

Opinion of O'CONNOR, J.

SUPREME COURT OF THE UNITED STATES

Nos. 01-1437 and 01-1596

BEATRICE BRANCH, ET AL., APPELLANTS
01-1437 *v.*
JOHN ROBERT SMITH ET AL.

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01-1596 *v.*
BEATRICE BRANCH ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF MISSISSIPPI

[March 31, 2003]

JUSTICE O'CONNOR, with whom JUSTICE THOMAS joins,
concurring in part and dissenting in part.

I join Parts I and II of the Court's opinion because I agree that the Mississippi Chancery Court's redistricting plan lacks preclearance. I join Part II–C because it is consistent with our decisions holding that federal courts should not rule on a constitutional challenge to a non-precleared voting change when the change is not yet capable of implementation. See, e.g., *Connor v. Waller*, 421 U. S. 656 (1975) (*per curiam*); see also *ante*, p. 1 (KENNEDY, J., concurring). I cannot join Part III or Part IV, however, because I disagree with the Court that 2 U. S. C. §2c is a command to the States and I disagree with the plurality regarding the proper statutory construction of §2a(c)(5).

I

First, I agree with the plurality's somewhat reluctant conclusion that §2c does not impliedly repeal §2a(c)(5). Here, it is quite easy to read §§2c and 2a(c) together. A natural statutory reading of §2a(c) gives force to both §§2c

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and 2a(c): Section 2a(c) applies “[u]ntil a State is redistricted in the manner provided by the law thereof.” Section 2c applies *after* a State has “redistricted in the manner provided by the law thereof.”

As both the plurality and JUSTICE STEVENS recognize, an implied repeal can exist only if the “provisions in the two acts are in irreconcilable conflict” or if “the later act covers the whole subject of the earlier one and is clearly intended as a substitute.” *Posadas v. National City Bank*, 296 U. S. 497, 503 (1936). See also *ante*, at 17 (plurality opinion); *ante*, at 2 (STEVENS, J., concurring in part and concurring in judgment). Indeed, “‘when two statutes are capable of co-existence, it is the duty of the courts . . . to regard each as effective.’” *Radzanower v. Touche Ross & Co.*, 426 U. S. 148, 155 (1976) (quoting *Morton v. Mancari*, 417 U. S. 535, 551 (1974)). We have not found *any* implied repeal of a statute since 1975. See *Gordon v. New York Stock Exchange, Inc.*, 422 U. S. 659. And outside the antitrust context, we appear not to have found an implied repeal of a statute since 1917. See *Lewis v. United States*, 244 U. S. 134. Because it is not difficult to read §§2a(c) and 2c in a manner that gives force to both statutes, §2c cannot impliedly repeal §2a(c). See, e.g., *United States v. Burroughs*, 289 U. S. 159, 164 (1933) (“[I]f effect can reasonably be given to both statutes, the presumption is that the earlier is intended to remain in force”); *Radzanower v. Touche Ross & Co.*, *supra*, at 155 (“Repeal is to be regarded as implied only if necessary to make the [later enacted law] work, and even then only to the minimum extent necessary. This is the guiding principle to reconciliation of the two statutory schemes” (alteration in original and internal quotation marks omitted)).

The previous versions of §§2c and 2a(c) confirm that an implied repeal does not exist here. Since 1882, versions of §§2c and 2a(c) have coexisted. Indeed, the 1882, 1891, 1901, and 1911 apportionment statutes all contained the

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single-member district requirement as well as the at-large default requirement. Compare Act of Feb. 25, 1882, ch. 20, §3, 22 Stat. 6 (“[T]he number to which such State may be entitled . . . *shall be elected by Districts* . . . , no one District electing more than one Representative” (emphasis added)) with *ibid.* (“ . . . *shall be elected at large*, unless the Legislatures of said States have provided or shall otherwise provide before the time fixed by law for the next election of Representatives therein” (emphasis added)); Act of Feb. 7, 1891, ch. 116, §3, 26 Stat. 735 (“[T]he number to which such State may be entitled . . . *shall be elected by districts*” and “[t]he *said districts shall be equal* to the number of Representatives to which such State may be entitled in Congress, no one district electing more than one Representative” (emphasis added)) with §4, 26 Stat. 736 (“[S]uch additional Representative or Representatives *shall be elected by the State at large*” (emphasis added)); Act of Jan. 16, 1901, ch. 93, §3, 31 Stat. 734 (“[T]he number to which such State may be entitled . . . *shall be elected by districts*” and “[t]he *said districts shall be equal* to the number of Representatives to which such State may be entitled in Congress, no one district electing more than one Representative” (emphasis added)) with §4, 31 Stat. 734 (“[I]f the number hereby provided for shall in any State be less than it was before the change hereby made, then the whole number to such State hereby provided for *shall be elected at large*, unless the legislatures of said States have provided or shall otherwise provide before the time fixed by law for the next election of Representatives therein” (emphasis added)); Act of Aug. 8, 1911, ch. 5, §3, 37 Stat. 14 (“[T]he Representatives . . . *shall be elected by districts*” and “[t]he *said districts shall be equal* to the number of Representatives to which such State may be entitled in Congress, no one district electing more than one Representative” (emphasis added)) with §4, 37 Stat. 14 (“[S]uch additional Representative or Representatives *shall be elected by the State at large* . . . until such State

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shall be redistricted in the manner provided by the laws thereof”).

JUSTICE STEVENS attempts to distinguish the prior versions of §2a(c) because they contained slightly different language than the present version of §2a(c). See *ante*, at 8. Even assuming, however, that the 1882 version of §2a(c) is slightly different from the present version, the versions of §2a(c) in effect in 1891, 1901, and 1911 are materially indistinguishable from the present version. Indeed, the 1911 statute—the one in effect at the time Congress enacted the present version of §2a(c)—is almost word for word the same as the current statute. Compare Act of Aug. 8, 1911, ch. 5, §4, 37 Stat. 14 (“until such State shall be redistricted in the manner provided by the laws thereof”), with 2 U. S. C. §2a(c) (“[u]ntil a State is redistricted in the manner provided by the law therof”). See also *Smiley v. Holm*, 285 U. S. 355, 374 (1932) (noting that the 1911 version of §2a(c) would apply “unless and until new districts are created”).

Given this history of the two provisions coexisting in the same statute, I would not hold that §2c impliedly repeals §2a(c). The two statutes are “capable of co-existence” because each covers a different subject matter. *Morton v. Mancari*, *supra*, at 551. Section 2c was not intended to cover the whole subject of §2a(c) and was not “clearly intended as a substitute” for §2a(c). *Posadas v. National City Bank*, *supra*, at 503. Section 2a(c) (requiring at-large elections) applies unless or until the State redistricts, and §2c (requiring single-member districts) applies once the State has completed the redistricting process.

This Court has in fact read the prior versions of §§2c and 2a(c) so that the two did not conflict. In *Smiley v. Holm*, *supra*, we recognized that under the 1911 version of these provisions, at-large elections were an appropriate remedy if the State was not properly redistricted in the first instance. See *id.*, at 374 (“[U]nless and until new

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districts are created, all representatives allotted to the State must be elected by the State at large”).

When the 1911 statute expired in 1929, Congress did not reenact it. Instead, Congress passed §2a(c), which took effect in 1941. Because §2a(c) concerned only at-large elections, no complementary single-member district requirement existed from 1941 until 1967. In 1967, Congress enacted §2c, which states in relevant part: “[T]here shall be established by law a number of districts equal to the number of Representatives to which such State is so entitled, and Representatives shall be elected only from districts so established, no district to elect more than one Representative” The relevant language of this statute tracks the language of the prior versions of §2c. JUSTICE STEVENS’ only distinction between the prior versions of §2c and this version of §2c is that Congress added the word “only” to the latest version of §2c. See *ante*, at 4. But this one word is a thin reed on which to rest an implied repeal. JUSTICE STEVENS would hold that instead of expressly repealing §2a(c), Congress added the word “only” to §2c. This one-word addition that does not change the meaning of the statute is no basis for finding an implied repeal.

JUSTICE STEVENS argues that Congress intended to “‘cove[r] the whole subject’” of at-large redistricting when it enacted §2c in 1967. *Ante*, at 3 (quoting *Posadas v. National City Bank*, 296 U. S., at 503). But the 1967 enactment of §2c simply restored the prior balance between the at-large mandate and the single-member district mandate that had existed since 1882. To hold that an implied repeal exists, one would have to conclude that Congress repeatedly enacted two completely conflicting provisions in the same statute. The better reading is to give each provision a separate sphere of influence, with §2a(c) applying until a “State is redistricted in the manner provided by the law thereof,” and §2c applying after the

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State is redistricted. Because the 1967 version of §2c parallels the prior versions of §2c, and because of the longstanding coexistence between the prior versions of §§2a(c) and 2c, JUSTICE STEVENS' argument that Congress "clearly intended" §2c "as a substitute" for §2a(c) is untenable. *Ante*, at 2, n. 1; *Posadas v. National City Bank*, *supra*, at 503. Cf. *Regional Rail Reorganization Act Cases*, 419 U. S. 102, 134 (1974) ("Presumably Congress had given serious thought to the earlier statute Before holding that the result of the earlier consideration has been repealed or qualified, it is reasonable for a court to insist on the legislature's using language showing that it has made a considered determination to that end").

JUSTICE STEVENS' strongest argument is that the legislative history indicates that "all parties involved were operating under the belief that the changes they were debating would completely replace §2a(c)." *Ante*, at 7. Yet JUSTICE STEVENS acknowledges that Congress *could have* expressly repealed §2a(c). See *ante*, at 4, 8. JUSTICE STEVENS thinks the evidence that Congress tried to expressly repeal §2a(c) four times cuts strongly in favor of an implied repeal here. See *ante*, at 8. But these four attempts to repeal §2a(c) were unsuccessful. It is difficult to conclude that Congress can impliedly repeal a statute when it deliberately chose not to expressly repeal that statute. In this case, where the two provisions have coexisted historically, and where Congress explicitly rejected an express repeal of §2a(c), I would not find an implied repeal of §2a(c).

I would hold instead that Congress passed §2c in 1967 to restore redistricting law to its pre-1941 status, when §2a(c) became effective without any complementary provision regarding single-member districts. The floor statements and colloquy by Senators Baker and Bayh cited by JUSTICE STEVENS, see *ante*, at 6–7, n. 5, cannot overcome the strong presumption against implied repeals, especially

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given the historical evidence that §§2c and 2a(c) had peacefully coexisted since the 19th century. And as explained in more detail in Part II–B, *infra*, the circumstances leading up to the passage of §2c in 1967 do not support a finding of implied repeal.

In short, because §§2a(c)(5) and 2c are capable of coexistence, and because the history shows that §2c does not cover the whole subject of §2a(c), I agree with the plurality that §2c does not impliedly repeal §2a(c), and therefore that §2a(c) “continues to apply.” *Ante*, at 18.

II

A

Although the plurality acknowledges that §2a(c) remains in full force, it inexplicably adopts a reading of §2a(c) that has no textual basis. Under §2a(c)(5), the State must conduct at-large elections “[u]ntil a State is redistricted in the manner provided by the law thereof.” Instead of simply reading the plain text of the statute, however, the plurality invents its own version of the text of §2a(c). The plurality holds that “[u]ntil a State is redistricted . . .” means “[u]ntil . . . the election is so imminent that no entity competent to complete redistricting pursuant . . . to the mandate of §2c [] is able to do so without disrupting the election process.” *Ante*, at 19. But such a reading is not faithful to the text of the statute. Like JUSTICE STEVENS, I believe that the Court’s interpretation of §2a(c) is nothing more than “tortured judicial legislation.” *Ante*, at 9. See also Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1185 (1989) (“[W]hen one does not have a solid textual anchor or an established social norm from which to derive the general rule, its pronouncement appears uncomfortably like legislation”).

Dictionary definitions confirm what the plain text says: “Until a State is redistricted in the manner provided by

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the law thereof” means “[u]ntil a State is redistricted in the manner provided by the law thereof.” The meaning of the word “until” is not difficult to understand, nor is it some specialized term of art. See Webster’s New International Dictionary 2794 (2d ed. 1957) (defining “until” to mean “[d]uring the whole time before”); Webster’s Collegiate Dictionary 1297 (10th ed. 1993) (defining “until” to mean “up to such time as” or “[b]efore”). The word “redistricted” also is not hard to comprehend. *Id.*, at 980 (defining “redistrict” to mean “to divide anew into districts”); Black’s Law Dictionary 1283 (7th ed. 1999) (defining “redistrict” to mean “[t]o organize into new districts, esp. legislative ones; reapportion”). While the Court employs dictionary definitions to interpret §5 of the Voting Rights Act of 1965, see *ante*, at 8, it notably refrains from using any dictionary definition for §2a(c).

Section 2a(c) contains *no* imminence requirement. It is not credible to say that “until a State is redistricted in the manner provided by the law thereof after any apportionment” means: “[u]ntil . . . the election is so imminent that no entity competent to complete redistricting pursuant to . . . the mandate of §2c [] is able to do so without disrupting the election process.” *Ante*, at 19. The plurality characterizes §2a(c) as a “stopgap provisio[n],” but the text of §2a(c) is not so limited. *Ibid.* The plurality asks “[h]ow long is a court to await that redistricting before determining that §2a(c) governs a forthcoming election?” *Ibid.* Yet the text provides *no basis* for why the plurality would ask such a question. Indeed, the text tells us “how long” §2a(c) should govern: “*until* a State is redistricted in the manner provided by the law thereof.” (Emphasis added.) Under the plurality’s reading, however, §2a(c) would not apply even though §2a(c) by its terms *should* apply, as the State has not yet “redistricted in the manner provided by the law thereof.” The language of the statute cannot bear such a reading. Cf. *Holloway v. United States*, 526 U. S. 1,

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14 (1999) (SCALIA, J., dissenting) (“No amount of rationalization can change the reality of this normal (and as far as I know exclusive) English usage. The word in the statute simply will not bear the meaning that the Court assigns”).

The dispositive question is what the text says it is: Has a State “redistricted in the manner provided by the law thereof”? 2 U. S. C. §2a(c). “*Until* a State is redistricted in the manner provided by the law thereof after any apportionment,” a court cannot draw single-member districts. *Ibid.* (emphasis added). The court must apply the terms of §2a(c) and order at-large elections. If, however, the State is redistricted “in the manner provided by the law thereof,” §2c applies. Thus, *after* a State has been redistricted, if a court determines that the redistricting violates the Constitution or the Voting Rights Act, the correct remedy for such a violation is the §2c procedure of drawing single-member districts that comport with federal statutory law and the Constitution. But “[u]ntil a State is redistricted in the manner provided by the law thereof,” §2a(c)(5) mandates that a court order at-large elections. In short, a court should enforce §2a(c) *before* a “State is redistricted in the manner provided by the law thereof,” and a court should enforce §2c *after* a State has been “redistricted in the manner provided by the law thereof.”

The plurality seems to forget that in cases such as this one, a federal court has the power to redistrict only because private parties have alleged a violation of the Constitution or the Voting Rights Act. Sections 2a(c) and 2c do not create independently enforceable private rights of action themselves. Rather, both these provisions address the *remedy* that a federal court must order if it finds a violation of a constitutional or statutory right.¹ The federal plaintiffs

¹It does not matter whether §2a(c) applies exclusively to legislative

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in this case alleged a constitutional violation, and the federal court drew a plan to remedy that violation. Having found a constitutional violation, the federal court was required to fashion the appropriate remedy of §2c or §2a(c) depending on whether the “State is redistricted in the manner provided by the law thereof.” 2 U. S. C. §2a(c).

The plurality’s reading of §2a(c) also fails on its own terms. As the plurality appears to acknowledge, *ante*, at 21, the plain text of §2a(c) requires courts to apply §2a(c) before applying §2c. Yet the plurality never justifies why, when it is interpreting §2a(c), it looks to §2c instead of reading the plain language of §2a(c) itself. If state law really includes federal law, as the Court maintains, both §§2c and 2a(c) are equally applicable. The text of §2a(c) directs federal courts to order at-large elections “[u]ntil a State is redistricted in the manner provided by the law thereof.” In deciding whether §2c or §2a(c) is applicable, it is no answer to escape the directive of §2a(c) by pointing to the text of §2c. Indeed, if one takes at face value the plurality’s statement that §2a(c) “continues to apply,” *ante*, at 18, a court should not look at §2c until the State complies with the terms of §2a(c). Section 2a(c) is antecedent to §2c, since §2a(c) defines when at-large elections are appropriate.

Moreover, the Court’s interpretation of the interplay between §§2a(c) and 2c calls into question this Court’s anti-commandeering jurisprudence. See, *e.g.*, *New York v.*

redistricting. Under the terms of §2a(c), courts can be involved in the redistricting process. To the extent that courts are part of the “manner provided by the law thereof,” courts may redistrict. 2 U. S. C. §2a(c). And contrary to the plurality’s interpretation, the text of §2a(c) makes clear that this “manner” refers exclusively to state law. The *manner* in which a State redistricts can only refer to the *process* by which a State redistricts. Moreover, the plurality’s conflation of state and federal law is in substantial tension with this Court’s opinion in *Pennhurst State School and Hospital v. Halderman*, 465 U. S. 89 (1984) (delineating a distinction between state and federal law when a federal court enters an injunction).

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United States, 505 U. S. 144, 166 (1992) (“We have always understood that even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts”); and *Printz v. United States*, 521 U. S. 898, 912 (1997) ([S]tate legislatures are *not* subject to federal direction”) (SCALIA, J.). The plurality states that the anticommandeering jurisprudence is inapplicable to Article I, §4, because that section gives Congress the power to “Regulat[e]” the times, places, and manner of holding congressional elections. But of course, Article I, §8, uses similar language when it authorizes Congress to “regulate Commerce . . . among the several States.” Whether the anticommandeering principle of *New York* and *Printz* is as robust in the Article I, §4, context (the font of congressional authority here) as it is in the Article I, §8, context (the source of congressional authority in those cases) is a question that need not be definitively resolved here. In any event, the canon of constitutional avoidance counsels strongly against the reading of §§2c and 2a(c) adopted in Parts III and IV of the principal opinion. The Court’s reading of §2c, see *ante*, at 15–16—also adopted by JUSTICE STEVENS—invites a future facial attack to the constitutional validity of §2c.²

²It is just as coercive for Congress to say that if the State does not comply with a legislative command, a federal court will enter an injunction making the State conform with Congress’ command. See, e.g., *New York v. United States*, 505 U. S. 144, 174–177 (1992) (striking down Congress’ “take title” provision because the choice between two unconstitutional choices is “no choice at all”). If §2c is not a command, however, a State has the choice between passing redistricting legislation or using at-large elections. Section 2c merely limits the type of remedies that a federal court may adopt in response to a pre-existing violation of federal law. Neither it nor §2a(c) affirmatively provides courts the authority to draw districts absent a violation. Rather, §2a(c) specifies which remedy is appropriate for the constitutional violation. See 2

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The history of the prior versions of §2c shows that §2c has *never* been treated as an absolute command. States routinely used at-large elections under the previous iterations of §2c, even though those versions of §2c also stated that Representatives “shall be elected by districts.” Act of June 25, 1842, ch 47, §2, 5 Stat. 491; Act of July 14, 1862, ch. 170, 12 Stat. 572; Act of Feb. 2, 1872, 17 Stat. 28; cf. *supra*, at 3–4 (documenting the 1882, 1891, 1901, and 1911 versions of §2c). See also K. Martis, *Historical Atlas of United States Congressional Districts 1789–1983*, pp. 4, 6 (1982) (hereinafter Martis) (documenting 36 States that used at-large elections from the 28th Congress—after Congress passed the first version of §2c in 1842—through the 70th Congress, when the last version of §2c expired in 1929).³ Indeed, in *every* Congress from 1843 until 1929, at least one State used some form of at-large representation.

Unless the Court is willing to say that these States

U. S. C. §2a(c) (a court must order at-large elections “[u]ntil a State is redistricted in the manner provided by the law thereof”).

³Alabama (43d, 44th, 63d, 64th Congresses), Arkansas (43d, 48th Congresses), California (31st–38th, 48th Congresses), Colorado (58th–63d Congresses), Connecticut (58th–62d Congresses), Florida (43d, 63d Congresses), Georgia (28th, 48th Congresses), Iowa (29th Congress), Kansas (43d, 48th, 53d–57th, 59th, 60th Congresses), Idaho (63d–65th Congresses), Illinois (37th–42d, 53d, 63d–70th Congresses), Indiana (43d Congress), Louisiana (43d Congress), New York (43d, 48th Congresses), Maine (48th Congress), Michigan (63d Congress), Minnesota (35th–37th, 63d Congresses), Mississippi (28th, 29th, 33d Congresses), Missouri (28th, 29th Congresses), Montana (63d–65th Congresses), New Hampshire (28th, 29th Congresses), New Mexico (62d Congress), North Carolina (48th Congress), North Dakota (58th–62d Congresses), Ohio (63d Congress), Oklahoma (63d Congress), Pennsylvania (43d, 48th–50th, 53d–57th, 63d–67th Congresses), South Carolina (43d Congress), South Dakota (51st–62d Congresses), Tennessee (43d Congress), Texas (43d, 63d–65th Congresses), Utah (63d Congress), Virginia (48th Congress), Washington (53d–60th, 63d Congresses), West Virginia (63d, 64th Congresses), Wisconsin (30th Congress).

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openly flouted federal law, the only way to read this history is to acknowledge that §2c is not a statutory command. But see *ante*, at 19 (plurality opinion) (§2c is a “statutory comman[d]”). Rather, §2c and its predecessors tell States what type of redistricting legislation they are allowed to pass (all others being prohibited). This reading also comports with the pre-1842 history of congressional elections. Before Congress passed its first version of §2c in 1842, States routinely would elect more than one individual from a specific district. See Martis 4–5 (listing five States—Maryland, Massachusetts, New Jersey, New York, and Pennsylvania—that used multimember districts from the 3d Congress in 1793 through the 27th Congress in 1842). After the first version of §2c went into effect, however, States could no longer use multimember districts. Rather, States could either redistrict using single-member districts or use at-large elections. In short, §2c does not tell States that they must pass redistricting legislation. Section 2c is instead a restriction on the *type* of legislation that a State may pass—a restriction completely consistent with *New York* and *Printz*. And §2a(c) provides that at-large elections will be the default mechanism if States choose not to pass redistricting legislation.

An interpretation of §2a(c) which mandates that courts order at-large elections “[u]ntil a State is redistricted in the manner provided by the law thereof” does not mean that once a redistricting plan is in effect, §2a(c) applies if a court later deems the apportionment plan invalid. The words of §2a(c) specifically refer to the process in which the State redistricts: “in the manner provided by the law thereof.” Section 2a(c) is no longer implicated after the State finishes its process of redistricting “in the manner provided by the law thereof after any apportionment.” When all required action by the State is complete, and when the state plan first becomes effective, the “State is redistricted in the manner provided by the law thereof.”

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Ibid.

B

Because the plurality's construction of §2a(c) has no statutory basis, the only way to understand the Court's opinion is that the Court is overlooking the words of the statute for nontextual prudential reasons. Cf. A. Scalia, A Matter of Interpretation 18–23 (1997) (discussing the case of *Church of Holy Trinity v. United States*, 143 U. S. 457 (1892), and noting that “Congress can enact foolish statutes as well as wise ones, and it is not for the courts to decide which is which and rewrite the former”).

The only other prudential reason why the plurality would distort the plain text of §2a(c) is to hold *sub silentio* that §2c impliedly repeals §2a(c). Why else would the plurality note the “tension” between the two statutes, *ante*, at 17, note that “[t]here is something to be said for [the implied repeal] position,” *ibid.*, and engage in such a long exegesis about the historical context surrounding the enactment of §2c? See *ante*, at 12–15 (majority opinion). The plurality adopts the reading of §2a(c) proposed by one District Court in a 1982 decision. See *Carstens v. Lamm*, 543 F. Supp. 68 (Colo. 1982). As the United States recognizes in its brief, the reasoning of *Carstens* is nothing less than a *partial implied repeal* of §2a(c). See Brief for United States as *Amicus Curiae* 29. (“Section 2c’s unequivocal mandate that Members of the House of Representatives should be elected from single-member districts (except where exigencies of time render that impracticable, see *Carston [sic] v. Lamm*, *supra*) resolves that problem. It creates a workable and sensible regime that faithfully fulfills Congress’s purpose when it enacted Section 2c in 1967”); see also *id.*, at 10 (“While . . . repeal by implication is disfavored, so is failure to give a later-enacted statute the full scope that its terms require”).

Moreover, neither the plurality nor JUSTICE STEVENS

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can rely on the historical context of the pre-1967 cases to support their interpretations of §§2a(c) and 2c. This history in fact cuts against them. It is true that before 1967, some district courts threatened to impose at-large elections if the state redistricting plan were ruled unconstitutional. See *ante*, at 13 (majority opinion) (citing cases). In all these cases, however, a legislature had already redistricted “in the manner provided by the law thereof.” 2 U. S. C. §2a(c).⁴

Thus, Congress’ response in enacting §2(c) cannot be read to target anything more than situations in which a State had already “redistricted in the manner provided by the law thereof.” And of course, once a State was redistricted in this manner, §2a(c) by its terms would not apply. If anything, the enactment of §2c in 1967 clarified that the statutory balance between §§2c and 2a(c) that had existed in prior versions of the statute would continue to exist.

⁴See, e.g., *Calkins v. Hare*, 228 F. Supp. 824, 825 (ED Mich. 1964) (“The plaintiffs have challenged the constitutionality of the congressional districting in this state”); *Bush v. Martin*, 251 F. Supp. 484, 488 (SD Tex. 1966) (“The question is whether the Texas 1965 Congressional Redistricting Act . . . is constitutional”); *Park v. Faubus*, 238 F. Supp. 62, 63 (ED Ark. 1965) (“It is alleged that Act 5 of the Second Extraordinary Session of the Acts of the General Assembly of the State of Arkansas for the year of 1961, being the Act which divides the State of Arkansas into congressional districts, deprives plaintiff and others similarly situated of their right to vote” (citation omitted)); *Preisler v. Secretary of State*, 257 F. Supp. 953, 955 (WD Mo. 1966) (The “plaintiffs contest the constitutional validity of Missouri’s 1965 Congressional Redistricting Act”); *Meeks v. Anderson*, 229 F. Supp. 271, 272 (Kan. 1964) (“The action was brought by qualified voters in four of the five Congressional Districts of Kansas, seeking to have Kansas Statutes, which is the last congressional reapportionment by the Kansas Legislature, declared unconstitutional” (citation omitted)); *Baker v. Clement*, 247 F. Supp. 886, 888 (MD Tenn. 1965) (“This case presents the question of whether the statute creating Tennessee’s nine congressional districts violates Article 1, Section 2 of the Constitution of the United States”).

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The cases cited by the Court do not resolve the question of what happens when a State *fails* to redistrict “in the manner provided by the law thereof.” 2 U. S. C. §2a(c). The Court itself describes these pre-1967 cases as decisions where the courts “are remedying a failure to redistrict constitutionally.” *Ante*, at 14. I agree with the Court that when a court strikes down a State’s apportionment plan, §2c mandates that a court “draw single-member districts whenever possible.” *Ibid*. The historical context confirms that once a State is redistricted, and the court rules that the plan is unconstitutional, §2c ensures that courts not order at-large elections. Because in these pre-1967 cases the legislature had redistricted “in the manner provided by the law thereof,” §2a(c) was not applicable. Thus, the Court cannot rely on these pre-1967 cases to support the notion that the historical context surrounding the enactment of §2c renders §2a(c) toothless. Indeed, it is unclear why the Court examines this historical context at all. Cf. *Bank One Chicago, N. A. v. Midwest Bank & Trust Co.*, 516 U. S. 264, 279 (1996) (SCALIA, J., concurring in part and concurring in judgment) (“In my view a law means what its text most appropriately conveys, whatever the Congress that enacted it might have ‘intended.’ The law *is* what the law *says*, and we should content ourselves with reading it rather than psychoanalyzing those who enacted it”).

The Court also implies that it reads §2a(c) in the way it does because our decisions in *Baker v. Carr*, 369 U. S. 186 (1962), *Wesberry v. Sanders*, 376 U. S. 1 (1964), and *Reynolds v. Sims*, 377 U. S. 533 (1964), “ushered in a new era in which federal courts were overseeing efforts by badly malapportioned States to conform their congressional electoral districts to the constitutionally required one-person, one-vote standards.” *Ante*, at 12. For JUSTICE STEVENS, these decisions explain why Congress passed §2c. See *ante*, at 4, 6–7. But these watershed opinions

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cannot change the meaning of §2a(c). First, a later development cannot change an unamended statute. See *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U. S. 765, 780–784 (2000) (SCALIA, J.). Since §2a(c) was enacted decades before the *Baker* line of cases, this subsequent development cannot change the interpretation of §2a(c).

Second, the Court's decision in *Baker v. Carr*, *supra*, rested in large part on the fact that courts were *already* involved in overseeing apportionment cases. Courts had been “directing” redistricting disputes since well before *Baker*. *Ante*, at 12. Indeed, the Court in *Baker* specifically acknowledged that “[a]n unbroken line of our precedents sustains the federal courts’ jurisdiction of the subject matter of federal constitutional claims of this nature.” 369 U. S., at 201–202 (citing cases, including *Colegrove v. Green*, 328 U. S. 549 (1946)). In *Smiley v. Holm*, 285 U. S., at 375, for example, we specifically reached the redistricting question, and held that the prior versions of §§2c and 2a(c) mandated at-large elections “in the absence of a redistricting act.” We held that at-large elections were required “in order to afford the representation to which the State is constitutionally entitled, and the general provisions of the Act of 1911 cannot be regarded as intended to have a different import.” *Ibid*.

In *Wood v. Broom*, 287 U. S. 1 (1932), the Court ruled on an issue strikingly similar to that in front of the Court today: the effect of the prior versions of §§2c and 2a(c) when the Mississippi congressional delegation was reduced by one seat. In fact, the District Court in *Wood* made a ruling on statutory grounds that would mirror the post-*Baker* constitutional review: “The District Court held that the new districts, created by the redistricting act, were not composed of compact and contiguous territory, having as nearly as practicable the same number of inhabitants, and hence failed to comply with the mandatory

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requirements of §3 of the Act of August 8, 1911.” 287 U. S., at 5. See also *Hume v. Mahan*, 1 F. Supp. 142 (ED Ky. 1932). Likewise, before *Baker*, state courts had enforced prior versions of §§2c and 2a(c). See, e.g., *Moran v. Bowley*, 347 Ill. 148, 179 N. E. 526 (1932); *State ex rel. Carroll v. Becker*, 329 Mo. 501, 45 S. W. 2d 533 (1932). In short, while *Baker* and its progeny expanded the scope of federal court review, these cases did not change the fact that this Court recognized federal court jurisdiction over this subject matter at the time of §2a(c)’s enactment. Therefore, the *Baker* line of cases could not have caused §2a(c) to magically change meaning.

The plurality also seems to base its *sub silentio* holding of implied repeal on the fact that “[e]ighty percent” of §2a(c) is “dead letter.” *Ante*, at 17. But even assuming that the first four parts of §2a(c) are currently unconstitutional, they were not necessarily unconstitutional when Congress passed §2c in 1967. For instance, §2a(c)(1) specifies that “[i]f there is no change in the number of Representatives, they shall be elected from the districts then prescribed by the law of such State.” While it is true today that no district could in all probability remain exactly the same after an apportionment, it was not true in 1967.

This Court did not hold that a strict zero-deviation rule applied to redistricting cases until the 1983 decision of *Karcher v. Daggett*, 462 U. S. 725. Indeed, the decision of this Court in *Wesberry v. Sanders*, *supra*, stated only that congressional districts must be equal to each other “as nearly as is practicable.” *Id.*, at 7–8. As JUSTICE STEVENS points out, after *Wesberry*, the House passed a bill in 1965 permitting congressional districts to deviate by as much as 15%. See *ante*, at 4–5. In 1967, in the same Congress that passed §2c, the House passed a bill permitting congressional districts to deviate by as much as 10%. See *ante*, at 5. And it appears that at least with the State of New

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Mexico, the congressional apportionment plan did not change after the 1970 census. See *Martis* 247 (noting that New Mexico used its 1968 districting plan from the 91st through the 97th Congresses—in other words, from 1968 through 1983). These same principles also explain why as of 1967, §§2a(c)(2), 2a(c)(3), and 2a(c)(4) were similarly constitutional.

Even if parts of §2a(c) would be unconstitutional today, a court can redistrict the existing district lines to make the districts constitutional while ordering an at-large election for the additional Representatives. Indeed, this approach best accords with the principle that a federal court's "modifications of a state plan are limited to those necessary to cure any constitutional or statutory defect." *Upham v. Seamon*, 456 U. S. 37, 43 (1982) (*per curiam*). And even if only §2a(c)(5) were constitutional, the plurality correctly recognizes that §2a(c)(5) is easily severable from the rest of the statute. See *ante*, at 17.

Finally, the fact that a court must enter an order under §2a(c)(5) mandating at-large elections does not necessarily mean that the plan would violate §§2 or 5 of the Voting Rights Act, 42 U. S. C. §§1973, 1973c, or that traditional winner-take-all elections are required on a statewide basis. Rather, as cross-appellants acknowledge, Brief for Cross-Appellants in No. 01–1596, pp. 27–28, Tr. of Oral. Arg. 47–48, a court could design an at-large election plan that awards seats on a cumulative basis, or by some other method that would result in a plan that satisfies the Voting Rights Act. Cf. *Grove v. Emison*, 507 U. S. 25, 40 (1993); *Rogers v. Lodge*, 458 U. S. 613, 616–617 (1982); *Holder v. Hall*, 512 U. S. 874, 897–898, 908–912 (1994) (THOMAS, J., concurring in judgment); *Dillard v. Chilton County Bd. of Ed.*, 699 F. Supp. 870 (MD Ala. 1988); see also S. Issacharoff, P. Karlan, & R. Pildes, *The Law of Democracy* 1091–1151 (rev. 2d ed. 2002); Pildes & Donoghue, *Cumulative Voting in the United States*, 1995

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U. Chi. Legal F. 241, 251–257.

In short, I cannot agree that the phrase “[u]ntil a State is redistricted in the manner provided by the law thereof” contains any sort of “imminence” requirement, a requirement without any statutory mooring. And although the plurality claims to hold that §2c does not impliedly repeal §2a(c), the plurality’s opinion makes sense only if §2c serves as a partial implied repeal of §2a(c). It is difficult to say, as the plurality does, that §2a(c) “continues to apply,” *ante*, at 18, and also to say, as the plurality does, that §2a(c) applies only if “the election is so imminent that no entity competent to complete redistricting pursuant to . . . the mandate of §2c [] is able to do so without disrupting the election process.” *Ante*, at 19. Unless and until Congress expressly repeals §2a(c), I would hold that federal courts are required to order some form of at-large elections “[u]ntil a State is redistricted in the manner provided by the law thereof after any apportionment.”

III

Having concluded that §2a(c) applies “[u]ntil a State is redistricted in the manner provided by the law thereof after any apportionment,” it is necessary to consider the question that the Court intentionally avoids: whether the State of Mississippi here has been “redistricted in the manner provided by the law thereof.” If it has not, §2a(c) applies, and the District Court should have ordered at-large elections. If it has been “redistricted,” the District Court was correct to draw single-member districts under §2c. Under this Court’s consistent case law, and under Mississippi state law, a State is not “redistricted” until the apportionment plan has been precleared under §5 of the Voting Rights Act, 42 U. S. C. §1973c. Because Mississippi’s plan has not been precleared, I would hold that §2a(c) applies.

We have held that a “new reapportionment plan enacted by a State . . . will not be considered ‘effective as law,’ until

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it has been submitted and has received clearance under §5.” *Wise v. Lipscomb*, 437 U. S. 535, 542 (1978) (plurality opinion) (quoting *Connor v. Finch*, 431 U. S. 407, 412 (1977)) (citation omitted). Accord, *Connor v. Waller*, 421 U. S., at 656 (an apportionment plan is “not now and will not be effective as laws until and unless cleared pursuant to §5”); *Morris v. Gressette*, 432 U. S. 491, 501–502 (1977) (“Section 5 requires covered jurisdictions to delay implementation of validly enacted state legislation until federal authorities have had an opportunity to determine whether that legislation conforms to the Constitution and to the provisions of the Voting Rights Act”); *Clark v. Roemer*, 500 U. S. 646, 652 (1991); *Hathorn v. Lovorn*, 457 U. S. 255, 269 (1982) (“Our opinions repeatedly note that failure to follow [the preclearance procedures] renders the change unenforceable”). Indeed, in *Hathorn v. Lovorn*, we held that Mississippi itself could “not further implement [a] change until the parties comply with §5.” *Id.*, at 270.

Preclearance is the final step in the process of redistricting. If the apportionment plan is not precleared, it is not “effective as law,” and cannot be implemented. Under our case law, then, a State is only redistricted once the clearance process is complete. Before a covered jurisdiction receives clearance, the Federal Government may force the State to make changes to the redistricting plan. Once a State receives preclearance, it may implement a voting change.

The Mississippi Supreme Court has recognized that the redistricting process is not complete until the apportionment plan is cleared: “Voting changes subject to §5 ‘will not be effective as law until and unless cleared.’” *In re McMillin*, 642 So. 2d 1336, 1339 (Miss. 1994) (quoting *Connor v. Waller*, *supra*, at 656). In *McMillan*, the Mississippi Supreme Court held that a plan for nonpartisan judicial elections passed by the legislature was not yet effective because it had not been precleared. 642 So. 2d, at

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1339. Consequently, the court ordered elections to occur under the *old* plan, which required partisan judicial elections. See *ibid.* (“Consequently, the statutes currently governing primary judicial elections and setting such elections for Tuesday, June 7, 1994, are the only enforceable provisions regarding said primaries”). Thus, despite the fact that the legislature had passed a law mandating nonpartisan judicial elections, despite the fact that the new law *expressly repealed* the old law, despite the fact that the Governor had signed the law, and despite the fact that the State had submitted the new law to the United States Attorney General for preclearance under §5, this new law was not operative for one reason: The United States Attorney General had not precleared this new law by the time of the new primary elections. See *id.*, at 1338. Thus, at least in Mississippi, the old voting plan remains in effect *until the new plan has been precleared*.

Accordingly, the terms of §2a(c)(5) should apply here, and the District Court should have ordered at-large elections for the entire state congressional delegation. Congress can expressly repeal §2a(c) quite easily. But it has not done so. This Court should not presume to act in Congress’ stead. And this Court should not read §2a(c) in a manner divorced from any semblance of textual fidelity in order for it to reach what it deems to be the “correct” or more unintrusive result. I therefore respectfully dissent from Part III-A of the Court’s opinion and Parts III-B and IV of the plurality opinion.