Is Partisan Gerrymandering Unconstitutional? Rethinking *Rucho v. Common Cause*

By Barnett J. Harris*

Introduction

"If THE LEGISLATURES CONTINUE TO NEGLECT their constitutional responsibilities, we can only hope the Court will continue to do the best it can to fill the gap." – Skelly Wright[1]

The next time someone says the Constitution does not guarantee the right to vote, simply respond: The Constitution does something just as good, it presumes every eligible citizen *is a voter* and prescribes a penalty for interfering with that right *in any way*.[2] Further, "[i]t cannot be presumed that any clause in the [C]onstitution is intended to be without effect."[3] Yet why does the Supreme Court oscillate in pro-

* J.D. 2021, Georgetown University Law Center; A.B. 2017, University of Delaware. I am thankful for a support network whose names are longer than this piece. I wish to specifically thank my parents Barnett Harris and Sonia Harris for their support and wisdom. I wish to thank Betsy Kuhn for encouraging me to undertake this piece. I wish to thank Jeffrey Shulman, David Stewart, Paul Smith, Kevin Tobia, Dan Friedman, Anna Gelpern, Josh Geltzer, Jackson Froliklong, Allegra Upton, and all of the students on the University of San Francisco Law Review who have poured over these words and provided immensely helpful feedback on this piece. I wish to thank Matthew Steinway and Patrick Brennan for continuous inspiration and invaluable guidance. I also wish to thank my first-year Contracts Professor, Anne Fleming, who was as brilliant a scholar as she was kind a person, and whose untimely passing has left a hole in the hearts of all who were lucky enough to have met her—for going above and beyond to make sure her students had everything they needed to succeed. In the words of the late John Hart Ely: "You don't need many heroes if you choose carefully." John Hart Ely, Democracy and Distrust: A Theory of Judicial Review, at v (1980). I dedicate this to my hero, Skelly Wright—the greatest of his generation and one of the greatest federal judges in the history of the federal bench.

1. J. Skelly Wright, *The Role of the Supreme Court in a Democratic Society—Judicial Activism or Restraint?*, 54 Cornell L. Rev. 1, 28 (1968).

2. U.S. Const. amend. XIV, § 2 (penalizing a state for "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 . . . or in any way abridged.").

3. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 174 (1803).

tecting the vote when the Constitution explicitly contains such a presumption? In doing so, the Supreme Court has ignored the text of the Constitution as well as the wishes of the Framers of the Fourteenth Amendment, who had an expansive view of protecting the political process. In June 2019, the Supreme Court held federal courts cannot stop states from drawing maps that intentionally dilute votes of a political party they do not like—a partisan gerrymander—because policing such conduct presents a nonjusticiable political question.[4] This decision is wrong in four manners.

First, it is wrong *descriptively*. There are other types of gerrymanders the Court is willing to intervene on and strike down maps if necessary.[5] Second, it is wrong *normatively*. In policing partisan gerrymandering, the Court would be protecting, not ruining, the political process.[6] Third, it is wrong *historically*. The Supreme Court took a view of the historical record in a cabined way that fails to paint the entire picture of why partisan gerrymandering claims are nonjusticiable.[7] And finally, it is also wrong *constitutionally*. In holding partisan gerrymandering claims are nonjusticiable, the Supreme Court thus finds the legislative branch is the body to resolve these disputes—a decision in violation of the Apportionment Clause of the Fourteenth Amendment.

Section Two of the Fourteenth Amendment concerns circumstances where "the right to vote at any election . . . is denied . . . or *in any way abridged*."[8] This Article argues that properly understood, Sec-

4. *See* Rucho v. Common Cause, 139 S. Ct. 2484, 2507 (2019). However, the rationale is not limited to just the disfavored political party, it would apply equally if it was done to the majority party as well. *See, e.g.*, Gaffney v. Cummings, 412 U.S. 735 (1973) (discussing reapportionment).

5. Take, for example, the hypothetical state of Ruperta, where the legislature draws a map based only on race. Doing such would violate the Equal Protection Clause. *See generally* Miller v. Johnson, 515 U.S. 900 (1995).

6. For example, take that same hypothetical state, Ruperta. Say the governor sends a memo to the speaker of the house stating: I want you to get a bill to my desk that declares all redistricting and apportionments in Ruperta will happen with the express intention and effort to dilute as much of Muffys' rights to fair and effective representation, as long as you make sure it stays within the confines of the one-person, one-vote principle. I do not care how the map looks, as long as you make sure Muffys have as little power or representation in both this legislature and the national delegation. Under *Rucho*, this is allowed. 139 S. Ct. 2484; *see also* Pamela S. Karlan, *The Rights to Vote: Some Pessimism About Formalism*, 71 TEX. L. REV. 1705, 1733–35 (1993) (discussing the strategic partisan manipulation of the one-person, one-vote principle).

7. The Supreme Court's turn to the historical record makes the historical context significant, especially since the *Rucho* Court justified its decision largely as a matter of history, not logic or policy. *See generally Rucho*, 139 S. Ct. 2484.

8. U.S. CONST. amend. XIV, § 2.

tion Two is a constitutional constraint on partisan gerrymandering because partisan gerrymandering results in an abridgment of the vote and that, as a result, redress should be available. *Rucho v. Common Cause* put the issue squarely before the Court of whether extreme partisan gerrymandering—wherein computers basically enable elected officials to choose their voters—had any constraints in the Constitution.[9] The Court rejected this inquiry, and *Rucho* thus conflicts with constitutional commands and the original understanding of the role of the judiciary.[10] The Framers of both the Elections Clause and the Fourteenth Amendment viewed the proper scope of judicial review over fundamental rights far more broadly than the *Rucho* Court does. In *Rucho*, the plaintiffs did not make this Section Two argument.[11] Section Two should be understood as a *duty* on part of state legislatures not to gerrymander; if they choose to gerrymander, then they accept the consequences of loss of representation enforced by federal courts.

To explain why partisan gerrymandering claims are justiciable, the Article proceeds as follows. Part I explores the case law involving partisan gerrymandering and outlines the Supreme Court's prior decisions. Part II discusses the history of adopting the Elections Clause and the Framers' expectation of judicial review. This Part also outlines the influences that shaped the Framers, such as including the Elections Clause and judicial review in the new constitutional framework. Part III discusses the history of making Section Two of the Fourteenth Amendment, a section addressing the right to vote. Surprisingly, Section Two has received amazingly little scholarly notice. Part IV details the history of making the Enforcement Act of 1871—the Act that enforces the provisions of the Fourteenth Amendment. This Part highlights how Congress—using its enforcement powers under Section Five of the Fourteenth Amendment—brought the judiciary into the world of partisan gerrymandering and questions the common understanding of the Reconstruction Amendments as experienced through the Framers of the Act. Part V challenges the result in *Rucho*. This Part highlights the Court's inconsistent use of the political question doctrine as well as the Court's inconsistency in its reliance on unsound doctrinal structures in other legal areas. This section also describes why the political question doctrine actually does not pose a barrier to

9. 139 S. Ct. at 2491.

10. *See infra* Parts II, III.

11. *See* Brief for Respondent O. John Benisek at 24–42, 139 S. Ct. 2484 (No. 18-726); Brief for Respondent Common Cause at 26–53, *Rucho*, 139 S. Ct. 2484 (No. 18-424).

policing partisan gerrymandering. This Part then describes the components of the judicial mechanism for implementation of the Section Two penalty. Part VI concludes the piece and encourages the federal court system to follow in line with the historical record and review questions of partisan gerrymandering—just as the Constitution commands.

I. Partisan Gerrymandering Claims in the Supreme Court: A Brief Review

This Part will describe (a) the problem of malapportioned maps, and (b) what the Court has said in its attempts to address partisan gerrymandering as a restriction on voting rights.

A. The Problem

Despite growing populations and drastic population shifts, state legislatures refused to adjust maps, and the result of this decision was severely malapportioned maps with serious societal impacts from at least the 1860s until the 1960s.[12] Malapportioned maps are detrimental because they lead to political dysfunction, vast underrepresentation for citizens in the malapportioned districts, and a gross power disparity between similarly situated voters.[13] However, beginning in the 1940s and ending in a series of cases considered to be the "voting rights revolution," the Supreme Court would enter into a conversation that, until then, had been left entirely to Congress—the thicket of malapportionment and voting rights.[14]

12. ERIK J. ENGSTROM, PARTISAN GERRYMANDERING AND THE CONSTRUCTION OF AMERICAN DEMOCRACY 148–63 (2013).

13. Michael W. McConnell, *The Redistricting Cases: Original Mistakes and Current Consequences*, 24 HARV. J.L. & PUB. POL'Y 103, 103 (2000); *see also* Nathaniel Persily, Thad Kousser & Patrick Egan, *The Complicated Impact of One Person, One Vote on Political Competition and Representation*, 80 N.C. L. REV. 1299, 1309–11 (2002).

14. This began with Colegrove v. Green, 328 U.S. 549 (1946), where the Court initially refused to get involved in redistricting matters no matter the circumstances. The Court reasoned to do so "would cut very deep into the very being of Congress. Courts ought not to enter this political thicket." *Id.* at 556. Just sixteen years later, with no change in the actions of the states, the Court returned to the issue in Baker v. Carr, 369 U.S. 186, 187 (1962); *see also* Samuel Issacharoff & Pamela S. Karlan, *Where to Draw the Line?: Judicial Review of Political Gerrymanders*, 153 U. PA. L. REV. 541, 545–53 (2004) (discussing the political manipulation and entrenchment that lead to the redistricting revolution). In *Baker*, the Court would change course when it held apportionment challenges presented "no nonjusticiable political question." 369 U.S. at 209. In doing so, the Court framed the issue as, "[a] citizen's right to a vote free of arbitrary impairment by state action has been judicially recognized as a right secured by the Constitution." *Id.* at 207–08. A year after *Baker*, the Court would return to redistricting in Gray v. Sanders, 372 U.S. 368 (1963). It was here

B. The Solution: The Court Enters the Partisan Thicket

The Court has entered what I believe to be the "partisan thicket." The life of this began in *Fortson v. Dorsey*, where the Court clarified map-drawing for political gains may raise serious Fourteenth Amendment concerns.[15]

As the state legislatures tried to work their way around the commands of the voting rights cases, we saw many (successful) attempts of partisan gerrymandering arise. In the 1980s, the Court first addressed head-on the prospective illegality of partisan gerrymandering in *Davis v. Bandemer*.[16] *Bandemer* involved redistricting in Indiana after the 1980 Census, where Indiana Republicans adopted a map that harmed Democrats and significantly favored Republicans.[17] The district court held the plan unconstitutional and ordered a redrawing of the map.[18]

---

where the famous term "one-person, one-vote" was coined: "[t]he 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." *Id.* at 381. Here, the Court affirmatively recognized "all qualified voters have a constitutionally protected right 'to cast their ballots and have them counted' . . . Every voter's vote is entitled to be counted [and] . . . It can be protected from the diluting effect . . . And these rights must be recognized." *Id.* at 379–80. It was here where the Court first reached the merits of an apportionment challenge under the Fourteenth Amendment. Just a year after *Gray*, the Court would again return to the political thicket in Wesberry v. Sanders, 376 U.S. 1 (1964). In *Wesberry*, the Court extended the holding to the context of federal congressional elections. *Id.* The last of these "revolution" cases is Reynolds v. Sims, 377 U.S. 533, 536 (1964). Speaking for the Court, Chief Justice Warren affirmatively stated, "the fundamental principle of representative government in this country is one of equal representation for equal numbers of people, without regard to race, sex, economic status, or place of residence within a State." *Id.* at 560–61. For the first time, the Court rejected the traditional equal protection rationality yardstick and instead established an affirmative, fundamental constitutional right based on population. The Court stated in clear terms, "the Constitution of the United States protects the right of all qualified citizens to vote, . . . and to have their votes counted." *Id.* at 554. The Court found the right to vote and have that vote count "can be denied by a debasement or dilution of the weight of a citizens vote." *Id.* at 555. In creating this principle, the Court recognized that voting was at the core of self-government and diluting the vote was a direct harm to that fundamental principle. *See generally* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 135–53 (1980).

15. Fortson v. Dorsey, 379 U.S. 433, 434 (1965). *Fortson* was the first case where the Court stated an apportionment map may violate the Fourteenth Amendment if it "designedly or otherwise . . . would operate to minimize or cancel out the voting strength of racial or political elements of the voting population." *Id.* at 439.

16. *See* Davis v. Bandemer, 478 U.S. 109, 113 (1986).

17. *Id.* The plan was created by the Indiana Republican Party "in order to protect[ ] its incumbents and creat[e] every possible 'safe' Republican district possible." Bandemer v. Davis, 603 F. Supp. 1479, 1488 (S.D. Ind. 1984). The plan succeeded. In the first election under the new map, the Democrats won about fifty-two percent of the votes in the election but won only forty-three out of 100 seats. *Bandemer*, 478 U.S. at 115.

18. *See Bandemer*, 478 U.S. at 113.

In reversing the district court, the Supreme Court fractured badly and split into three camps.[19] The plurality—Justices White, Blackmun, Marshall, and Brennan—held political gerrymandering is justiciable under the Equal Protection Clause.[20] Writing for the plurality, Justice White required the plaintiffs must prove intentional discriminations against an identifiable political group as well as actual discrimination against that group to win a political gerrymandering claim.[21] The second camp—led by Justice O'Connor, Chief Justice Burger, and Justice Rehnquist—held political gerrymandering claims are nonjusticiable political questions.[22] According to Justice O'Connor, "partisan gerrymandering claims of major political parties raise a nonjusticiable political question that the judiciary should leave to the legislative branch."[23] The third camp—led by Justices Stevens and Powell—dissented and held political gerrymandering is both justiciable and unconstitutional in this very case.[24] The camps were so fractured that it is hard to tell what was decided. Seven Justices held the Indiana plan was constitutional, but a separate six Justices found political gerrymandering claims were justiciable under the Fourteenth Amendment.[25] In sum though, the standard set by the plurality was so high that no plaintiff ever prevailed.

Things only got worse in the realm of partisan gerrymandering after the *Bandemer* decision. In trying to clear up a controversial and confusing body of law, the Court fractured even further in *Vieth v. Jubelirer*.[26] *Vieth* involved redistricting in Pennsylvania after the 2000 Census—Pennsylvania Republicans adopted a map that harmed Democrats and significantly favored Republicans "as a punitive measure against Democrats for having enacted pro-Democrat redistricting plans elsewhere."[27]

19. *See id.* at 113, 144, 162.

20. *Id.* at 113.

21. *Id.* at 127. To fulfill the effect requirement, the plaintiff must show more than a lack of representations; they need to prove "the electoral system is arranged in a manner that will consistently degrade a voter's or a group of voters' influence on the political process as a whole." *Id.* at 132.

22. *Id.* at 144 (O'Connor, J., concurring).

23. *Id.*

24. *See id.* at 161 (Powell, J., dissenting).

25. *See id.* at 113, 144, 162.

26. *See* Vieth v. Jubelirer, 541 U.S. 267, 271, 306, 317, 342–43, 355–56 (2004).

27. *Id.* at 272. The result was as intended: Republicans won twelve of Pennsylvania's nineteen congressional seats in the 2002 election while only forty-one percent of the voters were registered Republicans. Guy-Uriel E. Charles, *Democracy and Distortion*, 92 CORNELL L. REV. 601, 621 (2007).

In affirming the district court's dismissal of the suit, the Supreme Court fractured worse than it did in *Bandemer*.[28] Once again, it split into three camps. The plurality—constituting Justices Scalia, O'Connor, Thomas, and Chief Justice Rehnquist—thought political gerrymandering claims are nonjusticiable political questions and precluded judicial review in any of the claims brought as an unconstitutional partisan gerrymander.[29] Justice Scalia, writing for the plurality, tried to overrule *Bandemer* on the basis that political gerrymandering has existed in American politics for a very long time, and Congress can intervene if it deems it necessary.[30] The second camp—Justices Souter, Stevens, Ginsburg, and Breyer—all thought these claims were justiciable, yet even they could not agree on what standard would apply.[31] Justice Stevens believed all vote dilution claims should be treated the same,[32] and Justices Souter and Ginsburg believed that five elements should be shown to satisfy a claim.[33] The third camp included Justice Kennedy, who, speaking for himself, wrote a remarkably confusing opinion wherein he argued political gerrymandering claims were not *per se* nonjusticiable, but he had not yet seen a claim that would make them justiciable.[34]

After very little intervening guidance, these cases bring us to the latest chapter in the Court's journey through the partisan thicket, which came just two years ago in *Rucho v. Common Cause*.[35] *Rucho* was the first instance where a majority of the Court found that partisan gerrymandering was a nonjusticiable political question, thereby en-

28. 478 U.S. at 267, 271, 281, 306, 317, 342–43, 355–56.

29. *Id.* at 281, 305–06.

30. *Id.* at 274–77.

31. *See id.* at 317, 342–43, 355–56 (Stevens, J., dissenting) (Souter, J., dissenting) (Breyer, J., dissenting).

32. *See id.* at 322–23 (Stevens, J., dissenting).

33. For the first element, membership in a cohesive political group; second, disregard for normal districting criteria by the state legislature; third, correlations between the group and distribution; fourth, a hypothetical district that better meets fair or traditional criteria; and fifth, intentional manipulation through common gerrymander techniques. *Id.* at 347–50 (Souter, J., dissenting).

34. *Id.* at 306–17 (Kennedy, J., concurring). Just a few years after *Vieth*, another sharply divided Court would again weigh in on partisan gerrymandering claims. Agreeing with four other justices, Justice Kennedy again held the plaintiffs did not meet the bar of a justiciable partisan gerrymandering claim. *See* League of United Latin Am. Citizens v. Perry, 548 U.S. 399, 414 (2006). However, Justice Kennedy agreed with a separate four justices that partisan gerrymandering could violate the Fourteenth Amendment, but he remained unsatisfied as to the case that presents a claim and a standard for him to get behind. *Id.* at 413–14, 418.

35. Rucho v. Common Cause, 139 S. Ct. 2484, 2491 (2019).

closing federal court jurisdiction under Article III over these cases.[36] *Rucho* involved two state legislature partisan gerrymanders—North Carolina and Maryland.[37]

To provide some background, after the 2010 elections Republicans in North Carolina had majorities in both the Senate and the House, giving the Party exclusive control over redistricting.[38] With control of the map-drawing, Republicans sought to "solidify conservative policymaking at the state level and maintain a Republican stronghold in the U.S. House of Representatives for the next decade."[39] After a lawsuit was brought challenging the plan, the legislature was ordered to redraw the map.[40] The three-judge District Court in the Middle District of North Carolina held the partisan-gerrymandered new map violated the Equal Protection Clause, the First Amendment, and Article I of the Constitution.[41]

The Maryland story is one of a similar tune. Also following the 2010 elections, Democrats controlled all branches of state government in Maryland giving them exclusive control over redistricting.[42] The Governor and Congressman Steny Hoyer directed the map drawers to draw a map that "maximized 'incumbent protection'" for Democrats and that changed the congressional delegation from 6 Democrats and 2 Republicans to 7 Democrats and 1 Republican."[43]

36. *Id.* at 2508.

37. *Id.* at 2491.

38. Common Cause v. Rucho, 318 F. Supp. 3d 777, 803 (M.D.N.C. 2018).

39. *Id.* at 803. The plan worked exactly as they had hoped. In the first round of elections under the map, "Republican candidates received a minority of the statewide vote (49%), but won a supermajority of the seats in the State's congressional delegation (9 of 13)." *Id.* at 804. In the next election, they won ten of the thirteen seats. *Id.*

40. Under the new map, in coordination with the plan of the Republican party:

> Republican candidates prevailed in 10 of the 13 (76.92%) congressional districts . . . [while receiving] 53.22 percent of the statewide vote. Republican candidates prevailed in each of the ten districts . . . intended and expected [of them to] prevail . . . and Democratic candidates prevailed in each of the three districts . . . intended and expected [of them].

Id. at 810 (citations omitted). In proceedings for the redrawing of the map, a Republican representative recommended the map to produce a "10 Republicans and 3 Democrats [advantage] because he did not believe it would be possible to draw a map with 11 Republicans and 2 Democrats." *Id.* at 808 (citations omitted).

41. *Id.* at 941.

42. Benisek v. Lamone, 348 F. Supp. 3d 493, 502 (D. Md. 2018). Under state law, the Governor takes the lead on redistricting. The Democratic Governor testified "that he wanted to use the redistricting process to change the overall composition of Maryland's congressional delegation to 7 Democrats and 1 Republican by flipping either the First District on the Eastern Shore of Maryland or the Sixth District in western Maryland." *Id.*

43. *Id.* at 502–03. The plan worked to a tee. In the "four elections under the map," "Democrats have won . . . 7 of 8 House seats" while never garnering "more than 65% of the

The three-judge District Court for the District of Maryland held the Maryland partisan-gerrymandered map violated the First Amendment.[44]

In reversing the lower court decisions, Chief Justice Roberts, speaking for a five-member majority, concluded these claims presented a nonjusticiable political question.[45] The Chief Justice provided three reasons why the claims are nonjusticiable. First, the Framers of the Constitution wanted Congress to resolve political-gerrymandering claims if it felt the need to step in, or in the alternative, the people could resolve such claims through the political process.[46] Second, while racial gerrymandering without sufficient justification may be illegal under the Fourteenth Amendment,[47] political gerrymandering is seemingly not illegal because the "one-person, one-vote" standard protects individual rights and not group rights.[48] Third, the Constitution does not require proportionality, so federal courts have no basis for adjudicating these claims with "judicially discoverable and manageable standards."[49] The majority concluded that while true excessive partisan gerrymandering places a burden on self-governance, courts cannot protect people from this occurrence—no matter if the legislature intervenes or not. In short, the Court held no basis exists in the Constitution to limit state legislatures from manipulating district lines for political gains.

II. The Lost Historical Context of the Elections Clause

This Part provides (a) the historical background behind the adoption of the Elections Clause, and (b) the Framers' understanding of the role of the judiciary to act as a check on abusive state governments.

statewide vote." Rucho v. Common Cause, 139 S. Ct. 2484, 2511 (2019) (Kagan, J., dissenting).

44. *Benisek*, 348 F. Supp. 3d at 523.

45. *Rucho*, 139 S. Ct. at 2506–07.

46. *Id.* at 2494–96.

47. *Id.*; *see also* Shaw v. Reno, 509 U.S. 630, 658 (1993).

48. *See Rucho*, 139 S. Ct. at 2497 (finding partisan gerrymandering claims far more difficult to adjudicate as unconstitutional because political gerrymandering is allowed).

49. *See id.* at 2494. In fact, the Chief Justice argued doing so would require courts to "apportion political power as a matter of fairness, [without] any basis for concluding that they were authorized to do so." *Id.* at 2499.

A. The Constitutional Convention and The Ratification Debates

It is hard to understand contemporary debates about the scope of the federal courts' ability to police partisan gerrymandering or the Constitution's potential prohibition of partisan gerrymandering outright without some historical context.[50] Such context reveals traditional conceptions of partisan gerrymandering and the Court's ability to do anything about such perspectives are far more encompassing than commonly assumed. The claims presented by Chief Justice Roberts in *Rucho* do not tell the whole story.[51] By clarifying the historical context surrounding the adoption of the Elections Clause, the history shows that blanket statements such as "it is impossible to tell when a state has gone too far" cannot justify acquiescence especially when based on the reasoning that "it has always been this way." The Elections Clause is meant to ensure representative government can be maintained, not undermined. "Always start with the text," my first-year civil procedure teacher told us, "then move to context."[52] This mantra is reiterated in the text of Article I of the Constitution:

> The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing [sic] Senators.[53]

The Elections Clause text gives state legislatures the ability to prescribe "[t]he Times, Places and Manner of holding Elections for Sena-

50. At the outset, I think it prudent to distinguish two similar yet distinct concepts—apportionment and redistricting. Apportionment refers to determining how many representatives each state is entitled to in the U.S. House of Representatives, which is subject to change after each census. *See* Gerard N. Magliocca, *Our Unconstitutional Reapportionment Process*, 86 GEO. WASH. L. REV. 774, 775 (2018). For a hypothetical example, if the state of Ruperta had an influx in citizens, it may receive ten congressional districts instead of the nine they were granted after the previous census. On the other hand, redistricting refers to redrawing the map of the geographic boundaries from which people can elect representatives to the U.S. House of Representatives, a state legislature, a county council, a school board, and more. *See* Lisa Marshall Manheim, *Redistricting Litigation and the Delegation of Democratic Design*, 93 B.U. L. REV. 563, 564 (2013). For example, redistricting is the act of the Ruperta State Legislature redrawing the boundaries of Ruperta's house, senate, and national congressional districts following the decennial U.S. Census.

51. *See* Rucho v. Common Cause, 139 S. Ct. 2484, 2494 (2019) ("Partisan gerrymandering is nothing new. Nor is frustration with it. The practice was known in the Colonies prior to Independence, and the Framers were familiar with it at the time of the drafting and ratification of the Constitution.").

52. Naomi Mezey, Georgetown University Law Center, 2018, Washington, D.C. Lecture; *see also* Harvard Law School, *The 2015 Scalia Lecture: A Dialogue with Justice Elena Kagan on the Reading of Statutes*, YOUTUBE, at 08:29 (Nov. 25, 2015), https://youtu.be/dpEtszFT0Tg [https://perma.cc/GC4W-SX8C] ("We're all textualists now").

53. U.S. CONST. art. I, § 4, cl. 1.

tors and Representatives."[54] However, the Framers never intended—nor does the text imply—this Clause to be construed as permitting only Congress to be the sole check on the overreaching states.[55] The Framers wanted a safeguard to protect against politicians and factions manipulating electoral rules for partisan gain—goals that would then prevent the House from being "in miniature, an exact portrait of the people at large."[56]

The British system functioned off of power and status, while the new government was designed for the people.[57] Like many constitutional provisions, this provision stemmed from a compromise. States never had any inherent right over the design of congressional districts for elections. The compromise had the effect of giving states significant power over how citizens could choose electors and engage in the political process, and also included the ability for the federal government to step in if needed.[58] The Framers wanted multiple layers of protection against abuse of authority in all levels of government.[59]

54. *Id.*

55. *See* Franita Tolson, *Election Law "Federalism" and the Limits of the Antidiscrimination Framework*, 59 WM. & MARY L. REV. 2211, 2250 (2018) (surveying the history of the Elections Clause).

56. John Adams, *Thoughts on Government*, in 4 PAPERS OF JOHN ADAMS, Papers 86–93 (1776). The Framers adamantly believed governments depended on protecting the system of representation from such entrenchment. As Edmund Randolph once alluded to, "[i]f a fair representation of the people be not secured, the injustice of the Govt, will shake to its foundations." 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 580 (Max Farrand ed., 1911). The Supreme Court has also alluded to this principle. *See* Tashjian v. Republican Party of Conn., 479 U.S. 208, 217 (1986) ("The power to regulate the time, place, and manner of elections does not justify, without more, the abridgment of fundamental rights."). There is arguably nothing more fundamental than the vote.

57. For a government to be built off the consent of the governed, it requires the government to be representative of the governed. *See* Keith E. Whittington, *The Place of Congress in the Constitutional Order*, 40 HARV. J.L. & PUB. POL'Y 573, 575 (2017); *see also* Alison L. LaCroix, *Rhetoric and Reality in Early American Legal History: A Reply to Gordon Wood*, 78 U. CHI. L. REV. 733 (2011).

58. The Framers deeply feared politicians entrenching themselves with power for the sake of the citizens just like had been done in Britain. *See* BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 167–75 (1967) (discussing the criticisms the Framers gave of the British concept of representation); *see also* William N. Eskridge, Jr., *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275, 280–83 (1988).

59. *See* ALLISON L. LACROIX, THE IDEOLOGICAL ORIGINS OF AMERICAN FEDERALISM 5 (2010). Hamilton exemplified this sentiment, declaring that "the people should choose whom they please to govern them." 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 257 (Jonathan Elliot 2d ed., 1836); *see also* Franita Tolson, *The Elections Clause and the Underenforcement of Federal Law*, 129 YALE L.J. F. 171, 180 (2019). James Madison was clear in this justification and argued:

> State Legislatures will sometimes fail or refuse to consult the common interest at the expense of their local conveniency [sic] or prejudices. . . . Whenever the State

The states were assured that the new government would not allow abuses of power, such as where factions could unjustly entrench power for themselves by manipulating the voting system.[60]

For example, delegate Melancthon Smith of New York was deeply concerned with the ability of state legislatures to abuse power by having representatives drawn "from a small part of the state," risking the possibility that "the bulk of the people [ ] might not be fully represented."[61] The same rang true in North Carolina, where Delegate John Steele argued that the states have no more authority than the ability to "determine how these electors shall elect—whether by ballot, or by vote, or by any other way."[62] In a similar vein, delegate Theophilius Parsons of Massachusetts argued that the Elections Clause was needed to check legislatures that could "mak[e] an unequal and partial division of the state into districts for the election of representatives."[63] Simply put, it was well-understood that the Elections Clause was the mechanism to provide the check on state authority. Furthermore, these very issues almost led to the ratification being thwarted because the people did not trust that the government would not abuse

---

> Legislatures had a favorite measure to carry, they would take care so to mould [sic] their regulations as to favor the candidates they wished to succeed.

2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 240–41 (Max Farrand ed., 1911). Madison argued this position because South Carolina's delegates to the convention wanted to strike out the Elections Clause because South Carolina's "tidewater ruling elite" malapportioned their legislature and wanted to retain the ability to do so. JACK RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 223 (1996). It was clear Madison was referring to the flawed system under British rule as well as the Articles of Confederation that enabled states to gerrymander their legislature for partisan gain. *Id.*

60. *See* ROSEMARIE ZAGARRI, THE POLITICS OF SIZE: REPRESENTATION IN THE UNITED STATES 1776-1850 102 (1987); *see also* ERIC NELSON, THE ROYALIST REVOLUTION: MONARCHY AND THE AMERICAN FOUNDING 71–75 (2014) (discussing how it was believed a legislative body should resemble the people it represents).

61. ZAGARRI, *supra* note 60, at 106–07 (citations omitted).

62. 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 71 (Jonathan Elliot 2d ed., 1836).

63. JOHN KAMINSKI ET AL., THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, VI 197, 1218; *see also* Timothy Pickering of Massachusetts also suggested that the Election Clause was a check on "[s]tate governments abus[ing] their power, and regulat[ing] these elections in such manner as would be highly inconvenient to the people, [and] injurious to the common interests of the States." JOHN KAMINSKI ET AL., *Letter from Timothy Pickering to Charles Tillinghast, Philadelphia, 24 December 1787, in* THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, XIV 197. In Connecticut, the point was made even more by "The Republican" where he wrote, "[t]he constitution expressly provides that the choice shall be by the people, which cuts off both from the general and state Legislatures the power of so regulating the mode of election, as to deprive the people of a fair choice." BERNARD BAILYN, THE DEBATE ON THE CONSTITUTION: FEDERALIST AND ANTIFEDERALIST SPEECHES, ARTICLES, AND LETTERS DURING THE STRUGGLE OVER RATIFICATION: PART ONE, SEPTEMBER 1787–FEBRUARY 1788 713 (1993).

its power for its own gain, at the expense of the people themselves as a polity.[64] As the Framers of the Fourteenth Amendment shunned any system that related to the governing body of the British, they instead went with a vision of representative democracy intended to reflect the broader electorate and become responsive to their demands.[65] This historical goal is potentially misplaced today, as unchecked partisan gerrymandering does not fit into this vision.[66]

B. The Role of the Judiciary as a Check on Abusive State Governments

During the colonial period, judges acted as just an extension of the executive branch, and the judiciary was a political subordinate to both the legislative and executive branch.[67] Due in large part to the Framers' lived experiences of abusive governments during British rule and under the Articles of Confederation, they designed a system where the judiciary would act as another check on abusive state governments.[68] As historian William Treanor notes:

> [T]he [F]ramers had abandoned the faith in legislative decision-making that informed the early state constitution. They were creating a system of governance that involved the primacy of a written

64. *See* ZAGARRI, *supra* note 60, at 107; *see also* MICHAEL KLARMAN, THE FRAMERS' COUP: THE MAKING OF THE UNITED STATES CONSTITUTION 340–42 (2016).

65. RAKOVE, *supra* note 59, at 204 (discussing the concept of the legislature as accountable to the people); BAILYN, *supra* note 58, at 167 (discussing how the colonists viewed the British system with disdain); *see also* JOHN LOCKE, SECOND TREATISE OF GOVERNMENT §§ 157–58 (1689) (discussing the British system). The Framers believed the vote was the protection that forced representatives to respond to their constituents. GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776–1787 182 (2d ed., 1998) ("[t]he process of voting was . . . the heart of [representation].").

66. James Madison alluded to partisan gerrymandering many times. Speaking in favor of the Elections Clause, Madison noted "[a] Republic may be converted into an aristocracy or oligarchy as well by limiting the number capable of being elected, as the number authorized to elect." Farrand, *supra* note 56, at 250; *see also* Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593, 623 (2002) ("Allowing partisan actors to control redistricting so as to diminish competition runs solidly counter to the core concern of democratic accountability.").

67. *See* William Michael Treanor, *The Genius of Hamilton and the Birth of the Modern Theory of the Judiciary*, *in* CAMBRIDGE COMPANION TO THE FEDERALIST 469–70 (Jack N. Rakove & Colleen A. Sheehan eds., 2020).

68. THE FEDERALIST NO. 78 (Alexander Hamilton). Hamilton is affirming the notion that federal courts "are to be considered as the bulwarks of a limited constitution against legislative encroachments." *Id. See also* Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L.J. 491, 198 (1997) (discussing how this clause also prohibits Congress from imposing added qualifications "for fear that congressmen would endeavor to entrench themselves in office"). Having lived through the terrors of British rule, they rejected any similar approach. THE FEDERALIST NO. 81 (Alexander Hamilton).

> constitution adopted by 'We the People' and a dramatically changed and expanded judicial role.[69]

As James Madison argues in Federalist 49, this approach ensures each branch is "perfectly co-ordinate by the terms of their common commission, neither of them, it is evident, can pretend to an exclusive or superior right of settling the boundaries between their respective powers."[70]

From this dynamic setup, judicial review emerged. The Constitution says very little about the judiciary or the role of judges, but such an omittance is largely due to the fact that the Framers found it implicit in this new form of government.[71] Many delegates to the ratifying conventions likewise expressed the need for judicial review of state and federal legislatures.[72] Oliver Ellsworth of Connecticut (the primary drafter of the Judiciary Act of 1789 and future Chief Justice of the United States) argued: "If the states go beyond their limits . . . independent judges will declare it [illegal]."[73] To this point, U.S. Senator William Plummer remarked, "[t]hat is the only body of men who will have an effective check upon a numerous Assembly."[74] The judici-

69. Treanor, *supra* note 67, at 470, 511–12; *see also* Girardeau A. Spann, *Pure Politics*, 88 MICH. L. REV. 1971, 1976 (1990). This was a significant departure not just from British rule, but even the experiences under the Articles of Confederation as many colonial legislatures exercised judicial functions. *See also* Matthew P. Harrington, *Judicial Review Before John Marshall*, 72 GEO. WASH. L. REV. 51, 53 (2003) ("Legislatures in almost every state began to pass laws that many considered unjust or extreme. Foremost among these were laws imposing 'revolutionary justice,' which were aimed at punishing former Tories by depriving them of property, often without the right to trial by jury.").

70. THE FEDERALIST NO. 49 (Alexander Hamilton); *see also* Randy E. Barnett & Evan D. Bernick, *The Letter and the Spirit: A Unified Theory of Originalism*, 107 GEO. L.J. 1, 21–22 (2018).

71. While discussions were not extensive, delegate James Wilson of Pennsylvania, a well-regarded man of the law, expressed an expansive view of the power of judges under the new constitutional framework. *See* William Michael Treanor, *Judicial Review Before Marbury*, 58 STAN. L. REV. 455, 470 (2005). Up until the adoption of the Constitution, Congress was almost entirely at the mercy of state courts—which became one of the biggest ailments of the Articles. *See* Victoria Nourse, *The Constitution Entire: An Essay on Legislated Rights*, 10 FAULKNER L. REV. 1, 4 (2018). Judges felt the same way. *See* William Michael Treanor, *Against Textualism*, 103 NW. U. L. REV. 983, 987 (2009) (discussing how the "overwhelming majority of judges in the early Republic who had occasion to confront the issue found judicial review implicit in the Constitution").

72. Saikrishna B. Prakash & John C. Yoo, *The Origins of Judicial Review*, 70 U. CHI. L. REV. 887, 928 (2003).

73. ELLIOT, *supra* note 59, at 198.

74. LYNN W. TURNER, WILLIAM PLUMMER OF NEW HAMPSHIRE, 1759-1850 34–35 (1962) (quoting a Letter from William Plummer to William Coleman, May 31, 1786, Letter Book, I, Lib. Cong.); *see also* Harlan F. Stone, *The Common Law in the United States*, 50 HARV. L. REV. 4, 25 (1936) (describing judicial review as "represent[ing] the sober second thought of the community, which is the firm base on which all law must ultimately rest").

ary's power was vital to the Framers in protecting the people from zealous politicians.[75] As Professor Treanor notes, "[t]he need for a federal judicial system (comprising at least a Supreme Court) and for judicial independence is largely assumed, as is the legitimacy of judicial review."[76] This sentiment is prevalent in Alexander Hamilton's (a Framer and author of many of the influential Federalist Papers) biggest defense of judicial review in Federalist 78. He states:

> It therefore belongs to [the judiciary] to ascertain its meaning as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought of course to be preferred.[77]

For Hamilton, federal courts would be "the bulwarks of a limited Constitution against legislative encroachments" and guard against abusive governments that distort the rights of the people.[78] Courts

75. Hamilton argues in Federalist 78 that federal courts are courts needed "to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits." THE FEDERALIST NO. 78 (Alexander Hamilton). The Framers accomplished this by, among other things, establishing a judicial branch and later crafting section twenty-five of the Judiciary Act of 1789. *See* The Judiciary Act of 1789, § 25, 1 Stat. 73 (The Act provided "a final judgement or decree in any suit, in the highest court of law or equity of a State in which a decision in the suit could be had where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the constitution, treaties or laws of the United States, and the decision is in favor of such their validity, or where is drawn in question the construction of any clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision is against the title, right, privilege or exemption specially set up or claimed by either party, under such clause of the said Constitution, treaty, statute or commission, may be re-examined and reversed or affirmed in the Supreme Court of the United States upon a writ of error.").

76. Treanor, *supra* note 67, at 480. This flowed naturally from what Professor Gordon Wood called the "fundamental changes taking place in the Americans' ideas of government and law" during this historic period. Gordon S. Wood, *The Origins of Judicial Review Revisited, or How the Marshall Court Made More out of Less*, 56 WASH. & LEE L. REV. 787, 793 (1999). He then proceeded to identify four fundamental alterations in Americans' thinking about the law: First, the new framework of separation of powers, where judges are equal with legislators and executives; second, the embracing of fundamental law in a written document; third, manifesting the Constitution so it worked just as ordinary law would work; and fourth, distinguishing law from politics. *See id.* at 792–808.

77. THE FEDERALIST NO. 78 (Alexander Hamilton); *see also* 1 Annals of Cong. 457, 457 (1789) (Gales & Seaton eds., 1834) (James Madison arguing the judiciary would "be naturally led to resist every encroachment upon rights expressly stipulated for in the constitution by the declaration of rights").

78. THE FEDERALIST NO. 78, at 5 (Alexander Hamilton); *see also* LACROIX, *supra* note 59, at 748 (arguing the point of Federalist 78 was not only to establish the legitimacy of the courts by linking them to the people but also to vest the judiciary with ultimate guardianship of the Constitution). Hamilton continued, claiming it was the "duty" for federal courts

during this time also agreed with this principle.[79] Thus, from the very beginning, the Framers had a broad vision of federal courts using their power to decide cases and act as a check on the other branches of government.[80]

III. The Making of Section Two of the Fourteenth Amendment

Beginning with the formation of the Thirty-Ninth Congress and continuing through the creation of the Fourteenth Amendment, this Part provides the historical background and context around the creation and adoption of Section Two of the Fourteenth Amendment.

A. The Background of the Thirty-Ninth Congress

The Apportionment Clause of Article One gives state legislatures the ability to elect members of Congress and the Electoral College based on the population of the state. The Constitution states:

> Representatives . . . shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.[81]

This section's primary concern is understanding how the Fourteenth Amendment—and specifically Section Two—operates as a constraint on state legislatures discriminating against citizens based on

"to declare all acts contrary to the manifest tenor of the constitution void" because "[w]ithout this, all the reservations of particular rights or privileges would amount to nothing." THE FEDERALIST NO. 78, at 3 (Alexander Hamilton).

79. As Professor Treanor found, "courts exercised the power of judicial review *to keep legislatures and Congress from overstepping their bounds*." Treanor, *supra* note 67, at 557; *see also* Alison L. LaCroix, *Federalists, Federalism, and Federal Jurisdiction*, 30 LAW & HIST. REV. 205, 207–12 (2012) (explaining how members of the Court believed federal courts were the institutions through which the people of the nation would encounter the authority of the general government); Suzanna Sherry, *The Founders' Unwritten Constitution*, 54 U. CHI. L. REV. 1127, 1127-28 (1987) (arguing judicial review was an accepted practice (albeit more elaborate), and judges would determine whether either natural law or the Constitution was violated).

80. LACROIX, *supra* note 59, at 749 ("Courts, therefore, would police the actions of the legislatures to ensure that fleeting majorities could not damage the perpetual Constitution. . . . The Constitution was understood to embody the people, but for Hamilton and his fellow Federalists, it was also a source of law and a roadmap for dividing governmental authority."). *But see* WILLIAM F. CONNELLY, JR., JAMES MADISON RULES AMERICA: THE CONSTITUTIONAL ORIGINS OF CONGRESSIONAL PARTISANSHIP 2–6 (2010) (defending excessive partisanship in public offices).

81. U.S. CONST. art. I, § 2, cl. 3.

partisan affiliation.[82] Doing so requires looking first at the era leading up to the Thirty-Ninth Congress (the drafters of Section Two), how its concepts originated, and the problem the Section Two drafters were trying to solve.

For context, the Apportionment Clause was rooted in compromise and granted states with slaves far more representatives per voters than those in the non-slave states.[83] Such an allocation resulted in a significant power disparity among the states. This compromise gave rise to what became known as the Slave Power.[84] The Slave Power was the silent (and sometimes explicit) backing in the Constitution that enabled nearly unfettered domination by the slave states of all three branches of the federal government up until the Civil War.

Those who wrote the Fourteenth Amendment knew all too well the long and problematic role of the Slave Power.[85] As Republican U.S. House member Thaddeus Stevens remarked:

---

82. At first blush, this may seem an extreme take that goes against the historical practice. However, the history tells a different story; it shows the wrong question was being asked. When the right one is asked, history provides a clear answer. *See supra* Part III; *see infra* Parts IV, V.

83. Paul Finkelman, *How the Proslavery Constitution Led to the Civil War*, 43 RUTGERS L.J. 405, 407 (2013).

84. *See* Rufus King in the Senate of the United States:

> Thus while 35,000 free persons are requisite to elect one representative in a state where slavery is prohibited, 25,559 free persons in Virginia may and do elect a representative—so that five free persons in Virginia have as much power in the choice of representatives to Congress, and in the appointment of presidential electors, as seven free persons in any of the states in which slavery does not exist. This inequality in the appointment of representatives was not misunderstood at the adoption of the constitution; but as no one anticipated the fact that the whole of the revenue of the United States would be derived from indirect taxes (which cannot be supposed to spread themselves over the several states according to the rule for the apportionment of direct taxes), but it was believed that a part of the contribution to the common treasury would be apportioned among the states by the rule for the apportionment of representatives — the states in which slavery is prohibited, ultimately, though with reluctance, acquiesced in the disproportionate number of representatives and electors that was secured to the slave-holding states. The concession was, at the time, believed to be a great one, and has proved to have been the greatest which was made to secure the adoption of the constitution.

3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 429–30 (Max Farrand ed., 1911).

85. Paul Finkelman, *Slavery and the Constitutional Convention: Making a Covenant with Death*, *in* BEYOND CONFEDERATION: ORIGINS OF THE CONSTITUTION AND AMERICAN NATIONAL IDENTITY 188, 198 (Richard Berman, Stephen Botein & Edward C. Carter eds., 1987). However, this concept has gone neglected in much scholarship in the area of the Fourteenth Amendment but plays a crucial role in understanding the realities faced by those in Washington in the winter of 1865. The Slave Power derived in part by the pro-slavery elements of the Constitution, such as the Three-fifths Clause, gave the states with slavery extra representation in Congress and the Electoral College by counting the slaves for representa-

> [The Civil War] sprang from the vicious principles incorporated into the institutions of our country. Our fathers had been compelled to postpone the principles of their great Declaration and wait for their full establishment till a more propitious time. That time ought to be present now. But the public mind has been educated in error for a century. How difficult in a day to unlearn it. In rebuilding, it is necessary to clear away the rotten and defective portions of the old foundations, and to sink deep and found the repaired edifice upon the firm foundation of eternal justice.[86]

Further, historian Leonard Richards also noted:

> [S]lavemasters had far more power than their numbers warranted. In the sixty-two years between Washington's election and the Compromise of 1850, for example, slaveholders controlled the presidency for fifty years, the Speaker's chair for forty-one years, and the chairmanship of House Ways and Means for forty-two years. The only men to be reelected president—Washington, Jefferson, Madison, Monroe, and Jackson—were all slaveholders. The men who sat in the Speaker's chair the longest—Henry Clay, Andrew Stevenson, and Nathaniel Macon—were slaveholders. Eighteen out of thirty-one Supreme Court justices were slaveholders.[87]

In re-framing the Constitution, the Thirty-Ninth Congress sought to incorporate protections for certain fundamental rights that States had violated for far too long. The Union's victory in the Civil War provided no cause for optimism that such efforts were unnecessary either, as Andrew Johnson (who became president after the assassina-

---

tion—despite such a system being different for state representation among the states. *Id.* Article IV of the Constitution provided that no free state could emancipate a runaway slave and, more importantly, that individuals in free states had to deliver the slave "on Claim of the Party to whom such Service or Labour may be due." U.S. CONST. art. IV, § 2, cl. 3. The Migration and Importation Clause prohibited the federal government from at the very least trying to end the international slave trade for at least twenty years. *See* U.S. CONST. art. I, § 9, cl. 1. The Domestic Insurrections Clause gave Congress the power to call the militia to suppress insurrections, which was aimed at slave rebellions. U.S. CONST. art. I, § 8, cl. 15. The Domestic Violence Clause guaranteed the federal government would protect the states from domestic violence, which sought to protect the slave states from slave rebellions. Paul Finkleman, *Affirmative Action for the Master Class: The Creation of the Proslavery Constitution*, 32 AKRON L. REV. 423, 429 (1999). Another clause stated prohibition on taxing exports or imports by the states disabled the states' ability to tax the products of slave labour indirectly. *Id.* The Electoral College provided for the indirect election of the president based on congressional representation, not population, which provided the slave states with a disproportionate ability to elect the president (the Three-Fifths Clause was also incorporated into its making). *See* Paul Finkleman, *Proslavery Origins of the Electoral College*, 23 CARDOZO L. REV. 1145, 1156 (2002).

86. CONG. GLOBE, 39th Cong., 1st Sess. 2459 (1866) (statement of Rep. Thaddeus Stevens).

87. LEONARD RICHARDS, THE SLAVE POWER: THE FREE NORTH AND SOUTHERN DOMINATION, 1780–1860 9–10 (2000). But for this power, Thomas Jefferson would have considerably lost the presidential election of 1800. *See generally* GARY WILLS, NEGRO PRESIDENT: JEFFERSON AND THE SLAVE POWER 75–76 (2005).

tion of Abraham Lincoln) had plans of his own to undermine the rights of the people. Although he invited the Rebel states to ratify the Thirteenth Amendment to regain admittance to the Union, Johnson failed to set any meaningful conditions on "the Rebel states' return."[88] In the first two proclamations he laid out for the Southern States, he required: the abolition of slavery, the nullification of secession, and the repudiation of all state debts incurred during the Confederacy.[89] However, under his authority, the rebel states then simply re-enacted their antebellum constitutions and worked around including any anti-slavery clauses.[90]

From the time members of the Thirty-Ninth Congress set foot in Washington in December 1865, they knew all too well the looming cloud of injustice that had plagued the nation for so long was about to take center stage.[91] This sense of concern aligned with the reality on the ground. Under Johnson's Reconstruction governments, the Southern States uniformly denied blacks and even some whites the protections of the Constitution—these laws all had similarities even though enforcement varied on how far south one went.[92] For instance, in the post-Civil War south, African Americans needed to

88. Orville Vernon Burton, *The Creation and Destruction of the Fourteenth Amendment During the Long Civil War*, 79 LA. L. REV. 189, 200 (2018).

89. *See* MICHAEL LES BENEDICT, A COMPROMISE OF PRINCIPLE: CONGRESSIONAL REPUBLICANS AND RECONSTRUCTION, 1863-1869 136 (1974); *see also* CONG. GLOBE, 39th Cong., 2nd Sess. 1334 (1867) (statement of Rep. Burton Cook). In his reconstruction proclamations, Johnson specified that voting rights in the states under his authority would be extended only to whites. *See* ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863–1877 183 (1988).

90. *See* BENEDICT, *supra* note 89, at 136.

91. As John Bingham noted:

> It has been the want of the republic, that there has not been an express grant of power in the Constitution to enable the whole people of every state . . . to enforce obedience to these requirements of the Constitution . . . [I]t is equally clear . . . that these great provisions of the Constitution . . . rested for its execution and enforcement.

CONG. GLOBE, 39th Cong., 1st Sess. 1033–34 (1866) (statement of Rep. John Bingham).

92. As historian Eric Foner notes: "Freedmen were assaulted and murdered for attempting to leave plantations, disputing contract settlements, not laboring in the manner desired by their employers, attempting to buy or rent land, and resisting whippings." FONER, *supra* note 89, at 121. In Alabama, if a black or white laborer was unable to find a job, he could be incarcerated in a "public work house." Paul Finkelman, *The Historical Context of the Fourteenth Amendment*, 13 TEMP. POL. & CIV. RTS. L. REV. 389, 402–03 (2004). In North Carolina, courts could take away any black child and apprentice him or her out to a white employer. Eric Foner, *The Original Intent of the Fourteenth Amendment: A Conversation with Eric Foner*, 6 NEV. L.J. 425, 441 (2006). In Mississippi, blacks needed to prove they had "lawful home or employment" while at the same time were prohibited from renting land except in towns and cities. Paul Finkelman, *John Bingham and the Background to the Fourteenth Amendment*, 36 AKRON L. REV. 671, 682–83 (2003).

maintain employment and were prohibited from carrying or owning firearms and knives, children could be seized from their parents if a court considered their parents unable to care for them, and vagrants could be auctioned off as contract laborers.[93]

B. Midnight in Washington

The Framers of the Fourteenth Amendment grasped what was at stake when, in December 1865, less than a year after the South's surrender at Appomattox and the assassination of President Lincoln, they came together to form the Thirty-Ninth Congress.[94] On December 6, 1865, the Thirteenth Amendment was ratified.[95] This new birth of freedom, however, gave rise to a situation that threatened all that had been won in the Civil War. While former slaves were not full persons under the law, they would be counted as much for apportionment purposes.[96] The ratification of the Thirteenth Amendment would potentially give the former slave states an almost forty percent increase in representation without giving political power to the source

93. *See* FONER, *supra* note 89; JOHN HOPE FRANKLIN, RECONSTRUCTION AFTER THE CIVIL WAR 48–50 (2012); *see also* MELVIN UROFSKY & PAUL FINKELMAN, A MARCH OF LIBERTY: A CONSTITUTIONAL HISTORY OF THE UNITED STATES, VOLUME 1: FROM THE FOUNDING TO 1900 490–504 (2011); THEODORE BRANTNER WILSON, THE BLACK CODES OF THE SOUTH 72 (1965); Joe M. Richardson, *Florida Black Codes*, 47 FLA. HIST. Q. 365, 373–75 (1969). The brutal treatment African Americans and poor whites experienced at the hands of state governments up to December 1865 prompted grievances several times. For example, John Bingham gave a speech opposing the admission of Oregon to the Union because the state Constitution excluded African Americans from entering its borders and denied them the ability to use the courts of the new state to vindicate their rights from within its borders: "In my judgement, sir, this constitution framed by the people of Oregon, is repugnant to the Federal Constitution, and violative of the rights of citizens of the United States." CONG. GLOBE, 35th Cong., 2nd Sess. 982 (1859) (statement of Rep. John Bingham); *see also* CONG. GLOBE, 34th Cong., 3d Sess. 140 (1857) (statement of Rep. John Bingham) ("[Y]ou may call the State which enslaves and sells its own children, and menaces the hand which feeds and clothes and shelters it, republican; but truth, and history, and God's eternal justice, will call it despotism, equally criminal and equally odious, whether sanctioned by one or many, by a single tyrant or by the million . . . because such a Government subversive of the great objects for which that Constitution was ordained, and violative of its spirit.").

94. *See* CONG. GLOBE, 39th Cong., 1st Sess. 1 (1866).

95. The 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. This amendment effectively removed the Three-Fifths Clause of the Constitution. *See* Finkelman, *supra* note 92, at 681.

96. This fact was important because in some states, the slave population outnumbered free people. These states were granted extra seats in Congress that they were not even granted in their own State Legislatures. *See* Finkelman, *supra* note 85, at 188, 198.

of that forty percent.[97] As the war was "over" and with Reconstruction now in the hands of President Johnson, the former rebel Confederate States wanted to return to Congress.[98] It was well understood the Slave Power would only grow stronger had these states been admitted back into Congress.[99]

For many in Congress, this outcome was untenable.[100] Acting fast, Congress refused to seat members from the Southern States.[101] Representative Thaddeus Stevens of Pennsylvania introduced a resolution proposing the creation of a committee of fifteen (also known as the Joint Committee on Reconstruction), representing both the House and the Senate, to oversee all of the Reconstruction efforts.[102] The goal of this committee was to "inquire into the condition of the states which formed the so-called Confederate States of America, and report whether they or any of them, are entitled to be represented in either House of Congress."[103]

97. *See* George David Zuckerman, *A Consideration of the History and Present Status of Section 2 of the Fourteenth Amendment*, 30 FORDHAM L. REV. 93, 95 (1961). The South could potentially become more powerful without giving any power to its massive number of freedmen.

98. Garrett Epps, *The Antebellum Political Background of the Fourteenth Amendment*, 67 L. & CONTEMP. PROBS. 175, 203 (2004). Under new governments authorized by President Johnson, the former rebel states sent almost fifty-five elected Representatives and twenty Senators (chosen by only white male voters) to Washington for the opening of the 39th Congress. Members consisted of both former confederates—including the vice president of the Confederacy Alexander Stephens of Georgia—as well as southern unionists. *Id.*

99. GARRETT EPPS, DEMOCRACY REBORN: THE FOURTEENTH AMENDMENT AND THE FIGHT FOR EQUAL RIGHTS IN POST-CIVIL WAR AMERICA 197 (Henry Holt & Co., 2006); Garrett Epps, *Second Founding: The Story of the Fourteenth Amendment*, 85 OR. L. REV. 895, 904 (2006); *see also* BENEDICT, *supra* note 89, at 136; CONG. GLOBE, 39th Cong., 1st Sess. 357 (January 22, 1866) (statement of Rep. Roscoe Conkling) ("Shall one hundred and twenty-seven thousand white people in New York cast but one vote in this House, and have but one voice here, while the same number of white people in Mississippi have three votes and three voices. Shall the death of slavery add two fifths to the entire power which slavery had when slavery was living? Shall one white man have as much share in the Government as three other white men merely because he lives where blacks outnumber whites two to one? Shall this inequality exist, and exist only in favor of those who without cause drenched the land with blood and covered it with mourning? Shall such be the reward of those who did the foulest and guiltiest act which crimsons the annals of recorded time? No, sir; not if I can help it.").

100. *See* EPPS, *supra* note 99, at 900–01.

101. *See* GREGORY P. DOWNS, AFTER APPOMATTOX: MILITARY OCCUPATION AND THE ENDS OF WAR 118 (Harvard Univ. Press 2015).

102. *See* BENJAMIN B. KENDRICK, JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION 141 (1914).

103. *Id.* at 145. The Joint Committee consisted of six Senators and nine Congressmen representing both Democrats and Republicans. At this time, Democrats were made up of pro-confederates and anti-war Democrats known as copperheads including some Northerners like Fernando Wood. *See* Michael Les Benedict, *Constitutional Politics, Constitu-*

With the stage set for Reconstruction, Congress wasted no time in turning their attention to a looming problem—undeserved power by abusive state governments. Just two days after Congress came to order in December 1865, Representative Thaddeus Stevens suggested a Constitutional Amendment to act as the resolution to this problem.[104] His proposed Amendment read:

> Representatives shall be apportioned among the States which may be within the Union according to their respective legal voters: and for this purpose none shall be named as legal voters who are not either natural-born citizens or naturalized foreigners.[105]

Stevens' proposal quickly came under considerable scrutiny. Republican members who would suffer consequences based on Stevens' proposal made clear that states abridged citizens' political rights in more ways than at the ballot box.[106] For instance, many Northern States had a large population of women and uneducated individuals, who were unable to vote at the time.[107] The proposal needed to be reworked as it would create many indirect negative effects, and there was a shared belief by enough members in Congress that Congress did not have the power to directly grant the elective franchise.[108]

On January 22, 1866, Thaddeus Stevens introduced the first bill adopted by the Joint Committee to the full House, which read:

> Representatives shall be apportioned among the several States which may be included within this Union according to their respective numbers, counting the whole number of persons in each

tional Law, and the Thirteenth Amendment, 71 MD. L. REV. 163, 179 (2011). "The political figures most responsible for the Reconstruction Amendments were legislators known as radical Republicans." *See* Richard M. Re & Christopher M. Re, *Voting and Vice: Criminal Disenfranchisement and the Reconstruction Amendments*, 121 YALE L.J. 1584, 1590 (2012).

104. CONG. GLOBE, 39th Cong., 1st Sess. 10 (1865) (statement of Rep. Thaddeus Stevens).

105. *Id.*

106. CONG. GLOBE, 39th Cong., 1st Sess. 141, 357 (1866) (statement of Rep. James Blaine).

107. Zuckerman, *supra* note 97, at 95; *see also* Eugene Sidney Bayer, *The Apportionment Section of the Fourteenth Amendment: A Neglected for Defense of the Voting Rights of Southern Negroes*, 16 CASE W. RSRV. L. REV. 965, 970 (1965).

108. CONG. GLOBE, 39th Cong., 1st Sess. 2766 (1866) (statement of Sen. Jacob Howard) (discussing how the privilege of voting should be shared with all men regardless of race and how states that exclude black men from the privilege of voting would still be entitled to "include the whole of that population in the basis of their representation and thus [ ] obtain an advantage which that did not possess before the rebellion and emancipation"); *see also* Mark R. Killenbeck & Steve Sheppard, *Another Such Victory? Term Limits, Section 2 of the Fourteenth Amendment, and the Right to Representation*, 45 HASTINGS L.J. 1121, 1178 (1994). In fact, the Committee received two proposals that would have granted Congress the ability to control "the elective franchise," yet neither proposal even made it to a floor vote. KENDRICK, *supra* note 102, at 54–55.

> State, excluding Indians not taxed: *Provided*, That whenever the elective franchise shall be denied or abridged in any State on account of race or color, all persons therein of such race or color shall be excluded from the basis of representation.[109]

The change in this bill would reduce the representation of all members of a class whenever any individual member was disenfranchised. While the House passed the proposal convincingly, the bill drew attacks from all sides in the Senate.[110] Democrats viewed the proposal as an attack on the South and opposed all efforts to reduce the power of states to control the political process.[111] Republicans, both radical and conservative, took serious issue with the proposal, viewing it as a "Compromise of Human Rights," means "unworthy of our country," and simply a grant to permit discrimination.[112] After a few attempts at amending the proposal and significant debate surrounding the issues referenced above, the Senate voted down the bill and returned it to the Committee.[113]

These debates bear close attention. While there was the expectation in Congress that states controlled their own elections and election processes (i.e. free from federal tinkering), many members suggested these proposals did not address the various forms of ex-

109. CONG. GLOBE, 39th Cong., 1st Sess. 351 (1866). Speaking on the necessity of the bill but explaining why it had to be framed in the way it is framed due to the lack of Congress's ability to directly grant suffrage rights, Representative Bingham explained how the only way it can work is as a penalty:

> It says in terms that if any of the States of the United States shall disobey the Constitution; that if they shall make distinctions in violation of the second section of the first article of the Constitution [section 2], that as a penalty such State shall lose political power in this House.

CONG. GLOBE, 39th Cong., 1st Sess. 432 (1866) (statement of Rep. John Bingham); *see also* CONG. GLOBE, 39th Cong., 1st Sess. 2766 (1866) (statement of Sen. Jacob Howard) ("It is very true, and I am sorry to be obliged to acknowledge it, that this section of the amendment does not recognize the authority of the United States over the question of suffrage. . . . The second section leaves the right to regulate the elective franchise still with the States, and does not meddle with that right."). Professor Tolson has argued the Apportionment Clause was the "Reconstruction Congress's attempt to constitutionalize a mechanism that would allow Congress to all but legislate universal suffrage since there was very little support for a constitutional amendment that would actually require it." Franita Tolson, *What Is Abridgment?: A Critique of Two Section Twos*, 67 ALA. L. REV. 433, 458 (2015).

110. CONG. GLOBE, 39th Cong., 1st Sess. 351 (1866).

111. CONG. GLOBE, 39th Cong., 1st Sess. 766 (1866) (statement of Sen. Reverdy Johnson).

112. *See* CONG. GLOBE, 39th Cong., 1st Sess. 383 (1866) (statement of Rep. John Farnsworth); CONG. GLOBE, 39th Cong., 1st Sess. 673 (1866) (statement of Sen. Charles Sumner). One member viewed it as the authoritative sanction for states to "disfranchise entirely" qualified citizens. CONG. GLOBE, 39th Cong., 1st Sess. 1256 (1866) (statement of Sen. Richard Yates).

113. CONG. GLOBE, 39th Cong., 1st Sess. 1289 (1866).

isting discrimination.[114] Encompassing a broad spirit, the Committee tried to navigate the many complexities of the situation by coming up with a way to propose a bill that: (1) did not deprive the Northern States of its representation based on women or immigrants; (2) could extend beyond mere qualifications based on race or color; and (3) could motivate, rather than force, the state to extend the franchise.[115] Faced with competing concerns, Stevens and the rest of the Committee came up with a middle ground between directly granting suffrage rights and allowing states to discriminate against its citizens and gain from it.[116] The bill read, in part:

> Representatives shall be apportioned among the several States which may be included within this Union, according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But whenever, in any State, the elective franchise shall be denied to any portion of its male citizens not less than twenty-one years of age, or in any way abridged except for participation in rebellion or other crime, the basis of representation in such State shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens not less than twenty-one years of age.[117]

A few new features appeared in this proposal. First, it included the word "male" for the first time.[118] Another new feature was that the

114. KENDRICK, *supra* note 102, at 83, 90, 91, 101, 106; *see also* CONG. GLOBE, 39th Cong., 1st Sess. 386 (statement of Rep. Thomas Jenckes) (stating "[t]his merely enjoins the Legislature and conventions of the States from discriminating on account of race or color, and leaves open every other qualification, or anything which may be declared a qualification for the exercise of the right of suffrage on the part of the States."). The assumption animating these statements was that state governments would find another way to discriminate and disenfranchise the people with no punishment for their actions. For example, women were not granted suffrage rights in any northern state; some states had extremely high property tax requirements for their suffrage rights; and other states did not grant minorities the ballot. *See, e.g.*, Cong. Globe, 39th Cong., 1st Sess. 141 (1866) (statement of Rep. James Blaine).

115. Radical Republicans justified granting suffrage rights directly because the ballot was the most important tool to help citizens protect themselves. *See* CONG. GLOBE, 39th Cong., 1st Sess. 38, 107 (1866) (statement of Sen. Charles Sumner). Moderate and conservative Republicans favored a measure that would motivate states to grant suffrage rights and punish them if they abridged suffrage rights for nefarious reasons such as securing more power. CONG. GLOBE, 39th Cong., 1st Sess. 403–04 (1866) (statement of Rep. William Lawrence). Democrats wanted nothing to do with anything that would change the power dynamics of the federal government, many believing nothing needed to be fixed in the first place. Travis Crum, *Reconstructing Racially Polarized Voting*, 70 DUKE L.J. 261, 301 (2020).

116. *See* CONG. GLOBE, 39th Cong., 1st Sess. 2286 (1866).

117. *Id.*

118. *Id.* This was intentional. As all states at this point prohibited women from voting, anyone who would continue to deny women the right to vote would lose representatives or, in the alternative, have the incentive of granting some women the right to vote but not all

section would be invoked whenever a state denied or abridged *in any way* the elective franchise for reasons other than for participating in rebellion or committing other crimes.[119] This framing strongly suggests the Framers of the Fourteenth Amendment recognized an important problem of abridging the right to vote for reasons other than race and tried to implement a safeguard against such a practice.[120] After extensive debate over the many ways the elective franchise could be abridged by states other than by race, the Framers reworded the clause to state "any abridgment." Such a change is important, for dictionaries defined the term "abridge" rather expansively: "[T]o diminish; to deprive of; to reduce; to curtail; to sever or leave out some of the substance."[121] Thus, it cannot be denied abridgment in any way means abridgment *in any way*—extending the prohibition far beyond mere race.[122]

The House debated and passed the proposal with no alterations.[123] Until then, the Joint Committee had endured multiple failures in the Senate over various factions of the party's grievances.[124] This draft of the bill sought to be a compromise while addressing as many concerns as possible. After novel debate in the Senate—and

(African American women would be denied the right to vote on account of race or color). *See* CONG. GLOBE, 39th Cong., 1st Sess. 379 (1866) (statement of Rep. James Brooks). Professor Akhil Amar has found the Committee felt there was no viable alternative to this choice. AKHIL AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 393–94 (2005).

119. CONG. GLOBE, 39th Cong., 1st Sess. 2286 (1866).

120. For example, the Committee's first proposal limited this clause to "on account of race or color." CONG. GLOBE, 39th Cong., 1st Sess. 535 (1866).

121. HENRY CAMPBELL BLACK, DICTIONARY OF LAW CONTAINING DEFINITIONS OF THE TERMS AND PHRASES OF AMERICAN AND ENGLISH JURISPRUDENCE, ANCIENT AND MODERN (1st ed. 1891); ALEXANDER M. BURRILL, A LAW DICTIONARY AND GLOSSARY: CONTAINING FULL DEFINITIONS OF THE PRINCIPAL TERMS OF THE COMMON AND CIVIL LAW 13 (Baker, Voorhis & Co. 1871); ARTHUR ENGLISH, DICTIONARY OF WORDS AND PHRASES USED IN ANCIENT AND MODERN LAW 5 (Wash. L. Book Co. 1899); SAMUEL JOHNSON, DICTIONARY OF THE ENGLISH LANGUAGE: IN WHICH THE WORDS ARE DEDUCED FROM THEIR ORIGINALS, AND ILLUSTRATED IN THEIR DIFFERENT SIGNIFICATIONS BY EXAMPLES FROM THE BEST WRITERS 6 (Henry G. Bohn 1850); J. KENDRICK KINNEY, LAW DICTIONARY AND GLOSSARY: PRIMARILY FOR THE USE OF STUDENTS BUT ADAPTED ALSO TO THE USE OF THE PROFESSION AT LARGE 6 (Littleton et al., 1987) (1893); CHARLES RICHARDSON, NEW DICTIONARY OF THE ENGLISH LANGUAGE 7 (Butler, 1846); THOMAS SHERIDAN, A COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (6th ed. 1796); JOHN WALKER, CRITICAL PRONOUNCING DICTIONARY, AND EXPOSITOR OF THE ENGLISH LANGUAGE (1st ed. 1803); NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE: INTENDED TO EXHIBIT (1828).

122. Thaddeus Stevens said as much himself. When introducing the revised bill, he said in unmistakable terms "[i]f any State shall . . . abridge that right [of the elective franchise], she shall forfeit her right to representation in the same proportion." CONG. GLOBE, 39th Cong., 1st Sess. 2459 (1866) (statement of Rep. Thaddeus Stevens).

123. CONG. GLOBE, 39th Cong., 1st Sess. 2545 (1866).

124. *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 1289 (1866).

some accompanying attempts to change the proposal—the Senate amended the word "citizens" to "inhabitants" and clarified to which elections the Amendment would pertain.[125] After the agreement, the section was added to the rest of the Amendment, voted on June 13, 1866, and sent to the states to be ratified.[126]

Congress dedicated more time and effort to Section Two than any other constitutional section,[127] and this addition brought many new features to the voting framework. First, it created a presumption—if a citizen is at least twenty-one and male, he is presumptively a voter.[128] Second, the debates strongly suggest this section sought to prevent any abridgment of the elective franchise, regardless of the abridgement's basis.[129] Third, this limitation is subject only to the qualification that those who have participated in a "rebellion, or other crime" are exempted. Thus, Section Two has substantial implications for voting and representation that should make it more difficult for misconduct and discrimination to occur.[130]

IV. The Enforcement Acts: Adding Fuel to the Fire

This Part provides the historical background and context surrounding the creation and adoption of The Enforcement Act of 1871, an Act created to enforce the rights of citizens of the United States to freely engage in the political process.

125. *See* CONG. GLOBE, 39th Cong., 1st Sess. 2897, 3041 (1866); Tolson, *supra* note 109, at 458 (discussing how the change allowed Congress to intervene in both state and federal elections).

126. Zuckerman, *supra* note 97, at 107.

127. While it achieved its ultimate aim indirectly, as evidenced by the legislative history, the ballot was key to the Framers of the Amendment. For more detailed discussions on Section Two, *see* Michael Kent Curtis, *The Fourteenth Amendment: Recalling What the Court Forgot*, 56 DRAKE L. REV. 911, 955–61 (2008); Mark A. Graber, *Foreword: Plus or Minus One: The Thirteenth and Fourteenth Amendments*, 71 MD. L. REV. 12 (2011); Gregory E. Maggs, *A Critical Guide to Using the Legislative History of the Fourteenth Amendment to Determine the Amendment's Original Meaning*, 49 CONN. L. REV. 1069, 1087–90 (2017); Earl M. Maltz, *The Forgotten Provision of the Fourteenth Amendment: Section 2 and the Evolution of American Democracy*, 76 LA. L. REV. 149, 150 (2015).

128. CONG. GLOBE, 39th Cong., 1st Sess. 2286 (1866).

129. *See* Tolson, *supra* note 109, at 458; *see also id.* at 434 ("denying or abridging the right to vote in almost any election—state or federal—on almost any grounds, with the exception of the commission of a crime."). *But see* Franita Tolson, *Partisan Gerrymandering as a Safeguard of Federalism*, 2010 UTAH L. REV. 859, 878 (2010) (arguing nothing in the text of the Constitution suggests partisan gerrymandering is *per se* illegal).

130. AKIL REED AMAR, AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY 188 (2012) (arguing Section Two "provides the missing foundation for the general 'right to vote' championed by the Warren" Court).

A. The Problem

After Congress sent the Fourteenth Amendment out to the states for ratification, the United States entered into perhaps one of the most violent periods in our nation's history.[131] The first signs of trouble started to appear when President Johnson took aim at the Amendment during the summer and fall of 1866—in what would be called "the swing around the circle," where he went on a speaking tour decrying the Amendment as well as encouraging states not to ratify the piece of legislation.[132] Evidence shows Johnson and his lenient stance had significant consequences in states' hostility to the Amendment.[133]

However, Johnson failed. With Republicans winning overwhelmingly in the elections of 1866 and increasing their strength in Congress, the Republican Party now had veto-proof numbers. Rather than wait for the states to get in line, Congress chose to take more affirma-

131. The Enforcement Acts of 1870–1871 are probably the most important civil rights bills ever enacted by Congress that no one has ever heard of. As originally passed, the Enforcement Acts sought to finish an era of violence, fraud, abuse, and inaction that frustrated African Americans and poor whites from exercising their elective franchise. The Act's legislative history record is substantive. Victoria F. Nourse, *Elementary Statutory Interpretation: Rethinking Legislative Intent and History*, 55 B.C. L. Rev. 1613, 1644–50 (2014) (arguing for the importance of legislative history for a more disciplined understanding of the statute). The problems faced by many in the country during these times are well documented. For these reasons, the Enforcement Acts seems to go against the traditional notion Congress did not want courts to resolve these issues. Courts routinely invoke legislative history to explain why certain claims fall outside a statute's scope. Treanor, *supra* note 67, at 983 (exploring how courts looked to non-textual factors at the founding when deciding cases). The legislative history paints a portrait not often told—partisan gerrymandering can be in federal court under these Acts. As William Eskridge persuasively argues, at the Founding, judges were thought to be able to interpret statutes in a broad way if justice demanded. William N. Eskridge, Jr., *All About Words: Early Understandings of the "Judicial Power" in Statutory Interpretation*, 1776–1806, 101 Colum. L. Rev. 990, 996 (2001). Professor Tolson believes Section Two of the Fourteenth Amendment validates any statutory scheme that prevents abridgment of the right to vote. Tolson, *supra* note 108, at 433. I believe this measure is not limited to statutory schemes, and in fact applies more to the judiciary than it does to Congress.

132. Donna L. Dickerson & David A. Copeland, The Reconstruction Era: Primary Documents on Events from 1865 to 1877 124 (2003); Downs, *supra* note 100, at 163.

133. It must be remembered, President Johnson until now had exclusive control over Reconstruction in the South. During the 1865 and 1866 elections, under Johnson's authority, the rebel states were governed by their antebellum constitutions less slavery. *See* Benedict, *supra* note 89, at 136; *see also* Cong. Globe, 39th Cong., 2nd Sess. 1334 (1867) (statement of Rep. Burton Cook). As one southern legislature put it, Congress can do all they want, but what they do will have to "be imposed & not voluntarily accepted." Downs, *supra* note 101, at 164. As it became abundantly clear that Southern States would remain hostile to ratifying the Fourteenth Amendment, Congress came up with a plan of their own.

tive steps during this period; the result of such action was the adoption of a series of Reconstruction Acts.[134]

The early days after Congress enacted the first few Reconstruction Acts was a period of optimism. Scores of African Americans gained the right to vote.[135] African American turnout in these elections was staggering—ranging from seventy to ninety percent.[136] African Americans outnumbered white voters in some Southern States.[137] African Americans helped enact new state constitutions that overturned the Black Codes.[138] Their votes also secured the southern ratification of the Fourteenth Amendment by July 1868.[139] Despite the optimism though, the fight for voting rights had just begun. For their part, southern governments did not take this change without a fight.[140] Such was the backdrop for the first extensive debate about what Congress could do to protect the political process rights of citizens' following the ratification of the Fourteenth Amendment.

B. The Solution: The Enforcement Act of 1871

Just a few years after the ratification of the Fourteenth Amendment, a bill was passed to enforce its commands—the Enforcement Act of 1871.[141] During the ensuing years prior to this Enforcement Act, the legitimacy of Reconstruction and the aims of the Reconstruc-

134. The first Act called for the ten remaining rebellion states to be divided into military districts under the control of a military commander, declared all existing governments provisional and subject to military oversight, allowed all males not disqualified under the Fourteenth Amendment to vote, and required the states to ratify the Fourteenth Amendment; once all of these conditions were met, the states would then be re-admitted to the Constitution. XI WANG, THE TRIAL OF DEMOCRACY: BLACK SUFFRAGE AND NORTHERN REPUBLICANS, 1860–1910 36–37 (1997). The First Reconstruction Act left the Southern States as to who would enforce the legislation. The Second Act answered this problem by declaring Congress was the proper authority to enforce it. It also required that every voter promise to support to the Constitution.

135. WANG, *supra* note 134, at 37.

136. DICKERSON & COPELAND, *supra* note 132, at 153.

137. Burton, *supra* note 88, at 213; Crum, *supra* note 115, at 303.

138. Many African Americans were sent to elected offices including Congress as well as the Governor's mansion. William Alan Blair, *The Use of Military Force to Protect the Gains of Reconstruction*, 51 CIV. WAR HIST. 388, 395 (2005).

139. WANG, *supra* note 134, at 40.

140. Political rights were being abridged all across the country in a variety of ways. CONG. GLOBE, 41st Cong., 2nd Sess. 3503 (1870) (statement of Rep. John Bingham) ("a right which is denied in my own State and in others, [is] in direct contravention of the express letter of the Constitution.").

141. WANG, *supra* note 134, at 57. Up to this point, Congress passed three Enforcement Acts, with not much success. At the time the Enforcement Act of 1871 was being debated, all knew what was at stake. *See id.*

tion Amendments were called into serious question. Violence and fraud occurred with impunity towards blacks in the South, and states refused to enforce measures of the prior Enforcement Acts.[142] Such refusal almost led to Reconstruction being halted, and subsequent horrors highlighted the wave of southern Democrats extremely hostile to Reconstruction.[143] Despite laws on the books calling for the protection of political and civil rights, states did little to curb the ongoing violence—as historians John Hope Franklin and Alfredo A. Moss describe it, "[i]t had looked as though the Civil War would break out anew as Democrats resorted to every possible device to overthrow the Radicals."[144]

In response to the continuous violent wave disrupting the country's political process, President Grant sent a message to Congress pleading for further legislation to enshrine the principles outlined in the Reconstruction Amendments: the protection of citizens' rights.[145] The message read:

> A condition of affairs now exists in some States of the Union rendering life and property insecure and the carrying of the mails and the collection of the revenue dangerous. The proof that such a condition of affairs exists in some localities is now before the Senate. That the power to correct these evils is beyond the control of State authorities I do not doubt; that the power of the Executive of the United States, acting within the limits of existing laws, is sufficient for present emergencies is not clear. Therefore, I urgently recommend such legislation as in the judgment of Congress shall effectively secure life, liberty, and property, and the enforcement of the law in all parts of the United States. It may be expedient to provide that such law as shall be passed in pursuance of this recommendation shall expire at the end of the next session of Congress. There is no other subject upon which I would recommend legislation during the present session.[146]

Republicans in Congress believed these actions were an attempt to destroy the party. There was widespread agreement that something needed to be done immediately. Acting fast, Representative Sam Shellabarger, a moderate Republican from Ohio, introduced a bill to en-

142. *See* DICKERSON & COPELAND, *supra* note 132, at 253.

143. *Id.*

144. JOHN HOPE FRANKLIN & ALFRED A. MOSS, FROM SLAVERY TO FREEDOM: A HISTORY OF AFRICAN AMERICANS 293 (1994); *see also* Robin West, *Toward an Abolitionist Interpretation of the Fourteenth Amendment*, 94 W. VA. L. REV. 111, 139 (1991) (noting that "[k]lan lynchings and private violence [were] undeterred and [went] unpunished by the state").

145. *See* CONG. GLOBE, 42nd Cong., 1st Sess. 244 (1871).

146. *Id.*

force the Fourteenth Amendment in the House on March 28, 1871.[147] The aim was to create a more elaborate supplement to the first Enforcement Act of 1870. The first section provided a criminal penalty for racially-motivated deprivation of rights, privileges, or immunities.[148] The second section addressed private conduct aimed at protecting individuals' civil rights from illegality.[149] The third section prohibited conspiracies obstructing the laws of the United States and the states.[150] The fourth section allowed the President to suspend habeas corpus.[151] And the fifth section kept the previous Enforcement Acts as good law.[152] A new aspect of this bill was that it also aimed to punish anyone for depriving citizens of any of the "right, privilege, or immunity" protected by law.[153]

When introducing the bill, Representative Shellabarger stated:

> [T]he object of the [bill] is . . . to [prevent] deprivations which shall attack the equality of rights of American citizens. . . . [A]ny violation of the right, the animus, and effect of which is to strike down the citizen, to the end that he may not enjoy equality of rights as contrasted with his and other citizens . . . shall be within the scope of the remedies of this [bill].[154]

Shellabarger then expressed the reality that because of the failures in Congress to act with more urgency, "flagrant violation of the Constitution of the United States in some of its most delicate and important features" already existed in practice, and so this would be a bill of extreme importance to all in the country.[155]

Supporting the broad authority, Representative Jeremiah Wilson, a conservative Republican from Indiana, argued:

> There are fundamental rights and privileges, and no State has any right by its laws to deny them. . . . No one has any right to prevent the exercise of any of these constitutional rights and privileges. . . . A refusal to legislate equally for the protection of all would unquestionably be a denial [of the equal protection of laws as guaranteed by the Fourteenth Amendment]."[156]

147. CONG. GLOBE, 42nd Cong., 1st Sess. 317 (1871) (statement of Rep. Samuel Shellabarger).

148. *See id.* at 477.

149. *See id.*

150. *See id.*

151. *See id.*

152. *See id.* at 478.

153. *Id.* at 477. To note, previous versions of the bill did not contain such a broad protection.

154. *Id.* at 478.

155. CONG. GLOBE, 42nd Cong., 1st Sess. 485 (1871) (statement of Rep. Burton Cook).

156. CONG. GLOBE, 42nd Cong., 1st Sess. 481–82 (1871) (statement of Rep. Jeremiah Wilson).

Representative Burton Cook, a conservative Republican from Illinois, viewed the bill as "within the power of Congress" and Congress's duty is "to protect and enforce every right secured to American citizens by the Constitution."[157] He said the sole question that needs to be asked is:

> What rights are thus secured by the Constitution. . . . [W]herever the Constitution of the United States secures a right to a citizen, Congress may enforce and protect that right. . . . Any act that deprives a citizen of a constitutional right, that obstructs the operation of the Constitution of the United States so far as it affects his right, is within the constitutional power of Congress to remedy.[158]

To Cook, the Fourteenth Amendment applied to the executive, the legislative, and the judicial branches.[159]

Representative James Monroe, a moderate Republican from Ohio, furthered these sentiments, viewing this power of protection as a natural growth of the Constitution that must be viewed as "a means, and not an end."[160] Doubting that this bill was an intrusion in states' rights, he observed:

> Congress may legislate to protect rights that are unconstitutionally denied by a State[.] . . . This is not new. . . . [T]here is nothing new in [the bill], except that the crimes which it proposes to punish are more fully and clearly defined than they have been before. Believing this, and believing that the passage of this bill is imperatively necessary, and is demanded by the interests of humanity and good order, I shall, in every stage, yield it my cordial support.[161]

A supporter of the bill, Representative George Hoar, a moderate and very influential Republican from Massachusetts, argued he did not believe it was even a question whether Congress could protect "the great and sublime principles of the Thirteenth, Fourteenth, and Fifteenth Amendments," which enabled them to "carry out logically, and give a logical exposition of any provision for the maintenance of civil liberty."[162] He continued to expand on how civil, political, and personal rights have been denied to some portions of the population and that the bill was necessary to empower the executive to protect those rights.[163] Hoar declared the bill was only "an attempt to prevent a particular class of persons subject to a degrading oppression from

157. CONG. GLOBE, 42nd Cong., 1st Sess. 485 (1871) (statement of Rep. Burton Cook).
158. *Id.* at 485.
159. *See id.* at 485–86.
160. CONG. GLOBE, 42nd Cong., 1st Sess. 370 (1871) (statement of Rep. James Monroe).
161. *Id.* at 370-71.
162. CONG. GLOBE, 42nd Cong., 1st Sess. 333 (1871) (statement of Rep. George Hoar).
163. *Id.*

local laws from escaping this oppression," ensured by the federal courts.[164]

However, some conservative and even moderate Republicans raised concerns around the power to enforce the Fourteenth Amendment.[165] Representative John Farnsworth of Illinois and Representative Luke Poland of Vermont claimed that the federal government only had the power to step in under limited circumstances.[166] They disagreed with the notion that Congress possessed the authority to punish local state crimes.[167] For most Republicans in the House, however, the use of federal power in the protection of citizens' rights secured or guaranteed by federal law was warranted under the Fourteenth Amendment—especially given the violence, fraud, and slavery that had previously ensued.[168] The bill was passed in the House on April 7, 1871 and then sent to the Senate.[169]

The debate in the Senate was less extensive. Senator John Sherman, a moderate Republican from Ohio, who was in favor of broad legislation enforcing the Fourteenth Amendment, spoke at length about the atrocities that had gone on for a year—and how the one thing they all had in common was a political motive.[170] Senators opposing the bill believed the House bill was going a bit too far as to intrude into the area of local concerns.[171] As Senator Lyman Trumbull (the author of the Civil Rights Act of 1866) expressed in regards to a fellow Congressman's statement: "I do not believe the Senator from Vermont entertains that the Congress of the United States has a right to pass a general criminal code for the States of the Union."[172]

But many Senators disagreed with this belief. On April 11, 1871 Senator George Edmonds reported the House bill for a vote.[173] No Democrat supported any of the Reconstruction bills, and they consist-

164. *Id.* at 335.

165. *See* CONG. GLOBE, 42nd Cong., 1st Sess. 513–14 (1871) (statements of Rep. John Farnsworth & Rep. Luke Poland).

166. *Id.*

167. *Id.*

168. *See, e.g.*, CONG. GLOBE, 42nd Cong., 1st Sess. 333 (1871) (statement of Rep. George Hoar).

169. CONG. GLOBE, 42nd Cong., 1st Sess. 522 (1871).

170. *See* CONG. GLOBE, 42nd Cong., 1st Sess. 158 (1871) (statement of Sen. John Sherman) (describing especially the attacks by and lack of punishment for members of the Ku Klux Klan).

171. *See, e.g.*, CONG. GLOBE, 42nd Cong., 1st Sess. 579 (1871) (statement of Sen. Lyman Trumbull).

172. *Id.* (implying such national authority is irrational).

173. CONG. GLOBE, 42nd Cong., 1st Sess. 566 (1871) (statement of Sen. George Edmonds).

ently viewed them as either unnecessary or within the discretion of the states. After minor adjustments, the Senate passed the bill a few days later and sent it back to the House.[174] After joined conferences between the two bodies, the bill was finally signed into law by the President on April 20, 1871.[175]

The Enforcement Acts were elaborate attempts at securing protections for both the civil and political rights of citizens.[176] From the time of the enactment of the first Enforcement Act, redress in state court was never required, no matter how much it appeared to be an intrusion into the internal affairs of the state.[177] The debates make it abundantly clear the deprivations of political rights are protected under the Fourteenth Amendment, and the protection extends beyond just casting a ballot.[178] The Framers of the Enforcement Acts understood the Acts to protect rights guaranteed by the Constitution with redress available in federal courts.[179] Simply put, the historical record starkly contradicts the current narrow view on federal courts role in protecting political rights. And as *Brnovich v. Democratic National Committee*—the Supreme Court's most recent case interpreting a

174. CONG. GLOBE, 42nd Cong., 1st Sess. 779 (1871).

175. CONG. GLOBE, 42nd Cong., 1st Sess. 831 (1871).

176. The bills did a few new things. They authorized federal courts to hear all cases regarding rights infringements as outlined under the Civil Rights Act of 1866. They defined many federal crimes that would now be illegal—also preventing *any person or group to conspire to deprive citizens of their rights and privileges under the Constitution*. They also provided several remedies for victims to bring lawsuits in federal court seeking damages, as well as remove cases from state courts to federal court. WANG, *supra* note 134, at 288–91.

177. *See* WANG, *supra* note 134, at 267–91.

178. *See* Franita Tolson, *The Constitutional Structure of Voting Rights Enforcement*, 89 WASH. L. REV. 379, 384–86 (2014) (arguing for a broad construction of Congress's enforcement powers under the Fourteenth Amendment).

179. Randy E. Barnett, *Three Keys to the Original Meaning of the Privileges or Immunities Clause*, 43 HARV. J.L. & PUB. POL'Y 1, 10–12 (2020). They also intended state inaction to constitute a deprivation of rights afforded and secured by the Constitution, with redress in federal courts available. Slaughter-House Cases, 83 U.S. 36, 100, 21 L. Ed. 394 (1872) (Swayne, J., dissenting) (expressing how the majority distorted the historical context of the Fourteenth Amendment); United States v. Butler, 25 F. Cas. 213, 226 (C.C.D.S.C. 1877) (Waite, J.) ("it is not only the right, but the absolute duty of the national government to interfere and afford to its citizens that protection which every good government is bound to give. The case, as alleged in this indictment, is such a case, and you, as citizens, are bound to lift yourselves above the political arena, and render your verdict regardless of popular clamor or partisan excitement."); United States v. Rhodes, 27 F. Cas. 785, 794 (C.C.D. Ky. 1866) (Swayne, Circuit Justice) (holding the Reconstruction Amendments transformed the federal system by establishing federal protection for everyone in all rights secured or guaranteed by the Constitution); Pamela Brandwein, *A Lost Jurisprudence of the Reconstruction Amendments*, 41 J. SUP. CT. HIST. 329 (2016); Pamela Brandwein, *A Judicial Abandonment of Blacks: Rethinking the State Action Cases of the Waite Court*, 41 LAW & SOC'Y REV. 343 (2007).

political process statute—makes abundantly clear, looking to the historical record aids in fulfilling Congress's wishes at any given time.[180] These protections are neglected today, as unchecked partisan gerrymandering deprives citizens of political rights without affording any recourse in the courts.

V. Argument

This Part argues (a) partisan gerrymandering claims are a type of abridgement prohibited by the Constitution, and federal courts are the body to police it, (b) policing partisan gerrymandering equates to policing individual rights, and (c) the political question doctrine is not a true barrier to policing partisan gerrymandering.

A. Not Your Grandfather's Gerrymander

Skeptics may argue it is one thing to suggest that nothing prevents federal courts from reaching the substantive issue of a partisan gerrymandering claim. After all, gerrymandering claims, broadly speaking, concern *any* intentional dilution of an individual's vote, and manipulating district lines, even if only for partisan advantages, still *abridges* an individual's vote.[181] Yet, this is very different from claiming that partisan gerrymandering itself is unconstitutional and *federal courts are compelled* to adjudicate these claims. This is where the text of Section Two is vital. Section Two proscribes *any type of abridgment*, making no distinction between racial abridgments—which can be adjudicated by federal courts—and partisan abridgments.[182] Although partisan gerrymandering might not be "abridging" (in some very nar-

180. Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321 (2021). In fact, the Court held that an interpretation of the Voting Rights Act inconsistent with the legislative history would "strain[ ] mightily to obscure its objective" and "undo as much as possible the compromise that was reached between the House and Senate." *Id.*

181. To focus my argument, and to highlight my core objection to *Rucho*, I will set the stage with an assumption. I want you to assume you are in a hypothetical national legislature. The Biff party controls both houses of Congress and the Presidency. The President writes a letter to the Speaker of the House of Representatives. In it, he instructs Congress to pass a bill that declares Congress should disregard and not protect citizens whose rights to vote were abridged due to their partisan affiliation. This abridges the right to vote. *See, e.g.*, League of United Latin Am. Citizens ("LULAC") v. Perry, 548 U.S. 399, 481 (2006) (Stevens, J., concurring in part and dissenting in part) (discussing how political gerrymandering "subordinate[s] traditional politically neutral districting principles . . . to political considerations."); Vieth v. Jubelirer, 541 U.S. 267, 275 (2004) (discussing the Framers' conclusion that "Congress must be given the power to check partisan manipulation of the election process by the States.").

182. U.S. CONST. amend. XIV, § 2 (stating "when the right to vote at any election . . . is . . . in any way abridged . . . the basis of representation therein shall be reduced in the

row sense) the right to vote, the inclusion of "in any way" makes clear "abridged" takes a broader meaning in the context of Section Two.[183]

State governments unconstitutionally diminish an individual's right to an undiluted vote when it draws districts to intentionally cancel out or diminish the votes of voters of a party they dislike—causing the same injury as if it had intentionally miscounted votes or stuffed the ballot box.[184] With extreme partisan gerrymandering, there is no "right to a vote free of arbitrary impairment by state action."[185] It matters not that partisan gerrymandering has been around for a very long time.[186] This is not your grandfather's gerrymander.[187] It is especially not the Framers' gerrymander.[188] It is a strategic manipulation of redistricting more accurate and destructive than ever before.[189] Partisan

proportion which the number of such male citizens shall bear to the whole number."); *see also* Rucho v. Common Cause, 139 S. Ct. 2484, 2502 (2019).

183. In fact, the Court has said so on many occasions. *See, e.g.*, Ali v. Fed. Bureau of Prisons, 552 U.S. 214, 218–20 (2008) ("The phrase '"*any*'" suggests a broad meaning . . . Congress' use of '"any'" . . . is most naturally read to mean . . . whatever kind."); United States v. Gonzales, 520 U.S. 1, 5 (1997) ("Read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" (quoting Webster's Third New International Dictionary 97 (1976)); Harrison v. PPG Indus., Inc., 446 U.S. 578, 588–89 (1980) ("[W]e discern no uncertainty in the meaning of the phrase, 'any.' When Congress amended the provision in 1977, it expanded its ambit to include not simply 'other final action,' but rather '*any* other final action.' This expansive language offers no indication whatever that Congress intended the limiting construction of . . . [the provision . . .] We have found nothing in the legislative history to support a conclusion that the phrase, 'any' . . . [means] anything other than what it says."). *Cf.* United States v. Alvarez-Sanchez, 511 U.S. 350, 358 (1994) (noting that statute referring to "'any' law enforcement officer" includes all officers—including federal, state, or local); Collector of Internal Revenue v. Hubbard, 79 U.S. 1, 15 (1870) (stating it is clear that a statute prohibiting the filing of suit "in any court" "includes all courts because "there is not a word in the [statute] tending to show that the words 'in any court' are not used in their ordinary sense.").

184. And the Court has repeatedly held this to be a valid injury to remedy in the courts. *See, e.g.*, *Baker*, 369 U.S. at 208; United States v. Saylor, 322 U.S. 385, 388 (1944); United States v. Classic, 313 U.S. 299, 326 (1941); United States v. Mosley, 238 U.S. 383 (1915); *Ex parte* Siebold, 100 U.S. 371 (1879).

185. Baker v. Carr, 369 U.S. 186, 208 (1962).

186. *See Rucho*, 139 S. Ct. at 2494–96 (emphasizing this fact in Chief Justice Roberts' majority opinion). *But see* Obergefell v. Hodges, 576 U.S. 644, 664 (2015) (arguing that the "past alone [does not] rule the present").

187. Members of the Court thought political gerrymandering is "a self-limiting enterprise." *Bandemer*, 478 U.S. at 152 (O'Connor, J., concurring). This prediction has proven to be completely wrong.

188. Chief Justice Roberts discussed how the Framers would have explicitly included federal courts in the calculation of addressing partisan gerrymandering if the Framers' wanted the courts to police it. *Rucho*, 139 S. Ct. at 2496.

189. *See* David Daley, *'Gerrymandering On Steroids': How Republicans Stacked The Nation's Statehouses*, WBUR (July 19, 2016), https://www.wbur.org/hereandnow/2016/07/19/gerrymandering-republicans-redmap [https://perma.cc/8TL3-VQDF]; *see also* Vann R. Newkirk II, *How Redistricting Became a Technological Arms Race*, THE ATLANTIC (Oct. 28, 2017), https:/

gerrymandering is designed to shape districts that will aid political parties, protect incumbents running for re-election, and preserve partisan interests.[190] Even worse, there are "no affirmative legal obligations that require states to take partisanship into account" when drawing district lines.[191] That said, Section Two already prescribes a penalty: If the right to vote is in *any way abridged*, the basis of representation shall be reduced.[192] Courts will simply be enforcing the penalty Congress and the states have already approved.

The discussion now returns to *Rucho v. Common Cause*, where the Court held manipulating district lines for political gains does not offend the Constitution and federal courts have no place policing such conduct.[193] At this point, one could conclude the Court simply got it wrong in *Rucho*. But what if, in fact, the case's outcome is a ruse?

/www.theatlantic.com/politics/archive/2017/10/gerrymandering-technology-redmap-2020/543888/ [https://perma.cc/63MP-ATNJ]; Julian E. Zelizer, *The power that gerrymandering has brought to Republicans*, WASH. POST (June 17, 2016), https://www.washingtonpost.com/opinions/the-power-that-gerrymandering-has-brought-to-republicans/2016/06/17/045264ae-2903-11e6-ae4a-3cdd5fe74204_story.html [https://perma.cc/P4RR-9FQ3].

190. *See* Heather K. Gerken, *Getting from Here to There in Redistricting Reform*, 5 Duke J. Const. L. & Pub. Pol'y 1, 1–2 (2010). For example, in Connecticut, gerrymandering permitted minority republicans to dominate the state legislature and approve two constitutional amendments despite being significantly outnumbered. *See* Peter H. Argersinger, *The Value of the Vote: Political Representation in the Gilded Age*, 76 J. AM. HIST. 59, 64 (1989); *see also* ENGSTROM, *supra* note 11, at 82, 156 (noting that no Democrat was ever elected in a small district for seventy years based on partisan gerrymandering).

191. Richard H. Pildes, *The Supreme Court, 2003 Term - Foreword: The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 28, 37 (2004). Furthermore, partisan gerrymandering will likely be the worst we have ever seen in the next round of redistricting because *Rucho* now prohibits federal courts from policing it. *See* Richard L. Hasen, *The Gerrymandering Decision Drags the Supreme Court Further into the Mud*, N.Y. TIMES (June 27, 2019), https://www.nytimes.com/2019/06/27/opinion/gerrymandering-rucho-supreme-court.html [https://perma.cc/DU7A-H6WM]; Sam Wang, *The Great Gerrymander of 2012*, N.Y. TIMES (Feb. 3, 2013), https://www.nytimes.com/2013/02/03/opinion/sunday/the-great-gerrymander-of-2012.html [https://perma.cc/Q9CM-VPWM]; Michael Wines, *Why the Supreme Court's Rulings Have Profound Implications for American Politics*, N.Y. TIMES (June 27, 2019), https://www.nytimes.com/2019/06/27/us/supreme-court-gerrymandering-census.html [https://perma.cc/L4EA-9HSP].

192. U.S. CONST. amend. XIV, § 2. The majority's opaque and jumbled reasoning in *Rucho* on why partisan gerrymandering claims are a political question, fixable only through the political process because it's just "politics," distorts the role of courts in the framework the Constitution lays out for them. If one believes (to be sure, I do) that courts help police other branches of government, including abuses committed at the state level, then finding a safe haven in an idea known as a political question may distort the belief in the system of checks and balances. That is not to say that every legal dispute can be resolved by federal courts. But placating what is and what is not a political question undermines belief in the doctrine as a whole.

193. *See Rucho*, 139 S. Ct. at 2508.

While stating it is protecting the political process, the *Rucho* court is in fact intentionally hostile to the political process. The Court routinely intervenes in cases involving the political process to protect fundamental rights, but what is disguised as deference for other branches here may in fact be intentional and hostile in substance—the Court simply decided the case was not worth saving. So, by forgoing the opportunity to firmly establish limits on state governments dictating election outcomes, the Court reached its intended result of avoiding a decision based on a political question.[194] As the majority in *Rucho* would have readers believe, the issue of partisan gerrymandering is a wolf clad in sheep's clothing of racial gerrymandering.[195] Yet, this dressing of a vote dilution injury is merely a ploy—as Justice Scalia once said, "this wolf comes as a wolf."[196]

That brings us to the thief in the night—the political question doctrine. The political question doctrine is like "some ghoul in a late-night horror movie that repeatedly sits up . . . [and] stalks" the partisan gerrymandering jurisprudence.[197] There are few doctrines as controversial as the political question doctrine. It has morphed into a concept that courts invoke when they consider an issue not within the purview of the judiciary to decide. In essence, it holds certain questions are to be decided by one of the other branches exclusively. As Professor Helen Hershkoff articulated:

> The political question doctrine . . . remits entire areas of public life to Congress and the President, on the grounds that the Constitution assigns responsibility for these areas to the other branches, or that their resolution will involve discretionary, polycentric decisions that lack discrete criteria for adjudication and thus are better handled by the more democratic branches.[198]

194. *See* Easley v. Cromartie, 532 U.S. 234, 257 (2001) (wherein the Court held a racial gerrymander could be a partisan gerrymander that would not be unconstitutional). With *Rucho* on the books, it is not far-fetched to see racial gerrymandering start to get dressed up in sheep clothing as partisan intent. *See* Pamela S. Karlan & Daryl J. Levinson, *Why Voting is Different*, 84 CAL. L. REV. 1201, 1202 (1996) (conceiving the Court's voting rights into a Fourteenth Amendment general equal protection analysis is "misguided and incoherent").

195. *See Rucho*, 139 S. Ct. at 2502.

196. Morrison v. Olson, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting).

197. Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 398 (1993) (Scalia, J., concurring) (describing how *Lemon* stalks the Establishment Clause).

198. Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1862 (2001).

The Court has never been consistent in applying the doctrine or explaining exactly when it applies,[199] and its use often creates much bewilderment. The sense of bewilderment results from the Court's inconsistent application of the doctrine and the Court's intentional disregard of the doctrine when it demonstrably should be invoked based on prior criteria and frameworks the Court adopts in other cases. Nevertheless, this section aims to illustrate why the political question doctrine need not be used to stop the policing of partisan gerrymandering. It also aims to illustrate why Section Two provides the mandate the Court has been desperately searching for to create consistency and guideposts in its decisions. From the beginning of this discussion, I engage with the Court's lack of adherence to the principles of the "political question doctrine," and how that inconsistency does not justify it in refraining from policing partisan gerrymandering.

B. Voting Protections: A Group or Individual Right, or Both?

To begin, it is worth distinguishing between two rights—the individual right and the group right. Chief Justice Roberts held voting is protected as an individual right, not a group right.[200] That said, such a distinction is not so simple—nor is it quite true—as each right has a distinct interest that should be protected. Individual interest in voting comes in many shapes and sizes. Some individuals are prohibited from voting (children, prisoners, mentally incompetent individuals) while others enjoy the right. Some individuals can group their votes together to elect a preferred candidate, while others cannot (such as individuals in two separate districts). As Professor Gerken notes:

199. *See* Louis Henkin, *Is There A "Political Question" Doctrine?*, 85 YALE L.J. 597, 622 (1976) (stating how the "'political question' doctrine, . . . is an unnecessary, deceptive packaging of several established doctrines that has misled lawyers and courts to find in it things that were never put there and make it far more than the sum of its parts."); *see also* Robert F. Nagel, *Political Law, Legalistic Politics: A Recent History of the Political Question Doctrine*, 56 U. CHI. L. REV. 643, 668 (1989) (proposing that "the political question doctrine is largely incomprehensible to the Court and to the academy."); Louis Michael Seidman, *The Secret Life of the Political Question Doctrine*, 37 J. Marshall L. Rev. 441, 444 (2004) (discussing "[t]here is not a single political question doctrine, but three separate doctrines, and the failure to distinguish among the three has produced much confusion.").

200. *Rucho*, 139 S. Ct. at 2501. *But see* Gaffney v. Cummings, 412 U.S. 735, 754 (1973) ("[w]hat is done in so arranging for elections, or to achieve political ends or allocate political power, is not wholly exempt from judicial scrutiny under the Fourteenth Amendment."); Karlan & Levinson, *supra* note 194, at 1202 (discussing how "the very purpose of apportionment is to treat voters as members of groups"); Tolson, *supra* note 178, at 384–85 (arguing for an expansive understanding of Congress's ability to regulate the political process under the Fourteenth Amendment).

"[A]lthough the harm of dilution can be understood as an individual injury, fairness is measured in group terms."[201] When an individual brings a suit alleging a dilution of their vote, the right to that undiluted vote "rises and falls with the treatment of the group."[202] Thus, while the individual may bring the claim, the group is the one that reaps the benefits.

Reynolds v. Sims is an example of framing the injury this way in practice.[203] While the Court claimed it was protecting the individual's right to an equal vote, it implemented this protection by guaranteeing equal representation to the group through their legislative districts.[204] Partisan gerrymandering arbitrarily diminishes voters' political power. *Reynolds* strongly suggests the Constitution protects against such an outcome.[205] There is only one key aspect that must be determined when one discerns if a claim lies in individual or group territory—whether the benefit of the outcome rises or falls with the group, affecting them all equally; or if the benefit rises and falls with the individual, solely affecting him or her.[206]

In a highly influential article, Professor Pamela Karlan articulates three tiers of voting rights: participation, aggregation, and governance.[207] The first tier consists of individual voting rights, "individual citizens . . . casting a ballot that gets counted."[208] This tier allows the individual to assert full membership in the political community despite the effect participation has on electoral results.[209] The second tier of voting rights comes in the group form by way of "aggregating the votes of individuals to achieve a collective outcome."[210] If an indi-

201. Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 HARV. L. REV. 1663, 1681 (2001).

202. *Id.* at 1681. *But see* Tolson, *Partisan Gerrymandering as a Safeguard of Federalism*, *supra* note 129, at 890–93 (arguing the inquiry should be defined in terms of interests rather than institutions).

203. *See* Reynolds v. Sims, 377 U.S. 533, 565, 561–62 (1964).

204. *Id.* at 565. Indeed, the Court's opinion strongly suggests the right to vote for an individual means far more than simply casting a ballot of numerically equal weight. The language used implies a requirement that all voters at least have an equal opportunity to affect election outcomes. *Cf* Heather K. Gerken, *The Costs and Causes of Minimalism in Voting Cases: Baker v. Carr and Its Progeny*, 80 N.C. L. REV. 1411, 1418 (2002).

205. *Reynolds*, 377 U.S. at 565.

206. One can also think about it this way: whether the right makes any group member more or less injured than any other group member. If the right accomplishes this kind of injury, one is in individual territory; if not, one is in group territory.

207. Pamela S. Karlan, *All over the Map: The Supreme Court's Voting Rights Trilogy*, 1993 SUP. CT. REV. 245 (1993).

208. *Id.* at 248.

209. *Id.* at 248–49.

210. *Id.* at 249.

vidual desires to achieve influence in the political process and through policymaking, this can best be accomplished if the individual acts in collaboration with others as a group.[211] The group form also serves as the primary target for partisan gerrymandering to impair a voter's ability to elect their preferred candidate.[212] However, this is also where the Fourteenth Amendment plays a vital role, barring actions with both a discriminatory intent and effect. The third-tier deals with governance rights.[213] Governance rights concern the post-election governance of elected officials and the extent their post-election abilities satisfies the policy preferences of the voter.[214] As Professor Karlan notes: "[The] real complaint is that their voice is diluted at the post-election process of official decision making."[215]

The true essence of a partisan gerrymandering claim is not that the preferred individual lost an election, but rather, the issue comes down to whether the candidates from the favored political party were more likely to succeed than those from the disfavored party. Partisan gerrymandering claims thus straddle the line between all three tiers of voting rights. Redistricting raises issues involving every aspect of voting dilution. How and where district lines are drawn will affect: (1) the ability of an individual to cast a ballot that gets counted (individual right), (2) which voters can elect the candidates of their choice (a group right), and (3) the chance of success that those elected officials will become members of elective bodies favorable to a group's policy agenda (governance right).[216] So, while the Court framed the group harm in individualistic terms, it is impossible to think about voting dilution without understanding that it involves more than just an individual right—it affects the group's rights as well.[217] "One-person, one-vote" may be stylistically designed to protect the individual's right to

211. *See* Karlan, *supra* note 6, at 1708.
212. *See* Karlan, *supra* note 207, at 249.
213. *See id.* at 251.
214. *Id.*
215. *Id.*
216. *See id.* at 249–51.
217. The Court has suggested this notion as well. *See* Reynolds v. Sims, 377 U.S. 533, 565 (1964) ("each and every citizen has an inalienable right to full and effective participation in the political processes . . . Most citizens can achieve this participation only as qualified voters through the election of legislators to represent them. Full and effective participation by all citizens . . . requires, therefore, that each citizen have an equally effective voice in the election of members."); *see also* Fortson v. Morris, 385 U.S. 231, 250 (1966) (Fortas, J., dissenting) ("In simple terms, the vote is meaningless . . . unless it, taken in the aggregate with the votes of other citizens, results in effectuating the will of those citizens."); Gerken, *supra* note 201, at 1665, 1672–73 (showing how vote dilution claims cannot be resolved within the traditional individual rights framework); Samuel Issacharoff & Richard

vote (or so says the *Rucho* majority), but implementation of the doctrine strongly suggests there must be equality among groups of voters.

C. The Political Question Doctrine: The Gift That Keeps on Giving

1. Committed to Another Branch

At the outset, the political question doctrine constitutes a "narrow exception" to the "rule" that "the Judiciary has a duty to decide cases, even those it 'would gladly avoid.' "[218]

The first factor of the political question determination that stymies judicial intervention is that there is "a textually demonstrable constitutional commitment of the issue to a coordinate political department."[219] The resolution of this kind of dispute has not been exclusively committed to either of the political branches. Partisan gerrymandering cases ask courts to rule on whether state legislatures have acted contrary to the limitations of the Constitution. The Court's long history of answering very similar questions to racial vote dilution confirms these cases are justiciable—it is thus fanciful to assume granting Congress the authority to step in equates to relieving the Courts of any role in resolving partisan gerrymandering disputes. First, there is no historical or textual support suggesting the Framers wanted to shield federal courts from judicial review of state legislature redistricting. Second, and more importantly, if Congress held the exclusive check on abusive state governments in redistricting, courts would have no jurisdiction over any federal election laws—including racial vote dilution, "one-person, one-vote," voter identification laws, and more. As the entire history of voting rights jurisprudence confirms, courts routinely police redistricting; in fact, in the more than sixty years since the Court decided *Baker*, it has never questioned its authority to second guess the decisions of state legislatures when it comes to racial vote dilution, or the "one-person, one-vote" mandate.[220]

H. Pildes, *Politics As Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 645 (1998).

218. Zivotofsky v. Clinton, 566 U.S. 189, 194 (2012) (quoting Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821)).

219. Baker v. Carr, 369 U.S. 186, 217 (1962).

220. *See* Girardeau A. Spann, *Gerrymandering Justiciability*, 108 GEO. L.J. 981, 987–90 (2020).

Nor is there, even arguably, a textual commitment under the Elections Clause to the legislative branch.[221] The Supreme Court has ruled on Fourteenth Amendment grounds in cases for over a hundred years and the textual commitment under Section Five of the Fourteenth Amendment is far stronger than the Elections Clause.[222] Even more surprising, the Court struck down legislative maps on racial vote dilution grounds with no hesitation, and held that state legislatures are accountable when drawing maps based on race.[223] In fact, Congress itself has said many times that courts are the proper venue for resolving these types of issues.[224] Neither the language of Section Two, Section Five, nor Supreme Court precedent can be construed as committing the enforcement of the provision exclusively to Congress.

221. U.S. CONST. art. I, § 4, cl. 1.

222. *See, e.g.*, Regents of Univ. of California v. Bakke, 438 U.S. 265, 287–306 (1978) (discussing Equal Protection Clause and university consideration of race as a factor in university admissions). Although Section Five of the Fourteenth Amendment gives Congress the power to enforce the provisions of the Fourteenth Amendment (including Section Two), the Supreme Court decision in *City of Boerne v. Flores* rejected the argument that Congress could enforce the Religious Freedom Restoration Act against states and localities because the Court found the disputed practices did not violate the Constitution. *See* 521 U.S. 507, 536 (1997). Stated differently, the Court held that the Section Five power of Congress to enforce the Fourteenth Amendment was limited by the Supreme Court's determination of whether there was a violation of the Constitution. *Id.* Such an outcome suggests the Supreme Court thinks the Fourteenth Amendment—including Section Two—is intended primarily to be judicially rather than congressionally enforceable.

223. *See* Shaw v. Hunt, 517 U.S. 899, 917–18 (1996) (*Shaw II*); *see also* Hunt v. Cromartie, 526 U.S. 541, 551 (1999) (discussing the Court's approach on evaluating impermissible racial motivation under a motion for summary judgment standard); Miller v. Johnson, 515 U.S. 900, 916 (1995) (discussing sufficiency of a challenge to a districting plan under a motion for summary judgment standard).

224. *See* ASHER C. HINDS, *The South Carolina Election Case of* Dantzler v. Lever *in the Fifty-eight Congress*, *in* 2 HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES 1, 742, 744 '("[h]owever desirable it may be for a legislative body to retain control of the decision as to the election and qualification of its members, it is quite certain that a legislative body is not the ideal body to pass judicially upon the constitutionality of the enactments of [state legislatures]. We have in this country a proper forum for the decisions of constitutional and other judicial questions . . . That suit can be carried by him, if necessary, to the Supreme Court of the United States . . . The decision of the Supreme Court would be binding and would be a positive declaration of the law of the and which could not be denied or challenged." They continued down this deferral in a different case.) *See* CLARENCE CANNON, *Prioleau v. Legare*, *in* 6 CANNON'S PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES 1, 234 '("If there be any who desire to raise the question of the constitution and election laws of a State being in conflict with Federal statutes or our national organic law, we consider such a matter should be tested in the courts.").

2. Does Adjudication Under Section Two Depend on Unreviewable Legislative or Executive Determinations?

The second factor courts look to when deciding whether an issue constitutes a political question is if there is a lack of "judicially discoverable and manageable standards."[225] Chief Justice Roberts stated that because no standard exists to police partisan gerrymandering, judicial action should be based on rules "principled, rational, and based upon reasoned distinctions found in the Constitution or laws."[226] This does not add up with the Supreme Court's past decision record. The Court has consistently found state legislatures have gone too far in drawing legislative districts, and in many cases ordered the states to draw a new map.[227] Further, lower courts developed manageable standards for resolving every element of political gerrymandering claims.[228] Finally, the Constitution sets forth a simple rule that also demonstrates the judiciary's capacity to create a manageable standard. Neither the Constitutional text nor history or legal precedent provides a reason to limit that rule to "some" abridgment.

The command of the Constitution is clear—if you abridge the vote, you lose representation. The core issue in resolving these claims pertains not to whether a wrong has been committed, but whether the courts provide a proper forum to correct it. Acting contrary to these principles, the courts deciding that these claims were non-justiciable created sweeping ramifications. Such results include disabling anyone from challenging legislative maps drawn in disregard of any semblance of fairness and, contrary to every decision since *Baker*, preventing everyone—except ordinary individuals, associations, or businesses—a right to effective representation or self-governance. If these claims are unmanageable, then states are free to discriminate against every one of its citizens, and all that is needed to do so is knowing the citizen's party identification. Such a conclusion is untenable. Partisan gerrymandering simply involves the application of a constitu-

225. Baker v. Carr, 369 U.S. 186, 217 (1962).

226. Rucho v. Common Cause, 139 S. Ct. 2484, 2507 (2019).

227. Shaw v. Reno, 509 U.S. 630, 633 (1993); Miller v. Johnson, 515 U.S. 900, 927 (1995); *see also* Thornburg v. Gingles, 478 U.S. 30, 34 (1986).

228. The courts achieved these standards by honing in on the harm of vote dilution: "Like many legal standards in the dilution context, that test generally consists of three parts: (1) intent; (2) effects; and (3) causation." *Rucho*, 139 S. Ct. at 2516 (Kagan, J., dissenting). Case law thus establishes clear rules for assessing state legislatures' power to draw maps that intentionally discriminate against citizens.

tional command to transient facts—it does not make any task of the judiciary unmanageable.[229]

This raises another concern about the doctrine as a respectable constraint—the Court's failure to find a manageable standard has not prevented it from intervening in almost any other area of law. The sheep's clothing starts to fall when one looks to the Court's involvement elsewhere.

For instance, campaign finance regulation. The Court has gone out of its way to involve itself in campaign-finance regulation, in effect ending what was campaign finance, because campaign finance regulations would conflict with corporations' free speech rights. In 2010, the Court held in *Citizens United v. FEC*,[230] that corporations enjoy the same free speech rights as individuals, and government regulations that interfere with such rights are not harmonious with the Constitution.[231] The Court emphasized that political speech is vital to making decisions in a democracy—whether it comes from a person or a corporation.[232] Additionally, the Court held the First Amendment was a belief premised on "mistrust of governmental power . . . [standing] against attempts to disfavor certain subjects or viewpoints."[233] The Court relied on the notion that individuals fund almost all of these corporations and thus deserve protection. The Court argued that a ban stifled voters' speech and undermined the speech rights of corporations.[234]

The Court's argument is striking because neither text, history, nor Court precedent supports this notion. The Court's involvement also comes without any semblance of a manageable standard. In just

229. There is a significant amount of scholarship laying out why the judiciary has a role in checking partisan gerrymandering. *See, e.g.*, Christopher S. Elmendorf, *From Educational Adequacy to Representational Adequacy: A New Template for Legal Attacks on Partisan Gerrymanders*, 59 WM. & MARY L. REV. 1601, 1605–07 (2018); Michael S. Kang, *Gerrymandering and the Constitutional Norm Against Government Partisanship*, 116 MICH. L. REV. 351, 353–56 (2017).

230. Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010).

231. *Id.* at 342–43.

232. *Id.* at 339 ("Speech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people."). Professor Tolson has aptly shown how the Court has a "pluralist view of democracy, routinely restricting government power in order to encourage its own version of 'broad' and 'diverse' political participation" when it comes to campaign contributions. Franita Tolson, *The Federalism Implications of Campaign Finance Regulation*, 164 U. PA. L. Rev. 247, 248–52 (2016).

233. *Citizens United*, 558 U.S. at 340.

234. *Id.* at 349; *see also* Heather K. Gerken, *The Real Problem with Citizens United: Campaign Finance, Dark Money, and Shadow Parties*, 97 MARQ. L. REV. 903, 907–11 (2014) (discussing how the case not only impacted the parties in dispute but seriously limited the ability to adopt "sensible fixes going forward").

the Free Speech context alone, the Court seems to differentiate between obscene speech, corporate speech, school speech, compelled speech, and others.[235] With each distinction, the Court has drawn a different standard and within each standard, the Court also created layers of sub-standards. Furthermore, the Court involved itself in policing campaign finance reform despite longstanding historical practice to the contrary, and despite there being no clear text or original understanding that money equals speech and corporations are entitled to Free Speech rights.

Punitive damages are another area where the Court has involved itself without any semblance of a manageable standard. It is astonishing that the Court invoked historical practice in *Rucho* because it contradicts many other cases where the Court made clear that a practice with longstanding history does not shield that practice from constitutional scrutiny.[236] In *BMW v. Gore*, the Court held:

> Elementary notions of fairness enshrined in this Court's constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment but also of the severity of the penalty that a State may impose. Three guideposts . . . lead to the conclusion [of whether an] award is grossly excessive.[237]

Not only was this a drastic change made out of thin air, but it also has almost no support in the text, history, or original understanding of the Due Process Clause. First, the historical practice goes the other way—punitive damages have never been constrained as excessive by the Due Process Clause or otherwise.[238] Second, the *BMW* standard

235. *See* Jacobellis v. State of Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) ("I know it when I see it."); Morse v. Frederick, 551 U.S. 393, 396 (2007) (addressing school speech); Pope v. Illinois, 481 U.S. 497, 498 (1987) (discussing obscene speech); Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York, 447 U.S. 557, 558 (1980) (addressing commercial speech); Wooley v. Maynard, 430 U.S. 705, 706 (1977) (discussing compelled speech); *see also* Louis Michael Seidman, *State Action and the Constitution's Middle Band*, 117 MICH. L. REV. 1, 26 (2018) (addressing commercial speech standards); Girardeau A. Spann, *Constitutional Hypocrisy*, 27 CONST. COMMENT. 557, 566 (2011) (discussing free speech).

236. *See, e.g.*, I.N.S. v. Chadha, 462 U.S. 919, 944 (1983); *see also* WOOD, *supra* note 65, at 174.

237. BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 560 (1996); *see also* Philip Morris USA v. Williams, 549 U.S. 346, 354 (2007) (referencing *BMW*, 517 U.S. at 560); Exxon Shipping Co. v. Baker, 554 U.S. 471, 475 (2008) (holding a ratio of five-to-one is possible but not outlining what is or is not excessive).

238. In fact, awarding damages in significant excess to those awarded for compensatory damages was a well-recognized practice. *See* Wilkes v. Wood, 98 Eng. Rep. 489 (C.P 1763) (affirming a million dollar equivalent punitive damage award); *see also* Day v. Woodworth, 54 U.S. 363, 371 (1851) ("It is a well-established principle . . . a jury may inflict what are called exemplary, punitive, or vindictive damages upon a defendant, having in view the

does not alleviate concerns of the Court involving itself in an area while lacking any manageable standard either. Not only has the Court not set an applicable standard outside "elementary notions of fairness," it has simply intervened and decided when the punitive damage has gone too far on an ad hoc basis. Even without a manageable standard, the Court never second-guessed its ability to decide these cases. Simply put, the "elementary notion of fairness" has been and continues to be "insusceptible of principled application," yet the Court has continually intervened in this area.[239] Third, there is almost no evidence to suggest that the Due Process Clause was understood to cover punitive damages.[240]

Rather than adhere to the "near standardless dimension to the punitive damages equation," the Court in *Philip Morris USA v. Williams* believed the best place to provide those standards is the Court itself.[241] The Court explicitly claimed it was the duty of the Court to "provide assurance" of fairness.[242] In the Court's view, avoiding "an arbitrary determination of an award's amount" necessitates the need for the Court to police it.[243] Despite there being no support for this assertion other than the "elementary notions of fairness" emanating from the Due Process Clause, the Court still conceded in two cases that it could not pinpoint what "limits" the Constitution places on punitive damage awards.[244] Nevertheless, the *BMW* Court still overarchingly held that "[p]unitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition."[245]

However, what is even more alarming is the Court's distinction between civil and criminal penalties. When sentencing an individual, judges "may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the

enormity of his offence rather than the measure of compensation to the plaintiff."); Missouri Pac. Ry. Co. v. Humes, 115 U.S. 512, 520 (1885); Reed v. Davis, 21 Mass. 216, 228–229 (1826) (discussing how the jury has "proceeded upon higher grounds of damages, than those which arise merely from bodily wounds and bruises . . . These motives are sound").

239. *BMW*, 517 U.S. at 599 (Scalia, J., dissenting).

240. *See, e.g.*, Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 24 (1991) (Scalia, J., concurring) (discussing proposition that the jury deciding punitive damages does not violate Due Process).

241. *Williams*, 549 U.S. at 354.

242. *Id.* at 355.

243. *Id.* at 352.

244. *Id.* at 353; Exxon Shipping Co. v. Baker, 554 U.S. 471, 510 (2008) (five-to-one is too much).

245. *BMW*, 517 U.S. at 568.

source from which it may come"; yet when it comes to sentencing a corporation, the Court believes "elementary notions of fairness" dictate when a corporation is faced with a too heavy monetary price.[246] The Court never clearly articulated why this distinction exists, but such an omittance has not stopped it from policing punitive-damage awards.

In short, even if the political question doctrine is a command, the Court has been conspicuously selective and idiosyncratic about when it uses its factors. In *Citizens United*, the Court stressed the risk of disfavoring certain subjects or viewpoints or identifying certain preferred individuals in regard to the First Amendment.[247] Further, the Court argued:

> [I]t is inherent in the nature of the political process that voters must be free to . . . determine how to cast their votes . . . We find no basis for the proposition that, in the context of political speech, the Government may impose restrictions on certain disfavored individuals.[248]

The lack of a manageable standard (or any standard at all) or clear textual authority to intervene does not weigh against the Court policing the political process. In *Philip Morris*, the Court stressed the Fourteenth Amendment requires states to provide some cap on punitive damages to avoid arbitrary determinations.[249] Despite lacking a set standard, the Court implemented notions of reasonableness and fairness to explore its role in an evolving legal world.[250] None of these difficult issues—including the lack of a manageable standard—gave

246. United States v. Tucker, 404 U.S. 443, 446 (1972); *see also BMW*, 517 U.S. at 573 n.19 ("Our cases concerning recidivist statutes . . . permit the sentencing court to enhance a defendant's punishment for a crime in light of prior convictions."); *see also* Williams v. New York, 337 U.S. 241, 251 (1949) ("In determining whether a defendant shall receive a one-year minimum or a twenty-year maximum sentence, we do not think the Federal Constitution restricts the view of the sentencing judge . . . So to treat the due-process clause [like this] would hinder if not preclude all courts—state and federal—from making progressive efforts to improve the administration of criminal justice.").

247. *Citizens United*, 558 U.S. at 340.

248. *Id.* at 341. The Court's approach is striking as in its utter indifference to the effects on democracy the ruling would have, while claiming the ruling preserves democracy. Gerken, *supra* note 234, at 910–12.

249. *See* Philip Morris USA v. Williams, 549 U.S. 346, 352–53 (2007) (emphasizing avoiding arbitrary determinations of awards amounts).

250. *See id.* at 355. The Court's jurisprudence under the Establishment Clause is also unmanageable. For example, in two separate cases dealing with almost identical fact patterns, the Court found a valid secular purpose and lack thereof over Ten Commandment statutes in the same day. *Compare* Van Orden v. Perry, 545 U.S. 677 (2005) (declaring a monolith inscribed with the Ten Commandments of the Texas State Capitol had a valid secular purpose), *with* McCreary Cnty. v. ACLU, 545 U.S. 844 (2005) (declaring the posting of the Ten Commandments in a Kentucky courthouse lacked secular purpose).

the Court any hesitation to intervene in past cases. Thus, it is now hard to conceive a justification for why judicial intervention would be any different in the realm of partisan gerrymandering.

3. The Initial Policy Question

The third factor courts consider in deciding whether to invoke the political question doctrine is whether a court is asked to make "an initial policy determination of a kind clearly for nonjudicial discretion."[251] In this context, courts are asked to rule on the distribution of power between groups. Chief Justice Roberts decried such a judgment as being outside the realm of the courts and that the court must not intervene.[252] Professor Guy Uriel Charles terms this belief as the "rights-structural rights divide."[253] While some may find Chief Justice Robert's words misleading, this play on words is nothing more than a sleight of hand.[254] When courts are asked to police partisan gerrymandering claims, they are not being asked to decide the outcome of elections or divide power among the dominant branches of government. Rather, courts are only deciding whether the state legislatures have discriminatorily denied or abridged the right to vote so far as it affects the apportionment of representation among the states. There is nothing unusual or remarkable about fact-finding to determine these answers—courts conduct such measures all the time.

Partisan gerrymandering cases involve neither policy choices nor value determinations (as the Chief Justice would like one to assume); instead, they simply ask the straightforward legal question of whether state legislatures exceeded their constitutional authority in intentionally diluting votes of members in a rival political party. There is nothing that must be at first decided by the courts; the Thirty-Ninth Congress made that decision for them when they created Section Two

251. Baker v. Carr, 369 U.S. 186, 217 (1962).

252. Rucho v. Common Cause, 139 S. Ct. 2484, 2500–01 (2019).

253. Guy-Uriel E. Charles & Luis E. Fuentes-Rohwer, *Judicial Intervention as Judicial Restraint*, 132 HARV. L. REV. 236, 247 (2018) (discussing the argument Chief Justice Roberts seems to adopt—a belief the proper purpose of judicial review is to "vindicate violations of individual rights." Correspondingly, judicial review should not be "deployed to guard against the maldistribution of political power among groups" because the "maldistribution of political power or the institutional arrangements of democratic politics reflects structural rights, which are not protected by the Constitution.").

254. *Rucho*, 139 S. Ct. at 2500–01. This is especially so since, as a general matter, scholars have shown that so-called "structural claims" need to be converted to an "individual rights" framework to make the claims justiciable and within the purview of federal courts in the first place. *See, e.g.*, Guy-Uriel E. Charles, *Judging the Law of Politics*, 103 MICH. L. REV. 1099, 1102 (2005).

of the Fourteenth Amendment. Combine the command of the Thirty-Ninth Congress with equal-population and the "one-person, one-vote" principle, and in the context of political gerrymandering, partisan considerations should not play a role in redistricting.[255]

This factor also addresses the fear of seeming partisan—a related concern the doctrine purports to constrain. Yet this fear has not prevented the Court from intervening in many other areas of law. The sheep's clothing continues to fall when one looks at the Court's past decisions.

These partisan fears have not inhibited the Court from enforcing constitutional commands in the past. For example, the Court's fear of being considered partisan did not stop it from deciding that Congress cannot require "Israel" to be identified on the passport of an American citizen born in Jerusalem if the President does not agree with that belief.[256] The fear of appearing partisan did not stop the Court from deciding that any recesses shorter than ten days will be insufficient to enable the president's recess appointment power.[257] The fear of appearing partisan did not stop the Court from terminating part of the most successful piece of civil rights legislation in American history to date—a law that ended widespread disenfranchisement that characterized the Jim Crow South and enabled voters to participate in the political process in places where they otherwise would have been prohibited.[258] The fear of appearing partisan did not stop the Court from deciding that a closely held company can deny their employees' healthcare coverage for contraception.[259] The fear of appearing partisan did not stop the Court from deciding the 2000 Presidential Elec-

255. It is surprising the Court outlined this concern in these cases but never questioned whether it appears partisan in a long line of advisory opinion cases. *See* Girardeau A. Spann, *Advisory Adjudication*, 86 TUL. L. REV. 1289, 1329, 1326–32 (2012) (discussing the appearance of the Court seeming political using this tool yet never questioning its power to use it).

256. Zivotofsky v. Kerry, 576 U.S. 1, 31–32 (2015). In fact, it was this dispute where Chief Justice Roberts said in clear terms: "In general, the Judiciary has a responsibility to decide cases properly before it, even those it 'would gladly avoid.'" Zivotofsky v. Clinton, 566 U.S. 189, 194–95 (2012).

257. N.L.R.B. v. Noel Canning, 573 U.S. 513, 519, 580 (2014). A highly neglected aspect of this decision was that the Court's holding sharply limited the recess appointments power whenever either the Senate or the House of Representatives is controlled by a different political party than the president's.

258. Shelby Cnty. v. Holder, 570 U.S. 529, 530–32 (2013). More recently, the Court continued to chip away at the remaining provisions of this monumental statute, leaving almost nothing in place to stop voter disenfranchisement. *See* Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321 (2021).

259. Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014).

tion.[260] The list goes on. As the Chief Justice so adamantly said in *Zivotofsky*, if it is the Court's "duty to decide cases properly before it,"[261] then the Court should enforce the anti-gerrymandering clause (Section Two) explicitly included in the Fourteenth Amendment as it's a nondiscretionary command of the U.S. Constitution.

4. An Embarrassment of Another Branch

The fourth factor courts consider in deciding whether an issue is a political question is whether they can resolve the claim without "expressing lack of the respect due coordinate branches of government."[262] Courts policing partisan gerrymandering—involving disputes between the state government and citizens of that state—do not express a "lack of the respect due coordinate branches of government"[263] because the other branches of government have refused to intervene or act at all. Given the Court's insistence that "[i]t is emphatically the province and duty of the judicial department to say what the law is,"[264] the Court made it clear it has to decide cases ("even those it would gladly avoid") and could decline to decide a case because of political implications.[265] Thus, even if courts would like to avoid partisan gerrymandering cases, Section Two properly puts forth the idea before the federal judiciary that it *must* decide such cases.

5. The Need to Stick with a Political Decision

Further, the fifth factor courts weigh is if there is an "unusual need for unquestioning adherence to a political decision already made."[266] While I do believe that state inaction can constitute action, policing partisan gerrymandering presents no need for courts to have "unquestioning adherence to a political decision"[267] because there is no decision in the first place. Furthermore, whether a state legislature has violated the commands of Section Two of the Fourteenth Amendment is a legal question, not a political one.

260. Bush v. Gore, 531 U.S. 98, 111 (2000).

261. *Zivotofsky*, 566 U.S. at 194.

262. *Baker*, 369 U.S. at 217.

263. *Id.*

264. Marbury v. Madison, 5 U.S. 137, 177 (1803).

265. *Zivotofsky*, 566 U.S. at 194 (citing Cohens v. Virginia, 19 U.S. 264 (1821)).

266. *Baker*, 369 U.S. at 217.

267. *Id.*; *see generally* Seidman, *supra* note 199. Further, if there was a decision made, there would be no need for the courts to get involved in the first place.

6. The Multifarious Question

Finally, the sixth and last factor courts look to is "the potentiality of embarrassment from multifarious pronouncements by various departments on one question."[268] Because neither branch of government has taken opposite sides in dealing with political gerrymandering, this factor does not apply to the enforcement of Section Two of the Fourteenth Amendment in policing partisan gerrymandering.

7. Judicial Inquiry: The Standard for Judges

Contrary to what many may believe, the standard of review for partisan gerrymandering would not deviate far from standards already in use. This Article has argued that the political question doctrine is not a barrier for judges to enforce the provisions of Section Two of the Fourteenth Amendment. The Court has never addressed the question, but lower courts have refused to compel compliance with the commands of the text.[269] Partisan gerrymandering results in vote dilution clearly prohibited by Section Two. The claim suggested here comes in the form of residents of the "gerrymandered" district who suffered the vote dilution (in both the House of Representatives and the Electoral College) as a result of the state's gerrymandering being discounted for apportionment purposes. The calculation would include all registered individuals of the party whose votes were diluted based on the gerrymander without regard for the gerrymander's level of extremity. The reduction in representation would come by taking the numbers of the most recent Census and comparing it to the number of people whose votes were abridged by the gerrymander.

Due to a clear constitutional command, a state's abridgment of the voting right should result in the reduction outlined in Section Two of the Fourteenth Amendment. However, the reduction would only occur if the gerrymander impacts enough individuals. Such evaluation requires no greater effort or standard than what is required in the general "one-person, one-vote cases" (*Baker* also relied on Census numbers).[270] The state would then have two choices—it could redraw the map using traditional districting criteria, or it could refrain and

268. *Baker*, 369 U.S. at 217.

269. *See* Saunders v. Wilkins, 152 F.2d 235, 237 (4th Cir. 1945); Dennis v. U.S., 171 F.2d 986, 992 (D.C. Cir. 1948). *Cf.* Harper v. Virginia State Bd. of Elections, 383 U.S. 663, 666 (1966). Professor Karlan also discussed how the Court has taken a narrow view to avoid fulfilling the constitutional command. Karlan & Levinson, *supra* note 194, at 1212–16.

270. *Baker*, 369 U.S. at 191–92.

lose representation in proportion to the percentage of the electorate whose votes were abridged by the dilution. The latter option leads to a redrawing of the map anyway so as to conform to the reduced number of representatives. Thus, if racial gerrymandering plaintiffs have a heavy hill to climb (as has been the case for decades), then courts being barred from policing partisan gerrymandering claims because they present a political question makes it easier for racialized districting to exist under the ruse of nonjusticiable partisan gerrymandering.[271]

There is a necessity for federal courts, rather than Congress, to enforce Section Two of the Fourteenth Amendment. First, it is well known that partisan gerrymandering is "incompatible with democratic principles."[272] Second, Congress has proven incapable of addressing it—nor do they have any incentive to do so.[273] Members of Congress have absolutely no reason to "ignore their own interests and do the right thing."[274] Partisan gerrymandering is a "political, civil and moral injustice" that legislatures inevitably engage in.[275] Third, the meaning of the term "abridgement" was construed broadly at the time of the adoption of Section Two.[276] And fourth, the text of Section Two has a clear prohibition against abridging the vote—and "[i]n general, the Judiciary has a responsibility to decide cases properly before it, even those it 'would gladly avoid.'"[277]

271. Bush v. Vera, 517 U.S. 952, 959 (1996). State legislators accomplish redistricting by creating little to no direct or circumstantial evidence; such action demonstrates race was the dominant factor motivating redistricting all along. *See* David Daley, *The Secret Files of the Master of Modern Republican Gerrymandering*, NEW YORKER (Sept. 6, 2019), https://www.newyorker.com/news/news-desk/the-secret-files-of-the-master-of-modern-republican-gerrymandering [https://perma.cc/5AWP-EKZW].

272. Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787, 791 (2015).

273. Rucho v. Common Cause, 139 S. Ct. 2484, 2508 (2019). Further, in 1870, future President James Garfield decried partisan gerrymandering as:

> [T]he weak point in the theory of representative government . . . that a large portion of the voting people are permanently disfranchised . . . I can find no stronger illustration of the evil than in my own State . . . by the adjustment and distribution of political power in the State . . . voters ought not by any system to be absolutely and permanently disfranchised.

CONG. GLOBE, 41st Cong., 2d Sess. 4737 (1871) (statement of Rep. James Garfield).

274. Gerken, *supra* note 190, at 2.

275. ELMER C. GRIFFITH, THE RISE AND DEVELOPMENT OF THE GERRYMANDER 124 (1907).

276. *See supra* note 121 and accompanying text.

277. Zivotofsky v. Clinton, 566 U.S. 189, 194 (2012).

Conclusion

The historical record provides the foundation and guideposts needed for the Supreme Court to protect voting rights in accordance with the Fourteenth Amendment. The historical evidence illustrates several points to prove partisan gerrymandering claims fall within the purview of federal courts. First, the Framers did not exclude courts from policing state governments that abused redistricting under the Elections Clause. Second, the members of the Thirty-Ninth Congress understood there were more ways to discriminate against a person's political rights beyond simply prohibiting them from casting a ballot due to their race. Such ways included states using political rights to ensure those they disliked remained subservient. The Thirty-Ninth Congress then provided a mechanism for dealing with abusive state governments that abridged the right to vote in its Section Two of the Fourteenth Amendment. Third, the political question doctrine does not constitute a legitimate barrier for courts to stay out of policing partisan gerrymandering.

History also casts serious doubt on the claim that the judiciary was never meant to step in and police partisan gerrymandering claims. Congress passed many bills extending jurisdiction in federal courts to protect political rights from abridgment, such as three separate Enforcement Acts covering the gamut of political protections.[278] The judiciary was long expected to police abuses by state governments, and the Framers of both the Elections Clause and Fourteenth Amendment transformed and broadened Congress's power over the states—they remade the federalism dynamic that was in place since the Founding up until the end of the Civil War. To this end, the Framers employed the power of the federal courts to give citizens redress over legislative actions (or inaction). Even under a fair review of the evidence and with the benefit of the doubt given to the courts, there is not a persuasive argument in the text, history, or original intent of the Framers compelling partisan gerrymandering claims to be committed solely to the political branches. There is far too much evidence suggesting the Framers of the Fourteenth Amendment and future Congresses understood the many ways states could abridge one's vote—and gain unfair power—and wielded the Fourteenth Amendment as a tool to help end such unjust practices. And by refusing to allow courts to police abusive state legislatures, the Court undoes "as much as possible the

278. WANG, *supra* note 134.

compromise that was reached between the House and Senate" when the Enforcement Act was crafted.[279]

Without the right to vote, what rights do we have? The history of Section Two provides persuasive evidence that the Framers used the word "abridgment" to encompass all the ways states could harm the political process. Now, the Court should adopt a new framework and protect the political process by enforcing the penalty outlined by Section Two of the Fourteenth Amendment—reduced representation in the House as well as Electoral College if states abridge the right to vote of its citizens for partisan gain. Whether or not one agrees with the remedy, one thing remains unmistakably true: Partisan gerrymandering is an abridgment of the right to vote, and Section Two of the Fourteenth Amendment, in extremely clear terms, prohibits the states from abridging the vote in any way.[280] With this in mind, *Rucho v. Common Cause* was improperly decided. The federal courts would do well to move forward and consider claims of partisan gerrymandering in alignment with its constitutional mandate to avoid diluting or impeding the ever-important right to vote. Only then will *all* citizens' voting rights be truly protected.

279. Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321 (2021) (majority discussing the dissent's goal).

280. Of course, this should not discourage litigants from challenging partisan gerrymandering schemes under state constitutional provisions. In fact, I encourage such an undertaking for the same reasons outlined in this piece. Although the federal Constitution does not confer an express right to vote, forty-nine of the fifty state constitutions expressly do. *See* Joshua A. Douglas, *The Right to Vote Under State Constitutions*, 67 VAND. L. REV. 89, 91 (2014); *see also* League of Women Voters v. Commonwealth, 178 A.3d 737, 740–41 (Pa. 2018); Burling v. Chandler, 804 A.2d 471, 485 (N.H. 2002).