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## Vote Denial and Defense: Reaffirming the Constitutionality of Section 2 of the Voting Rights Act

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## Vote Denial and Defense: Reaffirming the Constitutionality of Section 2 of the Voting Rights Act

Hayden Johnson†

### Abstract

*Election law advocates and scholars have revered the Voting Rights Act (VRA) as holding “super-statute” status. But the Supreme Court in Shelby County v. Holder rattled this view after it ruled that a core provision of the statute was unconstitutional. Since then, jurisdictions nationwide have increasingly enacted so-called “vote denial” laws, which restrict where, when, and how voters can participate in the electoral process and often disproportionately harm voters of color. At the same time, proponents of these restrictive laws are making louder and more explicit invitations for the Court to also rule unconstitutional the primary remaining VRA tool to confront vote denial laws: the Section 2 results test. Indeed, during October Term 2020, the Supreme Court will decide Brnovich v. Democratic National Committee, a case with significant implications for the future of Section 2.*

*The arguments that Section 2 is unconstitutional fall into two main categories: (1) Section 2 exceeds Congress’ enforcement power under the Reconstruction Amendments because the results test lacks “congruence and proportionality” to the harm of intentional voting discrimination; and (2) Section 2 violates the Equal Protection Clause because the results test requires excessive race-consciousness by state election decisionmakers. This article discusses both theories of Section 2’s purported unconstitutionality and how the Supreme Court has handled similar challenges in related antidiscrimination contexts. It then rebuts these challenges and reaffirms that the prevailing Section 2 results test applied in the vote denial context stands on firm constitutional ground.*

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## Table of Contents

Introduction .....	48
I. Modern Voter Suppression and the Section 2 Results Test.....	55
II. Constitutional Concerns About Section 2 .....	63
A. Forecasting the Roberts Court's View of the Section 2 Results Test .....	65
B. Two Constitutional Challenges to Section 2.....	75
i. <i>City of Boerne</i> "Congruence and Proportionality" Challenge to Section 2.....	76
a. <i>Boerne</i> Problem One: Judicial Supremacy and Remedial Mandate .....	78
b. <i>Boerne</i> Problem Two: Limitations on Temporal and Geographic Scope .....	79
c. Rebuttal to <i>Boerne</i> Arguments Against Section 2 .	83
ii. Equal Protection Clause Challenge to Section 2 .....	89
a. Disfavored Disparate Impact Jurisprudence.....	90
b. Applying the Equal Protection Arguments to Section 2.....	95
c. Rebuttal to the Equal Protection Arguments Against Section 2 .....	101
Conclusion .....	105

## Introduction

After decades of rampant voter suppression, the 1965 Voting Rights Act ("VRA" or "the Act") marked a long-overdue revolution for American democracy. A century beforehand at the end of the American Civil War, the abolitionist movement saw voting as the lynchpin of freedom and Frederick Douglass urged that "[s]lavery is not abolished until the black man has the ballot. While the Legislatures of the South retain the right to pass laws making any discrimination between black and white, slavery still lives there."<sup>1</sup> Despite backlash from even some progressive lawmakers,<sup>2</sup> the

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1. Frederick Douglass, Address at a Business Meeting During the Thirty-Second Anniversary of the American Anti-Slavery Society (May 10, 1865), in NAT'L ANTI-SLAVERY STANDARD, May 20, 1865 (opposing the dissolution of the Society).

2. For example, when a proposed Fourteenth Amendment would have provided that "[n]o state, in prescribing the qualifications requisite for electors therein, shall discriminate against any person on account of color or race," Congress resoundingly rejected it. Herman V. Ames, *The Proposed Amendments to the Constitution of the United States During the First Century of Its History*, [Proposed Amendments to the Constitution, 1789 to 1889] 1896-2 Ann. Rep. Am. Hist. Ass'n 165, 227-28 (1897). As

Reconstruction Amendments, in form, assured that the right to vote would be provided equally.<sup>3</sup> But in function, the Amendments failed to make that right a reality for many otherwise eligible minority voters.<sup>4</sup>

The Fifteenth Amendment facially establishes a forceful guarantee of an equal franchise: “The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.”<sup>5</sup> But the Supreme Court interpreted this provision narrowly, holding soon after its enactment that “[t]he Fifteenth Amendment does not confer the right of suffrage upon any one” and it merely “prevents the States, or the United States, . . . from giving preference” to voters based on race.<sup>6</sup>

In addition, Section 2 of the Fourteenth Amendment states that if the right to vote “is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, . . . the basis of representation therein shall be reduced” proportionally for the state.<sup>7</sup> This appears to be a harsh penalty for denials of voting rights,<sup>8</sup> but the text still envisions a circumscribed political class<sup>9</sup> and has been rendered

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one Republican senator remarked, “[t]he right of suffrage is not, in law, one of the privileges or immunities thus secured by the Constitution. It is . . . not regarded as one of those fundamental rights lying at the basis of all society . . .” CONG. GLOBE, 39th Cong., 1st Sess. 2766 (1866) (statement of Sen. Jacob Howard), <http://memory.loc.gov/cgi-bin/ampage?collId=llcg&fileName=072/llcg072.db&recNum=847> [<https://perma.cc/8WHB-JV6L>].

3. See ERIC FONER, *THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION* 122–23 (2020).

4. See *id.* at 105–06 (describing shortfalls in the Fifteenth Amendment).

5. U.S. CONST. amend. XV, § 1.

6. *United States v. Reese*, 92 U.S. 214, 217 (1875); see also *Guinn v. United States*, 238 U.S. 347, 362–63 (1915) (“[T]he [Fifteenth] Amendment gives no right of suffrage . . .”).

7. U.S. CONST. amend. XIV, § 2.

8. See ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* 90 (2000) (“In its direct references to suffrage, the Fourteenth Amendment was a double-edged sword. Since most congressional Republicans—whatever their personal beliefs—were convinced that northern whites would not support the outright enfranchisement of [Black voters], the amendment took an oblique approach: any state that denied the right to vote to a portion of its male citizens would have its representation in Congress (and thus the electoral college) reduced in proportion to the percentage of citizens excluded. The clause would serve to penalize any southern state that prevented [Black voters] from voting without imposing comparable sanctions on similar practices in the North, where [Black voters] constituted a tiny percentage of the population.”).

9. See *id.* at 90–91 (“Although this section of the amendment amounted to a clear constitutional frown at racial discrimination, . . . [it] tacitly recognized the

dormant because it lacks an intelligible way to be enforced in court.<sup>10</sup> The Fourteenth Amendment also famously guarantees that “[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; . . . nor deny to any person within its jurisdiction the equal protection of the laws.”<sup>11</sup> The Supreme Court could have construed these provisions to provide an affirmative and equal voting right, but it almost immediately refused to do so.<sup>12</sup>

Accordingly, the brief surge in minority voters’ political power after the Reconstruction Amendments was fleeting, and the equal right to vote became merely a parchment promise that gave way to local discrimination during the era of Jim Crow.<sup>13</sup> Using poll taxes, literacy tests, and other “de facto disenfranchisement” devices,<sup>14</sup> many states for decades engaged in an “unremitting and ingenious defiance of the Constitution” to deny minority voters their rights.<sup>15</sup> At the same time, rigid segregation exacerbated the problem of unequal representation nationwide,<sup>16</sup> while rampant intimidation<sup>17</sup>

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right of individual states to erect racial barriers.”). Crucially, the Amendment also explicitly permits disenfranchisement “for participation in rebellion, or other crime.” U.S. CONST. amend. XIV, § 2, which states have used to create sweeping felony disenfranchisement programs, and sometimes to effectuate a racially discriminatory purpose, *Hunter v. Underwood*, 471 U.S. 222, 229 (1985).

10. See ALLAN J. LICHTMAN, *THE EMBATTLED VOTE IN AMERICA: FROM THE FOUNDING TO THE PRESENT* 79 (2018) (“Congress never followed through with a mechanism for implementing this explosive section of the Fourteenth Amendment; it remains unenforced to date. The federal courts have rebuffed efforts to enforce the provision judicially, terming enforcement a ‘political question’ outside their purview.”); see also, e.g., *Saunders v. Wilkins*, 152 F.2d 235, 238 (4th Cir. 1945) (dismissing a Fourteenth Amendment, Section 2 legal challenge as a nonjusticiable political question).

11. U.S. CONST. amend. XIV, § 1.

12. See *Minor v. Happersett*, 88 U.S. 162, 171 (1874) (finding the Fourteenth Amendment to the Constitution “has not added the right of suffrage to the privileges and immunities of citizenship as they existed at the time it was adopted”); LICHTMAN, *supra* note 10, at 77 (“[N]arrow court constructions limited [the Equal Protection Clause’s] application to suffrage well into the twentieth century.”).

13. See U.S. COMM’N ON C.R., *AN ASSESSMENT OF MINORITY VOTING RIGHTS ACCESS IN THE UNITED STATES* 15–18 (2018), [https://www.usccr.gov/pubs/2018/Minority\\_Voting\\_Access\\_2018.pdf](https://www.usccr.gov/pubs/2018/Minority_Voting_Access_2018.pdf) [<https://perma.cc/M6LP-KLCE>] [hereinafter “USCCR REPORT”] (“Reliance upon tactics to suppress black voting rights expanded during the Jim Crow Era . . . and black voter registration subsequently declined dramatically.”).

14. See LICHTMAN, *supra* note 10, at 80; KEYSSAR, *supra* note 8, at 16, 109–12.

15. *South Carolina v. Katzenbach*, 383 U.S. 301, 309 (1966).

16. See generally RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* (2017) (detailing the history of intentional, government-driven housing and zoning segregation).

17. See *United States v. Cruikshank*, 92 U.S. 542, 542–43 (1875) (ruling that the

and violence<sup>18</sup> targeting minority groups trying to register and vote further depressed political participation. Even though this environment of disenfranchisement and discrimination was repugnant to the explicit agreement struck in the Reconstruction Amendments—and generally violative of America’s foundational values of equality and government by consent of the governed—the Constitution proved impotent to address the challenge of post-Reconstruction voter suppression.<sup>19</sup>

During the Civil Rights Movement, Dr. Martin Luther King, Jr. echoed Frederick Douglass’ century-old calls for equal suffrage. “The denial of this sacred right [to vote] is a tragic betrayal of the

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Fourteenth Amendment did not extend to protections against voter intimidation by semi-private entities, like White supremacist organizations); LICHTMAN, *supra* note 10, at 92 (“[T]he U.S. Supreme Court further undercut efforts to protect black voters and their allies from white vigilantes . . . . White terrorists could thus intimidate black voters without fear of retribution from federal authorities and with the knowledge that white supremacist governments supported efforts to suppress the black vote by any necessary means.”); ARI BERMAN, *GIVE US THE BALLOT: THE MODERN STRUGGLE FOR VOTING RIGHTS IN AMERICA 18–20* (2015) (detailing private intimidation efforts).

18. *See, e.g.*, KEYSSAR, *supra* note 8, at 91 (detailing that in New Orleans in 1866, for example, “one of the most flagrant incidents of violence” occurred when advocates attempted to hold a constitutional convention favoring Black suffrage and thirty-four Black and four White attendees were killed, with dozens of others wounded).

19. Notwithstanding the explicit language in the Fourteenth and Fifteenth Amendments promoting free and equal access to the ballot box, the Supreme Court interpreted the Constitution in a manner that tolerated certain discriminatory practices for many decades. *See, e.g.*, *Minor v. Happersett*, 88 U.S. 162, 171 (1874); *United States v. Reese*, 92 U.S. 214, 217 (1875); *Williams v. Mississippi*, 170 U.S. 213, 225 (1898) (holding unanimously that Mississippi’s literacy and poll-tax qualifications were constitutional because they “[did] not on their face discriminate between the races, and it has not been shown that their actual administration was evil, only that evil was possible under them”); *Giles v. Harris*, 189 U.S. 475, 486–88 (1903) (Holmes, J.) (rejecting a challenge to Alabama’s discriminatory voting and registration system for an apparent lack of available equitable relief, stating that “equity cannot undertake now, any more than it has in the past, to enforce political rights” of access to the ballot box); *Giles v. Teasley*, 193 U.S. 146, 160 (1904) (rejecting plaintiffs’ revised claims at law under the political question doctrine); *Newberry v. United States*, 256 U.S. 232, 250 (1921) (upholding White primaries because primary elections “are in no sense elections for an office, but merely methods by which party adherents agree upon candidates whom they intend to offer and support . . . .”); *Breedlove v. Suttles*, 302 U.S. 277, 283 (1937) (“To make payment of poll taxes a prerequisite of voting is not to deny any privilege or immunity protected by the Fourteenth Amendment. Privilege of voting is not derived from the United States, but is conferred by the State . . . .”); *Grove v. Townsend*, 295 U.S. 45, 48 (1935) (approving White primaries under the state action doctrine); *Lassiter v. Northampton Cnty. Bd. of Elections*, 360 U.S. 45, 54 (1959) (upholding North Carolina’s basic literacy test in the absence of a showing of discriminatory application).

highest mandates of our democratic tradition,” Dr. King said.<sup>20</sup> “Give us the ballot, and we will no longer have to worry the federal government about our basic rights.”<sup>21</sup> Congress answered this call on the heels of violent clashes in the Jim Crow South and enacted the VRA in 1965.<sup>22</sup> Many exalted the VRA as “the dawn of freedom”<sup>23</sup> because, unlike the Reconstruction Amendments, the VRA offered a toolbox of incisive, prophylactic enforcement measures to extinguish disenfranchisement wherever racial animus could fester. As the Supreme Court recognized:

After enduring nearly a century of systematic resistance to the Fifteenth Amendment, Congress might well decide to shift the advantage of time and inertia from the perpetrators of the evil to its victims . . . . [It] has marshalled an array of potent weapons against the evil, with authority in the Attorney General to employ them effectively . . . . [M]illions of non-white Americans will now be able to participate for the first time on an equal basis.<sup>24</sup>

But the history of enfranchisement is one of expansions and contractions,<sup>25</sup> and advancing the gains of the VRA requires proactive efforts in the face of renewed challenges to the Act’s constitutionality.<sup>26</sup> In 2013, the Supreme Court in *Shelby County v. Holder* ruled unconstitutional the coverage formula used to enforce Section 5 of the VRA,<sup>27</sup> effectively nullifying the core mechanism for the federal government to prevent discriminatory voting laws from

20. Martin Luther King, Jr., Give Us the Ballot: Address Delivered at the Prayer Pilgrimage for Freedom (May 17, 1957), in *THE PAPERS OF MARTIN LUTHER KING, JR., VOLUME IV: SYMBOL OF THE MOVEMENT, JANUARY 1957–DECEMBER 1958* (Clayborne Carson et al. eds.), at 208, 210, <https://kinginstitute.stanford.edu/king-papers/documents/give-us-ballot-address-delivered-prayer-pilgrimage-freedom> [<https://perma.cc/V275-ANXX>].

21. *Id.*

22. BERMAN, *supra* note 17, at 13, 18, 35–36.

23. See MARTIN LUTHER KING, JR., WHERE DO WE GO FROM HERE: CHAOS OR COMMUNITY? 35 (1967).

24. *South Carolina v. Katzenbach*, 383 U.S. 301, 328, 337 (1966); see also *Allen v. State Bd. of Elections*, 393 U.S. 544, 548 (1969) (“[T]he Act implemented Congress’ firm intention to rid the country of racial discrimination in voting.”).

25. See generally KEYSSAR, *supra* note 8 (describing the turbulent history of voting rights).

26. USCCR REPORT, *supra* note 13, at 277 (“The right to vote is the bedrock of American democracy. It is, however, a right that has proven fragile and in need of both Constitutional and robust statutory protections . . . . Voter access issues, discrimination, and barriers to equal access for voters with disabilities and for voters with limited-English proficiency continue today.”).

27. Voting Rights Act of 1965, Pub. L. No. 89-110, § 5, 79 Stat. 437, 439 (codified at 52 U.S.C. § 10304(a)).

going into effect.<sup>28</sup> After that litigation success for opponents of the VRA, now Section 2 of the Act has become the new focus. Section 2, like Section 5, prohibits voting discrimination by purpose or in effect and employs a “results test” to cut back election laws that disproportionately burden minority voters compared to White voters under conditions of race discrimination.<sup>29</sup>

In the wake of *Shelby County*, and by recycling many of the arguments made during that litigation and in other voting cases, proponents of restrictive voting laws are now emboldened to contest the constitutionality of the Section 2 results test. Indeed, during October Term 2020 the Supreme Court will decide *Brnovich v. DNC*, the Court’s first Section 2 case in a non-redistricting context and one that carries significant implications for the future of the VRA.<sup>30</sup> *Brnovich v. DNC* involves two consolidated appeals from an *en banc* Ninth Circuit opinion that held Arizona’s prohibition of out-of-precinct voting and some third-party ballot collection violated Section 2’s results test.<sup>31</sup> Petitioners seeking to maintain Arizona’s restrictions (along with numerous supporting amici) have strenuously argued that the manner by which the Ninth Circuit applied Section 2 has substantial constitutional defects, and the Court should promulgate a much more onerous standard to avoid these alleged concerns.<sup>32</sup> Thus, the question of Section 2’s constitutional status is squarely before the Supreme Court, and the

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28. *Shelby County v. Holder*, 570 U.S. 529, 549–53 (2013) (holding unconstitutional the Section 4(b) coverage formula enforcing Section 5 of the VRA for violating the “fundamental principle of equal sovereignty” among the states”); see also BERMAN, *supra* note 17, at 280 (“Roberts’s opinion turned Section 5 into a zombie, a body with no life in it.”).

29. Voting Rights Act of 1965, Pub. L. No. 89-110, § 2, 79 Stat. 437 (codified as amended at 52 U.S.C. § 10301(b)); see *Thornburg v. Gingles*, 478 U.S. 30, 35 (1986) (confirming the appropriate interpretation of the revised Section 2 and its “results test”).

30. *Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 222 (2020) (mem.); *Ariz. Republican Party v. Democratic Nat’l Comm.*, 141 S. Ct. 221 (2020) (mem.).

31. See *Democratic Nat’l Comm. v. Hobbs*, 948 F.3d 989, 999 (9th Cir. 2020) (*en banc*). The court further held that Arizona enacted the third-party ballot collection law with discriminatory intent, in violation of Section 2’s intent test and the Fifteenth Amendment. *Id.*

32. See Brief for State Petitioners at 24–33, *Brnovich v. Democratic Nat’l Comm.*, Nos. 19-1257 & 19-1258 (U.S. Nov. 30, 2020), 2020 WL 7121776 (making scope of enforcement, Equal Protection Clause, and Elections Clause arguments against Section 2); Brief for Private Petitioners at 39–42, *Brnovich v. Democratic Nat’l Comm.*, Nos. 19-1257 & 19-1258 (U.S. Nov. 30, 2020), 2020 WL 7121775 (making scope of enforcement and Equal Protection Clause arguments against Section 2). For amici making additional constitutional arguments, see Docket, *Brnovich v. Democratic Nat’l Comm.*, No. 19-1257 (U.S.) (amici filings from December 3 to December 7, 2020).



outlook remains uncertain.<sup>33</sup> If the Supreme Court chooses to eliminate or curtail Section 2's results test, the potential consequence could be an unchecked rise in discriminatory practices in voting to a degree not seen since the Jim Crow era.<sup>34</sup>

This article confronts the most prominent constitutional challenges to the prevailing Section 2 results test. Part I discusses how practices that deny or abridge minority voters' equal access to the political process—so-called “vote denial”<sup>35</sup> laws—have increased nationwide in recent years,<sup>36</sup> and overviews the two-part results test that federal courts have developed to apply Section 2 in this context. Part II details the two primary constitutional claims against the vote denial results test, and rebuts both of those theories. Namely, proponents of vote denial laws argue that the Section 2 results test is unconstitutional because it (1) exceeds Congress' enforcement power by proscribing conduct that is too remote from the constitutional injury of intentional voting

33. See Matt Naham, *SCOTUS Agrees to Decide Major New Case that Lawyers Fear Will Dramatically Weaken Landmark Civil Rights Law*, LAW & CRIME (Oct. 2, 2020), [www.lawandcrime.com/supreme-court/scotus-agrees-to-decide-major-new-case-that-lawyers-fear-will-dramatically-weaken-landmark-civil-rights-law/](http://www.lawandcrime.com/supreme-court/scotus-agrees-to-decide-major-new-case-that-lawyers-fear-will-dramatically-weaken-landmark-civil-rights-law/) [<https://perma.cc/Y3EU-ZVWY>] (describing voting rights advocates' concerns about the implications for the VRA); see also Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *The Voting Rights Act in Winter: The Death of a Superstatute*, 100 IOWA L. REV. 1389, 1391 (2015) (“*Shelby County* marks the death of the VRA as a superstatute.”).

34. See Nicholas O. Stephanopoulos, *Disparate Impact, Unified Law*, 128 YALE L.J. 1566, 1577–78 (2019) (“Since 2010 . . . *twenty-three* states have implemented new franchise restrictions. Thirteen have required identification for voting; eleven have limited voter registration; seven have reduced the timespan available for early voting; and three have delayed the restoration of voting rights for people with criminal convictions. These measures amount to the most systematic retrenchment of the right to vote since the [C]ivil [R]ights [E]ra. In geographic coverage, indeed, they surpass the franchise restrictions of Jim Crow . . . .” (emphasis in original)).

35. Daniel P. Tokaji, *The New Vote Denial: Where Election Reform Meets the Voting Rights Act*, 57 S.C. L. REV. 689, 691–92 (2006) (applying the “VRA to practices such as felon[y] disenfranchisement, voting machines, and voter ID laws represents a new generation . . . . This article collectively refers to these practices as the ‘new vote denial.’”).

36. See, e.g., Danielle Lang & J. Gerald Hebert, *A Post-Shelby Strategy: Exposing Discriminatory Intent in Voting Rights Litigation*, 127 YALE L.J.F. 779, 784 (2018) (“This disconcerting trend [to enact voting restrictions] coincided with the loss of preclearance in *Shelby County*. These events have resulted in an avalanche of voting restrictions that target minority voters to minimize their political power.”); Pamela S. Karlan, *Turnout, Tenuousness, and Getting Results in Section 2 Vote Denial Claims*, 77 OHIO ST. L.J. 763, 766 (2016) (quoting SAMUEL ISSACHAROFF, PAMELA S. KARLAN, RICHARD H. PILDES & NATHANIEL PERSILY, *THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS* 124 (5th ed. 2016)) (observing that the elimination of Section 5 coverage and “understandings about the ‘empirical relation between turnout and election outcomes[]’ produced a spate of measures in which Republican officials cut back on expansions to voting opportunities previously implemented by Democrats”).

discrimination; and (2) violates the Equal Protection Clause by requiring excessive consideration of race at the expense of other interests in electoral decision-making. The article concludes, however, that these arguments are unfounded because they overlook key aspects of Congress' enforcement power in protecting voting rights, misconstrue the difficulties of succeeding on a results test claim, and conflate the nature of the interests at stake and remedies sought with other dissimilar antidiscrimination contexts. When the Supreme Court decides *Brnovich v. DNC* or any other subsequent Section 2 results test cases, it should reaffirm the constitutionality of the statute and retain the prevailing results test applied in the vote denial context.

### I. Modern Voter Suppression and the Section 2 Results Test

Since *Shelby County v. Holder*, voting has become more burdensome in many states across the country.<sup>37</sup> Civil rights reports have detailed the rising use of electoral laws or practices that discriminate against minority voters, including the increased enactment of voter photo-ID laws, stricter registration requirements and removal programs, and cutbacks to prior expansions on where, when, and how eligible voters may cast a ballot.<sup>38</sup> Texas, for example, has repeatedly faced lawsuits for its persistent use of discriminatory redistricting maps and strict voter qualification laws.<sup>39</sup> Georgia's Governor and former Secretary of

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37. See Stephanopoulos, *supra* note 34, at 1578 n.41.

38. See, e.g., USCCR REPORT, *supra* note 13, at 60; THE LEADERSHIP CONFERENCE EDUCATION FUND, DEMOCRACY DIVERTED: POLLING PLACE CLOSURES AND THE RIGHT TO VOTE 12–18 (2019), <http://civilrightsdocs.info/pdf/reports/Democracy-Diverted.pdf> [<https://perma.cc/EBM8-BXMX>]; NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, DEMOCRACY DIMINISHED: STATE AND LOCAL THREATS TO VOTING POST-SHELBY COUNTY, ALABAMA V. HOLDER 34 (2018), [https://www.naacpldf.org/wp-content/uploads/Democracy-Diminished-State-and-Local\\_Threats-to-Voting\\_Post-Shelby-County,Alabama-v.Holder\\_Political\\_Participation\\_.pdf](https://www.naacpldf.org/wp-content/uploads/Democracy-Diminished-State-and-Local_Threats-to-Voting_Post-Shelby-County,Alabama-v.Holder_Political_Participation_.pdf) [<https://perma.cc/Y3VX-9MV7>]; BRENNAN CTR. FOR JUST., PURGES: A GROWING THREAT TO THE RIGHT TO VOTE 3 (2018), [https://www.brennancenter.org/sites/default/files/2019-08/Report\\_Purges\\_Growing\\_Threat.pdf](https://www.brennancenter.org/sites/default/files/2019-08/Report_Purges_Growing_Threat.pdf) [<https://perma.cc/B8YT-M2PF>] (examining registration data across 6,600 jurisdictions, finding that the median rate of purging across the country has increased significantly, rising from 6.2 percent of voters to 7.8 percent since 2008); BRENNAN CTR. FOR JUST., NEW VOTING RESTRICTIONS IN AMERICA 1 (2017), <https://www.brennancenter.org/sites/default/files/2019-11/New%20Voting%20Restrictions.pdf> [<https://perma.cc/3XXB-KNL4>] (showing rise in strict photo ID requirements, early voting cutbacks, and registration restrictions since 2010).

39. See, e.g., *Texas v. United States*, 887 F. Supp. 2d 133, 178 (D.D.C. 2012) (ruling on the discriminatory result claim, but also noting that “record evidence may

State, Brian Kemp, also has a long history of voter suppression accusations.<sup>40</sup> While overseeing elections during his own gubernatorial campaign in 2018, Kemp is alleged to have closed or moved polling places in districts where minority voters live, purged nearly 670,000 voters from the registration rolls (almost 70 percent of whom were minority voters), and stifled the counting of provisional and absentee ballots that would have benefitted his opponent, Stacey Abrams, a prominent voting rights advocate.<sup>41</sup> North Carolina presents even more stark examples of voting discrimination. The Fourth Circuit struck down a 2014 omnibus election law for targeting minority voters with “surgical precision”<sup>42</sup> and the state legislature has battled in the courts for decades to retain redistricting maps that dilute minority voters’ electoral strength,<sup>43</sup> among other discriminatory efforts.<sup>44</sup>

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support a finding of discriminatory purpose in enacting the State House Plan. Although we need not reach this issue, at minimum, the full record strongly suggests that the retrogressive effect we have found may not have been accidental”); *Veasey v. Abbott*, 830 F.3d 216, 265, 272 (5th Cir. 2016) (en banc) (invalidating a voter-ID law for discriminatory effect, but remanding for the lower court to reevaluate the plaintiff’s intent claim); *Texas League of United Latin Am. Citizens v. Whitley*, No. CV SA-19-CA-074-FB, 2019 WL 7938511, at \*1–2 (W.D. Tex. Feb. 27, 2019) (finding that a Texas registration purge program was “a solution looking for a problem” and used a process that was “inherently paved with flawed results,” “ham-handed,” and “exemplifies the power of government to strike fear and anxiety and to intimidate the least powerful among us”); see also Yael Bromberg, *Youth Voting Rights and the Unfulfilled Promise of the Twenty-Sixth Amendment*, 21 U. PA. J. CONST. L. 1105, 1149 (2019) (discussing a lawsuit involving disenfranchisement on an historically Black public university campus in rural Texas).

40. See, e.g., Carol Anderson, Opinion, *Brian Kemp, Enemy of Democracy*, N.Y. TIMES (Aug. 11, 2018), <https://nyti.ms/2Ou8LA5> [<https://perma.cc/3YKT-9DBJ>] (discussing Brian Kemp’s history with voter suppression); Spencer Woodman, *Register Minority Voters in Georgia, Go to Jail*, NEW REPUBLIC (May 5, 2015), [newrepublic.com/article/121715/georgia-secretary-state-hammers-minority-voter-registration-efforts](http://newrepublic.com/article/121715/georgia-secretary-state-hammers-minority-voter-registration-efforts) [<https://perma.cc/RU4B-HPDB>] (detailing Brian Kemp’s efforts as Secretary of State to restrict voting access by the threat of fraud prosecutions).

41. See *Fair Fight Action, Inc. v. Raffensperger*, 413 F. Supp. 3d 1251, 1292 (N.D. Ga. 2019) (denying a motion to dismiss a VRA Section 2 claim pertaining to discrimination in Georgia’s voting and registration system); *Ga. Coal. for the People’s Agenda, Inc. v. Kemp*, 347 F. Supp. 3d 1251, 1264–69 (N.D. Ga. 2018) (granting a preliminary injunction against a Georgia voter registration purge); Richard Fausset, *‘Large-Scale Reforms’ of Georgia Elections Sought in Federal Lawsuit*, N.Y. TIMES (Nov. 26, 2018), [nyti.ms/2zsQpug](https://nyti.ms/2zsQpug) [<https://perma.cc/8638-MQ6T>] (detailing Kemp’s involvement in voter suppression in Georgia and a related lawsuit).

42. *N.C. State Conf. of the NAACP v. McCrory*, 831 F.3d 204, 214 (4th Cir. 2016).

43. Carli Brosseau, *A Short History of the Court Battles over NC Congressional Districts*, NEWS & OBSERVER (Aug. 29, 2018, 2:57 PM), [www.newsobserver.com/news/politics-government/state-politics/article217504240.html](http://www.newsobserver.com/news/politics-government/state-politics/article217504240.html) [<https://perma.cc/KHL4-4J83>].

44. See Blake Paterson, *Bipartisan Furor as North Carolina Election Law*

Minority voters also overcame extraordinary hurdles and suppression efforts to exercise their rights during the 2020 election cycle, ranging from excessive purges of voter registration lists, to polling place closures and overburdening, to widespread intimidation efforts.<sup>45</sup> In one particularly egregious case in North Carolina’s Alamance County, police confronted Black voters marching to the polls by indiscriminately firing tear gas at the marchers, evoking scenes reminiscent of the Civil Rights Movement.<sup>46</sup>

These examples are abundant, increasing, and not confined to the South.<sup>47</sup> States ranging from New York to North Dakota to Arkansas have administered new or existing laws that make it harder to vote, and often disproportionately so for minority groups.<sup>48</sup> And almost all of these restrictive laws are justified by a

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*Shrinks Early Voting Locations by Almost 20 Percent*, PROPUBLICA: ELECTIONLAND (Sept. 24, 2018, 5:00 AM), [www.propublica.org/article/bipartisan-furor-as-north-carolina-election-law-shrinks-early-voting-locations-by-almost-20-percent](http://www.propublica.org/article/bipartisan-furor-as-north-carolina-election-law-shrinks-early-voting-locations-by-almost-20-percent) [https://perma.cc/J8Z5-KL8Y] (“In June [2018], the North Carolina General Assembly passed legislation mandating that all early voting sites in the state remain open for uniform hours on weekdays from 7 a.m. to 7 p.m. . . . [but] county election officials from both parties have expressed near uniform discontent over the new requirements . . . .”); Colin Campbell, *NC Republican Party Seeks ‘Party Line Changes’ to Limit Early Voting*, NEWS & OBSERVER (Aug. 17, 2016), [www.newsobserver.com/news/politics-government/election/article96179857.html](http://www.newsobserver.com/news/politics-government/election/article96179857.html) [https://perma.cc/WXQ5-CP64] (detailing coordinated GOP election officials’ efforts to reduce voting opportunities used primarily by minority voters).

45. See, e.g., Sherrilyn Ifill, *No, This Election Did Not Go “Smoothly”*, SLATE (Nov. 9, 2020), <https://slate.com/news-and-politics/2020/11/2020-election-voting-did-not-go-smoothly.html> [https://perma.cc/8WH3-NVBK] (describing voter intimidation and long voting lines, among other concerns); Shondiin Silversmith, *Native Voters Still Find Obstacles on Election Day, but Advocates Work to Remove Barriers*, ARIZ. REPUBLIC (Oct. 31, 2020), [www.azcentral.com/story/news/politics/elections/2020/10/31/advocates-work-break-down-barriers-native-voters/5980832002/](http://www.azcentral.com/story/news/politics/elections/2020/10/31/advocates-work-break-down-barriers-native-voters/5980832002/) [https://perma.cc/RBE4-4RBR] (discussing the closure of polling locations); Eileen Sullivan, *A Lawsuit in Georgia Claims that Nearly 200,000 Registered Voters Were Improperly Purged*, N.Y. TIMES (Dec. 2, 2020), <https://nyti.ms/39BKmGE> [https://perma.cc/QV4D-GUGF] (describing efforts to restore registration status to voters who were purged from registration lists).

46. See Complaint, *Allen v. City of Graham*, No. 1:20-cv-00997 (M.D.N.C. Nov. 2, 2020); see also Zachery Eanes & Carli Brosseau, *March to Alamance Polls Ends with Police Using Pepper-Spray on Protesters, Children*, NEWS & OBSERVER (Nov. 3, 2020), [www.charlotteobserver.com/news/state/north-carolina/article246861942.html](http://www.charlotteobserver.com/news/state/north-carolina/article246861942.html) [https://perma.cc/F8WQ-5F5J] (describing events in Alamance County).

47. See, e.g., *Voting Laws Roundup 2020*, BRENNAN CTR. FOR JUST. (Feb. 4, 2020), [www.brennancenter.org/our-work/research-reports/voting-laws-roundup-2020](http://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-2020) [https://perma.cc/M2KF-7Y8Y]; Ally J. Levine & Blake Paterson, *How Voting Laws Have Changed Since 2016*, PROPUBLICA (June 25, 2018), [projects.propublica.org/graphics/voting-changes-2018](http://projects.propublica.org/graphics/voting-changes-2018) [https://perma.cc/9TLD-F9K5] (cataloguing voting laws by state).

48. See, e.g., USCCR REPORT, *supra* note 13, at 82 (“At least 23 states have

fear of widespread voting fraud—a concern not supported in empirical reality and often used as a crude cover for efforts to shave off votes for the opposing political party.<sup>49</sup>

Congress enacted Section 2 of the VRA to strike down precisely these types of restrictions that import conditions of race discrimination into the political process and disproportionately burden minority voters.<sup>50</sup> As amended in 1982, Section 2 proscribes any “voting qualification or prerequisite to voting or standard, practice or procedure . . . which results in a denial or abridgement of the right of any citizen . . . to vote on account of race or color [or membership in a language-minority group].”<sup>51</sup> The Senate Report

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enacted newly restrictive statewide voter laws since the Shelby County decision.”); James MacPherson, *North Dakota, Tribes Fail to Reach Settlement over Voter ID Lawsuit*, ASSOCIATED PRESS (May 30, 2018), [www.apnews.com/bd727123ddc542a1aafedc574b1ee03](http://www.apnews.com/bd727123ddc542a1aafedc574b1ee03) [<https://perma.cc/C4H6-9S3P>]; Max Brantley, *Arkansas Voter ID Law an Impediment to Voting, Lawsuit Argues*, ARK. TIMES (Mar. 19, 2018, 2:29 PM) [www.arktimes.com/ArkansasBlog/archives/2018/03/19/arkansas-voter-id-law-an-impediment-to-voting-lawsuit-argues](http://www.arktimes.com/ArkansasBlog/archives/2018/03/19/arkansas-voter-id-law-an-impediment-to-voting-lawsuit-argues) [<https://perma.cc/36XK-689P>]; Sam Levine, *New York is One of the Bluest States in the Country. Its Voting Laws Are Horrendous.*, HUFFINGTON POST (Sept. 11, 2018), [www.huffingtonpost.com/entry/new-york-votinglaws\\_us\\_5b97ffb9e4b0162f4731895a](http://www.huffingtonpost.com/entry/new-york-votinglaws_us_5b97ffb9e4b0162f4731895a) [<https://perma.cc/C27N-UZM9>]; Sari Horowitz, *Want to Vote in This State? You Have to Have a Passport or Dig Up a Birth Certificate*, WASH. POST (Feb. 19, 2016), [www.washingtonpost.com/news/post-nation/wp/2016/02/19/how-kansas-has-become-a-battleground-state-for-voting-rights/](http://www.washingtonpost.com/news/post-nation/wp/2016/02/19/how-kansas-has-become-a-battleground-state-for-voting-rights/) [<https://perma.cc/S8CL-2UQN>].

49. As one prominent election law scholar has summarized, “[t]he issue of organized voter fraud has now been put to the test in courts and in social science” and amounts to no more than “a sham perpetuated by people who should know better, advanced for political advantage.” RICHARD L. HASEN, *ELECTION MELTDOWN* 128 (2020). For more detailed descriptions of studies debunking the myth of large-scale voter fraud, see RICHARD L. HASEN, *THE VOTING WARS: FROM FLORIDA 2000 TO THE NEXT ELECTION MELTDOWN* 41–75 (2012); LICHTMAN, *supra* note 10, at 189–93; USCCR REPORT, *supra* note 13, at 102–21. For a discussion of how allegations of voter fraud have become the “new Southern strategy,” see LORRAINE C. MINNITE, *THE MYTH OF VOTER FRAUD* 89–90 (2010).

50. Voting Rights Act of 1965, Pub. L. No. 89-110, § 2, 79 Stat. 437 (codified as amended at 52 U.S.C. § 10301); *Thornburg v. Gingles*, 478 U.S. 30, 35 (1986).

51. Section 2 states in full:

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 10303(f)(2) of this title, as provided in subsection (b).

(b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been

accompanying the 1982 amendment broadly characterized Section 2 as “the major statutory prohibition of all voting rights discrimination” that “prohibits practices, which . . . result in the denial of equal access to any phase of the electoral process . . . .”<sup>52</sup> In essence, Section 2 is designed to bar any laws that, by purpose or as a result, make it disproportionately harder for minority voters to participate in elections as compared to White voters because of conditions of discrimination.<sup>53</sup>

In the past, Section 2 advocates have most often sought relief under the results test in what is called the “vote dilution” context, which concerns how a jurisdiction’s districting practices may dilute minority voting strength.<sup>54</sup> Section 2 applied to vote dilution follows a well-established four-part totality analysis called the “*Gingles* framework.”<sup>55</sup> Because the nature of the harm to voters in vote dilution cases is distinct from the harm imposed by vote denial laws, the nature of the analysis and relevant considerations must also be different.<sup>56</sup> Accordingly, the rise of vote denial laws in the last

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elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

52 U.S.C. § 10301.

52. S. REP. NO. 97-417, at 30 (1982); *see also* *Major v. Treen*, 574 F. Supp. 325, 347 (E.D. La. 1983) (upholding Section 2’s constitutionality and detailing the legislative discussion surrounding its scope during the 1982 amendments).

53. *See* *Chisom v. Roemer*, 501 U.S. 380, 404 (1991) (“[A] violation of § 2 could be established by proof of discriminatory results alone.”). Congress deliberately omitted any requirement of showing intent, having “revised the statute ‘to make clear that a violation [can] be proved by showing discriminatory effect alone.’” *Veasey v. Abbott*, 830 F.3d 216, 277 (5th Cir. 2016) (en banc) (Higginson, J., concurring) (citing *Thornburg v. Gingles*, 478 U.S. 30, 35 (1986)).

54. *See* Tokaji, *supra* note 35, at 703–09; *see also* Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success*, 89 MICH. L. REV. 1077, 1093–94 (1991) (detailing that as jurisdictions became more elusive in their efforts to limit minority voting, states created “second generation” barriers that dilute minority electoral power through districting or at-large election processes).

55. The framework comes from *Thornburg v. Gingles*, the paradigmatic vote dilution case in which the Supreme Court applied Section 2 to North Carolina’s state legislative redistricting plan. 478 U.S. 30, 47 (1986). In an opinion by Justice Brennan, the Court established a tripartite threshold test for Section 2 vote dilution claims. Minority plaintiffs alleging a violation must establish that they are: (1) sufficiently large and geographically compact; (2) politically cohesive; and (3) often denied an equal opportunity to elect candidates of their choice because of racial polarization. *Id.* at 50–51. After proving the “preconditions” for vote dilution claims, the court then moves onto a fourth step and considers the totality of circumstances using the nine Senate Factors. *Id.* at 36–37, 49–50.

56. *See* Tokaji, *supra* note 35, at 718–23.

decade and the initial lack of a uniform Section 2 results test in that distinct context led to some brief confusion.<sup>57</sup>

In recent years, however, the circuit courts have mostly coalesced around the same two-part analysis: a vote denial law or practice violates Section 2 if it (1) causes a disparate impact on minority voters (2) through the law's interaction with conditions of social or historical race discrimination.<sup>58</sup> Vote denial plaintiffs must show more than a bare statistical disparity between the burden on minority and nonminority voting groups<sup>59</sup> by also proving some of the non-exhaustive, circumstantial factors listed in the 1982 Senate Report.<sup>60</sup> These factors indicate when disparities are likely to be an outgrowth of discrimination and lack a legitimate justification.<sup>61</sup>

57. See *id.* at 720; Derek T. Muller, *The Democracy Ratchet*, 94 IND. L.J. 451, 468–69 (2019).

58. Stephanopoulos, *supra* note 34, at 1574–75. Multiple circuit courts have applied the same two-part results test in a variety of contexts. See, e.g., *Democratic Nat'l Comm. v. Hobbs*, 948 F.3d 989, 1012 (9th Cir. 2020) (en banc) (in the context of out-of-precinct voting and third-party ballot collection restrictions); *Veasey v. Abbott*, 830 F.3d 216, 277 (5th Cir. 2016) (en banc) (in the context of a voter photo ID law); *Ne. Ohio Coal. for the Homeless v. Husted*, 837 F.3d 612, 626–27 (6th Cir. 2016) (relating to absentee and provisional ballot process); *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 240 (4th Cir. 2014) (addressing challenges to numerous laws, including restrictions on same-day registration and out-of-precinct voting); *Ohio State Conf. of the NAACP v. Husted*, 768 F.3d 524, 554 (6th Cir. 2014), *vacated as moot*, No. 14-3877, 2014 WL 10384647 (6th Cir. Oct. 1, 2014) (addressing early voting cutbacks).

59. See, e.g., *Johnson v. Bush*, 405 F.3d 1214, 1228 (11th Cir. 2005) (en banc) (“Despite its broad language, Section 2 does not prohibit all voting restrictions that may have a racially disproportionate effect.”); *Smith v. Salt River Project Agric. Improvement & Power Dist.*, 109 F.3d 586, 595 (9th Cir. 1997) (rejecting a Section 2 claim using statistical evidence regarding land ownership because “a bare statistical showing of disproportionate *impact* on a racial minority does not satisfy the § 2 ‘results’ inquiry” (emphasis in original)); *Ortiz v. City of Phila. Off. of the City Comm’rs Voter Registration Div.*, 28 F.3d 306, 314–15 (3d Cir. 1994) (rejecting a results claim against a voter purge law that had a disparate statistical impact, but did not sufficiently demonstrate a causal nexus and presence of the Senate Factors).

60. The Senate Factors are: (1) the history of voting-related discrimination in the State or political subdivision; (2) the extent of racially polarized voting in the elections of the State or political subdivision; (3) the extent to which the State or political subdivision has used voting practices or procedures that tend to enhance the opportunity for discrimination against the minority group; (4) the exclusion of members of the minority group from candidate slating processes; (5) the extent to which minority group members bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process; (6) the use of overt or subtle racial appeals in political campaigns; (7) the extent to which minority group members have been elected to public office; (8) whether elected officials are unresponsive to the particularized needs of the members of the minority group; and (9) whether the policy underlying the State's or the political subdivision's use of the contested practice or structure is tenuous. See S. REP. NO. 97-417, at 28–29.

61. See *Rogers v. Lodge*, 458 U.S. 613, 624–27 (1982) (analyzing similar factors in an intentional voting discrimination case).

Although some election law scholars have criticized aspects of the two-part framework,<sup>62</sup> others have indicated that the analysis strikes the balance of being flexible and probing to target even well-disguised voter suppression, while not interfering in every aspect of election management.<sup>63</sup> As Congress observed in 2006, “[d]iscrimination today is more subtle than the visible methods used in 1965,” but efforts to deny the “minority community’s ability to fully participate in the electoral process and to elect their preferred candidates” continue to suppress eligible voters.<sup>64</sup> The two-part vote denial results test is an effective and appropriate tool for challenging these subtler methods of disenfranchisement. The first prong indicates that a voting restriction may cause undue harm to minority voters, and the second prong weighs the totality of the circumstances to reveal whether that harm is precipitated by or further perpetuates conditions of discrimination.<sup>65</sup> In other words, the Section 2 vote denial results test is an effective device to diminish inequality in voting while stopping short of preventing

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62. See, e.g., Christopher S. Elmendorf, *Making Sense of Section 2: Of Biased Votes, Unconstitutional Elections, and Common Law Statutes*, 160 U. PA. L. REV. 377, 384 (2012) (suggesting plaintiffs should have to prove “to a significant likelihood that the electoral inequality is traceable to race-biased decisionmaking” (emphasis in original)); Jamelia N. Morgan, *Disparate Impact and Voting Rights: How Objections to Impact-Based Claims Prevent Plaintiffs from Prevailing in Cases Challenging New Forms of Disenfranchisement*, 9 ALA. C.R. & C.L. L. REV. 93, 158–60 (2018) (advancing a burden-shifting approach); Michael J. Pitts, *Rethinking Section 2 Vote Denial*, 46 FLA. ST. U. L. REV. 1, 4–6 (2018) (arguing for a balancing test for Section 2); Stephanopoulos, *supra* note 34, at 1620–21 (arguing for a “unification” of disparate impact law and grafting developed rules from Title VII and Fair Housing Act cases onto the Section 2 vote denial test); Daniel P. Tokaji, *Applying Section 2 to the New Vote Denial*, 50 HARV. C.R.-C.L. L. REV. 439, 474, 477 (2015) (drawing from employment discrimination under Title VII and juror discrimination under the Equal Protection Clause to suggest a burden-shifting framework in Section 2); see also Lang & Hebert, *supra* note 36, at 782 (advocating for an intent-based strategy to enforcing Section 2).

63. See Dale E. Ho, *Building an Umbrella in a Rainstorm: The New Vote Denial Litigation Since Shelby County*, 127 YALE L.J.F. 799, 820 (2018) (claiming that disparate impact is a necessary component of Section 2 liability, but not sufficient to state a claim on its own and the Senate Factors inquiry sufficiently narrows liability); Dale E. Ho, *Voting Rights Litigation After Shelby County: Mechanics and Standards in Section 2 Vote Denial Claims*, 17 N.Y.U. J. LEGIS. & PUB. POL’Y 675, 701 (2014) (making a similar argument); Karlan, *supra* note 36, at 767–68 (supporting the two-part test, but warning that turnout reduction should not be a required evidentiary showing); Janai S. Nelson, *The Causal Context of Disparate Vote Denial*, 54 B.C. L. REV. 579, 597–98 (2013) (adding that courts should focus on “examin[ing] the historical racial context of discrimination” when analyzing a vote denial burden and scrutinize proof of implicit bias in the totality examination).

64. H.R. REP. NO. 109-478, at 6 (2006).

65. See generally Stephanopoulos, *supra* note 34, at 1578–79 (describing the origin and current application of the two-part test).



jurisdictions from managing their own elections in a non-discriminatory manner.

Proponents of vote denial measures, the myth of widespread voter fraud, and increased deference to local management of the political process have disagreed that Section 2 achieves this balance. Conservative election law commentators have increasingly challenged the constitutional status of the two-part vote denial test in legal articles and blogs.<sup>66</sup> Voting jurisdictions, lawmakers, and special interest groups serving as amici have explicitly argued in litigation that aspects of Section 2 are unconstitutional.<sup>67</sup> And even

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66. See, e.g., J. Christian Adams, *Transformation: Turning Section 2 of the Voting Rights Act into Something It Is Not*, 31 *TOURO L. REV.* 297, 319–21 (2015); Roger Clegg, *The Future of the Voting Rights Act After Bartlett and NAMUDNO*, 2008 *CATO SUP. CT. REV.* 35, 49–50 (2009); Roger Clegg & Hans A. von Spakovsky, “Disparate Impact” and Section 2 of the Voting Rights Act, *HERITAGE FOUND.: LEGAL MEMORANDUM NO. 119*, at 1, 4 (Mar. 17, 2014), <http://thf-media.s3.amazonaws.com/2014/pdf/LM119.pdf> [<https://perma.cc/W98J-SHBV>]; Noel H. Johnson, *Resurrecting Retrogression: Will Section 2 of the Voting Rights Act Revive Preclearance Nationwide?*, 12 *DUKE J. CONST. L. & PUB. POL’Y* 1, 2 (2017); Chris Kieser, *Federal Courts Expanding Disparate Impact Analysis in Recent Voting Rights Act Cases*, *PAC. LEGAL FOUND.* (Oct. 1, 2014), <https://pacificlegal.org/federal-courts-expanding-disparate-impact-analysis-recent-voting-rights-act-cases/> [<https://perma.cc/3UL2-YPGB>].

67. The Petitioners in *Brnovich v. DNC* raise constitutional avoidance arguments to support their preferred standard, and numerous amici argue more explicitly that Section 2 is unconstitutional. See *supra* note 32. But these arguments are not unique to this case. For briefs raising arguments that Section 2 is unconstitutional because it is not a proper enforcement statute of the Reconstruction Amendments, see Petition for a Writ of Certiorari at 28, *Abbott v. Veasey*, 137 S. Ct. 612 (2017) (No. 16-393), 2016 WL 5390670; Brief for Appellees at 32, *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788 (2017) (No. 15-680), 2016 WL 6123732; Appellant Brief at 28–33, *Alabama v. Ala. State Conf. of the NAACP*, No. 17-14443 (11th Cir. Nov. 13, 2017), 2017 WL 5495567; Brief Amicus Curiae of Pac. Legal Found., Ctr. for Equal Opportunity, and Project 21 in Support of Defendants-Appellees at 3–4, *N.C. State Conf. of NAACP v. McCrory*, 831 F.3d 204 (4th Cir. 2016) (No. 16-1468), 2016 WL 3438051; Amended Amicus Brief in Opposition to Plaintiffs’ Motion for a Preliminary Injunction at 28, *N.C. State Conf. of the NAACP v. Cooper*, No. 1:18-cv-01034-LCB-LPA (M.D. N.C. Dec. 2, 2019), 2019 WL 7882013; Defendants’ Motion to Dismiss Complaint for Declaratory and Injunctive Relief at 18–19, *League of United Latin Am. Citizens v. Abbott*, No. 5:18-cv-00175 (W.D. Tex. Apr. 9, 2018), 2018 WL 8262596; Defendants’ Brief in Support of Their Motion for Summary Judgment at 24–25, *One Wis. Inst., Inc. v. Nichol*, No. 15-CV-324 (W.D. Wis. Jan. 11, 2016), 2016 WL 8738854; Memorandum in Opposition to Plaintiffs’ Motion for Temporary Restraining Order at 26 n.11, *Thompson v. Hood*, No. 3:15-cv-620-CWR-FKB (S.D. Miss. Sept. 3, 2015), 2015 WL 10521829. For briefs raising constitutional concerns based on the Equal Protection Clause, see Petition for a Writ of Certiorari at 29, *Veasey*, 137 S. Ct. 612 (No. 16-393); Brief for Appellants at 48–49, *Cooper v. Harris*, 137 S. Ct. 1455 (2017) (No. 15-1262), 2016 WL 4771954; Brief for Appellees at 33–34, *Bethune-Hill*, 137 S. Ct. 788 (No. 15-680); Brief of Senator Thom Tillis et al., as Amici Curiae in Support of Defendants-Appellees and Affirmance at 21, *N.C. State Conf. of the NAACP*, 831 F.3d 204 (No. 16-1468); Brief

some circuit court judges have opined on the potential constitutional problems of the results test.<sup>68</sup> In this environment, voting rights advocates must not take the future of Section 2 as a given and must make strategic litigation choices to demonstrate that the vote denial results test stands on firm constitutional ground.<sup>69</sup> They may do so by rebutting the two prevailing constitutional challenges to Section 2 to show that the results test effectively confronts the rise of modern and widespread voter suppression, without unduly intruding into local control of elections or commanding excessive race-consciousness.

## II. Constitutional Concerns About Section 2

Although no federal court decision to date has held that the results test is unconstitutional, the Supreme Court may be inclined to eliminate or limit Section 2 in the vote denial context.<sup>70</sup> There are several reasons why this risk to Section 2 must be taken seriously. First, the Supreme Court has explicitly left open the question of Section 2's constitutionality,<sup>71</sup> and over the last two decades, multiple justices have expressed serious doubts about the results

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of the Buckeye Inst. and the Jud. Educ. Project as Amici Curiae in Support of Defendants-Appellants and Reversal at 21–22, *Ne. Ohio Coal. for the Homeless v. Husted*, 837 F.3d 612 (6th Cir. 2016) (No. 16-3603), 2016 WL 3680235; Defendants' Brief in Support of Their Motion for Summary Judgment at 24, *One Wis. Inst., Inc.*, No. 15-CV-324.

68. *See, e.g.*, *Thomas v. Bryant*, 938 F.3d 134, 183–85 (5th Cir. 2019) (Willett, J., dissenting), *reh'g en banc granted*, 939 F.3d 629 (2019); *Veasey v. Abbott*, 830 F.3d 216, 314–18 (5th Cir. 2016) (en banc) (Jones, J., dissenting); *Hayden v. Pataki*, 449 F.3d 305, 333 (2d Cir. 2006) (Walker, J., concurring); *Farrakhan v. Washington*, 359 F.3d 1116, 1122–25 (9th Cir. 2004) (Kozinski, J., dissenting); *see also* Ala. State Conf. of NAACP v. Alabama, 949 F.3d 647, 655–59 (11th Cir. 2020) (Branch, J., dissenting) (writing that Section 2 must be significantly curtailed to comply with the Eleventh Amendment's state sovereign immunity principles); *Mich. State A. Philip Randolph Inst. v. Johnson*, 749 F. App'x 342, 353 (6th Cir. 2018) (excluding certain balloting programs from the reach of Section 2 altogether).

69. *See* Hayden Johnson, *Vote Denial and Defense: A Strategic Enforcement Proposal for Section 2 of the Voting Rights Act*, 108 GEO. L.J. 449 (2019) (offering eight considerations to strategically pursue Section 2 vote denial cases).

70. *See* Elmendorf, *supra* note 62, at 382 (“Section 2 looks like a ripe target for a conservative Supreme Court.”); Luis Fuentes-Rohwer, *The Future of Section 2 of the Voting Rights Act in the Hands of a Conservative Court*, 5 DUKE J. CONST. L. & PUB. POLY 125, 127 (2010) (“To date, however, the Supreme Court has left open the question whether section 2 is a constitutional exercise of congressional power.”); *see also* Mark Joseph Stern, *The Supreme Court May Soon Deal a Final, Fatal Blow to the Voting Rights Act*, SLATE (Oct. 10, 2019, 5:45 AM), <https://slate.com/news-and-politics/2019/10/supreme-court-voting-rights-act-obliteration.html> [<https://perma.cc/PLC3-YR36>] (discussing the potential constitutional challenge to Section 2).

71. *See* Fuentes-Rohwer, *supra* note 70, at 127.

test.<sup>72</sup> Second, proponents of restrictive voting laws have consistently argued that Section 2 is not “congruen[t] and proportional[]” to the harm it seeks to redress under the tailoring rule established in *City of Boerne v. Flores*.<sup>73</sup> Third, the Supreme Court’s equal protection jurisprudence has tended to be very suspicious of race-conscious governmental actions, even when viewed by some as beneficial.<sup>74</sup> Accordingly, the Roberts Court has generally disfavored antidiscrimination statutes that impose liability because of a challenged law or practice’s disparate impact on minority groups, as seen in the Fair Housing Act<sup>75</sup> and Title VII<sup>76</sup> contexts. In sum, challengers to Section 2 contend that the statute is unconstitutional because it is purportedly untethered from its constitutional foundation and violates the Equal Protection Clause by requiring excessive consideration of race in electoral decision-making.<sup>77</sup>

As the Supreme Court weighs in on this long-brewing fight over Section 2,<sup>78</sup> it could strike down the results test altogether and reimpose an intent-based standard. After all, the Court in 1980 did precisely that in *City of Mobile v. Bolden*,<sup>79</sup> and the Roberts Court has shown a willingness to rebuff judicial minimalism in recent

72. See Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *Race and Representation Revisited: The New Racial Gerrymandering Cases and Section 2 of the VRA*, 59 WM. & MARY L. REV. 1559, 1596 (2018) (“As many as four Justices are on record as skeptical of section 2. The Court may simply be of the view that section 2 is no longer necessary to enable voters of color to elect their candidates of choice.”).

73. See 521 U.S. 507, 519–20 (1997) (ruling that statutory enforcement of the Reconstruction Amendments must be congruent and proportional to a record or threat of constitutional violations); see also Fuentes-Rohwer, *supra* note 70, at 137 (“[I]t is often noted that the Court offered the Voting Rights Act as an exemplary statute. The Court underscored often how [the Religious Freedom Restoration Act] was different in degree and kind from the VRA . . . [However, S]ection 2 remained conspicuously absent from the discussion.”).

74. See, e.g., *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007) (plurality opinion) (rejecting voluntary school desegregation program and demanding colorblindness in efforts to promote racial inclusion because “[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race”); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 225–27 (1995) (holding that equal protection strict scrutiny analysis applies to federal laws that discriminate based on race, even when those laws have “benign” motives).

75. See, e.g., *Tex. Dep’t of Hous. & Cmty. Affs. v. Inclusive Cmty. Project, Inc.*, 576 U.S. 519 (2015).

76. See, e.g., *Ricci v. DeStefano*, 557 U.S. 557 (2009).

77. See Elmendorf, *supra* note 62, at 382 (summarizing that “if it is not clear what harms Section 2 guards against, and if Section 2 in practice precipitates racial conflict, then Section 2 is probably not a reasonable congressional remedy”).

78. See discussion *supra* note 33.

79. 446 U.S. 55, 60–61 (1980) (holding that the original Section 2 “was intended to have an effect no different from that of the Fifteenth Amendment itself”).

election law cases such as *Shelby County v. Holder*, *Citizens United v. FEC*, and *Abbott v. Perez*.<sup>80</sup> But the more likely route may be that the Court would follow the preferred incrementalist approach of Chief Justice Roberts,<sup>81</sup> by which the Court could narrow the scope of Section 2's applicability or impose more onerous evidentiary requirements (such as demanding proof of reduced minority turnout or more direct causation showings) to make successful results test litigation nearly impossible. Ultimately, though, the constitutional arguments against Section 2 should be rejected because the arguments in favor of Section 2's constitutionality are much stronger than the claims against it.

A. *Forecasting the Roberts Court's View of the Section 2 Results Test*

Remarkably, the Supreme Court has never explicitly upheld Section 2's results test as constitutional or even decided a Section 2 vote denial case.<sup>82</sup> Yet the continuous enforcement of the results test against a wide range of election laws in the lower courts and the Supreme Court's reticence to weigh in may support an inference of constitutionality.<sup>83</sup> The Court has also tacitly reaffirmed the constitutionality of the results test on three occasions.<sup>84</sup> First, soon after the 1982 amendments to the Voting Rights Act, the Court summarily affirmed a three-judge panel's decision upholding Section 2 as constitutional, sending the signal to lower courts that the results test should be followed.<sup>85</sup> Second, in a 1996 racial redistricting case involving Section 2, called *Bush v. Vera*, Justice O'Connor wrote a concurrence that offered tepid support for the vote

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80. See discussion *infra* notes 90, 104–109.

81. See Adam Liptak, *Roberts's Incremental Approach Frustrates Supreme Court Allies*, N.Y. TIMES (July 14, 2014), <https://nyti.ms/1raJ71A> [<https://perma.cc/SR85-ZQD8>].

82. Stephanopoulos, *supra* note 34, at 1572.

83. See, e.g., *Bush v. Vera*, 517 U.S. 952, 990–92 (1996) (O'Connor, J., concurring) (citing cases upholding Section 2's results test); *Holder v. Hall*, 512 U.S. 874, 965 (1994) (Stevens, J., dissenting) (claiming that the reinterpretation of Section 2 to limit its scope “would require overruling a sizable number of this Court's precedents”).

84. See *Shelby Cnty. v. Holder*, 570 U.S. 529, 537 (2013); *Vera*, 517 U.S. at 992 (O'Connor, J., concurring); *Miss. Republican Exec. Comm. v. Brooks*, 469 U.S. 1002, 1002–03 (1984) (Stevens, J., concurring).

85. See *Miss. Republican Exec. Comm.*, 469 U.S. at 1002–03 (Stevens, J., concurring); see also *Hicks v. Miranda*, 422 U.S. 332, 344–45 (1975) (“[L]ower courts are bound by summary decisions by this Court ‘until such time as the Court informs [them] that [they] are not.’”) (alterations in original) (internal citations omitted).

dilution results test.<sup>86</sup> She concluded that Section 2's repeated application means that jurisdictions should "assume the constitutionality of §2 of the VRA, including the 1982 amendments."<sup>87</sup> Third, and most recently, the *Shelby County v. Holder* decision referred to Section 2's permanent, nationwide cause of action and potential to seek preliminary relief as support for its conclusion that Section 5's preclearance coverage was no longer necessary.<sup>88</sup>

These three instances and the consistent application of Section 2's results test to vote denial laws in the lower courts may provide cold comfort to voting rights advocates in the current legal environment. In recent terms, multiple different coalitions of justices were willing to overrule longstanding precedents.<sup>89</sup> Concerning election law in particular, the Roberts Court has circumscribed even recent precedential decisions multiple times over the past decade.<sup>90</sup> And specifically related to Section 2, some election law academics have suggested that prior cases interpreting Section 2 are entitled to lesser precedential deference under the

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86. *Vera*, 517 U.S. at 992 (O'Connor, J., concurring) (approvingly citing twelve lower court decisions upholding Section 2 and ruling that the results test "is an important part of the apparatus chosen by Congress to effectuate this Nation's commitment 'to confront its conscience and fulfill the guarantee of the Constitution' with respect to equality in voting" (citing S. REP. NO. 97-417, at 4 (1982))).

87. *Id.*

88. *See* 570 U.S. at 537 (observing that "[b]oth the Federal Government and individuals have sued to enforce §2, and injunctive relief is available in appropriate cases to block voting laws from going into effect. Section 2 is permanent, applies nationwide, and is not at issue in this case") (internal citations omitted). *But see* Nicholas O. Stephanopoulos, *The South After Shelby County*, 2013 SUP. CT. REV. 55, 58 (2013) (disagreeing with the *Shelby County* majority that preliminary relief is actually available under Section 2, given that "the proportion of Section 2 suits in which preliminary injunctions are granted is quite small, certainly no higher than 25 percent and probably lower than 5 percent").

89. *See, e.g.*, *Knick v. Twp. of Scott*, 139 S. Ct. 2162, 2170 (2019) (overruling *Williamson Cty. Reg'l Plan. Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985)); *Franchise Tax Bd. v. Hyatt*, 139 S. Ct. 1485, 1492 (2019) (overruling *Nevada v. Hall*, 440 U.S. 410 (1979)); *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2479 (2018) (overruling *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209 (1977)); *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2099 (2018) (overruling *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992)); *see also* Anita S. Krishnakumar, *Textualism and Statutory Precedents*, 104 VA. L. REV. 157, 160–61 (2018) ("[D]uring the Roberts Court's first decade, the Court's textualist or textualist-leaning Justices repeatedly have called for overruling a statutory precedent, even when doing so would upset settled expectations.").

90. *See, e.g.*, *Shelby Cnty.*, 570 U.S. at 556–57 (abrogating *Lopez v. Monterey Cnty.*, 525 U.S. 266 (1999)); *City of Rome v. United States*, 446 U.S. 156 (1980); *Georgia v. United States*, 411 U.S. 526 (1973); and *South Carolina v. Katzenbach*, 383 U.S. 301 (1966)); *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010) (overruling *Austin v. Mich. Chamber of Com.*, 494 U.S. 652 (1990) and overruling in part *McConnell v. Fed. Election Comm'n*, 540 U.S. 93 (2003)).

doctrine of stare decisis.<sup>91</sup> Moreover, even the Court’s prior swing votes, Justices O’Connor and Kennedy, were apprehensive about using Section 2 to increase electoral opportunities for minority groups at the expense of other state interests, and criticized the apparent racial divisiveness that VRA enforcement perpetuates.<sup>92</sup> In recent years, the Court has become more ideologically conservative,<sup>93</sup> particularly after the passing of the Court’s staunchest VRA defender, Justice Ruth Bader Ginsburg.<sup>94</sup>

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91. See Elmendorf, *supra* note 62, at 448–55 (suggesting that Section 2 is a “common law statute” and its precedents may be entitled to a weaker stare decisis protection); Pitts, *supra* note 62, at 4 (citing Elmendorf’s proposition).

92. Justice Kennedy continuously cast doubt on the status of Section 2, writing for the Court and separately on several occasions to deliberately leave the results test’s legitimacy open to challenge. See, e.g., *Bartlett v. Strickland*, 556 U.S. 1, 21 (2009) (warning that too much Section 2 race consciousness would “infuse” racial considerations into every redistricting decision and that “[t]o the extent there is any doubt whether §2 calls for the majority-minority rule, we resolve that doubt by avoiding serious constitutional concerns under the Equal Protection Clause”); *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 405–06 (2006) (cautioning that interpreting Section 2 to protect influence districts would “unnecessarily infuse race into virtually every redistricting”); *Miller v. Johnson*, 515 U.S. 900, 927 (1995) (recognizing that although the VRA “has been of vital importance in eradicating invidious discrimination from the electoral process and enhancing the legitimacy of our political institutions,” its purpose “is neither assured nor well served . . . by carving electorates into racial blocs”); *Johnson v. De Grandy*, 512 U.S. 997, 1028–29 (1994) (Kennedy, J., concurring in part and dissenting in part) (“It is important to emphasize that the precedents to which I refer, like today’s decision, only construe [Section 2], and do not purport to assess its constitutional implications.”) (internal citations omitted); *Chisom v. Roemer*, 501 U.S. 380, 418 (1991) (Kennedy, J., dissenting) (writing pointedly that “[n]othing in today’s decision addresses the question whether § 2 . . . , as interpreted in *Thornburg v. Gingles*, is consistent with the requirements of the United States Constitution”) (internal citation omitted). Justice O’Connor echoed Kennedy’s opposition to race-conscious redistricting, emphasizing that, “[r]acial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions; it threatens to carry us further from the goal of a political system in which race no longer matters—a goal that the Fourteenth and Fifteenth Amendments embody.” *Shaw v. Reno*, 509 U.S. 630, 657 (1993).

93. See Adam Liptak, *Barrett’s Record: A Conservative Who Would Push the Supreme Court to the Right*, N.Y. TIMES (Nov. 2, 2020), <https://nyti.ms/36WTep2> [<https://perma.cc/WE9C-TQYP>]; Amelia Thomson-DeVeaux, *How Amy Coney Barrett Could Change the Supreme Court*, FIVETHIRTYEIGHT (Sept. 25, 2020), <https://fivethirtyeight.com/features/how-amy-coney-barrett-could-change-the-supreme-court/> [<https://perma.cc/4BNH-7SAL>] (suggesting that, according to one empirical measure of judicial ideology, Chief Justice Roberts would “no longer be the court’s median”).

94. See, e.g., *Shelby Cnty. v. Holder*, 570 U.S. 529, 590 (2013) (Ginsburg, J., dissenting) (“Throwing out preclearance when it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet.”); see also Richard Hasen, *Symposium: Ginsburg Was a Champion of Voting Rights, but Mostly in Dissent*, SCOTUSBLOG (Sept. 29, 2020), <https://www.scotusblog.com/2020/09/symposium->

Of the current members of the Supreme Court, Justice Thomas has provided the most sweeping critique of Section 2, specifically in the vote dilution context.<sup>95</sup> Justice Thomas wrote in a concurrence in the 1994 *Holder v. Hall* case that “few devices could be better designed to exacerbate racial tensions than the consciously segregated districting system currently being constructed in the name of the Voting Rights Act.”<sup>96</sup> Justice Scalia signed on to Thomas’ perspective,<sup>97</sup> and recently in the 2017 *Abbott v. Perez* case, Justice Gorsuch has followed suit.<sup>98</sup> But Thomas also elaborated at length in *Holder v. Hall* that Section 2 can *only* apply to voting participation restrictions, perhaps indicating that he would be more willing to find the results test is still constitutional in the vote denial context.<sup>99</sup>

On balance, though, Justices Thomas and Gorsuch may be hostile to non-intent focused analyses in voting<sup>100</sup> or other civil rights areas that could be viewed as “progressive causes”<sup>101</sup> and both justices could vote to curb or strike down Section 2.

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ginsburg-was-a-champion-of-voting-rights-but-mostly-in-dissent/  
[<https://perma.cc/2H65-B56B>].

95. See *Holder v. Hall*, 512 U.S. 874, 892–93 (1994) (Thomas, J., concurring); see also Fuentes-Rohwer, *supra* note 70, at 142–43 (“Justices Thomas and Scalia have . . . remonstrated against the use of race in elections and the constitutionality of the VRA.”).

96. *Hall*, 512 U.S. at 907; see also *Cooper v. Harris*, 137 S. Ct. 1455, 1485–86 (2017) (Thomas, J., concurring) (reiterating that compliance with Section 2 cannot be used to justify a racial gerrymander).

97. *League of United Latin Am. Citizens*, 548 U.S. at 512 (Scalia, J., concurring in part and dissenting in part) (finding that Section 2 “continues to drift ever further from the [VRA]’s purpose of ensuring minority voters equal electoral opportunities”).

98. 138 S. Ct. 2305, 2335 (2018) (Thomas, J., concurring, joined by Gorsuch, J.) (voting to join Justice Thomas’ “view that § 2 of the Voting Rights Act of 1965 does not apply to redistricting”).

99. *Hall*, 512 U.S. at 945 (Thomas, J., concurring) (surveying the text and context of Section 2 and concluding that the results test applies “only to state enactments that regulate citizens’ access to the ballot or the processes for counting a ballot”).

100. See, e.g., *Shelby Cnty.*, 570 U.S. at 558 (Thomas, J., concurring) (arguing the Court should have gone further to eliminate Section 5 protections altogether because “[h]owever one aggregates the data compiled by Congress, it cannot justify the considerable burdens created by § 5”); *Lopez*, 525 U.S. at 293 (Thomas, J., dissenting) (collecting cases discussing how “Section 5 is a unique requirement that exacts significant federalism costs”).

101. Neil M. Gorsuch, *Liberals’N’Lawsuits*, NAT’L REV. ONLINE (Feb. 7, 2005), [www.nationalreview.com/2005/02/liberalsnlawsuits-joseph-6/](http://www.nationalreview.com/2005/02/liberalsnlawsuits-joseph-6/) [<https://perma.cc/A4AG-VZ3U>] (arguing against liberal causes using litigation to counter discrimination and warning that “as Republicans win presidential and Senate elections and thus gain increasing control over the judicial appointment and confirmation process, the level of sympathy liberals pushing constitutional litigation can expect in the courts may wither over time, leaving the Left truly out in the cold”);

Justice Alito has also generally advanced more stringent views on results-oriented antidiscrimination statutes<sup>102</sup> and has sought to reshape the legal landscape to remove key federal oversights over local control of elections.<sup>103</sup> In *Abbott v. Perez*, for example, Alito wrote the majority opinion and articulated a narrow conception of Section 2's role in checking a jurisdiction's management of its elections.<sup>104</sup> Alito concluded that because election regulation "is primarily the duty and responsibility of the State," "[f]ederal-court review of districting legislation represents a serious intrusion on the most vital of local functions" and the "good faith of [a] state legislature must be presumed."<sup>105</sup> By giving states this benefit of the doubt, the *Abbott* decision ratcheted up the burden of proving a jurisdiction acted with discriminatory intent.<sup>106</sup>

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*see also* Cinnamon Hills Youth Crisis Ctr., Inc. v. Saint George City, 685 F.3d 917, 923–24 (10th Cir. 2012) (Gorsuch, J.) (asserting a caged view of the Fair Housing Act disparate impact test related to housing for persons with disabilities).

102. For example, as a judge on the Third Circuit, Alito sought to increase the evidentiary burden for plaintiffs to prove workplace race discrimination under Title VII. *See* *Bray v. Marriott Hotels*, 110 F.3d 986, 999 (3d Cir. 1997) (Alito, J., dissenting). The majority opinion in *Bray v. Marriott Hotels* wholly rejected Alito's reading of the law, stating that "Title VII would be eviscerated if our analysis were to halt where the dissent suggests." *Id.* at 993 (majority opinion).

103. One scholar has broadly contended that Justices Thomas and Alito "believe that any federal interference with the state's power over voter qualifications is unconstitutional." *See* Franita Tolson, *The Elections Clause and the Underenforcement of Federal Law*, 129 YALE L.J.F. 171, 175–76 (2019). Justice Alito has been a consistent voice against the Supreme Court's one-person, one-vote doctrine and wrote in a job application personal statement explaining his lifelong conservatism and that his interest in constitutional law was "motivated in large part by disagreement with Warren Court decisions, particularly in the areas of . . . reapportionment." *See* Samuel Alito, Personal Qualifications Statement (Nov. 15, 1985), [www.npr.org/documents/2005/nov/alito/alitoabortion.pdf](https://www.npr.org/documents/2005/nov/alito/alitoabortion.pdf) [<https://perma.cc/T953-P6MY>]. In accordance with this view, Justice Alito in 2016 raised the possibility of changing the longstanding meaning of one-person, one-vote jurisprudence to provide states greater deference in redistricting, *see* *Evenwel v. Abbott*, 136 S. Ct. 1120, 1144–45 (2016) (Alito, J., concurring), which contributed to a flash point during the 2019 census citizenship question litigation, *see* Richard L. Hasen, *New Memo Reveals the Census Question Was Added to Boost White Voting Power*, SLATE (May 30, 2019, 11:59 AM), <https://slate.com/news-and-politics/2019/05/census-memo-supreme-court-conservatives-white-voters-alito.html> [<https://perma.cc/TK42-EVHN>].

104. *See* *Perez*, 138 S. Ct. at 2313–14 (concluding that all but one of Texas' legislative districts are lawful under Section 2).

105. *Id.* at 2324 (citing *Miller v. Johnson*, 515 U.S. 900, 915 (1995)). The view Alito expressed in *Abbott v. Perez* is consistent with his dissent in a prior voting registration case, in which he argued that courts must defer to local administration of elections and "begin by applying a presumption against pre-emption of" the state voting law. *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 39 (2013) (Alito, J., dissenting).

106. *See* Richard L. Hasen, *Suppression of Minority Voting Rights Is About to Get*



The *Abbott* Court also reached the merits only by eschewing judicial minimalism to review the case before a final injunction order and assertively displaced the trial court's factual findings regarding intentional discrimination.<sup>107</sup> In response, Justice Sotomayor's dissent warned of the potentially larger import of Justice Alito's majority opinion on Section 2, claiming that the majority went "out of its way" to set aside the lower court's unanimous finding that Texas' revised electoral maps "were adopted for the purpose of preserving the racial discrimination that tainted its previous maps."<sup>108</sup> Moreover, Justice Sotomayor emphasized that the *Abbott* majority had prioritized the "presumption of good faith" of a legislature "at serious costs to our democracy," and contrary to the record of intentional discrimination in Texas and the purposes of Section 2.<sup>109</sup>

Justices Alito and Sotomayor similarly wrote opinions on opposite sides of a 2018 case called *Husted v. A. Philip Randolph Institute*,<sup>110</sup> which concerned the methods states may use to remove voters from their registration rolls under the National Voter Registration Act (NVRA).<sup>111</sup> Writing for the majority, Justice Alito concluded that Ohio's method of classifying and removing allegedly ineligible voters complied with the NVRA, including the requirement that registration programs must conform with the VRA and Section 2's results-oriented prohibition of discriminatory voting laws.<sup>112</sup> Dissenting, Justice Sotomayor emphasized that Ohio's registration removal "[p]rocess has disproportionately affected minority, low-income, disabled, and veteran voters"<sup>113</sup> and noted that in one county, "African-American-majority neighborhoods in downtown Cincinnati had 10% of their voters removed due to inactivity since 2012, as 'compared to only 4% of voters in a suburban, majority-White neighborhood,'" a likely

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*Way Worse*, SLATE (June 25, 2018, 2:20 PM), <https://slate.com/news-and-politics/2018/06/the-abbott-v-perez-case-echoes-shelby-county-v-holder-as-a-further-death-blow-for-the-voting-rights-act.html> [<https://perma.cc/PZL9-QFYF>].

107. *Id.*

108. *Perez*, 138 S. Ct. at 2335 (Sotomayor, J., dissenting); *see also id.* at 2360 (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886)) (arguing the court ignored proper procedures "to allow Texas to use electoral maps that, in design and effect, burden the rights of minority voters to exercise that most precious right that is 'preservative of all rights'").

109. *Id.* at 2346.

110. *See Husted v. A. Philip Randolph Inst.*, 138 S. Ct. 1833 (2018).

111. *See id.*

112. *See id.* at 1840, 1848 (articulating the NVRA's requirements and finding that Ohio complied).

113. *Id.* at 1864 (Sotomayor, J., dissenting).

sufficient disparate impact under part one of the vote denial results test.<sup>114</sup> Justice Sotomayor’s opinion also noted that the majority had ignored the state’s history of voter suppression and the purpose behind voting rights legislation to enfranchise more people, not to justify unnecessarily removing eligible voters from the registration rolls.<sup>115</sup> Although *Husted* did not involve Section 2 directly, the two opinions may indicate how the Court would address a results test challenge to alleged discrimination in state maintenance of registration rolls, and the likelihood that, similar to *Abbott v. Perez*, the Court may also view Section 2 as improperly second-guessing local electoral choices.<sup>116</sup>

Justice Kavanaugh may prove decisive for the future of the VRA.<sup>117</sup> Though he never reviewed a Section 2 case as a D.C. Circuit judge, Kavanaugh’s potential views may be revealed by a 2012 Section 5 case in which he wrote the majority opinion approving South Carolina’s voter ID law.<sup>118</sup> There, Judge Kavanaugh ruled that the challenged law did not offend the even more protective

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114. *Id.* (quoting Brief for NAACP & The Ohio State Conf. of the NAACP as Amici Curiae Supporting Respondents, *Husted v. A. Philip Randolph Inst.*, 138 S. Ct. 1833 (2018) (No. 16-980)); see also USCCR Report, *supra* note 13, at 144–57 (documenting disproportionate impact of voter registration list purges in several states).

115. *Husted*, 138 S. Ct. at 1865.

116. See Lisa Marshall Manheim & Elizabeth G. Porter, *The Elephant in the Room: Intentional Voter Suppression*, 2018 SUP. CT. REV. 213, 219 (2018) (“*Husted* underscores the Supreme Court’s willingness to use its limited institutional resources and massive institutional power not to protect voters, but instead to aid and abet a rollback of voting rights.”); Richard L. Hasen, *Sonia Sotomayor’s Dissent in the Big Voter-Purge Case Points to How the Law Might Still be Struck Down*, SLATE (June 11, 2018, 12:33 PM), <https://slate.com/news-and-politics/2018/06/sonia-sotomayors-husted-dissentpoints-the-way-forward-on-racist-voter-purge-laws.html> [<https://perma.cc/T3Q3-YLJG>].

117. See Adam Liptak, *How Brett Kavanaugh Would Transform the Supreme Court*, N.Y. TIMES (Sept. 2, 2018), <https://nyti.ms/2N3M5d1> [<https://perma.cc/RP9K-B929>] (predicting that Kavanaugh’s appointment will lead to “a solid five-member conservative majority that would most likely . . . uphold voting restrictions [and] strike down campaign finance regulations”). In addition, Kavanaugh’s view on voting rights may also be influenced by his “colorblind” approach to the Constitution, having previously written “in a newspaper column that the Supreme Court would eventually, inevitably find that ‘in the eyes of government, we are just one race.’” Ann E. Marimow, *Brett Kavanaugh Once Predicted ‘One Race’ in the Eyes of Government. Would He End Affirmative Action?*, WASH. POST (Aug. 7, 2018), [https://www.washingtonpost.com/local/public-safety/brett-kavanaugh-once-called-a-government-program-for-native-hawaiians-a-naked-racial-spoils-system-would-he-end-affirmative-action/2018/08/07/d4123ffc-94f4-11e8-a679-b09212fb69c2\\_story.html](https://www.washingtonpost.com/local/public-safety/brett-kavanaugh-once-called-a-government-program-for-native-hawaiians-a-naked-racial-spoils-system-would-he-end-affirmative-action/2018/08/07/d4123ffc-94f4-11e8-a679-b09212fb69c2_story.html) [<https://perma.cc/EW6V-7YVC>].

118. See *South Carolina v. United States*, 898 F. Supp. 2d 30 (D.D.C. 2012) (three-judge panel).

Section 5 retrogression standard<sup>119</sup> because a reasonable impediment exception ameliorated the law's burden on minority voters.<sup>120</sup> In upholding the voter ID law, Kavanaugh brushed past the reality that the exception mitigated the discriminatory burden merely because South Carolina had broadly reinterpreted the provision during the course of litigation (a point recognized by the concurrence),<sup>121</sup> and only passingly acknowledged evidence of the state legislature's racially discriminatory motive.<sup>122</sup> Moreover, in an earlier discovery order, Kavanaugh wanted to shield material prepared by state legislature staff attorneys while drafting the voter ID law, which may have blinded the court to other potential evidence of discriminatory intent.<sup>123</sup> In addition, during his 2018 confirmation hearing, Kavanaugh was evasive about his stance on the constitutionality of Section 2<sup>124</sup> and the existence of voter fraud,<sup>125</sup> offering few assurances for the future of a results test applied to vote denial laws.

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119. A voting law change violates Section 5 if data shows the status of minority voters would "retrogress" or worsen under the law when compared to the status quo ante. *See, e.g., Beer v. United States*, 425 U.S. 130 (1976).

120. *See South Carolina*, 898 F. Supp. 2d at 39.

121. *Id.* at 54 (Bates, J., concurring); *see also* Richard Hasen, *Softening Voter ID Laws Through Litigation: Is It Enough?*, 2016 WIS. L. REV. FORWARD 100, 108 (2016) ("There is little doubt South Carolina adopted this softening solely to obtain preclearance from the court.").

122. The record included an email between a State Representative and a supporter of the voter ID bill, with the supporter writing that Black voters "would be like a swarm of bees going after a watermelon" if they were offered \$100 dollars to obtain a voter ID. The Representative responded "Amen . . . Thank you for your support of voter ID." NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., THE CIVIL RIGHTS RECORD OF JUDGE BRETT KAVANAUGH, 58 (2018), [www.naacpldf.org/files/our-work/FINAL\\_Report%20on%20Brett%20Kavanaugh\\_FINAL\\_11\\_22.pdf](http://www.naacpldf.org/files/our-work/FINAL_Report%20on%20Brett%20Kavanaugh_FINAL_11_22.pdf) [<https://perma.cc/C26M-W9S9>]. The exchange took place after the bill was passed. *Id.* Judge Kavanaugh glossed over the exchange and indicated that the court was "troubled," but denied that it proved discriminatory intent. *See South Carolina*, 898 F. Supp. 2d at 45.

123. *See* Order at 9–10, *South Carolina v. United States*, No. 1:12-cv-00203 (D.D.C. Aug. 10, 2012) (Kavanaugh, J., dissenting).

124. Supreme Court Nominee Brett Kavanaugh Confirmation Hearing, Day 2, Part 5, at 1:41:26–1:41:55, C-SPAN (Sept. 5, 2018), <https://www.c-span.org/video/?449705-15/supreme-court-nominee-brett-kavanaugh-confirmation-hearing-day-2-part-5&playEvent&start=5914> (showing video recording of Justice Kavanaugh hesitating "to pre-commit" on the constitutionality of Section 2 in response to questioning from then-Senator Kamala Harris).

125. Confirmation Hearing on the Nomination of Brett M. Kavanaugh to be an Associate Justice of the Supreme Court Before the Senate Judiciary Committee, (Day 3), at 5:37:20–5:38:36, 115th Cong., 2d Sess. (Sept. 6, 2019), [www.judiciary.senate.gov/meetings/nomination-of-the-honorable-brett-m-kavanaugh-to-be-an-associate-justice-of-the-supreme-court-of-the-united-states-day-3](http://www.judiciary.senate.gov/meetings/nomination-of-the-honorable-brett-m-kavanaugh-to-be-an-associate-justice-of-the-supreme-court-of-the-united-states-day-3) (regarding the existence of voter fraud, Judge Kavanaugh responded to

Recently appointed Justice Barrett's record provides few reliable signposts for predicting her potential views on the VRA. In the sole voting rights merits decision she wrote during her time on the Seventh Circuit, Justice Barrett ruled against the plaintiff on his constitutional claim.<sup>126</sup> In a dissenting opinion in which Justice Barrett contested firearm ownership limitations imposed on certain individuals convicted of felony offenses, Justice Barrett distinguished deprivations of gun rights from voting rights by emphasizing that "founding-era legislatures imposed virtue-based restrictions" on "civic rights like voting and jury service, not to individual rights like the right to possess a gun."<sup>127</sup> Commentators and journalists also noted Justice Barrett's dodging answers during her 2020 confirmation hearing on even seemingly low-stakes voting rights questions, such as whether voter intimidation is unlawful under federal law or if she agreed with Chief Justice Roberts' statement in *Shelby County v. Holder* that "[v]oting discrimination still exists."<sup>128</sup> Thus, of the scant information available, Justice Barrett's vote to uphold an effective Section 2 results test is far from a sure conclusion.

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Senator Amy Klobuchar: "I hesitate to opine on . . . something I read in the law review article or blog . . . I would want a record in a particular case to determine what the evidence in the particular case was.")

126. See *Acevedo v. Cook Cnty. Officers Electoral Bd.*, 925 F.3d 944 (7th Cir. 2019) (involving a candidate's constitutional claim concerning ballot access); see also *Democratic Party of Wis. v. Vos*, 966 F.3d 581 (7th Cir. 2020) (joining opinion rejecting constitutional voting rights claims based on standing and justiciability); *McDonald v. Cook Cnty. Officers Electoral Bd.*, 758 F. App'x 527 (7th Cir. 2019) (rejecting constitutional voting rights claims based on mootness).

127. *Kanter v. Barr*, 919 F.3d 437, 451 (7th Cir. 2019) (Barrett, J., dissenting).

128. See, e.g., Joan Biskupic, *Amy Coney Barrett Grilled on Voting Rights as 2020 Election Is Underway*, CNN (Oct. 13, 2020), [www.cnn.com/2020/10/14/politics/voting-rights-amy-coney-barrett-shelby-county/index.html](http://www.cnn.com/2020/10/14/politics/voting-rights-amy-coney-barrett-shelby-county/index.html) [<https://perma.cc/8AVL-FA5C>]; Press Release, The Leadership Conf. on Civ. and Hum. Rights, *Nine Voting Rights and Democracy Questions Judge Barrett Refused to Answer* (Oct. 20, 2020), <https://civilrights.org/blog/nine-voting-rights-and-democracy-questions-judge-barrett-refused-to-answer/> [<https://perma.cc/7PUR-TV74>]. Justice Barrett's academic publications are also unrevealing of her potential voting rights jurisprudence, though many of her writings speak to a philosophy of judicial minimalism that prioritizes deference to the choices of political entities accountable to voters. See, e.g., Amy Coney Barrett, Book Review, *Countering the Majoritarian Difficulty*, 32 CONST. COMMENT. 61, 76 (2017) (reviewing RANDY E. BARNETT, *OUR REPUBLICAN CONSTITUTION: SECURING THE LIBERTY AND SOVEREIGNTY OF WE THE PEOPLE*) (critiquing the author's view of judicial power, arguing that judicial review is a "power" and not a "duty," and that "the courts must be cognizant of the limits upon their judicial power").

Finally, Chief Justice Roberts' current views of the propriety of Section 2's results test may also be in question.<sup>129</sup> In the early 1980s after he clerked for Justice Rehnquist,<sup>130</sup> Roberts lobbied against the 1982 results test amendment to Section 2 and penned several memoranda to Reagan Justice Department officials making his case. In his memos, Roberts warned that a Section 2 results test would effectively impose the Section 5 retrogression standard nationwide, which he argued was in violation of the intent of the Framers and the Congress that enacted the VRA in 1965.<sup>131</sup> He criticized that a results standard "establish[ed] a 'right' in racial and language minorities to electoral representation proportional to their population in the community."<sup>132</sup> From this early point, Roberts also raised constitutional concerns about Section 2: "[T]he constitutional standard of intent is now set for the Fifteenth Amendment, and Congress cannot change that. It can change the statutory standard, in § 2, but that would be severing the statute from its constitutional base and creating great uncertainty."<sup>133</sup> Some of Roberts' concerns about Section 2 materialized in a 2006 vote dilution case called *LULAC v. Perry*.<sup>134</sup> There, Chief Justice Roberts dissented from the majority's application of Section 2, concluding that he "[did] not believe it is [the Court's] role to make judgments about which mixes of minority voters should count for purposes of forming a majority in an electoral district . . . . It is a

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129. See BERMAN, *supra* note 17, at 152 (quoting voting rights advocate Gerry Hebert for his view that "John [Roberts] seemed like he always had it in for the Voting Rights Act. I remember him being a zealot when it came to having fundamental suspicions about the Voting Rights Act's utility").

130. Chief Justice Roberts' jurisprudence is influenced by former Chief Justice Rehnquist, who once wrote a dissenting opinion criticizing the VRA and stating that "[t]he enforcement provisions of the Civil War Amendments were not premised on the notion that Congress could empower a later generation of blacks to 'get even' for wrongs inflicted on their forebears." *City of Rome v. United States*, 446 U.S. 156, 218 (1980); see also Jeffrey Toobin, *No More Mr. Nice Guy: The Supreme Court's Stealth Hard-Liner*, NEW YORKER (May 25, 2009), [www.newyorker.com/magazine/2009/05/25/no-more-mr-nice-guy](http://www.newyorker.com/magazine/2009/05/25/no-more-mr-nice-guy) [<https://perma.cc/9WL5-JYEC>] (detailing Chief Justice Roberts' relationship with Justice Rehnquist).

131. See BERMAN, *supra* note 17, at 150–51; see also Records Pertaining to John G. Roberts, Jr., NAT'L ARCHIVES, [www.archives.gov/news/john-roberts/accession-60-89-0372](http://www.archives.gov/news/john-roberts/accession-60-89-0372) [<https://perma.cc/SY8K-TRHD>].

132. Memorandum from John Roberts, Special Assistant to the Att'y Gen., to the Att'y Gen., Why Section 2 of the Voting Rights Act Should Be Retained Unchanged, at 2 (Dec. 22, 1981), <https://www.archives.gov/files/news/john-roberts/accession-60-88-0498/030-black-binder1/folder030.pdf> [<https://perma.cc/64RS-YPXF>].

133. Memorandum from John Roberts, Special Assistant to the Att'y Gen., to the Att'y Gen., Today's Post Ed., at 2 (Jan. 26, 1982), <https://www.archives.gov/files/news/john-roberts/accession-60-88-0498/030-black-binder1/folder030.pdf> [<https://perma.cc/64RS-YPXF>] (emphasis in original).

134. See 548 U.S. 399 (2006).

sordid business, this divvying us up by race.”<sup>135</sup> To the extent Roberts believes Section 2’s vote denial results test also requires too much race-consciousness, he may think the test violates his “colorblind” interpretation of the Equal Protection Clause.<sup>136</sup>

### B. Two Constitutional Challenges to Section 2

The arguments Chief Justice Roberts and other justices have raised against Section 2 and related election law doctrines remain a threat to the vote denial results test, and opponents of this provision have endeavored to tee-up two questions concerning Section 2’s constitutionality to test the Court’s apprehension.<sup>137</sup> The first theory that Section 2 is unconstitutional relies upon many of the same purported federalism and enforcement power defects that arose in *Shelby County v. Holder* and *Northwest Austin v. Holder* (a precursor case to the facial challenge of the VRA’s preclearance scheme).<sup>138</sup> The argument is that Section 2 exceeds the permissible scope of Congress’ remedial power to enforce the Reconstruction Amendments “by appropriate legislation,”<sup>139</sup> given the tailoring rule the Supreme Court established in *City of Boerne v. Flores*.<sup>140</sup> This contention critically portrays Section 2 as an impermissible

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135. *Id.* at 511 (Roberts, C.J., concurring in part, concurring in judgment in part, and dissenting in part).

136. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007) (plurality opinion) (rejecting voluntary school desegregation program and demanding colorblindness in efforts to promote racial inclusion because “[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race”); see also Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 585 (2003) (“[R]ise of individualist and colorblind values in the generation since *Davis* now makes it necessary to consider a third issue: the affirmative tension between equal protection and disparate impact statutes.”).

137. See *supra* notes 32–33, 67–68; see also *Ho*, *supra* note 63, at 824 (quoting *Abbott v. Veasey*, 137 S. Ct. 612, 613 (2017), and citing *North Carolina v. N.C. State Conf. of the NAACP*, 137 S. Ct. 1399, 1400 (2017)) (observing that in denying certiorari in the Texas and North Carolina vote denial cases, “[t]he Chief Justice pointedly noted that ‘[t]he issues will be better suited for certiorari review’ after final judgment, all but promising that the Supreme Court will eventually take the case”); see also *Mich. State A. Philip Randolph Inst. v. Johnson*, 139 S. Ct. 50 (2018) (denying application to vacate the Circuit Court’s stay of the District Court’s permanent injunction of Michigan’s elimination of straight-ticket voting). Justices Ginsburg and Sotomayor dissented in the denial of the application to vacate stay. *Id.*

138. See *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193 (2008) (raising issues with Section 5 a year before *Shelby County*, but applying the constitutional avoidance canon to rule narrowly); *Shelby Cnty. v. Holder*, 679 F.3d 848, 859 (D.C. Cir. 2012) (determining that the Supreme Court has “sen[t] a powerful signal that congruence and proportionality is the appropriate standard of review”).

139. See U.S. CONST. amend. XIV, § 5; U.S. CONST. amend. XV, § 2.

140. See *Farrakhan v. Washington*, 359 F.3d 1116, 1122–25 (9th Cir. 2004) (Kozinski, J., dissenting) (analyzing whether Section 2’s results test fails the *Boerne* “congruence and proportionality” test).

substantive rather than remedial statute, and often attacks Section 2's scope in two forms: temporally and geographically.

The second challenge to Section 2 concerns an alleged conflict between the disparate impact component of the results test and the Court's usual interpretation of the Equal Protection Clause to command racial neutrality in antidiscrimination laws. The Court in recent years has addressed a variation of this conflict in the Fair Housing Act context in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project*<sup>141</sup> and Title VII context in *Ricci v. DeStefano*,<sup>142</sup> where the Roberts Court has remained wary of disparate impact statutes favoring racial minorities at the perceived expense of other races or interests. Proponents of restrictive voting laws argue that a disparate impact reading of Section 2 also encourages too much race-conscious decision-making, while employing a facile, retrogression-like standard to strike down useful and generally applicable electoral regulations.<sup>143</sup>

Both constitutional threats are analyzed below. Although the calls to reexamine the constitutionality of Section 2 have become louder in recent years from both advocates and commentators, these contentions are ultimately unfounded and the prevailing two-part results test stands on firm constitutional ground.

i. *City of Boerne* “Congruence and Proportionality”  
Challenge to Section 2

In *City of Boerne v. Flores*, the Supreme Court announced a new tailoring limit on congressional authority to enforce the Fourteenth Amendment: Congress' enforcement power is strictly “remedial,” and statutes protecting the Amendment's substantive rights must have “a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.”<sup>144</sup> Lacking such a connection, enforcement legislation may

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141. *Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmty. Project, Inc.*, 576 U.S. 519, 543–44 (2015) (upholding but limiting the Fair Housing Act's disparate impact standard).

142. *Ricci v. DeStefano*, 557 U.S. 557, 593 (2009) (upholding but limiting a disparate impact standard in the Title VII employment context).

143. *See Johnson*, *supra* note 66, at 2 (arguing that the Section 2 results test looks too much like retrogression and should be curtailed for that reason); *see also* Chief Justice Roberts' Memos, *supra* notes 130–133 and accompanying text.

144. *City of Boerne v. Flores*, 521 U.S. 507, 519–20 (1997). *But see Tennessee v. Lane*, 541 U.S. 509, 557–58 (2004) (Scalia, J., dissenting) (criticizing the *Boerne* test as “a standing invitation to judicial arbitrariness and policy-driven decisionmaking”).

improperly become “substantive in operation and effect.”<sup>145</sup> Applying this test, the *Boerne* Court held unconstitutional part of the Religious Freedom Restoration Act (RFRA),<sup>146</sup> which Congress passed to statutorily circumvent a then-recently narrowed interpretation of the Free Exercise Clause.<sup>147</sup>

Proponents of voting restrictions have repeatedly raised the *Boerne* framework as a basis for holding Section 2 unconstitutional,<sup>148</sup> and the decision’s reasoning may be relevant to the future of the results test along several dimensions. Although *Boerne* twice pointed to the VRA as the model for appropriate enforcement legislation,<sup>149</sup> the decision references cases discussing Section 5, and *Shelby County* effectively nullified that provision and went to great lengths to avoid opining on the asserted *Boerne* issues.<sup>150</sup> The threat the *Boerne* rule poses, in a nutshell, arises from the fact that Section 2 establishes an objective, results-oriented standard, but the Reconstruction Amendments prohibit only subjective, intentional discrimination.<sup>151</sup> As such, the Court may

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145. *Boerne*, 521 U.S. at 519–20; see also *id.* at 525 (citing *The Civil Rights Cases*, 109 U.S. 3, 13–14 (1883), for proposition that Congress may not pass “general legislation” under the Fourteenth Amendment, and must instead only enact “corrective legislation”); Jennifer G. Presto, *The 1982 Amendments to Section 2 of the Voting Rights Act: Constitutionality After City of Boerne*, 59 N.Y.U. ANN. SURV. AM. L. 609, 615 (2004) (analyzing the Court’s remedial limits); Nelson, *supra* note 63, at 591 (describing the “congruence and proportionality” of Section 2).

146. *Boerne*, 521 U.S. at 520 (holding unconstitutional RFRA’s state and local government provisions).

147. See *id.* at 512–15; see also *Emp. Div., Dept. of Hum. Res. of Or. v. Smith*, 494 U.S. 872, 879 (1990) (holding that the First Amendment’s Free Exercise Clause “does not relieve an individual of the obligation to comply with a ‘valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)’” (citation omitted)); Tabatha Abu El-Haj, *Linking the Questions: Judicial Supremacy as a Matter of Constitutional Interpretation*, 89 WASH. U. L. REV. 1309, 1349 (2012) (describing *Boerne* as an assertion of judicial supremacy over the Constitution, in response to Congress’ attempted disavowal of the Supreme Court’s Free Exercise Clause holding in *Employment Division v. Smith*).

148. For briefs, articles, and opinions raising *Boerne*-based constitutional arguments against Section 2, see *supra* notes 32, 66–68.

149. *Boerne*, 521 U.S. at 532–33; *Veasey v. Abbott*, 830 F.3d 216, 253 n.47 (5th Cir. 2016) (en banc) (noting that *Boerne* used the VRA as a model of appropriately congruent and proportional legislation).

150. See Fuentes-Rohwer, *supra* note 70, at 137 (“[I]t is often noted that the Court offered the Voting Rights Act as an exemplary statute. The Court underscored often how RFRA was different in degree and kind from the VRA.” However, “Section 2 remained conspicuously absent from the discussion.”).

151. See Christopher S. Elmendorf & Douglas M. Spencer, *Administering Section 2 of the Voting Rights Act After Shelby County*, 115 COLUM. L. REV. 2143, 2162 (2015); see also Fuentes-Rohwer, *supra* note 70, at 137 (“[I]f *City of Boerne* serves as guide,



apply *Boerne* to hold the vote denial results test unconstitutional because, like RFRA, Section 2 attempts to change the substantive constitutional right at issue and lacks a sufficient nexus to the temporal and geographic scope of intentional voting discrimination.

*a. Boerne Problem One: Judicial Supremacy and Remedial Mandate*

First, Section 2 may be at risk if the Court construes the results test as a substantive rather than remedial provision. In *Boerne*, the Court asserted its judicial supremacy to reaffirm that although Congress may have the first pass at determining what legislation is required to enforce the Fourteenth Amendment, the Court has the last word on the substantive right to be enforced.<sup>152</sup> In the Court's words, Congress "has been given the power 'to enforce,' not the power to determine what constitutes a constitutional violation."<sup>153</sup> And while Congress may enact "[l]egislation which deters or remedies constitutional violations . . . even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into legislative spheres of autonomy previously reserved to the States,"<sup>154</sup> it cannot too far exceed the Court's interpretation of the bounds of the underlying constitutional right.<sup>155</sup> Because RFRA came on the heels of the Court's narrowing of the Free Exercise Clause,<sup>156</sup> the *Boerne* Court determined that the legislation looked too much like Congress trying to use its legislative enforcement power to reinstall an

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it is hard to believe that the Voting Rights Act as amended in 1982 will survive this kind of judicial review."). *But see* Travis Crum, *The Superfluous Fifteenth Amendment?*, 114 NW. U. L. REV. 1549, 1563 (2020) (noting that the Court has not been "clear about whether the intent requirement applies to the Fifteenth Amendment").

152. *Boerne*, 521 U.S. at 536 ("It is for Congress in the first instance to determine whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment, and its conclusions are entitled to much deference. Congress' discretion is not unlimited, however, and the courts retain the power, as they have since *Marbury v. Madison*, to determine if Congress has exceeded its authority under the Constitution." (citations and quotations omitted)).

153. *Id.* at 519.

154. *Id.* at 518 (internal citations and quotations omitted).

155. *Id.* at 519 (rejecting "the suggestion that Congress has the power to decree the substance of the Fourteenth Amendment's restrictions on the States" because "Congress does not enforce a constitutional right by changing what the right is"); *see also* Elmendorf & Spencer, *supra* note 151, at 2163 (analyzing the relationship between Congress and the Court); Presto, *supra* note 145, at 616 (same).

156. *See* Emp. Div., Dept. of Hum. Res. of Or. v. Smith, 494 U.S. 872, 879 (1990).

overruled constitutional interpretation of individual religious rights, thereby usurping the judiciary's proper role.<sup>157</sup>

In a somewhat similar fashion, the 1982 Congress amended Section 2 to expressly adopt a results test as a direct response to the Supreme Court's ruling in *City of Mobile v. Bolden*, in which the Court held that Section 2's original language could only support an intent test in accordance with the Fifteenth Amendment's standard.<sup>158</sup> By reinstating a results test, opponents of Section 2 could argue that the 1982 Congress did not merely provide a prophylactic protection for the constitutional right to vote, but instead used a statute to amend the Constitution and redefine the substance of that right.<sup>159</sup> As such, the amended Section 2 is said to "be noncongruent and disproportionate because it prohibits a broad swath of conduct that is constitutionally innocuous: governmental activity that lacks a discriminatory purpose but produces a disparate impact."<sup>160</sup>

*b. Boerne Problem Two: Limitations on Temporal and Geographic Scope*

Second, the *Boerne* Court's tailoring restrictions on Congress' remedial power may also pose a problem for Section 2's constitutional status. The *Boerne* Court held that a Fourteenth Amendment enforcement statute must be tied with some degree of specificity to the constitutional injury it seeks to redress, both

157. *Boerne*, 521 U.S. at 536; see also Abu El-Haj, *supra* note 147, at 1349.

158. *City of Mobile v. Bolden*, 446 U.S. 55, 60–61 (1980) (finding that the original Section 2 "was intended to have an effect no different from that of the Fifteenth Amendment itself"); see also Fuentes-Rohwer, *supra* note 70, at 129 ("On its face, it is clear that [the original] Section 2 was only codifying the Fifteenth Amendment, and both the Attorney General and leading members of Congress said as much during the hearings in 1965."). *But see* Crum, *supra* note 151, at 1563, 1627 (challenging whether the Fifteenth Amendment requires discriminatory intent).

159. As the 1982 Senate Report made clear, the "principal reason" for statutorily overruling *Mobile v. Bolden* and rejecting an intent-based analysis "is that, simply put, the test asks the wrong question." S. REP. NO. 97-417, at 36; see also Michael T. Morley, *Prophylactic Redistricting? Congress's Section 5 Power and the New Equal Protection Right to Vote*, 59 WM. & MARY L. REV. 2053, 2085 (2018) (comparing the history of Section 2 and RFRA); Douglas Laycock, *Conceptual Gulfs in City of Boerne v. Flores*, 39 WM. & MARY L. REV. 743, 751 (1998) (analyzing the effect of *Boerne* on the vote dilution results test). For commentators analyzing the substantive nature of Section 2, see Presto, *supra* note 145, at 626; Fuentes-Rohwer, *supra* note 70, at 143–44; Elmendorf & Spencer, *supra* note 151, at 2158.

160. Stephanopoulos, *supra* note 34, at 1593; see also Morley, *supra* note 159, at 2077 (noting that *Boerne* is "[e]specially concerning from a voting rights perspective" because "the Court has taken a dim view of statutes aimed primarily at eliminating disparate impacts that do not themselves violate the Fourteenth Amendment").

temporally and geographically.<sup>161</sup> Temporally, the Court pointed to weaknesses in the RFRA legislative record, concluding that it “lacks examples of modern instances of generally applicable laws passed because of religious bigotry. The history of persecution in this country detailed in the hearings mentions no episodes occurring in the past 40 years.”<sup>162</sup> The record’s lack of modern examples of religious discrimination persuaded the *Boerne* Court that the statute was noncongruent and nonproportional to the constitutional harm.<sup>163</sup>

Notwithstanding the reality that discriminatory restrictions on voting and registration are increasingly pervasive today,<sup>164</sup> a constitutional claim against Section 2 may raise a similar *Boerne*-based temporal scope argument. One scholar has called this issue the “Bull Connor is dead” problem: When Congress enacted the VRA in 1965 and amended it in 1982, the record was replete with examples of intentional voting discrimination in the states, but with the use of more deceptive and subtler discriminatory practices today, Congress “may be hard-pressed to find widespread evidence of such discrimination.”<sup>165</sup> The Supreme Court in both *Shelby County* and *Northwest Austin* expressed strong condemnation of the idea that Congress can continue providing a voting rights remedy with high perceived federalism costs based on discriminatory voting conditions supposedly eliminated decades ago.<sup>166</sup> As Chief Justice Roberts stated for the *Shelby County* majority, “[o]ur country has changed, and while any racial discrimination in voting is too much, Congress must ensure that the legislation it passes to remedy that

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161. See *Boerne*, 521 U.S. at 529–31.

162. *Id.* at 530.

163. See *id.* at 530–32.

164. For descriptions of the rise in vote denial restrictions across the country, see generally the civil rights reports cited *supra* note 38.

165. Richard L. Hasen, *Congressional Power to Renew the Preclearance Provisions of the Voting Rights Act After Tennessee v. Lane*, 66 OHIO ST. L.J. 177, 179 (2005); see also Pamela S. Karlan, *Two Section Twos and Two Section Fives: Voting Rights and Remedies After Flores*, 39 WM. & MARY L. REV. 725, 730 (1998) (noting that Kennedy’s *Boerne* opinion’s “discussion of RFRA’s legislative record at least raises the possibility of some kind of durational constraint” on Congress’ enforcement power); Franita Tolson, *What Is Abridgment?: A Critique of Two Section Twos*, 67 ALA. L. REV. 433, 452–53 (2015) (noting that *Shelby County* “reflected long-standing concerns that Congress had not built a sufficient record of intentional racial discrimination in voting to justify the continued use of this particular remedy”).

166. See *Shelby Cnty. v. Holder*, 570 U.S. 529, 553 (2013) (ruling that disrupting traditional federalism and equal sovereignty principles must be done “on a basis that makes sense in light of current conditions”); *Nw. Austin Mun. Util. Dist. No. 1 v. Holder*, 557 U.S. 193, 203 (2009) (stating that the VRA “imposes current burdens and must be justified by current needs”).

problem speaks to current conditions.”<sup>167</sup> Applying this principle to the VRA’s preclearance formula, the Court observed:

Coverage [was] based on decades-old data and eradicated practices . . . . And voter registration and turnout numbers in the covered States have risen dramatically in the years since. Racial disparity in those numbers was compelling evidence justifying the preclearance remedy and the coverage formula. There is no longer such a disparity.<sup>168</sup>

Thus, although *Shelby County* concerned the federalism costs of Section 5—which empowers greater federal oversight of local electoral control—the decision’s “rejection of past discrimination as a basis for congressional prophylactic measures certainly places Section 2 in the Supreme Court’s constitutional crosshairs.”<sup>169</sup> And unlike Section 5, Section 2 is a permanent remedy in that it contains no sunset provision and does not itself require Congress to reconsider current conditions of voting discrimination.<sup>170</sup> Opponents of Section 2 could argue that the potential inability of Congress to identify enough modern examples of unconstitutional intentional voting discrimination shows that the results test exceeds the proper temporal scope of its Reconstruction Amendments enforcement power.<sup>171</sup>

Next, *Boerne* also suggests that the geographic scope of an enforcement statute must be tailored to the constitutional harm. Concerning RFRA, the Court reasoned that the statute’s nationwide coverage was not justified by evidence of nationwide unconstitutional religious discrimination.<sup>172</sup> The Court concluded that this broad geographic reach in part distinguished RFRA from

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167. *Shelby Cnty.*, 570 U.S. at 557. *But see* BERMAN, *supra* note 17, at 275 (challenging the evidence that Chief Justice Roberts referenced during oral argument); Ho, *supra* note 63, at 813 (detailing the statistical unreliability of Chief Justice Roberts’ conclusions concerning improved voting equality).

168. *Shelby Cnty.*, 570 U.S. at 551 (citations omitted).

169. Morgan, *supra* note 62, at 127–28; *see also* Farrakhan v. Washington, 359 F.3d 1116, 1122–23 (9th Cir. 2004) (Kozinski, J., dissenting) (arguing that the lack of recent intentional voting discrimination calls into question Section 2’s compliance with *Boerne*). *But see* Hayden v. Pataki, 449 F.3d 305, 333 (2d Cir. 2006) (Walker, J., concurring) (concluding that Section 2 “can serve to invalidate measures with disparate racial impact only if there is evidence in the congressional record that those measures are *part of a history and practice* of unconstitutional intentional discrimination” (emphasis added)).

170. *See* Morley, *supra* note 159, at 2085.

171. *See, e.g.,* Farrakhan, 359 F.3d at 1122–23 (Kozinski, J., dissenting).

172. *Boerne*, 521 U.S. at 531–32.

other permissible exercises of Congress' enforcement power.<sup>173</sup> Notably, Justice Kennedy's opinion referenced Section 5 as an exemplar statute that is sufficiently geographically tailored, and contrasted it with RFRA's "[s]weeping coverage," which "ensures its intrusion at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter."<sup>174</sup>

In 2000, the Supreme Court reiterated the potential geographic limits on Congress' remedial enforcement power in the *United States v. Morrison* decision.<sup>175</sup> The *Morrison* Court held that Congress lacked the authority to enact portions of the Violence Against Women Act (VAWA), in relevant part because VAWA's geographic scope lacked a congruent-and-proportional relationship to the Fourteenth Amendment harm of governmental gender discrimination.<sup>176</sup> The Court went on to contrast VAWA with two 1960s cases upholding the constitutionality of the VRA, *Katzenbach v. Morgan*<sup>177</sup> and *South Carolina v. Katzenbach*,<sup>178</sup> because the VRA's protections were "directed only to the State where the evil found by Congress existed, [or] the remedy was directed only to those States in which Congress found that there had been discrimination."<sup>179</sup> The Court emphasized that the gender discrimination detailed in the VAWA legislative record was not state conduct, but even if it were, "[VAWA] is also different from . . . previously upheld remedies in that it applies uniformly throughout the Nation. Congress' findings indicate that the problem of discrimination against the victims of gender-motivated crimes does not exist in all States, or even most States."<sup>180</sup>

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173. *Id.*

174. *Id.* at 532.

175. *United States v. Morrison*, 529 U.S. 598 (2000).

176. *Id.* at 626–27. Concerning the Fourteenth Amendment, the *Morrison* Court primarily held that although there was pervasive gender-based discrimination and gender-motivated crime across much of the country, this was merely private conduct beyond the reach of Congress' enforcement power. *Id.* at 621–22.

177. 384 U.S. 641, 651 (1966) (viewing the Section 5 enforcement clause as a one-way ratchet that provides "a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment") (citing *South Carolina v. Katzenbach*, 383 U.S. 301 (1966)). *But cf.* William Cohen, *Congressional Power to Interpret Due Process and Equal Protection*, 27 STAN. L. REV. 603, 606 (1975) (critiquing Justice Brennan's one-way "ratchet" theory of Congressional enforcement power).

178. 383 U.S. 301, 309 (1966).

179. *Morrison*, 529 U.S. at 627 (citation omitted).

180. *Id.* at 626.

Applied here, Section 2 may lack congruence and proportionality because its nationwide coverage purportedly also exceeds the scope of disenfranchisement, which mostly consisted (and some argue still consists)<sup>181</sup> of localized efforts to suppress Black voters in the South.<sup>182</sup>

In sum, the factors upon which the *Boerne* Court and its progeny have developed the “congruence and proportionality” test—including the close examination of the remedial nature of a Fourteenth Amendment enforcement statute and the nexus of the remedy to the temporal and geographic scope of the constitutional harm to be prevented—may not bode well for the future of Section 2’s results test. As one commentator concluded:

[T]he constitutional question framed by the Court in *City of Boerne* is a question of empirical judgment. This is now a subjective inquiry about how much racial discrimination exists in voting procedures and policies. The point was easy to make in 1965, as the record was replete with evidence of racial discrimination. It remains to be seen whether . . . the new conservative majority will look to the current state of affairs and make a similar conclusion.<sup>183</sup>

### c. *Rebuttal to Boerne Arguments Against Section 2*

Even though lower court cases discussing *Boerne*’s effect on Section 2’s results test have so far upheld its constitutionality,<sup>184</sup> the future remains uncertain.<sup>185</sup> Yet the uncertainty here should

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181. See Stephanopoulos, *supra* note 88, at 88–92; Tolson, *supra* note 165, at 463.

182. See Farrakhan v. Washington, 359 F.3d 1116, 1123–24 (9th Cir. 2004) (Kozinski, J., dissenting) (applying *Morrison* and discussing the geographic scope problem for Section 2’s results test); CHARLES ABERNATHY, CIVIL RIGHTS AND CONSTITUTIONAL LITIGATION 938–39 (5th ed. 2012) (same); Morley, *supra* note 159, at 2085–86 (same).

183. Fuentes-Rohwer, *supra* note 70, at 136.

184. See, e.g., Veasey v. Abbott, 830 F.3d 216, 253 (5th Cir. 2016) (en banc) (noting that “the constitutionality argument by the State is short sighted and ignores the history and text of the Fifteenth Amendment” because “both the Fifteenth Amendment and Section 2 . . . explicitly prohibit *abridgement* of the right to vote”); United States v. Blaine Cnty., 363 F.3d 897, 900 (9th Cir. 2004) (vote dilution case upholding Section 2 after addressing the *Boerne* temporal and geographic scope arguments). *But see* Farrakhan, 359 F.3d at 1122–25 (Kozinski, J., dissenting) (arguing that if the results test were to be applied to felony disenfranchisement laws, Section 2 may be unconstitutional under the *Boerne* framework); Hayden v. Pataki, 449 F.3d 305, 330 (2d Cir. 2006) (Walker, J., concurring) (same).

185. As stated *supra* in note 32 and the accompanying text, the Supreme Court during October Term 2020 will potentially address the *Boerne* arguments against Section 2 in *Brnovich v. DNC*. For commentators discussing the potential *Boerne*-related problems for Section 2, see, e.g., *supra* note 151.

not overshadow the strong arguments supporting the results test's compliance with the *Boerne* framework. First, regarding the remedial nature of Section 2, a direct analogy to *Boerne* is likely weak given crucial differences between the two statutes and their related circumstances. The primary difference is that RFRA was a new statute created from whole cloth to legislatively restore an overruled interpretation of the First Amendment, whereas Section 2's results test arose from Congress' explicit addition of the results-oriented language to the long-existing VRA to correct what it saw as the Supreme Court's misinterpretation of the statute.<sup>186</sup> It stands to reason that *Boerne* represents an assertion of judicial supremacy over the *Constitution*, not the *statutory* standards of the VRA, where Congress has more room to supersede the Court's interpretation of a statute to achieve legitimate remedial objectives.<sup>187</sup>

Moreover, proponents of Section 2 have persuasively asserted that the scope of Congress' authority in voting is broader than other areas because it enforces both the Fourteenth and Fifteenth Amendments,<sup>188</sup> and accordingly, Congress should have more latitude to affix appropriate remedies.<sup>189</sup> More leeway in combatting discriminatory voter suppression has a strong appeal given the fundamental nature of the right at stake<sup>190</sup> and the potential

186. See Morley, *supra* note 159, at 2085.

187. See James Durling, *May Congress Abrogate Stare Decisis by Statute?*, 127 YALE L.J.F. 27, 31 (2017); Fuentes-Rohwer, *supra* note 70, at 131.

188. *United States v. Bd. of Comm'rs of Sheffield*, 435 U.S. 110, 126–27 (1978) (holding that the VRA “is designed to implement the Fifteenth Amendment and, in some respects, the Fourteenth Amendment”).

189. See Crum, *supra* note 151, at 1627 (making case for applying a “rationality standard” to Fifteenth Amendment enforcement statutes that “gives Congress far greater authority to interpret the Constitution and fashion remedial schemes”); Evan Tsen Lee, *The Trouble with City of Boerne, and Why It Matters for the Fifteenth Amendment as Well*, 90 DENV. U. L. REV. 483, 502–03 (2012) (“When Congress acts pursuant to its Fourteenth or Fifteenth Amendment enforcement powers to combat such action, those enactments must be given the widest berth possible.”); see also Karlan, *supra* note 165, at 738 (arguing that “the Court should conclude that the risk that constitutionally innocuous conduct will be banned is outweighed by the difficulty of detecting and stopping serious constitutional injuries” to voting rights); Fuentes-Rohwer, *supra* note 70, at 134 (making similar arguments); Morgan, *supra* note 62, at 165 (same); Nelson, *supra* note 63, at 637 (same).

190. In many contexts, the Supreme Court has long recognized the fundamental nature of the right to vote. See *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) (describing the right to vote as a “fundamental political right”); *Reynolds v. Sims*, 377 U.S. 533, 561–62 (1964) (“[T]he right of suffrage is a fundamental matter in a free and democratic society.”); *Katzenbach v. Morgan*, 384 U.S. 641, 652–54 (1966) (quoting *Yick Wo*, 118 U.S. at 370) (observing that the right to vote is “precious and fundamental” and “preservative of all rights”); *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 670 (1966) (“[T]he right to vote is too precious, too fundamental to be

distortive effects of vote denial laws on the proper functioning of our democracy.<sup>191</sup> With the exception of *Shelby County*, the Court has historically assented to this view in voting,<sup>192</sup> and has generally acknowledged that Congress' enforcement power is at its height when acting to protect a suspect class against discrimination or to safeguard a fundamental right.<sup>193</sup>

Second, advocates have defended Section 2's temporal tailoring by arguing that the statute "contains a kind of durational calibration that makes the enforcement congruent with the injury."<sup>194</sup> Although there is no sunset provision or reauthorization process for Section 2, the results test itself encompasses timing restraints that satisfy *Boerne's* requirements. For example, Section 2 does not itself impose a permanent ban or curtailment of any facially non-discriminatory election laws, such as voter photo-ID requirements.<sup>195</sup> Rather, Section 2 merely "discontinues the use of an otherwise lawful electoral practice so long as it continues to

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so burdened or conditioned" on the ability to pay a tax.); *Rice v. Cayetano*, 528 U.S. 495, 512 (2000) (observing that the right to vote free of racial discrimination is a "fundamental principle" of the Constitution); *Bush v. Gore*, 531 U.S. 98, 104 (2000) ("[T]he right to vote as the legislature has prescribed is fundamental; and one source of its fundamental nature lies in the equal weight accorded to each vote and the equal dignity owed to each voter.").

191. See JOHN HART ELY, *DEMOCRACY AND DISTRUST* 105–10 (1980); Nelson, *supra* note 63, at 637 ("Because of the power of the vote in our democracy—because the right to vote secures all others—Congress has determined that discrimination may not infect voting or limit it on account of race, even if such discrimination is not purposeful."); see also *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 486 (1982) (quoting *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938)) ("[W]hen the State's allocation of power places unusual burdens on the ability of racial groups to enact legislation specifically designed to overcome the 'special condition' of prejudice, the governmental action seriously 'curtail[s] the operation of those political processes ordinarily to be relied upon to protect minorities.'").

192. See, e.g., *Chisom v. Roemer*, 501 U.S. 380, 403 (1991) (quoting *Allen v. State Bd. of Elections*, 393 U.S. 544, 567 (1969)) (observing that the VRA "should be interpreted in a manner that provides 'the broadest possible scope' in combating racial discrimination"); *City of Rome v. United States*, 446 U.S. 156, 173 (1980) ("[E]ven if § 1 of the Amendment prohibits only purposeful discrimination, the prior decisions of this Court foreclose any argument that Congress may not, pursuant to § 2, outlaw voting practices that are discriminatory in effect."); see also Daniel P. Tokaji, *Intent and Its Alternatives: Defending the New Voting Rights Act*, 58 ALA. L. REV. 349, 370 (2006) (observing that VRA caselaw shows that "Congress may have greater latitude under the Fourteenth Amendment in protecting rights of participation, as compared with rights of representation").

193. See, e.g., *Tennessee v. Lane*, 541 U.S. 509, 530–34 (2004); *Nevada Dep't of Human Resources v. Hibbs*, 538 U.S. 721, 735–39 (2003).

194. Karlan, *supra* note 165, at 733; see also Morley, *supra* note 159, at 2081 ("[T]he VRA will cease having any effect when voters no longer engage in racial bloc voting, meaning that members of all races have an equal opportunity to elect the candidates of their choice.").

195. See 52 U.S.C. § 10301; see also Nelson, *supra* note 63, at 636–37.



result in vote denial or dilution on account of race.”<sup>196</sup> If racial inequality in America improves and neutral voting requirements no longer interact with conditions of discrimination to harm minority voters more than White voters, then results test lawsuits will also wane and Section 2 will no longer be necessary to check local electoral control.<sup>197</sup>

Additionally, the importance of the *Northwest Austin* and *Shelby County* decisions regarding the need for contemporary proof of intentional voting discrimination may also be overstated and distinguishable when evaluating Section 2 instead of Section 5.<sup>198</sup> To start with, *Shelby County* found that the VRA coverage formula was unconstitutional not based on the *Boerne* analysis, but instead on an “equal state sovereignty” doctrine that is entirely irrelevant to Section 2.<sup>199</sup> The majority even justified its decision to nullify Section 5 by reassuring that Section 2 remained available to enforce the VRA.<sup>200</sup> More generally, the Supreme Court has never applied the *Boerne* congruence and proportionality standard to voting rights

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196. Nelson, *supra* note 63, at 637.

197. The Section 2 remedy “is in effect only temporary. Conditions external to the process of voting that presumably can be corrected provide the rationale for the remedy, and the remedy is no longer appropriate once those conditions cease to create a disparate impact.” *Id.* See also Karlan, *supra* note 165, at 741 (“Election practices are vulnerable to section 2 only if a jurisdiction’s politics is characterized by racial polarization. As the lingering effects of racial discrimination abate, . . . [excluded minorities’] ability and need to bring claims under section 2 will subside as well.”).

198. But even if *Shelby County* does not provide a reason to strike down the results test altogether, its suggestion that modern voting restrictions must be supported by recent violations may have bearing on what proof is required in Section 2 results litigation. See Tolson, *supra* note 165, at 452–53. But see Democratic Nat’l Comm. v. Hobbs, 948 F.3d 989, 1017 (9th Cir. 2020) (en banc) (detailing Arizona’s “long and unhappy history of official discrimination connected to voting” and evaluating historical context as far back as 1848); Veasey v. Abbott, 830 F.3d 216, 257 (5th Cir. 2016) (en banc) (quoting *Perry*, 71 F. Supp. 3d at 636) (“[I]n every redistricting cycle since 1970, Texas has been found to have violated the VRA with racially gerrymandered districts.”); N.C. State Conf. of the NAACP v. McCrory, 831 F.3d 204, 218 (4th Cir. 2016) (considering similar history in the court’s disparate impact analysis, but concluding that the challenged law was enacted with discriminatory intent).

199. *Shelby Cnty. v. Holder*, 570 U.S. 529, 556 (2013); see also Austin Graham, *Unstable Footing: Shelby County’s Misapplication of the Equal Footing Doctrine*, 23 WM. & MARY BILL RTS. J. 301 (2014) (arguing the *Shelby County* court misapplied the equal state sovereignty doctrine); Leah M. Litman, *Inventing Equal Sovereignty*, 114 MICH. L. REV. 1207 (2016) (same).

200. *Shelby Cnty.*, 570 U.S. at 537 (“Both the Federal Government and individuals have sued to enforce § 2, and injunctive relief is available in appropriate cases to block voting laws from going into effect. Section 2 is permanent, applies nationwide, and is not at issue in this case.” (citations omitted)).

legislation enforcing the Fifteenth Amendment,<sup>201</sup> which has numerous important textual, historical, and contextual differences compared to the Fourteenth Amendment.<sup>202</sup> And although *Boerne* and its progeny have mostly contrasted violative statutes with Section 5, it also cannot be ignored that many Supreme Court decisions have repeatedly held up the VRA as a model of a congruent and proportional enforcement statute.<sup>203</sup> Accordingly, the *Boerne* analysis and demand for a modern or widespread record of intentional discrimination may not even apply to voting rights legislation, and if it does, there are strong arguments for the Court to apply the tailoring requirement less stringently in this context.

In short, Section 2 complies with any temporal tailoring requirement because built into the vote denial test is a durational limit: If the country improves such that there are “no episodes [of voter suppression] occurring in the past 40 years,” then vote denial results claims will no longer be viable.<sup>204</sup> Regardless, it remains to be seen whether *Boerne*’s temporal limit will be imposed on voting rights legislation at all or in the same way as it has been applied to statutes in different antidiscrimination contexts that enforce only the Fourteenth Amendment’s substantive rights.

Third, the most direct argument against a *Boerne* challenge based on Section 2’s nationwide scope is simply that there are many historical and current examples of successful lawsuits confronting voting discrimination across the country, and areas imposing voting restrictions now are not necessarily the same as in 1965 or 1982.

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201. See *Nw. Austin Mun. Util. Dist. No. 1 v. Holder*, 557 U.S. 193, 204–06 (2009); *Shelby Cnty.*, 570 U.S. at 546–47.

202. See generally *Crum*, *supra* note 151 (proposing a rational basis-like test for determining the permissible scope of Congressional enforcement powers under the Fifteenth Amendment); *Tsen Lee*, *supra* note 189 (making a similar argument). *But see City of Rome v. United States*, 446 U.S. 156, 213 n.1 (1980) (Rehnquist, J., dissenting) (citing cases and claiming that the two enforcement clauses have always been treated as coextensive and that “it is not necessary to differentiate between the Fourteenth and Fifteenth Amendment powers”).

203. See, e.g., *City of Boerne v. Flores*, 521 U.S. 507, 518 (1997) (“[M]easures protecting voting rights are within Congress’ power to enforce the Fourteenth and Fifteenth Amendments, despite the burdens those measures place[] on the States.”); *Nev. Dep’t of Hum. Res. v. Hibbs*, 538 U.S. 721, 738 (2003) (upholding the FMLA and likening it to the VRA, which the Court described as a “valid exercise[] of Congress’ § 5 power”); *Bd. of Tr. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 373 (2001) (“The ADA’s constitutional shortcomings are apparent when the Act is compared to Congress’ efforts in the Voting Rights Act of 1965 to respond to a serious pattern of constitutional violations.”); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 640 (1999) (distinguishing the Patent Remedy Act from the VRA on account of the “undisputed record of racial discrimination confronting Congress in the voting rights cases”).

204. See *Boerne*, 521 U.S. at 530; see also *Karlan*, *supra* note 165, at 741.

For instance, North Dakota and Utah were not states subject to Section 5 preclearance or traditionally known for voter suppression, yet advocates in both states have recently used Section 2 litigation to successfully protect the rights of Native American voters.<sup>205</sup> Such examples demonstrate that the nationwide coverage of Section 2 makes it appropriately flexible to address voting discrimination whenever and wherever it may arise.

That the Court has previously upheld nationwide voting protections against constitutional challenge without proof of nationwide need further supports this point. In *Oregon v. Mitchell*, for example, the Court upheld the VRA's national ban on literacy tests, despite the lack of findings in the record that each state used a literacy test or imposed such a test to discriminate against minority voters.<sup>206</sup> Congress came to the same conclusion in the 1982 Senate Report, and asserted that "a certain amount of overinclusion is permissible" regarding the geographic coverage of an appropriate remedial statute.<sup>207</sup> Moreover, it was precisely the unequal treatment of states that determined *Shelby County's* effective negation of Section 5.<sup>208</sup> For the Supreme Court to now hold that Section 2's results test is unconstitutional because it *does not* distinguish between states would be an incongruous and illogical outcome. Overall, the modern voting discrimination

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205. For North Dakota, see *Brakebill v. Jaeger*, No. 1:16-CV-008, 2016 WL 7118548, at \*3 (D.N.D. Aug. 1, 2016), *stay granted*, No. 18-1725, 2018 WL 4559487, at \*3 (8th Cir. Sept. 24, 2018); Press Release, N.D. Sec'y of State, Agreement in Principle Related to Tribal IDs for Voting (Feb. 13, 2020), [http://sos.nd.gov/files/uploaded\\_documents/tribal-ids-for-voting-joint-press-release-20200213.pdf](http://sos.nd.gov/files/uploaded_documents/tribal-ids-for-voting-joint-press-release-20200213.pdf) [<https://perma.cc/65XK-NC53>] (successful settlement of Section 2 claims related to voter ID); *Spirit Lake Tribe v. Benson Cnty.*, No. 2:10-CV-095, 2010 WL 4226614, at \*5 (D.N.D. Oct. 21, 2010) (successful Section 2 challenge to poll place closures). For Utah, see *Navajo Nation v. San Juan Cnty.*, 266 F. Supp. 3d 1341, 1346 (D. Utah 2017) (granting summary judgment in favor of Navajo Nation on equal protection and Section 2 challenge to Utah redistricting plan), *aff'd*, 929 F.3d 1270 (10th Cir. 2019); *Navajo Nation Hum. Rts. Comm'n v. San Juan Cnty.*, 281 F. Supp. 3d 1136, 1165 (D. Utah 2017) (denying summary judgment to the county on a Section 2 challenge to the elimination of early in-person voting opportunities in the Navajo Nation); Press Release, ACLU of Utah, Settlement Announced in *Navajo Nation Human Rights Commission v. San Juan County* (Feb. 21, 2018), [www.acluutah.org/images/18-02-21-ACLU\\_UT\\_Press\\_Release\\_NavajoVotingRights-FINAL.pdf](http://www.acluutah.org/images/18-02-21-ACLU_UT_Press_Release_NavajoVotingRights-FINAL.pdf) [<https://perma.cc/Q9QY-9YQ8>].

206. *Oregon v. Mitchell*, 400 U.S. 112, 117, 133 (1970) (upholding Congress' power to ban literacy tests nationwide, based in part on the voluminous record of "substantial, if not overwhelming" race-based discrimination in education).

207. Presto, *supra* note 145, at 627 (citing S. REP. NO. 97-417, at 42-43).

208. See *Shelby Cnty. v. Holder*, 570 U.S. 529 (2013) (applying the equal sovereignty doctrine to strike down Section 4's coverage formula of some but not all states). See, e.g., Jeffrey M. Schmitt, *In Defense of Shelby County's Principle of Equal State Sovereignty*, 68 OKLA. L. REV. 209, 213 (2016).

problem demands an adaptable and incisive solution, and Section 2's broad reach makes it particularly fitting to forestall today's voter suppression.<sup>209</sup>

ii. Equal Protection Clause Challenge to Section 2

In both recent and historical Section 2 cases, courts have consistently applied the results test using a totality of the circumstances analysis, not as a bare disparate impact standard.<sup>210</sup> But challengers to Section 2 have framed the statute as an overly race-conscious remedy that calls into doubt any election law with the smallest statistical racial disparity.<sup>211</sup> In litigation, opponents of Section 2 have claimed that such an allegedly easy-to-prove standard requires election decisionmakers to think too much about race.<sup>212</sup> Such race-consciousness purportedly offends the Roberts Court's "colorblind" approach to ensuring access to political process, as expressed in several constitutional racial gerrymandering opinions.<sup>213</sup>

To understand this equal protection challenge to the results test, it is helpful to return to first principles and summarize the development of the Court's intent-favored approach to antidiscrimination laws in the 1976 *Washington v. Davis* case.<sup>214</sup> From this point of origin, the argument that Section 2 is in tension with the Equal Protection Clause can be viewed similarly to how

209. See Nelson, *supra* note 63, at 591 (listing "voter ID requirements, voter purges, restricted voting periods, stringent voter registration regulations, and felon[y] disfranchisement, among other voting rights encumbrances").

210. See, e.g., *Veasey v. Abbott*, 830 F.3d 216, 277 (5th Cir. 2016) (en banc); *Ne. Ohio Coal. for the Homeless v. Husted*, 837 F.3d 612, 628 (6th Cir. 2016); *Feldman v. Ariz. Sec'y of State's Off.*, 843 F.3d 366, 379 (9th Cir. 2016); *Lee v. Va. State Bd. of Elections*, 843 F.3d 592 (4th Cir. 2016); *Ohio State Conference of the NAACP v. Husted*, 768 F.3d 524, 554 (6th Cir. 2014).

211. See Fuentes-Rohwer, *supra* note 70, at 152 ("[C]ritics now consider section 2 to be an all-purpose anti-discrimination provision, no different from much derided affirmative action plans."); Johnson, *supra* note 66, at 2 ("Even though *Shelby County* rejected federal oversight of state elections through Section 5, a conscious effort has been made on several fronts to resurrect federal supremacy over state control of elections under Section 2 . . . . [T]hese efforts attempt to import bare statistical tests for liability that were previously utilized under Section 5 . . . .").

212. For briefs raising equal protection constitutional claims against Section 2, see *supra* notes 32, 67.

213. See Fuentes-Rohwer, *supra* note 70, at 149–51 (discussing the conflict between the colorblind reading of the Constitution and purpose to protect "discrete and insular minorities" in the context of election law). See, e.g., *Bartlett v. Strickland*, 556 U.S. 1 (2009); *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399 (2006); *Miller v. Johnson*, 515 U.S. 900 (1995); *Johnson v. De Grandy*, 512 U.S. 997 (1994); *Shaw v. Reno*, 509 U.S. 630 (1993).

214. 426 U.S. 229 (1976).

the Court had applied the reasoning from *Davis* to narrow the statutory disparate impact tests in the housing<sup>215</sup> and employment<sup>216</sup> antidiscrimination context.

In short, the argument that Section 2 violates the Equal Protection Clause relies on two critiques: (1) Section 2's results test is nothing more than a race-conscious disparate impact standard; and (2) remedial race-conscious voting protections are the equivalent of racial discrimination, and implicate the same zero-sum game of supposed competition between racial groups as seen in the allocation of employment and housing resources in the Title VII and Fair Housing Act contexts. As described below, however, the Supreme Court should reject both critiques; where other antidiscrimination statutes may affront the Roberts Court's colorblind reading of the Constitution, the Section 2 vote denial results test does not pose the same issues. As the Supreme Court itself has recognized, "States enjoy leeway to take race-based actions reasonably judged necessary under a proper interpretation of the VRA."<sup>217</sup>

*a. Disfavored Disparate Impact Jurisprudence*

In 1970, Black police officers challenged the alleged discriminatory hiring practice of the D.C. Police Department—a lawsuit that would forever change the legal landscape of antidiscrimination law.<sup>218</sup> The plaintiff officers opposed the Department's use of an aptitude test that they said had no relationship to job performance, but disproportionately screened out Black candidates.<sup>219</sup> In a 1976 Justice White opinion, the Supreme Court ushered in a new era of Equal Protection Clause jurisprudence by holding that laws with a racial disparate impact, "standing alone and without regard to whether it indicated a discriminatory purpose," do not violate the Constitution.<sup>220</sup> To downplay the significance of its holding, the Court portrayed the new intent rule as fitting squarely in a longstanding history of the Court preferring an intent-based approach to combat

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215. See *Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmty. Project, Inc.*, 576 U.S. 519, 543–44 (2015).

216. *Ricci v. DeStefano*, 557 U.S. 557, 595–96 (2009).

217. *Cooper v. Harris*, 137 S. Ct. 1455, 1472 (2017).

218. See *Davis*, 426 U.S. at 229.

219. *Id.* at 235; see also Michael J. Perry, *The Disproportionate Impact Theory of Racial Discrimination*, 125 U. PA. L. REV. 540, 548 n.56 (1977) (noting that the plaintiffs in *Washington v. Davis* "made no claim of intentional or purposeful racial discrimination; they relied solely on disproportionate impact").

220. *Davis*, 426 U.S. at 237.

discrimination, but that history is much more equivocal than the Court led on.<sup>221</sup> Justice White also attempted to soften the edges of the new rule by asserting that lower courts should take a seemingly pragmatic<sup>222</sup> and flexible approach by aggregating results-based evidence to circumstantially prove intent, but subsequent decisions have mostly hardened around an intent standard that has minimized the importance of discriminatory results.<sup>223</sup>

Tellingly, the *Davis* Court expressed an awareness that almost all laws are more burdensome on minority groups, and an apprehension of a results-based cause of action that had the

221. Compare *Gomillion v. Lightfoot*, 364 U.S. 339, 340–42 (1960) (holding that the “essential inevitable effect” of redefining a city’s boundaries to remove Black voters violated the Fourteenth and Fifteenth Amendments), *Palmer v. Thompson*, 403 U.S. 217, 224–25 (1971) (using an effects test to uphold discriminatory public pool closures because the closure “shows no state action affecting blacks differently from whites” and “no case in this Court has held that a legislative act may violate equal protection solely because of the motivations of the men who voted for it”), and *Wright v. Council of City of Emporia*, 407 U.S. 451, 462 (1972) (“[W]e have focused upon the effect—not the purpose or motivation—of a school board’s action in determining whether it is a permissible method of dismantling a dual system. The existence of a permissible purpose cannot sustain an action that has an impermissible effect.”), with *Akins v. Texas*, 325 U.S. 398, 403–04 (1945) (holding that to prove an equal protection violation, “[a] purpose to discriminate must be present” and “may be proven by systematic exclusion of eligible jurymen of the proscribed race or by unequal application of the law to such an extent as to show intentional discrimination”), *Griffin v. Prince Edward Cnty. Sch. Bd.*, 377 U.S. 218, 234 (1964) (rejecting the official closure of public schools to avoid desegregation after finding the state was motivated by “massive resistance” to desegregation efforts), *Wright v. Rockefeller*, 376 U.S. 52, 56 (1964) (rejecting an equal protection vote dilution claim because plaintiffs failed to prove the legislature was “motivated by racial considerations or in fact drew the districts on racial lines”), and *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189, 205 (1973) (ruling that “a current condition of segregation resulting from intentional state action” is an essential element of plaintiffs’ desegregation claim). See generally *Perry*, *supra* note 219, at 544–48.

222. See Allan Ides, *The Jurisprudence of Justice Byron White*, 103 YALE L.J. 419, 456 (1993) (arguing that Justice White’s jurisprudence reflects “realism rooted in the belief that law should reflect a pragmatic appraisal” of the facts).

223. See, e.g., *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979) (ruling that discriminatory intent cannot be proven by the mere awareness of a decisionmaker that a disparate impact would result from its action); *McCleskey v. Kemp*, 481 U.S. 279, 298–99 (1987) (upholding the constitutionality of capital punishment despite an overwhelming statistical disparity involving race and capital sentencing); *Fisher v. Univ. of Tex. at Austin*, 570 U.S. 297, 330 (2013) (Thomas, J., concurring) (“The University’s professed good intentions cannot excuse its outright racial discrimination any more than such intentions justified the now denounced arguments of slaveholders and segregationists.”). Cf. *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264–68 (1977) (reaffirming that “official action will not be held unconstitutional solely because it results in a racially disproportionate impact” but enumerating circumstantial factors permissible to show *prima facie* discriminatory intent, including evidence of disparate impact as a “starting point”); *Id.* at 270 n.21 (adopting the *Mt. Healthy v. Doyle*, 429 U.S. 274 (1977), defense that the state may “establish . . . that the same decision would have resulted even had the impermissible purpose not been considered”).

potential to disrupt any number of regulatory schemes.<sup>224</sup> That same apprehension has endured, and is evidenced by an equal protection election law standard that prioritizes the states' interests<sup>225</sup> and the Roberts Court's overall adoption of an intent-favored ethos in other contexts.<sup>226</sup> While the *Davis* opinion left open "the choice whether to impose [statutory] disparate impact standards to legislators,"<sup>227</sup> the reality is that existing antidiscrimination statutes are being subjected to a similar intent-based narrowing.<sup>228</sup>

The contracting of statutory disparate impact tests has occurred most prominently in the Title VII and Fair Housing Act contexts, but is not exclusive to those statutes.<sup>229</sup> Title VII is the centerpiece of the Civil Rights Act of 1964, and uses a disparate impact test to prohibit discrimination in employment decisions

224. *Davis*, 426 U.S. at 248; *see also id.* at 248 n.14 ("[D]isproportionate-impact analysis might invalidate 'tests and qualifications for voting, draft deferment, public employment, jury service, . . . (s)ales taxes, bail schedules, utility rates, bridge tolls, license fees, and other state-imposed charges.' It has also been argued that minimum wage and usury laws as well as professional licensing requirements would require major modifications in light of the unequal-impact rule."); Stephanopoulos, *supra* note 34, at 1612 (noting that "[d]isparate impacts are ubiquitous"); *see also* ABERNATHY, *supra* note 182, at 124 (contemplating whether widespread disparate impacts on minority voters should be a reason to have a results-oriented standard).

225. *See, e.g.*, *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 190–91 (2008); *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (ruling that the degree of scrutiny on state election law decisions depends on the extent the challenged practice burdens voting rights); *see also* HASEN, *supra* note 49, at 40 (aptly describing the equal protection burden analysis as "an awful double standard").

226. *See* Nelson, *supra* note 63, at 605 (observing that since the 1982 Section 2 Amendments, "the Supreme Court's receptivity toward evidence of disparate impact" has experienced "a precipitous decline"). *See generally* Reva B. Siegel, *Race-Conscious but Race-Neutral: The Constitutionality of Disparate Impact in the Roberts Court*, 66 ALA. L. REV. 653 (2015) (overviewing the tensions in Roberts Court disparate impact jurisprudence).

227. *Washington v. Davis*, 426 U.S. 229, 248 (1976) (stating the "extension of the rule beyond those areas where it is already applicable by reason of statute, such as in the field of public employment, should await legislative prescription").

228. *See* Primus, *supra* note 136, at 585 ("The rise of individualist, colorblind values in the generation since *Davis* now makes it necessary to consider a third issue: the affirmative tension between equal protection and disparate impact statutes."); *see also* Nelson, *supra* note 63, at 584 (discussing the same tension); Stephanopoulos, *supra* note 34, at 1595 (same).

229. *See, e.g.*, *Box v. Planned Parenthood of Ind. & Ky., Inc.*, 139 S. Ct. 1780, 1787 n.4 (2019) (Thomas, J., concurring) (generally deriding disparate impact liability as relying on a "simplistic and often faulty assumption that 'some one particular factor is the key or dominant factor behind differences in outcomes' and that one should expect 'an even or random distribution of outcomes . . . in the absence of such complicating causes as genes or discrimination'"); *Alexander v. Sandoval*, 532 U.S. 275, 280–81 (2001) (permitting only intent claims—not disparate impact claims—under Title VI of the Civil Rights Act of 1964).

based on race or other protected characteristics.<sup>230</sup> The test came under scrutiny in 2009 in *Ricci v. DeStefano*.<sup>231</sup> In that case, White firefighters in New Haven challenged the municipality's decision to abandon a promotions exam that would likely result in minority employees being rejected at a disproportionately higher rate.<sup>232</sup> New Haven claimed it discarded the exam because of Title VII disparate impact liability concerns.<sup>233</sup> In a 5–4 decision, Justice Kennedy ruled that New Haven violated Title VII's prohibition of disparate *treatment* of the White firefighters because the City lacked a “strong basis in evidence” that keeping the exam would result in disparate *impact* liability favoring the Black firefighters.<sup>234</sup> In so ruling, the *Ricci* Court heightened the burden on regulated entities seeking to prevent a discriminatory disparate impact violation pre-litigation, reasoning that even the risk of “a significant statistical disparity,” without something more, would be insufficient to comply with Title VII.<sup>235</sup>

Justice Scalia also wrote a blistering concurrence, warning of a coming “war” between disparate impact and the Court's equal protection doctrine.<sup>236</sup> Justice Scalia criticized that “disparate-impact provisions place a racial thumb on the scales, often requiring employers to evaluate the racial outcomes of their policies.”<sup>237</sup> Despite Scalia's more direct confrontation of the potential constitutional issue posed by results tests, the risk to Title VII seems to have briefly subsided.<sup>238</sup> But the *Ricci* opinions surfaced the Court's overall unease about statutory disparate impact tests.<sup>239</sup>

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230. See 42 U.S.C. §§ 2000e-2(a)(1)-(2), 2000e-2(l); *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971).

231. *Ricci v. DeStefano*, 557 U.S. 557, 593 (2009).

232. *Id.* at 562.

233. *Id.* at 563.

234. *Id.* at 593.

235. *Id.* at 587.

236. See *id.* at 594–96 (Scalia, J., concurring).

237. *Id.* at 594; see also Morgan, *supra* note 62, at 109 (noting that Justice Scalia's *Ricci* concurrence views the government as “effectively classifying citizens on the basis of race and making assumptions about individuals in those groups”); Clegg, *supra* note 66, at 40 (claiming that the tension “between the anti-race-conscious mandate of prohibiting disparate treatment and the race-conscious mandate of prohibiting disparate impact . . . is so strong that disparate impact statutes may violate the Constitution's equal protection guarantee”).

238. Just one year after *Ricci*, Justice Scalia authored a unanimous opinion applying Title VII's disparate impact test and explicitly did not challenge the statute's constitutionality. See *Lewis v. City of Chicago*, 560 U.S. 205, 216 (2010).

239. Nelson, *supra* note 63, at 609 n.156 (observing that eliminating the “good faith” defense used by employers to conform with Title VII makes pre-litigation voluntary compliance more difficult).



For the Fair Housing Act (FHA), the Roberts Court in 2015 again showed apprehension about the future of statutory disparate impact tests in *Texas Department of Housing and Community Affairs v. Inclusive Communities*.<sup>240</sup> There, the Court warned of potential constitutional problems if the housing disparate impact standard functioned to encourage race-conscious remedies or numerical quotas.<sup>241</sup> The case concerned Texas' method of allocating low-income housing tax credits in Dallas, where the housing authority had allegedly granted most credits to developments in low-income neighborhoods and denied them to developments within suburban (and predominantly White) areas.<sup>242</sup> This caused a disparate impact on minority residents because it perpetuated racial segregation by concentrating government housing in only certain low-income neighborhoods, in violation of the FHA.<sup>243</sup>

The *Inclusive Communities* Court upheld the FHA disparate impact test, but Justice Kennedy warned that difficult questions “might arise if disparate-impact liability under the FHA caused race to be used and considered in a pervasive and explicit manner . . . [that] tend[s] to perpetuate race-based considerations rather than move beyond them.”<sup>244</sup> To remain constitutional, Justice Kennedy continued, the FHA disparate impact test must be applied in a way that avoids “inject[ing] racial considerations into every housing decision.”<sup>245</sup> Yet the Court made sure to clarify that its unease with the FHA's test “does not impugn housing authorities' race-neutral efforts to encourage revitalization of communities that have long suffered the harsh consequences of segregated housing.”<sup>246</sup> Thus, the final message in *Inclusive Communities* was clear, if not instructive: Housing officials “may choose to foster diversity and combat racial isolation with race-neutral tools” having *some* awareness of race, but not too much.<sup>247</sup>

The *Inclusive Communities* and *Ricci* decisions revealed that the Roberts Court views statutory disparate impact tests as

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240. 576 U.S. 519, 543–44 (2015).

241. *Id.*

242. *Id.* at 526.

243. *Id.*

244. *Id.* at 543.

245. *Id.*

246. *Id.* at 545.

247. *Id.* (citing *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 789 (2007) (Kennedy, J., concurring)); see also Samuel R. Bagenstos, *Disparate Impact and the Role of Classification and Motivation in Equal Protection Law After Inclusive Communities*, 101 CORNELL L. REV. 1115, 1131–33 (2016) (describing the undefined line in the *Inclusive Communities* Court's opinion).

constitutional only given the appropriate set of safeguards and circumstances. And importantly, these cases appear to reinforce the *Davis* Court's view that intent-based methods are best for rooting out discrimination. Under these circumstances, Justice Scalia's warning of a coming "war between disparate impact and equal protection"<sup>248</sup> may have its next major battle play out in the Supreme Court over the Section 2 results test.<sup>249</sup>

*b. Applying the Equal Protection Arguments to Section 2*

The importance of *Ricci* and *Inclusive Communities* on the future of Section 2 depends on the degree to which the Supreme Court adheres to two main Equal Protection Clause critiques: (1) the two-part results test is essentially a one-part disparate impact analysis that is too easy to prove;<sup>250</sup> and (2) remedial race-conscious voting remedies are the equivalent of racial discrimination, implicating what is perceived as the same zero-sum competition for finite resources between racial groups as in the employment and housing contexts.<sup>251</sup> On this second point, opponents of Section 2

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248. *Ricci v. DeStefano*, 557 U.S. 557, 595 (2009) (Scalia, J., concurring); *see also* Siegel, *supra* note 226, at 667.

249. For scholars discussing constitutional risk to Section 2's two-part results test, *see, e.g.*, Ho, *supra* note 63, at 824; Nelson, *supra* note 63, at 635; Tokaji, *supra* note 62, at 489; Fuentes-Rohwer, *supra* note 70, at 127. For a discussion of the equal protection arguments raised in Section 2 cases, *see supra* notes 30–32, 66–68.

250. *See* Clegg & von Spakovsky, *supra* note 66, at 4 (narrowly construing Section 2); Johnson, *supra* note 66, at 1–3 ("Section 2 of the Voting Rights Act requires much more than bare statistical disparities; it requires a searching inquiry into the real-world impact of a particular law on the opportunity of minority voters to cast a ballot, as viewed within the entire landscape of electoral opportunities."); Adams, *supra* note 66, at 308 ("If Section 2 were applied to cases where a statistical disparity drove a liability finding, absent causality and supported by a broad non-qualitative package of evidence, then that version of Section 2 may well face serious constitutional challenges . . .").

251. *See* Nelson, *supra* note 63, at 608–09 ("Implicit in the *Ricci* decision is the notion that remedial race consciousness is the equivalent of racial discrimination . . . [C]hoosing a policy or practice with a less discriminatory impact on minorities is intentionally discriminatory toward another population. This false equivalence forms the premise of the Court's determination that preventive race-conscious measures are almost always illegal."); Lawrence Rosenthal, *Saving Disparate Impact*, 34 CARDOZO L. REV. 2157, 2163 (2013) ("*Ricci* means that disparate-impact liability is vulnerable to constitutional attack . . . *Ricci* characterizes a decision to abandon a promotional practice because of the race of successful candidates as a form of racial discrimination, meaning that disparate-impact liability, triggered as it is by the race of successful candidates, is a type of racial classification subject to strict scrutiny . . . [or] 'strict in theory and fatal in fact.'"); Helen Norton, *The Supreme Court's Post-racial Turn Towards a Zero-Sum Understanding of Equality*, 52 WM. & MARY L. REV. 197, 202 (2010) ("A post-racial discomfort with noticing and acting upon race supports such a zero-sum

may seek to draw on the Court's constitutional racial gerrymandering jurisprudence, which prohibits race considerations from "predomina[ting]" over other factors in the drawing of electoral district lines.<sup>252</sup> If the Court accepts these premises, the reasoning from *Ricci* and *Inclusive Communities* could present problems for the Section 2 vote denial results test.

First, opponents of Section 2 assert that the results test has been construed to conceal what is really a bare disparate impact test.<sup>253</sup> Under this theory, the Senate Factors that guide a probing totality of the circumstances analysis of the discriminatory conditions giving rise to the burden on minority voters are only window dressing, and if voting rights plaintiffs can show that an election law causes a racial statistical disparity, they win.<sup>254</sup> As such, the results test purportedly employs a "*de minimis* statistical standard" for finding a Section 2 violation, meaning that plaintiffs will prevail too easily and overly disrupt local administration of elections.<sup>255</sup> Some have gone so far as to claim that the results test in essence has covertly resurrected the more stringent Section 5 retrogression standard.<sup>256</sup>

Indeed, even Section 2 advocates have cautioned that the prevailing two-part vote denial test should not devolve into a one-part disparate impact showing.<sup>257</sup> As these commentators have warned, the results test applied to vote denial laws may be even more constitutionally problematic than other antidiscrimination disparate impact statutes because Section 2 does not follow a burden-shifting framework, which deprives jurisdictions of the

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understanding of equality: if race no longer matters, a decision maker's concern for the disparities experienced by members of one racial group ('empathy') inevitably includes the intent to discriminate against others ('prejudice')."); Siegel, *supra* note 226, at 687 (discussing zero-sum conceptions in the Roberts Court's opinions).

252. See, e.g., *Bartlett v. Strickland*, 556 U.S. 1 (2009); *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399 (2006); *Miller v. Johnson*, 515 U.S. 900 (1995); *Johnson v. De Grandy*, 512 U.S. 997 (1994); *Shaw v. Reno*, 509 U.S. 630 (1993).

253. *Johnson*, *supra* note 66, at 11–13.

254. *Id.*

255. *Id.* at 13.

256. *Id.* at 11–13 (arguing that Section 2 litigants have encouraged courts to "graft Section 5 retrogression principles onto Section 2"); Adams, *supra* note 66, at 318 (criticizing the alleged conversion of Section 2 disparate impact into Section 5 retrogression); see also *supra* note 119 for the definition of retrogression.

257. See, e.g., Stephanopoulos, *supra* note 34, at 1590 (arguing that a mere statistical test is problematic because it "is too easy to satisfy" and noting that "[m]any aspects of states' electoral systems cause racial disparities, and almost all of them are suspect under the test").

opportunity to justify racial disparities past the *prima facie* stage of litigation.<sup>258</sup>

Second, *Ricci* and *Inclusive Communities* both suggest that compelling states to prioritize avoiding a racial disparate impact is intrinsically undesirable, and violates the Equal Protection Clause's demand of race-neutrality.<sup>259</sup> Applied to Section 2, the anticipation of results test liability could theoretically incentivize lawmakers to avoid statistical disparities by overly scrutinizing the racial effects of every proposed voting law or policy in advance.<sup>260</sup> This incentive could put jurisdictions between a rock and a hard place of litigation.<sup>261</sup> The argument would be that, like the city of New Haven choosing to reject its promotion exam in fear of Title VII liability in *Ricci*, jurisdictions apprehensive of Section 2 liability because of potential racial disparities would be forced to abandon an otherwise justified electoral regulation. But by choosing the Section 2 liability-avoidance route that favors protecting minority voters—even in situations presenting a significant statistical disparity and strong indication that enacting the law would violate Section 2<sup>262</sup>—the jurisdiction could also be subjected to equal protection liability for elevating race over other factors in election administration. This perceived incentive for jurisdictions to be more race-conscious in making election management decisions offends the Roberts Court's preference for race-neutrality. As one commentator summarized:

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258. *Id.*; see also Johnson, *supra* note 66, at 5–7.

259. See *Tex. Dept. of Hous. & Cmty. Affs. v. Inclusive Cmty. Project, Inc.*, 576 U.S. 519, 543–46 (2015); *Ricci v. DeStefano*, 557 U.S. 557, 585 (2009).

260. Nelson, *supra* note 63, at 585–86 (“*Ricci*’s holding that evidence of statistical disparity is not ‘a strong basis in evidence’ to advance a claim of employment discrimination . . . potentially informs Section 2’s vote denial jurisprudence.”).

261. See, e.g., Morley, *supra* note 159, at 2086 (citing *Cooper v. Harris*, 137 S. Ct. 1455, 1469, 1472 (2017)) (“In attempting to enforce Fourteenth Amendment equal protection rights, section 2 might compel considerations of race that run afoul of them.”); Mark Rush, *The Current State of Election Law in the United States*, 23 WASH. & LEE J. C. R. & SOC. JUST. 383, 393 (2017) (citing *Ala. Legis. Black Caucus v. Alabama*, 135 S. Ct. 1257, 1273–74 (2015)) (summarizing that “states must avoid the ‘trap’ that the case law sets if states are unable to navigate between the Scylla of Section 2 of the VRA and the Charybdis of the Equal Protection clause of the Fourteenth Amendment”).

262. See *Ricci*, 557 U.S. at 584 (declining to hold “that meeting the strong-basis-in-evidence standard would satisfy the Equal Protection Clause in a future case”); cf. *Ala. Legis. Black Caucus*, 135 S. Ct. at 1274 (citing *Ricci*, 557 U.S. at 585, and setting the standard that legislators “may have a strong basis in evidence to use racial classifications in order to comply with a statute when they have *good reasons* to believe such use is required, even if a court does not find that the actions were necessary for statutory compliance”).

[W]hen the government acts based on the racial outcomes of its programs or policies, the government is effectively classifying citizens on the basis of race and making assumptions about individuals in those groups in a process that facilitates and encourages essentialization of minority and non-minority citizens alike and therefore presents an affront to the dignity of the individual.<sup>263</sup>

Third, the argument against race-consciousness in regulating elections also relies on a zero-sum understanding of government resource allocation. Opponents of disparate impact tests assume that antidiscrimination laws purportedly create competition between racial groups.<sup>264</sup> Under this framing, the Roberts Court has at times viewed preventative or remedial measures to abate racial disparate impacts as direct causes of injury to non-minority groups, in violation of Equal Protection.<sup>265</sup> As Justice Scalia warned in *Ricci* concerning Title VII, “disparate-impact provisions place a racial thumb on the scales,” in favor of minority groups and in purported detriment to non-minority applicants.<sup>266</sup>

A similar zero-sum understanding could be applicable in the vote dilution context, where the Title VII analogy is said to be relevant because legislators also have a finite amount of districts by which to divide the state.<sup>267</sup> Along these lines, the Court has cautioned that if the VRA unjustifiably compels legislators to have race “predominate” in redistricting choices, race-neutral interests are unlawfully “subordinated.”<sup>268</sup> In other words, employment or redistricting decisionmakers can be viewed as choosing between two racial groups pitted against each other to split the pie of a finite

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263. Morgan, *supra* note 62, at 109 (footnotes omitted) (citing *Ricci*, 557 U.S. at 584).

264. See Nelson, *supra* note 63, at 608–09 (summarizing these arguments); Siegel, *supra* note 226, at 687 (summarizing the same arguments).

265. See, e.g., *Fisher v. Univ. of Texas*, 136 S. Ct. 2198, 2237 (2016) (observing that race-consciousness is a “highly suspect tool”); *Ricci*, 557 U.S. at 579–80 (“Whatever the City’s ultimate aim—however well intentioned or benevolent it might have seemed—the City made its employment decision because of race.”).

266. *Ricci*, 557 U.S. at 594 (Scalia, J., concurring).

267. Nelson, *supra* note 63, at 611 (“In the context of redistricting, like employment, the potential zero-sum calculation predominates . . . . For example, drawing voters into one district versus another may potentially impact the electability of one group’s preferred candidate versus another group’s.”).

268. See, e.g., *Miller v. Johnson*, 515 U.S. 900, 916 (1995) (“[A] plaintiff must prove that the legislature subordinated traditional race-neutral districting principles . . . to racial considerations.”); see also Pamela S. Karlan, *Easing the Spring: Strict Scrutiny and Affirmative Action After the Redistricting Cases*, 43 WM. & MARY L. REV. 1569, 1573–94 (2002) (collecting cases and discussing the subordination issue).

resource: If a minority candidate gets the job or a racially polarized state draws a Section 2 majority-minority electoral district, then the White candidate is not hired, or the state overlooks districting principles that could benefit non-minority voters. The ostensible conflict is that anticipating results test liability makes lawmakers unfairly put additional resources in favor of minority voters' interests.<sup>269</sup> The many weaknesses of this argument related to vote dilution are beyond the scope of this Article,<sup>270</sup> but as discussed below, the *Ricci* analogy that favoring one race inextricably harms another is particularly unfounded in the vote denial context.

The reasoning from *Inclusive Communities* is perhaps more relevant to vote denial because, unlike employment decisions, FHA funding does not necessarily present the same zero-sum dynamic. Instead, both the FHA and Section 2 vote denial cases can be reframed as concerning enlarge-the-pie objectives because creating more affordable housing and additional opportunities to register and vote could benefit everyone, not just minority groups.<sup>271</sup> But issues related to zero-sum framing may still present problems for the vote denial results test.<sup>272</sup> In *Inclusive Communities*, the Court warned of rigidity in housing choices as a response to disparate impact liability concerns.<sup>273</sup> For Justice Kennedy, the FHA does not promote one vision of affordable housing development, and results liability should not be used to elevate a minority groups' interests over other considerations.<sup>274</sup> Doing so may chill the innovation and

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269. See, e.g., *Cooper v. Harris*, 137 S. Ct. 1455, 1469–72 (2017) (examining the tension in the vote dilution context between Section 2 and the Equal Protection racial gerrymandering jurisprudence). *But see Hinds Cnty. Republican Party v. Hinds Cnty.*, 432 F. Supp. 3d 684 (S.D. Miss. 2020) (rejecting a group of White voter's Section 2 vote dilution claim).

270. For a discussion of these arguments, see generally Dale Ho, *Minority Vote Dilution in the Age of Obama*, 47 U. RICH. L. REV. 1041 (2013); Morley, *supra* note 159.

271. See Stephanopoulos, *supra* note 34, at 1609 (“[W]ith a nonrivalrous good like voting, there is no risk of such collateral damage. A ruling that makes it easier for minority citizens to vote does not impede nonminority citizens from casting ballots. In fact, it *helps* them to vote, thus yielding innocent *beneficiaries* rather than victims—a dynamic that could plausibly induce courts to err on the side of liability in section 2 litigation.”).

272. See *Tex. Dept. of Hous. & Cmty. Affs. v. Inclusive Cmty. Project, Inc.*, 576 U.S. 519, 539–40 (2015) (discussing issues with focusing on only statistical disparities).

273. *Id.* at 540 (“The FHA is not an instrument to force housing authorities to reorder their priorities. Rather, the FHA aims to ensure that those priorities can be achieved without arbitrarily creating discriminatory effects or perpetuating segregation.”).

274. See *id.* at 541–42 (discussing other considerations that “housing authorities and private developers” must take into account).

flexibility necessary to improve and distribute housing options in the “vibrant and dynamic free-enterprise system.”<sup>275</sup> According to the Court, local housing authorities may legitimately (and permissively) “choose to foster diversity . . . and mere awareness of race in attempting to solve the problems facing inner cities does not doom that endeavor at the outset.”<sup>276</sup> But the Court imposed a limitation on this principle, stating that diversity-fostering objectives may not be sought in a way that encourages the adoption of numerical racial quotas or makes race the overriding consideration.<sup>277</sup>

Section 2 applied to vote denial could be misconstrued to operate similarly. If the risk of Section 2 results test liability incentivizes lawmakers to overly structure their election rules to foster access for minority groups, opponents of Section 2 would argue that the results test is stunting innovation in electoral management and unconstitutionally subordinates other non-racial interests (like the common refrain of preventing voter fraud).<sup>278</sup> Even if such race-consciousness imposes no concrete injury on other voters—based on race or otherwise in a so-called “visible-victims” theory<sup>279</sup>—challengers of Section 2 may still claim that simply having race-neutral interests “subjected to a discriminatory competitive process is a legally cognizable injury.”<sup>280</sup>

In sum, opponents of Section 2 argue that the results test is on a collision course with the Equal Protection Clause<sup>281</sup> because it

275. *Id.* at 533.

276. *Id.* at 545.

277. *Id.* at 542 (warning that “serious constitutional concerns” arise if states are encouraged to adopt racial quotas).

278. For detailed analyses of the myth of widespread voter fraud, see sources cited *supra* note 49.

279. See Paul Brest, *Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 36 (1976) (“The voting test suspension remedies have been relatively uncontroversial because they do not frustrate the legitimate expectations of third parties or prefer the intended beneficiaries to others similarly situated . . .”); Richard Primus, *The Future of Disparate Impact*, 108 MICH. L. REV. 1341, 1381 (2010) (noting that VRA remedies generally do not create visible victims); Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L.J. 1278, 1346–48 (2011).

280. See Rosenthal, *supra* note 251, at 2200 (citing *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 718–19 (2007); *Gratz v. Bollinger*, 539 U.S. 244, 260–62 (2003); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 211 (1995)).

281. See Clegg, *supra* note 66, at 40 (citing *Ricci v. DeStefano*, 557 U.S. 557, 594–96 (2009) (Scalia, J., concurring)) (arguing there is a tension “between the anti-race-conscious mandate of prohibiting disparate treatment and the race-conscious mandate of prohibiting disparate impact . . . so strong that disparate impact statutes may violate the Constitution’s equal protection guarantee”).

purportedly (1) is too easy to prove by a bare statistical disparate impact on minority voters, and (2) encourages too much race-consciousness in election management at the perceived cost to non-minority voters and race-neutral interests.

*c. Rebuttal to the Equal Protection Arguments Against Section 2*

The Supreme Court should reject the Equal Protection Clause arguments against Section 2 in the vote denial context. Addressing the first critique, advocates are wise to reinforce that the results test promulgates a totality of the circumstances analysis, *not* a bare disparate impact standard. Although certain aspects of the vote denial results test are still forming, all circuit courts have agreed that the two-part framework requires proving much more than a statistical disparity to establish a violation.<sup>282</sup> In other words, evidence of a disparate impact on minority voters is necessary, but not sufficient, to strike down an election law for its discriminatory effects.<sup>283</sup> Arguments against the results test have largely ignored the second part of the analysis that requires Section 2 plaintiffs to prove a causal nexus to conditions of discrimination using the Senate Factors. This burden on plaintiffs to link the identified disparate impact to conditions of discrimination and the jurisdiction's lack of a legitimate, race-neutral justification provides a liability-limiting function for Section 2,<sup>284</sup> and the totality of the circumstances inquiry is perhaps even more cabinining of the vote denial test than the vote dilution test.<sup>285</sup>

Further, Section 2 advocates are well-positioned to disprove that the results test has actually superimposed the Section 5

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282. "Section 2 rejects reliance on '[a]n inflexible rule,'" Ellen D. Katz, *Section 2 After Section 5: Voting Rights and the Race to the Bottom*, 59 WM. & MARY L. REV. 1961, 1970 (2018) (quoting *Johnson v. De Grandy*, 512 U.S. 997, 1018 (1994)), and Section 2 requires "a searching practical evaluation of the past and present reality, and on a functional view of the political process." Katz, *supra* (citing *Thornburg v. Gingles*, 478 U.S. 30, 45 (1986)). See also Stephanopoulos, *supra* note 34, at 1569.

283. Ho, *supra* note 63, at 822.

284. *Id.* (emphasizing the second prong analyzing the Senate Factors as a key aspect of the Section 2 vote denial test).

285. See Ellen Katz, Margaret Aisenbrey, Anna Baldwin & Emma Cheuse, *Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982 Final Report of the Voting Rights Initiative*, University of Michigan Law School, 39 U. MICH. J.L. REFORM 643, 660 (2006) (finding that of sixty-eight lawsuits satisfying the *Gingles* preconditions, "courts engaged in only a perfunctory review of the Senate Factors," and only eleven decisions ruled against plaintiffs at this second step).



retrogression standard that *Shelby County* effectively nullified. The Supreme Court has explicitly recognized that “[r]etrogression is not the inquiry in [Section] 2 dilution cases.”<sup>286</sup> And unlike Section 5 retrogression, which analyzes a voting changes’ effect on access for minority voters as compared to the status quo ante, inherent in Section 2’s language is a comparison of a voting law’s effects *between* minority and nonminority groups.<sup>287</sup> The two tests applied to vote denial laws ask fundamentally different questions and claims that the Section 2 test has somehow stealth-revived the Section 5 retrogression standard are entirely meritless.<sup>288</sup>

More fundamentally, Section 2’s results-based and totality-focused analysis is the best way to protect against even subtle forms of unconstitutional voting discrimination and should be preferred to a standard built on intent. Focusing on unjustified disparate impacts in election laws can “smoke out”<sup>289</sup> prejudicial intent without the smoking gun evidence rarely available in modern discrimination cases.<sup>290</sup> Intent-based tests also have practical barriers to their effectiveness, which could be avoided by a results standard.<sup>291</sup> First, there are substantial obstacles to ascertaining and aggregating the intent of the legislative body that enacted an election law.<sup>292</sup> Second, judges may face interpersonal disincentives

286. *Holder v. Hall*, 512 U.S. 874, 884 (1994) (citing 42 U.S.C. § 1973(a); S. REP. NO. 97-417, at 68 n.224).

287. See Katz, *supra* note 282, at 1976–80 (discussing cases denying and allowing the use of retrogression); Muller, *supra* note 57, at 469–70 (comparing Section 2 and Section 5); Tokaji, *supra* note 62, at 456 (same).

288. See *Ohio State Conf. of the NAACP v. Husted*, 768 F.3d 524, 551–56 (6th Cir. 2014) (rejecting Ohio’s argument that the Section 2 test improperly adopts Section 5’s retrogression analysis, considering the Section 2 “benchmark” is not past practice, but instead is the minority group’s status “compared to other groups of voters”); *League of Women Voters of N.C. v. N.C.*, 769 F.3d 224, 241–42 (2014) (rejecting the retrogression argument).

289. *Ricci v. DeStefano*, 557 U.S. 557, 595 (2009) (Scalia, J., concurring); see also *Veasey v. Abbott*, 830 F.3d 216, 236 (5th Cir. 2016) (en banc) (finding that “neutral reasons can and do mask racial intent” and disparate impact tests can help smoke out discriminatory intent in voting).

290. Lang & Hebert, *supra* note 36, at 780; Primus, *supra* note 279, at 1376; Stephanopoulos, *supra* note 34, at 1605.

291. See Tolson, *supra* note 165, at 447–48 n.65 (citing *Rogers v. Lodge*, 458 U.S. 613, 629 (1982) (Powell, J., dissenting)) (finding that the “problems with the discriminatory intent standard—i.e., adducing the amount/kind of evidence sufficient to prove a violation—continued to confound plaintiffs and scholars”).

292. Regarding older laws, an intent test is “hopelessly ineffective” because legislative histories are not maintained in many jurisdictions and “those who enacted ancient voting requirements could not be subpoenaed from their graves.” *United States v. Blaine Cnty.*, 363 F.3d 897, 908 (9th Cir. 2004). Present-day legislators are also often “protected from testifying about their motives by legislative immunity.”

to finding intent from circumstantial factors. After all, a finding of discriminatory intent inevitably puts judges in the challenging position of essentially labeling their fellow public servants as racist, often without direct proof.<sup>293</sup> Therefore, an intent test for voting discrimination could contradictorily foster the type of problematic racial divisiveness that the Supreme Court labors to avoid,<sup>294</sup> while a disparate impact-based standard best serves the important Reconstruction Amendment objective to eliminate discrimination in voting.<sup>295</sup>

Turning to the second Section 2 results test critique that is based on arguments raised in *Ricci* and *Inclusive Communities*, the Supreme Court cannot ignore crucial distinctions between antidiscrimination efforts in voting compared to employment or housing. Primarily, the vote denial context does not present a zero-sum game of racial groups competing for a scarcity of resources. Invalidating discriminatory voting burdens “will not visit negative consequences on any racial group. Unlike in the employment context, . . . the right to vote can be extended to countless individuals without denying others access to that right.”<sup>296</sup>

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*Id.* (citing S. REP. NO. 97-417, at 36–37); *see also* *Bogan v. Scott-Harris*, 523 U.S. 44, 45 (1998) (discussing legislative immunity). Even if the intent of a legislator can be determined, the issue is compounded if intent must be proved as to the enacting governing body as a whole. *See, e.g.,* *Hunt v. Cromartie*, 526 U.S. 541, 546 (1999) (citing *Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977)) (“The task of assessing a jurisdiction’s motivation, however, is not a simple matter; on the contrary, it is an inherently complex endeavor . . .”); ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 16–18 (1997) (arguing against statutory intentionalism, Scalia recognized the impossibility of determining the single, motivating intent of a legislature). Without clear public statements of motivation, advocates often cannot prove an intent claim without relying mostly on circumstantial factors and the law’s disparate impact, which alone is typically insufficient to make a *prima facie* case. *See, e.g.,* *NAACP v. McCrory*, 831 F.3d 204, 231 (4th Cir. 2016) (noting that in vote denial intent claims “[s]howing disproportionate impact . . . suffices to establish one of the circumstances evidencing discriminatory intent”).

293. *See* Karlan, *supra* note 165, at 735 (“Judges, after all, often live in the same milieu as other public officials and far away from the plaintiffs who bring racial vote dilution lawsuits. If they are compelled to call their acquaintances evil in order to do justice, then they may find themselves tempted to shade their judgment in even remotely close cases.”); Primus, *supra* note 136, at 520 (making similar arguments).

294. *See* S. REP. NO. 97-417, at 36 (finding that “the intent test is unnecessarily divisive because it involves charges of racism on the part of individual officials or entire communities,” and could exacerbate purposeful discrimination); *see also* Siegel, *supra* note 226, at 685–86 (observing that the Roberts Court focuses on ensuring “interventions designed to heal social division should be implemented in ways that do not aggravate social division”).

295. *See* discussion of Reconstruction Amendments at *supra* notes 7–19 and accompanying text.

296. Nelson, *supra* note 63, at 611.

Accordingly, opponents of Section 2 have difficulty articulating an apolitical, neutral reason for why reducing discriminatory disparate impacts on minority groups actually harms non-minority voters; they instead resort to an amorphous vote-dilution-by-fraud harm that lacks any empirical support and itself reveals racially discriminatory assumptions about minority voters' participation in the political process.<sup>297</sup> At bottom, successfully applying Section 2 to ease burdens on voting has no adverse consequences based on race and instead offers ancillary benefits for everyone who faces barriers to participating in the political process.

Also, unlike housing and employment, there can be no market-based reason to limit the franchise. Denials of voting access cannot be justified by "business necessity" like in Title VII cases, or the need for unencumbered "profit-related decisions" like in the FHA.<sup>298</sup> While opponents argue that race-consciousness in voting laws has a chilling effect on creating allegedly justified election restrictions,<sup>299</sup> the analogy to the potential competing interests outlined in *Ricci* and *Inclusive Communities* is hollow because any urgent interest in profit maximization is off the table and the overriding state interest in voting should be maximizing participation by all eligible voters.<sup>300</sup> A state's interests in cost-minimization, administrative convenience, or confronting speculative concerns over voter fraud should always be secondary to the chief purpose of election administration: enfranchising eligible voters.<sup>301</sup> Section 2's results test is in step with this order of priority.

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297. *See id.* ("[T]he individual and collective right to vote can be adversely impacted when the franchise is extended impermissibly. Voting power is diluted when unlawful votes are cast. With respect to modern vote denial measures such as voter ID laws and excessive voter purge practices, however, proof of unlawful voting is negligible . . ."); *see also* *Bognet v. Sec'y of Pa.*, 980 F.3d 336, 358 (3d Cir. 2020) (rejecting that vote-dilution-by-fraud injuries are sufficient to confer standing).

298. *See* Stephanopoulos, *supra* note 34, at 1608 (citing *Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmty. Project, Inc.*, 576 U.S. 519, 533 (2015)).

299. *See* Clegg, *supra* note 66, at 39 (arguing that "whenever the government bans actions (public or private) that merely have racially disparate impact, . . . actions that are perfectly legitimate will be abandoned").

300. *See* Stephanopoulos, *supra* note 34, at 1571 (comparing interests related to voting and housing).

301. *See, e.g.,* *Veasey v. Abbott*, 830 F.3d 216, 237 (5th Cir. 2016) (en banc) (summarizing testimony that addressing voter fraud has long been used as the proffered rationale for a range of election laws that were nonetheless rejected for their discrimination); *Stewart v. Blackwell*, 444 F.3d 843, 869 (6th Cir. 2006), *vacated as moot*, 473 F.3d 692 (6th Cir. 2007) (citing *Frontiero v. Richardson*, 411 U.S. 677, 690 (1973), to support the proposition that potential "[a]dministrative convenience" or cost-cutting rationales by election officials are "simply not a compelling justification in light of the fundamental nature of the right" at stake).

Finally, finding a Section 2 vote denial violation does not require any problematic analysis that separates people into racial categories at the expense of other traits.<sup>302</sup> While such alleged “racial sorting” is a common argument against the vote dilution results test, it is not a coherent critique in the vote denial context.<sup>303</sup> This is because vote denial claims do not prompt courts to categorize voters in a way that could precipitate racial polarization, do not require data showing how minority voters might prefer certain candidates in conflict with the preferences of non-minority voters, and do not demand proportional representation or any political outcomes at all.<sup>304</sup> In short, Section 2 vote denial results claims call for no race-based assumptions—or in Chief Justice Roberts’ words: “divvying us up by race”<sup>305</sup>—that could aggravate instead of improve perceived racial divisions.

### Conclusion

For voting rights advocates seeking to stem the rise of voter suppression, it cannot be ignored that opponents of Section 2 are making increasingly explicit claims against the constitutionality of the vote denial results test,<sup>306</sup> and a conservative majority of the Court could adopt any one of these arguments to do serious damage to the VRA. Some commentators have suggested that the best way to protect Section 2 is by adopting a different test that further limits liability and offers a greater platform to the state’s proffered justifications.<sup>307</sup> But the concerns about Section 2’s constitutionality are overstated and should be rejected on their merits.

The Supreme Court should affirm rather than limit the last best VRA mechanism for protecting an equal right to vote. Section 2 is

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302. See Clegg, *supra* note 66, at 39 (claiming that the results test makes jurisdictions adopt “surreptitious—or not so surreptitious—racial quotas . . . so that the action is no longer racially disparate in its impact”); Primus, *supra* note 279, at 1342 (agreeing it is problematic if Title VII “requires employers and public officials to classify the workforce into racial categories and then allocate social goods on the basis of that classification”).

303. In vote dilution, by contrast, some commentators have argued that Section 2 results claims seem to require courts to “engage in *ad hoc* determinations of the voting behaviors of minority and non-minority groups” and separate them accordingly, which could be misconstrued as presenting an affront to individual dignity of voters or adopting racial quotas for minority representation. See Morgan, *supra* note 62, at 109, 113.

304. *Id.* at 116.

305. League of United Latin Am. Citizens v. Perry, 548 U.S. 399, 511 (2006) (Roberts, J., dissenting).

306. See *supra* notes 32, 66–68.

307. See *supra* note 62.

appropriately remedial and sufficiently tailored legislation to enforce the substantive Reconstruction Amendments' right of equal suffrage in today's voter suppression environment. And the vote denial results test safeguards principles of equality in the political process rather than offending them.

In 1965, President Lyndon B. Johnson captured the essence of these two truths about the VRA when signing the bill into law:

This act flows from a clear and simple wrong. Its only purpose is to right that wrong. Millions of Americans are denied the right to vote because of their color. This law will ensure them the right to vote. The wrong is one which no American, in his heart, can justify. The right is one which no American, true to our principles, can deny.<sup>308</sup>

Section 2 of the VRA remains faithful to these principles and the results test continues to be an effective, restrained, and constitutionally justified tool for addressing the "clear and simple wrong"<sup>309</sup> of voter suppression. Inequality in the political process is not merely an isolated problem or vestige of the past, and Section 2 is urgently needed to confront modern threats to American democracy.

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308. Lyndon B. Johnson, President, U.S., Remarks in the Capitol Rotunda at the Signing of the Voting Rights Act (Aug. 6, 1965), [www.presidency.ucsb.edu/documents/remarks-the-capitol-rotunda-the-signing-the-voting-rights-act](http://www.presidency.ucsb.edu/documents/remarks-the-capitol-rotunda-the-signing-the-voting-rights-act) [<https://perma.cc/R789-FJF7>].

309. *Id.*