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WHAT IS ABRIDGMENT?: A CRITIQUE OF TWO SECTION TWOS

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ABSTRACT

For over a century, Section 2 of the Fourteenth Amendment has been a dead letter, but recent challenges to voting rights demand that we resurrect this long forgotten provision. The thesis of this Article is that Section 2, which allows Congress to reduce a state's delegation in the House of Representatives if the state abridges the right to vote, gives Congress the authority to address virtually any abridgment of the ballot through its Section 5 enforcement power. Specifically, this Article contends that Section 2, with its broad language unencumbered by references to race or color, provides constitutional justification for section 2 of the Voting Rights Act, the validity of which has come under fire in recent years. Section 2 of the Voting Rights Act forbids any voting "standard, practice, or procedure" that "results in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color." Critics argue that the statute's use of race-conscious remedies and its focus on the racially discriminatory effect of various state laws unduly infringes the states' sovereignty over elections. To avoid potential constitutional problems, these critics contend that the statute should be limited to only those instances in which states act with discriminatory intent.

As this Article shows, the search for intent is not only futile in this context but unnecessary. Section 2 is constitutionally sound because Section 2 of the Fourteenth Amendment validates any statutory scheme that prevents abridgment of the right to vote, regardless of the presence or absence of discriminatory intent. This Article concludes that an effects-only interpretation of section 2 of the Voting Rights Act is consistent with the

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broad authority that Section 2 of the Fourteenth Amendment grants Congress to regulate and protect the right to vote.

INTRODUCTION

Section 2 of the Fourteenth Amendment has the unfortunate privilege of being dead as long as it has been alive. This provision, which has never been enforced, provides that Congress can reduce a state's delegation in the House of Representatives for denying or abridging the right to vote in almost any election—state or federal—on almost any grounds, with the exception of the commission of a crime.¹ It is true that Section 2 has had its moments—congressional legislation to enforce its penalty in the 1890s; the provision's endorsement in the Republican platform of 1904; the campaign by the National Association for the Advancement of Colored People (NAACP) to implement the provision in the 1920s.² But Congress has never imposed Section 2's penalty on offending states, and this failure has had far-reaching consequences for the political power of minority communities and the electorate as a whole. For example, Congress's failure to penalize states in accordance with Section 2 increased the likelihood that Woodrow Wilson would be victorious over Charles Evans Hughes in the 1916 presidential election. Wilson, a Democrat, authorized a wide-ranging policy of racial segregation in both the federal civil service and in Washington, D.C., during his time in office.³ Refusal to enforce Section 2 also gave southern Democrats about twenty-five extra seats in Congress between 1903 and 1953, altering about fifteen percent of the roll call outcomes in the House during these decades.⁴ Nonenforcement also contributed to the demise of the Republican Party in the South and the rise

1. U.S. CONST. amend. XIV, § 2. The text of Section 2, in its entirety, reads:

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Id.

2. See, e.g., *infra* Part II.B; W.E.B. Du Bois, *Reduced Representation in Congress*, 21 CRISIS 149 (1921).

3. RICHARD M. VALELLY, *THE TWO RECONSTRUCTIONS: THE STRUGGLE FOR BLACK ENFRANCHISEMENT* 146–47 (2004).

4. *Id.*

of the all-white Democratic Party primary that insulated Jim Crow from political attack for almost a century.⁵

While its historical importance is obvious, the scholarly literature has not fully appreciated the central role that Section 2 can play in voting rights enforcement.⁶ Independent of its penalty, Section 2 embraces a principle of broad enfranchisement that Congress can enforce through its authority under Section 5 of the Fourteenth Amendment.⁷ The scope and reach of Section 2 is separate and distinct from the Fifteenth Amendment's protection of minority voters as a class because the language of Section 2 does not focus exclusively on the abridgment of the right to vote on the basis of race.⁸ Section 2 is also independent of the caselaw that has developed under Section 1 of the Fourteenth Amendment with respect to the fundamental interest in voting—jurisprudence that allows substantially more state regulation that “abridges” the right to vote than Section 2 would

5. *Id.* Enforcement of Section 2's penalty today could have a limited, but still far-reaching impact. See Richard Kreitner, *This Long-Lost Constitutional Clause Could Save the Right to Vote*, THE NATION, Jan. 21, 2015, <http://www.thenation.com/article/any-way-abridged/>. Kreitner noted that voter turnout in states with voter ID laws “declined 2 to 3 percentage points more than in comparable states that did not introduce such restrictions.” *Id.* While voter ID laws in states like Kansas and Tennessee would have to disenfranchise a large percentage of its population for the penalty of Section 2 to have any impact, *id.*, it could have a significant effect on representation in other states. See *id.* (“Texas [which has also implemented a voter ID law] has thirty-six representatives. Only 2.8 percent of Texans would need to be disenfranchised for the Lone Star State to lose a member of its congressional delegation.”).

6. Scholars often mention Section 2 in passing, and only a few have written extensively about its meaning and role in voting rights enforcement. See, e.g., Franita Tolson, *The Constitutional Structure of Voting Rights Enforcement*, 89 WASH. L. REV. 379 (2014) [hereinafter Tolson, *Voting Rights Enforcement*]; Michael T. Morley, Remedial Equilibration and the Right to Vote Under Section 2 of the Fourteenth Amendment, 2015 U. CHI. LEGAL F. 279; Richard M. Re & Christopher M. Re, *Voting and Vice: Criminal Disenfranchisement and the Reconstruction Amendments*, 121 YALE L.J. 1584, 1591 (2012); Gabriel J. Chin, *Reconstruction, Felon Disenfranchisement, and the Right to Vote: Did the Fifteenth Amendment Repeal Section 2 of the Fourteenth Amendment?*, 92 GEO. L.J. 259 (2004); Mark R. Killenbeck & Steve Sheppard, *Another Such Victory? Term Limits, Section 2 of the Fourteenth Amendment, and the Right to Representation*, 45 HASTINGS L.J. 1121 (1994); William W. Van Alstyne, *The Fourteenth Amendment, the “Right” to Vote, and the Understanding of the Thirty-Ninth Congress*, 1965 SUP. CT. REV. 33; Eugene S. Bayer, *The Apportionment Section of the Fourteenth Amendment: A Neglected Weapon for Defense of the Voting Rights of Southern Negroes*, 16 W. RES. L. REV. 965 (1965); Ben Margolis, *Judicial Enforcement of Section 2 of the Fourteenth Amendment*, 23 LAW IN TRANS. 128 (1963); George David Zuckerman, *A Consideration of the History and Present Status of Section 2 of the Fourteenth Amendment*, 30 FORDHAM L. REV. 93, 97–98 (1961); Arthur E. Bonfield, *The Right to Vote and Judicial Enforcement of Section Two of the Fourteenth Amendment*, 46 CORNELL L. Q. 108 (1960).

7. See Tolson, *Voting Rights Enforcement*, *supra* note 6, at 427 (arguing that the Framers of the Fourteenth and Fifteenth Amendments “viewed many voting rights regulations as fairly pedestrian and not per se unconstitutional under the Amendments” but believed that they had the power to prevent “states from implementing ostensibly neutral laws or taking other official actions that had the effect of circumventing the protections of the Fourteenth and Fifteenth Amendments”).

8. The Fifteenth Amendment prohibits abridgment or denial of the right to vote, but only on the basis of race, color, or previous condition of servitude. U.S. CONST. amend. XV, § 1.

permit.⁹ Nevertheless, as the only provision in the Fourteenth Amendment that mentions voting, Section 2 is arguably the baseline from which scholars should critique all congressional legislation passed under Section 5 to protect voting rights.¹⁰

Similar to the legal scholarship, the U.S. Supreme Court has mostly overlooked Section 2, as evidenced by the sharp limitations that the Court has imposed on congressional authority to regulate voting rights in recent cases.¹¹ The Court has explicitly recognized that the states have the authority to ensure the integrity of their electoral process through their voter registration rules, a principle discussed most recently in *Arizona v. Inter Tribal Council of Arizona, Inc.* and *Crawford v. Marion County Election Board*,¹² but the Court has made far fewer concessions with respect to the breadth of congressional authority to protect the right to vote. In *Shelby County v. Holder*,¹³ for example, the Court circumscribed Congress's enforcement authority under the Fourteenth and Fifteenth Amendments by invalidating the coverage formula of section 4(b) of the Voting Rights Act of 1965 ("VRA" or "the Act"). The coverage formula determined those jurisdictions that had to preclear all changes to their election laws with the federal government under section 5 of the Act.¹⁴ The Court held that the formula unduly infringed on the states' sovereign authority over elections because it did not account for the decrease in racial discrimination in voting over the last four decades.¹⁵

9. The Roberts and Rehnquist Courts have interpreted Section 1 of the Fourteenth Amendment more narrowly than their predecessors. See Franita Tolson, *Protecting Political Participation through the Voter Qualifications Clause of Article I*, 56 B.C. L. Rev. 159, 161 (2015) [hereinafter Tolson, *Protecting Political Participation*] ("The equal protection framework, modified in decisions subsequent to *Harper v. Virginia State Board of Elections*] to be more deferential to state authority, has come to dominate the assessment of all regulations governing the right to vote, regardless if the law applies to state elections, federal elections, or both." (footnote omitted)).

10. Tolson, *Voting Rights Enforcement*, *supra* note 6, at 412–13.

11. Very few cases discuss Section 2 of the Fourteenth Amendment. See, e.g., *Richardson v. Ramirez*, 418 U.S. 24 (1974); *McPherson v. Blacker*, 146 U.S. 1 (1892); *Minor v. Happersett*, 88 U.S. 162 (1874); see also *Oregon v. Mitchell*, 400 U.S. 112, 152 (1970) (Harlan, J., dissenting).

12. *Arizona v. Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247, 2263 (2013) (observing that state control over voter qualifications is plenary, limited only by the Fourteenth, Fifteenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth Amendments); *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 190 (2008) (applying a balancing test, rather than strict scrutiny, to assess the burdens imposed on the right to vote by Indiana's voter-identification law).

13. 133 S. Ct. 2612 (2013).

14. Voting Rights Act of 1965, Pub. L. No. 89-110, § 2, 79 Stat. 437, 437 (codified as amended at 52 U.S.C. § 10301 (2012)). Nine states—mostly in the deep South, along with a few jurisdictions scattered throughout several other states—were covered by section 5. *Jurisdictions Previously Covered by Section 5*, U.S. DEP'T OF JUST., http://www.justice.gov/crt/about/vot/sec_5/covered.php (last updated Aug. 6, 2015). Specifically, section 5 prohibits those changes that have a "retrogressive" effect on minority communities—i.e., minorities are worse off under the new law than its predecessor. See *Beer v. United States*, 425 U.S. 130, 141–42 (1976).

15. *Shelby Cty.*, 133 S. Ct. 2612.

Unsurprisingly, both the U.S. Department of Justice and private litigants have turned to section 2 of the VRA to protect voting rights after the Supreme Court crippled the preclearance regime,¹⁶ and with this strategic decision comes renewed attention to section 2's constitutionality.¹⁷ Section 2 of the Act forbids any "standard, practice, or procedure" that "results in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color."¹⁸ Unlike sections 4(b) and 5, section 2 applies nationwide. Critics argue that its use of race-conscious remedies to further goals that are inchoately defined renders section 2 vulnerable to many of the same federalism concerns as the coverage formula recently invalidated in *Shelby County*.¹⁹ In reality,

16. Some scholars have explicitly argued that section 2 should fill the gap left by the paralysis of section 5. See, e.g., Christopher S. Elmendorf & Douglas M. Spencer, *Administering Section 2 of the VRA After Shelby County*, 115 COLUM. L. REV. (forthcoming 2015), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2414652.

17. See, e.g., *Veasey v. Perry*, 71 F. Supp. 3d 627 (S.D. Tex.) (alleging violations of section 2 of the Voting Rights Act), *stay granted*, 769 F.3d 890 (5th Cir. 2014), *vacatur denied*, 135 S. Ct. 9 (2014), *aff'd in part, rev'd in part sub nom. Veasey v. Abbott*, 796 F.3d 487 (5th Cir. 2015); *Frank v. Walker*, 17 F. Supp. 3d 837 (E.D. Wis.) (same), *stay granted*, 766 F.3d 755 (7th Cir. 2014), *rev'd*, 768 F.3d 744 (7th Cir. 2014), *stay vacated*, 135 S. Ct. 7 (2014); *N.C. State Conference of NAACP v. McCrory*, 997 F. Supp. 2d 322 (M.D.N.C.) (same), *aff'd in part, rev'd in part sub nom. League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224 (4th Cir. 2014), *stay granted*, 135 S. Ct. 6 (2014); *Complaint, One Wis. Inst., Inc. v. Nichol*, No. 15-324 (W.D. Wis. May 29, 2015), 2015 WL 3464112 (same).

18. 52 U.S.C. § 10301(a) (2012). Section 2 reads in part:

No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color

Id.

19. See, e.g., ROGER CLEGG & HANS A. VON SPAKOVSKY, THE HERITAGE FOUND., LEGAL MEMORANDUM 119, "DISPARATE IMPACT" AND SECTION 2 OF THE VOTING RIGHTS ACT (Mar. 17, 2014), http://thf_media.s3.amazonaws.com/2014/pdf/LM119.pdf. After section 2 was amended, commentators noted how courts were already drifting back towards a discriminatory purpose standard in section 2 cases. See Richard L. Engstrom, *The Reincarnation of the Intent Standard: Federal Judges and At-Large Election Cases*, 28 HOW. L.J. 495, 498 (1985) ("The medium through which the new statutory protection is being weakened is the reintroduction into dilution litigation of the previously interred intent requirement. Despite Congress being quite explicit about its burial as a decisional standard in dilution cases, some federal judges have recently given the intent requirement a second life, this time as a necessary condition for a finding of racially polarized voting, the single most important 'fact' issue in almost every vote dilution controversy."); Peyton McCrary, *Discriminatory Intent: The Continuing Relevance of "Purpose" Evidence in Vote-Dilution Lawsuits*, 28 HOW. L.J. 463 (1985). Courts continue to be suspicious of civil rights statutes that premise liability on discriminatory effects or disparate impact. Recently, several Justices on the Supreme Court criticized disparate impact liability in the context of Title VII of the Civil Rights Act of 1964, which allows plaintiffs to challenge employment practices that have a discriminatory effect. See *Ricci v. DeStefano*, 557 U.S. 557, 594 (2009) (Scalia, J., concurring) (noting that the majority "merely postpones the evil day on which the Court will have to confront the question: Whether, or to what extent, are the disparate-impact provisions of Title VII of the Civil Rights Act of 1964 consistent with the Constitution's guarantee of equal protection"); see also *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2551 (2015) (Alito, J., dissenting) (arguing that the majority's interpretation of the Fair Housing Act to permit disparate impact liability invites "difficult constitutional questions" because of "the risk

Section 2 of the Fourteenth Amendment provides a sound constitutional foundation for its statutory namesake.

In defending the constitutionality of section 2 of the VRA, this Article explores the meaning of the phrase “in any way abridged” in Section 2 of the Fourteenth Amendment and its implications for the scope of Congress’s enforcement authority under Section 5 of the Fourteenth Amendment.²⁰ As this analysis will show, Congress does not have to amass a record of purposeful racial discrimination or action by the state in order to enact legislation that ensures broad enfranchisement in state and federal elections. Abridgment does not mean purpose.²¹ Instead, Section 2 of the Fourteenth Amendment justifies any law that prevents states from unduly circumscribing the electorate, regardless of intent, and it provides ample constitutional support for section 2 of the Voting Rights Act.

Part I of this Article argues that the Supreme Court’s jurisprudence under Sections 1 and 5 of the Fourteenth Amendment does little to justify the constitutionality of section 2 of the VRA. Its constitutional vote-dilution cases imply that discriminatory intent remains the touchstone for determining liability in statutory vote-dilution cases because the discriminatory effect standard of section 2 incorporates many of the evidentiary elements of the Court’s constitutional vote-dilution caselaw. The Court has been inconsistent in both defining discriminatory purpose and articulating what evidence is sufficient to establish such purpose, which has blurred the distinction between intent and effect in the statutory context.²² Likewise, the “congruence and proportionality” test that the Court applies to assess the constitutionality of congressional legislation enacted pursuant to Section 5 of the Fourteenth Amendment has failed to impose clear limitations on congressional power, sowing significant confusion about the nature and degree of constitutional violations necessary

that disparate impact may be used to ‘perpetuate race-based considerations rather than move beyond them’” and cautioning that “‘racial quotas . . . rais[e] serious constitutional concerns’” (alteration in original) (quoting the majority opinion)); Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 494, 494–508 (2003) (discussing the tension between equal protection doctrine and disparate impact liability). It is not a stretch to argue that many of these concerns likely apply to section 2 of the Voting Rights Act. *See, e.g.*, *Holder v. Hall*, 512 U.S. 874, 891–946 (1994) (Thomas, J., concurring) (arguing that vote-dilution claims are not cognizable under section 2).

20. Section 5 of the Fourteenth Amendment allows Congress to enforce the provisions of the Amendment “by appropriate legislation.” U.S. CONST. amend. XIV, § 5.

21. *See, e.g.*, Killenbeck & Sheppard, *supra* note 6, at 1124 (arguing that state imposed term limits for senators and representatives may “‘deny’ or ‘abridge’ the right to vote in ways that pose the disquieting spectre of Section 2 sanctions against the offending state.”).

22. *See* Frank R. Parker, *The “Results” Test of Section 2 of the Voting Rights Act: Abandoning the Intent Standard*, 69 VA. L. REV. 715, 750 (1983) (noting that the language of section 2(b) of the Voting Rights Act mirrors language from the Court’s decision in *White v. Regester*, one of its constitutional vote-dilution cases: “any voting or electoral practice which provides minority group members ‘less opportunity than other members of the electorate to participate in the political process and to elect legislators of their choice’ is prohibited”).

to justify the remedy that Congress has selected.²³ Instead of providing clarification, this caselaw has led to a fundamental misunderstanding about the nature of section 2 claims, raising unnecessary constitutional questions about the validity of the statute as an appropriate exercise of congressional authority.

Part II defends section 2 of the VRA by shedding light on the post-enactment history of Section 2 of the Fourteenth Amendment, which reveals that many congressmen believed that states could abridge the right to vote if they passed laws that operated to disproportionately limit access to the ballot.²⁴ Notably, these restrictions, which ranged from voter-registration systems to literacy and property qualifications, were facially race neutral, thereby placing them outside of the reach of the Fifteenth

23. See *City of Boerne v. Flores*, 521 U.S. 507 (1997) (holding that the remedies in congressional legislation enacted under the Fourteenth Amendment must be congruent and proportional to the harm to be addressed); see also *Tennessee v. Lane*, 541 U.S. 509, 557–58 (2004) (Scalia, J., dissenting) (“The ‘congruence and proportionality’ standard, like all such flabby tests, is a standing invitation to judicial arbitrariness and policy-driven decisionmaking. Worse still, it casts this Court in the role of Congress’s taskmaster. Under it, the courts (and ultimately this Court) must regularly check Congress’s homework to make sure that it has identified sufficient constitutional violations to make its remedy congruent and proportional.”); 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, 43–44 (2006) (“In light of *City of Boerne* and cases following it, the constitutionality of section 2 depends on the connection between the scope of section 2 and the underlying pattern of constitutional violations the statute aims to remedy; that connection cannot be understood absent a description of the standards for finding a violation under the statute and the Constitution as well as a comparison of the two.”).

24. Scholars have relied on congressional debates and statutes enacted after the ratification of the Fourteenth Amendment in order to ascertain the scope of the Amendment. See Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 984–85 (1995) (arguing that the debates surrounding the Civil Rights Act of 1875 show that the Framers of the Fourteenth Amendment intended it to apply to school desegregation). The methodology employed here takes a similar approach, but recognizes that the conclusions that can be drawn from the post-enactment history are persuasive, but not dispositive, evidence of constitutional meaning. See Earl M. Maltz, *Originalism and the Desegregation Decisions — A Response to Professor McConnell*, 13 CONST. COMMENT. 223 (1996) (detailing the problems with relying on legislation enacted after the Fourteenth Amendment as authoritative evidence of original intent). I am not arguing that the post-enactment history is (or should be) as authoritative as the legislative debates surrounding Section 2, nor do I contend that original intent should be the sole determinant of the meaning of this provision. Nonetheless, the post-enactment history is persuasive evidence regarding the scope of Section 2 because of the ideological connections between the Reconstruction-era Republicans who enacted this provision and those who sought to protect voting rights in the 1890s. See Albert V. House, *Republicans and Democrats Search for New Identities, 1870-1890*, 31 REV. POL. 466, 468 (1969) (describing Henry Cabot Lodge, who introduced the Federal Elections Bill of 1890, and other Republicans as “heirs of the Radical tradition”); Richard E. Welch, Jr., *The Federal Elections Bill of 1890: Postscripts and Prelude*, 52 J. AM. HIST. 511, 511 (1965) (noting that the Federal Elections Bill is “usually viewed as a last desperate effort by certain anachronistic Republicans to wave the bloody shirt and once again exacerbate relations between the races in the South for mischievous, partisan purposes”); XI WANG, *THE TRIAL OF DEMOCRACY: BLACK SUFFRAGE AND NORTHERN REPUBLICANS, 1860-1910*, at 222 (discussing the internal debate in the Republican Party over the party’s 1888 platform and noting that the “radicals” in the party believed that “the party had to take federal enforcement of black rights and protection of purity of congressional elections as its foremost issues”).

Amendment. Yet members of Congress proposed new legislation, the Federal Elections Bill of 1890,²⁵ and also introduced bills to reduce the congressional representation of certain southern states pursuant to Section 2 of the Fourteenth Amendment in order to address the discriminatory effects of these laws during the 1890s. In debating this legislation, no one argued that racially discriminatory intent was a condition precedent to trigger congressional action. The historical record is surprisingly bereft of any statements from both those who wanted to evoke Section 2's penalty, though they had plenty evidence of intent at their disposal, and those who opposed enforcement because of the absence of facial discrimination in the controversial state constitutions. These debates provide compelling evidence that Section 2 of the Fourteenth Amendment justifies the reach of section 2 of the VRA to laws that only have a discriminatory effect on the basis of race or color.

Contrary to this history, recent controversies over the right to vote illustrate how courts have continued to look for racially discriminatory actions by "bad" state actors or, alternatively, absolute barriers to exercising the right to vote in order to impose liability under section 2 of the Act.²⁶ This is the subject of Part III. As this Article shows, Congress can legislatively address virtually any abridgment of the ballot through its power under Sections 2 and 5 of the Fourteenth Amendment, even, in some circumstances, reaching those restrictions long held to reasonably regulate access to the ballot.

I. THE CONSTITUTIONAL PROBLEMS FACING SECTION 2 OF THE VOTING RIGHTS ACT

The alleged constitutional problems surrounding section 2 of the Voting Rights Act are mostly a product of interpretation rather than drafting.²⁷ The lower courts have taken varied approaches to section 2

25. H.R. 10958, 51st Cong. § 1 (1890).

26. Compare *Farrakhan v. Gregoire*, 590 F.3d 989, 1004 (9th Cir.) (finding that Washington's felon-disenfranchisement law violated section 2 of the VRA because the evidence showed that "there [were] significant statistical racial disparities in the operation of the criminal justice system" and the "disparities [could not] be explained in race-neutral ways"), *rev'd en banc*, 623 F.3d 990 (9th Cir. 2010), with *Hayden v. Pataki*, 449 F.3d 305, 334 (2d Cir. 2006) (holding that section 2 of the VRA does not apply to New York's felon-disenfranchisement statute because there is no evidence in the legislative record that Congress thought felon-disenfranchisement statutes were being used "as part of a history and pattern of unconstitutional discrimination").

27. Christopher S. Elmendorf, *Making Sense of Section 2: Of Biased Votes, Unconstitutional Elections, and Common Law Statutes*, 160 U. PA. L. REV. 377, 381 (2012) ("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 . . ."); see also Richard L. Hasen, *Shelby County and the Illusion of Minimalism*, 22 WM. & MARY BILL RTS. J. 713 (2014); Luis Fuentes-Rohwer, *The*

claims, often searching for discriminatory intent or racial bias on the part of state actors or among members of the electorate, even though the statute does not require any such finding to prove a violation.²⁸ More recently, lower courts have refused to impose liability under section 2 regardless if there is significant evidence that the defendant jurisdiction engaged in

Future of Section 2 of the Voting Rights Act in the Hands of a Conservative Court, 5 DUKE J. CONST. L. & PUB. POL'Y 125 (2010).

28. See, e.g., *Teague v. Attala Cty.*, 92 F.3d 283, 290 (5th Cir. 1996) (“Plaintiffs are to present evidence of racial bias operating in the electoral system by proving up the *Gingles* factors. Defendants may then rebut the plaintiffs’ evidence by showing that no such bias exists in the relevant voting community.”); *Uno v. City of Holyoke*, 72 F.3d 973, 981 (1st Cir. 1995) (“We believe it follows that, after *De Grandy*, plaintiffs 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.”); *Nipper v. Smith*, 39 F.3d 1494, 1514–15 (11th Cir. 1994) (en banc) (“[S]ection 2 prohibits those voting systems that have the effect of allowing a community motivated by racial bias to exclude a minority group from participation in the political process. Therefore, if the evidence shows, under the totality of the circumstances, that the community is not motivated by racial bias in its voting patterns, then a case of vote dilution has not been made.”); *League of United Latin American Citizens (LULAC), Council No. 4434 v. Clements*, 986 F.2d 728, 846 (5th Cir. 1993) (Higginbotham, J., dissenting) (arguing that proof of racial bias is necessary in order to show racial bloc voting in support of a section 2 claim); *Jones v. City of Lubbock*, 730 F.2d 233, 234 (5th Cir. 1984) (Higginbotham, J., specially concurring from denial of rehearing) (same); *Solomon v. Liberty Cty.*, 899 F.2d 1012, 1029 (11th Cir. 1990) (Tjoflat, J., concurring specially) (“[A]mended section 2 was intended to restore the invidious discrimination requirement as articulated by the *Whitcomb* and *White* Courts: a plaintiff must prove either (1) the subjective discriminatory motive of the legislators or officials, or (2) the existence of objective factors, showing that the electoral scheme interacted with racial bias in the community and allowed that bias to dilute the minorities’ voting strength.” (footnote omitted)); *Collins v. City of Norfolk*, 768 F.2d 572, 578 (4th Cir. 1985) (Butzner, J., dissenting) (criticizing the district court for adopting “a definition of polarization that required the appellants to prove ‘white backlash’ and that ‘whites attempt to limit the field of candidates,’” which the dissenters found to be the equivalent of discriminatory intent); *Jeffers v. Clinton*, 730 F. Supp. 196, 244–45 (E.D. Ark. 1989) (Eisele, J., concurring and dissenting) (“Surely everyone understands that it is standard procedure for plaintiffs in these cases to also allege intentional racial discrimination as a basis for their constitutional claims. And even in a bare Section 2 ‘results’ case, the record will overflow with efforts to prove racism. (Just note once more the Senate factors.) And why not? That is what such cases are ultimately all about. To say that the defendants in cases such as this may not show that race discrimination is *not* the true reason for the differing voting behavior of blacks and/or whites in the area is to deny the right to demonstrate that there is no constitutionally adequate basis for the Section 2 claim or for the potential relief which will follow from the ‘establishment’ of that claim.”); see also James Thomas Tucker, *Tyranny of the Judiciary: Judicial Dilution of Consent Under Section 2 of the Voting Rights Act*, 7 WM. & MARY BILL RTS. J. 443, 595 n.775 (1999) (“The racial bias test revives intent merely by requiring a defendant to offer some evidence of other factors suggesting ‘that the voting community is not driven by racial bias,’ in order to shift the burden to the plaintiff to prove the existence of racial bias.”). The Supreme Court’s 2006 decision in *LULAC v. Perry* could be interpreted to eliminate any need for proof of racial bias in order to establish a section 2 violation, yet this decision also significantly broadened the definition of intent beyond how that term had traditionally been used in the caselaw. See *LULAC v. Perry*, 548 U.S. 399 (2006) (holding that the state’s partisan decision to dismantle a majority-Latino district violated section 2 because the legislature impermissibly subordinated the ability of the Latinos in the district to elect their candidate of choice to its interest in protecting an increasingly unpopular incumbent); see also Ellen D. Katz, *Reviving the Right to Vote*, 68 OHIO ST. L.J. 1163, 1172–73 (2007). *But see LULAC*, 548 U.S. at 516 (Scalia, J., concurring in part and dissenting in part) (arguing that there is no section 2 violation because the legislature removed Latinos from this district, not for racial reasons, but for voting against the incumbent).

minority vote dilution in violation of the statute.²⁹ The Supreme Court has been equally complicit in undermining section 2, issuing a series of decisions that have narrowed the scope of the statute.³⁰

Unsurprisingly, the incoherence of the caselaw has led to some confusion about the reach of section 2.³¹ For example, Heather Gerken has argued that vote dilution under section 2 infringes on aggregate rights,³² a view that is inconsistent with the individual-rights approach embraced by the Court in its jurisprudence. The concept of aggregate rights reflects that “an individual has the best chance of influencing the political process when she acts as part of a cohesive voting group that can cast its weight behind one candidate or another”³³ and “that even numeric minorities should have

29. See Richard H. Pildes, *The Decline of Legally Mandated Minority Representation*, 68 OHIO ST. L.J. 1139, 1140–41 (2007) (noting that, between 1986 and 2006, voting rights plaintiffs lost every section 2 case that received “plenary consideration”).

30. See *Bartlett v. Strickland*, 556 U.S. 1, 14–15 (2009) (holding that crossover districts in which minority voters constitute less than a numerical majority of the voting-age population are not protected by section 2); *LULAC*, 548 U.S. at 445 (upholding a district-court finding that residents of an influence district where African-Americans constituted less than 50% of the voting-age population did not have a cognizable section 2 claim for the dismantling of their district because there was insufficient evidence that they could elect their candidate of choice under the old plan); *Holder v. Hall*, 512 U.S. 874, 881 (1994) (holding that the size of a governing body cannot be challenged under section 2 because “there is no objective and workable standard for choosing a reasonable benchmark by which to evaluate a challenged voting practice”).

31. See, e.g., Daniel P. Tokaji, *Applying Section 2 to the New Vote Denial*, 50 HARV. C.R.-C.L. L. REV. 439 (2015). Maybe scholars can blame the doctrinal confusion on the Supreme Court’s use of passive voice in its constitutional vote-dilution cases. See *Solomon*, 899 F.2d at 1025 (Tjoflat, J., concurring) (“The *White* Court said that a plaintiff succeeds when he can show that the multimember districts ‘are being used’ to dilute minority voting strength. Who did the Court think would be using the multimember districts to dilute minority voting strength? The Court also noted that certain rules, while ‘neither in themselves improper nor invidious, enhanced the opportunity for racial discrimination.’ Whose opportunity to discriminate did those rules enhance? I submit that the Court was concerned about the interaction between the voting scheme and racial bias in all levels of the voting community.” (internal citations omitted)).

32. Vote dilution is a harm that is different from outright vote denial in that individuals can still vote but the structure of the electoral system in which the individuals are voting guarantees that their votes will be worthless. See Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 HARV. L. REV. 1663, 1672–73 (2001):

Vote dilution doctrine developed in reaction to states’ use of at-large districting schemes, in which more than one representative is elected from a single district (for instance, where all candidates are elected in statewide races, as in the first example described above). Under a winner-take-all voting system, this districting scheme virtually guarantees that even a sizeable minority group will always be outvoted by whites in any state where voting is racially polarized.

The Court’s eventual solution to this problem was to invalidate at-large districts as “diluting” minority votes and to replace them with a single-member districting plan that gave minority voters a majority in one or more districts.

Id. (footnotes omitted).

33. *Id.* at 1678; see also Pamela S. Karlan, *The Rights to Vote: Some Pessimism About Formalism*, 71 TEX. L. REV. 1705, 1708 (1993) (arguing that the right to vote involves “participation: the formal ability of individuals to enter into the electoral process by casting a ballot”; “aggregation:

an opportunity, consistent with their voting strength, to aggregate their votes effectively.”³⁴ While this idea of group representation is the animating principle behind section 2, the Court has resisted this notion in its cases. Despite this, Professor Gerken concludes that the Court must recognize the concept of aggregate rights in order to be faithful to the operation of our political system and the underlying goals of section 2, but she concedes that her approach could render section 2 constitutionally suspect under current doctrine.³⁵

Other scholars have defended section 2 by clarifying both its reach and the evidence necessary to sustain a section 2 claim. Janai Nelson, for example, has emphasized that discriminatory intent cannot be the benchmark for section 2 liability, arguing that both implicit bias and racial context are key to proving vote denial under section 2.³⁶ However, most scholarly efforts—perhaps out of an abundance of caution or a sober assessment of current Supreme Court jurisprudence—still utilize some variation of a discriminatory intent standard in their respective analyses. Recently, Christopher Elmendorf has argued that plaintiffs should have to show that electoral inequality is traceable to race-biased decision-making by state actors or majority voters, which is still a discriminatory intent standard, albeit a less onerous one.³⁷ Likewise, the burden-shifting approach offered by Daniel Tokaji lists discriminatory intent as one factor

the choice among rules for tallying individual votes to determine election outcomes”; and “governance: [i]t serves a key role in determining how decisionmaking by elected representatives will take place”).

34. Gerken, *supra* note 32, at 1680; see also Michael J. Pitts, *Congressional Enforcement of Affirmative Democracy through Section 2 of the Voting Rights Act*, 25 N. ILL. U. L. REV. 185, 189 (2005) (noting that the Court’s allowance of more race-based decision-making in the electoral context; the limited encroachment on the Court’s ability to define the scope of constitutional law; and its relatively small impact on federalism are all core values “that demonstrate section 2’s validity”).

35. Gerken, *supra* note 32, at 1737 (“If the Court were to conclude that the Constitution recognizes *only* the type of conventional individual harm we see in its recent equal protection jurisprudence, then aggregate rights, with their group-based attributes, arguably exceed the scope of the injury that the Constitution recognizes.”); see also *id.* at 1726–27 (rejecting the argument that the injury from a vote-dilution claim is not sufficiently concrete, despite concerns about separating the injured from the unharmed).

36. See Janai S. Nelson, *The Causal Context of Disparate Vote Denial*, 54 B.C. L. REV. 579, 586 (2013). For other scholars who, like Nelson, advocate for a more contextual approach to resolving section 2 claims that extends beyond questions of discriminatory intent, see Kathleen M. Stoughton, Note, *A New Approach to Voter ID Challenges: Section 2 of the Voting Rights Act*, 81 GEO. WASH. L. REV. 292 (2013); Paul Moke & Richard B. Saphire, *The Voting Rights Act and the Racial Gap in Lost Votes*, 58 HASTINGS L.J. 1 (2006). But see Fuentes-Rohwer, *supra* note 27, at 153–157 (arguing that the governing legal regime will play a secondary role in determining the constitutionality of section 2; instead, its validity will depend on the preferences of Justice Kennedy as the swing vote).

37. Elmendorf, *supra* note 27, at 383 (“As for the evidentiary norms, Section 2’s legislative history makes clear that plaintiffs may not be required to prove intentional discrimination in accordance with conventional evidentiary standards. But, read in constitutional context, Section 2 should be understood to require plaintiffs to prove to a significant likelihood that the electoral inequality is traceable to race-biased decisionmaking.”).

among many that are relevant to determining a section 2 violation.³⁸ Other scholars have explicitly relied on the connection between the statutory standard and the constitutional intentional-discrimination standard in defending section 2's constitutionality.³⁹

From the literature, it is clear that intent remains an important factor in ascertaining whether section 2 has been violated. The courts, like most of the legal scholarship, persist in focusing on intent because uncertainty about the proper evidentiary standard to prove unconstitutional minority vote dilution has caused confusion with respect to the standard of proof for claims under section 2 of the Voting Rights Act.

A. The Effect of the Supreme Court's Constitutional Vote-Dilution Jurisprudence on Section 2 of the Voting Rights Act

Minority vote dilution has been a difficult theoretical concept for the Supreme Court to define and police since the one-person, one-vote cases in the 1960s.⁴⁰ In *Reynolds v. Sims*, the Court held that legislative districts have to contain an equal amount of people as practicable because "the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise."⁴¹ Claims for constitutional vote dilution have been criticized since their infancy, when Justice Frankfurter observed in his *Baker v. Carr* dissent that "[t]alk of 'debasement' or 'dilution' is circular talk. One cannot speak of 'debasement' or 'dilution' of the value of a vote until there is first defined a standard of reference as to what a vote should be worth."⁴²

38. Tokaji, *supra* note 31, at 441 ("At the first step, racial minorities would have the burden to demonstrate that the challenged practice has a disparate impact on minority voters. . . . Second, plaintiffs would have the burden of demonstrating that the disparate impact is traceable to the challenged practice's interaction with social and historical conditions, including but not limited to intentional discrimination attributable to the state.").

39. See McLoughlin, *supra* note 23, at 47 (arguing that the "connectedness" between the constitutional and statutory standards "bolsters section 2's claim to being a remedial statute proportional and congruent to the unconstitutional harm targeted"); Pitts, *supra* note 34, at 209 ("[E]ven though section 2 does not require a finding of purposeful discrimination, the standard the Court uses to determine unconstitutional purpose in the maintenance of an electoral system is relatively similar and certainly not totally divorced from the standard used in the section 2 results test."); see also Joshua S. Sellers, *The Irony of Intent: Statutory Interpretation and the Constitutionality of Section 2 of the Voting Rights Act*, 76 LA. L. REV. 43 (2015) (arguing that section 2 is constitutional because "even when evaluated under the Court's most demanding cases, [s]ection 2 is sufficiently tailored to remedy intentional constitutional violations").

40. See Gerken, *supra* note 32, at 1738.

41. 377 U.S. 533, 555 (1964).

42. *Baker v. Carr*, 369 U.S. 186, 300 (1962) (Frankfurter, J., dissenting); see also Gerken, *supra* note 32, at 1666 ("Vote dilution claims implicate a special kind of injury, one that does not fit easily with a conventional view of individual rights. That is because they require a court to consider the

The idea that states can degrade a person's vote by placing him or her within a particular district foreshadowed later cases brought by African-Americans challenging redistricting plans under the Fourteenth and Fifteenth Amendments based on this theory.⁴³ Two cases—*Whitcomb v. Chavis* and *White v. Regester*—illustrate the difficulty of ascertaining discriminatory purpose with any certainty in vote-dilution cases. In *Whitcomb v. Chavis*, the Court rejected a claim by African-American plaintiffs that they could not elect their candidate of choice because the state submerged them in a multi-member district and diluted their votes.⁴⁴ In Marion County, Indiana, the wealthy white suburban area contained 13.98% of the county's population, but elected 47.52% of its senators and 34.33% of its representatives.⁴⁵ In contrast, the mostly minority area elected only 4.75% of senators and only 5.97% of representatives, despite containing 17.8% of the population.⁴⁶ The district court determined that this disparity, combined with the unresponsiveness of legislators representing the district, gave these residents less opportunity than other groups to elect their candidate of choice.⁴⁷

On appeal, the Court faulted the district court for being insufficiently attentive to partisan politics; in its view, these residents were losing, not because they were African-American, but because they voted for losing Democratic candidates.⁴⁸ The Court signaled that it was looking for those state actions that would be indicative of *racially* discriminatory purpose: that “poor Negroes were not allowed to register or vote, to choose the political party they desired to support, to participate in its affairs or to be equally represented on those occasions when legislative candidates were chosen.”⁴⁹ In addition, the success of the Republican Party in Indiana further corroborated the political nature of the losses. The party had “won four of the five elections from 1960 to 1968”—a state of affairs that made

relative treatment of *groups* in determining whether an *individual* has been harmed. Although a handful of courts and commentators have noted the group-related aspects of dilution claims, there is not yet a fully developed theory for describing and understanding this unique constitutional and statutory injury.” (footnote omitted).

43. See, e.g., *Fortson v. Dorsey*, 379 U.S. 433, 439 (1965) (“It might well be that, designedly or otherwise, a multi-member constituency apportionment scheme, under the circumstances of a particular case, would operate to minimize or cancel out the voting strength of racial or political elements of the voting population. When this is demonstrated it will be time enough to consider whether the system still passes constitutional muster.”).

44. 403 U.S. 124, 128–29 (1971).

45. *Id.* at 133.

46. *Id.*

47. *Id.*

48. See *id.* at 149 (“[T]here is no suggestion here that Marion County’s multi-member district, or similar districts throughout the State, were conceived or operated as purposeful devices to further racial or economic discrimination.”).

49. *Id.*

it unlikely that the “Democratic Party could afford to overlook [African-Americans] in [the] slating [of] its candidates.”⁵⁰

Here, discriminatory purpose is defined as not having an “equal opportunity to participate in and influence the selection of candidates and legislators.”⁵¹ This definition is so narrow that it would not encompass much more than what scholars have termed “first generation” claims—or “direct impediments to electoral participation, such as registration and voting barriers.”⁵² Upon initial review, the *Whitcomb* analysis looks for the same type of discriminatory purpose as described in cases decided a few years later that, notably, did not involve an electoral system. In *Washington v. Davis*⁵³ and *Personal Administrator of Massachusetts v. Feeney*,⁵⁴ the Court held that, while impact is certainly probative of intent,⁵⁵ discriminatory purpose means official action must be taken “‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group.”⁵⁶ Both the majority and the dissent in *Whitcomb* seemed to foreshadow this intent requirement,⁵⁷ ignoring that the submergence of minority groups in all-white districts can render the groups powerless regardless of purpose.

The Court tried to remedy this oversight two years after *Whitcomb* in *White v. Regester*, which held that the multi-member districts used in Dallas and Bexar Counties, Texas, violated the Fourteenth Amendment.⁵⁸ The *White* Court claimed that it was acting consistently with *Whitcomb*, looking for evidence that minorities “had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice.”⁵⁹ Yet it placed great weight on the history of official discrimination in Texas in finding that the state had acted with discriminatory purpose, and much of this evidence was not limited to

50. *Id.* at 150.

51. *Id.* at 153.

52. See Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success*, 89 MICH. L. REV. 1077, 1093–94 (1991).

53. 426 U.S. 229 (1976).

54. 442 U.S. 256, 279 (1979).

55. See *Washington*, 426 U.S. at 242 (“[A]n invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another.”); see also *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264–65 (1977) (“[O]fficial action will not be held unconstitutional solely because it results in a racially disproportionate impact.”).

56. *Feeney*, 442 U.S. at 279.

57. *Whitcomb v. Chavis*, 403 U.S. 124, 177, 180 (1971) (Douglas, J., dissenting in part and concurring in the result in part) (arguing that “[a] showing of racial motivation is not necessary when dealing with multi-member districts”—but later noting that “once [the plaintiffs’] identity is *purposely* washed out of the system, the system, as I see it, has a constitutional defect” (emphasis added)).

58. See *White v. Regester*, 412 U.S. 755, 765 (1973).

59. *Id.* at 766.

discrimination in politics.⁶⁰ The Court also found that other characteristics of the Texas system—“requiring a majority vote as a prerequisite to nomination in a primary election”; “the so-called ‘place’ rule limiting candidacy for legislative office from a multi-member district to a specified ‘place’ on the ticket”; and powerful, white-dominated slating organizations—made racial discrimination more likely.⁶¹ This totality-of-the-circumstances approach considerably broadened the universe of evidence sufficient to prove discriminatory purpose beyond that present in *Whitcomb*.⁶²

The tension between *Whitcomb* and *White* came to a head in *City of Mobile v. Bolden*, where the Court rejected a challenge to the at-large election scheme that Mobile used to elect city commissioners.⁶³ Consistent with its caselaw on the Fourteenth Amendment, the Court held that the Fifteenth Amendment and section 2 of the Voting Rights Act both require proof of discriminatory purpose to establish a violation of either provision.⁶⁴ The plurality rejected the argument that the evidence in *Bolden* could sustain the Fifteenth Amendment or section 2 claims, although the Court had found sufficient evidence of vote dilution in *White* on similar facts.⁶⁵

60. See *id.* at 768 (finding that Hispanics in Texas “had long ‘suffered from, and continue[] to suffer from, the results and effects of invidious discrimination and treatment in the fields of education, employment, economics, health, politics[,] and others’” (quoting *Graves v. Barnes*, 343 F. Supp. 704, 728 (W.D. Tex. 1972), *aff’d in part, rev’d in part sub nom. White*, 412 U.S. 755)).

61. *Id.* at 766–67.

62. The *Whitcomb/White* factors were fleshed out in an influential Fifth Circuit decision, *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973), which further outlined the criteria needed to establish a successful vote-dilution claim:

[W]here a minority can demonstrate a lack of access to the process of slating candidates, the unresponsiveness of legislators to their particularized interests, a tenuous state policy underlying the preference for multi-member or at-large districting, or that the existence of past discrimination in general precludes the effective participation in the election system, a strong case is made. Such proof is enhanced by a showing of the existence of large districts, majority vote requirements, anti-single shot voting provisions and the lack of provision for at-large candidates running from particular geographical subdistricts. . . . [A]ll these factors need not be proved in order to obtain relief.

Zimmer, 485 F.2d at 1305 (footnotes omitted). The *Zimmer* factors were also mentioned in the Senate report underlying the reauthorization of section 2 of the VRA in 1982. See S. REP. NO. 97-417, at 23 (1982), reprinted in 1982 U.S.C.C.A.N. 177; see also *Rogers v. Lodge*, 458 U.S. 613 (1982) (relying on a host of circumstantial evidence to support an inference of discriminatory intent with respect to an at-large election system).

63. *City of Mobile v. Bolden*, 446 U.S. 55 (1980), *superseded in part by statute*, Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, sec. 3, § 2, 96 Stat. 131, 134 (codified as amended at 52 U.S.C. § 10301 (2012)), *as recognized in Thornburg v. Gingles*, 478 U.S. 30, 35–36 (1986).

64. *Id.* at 65 (plurality opinion).

65. *Id.* at 68–69 (“*White v. Regester* is thus consistent with ‘the basic equal protection principle that the invidious [quality] of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose.’” (quoting *Washington v. Davis*, 426 U.S. 229, 240 (1976))). The *Mobile* decision was significantly undermined a short time after it was decided in *Rogers v. Lodge*,

There is no evidence that the multi-member districts used in Dallas and Bexar Counties, or the at-large elections used in Mobile for the city commission, were adopted for the purpose of diluting the votes of minorities. But, in the former case, general societal discrimination was sufficient to doom the multi-member scheme.⁶⁶ In *Bolden*, the Court distinguished *White* by focusing on the fact that “there were no inhibitions against Negroes becoming candidates, and . . . Negroes had registered and voted without hindrance”⁶⁷—a contention that ignored all of the other factors that the Court had previously stated were relevant to the validity of the vote-dilution claim.⁶⁸

Justice White, who had authored *Washington v. Davis*, argued that the *Bolden* plaintiffs had established discriminatory intent by showing evidence of racially polarized voting, a history of official discrimination, the unresponsiveness of elected officials, and an inability to elect their candidate of choice despite comprising 35% of the population.⁶⁹ Indeed, Justice White’s discussion of racially polarized voting is notable here, for this important factor, which would become central to proving vote dilution under amended section 2, had played virtually no role in *White v. Regester*. Here, the *Bolden* plaintiffs had adduced *more* evidence of vote dilution than had the plaintiffs in *White*, but in rejecting liability, the plurality narrowly focused on whether there were first-generation barriers to exercising the right to vote.⁷⁰

In 1982, voting rights advocates lobbied Congress to amend section 2 of the VRA in response to the *Bolden* decision. In altering the statute to embrace a results test rather than the intent analysis developed in *Bolden*, Congress outlined a list of factors (known as the “Senate factors”) relevant

458 U.S. 613 (1982). While an African-American had never been elected under either of the electoral schemes at issue in *Mobile* and *Rogers*, the *Rogers* plaintiffs presented more evidence of discrimination that was directly linked to the at-large election system than the plaintiffs in *Mobile*. Nonetheless, the problems with the discriminatory intent standard—i.e., adducing the amount/kind of evidence sufficient to prove a violation—continued to confound plaintiffs and scholars after the *Rogers* decision. See *Rogers*, 458 U.S. at 629 (Powell, J., dissenting) (arguing that *Mobile* and *Rogers* cannot be reconciled because *Mobile* rejected the type of subjective evidence of discriminatory intent that the Court found persuasive in *Rogers*).

66. Compare *Bolden*, 446 U.S. at 112 (Marshall, J., dissenting) (referring to *White* as using a “discriminatory-effect standard”), with *id.* at 73–74 (plurality opinion) (rejecting the argument that discrimination against African-Americans in “municipal employment and in dispensing public services” is sufficient to establish the “constitutional invalidity of the electoral system under which [white officials] attained their offices”).

67. *Id.* at 71 (plurality opinion).

68. See *supra* text accompanying notes 60–61.

69. See *Bolden*, 446 U.S. at 102–03 (White, J., dissenting). In *Bolden*, four Justices—Blackmun, White, Brennan, and Marshall—endorsed the view that enough evidence was present to prove discriminatory purpose. See *id.* at 80–83 (Blackmun, J., concurring); *id.* at 94–103 (White, J., dissenting); *id.* at 94 (Brennan, J., dissenting); *id.* at 103–40 (Marshall, J., dissenting).

70. See *id.* at 71–74 (plurality opinion).

to proving a section 2 claim, including racially polarized voting and a history of official discrimination.⁷¹ In *Thornburg v. Gingles*, the Court reduced the Senate factors to three necessary preconditions that plaintiffs must establish in order to prove a violation under amended section 2: that a minority group is “sufficiently large and geographically compact to constitute a majority in a single-member district”; that it is “politically cohesive”; and that “the white majority votes sufficiently as a bloc to enable it . . . to defeat the minority’s preferred candidate.”⁷² This requirement of racial bloc voting, mentioned by the dissenters in *Bolden* but not a prominent feature of any of the prior constitutional vote-dilution cases, helped distinguish illegal vote dilution from the routine electoral losses that had doomed the plaintiffs in *Whitcomb*.⁷³

Despite the 1982 amendments, section 2 cases have not been able to escape the specter of discriminatory intent that continues to haunt vote-dilution claims from the time of *White*, *Whitcomb*, and *Bolden* for two reasons. First, both constitutional vote dilution and section 2 violations are determined based on a totality-of-the-circumstances assessment of how an

71. See *Thornburg v. Gingles*, 478 U.S. 30, 36–37 (1986). The Senate Judiciary Committee outlined a list of factors that are probative of a section 2 claim:

1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;
2. the extent to which voting in the elections of the state or political subdivision is racially polarized;
3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;
4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;
5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;
6. whether political campaigns have been characterized by overt or subtle racial appeals;
7. the extent to which members of the minority group have been elected to public office in the jurisdiction.

Additional factors that in some cases have had probative value as part of plaintiffs’ evidence to establish a violation are:

whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group.

whether the policy underlying the state or political subdivision’s use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.

Id. (quoting S. REP. NO. 97-417, at 28–29 (1982), reprinted in 1982 U.S.C.C.A.N. 177, 206–07).

72. *Id.* at 50–51 (referred to herein as “the *Gingles* factors”); see also *Johnson v. DeGrandy*, 512 U.S. 997, 1011, 1020 (1997) (noting that “*Gingles* provided some structure to the statute’s ‘totality of circumstances’ test in a case challenging multimember legislative districts” but courts must still consider other factors, including those in the Senate Report and evidence of proportionality, in determining the existence of a section 2 violation).

73. *Gingles*, 478 U.S. at 49–50 (citing *Bolden*, 446 U.S. at 105 n.3 (Marshall, J., dissenting)).

electoral structure impacts the rights of a minority group. Even though the Court has interpreted this standard to require that the evidence be sufficient to create an inference of discriminatory intent for constitutional claims, section 2 does not endorse this approach.⁷⁴ Because of the overlap between the constitutional and statutory criteria for determining vote dilution, however, courts analyzing section 2 claims often look for the same amount of evidence that would establish a claim for constitutional vote dilution.⁷⁵

Second, statutory vote dilution has become difficult to implement because some of the Justices are uncomfortable with imposing liability based solely on a law's discriminatory effect.⁷⁶ It is irrelevant to these particular Justices that the concept of intent, as Congress recognized when it amended section 2 in 1982, obscures a very real threat to voting rights: facially neutral laws that purport to extend equal suffrage in theory but deny it in practice. The 1982 amendments to section 2, which explicitly allow evidence of discriminatory impact to be sufficient to establish a violation of the statute, have not been enough to deter courts from looking for evidence of discriminatory purpose because constitutional doctrine has evolved in recent decades to be less amenable to the broad enforcement of civil rights statutes more generally.

B. The Validity of Section 2 of the Voting Rights Act Amidst Evolving Constitutional Doctrine

The Supreme Court has sustained the Voting Rights Act in past cases as a constitutional exercise of Congress's authority to enforce the Fourteenth and Fifteenth Amendments, but challenges to the statute's

74. Parker, *supra* note 22, at 764.

75. Courts try to fit section 2's results test within the intentional discrimination framework. See Ellen Katz et al., *Documenting Discrimination in Voting: Judicial Findings under Section 2 of the Voting Rights Act Since 1982*, 39 U. MICH. J.L. REFORM 643, *passim* (2006) (noting that, besides the history of official discrimination in voting and the official use of racialized appeals, numerous courts classify elements of a section 2 claim as evidence of intentional discrimination; such evidence has included "the knowing sacrifice of minority interests to the quest for partisan gain," the state's reliance on at-large elections, and the state's failure to actively remedy past discrimination); see also *supra* note 28.

76. See, e.g., *Tex. Dep't of Hous. and Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2548 (2015) (Alito, J., dissenting) (reading the Fair Housing Act to prohibit intentional discrimination, not disparate impact); *id.* at 2526 (Thomas, J., dissenting) (rejecting the argument that *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), which recognized disparate-impact claims under Title VII of the Civil Rights Act of 1964, is good law); see also Bertrall L. Ross II, *The State as Witness: Windsor, Shelby County, and Judicial Distrust of the Legislative Record*, 89 N.Y.U. L. REV. 2027, 2032 (2014) ("Conservative Justices... tend to treat the record of laws benefitting minorities skeptically.").

validity have focused almost exclusively on section 5 of the Act.⁷⁷ Nevertheless, the Court's interpretation of the Fourteenth and Fifteenth Amendments in its section 5 caselaw has implications for the concept of discriminatory intent and, by extension, the constitutional validity of section 2.

In *City of Rome v. United States*, for example, the Court rejected the argument that Congress's enforcement power under the Fifteenth Amendment was limited to remedying only intentional discrimination, noting that "even if § 1 of the [Fifteenth] Amendment prohibits only purposeful discrimination, the prior decisions of this Court foreclose any argument that Congress may not, pursuant to § 2, outlaw voting practices that are discriminatory in effect."⁷⁸ "[S]o long as the prohibitions attacking racial discrimination in voting are 'appropriate,' as that term is defined in *McCulloch v. Maryland*,"⁷⁹ then Congress can enact a broad range of legislation to remedy voting rights violations.

Similarly, in *Lopez v. Monterey County*, the Court held that a county covered under section 5 of the Voting Rights Act had to preclear the changes to its judicial system, even though the changes were mandated by state law.⁸⁰ The fact that the county did not have discretion in whether to implement the changes illustrates the absence of discriminatory intent. Nonetheless, the Court determined that preclearance was required because "Congress has the constitutional authority to designate covered jurisdictions and to guard against changes that give rise to a discriminatory effect in those jurisdictions."⁸¹

Both *City of Rome* and *Lopez* are in tension with cases that limit Congress's enforcement authority under the Fourteenth and Fifteenth Amendments, and by implication, create constitutional concerns about section 2 of the Voting Rights Act.⁸² *City of Rome*, in particular, could have easily validated an effects-only interpretation of section 2 of the VRA, particularly in light of the sparse nature of the congressional record

77. See, e.g., *Shelby Cty. v. Holder*, 133 S. Ct. 2612 (2013); *Nw. Austin Mun. Util. Dist. No. One v. Holder (NAMUDNO v. Holder)*, 557 U.S. 193 (2009); *South Carolina v. Katzenbach*, 383 U.S. 301, 313–14 (1966).

78. 446 U.S. 156, 173 (1980) (footnote omitted); see also Franita Tolson, *Reinventing Sovereignty?: Federalism as a Constraint on the Voting Rights Act*, 65 VAND. L. REV. 1195, 1234 (2012) (discussing *City of Rome* and other cases relevant to Congress's authority to enforce the Fourteenth and Fifteenth Amendments).

79. *City of Rome*, 446 U.S. at 177 (citing *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819)).

80. 525 U.S. 266 (1999).

81. *Id.* at 283.

82. See Ellen D. Katz, *Reinforcing Representation: Congressional Power to Enforce the Fourteenth and Fifteenth Amendments in the Rehnquist and Waite Courts*, 101 MICH. L. REV. 2341, 2372–73 (2003).

surrounding its adoption.⁸³ Oddly, both *City of Rome* and *Bolden* were decided in the same term.

The Court has since declined the invitation to continue its charitable view of congressional power outlined in *City of Rome* and *Lopez*. In *City of Boerne v. Flores*, the Court took a relatively narrow view of the scope of Congress's enforcement authority under Section 5 of the Fourteenth Amendment, characterizing Congress's power as remedial and lacking the authority to determine the substance of constitutional violations.⁸⁴ *City of Boerne* limited this power to crafting remedies that address clearly identified problems, and held that there must be a "congruence and proportionality" between the remedy imposed by Congress and the harm to be addressed.⁸⁵

While *City of Boerne* discussed the Voting Rights Act favorably, the intervening years since the decision has produced Justices less predisposed to protecting the once venerable super statute.⁸⁶ Unsurprisingly, sections 4(b) and 5 of the Act recently fell victim to a narrow interpretation of Congress's enforcement authority similar to that embraced in *Boerne*. In *Shelby County v. Holder*, the Court struck down the coverage formula of section 4(b), which had for over forty years subjected to preclearance under section 5 those states that used a test or device as a prerequisite to voting in the 1964, 1968, and 1972 elections.⁸⁷

One of the primary criticisms of the preclearance regime, which affected mostly southern states, is that circumstances had substantially improved because there is less racial discrimination in voting. The Court argued that Congress could not use a metric devised at a time when discrimination was significantly worse to force states into preclearance.⁸⁸ This holding reflected long-standing concerns that Congress had not built a sufficient record of intentional racial discrimination in voting to justify the continued use of this particular remedy (both preclearance and selective

83. It is not clear from the legislative history that the Congress that originally enacted section 2 in 1965 intended to require evidence of discriminatory purpose in order to prove a violation. Cf. James Thomas Tucker, *Tyranny of the Judiciary: Judicial Dilution of Consent Under Section 2 of the Voting Rights Act*, 7 WM. & MARY BILL RTS. J. 443, 550 & n.527 (1999). See generally S. REP. NO. 89-162 (1965), reprinted in 1965 U.S.C.C.A.N. 2508.

84. 521 U.S. 507 (1997).

85. *Id.* at 520; see also Douglas Laycock, *Conceptual Gulfs in City of Boerne v. Flores*, 39 WM. & MARY L. REV. 743, 749-50 (1998).

86. *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 203 (2009) (reading the Voting Rights Act broadly to avoid the constitutional questions raised by the statute).

87. 133 S. Ct. 2612, 2619-20, 2630-31 (2013).

88. See *id.* at 2625-31.

coverage) under not just *City of Boerne*'s congruence and proportionality analysis but under *any* standard of review.⁸⁹

Unlike section 5, section 2 does not require preclearance nor does it engage in selective coverage, but courts employ remedies to address section 2 violations that raise similar concerns about the fit between the scope of the violation and the remedy imposed.⁹⁰ Since the 1982 amendments, a common remedy to address a potential section 2 violation is for states to create a majority-minority district in which historically disenfranchised voters can elect their candidate of choice. *Johnson v. De Grandy*, for example, involved a section 2 claim brought by plaintiffs in Dade County, Florida, challenging the state legislative redistricting plan, which did not maximize the number of Hispanic-majority districts. Maximization would have exceeded the number of districts expected to yield rough proportionality for Hispanic voters relative to their share of the population.⁹¹ Technically, the plaintiffs met all three *Gingles* criteria: they were sufficiently large and geographically compact; they were politically cohesive; and there was sufficient evidence of racial bloc voting. The issue was whether the state was required to create majority-minority districts where the *Gingles* factors were met but other factors (here, proportionality) might counsel against it.

The Court, ruling against the plaintiffs, held that proportionality should be a factor in the totality-of-the-circumstances assessment for section 2 claims.⁹² But *De Grandy* highlighted a foundational problem with these claims that has become the crux of much of the criticism facing the statute: that the fear of section 2 liability forces the state to pick and choose among minority groups in allocating political power, making the reliance on racial

89. See *id.* at 2630–31 (leaving open the question of whether the congruence and proportionality standard applies to the Fifteenth Amendment but finding that the coverage formula fails regardless of which standard applies).

90. Cf. *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001) (legislative record compiled by Congress insufficient to subject states to suits under Title I of the Americans with Disabilities Act); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000) (same for the Age Discrimination in Employment Act); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627 (1999) (same for patent infringement lawsuits). But see *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721 (2003) (allowing abrogation of state immunity under the Family and Medical Leave Act). See also Gerken, *supra* note 32, at 1736 (“The most likely basis for challenging the constitutionality of § 2 is the argument that the results-based test adopted by Congress — and the remedy of proportionality — is not ‘congruent’ or ‘proportional’ to the underlying harm. Defenders of § 2 would have to establish that Congress had an adequate factual record to conclude either that it is fair to infer intentional discrimination from a state’s failure to achieve proportionality or that the requirement of proportionality is an appropriate remedy for intentional discrimination.”).

91. 512 U.S. 997, 1022 (1994).

92. See *id.* at 1020 (“It is enough to say that, while proportionality in the sense used here is obviously an indication that minority voters have an equal opportunity, in spite of racial polarization, ‘to participate in the political process and to elect representatives of their choice,’ 42 U.S.C. § 1973(b), the degree of probative value assigned to proportionality may vary with other facts.”).

criteria all the more problematic.⁹³ Not only were the plaintiffs advancing a maximization theory under section 2, but there was also a conflict about the number of Hispanic districts that could be drawn without having a retrogressive effect on African-Americans.⁹⁴ Section 2 often pits the desires of one minority group against another, and the Court has generally frowned on the use of race as outcome determinative in the battle between political winners and losers.⁹⁵ In *De Grandy*, the outcome was simple—neither African-Americans nor Hispanics were given the additional district—but other cases have not been so easy.

To take one of the most notable examples, in *Shaw v. Reno*, the Court held that creating majority-minority districts where none are required violated the Fourteenth Amendment because this type of state action “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.”⁹⁶ Similarly, in *Bartlett v. Strickland*, the Court held that states were not required, under section 2, to create districts that were less than 50% minority because such a requirement would raise constitutional concerns under the Equal Protection Clause by impermissibly inserting race into every redistricting decision.⁹⁷ Thus, avoiding section 2 liability cannot be a compelling governmental interest where states draw noncompact districts that are

93. See Samuel Issacharoff, *Groups and the Right to Vote*, 44 EMORY L.J. 869, 903 (1995) (“Whether cast as a violation of the antiessentialism principle, or as an embodiment of an expressive harm to individual dignity, the act of assigning representation on the basis of what state authorities determine to be the defining feature of a citizen’s existence is necessarily problematic. While this is an inherent feature of districting, it becomes a first order problem once the drawing of lines is coupled with the express objective of securing prescribed levels of group representation.” (footnotes omitted)).

94. See *De Grandy*, 512 U.S. at 1024 (“[While both groups met the *Gingles* factors,] the [lower] court did not . . . think it was possible to create both another Hispanic district and another black district on the same map . . .”).

95. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493, 510–11 (1989); see also *Bush v. Vera*, 517 U.S. 952, 985–86 (1996) (plurality opinion).

96. See *Shaw v. Reno*, 509 U.S. 630, 657 (1993) (creating a new cause of action under the Equal Protection Clause to address racial gerrymandering); see also *Miller v. Johnson*, 515 U.S. 900 (1995) (applying strict scrutiny where race was the predominant factor in the drawing of a legislative district).

97. 556 U.S. 1, 21–22 (2009). As the Court recognized:

To the extent there is any doubt whether §2 calls for the majority-minority rule, we resolve that doubt by avoiding serious constitutional concerns under the Equal Protection Clause. Of course, the “moral imperative of racial neutrality is the driving force of the Equal Protection Clause,” and racial classifications are permitted only “as a last resort.” “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.”

Id. at 21 (first citation omitted) (quoting *Crosan*, 488 U.S. at 518, 519 (Kennedy, J., concurring in part and concurring in judgment), and *Shaw*, 509 U.S. at 657, respectively).

“unexplainable on grounds other than race,”⁹⁸ nor is section 2 triggered upon the dismantling of districts in which minorities constitute less than a majority of the population.

Presumably, concerns about the potential conflict with the Equal Protection Clause has led the Court to eschew any outcome that would require states to engage in more race-based redistricting unless something akin to discriminatory intent is present. In *LULAC v. Perry*, the Court held that the dismantling of majority-Latino District 23 in Texas not only violated section 2, but the state’s action “bears the mark of intentional discrimination that could give rise to an equal protection violation.”⁹⁹ The legislature impermissibly dismantled the majority-Latino district to protect an increasingly unpopular representative.¹⁰⁰ The incumbent, Henry Bonilla, had been steadily losing Latino support, and during the redistricting, the state shifted some of the Latino voters out of District 23 and added white voters to shore up his support. The Court concluded that because Latinos were set to elect the candidate of their choice pre-redistricting and had indicated their disapproval of the incumbent by not voting for him, the new plan violated section 2 because it took away their opportunity to exercise an effective vote just as they were about to use it.¹⁰¹

In analyzing the section 2 claim, the Court relied on the same standard highlighted in *White v. Regester*, which, if you will recall, is a constitutional case and not a statutory one: whether, based on the totality of the circumstances, “the proposed districting would ‘remedy the effects of past and present discrimination against Mexican-Americans, and [] bring the community into the full stream of political life of the county and State by encouraging their further registration, voting, and other political activities.’”¹⁰² In describing the harm to Latinos as akin to an equal protection violation, the Court did not reaffirm that section 2 of the VRA only requires proof of discriminatory effect—a move that opened the door for the dissenters to criticize the opinion’s statutory holding using the rhetoric of discriminatory purpose.¹⁰³ The Court’s analysis, perhaps

98. *Shaw*, 509 U.S. at 644 (quoting *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977)); *Vera*, 517 U.S. at 952, 976–79 (plurality opinion) (assuming, but not deciding, that compliance with section 2 can be a compelling state interest that justifies race-based redistricting that would otherwise violate the Equal Protection Clause).

99. 548 U.S. 399, 440 (2006).

100. *See id.*

101. *See id.* at 440–41 (majority opinion).

102. *Id.* at 439 (quoting *White v. Regester*, 412 U.S. 755, 769 (1973)).

103. *See id.* at 516 (Scalia, J., dissenting) (finding no discriminatory intent because “the State’s purpose was to protect Bonilla, and not just to create a safe Republican district. The fact that the redistricted residents voted against Bonilla (regardless of how they voted in other races) is entirely consistent with the legislature’s political and nonracial objective. I cannot find, under the clear error standard, that the District Court was required to reach a different conclusion”).

inadvertently, made the constitutional discriminatory intent standard into the focal point of its section 2 discussion, giving credence to the argument that the *Davis/Bolden/Feeney* requirement—that official action be taken “because of, rather than in spite of” its effect on a racial group—applies to section 2 claims.

While the caselaw provides little guidance about the proper scope of section 2, much less its constitutionality, the statute remains an appropriate use of Congress’s enforcement authority because of a previously overlooked provision of the Constitution: Section 2 of the Fourteenth Amendment. Through Section 2, Congress has the authority to enact legislation that adopts a results-based, rather than an intent-based, test to police voting rights violations. While potentially fatal under traditional Fourteenth and Fifteenth Amendment analysis, the absence of discriminatory intent and the requirement of race-conscious measures under section 2 of the VRA is consistent with Section 2 of the Fourteenth Amendment’s broad protection of the right to vote from “abridgment.” As the next Section shows, prior Congresses seeking to enforce Section 2 believed that “abridgment” did not require that decisionmakers act with discriminatory purpose.

II. DISPELLING THE INTENT REQUIREMENT FOR GOOD: A HISTORICAL ANALYSIS OF THE POST-ENACTMENT HISTORY OF SECTION 2 OF THE FOURTEENTH AMENDMENT

The Supreme Court has interpreted Section 1 of the Fourteenth Amendment broadly to protect the right to vote, holding that “‘the political franchise of voting’ [is] a ‘fundamental political right, because [it is] preservative of all rights,’”¹⁰⁴ and therefore “classifications which might invade or restrain them must be closely scrutinized and carefully confined.”¹⁰⁵ Similarly, the Fifteenth Amendment declares that the “right of citizens . . . to vote shall not be denied or abridged” on the basis of race,¹⁰⁶ which suggests that Congress, in accordance with its enforcement authority, can protect the right to vote from a panoply of state laws that discriminate on the basis of race in any number of ways.¹⁰⁷ As Part I illustrates, recent caselaw has limited the reach of these provisions and the

104. *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 667 (1966) (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886)).

105. *Id.* at 670.

106. U.S. CONST. amend. XV, § 1.

107. *See, e.g., South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966), *abrogated by Shelby Cty., Ala. v. Holder*, 133 S. Ct. 2612 (2013).

ability of Congress to enforce their mandates absent a documented pattern of purposeful discrimination on the part of the states.

Less attention has been paid to Section 2 of the Fourteenth Amendment, which does not require a record of racially discriminatory actions by state officials before triggering Congress's enforcement authority. The fact that the Court has never definitively resolved the constitutionality of section 2 of the Voting Rights Act presents an opportunity to incorporate Section 2 of the Fourteenth Amendment back into the constitutional canon,¹⁰⁸ particularly in light of the renewed focus on the scope of congressional authority to enforce the Reconstruction Amendments after *Shelby County v. Holder*.

In prior work, I argued that courts have to assess Congress's enforcement authority in light of the language of Section 2.¹⁰⁹ Section 2, and its penalty of reduced representation for voting rights violations, not only stands as an example of what would be a "congruent and proportional" remedy to address abridgment of the right to vote in both state and federal elections;¹¹⁰ it also influences the scope of congressional authority under Section 5 of the Fourteenth Amendment.¹¹¹ Section 2 permits Congress to impose the penalty of reduced representation or, alternatively, to criminalize conduct that abridges the right to vote under Section 5. Such means would be an "appropriate" way of enforcing the Fourteenth Amendment so long as the legislation enacted by Congress does not impose a remedy that is more severe than reduced representation.¹¹² This approach is contrary to *Shelby County v. Holder* because the preclearance requirement is a "lesser penalty" than reduced representation, and therefore is consistent with the structure of Sections 2 and 5 of the Fourteenth Amendment.¹¹³ The prohibitions in section 2 of the Voting Rights Act on practices or procedures that "abridge" the right to vote closely track language used in Section 2 of the Fourteenth Amendment,

108. See, e.g., *Chisom v. Roemer*, 501 U.S. 380, 418 (1991) (Kennedy, J., dissenting); *Thornburg v. Gingles*, 478 U.S. 30, 30 (1986).

109. See Tolson, *Voting Rights Enforcement*, *supra* note 6, at 387–98.

110. See *City of Boerne v. Flores*, 521 U.S. 507, 530 (1997).

111. Tolson, *Voting Rights Enforcement*, *supra* note 6, at 394–404.

112. *Id.*

113. *Id.* Michael Morley has argued that the severity of the penalty cautions against using Section 2 to penalize states for facially neutral voting laws, but this argument ignores Section 2's text, which has no requirement of discriminatory intent or facial discrimination, just abridgment, as well as the post-enactment history, discussed herein. See Morley, *supra* note 6. There is evidence in the legislative history that some representatives assumed that the penalty would be exclusive, but the text of Sections 2 and 5 do not compel this interpretation. See Tolson, *Voting Rights Enforcement*, *supra* note 6, at 403–04.

suggesting that the statute can legitimately apply to a broader swath of conduct outside of purposeful discrimination.¹¹⁴

The legislative history of the Fourteenth Amendment supports this broad reading of Section 2. Section 2 of the Fourteenth Amendment was the Reconstruction Congress's attempt to constitutionalize a mechanism that would allow Congress to all but legislate universal suffrage since there was very little support for a constitutional amendment that would actually require it.¹¹⁵ This provision gave Congress the ability to intervene in both state and federal elections—despite concerns about the states' sovereignty over elections—because Congress realized that guaranteeing the right to vote in only federal elections and prohibiting vote denial only on the basis of race would do little to protect the ex-slaves from being disenfranchised.

In many ways, the promise of Section 2 has not been realized because questions remain as to what constitutes abridgment within the scope of its language. Michael Morley, for example, has argued that both supporters and opponents of proposed Section 2 agreed that “the term ‘abridge’ . . . referred to the imposition of qualifications to vote for blacks, such as property or intelligence requirements, that did not also apply to white people.”¹¹⁶ While some senators and representatives were concerned about the lack of specificity in the language of Section 2,¹¹⁷ and others discussed scenarios in which its penalty might be triggered,¹¹⁸ there is nothing in the legislative history (or the text, for that matter) to indicate that these individuals believed that applying voting qualifications unequally is the *only* way in which a state could abridge the right to vote.

114. See Tolson, *Voting Rights Enforcement*, *supra* note 6, at 403–04.

115. *Id.* at 405–08.

116. Morley, *supra* note 6, at 310.

117. *Id.* (discussing one representative who “recommended that the amendment should flatly prohibit States from disenfranchising their citizens”).

118. *Id.* at 310, 319–21. In fact, Professor Morley discusses comments by Sen. Jacob Howard as proof that the term abridge should be read narrowly. Senator Howard, a Republican, argued that a state abridges the right to vote if it “permit[s] one person to vote for a member of the State Legislature, but prohibit[s] the same person from voting for a Representative, in Congress.” *Id.* at 320 (first alteration in original) (quoting CONG. GLOBE, 39th Cong., 1st Sess. 2767 (1866) (statement of Sen. Howard)). Yet, Senator Howard also thought that the term “abridge” was too vague (and by implication not limited to any specific effort by the state to narrow its electorate). Senator Howard referred to the term as “an invitation to raise questions of construction, and it will be followed . . . with an unending train of disputations in courts of justice and elsewhere, and there is no possibility of foreseeing what in the end will be the decision of the Supreme Court as to the meaning of the language ‘or in any way abridge.’” *Id.* at 323 (alteration in original) (quoting CONG. GLOBE, 39th Cong., 1st Sess. 3039 (1866) (statement of Sen. Howard)); see also *id.* at 322 (“Several opponents objected that it would be too difficult [under Section 2] to determine the number of people who have been disenfranchised for improper, as opposed to permissible, reasons.”). Despite its apparent vagueness, Congress left this open-ended term in the final version of Section 2, presumably leaving its scope to be determined by courts or future Congresses.

Some of the best evidence of what state actions constitute an abridgment of the right to vote lies in the few congressional attempts to protect voting rights during the periods of Redemption and Restoration, which lasted from about 1877 to 1910.¹¹⁹ This period saw a wave of state constitutional conventions that engaged in the “legal” disenfranchisement of African-Americans and whites, yet many in Congress still believed they had the constitutional authority to enact legislation to counter these efforts.¹²⁰ Congress first tried to police the offending state laws through legislation known as the Federal Elections Bill of 1890, which would have subjected congressional elections to federal oversight. This legislation ultimately failed, and Congress later sought to evoke the penalty of Section 2 of the Fourteenth Amendment. The controversy over these attempts to intervene in state electoral practices sheds light on the meaning of “in any way abridge” in the text of Section 2 of the Fourteenth Amendment.

A. What is Abridgment? Lessons from the Federal Elections Bill of 1890

The legal scholarship has ignored efforts to protect voting rights during Redemption and Restoration because of the common misconception that Republicans in Congress abandoned the cause of black enfranchisement after the presidential election of 1877.¹²¹ However, their successors were

119. While this period is commonly known as the Gilded Age, voting rights scholars divide this time frame into two phases known as Redemption and Restoration, respectively. See MICHAEL PERMAN, *STRUGGLE FOR MASTERY: DISENFRANCHISEMENT IN THE SOUTH, 1888–1908*, at 10 (2001) (Perman notes that, in 1877, “Reconstruction was over . . . but its electoral system, its regime, remained. . . . Redemption had overthrown governments; Restoration would attempt to remove all traces of the political and electoral system created during Reconstruction.”).

120. There was plenty of evidence of discriminatory intent behind the voting regulations enacted in the late nineteenth century, which would have been enough to sustain a Fourteenth or Fifteenth Amendment challenge under current caselaw. See, e.g., *id.* at 70 (“Let us tell the truth if it bursts the bottom of the Universe. We came here to exclude the negro. Nothing short of this will answer.”) (quoting Solomon S. Calhoun, Mississippi Constitutional Convention, Sept. 10, 1890)). However, the fact that there were few successful Fifteenth Amendment challenges to facially race-neutral laws shows that, during the nineteenth and early twentieth centuries, much of the judicial focus was on the facial validity of the regulation (and the judiciary’s authority to impose a remedy) as opposed to whether the regulation was adopted with discriminatory intent. Cf. *Giles v. Harris*, 189 U.S. 475, 642 (1903) (refusing to force the state to register a black voter because “equity cannot undertake now, any more than it has in the past, to enforce political rights”). It was not until the *White Primary Cases* that the Court expanded its voting rights jurisprudence to reach facially neutral laws and practices undertaken with discriminatory intent. Compare *Terry v. Adams*, 345 U.S. 461 (1953), and *Smith v. Allwright*, 321 U.S. 649 (1944), with *Grovey v. Townsend*, 295 U.S. 45 (1935), *overruled in part by Allwright*, 321 U.S. 649, and *Nixon v. Condon*, 286 U.S. 73 (1932), and *Nixon v. Herndon*, 273 U.S. 536 (1927).

121. Scholars in other disciplines have given significant attention to voting rights enforcement during this period. See, e.g., Scott C. James & Brian L. Lawson, *The Political Economy of Voting Rights Enforcement in America’s Gilded Age: Electoral College Competition, Partisan Commitment, and the Federal Election Law*, 93 AM. POL. SCI. REV. 115 (1999). In contrast, legal scholars tend to focus on Reconstruction and then skip to the Civil Rights Era, and for those who discuss the Gilded Age, they are not focused specifically on voting rights enforcement. See, e.g., Michael J. Klarman, *The*

willing to use Congress's enforcement authority to punish infringements of the right to vote well after the end of Reconstruction. In the course of trying to enact voting rights legislation, very few of these representatives focused on racially discriminatory intent because many states designed voter-qualification standards to disenfranchise both African-Americans *and* poor whites.¹²² Moreover, disenfranchisement was often accomplished through the discretion that state election laws *legally* delegated to election supervisors. Although proposed pursuant to Congress's authority under the Elections Clause,¹²³ the Federal Elections Bill of 1890, and the debate surrounding it, is a useful point of reference when analyzing the types of state election laws and actions by state election supervisors that, according to the bill's supporters, abridge the right to vote. By implication, these laws and the manner in which they were administered also could run afoul of Section 2.

Henry Cabot Lodge introduced the Federal Elections Bill in order to "secure entire publicity in regard to every act connected with the election of members of Congress."¹²⁴ It would have instituted federal supervision of all phases of registration and voting in national elections if 100 people within any given congressional district requested federal intervention.¹²⁵ Following a wave of support for election reform, Lodge proposed this legislation after the Republicans gained majorities in both houses of Congress in 1888 and sought to overcome the political stalemate that had hampered enforcement of the federal election laws then on the books.¹²⁶ The bill was the only piece of election legislation to gain significant traction and almost become law since Reconstruction. Widely referred to

Plessy Era, 1998 SUP. CT. REV. 303 (focusing on state-imposed racial segregation, disenfranchisement, and criminal convictions from 1895 to 1910).

122. See J. MORGAN KOUSSER, *THE SHAPING OF SOUTHERN POLITICS: SUFFRAGE RESTRICTION AND THE ESTABLISHMENT OF THE ONE-PARTY SOUTH, 1880-1910*, at 58 (1974).

123. The Elections Clause provides: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." U.S. CONST. art. I, § 4, cl. 1.

124. Henry Cabot Lodge & T.V. Powderly, *The Federal Election Bill*, 151 N. AM. REV. 257, 257 (1890); see also Federal Elections Bill of 1890, H.R. 10958, 51st Cong. (1st Sess. 1890).

125. KOUSSER, *supra* note 122, at 29-30 (referring to the Federal Elections Bill of 1890 as a "mild piece of legislation" that would have "extended the federal supervisory act of 1870 . . . to every congressional district in which 100 citizens petitioned to have the law go into effect").

126. Welch, *supra* note 24, at 512 ("[I]n the election of 1888 the Republicans won control of Congress as well as the presidency, and the latter office would be held by Benjamin Harrison. Harrison stood with such old-time Republican senators as [George Frisbie] Hoar [floor manager of the Bill in the Senate] and [William E.] Chandler in refusing to admit that the aims and ideals of Radical Reconstruction had been disproved or that the Republican party had outgrown its concern for the southern Negro. The motives of these 'old-fashioned Republicans' offered a strange blend of political opportunism and political idealism. They were determined to spite Grover Cleveland and revive the ideals of Charles Sumner.").

by critics as a “Force Act,” this misnomer was more of a reflection of the controversy surrounding the proposal as opposed to its scope.¹²⁷

The Federal Elections Bill raised interesting questions about whether Congress had the constitutional authority to take over federal elections, which, in the view of critics, was a far different power than regulating the “manner” of federal elections, as dictated by the Elections Clause.¹²⁸ This legislation would have appointed election officers from the two major political parties to oversee congressional elections from registration to the certification of the winners.¹²⁹ While these officers could not directly interfere with the state law that governed federal elections, they had investigative power that allowed them to secure evidence of voter disenfranchisement for later prosecutions against state officials and publicize their wrongdoing.¹³⁰ Despite the limited scope of the bill, it represented a significant change in the basic structure of the system for state oversight of congressional elections. It installed a chief election supervisor in each judicial circuit in the country to take applications from citizens requesting federal assistance.¹³¹ Under this new regime, federal election supervisors would no longer oversee just registration and voting; their duties would also include:

[I]nspecting the registration lists; verifying a doubtful voter’s name, identity, and residential information; placing an oath before a voter when his qualifications were challenged; making a list of all voters; making and certifying statements of the votes cast in his election district; and assisting the court in preventing illegal immigrants from voting.¹³²

Most important, the bill allowed the United States Board of Canvassers to determine the winner of a congressional election, even if the state

127. See WANG, *supra* note 24, at 233–37 (noting that Republicans considered separating state and federal elections, or alternatively, taking the power of conducting congressional elections away from the states before settling on a regime of federal oversight).

128. 21 CONG. REC. 6843 (1890) (comments of Rep. Holman) (pointing to federal laws that require single-member districts and ballots as “manner” regulations under the Elections Clause, and noting that the Federal Elections Bill presented a “new and startling question” of whether Congress can “not only prescribe rules as to the procedure in these elections of Senators and Representatives, but through its own agents take charge of these elections and decide and declare the result”).

129. Lodge, *supra* note 124, at 257–58.

130. *Id.* at 258.

131. *Id.* at 266; Federal Elections Bill of 1890, H.R. 10958, 51st Cong. § 2 (1st Sess. 1890).

132. WANG, *supra* note 24, at 237; Federal Elections Bill of 1890, H.R. 10958, 51st Cong. § 8 (1st Sess. 1890).

certified a different candidate than the Board.¹³³ The losing candidate could appeal the Board's decision, but only in federal court.¹³⁴

The ability to override a state-certified winner in a congressional election, in addition to leaving federal elections almost entirely in the hands of federal judges and election supervisors, led one representative to argue that the bill represented "an absolute and complete change in our system of government."¹³⁵ Others warned that the bill would cause widespread violence and disruption, leading a minority of representatives from the House Committee on Elections to propose an amendment that would have ultimately left control of the elections in the hands of state officials.¹³⁶

In response to this proposal, supporters of the bill pointed to the lack of checks within state systems that would prevent fraud from occurring. Some states, including North and South Carolina, made county canvassing boards judicial officers and removed any oversight of election returns from the hands of state courts (assuming, of course, that state courts were honest and not engaged in fraud). As one congressman observed, this structure resulted in the wrong man being elected to a congressional seat in South Carolina because the county canvassing board, appointed by the Governor, had thrown out votes for his opponent.¹³⁷ Instead of denying the existence of fraud, some Democrats focused on its inevitability, arguing that the various

133. Lodge, *supra* note 124, at 266 ("Where an entire Congressional district is placed under the law, a United States Board of Canvassers appointed for the district receives the supervisors' returns, and on those returns issues a certificate to the candidate who appears to be elected. If that certificate agrees with the certificate of the State officers, the name of the candidate who holds them both is, of course, placed upon the roll of members of the House. If the two certificates disagree, then the certificate of the United States board is *prima-facie* evidence and places the name of the holder upon the roll of Representatives . . ."); Federal Elections Bill of 1890, H.R. 10958, 51st Cong. §§ 15–16 (1st Sess. 1890).

134. Lodge, *supra* note 124, at 258 (noting that the "Circuit Court of the United States . . . has power to set aside the certificate of the canvassers and virtually decide whose name shall be placed on the roll of the House"); see also Welch, *supra* note 24, at 514 (noting that "the judges of the federal circuit courts in 1890 were mostly Republican appointees"); Lodge, *supra* note 124, at 258 (conceding that this is the only point in the legislation where "the United States take what may be called control of any essential step in the election of Representatives.").

135. 21 CONG. REC. 6844–45 (1890) (comments of Rep. Holman) (referring to the bill as "[a] mean, petty system of espionage on the citizens of our country").

136. See *id.* at 6851 (comments of Rep. Buckalew) ("[T]his amendment now proposed by the minority of the committee, when properly understood by the House, is simply this: That the existing system for State elections for Representatives in Congress, including all the proceedings of returns, shall be left unimpaired. The election will be held by the proper State officers. In the first place, the election returns will be carried in such States as mine to a court a day or two after the election, all the returning judges appearing there, the court being empowered to correct errors or any apparent frauds. Then they pass to the district returning boards, which is merely a mere matter of form now in those, and then to the proper high State officers, the secretary of the Commonwealth, . . . and then the returns come here [to Congress] and are *prima facie* evidence of what the people have done." (emphasis omitted)).

137. *Id.* at 6852 (comments of Rep. Rowell).

election frauds would cancel themselves out so federal oversight was unwarranted.¹³⁸ Others tried to deflect attention away from the improprieties committed by state and local officials by pointing out that the bill was a partisan measure, designed to bolster electoral support for the Republican Party.¹³⁹

Criticism of the bill was not limited to southern Democrats. Some representatives were troubled because it applied nationwide, a concern that ignored that election fraud was rampant in both the North and the South.¹⁴⁰ Yet nationwide application was a further indication that supporters were concerned less about focusing on specific practices that were enacted with discriminatory intent, which would have limited the scope of the bill mostly to the South, and more on fraudulent or discriminatory practices that had the effect of undermining the integrity of elections more generally.¹⁴¹ During the congressional debates, fraud in elections held in Chicago and New York was as much a topic of discussion as the discriminatory practices in the South.¹⁴²

But few could deny that the South was the bill's primary target.¹⁴³ First, most of the fraud identified by its supporters had occurred in southern

138. *See id.* at 6854 (comments of Rep. Breckinridge) ("Any Federal election law, in my judgment, is unwise. . . . With the States controlling their elections there can be only local frauds and only temporary mischief. In the give and play of counteracting forces these frauds will generally offset each other. The average result in a series of years will about be equal on either side . . .").

139. *See id.* at 6858 (comments of Rep. Caruth) ("This is an effort here, Mr. Speaker, to perpetuate you Republicans in power. For the first time in quite a number of years the Republican party finds itself in possession of the executive office and of both bodies constituting the legislative department of the Government. The methods by which it secured this supremacy were, to say the least, questionable. The party fought with a desperation which seemed born of despair.")

140. *See id.* at 6847 (comments of Rep. Hill) ("After days and days of talking against this bill in every conceivable form . . . we find them advocating its application, if enacted into law, not merely to a few Congressional districts, not merely to a few cities and localities where it is needed in this country, but to every Congressional district. The constitutional argument is forgotten, the great expense to the people of the United States is forgotten, all the arguments that they have used against this bill are forgotten for the time, and they are ready to fall in and adopt the amendment . . . extending the operations of this bill to every Congressional district, making it not voluntary but compulsory, regardless of expense and regardless of constitutional law."). *But see id.* at 6848 (comments of Rep. Hemphill and Rep. Richardson) (arguing that the Bill should apply nationwide otherwise "there will be gentleman upon this floor who will be seated here under the State law, others will be seated under the United States law . . . [a]nd some without any law"); *id.* (comments of Rep. Hemphill) (noting that the law only goes into operation if 100 people in a district request oversight).

141. In fact, Lodge explicitly stated that the Bill would leave in place state election laws, most of which were adopted with discriminatory purpose. *See* Lodge, *supra* note 124, at 258 ("The State systems, whether they provide for the secret and official ballot or otherwise, are all carefully protected under this law against any interference from United States officers."); *see also* WANG, *supra* note 24, at 234 (arguing that Lodge believed "the best way to eliminate southern suppression of black votes was to carry out comprehensive ballot reform").

142. *See* 21 CONG. REC. 6846-47, 49 (1890); Lodge, *supra* note 124, at 258. *See also* WANG, *supra* note 24, at 225 (noting that the Republican Party's 1888 platform emphasized "equal suffrage instead of black suffrage . . . although black suffrage was intended to be the object of attention").

143. WANG, *supra* note 24, at 234-35, 238.

states.¹⁴⁴ Second, the legislation would have strengthened the system of federal oversight already in place in the southern states as a result of federal elections bills passed between 1870 and 1872. While the purpose of the original federal election laws was to protect African-American voters, enforcement efforts quickly shifted to helping secure Republican majorities in northern swing states in presidential elections.¹⁴⁵ The 1890 Bill would have brought national attention back to the fraudulent and discriminatory practices in the South.

Despite its fairly limited reach, southerners were right to be concerned about the effect of the Federal Elections Bill on their decades long campaign to disenfranchise African-Americans. The bill arguably would have had its biggest impact in preventing states from applying their election laws in a disparate manner, and many states relied on unequal application to maximize the disenfranchisement of both African-Americans and those whites who did not support the Democratic Party. For example, the system of periodic voter registration that many southern states used during the 1870s and 1880s depended, for broadest impact, on the significant discretion that state law delegated to registrars.¹⁴⁶ As J. Morgan Kousser noted in his seminal study of these practices:

According to the North Carolina law of 1889, for instance, registrars, appointed indirectly by the Democratic legislature, could require that a voter prove "as near as may be" his "age, occupation, place of birth and place of residency . . . by such testimony, under oath, as may be satisfactory to the registrar." Black men born into slavery were often ignorant of their exact ages; streets in Negro areas often had no names, houses no numbers. . . . Registration

144. See 21 CONG. REC. 6862 (1890) (comments of Rep. Oates) (noting: "It is said by the advocates of this bill that they have found that frauds have been committed in one district out of the eight in Alabama, in two districts of Arkansas, one in South Carolina, one in Virginia, and one in Mississippi" but arguing that "such a law as that proposed will . . . set us [the South] back to the days of violence which were prevalent there twenty years ago"). This does not mean that fraud was not prevalent in the North. See WANG, *supra* note 24, at 225 ("The election frauds in northern cities, where large numbers of foreign immigrants lived and voted, presented a problem no less urgent than black disenfranchisement in the South and probably even more threatening as it spread nationwide.").

145. See James & Lawson, *supra* note 121, at 115 (noting that "the Republican promise of black voting rights was gradually crowded out by a preoccupation to contain Democratic registration and voter fraud in the competitive swing states in presidential elections").

146. KOUSSER, *supra* note 122, at 48 ("The key disfranchising features of the Southern registration laws were the amount of discretion granted to the registrars, the specificity of the information required of the registrant, the times and places set for registration, and the requirement that a voter bring his registration certificate to the polling place."). Voter registration systems remain legal today. See *Kramer v. Union Free Sch. Dist.*, 395 U.S. 621 (1969).

officials in Florida merely erased Republican names and then refused to meet with the voters so that they could re-register.¹⁴⁷

Like North Carolina and Florida, the registration requirements in an 1896 Louisiana law were a very potent means of disenfranchising both African-Americans and whites. While Louisiana's voter rolls were inflated, as reflected by the fact that 103.2% of whites and 95.6% of African-Americans were registered to vote in 1897, it is still instructive that, just one year later, mandatory re-registration had reduced these figures to 46.6% and 9.5%, respectively.¹⁴⁸ While the constitutional requirements for voter registration did not change, discriminatory administration all but ensured a reduction in the size of the electorate.

The Federal Elections Bill, and its regime of federal oversight, would have eliminated the ability of registrars handpicked by Democratic officials to engage in widespread disenfranchisement. It is clear from the structure of the law that Congress did not actually believe that voter-registration systems were presumptively unlawful or unconstitutional, but Congress recognized that these regulations, and similar laws adopted throughout the 1870s and 1880s, had operated to deprive large segments of the population of the right to vote.

The same argument can be made with respect to literacy tests, which also depended on the discriminatory actions of registrars for broadest impact in narrowing the electorate. In fact, as late as 1959, the Supreme Court upheld the facial constitutionality of these devices as "one fair way of determining whether a person is literate, not a calculated scheme to lay springes for the citizen" so long as they were "applicable to members of all races."¹⁴⁹ Yet the discretion delegated to election administrators ensured that literate African-Americans would not be able to register to vote and illiterate whites would still be able to cast a ballot. "Understanding" clauses allowed illiterate whites to register to vote if they could understand a provision of the state constitution, read to them by the registrar, and explain that provision to the registrar's satisfaction.¹⁵⁰ Although literacy tests were legal, the Federal Elections Bill would have limited the discretion given to registrars to use these devices as a means of furthering racial and partisan discrimination.¹⁵¹

147. KOUSSER, *supra* note 122, at 48 (first alteration in original).

148. *Id.* at 49 ("The law as administered reduced white registration by nearly 60 percent and Negro by 90 percent.")

149. *Lassiter v. Northampton Cty. Bd. of Elections*, 360 U.S. 45, 53–54 (1959).

150. KOUSSER, *supra* note 122, at 58.

151. To be fair, it is not clear whether federal administration of a literacy requirement would have had less of an impact on the electorate than administration by the state because many individuals,

The Democrats (with the help of some Republicans) ultimately killed the Federal Elections Bill in Congress, but the wheels of disenfranchisement, more far-reaching than prior efforts, had been set in motion.¹⁵² Southern states responded to the prospect of federal oversight by engaging in the systematic and “legal” disenfranchisement of African-Americans and poor whites, amending their constitutions and adopting laws that would render the bill largely nugatory.¹⁵³ Since its purpose was to ensure compliance with state and federal law, southern states subverted the bill by adopting facially neutral voter-qualification standards that would narrow the electorate without the need for force, fraud, or discriminatory implementation.¹⁵⁴

By 1908, every southern state adopted various limitations on voting—complicated voter-registration systems, the Australian secret ballot,¹⁵⁵ poll taxes,¹⁵⁶ more expansive literacy tests,¹⁵⁷ and multiple-box laws,¹⁵⁸ to name a few—none of which would have been prohibited by the Federal Elections Bill.¹⁵⁹ The bill would have made it difficult for state officials to exercise

both African-American and white, were deterred from even trying to register because they did not want to publicly expose their illiteracy. *See id.* at 59.

152. Welch, *supra* note 24, at 515 (noting that some Republicans wanted to table the Elections Bill in order to push through the McKinley tariff).

153. KOUSSER, *supra* note 122, at 30 (“Despite the mildness of the Lodge Bill, the Democrats were correct in fearing its possible consequences. Had it been enacted and enforced (and had the Southern states not passed disenfranchising laws), the bill would have increased the number of Southern Republicans and Populists in Congress and focused attention on the malodorous Southern election practices. These exposures and the increased strength in Congress of Southerners opposed to the Democratic party might well have led Congress to pass stronger legislation, which would have added further to the erosion of Democratic power, and so on and on.”).

154. *Id.* at 32; Michael J. Klarman, *The Puzzling Resistance to Political Process Theory*, 77 VA. L. REV. 747, 792–93 (1991) (“The South was anything but politically ‘solid’ through the 1880s (except as to presidential contests); Democrats faced close competition from an assortment of independent, Republican, and Populist candidates, often emerging victorious only with the aid of rampant ballot fraud and voter intimidation. For this reason, the Lodge Federal Elections Bill of 1890 . . . aroused great anxiety in the South, leading to a formalization and extension of disfranchisement techniques that already had proven quite successful by 1890.” (footnote omitted)).

155. *See* KOUSSER, *supra* note 122, at 53 (noting that “there is little question that the secret ballot was adopted in the South primarily to purge the electorate of illiterates”); *id.* at 55–56 (looking at Arkansas, Alabama, and Louisiana and noting that, because of the Australian ballot, the “decline in participation varied from 8 percent to 28 percent of the white adult males, and from 15 percent to 45 percent of the Negro adult males”).

156. *See id.* at 63–82.

157. *See id.* at 56–62.

158. *See id.* at 50 (“Under the eight-box laws, separate ballots for president, congressman, governor, state senator, etc., were supposed to be deposited in the proper boxes; if the ballots were distributed otherwise, they were not counted.”).

159. *See id.* at 32–33 (“[E]ven if the [federal] supervisors managed to guarantee impartial administrative practices in registration—a difficult task, since registration took place at myriads of different places and times—a large portion of the Negroes and lower-class whites would be disfranchised by the literacy and poll tax qualifications.”). One voting regulation that likely would have been directly affected by the Federal Elections Bill was Mississippi’s “understanding” clause in its state

the discretion that they retained under state law to ensure the virtual elimination of African-Americans from the electorate; the response of many southern states after its failure was to limit this discretion to avoid triggering the attention of federal officials. In addition, elected officials wanted to eliminate the need for partisans within the Democratic Party to engage in the fraud and violence that had characterized southern elections, which also had brought them to the attention of Congress.¹⁶⁰

The movement to disenfranchise African-Americans and the failure of the Federal Elections Bill was followed by the repeal of most of the Reconstruction-era legislation in 1894 after the Democrats regained control of Congress, legislation that had secured black enfranchisement in the years immediately following the Civil War. Republicans who still believed in the political equality of African-Americans but recognized the futility of trying to pass federal legislation turned to Section 2 of the Fourteenth Amendment as a means to force the South to rescind some of its draconian voter-qualification standards.

Congressional proposals to address disenfranchisement through Section 2, first in 1899 and then in 1901, went a step further than the Federal Elections Bill of 1890 would have in punishing states for their restrictive election laws. While the 1890 bill would have prevented discriminatory application of state laws by election officials, the bills to enforce Section 2 focused primarily on punishing states for laws that had a discriminatory impact.

B. What is Abridgment? Lessons from Congressional Attempts to Enforce Section 2 of the Fourteenth Amendment

Decennial reapportionment in 1900 presented another opportunity for the House of Representatives to revisit the issue of voting rights violations in the South.¹⁶¹ Despite the fact that the newly adopted state election laws were facially neutral and did not explicitly offend the Fifteenth Amendment, in 1899, Edgar D. Crumpacker, a Republican member of the

constitution, which depended upon the discretion of election officials to register whites who could not pay the poll tax or read the state constitution. See PERMAN, *supra* note 119, at 86 (noting that “the white-county representatives realized that, without the elastic ‘understanding’ clause, thousands of white voters would be confused or deterred by the secret ballot and eliminated by the poll tax”).

160. See Lodge, *supra* note 124, at 259 (“There is absolutely nothing in this bill except provisions to secure the greatest amount of publicity in regard to elections and to protect the ballot-box by making sure the punishment of those who commit crimes against the suffrage. It interferes with no man’s rights; it changes no local system; it disturbs no local officers; but it gives publicity to every step and detail of the election, and publicity is the best, as it is the greatest, safeguard that we can have in this country for good government and honest voting.”).

161. See PERMAN, *supra* note 119, at 224.

House of Representatives from Indiana, introduced a proposal invoking Section 2 that would reduce the representation of Mississippi, South Carolina, Louisiana, and North Carolina as a penalty for disenfranchising large segments of their electorate. While other southern states would eventually amend their state constitutions to constrict the electorate, these states were especially proactive in responding to the threat of federal intervention.

1. *The State Constitutional Conventions of the 1890s and the Quest for "Legal" Disenfranchisement*

Mississippi, in particular, was relentless in its quest to disenfranchise African-Americans and eliminate any prospect of federal oversight of its elections. In 1890, the state was the first to call a convention to amend its constitution and change its voter qualifications.¹⁶² Section 241 of the state constitution introduced an onerous residency rule, requiring that voters live "in this State two years, and one year in the election district, or in the incorporated city or town, in which he offers to vote"¹⁶³ and be registered "within four months next before any election at which they may offer to vote."¹⁶⁴ The constitution also imposed a literacy test that required potential voters to read a provision of the state constitution, which would disenfranchise African-Americans at the registration stage instead of through the fraud at the ballot box that was prevalent prior to the convention.¹⁶⁵ The so-called understanding clause provided an out for white voters who were illiterate but could "'understand' the constitution or 'give a reasonable interpretation thereof.'"¹⁶⁶

The state constitution also instituted a poll tax of \$2 that was successful in disenfranchising African-American voters in most of Mississippi's

162. See PERMAN, *supra* note 119, at 75 (Perman notes that the Federal Elections Bill "presented not only the alarming prospect of an increased federal presence in southern congressional elections but also the likelihood that federal officials would see for themselves how the vote was manipulated in black-majority districts. This kind of scrutiny could be obviated by redefining suffrage rights constitutionally in such a way as to place them outside the scope of a law intended simply to supervise elections.").

163. MISS. CONST. art. XII, § 241 (1895) (amended 1968).

164. MISS. CONST. art. XII, § 251.

165. PERMAN, *supra* note 119, at 85-86.

166. *Id.* at 86; see MISS. CONST. art. XII, § 244 (1895) (repealed 1975) ("On and after the first day of January, A. D., 1892, every elector shall, in addition to the foregoing qualifications, be able to read any section of the constitution of the state; or he shall be able to understand the same when read to him, or give a reasonable interpretation thereof.").

counties.¹⁶⁷ Although the constitution indicated that the tax was for the “aid of the common schools,” it explicitly refused to set up any penalty for failure to pay, an indication that the motivation behind the tax had little to do with raising revenue.¹⁶⁸ Finally, its apportionment scheme guaranteed that the political strength of majority-African-American counties would be significantly diluted.¹⁶⁹

Mississippi served as a model for other states that sought to emulate its success in disenfranchising African-Americans, but the effect of some of the restrictions on white voters did not go unnoticed.¹⁷⁰ While Mississippi viewed these voters as unfortunate casualties of a hard-fought war between the races, other states experimented with different variations of Mississippi’s approach in order to maximize the amount of African-American disenfranchisement and limit the impact on whites.

South Carolina, for example, did not adopt the Australian secret ballot, which could have had a negative impact on illiterate white residents,¹⁷¹ but it used many other qualifications that limited the ability of African-Americans to access the ballot:

(a) Residence in the State for two years, in the County one year, in the polling precinct in which the elector offers to vote four months, and the payment six months before any election of any poll tax then due and payable

(b) Registration, which shall provide for the enrollment of every elector once in ten years

(c) Up to January 1st, 1898, all male persons of voting age applying for registration who can read any Section in this Constitution submitted to them by the registration officer, or understand and explain it when read to them by the registration officer, shall be entitled to register and become electors

167. See PERMAN, *supra* note 119, at 88 (“By July 1891, when thirty-two of Mississippi’s sixty-five counties had paid [the poll tax], 44,971 whites but only 17,331 blacks had cleared the pecuniary hurdle.”); see also MISS. CONST. art. XII, § 243 (1895) (repealed 1975).

168. MISS. CONST. art. XII, § 243 (1895) (repealed 1975) (“No criminal proceedings shall be allowed to enforce the collection of the poll-tax.”).

169. PERMAN, *supra* note 119, at 87.

170. See *id.* at 89 (“According to the secretary of state’s records, the vote in the 1892 congressional election was a mere 69,905 white votes and 9,036 black out of a total state population of 1.27 million. The fact that the white vote had also fallen considerably caused little concern.”).

171. KOUSSER, *supra* note 122, at 53 (“About one of every four white males of voting age in the United States in 1900 had been born abroad, two-thirds of these in non-English-speaking countries. . . . It seems probable, therefore, that many immigrants did not have a sufficient command of English to complete their ballots unassisted.”). A good point of comparison is Louisiana. The secret ballot had a devastating impact on its electorate in the 1896 elections, where the vote shrank from 206,354 in the April state elections to 101,179 in the November general election. PERMAN, *supra* note 119, at 136.

(d) Any person who shall apply for registration after January 1st, 1898, if otherwise qualified, shall be registered: *Provided*, That he can both read and write any Section of this Constitution submitted to him by the registration officer or can show that he owns, and has paid all taxes collectible during the previous year on property in this State assessed at three hundred dollars (\$300) or more.¹⁷²

The registration requirement in subsection (b) has to be read in light of an 1882 law that had already disenfranchised almost 75% of the African-American population in the state.¹⁷³ Its success is best indicated by the Republican Party's share of the vote in presidential elections during that decade, which dropped from 58,071 in 1880 to 13,740 in 1888 because of this and other voter-qualification standards that eroded the African-American vote:

The main reason for the Republicans' predicament was the state's electoral legislation of 1882, which established insuperable barriers to both registration and voting. The registration law established a one-time registration in 1882 and gave registrars broad discretion in deciding an applicant's eligibility. The election law introduced a system of multiple ballot boxes—eight, in fact, one for each office contested—that ensured the automatic rejection of wrongly deposited or incorrectly marked tickets.¹⁷⁴

Essentially, the 1895 state constitution made permanent the reduction in African-American voters disenfranchised by the 1882 law. These new voting restrictions, as well as a gerrymander that confined the majority of the state's African-American population into one congressional district, furthered the central aim of the constitutional convention, which was to eliminate any possibility that rival factions within the Democratic Party could rely on African-American voters to swing an election.¹⁷⁵ Notably, the state constitutional provision pertaining to voter registration was more restrictive than the 1882 law because it required re-registration every ten years, whereas the 1882 law established a one-time registration requirement. In addition, the three-year safe harbor in subsection (d) gave illiterate whites an opportunity to register without hindrance, subject to the discretion of the registration officer. This discretion was eliminated by 1898, arguably in response to the threat posed by federal oversight.

172. S.C. CONST. art. II, § 4 (1895) (amended 1971).

173. See KOUSSER, *supra* note 122, at 92.

174. *Id.* at 94.

175. See PERMAN, *supra* note 119, at 96.

Other southern states quickly followed Mississippi and South Carolina. North Carolina, in 1898, amended its constitution to require the exact same residency requirements as South Carolina.¹⁷⁶ The literacy requirements were also similar, obligating every voter to “read and write any section of the constitution in the English language.”¹⁷⁷ Instead of a safe-harbor provision that gave significant discretion to election supervisors to register illiterate whites, the state constitution contained a grandfather clause that prevented anyone (or their descendent) entitled to vote before January 1, 1867, (before the adoption of the Fourteenth and Fifteenth Amendments) from being “denied the right to register and vote at any election in this state by reason of his failure to possess the educational qualification prescribed in section four of this article,” i.e., the ability to read and write the state constitution.¹⁷⁸ Like South Carolina, North Carolina adopted this provision and eschewed a secret-ballot requirement to minimize the impact of the new voter-qualification standards on white voters.¹⁷⁹ Influenced by the Mississippi constitution, North Carolina also imposed a poll tax that it had no intention of collecting, stating that “[p]oll taxes shall be a lien only on assessed property and no process shall issue to enforce the collection of the same except against assessed property.”¹⁸⁰

Louisiana, like its sister states, opted for constitutional disenfranchisement to prevent African-Americans from influencing election outcomes, but the threat that third parties and fusion candidacies posed to the Democratic Party also prompted many of these restrictions.¹⁸¹ In 1892, the Populist Party, which consisted of mostly agrarian farmers and poorer whites, started voting with Republicans in congressional races, making those elections significantly closer than they otherwise would have been.¹⁸² In 1896, the business and professional elite in New Orleans created the Citizens’ League, a third party that directly challenged the city’s

176. N.C. CONST. art. VI, § 2 (1898) (amended 1920) (“He shall have resided in the state of North Carolina for two years, in the county six months and in the precinct, ward or other election district in which he offers to vote four months next preceding the election . . .”).

177. N.C. CONST. art. VI, § 4 (1898) (amended 1920).

178. N.C. CONST. art. VI, § 5.

179. N.C. CONST. art. VI, § 6 (“All elections by the people shall be by ballot and all elections by the general assembly shall be *viva voce*.”).

180. N.C. CONST. art. VI, § 4 (1898) (amended 1920) (“[A]nd before he shall be entitled to vote he shall have paid on or before the first day of March of the year in which he proposes to vote his poll tax as prescribed by law for the previous year.”).

181. PERMAN, *supra* note 119, at 124–25; *see also id.* at 127 (noting that “Louisiana’s Democrats refused to use the secret ballot and suffrage tests” in order to disenfranchise voters like other states because the Democratic machine in New Orleans was actually stealing these votes to win elections).

182. *Id.* at 126.

Democratic machine.¹⁸³ The Citizens' League ran on fairness in elections and white supremacy, arguing that it was disgraceful that Democrats were relying on African-American votes in order to retain power.¹⁸⁴ Because of this faction within the party, the Democrats were doubly motivated to engage in legal disenfranchisement, and to do so sooner than otherwise would have been the case. By 1896, the Populists, Republicans, and members of the Citizens' League had some success in state legislative races, although the Democrats managed to hold on to the governor's seat.¹⁸⁵ Thus, one could conclude that the Louisiana Democratic Party, facing a well-financed Republican Party, its Populist collaborator, and a disgruntled Democratic faction, needed African-American voters to be registered in order to steal their votes and win elections. Yet the political dissension raised the risks of committing fraud, especially since fraud was the only reason why Democrats held on to the governor's seat in 1896.¹⁸⁶

The voter-qualification standards incorporated in the state constitution reflected that the Louisiana Democratic Party was motivated by a somewhat different threat than that present in other states.¹⁸⁷ From their perspective, any new voter-registration requirements had to eliminate or marginalize Populists, Republicans, and African-Americans; appease members of the Citizens' League; and obviate the need for fraud.¹⁸⁸

Like much of the former Confederacy, the state constitution contained a registration requirement that impacted the size of the electorate,¹⁸⁹ but it also adopted a grandfather clause, similar to the North Carolina

183. *Id.* at 130.

184. *Id.* at 135.

185. *Id.* at 132 ("In the state legislature, the Democrats had suffered a further setback, since 18 Populists, 13 Republicans, and 27 Citizens' League candidates had been elected. Although the leaguers were formally Democrats, the dominant party was likely to have only a slim majority of 11 in the senate and a mere plurality in the house on matters relating to suffrage and elections.").

186. *See id.* (noting that the Democrats were afraid that the opposition was numerous enough that if they came together they could challenge the election results "since evidence of massive fraud was surfacing throughout the state").

187. *See id.* at 135 ("Acquiescence to the demand of the Citizens' League for ballot reform and a convention would almost certainly force the New Orleans reformers to return to the Democratic fold and participate in its legislative caucus."); *see also id.* at 142 (noting that some delegates wanted to reduce the white vote in white-majority parishes).

188. *See id.* at 141 (noting that the chairman of the state constitutional convention admitted that the purpose of the convention was "the elimination of as many black voters as possible" and a second, more problematic, purpose that distinguished Louisiana from other states: to "impose certain limitations upon the exercise of the right of suffrage by the white race"). Election laws enacted prior to the 1898 constitutional convention had already substantially diminished the electorate; the 1898 constitution made these declines permanent for African-Americans, but helped re-enfranchise some whites. KOUSSER, *supra* note 122, at 62.

189. *See* LA. CONST. art. 197, § 1 (1898) ("He shall have been an actual bona-fide resident of this State for two years, of the parish one year and of the precinct in hich [sic] he offers to vote six months next preceding the election . . .").

constitution, that was designed to insulate whites from being disenfranchised.¹⁹⁰ Poll tax and literacy qualifications mirrored those present in other state constitutions for the most part, requiring that a voter “read and write, and . . . demonstrate his ability to do so when he applies for registration, by making . . . written application therefor,” but notably, the Louisiana constitution allowed the voter to do so in English or “his mother tongue.”¹⁹¹ The ability to read and write in one’s mother tongue was not the only provision that was solicitous to immigrants; the constitution also provided that anyone who was naturalized prior to the first day of January, 1898, and had resided in the state at least five years should not “be denied the right to register and vote in this State by reason of his failure to possess the educational or property qualifications prescribed by this Constitution”¹⁹² The special dispensations for immigrants were a way of preserving the white vote, although some of the delegates criticized these provisions for allowing undeserving whites to have access to the franchise.¹⁹³

Another factor that set Louisiana apart from other states is that its constitution explicitly prohibited election officials from assisting voters with fulfilling the literacy requirement in any way.¹⁹⁴ While this provision was arguably a response to the threat posed by the now defunct Federal Elections Bill,¹⁹⁵ the political climate in Louisiana also counseled against such discretion for election officials because the opposition could potentially win control of the election machinery.¹⁹⁶ If voters could not read and write, they could register and vote if they owned property, which was an insurmountable barrier for most African-Americans.¹⁹⁷ Unlike other states’ constitutions, the Louisiana constitution was a balance between the express desire to disenfranchise some whites and almost all African-Americans, while appeasing the political foes that threatened the viability of the Democratic Party in the state.

190. *See id.* § 5.

191. *Id.* § 3.

192. *Id.* § 5.

193. PERMAN, *supra* note 119, at 140.

194. LA. CONST. art. 197, § 3 (1898).

195. *See supra* Part II.A.

196. PERMAN, *supra* note 119, at 142.

197. *See* KOUSSER, *supra* note 122, at 58 (“Administered fairly, these provisions would certainly have disenfranchised a majority of the potential Negro voters in 1900, and perhaps as many as 30 percent to 40 percent of the whites in some states.”).

2. *Section 2 of the Fourteenth Amendment and the Federal Response to the New Southern Regimes*

Because Mississippi, South Carolina, North Carolina, and Louisiana passed the most restrictive voting laws that the Fifteenth Amendment and the ill-fated Federal Elections Bill would permit, Section 2 of the Fourteenth Amendment became the only viable means of punishing these actions.¹⁹⁸ On March 3, 1899, the last day of the 55th Congress, the House of Representatives Committee on the Census voted out of committee H.R. 11982, which would require the director of the census to furnish Congress with statistical information regarding the number of men of voting age in each state (broken down by race).¹⁹⁹ Representative Crumpacker, chairman of the committee, used this information to determine how many voters in southern states had been unconstitutionally disenfranchised so as to trigger the penalty of Section 2.²⁰⁰ Though this specific bill would not come to a vote, the issue of reduction would become a subject of intense debate in early 1901, culminating in a motion by Crumpacker on January 8, 1901, to re-commit an apportionment bill, H.R. 12740, to the House Census Committee, presumably so his own bill reducing representation in Mississippi, South Carolina, North Carolina, and Louisiana could be substituted.²⁰¹ While Crumpacker's bill would have kept the number of representatives in the House at 365, it would have reduced the representation in the four southern states that had improperly denied many of their citizens the right to vote.²⁰² Crumpacker spoke passionately in favor of reducing southern representation, detailing the specific provisions that had been drafted and implemented to make it difficult or impossible for thousands of people to vote, and then using voting statistics to demonstrate that the laws had the desired effect.²⁰³

This motion would fail, as would a more limited proposal, H.R. 329. The latter bill, proposed by the House Committee on the Census, was similar to Crumpacker's proposal in H.R. 11982. It targeted the same four southern states, and it required the census director to gather demographic

198. This assumes that the Fifteenth Amendment requires discriminatory intent or facial discrimination, which is how the Supreme Court reads this provision today. *See supra* Part I.A.

199. 32 CONG. REC. 2936 (1899).

200. *Black Americans in Congress, The Negroes' Temporary Farewell, Legislative Interests*, U.S. HOUSE OF REPRESENTATIVES: HIST., ART & ARCHIVES, <http://history.house.gov/Exhibitions-and-Publications/BAIC/Historical-Essays/Temporary-Farewell/Legislative-Interests/> (last visited Oct. 7, 2015).

201. 34 CONG. REC. 748 (1901).

202. PERMAN, *supra* note 119, at 224–25.

203. 34 CONG. REC. APP. 70–72 (1901).

data to determine how much representation each state would lose.²⁰⁴ But unlike the Crumpacker bill, H.R. 329 would not have directly reduced the states' representation; it only reported those states that were eligible for reduction.²⁰⁵ Together, these and other unsuccessful legislative efforts represented a brief rise of "reduction" as a political issue at the turn of the twentieth century, but most importantly, this debate shows that much of the evidence marshaled in favor of imposing Section 2 had to do with preventing laws that have a discriminatory effect.²⁰⁶

Like Crumpacker, several other representatives were quite vocal in their support for reduced representation in the southern states, and all of them relied on the effects of the discriminatory provisions on the electorate in arguing for the imposition of Section 2. On January 5, 1901, Representative William Shattuc emphasized that the plain text of Section 2 *required* Congress to reduce congressional representation in states that made it difficult, if not impossible, for those qualified to exercise the right to vote:

In four of these States in the past ten years they have placed amendments in their constitutions and have placed laws upon their statute books that disfranchised from 40 to 50 per cent of the voters of their States.

The defense employed in the seventies, that the abridgment of the electorate was the act of individuals and not of the State, no longer holds good.

In four of the Southern States the denial of the right to vote to 40 or 50 per cent of the male members, 21 years of age or over, and citizens of the United States, is no longer the act of individuals but of the States.

....

[Laws in the south intended to limit participation in elections] developed in various forms, as will be shown later, but nowhere to

204. *Id.* at 3182.

205. The resolution's conclusion read:

Resolved, That the Committee on Census shall be, and is, authorized and directed, either by full committee or by such subcommittee or subcommittees as may be appointed by the chairman thereof, to inquire, examine, and report in what States the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the executive and judicial officers of a State, or the members of the legislature thereof, is denied to any of the male inhabitants of such States 21 years of age and citizens of the United States, or in any way abridged, except for participation in rebellion or other crimes, and the proportion which the number of such male citizens shall bear to the whole number of male citizens 21 years of age in such State.

Id.

206. U.S. HOUSE OF REPRESENTATIVES, *supra* note 200.

the extent of wholesale disfranchisement as in four of the States—Mississippi, Louisiana, South Carolina, and North Carolina.

Even in the South these four States occupy a position of their own in this matter²⁰⁷

Shattuc then outlined the state statutes and constitutional provisions intended to limit African-American voting rights.²⁰⁸ He also proposed a separate resolution that would have established a special committee to investigate disenfranchisement for purposes of apportionment, a proposal that never came to a vote.²⁰⁹ Notably, Shattuc did not limit his attacks to the states' desire to exclude African-Americans; instead, he observed how the laws were exclusionary across the board, disenfranchising almost half of the male population in the offending states.

Representative Marlin Olmsted of Pennsylvania also proposed an unsuccessful resolution in January of 1901 requiring the House Census Committee to investigate reduction further, either as a committee or through an appointed sub-committee.²¹⁰ Among the evidence that Olmsted relied on was the significant decline in African-American turnout in congressional elections.²¹¹ Most importantly, Olmsted presented evidence of the discriminatory effect of the laws adopted by the southern constitutional conventions, which had eliminated half of eligible voters and had reduced African-American voter registration by an even larger margin. The disparity was quite stark when compared to the voting regulations in the North, which never impacted more than eight percent of potential voters.²¹²

Unsurprisingly, efforts to enforce Section 2 were met with firm opposition from southern representatives, but what one can glean from these debates is their belief that only a law that is racially discriminatory on its face can trigger the penalty of Section 2. For example, Representative William Kitchin of North Carolina argued that Section 2 could be enforced only if a state denied the right to vote to its citizens under the Fifteenth Amendment, and further, that a state only violated the Fifteenth

207. 34 CONG. REC. 601–02 (1901) (comments of Rep. Shattuc).

208. *Id.* at 602.

209. *Id.* at 599–603.

210. *Id.* at 520, 609 (comments of Rep. Olmsted).

211. PERMAN, *supra* note 119, at 225 (Perman notes that “Mississippi’s seven [congressional] districts polled a mere 27,045 votes in 1898, compared to a turnout of 62,652 in 1890. The vote in South Carolina’s seven districts fell from 73,522 in 1890 to 28,831 in 1898. And Louisiana’s six districts returned 74,542 votes in 1890 and only 33,161 in 1898. In each state, there was one district with between 160,000 and 200,000 inhabitants that gave its sitting congressman about 2,000 votes.”).

212. *Id.* at 226.

Amendment if it explicitly barred voting by qualified individuals “on account of race, color, or previous condition of servitude.”²¹³ Otherwise, he argued, states had the power to impose any voter qualifications they wished:

When the fifteenth amendment says that the States shall not deny or abridge the right to vote on account of race, color, or previous condition of servitude, the mentioning of these three conditions, in my judgment, is an exclusion of all others, and is tacit permission to the States for any other cause than race, color, or previous condition of servitude to abridge or deny the right of suffrage without penalty. The United States Constitution in no wise deprives a State of the right to prescribe qualifications for her voters, nor does it, in my judgment, impose any penalty upon the exercise of that right, and the true meaning of the fifteenth amendment is that if a citizen has the qualifications prescribed by a State, then his right to vote shall not be denied on account of race, color, or previous condition. But I call the attention of the gentleman’ from Indiana [Representative Crumpacker] to this proposition, that when the State of Massachusetts has an educational qualification, and the State of Pennsylvania a tax-paying qualification, it is not a denial of the right of suffrage.²¹⁴

Aside from narrowly defining the Fifteenth Amendment and then using it as a condition precedent for Section 2 enforcement, some opponents of reduction attacked the efforts to enforce Section 2 as a relic of the Reconstruction era and too impractical to actually implement.²¹⁵ Others denied that African-Americans were being disenfranchised at all, an argument that could be made with a straight face in light of the facial neutrality of the regulations.²¹⁶ Despite the wealth of evidence that hundreds of thousands of voters were being disenfranchised, attempts to enforce Section 2 of the Fourteenth Amendment in 1899 and 1901 ultimately were unsuccessful. Nonetheless, these debates reveal that Republicans in Congress believed that they had significant authority to

213. 34 CONG. REC. 648 (1901).

214. *Id.* at 648–49.

215. See PERMAN, *supra* note 119, at 225–28.

216. See 21 CONG. REC. 6845 (1889) (comments of Rep. Holman) (“It is said that this Federal interference in elections is necessary to protect in the right of voting the colored people of the South. [sic] But will this Federal interference be beneficial to the colored people? We meet almost daily in this city with colored people from the South who give us assurance of the prosperity and progress of their race in the Southern States.”).

address facially neutral laws that circumscribed the electorate independent of any requirement of discriminatory intent.

III. READING SECTION 2 OF THE VOTING RIGHTS ACT IN LIGHT OF SECTION 2 OF THE FOURTEENTH AMENDMENT: A NEW PERSPECTIVE

The controversy over the Federal Elections Bill of 1890 and efforts to enforce Section 2 of the Fourteenth Amendment on the wayward southern states help shed light on what constitutes abridgment of the right to vote today. As Part II shows, abridgment is deprivation of the vote by not only force and violence, but also through legal channels if the effect is to disenfranchise a substantial portion of the electorate. Some recent cases under section 2 of the Voting Rights Act are in line with the historical understanding of how otherwise legal practices can abridge the right to vote.

In *Veasey v. Perry*, for example, the district court held that Texas's voter-identification law, S.B. 14, violated the Fourteenth, Fifteenth, and Twenty-Fourth Amendments as well as section 2 of the Voting Rights Act.²¹⁷ Texas argued that the U.S. Constitution only prohibits intentional discrimination, and applying section 2 in a way that addresses discriminatory effects absent a showing of intent was unconstitutional. The court rejected this argument, noting that the federal courts had repeatedly upheld section 2's effects prong.²¹⁸ Although the court found that Texas had acted with discriminatory intent in enacting its voter-identification law, the court's discussion of the section 2 violation clearly illustrates that the law's discriminatory effect would have been enough to sustain the statutory violation based on the totality of the circumstances.²¹⁹

In resolving the merits of the section 2 claim, the court found that the law had a discriminatory effect on Latinos and African-Americans relative to whites in Texas, and this impact was present regardless of the method

217. *Veasey v. Perry*, 71 F. Supp. 3d 627 (S.D. Tex.), *stay granted*, 769 F.3d 890 (5th Cir. 2014), *aff'd in part, vacated in part sub nom. Veasey v. Abbott*, 796 F.3d 487 (5th Cir. 2015). The Twenty-Fourth Amendment provides:

The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax.

U.S. CONST. amend. XXIV.

218. *See Veasey v. Perry*, 29 F. Supp. 3d 896, 916 (S.D. Tex. 2014). The court specifically rejected the argument that section 2 exceeds the scope of the Fourteenth and Fifteenth Amendments because of its results test. *See id.* at 916–17.

219. Notably, the Fifth Circuit recently affirmed the section 2 violation while rejecting the district court's findings of discriminatory intent because there were no contemporary examples of such discrimination in the record. *See Veasey v. Abbott*, 796 F.3d 487 (5th Cir. 2015).

used to assess the disparity.²²⁰ Comparatively, the method of assessing the disparity under a discriminatory intent standard would be of vital importance in determining whether the plaintiff has a viable constitutional claim.²²¹

The court then looked at the Senate factors to determine whether S.B. 14 diminished voting opportunities for African-Americans and Latinos. Among the evidence considered by the court was Texas's history of racially discriminatory practices with respect to the right to vote, including facially "neutral" techniques such as voter re-registration and purging that were prevalent during Redemption and Restoration (and for much of the twentieth century).²²² For example, after the invalidation of the poll tax in *Harper v. Virginia State Board of Elections*,²²³ the Texas legislature instituted annual voter re-registration, a practice that was invalidated in 1971 "[b]ecause of its substantial disenfranchising effect."²²⁴

Discrimination also was prevalent at the local level in Texas. From 1971 to 2008, officials in Waller County, Texas, consistently engaged in a number of practices to prevent students from historically black Prairie View A&M University from voting through threatened prosecutions for voter fraud; by changing election practices without seeking preclearance from the Department of Justice, even though the county was a covered jurisdiction under the VRA; and by prohibiting students from voting unless their families owned property in the county.²²⁵ These incidents, all of which lack the requisite "smoking gun" evidence of racially discriminatory intent, constitute an abridgment of the right to vote within the meaning of both section 2 of the VRA and Section 2 of the Fourteenth Amendment. Indeed,

220. See *Veasey*, 71 F. Supp. 3d at 695 ("It is clear from the evidence—whether treated as a matter of statistical methods, quantitative analysis, anthropology, political geography, regional planning, field study, common sense, or educated observation—that SB 14 disproportionately impacts African-American and Hispanic registered voters relative to Anglos in Texas."). The court elaborated on the strength of the evidence showing the discriminatory effect:

To call SB 14's disproportionate impact on minorities statistically significant would be an understatement. Dr. Ansolabehere's ecological regression analysis found that African-American registered voters were 305% more likely and Hispanic registered voters 195% more likely than Anglo registered voters to lack SB 14-qualified ID. Drs. Barreto and Sanchez's weighted field survey, a different but complementary statistical method, found that Hispanic voting age citizens were 242% more likely and African-American voting age citizens were 179% more likely than Anglos to lack adequate SB 14 ID

Id.

221. See *McClesky v. Kemp*, 481 U.S. 279, 293 (1987) (noting that "statistical proof normally must present a 'stark' pattern to be accepted as the sole proof of discriminatory intent under the Constitution" (citing *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977))); see also *supra* text accompanying note 65.

222. See *supra* Part II.

223. 383 U.S. 663, 667 (1966).

224. *Veasey v. Perry*, 71 F. Supp. 3d at 635.

225. *Id.*

the substantial (and un rebutted) evidence of discriminatory effect, in addition to the presence of racially polarized voting; the racialized appeals in election campaigns; and diminished opportunities for minorities in education, employment, and health, all convinced the district court that S.B. 14 violated section 2 of the Act.

Similar to *Veasey*, *Frank v. Walker* also presented a challenge to a state voter-identification law under section 2 of the Voting Rights Act.²²⁶ The Wisconsin law, like its Texas counterpart, was very restrictive, and the district court concluded that since minority voters disproportionately lived in poverty that resulted from past and present discrimination in housing, education, and employment—and were therefore more likely to have difficulty obtaining the documents needed to get an ID—then the law violated section 2 of the VRA.²²⁷

Notably, the court rejected the argument that a section 2 violation is present in this circumstance only if the law makes it impossible for minorities to vote, a requirement that actually would be more onerous than proving discriminatory intent.²²⁸ This standard, if accepted by the court, would have been inconsistent with the historical understanding of what constitutes an abridgment of the right to vote. The entire purpose of the state constitutional conventions of the 1890s was to remove the right to vote permanently, precisely because the fraud and intimidation used prior to this period were not the most effective means of eliminating African-Americans from the electorate. Yet, Congress still believed that it could address the disenfranchisement and voting rights violations that existed prior to these conventions through the Federal Elections Bill of 1890; complete disenfranchisement or absolute barriers to voting were not prerequisites for federal involvement.

Unfortunately, the Seventh Circuit, in resolving *Frank v. Walker* on appeal, adopted a reading of section 2 that raised the evidentiary burden to one that would require plaintiffs to show that the voter-identification law amounts to what is essentially an absolute barrier to voting.²²⁹ The majority observed that section 2 “does not condemn a voting practice just because it has a disparate effect on minorities,” and concluded that the voter-identification law did not violate section 2 because African-Americans had high voter registration rates overall.²³⁰ Backpedaling, the court argued that

226. *Frank v. Walker*, 17 F. Supp. 3d 837, 847 (E.D. Wis.), *stay granted*, 766 F.3d 755 (7th Cir. 2014), *rev'd*, 768 F.3d 744 (7th Cir. 2014), *stay vacated*, 135 S. Ct. 7 (2014).

227. *See id.*

228. *See id.* at 874.

229. *See Frank v. Walker*, 768 F.3d 744 (7th Cir. 2014).

230. *Id.* at 752–53 (noting the district court’s findings that “92.7% of whites, 86.8% of blacks, and 85.1% of Latinos” had qualifying IDs to vote and holding that “[a]lthough these findings document

it was *not* saying that “as long as blacks register and vote more frequently than whites, a state is entitled to make changes for the purpose of curtailing black voting.”²³¹ Since Wisconsin’s voter-identification law will only impact about two percent of the electorate and still leave African-American turnout significantly high, however, then the discriminatory effect of the law was not large enough, in the court’s view, to violate section 2.²³²

Frank raises important questions about the degree of disenfranchisement required to violate federal law. How many people have to be disenfranchised before a law will be found to violate section 2 of the Voting Rights Act? How big of an effect is enough to prove a violation?²³³ Once again, Section 2 of the Fourteenth Amendment provides substantial guidance on this question, and supports the totality-of-the-circumstances approach utilized by section 2 of the VRA.

During the congressional debates that preceded the enactment of Section 2 of the Fourteenth Amendment, Congress rejected language in draft Section 2 that would have excluded “all persons of such race or color . . . from the basis of representation” whenever the right to vote is abridged.²³⁴ Pursuant to this language, discrimination against one African-American could have conceivably removed the entire population of African-Americans from the state’s basis of representation.²³⁵ Instead, Section 2 removes only the number of citizens whose right to vote has actually been abridged, suggesting that there is no minimum threshold that must be crossed before Congress can find that a voting regulation has a discriminatory impact.²³⁶

This legislative history provides broad support for an approach to section 2 of the VRA in which the degree of disenfranchisement would be

a disparate outcome, they do not show a ‘denial’ of anything by Wisconsin, as § 2(a) requires; unless Wisconsin makes it *needlessly* hard to get photo ID, it has not denied anything to any voter”).

231. *Id.* at 754.

232. *Id.* at 753–54. As the court observed:

To the extent outcomes help to decide whether the state has provided an equal opportunity, we must look not at Act 23 in isolation but to the entire voting and registration system. If blacks and Latinos do not get photo IDs at the same frequency as whites, that will reduce their relative share of voting in Wisconsin. By how much? We don’t know, because (for reasons we have covered) it may be that the people who do not get photo IDs are also those least likely to vote with or without photo IDs. . . . In 2012 75% of the state’s eligible white non-Hispanic registered voters went to the polls; 78.5% of the state’s eligible black voters cast ballots. Even if Act 23 takes 2.1% off this number (the difference between the 97.6% of white voters who already have photo ID or qualifying documents, and the 95.5% of black voters who do), black turnout will remain higher than white turnout.

Id.

233. *Cf. Burdick v. Takushi*, 504 U.S. 428 (1992).

234. JOSEPH B. JAMES, *THE FRAMING OF THE FOURTEENTH AMENDMENT* 60 (1956).

235. *Id.* at 57, 60.

236. *See Tolson, Voting Rights Enforcement, supra* note 6.

part of the court's overall assessment of whether the statute has been violated, as opposed to serving as an absolute bar to section 2 liability if the effect is minimal. For this reason, the Seventh Circuit's speculation that less than two percent of minority voters will be impacted by Wisconsin's voter-identification law (and is therefore insufficient to show a discriminatory effect in violation of section 2 of the VRA) misses the point. As Judge Posner observed in his dissent:

The aggregate effect of strict voter identification requirements in depressing turnout does not appear to be huge—it has been estimated as deterring or disqualifying 2 percent of otherwise eligible voters (Nate Silver, “Measuring the Effects of Voter Identification Laws,” *N.Y. Times*, July 15, 2012, <http://fivethirtyeight.blogs.nytimes.com/2012/07/15/measuring-the-effects-of-voter-identification-laws/>). But obviously the effect, if felt mainly by persons inclined to favor one party (the Democratic Party, favored by the low-income and minority groups whose members are most likely to have difficulty obtaining a photo ID), can be decisive in close elections. The effects on turnout are bound to vary, however, from state to state, depending on the strictness of a state's ID requirements for voting and the percentage of the state's population that lacks the required ID. Remember that at the time of the *Crawford* case only 43,000 Indiana residents lacked the required identification; 330,000 registered Wisconsin voters lack it—and Wisconsin has a smaller population (5.7 million versus Indiana's 6.5 million). Hence the effects of the photo ID requirement on voter suppression are likely to be much greater in Wisconsin, especially since as we saw earlier its law is stricter than Indiana's.²³⁷

Thus, it is not even clear that the majority was right to assume that two percent is a small effect given the party dynamics in the state. Indeed, the state's justifications for passing the law become even more important when the effects of the law are contested, and a thorough analysis of the state's rationale should guide courts in determining whether an effect is substantial enough to violate section 2 of the VRA.²³⁸ As the district court noted, there had not been any evidence of voter fraud in elections in Wisconsin in the

237. *Frank v. Walker*, 773 F.3d 783, 793–94 (7th Cir. 2014) (Posner, J., dissenting from denial of rehearing en banc).

238. Under a totality-of-the-circumstances approach, the absence of credible justifications for the law should point in the direction of a violation of section 2 of the Voting Rights Act. See generally Tolson, *Protecting Political Participation*, *supra* note 9.

last four presidential election cycles that would justify this regulation.²³⁹ At the very least, it is clear that the U.S. Constitution does not require a minimum threshold of disenfranchisement before federal power is triggered; in other words, a law does not have to drive minority turnout down below that of whites before there is a violation of federal law, as the Seventh Circuit contends.

Finally, given the importance of the right to vote, any law that has a demonstrable effect on the voting rights of a significant percentage of the population must be justified by empirical evidence of its necessity.²⁴⁰ Otherwise, many of the election laws recently enacted, although ostensibly race “neutral,” start to look remarkably like the restrictive laws that disenfranchised thousands in the post-Reconstruction period.

CONCLUSION

Critics contend that section 2 of the Voting Rights Act raises constitutional concerns because it imposes liability for laws that have a discriminatory effect on the basis of race or color—liability that infringes on the states’ constitutional authority to structure their elections so long as discriminatory purpose is absent. To avoid liability under the statute, states engage in race-conscious measures that, in the view of some members of the Supreme Court, give rise to the discriminatory purpose that potentially violates the Equal Protection Clause of the Fourteenth Amendment. Section 2’s use in recent cases to attack voter-identification laws highlights the problems that courts have had in trying to discern the scope of the statute in order to avoid these problems.

Incorporating Section 2 of the Fourteenth Amendment into any analysis of congressional authority to enforce the Fourteenth and Fifteenth Amendments can address some of the constitutional questions currently facing section 2 of the Act. As this Article shows, a record of intentional discrimination is not required in order to trigger section 2 of the VRA or to validate the race conscious remedies that states use in order to avoid liability under its provisions. As both the Framers of the Fourteenth Amendment and the congressmen who followed in their ideological footsteps recognized long ago, abridgment of the right to vote does not require that laws be explicitly passed for that purpose.

239. See *Frank v. Walker*, 17 F. Supp. 3d 837, 849 (E.D. Wis. 2014).

240. See Tolson, *Protecting Political Participation*, *supra* note 9.

