Revitalizing Section 2

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Abstract: This article develops a fresh account of the meaning and constitutional function of Section 2, the Voting Rights Act’s core provision of nationwide application, which has long been portrayed as conceptually opaque, counterproductive in effect, and quite possibly unconstitutional. Section 2 on my account 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 only arise when electoral inequalities owe to race-biased decisionmaking by majority-group actors, whether public or private. But as an evidentiary matter, 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 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 resolves a number of prominent circuit splits over the application of Section 2. And it clears the ground for overruling the many Section 2 precedents that rest on the constitutional avoidance canon.

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INTRODUCTION

Section 2, the Voting Rights Act’s core provision of nationwide application, bans electoral structures “which result[] in members of a class of citizens defined by race or color ‘having’ less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.”\(^1\) Enacted in 1982, the Section 2 results test was the basis for a hugely successful litigation campaign against multi-member districts and at-large elections, arrangements said to “dilute” the “voting strength” of minority citizens.\(^2\) Courts ordered the creation of single-member, supernmajority-minority districts meant to enable minority-preferred candidates to be elected without support from majority-group voters.\(^3\)

But Section 2 has fallen into disfavor. Indeed, since the Supreme Court’s first decision interpreting the results test (in 1986), advocates have lost every vote-dilution case but one in the high court.\(^4\) And their sole victory post-1986 actually says much about the Court’s dissatisfaction with Section 2.\(^5\) 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 being part of 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.\(^6\) Further and more drastic interpretive narrowings are likely.\(^7\)

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4. Richard H. Pildes, The Decline of Legally Mandated Minority Representation, 68 Ohio St. L.J. 1139, 1140-41 (2007) (noting that this is true of every case that received “plenary consideration”). 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 Act Jurisprudence, 75 U. Chi. L. Rev. 1493 (2008) (showing that judges, especially Democratic judges, have become less likely to find liability in Section 2 cases where the so-called Gingles test is satisfied).
5. See infra text accompanying notes 76-85 and 121-122 (explaining gulf between LULAC and conventional understandings of vote dilution).
6. See Bartlett v. Strickland, 129 S.Ct. 1231 (2009) (holding that vote dilution claim under Section 2 may not be brought by minority plaintiffs unless plaintiffs are part of a racial community could comprise a numerical majority of a compact single member district); LULAC, 548 U.S. at 445-46 (2006) (holding that “influence districts” are not protected by Section 2); Holder v. Hall, 512 U.S. 874 (1994) (holding that “single commissioner” form of county government cannot be challenged under Section 2 by plaintiffs seeking its replacement with a five-member commission elected from single-member districts).
7. For example, it is open for the Court to hold (1) that vote-dilution claims are categorically precluded if 20% of majority-group voters support minority-preferred
No doubt this is due in part to simple judicial politics.\textsuperscript{8} Section 2 establishes a results test; conservatives dislike results tests in antidiscrimination 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 Section 2’s defenders have yet to answer while honoring the critics’ point of view. Providing those answers is my project here. It is a project that will yield a substantially novel understanding of Section 2—one that can reach barriers to racial equality that are now regarded as untouchable.

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.\textsuperscript{9} 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 candidates of their choice.”\textsuperscript{10}

The second problem with Section 2 is its uncertain relationship to what liberals and conservatives agree to be the overarching ambition of the

\textsuperscript{8} Cf. Adam B. Cox & Thomas J. Miles, \textit{Judging the Voting Rights Act}, 108 Colum. L. Rev. 1 (2008) (showing statistical correlation between judges’ party affiliations and votes for or against liability in Section 2 cases).

\textsuperscript{9} See \textit{infra} Part I.A.

\textsuperscript{10} 42 U.S.C. § 1973(b).
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Voting Rights Act: to “hasten the waning of racism in American politics.”

Section 2 in operation has powerfully encouraged the drawing of supermajority-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.”

This conjecture is conventional wisdom among conservative Supreme Court justices.

Finally, say the critics, it is doubtful whether Section 2 as an exercise of congressional enforcement authority under the 14th and 15th Amendments is a “congruent and proportional” response to constitutional violations.

There can be little doubt that Congress could require states and local governments to draw supermajority-minority electoral districts when the persons-in-charge likely would have done so but for racial animus, or in response to pervasive and severe racial discrimination by the elected body in question, but the “exceptionally vague” text of Section 2 does not provide this sort of guidance.

Put these pieces together, and the Section 2 that emerges 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 the creation of supermajority-minority electoral districts looks increasingly anachronistic.

If Section 2 is not to suffer death by a thousand cuts--or outright constitutional invalidation--its supporters must produce a conceptualization

11 Johnson v. De Grandy, 512 U.S. 997, 1020 (1994). For other Supreme Court opinions to this effect--some authored and joined by liberals, others by conservatives--see infra note 90.


13 See infra Part I.B.

14 See infra Part I.C.


16 See, e.g., Abigail Thernstrom & Stephan Thernstrom, Racial Gerrymandering Is Unnecessary, WALL. ST. J., Nov. 11, 2008 (arguing on the basis of Obama’s election that drawing majority-minority districts to facilitate the election of minority candidates is unnecessary); Ellen Katz, Leave It up to Congress, NAT’L J., Apr. 13, 2009 (suggesting that Supreme Court in effect remand Section 5 of the VRA to Congress, for Congress to reconsider in light of Obama’s election).
of the results test which renders it intelligible, responsive to racial progress, and discriminating in its bite.\textsuperscript{17}

\* \* \*

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.\textsuperscript{18} Substantively, Section 2 provides independent protection against \textit{vote dilution} and \textit{participation} injuries.\textsuperscript{19} \textit{Dilution} injuries arise, on my account, whenever \textit{race-biased decisionmaking} by conventional state actors, or by the majority-group electorate,\textsuperscript{20} results in minorities having less representational opportunity than they otherwise would.\textsuperscript{21} \textit{Participation} injuries occur whenever such biased decisions result in disparate burdens on minority participation in a discrete phase of the electoral process.\textsuperscript{22} There is considerable uncertainty about what counts as a “phase” of the electoral process for purposes of Section 2, but at the very least, participation challenges may be brought against election laws governing voter eligibility, the casting and counting of ballots, the qualification of candidates, and partisan nomination proceedings. (A terminological aside: a \textit{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 the race of a candidate affects his choice. A juror makes a race-biased decision when the race of a defendant or witness affects her decision. Etc.)

As for the evidentiary norms, Section 2’s legislative history makes it clear that plaintiffs may not be required to prove intentional discrimination in accordance with conventional evidentiary standards.\textsuperscript{23} But, read in constitutional context, Section 2 should be understood to require plaintiffs to prove \textit{to a significant likelihood} that the electoral inequality at issue is traceable to race-biased decisionmaking.\textsuperscript{24}

The final guiding norm concerns legal change: Section 2 precedents should enjoy not the “super strong” \textit{stare decisis} typical of statutory

\textsuperscript{17} Cf. Ellen Katz, \textit{Engineering the Endgame}, 109 Mich. L. Rev. 349 (2010) (observing that the Supreme Court’s general response to racial progress has been to eliminate previously recognized remedies for racial discrimination).

\textsuperscript{18} See infra Part II.

\textsuperscript{19} See infra Parts II.A.3, II.B.1.

\textsuperscript{20} It is arguable that 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.

\textsuperscript{21} See infra Part II.B.

\textsuperscript{22} Id.

\textsuperscript{23} See infra Part II.B.1.

\textsuperscript{24} See infra Part II.B.2.
precedents, but the weak-form *stare decisis* of precedents under Sherman Act, the paradigmatic common law statute.25

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 shall develop two further points of some importance. First, 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 constitutional litigation.26 To date, the idea that election results can be unconstitutional due to racially biased voting has only been recognized 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 representative, and, further, that the political question doctrine prevents the courts from directly enforcing this norm in the elections-for-representative context. The impossibility of direct judicial enforcement in ordinary constitutional litigation warrants a measure of deference when evaluating the “congruence and proportionality” of Section 2.

My other important claim is that Section 2 can support a cause of action against electoral arrangements on the ground that they unreasonably induce or sustain race-biased voting, whatever the consequences for minority representation.27 These I shall call *depolarization claims*. Although congressional supporters of the 1982 Amendments apparently believed “election law” and “racial prejudice” to be functionally unrelated, recent work by political scientists shows otherwise.28 The failure of the enacting Congress to anticipate and specifically provide for depolarization claims does not, on the common law understanding of Section 2, preclude their judicial recognition today. Once these 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” will be put to rest. (The adjudication of depolarization claims will also make the courts confront an increasingly impressive body of evidence which suggests 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.29 This is precisely contrary to the conservative jurists’ prognostications.)

25 See infra Part II.C.
26 See infra Part II.B.2.
27 See infra Parts II.B.1, II.B.2.
28 See infra notes 244-249 and accompanying text.
29 See infra notes 99-104.
Beyond answering the conservatives’ objections, 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 Section 2’s evidentiary norm; the minority view misunderstands the substantive norm. The circuit courts have been debating this question for more than twenty years, and yet none has seen my solution. My account of Section 2 also sheds light on circuit splits regarding felon disenfranchisement, and on whether Section 2 reaches participation injuries irrespective of their possibly dilutive effects (here one finds erroneous dicta from the Supreme Court as well as a circuit split).

But there is much this Article does not resolve. It does not establish that courts must recognize depolarization claims (only that this is reasonable), let alone provide a method for their adjudication. It does not foreclose the narrowing of Section 2 through gatekeeping conditions (only that this is unwarranted on 14th Amendment grounds). It does not identify particular Supreme Court precedents that should be overturned (only that the common-law conception of the statute clears the path for overrulings). I leave those questions for the next article in this series.

* * *

The balance of this Article unfolds as follows. 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. Part III shows that my theory of Section 2 would resolve a number of prominent circuit splits regarding the results test. Part IV concludes.

I. PRECARIOUS SECTION 2

The Voting Rights Act contains two core provisions: Section 2, which applies nationally, and Section 5, which applies to the so-called “covered jurisdictions” (states and some localities that had particularly egregious records of race-based discrimination with respect to voting). Section 5, as interpreted by the courts, guards against backsliding by the covered jurisdictions.

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30 See infra Part III.
Section 2, by contrast, prescribes an ideal. As adopted by Congress in 1965, it decreed:

No voting qualification or prerequisite to voting or standard, practice, or procedure with respect to voting shall be imposed or applied by any state to deny or abridge the right of any citizen of the United States to vote on account of race or color.

In 1980, a four-Justice plurality in City of Mobile v. Bolden determined that this prohibition was coextensive with the 15th Amendment, that the 15th Amendment only reached barriers to the casting of votes, and that “dilutive” electoral structures violate the 14th Amendment only if established or maintained for the purpose of minimizing the political strength of a racial group. Two years later, Congress replaced the phrase “to deny or abridge” in Section 2 with the phrase “which results in the denial or abridgment of,” and appended the following explanation of what it means for a “standard, practice, or procedure with respect to voting” to have this result:

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.

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37 96 Stat. 134.
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 multi-member electoral districts without, as Congress saw it, demanding proof that the districts were established for race-discriminatory reasons.\(^{38}\) *White* itself was susceptible to several interpretations.\(^{39}\) It thus fell to the courts to make sense of the “exceptionally vague” text Congress had enacted.\(^{40}\)

Nearly a generation has passed since the 1982 amendments, and the Supreme Court’s repeated efforts to make sense of it have not borne fruit. The evil which Section 2 targets remains obscure, as does the functional relationship (if any) between Section 2 and the VRA’s ambition to “hasten the waning of racism in American politics.” Doubts have also surfaced about the constitutionality of the results test, and conservative jurists have regularly invoked the constitutional avoidance canon to justify narrowing interpretations. The balance of this Part reviews the conceptual uncertainties, the worries about the effect of Section 2 on racial politics, and the basis for doubting Section 2’s constitutionality. Taken together, these factors suggest that the string of limiting constructions Section 2 has suffered in the hands of the Supreme Court is not an accident of history but a preview of the future. The condition of Section 2 is indeed precarious.\(^{41}\)

A. The Conceptual Puzzle

The text of Section 2 provides little guidance on its face about what constitutes an injury within the meaning of the statute, or how injuries may be proven, except that proof somehow requires a consideration of the “totality of circumstances.”\(^{42}\)

There is no plain meaning to the phrase, “less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.”\(^{43}\) This sentence could be read as authorizing two separate causes of action (one for “opportunity to participate” injuries, the other for “opportunity to elect” injuries), or a single cause of action which may only be exercised when both types of injury have

\(^{38}\) 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 district court’s vote-dilution finding “[b]ased on the totality of the circumstances”).

\(^{39}\) See *infra* Part IIA

\(^{40}\) Goosby v. Town of Hempstead, 180 F.3d 476, 500 (2d. Cir. 1998) (Leval, J., concurring in the judgment).

\(^{41}\) For examples of limiting constructions that are in the offing, see note 7, *supra*.


\(^{43}\) *Id.*
been sustained. There is also ambiguity about the meaning of “participate” and “elect.” “Opportunity . . . to participate” could mean “opportunity to vote” or it could mean something much broader. “Opportunity . . . to elect” could refer to the number of ideally preferred representatives whom a politically cohesive minority community may elect, or it could refer to whether the general-election candidates whom minority voters predominately support, if only as the lesser of two evils, have a shot at winning. And then there is the puzzle of the famous “Dole proviso,” which states, “[N]othing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion of the population.” This could be read as anything from a sweeping rejection of electoral systems that tend toward proportionality to an essentially redundant acknowledgment of Section 2’s guarantee of equal opportunity rather than equal outcomes.

Nor does the statute’s legislative history provide decisive answers to most of these questions. In a parry that would become famous to teachers and students of election law, 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. The proponents had no real answer, at least not one they were willing to convey. They simply cross-referenced the pre-*Bolden* status quo.

Prior to *Bolden*, the lower courts, generalizing from the Supreme Court’s decisions in *Whitcomb v. Chavis* and *White v. Regester*, were deciding constitutional vote dilution cases on the basis of a murky, multi-

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44 *Id.* The Dole proviso was a compromise provision added late in the legislative process, nominally to ensure that the courts would not read the “results test” as a mandate for proportional representation. See Thomas M. Boyd & Stephan J. Markman, *The 1982 Amendments to the Voting Rights Act: A Legislative History*, 40 WASH & LEE L. REV. 1347, 1414-20 (1983).

45 Though it does provide some helpful guidance. See infra Part II.B.1.


48 See Boyd & Markman, *supra* note 44, at 1388-94, especially 1391 & n. 220 (remarking that “[i]t 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 evience 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 412 U.S. at 766).


factored test that took account not only of the extent to which race-correlated voting patterns prevented the minority community from electing its chosen candidates, but also of the defendant jurisdiction’s history of discrimination, 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 tend to disadvantage minorities, and the strength or weakness of the state interests asserted in defense of the challenged election laws.51 But, critically, the pre-Bolden doctrine did not itself clearly answer Senator Hatch’s question: what is the core value to be protected?52

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.53 A plaintiff who is challenging a barrier to voting need not prove that it tangibly dilutes minority representation. But dicta from the Supreme Court rejects the two-separate-rights theory.54 Lower courts that subscribe to the two-rights model have entirely ignored the high court’s pronouncement on this

51 The leading pre-Bolden case, which derives these factors from the Supreme Court’s opinion in White, is Zimmer v. McKeithen, 485 F.2d 1297 (5th Cir. 1973) (en banc).
52 See infra text accompanying notes 130-145.
53 See, e.g., Farrakhan v. Gregoire, 590 F.3d 989, 1006-07 (9th Cir. 2010) (distinguishing participation and dilution claims), vacated en banc on other grounds, 623 F.3d 990 (2010); Simmons v. Galvin, 575 F.3d 24, 28-29 (1st Cir. 2009) (same); Stewart v. Blackwell 444 F.3d 843, 877-79 (6th Cir. 2006) (indicating that Section 2 claim may be brought against voting technology that results in disproportionate invalidation of black voters’ ballots, without reference to dilution factors), vacated as moot, 473 F.3d 692 (6th Cir. 2007); Burton v. City of Belle Glade, 178 F. 3d 1175, 1196-1200 (11th Cir. 1999) (separately assessing vote denial and vote dilution challenges to city’s refusal to annex an unincorporated neighborhood); Common Cause v. Billups, 406 F. Supp. 2d 1326, 1372-75 (N.D. Ga. 2005) (treating Section 2 challenge to voter ID requirement as a “vote denial” claim, analytically distinct from “vote dilution”); Common Cause v. Jones, 213 F. Supp. 2d 1106, 1108 (C.D. Cal 2001) (expressly rejecting need to prove representational harms for purposes of Section 2 challenge to punch-card voting technology); Harris v. Siegelman, 695 F. Supp. 517, 528 (M.D. Ala. 1988) (distinguishing “the type of results claim presented in Thornburg (the ability of minority voters to elect representatives of their choice under different election systems)” from “the type of claim presented here (the treatment of minority voters at polling places)”).
54 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.”).
Participate, how? Plaintiffs have with increasing frequency brought participation claims under Section 2, but all such claims have all concerned barriers to the casting or counting of minority votes. Some commentators have contended for a more expansive conception of Section 2 participation rights, but the courts have yet to face this issue.

Elect, in what sense (influence or control)? Thornburg v. Gingles, the Court’s first decision interpreting the results test, suggested that the “right to elect” protected by Section 2 entitles politically cohesive minority communities to elect their ideally preferred candidates. A decade later, in Johnson v. De Grandy, the Court hinted at a somewhat different


57 The leading works are Lani Guinier, The Tyranny of the Majority (1994) (arguing for a conception of Section 2 under which minority legislators would have veto rights over issues of special concern to the minority community); Kathryn Abrams, “Raising Politics Up”: Minority Political Participation and Section 2 of the Voting Rights Act, 63 N.Y.U. L. REV. 449 (1988) (arguing the rights of participation under Section 2 include rights of political influence that go beyond the election of minority-preferred candidates); Pamela S. Karlan, Maps and Misreadings, The Role of Geographic Compactness in Racial Vote Dilution Litigation, 24 HARV. C.R.-C.L. L. REV. 173 (1989) (arguing that Section 2 should be understood to protect “civic inclusion” of minorities at both electoral and governing stages of the democratic enterprise).

58 Except in one respect: the courts have rejected Abrams’s suggestion 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 LULAC v. Perry, 548 U.S. 399, 445-46 (2006). That said, as a conceptual matter, it makes more sense to think of “influence” over the election of candidates as being part of the Section 2 representation right, rather than part of the participation right. The representation right is concerned with who ends up speaking (or not speaking) for minority voters in the halls of the assembly, whereas the participation right is concerned with access to phases of the electoral process that come before (or after?) the election of representatives. Cleaving Section 2 in this way also makes sense on “political question” grounds, for reasons I’ll explain in more length in a companion article. But to state the point briefly, there is a greater need for bright-line rules when courts are asked to pass on questions about the distribution of representation or power, than when they address issues of “access” to the political process that can be evaluated without reference to the fairness of electoral outcomes. Drawing the line between representation and participation rights under Section 2 so as to track this distinction would ease the task of setting prudential limits on the class of claims that most clearly implicate the political question doctrine.

59 478 U.S. 30, 47-51 & n. 12 (1985) (plurality opinion).
understanding of the representation 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.60 Ten years after De Grandy, however, the Court in League of United Latin American Citizens (“LULAC”) v. Perry held that a vote-dilution claim could not be predicated on a mere lack of electoral influence.61 What Section 2 protects, per LULAC, is minority control over certain elected positions.62 But a scant two years later, in an opinion by the same Justice (Kennedy) who authored LULAC, the Court intimated that so-called “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.63 In short, the metric of “voting strength” for purposes of dilution claims remains highly unsettled.

What is “neutrality”? 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 variously hint at three different conceptions of the normative benchmark for dilution claims. One is a fixed measure of how the electoral system performs given majority-group voting patterns: specifically, whether it enables the minority community to elect a “roughly proportional” number of its ideally preferred representatives.64 Another benchmark is institutional: the representational opportunities that the minority community would have enjoyed under a “normal” scheme of single-member districts.65 The third is

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62 Id.
64 See, e.g., Johnson v. De Grandy, 512 U.S. 997, 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.”); LULAC v. Perry, 548 U.S. 399, 436 (2006) (“We proceed now to the totality of circumstances, and first to the proportionality inquiry, comparing the percentage of total districts that are Latino opportunity districts with the Latino share of the citizen voting age population.”)
65 See, e.g., Thornburg v. Gingles, 478 U.S. 30, 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 Courts in LULAC v. Perry, 548 U.S. 399 (2006), as resting implicitly on a conventional-institutional benchmark. See Pildes, supra note 4, 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
Revitalizing Section 2

tied to discriminatory intent: the representational opportunity that the minority community would have had in the absence of race-biased decisionmaking by the state or the majority-group electorate.66 (This is the benchmark I will defend.) I shall refer to these, respectively, as the performance-based, the conventional-institutional, and the intent-based benchmarks.

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 conventional-institutional solution to the benchmark problem. But then, in response to the plaintiffs’ suggestion that the benchmark for purposes of evaluating the defendant’s “single commissioner” 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 conventional-institutional benchmark. Dilution is here understood as a property that inheres in the electoral system at issue (consistent with performance- and intent-based benchmarks), rather than a property which emerges when one compares the challenged system to some reasonable, conventional alternative.

Consider too Justice Souter’s majority opinion in Johnson v. De Grandy.70 Per De Grandy, the decisive question in a vote dilution case is

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66 See also Gonzalez v. City of Aurora, Ill., 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 a large number of randomized, computer-generated maps).
67 512 U.S. 874 (1994)
68 Id. at 880 (emphasis added).
69 Id. at 881.
“whether the totality of facts, including those pointing to proportionality, show[] that the [challenged] scheme would deny minority voters equal political opportunity.”71 De Grandy is widely thought to have made “rough proportionality” between the number of majority-minority districts and the minority’s population share a central consideration in the vote-dilution inquiry.72 This is consistent with a performance-based benchmark, or a hybrid of the performance and conventional-institutional approaches. But another passage in De Grandy supports an intent-based benchmark:

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.73

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

So what’s the answer? Which benchmark is right? De Grandy is studiously agnostic. Having stated that “equal political opportunity” is the central issue (“core value”) in a vote dilution case,74 De Grandy nowhere defines its meaning.75

The recent case of LULAC v. Perry76—the only post-Gingles decision in which the Court has found liability--vividly illustrates 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), notwithstanding that the districting plan created an additional majority-Latino district elsewhere in the state, thereby achieving proportionality on a

71 Id. at 1013-14.
73 512 U.S. at 1015.
74 Id. at 1013-14.
75 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 over-reliance on proportionality. See id. at 1017-22.
statewide basis. Objecting to the replacement district’s odd shape and its conjoining of socio-economically and geographically distant Latino communities, Kennedy wrote that so peculiar a district ought not even count in the Section 2 proportionality analysis.77

But what the Court then held is even more curious. “We need not decide,” Kennedy wrote, “whether the [proportionality] deficit . . . weighs in favor of a § 2 violation,” because “[e]ven if [the districting plan’s] disproportionality were deemed insubstantial, that consideration would not overcome the other evidence of vote dilution for Latinos in District 23.”78 What, precisely, was the offense that these voters had suffered? Kennedy explained:

In essence the State took away the Latinos’ opportunity because Latinos were about to exercise it. This bears the mark of intentional discrimination that could give rise to an equal protection violation.79

It may have borne that mark, yet the district court found that the stripping of Latinos from District 23 was politically not racially motivated.80 Kennedy did not hide this fact. Rather, he stated that even if the motivation was political—to protect an incumbent—the redistricting strategy, 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].” 81

Justice Roberts, dissenting, pointed out that the state could not have created any more majority-Latino districts than it had.82 “Whatever the majority believes it is fighting with its holding,” he quipped, “it is not vote dilution on the basis of race or ethnicity.”83 The disagreement between Roberts and Kennedy seems to be grounded in different understandings of both “minority voting strength” and the benchmark of neutrality. For 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 Kennedy, “voting strength” may be disaggregated and assessed in terms of the representational opportunities enjoyed by particular geographic clusters of minority citizens.84 For Roberts, the benchmark is rough proportionality

77 Id. at 429-35.
78 Id. at 438.
79 548 U.S. at 440 (internal citations omitted).
80 Id.
81 Id. at 440-41.
82 Id. at 497.
83 Id. at 511.
84 This idea also surfaces in Johnson v. De Grandy. See 512 U.S. at 1019 (rejecting proposed “proportionality safe harbor” because it “rest[s] on an unexplored premise of highly
across the jurisdiction as a whole; for Kennedy, rough proportionality is part of the story, but one which gets supplemented by intuitions about intentional discrimination (or its appearance) and conventional practices. The District 23 Latinos suffered vote dilution, Kennedy seemed to be saying, because they were deprived of an electoral opportunity which in the normal course of events—which is to say, a conventional, race neutral, and otherwise normatively tolerable course of events—they would have enjoyed.85

B. The Worst of 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- (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 deprivesthe plaintiffs of an equal opportunity to elect their “candidates of choice”:

1. “[T]he minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district”;
2. “the minority group must be able to show that it is politically cohesive”; and
3. “the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it—in the absence of special circumstances . . .—usually to defeat the minority's preferred candidate.”

Though Gingles did not so hold, 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 majority and minority voters tended to support different candidates.87 Subsequent cases draw this into question,88 but the Gingles

suspect validity: that . . . the rights of some minority voters under § 2 may be traded of against other members of the same minority class”.
85 Cf. Pildes, supra note 4, at 1146-47 (arguing that Justice Kennedy in LULAC understands Section 2 to protect only “naturally arising” safe minority districts).
87 See id. at 51 n. 15 (“the most important Senate Report factors bearing on § 2 challenges to multi-member 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’”). Cf. id. at 85 (O’Connor, J., concurring) (cautioning that the plurality opinion, “although does not acknowledge it expressly,” suggests “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.”).
framework and the majority-minority district are no doubt central to most lawyers’ and judges’ sense of what Section 2 is all about.\(^\text{89}\)

Within a few years of the decision in *Gingles*, conservatives on the Supreme Court were openly worrying about whether majority-minority districts created to comply with Section 2 were stymieing the VRA’s ultimate objective of “hasten[ing] the waning of racism in American politics.”\(^\text{90}\) In *Shaw v. Reno*, which invalidated an oddly shaped majority-minority district on equal protection grounds, Justice O’Connor for the Court explained:

Racial classifications of any sort pose the risk of lasting harm to our society. They 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 embody, and to which the Nation continues to aspire.\(^\text{91}\)

Two years later, the Court per Justice Kennedy struck down another convoluted majority-minority district and continued the refrain.\(^\text{92}\) Justice Thomas soon offered an even more forceful articulation of O’Connor’s

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\(^\text{88}\) See supra text accompanying notes 64-85 (discussing competing conceptions of neutrality in the Supreme Court’s vote-dilution jurisprudence).

\(^\text{89}\) 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 Issacharoff et al., supra note 46, at 596-711; Lowenstein & Hasen, Election, at 187-244.

\(^\text{90}\) Johnson v. De Grandy, 512 U.S. 997, 1020 (1994). That this is the ultimate objective of the VRA is a point of agreement among liberal and conservative justices. Though the majority opinion in *De Grandy* was authored by Justice Souter and joined 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. See Georgia v. Ashcroft, 539 U.S. 461, 481 (2003). See also Holder v. Hall, 512 U.S. 874, 906-07 (1994) (dissenting opinion of Justice Thomas, joined by Justice Scalia, complaining that the Court’s interpretations of Section 2 have not well served this purpose).


\(^\text{92}\) 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. Only if our political system and our society cleanse themselves of that discrimination will all members of the polity share an equal opportunity to gain public office regardless of race. . . . Th[is] end is neither assured nor well served, however, by carving electorates into racial blocs.

thesis.93 “Few 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.”94

The fears expressed by O’Connor, Kennedy, and Thomas were of a piece with the hostility conservative Justices had expressed—and continue to express—toward “racial balancing” in the public distribution of any widely desired good, from admission to a public school or university,95 to a job in the public sector,96 to contracts to provide services to the government.97 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 groups defined by race may be the worst kind of racial balancing of all: 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.98

The conservatives’ intuitions about the polarizing consequences of majority-minority districts have since been put to the test by political scientists. The findings to date are quite consistent: the election of out-group candidates tends to reduce race-biased voting by members of the majority group, and to diminish majority-group prejudice and negative stereotyping of the out-group more generally, so long as the out-group officeholders have incentives to respond to majority-group concerns.99 The

93 Holder v. Hall 512 U.S. 874, 891-946 (Thomas, J., joined by Scalia, J., concurring in the judgment).
94 Id. at 906-07.
99 The leading work on this phenomenon in U.S. elections is ZOLTAN L. HAJNAL, CHANGING WHITE ATTITUDES TOWARD BLACK POLITICAL LEADERSHIP (2007). 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 (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 (2010) (showing that temporary quotas have lasting effects on electability of out-group candidates). For other studies examining the “depolarization effect” of representation by an out-group
conventional “VRA district,” which contains a modest supermajority of minority voters, does a serviceable job of this.\textsuperscript{100} 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 then mounting turnout-oriented, own-race-centered campaigns.\textsuperscript{101} (Campaigns at risk of descending into race-baiting.\textsuperscript{102}) Instead, these districts encourage majority group leaders to make common cause with segments of the minority community, and to coalesce behind what David officeholder, see Kareem U. Crayton, Beat ‘Em or Join ‘Em? White Voters and Black Candidates in Majority-Black Districts, 58 SYRACUSE L. REV. 547 (2008) (in longitudinal study of white support for black candidate in South Carolina’s only majority-minority congressional district, finding “that the rate of white support for the ‘black-preferred candidate is consistently higher than one would expect in a racially polarized climate’ Baodong Liu, Deracialization and Urban Racial Contexts, 38 URBAN AFFAIRS REV. 572 (2003) (in study of 77 bi-racial local government elections in New Orleans, showing that incumbency is highly correlated with white crossover voting, while acknowledging that this effect cannot be disentangled from the effect of newspaper endorsements given high correlation between the two variables); Robert M. Stein et al., Voting for Minority Candidates in Multiracial/Multiethnic Communities, 41 URB. AFFAIRS REV. 157 (2005) (in study of Houston elections, showing that race-based voting is pervasive when minority challengers run for office, but that if the minority candidate wins, voting in subsequent elections is dominated by the incumbent’s perceived performance rather than race, and that race does not significantly color perceptions of the incumbent’s performance). Cf. Susan E. Howell & Huey L. Perry, Black Mayors/White Mayors: Explaining Their Approval, 66 PUB. OPIN. Q. 32 (2004) (in study of four cities, finding that performance variables explained more variation in mayoral approval than race variables); Susan E. Howell & William P. McLean, Performance and Race in Evaluating Minority Mayors, 65 PUB. OPIN. Q. 321 (2001) (finding white support for incumbent black mayor in New Orleans to be explained by performance as well as racial variables); Tasha Philpot & Hanes Walton, Jr., One of Our Own: Black Female Candidates and the Voters Who Support Them, 51 AM. POL. SCI. REV. 49 (2007) (finding that black female candidates with previous experience in office face little discrimination from white voters, in contrast to candidates without such experience).

To be sure, some case studies find limited or no depolarization effect from the election of a minority officeholder. See HAJNAL, supra note 99, at 31-32. Hajnal argues that these results can be explained by demographic context (specifically, an even racial balance within the electorate) and/or the fact that the minority candidate had little power to govern.\textsuperscript{100} 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.”); HAJNAL, supra note 99, at 142-46 (showing that white voters are much more supportive of black congressional incumbents than challengers, and that blacks running as incumbents fare somewhat better among white voters than when they were first elected).\textsuperscript{101} See CANON, supra note 100, at 93-142 (showing that in majority-black congressional districts, black candidates backed by biracial coalitions are likely winners unless a white candidate enters the primary).

\textsuperscript{102} Compare HAJNAL, supra note 99, at 29-30, 95-140 (analyzing mayoral politics in racially balanced cities, in contrast to white majority and white minority cities); Liu, supra note 99 (showing that whites are less supportive of minority candidates when electorate is evenly divided than when minority population comprises at least 55% of the electorate).
Canon has called “new style” minority candidates who assiduously court white as well as minority voters.\textsuperscript{103} The experience of being represented—or better yet, governed\textsuperscript{104}—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” (in that neither the determination of 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 suffice to 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. \textit{Boerne}

The conservative bloc’s intuitions about the polarizing consequences of majority-minority districts go some distance toward explaining the pattern of narrow interpretations of Section 2, but they’re 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 “coalition” districts, districts in which the minority voters could wield power in concert with white voters.\textsuperscript{105} Manageability concerns are part of the story here, as Justice Kennedy acknowledged in his opinion for the Court in \textit{Bartlett v. Strickland}.\textsuperscript{106} The rest of the story is about constitutional avoidance.\textsuperscript{107}

\textsuperscript{103} See also Crayton, supra note 99 (providing case study of white support for black candidate in majority-minority congressional district); Liu, supra note 99 (in study of New Orleans elections, showing that whites are more supportive of minority candidates when whites are a numerical minority of the electorate); Baadong Liu, \textit{Whites as a Minority and the New Biracial Coalition in New Orleans and Memphis}, 39 PS-POL SCI & POL. 69 (2006) (showing similar effect at mayoral level in two Southern cities).

\textsuperscript{104} See HAJNAL, supra note 99, at 95-102 (showing that election of black mayor has greater depolarization effect when mayor’s coalition is the governing coalition).


\textsuperscript{106} 139 S.Ct. at 1244-45. On manageability as a theme in the VRA jurisprudence, see Christopher S. Elmendorf, \textit{Refining the Democracy Canon}, 95 CORNELL L. REV. 1051, 1099-1103 (2010).

\textsuperscript{107} For a thoughtful look at how the conservative wing of the Court views the constitutionality of Section 2, see Luis E. Fuentes-Rohwer, \textit{The Future of Section 2 of the
Justice Kennedy has long made a show of reserving the question of Section 2’s constitutionality, and he invoked the principle that constitutionally doubtful statutes should be narrowly construed in his opinions for the Court in LULAC v. Perry and Bartlett v. Strickland (holding, respectively, that a Section 2 claim cannot be predicated on the possibility of an “influence district” or a “crossover district”). But why is Section 2’s constitutionality in doubt? Here Kennedy was circumspect, noting only that if Section 2 protected influence districts, it would “unnecessarily infuse race into virtually every redistricting, raising serious constitutional questions.”

A Section 2 that had this effect would presumably run afoul of City of Boerne v. Flores, which holds that congressional enactments pursuant to Section 5 of the Fourteenth Amendment must be “congruen[t] and proportional[]” to constitutional violations. If the “infusion of race” into “virtually every redistricting” is truly “unnecessary” to the curing of constitutional violations, it is hard to see how a statute that brought this about could be congruent and proportional sensu Boerne.

Boerne invalidated the Religious Freedom Restoration Act (RFRA), which subjected burdens on the free exercise of religion to strict scrutiny. Justice Kennedy’s opinion for the Boerne Court sheds considerably light on both his doubts about the constitutionality of Section 2 and his belief that interpretations of Section 2 which narrow its domain of application pull it back from the constitutional brink. RFRA, Kennedy explained, was unconstitutional (not “congruent and proportional”) because of its broad coverage and the fact that it was “not designed to identify and counteract state laws likely to be unconstitutional because of their treatment of religion” (the constitutional standard). Congress made no effort to tailor

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110 548 U.S. at 405.
112 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 107, at 114-19 (explaining challenge of justifying amended Section 2 as a remedial measure against constitutional violations); Douglas Laycock, Conceptual Gulfs in City of Boerne v. Flores, 39 Wm. & MARY L. REV. 743, 749-50 (1998) (commenting on similarities between the congressional politics of enacting RFRA and amending Section 2).
113 521 U.S. at 532 (“RFRA[’s s]weeping coverage ensures its intrusion at every level of government”).
114 Id. at 534-35.
RFRA’s coverage to cases where there was a “significant likelihood” that the state had “been motivated by religious bigotry.”

Now consider Section 2. If, as Gingles suggested, there is an “abridgment of the right to vote on the basis of race” 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 much the same design flaw as RFRA.

This is so because of the scant basis for suspecting an official intent to discriminate from the mere fact that an electoral system results in a minority community exercising a less-than-proportionate share of political power, given the ubiquity and long tradition of highly majoritarian electoral systems in American democracy. First-past-the-post elections are the American norm, typically (but not universally) conducted using single member districts. It is well known that this vote-aggregation rule results in less-than-proportionate representation for all political minorities. And if majoritarian vote-aggregation rules are as common in all-white areas as they are in areas with significant minority populations (Congress did not find otherwise), then it can hardly be said that under-representation for a politically cohesive group of minority voters bespeaks a likelihood that the vote aggregation rules were adopted or are being maintained for discriminatory reasons.

To be sure, one might infer a likelihood of discriminatory intent if the vote-aggregation rule were changed in response to changes in the minority population, or if 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 does not on its face demand any such inquiry. It

115 Id. at 535. See also id. at 532 (“Preventative 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.”)

116 To be sure, Boerne concerns congressional enforcement powers under the 14th Amendment, and Section 2 is, at least in part, an exercise of congressional power under the 15th Amendment. (Congress invoked both Amendments. See S. REP. NO. 97-417 at 39 (1982) (hereafter, “Senate Report”). It is widely thought, however, that the Court will extend Boerne’s “congruence and proportionality” requirement to the 15th Amendment when presented with a case that forces the question. But see Nw. Austin Mun. Utility Dist. No. 1 v. Mukasey, 573 F.Supp.2d 221, 241-46 (D.D.C. 2008) (rejecting this view), vacated on other grounds, 129 S.Ct. 2504 (2009). In any event, the 14th rather than the 15th Amendment ought to be treated as the basis for Section 2 insofar as Section 2 reaches injuries beyond simple “vote denial,” for in City of Mobile v. Bolden, 444 U.S. 55 (1980), the four-justice plurality undertook to limit the 15th to vote denial. Id. at 61-65.

117 This is because the rule encourages voters and candidates to coordinate on two major parties, and the two parties to compete for the affections of the median voter. See generally DENNIS C. MUELLER, PUBLIC CHOICE III 230-301 (2003)
simply and flatly disallows those electoral “standards, practices, and procedures” “which result in the denial or abridgement of the right to vote on the basis of race.” 118

None of this is to say that Section 2 needs to be or ought to be viewed as constitutional suspect under Boerne. As I will show in Part II, the statute admits of interpretations that would make it a reasonable, 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 not be solved unless or until the courts resolve a prior conceptual puzzle: precisely what harms does Section 2 target, and how? 119


119 Proponents of Section 2 have, to date, mustered two kinds of responses to the Boerne objection. One strategy, advanced by Pam 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 (e.g., the adoption of racist policies by an all-white governing body). Pamela S. Karlan, Two Section Twos and Two Section Fives: Voting Rights and Remedies After Flores, 39 WM. & MARY L. REV. 725, 738-40 (1998). 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. See Michael J. Pitts, Congressional Enforcement of Affirmative Democracy Through Section 2 of the Voting Rights Act, 25 N. ILL. U. L. REV. 185 (2004); 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).

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.

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 remedy “significantly likely” violations. See supra text accompanying notes 113-115. But, absent a case-specific “significant likelihood” showing by Section 2 plaintiffs (which is not required under current understandings of the results test), 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 by the bodies so reformed. (Perhaps violations were unlikely in any event. 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.)

The “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 Rodgers was rightly decided and would follow it today. Rodgers was a split decision, and the dissenters—who were in the majority in Bolden—thought the Rodgers majority opinion flatly inconsistent with Bolden. See 458 U.S. at 628-29 (Powell, J., dissenting). Second, in Rogers the constitutional harm that the district
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 statute’s broad coverage and permanence. This implies that courts might save a borderline enactment by narrowing its reach or duration through statutory interpretation. And narrowing the statute’s reach 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 being part of 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, especially if the case presents an opportunity to develop the law of Section 2 in a manner that results in a better, more tailored prophylaxis against intentionally discriminatory state action. This prediction is arguably borne out by Justice Kennedy’s opinion for the Court in *LULAC v. Perry*. The reader will recall that Kennedy joined with the liberal justices to invalidate a Republican gerrymander that shifted some 100,000 mostly Latino voters out of a Republican incumbent’s district, while creating an additional majority-Latino district elsewhere in the state (maintaining proportionality on a statewide basis). Kennedy stressed that this maneuver “bore the mark” of intentional discrimination, notwithstanding the district court’s finding that it was politically rather than racially motivated. His 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 toehold for judges who in future cases may seek to further reorient Section 2 toward circumstances that bespeak, in the words of *Boerne*, “a significant likelihood” of discriminatory intent.

court purported to undo was clear in principle, even if disputed on the facts of the case. See id. at 621 (“the 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; internal quotations and citation omitted). But under the results test of Section 2, there is not, as yet, any requirement that plaintiffs identify particular constitutional injuries for the court to cure or abate.

120 521 U.S. at 530-35.
122 Id. at 440.
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” and to put to rest Boerne-based doubts about Section 2’s constitutionality. This Part charts one path forward, and explains its basis in the text, history and constitutional context of Section 2.

Section 2 on my account 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 against 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 citizens’ access to discrete “phases” of the electoral process, such as casting a ballot or nominating a candidate. (Participation injuries may, but need not, result in actionable vote dilution.)

Regarding the evidentiary norm, the big idea is that plaintiffs must not be required to prove race-biased decisionmaking in accordance with conventional (“preponderance of the evidence”) standards. It should suffice 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.123 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 development of the law.124 Section 2 precedents should be treated similarly, albeit for different reasons.

* * *

The argument of this Part unfolds as a response to three related questions, each premised on the incontrovertible thesis that the 1982 amendments direct a return to the pre-Bolden status quo. The first is

whether the status quo to which Congress directed a return should be understood in static or dynamic terms. On the static understanding of Section 2, Congress required courts to adjudicate cases using the exact method of the Supreme Court in \textit{White}. On the dynamic understanding, Congress authorized the courts to continue the pre-\textit{Bolden} process of doctrinal evolution, and ultimately to convert the \textit{White} standard into something more analytically and normatively precise.

Part II.A makes the case for the dynamic understanding. The argument draws its force from (1) the perspective of a reasonable congressperson who seeks ongoing influence over judicial application of the results test; (2) multiple constitutional considerations, including the \textit{Boerne} “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 (participation claims) for which the \textit{White} standard, such as it is, was not designed; and (4) the fact that the static approach wastes probative information regarding what the framers of the results test liked about the pre-\textit{Bolden} jurisprudence, and what they found objectionable in \textit{Bolden}.

Assuming that the dynamic understanding is correct, the next question is what norms ought to guide judicial elaboration and refinement of the results test. Meshing arguments from legislative history with arguments about the Constitution, Part 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, i.e., challenges to electoral arrangements on the ground that they unnecessarily induce or sustain race-biased voting by members of a racial majority, whether or not they prevent a politically cohesive minority community from electing a reasonable number of its preferred candidates.

The third question, tackled in Part II.C, concerns the presumptive \textit{stare decisis} effect of Section 2 precedents. On one view, the dynamic understanding of Section 2’s resurrection of \textit{White} entails weak \textit{stare decisis}, rather than conventional “super strong” statutory \textit{stare decisis}. But this position is probably too strong. The paradigm case for weak-form statutory \textit{stare decisis} is the Sherman Act, whose status as a “common law statute” the Supreme Court grounded in the clear expectations of the enacting Congress. The legislative history of Section 2 is in relevant respects silent. But Part II.C argues that the case for weak-form \textit{stare decisis} under amended Section 2 is nonetheless quite strong, due to (1) the manner in which justiciability concerns bear on judicial elaboration of the results test; and (2) 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 the making of racial policy. Other, more conventional
considerations also tend to weaken the *stare decisis* effect of many Section 2 precedents.

A. The Return to *White*: Static or Dynamic?

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,\(^{125}\) and the authoritative Senate Judiciary Committee Report\(^{126}\) makes it 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.\(^{127}\) (The Senate Report explains the “totality of circumstances” inquiry prescribed in the statute by reciting the factors highlighted in *Zimmer v. McKeithen*,\(^{128}\) the leading circuit court case following *White*.\(^{129}\))

But the pre-*Bolden* status quo may be understood in static or dynamic terms. Prior to *Bolden*, there was both a “legal standard” for judging unconstitutional vote dilution—the standard of *White/Zimmer*—and a process of doctrinal evolution. There can be little doubt that the standard was going to be refined, and not simply because of its arguable conflict with *Washington v. Davis*.\(^{130}\) The standard was inchoate. *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 got their start with decisions in which the Supreme Court said little more

\(^{125}\) *See supra* text accompanying notes 37-38.

\(^{126}\) *Supra* note 116. The Supreme Court regards the Senate Report as the “authoritative source” regarding congressional intent with respect to Section 2. *See Thornburg v. Gingles*, 478 U.S. 30, 43 n. 7 (1986).

\(^{127}\) *See Senate Report, supra* note 116, at 2, 15-16, 19-24, 27-31 (concluding, “[t]he proposed results test was developed by the Supreme Court and followed in nearly two dozen cases by the lower federal courts”).

\(^{128}\) 485 F.2d 1297 (5th Cir. 1973) (en banc).

\(^{129}\) *Senate Report, supra* note 116, at 28-29.

\(^{130}\) 426 U.S. 229 (1976). *Davis* famously held that the equal protection clause does not protect racial minorities against state action with a racially disparate impact, unless the relevant state actors acted on the basis of impermissible discriminatory motives. *See id.* at 238-45. The Supreme Court’s decision in *Mobile v. Bolden* applies the same “discriminatory intent” requirement to vote-dilution claims. 446 U.S. 55, 66-74 (1980).

\(^{131}\) I do not exaggerate. *See* 412 U.S. at 765-70.

\(^{132}\) *See infra* text accompanying note 145.
than “we think the state went too far in this case,” if it even said that much.\textsuperscript{133} Professor Richard Hasen has argued that this is an entirely sensible way to proceed when, as is typically the case, the Justices at the start of a new venture are uncertain about how best to give effect the constitutional values they perceive while minimizing incursions on competing values.\textsuperscript{134} Over time, an initially murky standard typically resolves into a set of more refined distinctions as constitutional common law develops.\textsuperscript{135} This is particularly true with respect to political rights, where the special risk of judicial partisanship (in fact or appearance) counsels for the development of bright line rules whenever the relevant constitutional values are thought to require a substantial redirection of current political practices.\textsuperscript{136}

There was every reason to expect the pre-\textit{Bolden} vote dilution standard to follow the same path. The \textit{Bolden} plurality opinion, which put a particular normative spin on \textit{White}, represented only one of many crystallizing possibilities then open to Court.\textsuperscript{137} Yet the fact that some such evolution was likely does not mean that it remains permissible following the 1982 Amendments. Congress in amending Section 2 might have meant to \textit{lock in place} the standard of \textit{White} (as glossed by \textit{Zimmer}), rather than to authorize a process of doctrinal evolution. The legislative history cannot, however, resolve this question, because the question was simply absent from the congressional debates. No one addressed it.

The most that can be said in favor of the static understanding of Section 2 is that Congress opposed any mindless simplification of the \textit{White} inquiry. Hence the text of amended Section 2, which expressly prescribes a “totality of circumstances” inquiry,\textsuperscript{138} hence the Senate Report, which after enumerating the \textit{White}/\textit{Zimmer} factors states, “the Committee intends that there is no requirement that any particular number of factors be proved, or


\textsuperscript{134} \textit{Id}.\textsuperscript{135}


\textsuperscript{136} See generally Christopher S. Elmendorf, \textit{Structuring Judicial Review of Electoral Mechanics: Explanations and Opportunities}, 156 U. Pa. L. Rev. 313 (2007) (showing that nominal balancing test for regulatory burdens on political rights has been used to create a series of fairly bright line rules).

\textsuperscript{137} To give but a few examples, it was also open (1) to define with more precision (but in other ways) the constitutional injury of vote dilution, thereby providing normative guidance to the lower courts while leaving them free to decide cases on the basis of a multi-factor 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 is deemed presumptively violated; and/or (4) to develop a body of law about state interests that might justify otherwise impermissible vote dilution.

\textsuperscript{138} 42 U.S.C. \S 1973.
that a majority of them point one way or the other. But that Congress ruled out mindless simplification of *White* does not foreclose mindful refinement of it. And that the text calls for liability to be determined following a “totality of circumstances” inquiry does not preclude the development of strong presumptions to guide that inquiry.

But if the legislative history does not answer the question of whether Section 2 should be understood to embody a static or dynamic conception of *White*, what does? The facile answer is this: twenty-five years of Supreme Court interpretation of the results test. As Guy 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. (This, they further observe, is in keeping with the Court’s pragmatic approach to the rest of the Act.)

But I want to make a more normative claim: that Section 2 should be understood to delegate authority to evolve the *White* standard into something more analytically and normatively precise. The dynamic 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 static understanding of Section 2 wastes information about the normative objectives of the framers of the results test. The fleshing out of these points will do more than rationalize the fact of the Supreme Court’s departure from *White* in post-1982 cases. It also sets the stage for the my arguments (in Part II.B) about the substantive and evidentiary norms that should guide judicial elaboration of Section 2, and (in Part II.C) about the weak *stare decisis* effect of Section 2 precedents.

### 1. Coherence and Congressional Oversight

On the static 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 precise manner of *White* is only this: (1) duly note that vote-dilution claims require not simply evidence that “the racial group allegedly discriminated against has not had legislative seats in proportion to its voting potential,” but rather “evidence to support findings that the political processes leading up to nomination and election were not equally open to participation by the group in question”; (2) make findings

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141 Id.
regarding the presence or absence of a 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;\(^{143}\) (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.\(^{144}\) (The Fifth Circuit’s decision in \textit{Zimmer v. McKeithen} does not add anything to \textit{White} beyond treating some of the \textit{White} factors as core considerations, and others as “enhance[ments].”\(^{145}\))

Thus, on the static view, Section 2 essentially stipulates that state electoral practices shall be reformed on the basis of \textit{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. This, to say the least, would be odd. The dynamic approach to the 1982 amendments, which calls on courts to identify guiding norms and refine the law accordingly, is likely to make judicial application of the results test more predictable and the ends to be achieved more transparent. This not only makes life easier for litigants and defendant jurisdictions, it also helps Congress to control the development of the law. Oversight hearings are surely more productive to the extent that Congress can see what the courts are doing. And the clearer Congress’s picture of the law in application, the easier it will be to design amendments to redirect the courts in particular categories of cases.

\textbf{2. Two Constitutional Considerations}

The Constitution provides further reasons to reject the static conception of Section 2, for the static conception gives rise to two constitutional difficulties that the dynamic alternative substantially resolves. These are, first, the Article III problem with courts resolving politically sensitive cases on the basis of open-ended standards and unstated policy judgments, and, second, the difficulty (impossibility?) of judging the “congruence and proportionality” of the static version of Section 2.

a. Article III and Political Questions

One of the defining features of the Supreme Court’s constitutional jurisprudence of political rights is the pattern of rapid doctrinal evolution

\(^{143}\) \textit{Id.} at 766-79. The Senate Report, \textit{supra} note 116, provides a concise restatement of the factors. \textit{See id.} at 28-29.

\(^{144}\) \textit{White}, 412 U.S. at 767, 769-770.

\(^{145}\) \textit{Zimmer}, 485 F.3d at 1305. The opinion explains, unhelpfully, that “[t]he fact of dilution is established upon proof of an aggregate of these factors.” \textit{Id.}
from initially muddy standards to firm rules.  

This is not accidental. As the Court explained in Vieth v. Jubelirer, what is a “manageable standard” within the meaning of the political question doctrine depends on the political stakes and character of the determination the court has been asked to make. 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.”

Vote dilution claims requires courts to pass on precisely such questions about the distribution of political power among groups, and on the static understanding of Section 2, the courts must do so without the benefit of rules or even norms to “limit and confine judicial intervention.” 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, 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. 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. (Elsewhere I have called this the neutrality canon.)

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146 See supra notes 133-136 and accompanying text.
148 541 U.S. at 307 (Kennedy, J., concurring in the judgment).
150 Mistretta v. United States, 488 U.S. 361 (1989). In Mistretta, which concerned a statute that prescribed the appointment of Article III judges to an un-court-like body (the U.S. Sentencing Commission), the Supreme Court said that a separation-of-powers violation would have occurred if the appointments had resulted in judges becoming “entangle[d] in . . . political work . . . undermin[ing] public confidence in the disinterestedness of the Judicial Branch.” Id. at 407-08. Per Vieth, the “manageable standards” prong of the political question doctrine is anchored in precisely the same concerns. See supra note 147. A statute that instructed the courts to decide “political” cases on the basis of a vacuous legal standard, while disallowing judicial elaboration of the standard into something more normatively precise and/or rule-like, would therefore raise serious constitutional questions.
151 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.
152 Elmendorf, supra note 106, at 1098-1104.
b. *Boerne*

Congressional enactments under the Fourteenth Amendment must be “congruent and proportional” to an underlying pattern of constitutional violations. It is difficult to judge whether Section 2 is a congruent and proportionate exercise of congressional authority unless courts can 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. On the static 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. It’s anyone’s guess whether the resulting pattern of judicial decisions would reasonably respond to constitutional violations. By contrast, as Part II.B will illustrate, the dynamic understanding allows courts to give the results test normative structure and thereby render it both intelligible and “proportionate” vis-à-vis imputed constitutional functions. The familiar constitutional avoidance canon therefore counsels for the dynamic interpretation, by dint of the Reconstruction Amendments as well as Article III.

3. *The Puzzle of Participation Claims*

The weirdness of the static conception of the results test becomes even more apparent once one appreciates the congressional expectation that amended Section 2 would reach participation as well as dilution claims. The legislative history touches on participation claims only briefly, but the authoritative Senate Report makes it clear that an actionable harm arises when minorities face improper barriers to participation at discrete junctures in the electoral process, irrespective of whether this results in vote dilution:

Whitcomb, White, Zimmer and their progeny dealt with electoral system features such as at-large elections, majority vote requirements and districting plans. However, section 2 remains the major statutory prohibition of all voting rights discrimination. It also prohibits practices which, while episodic and not involving permanent structural barriers, result in the denial of equal access to *any phase of the electoral process* for minority group members.

A footnote in the Senate Report provides illustrative examples, noting, inter alia, that “[a] violation [of Section 2] could be proved by showing that the election officials made absentee ballots available to white citizens without a

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153 *See supra* notes 111-115 accompanying text.
154 *See supra* Part II.A.1.
corresponding opportunity being given to minority citizens." Denial of equal access to an absentee-ballot “phase of the electoral process,” without more, violates Section 2.

Yet there was not, pre-Bolden a body of participation law analogous to the White/Zimmer dilution jurisprudence. The authors of the Senate Report were able to identify only three previous participation cases under the Voting Rights Act. Each addressed barriers to the casting of ballots. Yet, as I will explain below, White speaks to a much broader conception of participation, 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 . . .”

So at the very least, the courts have to make new law on the question of what is a “phase” of the electoral process for purposes of Section 2. And though in theory 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 and dilution cases differ in both the character of the injury and the remedy sought, and there’s no reason to think that the Congress would have wanted

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156 Id. n. 119 (emphasis added).
157 In his important article in Section 2 “vote denial” claims, Daniel Tokaji grounds the existence of a separate clause of action for participation violations in the text of Section 2(a), which prohibits “den[ial] or abridge[ment]” of the right to vote on account of race or color. Tokaji, supra note 56, at 692 (suggesting that vote dilution is an “abridgement” within the meaning of Section 2(a), whereas a participation barrier which prevents the plaintiff from recording a vote is “denial” within the meaning of the text). I do not think this is the right way to conceptualize participation injuries, however. For one, the legislative history strongly suggests that “participation” within the meaning of Section 2 covers more than the casting of a valid, duly counted ballot. See infra text accompanying notes 163-177. Second, Tokaji’s formulation invites an aggressive “voter fault” defense. If participation injuries only arise in cases of “vote denial,” a Section 2 defendant may be able to avoid liability by arguing that the defendant did not categorically disqualify the plaintiff from voting, but merely established an administrative protocol for voting with which the plaintiff failed to comply. (Regarding the proper scope of the voter-fault defense in participation claims, see infra Part III.D.)
158 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 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”). There was also a small, race-specific body of 15th Amendment law, but limited to cases in which the voter was denied the franchise. See Mobile v. Bolden, 446 U.S. 55, 61-65 (reviewing 15th Amendment cases).
159 Senate Report, supra note 116, at 30 n. 199 (mentioning Toney v. White, 488 F.2 310 (5th Cir. 1973); United States v. Post, 297 F. Supp. 46 (W.D. La. 1969), and Monroe v. Post, 279 F. Supp. 60 (W.D. La. 1968)).
160 See infra text accompanying notes 174-175.
161 Senate Report, supra note 116, at 30 (emphasis added).
the courts to weigh exactly the same factors in each type of case. Some
development of the law would seem desirable—and nearly inevitable.

4. Wasted Information

The final reason to reject the static 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 static
understanding leaves it to individual judges to decide what’s fair by their
own lights, whereas the dynamic understanding encourages courts to wrestle
with the normative impulses manifested in the authoritative Senate Report
on the 1982 amendments. As the next section will show, it is possible to
identify these normative impulses and to integrate them into a conceptually
and constitutionally coherent account of Section 2. But for the courts to do
this, they must first understand the Section 2 delegation in dynamic terms,
for the law of Section 2 that will result has substantially more structure than
*White/Zimmer*.

B. Substantive and Evidentiary Norms for a Dynamic Section 2

Assuming that amended Section 2’s “return to *White*” should be
understood dynamically, the next question is: What norms ought to inform
judicial precissification of the results test? It would be (and has been162)
possible for the courts to evolve the law of Section 2 without specifying
guiding norms, but, like the status-quo reading of Section 2, this wastes
information in the legislative history and gives short shrift to the
constitutional context of the statute.

This Section argues 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 the racial basis for the electorate’s

162 *See supra* Part I.A (discussing normatively unsettled state of Supreme Court’s
Section 2 jurisprudence).
verdict. I shall argue that the political question doctrine prevents direct judicial enforcement of this constitutional prohibition in ordinary constitutional litigation, and that legislative responses to the problem are therefore owed deference. 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 support judicial recognition of depolarization claims, i.e., challenges to election laws on the ground 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 address 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 the common law conception of Section 2, if coupled with a requirement that plaintiffs to trace the injury of which they complain to race-biased decisionmaking shown “to a significant likelihood,” substantially resolves the Boerne-based objection to Section 2. 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 is to recognize that the framers of the results test contemplated separate causes of action for “vote dilution” and “participation” injuries. To be sure, participation injuries often result in vote dilution, and some vote dilution claims will fail for want of an underlying participation impairment, but a showing of dilution is not necessary to a participation claim, and defendants cannot defeat a participation claim with evidence of minority representation.

   That Section 2 authorizes vote-dilution claims is beyond reasonable doubt. The central purpose of the 1982 amendments was to enable vote-dilution litigation to continue under the pre-Bolden framework. By

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163 See supra Part II.A.3.
164 See infra text accompanying note 174.
166 See supra Part II.A (making this point, and addressing whether the “return to White” should be understood in static or dynamic terms).
contrast, the legislative history mentions participation claims only in passing.\textsuperscript{167} Yet, as noted above, the authoritative Senate Judiciary Committee report makes it clear that the results test was supposed to be “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).\textsuperscript{168} Per the Report, “[d]enial of equal access to any phase of the electoral process for minority group members” violates the results test.\textsuperscript{169} But what is a “phase” of the electoral process for purposes of the results test? Here the Senate Report comments, elliptically:

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.\textsuperscript{170}

As the Court said in White, the question [of] whether the political processes are “equally open” depends upon a searching practical evaluation of “past and present reality.”\textsuperscript{171}

Restated, 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.

Though it is a dilution case, White is instructive for participation litigation because of the White Court’s view that dilution is actionable only when associated with participation harms.\textsuperscript{172} Presumably the reason the Court recognized a cause of action for dilution is that 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 ought to be independently actionable under Section 2.\textsuperscript{173}

\textsuperscript{167} See supra Part II.A.3.
\textsuperscript{168} Senate Report, supra note 116, at 30 (emphasis added).
\textsuperscript{169} Id. (emphasis added).
\textsuperscript{170} Id. (emphasis added)
\textsuperscript{171} Id.
\textsuperscript{172} See 412 U.S. at 765-66 (“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 . . . .”). Post-1982, however, at least one set of circumstances should support a finding of liability for vote dilution absent an associated 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 192, 200-203, and 204-210.
\textsuperscript{173} See quotation accompanying note 171.
White, though protean, 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 by political parties substantially unimpeded by racially biased decisionmaking whether public or private. 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 African American candidates, and that effectively deployed “racial campaign tactics in white precincts” (presumably inducing white citizens to cast their ballots on racial grounds).174 By contrast, in the prior case of 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.”175

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. (In our two-party system, “normal party politics” can be said to involve joining forces with other citizens so as to construct a political coalition with a realistic shot at winning control of the government.176) 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.177

One could even argue that a non-trivial level of majority-group voting on the basis of race constitutes a participation injury per se, because this 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 in the process of forging a politically competitive coalition faces an impediment that is not shared equally by majority-group citizens. This is so 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.

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175 403 U.S. 124, 150 (1971).
177 This analysis casts some doubt on Presley v. Etowah County Com’n, 502 U.S. 491, 509-10 (1992), in which the Court drew a firm line between “voting” and “governance,” presuming the VRA to be concerned only with the former.
“Equal” discrimination results in a greater impediment to joining a potential-winning coalition for members of the minority.

If this is right, then plaintiffs ought to be able to bring what I have called depolarization claims on a Section 2 participation theory. (A depolarization claim is a challenge to electoral arrangements on the ground that they unnecessary induce or sustain race-biased voting.) Conceptualized in “participation” terms, the 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 necessarily 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 direction in which 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 how courts should understand “phase of the electoral process” for purposes of Section 2 participation claims (to say nothing of “voting strength” for purposes of dilution claims), it does speak to these further and very important point: First, an injury within the meaning of the results test 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. (The latter proposition is more certain than the former.)

The Senate Report shows that proponents of the results test were concerned with subjective racism, and--when pressed--that they treated its presence or absence as decisive in run-of-the-mill dilution cases. Consider their answer to the argument that the results test would lead to wholesale

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178 Other considerations also support reading Section 2 to authorize depolarization claims. See infra Parts II.B.2 (regarding constitutional considerations), and II.D (regarding purpose of the VRA as a whole). Note also that insofar as depolarization claims put pressure on defendant jurisdictions to lower the cost to voters of acquiring probative, non-racial voting cues in low-information elections (see infra notes 243-244), 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 so as to improve the representativeness and collective competence of the voting public. See Elmendorf, supra note 106, at 1076-95 (suggesting and defending this canon).

179 Due to space limitations, I shall not explore the “voting strength” question in this paper, except to note that courts have struggled with it. See supra text accompanying notes 59-63.
invalidation of at-large elections and multimember districts around the country. In response, proponents took shelter in the pre-Bolden jurisprudence of the lower courts. They added an explanatory section to the statutory text (codified as Section 2(b)), which quotes White v. Regester, 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 appeal.” For present purposes the most important of the “major points” are these:

1. The results test of White was the controlling legal standard . . . .

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.

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 (including racial minorities) of proportionate representation for their interests. Highly majoritarian systems become suspect only when “racial politics play an excessive role in the electoral process.” Other passages in the Senate Report reiterate the idea that racial politics is generally the defining issue under the results test. The Report nowhere defines exactly what it means by “excessive” or “intense” racial politics, but its list of “typical factors” for establishing a Section 2 violation is suggestive. Extreme, race-correlated disparities in voter preferences, the exclusion of minorities from influential candidate-slating processes, a

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180 Boyd & Markman, supra note 44, at 1390-92 (describing questioning by Sen. Hatch), 1403 (further explaining opponents’ argument that results test would require the elimination of at-large systems).
181 Id. at 1400.
182 Id. at 1399-400, 1414-16 (describing response, and amendments introduced by Sen. Dole with support from original proponents of amending Section 2); Senate Report, supra note 116 at 31-34 (“Response to Questions Raised About the Results Test”).
183 Senate Report, supra note 116, at 32.
184 Id. at 32-33 (emphasis added).
185 Id. at 33 (emphasis added)
186 See, e.g., id. at 33 (“there are still some communities in our Nation where racial politics do dominate the electoral process”), 34 (suggesting that the results test was meant to detect “instances of intensive racial politics”).
187 Id. at 28-29.
history of official discrimination “touch[ing] the right of members of the minority group to register, to vote, or otherwise to participate in the political process,” and “whether political campaigns have been characterized by overt or subtle racial appeals,” all speak to the likelihood of discrimination on the basis of race by majority-group voters (and political elites).

This suggests that the proper measure of “undiluted” voting strength is not the level of electoral opportunity or influence which the minority community would enjoy under some conventional electoral system (such as a regime of single-member districts drawn to respect communities of interest), or a measure of electoral system performance defined in the abstract (like proportionality), but rather the level of influence that minority communities could have realized under the defendant’s electoral system had their efforts to make common cause with others—to join or forge a working political majority—not been impeded by racial bias on the part of non-state, majority-group actors.

Given the centrality of racial bias to this account of dilution, it would seem reasonable to modify the benchmark in cases where the defendant’s electoral system was 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 non-electoral realms. The legislative history confirms both points. The enactors of Section 2 thought it trivially true that Section 2 was violated by any “voting qualification, prerequisite to voting, or standard, practice, or procedure with respect to voting” created or maintained for discriminatory reasons.

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188 Id.

189 There are also, I concede, passages in the Report which 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 in which “racial bloc voting is not 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. This scenario the Report contrasts with communities in which “racial politics do dominate the electoral process,” id., arguably suggesting that race-correlated differences in candidate preference constitute “racial politics.” But the same passage also disputes critics’ assertion that “the results assumes ‘that race is the predominant determinant of political preference,’” id. at 33, which suggests that “racial politics” is defined by the role of race in voter decisionmaking, consistent with my definition of racial bias. 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.”) (emphasis added).

190 Cf. text accompanying note 65, supra (explaining “conventional-institutional” benchmark for judging vote-dilution claims).

191 Cf. text accompanying note 64, supra (explaining “performance based” benchmark for judging vote-dilution claims).

192 See, e.g., Senate Report, supra note 116, at 27 (“ Plaintiffs must either prove [a discriminatory purpose in the adoption or maintenance of the challenged system], or, alternatively, must show that the challenged system . . . results in minorities being denied equal access to the political process.”)
that the electoral effects of race-discriminatory decisions in non-electoral realms (as well as discrimination with respect to the franchise) should be weighed in judging vote dilution.\textsuperscript{193} 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/or majority-group participants in the political process.\textsuperscript{194}

Sitting uneasily with the many passages in the Report which suggest that an infection of the electoral system by racial bias is essential to a Section 2 violation, there 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-\textit{Bolden} dilution jurisprudence:

\begin{enumerate}
  \item The[ courts] did not apply an “intent standard.” \ldots The unanimous and uncontradicted testimony of [litigators called before the Committee] was that the parties and the courts \textit{did not focus on the motives behind the election methods being challenged}, let alone require proof of discriminatory intent as a prerequisite to relief.\textsuperscript{195}
\end{enumerate}

It is important to understand what the framers of the 1982 Amendments found objectionable in the \textit{Bolden} plurality’s intent requirement. The Senate Report voices three complaints. First, the \textit{Bolden} plurality “asks the wrong question,” in that “what motives were in an official’s mind 100 years ago is at most of limited relevance” to whether minorities today have “equal access to the process of electing their representatives.”\textsuperscript{196} Second, “the intent test is unnecessarily divisive because it involves charges of racism on the part of individual officials or entire communities.”\textsuperscript{197} Relief under Section 2 ought not to require “brand[ing] individuals as racist.”\textsuperscript{198} Third, “the intent test will be an inordinately difficult burden for plaintiffs in most cases.”\textsuperscript{199}

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 by expanding the \textit{object} of the intent test (from “enacting

\textsuperscript{193} See Senate Report, \textit{supra} note 116 at 28-29 & n. 114.
\textsuperscript{194} The Senate Report and \textit{White v. Regester} do not distinguish discrimination by \textit{voters} from discrimination by any other non-state actors in the political arena. But as I will explain shortly, \textit{see infra} Part II.A.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.
\textsuperscript{195} \textit{Id.} at 32-33 (emphasis added).
\textsuperscript{196} \textit{Id.} at 36
\textsuperscript{197} \textit{Id.}
\textsuperscript{198} \textit{Id.} (quoting testimony of Dr. Arthur S. Flemming, Chairman of the United States Commission on Civil Rights).
\textsuperscript{199} \textit{Id.} at 36-37.
lawmakers” to “all public actors and majority-group voters whose biased
decisions affect minority electoral opportunities”), and by relaxing the
standard of proof which plaintiffs must satisfy (from “more likely than not”
to something more lenient, e.g., “significantly likely”). 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
racially biased decisionmaking (shown to a “significant likelihood”) by state
or nonstate actors. My notion that plaintiffs should be held to this
requirement draws most of its force from the Constitution, for reasons
explained in the next subsection. The modest point I wish to make here 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 more
likely than not. The mechanics of the significant likelihood showing will
have to be worked out by the courts, but there’s a strong case to be made for
resolving this question with the aid of presumptions gleaned from national
or regional studies of voter behavior. (Given the Senate Report’s worry
about “inordinate” burdens on plaintiffs, 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, of racial campaign tactics, and of
historical or current race-based discrimination within the jurisdiction.

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200 Per note 194, supra, the sentence in the text above would be more faithful to the
legislative history if I substituted “majority-group participants in the political process” for
“majority-group voters.” But owing to constitutional doubts, I take no position on whether
Section 2 claims may be predicated on non-voter species of private discrimination.

201 Dan Tokaji has made a similar argument for separating the “core value” and
“standard of proof” questions, see Tokaji, supra note 56, at 719-20, although he reaches a
different conclusion about the necessary evidentiary showing, see id. at 723-26 (arguing that
in § 2 participation cases, the courts should apply strict scrutiny whenever the plaintiff shows
that the challenged election law has a disparate impact which is traceable to socio-economic
or cultural differences between racial groups). In my view, Tokaji’s proposed test so
attenuates the link to intentional discrimination as to raise serious questions about its
constitutionality, given that socio-economic or cultural differences may not be due to past
discrimination. (Should a white minority in a majority-Asian jurisdiction be permitted to
bring a Section 2 claim predicated on whites’ lower levels of educational attainment?) Cf.
Part I.C, supra (explaining the Boerne objection to Section 2), and Part II.A.2.c (justifying
my proposal in light of Boerne).
Recall that the text of the Section 2 and the Senate Report both call for a “totality of circumstances” inquiry.)

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 heart-of-hearts, 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 divinements of the “truth” about the existence or force of racial prejudice in particular communities.\(^{202}\)

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 which does not suffer from characteristic problems of intent tests, and that is what I am providing. My ascription of congressional purpose is not incontestable,\(^{203}\) but it well captures the principal themes of the authoritative Senate Report.

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\(^{202}\) 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 the divisive labeling problem.

\(^{203}\) 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, *supra* note 116, cites three cases as examples of “episodic” participation-based violations of Section 2. See *id.* at 30 n. 118 (citing *Toney* v. White, 488 F.2d 310 (1973), United States v. *Post*, 297 F. Supp. 46 (1969), and *Brown* v. *Post*, 279 F. Supp. 60 (1968)). In each of these cases, the court expressly found that the state actor responsible for the “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—both by the state actors responsible for the challenged procedure and by a private farmer whose prejudices the state election administrators enabled—and as such would support liability under my “significant likelihood” approach. See *Toney*, 488 F.2d at 312 (noting that the state defendants, shortly before a very close election, purged the voter rolls in violation of state law in a manner that resulted in many blacks being improperly removed, and many whites who should have been removed not being removed; and that there was in this jurisdiction “a history of racial discrimination in the voting process”); *Brown*, 279 F. Supp. at 63 (noting 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]llowed white individuals to vote absentee by making absentee ballots available to them in their private residences without extending this same opportunity to Negroes”; “[m]ade absentee ballots available to the white employees of Scott Plantation without doing so for Negro employees similarly situated”; and “[m]ade absentee voting available to white residents of the Willow Bayou section [through voting ‘substations’ in private homes] without a
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 section acknowledged, the legislative history leaves big questions unresolved. The most important of these is whether plaintiffs must make some showing that the injury of which they complain is traceable to race-biased decisionmaking, even if not a showing that comports with conventional standards of evidence. The last section 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.

As Part 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, so

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 (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 the Supreme Court in White v. Regester, in upholding the district court’s finding of unconstitutional vote dilution with respect to the Latino plaintiffs, put some weight on the fact that “the typical Mexican-American suffers a cultural and language barrier that makes his participation in community processes especially difficult, particularly . . . with respect to the political life of [the defendant jurisdiction,] Bexar County.” 412 U.S. at 768 (emphasis added). 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 process in Texas . . . .” Id. Though 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. at 768, emphasis added, internal quotation marks omitted); and though that discrimination no doubt made the language and cultural barrier both larger and more persistent than it would otherwise have been; it’s at least arguable that a language barrier would have been present even if white Texans had not discriminated against Mexican immigrants. And if “language and cultural barriers” may substitute, as it were, for evidence of race-biased decisionmaking, 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. See id. at 766-69. And, as noted above, when congressional proponents of the results test tried to explain what differentiates “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 notes 184-187.
there’s a solid constitutional-avoidance argument against this approach. But if plaintiffs must show race-discriminatory decisionmaking “to a significant likelihood,” the constitutional objection to the results test would evaporate.

This follows from Justice Kennedy’s opinion for the Court in Boerne. Recall that the Religious Freedom Restoration Act flunked Boerne’s “congruence and proportionality” test because the Act reached broadly and “was not designed to identify and counteract state laws likely to be unconstitutional because of their treatment of religion.” The Court specifically allowed, 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.” My formulation of the intent requirement under Section 2 takes the same idea and applies it at a retail level—not “prohibiting certain types of laws” across the board, but applying heightened scrutiny to particular voting requirements when a case-specific “significant likelihood” showing has been made.

This resolves the Boerne objection to Section 2 in those cases where the plaintiff’s showing concerns discrimination by conventional state actors. If, for example, the state actors in question were responsible for the enactment of the law that plaintiffs have challenged, then judicial invalidation of that law would be a pretty effective way of eliminating current constitutional violations (by hypothesis, the invalidated law was at least “significantly likely” to violate the Constitution). If, instead, the state actors in question exercise discretion under an innocuously motivated law,

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204 A conventional-institutional 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 intentional discrimination by the state actors who adopted the unconventional system. But whatever the viability of the conventional-institutional 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.” The enacting Congress clearly objected to electoral structures that give effect, as it were, to private discrimination and/or state discrimination in non-electoral realms (e.g., education).


206 Id. at 534-35 (emphasis added).

207 Id. at 532 (emphasis added). See also id. at 525-27 (discussing and approving of the VRA’s ban on literacy test, in light of the “long history of the discriminatory use of literacy tests to disfranchise voters on account of their race”).

208 Id. at 532.

209 A Section 2 targeted in this way might nonetheless fail the congruence-and-proportionality test if its requirements were incredibly intrusive. But the common law understanding of Section 2 allows this problem to be solved via judicial glosses on the statute. See infra text accompanying notes 250-252.
then judicial modification of that law so as to curtail discretion can be understood as a reasonable prophylactic measure against future constitutional violations otherwise “significantly likely” to occur. (The Boerne Court expressly authorized Congress to enact forward-looking measures to reduce the likelihood of future constitutional violations.\textsuperscript{210}) And if the state actors in question act in non-electoral realms, judicial reformation of a law that gives their actions electoral effect, as it were, would alleviate an especially noxious downstream consequence of “significantly likely” constitutional violations. (Compare 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.”\textsuperscript{211})

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,\textsuperscript{212} and seemingly the White Court as well.\textsuperscript{213} 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?\textsuperscript{214} The answer lies in the problem of election outcomes that are unconstitutional because 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.

\textsuperscript{210} 521 U.S. at 533 (noting that Congress may act under the Fourteenth Amendment “to remedy or to prevent unconstitutional state action”) (emphasis added). See also Karlan, supra note 119, at 729 (emphasizing this point).

\textsuperscript{211} 521 U.S. at 526. See also Karlan, supra note 119, at 728-29 (elaborating this idea).

\textsuperscript{212} See supra Part II.B.1.

\textsuperscript{213} See supra text accompanying notes 174-175.

\textsuperscript{214} Note in this regard that the modern Supreme Court has consistently rejected the notion that there is a compelling state interest in remedying societal discrimination. See Shaw v. Hunt, 517 U.S. 899, 909-10 (1996), and cases cited therein.
The secret ballot, adopted more than a century ago, is probably integral to lay understandings of what it means for an election to be fair.\textsuperscript{215}

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.”\textsuperscript{216} Karlan and Levinson’s position has at least tacit support from the Supreme Court. In \textit{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:

\begin{quote}
[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.\textsuperscript{217}
\end{quote}

The implication of \textit{Anderson} seems to be that, while state action designed to foster racially discriminatory voting is unconstitutional, citizens may cast their ballots for the very reasons the Constitution denies to the states.\textsuperscript{218} (For purposes of this paper, I will assume this to be true.)

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.”\textsuperscript{219} This was not a careless dictum. It justified the Court’s invalidation, in \textit{City of Cleburne v. Cleburne Living Center}, of a popularly adopted restriction on group homes, one which “rest[ed] on an irrational prejudice against the mentally retarded.”\textsuperscript{220} It made sense of several earlier decisions in which the Supreme Court invalidated

\begin{footnotes}

\item[215] In keeping with this, courts are extremely reluctant to compel anyone to disclose how she voted, unless the voter stands accused of fraud. Steve Huefner, \textit{Remedying Election Wrongs}, 44 Harv. J. Legis. 265, 290-91 (2007).
\item[217] 375 U.S. 399, 402 (1964).
\item[218] \textit{See also} Romer v. Evans, 517 U.S. 620, 634 (1996) (stating that right to vote may not be denied on basis of citizen’s espousing of offensive positions); Kirsey v. City of Jackson, 663 F.2d 659 (5th Cir. 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).
\item[220] \textit{Id.} at 450.
\end{footnotes}
facially neutral, voter-enacted laws on equal protection grounds.\textsuperscript{221} And it has been honored by the Court in the years since \textit{Cleburne}.\textsuperscript{222}

The seemingly incompatible precepts of \textit{Anderson} and \textit{Cleburne} can be reconciled. Here’s the key: the citizen’s right to vote “for any reason he pleases” is a personal right, and does not entitle the individual 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. More specifically, \textit{if the number of race-biased votes cast for the winning candidate (or ballot measure) exceeds the margin of victory, \textit{the election outcome is presumptively unconstitutional.}}\textsuperscript{223}

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 any reason he pleases,” he may not exercise political power “for any reason he pleases.” It may seem odd to think of the right to vote as separate and apart from the exercise of power, but this is more or less how the Supreme Court has come to understand it.\textsuperscript{224}

\begin{footnotesize}
\textsuperscript{221} See, e.g., Seattle Sch. Dist. No. 1 v. State, 458 U.S. 457, 471-80 (1982) (invalidating initiative that prohibited school busing while creating an exemption for numerous purposes other than racial integration, and explaining that the content of the initiative coupled with the circumstances of enactment supported an inference of discriminatory purpose); Hunter v. Erickson, 393 U.S. 385 (1969) (invalidating amendment to city charter, created by ballot initiative, which required certain antidiscrimination measures to pass a referendum vote); Reitman v. Mulkey, 387 U.S. 369 (1967) (striking down initiative that purported to create state constitutional right to alienate property in violation of state antidiscrimination statutes; discriminatory voter purpose inferred from context). Note that the decision in \textit{Seattle Sch. Dist.}, postdated the consolidation of “intent based” equal protection jurisprudence in \textit{Washington v. Davis}, 426 U.S. 229 (1976), and \textit{Personnel Adm’r of Mass. v. Feeney}, 442 U.S. 256 (1979).

\textsuperscript{222} See, e.g., City of Cuyahoga Falls v. Buckeye Community Hope Found., 538 U.S. 188, 194-97 (2003) (stating that evidence of “discriminatory voter sentiment” can be basis for invalidating referendum measure on equal protection grounds); Romer v. Evans, 517 U.S. 620, 635 (1992) (“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 \textit{Romer} Court’s easy equation of the state and the electorate.

\textsuperscript{223} Under standard equal protection doctrine, this presumption may be overcome if the defendant can show that result would not have changed were the impermissible motives stripped away, or if the result is necessary to a compelling state interest. See Village of Arlington Hts. v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977).

\textsuperscript{224} Despite some early language to the contrary, the Supreme Court has made it very clear that the constitutional right to vote “on equal terms with others” does not encompass a right to be “effective” as a voter, i.e., to participate in elections reasonably structured to enable the normative electorate to make preference-conforming choices and to hold the
My margin-of-victory formulation of the *Cleburne* principle is new, but a near analogue can be found in illicit-purpose cases involving multi-member public bodies. Imagine a First Amendment/free-exercise challenge, brought by a church, to a zoning board’s denial of the plaintiff’s application for a permit to expand. The zoning board has five members. The plaintiff shows that one of the members who voted to deny the church’s application was motivated by religious bigotry. If the board denied the permit by a vote of 3:2, courts generally will overturn the denial. But if the vote was 4:1, courts will let it stand. In the latter case, though one of the decisionmakers acted on improper motives, the decision itself was not contaminated, because the bigoted vote was not necessary to the outcome.  

The *Cleburne* principle is well established in constitutional challenges to legislation enacted by plebiscite, but it appears that no court has even been asked to invalidate the outcome of an election for public office because it “rested on prejudice.” Professor (now Dean) Sager once remarked that this would be inconceivable, yet I see no principled and doctrinally tethered basis for saying that a racist electorate’s choice is constitutionally protected in the case of representative but not plebiscitory elections. One might try to distinguish the two scenarios on the ground that a popularly approved referendum creates binding law, whereas the election of a representative does not, as such, bring the power of the state directly to bear on any of its citizens. Yet the equal protection clause applies to state action generally, not just to state actions that directly coerce or tangibly burden particular, identifiable citizens. Absent such a discrete harm, private parties may not have standing to bring suit, 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 government to account. See Elmendorf, *supra* note 106, at 1084-89, and sources cited therein.  

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226 But the intuition that election-for-representative outcomes are unconstitutional when they rest on prejudice is arguably reflected in *Terry v. Adams*, 345 U.S. 461 (1953), an otherwise perplexing case in which the Court deemed a racist, privately constituted organization that conducted advisory primary elections to be a state actor. *Terry*’s classification of a privately constituted 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 to all white registered voters).  


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

229 Technically, the “public function” prong of state-action doctrine asks whether the power at issue was “traditionally exclusively reserved to the State.” *Jackson v. Metropolitan*
that directly bind the citizenry. No one can doubt that 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—if his margin of victory was provided by voters who acted on the same motives as the mayor.230

Edison Co., 419 U.S. 345, 352 (1974). One might think that the fact that certain offices have sometimes or often been elected rather than appointive means that the power to select that official is not by tradition exclusively reserved to the State. But that reads the doctrine out of context, which concerns not the distinction between election and appointment, but between powers that have been exercised individually by private actors (persons, corporations) and voluntary associations thereof, and powers that in our tradition may not be exercised individually. See, e.g., Jackson, 419 U.S. at 353 (“supplying of utility service is not traditionally the exclusive prerogative of the State”); Marsh v. Alabama, 326 U.S. 501 (1946) (holding that administration of a “company town” is state action); Evans v. Newton, 382 U.S. 296 (1966) (holding that operation of a longstanding municipal park, since transferred to private ownership subject to requirement of continued operation on behalf of city residents, remains state action). It is beyond cavil that in our constitutional tradition, private actors may not individually appoint persons who will exercise the public, coercive authority of the state. See, e.g., Texas Boll Weevil Eradication Found. v. Lewellen, 952 S.W.2d 454, 457 (Tex. 1997) (invalidating delegation of legislative authority to private board). Cf. Carter v. Carter Coal Co., 298 U.S. 238, 311 (1936) (holding that delegation to subset of producers of power to set minimum wages for all producers is “is legislative delegation in its most obnoxious form [and clearly a denial of rights safeguarded by the due process clause of the Fifth Amendment]; 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”); Ball v. James, 451 U.S. 355, 366 (1981) (permitting landownership-based distribution of franchise in election for 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. Chicago Bd. of Educ., 64 F.3d 1098, 1102-03 (7th Cir. 1998) (Posner, J.) (exempting local schools councils from rule of “one person, one vote” because “they have no power to tax directly and they also have no power to tax indirectly”).

230 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 an elected official who is filling offices with significant policymaking responsibilities. See, e.g., Duke v. Massey, 87 F.3d 1226 (11th Cir. 1996) (holding that party committee may discriminate against candidate on basis of candidate’s racist views); LaRouche v. Fowler, 152 F.3d 974 (D.C. Cir. 1998) (holding that party convention may discriminate against candidate deemed insufficiently committed to party platform); Rutan v. Republican Party, 497 U.S. 52, 70 & n.5 (1990) (recognizing “policymaking position” exception to general First Amendment prohibition on government employment discrimination on basis of ideology). Like the electorate, political parties may not discriminate on the basis of race in selecting candidates for office. See Smith v. Allwright, 321 U.S. 649 (1944) (holding that Democratic Party of Texas is a state actor insofar as it race-discriminates in determining who may vote in its primary).
b. “Political Questions” and Congressional Enforcement

That there is no state-action difference between the Klansman-for-sheriff hypothetical and the racist ballot initiative does not mean that courts should treat the two cases the same way. The problem of unconstitutional electorate motive (hereafter, “Cleburne violations”) in elections for representative should almost certainly be held to present a nonjusticiable political question, 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.

To see the political question point, consider first how courts have determined electorate motive in the plebiscite cases. Some courts look exclusively at the text of the measure. They will infer an illicit motive only if the measure is so bizarre or poorly tailored as to defy the legitimate purposes brought forth on its behalf. Other courts consider election-related information (such as campaign advertisements, or public-opinion studies), but such evidence plays at most a supporting role. Election

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231 Very rare circumstances may present exceptions to this general rule. Cf. note 226, supra (suggesting that Terry v. Adams, 345 U.S. 461 (1953), is best understood as an electorate motive case).

232 The leading case is Arthur v. City of Toledo, 782 F.2d 565, 573-74 (6th Cir. 1986) (mandating this approach on the basis of voter privacy concerns). See also Kirksey v. City of Jackson, 663 F.3d 659, 661-62 (5th Cir. 1981) (rejecting equal protection challenge to referendum measure because 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 (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 goes for Romer v. Evans, the Supreme Court’s principal post-Arthur plebiscite case. See 517 U.S. at 631-35 (inerring animus on basis of unusual nature of state constitutional amendment and the fact that “its sheer breadth [was] so discontinuous with the reasons offered for it”). But see City of Cuyahoga Falls v. Buckeye Community Hope Found., 538 U.S. 188, 194-97 (2003) (stating in dicta that evidence of “discriminatory voter sentiment” can be basis for invalidating referendum measure).

233 See supra note 232.

234 The most dramatic example is Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 973-71, 1002-03 (N.D. Cal. 2010), which relies on campaign advertisements, proponents' statements and correspondence, the history of anti-gay ballot campaigns, and political scientists' testimony in determining the likely motive behind a California initiative banning same-sex marriage. But, significantly, the Perry Court turned to this evidence only after determining that the measure bore no rational relationship to a legitimate public purpose, id.
evidence may corroborate the judge’s initial inference of motive, based on
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 hypothetically 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’ll strike it down.

An analogous “objective purpose” test 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 reasonable
person could vote for candidate X, given the other options, on non-racist
grounds. Almost certainly this is a question “impossib[le to] decide[ ]
without an initial policy determination clearly for nonjudicial discretion”
and therefore a nonjusticiiable 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 which suggests that Article III courts have any
business making this judgment. While the “electorate as a whole” 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.

Other branches of the political question doctrine also counsel for
judicial abstention from motive-based challenges to the outcome of elections
for public office. To reach the merits of a constitutional claim, courts must
be able to craft a manageable standard for implementing the underlying
constitutional norm. As the Court made clear in Vieth v. Jubelirer, what
counts as a manageable standard depends on the political stakes of the
dispute. 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 extremely unlikely that the courts could ever
device such a standard for electorate-motive cases about elections for
representative, especially in light of privacy values that prevent courts from

at 963-73, 997-1002 (“In the absence of a rational basis, what remains of proponents’ case is
an inference, amply supported by evidence in the record, that Proposition 8 was premised on
the belief that same-sex couples simply are not as good as opposite-sex couples.”). See also
Buckeye Community Hope Found. v. City of Cuyahoga Falls, 263 F.3d. 627, 637 n. 2 (6th
Cir. 2001), rev’d on other grounds 538 U.S. 188 (2003) (criticizing Arthur, seemingly
in favor of an Arlington Heights-style approach to electorate motive, i.e., weighing impact,
historical context, procedural history, and specific evidence of decisionmaker intent).

Cf. McCreary County, Ky. v. Amer. Civil Liberties Union, 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).


See supra Part II.A.2.a.
subjecting voters to compulsory “thought process” examinations. (The need for a constraining standard is arguably not so great in plebiscite cases, since a court’s decision concerning a ballot initiative is less likely to be seen as favoring one of the major political parties at the expense of the other.)

Motive-based challenges to elections for representative would also implicate the branch of the political question doctrine concerned with “an unusual need for adherence to a political decision already made.”238 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; the same cannot be said for a sitting lawmaker who has been diverted from the business of governing by a legal challenge to her election.

Even assuming that judges could produce correct merits rulings in 
Cleburne challenges to elections for representative, the courts would then be faced with incredibly awkward remedial choices. Should the second place candidate be declared the victor? (A remedy sure to be loathed by any judge worried about judicial entanglement in politics.) Should the court instead order a special election? (But what is to prevent the expression of racial bias in this election?) Should the court restore the previous representative to office? (But what if she was trounced in the election, or did not run?) For purposes of Cleburne challenges to elections for public office, there is no satisfactory remedial counterpart to the enjoining of direct legislation that was enacted for unconstitutional reasons.239 This too counts in favor of treating the violation as nonjusticiable.

What does this mean 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 enforcement clauses of the Fourteenth Amendment 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

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238 Baker, 369 U.S. at 217.
239 Except in very rare circumstances, and even then only to a limited degree. Cf. note 226, supra (discussing Terry v. Adams, 345 U.S. 461 (1953)); Issacharoff et al., supra note 46, at 223 (observing that the remedy in Terry, meant to integrate blacks into an all-white endorsement-making organization on which the white electorate had relied, resulted in dissolution of said organization).
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. 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 what I have termed “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) so as to enable the election of more minority champions even if racially biased voting continues unabated. The remedy for a meritorious depolarization claim would be to change the electoral arrangements that induce or sustain racially biased voting, thereby reducing the amount or frequency of such voting in the future.\textsuperscript{240} The latter is superior as a means of combating \textit{Cleburne} violations. The less racially biased voting there is, the less likely it is that the winner of any given election will be determined by racially biased votes. By contrast, the redesign of legislative districts so as to enable the election of more minority-preferred candidates does not, as such, prevent \textit{Cleburne} violations.\textsuperscript{241} The pattern of \textit{Cleburne} violations could continue unabated—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 \textit{Boerne}’s congruence-and-proportionality test. Imagine a mandate from Congress that all citizens be tested for racial bias prior to voting, and that the “most biased 10%” be denied the franchise. If the testing technology were sound, this regime would almost surely reduce the likelihood of \textit{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.”\textsuperscript{242} Congress in enforcing one constitutional norm ought not to run roughshod over another. The courts should and no

\textsuperscript{240} Note that in conventional dilution cases, it may also be possible (though unprecedented) to craft depolarization remedies where race-biased voting is endogenous to the electoral system. But in such cases, the choice between this remedy and a conventional representation-oriented remedy would presumably be up to the defendant, for it is black letter law that a “defendant found liable under Section 2 must be given an opportunity to propose a remedy, which remedy 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.” \textit{U.S. v. Euclid City Sch. Bd.}, 632 F.Supp.2d 740, 750 (N.D. Ohio 2009) (internal citations and quotations marks omitted). \textit{See also} Upham v. Seamon, 456 U.S. 37 (1982).

\textsuperscript{241} Though it might indirectly. \textit{See supra} notes 99-104 and accompanying text.

\textsuperscript{242} Anderson v. Martin, 375 U.S. 399, 402 (1964).
doubt would look askance at any depolarization strategy that punishes or reprimands individual voters who cast their ballots for racial reasons.

Not all depolarization strategies are objectionable in this way, however. To canvass the relevant political science literature is beyond the scope of this paper, but to illustrate my point, here are a few examples. 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. Legal 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

243 Most of this work compares partisan and nonpartisan elections. See, e.g., Citrin et al., *White Reactions to Black Candidates - When Does Race Matter?*, 54 PUB. OPINION Q. 76 (1990) (demonstrating that various antiblack attitudes had a powerful effect on candidate preferences in a biracial, nonpartisan contest for California’s state superintendent of schools, but not in a (concurrent) biracial, partisan context 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 (2007) (reporting results of simulated judicial election showing that voters who score high on various measures of implicit and explicit racial bias were likely to vote against the Latino 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 CANAD. J. PSYCH. 205 (1958) (reporting results of experiment showing that Canadian voters with no information about candidates other than ethnicity vote on that basis, and that introduction of partisan cue renders candidate ethnicity irrelevant); Lorinkas et al., *The Persistence of Ethnic Voting in Urban and Rural Areas: Results from a Controlled Method*, 49 SOC. SCI. Q. 891 (1969) (finding, in simulated elections, that Polish-American voters were more likely to vote on the basis of ethnic cue using nonpartisan than party-labeled ballots); Peverill Squire & Eric R.A.N. Smith, *The Effect of Partisan Information on Voters in Nonpartisan Elections*, 50 J. POL. 169 (1988). (showing that black and Latino respondents were less likely to favor own-race candidates in a judicial retention election when informed about the governor who appointed each judge who was up for election); cf. Benjamin Highton, *White Voters and African American Candidates for Congress*, 26 POL. BEHAV. 1 (2004) (finding “little aversion of white voters to black candidates” at the general election stage of competition for seats in Congress). See also Jeremey N. Bailenson et al., *Facial Similarity Between Voters and Candidates Causes Influence*, 72 PUB. OPIN. Q. 935 (2008) (reporting results of experiment on preference for candidates that look like the voter; the effect is strongest with respect to unfamiliar candidates); Marsha Matson & Terri Susan Fine, *Gender, Ethnicity, and Ballot Information: Ballot Cues in Low-Information Elections*, 6 STATE POL. & POL’Y Q. 49 (2006) (providing evidence of voter reliance on ethnic and gender cues in a class of low-information elections, and showing that effect may be neutralized with sufficient campaign spending); McDermott, *Race* (showing that voters in low-information elections 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 (1995) (showing that white voters stereotype black candidates as more compassionate and less competent than white candidates).

Several studies have also shown that the provision of photographs on the ballot induces voters to use candidates’ race or color as a voting cue. See, e.g., Andrew Leigh & Tirta Susilo, *Is Voting Skin Deep? Estimate the Effect of Candidate Ballot Photographs on Election Outcomes*, 30 J. ECON. PSYCH. 61 (2009); Susan A. Banducci et al., *Ballot Photographs as Cues in Low-Information Elections*, 29 POL. PSYCH. 903 (2008).
race-biased voting. Second, the experience of being represented by a minority officeholder tends to increase majority-group voters’ willingness to support minority candidates in the future, and to diminish negative stereotyping of minorities both in the electoral domain and elsewhere, so long as the minority officeholder is responsive to majority-group concerns. Legal reforms that facilitate the election of minority candidates backed by cross-racial coalitions (especially to visible and powerful executive offices, such as mayor) are likely to reduce race-biased voting. 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. This thesis, though contested, has a number of interesting implications for the design of electoral districts and vote-aggregation rules.

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244 On legal strategies for increasing the informational value of party cues, see David Schleicher & Christopher S. Elmendorf, The Known Unknowing: On Voter Ignorance, Political Parties, and Party Substitutes (unpublished manuscript, on file with author).

245 See supra text accompanying notes 99-104.

246 One way to do this, in cities with large minority populations but low minority voter turnout (as is common) 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).


249 For example: (1) 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. (2) Under a system of instant-runoff voting, the goal of electing candidates with cross-race constituencies can likely be furthered by substituting the “Coombs Rule” for vote tabulation for the conventional instant-runoff algorithm. See Bernard Grofman & Thomas 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 (2004) (proving theorem about moderating properties of the Coombs rule). Finally, where the majority and minority groups live in very segregated communities, it may be beneficial to use multi-member electorate districts with a vote-pooling rule, see Reilly, supra note 247, at
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 casts their ballots, and that do not intrude on the citizen’s autonomy to cast her ballot for whatever reasons she pleases.

That said, depolarization remedies under Section 2 could fail the congruence-and-proportionality test in a more conventional manner: by imposing “federalism costs” out of proportion to the constitutional violations prevented or remedied. A depolarization-minded Section 2 whose requirements were heavy handed, whose reach was broad, and whose duration was unlimited, might well be struck down on this basis, depending on the evidence concerning the likely frequency of Cleburne violations. But if I am right that Section 2 delegates authority to the courts to develop a body of common law to abate, or compensate for, racially charged voting (as well as racially biased decisionmaking by conventional state actors), this type of Boerne problem can be easily avoided through judicious glosses on the statute.

The courts could hold, for example, that Section 2 proscribes electoral arrangements that encourage or sustain race-based voting only if they are all-things-considered “unreasonable.” (The Supreme Court has already said that dilutive electoral arrangements do not violate Section 2 if they well serve important state interests. 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. And the courts could craft proximate-causation requirements
to limit liability in cases where race-biased decisionmaking bears only an attenuated relationship to the electoral inequality at issue.

3. Summary

Section 2’s delegation of authority, though textually opaque, is not entirely open-ended. The statute’s legislative history and constitutional context, read together, provide significant guidance. They jointly establish (1) that Section 2 provides causes of action against both dilution and participation injuries; (2) that an injury within the meaning of Section 2 has occurred only if the inequality at issue owes 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. The legislative history and constitutional context further suggest—though they certainly do not compel—that courts should read Section 2 to provide a cause of action against electoral arrangements that unnecessarily induce or sustain race-biased voting, whatever the consequences for the minority community’s ability to elect a suitable number of its candidates of choice.

My conceptualization of Section 2 as a delegation of authority to develop a common law of racially fair elections, guided by certain substantive and evidentiary norms, leads to a further question. Is Section 2 a full blown “common law statute” for stare decisis purposes? Or should Section 2 precedents be treated like conventional statutory precedents, whose stare decisis effect is very strong? The answer will have significant implications for the law of Section 2 going forward, given that the results test has been encrusted with almost thirty years of judicial holdings. (That said, because the Supreme Court’s Section 2 jurisprudence leaves so much conceptually unresolved, the Court could adopt my account of Section 2’s guiding norms without overruling its own precedents, save for some dicta in Chisom v. Romer.

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

The convention of “super strong” statutory stare decisis is well established but not unyielding. There is a nascent exception for so-called

\[\text{\textsuperscript{253} See supra Part I.A.}\]

\[\text{\textsuperscript{254} See infra text accompanying notes 303-307.}\]

\[\text{\textsuperscript{255} Eskridge, supra note 123, at 1364-84 (discussing the principle and several arguable exceptions).}\]
common law statutes. The leading example is the Sherman Act. Nowadays the Court freely jettisons Sherman Act precedents that have been undermined by developments in social science, or larger trends in the law.

Does it follow from the dynamic understanding of amended Section 2’s return to White that Section 2 is a “common law statute” (more accurately, a common law statutory section) for stare decisis purposes? This is a plausible but not necessary conclusion. Professor Eskridge, relying on the principle that administrative agencies are generally free to change their statutory interpretations over time, argues that courts should be similarly unencumbered when delegated authority to implement open-textured statutory terms. But this is not obviously correct.

For one, administrative agencies are free to change judicial interpretations of the statutes they implement only if Congress has delegated to the agency authority to issue “rules with the force of law,” and the agency properly exercises that authority. This generally requires the use of notice-and-comment rulemaking. Notice-and-comment rulemaking is a participatory process and, absent a clear statement from Congress, results in rules that have prospective effect only. Adjudication by Article III courts is much less participatory and yields decisions with retroactive effect. Courts do not provide advance notice to the general public and an opportunity to comment before they overrule precedents.

Strong stare decisis has familiar benefits: certainty for regulated parties, reduced decision costs for courts, and likely a deterrent effect on adventuresome judicial policymaking. A Congress that drafts a broadly worded statute without delegating implementation to an administrative agency necessarily devolves some policymaking responsibility on courts. But a rational congressperson who votes for such a statute might nonetheless want judicial interpretations of it to receive super-strong stare decisis. This congressperson might view the statutory stare decisis convention as a useful check on courts “going too far” in the exercise of their policymaking responsibilities, or simply conclude that policymaking benefits of weak-

256 See, e.g., Leegin Creative Leather Products, 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 . . . [but s]tare 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).
257 See id., and cases cited therein.
258 Eskridge, supra note 123, at 1377-78.
form *stare decisis* are outweighed by the costs in terms of legal certainty. Indeed, one might venture that the congressional choice to delegate implementing authority to Article III courts rather than to an agency signals a preference for legal stability and continuity.

For these reasons, it is at least plausible to think that the classification of a statute as “common law” or “weak” for *stare decisis* purposes ought to require more than a vague statutory standard whose implementation is delegated to the courts. And in point of fact, the Supreme Court does require more. In the case of the Sherman Act, for example, the Court bottomed its flexible approach on the intent of the enacting Congress.

Where does this leave Section 2? The legislative history, which does not even engage whether Section 2’s “return to *White*” should be understood dynamically, is of no help. But I shall argue here that other factors nonetheless warrant a presumption of weak-form *stare decisis* for Section 2 precedents. These include (1) the fact that the statutory standard bears directly on the distribution of political power among groups, and (2) the statute’s racial subject matter. Several more conventional considerations also tend to soften the *stare decisis* effect of Section 2 precedents.

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 relatively bright line rules if the standard concerns the distribution of political power among groups. 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 confine and limit judicial discretion.”

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263 Plausible, but not a given. Going the other way, Eskridge would have the courts abandon the convention of super-strong statutory *stare decisis*. Eskridge, supra note 123, at 1385-1409.

264 State Oil Co. v. Khan, 522 U.S. 3, 20 (1997) (“the 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”) (internal citations omitted); Business Electronics Corp. v. Sharp Electronics 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. Engineers v. U.S., 435 U.S. 679, 688 (1978) (“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”).

265 *See supra* Part II.A.

266 *See supra* text accompanying notes 146-152.

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

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-form *stare decisis* for power-distributing statutes would undermine the very point of fashioning rules from vague standards. A judge-made rule cannot “confin[e] and limit judicial discretion” if the judge has untrammeled freedom to change the rule in the next case. But this objection overlooks the hierarchical organization of the judiciary. Even if the Supreme Court understood itself to have complete discretion to overrule its VRA precedents, for example, a rule-like Supreme Court precedent would do a tremendous amount to “confin[e] and limit judicial discretion,” 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.268

2. *Disguising Racial Remedies (the Politics of Race)*

Weak-form *stare decisis* for Section 2 precedents might also be justified on the basis of a substantive canon that would give effect to what we might term the “race premises” of the judicial center. Since the mid-1970s, the center of opinion on the Supreme Court has maintained (1) that state action that singles out particular racial groups for favored treatment is inherently divisive;269 (2) that the organization of politics on racial lines tends to

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269 This is why express racial classifications trigger strict scrutiny, even if benignly intended. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 722 (1989) (“Classifications based on race carry a danger of stigmatic harm. Unless they are strictly
inflame racial conflict; and (3) that the persistent correlation between race and socio-economic “outcomes” represents a serious, festering wound in the social fabric, given our history of discrimination.

Modern equal protection doctrine gives the government considerable leeway to try to close outcome gaps, but only if the policies in question are couched in race-neutral terms, or at most treat race as one relevant—and ambiguously weighted—factor among many. This strategy has twin benefits, at least if one grants the premises set forth in the last paragraph. It avoids the inherent divisiveness of the overt, transparent distribution of public benefits on racial grounds. And the policies it encourages are likely to draw support from cross-race political coalitions.

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. Federal judges and state boards of regents receive a measure of deference for their race-minded remedial measures; city councils, mayors, and state legislators are viewed much more skeptically. This practice has been defended as a

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) (opinion of Powell, J.).

See supra Part I.B.

This point is rarely if ever made explicitly, but it provides a plausible explanation of why the center of opinion on 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 Community Schools v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 788-89 (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 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 citation and quotation marks omitted).


Because race-specific benefits are disallowed, proponents of policies to close the racial outcomes gaps must push for broader policies, and this encourages proponents to identify other constituencies who might benefit from the broader policy, and to forge political coalitions accordingly.


Id.
way of closing outcome gaps without simultaneously engendering a divisive politics of racial spoils.\footnote{276}

The premises that inform these doctrinal and subdoctrinal features of equal protection jurisprudence also have implications for statutory interpretation. They would support a substantive canon favoring dynamic interpretation and weak-form \textit{stare decisis} for statutes that seek to remedy race discrimination and its legacy. This canon would, in effect, make the courts rather than the legislature the primary “lawmaker” in the face 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, 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 front-line policymakers on questions of race. Part of the courts’ job is to discourage narrowly racial electioneering and legislative activity. To give \textit{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.\footnote{277} The courts’ failure to respect and enforce particular bargains ex post diminishes legislators’ incentives to forge those bargains in the first place. The result may be a reallocation of legislative effort 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.\footnote{278} Which, one might think, is precisely as it should be.

Let me 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

\footnote{276 }Id.
striking implications for statutory interpretation and, more particularly, for statutory *stare decisis*.\textsuperscript{279}

3. Some Conventional Considerations

The political-question and “politics of race” considerations surveyed above provide the most convincing grounds for treating Section 2 as a common law statute, akin to the Sherman Act, for *stare decisis* purposes.\textsuperscript{280} It bears noting, however, that the Supreme Court in overruling statutory precedents has traditionally relied on a mishmash of factors;\textsuperscript{281} the classification of the underlying statute as “common law” has rarely been decisive and in many cases is not even part of the analysis (although this may be changing).\textsuperscript{282} Other prominent considerations include whether the precedent in question is procedurally flawed,\textsuperscript{283} and whether it has engendered substantial reliance.\textsuperscript{284} As well, several Justices have suggested that civil rights precedents should have weaker *stare decisis* effect than other statutory precedents; the thinking here is that statutory civil rights law ought to track ongoing developments in the judicial understanding of correlative constitutional provisions.\textsuperscript{285}

These considerations soften the force of many Section 2 precedents. Section 2 is, of course, a civil rights statute, one adopted pursuant to constitutional provisions (the enforcement clauses of the 14th and 15th Amendments\textsuperscript{286}) whose meaning has been transformed by the courts in the years since 1982.\textsuperscript{287} As for reliance interests, Section 2 regulates public

\textsuperscript{279} 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 (Parts II.A, II.B, *supra*). Judicial transparency makes it easier for Congress to respond (Part II.A.1, *supra*), and for interest groups too; as well, the act of labeling certain decisions as “significantly likely” (or not) to be racially biased may engender public controversy. This is certainly a cost, given the premises of the judicial center, but it may be an imperative cost--for clarifying the normative and evidentiary function of Section 2 seems necessary both to guide the lower courts and to ensure that the statute is deployed for constitutionally proper purposes.

\textsuperscript{280} Convincing, that is, for a pragmatic judges who accept the race premises of the judicial center.

\textsuperscript{281} Eskridge, *supra* note 123, at 1369-84.

\textsuperscript{282} Writing in the 1990s, Eskridge observed that the common-law statute exception, first suggested by Justice Stevens, was not widely followed. *Id.* at 1377-79. Whether *Leegin* marks a turning point in the development of the exception remains to be seen.

\textsuperscript{283} *Id.* at 1369-76 (explaining this exception, and noting that Court often stretches to justify overrulings on this ground).

\textsuperscript{284} *Id.* at 1382-84.

\textsuperscript{285} *Id.* at 1376.

\textsuperscript{286} Senate Report, *supra* note 116, at 39.

\textsuperscript{287} The transformation is clear with respect to the enforcement clause of the 14th Amendment: *Boerne* is commonly described as a revolutionary decision. *See*, *e.g.*, Luis
rather than private, commercial activity, and reliance interests are generally weaker in the former context. 288 Nor has Congress legislated in reliance on Section 2 precedents. 289 Finally, if the Supreme Court comes to accept my account of Section 2, the Court 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. 290 (The Court has not hesitated to dump precedents that rest on the constitutional avoidance canon when subsequent developments obviate the feared constitutional problem. 291)

D. Still Precarious? Revisiting the Objections to Section 2

This Article began by recounting three prominent objections to the results test of Section 2. Let us take a moment to recap those objections, and to pull together the strands of my response to them. The objections are, first, that Section 2 is utterly opaque; second, that Section 2 may exacerbate racial conflict and thereby undermine the VRA’s ultimate objective to “hasten the waning of racism in American politics”; and, third, that Section 2 is constitutionally doubtful because 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.


288 For an influential statement of this view--albeit in dissent--see Monroe v. Pape, 265 U.S. 167, 221-22 (1961) (Frankfurter, J., dissenting) (observing, with respect to the Civil Rights Acts, “[i]t is not an area of commercial law in which, presumably, individuals may have arranged their affairs in reliance on the expected stability of [judicial] decision.”)

289 The Voting Rights Act 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 affect the law of Section 2. See H. Rep. 109-478 at 71.

290 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 123, at 1372. Thus, a failure to be briefed on, and to consider, an understanding of Section 2 and its constitutional function subsequently adopted by the Court would render earlier constitutional avoidance precedents “procedurally defective,” as the Court uses the term.

291 See, e.g., Griffin v. Brickenridge, 403 U.S. 88, 92-102 (1971) (reasoning, in overruling precedent, that “in light of the evolution of decisional law in the years that have passed since [the earlier case] was decided,” “it is clear . . . that many of the constitutional problems there perceived simply do not exist”).
These norms, when harnessed to the common-law understanding of judicial authority under Section 2, answer not only the “opacity” objection but also 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 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 considerable leeway to limit the disruptive effect of the results test through state-interest balancing, or by scaling back of the statute’s reach in response to racial progress. It also positions the courts to recognize and vindicate certain claims that the framers of Section 2 did not specifically anticipate, such as depolarization claims.

Depolarization litigation would prevent otherwise irremediable constitutional violations, and as such would solidify the status of Section 2 as a reasonable exercise of congressional enforcement authority. As well, the recognition of depolarization claims would remove any lingering doubts about whether Section 2 advances the VRA’s ambition to “hasten the waning of racism in American politics.”

III. SOME IMPLICATIONS FOR CIRCUIT SPLITS

It is beyond the scope of this paper to canvass all the implications of my account of Section 2 for the decisional law of Section 2. I leave for another day the nuts and bolts of depolarization claims; the possibility that defendants may be able to elect depolarization remedies in conventional dilution cases;\(^\text{292}\) and the question of whether any of the Supreme Court’s Section 2 holdings should be overruled. But to clarify that my theory of Section 2 has concrete, practical payoffs (and to consolidate the reader’s understanding of a few central points) this Part briefly relates my theory to some prominent circuit splits.

A. Is Proof of Intentional Discrimination Required Under Section 2?\(^\text{292}\)

In \textit{Nipper v. Smith}, a plurality of the \textit{en banc} 11th Circuit held that plaintiffs bringing a vote dilution claims under Section 2 must prove either:

(1) discriminatory intent on the part of legislators or other officials responsible for creating or maintaining the challenged system; or (2) objective factors that, under the totality of the circumstances, show the exclusion of the

\(^{292}\) \textit{See note 240, supra.}
minority group from meaningful access to the political process is due to the interaction of racial bias in the community [e.g., racist voting by whites against black candidates] with the challenged voting scheme.\textsuperscript{293}

The Nipper dissenters argued, by contrast, that the “totality of circumstances” inquiry under Section 2 should be directed solely to the question of whether “racial bloc voting impedes the ability of a geographically compact and politically cohesive racial minority to elect its preferred candidate[s]”\textsuperscript{294} in “proportion to [its] percentage of the area’s population.”\textsuperscript{295} On the Nipper dissenters approach, it is immaterial whether whites vote differently than blacks, for example, because white citizens are wealthier on average and vote their self interest, or because whites project negative racial stereotypes onto blacks.

The Nipper plurality’s understanding of Section 2 has carried the day in the First, Fifth, and Eleventh Circuits,\textsuperscript{296} and the Sixth Circuit has spoken favorably of it.\textsuperscript{297} The Second, Fourth, and Seventh Circuits have carved out an ambiguous middle ground, holding that plaintiffs need not to prove racial bias within the majority voting community, while insisting that the presence or absence such bias is “a factor” (or “a critical factor”) that courts should weigh once plaintiffs have satisfied the Gingles preconditions.\textsuperscript{298} The Ninth Circuit has held, by contrast, that a showing that majority-race and minority-race voters tend to prefer different candidates is the only relevant showing

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\bibitem{} 39 F.3d 1494, 1524 (11th Cir.1994) (Tjoft, J.) (emphasis added).
\bibitem{} Id. at 1552 (Hatchett, J., dissenting).
\bibitem{} Id. at 1555.
\bibitem{} Uno v. City of Holyoke, 72 F.3d 973, 981 (1st Cir. 1995) (“[P]laintiffs cannot prevail on a VRA § 2 claim if there is significantly probative evidence that whites voted as a bloc for reasons wholly unrelated to racial animus.”); Teague v. Attala County, Miss., 92 F.3d 283, 299 (5th Cir. 1996) (endorsing Nipper approach); Southern Christian Leadership Conf. of Ala. v. Sessions, 56 F.3d 1281, 1293-94 (11th Cir. 1995) (“[T]here was ample evidence in the record to support the court’s conclusion that factors other than race, such as party politics and availability of qualified candidates, were driving the election results and that racially polarized voting did not leave minorities with “less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.”).
\bibitem{} Clarke v. Cincinnati, 40 F.3d 807, 812-13 (6th Cir. 1994) (stating that the reasons for racial-bloc voting in the white community “can be relevant to a Section 2 inquiry,” while declining to reach the question of whether plaintiffs must make a “because of race” showing to prevail under Section 2).
\bibitem{} Goosby v. Town Bd. of Town of Hempstead, N.Y., 180 F.3d 476 (2d. Cir. 1999); U.S. v. Charleston County, 365 F.3d 341, 439 (4th Cir. 2004) (“the reason for polarized voting is a critical factor in the totality analysis”); Milwaukee Branch of the N.A.A.C.P. v. Thompson, 116 F.3d 1194, 1199-1200 (7th Cir. 1997) (stating that this factor is relevant, but cautioning that “[a] district judge . . . should not assign to plaintiffs the burden of showing why the candidates preferred by black voters lost”).
\end{thebibliography}
of “discrimination” for purposes of a vote dilution claim;\textsuperscript{299} the Tenth Circuit views the matter somewhat similarly.\textsuperscript{300}

On my theory of Section 2, all of these courts have it wrong. They have failed to see that the intentional-discrimination atom can be split: 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.\textsuperscript{301} Proof “to a significant likelihood” is enough.\textsuperscript{302}

B. Is Vote Dilution Necessary to Section 2 Participation Claims?

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 minority “voting strength.”\textsuperscript{303} But in \textit{Chisom v. Roemer}, the Supreme Court said otherwise.\textsuperscript{304} The relevant passage is arguably dicta,\textsuperscript{305} and it has generally been ignored by lower courts in the years since. But the Third Circuit, relying \textit{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.\textsuperscript{306}

My theory of Section 2 confirms the majority view. Contrary to \textit{Chisom}, Section 2 does provide an independent, stand-alone cause of action against participation harms, whatever the consequences for minority representation.\textsuperscript{307}

\textsuperscript{299} U.S. v. Blaine County, 363 F.3d 897 (2004) (conceding that liability under Section 2 obtains only if the plaintiff establishes a “causal connection” to racial discrimination (beyond a mere disparity in outcomes), while holding that a showing of “racial bloc voting” sensu \textit{Gingles} establishes the requisite causal connection).

\textsuperscript{300} Sanchez v. Colo., 97 F.3d 1303 (10th Cir. 1996) (reversing district court which had denied a Section 2 claim on the ground that race-correlated differences in candidate preferences owed to race-correlated differences in political party identification rather than racial bias, while allowing that in some unspecified set of cases, a showing that racial voting patterns were due to partisanship might suffice to defeat a Section 2 claim).

\textsuperscript{301} An exception is \textit{Blaine County}, supra note 299. But \textit{Blaine County} lowers the bar too far: when there are geographic and socioeconomic gaps between racial communities, there is scant basis for inferring race-biased decisionmaking (even to a “significant likelihood”) from the simple fact of race-correlated differences in vote choice.

\textsuperscript{302} See supra Part II.

\textsuperscript{303} See supra note 53 and accompanying text.

\textsuperscript{304} See supra note 54.

\textsuperscript{305} As Justice Scalia remarked in dissent, the \textit{Chisom} majority’s thesis that participation harms under Section 2 are not actionable absent a showing of dilution “is in any event not central to the present case.” 501 U.S. at 409.

\textsuperscript{306} On this view, plaintiffs have to show that removal of the participation barrier would, for example, enable the minority community to elect a larger number of preferred representatives.

\textsuperscript{307} See supra text accompany notes 163-177.
C. Does Section 2 Reach Felon Disenfranchisement?

Judges who have answered this question affirmatively stress the plain meaning of the term “voter qualification.” Judges who say “no” emphasize constitutional avoidance and the Boerne “congruence and proportionality” requirement for congressional enforcement legislation. On my account of Section 2, felon disenfranchisement laws are covered.

There is no reason for Boerne hand-wringing, because on my approach plaintiffs cannot prevail in challenges to a felony qualification without showing a “significant likelihood” of race-biased decisionmaking by the lawmakers responsible for the qualification, or by state actors in the criminal justice system. Moreover, Section 2 as interpreted by the Supreme Court

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308 See, e.g., Hayden v. Pataki, 449 F.3d 305, 346-58 (2d Cir. 2006) (en banc) (Parker, J., dissenting) (making the plain-meaning argument); Johnson v. Governor of Fla., 405 F.3d 1214, 1240 (2005) (en banc) (Wilson, J., dissenting) (“As a purely textual matter, a voting qualification based on felony status . . . falls within the scope of the VRA.”); id. at 1248 (Barkett, J., dissenting) (arguing that the language of Section 2 “is unambiguous, and compels a conclusion that it applies to felon disenfranchisement provisions.”); Farrakhan v. Washington, 338 F.3d 1009, 1016 (9th Cir. 2003) (“Felon disenfranchisement is a voting qualification, and Section 2 is clear that any voting qualification that denies citizens the right to vote in a discriminatory manner violates the VRA.”) (emphasis in original); Baker v. Pataki, 85 F.3d 919, 939-40 (2d Cir. 1996) (en banc) (Feinberg, J., for an equally divided court) (arguing that felon disenfranchisement statutes are within purview of Section 2 because the statute “covers any voting qualification”).

309 See, e.g., Hayden v. Pataki, 449 F.3d 305, 329-36 (2d Cir. 2006) (en banc) (Walker, J., concurring) (arguing that Section 2 would be unconstitutional as applied to felony qualifications for voting); Johnson v. Governor of Florida, 405 F.3d 1214, 1229 (2005) (en banc) (“interpreting Section 2 . . . to [cover felon disenfranchisement laws would] raise[] serious constitutional problems . . . “); Muntaquim v. Coombe, 366 F.3d 102, 126 (2d Cir. 2004) (vacated, superseded en banc) (concluding that if Section 2 was interpreted to reach felon disenfranchisement law, it would lack “congruence and proportionality between the injury to be prevented or remedied . . . and the means adopted to that end”); Farrakhan v. Washington, 359 F.3d 1116, 1121 (9th Cir. 2004) (Kozinski, J. dissenting from denial of rehearing en banc) (cautioning that “extending the VRA to reach felon disenfranchisement laws . . . seriously jeopardizes its constitutionality”); Baker v. Pataki, 85 F.3d 919, 930 (2d Cir. 1996) (en banc) (opinion of Mahoney, J.) (“[A]ny attempt by Congress to subject felon disenfranchisement provisions to the [‘results test’] would pose a serious constitutional question concerning the scope of Congress’ power to enforce the Fourteenth and Fifteenth Amendments”).

310 In the most recent felon disenfranchisement decision, Farrakhan v. Gregoire, 623 F.3d 990 (9th Cir. 2010), the en banc Ninth Circuit totally missed this point. Plaintiffs had introduced unrefuted statistical evidence showing that racial disparities in the criminal justice system could not be explained by a number of race-neutral factors. See Farrakhan v. Gregoire, 2006 WL 1889273 at *4-6 (E.D. Wash.). This doesn’t prove the disparities were due to race-biased decisionmaking, but it does raise a fair inference to that effect. Yet the 9th Circuit rejected the Section 2 claim, stating that plaintiffs were required to show “intentional discrimination” but had “presented no evidence of [it].” 623 F.3d at 993-94. The second
requires a weighing of the state interests offered in defense of the challenged requirement. There is, accordingly, no great “federalism cost” to reading Section 2 at face value for purposes of felon disenfranchisement claims. If a state can show that its felony qualification for voting serves important interests or is somehow essential to the polity’s self conception, that would weigh heavily against a finding of liability even if the plaintiff has made the requisite “significant likelihood” showing.

D. A “Voter Fault” Defense?

Some judges have surmised that if a reasonable voter would manage to comply with a voting requirement challenged under Section 2, that requirement does not violate the statute, because Section 2 guarantees only equality of opportunity, not equality of results. In the Sixth Circuit, for example, felony qualifications are nominally covered by Section 2 yet cannot violate the statute because the associated disenfranchisement results from individuals’ “conscious decision to commit a criminal act for which they assume the risks of detention and punishment.”

If my account of Section 2 is correct, however, “voter fault” is at most a factor to be weighed in cases where the challenged election law well serves substantial state interests, rather than an absolute defense. Section 2 aims to strip the electoral process of distortions caused by racial bias. Whether or not a citizen may be said to be “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 remains infected by racial bias insofar as the felony qualification for voting, the punch-card technology, or the convoluted absentee voting procedures owe their existence to discriminatory reasons, or give electoral effect to racial bias in, for example, the state’s criminal justice or educational systems. The harm exists independently of voter fault.

That said, the severity of the harm arguably depends on the substantiality of the barrier to minority participation, and the number of minority voters affected. It is for this reason that voter fault may be weighed in cases where the state has important, legitimate reasons for retaining the challenged electoral arrangements. State interests sufficient to

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312 See, e.g., Ortiz v. Philadelphia Office of the City Comm’rs Voter Reg., 28 F.3d 306, 315-17 (3d Cir. 1994) (suggesting that registrants purged for non-voting are at fault for failing to re-register); Wesley v. Collins, 791 F.2d 1255, 1262 (6th Cir. 1986) (rejecting felon disenfranchisement challenge under Section 2 on theory that voter is at fault for committing the crime).
313 Wesley, 791 F.2d at 1262.
justify a practice that results in the “light” transmission of racial bias into the electoral system may not be enough if the resulting barrier to minority participation is difficult for ordinary voters to surmount. That said, in weighing voter fault, courts should approach the question not from the point of view of a deracialized “reasonable voter.” One cannot make appropriate judgments about fault in a Section 2 case without considering, for example, the degree to which differences in voter capacity or interest owe to a history of discrimination in the state’s educational system.

IV. CONCLUSION

Section 2, the Voting Rights Act’s core provision of nationwide application, has fallen into disfavor. Critics portray it as conceptually vacuous, counterproductive in effect, and quite possibly unconstitutional for want of adequate tailoring to the prevention or remediation of actual constitutional violations. The legacy of this criticism has been a virtually unbroken string of narrowing interpretations at the hands of a conservative Supreme Court.

This Article has sought to resuscitate Section 2. I have developed and defended a new understanding of the results test and its constitutional function. On my account, 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. 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 both to limit and to 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 the Supreme Court’s Section 2 precedents that rely on the constitutional avoidance canon are vulnerable, but I haven’t explored whether they might be justified on other grounds. And I have said little about how the common law understanding of Section 2 fits with the Supreme Court’s practice in interpreting the statute to date, except to note that the Court never abided the static understanding of Section 2’s “return to White.” All this is grist for the next article in this series.