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Does the Constitution protect individual voters' freedom to cast their votes for racially discriminatory reasons? Or does it prohibit racist voting that denies a minority group the opportunity to elect its candidate of choice? The surprising answer is that it does both. On an individual level, voters are free to cast their votes for their preferred candidates for whatever reasons they choose, including racist ones. On a systemic level, however, the aggregation of racist votes violates the Constitution where it is sufficiently prevalent to affect election results.

The practical importance of recognizing racist voting as a constitutional violation is to fortify Section 2 of the Voting Rights Act of 1965 (VRA). The constitutional status of Section 2 remains an open question after the Supreme Court's two most recent redistricting decisions. In Allen v. Milligan, *the Court affirmed the constitutionality of Section 2, while leaving the door open to a future challenge based on its unlimited temporal scope. In* Alexander v. South Carolina State Conference of the NAACP, *the Court raised the bar for showing that intentional race discrimination by the legislature invalidates a redistricting plan. These two cases highlight the urgency of defining with precision the "constitutional wrongs" that Section 2 addresses.*

There is no doubt that intentional race discrimination by legislators is a constitutional wrong that Congress has the power to remedy through appropriate legislation. This Article argues that intentional race discrimination by voters is also a constitutional wrong that Congress may address through legislation. Part I considers the extent to which intentional race discrimination influences vote choice—in other words, whether racist voting is a thing. Part II considers whether racist voting is constitutionally protected, concluding that the combination of the secret ballot and constitutional limits on compelled disclosure effectively protects vote choices from judicial scrutiny. Part III argues that racist voting may nevertheless violate the Constitution where it is sufficiently prevalent to affect election results and that Section 2 of the VRA should be understood as a remedy for this constitutional wrong.

INTRODUCTION

Does the Constitution protect individual voters' freedom to cast their votes for racially discriminatory reasons?[1] Or does it prohibit racist voting that denies

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1. This Article uses the term "racist" in the conventional sense to describe actions that arise from invidious (i.e., racially discriminatory) intent. *See* Washington v. Davis, 426 U.S. 229, 239–40 (1976) (holding that facially neutral laws violate the Equal Protection Clause only if motivated by discriminatory intent). An alternative understanding focuses on effects rather than intent, characterizing actions as racist if they worsen racial subordination and as antiracist if they have the opposite effect. *See generally* IBRAM X. KENDI, HOW TO BE AN ANTIRACIST 20–23 (2019). This Article takes no position on whether an effects-based understanding of "racism" should be adopted. Because my goal is to make an argument within the boundaries of existing law, it uses the term "racist" as shorthand for intentional discrimination that presumptively violates the Constitution. Also, the Article use the terms "intent" and "purpose" interchangeably to refer to the requirement of *Washington v. Davis* and its progeny.

a minority group the opportunity to elect its candidate of choice? The surprising answer is that it does both.

This conclusion will surely seem counterintuitive and perhaps even contradictory, but it follows from an understanding of two different dimensions of the right to vote.[2] On an individual level, voters are free to cast their votes for whatever candidates they choose and for whatever reasons they choose, including racist ones. While existing constitutional doctrine is surprisingly murky on the question of whether people have a legal right to cast their votes with invidious motivations, the ubiquity of the secret ballot combined with constitutional limits on compelled disclosure effectively affords individuals the freedom to cast racist votes.

On a systemic level, by contrast, the aggregation of racist voting violates the Fourteenth and Fifteenth Amendments when it is sufficiently prevalent to affect election results.[3] For voting is not simply an individual act. The aggregation of votes to select government officials, through a process run by state and local election officials, is a quintessential public function. State action permeates the electoral process from beginning to end.[4] Accordingly, the Fourteenth and Fifteenth Amendments apply when intentional discrimination by voters affects election results, even in the absence of intentional discrimination by legislators or other public officials.

The constitutionality of racist voting is not merely an academic exercise but a question of considerable practical importance. That is so for two reasons. The first is the mounting evidence that many people *do in fact* cast their votes with racially discriminatory intent.[5] Donald Trump's emergence and persistence as the dominant figure in the Republican Party may have something to do with this, but racial bias played a significant role in U.S. politics long before he arrived on the scene. Today, there is a robust debate in the social science literature over "white identity politics" and its impact on elections.[6] This is not exactly the same thing as racist voting, but it is related, providing reason to believe that intentional race discrimination by voters sometimes affects election results.

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2. *See* Pamela S. Karlan, *The Rights to Vote: Some Pessimism About Formalism*, 71 TEX. L. REV. 1705, 1709–19 (1993) [hereinafter Karlan, *The Rights to Vote*] (identifying and discussing three conceptions of the right to vote: participation, aggregation, and governance); *see also* Daniel P. Tokaji, *Vote Dissociation*, 127 YALE L.J.F. 761, 762–66 (2018) (relying on Karlan's framework to propose a vocabulary for violations of the three dimensions of the right to vote: vote denial, vote dilution, and vote dissociation).

3. *See* Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 HARV. L. REV. 1663, 1668 (2001) (understanding vote dilution claims as involving an aggregate right rather than an individual right).

4. *See, e.g.*, Terry v. Adams, 345 U.S. 461, 469–70 (1953); Smith v. Allwright, 321 U.S. 649, 664–66 (1944).

5. *See infra* Part I.

6. *Compare* ASHLEY JARDINA, WHITE IDENTITY POLITICS 264–65 (2019) (attributing the success of Trump's 2016 presidential campaign to White identity politics), *with* Richard C. Fording & Sanford F. Schram, *Pride or Prejudice? Clarifying the Role of White Racial Identity in Recent Presidential Elections*, 55 POLITY 106, 135 (2023) (concluding that the concept of White identity politics "is an illusion to the extent that people believe White racial identity has a direct, independent effect on vote choice").

The second reason for the practical importance of racist voting is its relevance to the constitutionality of Section 2 of the Voting Rights Act of 1965 (VRA), which prohibits practices that "result[] in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color."[7] Section 2's constitutionality is front and center after the Supreme Court's two most recent redistricting decisions. In *Allen v. Milligan*, the Court declined an invitation to scrap the *Thornburg v. Gingles* framework that has long governed racial vote dilution claims under Section 2.[8] *Gingles* put racial polarization at the center of the vote dilution inquiry, requiring that "the minority group . . . show that it is politically cohesive" and that the "majority votes sufficiently as a bloc to enable it . . . to defeat the minority's preferred candidate."[9] While *Milligan* summarily rejected Alabama's constitutional challenge to the *Gingles* framework, Justice Kavanaugh (who supplied the crucial fifth vote for the majority opinion) wrote an ominous concurrence suggesting that there may be a constitutional problem with Section 2 arising from its "indefinite[]" temporal scope—that is, its lack of a sunset date.[10] Justice Kavanaugh cited Justice Thomas's dissenting opinion in the same case, which argued that Section 2 bears "no nexus to any likely constitutional wrongs."[11]

Another recent decision could make it more difficult to defend Section 2 on the conventional ground that it remedies purposeful discrimination by legislative bodies.[12] In *Alexander v. South Carolina State Conference of the NAACP*, the Court overturned a lower court's conclusion that South Carolina had engaged in unconstitutional racial gerrymandering and vote dilution.[13] Justice Alito's opinion underscored the high bar for proving these claims by imposing a "presumption that the legislature acted in good faith."[14] That meant presuming that the South Carolina legislature had acted principally for permissible *partisan* reasons (to advantage Republicans) rather than for

7. 52 U.S.C. § 10301(a).

8. 599 U.S. 1, 26 (2023). For further discussion about Section 2's results standard after *Allen v. Milligan*, see Michael J. Pitts, *Re-Legislating Section 2 of the Voting Rights Act*, 76 ALA. L. REV. 489 (2025) (arguing that Congress should revise Section 2's results standard to "account for the political and jurisprudential realities that exist today").

9. *Milligan*, 599 U.S. at 18 (quoting Thornburg v. Gingles, 478 U.S. 30, 51 (1986)).

10. *Id.* at 45 (Kavanaugh, J., concurring).

11. *Id.* at 88 (Thomas, J., dissenting); *see also id.* at 104–09 (Alito, J., dissenting) (raising other constitutional problems with the lower court's application of the *Gingles* framework).

12. I use the terms "legislature" and "legislative bodies" as shorthand for state actors responsible for districting or other electoral functions. Thus, in a state where an independent redistricting commission is responsible for redistricting, that body would fall within my definition. *See* Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787, 792–93 (2015) (understanding "the Legislature," as used in Article I, Section 4 of the Constitution, to mean the lawmaking power). The term also encompasses local bodies that perform such functions.

13. *See* 602 U.S. 1, 7 (2024).

14. *Id.* at 6. The Court's assertion that a "presumption of good faith" must be accorded to a state's redistricting decisions originally traces back to *Miller v. Johnson*, 515 U.S. 900, 916 (1995).

impermissible racial reasons (to disadvantage Black voters).[15] By narrowing the circumstances in which a legislative body may be found to have engaged in intentional race discrimination, *Alexander* could make it harder to defend Section 2 as a permissible remedy for that constitutional wrong, especially if the Court requires that "'current burdens' [on states] . . . be justified by 'current needs.'"[16]

Milligan and *Alexander* thus highlight the urgency of defining with precision the "constitutional wrong" that Section 2 addresses. This Article argues that intentional race discrimination *by voters* is a constitutional wrong that Congress is empowered to address through legislation and that Section 2 of the VRA does in fact remedy. Specifically, it argues that racist voting is state action that violates the Fourteenth and Fifteenth Amendments, when it is sufficiently prevalent to affect the result of an election, and that Section 2 is an appropriately tailored remedy for this constitutional wrong.

My argument proceeds in three parts. Part I considers the extent to which intentional race discrimination influences vote choice—in other words, whether racist voting is a thing. It starts with the Court's recognition of racial polarization as a critical element of racial vote dilution claims before proceeding to empirical research on race and vote choice. Part II turns to the question of whether racist voting is constitutionally protected. Although there is scant precedent on this question, I conclude that—as a functional, if not formal, matter—the combination of the secret ballot and First Amendment protection from compelled disclosure protects the freedom of individual voting choices, including racist votes. Part III addresses whether the aggregation of racist votes might violate the Constitution. Because elections are a quintessential public function, voters making choices with racially discriminatory intent are not simply acting as individuals, as is a street-corner speaker spewing racist invective. Rather, voters acting with racially discriminatory intent are engaged in state action when their votes are aggregated with those of other racist voters to determine the selection of public officials. It is doubtful that minority plaintiffs could prevail on an affirmative constitutional claim alleging that racially discriminatory voting determined any particular election, as such a claim would be difficult to prove and remedy. Racist voting is, however, a constitutional wrong that justifies Congress's exercise of its enforcement power under the Fourteenth and Fifteenth Amendments. It therefore provides an additional justification for Section 2 of the VRA. As construed and applied by *Gingles* and its progeny, Section 2 remedies the constitutional wrong of intentional discrimination by voters as well as by legislators.

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15. *See Alexander*, 602 U.S. at 10–16.

16. Shelby County v. Holder, 570 U.S. 529, 550 (2013) (quoting Nw. Austin Mun. Util. Dist. No. 1 v. Holder, 557 U.S. 193, 203 (2009)).

I. IS RACIST VOTING A THING?

This Article uses the term "racist voting" to describe vote choices made with the discriminatory purpose that is usually required to prove a constitutional violation.[17] By that definition, racist voting would include decisions to vote against particular candidates because of their race.[18] It would also include the decision to vote for a candidate because they favor policies or other actions adverse to a particular racial group. Consistent with longstanding equal protection doctrine, intent requires more than "awareness of consequences" for the disfavored group.[19] Rather, "the decisionmaker, in this case [the voter]," must act "'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."[20] So the decision to vote against a particular candidate because she is Latina would constitute racist voting, as would the decision to vote for her because she supports policies harmful to Asian Americans.

The concept of racist voting is not recognized in case law on voting rights and is almost entirely absent from academic literature.[21] A related concept has, however, long been at the center of voting rights doctrine: racial polarization.[22] After reviewing case law on racial polarization—including its relation to racist voting—this Part surveys the social science literature on racist attitudes and vote choice. While there is disagreement about what kinds of racial attitudes are most closely linked to voting decisions, there is little doubt that many voters are motivated to cast their ballots by a desire to protect their racial group and that some are motivated by hostility toward other racial groups.

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17. *See* City of Mobile v. Bolden, 446 U.S. 55, 66 (1980) ("To prove [discriminatory] purpose[,] . . . [a] plaintiff must prove that the disputed plan was 'conceived or operated as [a] purposeful devic[e] to further racial . . . discrimination.'" (citations omitted) (quoting Whitcomb v. Chavis, 403 U.S. 124, 149 (1971))).

18. This Article uses the term "race" to include race, ethnicity, and national origin.

19. Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979) (citing United Jewish Orgs. v. Carey, 430 U.S. 144, 179 (1979) (Brennan, J., concurring)).

20. *Id.* at 279 & n.25 (rejecting a sex-discrimination claim against Massachusetts's veterans' preference statute for lack of evidence that it was adopted with a discriminatory purpose).

21. While not using the term "racist voting," two other legal scholars have argued that intentional race discrimination by voters may violate the Constitution. An article by Christopher Elmendorf briefly addressed the question, arguing that the electorate may be considered a state actor when "an outcome-determinative share of the votes were cast for discriminatory reasons." Christopher Elmendorf, *Making Sense of Section 2: Of Biased Votes, Unconstitutional Elections, and Common Law Statutes*, 160 U. PENN. L. REV. 377, 432 (2012). The late Terry Smith likewise argued that racial discrimination by White voters amounts to state action that can violate the constitutional rights of minority voters. *See* TERRY SMITH, WHITELASH: UNMASKING WHITE GRIEVANCE AT THE BALLOT BOX 165, 171–73 (2020). Part III further discusses the work of these scholars.

22. For further discussion of the concept of racial polarization, see Christopher S. Elmendorf et al., *Racially Polarized Voting*, 83 U. CHI. L. REV. 587 (2016).

A. Racially Polarized Voting

Racial polarization was part of voting rights law even before the 1982 VRA amendments prohibiting discriminatory "results."[23] In *White v. Regester*, the Court adopted a "totality of the circumstances" standard for constitutional vote dilution claims.[24] *White* identified the plaintiffs' burden as showing "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."[25] While the Court did not use the term "racial polarization," factors relevant to the Court's decision included the Democratic Party's "white-dominated" slating process and the use of "racial campaign tactics . . . to defeat candidates who had the overwhelming support of the black community," resulting in only two Blacks ever being elected to the state house from the county.[26] *White* used the term "invidious discrimination" to convey what was required to establish an equal protection violation but did not say that intentional discrimination *by the legislature* was required.[27]

Two subsequent cases raised the bar for showing unconstitutional vote dilution while clarifying the relevance of racial polarization to that inquiry. In *City of Mobile v. Bolden*, a plurality of the Court said that both the Fourteenth and the Fifteenth Amendments require that plaintiffs show "purposeful discrimination" to prevail on a vote dilution claim.[28] In so holding, the Court relied in part on *Washington v. Davis*[29] and *Arlington Heights v. Metropolitan Housing Development Authority*,[30] which required plaintiffs to show a racially discriminatory purpose to prevail on equal protection claims in other contexts.[31] A majority of the Court affirmed *Bolden*'s discriminatory purpose requirement in *Rogers v. Lodge*,[32] which was decided just days after President Reagan signed the 1982 VRA amendments into law.[33] But in *Rogers*, the Court found the circumstantial evidence of such purpose sufficient to support the lower court's conclusion that an at-large county election system violated the Fourteenth and

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23. *See* Travis Crum, *Reconstructing Racially Polarized Voting*, 70 DUKE L.J. 261, 297–311 (2020) (tracing the origins of racially polarized voting back to the 1860s, prior to the passage of the Fifteenth Amendment).

24. *See* 412 U.S. 755, 769 (1973).

25. *Id.* at 766 (quoting Whitcomb v. Chavis, 403 U.S. 124, 149–50 (1971)).

26. *Id.* at 767 (quoting Graves v. Barnes, 343 F. Supp. 704, 727 (W.D. Tex. 1973)).

27. *Id.* at 764.

28. *See* 446 U.S. 55, 63, 64–66 (1980).

29. 426 U.S. 229 (1976).

30. 429 U.S. 252 (1978).

31. *Bolden*, 446 U.S. at 63–66.

32. *See* 458 U.S. 613, 617–18 (1982).

33. Nicholas J. Dilley, *Legacy of the Voting Rights Act – Crossroads of 1982*, NAT'L ARCHIVES: THE REAGAN LIBR. EDUC. BLOG (Apr. 28, 2022), https://reagan.blogs.archives.gov/2022/04/28/legacy-of-the-voting-rights-act-crossroads-of-1982/ [https://perma.cc/B45E-N5W4] ("After passing through both chambers of Congress, Reagan signed the [VRA] Amendments of 1982 into law on June 29.").

Fifteenth Amendments.[34] That evidence included "overwhelming evidence of bloc voting along racial lines,"[35] as well as past discrimination in voting and education, exclusion from party activities and grand juries, employment discrimination by local government, insensitivity to the needs of the Black community, and socioeconomic disparities.[36] Racial polarization was thus one of the factors that could be used to show that the challenged election system was maintained with a discriminatory purpose.

Thornburg v. Gingles put racial polarization at the center of the vote dilution inquiry. That case presented the Court with its first opportunity to interpret Section 2's new language, which prohibits voting practices that "result[]" in the denial or abridgement of the right to vote on account of race.[37] In determining whether a discriminatory result has been shown, the amended statute identified "[t]he extent to which members of a protected class have been elected to office" as one relevant circumstance, while making clear that members of a protected class have no right to be "elected in numbers equal to their proportion in the population."[38] The accompanying Senate Report provided additional guidance, listing nine relevant factors drawn mostly from *White v. Regester* and the Fifth Circuit's decision in *Zimmer v. McKeithen*.[39] One of those factors was "the extent to which voting in the elections of the State or political subdivision is racially polarized."[40]

As I have elsewhere documented, the briefs in *Gingles* mostly tracked the *White-Zimmer* factors set forth in the Senate Report—as did the first draft of Justice Brennan's opinion.[41] When that draft stirred dissatisfaction among other Justices for its failure to provide adequate guidance, Justice Brennan went back to the drawing board.[42] His second draft, which he described in an internal memo as "in effect, a new opinion," put racial polarization at the center of the vote dilution inquiry.[43] It stated three "necessary preconditions" that plaintiffs must satisfy to challenge multimember districts: (1) the minority group is "sufficiently large and geographically compact to constitute a majority in a single-member district"; (2) it is "politically cohesive"; and (3) "the white majority . . . vote[s] sufficiently as a bloc" so as to usually defeat minority-

34. *See Rogers*, 458 U.S. at 621–28.

35. *Id.* at 623.

36. *See id.* at 624–26.

37. *See* Thornburg v. Gingles, 478 U.S. 30, 35 (1986).

38. *Id.* at 36 (quoting Voting Rights Act of 1965 § 2, 52 U.S.C. § 10301(b)).

39. *See* S. REP. NO. 97-417, at 28–29 & n.113 (1982), *as reprinted in* 1982 U.S.C.C.A.N. 177, 206–07; *see also* Crum, *supra* note 23, at 278.

40. *Gingles*, 478 U.S. at 44–45 (citing S. REP. NO. 97-417, at 29).

41. Daniel P. Tokaji, *Realizing the Right to Vote: The Story of* Thornburg v. Gingles, *in* ELECTION LAW STORIES 127, 158 (Joshua A. Douglas & Eugene D. Mazo eds., 2016).

42. *Id.* at 165.

43. *Id.* at 166.

preferred candidates.[44] The second and third preconditions effectively require racial polarization. These preconditions became part of the published opinion[45] and have been with us ever since, later extended to claims against single-member as well as multimember districts.[46]

Racial polarization is not the same thing as racist voting, but the two concepts are related. That is evident from a portion of Justice Brennan's opinion that spoke only for a plurality of four Justices, addressing the question of "causation." This part of the opinion considered whether plaintiffs were required to show whether voting patterns were "caused by race" or merely "correlated with the race of the voter."[47] The plurality concluded that causation was not necessary.[48] In other words, plaintiffs need not show that race itself—as opposed to socioeconomic status or other characteristics—caused the difference in majority- and minority-race voters' choices.[49] All that was required, according to the plurality, was that they chose different candidates, not why they chose different candidates.[50] It was, moreover, the race of voters that mattered, not the race of the candidates they preferred.[51] The plurality thus rejected the suggestion that plaintiffs were required to show White animosity toward minority candidates, noting that Congress had unambiguously rejected any kind of intent test when it amended Section 2.[52] Requiring plaintiffs to show that race was *causing* racial voting differences would, by contrast, effectively require them to show that Whites were voting against minority-preferred candidates on the basis of their race—in other words, that Whites engage in racist voting. Justice White (the fifth vote for the majority parts of the opinion, including the three preconditions) declined to join this portion of the opinion, writing a one-paragraph concurrence maintaining that the race of the candidate is sometimes relevant to the question of racial polarization.[53] Justice O'Connor's concurrence (joined by three other Justices) disagreed with the plurality's conclusion that causation was irrelevant, contending that "racial hostility" to minority candidates is probative of the minority group's political influence and thus germane to the Section 2 inquiry.[54] Even the concurring

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44. *Id.* at 167. These preconditions were drawn mainly from a law review article by two voting rights lawyers. James U. Blacksher & Larry T. Menefee, *From* Reynolds v. Sims *to* City of Mobile v. Bolden*: Have the White Suburbs Commandeered the Fifteenth Amendment?*, 34 HASTINGS L.J. 1, 55–57 (1982).

45. *Gingles*, 478 U.S. at 50–51.

46. *See, e.g.*, Growe v. Emison, 507 U.S. 25, 40–41 (1993); Voinovich v. Quilter, 507 U.S. 146, 153–54 (1993).

47. *Gingles*, 478 U.S. at 63 (emphasis omitted).

48. *Id.* at 74.

49. *Id.*; *see also id.* at 64–67 (dismissing appellants' argument that causation is necessary).

50. *See id.* at 64–66.

51. *Id.* at 68; *see also id.* at 67–70 (dismissing appellants' argument that to be considered racially polarized voting, voters must select candidates principally on the candidate's race).

52. *Id.* at 71–73.

53. *Id.* at 82–83 (White, J., concurring).

54. *Id.* at 100–01 (O'Connor, J., concurring).

Justices, however, would not have required plaintiffs to show that racially polarized voting patterns are attributable to racist voting.[55]

Importantly, then, all the Justices in *Gingles* agreed that racial polarization should be central to the Section 2 vote dilution inquiry. But why? One answer is that it provides a manageable and administrable limit on vote dilution claims, allowing courts to navigate between the twin shoals of requiring discriminatory intent and proportional representation—both of which Congress expressly meant to avoid when it amended the statute in 1982.[56] It avoids the "formless mush" that would result from a "totality of circumstances" inquiry guided only by the Senate factors.[57] That is surely true, but it begs the question of why the pivotal requirement for proving vote dilution should be racial polarization, rather than something else.

The best answer is that racial polarization is probative of racist voting. Racial polarization was among the many factors in *White* and *Zimmer* and was one of the considerations that led the Court to uphold a finding of purposeful discrimination in *Rogers v. Lodge*. It is, however, weak circumstantial evidence that *the legislature* has acted with a racially discriminatory purpose.[58] At best, it might show that the legislature would have a motive to create districts (multimember or single-member) that weaken minority strength, not that it has actually done so. While racial polarization does not prove purposeful discrimination by voters either, it is stronger (if still circumstantial) evidence of racist voting. That is not to say that the *Gingles* majority thought intentional discrimination by voters to be the main constitutional wrong that Section 2 addresses—at that time, many years before the Court tightened the screws on congressional enforcement power starting with *City of Boerne v. Flores*,[59] there was little reason to worry that Congress had exceeded its authority. The point is that evidence of racial polarization is more probative of discriminatory intent on the part of voters than that of legislators.

Other parts of the Section 2 vote dilution inquiry are also probative of racist voting. If plaintiffs are able to satisfy the *Gingles* preconditions, they must still show that the challenged law or practice results in the denial or abridgment of the right to vote on account of race, considering the "totality of circumstances."[60] Courts consider the various Senate factors drawn from *White*

55. *Id.* at 100. In cases following *Gingles*, the lower courts have split on whether causation should be required. *See* Elmendorf et al., *supra* note 22, at 614–15.

56. S. REP. NO. 97-417, at 2 (1982), *as reprinted in* 1982 U.S.C.C.A.N. 177, 206–07.

57. Nicholas O. Stephanopoulos, *Race, Place, and Power*, 68 STAN. L. REV. 1323, 1333 (2016); *see also id.* at 1325–26; Samuel Isaacharoff, *Polarized Voting and the Political Process: The Transformation of Voting Rights Jurisprudence*, 90 MICH. L. REV. 1833, 1845 (1992) (likening the *White-Zimmer* factors to an "I know it when I see it" analysis).

58. *See* Daniel P. Tokaji, *Applying Section 2 to the New Vote Denial*, 50 HARV. C.R.-C.L. L. REV. 439, 481–82 (2015).

59. 521 U.S. 507 (1997).

60. Allen v. Milligan, 599 U.S. 1, 10 (2023).

and *Zimmer* in determining whether that showing is met.[61] One of those factors is "whether political campaigns have been characterized by overt or subtle racial appeals,"[62] which goes directly to whether candidates have encouraged voters to make decisions based on race. For example, post-*Gingles* cases have considered campaign materials and candidate statements highlighting an opponent's minority-race status and even advertisements that darken the skin of African American opponents.[63] Another Senate factor is "the extent to which members of the minority group have been elected to public office in the jurisdiction,"[64] a consideration closely related to racial polarization, which also relates to intentional discrimination by majority-race voters.

Racist voting is thus entwined with the *Gingles* standard, including its preconditions, as well as the Senate factors considered in the "totality of circumstances" analysis. And proving these elements is essential to success in Section 2 vote dilution cases. Ellen Katz and her colleagues' study of 331 Section 2 cases between 1982 and 2005 found that racial polarization was the key determinant. Courts found racially polarized voting in 105 of those cases, and plaintiffs prevailed in 77 of them—meaning that plaintiffs won 73.3% of the cases in which racial polarization was found.[65] Of course, the existence of racial polarization and minority-preferred candidates' lack of success does not necessarily mean that voters are engaged in purposeful discrimination.[66] That is especially true in an era of "conjoined polarization," where race and party affiliation are closely aligned.[67] Most people of color support Democratic candidates, while most White voters support Republican candidates.[68] Racial polarization could therefore reflect ideological differences rather than racially discriminatory intent.

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61. *See* Ellen Katz et al., *Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982*, 39 MICH. J.L. REFORM 643, 675–730 (2006) [hereinafter Katz, *Documenting Discrimination*]. (providing an in-depth discussion of each Senate factor and courts' applications of the Senate factors).

62. S. REP. NO. 97-417, at 29 (1982), *as reprinted in* 1982 U.S.C.C.A.N. 177, 206–07. For a modern discussion of the impacts of racial appeals and examples of racial appeals utilized in congressional, gubernatorial, and presidential elections in 2016, see SMITH, *supra* note 21, at 137–54.

63. Katz, *Documenting Discrimination*, *supra* note 61, at 708–09. For a more recent analysis of Section 2 cases in the aftermath of *Shelby County v. Holder*, see Ellen Katz et al., *To Participate and Elect: Section 2 of the Voting Rights Act at 40*, UNIV. MICH. L. SCH. VOTING RIGHTS INITIATIVE (2022), https://voting.law.umich.edu/ [https://perma.cc/2A8A-T7TS].

64. S. REP. NO. 97-417, at 28–29.

65. Katz, *Documenting Discrimination*, *supra* note 61, at 657.

66. *See* Whitcomb v. Chavis, 403 U.S. 124 (1971) (holding that unfavorable political outcomes for a particular group, without evidence of intentional racial discrimination or barriers to political participation, do not amount to a constitutional violation).

67. *See* Bruce E. Cain & Emily R. Zhang, *Blurred Lines: Conjoined Polarization and Voting Rights*, 77 OHIO ST. L.J. 867, 869 (2016).

68. *Id.* at 873–74; *see also* Richard L. Hasen, *Race or Party, Race as Party, or Party All the Time: Three Uneasy Approaches to Conjoined Polarization in Redistricting and Voting Cases*, 59 WM. & MARY L. REV. 1837, 1838 (2018) ("Throughout the United States, but especially in the modern American South, the situation is one of 'conjoined polarization' . . . ." (quoting Cain & Zhang, *supra* note 67, at 869)).

Recognizing this, most courts consider whether party rather than race is responsible for minority-preferred candidates' lack of electoral success, rejecting Justice Brennan's view that candidates' race is irrelevant.[69] They have instead sided with Justice O'Connor's views on causation in *Gingles*, which argued for consideration of whether "divergent racial voting patterns may be explained in part by causes other than race, such as an underlying divergence in the interests of minority and white voters."[70] A prominent example is the Fifth Circuit's en banc decision in *League of United Latin American Citizens v. Clements*, which rejected a Section 2 vote dilution claim on the ground that partisanship, rather than race, accounted for racially divergent voting patterns.[71] As the court put it, the statute is violated "only where Democrats lose because they are black, not where blacks lose because they are Democrats."[72] While most courts have not gone as far as the Fifth Circuit, a majority do require plaintiffs to show a causal link when evidence of another explanation for the pattern is offered.[73] That brings the required showing of racial polarization closer to racist voting—if nonracial explanations for racially bloc voting are ruled out, it suggests that voters are likely to be motivated by discriminatory intent in choosing candidates.

Racial polarization persists, though there is some debate over whether it has increased or decreased over the years.[74] During the 1970s and 1980s, there was a high level of Black–White polarization, especially in the South.[75] One set of studies found a decrease in polarization in the 1990s due to more White voters' willingness to vote for Black candidates.[76] Other research, however, found both Black–White and non-Hispanic–Hispanic polarization to be "remarkably stable" from the 1990s through the early 2000s.[77] Relying on exit poll data, Nick Stephanopoulos found that polarization was high through the 1970s and 1980s and temporarily decreased in the 1990s, only to increase again in the 2000s.[78] According to Stephanopoulos, Black–White polarization in the South has *increased* overall in the years since *Gingles*, while non-Hispanic–

69. Katz, *Documenting Discrimination*, *supra* note 61, at 659, 665.

70. Thornburg v. Gingles, 478 U.S. 30, 100 (1986) (O'Connor, J., concurring).

71. League of United Latin Am. Citizens v. Clements, 999 F.2d 831, 861 (5th Cir. 1993) (en banc).

72. *Id.* at 860; *see also* Hasen, *supra* note 68, at 1857–59.

73. Katz, *Documenting Discrimination*, *supra* note 61, at 671.

74. *See* Stephanopoulos, *supra* note 57, at 1351–53.

75. Lisa Handley & Bernard Grofman, *The Impact of the Voting Rights Act on Minority Representation: Black Officeholding in Southern State Legislatures and Congressional Delegations*, *in* QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT 1965–1990, at 335–36 (Chandler Davidson & Bernard Grofman eds., 1994).

76. Stephanopoulos, *supra* note 57, at 1352 & nn.162, 164 (first citing Charles S. Bullock, III & Richard E. Dunn, *The Demise of Racial Districting and the Future of Black Representation*, 48 EMORY L.J. 1209, 1213 (1999); and then citing David Epstein & Sharyn O'Halloran, *A Social Science Approach to Race, Redistricting, and Representation*, 93 AM. POL. SCI. REV. 187, 190 (1999)).

77. 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).

78. Stephanopoulos, *supra* note 57, at 1357–58.

Hispanic polarization dipped after the decision, only to return to its prior level.[79] He concluded that Black–White polarization "remains severe and is notable for its stasis more than its flux."[80] In a recent study examining polarization at the congressional district level, Shiro Kuriwaki and colleagues found considerable regional variation, with racial polarization highest in parts of the South and Midwest.[81] Overall, they found 60% of the variation in the 2016 presidential vote share to be explained by "national differences across racial groups" with 30% explained by regional differences.[82]

B. Racial Resentment and Voting

Though the persistence of racial polarization is undeniable, the extent of intentionally discriminatory voting is more difficult to assess. With the late twentieth century decline of "old-fashioned racism," premised on biological notions of racial inferiority,[83] social scientists have examined more subtle forms of racial bias.[84] That includes a long line of research on racial attitudes, including resentment toward people of color, and more recently on implicit or unconscious bias. This research leaves no doubt that racial bias continues to play a prominent role in American politics, notwithstanding differences of opinion on exactly how and why it does so.

For the past three decades, the dominant paradigm for measuring racial attitudes has been "racial resentment."[85] David Sears and Donald Kinder used the term "symbolic racism" in the early 1970s to describe racially charged attitudes in the context of Los Angeles's mayoral election between a White and

79. *Id.* at 1396.

80. *Id.* at 1358.

81. Shiro Kuriwaki et al., *The Geography of Racially Polarized Voting: Calibrating Surveys at the District Level*, 118 AM. POL. SCI. REV. 922, 922 (2024).

82. *Id.*

83. *See* HOWARD SCHUMAN ET AL., RACIAL ATTITUDES IN AMERICA: TRENDS AND INTERPRETATION 153–55 (rev. ed. 1997) (noting a decline between 1977 and 1996 in White poll respondents who attribute the lack of inborn ability as the explanation for Black Americans having worse jobs, education, and housing).

84. *See, e.g.*, DONALD R. KINDER & LYNN M. SANDERS, DIVIDED BY COLOR: RACIAL POLITICS AND DEMOCRATIC IDEALS 6, 92–98, 124–27, 293 (1996).

85. *See* DARREN W. DAVIS & DAVID C. WILSON, RACIAL RESENTMENT IN THE POLITICAL MIND 4 (2022) (defining racial resentment as "a belief that undeserving African Americans and other minorities are taking advantage of resources that challenge Whites' status and privilege"); JARDINA, *supra* note 6, at 14 (explaining racial resentment as "the dominant paradigm for how we think about whites' racial attitudes today"); Lawrence Bobo, *Race and Beliefs About Affirmative Action*, *in* RACIALIZED POLITICS: THE DEBATE ABOUT RACISM IN AMERICA 137, 140 (2000) (describing racial resentment as a form of racism that "involves a blend of early learned [anti-Black] feelings and beliefs with traditional American values of hard work and self-reliance"); Candis Watts Smith et al., *The Dynamics of Racial Resentment Across the 50 US States*, 18 PERSPS. ON POL. 527, 528 (2020) (discussing racial resentment as "one of the most predictive sentiments in American politics" and developing state-level measures of these attitudes).

an African American candidate.[86] In the 1990s, Kinder and Lynn Sanders reframed this concept as "racial resentment" (sometimes called "the new racism"), employing a battery of questions to measure it.[87] The questions asked respondents whether they agreed with statements like "[m]ost blacks who receive money from welfare programs could get along without it if they tried" and "[o]ver the past few years, blacks have gotten less than they deserve."[88] Kinder and Sanders found that Whites' performance on this scale "powerfully predicts derogatory racial stereotypes, which are often thought to be the core of prejudice."[89] Accordingly, they claimed that the racial resentment scale can help distinguish between Whites who are sympathetic toward Blacks and those who are not.[90] Their work and subsequent studies have found that racial resentment strongly correlated with White Americans' opposition to policies designed to help Blacks and other people of color, such as race-conscious affirmative action.[91] This arguably reveals a "principle-policy gap"—that is, a "discrepancy between whites' strong support for principles of racial equality on one hand and their intransigence on policies designed to redress that inequality on the other."[92]

Some social scientists regard racial resentment as the best indicator of racial prejudice.[93] But not everyone agrees. The most formidable criticism is that what's called "racial resentment" is really measuring individualistic or conservative views on race, not racial bias.[94] While no one denies the relationship between the racial resentment scale and policy views on racial issues,[95] some have argued that they are different aspects of the same general construct.[96] What the questions composing the scale really measure, goes this critique, are simply the respondents' views on matters of race policy—not

86. *See* David O. Sears & Donald R. Kinder, *Racial Tensions and Voting in Los Angeles*, *in* LOS ANGELES: VIABILITY AND PROSPECTS FOR METROPOLITAN LEADERSHIP (1971).

87. KINDER & SANDERS, *supra* note 84, at 106–07, 293.

88. *Id.* at 107.

89. *Id.* at 27, 109, 113–15.

90. *Id.* at 106.

91. *Id.* at 116–19; MICHAEL TESLER, POST-RACIAL OR MOST RACIAL?: RACIAL POLITICS IN THE OBAMA ERA 24 (2016).

92. Steven A. Tuch & Michael Hughes, *Whites' Racial Policy Attitudes in the Twenty-First Century: The Continuing Significance of Racial Resentment*, 634 ANNALS AM. ACAD. POL. & SOC. SCI. 134, 135 (2011).

93. DAVIS & WILSON, *supra* note 85, at 73.

94. David C. Wilson & Darren W. Davis, *Reexamining Racial Resentment: Conceptualization and Content*, 634 ANNALS AM. ACAD. POL. & SOC. SCI. 117, 118 (2011); *see also* Josh Pasek et al., *Determinants of Turnout and Candidate Choice in the 2008 U.S. Presidential Election: Illuminating the Impact of Racial Prejudice and Other Considerations*, 73 PUB. OP. Q. 943, 948 (2009); JARDINA, *supra* note 6, at 15 (noting complaint that because the architects of the racial resentment scale "define the concept as a combination of anti-black affect and more conservative values, they rely on a measure that confounds these two constructs").

95. Edward G. Carmines et al., *On the Meaning, Measurement, and Implications of Racial Resentment*, 634 ANNALS AM. ACAD. POL. & SOC. SCI. 98, 105 (2011).

96. SCHUMAN ET AL., *supra* note 83, at 305.

necessarily whether someone harbors racial stereotypes or prejudice.[97] Given the concerns about racial resentment, social scientists have supplemented the racial resentment scale with other measures designed to disaggregate racial attitudes from political ideology. For example, respondents may be asked to evaluate different racial groups on characteristics like their work ethic and intelligence.[98]

There is abundant evidence that racial attitudes affect vote choice—and that the impact has grown in recent election cycles. Evidence that White voters' racial attitudes affect their decisions goes back more than fifty years to research on the L.A. mayoral race between African American Democrat Tom Bradley and White Democrat Sam Yorty.[99] Not surprisingly, high levels of racial resentment are consistently associated with decreased support for Black candidates.[100] More recent studies show that racial attitudes have been an important factor in presidential elections since 2008, all of which have included either Barack Obama or Donald Trump.[101] Even before Obama announced that he was running in 2008, racial attitudes powerfully predicted White Americans' assessment of him.[102] In the primary election between Obama and Hillary Clinton, racial resentment and other racial attitudes had a greater impact on candidate preference than voters' nonracial ideological and policy views.[103] A multitude of studies also document racial attitudes' impact on the 2008 general election between Obama and John McCain.[104] Summing up this research, Michael Tesler explained that "racial resentment, anti-black stereotypes, and old-fashioned racist opposition to intimate interracial relationship all had significantly stronger effects on 2008 voter preferences than they did on pre-Obama presidential contests."[105] Racial resentment strongly predicted support for Obama.[106] Overall, studies conclude that "Obama would have performed anywhere from one to seven percentage points better had he been white."[107]

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97. Carmines et al., *supra* note 95, at 108; Paul M. Sniderman et al., *The Politics of Race*, *in* RACIALIZED POLITICS: THE DEBATE ABOUT RACISM IN AMERICA 236, 267. For a middle-ground position, see DAVIS & WILSON, *supra* note 85, at 3 ("Whites' resentment toward African Americans, properly conceived and measured, is not necessarily racial prejudice, but rather it may stem from a just-world motive and an appraisal of deservingness along with legitimizing racial myths (i.e., negative racial information and stereotypes).").

98. *See, e.g.*, Donald Kinder, *Prejudice and Politics*, *in* OXFORD HANDBOOK OF POLITICAL PSYCHOLOGY 812 (2d ed. 2013).

99. Sears & Kinder, *supra* note 86.

100. Christopher F. Karpowitz et al., *What Leads Racially Resentful Voters to Choose Black Candidates*, 83 J. POL. 103, 103 (2020).

101. TESLER, *supra* note 91, at 16–17.

102. DONALD KINDER & ALLISON DALE-RIDDLE, THE END OF RACE?: OBAMA, 2008, AND RACIAL POLITICS IN AMERICA 29, 103–05 (2012).

103. TESLER, *supra* note 91, at 17.

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.* at 18 (citations omitted).

During the Obama presidency, Tesler found, politics became increasingly polarized "by and over race."[108] That dynamic spilled over into congressional elections, with voting behavior in 2010 and 2012 more racialized than it had been before Obama.[109] This is partly attributable to partisan identification shifting in accordance with racial attitudes.[110] While racial resentment had a modest effect on changes in partisan identification before Obama's candidacy (2000–06), that effect quadrupled in the next four years.[111] Obama's candidacy and presidency magnified not only the significance of racial resentment but also *explicitly racist* attitudes. Tesler found that the Obama presidency marked the return of old-fashioned racism—largely absent from partisan alignment for decades—as a significant factor in White Americans' party preferences and vote choices.[112]

Carrie LeVan and Stacey Green documented the growing impact of anti-Black attitudes on vote choice in elections since 2004.[113] As explicitly racist messages have grown more common in political debates, racial resentment and anti-Black stereotypes have become increasingly reliable predictors of Whites' voting choices.[114] The more resentful White respondents were of Black people, the less likely they were to vote for Democratic candidates.[115] So too, Whites who held racial stereotypes of Black people were significantly less likely to vote for Democratic candidates during and after the Obama presidency.[116] LeVan and Green further found that White racial attitudes undermined the role traditionally played by party identification, particularly among Democrats harboring elevated levels of anti-Black racial resentment or stereotypes who became more likely to split their tickets.[117] On the other hand, there is evidence that Whites with high levels of racial resentment responded well to Black Republican candidates with individualistic messages.[118]

There have also been attempts to measure reverse resentment, the extent to which racial minorities—including African Americans—harbor resentment toward Whites.[119] Some critical theorists would argue that ingroup bias by a historically subordinated group should not be considered racism.[120] While not

108. *Id.* at 5.

109. *Id.* at 8.

110. *Id.* at 151.

111. *Id.* at 158–60.

112. Michael Tesler, *The Return of Old-Fashioned Racism to White Americans' Partisan Preferences in the Early Obama Era*, 75 J. POL. 110, 110–11 (2012).

113. Carrie A. LeVan & Stacey A. Green, *Undermining the Party: Anti-Black Attitudes, Presidential Vote Choice, and Split-Ticket Voting Among White Voters*, 11 POL. GRPS. & IDENTITIES 526, 527–28 (2023).

114. *Id.* at 527–29.

115. *Id.* at 536.

116. *Id.*

117. *Id.* at 540–43.

118. Karpowitz et al., *supra* note 100, at 119.

119. DAVIS & WILSON, *supra* note 85, at 30, 224–41.

120. *See, e.g.*, KENDI, *supra* note 1, at 17–20.

denying the importance of this debate, this Article's view uses the term racism to encompass racial discrimination that would violate the Fourteenth or Fifteenth Amendments if engaged in by public actors. Rightly or wrongly, a long line of Supreme Court precedent holds intentional race discrimination to be constitutionally suspect, regardless of whether it burdens or benefits subordinated groups.[121] Accordingly, vote choices that are motivated by intentional discrimination fall within this Article's definition of racist voting, whatever the race of the voter.

C. Implicit Racial Bias and Voting

So far, the research discussed in this Part addresses *explicit* racial attitudes, ones that can be measured through surveys probing respondents' views on race. But implicit attitudes, including racial bias, can also affect our decisions and actions, including whom we vote for. In his seminal article on unconscious bias, Charles Lawrence argued that the Supreme Court's line between discriminatory impact and intent was a "false dichotomy."[122] Negative beliefs about non-White people, Professor Lawrence argued, can influence thoughts and actions in ways we often do not consciously recognize or intend.[123]

Subsequent social and cognitive psychology research has provided empirical support for the existence of unconscious racism, showing that most people—including those holding egalitarian views—have, and sometimes act on, implicit bias.[124] Hundreds of studies have documented the existence of implicit bias, with some showing that it predicts discriminatory behavior.[125] The most established way of measuring implicit bias is the Implicit Association Test (IAT), which examines how tightly different concepts are associated with one another.[126] That research can be used to measure the extent of association between concepts, including race and stereotypes.[127] It can be used to measure whether people harbor stereotypes or prejudices (e.g., that Blacks are violent or lazy) of which even they may be unaware.[128] The first generation of that

121. *See* Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll., 600 U.S. 181, 184–86 (2023) (discussing precedent applying strict scrutiny to any race-based classifications).

122. Charles Lawrence, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 322 (1987).

123. *Id.*

124. *See, e.g.*, Anthony G. Greenwald & Mahzarin Banaji, *Implicit Social Cognition: Attitudes, Self-Esteem, and Stereotypes*, 102 PSYCH. REV. 4, 4–5 (1995); Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1498–1503 (2005).

125. B. Keith Payne et al., *Implicit and Explicit Prejudice in the 2008 American Presidential Election*, 46 J. EXPERIMENTAL SOC. PSYCH. 367, 367 (2010) (citing studies).

126. The IAT may be found and taken at: https://implicit.harvard.edu/implicit/takeatest.html [https://perma.cc/EK8K-6KRC]. For a description of the IAT, see Kang, *supra* note 124, at 1509–10.

127. *About the IAT*, PROJECT IMPLICIT, https://implicit.harvard.edu/implicit/iatdetails.html [https://perma.cc/9U8C-K3RW].

128. Kang, *supra* note 124, at 1493–94.

research found implicit bias against various groups, including Blacks and Latinos, in the U.S. as well as historically excluded groups in other countries.[129] Of the more than two million people who have taken the IAT, 68% have some degree of race-based implicit bias.[130]

The second generation of implicit bias research has looked at the impact on behavior.[131] One study, for example, found that implicit bias against women was associated with negative stereotypes of them as job candidates.[132] On the other hand, some critics of implicit bias question whether it really measures prejudice at all and whether laboratory studies of associated behaviors are relevant to real-world conduct.[133]

Notwithstanding this criticism, there is reason to believe that implicit bias may influence both policy views and voting choices.[134] A classic example is the Willie Horton ad run against presidential candidate Michael Dukakis in 1988, which played into racial stereotypes about Black criminal activity.[135] Surveys and other means of assessing explicitly held racial attitudes cannot get at implicit cognition, which is characterized by spontaneity rather than reflection.[136] As Milton Lodge and Charles Taber put it: "Much if not most of our experience takes place outside our conscious awareness, and as our recollections fade from memory they are replaced by socially constructed rationalizations about how and why we as well as others think and behave."[137] Applying this insight to the realm of politics, they argued that political beliefs and decisions arise from "feelings" that enter the process of evaluating prior to any "cognitive considerations."[138] For that reason, racial messages (like the Willie Horton ad) tend to be most effective when they are covert.[139] A more recent example is

129. *Id.* at 1512.

130. Brian A. Nosek et al., *Pervasiveness and Correlates of Implicit Attitudes and Stereotypes*, 18 EUR. REV. SOC. PSYCH. 1, 17, 40 (2007).

131. Kang, *supra* note 124, at 1514.

132. Laurie A. Rudman & Peter Glick, *Prescriptive Gender Stereotypes and Backlash Toward Agentic Women*, 57 J. SOC. ISSUES 743, 747–48 (2001).

133. *See* Payne et al., *supra* note 125, at 68 (describing criticisms articulated in Hal R. Arkes & Philip E. Tetlock, *Attributions of Implicit Prejudice, or Would Jesse Jackson 'Fail' the Implicit Association Test?*, 15 PSYCH. INQUIRY 278 (2004), and Philip E. Tetlock & Gregory Mitchell, *Calibrating Prejudice in Milliseconds*, 71 SOC. PSYCH. Q. 12 (2008)).

134. Jack Glaser & Christopher Finn, *How and Why Implicit Attitudes Should Affect Voting*, 46 PS: POL. SCI. & POL. 537, 539 (2013). For a discussion on how implicit bias can impact other aspects of the voting process, see Antony Page & Michael J. Pitts, *Poll Workers, Election Administration, and the Problem of Implicit Bias*, 15 MICH. J. RACE & L. 1 (2009) (addressing how implicit biases held by poll workers may result in race-based discrimination between prospective voters).

135. MILTON LODGE & CHARLES S. TABER, THE RATIONALIZING VOTER 7 (2013).

136. EFRÉN O. PERÉZ, UNSPOKEN POLITICS: IMPLICIT ATTITUDES AND POLITICAL THINKING 7 (2016).

137. LODGE & TABER, *supra* note 135, at 26; *see also* PERÉZ, *supra* note 136, at 4 ("[A] growing cavalcade of research from social psychology indicates that introspection provides very limited access to the full content of people's minds.").

138. LODGE & TABER, *supra* note 135, at 27.

139. *Id.* at 7.

Efrén Peréz's research showing that Americans' policy views on immigration are strongly associated with their implicit attitudes toward Latinos.[140] Other research shows that implicit racism is strongly associated with policies like voter ID.[141] Whites who rated high on implicit racial bias were much more likely to support voter ID laws, especially among Democrats, although respondents explained their views in terms of preventing fraud rather than in racial terms.[142]

A number of studies found a correlation between implicit racial bias and vote choice, particularly in the 2008 presidential contest between Obama and McCain.[143] Christopher Finn and Jack Glaser, for example, found that an implicit preference for Whites over African Americans was a significant predictor of selecting McCain over Obama, controlling for other variables.[144] Josh Pasek and his coauthors likewise found that anti-Black racism was an important element of the 2008 election, "perhaps considerably reducing Obama's share of the vote."[145] B. Keith Payne and coauthors found both explicit and implicit racial bias to be significant predictors of vote choice in 2008.[146] When controlling for explicit bias, they found that those rating higher in implicit bias were less likely to vote for Obama—but interestingly, they were *not* more likely to vote for McCain (instead choosing to abstain or vote for a third-party candidate).[147] Another study of the 2008 election by Nathan Kalmoe and Spencer Piston, however, called these results into question.[148] Kalmoe and Piston found little or no evidence of a connection between implicit bias and candidate evaluations.[149] In yet another study of the 2008 election, Donald Kinder and Timothy Ryan found a "weak political effect traceable to implicit prejudice," but a "strong political effect traceable to explicit prejudice," as measured by the racial resentment scale.[150] There is, accordingly, some evidence that implicit bias can affect candidate choice, although the magnitude of this effect is unclear.

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140. PERÉZ, *supra* note 136, at 14.

141. Antoine J. Banks & Heather M. Hicks, *Fear and Implicit Racism: Whites' Support for Voter ID Laws*, 37 POL. PSYCH. Q. 641, 642 (2016).

142. *Id.* at 651–52.

143. Glaser & Finn, *supra* note 134, at 540 (citing studies).

144. Christopher Finn & Jack Glaser, *Voter Affect and the 2008 U.S. Presidential Election: Hope and Race Mattered*, 10 ANALYSIS SOC. ISS. & PUB. POL'Y 262, 270–72 (2010).

145. Josh Pasek et al., *Determinants of Turnout and Candidate Choice in the 2008 U.S. Presidential Election: Illuminating the Impact of Racial Prejudice and Other Considerations*, 73 PUB. OP. Q. 943, 982 (2009).

146. Payne et al., *supra* note 125, at 367.

147. *Id.*

148. Nathan P. Kalmoe & Spencer Piston, *Is Implicit Prejudice Against Blacks Politically Consequential?: Evidence from the AMP*, 77 PUB. OP. Q. 305, 305 (2013).

149. *Id.* at 305–06, 319.

150. Donald R. Kinder & Timothy J. Ryan, *Prejudice and Politics Re-Examined: The Political Significance of Implicit Racial Bias*, 5 POL. SCI. RSCH. & METHODS 241, 255 (2017).

D. Race and Voting in the Trump Era

The impact of explicit racial attitudes on vote choice has become more pronounced over the last decade, during which Donald J. Trump has dominated national politics. More so than any other presidential candidate in modern history, Trump has relied on racially charged rhetoric—questioning President Obama's place of birth, calling for a ban on Muslims entering the country, decrying "rapists" and other criminals entering the U.S. through the southern border, and invoking anti-Semitic tropes in attacking his opponent Hillary Clinton, to give just a few examples.[151] While these racially coded—if not outright racist—appeals undoubtedly turned off many voters, they seem to have helped Trump win over many voters, including those rating high in racial resentment who have traditionally supported Democrats.[152]

In their thorough empirical analysis of the 2016 election, John Sides, Michael Tesler, and Lynn Vavrick found that racial attitudes more strongly correlated with vote choice in that election than in previous years.[153] The impact was especially noticeable among voters with less formal education.[154] During the Obama years, they explained, non-college-educated Whites came to more closely connect racial policies and partisan affiliation.[155] As a result, the Republican advantage among this group more than doubled between the 2004 and 2012 elections.[156] They explained that "no other factor predicted changes in white partisanship during Obama's presidency as powerfully and consistently as racial attitudes."[157] In 2016, Trump succeeded in "activating" racial attitudes.[158] At the same time, voters with attitudes more sympathetic to racial, ethnic, and religious minorities moved toward Hillary Clinton, which likely reflects backlash against Trump.[159] Surveys consistently showed that White voters' views of African Americans—including their racial stereotypes and negative feelings toward them—were more tightly linked to their support for

151. NATHAN ANGELO, ONE AMERICA?: PRESIDENTIAL APPEALS TO RACIAL RESENTMENT FROM LBJ TO TRUMP 202–03 (2019).

152. Brian F. Schaffner et al., *Understanding White Polarization in the 2016 Vote for President: The Sobering Role of Racism and Sexism*, 133 POL. SCI. Q. 9, 31 (2018); *see also* SMITH, *supra* note 21, at 22 (arguing that, even though there exists an established ethos that a voter should not vote based on racial prejudice, "millions of white voters departed from this ethos in supporting Donald Trump's candidacy" and that "many white voters routinely do the same when supporting racially divisive candidates up and down the ballot").

153. JOHN SIDES ET AL., IDENTITY CRISIS 9, 27–29, 165, 169–70 (2018).

154. *Id.* at 27.

155. *Id.*

156. *Id.* at 28.

157. *Id.*

158. *Id.* at 169–70; *see also* Peter K. Enns & Ashley Jardina, *Complicating the Role of White Racial Attitudes and Anti-Immigrant Sentiment in the 2016 U.S. Presidential Election*, 85 PUB. OP. Q. 539, 539 (2021) (finding evidence that White Trump supporters' attitudes toward Blacks shifted during the 2016 campaign to match Trump's attitude).

159. SIDES ET AL., *supra* note 153, at 170.

Trump.[160] In contrast, White voters' economic anxieties were much less closely tied to their vote choices than were their racial attitudes.[161] While Trump's racial appeals cost him some support from more educated Whites, he more than made up for that through racist and sexist appeals that seem to have benefitted him among less educated Whites.[162]

Recent research attempts to explore racial attitudes through a different lens, showing that the racial identity of White voters plays a more central role in American politics than previously recognized.[163] Ashley Jardina used the term "white identity politics" to describe ingroup favoritism and solidarity among Whites.[164] She argued that "this solidarity, and whites' desire to protect their group's interests, plays a key role in today's most important and pressing political and social issues."[165] This growing sense of White identity, she argued, is rooted in fears about what America's growing diversity means for Whites' status.[166] Jardina distinguished White identity from racial prejudice.[167] While the two may sometimes go together, the former is more about protecting "ingroup" status than harming people from other groups.[168] White racial identity is also distinct from racial resentment. Although they are correlated, some Whites score high on identity but low on resentment.[169]

Jardina found that White racial identity is a strong predictor of both policy views and vote choices. People with high levels of White identity tend to support policies that benefit Whites and protect their status.[170] The policy correlation is not just on issues like immigration and welfare, which White identifiers view negatively, but also Social Security and Medicare, which they perceive as helping people like them and therefore view favorably.[171] Even more significant for present purposes is the relation between White identity and vote choice.[172] Many White Americans, especially those rating high on White identity and consciousness, perceived the election and reelection of President Obama as threatening.[173] Even after controlling for other factors, White identifiers were much more likely to vote for Mitt Romney over Obama in 2012,

160. *Id.* at 170–72.

161. *Id.* at 172–75; *see also* Schaffner et al., *supra* note 152, at 30 (finding that race and gender attitudes were much more important than economic considerations in Whites' 2016 voting choices).

162. Schaffner et al., *supra* note 152, at 30–31.

163. SIDES ET AL., *supra* note 153, at 87–90.

164. JARDINA, *supra* note 6, at 4, 16.

165. *Id.* at 4.

166. *Id.* at 16.

167. *Id.* at 5.

168. *Id.* at 8, 16, 19.

169. *Id.* at 79.

170. *Id.* at 214.

171. *Id.* at 18–19, 192–202.

172. *Id.* at 19.

173. *Id.* at 220, 225–27.

a dynamic Jardina attributed to the desire to protect their ingroup status.[174] And Jardina found that Donald Trump owes much of his success to the activation of White identity. Candidate Trump's racially charged rhetoric appealed not only to racially prejudiced Whites but also to those concerned with their perceived diminishing group status.[175] In fact, she showed, Trump was uniquely successful among both Democratic and Republican presidential candidates that year in appealing to voters who rated high on White identity and consciousness.[176] These effects persist even after controlling for racial resentment, suggesting that White support for Trump is attributable not only to racial animus but also White identity and consciousness.[177] Jardina concluded that Trump succeeded in activating White identity by appealing to concerns about their waning status.[178]

While there is little doubt that White voters' racial attitudes play an important role in vote choice, questions remain about the significance of their racial identity as opposed to negative attitudes toward other racial groups. Looking at survey data from presidential elections between 2012 and 2020, Richard Fording and Sanford Schram questioned the degree to which racial identity plays a central role in vote choice.[179] They argued that some of the survey questions Jardina and others relied on to show "White identity" are actually better measures of "outgroup hostility."[180] In addition, Fording and Schram claimed that the proponents of White identity's central role fail to control for hostility toward all relevant political and cultural outgroups (including Latino immigrants, Muslims, LGBTQ+ people, and feminists).[181] What is called "White identity" may therefore reflect a larger "dominant group" identity, which causes people to react negatively to threats that they perceive from traditionally subordinated groups.[182] Controlling for other attitudes related to vote choice, Fording and Schram found that White identity has no independent significance.[183] They disputed that White identity has become

174. *Id.* at 223–25.

175. *Id.* at 232; *see also* SIDES ET AL., *supra* note 153, at 85 ("Given Trump's rhetoric about blacks, immigrants, and Muslims, it is no surprise that views of those groups were strongly correlated with supporting him.").

176. JARDINA, *supra* note 6, at 239; *see also* SIDES ET AL., *supra* note 153, at 89 (documenting a correlation between White identity and support for Trump, as opposed to other Republican candidates).

177. JARDINA, *supra* note 6, at 241.

178. *Id.* at 258. For more on White racial identity and vote choice, see Beyza Buyuker et al., *Race Politics Research and the American Presidency: Thinking About White Attitudes, Identities and Vote Choice in the Trump Era and Beyond*, 6 J. RACE ETHNICITY & POL. 600 (2021); Jonathan Knuckey & Myunghee Kim, *The Politics of White Racial Identity and Vote Choice in the 2018 Midterm Election*, 101 SOC. SCI. Q. 1584 (2020).

179. Fording & Schram, *supra* note 6, at 109.

180. *Id.* at 109, 114–18.

181. *Id.* at 109, 119.

182. *Id.* at 119.

183. *Id.* at 122–23.

more strongly associated with vote choice in the Trump era.[184] Instead, they found that hostility toward outgroups better explains vote choice, especially White voters' preference for Trump in the 2016 and 2020 elections.[185] According to Fording and Schram, then, hostility toward racial outgroups better explains vote choice than the protection of White identity favored by scholars emphasizing White identity.[186] This is attributable to the unique ability of outgroup attitudes to "generate politically relevant emotions."[187] That is not to deny the existence of White identity but rather to clarify that it is closely related to negative attitudes toward other racial groups.[188] As Fording and Schram summed it up: "Regarding vote choice, White identity matters when it serves as a platform for hate."[189]

More empirical research on racial bias in the electorate will undoubtedly emerge from the 2024 election, in which President Trump defeated Vice President Kamala Harris, an African American and Indian American woman.[190] The preliminary evidence indicates that racial polarization actually *decreased* in the 2024 presidential election, which could mean that racist voting was less prevalent than in previous election cycles.[191] Whatever further research ultimately reveals, there can be no question that racial attitudes play a substantial role in contemporary electoral politics.

* * *

The point of the above discussion is not to adjudicate the disagreements in the social science literature over the impact of racial resentment, implicit racial bias, racial identity, and other racial attitudes on vote choice. It is instead to highlight the persistent significance of racial attitudes (implicit or explicit) in whom people decide to vote for. The empirical research shows a strong correlation between racial attitudes and vote choice.[192] More difficult to assess is the prevalence of "racist voting," which is defined as intentional discrimination in vote choice. There is no doubt that some voters are motivated

184. *Id.* at 135.

185. *Id.* at 123–26.

186. *Id.* at 128.

187. *Id.*

188. *See id.* at 119.

189. *Id.* at 135.

190. *See* Andrew Menezes et al., *2024 Presidential Candidates*, CNN (Oct. 21, 2024), https://www.cnn.com/interactive/2024/politics/presidential-candidates-dg/ [https://perma.cc/2CR3-WMAZ] (providing demographic information about the 2024 presidential candidates); *see also 2024 Electoral College Results*, U.S. NAT'L ARCHIVES & RECS. ADMIN. (Jan. 13, 2025), https://www.archives.gov/electoral-college/2024 [https://perma.cc/NHF8-7N2X] (documenting the results of the 2024 presidential election).

191. *See* Nicholas O. Stephanopoulos, Opinion, *Surprise! America Is Less Polarized than It Used to Be*, WASH. POST (Dec. 9, 2024), https://www.washingtonpost.com/opinions/2024/12/09/election-polarized-voters-politics/ [https://perma.cc/BM8A-ZLTN].

192. *See* Fording & Schram, *supra* note 6, at 122.

to support or oppose candidates because of—not just in spite of—their race, the traditional standard for assessing discriminatory intent.[193] It is also very clear that racial bias continues to play a significant role in some people's voting choices.[194]

While racist voting is very much a thing, that does not mean that it violates the Constitution for a voter's racial bias to determine their choice of candidate. As discussed below in Part II,[195] U.S. law has long protected individual voting choices from scrutiny, effectively giving voters the freedom to cast racist votes.

II. IS RACIST VOTING CONSTITUTIONALLY PROTECTED?

Although the right to vote has long been recognized as fundamental, that doesn't necessarily mean that there is a right to cast a racist vote. There is, of course, a constitutional right to engage in racist *speech* within the broad boundaries of the First Amendment, which generally prohibits viewpoint-based discrimination.[196] But the Supreme Court has never held that voting is protected speech and, in at least one opinion, has said that legislators' votes are not speech.[197] It has, however, held voting to be a form of *association* protected by the First and Fourteenth Amendments,[198] and the right to association sometimes includes the right *not* to associate.[199] Obvious as it might seem that people have a right to vote for whomever they want for whatever reasons they want, there is no direct case authority on the question of whether individuals have a right to cast their votes for racist reasons.[200]

As a doctrinal matter, then, it is unclear whether the Constitution confers a right to cast a racist vote. As a practical matter, by contrast, individuals have the freedom to cast their votes for whatever reasons move them, including racially discriminatory ones. That is due to the confluence of two developments: (1) the rise of the secret ballot, the use of which is now virtually universal and

193. *See* JARDINA, *supra* note 6, at 257–59.

194. *See id.*

195. *See* discussion *infra* Part II.

196. Virginia v. Black, 538 U.S. 343, 394 (2003); R.A.V. v. City of St. Paul, 505 U.S. 377, 431 (1992).

197. Nev. Comm'n on Ethics v. Carrigan, 564 U.S. 117, 125–26 (2011).

198. Daniel P. Tokaji, *Voting Is Association*, 43 FLA. ST. U. L. REV. 763, 771–72 (2016).

199. *See* Hurley v. Irish-Am. Gay, Lesbian, & Bisexual Grp. of Bos., Inc., 515 U.S. 557, 573 (1995); Boy Scouts of Am. v. Dale, 530 U.S. 640, 648 (2000).

200. In Anderson v. Martin, 375 U.S. 399, 404 (1964), the Court struck down a state requirement that the race of candidates be listed on the ballot, on the ground that it would promote discrimination. The Court said that the case "has nothing whatever to do with the right of a citizen to cast his vote for whomever he chooses and for whatever reason he pleases" but only with the State's authority to encourage discrimination. *Id.* at 402. I do not take this to mean that there is a right to cast a racist vote but rather what the Court literally says: that the question was not before it. Pam Karlan and Daryl Levinson have asserted that the First Amendment absolutely protects individual voting decisions, including ones that are racially motivated. Pamela S. Karlan & Daryl J. Levinson, *Why Voting Is Different*, 84 CALIF. L. REV. 1201, 1228 (1996). For the reasons explained in this Section, I find this to be a more difficult question than they do, although I ultimately agree that voters have the freedom to cast racist votes.

protected by all states' laws; and (2) the expansion of protection from compelled disclosure under the First Amendment, which means that voters can't be made to disclose whom they voted for or the reasons (racist or otherwise) for their vote choices. Individual voters thus enjoy a functional, if not formal, right to cast a racist vote.

A. Ballot Secrecy

Today, we tend to think of a secret and anonymous ballot as essential to the effective exercise of the right to vote. The Australian ballot, which protects the secrecy of our voting choices—and thus protects us from having to give reasons for those choices—is ubiquitous in the U.S. and around the world.[201] But that was not always the case. In considering whether casting a racist vote is constitutionally protected, it is helpful to start with the historical debate over, and eventual shift toward, the secret ballot.

In the Founding Era and for decades afterward, *viva voce* (voice voting) was the norm.[202] Voice voting provided no secrecy to individual voters, whose choices and motivations were subject to the scrutiny of fellow citizens, as well as public officials. Paper voting became more common in the early nineteenth century, but not with the state-printed Australian ballot that we know today.[203] Instead, ballots (or tickets) were typically distributed by party officials or their ticket-peddler agents, with the parties hawking tickets of different colors or shapes.[204] That made it easy for illiterate voters to determine which ticket they wanted to vote (although counterfeiters sometimes printed ones with the opposite party's nominees).[205] It also opened the door to bribery or intimidation because others could see which ticket a voter was using.[206] In some places, voters were permitted or even required to write their names on the tickets, which made it possible to confirm that a vote-buying contract had been fulfilled.[207]

Across the pond, there was a vigorous debate over the desirability of secret voting during the late eighteenth and early nineteenth centuries.[208] The views of two English utilitarian philosophers, Jeremy Bentham and John Stuart Mill,

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201. ROY SALTMAN, THE HISTORY AND POLITICS OF VOTING TECHNOLOGY: IN QUEST OF INTEGRITY AND PUBLIC CONFIDENCE 102 (2006); *see also* Tom Theuns, *Jeremy Bentham, John Stuart Mill and the Secret Ballot: Insights from Nineteenth Century Democratic Theory*, 63 AUS. J. POL. & HIS. 493, 493 (2017).

202. *See* SALTMAN, *supra* note 201, at 61, 63, 82; ELDON COBB EVANS, A HISTORY OF THE AUSTRALIAN BALLOT SYSTEM IN THE UNITED STATES 1–6 (1923).

203. SALTMAN, *supra* note 201, at 43–44, 61–65.

204. EVANS, *supra* note 202, at 6–10.

205. *Id.* at 7 ("One object in making the ballots so easily distinguishable was to enable the ignorant elector to obtain the ticket he wished to vote; but it was usually easy to counterfeit the opposition ticket.").

206. *Id.* at 11–13.

207. *Id.* at 10.

208. Alison R. Hayward, *Bentham & Ballots: Tradeoffs Between Secrecy and Accountability in How We Vote*, 26 J.L. & POL. 39, 44–48 (2010); EVANS, *supra* note 202, at 11–12.

illustrate the divide over this question—as well as a common understanding of voters' moral obligations. In his *Essay on Political Tactics*, originally published in 1791,[209] Bentham argued in favor of the secret ballot in public elections.[210] Bentham believed that legislators' votes should be open so that they could be held accountable to the public.[211] On the other hand, he favored secret ballots in public elections and other circumstances where "*there is more to fear from the influence of particular wills, than to hope from the influence of public opinion*."[212] By "particular wills," he appears to mean influence from more powerful and wealthy factions of society. If voting were open, Bentham explained, it would open the door to the buying and selling of votes; by contrast, secrecy would prevent a would-be vote buyer from knowing whether "the contract would be faithfully executed by the seller."[213] He thus worried that "friendship, hope, or fear, may take away the freedom of voting."[214] In modern terms, Bentham's concern was that open voting would lead to special interests taking precedence over the collective interest.

John Stuart Mill shared Bentham's notion that elections should be structured to avoid undue favoritism toward particular interests, but he came to the opposite conclusion regarding secret voting. In his *Considerations on Representative Government*, published in 1862, Mill argued that voting should be thought of as a "trust for the public" and *not* an individual right.[215] Ahead of his time in advocating that women be permitted to vote,[216] Mill believed that in a world where only certain people were allowed to vote,[217] voters had an obligation to exercise their choices with *everyone's* interests in mind.[218] On that point, his thinking aligned with Bentham's, who also believed that people voting should be free from "factitious interest."[219] Where Mill parted ways with

209. Theuns, *supra* note 201, at 496.

210. JEREMY BENTHAM, AN ESSAY ON POLITICAL TACTICS 144–45 (Clarendon 1999) (1791).

211. *Id.*

212. *Id.* at 145.

213. *Id.* at 146.

214. *Id.* Bentham argued that "open voting disturbs the degree to which a vote represents the actual will of the voter, and that the purpose of elections was to best ascertain the universal interest, which he took as the aggregate of individual interests." *See* Theuns, *supra* note 201, at 496.

215. JOHN STUART MILL, CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT 205–07 (Parker, Son & Bourn 1861). Mill also argued that voting was better conceived of as a form of association, not expression: "He declares nothing by his vote but that he is or is not willing to associate, in a manner more or less close, with a particular person." *Id.* at 207–08. This anticipates something the U.S. Supreme Court would say more than a century later, albeit in a different context. In *Buckley v. Valeo*, 424 U.S. 1, 14–23 (1976), the Court held that campaign contributions sound more in association than expression, thus justifying a more lenient standard of review for contribution limits than for expenditure limits.

216. Pamela Karlan, *The "Ambiguous Giving Out": The Complicated Roles of Disclosure and Anonymity in Political Activity*, 27 J.L. & POL. 655, 655 (2012) [hereinafter Karlan, *The "Ambiguous Giving Out"*].

217. Those unable to vote included less affluent laborers as well as women. MILL, *supra* note 215, at 212–13.

218. *Id.* at 208 ("[T]he voter is under an absolute moral obligation to consider the interest of the public, not his private advantage . . . .").

219. *See* BENTHAM, *supra* note 211, at 146.

Bentham and other advocates of the secret ballot—including his father, James Mill[220]—was the question of whether publicizing individuals' voting choices would induce them to consider the public interest. The junior Mill asserted: "People will give dishonest or mean votes from lucre . . . from the interests or prejudices of class or sect, more readily in secret than in public."[221] The best way of extirpating such bias from the voting process was for them to endure "the shame of looking an honest man in the face" if they failed to cast their votes in a principled way.[222] This is the sunlight-as-disinfectant view applied to the act of voting. Mill acknowledged Bentham's worry that, in some circumstances, an open ballot might cause voters to sublimate the general interest to that of some powerful interest.[223] In those instances, he allowed, a secret ballot might be "the smaller evil."[224] But he thought coercion and other discreditable influences to be on the decline.[225] He worried most about the then-innovative practice of allowing people to vote from home, which he thought would open the door to "pernicious influences," like bribery, "in the shelter of privacy."[226]

Although Mill wasn't focused on *racial* bias, his concerns about "prejudices of class or sect"[227] have direct relevance to the question of racist voting. For Mill (as for Bentham), it was improper for voters to consider particular interests rather than the common interest when making their choices.[228] They differed on whether a secret vote would help or hinder the goal of inducing voters to cast their votes for public-minded reasons, rather than mean and selfish, interests. The Bentham–Mill debate not only sheds light on the pros and cons of the secret ballot but also the moral—if not legal—obligations of voters.[229]

Today, of course, we tend to think of voting as a right rather than a trust. And that right has broadened considerably in the generations since Bentham and Mill to include less affluent men, women, people of color, and others who had long been excluded. With the expansion of voting rights, one might argue that it is more permissible than in their day for voters to cast their votes for self-interested or prejudiced reasons. On the other hand, it remains the case that some members of the community—children, for example—lack the right

220. Hayward, *supra* note 208, at 47 & n.36.

221. MILL, *supra* note 215, at 218; *see* Karlan, *The "Ambiguous Giving Out"*, *supra* note 216, at 655–56 (discussing Mill's support for open ballots as motivated by his view that "[p]eople have ignoble desires and will act on them as long as they can get away with it").

222. *See* MILL, *supra* note 215, at 218–19.

223. *See id.* at 209–10.

224. *Id.* at 209. "Mill often uses the term 'ballot' for what we [today] call the 'secret ballot.'" Annabelle Lever, *Mill and the Secret Ballot: Beyond Coercion and Corruption*, 19 UTILITAS 354, 355 (2007).

225. MILL, *supra* note 215, at 210.

226. *Id.* at 219.

227. *Id.* at 218.

228. *Id.* at 208.

229. For a modern take on the costs of the secret ballot, see Bruce Ackerman & James S. Fishkin, *Deliberation Day*, 10 J. POL. PHIL. 129 (2002).

to vote. And the idea that voting should be thought of not just as a right but as a trust lives on. Ned Foley, for example, has argued that voters should consider themselves "fiduciaries," who are responsible for acting on behalf of all current and future inhabitants of the polity and not merely in their own self-interest.[230] Rejecting Mill's right-versus-trust dichotomy, Professor Foley contended that there is no inconsistency between considering voting a right and recognizing that voters have a responsibility to consider everyone's interests.[231] Taking those responsibilities seriously would imply that voters have a moral if not legal obligation to avoid casting what Mill called "mean votes," ones influenced by prejudice or selfish motives rather than by a concern for the common good.[232]

History has, of course, come down on Bentham's side of the debate over secret voting. Concerns about intimidation and bribery eventually led to the adoption of the Australian ballot, which guaranteed the secrecy of the ballot.[233] Australia adopted this form of ballot in 1856, and England followed in 1872.[234] Louisville, Kentucky, became the first American jurisdiction to adopt the Australian ballot in 1888.[235] It was adopted in Massachusetts and New York later that year and then spread like wildfire across the United States.[236] By 1896, it had been adopted in all but seven states and territories.[237] The main objection to it was not Mill's concern that secret voting would embolden those with base motives but rather the negative impact that the Australian ballot would have on voters who could not read, including many foreign-born people.[238] Courts nevertheless upheld this form of balloting as a reasonable restriction on access to the ballot.[239]

The Australian ballot is now used in elections across the United States, and the right to a secret ballot is enshrined in the law of all states.[240] Forty-four states have constitutional provisions that guarantee the right to cast a secret ballot.[241] The remaining states (and the District of Columbia) protect the secret

230. Edward B. Foley, *Voters as Fiduciaries*, 2015 U. CHI. LEGAL F. 153, 153 (2016).

231. *See id.* at 158.

232. *See* Theuns, *supra* note 201, at 495, 504–05 (explaining the contemporary relevance of Mill's conception of voting as a trust); Lever, *supra* note 224, at 354, 357–78 (rejecting the idea of voting as a trust).

233. ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 142 (2000); EVANS, *supra* note 202, at 21–22; SALTMAN, *supra* note 201, at 96–102.

234. KEYSSAR, *supra* note 233, at 201.

235. EVANS, *supra* note 202, at 19; Charles Chauncey Binney, *American Secret Ballot Decisions*, 32 AM. L. REG. & REV. 101, 101 n.1 (1893).

236. SALTMAN, *supra* note 201, at 98–102.

237. *Id.* at 102.

238. *See* KEYSSAR, *supra* note 233, at 111–12.

239. EVANS, *supra* note 202, at 56–57; Binney, *supra* note 235, at 103.

240. CAITRIONA FITZGERALD ET AL., THE SECRET BALLOT AT RISK: RECOMMENDATIONS FOR PROTECTING DEMOCRACY 2 (2016), https://www.secretballotatrisk.org/Secret-Ballot-At-Risk.pdf [https://perma.cc/XU87-B7Z2].

241. *Id.* at 6. Forty-four states have a constitutional provision guaranteeing secrecy in voting: AK, AL, AR, AZ, CA, CO, CT, DE, FL, GA, HI, IA, ID, IL, IN, KS, KY, LA, MA, MD, ME, MI, MN, MO, MS, MT, NC, ND, NE, NM, NV, NY, OH, PA, SC, SD, TN, TX, UT, VA, WA, WI, WV, and WY. *Id.*

ballot by statute.[242] The secret ballot is also enshrined in international law, including Article 25 of the International Covenant on Civil and Political Rights, which provides that voting "shall be held by secret ballot, guaranteeing the free expression of the will of the electors."[243] Federal law also offers some protection for secret voting, albeit limited. The Civil Rights Act of 1957 protected vote choice by prohibiting threats or coercion "for the purpose of interfering with the right of [any] other person . . . to vote as he may choose."[244] Section 242 of the Help America Vote Act of 2002 directed the Election Assistance Commission to consider the right of uniformed and overseas voters "to cast a secret ballot," while § 301 of that statute required voting systems that allow people with disabilities "the same opportunity for access and participation (including privacy and independence) as for other voters."[245] Federal labor law also protects the right to cast a secret ballot.[246] Open voting still exists in some of the states that continue to hold caucuses and in New England town meetings.[247] Though not completely extinct, it is an endangered species.

Despite the ubiquity of the secret ballot, the Supreme Court has never held that it is a constitutional right. Given the history recounted above—in particular, the fact that the Australian ballot was not adopted until the late 1880s—it would be practically impossible to make an originalist argument for such a right.[248] The closest the Court ever came to declaring a constitutional right to secret voting was its 5–3 decision in *Burson v. Freeman*, which upheld a state law that prohibited campaign activities within 100 feet of a polling place.[249] Writing for the four-Justice plurality, Justice Blackmun viewed the law as a content-based restriction on speech in a public forum and thus subject to strict scrutiny.[250] The plurality found a compelling interest in the "right to vote freely

242. *Id.* at 2.

243. International Covenant on Civil and Political Rights art. 25, ¶ (b), *adopted* Dec. 16, 1966, T.I.A.S. No. 92-908, 999 U.N.T.S. 171.

244. 42 U.S.C. § 1971(b); *see* Karlan, *The "Ambiguous Giving Out"*, *supra* note 216, at 658 & n.17.

245. 52 U.S.C. §§ 20982(a)(2)(B), 20181(a)(3).

246. 29 U.S.C. § 402(k); 29 C.F.R. § 452.97 (2024).

247. *See* Lilly McGee, *What Is a Presidential Caucus?*, LEAGUE OF WOMEN VOTERS (Feb. 7, 2024), https://www.lwv.org/blog/what-presidential-caucus [https://perma.cc/BJ7V-FMAX]; Nick Perry & Lisa Rathke, *In Vermont, 'Town Meeting' Is* Democracy *Embodied. What Can the Rest of the Country Learn from It?*, ASSOCIATED PRESS (Mar. 18, 2024), https://apnews.com/article/democracy-town-meeting-vermont-elections-civility-elmore-11d7d1b63037d054506e77e261aff87c [https://perma.cc/4QE8-N57B]. Through 2020, the Iowa caucus had open voting on the Democratic side, where voters would form preference groups, Chad G. Marzen, *In Defense of the Iowa Caucuses*, 54 CREIGHTON L. REV. 359, 378–79 (2021), but it now provides for secret voting in both parties. *See* Robert Yoon, *Here's How the 2024 Iowa Caucus Will Work*, PBS NEWS (Jan. 4, 2024), https://www.pbs.org/newshour/politics/heres-how-the-2024-iowa-caucus-will-work [https://perma.cc/CZL3-E25U].

248. *See* Doe v. Reed, 561 U.S. 186, 224–27 (2010) (Scalia, J., concurring) (relying on the history of voice voting to reject the argument that secret voting is protected by the First Amendment).

249. 504 U.S. 191, 211 (1992). Justice Thomas, who had recently joined the Court, took no part in the consideration or disposition of the case.

250. *Id.* at 198. The opinion calls its standard "exacting scrutiny," but its requirement that the regulation be "narrowly drawn" to a "compelling state interest" is that of strict scrutiny. *Id.*

for the candidate of one's choice."[251] Justice Blackmun proceeded to run through the above history, noting that the transition from voice voting to the secret ballot was driven by concerns of bribery and intimidation.[252] Those same concerns, the Court explained, led Louisville and other jurisdictions that adopted the Australian ballot to enact laws prohibiting attempts at persuasion in and around polling places.[253]

According to the *Burson* plurality, protecting the "right to vote freely and effectively" was a compelling interest that justified the state's prohibition on electioneering within 100 feet of voting sites.[254] This came very close to the secret ballot being declared a constitutional right, but only for four Justices.[255] Justice Scalia furnished the fifth vote to uphold the 100-foot campaign-free zone—citing the long tradition of secret ballots and restrictions on speech near polling places, Justice Scalia concluded that such spaces were not traditional public fora.[256] Accordingly, he thought they should be upheld if reasonable—obviating the need to determine whether ballot secrecy was a compelling interest.[257] The three dissenters likewise avoided deciding whether ballot secrecy was a constitutional right, concluding that the campaign-free zone was unnecessary to achieve the state's interests.[258]

Even if one reads Justice Blackmun's plurality opinion in *Burson* generously, there were no more than four votes for the proposition that ballot secrecy is a constitutional right. There is, however, a constitutional "right to vote freely and effectively."[259] The question is whether that right includes the freedom to cast one's vote with racist or otherwise invidious motivations. To answer that question, it is necessary to consider another line of cases, which has found voting to be a constitutionally protected political association.

B. Association and Compelled Disclosure

The most viable constitutional basis for the right to cast a racist vote rests on the line of cases in which the First Amendment's right of expressive association overlaps with the right to vote. While the Court has never held voting to be protected *speech*, it has held voting to be a form of protected

251. *Id.* at 199 (quoting Reynolds v. Sims, 377 U.S. 533, 555 (1964)).

252. *Id.* at 200–06.

253. *Id.* at 203.

254. *Id.* at 208.

255. Justice Kennedy, who joined the plurality opinion, came even closer. He wrote that "the justification for the speech restriction [in the 100-foot buffer zone] is to protect another constitutional right." *Id.* at 213 (Kennedy, J., concurring).

256. *Id.* at 214–16 (Scalia, J., concurring).

257. *Id.* at 216.

258. *Id.* at 217, 222–23 (Stevens, J., dissenting).

259. *Id.* at 191, 200, 208 (plurality opinion).

association.[260] In addition, the right to associate sometimes includes the freedom *not* to associate with others, including for racist, sexist, homophobic, or other invidious reasons.[261] Moreover, the First Amendment's limits on compelled disclosure effectively prevent governments from inquiring into a voter's choices or motivations.[262] I therefore conclude that the First and Fourteenth Amendments are best understood to protect an individual's freedom to cast a racist vote.

Although racist speech is reprehensible, it is generally protected by the First Amendment. In *R.A.V. v. City of St. Paul*, for example, the Court struck down a city ordinance criminalizing the display of symbols (like a burning cross) that arouse alarm or resentment on the basis of race.[263] Such speech is protected unless it falls within a proscribable category, such as threats, fighting words, defamation, or obscenity.[264] Therefore, if voting were a form of speech, there would be a strong argument that the First Amendment protects racist voting. But it is not—or at least the Supreme Court has never so held.

The Supreme Court has occasionally flirted with, but never embraced, the proposition that voting is protected speech under the First Amendment.[265] And in *Nevada v. Carrigan*, the Court rejected the proposition that voting is speech, albeit in the context of *legislative* votes.[266] Justice Scalia's opinion for the majority reasoned that, when legislators vote, they are exercising a power that belongs to, and has been delegated to them by, the people.[267] Accordingly, legislators have no "personal right" to that vote.[268] In this respect, the Court acknowledged that legislators are quite unlike citizens, who do have a personal right to their votes.[269] Had *Carrigan* gone only this far, there would still be an argument that citizens' votes constitute a form of speech protected by the First Amendment. But the Court went on to reject the idea that voting should be considered speech.[270] While there are actions—like flag burning[271]—that "convey[] a symbolic meaning," "the act of voting symbolizes nothing" and is not "an act

260. Tokaji, *supra* note 198, at 771–84; *see also* Guy-Uriel Charles, *Racial Identity, Electoral Structures, and the First Amendment Right of Association*, 91 CALIF. L. REV. 1209 (2003).

261. Tokaji, *supra* note 198, at 769–70.

262. *Id.* at 767–71.

263. 505 U.S. 377, 391 (1992).

264. *Id.* at 382–83. The Court further explained that, even when speech does fall within one of those categories, the First Amendment limits the government's power to engage in content-based discrimination within that category. *Id.* at 383–90; *see also* Virginia v. Black, 538 U.S. 343, 347–48 (2003) (holding that the First Amendment allows a state to prohibit cross burning with the intent to intimidate but that the statute was invalid for making cross burning prima facie evidence of such intent).

265. Tokaji, *supra* note 198, at 771.

266. 564 U.S. 117, 121 (2011).

267. *Id.* at 125–26.

268. *Id.* at 126.

269. *Id.*

270. *Id.* at 126–28.

271. *Id.* at 126 (citing Texas v. Johnson, 491 U.S. 397 (1989)).

of communication."[272] The Court thus rejected the argument, made by Justice Alito in partial concurrence, that voting is a form of expression.[273] While this portion of the opinion might be deemed dicta given the distinction that Justice Scalia had earlier drawn between legislator and citizen voting, it does constitute a rejection of the idea that voting is speech.[274]

On the other hand, the Supreme Court has long recognized that voting is a form of expressive association. The First Amendment right of association extends back to Justice Harlan's opinion for the Court in *NAACP v. Alabama ex rel. Patterson*,[275] a mid-twentieth-century decision invalidating a state's attempt to make the NAACP disclose its members.[276] The Court explained that the "freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech."[277] In subsequent cases, the Court applied the right of association to overturn convictions for membership in the Communist Party absent an intent to further its illegal aims.[278]

A decade after *NAACP v. Alabama*, the Court extended the right of association to ballot-access rules. *Williams v. Rhodes*[279] struck down a state's onerous requirements for appearing on the gubernatorial ballot, which required signatures equal to 15% of the number of people who voted in the last election.[280] Justice Black's majority opinion concluded that this requirement "place[d] substantially unequal burdens on *both the right to vote and the right to associate*" by favoring the two major parties over minor parties.[281] *Williams* thus establishes a hybrid right of voting and association for ballot-access claims. When citizens vote, they are both exercising an individual right and associating with political parties, candidates, and other voters.[282]

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272. *Id.* at 126–27. The Court proceeded to cite cases rejecting a First Amendment interest in using ballot labels or write-in votes to convey messages. *Id.* at 127 (first citing Timmons v. Twin Cities Area New Party, 520 U.S. 351 (1997) (ballot labels); and then citing Burdick v. Takushi, 504 U.S. 428 (1992) (write-in votes)). I discuss *Burdick* and other cases below.

273. *Id.* at 128; *see also id.* at 132–34 (Alito, J., concurring in part and concurring in the judgment).

274. *See* SMITH, *supra* note 21, at 165 (discussing *Carrigan*'s rejection of the argument that voting is a protected expression).

275. 357 U.S. 449 (1958).

276. *Id.*

277. *Id.* at 460. The Court relied on the Free Assembly Clause as well as the Free Speech Clause. *Id.*; *see also* Tokaji, *supra* note 198, at 767.

278. Tokaji, *supra* note 198, at 768.

279. 393 U.S. 23 (1968).

280. *Id.* at 24–25, 30–31, 34.

281. *Id.* at 31 (emphasis added); *see* Tokaji, *supra* note 198, at 772–73 (noting *Williams*'s recognition of the connection between the First Amendment right of association and the Fourteenth Amendment right to vote).

282. *See also* Kusper v. Pontikes, 414 U.S. 51, 51, 57–58 (1973) (striking down a requirement that voters have been disassociated with one party for at least twenty-four months before voting in another party's primary, on the ground that this was too great a restriction on voters' freedom to associate with their party of choice).

Subsequent cases affirm that voting implicates associational rights, while recognizing that there are sometimes good reasons for the state to restrict ballot access and otherwise regulate the electoral process. In *Anderson v. Celebrezze*, the Court struck down a state requirement that independent presidential candidates file their papers in March, more than seven months before the general election.[283] Following *Williams*, Justice Stevens's opinion for the *Anderson* majority relied on the right of association as well as the right to vote.[284] New in *Anderson* was the articulation of a balancing standard for adjudicating such claims. Recognizing that elections require substantial regulation, the Court explained that "the State's important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions."[285] Courts should "consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments" and then "identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule."[286] Rejecting any "litmus-paper test," *Anderson* instead required a "weighing" of the injury to plaintiffs against the state's legitimate interests.[287] Applying this standard, the Court found the burden on minor parties and independent candidates too great—and the state's interests insufficient—to justify the state's early filing deadline.[288]

The Court elaborated on this standard in *Burdick v. Takushi*, which upheld a state ban on write-in voting against a challenge based on the First and Fourteenth Amendments.[289] Citing *Anderson*, Justice White's opinion explained that "'severe' restrictions" on voting must satisfy strict scrutiny, while "reasonable, nondiscriminatory restrictions" may generally be sustained by "the State's important regulatory interests."[290] While not explaining precisely what it meant for a law to be "nondiscriminatory," Justice White noted that "politically neutral" laws had previously been upheld and that "there is nothing content based about a flat ban on" write-in voting.[291] *Burdick* found this law to impose only a "slight" burden on association, and the voting law was justified by the state's interests in avoiding factionalism and "party raiding."[292]

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283. 460 U.S. 780, 780 (1983).

284. *Id.* at 787.

285. *Id.* at 788.

286. *Id.* at 789.

287. *Id.*; *see also* Storer v. Brown, 415 U.S. 724, 730 (1974) (rejecting the idea that prior cases regard all burdens on the right to vote or associate as constitutionally suspect and that there are any "litmus-paper test[s]" for determining what restrictions are constitutionally permissible).

288. *Anderson*, 460 U.S. at 790–806.

289. 504 U.S. 428, 430 (1992).

290. *Id.* at 434 (first quoting Norman v. Reed, 502 U.S. 279, 289 (1992); and then quoting *Anderson*, 460 U.S. at 788).

291. *Id.* at 438; *see also* Lori A. Ringhand, *Voter Viewpoint Discrimination: A First Amendment Challenge to Voter Participation Restrictions*, 13 ELECTION L.J. 288, 292 (2014) (reading *Burdick* to suggest that a viewpoint-based restriction would have been subject to more rigorous scrutiny).

292. *Burdick*, 428 U.S. at 439–40.

Today, the *Anderson-Burdick* standard (as it is commonly called) applies to a wide range of constitutional claims implicating the rights to vote and to associate with candidates, parties, and other voters. That includes not only challenges to ballot access and write-in voting but also primary rules, voter ID, and other restrictions on voting.[293] *Anderson* and *Burdick* affirm the hybrid voting-association right recognized in *Williams*, while limiting the scope of that right. Although it is generally considered to be a lenient standard, it does require searching review of some restrictions on voting and association.[294] *Burdick* draws a distinction between "reasonable, nondiscriminatory restrictions" on one hand, and "severe" ones on the other.[295] The implication is that *discriminatory* restrictions receive strict scrutiny.

State efforts to prohibit racist voting through ballot-access laws would almost certainly be deemed unconstitutional under this standard. Consider, for example, a hypothetical state law that excluded candidates or parties from the ballot because of their racist views. Although the Court has not been very clear about what it means for a law to be "nondiscriminatory," *Burdick*'s language about political neutrality suggests that a law targeting candidates—and the voters who wish to associate with them—based on their ideological views would be discriminatory.[296] Moreover, even though voting is not speech, a candidate's exclusion from the ballot because of their expression would very likely violate the First Amendment, similar to denying someone a government position or benefit because of their viewpoint.[297] Accordingly, limiting candidates' or parties' access to the ballot based on their racist views would be subject to strict scrutiny, and it would be difficult to imagine any court finding it to be narrowly tailored to a compelling interest.

The question of whether an individual may be prohibited from casting a racist vote is more difficult. Imagine a state law making it illegal to choose one candidate over another because of their race—and put aside, for the moment, the practical difficulties in enforcing such a law. Because voting is a form of association,[298] one could argue that the First and Fourteenth Amendments protect the freedom to vote for or against a candidate because of their race. That view finds support in cases like *Boy Scouts of America v. Dale*,[299] which

293. *See, e.g.*, Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 452–58 (2008) (concerning a law on a primary election system); Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 185–90 (2008) (concerning voter IDs).

294. *See* Tokaji, *supra* note 198, at 774–75.

295. *Burdick*, 428 U.S. at 434.

296. Gur Bligh, *Extremism in the Electoral Arena: Challenging the Myth of American Exceptionalism*, 2008 BYU L. REV. 1367, 1436–37 (2008).

297. *See, e.g.*, Shurtleff v. City of Boston, 596 U.S. 243, 258–59 (2022) (concerning private group's desire to raise a religious flag on city property under a city program); R.A.V. v. City of St. Paul, 505 U.S. 377, 391–96 (1992) (concerning teenagers engaged in cross burning and the validity of the city ordinance that they violated).

298. *See* Tokaji, *supra* note 198, at 764.

299. Boy Scouts of Am. v. Dale, 530 U.S. 640, 655–61 (2000).

recognize that the freedom of association sometimes includes the right to *avoid* associating with other people for discriminatory reasons.[300] *Dale* held that the Boy Scouts had the right to avoid associating with a would-be Scoutmaster because of his sexual orientation.[301] Voters should, arguably, also have the right to avoid associating with candidates because of their race.

There is, however, an important difference between voting and other forms of association: when people join with other voters through their votes, or choose not to do so, they are participating in a public function and arguably engaging in state action.[302] Yet that fact does not necessarily strip away constitutional protection for the right to associate, including the right not to associate. In *California Democratic Party v. Jones*, the Court held that a major political party could exclude from voting in its primary voters who were not primary members, even though that primary was administered by the state.[303] A party's decision to avoid associating with nonmembers is not the same as a voter's decision to avoid associating with candidates and parties for racially discriminatory reasons.[304] As discussed below, the White Primary Cases held that political parties are prohibited from excluding Black voters on the basis of race.[305] The point is that participation in the official process of public elections does not, without more, vitiate the right not to associate.[306]

As a doctrinal matter, then, there is room for reasonable disagreement over whether the First and Fourteenth Amendments protect the individual voter's right to cast a racist vote. As a practical matter, however, voters do have this freedom. That is because of another line of association cases, which protects individuals from being compelled to *disclose* information about their political views and affiliations.

Protection from compelled disclosure goes back to *NAACP v. Alabama ex rel. Patterson*, which recognized that members would be subject to reprisals,

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300. *See also* 303 Creative v. Elenis, 600 U.S. 570, 601–03 (2023) (upholding a business's First Amendment right to refuse to design websites for same-sex marriages); Hurley v. Irish-Am. Gay, Lesbian and Bisexual Grp. of Bos., 515 U.S. 557, 557–58 (1995) (holding that a private group has a First Amendment right to exclude from its parade another group advocating equal rights for LGBTQ+ people). *But see* Rumsfeld v. F. for Acad. and Institutional Rts., Inc., 547 U.S. 47, 69–70 (2006) (rejecting the argument that universities have a First Amendment right to exclude military recruiters from interviewing on campus); Roberts v. U.S. Jaycees, 468 U.S. 609, 625–29 (1984) (holding that a private club did not have a First Amendment right to exclude women).

301. *Dale*, 530 U.S. at 655–56.

302. *See* Terry v. Adams, 345 U.S. 461, 471–75 (1953). I address the subject of state action *infra* Section III.A.

303. 530 U.S. 567, 585–86 (2000).

304. *Compare id.*, *with* Smith v. Allwright, 321 U.S. 649 (1944).

305. *See, e.g.*, Smith, 321 U.S. at 664 (holding that when the state runs an election where a political party seeks to exclude Black voters and they are excluded, "it endorses, adopts[,] and enforces the discrimination"). The White Primary Cases were a series of decisions stretching from the 1920s to the 1950s in which the Court invalidated efforts by the Texas Democratic Party and its affiliates to exclude Black citizens from voting in its primaries.

306. *Cal. Democratic Party*, 530 U.S. at 572–73 ("[W]e have not held . . . that the processes by which political parties select their nominees are . . . wholly public affairs that States may regulate freely.").

coercion, and other forms of hostility if their identities were revealed.[307] Subsequent cases require a form of heightened scrutiny for laws compelling individuals and groups to disclose private information, especially in contexts where they might face negative consequences for their political associations. *Buckley v. Valeo* recognized that compelled disclosure of campaign contributions and expenditures can inhibit political views or affiliations.[308] The Court applied "exacting scrutiny" to federal disclosure requirements, upholding them because they had a substantial relation to "sufficiently important interest[s]," but the Court left open the possibility that compelled disclosure might, in some circumstances, create an unacceptable risk of harassment or retaliation.[309] A few years later, in *Brown v. Socialist Workers '74 Campaign Committee*, the Court found that a minor party was entitled to an exception from compelled disclosure where it showed that its members faced a reasonable probability of threats, harassment, and reprisals.[310] Later, in *McIntyre v. Ohio Elections Commission*, the Court struck down a state law requiring people distributing campaign literature to identify themselves.[311] The Court later extended this protection to petition circulators in *Buckley v. American Constitutional Law Foundation*.[312] While it upheld a state law requiring the disclosure of petition signatories' names against a facial challenge in *Doe v. Reed*,[313] the Court again recognized that a narrower challenge would be appropriate if plaintiffs could show a reasonable probability of threats, harassment, and reprisals.[314]

Compelled disclosure requirements are thus facially constitutional if they bear a substantial relation to sufficiently important state interests, though individuals may claim an exemption from disclosure if they face a reasonable probability of threats, harassment, or reprisals. The Supreme Court's most recent decision, however, suggests a more stringent standard. In *Americans for Prosperity v. Bonta*,[315] the Court struck down a state law requiring tax-exempt charitable organizations to disclose their major donors (those contributing more than $5,000 in a tax year).[316] The Court required "narrow tailoring" of disclosure laws and went on to conclude that the state's disclosure requirement lacked a sufficiently tight fit to its claimed fraud-prevention and administrative interests to justify the potential chilling effect on association.[317] The potential

307. 357 U.S. 449, 462 (1958).

308. *See* 424 U.S. 1, 64–67 (1976).

309. *Id.* at 25, 64, 68–71; *see also* Citizens United v. FEC, 558 U.S. 310, 366–67 (2010) (applying exacting scrutiny to uphold disclosure requirements of the Bipartisan Campaign Reform Act).

310. 459 U.S. 87, 92–101 (1982).

311. 514 U.S. 334, 357 (1995).

312. 525 U.S. 182, 197–200 (1999).

313. 561 U.S. 186, 201–02 (2010).

314. *Id.*

315. 594 U.S. 595, 616–19 (2021).

316. *Id.* at 602.

317. *Id.* at 611–17.

for reprisals against people giving money to unpopular groups was, in the Court's estimation, sufficient to strike down the disclosure statute on its face.[318]

In light of this line of precedent, it would be a rare case in which voters could be compelled to disclose their vote choices, let alone the reasons for those choices—racist or otherwise. While there is no Supreme Court precedent on the subject, lower courts have generally balked at requests that individuals be forced to reveal their voting choices.[319] The only exception is in cases involving ineligible voters, in which some courts have allowed compelled disclosure.[320] Outside those circumstances, voters cannot be required to testify or otherwise reveal their votes or the reasons for those choices.[321] As a practical matter, this means that racist voting choices are immune from civil or criminal penalties.

Returning to the hypothetical state law forbidding people from intentional discrimination in their vote choices, it is hard to see how any such law could be enforced. The secrecy of the ballot makes it impossible to verify whom someone voted for, while the First Amendment protection against compelled disclosure makes it impossible to probe the reasons for anyone's vote. We could perhaps imagine a voter voluntarily *admitting* that they decided to vote against a candidate because of their race. But it is difficult to imagine any civil or criminal case being sustained in such circumstances. If a court were really forced to confront that case, the inviolability of one's freedom to choose whom to vote for and why—whether founded on the First Amendment right of association or the Fourteenth Amendment right to vote—would almost surely trump any asserted state interests.

In sum, the combined effect of the secret ballot and constitutional limits on compelled disclosure is to protect both individual voters' choices and the reasons for those choices, including racist motivations. On an individual level, then, racist voting is functionally—if not formally—protected. It does not necessarily follow, however, that the aggregation of discriminatory voting choices is immune from constitutional scrutiny. That is the question to which I now turn.

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318. *Id.* at 615.

319. *See, e.g.*, Gruber v. Suffolk Cnty. Bd. of Elections, 192 N.Y.S.3d 657, 660 (N.Y. App. Div. 2023) (denying request to compel disclosure of voter's ballot on the ground that it would violate his privacy); Mahaffey v. Barnhill, 855 P.2d 847, 848 (Colo. 1993) (holding that the interest in ballot secrecy prohibited lower court from making voters testify about their votes); *Ex parte* Henry, 126 S.W.2d 1, 1 (Tex. 1939) (holding that the trial court lacked authority to compel a voter to disclose vote choice); Moore v. Sharp, 41 S.W. 587, 589 (Tenn. 1896) (holding that voters may not be compelled to disclose their choices).

320. *See* Rodriguez v. Rangel, 679 S.W.3d 890, 908–09 (Tex. App. 2023) (citing state law allowing compelled disclosure of vote choices by those who cast illegal votes, if relevant to an election contest); *In re* Levens, 702 P.2d 320, 325 (Kan. 1985) (holding that while state law generally protects ballot secrecy, unqualified voters may be compelled to reveal their choices based on greater public policy in ensuring accurate election results).

321. *See, e.g.*, *Gruber*, 192 N.Y.S.3d at 657; *Mahaffey*, 855 P.2d at 847; *Ex parte Henry*, 126 S.W.2d at 1; *Moore*, 41 S.W. at 587.

III. IS RACIST VOTING UNCONSTITUTIONAL?

While individuals may have the freedom to cast racist votes, the aggregation of their votes to select candidates for public office is a different matter. This Part argues that racist voting should be understood to violate the Fourteenth and Fifteenth Amendments when it affects election results.

To understand why, it is first necessary to consider the state action doctrine, long recognized as one of the most convoluted in all of law.[322] When it comes to state action, voting is quite different from speaking. A private individual's or group's decision to engage in racist speech would not, without more, constitute state action. But when votes are counted and tabulated to determine who will serve in public office, there is state action. That does not end the inquiry into whether and when racist voting violates the Constitution. It is still necessary to consider what would be required to prove that an election was so tainted with discriminatory voting choices that the Fourteenth or Fifteenth Amendments are violated. I conclude that, to prove such a claim, plaintiffs should be required to demonstrate that there was sufficient racially discriminatory voting to change the result in that election—in other words, that the result would have been different but for intentional race discrimination by voters. That showing would be difficult, if not impossible, to make in any particular election. On the other hand, racial discrimination by voters does provide a basis for Congress's exercise of its enforcement authority under the Fourteenth and Fifteenth Amendments. And there is an existing statute, Section 2 of the Voting Rights Act, that should be understood to remedy intentional discrimination by voters as well as intentional discrimination by legislators.[323] Recognizing racist voting as a constitutional wrong, therefore, provides an alternative constitutional justification for Section 2's prohibition on vote dilution, as applied in *Thornburg v. Gingles* and its progeny.[324]

I am not the first legal scholar to suggest that racially discriminatory voting violates the Constitution. In his final book, *Whitelash: Unmasking White Grievance at the Ballot Box*, the late Terry Smith argued that intentional race discrimination in voting violates equal protection.[325] This Article develops Professor Smith's argument while departing from it in two key respects. First, I argue that the threshold for proving a constitutional violation should be significantly higher than Professor Smith seemed to believe, requiring plaintiffs to show that a

322. *See* Charles L. Black, Jr., *Foreword: "State Action," Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69, 95 (1967) (referring to state action as a "conceptual disaster area").

323. 52 U.S.C. § 10301.

324. Thornburg v. Gingles, 478 U.S. 30 (1986); Allen v. Milligan, 599 U.S. 1 (2023); Alexander v. S.C. State Conf. of the NAACP, 602 U.S. 1 (2024).

325. SMITH, *supra* note 21, at 33, 165. Professor Elmendorf has also briefly discussed the question, concluding that the electorate engages in unconstitutional state action where outcome-determinative votes are cast for racially discriminatory reasons. Elmendorf, *supra* note 21, at 430–36. I follow a different path than Professor Elmendorf but arrive at the same conclusion.

particular election's outcome was affected by racist voting. Second, I think that the most important implication of recognizing racist voting as a constitutional wrong is on Congress's enforcement authority, and especially on the constitutional status of Section 2, which was not the focus of Professor Smith's work.

The argument that racist voting should be considered a constitutional wrong proceeds in three parts. Section III.A argues that racist voting constitutes state action, at least where a sufficient number of people are motivated by racially discriminatory intent to change the result of an election. Section III.B argues that, in these circumstances, racist voting should be considered a constitutional violation, but the Section concludes that it would be extremely difficult for plaintiffs to prevail on such a claim in court. Section III.C examines Congress's enforcement authority over racist voting, concluding that Section 2 should be understood as a remedy for intentional race discrimination by voters as well as by legislators.

A. State Action

In considering whether racist voting might violate the Fourteenth and Fifteenth Amendments, the predicate question is whether intentional race discrimination *by voters* constitutes state action. Since the late nineteenth century, the Supreme Court has required state action—both to prove a constitutional violation in court and to justify Congress's use of its enforcement powers.[326] The state action doctrine is notoriously muddled, making the resolution of many state action cases difficult and the outcome hard to predict.[327] That said, there can be no doubt that elections are a public function that constitute state action.[328] When voters act collectively to select candidates for office, they should be considered state actors.

The state action doctrine derives from the *Civil Rights Cases*,[329] which struck down the 1875 Civil Rights Act's prohibition on race discrimination in places of public accommodation on the ground that it exceeded Congress's enforcement powers.[330] The Court held that the Fourteenth Amendment prohibits only the actions of state and local governments, not private actors,

326. *See, e.g.*, United States v. Morrison, 529 U.S. 598 (2000); Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972); Civil Rights Cases, 109 U.S. 3 (1883).

327. *See* Black, *supra* note 322, at 95; Erwin Chemerinsky, *Rethinking State Action*, 80 NW. U. L. REV. 503, 503–04 (1986); Barbara Snyder, *Private Motivation, State Action and the Allocation of Responsibility for Fourteenth Amendment Violations*, 75 CORNELL L. REV. 1053, 1054 (1990).

328. SMITH, *supra* note 21, at 165 ("When citizens vote in a general election, they are performing a public function; they are the 'state,' as surely as a city council, the state legislature, or Congress is.").

329. *Civil Rights Cases*, 109 U.S. at 61–62.

330. Congress's enforcement authority under both the Thirteenth and Fourteenth Amendments was at issue, but only the Fourteenth Amendment portion is germane to the state action question, since the Thirteenth Amendment reaches private as well as public conduct. *Id.*

saying that "[i]ndividual invasion of individual rights is not the subject-matter of the amendment."[331] Protection from private wrongs, including race discrimination, was, therefore, within the sphere of state and not federal authority.[332] Congress therefore lacked the power to prohibit and provide a remedy for private discrimination.[333]

To this day, it remains the law that Congress's remedial power is limited to state action and not merely private action—a subject to which I will return in Section III.C.[334] In the mid-twentieth century, however, the Court expanded its conception of state action to include circumstances in which otherwise private actors are engaged in public functions—that is, "powers traditionally exclusively reserved to the State."[335] An example is *Marsh v. Chambers*, in which a privately owned "company town" was engaged in state action for First Amendment purposes when it performed functions typically performed by local government.[336] Another is *Evans v. Newtown*,[337] involving a public park that had been devised to a city with the requirement that it be opened only to White people.[338] Because the park was in the "public domain," the obligation to open it on a nondiscriminatory basis could not be evaded by turning it over to a private entity.[339]

In considering whether election results influenced by racist voting constitute state action, the most relevant precedents are the White Primary Cases. In a series of decisions stretching from the 1920s to the 1950s, the Court invalidated efforts by the Texas Democratic Party and its affiliates to exclude Black citizens from voting in its primaries.[340] The first in that line of decisions, *Nixon v. Herndon*,[341] concerned a state statute that expressly prohibited Blacks from voting in the Democratic primary, so it raised no substantial state action question.[342] The State responded by amending its statute to give the state party's executive committee authority to set the qualifications for voting in its primary.[343] In *Nixon v. Condon*, the Court held that the party committee's exclusion of Blacks pursuant to this statute constituted state action for purposes

331. *Id.* at 11.

332. *Id.* at 17.

333. *Id.* at 17–18.

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

335. *See* Jackson v. Metro. Edison Co., 419 U.S. 345, 352 (1974); *see also* Flagg Bros. v. Brooks, 436 U.S. 149, 157 (1978).

336. 326 U.S. 501, 508 (1946).

337. 382 U.S. 296 (1966).

338. *Id.* at 297.

339. *Id.* at 301–02.

340. *See* Michael J. Klarman, *The White Primary Rulings: A Case Study in the Consequences of Supreme Court Decisionmaking*, 29 FLA. ST. U. L. REV. 55, 57–58 (2001).

341. 273 U.S. 536 (1927).

342. *Id.* at 536.

343. *See* Nixon v. Condon, 286 U.S. 73, 81–82 (1932).

of plaintiff's equal protection claim.[344] The State's next move was to change its law again, allowing the qualifications for party membership—and thus for voting in its primary—to be set by the state party convention.[345] The Court initially upheld this scheme in *Grovey v. Townsend*, on the grounds that the party was a private entity not governed by the Fourteenth or Fifteenth Amendments.[346] But in a subsequent decision not involving the White primary, the Court held that Congress had the authority to regulate party primary elections under Article I, Section 4 of the Constitution where the primary was an "integral part of the election machinery."[347] That set the stage for the overruling of *Grovey v. Townsend*'s state action holding in *Smith v. Allwright*,[348] in which the Court held that party primaries that are "part of the machinery for choosing officials, state and national" constitute state action under the Fifteenth Amendment.[349]

The last of the White Primary Cases, *Terry v. Adams*,[350] stretched the state action doctrine to its outer boundary.[351] The case involved the Jaybird Democratic Association, a private political organization from which Blacks were excluded, which conducted its own primary election.[352] The winners of the Jaybird primary invariably went on to win the Democratic primary and then the general election.[353] By an 8–1 vote, the Court concluded that there was state action under the Fifteenth Amendment.[354] Although there was no majority opinion, Justice Black's opinion for three Justices found that the Jaybird primary was "an integral part, indeed the only effective part, of the electoral process."[355] Writing for four other Justices, Justice Clark's concurring opinion concluded that there was state action because the Jaybird association was the "decisive power in the county's recognized electoral process."[356]

Taken together, the White Primary Cases support the conclusion that there is state action when elections are influenced by intentional race discrimination. To be sure, political parties are not the same as individual voters, and the

344. *Id.* at 89.

345. *See* 295 U.S. 45, 46–48 (1935), *overruled by* Smith v. Allwright, 321 U.S. 649 (1944).

346. *See id.* at 55.

347. United States v. Classic, 313 U.S. 299, 318–20 (1941).

348. *Allwright*, 321 U.S. at 649.

349. *Id.* at 664.

350. 345 U.S. 461 (1953).

351. *See* G. Sidney Buchanan, *A Conceptual History of the State Action Doctrine: The Search for Governmental Responsibility*, 34 HOUS. L. REV. 333, 370 (1997) (observing that *Terry v. Adams* and the White Primary Cases stand for the idea that "any election process, in whatever form, that affects . . . more than minimally . . . the political process by which public officials are ultimately selected will be characterized as state action").

352. *Terry*, 345 U.S. at 463–65 (Black, J., lead opinion).

353. *Id.* at 483 (Clark, J., concurring).

354. *See id.* at 469–70 (Black, J., lead opinion); *id.* at 473–77 (Frankfurter, J.); *id.* at 482–84 (Clark, J., concurring). Only Justice Minton dissented, concluding that there was no state action. *See id.* at 494 (Minton, J., dissenting).

355. *Id.* at 469 (Black, J., lead opinion).

356. *Id.* at 484 (Clark, J., concurring).

exclusion of voters from primaries is different from exclusion from elected office for race-based reasons. The core principle for which these cases stand, however, is that the electoral process is a public function from beginning to end. Accordingly, where elections are affected by private racial discrimination—whether by political parties or voters—the Fourteenth and Fifteenth Amendments' state action requirement is satisfied.

Another line of cases concerns private parties whose actions bear a "sufficiently close nexus" to the state.[357] In *Burton v. Wilmington Parking Authority*,[358] for example, the Court found that a coffee shop leasing space from a municipal parking authority was engaged in state action by virtue of the "mutual benefits" that they conferred on one another.[359] The benefits the shop received from the city, and vice versa, were sufficient to satisfy the Fourteenth Amendment state action requirement and therefore, to prohibit it from discriminating on the basis of race.[360] On the other hand, in *Moose Lodge No. 107 v. Irvis*,[361] the Court held that the state's grant of a liquor license to a private club was not enough to make the latter's racial discrimination a form of state action.[362]

The Court has long stressed that there is no litmus test for determining when the relation between private and public actors is sufficiently close, stressing that the inquiry requires "sifting facts and weighing circumstances."[363] In *Lugar v. Edmonson Oil Co.*,[364] the Court attempted to bring some order to state action law by articulating a two-part test for determining whether private actors are bound by the Fourteenth Amendment.[365] First, "the [alleged] deprivation must be caused by the exercise of [a] right or privilege created by the State."[366] Second, the party responsible for the deprivation must be a state actor—which would include either a state official or someone who has "acted together with or has obtained significant aid from state officials" or whose "conduct is otherwise chargeable to the State."[367]

The most relevant applications of the *Lugar* standard are to race discrimination in jury selection. The Court held in *Batson v. Kentucky* that the

357. *See, e.g.*, Jackson v. Metro. Edison Co., 419 U.S. 345, 351 (1974).

358. 365 U.S. 715 (1961).

359. *Id.* at 717, 724.

360. *Id.* at 724.

361. 407 U.S. 163 (1972).

362. *Id.* at 177.

363. *Burton*, 365 U.S. at 722.

364. 457 U.S. 922, 942 (1982) (finding state action where a private creditor obtained a prejudgment attachment order, enforceable by the sheriff, from a court).

365. *See id.* at 939. The Court first concluded that conduct satisfying the Fourteenth Amendment state action requirement is also action "under color of . . . law" sufficient to support an action under 42 U.S.C. § 1983. *Id.* at 935.

366. *Id.* at 937.

367. *Id.* The last part of this standard borders on circularity, since what conduct is "chargeable to the State" and who is considered a state actor are essentially different means of asking the same question.

Equal Protection Clause prohibits prosecutors from exercising peremptory challenges in a racially discriminatory manner.[368] While there is no doubt that prosecutors are state actors, the Court next had to confront the question of whether private litigants are also bound by the Fourteenth Amendment.[369] In *Edmonson v. Leesville Concrete Co.*,[370] the Court held that they are. Following *Lugar*'s two-part framework, it first addressed the easy question, finding that peremptory challenges have their source in state authority.[371] The more difficult question is whether private litigants should be considered state actors when exercising peremptory challenges. *Edmonson* concluded that they should be considered state actors for several reasons. One was that private litigants depend on the "significant assistance" of the state (in this case, its court system) when selecting juries.[372] Another was that jury selection is a "traditional function of the government."[373] On this point, the Court relied on *Terry v. Adams*, recognizing that the selection of juries—like the election of public officials—is a core public function.[374] *Edmonson* also found the locus of the discrimination significant, given the centrality of the judicial process to "democratic government."[375]

The Court's application of the *Lugar* standard to private litigants suggests that voters are state actors when their racially discriminatory intent influences election results. The first part of the test is easily satisfied: voting is a right created by the state. As for the second part of the *Lugar* standard, *Edmonson*'s reasons for finding private litigants to be state actors apply with equal force to voters. When voters collectively exercise that right, they depend on "significant assistance" from state and local actors.[376] The electoral process is, moreover, a "traditional function of government"—in fact, it is a quintessential public function, as *Edmonson* recognized by citing *Terry v. Adams*.[377] And the electoral process is central to democratic government. *Edmondson*'s statement that "[f]ew places are a more real expression of the constitutional authority of the government than a courtroom" applies with even greater force to the voting booth.[378] Like jury service and holding political office, voting has long been

368. 476 U.S. 79, 86 (1986).

369. *See* Edmonson v. Leesville Concrete Co., 500 U.S. 614, 616 (1991).

370. *Id.*

371. *Id.* at 620–21.

372. *Id.* at 624.

373. *Id.*

374. *Id.* at 625.

375. *Id.* at 628. For similar reasons, the Court later found that criminal defendants should be considered state actors when they exercise peremptory challenges in an allegedly discriminatory way. Georgia v. McCollum, 505 U.S. 42, 50 (1992).

376. *Edmonson*, 500 U.S. at 622 (quoting Tulsa Pro. Collection Servs., Inc. v. Pope, 485 U.S. 478, 486 (1988)).

377. *See id.* at 624–25.

378. *See id.* at 628.

considered a core political right.[379] No less than private litigants—and arguably more so—voters are state actors when their collective decision is influenced by race discrimination.[380]

There is one other line of cases germane to the question of whether voters should be considered state actors when they collectively engage in race-motivated action. In decisions stretching from the 1960s to the 2010s, the Court considered constitutional challenges to various ballot measures alleged to discriminate on the basis of race. Ballot measures present especially difficult questions of intent, given the difficulty of determining the reasons for voters' collective choice. The first of those cases, *Reitman v. Mulkey*,[381] most directly addressed the question of state action. At issue in *Reitman* was a state constitutional amendment, adopted by ballot initiative, prohibiting the state from infringing on property owners' freedom to lease their property to whomever they chose.[382] The purpose of the initiative, according to the lower court, was to give private landlords a state constitutional right to discriminate.[383] Affirming the conclusion that the amendment "was intended to authorize, and does authorize, racial discrimination in the housing market," the Supreme Court found discriminatory state action in violation of the Equal Protection Clause.[384] The implication is that the collective discriminatory motivation *of voters* was sufficient to create state action.

The Court followed and expanded on *Reitman*'s rationale in two subsequent cases, *Hunter v. Erickson*[385] and *Washington v. Seattle School District, Number 1* (*Seattle*),[386] both of which struck down ballot measures on the grounds that they denied equal protection.[387] *Hunter* involved a city charter amendment that took away protection from housing discrimination,[388] while *Seattle* involved a state constitutional amendment that effectively prohibited race-conscious school integration measures.[389] *Seattle* is especially significant because it came after

379. *See* Travis Crum, *The Unabridged Fifteenth Amendment*, 133 YALE L.J. 1039, 1054 (2024) [hereinafter Crum, *Unabridged*] (noting the distinction between civil and political rights, as understood by the Reconstruction Framers).

380. While the comparison between voters and private litigants is strong, an even closer comparison may be drawn between voters and *jurors*. Like a jury, the electorate is composed of people who are otherwise private citizens who collectively engage in a core public function. There are fewer modern cases involving juror discrimination than discrimination by private litigants, but it is very clear that jurors engage in state action when they intentionally discriminate on the basis of race. *See* Peña-Rodriguez v. Colorado, 580 U.S. 206, 225 (2017) (explaining that a state rule prohibiting inquiries into juror statements must give way to the federal constitutional rule prohibiting racial bias in jury deliberations).

381. 387 U.S. 369 (1967).

382. *Id.* at 371.

383. *Id.* at 374.

384. *Id.* at 381.

385. 393 U.S. 385 (1969).

386. 458 U.S. 457 (1982).

387. *Id.* at 487; *Hunter*, 393 U.S. at 393.

388. *Hunter*, 393 U.S. at 387.

389. *Seattle*, 458 U.S. at 461–63.

Washington v. Davis confirmed that voters must generally show racially discriminatory intent to prove an equal protection violation.[390] *Seattle* acknowledged this requirement but said that "a particularized inquiry into motivation" is not always required,[391] opting instead for an inquiry that looked to the "racial focus" of the initiative and its "practical effect" on the allocation of political power.[392] Neither *Hunter* nor *Seattle* questioned that there is state action when ballot measures are enacted with racially discriminatory intent by voters.

The Court's most recent decision in this line, *Schuette v. Coalition to Defend Affirmative Action*,[393] departed from *Seattle*'s legal framework but confirmed that there is state action when voters adopt a ballot initiative with racially discriminatory intent.[394] *Schuette* upheld Michigan's initiative: a constitutional amendment banning race-conscious affirmative action.[395] There was no majority opinion, but Justice Kennedy's lead opinion (for three Justices) cited the "well-established principle that when hurt or injury is inflicted on racial minorities by the encouragement or command of laws or other state action, the Constitution requires redress by the courts."[396] It understood *Reitman*, *Hunter*, and *Seattle* as standing for the principle that states may not impose a restriction that is "designed to be used, or [is] likely to be used, to encourage infliction of injury by reason of race."[397] Although he found no such injury, Justice Kennedy's opinion confirmed that there is state action when an initiative is intended to inflict injury on the basis of race. Justice Scalia, joined by Justice Thomas, would only find a constitutional violation where discriminatory intent is shown.[398] While the Justices differed on the appropriate equal protection standard, they all seem to agree that the state action requirement would be satisfied where a ballot initiative is adopted with racially discriminatory intent.[399]

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390. *See* Washington v. Davis, 426 U.S. 229, 239–41 (1976).

391. *Seattle*, 458 U.S. at 485. In this regard, *Seattle* bears comparison to *Rogers v. Lodge*, *see infra* note 443–46 and accompanying text, which was decided the day after *Seattle*. Both cases relax the intent requirement, making it similar if not identical to an effects-based standard.

392. *Id.* at 474.

393. 572 U.S. 291 (2014). The author was one of the attorneys for plaintiffs in this case.

394. *See id.* at 313–15. To be precise, the lead opinion by Justice Kennedy departed from *Seattle*'s reasoning that state laws are necessarily unconstitutional if they have a "racial focus" and make it more difficult for racial minorities to achieve legislation in their interest. *See id.* at 307. Justice Scalia's concurrence (joined by Justice Thomas) would have overruled *Hunter* and *Seattle* outright. *See id.* at 329–30 (Scalia, J., concurring). Justice Breyer wrote a puzzling concurrence, asserting that Michigan's initiative did not involve any reordering of the political process. *See id.* at 335 (Breyer, J., concurring). The key point is that none of the Justices questioned that there is state action where an initiative is adopted with racially discriminatory intent on the part of voters.

395. *Id.* at 314–15 (majority opinion).

396. *Id.* at 313.

397. *Id.* at 313–14.

398. *See id.* at 330 (Scalia, J., concurring).

399. *See id.* at 331; *id.* at 351 (Sotomayor, J., dissenting).

The ballot-measure cases thus confirm that there is state action when voting results are the product of intentional race discrimination. The selection of candidates through an election is no less state action than the adoption of a law through an election. That much is clear from the White Primary Cases—which treat elections as the paradigmatic public function—and is confirmed by the *Lugar* line of cases.[400] While the Justices in *Schuette* differed on the showing that is required to establish an equal protection violation, they all appeared to agree that there is state action when a ballot measure is adopted with the intent to discriminate on the basis of race.[401] Of course, one must acknowledge that the complexities and vagaries of the state action doctrine make for many difficult cases. But public elections are not among those difficult cases. When intentional race discrimination by voters influences election results, the state action requirement is satisfied.

To be clear, my claim is *not* that every individual voting decision should be deemed an act of the state, nor that each voter should be considered a state actor whenever they cast ballots for racially discriminatory or otherwise invidious reasons. Instead, the claim is that when voters act *collectively*—whether to adopt a ballot measure or to select or defeat a candidate—they engage in state action.[402] That is because elections are a public function, because the right to vote is created by federal and state law, because voters depend on the machinery of government in voting and in having their votes tabulated, and because the electoral process (like the judicial process) lies at the core of American constitutional democracy.[403]

It bears emphasis that this Section has focused on the state action requirement, not the constitutional standard that should apply when determining whether racist voting violates the Fourteenth or Fifteenth Amendments. Although they are often confused—and as we shall see, some of the same cases are relevant—the question of whether there is state action is distinct from the question of whether there is a constitutional violation.[404] The above discussion establishes that there is state action when election results are influenced by intentional race discrimination on the part of voters. The next question is what should be required to prove a constitutional violation.

400. *See* Smith v. Allwright, 321 U.S. 649, 664 (1944); *see also* Edmonson v. Leesville Concrete Co., 500 U.S. 614, 620–25 (1991).

401. *See Schuette*, 572 U.S. at 331 (Scalia, J., concurring); *id.* at 351 (Sotomayor, J., dissenting).

402. *See* Elmendorf, *supra* note 21, at 432 (distinguishing an individual voter's personal right to vote for their preferred candidate from the "determination of election results," which is state action).

403. *See id.* at 435–36 (arguing that the selection of legislative and executive officials who will exercise coercive authority is a "public function").

404. *See* Snyder, *supra* note 327, at 1054 (noting that the Supreme Court sometimes confused the state action question with the question of whether the Constitution was violated).

B. Proving Discriminatory Intent

The preceding Section established that the collective action of the electorate in selecting a candidate should be considered state action. This Section considers the standard that should apply to determine whether that action violates the Fourteenth or Fifteenth Amendments. I argue that racist voting should be considered a constitutional wrong when intentional race discrimination affects an election result. But while lawsuits challenging racist voting are theoretically possible, they would be practically unwinnable. This Section first explains why intentional race discrimination by the electorate should be considered a constitutional wrong and then explains why judicial enforcement is not likely to be viable.

While the questions of state action and constitutional violation are distinct, the cases discussed in the last Section shed light on why racist voting should be considered unconstitutional. The White Primary Cases establish that the entirety of the electoral process should be considered state action.[405] They also stand for the proposition that purposeful exclusion from that process violates the Fourteenth and Fifteenth Amendments.[406] The jury-discrimination cases establish that private litigants are state actors when they exercise peremptory challenges in a discriminatory fashion and that intentional discrimination in the exercise of peremptory strikes violates the Fourteenth Amendment.[407] Jurors themselves present an even closer analogy to voters. Although there are fewer cases on the subject, it is settled law that the Constitution prohibits intentional race discrimination in jury deliberations.[408] Finally, the *Reitman-Schuette* line of cases establishes that voters may be considered state actors when they enact discriminatory ballot measures and that initiatives intended to inflict injury by reason of race violate the Equal Protection Clause.[409]

Because voters in candidate elections are state actors—no less than political parties, private litigants, jurors, and voters in ballot-measure elections—their collective decisions are also subject to the Fourteenth and Fifteenth Amendments. What remains to be determined is the constitutional standard that should apply in determining their liability. To examine this question, it is necessary to explore the foundations of the right to be free from racial discrimination in the electoral process. In one sense, the idea that elections should not be tainted by racial bias is a very old one. It harkens back to Mill's conception of voting as a trust rather than a right and the concomitant notion

405. *See, e.g.*, Nixon v. Herndon, 273 U.S. 536, 540–41 (1927) (holding that exclusion from a primary election deserves the same constitutional protection as the final election).

406. *See, e.g.*, *id.* at 540–41; *Smith*, 321 U.S. at 664–66.

407. *See, e.g.*, Batson v. Kentucky, 476 U.S. 79, 84 (1986).

408. *See, e.g.*, Peña-Rodriguez v. Colorado, 580 U.S. 206, 225 (2017) (explaining that a state rule prohibiting impeachment of jurors must give way to the Constitution's prohibition on race discrimination in the administration of justice).

409. *See, e.g.*, Reitman v. Mulkey, 387 U.S. 369, 375–76 (1967).

that voters have an obligation to vote in a way that is free from "prejudices of class or sect."[410] Of course, we now recognize voting as a right, and a part of that right is the freedom to vote for whom we choose, as discussed in Part II. It does not, however, follow that we should be unconcerned with racial or other prejudices affecting election results. To the contrary, the fact that individuals are free to cast their votes for whatever reasons move them should make us *more* concerned about the systemic impact that racial bias may have on election results.[411]

To see why, it is essential to recognize that voting is both an individual and a collective right. As Pam Karlan explained more than three decades ago, the right to vote is multidimensional.[412] It includes not only individuals' right to participate in elections by voting and having their votes counted but also the collective right to join with like-minded others to elect representatives of choice.[413] In other words, it involves the *aggregation* of many people's votes. As Professor Karlan explained, aggregation claims are qualitatively different from participation claims because they are "outcome-regarding."[414] Aggregation claims focus on a group's ability to secure representation rather than on individual voters' access to the ballot.[415] That does not, of course, mean that there is a right to have one's preferred candidate win every election—something that is self-evidently impossible. What it does mean is that there is a right to have an electoral structure that avoids diluting the voting strength of some groups, including those defined by racial identity.[416]

The constitutional right against racist voting arises from the aggregative (collective) rather than the participatory (individualized) dimension of the right to vote. From the research canvassed in Part I, we know that some voters in every election will be motivated by racial bias.[417] Imagine, for example, an election pitting an Asian American candidate against a White candidate. Imagine further that some White voters are motivated to vote against the Asian American candidate because of his ethnicity, while some Asian American voters are motivated to vote against the White candidate because of her ethnicity. Other voters may be moved to vote for or against a candidate for racial reasons other than candidate identity. For example, voters who strongly identify as

410. MILL, *supra* note 215, at 203; *see also supra* notes 215–23 and accompanying text.

411. *See generally* Foley, *supra* note 230, at 180 (arguing that the way to avoid bias is to give "all voters an equal chance to participate in the judgment of which candidates will best serve society as a whole" rather than "encouraging voters to vote their own biases so that these biases counteract each other").

412. Pamela S. Karlan, *All Over the Map: The Supreme Court's Voting Rights Trilogy*, 1993 SUP. CT. REV. 245, 248–51 (1993) [hereinafter Karlan, *All Over the Map*]; Karlan, *The Rights to Vote*, *supra* note 2, at 1709–19.

413. Karlan, *All Over the Map*, *supra* note 412, at 248–49; Karlan, *The Rights to Vote*, *supra* note 2, at 1712.

414. Karlan, *The Rights to Vote*, *supra* note 2, at 1713.

415. *Id.*

416. *Id.* at 1713–15. For more on the group-based nature of the right to vote, see Heather Gerken, *Understanding the Right to an Undiluted Vote*, 114 HARV. L. REV. 1663, 1666–67 (2001).

417. *See generally* Glaser & Finn, *supra* note 134 (explaining the correlation between implicit bias and voting).

Vietnamese American may vote for candidates whose policies favor their ethnic group; voters who strongly identify as White may vote for candidates favoring policies perceived to benefit their racial group and to harm groups they perceive as outsiders. At least some voters can be expected to act on discriminatory motivations—in favor of their group or against another—in every single election. Claiming a right to be free from all bias on the part of individual voters would therefore prove too much. It would, moreover, miss the real problem to argue that every biased vote is its own distinct constitutional violation. There is no real injury if some voters vote against an Asian American candidate because of her race but she still wins the election. The real injury arises from the *collective* harm that arises when racist votes are aggregated to affect election results.

Any constitutional right against racist voting must therefore be understood as an aggregate, rather than an individual, right. The most logical textual sources of such a right are the Equal Protection Clause of the Fourteenth Amendment and the Fifteenth Amendment's prohibition on the denial or abridgment of the right to vote on account of race. While the current Supreme Court majority tends to focus on the original understanding of the Constitution, that approach is of little help here, given how far constitutional doctrine on voting rights has strayed from that meaning.[418] The consensus view of the original understanding is that Section 1 of the Fourteenth Amendment was designed to encompass only civil rights and *not* political rights like voting, officeholding, or jury service.[419] As a matter of legal doctrine, however, the Fourteenth Amendment's Equal Protection Clause has long been understood as the primary source of the right to vote.[420] That includes protection against intentional vote dilution[421] as well as excessive consideration of race in drawing district lines.[422]

The Supreme Court has also departed from originalism in sidelining the Fifteenth Amendment. In a series of articles, Travis Crum has meticulously documented the forgotten history of the Fifteenth Amendment,[423] which was originally understood to embody the aggregate character of the right to vote.[424]

418. Erwin Chemerinsky, *Chemerinsky: Originalism Has Taken Over the Supreme Court*, ABA J. (Sept. 6, 2022, 8:00 AM), https://www.abajournal.com/columns/article/chemerinsky-originalism-has-taken-over-the-supreme-court [https://perma.cc/WXV3-ACU8].

419. Crum, *Unabridged*, *supra* note 379, at 1046, 1054; *see also* Travis Crum, *The Superfluous Fifteenth Amendment?*, 114 NW. L. REV. 1549, 1551, 1579–80 (2020) [hereinafter Crum, *Superfluous*]. *But see* Franita Tolson, *The Constitutional Structure of Voting Rights Enforcement*, 89 WASH. L. REV. 379, 384–85 (2014) (arguing that Congress has authority to protect the right to vote under Section 2 of the Fourteenth Amendment).

420. *See, e.g.*, Crum, *Superfluous*, *supra* note 419, at 1551.

421. *See* City of Mobile v. Bolden, 446 U.S. 55, 69–70 (1980); Rogers v. Lodge, 458 U.S. 613, 621 (1982).

422. *See* Shaw v. Reno, 509 U.S. 630, 642 (1993); Cooper v. Harris, 581 U.S. 285, 291 (2017).

423. Crum, *Superfluous*, *supra* note 419, at 1557–67.

424. Crum, *Unabridged*, *supra* note 379, at 1130 ("[T]he Reconstruction Framers viewed the right to vote as attaching not just to individuals but to classes of citizens."). In his recently published article, Professor Crum considers the question of whether the Fifteenth Amendment was intended to reach racially discriminatory redistricting. Travis Crum, *The Riddle of Race-Based Redistricting*, 124 COLUM. L. REV. 1823, 1866–71 (2024) [hereinafter Crum, *Riddle*]. In its most recent decision on redistricting, the Court appears to

The Framers of the Fifteenth Amendment were acutely aware of the reality of racially polarized voting and meant to give Congress the power to adopt remedies for racial vote dilution (a subject to which I shall return in the next Section).[425] The contemporary understanding of the Fifteenth Amendment, however, is that it is limited to facial and intentional race discrimination and therefore duplicative of the Equal Protection Clause.[426] While the judicial occlusion of the Fifteenth Amendment is unfortunate, this Article seeks to make an argument within the confines of existing doctrine, not to overturn precedent. Accordingly, the remainder of this Section will focus on the standard that should govern claims that racist voting violates the Equal Protection Clause.[427]

To prevail on a race discrimination claim under the Fourteenth Amendment, plaintiffs must generally show that the challenged law or practice is the product of discriminatory intent.[428] This requirement stems from *Washington v. Davis*,[429] which held that facially neutral laws violate equal protection only if they have a racially discriminatory purpose.[430] The Court thus rejected the argument that the disparate racial impact of an employment test sufficed to render it unconstitutional.[431] In subsequent cases, the Court clarified that showing a discriminatory purpose requires more than mere awareness of the negative consequences of the challenged law or practice; rather, it means that the action must have been taken "'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."[432] That does not mean that there must be *direct* evidence of discriminatory purpose.[433] In *Village of Arlington Heights v. Metropolitan Housing Development Authority*,[434] the Court clarified that a racially discriminatory purpose need not be the sole reason for the challenged action.[435] It provided examples of factors that may provide circumstantial evidence of such intent.[436] They include a disparate impact as well as a pattern

conclude that it does, holding that Section 2 of the VRA falls within Congress's Fifteenth Amendment enforcement authority, as applied to redistricting. Allen v. Milligan, 599 U.S. 1, 41 (2023).

425. Crum, *supra* note 39, at 266–67. Professor Crum further argues that it is "doctrinally defensible" to view vote dilution as violative of the Fifteenth Amendment, because "abridge[ment]" of the right to vote suggests "the right to cast a *meaningful* [vote]." *Id.* at 312, 322–23.

426. Crum, *Superfluous*, *supra* note 419, at 1563.

427. Even if the Fifteenth Amendment does not reach more broadly than the Fourteenth Amendment, there may be a difference in the scope of Congress's enforcement authority, a subject addressed *infra* Section III.C.

428. *See, e.g.*, Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265 (1977).

429. 426 U.S. 229 (1976).

430. *Id.* at 240–41.

431. *Id.* at 246.

432. Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979).

433. *Vill. of Arlington Heights*, 429 U.S. at 265–66.

434. *Id.*

435. *Id.* at 265.

436. *Id.* at 266–68.

of enforcement inexplicable on grounds other than race.[437] Other relevant factors include the history of official decision-making, departures from usual procedure, and contemporaneous statements by decisionmakers.[438]

For almost a half-century, the law on the books has been that the same standard—discriminatory intent—applies to all race discrimination claims under the Equal Protection Clause.[439] But as Dan Ortiz pointed out just a few years after *Washington v. Davis* and *Arlington Heights*, the reality is that the Court applies different intent standards in different areas of equal protection law.[440] In employment, housing, and criminal cases, the Court has applied a relatively stringent version of the intent standard.[441] In other contexts, including voting and jury selection, the Court has applied a more lenient standard for intent.[442]

One example of the more lenient equal protection standard is racial vote dilution. As discussed in Section I.A, a majority of the Court required a showing of discriminatory purpose in *City of Mobile v. Bolden*.[443] But two years later, the Court upheld a challenge to another at-large election system in *Rogers v. Lodge*,[444] relying primarily on the negative effect that this system had on African American voters as well as historical discrimination against them and the continuing unresponsiveness of elected officials to their concerns.[445] Professor Ortiz accurately described this approach as "largely coextensive with adverse impact."[446] Because of the 1982 amendments to the VRA, there has been little further development of the *constitutional* standard for racial vote dilution; subsequent vote dilution cases have been litigated primarily under Section 2's "results" standard.[447] *Rogers v. Lodge* nevertheless illustrates a more relaxed approach to proving intent than is conventionally applied under *Washington v. Davis*.

The Court has likewise adopted a less demanding approach to discriminatory intent in three other domains of voting law. One is criminal disenfranchisement. In *Hunter v. Underwood*, the Court struck down Alabama's criminal disenfranchisement law on the ground that it violated the Fourteenth Amendment.[448] Justice Rehnquist's opinion for the Court found that race discrimination was *a* motivation for that law—though not the only one, given

437. *Id.* at 266.

438. *Id.* at 267–68.

439. Daniel R. Ortiz, *The Myth of Intent in Equal Protection*, 41 STAN. L. REV. 1105, 1110–13 (1989).

440. *Id.* at 1110–34.

441. *Id.* at 1110–19; *see also* Daniel P. Tokaji, *First Amendment Equal Protection: On Discretion, Inequality, and Participation*, 101 MICH. L. REV. 2409, 2453–55, 2459–64 (2003).

442. Ortiz, *supra* note 439, at 1119–30; Tokaji, *supra* note 441, at 2469–95.

443. 446 U.S. 55, 63, 66 (1980).

444. 458 U.S. 613, 627 (1982).

445. *Id.* at 623–27.

446. Ortiz, *supra* note 439, at 1129.

447. *Id.* at 1130. *But see* Alexander v. S.C. State Conf. of the NAACP, 602 U.S. at 38–39 (addressing briefly and remanding constitutional vote dilution claim).

448. 471 U.S. 222, 233 (1985).

evidence that the law was also intended to exclude poor Whites from voting.[449] To succeed, the Court said, racial discrimination must have been "a 'but-for' motivation for the enactment."[450]

The second area with a less demanding approach to discriminatory intent is racial gerrymandering. Under the line of cases beginning with *Shaw v. Reno*, the excessive consideration of race in drawing district lines violates the Equal Protection Clause.[451] For strict scrutiny to apply, race must be the "predominant factor" motivating the placement of voters in a district.[452] This is a more demanding standard than *Hunter v. Underwood*, which required only that race be *a* motivation, but not as demanding as in other areas of law.[453] Applying this standard, the Court has invalidated districts where the state legislature sought to place a predetermined percentage of minority voters in a particular district.[454]

The third domain is the line of cases from *Reitman* to *Schuette* involving racially discriminatory ballot measures. As noted above, the Court has "not insisted on a particularized inquiry into motivation in" considering whether ballot initiatives deny equal protection.[455] Although the *Schuette* plurality seemed to adopt a more demanding standard than had been applied in *Hunter* and *Seattle*, it left the door open to successful equal protection claims without the conventional showing of discriminatory intent.[456] According to Justice Kennedy's plurality opinion, it would be enough to show that "the political restriction in question was designed to be used, *or was likely to be used*, to encourage infliction of injury by reason of race."[457] The italicized language suggests that ballot initiatives may still be challenged on something less than the usual proof of intent—which makes sense, given the inherent evidentiary difficulty of proving the electorate's motivations.

This body of case law supports the conclusion that racist voting should be understood to violate the Fourteenth Amendment when it is sufficiently widespread to influence election results. At the same time, these cases expose the formidable challenge in coming up with a manageable standard for assessing intentional race discrimination by the electorate.

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449. *Id.* at 231–32.

450. *Id.* at 232. While the Court states that but-for causation is required, it is not at all clear that the Court demanded plaintiffs prove that the law would not have been enacted but for the intent to discriminate against Blacks. *See* Andrew Verstein, *The Jurisprudence of Mixed Motives*, 127 YALE L.J. 1106, 1144–47 (2018).

451. Shaw v. Reno, 509 U.S. 630, 657–58 (1993).

452. Miller v. Johnson, 515 U.S. 900, 916–20 (1995).

453. *See Hunter*, 471 U.S. at 231.

454. *See, e.g.*, Ala. Legis. Black Caucus v. Alabama, 575 U.S. 254, 258, 279 (2015); Cooper v. Harris, 581 U.S. 285, 291 (2017).

455. Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 485 (1982).

456. *See* Tokaji, *supra* note 441, at 2475–83 (discussing the *Hunter-Seattle* line as an example of unconventional equal protection analysis).

457. Schuette v. Coal. to Defend Affirmative Action, 572 U.S. 291, 314 (2014) (plurality opinion) (emphasis added). Justice Scalia, by contrast, would require the usual showing of discriminatory intent. *Id.* at 330 (Scalia, J., concurring in judgment).

The mixed-motives problem is especially vexing in the electoral context, given that voters invariably have different reasons for their choices and that racial bias will almost always be part of the mix. That is most obvious in elections involving candidates of different races, like one discussed earlier in this Section.[458] Some voters will vote for a particular candidate who is of the same race; others will vote against a candidate of a different race for that reason; still, others may vote for a different-race candidate out of a belief that more representation from that group is necessary. But even when elections involve only candidates of the same race, some voters will have racial motivations for their choices. Some may vote for a candidate because she supports policies helpful to their own racial group; others may select a candidate because she favors policies harmful to another racial group; and still, others may vote for a candidate they believe will help a different group. For example, some White voters may vote for a candidate because she supports race-conscious affirmative action to help historically disadvantaged groups, while other White voters may oppose the same candidate on the belief that affirmative action will harm their own children.

What standard should courts apply in determining whether racial bias has unduly influenced a candidate's election? As Andrew Verstein explained in his illuminating analysis of mixed-motive jurisprudence, there are at least four different rules that courts have applied in mixed-motive cases.[459] The most stringent is to require plaintiffs to prove that the impermissible consideration—in this case, race—is the *sole motive* behind the challenged decision.[460] That standard is highly deferential to defendants and would be impossible to meet in any case challenging racist voting, since there will invariably be multiple reasons motivating different voters.[461] That would effectively mean that racist voting, however widespread, is never unconstitutional. At the other end of the spectrum is the *any motive* standard, which would invalidate the challenged decision if race played any role in the decision.[462] That standard is too permissive, since race will almost always be a factor in real-world elections. That is most obvious in cases involving candidates of different races. It would be implausible—and highly disruptive—if elections could be challenged whenever such reasons formed any part of some voters' decisions.

These concerns suffice to disqualify the sole-motive and any-motive standards. In between these poles are two other standards, which are more commonly employed.[463] One is to require that race be the *primary motive* behind

458. *See* Thornburg v. Gingles, 478 U.S. 30, 40–41 (1986).
459. Verstein, *supra* note 450, at 1134–43.
460. *Id.* at 1139–40.
461. *Id.*
462. *Id.* at 1141–43.
463. *Id.* at 1134–39.

the decision.[464] The *Shaw* line of racial gerrymandering cases falls in this category, asking whether race was the "predominant factor" motivating the placement of voters in a district.[465] The other in-between standard is to require plaintiffs to show that race was a *but-for motive* for the decision.[466] Recall that this was the standard the Court articulated in *Hunter v. Underwood*, the Alabama criminal-disenfranchisement case.[467] It has been applied in many other contexts, including employment discrimination claims under Title VII of the Civil Rights Act of 1964.[468] Under this standard, plaintiffs prevail if they can show that a different decision would have been made but for the impermissible consideration.[469] In general, the primary-motive standard is more difficult to satisfy than the but-for standard. By way of example, consider an election in which one could narrow down the primary reasons for voter choice to just three: (1) the race of the candidates, (2) their positions on abortion, and (3) their positions on immigration. In a close election, all of them could be but-for causes of one of the candidates prevailing. But by definition, only one of them can be the primary motive.

The difficulty of discerning primary motive makes it an impracticable standard for racist voting. It is hard enough to determine the predominant motive of a multimember body, as courts are required to do in racial gerrymandering cases. The *Shaw* line of cases exemplifies this problem.[470] Courts have often struggled to determine whether racial or partisan motivations were the "predominant factor" in redistricting decisions, given the reality of conjoined polarization.[471] Making that determination would be much harder where the motivations of *voters* rather than legislators are at issue, given how many more of them there are and how many other factors influence their decision. Complicating the inquiry is the fact that voters' views on policy issues may be deeply intertwined with their views on race, making it difficult to disentangle the two.[472] Take immigration, policing, and affirmative action, just to name a few. Even with all the empirical evidence on vote choice canvassed in Part I, determining whether racial bias or policy views were predominant in any given election would be nearly impossible.

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464. *Id.* at 1134.

465. Shaw v. Reno, 509 U.S. 630, 647–48 (1993).

466. *See* Verstein, *supra* note 450, at 1137.

467. *Id.* at 1144.

468. *See, e.g.*, Bostock v. Clayton County, 590 U.S. 644, 650 (2020); *see also* McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 282 n.10 (1976).

469. Hunter v. Underwood, 471 U.S. 222, 231 (1985).

470. *Shaw*, 509 U.S. at 630.

471. *See, e.g.*, Hunt v. Cromartie, 526 U.S. 541, 554 (1999); *see also* Easley v. Cromartie, 532 U.S. 234, 258 (2001). For scholarly discussions of this issue, see Richard L. Hasen, *supra* note 68, at 1839–40; *see also* Bruce E. Cain & Emily R. Zhang, *supra* note 67, at 869.

472. *See* Cain & Zhang, *supra* note 471, at 876.

The difficulty in determining predominance is not the only reason for preferring a but-for standard to a primary-motive standard. As Katie Eyer has argued, a but-for standard aligns with the core theoretical commitment of anti-discrimination law: that some people should not be treated more or less favorably than others because of their race.[473] In the context of candidate elections, this translates into the principle that an election denies equal protection if racist voting changed the result of an election—in other words, if an opposing candidate would have prevailed but for intentional race discrimination by voters.

But-for causation presents a more workable standard than the sole-motive or any-motive extremes, and it is a better Goldilocks solution than a primary-motive standard. That said, a but-for causation standard will not eliminate the practical problems in disentangling racial bias from the many other considerations that can influence elections. To see why this is so, let us consider two different types of racist voting.

The first is discrimination based on the *race of a candidate*. Take for example an election between a Black candidate and a White candidate, in which the White candidate prevails 55% to 45%. To successfully challenge the result, the Black candidate would have to prove that she would have won but for racial bias on the part of the electorate. That means showing how many people would have switched to vote for her had she been White. In addition, a court would have to consider how many people would have switched their votes in the other direction, as there may be some people who voted for her because she is Black. She could only prevail on a showing that her net gain in votes would be more than 5% had she been White. That showing would be difficult—not to mention extremely costly—to make in any individual election.

The other type of discrimination is that based on the *race of people affected by the election*. This type of bias could take place in elections between same-race candidates. Consider, for example, a mayoral candidate in Springfield, Ohio, between two White candidates: one running on a platform of expelling Haitian immigrants from the city, the other adopting a more welcoming posture toward immigrants. Let us further suppose that the anti-Haitian candidate wins 55% to 45%. It might be possible to show that more than a significant number of voters were influenced by the winning candidate's position on that issue—in other words, that they would have voted for the other candidate but for that difference. But even in this stylized (and oversimplified) example, it would be hard to show that racial bias, as opposed to policy views, determined the difference.

473. Katie Eyer, *The But-for Theory of Anti-Discrimination Law*, 107 VA. L. REV. 1621, 1624–25 (2021). For a different perspective, see generally Guha Krishnamurthi, *Not the Standard You're Looking For: But-for Causation in Anti-Discrimination Law*, 108 VA. L. REV. ONLINE 1 (2022).

There are many other examples that might be given, but this suffices to illustrate the formidable challenge in proving that racist voting affected election results, even under a but-for standard. Added to that is what might be called the *McCleskey* problem, after the death-penalty case in which the Court declined to find an equal protection violation despite strong empirical evidence of racial disparities in Georgia's capital sentencing.[474] In rejecting McCleskey's equal protection claim, the Court emphasized the importance of preserving discretion in the criminal system.[475] Taken to its logical conclusion, the Court said, his argument would "throw[] into serious question the principles that underlie our entire criminal justice system,"[476] a concern that the dissent summed up as fear of "too much justice."[477] As described above, the Court has been more willing to find intentional race discrimination in election cases than in criminal cases.[478] But the "too much justice"[479] concern would seem to apply here too. If a court were to find sufficient racist voting affecting one election, it would open the door to challenging others. As in *McCleskey*, courts can be expected to demand clear evidence that racial bias affected the result in *this case*.

Problems of proof are not the only barrier to challenging racist voting in court; there is also the matter of remedy. Amassing the empirical research needed to show that any particular election result was affected by racist voting would be a time-consuming (not to mention expensive) endeavor. Even assuming it would be possible to generate or collect the necessary evidence, that process and the subsequent discovery could be expected to take many months, if not years. By the time the case went to trial, the prevailing candidates would be well into their terms. And if the losing candidate were successful, what remedy could a court impose? Courts are generally reluctant to void an election or order a do-over, even if serious legal violations have been shown.[480]

This leaves a conundrum. On one hand, I have argued that racist voting should be considered a constitutional violation where there is sufficient intentional racial discrimination on the part of voters to affect an election result. On the other hand, courts are unlikely to provide effective relief for racist voting in direct actions under the Constitution. Even under the best available standard, a but-for motive test, the practical problems of proof and remedy are too overwhelming. Difficult as it is to assess the voting motivations of any single person, it would be many times more difficult to ascertain the voting motivations of thousands or millions of people, much less prove that they were sufficient to make a difference in the result.

474. *See* McCleskey v. Kemp, 481 U.S. 279, 286–87 (1987).
475. *Id.* at 297.
476. *Id.* at 314–15.
477. *Id.* at 339 (Brennan, J., dissenting).
478. Shaw v. Reno, 509 U.S. 630, 630 (1993).
479. *Kemp*, 481 U.S. at 339 (Brennan, J., dissenting).
480. Steven H. Huefner, *Remedying Election Wrongs*, 44 HARV. J. LEG. 265, 281 (2007).

At this point, readers may be tempted to throw up their hands in despair. It might seem that recognition of racist voting as a constitutional wrong is a mere academic exercise, or, worse still, "an invitation to litigation without much prospect of redress."[481] But the power of recognizing racist voting as a constitutional wrong is not to allow judicial enforcement; it is rather to give Congress authority to enact appropriate remedies. And as it turns out, such legislation already exists.

C. Congressional Enforcement Authority and Section 2 of the VRA

Today, we tend to think of the Supreme Court as the primary protector of federal constitutional rights. That is not how the Framers of the Civil War Amendments saw things. With *Dred Scott v. Sandford* fresh in their memories, they were highly suspicious of the Supreme Court and much more inclined to believe that Congress would finish the work they had begun.[482] The Thirteenth, Fourteenth, and Fifteenth Amendments were thus written with enforcement language modeled on *McCulloch v. Maryland*,[483] giving Congress broad authority to protect the rights of newly freed African Americans.[484] All three Amendments give Congress power to enforce them "by appropriate legislation."[485] Although there is lingering uncertainty over the scope of Congress's enforcement authority to enforce constitutional voting rights, the Supreme Court has not clearly spoken on whether intentional discrimination *by voters* violates the Constitution. That silence leaves room for Congress to step in.

Recognizing racist voting as a constitutional wrong means that Congress has the power to remedy intentional discrimination by voters as well as by legislators. The previous Section argued that the Fourteenth and Fifteenth Amendments should be understood to prohibit such discrimination, at least where it affects election results. This Section argues that Congress has the authority to remedy this constitutional wrong and that Section 2 of the VRA can and should be understood as a remedy for that wrong. The conventional defense of Section 2 is that it enforces the constitutional prohibition on intentional race discrimination by the state legislative bodies. While the statute may be defended on this ground alone, intentional discrimination by voters provides another ground—and in some ways a firmer ground—for its

481. SAMUEL ISSACHAROFF ET AL., THE LAW OF DEMOCRACY 783 (4th ed. 2012) (describing the effect of *Davis v. Bandemer* on partisan-gerrymandering claims).

482. Crum, *Superflous*, *supra* note 419, at 1592; *see also* Jack M. Balkin, *The Reconstruction Power*, 85 N.Y.U. L. REV. 1801, 1856–60 (2010) (noting that the Reconstruction Amendments were meant to give Congress broad powers because the Supreme Court could not be trusted to protect freedmen's rights).

483. *See* McCulloch v. Maryland, 17 U.S. 316 (4 Wheat.) 421 (1819).

484. Crum, *Superfluous*, *supra* note 419, at 1590–92.

485. *Id.*

application to vote dilution claims arising from racially polarized voting, even where there is no intentional discrimination by legislators.

To understand how recognition of racist voting as a constitutional wrong expands Congress's enforcement authority over voting rights, it is helpful to canvas existing precedent on the scope of that authority. The Supreme Court upheld the coverage formula and preclearance requirement of the Voting Rights Act of 1965 as a permissible exercise of Congress's Fifteenth Amendment enforcement authority in *South Carolina v. Katzenbach*.[486] The Court concluded that the Fifteenth Amendment's enforcement clause was meant to embody the *McCulloch* standard and quoted the key language from the first Justice Marshall's opinion in that case: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."[487] Three months later, *Katzenbach v. Morgan*[488] upheld another provision of the original VRA, which excused U.S. citizens educated in Puerto Rico from literacy tests.[489] This time, the Court relied on Congress's enforcement authority under the Fourteenth Amendment, again quoting the above language from *McCulloch*.[490] The Court adhered to this broad view of Congress's authority under the Fourteenth and Fifteenth Amendments over voting rights in later cases, including decisions upholding subsequent VRA reauthorizations and amendments.[491]

In the 1990s, the Supreme Court began to pull back the reins on Congress's enforcement authority while continuing to affirm the *Katzenbach* cases' conferral of its broad authority over voting rights. The key decision was *City of Boerne v. Flores*,[492] which struck down the Religious Freedom Restoration Act's restrictions on state and local government on the ground that they exceeded Congress's Fourteenth Amendment enforcement authority.[493] The Supreme Court had previously held that the First Amendment does not generally prohibit neutral laws that substantially burden the exercise of religion.[494] Congress disagreed with that interpretation and enacted the RFRA in direct response.[495]

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486. 383 U.S. 301, 328 (1966).

487. *Id.* at 326 (quoting *McCulloch*, 4 Wheat. at 421).

488. 384 U.S. 641 (1966).

489. *Id.* at 657–58.

490. *Id.* at 650 (quoting *McCulloch*, 4 Wheat. at 421).

491. *See* City of Rome v. United States, 446 U.S. 156, 175–77 (1980) (upholding the 1975 reauthorization of VRA under the Fifteenth Amendment, on the ground that Congress had authority to prohibit voting changes with discriminatory effects); *see also* Oregon v. Mitchell, 400 U.S. 112, 117–19 (1970) (upholding provisions of the 1970 reauthorization allowing eighteen-year-olds to vote in federal elections, extending literacy-test suspension nationwide, and liberalizing residency and absentee voting rules).

492. City of Boerne v. Flores, 521 U.S. 507 (1997).

493. *Id.* at 536.

494. *See* Emp. Div. v. Smith, 495 U.S. 872, 883–85 (1990).

495. *City of Boerne*, 521 U.S. at 512–15.

Boerne articulated a new standard, "congruence and proportionality,"[496] for evaluating Congress's exercise of its Fourteenth Amendment enforcement authority. Under this standard, Congress still has the power to enforce constitutional rights, but it may not "alter[] the meaning" of the Constitution by interpreting it more expansively than the Supreme Court.[497] *Boerne* identified the *Katzenbach* cases as examples of the permissible exercise of Congress's authority.[498] The VRA went beyond the Fourteenth and Fifteenth Amendments, but in ways that were congruent and proportional to protect constitutional voting rights.[499]

In later cases, *Boerne*'s standard evolved into a three-part test. Where Congress enacts such "prophylactic" legislation (i.e., a statute prohibiting conduct that the Constitution does not), courts should: (1) identify the scope of the constitutional right with "some precision," (2) examine whether there is a demonstrated "history and pattern" of constitutional violations, and (3) determine whether there is "congruence and proportionality" between the means and ends.[500] While striking down multiple statutes on the ground that there was insufficient evidence of a pattern of constitutional violations or that the remedy swept too broadly, the Court repeatedly affirmed the vitality of the cases upholding the VRA as a permissible exercise of Congress's enforcement power under the Fourteenth and Fifteenth Amendments.[501]

The Roberts Court has taken a more skeptical view of the VRA, though it has not overruled the *Katzenbach* cases' invocation of *McCulloch*'s permissive standard for reviewing voting rights legislation. In *Northwest Austin Municipal Utility District v. Holder*,[502] the Court avoided ruling on the constitutionality of the 2006 reauthorization amendment by interpreting the VRA to allow local jurisdictions to "bail out" of coverage.[503] That decision, however, said that the Act imposed "current burdens" on states that must be justified by "current needs."[504] Four years later, *Shelby County v. Holder*[505] relied on this language to strike down the VRA's formula for determining which states and localities were covered by its preclearance requirement.[506] *Shelby County* rested on a newly minted "equal sovereignty" principle.[507] The notion is that when Congress

496. *Id.* at 520.

497. *Id.* at 519.

498. *Id.* at 532–33.

499. *Id.* at 530–33.

500. Bd. of Trs. v. Garrett, 531 U.S. 356, 365–74 (2001).

501. *See id.* at 373 (contrasting history of discrimination underlying VRA with that underlying Americans with Disabilities Act of 1990).

502. 557 U.S. 193 (2009).

503. *Id.* at 210–11.

504. *Id.* at 203.

505. Shelby County v. Holder, 570 U.S. 529 (2013).

506. *Id.* at 542.

507. *Id.*

treats some states differently from others, it must show that this differential treatment is justified by "current conditions."[508]

The Roberts Court's skeptical approach to voting rights legislation has led some commentators to argue or worry that Section 2 of the VRA is vulnerable to constitutional challenge.[509] Unlike the coverage and preclearance requirements of Sections 4 and 5 of the VRA, Section 2 of the VRA has nationwide applicability. Moreover, as Professor Karlan pointed out many years ago, the "genius" of Section 2 is that it's effectively self-liquidating when it comes to vote dilution.[510] Under the *Gingles* test, a violation may only be proven if there is racially polarized voting;[511] accordingly, there can be no vote dilution under Section 2 where such patterns no longer exist. While the statute applies to all jurisdictions, liability will only exist in places where racial polarization persists. In this respect, Section 2 has a built-in sunset provision, applying only so long as racial bloc voting remains a reality.[512]

The Supreme Court upheld the constitutionality of Section 2 in *Allen v. Milligan*,[513] while leaving an opening for future constitutional challenges. After affirming the *Gingles* framework and the lower court's application of this framework to Alabama's congressional districts,[514] the Court held that Section 2 fell within Congress's Fifteenth Amendment enforcement authority.[515] Writing for the majority, Chief Justice Roberts relied on *South Carolina v. Katzenbach* and *City of Rome v. United States* for the proposition that Congress may proscribe voting practices with discriminatory effects, even if the Fifteenth Amendment reaches only purposeful discrimination.[516] The Court's rejection of Alabama's constitutional challenge necessarily means that intentional vote dilution falls within the scope of the Fifteenth Amendment. That conclusion, according to the Court, is not vitiated by the fact that Section 2 (as construed

508. *Id.* at 553.

509. Roger Clegg & Hans A. von Spakovsky, *Disparate Impact and Section 2 of the Voting Rights Act*, 85 MISS. L.J. 1357, 1362–63 (2017) (arguing that Section 2's disparate-impact standard exceeds Congress's enforcement authority under the Fourteenth and Fifteenth Amendments); *see also* Travis Crum, *Deregulated Redistricting*, 107 CORNELL L. REV. 359, 435 (2022) (recognizing that *Boerne*'s "congruence and proportionality" approach and *Shelby County*'s "current burdens" approach present a threat to Section 2's constitutionality); Guy-Uriel E. Charles, *Section 2 Is Dead: Long Live Section 2*, 160 U. PA. L. REV. PENNUMBRA 219, 220–21 (2012) (suggesting that it would be unsurprising if Section 2 were struck down in coming years); Guy-Uriel Charles & Luis Fuentes-Rohwer, *Race and Representation Revisited: The New Racial Gerrymandering Cases and Section 2 of the VRA*, 59 WM. & MARY L. REV. 1560, 1597–98 (2018) (noting the tension between the colorblindness principle in racial-gerrymandering cases and the race-conscious requirements of Section 2).

510. Pamela Karlan, *Two Section Twos and Two Section Fives: Voting Rights and Remedies After* Flores, 39 WM. & MARY L. REV. 725, 741 (1998).

511. *Id.*

512. *Id.*

513. Allen v. Milligan, 599 U.S. 1, 42–43 (2023).

514. *Id.* at 15–41.

515. *Id.* at 40–42.

516. *Id.* at 40–41.

in *Gingles*) sometimes requires "race-based redistricting" to remedy vote dilution.[517]

If that were all *Milligan* said, then the decision would seem to be an unequivocal affirmation of Section 2's constitutionality, albeit by a bare majority of five Justices. The problem is that Justice Kavanaugh—the fifth vote for the portions of the majority opinion mentioned above—wrote a concurring opinion that leaves the door open to a future constitutional challenge.[518] Justice Kavanaugh agreed that Alabama's constitutional argument was unpersuasive, but he suggested an alternative argument: namely, that there may be a temporal limitation on Congress's authority to require race-based redistricting.[519] For this proposition, Justice Kavanaugh cited Justice Thomas's dissenting opinion.[520] Justice Thomas, in turn, argued that Section 2's results standard (as construed in *Gingles* and its progeny) exceeds Congress's enforcement authority because "it is unbounded in time, place, and subject matter, and its districting-related commands have no nexus to any likely constitutional wrongs."[521] Professor Crum counts three votes in *Milligan* to invalidate Section 2 as applied to racial vote dilution (Justices Thomas, Barrett, and Gorsuch).[522] To be clear, Justice Kavanaugh did not agree with this argument but suggested that he would be open to considering it if properly raised in a future case.[523]

The constitutionality of Section 2's results standard, at least as applied to vote dilution claims under *Gingles* and its progeny, thus remains a live issue. The conventional argument is that Section 2 falls within Congress's authority to address intentional race discrimination *by the legislature*.[524] Even if both the Fourteenth and Fifteenth Amendments require a discriminatory purpose, the Court has repeatedly affirmed that Congress may impose a broader prophylactic remedy, prohibiting practices that have a discriminatory effect, as Section 2 does.[525] There is, however, some uncertainty about whether the *Katzenbach*

517. *Id.* at 40–42. As Professor Crum has observed, the Court has not explicitly stated that the Fifteenth Amendment reaches racial vote dilution. Crum, *Riddle*, *supra* note 424, at 1826. In *Bolden*, the Court viewed intentional vote dilution as a Fourteenth Amendment question, and so held in its subsequent decision in *Rogers*, but neither case resolved the question whether intentional vote dilution violates the Fifteenth Amendment as well. *Id.* at 1836. *Milligan* nevertheless concluded that Section 2 vote dilution claims fall within Congress's Fifteenth Amendment enforcement authority. *Id.* at 1856. Implicit in that holding, even though not specifically mentioned by the Court, is that the Fifteenth Amendment prohibits intentional racial vote dilution.

518. *Milligan*, 599 U.S. at 43 (Kavanaugh, J., concurring).

519. *Id.*

520. *Id.* at 45 (Kavanaugh, J., concurring).

521. *Id.* at 88 (Thomas, J., dissenting).

522. Crum, *Riddle*, *supra* note 424, at 1854. He also noted that Justice Alito did not join this portion of Justice Thomas's dissent. *Id.*

523. *Milligan*, 599 U.S. at 45 (Kavanaugh, J., concurring).

524. As noted *supra* note 12, I use the term "by the legislature" to include any public authority drawing district lines or otherwise making electoral rules.

525. *See, e.g.*, City of Boerne v. Flores, 521 U.S. 507 (1997); Lopez v. Monterey County, 525 U.S. 266 (1999); Nevada Dep't of Hum. Res. v. Hibbs, 538 U.S. 721 (2003).

cases' deferential standard (taken from *McCulloch*) or *Boerne*'s more restrictive "congruence and proportionality" standard applies.[526]

The Court's most recent redistricting decision, *Alexander v. South Carolina State Conference of the NAACP*,[527] adds to this uncertainty by raising the bar on what is required to show that the legislature acted with discriminatory intent in drawing districts.[528] Under the *Shaw* line of cases, racial gerrymandering plaintiffs have long been required to show that race—rather than political party or some other consideration—predominated in drawing a district.[529] The three-judge district court in *Alexander* held that plaintiffs had made an adequate showing that race predominated and, furthermore, that the legislature had engaged in intentional vote dilution.[530] The Supreme Court reversed, finding that the lower court had clearly erred in its findings.[531] Most significantly for present purposes, the *Alexander* majority imposed a presumption of "good faith" on the part of the legislature[532]—which in that case meant that plaintiffs had a high burden of showing that the state had drawn its districts with racial, rather than partisan, intent.[533] To meet this burden, plaintiffs were required to produce a map that satisfied the legislature's political goals while also producing a significantly greater racial balance.[534] Plaintiffs' racial gerrymandering claim failed, in part because they failed to make that showing.[535] The Court also remanded the vote dilution claim on the ground that the lower court had failed to apply the proper constitutional standard: a "purpose and effect" of diluting minority votes.[536]

Although Section 2 can still be defended as a remedy for intentional discrimination by the legislature, *Alexander* might make that more difficult.[537] Of course, Congress is not bound by the same standards as private litigants in showing intentional discrimination by the legislature. But if the Court were to require evidence of racial (not just political) discrimination to justify Congress's exercise of its enforcement powers, that would create a significant problem. It

526. *Boerne*, 521 U.S. at 520.

527. 602 U.S. 1 (2024).

528. *See id.* at 18–24.

529. *See supra* notes 464–55 and accompanying text.

530. S.C. State Conf. of the NAACP v. Alexander, 649 F. Supp. 3d 177, 197–98 (D.S.C. 2023).

531. *Alexander*, 602 U.S. at 7.

532. *Id.* at 6.

533. *Id.* at 7–9.

534. *Id.* at 4.

535. *Id.* at 35–36.

536. *Id.* at 39.

537. For a discussion regarding the difficulties posed by the Court's decision in *Alexander v. South Carolina State Conference of the NAACP*, see Michael J. Pitts, *Underruling Voting Rights*, 56 N.M. L. REV. (forthcoming 2026) (arguing that the Court's vote dilution and racial gerrymandering jurisprudence are complicated by decisions like *Alexander* because these decisions act as an "under-the-table overruling," also referred to as "underruling," in which "the Court effectively gut[s] a core aspect of some . . . precedent without confessing it [is] doing so" (alterations in original)).

still might be possible to show a history and pattern of intentional race discrimination by legislative bodies, but it would be more difficult.

Milligan thus highlights the necessity of identifying the constitutional wrongs that Section 2 remedies, while *Alexander* elevates the value of supplementing the conventional answer of intentional discrimination by legislative bodies. If racist voting is acknowledged as a distinct constitutional wrong, it provides an additional justification for Section 2. And in at least one key respect, Section 2 is better tailored to address the constitutional wrong of intentional vote discrimination by voters than by legislators.

As discussed in Part I, *Gingles* put racial polarization at the center of the Section 2 vote dilution inquiry, the focus of two of its three preconditions (a politically cohesive minority group and White bloc voting).[538] Although racial polarization is not the same as racist voting, it is a much closer proxy for racist voting than for intentional discrimination by legislative bodies. At best, racial polarization provides an incentive for legislators to draw districts in a way that dilutes minority votes. It does not demonstrate that they have actually done so. Some of the other factors that are part of Section 2's totality of circumstances standard are better proxies for intentional discrimination by legislators—a history of discrimination by public officials or their unresponsiveness to minority communities, for example. But racial polarization, the question at the very heart of *Gingles*'s vote dilution standard, is more closely related to intentional discrimination by voters than by legislators.

Again, my point is not to argue against Section 2's constitutionality as a remedy for intentional discrimination *by legislators* but rather to argue that it is also justified as a remedy for intentional discrimination *by voters*. That is true whether the more lenient *Katzenbach* standard or the more restrictive *Boerne* standard applies.[539] Recall that the *Katzenbach* cases, borrowing from *McCulloch,*

538. Thornburg v. Gingles, 478 U.S. 30, 56 (1986).

539. There is a now-substantial body of legal scholarship arguing that Congress has greater authority to enforce voting rights than other constitutional rights. Professor Crum argued that Congress's Fifteenth Amendment authority should be viewed as significantly broader than its Fourteenth Amendment authority, given that empowering Congress to protect voting rights was one of the Reconstruction Framers' main goals. Crum, *Superfluous*, *supra* note 419, at 1553–55; *see also* Crum, *supra* note 39, at 326–30 (arguing that Section 2's prohibition of racial vote dilution falls within Congress's Fifteenth Amendment enforcement authority, even if we view racial bloc voting as "private action"). Franita Tolson argued that the Fourteenth Amendment empowers Congress to guard against abridgment or denial of the vote through means that are less restrictive than the penalty on representation that Section 2 of that Amendment requires (but Congress never imposed). Tolson, *supra* note 419, at 384–85 (2014); *see also* Franita Tolson, *What Is Abridgment?: A Critique of Two Section Twos*, 67 ALA. L. REV. 433, 458 (2015) (arguing that the Fourteenth and Fifteenth Amendments should be read together to provide broad enforcement authority over voting rights). *But see* Crum, *Superfluous*, *supra* note 419, at 1618–19 (disagreeing with Professor Tolson's argument that the Reconstruction Framers meant to give Congress the power to legislate voting rights through the Fourteenth Amendment). And Jack Balkin has argued that, given the murkiness of state action doctrine, Congress should be understood to have authority to recognize state action in places where the Supreme Court has not. Balkin, *supra* note 482, at 1856–60. While this Article does not depend on acceptance of these arguments, it is stronger if Congress has more latitude to remedy voting rights violations than other constitutional violations, especially if Congress has

required only a rational relationship between means and ends.[540] If racially discriminatory voting is recognized as a constitutional wrong, that standard is easily achieved. Section 2's results test as construed in *Gingles*, focusing as it does on racial polarization, bears a rational relationship to addressing the effects of racist voting. It provides a means by which a minority group can elect representatives of choice in circumstances where White bloc voting would otherwise prevent that from happening.

Under the *Boerne* standard, recognition of racist voting as a constitutional wrong provides even greater value to Section 2's defense. For prophylactic statutes like Section 2, the first step in that analysis is to identify with precision the constitutional rights that the legislation protects.[541] I have argued that Section 2's prohibition on racial vote dilution protects the right to be free from intentional race discrimination by voters that affects election results, as well as the already-recognized right to be free from intentional discrimination by legislators.[542] The next step is to determine whether there is a "history and pattern" of constitutional violations.[543] As discussed in Part I, there is substantial evidence of intentional race discrimination by voters that, in the absence of remedial legislation, would prevent minority voters from electing their preferred candidates.[544] That problem was front and center when Congress amended Section 2 of the VRA in 1982 to adopt the "results" language.[545] Moving to the last step, Section 2's results standard (as construed in *Gingles*) is a congruent and proportional remedy for racist voting that would otherwise impede the minority group from electing their representatives of choice.[546] With its focus on racial polarization, that standard is more closely tailored to addressing intentional discrimination by voters than by legislators.

The fact that the Court has not yet held racist voting to be a constitutional wrong is no barrier to it being considered an additional constitutional

authority to find state action in circumstances where the Court has not. *See* Crum, *Superfluous*, *supra* note 419, at 1627–30 (arguing that the VRA is on firmer constitutional ground if *Katzenbach*, rather than *Boerne*, furnishes the constitutional standard); Tolson, *supra* note 419, at 428–29 (explaining how the *Katzenbach* cases give Congress more latitude in enforcing voting rights).

540. South Carolina v. Katzenbach, 383 U.S. 301, 326–27 (1966).

541. Bd. of Trs. v. Garrett, 531 U.S. 356, 336–37 (2001).

542. *See supra* Section III.C.

543. *See Garrett*, 531 U.S. at 368.

544. *See supra* Part I.

545. A detailed excavation of the legislative history of the 1982 VRA amendments, adopting the "results" language, is beyond the scope of this Article. For present purposes, it should be noted that Congress's main focus was on how radically *Bolden* had negatively affected vote dilution litigation and on whether its intent requirement should be replaced with an effects-based standard. *See* Thomas M. Boyd & Stephen J. Markman, *The 1982 Amendments to the Voting Rights Act: A Legislative History*, 40 WASH. & LEE L. REV. 1347, 1355–56, 1366, 1388–1420 (1983). In arguing for a restoration of the *White-Zimmer* factors, proponents of this language focused on how difficult it was to prove intentional discrimination by legislative bodies. Accordingly, they advocated for a standard that would address racially discriminatory voter behavior and its concomitant effects on minority representation. *See id.* at 1397, 1400.

546. *See Garrett*, 531 U.S. at 357, 374 (stating that the remedy imposed by Congress must be congruent and proportional to the targeted violation); *see also supra* Part I.

justification for Section 2. The Court has never addressed the question of whether intentional race discrimination by voters violates the Fourteenth or Fifteenth Amendments. It has neither accepted nor rejected the proposition for which this Article argues. Whether racist voting can serve as a justification for Section 2 is therefore different from a case like *Boerne*, in which Congress sought to interpret the Constitution in a way that was at odds with the Court's interpretation.[547] In *Boerne*, Congress sought to enforce a constitutional right that the Court held did not exist.[548] Here, by contrast, there is no conflict with binding precedent because the Supreme Court has not addressed the question of whether intentional discrimination by voters violates the Constitution.

In sum, the most significant effect of understanding racist voting as a constitutional wrong is to augment Congress's enforcement authority. Specifically, it strengthens the argument that Section 2 is a permissible exercise of Congress's enforcement authority under the Fourteenth and Fifteenth Amendments. Given its focus on racial polarization by voters, as construed in *Gingles* and its progeny, Section 2 is well-tailored to address this constitutional wrong.

CONCLUSION

Racist voting is real. A large and growing body of social science research demonstrates that racial attitudes, including both explicit and implicit bias, affect voting choices. Despite this evidence, legal scholars have almost entirely overlooked the constitutional questions surrounding racist voting. This Article has argued that racist voting is, paradoxically, *both* constitutionally protected and unconstitutional. On an individual level, voters' decisions to cast their votes for whatever reasons move them—including racist motivations—are effectively insulated from scrutiny. That is due to a combination of the now-ubiquitous secret ballot and constitutional protection against compelled disclosure. On a systemic level, however, racist voting may violate the Fourteenth and Fifteenth Amendments. Because the collective action of the electorate in selecting public officials constitutes state action, intentional race discrimination by voters should be deemed a constitutional violation, where it is sufficiently prevalent to affect an election result. That would be hard to prove (and even harder to remedy) in any particular election. But the real power of understanding racist voting as a constitutional wrong is that it would expand Congress's enforcement authority. With the constitutionality of Section 2 of the VRA likely to come back before the Court, this is a question of pressing importance. Recognizing racist voting as a constitutional wrong strengthens the argument that Section 2

547. City of Boerne v. Flores, 521 U.S. 507, 535–36 (1997).

548. *Id.* at 536.

is a permissible exercise of Congress's enforcement powers under the Fourteenth and Fifteenth Amendments.