

SECTION 2 OF THE VOTING RIGHTS ACT AND *CITY OF BOERNE*: THE CONTINUITY, PROXIMITY, AND TRAJECTORY OF VOTE-DILUTION STANDARDS

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Senator KENNEDY. Well, after President Reagan signed [the 1982 Voting Rights Act Amendments] into law, did you agree with that position . . . of the administration?

Judge ROBERTS. I certainly agreed that the Voting Rights Act should be extended. I certainly agreed that the effects test in Section 5 should be extended. We had argued that the intent test—that the Supreme Court recognized in *Mobile v. Bolden*—I know you think it was wrong, but that was the Supreme Court’s interpretation—should have been extended.¹

INTRODUCTION

Supreme Court nominations force questions usually debated exclusively by lawyers, scholars, and judges into the public square, and as a result the broader public glimpses the real-world implications of such debates for the first time.² The nomination and confirmation of Chief Justice John Roberts to the Supreme Court was no different. Though Roberts was questioned on a variety of fronts and challenged to defend many of the positions reflected in memoranda he wrote as a young lawyer in the Reagan Administration, one of the most important and timely discussions during the Roberts hearings involved the 1982 Amendments to the Voting Rights Act of 1965 (VRA). Specifically, the nomination of John Roberts to the Supreme Court and its coincidence with the recent push to reauthorize sections of the VRA have brought the concept of vote dilution and the interpretation of the 1982 Amendments to a broader audience. Though not the central focus of the Roberts hearings, the internal memoranda written by Chief Justice John Roberts thrust into the public

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1. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 173 (2005) [hereinafter *Confirmation Hearing*] (question from Sen. Edward Kennedy, Member, S. Comm. on the Judiciary).

2. Nomination hearings can even change the jurisprudence itself. See, e.g., Brad Snyder, *How the Conservatives Canonized Brown v. Board of Education*, 52 RUTGERS L. REV. 383, 414 (2000) (describing how William Rehnquist’s nomination hearings secured *Brown*’s legacy).

spotlight a critical issue that lay dormant for nearly twenty-five years:³ How easy should it be for litigants to prove vote dilution⁴ not only as a statutory injury but *as a constitutional injury*?⁵

Though the Court in *Gomillion v. Lightfoot* invalidated on Fifteenth Amendment grounds a district scheme that today would be called vote dilution on the basis of race,⁶ Congress in 1965 created a statutory remedy for vote dilution in the form of the VRA.⁷ Via amendments to the Act in 1982, Congress altered the standard by which vote dilution would be proven, widening the possibility of relief.⁸ The 1982 Amendments to the

3. Linda Greenhouse, *Roberts's Files Recall 80's Cases*, N.Y. TIMES, Aug. 16, 2005, at A1.

4. For decades the right to vote has been understood to include the right to an undiluted vote. *Reynolds v. Sims*, 377 U.S. 533, 555 n.29 (1964) (quoting *South v. Peters*, 339 U.S. 276, 279 (1950) (Douglas, J., dissenting)). “There is more to the right to vote than the right to mark a piece of paper and drop it in a box or the right to pull a lever in a voting booth. . . . It also includes the right to have the vote counted at full value without dilution or discount.” *Id.* (citation omitted). Vote dilution can take a variety of forms. See Laughlin McDonald, *The Quiet Revolution in Minority Voting Rights*, 42 VAND. L. REV. 1249, 1256–57 (1989) (listing as examples “reapportionment plans that unnecessarily fragment or concentrate black population, numbered posts, staggered terms, majority vote requirements, discriminatory annexations, and the abolition of elected or appointed offices”) (footnotes omitted). Under current Supreme Court jurisprudence, vote dilution on the basis of political party is cognizable as a constitutional injury. See *Vieth v. Jubelirer*, 541 U.S. 267, 306 (2004) (plurality opinion) (Kennedy, J., concurring in judgment) (refusing to join plurality in finding claims of partisan gerrymandering nonjusticiable); *League of United Latin American Citizens v. Perry (LULAC)*, 126 S. Ct. 2594, 2607 (2006) (declining to revisit *Vieth*'s justiciability inquiry); *Davis v. Bandemer*, 478 U.S. 109, 143 (1986) (plurality opinion) (holding political gerrymandering claims justiciable under the Equal Protection Clause). As discussed *infra*, while a standard for policing partisan gerrymanders has proved elusive, at minimum it involves an allegation of discriminatory purpose and effect. See *id.* at 127 (stating that a plaintiff must show “both intentional discrimination against an identifiable political group and an actual discriminatory effect on that group.”).

5. I use the term “constitutional injury” to refer to the strand of vote dilution that violates the Constitution and to distinguish it from the concept of vote dilution embodied in the more liberal section 2 standard. I use the term “unconstitutional vote dilution” to refer to vote dilution impermissible under the Fourteenth and Fifteenth Amendments, and I refer to “constitutional vote dilution challenges” as vote dilution claims premised on the Constitution. See *Reno v. Bossier Parish Sch. Bd. (Bossier I)*, 520 U.S. 471, 481 (1997) (“Since 1980, a plaintiff bringing a constitutional vote dilution challenge, whether under the Fourteenth or Fifteenth Amendment, has been required to establish that the State or political subdivision acted with a discriminatory purpose.”). At times I refer to “unconstitutional minority vote dilution” to emphasize the Constitution’s prohibition of vote dilution on the basis of race, acknowledging that vote dilution on the basis of race can target majority as well as minority populations.

6. *Gomillion v. Lightfoot*, 364 U.S. 339, 346 (1960). Years later, members of the Court would disagree as to whether *Gomillion* involved vote dilution. See *Reno v. Bossier Parish Sch. Bd. (Bossier II)*, 528 U.S. 320, 334–35 n.3 (2000) (stating that the Court has never held vote dilution to violate the Fifteenth Amendment); *id.* at 360 n.11 (Souter, J., concurring in part and dissenting in part) (“That the Court did not use the word ‘dilution’ in its modern sense in *Gomillion* does not diminish the force of its Fifteenth Amendment analysis.”).

7. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1971–1973bb-1 (2000)).

8. See Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, sec. 3, § 2(b), 96 Stat. 131, 134 (codified at 42 U.S.C. § 1973(b) (2000)).

VRA—portions of which were opposed by Roberts in his memoranda—offered broader protection than the Court had interpreted the VRA to provide in *City of Mobile v. Bolden*, decided just two years earlier.⁹ The 1982 Amendments made clear that—contrary to the Supreme Court’s interpretation of the 1965 Act in *City of Mobile*—proof of discriminatory intent was not required for vote-dilution claims to succeed.¹⁰ Whereas the constitutional standard for vote dilution (a standard left undisturbed by the 1982 Amendments) required proof of discriminatory intent and effect, all that was required under the 1982 Amendments was that litigants demonstrate by the totality of circumstances that “the political processes leading to nomination or election in the State or political subdivision are not equally open to participation.”¹¹

The creation of a broad avenue of relief under the VRA essentially eliminated the claims of “unconstitutional” minority vote dilution. The practice of seeking relief under the statute instead of the Constitution quickly became the norm. But a variety of political events and jurisprudential factors have given the constitutional strand of vote dilution renewed significance.

What is unconstitutional vote dilution? As a legal concept it has gone unused for nearly a quarter of a century when used to describe the dilution of voting power on the basis of race. The VRA’s more robust protections

9. See *City of Mobile v. Bolden*, 446 U.S. 55 (1980) (plurality opinion). Neither the *City of Mobile* plurality nor Justice Marshall in dissent saw a difference in the standards for vote dilution under the Constitution and under the 1965 Voting Rights Act. See discussion *infra* Part I.

10. Voting Rights Act Amendments of 1982, sec. 3, § 2(d) (codified as amended at 42 U.S.C. § 1973 (2005)). The text of the statute reads:

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2) [42 U.S.C. § 1973b(f)(2)], as provided in subsection (b).

(b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

Id.

11. *Id.*

have for years made claims of unconstitutional vote dilution unnecessary. Meanwhile, while the term “unconstitutional vote dilution” has lain dormant in the context of minority vote dilution, vote dilution under the VRA came to occupy nearly the entirety of the vote-dilution jurisprudence. The result is that vote dilution today is understood almost entirely through the cases interpreting the 1982 Amendments, and the concept of unconstitutional vote dilution, a harm requiring proof of discriminatory purpose and effect, has remained far less developed on its own.

Within the academy and among practitioners it essentially goes without saying that minority “vote dilution” is meant to refer to the statutory injury, not the constitutional one.¹² In an important recent work on vote dilution, titled *Understanding the Right to an Undiluted Vote*, Heather Gerken examined vote dilution almost exclusively through the statutory lens, noting in a prefatory footnote that “[v]ote dilution claims may also be raised as constitutional claims. Plaintiffs rarely litigate this type of claim because it requires proof of invidious intent as well as of discriminatory effect.”¹³ Indeed, vote dilution is most often described as a unitary concept with different standards of review under the Constitution and the VRA (the Constitution’s standard being understood as out-of-use). And insofar as the VRA is understood as “designed primarily to enforce the 15th amendment,”¹⁴ it makes sense that vote-dilution cases have become primarily statutory, not constitutional, cases. Doctrinally, statutory vote dilution has eclipsed the constitutional species.

However, the relationship between the scope of section 2, the constitutional standard for vote dilution and the underlying discriminatory actions the statute targets remains of crucial importance.¹⁵ In *City of Boerne v. Flores* and cases following it, the Supreme Court has required that laws passed by Congress pursuant to its Fourteenth and Fifteenth

12. According to one scholar, the Supreme Court “has not issued an opinion regarding unconstitutional vote dilution since 1982.” Michael J. Pitts, *Section 5 of the Voting Rights Act: A Once and Future Remedy?*, 81 DENV. U. L. REV. 225, 255 n.166 (2003) [hereinafter Pitts, *Future Remedy*]. This statement refers, of course, only to vote dilution on the basis of race.

13. Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 HARV. L. REV. 1665, 1666 n.1 (2001) (citation omitted) [hereinafter Gerken, *Undiluted Vote*]. See also Richard Briffault, *Race and Representation After Miller v. Johnson*, 1995 U. CHI. LEGAL F. 23, 27 (“Although the constitutional vote-dilution doctrine is triggered only by intentional state action, today most vote-dilution litigation proceeds under Section 2 of the Voting Rights Act, which dispenses with the requirement of discriminatory intent and focuses on discriminatory effects.”).

14. H.R. REP. NO. 89-439, at 1 (1965), as reprinted in 1965 U.S.C.A.N. 2437, 2437.

15. See Gerken, *Undiluted Vote*, *supra* note 13, at 1674 (“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*.”).

Amendment enforcement powers be “congruent and proportional” to the underlying constitutional violations the statute targets.¹⁶ In doing so, the Court has given evidence of constitutional violations renewed importance, placing special emphasis on the nature of those violations and the extensiveness of a pattern of violations identified by Congress.

The Court has not heard a direct *City of Boerne* challenge to section 2, and the VRA has a revered place in American history, but the Court has struck down or limited other antidiscrimination laws enacted by Congress which invoked the enforcement powers.¹⁷ Indeed even part of an amendment to the VRA itself was invalidated under pre-*Boerne* precedents.¹⁸ In light of *City of Boerne* and cases following it, the

16. See *City of Boerne v. Flores*, 521 U.S. 507, 530 (1997) (“While preventive rules are sometimes appropriate remedial measures, there must be a congruence between the means used and the ends to be achieved.”). See also *Tennessee v. Lane*, 541 U.S. 509, 520 (2004) (applying the congruence and proportionality test); *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 728 (2003) (“Valid § 5 legislation must exhibit congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.”) (quotation omitted); *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 365 (2001) (holding that legislation enforcing Fourteenth Amendment guarantees must exhibit congruence and proportionality between the harm sought to be prevented and the means adopted to achieve that end); *United States v. Morrison*, 529 U.S. 598, 625–26 (2000) (“[P]rophylactic legislation under § 5 must have a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.”) (quotation omitted); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 82–83 (2000) (“Applying the same ‘congruence and proportionality’ test in these cases, we conclude that the ADEA is not ‘appropriate legislation’ under § 5 of the Fourteenth Amendment.”); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627, 647 (1999) (“[W]here a congressional enactment pervasively prohibits constitutional state action in an effort to remedy or to prevent unconstitutional state action, limitations of this kind tend to ensure Congress’ means are proportionate to ends legitimate under § 5”).

17. See *Garrett*, 531 U.S. at 374 (concluding that the Americans with Disabilities Act’s authorization of a private remedy against states failed the Fourteenth Amendment’s “congruent and proportional” test); *Morrison*, 529 U.S. at 627 (striking down part of the Violence Against Women Act of 1994 as exceeding Congress’s authority under the Fourteenth Amendment); *Kimel*, 528 U.S. at 89 (“Congress never identified any pattern of age discrimination by the States, much less any discrimination whatsoever that rose to the level of constitutional violation.”).

18. See *Oregon v. Mitchell*, 400 U.S. 112, 118 (1970) (invalidating the VRA provision setting minimum voting age at eighteen for state and local elections). For discussions of how sections 2 and 5 of the VRA would be interpreted under *City of Boerne*, see 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 (2005) [hereinafter Hasen, *Congressional Power*]; Pamela S. Karlan, *Two Section Twos and Two Section Fives: Voting Rights and Remedies After Flores*, 39 WM. & MARY L. REV. 725 (1998) [hereinafter Karlan, *Voting Rights*]; Ellen D. Katz, *Federalism, Preclearance, and the Rehnquist Court*, 46 VILL. L. REV. 1179 (2001); Douglas Laycock, *Conceptual Gulfs in City of Boerne v. Flores*, 39 WM. & MARY L. REV. 743 (1998); Victor Andres Rodríguez, *Section 5 of the Voting Rights Act of 1965 After Boerne: The Beginning of the End of Preclearance?*, 91 CAL. L. REV. 769 (2003); Paul Winke, *Why the Preclearance and Bailout Provisions of the Voting Rights Act Are Still a Constitutionally Proportional Remedy*, 28 N.Y.U. REV. L. & SOC. CHANGE 69 (2003); Jennifer G. Presto, Note, *The 1982 Amendments to Section 2 of the Voting Rights Act: Constitutionality After City of Boerne*, 59 N.Y.U. ANN. SURV. AM. L. 609 (2004). Notably, Justice Scalia’s opinion in *Tennessee v. Lane* attempted to enshrine certain legislation as the only type appropriate under the enforcement powers. See *Lane*, 541 U.S. at 561

constitutionality of section 2 depends on the connection between the scope of section 2 and the underlying pattern of constitutional violations the statute aims to remedy; that connection cannot be understood absent a description of the standards for finding a violation under the statute and the Constitution as well as a comparison of the two.¹⁹

Several scholars and judges have debated whether section 2 ought to survive a *City of Boerne* challenge, basing arguments on the fact that section 2 targets racial discrimination;²⁰ the record of intentional discrimination amassed by Congress;²¹ the special importance of legislation aimed at

(Scalia, J., dissenting) (“Giving § 5 [of the Fourteenth Amendment] more expansive scope with regard to measures directed against racial discrimination by the States accords to practices that are distinctively violative of the principal purpose of the Fourteenth Amendment a priority of attention that this Court envisioned from the beginning . . .”). Justice Scalia also stated: “I shall also not subject to ‘congruence and proportionality’ analysis congressional action under § 5 that is *not* directed to racial discrimination.” *Id.* at 565.

19. *Cf.* Hasen, *Congressional Power*, *supra* note 18, at 204.

By allowing covered jurisdictions increased flexibility in defending changes in voting practices or procedures as nonretrogressive, the Court has limited the intrusion that preclearance makes on state governance. . . . [P]reclearance should be much easier to obtain than it was in 1965, 1982 or even 2002, making it a less draconian remedy than it was in the past from the point of view of federalism.

Id. See also Richard H. Pildes, *Response to Written Questions from Senator Arlen Specter Supplement to Original Testimony Before S. Judiciary Comm. on May 16, 2006 Hearing Titled: “The Continuing Need for Section 5 Preclearance”* at 1, available at <http://electionlawblog.org/archives/pildes3.doc> (discussing *City of Boerne* approach to section 5 of the Voting Rights Act based on three aspects of the statute: “[v]iewed as a whole, the statute has a front end (the coverage formula), a middle (the substantive standards that determine what constitutes a § 5 violation) and a back end (the bailout provisions and the expiration date)”). With respect to section 2, the statute has nationwide application, no bailout provision, and no expiration date, placing even more importance on the substantive standard. For the argument that section 2 is temporally and geographically limited by the extent of racially polarized voting, see *infra* note 253 and accompanying text.

20. *See, e.g.*, *Hayden v. Pataki*, 449 F.3d 305, 361 (2d Cir. 2006) (en banc) (Parker, J., dissenting).

The distinction between the VRA and other remedial legislation rests on three obvious and interrelated factors: One, the right to vote free of racial discrimination is a fundamental principle of the Constitution. Two, the country’s long and persistent history of discrimination gives Congress much greater latitude in fashioning appropriate remedies for racial discrimination in voting than for other types of discrimination. And three, it is easier for Congress to show a pattern of state constitutional violations when the remedial legislation is targeted at a classification that is subject to heightened judicial scrutiny, such as race.

Id. (internal citations and quotations omitted); Hasen, *Congressional Power*, *supra* note 18, at 188 (discussing the importance of section 5 of the VRA in reducing “purposeful racial discrimination”).

21. RICHARD L. HASEN, *THE SUPREME COURT AND ELECTION LAW: JUDGING EQUALITY FROM BAKER V. CARR TO BUSH V. GORE* 132 (2003) [hereinafter HASEN, *JUDGING EQUALITY*] (“[G]iven the scope of the evidence found insufficient in *Garrett*, it does not appear that the [Senate] report contains enough evidence of nationwide systemic problems with intentional state discrimination to justify the dramatic remedy of section 2.”); Presto, *supra* note 18, at 620, 628–29.

protecting the right to vote;²² and the basic logic of *City of Boerne* and its progeny. An appropriate starting point for any assessment of section 2 after *City of Boerne*, however, is an examination of the underlying constitutional injury at issue and the standards of protection offered by the Constitution and the VRA. “The first step of the *Boerne* inquiry requires us to identify the constitutional right or rights that Congress sought to enforce when it enacted [the statute].”²³ Describing the standard for the constitutional violation is thus not only key to establishing a pattern of activity by the states, but it is an important definitional step in charting the content of the constitutional right Congress sought to enforce.²⁴

This Article focuses on the underlying constitutional violation of vote dilution and explores the under-examined and in some ways indeterminate content of the constitutional species of vote dilution.²⁵ Insofar as *City of Boerne* mandates a specific connection between the means chosen by Congress and the ends targeted,²⁶ the ends sought to be protected in the context of vote dilution are difficult to define precisely. Not only does the

22. Michael J. Pitts, *Congressional Enforcement of Affirmative Democracy Through Section 2 of the Voting Rights Act*, 25 N. ILL. U. L. REV. 185, 189 (2005) [hereinafter Pitts, *Affirmative Democracy*] (“[R]acial discrimination in voting amounts to a context where the Court will allow a greater amount of race-based decision-making that favors racial minorities and a greater amount of congressional imposition of remedies against state and local governments.”); 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.”). There are also predictions based on realism that the current Court would not strike down section 2. Cf. Hasen, *Congressional Power*, *supra* note 18, at 195 (“[E]ven putting *Hibbs* and *Lane* aside, it 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.”).

23. *Tennessee v. Lane*, 541 U.S. 509, 522 (2004) (citing *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 365 (2001)).

24. Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After Morrison and Kimel*, 110 YALE L.J. 441, 471–72 (2000). “Separation-of-powers values require a judicial judgment about whether the constitutional interpretation informing Congress’s exercise of Section 5 power is appropriate to the role of legislatively enforcing the Fourteenth Amendment. This suggests that courts cannot apply the *Boerne* test to antidiscrimination laws without first interpreting the Equal Protection Clause.” *Id.*

25. The indeterminateness of “unconstitutional vote dilution” is more than just a linguistic difficulty of translating legal decisions into workable rules. The compelling interest test is also difficult to parse but at least that test has been applied to existing governmental structures in a recent period. *See, e.g., Grutter v. Bollinger*, 539 U.S. 306, 326 (2003) (applying the compelling interest test to the use of race in the context of higher education admissions policies). The Supreme Court has not applied the *Rogers v. Lodge* standard of discriminatory intent and effect to single-member districts. If section 2 aids in understanding the injury involved in unconstitutional vote dilution, that also indicates that there may be less space between the two than some would believe.

26. *See generally* Evan H. Caminker, “Appropriate” Means-Ends Constraints on Section 5 Powers, 53 STAN. L. REV. 1127 (2001) (agreeing on the need for a section 5 test to determine whether legislative means are appropriate for the targeted ends).

task of identifying discriminatory intent present difficulties,²⁷ but the abstract concept of vote dilution (when one-person, one-vote has been satisfied) has vexed judges and scholars for decades.²⁸ While other provisions in the VRA targeted specific structures—imposing, for example, a five-year nationwide ban on literacy tests in state and federal elections²⁹ and a requirement that any change in election practices in specific states and counties be pre-cleared by the Department of Justice or a three-judge court in the District of Columbia³⁰—section 2’s aims were more nebulous. Instead of barring multimember districts outright³¹—a structure that was viewed as often dilutive of minority clout—section 2 sought to alter the standard by which challenges to any electoral district would be considered.

But because the 1982 Amendments to section 2 meant that vote-dilution cases would become predominantly statutory in nature, the twist for thinking about section 2 after *City of Boerne* is that the Court’s understanding of the end to be remedied has developed through the Court’s series of statutory cases. Much of the work of parsing and explaining the content of vote dilution in general has taken place via the section 2 cases, to the point that vote dilution under section 2 after *Thornburg v. Gingles* and *Johnson v. De Grandy* reflects the Court’s understanding of vote dilution *simpliciter*.³² As the Court decided no claims of unconstitutional minority vote dilution after its opaque decision in *Rogers v. Lodge* in 1982,³³ the project of defining a manageable standard for constitutional vote-dilution suits was only able to continue after 1982 insofar as the Court’s section 2 cases incorporated an understanding of vote dilution that applied to both the Constitution and section 2. In short, whereas *City of Boerne* asks if the means fit the ends, in the context of vote dilution, the constitutional end has been to a great extent defined by the statutory means.

Thus, while avoiding a full-fledged defense of section 2 in the face of a

27. See Post & Siegel, *supra* note 24, at 469. “The doctrine of discriminatory purpose appears to set forth a clear liability rule, defining what does and does not violate the Equal Protection Clause. But this clarity dissipates on close inspection.” *Id.*

28. See *infra* Part II.C.

29. See *Oregon v. Mitchell*, 400 U.S. 112, 118 (1970) (“Congress, in the exercise of its power to enforce the Fourteenth and Fifteenth Amendments, can prohibit the use of literary tests or other devices used to discriminate against voters on account of their race in both state and federal elections.”).

30. 42 U.S.C. § 1973c.

31. Justice Stevens, dissenting in *Rogers v. Lodge*, noted that this would be a more direct method of combating vote dilution. *Rogers v. Lodge*, 458 U.S. 613, 632 (1982) (Stevens, J., dissenting) (“Nor, in my opinion, could there be any doubt about the constitutionality of an amendment to the Voting Rights Act that would require Burke County and other covered jurisdictions to abandon specific kinds of at-large voting schemes that perpetuate the effects of past discrimination.”).

32. *Johnson v. De Grandy*, 512 U.S. 997 (1994); *Thornburg v. Gingles*, 478 U.S. 30 (1986).

33. *Rogers v. Lodge*, 458 U.S. 613 (1982).

City of Boerne challenge,³⁴ this Article instead notes the ways in which space between the standards for vote dilution as a constitutional injury and vote dilution as a statutory injury is not as broad as commonly believed.³⁵ As Mike Pitts has written, “even though section 2 does not require a finding of purposeful discrimination, the standard the Court uses to determine unconstitutional purpose in the maintenance of an electoral system is relatively similar and certainly not totally divorced from the standard used in the section 2 results test.”³⁶ Insofar as *City of Boerne* puts the focus on the standards for proving a violation of constitutional rights and the standard provided by the statutory remedy, an analysis of the vote-dilution jurisprudence indicates that the Court’s early vote-dilution cases decided under the Constitution and its later cases decided on section 2 grounds are inescapably connected to one another on the conceptual, historical, and practical levels. The standards for unconstitutional vote dilution and vote dilution under the VRA have in many ways merged, indicating a connectedness that bolsters section 2’s claim to being a remedial statute proportional and congruent to the unconstitutional harm targeted.

Three principal grounds support this view. First, Congress’s amendments to the VRA in 1982 after the Court’s decision in *City of Mobile v. Bolden* led to a fissure between the statutory standard and constitutional standard for vote dilution. Often forgotten, however, is the fact that *Rogers v. Lodge*, decided by the Supreme Court in 1982 after much of the *City of Mobile* outcry, made some important changes to the constitutional standard for vote dilution, returning it in many ways to a more liberal pre-*City of Mobile* standard.³⁷ But *Rogers* did not involve

34. Under *Tennessee v. Lane*, a facial challenge to section 2 is not likely to succeed. Challenges must be made to specific applications. See *Tennessee v. Lane*, 541 U.S. 509, 530–31 (2004).

Petitioner urges us both to examine the broad range of Title II’s applications all at once, and to treat that breadth as a mark of the law’s invalidity. . . . But nothing in our case law requires us to consider Title II, with its wide variety of applications, as an undifferentiated whole. Whatever might be said about Title II’s other applications, the question presented in this case is not whether Congress can validly subject the States to private suits for money damages for failing to provide reasonable access to hockey rinks, or even to voting booths, but whether Congress had the power under § 5 to enforce the constitutional right of access to the courts.

Id. (footnotes omitted).

35. See Karlan, *Voting Rights*, *supra* note 18, at 738 (discussing “convergence of effects and intent standards”).

36. Pitts, *Affirmative Democracy*, *supra* note 22, at 209.

37. Mike Pitts cogently outlines the *City of Boerne* implications of the similarities between section 2 and unconstitutional vote dilution under *Mobile v. Bolden* and *Rogers v. Lodge* in Part II of his *Affirmative Democracy* article. I agree that these similarities bolster section 2’s constitutionality and that *Rogers* must be the baseline for any consideration of section 2’s constitutionality after *City of Boerne*. I argue in this Article that section 2’s constitutionality is bolstered not only by similarities to

single-member districts, and it did not provide clear benchmarks for determining whether a districting plan was unconstitutional.³⁸ If it is “a *judicial question* whether the condition with which Congress has thus sought to deal is in truth an infringement of the Constitution, something that is the necessary prerequisite to bringing the § 5 power into play at all,”³⁹ *Rogers* leaves much to be desired in showing how courts can answer that question with respect to unconstitutional vote dilution.

Second, while section 2 is often described as having “overruled” *City of Mobile* and as imposing an effects-test on voting structures, the section 2 Senate Report and the cases interpreting section 2 not only leave room for claims of intentional discrimination under the statute, but they are themselves interwoven with concepts of intentional discrimination and the language of impermissible purposes.⁴⁰ Litigants are required to do more than simply show disproportionate effects under section 2,⁴¹ and in practice plaintiffs sometimes bring evidence that would meet a test for discriminatory intent and effect in order to disprove other theories as to what motivated the line-drawing.⁴² The VRA has also seen significant changes in the last decade and a half: the number of successful section 2 claims has shrunk, while at the same time the VRA has increasingly come to be used as a weapon by political players. The use of the VRA to wage political battles implicitly raises the level of proof required of all vote-dilution claimants. In short, the practice of section 2 has seen section 2 and the constitutional standard come to bear common characteristics.

Third, the Supreme Court’s recent decision in *League of United Latin*

the *Rogers* standard, but by the history of section 2 cases after *Rogers*, the extended project to give content to vote dilution in the abstract, and the trajectory of section 2 cases in light of changing motivations in redistricting. I also view *Rogers* as a problematic baseline for *City of Boerne* purposes in light of the fact that its standard has not been applied to single-member districting in a case decided by the Supreme Court.

38. See *Rogers*, 458 U.S. at 615, 620–27 (discussing the wide variety of factors relevant to determining whether the at-large voting system is constitutional).

39. *Katzenbach v. Morgan*, 384 U.S. 641, 666 (1966) (Harlan, J., dissenting) (emphasis added).

40. See S. REP. NO. 97-417, at 27 (1982), reprinted in 1982 U.S.C.C.A.N. 177, 205 (“Plaintiffs must either prove [discriminatory] intent, or, alternatively, must show that the challenged system or practice, in the context of all the circumstances in the jurisdiction in question, results in minorities being denied equal access to the political process.”) (footnote omitted).

41. See *United States v. Blaine County*, 363 F.3d 897, 909 (9th Cir. 2004). “In fact, calling section 2’s test a ‘results test’ is somewhat of a misnomer because the test does not look for mere disproportionality in electoral results. Rather, plaintiffs must establish that under the totality of the circumstances, the challenged procedure prevents minorities from effectively participating in the political process.” *Id.*

42. See Peyton McCrary, *Discriminatory Intent: The Continuing Relevance of “Purpose” Evidence in Vote-Dilution Lawsuits*, 28 HOW. L. J. 463, 491 (1985) (“Most [voting-rights attorneys] still seek to prove discriminatory purpose lies behind the adoption or maintenance of at-large elections for local governing bodies.”).

American Citizens (LULAC) v. Perry gave particular emphasis to the inference that intentional discrimination was at play in the dilution of one of the districts,⁴³ connecting section 2 to the constitutional standard of discriminatory intent in new and potentially important ways. The trajectory charted by the Supreme Court in its seminal section 2 cases—*Gingles*, *Growe*, and *De Grandy*—indicates that as the Court strives to keep section 2 a politically attuned statute targeted to its aims of combating racial discrimination in voting, the flexibility provided line-drawers may increasingly lead courts to describe the section 2 injury in terms of impermissible motivations as opposed to unlawful effects. A recognition that section 2 cases often incorporate at the totality-of-the-circumstances stage some description of objective, if not subjective, intent indicates the short span between the section 2 standard and the constitutional standard.

The fact that the statutory offense is so intertwined with the concepts and standards of unconstitutional vote dilution adds force to the contention that section 2 is a proportional and congruent remedy. While unconstitutional vote dilution nominally may have disappeared after 1982, it lives on in the form of applications and interpretations of the VRA that incorporate the constitutional standard of intent and effect. Paradoxically, the Court's constitutional vote-dilution jurisprudence continues to thrive in its similarity to the statutory standard despite ostensibly being in hibernation for a quarter century. The similarities between section 2 as currently applied and the constitutional standard as understood after *Rogers* increase the likelihood of section 2 withstanding a challenge to its constitutionality under *City of Boerne*.

This Article proceeds in four parts. Part I outlines how vote-dilution cases were brought in the years from 1960 to 1980, the period between the Court's decisions in *Gomillion v. Lightfoot* and *City of Mobile v. Bolden*, the latter of which established that proof of discriminatory intent and effect was required for vote-dilution claims brought under both the VRA and the Constitution.⁴⁴ This Part discusses the attempt by Congress to overrule *City of Mobile*'s statutory interpretation via the 1982 Amendments to the VRA and how minority vote dilution came to be exclusively a statutory injury in practice. Part II explores the relationship between the Court's final unconstitutional vote-dilution case, *Rogers v. Lodge*, and *City of Boerne*. This Part examines the similarity and convergence of statutory and constitutional vote-dilution standards and notes the ways in which any

43. See *League of United Latin American Citizens (LULAC) v. Perry*, 126 S. Ct. 2594, 2622 (2006) (“[The redistricting plan] bears the mark of intentional discrimination that could give rise to an equal protection violation.”).

44. *City of Mobile v. Bolden*, 446 U.S. 55, 66 (1980) (plurality opinion).

attempt by the Court to break *Rogers* down into a more manageable judicial standard for unconstitutional vote dilution was diverted into the line of statutory vote-dilution cases that would begin after the 1982 Amendments. The continuation in the statutory cases of the conceptual project of giving meaning to vote dilution more generally reflects the deep connection between the constitutional and statutory standards for vote dilution.

Part III demonstrates how after the line of unconstitutional minority vote-dilution cases came to an end in *Rogers* the concept of intentional discrimination remained part of the vote-dilution jurisprudence, particularly in areas of redistricting. Acknowledgement that proof of intent has remained part of section 2's theory and application since 1982 bolsters section 2's claim to be an antidiscrimination law safely within Congress's enforcement authority. Finally, Part IV discusses *LULAC v. Perry* and the majority opinion by Justice Kennedy. This recent section 2 case indicates how vote dilution under section 2 and the Constitution are inescapably intertwined in what they aim to prohibit and how they describe the offending action. *LULAC* reflects how the unitary concept of vote dilution resists the distinction between means and ends *City of Boerne* envisions. If section 2 were to be upheld, the next question is whether section 2 is well within Congress's enforcement authority or at its periphery. This Part discusses how a post-*Boerne* section 2 decision could elucidate the future of congressional enforcement powers under the Roberts Court, both in the context of racial discrimination in voting and beyond.

Chief Justice Roberts in his confirmation hearings stated that he had argued after *City of Mobile* that the intent and effect test "should have been extended" in the 1982 Amendments.⁴⁵ While that view did not carry the day in 1982, it is clear that in the years that followed the view urged by Chief Justice Roberts did prevail in many respects. Though the *City of Boerne* analysis envisions a constitutional injury and a distinct statutory remedy, the proportionality and congruence of section 2 is recommended by the continuity and proximity between section 2 and the very constitutional test it sought to replace.

45. *Confirmation Hearing*, *supra* note 1, at 173.

I. UNCONSTITUTIONAL VOTE DILUTION AND THE VOTING RIGHTS ACT OF 1965

A. *Vote Dilution in the 1960s and 1970s*

A short description of the early vote-dilution jurisprudence is necessary in order to elucidate the later directions taken by the Court and by Congress. Between 1960, when the Supreme Court decided *Gomillion v. Lightfoot*, and 1982, when the Court decided *Rogers v. Lodge*, the Constitution—specifically the Fourteenth and Fifteenth Amendments—was the preferred basis for vote-dilution suits.⁴⁶ Though the Voting Rights Act was a possible basis for vote-dilution suits as of 1965,⁴⁷ the statutory and constitutional standards for vote dilution were interpreted as being perfectly aligned.⁴⁸ As a result, despite the canon of constitutional avoidance, the constitutional standard was usually the basis for decision, though courts often did not distinguish between the two.⁴⁹

That standard was quite flexible, if vague, in the years leading up to the *City of Mobile v. Bolden* decision in 1980. Prior to *City of Mobile*, vote-dilution suits faced a multifactor test laid out in *Whitcomb v. Chavis*,⁵⁰ *White v. Regester*,⁵¹ and the Fifth Circuit case *Zimmer v. McKeithen*.⁵²

46. See, e.g., *White v. Regester*, 412 U.S. 755, 765 (1973) (finding that a Texas redistricting plan violated constitutional standards); *Whitcomb v. Chavis*, 403 U.S. 124, 160 (1971) (upholding a multimember voting district on constitutional grounds). See also McDonald, *supra* note 4, at 1258–61 (discussing constitutional challenges brought during the 1960s and 1970s).

47. Some suits made both constitutional and statutory claims. See, e.g., *Zimmer v. McKeithen*, 485 F.2d 1297, 1301 (5th Cir. 1973) (en banc), *aff'd sub nom.* E. Carroll Parish Sch. Bd. v. Marshall, 424 U.S. 636 (1976) (per curiam).

48. See *Chisom v. Roemer*, 501 U.S. 380, 392 (1991) (“At the time of the passage of the Voting Rights Act of 1965, § 2, unlike other provisions of the Act, did not provoke significant debate in Congress because it was viewed largely as a restatement of the Fifteenth Amendment.”).

49. The reasons for this practice are not entirely clear. See Frank R. Parker, *The “Results” Test of Section 2 of the Voting Rights Act: Abandoning the Intent Standard*, 69 VA. L. REV. 715, 727–28 (1983).

The courts may have considered discussion of the section 2 standard to be superfluous because they thought the prevailing constitutional standard, under which proof of discriminatory purpose was not required, and the section 2 standard were the same. The courts may also have preferred to rely on the more developed case law discussing the proper constitutional standard as the safest basis for their decisions.

Id. (footnote omitted).

50. *Whitcomb*, 403 U.S. at 149–52.

51. *White*, 412 U.S. at 766–67.

52. *Zimmer*, 485 F.2d at 1305. See Gerken, *Undiluted Vote*, *supra* note 13, at 1673, n.21 (“Although *Zimmer* was a circuit court decision, it was considered a paradigmatic example of the Supreme Court’s approach to dilution claims at the time.”).

Vote-dilution claimants had to show that “political processes leading to nomination and election were not equally open to participation by the group in question—that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice.”⁵³ That showing depended on a demonstration of several malleable factors:

[W]here a minority can demonstrate a lack of access to the process of slating candidates, the unresponsiveness of legislators to their particularized interests, a tenuous state policy underlying the preference for multi-member or at-large districting, or that the existence of past discrimination in general precludes the effective participation in the election system, a strong case is made. Such proof is enhanced by a showing of the existence of large districts, majority vote requirements, anti-single shot voting provisions and the lack of provision for at-large candidates running from particular geographical subdistricts. The fact of dilution is established upon proof of the existence of an aggregate of these factors.⁵⁴

As one scholar and practitioner wrote, “[t]he Whitcomb-White-Zimmer approach was flexible, fact-specific, precise, and workable. Proportional representation was never required and claims to proportional representation were regularly rejected.”⁵⁵ Importantly, the multifactor test did not clearly distinguish proof of intent and proof of effects in assembling the factors to be aggregated.⁵⁶ In cases that would later be stressed by the dissenters in *City of Mobile*, the Supreme Court between 1965 and 1980 signaled that evidence of discriminatory effects alone would be sufficient to prove vote dilution. In *Fortson v. Dorsey*, the Court in dicta questioned the constitutionality of multimember apportionment schemes that “designedly or otherwise . . . operate to minimize or cancel out the voting strength of

53. *White*, 412 U.S. at 766 (citing *Whitcomb*, 403 U.S. at 149–50).

54. *Zimmer*, 485 F.2d at 1305 (footnotes omitted).

55. Parker, *supra* note 49, at 725.

56. This distinction is in many ways a matter of perspective, as many have noted. See Henry L. Chambers, Jr., *Retooling the Intent Requirement Under the Fourteenth Amendment*, 13 TEMP. POL. & CIV. RTS. L. REV. 611, 620 (2004) (“That effects can be important in determining intent is hardly surprising, as an intent inquiry can arguably be rephrased as an effects test.”); James U. Blacksher & Larry T. Menefee, *From Reynolds v. Sims to City of Mobile v. Bolden: Have the White Suburbs Commandeered the Fifteenth Amendment?*, 34 HASTINGS L.J. 1, 32 (1982) (“It is difficult, however, to distinguish the Rogers ‘intent’ test from the ‘results’ test of the Voting Rights Act.”). Some scholars take quite bold stances with regard to intent and effect. See, e.g., Michael Selmi, *Proving Intentional Discrimination: The Reality of Supreme Court Rhetoric*, 86 GEO. L.J. 279, 335–38 (1997) (arguing that applying an effects test would not have made a difference in how the Court decided vote-dilution cases).

racial or political elements of the voting population.”⁵⁷ In *Burns v. Richardson* the Court noted that district maps could face challenges under the Constitution if it could be shown that the map “although made on a proper population basis, was designed to *or would operate to* minimize or cancel out the voting strength of racial or political elements of the voting population.”⁵⁸ Discriminatory effects could be sufficient to prove vote dilution, and the Court did not attempt to draw a stark line distinguishing intent and effect. Nor did it demand that particular evidence of either was dispositive to a vote-dilution claim. In sum, vote-dilution cases, sounding in the Constitution, did not require specific showings of either intent or effect, a fact which contributed both to the flexibility and amorphousness of the constitutional standard.⁵⁹

In *Washington v. Davis* and *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, the Supreme Court held that challenges brought under the Equal Protection Clause of the Fourteenth Amendment to facially neutral laws must demonstrate discriminatory intent and effect.⁶⁰ These decisions, grounded like the vote-dilution cases in the Equal Protection Clause, had clear implications for the vote-dilution jurisprudence. A ratcheting-up of the standard of proof for vote dilution loomed. The Fifth Circuit, which had established the “*Zimmer* factors,” sought in *Nevitt v. Sides*⁶¹ to reconcile the effects-based approach with the recent Supreme Court decisions. “[W]e harmonize our holding [that

57. *Fortson v. Dorsey*, 379 U.S. 433, 439 (1965). See McDonald, *supra* note 4, at 1258–60 (detailing the relationship of *Fortson* to other voting-rights cases).

58. *Burns v. Richardson*, 384 U.S. 73, 89 (1966) (emphasis added).

59. See *Wise v. Lipscomb*, 437 U.S. 535, 550 (1978) (Rehnquist, J., concurring) (describing *White v. Regester* factors as “highly amorphous”). For another view on the factors described in *White v. Regester*, see *Holder v. Hall*, 512 U.S. 874, 938 (1994) (Thomas, J., concurring in the judgment).

In reality, the list of *White* factors provides nothing more than just that: a list of possible considerations that might be consulted by a court attempting to develop a *gestalt* view of the political and racial climate in a jurisdiction, but a list that cannot provide a rule for deciding a vote dilution claim. Take, for example, a case in which a district court determines that a minority group constituting 34% of the population in a certain jurisdiction has suffered discrimination in the past, that the group currently bears the effects of that discrimination, and that there has been a history of racial campaigning in the jurisdiction. How can these facts possibly answer the question whether the group’s votes have been diluted if the group controls two rather than three seats in a 10-member governing body?

Id. (citation omitted). For scholarly reaction to Justice Thomas’s concurrence, see SAMUEL ISSACHAROFF ET AL., *THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS* 849–50 (rev. 2d ed. 2002) (“Justice Thomas’s concurrence in *Holder* is in some ways the most extraordinary voting rights opinion of modern times.”).

60. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264–65 (1977); *Washington v. Davis*, 426 U.S. 229, 244–45 (1976).

61. *Nevitt v. Sides*, 571 F.2d 209, 217 (5th Cir. 1978).

discriminatory intent is required for vote dilution claims brought under the Fourteenth and Fifteenth Amendments] with the case law of this circuit by demonstrating that *Zimmer* and its progeny establish sufficient conditions for a finding of intentional discrimination.”⁶² In recasting evidence of effects as indicia of intent, the Fifth Circuit tried to reconceptualize the *Zimmer* factors and preserve their role in the vote-dilution inquiry. But in *City of Mobile*, the Supreme Court would not find that reconceptualization sufficient.⁶³

Thus, at the time *City of Mobile* reached the Supreme Court in 1980, the vote-dilution jurisprudence was still predominantly constitutional in nature, though *Washington v. Davis* and *Village of Arlington Heights* indicated that the test for vote dilution was likely to become more strict. The statutory provisions of the 1965 VRA were understood as virtually indistinguishable from what the Fourteenth and Fifteenth Amendments required. Prior to 1980, when the Supreme Court and lower courts heard vote-dilution cases, they gave great weight to evidence of discriminatory effects and often did not distinguish between intent and effect. All of this would change—for a time—after the *City of Mobile* decision.

B. *City of Mobile and its Aftermath*

Between 1980 and 1982 the vote-dilution jurisprudence went through an upheaval. In 1980 the Supreme Court decided *City of Mobile v. Bolden* and reversed the *White-Whitcomb-Zimmer* line of cases which had suggested that discriminatory effects were sufficient to support a finding of unconstitutional vote dilution. The Court, in a plurality decision, followed *Washington v. Davis* and required vote-dilution claimants to demonstrate discriminatory purpose and effect, and rejected any suggestion that proof of discriminatory effects could be a sufficient indication of discriminatory intent.⁶⁴ The Court, as in prior decisions, held that there was no discernible difference between the vote-dilution standards under the Constitution and the VRA.⁶⁵ “In view of the section’s language and its sparse but clear

62. *Id.*

63. *City of Mobile v. Bolden*, 446 U.S. 55, 73 (1980) (plurality opinion).

64. *Id.* For an early interpretation of *Mobile*, see Samuel Issacharoff, Note, *Making the Violation Fit the Remedy: The Intent Standard and Equal Protection Law*, 92 YALE L.J. 328, 333 (1982) [hereinafter Note, *Making the Violation Fit the Remedy*] (“Although the Court purported to apply an already established intent standard, its holding was, in fact, irreconcilable both with precedent and with the conventionally understood doctrinal basis of intent.”).

65. *City of Mobile*, 446 U.S. at 60–61. Lower courts were quick to follow the Court’s direction. See Parker, *supra* note 49, at 733 (“Because six Justices agreed that the scope of section 2 was the same as that of the fifteenth amendment, the lower courts generally considered themselves bound by the Stewart plurality’s ruling that section 2 requires proof of discriminatory purpose.”)

legislative history, it is evident that this statutory provision adds nothing to the appellees' Fifteenth Amendment claim. We turn, therefore, to a consideration of the validity of the judgment . . . with respect to the Fifteenth Amendment."⁶⁶ Justice Marshall, dissenting on most other substantive points, agreed with the plurality. "I agree with the plurality . . . that the prohibition on denial or infringement of the right to vote contained in § 2 of the Voting Rights Act contains the same standard as the Fifteenth Amendment."⁶⁷ In sum, *City of Mobile* held that under both the VRA and the Constitution, discriminatory intent and effect were indispensable elements of any vote-dilution claim.

The *City of Mobile* decision provoked outrage.⁶⁸ James Blacksher, plaintiffs' attorney in *City of Mobile* and co-author of an important article cited by Justice Brennan in *Thornburg v. Gingles*⁶⁹ (a seminal VRA case that would be decided four years after *Mobile*), called *Mobile* "the biggest step backwards in civil rights to come from the Nixon Court."⁷⁰ The outrage over the decision coincided with a planned return to the VRA by Congress in 1982,⁷¹ and the confluence of events led to a broad public debate about the scope of the VRA. Chief Justice John Roberts, at the time a young lawyer in the Reagan administration, wrote several memoranda in late 1981 arguing that any proposed amendment to the Act should preserve the intent-and-effect standard of *City of Mobile*.⁷²

(footnote omitted).

66. *City of Mobile*, 446 U.S. at 61.

67. *Id.* at 105 n.2 (Marshall, J., dissenting) (citation omitted). *See also id.* at 61 (plurality opinion) ("The view that [section 2] simply restated the prohibitions already contained in the Fifteenth Amendment was expressed without contradiction during the Senate hearings.")

68. *See, e.g., Jones v. City of Lubbock*, 640 F.2d 777, 777 (5th Cir. 1981) (Goldberg, J., specially concurring) ("[A] majority of justices of the United States Supreme Court in *City of Mobile v. Bolden* have rejected the *Zimmer* test, simultaneously casting aside the ten years of thought, experience and struggle embodied within it.")

69. 478 U.S. 30, 47–49 (1986) (citing James U. Blacksher & Larry T. Menefee, *From Reynolds v. Sims to City of Mobile v. Bolden: Have the White Suburbs Commandeered the Fifteenth Amendment*, 34 HASTINGS L.J. 1 (1982)).

70. Linda Greenhouse, *High Court Voids Victory of Blacks Over At-Large Voting in Mobile*, N.Y. TIMES, Apr. 23, 1980, at A22 (quoting James Blacksher).

71. The return was because section 5, among other sections, had to be reauthorized in 1982. An Act to amend the Voting Rights Act of 1965 to extend certain provisions for an additional seven years, to make permanent the ban against certain prerequisites to voting, and for other purposes, Pub. L. No. 94-73, Sec. 101, 89 Stat. 400.

72. *See, e.g., Memorandum from John Roberts to the U.S. Att'y Gen. on section 2 of the Voting Rights Act 1*, (Dec. 22, 1981), <http://www.archives.gov/news/john-roberts/accession-60-88-0498/030-black-binder1/folder030.pdf>. [hereinafter Roberts Memorandum]. "[Section 2] in its historic form requires proof that the challenged voting law or procedure was *designed* to discriminate on account of race. This 'intent test' follows logically and inexorably from the nature of the evil that §2 was designed to combat." *Id.* "Section 2 in its present form has been a successful tool in combatting racial discrimination in voting. The House in its hearings on extension of the Voting Rights Act failed to

The amendments to section 2 of the VRA sought to overturn the *City of Mobile* decision as a matter of statutory interpretation.⁷³ The House and Senate Reports suggested that Congress amended the VRA “to restate Congress’ earlier intent that violations of the Voting Rights Act, including Section 2, could be established by showing the discriminatory effect of the challenged practice.”⁷⁴ The amendments passed by a vote of 389 to 24 in the House and 85 to 8 in the Senate and were signed into law by President Reagan.⁷⁵

Notably, the 1982 Amendments left *City of Mobile*’s constitutional holding untouched. As the statutory avenue was the only one altered by the 1982 Amendments, and because the relief it offered extended beyond that of the constitutional provision, the constitutional avenue quickly faded from view. For all intents and purposes, minority vote dilution meant a statutory violation, not a constitutional one.

II. *ROGERS V. LODGE* AND *CITY OF BOERNE V. FLORES*

In 1982, just after the enactment of the VRA amendments, the Court decided *Rogers v. Lodge*,⁷⁶ a decision seen by some as responding to the public outcry over *City of Mobile*.⁷⁷ In *Rogers*, the Court retreated partially from the position that vote dilution required proof of discriminatory intent and effect, noting that discriminatory effects could raise the inference of discriminatory intent.⁷⁸ Quoting from *Washington v. Davis*, the Court

make the case to support a change in the existing ‘intent’ standard.” *Id.* at 3.

73. See *Reno v. Bossier Parish Sch. Bd.* (*Bossier I*), 520 U.S. 471, 482 (1997) (describing “divergence of constitutional and statutory standards”). For a discussion of the legislative history of the passage of the amendments to Section 2, see Andrew P. Miller & Mark A. Packman, *Amended Section 2 of the Voting Rights Act: What is the Intent of the Results Test?*, 36 EMORY L.J. 1 (1987) (discussing the legislative history of the passage of the Section 2 amendments).

74. H.R. REP. NO. 97-227, at 29 (1981) (footnote omitted). See also S. REP. NO. 97-417, at 17–19 (1982), as reprinted in 1982 U.S.C.C.A.N. 177, 194–196 (“The Committee amendment rejecting a requirement that discriminatory purpose be proved to establish a violation of Section 2 is fully consistent with the original legislative understanding of Section 2 when the Act was passed in 1965.”).

75. Miller & Packman, *supra* note 73, at 9, 13 (citing 127 CONG. REC. H23, 205 (1981) and 128 CONG. REC. S14, 337 (1982)).

76. *Rogers v. Lodge*, 458 U.S. 613 (1982).

77. See McDonald, *supra* note 4, at 1267. (“*City of Mobile v. Bolden* and *Rogers v. Lodge* probably cannot be distinguished on their facts but can be best understood as a reflection of changes in the membership of the Court and the position of the Chief Justice.”).

78. See Issacharoff, *Making the Violation Fit the Remedy*, *supra* note 64, at 346–49 (demonstrating how *Rogers* differed from *City of Mobile*). See also Blacksher & Menefee, *supra* note 69, at 62–63 (“In *Rogers v. Lodge*, a six-member majority accepted the view of the *Bolden* plurality that an invidious legislative purpose must be proved to invalidate an at-large election scheme on constitutional grounds, but also reinstated the formulae of *White v. Regester* and *Zimmer v. McKeithen* as sufficient to prove such intent.”); Karlan, *Voting Rights*, *supra* note 18, at 737 (discussing *Rogers*’s

found that “discriminatory intent need not be proved by direct evidence. ‘Necessarily, an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another.’”⁷⁹ *Rogers* is the last Supreme Court decision where the majority dealt directly with the standard for unconstitutional minority vote dilution. The Court’s *City of Boerne* cases render the relationship between the underlying constitutional violation and section 2 of great importance,⁸⁰ and accordingly, the point of comparison for vote dilution under the VRA and the Constitution is the set of factors identified in *Rogers* as proof of discriminatory intent. Before discussing those factors, it is appropriate to describe the Court’s *City of Boerne* review of congressional legislation enacted pursuant to its enforcement powers.

A. *City of Boerne and the Religious Freedom Restoration Act (RFRA) Comparison*

The Supreme Court has never confronted the constitutionality of section 2 in a full opinion,⁸¹ but it is hard to deny that at some point the

recitation of a “sprawling array of facts” and noting that the Court “left unstated the link between these facts on the one hand, and a deliberate decision by state actors to maintain at-large elections in order to perpetuate black political powerlessness on the other hand.”)

79. *Rogers*, 458 U.S. at 618 (quoting *Washington v. Davis*, 426 U.S. 229, 242 (1976)). Chief Justice Roberts noted in his Department of Justice memorandum that indirect evidence could prove intent. Roberts Memorandum, *supra* note 72, at 3.

Proponents of the amendment also claim that intent is virtually impossible to prove. This argument is simply false. The Supreme Court has made clear that intent in this area, like any other, may be proved by both direct and circumstantial evidence. A so-called ‘smoking gun’ (in terms of actual expressions of discriminatory intent by members of the legislature) is simply not necessary. Plaintiffs can rely on the historical background of official actions, departures from normal practice, and other indirect evidence in proving intent.

Id.

80. Compare *Blacksher & Menefee*, *supra* note 69, at 32 (“It is difficult, however, to distinguish the *Rogers* ‘intent’ test from the ‘results’ test of the Voting Rights Act.”), and Michael J. Pitts, *Georgia v. Ashcroft: It’s the End of Section 5 As We Know It (And I Feel Fine)*, 32 PEPP. L. REV. 265, 310–11 (2005) [hereinafter Pitts, *End of Section 5*] (examining *Gingles* and *Rogers* and arguing that “the evidentiary factors considered under both the constitutional and statutory standards [for section 2] are nearly, though by no means precisely, identical.”), with John Matthew Guard, Comment, “*Impotent Figureheads?*” *State Sovereignty, Federalism, and the Constitutionality of Section 2 of the Voting Rights Act After Lopez v. Monterey County and City of Boerne v. Flores*, 74 TUL. L. REV. 329, 361 (1999) (“Section 2 as it exists is no longer concerned with intentional state discrimination and other traditional constitutional prohibitions. The concepts that underlie the *Gingles* test are not constitutionally based and do not resemble the traditional tiers of scrutiny.”) (footnote omitted).

81. See *Bush v. Vera*, 517 U.S. 952, 990 (1996) (O’Connor, J., concurring) (“In the 14 years since the enactment of § 2(b), we have interpreted and enforced the obligations that it places on States in a succession of cases, assuming but never directly addressing its constitutionality.”); ISSACHAROFF ET

Court will determine whether section 2 can withstand a *City of Boerne* challenge, either as it applies to a particular election procedure (such as redistricting) or more generally. This is particularly true because Congress in enacting the Religious Freedom Restoration Act of 1993 (RFRA)⁸²—the enactment struck down in *City of Boerne*—appeared to act similarly to the way it did after *City of Mobile* was decided.

In *Employment Division v. Smith*, the Court held that “[t]he government’s ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, ‘cannot depend on measuring the effects of a governmental action.’”⁸³ Congress responded to the *Smith* decision by enacting RFRA, “which adopts a statutory rule comparable to the constitutional rule rejected in *Smith*.”⁸⁴ Thus, Congress sought by statute to restore the standard it believed appropriate.

The similarities between RFRA and section 2 are striking. As one commentator has noted: “Both RFRA and the 1982 Act enacted a broad standard drawn from prior constitutional interpretation. . . . In each case, there was some evidence that the new statutory standard simplified proof of constitutional violations, and substantial evidence that Congress disagreed with the new court-defined constitutional standard.”⁸⁵

The Court in *City of Boerne* noted that the respondent (with support of the United States as amicus) argued that RFRA was permissible legislation because the “congressional decision to dispense with proof of deliberate or overt discrimination and instead concentrate on a law’s effects accords with the settled understanding that § 5 includes the power to enact legislation designed to prevent, as well as remedy, constitutional violations.”⁸⁶

Justice Kennedy, writing for the majority, agreed that “preventive rules are sometimes appropriate remedial measures,” but nevertheless “there must be a congruence between the means used and the ends to be achieved.”⁸⁷ And

AL., *supra* note 59, at 860 (“It is . . . striking that the Court has never squarely addressed the question of the constitutionality of amended § 2’s results test.”). See also *Miss. Republican Executive Comm. v. Brooks*, 469 U.S. 1002 (1984), *summary aff’g* *Jordan v. Winter*, 604 F. Supp. 807, 811 (N.D. Miss. 1984).

82. Religious Freedom Restoration Act (RFRA) of 1993, Pub. L. No. 103-141, 107 Stat. 1488, *invalidated in part* by *City of Boerne v. Flores*, 521 U.S. 507 (1997).

83. *Employment Div. v. Smith*, 494 U.S. 872, 885 (1990) (quoting *Lyng v. Nw. Indian Cemetery Protective Ass’n*, 485 U.S. 439, 451 (1988)).

84. *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 126 S. Ct. 1211, 1216 (2006).

85. Laycock, *supra* note 18, at 750 (footnotes omitted).

86. *City of Boerne v. Flores*, 521 U.S. 507, 517 (1997).

87. *Id.* at 530.

RFRA was out of proportion to the ends targeted.⁸⁸

Without discussing section 2 directly, the Court proceeded to describe how RFRA compared unfavorably to other portions of the VRA.⁸⁹ It compared unfavorably because it swept far beyond the constitutional violations it was aimed at preventing. “RFRA is 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. It appears, instead, to attempt a substantive change in constitutional protections.”⁹⁰

Aside from the fact that the congressional record supporting RFRA lacked “examples of modern instances of generally applicable laws passed because of religious bigotry,”⁹¹ RFRA was a substantive change because the test imposed by RFRA was too removed from the constitutional standard. The Court first noted that, if taken literally, the logical applicability of RFRA was vast.

88. *See id.* at 519–20 (“While the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law is not easy to discern, and Congress must have wide latitude in determining where it lies, the *distinction exists and must be observed.*”) (emphasis added). One scholar noted that:

While Congress may adopt prophylactic measures to prevent future deprivations of a constitutional right or offer remedies for past deprivations, the Court has held that the power to identify the underlying right itself rests exclusively with the judiciary. If the Court were to conclude that the Constitution recognizes *only* the type of conventional individual harm we see in its recent equal protection jurisprudence, then aggregate rights, with their group-based attributes, arguably exceed the scope of the injury that the Constitution recognizes.

Gerken, *Undiluted Vote*, *supra* note 13, at 1737.

89. Crucially, despite the Court’s approving discussion in *City of Boerne* of early VRA enforcement power decisions, those cases did not involve section 2. *See Presto, supra* note 18, at 624–25 (“*City of Boerne* itself, despite its extensive contrasting of the Voting Rights Act with RFRA, does not once mention the amended section 2 in its approving description of the former.”); Note, *Race, Rights, and Remedies: Census Sampling and the Voting Rights Act*, 114 HARV. L. REV. 2502, 2521 (2001) (“Although the *City of Boerne* Court carefully distinguished the Civil Rights-era cases upholding the VRA, those cases did not seriously address the constitutionality of section 2, which Congress originally drafted to be coterminous with the Fifteenth Amendment’s prohibition on racial discrimination in voting.”) (footnotes omitted); David Zetlin-Jones, Note, *Right to Remain Silent?: What the Voting Rights Act Can and Should Say About Felony Disenfranchisement*, 47 B.C. L. REV. 411, 431 (2006).

The recent cases limiting congressional enforcement power under the Reconstruction Amendments cite the VRA as an appropriate use of congressional enforcement power. The VRA provisions referenced, however, pre-date the amendments to the VRA that Congress enacted in 1982. Whether the VRA *as amended* retains that constitutional appropriateness remains uncertain, an uncertainty that the current criminal disenfranchisement challenges directly address.

Id. (footnotes omitted).

90. *City of Boerne*, 521 U.S. at 532. Notably, unlike other voting-rights legislation enacted with the enforcement powers, section 2 does not strike down specific laws.

91. *Id.* at 530.

Requiring a State to demonstrate a compelling interest and show that it has adopted the least restrictive means of achieving that interest is the most demanding test known to constitutional law. . . . We make these observations not to reargue the position of the majority in *Smith* but to illustrate the substantive alteration of its holding attempted by RFRA.⁹²

The Court then entertained the possibility that another test might be applied in practice: “Even assuming RFRA would be interpreted in effect to mandate some lesser test, say, one equivalent to intermediate scrutiny, the statute nevertheless would require searching judicial scrutiny of state law with the attendant likelihood of invalidation.”⁹³ The Court suggested that such a test would have also been unconstitutional had Congress enacted it.

The Court contended that “[i]n most cases, the state laws to which RFRA applies are not ones which will have been motivated by religious bigotry.”⁹⁴ Consequently, putting the onus on the state to justify burdens with compelling interests was inappropriate. In an additional important comparison, the Court noted how proof of disparate effects might have been a better avenue for attacking laws motivated by religious bigotry. “If a state law disproportionately burdened a particular class of religious observers, this circumstance might be evidence of an impermissible legislative motive. RFRA’s substantial-burden test, however, is not even a discriminatory-effects or disparate-impact test.”⁹⁵

The discussion by the Court of the various tiers of scrutiny and available tests said nothing about section 2, but it did imply that a law grounded in proof of effects could be proportional and congruent to the ends targeted. 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 powers where Congress sought to protect suspect classes and fundamental rights.⁹⁶ In particular, it emphasized that Congress’s enforcement powers

92. *Id.* at 534.

93. *Id.*

94. *Id.* at 535.

95. *Id.* (citation omitted).

96. *See* *Tennessee v. Lane*, 541 U.S. 509, 532–34 (2004) (suggesting greater likelihood of meeting *City of Boerne* test when fundamental rights are at issue); *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 737–40 (2003) (noting the greater congressional latitude to combat gender-based discrimination). *See also* *Hayden v. Pataki*, 449 F.3d 305, 359 (2006) (Parker, J., dissenting) (“[I]t is clear that the scope of Congress’s enforcement authority is at its zenith when protecting against discrimination based on suspect classifications (such as race), or when protecting fundamental rights (such as voting).”).

contain the authority to ban facially constitutional state laws, and thus that authority might also be read as approving of effects-based remedies.⁹⁷ Of course, the Court also justified such enactments by noting the demonstrable history of intentional discrimination.⁹⁸

The fate of section 2 remains bound up with how congruent and proportional section 2 is to the underlying unconstitutional behavior, as any measure found to sweep too far beyond the constitutional standard and the record of constitutional violations would not be justified as a prophylactic measure. *City of Boerne* is thus a second “brooding omnipresence” on section 2’s horizon.⁹⁹ Despite the VRA’s place as a historic statute, congressional antidiscrimination enactments invoking the enforcement powers have been struck down post-*Boerne*,¹⁰⁰ and section 2 has been held by some courts not to

97. See *Lane*, 541 U.S. at 519–20 (2004) (discussing *Hibbs*, in which the Court recognized Congress’s authority to enact “prophylactic legislation” to proscribe practices that have a discriminatory effect even when there is no indication of discriminatory purpose in order to “carry out the basic objectives of the Equal Protection Clause”). The *Lane* Court’s description of the *Hibbs* case is dicta, and may overstate the acceptability of effects-based remedial legislation. As Mike Pitts writes, “a constitutional purpose test cannot be completely and wholly replaced by a ‘pure’ statutory effects test, but rather any statutory effects test must work in practice to appear to be ‘smoking out’ discriminatory purpose.” Pitts, *End of Section 5*, *supra* note 80, at 314. Cf. Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 521 (2003) (“Disparate impact’s friends thus have an incentive to take up the evidentiary dragnet theory as a means of preserving disparate impact liability after *Boerne*.”).

98. See *City of Rome v. United States*, 446 U.S. 156, 177 (1980) (“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.”) (citation omitted). Justice Stevens agreed with this view. See *id.* at 156 (Stevens, J., concurring) (“Congress, under the authority of § 2 of the Fifteenth Amendment may prohibit voting practices that have a discriminatory effect in instances in which there is ample proof of a longstanding tradition of purposeful discrimination.”). See also *Reno v. Bossier Parish Sch. Bd. (Bossier II)*, 528 U.S. 320, 366 (2000) (Souter, J., dissenting) (noting that Congress established preclearance to prevent covered jurisdictions from pouring “old poison into new bottles”); HASEN, JUDGING EQUALITY, *supra* note 21, at 133 (“[W]hile I have much sympathy with [Karlson’s argument in her *Voting Rights* article], I doubt it would be sufficient if the current Court made a close examination of [sections 2 and 5] of the Voting Rights Act in light of the federalism revolution.”).

99. For a discussion of the first “brooding omnipresence,” see Sanford Levinson, *Gerrymandering and the Brooding Omnipresence of Proportional Representation: Why Won’t It Go Away?*, 33 UCLA L. REV. 257 (1985).

100. See, e.g., *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 (2001).

Congress is the final authority as to desirable public policy, but in order to authorize private individuals to recover money damages against the States, there must be a pattern of discrimination by the States which violates the Fourteenth Amendment, and the remedy imposed by Congress must be congruent and proportional to the targeted violation. Those requirements are not met here, and to uphold the [Americans with Disabilities] Act’s application to the States would allow Congress to rewrite the Fourteenth Amendment law laid down by this Court in *Cleburne*.

Id. See also *United States v. Morrison*, 529 U.S. 598, 627 (2000) (striking down part of the Violence

apply to the disenfranchisement of felons in light of *City of Boerne* concerns.¹⁰¹ Section 2's results test would be impermissible under *City of Boerne* if section 2 were understood to redefine the right to cast an undiluted vote,¹⁰² as opposed to offering a new procedure to enforce protections of that right.¹⁰³

In light of *City of Boerne*'s discussion of the standards imposed by the statute and by the Court in *Employment Division v. Smith*, the likelihood of section 2 being struck down on *City of Boerne* grounds depends, in part, on the standard applicable to the underlying constitutional injury. Yet there is a lack of clarity with respect to what is sufficient to prove vote dilution under the Constitution, a lack of clarity that results in no small part from the general difficulties of proving discriminatory intent. The vagueness of the parameters of the constitutional injury also owes to the fact that vote-dilution litigation has become predominantly statutory in nature, and unconstitutional vote dilution cases came to a halt after *City of Mobile* and *Rogers*. Unconstitutional vote dilution as an injury thus has not evolved post-1982 as a concept distinct from the statutory injury. A review of *Rogers* reveals how that case retreated from *City of Mobile* and brought the test for unconstitutional vote dilution closer to the statutory test.¹⁰⁴ At the same time, *Rogers*'s unstructured standard adds

Against Women Act of 1994 as exceeding Congress's authority under the Fourteenth Amendment); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 89 (2000). "Congress never identified any pattern of age discrimination by the States, much less any discrimination whatsoever that rose to the level of constitutional violation. The evidence compiled by petitioners to demonstrate such attention by Congress to age discrimination by the States falls well short of the mark." *Id.* See also *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 640 (1999) ("In enacting the Patent Remedy Act . . . Congress identified no pattern of patent infringement by the States, let alone a pattern of constitutional violations."). But see *Lane*, 541 U.S. at 519–20 (recognizing a limited authority for Congress to enact measures that do not amount to a "substantive change to the governing law"); *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 735 (2003) ("[T]he States' record of unconstitutional participation in, and fostering of, gender-based discrimination in the administration of leave benefits is weighty enough to justify the enactment of prophylactic § 5 legislation.").

101. Compare *Hayden v. Pataki*, 449 F.3d 305, 327 (2d Cir. 2006) (en banc) (barring section 2 challenges to felon disenfranchisement) with *Farrakhan v. Washington*, 338 F.3d 1009, 1011–12 (9th Cir. 2003) (permitting such challenges where there is evidence of discrimination in the state's criminal justice system), *reh'g en banc denied*, 359 F.3d 1116 (9th Cir. 2004).

102. See *Guard*, *supra* note 80, at 363 ("The lack of any limitations together with a broad remedy, broader than any previously upheld remedy, not based on preventing or remedying widespread national unconstitutional conduct leads to only one conclusion: If the Court applies the *Flores* analysis, amended section 2 could be unconstitutional because it could be considered substantive.").

103. Cf. *Lane*, 541 U.S. at 558–59 (Scalia, J., dissenting).

[O]ne does not, within any normal meaning of the term, "enforce" a prohibition by issuing a still broader prohibition directed to the same end. One does not, for example, "enforce" a 55-mile-per-hour speed limit by imposing a 45-mile-per-hour speed limit—even though that is indeed directed to the same end of automotive safety and will undoubtedly result in many fewer violations of the 55-mile-per-hour limit.

Id.

104. See *Guard*, *supra* note 80, at 359.

ambiguity to what the Constitution prohibits and complicates the *City of Boerne* question.

B. Rogers v. Lodge and Similarities Between the Constitutional and Statutory Standards

As one commentator has written, in addition to pragmatic reasons suggesting section 2 will defeat a *City of Boerne* challenge, there “lies a more principled reason to think Section 2 remains constitutional under the recent Court decisions—the Section 2 standard strongly resembles the standard for proving unconstitutional vote dilution.”¹⁰⁵ That resemblance is due in large part to the reclamation in *Rogers v. Lodge* of the *Zimmer* factors as part of the constitutional test for vote-dilution, factors which were later incorporated into the Senate Report on section 2.¹⁰⁶ While the similarities between the *Rogers* standard and the text of section 2’s Senate Report are important, this section discusses *Rogers* at some length in order to demonstrate how the decision ultimately offered little clarity as to the constitutional test for vote dilution, and obligated the Court to continue spelling out its conception of vote dilution in the line of statutory cases that were to follow. *Rogers* is thus important not only for how it steps back after *City of Mobile*, but also in how it leaves unfinished the project of parsing vote dilution.

At issue in *Rogers* was a challenge to the Burke County Board of Commissioners in Burke County, Georgia. The Board, elected via an at-large system, was comprised of five members and had never had an African-American member elected.¹⁰⁷ The district court heard the vote-dilution challenge pre-*City of Mobile*, but according to the Fifth Circuit Court of Appeals and the majority opinion in *Rogers*, “the District Court correctly anticipated *Mobile* and required appellees to prove that the at-

There is a difference between the RFRA and section 2 that might lead to an avoidance of the *Flores* test. First, the heavy burden for proving unconstitutional vote dilution approved in *Bolden* has been lessened by the Court in *Rogers v. Lodge*, which allows an inference from impact and effects. This eases the conflict that exists between the Court and Congress in interpreting vote dilution.

Id. (footnote omitted). See also Pitts, *Affirmative Democracy*, *supra* note 22, at 206–07 (“[W]hen it comes right down to it, the evidentiary factors involved in proving a constitutional violation in *Rogers* are pretty much the same as the evidentiary factors involved in proving a violation of amended section 2.”).

105. Pitts, *End of Section 5*, *supra* note 80, at 310. See also Pitts, *Affirmative Democracy*, *supra* note 22, at 206–07 (discussing the importance of *Rogers* to *City of Boerne* analysis).

106. S. REP. NO. 97-417, at 28–29 (1982), as reprinted in 1982 U.S.C.C.A.N. 177, 206–07. See also Presto, *supra* note 18, at 625–26 (discussing how testimony from Senate hearings on the section 2 amendments persuaded the subcommittee not only to return to the pre-*City of Mobile* effects test, but to reach beyond it).

107. *Rogers v. Lodge*, 458 U.S. 613, 615 (1982).

large voting system was maintained for a discriminatory purpose.”¹⁰⁸

The Court noted that while multimember or at-large districts were not constitutionally infirm per se, “multimember districts violate the Fourteenth Amendment if ‘conceived or operated as purposeful devices to further racial discrimination’ by minimizing, cancelling out or diluting the voting strength of racial elements in the voting population.”¹⁰⁹ After describing how *Arlington Heights* and *Washington v. Davis* mandated a showing of discriminatory intent, the Court went on to note that both *Arlington Heights* and *Washington v. Davis* permitted an inference of discriminatory intent to be raised by discriminatory effects.¹¹⁰ “[D]etermining the existence of a discriminatory purpose ‘demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.’”¹¹¹

The Court then discussed *City of Mobile v. Bolden*, decided just two years earlier.¹¹² In *City of Mobile*, the plurality found that the lower court had inappropriately relied on the *Zimmer* factors, finding that *Zimmer* was “decided upon the misunderstanding that it is not necessary to show a discriminatory purpose in order to prove a violation of the Equal Protection Clause—that proof of a discriminatory effect is sufficient.”¹¹³ The *City of Mobile* plurality had determined that while “the presence of the indicia relied on in *Zimmer* may afford some evidence of a discriminatory purpose,” the mere existence of those criteria is not a substitute for a finding of discriminatory purpose.¹¹⁴ The *Rogers* majority also noted that the *City of Mobile* plurality had found that the evidence upon which the lower courts had relied was “insufficient to prove an unconstitutionally discriminatory purpose in the present case.”¹¹⁵

The *Rogers* Court then took up the case before it. “Because the District Court in the present case employed the evidentiary factors outlined in *Zimmer*, it is urged that its judgment is infirm for the same reasons that led to the reversal in *Mobile*. We do not agree.”¹¹⁶ It then stated its global answer to the charge that it had eroded *City of Mobile*’s requirement of a showing of discriminatory intent: a claim of vote dilution under the Constitution still had to allege proof of discriminatory intent, but the

108. *Id.* at 616 (citing *Lodge v. Buxton*, 639 F.2d 1358, 1375–76 (5th Cir. 1981)).

109. *Id.* at 617 (quoting *Whitcomb v. Chavis*, 403 U.S. 124, 149 (1971)).

110. *Id.* at 617–18 (citing *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977); *Washington v. Davis*, 426 U.S. 229, 240, 242 (1976)).

111. *Id.* at 618 (quoting *Arlington Heights*, 429 U.S. at 266).

112. *Id.* at 618–20.

113. *City of Mobile v. Bolden*, 446 U.S. 55, 71 (1980) (plurality opinion).

114. *Id.* at 73.

115. *Rogers*, 458 U.S. at 620 (quoting *City of Mobile*, 466 U.S. at 73).

116. *Id.* at 620–21.

Zimmer factors could be understood as setting forth indicia of that intent.¹¹⁷

The *Rogers* Court noted:

Both the District Court and the Court of Appeals thought the supporting proof in this case was sufficient to support an inference of intentional discrimination. The supporting evidence was organized primarily around the factors which *Nevett v. Sides*, had deemed relevant to the issue of intentional discrimination. These factors were primarily those suggested in *Zimmer v. McKeithen*.¹¹⁸

The *Zimmer* factors had returned as relevant but not dispositive to the issue of intentional discrimination.

The *Rogers* Court pointed to certain facts supporting the inference of discriminatory purpose in the maintenance of the Burke County voting system. It noted that the district court found that “past discrimination has had an adverse effect on black voter registration which lingers to this date.”¹¹⁹ Specifically, it also noted a history of discrimination in education and that “some schools still remain essentially segregated and blacks as a group have completed less formal education than whites.”¹²⁰ It pointed to evidence of exclusion from party politics, burdensome property ownership requirements, disparities in the quality of property owned, and discrimination in the selection of grand juries.¹²¹ Overall, it agreed with the district court which had “concluded that historical discrimination had restricted the present opportunity of blacks effectively to participate in the political process.”¹²²

In addition, the Court highlighted evidence of a lack of responsiveness of elected officials to the needs of the African-American community, evidence of the effects of discrimination on socio-economic status, the tenuousness of the rationale for retaining the voting system, the geographic

117. *Id.* at 621.

The District Court . . . demonstrated its understanding of the controlling standard by observing that a determination of discriminatory intent is a requisite to a finding of unconstitutional vote dilution under the Fourteenth and Fifteenth Amendments. Furthermore, while recognizing that the evidentiary factors identified in *Zimmer* were to be considered, the District Court was aware that it was not limited in its determination only to the *Zimmer* factors but could consider other relevant factors as well.

Id. (citations and quotations omitted).

118. *Id.* at 624 (citation omitted).

119. *Id.*

120. *Id.* at 624–25.

121. *Id.* at 625–26.

122. *Id.* at 625.

size of the county, and the requirement that candidates run for specific seats on the board.¹²³ After summarizing these factors, the Court announced that “[n]one of the District Court’s findings underlying its ultimate finding of intentional discrimination appears to us to be clearly erroneous.”¹²⁴

Justice Powell wrote a brief dissent, joined by then-Justice Rehnquist.¹²⁵ Justice Stevens authored a lengthy dissent that focused on the fact that *Rogers* had imposed an amorphous, unmanageable standard upon the Constitution and the courts. “I believe the Court errs by holding the structure of the local governmental unit unconstitutional without identifying an acceptable, judicially manageable standard for adjudicating cases of this kind.”¹²⁶ Justice Stevens argued that the Court’s formulation improperly required an inquiry into the subjective intent of lawmakers and that the Court ought to have promulgated a test that relied on objective indicia of vote dilution.¹²⁷ In this way, the Court would have avoided imposing a constitutional standard of “ephemeral character.”¹²⁸

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). That new standard, however, was quite amorphous. Aside from the fact that cases brought in the Jim Crow South were more likely to be won by plaintiffs, there existed no clear standard cabining judicial discretion regarding the factors from which discriminatory intent could be divined or inferred. Notably, there was no triage device, like the one the Court would create in *Thornburg v. Gingles*,¹²⁹ to filter vote-dilution claims and quickly get to the heart of whether voting clout was being minimized, cancelled out, or diluted. Instead, as Justice Stevens argued, the sprawling examination of economic data, intra-party political data, geographical figures, educational opportunities, and the responsiveness of public officials (among other indicia) failed to lay out a manageable judicial standard for vote-dilution cases.¹³⁰ Moreover, such an

123. *Id.* at 625–27.

124. *Id.* at 627.

125. *See id.* at 628–29 (Powell, J., dissenting). “The District Court and Court of Appeals in this case based their findings of unconstitutional discrimination on the same factors held insufficient in *Mobile*. Yet the Court now finds their conclusion unexceptionable. . . . Whatever the wisdom of *Mobile*, the Court’s opinion cannot be reconciled persuasively with that case.” *Id.*

126. *Id.* at 633 (Stevens, J., dissenting).

127. *Id.* at 642–43.

128. *Id.* at 643.

129. *See Thornburg v. Gingles*, 478 U.S. 30, 46 (1986) (establishing a three-part prima facie test for section 2 violation).

130. *Rogers*, 458 U.S. at 633.

inquiry would prove incredibly costly and time consuming.¹³¹ Pam Karlan has written that the cost of litigating *City of Mobile* after the remand from the Supreme Court was staggering:

[P]laintiffs' lawyers logged 5,525 hours and spent \$96,000 in out-of-pocket expenses, 'which were exclusive of expenses incurred by Justice Department lawyers after the department intervened [in support of the plaintiffs] and the costs of expert witnesses and paralegals.' Given the minuscule size of the voting rights bar, requiring plaintiffs to prove intentional discrimination in cases involving complex election practices with lengthy and distant pedigrees would quite plausibly leave literally thousands of unconstitutional systems in place.¹³²

As the 1982 VRA Amendments soon halted the unconstitutional vote-dilution strand of cases, the *Rogers* standard faced no pressure from litigants or district judges to become more streamlined. Nor was the Court required by any such pressures to modify the *Rogers* standard by developing a prima facie test for unconstitutional vote dilution.¹³³ Justice Stevens's search for a comprehensive approach to claims of unlawful redistricting would continue in other voting cases.¹³⁴ Moreover, the Court would—four years after *Rogers*—develop a filtering system for vote-dilution cases brought under section 2 of the VRA, as the constitutional standard for vote dilution nominally went into stasis.¹³⁵

131. *Id.* at 645.

132. Karlan, *Voting Rights*, *supra* note 18, at 736 (quoting Chandler Davidson, *The Recent Evolution of Voting Rights Law Affecting Racial and Language Minorities*, in *QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT, 1965–1990*, at 21, 29 (Chandler Davidson & Bernard Grofman eds., 1994) (footnote omitted). *See also Voting Rights Act: Hearings Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 97th Cong. 368 (1982) (statement of Laughlin McDonald, Director, Southern Regional Office, American Civil Liberties Union Foundation) (“[T]here’s no question that a vote dilution suit is the most difficult. . . . The optimum dilution suit, quite frankly, was nothing less than a presentation of the complete racial history of the jurisdiction.”).

133. *Cf.* Tokaji, *supra* note 22, at 692 (noting the lack of a clear standard for section 2 vote-denial cases and proposing a burden-shifting test styled after Title VII).

134. *See generally* Heather K. Gerken, *Lost in the Political Thicket: The Court, Election Law, and the Doctrinal Interregnum*, 153 U. PA. L. REV. 503, 522–29 (2004) [hereinafter Gerken, *Doctrinal Interregnum*] (discussing Justice Stevens' dissent in *Vieth*); Pamela S. Karlan, *Cousins' Kin: Justice Stevens and Voting Rights*, 27 RUTGERS L.J. 521, 522 (1996) (“Justice Stevens' approach has the signal virtue of giving a coherent answer to the most vexing question in contemporary voting rights litigation: the permissibility of race-conscious districting.”).

135. *See Thornburg v. Gingles*, 478 U.S. 30, 46 (1986) (plurality opinion) (establishing the three-part *Gingles* test for cases brought under section 2).

C. The Gingles Breakthrough

Thornburg v. Gingles is in some ways the most remarkable voting-rights case since *Reynolds v. Sims*, in that it structured an entire generation of vote-dilution cases brought under section 2 and ordered the vote-dilution cases in an intelligible, clear way.¹³⁶ The three-part *Gingles* test, which the plurality formed out of the text of section 2, did not invalidate multimember districts altogether.¹³⁷ Instead it set up a three-part test to act as a “sentry” at the gates for vote-dilution cases.¹³⁸

In creating the three-part test, the *Gingles* plurality also took steps to give content to the concept of vote dilution, insofar as it requires a baseline understanding of what is being diluted. As Justice Scalia said during oral argument in *Chisom v. Roemer*: “You don’t know what watered beer is unless you know what beer is, right?”¹³⁹ Justice O’Connor in her *Gingles* concurrence struggled quite openly with the difficulty of articulating some baseline of voting strength sufficient to show that section 2 had been violated:

In order to evaluate a claim that a particular multimember district or single-member district has diluted the minority group’s voting strength to a degree that violates § 2, however, it is also necessary to construct a measure of “undiluted” minority voting strength. . . . Put simply, in order to decide whether an electoral system has made it harder for minority voters to elect the candidates they prefer, a court must have an idea in mind of how hard it “should” be for minority voters to elect their preferred candidates under an acceptable system.¹⁴⁰

Insofar as the word “should” urges the discovery of an *exact* baseline from which vote dilution is measured, that “should” has often proved elusive in vote-dilution jurisprudence. Indeed, different members of the Court in

136. *See id.* at 46–51 (discussing principles utilized by the Court in past vote-dilution cases).

137. *See id.* at 46 (“[E]lectoral devices, such as at-large elections, may not be considered *per se* violative of § 2.”).

138. *See Metts v. Murphy*, No. 02-2204, 2003 WL 22434637, at *17 (1st Cir. 2003) (Selya, J., dissenting) (“The *Gingles* preconditions act as a sentry at the gates—a bright-line rule that must be satisfied *before* the totality of the circumstances comes into play.”), *vacated en banc*, 363 F.3d 8 (1st Cir. 2004).

139. Transcript of Oral Argument at 8, *Chisom v. Roemer*, 501 U.S. 380 (1991) (Nos. 90-757, 90-1032). *See also* *Miss. Republican Executive Comm. v. Brooks*, 469 U.S. 1002, 1012 (1984) (Rehnquist, J., dissenting from summary affirmance) (“[The] phrase [vote dilution] itself suggests a norm with respect to which the fact of dilution may be ascertained.”).

140. *Gingles*, 478 U.S. at 88 (O’Connor, J., concurring).

several cases after *Gingles* noted the difficulties of determining a baseline for vote dilution.¹⁴¹

The baseline provided in *Gingles*, however, produced an understandable system which courts and litigants could operate.¹⁴² As mandated by section 2 itself, proportional representation was not required. But in a stark reworking of other language in section 2 (not to mention the sprawling factors outlined in the Senate Report), the *Gingles* plurality consolidated the vote-dilution inquiry into a three-part test followed by an examination of the totality of the circumstances. Plaintiffs had to demonstrate that their bloc was “sufficiently large and geographically compact to constitute a majority in a single-member district[,] . . . politically cohesive[,] . . . [and] that the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority’s preferred candidate.”¹⁴³ Vote dilution was now about voting patterns; *Gingles* eliminated the need to delve into the voluminous social and historical factors described in *Rogers* and instead put the focus directly on evidence of

141. See, e.g., *Reno v. Bossier Parish Sch. Bd. (Bossier II)*, 528 U.S. 320, 367–68 (2000) (Souter, J. dissenting).

Dilutive effect requires a baseline against which to compare a proposed change. While the baseline is in theory the electoral effectiveness of majority voters, dilution is not merely a lack of proportional representation, and we have held that the maximum number of possible majority-minority districts cannot be the standard. Thus we have held that an enquiry into dilutive effect must rest on some idea of a reasonable allocation of power between minority and majority voters

Id. (citation omitted). See also *Holder v. Hall*, 512 U.S. 874, 896 (1994) (Thomas, J., concurring in the judgment) (“The central difficulty in any vote dilution case, of course, is determining a point of comparison against which dilution can be measured.”); *Chisom v. Roemer*, 501 U.S. 380, 415 (1991) (Scalia, J., dissenting).

I frankly find it very difficult to conceive how it is to be determined whether “dilution” has occurred, once one has eliminated *both* the requirement of actual intent to disfavor minorities, *and* the principle that 10,000 minority votes throughout the State should have as much practical “electability” effect as 10,000 nonminority votes. How does one begin to decide, in such a system, how much elective strength a minority bloc *ought* to have?

Id.

142. See Samuel Issacharoff, *Groups and the Right to Vote*, 44 EMORY L.J. 869, 879 (1995) (“*Gingles* proved tremendously useful in challenges to at-large electoral systems because of the confined nature of the inquiry.”). Data indicates that by meeting the three-pronged *Gingles* test, litigants had a great probability of success on the merits. See Ellen Katz et al., *Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982*, 39 U. MICH. J. L. REFORM (forthcoming 2006) (manuscript at 14), available at <http://www.sitemaker.umich.edu/votingrights/files/finalreport.pdf> [hereinafter Katz et al., *Documenting Discrimination*] (“Of the 67 lawsuits that deemed the *Gingles* factors satisfied, plaintiffs in covered jurisdictions prevailed in 93.1% of the cases Plaintiffs in non-covered jurisdictions prevailed in 76.3% of the cases, winning relief in 29 of the 38 cases that satisfied the *Gingles* preconditions.”).

143. *Gingles*, 478 U.S. at 50–51.

polarized voting and the size and compactness of the minority bloc.¹⁴⁴ As the Court would later state in *Grove v. Emison*, “[u]nless these points are established, there neither has been a wrong nor can be a remedy.”¹⁴⁵ The *Gingles* test would be applied to single-member districts in *Grove* and *Voinovich v. Quilter*,¹⁴⁶ and the Court would clarify in *Johnson v. De Grandy* that section 2 did not guarantee a political feast, only protection against a wrongful political famine.¹⁴⁷ Vote dilution as a concept was fine-tuned in these statutory cases, as the Court sought to determine the ingredients for beer and its watered-down version.

But returning to the decision that began the Court’s foray into defining the requirements of section 2, it is important to note that the standard *Gingles* developed was not conceived of as a break from the pre-*City of Mobile* constitutional standard, but rather as a continuation of a suspended project of giving content to the test for vote dilution. Notably, the *Gingles* three-part test had roots in an important law review article that sought to provide a standard for *unconstitutional* vote dilution. Co-authored by James Blacksher, one of the plaintiffs’ attorneys in *Gingles* itself, the article argued that “[a]ny standard for measuring unconstitutional vote dilution must (1) assure commensurate protection for the voting strength of the racial minorities and majority alike, and (2) provide a judicially manageable standard of proof that neither outlaws multimember districts per se nor requires proportional representation.”¹⁴⁸ In proposing a constitutional standard for vote dilution in at-large systems, Blacksher and Menefee recommended a structure very similar to what would eventually become the *Gingles* test. Calling it “One Proposal for a Constitutional Standard of At-Large Vote Dilution,”¹⁴⁹ the authors declared that their article

proposes the following criteria for use in measuring
unconstitutional vote dilution caused by at-large election plans,

144. For an attack on the *Gingles* test, see Holder, 512 U.S. at 930–940 (1994) (Thomas, J., concurring in the judgment) (calling *Gingles* factors “nothing but puffery used to fill out an impressive verbal formulation and to create the impression that the outcome in a vote dilution case rests upon a reasoned evaluation of a variety of relevant circumstances”); *id.* at 943–44 (“Few words would be too strong to describe the dissembling that pervades the application of the ‘totality of circumstances’ test under our interpretation of § 2. It is an empty incantation—a mere conjurer’s trick that serves to hide the drive for proportionality that animates our decisions.”).

145. *Grove v. Emison*, 507 U.S. 25, 40–41 (1993) (footnote omitted).

146. *Id.* at 40; *Voinovich v. Quilter*, 507 U.S. 146, 157–58 (1993).

147. *Johnson v. De Grandy*, 512 U.S. 997, 1017 (1994) (“One may suspect vote dilution from political famine, but one is not entitled to suspect (much less infer) dilution from mere failure to guarantee a political feast.”).

148. Blacksher & Menefee, *supra* note 56, at 4.

149. *Id.* at 50.

without demanding that they should constitute the exclusive standard for at-large situations: *An at-large election scheme for a state or local multi-representative body is unconstitutional when jurisdiction-wide elections permit a bloc-voting majority, over a substantial period of time, consistently to defeat candidates publicly identified with the interests of and supported by a politically cohesive, geographically insular racial or ethnic minority group.*¹⁵⁰

The *Gingles* plurality embraced this test, citing the article several times in molding section 2's text into the *Gingles* test, a process which it said effectuated Congress's will.¹⁵¹ As the lower court in *Gingles* had ruled entirely on statutory grounds, the Court had no opportunity to apply the Blacksher and Menefee logic to a claim of unconstitutional vote dilution. But insofar as a multimember district map was being challenged, the Court found the Blacksher and Menefee piece to offer the outline of a workable standard for vote dilution under section 2. It connected the injury caused by the multimember scheme to the potential remedy—a single-member district map—thereby enhancing the administrability of the principle.¹⁵²

One can only speculate whether the Court would have adopted something akin to the *Gingles* test had it faced constitutional challenges to multimember maps as opposed to statutory challenges. The use of the Blacksher and Menefee article suggests that the Court believed section 2's application to multimember maps required parsing and elaboration in the same way vote dilution under the Constitution did. Because vote-dilution cases after the 1982 Amendments were statutory in nature, the Court was never called to develop explicitly the meaning of unconstitutional vote dilution with regard to multimember districts or single-member districts. But the citation to the Blacksher and Menefee article and the unique posture of *Gingles* suggest that, in some ways, the Court's statutory vote-dilution cases gave the Court its only opportunity to describe a baseline for vote

150. *Id.* at 50–51 (footnote omitted).

151. *Thornburg v. Gingles*, 478 U.S. 30, 48 n.15 (1986) (plurality opinion) (“In recognizing that some Senate Report factors are more important to multimember district vote dilution claims than others, the Court effectuates the intent of Congress.”).

152. *See Holder v. Hall*, 512 U.S. 874, 899 n.6 (1994) (Thomas, J., concurring in the judgment).

[O]ne factor that has prompted our focus on control of [single-member] seats has been a desire, when confronted with an abstract question of political theory concerning the measure of effective participation in government, to seize upon an objective standard for deciding cases, however much it may oversimplify the issues before us. If using control of seats as our standard does not reflect a very nuanced theory of political participation, it at least has the superficial advantage of appealing to the “most easily measured indicia of political power.”

Id. (quoting *Davis v. Bandemer*, 478 U.S. 109, 157 (1986) (O'Connor, J., concurring)).

dilution more generally, a baseline which the Court might have similarly described had it been forced to standardize *City of Mobile* and *Rogers*.

This indicates that a strong conceptual link exists between the constitutional and statutory standards because dilutive effect is understood as essentially the same in both systems. Even if constitutional vote-dilution suits require additional proof of intent, the relationship between *Gingles*, *Rogers*, and the 1982 Amendments indicates that the injury targeted by the statute is identical to the constitutional injury with respect to the meaning of diminished clout in voting, regardless of the reasons for that diminishment. This point must be qualified because it is unknown exactly what *Rogers* requires with respect to single-member districts; the Court has never had an unconstitutional vote-dilution case involving single-member districts. But *Gingles* suggests that at minimum, its concept of diluted voting clout is no different from what the Court would look for in examining discriminatory effects in a constitutional vote-dilution case.

While the work of elaborating the Court's understanding of vote dilution proceeded in the section 2 cases, the Court was not called upon to articulate an understanding of what discriminatory intent looked like in a world where multimember districting has been abandoned and the most egregious forms of intentional discrimination have been deterred. (Indeed, it is not clear that Congress had any particular understanding or expectation of how either the VRA or the Constitution would be applied to single-member districts.)¹⁵³ Justice Souter, dissenting in *Bossier II*, noted that parsing "intentional discrimination" is conceptually easy.¹⁵⁴ But in practice the matter is different: "[The majority's view] assumes that purpose is easier to prove than effect. While that may be true in price-fixing cases, it is not true in voting rights cases (even though purpose is conceptually simpler than effect under § 5 [of the VRA])."¹⁵⁵

153. See Richard H. Pildes, *Principled Limitations on Racial and Partisan Redistricting*, 106 YALE L.J. 2505, 2519 (1997) ("[V]ote dilution challenges to the way districts were arrayed within a single-member districting plan were still largely problems for the coming years"). The author adds:

A . . . plausible possibility is that [the 1982] Congress simply had no clear conception in mind of what vote dilution or the 'results' test would mean. . . . Congress might well have had neither a clear conceptual sense of vote dilution, nor a well-developed practical understanding of what the results test would mean in application.

Id. at 2521.

154. See *Reno v. Bossier Parish Sch. Bd. (Bossier II)*, 528 U.S. 320, 367 (2000) (Souter, J., dissenting) ("[I]ntent to dilute is conceptually simple, whereas a dilutive abridgment-in-fact is not readily defined and identified independently of dilutive intent."). See also Tokaji, *supra* note 22, at 731 ("In the vote dilution area, the Court has provided considerable clarity on the scope of the constitutional right. Specifically, it has held that intentional race discrimination is required.").

155. *Bossier II*, 528 U.S. at 358 n.10 (citation omitted).

In *Shaw v. Reno*, the Court demonstrated that an inquiry into the presence of a discriminatory motive presents unique difficulties in the context of single-member districting.¹⁵⁶ *Shaw* does not involve using race to achieve the dilution of voting clout, but rather the use of race that imposes an expressive harm upon voters.¹⁵⁷ Assessing, even roughly, how much consideration line-drawers gave to race in dividing populations whose political, economic, and racial demographics were well-known is not easy.¹⁵⁸ The constitutional test of discriminatory intent may not be amenable to “exact calibration,” and exact calibration may indeed be unnecessary.¹⁵⁹ The point is that insofar as discriminatory intent is a component of the constitutional test for vote dilution, any evolution in what discriminatory intent encompassed has taken place in the statutory vote-dilution cases and the *Shaw* cases.

Before discussing some of the ways in which section 2 overlaps with the constitutional test, a small point is worth making with regard to the actual content of that test. Two other forms of unconstitutional vote dilution, numerical dilution (violations of the one person, one vote rule) and dilution on the basis of partisan affiliation, have not generated any standards that might apply in the context of minority vote dilution. While the one-person, one-vote cases provide a straightforward test for vote dilution that adds little to the content of vote dilution under *Rogers*, the

156. *Shaw v. Reno*, 509 U.S. 630, 646 (1993).

157. *See id.* at 649–50 (“Classifying citizens by race, as we have said, threatens special harms that are not present in our vote-dilution cases. It therefore warrants different analysis.”). The “analytically distinct” equal protection claim in *Shaw* was not premised on a vote-dilution theory. *Id.* at 652. The court was careful to note that this constitutional claim was not a vote-dilution claim by nature. *Id.* at 649–50. Cf. Richard H. Pildes & Richard G. Niemi, *Expressive Harms, “Bizarre Districts,” and Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno*, 92 MICH. L. REV. 483 (1993) (elaborating on new strain of Equal Protection Clause injury conceived of by the *Shaw* court).

158. *See Shaw*, 509 U.S. at 646.

[R]edistricting differs from other kinds of state decisionmaking in that the legislature always is aware of race when it draws district lines, just as it is aware of age, economic status, religious and political persuasion, and a variety of other demographic factors. That sort of race consciousness does not lead inevitably to impermissible race discrimination.

Id.

159. *See Bossier II*, 528 U.S. at 367 (Souter, J., dissenting).

A purpose to dilute simply means to subordinate minority voting power; exact calibration is unnecessary to identify what is intended. Any purpose to give less weight to minority participation in the electoral process than to majority participation is a purpose to discriminate and thus to “abridge” the right to vote. No further baseline is needed because the enquiry goes to the direction of the majority’s aim, without reference to details of the existing system.

Id. *See also* *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 277 (1979) (“Discriminatory intent is simply not amenable to calibration. It either is a factor that has influenced the legislative choice or it is not.”).

partisan gerrymandering cases have failed to provide a standard that might mechanize the standard for unconstitutional vote dilution on the basis of party, or clarify the standard for unconstitutional dilution on the basis of race, as described in *Rogers*.¹⁶⁰

One way of thinking about the problems this may cause under the *City of Boerne* analysis is to imagine Congress enacting a statute aimed at preventing unconstitutional vote dilution on the basis of partisan affiliation. Congress might marshal what it believed to be a pattern of nationwide partisan gerrymandering (on either the congressional or state levels), and legislate pursuant to its enforcement powers under the Fourteenth or Fifteenth Amendments in order to prevent some type of egregious partisan gerrymandering.¹⁶¹ Assuming *City of Boerne* applies, the question would be whether this statute altered the substance of the constitutional right at issue or whether it was properly within Congress's enforcement powers. Thus the immediate focus would be on what the substance of the right was.

Despite the fact that "Congress must have wide latitude in determining where [the line between substantive and remedial legislation] lies,"¹⁶² the line must be respected. The Court, however, has offered no standard for partisan gerrymandering in either *Vieth* or *LULAC*. The Court has recognized that partisan gerrymanders may violate the right to an undiluted vote, but it has offered no standard for protecting that right.¹⁶³ Thus, how

160. See Bruce E. Cain & Karin MacDonald, *Voting Rights Act Enforcement: Navigating Between High and Low Expectations*, in *THE FUTURE OF THE VOTING RIGHTS ACT 125*, 126 (David L. Epstein et al. eds., 2006) ("The VRA falls between the extremes on a specificity continuum that stretches from the certainty and simplicity of the 'one person, one vote' rule to the more ambiguously defined political gerrymandering standard."). The *City of Boerne* analysis typically envisions the description of the constitutional injury as the first step. The Court has not indicated whether Congress has more or less latitude when the constitutional standard possesses such ambiguities, but the absence of standards altogether is seen as an invitation for Congress to act. See *Nixon v. United States*, 506 U.S. 224, 228-29 (1993) ("[T]he lack of judicially manageable standards [for resolving an issue] may strengthen the conclusion that there is a textually demonstrable commitment [of that issue] to a coordinate branch").

161. There may be alternative constitutional grounds for such an enactment. See Richard H. Pildes, *The Constitution and Political Competition*, 30 *NOVA L. REV.* 253, 255 (2006) (suggesting that Elections Clause could serve as basis for such legislation); Jamal Greene, Note, *Judging Partisan Gerrymanders Under the Elections Clause*, 114 *YALE L.J.* 1021, 1027-30, 1058-59 (2005) (suggesting Congress may regulate elections using Elections Clause as a basis).

162. *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997).

163. Consensus on an underlying concept of a right to an undiluted vote in the partisan-gerrymandering context did not emerge from the dissenters' opinions in *Vieth*. See Gerken, *Doctrinal Interregnum*, *supra* note 134, at 505-10 (describing difficulties *Vieth* dissenters had in identifying the right at issue and in naming an appropriate standard). See also *Vieth v. Jubelirer*, 541 U.S. 267, 297 (2004) (plurality opinion) (noting the Court's reluctance to establish a partisan gerrymandering test due to the uncertainty of what is being tested). One might say that the obstacle to an invigorated partisan gerrymandering jurisprudence is the inability of a majority of the Court to settle upon something like the *Gingles* test for partisan gerrymanders. Justice Scalia in his *Vieth* plurality opinion stated that

can the inquiry even begin into whether the statutory remedy sweeps beyond the constitutional protection, when the constitutional protection is undefined? Yet it is hard to believe that Congress would be prohibited from legislating because the Court had not enunciated a standard. The problem is different in the context of section 2. There, section 2's potential problem is not the absence of a constitutional standard, but the vagueness and lack of coherence of the standard in light of its stasis post-*Rogers*.

There is no doubt content to the underlying constitutional standard for vote dilution, but ambiguity in this out-of-use standard (at least as applied to redistricting) may, on one reading of *City of Boerne*, leave Congress with less ability to justify section 2. Indeed, the twenty-five year record of section 2 violations cannot support the constitutionality of section 2 under *City of Boerne* unless those violations are shown to somehow be evidence of unconstitutional discrimination in voting or evidence of the ability of section 2 to deter such discrimination.¹⁶⁴

As noted, *Gingles* was not only a breakthrough decision insofar as it organized a generation of vote-dilution suits. Its unique posture as the first vote-dilution case the Court decided after *Rogers* and the 1982 Amendments places it as a nexus between the constitutional and statutory cases. Recognizing that nexus puts in sharper relief the unified project—begun in the constitutional cases and continued in the section 2 cases—of charting the meaning of and the limits to minority vote dilution in the

appellants' proposed standard for dilutive partisan effect was based on section 2 of the VRA. *See id.* at 286–87 (“The effects prong of appellants’ proposal replaces the *Bandemer* plurality’s vague test . . . with criteria that are seemingly more specific This test is loosely based on our cases applying § 2 of the Voting Rights Act of 1965 to discrimination by race.”). (citation omitted). Justice Souter referenced *Gingles* in outlining his proposed test. *See id.* at 349–50 (Souter, J., dissenting) (“A plaintiff would need to present the court with a hypothetical district including his residence, one in which the proportion of the plaintiff’s group was lower (in a packing claim) or higher (in a cracking one) and which . . . deviated less from traditional districting principles than the actual district. *Cf.* *Thornburg v. Gingles*, 478 U.S. 30, 50 (1986).”). *See also* Richard H. Pildes, *The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 28, 70 (2004) [hereinafter Pildes, *Constitutionalization*] (“Justice Souter, joined by Justice Ginsburg, viewed partisan gerrymandering through the lens of equal protection models from the race context; he framed partisan gerrymandering as a vote-dilution problem akin to racial vote dilution and remediable through similar doctrines.”).

164. *See* Karlan, *Voting Rights*, *supra* note 18, at 731 (“[I]t may be quite difficult to judge whether a threat has receded because state actors no longer wish to engage in purposeful discrimination (if, for example, attitudes about the protected class or behavior have changed) or only because the congressional prohibition remains in place.”). *Cf.* Hasen, *Congressional Power*, *supra* note 18, at 188.

The very fact that Section Five [of the VRA] has served as a good deterrent to such behavior complicates the task of renewal. How then can Congress point to sufficient intentionally discriminatory acts by the states to justify the strong remedy of having every voting change in a covered jurisdiction subject to federal preclearance?

Id.

context of single-member districting. The next Part of this Article shows how aspects of the constitutional test for vote dilution have been preserved in the section 2 caselaw. Though unconstitutional minority vote dilution has been in hibernation since *Rogers*, the section 2 jurisprudence reflects strong connections to the constitutional standard of intent-and-effect.

III. INTENT AND EFFECT AFTER THE 1982 AMENDMENTS

It is clear that the distance *Rogers v. Lodge* advances from *City of Mobile v. Bolden* is incredibly important for the constitutionality of section 2. As this Part shows, the history and practice of section 2 are also important, as they reflect a parallel move in section 2. The years since 1982 have shown proof of discriminatory intent to have remained very much a part of section 2. This Part discusses this at some length in the hopes of dispelling the notion that section 2 is nothing more than a test for statistical disparities.¹⁶⁵ The Court in *Johnson v. De Grandy* re-emphasized the importance of the totality-of-the-circumstances tier, holding that compliance with the three *Gingles* prongs was necessary to a successful section 2 claim but not sufficient.¹⁶⁶ Even before that re-emphasis, however, section 2 was shown in application to be much more than a test for disparate electoral outcomes.

A. Section 2 Incorporates Aspects of Claims of Intentional Discrimination

The Senate Report, which is viewed as the “authoritative source” on the meaning of amended section 2,¹⁶⁷ reflects the notion that section 2 permits and even envisions aspects of an inquiry into discriminatory intent.¹⁶⁸ Indeed, given the conflict in the Senate as to whether section 2 would combat intentional discrimination or prohibit disproportionate results,¹⁶⁹ it is unsurprising that intent remains an aspect of section 2.

165. See *United States v. Blaine County*, 363 F.3d 897, 909 (9th Cir. 2004) (“In fact, calling section 2’s test a ‘results test’ is somewhat of a misnomer because the test does not look for mere disproportionality in electoral results. Rather, plaintiffs must establish that under the totality of the circumstances, the challenged procedure prevents minorities from effectively participating in the political process.”).

166. *Johnson v. De Grandy*, 512 U.S. 997, 1011–12 (1994).

167. *Thornburg v. Gingles*, 478 U.S. 30, 43 n.7 (1986).

168. See S. REP. NO. 97-417, at 28–30 (1982), as reprinted in 1982 U.S.C.C.A.N. 177, 206–08 (listing factors that a court should consider when determining whether a voting system has discriminatory effects on minorities and including such items as “the extent of any history of official discrimination”).

169. See Richard H. Pildes, *Principled Limitations on Racial and Partisan Redistricting*, 106 YALE L.J. 2505, 2522–23 (1997).

As described in *Gingles*:

The Senate Report specifies factors which typically may be relevant to a § 2 claim: the history of voting-related discrimination in the State or political subdivision; the extent to which voting in the elections of the State or political subdivision is racially polarized; the extent to which the State or political subdivision has used voting practices or procedures that tend to enhance the opportunity for discrimination against the minority group, such as unusually large election districts, majority vote requirements, and prohibitions against bullet voting; the exclusion of members of the minority group from candidate slating processes; the extent to which minority group members bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process; the use of overt or subtle racial appeals in political campaigns; and the extent to which members of the minority group have been elected to public office in the jurisdiction. The Report notes also that evidence demonstrating that elected officials are unresponsive to the particularized needs of the members of the minority group and that the policy underlying the State's or the political subdivision's use of the contested practice or structure is tenuous may have probative value. The Report stresses, however, that this list of typical factors is neither comprehensive nor exclusive.¹⁷⁰

The role of proof of intentional discrimination was thus a vital part of the section 2 analysis envisioned by Congress. The history of discrimination in voting is the first factor listed, and nearly all of the remaining factors incorporate some aspect of intentional vote dilution, be it in the presence of racial appeals, tenuous justifications for contested practices, nonresponsive elected officials, exclusive slating rules, or voting structures that enhance the opportunity for discrimination. The Senate Report must be said to place the focus of reviewing courts on intentional discrimination and the various ways in which it permeated the electoral

[W]hat Congress understood itself to be erecting in the place of *Mobile*—what it understood the “results” test to mean—is far less certain. One possibility, probably the best description of a plausible collective understanding to attribute, is that Congress conceived itself to be restoring the pre-*Mobile* judicial status quo. . . . The problem, though, was that these earlier cases themselves had not worked out a coherent conception of vote dilution.

Id.

170. *Gingles*, 478 U.S. at 44–45 (citation omitted).

system. But the Report was not the only way in which intent was preserved—many cases after the 1982 Amendments continued to import proof of intentional discrimination into the section 2 analysis.

B. Pre- and Post-Gingles Attempts to Preserve the Intent Standard

As discussed, *Gingles*'s three-pronged approach ushered in a new era of broadened relief, bringing clarity to section 2. The racial-polarization prong was defined in a way that required mere correlation between race and voting;¹⁷¹ it did not require proof in the form of sophisticated multivariate regression data, which would more definitively establish a causal connection between race and voting. Multimember districts began to disappear, and big gains were made by minority plaintiffs.¹⁷² The statutory avenue under *Gingles* provided a straightforward system for both lawmakers and litigants, and that system often provided significant relief for minority plaintiffs.

But while statutory vote dilution eclipsed unconstitutional vote dilution as the preferred litigation route for voting-rights plaintiffs, it did not mean the end of intent-and-effect as an analytical tool. In fact, in the four years between the passage of the 1982 Amendments and the *Gingles* decision, some scholars claimed to have witnessed a move to reassert the intent standard as the appropriate standard for minority vote dilution, despite the text of the amended section 2.¹⁷³ As one scholar wrote in 1985, “[t]he reincarnation of the intent standard as a crucial evidentiary requirement has not proceeded in a very explicit fashion, but it has occurred nonetheless.”¹⁷⁴

171. *Id.* at 63 (“[W]e conclude that under the ‘results test’ of § 2, only the correlation between race of voter and selection of certain candidates, not the causes of the correlation, matters.”).

172. See Samuel Issacharoff, *Polarized Voting and the Political Process: The Transformation of Voting Rights Jurisprudence*, 90 MICH. L. REV. 1833, 1856 (1992) (“By the time President Reagan left office, eight years and three Supreme Court appointments later, the governing law had not only repaired the damage of *Bolden* but had provided a far more beneficial regime for plaintiffs’ claims than even under *White* and *Zimmer*.”); McDonald, *supra* note 4, at 1280.

Prior to the adoption of the results standard in 1982, voting cases were brought in federal court at the rate of about 150 a year. Since then, with the streamlining and greater predictability of dilution challenges, the number has jumped to about 225 a year. As a result of the increase in litigation, and the threat of litigation, more jurisdictions have abandoned their at-large elections and adopted district voting. According to the Department of Justice, in the three years prior to 1982, fewer than six hundred jurisdictions in the covered states changed their method of election. In the three years following the amendment of section 2 the number rose to 1354.

Id. (footnotes omitted).

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

174. *Id.* at 500.

Part of this phenomenon was due to precautions taken by voting rights practitioners in how they tried cases. One historian, Peyton McCrary, wrote before *Gingles* was decided that “[m]ost [voting rights attorneys] still seek to prove discriminatory purpose lies behind the adoption or maintenance of at-large elections for local governing bodies.”¹⁷⁵ And the line between intent-and-effect could often be blurred. “The opinions in vote-dilution lawsuits tried since *Bolden* reveal a substantial blurring of the differences between the intent and effect standards, when viewed from the point of view of the evidence presented. This is true of decisions rendered both before and after the Supreme Court handed down *Rogers*.”¹⁷⁶

Moreover, many defendants attempted to preserve a high standard of proof in vote-dilution cases. Richard Engstrom wrote of recalcitrant defendants in vote-dilution cases: “How do they attempt to minimize the impact of this evidence [of racially polarized voting]? The answer is quite simple—they try to reintroduce an intent requirement!”¹⁷⁷ Engstrom laid out two aspects of this move to reintroduce the intent requirement. “One is to *redefine the concept* of racially polarized voting so that it means more than racially divided or bloc voting.”¹⁷⁸ In other words, more evidence of “racially motivated behavior” would be required on top of polarization percentages. “The second approach is to assert that a *multivariate analysis* of the voting behavior in local elections is required.”¹⁷⁹

In *Gingles*, decided a year after the articles written by McCrary and Engstrom were published (and citing both pieces), the Court held that bivariate, not multivariate, regression would be the standard for the third *Gingles* prong.¹⁸⁰ This meant that vote dilution could be shown simply by reference to “the existence of a correlation between the race of voters and the selection of certain candidates. Plaintiffs need not prove causation or intent in order to prove a prima facie case of racial bloc voting and defendants may not rebut that case with evidence of causation or intent.”¹⁸¹

175. McCrary, *supra* note 42, at 491.

176. *Id.* at 480 (footnote omitted). *But cf.* *Personnel Adm’r of Mass. v. Feeney*, 442 U.S. 256, 277 (1979). “Discriminatory intent is simply not amenable to calibration. It either is a factor that has influenced the legislative choice or it is not.” *Id.*

177. Engstrom, *supra* note 173, at 500.

178. *Id.*

179. *Id.* at 500–01.

180. *Thornburg v. Gingles*, 478 U.S. 30, 73–74 (1986).

181. *Id.* at 74. The standard the Court adopted in *Gingles* for examining racial bloc voting had three parts.

The court’s initial consideration of these data took the form of a three-part inquiry: did the data reveal any correlation between the race of the voter and the selection of certain candidates; was the revealed correlation statistically significant; and was the difference in black and white voting patterns

While Justice O'Connor in her concurrence would have chosen a higher bar for claimants and would have held that multivariate regression must be shown,¹⁸² the Court's ruling in favor of bivariate regression has remained the applicable method in most cases, though it has been questioned by some lower courts.¹⁸³

Despite the preservation of the bivariate regression standard, the subtle pre-*Gingles* attempts to preserve an intent-and-effect standard were followed by post-*Gingles* attempts to show that proof of discriminatory intent in fact remained part of section 2. First (and most innocuously), proof of discriminatory intent was always considered *relevant* to the *Gingles* inquiry.¹⁸⁴ Neither the 1982 Amendments nor *Gingles forbade* plaintiffs from presenting evidence of intentional discrimination, and often such evidence was taken into account at the totality-of-the-circumstances stage.¹⁸⁵

“substantively significant”?

Id. at 53. Justice Brennan's *Gingles* opinion evinced a concern that requiring an extremely high level of statistical confidence would unfairly bar some vote-dilution claims. “In order to prove that a *specific factor*—racial hostility—*determined* white voters' ballots, it would be necessary to demonstrate that other potentially relevant *causal factors*, such as socioeconomic characteristics and candidate expenditures, do not correlate better than racial animosity with white voting behavior.” *Id.* at 72. Justice Brennan continued: “As one commentator has explained: ‘Many of [these] independent variables . . . would be all but impossible for a social scientist to operationalize as interval-level independent variables for use in a multiple regression equation, whether on a step-wise basis or not.’” *Id.* at 72–73 (quoting Peyton McCrary, *Discriminatory Intent: The Continuing Relevance of “Purpose” Evidence in Vote-Dilution Lawsuits*, 28 HOW. L. J. 463, 492 (1985)) (footnote omitted).

182. See generally *Gingles*, 478 U.S. at 97–100 (O'Connor, J., concurring) (arguing the multivariate test is preferable because the Court's standard improperly requires proportional representation).

183. See, e.g., *Lewis v. Alamance County*, 99 F.3d 600, 604 n.3 (4th Cir. 1996) (Luttig, J.).

[W]e again caution against overreliance on bivariate ecological regression analysis in the estimation of voter preferences for purposes of a vote dilution claim. . . . [T]he bivariate ecological regression analysis merely *assumes* that which it is the purpose of the analysis to *prove*—political cohesiveness and constancy of candidate preference among minority voters and racial bloc voting among majority voters.

Id. (citation omitted). See also Richard H. Pildes, *Is Voting-Rights Law Now at War with Itself? Social Science and Voting Rights in the 2000s*, 80 N.C. L. REV. 1517, 1524 n.14 (2002) [hereinafter Pildes, *Voting Rights at War*] (“At least one lower court has . . . concluded that where the record ‘indisputably proves that partisan affiliation, not race’ best explains what are otherwise racially divergent candidate preferences, the Voting Rights Act is not violated.” (quoting *League of United Latin American Citizens v. Clements*, 999 F.2d 831, 850 (5th Cir. 1993) (en banc))

184. See generally *Gingles*, 478 U.S. at 83–105 (O'Connor, J., concurring). See also *Goosby v. Town Bd. of Hempstead*, 180 F.3d 476, 493 (2d Cir. 1999) (Leval, J., concurring) (“We think the best reading of the several opinions in *Gingles*, however, is one that treats causation as irrelevant in the inquiry into the three *Gingles* preconditions, but relevant in the totality of circumstances inquiry.”) (internal citation omitted).

185. See 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, 944 n.14 (2000) (“The circuit courts that

Second, some courts interpreted section 2 to preserve the intent-and-effect standard as a separate avenue within section 2. On this theory, litigants had the option of either utilizing the results test or proceeding upon an intent-and-effect theory.¹⁸⁶ The Eleventh Circuit in *Nipper v. Smith* stated:

[A] plaintiff must prove invidious discrimination in order to establish a violation of section 2 of the Voting Rights Act. Specifically, the plaintiff may prove *either*: (1) discriminatory intent on the part of legislators or other officials responsible for creating or maintaining the challenged system; *or* (2) objective factors that, under the totality of the circumstances, show the exclusion of the minority group from meaningful access to the political process due to the interaction of racial bias in the community with the challenged voting scheme.¹⁸⁷

Thus, under this interpretation, intent and effect remained not just relevant evidence but a separate track within section 2.

The Fifth Circuit also followed this approach. In *McMillan v. Escambia County*, the panel noted that a “showing of intent is sufficient to constitute a violation of section 2 just as we found that it was sufficient to constitute a violation of the fourteenth amendment.”¹⁸⁸ In reconnecting the VRA to the Fourteenth Amendment standard, the panel stated that intent-and-effect was still very much a part of section 2. “Congress intended that fulfilling *either* the more restrictive intent test or the results test would be sufficient to show a violation of section 2.”¹⁸⁹ Consequently, the results test

have considered this issue have all agreed with Justice O’Connor’s view that intent proof was relevant to the inquiry under the totality of circumstances standard.”). Mike Pitts views the totality-of-the-circumstances tier as crucial to section 2’s constitutionality after *City of Boerne*. See Pitts, *Affirmative Democracy*, *supra* note 22, at 207.

[T]he over-emphasis on these three factors might arguably have placed section 2 in constitutional jeopardy because it made the provision look like a reflexive use of a race-based remedy through reliance on numbers and statistics alone that could have been considered to be the enforcement of some sort of proportional representation rule or, to put it more starkly, an unconstitutional electoral quota.

Id. (footnotes omitted).

186. See also *Goosby v. Town Bd.*, 180 F.3d 476, 499 n.2 (2d Cir. 1999) (Leval, J., concurring) (“Some courts find that a requirement of racial animus survives the 1982 amendment, and can be satisfied by racial motivation on the part of the electorate, rather than the state.”) (citing *Nipper v. Smith*, 39 F.3d 1494, 1524–25 (11th Cir. 1994) (en banc) and *League of United Latin American Citizens v. Clements*, 999 F.2d 831, 859–63 (5th Cir. 1993) (en banc)).

187. *Nipper*, 39 F.3d at 1524.

188. *McMillan v. Escambia County*, 748 F.2d 1037, 1046 (5th Cir. 1984) (en banc).

189. *Id.* The panel noted that this interpretation had support in the oft-cited Senate Report to the 1982 Amendments:

was not the exclusive subject about which Fifth Circuit judges expected to hear evidence in section 2 cases.¹⁹⁰

While the explanation for the preservation of an intent-and-effect standard within section 2 may lie in the complexity of section 2 and confusion over how it modified *City of Mobile*,¹⁹¹ the result of cases such as *McMillan* and *Nipper* was that intent-and-effect was by no means banished from judges' understanding of what section 2 required. It remained a means of suing under the Act, even though other courts would cast the intent theory as no longer necessary or even available under the statute,¹⁹²

The amendment to the language of Section 2 is designed to make clear that plaintiffs need not prove discriminatory purpose in the adoption or maintenance of the challenged system or practice in order to establish a violation. *Plaintiffs must either prove such intent, or alternatively,* must show that the challenged system or practice, in the context of all the circumstances in the jurisdiction in question, results in minorities being denied equal access to the political process.

Id. (quoting S. REP. NO. 97-417, at 27 (1982), as reprinted in 1982 U.S.C.A.N. 177, 205) (emphasis added by Court). There is an important difference between viewing the results test as an *additional* method of proving vote dilution, and viewing it as overruling *Mobile*. The Fifth Circuit view sees section 2 as relieving plaintiffs of the obligation of proving intentional discrimination, while still permitting them to make such a showing if they so choose. Other circuits have noted a lack of Supreme Court guidance on this question. See, e.g., *Muntaqim v. Coombe*, 366 F.3d 102, 116 n.16 (2d Cir. 2004), *vacated on other grounds*, 449 F.3d 371, 374 (2d Cir. 2006) (dismissing the case for lack of jurisdiction).

Judge Leval explained that '[t]he Supreme Court has offered no definitive guidance on the role of discriminatory intent under [§ 1973].' In *Gingles*, in Part III.C of Justice Brennan's opinion for a plurality of the Court, four Justices interpreted § 1973 to require no showing of intentional discrimination. But five Justices expressed different views.

Id. (internal citations and quotations omitted).

190. An additional way in which intent and effect remained was that some courts understood the act to require proof of discriminatory intent in some election structures, while other claims had to proceed upon an intent and effect theory. Judge Leval, concurring in *Goosby v. Town Board of Hempstead*, wrote that "[i]t thus appears that some violations . . . might require race-based intent on the part of officials or voters, but others would not." 180 F.3d 476, 500 (2d Cir. 1999) (Leval, J., concurring). In addition, the notion of striking down districts despite the absence of evidence of discriminatory intent was "alarming and far beyond the probable contemplation of Congress." *Id.* at 501 n.3.

191. See *id.* at 500 (Leval, J., concurring) ("The relevance of race-based intent to a violation of subsection (b) is especially unclear under the amended act."). See also Scott-McLaughlin, *supra* note 185, at 980.

The [VRA] has ushered in a new day in American politics where African-Americans can finally achieve some modicum of political success, unmarred by racism. Yet, the Act has been limited and restricted by the debate over intent. Perhaps, when the statute is again considered by Congress for extension, the intent question will finally be put to rest.

Id.

192. See, e.g., *Black Political Task Force v. Galvin*, 300 F. Supp. 2d 291, 298 (D. Mass. 2004) (three-judge court) (stating that plaintiffs are "relieved of the burden of proving intentional discrimination by Section 2").

and the Supreme Court would note that “[w]hen Congress amended § 2 in 1982, it clearly expressed its desire that § 2 *not* have an intent component.”¹⁹³

Much of the academic literature on section 2 utilizes a shorthand (one somewhat difficult to avoid) that gives the impression that section 2 overruled *City of Mobile* and implemented an effects test *to the complete exclusion of an intent test*.¹⁹⁴ This portion of the Article has demonstrated that such a view of the 1982 Amendments is incomplete. Indeed, referring to section 2 as implementing an effects test is an abbreviation that—while partially correct—overemphasizes the role of effects and obscures the fact that the VRA does not forbid using intent-and-effect as legitimate means of bringing a section 2 suit. Intent-based vote-dilution suits are still possible under the VRA. As the next section shows, the attempt to develop the intent-based avenue of the VRA has not been made solely by those wishing to contract the scope of the VRA.

C. Coalitional Districts, Influence Districts, and Proof of Intent

In addition to attempts to revive an intent-and-effect standard in order to narrow the protections of the VRA, there were several post-*Gingles* attempts to utilize an intent-and-effect standard to provide broader relief for particular litigants. Specifically, plaintiffs unable to meet *Gingles*'s requirement that they comprise a majority in a district have made vote-dilution claims based purely on an intent-and-effect theory. This is an important development in the voting-rights jurisprudence, as the Supreme Court and many commentators have noted that minority voting clout can be protected without the creation of majority-minority districts,¹⁹⁵ and thus vote-dilution claims involving coalitional and influence districts are likely to increase in the coming years.

193. *Reno v. Bossier Parish Sch. Bd.* (*Bossier I*), 520 U.S. 471, 482 (1997).

194. See, e.g., Gerken, *Undiluted Vote*, *supra* note 13, at 1674 (“[*Mobile*] prompted Congress to amend § 2 in 1982 to clarify that vote dilution claims are governed by an effects-based standard.”); Statement of Frank Askin, ACLU General Counsel, Census 2000: Sampling Fairness (Oct. 1, 1998), <http://www.aclu.org/scotus/1998/22660prs19981001.html> (“In 1986, the Supreme Court recognized in *Thornburg v. Gingles* that the 1982 amendments had overruled *Bolden*'s ‘intent’ test and replaced it with an ‘effects’ test.”); Keith Aoki, *A Tale of Three Cities: Thoughts on Asian American Electoral and Political Power After 2000*, 8 UCLA ASIAN PAC. AM. L.J. 1, 38 (2002) (“In part to show dissatisfaction with the *Bolden* decision, Congress amended Section 2 of the VRA in 1982 by replacing the Supreme Court’s requirement of a showing of discriminatory intent with a disparate impact or discriminatory effects test.”).

195. See *Georgia v. Ashcroft*, 539 U.S. 461, 480 (2003) (discussing maps with majority-minority and coalitional districts and declaring that “[s]ection 5 [of the VRA] does not dictate that a State must pick one of these methods of redistricting over another”). See also n.220 and accompanying text.

While *Gingles* left open the question of what relief was available under section 2 of the VRA for minority blocs unable to comprise a majority of a district,¹⁹⁶ most cases following *Gingles* have suggested that no relief is available.¹⁹⁷ As a result, the more difficult intent-and-effect standard appears to be the sole means of relief for such smaller blocs, which are often described as comprising coalitional districts or influence districts.

Coalitional and influence districts are districts in which the minority bloc does not constitute a majority of the district, with coalitional districts understood as having significant voting clout despite the lack of majority status and influence districts understood as having less clout and as lacking the ability to be the deciding faction in an election.¹⁹⁸ In the wake of *Georgia v. Ashcroft*, lower courts have struggled with what protections coalitional and influence districts have under section 2.¹⁹⁹

196. See *Thornburg v. Gingles*, 478 U.S. 30, 46 n.12 (1986).

We have no occasion to consider whether § 2 permits, and if it does, what standards should pertain to, a claim brought by a minority group, that is not sufficiently large and compact to constitute a majority in a single-member district, alleging that the use of a multimember district impairs its ability to influence elections.

Id. See also *id.* at 89 n.1 (O'Connor, J., concurring).

I express no view as to whether the ability of a minority group to constitute a majority in a single-member district should constitute a threshold requirement for a claim that the use of multimember districts impairs the ability of minority voters to participate in the political processes and to elect representatives of their choice.

Id.

197. See *Grove v. Emison*, 507 U.S. 25, 40–41 (1993) (“Unless these points are established, there neither has been a wrong nor can be a remedy.”). See also *Voinovich v. Quilter*, 507 U.S. 146, 158 (1993) (“[T]he first *Gingles* precondition . . . would have to be modified or eliminated when analyzing the influence-dilution claim we assume, *arguendo*, to be actionable today.”).

198. See *Ashcroft*, 539 U.S. at 482 (defining “influence districts” as those in which “minority voters may not be able to elect a candidate of choice but can play a substantial, if not decisive, role in the electoral process”); *id.* at 492 (Souter, J., dissenting) (defining “coalition districts” as districts “in which minorities are in fact shown to have a similar opportunity [to elect candidates of their choice as majority-minority districts] when joined by predictably supportive nonminority voters”); Pildes, *Voting Rights at War*, *supra* note 183, at 1539 (“The concept of influence is nebulous and difficult to quantify. In contrast, coalitional districts do not present these same difficulties. A coalitional district is defined in terms of actual electoral outcomes . . .”). The terms “coalition district” and “coalitional district” are used interchangeably in this context.

199. See, e.g., *Meza v. Galvin*, 322 F. Supp. 2d 52, 64 (D. Mass. 2004); *Rodriguez v. Pataki*, 308 F. Supp. 2d 346, 382–84 (S.D.N.Y. 2004); *Session v. Perry*, 298 F. Supp. 2d 451, 478–81 (E.D. Tex. 2004), *aff'd in part, vacated in part, rev'd in part*, *League of United Latin American Citizens (LULAC) v. Perry*, 126 S. Ct. 2594 (2006); *Hall v. Virginia*, 276 F. Supp. 2d 528, 536–38 (E.D. Va. 2003). For a sampling of scholarly efforts to chart the role of coalitional and influence districts, see Bernard Grofman et al., *Drawing Effective Minority Districts: A Conceptual Framework and Some Empirical Evidence*, 79 N.C. L. REV. 1383, 1393 (2001); Sam Hirsch, *Unpacking Page v. Bartels: A Fresh Redistricting Paradigm Emerges in New Jersey*, 1 ELECTION L. J. 7, 21 (2002); Pildes, *Voting Rights at War*, *supra* note 183; Luke P. McLoughlin, Note, *Gingles in Limbo: Coalitional Districts, Party Primaries and Manageable Vote Dilution Claims*, 80 N.Y.U. L. REV. 312, 338–42 (2005).

Despite being extolled in *Georgia v. Ashcroft* as a superior form of politics and a means of disproving a claim of retrogression,²⁰⁰ coalitional districts and influence districts would fail an unmodified *Gingles* test and be unable to reach the totality-of-the-circumstances stage under section 2.²⁰¹ But the intent-and-effect standard has no such size requirement for minority blocs. In *Garza v. County of Los Angeles*, the Ninth Circuit permitted a section 2 vote-dilution suit to proceed on a theory of discriminatory intent and effect.²⁰² Declaring that “[i]t would be myopic, on these facts and circumstances, for the Court to apply the bright line 50 percent requirement,” the district court had permitted the case to proceed on an intent-and-effect theory.²⁰³ The Ninth Circuit affirmed, writing:

[T]he district court in this case found that the County had adopted its current reapportionment plan at least in part with the intent to fragment the Hispanic population. The court noted that continued fragmentation of the Hispanic population had been at least one goal of each redistricting since 1959. Thus, the plaintiffs’ claim is not, as in *Gingles*, merely one alleging disparate impact of a seemingly neutral electoral scheme. Rather, it is one in which the plaintiffs have made out a claim of intentional dilution of their voting strength.²⁰⁴

The *Garza* case is important because it offers perhaps the only standard a court would recognize for providing a remedy to the dilution of blocs unable to meet the fifty-percent requirement. A showing of discriminatory intent and effect would appear to be the only avenue of relief for minority blocs inhabiting such districts.²⁰⁵ For example, in a recent First Circuit case involving a section 2 claim by a minority bloc unable to meet the fifty-percent requirement, the First Circuit, sitting en banc, ruled that the failure

200. See *Ashcroft*, 539 U.S. at 482–83 (majority opinion) (“In fact, various studies have suggested that the most effective way to maximize minority voting strength may be to create more influence or coalitional districts.”) (citation omitted).

201. E.g., *Voinovich*, 507 U.S. at 158.

202. *Garza v. County of Los Angeles*, 918 F.2d 763 (9th Cir. 1990).

203. *Garza v. County of Los Angeles*, 756 F. Supp. 1298, 1304 (C.D. Cal. 1990).

204. *Garza*, 918 F.2d at 770 (citation omitted). For background on this case, see generally J. MORGAN KOUSSER, *COLORBLIND INJUSTICE* 69–137 (1999).

205. See *Metts v. Murphy*, No. 02-2204, 2003 WL 22434637, at *18 (1st Cir. 2003) (Selya, J., dissenting) (“While I am willing to leave open the possibility that a racial minority group constituting less than 50% of the electorate in a particular single-member district may in special circumstances satisfy the first *Gingles* precondition, the facts alleged in this case reflect no such special circumstances.”) (footnote omitted), *vacated en banc*, 363 F.3d 8 (1st Cir. 2004). Judge Selya cited the *Garza* case in a footnote and noted that “[s]uch a situation may occur, for example, where evidence of intentional vote dilution exists.” *Metts*, 2003 WL 22434637, at *18 n.21.

to reach the fifty-percent mark was insufficient grounds for dismissing the claim pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.²⁰⁶ Meanwhile, one of the judges on the original First Circuit panel, Judge Selya, had noted that “special circumstances” would have to exist in order to permit a sub-fifty-percent bloc to defeat a 12(b)(6) motion. Judge Selya wrote that while he was “willing to leave open the possibility that a racial minority group constituting less than 50% of the electorate in a particular single-member district may in special circumstances satisfy the first *Gingles* precondition, the facts alleged in this case reflect no such special circumstances.”²⁰⁷ Judge Selya cited the *Garza* case in a footnote and noted that “[s]uch a [special] situation may occur, for example, where evidence of intentional vote dilution exists.”²⁰⁸ Thus, if the inhabitants of coalitional districts and influence districts have no right to relief under the *Gingles* framework, a claim based on intent-and-effect may be the only way to seek redress.²⁰⁹

While *Gingles* may be modified to offer relief to coalitional districts and influence districts, the intent-and-effect standard also appears to offer a plausible means of relief, even though section 2 itself is silent as to the burdens of proof applicable to different-sized blocs.²¹⁰ Accordingly, the relationship between coalitional districts, influence districts, and section 2

206. *Metts*, 363 F.3d at 11–12.

207. *Metts*, 2003 WL at 22434637, at *18 (Selya, J., dissenting) (footnote omitted).

208. *Id.* at *18 n.21.

209. Indeed, in *League of United Latin American Citizens (LULAC) v. Perry*, Justice Souter, urging that the first *Gingles* prong not bar section 2 claims, noted that the *Gingles* framework itself might have to be re-thought in order to vindicate section 2 claims by certain blocs. See *League of United Latin American Citizens (LULAC) v. Perry*, 126 S. Ct. 2594, 2651 n.8 (2006) (Souter, J., concurring in part and dissenting in part) (“All aspects of our established analysis for majority-minority districts in *Gingles* and its progeny may have to be rethought in analyzing ostensible coalition districts.”). Justice Souter seemed to hint that for coalitional districts, the third prong would have to be more stringent.

The way this third condition is understood when a claim of a putative coalition district is made will have implications for the identification of candidate of choice under the first *Gingles* condition. Suffice it to say here that the [*Gingles*] criteria may not be the same when dealing with coalition districts as in cases of districts with majority-minority populations.

Id.

210. One law review note finds the legislative history of the 1982 Amendments silent with respect to coalitional districts. See Note, *The Future of Majority-Minority Districts in Light of Declining Racially Polarized Voting*, 116 HARV. L. REV. 2208, 2211 (2003) [hereinafter Note, *Future of Majority-Minority Districts*] (“Congress was silent on the use of coalitional districts, thus providing courts with little guidance.”). As noted, *Gingles* itself, left the question open. See *Gingles*, 478 U.S. at 46 n.12 (declining to consider “whether § 2 permits, and if it does, what standards should pertain to, a claim brought by a minority group, that is not sufficiently large and compact to constitute a majority in a single-member district, alleging that the use of a multimember district impairs its ability to influence elections”).

has intriguing implications. If *Gingles* cannot accommodate claims of genuine vote dilution, the Constitution and the intent-and-effect standard would seemingly be the only recourse for those claimants. Despite the absence of any reference in section 2 itself to how large a minority bloc must be to put forward a claim of vote dilution, the *Gingles* decision may lead to some vote-dilution claims being examined under the constitutional standard. Not only would the three-prong *Gingles* test have retained aspects of an inquiry into discriminatory intent, but a rigid application of its prongs would directly divert certain claims towards the *Rogers* test.

Lastly, were coalitional and influence districts to be interpreted to be relevant to the vote-dilution inquiry in the same way they are now relevant to the section 5 inquiry after *Georgia v. Ashcroft*, coalitional and influence districts could become both the basis for and defense against claims of vote dilution. Under *Johnson v. De Grandy*, the section 2 inquiry would examine whether there is rough proportionality of districts in which the minority bloc comprises an effective majority (regardless of the actual size of the minority population), and scrutinize whether the creation or destruction of districts of various sizes enhanced or diminished minority voting clout. Like *Georgia v. Ashcroft*, that inquiry is less susceptible to bright-line determinations and offers line-drawers more latitude. Indeed, it would require a more textured, fact-based inquiry (of the kind envisioned by Justice O'Connor in her *Gingles* concurrence) in order to determine whether minority clout was being expanded or diminished, an inquiry that would no doubt approximate or include an assessment of the intent behind the map.

D. Competing Justifications

It has become more difficult to demonstrate that redistricting maps violate the VRA because redistricting battles now more openly reflect the pro-incumbent and partisan motives which have always been part of the redistricting dynamic. With public attention having shifted towards the anticompetitive and partisan effects of certain redistricting schemes, and with the Supreme Court having tacitly approved of competing justifications for line-drawing (such as incumbency²¹¹ and partisan gerrymandering²¹²), it

211. See *LULAC*, 126 S. Ct. at 2622 (“The Court has noted that incumbency protection can be a legitimate factor in districting, but experience teaches that incumbency protection can take various forms, not all of them in the interests of the constituents.”) (citation omitted); *Gaffney v. Cummings*, 412 U.S. 735, 752–54 (1973) (rejecting a challenge to a “districting plan that would achieve a rough approximation of the statewide political strengths of the Democratic and Republican Parties”).

212. See, e.g., *Vieth v. Jubelirer*, 541 U.S. 267, 306 (2004) (refusing to adjudicate partisan gerrymandering claims on the grounds that they are nonjusticiable); *Easley v. Cromartie*, 532 U.S. 234,

becomes harder to convince a court that discriminatory motives are behind the disparity in election results.

Pursuant to the “first law of political thermodynamics,” which states that cases that cannot be brought under one legal theory will be brought under another,²¹³ the VRA has become a weapon used by political players. The VRA is transparently being used for objectives different from those the law was intended to achieve, a fact that has important consequences for voting-rights jurisprudence.²¹⁴ The increased attention paid to partisan and pro-incumbent gerrymandering suggests a host of possible motives behind districting other than racially discriminatory purposes, even though the VRA does not require proof of motive. Therefore, as a practical matter, a VRA case today necessarily must include some explanation as to why the discriminatory motive is a cogent explanation for the line-drawing.

This is particularly true in cases where it appears that the VRA has been used for political purposes, not for equality of participation. Frequently, the alternative justifications available are sufficient to cast doubt on an otherwise viable vote-dilution claim.²¹⁵

One study has recently noted:

[M]ost [courts in vote-dilution cases] require that plaintiffs

249 (2001). “[T]he Constitution does not place an *affirmative* obligation upon the legislature to avoid creating districts that turn out to be heavily, even majority, minority. It simply imposes an obligation not to create such districts for predominantly racial, as opposed to political or traditional, districting motivations.” *Id.*

213. See Samuel Issacharoff & Pamela S. Karlan, *Where to Draw the Line?: Judicial Review of Political Gerrymanders*, 153 U. PA. L. REV. 541, 543 (2004) (“A first law of political thermodynamics guarantees that partisan challenges cannot be eliminated; at most, they can be channeled into different doctrinal pigeonholes.”).

214. See, e.g., *Vieth*, 541 U.S. at 304–05.

Inevitably, as the political party in power uses district lines to lock in its present advantage, the party out of power attempts to stretch the protective cover of the Voting Rights Act, urging dilution of critical standards that may, if accepted, aid their party in the short-run but work to the detriment of persons now protected by the Act in the long-run.

Id. (quoting *Session v. Perry*, 298 F. Supp. 2d 451, 474 (E.D. Tex. 2004)). See also *Page v. Bartels*, 144 F. Supp. 2d 346 (D.N.J. 2001); Bernard Grofman, *Would Vince Lombardi Have Been Right If He Had Said: “When it Comes to Redistricting, Race Isn’t Everything, It’s the Only Thing”?*, 14 CARDOZO L. REV. 1237, 1256 (1993) (regarding as accurate the “view that Republicans are *seeking to use* the Voting Rights Act for partisan gain”).

215. *But see* *Black Political Task Force v. Galvin*, 300 F. Supp. 2d 291, 313–14 (D. Mass. 2004) (three-judge court) (“Here, the Committee made African-American incumbents less vulnerable by adding black voters to their districts and made white incumbents less vulnerable by keeping their districts as ‘white’ as possible. . . . This course of conduct sacrificed racial fairness to the voters on the altar of incumbency protection.”) (citations and quotations omitted). See also *Clark v. Putnam County*, 293 F.3d 1261, 1271–72 (11th Cir. 2002) (“Incumbency protection achieved by using race as a proxy is evidence of racial gerrymandering.”) (citation omitted).

demonstrate that race is the causal linkage when defendants proffer evidence supporting an alternative explanation. Proving the linkage is difficult regardless of the juncture, and numerous lawsuits have held that plaintiffs failed to meet their burden to successfully rebut defendants' evidence on this point.²¹⁶

The fact that partisanship essentially is an acceptable justification for district maps after *Vieth* and *LULAC* may distract courts from reaching conclusions that heretofore would naturally follow from a district map's failure to comply with the *Gingles* factors. As courts accept more explanations as non-tenuous, and as the atmospherics surrounding redistricting evolve to reflect changing times and motives, courts in section 2 cases are forced to wade through a cacophony of justifications and confront the fact that the VRA is employed by political players who use the VRA to get extra bites at the redistricting apple.²¹⁷ Amid the dissonance of competing explanations, plaintiffs rarely succeed in rebutting defendants' evidence.²¹⁸

E. Gains

As section 2 entered its second decade, the overall section 2 docket was shrinking. Though it is difficult to determine to what extent positive societal changes account for the decrease in the number of successful section 2 cases, part of the story certainly is the demise of some of the starkest and most repugnant attempts to dilute minority voting power.²¹⁹

216. Katz et. al., *Documenting Discrimination*, *supra* note 142 (manuscript at 34–35) (footnotes omitted).

217. *See id.* “Many jurisdictions defended their districting choices or other electoral practices on the ground that the plans or practices protected incumbents or other political allies. Some courts accepted this justification as non-tenuous.” *Id.* (manuscript at 94) (footnotes omitted). The Senate Report included, as a factor having “probative value” in the section 2 inquiry, whether there are tenuous justifications for the challenged practice or procedure. *See* S. REP. NO. 97-417, at 29 (1982), *as reprinted in* 1982 U.S.C.C.A.N. 177, 207.

218. Katz et. al., *Documenting Discrimination*, *supra* note 142 (manuscript at 35) (footnotes omitted).

219. *See* Hasen, *Congressional Power*, *supra* note 18, at 188 (“[B]ecause Section Five of the Voting Rights Act has been in effect in many places for nearly four decades, states do not engage in much activity that demonstrates purposeful racial discrimination.”). For another description of an anticipated wane in section 2 cases, see Karlan, *Voting Rights*, *supra* note 18, at 741.

As the lingering effects of racial discrimination abate, and thus as excluded minorities become physically and politically integrated into the dominant society, their ability and need to bring claims under section 2 will subside as well. When the history of racial discrimination in our political process ‘mentions no episodes occurring in the past 40 years,’ there will not be any more section 2 cases or any need for section 2.

A recent study suggests that, for a variety of reasons, the number of successful section 2 cases has decreased over the last decade:

Courts identified violations of Section 2 more frequently between 1982 and 1992 than in the years since. Of the 91 total violations identified, courts found 47.3% of them during the 1980s, 38.5% during the 1990s, and 14.3% since then. . . .

The nature of Section 2 litigation has changed during the past twenty-three years. Of the 100 lawsuits in the 1980s, most involved challenges to at-large elections (60 or 60%). Since 1990, 231 lawsuits have produced published opinions. Of these, 86 (37.2%) challenged at-large elections, and 89 (38.5%) challenged reapportionment or redistricting plans.²²⁰

This mixed legacy suggests that there may be positive reasons for this decline in the number of cases. For example, decreasing levels of voter polarization would make it more difficult to demonstrate the *Gingles* preconditions necessary to bring a section 2 suit.²²¹ As one advocate for the NAACP Legal Defense Fund testified:

The context for the current renewal debate is one in which LDF's perspective reveals two truths that shape the current debate: First, we must recognize that we've made a great deal of progress, a lot of change for the better, since 1965, due in large part to the existence of strong, effective civil rights laws, such as the Voting Rights Act. Second—and LDF's experience bears this out—any accurate description of the situation within covered jurisdictions illustrates that in significant respects, a great deal remains to be done, if we are to achieve the political equality to which the Reconstruction constitutional amendments unequivocally commit us.²²²

Id. (quoting *City of Boerne v. Flores*, 521 U.S. 507, 530 (1997)) (footnote omitted).

220. Katz et. al., *Documenting Discrimination*, *supra* note 142 (manuscript at 12–13) (footnote omitted).

221. See *Page v. Bartels*, 144 F. Supp. 2d 346, 365 (D.N.J. 2001) (holding that the third *Gingles* prong was not satisfied because plan to split minority bloc between two districts would actually increase minority clout). See also Note, *Future of Majority-Minority Districts*, *supra* note 210, at 2221 (analyzing *Page v. Bartels*).

222. *Voting Rights Act: The Judicial Evolution of the Retrogression Standard: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 12 (2005) (statement of Theodore M. Shaw, President and Director-Counsel, NAACP Legal Defense and Educational Fund, Inc.), available at <http://judiciary.house.gov/media/pdfs/printers/109th/24504.pdf>.

Societal changes in the past twenty-five years have led to changing assumptions about, and justifications for, district drawing. The impact of the successes of the VRA over the past forty years (and over the twenty-four years since the 1982 Amendments) cannot be overlooked, particularly when the VRA's successes have produced paradoxical results in its interpretation and implementation.²²³ Even though section 2 was hailed as a broad expansion of the potential for redress for litigants, intent-and-effect was by no means abolished as a doctrinal force in the voting-rights jurisprudence either before or after *Gingles*. Voting-rights attorneys often brought intent-and-effect evidence before the court, and several courts saw intent-and-effect to be a separate theory within section 2. The totality-of-the-circumstances tier made certain that liability did not flow automatically from meeting the three-pronged test. The decisions in *Johnson v. De Grandy* and *Georgia v. Ashcroft* signaled a shift towards the position articulated by Justice O'Connor in her *Gingles* concurrence, a position that would offer greater protection for coalitional and influence districts but which would demand stronger proof that intentional discrimination caused the dilution. And more broadly, the assumptions about section 2 began to change as victories were collected, multimember districts faded away, and the Act became a litigation device for partisan insiders. Those assumptions, in turn, affected how section 2 was applied in practice.

If the aim of section 2 was to banish the role of proof of intentional discrimination in vote-dilution suits, the above analysis shows that aim has gone unfulfilled. Given the persistent role of proof of discriminatory intent in vote-dilution cases post-*Gingles* and the underdeveloped concept of vote dilution as a constitutional injury in its own right, it may not even be possible at this point in the voting-rights jurisprudence to disentangle section 2 from the language and logic of intentional discrimination. 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 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

223. See, e.g., Samuel Issacharoff, *Is Section 5 of the Voting Rights Act a Victim of its Own Success?*, 104 COLUM. L. REV. 1710, 1731 (2004) (noting "mischief that section 5 can play in stalling coalition politics and inviting politically inspired interventions from outside the covered jurisdictions"); Pildes, *Voting Rights at War*, *supra* note 183, at 1563-64; Pildes, *Constitutionalization*, *supra* note 163, at 84 (referring to "paradox of success"). As the standard for vote dilution claims has subtly become more difficult to meet, the question arises about whether section 2 cases should be harder to bring in 2005 compared to 1985 or 1995 in light of the victories voting-rights litigants have had over the years in winning section 2 cases.

argument for the congruence and proportionality of section 2 to the constitutional standard is even more cogent. This proximity and continuity are particularly evident in the Supreme Court's most recent section 2 case, *LULAC v. Perry*. In *LULAC* the Court faced competing theories of and justifications for the 2003 Texas congressional (re-)map, and a majority of the Court found the map to violate section 2. Importantly, the majority opinion by Justice Kennedy described the section 2 violation in a way that implicitly emphasized the continued connection between the constitutional and statutory standards.

IV. *LULAC* AND THE ROAD AHEAD

On June 28, 2006 the Supreme Court handed down its decision in *League of United Latin American Citizens (LULAC) v. Perry*, the complex case arising out of the mid-decade redistricting of the Texas congressional map.²²⁴ While most of the focus in the popular press was on the issue of partisan gerrymandering, the Court did not invalidate the map on account of any unconstitutional partisan motive in the line drawing, and the Court put off for another day deciding whether there is a judicially manageable standard for claims of partisan gerrymandering. However, the Court did find that District 23, a district with a substantial Latino population which possessed increasing electoral clout, unlawfully diluted minority voting clout in violation of section 2. The state's attempt to ameliorate that dilution with the creation of another Latino district in District 25 did not erase the original dilution, as that district was not compact.²²⁵

Much of the immediate analysis of the invalidation of District 23 focused on the reasons why the crafting of District 25 was not an appropriate means of remedying the dilution that took place in District 23.²²⁶ But for the purposes of understanding the relationship between the statutory and constitutional standards for vote dilution, Justice Kennedy's description of the injury inflicted upon the voters in District 23 is more

224. *League of United Latin American Citizens (LULAC) v. Perry*, 126 S. Ct. 2594 (2006).

225. *Id.* at 2619.

226. *See, e.g.*, Posting of Heather Lloyd to SCOTUSblog,

http://www.scotusblog.com/movabletype/archives/2006/06/more_thoughts_o_1.html#more (July 1, 2006, 11:35 EST) (quoting Professor Dan Ortiz of the University of Virginia Law School).

Relying on the district court's findings that Latinos in two parts of District 25 were 'disparate communities of interest' with 'differences in socio-economic status, education, employment, health, and other characteristics,' [the Court] found District 25 to be noncompact. Thus, minority voters within District 25 could never argue that § 2 required its creation and so it could not be used to offset District 23.

Id.

noteworthy. Justice Kennedy's opinion in *LULAC* shows how the vote-dilution cases have practically come full circle, as it repeatedly tied descriptions of the harm done to District 23 to inferences of intentional discrimination.

A. *The Harm to District 23*

District 23 was a district with a sizable Latino population that had often voted against its elected congressman, Republican Henry Bonilla. “[Ninety-two percent] of Latinos voted against Bonilla in 2002, while 88% of non-Latinos voted for him.”²²⁷ The mid-decade redistricting plan divided Webb County in order to help preserve the ability of Bonilla to withstand political challenge. “[T]he new plan divided Webb County and the city of Laredo, on the Mexican border, that formed the county's population base. Webb County, which is 94% Latino, had previously rested entirely within District 23; under the new plan, nearly 100,000 people were shifted into neighboring District 28.”²²⁸ The change of 100,000 people made a significant difference. “[T]he redrawing of lines in District 23 caused the Latino share of the citizen voting-age population to drop from 57.5% to 46%.”²²⁹ The three-judge district court found that this reduction was not an unlawful dilution under section 2, but a majority of the Supreme Court disagreed.

While discussing the *Gingles* factors and finding that the minority bloc in District 23 satisfied all three, Justice Kennedy described the intentional harm done to the district's inhabitants.

In old District 23 the increase in Latino voter registration and overall population, the concomitant rise in Latino voting power in each successive election, the near-victory of the Latino candidate of choice in 2002, and the resulting threat to the Bonilla incumbency, were the very reasons that led the State to redraw the district lines.²³⁰

The line-drawers had intentionally squelched the political clout the minority bloc would soon have realized. Kennedy emphasized that “the Latino population of District 23 was split apart particularly because it was becoming so cohesive. The Latinos in District 23 had found an efficacious

227. *LULAC*, 126 S. Ct. at 2615.

228. *Id.* at 2613.

229. *Id.* at 2615.

230. *Id.* (citation omitted).

political identity,”²³¹ and the district map muted that identity. “District 23’s Latino voters were poised to elect their candidate of choice. They were becoming more politically active, with a marked and continuous rise in Spanish-surnamed voter registration.”²³² But the map snuffed out that electoral potential.

In response to the growing participation that threatened Bonilla’s incumbency, the State divided the cohesive Latino community in Webb County, moving about 100,000 Latinos to District 28, which was already a Latino opportunity district, and leaving the rest in a district where they now have little hope of electing their candidate of choice.

The changes to District 23 undermined the progress of a racial group that has been subject to significant voting-related discrimination and that was becoming increasingly politically active and cohesive.²³³

In short, Kennedy saw the map as an impermissible preemptive strike aimed at the growing clout of the Latino population: “In essence the State took away the Latinos’ opportunity because Latinos were about to exercise it. This bears the mark of intentional discrimination that could give rise to an equal protection violation.”²³⁴

It has been noted that Justice Kennedy also imported aspects of the *Shaw* jurisprudence into his discussion of District 25, as that district’s formation did not alleviate the harm done to District 23 because the Latino populations in District 25 were not politically, geographically, or socially compact.²³⁵ Prior to *LULAC*, compactness, though part of the *Gingles*

231. *Id.* at 2619.

232. *Id.* at 2621.

233. *Id.*

234. *Id.* at 2622. Justice Scalia in *LULAC* adhered to the view of Justice Thomas in *Holder v. Hall* that section 2 does not apply to claims of vote dilution, and thus analyzed the claim of unconstitutional vote dilution. *Id.* at 2663–64 (Scalia, J., concurring in the judgment in part and dissenting in part).

The ultimate inquiry, as in all cases under the Equal Protection Clause, goes to the State’s purpose, not simply to the effect of state action. Although it is true that the effect of an action can support an inference of intent, there is ample evidence here to overcome any such inference and to support the State’s political explanation.

Id. at 2666 (citation omitted).

235. See Daniel R. Ortiz, *Cultural Compactness*, 105 MICH. L. REV. FIRST IMPRESSIONS 48, 49 (2006), <http://students.law.umich.edu/mlr/firstimpressions/vol105/ortiz.pdf> (arguing that Kennedy’s examination of cultural compactness in the section 2 setting “represents the flip-side of the *Shaw* line of cases”).

framework, was understood mostly as an aspect of the *Shaw* line of cases. A lack of compactness raised the suspicion that lines were drawn with too much emphasis on race.

But Justice Kennedy imported another aspect of *Shaw* to his vote-dilution analysis, the notion that the lines drawn for District 23 constituted an “affront” to the voters living there. As he stated at oral argument: “[D]o you want this Court to say that it’s constitutionally permissible to take away a number of minority voters from the district, but leave just enough so that it looks like a minority? Is that a permissible use of race? It—it seems to me that’s an affront and an insult.”²³⁶ While this language is normally found in cases involving the “expressive harm” incurred by a *Shaw* violation, Kennedy used it to articulate the injury at work in District 23.²³⁷ Kennedy found the State’s explanation that the lines were drawn to protect the incumbent insufficient. The State’s explanation was lacking when considered “in light of evidence suggesting that the State intentionally drew District 23 to have a nominal Latino voting-age majority (without a citizen voting-age majority) for political reasons. This use of race to create the facade of a Latino district also weighs in favor of appellants’ claim.”²³⁸ The notion that the State structured the district to contain a numerical Latino majority in order to hamper the Latino bloc’s voting strength suggests an attempt to dilute and again evokes notions of expressive harms—“the facade of a Latino district”—both of which at their core reflect concerns about the intent of the line drawing.

Similarly, the role of incumbency in the drawing of District 23 was viewed by Kennedy as a tenuous justification. Notably, *LULAC* indicated that not all pro-incumbent line-drawing is suspect. Justice Kennedy distinguished pro-incumbent gerrymanders which are done for voters from those to protect politicians.²³⁹ The map at hand was the latter. “This policy [of drawing lines to protect the incumbent], whatever its validity in the realm of politics, cannot justify the effect on Latino voters.”²⁴⁰ The *LULAC* majority opinion thus explicitly rejected incumbent protection when the incumbent protection is done to benefit the legislator, not the voters. Again, the intent imputed to the legislature is key.

236. Transcript of Oral Argument at 76, *LULAC*, 126 S. Ct. 2594 (No. 05-204).

237. See Pildes & Niemi, *supra* note 157, at 506–09 (“An expressive harm is one that results from the ideas or attitudes expressed through a governmental action, rather than from the more tangible or material consequences the action brings about.”).

238. *LULAC*, 126 S. Ct. at 2623 (citation omitted).

239. *Id.* at 2622 (“The Court has noted that incumbency protection can be a legitimate factor in districting, but experience teaches that incumbency protection can take various forms, not all of them in the interests of the constituents.”) (citation omitted).

240. *Id.* at 2623 (citing *Thornburg v. Gingles*, 478 U.S. 30, 45 (1986)).

Finally, unlike the opinion authored by Chief Justice Roberts (who dissented on the section 2 question), Justice Kennedy's opinion gave newfound focus to the "cultural compactness" of districts.²⁴¹ This focus gave attention to the social and economic features of District 25, in addition to the more traditional aspect of whether the minority bloc inhabiting the district was likely to vote cohesively to regularly elect candidates of its choice. Indeed, as Justice Kennedy wrote, "We do not question the District Court's finding that the groups' combined voting strength would enable them to elect a candidate each prefers to the Anglos' candidate of choice."²⁴² Justice Kennedy's focus on the socio-economic and cultural aspects of the district echoes the widespread inquiry undertaken by the *Rogers* Court, and indeed could be read to encourage more probing inquiries of the internal dynamics of both those districts offered as the basis for section 2 suits and as a defense against them.²⁴³ It is too soon to tell how groundbreaking this aspect of *LULAC* is, and whether, as Chief Justice Roberts argued, this "basis for liability pushes voting rights litigation into a whole new area—an area far removed from the concern of the Voting Rights Act to ensure minority voters an equal opportunity 'to elect representatives of their choice.'"²⁴⁴

Edward Foley has suggested that *LULAC* is thus not a typical section 2 case but rather a case of intentional vote dilution,²⁴⁵ thereby lending more support to Kennedy's view that District 25 cannot alleviate the harm done to District 23 because the two districts are too different, even if they vote alike. If it is an intentional vote-dilution case, however, Justice Kennedy is not forthright about his view—indeed the repeated citations to *Gingles* and *Johnson v. De Grandy* would indicate that the facts of District 23 were

241. See Ortiz, *supra* note 235, at 50, (discussing *LULAC*'s possible implications).

242. *LULAC*, 126 S. Ct. at 2619.

243. *Id.* ("We emphasize it is the enormous geographical distance separating the Austin and Mexican-border communities, coupled with the disparate needs and interests of these populations—not either factor alone—that renders District 25 noncompact for § 2 purposes.").

244. *Id.* at 2653 (Roberts, C.J., concurring in part, dissenting in part, and concurring in the judgment in part) (quoting 42 U.S.C. § 1973(b)). See also Ortiz, *supra* note 235, at 50 ("This requirement of 'cultural compactness' is quite different from the requirements of geographical compactness and political compactness (what the Court calls political cohesiveness), which the Court had already read into Section 2.").

245. See Edward B. Foley, *Justice Kennedy Deserves Praise, Part II*, ELECTION LAW @ MORITZ, July 3, 2006, <http://moritzlaw.osu.edu/electionlaw/comments/2006/060703.php>.

Although perhaps not as egregious as the dilution of black voting power in *Gomillion*, the dilution of Latino voting power in *LULAC* by splitting Laredo in half is the exact same kind of consciously imposed harm on a local minority community as occurred in *Gomillion* and should be subject to the same strict constitutional scrutiny.

Id.

examined according to the garden variety section 2 heuristic. Furthermore, as discussed above, the description Kennedy gives in his explanation as to why the lower court was incorrect stands as the type of totality-of-the-circumstances analysis of the map that *Gingles* and *De Grandy* require.

But the fact that Kennedy cannot get away from describing the section 2 violation in terms of intentional vote dilution speaks more broadly to the connectedness between the constitutional strand and the statutory strand. That connectedness is likely to remain as line drawers are provided more and more latitude in drawing district lines. Cases such as *Georgia v. Ashcroft* and *Johnson v. De Grandy* offer additional flexibility to line-drawers; majority-minority seats need not be preserved at all costs, and a given map does not necessarily raise the inference of a statutory violation on numbers alone.²⁴⁶ At some point, the increased flexibility provided to line-drawers means that when a violation is found, the Court is back to employing a constitutional standard and saying that the violation is an intentional one. *LULAC* reflects the continued trajectory of section 2 towards a more textured understanding of what is at work in a given district map.²⁴⁷ That fine-grained analysis of district maps indicates that the work being done to effectuate section 2's obligations varies little from what courts could be expected to do under the Constitution. While the Court has not returned to the amorphous standard laid out in *White v. Regester*, the Court's attention to intent augurs well for section 2's constitutionality.

B. Section 2 and City of Boerne: Proving Too Much?

The likelihood of section 2 withstanding a *City of Boerne* challenge will become clearer once the Court decides the looming challenge to the recently renewed section 5 of the VRA. Given the related aims and expansive measures in both provisions, how the Court resolves the challenge to section 5 will mark the outlines for a future decision on section 2.

Additionally, the context of a *City of Boerne* challenge to section 2 is crucial. The fact that section 2 may withstand a *City of Boerne* challenge in the context of redistricting does not mean that section 2 will be understood

246. See Pitts, *End of Section 5*, *supra* note 80, at 301 ("Some of the evidentiary factors that Georgia adds to the retrogression test look more like factors that would help to determine whether a discriminatory purpose was at work.").

247. Cf. Samuel Issacharoff, *Does Section 5 of the Voting Rights Act Still Work?*, in *THE FUTURE OF THE VOTING RIGHTS ACT* 107, 112 (David L. Epstein et al. eds., 2006) ("The striking feature about [*Georgia v.*] *Ashcroft* was the willingness of the entire Court to abandon the formal Beer standard for retrogression in favor of a more nuanced assessment of the on-the-ground political realities of a jurisdiction.").

to be a congruent and proportional enactment when applied to other areas.²⁴⁸ For example, it is easier to make a case (given section 2's origins) for the congruence and proportionality of section 2 in the redistricting context than it is in the felon-disenfranchisement context.²⁴⁹ How the Court decides a challenge to section 2 in its most justifiable realm (single-member districting) will have important implications for how it is viewed in areas where the application of section 2 requires additional explanation or justification. The Court could view section 2 as being well within Congress's enactment powers, signaling the appropriateness of more expansive remedial measures and of applying section 2 to broader contexts.²⁵⁰ Alternatively, the Court could take section 2 as the paradigmatic case of enforcement powers at their apex. The Court could find that the case for section 2 "proved too much," and use a section 2 redistricting case to preserve section 2 in that domain but restrict its application in others.²⁵¹

In this respect, the potential positions of the Justices in a redistricting case where section 2 is challenged are intriguing. Justice Scalia, for example, has given hints that he might uphold section 2, having stated in his dissent in *Tennessee v. Lane* that "Congress's enforcement power is broadest when directed 'to the goal of eliminating discrimination on account of race.'"²⁵² But section 2 might be too expansive in Justice

248. *Tennessee v. Lane*, 541 U.S. 509, 530–31 (2004).

Whatever might be said about Title II's other applications, the question presented in this case is . . . whether Congress had the power under § 5 to enforce the constitutional right of access to the courts. Because we find that Title II unquestionably is valid § 5 legislation as it applies to the class of cases implicating the accessibility of judicial services, we need go no further.

Id.

249. See generally Richard L. Hasen, *The Uncertain Congressional Power to Ban State Felon Disenfranchisement Laws*, HOW. L. J. (forthcoming 2006) (manuscript at 15–22, on file with *Vermont Law Review*) (discussing the likely obstacles in applying section 2 in the felon-disenfranchisement context).

250. See, e.g., *Hayden v. Pataki*, 449 F.3d 305, 361 (2d Cir. 2006) (en banc) (Parker, J., dissenting) (analyzing section 2 challenge to a state felon-disenfranchisement provision and concluding that "Congress was comfortably within its expansive enforcement powers when enacting VRA § 2(a)"); Tokaji, *New Vote Denial*, *supra* note 22, at 729 ("Congress designed Section 2 to curb discrimination against the prototypical suspect class with respect to the prototypical fundamental right.").

251. For example, the constitutionality of Title VII of the 1964 Civil Rights Act would be implicated by a section 2 decision, as there is debate as to the constitutionality of that statute under *City of Boerne* and its progeny. Compare *Okruhlik v. Univ. of Ark. ex rel. May*, 255 F.3d 615, 626–27 (8th Cir. 2001) (finding Title VII's disparate impact standard constitutional under *City of Boerne*), and *Crum v. Alabama*, 198 F.3d 1305, 1323–24 (11th Cir. 1999) (finding "the disparate impact provisions of Title VII, so closely aligned to the constitutional equal protection analysis," to be congruent with preventing employment discrimination), with *Erickson v. Bd. of Governors*, 207 F.3d 945, 951–52 (7th Cir. 2000) (suggesting that Title VII is unconstitutional under *City of Boerne*).

252. *Lane*, 541 U.S. at 563 (Scalia, J., dissenting) (quoting *Oregon v. Mitchell*, 400 U.S. 112,

Scalia's view, given his emphasis in his *Lane* dissent that he would not "abandon the requirement that Congress may impose prophylactic § 5 [enforcement] legislation only upon those particular States in which there has been an identified history of relevant constitutional violations."²⁵³ Defenders of section 2 might argue that under *Gingles*, section 2 is limited to those states and localities where racially polarized voting is present,²⁵⁴ but it is not at all obvious that that argument would retain Justice Scalia's vote. Moreover, Justice Scalia already appears to view section 2 as too expansive as a matter of statutory interpretation, having joined the concurrence authored by Justice Thomas in *Holder v. Hall*. And Justice Scalia reaffirmed that position in *LULAC*, where he would have held that the claimants who challenged the redistricting map on section 2 grounds failed to state a claim.²⁵⁵

To take another example, an opinion by Justice Breyer upholding section 2 in the redistricting context might offer broad latitude for Congress to legislate against barriers to political participation, particularly when those barriers are race related. Though he is viewed as one of the Justices most deferential to congressional judgment, the ultimate boundaries of Justice Breyer's conception of congressional powers under section 5 of the Fourteenth Amendment are not yet clear. Justice Breyer dissented in

130 (1970)).

253. *Id.* at 564 (Scalia, J., dissenting). See also *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 742 (2003) (Scalia, J., dissenting) (discussing absence of evidence of nationwide discrimination and declaring that "[p]rophylaxis in the sense of extending the remedy beyond the violation is one thing; prophylaxis in the sense of extending the remedy beyond the violator is something else"). Chief Justice Roberts might join Justice Scalia on this point. See Roberts Memorandum, *supra* note 72, at 4.

The Supreme Court upheld the constitutionality of [section 5 of the VRA] because a basis for such drastic special remedial measures had been fully demonstrated. To seek some seventeen years later to impose [via an amended section 2] a similar 'effects' standard nationwide on the strength of a record that is silent on the subject of voting abuses in non-covered jurisdictions is not only constitutionally suspect, but also contrary to the most fundamental tenants [sic] of the legislative process on which the laws of this country are based.

Id.

254. See Karlan, *Voting Rights*, *supra* note 18, at 741.

Section 2 . . . contains no sunset provision. Nor does it cover only specific jurisdictions with a well-documented history of unconstitutional conduct. Nonetheless, the genius of the requirement that plaintiffs in section 2 vote dilution suits prove racial bloc voting is that that requirement provides precisely such a durational limit on section 2's operation. Election practices are vulnerable to section 2 only if a jurisdiction's politics is characterized by racial polarization.

Id.

255. See *LULAC*, 126 S. Ct. at 2663 (Scalia, J., concurring in the judgment in part and dissenting in part) ("I would dismiss appellants' vote-dilution claims premised on §2 of the Voting Rights Act of 1965 for failure to state a claim, for the reasons set forth in Justice THOMAS's opinion, which I joined, in *Holder v. Hall*.")

*United States v. Morrison*²⁵⁶ but grounded his dissent primarily on objections to the majority's interpretation of the Commerce Clause.²⁵⁷ Expressing tentative approval of the remedy at issue in *Morrison* (which would have provided a remedy against private actors), as well as doubts about the majority's reasoning, Justice Breyer nevertheless left the *City of Boerne* question "for more thorough analysis if necessary on another occasion."²⁵⁸

In the years following *Morrison*, Breyer has voted to uphold congressional authority in several enforcement powers cases, and in 2005 Justice Breyer authored *Active Liberty*, which sought to re-emphasize the "democratic objective"²⁵⁹ of the Constitution and argued for judicial attention to the Constitution's "democratic nature"²⁶⁰ in situations where text, legislative history, and interpretive canons fail to provide an answer.²⁶¹ Justice Breyer set forth several applications of this approach, discussing free speech, federalism, privacy, affirmative action, statutory interpretation, and administrative law.²⁶² In a lecture published three years before *Active Liberty*, Justice Breyer laid out his approach with many of the same examples, with one notable difference.²⁶³ In *Active Liberty*, Justice Breyer

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

257. *Id.* at 665–66 (Breyer, J., dissenting).

258. *Id.* at 666. A year later in his dissent in *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001), Justice Breyer suggested that the majority's *City of Boerne* review was too "harsh" on the facts presented, and stated that he "could understand the legal basis for such review were we judging a statute that discriminated against those of a particular race or gender, or a statute that threatened a basic constitutionally protected liberty such as free speech. The legislation before us, however, does not discriminate against anyone, nor does it pose any threat to basic liberty." *Id.* at 387 (Breyer, J., dissenting) (citation omitted).

259. See STEPHEN BREYER, *ACTIVE LIBERTY* 12 (2005) (declaring his goal "to promote re-emphasis of those [democratic] objectives as an important theme that significantly helps judges interpret the Constitution.").

260. *Id.* at 5 ("My thesis is that courts should take greater account of the Constitution's democratic nature when they interpret constitutional and statutory texts.").

261. *Id.* at 86.

Most judges start in the same way. They look first to the statute's language, its structure, and its history in an effort to determine the statute's purpose. They then use that purpose (along with the language, structure, and history) to determine the proper interpretation. Thus far there is agreement. But when the problem is truly difficult, these factors without more may simply limit the universe of possible answers without clearly identifying a final choice. What then?

Id.

262. See generally *id.* at 39–108.

263. Stephen Breyer, *Our Democratic Constitution*, 77 N.Y.U. L. REV. 245 (2002). As Justice Breyer wrote in the Acknowledgements to *Active Liberty*: "This book originally took the form of the Tanner Lectures on Human values presented at Harvard University in 2004. . . . I presented an initial version of the Tanner Lectures at New York University Law School in 2001 (published as *Our Democratic Constitution*. . .)." BREYER, *ACTIVE LIBERTY*, *supra* note 259, at ix.

illustrated his approach to the Equal Protection Clause of the Fourteenth Amendment by discussing the recently decided case *Grutter v. Bollinger*.²⁶⁴ In his published lecture, Justice Breyer instead utilized as an example the use of race in redistricting.²⁶⁵ Though not directly relating to the *City of Boerne* issues at hand, Justice Breyer suggested that “in the electoral context, the reference [to the Constitution’s democratic objective] suggests increased legislative authority to deal with multiracial issues.”²⁶⁶ When squarely presented with the question of section 2’s constitutionality, Justice Breyer may return to that democratic objective to uphold section 2 and broaden Congress’s enforcement capacity more generally.²⁶⁷

Lastly, to return to the Justice with whom this article began, the role of

264. BREYER, *ACTIVE LIBERTY*, *supra* note 259, at 79–84.

265. *See* Breyer, *Our Democratic Constitution*, *supra* note 263, at 264–65 (applying the Constitution’s democratic objective to the evaluation of the use of race in redistricting).

266. *Id.* at 265. This section also contains a citation to John Hart Ely’s famous work, *Democracy and Distrust*, cited once in both *Active Liberty* and *Our Democratic Constitution*. Many scholars reviewing *Active Liberty* have noted the similarities between Justice Breyer’s approach and Ely’s. *See, e.g.*, Michael W. McConnell, *Active Liberty: A Progressive Alternative to Textualism and Originalism?*, 119 HARV. L. REV. 2387, 2413 (2006) (book review) (“One approach with even stronger similarities [to Breyer’s] is the ‘representation-reinforcement’ idea proposed a generation ago by John Hart Ely. . . . Justice Breyer could have made his approach clearer by explaining how and why it differs from these related approaches.”); Richard A. Posner, *Justice Breyer Throws Down the Gauntlet*, 115 YALE L. J. 1699, 1702 (2006) (book review) (“[Breyer’s] project resembles that of John Hart Ely (cited by Breyer, though only in passing), who argued that the major thrust of the Warren Court had been to make American government more democratic”) (footnote omitted); James E. Ryan, *Does it Take a Theory? Originalism, Active Liberty, and Minimalism*, 58 STAN. L. REV. 1623, 1642 (2006) (book review) (“Faintly echoing John Hart Ely, Justice Breyer believes that reference to this [democratic] purpose, along with attention to the practical consequences of judicial decisions, can lead the Court to better results.”); Cass R. Sunstein, *Justice Breyer’s Democratic Pragmatism*, 115 YALE L. J. 1719, 1739 (2006) (book review) (“A puzzling gap in Breyer’s book is the omission of any treatment of Ely’s apparently similar argument.”); Posting of James Lindgren to the Volokh Conspiracy, *Is Justice Breyer Channeling John Hart Ely?*, http://volokh.com/archives/archive_2005_08_21-2005_08_27.shtml (questioning the originality of Breyer’s argument). Insofar as Ely’s approach is concerned, section 2 would appear to meet its test. *See* Pamela S. Karlan, *John Hart Ely and the Problem of Gerrymandering: The Lion in Winter*, 114 YALE L.J. 1329, 1338 (2005).

[A]lthough Ely did not discuss the emerging jurisprudence of racial vote dilution in *Democracy and Distrust*, the tack the Supreme Court took was entirely consistent with his theory. Indeed, because the racial vote dilution cases arguably rested on all three strands of *Carolene Products*, evoking as they did the Fifteenth Amendment’s prohibition on denial or abridgement of the right to vote on account of race—a ‘specific prohibition of the Constitution’—as well as the more general concerns with process failure and the plight of discrete and insular minorities, they serve as a particularly powerful example of participation-oriented, representation-reinforcing judicial review.

Id. (footnote omitted).

267. *Cf.* HASEN, *JUDGING EQUALITY*, *supra* note 21, at 134–35 (urging more latitude for Congress to use enforcement powers in the arena of political equality, with the Court’s review centered on guarding core equality rights and policing self-interested legislation).

Chief Justice Roberts cannot be underestimated. In light of his early experience with the VRA²⁶⁸ and his express concern in *LULAC* that this is a “sordid business, this divvying us up by race,”²⁶⁹ Justice Roberts might support changes to how section 2 is interpreted, both for *City of Boerne* reasons and more generally. Specifically, Justice Roberts might require stronger proof of a causal connection between race and electoral outcomes. Notably, both Justice Roberts and Justice Kennedy focused heavily on the intent of the line-drawers in Texas, while the reasons behind the polarized voting in District 23 received far less attention. But at the *LULAC* oral argument Roberts indicated that he would interpret racially polarized voting more stringently. “[T]he Voting Rights Act is concerned with whether or not a group voting ethnically as a bloc can vote for candidates of its choice. Well, if they’re 30/70, it’s not—it’s hard to think of them as having a clear candidate of choice.”²⁷⁰ Such crossover voting has, to date, not been held to doom automatically section 2 claims.²⁷¹ A holding by the Court that

268. In a 1982 memorandum addressed to administration officials Brad Reynolds, Ken Starr, David Hiller, and Chuck Cooper, Roberts offered a sketch of how he would craft an amendment to section 2. “Just to get the ball rolling, I have taken a stab at adding to §2 the various factors identified in *Arlington Heights* as relevant on the question of intent.” Memorandum from John Roberts to Brad Reynolds, Compromise Position on Section 2 of the Voting Rights Act (Feb. 16, 1982), available at <http://www.archives.gov/news/john-roberts/accession-60-88-0498/016-voting-rights/folder016.pdf#page=5>. That sketch included the following:

In determining whether a state or political subdivision has violated this provision, the court should consider both direct and indirect evidence of purpose, including but not limited to evidence of legislative and administrative history, departures from ordinary practice, the effects or consequences of the action in question, the historical background, and the sequence of events leading to the action.

Id. It might be said that, in borrowing directly from *Arlington Heights*, this hypothetical section 2 would have parroted the constitutional standard, something the Court has held to be unnecessary. See *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 81 (2000).

Congress’ §5 power is not confined to the enactment of legislation that merely parrots the precise wording of the Fourteenth Amendment. Rather, Congress’ power ‘to enforce’ the Amendment includes the authority both to remedy and to deter violation of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment’s text.

Id.

269. *LULAC*, 126 S. Ct. at 2663.

270. Transcript of Oral Argument at 47, *LULAC*, 126 S. Ct. 2594 (No. 05-204).

271. Language in *Gingles* which commanded the votes of five Justices defined racial bloc voting in flexible terms, acknowledging that legally significant polarization would vary from district to district. See *Thornburg v. Gingles*, 478 U.S. 30, 56 (1986).

A showing that a significant number of minority group members usually vote for the same candidates is one way of proving the political cohesiveness necessary to a vote dilution claim, and, consequently, establishes minority bloc voting within the context of 2. And, in general, a white bloc vote that normally will defeat the combined strength of minority support plus white ‘crossover’ votes rises to the level of legally significant white bloc voting.

section 2 and *Gingles* required stronger proof of polarized voting would narrow the scope of the Act, but also increase its prospects of being upheld in the face of a *City of Boerne* challenge. In future section 2 cases, the relationship between the intent of the line-drawers and the probative value of voter polarization data may receive greater attention from the Court.

On the related issue of whether to allow greater consideration of coalitional and influence districts, Justice Roberts like Justice Kennedy appeared comfortable adopting the language of *De Grandy*, which put the focus on effective control of districts, not specific percentages or majority-minority populations.²⁷² This could indicate a willingness to give states added flexibility in defending section 2 claims, also limiting section 2's scope and increasing its chances of being held constitutional under *City of Boerne*.

The possible views of these three Justices are offered not as rough predictions but to illustrate the complexities that await not only the outcome of a *City of Boerne* challenge to section 2 but also the jurisprudential underpinnings of the decision. Section 2, if upheld in the redistricting setting, could be a gateway for ambitious legislation in the future or it could be a signal that such legislation is warranted only in the narrowest of circumstances. Additionally, section 2 is not static; it may undergo important changes in decisions that arise prior to a *City of Boerne* challenge. But at minimum, to have a VRA provision analyzed under the *City of Boerne* rubric after the seminal VRA cases have been decided decades earlier under a more deferential standard may clarify and unify both the early and recent epochs of the enforcement-powers jurisprudence.²⁷³

Id. (citation omitted). Cf. Pildes, *Voting Rights At War*, *supra* note 183, at 1567 (“[T]he rise of coalitional district possibilities also raises the prior, more profound question of whether the VRA should apply—whether its predicate of polarized voting should be understood to be present—in places where one-third of whites cross racial lines and vote for black candidates at nearly the same rate as white Democratic candidates.”).

272. *LULAC*, 126 S. Ct. at 262–63 (discussing “effective Latino majority districts”).

273. See Ellen Katz, *Reinforcing Representation: Congressional Power to Enforce the Fourteenth and Fifteenth Amendments in the Rehnquist and Waite Courts*, 101 MICH. L. REV. 2341, 2369 (2003) (“[T]he *Boerne* cases appear to be doctrinally irreconcilable with the earlier VRA precedent they purport to preserve.”).

CONCLUSION

City of Boerne asks that courts examine a statute in comparison to the underlying constitutional injury it aims to remedy. But the Court in its vote-dilution cases has resisted this dichotomy, even as a doctrinal schism opened up between section 2 and the Constitution. The Court's work in explicating its understanding of vote dilution picked up in the section 2 cases where it left off in *Rogers*, and the practice of section 2 in the years following the 1982 Amendments revealed the continuing connection of proof of intentional discrimination to the statutory analysis. Congress in 1982 altered the standard of proof for vote-dilution claims, but the cases since then (such as *LULAC*) have in fact shown how much in common section 2 has with the constitutional strand of vote-dilution cases. The Supreme Court, in examining a *City of Boerne* challenge to section 2, will evaluate on a far more detailed scale the proportionality and congruence of section 2, but section 2 has in its favor the historical, practical, and conceptual proximity between its standard and the underlying right section 2 is said to vindicate. Given section 2's unique status—a VRA provision facing a constitutional challenge post-*Boerne*—a ruling on section 2's constitutionality may offer the clearest indication yet of the direction the Roberts Court will take in analyzing federal laws enacted pursuant to the enforcement powers.