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# The Irony of Intent: Statutory Interpretation and the Constitutionality of Section 2 of the Voting Rights Act

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## INTRODUCTION

Nearly two years ago, in *Shelby County v. Holder*,[1] the Supreme Court declared Section 4 of the Voting Rights Act of 1965[2] ("VRA") unconstitutional, rendering Section 5 of the statute impotent.[3] Section 5,[4] the so-called

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1. 133 S. Ct. 2612 (2013).
2. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended as 52 U.S.C.A. §§ 10101, 10301 to 10314 (West, Westlaw through P.L. 113-296)).
3. *Shelby Cnty.*, 133 S. Ct. at 2631.
4. 52 U.S.C.A. § 10304 (West, Westlaw through P.L. 113-296).

"preclearance" provision,[5] has played an extraordinarily important role in the history of voting rights enforcement, and many scholars doubted that the Court would go so far as to undermine it.[6] Though the decision contains declarations of judicial modesty, it is difficult not to read it as "portend[ing] a realignment in voting rights law and policy."[7] The *Shelby County* holding thus elevates the question of whether Section 2, the Act's other foundational provision, can survive a constitutional challenge that many experts have long anticipated,[8] but which now seems particularly urgent. The answer to that question turns on the Court's assessment of Section 2 as a constitutionally permissible remedy in light of its increasingly constricted holdings on congressional enforcement power.

This Article argues that Section 2 is a constitutionally sound exercise of Congress's enforcement power under the Reconstruction Amendments,[9] because, even when evaluated under the Court's most demanding cases, Section 2 is sufficiently tailored to remedy intentional constitutional violations. Whether Section 2 was designed to do so is doubtful.[10] However, as frequently interpreted throughout the lower courts, the provision remedies both intentional and unintentional discrimination in voting.[11]

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5. Under the preclearance regime of Section 5, either the Department of Justice or a three-judge panel of the U.S. District Court for the District of Columbia had to approve any change related to a voting qualification or prerequisite to voting for select jurisdictions. *Id.* § 10304(a).

6. *See, e.g.*, Richard L. Hasen, *Congressional Power to Renew the Preclearance Provisions of the Voting Rights Act After* Tennessee v. Lane, 66 OHIO ST. L.J. 177, 195 (2005) ("[I]t is not clear that the Court would have the stomach to overturn a renewed preclearance provision. The early voting rights cases are considered by many to be a high-water mark for the Court in fostering racial equality in this country.").

7. Guy Uriel-Charles & Luis Fuentes-Rohwer, *State's Rights, Last Rites, and Voting Rights*, 47 CONN. L. REV. 481, 486 (2014).

8. *See, e.g.*, Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 HARV. L. REV. 1663, 1674 (2001) ("The distinction between the constitutional claim, which requires proof of intent, and the statutory claim, which demands only proof of discriminatory results, will be quite important when the constitutionality of § 2 is challenged under *City of Boerne* [521 U.S. 507 (1997)].").

9. *See* Jack M. Balkin, *The Reconstruction Power*, 85 N.Y.U. L. REV. 1801, 1808–11 (2010) (providing background on the Reconstruction Amendments); A. Christopher Bryant, *The Pursuit of Perfection: Congressional Power to Enforce the Reconstruction Amendments*, 47 HOUS. L. REV. 579, 594–601 (2010) (same).

10. For instance, in amending Section 2 in 1982, the applicable senate report expressly rejected the requirement that plaintiffs prove intentional discrimination. S. REP. NO. 97-417, at 17–19 (1982), *as reprinted in* 1982 U.S.C.C.A.N. 177, 194–96.

11. *See infra* Part II.

Nonetheless, this remedy has not prevented its opponents from calling for judicial review on the grounds that it is unconstitutionally broad.[12]

Behind these efforts lurk decades-old, politically-charged arguments about the limits of congressional authority.[13] Moreover, the Act's opponents have long expressed constitutional objections to its codification of a "discriminatory effects" standard.[14] These opponents have revived their arguments, with regard to Section 2 in particular, in recent months.[15] Thus, understanding the menu of arguments both supporting and opposing Section 2's constitutionality is vitally important.

The power-conferring provisions of the Constitution authorizing the VRA are Section 8 of Article I, Section 5 of the Fourteenth Amendment, and Section 2 of the Fifteenth Amendment.[16] Following the Court's

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12. *See* Roger Clegg & Hans A. von Spakovsky, *"Disparate Impact" and Section 2 of the Voting Rights Act*, HERITAGE FOUND. (Mar. 17, 2014), http://report.heritage.org/lm119 [https://perma.cc/5235-LXKG].

13. Pamela S. Karlan, *The Supreme Court 2011 Term — Foreword: Democracy and Disdain*, 126 HARV. L. REV. 1, 10 (2012) ("Forty years ago, conservatives quite deliberately set out to change how the Constitution is interpreted and enforced. They set their sights on key doctrines . . . in particular the Supreme Court's expansive constructions of congressional authority under the power to regulate commerce, the taxing power, the spending power, and the enforcement powers in the Reconstruction Amendments." (footnotes omitted)).

14. Dawn E. Johnsen, *Ronald Reagan and the Rehnquist Court on Congressional Power: Presidential Influences on Constitutional Change*, 78 IND. L.J. 363, 405 (2003) (describing the Reagan Administration's written mandate to oppose *City of Rome v. United States*, 446 U.S. 156 (1980), because the Court "upheld a provision of the Voting Rights Act of 1965 that prohibited certain voting practices that had a discriminatory racial impact, without requiring a showing of purposeful discrimination"); *see also* Reva B. Siegel, *The Supreme Court 2012 Term — Foreword: Equality Divided*, 127 HARV. L. REV. 1, 23 (2013) ("During the 1980s, the newly articulated constitutional distinction between purpose and effects became a lightning rod for debates about the proper reach of civil rights legislation, and a ground on which conservatives would call for limiting the ways representative government could respond to discrimination claims.").

15. Clegg & von Spakovsky, *supra* note 12. Clegg and von Spakovsky state:

> [T]he two Reconstruction amendments ban state disparate *treatment* on the basis of race but not a mere disparate *impact* on that basis. Since Section 2 of the Voting Rights Act purports to prohibit state action that has a racially disproportionate "result" or "effect" (disparate impact) but did *not* stem from a racially discriminatory "purpose" or "intent" (disparate treatment), Congress, by enacting this provision, arguably exceeded its enforcement authority to pass "appropriate legislation" under Section 5 of the Fourteenth Amendment and Section 2 of the Fifteenth Amendment.

*Id.* (manuscript 4) (emphasis in original).

16. U.S. CONST. art. I, § 8; U.S. CONST. amend. XIV, § 5; U.S. CONST. amend. XV, § 2; *see also* Katzenbach v. Morgan, 384 U.S. 641, 651–52 (1966) (Fourteenth); South Carolina v. Katzenbach, 383 U.S. 301, 325–26 (1966) (Fifteenth).

decision in *City of Boerne v. Flores*,[17] Congress's enforcement power under the Fourteenth and Fifteenth Amendments is limited to enacting preventive and remedial legislation that demonstrates "a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."[18] Though the exact parameters of this requirement are unsettled, the principal argument against Section 2's constitutionality is that the provision's codification of a discriminatory effects standard renders it too expansive and exceeds what can fairly be considered "appropriate legislation."[19] In other words, opponents of Section 2 argue that because the Fourteenth and Fifteenth Amendments prohibit only state action marred by "discriminatory intent,"[20] Section 2 may not prohibit state action for which discriminatory intent is absent.[21]

However, many lower court judges have expressly applied a discriminatory intent standard in Section 2 cases for some time.[22] By narrowing the range of the discriminatory effects evaluation, these judges have, ironically, bolstered the case for Section 2's constitutionality. In short, the frequent use of a discriminatory intent standard more likely renders the provision congruent and proportional under a potential *Boerne* analysis.

The observation that a discriminatory intent standard is being employed in Section 2 cases is not new. Writing in 1985, Richard Engstrom cautioned against the practice, describing it as "a very ominous development[,]" and stating that the "reincarnation of the intent test . . . unquestionably conflicts with Congress's express purpose, in amending [S]ection 2, of creating a results-based, rather than intent-based, adjudication standard in vote dilution litigation."[23] Subsequent articles have tracked subsets of Section

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17. 521 U.S. 507 (1997).

18. *Id.* at 520.

19. The Fourteenth and Fifteenth Amendments contain similar language: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5; U.S. CONST. amend. XV, § 2.

20. *See* Washington v. Davis, 426 U.S. 229, 242 (1976) (noting that "[n]evertheless, we have not held that a law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another. Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution. Standing alone, it does not trigger the rule that racial classifications are to be subjected to the strictest scrutiny and are justifiable only by the weightiest of considerations." (citation omitted)).

21. *See* Clegg & von Spakovsky, *supra* note 12 (manuscript at 4).

22. *See infra* Part II.

23. Richard L. Engstrom, *The Reincarnation of the Intent Standard: Federal Judges and At-Large Election Cases*, 28 HOW. L.J. 495, 509 (1985).

2 cases that also reflect this practice.[24] This Article takes a more comprehensive approach, exploring all Section 2 cases in which the debate over the appropriate evidentiary standard was expressly discussed in the opinion, and discussing in detail the implications of the findings for Section 2's constitutionality.

Part I of this Article provides an overview of the VRA, with a particular focus on Section 2, the operative provision of interest. This Part then considers *City of Boerne* and its progeny, cases delimiting congressional enforcement power under Section 5 of the Fourteenth Amendment, and the implications of these cases for Section 2's constitutional viability. Part II empirically investigates lower court judges' propensity to favor the use of a discriminatory intent standard in Section 2 cases. Part III relates the findings to the question of Section 2's constitutionality.

## I. CONTEXTUALIZING THE VOTING RIGHTS ACT AND CONGRESS'S FOURTEENTH AMENDMENT ENFORCEMENT POWER

This Part provides an overview of the VRA, with an emphasis on Section 2, before considering *City of Boerne* and other relevant cases pertaining to Congress's Fourteenth Amendment enforcement power. This background will aid in clarifying how lower court judges' decisions in Section 2 cases inform the provision's constitutionality.

### *A. The Voting Rights Act and Vote Dilution Doctrine*

The VRA proscribes the denial or abridgement of the right to vote on the basis of race, color, or language minority status.[25] Though the precise motivations for the Act's passage are contested,[26] its immediate impact was the elimination of various tests and devices used to exclude African

24. *See, e.g.*, Randolph M. Scott-McLaughlin, *The Voting Rights Act and the "New and Improved" Intent Test: Old Wine in New Bottles*, 16 TOURO L. REV. 943, 960–78 (2000); Elizabeth M. Ryan, Note, *Causation or Correlation? The Impact of* LULAC v. Clements *on Section 2 Lawsuits in the Fifth Circuit*, 107 MICH. L. REV. 675, 696–706 (2009).

25. *See* 52 U.S.C.A. § 10101(a) (West, Westlaw through P.L. 113-296).

26. *See* JOHN D. SKRENTNY, THE MINORITY RIGHTS REVOLUTION 21 (2002) (arguing that the passage of civil rights statutes was based on American national security interests); Chandler Davidson, *The Voting Rights Act: A Brief History*, *in* CONTROVERSIES IN MINORITY VOTING 14 n.33 (Bernard Grofman & Chandler Davison eds., 1992) ("[President] Johnson's motives were probably a mixture of genuine concern for voting rights and a fear that the Civil Rights Act of 1964 had so alienated white southerners from the Democratic party that only a vastly increased black vote could offset the party's losses.").

Americans from exercising the franchise.[27] The expectation of its supporters was that voting equality would engender political equality more generally, and aid in the political integration of African Americans.[28] Viewed accordingly, the Act has been immensely successful and holds a largely uncontroversial position as the most impactful civil rights statute in American history.[29] Its temporary sections were reauthorized by large voting margins in 1970, 1975, 1982, and 2006.[30]

Section 2, the relevant provision for the purposes of this Article, does not require reauthorization.[31] It forbids any "standard, practice, or procedure . . . which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color."[32] Yet unlike the now forceless Section 5, Section 2 places the primary evidentiary burden on plaintiffs.[33] Section 2 is the nucleus of modern private voting rights litigation.[34] Its history is sensibly demarcated before and after 1982, the year in which Congress amended the original Section 2 to eliminate the requirement that plaintiffs show evidence of discriminatory intent to succeed.[35] A brief overview of the evolution of voting rights litigation will illuminate exactly why 1982 was a critical juncture.

The "first generation" of voting rights litigation sought simple registration and ballot access for minority voters.[36] Although successful at eliminating the

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27. *See generally* ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 263–66 (2000) (discussing the Voting Rights Act of 1965 in its historical context).

28. *See* Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success*, 89 MICH. L. REV. 1077, 1081 (1991).

29. Richard H. Pildes, *Introduction*, *in* THE FUTURE OF THE VOTING RIGHTS ACT xi (David L. Epstein et al. eds., 2006) ("The Voting Rights Act [] is a sacred symbol of American democracy. The act, the most effective civil rights statute ever enacted in the United States, was the last significant stage in the nearly universal formal inclusion of all adult citizens in American democracy.").

30. Shelby Cnty. v. Holder, 133 S. Ct. 2612, 2620–21 (2013).

31. *See* 52 U.S.C.A. § 10301 (West, Westlaw through P.L. 113–296).

32. *Id.* § 10301(a).

33. *See id.* § 10301(b).

34. Adam B. Cox & Thomas J. Miles, *Judicial Ideology and the Transformation of Voting Rights Jurisprudence*, 75 U. CHI. L. REV. 1493, 1501 (2008) ("After 1982, nearly every vote dilution challenge to an electoral practice included a claim that the practice violated § 2 . . . .").

35. Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 3, 96 Stat. 131, 134 (codified at 42 U.S.C. § 1973(a) (2000)); Thomas M. Boyd & Stephen J. Markman, *The 1982 Amendments to the Voting Rights Act: A Legislative History*, 40 WASH. & LEE L. REV. 1347, 1356–57, 1425 (1983).

36. Samuel Issacharoff, *Polarized Voting and the Political Process: The Transformation of Voting Rights Jurisprudence*, 90 MICH. L. REV. 1833, 1838–39 (1992) ("The 'first generation' of voting rights challenges forced the removal of the open barriers to black registration and the casting of ballots." (footnote omitted)); Cox & Miles, *supra* note 34, at 1498 ("The first generation of

most blatant barriers to voting, first generation cases provoked intricate attempts by hostile jurisdictions—such as the rearrangement of electoral district lines, or the selective use of at-large or multimember electoral districts—to weaken the influence of minority votes.[37] Many jurisdictions modified electoral structures for just this purpose.[38] These efforts at "vote dilution"[39] precipitated the "second generation" of litigation, which sought elimination of these more sophisticated discriminatory schemes.

Initially understood as simply a statutory analogue to the Fifteenth Amendment, Section 2 was not an important part of early voting rights cases.[40] Plaintiffs premised their cases on the Fourteenth and Fifteenth Amendments, and courts were amenable to such claims.[41] For example, in *White v. Regester*,[42] the Court found a Texas apportionment scheme dilutive and in violation of the Fourteenth Amendment.[43] The decision ratified the district court's "intensely local appraisal" and use of a fact-intensive "totality of the circumstances" approach to resolving vote dilution cases.[44] It made specific mention of several factors that courts hearing future cases should consider, including: the history of official racial discrimination in the area, the past use of racial campaign tactics, the use of numbered-place laws, a lack of minority elected officials, and other exclusionary election rules.[45]

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constitutional litigation concerned claims of 'vote denial'—claims that particular legal rules and practices unlawfully denied minority voters access to the ballot.").

37. Issacharoff, *supra* note 36, at 1839–42.

38. Pamela S. Karlan, *Maps and Misreadings: The Role of Geographic Compactness in Racial Vote Dilution Litigation*, 24 HARV. C.R.-C.L. L. REV. 173, 184 (1989) ("Starting in 1966, in the wake of the massive influx of black voters brought about by the [Voting Rights] Act's registration machinery, jurisdiction after jurisdiction adopted measures designed to minimize the impact of the increased black vote.").

39. Vote dilution has been defined as "a process whereby election laws or practices, either singly or in concert, combine with systematic bloc voting among an identifiable majority group to diminish or cancel the voting strength of at least one minority group." Davidson, *supra* note 26, at 24.

40. Gerken, *supra* note 8, at 1671 n.9 ("For many years, § 2 was thought merely to mirror the requirements of the Fifteenth Amendment, and plaintiffs typically brought dilution claims under both the Voting Rights Act and the Constitution."); Davidson, *supra* note 26, at 38 (noting that "Section 2 . . . had served as little more than a symbolic preamble to the operative sections, in effect restating the Fifteenth Amendment").

41. *See, e.g.*, Whitcomb v. Chavis, 403 U.S. 124 (1971); White v. Regester, 412 U.S. 755 (1973).

42. 412 U.S. 755.

43. *Id.* at 769–70.

44. *Id.*

45. *Id.* at 766–67; *see also* Karlan, *supra* note 38, at 186 n.53 ("The reason why numbered-place laws are often found to be racially dilutive is that they preclude single-shot voting, the technique by which minority voters enhance their ability to elect their preferred candidate in an at-large system.").

*Zimmer v. McKeithen*,[46] a Fifth Circuit case decided the same year, similarly found Louisiana's system for electing police jurors and school board members in violation of the Fourteenth and Fifteenth Amendments.[47] The decision further "refined and systematized the criteria" for deciding vote dilution cases.[48] Four factors were designated as primary in vote dilution inquiries: (1) "a lack of access to the process of slating candidates"; (2) "the unresponsiveness of [elected officials] to their [minority's needs]"; (3) "a tenuous state policy underlying the preference for multi-member or at-large districting"; and (4) "the existence of past discrimination . . . [which] precludes effective participation in the election system."[49]

*Regester* and *Zimmer* were the precursors of modern vote dilution doctrine. The evidentiary factors that those cases emphasized (the "*Regester–Zimmer* factors") are still relevant in determining Section 2's constitutionality, to the extent that they evince discriminatory intent. However, the degree to which they should be interpreted as indicative of discriminatory intent has always been unclear. Consider the Court's decision in *City of Mobile v. Bolden*,[50] a case almost invariably described as a major setback for voting rights advocates.[51] The plurality decision held that vote dilution suits premised on the Fourteenth or Fifteenth Amendments required plaintiffs to show proof of discriminatory intent.[52] Yet, evidence of the *Regester–Zimmer* factors was deemed insufficient to meet this requirement.[53] The decision also interpreted Section 2 as "intended to have an effect no different from that of the Fifteenth Amendment itself," thereby eliminating the possibility that Section 2 might provide an independent basis for vote dilution claims.[54] The decision was widely maligned. As noted by

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46. 485 F.2d 1297 (5th Cir. 1973) (en banc).
47. *Id.* at 1305–07.
48. Davidson, *supra* note 26, at 34.
49. *Zimmer*, 485 F.2d at 1305.
50. 446 U.S. 55 (1980).
51. *See, e.g.*, Issacharoff, *supra* note 36, at 1846–47; Luis Fuentes-Rohwer, *The Future of Section 2 of the Voting Rights Act in the Hands of a Conservative Court*, 5 DUKE J. CONST. L. & PUB. POL'Y 125, 130–31 (2010); BERNARD GROFMAN, LISA HANDLEY & RICHARD G. NIEMI, MINORITY REPRESENTATION AND THE QUEST FOR VOTING EQUALITY 36 (1992) ("By sharply limiting the inferences that the lower courts were allowed to draw from the evidence and by treating each of the facts in isolation rather than as part of a whole, the *Mobile* court rendered discriminatory impact largely irrelevant and essentially overturned the [*Regester–Zimmer*] 'totality of the circumstances' test.").
52. *Bolden*, 446 U.S. at 62. *But see* Bertrall L. Ross II, *The Representative Equality Principle: Disaggregating the Equal Protection Intent Standard*, 81 FORDHAM L. REV. 175, 192–94 (2013) (suggesting that *Bolden* did not hold that evidence of discriminatory intent, at least as conventionally understood, was required).
53. *Bolden*, 446 U.S. at 73–74.
54. *Id.* at 60–61.

one expert, "the Supreme Court's *Bolden* decision changed what had been a formidable burden of proof for plaintiffs to an impossible one in many instances."[55]

*Bolden* catalyzed an aggressive lobbying effort by civil and voting rights organizations in advance of the 1982 VRA reauthorization period.[56] Consequently, Congress amended Section 2 to prohibit all manner of voting practices that result in the denial or abridgement of minority votes, thereby codifying a discriminatory effects standard.[57] As summarized by Adam Cox and Tom Miles:

> Prior to 1982, the provision prohibited states from using any voting practice "to deny or abridge" minority voting rights. The 1982 Amendment changed § 2's language from active to passive voice, so that it prohibited states from using any voting practice "in a manner which results in a denial or abridgement of" minority voting rights.[58]

The amendments also elevated the importance of electoral outcomes in vote dilution cases. The statute now states:

> A violation of [this subsection] is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens . . . in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.[59]

The Senate produced a supplemental report outlining the factors courts should regard as probative.[60] Within the report, the *Regester–Zimmer* factors were both reemphasized and supplemented.[61] Courts were advised to assess: (1) the history of official discrimination in the jurisdiction; (2)

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55. Chandler Davidson, *Minority Vote Dilution: An Overview*, *in* MINORITY VOTE DILUTION 17 (Chandler Davidson ed., 1984); *see also* GROFMAN ET AL., *supra* note 51, at 36.

56. *See* Dianne M. Pinderhughes, *Black Interest Groups and the 1982 Extension of the Voting Rights Act*, *in* BLACKS AND THE AMERICAN POLITICAL SYSTEM 203, 214–15 (Huey L. Perry & Wayne Parent eds., 1995).

57. *See* 52 U.S.C.A. § 10301(a) (West, Westlaw through P.L. 113–296).

58. Cox & Miles, *supra* note 34, at 1499 n.25; *see also* RICHARD M. VALELLY, THE TWO RECONSTRUCTIONS: THE STRUGGLE FOR BLACK ENFRANCHISEMENT 215–18 (2004).

59. 52 U.S.C.A. § 10301(b).

60. S. REP. NO. 97-417 (1982).

61. *Id.* at 28–29.

the existence of racially polarized voting; (3) the use of large districts, majority vote requirements, anti-single shot provisions, or other schemes that enhance the opportunity for discrimination; (4) the denial of minority groups' access to slating process; (5) the lingering effects of past discrimination; (6) the use of racial appeals in political campaigns; (7) the extent to which members of the minority group have been elected to public office; (8) the lack of responsiveness on the part of elected officials to minority groups' needs; and (9) whether the purported state policy underlying the scheme at issue is tenuous.[62] While informative, the list was not meant to be exclusive.

The Supreme Court first interpreted the amended Section 2 in the 1986 case *Thornburg v. Gingles*.[63] Justice Brennan's opinion established the modern framework for judging Section 2 vote dilution claims, introducing a three-part test that still governs.[64] Under the *Gingles* test, plaintiffs must first prove that they constitute a sufficiently large and geographically compact voting bloc.[65] This requirement was intended to confirm that a majority-minority electoral district might conceivably be ordered as a remedy. Second, plaintiffs must prove that they are politically cohesive.[66] Political cohesion is a vague concept. In this context, it is generally understood to mean that minority group members have voted similarly in the past.[67] Third, plaintiffs must prove that "the white majority votes sufficiently as a bloc to enable it" to impede their success in electing preferred candidates.[68]

These three preconditions "came to be seen as the linchpin of the liability inquiry."[69] However, when the preconditions are satisfied, courts are technically still expected to perform a totality of the circumstances inquiry and consider the various factors outlined in the Senate's supplemental report. In actuality, the three preconditions have typically proved dispositive.[70] The test—specifically, the second and third preconditions, and the subsequent totality of the circumstances inquiry—probes the existence and effects of racially polarized voting, an evidentiary element that has been the principal means by which a discriminatory intent standard has been applied in Section 2 cases.[71] To date, the Court has failed to directly address the question of

62. *Id.*
63. 478 U.S. 30 (1986).
64. *Id.* at 50–51.
65. *Id.* at 50.
66. *Id.* at 51.
67. GROFMAN ET AL., *supra* note 51, at 67.
68. *Gingles*, 478 U.S. at 51.
69. Cox & Miles, *supra* note 34, at 1501.
70. *Id.* at 1500.
71. *See infra* Part II; Engstrom, *supra* note 23, at 500–01.

Section 2's constitutionality.[72] If and when the Court does, it is likely to begin its inquiry with *City of Boerne*.

### *B. The Burden of* City of Boerne

Section 5 of the Fourteenth Amendment authorizes Congress to enforce the Amendment's substantive provisions by appropriate legislation.[73] In *City of Boerne*, the Court outlined the limits of that authority.[74] The case involved the constitutionality of the Religious Freedom Restoration Act of 1993 ("RFRA"), a statute designed by Congress to provide relief when religious liberties were "substantially burdened" by laws of general applicability.[75] The statute was passed in response to the Court's decision in *Employment Division v. Smith*,[76] which held that the First Amendment's Free Exercise Clause does not entitle individuals to exemptions from "neutral, generally applicable laws."[77] The neutral, generally applicable law at issue in *City of Boerne* was a city ordinance designed to preserve certain historic landmarks in Boerne, Texas.[78] The ordinance was the basis for the denial of a permit requested by a local parish to enlarge a church.[79] The local Archbishop relied on RFRA to challenge the permit denial, claiming the ordinance violated the parish's free exercise rights.[80]

The Court disagreed, finding RFRA unconstitutionally broad and deeming the statute "so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior."[81] This language is key. The decision emphasizes the distinction between remedial or preventive legislation, and substantive or definitional legislation. The former types are permissible, but the latter types are not:

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72. *See* Bush v. Vera, 517 U.S. 952, 990 (1996) (O'Connor, J., concurring); Johnson v. DeGrandy, 512 U.S. 997, 1028–29 (1994) (Kennedy, J., concurring); Chisom v. Roemer, 501 U.S. 380, 418 (1991) (Kennedy, J., dissenting).

73. U.S. CONST. amend. XIV, § 5.

74. 521 U.S. 507, 520 (1997); *see also* Pamela S. Karlan, *Two Section Twos and Two Section Fives: Voting Rights and Remedies After* Flores, 39 WM. & MARY L. REV. 725, 727 (1998) ("The question at the heart of *Flores* was Congress's power to forbid state practices that have only a disparate impact in the service of enforcing constitutional provisions that would directly forbid only purposeful discrimination.").

75. 42 U.S.C. §§ 2000bb to 2000bb–4 (2012).

76. 494 U.S. 872 (1990).

77. *Id.* at 881.

78. *City of Boerne*, 521 U.S. at 512.

79. *Id.*

80. *Id.* at 517.

81. *Id.* at 532.

> Congress does not enforce a constitutional right by changing what the right is. It has been given the power "to enforce," not the power to determine what constitutes a constitutional violation. Were it not so, what Congress would be enforcing would no longer be, in any meaningful sense, the "provisions of [the Fourteenth Amendment]."[82]

Congress, in other words, may not independently define constitutional violations. Congress must therefore ensure "a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."[83]

What *City of Boerne* portends for Section 2's constitutionality is vexing. The amended provision's codification of a discriminatory effects standard bears resemblance to the RFRA, and is thus vulnerable to the Court's skepticism regarding laws that "dispense with proof of deliberate or overt discrimination and instead concentrate on a law's effects."[84] Yet the *City of Boerne* decision cited with approval several prior decisions upholding the VRA's constitutionality.[85] For example, the decision cited *South Carolina v. Katzenbach*,[86] the first case to challenge the VRA's suspension of literacy tests and imposition of a preclearance regime, as emblematic of the Court's willingness to defer to Congress when presented with a record documenting "the widespread and persisting deprivation of constitutional rights."[87]

Similarly, the *City of Boerne* opinion mentioned the Court's decision in *Katzenbach v. Morgan*,[88] upholding a provision of the VRA that suspended the use of literacy tests for those who had completed the sixth grade in non-English instruction schools in Puerto Rico.[89] The *City of Boerne* Court extensively quoted *Oregon v. Mitchell*,[90] a case in which the Court upheld Congress's five-year nationwide ban on literacy tests, as another instance of congressional primacy when remedying rampant discrimination.[91] In addition, the *City of Boerne* decision commended *City of Rome v. United States*,[92] in which the Court upheld a seven-year extension of the preclearance regime, for the deference afforded to

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82. *Id.* at 519.
83. *Id.* at 520.
84. *Id.* at 517.
85. *See, e.g.*, *id.* at 526.
86. 383 U.S. 301 (1966).
87. *City of Boerne*, 521 U.S. at 526.
88. 384 U.S. 641 (1966).
89. *City of Boerne*, 521 U.S. at 518, 536; *Katzenbach*, 384 U.S. at 643–47.
90. 400 U.S. 112 (1970).
91. *City of Boerne*, 521 U.S. at 526; *Oregon*, 400 U.S. at 118.
92. 446 U.S. 156 (1980).

Congress to "counter the perpetuation of 95 years of pervasive voting discrimination."[93]

The *City of Rome* opinion warrants closer examination. At issue in the case were a number of changes to the governmental structure of the City of Rome, Georgia, as well as 60 annexations the city failed to submit for preclearance.[94] The Attorney General refused to approve the changes and some of the annexations, prompting the city to challenge the constitutionality of Section 5 of the VRA, which the city alleged "may not be read as prohibiting voting practices that have only a discriminatory effect."[95] More specifically, the city argued that Section 5, to the extent that it outlawed voting practices with only a discriminatory effect, exceeded Congress's power to enforce the Fifteenth Amendment.[96]

The Court flatly rejected the city's arguments, affirming Congress's Fifteenth, and by extension Fourteenth, Amendment power to legislate against prospective discrimination: "Congress could rationally have concluded that, because electoral changes by jurisdictions with a demonstrable history of intentional racial discrimination in voting create the risk of purposeful discrimination, it was proper to prohibit changes that have a discriminatory impact."[97] Thus, the majority opinion stands for the proposition that the mere risk of purposeful discrimination, as determined in the voting rights context by assessing the foreseeable discriminatory effects of an electoral change, justifies congressional action.

Justice Rehnquist's dissenting opinion accused the majority of abdicating its institutional authority.[98] In his view, Section 5's intrusion into state and local political affairs would be justifiable only if intentional discrimination had been clearly shown.[99] Absent such a showing, he claimed, the provision's prohibition of changes to the localities' governmental structures was effectively a Constitutional amendment.[100] Justice Rehnquist took pains to distinguish the facts of the case from the Court's prior precedents—specifically *Oregon*.[101] In *Oregon*, he noted, the Court upheld the nationwide ban on literacy tests because of their inextricable relation to

93. *City of Boerne*, 521 U.S. at 526–27 (quoting *City of Rome*, 446 U.S. at 182).
94. *City of Rome*, 446 U.S. at 160–61. The entire State of Georgia was subject to the preclearance regime. *Id.* at 215–18.
95. *Id.* at 172.
96. *Id.* at 173.
97. *Id.* at 177.
98. *Id.* at 207 (Rehnquist, J., dissenting).
99. *Id.* at 209 (referring to the Court's obligation to "carefully scrutinize the alleged source of congressional power to intrude so deeply in the governmental structure of the municipal corporations created by some of the 50 States").
100. *Id.* at 210.
101. *See id.* at 215–16.

intentional discrimination,[102] and noted that "the disparate effects were traceable to the discrimination of governmental bodies."[103] Because, as he understood the record, the changes at issue in *City in Rome* were not comparably traceable to intentional discrimination, Justice Rehnquist would have found Section 5, insofar as it demanded preclearance for voting practices with only a discriminatory effect, unconstitutional.[104]

What can be concluded from *City of Rome* regarding Section 2's constitutionality? The majority opinion, and its favorable citation in *City of Boerne*, seems to offer a template of sorts for Section 2's supporters. However, much has changed since *City of Rome* was decided,[105] and multiple scholars have identified reasons why *City of Boerne*'s treatment of *City of Rome*'s majority opinion may not foretell a great deal.[106] Further, the Court's most recent VRA decisions—both of which concerned the preclearance provision of the statute—*Northwest Austin Municipal Utility District No. One v. Holder*[107] and *Shelby County*, indicate that the VRA is

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102. *Id.* at 215 ("The Court found the nationwide ban to be an appropriate means of effectively preventing purposeful discrimination in the application of the literacy tests as well as an appropriate means of remedying prior constitutional violations by state and local governments in the administration of education to minorities.").

103. *Id.* at 216.

104. *Cf. id.* at 219 ("[E]ven if this Court could find a remedial relationship between the prohibition of all state action with a disparate impact on black voting strength and the incidence of purposeful discrimination, this Court should exercise caution in approving the remedy in issue here absent purposeful dilution.").

105. *See* RICHARD L. HASEN, THE SUPREME COURT AND ELECTION LAW 125 (2003) ("Justice Rehnquist wrote his dissent in 1980, speaking only for himself and Justice Stewart. Times changed, however, and the Rehnquist theory has gained adherents in cases outside the Voting Rights Act. This recent history raises serious concerns about the constitutionality of the 1982 amendments to the Voting Rights Act . . . .").

106. *Id.* at 131 (noting that "*City of Rome* came before the Court's federalism revolution, and its reasoning perhaps would not command a majority today"); Fuentes-Rohwer, *supra* note 51, at 137 (noting that Justice Rehnquist's *City of Rome* dissent "commanded a majority within the Court for the first time in *City of Boerne*"); Luke P. McLoughlin, *Section 2 of the Voting Rights Act and* City of Boerne: *The Continuity, Proximity, and Trajectory of Vote-Dilution Standards*, 31 VT. L. REV. 39, 59 n.89 (2007) ("Crucially, despite the Court's approving discussion in *City of Boerne* of early VRA enforcement power decisions, those cases did not involve section 2."); Karlan, *supra* note 74, at 725–26 ("Justice Kennedy's [*City of Boerne*] opinion relied heavily on the Act as an exemplary illustration of congressional enforcement power under Section 5 of the Fourteenth Amendment. Yet the quartet of '[r]ecent' Voting Rights Act cases on which he relied were all decided at least seventeen years ago. In more contemporary cases involving the key provisions of the 1982 amendments to the Act, Justice Kennedy has explicitly left open the question of the Act's constitutionality.").

107. 557 U.S. 193 (2009).

not constitutionally sacrosanct in the eyes of at least five Justices.[108] Only time will tell whether future compositions of the Court will subscribe to *City of Boerne*'s praiseworthy discussion of the VRA.

Questions about Section 2's constitutionality lingered in the background of the Court's more recent decisions regarding congressional enforcement power under the Fourteenth Amendment as well.[109] Consider *Board of Trustees of the University of Alabama v. Garrett*.[110] At issue in the case was the question of whether employees of the State of Alabama were entitled to money damages under Title I of the Americans with Disabilities Act of 1990 ("ADA") for the State's failure to comply with the statute.[111] The congressional enforcement question, therefore, was whether the ADA unconstitutionally abrogated Alabama's Eleventh Amendment immunity.[112] The Court's analysis focused on the quality of the legislative record amassed by Congress and asked whether the record demonstrated "irrational state discrimination in employment against the disabled."[113]

The Court found the record wanting.[114] The examples of discrimination against the disabled on which Congress relied were, in the Court's view, inconclusive in establishing a widespread problem.[115] Most troublesome for Section 2's viability was the decision's statement regarding the weight to be afforded to evidence of discriminatory effects: "Although disparate impact may be relevant evidence of racial discrimination, such evidence alone is insufficient even where the Fourteenth Amendment subjects state action to strict scrutiny."[116] Equally disconcerting was Justice Kennedy's concurring

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108. *Id.* at 202 ("Some of the conditions that we relied upon in upholding this statutory scheme in *Katzenbach* and *City of Rome* have unquestionably improved. Things have changed in the South. Voter turnout and registration rates now approach parity. Blatantly discriminatory evasions of federal decrees are rare. And minority candidates hold office at unprecedented levels."); Shelby Cnty. v. Holder, 133 S. Ct. 2612, 2629 ("The [Fifteenth] Amendment is not designed to punish for the past; its purpose is to ensure a better future."). Note, however, that neither decision engaged the *City of Boerne* line of jurisprudence.

109. *See* Richard L. Hasen, *Congressional Power to Renew Preclearance Provisions*, *in* THE FUTURE OF THE VOTING RIGHTS ACT 81, 86 (David L. Epstein et al. eds., 2006) ("Three post-Boerne Supreme Court cases confirm the substantial narrowing of congressional power under section 5 of the Fourteenth Amendment and the need for Congress to provide adequate evidence of unconstitutional conduct by the states.").

110. 531 U.S. 356 (2001).

111. *Id.* at 360.

112. *Id.* at 364 ("The question, then, is whether Congress acted within its constitutional authority by subjecting the States to suits in federal court for money damages under the ADA.").

113. *Id.* at 368.

114. *Id.*

115. *Id.*

116. *Id.* at 372–73 (internal citations omitted).

opinion in which he exhibited his own reservations about statutory remedies disconnected from discriminatory intent: "It is a most serious charge to say a State has engaged in a pattern or practice designed to deny its citizens the equal protection of the laws, particularly where the accusation is based not on hostility but instead on the failure to act or the omission to remedy."[117]

The holding in *Garrett* appeared to foreshadow danger for Section 2.[118] Many experts expressed concern about the decision's heavy weighting of legislative findings of unconstitutional practices.[119] Two subsequent decisions, however, suggested a possible reprieve. *Nevada Department of Human Resources v. Hibbs*[120] and *Tennessee v. Lane*[121] appeared to stem the tide of circumscribing Congress's Fourteenth Amendment enforcement power.[122] *Hibbs* was in many ways similar to *Garrett*, as the case involved the question of whether employees of the State of Nevada could recover money damages for the State's lack of compliance with the Family and Medical Leave Act of 1993 ("FMLA").[123] Chief Justice Rehnquist's majority decision held that they could. Like the ADA in *Garrett*, the FMLA was challenged as being unconstitutionally broad and

117. *Id.* at 375 (Kennedy, J., concurring); *see also* Fuentes-Rohwer, *supra* note 51, at 153 ("It is no secret that the future of the Act rests in the hands of Justice Kennedy. It is also true that his record on race questions is not encouraging, nor is his particular record on VRA cases.").

118. Several other cases pertaining to Congress's Section 5 enforcement power elicited a similar sense of foreboding. *See, e.g.*, Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627 (1999) (finding the Patent and Plant Variety Protection Remedy Clarification Act of 1992 to fail *City of Boerne*'s congruence and proportionality test); Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000) (finding the same of the Age Discrimination in Employment Act of 1967); *see also* Ellen D. Katz, *Reinforcing Representation: Congressional Power to Enforce the Fourteenth and Fifteenth Amendments in the Rehnquist and Waite Courts*, 101 MICH. L. REV. 2341, 2361–69 (2003) (discussing the cases).

119. *See, e.g.*, HASEN, *supra* note 105, at 131 ("Congress may not have created an adequate legislative record of intentional discrimination under *Garrett* to justify the reach of section 2. Of course, Congress did not know of the *Garrett* requirements in 1982, but the Court in *Garrett* did not indicate it would apply its legislative evidence rule prospectively only. Section 2's constitutionality therefore is now in serious doubt.").

120. 538 U.S. 721 (2003).

121. 541 U.S. 509 (2004).

122. *See* HASEN, *supra* note 105, at 95–99 (discussing the cases in relation to the constitutionality of Section 5 of the VRA); Pamela S. Karlan, *Section 5 Squared: Congressional Power to Extend and Amend the Voting Rights Act*, 44 HOUS. L. REV. 1, 13–14 (2007) (same).

123. *Hibbs*, 538 U.S. at 725.

in violation of the Eleventh Amendment.[124] However, the challenge failed.[125]

Once again the Court looked to the legislative record.[126] With reference to the "long and extensive history of sex discrimination,"[127] the Court interpreted the FMLA as an appropriate remedy, despite the fact that the evidence garnered in its favor was largely indistinguishable from that used in defense of the ADA in *Garrett*.[128] The majority in *Hibbs* made two potentially important distinctions between the FMLA and the statutes struck down by the Court in other cases, both of which may be relevant to a Section 2 challenge. First, the decision sanctioned greater deference to Congress when it acts to benefit a group or interest afforded heightened judicial scrutiny.[129] Because the FMLA targeted sex-based discrimination, a category that triggers intermediate scrutiny, Congress was granted greater latitude:

> Here, however, Congress directed its attention to state gender discrimination, which triggers a heightened level of scrutiny. Because the standard for demonstrating the constitutionality of a gender-based classification is more difficult to meet than our rational-basis test . . . it was easier for Congress to show a pattern of state constitutional violations.[130]

This approach bodes well for Section 2's supporters. Section 2 concerns both racial discrimination and the right to vote—two issues that trigger

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124. *Id.* at 726.

125. *Id.* ("This case turns, then, on whether Congress acted within its constitutional authority when it sought to abrogate the States' immunity for purposes of the FMLA's family-leave provision.").

126. *Id.* at 730.

127. *Id.*

128. *See id.* at 753 (Kennedy, J., dissenting) ("Considered in its entirety, the evidence fails to document a pattern of unconstitutional conduct sufficient to justify the abrogation of States' sovereign immunity. The few incidents identified by the Court 'fall far short of even suggesting the pattern of unconstitutional discrimination on which § 5 legislation must be based.'" (quoting Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 370 (2001)).

129. Karlan, *supra* note 122, at 13.

130. *Hibbs*, 538 U.S. at 736 (internal citations omitted); *see also* Karlan, *supra* note 122, at 13 ("Put in simple terms, when Congress acts to protect a fundamental right or when it acts to protect a suspect or quasi-suspect class, its powers are broader than when it acts to promote equality more generally."); McLoughlin, *supra* note 106, at 60 ("In the years following *City of Boerne*, the Court applied the congruence and proportionality test to other antidiscrimination legislation, ultimately signaling that Congress had greater authority under its enforcement power where Congress sought to protect suspect classes and fundamental rights.").

strict scrutiny, the latter of which arguably warrants the greatest degree of legislative leniency to Congress.[131]

Second, the decision accentuated the FMLA's limitations.[132] The statute's modest requirements—"unpaid leave," limited eligibility, notice requirements, and "strictly defined" damages—were judged to be congruent and proportional to the underlying unconstitutional conduct.[133] This portion of the decision does not bode well for Section 2's supporters. The principal remedy that Section 2 has provided has been the creation of majority-minority electoral districts. The creation of these districts is a far more consequential intrusion into state and local affairs than the authorization of money damages. Moreover, Section 2 prohibits any "standard, practice, or procedure . . . which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color."[134] As such, when examined against the FMLA, it is not comparably delimited. Still, *Hibbs* seemed to approve a more expansive acceptance of congressional enforcement power than its precursors.

*Lane* can be read similarly. The case involved the constitutionality of Title II of the ADA, the provision prohibiting the denial of public benefits to the disabled.[135] Again, at issue was whether the provision exceeded Congress's Fourteenth Amendment enforcement power.[136] The Court found the provision constitutional.[137] And again, of interest is the decision's treatment of the legislative record. The Court noted that a provision's import "must be judged with reference to the historical experience which it reflects."[138] In addition, the "gravity of the harm" must be considered, which is particularly meaningful in instances characterized by the "systematic deprivation[] of fundamental rights."[139]

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131. *See* City of Mobile v. Bolden, 446 U.S. 55, 113, 120–21 (1980) (Marshall, J., dissenting); Daniel P. Tokaji, *The New Vote Denial: Where Election Reform Meets the Voting Rights Act*, 57 S.C. L. REV. 689, 729 (2006) ("Congress designed Section 2 to curb discrimination against the prototypical suspect class with respect to the prototypical fundamental right.").

132. *Hibbs*, 538 U.S. at 738 ("Unlike the statutes at issue in *City of Boerne*, *Kimel*, and *Garrett*, which applied broadly to every aspect of state employers' operations, the FMLA is narrowly targeted at the faultline between work and family—precisely where sex-based overgeneralization has been and remains strongest—and affects only one aspect of the employment relationship.").

133. *Id.* at 739–40.

134. 52 U.S.C.A. § 10301(a) (West, Westlaw through P.L. 113-296).

135. Tennessee v. Lane, 541 U.S. 509, 513 (2004).

136. *Id.*

137. *Id.* at 533–34.

138. *Id.* at 523 (quoting South Carolina v. Katzenbach, 383 U.S. 301, 308 (1966)).

139. *Id.* at 523–24.

As with *Hibbs*, the Court's apparent countenancing of Congress's authority to remedy violations of fundamental rights is assuring.[140] Also assuring, as Richard Hasen has noted, was the Court's consideration of fairly dated evidence.[141] Because the primary evidence of Section 2's constitutionality was gathered at the time of the 1982 amendments, the Court's willingness to credit old data must be taken as a positive, though a decades-old legislative record is unlikely to fully satisfy the Court. Viewed collectively, *Hibbs* and *Lane* seem less threatening to Section 2's future than *City of Boerne* and *Garrett*. However, all of these cases emphasize the need to establish a pattern of unconstitutional state action.

## II. DISCRIMINATORY INTENT IN SECTION 2 CASES

This Part empirically investigates lower court judges' propensity to favor a discriminatory intent standard in Section 2 cases. Before reviewing the findings, however, one must understand exactly how this investigation relates to the larger question of Section 2's constitutionality.

### *A. Evidence and Permissible Enforcement*

As explained in the previous Part, *City of Boerne* requires remedial legislation to be congruent and proportional to the underlying injury at issue.[142] As *City of Boerne* and its progeny indicated, congruence and proportionality are principally assessed through evidence of constitutional violations, most often a demonstrated pattern of intentional discrimination. Such a pattern has generally been established through legislative findings. This is problematic in the case of Section 2, because its legislative record is dated and may not be viewed as particularly probative by the Court.

The Court's evidentiary evaluation in *Lane* offers an alternative option. In *Lane*, a pattern of unconstitutional practices was established, in part, through the identification of lower court cases involving instances of intentional discrimination against the disabled.[143] The Court credited the cases as documentary evidence of "unconstitutional treatment of disabled persons."[144] Thus, the introduction of analogous evidence of intentional

140. *See* Hasen, *supra* note 109, at 99 ("The tone of the Court's opinion in Tennessee v. Lane on the fundamental rights question suggests that the Court is willing to defer more to Congress to remedy the more that Congress seeks to protect fundamental rights.").

141. *Id.* at 97 ("Lane was a 2004 decision, yet most of the evidence before Congress to which the Court cited was gathered in the 1980s and published in the 1990s.").

142. *See supra* Part I.B; City of Boerne v. Flores, 521 U.S. 507, 520 (1997).

143. *Lane*, 541 U.S. at 524–25.

144. *Id*.

discrimination against minority voters, derived from lower court Section 2 cases, could strengthen the case for Section 2's constitutionality.[145]

The importance of establishing a pattern of intentional discrimination cannot be overstated. In *City of Boerne*, the Court, after citing the transcripts of RFRA legislative hearings, expressed skepticism of the pervasiveness of religious bigotry: "It is difficult to maintain that the[re] are examples of legislation enacted or enforced due to animus or hostility to the burdened religious practices or that they indicate *some widespread pattern* of religious discrimination in this country."[146]

In *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*,[147] which involved the question of whether Congress could enforce the Patent Remedy Act of 1992, a statute subjecting states to liability for patent infringement, the Court chided Congress for identifying "no pattern of patent infringement by the States, let alone a pattern of constitutional violations."[148] Most instructive, for present purposes, the decision noted that the legislative history only contained "two examples of patent infringement suits against the States[,]" and that the lower court's opinion "identified only eight patent-infringement suits prosecuted against the States in the 110 years between 1880 and 1990."[149]

The Court's decision in *Kimel v. Florida Board of Regents*,[150] a case involving the Age Discrimination in Employment Act of 1967 ("ADEA"), found the statute to be an unconstitutional exercise of congressional authority. Echoing *Florida Prepaid*, the Court noted that "Congress never identified any pattern of age discrimination by the States, much less any discrimination whatsoever that rose to the level of constitutional violation."[151] *Garrett* also emphasized the need for Congress to show "a history and pattern of unconstitutional employment discrimination by the States against the disabled."[152] In *Hibbs*, the Court looked to its own prior decisions involving gender-based discrimination in seeking "evidence of a pattern of constitutional violations on the part of the States."[153]

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145. To be sure, the *Lane* Court relied on more than just judicial findings. But the decision did expressly use judicial findings as evidence of a "pattern." *Id.* at 525. Also, the type of "statistical, legislative, and anecdotal evidence" on which the decision relied can certainly be produced in support of Section 2, as others have noted, but to the author's knowledge the utility of using recent judicial findings as evidence of intentional discrimination has been largely unexplored. *Id.* at 529.

146. *City of Boerne*, 521 U.S. at 531 (emphasis added).

147. 527 U.S. 627 (1999).

148. *Id.* at 640.

149. *Id.* The attention to judicial findings is notable.

150. 528 U.S. 62 (2000).

151. *Id.* at 89.

152. Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 368 (2001).

153. Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 729 (2003).

Section 2, by design and as conventionally understood, does not *require* plaintiffs to produce evidence of intentional discrimination.[154] Yet things are more complicated than they first appear. For many years now, some judges have controversially applied a discriminatory intent standard in Section 2 cases, even though the use of this standard ostensibly violates Congress's intent.[155] In fact, a circuit split on the issue has persisted for some time,[156] indicating that although a discriminatory intent standard has been applied, comprehensive information about when or how it has been applied is lacking. This information is potentially of great importance in establishing a pattern of intentional discrimination in support of Section 2's constitutionality.

Consider what we know about the use of a discriminatory intent standard in Section 2 cases. The primary means by which it has been applied is through the evidentiary element of racially polarized voting ("RPV").[157] The Court's decision in *Thornburg v. Gingles* introduced a three-part test for vote-dilution plaintiffs.[158] Plaintiffs are required to prove three things: (1) they constitute a sufficiently large and geographically compact voting bloc, (2) they are politically cohesive, and (3) white bloc voting exists in the jurisdiction.[159] The second and third prerequisites each rely, in part, on evidence of RPV.[160] The third prerequisite, in particular, turns almost entirely on its existence, and is the central focus here.[161] Recall, however, that evidence of RPV is also a factor in the totality of the

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154. An important minority view claims the opposite. *See* Dale Ho, *Minority Vote Dilution in the Age of Obama*, 47 U. RICH. L. REV. 1041, 1060–61 (2013) (claiming that a section 2 claim "requires proof of the very same factors that the Supreme Court has deemed probative of unconstitutional intent" and that "the connection to elements of intentionality was, for lack of a better word, intentional"); McLoughlin, *supra* note 106, at 77 ("The role of proof of intentional discrimination was thus a vital part of the section 2 analysis envisioned by Congress."); Michael J. Pitts, *Congressional Enforcement of Affirmative Democracy Through Section 2 of the Voting Rights Act*, 25 N. ILL. U. L. REV. 185, 206–07 (2005) ("[T]he evidentiary factors involved in proving a constitutional violation . . . are pretty much the same as the evidentiary factors involved in proving a violation of amended section 2.").

155. *See* Reno v. Bossier Parish Sch. Bd. (*Bossier I*), 520 U.S. 471, 482 (1997) ("When Congress amended § 2 in 1982, it clearly expressed its desire that § 2 *not* have an intent component . . . .").

156. *Compare* League of United Latin Am. Citizens v. Clements, 999 F.2d 831, 856–58 (5th Cir. 1993) (en banc) (heightened burden), *and* Uno v. City of Holyoke, 72 F.3d 973, 980–85 (1st Cir. 1995) (same), *with* Sanchez v. Colorado, 97 F.3d 1303, 1322 (10th Cir. 1996) (no heightened burden).

157. Engstrom, *supra* note 23, at 500–01.

158. 478 U.S. 30, 50–51 (1986).

159. *Id.*

160. *See id.* at 56.

161. *Id.*

circumstances inquiry that courts are expected to perform if the three prerequisites are satisfied.[162]

How does RPV relate to discriminatory intent? The specific issue is whether, in establishing RPV, and in particular white bloc voting, plaintiffs must prove that whites' votes were tainted with racial bias. Historically, most courts have found a simple correlation between race and past vote choices sufficient to prove legally significant RPV.[163] But in a significant number of cases, judges have deemed the specific causes of RPV not only relevant, but also central, to plaintiffs' claims.[164] In doing so, these judges have sought to isolate the role of race in racially polarized vote outcomes. The recurrent application of this heightened evidentiary burden seems to place Section 2 on firmer constitutional ground than is widely believed, even if subjected to the rigorous scrutiny of *Boerne* and *Garrett*.

To further illustrate the point, consider Pamela Karlan's constitutional defense of the VRA. Karlan asserts that the mere existence of RPV shows intentional discrimination, or at least the strong possibility of it in the future.[165] Thus, in her view, Section 2 plaintiffs would not have to show any more than a correlation between race and past votes. This argument has force, but it is unlikely that the current Court would be amenable to such a deferential stance. A showing that lower court judges routinely require actual evidence of intentional discrimination would be significantly more persuasive.[166] Particularly instructive in this regard, therefore, are lower court cases in which judges have expressly discussed the debate over

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162. *See supra* Part I.A.

163. *See, e.g.*, United States v. Marengo Cnty. Comm'n, 731 F.2d 1546 (11th Cir. 1984); McMillan v. Escambia Cnty., 748 F.2d 1037 (5th Cir. 1984); Jackson v. Edgefield Cnty., 650 F. Supp. 1176 (D.S.C. 1986); Citizens for a Better Gretna v. City of Gretna, 834 F.2d 496 (5th Cir. 1987).

164. *See, e.g.*, Lee Cnty. Branch of NAACP v. City of Opelika, 748 F.2d 1473, 1482 (11th Cir. 1984); League of United Am. Citizens v. Clements, 999 F.2d 831, 856–58 (5th Cir. 1993); Nipper v. Smith, 39 F.3d 1494, 1496–97 (11th Cir. 1994) (en banc).

165. Karlan, *supra* note 74, at 739 ("Racial bloc voting that results in the defeat of minority-preferred candidates and the disregard of minority interests surely is caused in part by external government discrimination."); *Id.* at 740 ("As for the prospective model, the process failure caused by racial bloc voting plays out in post-election nonresponsiveness to the needs of the black community.").

166. Some might argue that even when the causes of RPV are determined, and factors such as partisanship have been eliminated as explanatory, discriminatory intent is insufficiently established. This criticism ignores the Court's equal protection doctrine, which infers discriminatory intent in various ways. *See* Ross, *supra* note 52, at 187–91 (describing the relevant case law and noting "discriminatory intent could be inferred from circumstantial evidence such as the sequence of events leading up to the decision, deviations from the normal decision-making procedures, or the decision maker's failure to consider factors ordinarily relevant to the decision").

whether to apply a discriminatory intent standard. If it can be shown that Section 2 plaintiffs have found success when subject to a discriminatory intent standard, the Court should interpret such cases as indicative of a pattern of constitutional violations.

There is no per se rule for how many lower court cases in which plaintiffs were both subject to a discriminatory intent standard and won will suffice to demonstrate a convincing pattern of constitutional violations. However, the more frequent a discriminatory intent standard has been applied, the more convincing the case that Section 2 is sufficiently tailored to prevent unconstitutional activity. Thus, a convincing case for Section 2's constitutionality can be made through a review of cases in which judges have unambiguously applied a discriminatory intent standard. Such cases offer a strong rebuttal to those claiming that Section 2 is patently unconstitutional and, to these ends, are reviewed in the following discussion.[167]

### *B. Measuring Judicial Ideology in Section 2 Cases*

This section investigates lower court judges' propensity to favor the application of a discriminatory intent standard in Section 2 cases. This Article identifies 47 published Section 2 vote dilution cases, district and appellate, in which the debate over the appropriate evidentiary standard for establishing legally significant RPV under the third *Gingles* precondition, or as part of the totality of the circumstances inquiry, was *expressly discussed*.[168] The time horizon of the first database runs from 1986, when *Gingles* was decided, through 2012.[169] Many vote dilution cases make no mention of the appropriate standard, or are decided solely on other grounds. These cases are excluded.

The cases were culled from the LexisNexis federal court database. For context, a Lexis search of "racially polarized voting," date limited from 1986 to 2012, produces a list of 312 cases. These cases were compared against lists derived from various Lexis searches of Section 2. The

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167. *See* McLoughlin, *supra* note 106, at 83 ("Intent-based vote-dilution suits are still possible under the VRA.").

168. *See* Stefanie A. Lindquist & Frank B. Cross, *Empirically Testing Dworkin's Chain Novel Theory: Studying the Path of Precedent*, 80 N.Y.U. L. REV. 1156, 1180–81 (2005) (utilizing an identical approach); KEITH J. BYBEE, MISTAKEN IDENTITY: THE SUPREME COURT AND THE POLITICS OF MINORITY REPRESENTATION 10–11 (1998) (taking an approach oriented around the "culture of argument" in VRA cases).

169. As discussed below, this Article is secondarily interested in the question of *at what stage* judges are most likely to require the heightened evidentiary burden. Because of this interest, cases decided prior to 1986, when *Gingles* introduced the modern vote dilution framework, are excluded. Prior to *Gingles* there were no stages of analysis.

resulting case list was cross-referenced against other studies of Section 2 cases, most notably that of Ellen Katz and her co-authors at the University of Michigan, who identified 331 Section 2 cases decided between 1982 and 2005.[170]

The idiosyncrasy of the case selection warrants further comment. First, as noted, the cases under review are ones in which the relevant issue was expressly discussed. That is, they are cases in which the debate over whether plaintiffs must produce evidence of discriminatory intent as part of their RPV showing, received clear acknowledgement, either through specific language to this effect, or through indicative language coupled with a citation to a case containing clear acknowledgement. The focus of the analysis is on analyzing "the consistently recorded . . . legal content of judicial opinions."[171] Thus, excluded were cases that merely credit either type—correlative or causative—of RPV evidence. Second, both en banc and per curiam decisions are included. Third, not all of the 47 cases are merits cases. In short, the methodology for case selection privileges cases where the debate was "live" and received more than a cursory mention.

*1. General Findings*

The 47 published Section 2 cases constitute the entire population of cases that expressly discuss the relevant issue in the time period under review.[172] These cases represent 10 of the 11 judicial circuits.[173] The fewest number of cases (2) derive from the Second Circuit.[174] The largest number (11) derives from the Fifth Circuit, which is unsurprising given Judge Higginbotham's attention to this issue.[175]

Only in the Ninth Circuit do all three relevant cases reach the same conclusion regarding the RPV burden of proof.[176] Each holds that establishing

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170. Ellen Katz et al., *Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982*, 39 U. MICH. J.L. REFORM 643, 652–54 (2006).

171. Mark A. Hall & Ronald F. Wright, *Systematic Content Analysis of Judicial Opinions*, 96 CAL. L. REV. 63, 81 (2008).

172. *See infra* Appendix.

173. There are no cases expressly discussing the issue in the Third Circuit.

174. *See infra* Appendix.

175. Judge Higginbotham led the judicial effort for the consideration of the causes of RPV in Section 2 cases, and his opinions have been cited in support of such an effort by dozens of federal judges. League of United Latin Am. Citizens v. Clements, 999 F.2d 831, 849–58 (5th Cir. 1993) (detailing at length the view that the causes of PRV must be considered in Section 2 cases); *see also* GROFMAN ET AL., *supra* note 51, at 70–71 (noting that Judge Higginbotham's role in advocating for judges to look beyond mere voting patterns when deciding Section 2 cases).

176. *See infra* Appendix.

legally significant RPV does not require evidence of discriminatory intent.[177] In every other circuit there is variance across cases.[178] For example, in a Tenth Circuit case, *Sanchez v. Colorado*,[179] the trial court held that the causes of voter behavior are relevant to determining whether RPV exists under the third *Gingles* precondition.[180] On appeal, the court of appeals found the inquiry into the causes unnecessary.[181] Yet, in a subsequent case from the circuit, the causes of voter behavior were deemed relevant at the totality of the circumstances stage.[182] This intra-circuit disunity is common.[183]

Furthermore, even en banc decisions that appeared to resolve the issue in a given circuit have failed to do so. Nine of the 13 Fifth Circuit judges deciding *League of United Latin American Citizens v. Clements*[184] voted to consider partisanship as a cause of white bloc voting under the third *Gingles* precondition.[185] Despite this precedent, a subsequent case in the Fifth Circuit determined that the "reasons that black and white voters vote differently have no relevance to the central inquiry of [Section] 2, but the correlation between the race of the voter and the selection of certain candidates is crucial to that inquiry."[186] In the Eleventh Circuit, ten judges voted to find the "political or personal affiliation of different racial groups with different candidates" relevant to proving bloc voting as part of the totality of the circumstances inquiry.[187] A judge deciding a subsequent case equivocated on whether the causes of RPV matter.[188] In sum, a decided lack of consensus on how to prove legally significant RPV exists both across and within the circuits.

Throughout the 47 cases, the author found that 119 measurable votes were cast. Of these 119 votes, 67% (80) were cast in support of evaluating the causes of RPV at some stage in vote dilution cases.

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177. Romero v. City of Pomona, 665 F. Supp. 853, 866 (C.D. Cal. 1987); Ruiz v. City of Santa Maria, 160 F.3d 543, 557–58 (9th Cir. 1998) (Wallace, J., dissenting); United States v. Blaine Cnty., 363 F.3d 897, 912 (9th Cir. 2004).

178. *See infra* Appendix.

179. 861 F. Supp. 1516, 1527–29 (D. Colo. 1994).

180. *Id.* at 1527.

181. Sanchez v. Colorado, 97 F.3d 1303, 1313, 1316 (10th Cir. 1996).

182. United States v. Alamosa Cnty., 306 F. Supp. 2d 1016, 1029 n.36, 1038–40 (D. Colo. 2004).

183. *Compare* Mallory v. Ohio, 38 F. Supp. 2d 525, 575–76 (S.D. Ohio 1999) (finding the cause of voter behavior relevant at the totality of the circumstances stage), *with* United States v. City of Euclid, 580 F. Supp. 2d 584, 603, 603 n.27 (N.D. Ohio 2008) (finding causes of RPV inessential to a claim).

184. 999 F.2d 831 (5th Cir. 1993) (en banc).

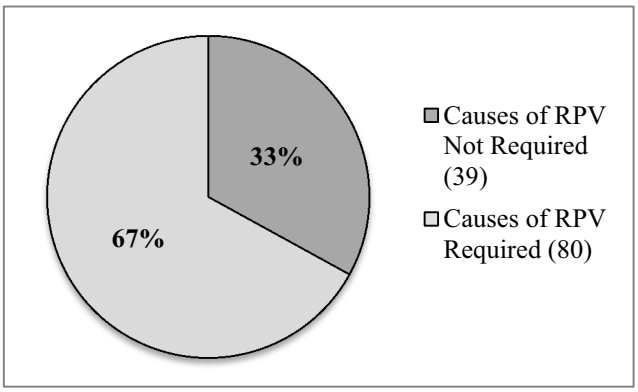
185. *Id.* at 856–62.

186. Jamison v. Tupelo, 471 F. Supp. 2d 706, 713–14 (N.D. Miss. 2007).

187. Solomon v. Liberty Cnty. Comm'rs, 221 F.3d 1218, 1225 (11th Cir. 2000) (en banc).

188. *Compare* United States v. Osceola Cnty., 475 F. Supp. 2d 1220, 1229 (M.D. Fla. 2006), *with Solomon*, 221 F.3d at 1232.

FIGURE 1: PERCENTAGE OF VOTES CAST FOR INQUIRY INTO CAUSES OF RPV




*2. Findings by Stage*

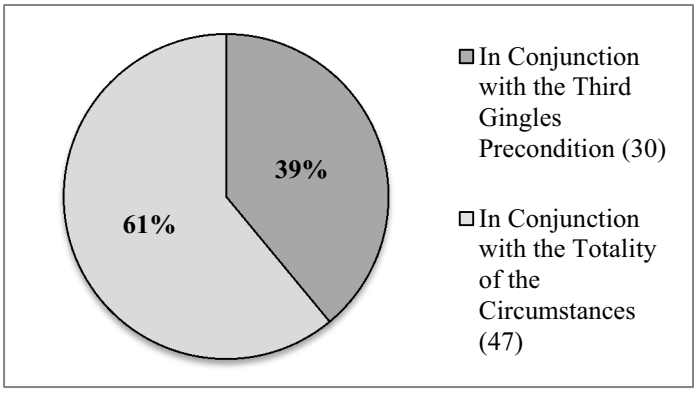
Of secondary interest are questions about the stage at which judges apply the discriminatory intent standard. There is some discussion in the literature and in the case law suggesting that the stage at which the burden is applied might matter.[189] Seventy-seven votes were cast for which the specific stage of the inquiry into the causes of RPV was discernible.[190] Thirty-nine percent (30) of the votes supported considering the causes of RPV in conjunction with the third *Gingles* precondition; 61% (47) did so as part of the totality of the circumstances.

The imposition of a discriminatory intent standard is arguably most burdensome if applied when a court adjudicates the third *Gingles* precondition, given the preeminence of the *Gingles* test in vote dilution cases.

189. D. James Greiner, *Re-Solidifying Racial Bloc Voting: Empirics and Legal Doctrine in the Melting Pot*, 86 IND. L.J. 447, 459 (2011).

190. The three-judge panel in *Overton v. City of Austin*, 871 F.2d 529 (5th Cir. 1989), voted to inquire into the causes of RPV but did not specify a stage at which the inquiry should occur. *Id.* at 538. Consequently, these three "cause votes" have been excluded from the analysis of findings by stage and the numerator was changed accordingly.

FIGURE 2: PERCENTAGE OF VOTES CAST FOR INQUIRY INTO CAUSES OF RPV AS PART OF *GINGLES* ANALYSIS




In sum, approximately 65% of the total votes cast specified the stage at which the inquiry into the causes of RPV should occur.

## III. ASSESSING THE IMPLICATIONS OF THE INTENT REQUIREMENT

The previous Part provided some evidence regarding the discriminatory intent standard, as applied in Section 2 cases. This Part relates the findings to the question of Section 2's constitutionality.

The findings of Part II reveal, on the broadest level, that the question of whether a discriminatory intent standard is appropriate was expressly discussed in 47 cases decided between 1986 and 2012. Recall that the entire universe of cases during this time was approximately 312.[191] At first glance, these numbers would seem fairly insignificant—only 15% of cases discussed the issue expressly. However, it is important to remember that the number of cases in which the issue was expressly discussed is but a part of the entire population of cases in which a discriminatory intent standard was applied.

However, this distinction may not even matter. What matters is, principally, that some evidence exists confirming that Section 2 is sufficiently tailored to remedy intentional discrimination. Congress need not show that every Section 2 case does so. The question, as articulated in *City of Boerne*, is if "there is reason to believe that many of the [electoral practices and procedures] affected by the congressional enactment have a significant likelihood of being unconstitutional."[192]

191. *See supra* Part II.B.
192. City of Boerne v. Flores, 521 U.S. 507, 532 (1997).

Of course, this begs the question of what constitutes a "significant likelihood." In *Lane*, the Court alluded to several lower court decisions as evidence of "a pattern of unconstitutional treatment in the administration of justice" against the disabled.[193] To be more precise, the Court cited 18 lower court cases.[194] To return to the present findings, in 12 of the 47 cases, plaintiffs were successful despite having to introduce evidence of discriminatory intent in establishing RPV.[195] These cases illustrate Section 2's success at remedying intentional discrimination. Exactly how many cases are necessary to convince the Court that a pattern of unconstitutional treatment exists is obviously indeterminate.

Perhaps more important, though, is that these 12 cases, because they contain express acknowledgement of the debate over the appropriate evidentiary standard for establishing RPV, are uniquely probative. They underscore both the plausibility and commonality of interpreting Section 2 in a manner that targets intentional discrimination. The judges deciding the cases were well aware of their option regarding the RPV burden of proof, yet they chose to impose the heightened burden. That judges have done so should provide solace to the Court.[196]

Section 2's opponents want the Court to, at the very least, mandate the application of a discriminatory intent standard. Their arguments are open to question. For example, Roger Clegg and Hans von Spakovsky, authors of a legal memorandum laying out the principal arguments against Section 2's constitutionality, rely on the "Canon to Avoid Constitutional Questions" ("Canon") in arguing that, "case law demands that courts construe statutes to avoid constitutional problems."[197] Case law *demands* no such thing.[198] The Court has used the Canon "[i]n a number of cases,"[199] nothing more.

Furthermore, the Canon is largely inapposite here. As detailed in the Court's doctrine, the Canon aims to avoid "serious constitutional questions."[200] It seeks to interpret statutes so as to avoid "a significant risk" of a Constitutional transgression.[201] The Canon has minimal force here,

193. Tennessee v. Lane, 541 U.S. 509, 525 (2004).
194. *Id.* at 525–26 n.14.
195. *See infra* Appendix.
196. *See* Christopher S. Elmendorf, *Making Sense of Section 2: Of Biased Votes, Unconstitutional Elections, and Common Law Statutes*, 160 U. PA. L. REV. 377, 383 (2012) ("Section 2 . . . should be understood as a delegation of authority to the courts to develop a common law of racially fair elections, guided by certain substantive and evidentiary norms as well as norms about legal change.").
197. Clegg & von Spakovsky, *supra* note 12 (manuscript at 4).
198. *See generally* H. Jefferson Powell, *The Executive and the Avoidance Canon*, 81 IND. L.J. 1313 (2005).
199. Nat'l Labor Relations Bd. v. Catholic Bishop of Chi., 440 U.S. 490, 500 (1979).
200. *Id.* at 501.
201. *Id.* at 502.

where the ostensible constitutional threat is merely that Congress has exceeded the Court's own extraordinarily narrow view of congressional enforcement power under the Fourteenth and Fifteenth Amendments.

In *National Labor Relations Board v. Catholic Bishop of Chicago*,[202] a representative case in which the Canon was utilized, the Court's concern was that a liberal grant of jurisdictional authority to the National Labor Relations Board would infringe the First Amendment.[203] Likewise, in *United States ex rel. Attorney General v. Delaware & Hudson Co*.,[204] also cited by the authors, the Court, in employing the Canon, sought to avoid ruling on several thorny Commerce Clause questions.[205] As such, in both instances, the Court interpreted statutes in a narrow manner so as to avoid the violation of substantive constitutional provisions. By comparison, a liberal interpretation of Section 2 threatens only the Court's dubious specifications for the enactment of remedial legislation. In other words, a narrow construction of Section 2 is only appropriate under the Court's narrow construction of the Reconstruction Amendments themselves, which, unlike the First Amendment or the Commerce Clause, give Congress express enforcement authority.[206]

Clegg and von Spakovsky further cite *Gregory v. Ashcroft*[207] in defense of the "clear statement" rule, a "federalism based etiquette rule,"[208] requiring clarity in legislation when the federal-state balance of powers is implicated.[209] *Gregory* involved the question of whether a mandatory retirement age for state judges violated the ADEA.[210] The specific question was whether judges were "appointees" under the statute's terms.[211] Once again, the authors overstate the case in asserting that the clear statement rule controls

202. 440 U.S. 490.
203. *Id.* at 504 ("We see no escape from conflicts flowing from the Board's exercise of jurisdiction over teachers in church-operated schools and the consequent serious First Amendment questions that would follow.").
204. 213 U.S. 366 (1909).
205. *Id.* at 406.
206. *See also* VALELLY, *supra* note 58, at 102 ("Republicans quite possibly wrote the Fifteenth Amendment in such a way as to get it through Congress and the state legislatures quickly, knowing that they could beef it up later by statute.").
207. 501 U.S. 452 (1991).
208. *See* MICHAEL C. DORF & TREVOR W. MORRISON, CONSTITUTIONAL LAW 84–93 (Dennis Patterson ed., 2010) (describing "etiquette" limits on federal power).
209. Clegg & von Spakovsky, *supra* note 12 (manuscript at 4) ("If Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so *unmistakably clear* in the language of the statute." (quoting *Gregory*, 501 U.S. at 460)).
210. *Gregory*, 501 U.S. at 455.
211. *Id.*

whenever a federal statute touches on "traditionally sensitive areas, such as legislation affecting the federal balance."[212]

The authors notably fail to cite *Chisom v. Roemer*,[213] a Section 2 case decided the same day as *Gregory*, and similarly focused on whether judges were fairly considered "representatives" under the provision.[214] In *Chisom*, the Court made no mention of the clear statement rule. Others have effectively detailed why it should not apply to the VRA.[215] Even Justice Scalia, in his *Chisom* dissent, acknowledged Section 2 as "a general imposition upon state elections that unquestionably exists[,]"[216] and conceded the application of a "plain statement" rule.[217]

With that said, simply rebutting the pertinence of the Canon and the clear statement rule does not make the constitutional case for Section 2. Christopher Elmendorf has aptly noted that, to date, Section 2 supporters have put forth two types of responses to *City of Boerne*, neither of which is entirely satisfactory.[218] Pamela Karlan's response, one of the two, takes the uncompromising position that Section 2, "in its current form . . . represents an appropriate congressional judgment."[219] She introduces a useful taxonomy by which to evaluate "congressionally corrigible invidious discrimination:" an internal model, an external model, and a prospective model.[220] The internal model evaluates instances of intentional discrimination "within the electoral system."[221] The external model evaluates instances of intentional discrimination outside of the electoral system, which nonetheless produce consequences that "might play out within the electoral system."[222] And the prospective model evaluates the possibility of electoral events "enabling future invidious action."[223]

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212. *Id.* at 471 (quoting United States v. Bass, 404 U.S. 336, 349 (1971)); *see also* Christopher E. Skinnell, Comment, *Why Courts Should Forbid "Minority Coalition" Plaintiffs Under Section 2 of the Voting Rights Act Absent Clear Congressional Authorization*, 2002 U. CHI. LEGAL F. 363, 366.

213. 501 U.S. 380 (1991).

214. *Id.*

215. Bertrall L. Ross II, *Not a Mere Omission: Reconciling the Clear Statement Rule and the Voting Rights Act*, 7 LOY. J. PUB. INT. L. 159, 194–95 (2006).

216. *Chisom*, 501 U.S. at 412 (Scalia, J., dissenting).

217. *Id.*

218. Elmendorf, *supra* note 196, at 402 n.120.

219. Karlan, *supra* note 74, at 726.

220. *Id.* at 728.

221. *Id.*

222. *Id.*

223. *Id.* at 729.

Karlan's response is sophisticated, yet excessively sanguine.[224] Outside of the Court's continued citation of its earlier precedents upholding the VRA's constitutionality, there is little reason to think that the current Court would adopt such a deferential posture in a Section 2 analysis. Indeed, in some cases the Court's citations to *South Carolina* and *Morgan* seem a mere formality.

The second type of response, originating with Michael Pitts, contends that Section 2 is constitutionally unproblematic because it "closely conforms to the Court's own equal protection doctrine as it relates to racial discrimination in general and, particularly, as it relates to racial discrimination in voting."[225] The foundation of this view is the Court's decision in *Rogers v. Lodge*,[226] a constitutional vote dilution case decided just days after Section 2 was amended in 1982. *Rogers* is a curious case insofar as it seemingly relaxed the constitutional standard for proving racial vote dilution by restoring the import of the *Regester-Zimmer* factors in proving a constitutional violation.[227] This apparent relaxation is at odds with the Court's contemporaneous equal protection decisions, which, by comparison, were much less favorable to plaintiffs.[228]

Thus, the second type of response asserts that Section 2 is constitutional because the provision's evidentiary requirements, in particular those considered in the totality of the circumstances inquiry, are essentially the same as those employed in *Rogers*:

> The practice of section 2 cases parallels the conceptual development of unconstitutional vote dilution: both the statutory and constitutional injury have roots in the caselaw of the other. The statutory cases

224. Elmendorf, *supra* note 196, at 402 n.120 ("The problem with Karlan's approach is that it rests, implicitly, on a very relaxed understanding of the necessary degree of fit between statutory remedies and constitutional violations under the congruence and proportionality test."); *see also* HASEN, *supra* note 105, at 133 ("Karlan cites nothing to indicate Congress had this chain of causation in mind in enacting its amendments to the Voting Rights Act, or that any such evidence would satisfy the Court that past state discrimination has caused private discriminatory attitudes.").

225. Pitts, *supra* note 154, at 189.

226. 458 U.S. 613 (1982).

227. Pitts, *supra* note 154, at 204, 206 ("[T]he way the Court applied the purpose standard in *Rogers* amounted to something remarkably similar to the constitutional standard the Court had employed pre-*Bolden* when a less stringent test existed."); McLoughlin, *supra* note 106, at 66 ("The end result of *Rogers* is that the Court appeared to backtrack from *City of Mobile* and move toward an analytical approach that would permit the inference of discrimination from discriminatory effects (an inference which was said to be possible in *City of Mobile*, but which after *Rogers* was a far more plausible option).").

228. Ross, *supra* note 52, at 184–201 (describing the distinction between *Rogers* and other equal protection cases).

> incorporate an aspect of intentional harm, and the concepts of dilutive effect and vote dilution as a whole have been continued from the line of constitutional cases into the line of statutory cases. These factors suggest that the argument for the congruence and proportionality of section 2 to the constitutional standard is even more cogent.[229]

Although this argument is thought-provoking, "it is not at all clear that the conservative center believes that *Rogers* was rightly decided and would follow it today."[230] If the Court sought, as most experts predict would be the case, actual evidence in support of an underlying pattern of unconstitutional practices, the mere theoretical similarity between the evidentiary requirements of Section 2 and *Rogers*, a single, largely overlooked case from over thirty years ago, is unlikely to sway five Justices.

The evidence presented in this Article is more directly responsive to the Court's anticipated analysis. Unlike the Karlan response, this Article takes account of the Court's most constrictive Fourteenth Amendment congressional enforcement cases. And unlike the response originated by Michael Pitts, this Article does not overstate the similarity between the Section 2 and constitutional evidentiary standards. Section 2 was designed to be, and has functioned as, a special statutory remedy to the intractable, confounding problem of racial discrimination in voting. It was amended in 1982 to codify a discriminatory effects standard.[231] Yet judges have consistently, though controversially, applied a discriminatory intent standard when hearing cases. This practice may, ironically, serve to preserve the provision's constitutionality.

To summarize, *City of Boerne* and its progeny indicate that the Court, if it decides to take up the question of Section 2's constitutionality, will evaluate legislative and judicial findings of unconstitutional practices. In doing so, the Court will look for evidence of a pattern. This Article includes some such evidence. The findings reveal that in at least a dozen cases, plaintiffs were required to introduce evidence of intentional discrimination when establishing RPV, the key evidentiary element in Section 2 cases. Moreover, the judges who applied this discriminatory intent standard did so with full knowledge of the fact that they were applying a heightened evidentiary burden. In light of this, the Court should refrain from striking down Section 2, as sufficient evidence exists to confirm that it frequently remedies intentional discrimination. The fact that judges both have and may apply a discriminatory intent standard warrants judicial restraint.

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229. McLoughlin, *supra* note 106, at 91–92.
230. Elmendorf, *supra* note 196, at 402 n.120.
231. Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 3, 96 Stat. 131, 134 (codified at 42 U.S.C. § 1973(a) (2000)).

## CONCLUSION

Section 2 is a constitutionally sound exercise of Congress's enforcement power under the Reconstruction Amendments. Even when evaluated under the Court's most demanding cases, Section 2 is sufficiently tailored to remedy identifiable constitutional violations.[232] Following *City*

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232. This Article assumes that *City of Boerne* and its progeny are the most relevant precedents in a hypothetical constitutional challenge to Section 2. It is worth noting, however, that striking down Section 2 would arguably violate other, well-established conceptions of constitutional meaning making. *See* J. MITCHELL PICKERILL, CONSTITUTIONAL DELIBERATION IN CONGRESS: THE IMPACT OF JUDICIAL REVIEW IN A SEPARATED SYSTEM 15–16 (2004) (summarizing the work of scholars advocating extra-judicial constitutional construction). It would also arguably violate the intent of the Fourteenth Amendment's authors. Michael W. McConnell, *Insitutions and Interpretation: A Critique of* City of Boerne v. Flores, 111 HARV. L. REV. 153, 182 (1997) ("Section Five of the Fourteenth Amendment was born of the fear that the judiciary would frustrate Reconstruction by a narrow interpretation of congressional power. . . . As Republican Senator Oliver Morton explained: 'the remedy for the violation of the fourteenth and fifteenth amendments was expressly not left to the courts. The remedy was legislative, because in each the amendment itself provided that it shall be enforced by legislation on the part of Congress.'" (quoting CONG. GLOBE, 42d Cong., 2d Sess. 525 (1872)).

But even if one rejects congressional supremacy, or, the position that courts should be excessively deferential to Congress's interpretive authority, and by extension, remedial acts, there are "softer" alternatives that still legitimate Section 2 of the VRA. For instance, Steven Calabresi and Nicholas Stabile have advocated for according remedial legislation a "presumption of constitutionality." Steven G. Calabresi & Nicholas P. Stabile, *On Section 5 of the Fourteenth Amendment*, 11 U. PA. J. CONST. L. 1431, 1435 (2009) ("The Supreme Court has the power and the duty to decide cases and controversies agreeably to the Constitution. It must make its own independent evaluation of whether a law 'enforces' or changes the meaning of Section 1 of the Fourteenth Amendment. In making an independent evaluation on this question, the Court ought to accord congressional statutes a presumption of constitutionality because our Constitution is enforced by a three branch process of checks and balances.").

Richard Fallon has defended this type of approach, labeling it the "Reasoned Judgment Model." RICHARD H. FALLON JR., THE DYNAMIC CONSTITUTION: AN INTRODUCTION TO AMERICAN CONSTITUTIONAL LAW AND PRACTICE 352 (2013) ("Insofar as a right is vague or indeterminate, there would be some room, within a range, for Congress to substitute its reasoned judgment for that of the Court about how that right would best be implemented. If the Reasoned Judgment Model were adopted, the Court's job in Section 5 cases would be to assess whether Congress moved beyond the vague or indeterminate range and thereby expanded or contracted a constitutional guarantee. Within that range, Congress could substitute its reasoned judgment for that of the Supreme Court.").

And David Cole has suggested the Court employ a reasonableness test when evaluating enforcement legislation:

> Where Congress acts pursuant to one of its affirmative powers and does not contravene any affirmative constitutional prohibition, its actions should be upheld so long as they reflect a reasonable construction of the

*of Boerne*, the Court has looked for a pattern of unconstitutional violations when evaluating the constitutionality of remedial legislation. This Article provides some evidence demonstrating that lower court judges have routinely applied a discriminatory intent standard in Section 2 cases. These judicial findings should serve as a useful supplement to Section 2's legislative record in the event of a constitutional challenge. The findings render the provision congruent and proportional. At present we are left to wait in anticipation of the emergence of an appropriate case and with uncertainty of the continued potency of a key provision of the crowning legislative achievement of the civil rights era.

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affirmative constitutional authority pursuant to which it has acted, whether it be Article I, Section 8, or Section 5 of the Fourteenth Amendment.

David Cole, *The Value of Seeing Things Differently:* Boerne v. Flores *and Congressional Enforcement of the Bill of Rights*, 1997 SUP. CT. REV. 31, 70 (1997).

Under any of these alternate approaches to evaluating congressional enforcement legislation, Section 2 should be upheld.

## APPENDIX: CASE LIST

### FIRST CIRCUIT

*Uno v. City of Holyoke*, 72 F.3d 973, 980–85, 983 n.4 (1st Cir. 1995)
- Totality of the Circumstances
- Vacated and remanded for further evidentiary factual findings

*Uno v. City of Holyoke*, 960 F. Supp. 515, 520–23 (D. Mass 1997)
- Third Precondition of the *Gingles* Test (vague)
- Defendant won

*Black Political Task Force v. Galvin*, 300 F. Supp. 2d 291, 298, 313 (D. Mass. 2004)
- Citing *Uno*
- Totality of the Circumstances
- Plaintiffs won

### SECOND CIRCUIT

*Reed v. Town of Babylon*, 914 F. Supp. 843, 877–79 (E.D.N.Y. 1996)
- Third Precondition of the *Gingles* Test (partisanship only)
- Defendant won

*Goosby v. Town Bd. of Hempstead*, 956 F. Supp. 326, 355 (E.D.N.Y. 1997)
- Totality of the Circumstances
- Plaintiffs won

*Goosby v. Town Bd. of Hempstead*, 180 F.3d 476, 493 (2d. Cir. 1999)
- Citing *Alamance County* and *Nipper*
- Totality of the Circumstances
- Plaintiffs won

*Rodriguez v. Pataki*, 308 F. Supp. 2d 346, 393–94, 426 (S.D.N.Y. 2004)
- Totality of the Circumstances (partisanship only)
- Defendant won

*Ruiz v. Vill. of Port Chester*, 704 F. Supp. 2d 411, 443 (S.D.N.Y. 2010)
- Totality of the Circumstances
- Plaintiffs won

### FOURTH CIRCUIT

*Jackson v. Edgefield Cnty.*, 650 F. Supp. 1176, 1194 n.1 (D.S.C. 1986)
- Plaintiffs won

*Lewis v. Alamance Cnty.*, 99 F.3d 600, 615 n.12 (4th Cir. 1996)
- Totality of the Circumstances
- Defendant won

*United States v. Charleston Cnty.*, 316 F. Supp. 2d 268, 298–99 (D.S.C. 2003)
- Totality of the Circumstances
- Plaintiffs won

*United States v. Charleston Cnty.*, 365 F.3d 341, 348–49 (4th Cir. 2004)
- Totality of the Circumstances
- Plaintiffs won

FIFTH CIRCUIT

*Citizens for a Better Gretna v. City of Gretna*, 834 F.2d 496, 499, 499 n.7 (5th Cir. 1987)
- Plaintiffs won

*Overton v. City of Austin*, 871 F.2d 529, 538 (5th Cir. 1989)
- Vague: suggesting cause is relevant, but not specifying at which stage
- Defendant won

*League of United Latin Am. Citizens v. Clements*, 986 F.2d 728, 745–46, 776–803, 846 (5th Cir. 1993)
- For dissent: Third Precondition of the *Gingles* Test (partisanship only)
- Plaintiffs won, with one exception

*League of United Latin Am. Citizens v. Clements*, 999 F.2d 831, 856–62, 906, 909 (5th Cir. 1993) (en banc)
- For dissent: n/r
- Third Precondition of the *Gingles* Test (partisanship only)
- Defendant won

*Armstrong v. Allain*, 893 F. Supp. 1320, 1329–32 (S.D. Miss. 1994)
- Third Precondition of the *Gingles* Test
- Defendant won

*Houston v. Lafayette*, 56 F.3d 606, 612 (5th Cir. 1995)
- Third Precondition of the *Gingles* Test (citation to *Clements* suggests partisanship only)
- Vacated and remanded for further evidentiary factual findings

*Teague v. Attala Cnty.*, 92 F.3d 283, 290–91 (5th Cir. 1996)
- Third Precondition of the *Gingles* Test (defendant may rebut)
- Plaintiffs won

*Clark v. Calhoun Cnty.*, 88 F.3d 1393, 1397 (5th Cir. 1996)
- Third Precondition of the *Gingles* Test (defendant may rebut)
- Plaintiffs won

*Harris v. Houston*, 10 F. Supp. 2d 721, 728 (S.D. Tex. 1997)
- Third Precondition of the *Gingles* Test (partisanship only)
- Defendant won

*Session v. Perry*, 298 F. Supp. 2d 451, 478 n. 88 (E.D. Tex. 2004)
- Third Precondition of the *Gingles* Test (partisanship only)
- Defendant won

*Jamison v. Tupelo*, 471 F. Supp. 2d 706, 713–14 (N.D. Miss. 2007)
- Plaintiffs won

SIXTH CIRCUIT

*Mallory v. Ohio*, 38 F. Supp. 2d 525, 575–76 (S.D. Ohio 1999)
- Totality of the Circumstances
- Defendant won

*United States v. City of Euclid*, 580 F. Supp. 2d 584, 603, 603 n.27 (N.D. Ohio 2008)
- Plaintiffs won

SEVENTH CIRCUIT

*McNeil v. City of Springfield*, 658 F. Supp. 1015, 1019 (C.D. Ill. 1987)
- Plaintiffs won

*Barnett v. City of Chi.*, 969 F. Supp. 1359, 1409–11 (N.D. Ill. 1997)
- Third Precondition of the *Gingles* Test
- Defendant won

*Milwaukee Branch of the NAACP v. Thompson*, 116 F.3d 1194, 1198–1200 (7th Cir. 1997)
- Totality of the Circumstances
- Defendant won

EIGHTH CIRCUIT

*Jeffers v. Clinton*, 730 F. Supp. 196, 208, 243–46 (E.D. Ark. 1989)
- For dissent: Third Precondition of the *Gingles* Test
- Plaintiffs won

*Bone Shirt v. Hazeltine*, 336 F. Supp. 2d 976, 1008 (D.S.D. 2004)
- Totality of the Circumstances (partisanship only)
- Plaintiffs won

*Cottier v. City of Martin*, 445 F.3d 1113, 1119 (8th Cir. 2006)
- Totality of the Circumstances (partisanship only)
- Remanded

NINTH CIRCUIT

*Romero v. City of Pomona*, 665 F. Supp. 853, 866 (C.D. Cal. 1987)
*Ruiz v. City of Santa Maria*, 160 F.3d 543, 557–58 (9th Cir. 1998)
- Note: addressed in the context of special circumstances inquiry
- Summary judgment motion denied—no ultimate holding

*United States v. Blaine Cnty.*, 363 F.3d 897, 912 (9th Cir. 2004)
- Meeting 3 *Gingles* preconditions = sufficient racial discrimination
- Plaintiffs won

TENTH CIRCUIT

*Sanchez v. Bond*, 875 F.2d 1488, 1493 (10th Cir. 1989)
- Addressed in the context of Second Precondition of the *Gingles* Test
- Defendant won

*Sanchez v. Colorado*, 861 F. Supp. 1516, 1527–29 (D. Colo. 1994)
- Third Precondition of the *Gingles* Test
- Defendant won

*Sanchez v. Colorado*, 97 F.3d 1303, 1313, 1316, 1321 (10th Cir. 1996)
- Plaintiffs won

*Cuthair v. Montezuma-Cortez*, 7 F. Supp. 2d 1152, 1168 (D. Colo. 1998)
- Vague, but Third Precondition of the *Gingles* Test
- Plaintiffs won

*United States v. Alamosa Cnty.*, 306 F. Supp. 2d 1016, 1029 n.36, 1038–40 (D. Colo. 2004)
- Totality of the Circumstances
- Defendant won

*Large v. Fremont Cnty.*, 709 F. Supp. 2d 1176, 1207, 1210, 1225 (D. Wyo. 2010)
- Totality of the Circumstances
- Plaintiffs won

ELEVENTH CIRCUIT

*City of Carrollton NAACP v. Stallings*, 829 F.2d 1547, 1558, 1558 n.13 (11th Cir. 1987)
- Vacated and remanded for further evidentiary factual findings

*Solomon v. Liberty Cnty. Comm'rs*, 899 F.2d 1012, 1016, 1016 n.3, 1033–34 (11th Cir. 1990) (en banc) (per curiam)

- For Tjoflat et al: Totality of the Circumstances
- Vacated and remanded for further evidentiary factual findings.

*Nipper v. Smith*, 39 F.3d 1494, 1514–15, 1525–26, 1548 (11th Cir. 1994) (en banc)

- Totality of the Circumstances (partisanship and non-racial reasons)
- For dissent: n/r
- Defendant won

*Solomon v. Liberty Cnty. Comm'rs*, 957 F. Supp. 1522, 1543–1550 (N.D. Fla. 1997)

- Defendant won

*Askew v. City of Rome*, 127 F.3d 1355, 1382 (11th Cir. 1997) (per curium)

- Defendant won

*Solomon v. Liberty Cnty. Comm'rs*, 221 F.3d 1218, 1225 (11th Cir. 2000) (en banc)

- Totality of the Circumstances
- Defendant won

*United States v. Osceola Cnty.*, 475 F. Supp. 2d 1220, 1229 (M.D. Fla. 2006)

- *But see* 1232 (seemingly contradicting p. 1229)
- Totality of the Circumstances
- Plaintiffs won