of the Thirteenth Amendment is plausible, but not self-evident. See tenBroek, *supra* note 11, at 177-81 (arguing that the debates regarding the passage of the Thirteenth Amendment suggest a broad reading of the Amendment and what it abolished).

¹⁹ Indeed, the Civil Rights Act of 1866—written to secure rights resulting from the Thirteenth Amendment—was relatively mild, even as it attempted to secure citizenship for freedmen. See BELZ, *supra* note 14, at 180-82 (noting the mild nature of the Civil Rights Act of 1866). At the time the Thirteenth Amendment was passed, a slave could have been raised to the status of a free black or a white woman and still not have enjoyed all of the rights a white man had. For example, the right to vote was one right available to many white male citizens that was not available to all other citizens.

²⁰ An aggressive view of the Thirteenth Amendment could lead courts to determine that all manner of race-based action is made unconstitutional by the Thirteenth Amendment. See Colbert, *supra* note 8, at 49-52 (providing bibliography of scholarship using the Thirteenth Amendment in very creative ways); see also, Akhil Reed Amar, *The Case of the Missing Amendments: R.A.V. v. City of St. Paul*, 106 HARV. L. REV. 124,

Thus, any legal right afforded to white citizens that was systematically denied to slaves could be viewed as a badge or incident of slavery subject to outlaw or already outlawed under the Thirteenth Amendment.²¹ This suggests that the Thirteenth Amendment could apply to any form of state-endorsed or state-sponsored racial discrimination or disability that can be traced to a pre-1865 limitation on slaves or on free blacks who were treated as less than full citizens.²² As such, any practice that may create or perpetuate a lower status for an identifiable group of people by differentiating the rights of the progeny of former slaves from the rights of other citizens arguably can be viewed as a badge or incident of slavery subject to outlaw by the Thirteenth Amendment.²³

155-60 (1992) (arguing that the Court should have undertaken a Thirteenth Amendment analysis in determining if punishing cross-burning as a specific crime ran afoul of the Constitution). *But see* Alex Kozinski & Eugene Volokh, *A Penumbra Too Far*, 106 HARV. L. REV. 1639, 1648-51 (1993) (arguing that the fuzziness of the Thirteenth Amendment argument cannot override the clarity of the First Amendment protection given to speech, such as cross-burning).

²¹ A difference in approach to lawful limitations on black citizens can be seen in the ways one could view the Black Codes—the limitations on newly-freed slaves and free blacks—passed by southern states just after the Civil War. *See* Colbert, *supra* note 8, at 11-12 (stating the Black Codes were meant to perpetuate slavery); tenBroek, *supra* note 11, at 188 (“A great deal was said about the infamous Black Codes [in the Thirteenth Amendment debates]. They were only less rigorous than the slave codes which they had replaced.”). To the extent that the Black Codes did not technically reestablish slavery, they could be viewed as delineating valid restrictions on free people still subject to control by the state and thus merely subject to invalidation under the Thirteenth Amendment. *Cf. The Civil Rights Cases*, 109 U.S. at 21-22 (explaining that while some discrimination in public accommodations may have had its genesis in innkeepers not wanting to harbor blacks who may or may not have been slaves, such discrimination was not an incident of slavery). Conversely, they could be considered the very essence of badges and incidents of slavery because they attempted to reestablish a relationship among citizens that more resembled quasi-slavery than one among fellow citizens. The passage of the Civil Rights Act of 1866 and the Fourteenth Amendment ended the official sanction of the Black Codes.

²² Of course, commentators have linked slavery to post-Civil War treatment of blacks as second-class citizens. *See, e.g.,* MILTON D. MORRIS, *THE POLITICS OF BLACK AMERICA* 50-52 (1975) (noting that slavery created the context for the subordination of blacks before and after the Civil War); *see also* Blacksher, *supra* note 9, at 639 (noting that “[e]ven free blacks bore the badge of slavery” with respect to their exclusion from the Constitution’s formation); Colbert, *supra* note 8, at 3-4 (“Moreover, by reviving the debate over the constitutional meaning of freedom rights, the *Jones* opinion compels courts to consider whether existing racial injustices are traceable to slavery or segregation . . .”).

²³ Whether and what rights were granted by the Thirteenth Amendment might depend on whether it was to be viewed as an end or a beginning. *See* tenBroek, *supra* note 11, at 176. It has been argued that the framers of the Thirteenth Amendment viewed it as an end:

The amendment was presented not as one step in a series of steps yet to come, not as an act of partial fulfillment, not as the opportunistic achievement of a limited objective. It was exultantly held up as “the final step,” “the crowning act,” “the capstone upon the sublime structure”; the joyous “consummation of abolitionism.”

But see Colbert, *supra* note 8, at 11 (suggesting that the passage of the Thirteenth Amendment was the starting point of defining liberty and freedom for former slaves).

Viewing the badges and incidents of slavery in this manner would recast their content much more broadly than the *Civil Rights Cases* Court did.²⁴

However, there is little practical need to read the Thirteenth Amendment so broadly. A narrow construction of the Thirteenth Amendment²⁵ and the poor treatment of former slaves by southern state legislatures and citizens²⁶ prompted the passage of the Fourteenth Amendment as a reminder that the Thirteenth Amendment's abolition of slavery should have yielded, at a minimum, a narrow set of legal rights for the newly freed slaves and their progeny. Given the existence of the Fourteenth Amendment, only principles of constitutional fidelity might require a broad reading of the Thirteenth Amendment and yield a correspondingly broad set of rights.²⁷ Simply, a

²⁴ Though the *Civil Rights Cases* have received well-deserved criticism for their cramped reading of the Thirteenth Amendment, the Court further gutted the Thirteenth Amendment in *Plessy v. Ferguson*, 163 U.S. 537 (1896). See Colbert, *supra* note 8, at 25-26 (examining the *Plessy* Court's limitation of the Thirteenth Amendment to compulsory exploitation of labor and peonage).

²⁵ For such a construction, see *The Civil Rights Cases*, 109 U.S. at 3. However, some courts did give a broad construction to the Thirteenth Amendment. See Colbert, *supra* note 8, at 15-17 (noting that just after the passage of the Thirteenth Amendment and the Civil Rights Act of 1866, some courts upheld the legislative intent of the laws to abolish all vestiges of slavery); see also FRANK J. SCATURRO, *THE SUPREME COURT'S RETREAT FROM RECONSTRUCTION* 19 (2000) (noting that the Civil Rights Act of 1866 had been validated in circuit court cases in which Supreme Court justices sat in 1866 and 1867). Of course, for years, dissenters also gave life to a broad construction of the Thirteenth Amendment. See *Plessy*, 163 U.S. at 555 (Harlan, J., dissenting):

The Thirteenth Amendment does not permit the withholding or the deprivation of any right necessarily inhering in freedom. It not only struck down the institution of slavery as previously existing in the United States, but it prevents the imposition of any burdens or disabilities that constitute badges of slavery or servitude. It decreed universal civil freedom in this country.

See also *The Civil Rights Cases*, 109 U.S. at 34 (Harlan, J., dissenting) ("The Thirteenth Amendment, it is conceded, did something more than to prohibit slavery as an *institution*, resting upon distinctions of race, and upheld by positive law. My brethren admit that it established and decreed universal *civil freedom* throughout the United States."); *Blyew v. United States*, 80 U.S. (13 Wall.) 581, 595-96 (1871) (Bradley, J., dissenting) (arguing for expansive view of the Thirteenth Amendment that would deem the refusal to allow blacks to testify a badge of slavery).

²⁶ The continued vitality of the Black Codes after the Civil War suggests that southern states were not willing to treat freed slaves as anything other than quasi-slaves unless forced. See JOHN HOPE FRANKLIN, *RECONSTRUCTION AFTER THE CIVIL WAR* 47-51 (2d ed. 1994).

²⁷ Some commentators have suggested that the Amendment should be read broadly. See, e.g., tenBroek, *supra* note 11, at 180. tenBroek states:

This then was the slavery which the Thirteenth Amendment would abolish: the involuntary personal servitude of the bondman; the denial to the blacks, bond and free, of their natural rights through the failure of the government to protect them and to protect them equally; the denial to the whites of their natural and constitutional rights through a similar failure of government.

healthy Fourteenth Amendment jurisprudence should provide the same, if not more, rights than a healthy Thirteenth Amendment jurisprudence.

B. *The Fourteenth Amendment*

The Fourteenth Amendment was a recapitulation and extension of the Thirteenth Amendment.²⁸ In the wake of the widespread denial of legal and civil rights to newly free former slaves, e.g., the passage and enforcement of the Black Codes,²⁹ Congress presented the Fourteenth Amendment to guarantee that the legal rights presumed by some to have been granted to former slaves by the Thirteenth Amendment were specifically protected.³⁰ Rather than provide specific substantive rights, the Fourteenth Amendment guarantees legal equality by making former slaves and free blacks U.S. citizens

²⁸ See tenBroek, *supra* note 11, at 203 (“The Fourteenth Amendment reenacted the Thirteenth Amendment and made the program of legislation designed to implement it constitutionally secure or a part of the Constitution.”); see also BELZ, *supra* note 14, at 172 (“[T]he framers in the Thirty-Eighth and Thirty-Ninth Congresses viewed the Thirteenth and Fourteenth Amendments as an extension of existing constitutional principles or as a completion of the Constitution.”); KENNETH M. STAMPP, *THE ERA OF RECONSTRUCTION, 1865-1877* 136 (1965) (“Fearing that the Supreme Court might rule against the constitutionality of the Civil Rights Act, the Joint Committee on Reconstruction, after much wrangling, incorporated its substance into the first section of the Fourteenth Amendment.”). Indeed, the Fourteenth Amendment’s purpose can be thought to already have been served by the Thirteenth Amendment. See Colbert, *supra* note 8, at 22-24 (suggesting that slavery was a system backed by discriminatory laws and governmental treatment and that therefore the abolition of slavery needed to abolish the accompanying discriminatory laws and treatment). However, the Thirteenth and Fourteenth Amendments can be thought to have different focuses. See *The Civil Rights Cases*, 109 U.S. at 23 (noting that the Thirteenth and Fourteenth Amendments are aimed at different purposes, the Thirteenth at slavery and the Fourteenth at state actions).

²⁹ See FRANKLIN, *supra* note 26, at 47-48 (noting the Black Codes passed by southern legislatures soon after the Civil War).

³⁰ See *The Slaughterhouse Cases*, 83 U.S. (16 Wall.) 36, 81 (1872) (“The existence of laws in the States where the newly emancipated negroes resided, which discriminated with gross injustice and hardship against them as a class, was the evil to be remedied by this [equal protection] clause, and by it such laws are forbidden.”); BELZ, *supra* note 14, at 215 (“When the Thirteenth Amendment proved inadequate for the task of protecting civil liberty, Republicans proposed the Fourteenth Amendment to secure the civil rights of United States citizens against denial by the states.”); tenBroek, *supra* note 11, at 198, noting:

The equal protection of the laws, then, as an integral part of the social compact-natural rights doctrine, and as nourished, matured and understood by the abolitionists, was far from the simple command of comparative treatment that courts and later generations have made it. Freemen, all men, were entitled to have their natural rights protected by government. Indeed, it was for that purpose and that purpose only that men entered society and formed governments. Once slavery was abolished, the legal pretense for withholding the protection of the laws from some people was at an end. Those people, too, must then be protected fully, equally.

and citizens of the state in which they reside,³¹ and requiring that states provide all citizens the same set of substantive legal rights owed to them by virtue of their national and state citizenship.³² This is the import of the Privileges or Immunities and Equal Protection Clauses.³³ Legal rights flowing indirectly from the Thirteenth Amendment's abolition of slavery, directly to U.S. citizens through specific constitutional or statutory provisions and directly from states to their citizens were to be granted to all citizens and affirmatively protected by the states through their adherence to the Fourteenth Amendment.³⁴ Not surprisingly, the Fourteenth Amendment, not the Thirteenth Amendment, has been the prime locus of equality rights, as the Supreme Court has drawn a distinction between a state's poor treatment of a citizen because of a citizen's race (racial discrimination covered by the Fourteenth Amendment) and treating a person like a slave (covered by the Thirteenth Amendment).³⁵

³¹ See *The Slaughterhouse Cases*, 83 U.S. (16 Wall) at 73 (suggesting that section 1 of the Fourteenth Amendment was specifically meant to repudiate *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857), and make certain that former slaves were citizens).

³² The first section of the Fourteenth Amendment reads:

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

³³ See AKHIL REED AMAR, *THE BILL OF RIGHTS 181-82* (1998) (noting John Bingham's vision of privileges and immunities as relating to the rights of citizens that must be distributed to all citizens). Rather than provide any particular rights to freedmen, the Fourteenth Amendment requires merely that state governments treat citizens equally with respect to legal rights. See *The Slaughterhouse Cases*, 83 U.S. (16 Wall.) at 77 (noting that the Fourteenth Amendment does not dictate all of the rights states must provide to their citizens, but requires that if such rights are given, they must be given to all U.S. citizens in the state); see also BELZ, *supra* note 14, at 235 ("Civil rights policy [just after the Civil War] was not based on a utopian aspiration to eliminate all racial distinctions in the society. Its purpose was to establish racially impartial protection of fundamental rights, referred to by [Earl] Maltz as limited absolute equality."). Indeed, it was unclear what specific rights were protected. See Paul Finkelman, *Rehearsal for Reconstruction*, in *THE FACTS OF RECONSTRUCTION*, *supra* note 8, at 1-2 (suggesting that even the framers of the Fourteenth Amendment were not clear on how expansively to read it).

³⁴ Of course, these rights were limited. See BELZ, *supra* note 14, at 139-40 ("[A]most all Republicans desired to recognize the emancipated people as free men with the same rights, responsibilities, and personal freedom as ordinary citizens, understanding, of course, that this did not entail political or social equality.").

³⁵ See *The Civil Rights Cases*, 109 U.S. 3, 24 (1883). The Court opined:

The Thirteenth Amendment has respect, not to distinctions of race, or class, or color, but to slavery. The Fourteenth Amendment extends its protection to races and classes, and prohibits any State legislation which has the effect of denying to any race or class, or to any individual, the equal protection of the laws.

Distinguishing harms that can be addressed by Thirteenth and Fourteenth Amendments, the court stated:

The Thirteenth and Fourteenth Amendments dovetailed to guarantee that former slaves and their progeny were to enjoy the full legal rights provided by virtue of their American citizenship and state citizenship.³⁶ Of course, legal rights consisted of a narrow set of rights that did not include voting rights or even many rights that would now be considered civil rights.³⁷ Though the Fourteenth Amendment's particular application to newly freed slaves is clear, it, like all constitutional amendments, applies to all citizens. Thus, it provides a way to view equality and a structure for distributing legal rights to all citizens, rather than merely providing specific, concrete rights to a subset of newly-freed citizens and their progeny. Indeed, *how* rights are protected by the Fourteenth Amendment is as important as *what* rights are protected by the Fourteenth Amendment.

C. Colorblindness and Intent to Discriminate as Constitutional Imperatives

The Fourteenth Amendment requires a single class of citizenship³⁸ and requires that the rights of U.S. and state citizenship be protected by each state

Where does any slavery or servitude, or badge of either, arise from such an act of denial? Whether it might not be a denial of a right which, if sanctioned by the state law, would be obnoxious to the prohibitions of the Fourteenth Amendment, is another question. But what has it to do with the question of slavery?

Id. at 21.

Viewing the badges and incidents of slavery in this way makes it easy to see why most customs following slavery would be viewed as race discrimination accompanying the end of slavery rather than the perpetuation of incidents of slavery. This also makes it easy to see how the Thirteenth Amendment could be deemed coterminous, when state action is involved, with the Fourteenth Amendment. However, instead of deeming the Thirteenth and Fourteenth Amendments coterminous and applying only the Fourteenth Amendment to any particular course of action, it would seem equally sensible to allow redress under either the Thirteenth or Fourteenth Amendments for officially endorsed or sanctioned race discrimination. If the discrimination is deemed not subject to redress by the Fourteenth Amendment, possibly because of the Fourteenth Amendment's intent standard or the lack of state action, a harder look at whether the discrimination should be treated as an incident or badge of slavery and subject to redress under the Thirteenth Amendment might be worthwhile.

³⁶ See tenBroek, *supra* note 11, at 194-97 (presenting arguments from the debates relating to the Civil Rights Act of 1866 and the Freedmen's Bureau Bill suggesting that the equal protection of the laws is part of one's civil rights).

³⁷ See *The Slaughterhouse Cases*, 83 U.S. (16 Wall.) at 36.

³⁸ To some, this meant political and legal equality for former slaves. See STAMPP, *supra* note 28, at 122:

The radicals, to reconstruct the South on a firm foundation, would throw out the Black Codes, which were hardly designed to prepare the Negroes for freedom anyway, give the Negroes civil rights and the ballot, and get white men accustomed to treating Negroes as equals, at least politically and legally.

of the Union.³⁹ That the Fourteenth Amendment guarantees a form of legal equality is clear; whether that equality is to be protected through colorblindness or through a more aggressive requirement of race neutrality, i.e., race-neutral effects,⁴⁰ is not clear from the Amendment's text. However, courts appear to base Fourteenth Amendment jurisprudence on the twin notions that colorblind rules provide substantial equality and that a prohibition on intentional discrimination is the sole constitutional protection against legal inequality.⁴¹ Thus, colorblindness (equal process) is a constitutional imperative⁴² and race neutrality (equal results) is a subconstitutional preference.⁴³

³⁹ See BELZ, *supra* note 14, at 179-80 (noting that proponents of black rights still assumed that states would be the ultimate protectors of freedoms provided by the Constitution); DAVID HERBERT DONALD ET AL., *THE CIVIL WAR AND RECONSTRUCTION* 543 (2001) (suggesting that the thinking behind the Civil Rights Act of 1866 was to require states to enforce equal rights, not to grant the federal government power over state matters); Michael Les Benedict, *Preserving Federalism: Reconstruction and the Waite Court*, 1978 SUP. CT. REV. 39, 47 ("Historians now recognize that every Reconstruction-era effort to protect the rights of citizens was tempered by the fundamental conviction that federalism required that the day-to-day protection of the citizen had to remain the duty of the States."); see also SCATURRO, *supra* note 25, at 11-18 (suggesting that disenchantment with federal intervention in state issues was one of the concerns of those who opposed particular Reconstruction measures). But see Robert J. Kaczorowski, *To Begin the Nation Anew: Congress, Citizenship, and Civil Rights After the Civil War*, 92 AM. HIST. REV. 45, 66 (1987):

Federal judges and legal officers interpreted the Thirteenth Amendment, the Fourteenth Amendment and the Civil Rights Act of 1866 as conferring a broad authority to enforce civil rights directly, irrespective of the presence of discriminatory state action and regardless of the source of the violation, because these rights were the natural rights that belonged to all free citizens of a free republic. Indeed, the notion that a national civil rights enforcement authority was merely a guarantee of racially impartial government action was not judicially recognized in the federal courts until the Supreme Court's decisions in the 1870s.

⁴⁰ Of course, these visions of equality—colorblindness and race neutrality—are different, but sometimes are compatible. The Congress that submitted the Fourteenth Amendment for ratification may have presumed that equal protection of the laws and strict colorblindness would bring about race neutrality with respect to legal rights. Indeed, some thought that the passage of the Thirteenth Amendment alone would have that effect. See tenBroek, *supra* note 11, at 180 ("In part, the framers, sponsors and supporters of the Thirteenth Amendment felt that, with chattel bondage abolished and the Negro elevated to legal and civil equality, the pulsing heart of the system would be stilled and all of the appendages would soon atrophy and disappear.").

However, various leaders had fought for substantive equality under the Fourteenth Amendment. See SCATURRO, *supra* note 25, at 146-50 (noting that many supporters of the Fourteenth Amendment and the Civil Rights Act of 1866 aimed at full equality for former slaves, including the right to desegregated facilities); Finkelman, *supra* note 33, at 3-4 (explaining that though the Northern states did not provide equality to free blacks, leaders from the north, including some framers of the Fourteenth Amendment, fought hard for black rights and black equality). The different visions of equal protection have found voice in the colorblind and anti-subordination approaches to the Fourteenth Amendment. See Robin West, *Toward an Abolitionist Interpretation of the Fourteenth Amendment*, 94 W. VA. L. REV. 111, 111-13 (1991) (outlining the colorblind and anti-subordination positions).

⁴¹ See, e.g., *Miller v. Johnson*, 515 U.S. 900, 911-12 (1995) (suggesting that the use of race in any form works injustice); *Washington v. Davis*, 426 U.S. 229, 240-41 (1976) (noting that equal protection violation

This leads to seemingly odd results. Race-conscious rules that may encourage race-neutral results are subject to strict scrutiny,⁴⁴ but colorblind laws that have race-preferred effects are constitutional unless passed with the intent to discriminate.⁴⁵ Simply, the preference for colorblindness can lead to the validation of laws that have race-preferred effects and the invalidation of laws that encourage race-neutral results.⁴⁶ Though this is the constitutional

requires intentional discrimination). If the use of race harms the equality principle, presumably colorblindness provides formal equality.

⁴² Of course, colorblindness has not always been the only method for providing supposed equality. See *Plessy v. Ferguson*, 163 U.S. 537 (1896). However, some embraced colorblindness from the beginning of the post-Civil War period. See DONALD ET AL., *supra* note 39, at 505 (summarizing the debate to include white refugees in post-Civil War Freedmen's Bureau legislation based on "no discrimination according to color"); SCATURRO, *supra* note 25, at 144 (suggesting that need for colorblindness was an issue during the 1866 debates).

⁴³ Some might suggest that equal results are unrelated to the Fourteenth Amendment doctrine. See BELZ, *supra* note 14, at 186 (suggesting that equality of results is antithetical to concepts underlying Reconstruction Amendments); RAOUL BERGER, *GOVERNMENT BY JUDICIARY* 201-07 (1997) (noting the Fourteenth Amendment's purpose was not to provide full substantive equality).

⁴⁴ See *Hunt v. Cromartie*, 526 U.S. 541, 546 (1999) ("Our decisions have established that all laws that classify citizens on the basis of race, including racially gerrymandered districting schemes, are constitutionally suspect and must be strictly scrutinized."); see, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995) (applying strict scrutiny to policy granting contracting preferences to businesses owned by members of socially disadvantaged groups); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (applying strict scrutiny to a set-aside plan aimed at increasing the percentage of city construction dollars spent using minority-owned subcontractors).

⁴⁵ See *Washington* 426 U.S. at 240-41 (requiring intent to discriminate for Fourteenth Amendment violation).

⁴⁶ Though some suggest that colorblindness is the only way to discharge the goals of the Reconstruction Amendments, they may not be correct. See Jeffrey Rosen, *The Color-Blind Court*, 45 AMER. U. L. REV. 791, 791 (1996) ("An examination of the historical evidence suggests that the original intentions of the radical Republicans in 1865 are flamboyantly inconsistent with the color-blind jurisprudence of the conservative Justices in 1995."); see also SCATURRO, *supra* note 25, at 203:

During its retreat from Reconstruction, the Supreme Court, in case after case, departed from the understanding of the Reconstruction amendments held by those who supported them, adopting in all but a few cases the interpretations of those who opposed both the post-Civil War movement and its resulting innovations to the Constitution.

But see BELZ, *supra* note 14, at 199-209 (suggesting that much of the scholarship suggesting an egalitarian purpose to the Thirteenth and Fourteenth Amendments is not based on original intent and understanding). Nonetheless, the notion that the Fourteenth Amendment is related to substantive equality is powerful. See Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753, 787 (1985):

In other words, the Speaker viewed the Freedmen's Bureau bill as an example of federal legislation securing equal protection, precisely the sort of legislation for which the fourteenth amendment would provide clear constitutional authority. Congress, or at least the Speaker of the House, regarded the race-conscious assistance programs of the Freedmen's Bureau as furthering rather than violating the principle of equal protection.

regime with respect to the Fourteenth Amendment, given the history of the Fourteenth Amendment, it is unclear why colorblindness, rather than race neutrality, would play such a large factor in determining a law's constitutionality.⁴⁷

1. Colorblindness

When the Fourteenth Amendment was passed, the notion that it required that all laws be colorblind would have seemed odd.⁴⁸ Race-conscious laws were common, and the attitudes of many staunch supporters of the Fourteenth Amendment suggest that colorblindness with respect to all laws was not an assumed result of the Fourteenth Amendment.⁴⁹ However, that race-consciousness was allowed with respect to some laws does not necessarily

See also West, *supra* note 40, at 112:

For a second group of jurists, including the liberal dissenters on the Court and a sizeable number of constitutional theorists in law schools, the "equal protection" clause of the Fourteenth Amendment requires not "rationality" in legislation but, rather, substantive justice. . . . On this view, the equal protection mandate and the Fourteenth Amendment is historically grounded not in the pernicious idea of racial difference but, rather, in the pernicious practice of racial subordination. . . .

R. Richard Banks, "Nondiscriminatory" Perpetuation of Racial Subordination, 76 B.U. L. REV. 669, 695 (1996) (book review) ("Some scholars are of the opinion that rather than enacting a prohibition against discrimination, the Fourteenth Amendment embodies a vision of positive rights intended to protect blacks as a group.").

⁴⁷ *See generally* Schnapper, *supra* note 46 (describing the interplay between the race-conscious legislation passed by the same Congress that approved the Fourteenth Amendment). One explanation may be where the courts are looking for the meaning of the Fourteenth Amendment. *See* SCATURRO, *supra* note 25, at 3-4 (suggesting that courts often look for original meaning of Reconstruction Amendments in cases decided a few years after the ratification of the Amendments, rather than in material that was contemporaneous with the passage of the Amendments).

⁴⁸ *See* Michael Les Benedict, *Reform Republicans and the Retreat from Reconstruction*, in THE FACTS OF RECONSTRUCTION, *supra* note 8, at 55 (noting that racism coexisted with the desire for equal rights in the minds of some Republicans); SCATURRO, *supra* note 25, at 141 (noting that Senators Lot Morrill and Lyman Trumbull, supporters of the Fourteenth Amendment, supported segregation). Of course, segregation could be a welcome step closer to equality than slavery. *See* Finkelman, *supra* note 33, at 19-24 (discussing school segregation and noting that segregated public schools may be preferred to no schools); Howard N. Rabinowitz, *Segregation and Reconstruction*, in FACTS OF RECONSTRUCTION, *supra* note 8, at 88 (arguing that in some situations, segregation was a step up from exclusion and therefore a triumph or positive move toward equality).

⁴⁹ *See* Schnapper, *supra* note 46, at 784-85 (noting that many who supported the Fourteenth Amendment also supported the color conscious aid limited specifically to blacks in Freedmen's Bureau Act of 1866). However, it is clear that some legislators thought seriously about requiring colorblindness in various contexts. *See* Rosen, *supra* note 46, at 795 (noting that colorblindness was required in the post-Civil War Freedmen's Act with respect to white refugees). Of course, the colorblind requirement in the Freedmen's Act was inserted to make sure that displaced whites were treated equally. Thus, this colorblind requirement may have been geared toward substantive race neutrality.

mean it was to be permitted in the context of the narrow set of laws and legal rights to which the Fourteenth Amendment applied. For example, colorblindness may have been required and may have provided full substantive equality with regard to rights clearly granted by the Fourteenth Amendment, such as the right to testify and the right to make contracts.⁵⁰ If colorblindness provided the full measure of substantive equality with respect to those rights, a preference for colorblindness within the original scope of the Fourteenth Amendment might coexist with the allowance of race consciousness with respect to rights not considered covered by the original scope of the Fourteenth Amendment.

As the Fourteenth Amendment's scope expanded to apply to more rights and required that a choice be made between colorblindness and race consciousness that resulted in ostensibly race-neutral results, colorblindness was rejected as a constitutional imperative.⁵¹ For years, the Supreme Court suggested that colorblindness was not constitutionally required and that race-conscious legislation could yield a type of substantive legal equality with respect to rights covered by the Fourteenth Amendment.⁵² The question became whether the races obtained equal results under the law, not whether they enjoyed precisely the same treatment. Though few, if any, would suggest a return to the separate-but-equal doctrine of *Plessy v. Ferguson* and similar cases, it is worthwhile to note that equality of result, the "but equal" part of the

⁵⁰ These rights have been acknowledged as rights that slaves had not been allowed to exercise, but which necessarily were required to be provided equally by the Fourteenth Amendment. See *The Civil Rights Cases*, 109 U.S. 3, 22 (1883).

⁵¹ See *Plessy v. Ferguson*, 163 U.S. 537 (1896). This rejection is hardly a surprise, as the Fourteenth Amendment did not appear to require colorblindness. See Rosen, *supra* note 46, at 791 (suggesting that the "the ideal of a color-blind Constitution . . . was considered and rejected during Reconstruction"); Schnapper, *supra* note 46, at 788 ("The terms of section 1 of the Civil Rights Act of 1866 also make clear that the race-conscious Reconstruction programs were consistent with the fourteenth amendment's guarantee of equal protection."); Laurence H. Tribe, *In What Vision of the Constitution Must the Law Be Color-Blind?*, 20 J. MARSHALL L. REV. 201, 204 (1986):

I am referring to the fact that we know, with as much certainty as such matters ever permit, that the Framers of the Fourteenth Amendment did not think 'equal protection of the laws' made *all* racial distinctions in law unconstitutional; they did not intend, for example, to outlaw racially segregated public schools.

Banks, *supra* note 46, at 695 ("The Fourteenth Amendment itself contains no explicit prohibition against discrimination, and there is little basis for concluding it was intended to prohibit all racial classifications by the government."); see also West, *supra* note 40, at 135 ("Colorblindness, although perhaps a condition of formal, equal justice, is simply not the nub of equal protection. Rather, protection is.")

⁵² See, e.g., *Plessy*, 163 U.S. at 537 (endorsing separate but equal and upholding forced segregation by the State of Louisiana); see also BELZ, *supra* note 14, at 185 ("The Fourteenth Amendment did not embody the general principle that racial discrimination is categorically wrong.").

Plessy doctrine, was at one point considered a constitutional value underlying the Fourteenth Amendment.

Indeed, the acceptance of colorblindness as a constitutional value in the era of the expanded application of the Fourteenth Amendment occurred only when colorblindness was deemed necessary to reach race-neutral results. The separate-but-equal doctrine was challenged in contexts in which separate was not qualitatively or quantitatively equal. For example, challenges to state-enforced segregated school systems rested on the facts that unequal facilities existed and unequal results obtained from the separate-but-equal system.⁵³ Thereafter, separate was deemed inherently unequal.⁵⁴ Though some, including framers of the Fourteenth Amendment, had historically argued that separate could never be equal,⁵⁵ others have argued that separate facilities may yield substantively equal results in certain limited contexts.⁵⁶ This is not a suggestion for a return to separate-but-equal facilities, but merely recognition that equality of result can be an important component of equality.⁵⁷

Currently, rather than being viewed as a way to reach race-neutral results, colorblindness is taken to be the key to constitutional legitimacy even if it helps create or perpetuate race-preferred results. This is hardly a surprise, some may argue, because as the Fourteenth Amendment's scope has expanded to cover areas it was not originally thought to cover, applying colorblindness to all of the rights now covered appears more consistent with the framers' world view than requiring that race-neutral results flow from all covered governmental action.⁵⁸ That is, the belief may be that given a choice between colorblindness and race neutrality with respect to social and other rights, the framers of the Fourteenth Amendment would have endorsed a colorblind

⁵³ For detailed accounting of the inequality in segregated school systems, see RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY* (1975).

⁵⁴ See *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) ("We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal.").

⁵⁵ See Rosen, *supra* note 46, at 800 (noting that Sen. Charles Sumner had argued that separate but equal was always unequal).

⁵⁶ See, e.g., *United States v. Virginia*, 44 F.3d 1229 (4th Cir. 1995) (ruling that single-sex public education could be allowed if state afforded equivalent educational opportunity to other sex), *rev'd*, 518 U.S. 515 (1996); Pamela J. Smith, Comment, *All-Male Black Schools and the Equal Protection Clause: A Step Forward Toward Education*, 66 TUL. L. REV. 2003 (1992).

⁵⁷ See *supra* note 46.

⁵⁸ See BERGER, *supra* note 43, at 201-07 (arguing that the Fourteenth Amendment was not intended to provide full racial equality); Rosen, *supra* note 46, at 792 (noting that the scope of the Fourteenth Amendment was limited to civil rights and thus excluded political and social rights).

regime because it more snugly fit the framers' vision of blacks as legal equals but social inferiors than a regime requiring race-neutral results would.⁵⁹ However, the opposite may be correct. It may be the case that if forced to provide some form of social equality to former slaves, the framers would have chosen a separate-but-equal regime in which faux race neutrality, rather than real colorblindness, was more highly valued. This seems particularly possible given the rejection of colorblindness as a constitutional imperative as the Fourteenth Amendment's scope expanded. Again, this is not a suggestion that separate-but-equal is a reasonable constitutional doctrine, just that equality of result should be subsumed by a constitutional concept of equality.

Few would disagree that a society in which colorblindness yields race-neutral results is desired. However, disputes occur with respect to how to create or foster such a world. On occasion, the Supreme Court has appeared to suggest that merely requiring colorblindness and willing that racial equality exist will create that utopia.⁶⁰ The belief seems to be that strict colorblindness will eventually beget racial equality and presumably race-neutral results, and that the Constitution is violated when government is cognizant of race and acts based on it.⁶¹ However, at times, the Court has been willing to allow states to use race in limited situations when it helped move the country toward racial equality, even while preferring colorblindness.⁶²

⁵⁹ Of course, the notion of white superiority was not limited to those who would seek to limit the reach of the Fourteenth Amendment. See *Plessy v. Ferguson*, 163 U.S. 537, 559 (Harlan, J., dissenting):

The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage and holds fast to the principles of constitutional liberty.

See also *Benedict*, *supra* note 48.

⁶⁰ See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 209 (1995) (Scalia, J., concurring) ("In the eyes of government, we are just one race here. It is American."); *Shaw v. Reno*, 509 U.S. 630, 657 (1993). The Court in *Shaw* observed:

Racial classifications of any sort pose the risk of lasting harm to our society. They reinforce the belief, held by too many for too much of our history, that individuals should be judged by the color of their skin. Racial classifications with respect to voting carry particular dangers. Racial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions; it threatens to carry us further from the goal of a political system in which race no longer matters—a goal that the Fourteenth and Fifteenth Amendments embody, and to which the Nation continues to aspire.

⁶¹ See, e.g., *Adarand Constructors, Inc.*, 515 U.S. at 200; *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 469 (1989).

⁶² See *infra* notes 229-39 and accompanying text. See also Pamela S. Karlan, *Easing the Spring: Strict Scrutiny and Affirmative Action After the Redistricting Cases*, 43 WM. & MARY L. REV. 1569, 1602-03 (2002)

The relationship between colorblindness and the Fourteenth Amendment has changed over time. For a number of years, colorblindness was deemed unnecessary as long as color consciousness yielded ostensibly race-neutral results. Later, colorblindness was deemed necessary to guarantee race-neutral results. Now, colorblindness is generally required even if it leads to non-race-neutral results. Thus, race-conscious state action, even when focused on providing race-neutral results, is subject to strict scrutiny and likely invalidation.⁶³ As such, the preference for colorblindness can limit the style of legislation that can be passed to protect the interests of or to provide equal results for minority groups.

2. *Discriminatory Intent*

However, colorblindness is not the only consideration in determining whether a law or rule is constitutional under the Fourteenth Amendment. That a law is colorblind will not save it from strict scrutiny and likely constitutional invalidation if it is enacted with discriminatory intent or enforced in a discriminatory manner.⁶⁴ Discriminatory intent—the intent to treat people differently based on race—is presumed if the law is race-conscious; it must be proven if the law is colorblind.⁶⁵ Though the intent requirement may protect minority group members from some facially colorblind rules that are designed to yield race-preferred outcomes, that the standard is a requirement also means that colorblind rules that unintentionally yield detrimental racial effects are generally constitutional. The combination of colorblindness and the intent rule appears to create a world in which laws that unintentionally harm racial minorities because of their position in society are presumptively valid while laws that affirmatively seek to help racial minorities attain an equal position in society are presumptively invalid. Though one could argue that eliminating discriminatory intent and race consciousness in lawmaking is the ethos of Fourteenth Amendment jurisprudence, issues of intent were not explicit factors

(noting that the Supreme Court has used a relaxed version of strict scrutiny in some redistricting cases and suggesting that it may do so in future affirmative action cases).

⁶³ See *supra* note 44.

⁶⁴ See *Washington v. Davis*, 426 U.S. 229, 239 (1976) (ruling that existence of discriminatory intent or purpose infecting the statute will yield relief under the Fourteenth Amendment); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (invalidating race-neutral law applied in discriminatory manner); James F. Blumstein, *Defining and Proving Race Discrimination: Perspectives on the Purpose vs. Results Approach from the Voting Rights Act*, 69 VA. L. REV. 633, 635 (1983) (noting that intentional discrimination violates the non-discrimination norm of the Fourteenth Amendment).

⁶⁵ See *Shaw*, 509 U.S. at 642-43 (noting that facially discriminatory laws are automatically suspect under the Fourteenth Amendment).

in constitutional analysis until well after the Fourteenth Amendment was ratified.⁶⁶

Requiring that discriminatory intent precede Fourteenth Amendment invalidation of a statute or government action may be sensible, if the key to the Fourteenth Amendment is the manner of distribution of rights to citizens. If the Fourteenth Amendment merely provides a mechanism for identifying existing rights and structure for distributing those rights, then it is plausible that the Fourteenth Amendment may only be violated when states stand in the way of the equal distribution of rights, i.e., when they intentionally discriminate. Though this is a plausible explanation for why discriminatory intent might be required before the Fourteenth Amendment can be used to protect rights generally, whether this scheme is at all sensible for the protection of Fifteenth Amendment voting rights, an area to which this structure has also been applied,⁶⁷ remains to be seen.

II. THE RECONSTRUCTION AMENDMENTS AND VOTING RIGHTS

Collectively, the Reconstruction Amendments require full legal and political equality for former slaves and their progeny. Though the Fourteenth Amendment now clearly protects voting rights and the Thirteenth Amendment may do so theoretically, only the Fifteenth Amendment was initially designed to protect voting rights.

A. *The Thirteenth and Fourteenth Amendments and Voting Rights*

As passed, the Thirteenth Amendment had little, if any, relevance to voting rights.⁶⁸ Even a broad reading of the Thirteenth Amendment as an affirmative

⁶⁶ See Michael Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213, 296-97 (1991) (noting that *Washington v. Davis* was the first time the Supreme Court squarely determined that discriminatory intent was necessary for an equal protection violation). Indeed, there were hints that this might not have been the correct rule. *Id.* at 295 ("Scattered dicta in Warren Court decisions, moreover, suggested that facially neutral legislation producing disparate racial impacts possibly violated the Equal Protection Clause regardless of legislative motivation."); see also Banks, *supra* note 46, at 696-97 ("Not until the 1976 decision of *Washington v. Davis* did the Court unambiguously interpret the Equal Protection Clause as 'concerned principally with barring race-conscious decisionmaking.'").

⁶⁷ See Jordan, *supra* note 5, at 391 (noting that the Court has collapsed the Fifteenth Amendment vote dilution inquiry into the Fourteenth Amendment inquiry in the wake of *City of Mobile v. Bolden*).

⁶⁸ The Fourth Circuit Court of Appeals has ruled that the Thirteenth Amendment has no independent application to voting rights issues, because it goes no farther in protecting voting rights than the Fourteenth and Fifteenth Amendments do. See *Irby v. Virginia Bd. of Elections*, 889 F.2d 1352, 1359 (4th Cir. 1989) (noting that the Thirteenth Amendment goes no farther than the Fourteenth or Fifteenth Amendments in

extension of freedom rights to former slaves would not have yielded a right to vote for former slaves, as the right to freedom did not include the right to vote when the Thirteenth Amendment was passed.⁶⁹ Simply put, not all free citizens were allowed to vote.⁷⁰ However, as the right to vote has become almost universal,⁷¹ the denial of voting rights to racial minorities may be viewed as an incident or badge of slavery.⁷² It may appear odd to suggest that the Thirteenth Amendment may provide equal voting rights today given that it clearly did not provide voting rights at the time of its passage and given that the Fourteenth and Fifteenth Amendments currently protect voting rights. However, as the right to vote has become available to all free citizens, its abridgement on racial grounds may be sufficiently inconsistent with the Thirteenth Amendment to be unconstitutional.⁷³

As noted in Part I, when passed, the Fourteenth Amendment provided equality only with respect to a narrow set of legal rights, and did not provide political rights, such as voting rights,⁷⁴ or social rights.⁷⁵ Voting rights were

protecting voting rights); *Washington v. Finlay*, 664 F.2d 913, 927 (4th Cir. 1981) (“The plaintiffs also press on appeal their claims that the at-large election system violates their first and thirteenth amendment rights. . . . In the realm of voting, we think the thirteenth amendment offers no protections not already provided under the fourteenth or fifteenth amendments.”).

⁶⁹ See Virginia E. Hench, *The Death of Voting Rights: The Legal Disenfranchisement of Minority Voters*, 48 CASE W. RES. L. REV. 727, 732-33 (1998) (“Passage of the Thirteenth Amendment did not automatically confer the right to vote. . . . Indeed, the denial of voting rights on the basis of race or previous condition of servitude was both legal and widely practiced.”).

⁷⁰ Of course, the voting rights of free blacks were often restricted or non-existent. See FRANKLIN, *supra* note 26, at 73-74 (noting states that limited the franchise to whites in the mid-1860s). Restrictions on women’s voting rights continued until the passage of the 19th Amendment.

⁷¹ The limitations on restrictions that can be placed on the right to vote have become so substantial that one can argue for a general right to vote for citizens. See U.S. CONST. amend. XIX (ending sex-based restrictions on the right to vote); *id.* amend. XXIV (eliminating the poll tax); *id.* amend. XXVI (lowering the voting age to 18).

⁷² See *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 445 (1968) (Douglas, J., concurring) (asserting that “contrivances by States designed to thwart Negro voting” clearly subject to redress under the Fourteenth and Fifteenth Amendments constituted a continuing badge of slavery presumably also subject to redress under the Thirteenth Amendment).

⁷³ One commentator has forged a link between the Thirteenth Amendment and color-conscious redistricting. See Blacksher, *supra* note 9, at 633-34:

[T]he only way the Shaw Cases holdings can be reconciled with the First and Thirteenth Amendments is for the Court to acknowledge that free participation of African Americans in redistricting negotiations is a compelling state interest and that any redistricting plan that serves this compelling interest is narrowly tailored if it is not completely irrational and does not unfairly inhibit the political participation of other persons or groups.

⁷⁴ See DONALD ET AL., *supra* note 39, at 544 (noting that many radical Republicans wanted an explicit right to vote in the Fourteenth Amendment, but did not get it).

⁷⁵ See BELZ, *supra* note 14, at 184-85 (“The [Fourteenth] amendment was designed to confer limited

not uniformly provided to free black males in the North⁷⁶ and voting rights were provided to black males in the South only because Congress required that southern states grant equal voting rights to freedmen as a part of readmission to the Union.⁷⁷ Indeed, section 2 of the Fourteenth Amendment specifically provides that states that disfranchise male voters for any reason other than participation in rebellion or criminal activity will lose congressional representation in proportion to the number of those disfranchised.⁷⁸ The

absolute equality, or a guarantee of fundamental rights of person and property under state authority without distinction of color. Equality in basic rights was justified on the ground that all individuals have natural rights.”); SCATURRO, *supra* note 25, at 136-40 (discussing distinction between social equality and legal equality and noting that the distinction between social rights and equal access to public rights was difficult to define); Rosen, *supra* note 46, at 792 (noting the distinction between civil rights protected by the Fourteenth Amendment and political and social rights left unprotected). However, some framers of the Fourteenth Amendment may have thought that the Fourteenth Amendment would ban some forms of segregation. *See* SCATURRO, *supra* note 25, at 149-50 (arguing that those framers who supported the Fourteenth Amendment generally thought it would prohibit segregation in public conveyances); Finkelman, *supra* note 33, at 20-23 (arguing that those who supported the Fourteenth Amendment had also supported desegregated schools before the Fourteenth Amendment was passed); *see also* FRANKLIN, *supra* note 26, at 110 (“The opposition to racially mixed schools was tempered by the fact that many Southern Democrats, who called themselves Conservatives, believed that the equality required by the Fourteenth Amendment meant unsegregated education.”).

⁷⁶ *See* FRANKLIN, *supra* note 26, at 74 (noting that New Jersey and Maryland limited the franchise to whites in the mid-1860s).

⁷⁷ *See id.* at 129 (noting that southern states were readmitted to the Union on granting black suffrage and passing the Fourteenth Amendment); WILLIAM GILLETTE, *THE RIGHT TO VOTE: POLITICS AND THE PASSAGE OF THE FIFTEENTH AMENDMENT* 31 (1965) (noting that states had to allow black suffrage as a condition of readmission to the Union); SCATURRO, *supra* note 25, at 10 (noting that black suffrage under state constitutions was required for readmittance to the Union by the first of three 1867 Reconstruction Acts). Indeed, Southern states were required to rewrite their constitutions. *See also* DONALD ET AL., *supra* note 39, at 559-60 (noting that the first Military Reconstruction Act of 1867 required new constitutions for states that had not passed the Fourteenth Amendment).

⁷⁸ U.S. CONST. amend. XIV, § 2 reads:

But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

The concern prompting section 2 was that the southern states would immediately be able to count each former slave as a citizen for representational purposes rather than as three-fifths of a person without providing those former slaves the right to vote. That would have led to the odd result that the old guard in the southern states would control more seats in the House of Representatives after the Civil War than before the Civil War. *See* DONALD ET AL., *supra* note 39, at 544 (noting that stopping the increase in southern states’ house delegation as result of end of the three-fifths clause was one reason for Fourteenth Amendment’s section 2); FRANKLIN, *supra* note 26, at 59 (suggesting that concern with increased southern representation in the House of Representatives that would come with counting former slaves as whole citizens rather than three-fifths of a person); *see also* GILLETTE, *supra* note 77, at 22 (noting the increase in congressional seats southern states

framers of the Fourteenth Amendment appeared to recognize that the southern states might not continue to allow black citizens to vote after those states were readmitted to the Union.⁷⁹ However, instead of prohibiting race-based voting restrictions, section 2 merely provided a price for such restrictions.⁸⁰ Though the Thirteenth and Fourteenth Amendments symbolized real progress for former slaves, when passed, they did not protect voting rights.⁸¹ Even after the Fourteenth Amendment was passed, voting remained a true privilege that could be denied by a state on the basis of race. Now, the Fourteenth Amendment protects voting rights in two ways, as a fundamental right that cannot be abridged absent justification and as a right that cannot be provided by states in a discriminatory manner. What precisely the protections entail is discussed below.

would control after readmittance). The section can be viewed merely as the price a state would be forced to pay for its immoral, but not unconstitutional, decision to restrict the ballot.

⁷⁹ Indeed, after Reconstruction, states and private citizens attempted to make certain that few, if any, black citizens voted, often through violence. See STAMPP, *supra* note 28, at 201-04 (noting the violence invariably associated with the taking of power by Redeemer governments); Michael Les Benedict, *The Problem of Constitutionalism and Constitutional Liberty in the Reconstruction South*, in AN UNCERTAIN TRADITION: CONSTITUTIONALISM AND THE HISTORY OF THE SOUTH 227 (Kermit L. Hall & James W. Ely, Jr. eds., 1989) (detailing the violence accompanying the transfer of power to the Redeemers).

⁸⁰ See *Richardson v. Ramirez*, 418 U.S. 24, 73-74 (1974) (Marshall, J., dissenting):

There were two alternatives available—either to limit southern representation, which was unacceptable on a long-term basis, or to insure that southern Negroes, sympathetic to the Republican cause, would be enfranchised; but an explicit grant of suffrage to Negroes was thought politically unpalatable at the time. Section 2 of the Fourteenth Amendment was the resultant compromise. It put Southern States to a choice—enfranchise Negro voters or lose congressional representation.

See also DONALD ET AL., *supra* note 39, at 546-47 (suggesting that section 2 of the Fourteenth Amendment was an invitation to disfranchise blacks if a southern state was willing to pay the price in congressional representation); GILLETTE, *supra* note 77, at 23 (noting mere reduction in representation flowing from disfranchisement); STAMPP, *supra* note 28, at 141 (noting that rather than require equal voting rights, section 2 of the Fourteenth Amendment was merely meant to lessen representation if blacks were not granted suffrage).

⁸¹ Section 2 of the Fourteenth Amendment makes clear that voting rights were not directly granted to black citizens by the Fourteenth Amendment. See GILLETTE, *supra* note 77, at 25 (noting that section 2 of the Fourteenth Amendment was an incomplete nod to black suffrage at best); Benno C. Schmidt, Jr., *Principle and Prejudice: The Supreme Court and Race in the Progressive Era—Part 3: Black Disfranchisement from the KKK to the Grandfather Clause*, 82 COLUM. L. REV. 835, 837 (1982) (noting that section 2 of the Fourteenth Amendment intended to encourage, but not compel black suffrage in the South). It is only in the wake of additional amendments and changes in our collective thought about the centrality of voting to citizenship that voting has been considered a fundamental right for Fourteenth Amendment purposes.

B. *The Fifteenth Amendment*

The Fifteenth Amendment guarantees citizens the right to vote without regard to race.⁸² It was the capstone of the Reconstruction Amendments and the culmination of a six-year process to resolve the issue of black suffrage.⁸³ To be clear, the Fifteenth Amendment does not provide the right to vote;⁸⁴ it limits how the right to vote generally provided by the state government may be restricted.⁸⁵ Nonetheless, the Fifteenth Amendment, at least by negative implication, provides a functional ability to vote and the political rights necessary to allow blacks to protect their political interests.⁸⁶ As such, it operationalized the legal and political equality of black citizens and was the last step necessary to integrate blacks into the polity fully and formally. This functional integration—short-lived because of the end of Reconstruction and the rise of the Redeemer governments⁸⁷—allowed the election of a number of black officeholders to positions of prominence unprecedented before Reconstruction and not seen again for at least a century after Reconstruction.⁸⁸

⁸² The first section of the Fifteenth Amendment reads, “The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.” U.S. CONST. amend. XV § 1.

⁸³ See GILLETTE, *supra* note 77, at 21 (“Debate on the most important issue, Negro suffrage, began in earnest in 1864 and continued until 1870.”).

⁸⁴ See *United States v. Reese*, 92 U.S. 214, 217 (1876) (noting that the Fifteenth Amendment did not grant the right to vote, but “prevents the States, or the United States . . . from giving preference . . . to one citizen of the United States over another on account of race, color, or previous condition of servitude”); GILLETTE, *supra* note 77, at 90 (noting that the Fifteenth Amendment does not affirmatively enfranchise citizens).

⁸⁵ However, the result was to put black men ostensibly on the same footing as white men vis-à-vis the right to vote. See *Guinn v. United States*, 238 U.S. 347, 363 (1915), suggesting that the Fifteenth Amendment automatically struck racial restrictions from voting requirements without need for further legislation:

A familiar illustration of this doctrine resulted from the effect of the adoption of the Amendment on state constitutions in which at the time of the adoption of the Amendment the right of suffrage was conferred on all white male citizens, since by the inherent power of the Amendment the word white disappeared and therefore all male citizens without discrimination on account of race, color or previous condition of servitude came under the generic grant of suffrage made by the State.

⁸⁶ There had long been a debate regarding whether it made more sense for the government to take care of the freedmen or to provide freedmen the rights necessary for them to take care of themselves. See BELZ, *supra* note 14, at 149-51 (noting that many favored laissez-faire equality in which freedmen with rights were left to their own devices after being provided rights); GILLETTE, *supra* note 77, at 162 (“Regarding the ballot as a panacea, whites could in good conscience leave Negroes alone now, because Negroes could protect themselves with the ballot and without the help of government.”).

⁸⁷ See Benedict, *supra* note 79, at 241-42 (noting that Redeemer constitutions reflected white Southerners’ views that black voting during Reconstruction was inappropriate and rightly restricted or eliminated); Armand Derfner, *Racial Discrimination and the Right to Vote*, 26 VAND. L. REV. 523, 530-33 (1973) (noting the protection of black voters during Reconstruction and its decline as Reconstruction ended).

⁸⁸ See FRANKLIN, *supra* note 26, at 83 (noting black officeholders in the immediate post-Civil War era);

However, the protection of the voting rights of freedmen with a constitutional amendment met with strong dissent. Debates swirled before and after the passage of the Thirteenth and Fourteenth Amendments regarding the sensibility of providing voting rights to former slaves.⁸⁹ Indeed, even some radical Republicans, the group most supportive of the rights of freedmen, questioned whether providing such rights was a good idea.⁹⁰ This is unsurprising as some northern states had historically refused⁹¹ and continued to refuse to grant equal voting rights to free blacks in the pre- and immediate post-Civil War eras.⁹² Nonetheless, myriad forces combined to yield the amendment's passage.

The desires to provide political equality to ostensibly equal citizens,⁹³ to resolve the black suffrage question permanently,⁹⁴ to bolster the Republican Party in the North and the South,⁹⁵ to protect the northern gains of the Civil

see also STAMPP, *supra* note 28, at 185 (noting that after the Redeemer governments took power, blacks would have to wait a century to regain the civil and political rights lost after Reconstruction).

⁸⁹ Some had always been committed to black suffrage. *See* FRANKLIN, *supra* note 26, at 62 (noting that Sen. Sumner fretted that what was to become the Fourteenth Amendment did not have sufficient protection for black suffrage); *see also* DONALD ET AL., *supra* note 39, at 544 (noting that some radical Republicans were unhappy that the Fourteenth Amendment was not stronger); Kaczorowski, *supra* note 39, at 49 ("As a matter of law and as a matter of political objectives, most contemporaries distinguished between civil rights and voting rights. The essential reason that Radical Republicans criticized the Fourteenth Amendment as too moderate was its failure to provide the same protection for voting rights as for civil rights.").

⁹⁰ *See* DONALD ET AL., *supra* note 39, at 480 (noting non-unified support for black suffrage even among Republican leaders in immediate post-Civil War era); *see also* C. Vann Woodward, *The Political Legacy of Reconstruction*, 26 J. NEGRO EDUC. 231-32 (1957), *reprinted in* RACE, LAW, AND AMERICAN HISTORY 1700-1990: AFRICAN AMERICANS AND THE RIGHT TO VOTE 509 (Paul Finkelman ed., 1992) (noting disagreement among abolitionists with respect to black suffrage).

⁹¹ *See* GILLETTE, *supra* note 77, at 21 (noting that in 1864 "only New Englanders, except in Connecticut, allowed Negroes to vote without special discrimination").

⁹² *See id.* at 25-27 (noting that northern states tended to reject black suffrage in referenda in the 1860s); STAMPP, *supra* note 28, at 141 (noting that embarrassed Radical Republicans did not push the Negro suffrage issue prior to discussions regarding the Fifteenth Amendment in part because a number of northern states excluded free blacks from voting). Generally, the issue of suffrage was to be left to the states. *See* DONALD ET AL., *supra* note 39, at 575-76 (noting that the Fifteenth Amendment was worded negatively to allow states maximum control over the right to vote).

⁹³ *See* GILLETTE, *supra* note 77, at 81 ("Veteran abolitionist and antislavery Republicans, arguing that justice demanded suffrage in the North, claimed that the Amendment would guarantee equal and impartial rights to all citizens. The underlying theme was the abolitionist doctrine of political equality and opposition to color bars or caste legislation.").

⁹⁴ The Fifteenth Amendment was necessary given the possibility that southern states would, as they did, repudiate black voting rights after a return to the Union. *See* Derfner, *supra* note 87, at 525 (noting that southern constitutions granting equal suffrage to blacks were repealed a generation after they were passed).

⁹⁵ *See* DONALD ET AL., *supra* note 39, at 610-11 (noting the need to enfranchise blacks in the North to bolster slim Republican majorities); GILLETTE, *supra* note 77, at 50 ("The pattern of the framing and passage

War,⁹⁶ and to allow freedmen to protect their political interests⁹⁷ combined to make the passage of the amendment possible.⁹⁸ The promise of voting rights for freedmen and the protection it ostensibly afforded freedmen also allowed politicians and citizens to contemplate an end to Reconstruction. Though the end of Reconstruction may not have been a goal of those who sought the Amendment's passage,⁹⁹ it could logically flow from black suffrage and the Amendment. If freedmen could protect themselves with the ballot and if southern states enforced the letter and spirit of Reconstruction Amendments, those states would arguably be reconstructed and be ready to retake their place in post-Civil War America without special restraints.¹⁰⁰ Though the Fifteenth Amendment should not be seen as the end of Reconstruction, it can be seen as a logical beginning of the end of Reconstruction.¹⁰¹

The Fifteenth Amendment's passage rested on the lofty belief that freedmen should have political equality and on the more practical desire of the Republican Party for freedmen's votes to have an impact on elections.¹⁰²

of the Fifteenth Amendment indicates that the primary objective was to make Negro voters in the North; the secondary objective, to keep Negro voters in the South.”).

⁹⁶ See GILLETTE, *supra* note 77, at 22 (noting generally that by the end of the Civil War black suffrage was viewed by some as “central to Northern war aims”).

⁹⁷ *Id.* (“Freedom for the freedmen, moreover, was meaningless unless he had the ballot to protect himself.”); Woodward, *supra* note 90, at 234-35 (suggesting that giving the ballot to blacks to protect their rights was one reason to provide suffrage, but not the primary one).

⁹⁸ See DONALD ET AL., *supra* note 39, at 575-76 (noting the myriad of motives supporting the Fifteenth Amendment); GILLETTE, *supra* note 77, at 21-24 (noting various motives supporting black suffrage).

⁹⁹ See DONALD ET AL., *supra* note 39, at 611-12 (noting that the Fifteenth Amendment was not an exit strategy for the Republicans, though some thought it was).

¹⁰⁰ Unfortunately, many states did not enforce the amendment voluntarily. See GILLETTE, *supra* note 77, at 163 (“The [Fifteenth] Amendment became a dead letter everywhere that fraud, bribery, violence, intimidation, difficult registration, literacy tests, read-and-understand tests, poll taxes, grandfather clauses, and white primaries were condoned by public opinion.”); Huey L. Perry, *A Theoretical Analysis of National Black Politics in the United States*, in BLACKS AND THE AMERICAN POLITICAL SYSTEM 16 (Huey L. Perry & Wayne Parent eds., 1995) (noting that many constitutions passed in the late nineteenth and early twentieth centuries in former confederate states effectively disfranchised southern blacks).

¹⁰¹ The Fifteenth Amendment eventually allowed the federal government to exit the fight for rights for the freedmen in the South. The Fifteenth Amendment was supposed to allow the newly freed slaves to take care of themselves through the exercise of political rights. Once the ground rules were in place and the southern states were bound to follow a clear Constitution, those states would not need to be reconstructed any further. See BELZ, *supra* note 14, at 190 (“The object of postwar policy was to bring the former Confederate states back into the system of republican state governments provided by the Constitution.”); DONALD ET AL., *supra* note 39, at 638-43 (discussing the Compromise of 1877, the withdrawal of federal troops to support southern Republican governments and the dire consequences for blacks related to the withdrawal of direct federal power over southern states).

¹⁰² See DONALD ET AL., *supra* note 39, at 610 (noting speech by Charles Sumner in which he suggests the pragmatic benefit of black suffrage—additional votes for Republican candidates); *id.* at 610-12 (noting that blacks held the balance of power between Democrats and Republicans in places in the North); Woodward,

These twin notions should help define the scope of the amendment and guide its implementation. That the Fifteenth Amendment was passed in part to allow freedmen to affect elections suggests that voting rights are not limited to the symbolic casting of a ballot. Rather than being viewed narrowly as protecting the mechanical rights to register and to cast a ballot, the Fifteenth Amendment should be viewed more broadly as protecting the generalized right to representation when a minority group's numbers are sufficient or the right to influence elections when the group's numbers are not sufficient to guarantee the election of the group's candidate of choice.¹⁰³ Though the symbolism of casting a ballot and the feeling of belonging it brings should not be discounted,¹⁰⁴ the ballot's value is in its ability to garner or affect representation.¹⁰⁵ Simply, the ballot was and is an instrument of empowerment.¹⁰⁶

Though the Fifteenth Amendment does not explicitly grant a right to equal representation based on a group's numbers, that does not mean that a similar

supra note 90, at 235 (suggesting that if black vote had been unnecessary to sway elections, suffrage would not have been granted).

¹⁰³ Vote dilution claims suggest that the Fifteenth Amendment covers more than the individual's right to vote. See Gerken, *supra* note 2 at 1666. Nonetheless, it is unclear precisely how the Court views the right to vote, as there is resistance to view it as encompassing a group right of any sort. Indeed, this reluctance may drive ways of thinking about tangential voting rights issues. See Judith Reed, *Sense and Nonsense: Standing in the Racial Districting Cases as a Window on the Supreme Court's View of the Right to Vote*, 4 MICH. J. RACE & L. 389, 418 (1999), stating that:

The results in the Shaw cases owe much to the views of the individual justices about democracy and voting. This section surveys the views of the right to vote expressed by currently sitting justices. I conclude that under the views of the Shaw majority, standing makes sense because the Court is able to view the right to vote as little more than an individual right to cast a ballot that is equally weighted and counted. The Court ignores aspects of the right to vote that involve group rights, particularly the right to influence the political process and to be actually represented.

¹⁰⁴ Indeed, inclusion in the polity can be a significant aspect of gaining voting rights. See Gardner, *supra* note 2, at 906 ("To seek the vote is to seek formal recognition as a full member of society; to be denied the vote is to be either excluded altogether from membership in the community or consigned to some kind of second-class citizenship.")

¹⁰⁵ The Fourteenth Amendment has been deemed to stop vote dilution as a violation of the right to vote for years. See *Wesberry v. Sanders*, 376 U.S. 1, 4 (1964). However, some justices have argued that the Fifteenth Amendment is limited to registration and casting ballots. See, e.g., *City of Mobile v. Bolden*, 446 U.S. 55, 61-65 (1980) (plurality opinion) (suggesting that the Fifteenth Amendment's protection is limited to matters of voting registration and the casting of ballots). However, none of the remaining five justices adopted the plurality's position in *City of Mobile*. *Id.* at 84-85 (Stevens, J., concurring in result); *id.* at 102 (White, J., dissenting); *id.* at 126 (Marshall, J., dissenting).

¹⁰⁶ See *United States v. Mosley*, 238 U.S. 383, 386 (1915) (noting that the right to vote includes the right to have one's ballot counted). However, being empowered does not guarantee the right to win. See *Smith v. Brunswick County*, 984 F.2d 1393, 1398 (4th Cir. 1993) (noting that voter empowerment includes the right to have one's vote counted, but not necessarily the right to win).

1. *Conflating the Fourteenth and Fifteenth Amendments' Protection of Minority Voting Rights*

Determining what voting rights are protected by the Fifteenth Amendment can be difficult because courts have often conflated the protections offered by the Fourteenth and Fifteenth Amendments, even though voting rights were not originally protected by the Fourteenth Amendment. The Fourteenth Amendment requires that the right to vote, as a right supplied by a state, be distributed in a racially equal manner and that the right to vote, as a fundamental right, not be infringed.¹¹¹ The Fifteenth Amendment requires that voting rights not be abridged because of race.¹¹² Thus, the Fifteenth Amendment's requirement of equal voting rights often appears to go no further than the protection now afforded by the Fourteenth Amendment.¹¹³ As the Fourteenth and Fifteenth Amendments both protect the right to vote from racial discrimination, the conflation may appear sensible as it would not appear to have a practical effect on minority voting rights and would obviate the need to determine the scope of the Fifteenth Amendment.¹¹⁴

However, though courts have conflated the protection that the Fourteenth and Fifteenth Amendments provide, the protection provided by each is

¹¹¹ See *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 665 (1966) ("We do not stop to canvass the relation between voting and political expression. For it is enough to say that once the franchise is granted to the electorate [by states], lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment.").

There is a general right to vote in federal elections because the people must vote for their federal representatives. See *id.* ("While the right to vote in federal elections is conferred by Art. I, § 2, of the Constitution, *United States v. Classic*, 313 U.S. 299, 314-15, 61 S. Ct. 1031, 1037, 85 L. Ed. 1368, the right to vote in state elections is nowhere expressly mentioned."). However, the states determine who gets to vote subject to constitutional constraints. See *Lassiter v. Northampton County Bd. of Elections*, 360 U.S. 45, 51 (1959) (noting that the right to vote mentioned in Fourteenth Amendment is to be established by state law).

¹¹² See *Gomillion v. Lightfoot*, 364 U.S. 339, 346 (1960) ("When a legislature thus singles out a readily isolated segment of a racial minority for special discriminatory treatment, it violates the Fifteenth Amendment.").

¹¹³ The Supreme Court has often treated cases involving racial discrimination in voting as hybrid Fourteenth and Fifteenth Amendment cases. For example, *Rogers v. Lodge* is a vote dilution/equal protection case, in which the voting system in question was maintained to deny blacks the political rights that should have flowed from their numbers in the jurisdiction. See 458 U.S. 613, 625-27 (1982); see also *City of Mobile v. Bolden*, 446 U.S. 55, 58 (1980) (plurality opinion) (deciding vote dilution case in which the at-large numbered post system in place in City of Mobile was alleged to have violated the Fourteenth and Fifteenth Amendment rights of black citizens). As the intentional discrimination underlying the maintenance of the voting system in *City of Mobile* rendered it unconstitutional under the Fourteenth Amendment, it is somewhat unclear that the Fifteenth Amendment was a necessary factor in the Court's decision. See *Rogers*, 458 U.S. at 622-27.

¹¹⁴ See *Rogers*, 458 U.S. at 618 (applying intent standard from pure Fourteenth Amendment cases to at-large voting system that affected both Fourteenth and Fifteenth Amendment rights).

right was not presumed. Given the demographics of the post-Civil War South, requiring that freedmen be allowed to vote on equal terms with whites would automatically result in black representation or the ability of black voters to affect elections,¹⁰⁷ assuming states did not attempt to evade the Fifteenth Amendment.¹⁰⁸ That blacks served at nearly all levels of state and federal government in the Reconstruction South suggests that blacks could gain representation or at least exercise influence in elections if equal voting rules were enforced.¹⁰⁹ That blacks had been somewhat able to protect their political interests when southern states were required to provide them the right to vote as a condition of readmission to the Union suggests that little reason existed to be explicit that the right to vote was to include a right to representation or something close to it.¹¹⁰ Indeed, general democratic principles would suggest that protecting a substantial minority's right to vote would necessarily result in that minority group's ability to garner some representation in the absence of chicanery. Nonetheless, precisely what rights are ensured by the Fifteenth Amendment and how they should be protected remains an unresolved issue.

¹⁰⁷ See FRANKLIN, *supra* note 26, at 79-80 (noting that in the immediate post-Civil War period, blacks were a substantial percentage of voters in the South); GILLETTE, *supra* note 77, at 105 (indicating that blacks were over fifteen percent of the population even in post-War Maryland, Delaware, and Kentucky).

¹⁰⁸ Of course, each state provides its citizens the right to vote in federal elections. This has always been the case and as has been made abundantly clear in recent elections. See *Bush v. Gore*, 531 U.S. 98, 104 (2000) (observing that states control the ability of their citizens to vote in local, state, and federal elections subject to constitutional and statutory restrictions); cf. U.S. CONST. art. I, § 2 (noting that the people of the state are to elect their congressmen, but not determining who can vote in these federal elections); U.S. CONST. amend. XVII (noting that the electors for senators "shall have the qualifications requisite for electors of the most numerous branch of the State legislatures" and leaving those qualifications to the states).

¹⁰⁹ See DONALD ET AL., *supra* note 39, at 580-82 (noting that blacks held office in Reconstruction South, though not at a level equal to their population percentage); FRANKLIN, *supra* note 26, at 83, 85-90 (noting that blacks voted and held office in the Reconstruction South before and after the Fifteenth Amendment was passed); Woodward, *supra* note 90, at 237 (noting that blacks served in almost all levels of government in the Reconstruction South). Before the Confederate States were readmitted to the Union, their constitutions had to provide voting rights for former slaves. However, the Fifteenth Amendment provided durable rights that the Fourteenth Amendment never did, making clear that such a race-based restriction on voting is unconstitutional. See Finkelman, *supra* note 33, at 24 (noting that Fifteenth Amendment was one result of the failure of section 2 of the Fourteenth Amendment to functionally enfranchise black males).

¹¹⁰ Some might argue that in hindsight there was no reason to believe that states would honor the Fifteenth Amendment's commands. Nonetheless, there is no stronger message that could be sent to states that voting rights for former slaves were to be protected than the passage of a constitutional amendment. Of course, Congress also passed a number of statutes attempting to guarantee that voting rights were not infringed because of race. See DONALD ET AL., *supra* note 39, at 576 (noting the passage of the Enforcement Acts of 1870 and 1871 as an attempt to protect black voting rights).

somewhat distinct.¹¹⁵ The right to vote that the Fourteenth Amendment protects against infringement can be found in state law or more generally in the Constitution as a fundamental right that has evolved from the Constitution.¹¹⁶ Once found, the Fourteenth Amendment provides a template for distributing voting rights, which are shoehorned into the equal protection template and protected in a colorblind manner. Given how the Fourteenth Amendment protects voting rights, the Fifteenth Amendment often is not a necessary part of a Fourteenth Amendment-based voting rights jurisprudence.

However, the Fifteenth Amendment should not be viewed as merely adding the right to vote to the list of other rights to be protected under the Constitution and distributed to all citizens through the Fourteenth Amendment.¹¹⁷ The Fifteenth Amendment right not to be discriminated against in exercising one's voting rights—as opposed to a direct right to vote—is not a right that can be provided through or needs to be protected through the Fourteenth Amendment's equal protection clause.¹¹⁸ The Fifteenth Amendment's own

¹¹⁵ See Jordan, *supra* note 5, at 390. Jordan notes that:

The fifteenth amendment alone offers a unique vantage point, in which the special protection of the constitution is extended to racial minorities who seek to participate in this democracy by voting. By virtue of the fifteenth amendment, we can approach the questions arising from the loss of political representation for minorities as separate from the loss of representation to all voters arising from malapportioned districts of unequal population.

Id.

¹¹⁶ Technically, rather than providing a right to vote, the Constitution merely provides a number of ways in which the right cannot be restricted. Though the various ways in which the vote may not be restricted addresses many of the ways the vote has been restricted in the past and effectively limits the likelihood that the vote will actually be restricted in the future, the language of the Constitution does not make voting a right that cannot be denied to citizens in state elections. However, the Fifteenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth Amendments have arguably transformed the right to vote free of various types of discrimination into a general right to vote granted to all adult citizens. As such, the right to vote has become not merely a right to be distributed fairly to citizens regardless of race (or other characteristics), but also a fundamental right to be protected against nonracial incursion as well. Thus, the Fourteenth Amendment's Equal Protection Clause requires that any restriction on the right (as a fundamental right) or any race-based restriction on the right (as an ordinary right) survive strict scrutiny to be constitutional. See *Romer v. Evans*, 517 U.S. 620, 634 (1996) (suggesting strict scrutiny as the standard for validating restrictions on the right to vote); *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972) (noting the "close constitutional scrutiny" to which voting restrictions will be put); see also Kathryn Abrams, *No "There" There: State Autonomy and Voting Rights Regulation*, 65 U. COLO. L. REV. 835, 836 (1994) (noting that as the right to vote has been deemed a fundamental right, states need greater justification to infringe it than previously).

¹¹⁷ Unfortunately, courts have treated voting discrimination as just another type of Fourteenth Amendment discrimination. See, e.g., *City of Mobile*, 446 U.S. at 67 (plurality opinion) ("The Court explicitly indicated in *Washington v. Davis* that this principle applies to claims of racial discrimination affecting voting just as it does to other claims of racial discrimination.").

¹¹⁸ See Gardner, *supra* note 2, at 894 ("Less contradictory, but equally puzzling, is the Court's insistence on analyzing voting rights claims under the Equal Protection Clause when the right to vote in a republic seems

history suggests that the protection of voting rights under that amendment may be different from the protection of voting rights through the Fourteenth Amendment.¹¹⁹ The Fifteenth Amendment provided freedmen the ability to protect their legal interests and secure additional freedoms through the exercise of the franchise and an opportunity to participate in public life by guaranteeing that they would not be denied a voice as citizens merely because of their race or previous condition of servitude.¹²⁰ Given the context in which it was passed and its goal of providing political equality through its requirement of equal voting rights, the Fifteenth Amendment should protect such rights somewhat more aggressively than the Fourteenth Amendment protects other constitutional rights. The Fourteenth Amendment's protection of rights can be incomplete, as a race-based denial of rights must be intentional to be unconstitutional. Thus, if the Fifteenth Amendment is ignored, the Fourteenth Amendment may allow the validation of rules that appear to breach the Fifteenth Amendment's spirit or letter.

The conflation of Fourteenth and Fifteenth Amendments with respect to voting rights is not without harm. The conflation can effectively limit minority voting rights, as the Fourteenth Amendment protects voting rights by requiring colorblindness in some situations where requiring race-neutral results might be more appropriate under the Fifteenth Amendment.¹²¹ Nonetheless, it appears

a far better candidate for substantive than for relative forms of analysis.”); Pamela S. Karlan & Daryl J. Levinson, *Why Voting Is Different*, 84 CAL. L. REV. 1201, 1202 (1996) (stating that Supreme Court's attempt to shoehorn voting rights into a Fourteenth Amendment general equal protection analysis was “both misguided and incoherent”).

¹¹⁹ See Terry Smith, *Reinventing Black Politics: Senate Districts, Minority Vote Dilution and the Preservation of the Second Reconstruction*, 25 HASTINGS CONST. L.Q. 277, 308 (1998). Smith notes:

[T]he Court ignores the Fifteenth Amendment, construing the right to vote in the comparative context of the Fourteenth Amendment rather than in the substantive contours of the Fifteenth, and thus ignoring the possibility that the right, in order to be equally exercised, may require different schemes of implementation, such as majority-minority districts.

Id.; see also Jordan, *supra* note 5, at 390-93 (noting the substantive protection that the Fifteenth Amendment should provide).

¹²⁰ Though they apply to all Americans, the Reconstruction Amendments were specifically aimed at providing equal citizenship for former slaves and their progeny. See *Ex parte Yarbrough*, 110 U.S. 651, 665 (1884) (noting that Fifteenth Amendment was in place mainly for “citizens of African descent”); *The Slaughterhouse Cases*, 83 U.S. (16 Wall) 36, 71-72 (1872) (“It is true that only the fifteenth amendment, in terms, mentions the negro by speaking of his color and his slavery. But it is just as true that each of the other articles was addressed to the grievances of that race, and designed to remedy them as the fifteenth.”).

¹²¹ Of course, this does not mean that race-conscious solutions that yield race-neutral results would necessarily be constitutional. Such a rule would still be subject to the Equal Protection Clause even if it were allowed under Fifteenth Amendment jurisprudence. See *Shaw v. Reno*, 509 U.S. 630, 642-44 (1993) (suggesting that racial classification in the context of a districting scheme seeking to provide equal

that constitutional voting rights claims—whether brought under the Fourteenth or Fifteenth Amendment—must involve intentional discrimination to be successful, at least for now.¹²² Though the precise contours of intent are not clear, as the Court's decisions often do not provide clear lines distinguishing intentional and unintentional discrimination, requiring intent this can be a significant limitation on the full exercise of voting rights.¹²³

representation is still an unconstitutional racial classification). Some commentators are puzzled by *Shaw v. Reno*, and whether it is considered an equal protection case or a voting rights case given the seeming lack of sufficient harm shown by plaintiffs. See Blacksher, *supra* note 9, at 664.

What makes the *Shaw* constitutional right analytically distinct is that it does not depend on proof that any persons have actually been injured in the sense in which challenged state action traditionally has been judicially cognizable. . . . [I]n other contexts, such as attacks on affirmative action, the complainant not only must show he was classified on the basis of his race, but that the classification at least potentially denied him equal opportunity to obtain some tangible benefit or avoid some palpable harm. Where the context is legislative construction of electoral districts, however, the only harm that need be alleged is the racial classification itself.

Id; Pamela S. Karlan, *Still Hazy After All These Years: Voting Rights in the Post-Shaw Era*, 26 CUMB. L. REV. 287, 289-99 (1995-1996) (arguing *Shaw* plaintiffs evident lack of standing under traditional standing principles); Karlan & Levinson, *supra* note 118, at 1209-10 (suggesting that amount of representation (adequate or virtual) that individuals and groups received in entire electoral process was the key to specific gerrymandering injury before *Shaw v. Reno* and *Miller v. Johnson*); Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno*, 92 MICH. L. REV. 483, 506 (1993) (suggesting that the harms suffered in *Shaw* were of different type than those usually suffered by those who have standing). Not surprisingly, this has ignited a debate regarding whether plaintiffs in cases like *Shaw* should have standing. See John Hart Ely, *Standing to Challenge Pro-Minority Gerrymanders*, 111 HARV. L. REV. 576 (1997) (arguing that real harm exists in cases like *Shaw* and, therefore, standing exists as well); *contra* Samuel Issacharoff & Pamela S. Karlan, *Standing and Misunderstanding in Voting Rights Law*, 111 HARV. L. REV. 2276 (1998) (suggesting that standing must match a substantive vision of constitutional injury which the Court has not articulated); Reed, *supra* note 103, at 392 (noting that *Shaw v. Reno*'s standing doctrine "is facially aberrational and nonsensical"). Note that when black Americans press abstract discrimination claims, they are often denied standing. See, e.g., *Allen v. Wright*, 468 U.S. 737 (1984); see also David Kairys, *Unexplainable on Grounds Other than Race*, 45 AM. U. L. REV. 729, 738 (1996) (suggesting that a dual system exists in which claims that whites have been disadvantaged are presumed true while claims that blacks are disadvantaged must be proven); Frank R. Parker, *Factual Errors and Chilling Consequences: A Critique of Shaw v. Reno and Miller v. Johnson*, 26 CUMB. L. REV. 527, 533 (1995-1996) (suggesting that when claims of harm similar to the *Shaw* plaintiffs' are brought in other contexts "the Supreme Court characterizes such allegations as conjectural, or wholly speculative; and says there is no injury, therefore there's no standing [and] . . . there is not even an Article III case or controversy because there's no injury").

¹²² See *City of Mobile*, 446 U.S. at 62 (plurality opinion) ("Our decisions, moreover, have made clear that action by a State that is racially neutral on its face violates the Fifteenth Amendment only if motivated by a discriminatory purpose."); see also *id.* at 66 (noting that Fourteenth Amendment violation must be based on purposeful discrimination). Indeed, the Court's intent requirement forces scholars to defend the use of a results test in the Voting Rights Act, a statute designed to implement the Fifteenth Amendment. See, e.g., Karlan, *supra* note 2, at 726.

¹²³ Of course, in *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), the precision of the ostensibly colorblind repartitioning of the city was proof of the intent to discriminate. See *infra* notes 134-39. Additionally, though

Race-conscious voting rules and colorblind voting rules that are motivated by discriminatory intent are subject to strict scrutiny as potential violations of the Fifteenth Amendment, potential race-based violations of the Equal Protection Clause of the Fourteenth Amendment, and potential fundamental rights violations of the Equal Protection Clause. Conversely, voting rules that yield a racially disparate impact, but are not motivated by intentional discrimination, are treated only as potential Fourteenth Amendment violations of the individual voter's fundamental right to vote rather than as race-based violation of minority group's voting rights under the Fourteenth or Fifteenth Amendment.¹²⁴ Though the formal standards of scrutiny may be similar, the functional standard for invalidating a rule that violates the Fourteenth Amendment's fundamental right to vote may be different than the functional standard that applies to a race-based constitutional violation.¹²⁵

Applying the Fourteenth Amendment rights protection structure to Fifteenth Amendment voting rights is troubling. Allowing colorblind rules that have a race-preferred effect on the exercise of voting rights, e.g., rules that could negatively impact a minority group's ability to vote or gain representation, to be presumptively constitutional is worrisome. Though the Supreme Court does not require colorblindness to the exclusion of all factors, preferring to strike an uneasy balance between colorblindness and race-conscious race neutrality reflective of the continued vitality of the Voting Rights Act,¹²⁶ the result of the Court's jurisprudence is general acceptance of the constitutionality of colorblind electoral rules without regard to their effect on race neutrality and general skepticism of the constitutionality of color-conscious electoral rules regardless of their effect on race neutrality. This may be at odds with the spirit of the Fifteenth Amendment, which, based on the

a plurality of the Court in *City of Mobile* found the evidence presented to be insufficient to support an equal protection claim, 446 U.S. at 73-74, it is unclear that that evidence was significantly weaker than the evidence in *Rogers*, 458 U.S. 613, that did support such a claim. See Karlan, *supra* note 2, at 737 (noting that the evidence in *Rogers v. Lodge* suggested but did not explicitly demonstrate discriminatory intent).

¹²⁴ Disparate impact analysis deals with rules that have differential impacts for different races. See Michael J. Perry, *The Disproportionate Impact Theory of Racial Discrimination*, 125 U. PA. L. REV. 540, 541 n.3 (1977) ("A government action has a disproportionate racial impact if it has the effect of disadvantaging a greater percentage of nonwhites than whites, or of disadvantaging nonwhites much more grievously than whites."). A rule could have a disparate impact because of an immutable factor. Voting rules based on ancestry may do this. Subjecting such a rule to heavy scrutiny is sensible because the rule can be considered race-based, even if unintentionally so.

¹²⁵ Though the standard of scrutiny may linguistically be the same, the results can be quite different. See *infra* notes 140-49 and accompanying text.

¹²⁶ For a general defense of the Voting Rights Act as proper enforcement mechanism for the Fourteenth and Fifteenth Amendments, see Karlan, *supra* note 2.

content of the voting rights that the Fifteenth Amendment protects, entails some measure of substantive political equality.

2. *The Right to Cast a Ballot*

a. *Protecting the Right to Cast a Ballot*

The Fifteenth Amendment protects a citizen's right to cast a ballot free of racial discrimination.¹²⁷ All race-conscious voting rules are subject to exacting scrutiny, as even race-conscious voting rules that are supported by a credible, nonracial justification may violate the Fifteenth Amendment. For example, in *Rice v. Cayetano*,¹²⁸ the Supreme Court determined that a voting scheme governing the election of trustees of the Office of Hawaiian Affairs (OHA) violated the Fifteenth Amendment. The OHA electorate consisted of Hawaiians who had an ancestor who lived in Hawaii in 1778 and Hawaiians who were descended from the indigenous races that lived in Hawaii in 1778.¹²⁹ Defining the OHA electorate in this way appeared sensible, as the OHA administers lands for the benefit of those Hawaiians who had an ancestor who lived in Hawaii in 1778 and those Hawaiians who were descended from indigenous races living in Hawaii in 1778, i.e., the OHA electorate.¹³⁰ Nonetheless, in determining that this voting scheme violated the Fifteenth Amendment, the Court appeared to conclude that the combination of the use of ancestry and the distinct racial makeup of the inhabitants of Hawaii in 1778 necessarily meant that the makeup of the electorate for the OHA trustees—descendants of those people—was based (at least in part) on race, and thus

¹²⁷ Some have suggested that the right to cast a ballot may be the only right the Fifteenth Amendment protects. See *City of Mobile*, 446 U.S. at 64-65 (plurality opinion) (taking a particularly narrow view of the Fifteenth Amendment as limited to registration and casting a vote); see also *Holder v. Hall*, 512 U.S. 874, 892-93 (1994) (Thomas, J., concurring) (suggesting that access to the ballot is the only right the Voting Rights Act protects).

¹²⁸ 528 U.S. 495 (2000).

¹²⁹ *Id.* at 499.

¹³⁰ *Id.*

[The OHA] administers programs designed for the benefit of two subclasses of the Hawaiian citizenry. The smaller class comprises those designated as 'native Hawaiians,' defined by statute . . . as descendants of not less than one-half part of the races inhabiting the Hawaiian Islands prior to 1778 The second, larger class of persons benefited by OHA programs is 'Hawaiians,' defined to be . . . those persons who are descendants of people inhabiting the Hawaiian Islands in 1778.

Id.

violated the Fifteenth Amendment.¹³¹ That the OHA electorate included peoples of all races (through intermarriage, the existence of people not of indigenous blood living in Hawaii in 1778, or other means) did not matter; that the ability to vote could hinge on the race of the voter did matter.¹³² Thus, the Fifteenth Amendment invalidated the voting rules in *Rice*.¹³³

Likewise, colorblind voting rules that are supported by discriminatory intent may also violate the Fifteenth Amendment. For example, in *Gomillion v. Lightfoot*,¹³⁴ the Supreme Court ruled that an Alabama law repartitioning the City of Tuskegee to include nearly all of the white citizens of the previously-constituted city and to exclude nearly every black citizen of the previously-constituted city violated the Fifteenth Amendment.¹³⁵ The law was facially colorblind in that it merely redefined the city's boundaries.¹³⁶ However, because the lines were drawn precisely to exclude black residents from the electorate to stop them from voting in municipal elections,¹³⁷ the law had precisely the same effect as and was reasonably viewed as a marginally clever attempt to cut black voters out of an election in which they were entitled to

¹³¹ This is not to say that no whites lived in Hawaii in 1778 or that a single race of people inhabited Hawaii in 1778. Rather, it is to say that the racial mix of people living in Hawaii in 1778 was such that their descendants would necessarily create an electorate that tended to include those of certain races and exclude those of other races. *Id.* ("Ancestry can be a proxy for race. It is that proxy here. Even if the residents of Hawaii in 1778 had been of more diverse ethnic backgrounds and cultures, it is far from clear that a voting test favoring their descendants would not be a race-based qualification.")

¹³² The Court also dismissed the State of Hawaii's argument that the rule merely limited the electorate to those for whose benefit the land was to be administered, and thus was not based on race. *Id.*

¹³³ Of course, the *Rice* Court can be criticized for using the Fifteenth Amendment to refuse to allow the descendants of an indigenous people to determine how lands reserved for their benefit are to be used. Though one might quarrel with the creation of the OHA and its administration of lands for the benefit of a particular subset of citizens, limiting the OHA's electorate to those for whose benefit the OHA was created does not appear to be intentionally discriminatory in the way that other unconstitutional voting rules have been. *See, e.g.,* *Gomillion v. Lightfoot*, 364 U.S. 339 (1960) (redrawing municipal lines to specifically exclude blacks from the electorate); *Lane v. Wilson*, 307 U.S. 268 (1939) (passing grandfather clause to allow whites to qualify to vote because of their ancestry while maintaining exclusion of blacks). This does not mean that *Rice* was wrongly decided; it just may mean that its view of the Fifteenth Amendment may be particularly aggressive.

¹³⁴ 364 U.S. at 339.

¹³⁵ *Id.* ("The essential inevitable effect of this redefinition of Tuskegee's boundaries is to remove from the city all save only four or five of its 400 Negro voters while not removing a single white voter or resident.")

¹³⁶ *See* *Shaw v. Reno*, 509 U.S. 630, 646 (1993) (noting that a districting plan "typically does not classify persons at all; it classifies tracts of land, or addresses").

¹³⁷ Of course, there is a distinction between being excluded from an electorate to which one should belong and being unable to vote in one's preferred district. *See* *Gomillion*, 364 U.S. at 349 (Whittaker, J., concurring).

vote.¹³⁸ In practical terms, the repartition eliminated the black voters' ability to cast a ballot and, thus, violated the Fifteenth Amendment.¹³⁹

Similarly, other more sophisticated colorblind rules that intentionally deprive minorities of the ability to cast a ballot may run afoul of the Fifteenth Amendment.¹⁴⁰ Grandfather clauses, clauses that guarantee the right to vote to citizens whose grandfathers had been eligible to vote while placing additional voting qualifications on other citizens, violate the Fifteenth Amendment.¹⁴¹ In vogue in the late nineteenth and early twentieth centuries, grandfather clauses were technically colorblind (though clearly not race-neutral as to results) in that they were based on the voting rights of one's ancestors.¹⁴² However, they worked to skew the electorate to include whites and exclude blacks. Working hand-in-glove with literacy tests, grandfather clauses were designed to welcome many white citizens into the electorate who had been excluded by literacy tests, while maintaining the exclusion of many black citizens who were excluded from the electorate by the same literacy tests.¹⁴³ That grandfather

¹³⁸ See *id.* at 347 (suggesting that the point to redrawing the boundaries was to deprive black voters of their right to vote). Attempts to add voters to cities may also lead to statutory violations. See *City of Petersburg v. United States*, 354 F. Supp. 1021 (D.D.C. 1972), *aff'd*, 410 U.S. 962 (1973).

¹³⁹ The Fifteenth Amendment implications of this type of line-drawing should be differentiated from the Fourteenth Amendment implications of racial gerrymanders. While some would argue that a racial gerrymander is a Fifteenth Amendment violation, one distinction between the situations is that there is no denial of a right to cast a ballot in the racial gerrymander case. The voter is allowed to vote, albeit in a different district than she prefers. However, in *Gomillion*, the line-drawing excluded the voters from voting at all. In other words, the election in *Gomillion* was for the City of Tuskegee; the plaintiffs in the case were residents of the City of Tuskegee who were not allowed to vote in the City of Tuskegee elections.

¹⁴⁰ See *Lane v. Wilson*, 307 U.S. 268, 275 (1939) ("The [Fifteenth] Amendment nullifies sophisticated as well as simple-minded modes of discrimination. It hits onerous procedural requirements which effectively handicap exercise of the franchise by the colored race although the abstract right to vote may remain unrestricted as to race."). Unfortunately, our country has had a history of attempting to exclude minorities from voting. See Kim Forde-Mazrui, *Jural Districting: Selecting Impartial Juries Through Community Representation*, 52 VAND. L. REV. 353, 379 (1999) ("Voting laws that discriminated on their face, once invalidated, were replaced by only slightly less obvious devices, such as literacy test, grandfather clauses, and poll taxes, that prevented large numbers of racial minorities from exercising the right to vote.").

¹⁴¹ See *Lane*, 307 U.S. at 276-77 (invalidating system dispensing with the registration of voters who had been allowed to vote in last election using grandfather clause while requiring all others to register within a twelve-day period or forever lose the right to register and vote); *Guinn v. United States*, 238 U.S. 347, 367 (1915) (deeming use of grandfather clause a Fifteenth Amendment violation); see also *Jordan*, *supra* note 5, at 398-99 (detailing the litigation surrounding grandfather tests).

¹⁴² The race of one's grandfather is correlated to one's race and whether one's grandfather had voting rights has historically been related to race. However, the linkage on one's voting rights to those of one's grandfather is not necessarily race-based. Indeed, two generations from today, the use of a grandfather rule might be race-neutral, though somewhat pointless, except as a raw exercise of power over those whose grandfathers were not U.S. citizens.

¹⁴³ See *Lassiter v. Northampton County Bd. of Elections*, 360 U.S. 45, 45-47 (1959) (noting original combination literacy test/grandfather clause in the statutory scheme at issue); *Derfner*, *supra* note 87, at 536-38

clauses were deemed unconstitutional is not surprising, as they had no purpose other than to violate the spirit and the letter¹⁴⁴ of the Fifteenth Amendment.¹⁴⁵

Though facially colorblind rules that are supported by discriminatory intent and race-conscious rules are generally unconstitutional, voting rules that yield a racially disparate impact, but that may not be supported by discriminatory intent or the intent to evade the Fifteenth Amendment, may be constitutional under the Fifteenth Amendment.¹⁴⁶ They are, however, subject to the Fourteenth Amendment limitation on the abridgement of the fundamental right to vote.¹⁴⁷ Thus, grandfather clauses are unconstitutional under the Fifteenth Amendment though the literacy tests that were originally coupled with them may remain constitutional under a Fourteenth Amendment analysis, at least for now.¹⁴⁸ To see how the Fourteenth and Fifteenth Amendments interact with

(noting historical interplay between grandfather clause and literacy test). Attempts to use various means to reach the same ends are not surprising. See Hench, *supra* note 69, at 742 (“Historian J. Morgan Kousser . . . supported the view that felon disenfranchisement laws were specifically intended to serve as insurance if courts struck down more blatantly unconstitutional clauses.”); John O. Calmore, *Race-Conscious Voting Rights and the New Demography in a Multiracing America*, 79 N.C. L. REV. 1253, 1277-78 (2001) (arguing that southern felon disenfranchisement laws were aimed at taking the ability to vote from minorities). *But see* Wesley v. Collins, 605 F. Supp. 802, 813 (M.D. Tenn. 1985), *aff’d*, 791 F.2d 1255 (6th Cir. 1986) (suggesting a nondiscriminatory history of disfranchising felons).

¹⁴⁴ See *Lane*, 307 U.S. at 276 (“Unfair discrimination was thus retained by automatically granting voting privileges for life to the white citizens whom the constitutional ‘grandfather clause’ had sheltered while subjecting colored citizens to a new burden.”); *Guinn*, 238 U.S. at 363-64 (suggesting that the grandfather clause was passed specifically to avoid the Fifteenth Amendment).

¹⁴⁵ Though they look similar, the *Rice* case and the grandfather clause cases can be, and arguably should be, treated differently. The grandfather clauses allowed the descendants of the electorate of yesterday to vote today. The discrimination that constructed the electorate of the 1860s (a portion of the populace) potentially eligible created the racially skewed electorate of two generations later. Conversely, the scheme in *Rice* allowed the descendants of the entire eligible populace of yesterday to vote today. Without discrimination in the construction of the populace of yesterday, the racial makeup of today’s electorate is more serendipitous than racially motivated. This is not to state that the scheme in *Rice* should have been validated; it is to suggest that the problems underlying the scheme are different than those underlying the grandfather clause cases.

¹⁴⁶ Of course, they arguably should be unlawful under the Voting Rights Act. See Stephen B. Pershing, *The Voting Rights Act in the Internet Age: An Equal Access Theory for Interesting Times*, 34 LOY. L.A. L. REV. 1171, 1172 (2001) (noting that a rule that has a disparate impact on a minority group’s access to the ballot should be subject to the Voting Rights Act “even if it does not measurably affect a minority group’s ability to influence or control the outcome of elections”).

¹⁴⁷ Of course, that disparate impact does not necessarily equal unconstitutionality does not mean that a statutory prohibition on disparate impact would be troublesome. See Karlan, *supra* note 2, at 738 (“In assessing the constitutionality of Congress’s determination to enforce the Fourteenth and Fifteenth Amendments using an impact standard, the Court should conclude that the risk that constitutionally innocuous conduct will be banned is outweighed by the difficulty of detecting and stopping serious constitutional injuries.”). The Voting Rights Act prohibits many practices that yield disparate impact.

¹⁴⁸ Some believe that literacy tests would be banned under the Fourteenth Amendment if they were reexamined today, at least that might be the scholarly sentiment given the supposed constitutional evolution on

respect to rules that have a disparate racial impact, it is worthwhile to look at how literacy tests have been scrutinized.¹⁴⁹

b. Literacy Tests

Concerns regarding literacy tests have not been recently explored by courts because such tests have been statutorily banned since the passage of the Voting Rights Act of 1965.¹⁵⁰ Such tests have not been deemed unconstitutional per se. Though courts have invalidated schemes using grandfather clauses and literacy tests in conjunction, once the grandfather clauses were invalidated, the literacy tests have stood on their own.¹⁵¹ Particular literacy tests have been retained because of their disparate impact on the ability of blacks as a group to vote.¹⁵² However, in assessing the general constitutionality of literacy tests,

voting rights. See Richard H. Pildes, *Two Conceptions of Rights in Cases Involving Political "Rights,"* 34 HOUS. L. REV. 323, 327 (1997) (noting that some scholars view *Lassiter v. Northampton County Bd. of Elections*, 360 U.S. 45 (1959), merely as a old constitutional curiosity decided before the modern era of the protection of voting rights). Of course, notions of voting rights arguably should change over time. See *Richardson v. Ramirez*, 418 U.S. 24, 82 (1974) (Marshall, J., dissenting). Justice Marshall commented in his dissent:

Although, in the last century, this Court may have justified the exclusion of voters from the electoral process for fear that they would vote to change laws considered important by a temporal majority, I have little doubt that we would not countenance such a purpose today. The process of democracy is one of change. Our laws are not frozen into immutable form, they are constantly in the process of revision in response to the needs of a changing society.

Id.

¹⁴⁹ Of course, as with all voting rules, any particular literacy test may be unconstitutional though not all literacy tests are unconstitutional. See *Oregon v. Mitchell*, 400 U.S. 112, 132 (1970) (noting history of discrimination accompanying literacy tests). As the Court observed in *Lassiter*:

Of course a literacy test, fair on its face, may be employed to perpetuate that discrimination which the Fifteenth Amendment was designed to uproot. No such influence is charged here. On the other hand, a literacy test may be unconstitutional on its face. In *Davis v. Schnell*, 81 F. Supp. 872, 873. *aff'd* 336 U.S. 933, the test was the citizen's ability to 'understand and explain' an article of the Federal Constitution. The legislative setting of that provision and the great discretion it vested in the registrar made clear that a literacy requirement was merely a device to make racial discrimination easy. We cannot make the same inference here.

Lassiter v. Northampton Bd. of Elections, 360 U.S. 45, 53-54 (1959).

¹⁵⁰ The original five-year ban has been extended through amendments to the Voting Rights Act. See 42 U.S.C. § 1973aa(b) (2000) (continuing ban on literacy tests and other tests designed to restrict voting).

¹⁵¹ See, e.g., *Lassiter*, 360 U.S. at 45-47 (noting literacy test scheme in that case started as a combined grandfather clause/literacy test scheme).

¹⁵² Of course, any test passed with the intent to discriminate should be unconstitutional. See *Gomillion v. Lightfoot*, 364 U.S. 339 (1960). However, hypothetically, any specific literacy test could have been passed without such intent.

the Supreme Court has analyzed literacy tests as though some were not supported by discriminatory intent.¹⁵³

How to address the disparate impact that may be caused by the colorblind application of a colorblind law, such as a literacy test, is the question. A disparate impact occurs when societal conditions, possibly flowing from a history of discrimination, are such that a voting rule disqualifies a higher percentage of voters of a particular minority group than of the nonminority group. Even a reasonably well-crafted literacy test could have this effect if the English language literacy rate of a particular minority group were lower than that of the general population.¹⁵⁴ A rule causing a disparate impact on a minority group's ability to vote causes two harms. The first is the Fourteenth Amendment harm to an individual group member's fundamental right to vote. The second is the Fifteenth Amendment harm that a minority group will suffer through the disfranchisement of its members. The group's voting strength and ability to elect its candidate of choice will be diminished because the percentage of its members who will lose their ability to vote is higher than that

¹⁵³ Of course, this does not necessarily describe the real application of literacy tests. There are at least two other concerns that attend literacy tests, but they are already addressed by constitutional jurisprudence. The first is that the test can or will be applied in an unconstitutional manner. This concern is not related to the rule's constitutionality, as the discriminatory application of a constitutional rule supports the application's unconstitutionality, not necessarily the rule's. The second is that the installation or stricter enforcement of a rule occurs in response to or at precisely the time minorities gain the ability to exercise power in the political system. This concern has not gone unaddressed historically. See Derfner, *supra* note 87, at 546 (describing mechanism in 1960 Civil Right Act requiring that same rules that have been applicable for white voting remain as the rules to be applied when blacks began to vote again); Owen M. Fiss, *Gaston County v. United States: Fruition of the Freezing Principle*, 1969 SUP. CT. REV. 379, 417 (noting that the Court in *Gaston County v. United States*, 395 U.S. 285, 291 (1969), accepted findings that a large majority of the current voting black population subject to the literacy test had been deprived of equal education opportunities). In some situations, timing may allow a finding of intentional discrimination:

Evidence of historical discrimination is relevant to drawing an inference of purposeful discrimination, particularly in cases such as this one where the evidence shows that discriminatory practices were commonly utilized, that they were abandoned when enjoined by courts or made illegal by civil rights legislation, and that they were replaced by laws and practices which, though neutral on their face, serve to maintain the status quo.

Rogers v. Lodge, 458 U.S. 613, 625 (1982). This concern is related to the rule's constitutionality, but should be subsumed in the constitutional standard that subjects colorblind rules passed with discriminatory intent to strict scrutiny. It is somewhat like the use of municipal line drawing in *Gomillion* to eliminate blacks from voting. See *Gomillion*, 364 U.S. at 346-47 (noting that the use of line drawing to deprive blacks from voting is unconstitutional because it deprives blacks the vote; the practice is not to be deemed constitutional merely because line drawing tends to be a state prerogative).

¹⁵⁴ See *Gaston County v. United States*, 395 U.S. 285, 289-90 (1969) (noting differential literacy rate between minority and nonminority populations in North Carolina at the time this case was decided).

of the nonminority group.¹⁵⁵ If the scrutiny to which a rule causing a disparate impact is subjected is high enough under the Fourteenth Amendment's non-race-based fundamental rights jurisprudence, that Fifteenth Amendment scrutiny is not applied to the rule might not matter.¹⁵⁶ However, if the Fourteenth Amendment scrutiny is low, a Fifteenth Amendment analysis should also apply to the rule, and possibly invalidate it.

The Fourteenth Amendment limits restrictions on an individual's fundamental right to vote,¹⁵⁷ supposedly requiring a strong justification to allow an infringement.¹⁵⁸ That a rule survives the applicable scrutiny means that it is literally justified in infringing rights provided by the Constitution.¹⁵⁹ The Supreme Court's original, and as yet not reversed, justification for the constitutionality of literacy tests is that literacy bears some relation to the responsible exercise of the right to vote, and therefore, literacy tests bear some relation to the right to vote.¹⁶⁰ Because the justification for literacy tests was proffered before it was clear that the right to vote was to be deemed a

¹⁵⁵ This necessarily affects the group's ability to gain representation.

¹⁵⁶ The scrutiny should be high. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 17 (1973) ("We must decide, first, whether the Texas system of financing public education operates to the disadvantage of some suspect class or impinges upon a fundamental right explicitly or implicitly protected by the Constitution, thereby requiring strict judicial scrutiny.").

¹⁵⁷ See *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 670 (1966) (suggesting that voting is a fundamental right); *Reynolds v. Sims*, 377 U.S. 533, 561-62 (1964) ("Undoubtedly, the right to suffrage is a fundamental matter in a free and democratic society.").

¹⁵⁸ That voting is a fundamental right would make any infringement on it subject to Fourteenth Amendment scrutiny and would seem to make additional Fifteenth Amendment scrutiny redundant. See, e.g., *Dunn v. Blumstein*, 405 U.S. 330, 337 (1972) (applying compelling state interest test to justify restriction on right to vote). However, Professor Richard Pildes has noted that the constitutionality of literacy tests does not necessarily conflict with a fundamental rights analysis. See Richard H. Pildes, *Why Rights Are Not Trumps: Social Meanings, Expressive Harms, and Constitutionalism*, 27 J. LEGAL STUD. 725, 745-47 (1998); Pildes, *supra* note 148, at 326. Of course, the fact that pure political gerrymandering is not subject to strict scrutiny makes one wonder how robustly the Fourteenth Amendment repels infringements on non-race-based voting rights. See *Bush v. Vera*, 517 U.S. 952, 964 (1996) (plurality opinion) ("We have not subjected political gerrymandering to strict scrutiny.").

¹⁵⁹ See *Shaw v. Reno*, 509 U.S. 630, 642 (1993) (noting that "sufficiently compelling justification" is necessary to overcome race-based constitutional violation); *Pers. Admin. of Mass. v. Feeney*, 442 U.S. 256, 272 (1979).

¹⁶⁰ See *Lassiter v. Northampton County Bd. of Elections*, 360 U.S. 45, 51-52 (1959), noting that:

The ability to read and write likewise has some relation to standards designed to promote intelligent use of the ballot. Literacy and illiteracy are neutral on race, creed, color, and sex, as reports around the world show. Literacy and intelligence are obviously not synonymous. Illiterate people may be intelligent voters. Yet in our society where newspapers, periodicals, books, and other printed matter canvass and debate campaign issues, a State might conclude that only those who are literate should exercise the franchise.

fundamental right subject to strict scrutiny under the Fourteenth Amendment, commentators have argued that the scrutiny that literacy tests would now be subject to under the Fourteenth Amendment would invalidate them.¹⁶¹ Though this may be the case for any particular literacy test, it is not clear that this would be the case for literacy tests in general. The Supreme Court has cited the theory supporting the constitutionality of literacy tests since it became clear that voting is a fundamental right, and it has yet to retreat from its justification for literacy tests.¹⁶² Whether or not the Court would change its position if presented with the literacy test issue today, the Court's current Fourteenth Amendment jurisprudence with respect to literacy tests is wanting because the justification needed to validate the literacy test and other voting restrictions is quite low.¹⁶³

Whatever the level of scrutiny chosen, the Fourteenth Amendment fundamental rights jurisprudence would appear to be the proper one to apply to a literacy test not passed with discriminatory intent. Simply, the justification offered under the Fourteenth Amendment fundamental rights jurisprudence would appear to supplant any Fifteenth Amendment challenges or Fourteenth Amendment race-based challenges to such literacy tests.¹⁶⁴ Disparate impact issues simply do not arise under current Fifteenth Amendment analysis. The Fourteenth Amendment's intent to discriminate standard—imported into Fifteenth Amendment jurisprudence—would be fatal to a disparate impact claim with respect to a literacy test brought pursuant to the Fifteenth Amendment. That the Fifteenth Amendment is currently deemed inapplicable to disparate impact claims is troubling because the focus of a Fifteenth Amendment analysis would be different than the Fourteenth Amendment

¹⁶¹ See *supra* note 148.

¹⁶² See *Harper*, 383 U.S. at 665 (noting approval of *Lassiter* while invalidating poll tax). Cf. *Morse v. Republican Party of Virginia*, 517 U.S. 186, 217 n.30 (1996) (noting and not challenging *Lassiter* Court's decision that "facially fair tests are not themselves unconstitutional").

¹⁶³ For example, the justification for disfranchising felons appears to be relatively low. See *Richardson v. Ramirez*, 418 U.S. 24 (1974) (noting that disfranchising felons who have served their sentences and parole is constitutional, but offering no analysis that would suggest such disfranchisement rises to the level of a compelling state interest); *Wesley v. Collins*, 791 F.2d 1255, 1261-62 (6th Cir. 1986) (arguing that disfranchising felons serves a compelling state interest because the Constitution does not forbid such disfranchisement). This is particularly interesting given that many felon disfranchisement laws had their genesis in attempting to stop blacks from voting. See *Hunter v. Underwood*, 471 U.S. 222, 231-32 (1985) (noting that racial discrimination was a motivating factor in Alabama's felon disfranchisement statute); *Hench*, *supra* note 69, at 738-43.

¹⁶⁴ Indeed, the plaintiffs in *Lassiter* argued that the literacy tests at issue violated the Fifteenth Amendment as well as the Fourteenth Amendment. See *Lassiter*, 360 U.S. at 46 (declining to invalidate the literacy tests without commenting on the specific Fifteenth Amendment challenge raised).

fundamental rights analysis. The Fourteenth Amendment analysis focuses on whether the literacy test is generally justified as an abridgement of the individual voter's right to vote. It does not focus on whether the literacy test is a justified abridgement of the right to vote given the possible impact it might have on the political equality of minority voters. Given the low level of justification currently provided to support a literacy test's infringement on the ability to vote, requiring a justification that would meet Fifteenth Amendment objections to literacy tests might lead to their independent invalidation under the Fifteenth Amendment.¹⁶⁵

A justification sufficient to validate a voting rule that causes a racial disparate impact should be focused on overcoming the Fifteenth Amendment harm of the racial disparate impact, not merely on the Fourteenth Amendment harm to the individual's right to cast a ballot.¹⁶⁶ This is particularly so given the historical use of the literacy test as a way to create a disparate impact on minority voters. If the Fifteenth Amendment was supposed to allow former slaves and their progeny to exercise equal voting rights and influence according to their numbers, a voting rule that lessens that ability should be strongly justified not merely as convenient to voting (as the Fourteenth Amendment analysis of the literacy test suggests), but as fundamental to voting and to protecting the democratic enterprise.

Though the Fifteenth Amendment does not currently apply to disparate impact claims, it is suggested below that the Fifteenth Amendment could, consistent with general constitutional and democratic doctrine, be applied to literacy tests and other voting rules that cause a systematic disparate impact. However, before suggesting a plan to address the issue, it will be worthwhile to examine more fully how the disparate impact issue affects the ability of a minority group member to gain equal representation pursuant to the Fifteenth Amendment because the existence of a right to equal representation of some sort is necessary before its abridgment becomes problematic.

¹⁶⁵ This problem likely would go away if the Fourteenth Amendment standard actually applied to literacy tests matched the fundamental rights rhetoric. See *City of Mobile v. Bolden*, 446 U.S. 55, 83-84 (1980) (Stevens, J., concurring) ("Such practices must be tested by the strictest constitutional standards, whether challenged under the Fifteenth Amendment or under the Equal Protection Clause of the Fourteenth Amendment.").

¹⁶⁶ See *City of Mobile*, 446 U.S. at 134 (Marshall, J., dissenting) (arguing that disparate impact test would appropriately focus on the Fifteenth Amendment harm to minority voting rights).

3. *The Right to Elect One's Representative of Choice and Vote Dilution*

In addition to the right to cast a ballot, the right to vote includes the right to have that ballot counted¹⁶⁷ and the coordinate right to representation when one's numbers are sufficient to support representation.¹⁶⁸ That this general right to representation is embedded in the right to vote is made clear in the one-person, one-vote jurisprudence of *Reynolds v. Sims*.¹⁶⁹ *Reynolds* found a right to a vote of equal weight for all citizens¹⁷⁰ and effectuated it by requiring that each district contain approximately the same number of citizens, guaranteeing a form of equal representation.¹⁷¹ This component of the right to vote is operationalized in the Fifteenth Amendment's race-based voting rights jurisprudence¹⁷² as a minority group's right to participate in the political process, and yields a right to elect the representative of one's choice¹⁷³ and the

¹⁶⁷ See *United States v. Mosley*, 238 U.S. 383, 386 (1915) (noting that right to have vote counted is as protected as right to put ballot in box).

¹⁶⁸ See *Reynolds v. Sims*, 377 U.S. 533, 559-60 (1964) ("We found further, in *Wesberry*, that 'our Constitution's plain objective' was that 'of making equal representation for equal numbers of people the fundamental goal'"); *Wesberry v. Sanders*, 376 U.S. 1, 14 (1964) (noting that "equal representation in the House for equal numbers of people" was the foundation for congressional representation); *Gray v. Sanders*, 372 U.S. 368, 379 (1963):

Once the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote—whatever their race, whatever their sex, whatever their occupation, whatever their income, and wherever their home may be in that geographical unit. This is required by the Equal Protection Clause of the Fourteenth Amendment.

¹⁶⁹ 377 U.S. at 568.

¹⁷⁰ See *Reynolds*, 377 U.S. at 555 ("[T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise."); *Gray*, 372 U.S. at 380.

¹⁷¹ Of course *Reynolds* was not the first case to trace this path. See, e.g., *Wesberry*, 376 U.S. at 18:

While it may not be possible to draw congressional districts with mathematical precision, that is no excuse for ignoring our Constitution's plain objective of making equal representation for equal numbers of people the fundamental goal for the House of Representatives. That is the high standard of justice and common sense which the Founders set for us.

¹⁷² Indeed, the right arguably translated from the Fifteenth Amendment to the Fourteenth Amendment and back to the Fifteenth Amendment. The notion of vote dilution came from practices used to stop the black vote. This was translated into the Fourteenth Amendment as vote dilution and given a firmer footing requiring actual representation. See *Gray*, 372 U.S. at 381 ("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."). Nonetheless, the Court in *City of Mobile*, disagreed. 446 U.S. 55, 77-78 (1980) (plurality opinion) (suggesting that one-man, one-vote jurisprudence does not lead directly to representation).

¹⁷³ See *White v. Regester*, 412 U.S. 755, 766 (1973); *Whitcomb v. Chavis*, 403 U.S. 124, 149 (1971); see also *Thornburg v. Gingles*, 478 U.S. 30, 44 (1986) (noting that ability to participate effectively in the political process is the issue under section 2 of the Voting Rights Act); *Rogers v. Lodge*, 458 U.S. 613, 624-27 (1982) (focusing on the district court's findings relevant to "the ability of blacks to participate effectively in the

right to representation when a minority group's numbers are large enough to support representation.¹⁷⁴

Even in the absence of the one-person, one-vote jurisprudence, an implicit right to representation for minority groups based on their numbers springs directly from the Fifteenth Amendment's purpose to have freedmen and their progeny affect elections with their votes.¹⁷⁵ When this purpose merges with a broad vision of the right to vote,¹⁷⁶ the Fifteenth Amendment should necessarily provide racial minorities the general right to representation when a minority group's numbers and cohesion warrant it to ensure minority group members the ability to protect their political interests through the franchise and the power to influence electoral outcomes.¹⁷⁷ Rather than being provided

political process"). Cf. Laughlin McDonald, *The Counterrevolution in Minority Voting Rights*, 65 MISS. L.J. 271, 302 (1995) (arguing that section 2 of the Voting Rights Act protects the right to elect the representative of choice, rather than merely the right to influence elections).

¹⁷⁴ Although no explicit right to proportional representation exists in the Constitution, the right to cast a meaningful ballot suggests the right to win representation under certain conditions. Of course, some do suggest that proportional representation may be required. See DOUGLAS J. AMY, *REAL CHOICES/NEW VOICES: THE CASE FOR PROPORTIONAL REPRESENTATION ELECTIONS IN THE UNITED STATES* 212-15 (1993) (suggesting possible legal requirement of proportional representation); Richard Thompson Ford, *Geography and Sovereignty: Jurisdictional Formation and Racial Segregation*, 49 STAN. L. REV. 1365, 1409 (1997) ("For example, any substantive conception of minority representation requires race-conscious gerrymandering and a baseline of proportional representation.").

¹⁷⁵ The sheer number of black citizens in the South suggested that equal voting rights would yield some representation of their interests. See *supra* note 107.

¹⁷⁶ The purposes should be merged. See Jordan, *supra* note 5, at 396 ("The virtue of elevating the fifteenth amendment to equal status with the fourteenth, and the one-person, one-vote cases based upon that amendment, is that due recognition will be given to the unique significance of political participation for the formerly disenfranchised."). But see *City of Mobile*, 446 U.S. at 65 ("The Fifteenth Amendment does not entail the right to have Negro candidates elected. . . . That Amendment prohibits only purposefully discriminatory denial or abridgment by government of the freedom to vote 'on account of race, color, or previous condition of servitude.'"). To be clear, the point of any right to representation is to elect a candidate of choice, whether the candidate is a minority group member or not. See LANI GUINIER, *THE TYRANNY OF THE MAJORITY* 46-48 (1994) (arguing that the point of the voting rights movement was to elect authentic black leaders who represented the black community and black interests because "[t]he movement's unifying objective was to empower the black community, not simply its representatives"). Unfortunately, some do not appear to have internalized the view. See, e.g., Ely, *supra* note 121, at 594 ("White filler people have standing basically because they've been deprived of a meaningful shot at helping to elect a representative whose race is the same as theirs."). Of course, there may be other benefits to having representatives of the interests of racial minorities in the legislature. See Ford, *supra* note 174, at 1426 (noting that having minority members present at the ultimate level of decisionmaking, i.e., the legislature, may lead to beneficial cooperation and interaction between groups in the legislature).

¹⁷⁷ One concern is that the Supreme Court has lessened the ability to effect equality through its voting rights jurisprudence. See Pamela S. Karlan, *Loss and Redemption: Voting Rights at the Turn of a Century*, 50 VAND. L. REV. 291, 292 (1997) (suggesting that a series of Supreme Court decisions effectively "gutted African Americans' ability to protect themselves through the political process"); see also Christopher L. Eisgruber, *Democracy, Majoritarianism, and Racial Equality: A Response to Professor Karlan*, 50 VAND. L.

special rights, minority groups would be merely exercising the democracy-based rights accorded groups of citizens when their numbers are sufficient to garner representation.¹⁷⁸

However, the right to an equal ability to elect a candidate of one's choice is not a right to proportional representation.¹⁷⁹ No right to proportional representation exists under the Constitution.¹⁸⁰ Rather than guarantee representation, courts have protected the right to elect one's candidate of choice by providing a right not to have one's vote diluted.¹⁸¹ Vote dilution occurs when the value or impact of a vote is intentionally lessened.¹⁸² Whenever the one-man, one-vote principle is violated, there is vote dilution because one citizen's vote is literally worth less than another citizen's vote.¹⁸³

REV. 347, 349-50 (1997) ("The great vice of *Shaw v. Reno* and its progeny is that those decisions reduce the options available to legislators trying to cope with the most important problem facing the United States, the problem of racial equality."). *But see* Pildes & Niemi, *supra* note 121, at 575 (indicating that bizarre districting shape only triggers strict scrutiny under *Shaw*, rather than automatic invalidation and that compelling reasons and their narrow tailoring can rebut the presumption of improper districting). While Professors Pildes and Niemi are correct that *Shaw* only invokes strict scrutiny, strict scrutiny is not easy to survive. *See* *Shaw v. Hunt*, 517 U.S. 899, 908 (1996); *Miller v. Johnson*, 515 U.S. 900, 921 (1995).

¹⁷⁸ *Reynolds v. Sims* was styled a Fourteenth Amendment one-person, one-vote case, but its aim was to provide equal representation by eliminating a voting system that provided less representation for equal numbers of citizens. 377 U.S. 553, 565-66 (1964). This notion of a group-based right of representation for citizens translates easily into the notion of a group-based right of representation for minority citizens when their numbers are sufficient to support representation. Indeed, the Fourteenth Amendment one-person, one-vote allows a group of people to claim the right to elect a representative without regard to their cohesion. *But see* *Davis v. Bandemer*, 478 U.S. 109 (1986) (suggesting that political minorities have no right to be free of political gerrymandering). Conversely, the Fifteenth Amendment right to representation is still limited to minority groups that are cohesive, i.e., that vote similarly. *See infra* notes 207-12. Thus, the Fifteenth Amendment right to representation is more restrictive than the Fourteenth Amendment right to representation.

¹⁷⁹ The Voting Rights Act makes this very clear. *See* 42 U.S.C. § 1973(b) (2000) (noting that the Act should not be construed to provide right to proportional representation).

¹⁸⁰ *See, e.g., Thornburg v. Gingles*, 478 U.S. 30, 46 (1986) (noting that Voting Rights Act specifically notes no right to proportional representation); *City of Mobile*, 446 U.S. at 79 (plurality opinion) ("The fact is that the Court has sternly set its face against the claim, however phrased, that the Constitution somehow guarantees proportional representation.").

¹⁸¹ The right not to have one's vote diluted stems directly from the right to vote. *See Reynolds*, 377 U.S. at 554-55. Vote dilution can be a Fifteenth or Fourteenth Amendment phenomenon. *See Gray v. Sanders*, 372 U.S. 368, 379-80 (1963). However, some have clearly located the right with the Fifteenth Amendment. *See, e.g., Jordan, supra* note 5, at 440 ("Although the racial vote dilution cases have been justified on the basis of the fourteenth amendment more often than on the fifteenth amendment, this is surely wrong.").

¹⁸² A number of similar definitions exist. *See, e.g., Pershing, supra* note 146, at 1176.

¹⁸³ The right not to have one's vote diluted can be viewed as a group right if it rests on not being a part of a winning majority that could have been formed in the absence of vote dilution. *See* Anthony A. Peacock, *Voting Rights, Representation and the Problem of Equality*, in *AFFIRMATIVE ACTION AND REPRESENTATION: SHAW V. RENO AND THE FUTURE OF VOTING RIGHTS* 7, *supra* note 5, at 7 ("Vote dilution only makes sense in the context of group identification and group interests."). Conversely, the right not to have one's vote diluted can be viewed as an individual right if it rests on being systematically shut out of the process. Though the

However, attempts to lessen a vote's effectiveness in garnering representation are also considered vote dilution.¹⁸⁴ This is sensible given that the principal function of the vote is to garner representation.¹⁸⁵

The emphasis on winning representation stems from our winner-take-all version of majority rule that can allow bare majorities to exercise maximum power and suggests that political minorities only have the right to influence policy in proportion to the representatives they can elect. That a minority group with a significant number of members, but with few or no elected representatives, exercises almost no influence is seen by some as normal under our winner-take-all system.¹⁸⁶ Consequently, the precise nature of the right to elect one's representative of choice (the right to elect) and how it is to be protected is extremely important. The emphasis on winner-take-all democracy also suggests why the right to elect can, and arguably should, transform into the right to representation so easily. Of course, none of this is to suggest that a numerical minority will prevail over a numerical majority, as democratic principles require that majorities win.¹⁸⁷ However, democratic principles do not require voting structures that guarantee that a majority control all power.¹⁸⁸

suggestion can be made that the right not to have one's vote diluted is an individual right, *see* *Shaw v. Hunt*, 517 U.S. 899, 917 (1996) (noting that the right to an undiluted vote belongs to the individual, not the group), the right eventually must be protected as a group or aggregate right. *See generally* Gerken, *supra* note 2; *see also* Gardner, *supra* note 2, at 894 (commenting on the debate about the individual or group nature of vote dilution). This is no surprise once one realizes that the right not to have one's vote diluted is fundamental to a right to representation—a right that cannot be realized unless an individual's vote is joined with those of others.

¹⁸⁴ *See supra* notes 181-82.

¹⁸⁵ Vote dilution directly lessens the effectiveness of one's right to vote. *See Reynolds*, 377 U.S. at 555 (suggesting that vote dilution can be just as pernicious as denying the ability to vote).

¹⁸⁶ *See* T. Alexander Aleinikoff & Samuel Issacharoff, *Race and Redistricting: Drawing Constitutional Lines After Shaw v. Reno*, 92 MICH. L. REV. 588, 646 (1993) ("In a political system dedicated to majority rule, underrepresentation of a minority group hardly demonstrates a flawed or invidious process."); Blumstein, *supra* note 64, at 668 (suggesting that the fact that the supporters of losing candidates are without legislative voice is not an equal protection violation) (citing *Whitcomb v. Chavis*, 403 U.S. 124 (1971)); Katherine Inglis Butler, *Affirmative Racial Gerrymandering: Rhetoric and Reality*, 26 CUMB. L. REV. 313, 362 (1995-1996) ("Without some showing to the contrary, Blacks are no more under-represented than are members of any other group whose members believe that they have common interests that could be furthered through the political process.").

¹⁸⁷ *See Reynolds*, 377 U.S. at 565:

Logically, in a society ostensibly grounded on representative government, it would seem reasonable that a majority of the people of a State could elect a majority of that State's legislators. To conclude differently, and to sanction minority control of state legislative bodies, would appear to deny majority rights in a way that far surpasses any possible denial of minority rights that might otherwise be thought to result.

¹⁸⁸ Of course, it is possible that democracy can allow majorities to garner too much power. *See* GUINIER,

Racial vote dilution—the intentional race-based minimization of the impact of votes¹⁸⁹—does violence to the right to elect protected by the Fifteenth Amendment,¹⁹⁰ the equality principle underlying the Fourteenth Amendment,¹⁹¹ and the Thirteenth Amendment’s vision of all citizens as full and equal citizens.¹⁹² It is unconstitutional, and protection against it is central to maintaining equal minority voting rights.¹⁹³ By lessening a minority citizen’s ability to join with other group members to elect the representative of their choice, vote dilution provides a quantitatively smaller impact for the vote of a minority citizen than that of a nonminority citizen and destroys the Fifteenth

supra note 176; MILTON D. MORRIS, *THE POLITICS OF BLACK AMERICA* 68-69 (1975) (describing democracy as a way to allow the majority to enforce the political subordination of the minority).

¹⁸⁹ Regardless of what rights are to be vindicated under the Fifteenth Amendment, any violation of the amendment must be intentional. See *City of Mobile v. Bolden*, 446 U.S. 55, 62 (1980) (plurality opinion) (“Our decisions, moreover, have made clear that action by a State that is racially neutral on its face violates the Fifteenth Amendment only if motivated by a discriminatory purpose.”). The 1982 amendments to the Voting Rights Act eliminated this requirement as a statutory matter. See *Jordan*, *supra* note 5, at 391 n.4 (noting that the *Bolden* Court’s intent requirement led to the Voting Rights Act’s amendment and elimination of the intent requirement). Of course, those amendments had no effect on the parameters of the Fifteenth Amendment. However, intent need not be proven with direct evidence. See *Blumstein*, *supra* note 64, at 648 (indicating that discriminatory intent must be proven, but not necessarily by direct evidence). Consequently, if no reason other than discrimination exists for an action, that action will be considered to have been taken with discriminatory purpose. See *City of Mobile*, 446 U.S. at 62 (plurality opinion); *Gomillion v. Lightfoot*, 364 U.S. 339 (1960) (holding that the Fifteenth Amendment violation had occurred when city redrew boundaries of town in order to fence out minority voters).

¹⁹⁰ That harm is palpable. *GUINIER*, *supra* note 176, at 92 (“Dilution should be viewed as the submergence of black voters’ politically cohesive and self-identified interests.”).

¹⁹¹ The Fourteenth Amendment also protects minority voting rights through an anti-dilution standard. See *Shaw v. Reno*, 509 U.S. 630, 641 (1993) (noting the purpose to discriminate and effect of dilution are keys to invalidating voting scheme); see also *Reno v. Bossier Parish*, 520 U.S. 471, 481 (1997) (mentioning that vote dilution claim can be brought under the Fourteenth or Fifteenth Amendments). However, in some circumstances, the Fifteenth Amendment may provide a different perspective on racial minority voting than Fourteenth Amendment provides for political minority voting rights. See *Jordan*, *supra* note 5, at 390 (“By virtue of the fifteenth amendment, we can approach the questions arising from the loss of political representation for minorities as separate from the loss of representation to all voters arising from malapportioned districts of unequal population.”).

¹⁹² Though the standard analysis of vote dilution ignores its Thirteenth Amendment implications, the Thirteenth Amendment provides a partial explanation of the wrong of vote dilution. Vote dilution devalues black citizens’ votes, effectively treating those votes as if they were the votes of noncitizens or slaves. See *Blacksher*, *supra* note 9, at 634 (suggesting that ignoring a citizen’s right to consent to be governed is equivalent to treating him as a slave). Thus, vote dilution arguably can be considered a badge of slavery or a badge of inferiority and should be suspect under the Thirteenth Amendment. See *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 445 (1968) (Douglas, J., concurring) (suggesting that attempts to limit black suffrage are incidents of slavery); *Blacksher*, *supra* note 9, at 634 (“The ability to consent to the laws under which one is governed is the essential difference between a free person and a slave in American political tradition and constitutional jurisprudence.”).

¹⁹³ See *Gerken*, *supra* note 2, at 1671 (“Broadly understood, [vote] dilution claims are designed to ensure that members of a racial group have a fair opportunity to participate in the electoral process.”).

Amendment's implicit promise of the right to an equal vote.¹⁹⁴ However, that a minority group is unable to elect its candidate of choice does not necessarily mean that vote dilution has occurred. Minority groups, particularly discrete and insular ones, will often lose elections because of their insufficient numbers.

Racial vote dilution concerns the inability of a minority group to select its candidate of choice because of race. Thus, such claims require racially polarized voting to be successful, i.e., that minority groups and nonminority groups generally vote for different candidates.¹⁹⁵ The theory is that vote dilution allows majority-race members to stop minority groups from electing their candidate of choice. Functionally, if majority-race voters are willing to vote for the minority group's candidate of choice, either the minority group's candidate of choice would win (hence no harm) or the loss by the minority group's candidate of choice would be because of a lack of popular support.¹⁹⁶ In neither instance would race have determined the outcome.¹⁹⁷ Though the practice appears to fit the theory, the focus on polarized voting is arguably misplaced. Vote dilution could and should focus more squarely on whether a minority group has a sufficient number of members and sufficient cohesion to

¹⁹⁴ See *GUINIER*, *supra* note 176, at 124 ("Implicit in this equality norm is the moral proposition that every citizen has the right to equal legislative influence. This means an equal opportunity to influence legislative policy."). This norm also implicates the Fourteenth Amendment's promise of a right to an equal vote. See *Reynolds v. Sims*, 377 U.S. 533, 567 (1964) ("To the extent that a citizen's right to vote is debased, he is that much less a citizen. The fact that an individual lives here or there is not a legitimate reason for overweighting or diluting the efficacy of his vote.").

¹⁹⁵ Unfortunately, it appears that racial bloc voting may remain prevalent. See *Blacksher*, *supra* note 9, at 673-75 (noting continued racial bloc voting); *Grofman*, *supra* note 5, at 195-99 (suggesting that the claims that blacks can now be routinely elected from majority-majority districts are misleading); *Issacharoff & Karlan*, *supra* note 121, at 2291 n.75 (commenting on the prevalence of racial bloc voting). Cf. *Karlan & Levinson*, *supra* note 118, at 1231 ("Moreover, the negligible number of nonwhite representatives elected from majority-white constituencies suggests that race-conscious districting is still necessary to secure desegregated elected bodies.").

¹⁹⁶ See *Thornburg v. Gingles*, 478 U.S. 30, 50 (1986) (noting that if minority group is not sufficiently numerous to elect representative, the loss will not be caused by the voting system); *Rogers v. Lodge*, 458 U.S. 613, 623 (1982) ("Voting along racial lines allows those elected to ignore black interests without fear of political consequences, and without bloc voting the minority candidates would not lose elections solely because of their race.").

¹⁹⁷ This vision takes a narrow view of elections and of the notion of a candidate of choice. This vision takes the election as a race between Candidate A (the candidate of choice of the minority group) and Candidate B, and asks only if Candidate A won. If Candidate A lost, even with support from majority-race voters, the assumption is that Candidate A had insufficient support. If Candidate A won, presumably no harm occurred. However, even if the candidate favored by the minority group in a two-candidate race was victorious in part because of support from majority race voters, it does not address the issue of whether a change in electoral rules or district boundaries could have produced a candidate even more preferred by the minority group—a theoretical Candidate C.

elect its candidate of choice on its own¹⁹⁸ and whether voting rules affect how much representation the minority group can secure.¹⁹⁹ Though such a focus may appear to be merely a restatement of a focus on polarized voting, it may lead to slightly different results and priorities.

That one is a member of a minority group, racial or political, does not mean that one needs anti-democratic rules to gain representation, as one often need not be a member of a jurisdiction-wide majority to be able to choose the representative of one's choice.²⁰⁰ For example, in a districted system, an electing majority—that number of voters necessary to guarantee the election of their representative of choice—may be some small minority of all voters.²⁰¹ In a jurisdiction of 1,000,000 voters split equally among ten districts, an electing majority is 50,001, or just over 5% of the total voting population, though the electing majority must follow the geography of a particular district.²⁰² In limited at-large systems, where the number of votes each voter can cast is fewer than the number of representatives to be elected,²⁰³ an electing majority is smaller than a jurisdiction-wide majority, though never as small as in a districted system.²⁰⁴ Conversely, in traditional at-large systems, where each

¹⁹⁸ Cohesion is necessary for a vote dilution claim. See *Thornburg*, 478 U.S. at 51 (noting that a minority group must demonstrate cohesion for successful vote dilution claim).

¹⁹⁹ Simply, the Court should focus on minority group cohesion. See *Thornburg*, 478 U.S. at 56 (“A showing that a significant number of minority group members usually vote for the same candidates is one way of proving the political cohesiveness necessary to a vote dilution claim . . . and, consequently, establishes minority bloc voting within the context of § 2.”).

²⁰⁰ The notion that a minority should be able to gain some measure of power is not odd. See Rufus Browning, *Foreword to BLACKS AND THE AMERICAN POLITICAL SYSTEM*, *supra* note 100, at xi-xii (detailing pluralist vision that discrete groups of unequal citizens can achieve some authority over discrete points of power).

²⁰¹ This concept is also called the threshold of exclusion. See Steven J. Mulroy, *Alternative Ways Out: A Remedial Road Map for the Use of Alternative Electoral Systems as Voting Rights Act Remedies*, 77 N.C. L. REV. 1867, 1879-80 (1999) (noting the formula determining the amount of support will be sufficient to guarantee a candidate victory).

²⁰² Assuming equal population in each district, an electing majority would equal one-half of the district population plus one. The important limitation is that all members of the electing majority must reside in the same district.

²⁰³ See Edward Still, *Voluntary Constituencies: Modified At-Large Voting as a Remedy for Minority Vote Dilution in Judicial Elections*, 9 YALE L. & POL'Y. REV. 354, 358 (1991) (“[I]n the usual at-large election to fill five seats, each voter would have five votes to cast for five different candidates. . . . In limited voting plans, the voter would have fewer votes to cast than the number of seats to be filled.”); see also Adam J. Cohen, *Keeping the Promise: Establishing Nontransferable Election Systems in Jurisdictions Covered by Section Four of the Voting Rights Act*, 30 ST. MARY'S L.J. 655 (1999) (discussing and advocating the use of limited voting systems).

²⁰⁴ The electing majority in a 1,000,000 voter, 10 representative jurisdiction using a limited at-large system in which each voter has one vote is: (number of voters)/(number of representatives +1) +1 or 90,910 voters. See Mulroy, *supra* note 201, at 1880. Given the parameters proposed, a candidate who garners 90,910

voter is given as many votes as representatives to be elected, an electing majority can be quite substantial.²⁰⁵ How a voting system is structured can determine how easily a member of a jurisdiction-wide minority can be a part of an electing majority and elect her candidate of choice.²⁰⁶

An emphasis on the size of electing majorities might suggest that the key question regarding vote dilution should not be whether minority-race voters and majority-race voters vote differently,²⁰⁷ but whether minority-race voters have sufficient numbers and vote sufficiently similarly to guarantee representation for themselves.²⁰⁸ This would vary by jurisdiction and by

votes cannot be beaten because there are insufficient remaining votes for ten candidates to beat her. Thus, that candidate must be elected. Of course, it is entirely possible that the tenth highest vote getter will garner significantly fewer than 90,909 votes. Under this limited at-large system, an organized 9+% of the population could control 10% of the jurisdiction's representation. Under a districted system an organized 5% + 1 of the population living in proximity could control 10% of a jurisdiction's representation.

²⁰⁵ In a jurisdiction with 1,000,000 voters, ten representatives, eleven candidates, a requirement that all votes be used or lost, known as an anti-single shot rule, and no cumulative voting, an electing majority would be 909,091 votes or just over 90% support. See Mulroy, *supra* note 201, at 1880. That is, with fewer than 909,091 votes, the ten other candidates could garner more votes than the eleventh candidate. If one candidate were the candidate preferred by a minority group and 10% of voters refused to voter for her, she would lose. Of course, as the number of candidates increased, the number actually needed for victory would likely drop, though the percentage of voters necessary to guarantee victory would not.

²⁰⁶ Some systems make winning more difficult. See *Thornburg v. Gingles*, 478 U.S. 30, 47 n.13 (1986) (noting the work demonstrating the possible dilutive effects of at-large and multimember districting).

²⁰⁷ This has been an issue historically. See PATRICIA GURIN ET AL., *HOPE AND INDEPENDENCE: BLACKS' RESPONSE TO ELECTORAL AND PARTY POLITICS* 245 (1989) (noting, after outlining differences between the black and white electorate: "These discrepancies reflect long-standing differences between the political philosophies of blacks and other Americans who have historically wanted limited government and preferred local to national government action."); MORRIS, *supra* note 188, at 121-22. Morris observes:

It does assume that race forms the basis of one fundamental cleavage in the society which is reflected in virtually every area of political life. Second, it suggests that black Americans are set apart from the dominant political culture by a unique pattern of experiences that define their status in the political system and shape their perception of the system and of themselves as political actors. Third, it implies that black America is set apart by a set of objectives that give a distinct character to their politics. These distinguishing characteristics are all directly related to the subordinate status blacks occupy in American society.

Id.

²⁰⁸ Race matters to voting patterns not because minority groups want it to, but because the choices with which communities of color have been presented has required it. See Karlan, *supra* note 121, at 305 ("[T]o tell black citizens, who have organized to lobby for and obtain the districts they prefer, that their common interests are illusory or unworthy of satisfaction is chillingly reminiscent of the assertion that blacks have 'no rights which the white man [is] bound to respect.'") (quoting *Dred Scott v. Sandford*, 60 U.S. 393, 407 (1857)). Of course, it is possible that there is more cross-racial agreement on nonracial issues than generally thought. See Wayne Parent & Paul Stekler, *Black Political Attitudes and Behavior in the 1990s*, in *BLACKS AND THE AMERICAN POLITICAL SYSTEM*, *supra* note 100, at 41, 47 (noting that the difference between blacks and whites on race-relevant issues is larger than the difference between blacks and whites on non-race-relevant issues).

minority group.²⁰⁹ Of course, polarized voting would remain relevant.²¹⁰ When the percentage of voters required for an electing majority is high, polarized racial bloc voting would more easily stop minority groups from electing their candidates of choice.²¹¹ Conversely, the smaller the percentage of voters required for an electing majority, the less likely polarized voting is to stop the minority group from electing its representative of choice. Additionally, smaller electing majorities would allow racial minorities to join

However, even when blacks and whites vote for the same candidate generally, they may vote with different intensity. See *Easley v. Cromartie*, 532 U.S. 234, 251 (2001) (noting that in that North Carolina case, black voters were “more reliably Democratic” than white Democrats).

²⁰⁹ For example, though black American political opinion is not monolithic, see Regina Austin, *The Black Public Sphere and Mainstream Majoritarian Politics*, 50 VAND. L. REV. 339, 341-42 (1997) (suggesting diversity among blacks in political preferences: “[T]he so-called black community hardly possesses a unified and certain set of interests or attitudes that originate without debate and a counting of hands, as it were.”). Historically, black Americans as a whole have voted in similar patterns. See GURIN ET AL., *supra* note 207, at 246 (“Racial differences in policy preferences reflect a more basic ideological cleavage. . . . More blacks than whites believe that inequality is influenced by structural features of the economic system and by racial, ethnic, and gender discrimination.”); Christopher L. Eisgruber, *Ethnic Segregation by Religion and Race: Reflections on Kiryas Joel and Shaw v. Reno*, 26 CUMB. L. REV. 515, 524 (1995-1996):

[The] use of racial criteria to draw voting districts thus does not presuppose in any way what Justice O’Connor seemed to think it presupposed: that race determines thought. It doesn’t even presuppose the existence of racially distinct cultures—or racially defined cultures. It presupposes only what seems to be a matter of unfortunate fact: that interests in this society, where race still matters, will sometimes track racial lines.

See also Issacharoff & Karlan, *supra* note 121, at 2291 (“[A]ll the available evidence suggests that race determines voting patterns and electoral outcomes in large parts of the United States”); Parent & Steckler, *supra* note 208, at 47 (“The uniformity among blacks on most key political issues promotes blacks’ interests by maximizing black power within the American political system.”). Other minority groups may not be so cohesive, and blacks in different jurisdictions may not be so cohesive.

²¹⁰ Of course, polarized voting appears to still exist. See Grofman, *supra* note 5, at 195-99 (suggesting that the claims that blacks can now be routinely elected from majority-majority districts are misleading); Lisa Handley & Bernard Grofman, *The Impact of the Voting Rights Act on Minority Representation: Black Officeholding in Southern State Legislatures and Congressional Delegations*, in QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT 1965-1990, at 335 (Chandler Davidson & Bernard Grofman eds., 1994) (“In fact, there is little evidence for a widespread increase in the willingness of white voters to cast their ballots for black candidates.”); Clarence Page, *Trend Not Set in One Election*, ST. LOUIS POST-DISPATCH, Dec. 2, 1996, at 7B (suggesting that incumbent black congressional representative may be reelected in non-majority-minority districts because of the power of incumbency rather than the end of bloc voting).

²¹¹ Racial bloc voting may merely be a proxy for the differential political interests that different races have. See Karlan & Levinson, *supra* note 118, at 1229 (“Moreover, present-day racial bloc voting may itself be the product of past de jure race discrimination. To the extent that racially correlated differences in political preferences are the product of socioeconomic disparities produced by inferior access to schools, government services, and the like, state action has caused polarized voting.”). Cf. *Easley*, 532 U.S. at 245 (recognizing that heavily black precincts vote more heavily Democratic than white Democratic precincts).

coalitions to form electing majorities more easily.²¹² Nonetheless, the emphasis on the minority group's ability to guarantee representation for itself may allow a cleaner determination of whether the group members' rights have been violated.

In a restated fashion, racial vote dilution claims generally concern race-based attempts to keep minority group voters out of electing majorities. Such dilution can occur when a voting system that requires a larger number of voters or higher percentage of voters necessary to constitute an electing majority is chosen over one requiring fewer members, e.g., when a traditional at-large voting system is chosen instead of a nontraditional at-large or districted system, or when districting plans are structured in a way that minimizes a minority group's ability to create or join electing majorities in its districts or minimizes the number of electing majorities that minority voters can form or join across the jurisdiction. If the choice of the system was made or the use of the particular districting scheme was undertaken because of its negative effect on a minority group's ability to elect their candidate of choice, the system or scheme should be ruled unconstitutional.²¹³

a. System-Based Vote Dilution

System-based vote dilution claims tend to focus on a jurisdiction's decision to use a particular style of voting system. That at-large systems tend to require larger electing majorities made the retention or installation of at-large systems a tool for jurisdictions to maintain majority-race control over elections without the need to pass explicitly race-based voting laws.²¹⁴ Traditional at-large systems—those allowing each voter the same number of votes as repre-

²¹² Indeed, as polarized voting diminishes, it becomes more likely that minority groups will join with majority-race voters to elect the minority group's candidate of choice. Indeed, with no polarized voting, the candidate of choice of the minority group might be the candidate of choice of the majority-race group.

²¹³ See, e.g., *Rogers v. Lodge*, 458 U.S. 613, 617 (1982) (determining whether an at-large system had been maintained for discriminatory reasons); *City of Mobile v. Bolden*, 446 U.S. 55, 66 (1980) (plurality opinion) ("We have recognized, however, that such legislative apportionments could violate the Fourteenth Amendment if their purpose were invidiously to minimize or cancel out the voting potential of racial or ethnic minorities.").

²¹⁴ The nature of vote dilution claims are such that both the Fourteenth or Fifteenth Amendments apply. The arguments for the unconstitutionality of the scheme in *Rogers v. Lodge* sounded in both Fourteenth and Fifteenth Amendment theory. See 458 U.S. at 617 ("The Court has recognized, however, that multimember districts violate the Fourteenth Amendment if 'conceived or operated as purposeful devices to further racial discrimination' by minimizing, canceling out or diluting the voting strength of racial elements in the voting population."); see also *id.* at 625-27 (detailing evidence of discrimination in and flowing from the subject political system that rendered blacks less able "to participate effectively in the political process").

sentatives to be elected—may allow highly-organized, bare majorities to elect all of a jurisdiction's representatives and necessarily could stop even highly cohesive minority groups from electing any representatives to legislative bodies.²¹⁵ When the anti-minority representation features of at-large systems are the motivation to adopt such a voting system, the Fourteenth and Fifteenth Amendments invalidate those choices.

The intent requirement flowing from the Fourteenth and Fifteenth Amendments requires that system-based vote dilution be proven by a showing that the system used was promulgated or maintained specifically to limit the minority group's ability to elect the candidate of its choice.²¹⁶ Such a showing involves several components, including demonstrating that a minority group has been able to elect far fewer representatives than it would likely be able to elect under a different voting system and proving that minorities have been somewhat shut out of the political system, possibly because of their inability to elect representatives.²¹⁷ The focus on the number of representatives a minority group would be expected to elect does not mean that proportional representation is required, but does suggest that proportional representation can be used as a baseline from which to examine the impact of an electoral rule or system.²¹⁸ The ease with which at-large systems could be and were used to minimize the impact of minority voting strength led to such systems becoming disfavored, with single-member districting becoming the preferred voting method to avoid dilution.²¹⁹

²¹⁵ See *id.* at 616 ("At-large voting schemes and multimember districts tend to minimize the voting strength of minority groups by permitting the political majority to elect *all* representatives of the district."). The problems that can flow from a lack of representation can be palpable. See Forde-Mazrui, *supra* note 140, at 380-81 (noting that the lack of representation for minorities resulting from at-large districting often led to apathy and decreased minority voter turnout).

²¹⁶ See *Rogers*, 458 U.S. at 625 (suggesting that inference of intentional discrimination and unconstitutionality can be drawn from prior discrimination and the timing of the implementation of the plan).

²¹⁷ See *White v. Regester*, 412 U.S. 755 (1973); *Whitcomb v. Chavis*, 403 U.S. 124, 149 (1971); see also *Thornburg v. Gingles*, 478 U.S. 30, 44 (1986); *Rogers*, 458 U.S. at 624-27.

²¹⁸ See *Rogers*, 458 U.S. at 623-24 ("Because it is sensible to expect that at least some blacks would have been elected in Burke County, the fact that none have ever been elected is important evidence of purposeful exclusion.").

²¹⁹ See *Grove v. Emison*, 507 U.S. 25, 40 (1993) (noting preference for single-member districts); *City of Mobile*, 446 U.S. at 66 n.12 ("We have made clear, however, that a court in formulating an apportionment plan as an exercise of its equity powers should, as a general rule, not permit multimember legislative districts."); Blacksher, *supra* note 9, at 658-59 (noting the Supreme Court's expressed preference for single-member districts as a remedy for voting rights violations). Though a preference for districting at the state and municipal level may be relatively recent, districting has been mandated for congressional elections since 1842. See Reapportionment Act of 1842, ch. 47, 5 Stat. 491. Nonetheless, at-large voting schemes are not

Though the ascendancy of single-member districting as the preferred system is understandable, the dilutive effect of traditional at-large or multimember districting systems can be lessened by limiting the number of votes that each voter is allowed to cast or allowing voters to cast their multiple votes any way they choose.²²⁰ As the number of votes a voter can cast under an at-large system decreases, so does the size of the electing majority, though it will never be as small as under a districted system.²²¹ Nonetheless, such a scheme may yield approximate proportional representation and political power exercised in rough proportion to a group's numbers²²² and would allow a highly organized and cohesive minority group from across a jurisdiction to pool its votes in a way to elect as many representatives as its votes would allow. Limited at-large voting systems may have other shortcomings, but a lack of political equality flowing from them is not one of those shortcomings.²²³ Even so, the preference for districted systems has largely shifted the focus away from system-based vote dilution toward district-based vote dilution.²²⁴

b. District-Based Vote Dilution

The theory supporting district-based vote dilution is similar to that supporting system-based vote dilution claims, i.e., that a particular districting scheme allows majority-race voters to stop minority-race voters from electing

necessarily unconstitutional. See *City of Mobile*, 446 U.S. at 66 ("Despite repeated constitutional attacks upon multimember legislative districts, the Court has consistently held that they are not unconstitutional *per se*").

²²⁰ See Edward Still, *Alternatives to Single-Member Districts*, in MINORITY VOTE DILUTION 253 (Chandler Davidson ed., 1984) ("In a limited voting system the voter may cast fewer votes than the number of at-large seats to be filled."). Cumulative voting, a process by which voters are given multiple votes to expend on any number of candidates, is a cousin to limited voting. A number of scholars have described cumulative voting's potential benefit. See GUINIER, *supra* note 176, at 123 (discussing cumulative voting and some of its benefits); Still, *supra* note 203, at 355-58 (discussing cumulative voting); Richard L. Engstrom et al., *One Person, Seven Votes: The Cumulative Voting Experience in Chilton County, Alabama*, in AFFIRMATIVE ACTION AND REPRESENTATION: SHAW V. RENO AND THE FUTURE OF VOTING RIGHTS, *supra* note 5, at 311-12 (extolling the virtues of cumulative voting).

²²¹ See *supra* notes 202 & 205.

²²² The desire for proportional representation may be reasonable even though it is not required by the Constitution. See *City of Mobile*, 446 U.S. at 75-76 ("The Equal Protection Clause of the Fourteenth Amendment does not require proportional representation as an imperative of political organization.").

²²³ One of the major shortcomings of an at-large system is the loss of closeness to one's representative. See Henry L. Chambers, Jr., *Enclave Districting*, 8 WM. & MARY BILL RTS. J. 135, 145-50 (1999). The impact could be lessened with non-jurisdiction-wide, multimember districts.

²²⁴ See Pamela S. Karlan, *Maps and Misreadings: The Role of Geographic Compactness in Racial Vote Dilution Litigations*, 24 HARV. C.R.-C.L. L. REV. 173, 185 (1989) (indicating that at-large plans historically have been the favored method of diluting the black vote).

their representative of choice.²²⁵ The specific harm of district-based vote dilution is that districts are drawn so that minority groups will not be able to elect as many candidates throughout the jurisdiction as they could have otherwise. This may occur either when a minority population is cracked—split between multiple districts—and stopped from garnering a majority in any affected district, or when a minority population is packed—concentrated in a single district or few districts in which it has an overwhelming majority—so that it can only garner a majority in that single district or few districts, rather than weaker majorities in more districts.²²⁶ In either the cracking or packing scenarios, minority groups are stopped from joining or forming as many electing majorities as they could have otherwise. A single districting plan may contain elements of both packing and cracking.²²⁷

Proving a district-based vote dilution claim depends on proving that an identifiable minority group could have elected the representative of its choice in a differently-constructed hypothetical district or set of districts drawn using traditional voting principles.²²⁸ Such principles include geography-based

²²⁵ The fragmentation of districting can allow those in power to exercise control over a greater number of seats in a legislature than their numbers would suggest they should. For example, a group in power that represents 48% of the voters can garner 60% of the seats of a legislature with an average of 60% of the vote in those districts and maintain an average 30% of the vote in the remaining districts. Of course, a true majority can control a much larger proportion of seats. For example, a group representing 54% of the voters can garner 70% of the seats of a legislature with an average of 60% of the vote in those districts and maintain an average of 30% of the vote in the remaining districts. Necessarily, the ability to gain control of seats means the inability to control seats by those out of power, whether those out of power constitute the majority of voters or not.

²²⁶ See *Shaw v. Hunt*, 517 U.S. 899, 914 (1996):

Our precedent establishes that a plaintiff may allege a § 2 violation in a single-member district if the manipulation of districting lines fragments politically cohesive minority voters among several districts or packs them into one district or a small number of districts, and thereby dilutes the voting strength of members of the minority population.

See also Issacharoff & Karlan, *supra* note 121, at 2283 (explaining dilutive practices known as cracking (dividing voters into two districts so they do not have a majority in either) and packing (combining voters into few districts in which they will have a supermajority)).

²²⁷ A single districting plan would merely need to put too many minority members in one district and divide them between two others. Indeed, with a couple of alterations, the districting plan in *Shaw v. Reno*, 509 U.S. 630 (1993), could have been viewed as one involving both cracking and packing. For example, a packing claim might be made against the plan's majority-minority districts if those districts were more heavily African-American than they needed to be. Similarly, had the contested I-85 district not been drawn, a cracking claim focused on the refusal to draw the district might have been reasonable.

²²⁸ See *Grove v. Emison*, 507 U.S. 25, 40 (1993) (applying *Thornburg v. Gingles*, 478 U.S. 30 (1986), to single-member districting claim); *Thornburg*, 478 U.S. at 50 (noting that a precondition to challenging multimember districting plan is that "the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district").

principles, such as compactness, contiguousness, and respect for natural boundaries as well as non-geography-based principles, such as incumbent protection and political cohesion of groups.²²⁹ Thus, district-based dilution claims require proof that the minority group in question is geographically compact, is sufficiently cohesive to elect its candidate of choice, and has been kept from choosing its representative of choice because of polarized voting.²³⁰ In some cases, the proof will be that a fairly obvious majority-minority district was purposefully split.²³¹ In other cases, the proof may be that a district could have been drawn around a cohesive minority group with sufficient members to elect its representative of choice.²³²

Current district-based vote dilution jurisprudence takes districting using traditional geographical principles as the baseline from which to determine dilution.²³³ This use of geography is problematic. Though geography-based

²²⁹ See *Miller v. Johnson*, 515 U.S. 900, 906 (1995) (noting various geography-based and non-geography-based principles as traditional districting principles); *Shaw*, 509 U.S. at 646.

²³⁰ See *Thornburg*, 478 U.S. at 48-49 (“Stated succinctly, a bloc voting majority must usually be able to defeat candidates supported by a politically cohesive, geographically insular minority group.”); Chandler Davidson, *Minority Vote Dilution: An Overview*, in *MINORITY VOTE DILUTION*, *supra* note 220, at 4 (“Ethnic or racial minority vote dilution is a special case, in which the voting strength of an ethnic or racial minority group is diminished or cancelled out by the bloc vote of the majority.”).

²³¹ Purposeful splitting can only come when a compact group exists. If a dilution claim occurs when one splits a compact group that could have been a majority in a single-member district, then presumably the group must be placed in a district that allows it to elect the representative of its choice. This is also why some have suggested that the *Thornburg* standard created the majority-minority district phenomenon. See Parker, *supra* note 121, at 528 (suggesting that *Thornburg* helped create majority-minority districts because it set out that one of the conditions of a section 2 violation of the Voting Rights Act is the possibility of majority-minority district). Cf. Ford, *supra* note 174, at 1380 (“The *Thornburg* test addressed the difficulty of determining a baseline by, in effect, requiring that a cohesive minority group, consistently thwarted by majority bloc voting, be able to control the election of a representative, if such control were numerically possible given the number of representatives to be elected.”). Some courts have gone farther, suggesting that vote dilution occurs even when a compact racial minority could not have controlled the election of a representative. See *Armour v. Ohio*, 775 F. Supp. 1044, 1052 (N.D. Ohio 1991):

We cannot agree with the defendants that a government may with impunity divide a politically cohesive, geographically compact minority population between two single member districts in which the minority vote will be consistently minimized by white bloc voting merely because the minority population does not exceed a single district's population divided by two.

²³² See, e.g., *Grove*, 507 U.S. at 39-40 (noting that a Voting Rights Act section 2 single-member district claim must be supported by proof that a minority group could have been a majority in a compact district).

²³³ See *Easley v. Cromartie*, 532 U.S. 234, 249 (2001) (suggesting that deviation from traditional districting principles might have helped create a constitutional violation by creating a heavily minority district); *Bush v. Vera*, 517 U.S. 952, 962 (1996) (plurality opinion); *Miller*, 515 U.S. at 916 (suggesting that the subordination of traditional districting principles can help prove a Fourteenth Amendment violation). The continued reliance on geographical districting principles is understandable given that they have explicitly been accepted, even after the one-man, one-vote decisions. See *Reynolds v. Sims*, 377 U.S. 533, 578 (1964) (“A

districting systems have been used in some contexts for many years, most notably with respect to congressional districting,²³⁴ their use is not necessarily fundamental to representative democracy.²³⁵ Geographical districting principles should not invariably be applied, despite their previous use in a variety of contexts, because of their potentially negative effect on minority group representation.²³⁶ When using such principles helps perpetuate racial voting inequality inconsistent with the Reconstruction Amendments, the use should be altered or abandoned.

Geography-based districting provides common representation for those living in physical proximity to each other²³⁷ and can lead to results that are not race-neutral.²³⁸ Whether such results occur depends on the voting preferences of the minority group affected, their concentration in the jurisdiction in question, and the election at issue. When a minority group has voting patterns that tend to differ from the majority group's and is relatively dispersed throughout a jurisdiction, that group may be unlikely to garner a majority in any district drawn with geography-based principles and therefore may always be unable to choose its candidate of choice. Conversely, when a minority group is cohesive and clustered in particular sections of a jurisdiction, possibly as a result of explicit and institutional racism, it may be possible to limit its representation by providing fewer representatives throughout the jurisdiction

State may legitimately desire to maintain the integrity of various political subdivisions, insofar as possible, and provide for compact districts of contiguous territory in designing a legislative apportionment scheme. Valid considerations may underlie such aims.”).

²³⁴ Congressional districting has been required for 160 years. See *supra* note 219.

²³⁵ Indeed, single-member districts may be necessary for voters to gain adequate representation. See Chambers, *supra* note 223, at 144-53 (noting that single-member districts serve a particular vision of representative democracy).

²³⁶ See Blacksher, *supra* note 9, at 634:

By leaving legislative bodies free to squiggle district boundaries for partisan political purpose, to protect incumbents, or for any other nonracial reason, the Court has suggested—if it has not actually ruled—that it is black and Latino citizens alone who may not choose to associate with each other freely and try to optimize their legislative influence in pursuit of a common political agenda.

Karlan & Levinson, *supra* note 118, at 1220 (“The invocation of ‘traditional’ districting principles turns out to limit only the political aspirations of precisely that group whom the amendments were originally intended to serve: black Americans.”).

²³⁷ Such structuring can limit choice. See GUINIER, *supra* note 176, at 84 (“Without regard to race, districting arbitrarily limits electoral choices based solely on where particular voters happen to live.”).

²³⁸ Simply, geography may have little to do with minority voting interests. See Richard H. Pildes, *Principled Limitations on Racial and Partisan Redistricting*, 106 YALE L.J. 2505, 2536 (1997) (“We are currently trying to wedge the concerns of an interest-based approach into a geographically based system; at some point, the tension between the two reaches a breaking point.”).

than could otherwise be elected by the group.²³⁹ Not surprisingly, these demographics, when combined with a districting system, can lead to cracking and packing.

Whether geography-based districting principles actually submerge the voting power of minority groups may depend on the particular election being contested. For example, given the geographical dispersion of blacks²⁴⁰ and the size of federal congressional districts, a state may not have any readily apparent geographically compact majority-minority congressional districts, even if it has a relatively robust and somewhat concentrated black population. Of course, this may be comforting, as the ability to create a majority-minority congressional district of more than 500,000 people by combining entire neighborhoods of contiguous and somewhat compact territory may suggest large-scale residential segregation.²⁴¹ Indeed, we may be surprised if many majority-minority congressional districts existed in the absence of attempts to create them.²⁴² Conversely, the same state, when districting for the state house

²³⁹ Of course, this may implicate both the Thirteenth Amendment and the Fifteenth Amendment when geographical districting is required. See *Jones v. Albert H. Mayer Co.*, 392 U.S. 409, 441-43 (1968):

Just as the Black Codes, enacted after the Civil War to restrict the free exercise of those rights, were substitutes for the slave system, so the exclusion of Negroes from white communities became a substitute for the Black Codes. And when racial discrimination herds men into ghettos and makes their ability to buy property turn on the color of their skin, then it too is a relic of slavery.

²⁴⁰ See, e.g., *Shaw v. Reno*, 509 U.S. 630, 634 (1993) (noting that blacks in North Carolina are dispersed and that they constitute 20% of the population).

²⁴¹ Though minorities may be local majorities which may yield geographically compact majority-minority districts, many majority-minority congressional districts are the result of conscious attempts to create them. See, e.g., *Miller v. Johnson*, 515 U.S. 900, 917-18 (1995); *Shaw*, 509 U.S. at 640-41.

That North Carolina, a state whose 20% black population is relatively dispersed could create a congressional district that was 54.71% black by linking contiguous communities might be somewhat surprising in the absence of enforced residential segregation. See *Shaw*, 509 U.S. at 634, 671 n.7 (White, J., dissenting). Though the districts may look unconventional, it should trouble the Court that housing patterns are so segregated that redistricters can keep neighborhoods intact, yet still construct large districts that are majority black. This should particularly bother the Court given that widespread segregation likely was caused by race-conscious private and public decisions. Segregated housing patterns arguably remind one of apartheid much more than majority-minority districts do. *Id.* at 647 (suggesting that race-based districting evokes thoughts of apartheid).

²⁴² Some may naturally occur in large urban centers or pockets of the South. Of course, majority-minority districts, like any other voting structure, can be used to increase or decrease minority influence at the discretion of the legislative majority that creates the structure. A good result can be indistinguishable from a bad one depending on the intention of the legislature implementing the process. For example, decreasing wasted votes—those that go to losing candidates—can be good, but may look the same as packing, which can be bad. See Aleinikoff & Issacharoff, *supra* note 186, at 601 (commenting that the fewer wasted votes exist in a district, the more credible a claim of packing becomes). Determining what is occurring depends on whether the decrease of wasted votes is a policy that will extend to the districts dominated by a jurisdiction's majority or be limited to the districts not dominated by that majority.

of representatives, may find that the smaller size of the districts used in those elections may allow nearly proportional representation for minority groups even through use of the same geography-based districting principles. The smaller districts may allow smaller-scale residential segregation to create districts that may yield the election of the minority group's candidate of choice in a significant number of districts.

That traditional districting principles may submerge the voting power of racial minorities is clear. The point is not to stop using such principles, but to recognize the effects that using such principles may have and treat the use of the principles as possibly dilutive, rather than to suggest that a districting plan using such principles provides a natural baseline from which dilution can be proved. Courts should analyze districting principles as electoral rules that may affect the equal representation of minority groups rather than as constitutional givens. In some respects, the Supreme Court has recognized that traditional districting principles need to be abandoned or relaxed in the quest for fair representation because balancing the use of the principles and fair representation is extremely difficult.

The Supreme Court has struck an uneasy balance between colorblindness and race neutrality in districting, recognizing that the quest for race-neutral results is a legitimate end of the Voting Rights Act and presumably of the Fifteenth Amendment.²⁴³ Not surprisingly, the inability to protect equal voting rights exclusively through ostensibly colorblind rules, such as traditional districting principles, has led states to use race in districting.²⁴⁴ The Court seems to recognize this in allowing states the limited use of race to protect minority representation in drawing districts.²⁴⁵ If race is not the predominant

²⁴³ See Pildes, *supra* note 148, at 330 ("The line drawn in the racial redistricting cases appears to reflect just such a view—that the Voting Rights Act and race-conscious districting are permissible when in the service of ensuring nondiscrimination in voting.").

²⁴⁴ It may be the only way to achieve equal voting rights. See Issacharoff & Karlan, *supra* note 121, at 2291-92 (noting that ignoring race does not lead to perfect results but would only cement the results of prior race-conscious voting patterns); Frank R. Parker, *The Damaging Consequences of the Rehnquist Court's Commitment to Color-Blindness Versus Racial Justice*, 45 AM. U. L. REV. 763, 773 (1996):

The Supreme Court has declared war on minority efforts to achieve equal opportunity. Colorblindness is a pathology, a disease of the eye. In striving for a color-blind society, the Supreme Court is turning a blind eye to the gross racial inequities that pervade American society and which, unless alleviated, deprive this country of any claim to racial justice.

²⁴⁵ See Forde-Mazrui, *supra* note 140, at 383 (noting the role race may play in districting); Karlan, *supra* note 62, at 1575 (same). Of course, states have always used racial considerations to draw districts, and it is only recently that that has become problematic. For example, the Mississippi River delta region in Mississippi that was overwhelmingly populated by black Americans was split among various districts to ensure that blacks

factor in crafting a district or districting plan, it can be used like any other districting principle.²⁴⁶ However, it is difficult to determine when race has become the predominant factor in drawing a district.²⁴⁷

Those challenging a majority-minority district need to prove that race was the predominant factor in drawing the district by proving that other factors cannot explain the district's construction.²⁴⁸ Deviation from traditional ostensibly colorblind districting principles helps prove that race was the predominant factor motivating the district's structure.²⁴⁹ Consequently, oddly shaped or noncompact districts coupled with the sufficient consideration of race can be deemed proof sufficient to demonstrate that race was inappropriately factored into a districting plan.²⁵⁰ Proof that race was the

could not elect a congressional representative. See *AMY*, *supra* note 174, at 124 (mentioning the Mississippi delta district); Frank R. Parker, *Racial Gerrymandering and Legislative Reapportionment*, in *MINORITY VOTE DILUTION*, *supra* note 220, at 89-92 (explaining the cracking of the majority black Mississippi delta region into five majority white districts).

²⁴⁶ That race is a factor in creating many majority-minority districts is unquestioned. See, e.g., *Easley v. Cromartie*, 532 U.S. 234, 235 (2001) (noting that the issue in that case was the predominance of race, not whether it was a factor at all).

²⁴⁷ See *Pildes*, *supra* note 238, at 2545 (suggesting that because of the multitudinous concerns in the districting process, it cannot be determined when race is the predominant motive).

²⁴⁸ See *Easley*, 532 U.S. at 241 ("The issue in this case is evidentiary. We must determine whether there is adequate support for the District Court's key findings, particularly the ultimate finding that the legislature's motive was predominantly racial, not political."); *Shaw v. Reno*, 509 U.S. 630, 643-44 (1993) (explaining that actions "unexplainable on grounds other than race" will be treated the same as race-based actions); *Pildes*, *supra* note 238, at 2511:

When race-conscious districting . . . abandon[s] the principles typically used to draw other districts, the Court treats race as having been singled out for exceptionally preferential treatment. The *Shaw* Court can be understood, then, as holding that when this point has been crossed, the V[oting] R[ights] A[ct] has been illicitly transformed from a regime of "nondiscrimination" to one of "affirmative action."

See also *Pildes & Niemi*, *supra* note 121, at 499-506 (arguing that *Shaw* is best understood as suggesting that districting is a multi-faceted inquiry that must take a good number of factors into account).

²⁴⁹ See *Lawyer v. Dep't of Justice*, 521 U.S. 567 (1997); *Bush v. Vera*, 517 U.S. 952, 980 (1996) (plurality opinion) ("Significant deviations from traditional districting principles, such as the bizarre shape and noncompactness demonstrated by the districts here, cause constitutional harm insofar as they convey the message that political identity is, or should be, predominantly racial."); *Miller v. Johnson*, 515 U.S. 900, 916 (1995). The Court uses "race neutral" interchangeably with "colorblind." See *Shaw*, 509 U.S. at 639 (mixing "colorblindness" and "race neutrality" in suggesting that literacy tests and grandfather clauses are race neutral). As suggested throughout this Article, the terms are not interchangeable given this country's history of racial inequality.

²⁵⁰ This issue may merely be an evidentiary issue in which the shape of a district is strong evidence of race-conscious districting, and a compact district is conclusive evidence of traditional and ostensibly acceptable districting. See *Miller*, 515 U.S. at 912-13 (noting that the shape of a district is merely one possible part of an inquiry regarding improper use of race). But see *Bush*, 517 U.S. at 984 (disclaiming that *Shaw* is just an evidence case).

predominant factor triggers strict scrutiny under the Fourteenth Amendment.²⁵¹ Whether an explicit plan to create majority-minority districts will survive strict scrutiny and precisely when race becomes the dominant consideration in a districting plan remain unresolved issues.²⁵² However, even when race is the predominant factor in constructing a district, if its use serves a compelling state interest and is narrowly tailored to achieve that interest, the plan will not run afoul of the Fourteenth Amendment.²⁵³

The Court's recognition that fair representation may require some concession on the Fourteenth Amendment's colorblind imperative is welcome particularly given that it is unclear that the imperative should exist. However, its message is still troubling. The vision still privileges geography-based districting principles, even though those principles may be the root of some of the difficulty in providing fair and equal representation for minority groups. In addition, that relatively equitable results are required by the statutory command of the Voting Rights Act, rather than by the Fourteenth and Fifteenth Amendments, suggests that a change in Court policy on the use of race in districting could end this quest for fair representation.²⁵⁴ A clearer vision of district-based vote dilution would involve either the allowance that the use of

²⁵¹ See *Bush*, 517 U.S. at 959; *Miller*, 515 U.S. at 920.

²⁵² See *Bush*, 517 U.S. at 958-59 (determining that consciousness and use of race in districting is not always sufficient to trigger strict scrutiny).

²⁵³ See *Shaw v. Hunt*, 517 U.S. 899, 908 (1996); *Miller*, 515 U.S. at 920. It is unclear what a compelling state interest would be. Avoiding a section 2 vote dilution claim under the Voting Rights Act may be sufficient to allow the use of race in structuring a district in some cases. See Karlan, *supra* note 62, at 1603 ("[The Supreme Court] has also broadened the interests that can justify race-conscious redistricting, by holding that compliance with the Voting Rights Act's results tests can serve as a compelling state interest."). However, the need to avoid section 2 liability must be clear. See *Shaw*, 517 U.S. at 916 (suggesting that possible section 2 violations must be clearer); *Johnson v. DeGrandy*, 512 U.S. 997, 1017 (1994) ("Failure to maximize [a minority group's strength] cannot be the measure of § 2."). Conversely, the Court has made clear that attempting to avoid a section 5 retrogression violation of the Voting Rights Act will not necessarily be sufficient to constitute a compelling state interest. See *Miller*, 515 U.S. at 921 (stating that the Georgia plan to maximize black representation and avoid Department of Justice refusal to preclear is not sufficient to avoid constitutional violation). It is unclear what other reasons may be sufficient for an intentionally created majority-minority district to withstand strict scrutiny. However, some commentators have suggested that fostering real racial equality might be one such interest. See Blacksher, *supra* note 9, at 687. The narrow tailoring prong of the strict scrutiny test could compel a restrictive use of race, a narrow tailoring of the district to conform to a compact district, or both. See *Bush*, 517 U.S. at 979-80; *King v. State Bd. of Elections*, 979 F. Supp. 619, 623 (N.D. Ill. 1997) (applying the narrow tailoring prong to the shape of a remedial district).

²⁵⁴ See *City of Mobile v. Bolden*, 446 U.S. 55, 60-61 (1980) (plurality opinion) (noting that the Voting Rights Act (before the 1982 amendments) went no further than the Fifteenth Amendment command requiring intentional discrimination for violation); *Jordan*, *supra* note 5, at 391 (suggesting that *City of Mobile* restricted the quest for equal voting rights to the Voting Rights Act rather than the broader principles of the Fifteenth Amendment).

race is privileged when it ameliorates geography-based districting's effects on minority group representation or the explicit examination of districting principles as possibly dilutive.²⁵⁵

C. *Limitations on Protecting Fifteenth Amendment Rights*

The issues surrounding the right to equal representation mirror those surrounding the right to cast a ballot. In both situations, current constitutional jurisprudence is not as clear as it should be, in large measure because of the Fourteenth Amendment's focus on discriminatory intent and colorblindness.²⁵⁶ With respect to the right to cast a ballot, the intent requirement prohibits disparate impact claims, thereby cutting off access to claims that could allow the full recognition of the Fifteenth Amendment's promise of equality. With respect to the right to elect one's candidate of choice, the Court's acceptance of traditional districting principles and structures as colorblind (even though they can effectively harm minority interests) impedes analyzing the principles for what they are: electoral rules that may have a disparate impact on the ability of minority groups to garner equal representation. Instead, the Court has arguably ignored the possible use of the equality principles of the Fourteenth and Fifteenth Amendments to fix a problem created by its myopic characterization of traditional districting principles as colorblind. The solution to the problems attending the right to cast a ballot and the right to elect one's candidate of choice is similar. It is to treat deviation from strict equality as possible constitutional violations, subject to a justification for the deviation. Part III of this Article details the proposed solution.

III. PROTECTING FIFTEENTH AMENDMENT RIGHTS

The Reconstruction Amendments require the full inclusion of racial minorities—primarily the progeny of former slaves—in the life of the country. However, the goal underlying the Fifteenth Amendment—substantive political

²⁵⁵ The Court has fixated on the issue of race and colorblindness, possibly to the detriment of a complete constitutional analysis. See Alexandra Natapoff, *Madisonian Multiculturalism*, 45 AM. U. L. REV. 751, 761 (1996) ("Instead of insisting that any acknowledgment of racial difference represents a political and constitutional failure, the Court should incorporate Madison's pragmatic structural approach to faction and try to open up the political process to racial minorities, even while recognizing the persistent danger of white majoritarian tyranny.").

²⁵⁶ Of course, Justice Marshall argued that the intent standard was misplaced, suggesting as an example that *Reynolds v. Sims*, 377 U.S. 533, 565 (1964), rested on the discriminatory effects, not intent. *City of Mobile*, 446 U.S. at 116 (Marshall, J., dissenting).

equality, is somewhat different than that underlying the Fourteenth Amendment—procedural legal equality.²⁵⁷ Thus, the rules for determining whether the Fifteenth Amendment has been violated and how to remedy such a violation should focus specifically on substantive political equality, not procedural legal equality.²⁵⁸ As the right to vote protected under the Fourteenth and Fifteenth Amendments relates both to the right to cast a ballot and the right to choose one's representative of choice, full political equality for minority group members should require that both rights be provided and assiduously protected. Thus, rules that negatively affect a minority group member's ability to exercise such rights, whether motivated by discriminatory intent or not, should be deemed suspect under the Fifteenth Amendment.²⁵⁹

²⁵⁷ Of course, some of the values are similar. For example, the notion of inclusion of all citizens as a democratic value arguably should run through both Fifteenth and Fourteenth Amendment jurisprudence. See Blacksher, *supra* note 9, at 635 (“The question of whether the redistricting process is fair and comports with constitutional, democratic principles should not depend primarily on its outcome, but on the extent to which the participatory process leading to that outcome has been fair and inclusive.”); Jordan, *supra* note 5, at 391 (suggesting that the Fifteenth Amendment is key to voting rights, though Fourteenth Amendment “dominates the disposition of voting rights claims today”); Smith, *supra* note 119, at 308-13.

²⁵⁸ This may necessarily trigger group-style rights. See Aleinikoff & Issacharoff, *supra* note 186, at 600 (“An individual-rights based view of equal protection is problematic when transferred to the voting context.”); Karlan & Levinson, *supra* note 118 (arguing that equal protection analysis does not work for voting rights analysis because while equal protection analysis generally attempts to ignore race in the decision making processes, race does and must matter in reapportionment and redistricting decisions). For the same point, but a different ultimate conclusion on how to treat voting rights, see Peacock, *supra* note 183, at 128 (“My first contention . . . is that the [Voting Rights Act] and the [Equal Protection Clause] are incompatible in the most fundamental respect: they are predicated upon competing, irreconcilable conceptions of equality.”). The result of the pressure that is put on the Fourteenth Amendment to remedy voting rights violations may be that rights that should be vindicated under the Thirteenth and Fifteenth Amendments are being analyzed under the Fourteenth Amendment. See James Blacksher & Larry Menefee, *At-Large Elections and One Person, One Vote: The Search for the Meaning of Racial Vote Dilution*, in *MINORITY VOTE DILUTION*, *supra* note 220, at 238 (“As a constitutional rule, one person, one vote, the equal protection guarantee of majority control, is actually derived from cases decided under the Fifteenth Amendment, whose explicit purpose is the protection of racial minorities from abridgement of their voting rights.”).

²⁵⁹ Minority groups, by definition, will not tend to wield power over the majority. See Natapoff, *supra* note 255, at 755. Natapoff, after noting that concerted action by the majority is more harmful than concerted action by the minority notes:

This suggests that, contrary to the Court's current position, it sometimes may be appropriate to treat whites as a group differently under an equal protection analysis, precisely because they constitute a numeric and historic majority with the ability to distort the political process and control the definition of the common good.

Id. Indeed, given that rules have often been shaped to stop minority groups from even exercising influence, one could ask why racial minorities attempt to gain support through the electoral system. See BLACK POLITICS: THE INEVITABILITY OF CONFLICT/READINGS 15 (Edward S. Greenberg et al. eds., 1971) (“One might legitimately ask why Black people should continue to take part in ‘politics as usual.’ The burden of proof rests with those who would argue that they should.”).

Adequately protecting the substantive political equality that should flow from the Fifteenth Amendment requires reevaluating conventional constitutional wisdom. First, colorblindness should be nearly irrelevant to Fifteenth Amendment concerns, unless its use increases political equality. Rules that yield racial political inequality, whether race-conscious or colorblind, should be subject to Fifteenth Amendment scrutiny.²⁶⁰ Conversely, rules that encourage political equality should be validated by the Fifteenth Amendment, whether race-conscious or not. For example, a districting plan that specifically uses race to approximate fair and equal representation for a minority group should be validated under the Fifteenth Amendment, though it may still be subject to scrutiny under the Fourteenth Amendment.²⁶¹ Simply, the hierarchy of values that courts recognize under the Fifteenth Amendment should change, with race-neutral results becoming substantially more important than colorblind process.²⁶²

Second, the effects that electoral rules yield should trigger constitutional scrutiny, not the intent underlying those rules.²⁶³ The lack of discriminatory intent should be largely irrelevant in defending any rule that disparately impacts a minority group's ability to cast ballots or ability to gain representation consistent with its numbers.²⁶⁴ With respect to rules affecting the ability to cast a ballot, Fifteenth Amendment analysis should start with the presumption of full and equal suffrage, making any rule that systematically

²⁶⁰ Strict colorblindness and its disdain of group interests may limit blacks as a group from achieving political equality. See Blacksher, *supra* note 9, at 662:

The problem, however, is that in the context of redistricting, colorblind individualism will perpetuate the primary badge of slavery instead of removing it. Entrenched as constitutional principle, colorblind individualism arguably prohibits black Americans from negotiating collectively with white Americans over basic democratic structures, foreclosing the possibility that African Americans as a people eventually might achieve the ability to consent to the form of government and to become coequal members of the nation.

²⁶¹ How to accommodate the anti-dilution (race-neutral) and anti-classification (colorblind) principles extant in the Reconstruction Amendments has sparked one of the Supreme Court's most charged debates. See *Shaw v. Reno*, 509 U.S. 630, 647-48 (1993) (recognizing the right to be free of a voting system that classifies voters by race).

²⁶² A race-conscious rule's focus on providing substantive equality to minority groups should help it survive scrutiny. If some forms of race-consciousness are allowed to protect the core of the Voting Rights Act, surely they should be allowed to protect core principles of the Fifteenth Amendment. See *supra* notes 243-54.

²⁶³ Full inclusion should require no less. See Blumstein, *supra* note 64, at 650 ("The substantive effects approach subtly but necessarily adopts a philosophy that racially proportional participation in society's institutions is the norm.")

²⁶⁴ However, some commentators have suggested that disparate impact analysis does not or should not apply to voting. See, e.g., Perry, *supra* note 124, at 568-71.

disqualifies a higher percentage of minorities than nonminorities from voting suspect.²⁶⁵

Similarly, any electoral rule or law, including a districting scheme or choice of voting system, that systematically yields less representation than the jurisdiction-wide expected representation for the minority group at issue should be constitutionally suspect.²⁶⁶ Expected representation is the amount of representation one would expect a minority group to garner given a minority group's membership and cohesion.²⁶⁷ Expected representation is similar to proportional representation except that it considers a minority group's cohesion and focuses on the representation the group would likely garner without help from other groups, rather than what representation it could garner if it were completely cohesive. The less cohesive the minority group's vote, the less its expected representation, and the less likely an electoral rule will yield a deviation from expected representation and be constitutionally suspect.²⁶⁸ When a minority group is particularly cohesive, its expected representation will approximate proportional representation. Though proportional representation is not required under our Constitution,²⁶⁹ the ability of minority groups to exercise influence in proportion to their numbers parallels the

²⁶⁵ This may not fully track the original intent underlying the Fifteenth Amendment. See GILLETTE, *supra* note 77, at 57-58 (noting that while discussions regarding barring literacy or intelligence tests had occurred during the debates on the Fifteenth Amendment, no ban on measures that could functionally limit black suffrage were adopted); Rosen, *supra* note 46, at 797-98 (noting that The Universal Suffrage amendment to the Fifteenth Amendment failed). However, it may track how we currently think about the meaning of nondiscrimination. See 42 U.S.C. § 2000e-2(k) (2000).

²⁶⁶ Complaints that blacks living in different parts of a jurisdiction do not share sufficient salient interests to be deemed parts of the same interest group are unconvincing. See Richard Champagne & Leroy N. Rieselbach, *The Evolving Congressional Black Caucus: The Reagan-Bush Years*, in BLACKS AND THE AMERICAN POLITICAL SYSTEM, *supra* note 100, at 131 (recalling Congressman Charles Diggs' (D-Mich.) comment that "the [Congressional Black Caucus'] concerns include those of 'citizens living hundreds of miles from our districts who look on us as Congressmen-at-large for black people and poor people in the United States.'").

²⁶⁷ Though cohesion can be a somewhat difficult concept to prove, see *Thornburg v. Gingles*, 478 U.S. 30, 58 (1986) ("[T]here is no simple doctrinal test for the existence of legally significant racial bloc voting"), it is already used to determine if a minority group is sufficient to help anchor a majority-minority district. See, e.g., *Diaz v. Silver*, 978 F. Supp. 96, 99-101 (E.D.N.Y. 1997); *Moon v. Meadows*, 952 F. Supp. 1141, 1145-46 (E.D. Va. 1997).

²⁶⁸ Of course, expected representation may cause problems of its own. For example, a minority group that is large enough to support two representatives but is split equally between two competing parties could be deemed not cohesive at all, or as cohesive subsets of the minority group. The group could be considered noncohesive from a jurisdiction-wide perspective, as the inability to elect its candidate of choice would seem to depend on insufficient cohesive numbers in any particular district. However, in an at-large system, both subsets could elect their own representative.

²⁶⁹ See *Davis v. Bandemer*, 478 U.S. 109, 132 (1986); *City of Mobile v. Bolden*, 446 U.S. 55, 79 (1980) (plurality opinion); *Whitcomb v. Chavis*, 403 U.S. 124, 153-57 (1971).

guarantee that a minority group member will not be unable to elect her representative of choice because of her race.²⁷⁰ Expected representation is the best way to operationalize the promise of fair representation and focuses the issue unabashedly on race neutrality without requiring proportional representation.²⁷¹ A districting or at-large system passed in a context that inexorably results in the diminution of the minority group's chance to elect representatives of its choice would contravene the expected representation principle, and would necessarily be subject to scrutiny.²⁷² Racial political equality requires a fair ability to elect the representative of one's choice, the baseline for which should be expected representation.²⁷³

Third, scrutiny under the Fifteenth Amendment would require a substantial justification for any rule yielding a disparate impact. Lack of discriminatory intent would not be a defense.²⁷⁴ The justification for a rule having a disparate impact would be sufficient if the electoral rule were reasonably necessary to serve a substantial representational value.²⁷⁵ The Fifteenth Amendment should not invalidate rules that are reasonably related to purposes inherent in democracy merely because they happen to have a racial impact. However, the Amendment should force states to defend such rules and prove their centrality to the electoral process. Thus, a state would be required to show that a rule that infringes the substantive political equality of any minority group is a

²⁷⁰ The argument replicates the argument that the Fifteenth Amendment does not provide the right to vote to blacks, but merely restricts the denial of the right to vote on the basis of race. Thus, a black citizen claiming the right to vote is merely making the argument that no one has the right to stop her from voting because of her race.

²⁷¹ This, at least, would be consistent with the Voting Rights Act. See Daniel D. Polsby & Robert D. Popper, *Ugly: An Inquiry into the Problem of Racial Gerrymandering Under the Voting Rights Act*, 92 MICH. L. REV. 652, 658 (1993) (suggesting that the Voting Rights Act does provide "a limited right on behalf of minorities to some measure of proportional representation"). The Voting Rights Act can provide background notions regarding representation, though it does not provide constitutional standards.

²⁷² Intent would not matter in such a case, as proportional representation concerns results rather than process.

²⁷³ Representation can be a zero-sum game. See Parker, *supra* note 244, at 772 (noting that reducing minority power will necessarily increase majority race power).

²⁷⁴ Essentially, this restates an effects test. Of course, *Reynolds v. Sims* appears to embody an effects test. See Blacksher & Menefee, *supra* note 258, at 203-04 (noting the irony that *Reynolds v. Sims* rested in part on Fifteenth Amendment notions of voting rights and used an effects test to benefit white Alabamians, though conversely *City of Mobile v. Bolden* held that the Fifteenth Amendment was not violated without invidious intent in harming black Alabamians).

²⁷⁵ Of course, the standard is borrowed from Title VII of the Civil Rights Act of 1964. The defense of reasonable business necessity has been applied in the employment discrimination area. 42 U.S.C. § 2000e-2(k) (2000). Many of the issues in that area are similar to those in the voting rights setting. See, e.g., *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989) (effectively overruled in part by 1991 amendments to Title VII codified at 42 U.S.C. § 2000e-2(k) (2000)); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

necessary way to structure the franchise and representational democracy, and not merely an ostensibly colorblind way to restrict minority voting and representation.²⁷⁶ Though the reasonably necessary standard is somewhat vague, it may not be any more vague than the standards of review already applied in constitutional jurisprudence.²⁷⁷

Fourth, the reasonably necessary standard would need to be applied to every electoral rule—whether new or existing—that yielded a systematic disparate impact on a minority group’s ability to cast ballots or gain equal representation. For example, a rule disfranchising felons might be long-standing, but may also have a disproportionate impact on certain minority groups. That such a rule should be subject to the reasonably necessary test is sensible given that some of the factors that may contribute to a higher felon rate among a minority group than among a nonminority group may relate to race-based governmental actions.²⁷⁸ However, if a rule disfranchising felons were deemed reasonably necessary to the working of the electoral system or to protect a substantial representational value, it would be deemed constitutional under the Fifteenth Amendment.²⁷⁹ The effect on rules affecting equal representation would be similar. They would require a justification of all rules, systems, or plans that yielded a disparate impact. For example, districting plans that yielded less than expected representation and were not supported by sufficient justification would be deemed deficient and be invalidated. The invalidation should lead to the temporary imposition of a system without a race-dilutive effect, such as an at-large limited voting system.²⁸⁰

²⁷⁶ Arguably, the bigger impact a rule has, the stronger its justification should be. See Pershing, *supra* note 146, at 1198-1208 (proposing a standard under section 2 of Voting Rights Act to deal with colorblind rules that yield a disparate impact with respect to access to the ballot that would require a higher justification for the rule as the discriminatory impact of the rule became more pronounced).

²⁷⁷ See generally Michael Stokes Paulsen, *Medium Rare Scrutiny*, 15 CONST. COMMENT. 397 (1998).

²⁷⁸ See Hench, *supra* note 69, at 765-66 (noting the disparity in incarceration rates and sentencing between black and white offenders and noting that “[t]his imbalance in incarceration cannot be attributed to a disproportionate predilection for crime by minority populations”). However, at least one court has noted that a disparate impact flowing from felon disfranchisement laws is not race-based. See *Wesley v. Collins*, 791 F.2d 1255, 1262-63 (6th Cir. 1986) (denying that Tennessee’s felon disfranchisement law yields vote dilution under the Voting Rights Act, though the law does yield a disparate impact).

²⁷⁹ Were the rule passed with discriminatory intent, it would be subject to additional Fourteenth Amendment scrutiny. Of course, others have suggested a tougher Fourteenth Amendment test than what currently exists. See *Richardson v. Ramirez*, 418 U.S. 24, 77-86 (1974) (Marshall, J., dissenting); see also Calmore, *supra* note 143, at 1274-80 (suggesting that felon disfranchisement amounts to vote dilution); Hench, *supra* note 69, at 765-68 (same).

²⁸⁰ At-large limited voting schemes would necessarily afford nearly proportional or expected representation for an organized minority group. See *supra* note 204 and accompanying text.

Though these alterations in voting rights doctrine appear radical, they should not be. Once one considers that the right to vote protected by the Fourteenth and Fifteenth Amendments includes both the right to cast a ballot and the right to choose one's representative of choice, it is merely a matter of viewing such rights as both substantive under the Fifteenth Amendment and procedural under the Fourteenth Amendment, and protecting them in both ways. The attitudinal changes necessary might be more severe than the doctrinal changes. Internalizing a constitutional, rather than statutory, norm that requires real political equality would be necessary, as would rethinking electoral rules that have been taken for granted.

A change in mindset might also seem radical, though it need not be. The proposal merely takes doctrines that are ostensibly at the heart of the Constitution—near universal, non-race-based suffrage and equal representation for equal numbers of citizens—as the baselines for constitutional voting structures and requires that deviation from those baselines be justified. It would require that courts and legislatures structure voting rules and districting in a fashion that yielded true political equality for minority group members. Though this mindset should already exist given the number of years the Voting Rights Act has been in place, it has been somewhat resisted as historical visions of districting and electoral process have been presumed to be colorblind and race-neutral.²⁸¹ The shift in mindset is as easy as recognizing that a nondistricted system that yields political equality for all minority groups should be preferred to a districting system that does not.²⁸²

Using the limited at-large system as a default voting scheme might be more difficult to internalize.²⁸³ However, its virtue is its fidelity to the constitutional principle of political equality. This default appears quite radical given the current preference for single-member districting, but is quite conventional in the context of the Constitution and our vision of civil rights.²⁸⁴ The limited at-

²⁸¹ However, the Court has been willing on occasion to subject almost any voting rule to scrutiny under the Voting Rights Act. *See* *Holder v. Hall*, 512 U.S. 874, 946 (1994) (Blackmun, J., dissenting) (noting that the majority was willing to consider the dilutive effect of retaining a particular size of governing body).

²⁸² Many systems that may yield political equality exist. *See generally* Cohen, *supra* note 203 (arguing for establishing nontransferable election systems to remedy Voting Rights Act violations); Mulroy, *supra* note 201, at 1906-16 (arguing for alternative voting systems as remedies for Voting Rights Act violations).

²⁸³ The use of a limited at-large system as a constitutional baseline would seem reasonable. *See* Blacksher & Menefee, *supra* note 258, at 209 (quoting Justice Stewart: "I do not understand why the Court's constitutional rule does not require the abolition of districts and the holding of all elections at large." *Lucas v. Colorado Gen. Assembly*, 377 U.S. 713, 750 (1964) (Stewart, J., dissenting)).

²⁸⁴ *See* Blacksher, *supra* note 9, at 682.

large system's conventionality is especially evident in the context of congressional elections. Each citizen only votes for one Congressman currently, and at-large systems are used for some aspects of local governance.²⁸⁵ Thus, it is not that the limited at-large system is wholly foreign; it merely blends two common aspects of different voting structures.²⁸⁶ Given that the Constitution does not require districting with respect to congressional representatives and treats them as delegates from the several states to Congress,²⁸⁷ a limited at-large or multimember districting system could remind us that, under the Constitution, congressional members represent their states rather than their districts.²⁸⁸ Additionally, even though congressional districting is required by statute, choosing congressional representatives through at-large elections is allowable in certain situations.²⁸⁹ Importantly, the limited at-large system would be required only if the state could not produce a districting plan that adequately protected the interests of minority group members.²⁹⁰ A side benefit of a default plan is that it would stop courts from creating districting plans and instead leave the judiciary merely with the task of validating or invalidating these plans.²⁹¹

Outside of the context of congressional districting, the use of a limited at-large voting scheme default should not be particularly problematic.²⁹² The

²⁸⁵ School boards most readily come to mind.

²⁸⁶ However, some argue that using limited voting scheme that is too limited might harm voting. See Mulroy, *supra* note 201, at 1907-08 (arguing that limiting voters to a single vote in filling multiple vacancies can be too constraining).

²⁸⁷ The notion that representatives are delegates representing the common good rather than more narrow parochial interests can lead to a different and possibly better style of government. See Mark A. Graber, *Conflicting Representations: Lani Guinier and James Madison on Electoral Systems*, 13 CONST. COMMENT. 291, 306-07 (1996).

²⁸⁸ See Chambers, *supra* note 223, at 152-53 (commenting on the representational values underlying at-large and single-member Congressional districting systems).

²⁸⁹ See 2 U.S.C. § 2(a) (2000) (requiring the election of congressional representatives at-large when a decrease in the state's congressional delegation occurs and no redistricting plan has been approved); *Smiley v. Holm*, 285 U.S. 355 (1932) (same); Chambers, *supra* note 223, at 142 n.26 (noting Alabama's need to choose representatives at-large after population losses evident in the 1960 Census caused it to lose a congressional seat).

²⁹⁰ Of course, Congress would have to repeal 2 U.S.C. § 2 (2000), which requires districting, or the courts would have to declare it unconstitutional.

²⁹¹ Note that on occasion states concede districting to the courts. See *Lawyer v. Dep't of Justice*, 521 U.S. 567, 576-77 (1997) (holding that Florida's acceptance of the Court approved remedial district plan was permissible); Pildes, *supra* note 238, at 2508 ("Already in the aftermath of the Court's recent decisions, several states have become too politically paralyzed to redistrict at all; instead, they have defaulted the task to federal courts.").

²⁹² A limited at-large voting system can be constructed as a multimember district. Such districts may be generally disfavored given their historical color-conscious use, but may not be completely foreclosed. See

suggested revisions change the constitutional baseline from geography-based districting schemes that may implicitly disadvantage minority groups, to a system that encourages equal representation for cohesive minority groups. These revisions allow voluntary constituencies to form around issues and candidates,²⁹³ allow continued bloc voting without the effect on minority representation that bloc voting tends to cause, and protect the legitimate rights of racial minorities to elect their candidate of choice, if the state cannot create an appropriate districting scheme. The limited at-large system would provide a constitutional safe haven without the uncertainty of redistricting. This might remove some of the time pressure of redistricting and might encourage legislative compromise that would not have otherwise occurred.

This proposal also might spur experimentation with at-large, multimember, and single-member districting that could be quite useful. Experiments with at-large voting or cumulative voting,²⁹⁴ combinations of multimember districts and single-member districts, or different ways of structuring single-member districting plans might be appropriate.²⁹⁵ For example, a state plan that included multimember urban and suburban districts and single-member rural districts in rural areas could be a reasonable compromise to single-member districting and might yet lead to full expected representation for minority groups. Most importantly, the states would determine the best districting plan for them, rather than having judges do so.

The suggested alterations in constitutional structure fit snugly inside of the general parameters of the right to vote. This proposal allows minorities to choose representatives of their choice and permits citizens to continue voting

Reynolds v. Sims, 377 U.S. 533, 577 (1964) (suggesting the possibility of some multimember districts in state legislatures); Armour v. Ohio, 775 F. Supp. 1044, 1052 n.3 (N.D. Ohio 1991) (suggesting that in the case at hand a multimember district might serve minority plaintiffs interests well). Multimember districts have existed in state races in the past. See Thornburg v. Gingles, 478 U.S. 30, 34-35 (1986) (noting that the plan at issue contained single-member and multimember districts); Fortson v. Dorsey, 379 U.S. 433, 437 & n.3 (1965) (detailing a districting scheme containing single-member and multimember districts).

²⁹³ See Karlan, *supra* note 224, at 226 ("In essence, then, this form of limited voting allows the creation of 'voluntary,' nongeographic single-member districts within the jurisdiction."); see generally Still, *supra* note 203.

²⁹⁴ See Aleinikoff & Issacharoff, *supra* note 186, at 626-28 (describing nondistricted election systems including limited voting and at-large systems); Karlan, *supra* note 224, at 221-36 (describing limited and cumulative voting procedures); Mulroy, *supra* note 201, at 1906-16 (suggesting use of alternative voting systems). Cumulative voting would be another possible solution and although some believe it may confuse voters, there is reason to believe otherwise. See Still, *supra* note 203, at 368 (suggesting that voters are not confused by cumulative voting).

²⁹⁵ For other possible districting experiments, see Chambers, *supra* note 223, at 153-59.

in their preferred blocs.²⁹⁶ In addition, it provides a constitutional basis to require justifying all deviations from political equality rather than only those stemming from the intent to discriminate. As such, it fits the vision of the Fifteenth Amendment as a substantive grant of potential equality, a goal of the Reconstruction Amendments.²⁹⁷ As importantly, it does so while maintaining fidelity to the Fourteenth Amendment by allowing the Fourteenth Amendment to invalidate electoral rules independently when appropriate. The proposed solution affords a unified reading of the Reconstruction Amendments rather than an internally adversarial one. For that reason alone, the proposal may be preferable to our current system.

CONCLUSION

The rights and responsibilities of citizens include choosing who will represent them.²⁹⁸ From the earliest days of this country until the recent past, racial minorities in general and black Americans in particular have often been excluded from choosing their representatives at all levels of government both explicitly through restrictions on voting and implicitly through voting structures erected to minimize their voting impact.²⁹⁹ That is, their votes have been non-existent, ignored, or diluted.³⁰⁰ Though the Reconstruction Amendments arguably invalidate such practices, only the passage of the Voting Rights Act of 1965 protected the voting rights of racial minorities in

²⁹⁶ Allowing voters to continue voting as they wish could speed the day when racial bloc voting ends. Karlan, *supra* note 224, at 231 (“[T]o the extent that incumbency creates an electoral advantage by providing officials with chances to gain constituents’ good will through responsiveness, black incumbents may stand a better chance than black challengers of attracting significant white support and speeding the day when racial bloc voting is less monolithic.”).

²⁹⁷ Indeed, some might argue that the Fifteenth Amendment could require more. See Smith, *supra* note 119, at 310 (suggesting that the Fifteenth Amendment’s language would seem to support “affirmative action-type measures such as majority-minority districts”).

²⁹⁸ Representation can have many different meanings. See A.H. BIRCH, REPRESENTATION 15 (1971) (suggesting three nonpolitical usages of term representative: “(1) to denote an agent or spokesman who acts on behalf of his principal; (2) to indicate that a person shares some of the characteristics of a class of persons; (3) to indicate that a person symbolizes the identity or qualities of a class of persons”); PITKIN, *supra* note 1, at 6-17 (suggesting many different definitions of representation). Birch concludes that four different types of representation exist: symbolic, delegated, microcosmic, and elective. See BIRCH, *supra*, at 124.

²⁹⁹ The Fifteenth Amendment was supposed to eliminate the explicit denial of the franchise, and the Voting Rights Act was supposed to eliminate the implicit denial of the franchise, namely vote dilution. See U.S. CONST. amend. XV, § 1; Voting Rights Act of 1965, 42 U.S.C. §§ 1971-1974e (2000).

³⁰⁰ See *Shaw v. Reno*, 509 U.S. 630, 639 (1993) (noting that the voting rights of minorities have been ignored throughout this country’s history).

substance and ended this shame.³⁰¹ Given recent Supreme Court decisions arguably weakening the Act's effectiveness³⁰² and calling civil rights statutes into question,³⁰³ it is worthwhile to note that the Reconstruction Amendments should be read to prohibit practices that harm minority voting even in the absence of the Voting Rights Act.³⁰⁴ Ultimately, at issue is whether the principle that all Americans deserve a fair chance to elect their chosen representative can be directly enforced through the Reconstruction Amendments or will be lost.³⁰⁵

The time has come to revisit the Fifteenth Amendment and its promise of substantive equality. A reasonably robust vision of the Fifteenth Amendment focuses on the political equality that should have been the culmination of the Reconstruction Amendments. That vision requires that rules and procedures that limit the political equality of minority groups be justified as necessary for the functioning of the electoral system, not that they merely appear colorblind. Such a reading of the Fifteenth Amendment may appear to require affirmative action on the part of states to guarantee minority representation and might appear to conflict with an equally robust reading of the Fourteenth Amendment and its supposed colorblind principle. If this is the case, so be it.³⁰⁶

Fundamentally, the Fourteenth and Fifteenth Amendments constrain states. If a state acts in contravention of the Fourteenth Amendment, the action is unconstitutional. The same is true of actions in contravention of the Fifteenth Amendment. Conversely, acts regarding voting that honor the legal equality imperative of the Fourteenth Amendment and the political equality imperative of the Fifteenth Amendment should be constitutional. That it might be difficult

³⁰¹ See, e.g., 111 CONG. REC. 8295 (1965) (statement from Sen. Jacob Javits of New York: "[The Voting Rights Act] was designed not only to correct an active history of discrimination, the denying to Negroes of the right to register and vote, but also to deal with the accumulation of discrimination."). As has been suggested above, the Voting Rights Act could be justified under the Thirteenth Amendment as well.

³⁰² See *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471 (1997); *Bush v. Vera*, 517 U.S. 952 (1996); *Miller v. Johnson*, 515 U.S. 900 (1995); *Shaw*, 509 U.S. at 630; Aleinikoff & Issacharoff, *supra* note 186, at 639 (questioning whether the Court retains allegiance to the Voting Rights Act).

³⁰³ See *supra* note 2.

³⁰⁴ Whether the Supreme Court agrees is debatable. See Aleinikoff & Issacharoff, *supra* note 186, at 650 ("We believe that Justice O'Connor and a majority of the Court would ultimately like to push equal protection law toward a color-blind standard. In the specific context of redistricting, this would translate into race-neutral, compact districting that would be indifferent to the racial composition of districts.").

³⁰⁵ Broadly, the principle encompasses the representation of all. See *Reynolds v. Sims*, 377 U.S. 533, 565-66 (1964) ("[T]he achieving of fair and effective representation for all citizens is concededly the basic aim of legislative apportionment . . .").

³⁰⁶ See Smith, *supra* note 119, at 310 (noting the conflict between Fourteenth and Fifteenth Amendment principles in using race-conscious measures to create substantive voting equality).

to honor both imperatives is hardly a reason to ignore one or the other. Though states must be allowed some leeway to structure their voting systems and qualifications, a fair reading of the Fifteenth Amendment guarantees that the costs associated with that structuring will not be borne by minority groups.

The need to speak and write about racial inequality in America in the twenty-first Century is unfortunate, but necessary. Race must be addressed in structuring our democratic institutions because race still matters in America.³⁰⁷ That race still matters in this society makes constructing race-neutral, not merely ostensibly colorblind, democratic structures imperative for all of us.

³⁰⁷ This should come as no surprise to any observant American. See CORNEL WEST, *RACE MATTERS* x-xi (1993).