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SYMPOSIUM ESSAY

Enforcing the Political Constitution

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Abstract. This short essay argues that the congruence and proportionality test of *City of Boerne v. Flores*—which the U.S. Supreme Court applies to laws passed pursuant to Section 5 of the Fourteenth Amendment—should not apply to federal voting rights legislation. This test is inapplicable because the right to vote, although a judicially protected constitutional right, is also a political right beyond the purview of the courts. The right to vote implicates a number of constitutional provisions that are direct grants of power to Congress, the exercise of which can directly conflict with the notions of judicial supremacy that dominate our legal system.

Pursuant to its obligation to guarantee to every state a republican form of government under Article IV, Section 4 and in reviewing the elections of its members under Article I, Section 5, Congress has made substantive judgments about the scope of the right to vote in ways that are not always in line with judicial pronouncements about what constitutes "appropriate legislation" under the Fourteenth and Fifteenth Amendments. Through these provisions, Congress has constructed its own vision of the substantive contours of the right to vote.

As this essay will show, *City of Boerne*'s elevation of judicial, rather than congressional, interpretation is illegitimate where the Constitution delegates overlapping and, sometimes, competing authority to Congress to dictate the scope of hybrid political/constitutional rights like the right to vote. Because of the hybrid nature of the right as both constitutional and political, the Court must acknowledge this competing view in assessing the scope of congressional power over elections.

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Introduction

For over five decades, the U.S. Supreme Court has been primarily responsible for defining the contours of the constitutional right to vote, alternating between broad and narrow interpretations of the right based on the Court's views of the U.S. Constitution. The myopic focus on judicial enforcement has led to legal scholarship and caselaw that ignores that the Constitution also permits Congress to protect the right to vote through its delegated powers, some of which are judicially unreviewable.[1] Contrary to the notions of judicial supremacy that tend to predominate in the law's collective conscious, the right to vote is both a constitutional right, protected by the courts, and a political one, protected by Congress. The right's hybrid nature has wide implications not only for the constitutionality of federal voting rights legislation, but also challenges those narratives that relegate Congress to an understudy role in federal enforcement efforts.

This essay argues that, because of the hybrid nature of the right to vote, the congruence and proportionality test of *City of Boerne v. Flores*[2]—which the Court employs to assess the constitutionality of laws passed pursuant to Section 5 of the Fourteenth Amendment—should not apply to federal voting rights legislation. In *City of Boerne*, the Court substantially narrowed Congress' authority to enforce the Amendment, holding that Congress does not have "the power to determine what constitutes a constitutional violation" under its terms.[3] Recent cases have failed to clarify whether *City of Boerne*'s congruence and proportionality standard applies to exercises of congressional authority under Section 2 of the Fifteenth Amendment, which prohibits racial discrimination in voting, or to any other provisions that empower Congress to protect the right to vote. For its part, the *Boerne* Court cited the Voting Rights Act of 1965 as the quintessential example of "congruent and proportional" legislation, yet reversed course less than two decades later in *Shelby County v.*

1. For example, Congress has protected the right to vote through the Elections Clause of Article I, Section 4 and the Guarantee Clause of Article IV, Section 4; pursuant to its authority under Article I, Section 5 to judge the elections of its members; and via the Reconstruction Amendments, to name a few examples. *See generally* Franita Tolson, *The Elections Clause and the Underenforcement of Federal Law*, 129 YALE L.J. F. 171 (2019) [hereinafter Tolson, *Elections Clause*] (describing how Congress has under-utilized its authority under the Elections Clause to protect federal elections historically); Franita Tolson, *The Spectrum of Congressional Power over Elections*, 99 B.U. L. REV. 317 (2019) [hereinafter Tolson, *Spectrum*] (arguing that the Supreme Court should assess congressional power over elections comprehensively instead of using a clause-bound approach); Part III, *infra*.

2. 521 U.S. 507 (1997).

3. *Id.* at 519.

Holder,[4] which struck down the preclearance formula of section 4(b) that required certain jurisdictions to seek authorization from the federal government to change their election laws before implementation.[5]

This reversal of course was possible because the *Boerne* Court did not consider how the hybrid nature of the right to vote establishes that the right's substance and scope is not solely within the Court's domain. The constitutional right to vote implicates a number of provisions that empower Congress to act, specifically Article IV, Section 4's requirement that Congress ensure to each state a republican form of government and Congress's authority to review the elections of its members under Article I, Section 5.[6] Under these provisions, Congress has made substantive judgments about the scope of the right to vote in executing its constitutionally sanctioned duties in ways that are not always in line with judicial pronouncements about what constitutes "appropriate legislation" under the Fourteenth and Fifteenth Amendments.

As Part I of this essay will show, *City of Boerne*'s elevation of judicial, rather than congressional, interpretation is illegitimate where the Constitution delegates overlapping and, sometimes, competing authority to Congress to dictate the scope of hybrid political/constitutional rights like the right to vote. That case, the mistakes of which were compounded by *Shelby County v. Holder*, ignores that Congress determines, on the front end, the structure of republican government and, on the back end, whether the state political system has produced a legitimate winner. Relying on often-overlooked evidence from the Reconstruction era, Part II argues that congressional power under the Guarantee Clause and Article I, Section 5 are powerful sources of authority that Congress has used to impose its own interpretive vision of the right to vote.[7] This essay concludes that the Supreme Court should resolve the

4. 570 U.S. 529 (2013).

5. *See generally id.* (explaining that Section 4(b) of the Voting Rights Act was rational "in both practice and theory" when adopted but is now irrational under any standard of review).

6. U.S. CONST. art. I, § 5.

7. Congress' ability to shape the substantive contours of the right to vote pursuant to these Clauses is at its zenith in the context of federal elections, but these provisions also bear on the scope of the right to vote in the context of state and local elections as well. Assuming that Congress has an ongoing obligation to ensure that states are republican in form, then the Guarantee Clause, the text of which is not limited to federal elections, allows Congress to legislate with respect to state and local elections. In addition, states run unitary systems for state and federal elections, and Article I, Section 2 also connects state and federal voter qualifications, making it difficult to disaggregate state and federal authority in this domain. *See generally* Franita Tolson, *Protecting Political Participation Through the Voter Qualifications Clause of Article I,* 56 B.C. L. REV. 159 (2015) (analyzing the link between state and federal voter qualifications); Tolson, *Spectrum*, *supra* note 1 (discussing the circumstances in which Congress can invoke its authority under the Elections Clause to regulate voter qualifications).

constitutionality of federal voting rights legislation within a framework that, rather than emphasizing judicial supremacy, accounts for the fact that the right to vote is both constitutional and political.

I. Who Decides? Voting Rights Enforcement After *City of Boerne* and *Shelby County*

The Supreme Court has not been especially discerning in crafting the boundaries of congressional power over voting and elections, despite the intricacies of a constitutional text and structure that place substantial authority in Congress. In *City of Boerne v. Flores*, the Court adopted a one-size-fits-all approach to congressional authority, holding that Congress does not have the power to change the scope of substantive rights under the Fourteenth Amendment; rather, Congress is limited to enacting remedies that are congruent and proportional to the harm to be addressed.[8] *Boerne*'s congruence and proportionality test has been difficult to implement because there is no consistent and predictable set of criteria to dictate when the political branches have acted within the scope of their authority as defined by the Court. The sheer 'flabbiness' of the test, to use the words of the late Justice Scalia,[9] may also explain why the Court has declined to explicitly extend it to the Fifteenth Amendment. This reluctance has not inured to the benefit of the right to vote, which remains neglected as the Court seesaws over the appropriate standard to review acts of Congress while also seeking to preserve its power to say what the law is.[10]

Initially, the Court was amenable to broad exercises of federal power where the circumstances on the ground had been resistant to more modest efforts at equalizing voting rights. For almost a century, southern states had engaged in a persistent effort to suppress African American suffrage, and had consistently defied attempts by federal officials to challenge this discrimination on a case-by-case basis. In *South Carolina v. Katzenbach*,[11] the Court concluded that the preclearance provisions of the Voting Rights Act

8. *Flores*, 521 U.S. at 519-20.

9. *See* Tennessee v. Lane, 541 U.S. 509, 557-58 (2004) (Scalia, J., dissenting). *Compare* Nev. Dep't of Hum. Res. v. Hibbs, 538 U.S. 721, 740 (2003) (upholding the Family and Medical Leave Act (FMLA)'s family leave provision under congruence and proportionality standard), *with* Coleman v. Ct. of App. of Md., 566 U.S. 30, 41 (2012) (finding that Congress failed to establish record of discrimination with respect to individual provisions of FMLA under the same standard).

10. *See* Tolson, *Spectrum*, *supra* note 1, at 326 (arguing that the Court must consider congressional power in the aggregate in assessing the constitutionality of federal voting rights legislation).

11. 383 U.S. 301 (1966).

were necessary to dislodge this longstanding culture of racial discrimination in voting, and as such, was an appropriate exercise of Congress's enforcement authority under the Fifteenth Amendment.[12]

In *Shelby County*, however, the Court pointed to the unprecedented nature of the problem that Congress faced in the 1960s to decline to read federal power broadly, even though the *Katzenbach* Court was clear that its interpretation was not based just on exigency, but also on the constitutional text and structure.[13] Instead, the *Shelby County* Court used the progress that minority voters have enjoyed because of the Voting Rights Act as a reason to deprive them of the full equality to which they are entitled under the law; according to the Court, Congress should not have reauthorized preclearance without more recent evidence of intentional discrimination by the states.[14]

Importantly, *Shelby County* failed to clarify the appropriate standard by which the Court assesses the constitutionality of federal legislation. While the Voting Rights Act had been authorized and reauthorized under both the Fourteenth and Fifteenth Amendments, the Court contended that section 4(b) failed both rational-basis review and the standard of review derived from its decision in *NAMUDNO v. Holder*, which, according to the Court, "guides [its] review under both [the Fourteenth and Fifteenth] Amendments."[15] Notably, *NAMUDNO* did not articulate a standard of review under these provisions,[16] and unsurprisingly, the Court's punt introduced substantial uncertainty about the scope of congressional power over elections.

It therefore remains an open question the extent to which the congruence and proportionality test applies to federal voting rights legislation. *Shelby County* might have avoided difficult questions about how to apply the test to the area of voting rights, but its potential application to the Fifteenth Amendment makes it necessary to probe the extent to which the judicial supremacy inherent in the congruence and proportionality standard ignores how the Constitution delegates to Congress concurrent, and in some cases, final, authority over the meaning of the right to vote.

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12. *Id.* at 308, 337.

13. *Id.* at 334 (describing preclearance regime as "an uncommon exercise of congressional power" but noting that "the Court has recognized that exceptional conditions can justify legislative measures not otherwise appropriate").

14. *Shelby Cnty.*, 570 U.S. at 547-50, 554.

15. *Id.* at 542 n.1.

16. *See* Northwest Austin Mun. Dist. No. 1 v. Holder, 557 U.S. 193, 204 (2009) ("The parties do not agree on the standard to apply in deciding whether, in light of the foregoing concerns, Congress exceeded its Fifteenth Amendment enforcement power in extending the preclearance requirements . . . That question has been extensively briefed in this case, but we need not resolve it.").

II. In Congress We Trust?: Vindicating the Right to Vote Amidst Judicial Retrenchment

During Reconstruction, much of the substantive content of the right to vote came from Congress, not the Courts. In 1868, three-fourths of the states then in the union ratified the Fourteenth Amendment, Section 2 of which reduced a state's delegation in the House if the state abridged the right to vote of male citizens who were non-felons and over the age of 21. Two years later, the Fifteenth Amendment, which prohibited racial discrimination in voting, was also ratified. There is nothing in the language of either of these provisions that precludes the judiciary from weighing in on their meaning, but much of their enforcement—as contemplated by Section 5 of the Fourteenth Amendment and Section 2 of the Fifteenth, respectively—came from Congress. What is often overlooked in this narrative is that congressional enforcement efforts did not begin or end with Reconstruction Amendments. Congress also marshalled its authority under the Guarantee Clause and Article I, Section 5, both of which are judicially unreviewable, to address state efforts to impermissibly disenfranchise African-Americans.[17] The use of sources of authority outside of the Reconstruction Amendments to enforce voting rights substantially complicates the narrative of judicial supremacy that dictates constitutional interpretation in this area.

A. Enforcing Voting Rights through the Guarantee Clause: A New Blueprint for Republican Government

Congress has an ongoing obligation to ensure that state governments are republican in form and has used this authority to create political communities built around broad access to the right to vote. In 1867, Congress used its authority under the Guarantee Clause to suspend southern governments that deprived African-Americans of civil and political rights as non-republican in form, thereby allowing the formerly enslaved to vote and serve in public

17. Reconstruction followed an unprecedented war and an acute crisis in our constitutional system. Nonetheless, the precedents developed during this period formed the foundation for congressional efforts to police the elections of its members for the next three decades, even though these actions generated mixed results. *See, e.g.*, Herbert Shapiro, *The Ku Klux Klan During Reconstruction: The South Carolina Episode*, 49 J. NEGRO HIST. 34, 37-45 (1964) (describing Congress's actions to address elections where racial discrimination, violence, and intimidation led to an illegitimate outcome, including the decision to place elections for members of Congress under federal control); H.R. Rep. No. 58-1740 (1904) (report of the House Committee on Elections regarding *Dantzler v. Lever*; declining to invalidate an election even though voters claimed they were disenfranchised in violation of federal law). These precedents also served as a blueprint for federal civil rights statutes proposed in the late nineteenth century and enacted in the mid-twentieth century. *See also* Tolson, *Elections Clause*, *supra* note 1, at 356-67.

office.[18] The Military Reconstruction Act of 1867 created a new blueprint for state governance that mitigated the risk that the former confederates would co-op the state governments and exclude the former slaves. The Act made the governments of the southern states established under presidential reconstruction provisional until they ratified the Fourteenth Amendment and held constitutional conventions staffed by delegates "elected by the male citizens of said state, twenty-one years old and upward, of whatever race, color, or previous condition."[19]

The Military Reconstruction Act was a necessary step in ensuring that southern governments would be republican in form, by creating the most racially diverse governments with the broadest electorates in United States history. The new southern governments created in the wake of the Act also ensured the ratification of the Fifteenth Amendment, a provision that would apply to the north and the south alike. As a condition of readmission, Congress required Texas, Virginia, Mississippi, and Georgia to ratify the Amendment, securing the three-fourths of states needed to make the Fifteenth Amendment a part of the Constitution on March 30, 1870.[20]

These new governments provided a reset for what constitutes republican government in the post-Reconstruction era, a standard that applied nationwide. As George Boutwell, one of the leading sponsors of the Fifteenth Amendment, argued, "none of those States in which men are denied the elective franchise for themselves and for all their posterity are republican."[21] In making this assertion, Boutwell did not reference the southern states that had yet to be formally readmitted; instead, he referenced governments "in Delaware, in Kentucky, in Maryland, in Ohio, and in Pennsylvania" as being unrepublican in form because they disenfranchised individuals on the basis of race. Moreover, he viewed Congress has having a "duty to exercise the power vested in us by the Constitution and make those governments republican by law."[22]

On paper, at least, African Americans had achieved the political equality that had been in flux since emancipation, but in practice, this equality would prove difficult to maintain, and eventually, prove illusory altogether. The Ku Klux Klan, led by Nathan Bedford Forrest—a former Confederate general who oversaw the murder of 300 black soldiers at Fort Pillow in 1864—created carnage across the south in the early 1870s, killing and terrorizing blacks who,

18. *See* Military Reconstruction Act of 1867, ch. 153, 14 Stat. 428, 429.

19. *Id.*

20. XI WANG, THE TRIAL OF DEMOCRACY: BLACK SUFFRAGE AND NORTHERN REPUBLICANS, 1860-1910 50 (1997).

21. CONG. GLOBE, 40th Cong., 3d Sess. 558 (1869) (statement of Rep. George Boutwell).

22. *Id.*

among other things, dared to vote.[23] The Fourteenth Amendment, with its penalty of reduced representation in Congress for states that abridged or denied the rights of legal voters,[24] was insufficient to deter the vigilantes who terrorized black people into staying home on Election Day and the local election officials who discarded their votes at the polls.[25] Nor would the Military Reconstruction Act be enough, standing alone. For example, in 1868, the Georgia legislature expelled all of its black members following the state's constitutional convention and legislative elections, replacing them with white men who had not only lost at the polls, but many of whom were ineligible to serve under section 3 of the Fourteenth Amendment.[26]

The Enforcement Acts stood in the gap, preventing Klan terrorism and the machinations of elected officials from overthrowing the new southern governments. Between 1870 and 1872, Congress enacted five laws pursuant to its authority under the Fourteenth and Fifteenth Amendments as well as the Elections Clause, which empowered Congress to promulgate regulations that govern federal elections.[27] The provisions of these laws were not limited to the southern states. Two of these acts—the Enforcement Acts of 1870 and 1871—created a nationwide system of federal oversight of federal elections, targeted, in part, to address fraud in northern elections.[28] These acts also punished malfeasance by state election officials or any private individuals who would impair the rights of legal voters, and importantly, enforced Section 3 of the Fourteenth Amendment by disqualifying former confederates from elected office.[29] A third act—the Ku Klux Force Act—empowered the Department of Justice to prosecute Klan terrorism.[30]

By giving substantive meaning to the Fourteenth and Fifteenth Amendments, Congress ensured that the Constitution's new vision of political community would be protected by more than mere parchment barriers. But importantly, the Fourteenth and Fifteenth Amendments were able to play this role because Congress—through the Military Reconstruction Act and various acts readmitting the former confederate states—dismantled the southern political system, redefined the requirements of republican government, and then passed federal legislation to protect these new republican governments.

23. DAVID J. CHALMERS, HOODED AMERICANISM: THE HISTORY OF THE KU KLUX KLAN 8-21 (1987).

24. U.S. CONST. amend. XIV.

25. WANG, *supra* note 20, at 60.

26. *See* CONG. GLOBE, 40th Cong., 3d Sess. 674 (1869).

27. WANG, *supra* note 20, at 57.

28. 16 Stat. 140-146 (1870); 17 Stat. 13 (1871).

29. U.S. Const. amend. XIV, Sec. 3.

30. *Id.* at 59, 64.

By 1872, it was clear that the standards of republican government, including the right to vote that became the centerpiece of this concept, was defined by Congress, not the courts.[31]

B. Reinforcing the Republican Ideal: Policing Federal Elections through Article I, Section 5

In addition to enacting expansive federal legislation, Congress also exercised its authority under Article I, Section 5 to refuse to seat presumptive congressmen elected in violation of federal law. This authority became especially important as the Supreme Court began to sharply circumscribe federal power under the Reconstruction Amendments in a number of decisions throughout the 1870s and 1880s.[32]

Take, for example, the election of Charles Miller Shelley, a brigadier general in the Confederate Army and later congressman representing Alabama's fourth congressional district. While Shelley has been lost to history, he was no different from many other Democrats in the late 1870s, first serving as a soldier in the "Lost Cause," and then, later, seeking to suppress the African-American vote through violence and intimidation while "redeeming" the South during Reconstruction. Notably, the fourth congressional district was a Democratic gerrymander that had packed many of the state's Republican voters, most of whom were African-American, in the district.[33] Yet Shelley, despite being a Democrat, had good reason to believe that his quest to win the seat would be successful. In his first congressional run in 1876, Shelley emerged

31. Indeed, Congress has invoked the Guarantee Clause as constitutional authorization for recent voting rights legislation: H.R. 1, which was Congress' most ambitious attempt to restructure our system of federal elections in a generation. H.R. 1, aptly titled the "For the People Act of 2021," addressed campaign spending, expands voter registration, proposes independent redistricting commissions, prohibits felon disenfranchisement, and bolsters election security, among other things. In fall 2021, H.R. 1 was replaced by a narrower provision, the Freedom to Vote Act, which died in the Senate in January 2022. *See* Carl Hulse, *After a Day of Debate, the Voting Rights Bill is Blocked in the Senate*, N.Y. Times (Jan. 19, 2022), https://perma.cc/Y469-RKHQ.

32. *See generally* Slaughter-House Cases, 83 U.S. 36 (1872) (interpreting the Privileges and Immunities Clause of the Fourteenth Amendment very narrowly); Civil Rights Cases, 109 U.S. 3 (1883) (finding that Congress exceeded the scope of its authority under the Fourteenth Amendment in enacting the Civil Rights Act of 1875). *See also* U.S. v. Cruikshank, 92 U.S. 542, 556 (1876) (dismissing an indictment against the defendant election inspectors who had murdered African Americans during the Colfax massacre because "the intent of the defendants was [not] to prevent these parties from exercising their right to vote on account of their race . . . ." even though the murders were politically motivated).

33. *Smith v. Shelley, Fourth Congressional District of Alabama, in* DIGEST OF ELECTION CASES: CASES OF CONTESTED ELECTIONS IN THE HOUSE OF REPRESENTATIVES, FORTY-SEVENTH CONGRESS 18, 19 (J.H. Ellsworth, ed., 1883).

victorious because voters split between the two Republican candidates.[34] Shelley continued to win re-election in subsequent elections despite the district's demographics. By the 1880 election, it was clear that voter suppression, intimidation, and violence ensured that the 18,000 vote margin that black Republicans enjoyed in the district over white Democratic voters would never translate into success at the ballot box.[35]

Thanks to adverse court decisions during this period, African-American voters in the fourth district faced an uphill battle in challenging their disenfranchisement, difficulties that should have guaranteed Shelley's victory. In *United States v. Reese*,[36] decided in October of 1875, the Supreme Court invalidated section 4 of the Enforcement Act of 1870, which provided criminal penalties for "any person [who] by force, bribery, threats, intimidation, or other unlawful means, shall hinder, delay, prevent, or obstruct . . . any citizen from doing any act required to be done to qualify him to vote or from voting at any election[.]"[37] In invalidating section 4, the Court held that the statute exceeded the scope of the Fifteenth Amendment by criminalizing the actions of state officials for any denial of the ballot rather than just race based denials.[38] According to the Court, "[s]tates, as a general rule, regulated in their own way all the details of all elections." Because the Fifteenth Amendment did not alter this basic structure, section 4 represented "a radical change in the practice and . . . should be explicit in its terms."[39]

For most students of this period, the judicial invalidation of section 4 of the Enforcement Act is the end of the story for the unfortunate voters in the fourth district, a triumph of southern Redeemers laying important groundwork for the withdrawal of federal troops from the south after the 1876 presidential election.[40] However, the House of Representatives, acting pursuant to its authority under Article I, Section 5, set aside the 1878 election in the fourth congressional district because of the extensive evidence of African-American disenfranchisement.[41] The Committee determined that white administrators had impermissibly discarded the votes of African-American

34. *Id.*

35. *Id.*

36. 92 U.S. 214 (1876).

37. *Id.* at 220.

38. *Reese*, 92 U.S. at 219 (arguing that Section 4 of the Act interfered with the state's authority to choose the qualification of electors).

39. *Id.*

40. *See, e.g.*, Ellen D. Katz, *Reinforcing Representation: Congressional Power to Enforce the Fourteenth and Fifteenth Amendments in the Rehnquist and Waite Courts*, 101 MICH. L. REV. 2341, 2348, 2350-52 (2003).

41. *Shelley*, *supra* note 33, at 32.

electors. Once these votes were considered, Congress determined that the actual winner of the election was the contestant, Republican James Q. Smith, rather than Shelley, who had been declared the winner by the state.[42]

Smith v. Shelley is a paradigmatic example of how Article I, Section 5, in expressly delegating to Congress the power to judge the elections of its members, became a powerful tool to address race discrimination in voting through means other than judicial enforcement of the Fourteenth and Fifteenth Amendments. Article I, Section 5 was a way for Congress to further ensure that the new ideal of republican government, centered on universal male suffrage, remained robust and protected. While the Reconstruction Amendments had significantly broadened the scope of federal power over elections, unfavorable court decisions and the eventual federal military withdrawal from the south had essentially neutered their effectiveness. Nevertheless, Congress became more assertive, at least for a time, about using its other constitutional powers over elections—some of which had long lain dormant—to shape state political systems, counter to a court that had started to acquiesce in efforts to return to the white dominated political structure that predated the Civil War.

Conclusion

As the tumultuous 1860s and 1870s show, it took constitutional amendments, federal legislation, and continuous congressional oversight of state and federal elections for the right to vote to have substantive meaning under the U.S. Constitution. Our current approach is juricentric only because Congress retreated from its dominance in the area in the face of a hostile Supreme Court, not because the Constitution dictates that the judicial interpretation of political rights is the only interpretation. A better approach, one that is more consistent with the constitutional text, structure and history, would be for the Supreme Court to approach its interpretation of the right to vote as an endeavor that is shared with Congress, rather than as a solitary process in which its approach is treated as authoritative.

42. *Id.* at 32-33.