RE-LEGISLATING SECTION 2 OF THE VOTING RIGHTS ACTS

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Allen v. Milligan *(2023), a challenge to Alabama's congressional districts that invoked the results standard from Section 2 of the Voting Rights Act, was a surprising decision because many thought a conservative majority of the Supreme Court might completely unravel the statute. Instead, a five-Justice majority used the same standard for Section 2 vote-dilution claims that has been used since the results standard was first enacted in 1982. However, the key fifth vote in* Allen *came from Justice Kavanaugh who indicated that vote-dilution doctrine could not go on forever. Moreover, much has changed since Congress first enacted the results standard, including, among other things, shifts in the predominant type of challenge brought from at-large/multimember electoral structures to single-member districts, the advent of racial gerrymandering doctrine, and the embrace of textualism by the federal judiciary. Given the shaky ground on which Section 2 vote-dilution doctrine appears to stand and given all the changes that have occurred since the creation of that doctrine, this Article advocates that the time has come for Congress to revisit the statute. After making the case for a congressional revisit, the Article proposes some concrete revisions. Important, in proposing such revisions, the Article seeks to find a middle ground that retains important aspects of vote-dilution doctrine while simultaneously attempting to make the statute palatable to conservative politicians and Justices.*

INTRODUCTION

Allen v. Milligan,[1] a United States Supreme Court decision involving vote dilution under the results standard found in Section 2 of the Voting Rights Act, generated surprise among expert commentators.[2] Many had expected a solid conservative majority of the Court to reverse a district court that used Section 2 to order Alabama to create an additional congressional district that would enable Black[3] voters to elect their candidate of choice.[4] But instead of endorsing some novel interpretations of the Section 2 results standard put forth by the State, or even completely gutting vote-dilution claims,[5] the Court stuck with the

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1. 599 U.S. 1 (2023).

2. *See* Ari Berman, *Today's Giant Supreme Court Surprise Ruling Is a Rare Win for Democracy*, MOTHER JONES (June 8, 2023), https://www.motherjones.com/politics/2023/06/supreme-court-allen-v-milligan-voting-rights-act-alabama/ [https://perma.cc/C9QW-E55Q].

3. While appropriate conventions change over time, this Article will use capitalization when it refers to specific racial groups (e.g., Black voters and White voters).

4. *See* Singleton v. Merrill, 582 F. Supp. 3d 924, 1033 (N.D. Ala. 2022) ("[T]he evidence of racially polarized voting adduced during the preliminary injunction proceedings suggests that any remedial plan will need to include two districts in which Black voters either comprise a voting-age majority or something quite close to it.").

5. *See Allen*, 599 U.S. at 23–24 (discussing Alabama's arguments). Vote dilution refers to claims involving electoral structures, such as at-large elections and redistricting plans. This is in contrast to Section 2 claims involving vote denial, which include such things as registration procedures or photo-identification requirements. For definitions of the terms vote dilution and vote denial, see Daniel P. Tokaji, *The New Vote Denial: Where Election Reform Meets the Voting Rights Act*, 57 S.C. L. REV. 689, 691 (2006).

same general approach to Section 2 developed by the Court more than thirty-five years ago in the seminal decision of *Thornburg v. Gingles*.[6]

But concern about the future of Section 2 claims should persist because the *Allen* majority seems a bit wobbly. Justice Brett Kavanaugh provided the key fifth vote supporting the finding that Alabama's redistricting plan ran afoul of Section 2.[7] In a separate concurrence, though, he signaled that vote-dilution claims under the current results standard could not last forever, noting that "the authority to conduct race-based redistricting cannot extend indefinitely into the future . . . [b]ut Alabama did not raise that temporal argument in this Court."[8] Thus, the shot clock appears to be running on Section 2.

In a sense, what happened in *Allen* feels like it could be "déjà vu all over again"[9] for the Voting Rights Act, and the Section 2 results standard for vote dilution could eventually suffer the same fate as Section 5 of the Act. After Section 5's preclearance requirement was once again extended by Congress in 2006,[10] it survived an initial challenge before the Supreme Court in 2009.[11] But that survival proved to be relatively short-lived because less than five years later, the Court's decision in *Shelby County v. Holder*[12] stripped Section 5 of any utility.[13]

Section 5, though, might have been salvaged in some way. After the failure of the initial challenge to its existence in 2009, some commentators thought Section 5 had been given a temporary reprieve that provided an opening for Congress to revisit Section 5 and amend the provision to make it more palatable to the Court.[14] In essence, the Court had presented an opportunity for Congress to listen and engage in a statutory dialogue with the Justices. But Congress failed to revisit Section 5, and it went by the wayside.

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6. *See* 478 U.S. 30 (1986). At this introductory point, a detailed explanation of *Gingles* is not necessary, but fear not, dear reader; the *Gingles* framework will be discussed in much more detail in Section I.C.

7. *Allen*, 599 U.S. at 42–45 (Kavanaugh, J., concurring).

8. *Id.* at 45 (citation omitted).

9. This vibrantly redundant phrase is attributed to Yogi Berra, although my familiarity with it dates to its frequent use by ESPN's Chris Berman.

10. *See* Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, 120 Stat. 577.

11. *See* Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193 (2009).

12. 570 U.S. 529 (2013).

13. Michael J. Pitts, *Rescuing Retrogression*, 43 FLA. ST. U. L. REV. 741, 741 (2016) ("While technically *Shelby County* did not slay section 5—it only interred the coverage formula from section 4 of the Act that makes section 5 operative—it seems unlikely section 5 will ever be functional again.").

14. Joshua Douglas, *The Voting Rights Act Through the Justices' Eyes:* NAMUDNO *and Beyond*, 88 TEX. L. REV. *SEE ALSO* 1, 20 (2009) ("[T]he Court squarely put the fate of the Act back in Congress's hands; if Congress chooses not to correct the constitutional problems, then it has only itself to blame if the Court later invalidates Section 5."); Rick Hasen, *Ellen Katz: Roberts Didn't Blink*, ELECTION L. BLOG (June 24, 2009, 8:05 AM), https://electionlawblog.org/?p=12934 [https://perma.cc/KH8K-G85S] (The Court's "contrived statutory holding remands the statute to Congress with a time limit and a warning. Make no mistake, do nothing and we will scrap this statute in the next case."); Heather K. Gerken, *An Uncertain Fate for Voting Rights*, AM. PROSPECT (June 23, 2009), https://prospect.org/article/uncertain-fate-voting-rights/ [https://perma.cc/GEL9-6LL9] (describing the Court's decision as "arguably one of the most egregious judicial punts in recent memory").

Congress should not make the same mistake again. The Voting Rights Act is one of the most iconic statutes in United States history. And Section 2 is arguably the most key provision of the Act. *Allen* should be viewed as a signal for Congress to revisit the results standard when it comes to vote dilution. It's time for Congress to re-legislate Section 2.[15]

Of course, it's possible that Section 2 is not on as shaky ground as it seems,[16] but even without *Allen*, ample reason exists for Congress to revisit the results standard because a lot has happened since its passage in 1982. Consider the following major developments (in no particular order of importance) in the realm of vote dilution since Congress last legislated on the matter:

- When the results standard was enacted, the focus of concern was primarily at-large and multimember electoral structures. Today, Section 2 claims more often involve single-member districts.
- When the results standard was enacted, racial gerrymandering doctrine did not exist. Today, racial gerrymandering doctrine is in full operation and plays a role in the application of the results standard.
- When the results standard was enacted, Section 5 was a vibrant provision of the Voting Rights Act. Today, Section 5 stands dormant.
- When the results standard was enacted, the notion of strict textual interpretations of statutes—championed by Justice Antonin Scalia—was basically in its jurisprudential infancy. Today, textualist interpretation could fairly be described as the leading jurisprudential philosophy within the federal courts.
- When the results standard was enacted, vote-dilution lawsuits would often be brought against legislatures and local officials who were members of the Democratic Party. Today, at least on a statewide level, vote-dilution lawsuits tend to be aimed at Republican-controlled chambers.
- When the results standard was enacted, at all levels of government, there were far fewer minority elected officials.
- When the results standard was enacted, alternative election systems were far less mainstream.[17]

15. This Article will focus on vote dilution. However, a similar argument could probably be made for Congress to revisit Section 2 for the purpose of refining the results standard for vote-denial claims (e.g., claims involving voter registration, polling-place locations and hours, etc.). I leave that article for another day.

16. It's also possible that instead of entirely shutting down Section 2 in the same manner that the Court shut down Section 5, the Court will render future Section 2 decisions that apply the statute in a parsimonious manner. Such a jurisprudential move could amount to a de facto elimination of Section 2.

17. For discussion of all the issues listed in these bullet points, see *infra* Part II.

In short, the world of electoral structures and vote dilution today would probably be unrecognizable to those members of Congress who enacted the results standard in 1982, thus giving ample reason to undertake a comprehensive review of the provision.

To be fair, within the past few years, Congress considered (and even passed in one chamber) a bill that, among other things, would amend Section 2 as it relates to vote dilution.[18] But the amendments to Section 2 contained in that bill, which will be considered a bit during the discussion in the last Part of this Article, were flawed. For starters, that bill was developed prior to the *Allen* decision that contains a signal that Congress needs to act to satisfy a skeptical Court. In addition, it's not clear that those amendments reflected much thoughtfulness about how the world had changed in relation to vote dilution since the early 1980s, as much of the bill seemed to attempt to codify the *Gingles* status quo when it comes to vote dilution.[19] Finally, the bill was basically the product of one side of the partisan divide—the Democratic Party[20]—and it's unlikely that a partisan bill is going to do much to secure the future of a Section 2 results standard in front of a conservative Court that has already signaled its queasiness with the provision. Congress needs to undertake a more sober and less partisan reexamination of Section 2.

This Article proceeds in three parts. Part I traces the development of the Section 2 results standard from judicial doctrine in the 1970s that laid the groundwork to the enactment of the standard in 1982 to subsequent judicial interpretations of the standard. In essence, Part I establishes where we have been and where we are now with regard to Section 2 vote-dilution jurisprudence in order to set the stage for the Parts of the Article that discuss how the world has changed and where Section 2 should go. Part II fleshes out all the ways in which the context of Section 2 results has changed—focusing on the points highlighted above. The takeaway from Part II should be that the results standard was adopted by Congress and most fundamentally interpreted by the Supreme Court in an *extraordinarily different* context than exists today and that even apart from the decision in *Allen*, this extraordinarily different context would counsel for Congress to revisit the results standard. Part III sets forth some principles for Congress to re-legislate the results standard and includes some practical, concrete ideas for congressional consideration. Notably, the proposals in this Article emanate from a position that in undertaking an update of Section 2 for vote-dilution litigation, Congress should account for both how

18. *See* John R. Lewis Voting Rights Advancement Act of 2021, H.R. 4, 117th Cong. (2021). For the bill's history, see *H.R.4 - John R. Lewis Voting Rights Advancement Act of 2021*, CONGRESS.GOV, https://www.congress.gov/bill/117th-congress/house-bill/4 [https://perma.cc/7SDD-77BV].

19. *See* H.R. 4, § 2.

20. The bill passed the House by a vote of 219–212 with all 219 proponents of the bill being Democrats and all 212 opponents of the bill being Republicans. For the roll call vote, see *Roll Call 260 | Bill Number: H.R. 4*, U.S. HOUSE OF REPRESENTATIVES, https://clerk.house.gov/Votes/2021260 [https://perma.cc/LD2Y-PJ55].

the world has changed over the course of the past forty years and strive to create a framework that might enjoy broader bipartisan support and win favor from what appears to be a skeptical Supreme Court.

I. DEVELOPMENT AND IMPLEMENTATION OF THE SECTION 2 RESULTS STANDARD

The genesis of the Section 2 results standard involves a multiyear dialogue between the federal judiciary and Congress. In the early 1970s, the Supreme Court first used the United States Constitution to create a claim that would allow for racial and ethnic groups[21] to prove vote dilution. In 1980, the Court then retreated from its initial position by shifting the constitutional standard to make vote-dilution claims much more difficult for plaintiffs to win.[22] This shift led to congressional action in 1982 that created the results standard.[23] But the statutory results standard adopted by Congress left much for the judiciary to iron out. The Court did so in 1986 in the groundbreaking case of *Thornburgh v. Gingles*,[24] which created the basic framework still governing Section 2 vote-dilution litigation today.

A. The Judicial Origins of Racial and Ethnic Vote Dilution Claims

The groundbreaking decisions of *Baker v. Carr* and *Reynolds v. Sims* sparked a redistricting revolution by mandating that legislative districts contain equal population (i.e., the one-person, one-vote doctrine).[25] Following *Baker*, numerous claims were filed throughout the 1960s against malapportioned congressional and state legislative districts.[26] The gist of these claims was that malapportioned districts diluted the votes of those citizens who resided in more populated districts, with the citizens who resided in the more populated districts being urbanites while the citizens who resided in the less populated districts lived in rural areas.[27]

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21. The phrase "racial and ethnic" is a useful shorthand to describe the groups protected by Section 2 because that phrase was used in one of the earliest Supreme Court decisions involving voting rights and because that decision aided significantly in the formulation of the results standard. *See* White v. Regester, 412 U.S. 755, 759 (1973). Technically, Section 2 prohibits discrimination "on account of race or color, or in contravention of the guarantees set forth in [§] 10303(f)(2)," with § 10303(f)(2) covering discrimination against "language minority group[s]." 52 U.S.C. §§ 10301(a), 10303(f)(2).

22. *See* City of Mobile v. Bolden, 446 U.S. 55, 66–67 (1980).

23. *See* 52 U.S.C. § 10301.

24. 478 U.S. 30 (1986).

25. *See* Baker v. Carr, 369 U.S. 186 (1962); Reynolds v. Sims, 377 U.S. 533 (1964).

26. James B. Atleson, *The Aftermath of* Baker v. Carr*—An Adventure in Judicial Experimentation*, 51 CALIF. L. REV. 535, 535 (1963) ("Within seven weeks after the decision in *Baker v. Carr* lawsuits were underway in twenty-two states." (footnote omitted)).

27. Grant M. Hayden, *The False Promise of One Person, One Vote*, 102 MICH. L. REV. 213, 219 (2003) ("The effect of the refusal to redistrict was to numerically concentrate the voting power of those in the

But as the one-person, one-vote doctrine developed, another type of vote-dilution claim began to burgeon—one based on race and ethnicity. In one-person, one-vote litigation involving Georgia's state senate in the mid-1960s, the Supreme Court floated the possibility that multimember districts could "designedly or otherwise . . . operate to minimize or cancel out the voting strength of racial or political elements of the voting population."[28] Then, in the early 1970s, the Court made its initial doctrinal foray into the realm of racial and ethnic vote dilution in two important cases: *Whitcomb v. Chavis*[29] and *White v. Regester*.[30]

Whitcomb, which involved an equal protection challenge to multimember districts used to elect members of the Indiana state legislature in Marion County (Indianapolis), was the first Supreme Court decision to entertain a claim of racial vote dilution on the merits.[31] The Court rejected the claim by Black voters, mostly by relying on the unique facts of the case.[32] However, *Whitcomb* did shed light on the framework for adjudicating constitutional claims and can be said to stand for the following basic principles:

- Plaintiffs were entitled to bring claims of purposeful vote dilution (i.e., discriminatory purpose).[33]
- Lack of proportional representation could not prove unconstitutional vote-dilution—that minority voters had "less opportunity than did other . . . residents to participate in the political processes and to elect legislators of their choice."[34]
- Less opportunity to participate in the political process had not been proved by the plaintiffs because the evidentiary record showed that Black citizens had been allowed to register to vote, been allowed to choose the political party they desired (the

relatively small (and shrinking) rural districts, and, correspondingly, to dilute the power of those in the large (and growing) urban districts.").

28. Fortson v. Dorsey, 379 U.S. 433, 439 (1965); *see also* Burns v. Richardson, 384 U.S. 73, 88 (1966) ("[A]pportionment schemes including multi-member districts will constitute an invidious discrimination only if it can be shown 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.'" (quoting *Fortson*, 379 U.S. at 439)).

29. 403 U.S. 124 (1971).

30. 412 U.S. 755 (1973).

31. *See Whitcomb*, 403 U.S. at 127–28.

32. *See id.* at 143–46.

33. *Id.* at 149. The Court noted that no such allegation of purposeful discrimination had been made or shown. *Id.* ("[T]here is no suggestion here that Marion County's multi-member district . . . [was] conceived or operated as *purposeful* devices to further racial . . . discrimination. As plaintiffs concede, 'there was no basis for asserting that the legislative districts in Indiana were designed to dilute the vote of minorities.'" (emphasis added) (quoting Brief of Appellees at 28–29, Whitcomb v. Chavis, 403 U.S. 124 (1971) (No. 92))).

34. *Whitcomb*, 403 U.S. at 149.

Democratic Party) and been allowed to participate in that political party's affairs.[35]

- Less opportunity to participate in the political process did not occur when Black voters' preferred political party consistently lost at the polls. Put simply, vote dilution did not occur when minority voters lost because of politics rather than race.[36]

At bottom, *Whitcomb* clearly opened the door to the federal judiciary deciding vote-dilution claims on their constitutional merits, but it mostly described what sort of situation would *not* amount to vote dilution rather than what sort of situation would amount to unconstitutional vote dilution.[37]

In contrast to the plaintiffs' losing effort in *Whitcomb*, the Court's 1973 decision in *White v. Regester*[38] set the stage for decades of vote-dilution jurisprudence by demonstrating what a successful vote-dilution claim looked like.[39] *White* involved two separate challenges to multimember districts used to elect representatives to the Texas House of Representatives.[40] Black plaintiffs alleged that multimember districts diluted their votes in Dallas County, and Latino plaintiffs alleged that multimember districts diluted their votes in Bexar County (San Antonio).[41]

White has two seminally important aspects—the language used to describe the doctrinal standard for finding vote dilution and the evidence used to justify such a finding. In terms of the language used to describe the doctrinal standard, the Court first nodded to *Whitcomb* by noting that to sustain a claim of vote dilution, "it is not enough that the racial group allegedly discriminated against

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35. *See id.*

36. *See id.* at 150–53. The Court summarized the situation as follows:

> On the record before us plaintiffs' position comes to this: that although they have equal opportunity to participate in and influence the selection of candidates and legislators, and although the ghetto votes predominantly Democratic and that party slates candidates satisfactory to the ghetto, invidious discrimination nevertheless results when the ghetto, along with all other Democrats, suffers the disaster of losing too many elections. But typical American legislative elections are district-oriented, head-on races between candidates of two or more parties. As our system has it, one candidate wins, the others lose. Arguably the losing candidates' supporters are without representation, since the men they voted for have been defeated; arguably they have been denied equal protection of the laws, since they have no legislative voice of their own. This is true of both single-member *and* multimember districts. But we have not yet deemed it a denial of equal protection to deny legislative seats to losing candidates, even in those so-called "safe" districts where the same party wins year after year.

Id. at 153.

37. *See id.* at 148–55.

38. 412 U.S. 755 (1973).

39. *See id.* at 764–70. *White* could easily be considered the most important vote-dilution case ever decided because it sparked decades of vote-dilution claims under both the Constitution and the Voting Rights Act. *See* Brnovich v. Democratic Nat'l Comm., 594 U.S. 647, 657 (2021) (describing how *White* "came to have outsized importance in the development of our VRA case law").

40. *See White*, 412 U.S. at 758–59.

41. *Id.* at 759.

has not had legislative seats in proportion to its voting potential."[42] Instead (and here is the key verbiage that almost verbatim finds its way into the Section 2 results standard about a decade later)[43]:

> The plaintiffs' burden is to produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question—that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice.[44]

Having set forth the doctrinal standard, the Court then examined the evidence of vote dilution in Dallas and Bexar Counties and found the existence of vote dilution in both locales by canvassing a panoply of factors. Regarding Black voters in Dallas County, the Court found vote dilution based on:

- The history of official race discrimination in Texas, including discrimination related to voting.
- The fact that only two Black candidates had been elected to the Texas House of Representatives from Dallas County since Reconstruction.
- The existence of a White-dominated slating organization that did not need the support of the Black community to win elections and that did not "exhibit good-faith concern for the political and other needs and aspirations of the [Black] community."
- Racial campaign tactics.
- The use of a majority-vote requirement and numbered places.[45]

With regard to Latino voters in Bexar County, the Court found dilution based on:

- Socioeconomic data demonstrating that Latinos generally lived in areas with poor housing and generally had low income and high rates of unemployment.
- A "cultural and language barrier" that made participation in political life "extremely difficult."

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42. *Id.* at 765–66.

43. *See* Travis Crum, *Reconstructing Racially Polarized Voting*, 70 DUKE L.J. 261, 278 (2020) ("The 1982 amendments to Section 2 clearly borrowed from *White*'s approach.").

44. *White*, 412 U.S. at 766. Similar language involving "less opportunity than did other . . . residents to participate in the political processes and to elect legislators of their choice" had also appeared in *Whitcomb*. *See* Whitcomb v. Chavis, 403 U.S. 124, 149 (1971).

45. All of the statements in the bullet points find support in *White*, 412 U.S. at 766–67. Numbered places limit candidates for office in at-large and multimember systems to a specific "place," resulting in a head-to-head contest for each seat rather than a system where all candidates run at-large in one group and the top several vote-getters win election. *Id.* at 766 (explaining numbered places).

- The poll tax and "the most restrictive voter registration procedures in the nation" that contributed to a "poor" level of Latino voter registration.
- The fact that only five Latino citizens from Bexar County had served in the Texas legislature since 1880.[46]

Importantly, in its summation of the evidence presented to support vote dilution in Bexar County, the Court noted with favor that the lower court had made its finding of vote dilution based on "the totality of the circumstances."[47] The idea of a "totality of the circumstances" analysis is another key bit of constitutional doctrinal verbiage that eventually would find its way into Section 2 of the Voting Rights Act about a decade later.[48]

White is also important in defining the remedy for vote dilution—a remedy that remains with the Section 2 results standard to this day. In finding vote dilution, the district court had ordered Dallas and Bexar Counties' multimember districts to be divided into single-member districts.[49] The Supreme Court approved.[50] And, since *White*, single-member districts allowing racial and ethnic minority voters to elect a candidate of choice have almost uniformly served as the court-ordered remedy for vote dilution.[51]

White led to a wave of vote-dilution litigation, but that wave encountered a severe roadblock when the Supreme Court decided *City of Mobile v. Bolden* in 1980.[52] *Bolden* involved facts that seemed to be on a par with those in *White*. City voters elected a three-member council at-large using a majority-vote requirement and numbered places.[53] No Black citizens had ever been elected to the council.[54] And there was a history of discrimination by city officials and a

46. All of the statements in the bullet points find support in *White*, 412 U.S. at 767–69.

47. *Id.* at 769.

48. *Compare White*, 412 U.S. at 769 (discussion of "totality of the circumstances" for finding vote dilution), *with* 52 U.S.C. § 10301(b) (statutory language of Section 2 including "totality of circumstances").

49. Graves v. Barnes, 343 F. Supp. 704, 737 (W.D. Tex. 1972), *aff'd in part, rev'd in part sub nom.* White v. Regester, 412 U.S. 755 (1973) ("It is further ordered that the counties of Dallas and Bexar are hereby reapportioned into single-member representative districts . . . .").

50. *White*, 412 U.S. at 769 (noting that "[s]ingle-member districts were thought required to remedy 'the effects of past and present discrimination against [Latinos],' and to 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" (citation omitted)).

51. *See, e.g.*, Cane v. Worcester County, 35 F.3d 921, 923 (4th Cir. 1994) (upholding a district court's finding of vote dilution while rejecting a court-ordered remedy of cumulative voting); Shawna C. MacLeod, Note, *One Man, Six Votes, and Many Unanswered Questions: Cumulative Voting as a Remedial Measure for Section 2 Violations in Port Chester and Beyond*, 76 BROOK. L. REV. 1669, 1675 (2011) ("Since the Court's decision in *Gingles*, the traditional remedy employed for [S]ection 2 violations is the drawing of single-member districts.").

52. *See* 446 U.S. 55 (1980).

53. *Id.* at 59–60.

54. *Id.* at 71.

history of discrimination in the state of Alabama.[55] But this time, the Court found no vote dilution.

Bolden is perhaps the most important decision in the creation of the Section 2 results standard because, absent *Bolden*'s severe limitation on constitutional vote-dilution litigation, it's unlikely that the results standard would have ever been created.[56] *Bolden*'s limitation on vote-dilution litigation stemmed from its resounding endorsement of a standard of discriminatory purpose for adjudicating such claims.[57] But much more importantly, *Bolden* rejected the type of evidence to prove discriminatory purpose that had been accepted in *White*.[58] The bottom-line difference created by *Bolden* appeared to be that the application of the discriminatory-purpose standard would be much tougher and that discriminatory purpose could not be inferred from the same sort of totality of facts employed by the Court in *White*. Indeed, this tougher standard bore itself out in real-world litigation as vote-dilution claims became much more difficult to pursue.[59]

B. A Statutory Intervention

The civil rights community reacted negatively to *Bolden*, and that spurred Congress to action.[60] The history behind the genesis of the Section 2 results

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55. *See id.* at 73–74.

56. In addition to the constitutional claims (akin to those brought in *Whitcomb* and *White*), *Bolden* involved a statutory claim under Section 2. *Id.* at 61. But the Court declined to interpret Section 2 as anything more than a restatement of Fifteenth Amendment rights. *Id.* at 61 ("In view of the section's language and its sparse but clear legislative history, it is evident that this statutory provision [in Section 2 of the Voting Rights Act] adds nothing to the appellees' Fifteenth Amendment claim."). And when it came to Fifteenth Amendment rights, the Court limited the potential scope of Fifteenth Amendment rights in two ways: requiring a showing of discriminatory purpose (as opposed to discriminatory effect) and limiting the provision to participatory claims (i.e., claims involving vote denial rather than vote dilution). *See id.* at 65 ("[The Fifteenth] Amendment prohibits only purposefully discriminatory denial or abridgment by government of the freedom to vote 'on account of race, color, or previous condition of servitude.'" (quoting U.S. CONST. amend. XV)).

57. *Bolden*, 446 U.S. at 66–69. Although the lead opinion only garnered four votes, at least five and arguably six Justices endorsed discriminatory purpose as the standard for vote dilution under the Fourteenth Amendment. In dissent, Justice White endorsed discriminatory purpose but differed from the lead opinion because he thought the plaintiffs established a discriminatory purpose. *Id.* at 94–103 (White, J., dissenting). And in his opinion concurring in the result (reversal and remand), Justice Blackmun assumed that discriminatory purpose was the standard and indicated agreement with Justice White's analysis. *See id.* at 80 (Blackmun, J., concurring in the result). Justice Blackmun concurred in the judgment because he disagreed with the remedy for vote dilution ordered by the lower courts. *Id.*

58. Indeed, Justice Byron White wrote a dissent. In that dissent, he actually applied a discriminatory-purpose standard to find vote dilution. And, in doing so, he wrote that *Bolden* was "flatly inconsistent" with the decision in *White v. Regester*. *Id.* at 94 (White, J., dissenting).

59. Adam B. Cox & Thomas J. Miles, *Judging the Voting Rights Act*, 108 COLUM. L. REV. 1, 7 (2008) (noting that after *Bolden*, much voting-rights litigation "ground to a halt").

60. Michael J. Pitts, *The Voting Rights Act and the Era of Maintenance*, 59 ALA. L. REV. 903, 920 (2008) ("Reaction to *Bolden* was, to put it kindly, not positive."); *see* Note, *Making the Violation Fit the Remedy: The Intent Standard and Equal Protection Law*, 92 YALE L.J. 328, 346–48 (1982) (describing criticism generated by and reaction to *Bolden*); Thomas M. Boyd & Stephen J. Markman, *The 1982 Amendments to the Voting Rights Act: A*

standard has been comprehensively developed elsewhere,[61] but the bottom line for present purposes is that there was an extensive debate about what to do with Section 2 in light of *Bolden*, with fairly clearly drawn lines between the two sides. One side of the debate—led by Democrats in the House of Representatives and endorsed by civil rights leaders—sought to have a standard for vote dilution that did not revolve around intent but around the approach used by the federal courts prior to *Bolden* (i.e., *White*) that appeared to operate more like an effects test.[62] The other side of the debate—led by Republicans in the Senate—thought that the effects approach would lead to courts enforcing a standard that either created a right to proportional representation or led to unconstrained judicial discretion when it came to adjudicating vote-dilution claims.[63]

Importantly, neither side was able to clearly assert their will over the other and what emerged was a compromise[64] that adopted the following statutory language:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.
> (b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.[65]

Legislative History, 40 WASH. & LEE L. REV. 1347, 1355 (1983) ("The Supreme Court's decision in [*Bolden*] produced an avalanche of criticism, both in the media and within the civil rights community.").

61. For the most definitive account of the legislative history, see generally Boyd & Markman, *supra* note 60.

62. *See* Allen v. Milligan, 599 U.S. 1, 12–13 (2023); Boyd & Markman, *supra* note 60, at 1356–79 (describing the debate in the House).

63. *See* Boyd & Markman, *supra* note 60, at 1392.

64. *Id.* at 1414–15 (describing the compromise); *see also* Thornburg v. Gingles, 478 U.S. 30, 84 (1986) (O'Connor, J., concurring in judgment) (describing the amendment of Section 2 as "compromise legislation").

65. 42 U.S.C. § 1973 (1982) (reclassified and renumbered as 52 U.S.C. § 10301). Note that since 1982 there has been a reclassification and renumbering of the provisions of the Voting Rights Act in the U.S. Code, and reference to "section 1973(b)(f)(2)" in Section 2(a) is now a reference to "section 10303(f)(2)." *See* 52 U.S.C. § 10301. This reclassification and renumbering did not result in any substantive change to the statute.

But the compromise was not easy to understand and implement from the basic language of the statute—language that one well-regarded federal appellate judge has called "famously elliptical."[66] A results standard was clearly created, and that results standard was defined by section (b) of the statute.[67] And the results standard was clearly intended to eliminate any requirement that plaintiffs prove discriminatory purpose.[68] But a lot of the language in section (b) was devoid of precise meaning. Phrases in section (b) like "not equally open to participation" and "less opportunity . . . to participate in the political process and to elect representatives of their choice" are incredibly malleable and can easily mean different things to different people.[69] Moreover, the two portions of the statutory language that do have some genuinely concrete meaning gesture in opposing directions: a consideration of the extent to which minority persons have been elected as one circumstance that could lead to finding vote dilution but a rejection of a right to proportional representation. Add the fact that it's a "totality of the circumstances" test and anything and everything can get tossed into the mix. Famously elliptical, indeed!

Given the lack of clarity provided by the statutory language, the most accurate way to describe what happened may be this: Congress wanted to pass legislation to eliminate a strict discriminatory-purpose requirement but couldn't exactly agree on what to pass, so Congress enacted statutory language that could be all things to all people even though those people disagreed on a very basic level about what the language precisely meant. In short, Congress punted. On the receiving end of that punt was the Supreme Court.[70]

C. The Return of the Judiciary

After adoption of the results standard, the first Section 2 vote-dilution claim to reach the Supreme Court was *Gingles*.[71] *Gingles* involved a challenge by Black voters to the use of multimember districts for the North Carolina General

66. Gonzales v. City of Aurora, 535 F.3d 594, 597 (7th Cir. 2008); *see also* Boyd & Markman, *supra* note 60, at 1356 ("The amendments to [S]ection 2 ultimately became law . . . though many remain uncertain of their actual meaning."); Cox & Miles, *supra* note 59, at 7–8 (noting that there has been "considerable disagreement about the precise meaning of this [Section 2 results] standard").

67. *See Gingles*, 478 U.S. at 66 (explaining that Congress adopted an "effects test" with Section 2).

68. *See id.* at 84 (O'Connor, J., concurring in judgment) (emphasizing that, under the results test, plaintiffs did not need to prove discriminatory purpose).

69. *See* 42 U.S.C. § 1973 (1982) (reclassified and renumbered as 52 U.S.C. § 10301).

70. Pitts, *supra* note 60, at 920 ("As is often the case with controversial legislation, Congress left it to the courts to flesh out the more specific parameters of the 'results test.'").

71. *See Gingles*, 478 U.S. at 35. For an excellent history of *Gingles*, see Daniel P. Tokaji, *Realizing the Right to Vote: The Story of* Thornburg v. Gingles, *in* ELECTION LAW STORIES (Douglas & Mazo eds., 2016).

Assembly.[72] In that context, the Court developed a framework for adjudicating vote-dilution claims that remains the same basic structure employed today.[73]

The *Gingles* framework begins by mandating that a plaintiff pursuing a Section 2 vote-dilution claim prove three preconditions. "First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district."[74] "Second, the minority group must be able to show that it is politically cohesive."[75] "Third, the minority must be able to demonstrate that the [W]hite majority votes sufficiently as a bloc to enable it—in the absence of special circumstances, such as the minority candidate running unopposed, usually to defeat the minority's preferred candidate."[76] This trifecta of required elements has come to be known as the *Gingles* preconditions.[77]

If a plaintiff proves the existence of the three *Gingles* preconditions, a court shifts to a determination of whether, under the totality of the circumstances, vote dilution has occurred.[78] *Gingles* used legislative history in the form of a Senate Report to create a list of factors to consider in evaluating the totality of the circumstances, and the factors gleaned from the Senate Report look a lot like factors the Supreme Court developed in its constitutional vote-dilution jurisprudence in the 1970s.[79] Those factors, often referred to as the "Senate factors," are:

- "the history of voting-related discrimination in the State or political subdivision";
- "the extent to which voting in the elections of the State or political subdivision is racially polarized";
- "the extent to which the State or political subdivision has used voting practices or procedures that tend to enhance the opportunity for discrimination against the minority group, such as unusually large election districts, majority vote requirements, and prohibitions against bullet voting";
- "the exclusion of members of the minority group from candidate slating processes";

72. *Id.* at 34–35.

73. *See* Allen v. Milligan, 599 U.S. 1, 17 (2023) ("For the past forty years, we have evaluated claims brought under Section 2 using the three-part framework developed in our decision [in *Gingles*].").

74. *Gingles*, 478 U.S. at 50.

75. *Id.* at 51.

76. *Id.* (citation omitted).

77. *See id.* at 50.

78. Wis. Legislature v. Wis. Election Comm'n, 595 U.S. 398, 402 (2022) ("If the preconditions are established, a court considers the totality of circumstances to determine 'whether the political process is equally open to minority voters.'" (quoting *Gingles*, 478 U.S. at 79)).

79. Christopher S. Elmendorf et al., *Racially Polarized Voting*, 83 U. CHI. L. REV. 587, 597 (2016) (noting the Senate Report's inclusion of factors from the Court's constitutional vote-dilution jurisprudence).

- "the extent to which minority group members bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process";
- "the use of overt or subtle racial appeals in political campaigns"; and
- "the extent to which members of the minority group have been elected to public office in the jurisdiction."[80]

Gingles also recognized that two other factors from the Senate Report "may have probative value": whether "elected officials are unresponsive to the particularized needs of the members of the minority group" and whether "the policy underlying the State's or the political subdivision's use of the contested practice or structure is tenuous."[81]

The core of the two-step *Gingles* framework has basically remained unaltered since its creation in 1986, but there are two Supreme Court cases that arguably have added a significant bit of gloss: *Johnson v. De Grandy*[82] and *League of United Latin American Citizens v. Perry* (commonly referred to as "*LULAC*").[83]

De Grandy involved the first extensive treatment given by the Supreme Court to a Section 2 claim involving single-member districts and added a new factor to the totality of circumstances analysis.[84] A district court had ruled that redistricting plans adopted by the Florida state legislature violated Section 2, but the Supreme Court disagreed.[85] In doing so, the Court assumed the existence of the *Gingles* preconditions but found that no vote dilution existed under the totality of the circumstances.[86] To reach this totality finding, the Court added a new totality factor (in addition to the above-mentioned Senate factors): proportionality.[87] Proportionality is measured by comparing the

80. All of the quotes in the bullet points can be found in *Gingles*, 478 U.S. at 44–45.

81. *Id.* at 45.

82. *See* 512 U.S. 997, 1000 (1994).

83. *See* 548 U.S. 399, 427–35 (2006).

84. *De Grandy*, 512 U.S. at 1000. While *De Grandy* involved the Court's first *extensive* treatment of Section 2 in relation to single-member districts, it was not the first treatment. In *Growe v. Emison*, 507 U.S. 25, 27–31 (1993), the Court considered a challenge to Minnesota's single-member legislative districts. The district court found a Section 2 violation, but the Supreme Court reversed, noting that it was "satisfied that in the present case the *Gingles* preconditions were not only ignored but were unattainable" because there was a lack of statistical evidence of minority political cohesion or of majority bloc voting. *Id.* at 41. Similarly, in *Voinovich v. Quilter*, 507 U.S. 146, 158 (1993), a challenge to single-member districts used for the Ohio state legislature, the Court rejected the Section 2 claim because the plaintiffs "failed to demonstrate *Gingles'* third precondition—sufficient white majority bloc voting to frustrate the election of the minority group's candidate of choice."

85. *See De Grandy*, 512 U.S. at 1024 (finding no violation of the Voting Rights Act).

86. *See id.* at 1008–09.

87. *See id.* at 1014. The Court defined proportionality and distinguished it from proportional representation as follows:

percentage of single-member districts that allow minority voters to elect their candidate of choice with the percentage of minority residents in the challenged jurisdiction.[88]

LULAC added more to the mix when it comes to the first *Gingles* precondition—the requirement that minority voters be able to comprise a majority in a single-member district.[89] *LULAC* involved convoluted and complex litigation that included multiple different legal challenges to Texas's congressional redistricting.[90] The key for Section 2 results purposes, though, was a challenge by Latino voters to the dismantling of District 23, which had been shifted from a district where Latino voters had an opportunity to elect a candidate of choice to one where they did not.[91] To compensate for the loss of District 23, the State had created a replacement district, District 25, that would allow Latino voters to elect their candidate of choice.[92] Put simply, the State's redistricting plan had dismantled one Latino opportunity district but created another, leaving Latino voters with the same overall number of congressional districts in which they could elect a candidate of choice.[93]

But a majority of the Court said that the newly created District 25 did not count because while the Latino voters in the dismantled District 23 had a Section 2 right to elect a candidate of their choice in a single-member district,

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> "Proportionality" as the term is used here links the number of majority-minority voting districts to minority members' share of the relevant population. The concept is distinct from the subject of the proportional representation clause of § 2, which provides that "nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." 42 U. S. C. § 1973(b). This proviso speaks to the success of minority candidates, as distinct from the political or electoral power of minority voters. Cf. Senate Report 29, n. 115 (minority candidates' success at the polls is not conclusive proof of minority voters' access to the political process). And the proviso also confirms what is otherwise clear from the text of the statute, namely, that the ultimate right of § 2 is equality of opportunity, not a guarantee of electoral success for minority-preferred candidates of whatever race.

Id. at 1014 n.11.

88. *See id.* at 1014 (comparing the number of Latino-majority single-member districts with the amount of the Latino population).

89. *See* League of United Latin Am. Citizens v. Perry, 548 U.S. 399, 428 (2006). Another case involving Section 2 and the *Gingles* framework was *Bartlett v. Strickland*, 556 U.S. 1 (2009). However, *Bartlett* only merits mention in a footnote because it did not really change the existing *Gingles* framework but instead declined to extend the framework to a place where it had not gone. *See id.* at 25–26. In *Bartlett,* the Court was required to decide whether Section 2 could be "invoked to require state officials to draw election-district lines to allow a racial minority to join with other voters to elect the minority's candidate of choice, even where the racial minority is less than 50 percent of the voting-age population in the district to be drawn." *Id.* at 6. Or, put slightly more succinctly, "What size minority group is sufficient to satisfy the first *Gingles* requirement?" *Id.* at 12. The Court ultimately reaffirmed the initial *Gingles* interpretation of Section 2, holding that "[o]nly when a geographically compact group of minority voters [can] form a majority in a single-member district has the first *Gingles* requirement been met." *Id.* at 26.

90. *See League of United Latin Am. Citizens*, 548 U.S. at 409. *LULAC* also involved claims of partisan gerrymandering and racial gerrymandering. *Id.*

91. *See id.* at 423–25 (describing what happened to District 23).

92. *See id.* at 424–25 (describing what happened to District 25).

93. *Id.* at 430. Notably, the Court found that no additional districts could be constructed that would allow Latino voters the opportunity to elect a candidate of choice. *Id.*

the Latino voters in District 25 did not have such a right.[94] The reason the Latino voters in District 25 did not have a Section 2 right to a district was because they could not meet the compactness requirement—in the precise words of the Court, a "reasonably compact" district could not be created.[95] District 25 had connected a Latino population in Central Texas with a Latino population in the Rio Grande Valley that had "differences in socio-economic status, education, employment, health, and other characteristics."[96] And the reason District 25 was not "reasonably compact" was the "300-mile gap between the Latino communities . . . and a similarly large gap between the needs and interests of the two groups."[97]

In essence, *LULAC*'s import comes from providing guidance on what constitutes a "reasonably compact" single-member district that provides evidence of the existence of the first *Gingles* precondition.[98] Indeed, the additional requirement of "reasonable compactness," also described by the Supreme Court as "reasonable configuration," seems to be the only linguistic change to the *Gingles* preconditions since 1986.[99]

* * *

Thus ends our tour of the development of vote-dilution doctrine—first under the Constitution which then morphed into the statutory results standard. The evolution of the doctrine demonstrates how there has been a dialogue over the years between the Court and Congress.[100] Key aspects of Section 2 vote-dilution claims contemplated by Congress when it enacted the results standard were borrowed from prior Supreme Court constitutional jurisprudence. Then, after passage of the results standard by Congress, the Court provided the basic framework for adjudicating claims. Now, it's time for Congress to speak again

94. *Id.* ("Simply put, the State's creation of an opportunity district for those without a § 2 right offers no excuse for its failure to provide an opportunity district for those with a § 2 right.").

95. *Id.* at 435.

96. *Id.* at 432.

97. *Id.* (quoting Session v. Perry, 298 F. Supp. 2d 451, 512 (E.D. Tex. 2004), *vacated sub nom.* Henderson v. Perry, 543 U.S. 941 (2004)); *see also id.* at 435 ("We emphasize it is the enormous geographical distance separating the Austin and Mexican-border communities, coupled with the disparate needs and interests of these populations—not either factor alone—that renders District 25 noncompact for § 2 purposes.").

98. *See id.* at 430–35.

99. *Compare* Thornburg v. Gingles, 478 U.S. 30, 50 (1986) ("[T]he minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district."), *with* Allen v. Milligan, 599 U.S. 1, 18 (2023) ("[T]he minority group must be sufficiently large and [geographically] compact to constitute a majority in a *reasonably configured* district." (emphasis added) (quoting Wis. Legislature v. Wis. Elections Comm'n, 595 U.S. 398, 402 (2022))); *see also Wis. Elections Comm'n*, 595 U.S. at 402 (describing the first *Gingles* precondition as "[t]he minority group must be sufficiently large and compact to constitute a majority in a *reasonably configured* district" (emphasis added)).

100. JACOB EISLER, THE LAW OF FREEDOM 264 (2003) (describing the 1982 amendment of Section 2 as "a remarkable moment of institutional dialogue").

because, as will be developed in the next Part, much has changed in the world of vote dilution since the 1980s.

II. CHANGES

The Section 2 results standard for vote dilution was adopted in 1982.[101] Not a single word of Section 2 has been altered since.[102] This means that more than four decades have passed without Congress enacting any statutory revision,[103] despite the fact that a *lot* has happened in the past forty years that has implications for the Section 2 results standard.

What follows is a brief survey of changes to the vote-dilution landscape since 1982 that should be used to inform a reconsideration of the Section 2 results standard. Note, though, that the brief survey is not meant to be a comprehensive discussion of the complete intricacies of each area. For instance, this discussion will reference the advent of racial gerrymandering doctrine. It's possible to write an entire article on that doctrine alone (indeed, I have)[104] and to write an entire article on the implications racial gerrymandering doctrine has for racial vote-dilution claims under Section 2 (indeed, two erudite scholars have done so).[105] But such a detailed excursus in each area is not necessary to make the basic point that needs to be made for purposes of the current project—that the context surrounding vote dilution has changed significantly since Congress last entered the fray in 1982.[106]

A. The Type of Electoral Structure Challenged

A major shift in the type of electoral structure being attacked by plaintiffs has occurred since Congress last considered the Section 2 results standard. In 1982, and even in the immediate aftermath of passage of the results standard, the challenges were generally of two types—neither of which involved single-member districting plans. On the statewide level, the challenges were to the use of multimember districts. This is reflected in prominent Supreme Court cases like *Whitcomb* (Indiana legislature), *White* (Texas legislature), and *Gingles* (North

101. *See* Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131.

102. *See supra* note 65 and accompanying text. The reclassification and renumbering don't count.

103. *See supra* note 65 and accompanying text. Notably, other provisions of the Voting Rights Act have been amended since that time. *See* Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, 120 Stat. 577.

104. *See* Michael J. Pitts, *What Has Twenty-Five Years of Racial Gerrymandering Doctrine Achieved?*, 9 U.C. IRVINE L. REV. 229 (2018).

105. *See* Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *Race and Representation Revisited: The New Racial Gerrymandering Cases and Section 2 of the VRA*, 59 WM. & MARY L. REV. 1559 (2018).

106. These developments are not placed in any particular order of significance—they all have implications for a congressional revisiting of the Section 2 results standard in the context of vote dilution.

Carolina legislature), all of which involved multimember districts.[107] On the local level, the challenges were to at-large elections. This is reflected in *Bolden* (Mobile, AL, City Council) and the somewhat underappreciated decision in *Rogers v. Lodge* (Burke County, GA, Commission) that involved at-large election systems.[108]

While such challenges, particularly to at-large elections on the local level, have not entirely disappeared and continue to be litigated today,[109] sometime in the 1990s challenges to single-member districts became much more the norm.[110] The notable Supreme Court cases involving Section 2 vote dilution from the 1990s included challenges to single-member districting plans in Florida, Ohio, and Minnesota.[111] From the post-2000 and post-2010 redistricting cycles, notable challenges at the Supreme Court involved single-

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107. *See* Whitcomb v. Chavis, 403 U.S. 124, 128–29 (1971); White v. Regester, 412 U.S. 755, 758–59 (1973); Thornburg v. Gingles, 478 U.S. 30, 35 (1986).

108. *See* Mobile v. Bolden, 446 U.S. 55, 58 (1980); Rogers v. Lodge, 458 U.S. 613, 614 (1982). *Rogers* remains underappreciated because it was a constitutional vote-dilution case decided almost simultaneously with the adoption of the results standard in Section 2. *See* Michael J. Pitts, *Congressional Enforcement of Affirmative Democracy Through Section 2 of the Voting Rights Act*, 25 N. ILL. U. L. REV. 185, 206–07 (discussing *Rogers*'s underappreciation and timing). Following the adoption of the results standard, the vast majority of claims involving vote dilution were resolved on Section 2, rather than constitutional, grounds, which means *Rogers* never received widespread application. *See* Nathaniel Persily, *The Promise and Pitfalls of the New Voting Rights Act*, 117 YALE L.J. 174, 201–02 (2007) (describing the typical grounds for vote-dilution challenges).

109. *See, e.g.*, Lower Brule Sioux Tribe v. Lyman County, 625 F. Supp. 3d 891 (2022) (considering a vote-dilution challenge to the at-large method of electing commissioners in a South Dakota county).

110. *See* Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 HARV. L. REV. 1663, 1674–76 (2001) (describing the progression of vote-dilution litigation from challenges to at-large election systems to challenges to single-member districting plans); Cox & Miles, *supra* note 59, at 15 (finding that "the fraction of decisions involving challenges to at-large election districts remained in excess of 50% until 2000, after which it fell below 20%"); 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, 656 (2006) ("The nature of Section 2 litigation has changed in recent years. Of the 100 lawsuits in the 1980s, most involved challenges to at-large elections (60 or 60%). Since 1990, 231 lawsuits have produced published opinions. Of these, 86 (37.2%) challenged at-large elections, and 89 (38.5%) challenged reapportionment or redistricting plans."). As Pamela Karlan wrote in the late 1990s:

> At the state and local levels, the [Voting Rights] Act has profoundly changed election methods: Until the 1980s, most local elections were conducted at large, and most southern states elected at least some of their state legislators from multimember districts. But after a decade of intense litigation, most jurisdictions with substantial black populations had switched to election systems that contained at least some single-member districts, and state legislatures were elected entirely from single-member districts, at least some of which were majority black. The number of blacks and Hispanics in Congress, particularly from the South, skyrocketed as a direct result of litigation and the threat of litigation.

Pamela S. Karlan, *The Fire Next Time: Reapportionment After the 2000 Census*, 50 STAN. L. REV. 731, 739–40 (1998) (footnote omitted); *see also* Robert A. Kengle, *Voting Rights in Georgia: 1982-2006*, 17 S. CAL. REV. L. & SOC. JUST. 367, 370 (2008) ("The 1982 amendments to Section 2 of the Voting Rights Act prompted a wave of litigation that eliminated at-large election systems in cities, counties and school district[s] across the state [of Georgia].").

111. *See* Johnson v. De Grandy, 512 U.S. 997, 1000 (1994) (Florida); Voinovich v. Quilter, 507 U.S. 146, 153 (1993) (Ohio); Growe v. Emison, 507 U.S. 25, 40 (1993) (Minnesota).

member districts in North Carolina and Texas (twice).[112] The *Allen* decision involving Alabama's single-member congressional plan fits the pattern from the last few decades.[113] Indeed, a 2023 survey of currently pending Section 2 litigation involving vote dilution at the congressional, state, and local levels indicated that the vast majority of the litigation involved single-member districts rather than multimember or at-large elections.[114]

What this all means is that Section 2 and the basic *Gingles* framework were not developed for, and perhaps do not operate quite as well in, the single-member districting context. Indeed, the *De Grandy* Court recognized some tension between the application of Section 2 (as interpreted in *Gingles*) in the at-large/multimember district context as opposed to the single-member district context:

> If the three *Gingles* factors may not be isolated as sufficient, standing alone, to prove dilution in every multimember district challenge, *a fortiori* they must not be when the challenge goes to a series of single-member districts, *where dilution may be more difficult to grasp*. Plaintiffs challenging single-member districts may claim, not total submergence, but partial submergence; not the chance for some electoral success in place of none, but the chance for more success in place of some. When the question thus comes down to the reasonableness of drawing a series of district lines in one combination of places rather than another, judgments about inequality may become closer calls. As facts beyond the ambit of the three *Gingles* factors loom correspondingly larger, factfinders cannot rest uncritically on assumptions about the force of the *Gingles* factors in pointing to dilution.[115]

Put somewhat differently, *Gingles* was built to be employed in places where typically there was no minority representation due to at-large and/or multimember district electoral structures that operated in a hypermajoritarian manner. In contrast, single-member district systems often present instances where some minority representation exists. And in a statute that's expressly committed to not providing proportional representation, it becomes difficult to determine when additional representation for minority voters should be required. Indeed, when additional representation should be provided in the single-member district context may be the central challenge in the implementation of the *Gingles* framework.

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112. *See* League of United Latin Am. Citizens v. Perry, 548 U.S. 399, 425 (2006) (Texas); Bartlett v. Strickland, 556 U.S. 1, 11–12 (2009) (North Carolina); Abbott v. Perez, 585 U.S. 579, 585–86 (2018) (Texas).

113. *See* Allen v. Milligan, 599 U.S. 1, 38–41 (2023).

114. *See* Yurij Rudensky & Chris Leaverton, *Ongoing Voting Rights Act Redistricting Litigation After SCOTUS Ruling in* Allen v. Milligan, BRENNAN CTR. FOR JUST. (July 5, 2023), https://www.brennancenter.org/our-work/research-reports/ongoing-voting-rights-act-redistricting-litigation-after-scotus-ruling [https://perma.cc/WEX6-NX5D] (listing thirty-six cases, of which only four involved at-large or multimember districts).

115. *De Grandy*, 512 U.S. at 1012–13 (emphasis added).

B. Increase in Minority Elected Officials at All Levels of Government

Section 2 has been enormously successful in increasing the number of minority elected officials at all levels of government.[116] Since 1982, the number of Black members of the United States House of Representatives has more than doubled, going from twenty-one to fifty-three.[117] The share of Black state house members has also increased substantially since the *Gingles* decision.[118] And the number of Black candidates elected at the local level had basically doubled within the first two decades of passage of the results standard.[119] Data related to Latino and Asian American elected officials show similar significant increases at almost all levels of government over that same approximate time frame.[120]

The increase in minority elected officials means that the context of Section 2 vote dilution has changed. Around the time of the passage of the Section 2 results standard and the adoption of the *Gingles* framework, the context was federal, state, and local governments that were far less integrated than they are today.[121] This is especially true at the local level where there were numerous counties, cities, and school districts with substantial minority populations where no minority persons had ever been elected.[122] To be sure, minority groups remain underrepresented in proportion to their share of the population, but today there is far more integration within governing bodies than existed in the 1980s.[123]

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116. Section 5 of the Voting Rights Act also contributed to the increase in minority elected officials. Pitts, *supra* note 60, at 922–24 (describing Section 5's impact on increasing minority representation).

117. CONG. RSCH. SERV., RL30378, AFRICAN-AMERICAN MEMBERS OF THE U.S. CONGRESS: 1870-2020, at 8 (2020), https://sgp.fas.org/crs/misc/RL30378.pdf [https://perma.cc/48SE-X8Y5] (providing data on the number of Black members of the U.S. House in 1983); Katherine Schaeffer, *U.S. Congress Continues to Grow in Racial, Ethnic Diversity*, PEW RSCH. CTR. (Jan. 9, 2023), https://www.pewresearch.org/short-reads/2023/01/09/u-s-congress-continues-to-grow-in-racial-ethnic-diversity/ [https://perma.cc/TTV9-VM66] (providing data on the number of Black members of the U.S. House in 2023).

118. Nicholas O. Stephanopoulos, *Race, Place, and Power*, 68 STAN. L. REV. 1323, 1395 (2016) ("In the average southern state, the share of black state house members has jumped from about 13% before the [*Gingles*] decision to roughly 20% today. In the average nonsouthern state with a sizeable black population, this proportion has grown from around 9% to close to 14%." (footnote omitted)).

119. *See* KHALILAH BROWN-DEAN ET AL., JOINT CTR. FOR POL. & ECON. STUD., 50 YEARS OF THE VOTING RIGHTS ACT: THE STATE OF RACE IN POLITICS 28 (2015), https://jointcenter.org/wp-content/uploads/2019/11/VRA-report-3.5.15-1130-amupdated.pdf [https://perma.cc/FCV7-PNZS].

120. *See id.* (showing substantial increases at almost all levels of government for both Latinos and Asian Americans between the mid-1980s and 2015).

121. *See id.*

122. *See, e.g.*, Rogers v. Lodge, 458 U.S. 613, 615 (1982) (describing how no Black citizen had ever been elected to the Burke County Commission).

123. *See* Allen v. Milligan, 599 U.S. 1, 28–29 (2023) (describing the general lack of proportionality related to minority representation).

C. *Racial Gerrymandering Doctrine*

In the 1990s, the Supreme Court developed a new constitutional doctrine of racial gerrymandering, and the contours of the doctrine rapidly shifted over the course of that decade.[124] At first, it appeared that racial gerrymandering doctrine would only apply to majority-minority districts that were bizarrely shaped—such as North Carolina's "bug splattered on a windshield" congressional district.[125] But subsequent applications of the doctrine extended it much further to potentially have implications for just about any district drawn with the purpose of providing minority voters the ability to elect a candidate of choice.

Racial gerrymandering involves a two-step analysis that has remained fairly static since the 1990s. Plaintiffs bringing a racial gerrymandering challenge must initially demonstrate that race was the "predominant factor" motivating the government's "decision to place a significant number of voters within or without a particular district."[126] There is no limit to the type of proof that a plaintiff can use to establish that race was the predominant factor, but obviously, plaintiffs can use direct evidence of intent.[127] Plaintiffs can also use circumstantial evidence of intent by showing that the government "subordinated" other traditional redistricting criteria, such as compactness, respect for political subdivisions, or partisan advantage, to racial considerations.[128]

If plaintiffs prove that race was the predominant factor, the challenged district is then subjected to strict scrutiny (i.e., the district must be "narrowly tailored" to serve a "compelling interest").[129] The Court has assumed that compliance with Section 2 of the Voting Rights Act represents a compelling interest.[130] When it comes to narrow tailoring, the government must show that it had a "strong basis in evidence"[131] that Section 2 of the Voting Rights Act

124. Shaw v. Reno, 509 U.S. 630, 641–58 (1993) (recognizing a justiciable claim for racial gerrymandering); Pitts, *supra* note 104, at 230 ("New constitutional doctrine was born [in *Shaw v. Reno*].").

125. *Shaw*, 509 U.S. at 635 (quoting *Political Pornography-II*, WALL ST. J., Feb. 4, 1992, at A14) (describing District 1).

126. Miller v. Johnson, 515 U.S. 900, 916 (1995).

127. *See* Cooper v. Harris, 581 U.S. 285, 291 (2017) ("The plaintiff may make the required showing [that race was the predominant factor] through 'direct evidence' of legislative intent, 'circumstantial evidence of a district's shape and demographics,' or a mix of both." (quoting *Miller*, 515 U.S. at 916)).

128. *Id.*

129. *Id.* at 292.

130. *Id.* ("This Court has long assumed that one compelling interest is complying with operative provisions of the Voting Rights Act of 1965.").

131. Ala. Legis. Black Caucus v. Alabama, 575 U.S. 254, 278 (2015) (quoting Brief for United States as Amicus Curiae Supporting Neither Party at 29, Ala. Legis. Black Caucus v. Alabama, 575 U.S. 254 (2015) (No. 13-895)).

required its action or, in other words, "had 'good reasons' to think that it would transgress the Act if it did *not* draw race-based district lines."[132]

Suffice to say that there is quite a tension, if not a circularity, between racial gerrymandering doctrine and Section 2 vote dilution.[133] Compliance with Section 2 necessitates the consideration of race during redistricting, but too much consideration of race can place a redistricting plan in constitutional jeopardy. This sort of conundrum did not exist in 1982 when the Section 2 results standard was created or in 1986 when *Gingles* was decided.

D. Section 5's Dormancy

Section 5 of the Voting Rights Act required certain state and local governments (often referred to as "covered jurisdictions") to submit to the federal government for preclearance any voting change, such as a redistricting plan.[134] Preclearance could be obtained either through litigation in federal court or through an administrative review process conducted by the United States Department of Justice.[135] Regardless of which federal entity conducted the review, preclearance could only be obtained if the covered jurisdiction met its burden of proving that the voting change was not adopted with a discriminatory purpose and the voting change did not have a discriminatory effect.[136] For purposes of Section 5 review, discriminatory effect had a particularized meaning in that it precluded the adoption of any electoral change that would have a retrogressive impact on the voting strength of racial and ethnic minority groups.[137]

While the role of Section 5 evolved from the time the Section 2 results standard was adopted, by the advent of the 2000 redistricting cycle, the main import of Section 5 for vote dilution was the prohibition on retrogression.[138]

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132. *Cooper*, 581 U.S. at 292–93 (quoting *Ala. Legis. Black Caucus*, 575 U.S. at 279).

133. *See* Allen v. Milligan, 599 U.S. 1, 30–31 (2023) (describing the need to consider race in complying with Section 2 while "[a]t the same time" keeping race from being "the predominant factor in drawing district lines" (quoting *Cooper*, 581 U.S. at 291)); *see also* Daniel P. Tokaji, *Representation and Raceblindness: The Story of* Shaw v. Reno, *in* RACE LAW STORIES 497, 499 (Oni & Winant eds., 2008) (describing racial gerrymandering doctrine's intersection with the Voting Rights Act as "an internally unstable, if not self-contradictory, voting rights jurisprudence"). The Supreme Court itself has recognized the tension between racial gerrymandering doctrine and the requirements of the Voting Rights Act, writing in one decision that "[a]t the same time that the Equal Protection Clause restricts the consideration of race in the districting process, compliance with the Voting Rights Act of 1965 pulls in the opposite direction: It often insists that districts be created precisely because of race." Abbott v. Perez, 585 U.S. 579, 586 (2018) (citation omitted). For a thoughtful discussion of the tension between racial gerrymandering doctrine and Section 2, see Charles & Fuentes-Rohwer, *supra* note 105.

134. *See* 52 U.S.C. § 10304; *see also* Michael J. Pitts, *Redistricting and Discriminatory Purpose*, 59 AM. U. L. REV. 1575, 1576–77 (2010) (discussing Section 5's application to redistricting plans).

135. *See* 52 U.S.C. § 10304.

136. *See id.*

137. *See* Beer v. United States, 425 U.S. 130, 141 (1975) (establishing the retrogression standard).

138. For a fuller discussion of the twists and turns taken in the interpretation of Section 5 over the years, see Pitts, *supra* note 134, at 1582–99.

Most notably, Section 5 prevented the adoption of redistricting plans that would reduce the ability of minority voters to elect their candidates of choice.[139] Put into a simple, concrete hypothetical, if a city elected its council from five single-member districts and two of the current districts allowed Native American voters to elect a candidate of their choice, then any redistricting plan the city sought to implement would have to maintain or increase the number of districts controlled by Native American voters.[140] A redistricting plan that included one district (or no district) allowing Native American voters to elect a candidate of choice would be retrogressive and violate Section 5; a redistricting plan that included two or more districts allowing Native American voters to elect their candidates of choice would *not* be retrogressive and would *not* violate Section 5.

Section 5, though, has been dormant for about a decade. In *Shelby County v. Holder*, the Supreme Court struck down the formula used to determine which state and local jurisdictions were covered by the preclearance requirement.[141] Without any covered jurisdictions, Section 5 basically became inoperable.[142] This means that, unlike in the 1980s when the Section 2 results standard was adopted, the Voting Rights Act no longer contains a protection against retrogression of minority voting strength in areas of the United States that contain a substantial number of minority voters.

E. The Advent of Hypertextualism

When Congress adopted the Section 2 results standard, courts paid far less attention to text in the interpretation of statutes, but textualism has arguably become the leading method of statutory interpretation.[143] A good example of this comes from the seminal interpretation of Section 2 itself. In *Gingles*, the Court gave significant, if not conclusive, weight to legislative history—using a Senate Report as primary support in creating the list of factors to be considered in assessing whether, under the totality of circumstances, a statutory violation

139. *See* 52 U.S.C. § 10304(d) ("The purpose of subsection (b) of this section is to protect the ability of such citizens to elect their preferred candidates of choice.").

140. There was some wiggle room to allow for retrogression when such retrogression was unavoidable. *See* Guidance Concerning Redistricting and Retrogression Under Section 5 of the Voting Rights Act, 66 Fed. Reg. 5412 (Jan. 18, 2001).

141. 570 U.S. 529, 550–57 (2013).

142. Pitts, *supra* note 13 and accompanying text.

143. *See* Tara Leigh Grove, *Which Textualism?*, 134 HARV. L. REV. 265, 265 (2020) (noting that "textualism has in recent decades gained considerable prominence within the federal judiciary"); Harvard Law School, *The Antonin Scalia Lecture Series: A Dialogue with Justice Elena Kagan on the Reading of Statutes*, YOUTUBE, at 08:29 (Nov. 25, 2015), https://www.youtube.com/watch?v=dpEtszFT0Tg [https://perma.cc/33PE-NQVY] (declaration by Justice Kagan that "we're all textualists now").

had occurred.[144] It is hard to imagine that if it were writing on a blank slate, the Court today would be similarly as solicitous of legislative history.[145]

Take, as another example, Justice Clarence Thomas's view that Section 2 *does not even apply at all* to vote dilution.[146] Without delving into the nitty-gritty details of his contention, Justice Thomas expresses his opinion on the meaning of Section 2 through the use of a very singular textual prism.[147] And even though what might be described as his hypertextualist view has not garnered anything close to five votes on the Court, the general strong emphasis on statutory text is something that did not exist when Congress adopted the results standard in 1982.

The focus on textual interpretations has implications for current Section 2 litigation. Recall that the statutory language is "famously elliptical."[148] It is possible that Congress intended this obscurity in forging the compromise that led to the creation of the results standard.[149] But Congress baked this obscurity into the statutory language at a time when the Court paid much less attention to statutory language. With textualism coming to the fore, the Court is now interpreting Section 2 in a manner that was likely not anticipated by congressional drafters in 1982.

F. The Mainstreaming of Alternative Election Systems[150]

When Congress enacted the Section 2 results standard, there was not nearly as robust a dialogue surrounding alternative election systems as exists today. In other words, in 1982, the thinking when it came to the types of electoral structures that could be used pretty much revolved around multimember and at-large elections or single-member districting systems.[151] But that has changed in the last several decades—both in the dialogue surrounding electoral

144. *See* Thornburg v. Gingles, 478 U.S. 30, 43–46 (1986) (engaging in an extensive discussion of legislative history with limited focus on the statute's text); *see also* Holder v. Hall, 512 U.S. 874, 914–45 (1994) (Thomas, J., concurring) ("[T]he only source we have relied upon for the expansive meaning we have given § 2 has been the legislative history of the Act."); Brnovich v. Democratic Nat'l Comm., 594 U.S. 647, 667 (2021) ("In *Gingles*, our seminal § 2 vote-dilution case, the Court quoted the text of amended § 2 and then jumped right to the Senate Judiciary Committee report . . . .").

145. The opinions from Chief Justice Roberts and Justice Kavanaugh in *Allen v. Milligan*, both of which seem to rely quite a bit on stare decisis, hint that a clean slate might have led to a different interpretation of Section 2. *See* 599 U.S. 1, 38–39 (2023); *Id.* at 41–42 (Kavanaugh, J., concurring).

146. *See Hall*, 512 U.S. at 921 (Thomas, J., concurring).

147. *See id.* at 914–21.

148. Gonzales v. City of Aurora, 535 F.3d 594, 597 (7th Cir. 2008).

149. *See Gingles*, 478 U.S. at 84 (O'Connor, J., concurring).

150. The phrase "alternative election systems" is a catch-all term that generally includes systems such as cumulative voting, single-transferrable voting, limited voting, and ranked-choice voting. A detailed explanation of the specifics of how these systems operate is unnecessary to this discussion. For those who are interested in the mechanics of these alternative election systems, see *PR Library: Types of Voting Systems*, FAIRVOTE, https://fairvote.org/archives/types_of_voting_systems/ [https://perma.cc/AK3C-HC78].

151. *See supra* Section II.A.

structures generally and, more specifically, in the dialogue surrounding minority voting rights.

First, consider alternative election systems as a means to alleviate minority-vote dilution. A leading voice in this regard was the late Professor Lani Guinier who advocated for the use of such alternative systems as a substitute for the single-member districts used to remedy violations of Section 2.[152] Indeed, Justice Thomas, no champion of vote-dilution claims himself, recognized the potential for alternative election systems as a different method for providing minority representation.[153] And while federal courts have only very rarely ordered alternative election systems as a method for remedying vote-dilution claims, alternative election systems have been used to settle voting-rights litigation on a number of occasions.[154] Moreover, some state voting rights acts expressly allow for the use of alternative election systems.[155]

Now consider the use of alternative election systems where the voting rights of racial and ethnic minority groups have not been the primary impetus motivating change. For instance, both Alaska and Maine use ranked-choice voting for federal and state elections, and a number of other jurisdictions do so as well.[156] Other jurisdictions use systems such as limited voting and single-transferrable voting.[157] As the Pew Research Center noted in 2021, alternative election systems "have gained popularity in recent years."[158]

The present-day robust dialogue about alternative election systems presents a different context than faced by Congress and the Court in the 1980s. This means that if Congress revisits Section 2, it would not only have the opportunity to consider changes to the standard for finding a violation but could also have the opportunity to consider changes to the remedies available when vote dilution has been proven.

G. The Partisan Implications of the Voting Rights Act

When Congress enacted the results standard in 1982, the politics of vote-dilution claims were different. In the 1980s, many of the places that had the

152. *See, e.g.*, Lani Guinier, *The Representation of Minority Interests: The Question of Single-Member Districts*, 14 CARDOZO L. REV. 1135, 1135 (1993) ("Elections based on multimember districts and proportional or semiproportional representation may work better than districting as a remedy for vote dilution.").

153. *See Holder*, 512 U.S. at 911–12 (Thomas, J., concurring).

154. MacLeod, *supra* note 51, at 1670.

155. Ruth M. Greenwood & Nicholas O. Stephanopoulos, *Voting Rights Federalism*, 73 EMORY L.J. 301, 303 (2023) ("Certain SVRAs further permit claims by minority groups too small to elect their candidates of choice and contemplate remedies other than single-member districts.").

156. *See Ranked Choice Voting*, FAIRVOTE, https://fairvote.org/our-reforms/ranked-choice-voting/ [https://perma.cc/8UX2-5YDL] (providing a map of jurisdictions using ranked-choice voting).

157. *See* Drew Desilver et al., *More U.S. Locations Experimenting with Alternative Voting Systems*, PEW RSCH. CTR. (June 29, 2021), https://www.pewresearch.org/short-reads/2021/06/29/more-u-s-locations-experimenting-with-alternative-voting-systems/ [https://perma.cc/86UK-WCDS] (listing jurisdictions).

158. *Id.*

strong potential to spawn vote-dilution litigation (because they had very substantial minority populations) were dominated by the Democratic Party.[159] For instance, Republicans did not gain total control of the Texas, Georgia, or North Carolina state legislatures until after the year 2000 (and this was the first time Republicans controlled these bodies since Reconstruction!).[160] When voting-rights litigation was brought in the "one-party" South, it was brought against Democrats, and Republicans either would not be much impacted by voting-rights claims[161] or, perhaps, stood to gain politically from voting-rights litigation. As Professor David Lublin wrote in the late 1990s, "Republicans usually benefit from racial redistricting, since creating new majority [B]lack districts inevitably concentrates Democrats in a few districts."[162]

The current climate for racial vote-dilution litigation differs because, at least at the congressional and statewide levels, vote-dilution litigation has generally shifted to attacks on Republican-drawn single-member districting plans. *Allen v. Milligan* is an excellent example of this phenomenon. In Alabama, Republicans controlled the line drawing and drew only one district that would elect a Democrat—the existing majority-minority district.[163] Litigation to create a second district in which Black voters could elect a candidate of choice would result in a Republican loss of a seat.[164]

Put simply, at the congressional and statewide levels, in the last forty years, Section 2 vote-dilution litigation appears to have shifted from either being politically neutral or, perhaps, advantaging Republican electoral prospects to generally disadvantaging Republican electoral prospects.[165] This means that

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159. Michael S. Kang, *Race and Democratic Contestation*, 117 YALE L.J. 734, 743 (2008).

160. *See* David M. Halbfinger & Jim Yardley, *The 2002 Elections: The South; Vote Solidifies Shift of South to the GOP*, N.Y. TIMES (Nov. 7, 2002), https://www.nytimes.com/2002/11/07/us/the-2002-elections-the-south-vote-solidifies-shift-of-south-to-the-gop.html [https://perma.cc/H49J-FKQ2] (describing capture of the Texas legislature in 2002); Erin Madigan & Eric Kelderman, *GOP Loses Ground in Statehouse Control*, STATELINE (Nov. 5, 2004, 12:00 AM), https://stateline.org/2004/11/05/gop-loses-ground-in-statehouse-control/ [https://perma.cc/J8F2-7PB3] (describing capture of the Georgia legislature in 2004); Chris Kardish, *How North Carolina Turned So Red So Fast*, GOVERNING (June 26, 2014), https://www.governing.com/archive/gov-north-carolina-southern-progressivism.html [https://perma.cc/TPD2-D3JA] (describing capture of the North Carolina state legislature in 2010).

161. *See* Kang, *supra* note 159 ("What is more, in the context of the one-party South, the VRA's intervention did little, at least immediately, to shift partisan advantage or otherwise entrench either party any further. The VRA simply opened the door to African American representation within the Democratic Party, rather than offer opportunities for partisan mischief." (footnote omitted)).

162. DAVID LUBLIN, THE PARADOX OF REPRESENTATION: RACIAL GERRYMANDERING AND MINORITY INTERESTS IN CONGRESS 119 (1997).

163. *See* Complaint at 3, 14, Singleton v. Merrill, 582 F. Supp. 3d 924 (N.D. Ala. 2022) (No. 2:21-cv-01530).

164. *See* Jane C. Timm, *Alabama Gets a Court-Ordered Congressional Map with a Second Black District*, NBC NEWS (Oct. 5, 2023, 2:28 PM), https://www.nbcnews.com/politics/politics-news/alabama-gets-court-ordered-congressional-map-second-black-district-rcna119031 [https://perma.cc/8RTN-9Z6F].

165. *See* Kang, *supra* note 159, at 744–45 (describing how majority-minority districts create safe districts for Democrats); Crum, *supra* note 43, at 287–88 (describing the criticism that Section 2 "protects only Democratic-leaning districts").

support for Section 2 among Republican politicians in Congress and Republican federal judges has been sharply reduced.

* * *

The world has changed significantly since Congress enacted the results standard and the Court created the *Gingles* framework as the structure for adjudicating results claims involving vote dilution. These significant changes provide a solid rationale for Congress to re-legislate the Section 2 results standard. We now turn to a discussion of concrete ideas Congress might consider when revisiting Section 2.

III. RE-LEGISLATING SECTION 2 VOTE DILUTION

The Section 2 results standard for vote dilution was enacted by Congress in 1982 and was most fundamentally interpreted by the Supreme Court in 1986. A lot has changed in the interim, and it's probably well past time for Congress to revisit the statute, especially given Justice Kavanaugh's hint in *Allen v. Milligan* that Section 2 cannot survive forever.[166]

There's a wide universe of agenda items Congress might consider when revisiting Section 2, but any amendment of the results standard for vote-dilution claims should be governed by several general principles, all of which are related in some sense. First, any legislation ultimately enacted should be the product of broad bipartisan agreement. In the past, amendments and extensions of the Voting Rights Act have generally been the result of a broad coalition of bipartisan support both within Congress and from presidents who did not share the same partisan affiliation as a majority of at least one branch of Congress.[167] Any revisiting of Section 2 should be built around trying to retain that historic broad bipartisan support. Second, any legislation ultimately enacted should take seriously the doctrines and decisions rendered by the Supreme Court in the four decades since the initial enactment of the results standard. Many of these decisions, such as *Shelby County v. Holder*, have limited the use of race and the application of vote-dilution doctrine and are probably disliked by many of the strongest supporters of Section 2.[168] However, one of the flaws of the extension

166. *See* Allen v. Milligan, 599 U.S. 1, 45 (2023) (Kavanaugh, J., concurring).

167. The 1982 amendments to the Voting Rights Act were enacted by a Democratic-led House, a Republican-led Senate, and Republican President Ronald Reagan. *See generally* Boyd & Markman, *supra* note 60. The 2006 amendments to and reauthorization of certain provisions of the Voting Rights Act were enacted by a vote of 390–33 in the House and 98–0 in the Senate. *All Actions: H.R.9 — 109th Congress (2005-2006)*, CONGRESS.GOV, https://www.congress.gov/bill/109th-congress/house-bill/9/all-actions [https://perma.cc/9KSN-W4GY] (providing vote totals).

168. *See* 570 U.S. 529 (2013); *see also* Paige E. Richardson, *Preclearance and Politics: The Future of the Voting Rights Act*, 89 U. CIN. L. REV. 1089, 1102 (2021) (noting that with regard to the Voting Rights Act, "[w]hat was once a bipartisan issue has now become partisan").

of Section 5 in 2006 and, arguably something that led to Section 5's ultimate demise, was a lack of respect for Supreme Court jurisprudence.[169] Congress should not err twice. Put differently, Congress should strive to write a statute that stays within the constitutional boundaries set by the Court. Finally, Congress should try to adapt Section 2 vote dilution to have less political valence. In recent years, it seems like the Voting Rights Act generally and vote-dilution claims in particular have almost exclusively become a weapon that can be used by Democrats against Republicans.[170] The overall health of Section 2 vote-dilution claims would benefit from having a less prominent political impact.

The remainder of this Part proceeds with a menu of proposals that Congress should consider when revisiting Section 2. The proposals will be broken down into two main areas that would be described as procedural, such as the use of three-judge panels for adjudicating statewide claims, versus the substantive standard for liability.[171] The proposals will canvass some of the most thorny issues, such as the role of proportional representation in creating a baseline for vote dilution, and some issues that hopefully might be less thorny—like whether a private right of action should exist. In keeping with the notion that any legislation will likely have to be a combination of proposals that would appeal to Democrats and proposals that would appeal to Republicans, in each area I will try to predict to which political team a given proposal might appeal.[172] I'll also in some instances identify pieces of the puzzle that move the statute in the direction of passing constitutional muster with the Court.

It bears noting that no overarching theory connects these proposals besides pragmatism. The various proposals proceed from the notion that the Section 2 results standard is probably in trouble and likely needs to be adjusted to remain a part of the legal landscape going forward. The proposals also proceed from the perspective that the Section 2 results standard should have three primary functions in our modern society. First, Section 2 should serve to maintain most of the descriptive representation gains that have been made in the forty years since passage of the Section 2 results standard, especially given the absence of Section 5. Second, Section 2 serves an important function in correcting sharp imbalances of political power. Put differently, it should provide descriptive representation to minority voters when minority voters have no such representation, and it can correct gross disparities when minority representation

169. *See Shelby County*, 570 U.S. at 549–50 (describing Congress's amendment of Section 5 to undo Supreme Court jurisprudence and noting that "[i]n light of those two amendments, the bar that covered jurisdictions must clear has been raised even as the conditions justifying that requirement have dramatically improved").

170. *See supra* Section II.G.

171. Of course, procedure and substance can overlap, but this dichotomy is useful as a rough organization tool.

172. I freely recognize that my political prognostications are speculative, though I think they will generally comport with how liberals and conservatives have tended to view voting-rights issues.

falls very significantly behind the share of minority citizens in the population. Third, Section 2 should provide emerging and growing minority populations (e.g., Latino voters) at the local level the opportunity to seek representation. Civil rights activists may certainly want more; conservative activists may certainly want less. But finding a pragmatic middle ground, even if theoretically muddled, might just be the optimal way forward to preserve past gains and promote future electoral equality—particularly on the local level.

A. Procedural Considerations

Make Clear that Private Rights of Action Are Allowed. For years, private plaintiffs (in addition to the United States Attorney General) have brought Section 2 claims. However, in *Brnovich v. Democratic National Committee*, Justice Gorsuch included the following observation in a concurring opinion:

> I join the Court's opinion in full, but flag one thing it does not decide. Our cases have assumed—without deciding—that the Voting Rights Act of 1965 furnishes an implied cause of action under § 2. Lower courts have treated this as an open question. Because no party argues that the plaintiffs lack a cause of action here, and because the existence (or not) of a cause of action does not go to a court's subject-matter jurisdiction, this Court need not and does not address that issue today.[173]

Taking a cue from this concurrence, a federal appellate court has held that Section 2 does not allow for private rights of action.[174] Indeed, the existence of a private right of action provides a direct example of how shifting viewpoints toward the role of text in statutory interpretation since passage of the results standard have current implications for Section 2 litigation. Without delving too much into the details, the issue over whether Section 2 includes a private right of action relates to the Court's willingness to find implied, as opposed to express, private rights of action in statutes passed by Congress.[175] As one appellate court explained in describing the shift to a more textualist analytical framework for determining whether a private right of action exists, "[g]one are the days of divining 'congressional purpose.'"[176]

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173. 594 U.S. 647, 690 (2021) (Gorsuch, J., concurring) (citations omitted).

174. *See* Ark. State Conf. NAACP v. Ark. Bd. of Apportionment, 86 F.4th 1204, 1206–07 (8th Cir. 2023).

175. *See* Ark. State Conf. NAACP v. Ark. Bd. of Apportionment, 586 F. Supp. 3d 893, 906 (E.D. Ark. 2022) ("A line of Supreme Court cases, beginning with *Alexander v. Sandoval*, has made quite clear that judicially implied private rights of action are now extremely disfavored. If Congress wants private litigants to be able to enforce federal statutes, Congress should express that desire in the statute." (footnote omitted)); *see also id.* at 912 (describing prior Supreme Court jurisprudence related to implied private rights of action and noting the shift to a more text-based approach).

176. *Ark. State Conf. NAACP*, 86 F.4th at 1209 (quoting Alexander v. Sandoval, 532 U.S. 275, 287 (2001)). The appellate court wrote:

> When to imply a cause of action is bigger than just this case. The practice has long been controversial, in part because having the judiciary decide who can sue bypasses the legislative

A myriad of reasons exist to allow private rights of action in Section 2 cases. For starters, voting rights are fundamental, and citizens should be able to directly challenge government subversion of those rights.[177] In addition, the Attorney General does not have the resources to pursue all the claims that could be brought, particularly on the local level.[178] Moreover, leaving enforcement solely in the hands of the Attorney General allows for partisan enforcement by the political party that controls the Department of Justice.[179] Finally, private parties have been pursuing these claims for decades with few, if any, negative consequences.[180]

It's difficult to know whether any political party would disapprove of making clear that a private right of action exists. As evidence that Democrats might support such a measure, the bill recently passed by Democrats in the House on a party-line vote included such a provision.[181] As for Republicans, on the one hand, they may be less inclined to want private actors to bring claims if they think fewer claims should be brought. On the other hand, allowing private actors to bring claims means that Republicans could bring claims against Democratic redistricting plans even when a Democratic administration might not bring such claims.[182] On balance, an amendment to Section 2 making it clear that a private right of action exists would likely generate more support among Democrats than Republicans, but this seems like something on which the two sides might be able to find common ground.

Allow Vote-Dilution Claims Against Only State and Local Governments. As a potential means to turn the political temperature down, Congress should eliminate the applicability of Section 2 to congressional redistricting.[183] The

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process. The Supreme Court has been increasingly reluctant to go down this road in recent years, often citing the general principle that "private rights of action to enforce federal law must be created by Congress." Gone are the days of divining "congressional purpose."

Id. at 1208–09 (citations omitted).

177. Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886) (highlighting that voting is "a fundamental political right, because preservative of all rights").

178. Allen v. State Bd. of Elections, 393 U.S. 544, 556 (1969) (recognizing a private right of action for Section 5 of the Act and noting that the "Attorney General has a limited staff"); *Ark. State Conf. NAACP*, 586 F. Supp. 3d at 922 (referring to a Statement of Interest filed by the Department of Justice that noted there "are limited federal resources available for Voting Rights Act enforcement").

179. For a discussion of partisan law enforcement by the Attorney General, see Michael J. Pitts, *Defining "Partisan" Law Enforcement*, 18 STAN. L. & POL'Y REV. 324 (2007).

180. Granted, those who oppose any sort of vote-dilution claim probably think that negative consequences result. But that's a different and much broader objection than an objection to the use of private rights of action to enforce the Section 2 results standard once it's been agreed that such a standard should exist at all.

181. *See* John R. Lewis Voting Rights Advancement Act of 2021, H.R. 4, 117th Cong. § 9 (2021).

182. *See* Ark. State Conf. NAACP v. Ark. Bd. of Apportionment, 86 F.4th 1204, 1206–07 (8th Cir. 2023).

183. About two decades ago, I suggested limiting Section 5's applicability to local governments, in part as a means of turning the political temperature down on that provision of the Voting Rights Act. *See* Michael

partisan stakes, particularly for those who are incumbent members of Congress and would cast a vote on any revisions to Section 2, are highest when it comes to congressional redistricting. This is not to say that there are no political stakes when it comes to state and local governing bodies—just that the stakes seem generally to not be perceived as high as the stakes when it comes to the federal level.

Legitimate reasons exist to limit application of Section 2 to state and local governments. Over the years, many more claims have been brought and won against state and local governments than congressional districts.[184] And, while not perfect, substantial minority representation in the United States House of Representatives exists and such representation has in many ways been normalized so that it's unlikely that significant backsliding would occur without applying Section 2 to congressional elections.[185] Indeed, despite the absence of Section 5 for a decade, congressional representation for minority voters has not appeared to backslide.[186] And presumably, constitutional litigation, either by asserting purposeful vote-dilution discrimination or racial gerrymandering, could be used by plaintiffs to police egregious instances of racial and ethnic vote dilution in the design of congressional redistricting plans.

Section 2 claims against local governments also probably have a better chance of being brought against both political parties. While, to the best of my knowledge, no comprehensive data has been compiled about the number of local governments controlled by each political party, one would guess there are many places controlled by each political party that might be subject to voting-rights litigation.[187] Moreover, in some places, local elections are nonpartisan.[188]

J. Pitts, *Let's Not Call the Whole Thing Off Just Yet: A Response to Samuel Issacharoff's Suggestion to Scuttle Section 5 of the Voting Rights Act*, 84 NEB. L. REV. 605, 611–18 (2005).

184. Ellen Katz et al., *supra* note 110, at 739–55 (including a table showing hundreds of Section 2 lawsuits that generated a judicial opinion, with the vast majority of lawsuits involving state and local government); *see also* Ellen D. Katz et al., *The Evolution of Section 2: Numbers and Trends*, UNIV. MICH. L. SCH. VOTING RIGHTS INITIATIVE (2022), https://voting.law.umich.edu/findings/ [https://perma.cc/6MLC-DVRR] (explaining that "Section 2 defendants are more often local governments or officials (e.g., counties, cities, and school districts) than state governments or officials" and including a table showing data and success rates). Note that the idea of winning a claim against state and local governments also includes getting consent decrees issued on terms favorable to minority voters and that my own personal experience working in voting rights for the Department of Justice during the 1990s involved reviewing many, many such Section 2 vote-dilution consent decrees.

185. *See supra* note 117 and accompanying text (providing data on minority representation in the House).

186. Nicholas Stephanopoulos et al., *Non-Retrogression Without Law*, 2023 U. CHI. LEGAL F. 267, 269 ("Our primary finding is that there was little retrogression in formerly covered states in the 2020 redistricting cycle. At the congressional level, the total number of minority ability districts in states formerly covered in full or in part *increased* by one."). Of course, perhaps it is Section 2 that stands in the way of such backsliding in the absence of Section 5.

187. *See* Pitts, *supra* note 183, at 613 (noting that "one-party" rule occurs with higher frequency at the local level).

188. *See id.* (noting that "non-party [] politics occurs with higher frequency" on the local level).

None of this is to say that vote dilution cannot occur at the congressional level, but the overall cost-benefit of applying Section 2 to congressional claims may not be worth it. Presumably, this sort of proposal would appeal much more to Republicans than Democrats because, at the moment, it seems that vote-dilution litigation at the congressional level is more likely to benefit Democrats.[189] But perhaps making Section 2 inapplicable to congressional districts could de-polarize the debate just a tad.

Make Clear that Whites and Any Group of Language Minority Voters Can Bring Claims. In the mid-Aughts, the Department of Justice brought a controversial Section 2 case on behalf of White voters.[190] The claim was that the Democratic primary in Noxubee County, Mississippi was being conducted in a manner that diluted the votes of Whites.[191] Some in the civil rights community criticized the litigation and at least one academic commentator also questioned the use of the Voting Rights Act by White voters against Black officials.[192]

While the current language of Section 2 *may* allow White voters to bring claims, Congress should make this clear when revisiting the statute.[193] Allowing White voters to bring claims might strengthen the provision against constitutional challenge.[194] And allowing White voters to bring claims also allows for other groups, such as Arab Americans, to bring claims.[195] So while the current language might allow such claims, Congress should make this clear, and there are some legitimate policy reasons for doing so.

Indeed, Congress should not only clarify that voters of any race can bring claims; it should also allow other language minority groups to bring claims. Currently, the statute limits claims to the following language minority groups: "American Indian, Asian American, Alaskan Natives, or of Spanish Heritage."[196] And while those groups undoubtedly cover the vast majority of potential claims that might be out there, there would seemingly be no reason to

189. *See, e.g.*, Allen v. Milligan, 599 U.S. 1, 70 (2023) (Thomas, J., dissenting).

190. *See* United States v. Brown, 494 F. Supp. 2d 440 (S.D. Miss. 2007).

191. *Id.* at 443.

192. *See* Ari Shapiro, *White Voters in Mississippi Allege Voting Discrimination*, NPR (Nov. 14, 2005, 12:00 AM), https://www.npr.org/templates/story/story.php?storyId=5011333 [https://perma.cc/PQZ8-7H9N] (including criticism from Mississippi NAACP official regarding the litigation); Donald Campbell, *Partisanship, Politics, and the Voting Rights Act: The Curious Case of* U.S. v. Ike Brown, 29 HARV. J. RACIAL & ETHNIC JUST. 33, 61–68 (2013).

193. The plain language of the statute would seem to cover any race of voters, including Whites. *See* 52 U.S.C. § 10301 (allowing for claims based upon "race" or "color"). The Fifth Circuit has upheld Section 2 liability on behalf of White voters. *See* United States v. Brown, 561 F.3d 420, 435 (5th Cir. 2009).

194. For a thoughtful and more detailed discussion of the issue, including the statutory interpretation and policy arguments in favor of allowing Section 2 claims by White voters, see Denny Chan, *Section 2 of the 1965 Voting Rights Act and White Americans*, 2 U.C. IRVINE L. REV. 453 (2012).

195. *See id.* at 471–72.

196. 52 U.S.C. § 10301 (referencing the "guarantees set forth in section 10303(f)(2) of this title"); 52 U.S.C. § 10303(f)(2) (guaranteeing the rights of language minorities and language minority groups); 52 U.S.C. § 10503(e) (defining the terms "language minority" and "language minority group").

prevent other language minority groups from bringing claims. For example, if there was a large Ukranian-speaking population in a locality, there would seem to be little reason to deny them the ability to bring a Section 2 vote-dilution claim.[197]

The politics of such clarity and revision probably runs toward being more favorable to Republicans. One would guess that civil rights groups and Democrats might be less than enthusiastic about allowing White voters and, perhaps, other language minority groups to bring claims. After all, this discussion started with criticism from some more typically liberal quarters about the Noxubee County litigation.[198] However, as controversial proposals might go, this would seemingly have a relatively low salience in the grand scheme of revisiting the statute because, presumably, claims by White voters and other language minority groups not currently covered would likely be relatively few and far between.[199] Moreover, if such a provision helps make Section 2 less constitutionally suspect, it would likely be worth making the clarification.

Three-Judge District Courts. Section 2 vote-dilution challenges to statewide redistricting plans should be heard by three-judge panels with a direct appeal to the United States Supreme Court. Currently, if a challenge involving a constitutional claim, such as an allegation of an equal protection one-person, one-vote violation, is brought against a statewide redistricting plan, then a three-judge district court is empaneled, and any decision by that district court can be directly appealed to the United States Supreme Court.[200] However, statewide Section 2 claims do not currently require three-judge courts.[201]

Three-judge panels should be the norm for challenges to statewide redistricting plans whether they be Section 2 claims or constitutional claims. Using three-judge panels for Section 2 claims avoids the oddity of constitutional claims being adjudicated in front of a three-judge panel and a separate, likely related claim being adjudicated in a different courtroom before a single judge, as happened in *Allen v. Milligan*.[202] Indeed, it seems somewhat judicially inefficient to separate for decision by a single judge one type of voting-rights claim out of several. Moreover, using three-judge panels limits the opportunity for plaintiffs to forum shop for a single judge who might be more favorable to

197. A finding of liability would, obviously, depend on the specific evidence presented.

198. *See* Campbell, *supra* note 192.

199. *See id.* at 34 (highlighting the rarity of using the Voting Rights Act in favor of White voters against a Black official).

200. 28 U.S.C. § 2284(a) ("A district court of three judges shall be convened when . . . an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body."); 28 U.S.C. § 1253 (enumerating the right to a direct appeal from a three-judge panel to the Supreme Court).

201. *See* 28 U.S.C. § 2284(a).

202. 599 U.S. 1, 16 (2023) (describing the procedural history of the litigation).

one political side or the other.[203] Finally, the use of a three-judge panel with a direct appeal to the Supreme Court will provide more expeditious finality in what is likely to be higher-profile litigation.[204]

Presumably, both sides of the aisle might prefer not to have their political fate potentially decided by a single federal district court judge. However, Democrats may not want to allow for direct appeal to the currently conservative Supreme Court.[205] On the other hand, Democrats included a provision for three-judge panels in another recent voting bill.[206] On balance, my guess is that neither side would oppose such a provision.[207]

Sunset Provision. Congress should put a sunset provision into Section 2 vote-dilution claims—probably for a period of twenty years (enough to cover, say, two future redistricting cycles)—for several reasons. First, the key fifth vote to uphold plaintiffs' challenge in *Allen v. Milligan* came from Justice Kavanaugh, who wrote a concurring opinion where he noted that the "authority to conduct race-based redistricting cannot extend indefinitely into the future" but that Alabama did not raise that "temporal argument," so he "would not consider it at this time."[208] Thus, adding a sunset provision to Section 2 might be responsive to that concern.[209] In addition, sunset provisions have typically been looked upon favorably by the Court when determining whether a civil rights statute passed by Congress is a constitutional exercise of Congress's enforcement power under the Fourteenth Amendment.[210] Finally, a sunset

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203. *See* Joshua A. Douglas, *The Procedure of Election Law in Federal Courts*, 2011 UTAH L. REV. 433, 452 & n.117.

204. Joshua A. Douglas & Michael E. Solimine, *Precedent, Three-Judge District Courts, and the Law of Democracy*, 107 GEO. L.J. 413, 419–20 (2019) (describing speed of decision-making as a reason for having three-judge panels with a direct appeal to the Supreme Court).

205. A lack of direct appeal will probably not prevent the Supreme Court from weighing in very early on high-profile election law claims using the "shadow docket." For a discussion of the shadow docket as it relates to election law, see STEPHEN VLADECK, THE SHADOW DOCKET 197–227 (2023).

206. *See* For the People Act, H.R. 1, 117th Cong. § 2432(b)(2) (2021).

207. Given Congress's ability to legislate the use of three-judge panels, the use of three-judge panels for Section 2 claims should have no impact on the constitutionality of the statute.

208. 599 U.S. 1, 45 (2023) (Kavanaugh, J., concurring).

209. Academic commentators have opined that Section 2 contains a natural sunset provision because if racially polarized voting goes away, so do Section 2 claims. *See, e.g.*, Crum, *supra* note 43, at 319–20 ("[T]he *Gingles* factors do, in fact, place a de facto sunset date on Section 2."). But I doubt this contention will gain much traction with conservative judges, especially because it does not appear that Section 2 or the Voting Rights Act do much to reduce racially polarized voting. Stephen Ansolabehere et al., *Race, Region, and Vote Choice in the 2008 Election: Implications for the Future of the Voting Rights Act*, 123 HARV. L. REV. 1385, 1405 (2010) ("The race-based patterns in presidential vote choice have been remarkably stable over the past two decades."); Nicholas O. Stephanopoulos, *Race, Place, and Power*, 68 STAN. L. REV. 1323, 1357–58 (2016) ("Based on state-specific data over a four-decade timespan, I come to essentially the same conclusion that Ansolabehere and his coauthors reached using nationwide data for two decades: namely, that [B]lack-[W]hite polarization remains severe and is notable for its stasis more than its flux.").

210. *See* Michael J. Pitts, *Section 5 of the Voting Rights Act: A Once and Future Remedy?*, 81 DENV. U. L. REV. 225, 246 (2003) (describing that one of the factors in assessing the constitutionality of civil rights legislation is "whether the legislation has a termination date").

provision might be useful as a practical matter. Legislation can get old and stale. Indeed, one could argue that the current version of Section 2 has become old and stale and could have used a refresher during the last couple of decades (and not just from a conservative perspective—consider the previously mentioned scholarship related to alternative election systems penned by Professor Lani Guinier).[211]

Presumably, the use of a sunset provision would appeal to Republicans but not Democrats. Democrats, typically more supportive of Section 2, might oppose a sunset provision because they worry that the provision might actually one day sunset (i.e., a later Congress might not renew the provision). That is always a risk. But Section 5 of the Voting Rights Act consistently had a sunset provision and was extended each time it was scheduled to sunset.[212] Indeed, more likely what ultimately led to Section 5's doom was Congress's unwillingness to update the provision.[213] Moreover, a sunset provision might be welcomed by some of the more centrist, conservative members of the Court and help move them in the direction of letting the Section 2 results standard continue for at least a bit more time.[214] In essence, the short-term benefit of adding a sunset provision outweighs the potential long-term cost of Section 2 actually sunsetting in the future.

B. The Substantive Standard

This Section discusses aspects of Section 2 that Congress should consider when re-legislating the substantive standard. There are, of course, as many potential substantive revisions to be considered as crafty lawyers can concoct. Congress cannot resolve every issue involving the substantive standard that has been litigated or could possibly be litigated, nor should it.[215] Congress should leave room for the courts to fill statutory gaps—if only because that may allow the courts to rescue the statute's constitutionality on occasion. But, at a minimum, Congress should weigh in on some of the bigger-picture questions, such as, among other things, how racially polarized voting should be proved,

211. *See* Guinier, *supra* note 152, at 1135 and accompanying text.

212. *See* Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, §§ 2, 5, 84 Stat. 314, 314–15; Voting Rights Act Amendments of 1975, Pub. L. No. 94-73, §§ 204, 206, 405, 89 Stat. 402, 402–05; Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 2(b)(8), 96 Stat. 131, 133; Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, 120 Stat. 577.

213. *See generally* Shelby County v. Holder, 570 U.S. 529 (2013) (finding the coverage formula unconstitutional in part because it was based on outdated data).

214. Of course, Justice Kavanaugh's statement about race-based districting not "extend[ing] indefinitely into the future" might contemplate a shorter timeframe than twenty years. *See* Allen v. Milligan, 599 U.S. 1, 45 (2023) (Kavanaugh, J., concurring). However, coupled with other revisions to Section 2, a twenty-year sunset provision could be responsive enough to his concerns.

215. For example, when it comes to proving racially polarized voting there are dozens of issues on which judicial opinions diverge. *See* Elmendorf et al., *supra* note 79, at 608–27 (canvassing issues).

whether plaintiffs should be required to present an illustrative majority-minority single-member district, and the baseline for measuring vote dilution.[216]

Separate Vote Dilution from Vote Denial. Congress should create a substantive standard for vote dilution separate from the standard for vote-denial claims. Vote-dilution claims do not involve individual rights to cast a ballot that gets counted. Rather, vote-dilution claims involve a group right to elect a candidate or candidates of choice.[217] The factors involved in determining whether discrimination is occurring are (and should be) different, and this difference has been recognized by lower courts and in the only Supreme Court decision applying the Section 2 results standard to a claim of vote denial.[218]

There is no reason to think separate standards for vote-dilution claims and vote-denial claims would be problematic for either political party or the Court. The Democrats included separate standards in the bill that passed the House.[219] And there is no reason to think that Republicans or the Court would object given that the conservative Court has already moved in the direction of two separate standards. Both political teams should have little issue with this.

Racially Polarized Voting. To succeed on a claim of Section 2 vote dilution, plaintiffs should have to prove racially polarized voting, and Congress should enact statutory language to make that explicit. Racially polarized voting has essentially been a part of vote-dilution law from the beginning[220] and basically is captured by the second and third *Gingles* preconditions that call for proof of political cohesion by a minority group and proof of bloc voting by the majority.[221] And to underline the prominence of racially polarized voting in vote-dilution doctrine, the Senate factors used in assessing the totality of the

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216. Changes to the substantive standard for Section 2 could lead to more litigation being filed using the constitutional standard for vote dilution, which requires proof of discriminatory purpose. *See, e.g.*, Rogers v. Lodge, 458 U.S. 613 (1982). It would be left to the courts (or at least to another article) how to harmonize, if at all, constitutional vote-dilution doctrine with a revised Section 2 results standard.

217. City of Mobile v. Bolden, 446 U.S. 55, 78 (1980) ("It is, of course, true that the right of a person to vote on an equal basis with other voters draws much of its significance from the political associations that its exercise reflects . . . .").

218. *See* Brnovich v. Democratic Nat'l Comm., 594 U.S. 647, 672 (2021) (describing how some of the *Gingles* factors only matter for vote-dilution claims and are "plainly inapplicable" to vote-denial claims); *see also* Michael J. Pitts, *Rethinking Section 2 Vote Denial*, 46 FLA. ST. U. L. REV. 1, 13–21 (2018) (describing lower court jurisprudence involving Section 2 vote-denial claims).

219. *See* John R. Lewis Voting Rights Advancement Act of 2021, H.R. 4, 117th Cong. § 2 (2021).

220. Crum, *supra* note 43, at 276 (noting that "the *White* Court also identified racially polarized voting as a relevant factor" in establishing vote dilution).

221. Thornburg v. Gingles, 478 U.S. 30, 56 (1986) ("The purpose of inquiring into the existence of racially polarized voting is twofold: to ascertain whether minority group members constitute a politically cohesive unit and to determine whether whites vote sufficiently as a bloc usually to defeat the minority's preferred candidates.").

circumstances also include racially polarized voting as a touchstone for analysis regarding whether Section 2 has been violated.[222]

Congress should not try to legislate the levels of racial polarization needed to establish a Section 2 violation or a myriad of other questions that exist in this realm,[223] but Congress should end one major debate that has lingered since the decision in *Gingles* by making it clear that plaintiffs need not prove causation. In *Gingles*, a plurality of the Court determined that racially polarized voting can be proven by showing that race *correlates* with polarized voting rather than *causes* polarized voting.[224] And the lack of a majority on the Court on this subject has led to a circuit split about whether proof of causation is needed to establish vote dilution.[225] Congress should legislate that proof of correlation creates a presumption of racially polarized voting.

There are good reasons that correlation should presumptively prove polarized voting for purposes of the results standard. Over the years, correlation has been the predominant method of proving racially polarized voting for Section 2 results claims.[226] Moreover, requiring plaintiffs to prove that race causes polarized voting places too high of a burden on Section 2 plaintiffs. In addition, it is often difficult to separate correlation from causation when it comes to anything, let alone voting that occurs by secret ballot. Finally, by using causation as a presumption, nothing will prevent defendants in Section 2 cases from rebutting that presumption.[227]

Politically, it seems likely that both Republicans and Democrats could agree that polarized voting should be part of the evidence presented by plaintiffs to establish a claim of vote dilution. However, there would probably be disagreement on causation, with Democrats likely supporting a correlation standard because it makes for an easier burden on plaintiffs. Tempering the need to prove causation, with correlation only serving as a presumption that could be rebutted, might mitigate some Republican concerns, though probably only slightly.

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222. *See supra* note 80 and accompanying text (detailing the Senate factors).

223. *See supra* note 215.

224. *Gingles*, 478 U.S. at 74 ("In sum, we would hold that the legal concept of racially polarized voting, as it relates to claims of vote dilution, refers only to the existence of a correlation between the race of voters and the selection of certain candidates.").

225. Crum, *supra* note 43, at 280 ("This causation question remains open, and the circuits are split on it."); Elmendorf et al., *supra* note 79, at 614–15 (describing circuit split about causation).

226. *See* Crum, *supra* note 43, at 271.

227. *Cf.* United States v. Charleston County, 365 F.3d 341, 348–49 (4th Cir. 2004) (discussing that the reason why polarized voting occurs can be a factor in the totality of circumstances analysis). One way that defendants should be allowed to rebut the presumption would be through evidence similar to Justice White's hypothetical in his concurrence in *Gingles* where minority *candidates* are consistently elected without the support of minority voters. *Gingles*, 478 U.S. at 82–83 (White, J., concurring). To be sure, such cases seem likely to be rare.

Require Plaintiffs to Produce an Illustrative Majority-Minority Single-Member District. Congress should require plaintiffs to demonstrate that they can create at least one (more below on when more than one might be required) additional, reasonably configured single-member district. This would essentially codify existing law. In *Bartlett v. Strickland*, the Court held that "[o]nly when a geographically compact group of minority voters could form a majority in a single-member district has the first *Gingles* requirement been met."[228]

Requiring a reasonably configured majority-minority single-member district makes sense from the standpoint of administrability. It creates a relatively clear rule—"relatively clear" because there is certainly room for debate about what constitutes a reasonable configuration. It also serves as a tool to limit the number of Section 2 claims that could successfully be brought. Indeed, demonstrating the existence of the first *Gingles* precondition is one of the main reasons why Section 2 plaintiffs have not had a very high success rate in recent years.[229] Importantly, requiring proof of the ability to draw a majority-minority single-member district does not mean that such a district need be the final remedy for vote dilution; as will be discussed later, alternative election systems could be the ultimate remedy for vote dilution.[230]

The codification of the requirement that plaintiffs present an illustrative single-member district would be uncontroversial. Democrats already included this as part of the bill that passed the House in 2022,[231] and Republicans should be in favor of a requirement that tends to limit the potential for Section 2 liability. And codifying the requirement of a "reasonable configuration" should reduce concerns about designing districts that amount to racial gerrymanders—making the statute more constitutionally sound because it helps respect the constitutional prohibition on racial gerrymandering.

Eliminate Potential Liability for Influence, Crossover, and Coalition Districts. Closely related to requiring proof of a hypothetical majority-minority single-member district is eliminating potential liability for failing to draw other types of districts that might help boost minority voting strength. There are four types of districts when it comes to minority voting rights:

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228. 556 U.S. 1, 26 (2009).

229. Brief for Jowei Chen et al. as Amici Curiae in Support of Appellees/Respondents at 14–18, Allen v. Milligan, 599 U.S. 1 (2023) (No. 21-1086).

230. This discussion assumes the continued applicability of *Holder v. Hall*, which does not appear to allow claims that seek to expand the size of a governing body so that minority voters can be said to form a majority in a hypothetical single-member district. *See generally* 512 U.S. 874 (1994) (refusing to allow Section 2 to be used to challenge the size of a governing body). That said, Congress might consider codifying the result of *Holder* to put a clear statutory limit on Section 2 claims.

231. *See* John R. Lewis Voting Rights Advancement Act of 2021, H.R. 4, 117th Cong. § 2 (2021). To be sure, the preferred policy of many Democrats might be to eliminate the requirement of an illustrative majority-minority district in the manner in which some state voting rights acts have done. *See* Greenwood & Stephanopoulos, *supra* note 155, at 310–11 (describing how some state voting rights acts, which have generally been passed in states governed by Democrats, abandon *Gingles*'s first precondition).

- A majority-minority district where "a minority group composes a numerical, working majority of the voting-age population";[232]
- A coalition district where "two minority groups form a coalition to elect the candidate of the coalition's choice";[233]
- A crossover district where "minority voters make up less than a majority of the voting-age population . . . [but the minority population] is large enough to elect the candidate of its choice with help from voters who are members of the majority and who cross over to support the minority's preferred candidate";[234]
- An influence district "in which a minority group can influence the outcome of an election even if its preferred candidate cannot be elected."[235]

Congress should eliminate any potential claims for coalition, crossover, or influence districts. While there are potentially compelling arguments for allowing claims involving these types of districts—particularly coalition districts—to expand minority voters' power in elections, allowing such claims to proceed expands Section 2's reach too far and might run afoul of the Supreme Court's precedent.[236] Indeed, the conservative Fifth Circuit Court of Appeals, which previously had endorsed coalition districts, recently took a case en banc to reconsider the matter and overruled its prior decision.[237] Compelling creation of these sorts of districts smacks of maximizing minority voters' potential—something that the Supreme Court has disavowed for quite some time.[238] Crossover districts, in particular, also call into question the existence of racially polarized voting.[239] And influence-district claims would seemingly allow for an expansion of Section 2 litigation that Democrats could use as a political weapon to maximize Democratic political influence because influence districts are basically a tool to elect White Democrats.

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232. *Bartlett*, 556 U.S. at 13.

233. *Id.*

234. *Id.*

235. *Id.*

236. *Id.* at 21 (refusing to allow claims involving crossover districts, in part, to avoid "serious constitutional concerns" about interpreting Section 2 to allow such claims).

237. *See* Petteway v. Galveston County, 111 F.4th 596, 599 (5th Cir. 2024). There is a circuit split on the issue, with the Eleventh Circuit allowing for coalition-district claims and the Fifth and Sixth Circuits not allowing them. *Compare* Concerned Citizens of Hardee Cnty. v. Hardee Cnty. Bd. of Comm'rs, 906 F.2d 524, 526–27 (11th Cir. 1990) (allowing coalition-district claims), *with* Nixon v. Kent County, 76 F.3d 1381, 1393 (6th Cir. 1996) (en banc) (prohibiting coalition-district claims), *and Petteway*, 111 F.4th at 599.

238. *Bartlett*, 556 U.S. at 15–16; *see also* Johnson v. De Grandy, 512 U.S. 997, 1016–17 (1994).

239. *See Bartlett*, 556 U.S. at 16. It might be argued that crossover districts are beneficial because they demonstrate a reduction in polarized voting. However, there is no reason to think that allowing Section 2 claims for the creation of crossover districts will lead to less polarized voting than claims that allow for the creation of majority-minority districts.

One suspects that eliminating claims for anything other than majority-minority districts would appeal to Republicans instead of Democrats. For one thing, Democrats had included a provision explicitly allowing for coalition-district claims in their recent bill that passed the House.[240] But there are probably not a lot of coalition-district claims out there. The vast majority of claims involving Section 2 involve just one racial minority clamoring for its fair share of the electoral pie.[241] Moreover, there are sometimes tensions between minority groups when it comes to voting rights.[242] At bottom, given the concerns coalition-, crossover-, and influence-district claims might raise with the Court, it is probably not worth it to include such claims within the reach of Section 2.

Establish a Baseline for Measuring Dilution and Establish Presumptions for Liability and Non-liability Depending on the Amount of Dilution. Congress needs to establish a baseline for vote dilution, and proportionality should be the baseline for determining whether dilution exists. Supporters of Section 2 in Congress in 1982 tried to avoid designating a baseline for vote dilution, much to the chagrin of critics of proportional representation.[243] But conservative critiques (and the critiques have tended to be conservative) are right; there is no way to assess whether a group's voting rights are being diluted without establishing a benchmark for evaluating dilution.[244]

For years, though, it seems like everyone has run away from an explicit reliance on proportionality as a baseline for measuring dilution. Perhaps it is because the language of proportional representation smacks of something un-American. Perhaps it is because proportionality conjures up notions of racial and ethnic quotas. Perhaps it is because the earliest Supreme Court decision related to vote dilution foreswore a right to proportional representation.[245] Perhaps it is because there was a hope that some other baseline might magically appear, such as random computer-generated maps.[246]

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240. *See* John R. Lewis Voting Rights Advancement Act of 2021, H.R. 4, 117th Cong. § 2 (2021) ("A class of citizens protected by subsection (a) may include a cohesive coalition of members of different racial or language minority groups.").

241. Katz et al., *supra* note 184.

242. *See* Anita Snow, *LA's Black-Latino Tensions Bared in City Council Scandal*, ASSOCIATED PRESS (Oct. 17, 2022, 9:01 AM), https://apnews.com/article/los-angeles-race-and-ethnicity-racial-injustice-hispanics-government-politics-b1b1fd8d860c88eb097db573159bf6a9 [https://perma.cc/7DGS-YZ88] (detailing racist statements made during a redistricting process).

243. Boyd & Markman, *supra* note 60, at 1390–92 (detailing colloquies between Senators on the issue of proportional representation).

244. Holder v. Hall, 512 U.S. 874, 896 (1994) ("[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." (Thomas, J., concurring) (quoting Baker v. Carr, 369 U.S. 186, 300 (1962) (Frankfurter, J., dissenting))).

245. *See supra* Section I.A.

246. *See* Gonzalez v. City of Aurora, 535 F.3d 594, 599–600 (7th Cir. 2008) (discussing the possibility of using computer-generated maps to assess the presence of vote dilution).

But, apart from the computer-generated maps that were critiqued by Chief Justice Roberts in *Allen v. Milligan*,[247] there is not much else that makes sense as a means of measuring dilution apart from proportional representation. As Justice O'Connor long ago recognized in *Gingles*, "any theory of vote dilution must necessarily rely to some extent on a measure of minority voting strength that makes some reference to the proportion between the minority group and the electorate at large."[248] Indeed, one can view the opinion in *De Grandy*, which made proportionality a touchstone of Section 2 analysis, as a back-door importation of proportional representation as a baseline for measuring dilution.[249]

Importantly though, establishing proportional representation as a baseline for measuring dilution should not lead to the enforcement of proportional representation or proportionality as a remedy. Instead, liability should be based on something along the lines of the following framework:

- Vote dilution shall be presumed if minority voters have no ability to elect any candidate of choice.
- Vote dilution shall not be presumed if minority voters have some ability to elect a candidate or candidates of choice unless:
    - At the state legislative level, at least three additional reasonably configured single-member districts can be created that would allow minority voters to elect a candidate of choice.
    - At the local level, at least two additional reasonably configured single-member districts can be created that would allow minority voters to elect a candidate of choice.[250]
- The remedy for vote dilution where minority voters already have some opportunity to elect a candidate or candidates of choice will generally not require the creation of proportional opportunities to elect candidates of choice.

The above framework tries to capture several ideas. First, when minority voters have no representation, that is something which cries out for a remedy. Having no representation when a minority is a substantial portion (enough to form a majority in a reasonably configured single-member district) of the jurisdiction's population sends a bad message. There is value to having

247. *See* 599 U.S. 1, 33–37 (2023) ("Section 2 cannot require courts to judge a contest of computers when there is no reliable way to determine who wins, or even where the finish line is.").

248. Thornburg v. Gingles, 478 U.S. 30, 84 (1986) (O'Connor, J., concurring).

249. *See supra* notes 82–88 and accompanying text (discussing *De Grandy*).

250. I am not particularly wedded to the numbers presented here. The point is to center the discussion around the general concept of needing to do more than add an additional seat.

descriptive representation—even if it is only a single person who is consistently outvoted by other members of the legislative body. Thus, vote dilution should be presumed when there is no representation and it would be possible to provide some.[251] Second, where some representation exists, Section 2 should provide a remedy only where there is a more substantial departure from the dilution (i.e., proportionality) baseline. "One more district!" generally should not be a rallying cry for dilution plaintiffs. To intervene, it should have to be something more than that. Third, by generally not requiring proportionality in the remedial phase when some minority representation already exists, the provision steers clear of creating something that could look like a right to proportional representation.

In each of these instances, there are only presumptions either for or against dilution, and some flexibility should be provided to judges in crafting a remedy. In any given circumstance, there might be exceptions—though they should be rare. For instance, if a minority group is the population majority of a local electorate but a districting plan is preventing them from taking a majority of the seats by one seat, then vote dilution should be found on the theory that a majority should generally rule. Mileage may vary depending upon unique circumstances, but mileage should rarely vary.

Politically there is a lot for both sides to dislike. Republicans would likely object to the use of proportionality as a benchmark for measuring dilution, as conservatives have tended to be the loudest voices on that side of the ledger.[252] Democrats would likely object to the presumptions against finding dilution unless there is a more substantial departure from the baseline than one single-member district in instances where minority voters already have representation. On this score—and this is maybe the place where the rubber most meets the road when it comes to Section 2 vote dilution—this proposal is an attempt to fashion a compromise no side would be completely happy with. But that is likely what needs to happen to enact legislation.[253]

Retrogression as a Presumption of a Violation. A reduction in minority voters' ability to elect a candidate of choice should create a presumption of a Section 2 violation. For example, when minority voters have the ability to elect one member of a five single-member district city council and a redistricting plan or change in electoral structure to, say, at-large elections would eliminate that

251. While a total lack of representation could exist at a statewide level, it is much more likely to exist at the local level.

252. The Court might also look favorably upon a framework that gives more guidance to the judiciary in this realm.

253. I recognize that this sort of framework may create incentives for redistricting actors to draw just enough districts to prevent a presumption of dilution. However, that is probably not any different than what already happens. In other words, I suspect that in some instances redistricting actors currently draw just enough districts to try and stave off Section 2 liability.

ability, the Section 2 results standard should generally prevent such a diminishment of minority voting strength from occurring.

I have previously explored using retrogression as a presumption of a results-standard violation in a more detailed article including the reasons for doing so and some potential downsides.[254] The main reason for doing so is to preserve the gains that minority voters have made over the decades since the adoption of the Voting Rights Act.[255] Preventing backsliding also recognizes that minority voters are not even close to gaining proportional representation, and further backsliding from that baseline would be undesirable.[256] Finally, retrogression also provides a standard that is relatively easy for federal courts to administer and is similar, to some extent, to the Court's decision in *League of United Latin American Citizens v. Perry*.[257]

A presumption against retrogression does not mean that retrogression can never occur. If the demography of a jurisdiction has changed such that it is no longer possible to provide minority voters with an ability to elect their candidate of choice, then no violation should be found.[258] In addition, if providing representation would necessitate violating racial gerrymandering doctrine, then no violation should be found.[259] And there is no need for jurisdictions to perpetuate majority-minority districts to defeat a claim of retrogression. In other words, nothing would prevent a jurisdiction from shifting a majority-minority district that provides minority voters an ability to elect to a crossover district that provides minority voters an ability to elect.[260] Finally, nothing would prevent a switch from, for example, a single-member district to an alternative

254. *See generally* Pitts, *supra* note 13.

255. *Id.* at 753–55.

256. *See supra* note 123 and accompanying text (discussing lack of proportional representation).

257. Pitts, *supra* note 13, at 757 (making both points in a bit more detail).

258. The Department of Justice's enforcement guidance for Section 5 recognized that some retrogression of minority voting strength might be unavoidable:

> There may be circumstances in which the jurisdiction asserts that, because of shifts in population or other significant changes since the last redistricting (e.g., residential segregation and demographic distribution of the population within the jurisdiction, the physical geography of the jurisdiction, the jurisdiction's historical redistricting practices, political boundaries, such as cities or counties, and/or state redistricting requirements), retrogression is unavoidable. In those circumstances, the submitting jurisdiction seeking preclearance of such a plan bears the burden of demonstrating that a less-retrogressive plan cannot reasonably be drawn.

Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act, 76 Fed. Reg. 7470, 7472 (Feb. 9, 2011).

259. In its enforcement of Section 5, the Department of Justice recognized that "preventing retrogression . . . does not require jurisdictions to violate *Shaw v. Reno* and related [racial gerrymandering] cases." *Id.*

260. Cooper v. Harris, 581 U.S. 285 (2017), provides a good example of the ability of a crossover district to do the same work for which a majority-minority district might have been needed in the past. In *Cooper*, Republicans racially gerrymandered North Carolina's congressional District 1 for the purpose of ensuring that it had a majority-Black voting-age population. *Id.* at 299. To justify that racial gerrymandering, they cited Section 2 of the Voting Rights Act as mandating the need for a majority-minority district. *Id.* at 299–301. However, the Court rejected that justification, finding that there was insufficient White bloc voting because District 1 had operated for many years as a crossover district. *Id.* at 302–03.

election system (which will be discussed later) so long as the alternative election system was designed to preserve existing minority voting strength.

Creating a presumption of a violation when retrogression occurs is an idea that Democrats would more likely embrace than Republicans. Evidence of this is the fact that the bill passed by House Democrats included a provision that established retrogression to be a violation of the results standard.[261] The main reason is that, at the moment, a healthy majority of seats that allow minority voters to elect candidates of choice are held by Democrats.[262] Of course, political winds can change and it may not always be so,[263] but that is the current political reality.

Allow for Alternative Election Systems as a Remedy. An updated results standard should make room for the use of alternative election systems as a remedy for vote dilution but should do so in a way that is sensitive to local concerns. Thus, when a defendant loses a vote-dilution claim on the merits, the jurisdiction should have the first opportunity to remedy the violation and may do so by using any electoral system including, but not limited to, the use of single-member districts *or* alternative election systems.

There are many reasons to support the use of alternative election systems as a remedy for vote-dilution claims, and there is no need to rehash the extensive literature that has been devoted to the use of alternative election systems as a means for empowering minority voters.[264] Among the benefits is that alternative election systems generally do not require incumbent legislators to draw lines—thus preventing gerrymandering, be it racial, or otherwise.[265] Alternative election systems are also, in jurisprudential jargon, race neutral—they do not require the consideration of race in the way that constructing districts to allow minority voters to elect their candidates of choice do. And because an alternative election system does not rely on governmental

261. *See* John R. Lewis Voting Rights Advancement Act of 2021, H.R. 4, 117th Cong. § 3 (2021).

262. Some Democrats might oppose preserving minority voters' ability to elect because it prevents Democrats from more efficiently using those voters to achieve political power. In other words, preventing retrogression tends to elevate descriptive representation over substantive representation. For a discussion of this possible trade-off, see Pitts, *supra* note 13, at 758–59.

263. At one time in our nation's history, the Republican Party was the champion of Black voters. And some research indicates that some minority voters may be moving away from the Democratic Party and toward the Republican Party. Marissa Martinez, *Voters of Color Did Move to the Right – Just Not at the Rates Predicted*, POLITICO (Nov. 13, 2022, 7:01 AM), https://www.politico.com/news/2022/11/13/latino-voters-midterm-elections-republicans-00066618 [https://perma.cc/M3HB-GBLQ].

264. *See generally* Guinier, *supra* note 152; Lani Guinier, *No Two Seats: The Elusive Quest for Political Equality*, 77 VA. L. REV. 1413, 1432–58 (1991); Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success*, 89 MICH. L. REV. 1077, 1079–80 (1991); Steven J. Mulroy, *The Way Out: A Legal Standard for Imposing Alternative Electoral Systems as Voting Rights Remedies*, 33 HARV. C.R.-C.L. L. REV. 333, 333–34 (1998).

265. Mulroy, *supra* note 264, at 338 ("Single-member districting requires the government of a jurisdiction to assign voters to districts. It thereby provides members of governing bodies substantial discretion to 'gerrymander' in such a way as to determine the outcome of elections.").

assignment of voters, it allows voters to self-select their representation.[266] Put differently, an alternative election system does not require the government to decide, say, whether groups of minority voters that are dispersed geographically share common interests—rather, those voters can decide for themselves whether to unite to elect their candidate of choice. Apart from benefitting minority voters, alternative election systems can also benefit alternative parties and political views.[267]

Presumably the use of alternative election systems would be something supported mostly by Democrats, though it does not have to be that way. For instance, one result of the use of cumulative voting in a local election in Alabama was the election of Republicans for the first time ever.[268] And conservative Justices might find it appealing that alternative election structures can eliminate the potential for racial gerrymandering. Regardless, updating Section 2 should include some measure to expand the possibilities when it comes to remedying violations beyond the traditional single-member district model.

Discriminatory-Purpose Claims Under Section 2. Section 2 encompasses a results standard, but does the current version of Section 2 also establish a violation if plaintiffs prove that a discriminatory purpose exists? Some case law supports the idea that Section 2 currently allows for claims of discriminatory purpose,[269] but there are plausible arguments to the contrary and more recent case law that runs in the opposite direction.[270]

While this is mostly a minor technicality that probably does not have much political salience with either Republicans or Democrats, Congress should make clear that discriminatory-purpose claims can be brought under Section 2.[271]

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266. Guinier, *The Triumph of Tokenism*, *supra* note 264, at 1148–49 n.331 (describing "[p]roportionate interest representation"). For a clever proposal related to voters self-districting to eliminate gerrymandering, see Edward B. Foley, *Self-Districting: The Ultimate Antidote to Gerrymandering*, 111 KY. L.J. 693 (2023).

267. Mulroy, *supra* note 264, at 350 ("[B]ecause these systems tend to allow less well-known candidates and parties to gain seats and prevent dominant groups from sweeping elections, electoral contests held under these systems tend to offer voters more choices and be more competitive, which in turn leads to higher participation rates.").

268. Richard Engstrom et al., *One Person, Seven Votes: The Cumulative Voting Experience in Chilton County, Alabama*, *in* AFFIRMATIVE ACTION AND REPRESENTATION: *SHAW V. RENO* AND THE FUTURE OF VOTING RIGHTS 285, 297 (Anthony A. Peacock ed., 1997); MacLeod, *supra* note 51, at 1693 (describing the first election using cumulative voting in Port Chester, NY, as resulting in "a diverse Board: the villagers elected two [D]emocrats, two [R]epublicans, one independent, and one conservative").

269. *See* Nipper v. Smith, 39 F.3d 1494, 1520 (11th Cir. 1994) (en banc) (holding that a Section 2 violation can be proved by showing discriminatory purpose).

270. *See* League of Women Voters of Fla., Inc., v. Fla. Sec'y of State, 66 F.4th 905, 943 (11th Cir. 2023) ("[A] finding of discriminatory impact is necessary to establish a violation of [S]ection 2 of the Voting Rights Act."); *see also* Defendants' Motion to Dismiss Complaint at 5–9, United States v. Georgia, 574 F. Supp. 3d 1245 (N.D. Ga. 2021) (No. 1:21-CV-02575-JPB) (arguing against discriminatory-purpose claims being brought under Section 2).

271. The recent bill passed by the House included a provision to allow for purpose claims. *See* John R. Lewis Voting Rights Advancement Act of 2021, H.R. 4, 117th Cong. § 3 (2021). But that proposal is a bit

Many claims brought under Section 2 can also plausibly contain claims of purposeful discrimination, so it makes sense to allow double-barreled claims under Section 2. This clarity will allow the Department of Justice to bring claims of discriminatory intent under Section 2.[272] And there would seemingly be no good reason to block the Department of Justice from bringing such claims when they could just frame such claims using the results standard anyway.

* * *

It bears repeating that there are undoubtedly multiple different ways to craft an updated Section 2 results standard, and no single proposal above need be adopted. The central points are that Congress should do something to preserve some form of the Section 2 results standard going forward, that what Congress does should be bipartisan and recognize changed circumstances, and that congressional action should accommodate rather than repudiate the Supreme Court's jurisprudence. There remains a place for Section 2 vote-dilution claims, particularly at the local level, and steps should be taken to preserve that place.

It is also worth noting that re-legislating Section 2 may well be a lost cause. Congress is an incredibly polarized institution. Democrats may be unwilling to revisit something that currently may appear to be quite helpful to their overall, short-term political prospects. Republicans may prefer to drag their heels in the hopes that a conservative Supreme Court will ultimately put vote-dilution litigation out of business. Both sides may calculate that doing nothing is a better political bargain than compromise legislation. And it is certainly possible that no matter what Congress does, there will not be five votes on the Supreme Court in the future to uphold any kind of vote-dilution doctrine using a results standard. However, even in a polarized universe, bipartisanship in hot-button areas can happen,[273] and Court personnel and attitudes can shift over time. At least some effort should be made.

CONCLUSION

The Section 2 results standard should be revisited by Congress. The Supreme Court Justice who may well be the fifth vote sustaining the Section 2 results standard has hinted that the current results standard cannot go on forever. But even more so, the world in which the Section 2 results standard

complicated. Congress should just allow for claims based on discriminatory purpose however discriminatory purpose is interpreted by the judiciary.

272. Currently, the Department of Justice can bring claims under the statute but cannot bring constitutional claims. *See* 52 U.S.C. § 10308(d) (providing authority for the Department of Justice to bring claims under various provisions of the Voting Rights Act).

273. *See* Ximena Bustillo et al., *Respect for Marriage Act Clears Congress with Bipartisan Support*, NPR (Dec. 8, 2022, 2:28 PM), https://www.npr.org/2022/11/29/1139676719/same-sex-marriages-bill-senate-vote [https://perma.cc/6MAK-EMEV].

was initially developed by Congress and the Supreme Court has fundamentally shifted. There are a host of reasons why Congress should revisit Section 2 results and craft revisions that account for the political and jurisprudential realities that exist today.