
ARTICLE

MAKING SENSE OF SECTION 2: OF BIASED VOTES, UNCONSTITUTIONAL ELECTIONS, AND COMMON LAW STATUTES

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This Article develops a fresh account of the meaning and constitutional function of the Voting Rights Act's core provision of nationwide application, Section 2, which has long been portrayed as conceptually opaque, counterproductive in effect, and quite possibly unconstitutional. I argue that Section 2 delegates authority to the courts to develop a common law of racially fair elections, anchored by certain substantive and evidentiary norms, as well as norms about legal change. The central substantive norm is that injuries within the meaning of Section 2 arise only when electoral inequalities owe to race-biased decisionmaking by majority-group actors, whether public or private. As an evidentiary matter, however, plaintiffs need only show a "significant likelihood" of race-biased decisionmaking, rather than proving it more likely than not. So cast (and with a few more details worked out), Section 2 emerges as a constitutionally permissible response to, inter alia, the largely unrecognized problem of election outcomes that are unconstitutional because of the racial basis for the

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electorate’s verdict—a problem that generally cannot be remedied through constitutional litigation. My account of Section 2 has numerous practical implications. Most importantly, it suggests that electoral arrangements that induce or sustain race-biased voting are vulnerable under Section 2, irrespective of their potentially dilutive effect on minority representation. My account also clears the ground for overruling the many Section 2 precedents that rest on the constitutional avoidance canon, and it helps to resolve a number of prominent circuit splits.

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INTRODUCTION

Section 2 of the Voting Rights Act (VRA)¹ bans electoral structures “which result[.]” in members of a class of citizens defined by race or color “hav[ing] less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.”²

Enacted by Congress in 1982, the Section 2 “results test”³ was the basis for a hugely successful litigation campaign against multimember districts and at-large elections, arrangements said to “dilute[] minority voting strength.”⁴ The courts ordered defendant jurisdictions to adopt single-member districts—including some with a majority or supermajority of minority voters—whenever plaintiffs showed (1) that white and minority voters consistently preferred different candidates, (2) that minority candidates were rarely elected, and (3) that the minority community was large enough to control a (hypothetical) single-member district.⁵ This enabled minority-preferred candidates to be elected without support from white voters, diversifying legislative bodies that had been lily white.

But Section 2 has fallen into disfavor. Indeed, since the 1986 decision in which the Supreme Court first interpreted the results test,⁶ civil rights advocates have suffered an almost unbroken string of defeats in the high court.⁷ And, ironically, their one recent victory also

¹ Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1973-1973bb-1 (2006)).

² VRA § 5, 42 U.S.C. § 1973 (2006).

³ Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, sec. 3, § 2, 96 Stat. 131, 134 (codified at 42 U.S.C. § 1973 (2006)).

⁴ *Thornburg v. Gingles*, 478 U.S. 30, 91 (1986) (O’Connor, J., concurring); see also Michael J. Pitts, *The Voting Rights Act and the Era of Maintenance*, 59 ALA. L. REV. 903, 920-22 (2008) (describing the “sea-change in descriptive representation” that followed “the amendment of § 2”).

⁵ For a contemporaneous account of this era of Section 2 litigation, see Samuel Issacharoff, *Polarized Voting and the Political Process: The Transformation of Voting Rights Act Jurisprudence*, 90 MICH. L. REV. 1833, 1845-53 (1992).

⁶ *Gingles*, 478 U.S. at 44 n.8.

⁷ See Richard H. Pildes, *The Decline of Legally Mandated Minority Representation*, 68 OHIO ST. L.J. 1139, 1140-41 (2007) (noting that voting rights plaintiffs lost every Section 2 case that received “plenary consideration” between *Gingles* and *League of United Latin American Citizens v. Perry* (*LULAC*), 548 U.S. 399 (2006)). Plaintiffs are also faring less well in the lower courts. See Adam B. Cox & Thomas J. Miles, *Judicial Ideology and the Transformation of Voting Rights Jurisprudence*, 75 U. CHI. L. REV. 1493, 1526 (2008) (showing that, since 1994, Democratic judges have become less likely to find liability in Section 2 cases where the so-called *Gingles* test is satisfied).

speaks to the Court's dissatisfaction with Section 2.⁸ The Supreme Court has cabined Section 2 with severe gatekeeping conditions—in effect, a restrictive common law of statutory standing. In vote dilution cases, plaintiffs who cannot show the possibility of establishing a compact, majority-minority, single-member district—holding constant the size of the governing body—will be kicked out of court without any consideration of the remedial arrangements they propose.⁹ Further and more drastic interpretive narrowings are likely.¹⁰

No doubt this is due in part to simple judicial politics:¹¹ Section 2 establishes a results test; conservatives dislike results tests in anti-

⁸ See *infra* text accompanying notes 74-83 and 122-24 (explaining *LULAC*'s departure from the commonplace understanding of what constitutes vote dilution).

⁹ See *Bartlett v. Strickland*, 129 S. Ct. 1231, 1246 (2009) (holding that a vote dilution claim under Section 2 may not be brought by minority plaintiffs unless the plaintiffs are part of a racial community that could comprise a numerical majority of a compact single-member district); *LULAC*, 548 U.S. at 445 (finding that Section 2 claims cannot be predicated on remedies that would merely increase minority influence over election outcomes); *Holder v. Hall*, 512 U.S. 874, 881-85 (1994) (holding that plaintiffs seeking to replace a single-commissioner form of county government with a five-member commission elected from separate districts cannot bring the challenge under Section 2).

¹⁰ For example, it is open for the Court to hold: (1) that vote dilution claims are categorically precluded if twenty percent of majority-group voters support minority-preferred candidates (for intimations to this effect, see *Bartlett*, 129 S. Ct. at 1244); (2) that Section 2 plaintiffs must prove that their injury resulted from intentional racial discrimination by state actors or majority-group voters, see *infra* subsection II.B.1.b; (3) that felon disenfranchisement laws are outside the scope of Section 2, see *infra* text accompanying notes 139-40; (4) that election administration procedures that result in the disproportionate denial of minority votes cannot be challenged unless the denial is so massive as to usually prevent the minority community from electing its candidates of choice, see *infra* text accompanying notes 136-37; (5) that election practices that exacerbate the racial skew of the voting population (such as holding local government elections off-cycle with state and national elections, or conducting elections for certain offices on a nonpartisan basis) are not subject to a Section 2 challenge if a hypothetical reasonable voter would still manage to vote under these conditions, see *infra* text accompanying notes 142-43; (6) that such election practices or requirements cannot be challenged under Section 2 absent an uncontroversially "objective" regulatory benchmark against which to measure their asserted impact on racial skew, cf. *Holder*, 512 U.S. at 880, which states that a single-commissioner form of county government cannot be challenged as dilutive under Section 2 for want of a "reasonable alternative practice" to serve "as a benchmark against which to measure the existing voting practice"; or (7) that politically cohesive minority communities may be deprived of the opportunity to elect their candidates of choice so long as the state provides sufficient offsetting opportunities for political influence, cf. *Bartlett*, 129 S. Ct. at 1248, which suggests that legislatures seeking to comply with Section 2 may substitute other forms of minority political opportunity for "majority-minority" districts.

¹¹ Cf. Adam B. Cox & Thomas J. Miles, *Judging the Voting Rights Act*, 108 COLUM. L. REV. 1, 21 (2008) (finding that judges appointed by Democrats are more likely to find liability in Section 2 cases than those appointed by Republicans).

discrimination law; and the Supreme Court has become more conservative since 1986. But there is more to the story than this. Conservative critics (among others) have voiced three specific objections to Section 2, objections that defenders of the statute have yet to answer while honoring the critics' point of view.¹² Providing those answers is my project here. It is a project that will yield a substantially novel understanding of Section 2, one which enables Section 2 to reach currently untouchable barriers to racial equality, and which clears the ground for overruling the limiting constructions of the statute.

I begin with the critics' objections. Section 2, it is said, provides essentially no guidance about the nature of the harms it targets or directives for its judicial administration.¹³ Though the results test notionally protects racial minorities against "vote dilution," neither Congress nor the Supreme Court has been able or willing to explain what vote dilution *is*, except to say that its presence may be detected through a mysterious judicial inquiry into the "totality of circumstances" bearing on minorities' opportunity "to participate in the political process and to elect representatives of their choice."¹⁴

The second purported problem with Section 2 is its uncertain relationship to the overarching ambition of the Voting Rights Act: "to hasten the waning of racism in American politics."¹⁵ Section 2 in operation has powerfully encouraged the drawing of supermajority-

¹² Over the years there have been a number of noteworthy attempts to defend Section 2 (and in the process to explain or remake it). See, e.g., LANI GUINIER, *THE TYRANNY OF THE MAJORITY* (1994); Kathryn Abrams, "Raising Politics Up": *Minority Political Participation and Section 2 of the Voting Rights Act*, 63 N.Y.U. L. REV. 449 (1988); Heather K. Gerken, *Understanding the Meaning of an Undiluted Vote*, 114 HARV. L. REV. 1663 (2001); Issacharoff, *supra* note 4; Pamela S. Karlan, *Maps and Misreadings: The Role of Geographic Compactness in Racial Vote Dilution*, 24 HARV. C.R.-C.L. L. REV. 173 (1989) [hereinafter Karlan, *Maps and Misreadings*]; Pamela S. Karlan, *Two Section Twos and Two Section Fives: Voting Rights and Remedies After Flores*, 39 WM. & MARY L. REV. 725 (1998) [hereinafter Karlan, *Two Section Twos*]; Michael Pitts, *Congressional Enforcement of Affirmative Democracy Through Section 2 of the Voting Rights Act*, 25 N. ILL. L. REV. 185 (2005). But, in contrast to my account, none of these defenses of Section 2 accepts the jurisprudential premises of conservative critics concerning such essential matters as the "intent requirement" for establishing an equal protection violation, the scope of the Fifteenth Amendment, and the limits on Congress's remedial power under the Fourteenth and Fifteenth Amendments.

¹³ See generally ABIGAIL THERNSTROM, *VOTING RIGHTS—AND WRONGS* 73-110 (2009) (reviewing and critiquing the Supreme Court's varying interpretations of Section 2).

¹⁴ VRA § 5, 42 U.S.C. § 1973(b) (2006); see also, e.g., *LULAC*, 548 U.S. at 425-27.

¹⁵ *Johnson v. De Grandy*, 512 U.S. 997, 1020 (1994). Liberal and conservative jurists share the view that this is the ultimate objective of the VRA. See, for example, the Supreme Court opinions discussed *infra* notes 89-96.

minority electoral districts, a practice which, some fear, “may balkanize us into competing racial factions[,] . . . carry[ing] us further from the goal of a political system in which race no longer matters”¹⁶ This conjecture is conventional wisdom among conservative Supreme Court Justices.¹⁷

Finally, the critics say, it is doubtful whether Section 2 as an exercise of congressional enforcement authority under the Fourteenth and Fifteenth Amendments is a “congruen[t] and proportional[.]”¹⁸ response to constitutional violations. This objection is a corollary of the others; 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 for constitutional violations.

Put these pieces together, and Section 2 looks like a ripe target for a conservative Supreme Court. The statute’s opacity means that a limiting construction is always available, one whose adoption the constitutional avoidance canon easily justifies, and the premise that majority-minority districts cause racial conflict excuses the well-meaning Justice from any loss of sleep. In an era marked by the election of an African American president, a Voting Rights Act anchored by a vague, discretionary results test and concerned primarily with maintaining safe seats for minority candidates looks increasingly anachronistic.¹⁹ If Section 2 is to avoid a death by a thousand cuts—or outright constitutional invalidation—its supporters must produce a conceptualization of the results test that is intelligible, responsive to racial progress, and discriminating in its bite.²⁰

¹⁶ *Shaw v. Reno*, 509 U.S. 630, 657 (1993).

¹⁷ See *infra* Section II.B.

¹⁸ *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997).

¹⁹ See, e.g., Ellen D. Katz, *Leave It up to Congress*, NAT’L L.J., Apr. 13, 2009, at 23 (suggesting that the Supreme Court in effect remand Section 5 of the VRA to Congress, so that Congress may reconsider it in light of Obama’s election); Abigail Thernstrom & Stephan Thernstrom, Op-Ed, *Racial Gerrymandering Is Unnecessary*, WALL ST. J., Nov. 11, 2008, at A15 (arguing on the basis of Obama’s election that the drawing of majority-minority districts is not necessary for minority candidates to be elected). This is only a point about appearances; it is not my view that the VRA is actually anachronistic in the wake of Obama’s election. Cf. Kristen Clarke, *The Obama Factor: The Impact of the 2008 Presidential Election on Future Voting Rights Act Litigation*, 3 HARV. L. & POLY REV. 59, 84-85 (2009) (arguing that Obama’s election does not obviate the need for careful, localized judicial inquiries into racial voting patterns).

²⁰ Cf. Ellen D. Katz, *Engineering the Endgame*, 109 MICH. L. REV. 349, 379-85 (2010) (arguing that the Supreme Court’s general response to racial progress has been to terminate rather than modulate remedies for racial discrimination).

The death of Section 2 would be unimportant if other parts of the VRA could function in its place, but they cannot. Section 5, the VRA's other core provision, reaches only "covered jurisdictions" (states and some localities that once had particularly egregious records of voting discrimination)²¹ and guards primarily against backsliding.²² Section 2, by contrast, applies nationally and prescribes an ideal: equality of opportunity for members of any group defined by race or color "to participate in the political process and to elect representatives of their choice."²³ In the words of the enacting Congress, Section 2 is "the major statutory prohibition of all voting rights discrimination."²⁴ And if the Supreme Court follows through on its recent threat to invalidate Section 5 on federalism grounds,²⁵ Section 2 will be all that is left. Conceptualizing Section 2 in a way that answers the conservatives' objections is therefore a matter of some urgency.

* * *

Section 2, I will argue, should be understood as a delegation of authority to the courts to develop a common law of racially fair elections, guided by certain substantive and evidentiary norms as well as norms about legal change.²⁶ Substantively, Section 2 provides independent protection against *vote dilution* and *participation injuries*. Dilution injuries arise, on my account, whenever *race-biased decisionmak-*

²¹ VRA § 5, 42 U.S.C. § 1973c (2006).

²² See *Georgia v. Ashcroft*, 539 U.S. 461, 465-66 (2003) (explaining the concept of retrogressive effect). Section 5 also guards against certain forms of intentional discrimination. See Michael J. Pitts, *Redistricting and Discriminatory Purpose*, 59 AM. U. L. REV. 1575, 1582-90 (2010) (exploring discriminatory purpose within the meaning of Section 5 as amended in 2006). Covered jurisdictions are required to submit all changes to their election laws to the Department of Justice for preclearance or to seek approval from the District Court for the District of Columbia. 42 U.S.C. § 1973c(a).

²³ VRA § 2, 42 U.S.C. § 1973(b).

²⁴ S. REP. NO. 97-417, at 30 (1982).

²⁵ See *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 129 S. Ct. 2504, 2511-13 (2009) (explaining at length the federalism basis for questioning the constitutionality of Section 5).

²⁶ These guiding norms should allay the concerns of critics, like Justice Thomas, who assert that insofar as Section 2 reaches anything beyond barriers to casting a valid, duly counted ballot, nothing will limit it except the "political imagination" of judges. *Holder v. Hall*, 512 U.S. 874, 911-12 (1994) (Thomas, J., concurring) (quoting Lani Guinier, *The Representation of Minority Interests: The Question of Single-Member Districts*, 14 CARDOZO L. REV. 1135, 1137 (1993)).

ing by conventional state actors or the majority-group electorate²⁷ results in minorities having less representational opportunity than they otherwise would.²⁸ Participation injuries occur whenever such biased decisions result in disparate burdens on minority participation in a discrete phase of the electoral process. (A *race-biased decision*, as I shall use the term, is one that would have been different had the race of persons considered by the decisionmaker been different. A voter makes a race-biased decision when a candidate's race affects his choice. A juror makes a race-biased decision when the race of a defendant or witness affects her decision. And so on.)

As for the evidentiary norms, Section 2's legislative history makes clear that plaintiffs may not be required to prove intentional discrimination in accordance with conventional evidentiary standards.²⁹ But, read in constitutional context, Section 2 should be understood to require plaintiffs to prove *to a significant likelihood* that the electoral inequality is traceable to race-biased decisionmaking. The final guiding norm concerns legal change: Section 2 precedents should not enjoy the super-strong *stare decisis* typical of statutory precedents, but rather the weak *stare decisis* of precedents under the Sherman Act, the paradigmatic common law statute.³⁰

My account of the substantive, evidentiary, and legal change norms of Section 2 answers critics who say that Section 2 provides no guidance about the harms it targets or its proper administration. To be sure, the common law conceptualization of Section 2 leaves much to judicial discretion. Yet the very plasticity of the results test permits it to be interpreted and administered in ways that further resolve the critics' second ("it's polarizing") and third ("it's unconstitutional") objections.

In answering these objections I will develop two additional points of some importance. First, I contend that Section 2 is a constitutionally permissible response to the problem of election outcomes that are unconstitutional because of the role of race in the electorate's verdict—a problem that generally cannot be remedied through ordinary

²⁷ Arguably, vote dilution may also result from the race-biased decisions of non-state political elites within the majority group, but I shall set that question to the side for the time being.

²⁸ This Article takes no position on how broadly the word "minority" should be read (may whites bring a Section 2 claim if they are a numerical minority within a jurisdiction?), or on whether nonwhite groups may bring Section 2 claims in jurisdictions where they make up a majority of the population or electorate and have not been prevented from voting.

²⁹ See *infra* subsection II.B.1.

³⁰ See *infra* subsection II.C.1.

constitutional litigation.³¹ To date, the idea that election results can be unconstitutional due to racially biased voting has been recognized only in the plebiscite context, where the election directly establishes binding law. I shall argue, however, that similarly motivated election results are equally unconstitutional in elections for representatives.³² It is state action—a “public function”—to put in office an official entrusted with the coercive authority of the state, whether the putting-in-office is achieved by appointment or by election. The Fourteenth Amendment prohibition against race-biased state action applies in both scenarios.

Yet the problem of unconstitutional electorate motive should almost certainly be treated as a nonjusticiable political question with respect to elections for representatives, even though the same constitutional norm has been judicially enforced in plebiscite cases. This has important implications for the constitutionality of Section 2. Specifically, the “congruence and proportionality” test should be applied with a light touch insofar as Section 2 targets a constitutional problem that the courts cannot remedy on their own.

My other important claim is that Section 2 can support a cause of action against electoral arrangements that unreasonably induce or sustain race-biased voting, whatever the consequences for minority representation.³³ These I shall call *depolarization claims*. Once depolarization claims are recognized, the notion that there is some inherent conflict between Section 2 and the VRA’s purpose “to hasten the waning of racism in American politics”³⁴ will be put to rest. The adjudication of depolarization claims will also make the courts confront an increasingly impressive body of evidence that suggests—contrary to conservative jurists’ prognostications—that the experience of being represented and governed by out-group officials tends to *diminish* prejudice on the part of members of the in-group.³⁵

³¹ After submitting this Article for publication, I learned that Dean Evan Caminker of the University of Michigan Law School advanced a similar understanding of Section 2 in an unpublished paper written while he was a law student some twenty-five years ago. To the best of my knowledge, this Article represents the first published account of this thesis.

³² See *infra* subsection II.B.2.b.

³³ See *infra* subsections II.B.1-2.

³⁴ *Bartlett v. Strickland*, 129 S. Ct. 1231, 1249 (2009) (quoting *Johnson v. De Grandy*, 512 U.S. 997, 1020 (1994)) (internal quotation marks omitted).

³⁵ See *infra* notes 97-101 and accompanying text.

In addition to bringing into view some important ideas that have been missing from the Section 2 discourse, such as unconstitutional election outcomes, depolarization claims, and common law statutes, the account of Section 2 developed in this Article offers traction on a number of practical questions that have split the circuits. For example, on the central issue of whether proof of intentional discrimination is a required element of a vote dilution claim, my account shows that both the majority view (yes) and the minority view (no) are wrong. The majority view misses the evidentiary norm of Section 2; the minority view misunderstands the substantive norms.

But there is much this Article does not resolve. It does not establish that courts must recognize depolarization claims, only that doing so is reasonable. It does not foreclose the narrowing of Section 2 through gatekeeping conditions, only that narrowing is unwarranted on Fourteenth and Fifteenth Amendment constitutional avoidance grounds. It does not show that particular Supreme Court precedents should be overturned, only that the presumptive stare decisis effect of Section 2 precedents is weak, and that the avoidance canon has been misapplied. I leave those questions for future work.

This Article comes in two parts. Part I explains the difficulties that presently encumber Section 2, and briefly summarizes the Supreme Court's efforts to make sense of—and to limit—the results test. Part II fleshes out and defends my theory of Section 2.

I. PRECARIOUS SECTION 2

Congress enacted the Section 2 results test in response to *City of Mobile v. Bolden*, in which a four-Justice plurality determined that Section 2 as originally drafted was coextensive with the Fifteenth Amendment, that the Fifteenth Amendment reaches only barriers to the casting of votes, and that “dilutive” electoral structures—those which limit a racial group's ability to obtain representation—violate the Fourteenth Amendment only if established or maintained for that purpose.³⁶ To the new Section 2, Congress appended the following explanation of what it meant for an election law to “result[] in a denial or abridgement of . . . the right . . . to vote on account of race or color”:³⁷

³⁶ 446 U.S. 55, 60-63, 65-70 (1980), *superseded by statute*, Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 134, *as recognized in* *Thornburg v. Gingles*, 478 U.S. 30 (1986).

³⁷ Voting Rights Act Amendments, sec. 3, § 2, 96 Stat. at 134 (codified at 42 U.S.C. § 1973 (2006)).

A violation . . . 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 [protected] class of citizens . . . 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 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.³⁸

This less-than-pellucid language was cribbed from *White v. Regester*, a constitutional vote dilution case predating *Bolden*, in which the Supreme Court had invalidated certain multimember electoral districts without, as Congress saw it, demanding proof that the districts were established for race-discriminatory reasons.³⁹ *White* itself was susceptible to several interpretations.⁴⁰ It thus fell to the courts to make sense of the “exceptionally vague” text Congress had enacted.⁴¹

A generation has passed since Congress adopted the results test, and the Supreme Court’s repeated efforts to make sense of it have not borne fruit. This Part chronicles the Court’s ongoing uncertainty about the meaning of Section 2, the Court’s worries about the effects of Section 2 on racial politics, and the Court’s doubts about the constitutionality of Section 2. Seen in this context, the string of limiting constructions Section 2 has suffered at the hands of the Supreme Court seems less an accident of history than a preview of the future. The condition of Section 2 is indeed precarious.⁴²

A. *The Conceptual Puzzle*

What does it mean for an electoral arrangement to “result” in members of a racial group “ha[ving] less opportunity than . . . other

³⁸ *Id.*

³⁹ *White v. Regester*, 412 U.S. 755, 766 (1973) (requiring plaintiffs to show that “the political processes leading to nomination and election were not equally open to participation by the group in question—that its members had less opportunity than did other residents . . . to participate in the political processes and to elect legislators of their choice”); *id.* at 769 (affirming the district court’s vote dilution finding “[b]ased on the totality of the circumstances”).

⁴⁰ See *infra* Section II.A.

⁴¹ *Goosby v. Town Bd. of Hempstead*, 180 F.3d 476, 500 (2d Cir. 1999) (Leval, J., concurring).

⁴² For examples of limiting constructions that are in the offing, see *supra* note 10.

[members of the electorate] to participate in the political process[] and to elect legislators of their choice"?⁴³ There is certainly no plain meaning to this statutory standard, and the legislative history is opaque in critical respects.⁴⁴ In a parry that would become famous to teachers and students of election law,⁴⁵ Senator Orrin Hatch tried to thwart the gathering momentum for a legislative override of *Bolden* by demanding that sponsors of the results test explain what "core value" they sought to protect.⁴⁶ The proponents had no real answer; they simply cross-referenced the pre-*Bolden* status quo.⁴⁷

Prior to *Bolden*, the lower courts, generalizing from the Supreme Court's decisions in *Whitcomb v. Chavis*,⁴⁸ and *White v. Regester*,⁴⁹ were deciding constitutional vote dilution cases on the basis of a murky, multifaceted standard. The standard took into account not only the extent to which race-correlated voting patterns prevented the minority community from electing its chosen candidates, but also the defendant jurisdiction's history of discrimination, the lingering effects of past de jure discrimination, racial appeals in political campaigns, informal barriers to ballot access for minority candidates, unusual features of the electoral system that disadvantaged minorities, and the strength or weakness of the state interests asserted in defense of the challenged election laws.⁵⁰ But, critically, the pre-*Bolden* doctrine did not itself clearly answer Senator Hatch's question: what is the core value to be protected?⁵¹

⁴³ *Whitcomb v. Chavis*, 403 U.S. 124, 149 (1971).

⁴⁴ The legislative history can, however, be mined for some guidance. See *infra* subsection II.B.1.

⁴⁵ Senator Hatch's line of attack figures prominently in a leading election law casebook. SAMUEL ISSACHAROFF ET AL., *THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS* 572-77 (3d ed. 2007).

⁴⁶ *Id.* at 576; see also Thomas M. Boyd & Stephen J. Markman, *The 1982 Amendments to the Voting Rights Act: A Legislative History*, 40 WASH. & LEE L. REV. 1347, 1388-93 (1983).

⁴⁷ See Boyd & Markman, *supra* note 46, at 1391 & n.220 ("It was not until much later in the hearing process that proponents of the House bill seemed prepared to respond to [Hatch's] query," at which point their answer was to "quote[] Justice White in *White v. Regester*, that the plaintiff's burden in 'results' cases 'is to produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the [minority] group in question.'" (quoting *White v. Regester*, 412 U.S. 755, 766 (1973))).

⁴⁸ 403 U.S. 124 (1971).

⁴⁹ 412 U.S. 755 (1973).

⁵⁰ The leading pre-*Bolden* case, which derived these factors from the Supreme Court's opinion in *White*, is *Zimmer v. McKeithen*, 485 F.2d 1297, 1305-07 (5th Cir. 1973) (en banc).

⁵¹ See *infra* text accompanying notes 148-63.

Thirty years later, there is a substantial body of law interpreting Section 2 but no authoritative resolution of the basic questions one would need to answer to make sense of the results test. Consider the following by way of illustration.

One right or two? Many lower courts have held that Section 2 independently protects rights of participation and representation.⁵² This means that plaintiffs challenging a barrier to voting do not need to prove that it tangibly dilutes minority representation. But dicta from the Supreme Court rejects the two-separate-rights theory.⁵³ Lower courts subscribing to the two-rights model have entirely ignored the high court's pronouncement on this front, but at least one court has invoked the Supreme Court's statement in rejecting the model.⁵⁴

Participate, how? Plaintiffs have, with increasing frequency, brought participation claims under Section 2. All such claims to date have concerned barriers to the casting or counting of minority votes.⁵⁵ Some commentators have argued for a more expansive conception of Section 2 participation rights,⁵⁶ but the courts have yet to address this issue.⁵⁷

⁵² See, e.g., *Farrakhan v. Gregoire*, 590 F.3d 989, 1005-07 (9th Cir.), *vacated en banc on other grounds*, 623 F.3d 990 (9th Cir. 2010); *Simmons v. Galvin*, 575 F.3d 24, 28-29 (1st Cir. 2009); *Stewart v. Blackwell*, 444 F.3d 843, 877-79 (6th Cir. 2006), *vacated en banc as moot*, 473 F.3d 692 (6th Cir. 2007); *Burton v. City of Belle Glade*, 178 F.3d 1175, 1196-1200 (11th Cir. 1999); *Common Cause/Ga. v. Billups*, 406 F. Supp. 2d 1326, 1372-75 (N.D. Ga. 2005); *Common Cause v. Jones*, 213 F. Supp. 2d 1106, 1110 (C.D. Cal. 2001); *Harris v. Siegelman*, 695 F. Supp. 517, 528 (M.D. Ala. 1988).

⁵³ See *Chisom v. Roemer*, 501 U.S. 380, 397-98 (1991) (asserting that Section 2 “does not create two separate and distinct rights”; rather, plaintiffs “must allege an abridgment of the opportunity to participate in the political process *and* to elect representatives of one’s choice”).

⁵⁴ See *Ortiz v. City of Phila.*, 28 F.3d 306, 314-15 (3d Cir. 1994) (relying on *Chisom* for the proposition that the Voting Rights Act requires claimants to prove that minorities “had less opportunity both . . . to participate in the political process and . . . to elect representatives of their choice”); see also *Roberts v. Wamser*, 883 F.2d 617, 628-30 (8th Cir. 1989) (Heaney, J., dissenting) (analyzing, prior to *Chisom*, a Section 2 challenge to voting technology in terms of representational impacts); *Sw. Voter Registration Educ. Project v. Shelley*, 278 F. Supp. 2d 1131, 1141-42 (C.D. Cal. 2003) (holding, without reference to *Chisom*, that a dilution showing is necessary for a Section 2 challenge to punch-card voting machines).

⁵⁵ For a review and analysis of this litigation, see Daniel P. Tokaji, *The New Vote Denial: Where Election Reform Meets the Voting Rights Act*, 57 S.C.L. REV. 689, 709-18 (2005).

⁵⁶ The leading works are GUINIER, *supra* note 12, at 107-08 (arguing for a conception of Section 2 under which minority legislators would have special participation rights internal to the legislative process, such as veto rights over bills of particular concern to the minority community); Abrams, *supra* note 12, at 458-60 (arguing that the rights of participation under Section 2 include rights of political influence that go beyond the election of minority-preferred candidates); Karlan, *Maps and Misreadings*, *supra* note 12, at 179-82 (arguing that Section 2 should be understood to protect “civic inclu-

Elect, in what sense (influence or control)? The Court's first decision interpreting the results test, *Thornburg v. Gingles*, suggested that the "right to elect," as protected by Section 2, entitles politically cohesive minority communities to elect their ideally preferred candidates.⁵⁸ A decade later, in *Johnson v. De Grandy*, the Court hinted at a somewhat different understanding of the right, one which entitles racial minorities not to "control" the election of certain representatives, but rather to a fair chance to "pull, haul, and trade" with other groups seeking influence over election outcomes.⁵⁹ Ten years after *De Grandy*, however, the Court in *League of United Latin American Citizens v. Perry* (*LULAC*) held that a vote dilution claim could not be predicated on a mere lack of electoral influence.⁶⁰ The opportunity protected by Section 2, per *LULAC*, is the opportunity to elect ideally preferred representatives.⁶¹ But a scant two years later, in an opinion by Justice Kennedy (who also authored *LULAC*), the Court intimated that "influence districts"—electoral districts in which the minority community wields sway but cannot elect its ideally preferred candidate—are germane to the merits of a vote dilution claim under the totality of circumstances.⁶² In short, the metric of voting strength for purposes of dilution claims remains highly unsettled.

What is "neutral"? An antidiscrimination results test necessarily presupposes some benchmark conception of neutrality or fairness against which an allegedly discriminatory result may be measured. The Supreme Court's cases hint at three different conceptions of the normative benchmark for vote dilution claims: (1) the opportunity to elect a roughly proportional number of ideally preferred representa-

sion" of minorities at both the electoral and governing stages of the democratic enterprise).

⁵⁷ Except in one respect: the courts have rejected Abrams's suggestion in "*Raising Politics Up*," *supra* note 12, at 467-78, that Section 2 protects electoral districts (or potential electoral districts) in which minority voters have influence but not the ability to elect their ideally preferred representative. See *League of United Latin Am. Citizens v. Perry* (*LULAC*), 548 U.S. 399, 446 (2006) (plurality opinion).

⁵⁸ 478 U.S. 30, 47-51 & n.12 (1986) (plurality opinion).

⁵⁹ 512 U.S. 997, 1020 (1994).

⁶⁰ 548 U.S. at 446-47.

⁶¹ *Id.*

⁶² *Bartlett v. Strickland*, 129 S. Ct. 1231, 1248-49 (2009). The Court noted the relevance of influence and crossover districts to "minority voting strength" and advised that crossover districts—and, by implication, influence districts—"can be evidence . . . of equal political opportunity under the § 2 totality-of-the-circumstances analysis." *Id.*

tives,⁶³ (2) the representational opportunity that the minority community would have enjoyed under a “normal” scheme of single-member districts,⁶⁴ and (3) the representational opportunity that the minority community would have had absent race-biased decisionmaking by conventional state actors or majority-group voters and political elites (the benchmark I will defend).⁶⁵ I shall refer to these, respectively, as the *performance-based*, the *convention-based*, and the *intent-based* benchmarks.⁶⁶

Competing intuitions about the proper benchmark sometimes surface in the same judicial opinion. Consider *Holder v. Hall*, which held that plaintiffs could not challenge the size of a governing body as dilutive under Section 2.⁶⁷ The *Holder* plurality began its analysis by positing, “In a § 2 vote dilution suit . . . a court must find a *reasonable alternative practice* as a benchmark against which to measure the existing voting practice.”⁶⁸ This exemplifies the convention-based solution to the benchmark problem. But in response to the suggestion that the benchmark for evaluating the defendant’s “single commissioner”

⁶³ See, e.g., *LULAC*, 548 U.S. at 436 (“We . . . compar[e] the percentage of total districts that are Latino opportunity districts with the Latino share of the citizen voting-age population.”); *De Grandy*, 512 U.S. at 1013-14 & n.11 (“‘Proportionality’ as the term is used here links the number of majority-minority voting districts to minority members’ share of the relevant population.”).

⁶⁴ See, e.g., *Thornburg v. Gingles*, 478 U.S. 30, 83-89 (1986) (O’Connor, J., concurring) (noting, as one possible approach to the vote dilution inquiry, that “a court could posit some alternative districting plan as a ‘normal’ or ‘fair’ electoral scheme and attempt to calculate how many candidates preferred by the minority group would probably be elected under that scheme”). Rick Pildes interprets Justice Kennedy’s opinion for the Court in *LULAC* as resting implicitly on a convention-based benchmark. See Pildes, *supra* note 7, at 1159 (“The touchstone appears to be the concept of a ‘naturally arising’ minority district, one that exists or would exist due to the geographic concentration of minority voters whose proximity also reflects common socioeconomic and other interests.”); see also *Gonzalez v. City of Aurora*, 535 F.3d 594, 599-600 (7th Cir. 2008) (Easterbook, J.) (proposing to measure the dilutive effect of a challenged system of electoral districts by comparing the number of majority-minority districts in the actual plan to the typical number found in randomized, computer-generated maps).

⁶⁵ See *infra* text accompanying notes 72-83. For the leading statement of the intent-based benchmark in the lower courts, see *Nipper v. Smith*, 39 F.3d 1494, 1515 (11th Cir. 1994) (en banc).

⁶⁶ A decision can, of course, be race-biased, in the sense of treating persons differently because of their race, even if the actor did not self-consciously “intend” to discriminate (the discrimination may have been subconscious). By describing the third benchmark as “intent based,” I am merely employing a convenient shorthand; I do not mean to imply that subconscious race bias is not a concern of Section 2.

⁶⁷ 512 U.S. 874, 885 (1994) (plurality opinion).

⁶⁸ *Id.* at 880 (emphasis added).

form of county government should be a five-member commission because it was common elsewhere in the state, the *Holder* plurality wrote:

That the single-member commission is uncommon in the State of Georgia, or that a five-member commission is quite common, tells us nothing about its effects on a minority group's voting strength. The sole commissioner system has the same impact regardless of whether it is shared by none, or by all, of the other counties in Georgia.⁶⁹

This passage rejects the very idea of a convention-based benchmark. Dilution is understood here as a property that inheres in the electoral system at issue (consistent with performance- and intent-based benchmarks), rather than a property that emerges when one compares the challenged system to some ordinary alternative.

Consider also Justice Souter's majority opinion in *Johnson v. De Grandy*, which emphasizes that "rough proportionality" (between the number of majority-minority districts and the minority's population share) is a central consideration in vote dilution cases.⁷⁰ This is consistent with a performance-based benchmark, or with a hybrid of the performance- and convention-based approaches. But another passage in *De Grandy* drives at intent:

We would agree that where a State has split (or lumped) minority neighborhoods that would have been grouped into a single district (or spread among several) if the State had employed the same line-drawing standards in minority neighborhoods as it used elsewhere in the jurisdiction, the inconsistent treatment might be significant evidence of a § 2 violation, even in the face of proportionality.⁷¹

The state's "inconsistent treatment" of minority neighborhoods in this hypothetical evidences a discriminatory purpose. On such facts, Justice Souter equates the benchmark for an undiluted vote with the electoral opportunity that minority voters would enjoy if the electoral system were stripped of its racially motivated features.

So which benchmark is right? *De Grandy* is cryptically agnostic. After stating that "equal political opportunity" is the central issue in a vote dilution case,⁷² *De Grandy* nowhere defines this standard's meaning.⁷³

⁶⁹ *Id.* at 881.

⁷⁰ 512 U.S. 997, 1023 (1994). For a leading treatment of this conception of vote dilution, see Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 HARV. L. REV. 1663, 1675-76 (2001).

⁷¹ 512 U.S. at 1015.

⁷² *Id.* at 1013-14.

The recent *LULAC*⁷⁴ case vividly illustrates just how much remains unsettled about the substance of neutrality under Section 2. *LULAC* concerned the infamous, mid-decade partisan redistricting of Texas's congressional districts that occurred after Republicans won control of the state legislature in 2002. Justice Kennedy sided with the Court's four liberals to hold that the State had violated Section 2 by shifting 100,000 mostly Latino voters out of a Republican incumbent's district (District 23)—despite the fact that the districting plan created an additional majority-Latino district elsewhere in the state, thereby achieving proportionality on a statewide basis. Objecting to the replacement district's odd shape and its conjoining of socioeconomically and geographically distant Latino communities, Justice Kennedy wrote that so peculiar a district ought not even count in the Section 2 proportionality analysis.⁷⁵

But what the Court then held is even more curious. Justice Kennedy allowed that the districting plan's disproportionality might be "deemed insubstantial," but said that this could "not overcome the other evidence of vote dilution for Latinos in District 23."⁷⁶ The problem, he explained, is that "the State took away the[se] Latinos' [electoral] opportunity because [they] were about to exercise it. This bears the mark of intentional discrimination that could give rise to an equal protection violation."⁷⁷

It may have borne that mark, yet the district court found that the stripping of Latinos from District 23 was politically, not racially, motivated.⁷⁸ Justice Kennedy did not hide this fact. Rather, he stated that even if the motivation was political, the redistricting plan, which broke the link between an incumbent and his constituents, did not "accord with concern for the voters," and therefore "[could not] justify the effect on Latino voters [in District 23]."⁷⁹

⁷³ While emphasizing proportionality on the facts of the case, the *De Grandy* Court rejected the state's proposal for a proportionality "safe harbor," and expressly cautioned lower courts against overreliance on proportionality. *Id.* at 1017-22.

⁷⁴ 548 U.S. 399 (2006).

⁷⁵ *Id.* at 429-35.

⁷⁶ *Id.* at 438.

⁷⁷ *Id.* at 440.

⁷⁸ *See id.* ("[T]he reason for taking Latinos out of District 23, according to the District Court, was to protect [a Congressman] from a constituency that was increasingly voting against him.")

⁷⁹ *Id.* at 440-41.

Chief Justice Roberts, dissenting, pointed out that the state could not have created any more majority-Latino districts.⁸⁰ “Whatever the majority believes it is fighting with its holding,” he quipped, “it is not vote dilution on the basis of race or ethnicity.”⁸¹

The disagreement between Chief Justice Roberts and Justice Kennedy seems to be grounded in different understandings of both minority voting strength and the benchmark of neutrality. For Chief Justice Roberts, as for many academic commentators, voting strength is to be measured with reference to the representational opportunities *collectively* enjoyed by members of a racial minority throughout the jurisdiction; for Justice Kennedy, voting strength may be disaggregated and assessed in terms of the representational opportunities enjoyed by particular geographic clusters of minority citizens.⁸² For Chief Justice Roberts, the benchmark is rough proportionality across the jurisdiction as a whole; for Justice Kennedy, rough proportionality is part of the story but supplemented by intuitions about intentional discrimination (or the appearance of such discrimination) and conventional practices. The District 23 Latinos suffered vote dilution, Justice Kennedy seemed to be saying, because they were deprived of an electoral opportunity that they would have enjoyed in the normal course of events—which is to say, a conventional, race neutral, and otherwise normatively tolerable course of events.⁸³

To sum up, the text of Section 2’s results test can support any number of interpretations, and the Supreme Court has failed to resolve basic conceptual questions about what constitutes an injury within the meaning of the statute. Competing intuitions about the harm the statute targets sometimes surface in the same judicial opinion, or divide one group of Justices from another, but even then the intuitions tend to be latent, leaving lower courts and commentators to guess at the Justices’ meaning.

⁸⁰ *Id.* at 497 (Roberts, C.J., concurring in part, concurring in the judgment in part, and dissenting in part).

⁸¹ *Id.* at 511.

⁸² This idea also surfaces in *Johnson v. De Grandy*. See 512 U.S. 997, 1019 (1996) (rejecting a proposed proportionality “safe harbor” because it “rest[s] on an unexplored premise of highly suspect validity: that . . . the rights of some minority voters under § 2 may be traded off against the rights of other members of the same minority class”).

⁸³ *Cf.* Pildes, *supra* note 7, at 1146-47 (arguing that Justice Kennedy in *LULAC* understood Section 2 to protect “naturally arising” safe minority districts). Other commentators have understood this case somewhat differently. See, e.g., Ellen D. Katz, *Revising the Right to Vote*, 68 OHIO ST. L.J. 1163, 1172-73 (2007) (reading *LULAC* as refocusing Section 2 jurisprudence on political competition).

B. *Unintended Consequences*

Though the Supreme Court has not answered Senator Hatch's "core value" question, its decision in *Gingles* set the states down the path of creating majority-minority (typically supermajority-minority) districts to avoid liability under Section 2. *Gingles* established a threshold test for challenges to electoral districting schemes on the ground that the scheme deprives minority plaintiffs of an equal opportunity to elect "representatives of their choice."⁸⁴ The test requires plaintiffs to show that the minority community is "politically cohesive" and "sufficiently large and geographically compact to constitute a majority in a single-member district," and that "the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate."⁸⁵

Justice Brennan's plurality opinion strongly suggested that a state's failure to create majority-minority districts in proportion to the minority's population share would expose it to liability whenever the threshold conditions were met.⁸⁶ Subsequent cases unsettle this conclusion,⁸⁷ but the *Gingles* framework and the majority-minority district are no doubt central to most lawyers' and judges' sense of Section 2.⁸⁸

Within a few years of the decision in *Gingles*, conservatives on the Court were openly worrying about whether majority-minority districts created to comply with Section 2 stymied the VRA's ultimate objective to "hasten the waning of racism in American politics."⁸⁹ In *Shaw v. Re-*

⁸⁴ 478 U.S. 30, 50 (1986) (plurality opinion).

⁸⁵ *Id.* at 50-51.

⁸⁶ *See id.* at 48 n.15 ("[T]he most important Senate Report factors bearing on § 2 challenges to multimember districts are the 'extent to which minority group members have been elected to public office in the jurisdiction' and 'the extent to which voting in the elections of the state or political subdivision is racially polarized.'" (quoting S. REP. NO. 97-471, at 28-29 (1982)); *cf. id.* at 85 (O'Connor, J., concurring) (cautioning that the plurality opinion implies "the creation of a right to a form of proportional representation in favor of all geographically and politically cohesive minority groups that are large enough to constitute majorities if concentrated within one or more single-member districts").

⁸⁷ *See supra* text accompanying notes 58-83.

⁸⁸ Coverage of Section 2 in the leading election law casebooks focuses almost exclusively on judicial elaboration of the *Gingles* framework and the corresponding duty of the states to create majority-minority districts. *See, e.g.*, ISSACHAROFF ET AL., *supra* note 45, at 595-711; DANIEL H. LOWENSTEIN & RICHARD L. HASEN, *ELECTION LAW: CASES AND MATERIALS* 178-81 (2d ed. 2001).

⁸⁹ *Johnson v. De Grandy*, 512 U.S. 997, 1020 (1994). That this is the VRA's ultimate objective is a point of agreement among liberal and conservative justices. Though the majority opinion in *De Grandy* was authored by Justice Souter and joined

no, which invalidated an oddly shaped majority-minority district on equal protection grounds, Justice O'Connor explained for the Court:

Racial classifications . . . reinforce the belief, held by too many for too much of our history, that individuals should be judged by the color of their skin. *Racial classifications with respect to voting carry particular dangers.* Racial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions; it threatens to carry us further from the goal of a political system in which race no longer matters—a goal that the Fourteenth and Fifteenth Amendments embody⁹⁰

Two years later, the Court per Justice Kennedy struck down another convoluted majority-minority district and continued the refrain.⁹¹ Justice Thomas soon offered an even more forceful articulation of Justice O'Connor's thesis. "[F]ew devices," he wrote, "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."⁹²

The fears expressed by Justices O'Connor, Kennedy, and Thomas fit within a larger conservative narrative about racial balancing in the public distribution of any widely desired good, from admission to a public school or university,⁹³ to a job in the public sector,⁹⁴ to contracts providing services to the government.⁹⁵ If the courts allow race-based set asides, the thinking goes, this will further encourage citizens to organize politically along racial lines, and the normal disappointments felt by losers in the political sphere will be transformed into racially charged antagonisms. Seen in this light, the drawing of electoral districts on racial lines to achieve roughly proportionate representation for racially defined groups may be the very worst kind of racial balancing:

by the Court's liberal faction, *De Grandy's* characterization of the VRA's ultimate purpose was later quoted by Justice O'Connor in a majority opinion joined by the Court's conservative wing. *Georgia v. Ashcroft*, 539 U.S. 461, 481 (2003); *see also* *Holder v. Hall*, 512 U.S. 874, 906-07 (1994) (Thomas, J., concurring in judgment) (arguing that the Court's interpretations of Section 2 have not advanced this purpose).

⁹⁰ 509 U.S. 630, 657 (1993) (emphasis added).

⁹¹ *See* *Miller v. Johnson*, 515 U.S. 900, 927 (1995) ("The [Voting Rights] Act . . . has been of vital importance in eradicating invidious discrimination from the electoral process and enhancing the legitimacy of our political institutions. . . . Th[is] end is neither assured nor well served, however, by carving electorates into racial blocs.")

⁹² *Holder*, 512 U.S. at 906-08 (Thomas, J., concurring).

⁹³ *See, e.g.*, *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007) (plurality opinion); *Gratz v. Bollinger*, 539 U.S. 244, 271-72 (2003); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 294-99 (1978).

⁹⁴ *See, e.g.*, *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 282-83 (1986).

⁹⁵ *See, e.g.*, *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 499 (1989).

it encourages racialized political mobilization, it may be broadly visible, and it conduces to the allocation of public benefits on racial grounds. To politicians elected by a racial constituency, bringing home the bacon and voting for racial quotas may be one and the same.⁹⁶

Political scientists have since tested conservatives' intuitions about the polarizing consequences of majority-minority districts. The findings are quite consistent: the election of out-group candidates tends to *reduce* biased voting by members of the in-group and to diminish negative stereotyping of the out-group, so long as the out-group officeholders have incentives to respond to in-group concerns.⁹⁷ The con-

⁹⁶ Consider in this regard Justice Alito's dystopic portrayal of racial machine politics in *Ricci v. DeStefano*, 129 S. Ct. 2658, 2683-89 (2009) (Alito, J., concurring).

⁹⁷ The leading work on this phenomenon in U.S. elections is by Zoltan Hajnal. See, e.g., ZOLTAN L. HAJNAL, CHANGING WHITE ATTITUDES TOWARD BLACK POLITICAL LEADERSHIP (2007) (discussing the effect of an election of a black mayor on whites' racial attitudes and voting patterns). The most analytically powerful demonstration of depolarization effects from the election of out-group officials is Lori Beaman et al., *Powerful Women: Does Exposure Reduce Bias?*, 124 Q.J. ECON. 1497, 1498-99 (2009), which takes advantage of the natural experiment created by India's practice of randomly assigning certain village constituency seats to female candidates for a period of years. See also Rikhil R. Bhavnani, *Do Electoral Quotas Work After They Are Withdrawn? Evidence from a Natural Experiment in India*, 103 AM. POL. SCI. REV. 23, 34 (2009) (showing that temporary quotas have lasting effects on the electability of out-group (female) candidates). For other studies that speak to "depolarization effects" of representation by out-group officeholders, see Kareem U. Crayton, *Beat 'Em or Join 'Em? White Voters and Black Candidates in Majority-Black Districts*, 58 SYRACUSE L. REV. 547, 549, 565 (2008) (finding that white support for a black-preferred incumbent in South Carolina's only majority-minority congressional district is "consistently higher than one would expect in a racially polarized climate"); Susan E. Howell & William P. McLean, *Performance and Race in Evaluating Minority Mayors*, 65 PUB. OPINION Q. 321, 326, 331, 335-36 (2001) (concluding that white support for an incumbent black mayor in New Orleans can be explained by performance as well as by racial variables with performance taking on increasing importance over time); Baodong Liu, *Deracialization and Urban Racial Contexts*, 38 URB. AFF. REV. 572, 580 (2003) (finding that in biracial elections in New Orleans, whites are much more supportive of black incumbents than black challengers); Robert M. Stein et al., *Voting for Minority Candidates in Multiracial/Multiethnic Communities*, 41 URB. AFF. REV. 157, 177 (2005) (finding that race-biased voting is more common when minority challengers run for office but that voting in elections with a minority incumbent is instead driven by perceptions of the incumbent's job performance). Cf. Susan E. Howell & Huey L. Perry, *Black Mayors/White Mayors: Explaining Their Approval*, 68 PUB. OPINION Q. 32, 50 (2004) (finding that perceptions of performance explain more variation in mayoral approval than race); Tasha S. Philpot & Hanes Walton, Jr., *One of Our Own: Black Female Candidates and the Voters Who Support Them*, 51 AM. POL. J. SCI. 49, 59 (2007) (finding that, unlike black female candidates without experience in office, similar candidates with previous experience receive "equal levels of support among whites relative to blacks").

To be sure, some case studies find limited or no depolarization effects from the election of a minority officeholder. See, e.g., HAJNAL, *supra*, at 31 (describing case stud-

ventional “VRA district,” which contains a modest supermajority of minority voters, does a serviceable job in this regard.⁹⁸ By making it likely that the minority candidate would win a two-way, biracial contest, these districts discourage majority-group leaders from nominating one of their own and mounting a racialized campaign.⁹⁹ Majority group leaders are incentivized to collaborate with segments of the minority community and to coalesce behind what David Canon has called “new-style” minority candidates, who assiduously court both white and minority voters.¹⁰⁰ The experience of being represented—or better yet, governed¹⁰¹—by such candidates is an important solvent of antiquated racial stereotypes.

This research ought to allay conservatives’ worries about the unintended consequences of Section 2. Yet because Section 2 remains doctrinally divorced from the VRA’s purpose to “hasten the waning of racism in American politics”¹⁰² (in that neither the determination of

ies of congressional and mayoral elections with no observed depolarization effect). Hajnal argues that these results can be explained by demographic context (specifically, an even racial balance within the electorate), by the fact that the minority officeholder had little power to govern, or both. *Id.* at 28-30.

⁹⁸ See DAVID T. CANON, RACE, REDISTRICTING, AND REPRESENTATION: THE UNINTENDED CONSEQUENCES OF BLACK MAJORITY DISTRICTS 3 (1999) (“One significant effect of . . . ideological diversity among black candidates is to give a centrist coalition of moderate white and black voters the power to elect the black candidate of *their* choice in many [VRA] districts.” (citation omitted)); HAJNAL, *supra* note 97, at 142-46 (showing that black congressional incumbents in “redrawn minority black districts” enjoy high levels of support from white voters as compared to the support they received as challengers).

⁹⁹ See CANON, *supra* note 98, at 137-38 (showing that in majority-black congressional districts, black candidates who appeal to biracial coalitions are likely winners in primary elections against other minority candidates); *cf.* HAJNAL, *supra* note 97, at 29-30, 95-97 (analyzing mayoral politics in racially balanced cities, in contrast to white majority and white minority cities); Liu, *supra* note 97, at 576-77 (finding that whites are less supportive of minority candidates when the electorate is evenly divided than when the minority population comprises at least fifty-five percent of the electorate).

¹⁰⁰ CANON, *supra* note 98, at 128; *see also* Liu, *supra* note 97, at 587 (showing that deracialization campaign strategies more effectively garner white support when whites are a numerical minority in the electorate); Baodong Liu, *Whites as a Minority and the New Biracial Coalition in New Orleans and Memphis*, 39 PS: POL. SCI. & POL. 69, 73-74 (2006) (finding that successful black candidates in mayoral elections made efforts to attract white voters by “emphasiz[ing] the value of racial conciliation”); *cf.* Crayton, *supra* note 97, at 549, 566-72 (conducting a case study of white support for a black candidate in a majority-minority congressional district and concluding that “racial cooperation” in voting exists in such districts).

¹⁰¹ See HAJNAL, *supra* note 97, at 95-102 (showing that the election of a black mayor has a greater depolarization effect when the mayor’s coalition is the governing coalition).

¹⁰² *Johnson v. De Grandy*, 512 U.S. 997, 1020 (1994).

liability nor the design of remedies expressly turns on the consequences of alternative electoral arrangements for race-biased voting or racial attitudes), the natural course of litigation may not bring these findings to the attention of conservative judges. Even if it did, Section 2 would probably continue to be seen as a strange and suspicious growth in the body of civil rights law. Section 2 would remain a results test with no discernable core value whose functional connection to the VRA's animating purpose is incidental at best.

C. *Constitutional Doubts*

The conservative Justices' intuitions about the polarizing consequences of majority-minority districts go some distance toward explaining the pattern of narrow interpretations of Section 2, but they are not the whole story. They cannot explain, for example, why the conservative bloc disallowed Section 2 claims through which small groups of minority voters—groups too small to comprise a majority of a compact single-member district—sought protection for “influence” or “crossover” districts in which minority voters could wield power in concert with white voters.¹⁰³ Manageability concerns are part of the story here, as Justice Kennedy acknowledged in his opinion for the Court in *Bartlett v. Strickland*.¹⁰⁴ The rest of the story is about constitutional avoidance.¹⁰⁵

Justice Kennedy has long made a show of reserving the question of Section 2's constitutionality,¹⁰⁶ and in opinions disallowing Section 2 claims for “influence” or “crossover” districts, he invoked the princi-

¹⁰³ See *Bartlett v. Strickland*, 129 S. Ct. 1231, 1243-46 (2009) (concluding that Section 2 claims cannot be brought by minority voters who would be able to elect their candidate of choice in the proposed remedial district but only in coalition with majority-group voters); *League of United Latin Am. Citizens v. Perry (LULAC)*, 548 U.S. 399, 445-46 (2006) (plurality opinion) (stating that Section 2 claims cannot be predicated on “the failure to create . . . influence district[s]” in which the minority group could determine the “outcome between some candidates, none of whom is their candidate of choice”).

¹⁰⁴ 129 S. Ct. at 1244-45. On manageability as a theme in the VRA jurisprudence, see Christopher S. Elmendorf, *Refining the Democracy Canon*, 95 CORNELL L. REV. 1051, 1099-103 (2010).

¹⁰⁵ For a thoughtful look at how the conservative wing of the Court views the constitutionality of Section 2, see generally Luis Fuentes-Rohwer, *The Future of Section 2 of the Voting Rights Act in the Hands of a Conservative Court*, 5 DUKE J. CONST. LAW & PUB. POL'Y 125 (2010).

¹⁰⁶ See *De Grandy*, 512 U.S. at 1031 (Kennedy, J., concurring) (emphasizing that no constitutional claims were before the Court); *Chisom v. Roemer*, 501 U.S. 380, 418 (1991) (Kennedy, J., dissenting) (“I write to add only that the [Section 2] issue before the Court is one of statutory construction, not constitutional validity.”).

ple that constitutionally doubtful statutes should be narrowly construed.¹⁰⁷ But Kennedy has been circumspect regarding the basis for his constitutional doubts, noting only that if Section 2 were to protect influence districts, it would “unnecessarily infuse race into virtually every redistricting.”¹⁰⁸

If Section 2 had this effect, it would presumably run afoul of *City of Boerne v. Flores*, which establishes a “congruence and proportionality” requirement for congressional enactments pursuant to Section 5 of the Fourteenth Amendment.¹⁰⁹ If the “infus[ion of] race into virtually every redistricting” were truly “unnecessar[y]” to remedy constitutional violations,¹¹⁰ it is hard to see how a statute with this effect could be a “congruent and proportional” response to constitutional wrongs.¹¹¹

In *Boerne*, the Court invalidated the Religious Freedom Restoration Act (RFRA), which subjected burdens on the free exercise of religion to strict scrutiny.¹¹² Justice Kennedy’s opinion for the *Boerne* Court sheds considerable light on both his doubts about the constitutionality of Section 2 and his belief that interpretations of Section 2 that narrow its scope pull it back from the constitutional brink. RFRA, Justice Kennedy explained, was unconstitutional because of its broad coverage¹¹³ and because it was “not designed to identify and counteract state laws likely to be unconstitutional because of their treatment of religion.”¹¹⁴ Congress made no effort to tailor RFRA’s coverage to cases presenting a “significant likelihood” of state action “motivated by religious bigotry.”¹¹⁵

¹⁰⁷ See *Bartlett*, 129 S. Ct. at 1245, 1246-48; *LULAC*, 548 U.S. at 445-46.

¹⁰⁸ *LULAC*, 548 U.S. at 405.

¹⁰⁹ 521 U.S. 507, 520 (1997).

¹¹⁰ *LULAC*, 548 U.S. at 405.

¹¹¹ For related arguments that Section 2 is vulnerable on *Boerne* grounds—at least from the point of view of conservative jurists—see Fuentes-Rohwer, *supra* note 105, at 134-38, which explains the challenge of justifying amended Section 2 as a remedial measure against constitutional violations, and Douglas Laycock, *Conceptual Gulfs in City of Boerne v. Flores*, 39 WM. & MARY L. REV. 743, 749-50 (1998), which comments on similarities between the congressional politics of enacting the Religious Freedom Restoration Act (RFRA) and those of amending Section 2.

¹¹² 521 U.S. at 515-16.

¹¹³ *Id.* at 520, 535; see also *id.* at 532 (“RFRA[’s] . . . [s]weeping coverage ensures its intrusion at every level of government.”).

¹¹⁴ *Id.* at 534-35.

¹¹⁵ *Id.* at 532-35; cf. *id.* at 532 (“Preventive measures prohibiting certain types of laws may be appropriate when there is reason to believe that many of the laws affected by the congressional enactment have a significant likelihood of being unconstitutional.”).

Now consider Section 2. If, as *Gingles* suggested, there is an “abridgement of the right . . . to vote on account of race”¹¹⁶ within the meaning of the statute wherever minority and majority voters tend to prefer different candidates and the minority group is unable to elect a proportionate number of its candidate of choice (but could do so under a suitably designed regime of single-member districts), then Section 2 seems to suffer the same design flaw as RFRA.¹¹⁷ Given the ubiquity and long tradition of highly majoritarian electoral systems in American democracy, there is scant basis for suspecting an official intent to discriminate from the mere fact that an electoral system results in a minority community enjoying a less-than-proportionate share of political representation. First-past-the-post elections are the American norm, typically conducted using single-member districts. It is well known that this vote-aggregation rule usually results in less-than-proportionate representation for all political minorities.¹¹⁸ And if majoritarian vote-aggregation rules are as common in all-white areas as they are in areas with significant minority populations,¹¹⁹ it can hardly be said that under-representation for a politically cohesive group of minority voters supports an inference that the vote-aggregation rules were adopted or maintained for discriminatory reasons.

To be sure, one might infer a likelihood of discriminatory intent if the vote-aggregation rule were altered in response to changes in the

¹¹⁶ 478 U.S. 30, 36 (1986) (quoting 42 U.S.C. § 1973(a) (1982)).

¹¹⁷ To be sure, *Boerne* concerns congressional enforcement powers under the Fourteenth Amendment, and Section 2 is, at least in part, an exercise of congressional power under the Fifteenth Amendment. (Congress invoked both Amendments. See S. REP. NO. 97-417, at 39 (1982).) It is widely thought, however, that the Court will extend *Boerne*'s congruence and proportionality requirement to the Fifteenth Amendment when presented with a case that forces the question. *But see* Nw. Austin Mun. Util. Dist. No. One v. Mukasey, 573 F. Supp. 2d 221, 241-46 (D.D.C. 2008) (holding that *South Carolina v. Katzenbach*'s, 383 U.S. 301 (1965), rationality standard rather than *Boerne*'s congruence and proportionality should govern Fifteenth Amendment cases), *vacated on other grounds*, 129 S. Ct. 2504 (2009). In any event, Section 2 may need the Fourteenth Amendment as its anchor insofar as it reaches injuries beyond simple vote denial, as it remains disputed whether the Fifteenth Amendment goes any further. See *City of Mobile v. Bolden*, 446 U.S. 55, 61-65 (1980) (plurality opinion) (undertaking to limit the Fifteenth Amendment to racially discriminatory vote denial). Also, the Fourteenth Amendment must afford the basis for Section 2 claims brought by groups who are protected owing to their status as language minorities rather than racial minorities. 42 U.S.C. §§ 1973a, 1973b(f) (2006). I thank Mike Pitts for pointing this out.

¹¹⁸ This is because the rule encourages political actors to coalesce into two major coalitions (political parties), which compete for the affections of the median voter. See generally DENNIS C. MUELLER, PUBLIC CHOICE III 230-301 (2003).

¹¹⁹ Congress did not find otherwise.

minority population, or if certain highly majoritarian systems proved to be much more common in areas in which the principal political minority was also a racial minority. But Section 2 on its face does not demand any such inquiry.

None of this is to say that Section 2 ought to be viewed as constitutionally suspect under *Boerne*. As I will show in Part II, the statute can be shaped through interpretation into a well-tailored response to constitutional violations. My point is simply that so long as Section 2 is seen as a normatively ambiguous statute that in operation provides racial minorities with roughly proportional representation within a system of single-member districts, the statute's demands will seem remote from the Constitution's concerns. Put differently, Section 2's "*Boerne* problem" will persist until the courts resolve a prior conceptual puzzle: precisely what harms does Section 2 target, and how?¹²⁰

¹²⁰ Proponents of Section 2 have, to date, mustered two kinds of responses to the *Boerne* objection. One strategy, advanced by Pamela Karlan, is to explain how the redesign of electoral systems to increase minority representation can serve both to compensate for past constitutional violations, such as discrimination in education reflected in low voter turnout, and to prevent future constitutional violations, such as the adoption of racist policies by an all-white governing body. See Karlan, *Two Section Twos*, *supra* note 12, at 738-40. The other strategy, advanced by Mike Pitts and subsequently elaborated by Luke McLoughlin, emphasizes the similarity between the unstructured, "totality of circumstances" inquiry under Section 2 and the Supreme Court's inference of intentional discrimination via a similar analysis in *Rogers v. Lodge*, 458 U.S. 613 (1982), a constitutional vote dilution case decided two years after *Bolden*. Luke P. McLoughlin, *Section 2 of the Voting Rights Act and City of Boerne: The Continuity, Proximity, and Trajectory of Vote Dilution Standards*, 31 VT. L. REV. 39 (2006); Pitts, *supra* note 12.

The Supreme Court's continued reliance on the constitutional avoidance canon in Section 2 cases suggests that neither the Karlan nor the Pitts/McLoughlin strategy has worked. In my view, this is not surprising (although, as McLoughlin pointed out in comments on this paper, the Pitts/McLoughlin argument was not briefed in the cases in which the Supreme Court invoked the avoidance canon to narrow Section 2).

The problem with Karlan's approach is that it rests, implicitly, on a very relaxed understanding of the necessary degree of fit between statutory remedies and constitutional violations under the congruence and proportionality test. *Boerne* suggests that state practices disallowed by Congress must at least be significantly likely to violate the Constitution or to result in constitutional violations. 521 U.S. at 532; see *supra* text accompanying notes 113-14. But absent a case-specific significant-likelihood showing by Section 2 plaintiffs, it is entirely speculative whether the redesign of electoral systems to elect a more proportionate number of minority lawmakers will, as Karlan suggests, significantly reduce future constitutional violations. (Perhaps violations were unlikely in any event. Or perhaps violations will become more likely, if the election of minority lawmakers comes at the price of reducing the number of majority-group lawmakers who must compete for minority votes.)

Pitts's and McLoughlin's "it's like *Rogers*" defense of Section 2 is also problematic. For one, it is not at all clear that the conservative center believes that *Rogers* was rightly decided and would follow it today. *Rogers* was a split decision, and the dissenters—who

In striking down RFRA, the *Boerne* Court pointed not only to the lack of fit between the statutory standard and likely constitutional violations, but also to the statute's broad coverage and permanence.¹²¹ This implies that courts may save a borderline enactment by narrowing its reach or duration through statutory interpretation. This is precisely what the conservative Justices have done with Section 2. As noted above, they have created what amounts to a textually unmoored and very restrictive common law of statutory standing. Minority voters who cannot show the possibility of belonging to a compact, majority-minority, single-member district—holding constant the size of the governing body—will be kicked out of court without any consideration of the electoral arrangements they propose.

My thesis that the *Boerne* problem explains the conservative center's predilection for narrow readings of Section 2 has an important corollary: in cases where there is some basis for suspecting intentional discrimination, the conservative center may well side with the plaintiffs. This prediction is arguably borne out by Justice Kennedy's opinion for the Court in *LULAC*.¹²² The reader will recall that Kennedy joined with the liberal Justices to invalidate a Republican gerrymander that, as he saw it, "[bore] the mark of intentional discrimination."¹²³ Kennedy's suspicion that racial discrimination may have been at work, or at least that an ordinary observer might fear as much, was enough for him to deem this application of Section 2 unproblematic. In so holding, he created a building block for reorienting Section 2 toward circumstances that bespeak, in the words of *Boerne*, "a significant likelihood" of discriminatory intent.¹²⁴

were in the majority in *Bolden*—thought the *Rogers* majority opinion was flatly inconsistent with *Bolden*. See *Rogers*, 458 U.S. at 628-29 (Powell, J., dissenting). Second, in *Rogers* the constitutional harm that the district court purported to undo was clear in principle, even if disputed on the facts of the case. See *id.* at 621 (majority opinion) ("[T]he ultimate issue in a case alleging unconstitutional dilution of the votes of a racial group is whether the districting plan under attack exists *because it was intended* to diminish or dilute the political efficacy of that group." (emphasis added) (quoting *Nevett v. Sides*, 571 F.2d 209, 226 (5th Cir. 1978) (internal quotations marks omitted))). But under the Section 2 results test, there is not, as yet, any requirement that plaintiffs identify particular constitutional injuries for the court to cure or abate.

¹²¹ See 521 U.S. at 530-35.

¹²² 548 U.S. 399 (2006).

¹²³ *Id.* at 440.

¹²⁴ *Boerne*, 521 U.S. at 532.

II. SECTION 2 AS A COMMON LAW STATUTE

Section 2's precarious condition is meliorable. It is still possible for the courts to make both colloquial and legal sense of Section 2, and in so doing, to bring Section 2 into alignment with the VRA's ambition "to hasten the waning of racism in American politics"¹²⁵ and to put to rest *Boerne*-based doubts about Section 2's constitutionality. This Part charts the path forward and explains its basis in the text, history, and constitutional context of Section 2.

On my account, Section 2 is a delegation of authority to the courts to develop a common law of racially fair elections, guided by certain substantive and evidentiary norms as well as norms about legal change. Substantively, Section 2 provides separate causes of action for vote dilution and participation injuries. Dilution injuries arise whenever race-biased decisionmaking by conventional state actors, or by majority-group voters, results in racial minorities having diminished opportunities to secure representation relative to the opportunity the minority community otherwise would have enjoyed. Participation injuries occur when such biased decisionmaking leads to disparate burdens on minority access to discrete phases of the electoral process, such as casting a ballot or nominating a candidate.¹²⁶

Regarding the evidentiary norm, the main idea is that plaintiffs should not be required to prove race-biased decisionmaking in accordance with the conventional preponderance of the evidence standard.¹²⁷ It suffices for plaintiffs to trace the injury of which they complain to decisions shown *to a significant likelihood* to have been infected by racial bias.

What about norms of legal change? Statutory precedents generally receive super-strong *stare decisis* because, unlike constitutional precedents, they can always be revised by Congress.¹²⁸ The leading exception is the Sherman Act. The Supreme Court nowadays deems Sherman Act precedents as binding only insofar as they fit with current social-scientific understandings and larger trends in the devel-

¹²⁵ *Johnson v. De Grandy*, 512 U.S. 997, 1020 (1994).

¹²⁶ Participation injuries may, but need not, result in actionable vote dilution.

¹²⁷ See *infra* Section II.B.

¹²⁸ See William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 GEO. L.J. 1361, 1364-69 (1988).

opment of the law.¹²⁹ Section 2 precedents should be treated similarly, albeit for different reasons.¹³⁰

My account of Section 2 unfolds in response to three linked questions, each premised on the incontrovertible thesis that the 1982 amendments direct a return to the pre-*Bolden* status quo. The first and threshold question is whether that status quo should be understood in static or dynamic terms—as a protocol or as a path. Did Congress require the courts to decide cases using the Supreme Court’s exact method in *White v. Regester* (i.e., to make findings about a number of factors and then to issue an unexplained judgment about whether the challenged electoral structure violates Section 2)? Or did Congress authorize the courts to continue the pre-*Bolden* process of doctrinal evolution, gradually converting the mush of *White* into something more analytically and normatively precise while avoiding the wrong turn of *Bolden*? I shall refer to these as, respectively, the *protocol* and the *partnership* (or *common law*) conceptions of the 1982 amendments, borrowing part of my terminology from a thoughtful opinion by Judge Pierre Leval.¹³¹

Both the protocol and the partnership understandings of Section 2 leave judges with considerable discretion. They differ, however, on the question of whether that discretion should be used for the creative and typically legislative project of elaborating and structuring the law: of identifying guiding norms, establishing rules of decision and allocating burdens of proof, deciding whether novel claims may be brought under the statute, etc. The protocol understanding resists this assumption of judicial authority. It emphasizes that the 1982 amendments clearly license courts to decide vote dilution claims (premised on single-member-district remedies) exactly as the Supreme Court had in *White*. Any further claim of congressional authorization is speculative and should therefore be resisted in light of background norms about the primacy of the legislative branch.

The partnership understanding stresses that the creative and typically legislative project of elaborating and structuring the law is in fact

¹²⁹ For the most recent statement of this position, see *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 899-900 (2007).

¹³⁰ See *infra* Section II.C.

¹³¹ See *Goosby v. Town Bd. of Hempstead, N.Y.*, 180 F.3d 476, 501 (2d Cir. 1999) (Leval, J., concurring) (arguing that, by leaving open “inevitable questions” about Section 2, Congress “enter[ed] into a partnership with the courts, assigning them the task of supplying answers based on common sense and good judgment in giving effect to the incompletely formulated intentions and apparent compromises of the statute”).

an ordinary judicial project in common law and constitutional cases. When Congress incorporates an inchoate constitutional or common-law standard into a statute, there is nothing *prima-facie* anomalous about reading that statute as delegating authority to the judiciary to continue the ordinary process of legal development. Simple appeals to the legislature's institutional role cannot resolve the question of whether the statute should be understood in protocol or partnership terms.

Section II.A makes the case for the partnership understanding of Section 2. The argument draws its force from (1) the perspective of a reasonable congressperson, (2) multiple constitutional considerations, including *Boerne's* "congruence and proportionality" requirement and Article III justiciability concerns, (3) the fact that the results test was clearly intended to support a class of claims for which the *White* standard, such as it is, was not designed, and (4) the fact that the protocol approach wastes probative information regarding what the framers of the results test liked about the pre-*Bolden* jurisprudence and what they found objectionable in *Bolden*.

Assuming the partnership understanding is correct, the next question is what norms properly guide judicial elaboration and refinement of the results test. Meshing arguments from legislative history and about the Constitution, Section II.B makes the case for the substantive and evidentiary norms described above. It also shows how Section 2, once understood in this fashion, may support heretofore unrecognized *depolarization claims*: challenges to electoral arrangements on the ground that they unnecessarily induce or sustain race-biased voting by members of the racial majority, whether or not they prevent a politically cohesive minority community from electing a reasonable number of its preferred candidates.

Section II.C addresses the norm of legal change. One might suppose that the partnership understanding of Section 2's resurrection of *White* entails the weak form of *stare decisis* typically associated with common law statutes, rather than conventional super-strong statutory *stare decisis*. But this position is probably too strong. The paradigm statute for weak statutory *stare decisis* is the Sherman Act, whose flexible interpretation the Supreme Court grounded in the clear expectations of the enacting Congress. The legislative history of Section 2 is, in relevant respects, silent. But the case for weak *stare decisis* under the amended Section 2 is nonetheless quite strong, because of how justiciability concerns bear on judicial elaboration of the results test, and because of the politics of race—specifically, the sense of the Supreme Court's conservative center that America's racial inequalities

must be addressed, but that the legislative arena is a dangerous or ineffective forum for making racial policy. Other, more conventional considerations also tend to weaken the stare decisis effect of many Section 2 precedents.

* * *

The argument of this Part is long and intricate, and a sense of the payoffs may help to motivate the journey. Consider, then, some questions that have split the circuits.

Is Proof of Intentional Discrimination Required Under Section 2? The First, Fifth, and Eleventh Circuits require vote dilution plaintiffs to prove that their injuries resulted from race-biased decisionmaking by voters or conventional state actors.¹³² The Ninth Circuit effectively does not,¹³³ and the Tenth seems more or less aligned with the Ninth.¹³⁴ Neither side has it right. A showing of race-biased decisionmaking is a necessary element of a Section 2 claim, but plaintiffs need not prove discrimination in accordance with conventional evidentiary standards. Proof “to a significant likelihood” is enough.¹³⁵

¹³² For an early and influential statement of this view, see Judge Tjoflat’s plurality opinion in *Nipper v. Smith*, 39 F.3d 1494, 1524 (11th Cir. 1994). For subsequent applications from the above-mentioned circuits, see *Teague v. Attala Cnty.*, 92 F.3d 283, 295 (5th Cir. 1996), *S. Christian Leadership Conference of Ala. v. Sessions*, 56 F.3d 1281, 1293 (11th Cir. 1995), and *Uno v. City of Holyoke*, 72 F.3d 973, 983 (1st Cir. 1995).

¹³³ See *United States v. Blaine Cnty.*, 363 F.3d 897, 912 n.21 (9th Cir. 2004) (noting that liability under Section 2 attaches only if the plaintiff establishes a “causal connection” to racial discrimination, while holding that a showing of “racial bloc voting” (in the manner of *Gingles*) establishes the requisite connection). Whether *Blaine County* survives *Farrakhan v. Gregoire*, 623 F.3d 990 (9th Cir. 2010) (en banc), is an open question. The *Farrakhan* court held that an innocently motivated felony disqualification for voting could not be invalidated under Section 2 absent a strong showing of intentional racial discrimination in the state’s criminal justice system. Thanks to Justin Levitt for raising this question.

¹³⁴ *Sanchez v. Colorado*, 97 F.3d 1303, 1321 (10th Cir. 1996) (reversing the district court, which after finding that race-correlated differences in candidate preferences were due to racial disparities in political party identification rather than racial prejudices, denied the Section 2 claim).

¹³⁵ The Ninth Circuit’s opinion in *Blaine County* can be read as distinguishing the question of whether the plaintiffs’ injury must result from subjective discrimination to be actionable from the question of whether plaintiffs must prove subjective discrimination. See *supra* note 133. But *Blaine County* lowers the evidentiary bar too far. When there are geographic and socioeconomic gaps between racial communities, there is scant basis for inferring race-biased voting (even to a significant likelihood) from the simple fact of race-correlated differences in voting.

Is Proof of Vote Dilution Necessary to a Section 2 Participation Claim? Most courts have held that Section 2 provides a cause of action against participation injuries, whether or not the injury results in the tangible dilution of a minority community's voting strength.¹³⁶ But in *Chisom v. Roemer*, the Supreme Court (in a passage that is arguably dictum) said otherwise.¹³⁷ The Third Circuit, relying on *Chisom*, broke with its sister circuits and held that participation barriers do not violate Section 2 unless they demonstrably impair the minority community's opportunity to secure representation.¹³⁸ My theory of Section 2 confirms the majority view.

Does Section 2 Reach Felon Disenfranchisement? Judges who have answered this question in the affirmative stress that the statute textually covers "voting qualifications and prerequisites to voting," which quite plainly include felon disenfranchisement laws.¹³⁹ Judges who disagree rely on constitutional avoidance arguments.¹⁴⁰ My account of Section 2 should end the constitutional hand-wringing,¹⁴¹ freeing courts to give effect to this rare instance of statutory plain meaning.

Is There a "Voter Fault" Defense Under Section 2? Some judges have surmised that if a reasonable voter could navigate a voting require-

¹³⁶ See *supra* note 52 and accompanying text.

¹³⁷ 501 U.S. 380, 397-98 (1991).

¹³⁸ *Ortiz v. City of Phila.*, 28 F.3d 306, 314-15 (3d Cir. 1994). Under this approach, plaintiffs must show that removal of the participation barrier would, for example, enable the minority community to elect a larger number of its preferred representatives.

¹³⁹ See, e.g., *Hayden v. Pataki*, 449 F.3d 305, 346-48, 358-59 (2d Cir. 2006) (en banc) (Parker, J., dissenting); *Johnson v. Governor of Fla.*, 405 F.3d 1214, 1240 (11th Cir. 2005) (en banc) (Wilson, J., dissenting); *id.* at 1248 (Barkett, J., dissenting); *Farrakhan v. Washington*, 338 F.3d 1009, 1016 (9th Cir. 2003); *Baker v. Pataki*, 85 F.3d 919, 939-40 (2d Cir. 1996) (en banc) (Feinberg, J., writing for an equally divided court in favor of affirmance) (5-5 decision).

¹⁴⁰ See, e.g., *Hayden*, 449 F.3d at 329-36 (en banc) (Walker, J., concurring); *Johnson*, 405 F.3d at 1229 (majority opinion); *Muntaqim v. Coombe*, 366 F.3d 102, 126 (2d Cir. 2004), *vacated en banc*, 449 F.3d 371 (2006); *Farrakhan v. Washington*, 359 F.3d 1116, 1121 (9th Cir. 2004) (Kozinski, J., dissenting from denial of rehearing en banc); *Baker*, 85 F.3d at 930 (Mahoney, J., writing for an equally divided court in favor of reversal).

¹⁴¹ To be sure, some of the judges who have made the constitutional avoidance argument treat felony disqualifications for voting as a uniquely special prerogative of the states, by dint of their recognition in Section 2 of the Fourteenth Amendment. See, e.g., *Farrakhan*, 359 F.3d at 1121 (Kozinski, J., dissenting from denial of rehearing en banc). But the Constitution's recognition that *some* felon disenfranchisement laws are permissible hardly implies that Congress cannot exercise its enforcement power under the Fourteenth and Fifteenth Amendments to reform those felony disqualifications that are themselves unconstitutional (because they were enacted or are maintained for improper reasons) or that give electoral effect to other unconstitutionally discriminatory state action.

ment challenged under Section 2, then that requirement does not violate the statute, because Section 2 guarantees only equality of opportunity, not equality of results.¹⁴² If my account of Section 2 is correct, however, voter fault cannot be an absolute defense.¹⁴³ Section 2 aims to strip the electoral process of distortions caused by race-biased decision-making. Whether or not a citizen may be deemed at fault for committing a crime, for failing to double check his punch-card ballot before submitting it, or for misunderstanding the instructions for casting an absentee ballot, the electoral process will remain infected by racial bias if the voting rules at issue were created for discriminatory reasons or give electoral effect to racial discrimination in, for example, the state's criminal justice or educational systems. The harm exists independently of voter fault.

To reiterate, these quickly sketched applications of my theory to questions presently before the courts are meant only to motivate the arguments that follow. The full implications of my treatment of Section 2 run much further, establishing a foundation for previously unrecognized depolarization claims, and underpinning the *stare decisis* effect of the Supreme Court's Section 2 precedents—especially those that rest on the avoidance canon.

A. *The Return to White: Protocol or Partnership?*

As noted in Part I, the legal standard set forth in the 1982 amendments quotes *White v. Regester*, the Supreme Court's leading pre-*Bolden* vote dilution case,¹⁴⁴ and the authoritative Senate Judiciary Committee Report¹⁴⁵ is unmistakably clear that the framers of the results test were pleased with the circuit courts' pre-*Bolden* applications of *White* and intended to restore the pre-*Bolden* status quo.¹⁴⁶ The Senate Report explains the "totality of circumstances" inquiry prescribed in

¹⁴² See, e.g., *Ortiz*, 28 F.3d at 315-17 (suggesting that registrants purged for non-voting are at fault for failing to re-register); *Wesley v. Collins*, 791 F.2d 1255, 1261-62 (6th Cir. 1986) (rejecting a felon disenfranchisement challenge under Section 2 on the theory that the voter is at fault for committing the crime).

¹⁴³ I concede that voter fault may have some relevance in cases that require a weighing of harms against important interests served by the contested electoral arrangements.

¹⁴⁴ See *supra* text accompanying notes 38-39.

¹⁴⁵ The Supreme Court regards the Senate Report as the "authoritative source for legislative intent" with respect to Section 2. See *Thornburg v. Gingles*, 478 U.S. 30, 43 n.7 (1986).

¹⁴⁶ See S. REP. NO. 97-417, at 2, 15-16, 19-24, 27-31 (1982) ("The proposed results test was developed by the Supreme Court and followed in nearly two dozen cases by the lower federal courts.").

the statute by reciting the factors highlighted in *Zimmer v. McKeithen*, the leading circuit court case following *White*.¹⁴⁷

However, prior to *Bolden*, there was both a legal standard—a protocol—for judging unconstitutional vote dilution and a process of doctrinal evolution. There can be little doubt that the *White/Zimmer* protocol was going to be refined, and not simply because of its arguable conflict with *Washington v. Davis*.¹⁴⁸ The protocol was inchoate. The *White* Court simply recapped the lower court’s factual findings, duly noted that the Constitution does not guarantee representation for “every racial or political group,” and then declared that the trial judge’s “intensely local appraisal” established unconstitutional vote dilution.¹⁴⁹ *Zimmer* added little more.¹⁵⁰

Yet in this respect *White* was no different from many—perhaps most—Supreme Court decisions that acknowledge previously unrecognized rights or give rise to new doctrinal rubrics. The fundamental right to vote, political parties’ rights of ballot access, and rights of candidacy for independents all had their start with decisions in which the Supreme Court said little more than, “We think the state went too far in this case,” if it even said that much.¹⁵¹ Professor Richard Hasen has argued that this is an entirely sensible way to proceed when, as is typically the case, the Justices are uncertain at the start of a new venture about how best to give effect to a constitutional value while minimizing incursions on competing concerns.¹⁵²

Over time, an initially murky standard typically resolves into a set of more refined distinctions as constitutional common law devel-

¹⁴⁷ See *id.* at 28-29 (describing factors that may establish discriminatory purpose); see also *Zimmer v. McKeithen*, 485 F.2d 1297, 1305 (5th Cir. 1973) (en banc).

¹⁴⁸ 426 U.S. 229 (1976). In *Davis*, the Court famously held that the Equal Protection Clause does not protect racial minorities from state action with a racially disparate impact unless the relevant state actors acted on the basis of impermissible discriminatory motives. *Id.* at 238-48. The Supreme Court’s decision in *City of Mobile v. Bolden* applies the same “discriminatory intent” requirement to vote dilution claims. 446 U.S. 55, 66-74 (1980).

¹⁴⁹ See 412 U.S. 755, 765-71 (1973).

¹⁵⁰ See *infra* note 163 and accompanying text.

¹⁵¹ See generally RICHARD L. HASEN, *THE SUPREME COURT AND ELECTION LAW: JUDGING EQUALITY FROM BAKER V. CARR TO BUSH V. GORE* 47-72 (2003) (explaining, and defending, the Court’s initial use of murky standards when constitutionalizing political rights).

¹⁵² *Id.*

ops.¹⁵³ This is particularly true with respect to political rights, where the special risk of judicial partisanship (in fact or appearance) counsels for bright-line rules when the relevant constitutional values are thought to require a substantial redirection of current political practices.¹⁵⁴

There was every reason to expect the pre-*Bolden* vote dilution standard to follow the same path. The *Bolden* plurality opinion, which put a particular normative spin on *White*, represented only one of many crystallizing possibilities open to the Court at the time.¹⁵⁵ Yet the fact that some evolution was likely does not mean that it remained permissible following the 1982 amendments. Congress, in amending Section 2, might have meant to lock the *White/Zimmer* protocol in place, rather than to authorize a process of doctrinal evolution. The legislative history sheds no light on this question. It was simply absent from the congressional debates.¹⁵⁶

The most that can be said in favor of the protocol understanding of Section 2 is that Congress was content with the *White* “standard” and opposed any mindless simplification of it. Hence the text of amended Section 2, which expressly prescribes a totality of circumstances inquiry;¹⁵⁷ hence the Senate Report, which, after enumerating the *White/Zimmer* factors, states, “[T]he Committee intends that there is no requirement that any particular number of factors be proved, or that a majority of them point one way or the other.”¹⁵⁸ But the fact that the statute calls for liability to be determined following a totality of circum-

¹⁵³ On constitutional elaboration as a process akin to common law adjudication, see generally David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996).

¹⁵⁴ See generally Christopher S. Elmendorf, *Structuring Judicial Review of Electoral Mechanics: Explanations and Opportunities*, 156 U. PA. L. REV. 313 (2007) (showing that a nominal balancing test for regulatory burdens on political rights has been used to create a series of bright-line rules).

¹⁵⁵ To give but a few examples, it was also open to the Court (1) to define the constitutional injury of vote dilution with more precision but in some other way (i.e., not in terms of intentional discrimination by conventional state actors), thereby providing normative guidance to the lower courts while leaving them free to decide cases on the basis of a multifactor test; (2) to foreclose certain classes of otherwise colorable claims by deeming the harm de minimis or likely justified; (3) to delineate a subset of cases in which the Constitution would be deemed presumptively violated; and/or (4) to develop a body of law about state interests that might justify otherwise impermissible vote dilution.

¹⁵⁶ For a review of the congressional debates surrounding the 1982 amendments, see Boyd & Markman, *supra* note 46, at 1388-94.

¹⁵⁷ VRA § 2, 42 U.S.C. § 1973(b) (2006).

¹⁵⁸ S. REP. NO. 97-417, at 29 (1982).

stances inquiry does not preclude the development of strong presumptions to guide that inquiry, or the identification of orienting norms.

So if the legislative history does not adjudicate between the protocol and partnership conceptions of Section 2's return to *White*, what does? The facile answer is this: twenty-five years of Supreme Court interpretation of the results test. As Guy-Uriel Charles and Luis Fuentes-Rohwer emphasize, the Court has interpreted the 1982 amendments in an exceedingly pragmatic fashion, creating a body of law that barely resembles the pre-*Bolden* jurisprudence.¹⁵⁹

But I want to make a normative claim: Section 2 should be understood to delegate authority to evolve the *White* standard into something more analytically and normatively precise. The partnership understanding is the better understanding, I will argue, given (1) the concerns of a hypothetical, reasonable congressperson, (2) constitutional considerations, (3) the fact that Section 2 was clearly intended to authorize participation claims, for which the standard of *White* was not designed, and (4) the fact that the protocol understanding of Section 2 wastes information about the normative objectives of the framers of the results test. Fleshing out these points will do more than rationalize the Supreme Court's departure from *White* in post-1982 cases. It also sets the stage for my arguments in Section II.B about the substantive and evidentiary norms that should guide judicial elaboration of Section 2, and in Section II.C about the weak stare decisis effect of Section 2 precedents.

1. The Reasonable Congressperson Perspective

We may surmise that a reasonable member of Congress would like to exercise continuing influence over the development of open-textured laws she helped to enact. The partnership understanding of Section 2 facilitates this congressional role; the protocol understanding undermines it.

Under the protocol conception of Section 2, courts are *required* to decide cases under the results test in the precise manner of the Supreme Court's decision in *White*. But the dictate of *White* is only this: (1) duly note that vote dilution claims require "evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in ques-

¹⁵⁹ Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *The VRA in Winter: The Death of a Superstatute* (Oct. 2011) (unpublished manuscript) (on file with author).

tion,”¹⁶⁰ (2) make findings regarding the presence or absence of any number of factors related to present and past discrimination against minorities, minority political participation, minority representation, and the nuts and bolts of the electoral system at issue,¹⁶¹ and (3) conclude with an unexplained normative judgment about whether the findings, viewed in totality, warrant a federal court order replacing the challenged electoral arrangements with something more to the plaintiffs’ liking.¹⁶² (The Fifth Circuit’s decision in *Zimmer v. McKeithen* does not add anything to *White* beyond treating some of the *White* factors as core considerations, and others as enhancements.¹⁶³)

Thus, on the protocol view, Section 2 essentially stipulates that state electoral practices shall be reformed on the basis of the individual judge’s unstated sentiments and beliefs about racial fairness. District judges could be reversed, of course, but only by appellate judges making similarly unexplained normative calls. If Section 2 were applied in this way, it would be difficult for outside observers, such as members of Congress, to get a big-picture sense of how the law is working.

The partnership approach to Section 2, which calls on courts to identify guiding norms and to refine the doctrine accordingly, is likely to make judicial application of the results test more predictable and the ends more transparent. This not only makes life easier for litigants and defendant jurisdictions, it also helps Congress control the development of the law. Oversight hearings are surely more productive when Congress can see what the courts are doing. And the clearer Congress’s picture of the law in application, the easier it will be for Congress to design amendments to redirect the courts. For this reason, a hypothetical member of Congress who wishes to exercise continuing influence over the development of Section 2 would probably prefer that courts adopt the partnership understanding.

2. Two Constitutional Considerations

The protocol understanding of Section 2 gives rise to two constitutional difficulties that the partnership alternative substantially resolves.

¹⁶⁰ 412 U.S. 755, 766 (1973).

¹⁶¹ See *id.* at 766-79. The Senate Report provides a concise restatement of the factors. S. REP. NO. 97-417, at 28-29.

¹⁶² See *White*, 412 U.S. at 767, 769-770.

¹⁶³ *Zimmer v. McKeithen*, 485 F.2d 1297, 1305 (5th Cir. 1973). The opinion adds, unhelpfully, that “[t]he fact of dilution is established upon proof of the existence of an aggregate of these factors.” *Id.*

These are, first, the near impossibility of judging the congruence and proportionality of normatively opaque remedial legislation; and, second, the separation-of-powers problem with judicial resolution of politically sensitive cases on the basis of open-ended standards and unstated policy judgments.

a. *Congruence and Proportionality*

Congressional enactments under the Fourteenth (and probably the Fifteenth) Amendment must be congruent and proportional to an underlying pattern of constitutional violations.¹⁶⁴ To judge whether Section 2 is a congruent and proportional exercise of congressional authority, one must first ascertain the class of constitutional violations that the statute targets and the remedial and preventative design of the statute vis-à-vis those violations. Yet on the protocol understanding, the statute's design consists of nothing more than an instruction to individual judges to do what seems right given the totality of circumstances.¹⁶⁵ It is anyone's guess whether the resulting pattern of judicial decisions would reasonably respond to constitutional violations. Moreover, the protocol approach may allow and encourage state actors to rely on race in otherwise impermissible ways—both in adjudicating Section 2 claims and in designing election laws so as to avoid liability.¹⁶⁶ By contrast, as Section II.B will illustrate, the partnership understanding allows courts to impose structure on the results test and thereby render it intelligible and proportionate vis-à-vis constitutional violations.

b. *Article III and Political Questions*

A defining feature of the Supreme Court's constitutional jurisprudence of political rights is the pattern of rapid doctrinal evolution from initially muddy standards to firm rules.¹⁶⁷ This is not accidental. As the Court explained in *Vieth v. Jubelirer*, what constitutes a “manageable standard” within the meaning of the political question doctrine depends on the political stakes and character of the determina-

¹⁶⁴ See *supra* notes 109-14 and accompanying text.

¹⁶⁵ See *supra* subsection II.A.1.

¹⁶⁶ Thanks to Ellen Katz for stressing this point, which seems to be near the heart of Justice Kennedy's worries. See *supra* text accompanying notes 108-10.

¹⁶⁷ See *supra* notes 151-54 and accompanying text.

tion the court has been asked to make.¹⁶⁸ To pass on questions about the distribution of political power among groups—the issue in *Vieth*, a partisan gerrymandering case—generally necessitates “rules to limit and confine judicial intervention.”¹⁶⁹

Vote dilution claims require courts to pass on precisely such questions about the distribution of political power among groups. On the protocol understanding of Section 2, the courts must do so without the benefit of rules or even norms to “limit and confine judicial intervention.”¹⁷⁰ This arguably amounts to an unconstitutional delegation to the courts—not for want of the incredibly loose “intelligible principle” that Article I requires of congressional delegations to administrative agencies,¹⁷¹ but because, as the Supreme Court emphasized in *Mistretta v. United States*, Congress may not require federal judges to assume responsibilities that are incompatible with their duty to maintain political neutrality in fact and appearance.¹⁷²

The constitutional avoidance canon therefore counsels for a default rule of construction that permits judicial elaboration of election-related statutes so as to limit the fact or appearance of judicial partiality.¹⁷³ Elsewhere I have called this the *neutrality canon*.¹⁷⁴ As a default rule it supports the partnership gloss on Section 2, which empowers the judiciary to impose doctrinal structure on the mush of *White*.

¹⁶⁸ 541 U.S. 267, 286, 301 (2004) (plurality opinion); *id.* at 307 (Kennedy, J., concurring); see also Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1274, 1281-97 (2006) (synthesizing the manageable-standards jurisprudence and discussing the relevance of political stakes).

¹⁶⁹ *Vieth*, 541 U.S. at 307 (Kennedy, J., concurring in judgment).

¹⁷⁰ *Id.*

¹⁷¹ See *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472-76 (2001) (rejecting the view that the “intelligible principle” standard requires Congress to establish “determinate criteria” for agencies to follow when exercising delegated authority).

¹⁷² See 488 U.S. 361, 407 (1989) (stating that a statute which prescribes the appointment of Article III judges to a statutory commission would violate the separation of powers if the appointments resulted in judges becoming “entangle[d] in . . . political work . . . undermin[ing] public confidence in the disinterestedness of the Judicial Branch”). Per *Vieth*, the manageable standards prong of the political question doctrine is anchored in precisely the same separation of powers concerns. 541 U.S. at 301-05 (plurality opinion). A statute that instructed the courts to decide political cases on the basis of a muddy legal standard, while disallowing judicial elaboration of that standard into something more normatively precise and/or rule-like, would therefore raise serious constitutional questions.

¹⁷³ One might object: how can congressional codification of a legal standard developed by the Supreme Court itself possibly raise a manageable standards problem? The answer is that the standard as propounded by the Court was manageable only as a way station on the path to further doctrinal refinement.

¹⁷⁴ See Elmendorf, *supra* note 104, at 1098-104.

3. The Puzzle of Participation Claims

The limits of the protocol approach become even more apparent once one appreciates Congress's expectation that the Section 2 results test would reach participation as well as dilution claims. The legislative history touches on participation claims only briefly, but, as Section II.B will explain, the Senate Report makes clear that an actionable harm arises when minorities face improper barriers to participation at discrete junctures of the electoral process, irrespective of whether this results in vote dilution.

Yet before *Bolden*, there was not a body of participation law analogous to the *White/Zimmer* dilution jurisprudence.¹⁷⁵ The authors of the Senate Report identified only three previous participation cases under the VRA.¹⁷⁶ Each case addressed barriers to the casting of ballots.¹⁷⁷ Yet, as I will explain below, *White* speaks to a much broader conception of participation,¹⁷⁸ and the Senate Report characterizes Section 2 as "the major statutory prohibition of *all voting rights discrimination*," one which "prohibits practices which . . . result in the denial of equal access to *any phase of the electoral process*."¹⁷⁹

This legislative history disavows a basic premise of the protocol approach, namely that because the meaning of the statutory text is so facially uncertain, the courts should understand Section 2 as reaching only the type of claim that was foremost in the minds of its drafters. At the very least, the courts have to make new law on what constitutes a "phase" of the political process for purposes of Section 2. And though the permissibility of particular participation barriers might be resolved by working through the *White/Zimmer* factors and winding up with an unexplained judgment call, that would be odd. Participation

¹⁷⁵ There was a fundamental-right-to-vote jurisprudence under the Equal Protection Clause, but without a race-specific character. See, e.g., *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 666 n.3 (1966) (noting, in striking down a poll tax, that "[w]hile the Virginia poll tax was born of a desire to disenfranchise the Negro, we do not stop to determine whether on this record the Virginia tax in its modern setting serves the same end" (internal citation and quotation marks omitted)). There was also a small, race-specific body of Fifteenth Amendment law, but it was limited to cases in which the voter was denied the franchise. See *City of Mobile v. Bolden*, 446 U.S. 55, 61-65 (1980) (reviewing Fifteenth Amendment cases).

¹⁷⁶ S. REP. NO. 97-417, at 30 n.119 (1982) (citing *Toney v. White*, 488 F.2d 310 (5th Cir. 1973); *United States v. Post*, 297 F. Supp. 46 (W.D. La. 1969); *Brown v. Post*, 279 F. Supp. 60 (W.D. La. 1968)).

¹⁷⁷ See *infra* note 222.

¹⁷⁸ See *infra* text accompanying notes 189-92.

¹⁷⁹ S. REP. NO. 97-417, at 30 (emphasis added).

and dilution cases differ in both the character of the injury and the remedy sought,¹⁸⁰ and there is no reason to think that the enacting Congress would have wanted the courts to weigh the same factors, in the same way, in each instance.¹⁸¹

4. Wasted Information

The final reason to reject the protocol understanding of Section 2's resurrection of *White* is that it wastes information about what Congress liked about the pre-*Bolden* jurisprudence and disliked about *Bolden*. The protocol understanding leaves it to individual judges to decide what is fair by their own lights, whereas the partnership understanding encourages courts to wrestle with the normative impulses manifested in the legislative history of the 1982 amendments. As the next section will show, at least some of the enacting Congress's normative impulses were intelligible, and they can be integrated into a conceptually and constitutionally coherent account of Section 2.

B. Substantive and Evidentiary Norms

Assuming that amended Section 2's "return to *White*" should be understood in partnership terms, the next question is: what norms ought to inform judicial elaboration of the results test? I argue here that Section 2's legislative history and constitutional context jointly establish (1) that Section 2 provides causes of action against both participation and dilution injuries, (2) that an injury within the meaning of Section 2 only arises when political inequalities owe to race-biased decisionmaking, and (3) that plaintiffs, while not required to prove race-biased decisionmaking by a preponderance of the evidence, must nonetheless show "to a significant likelihood" that the injury of which they complain resulted from race-biased decisions.

Once Section 2 is understood in this way, the conservative critique of the results test can be readily answered. The substantive and evidentiary norms resolve the conceptual puzzle about what harms Section 2 guards against, and how. The *Boerne* objection can be met by treating Section 2 as a response to, inter alia, the underappreciated problem of election outcomes that are unconstitutional because of

¹⁸⁰ See Tokaji, *supra* note 55, at 718-23.

¹⁸¹ Note in this regard that the Senate Report expressly states that the *White/Zimmer* list of factors is *not* exhaustive of the considerations that may be brought to bear on a Section 2 liability determination. S. REP. NO. 97-417, at 28-29.

the racial basis for the electorate's verdict. Finally, Section 2 on my account is hardly indifferent to the problem of law-induced racial bias or its expression in politics. To the contrary, the common law conception of Section 2 would position judges to recognize depolarization claims, that is, challenges to election laws on the grounds that they unreasonably foster or sustain race-biased voting by members of the majority group, whatever the consequences for minority representation.

The argument of this Section begins with the legislative history of Section 2. I use it to characterize dilution and participation injuries, and I explore the boundaries of the latter with an eye to grounding depolarization claims. I also explain that the legislative history's mixed messages about the place of intentional discrimination under Section 2 can be reconciled by treating race-biased decisionmaking as an element of injury, but not as something that plaintiffs must prove in accordance with conventional evidentiary standards. I then turn to the Constitution and argue that my conception of Section 2 substantially resolves *Boerne*-based objections. I also show that the associated understanding of Section 2's constitutional function supports the recognition of depolarization claims.

1. The View from the Legislative History

a. *Two Separate Rights: Dilution and Participation Claims*

The first step in making sense of Section 2 (and answering the conservative criticism) is to recognize that the framers of the results test contemplated separate causes of action for vote dilution and participation injuries.¹⁸² To be sure, participation injuries often result in vote dilution, and vote dilution claims may fail for want of an underlying participation impairment.¹⁸³ But a showing of dilution is not necessary to a participation claim, and defendants cannot defeat a participation claim with evidence of minority representation.

The central purpose of the 1982 amendments was, of course, to turn back the clock and permit vote dilution litigation to continue under the pre-*Bolden* framework.¹⁸⁴ By contrast, the legislative history

¹⁸² See *supra* subsection II.A.3.

¹⁸³ See *White v. Regester*, 412 U.S. 755, 766 (1973) (stating that vote dilution claims require "evidence . . . that the political processes leading to nomination and election were not equally open to participation by the group in question").

¹⁸⁴ See *supra* Section II.A.

mentions participation claims only in passing.¹⁸⁵ Yet the Senate Judiciary Committee report states that the results test was supposed to be a “major statutory prohibition of *all voting rights discrimination*,” not simply a hook for the type of claim at issue in “*Whitcomb, White, Zimmer and their progeny*” (i.e., dilution claims).¹⁸⁶ Per the Report, “[d]enial of equal access to *any phase of the electoral process* for minority group members” violates the results test.¹⁸⁷ But the Report comments only elliptically on what constitutes a phase of the electoral process for purposes of the results test:

The requirement that the political processes leading to nomination and election be “equally open to participation by the group in question” *extends beyond formal or official bars* to registering and voting, or to maintaining a candidacy.

As the Court said in *White*, the question [of] whether the political processes are “equally open” depends upon a searching practical evaluation of the “past and present reality.”¹⁸⁸

This passage implies that the phases of participation for purposes of Section 2 include registration, voting, qualifying as a candidate, plus certain unspecified processes that do not occur in officially prescribed channels, guidance about which may be found in *White v. Regester*.

White, a dilution case, is nonetheless instructive for participation litigation because of the *White* Court’s view that dilution is actionable only when it results from participation harms.¹⁸⁹ Presumably the Court recognized a cause of action for dilution because some participation harms are beyond judicial control. But when they are remediable, the type of participation impairments that underwrote the finding of liability in *White* should be independently actionable under Section 2.

¹⁸⁵ See *supra* subsection II.A.3.

¹⁸⁶ S. REP. NO. 97-417, at 30 (emphasis added).

¹⁸⁷ *Id.* (emphasis added).

¹⁸⁸ *Id.* (emphasis added) (citing *White*, 412 U.S. at 769-70).

¹⁸⁹ As the *White* Court stated,

To sustain [a vote dilution claim], it is not enough that the [plaintiffs’] racial group . . . has not had legislative seats in proportion to its voting potential. The plaintiffs’ burden is to produce evidence to support findings that the political processes leading to nomination and election were not *equally open to participation* by the group in question

412 U.S. at 765-66 (emphasis added). Post-1982, however, at least one set of circumstances should support a finding of liability for vote dilution absent a participation harm: where the plaintiff shows to a significant likelihood that the ground rules for translating votes into representation were adopted or maintained for race-discriminatory reasons. See *infra* text accompanying notes 208, 216-26.

Though protean, *White* suggests that the political process is “equally open to participation” only if members of the minority community are free to register, to vote, and to pursue the nomination of responsive candidates substantially unimpeded by racially biased actors.¹⁹⁰ The black plaintiffs in *White*, though free to register and vote, were “effectively excluded from participation in the Democratic primary selection process” by an all-white candidate slating organization that was unwilling to support black candidates, and that effectively deployed “racial campaign tactics in white precincts”¹⁹¹ (presumably inducing white citizens to cast their ballots on racial grounds). By contrast, in *Whitcomb v. Chavis*, where the Supreme Court overturned a vote dilution holding, there was no evidence of a racial barrier to black voters “choos[ing] the political party they desired to support, [and] participat[ing] in its affairs.”¹⁹²

It is arguable, then, that prejudiced voting by majority-group citizens causes a participation harm within the meaning of Section 2 whenever it burdens minorities’ efforts to participate in normal party politics.¹⁹³ On this view, a minority community that elects a minority candidate would nonetheless suffer a participation harm if that legislator were excluded from larger coalitions with the potential to govern.¹⁹⁴

One could even argue that a nontrivial level of majority-group voting on the basis of race constitutes a participation injury per se, because it uniquely burdens minority participation in the coalition-building process. In the absence of racial prejudice, every voter within a governmental jurisdiction is a potential partner from the point of view of an individual citizen who hopes to form or join a potential winning political coalition vis-à-vis the government in question. But if majority-race citizens discriminate against minorities, then a minority citizen who wants to join the process of forging a politically competitive coalition faces an impediment that majority-group citizens do not

¹⁹⁰ See 412 U.S. at 766.

¹⁹¹ *Id.* at 767 (quoting *Graves v. Barnes*, 343 F. Supp. 704, 727 (W.D. Tex. 1972)) (internal quotation marks omitted).

¹⁹² 403 U.S. 124, 149 (1971).

¹⁹³ In our two-party system, “normal party politics” can be said to involve joining forces with other citizens to construct a political coalition with a realistic opportunity to win control of the government. Plurality-winner elections, the American norm, generally induce two-party systems. AREND LIJPHART, PATTERNS OF DEMOCRACY: GOVERNMENT FORMS AND PERFORMANCE IN THIRTY-SIX COUNTRIES 165-70 (1999).

¹⁹⁴ This analysis casts some doubt on *Presley v. Etowah Cnty. Comm’n*, 502 U.S. 491, 509-10 (1992), in which the Court drew a firm line between “voting” and “governance” and presumed the VRA is concerned only with the former.

equally share. This is the case even if minority voters discriminate against the majority group as much as majority-race voters discriminate against the minority. There remains the issue of numbers. “Equal” discrimination results in a greater impediment to joining a potential winning coalition for members of the minority.

If this is right, then plaintiffs should be able to bring what I have called depolarization claims on a Section 2 participation theory.¹⁹⁵ Conceptualized in participation terms, depolarization claims would rise or fall without regard to whether racially biased voting prevents the minority community from electing a proportional or otherwise appropriate number of champions for its interests. My point is not that Section 2 must be read in this way, only that the Senate Report’s effort to link participation injuries to informal and unofficial barriers invites an analysis along these lines. This is one way the courts might reasonably evolve the common law of Section 2.

b. *Race-Biased Decisionmaking as an Element of Injury (but Not Proof)*

Though the legislative history of Section 2 leaves much unsettled about participation and dilution claims, it does speak to two important points. First, an injury within the meaning of Section 2 arises only insofar as plaintiffs’ lack of electoral opportunity owes to race-biased decisionmaking by majority-group actors. Second, plaintiffs may not be required to prove intentional discrimination—in accordance with conventional evidentiary standards.¹⁹⁶

The Senate Report shows that proponents of the results test were concerned with subjective racism. When pressed, they treated its presence or absence as central to run-of-the-mill dilution cases. Consider their answer to the argument that the results test would lead to wholesale invalidation of at-large elections and multimember districts

¹⁹⁵ To repeat, a depolarization claim is a challenge to electoral arrangements on the ground that they unnecessarily induce or sustain race-biased voting. Other considerations also support reading Section 2 to authorize depolarization claims. See *infra* subsection II.B.2 (regarding constitutional considerations); Section II.D (regarding purpose of the VRA as a whole). Note also that insofar as depolarization claims pressure defendant jurisdictions to lower the cost to voters of acquiring probative, nonracial voting cues in low-information elections, see *infra* notes 279-81, the recognition of depolarization claims could draw support from what I have elsewhere termed the effective accountability canon, which holds that ambiguities in election statutes should be resolved to improve the representativeness and collective competence of the voting public. Elmendorf, *supra* note 104, at 1076-95.

¹⁹⁶ The latter proposition is more certain than the former.

around the country.¹⁹⁷ In response, proponents took shelter in the pre-*Bolden* jurisprudence of the lower courts. They added an explanatory section to the statutory text (Section 2(b)), which quotes *White v. Regester*,¹⁹⁸ and they came forward with a list of “major points” said to represent “actual judicial understanding” as evidenced by “23 reported vote dilution cases in . . . [the] federal courts of appeals.”¹⁹⁹ For present purposes the most important of the “major points” are:

1. The results test of *White* was the controlling standard applied in all of these cases

. . . .

4. Under the results test, at large elections were not automatically invalidated.

. . . .

6. Under the results test, the court distinguished between situations in which *racial politics play an excessive role* in the electoral process, and communities in which they do not.²⁰⁰

This distillation of the pre-*Bolden* jurisprudence clarifies that the 1982 Amendments were not intended generally to invalidate highly majoritarian systems, such as at-large elections, which tend to deprive political minorities of all stripes of proportionate representation. Highly majoritarian systems become suspect only when “racial politics play an excessive role in the electoral process.”²⁰¹ Other passages in the Senate Report reiterate that racial politics is generally the decisive issue under the results test.²⁰²

The Report nowhere defines exactly what it means by “excessive” or “intense” racial politics, though its list of “typical factors” for establishing a Section 2 violation is suggestive.²⁰³ Extreme, race-correlated disparities in voter preferences, the exclusion of minorities from influential candidate-slating processes, a history of official discrimination “touch[ing] the right of . . . members of the minority group to regis-

¹⁹⁷ S. REP. NO. 97-417, at 30-34 (1982).

¹⁹⁸ See *id.* at 31-34 (explaining this section); see also Boyd & Markman, *supra* note 46, at 1399-400 (noting that proponents responded to criticism by pointing to *White*'s language).

¹⁹⁹ S. REP. NO. 97-417, at 32.

²⁰⁰ *Id.* at 32-33 (emphasis added).

²⁰¹ *Id.* at 33.

²⁰² See, e.g., *id.* at 33 (“[T]here are still some communities in our Nation where racial politics do dominate the electoral process.”).

²⁰³ *Id.* at 28-29.

ter, to vote, or otherwise to participate in the political process,” and “political campaigns . . . characterized by overt or subtle racial appeals”²⁰⁴ all speak to the likelihood of discrimination on the basis of race by majority-group voters (and political elites).²⁰⁵

This suggests that the benchmark for assessing vote dilution is not the level of electoral opportunity or influence that the minority community would enjoy under some conventional electoral system (such as a regime of single-member districts drawn to respect communities of interest),²⁰⁶ or a measure of electoral system performance defined in the abstract (like proportionality).²⁰⁷ Rather, the benchmark is the level of representation or influence that minority communities could have realized under the defendant’s electoral system if their efforts to make common cause with others had not been hindered by racial bias on the part of nonstate, majority-group actors.

Given the centrality of racial bias to this account of dilution, it would seem reasonable to modify the benchmark in cases in which the election rules themselves were chosen or maintained for race-discriminatory reasons, as well as cases in which the minority community’s political efforts have been burdened by discrimination in nonelectoral realms. The legislative history confirms both points. Section 2’s amenders thought it trivially true that the statute would be violated by any “voting qualification, prerequisite to voting, or standard, practice, or procedure” with respect to voting created or maintained for

²⁰⁴ *Id.*

²⁰⁵ There are also, I concede, passages in the Report that might be read as equating “racial politics” with “race-correlated differences in candidate preferences,” irrespective of race-biased decisionmaking. The Report states, for example, that in communities where “racial bloc voting is not so monolithic, and . . . minority voters . . . receive substantial support from white voters,” it would be “exceedingly difficult for plaintiffs” to prevail under the results test. *Id.* at 33. The Report contrasts this scenario with communities in which “racial politics do dominate the electoral process,” arguably suggesting that race-correlated differences in candidate preference constitute “racial politics.” *Id.* But the same passage also disputes critics’ assertion that “the results test *assumes* ‘that race is the predominant determinant of political preference’”; it thus implies that racial politics is defined by the role of race in voter decisionmaking (consistent with my approach). *Id.*; *see also id.* at 34 (“The results test *makes no assumptions one way or the other* about the role of *racial political considerations* in a particular community.” (second emphasis added)).

²⁰⁶ *Cf. supra* text accompanying note 64 (explaining the convention-based benchmark for judging vote dilution claims).

²⁰⁷ *Cf. supra* text accompanying note 63 (explaining the performance-based benchmark for judging vote dilution claims).

discriminatory reasons.²⁰⁸ And the Senate Report states that the electoral effects of race-discriminatory decisions in nonelectoral realms (as well as discrimination with respect to the franchise) should be weighed when judging vote dilution.²⁰⁹ In summary, the benchmark for an undiluted vote is the representational opportunity that the minority community would have enjoyed in the defendant jurisdiction absent race-biased decisionmaking by conventional state actors and majority-group participants in the political process.²¹⁰

Sitting uneasily with the many passages in the Report suggesting that Section 2 is centrally concerned with barriers that result from subjective discrimination is a seemingly contrary refrain about not requiring plaintiffs to prove discriminatory intent. Witness point number two in the Report's characterization of the pre-*Bolden* dilution jurisprudence:

[The courts] did not apply an "intent standard." . . . The unanimous and uncontradicted testimony of [litigators called before the Senate Judiciary Committee] was that the parties and the courts *did not focus on the motives behind the election methods being challenged*, let alone require proof of discriminatory intent as a prerequisite to relief.²¹¹

It is important to understand what the framers of the 1982 amendments found objectionable in the *Bolden* plurality's intent requirement. The Senate Report voices three complaints. First, the *Bolden* plurality "asks the wrong question," in that "what motives were in an official's mind 100 years ago is of the most limited relevance" to whether minorities today have "equal access to the process of electing their representatives."²¹² Second, "the intent test is unnecessarily divisive because it involves charges of racism on the part of individual officials or entire communities."²¹³ Relief under Section 2 ought not to

²⁰⁸ VRA § 2, 42 U.S.C. § 1973(a) (2006); *see also, e.g.*, S. REP. NO. 97-417, at 27 ("Plaintiffs must either prove [a discriminatory purpose in the challenged system], or, alternatively, must show that the challenged system . . . results in minorities being denied equal access to the political process.")

²⁰⁹ *See* S. REP. NO. 97-417, at 28-29 & n.114.

²¹⁰ The Senate Report and *White v. Regester* do not distinguish discrimination by voters from discrimination by any other nonstate actors in the political arena. But as I will explain shortly in subsection II.B.2.a, there are firm constitutional grounds for reading Section 2 to reach discrimination by voters, whereas the constitutional basis for a congressional response to other types of "societal discrimination" is more doubtful.

²¹¹ S. REP. NO. 97-417, at 32 (emphasis added).

²¹² *Id.* at 36.

²¹³ *Id.*

require “brand[ing] individuals as racist.”²¹⁴ Third, “the intent test will be an inordinately difficult burden for plaintiffs in most cases.”²¹⁵

It is possible to reconcile the Senate Report’s implicit endorsement of an intent-sensitive benchmark for gauging vote dilution with its objections to intent tests. This can be accomplished by expanding the *object* of the intent test (from enacting lawmakers to all public actors and majority-group voters whose biased decisions affect minority electoral opportunities²¹⁶) and by relaxing the standard of proof that plaintiffs must satisfy (from “more likely than not” to something more lenient, such as “significantly likely”).²¹⁷ That is the crux of my proposal.

To be sure, there is no evidence that the framers of the results test specifically contemplated a requirement that plaintiffs trace their injury to race-biased decisionmaking by state or nonstate actors, shown to a significant likelihood. The modest point I wish to make is that my approach respects the Senate Report’s particular objections to intent tests.

My approach most certainly would not make the original purpose of the challenged electoral arrangement the end-all and be-all of Section 2. Many cases would turn instead on discrimination by majority-group voters, current elected officials, or state actors in other domains.

The difficulty-of-proof and divisive-labeling problems would also be attenuated. By definition, it is easier for plaintiffs to establish a significant likelihood of discrimination than to prove discrimination

²¹⁴ *Id.* (quoting *Voting Rights Act: Hearings Before the Subcomm. on the Constitution of the S. Comm. on the Judiciary*, 97th Cong. 6-7 (1982) (testimony of Arthur S. Flemming, Chairman, Comm’n on Civil Rights)).

²¹⁵ *Id.*

²¹⁶ Or to be more faithful to the legislative history, substitute “majority-group participants in the political process” for “majority-group voters.” See *supra* note 210. But owing to constitutional doubts, I take no position on whether Section 2 claims may be predicated on private discrimination other than by voters.

²¹⁷ Daniel Tokaji has made a similar argument for separating the “core value” and standard of proof questions. Tokaji, *supra* note 55, at 719-20. However, he reaches a different conclusion about the necessary evidentiary showing. See *id.* at 723-26 (arguing that in Section 2 participation cases, the courts should apply strict scrutiny whenever the plaintiff shows that the challenged election law has a disparate impact traceable to socioeconomic or cultural differences among racial groups). In my view, Tokaji’s proposed test so attenuates the link to subjective discrimination as to raise serious questions about its constitutionality, given that socioeconomic or cultural differences may have causes other than past discrimination. For example, should a white minority in a majority-Asian jurisdiction be permitted to bring a Section 2 claim predicated on the white community’s lower levels of educational attainment and, let us assume, correspondingly lower rate of voter turnout? Cf. *supra* Section I.C (explaining the *Boerne* objection to Section 2); *supra* subsection II.A.2.c (justifying my proposal in light of *Boerne*).

more likely than not. The mechanics of the significant-likelihood showing will have to be worked out by the courts, but there is a strong case to be made for resolving this question with the aid of presumptions gleaned from national or regional studies of public opinion and voter behavior.²¹⁸ (Given the Senate Report's worry about "inordinate" burdens on plaintiffs,²¹⁹ plaintiffs should not be required to conduct localized studies of racial bias within the majority community.) These presumptions would be supplemented by evidence of local voting patterns in biracial or multiracial contests, racial campaign tactics, and historical or current race-based discrimination within the jurisdiction.²²⁰

As for divisive labeling, my approach would allow courts to find liability while declaring it *more likely than not* that bias does not exist. The court must, of course, find a significant likelihood of bias, but that is just another way of reminding majority-group citizens that however benign their intentions, reasonable observers may fairly worry about the existence of bias. This is a comparatively gentle way of addressing prejudice. The courts would not be issuing black-robed divinations of the "truth" about the existence or force of racial prejudice in particular communities.²²¹

Without quite phrasing it this way, congressional proponents of the new results test seem to have wanted the courts to develop and apply an intent-like test that does not suffer from characteristic problems of intent tests—and that is what I am providing. My ascription of

²¹⁸ These studies will have to more than a race-correlated difference in candidate preferences, which could result from race-correlated disparities in income, age, family size, religion, or any number of other factors. The studies must provide *some* evidence of biased decisionmaking on the part of the racial majority group—for example, disparate responses to otherwise similar candidates of different races, negative stereotyping of minorities (racial resentment), or a marked drop in support for social programs when the beneficiaries are portrayed as being members of a racial minority.

²¹⁹ See S. REP. NO. 97-417, at 36-37.

²²⁰ See VRA § 2, 42 U.S.C. § 1973 (2006); S. REP. NO. 97-417, at 16, 21-22, 25-33. Recall that both the text of the Section 2 and the Senate Report call for a totality of circumstances inquiry.

²²¹ Of course, I cannot be sure that the difference between a judicial declaration that a community is racist and a judicial finding of a significant likelihood of prejudice would be experienced substantially differently by the community in question. Then again, neither can I be sure that the enactors of Section 2 really cared about the divisive labeling problem. (Their other concerns about intent tests seem more substantial to me.) Suffice it to say that my significant-likelihood solution to the intent problem would allow the courts to give a plausible answer to the Senate Report's stated—but perhaps not serious—worry about divisive labeling.

congressional purpose, though not incontestable,²²² captures the principal themes of the Senate Report.

²²² The strongest evidence against my position consists of a few snippets of legislative history that arguably suggest that certain *participation* injuries within the meaning of Section 2 may be purely disparate impact in character.

The Senate Report cites three cases as examples of “episodic,” participation-based violations of Section 2. See S. REP. NO. 97-417, at 30 n.119 (citing *Toney v. White*, 488 F.2d 310 (5th Cir. 1973); *United States v. Post*, 297 F. Supp. 46 (W.D. La. 1969); *Brown v. Post*, 279 F. Supp. 60 (W.D. La. 1968)). In each of these cases, the court expressly found that the state actor responsible for the challenged standard, practice, or procedure was not motivated by racial prejudice. *Toney*, 488 F.2d at 312; *Post*, 297 F. Supp. at 49; *Brown*, 279 F. Supp. at 63. The facts in two of these cases do suggest a strong probability of illicit discrimination and would therefore support liability under my significant-likelihood approach. See *Toney*, 488 F.2d at 312 (noting that the defendants, shortly before a very close election, purged the voter rolls in violation of state law, resulting in many blacks being improperly removed and many whites who should have been removed not being removed, and that “a history of racial discrimination in the voting process” existed in the jurisdiction); *Brown*, 279 F. Supp. at 63 (finding that state defendants “[a]llow[ed] inpatients of the Delta Haven Nursing Home to vote absentee without extending the same opportunity to inpatients of a Negro nursing home,” “[a]llowe[d] white individuals to vote absentee by making absentee ballots available to them in their private residences without extending this same opportunity to Negro residents,” made “absentee ballots available to the white employees of the Scott Plantation without doing so for Negro employees similarly situated,” and made “absentee voting available to white residents of the Willow Bayou section without a corresponding opportunity being given to Negroes similarly situated”). But the third case seems to have involved a comedy of administrative errors that incidentally disadvantaged a black candidate and his supporters. See *Post*, 297 F. Supp. at 48-49 (describing how election administrators had changed the voting-lever system, apparently for technical reasons, without notifying a black candidate who had “geared his entire campaign strategy to inducing the voters to pull the master Democratic lever,” a lever which, following the mechanical change, no longer recorded a vote for the candidate).

Another counterpoint to my thesis about the necessity of race-biased decisionmaking to injury within the meaning of the results test is that in upholding a district court’s finding of unconstitutional vote dilution with respect to Latino plaintiffs, the Supreme Court in *White v. Regester* pointed out that some minority voters “suffer[] a *cultural and language barrier* that makes . . . participation in community processes extremely difficult.” 412 U.S. 755, 768 (1973) (emphasis added). The Court said this “cultural incompatibility . . . conjoined with the poll tax and the most restrictive voter registration procedures in the nation . . . operated to effectively deny Mexican-Americans access to the political processes in Texas.” *Id.* (quoting *Graves v. Barnes*, 343 F. Supp. 704, 731 (W.D. Tex. 1972)) (internal quotation marks omitted). The Court also emphasized that the plaintiffs “had long suffered from, and continue[] to suffer from, the results and effects of *invidious discrimination* . . . in the fields of education, employment, economics, health, politics and others.” *Id.* (emphasis added) (quoting *Graves*, 343 F. Supp. at 728) (internal quotation marks omitted). Though discrimination no doubt made the language and cultural barrier both larger and more persistent than it would otherwise have been, a language barrier would have been present even if white Texans had not discriminated against Mexican immigrants. Further, if language and cultural barriers may act as substitutes, as it were, for evidence of race-biased decisionmaking

2. The View from the Constitution

Section 2's legislative history goes some distance toward clarifying the substantive and evidentiary norms that properly guide the application of the results test, but as the last subsection acknowledged, the legislative history also leaves big questions unresolved. The most important of these questions is whether plaintiffs must make a showing that connects their injuries to race-biased decisionmaking, even if not a showing that comports with conventional standards of evidence. The previous subsection argued that such a requirement would be compatible with the legislative history, though not compelled by it. The strongest reason to read Section 2 as requiring such a showing is constitutional. This Section develops the constitutional argument, with a special focus on the unappreciated problem of election outcomes that are unconstitutional because of the racial basis for the electorate's verdict.

As Section I.C explained, a pure disparate impact test for representational impairment—measured against a baseline of proportionality—would be a very clumsy device for capturing instances of intentional discrimination. Thus, there is a solid constitutional avoidance argument against this approach.²²³ But if plaintiffs must show race-discriminatory decisionmaking to a significant likelihood, the constitutional objection to the results test would evaporate.

(i.e., discrimination) on the part of the majority, then perhaps other evidence of cultural, economic, or political inequality may substitute for it, too.

But these conclusions are far from certain. Participation barriers were only briefly discussed in the legislative history. The *White* Court did stress the history of discrimination with respect to the Latino as well as the African American plaintiffs. *Id.* at 766-69. And, as noted above, when congressional proponents of the results test tried to differentiate impermissible from permissible lack of representation for minorities, they emphasized the difference between communities marked by “intense” or “excessive” racial politics, and those whose politics were not characterized by racial appeals. *See supra* text accompanying notes 200-03.

²²³ A convention-based benchmark for vote dilution and participation burdens (i.e., minority representation or participation opportunities under a “normal” electoral system) arguably would not suffer this constitutional flaw, because a defendant's failure to use the normal alternative to the challenged electoral arrangement is some evidence of intentional discrimination by the state actors who adopted the unconventional system. But whatever the viability of the convention-based approach as a constitutional matter, it cannot be squared with the legislative history. Recall the Senate Report's statement that to focus on the intent of the state actors behind the challenged law is to “ask[] the wrong question.” S. REP. NO. 97-417, at 36. The enacting Congress clearly objected to electoral structures that gave effect, as it were, to voter discrimination as well as state discrimination in nonelectoral realms, such as education.

This follows from Justice Kennedy's opinion for the Court in *Boerne*. Recall that RFRA flunked *Boerne's* "congruence and proportionality" test because the Act reached too broadly and was "not designed to *identify and counteract* state laws likely to be unconstitutional because of their treatment of religion."²²⁴ The Court acknowledged, however, that Congress could ban an entire class of state laws "when there is reason to believe that many of the laws affected by the congressional enactment have a *significant likelihood* of being unconstitutional."²²⁵ My formulation of the intent requirement under Section 2 takes the same idea and applies it at a retail level. Instead of "prohibiting certain types of laws"²²⁶ across the board, my reading of Section 2 subjects particular voting requirements to heightened scrutiny once a case-specific significant-likelihood showing has been made.

This resolves the *Boerne* objection to Section 2 in cases where the plaintiff's showing implicates discrimination by conventional state actors.²²⁷ If, for example, the state actors in question were responsible for the enactment of the challenged law, then judicial invalidation of that law would be an effective way to eliminate current constitutional violations (because the invalidated law was at least significantly likely to violate the Constitution). If, instead, the relevant state actors exercise discretion under an innocuously motivated law, then judicial modification of that law to curtail discretion can be understood as a reasonable prophylactic measure against future constitutional viola-

²²⁴ *City of Boerne v. Flores*, 521 U.S. 507, 534-35 (1997) (emphasis added).

²²⁵ *Id.* at 532 (emphasis added); *see also id.* at 525-27 (discussing and approving the VRA's ban on literacy tests, in light of the "long history of the discriminatory use of literacy tests to disfranchise voters on account of their race").

²²⁶ *Id.* at 532.

²²⁷ Notably, the significant-likelihood requirement completely eliminates the "innocent state" problem, which arises when Congress subjects all or many states to remedial regulation based on evidence of constitutional violations in only some of those states. *See, e.g., Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 741-42 (2003) (Scalia, J., dissenting) ("There is no guilt by association, enabling the sovereignty of one State to be abridged under § 5 of the Fourteenth Amendment because of violations by another State, or by most other States, or even by 49 other States."); *United States v. Morrison*, 529 U.S. 598, 626-27 (2000) (objecting to the civil remedy in the Violence Against Women Act because it applied to all states, even though congressional "findings indicate that the problem of discrimination against the victims of gender-motivated crimes does not exist in all States, or even most States"). Thanks to Vik Amar for emphasizing this point.

Of course, a Section 2 limited by a significant-likelihood requirement might nonetheless fail the congruence-and-proportionality test if the statute were otherwise incredibly intrusive. But the common law understanding of Section 2 allows courts to solve this problem. *See infra* notes 290-92.

tions that are otherwise significantly likely to occur.²²⁸ And if the state actors in question act in nonelectoral realms, judicial reformation of a law that gives their actions electoral effect would alleviate an especially noxious downstream consequence of significantly likely constitutional violations.²²⁹

But what of cases where the showing of race-biased decisionmaking concerns voters rather than conventional state actors? Such societal discrimination was an overriding concern of the Congress that adopted the results test,²³⁰ and seemingly of the *White* Court as well.²³¹ Yet private race-discriminatory behavior does not violate the Constitution, so in what sense could a Section 2 that targets such behavior be a congruent and proportional statutory remedy for constitutional violations?²³² The answer lies in the problem of election outcomes that are unconstitutional because they were determined by race-biased voting. This important point demands careful explanation.

a. *The Electorate as a State Actor*

The notion that an election held under constitutionally permissible ground rules can yield an unconstitutional result because of the reasons for voters' choices will strike many readers as peculiar. Isn't the reason for voting this way or that an entirely private matter? Our society has long structured the electoral process to protect the privacy of voters' choices. The secret ballot, adopted more than a century

²²⁸ The *Boerne* Court expressly authorized Congress to enact forward-looking measures to reduce the likelihood of future constitutional violations. See *Boerne*, 521 U.S. at 533; see also Karlan, *Two Section Twos*, *supra* note 12, at 729-30 (discussing this aspect of *Boerne*).

²²⁹ Note the *Boerne* Court's approving discussion of congressional authority to ban literacy tests when their "inevitable effect" is to "deny[] the vote to members of racial minorities whose inability to pass such tests is the direct consequence of previous governmental discrimination in education." 521 U.S. at 526 (quoting *Oregon v. Mitchell*, 400 U.S. 112, 235 (1970) (Brennan, J.)) (internal quotation marks omitted); see also Karlan, *Two Section Twos*, *supra* note 12, at 728-29 (discussing this part of *Boerne*).

²³⁰ See *supra* subsection II.B.1.

²³¹ See *supra* notes 191-92.

²³² Note that the modern Supreme Court has consistently rejected the claim that there is a compelling state interest in remedying "societal discrimination." For examples of this jurisprudence, see *Shaw v. Hunt*, 517 U.S. 899, 909-10 (1996), and cases cited therein.

ago, is probably integral to lay understandings of what constitutes a fair election.²³³

Pamela Karlan and Daryl Levinson have gone so far as to assert that “[t]he voting decisions of individual . . . citizens are absolutely protected under the First Amendment. This is true whether they decline to support candidates favored by [another racial group] out of ignorance, selective sympathy or indifference, or outright racism.”²³⁴ The Supreme Court at least tacitly supports Karlan and Levinson’s position. In *Anderson v. Martin*, which invalidated a Louisiana requirement that candidates’ race be designated on the ballot, the Court opened its legal analysis with these words:

[I]t is well that we point out what this case does not involve. It has nothing whatever to do with *the right of a citizen to cast his vote for whomever he chooses and for whatever reason he pleases* It has to do only with the right of a State to require or encourage its voters to discriminate upon the grounds of race.²³⁵

Anderson implies, then, that citizens may cast their ballots for the same discriminatory reasons that the Constitution denies to the state.²³⁶ For purposes of this Article, I will accept this as given.

Yet the Supreme Court has also written, “It is plain that the *electorate as a whole*, whether by referendum or otherwise, could not order [state] action violative of the Equal Protection Clause”²³⁷ This was not a careless dictum. It justified the Court’s invalidation of a popularly adopted restriction on group homes, which “rest[ed] on an irrational prejudice against the mentally retarded”²³⁸ It made sense of several earlier decisions in which the Supreme Court invalidated

²³³ In keeping with this, courts are extremely reluctant to compel anyone to disclose how he voted unless he stands accused of fraud. See Steven Huefner, *Remedying Election Wrongs*, 44 HARV. J. ON LEGIS. 265, 290-91 (2007).

²³⁴ Pamela S. Karlan & Daryl J. Levinson, *Why Voting Is Different*, 84 CALIF. L. REV. 1201, 1228 (1996).

²³⁵ 375 U.S. 399, 402 (1964).

²³⁶ See also *Romer v. Evans*, 517 U.S. 620, 634 (1996) (stating that the right to vote may not be denied because a citizen espouses offensive positions); *Kirsey v. City of Jackson*, 663 F.2d 659, 662 (5th Cir. Unit A Dec. 1981) (“The first amendment assures every citizen the right to cast his vote for whatever reason he pleases. . . . Baser motives are protected along with the grand and noble. Stigmatized racial attitudes . . . are not constitutionally proscribed.” (internal citation and quotation marks omitted)).

²³⁷ *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 448 (1985) (emphasis added).

²³⁸ *Id.* at 450.

facially neutral, voter-enacted laws on equal protection grounds.²³⁹ And it has been honored by the Court in unconstitutional-motive cases in the years since *City of Cleburne v. Cleburne Living Center, Inc.*²⁴⁰

The seemingly incompatible precepts of *Anderson* and *Cleburne* can be reconciled. Here is the key: the citizen's right to vote "for whatever reason he pleases"²⁴¹ is a personal right, and does not entitle him to a corresponding measure of influence over election outcomes. The determination of election results—the collective byproduct of these personal choices—is state action. Otherwise, private behavior *becomes state action* when it determines the outcome of an election.

A court that invalidates an election result because an outcome-determinative share of the votes were cast for discriminatory reasons does not burden anyone's right to vote. This follows from the personal nature of the right. Though the citizen may vote "for whatever reason he pleases," he may not exercise political power "for whatever reason he pleases."²⁴² It may seem odd to think of the right to vote as distinct from the exercise of power, but this is more or less how the Supreme Court has come to understand it.²⁴³

²³⁹ See, e.g., *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 471-80 (1982) (invalidating an initiative that prohibited school busing but exempted busing for numerous purposes other than racial integration; the content of the initiative coupled with the circumstances of enactment supported an inference of discriminatory purpose); *Hunter v. Erickson*, 393 U.S. 385, 392-93 (1969) (invalidating a ballot-initiative amendment to a city charter that conditioned enactment of certain antidiscrimination measures on a referendum vote); *Reitman v. Mulkey*, 387 U.S. 369, 374-81 (1967) (striking down an initiative that created a state constitutional right to alienate property in violation of state antidiscrimination statutes; discriminatory voter purpose was inferred from context). Note that the decision in *Seattle School District*, like that in *Cleburne*, postdated the consolidation of intent-based equal protection jurisprudence in *Washington v. Davis*, 426 U.S. 229 (1976), and *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256 (1979).

²⁴⁰ See, e.g., *City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.*, 538 U.S. 188, 194-97 (2003) (suggesting that evidence of "discriminatory voter sentiment" can be a basis for invalidating a referendum measure on equal protection grounds); *Romer*, 517 U.S. at 635 ("Amendment 2[, a voter-adopted measure,] classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else. This Colorado cannot do. A State cannot so deem a class of persons a stranger to its laws."). Note the *Romer* Court's easy equation of the state and the electorate.

²⁴¹ *Anderson v. Martin*, 375 U.S. 399, 402 (1964).

²⁴² *Id.*

²⁴³ Despite some early language to the contrary, the Supreme Court has made it clear that the constitutional right to vote "on equal terms with others" does not encompass a right to be "effective" as a voter, that is, to participate in elections reasonably structured to enable eligible voters to make preference-conforming choices and, collectively, to hold the government to account. See Elmendorf, *supra* note 104, at 1084-89, and sources cited therein (describing the Supreme Court's current understanding

The *Cleburne* principle is well established in constitutional challenges to legislation enacted by plebiscite, but as best I can tell no court has been asked to undo the outcome of an election for public office because it “rested on prejudice.”²⁴⁴ Dean Sager once remarked that judicial invalidation of a representative election on motive grounds would be inconceivable,²⁴⁵ yet it is hard to see why a racist electorate’s choice would be constitutionally unobjectionable in the case of representative elections if it violates the Constitution in plebiscitary elections.

One might distinguish the two scenarios on the ground that a popularly approved referendum creates binding law, whereas the election of a representative does not bring the power of the state directly to bear on its citizens.²⁴⁶ Yet the Equal Protection Clause applies to state action generally, not just to state actions that directly coerce or tangibly burden particular, identifiable citizens.²⁴⁷ Absent such a dis-

of the right to political participation as an individual right and not as a right in service of effective accountability).

²⁴⁴ However, the intuition that election-for-representative outcomes are unconstitutional when they rest on prejudice is arguably reflected in *Terry v. Adams*, an otherwise perplexing case in which the Court deemed a racist, privately constituted organization that conducted advisory primary elections to be a state actor. See 345 U.S. 461, 469-70 (1953) (plurality opinion) (“The [private] primary has become an integral part, indeed the only effective part, of the elective process that determines who shall rule and govern in the country.”). *Terry*’s classification of a private advocacy group as a state actor is dubious, but the end result might be justified as an extraordinary remedy for an uninterrupted, decades-long string of election outcomes that incontrovertibly rested on prejudice (owing to the decisive role of the racist endorser, whose membership was open only to white registered voters).

²⁴⁵ See Lawrence Gene Sager, *Insular Majorities Unabated: Warth v. Seldin and City of Eastlake v. Forest City Enterprises, Inc.*, 91 HARV. L. REV. 1373, 1421 (1978) (using a hypothetical mayoral election to illustrate the putatively obvious point that representative elections should not and cannot be invalidated on the basis of the electorate’s motive).

²⁴⁶ Thanks to David Schleicher for pressing me on this distinction.

²⁴⁷ To be sure, it might be argued that the Equal Protection Clause does not apply to state action in the form of appointment to public office because public service is a political rather than a civil right. Many scholars maintain that the Fourteenth Amendment was originally intended to protect only civil and not political rights. See, e.g., Vikram David Amar, *Jury Service as Political Participation Akin to Voting*, 80 CORNELL L. REV. 203, 222-41 (1995) (relating the history of the Fourteenth and Fifteenth Amendments). This counterpoint to my thesis that the electorate violates the Constitution when it installs a representative for race-discriminatory reasons faces two objections. First, there are innumerable Supreme Court precedents that apply the Equal Protection Clause in cases about political rights. See, e.g., *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991) (jury service); *Quinn v. Millsap*, 491 U.S. 95 (1989) (appointment to public office and service on juries); *Batson v. Kentucky*, 476 U.S. 79 (1986) (jury service); *Lubin v. Panish*, 415 U.S. 709 (1974) (candidacy for elective office); *Turner v. Fouche*, 396 U.S. 346 (1970) (appointment to public office); *Reynolds*

crete harm, private parties may not have standing to bring suit.²⁴⁸ But the absence of a party with standing does not equate to the absence of a constitutional violation.

It is state action to appoint a public official with coercive lawmaking or law enforcement authority, just as it is state action to enact rules of law that directly bind the citizenry. A mayor's decision to appoint David Duke as sheriff, for example, because of the mayor's stated desire to restore Jim Crow "by any means necessary," would violate the Equal Protection Clause. If the sheriff's office were elective rather than appointive, and Duke ran for sheriff pledging to restore Jim Crow by any means necessary, his victory would be just as unconstitutional as his hypothetical appointment by a racist mayor—as long as his margin of victory was provided by voters who acted on the same motives as the mayor.²⁴⁹

The state action in the mayor's appointment of the sheriff is not simply a byproduct of the mayor's status as a public official. Rather, the *putting in office* of an official cloaked with coercive lawmaking or

v. Sims, 377 U.S. 533 (1964) (voting rights); Baker v. Carr, 369 U.S. 186 (1962) (same). Second, historical purists should understand political rights beyond voting as subject to the antidiscrimination norms of the Fifteenth Amendment. See Amar, *supra*, at 222-34 (arguing that proponents of the Fifteenth Amendment wanted to prohibit discrimination in office-holding as well as voting). When putting a public official in office, the electorate remains bound by the constitutional norm against race-biased discrimination.

²⁴⁸ Then again, they might, either on the theory that they were unconstitutionally deprived of representation they would have otherwise obtained, or on a theory of expressive harm. Cf. Samuel Issacharoff & Pamela S. Karlan, *Standing and Misunderstanding in Voting Rights Law*, 111 HARV. L. REV. 2276, 2280-85 (1998) (analyzing standing in cases about race-motivated electoral district boundaries). Thanks to Justin Levitt for suggesting the expressive harm angle.

²⁴⁹ One further point (in anticipation of possible objections): though the electorate is a state actor, it is not a conventional state actor, and the standard First Amendment bar to discrimination on the basis of ideology should not apply to it. In this respect, the electorate is akin to a political party, or, alternatively, an elected official who is filling offices with significant policymaking responsibilities. See, e.g., Rutan v. Republican Party of Ill., 497 U.S. 62, 70, 71 n.5 (1990) (recognizing a "policymaking position[]" exception to the general First Amendment prohibition on government employment discrimination on the basis of ideology); LaRouche v. Fowler, 152 F.3d 974, 998 (D.C. Cir. 1998) (holding that a party convention may discriminate against a candidate deemed insufficiently committed to the party platform); Duke v. Massey, 87 F.3d 1226, 1235 (11th Cir. 1996) (holding that a party committee may discriminate against a candidate on the basis of the candidate's racist views). Like the electorate, political parties may not discriminate on the basis of race in nominating candidates. See Smith v. Allwright, 321 U.S. 649, 663-64 (1944) (invalidating a whites-only primary organized by the Texas Democratic Party for the purpose of selecting nominees).

law-enforcement authority should be treated as a “public function” within the meaning of the state action doctrine.²⁵⁰

The Supreme Court largely embraced this position when it found state action in the exercise of peremptory challenges by private lawyers in civil and criminal litigation, notwithstanding that the lawyer acts as her client’s agent rather than the government’s and indeed has an adversarial relationship with the government in criminal cases.²⁵¹ Justice O’Connor, joined by Chief Justice Rehnquist and Justice Scalia, dissented on the ground that the age-old tradition of peremptory challenges by private litigants means that the exercise of peremptories is not a function “traditionally exclusively reserved to the State.”²⁵² In rejecting this view, the Court, speaking through Justice Kennedy, emphasized that *the jury* is a “quintessential governmental body, having no attributes of a private actor.”²⁵³ The jury legitimates the exercise of state power, it has final authority over most questions of fact, and it “determine[s] the degree of the government’s interest in punishing and deterring willful misconduct.”²⁵⁴ Because the jury is a quintessential public body, the selection of its members is a public function.

The case for treating as a public function the investiture of legislative and executive officials who will exercise coercive authority over the citizenry is even stronger.²⁵⁵ There is no tradition of privately appointing such officials, akin to the use of peremptories to shape juries. Rather, the federal and many state constitutions have long been understood *to forbid* the delegation of coercive authority to private and privately appointed actors.²⁵⁶ The Supreme Court’s one-person, one-

²⁵⁰ The public-function test asks whether the power at issue was “traditionally exclusively reserved to the State.” *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 352 (1974).

²⁵¹ See, e.g., *Georgia v. McCollum*, 505 U.S. 42, 50-55 (1992); *Edmonson*, 500 U.S. at 620-31. Thanks to Vik Amar and Evan Caminker for suggesting the juror analogy.

²⁵² *Jackson*, 419 U.S. at 352; see also *Edmonson*, 500 U.S. at 638-41 (O’Connor, J., dissenting).

²⁵³ *Edmonson*, 500 U.S. at 624 (majority opinion).

²⁵⁴ *Id.* at 625; see also *McCollum*, 505 U.S. at 52 (“These same conclusions apply with even greater force in the criminal context . . .”).

²⁵⁵ I should acknowledge, however, that *Edmonson* suggests in passing that “the selection of state officials . . . through election by all qualified voters” does not constitute state action. 500 U.S. at 626. This unexplained dictum is utterly inconsistent with everything else *Edmonson* says about finding state action in the selection of public officials on the basis of the officials’ de jure responsibilities and authority.

²⁵⁶ See, e.g., *Tex. Boll Weevil Eradication Found., Inc. v. Lewellen*, 952 S.W.2d 454, 457 (Tex. 1997) (invalidating delegation of legislative authority to privately appointed board). Similarly, in *Carter v. Carter Coal Co.*, the Supreme Court held that delegating the power to set industry-wide minimum wages to a subset of producers was “legislative

vote jurisprudence is also instructive here. The Court has carved out an exception for certain quasi-proprietary, special-purpose districts.²⁵⁷ The boundaries of the exception remain elusive in many respects, but it is beyond cavil that an elected body with coercive governmental authority over citizens within a geographically defined area is subject to the one-person, one-vote principle.²⁵⁸ Responsibility for determining who shall serve on such a body is a governmental function that can no more be delegated to a partial, select electorate than to a coterie of private organizations.

b. “Political Questions” and Congressional Enforcement

That there is no state action difference between my Klansman-for-sheriff hypothetical and a racist-ballot initiative does not mean that courts should treat the two cases the same way. The problem of unconstitutional electorate motive (“*Cleburne* violations”) in *elections for representatives* should almost certainly be held to present a nonjusticiable political question,²⁵⁹ even though it is within the judicial competence to adjudicate *Cleburne* challenges to the outcome of a referendum election. This, I will argue, has important implications for how courts should evaluate the congruence and proportionality of any congressional response to the problem.

delegation in its most obnoxious form [and clearly a denial of rights safeguarded by the Due Process Clause]; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business.” 298 U.S. 238, 311 (1936).

This is not to say that private actors are never given a formal role in public governance. See Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 551-56 (2000) (providing examples). But the private role tends to be limited to specific contexts in which the empowered private actors have an exceptional interest. And, if the private role is coercive, it must be subject to public review and approval on a case-by-case basis. A state that delegated to private actors the authority to appoint members of, say, a city council or state legislature would unquestionably violate constitutional norms.

²⁵⁷ See, e.g., *Ball v. James*, 451 U.S. 355, 368 (1981) (noting that the defendant irrigation district was “essentially [a] business enterprise[.]”).

²⁵⁸ See *id.* at 366 (permitting landownership-based distribution of the franchise in an election for a water district because, inter alia, the district “cannot impose ad valorem property taxes or sales taxes” or “enact any laws governing the conduct of citizens”); *Pittman v. Chi. Bd. of Educ.*, 64 F.3d 1098, 1102-03 (7th Cir. 1995) (Posner, C.J.) (exempting local school councils from the rule of “one man, one vote” because they “have no power to tax directly and they also have no power to tax indirectly”).

²⁵⁹ Very rare circumstances may present exceptions to this general rule. Cf. *supra* note 244 (suggesting that *Terry v. Adams*, 345 U.S. 461 (1953), is best understood as an electorate-motive case).

To see the political question point, consider first the problem of remedies. Having concluded that race-biased votes determined the outcome of an election, what remedy could a federal court order? If the election was very close and the winning candidate garnered support from a substantial bloc of avowedly racist voters, one might venture that the court should declare the second-place candidate the winner, on the theory that she would have won but for the race-biased votes. But it is generally not possible to say whether the runner-up would have won but for race-biased voting. If a substantial, racially biased segment of the electorate suddenly stopped voting on racial grounds, strategic political actors ranging from prospective candidates to major donors to party officials would change their behavior. In this alternate universe, the “second place candidate” might not even *be* a candidate (so too the winner); campaigns would be contested on different terrain; and interest groups might coalesce into differently configured coalitions.

An intellectually honest judge who has found that a substantial fraction of the majority group voted on impermissible racial grounds is likely to conclude both that the winner may not have been elected otherwise (for his strengths are likely specific to the concerns then animating the electorate) and that it is sheer folly to try to guess who would have been elected in the counterfactual, no-bias condition.

To be sure, it would also be farcical to remedy a *Cleburne* violation in the plebiscite context by ordering the state to institute some hypothetical alternative measure that the judge imagines would have qualified for the ballot and then been adopted absent racial bias. But in the plebiscite setting, there is an adequate, conventional, and vastly simpler alternative: an injunction depriving the improperly motivated law of legal effect. The analogous remedy in the case of an election for a representative would be an injunction barring the elected official from exercising the authority of her office. No sifting of legal niceties is necessary to establish that this is unacceptable.²⁶⁰

²⁶⁰ But for anyone interested in the niceties, one way of thinking about the problem is in terms of interference by federal courts with core attributes of state sovereignty or, in the case of federal elections, with the states’ citizens’ ability to participate in federal lawmaking through their representatives. *Cf.* Fed. Energy Regulatory Comm’n (FERC) v. Mississippi, 456 U.S. 742, 761-63 (1982) (reasoning that whether Congress may require a state agency “to consider” a federal agency’s regulatory proposals prior to enacting further state regulations depends on whether the federal mandate interferes with the state agency’s ability to “set policy”). *FERC v. Mississippi* is part of the line of cases beginning with *National League of Cities v. Usery*, 426 U.S. 833 (1976), and eventually superseded on justiciability grounds by *Garcia v. San Antonio Metropolitan*

Yet what is the workable alternative? Should the court restore the previous representative to office? (But what if she was trounced in the election, or did not run, or was herself elected on racial grounds?) Or should the court order a special election? (But what is to prevent the expression of racial bias in this election?)²⁶¹ The bottom line is that in *Cleburne* challenges to elections for public office, there is no satisfactory remedial counterpart to enjoining direct legislation that was enacted for unconstitutional reasons.²⁶²

In my view, the problem of identifying a conceptually appropriate and practicable remedy is the strongest reason for treating *Cleburne* violations as nonjusticiable in the case of elections for public office. But the political question problem runs deeper still.

The Constitution contemplates no role for the federal courts in deciding *who shall be seated* following a disputed federal election. Article I specifies that “[e]ach House [of Congress] shall be the Judge of the Elections, Returns and Qualifications of its own Members.”²⁶³ The Twelfth Amendment leaves it to the Senate to count the ballots cast by presidential electors and instructs the House to choose among the top three candidates if none has won a simple majority.²⁶⁴ Similarly, the foundational case on the nonjusticiability of the Guarantee Clause concerned which of two purported governments was the rightful government of a state.²⁶⁵ The common norm linking these constitutional provisions and judicial decisions is this: disputes over whether particular, identified persons shall hold high office ought to be resolved by the political branches of government, not by the courts.²⁶⁶

Transit Authority, 469 U.S. 528 (1985). The present nonjusticiability of *Usery/FERC* claims, however, does not vitiate the idea that there are related, federalism-based limits on the remedial authority of Article III courts.

²⁶¹ Cf. *Bell v. Southwell*, 376 F.2d 659, 660 (5th Cir. 1967) (ordering a special election in response to “flagrant,” “glaring”—and correctible—constitutional violations by election administrators on Election Day).

²⁶² Satisfactory remedies may be available in very rare circumstances, but even then only to a limited degree. See *Terry v. Adams*, 345 U.S. 461 (1953); see also *supra* note 244. The remedy in *Terry* was a court order integrating a private, all-white endorsement-making organization on which the white electorate had relied. Rather than enabling the election of black candidates, the remedy in *Terry* led to the dissolution of the endorser. ISSACHAROFF ET AL., *supra* note 45, at 233.

²⁶³ U.S. CONST. art. I, § 5.

²⁶⁴ *Id.* amend. XII.

²⁶⁵ *Luther v. Borden*, 48 U.S. (7 How.) 1, 18-19 (1849).

²⁶⁶ Professor Laurence Tribe has argued, based on the Twelfth Amendment, that federal courts lack jurisdiction over post-election disputes in presidential elections. See Laurence H. Tribe, *eroG .v hsuB and Its Disguises: Freeing Bush v. Gore from Its Hall of Mirrors*, 115 HARV. L. REV. 170, 276-87 (2001). This is probably too strong. The feder-

Even if this norm did not categorically prevent the federal courts from hearing *Cleburne* challenges to representative elections, the courts could hear these cases only after establishing clear “rules to limit and confine judicial intervention.”²⁶⁷ As the Supreme Court made clear in *Vieth v. Jubelirer*, what counts as a “manageable standard” within the meaning of the political question doctrine depends on the political stakes of the dispute.²⁶⁸ In high-stakes disputes, where the courts’ reputation for impartiality and political neutrality is at risk, an objective and easily applied standard is necessary. It seems improbable that the courts could ever devise such a standard for electorate-motive cases about elections for representatives. Whether the winning candidate would have won but for race-biased votes is, in the run of cases, likely to be a matter of considerable conjecture.²⁶⁹

The need for a constraining legal standard is arguably not as great in plebiscite cases, because the decision to invalidate a ballot initiative is less likely to be seen as favoring one of the major political parties at the expense of the other. The plebiscite cases also provide the courts with a critical piece of information about electorate motive that would be lacking in *Cleburne* challenges to representative elections: the text of the ballot measure itself.²⁷⁰

Faced with an intent-based challenge to an initiative or referendum measure, some courts look exclusively at the text of the measure.²⁷¹ They will infer an illicit motive only if the measure is so bizarre

al courts can hear disputes to ensure that votes are counted in conformity with the individual rights guarantees of the Constitution, such as equal protection and due process. The critical issue in my view is the remedy sought: courts can hear claims where the remedy is an order regarding the distribution of the franchise or the counting of ballots, but they cannot hear disputes in which the plaintiff seeks an order declaring one candidate or the other the rightful winner.

²⁶⁷ *Vieth v. Jubelirer*, 541 U.S. 267, 307 (2004) (Kennedy, J., concurring).

²⁶⁸ *Id.* at 293-95, 306; see also *supra* subsection II.A.2.b.

²⁶⁹ Privacy values surely prevent courts from subjecting voters to compulsory thought process examinations.

²⁷⁰ Cf. Fritz W. Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 YALE L.J. 517, 567-73 (1966) (arguing that practical concerns about lack of judicial access to necessary information underlie many of the Supreme Court’s political question holdings).

²⁷¹ For the leading case, see *Arthur v. City of Toledo*, 782 F.2d 565, 573-74 (6th Cir. 1986), which mandates a purely textual inquiry on the basis of voter privacy concerns. See also *Kirksey v. City of Jackson*, 663 F.2d 659, 661-62 (5th Cir. Unit A Dec. 1981) (rejecting an equal protection challenge to a referendum measure because judicial inquiry into voter motives would present First Amendment problems). Evidentiary difficulties unrelated to the First Amendment may also lead courts to restrict their motive analysis to the face of the measure. Cf. *Jones v. Bates*, 127 F.3d 839, 860-61 & n.32

or poorly tailored that it defies the legitimate purposes brought forth on its behalf.²⁷² Other courts consider election-related information, such as campaign advertisements, and public opinion polls, but such evidence plays at most a supporting role.²⁷³ Election evidence may corroborate the judge's initial inference of motive from the text, but I have found no case in which campaign messages or other evidence of voter prejudice served to invalidate a measure that the court thought plausibly tailored to a legitimate public purpose. The keystone question seems to be this: would a reasonable voter have supported the measure on permissible grounds? If the judge thinks the answer is yes, she will uphold the measure; if not, she will strike it down.

An analogous objective-purpose test²⁷⁴ could in theory be applied to elections for representatives, but the analysis would be political in both literal and doctrinal senses. A court would be asking whether a

(9th Cir. 1997) (noting that “the search for the people’s intent in passing initiatives is far different from the attempt to discern legislative intent; there are no legislative hearing transcripts, committee reports, or other legislative history,” and dismissing the idea of inferring voter intent from campaign materials as “tantamount to relying on political parties’ campaign advertisements to interpret legislative acts”).

Arthur observed that all of the Supreme Court’s then-extant electorate motive cases had been decided on the face of the measure. 782 F.2d at 571-73 & n.2. The same is true of *Romer v. Evans*, the Supreme Court’s principal post-*Arthur* plebiscite case. See 517 U.S. 620, 631-35 (1996) (inferring animus on the basis of the unusual nature of the state constitutional amendment at issue, and the fact that “its sheer breadth [was] so discontinuous with the reasons offered for it”). But see *City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.*, 538 U.S. 188, 194-97 (2003) (stating in dicta that other evidence of “discriminatory voter sentiment” can be a basis for invalidating a referendum measure).

²⁷² See *Arthur*, 782 F.2d at 574 (holding that evidence that “a few individuals made racial slurs in contacts and meetings leading to the Referendum” was by itself insufficient to “infer racial bias in the total electorate” (internal quotation marks omitted)).

²⁷³ Of all published opinions in electorate-motive cases, the one that relies most extensively on election- and campaign-related evidence is *Perry v. Schwarzenegger*. See 704 F. Supp. 2d 921, 963, 973-81, 1002-03 (N.D. Cal. 2010). In *Perry*, the court evaluated campaign advertisements, proponents’ statements and correspondence, the history of antigay ballot campaigns, and political scientists’ testimony in determining the electorate motive behind a California initiative banning same-sex marriage. *Id.* But, significantly, the *Perry* court turned to this evidence only after concluding that the measure bore no rational relationship to a legitimate public purpose. *Id.* at 963-73, 997-1002; see also *Buckeye Cmty. Hope Found. v. City of Cuyahoga Falls*, 263 F.3d. 627, 637 n.2 (6th Cir. 2001) (criticizing *Arthur*, seemingly in favor of determining the electorate’s motive on the basis of the measure’s impact, historical context, and procedural history, plus specific evidence of decisionmaker intent), *rev’d on other grounds*, 538 U.S. 188 (2003).

²⁷⁴ Cf. *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 862 (2005) (asserting that, for Establishment Clause purposes, “[t]he eyes that look to purpose belong to an objective observer” (citations and internal quotation marks omitted)).

reasonable person could vote for candidate X, given the other options, on nonracist grounds. Almost certainly this is a question “impossib[le to] decid[e] without an initial policy determination of a kind clearly for nonjudicial discretion”²⁷⁵—and therefore a nonjusticiable political question—for it depends upon a judgment about the proper qualities that the people’s representatives ought to have. There is nothing in the text of the Constitution or in our practice of constitutional adjudication that suggests Article III courts have any business making this judgment. While the “electorate as a whole”²⁷⁶ cannot act on certain motives, it is not for the courts to say what other considerations are weighty or flimsy when it comes to the evaluation of candidates.

Motive-based challenges to elections for representatives would also implicate the branch of the political question doctrine concerned with “an unusual need for unquestioning adherence to a political decision already made.”²⁷⁷ Allowing such claims to go forward could seriously undermine the decisiveness of election results, and the need for decisive results is much greater in representative than plebiscitory elections. A law can be effective while its validity is litigated; a sitting lawmaker who has been diverted from the business of governing by a legal challenge to her election may not be.

If I am right that *Cleburne* claims present nonjusticiable political questions in the context of representative elections, then what follows for Section 2? There are two significant implications.

First, courts should apply the congruence-and-proportionality test with a light touch insofar as Section 2 targets *Cleburne* violations. Congressional authority under the Fourteenth Amendment’s enforcement clause properly reaches its apogee when Congress undertakes to prevent or remedy a type of constitutional violation that ordinary constitutional litigation cannot reach. This follows from the familiar distinction between Type 1 (false positive) and Type 2 (false negative) errors. In the context of judicial application of the *Boerne* standard, a false positive is the striking down of a congressional enactment when Congress crafted reasonable remedial legislation. A false negative occurs if the court upholds enforcement legislation when Congress made gross errors of judgment in designing the enforcement mechanism. The cost of a Type 1 error depends on the likelihood that the constitutional norm will be violated absent the invalidated legislation.

²⁷⁵ *Baker v. Carr*, 369 U.S. 186, 217 (1962).

²⁷⁶ *Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 448 (1985).

²⁷⁷ *Baker*, 369 U.S. at 217.

If the courts cannot enforce the norm *at all* absent suitable prophylactic legislation from Congress, then Type 1 errors are, *ceteris paribus*, of much greater concern than if the courts can and will provide vigorous enforcement on their own.

The other important implication is an interpretive thumb-on-the-scale in favor of reading Section 2 to authorize depolarization claims. Conventional dilution and depolarization claims are both ways of addressing race-biased voting by the majority-group electorate. The universal remedy in dilution cases has been to restructure the electoral process (e.g., the design of legislative districts) to enable the election of more minority champions even if race-biased voting continues unabated. The remedy for a meritorious depolarization claim would be to change the electoral arrangements that induce or sustain race-biased voting, thereby reducing the intensity or frequency of such voting in the future.²⁷⁸ The latter is superior as a means of combating *Cleburne* violations. The less race-biased voting there is, the less likely it is to determine the winner of any given election. By contrast, the redesign of legislative districts so as to enable the election of more minority-preferred candidates does not, as such, prevent *Cleburne* violations.²⁷⁹ The pattern of *Cleburne* violations might well continue—with each racial group electing candidates on racial grounds—albeit without so noxious an impact on the distribution of representation across groups.

This is not to say that any depolarization-oriented enforcement legislation would or should pass *Boerne's* congruence-and-proportionality test. Imagine a congressional mandate that all citizens be tested for racial bias prior to voting and that the most biased ten percent be de-

²⁷⁸ Note that in conventional dilution cases, it may also be possible to craft depolarization remedies where race-biased voting is endogenous to the electoral system. (For example, switching from nonpartisan to partisan elections rather than redesigning legislative districts. See *infra* notes 281-82 and accompanying text.). But in such cases, the choice between this remedy and a conventional representation-oriented remedy would presumably be up to the defendant jurisdiction, for it is black letter law that a defendant found liable under Section 2 must be given an opportunity to propose a remedy, which the “district court may reject . . . under only one condition: if . . . it fails to meet the same standards applicable to an original challenge of a legislative plan in place.” *United States v. Euclid City Sch. Bd.*, 632 F. Supp. 2d 740, 750 (N.D. Ohio 2009) (internal citations and quotation marks omitted); see also *Upham v. Seamon*, 456 U.S. 37, 43 (1982) (holding that a district court’s “modifications of a state plan [of electoral districts] are limited to those necessary to cure any constitutional or statutory defect”).

²⁷⁹ However, it might prevent *Cleburne* violations indirectly. See *supra* notes 97-101 and accompanying text.

nied the franchise. If the testing technology were sound, this regime would almost surely reduce the likelihood of *Cleburne* violations, but in so doing it would transgress the citizen's personal, First Amendment right "to cast his vote for . . . whatever reason he pleases."²⁸⁰ In enforcing one constitutional norm, Congress ought not to run roughshod over another. The courts should, and no doubt would, look askance at any depolarization strategy that punishes or reprimands individual voters who cast their ballots on racial grounds.

Not all depolarization strategies are objectionable in this way, however. Canvassing the relevant political science literature is beyond the scope of this Article, but I will discuss a few examples here to illustrate my point. First, various studies have shown that voters—even very prejudiced voters—rely less on racial cues when they have probative information about candidate ideology and qualifications.²⁸¹ Legal

²⁸⁰ Anderson v. Martin, 375 U.S. 399, 402 (1964).

²⁸¹ Most of this work compares partisan and nonpartisan elections. See, e.g., Jack Citrin et al., *White Reactions to Black Candidates: When Does Race Matter?*, 54 PUB. OPINION Q. 74, 90-91 (1990) (demonstrating that antiblack attitudes had a powerful effect on voter preferences in a biracial, nonpartisan contest for California's state superintendent of schools, but not in a concurrent biracial, partisan contest for governor, notwithstanding ideological and other similarities between the two black candidates); Cindy D. Kam, *Implicit Attitudes, Explicit Choices: When Subliminal Priming Predicts Candidate Preference*, 29 POL. BEHAV. 343, 357-62 (2007) (analyzing simulated judicial elections and showing that voters with high implicit and explicit racial biases were likely to vote against the Hispanic candidate in the nonpartisan scenario, but not in the partisan scenario); Leon J. Kamin, *Ethnic and Party Affiliations of Candidates as Determinants of Voting*, 12 CANADIAN J. PSYCHOL. 205, 207-12 (1958) (demonstrating that Canadian voters who know only the names of candidates vote in part on the basis of the names' ethnic connotations, but that knowing partisan cues renders a name's connotation irrelevant); Robert A. Lorinskas et al., *The Persistence of Ethnic Voting in Urban and Rural Areas: Results from the Controlled Election Method*, 49 SOC. SCI. Q. 891, 894-95 (1969) (finding in simulated elections that Polish American voters were more likely to vote on the basis of ethnic cues in nonpartisan than in partisan elections); Peverill Squire & Eric R.A.N. Smith, *The Effect of Partisan Information on Voters in Nonpartisan Elections*, 50 J. POL. 169, 176-77 (1988) (showing that black and Latino respondents were less likely to favor judges of their own race in a judicial retention election when informed about the governor who appointed each judge); see also, e.g., Jeremy N. Bailenson et al., *Facial Similarity Between Voters and Candidates Causes Influence*, 72 PUB. OPINION Q. 935, 952-54 (2008) (showing experimentally that the effect of facial similarity between candidate and voter on vote choice is strongest when voters are unfamiliar with the candidate); Benjamin Highton, *White Voters and African American Candidates for Congress*, 26 POL. BEHAV. 1, 16 (2004) (finding "little aversion of white voters to black candidates" in partisan elections for seats in Congress); Marsha Matson & Terri Susan Fine, *Gender, Ethnicity, and Ballot Information: Ballot Cues in Low-Information Elections*, 6 ST. POL. & POL'Y Q. 49, 63-64 (2006) (providing evidence of voter reliance on ethnic and gender cues in low-information elections and showing that campaign spending may counteract that reliance by furnishing voters with information); Monika L. McDermott, *Race and Gen-*

reforms that lower the cost to voters of learning about candidates (for example, by providing party cues on the ballot, or strengthening the informational value of the party cue) are likely to dampen race-biased voting.²⁸² Second, the experience of being represented by a minority officeholder tends to increase majority-group voters' willingness to support minority candidates and to diminish negative stereotyping of minorities, so long as the minority officeholder is responsive to majority-group concerns.²⁸³ Legal reforms that facilitate the election of minority candidates backed by cross-racial coalitions (especially for visible and powerful executive offices, such as mayor) are likely to reduce race-biased voting.²⁸⁴ Another school of thought, associated most prominently with Donald Horowitz, holds that the best salve for ethnic conflict is an electoral system that makes the tenure of majority-group officeholders dependent on minority-voter support.²⁸⁵ This thesis,

der Cues in Low-Information Elections, 51 POL. RES. Q. 895, 907-14 (1998) (using survey-based experiments to show that voters treat race and gender as proxies for candidate ideology and issue positions); Carol K. Sigelman et al., *Black Candidates, White Voters: Understanding Racial Bias in Political Perceptions*, 39 AM. J. POL. SCI. 243, 256-58 (1995) (showing that white voters stereotype conservative black candidates as more moderate, more compassionate, and less competent than white conservative candidates).

Several studies have also shown that the provision of photographs on the ballot induces voters to use a candidate's race or color as a voting cue. See, e.g., Susan A. Banducci et al., *Ballot Photographs as Cues in Low-Information Elections*, 29 POL. PSYCHOL. 903, 912 (2008) (finding that white candidates were advantaged by ballot photographs in elections for a British urban renewal board); Andrew Leigh & Tirta Susilo, *Is Voting Skin-Deep? Estimating the Effect of Candidate Ballot Photographs on Election Outcomes*, 30 J. ECON. PSYCHOL. 61, 68 (2009) (finding that in Australian territorial elections where candidates' photographs are included on the ballot, "the effect of skin color on vote share depends strongly upon the size of the Indigenous population").

²⁸² On legal strategies for increasing the informational value of party cues, see Christopher S. Elmendorf & David Schleicher, *Informing Consent: Voter Ignorance and Election Law* (Oct. 2011) (unpublished manuscript) (manuscript at 47-62) (on file with author).

²⁸³ See *supra* text accompanying notes 97-101.

²⁸⁴ One way to do this in cities with large minority populations but low minority voter turnout is to change the timing of the mayoral race. See ZOLTAN L. HAJNAL, *AMERICA'S UNEVEN DEMOCRACY: RACE, TURNOUT, AND REPRESENTATION IN CITY POLITICS* 156-59 (2010) (arguing that scheduling local elections to coincide with presidential or midterm congressional contests would increase voter turnout).

²⁸⁵ For the foundational work, see DONALD L. HOROWITZ, *ETHNIC GROUPS IN CONFLICT* (rev. ed. 2000). Horowitz sees his approach not as a way of reducing prejudice per se, but as a means of keeping group conflict from erupting in violence. See Donald L. Horowitz, *Conciliatory Institutions and Constitutional Processes in Post-Conflict States*, 49 WM. & MARY L. REV. 1213, 1217 n.11 (2008) (clarifying that his approach is not "integrative" because it "aims at a modicum of cooperative political behavior but not anything like the dissolution of group boundaries"). For works extending and qualifying Horowitz's thesis, see BENJAMIN REILLY, *DEMOCRACY IN DIVIDED SOCIETIES:*

though contested,²⁸⁶ has interesting implications for the design of electoral districts and vote aggregation rules.²⁸⁷

For present purposes, the important point is that there are a number of plausible depolarization strategies that target the incentives of candidates and parties, or the informational environment in which voters cast their ballots, without intruding on the citizen's autonomy to cast her ballot for whatever reasons she pleases.

Depolarization remedies under Section 2 could also fail the congruence-and-proportionality test in a more conventional manner: by imposing federalism costs that are out of proportion to the constitutional violations prevented or remedied. A depolarization-minded Section 2 whose requirements were heavy-handed,²⁸⁸ whose reach was

ELECTORAL ENGINEERING FOR CONFLICT MANAGEMENT (2001), and TIMOTHY D. SISK, POWER SHARING AND INTERNATIONAL MEDIATION IN ETHNIC CONFLICTS (1996). See also Richard H. Pildes, *Ethnic Identity and Democratic Institutions: A Dynamic Perspective* (arguing that group identity is shaped by candidates and parties responding to electoral incentives), in CONSTITUTIONAL DESIGN FOR DIVIDED SOCIETIES: INTEGRATION OR ACCOMMODATION? 173, 177-78 (Sujit Choudhry ed., 2008).

²⁸⁶ See, e.g., Arend Lijphart, *Double-Checking the Evidence*, 2 J. DEMOCRACY 42, 47-48 (1991) (arguing that a parliamentary democracy with proportional representation is better suited to an ethnically divided populace than is a "winner-take-all" parliamentary-plurality democracy); Arend Lijphart, *The Power-Sharing Approach* (same), in CONFLICT AND PEACEMAKING IN MULTI-ETHNIC SOCIETIES 491, 506-08 (Joseph V. Montville ed., 1991).

²⁸⁷ To illustrate, in a conventional system of single-member districts, the overriding goal should be to distribute minority voters so that they are electorally relevant. Both the "cracking" and "packing" of minority voters may violate Section 2 for wasting opportunities to create cross-race electoral dependence. Second, under a system of rank-choice voting, the goal of electing candidates with cross-race constituencies may be furthered by substituting the Coombs rule for the conventional algorithm used in vote tabulation. See Bernard Grofman & Scott L. Feld, *If You Like the Alternative Vote (a.k.a. the Instant Runoff), Then You Ought to Know About the Coombs Rule*, 23 ELECTORAL STUD. 641, 648 (2004) (showing that the Coombs rule, which eliminates candidates according to the number of last-place votes received, selects moderate candidates more reliably). Finally, where the majority and minority groups live in very segregated communities, it may be beneficial to use multimember electorate districts with a vote-pooling rule. See REILLY, *supra* note 285, at 18-19. Or it may be useful to condition the election of candidates from one community on a showing of nontrivial minority support (say, twenty percent) in the other. See HOROWITZ, *supra* note 285, at 633-38.

²⁸⁸ The *Boerne* Court noted:

The stringent test RFRA demands of state laws reflects a lack of proportionality or congruence between the means adopted and the legitimate end to be achieved. If an objector can show a substantial burden on his free exercise, the State must demonstrate a compelling governmental interest and show that the law is the least restrictive means of furthering its interest.

City of Boerne v. Flores, 521 U.S. 507, 533-34 (1997).

broad,²⁸⁹ and whose duration was unlimited might well be struck down on this basis,²⁹⁰ depending on the evidence concerning the likely frequency of *Cleburne* violations. But if the partnership conception of Section 2 is correct, this type of *Boerne* problem may be avoided through judicious glosses on the statute.

The courts might hold, for example, that electoral arrangements that encourage or sustain race-biased voting may be upheld if they also serve important state interests and are well tailored to that end. In fact, the Supreme Court recognized this defense some years ago in a conventional vote dilution case.²⁹¹ Judges might also limit the reach of the cause of action against polarizing electoral arrangements by requiring, as a threshold matter, that plaintiffs show (to a significant likelihood) “pervasive” or “severe” race-biased decisionmaking within the jurisdiction.²⁹² Additionally, the courts could craft proximate-causation requirements to limit liability in cases where the relationship between race-biased decisionmaking and the electoral inequality at issue is attenuated.²⁹³

²⁸⁹ Cf. *id.* at 532 (RFRA’s “[s]weeping coverage ensures its intrusion at every level of government, displacing laws and prohibiting official actions of almost every description.”).

²⁹⁰ Cf. *id.* (“RFRA has no termination date or termination mechanism.”).

²⁹¹ See *Hous. Lawyers’ Ass’n v. Attorney Gen. of Tex.*, 501 U.S. 419, 426-27 (1991) (noting that the state interest in electing trial judges from districts that are co-extensive with the trial court’s jurisdiction “is a factor to be considered by the court in evaluating whether the evidence in a particular case supports a finding [of] a vote dilution violation”).

²⁹² Much of the Supreme Court’s constitutional election law jurisprudence uses a similar approach, varying the level of scrutiny dichotomously depending on the character and magnitude of the burden on constitutionally protected interests. See Christopher S. Elmendorf & Edward B. Foley, *Gatekeeping vs. Balancing in the Constitutional Law of Elections: Methodological Uncertainty on the High Court*, 17 WM. & MARY BILL RTS. J. 507, 513-16 (2008) (examining recent Supreme Court election law cases).

²⁹³ One other issue deserves at least a footnote mention. It is within the realm of possibility (though unlikely) that (1) the electorate is a state actor bound by the Equal Protection Clause, (2) *Cleburne* challenges are justiciable in elections for public office, yet (3) such challenges must fail on the merits because of a compelling state interest in, for example, allowing citizens to vote for whatever reason they please, or in not leaving elective offices vacant. One who subscribes to this view could reconcile *Cleburne* by positing that the constitutional balance tips the other way with respect to plebiscitary elections, owing to the more direct connection between racial bias and state coercion or the easier remedy. (Thanks to Vik Amar for raising this possibility.)

This view, if right, is not fatal to my account of Section 2’s constitutional function and permissibility. One might think it axiomatic that if the outcome of an election for representatives cannot violate the Equal Protection Clause, then any statutory response to the “problem” of race-biased voting in elections for representatives necessarily fails

3. Summary

The partnership conception of Section 2 authorizes the courts to evolve the protocol of *White* into a more structured judicial inquiry, but it is not the courts' job to make it all up. This Section has shown that the statute's legislative history and constitutional context provide helpful guidance. They jointly establish (1) that Section 2 provides causes of action against both dilution and participation injuries, (2) that the injuries with which Section 2 is concerned are connected to race-biased decisionmaking, and (3) that plaintiffs, while not required to prove racial bias in accordance with conventional evidentiary standards, must nonetheless show to a significant likelihood that the injury for which they seek redress is traceable to race-biased decisionmaking. Once Section 2 is understood this way, the courts may read the statute to provide a cause of action against electoral arrangements that unnecessarily induce or sustain race-biased voting, regardless of its impact on the minority community's ability to elect a suitable number of its candidates of choice.

the congruence-and-proportionality test, because there is no underlying constitutional violation to be remedied. But this is mistaken.

If the electorate is a state actor and puts in office public officials for reasons denied to state actors, there is a constitutional *harm* even if the harm is sufficiently justified to prevent a court from finding a constitutional violation on balance. Implicit in the court's judgment about whether the harm is justified is an assessment of available remedies. See generally Daryl Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857 (1999). The remedies available to a court are of course much more limited than the remedies available to Congress. Shared understandings about limits on judicial discretion and remedial authority would prevent a court from remedying a race-biased election result in a constitutional case by restructuring the electoral process so as to somewhat reduce the probability of future race-biased voting by, for example, providing voters with easy access to low-cost, nonracial voting cues (e.g., switching from nonpartisan to partisan elections). But Congress could do just this. To be sure, the congressional remedy might impose federalism costs out of proportion to the constitutional harm prevented, and as such run afoul of *Boerne*, but that question would have to be answered on the facts of the case. There is, in principle, some room for congressional action under the enforcement clause of the Fourteenth Amendment whenever constitutional harms are incurred, even if those harms have been deemed sufficiently justified—within the confines of particular cases and given the limited remedial authority of Article III courts—not to violate the Constitution. Cf. Mitchell C. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1, 101-06 (2004) (explaining why Congress might reasonably opt for “decision rules” for enforcing constitutional norms that deviate from the rules the courts would develop on their own).

C. *The Norm of Legal Change: Stare Decisis and Section 2*

Because the partnership conception of Section 2 gives the courts considerable leeway to evolve the law, it leads naturally to a further question: is Section 2 a full-blown “common law statute” for stare decisis purposes?

One might suppose that questions about the stare decisis effect of particular Section 2 decisions stand apart from the general question tackled in this Article, which is how to properly interpret Section 2, not how to handle mistaken interpretations. I disagree. The stare decisis effect of particular Section 2 precedents will turn not only on facts specific to the precedent in question,²⁹⁴ but also on presumptions that derive from Section 2 itself. Although statutory precedents generally receive super-strong stare decisis,²⁹⁵ there is a nascent exception for so-called common law statutes.²⁹⁶ A general theory of the proper interpretation of Section 2 should therefore address whether Section 2 is an ordinary or common law statute for stare decisis purposes.

The answer to this question matters for the practical reach, today, of any theory of Section 2’s meaning as an original matter. The results test has been encrusted by thirty years of judicial holdings. The transformative potential of any new theory of Section 2 obviously depends on the stare decisis effect of those decisions.²⁹⁷

Does the partnership understanding of amended Section 2’s return to *White* entail that Section 2 is a common law statute, or more

²⁹⁴ For example, the extent and character of reliance interests, conflicts with subsequent legal developments, and difficulties of judicial application.

²⁹⁵ Eskridge, *supra* note 128, at 1364-84.

²⁹⁶ The leading example is the Sherman Act. See, e.g., *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 899 (2007) (“[C]oncerns about maintaining settled law are strong when the question is one of statutory interpretation. Stare decisis is not as significant in this case, however, because the issue before us is the scope of the Sherman Act. From the beginning the Court has treated the Sherman Act as a *common-law statute*.” (emphasis added) (internal citations omitted)). Similarly, at the state level, courts often overrule interpretations of codified common law. See Ethan J. Leib & Michael Serota, *The Costs of Consensus in Statutory Construction*, 120 YALE L.J. ONLINE 47, 53-54 (2010), <http://yalelawjournal.org/images/pdfs/900.pdf> (providing examples and hypothesizing that states codify tort and contract law with the expectation that judges will continue to develop the law).

²⁹⁷ That said, because the Supreme Court’s Section 2 jurisprudence leaves so much conceptually unresolved, see *supra* Section I.A, the Court could adopt my account of Section 2’s guiding norms without overruling its own precedents. The only restraint is some dicta in *Chisom v. Roemer*, 501 U.S. 380, 397-98 (1991), which states that Section 2 “does not create two separate and distinct rights” (i.e., separate causes of action for participation and dilution harms). See *supra* text accompanying notes 52-54, 183-95. Stare decisis is a bigger problem for Section 2 at the court of appeals level.

accurately, a common law statutory section, for stare decisis purposes? This conclusion is aplausible but not necessary.²⁹⁸ The partnership conception of Section 2 authorizes courts to play a creative role in identifying the statute's guiding norms and building its structure, but this judicial role is compatible in principle with either strong or weak stare decisis. Under strong stare decisis, the judiciary would be the first mover in fleshing out the results test, but decisions about backtracking would fall to Congress. Under weak stare decisis, the judiciary would have leeway to reverse course on its own.

Strong stare decisis has familiar benefits: certainty for regulated parties, reduced decision costs for courts, and a deterrent effect on adventuresome judicial policymaking.²⁹⁹ One cannot assume that a congressperson votes for a bill devolving partnership responsibilities on the courts necessarily favors weak stare decisis for judicial interpretations of the statute. The congressperson might view the statutory stare decisis convention as a useful restraint on courts in the exercise of their policymaking responsibilities, or simply conclude that policymaking benefits of weak stare decisis are outweighed by the costs of legal uncertainty. Indeed, the congressional choice to delegate implementing authority to Article III courts rather than to an administrative agency might signal a preference for stability and continuity.³⁰⁰

In Sherman Act cases, the Supreme Court bottomed its flexible approach on the intent of the enacting Congress.³⁰¹ The legislative

²⁹⁸ Professor William Eskridge, relying on the principle that administrative agencies are generally free to change their statutory interpretations over time, has argued that courts should be similarly unencumbered when delegated authority to implement open-textured statutory terms. Eskridge, *supra* note 128, at 1377-78.

²⁹⁹ See generally Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 595-602 (1987).

³⁰⁰ For this reason, among others, I am unconvinced by Professor Eskridge's analogy-to-administrative-law argument, for weak stare decisis whenever courts are tasked with responsibility for implementing a broadly worded statute. *Supra* note 298.

³⁰¹ See *State Oil Co. v. Khan*, 522 U.S. 3, 20-21 (1997) ("[T]he general presumption that legislative changes should be left to Congress has less force with respect to the Sherman Act in light of the accepted view that Congress 'expected the courts to give shape to the statute's broad mandate by drawing on common-law tradition.'" (quoting *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 688 (1978))); *Bus. Elec. Corp. v. Sharp Elec. Corp.*, 485 U.S. 717, 731 (1988) ("The changing content of the term 'restraint of trade' was well recognized at the time the Sherman Act was enacted."); *Nat'l Soc'y of Prof'l Eng'rs*, 435 U.S. at 688 ("The legislative history makes it perfectly clear that [Congress] expected the courts to give shape to the statute's broad mandate by drawing on common-law tradition.").

history of Section 2 is, however, bereft of pertinent guidance.³⁰² I shall nonetheless defend a presumption of weak stare decisis for Section 2 precedents, based on factors external to the legislative history. These include the fact that the statutory standard bears directly on the distribution of political power among groups, and the statute's racial subject matter.

1. On Election Statutes, Political Questions, and Stare Decisis

Earlier, I argued that Article III political question concerns presumptively permit the federal courts to convert vague statutory standards into firmer rules if the standards concern the distribution of political power among groups.³⁰³ The exercise of this interpretive authority avoids the constitutional problem that might result were the courts to pass on the distribution of political power in high-stakes disputes without the aid of "rules to limit and confine judicial intervention."³⁰⁴

But this leads to a further difficulty. The firming up of fuzzy standards involves a lot of guesswork. With the benefit of hindsight, judges may well conclude that the particular lines they drew were misplaced and that the statute no longer serves its original purpose very well. In theory, a dissatisfied Congress can always amend the statute, but in practice the powerful inertial forces in our system of separated powers will often prevent statutory amendment.

It may be argued, then, that the presumed judicial authority to evolve mushy standards in election statutes into firmer rules gives rise to a correlative judicial duty (absent indications to the contrary from Congress) to revisit from time to time the legal precedents created in the exercise of that authority and to abrogate those precedents that no longer cohere with the purposes behind the statutory standard.

One might object that a presumption of weak stare decisis for power distributing statutes would undermine the very point of fashioning rules from vague standards. A judge-made rule cannot "limit and confine judicial intervention"³⁰⁵ if the judge has untrammelled freedom to change the rule in the next case. But this objection overlooks the hierarchical organization of the judiciary. Even if, for ex-

³⁰² The legislative history does not engage whether Section 2's "return to *White*" should be understood in protocol or partnership terms, let alone whether the courts should be free to reconsider their earlier decisions. See *supra* Section II.A.

³⁰³ See *supra* text accompanying notes 167-74.

³⁰⁴ *Vieth v. Jubelirer*, 541 U.S. 267, 307 (2004) (Kennedy, J., concurring).

³⁰⁵ *Id.*

ample, the Supreme Court understood itself to have complete discretion to overrule its VRA precedents, a rule-like Supreme Court precedent would do a tremendous amount to “limit and confine judicial discretion,”³⁰⁶ because the vast majority of actual judicial decisions under the Act are made by lower courts duty-bound to follow the Supreme Court. Also, weak stare decisis is not the same as no stare decisis. Appellate courts would still have occasion to consider whether an outdated precedent should be retained because, among other things, its overruling would look transparently political.³⁰⁷

2. Disguising Racial Remedies

Weak stare decisis for Section 2 precedents may also be justified on the basis of a substantive canon grounded in the “race premises” of the judicial center. Since the mid-1970s, pivotal Justices on the Supreme Court have maintained (1) that state action singling out particular racial groups for favored treatment is inherently divisive,³⁰⁸ (2) that the organization of politics on racial lines tends to inflame racial conflict,³⁰⁹ and (3) that the persistent correlation between race and socioeconomic outcomes represents a serious, festering wound in American society, given our history of discrimination.³¹⁰

Modern equal protection doctrine affords the government considerable leeway to try to close outcome gaps, but only if the policies in

³⁰⁶ *Id.*

³⁰⁷ *Cf. Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 866-67 (1992) (declining to revisit *Roe v. Wade* because of, inter alia, feared effects on the Court’s reputation for political neutrality).

³⁰⁸ As a result, express racial classifications trigger strict scrutiny, even if benignly intended. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (“Classifications based on race carry a danger of stigmatic harm. Unless they are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility.” (citing *Univ. of Cal. Regents v. Bakke*, 438 U.S. 265, 298 (1978))).

³⁰⁹ See *supra* Section I.B.

³¹⁰ This point is rarely if ever made explicitly, but it provides a plausible explanation for why the Court has been more tolerant of affirmative action and integrationist policies in the domain of education, where human capital is acquired, than elsewhere. See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 788 (2007) (Kennedy, J., concurring) (“In the administration of public schools . . . it is permissible to consider the racial makeup of schools and to adopt general policies to encourage a diverse student body, one aspect of which is its racial composition.”); *Grutter v. Bollinger*, 539 U.S. 306, 334 (2003) (upholding a university affirmative action program in which “race or ethnicity [is considered] only as a ‘plus’ in a particular applicant’s file, without insulating the individual from comparison with all other candidates for the available seats” (internal citations and quotation marks omitted)).

question are couched in race neutral terms, or at most treat race as one relevant and ambiguously weighted factor among many.³¹¹ This strategy has twin benefits:³¹² it avoids the inherent divisiveness of overt, transparent distribution of public benefits on racial grounds, and the policies it encourages are likely to draw support from cross-race political coalitions.³¹³

Subdoctrinally, the Supreme Court's equal protection jurisprudence is comparatively tolerant of expressly race-conscious policies crafted by organs of the state with some insulation from electoral politics.³¹⁴ Federal judges and state boards of regents receive a measure of deference for their race-minded remedial measures, whereas city councils, mayors, and state legislators are viewed much more skeptically.³¹⁵ This practice has been defended as a way of closing outcome gaps without simultaneously engendering a politics of racial spoils.³¹⁶

The premises that inform these features of equal protection jurisprudence also have implications for statutory interpretation. They would support a substantive canon favoring dynamic interpretation and weak stare decisis for statutes that seek to remedy racial discrimination and its legacy. This canon would, in effect, make the courts rather than the legislature the primary lawmaker in the event of textual ambiguity. Given the premises of the judicial center, this is as it should be. The courts are politically insulated; the legislature is politically responsive. Judicial decisions generally receive little public attention; legislative decisions receive much more. The courts, in short,

³¹¹ This theme, evident in *Grutter* and *Parents Involved*, has a long lineage and is the subject of many commentaries. See, e.g., Paul J. Mishkin, *The Uses of Ambivalence: Reflections on the Supreme Court and the Constitutionality of Affirmative Action*, 131 U. PA. L. REV. 907, 929 (1983) (explicating Justice Powell's opinion in *Bakke* as an exercise of statesmanship); Robert C. Post, *The Supreme Court, 2002 Term—Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 64-76 (2003) (discussing *Grutter's* allowance of affirmative action in higher education); James E. Ryan, *The Supreme Court, 2006 Term—Comment: The Supreme Court and Voluntary Integration*, 121 HARV. L. REV. 131, 138-39 (2007) (analyzing Kennedy's concurrence in *Parents Involved*).

³¹² But only if one grants the premises set forth in the last paragraph.

³¹³ Because race-specific benefits are disallowed, proponents of policies to close the racial-outcomes gap must push for broader policies. This encourages proponents to forge political coalitions with other constituencies that might benefit from the broader policy.

³¹⁴ See TOM CAMPBELL, SEPARATION OF POWERS IN PRACTICE 121-23, 125-28 (2004) (noting and defending this practice).

³¹⁵ *Id.* at 125-28.

³¹⁶ See *id.*

are better positioned to pursue discrimination-remediation objectives without engendering, or pandering to, “racial politics.”

The freedom to overrule statutory precedents is essential to this vision of courts as frontline policymakers on questions of race. Part of the courts’ job is to discourage narrow racial electioneering and legislative activity. To give *stare decisis* effect to outdated precedents is to risk a political campaign for their overhaul.

Notice too that the conventional downsides of flexible statutory interpretation may actually be upsides in the domain of race-equality law, at least if one buys the race premises of the judicial center. Professors Daniel Rodriguez and Barry Weingast point out that flexible, pragmatic statutory interpretation undermines bargaining within the legislature.³¹⁷ The courts’ failure to respect and enforce particular bargains *ex post* diminishes legislators’ incentives to strike a deal in the first place. The result may be a reallocation of legislative efforts to those domains where statutory bargains are most likely to be respected. But, for jurists who subscribe to the view that legislating racial remedies is an intrinsically precarious and divisive business, this deterrent effect may well be seen as a positive. Lawmakers who understand that the courts may not respect the gist of their deals over race-minded remedial legislation will tend to avoid activity in this area altogether unless the need for it seems imperative.³¹⁸ To be clear, I am not arguing that the “race premises” of the judicial center are correct. My point is only that if they are correct, they have striking implications for statutory interpretation and, more particularly, for statutory *stare decisis*.³¹⁹

³¹⁷ Daniel B. Rodriguez & Barry R. Weingast, *The Paradox of Expansionist Statutory Interpretations*, 101 NW. U. L. REV. 1207, 1235-41 (2007).

³¹⁸ Cf. Matthew C. Stephenson, *The Price of Public Action: Constitutional Doctrine and Judicial Manipulation of Legislative Enactment Costs*, 118 YALE L.J. 2, 55-61 (2008) (arguing that uncertainty in constitutional doctrine raises “enactment costs,” thereby forestalling legislative action except on “high-value statutes”).

³¹⁹ One might also contend that they undermine some of the arguments I earlier made for judicial transparency regarding the substantive and evidentiary norms of Section 2. See *supra* Sections II.A-B. Judicial transparency makes it easier for interest groups and Congress to understand and hence to shape the development of the law. See *supra* subsection II.A.1. In addition, the act of labeling certain decisions as “significantly likely” (or not) to be racially biased may engender public controversy. These are certainly costs, given the premises of the judicial center, but these costs seem unavoidable if the Supreme Court is to guide the lower courts and ensure that Section 2 is deployed for constitutionally proper purposes.

3. Some Conventional Considerations

The political question and politics-of-race considerations surveyed above provide strong grounds for treating Section 2 as a common law statute—akin to the Sherman Act—for stare decisis purposes.³²⁰ It bears noting, however, that in overruling statutory precedents the Supreme Court has traditionally relied on a mishmash of factors.³²¹ The classification of the underlying statute as “common law” has rarely been decisive, and in many cases it is not even part of the analysis (although this may be changing).³²² Other prominent considerations include whether the precedent in question is procedurally flawed³²³ and whether it has engendered substantial reliance.³²⁴ In addition, several Justices have suggested that civil rights precedents should have weaker stare decisis effect than other statutory precedents, reasoning that statutory civil rights law ought to track ongoing developments in the judicial understanding of correlative constitutional provisions.³²⁵

These considerations soften the force of Section 2 precedents. Section 2 is, of course, a civil rights statute adopted pursuant to constitutional provisions (the enforcement clauses of the Fourteenth and Fifteenth Amendments³²⁶) whose meaning has been transformed by the courts in the years since 1982.³²⁷ As for reliance interests, Section 2 regulates public activity rather than private commercial activity, and reliance interests are generally weaker in the former context.³²⁸ Nor

³²⁰ The grounds should be strong, at least, for pragmatic judges who accept the race premises of the judicial center.

³²¹ See Eskridge, *supra* note 128, at 1369-84 (describing the three main exceptions invoked by the Supreme Court in overruling statutory precedent).

³²² Writing in the 1980s, Eskridge observed that the common law statute exception, first suggested by Justice Stevens, was not widely followed. *Id.* at 1377-80. Whether *Leegin Creative Leather Products, Inc. v. PSKS, Inc.* marks a turning point in the development of this exception remains to be seen.

³²³ *Id.* at 1369-76 (explaining the proceduralist exception and noting that the Court often strains to justify overrulings on this ground).

³²⁴ *Id.* at 1382-84.

³²⁵ *Id.* at 1376-77.

³²⁶ S. REP. NO. 97-417, at 39 (1982).

³²⁷ The transformation is especially clear with respect to the enforcement clause of the Fourteenth Amendment. *Boerne* is commonly described as a revolutionary decision. See, e.g., Luis Fuentes-Rohwer, *Legislative Findings, Congressional Powers, and the Future of the Voting Rights Act*, 82 IND. L.J. 99, 101-02 (2007) (describing *Boerne* as a “leading exemplar[]” of the Court’s recent “federalism revolution”).

³²⁸ For an influential statement of this view (in a dissent that would later carry the day), see *Monroe v. Pape*, 365 U.S. 167, 221-22 (1961) (Frankfurter, J., dissenting), overruled in part by *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 700 (1978).

has Congress legislated in reliance on Section 2 precedents.³²⁹ Finally, if the Supreme Court comes to accept my account of Section 2, it should deem earlier precedents that rely on the constitutional avoidance canon procedurally defective, given that my account substantially resolves the *Boerne*-based objection to Section 2.³³⁰ The Court has not hesitated to jettison precedents that rest on the avoidance canon when subsequent developments obviate the feared constitutional problem.³³¹

D. *Revisiting the Objections to Section 2*

This Article began by recounting three prominent objections to the results test of Section 2. Let us now recap those objections and pull together the strands of my response to them. The objections are (1) that Section 2 is utterly opaque, (2) that Section 2 exacerbates racial conflict and thereby undermines the VRA's ultimate objective to "hasten the waning of racism in American politics,"³³² and (3) that Section 2 is constitutionally doubtful because it is not well tailored (congruent and proportional) to the prevention or remediation of constitutional violations.

Section 2, on my account, is not opaque. Like the common law, it leaves much to the discretion of courts, but, fairly read, it also establishes substantive and evidentiary norms to guide the exercise of that discretion. These norms, when harnessed to the partnership conception of judicial authority under Section 2, yield answers to the critics' other complaints.

As a constitutional matter, Section 2 (as I have glossed it) is unobjectionable because it requires plaintiffs to make, at a retail level, the

³²⁹ The VRA has been amended only once since 1982, and the House Committee on the Judiciary, in presenting those amendments (which focused on Section 5), expressly stated that it did not intend to "disturb Section 2." See H.R. REP. NO. 109-478, at 71 (2006).

³³⁰ It may seem odd to think that a mistaken perception of Section 2's likely constitutionality would render the associated precedent "procedurally defective," but Eskridge observes that the procedural-defect exception comes into play when the precedent in question is "inconsistent with other statutory precedents, particularly if the former [precedent] also seems to reflect a lack of careful briefing and consideration by the Court." Eskridge, *supra* note 128, at 1372. Thus, if the Court were to adopt my account of Section 2 and its constitutional function, the fact that my theory was not briefed and considered by the Court when it issued its constitutional-avoidance interpretations of Section 2 would render those decisions "procedurally defective," as the Court uses the term.

³³¹ See, e.g., *Griffin v. Breckenridge*, 403 U.S. 88, 95-96 (1971).

³³² *Johnson v. De Grandy*, 512 U.S. 997, 1020 (1994).

same type of significant likelihood showing that the *Boerne* Court approved as the basis for wholesale congressional overrides of state law. Moreover, the common law understanding of Section 2 gives the courts some flexibility to limit the disruptive effect of the results test either through state-interest balancing or by scaling back the statute's reach in response to racial progress. It also positions the courts to recognize and vindicate certain claims that Section 2's framers did not specifically anticipate, such as depolarization claims. Depolarization litigation would prevent otherwise irremediable constitutional violations and, in so doing, would solidify the status of Section 2 as a reasonable exercise of congressional enforcement authority. The recognition of depolarization claims would also remove any lingering doubts about whether Section 2 advances the VRA's ambition to "hasten the waning of racism in American politics."³³³

CONCLUSION

Section 2, the VRA's core provision of nationwide application, has fallen into disfavor. This Article seeks to resuscitate it by developing and defending a new understanding of the results test and its constitutional function. Most importantly, Section 2 prevents or compensates for a type of constitutional violation that the courts cannot remedy through ordinary constitutional litigation: the election outcome that is unconstitutional owing to the racial basis for the electorate's verdict.

My account clarifies the nature of the harms that Section 2 targets, the place of discriminatory intent in Section 2 litigation, the authority of the courts to limit or extend the results test in ways not specifically contemplated by the text or legislative history of the statute, and the presumptive *stare decisis* effect of Section 2 precedents. But much remains to be worked out. I have suggested that Section 2 should be understood to authorize heretofore unrecognized depolarization claims, but I have said very little about how depolarization litigation could be managed or what electoral arrangements would likely prove vulnerable. I have argued that Section 2 holdings that rely on the constitutional avoidance canon are vulnerable, but I have not explored whether these precedents might be justified on other grounds. I have noted some circuit splits that my account of Section 2 can help to resolve, but I have only briefly sketched the resolutions. Finally, I have said little about how my conception of Section 2 comports with

³³³ *Id.*

the Supreme Court's interpretations of the results test to date, except to note that the Court never followed the protocol understanding of Section 2's return to *White* and that the Court's decisions leave open the question of what harms Section 2 should be understood to guard against. There is grist aplenty for future work.