FALSE CONFLICT: COLORBLINDNESS AND SECTION 2 OF THE VOTING RIGHTS ACT

*W. Kerrel Murray**

If friends and foes of section 2 of the Voting Rights Act of 1965 agree on one thing, it is the irrepressible conflict between section 2's attention to race and constitutional colorblindness. They're wrong. Rightly understood, section 2's design is remarkably compatible with colorblind constitutionalism's letter and spirit.

To show how, this Article first returns to section 2's origins and the preexisting approach its text codifies. That approach had an underappreciated ethos: When intentional discrimination's effects sufficiently distort a political system, an electoral rule's results might impugn its unconstitutionality, even if the rule had been adopted without discriminatory purpose. Drawing next on a novel examination of media coverage, this Article shows that this ethos animated public understanding of the mischief section 2 aimed to correct. The upshot is a unique account of section 2's design. Congress adopted a discriminatory-effect rule that targets disparate treatment of voters occurring on account of past or present intentional discrimination. That nestles section 2 within colorblind constitutionalism's acceptance of race-conscious remedies for intentional race-conscious harms. And it undercuts charges that section 2 created a disparate-impact regime that permanently racializes politics.

But there is more. That disparate-treatment justification has shaped section 2's doctrinal and practical function in ways congenial to worries about indefinite justifications for race-conscious remedies. The rules crafted to implement section 2 embrace an underappreciated remedial logic. Scholars have long claimed that section 2's strictures inherently relax over time. Doctrine has helped make that claim a reality by tethering section 2's activation to particularized electoral distortions flowing from intentional

* Associate Professor of Law and Milton Handler Fellow, Columbia Law School. For important early comments, I thank Kate Andrias, Richard Briffault, Guy-Uriel Charles, Max Cornell, Jeffrey Fagan, Jamal Greene, Kyle Haugh, Clare Huntington, Olatunde Johnson, Richard Pildes, Christina Ponsa-Kraus, Michaeljit Sandhu, and Nicholas O. Stephanopoulos. This Article benefited from presentations at the 2025 Constitutional Law Colloquium at the Loyola University School of Law, the 2025 Cardozo-Fordham Metropolitan Junior Scholars Conference, and a faculty workshop at Columbia Law School. I thank Journey Browne, Austin DeRamus, Mariana Newman, Nam Jin Yoon, Alice Park, Charlotte Waldman, and Sabrina You for valuable research assistance. Last but not least, I am grateful for the hard work that the editors of the *Fordham Law Review* put into this Article.

discrimination. The cases have thus kept section 2 focused on disparate treatment and facilitated its deactivation when such treatment ceases. And national trends in racially polarized voting and housing segregation bolster the point; section 2 keys on the empirical realities that dissipate not just in theory, but in fact.

The Article closes by applying this analysis to resolve section 2's confrontation with colorblindness and offer a framework for better grasping its overall constitutionality and addressing persistent section 2 issues.

INTRODUCTION 1837

I. COLORBLINDNESS CONFLICT 1842

A. *Colorblindness and the Remedial Rationale, Circa 2026* 1843
B. *The Travails of Section 2* 1848

II. WHAT IS SECTION 2? 1850

A. *Voting's Idiosyncrasies* 1851
B. *Origins* 1853
1. Old Soil 1853
2. Justice White and Racial Politics 1860
3. The Amendment 1861
a. Mischief 1862
b. Enactment 1865
c. Disparate Treatment as Core Value 1866
d. What Section 2 Was Not 1869
e. Why Section 2's Design Matters 1872

III. THE COLORBLIND SECTION 2 1877

A. Gingles *and Its Progeny* 1878
B. *Self-Liquidation: Theory and Reality* 1881
1. Conceptualizing Self-Liquidation 1882
2. Self-Liquidation in Doctrine and Practice 1883
a. Gingles *1* 1883
b. Gingles *2 and 3* 1887
c. Totality of the Circumstances 1891
3. Self-Liquidation Takeaways 1894
C. *Dissoluble Conflict* 1896

IV. LESSONS AND ENTAILMENTS 1900

A. *Baselines* 1900
B. *Internal Limitations* 1901
C. *Race, Party, and Causation* 1903
D. *Future Evolutions* 1906

CONCLUSION 1907

INTRODUCTION

Students for Fair Admissions v. President and Fellows of Harvard College's[1] (*SFFA*) conclusion that certain race-conscious admissions programs contravened the "'color-blind' . . . guarantees of the Equal Protection Clause" may not have ranked high on lists of judicial surprises.[2] After all, a clear U.S. Supreme Court majority embraces colorblind constitutionalism. More eyebrows raised, however, at the treatment of section 2 of the Voting Rights Act of 1965[3] in *Allen v. Milligan*.[4] Not only did the Court reaffirm section 2's constitutionality, but it rebuffed a putatively "race-neutral" limit on its scope.[5]

That *Milligan* surprised is, itself, unsurprising. Even before *SFFA*, precedent running back to 1993's *Shaw v. Reno*[6] deployed colorblind principles to limit race's use in districting.[7] Yet section 2, as amended in 1982, at least entails color cognizance in requiring state avoidance of electoral rules that operate to "den[y] or abridg[e]" any citizen's right to vote "on account of race or color."[8] What's more, remedies for violations of that rule have long included districts drawn with attention to race.[9] In taking

1. 143 S. Ct. 2141 (2023) [hereinafter *SFFA*].

2. *Id.* at 2175 (quoting Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)).

3. Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131, 134 (amending the Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended in scattered sections of 52 U.S.C.)).

4. 143 S. Ct. 1487 (2023); *see* Michael J. Pitts, *Re-Legislating Section 2 of the Voting Rights Act*, 76 ALA. L. REV. 489, 490–91 (2025) (expressing surprise); Franita Tolson, *A Few Preliminary Thoughts on* Allen v. Milligan, ELECTION L. BLOG (June 8, 2023, at 10:11 ET), https://electionlawblog.org/?p=136693 [https://perma.cc/U7U3-YCDN].

5. *See Milligan*, 143 S. Ct. at 1506–10, 1514–17; *see also infra* notes 451–62. The Court first validated section 2's constitutionality via summary affirmance. Miss. Republican Exec. Comm. v. Brooks, 469 U.S. 1002, 1002 (1984); *see also id.* at 1002–03 (Stevens, J., concurring) (noting the import of the summary affirmance).

6. 509 U.S. 630 (1993).

7. *See id.* at 643–44, 647; *see also infra* notes 103–04 and accompanying text; Travis Crum, *The Riddle of Race-Based Redistricting*, 124 COLUM. L. REV. 1823, 1826 (2024) (noting the decades-long "uneasy détente" between *Shaw*'s colorblind ethos and section 2's race consciousness).

8. Voting Rights Act Amendments of 1982, Pub L. No. 97-205, § 3, 96 Stat. 131, 134 (codified as amended at 52 U.S.C. § 10301).

9. Steven J. Mulroy, *Understanding Section 2*, *in* THE OXFORD HANDBOOK OF AMERICAN ELECTION LAW 721, 742–44 (Eugene D. Mazo ed., 2024). I refer deliberately to districts drawn with attention to race, not so-called "majority-minority districts," i.e., districts drawn to ensure that a racial minority is a majority of the relevant voting population. *See infra* note 90. Nothing in section 2 requires a certain number of majority-minority districts. It requires equal voting opportunities irrespective of race. States may thus cure violations or stave off liability without drawing any additional such districts (or indeed without districting at all), so long as their electoral systems offer all voters equal opportunity irrespective of race. *See, e.g.*, Cooper v. Harris, 137 S. Ct. 1455, 1470–72 (2017) (explaining that states can comply with section 2 without drawing majority-minority districts); Singleton v. Allen, 782 F. Supp. 3d 1092, 1112 (N.D. Ala. 2025) (recognizing that remedies for section 2 violations need not be majority-minority districts); *see infra* notes 339–41, 481 and accompanying text. In short, the attention section 2 requires to race is surgical and flexibly responsive to demonstrated

colorblindness to a new, not-yet-pellucid frontier, *SFFA* only raised the stakes for section 2.[10]

A confrontation looms. In a key *Milligan* concurrence, Justice Kavanaugh invoked a vital plank of *SFFA*'s colorblind reasoning: Race-based government action must have a discernible end point.[11] Two terms later, at oral argument on another section 2 case, *Louisiana v. Callais*,[12] he repeatedly raised this temporal point.[13] The Court then set *Callais* for reargument in October Term 2025, prompting influential conservative thinker George Will to demand an *SFFA* equivalent for section 2.[14] Invoking colorblindness critiques as old as section 2 itself,[15] he averred that section 2 "endorses a degraded theory of representation" by "freezing certain racial constituencies into law."[16] *The Wall Street Journal* Editorial Board agreed. Invoking Justice Kavanaugh's temporal remarks, it urged the Court to use *Callais* to not only "overturn [*Thornburg v.*] *Gingles*,"[17] its landmark decision interpreting section 2, but to "rule definitively that states can't consider race in map-making."[18] Because section 2 at least requires considering race to avoid race-based voting-rights abridgements, this is at bottom a call to hold it unconstitutional. And, indeed, the *Callais* reargument order asked the parties to expand upon an *SFFA*-based argument the appellees had previously made only in passing.[19] Subsequently, Louisiana—which had been formally

---

race-based harms, not rigid, which matters quite a bit for its compatibility with colorblindness. *See infra* Part III.C.

10. Olatunde Johnson, *Race, Affirmative Action, Antidiscrimination, and the Roberts Court*, 713 ANN. AM. ACAD. POL. SOC. SCI. 124, 129–31 (2024) (noting that *SFFA*'s entailments are "not yet clear" and observing implications for section 2).

11. *Compare* Allen v. Milligan, 143 S. Ct. 1487, 1519 (2023) (Kavanaugh, J., concurring) (flagging the "temporal argument" that "authority to conduct race-based redistricting cannot extend indefinitely into the future"), *with SFFA*, 143 S. Ct. 2141, 2164–66 (2023) (emphasizing the invalidity of "permanent justification[s] for racial preferences"), *and id.* at 2223 (Kavanaugh, J., concurring) (same).

12. 145 S. Ct. 2608 (2025) (mem.).

13. *See* Transcript of Oral Argument at 10, 55, Louisiana v. Callais, Nos. 24-109, 24-110 (U.S. reargued Oct. 15, 2025).

14. George Will, *The Supreme Court Puts Off Restoring the Voting Rights Act's Shine*, WASH. POST (July 2, 2025), https://www.washingtonpost.com/opinions/2025/07/02/supreme-court-louisiana-redistricting-voting-rights/ (on file with the *Fordham Law Review*) (invoking *SFFA* as guidance for *Callais*).

15. *See infra* Part I.B.

16. Will, *supra* note 14.

17. 478 U.S. 30 (1986).

18. The Editorial Board, Opinion, *The Racial Gerrymander Boomerang*, WALL ST. J. (July 21, 2025, at 05:36 ET), https://www.wsj.com/opinion/texas-gop-redistricting-maps-racial-gerrymander-greg-abbott-supreme-court-84450a57 (on file with the *Fordham Law Review*); *see also* The Editorial Board, Opinion, *The Supreme Court, Race and Redistricting*, WALL ST. J. (Mar. 26, 2025, at 06:08 ET), https://www.wsj.com/opinion/louisiana-v-callais-supreme-court-redistricting-racial-gerrymanders-brett-kavanaugh-23a099a3 (on file with the *Fordham Law Review*) (making the same argument and advocating a "return to the Constitution's race-neutral principles").

19. *Compare* Louisiana v. Callais, 146 S. Ct. 58 (2025) (mem.) (directing parties to certain pages of the appellees' brief and ordering them to address the question raised on those pages at reargument, including "[w]hether the State's intentional creation of a second majority-minority congressional district violates" the U.S. Constitution), *with* Brief for Appellees at

supporting section 2's application because of some procedural quirks—switched sides, offering instead a vociferous attack on section 2's constitutionality.[20]

What comes next turns on a simple question: Was *Milligan* more than a temporary reprieve for section 2? The right answer, this Article explains, is yes, given what colorblindness means, what section 2 *is*, and what section 2 *does*.

At the threshold, understanding the supposed conflict between colorblindness and section 2 turns on what colorblindness demands. Yet that is not self-explanatory; indeed, the Court clearly is still figuring the concept out.[21] This Article thus begins by distilling the best-fitting account of colorblindness circa 2026, focusing on the Court's justifications and its paradigm cases.[22] Its first contribution is thus augmenting and connecting to election law a growing body of work interrogating an ascendant (yet still-evolving) approach.[23]

Next, the Article returns to section 2's origins. Although scholarship often hurries past those origins, doing so risks underappreciating how Congress designed a statute surprisingly responsive to current challenges. The Article accordingly traces section 2's development in legal and historical context to build a novel account of what Congress created. Broadly stated, section 2's 1982 amendment provided that electoral devices, even those enacted without discriminatory purpose, may be illegal based on their "results."[24] Prompted by a plurality's view in *City of Mobile v. Bolden*[25] that the original section 2 reached only devices enacted with discriminatory purpose,[26] the amendment's text explicitly incorporated a line of pre-*Bolden* cases.[27] It is often thought, however, that those cases offer scant substantive guidance and that Congress thus produced a cipher in 1982.

36–38, Louisiana v. Callais, 145 S. Ct. 2608 (2025) (mem.) (No. 24-109) (making *SFFA*-based arguments later invoked in the reargument order).

20. *See* Rick Hasen, *With Louisiana Essentially Flipping Sides in* Callais *Case Before Supreme Court and Arguing Section 2 of the Voting Rights Act Is Unconstitutional, Full Defense Shifts to Voting Rights Groups*, ELECTION L. BLOG (Aug. 28, 2025, at 07:50 ET), https://electionlawblog.org/?p=151805 [https://perma.cc/5WEQ-7AN2].

21. *See* Benjamin Eidelson & Deborah Hellman, *Unreflective Disequilibrium: Race-Conscious Admissions After* SFFA, 4 AM. J.L. EQUAL. 295, 295 (2024); Issa Kohler-Hausmann, *What Did* SFFA *Ban?: Acting on the Basis of Race and Treating People as Equals*, 66 ARIZ. L. REV. 305, 305–06 (2024).

22. This Article does not rehash debates over colorblindness's desirability. *Compare* Randall Kennedy, *Colorblind Constitutionalism*, 82 FORDHAM L. REV. 1 (2013) (summarizing debates), *with* Charles Fried, Metro Broadcasting, Inc. v. FCC*: Two Concepts of Equality*, 104 HARV. L. REV. 107 (1990) (pro-colorblindness), *and* Neil Gotanda, *A Critique of Our Constitution Is Color-Blind*, 44 STAN. L. REV. 1 (1991) (anti-colorblindness). I am interested in what its ascendance means for section 2.

23. *See, e.g.*, Eidelson & Hellman, *supra* note 21, at 295 (describing *SFFA* as "ambivalent [and] unsure of its own import").

24. Voting Rights Act Amendments of 1982, Pub L. No. 97-205, § 3, 96 Stat. 131, 134 (codified as amended at 52 U.S.C. § 10301).

25. 446 U.S. 55 (1980) (plurality opinion).

26. *Id.* at 59–65, 63 n.10.

27. *See, e.g.*, Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321, 2331–33 (2021).

In arguing otherwise, this Article makes several contributions. Methodologically, stepping back from the seminal legislative history that often shapes section 2 analyses, it focuses on the "mischief" that prompted the amendment.[28] Through that lens, this Article first draws out the ethos animating the pre-*Bolden* cases: A political system's distortion by discrimination may result in genuinely neutral electoral devices treating voters disparately on account of race. Then, engaging in a novel examination of media coverage of the amendment, this Article integrates how contemporary public understanding of the problem the amendment addressed aligned with that pre-*Bolden* ethos.

This method generates the Article's central insight: the colorblind section 2. In short, section 2's history and context reveal it as a statute attacking present-day disparate treatment[29] of individuals caused by past or present intentional discrimination.[30] That design targets evils that colorblindness recognizes. And it avoids what colorblindness abhors. For example, it staves off loose equation of section 2 with disparate impact.[31]

---

28. *See, e.g.*, Samuel L. Bray, *The Mischief Rule*, 109 GEO. L.J. 967, 968, 973, 1003 (2021) (explaining how the textualist "mischief rule" treats "the generating problem . . . as part of the context for reading the statute").

29. By disparate treatment, I mean how an electoral device might make it harder for some individuals than others to cast or aggregate their ballots on par with others. *See infra* notes 248–51, 515 and accompanying text.

30. I have found no article taking this approach, although others have perceived intentional discrimination's relevance. Professor Christopher S. Elmendorf proposed reading section 2 to require a "showing . . . that unconstitutional race discrimination in the electoral process is at least 'significantly likely' to occur or to have occurred in the defendant jurisdiction." Christopher S. Elmendorf & Douglas M. Spencer, *Administering Section 2 of the Voting Rights Act After* Shelby County, 115 COLUM. L. REV. 2143, 2163 (2015); *see also* Christopher S. Elmendorf, *Making Sense of Section 2: Of Biased Votes, Unconstitutional Elections, and Common Law Statutes*, 160 U. PA. L. REV. 377, 377 (2012) [hereinafter Elmendorf, *Making Sense of Section 2*] (focusing on "electoral inequalities owe[d] to race-biased decisionmaking by majority-group actors, whether public or private"). Elmendorf, however, seems to focus on the risk of contemporary intentional discrimination, reading cases like *Shelby County v. Holder*, 570 U.S. 529 (2013), to have rendered past intentional discrimination almost irrelevant.

Conversely, I argue that section 2 cares not just about potential contemporary intentional discrimination (although it does care about that) but also present-day disparate treatment arising when past intentional discrimination prevents a voter from aggregating her vote on par with others in the jurisdiction. If Elmendorf's read of *Shelby County* was plausible (if maximalist), *Milligan* has complicated it. *See infra* notes 342–55 and accompanying text (discussing *Milligan*). Elmendorf also focuses more on "internal" limits on section 2 than the colorblindness-linked "external" limits on which this Article focuses. *See infra* Part II.B. Professor Janai S. Nelson homed in on "discrimination within or outside the electoral arena that is transmitted into the electoral arena" via election devices, but she was committed, as I am not, to describing section 2 within the disparate-impact paradigm. *See* Janai S. Nelson, *The Causal Context of Disparate Vote Denial*, 54 B.C. L. REV. 579, 592 (2013). Unlike me, she also relies heavily on implicit bias. Dean Dan Tokaji observes that section 2 prevents government decisionmaking from incorporating contemporary "racist voting" choices. Daniel P. Tokaji, *Racist Voting*, 76 ALA. L. REV. 537, 574 (2025). I endorse this function but propose a more complex relationship to past and present discrimination. *See infra* notes 272–77 and accompanying text.

31. *See, e.g.*, Nelson, *supra* note 30, at 584–85 (referencing "the disparate impact standard . . . under Section 2"); Tokaji, *supra* note 30, at 596 n.509 (referencing,

Precisely because *Bolden*'s negation keyed on how intentional discrimination distorts elections, section 2's design rejects race-based assumptions, avoids harming nonculpable individuals, and embraces a congenital end point. Contra critiques as old as section 2 itself, that design's "core values" are at peace with colorblindness.[32]

What I have said so far encapsulates how this Article roots its disparate-treatment account in section 2's text and enactment context. But, because history marches on, this Article also shows how subsequent doctrine and empirical events have confirmed and implemented that design.

Take doctrine first. Doctrinally, some tell the interpretive story of section 2 since *Gingles* as one of sharp departure from congressional intent. But the disparate-treatment paradigm complicates that tale. *Gingles* and its progeny built a framework suffused with the core value of combatting obstacles that discrimination's effects pose for present-day voters' ability to aggregate votes on par with others.[33] The idea that *Gingles* effects section 2's "self-liquidation" is nearly as old as *Gingles*.[34] What this Article adds is how *Gingles*—including its oft-calumniated first prong—amplifies

---

parenthetically, "Section 2's disparate-impact standard"); *cf.* Mulroy, *supra* note 9, at 738 (characterizing the results test as "analogous to the 'disparate impact' theory"). About a half-decade ago, Professor Nicholas Stephanopoulos argued that section 2 should be treated as a "disparate impact provision—a law that imposes liability on the basis of discriminatory effect, not invidious intent." Nicholas O. Stephanopoulos, *Disparate Impact, Unified Law*, 128 YALE L.J. 1566, 1570 (2019) [hereinafter Stephanopoulos, *Disparate Impact*]. But that article focused on section 2's application to vote-*denial* claims and in fact declined to apply "the usual [disparate-impact] framework" to vote-*dilution* claims. *Id.* at 1609 n.237. Even as applied to vote denial, Stephanopoulos emphasized that he was not deeming section 2 "a pure disparate impact provision: a law that imposes liability solely because of racial discrepancies." *Id.* at 1573. Our theses are not that far apart. I agree that section 2 neither requires evil intent by an electoral device's enactor nor operates as a pure disparate-impact provision in the sense described. Where we may part ways is that I believe section 2's history and context make the disparate-treatment label more apt, and importantly so. *See infra* Part II.B.3.c. I think, for example, that the disparate-treatment label equally or better avoids many of the problems that his careful analysis of the "usual framework" considers. While the Court has already recognized that section 2 is not a pure disparate-impact statute, *see Brnovich*, 141 S. Ct. at 2341 n.14, it has not recognized what is critical here: the disparate-treatment character that renders the disparate-impact tag inapt.

32. *See, e.g.*, Joan F. Hartman, *Racial Vote Dilution and Separation of Powers: An Exploration of the Conflict Between the Judicial Intent and the Legislative Results Standards*, 50 GEO. WASH. L. REV. 689, 729–30 (1982) (discussing critiques that amended section 2 lacked a constitutionally sound "core value").

33. This Article focuses primarily on so-called vote-dilution claims, i.e., those asserting that the processes for aggregating a vote cast and counted without undue obstruction underweight the vote relative to other votes. *See infra* note 110 and accompanying text. Section 2 also reaches vote-denial claims, i.e., those challenging impediments to registering or casting a ballot. *See Brnovich*, 141 S. Ct. at 2333, 2336. The general principles I develop should apply across the board. That said, vote-denial claims pose some unique issues that make it more efficient to develop this account for vote-dilution claims, which have been section 2's primary sphere. For example, the framework elaborated in *Gingles* doesn't control vote-denial claims. *See id.* at 2340. I intend to consider this approach's implications for vote-denial doctrine in a separate piece.

34. *See* Bernard Grofman & Lisa Handley, *Identifying and Remedying Racial Gerrymandering*, 8 J.L. & POL. 345, 402 (1992).

section 2's colorblindness compatibility by implementing and concretizing an ethos built into section 2's design.

Under *Gingles*, facts matter. Accordingly, this Article incorporates Americans' recent voting behavior. Whatever the ultimate causes, the latest national elections reflect a pronounced trend of racial depolarization in elections. We do not, apparently, inhabit a world "freezing certain racial constituencies into law."[35] Those trends, and analogous desegregation trends, suggest that section 2's aspirations are no fantasy: Section 2 poses no obstacles to the "waning of racism in American politics"[36] and plausibly accelerates it. And this proof that the conditions for section 2's activation do dissipate should offer additional confidence that, when the statute triggers, it has done so appropriately.

Building on the foregoing, this Article closes with two further contributions. First, dissolving the confrontation between section 2 and colorblindness resolves any perceived doctrinal tension between *Milligan* and *SFFA*. Second, the Article points toward answers to other longstanding section 2 problems. It offers a paradigm for defining the "undiluted" world in vote-dilution cases and shows why section 2 fits neatly with the requirement that legislation enforcing the Reconstruction Amendments be appropriate. It also shows this account's utility for evaluating whether doctrinal innovations advance or undermine section 2's design.

This Article proceeds in four parts. Part I distills the best-fitting version of colorblindness and introduces the earliest colorblind critiques of section 2. Part II lays the groundwork by describing what makes voting legally special. It then shows how section 2's prehistory, enactment, and context generated a disparate-treatment statute that targets discriminatory effect to fully remedy intentional discrimination. Colorblindness can take such a statute on board. Part III connects what section 2 is to what section 2 does. Doctrine elegantly implements section 2's original vision by tying its activation to past or present discrimination's particularized electoral effects, and factual developments back the vision's feasibility. In so doing, it confirms that section 2 can live peacefully with colorblindness. Part IV describes the Article's other important implications for section 2's constitutionality and doctrinal development.

I. COLORBLINDNESS CONFLICT

Attempts at describing "colorblindness" comprehensively can become complicated.[37] While this Article cannot undertake a full-length treatment, some engagement is necessary. Accordingly, Part I first draws out the latest doctrinal descriptions of colorblind constitutionalism. It then connects the doctrine to its various justifications, without delving into the motivations for those justifications (or, for that matter, colorblind constitutionalism's general

35. Will, *supra* note 14.
36. Johnson v. De Grandy, 512 U.S. 997, 1020 (1994).
37. *See generally* Eidelson & Hellman, *supra* note 21; Kohler-Hausmann, *supra* note 21.

desirability). Rather, the goal is simply to get a good-faith grasp on the principles likely to guide the further development of a still-developing paradigm. The part closes with a primer on historical claims that section 2's amendment contravened colorblindness principles.

A. Colorblindness and the Remedial Rationale, Circa 2026

The core colorblindness claim is that, because governments should not classify on the basis of race, such classifications are presumptively illegitimate, regardless of the race of those affected.[38] Governments simply may not treat race as they would other characteristics,[39] and thus only narrowly tailored pursuit of compelling governmental interests can justify race's use to "classify" persons.[40] My claim is that, rightly understood, section 2's design and operation respect that idea. This assertion rests on a descriptive claim about the content of colorblindness principles; to support that claim, this section places greatest weight on the latest cases (and their median justice, Justice Kavanaugh).[41]

Take first the idea of "classification," which is far murkier than might first appear.[42] Quite a bit could be, and has been, said on this subject.[43] What matters for section 2 is that mere awareness of race, without more, appears insufficient for a classification.[44] This aligns with *Shaw*'s distinction (in a Voting Rights Act case) between mere awareness, which does not trigger strict scrutiny because it does not "classify[] citizens by race," and racial "predominance," which does.[45] On this point, *Shaw* is neither outlier nor obsolete. Lower-court cases have declined to treat racial descriptions of criminal suspects as classifications.[46] In an analogous context, the Court

38. *See SFFA*, 143 S. Ct. 2141, 2160–62 (2023); Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 229–30 (1995); Kennedy, *supra* note 22, at 2 ("Colorblindness . . . . stands for the proposition that race ought to play no role in assessing individuals."). Like any legal principle, reasons offered to support this claim may bear on its application (e.g., what counts as conferring benefits or burdens or what might rebut the presumption), but for now I focus only on describing the governing rules.

39. *See SFFA*, 143 S. Ct. at 2170.

40. *Id.* at 2162.

41. *Cf.* Oliver Wendell Holmes Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 460–61 (1897) (asking "nothing more pretentious" than "what the courts will do in fact").

42. *See* Aziz Z. Huq, *The Trouble with Classifications*, 100 NOTRE DAME L. REV. 1, 1–8 (2024).

43. *See generally id.*

44. *See id.* at 67; Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 494, 505 (2003).

45. *See* Shaw v. Reno, 509 U.S. 630, 646–47 (1993) (outlining this distinction, sans the word "predominance"); *accord* Easley v. Cromartie, 532 U.S. 234, 241–42 (2001) (articulating the distinction in those words).

46. Primus, *supra* note 44, at 505 (adding examples of census bureau data and race-conscious adoption placements); Huq, *supra* note 42, at 19 n.96 (collecting U.S. Court of Appeals cases declining to treat "race-specific suspect selection rules" as classifications); *cf. SFFA*, 143 S. Ct. 2141, 2162 n.3 (2023) (distinguishing Supreme Court cases permitting law-enforcement use of race on the ground that they were decided as Fourth Amendment issues).

recently noted that "mere reference to sex" is not "sufficient to trigger heightened scrutiny."[47] The cases do not precisely mark the line of sufficiency, but a reasonable synthesis of what counts treats "classify" as shorthand for government distribution of burdens or benefits based on rules that treat different statuses differently.[48]

It is hardly easier to describe what interests count as compelling or what methods are sufficiently narrow; the Court has never purported to offer a comprehensive description. Exclusions are clearer. The Court has deemed *not* compelling—indeed, illegitimate—government pursuit of "racial balance" or "proportionality" (e.g., a university's desire to align its student population with racial distributions in the population at large).[49] Narrow tailoring rejects reliance on general propositions about race (whatever their basis in fact) for drawing conclusions in individual cases.[50] So too for treating "race qua race" as dispositive, as a racial quota might,[51] or injecting race into decisionmaking processes from which it was absent.[52]

Despite these limits, *SFFA* left untouched the longstanding permissibility of using race to remedy race-based harms.[53] To be clear, the Court has tightly patrolled this justification. Generalized "societal discrimination" will not do.[54] Rather, "race-based government action" must "remediat[e] specific, identified instances of past discrimination that violated the Constitution or a statute."[55] While fights are inevitable in the standard's application, such fights should not overshadow the critical point: Colorblind constitutionalism does not require ignoring intentionally inflicted race-based harms.[56]

---

47. United States v. Skrmetti, 145 S. Ct. 1816, 1829–30 (2025).

48. *See* Huq, *supra* note 42, at 18; *cf. Skrmetti*, 145 S. Ct. at 1831 (indicating that a "sex-based classification[] . . . . prohibit[s] conduct for one sex that it permits for the other").

49. *See SFFA*, 143 S. Ct. at 2172 ("'[R]acial balancing' is 'patently unconstitutional.'" (quoting Fisher v. Univ. of Tex. at Aus., 570 U.S. 297, 311 (2013))).

50. *See* Miller v. Johnson, 515 U.S. 900, 911–12 (1995).

51. *SFFA*, 143 S. Ct. at 2170.

52. *See, e.g.*, Bartlett v. Strickland, 556 U.S. 1, 21 (2009) (plurality opinion).

53. *See, e.g.*, Olatunde C.A. Johnson, *The Remedial Rationale After* SFFA, 54 SETON HALL L. REV. 1279, 1282 (2024).

54. *See SFFA*, 143 S. Ct. at 2173.

55. *Id.* at 2162.

56. *See, e.g.*, *id.* at 2225 (Kavanaugh, J., concurring) ("[T]he effects of past racial discrimination still persist . . . . [G]overnments . . . can, of course, act to undo the effects of past discrimination in many permissible ways that do not involve classification by race." (quoting City of Richmond v. J. A. Croson Co., 488 U.S. 469, 526 (1989) (Scalia, J., concurring in the judgment))); *see also* Parents Involved in Cmty. Schs. v. Seattle Sch. Dist., 551 U.S. 701, 772 n.19 (2007) (Thomas, J., concurring) ("[T]he colorblind Constitution does not bar the government from taking measures to remedy past state-sponsored discrimination—indeed, it requires that such measures be taken in certain circumstances."); *accord SFFA*, 143 S. Ct. at 2184–86 (Thomas, J., concurring) (similar). I bracket the much-discussed *SFFA* caveat that universities might still consider "an applicant's discussion of how race affected his or her life." *Id.* at 2176 (majority opinion). Though this is not explicit, I would read this line as distinguishing the conferral of a benefit based on race from conferring one based on an individualized merit-based evaluation, perhaps on the ground that not doing so would effectively discriminate against some candidates on the basis of race and/or because it does not qualify as a classification. *See supra* notes 44–48. It is unclear whether or how the caveat informs the scope of the remedial rationale. My view would be that it really does not; rather,

Our law has thus not embraced an unqualified "ends-colorblindness," under which "any race-related objective" per se "renders a policy suspect and almost certainly invalid."[57] Nor could it do so coherently. The Reconstruction Amendments themselves have such objectives. Indeed, the Fifteenth Amendment's text embodies its race-related command: no race-based voting discrimination. The remedial rationale is not boundless, but it must at least permit effectuating the U.S. Constitution's prohibitions. Something similar can be said about the disparate-treatment provisions of a law like Title VII of the Civil Rights Act of 1964,[58] which (at minimum) bar, and provide remedies for, harms inflicted on account of race.[59]

The doctrinal bounds of the remedial rationale suggest additional content for the recent concern with "logical end point[s]."[60] Judicial rejection of appeals to generalized societal discrimination seems to reflect the view that justifications for using race cannot justify permanent use of racial classifications.[61] Arguably, such justifications would resemble overmuch the "societal discrimination" rationale. I take this to be the thrust of Justice Kavanaugh's temporality concern.[62] It seems uncharitable to read him to suggest that it will someday become impermissible to bar discrimination or remedy its harms.[63] The claim is more plausibly about what logic permissibly underpins remedial claims. Due to section 2, states must sometimes look to race in adopting electoral devices they would rather not adopt; whatever justification authorizes that command cannot have "indefinit[e]" reach.[64]

This all matters because section 2 ties liability, and any required remedies, to electoral harms occurring on account of race. Pitting section 2 against colorblindness implicates section 2's fit with the remedial rationale. A Court forced to confront that question will find it hard to avoid grappling with the principles undergirding its embrace of colorblindness. I thus turn next to discussing those principles, while imposing some conceptual order

---

it simply describes behavior that does not trigger the colorblindness rule at all (plausibly, because such behavior does not treat different statuses differently). Whatever its ultimate justification, the caveat certainly confirms that colorblindness does not inevitably require ignoring race. *See also SFFA*, 143 S. Ct. at 2166 n.4.

57. *See* Sonja Starr, *The Magnet School Wars and the Future of Colorblindness*, 76 STAN. L. REV. 161, 164–65 (2024).

58. Pub. L. No. 88-352, 78 Stat. 241 (1964); *id*. § 703, 78 Stat. at 255–57.

59. *See id*. §§ 703, 706, 78 Stat. at 255, 259–62; *see also* Huq, *supra* note 42, at 67.

60. *See SFFA*, 143 S. Ct. at 2170; *id.* at 2221–24 (Kavanaugh, J., concurring).

61. *Id.* at 2163 (majority opinion) (quoting Justice Powell's concern in his *Bakke* opinion that "societal discrimination" was "amorphous" and "ageless in its reach into the past"); *id*. at 2224 (Kavanaugh, J., concurring) (emphasizing "particular[]" risks of "permanent or long-term racial classifications").

62. *See supra* notes 11–13 and accompanying text.

63. *See SFFA*, 143 S. Ct. at 2225 (Kavanaugh, J., concurring) (observing that "racial discrimination still occurs," that "the effects of past racial discrimination still persist," that law "serv[es] to deter and provide remedies for current acts of racial discrimination," and that governments may "'act to undo the effects of past discrimination in many permissible ways'" (quoting City of Richmond v. J. A. Croson Co., 488 U.S. 469, 526 (1989) (Scalia, J., concurring in the judgment))).

64. Allen v. Milligan, 143 S. Ct. 1487, 1519 (2023) (Kavanaugh, J., concurring).

sometimes not present in the cases or literature.[65] The goal is to capture fairly the intellectual moves embodied in current law, with the goal of fleshing out the current legal status quo.[66]

Start, then, with the reasons race is thought to be so unlike other personal characteristics that government reliance on race is uniquely and presumptively wrongful. The answers have essentially been that historical experience and principles of justice reveal that racial classifications carry a unique risk of concrete harms.[67] Most everyone accepts that governments constantly, and necessarily, notice personal characteristics on the individual and group levels.[68] Race's use is deemed to risk distinctive harms because of its past (and present) divisiveness, i.e., its traditional use for counterconstitutional ends.[69]

Some of those harms are dignitary or stigmatic.[70] So, the use of race inherently insults the individuals "place[d] on racial registers."[71] Anyone thus classified suffers, although some critics emphasize that classifications stigmatize their intended beneficiaries.[72] This rationale is often invoked against race-based *assumptions* about how people think and behave.[73] The argument seems entwined with (and may require)[74] a claim about the relationship the Constitution contemplates between persons and governments. Because that relationship focuses on individuals, not groups, distinctions that take the group as the unit rather than the individual are presumptively suspect.[75] History appears essential to this argument. Absent America's particular history, it seems nonobvious that placement on racial registers harms personal dignity any more than placement on registers of, say, nonathletic students.

---

65. This is unavoidable ex post, since colorblindness's justifications emerged evolutionarily. *See, e.g.*, Reva B. Siegel, *Foreword: Equality Divided*, 127 HARV. L. REV. 1, 29–44 (2013).

66. For other recent, generally simpatico, analyses of modern colorblindness's core concerns, see Daniel S. Harawa, *Coloring in the Fourth Amendment*, 137 HARV. L. REV. 1533, 1557–60 (2024), and Starr, *supra* note 57, at 248–50.

67. *See, e.g.*, David A. Strauss, *The Myth of Colorblindness*, 1986 SUP. CT. REV. 99, 118–19.

68. *See, e.g.*, Engquist v. Or. Dep't of Agric., 553 U.S. 591, 603–04 (2008).

69. Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 239 (1995) (Scalia, J., concurring in part and concurring in the judgment); Fried, *supra* note 22, at 111–12.

70. *See* Harawa, *supra* note 66, at 1574 (locating these harms at "the core of the Court's colorblindness ideology"); Strauss, *supra* note 67, at 126.

71. Grutter v. Bollinger, 539 U.S. 306, 353 (2003) (Thomas, J., concurring in part and dissenting in part); *see also* Benjamin Eidelson, *Respect, Individualism, and Colorblindness*, 129 YALE L.J. 1600, 1603–05 (2020).

72. *See* Strauss, *supra* note 67, at 126; Harawa, *supra* note 66, at 1557–58 (noting this subset of the dignitary claim).

73. *SFFA*, 143 S. Ct. 2141, 2169–71 (2023) (linking the problem with assumptions and "stereotyping" to dignitary harms).

74. Absent a constitutional hook, states presumably could adopt different conceptions of what actions best respect personal dignity.

75. *See* Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 227 (1995) (noting that colorblindness "follows from" the "basic principle that the Fifth and Fourteenth Amendments protect *persons*, not *groups*"); *id.* at 240 (Thomas, J., concurring) (invoking the Declaration of Independence); Fried, *supra* note 22, at 107–12.

Somewhat separate are justifications invoking the wrong of relying on a characteristic that is or should be irrelevant.[76] It is uncontroversial to deem it arbitrary to rely on irrelevant traits. A fuller account, which again seems to trade on history, must concede that race is sometimes relevant in practice but assert that governments may not concede that reality, as they might with other relevant characteristics.[77] Prospective-risk claims turn up here. For example, race is often said to require special care because even its remedial use risks entrenchment that outruns any remedial justification, transforms into interest-group politics, and perversely exacerbates racial tensions.[78]

A final broad set of dangers centers on harmed nonculpable persons.[79] Beyond dignitary affronts, using race to benefit some persons can harm those not favored.[80] The risk is not just that governments may actively desire to harm nonculpable persons or to venally benefit preferred groups.[81] Rather, the analysis assumes a zero-sum world, with harms occurring whenever race "benefit[s]" some but not others.[82]

These concerns undergirded *SFFA*'s demand for a logical end point.[83] Insofar as they shape the remedial rationale's contours, they matter here to the extent that some of section 2's applications depend on that rationale. Fortunately, as the remainder of this Article explains, those applications are singularly compatible with not just the doctrine but the justifications that

---

76. *See* Strauss, *supra* note 67, at 114–15. Perhaps one could find dignitary harm in treatment based on a trait that is or should be irrelevant.

77. *See, e.g.*, Fried, *supra* note 22, at 109, 124–25. A classic example recognizing that race might be relevant but nevertheless tightly scrutinizing its use is *Palmore v. Sidoti*, 466 U.S. 429 (1984).

78. *See, e.g.*, Richmond v. J. A. Croson Co., 488 U.S. 469, 493 (1989) (flagging the danger of "classifications . . . motivated by . . . simple racial politics" that may "lead to a politics of racial hostility"); Holder v. Hall, 512 U.S. 874, 905–09 (1994) (Thomas, J., concurring); Justin Driver, *The Cure as Disease: The Conservative Case Against SFFA v. Harvard*, 2023 SUP. CT. REV. 1, 2, 5, 27, 43–44.

79. *See SFFA*, 143 S. Ct. 2141, 2201 (2023) (Thomas, J., concurring); Siegel, *supra* note 65, at 30–31, 38–44 (describing these as the "earliest" colorblindness justifications); Strauss, *supra* note 67, at 101, 103, 131.

80. *See SFFA*, 143 S. Ct. at 2165.

81. Although that possibility is sometimes raised, see, for example, *Croson*, 488 U.S. at 493 (referencing "racial politics").

82. *See SFFA*, 143 S. Ct. at 2169.

83. *See, e.g.*, *id.* at 2165–73. The reader may wonder why originalism is not treated separately. Historically, the leading arguments for colorblindness rested on moral and pragmatic arguments, not assertions that the Reconstruction Framers clearly intended (or chose words plainly communicating) modern colorblindness. *See* Michael B. Rappaport, *Originalism and the Colorblind Constitution*, 89 NOTRE DAME L. REV. 71, 73 (2013); Siegel, *supra* note 65, at 29–51. The leading scholarly originalist examination of colorblindness has been unwilling to go quite as far as saying that originalism compels colorblindness. *See* Rappaport, *supra*, at 72. As that account acknowledged, originalist cases have been made in the opposite direction, see generally Jed Rubenfeld, *Affirmative Action*, 107 YALE L.J. 427 (1997); Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753 (1985). I thus note only that explaining why relevant actors wanted (or understood) text that is relevantly ambiguous to require colorblindness needs some antecedent account of the evils colorblindness attacks. Adopting originalism, without more, doesn't limn those evils.

underpin it. If government use of race is exceptional, requiring particularized justification, section 2 amply satisfies that standard.

B. The Travails of Section 2

The 1982 amendment[84] to the Voting Rights Act gave us today's section 2, which I quote in full below. Italics represent material added in 1982, and strikethroughs represent removed material:

> (a) No voting qualification or prerequisite to voting~~,~~ or standard, practice, or procedure shall be imposed or applied by any State or political subdivision ~~to deny or abridge~~ *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 [certain language-minority protections], *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.*[85]

Part II says much more about this provision's creation, so for now I give only the history necessary to frame its initial colorblindness-based critiques.

The 1982 amendment responded to *City of Mobile v. Bolden*, where a plurality concluded that section 2 reached only electoral mechanisms adopted (or perhaps maintained) because of, rather than in spite of, their adverse effects on a covered group.[86] *Bolden* represented the election-law application of what has become a general rule: Intent is integral to judicially ascertained violations of the Equal Protection Clause and Section 1 of the Fifteenth Amendment.[87]

In 1982, as now, the Reconstruction Amendments' Enforcement Clauses authorized Congress to ban prophylactically some conduct that a court would not independently hold to violate the Amendments.[88] Invoking that

---

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

85. *Compare id.* § 3, *with* Voting Rights Act of 1965, Pub L. No. 89-110, § 2, 79 Stat. 437, 437.

86. 446 U.S. 55, 59–65, 63 n.10 (1980) (plurality opinion); *see also id.* at 71–72 & n.17 (outlining the contours of the "purpose" standard); *id.* at 74 n.21 (noting the possibility that discriminatory maintenance sufficed).

87. *See* Washington v. Davis, 426 U.S. 229, 245 (1976) (Equal Protection Clause); *Bolden*, 446 U.S. at 65 (plurality opinion) (Section 1 of the Fifteenth Amendment); *accord* Reno v. Bossier Par. Sch. Bd., 520 U.S. 471, 481–82 (1997).

88. *See* U.S. CONST. amends. XIII–XV; *infra* notes 297–305, 520–25 and accompanying text.

authority, Congress sought a "results" standard that would permit invalidating electoral devices even absent the intent *Bolden* required.[89] In the many cases like *Bolden*, involving attacks on at-large or multimember districting systems, remedies for violations were often likely to be districting plans assuring decisive control over at least one district to a racial group that was a minority in the jurisdiction.[90]

In Congress, opponents saw "racial balance," "racial quotas," and "racial entitlements."[91] Senator Orrin G. Hatch, who led the U.S. Senate opposition, declared a results test a "full retreat from the color-blind principles of law fostered by *Brown*" and the original Voting Rights Act.[92] Senator Hatch's views should sound familiar. In his telling, "[i]nstead of aiming ultimately for the nonconsideration of race in the electoral process as did the original Act, the amendments would make race the over-riding factor in public decisions in this area."[93] Rather than prizing "the individual citizen as did the original Act—and as does the Constitution—the amendments would make racial and ethnic *groups* the basic unit of protection."[94] And in lieu of "the great constitutional principle of equal protection," section 2 would "substitute a totally alien principle of equal results."[95] The "so-called right to 'elect candidates of one's choice'" was merely a "right to have establi[s]hed racially homogenous districts to ensure proportional representation."[96] The amendment, he concluded, would "inject racial considerations into increasing numbers of electoral and political decisions

89. Allen v. Milligan, 143 S. Ct. 1487, 1499–501 (2023); S. REP. NO. 97-417, at 39 (1982) (invoking the Fourteenth and Fifteenth Amendments as authority for the section 2 amendment); H.R. REP. NO. 97-227, at 31 (1981) (same).

90. At-large and multimember voting systems let all voters in a jurisdiction vote in common for multiple members of the pertinent representative body. Critics sometimes charge these systems with "diluting" the votes of numerical minorities because a cohesively voting majority that opposes the minority's preferred candidate will always win. *See* Whitcomb v. Chavis, 403 U.S. 124, 157–59 (1971). One cure for that situation is a single-member districting scheme in which the numerical minority is a political majority in at least one district. That prevents the bloc-voting majority from blocking the numerical minority's desired electoral outcome, at least in the "safe" districts. When the numerical minority is a racial minority, election law shorthands such districts as "majority-minority districts." Christopher S. Elmendorf, Kevin M. Quinn & Marisa A. Abrajano, *Racially Polarized Voting*, 83 U. CHI. L. REV. 587, 594 n.39 (2016).

91. Siegel, *supra* note 65, at 24–25; *see also* S. REP. NO. 97-417, at 147–51 (1982) (Subcomm. Rep.). The "dissenting" report appended to the main committee report, *see id.* at 107–87, is referred to in this Article as the Subcommittee Report.

92. *See* S. REP. NO. 97-417, at 103 (additional views of Senator Hatch). Hatch's remarks are representative of the colorblind opposition. *Cf.* THE MACNEIL/LEHRER REPORT: *Voting Rights Act*, at 14:39–14:45 (PBS Broadcast, aired Feb. 3, 1982), https://americanarchive.org/catalog/cpb-aacip-507-h707w67x2f (on file with the *Fordham Law Review*) (interview of Sen. Hatch, introducing him as "one of the Administration's staunchest defenders on th[e] issue" of intent versus effect in section 2).

93. *See* S. REP. NO. 97-417, at 94 (additional views of Senator Hatch).

94. *Id.*

95. *Id.*

96. *Id.* at 100.

that formerly had nothing to do with race" and *increase* racial polarization and self-segregation.[97]

Individual justices amplified these claims. Justice Clarence Thomas's concurrence in *Holder v. Hall*,[98] joined by Justice Antonin Scalia, asserted that section 2, as interpreted, "encourage[d] federal courts to segregate voters into racially designated districts," causing "racial balkaniz[ation]."[99] It was "repugnant to . . . the ideal of a color-blind Constitution," for it required believing "that race define[d] political interest" and "that members of racial and ethnic groups must all think alike on important matters of public policy."[100] Justice Anthony M. Kennedy's concurrence in *Johnson v. De Grandy*[101] was of a piece.[102]

Essentially coterminously, *Shaw v. Reno* held that excessive use of race in drawing districts might violate the Equal Protection Clause.[103] Its constitutional reasoning ported familiar warnings to the electoral arena: Racial classifications would "stigmatize individuals," "incite racial hostility," and promote race-qua-race assumptions.[104]

One might disagree with Justice Thomas and Senator Hatch because one rejects colorblindness as a philosophy. Of more practical importance is whether they might simply have mistaken what that philosophy demands as applied to section 2. The remainder of this Article concerns whether that is so.

II. WHAT IS SECTION 2?

This part first situates section 2 in the unique context of voting and then explains why it is best understood as a discriminatory-effect statute that targets disparate treatment occurring on account of intentional discrimination.

This task requires revisiting the legal landscape that spawned section 2. I argue that Congress's explicit invocation of certain pre-*Bolden* cases offers more guidance than sometimes thought, because those cases offer more guidance than sometimes understood. Specifically, those cases turned on the recognition that a discrimination-tainted political system's corruption of a genuinely neutral electoral device's results may vitiate that device's constitutionality. In elaborating this read of those pre-*Bolden* cases, this

97. *Id.* at 103; *see also id.* at 147–51 (Subcomm. Rep.).
98. 512 U.S. 874 (1994).
99. *Id.* at 892 (Thomas, J., concurring) (alteration in original).
100. *Id.* at 903, 905–06 (alteration in original).
101. 512 U.S. 997 (1994).
102. *Id.* at 1027, 1029–30 (attacking the "assumption" that "defined racial groups" must have certain views, reiterating "[t]he moral imperative of racial neutrality," and warning of the risk of racial "balkaniz[ation]").
103. 509 U.S. 630, 649 (1993); Miller v. Johnson, 515 U.S. 900, 916 (1995). "Might" is key, since *Shaw* recognized that mere "aware[ness] of race" would not trigger strict scrutiny. *Id.* at 646 (emphasis omitted); *see supra* note 45. And, of course, strict scrutiny can in theory be satisfied.
104. *Shaw*, 509 U.S. at 643, 647.

discussion incorporates the broader jurisprudence of their author, Justice Byron R. White.

This part then explains how that pre-*Bolden* regime limns the mischief that Congress sought to solve in 1982 and then tracks that ethos into the core value ensconced in section 2. That analysis draws on a unique examination of the circumstances bearing on section 2's best reading, including a novel integration of the amendment's media coverage. It closes by explaining the implications of so characterizing section 2.

A. Voting's Idiosyncrasies

Section 2's limitation to the electoral arena makes it critical to clarify the distinctive aspects of voting that might bear on the applicability of the colorblindness paradigm.

First, consider how elections "blend" private and public action.[105] They depend fundamentally on private views and choices of private persons casting secret ballots. Yet elections transmute those views and choices into a state's public conferral of its power on state officials. And while political parties can look much like any association of private persons conjoined to advance private desires,[106] their unique ability to coordinate democratic decisionmaking makes them indispensable governmental institutions.[107] This entwinement of private behavior with public power may be voting's most distinctive aspect.[108]

Second, the individual right to vote contains multitudes. It involves the right to participate (to cast a vote and have it counted) and the right to aggregate (to have your ballot combined with the ballots of like-minded others on equal terms with all cast ballots).[109] It thus necessarily reaches beyond the individual. Not only does it implicate an individual's electoral friends (who want, for example, districts maximizing their collective influence), it also implicates foes (who want the contrary). This aggregative aspect underpins claims that an electoral system illegitimately vitiates one's combination of one's vote with others (so-called "vote-dilution" claims).[110]

---

105. Pamela S. Karlan & Daryl J. Levinson, *Why Voting Is Different*, 84 CALIF. L. REV. 1201, 1203 (1996).

106. *See* Samuel Issacharoff, *Private Parties with Public Purposes: Political Parties, Associational Freedoms, and Partisan Competition*, 101 COLUM. L. REV. 274, 294 (2001).

107. *See, e.g.*, *id.* at 277, 294.

108. *See* Karlan & Levinson, *supra* note 105, at 1227.

109. *See* Pamela S. Karlan, *The Rights to Vote*, 71 TEX. L. REV. 1705, 1709–20 (1994) [hereinafter Karlan, *The Rights to Vote*]. Professor Pamela S. Karlan's famous disaggregation of voting's facets also included "governance," "the practice of decisionmaking through representatives." *Id.* at 1716. The first two facets are most relevant here (some of what she deems governance could fit under aggregation).

110. Vote-dilution claims may be "quantitative" or "qualitative." The former comprise the one-person-one-vote cases, which find presumptive constitutional harms in unequally populated districts. *See* Evenwel v. Abbott, 578 U.S. 54, 59–61 (2016); Tennant v. Jefferson Cnty. Comm'n, 567 U.S. 758, 759 (2012). The latter include the constitutional racial vote-dilution cases on which section 2 is based, *see* Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321, 2331–33 (2021), and the meaning of which is therefore Part II.B's subject.

Recognition that groups matter to political systems' constitutional legitimacy is as old as founding-era debates over whether and how to conduct districted elections.[111] Both traditionally and theoretically, elections are unintelligible without groups in ways that, say, government contracting or university admissions are not.[112]

Still, this attention to groups is conceptually and doctrinally consistent with a fundamentally individualized unit of analysis.[113] In my view, the right to aggregate is best understood as an individual's right to combine that individual's vote with the votes of others equally. Thus, voting-as-aggregation talk need not be framed as involving group "rights" at all.[114] Groups matter, but in a way falling far short of the explicit electoral set-asides that characterize some other democratic regimes.[115] Thus, although this Article sometimes speaks directly of groups for expositional ease, it should be understood as referencing the rights and interests of the individuals who identify with the group.

Aggregation also underlies a concept key to understanding section 2: proportionality. In election law, this idea references circumstances where a group, by aggregating its votes, controls electoral seats in proportion to the group's "share of the relevant population."[116] The idea that a results test implied a *right* to proportionality was central to Senator Hatch's colorblindness-rooted attack on section 2.[117]

Third and finally, voting lacks the zero-sum concerns present elsewhere. Start with participation. Exercising participation rights does not pit individuals against each other as university admissions might. Casting a ballot stops no one else from doing so, unlike a college applicant who takes one of a finite number of admissions slots.[118]

---

111. *See* Pamela S. Karlan, *Reapportionment, Nonapportionment, and Recovering Some Lost History of One Person, One Vote*, 59 WM. & MARY L. REV. 1921, 1925–28 (2018); *see also* ROSEMARIE ZAGARRI, THE POLITICS OF SIZE 105–47 (1987); Lani Guinier, *Groups, Representation, and Race-Conscious Districting*, 71 TEX. L. REV. 1589, 1602–03 (1993).

112. *See* Karlan & Levinson, *supra* note 105, at 1204.

113. *See* Shaw v. Hunt, 517 U.S. 899, 917 (1996) (emphasizing that section 2 creates an individual right); Lucas v. Gen. Assembly, 377 U.S. 713, 736 (1964) (same for one-person-one-vote doctrine); Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 HARV. L. REV. 1663, 1668–69, 1723 (2001) (critiquing the Court's "insistence on treating the right to an undiluted vote like a conventional individual right," while recognizing that harms sounding in aggregation "can properly be understood as . . . individual").

114. *Contra* Samuel Issacharoff & Pamela S. Karlan, *Groups, Politics, and the Equal Protection Clause*, 58 U. MIAMI L. REV. 35, 42–43 (2003).

115. *See, e.g.*, Richard Pildes, *The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 28, 87 & n.238 (2004) [hereinafter Pildes, *The Constitutionalization*] (discussing "consociational structures of democracy that directly compel assigned levels of representation for specific groups").

116. *See* Johnson v. De Grandy, 512 U.S. 997, 1014 n.11 (1994); *accord* Whitcomb v. Chavis, 403 U.S. 124, 150 (1971).

117. *See supra* notes 51–52, 92–97 and accompanying text.

118. *Cf.* Samuel Issacharoff, *Polarized Voting and the Political Process: The Transformation of Voting Rights Jurisprudence*, 90 MICH. L. REV. 1833, 1879 (1992) [hereinafter Issacharoff, *Polarized Voting*]; Stephanopoulos, *Disparate Impact*, *supra* note 31, at 1607–09.

Though it may seem less obvious, the same is true for aggregation.[119] Of course a voter might self-interestedly prefer to have district lines ensuring that aggregation in her district combines her ballot with enough copartisans to outnumber the aggregated ballots of her electoral foes. So too might she prefer statewide district lines guaranteeing her preferred political party legislative control. But the aggregation right contemplates a right to have one's ballot aggregated on equal terms with others, not a right to maximally preferential aggregation rules.[120] While jurists dispute equality's demands in this context,[121] no one has argued that it means the latter. So long as the aggregation process in fact is nondilutive—so long as a voter can combine with likeminded others on par with fellow voters—she has no further aggregative entitlement. She thus has no legally protected interest in one nondilutive mode of aggregation as against another, which would be a freestanding right to a preferred electoral outcome unfamiliar to American law.

B. Origins

A section 2 violation occurs when members of a protected class "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice."[122] That is essentially a direct quote of *White v. Regester*,[123] one of the two pre-*Bolden* Supreme Court cases reaching the merits of a constitutional racial vote-dilution claim.[124] Section 2's text thus directs attention to its jurisprudential antecedents.[125] Scholars often emphasize that prehistory's murkiness, with some reason.[126] But we may underappreciate the degree to which it defined a comprehensible legal scaffolding for section 2. It did so, as it turns out, in a way that anticipated current disputes.

1. Old Soil

Soon after creating the one-person-one-vote rule, the Supreme Court intimated that a one-person-one-vote-compliant electoral system might nevertheless deny equal protection by "operat[ing] to minimize or cancel out

119. *Contra* Allen v. Milligan, 143 S. Ct. 1487, 1551 (2023) (Alito, J., dissenting) (claiming that "the creation of majority-minority districts is something of a zero-sum endeavor").

120. *See* Karlan & Levinson, *supra* note 105, at 1231 ("[N]o voter has a right to be placed in a district where her preferred candidate will win."); *cf.* Shaw v. Hunt, 517 U.S. 899, 917 (1996); Allen v. Milligan, 143 S. Ct. 1487, 1507 (2023).

121. *See* Karlan, *The Rights to Vote*, *supra* note 109, at 1714; *see also supra* note 110 and accompanying text.

122. 52 U.S.C. § 10301(b).

123. 412 U.S. 755 (1973); *see id.* at 766.

124. *See supra* note 110 (discussing vote-dilution theory).

125. *See, e.g.*, Taggart v. Lorenzen, 139 S. Ct. 1795, 1801 (2019) ("When a statutory term is 'obviously transplanted from another legal source,' it 'brings the old soil with it.'" (quoting Hall v. Hall, 138 S. Ct. 1118, 1128 (2018))).

126. *See* Elmendorf, *Making Sense of Section 2*, *supra* note 30, at 388.

the voting strength of racial . . . elements of the voting population."[127] *Whitcomb v. Chavis*[128] was the first full engagement with that possibility. There, Indiana required at-large multimember districting of Marion County's state legislative seats.[129] Residents of an area "termed 'the ghetto area'" were overwhelmingly Black and voted predominantly Democratic.[130] But as a numerical minority in a predominantly White, Republican-preferring county, their votes were consistently submerged by opposing votes.[131]

The district court found an equal protection violation, but the Supreme Court reversed.[132] It first noted the absence of any claim that the multimember scheme was "conceived or operated as [a] purposeful device[] to further racial or economic discrimination."[133]

Modern equal protection cases would end there. *Whitcomb*, however, asked whether plaintiffs could nevertheless prevail by showing "invidious discrimination."[134] Without defining the phrase, *Whitcomb* elaborated it. That the ghetto's proportion of legislators was "not in proportion to ghetto population" was insufficient "absent evidence and findings that ghetto residents had less opportunity than did other Marion County residents to participate in the political processes and to elect legislators of their choice."[135] The Court saw no such evidence.[136] Plaintiffs were just Democrats living in a Republican-preferring legislative district. To say that their "voting power" had been "cancelled out" was a "mere euphemism for political defeat at the polls."[137] The "disaster of losing too many elections," which is inevitable given "district-oriented, head-on races between candidates," could not justify intervention absent "indication that [plaintiffs were] being denied access to the political system."[138]

Whitcomb thus recognized the constitutionality of individuals—and the groups they compose—losing majoritarian elections, even repeatedly.[139] Identifiability entitles no group to electoral success.[140] But *Whitcomb* did recognize that an electoral system might, unintended by its creators, embody unconstitutionally "invidious discrimination" against a racial group.

The possibility manifested in *White v. Regester*'s affirmance of a district court's conclusion that two Texas counties' multimember districts were "invidiously discriminatory" against Black and Mexican-American

127. Fortson v. Dorsey, 379 U.S. 433, 439 (1965) (dictum).
128. 403 U.S. 124 (1971).
129. *Id.* at 128–29.
130. *See id.* at 129, 131–32.
131. *See id.* at 150–51; Karlan & Levinson, *supra* note 105, at 1221–22.
132. *Whitcomb*, 403 U.S. at 160.
133. *Id.* at 149.
134. *Id.*
135. *Id.*
136. *Id.* at 149–50 (emphasizing lack of racial restrictions on registration, voting, or political-party participation).
137. *Id.* at 153.
138. *Id.* at 153–55.
139. *See id.* at 153.
140. *See id.* at 156.

populations.[141] *Regester* began by embracing *Whitcomb*. Districts might "be[] used invidiously to cancel out or minimize the voting strength of racial groups."[142] But a group's deprivation of "legislative seats in proportion to its voting potential" was insufficient.[143] Rather, plaintiffs had to show "that the political processes leading to nomination and election were not equally open to participation by the group," i.e., "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."[144]

Unfortunately, *Regester*'s application of this rule was famously cryptic.[145] It essentially recounted certain district-court findings and declared them sufficient. Still, its emphases reveal a rationale focused on how fact-specific effluents of purposeful discrimination can turn otherwise normal effects of electoral devices into *discriminatory* effects, even when those devices themselves were not designed to discriminate.[146]

Consider *Regester*'s treatment of Dallas County, still in the early 1970s effectively a one-party Democratic county.[147] The Court began with Texas's history of racial discrimination, including in the democratic process. It next emphasized the lower court's finding that facially neutral electoral mechanisms that hampered Black voters' electoral success had "enhanced the opportunity for racial discrimination."[148] Also relevant was the recent "re[liance] upon 'racial campaign tactics in white precincts'" by a "white-dominated organization" that controlled Democratic candidate slating.[149] The organization had deployed those tactics to defeat candidates overwhelmingly supported by Black voters.[150] Because majority (White)

141. 412 U.S. 755, 756 (1973).

142. *Id.* at 765 (citing *Whitcomb*, 403 U.S. at 124); *accord id.* at 767 (noting the district court's inquiry as to "whether the impact" of the challenged electoral system "constituted invidious discrimination").

143. *Id.* at 765–66.

144. *Id.* at 766 (citing *Whitcomb*, 403 U.S. at 149–50).

145. *See* Elmendorf, *Making Sense of Section 2*, *supra* note 30, at 388.

146. A detailed amicus brief filed in *Regester* synthesized this principle more crisply than the Court ultimately did: "[A] history of racial discrimination may transform a system or process neutral on its face into one whose effects are discriminatory." Brief for Amici Curiae League of Women Voters of the United States and Texas League of Women Voters at 30, *Regester*, 412 U.S. 755 (No. 72-147). Although I cannot prove it influenced the Court, it appears to have been the only amicus brief filed.

147. *See* Bertrall L. Ross II, *The Representative Equality Principle: Disaggregating the Equal Protection Intent Standard*, 81 FORDHAM L. REV. 175, 219 (2012).

148. *Regester*, 412 U.S. at 766. For example, primary-election nominations required a majority vote. *Id.* In jurisdictions with two stable voting blocs, such rules hamper numerical minorities' electoral success more than (for example) plurality-winner rules. Under plurality-winner rules, a bloc-voting numerical minority might win an election if it concentrates its votes on one candidate while the majority bloc splits its votes among multiple candidates. Majority-vote rules (generally coupled with runoff provisions) guard against this result. *See* Pamela S. Karlan, *Maps and Misreadings: The Role of Geographic Compactness in Racial Vote Dilution Litigation*, 24 HARV. C.R.-C.L. L. REV. 173, 187 n.54 (1989) [hereinafter Karlan, *Maps & Misreadings*].

149. *Regester*, 412 U.S. at 766–67 (quoting Graves v. Barnes, 343 F. Supp. 704, 727 (W.D. Tex. 1972), *aff'd in relevant part sub nom.*, *Regester*, 412 U.S. 755).

150. *Id.* at 766–67.

voters voted as a bloc against Black-preferred candidates, the organization paid no price for those tactics. And it had no need to, and in fact did not, address the Black community's needs.[151]

The Bexar County analysis, for its part, centered on the "historic and present condition" of the Mexican-American "Barrio area," emphasizing its "cultural and economic realities."[152] The Court highlighted the community's residential segregation[153] and its continued "suffer[ing]" of "the results and effects" of discrimination in all aspects of life.[154] It observed continually depressed voting registration and the Barrio's election of only two legislators since 1880.[155] Here, too, a delegation with no incentive to address the Barrio's needs had not done so.[156] The Court approved the district court's "intensely local appraisal" of the multimember district's "design and impact" given the "past and present reality, political and otherwise," and its view that single-member districting was necessary "to remedy 'the effects of past and present discrimination.'"[157]

With *Whitcomb*, *Regester* defined a constitutional wrong in the shadow of a vision of normal politics. "As our system has it," one's aggregative dreams are dashed, often repeatedly.[158] Why would one ever view what might seem like ordinary majoritarianism as unconstitutionally antidemocratic? *Regester*'s near-verbatim reliance on *Whitcomb* indicated that racial vote dilution doesn't require an electoral device's *purposeful* conception or operation to harm a racial group. Yet lack of proportional representation (to which no group is entitled) was not enough. The dividing line was the Delphic phrase "invidious discrimination," which *Regester*'s rule statement elaborated. The problem was race-linked exclusion from the political process causing "less opportunity . . . to participate in the political processes."[159] One might shorthand the constitutional evil as distortive, electorally determinative racialization of politics.[160] These cases saw that evil as bound up with the past and present effects of intentional discrimination.

That paradigm explains *Whitcomb*'s emphasis on the lack of racial restrictions on registration, voting, or political-party participation and the plaintiffs' "equal opportunity to participate in and influence the selection of"

151. *Id.* at 767.
152. *Id.* at 767, 769.
153. This Article follows the common practice of using residential segregation to reference racially identifiable housing patterns, de jure or not.
154. *See Regester*, 412 U.S. at 767–68 (discussing "education, employment, economics, health, politics and others").
155. *Id.* at 768–69.
156. *See id.*
157. *Id.* at 769–70 (quoting Graves v. Barnes, 343 F. Supp. 704, 733 (W.D. Tex. 1972), *aff'd in relevant part sub nom.*, *Regester*, 412 U.S. 755).
158. Whitcomb v. Chavis, 403 U.S. 124, 153 (1971).
159. *Regester*, 412 U.S. at 766.
160. *Cf. Whitcomb*, 403 U.S. at 153 (asserting that plaintiffs' complaint was "more . . . a function of losing elections than of built-in bias against poor Negroes").

legislators.[161] *Whitcomb* seemed most taken by the *absence* of any indication that race was or had been determinative in politics.[162] Not so in *Regester*, which began its analysis of both counties by looking to the past and present effects of discrimination.[163] Consider the Court's emphases. The dominant Dallas County political organization deployed "racial campaign tactics" to defeat Black-supported candidates; in Bexar County, an electoral remedy was thought necessary for "the effects of past and present discrimination."[164] And, in recognizing both communities' segregation,[165] the Court recognized a sociopolitical reality entwined with past and present discrimination.[166]

The role of racial bloc voting[167] further underscores the cases' focus on discrimination-rooted electoral distortion. Without explicitly using that phrase, *Regester* invoked the concept; racial bloc voting was *why* that dominant political organization deployed "racial campaign tactics," eschewed Black support and needs, and regularly defeated candidates who had "overwhelming" Black support.[168] Yet bloc voting, without more, was not enough. *Whitcomb* saw no violation where Black voters' losses were best explained as losses suffered qua Democrats, "along with all other Democrats."[169] Racially identifiable voting patterns mattered, but only within an analysis of whether the sociopolitical context offered reason to characterize the electoral results of those patterns as invidious.

To say that voting patterns matter could pose a puzzle. Neither *Whitcomb* nor *Regester* questioned that purely private beliefs and actions, such as those explaining any voting choice, are beyond constitutional reach.[170] How then might facially neutral vote-tabulation rules (like majority-vote or place requirements) sufficiently "enhanc[e] the opportunity for racial

---

161. *Id.* at 149–50, 153.

162. *See id.* at 149–50; *accord Graves*, 343 F. Supp. at 726 & n.18 (contrasting anti-Black "hostility" that was "still an integral part of Dallas County politics" with a record in *Whitcomb* that suggested that "race play[ed] no part in politics").

163. *Regester*, 412 U.S. at 766, 768.

164. *Id.* at 767, 769.

165. *Id.* at 766 n.10, 767–68; *see also* 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, 58 (1982) (noting that "racial residential segregation was obvious" in those cases).

166. *See* Karlan, *Maps & Misreadings*, *supra* note 148, at 186 n.52; *Graves*, 343 F. Supp. at 729 & n.18a (case below in *Regester*).

167. For now, by racial bloc voting I simply mean distinctively racial voting patterns in which majority and minority races vote agonistically, with the term "distinctively" intended to bracket some of the difficulties noted below. *See infra* notes 410–13.

168. *Regester*, 412 U.S. at 767; *accord Graves*, 343 F. Supp. at 726 (noting that "white candidates endorsed by" the White-dominated political organization could "win in a county-wide race without appealing to the Negro vote"); Tokaji, *supra* note 30, at 543 (embracing this reading of *Regester*'s interest in "racial polarization"). Severe racial bloc voting also characterized the Barrio, although *Regester* does not mention it. *See Graves*, 343 F. Supp. at 730–31.

169. Whitcomb v. Chavis, 403 U.S. 124, 153 (1971). Perhaps notably, that explanation was unavailable in *Regester*'s one-party Dallas County.

170. *Cf.* Anderson v. Martin, 375 U.S. 399, 402 (1964) (suggesting in dicta a "right of a citizen to cast his vote for whomever he chooses and for whatever reason he pleases"); Karlan & Levinson, *supra* note 105, at 1228.

discrimination" to support a racial vote-dilution finding?[171] While the cases could have been clearer as to why, clarity lies in understanding why voting is different.

Both *Whitcomb* and *Regester* implicitly recognized how elections' singular melding of public and private action makes the race-linked distortion of *private* political choices salient. One can accept a bright line between public and private action and simultaneously recognize the unique degree to which states aggregate and implement voters' private acts when they create and apply electoral rules that vest candidates with public authority. Those private choices may be effects of past intentional discrimination no less than some public ones,[172] a risk heightened in a political system whose extreme racialization renders aggregation within it distinctively abnormal. In such a system, a facially neutral rule created and operated sans evil intent might still have constitutionally wrongful effects if that rule inherently and necessarily *embraces* those private choices.[173]

Two cases could not answer every theoretical question. But they did offer a concrete principle in linking invidious discrimination to unequal political opportunity and connecting unequal opportunity to a political system distorted by race's prior injection. For the Court, the mere relevance of race in politics would not suffice; *Whitcomb* did not deny that racially identifiable (and other) groups may have "distinctive interests."[174] But when race was the primary determinant in a political system in which racial minorities constantly lose, that phenomenon might, in context, offer reason to detect the malign effects of past intentional discrimination. It offered reason, in other words, to treat race's operation in *that* system as something other than the sort of benign organizing principle that might describe "any group with distinctive interests."[175] For the *Regester* Court, determinative racial bloc voting, like the "racial campaign tactics" that revealed its presence, suggested that what might seem to be normal majoritarian losses may actually stem from a constitutional wrong.[176] Evidence of race's distortive injection, like

171. *Regester*, 412 U.S. at 766. If anything, a majority-vote requirement might seem salutary in the abstract. *See, e.g.*, Edward B. Foley, *Requiring Majority Winners for Congressional Elections: Harnessing Federalism to Combat Extremism*, 26 LEWIS & CLARK L. REV. 365, 366–67 (2022).

172. *See* W. Kerrel Murray, *Discriminatory Taint*, 135 HARV. L. REV. 1190, 1199–201, 1207–11 (2022) [hereinafter Murray, *Discriminatory Taint*] (discussing recent and less-recent cases recognizing the relevance of past illegitimate public choices to a subsequent policy's legitimacy); *cf., e.g.*, Flowers v. Mississippi, 588 U.S. 284, 306–07 (2019) ("The State's actions in the first four trials necessarily inform our assessment of the State's intent going into [the defendant's later trial]. We cannot ignore that history. We cannot take that history out of the case.").

173. The classic case is *Smith v. Allwright*, 321 U.S. 649 (1944), which invalidated a nominally private party's racial restrictions on primary voting where Texas made primaries "part of the machinery for choosing officials" and "cast[] its electoral process in a form which permit[ted] a private organization to practice racial discrimination in the election." *Id.* at 664.

174. *Whitcomb*, 403 U.S. at 156; *see also id.* at 154–55.

175. *Id.* at 156.

176. *Regester*, 412 U.S. at 767. *Rogers v. Lodge*, 458 U.S. 613 (1982), explicitly linked racial bloc voting to evidence of "purposeful discrimination" and "purposeful exclusion"

determinative racial bloc voting, was evidence that repeated aggregative disappointments had occurred not simply because the plaintiffs had played the electoral game and been unable to persuade their fellow citizens but because they had been locked out of the game on account of race. And the electoral device proximately generating those disappointments (e.g., a multimember district) might invidiously discriminate, whatever its enactors' intent.

The pre-*Bolden* lower-court regime further elaborated *Regester* and *Whitcomb*'s focus on how intentional discrimination's politically distortive effects distinguished permissible from impermissible electoral disappointments. In general, and consistent with that approach, the cases recognized the centrality of racial bloc voting to the legal harm.[177] Beyond that general point, two cases in particular should be highlighted.

The first, *Zimmer v. McKeithen*,[178] propounded a lengthy list of factors indicative of dilution, which are well known to have been central in the 1982 amendment process.[179] Permeating the list was a focus on the effects of past or present discrimination and facially neutral aspects of the electoral environment that might, against a racially distorted electoral backdrop, enhance the opportunity for discrimination.[180] Cases applying *Zimmer* pre-*Bolden* homed in on the present-day effects of past discrimination.[181]

Less often noted is a South Carolina case, *McCain v. Lybrand*,[182] often referenced in the section 2 amendment process as exemplifying the status quo ante that *Bolden* disrupted.[183] Despite seeing no issue with Black candidates losing "in the normal give-and-take of the political arena," *Lybrand* found unconstitutional vote dilution precisely because that normal

---

under the *Regester* standard. *Id.* at 623–24. I do not rely on it heavily because it was issued days *after* section 2's amendment. *But see supra* notes 527–28 and accompanying text (noting *Rogers*' possible confirmatory value).

177. *See* Hartman, *supra* note 32, at 700.

178. 485 F.2d 1297 (5th Cir. 1973).

179. *See id.* at 1305; *see, e.g.*, S. REP. NO. 97-417, at 23, 28 & n.118 (1982); Gerken, *supra* note 113, at 1673 & n.21.

180. *Zimmer*, 485 F.2d at 1305 (asking whether "existence of past discrimination . . . precludes . . . effective participation in the election system" and observing that certain facially neutral devices might "enhanc[e]" a plaintiff's case).

181. Cross v. Baxter, 604 F.2d 875, 881–83 & nn.13, 15–16 (5th Cir. 1979); *see also Voting Rights Act: Hearings Before the Subcomm. on the Const. of the S. Comm. on the Judiciary*, 97th Cong., vol. 1, at 374, 382–86 (1982) [hereinafter *Senate Hearings*] (statement of Laughlin McDonald, Dir., S. Reg'l Off., ACLU) (discussing *Cross*).

182. McCain v. Lybrand, No. 74-281 (D.S.C. Apr. 17, 1980), *reprinted in Senate Hearings*, *supra* note 181, at 1147–66 (1982).

183. *See, e.g.*, *Senate Hearings*, *supra* note 181, at 386 (statement of Laughlin McDonald, Dir., S. Reg'l Off., ACLU); *id.* at 799–800, 818 (statement of Armand Derfner, Joint Ctr. for Pol. Stud.); THE MACNEIL/LEHRER REPORT, *supra* note 92, at 10:23–12:30 (interview of Armand Derfner) (invoking *Lybrand*). The district court vacated the *Lybrand* decision after *Bolden*, believing that the intentional-discrimination rule undercut its ruling. *See Senate Hearings*, *supra* note 181, at 382 (statement of Laughlin McDonald). Given the district court's extensive findings regarding the continued effects of intentional discrimination on voting in the jurisdiction, this about-face was, for *Bolden*'s opponents, one of the lead exhibits demonstrating *Bolden*'s wrongness. *See id.* at 381–82; *id.* at 800 (statement of Armand Derfner, Joint Ctr. for Pol. Stud.).

give-and-take was absent.[184] That, as one advocate said, was "what the [*Regester*] standard [was] about."[185] Consistent with *Regester* and *Whitcomb*, whether that normal situation obtained was the ultimate question before *Bolden*.

2. Justice White and Racial Politics

Scholarly treatments generally note that Justice White authored both *Whitcomb* and *Regester* and dissented in *Bolden* but omit extended treatment of his other writings.[186] Although section 2 did not have to adopt his broader views, the uncertainty about the cases it incorporated makes tracking his thought worthwhile. After all, he too thought *Bolden* erred, and the principles underpinning his conclusion may shed light on the principles Congress later embraced.

First, Justice White embraced government power to shape its responses to private conduct to avoid complicity in intentional discrimination. Three years after *Regester*, he deemed racial bloc voting an "unfortunate" "fact of life."[187] But Congress, he insisted, "has the power to minimize the effects of racial voting" and "deliberate discrimination at the polls," especially where "other electoral rules operat[e] to muffle the political potential of the minority."[188] The following year, in *United Jewish Organizations of Williamsburgh, Inc. v. Carey*,[189] his plurality opinion promoted state power "to minimize the consequences of racial discrimination by voters when it is regularly practiced at the polls."[190] And his *Bolden* dissent emphasized past discrimination and "severe racial polarization" in the political system as evidence that *Regester*'s rule was satisfied.[191] Finally, his *Gingles* concurrence criticized the plurality's approach to racially polarized voting as unfit for "hedging against racial discrimination."[192]

Second, and relatedly, Justice White seems to have thought intentional discrimination *relevant* under *Regester*, albeit not as the *Bolden* plurality thought. Unlike Justice Thurgood Marshall, his *Bolden* argument was not that "discriminatory impact" sufficed but that *Regester*'s approach facilitated inferences of "invidious discriminatory purpose."[193] Recall the *Bolden*

184. *Lybrand*, slip op. at 18 (emphasizing severe racial bloc voting and a "long history of discrimination"); *see* THE MACNEIL/LEHRER REPORT, *supra* note 92, at 12:20–12:30 (including an argument from a supporter of the section 2 amendment that the status quo ante required proof that "the election system is essentially stacked so [minorities] could not win").

185. *Senate Hearings*, *supra* note 181, at 800 (statement of Armand Derfner, Joint Ctr. for Pol. Stud.).

186. *See, e.g.*, Blacksher & Menefee, *supra* note 165, at 28 (mentioning only in passing that he also authored *Washington v. Davis*).

187. Beer v. United States, 425 U.S. 130, 144 (1976) (White, J., dissenting).

188. *Id.*

189. 430 U.S. 144 (1977) (plurality opinion).

190. *Id.* at 167.

191. City of Mobile v. Bolden, 446 U.S. 55, 97–98, 103 (1980) (White, J., dissenting).

192. Thornburg v. Gingles, 478 U.S. 30, 83 (1986).

193. *Bolden*, 446 U.S. at 94–95 (White, J., dissenting); Blacksher & Menefee, *supra* note 165, at 28–29.

plurality's demand that the challenged electoral device *itself* "be conceived or operated as [a] purposeful devic[e] to further racial . . . discrimination."[194] Conversely, Justice White asked whether public or private intentional discrimination elsewhere in a racially polarized polity intersected with a neutral electoral device to repeatedly defeat a racial minority's preferred candidates.[195]

On this point, consider *Shaw v. Reno*, his final dissent. There, he framed the *Whitcomb*/*Regester* rule as interested not in "mere suffering at the polls but discrimination in the polity" that effects political exclusion.[196] That understanding of the harm tracks a belief that states validly prevent the dragooning of their election machinery for "deliberate discrimination at the polls."[197] And it resonates with how *Regester* and *Whitcomb* distinguished ordinary losses from unacceptably racialized ones.

Justice White's jurisprudence is not dispositive. But its themes align with this Article's reading of the pre-*Bolden* landscape and, as I shall argue, with section 2's amendment.

3. The Amendment

After the *Bolden* plurality held that the original section 2 barred only electoral mechanisms adopted, or maintained, because of their harms to members of an identifiable group, Congress repudiated this standard. The question is how.

I begin with a methodological note. Like much legislation, section 2 embodies a compromise requiring some interpretation. In that regard, I intend to describe what we should reasonably understand Congress's chosen words to convey, attentive to constitutional concerns.[198] I work from section 2's "generating problem"—the "mischief" it addressed—to insights about the mechanism its capacious words created.[199] Although one might derive a statute's prospective purpose from its generating problem, the concepts are separable.[200] The method is thus ecumenical; "the mischief

194. *Bolden*, 446 U.S. at 66.

195. Notably, his argument cited and reflected the method of *Washington v. Davis*, 426 U.S. 229 (1976), which he also authored. That case's creation of equal protection's intentional-discrimination requirement took a contextual approach to intent that was sensitive to an action's foreseeable results. *See id.* at 242; Ian Haney-López, *Intentional Blindness*, 87 N.Y.U. L. REV. 1779, 1794–95 (2012).

196. Shaw v. Reno, 509 U.S. 630, 661 (1993).

197. Beer v. United States, 425 U.S. 130, 144 (1976) (White, J., dissenting); *see also* United Jewish Orgs. of Williamsburgh, Inc. v. Carey, 430 U.S. 144, 167 (1977) (plurality opinion).

198. *See, e.g.*, Parsons v. Bedford, 28 U.S. (3 Pet.) 433, 448–49 (1830).

199. Bray, *supra* note 28, at 970; *see also id.* at 1003 ("The mischief rule encourages the interpreter to think about what was in the eye of the legislature, not as a means of defeating or overriding the text, but as a way to understand it.").

200. *Id.* at 997–99.

rule . . . can be used with a good conscience even by a textualist."[201] Unsurprisingly, then, it is both recently precedented and deeply rooted.[202]

The previous sections' doctrinal prehistory pursued this methodological end. Because *Bolden*'s alteration of the status quo prompted section 2's amendment, understanding what *Bolden* did requires understanding that doctrinal status quo. For the same reasons, this section integrates an in-depth treatment of media coverage of the amendment fight. And, to illuminate and confirm the generating problem, it integrates legislative history, which—even in a textualist age—remains backed by forty years of practice.[203] More importantly, textualism hardly bars recourse to legislative history for evidence of "the problem to which the statute was addressed" and how "the statute is a remedy for that problem."[204] Whatever label one gives it, incorporating legislative history into holistic analyses of Congress's handiwork in context is not anathema.[205]

One can argue about the Ninety-Seventh Congress's ultimate amendatory aim. Multiple plausible candidates probably exist. But one need not pick among them to ascertain how section 2's design should shape its encounters with colorblindness. We can learn enough by putting section 2's words in the context of their generating mischief.

a. Mischief

In spring 1981, the House Committee on the Judiciary took up the proposed extension of the Voting Rights Act.[206] Along with certain preclearance issues, *Bolden* was a primary target.[207] Our first interpretive axiom for section 2, then, is that *Bolden* was wrong. How? Axiom two is that *Bolden*'s error was understood to be its deviation from a proper understanding of *Whitcomb* and *Regester*. As the U.S. House of Representatives began its work, *The New York Times* observed that Democratic leadership had "proposed amendments to [section 2] to undo

201. *Id.* at 1013; *accord* John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 84–85 (2006).

202. *See, e.g.*, Fischer v. United States, 144 S. Ct. 2176, 2186 (2024) (interpreting the statute "in light of the history of the provision," including a "loophole" in prior law that preceding events exposed); United States v. Daniel, 19 U.S. (6 Wheat.) 542, 548 (1821) (looking to the "inconvenience" that the statute "was introduced" to "remedy") (Marshall, C.J.).

203. *See, e.g.*, Allen v. Milligan, 143 S. Ct. 1487, 1510, 1515 & n.10 (2023) (relying, like *Gingles*, on the Senate Report and rejecting calls to dispense with *Gingles*'s method for section 2).

204. Bray, *supra* note 28, at 968.

205. *See, e.g.*, Fuld v. Palestine Liberation Org., 145 S. Ct. 2090, 2105 (2025) (seven-justice Court relying on legislative history to illuminate "background context inform[ing]" the statute's enactment); *see also* Health & Hosp. Corp. v. Talevski, 143 S. Ct. 1444, 1455–56 (2023) (same).

206. Bill Peterson, *Voting Rights Debate Opens with Poignant Look Back*, WASH. POST, May 7, 1981 (on file with the *Fordham Law Review*).

207. *See* H.R. REP. NO. 97-227, at 2, 29–32 (1981).

what [they saw] as the confusion and harm produced by" *Bolden*.[208] During the Senate debates, the *Times* reiterated that the House's amendment "sought to put the law back where it was before" *Bolden*.[209] Each chamber's committee report stressed the point.[210] Indeed, *Regester*'s rightness is one of the most powerful implications of Congress's near-verbatim quote of *Regester* in what became section 2(b) of the Act.[211] Commentary, additionally, understood the problematic aspect of *Bolden* to be its narrow focus on whether the particular electoral device challenged had been adopted with discriminatory purpose.[212]

Understanding precisely why that focus was mischievous requires understanding how embracing *Regester* could be thought to repair what *Bolden* broke.[213] We may exclude some answers. Embracing *Regester* would not repair an "error" of denying the right to proportionality that *Regester* rejected.[214] So too would it fail to fix an "error" of failing to guarantee identifiable racial groups a certain quantum of wins qua identifiable racial groups. The *Regester* regime distinguished losses that any numerical minority suffers in a normally operating majoritarian system from losses that racial minorities suffer because race distorts the system.[215] Nor would it "correct" *Bolden*'s failure to consider the value of electoral diversity in the *Bakke*[216] sense, which is absent from the pre-*Bolden* cases and the legislative history (despite Justice Lewis F. Powell Jr.'s landmark 1978 opinion).

---

208. Robert Pear, *Intent as Ground for Proving Bias Getting New Emphasis*, N.Y. TIMES, Apr. 19, 1981 (on file with the *Fordham Law Review*).

209. Opinion, *Voting Rights Are Not Quotas*, N.Y. TIMES, March 19, 1982 (on file with the *Fordham Law Review*) [hereinafter *Voting Rights Are Not Quotas*]; *see also* Peter W. Rodino, *A Reply to the Attorney General*, WASH. POST, Apr. 5, 1982 (on file with the *Fordham Law Review*).

210. *See* H.R. REP. NO. 97-227, at 29 (noting its goal to "restore the pre-*Bolden* understanding of the proper legal standard"); *see also* S. REP. NO. 97-417, at 27 (1982) ("The 'results' standard is meant to restore the pre-*Mobile* legal standard . . . . [S]ubsection (b) embodies the test laid down . . . in *White* [*v. Regester*].").

211. *Accord* S. REP. NO. 97-417, at 27. The House bill inserted the results language found in current section 2 ("in a manner which results in a denial or abridgement"), H.R. REP. NO. 97-227, at 48, but lacked all of current section 2(b).

212. *See Senate Panel Approves Vote Law Fought by Blacks*, CHI. TRIB., Mar. 25, 1982 (on file with the *Fordham Law Review*) [hereinafter *Senate Panel*] (describing *Bolden* as requiring proof "that local officials intended to discriminate against minority groups when they enacted discriminatory changes in voting laws"); *Once Again a Clash Over Voting Rights*, N.Y. TIMES, Sep. 27, 1981 (on file with the *Fordham Law Review*) [hereinafter *Once Again*] (describing *Bolden*'s "new and tougher standard" as requiring "pro[of] that . . . election laws were deliberately designed to exclude"); *see* S. REP. NO. 97-417, at 22, 27–28 (homing in on *Bolden*'s focus on "the intent motivating those who designed the [electoral device] at issue"); H.R. REP. NO. 97-227, at 29–30 (similar focus on particular practice).

213. *Accord* Bray, *supra* note 28, at 968 (describing the "mischief rule's" attention to the "way in which the statute is a remedy for" the "problem to which the statute was addressed").

214. *See* White v. Regester, 412 U.S. 755, 765–66 (1973).

215. *See id.* at 765–69; *see also supra* Part II.B.1; *accord Voting Rights Are Not Quotas*, *supra* note 209 (asserting that plaintiffs' victories under the *Regester* regime always included "substantial evidence that minorities were systematically excluded from politics").

216. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 311–15 (1978) (Powell, J.) (discussing "diversity" justification for race consciousness in admissions decisions).

Context suggests at least two compatible explanations for Congress's chosen fix. One is merely evidentiary. On this view, there were simply many electoral devices adopted with the discriminatory intent described in the *Bolden* plurality that would nevertheless evade invalidation because their enactors were dead or would (if alive) cloak that bad intent. The history clearly contains that justification,[217] and it partly undergirds the Senate Report's famous declaration that *Bolden*'s test "asks the wrong question."[218]

But observers saw the mischief more broadly. As the debates began, the *Times* explained that *Bolden* upset a regime where liability would lie if "the impact of past or present racial discrimination" "preclud[ed] blacks from participating in the political process."[219] Describing the final version of section 2 months later, the *Times* reiterated that the results test looked to "the 'effects' of discrimination" to repudiate *Bolden*.[220] A wide range of observers joined the *Times* in linking *Bolden*'s error with the effects or results of past or present discrimination. The Georgia State Senate's Republican Minority Leader agreed that an amendment to section 2 was needed to repudiate *Bolden* and "allow racial minorities . . . to challenge election procedures which continue to perpetuate the effects of past discrimination."[221] The historically Black newspaper *Cleveland Call and Post* explained *Bolden*'s mistake as focusing on "intent to discriminate rather than the results of discrimination."[222] And *The Washington Post* argued that, in "requiring proof that the drafters of the law in question intended to discriminate," *Bolden* kneecapped *Regester* and *Whitcomb*'s interest in whether "additional evidence of discrimination" showed that "the challenged system really shut out racial minorities."[223]

---

217. *See, e.g.*, *Senate Panel*, *supra* note 212 (criticizing *Bolden*'s rule for requiring "analyzing the motives of public officials, many of whom are now dead"); *Once Again*, *supra* note 212 (quoting a voting-rights lawyer's lament that "[p]eople aren't going to come forth today and say, 'Yeah, that was our intent'"); *see also* S. REP. NO. 97-417, at 36–37 (collecting these sorts of arguments).

218. *See* Thornburg v. Gingles, 478 U.S. 30, 44 (1986) (quoting S. REP. NO. 97-417, at 36). References in this Article to the Senate Committee on the Judiciary's now-iconic report are capitalized to distinguish it from other, less-influential reports.

219. *Once Again*, *supra* note 212 (explicitly tying status quo ante to *Zimmer*).

220. Steven V. Roberts, *President Backs Bipartisan Plan on Voting Law*, N.Y. TIMES, May 4, 1982 (on file with the *Fordham Law Review*); *accord* Robert Pear, *Reagan Backs Voting Rights Act but Wants to Ease Requirements*, N.Y. TIMES, Nov. 6, 1981 (on file with the *Fordham Law Review*) (connecting the House's initial "'effects' test," which mostly tracked what is now section 2(a), with the pursuit of "the results of effects of discrimination").

221. Letter from Senator Paul D. Coverdell to Senator Orrin G. Hatch (Mar. 5, 1982), *reprinted in Voting Rights Act: Hearings Before the Subcomm. on the Const. of the S. Comm. on the Judiciary*, 97th Cong., vol. 2, at 382 (1982); *see also id.* at 383 (emphasizing the importance of "electoral devices which perpetuated [past intentional] discrimination"); *cf. infra* note 252 (collecting articles describing the results test as one under which "the effects or results of discrimination" would prove a violation).

222. Robert Morris, *Voting Rights Act Approval Not Assured in U.S. Senate*, CALL & POST, May 15, 1982 (on file with the *Fordham Law Review*).

223. *Voting Rights: Be Strong*, WASH. POST, Jan. 26, 1982 (on file with the *Fordham Law Review*) (listing "responsiveness of elected officials to the needs of minorities, nominating procedures[,] and history of discrimination" as some of this "additional evidence").

In short, blindness to how and why past discrimination mattered under *Regester* also infected *Bolden*'s demand that the challenged law *itself* rest on discriminatory purpose.[224] That demand ignored how intentional discrimination's distortion of a political milieu could and should transmute otherwise-normal electoral losses into losses of constitutional concern.[225]

This was the problem *Bolden*'s opponents saw. Of course, *Bolden* "had its defenders, too"[226]—but descriptions of "mischief" cannot depend much on those who saw none. Their views, however, did shape the mechanism Congress selected to fix that problem.

b. Enactment

Congress's response began in the House, which reported an amendment mostly tracking current section 2(a)'s text, with two key exceptions. First, it lacked "as provided in subsection (b)" and any subsection (b). Second, a separate last sentence provided: "The fact that members of a minority group have not been elected in numbers equal to the group's proportion of the population shall not, in and of itself, constitute a violation of this section."[227] The House's committee report expressed a preference for the pre-*Bolden* rules, and invoked the need to attack the "effects of . . . past purposeful discrimination" and to reach subtler present intentional discrimination.[228]

Though the House gave section 2 some attention, the provision took center stage in hearings held by Senator Hatch's Subcommittee on the Constitution.[229] Here, opponents attacked the House bill as imposing electoral quotas, instituting racial entitlements to proportional representation, and replacing the Constitution's focus on the individual with a focus on groups.[230] Critics said that its injection of race contravened colorblind constitutionalism, swept too broadly to be genuinely prophylactic

224. *See, e.g.*, S. REP. NO. 97-417, at 40 (1982) (identifying the need to reach election devices that "perpetuate the effects of past purposeful discrimination"); *see also* H.R. REP. NO. 97-227, at 31 (1981) (same); *Senate Hearings*, *supra* note 181, at 374 (statement of Laughlin McDonald, Dir., S. Reg'l Off., ACLU) (calling the amendment necessary "to reach . . . practices which continue the effects of past intentional discrimination"); *id.* at 966 (statement of Professor Norman Dorsen, N.Y.U. Sch. of Law) ("[T]he proposed amendment of section 2 is an appropriate and reasonable remedy for removing the effects of past intentional discrimination in voting."); *supra* Part II.B.1.

225. *See* S. REP. NO. 97-417, at 33–34 (discussing racial politics); *see also Senate Hearings*, *supra* note 181, at 819–20 (statement of Armand Derfner, Joint Ctr. for Pol. Stud.); *Fair Politics for Blacks*, WASH. POST, Apr. 23, 1982 (on file with the *Fordham Law Review*) [hereinafter *Fair Politics for Blacks*] (emphasizing the results test's focus on "racial politics"—"all blacks voting for one set of candidates and all whites for another, and . . . white-supported candidates caring not a fig for what black voters regard as their interests"); *see also supra* notes 158–85 and accompanying text.

226. Allen v. Milligan, 143 S. Ct. 1487, 1500 (2023).

227. H.R. REP. NO. 97-227, at 48 (1981).

228. *Id.* at 29, 31.

229. *See* Thomas M. Boyd & Stephen J. Markman, *The 1982 Amendments to the Voting Rights Act*, 40 WASH. & LEE. L. REV. 1347, 1365–66, 1388–89 (1983).

230. *See supra* Part I.B.

"appropriate" legislation, or both.[231] A key theme for Senator Hatch was that a results test could have no "core value" that did *not* pose these problems.[232]

These critiques slowed the House bill's momentum.[233] The impasse was broken when Senator Robert J. Dole, sensitive to Hatch's critiques,[234] brokered a deal. The deal made the House's original bill into section 2(a), with a proviso that section 2(b) defines the violation that section 2(a) creates.[235] Section 2(b)'s first sentence essentially copies *Regester*'s key rule-defining language.[236] And, wary of proportionality critiques, it stated that, while the extent to which a group's members had been elected was relevant, section 2 established no "right to have members of a protected class elected in numbers equal to their proportion in the population."[237]

The Senate Report's lengthy defense of the final product made three claims worth highlighting here.[238] First, it insisted that the explicit embrace of *Regester* should quash quota and proportionality talk.[239] Second, it asserted that this pre-*Bolden* regime—far from casually injecting race into elections—had triggered only "where racial politics . . . dominate the electoral process."[240] Third, it stressed that section 2 was "appropriate" legislation precisely because a results test was necessary to eradicate the effects of past purposeful discrimination.[241] Further debates left section 2 unchanged, and President Ronald Reagan signed it into law on June 29, 1982.[242]

c. Disparate Treatment as Core Value

Before this Article turns in Part III to post-1982 events and doctrinal developments, consider what all this means for section 2 as understood at inception. Again, the mischief *Bolden* permitted was understood to be twofold. First, present bad intent can be hidden. Second, past discrimination may reverberate in particularized ways in present political systems, including

231. *See* Boyd & Markman, *supra* note 229, at 1397–98.
232. *See, e.g.*, S. REP. NO. 97-417, at 96 (1982) (additional views of Senator Hatch).
233. *See* Boyd & Markman, *supra* note 229, at 1413.
234. *See id.* at 1414 n.333, 1417.
235. 52 U.S.C. § 10301.
236. *Compare id.*, *with* White v. Regester, 412 U.S. 755, 766 (1973).
237. Read literally, this "proportional representation clause" only rejects a right to a certain quantum of "success [for] minority candidates, as distinct from the political or electoral power of minority voters," i.e., proportionality. *See* Johnson v. De Grandy, 512 U.S. 997, 1014 n.11 (1994); *see also supra* note 116. But it has been read as consonant with the rejection of proportionality implicit in Congress's adoption of *Regester*. *See* Allen v. Milligan, 143 S. Ct. 1487, 1517 (2023) (Kavanaugh, J., concurring).
238. *See* S. REP. NO. 97-417, at 15–43 (1982).
239. *See id.* at 16, 33.
240. *See id.* at 33–34; *accord Senate Hearings*, *supra* note 181, at 821 (statement of Armand Derfner, Joint Ctr. for Pol. Stud.) (arguing that even the pre-Dole compromise section 2 would "apply only in those places where there is already an extraordinary amount of division").
241. *Id.* at 40.
242. Boyd & Markman, *supra* note 229, at 1425.

by distorting voting's distinctive public-private blend.[243] Congress responded by barring electoral devices that "resul[t] in a denial or abridgement" of the right to vote "on account of race or color."[244] And it defined what that meant by embracing *Whitcomb* and *Regester*.[245]

This history and context reveal section 2 as a disparate-treatment statute that attacks intentional discrimination by barring discriminatory effects. Specifically, its prohibition of certain "results" occurring "on account of race or color" targets present-day effects of past or present intentional state discrimination on individual citizens' ability to aggregate their votes on par with others—or to cast votes at all.[246]

I pause to specify what "disparate treatment" embraces. X's intentional treatment of A worse than B is an easy case.[247] But the idea is broader, as I've argued elsewhere.[248] It at least includes X's unintended treatment of A worse than (a comparable) B in virtue of another actor, Y's, earlier and illegitimately motivated action.[249] There, A suffers a "discriminatory effect," even if X lacked discriminatory intent.[250] To see the point, take a retail example. Imagine that Casey intentionally hacks John's computer to insert typos into all resumes from names starting with A. And imagine that John consequently treats Avery's job application worse than Bailey's when John makes hiring decisions. If so, Avery suffers disparate treatment resulting from Casey's intentional discrimination, which we can (perhaps can only) remedy by fixing John's computer and evaluating Avery under the corrected regime. The *Bolden* plurality missed that point as applied to vote dilution; section 2 does not.

Public debate over section 2 reflected this perspective. Phrases like "discriminatory effects" or "effects of discrimination" often referenced past discrimination's effectuation of present-day exclusion.[251] Across the nation (via Associated Press syndication) newspapers described the results test as one under which "the effects or results of discrimination" would prove a

243. *See, e.g.*, *Judge Rejects Portales Challenge to Voting Law*, EL PASO TIMES, June 30, 1984 (on file with the *Fordham Law Review*) (quoting a federal judge's explanation, in affirming section 2's constitutionality, that the "goal of the Voting Rights Act is to eradicate the lingering effects of past discrimination as it affects voting"); *see also supra* notes 219–26.

244. 52 U.S.C. § 10301. Denial or abridgement "because [a citizen] is a member of a language minority group" is equally protected. *See id.* §§ 10301, 10303(f)(2). For ease, I will generally just say "on account of race or color," unless context requires otherwise.

245. *See id.* § 10301; *supra* notes 122–25, 227, 238 and accompanying text.

246. *See supra* note 33 and accompanying text (distinguishing vote-dilution and vote-denial claims).

247. *See, e.g.*, Ames v. Ohio Dep't of Youth Servs., 145 S. Ct. 1540, 1545 (2025) (discussing Title VII's disparate-treatment provision).

248. *See generally* W. Kerrel Murray, *Discriminatory Effect(s)*, 78 FLA. L. REV. (forthcoming 2026) (on file with the *Fordham Law Review*) [hereinafter Murray, *Discriminatory Effect(s)*].

249. *See id.* (manuscript at 23 & n.137) (discussing cat's paw liability); *cf.* Murray, *Discriminatory Taint*, *supra* note 172, at 1212–27 (discussing how continuity between events informs legal-responsibility judgments within and without constitutional law).

250. *See* Murray, *Discriminatory Effect(s)*, *supra* note 248 (manuscript at 68–72).

251. *See supra* notes 219–26.

violation.[252] An illuminating example is the *Times*'s synthesis of advocacy for the results test: "[M]inorities have suffered so much past discrimination and must also battle existing biases."[253] That is, as an advocate explained, "[w]e don't want to assure that blacks win; we want to assure that they don't lose because of racial discrimination."[254]

On this view, when past or present discrimination's effects distort the present-day results that election devices (like districting maps) produce, section 2 may invalidate such devices. Because devices for aggregating votes are uniquely unable to avoid ratifying discrimination-distorted exogenous influences, it makes no difference if the device itself genuinely is neutrally chosen and facially neutral. That is the genius of invoking the pre-*Bolden* regime to specify how electoral results might deny or abridge voting rights "on account of race or color" *without* replicating the *Bolden* plurality's misstep or making proportionality the violation's sine qua non. Neutral electoral devices ought not embrace or ratify discrimination-corrupted politics. This was section 2's core value—one not, contra its critics, based on proportionality.[255]

To see the point, recall *Regester* and *Whitcomb*'s interest in whether the maps were part of an electoral system so defined by race as to distort normal vote aggregation.[256] That reasoning rested on at least three constitutionally relevant intuitions. First, precisely because such situations are neither descriptively nor prescriptively normal, their existence is properly attributed to some past or present abnormality. Both history and the unique weight of state-sanctioned action support inferring that abnormality to have been state-sanctioned discrimination.[257] Second, the distortion's persistence indicates that the discrimination's effects have not dissipated sufficiently for race to be just one among many similarly situated factors affecting an electoral device's results. Discrimination-corrupted politics is what separates normal electoral losses from "invidious discrimination." Third, and critically, discrimination's effects *do* dissipate; no jurisdiction is assumed to be permanently tainted.

---

252. *E.g.*, *Senate Panel*, *supra* note 212; *Senate Panel Extends '65 Voting Rights Act*, HARTFORD COURANT, Mar. 25, 1982 (on file with the *Fordham Law Review*); *Voting Rights Bill Blocked in Senate Committee*, HARTFORD COURANT, Apr. 30, 1982 (on file with the *Fordham Law Review*); *2 Southern Senators Block Action on Voting Rights Bill*, NEWSDAY, Apr. 30, 1982 (on file with the *Fordham Law Review*); *Rights Bill Delayed; Night Sessions Likely*, ST. LOUIS POST-DISPATCH, Apr. 30, 1982 (on file with the *Fordham Law Review*); *Panel Advances Extension of 1965 Voting Rights Act*, BOS. GLOBE, Mar. 25, 1982 (on file with the *Fordham Law Review*); *Senate Liberals Want a More Stringent Voting Rights Measure*, RENO EVENING GAZETTE, Mar. 25, 1982 (on file with the *Fordham Law Review*); *Veto of Energy Controls Survives Senate Attack*, SPOKANE CHRON., Mar. 25, 1982 (on file with the *Fordham Law Review*).

253. Steven V. Roberts, *Senate Weighs Voting Rights and Past Wrongs*, N.Y. TIMES, June 13, 1982 (on file with the *Fordham Law Review*) (describing the groups' arguments).

254. *Id.* (quoting Laughlin McDonald).

255. *See* S. REP. NO. 97-417, at 96 (1982) (additional views of Senator Hatch).

256. *See supra* Part II.B.1.

257. *Cf.* Karlan & Levinson, *supra* note 105, at 1229–32 (connecting racially polarized voting to past state intentional discrimination).

d. What Section 2 Was Not

Congress's placement of racialized politics at section 2's core distinguished it from other approaches in the air at the time. Take the idea of generalized "societal discrimination," castigated just four years prior in Justice Powell's controlling opinion in *Regents of the University of California v. Bakke*.[258] This justification was implicitly disapproved in the *Bolden* plurality's disdain for accepting past governmental discrimination, "in the manner of original sin," as evergreen proof of present constitutional wrongs.[259] Nothing in section 2's text or history challenged that part of *Bolden*. Nor does anything in *Whitcomb* or *Regester*.

Contemporary media coverage and legislative history underscored the gap between generalized societal discrimination and the constitutional evil that section 2 targeted. As the Senate battle raged, *The Washington Post* defended the House bill by emphasizing that its results test (which, as mentioned, essentially duplicated what is now section 2(a))[260] "would make it clear that courts should . . . mak[e] an informed judgment about whether a community has a racial or a non-racial politics."[261] Racial politics, the *Post* explained, occurred where "all blacks vot[e] for one set of candidates and all whites for another," with "white-supported candidates caring not a fig for what black voters regard as their interests."[262] The *Times*, for its part, emphasized that the pre-*Bolden* regime had required "substantial evidence that minorities were systematically excluded from politics."[263]

The Senate Report seconded these points, explaining that the pre-*Bolden* cases "distinguished between situations in which racial politics play an excessive role in the electoral process, and communities in which they do not."[264] This function, it said, rebutted Senator Hatch's claim that section 2 "assum[ed] . . . that race is the predominant determinant of political preference."[265] True, "racial bloc voting" did not characterize every community.[266] Where it did not, success under the results test "would be exceedingly difficult."[267] But racial bloc voting persisted; there were still "some communities in our nation where racial politics . . . dominate[d] the electoral process."[268] The results test targeted those "instances of intensive racial politics."[269] So did the soon-to-be-famous "Senate Factors" relevant

258. 438 U.S. 265 (1978); *id.* at 307.
259. City of Mobile v. Bolden, 446 U.S. 55, 74 (1980) (plurality opinion).
260. *See supra* note 227 and accompanying text.
261. *Fair Politics for Blacks*, *supra* note 225.
262. *Id.* The *Post* did not mean "all" in the sense that every member of the racial group voted alike, which would have meant that, contra the *Post*'s evident view, there were no areas with racial politics in 1982.
263. *Voting Rights Are Not Quotas*, *supra* note 209.
264. S. REP. NO. 97-417, at 33 (1982).
265. *Id.* at 148 (Subcomm. Rep.); *see also id.* at 33 (Senate Report replying to Subcommittee Report).
266. *Id.* at 33 (Senate Rep.).
267. *Id.*
268. *Id.*
269. *Id.* at 34.

to a violation that the Senate Report distilled from pre-*Bolden* doctrine.[270] Section 2 did not target generalized societal discrimination.

Next, compare section 2's design with a view that would find presumptive or conclusive liability for foreseeably resulting disparities. Such a view was also available in 1982. Indeed, the Court had just three years earlier rejected it as the meaning of the Equal Protection Clause.[271] Still, defining the underlying wrong by reference to foreseeable harm would be narrower than defining it by reference to amorphous past discrimination. Yet the best evidence of contemporary understanding of the requisite "racial politics," across case law, media coverage, and legislative history, took an even narrower view. Disproportionate electoral results, even foreseeable ones, were not enough. Liability required something more: a politics distorted by intentional discrimination's effects *and* an electoral device that kneaded a distorted politics into public dispensation of political power.

It is thus unsurprising that racially polarized voting appears at the core of the pre-*Bolden* cases and contemporary discussions of the amendment. Requiring racially polarized voting limits actionable cases to those where a present-day state aggregation device embraces a distorted political milieu's outputs. It necessarily excludes cases where group members qua group members merely identify foreseeable political harm, such as less-than-proportional representation. Such harms must be paired with a reason to think that the effects of past or present discrimination have rendered the political environment abnormal in the relevant sense.

It is worth specifying precisely how racially polarized voting offers that reason. The easiest example is what Dean Dan Tokaji calls "racist voting," i.e., "vote choices made with the discriminatory purpose that is usually required to prove a constitutional violation."[272] That, at minimum, is what Justice White captured by "racial discrimination by voters . . . regularly practiced at the polls."[273] A private individual's voting decision is probably

---

270. *See id.* at 28–29 & n.113 (describing what have come to be known as the "Senate Factors"). The first and fifth factors both look to a history of discrimination, with the fifth explicitly looking to whether the "effects of discrimination" hinder a group's present "ability to participate effectively." *Id.* at 29. The second is racially polarized voting. *Id.* at 28. The third references facially neutral procedures that might, where voting is racially polarized, "enhance the opportunity for discrimination." *Id.* at 29. The sixth focuses on "overt or subtle racial appeals" in political campaigns. *Id.* Other factors also arguably share this focus on corrupted politics (e.g., denial of minority groups' access to any "candidate slating process" and unresponsiveness to minority groups' particularized needs). *Id.* But the general point stands even if one wishes to quibble about some factors.

271. *See* Pers. Adm'r v. Feeney, 442 U.S. 256, 279 (1979).

272. Tokaji, *supra* note 30, at 542 (citing *Feeney*, 442 U.S. at 256). Elmendorf has also linked private voting choices made for "discriminatory reasons" to section 2. *See id.* (quoting Elmendorf, *Making Sense of Section 2*, *supra* note 30, at 432); *see also* T. Alexander Aleinikoff, *The Constitution in Context: The Continuing Significance of Racism*, 63 U. COLO. L. REV. 325, 359 (1992).

273. United Jewish Orgs. of Williamsburgh, Inc. v. Carey, 430 U.S. 144, 167 (1977) (plurality opinion).

beyond constitutional cognizance.[274] But it would effect constitutionally cognizable intentional discrimination to embed such a decision in a public process for transmuting private action into public power.[275]

While the prevalence of "racist voting" may be disputed,[276] discrimination affects voting patterns in broader ways. Even absent "racist voting," a jurisdiction's racially identifiable voting patterns may reveal that race still dominates politics in a way justifying the inference that past discrimination still determines politics.[277] Racial bloc voting matters as potential evidence of present-day racial siloing and distorted political interests best explained by past racial discrimination.[278] So too for segregated housing.[279] While house purchases are private decisions, racially identifiable living patterns are both evidence and cause of broader racial siloing in society.[280]

I do not equate deeply racialized voting or housing patterns with "racist voting" (though the latter at least seems likelier as polarization in those areas increases). But they all bear on whether past discrimination still defines a political system. Even when isolated private choices are nonactionable, that constitutional calculus changes once the state's aggregation processes use them to dole out public power. And while jurists can debate the scope of congressional power to "enforce" the Civil War Amendments by "appropriate" legislation, it must at least permit Congress to remedy the very intentional discrimination that courts themselves view as constitutionally verboten.[281]

---

274. Some have argued that the Fifteenth Amendment's state-action requirement is more forgiving than the Fourteenth's. *See* Travis Crum, *Reconstructing Racially Polarized Voting*, 70 DUKE L.J. 261, 326–27 (2020). A broader state-action requirement would further strengthen the point made in text, but I do not depend on it.

275. *See* Norwood v. Harrison, 413 U.S. 455, 465 (1973) ("[A] state may not induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish."); *cf. SFFA*, 143 S. Ct. 2141, 2176 (2023) ("[W]hat cannot be done directly cannot be done indirectly." (quoting Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 325 (1867))); Palmore v. Sidoti, 466 U.S. 429, 433 (1984) ("Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."). While I doubt this reasoning requires locating racist voting's origins, no great leap is required to infer that behavior so resembling past state-sanctioned discrimination stems from it. *Cf.* Murray, *Discriminatory Taint*, *supra* note 172, at 1203–11 (discussing policy resemblance); *id.* at 1267–68 (discussing state action).

276. *See* Tokaji, *supra* note 30, at 549–59.

277. This broader account of why voting patterns matter distinguishes my view from those described in *supra* note 272.

278. *Cf.* Tokaji, *supra* note 30, at 546 (arguing that "racial polarization is probative of racist voting"). I agree with Tokaji that racial bloc voting matters because it is evidence of a condition that section 2 aims to prevent from distorting elections. I differ insofar as my view of that condition is broader than his.

279. *See* Johnson, *supra* note 53, at 1300 & n.109; *accord* White v. Regester, 412 U.S. 755, 766 n.10, 767–68 (1973) (noting housing segregation).

280. *See* Johnson, *supra* note 53, at 1300 & n.109.

281. *See, e.g.*, Nev. Dep't of Hum. Res. v. Hibbs, 538 U.S. 721, 727 (2003) (ruling that congressional power to enforce the Fourteenth Amendment encompasses the power to prohibit not just conduct itself "forbidden by the Amendment's text" but a "somewhat broader swath of conduct" (quoting Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356, 365 (2001))); *cf.* Allen v. Milligan, 143 S. Ct. 1487, 1516 (2023) (rejecting the argument that the Fifteenth Amendment "permits Congress to legislate against only purposeful discrimination by States,"

Section 2's results test operationalizes all this. It recognizes that many state actions, pre- and post-1982, flouted the constitutional intentional-discrimination prohibition. Some were adjudicated; some were not. With past acts and their effects themselves section 2 has nothing to do except to bar their incorporation into any process that disparately treats voters *today*. To ferret out that evil, section 2 rests on only one assumption—one congenial to colorblindness: Politics should not be racialized. And it takes facts indicating racialized distortion of politics as evidence that a neutral electoral device's results generate intentional-discrimination-based disparate treatment of voters. Present-day actors are not responsible for the past. They are not even, as far as section 2 is concerned, responsible in some generalized way for fixing past wrongs. They are only responsible for *not* acting in ways that affirmatively embrace those wrongs—a risk that section 2 perceives is heightened by the unique blend of public and private action in the electoral arena.

None of this requires a challenged mechanism's enactors to have possessed discriminatory purpose. The axiom that *Bolden* erred does not mean that section 2 addresses evils entirely divorced from intentional discrimination. What *Whitcomb* and *Regester* understood, and what *Bolden*'s plurality missed, is that intentional discrimination bore on more than a challenged rule's genesis. Rather, it mattered because of how it shapes the way that an electoral system blends public and private action. Even pure-hearted map drawers may have predecessors whose intentional discrimination demonstrably shapes present elections, e.g., by creating and sustaining the environment that produces racially identifiable housing patterns and severe racial bloc voting.[282] And because of how voting works, present-day state procedures for weaving public power from private acts may give present-day public force to that "racial politics." Intentional discrimination is not relevant as an element of the claim that section 2 creates. But it *is* relevant in explaining how section 2's core value distinguishes normal losses from illegitimate ones.

e. Why Section 2's Design Matters

Section 2's design focused on eradicating present-day disparate treatment flowing from past or present discrimination's distortion of present-day political systems. Two important implications follow, both of which bear on section 2's confrontation with colorblindness. First, the disparate-treatment label distinguishes section 2 from disparate-impact theory. Second, the core value that the label reflects points to a precise and time-bound causal account of the statute.

First, equating section 2 with disparate-impact standards has long threatened its viability. By disparate-impact standards, I mean those

thereby reaffirming that Congress may at least do that much); *see infra* notes 300–05, 520–25 and accompanying text.

282. Murray, *Discriminatory Taint*, *supra* note 172, at 1212–15.

imposing at least prima facie liability upon a showing that some act produces characteristic-linked results diverging from population distribution.[283] Those who charge section 2 with flouting colorblindness principles have long advanced explicit or implicit arguments of this sort, including the claim that it requires electoral proportionality in districting whenever possible.[284] The disparate-impact label has, however, even lured some of section 2's supporters.[285] Indeed, some have called the pre-*Bolden* framework "the electoral parallel to the disparate impact cause of action."[286]

But that characterization is fraught. The more section 2 "seems like a pure disparate impact provision," the more likely it is to be viewed as pushing states to flout colorblindness ideals.[287] The more it is thought to turn on numbers alone, the more plausible the charge that it requires injecting race into politics based on assumptions about the electoral success racial groups qua racial groups are entitled to have. Those sorts of assumptions are not easily cast as having a "logical end point."[288] Even putting aside the limits that *Shaw* enshrined, a more disparate-impact section 2 would be likelier to risk transgressing any limits inherent to the need for legislation enforcing the Reconstruction Amendments to be "appropriate."[289]

To be sure, disparate-impact standards, "properly limited," may be able to manage those concerns.[290] But section 2 need not court these risks at all. It is not a disparate-impact statute just because it does not require discriminatory purpose by the challenged practice's enactor. As argued above, its generating context reveals its concern to be particularized intentional-discrimination-based disparate treatment of individuals seeking to aggregate or cast votes on par with others. Its focus on racialized politics means it does not treat disproportionality per se as even a prima facie evil.

The distinction may seem subtle. Of course, smoking out present intentional discrimination or eradicating past discrimination's effects are among many plausible justifications for disparate-impact statutes.[291] Indeed, disparate-impact theory originally may have been merely a means of

283. Murray, *Discriminatory Effect(s)*, *supra* note 248 (manuscript at 19–22, 33–34); BENJAMIN EIDELSON, DISCRIMINATION AND DISRESPECT 45 (2015).

284. *See, e.g.*, *Milligan*, 143 S. Ct. at 1539–40 (Thomas, J., dissenting); S. REP. NO. 97-417, at 99 (1982) (additional remarks of Senator Hatch) (equating the results test with "disparate impact"); *cf.* Elmendorf & Spencer, *supra* note 30, at 2163 (recognizing the importance of distinguishing section 2 from a "pure disparate-impact standard"); Stephanopoulos, *Disparate Impact*, *supra* note 31, at 1573 (same).

285. *See supra* note 31 and accompanying text.

286. Issacharoff, *Polarized Voting*, *supra* note 118, at 1843 (citing Griggs v. Duke Power Co., 401 U.S. 424 (1971)).

287. Stephanopoulos, *Disparate Impact*, *supra* note 31, at 1573.

288. *Compare SFFA*, 143 S. Ct. 2141, 2170 (2023), *with Milligan*, 143 S. Ct. at 1519 (Kavanaugh, J., concurring).

289. *See infra* note 301 (distinguishing these types of constitutional limits); *see also infra* notes 297–305 and accompanying text (discussing the disparate-treatment model's interaction with the constitutional requirement for "appropriate legislation").

290. Stephanopoulos, *Disparate Impact*, *supra* note 31, at 1573 (quoting Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc., 576 U.S. 519, 540 (2015)).

291. Primus, *supra* note 44, at 520–25.

attacking intentional discrimination.[292] But the theory has come to stand for something broader,[293] which is what opponents like Senator Hatch attacked. Whatever one thinks of that broader concept, section 2's design did not embrace it, and the disparate-treatment label best describes its narrower remit. In a way that a "pure" disparate-impact statute might not require, attacking the effects of past or present intentional discrimination lies at section 2's heart. Rightly understood, that design is simply not a permanent "device for regulating, rationing, and apportioning political power among racial and ethnic groups."[294] Far from pursuing generalized electoral fairness or racial balancing, section 2 halts the present-day effects of discrete past wrongs.

Second, this approach to section 2 incorporates a precise causal account. Justificatory invocations of past discrimination cannot assume that discrimination's effects are permanent.[295] Nor can they assume that racial groups are monolithic or entitled to proportional representation. That would be inconsistent with *Regester* and *Whitcomb*, to say nothing of the Court's opposition to an "original sin" jurisprudence. But while time's passage is generally relevant to legal causation,[296] it would be legally anomalous to treat it as dispositive. On the flip side, it would be equally anomalous to assume uncritically that intervening events, even those intermixed with private action, break the constitutionally relevant chain of causation.

These are difficult issues. Their navigation should start with a foundational separation-of-powers point. Section 2 represents an exercise of powers expressly granted to Congress by the Civil War Amendments to enforce those Amendments' provisions by "appropriate legislation."[297] Those grants grew out of an understanding that the Congress would be just as critical as the courts in effectuating the Amendments.[298] Still, the word "appropriate" probably requires some link between what an amendment bans

---

292. *See* Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 UCLA L. REV. 701, 715 (2006).

293. *See id.* at 706, 715, 727, 771, 782; EIDELSON, *supra* note 283, at 5–6, 48–51 (pointing out that some disparate-impact justifications do not key on intentional discrimination at all but rather treat "disproportionate group impact" as a "constituent part of the wrongdoing" (quoting John Gardner, *Discrimination as Injustice*, 16 OXFORD J. LEGAL STUD. 353, 364–65 (1996))); *cf.* Primus, *supra* note 44, at 499.

294. Holder v. Hall, 512 U.S. 874, 893 (1994) (Thomas, J., concurring).

295. *See* Abbott v. Perez, 585 U.S. 579, 603 (2018).

296. *See, e.g.*, Freeman v. Pitts, 503 U.S. 467, 496 (1992).

297. *See* U.S. CONST. amend. XIII § 2; *id.* amend. XIV, § 5; *id.* amend. XV, § 2; S. REP. NO. 97-417, at 39 (1982) (invoking the Fourteenth and Fifteenth Amendments as authority for the section 2 amendment); H.R. REP. NO. 97-227, at 31 (1981) (same). Though it strikes me as plausible, I bracket for present purposes the possibility that section 2's application to federal congressional elections could stand on the Elections Clause (U.S. CONST. art. I, § 4, cl. 1) alone. *See* Nicholas O. Stephanopoulos, *The Sweep of the Electoral Power*, 36 CONST. COMMENT. 1, 77 (2021).

298. *See, e.g.*, *Ex parte* Virginia, 100 U.S. 339, 345–46 (1880); Michael W. McConnell, *Institutions and Interpretation: A Critique of* City of Boerne v. Flores, 111 HARV. L. REV. 153, 181–83 (1997).

of its own force and congressional action. To that end, judicial doctrine gauging exercises of these powers has looked to the tightness of that link.[299]

The Court treats intent as integral to violations of the Equal Protection Clause and the Fifteenth Amendment.[300] That makes legislation remedying particularized intentional discrimination the easy case for "appropriate" legislation.[301] A concrete example would be an individual's ability to sue a state actor who denies him the right to vote under 42 U.S.C. § 1983.[302] As flagged earlier, "appropriate" enforcement may also be prophylactic, that is, it may also ban some activity that courts would not independently hold unconstitutional.[303] Thus, Congress may enforce the Fifteenth Amendment by banning state actions "discriminatory in effect," even when those actions are not themselves animated by discriminatory purpose.[304] The Fourteenth Amendment also authorizes some prophylaxis.[305]

Because it reaches beyond actions themselves animated by discriminatory purpose, section 2 must sufficiently link its broader prohibitions to the constitutional prohibitions that it enforces. That link lies in section 2's targeting of present-day disparate treatment flowing from the effects of past or present intentional discrimination. As explained, section 2's core value incorporated a pre-*Bolden* ethos that looked to particular kinds of facts about racial politics to support particular kinds of inferences.[306] That ethos neither deemed disparities ipso facto illegal nor thought they necessarily proved the persistence of discrimination's effects. Rather, section 2's design embodies (1) a calibrated assertion that causal links between the effects of discrimination and present-day racialized politics *may* exist and (2) an account of what present-day facts bearing on racial politics *may* justify inferring such a connection. That design, and its focus on racial politics,

---

299. *See, e.g.*, United States v. Morrison, 529 U.S. 598, 625–26 (2000) (citing City of Boerne v. Flores, 521 U.S. 507, 526 (1997)) (Fourteenth Amendment); *see also* City of Rome v. United States, 446 U.S. 156, 173–78 (1980) (Fifteenth Amendment); *accord* Allen v. Milligan, 143 S. Ct. 1487, 1515–16 (2023) (same). This is not the place to delve into the debate over the doctrine's correctness. *See, e.g.*, Jack M. Balkin, *The Reconstruction Power*, 85 N.Y.U. L. REV. 1801, 1807 (2010); McConnell, *supra* note 298, at 156.

300. *See supra* note 87 and accompanying text.

301. *See, e.g.*, *Boerne*, 521 U.S. at 517; Tennessee v. Lane, 541 U.S. 509, 559–60 (2004) (Scalia, J., dissenting). The claim in text assumes that the Supreme Court's view of an amendment's substance is conclusive. It also addresses only so-called internal limits on "appropriate" legislation, i.e., those inherent in the text and structure of the enforcement powers themselves. *See* Richard Primus, *The Limits of Enumeration*, 124 YALE L.J. 576, 578 (2014) (using this terminology). "External" limits imposed by a separate constitutional provision, *see id.*, are also possible; one such limit is the colorblindness interpretation of the Fourteenth Amendment on which this Article focuses. Part IV.B links section 2's "external" and "internal" constitutionality.

302. *Lane*, 541 U.S. at 559–60 (Scalia, J., dissenting).

303. *See Boerne*, 521 U.S. at 518; *Milligan*, 143 S. Ct. at 1515; *supra* note 88 and accompanying text.

304. *Milligan*, 143 S. Ct. at 1516 (quoting *City of Rome*, 446 U.S. at 173).

305. *See* Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356, 365–74 (2001).

306. *See supra* notes 256–57; *supra* Part II.B.1; *see also Fair Politics for Blacks*, *supra* note 225 (rooting in pre-*Bolden* law the results test's focus on "whether a community has a racial or a non-racial politics"); S. REP. NO. 97-417, at 33 (1982) (same).

necessarily assumes the inference's refutability, even in locales where it might previously have been justified. And, if implemented faithfully, it places section 2's operation squarely within congressional power to detect and legislate against intentional discrimination's effects.[307]

The disparate-treatment paradigm helps place section 2 within larger debates on how law addresses race's political salience.[308] Consider Professor Richard H. Pildes's description of "integrationist" and "accommodationist" approaches.[309] Integrationist approaches emphasize the "risk of long-term entrenchment and solidification of ethnic identities" and warn against building "political institutions . . . to accommodate group differences."[310] Accommodationist approaches focus on the occasional pragmatic necessity of building "acknowledgement of ethnic differences" into "democratic institutions."[311] Pildes stresses the impossibility of a one-size-fits-all response. Rather, realism requires grasping that remedying democratic imperfection sometimes requires accommodation. Yet such policies must be sufficiently dynamic and flexible to avoid turning contingent accommodations into permanent features of democratic life.

Section 2 fits within this tradition. Its race consciousness seeks the ultimate end of unskewing politics distorted by past or present intentional discrimination. Thus, its causal account distinguishes electoral results that are "on account of race" from those that aren't. In rejecting proportional representation as its core value, it carries forward the pre-*Bolden* regime's assumption that the evils it combats are stubborn but eradicable. In deploying accommodationist tactics to serve a fundamentally integrationist approach to racial distortions in politics, section 2 embraces the best of both perspectives.[312] Such a statute is built to become less needed, as it and other laws expunge past discrimination's effects or those effects otherwise dissipate.

* * *

This account of section 2's original design might be largely academic if subsequent events had carried section 2 far from those origins.[313] But that has not happened. In fact, as Part III will explain, subsequent events track this disparate-treatment vision. Far from breaking from that approach,

307. *Milligan*, 143 S. Ct. at 1516–17.

308. *See generally* Madhav Khosla & Pratap Bhanu Mehta, *Caste Formalism: The Law and Politics of Equality in India*, 87 L. & CONTEMP. PROBS. 205 (2025) (discussing these points). *See* Richard H. Pildes, *Ethnic Identity and Democratic Institutions: A Dynamic Perspective*, *in* CONSTITUTIONAL DESIGN FOR DIVIDED SOCIETIES: INTEGRATION OR ACCOMMODATION? 173, 175 (Sujit Choudhry ed., 2008) [hereinafter Pildes, *Ethnic Identity*].

309. Pildes, *Ethnic Identity*, *supra* note 308, at 175.

310. *Id.*

311. *Id.*

312. For a similar paradigm, see Ellen D. Katz, *Engineering the Endgame*, 109 MICH. L. REV. 349, 350–54 (2010) (contrasting "adaptation" with less-optimal approaches).

313. *See, e.g.*, Holder v. Hall, 512 U.S. 874, 903–06, 931–36 (1994) (Thomas, J., concurring) (attacking section 2 based on its subsequent judicial interpretation).

doctrine has helped facilitate it. And subsequent factual developments align with the dynamic vision that section 2 reflects.

III. THE COLORBLIND SECTION 2

Part III's title is a provocation. In one sense (one true of the Fifteenth Amendment itself), section 2 cannot be *colorblind*; it requires that states consider race to avoid inadvertent denial or abridgement of voting rights. But it is equally coherent to call a mechanism "colorblind" that consists with and furthers colorblindness's goal that race not determine governmental allocation of political power. For two reasons, section 2 does just that.

First, judicial interpretation dovetails with Part II's view of section 2 as concerned with the causally demonstrable effects of intentional discrimination. I do not claim that four decades of cases consciously adopted my framing. But if this logic is implicit, it is hardly subterranean. Indeed, it permeates the pathbreaking *Gingles* decision and subsequent cases defining liabilities and remedies under section 2.

Second, the interpretive gloss of *Gingles*, consistent with section 2's design, ties the statute to realities that can wax or wane. The statute thus in theory should be inherently "self-liquidating," that is, triggering when the empirical indicia of the evil it targets grow or persist and deactivating when they disappear. And practice supports theory. Though they persist in some places, the factual preconditions for section 2's activation show sufficient dissipation to suggest two conclusions. First, section 2's self-limitation is real. Second, we can be confident that when it does activate, it requires only precise remedies for the problems that Congress legitimately attacked.

Part III begins by explaining that, while section 2's text and history did not *require* the doctrinal order *Gingles* imposed, *Gingles* nevertheless implemented section 2's design. I then connect the self-liquidation theory that emerged shortly after *Gingles* to Part II's disparate-treatment model and to *Gingles*'s progeny. After framing self-liquidation, I elaborate how each element of the *Gingles* analysis supports that function. I then bolster the doctrinal claims by conservatively integrating the latest relevant empirics. The methodology is legal, not empirical. Because section 2's law depends on real-world facts, I ask what the latest trends imply about charges that section 2, in theory or practice, permanently racializes politics.

At bottom, *Gingles*'s real-world grounding elegantly focuses section 2 on its intended quarry: particularized race-based harms that colorblindness permits correcting. Because doctrine and facts show that section 2's self-liquidation is real, neither section 2's theory nor its practice can be said to have "no end . . . in sight."[314]

314. *Cf. SFFA*, 143 S. Ct. 2141, 2166 (2023).

A. Gingles *and Its Progeny*

The Court first elaborated section 2 in *Gingles*. Its facts—a challenge to certain North Carolina multimember state legislative districts[315]—matter less than its framework, including its three now-famous preconditions. First, a plaintiff must be a member of a minority group "sufficiently large and geographically compact to constitute a majority in a single-member district."[316] Second, the group must be "politically cohesive."[317] Third, a majority group must vote "sufficiently as a bloc" to "usually . . . defeat the minority's preferred candidate," absent "special circumstances."[318] Prefiguring later practice, *Gingles* shorthanded the latter two preconditions as "racially polarized voting."[319] With some tweaks, this framework still guides section 2 cases.[320]

This framework was not random; it should be read in tandem with *Gingles*'s broader account of section 2. The amendment, the Court noted, rejected the *Bolden* plurality's demand for "pro[of] that a contested electoral mechanism was intentionally adopted or maintained by state officials for a discriminatory purpose."[321] The ensuing "results test" was Congress's encapsulation of the pre-*Bolden* test, which required asking whether a challenged electoral device denied "equal opportunity to participate in the political processes and to elect candidates of . . . choice."[322]

What did that mean? *Gingles* immediately noted the Senate Report's claim that a results test was necessary to eradicate "the effects of past purposeful discrimination."[323] As for the Senate Factors, while all could be objective indicia of a violation,[324] a cohesive group's repeated failures to elect preferred candidates and racially polarized voting were indispensable to section 2's "functional" analysis.[325] In sum, a section 2 claim's "essence" was that "a certain electoral law, practice, or structure interacts with social

315. Thornburg v. Gingles, 478 U.S. 30, 42, 46 & n.12 (1986). *Gingles* held all but one district invalid. *Id.* at 42.

316. *Id.* at 50.

317. *Id.* at 51.

318. *Id.* at 50–51.

319. *Id.* at 56.

320. *Cf.* Allen v. Milligan, 143 S. Ct. 1487, 1503 (2023).

321. *Gingles*, 478 U.S. at 35.

322. *Id.* at 35, 44.

323. *Id.* at 44 n.9 (quoting S. REP. NO. 97-417, at 40 (1982)); *see also id.* at 65 (plurality opinion) (noting "purpose . . . to eliminate the negative effects of past discrimination on the electoral opportunities of minorities"); *id.* at 69–70 (same).

324. *See id.* at 44–45 (majority opinion).

325. *See id.* at 48–49 & n.15. *Gingles* did say that "the lingering effects of past discrimination" would be "supportive of, but *not essential to*, a minority voter's claim." *Id.* at 48 n.15. In context, though, the point was simply that generalized "social and economic effects of past discrimination," without more, do not make out a section 2 violation. *Id.* After all, *Gingles* approvingly adverted to section 2's attack on the "accumulation of discrimination." *Id.* at 44 n.9 (quoting S. REP. NO. 97-417, at 5). And, as explained earlier, the racial bloc voting that *Gingles* deemed "most important," *see id.* at 48 n.15, matters for racial vote dilution precisely because it may signify that a neutral electoral device, left unchecked, is essentially embracing the effects of past discrimination. *See supra* notes 161–73 and accompanying text.

and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives."[326]

The framework within which *Gingles* construed section 2 thus dovetails with Part II's account of the statute's "core value."[327] Section 2 targets electoral disparate treatment flowing from distortive electoral racialization. A signal mark of that distortion is persistent racially polarized voting that usually defeats minority-preferred candidates.[328] That mark is itself plausibly the effect of past or present discrimination. *Gingles*'s focus on particularized facts also embraced Congress's assumption that section 2 targets contingent harms.[329] Intentional discrimination's effects *may* cause some neutrally designed electoral devices to treat voters disparately on account of race. But that wrong, rooted in distortive racialization, is neither nationally ubiquitous nor locally permanent.[330]

Four decades of cases appreciate these points. Consider first *Johnson v. De Grandy*.[331] There, Florida proposed treating proportionality as a categorical defense.[332] But that, the Court observed, would tend "to promote and perpetuate efforts to devise majority-minority districts even . . . where they may not be necessary to achieve equal political and electoral opportunity."[333] That observation boded ill for Florida; majority-minority districts are "remedial devices," premised on "a quintessentially race-conscious calculus aptly described as the 'politics of second best.'"[334]

Florida's proposal, *De Grandy* explained, thus misunderstood "the lesson of *Gingles*."[335] True, "society's racial and ethnic cleavages sometimes necessitate majority-minority districts to ensure equal political and electoral opportunity."[336] Discrimination's effects may sometimes prevent, for example, some rural Black voters who share interests with rural White voters from aggregating across that difference in the way that urban White voters might with rural White voters. But only sometimes. Where such effects are absent, section 2 should quiet, with its goal of uprooting race-based distortions of equal political opportunity no longer implicated.[337] In short, *De Grandy* understood, the need for the "second best" path of section 2 intervention would fade where discrimination's "cleavages" no longer barred minority voters from "pull[ing], haul[ing], and trad[ing] to find common political ground."[338] Section 2 has no problem with minority losses, so long

326. *Gingles*, 478 U.S. at 47.
327. *See id.* at 44 n.9 ("[T]he purpose of the Voting Rights Act was . . . 'also to deal with the accumulation of discrimination.'" (quoting S. REP. NO. 97-417, at 5)).
328. *See id.* at 48–49, 48 n.15, 51, 57.
329. *See supra* notes 265–70.
330. *See Gingles*, 478 U.S. at 46 & n.12, 48–49, 79.
331. 512 U.S. 997 (1994).
332. *Id.* at 1017.
333. *Id.* at 1019–20.
334. *Id.* at 1020.
335. *Id.*
336. *Id.*
337. *See id.*
338. *Id.*

as those losses do not flow from discrimination's effects preventing aggregation on par with other groups.

Fifteen years later, *Bartlett v. Strickland*[339] applied this theme to section 2 remedies. Majority-minority districts were not the only "method of complying with" section 2.[340] Rather, other districts, such as crossover districts where majority and minority voters "work together toward a common goal," might stave off liability.[341] Nothing in section 2 demands any particular method of compliance, let alone a particular governmental use of race. The command is to not dilute or deny the vote on account of race. *Bartlett*'s flexibility is a sensible gloss for a statute pegged to the effects of past or present discrimination. It would fit poorly, however, with a statute pursuing permanent, acontextual injection of race into politics.

Fourteen years later, the Court's latest section 2 case, *Allen v. Milligan*, sang a harmonious tune. *Milligan* began by recounting section 2's enactment, including accusations that it would seek proportionality, increase racial polarization, and force race-based "quota[s]."[342] The opinion ended by acknowledging old "concern[s] that section 2 may impermissibly elevate race in the allocation of political power."[343] In between, however, it trenchantly analyzed how "[e]ach *Gingles* precondition serves a different purpose" consistent with section 2's design.[344]

Plaintiffs satisfy the first *Gingles* precondition ("*Gingles* 1") with legally feasible illustrative maps containing at least one more majority-minority district than the challenged map.[345] Illustrative maps, *Milligan* explained, show that a minority *could* elect its preferred representative in a single-member district.[346] Proving minority political cohesiveness ("*Gingles* 2") shows that it "would in fact" elect such a representative in such a district.[347] And persistent majority-race bloc voting ("*Gingles* 3") "establishes that the challenged districting thwarts a distinctive minority vote at least plausibly on account of race."[348] Plaintiffs who satisfy the preconditions must still surmount a holistic totality-of-circumstances inquiry.[349] That inquiry requires "'an intensely local appraisal' of the electoral mechanism at issue, as well as a 'searching practical evaluation of the past and present reality.'"[350]

---

339. 556 U.S. 1 (2009) (plurality opinion).

340. *Id.* at 23. This plurality opinion was likely controlling, and at any rate, the majority in *Cooper v. Harris*, 137 S. Ct. 1455 (2017), expressly embraced this *Bartlett* proposition. *See id.* at 1470–72.

341. *Bartlett*, 556 U.S. at 23–24 (plurality opinion).

342. 143 S. Ct. 1487, 1500 (2023).

343. *Id.* at 1517.

344. *Id.* at 1503; *see also id.* at 1507–08.

345. *See* Johnson v. De Grandy, 512 U.S. 997, 1007 (1994); *see also Milligan*, 143 S. Ct. at 1502, 1504, 1509, 1512–13 & n.7.

346. *See Milligan*, 143 S. Ct. at 1503.

347. *Id.*

348. *Id.*

349. *See id.*; *see also De Grandy*, 512 U.S. at 1009 (establishing this requirement).

350. *Milligan*, 143 S. Ct. at 1503 (quoting Thornburg v. Gingles, 478 U.S. 30, 79 (1986)).

Milligan rooted these functions in section 2's analytical core. Illustrative maps show that "it is *possible* that the State's map has a disparate effect on account of race."[351] The rest of *Gingles* "helps determine whether that possibility is reality by looking to polarized voting preferences and the frequency of racially discriminatory actions taken by the State, past and present."[352] Looking to *Regester*, *Milligan* explained that section 2 targets circumstances disabling voters "from 'enter[ing] into the political process in a reliable and meaningful manner' 'in the light of past and present reality, political and otherwise.'"[353] The evil, encapsulated, occurs "when minority voters face—unlike their majority peers—bloc voting along racial lines, arising against the backdrop of substantial racial discrimination within the State, that renders a minority vote unequal to a vote by a nonminority voter."[354] Put otherwise, *Milligan* saw, as Part II argued, that section 2 focuses on the effects of intentional discrimination and prevents them from infecting present-day state electoral action.

Milligan thus perceived that, while nothing in section 2's text or context expressly prefigured *Gingles*,[355] the preconditions nevertheless implement section 2's design. The Court was right. *Gingles* and its progeny understood two important goals of section 2. First, it should trigger only in response to circumstances that are prima facie best explained by particularized past or present acts of discrimination. Second, it requires state action only to the extent necessary to prevent the effects of such discrimination from distorting present-day state action. Understanding how doctrine has successfully calibrated the preconditions to those ends requires explaining "self-liquidation."

B. Self-Liquidation: Theory and Reality

Section 2's vitality may turn on whether it responds to the Court's desire for logical endpoints. Under a disparate-treatment paradigm in which section 2's sweep is a function of intentional discrimination's effects, the statute should activate less as those effects dissipate. It may be one thing to assert that connection and another to show it. But it can be shown. Section 2's doctrinal glosses advance its disparate-treatment vision, and events in the real world show that the vision is possible.

---

351. *Id.* at 1507.
352. *Id.*
353. *Id.* (quoting White v. Regester, 412 U.S. 755, 767, 770 (1973)).
354. *Id.*
355. *See, e.g.*, Richard H. Pildes, *The Decline of Legally Mandated Minority Representation*, 68 OHIO ST. L.J. 1139, 1159–60 (2007) [hereinafter Pildes, *Minority Representation*] (arguing that, "given the nature of the legislative issues in 1982, it is difficult to conclude that" Congress would have embraced *Gingles*); Samuel Issacharoff, *Is Section 5 of the Voting Rights Act a Victim of Its Own Success?*, 104 COLUM. L. REV. 1710, 1719 (2004) (similar) [hereinafter Issacharoff, *Section 5 of the Voting Rights Act*].

1. Conceptualizing Self-Liquidation

The self-liquidation concept is at least as old as a 1992 piece by Professors Bernard Grofman and Lisa Handley, which explicitly linked the idea that section 2 is designed to eventually "lapse into irrelevance" with the *Gingles* preconditions.[356] Any such account emphasizes that the preconditions consider dynamic facts. Decreasing residential segregation makes it harder, and eventually impossible, to draw satisfactory *Gingles* 1 maps.[357] A similar relationship obtains between decreasing racially identifiable voting patterns and *Gingles* 2 and 3's demand for proof that bloc-voting majorities are consistently denying cohesive minority groups their candidates of choice.[358] Unlike, say, the population distributions central to a pure proportionality or disparate-impact standard, these facts have a tight theoretical and practical connection to intentional discrimination.[359] We may thus expect them to dissipate if the effects of that discrimination are adequately countered. When they do, section 2 requires no race-conscious action.

Self-liquidation means more than the tautological truth that section 2 only applies when the preconditions are satisfied. How much more might be described in multiple ways.

Least controversially, one might remain agnostic on section 2's role, holding only that section 2 will activate less *if* the preconditions wane. Even someone who, like Senator Hatch,[360] thought section 2 *increased* racial segregation and polarization could embrace that claim. One hesitates to use the word, but self-liquidation to this extent seems self-evident. A more ambitious, and more falsifiable, claim would be that decreases in racially identifiable housing and voting patterns have in fact manifested, and that section 2 has not stood in the way. Stronger still would be a claim that section 2 affirmatively plays a causal role in liquidating itself—that normal legal-causation principles qualify section 2 as a "cause" of the reduction of its activation conditions.[361]

Part II can embrace any of these formulations. As argued, the pre-*Bolden* cases home in on the electoral effects of a political system skewed by the

356. Grofman & Handley, *supra* note 34, at 402.

357. *Id.* at 402; *see also* Pamela S. Karlan, *Two Section Twos and Two Section Fives*, 39 WM. & MARY L. REV. 725, 741 (1998) [hereinafter Karlan, *Two Section Twos*] (noting that "physica[l] . . . integra[tion]" of excluded minority groups vitiates "ability and need to bring" section 2 claims); *see also Milligan*, 143 S. Ct. at 1503–05 (discussing the illustrative-map process under *Gingles* 1).

358. *See* Grofman & Handley, *supra* note 34, at 402–03; *see also* Karlan, *Two Section Twos*, *supra* note 357, at 741.

359. *See* Grofman & Handley, *supra* note 34, at 402–03.

360. *See* S. REP. NO. 97-417, at 149–50 (1982) (Subcomm. Rep.).

361. By "cause," I do not mean the truism that section 2 is a but-for cause of electoral events postdating its passage or the claim, implausible in most contexts, that *only* section 2 mattered in generating those events. *See* H.L.A. HART & TONY HONORE, CAUSATION IN THE LAW 9–13, 34 (2d ed. 1985). Those extremes aside, applications of the label of legal cause, though complex, rest on widely embraced principles. *See, e.g.*, Murray, *Discriminatory Effect(s)*, *supra* note 248 (manuscript at 38–39). I see no reason to assume that those principles would deny section 2 that label.

prior discriminatory injection of race. Those conditions were not omnipresent even before section 2's amendment.[362] Incorporating that ethos, section 2 assumed that the extent to which it required states to deviate from their preferred course would lessen as facts changed.[363] That said, the case for section 2's built-in time limit might falter if none of these formulations reflected reality. But they do because of how *Gingles* has shaped self-liquidation.

2. Self-Liquidation in Doctrine and Practice

Milligan rightly recognized that "each . . . precondition serves a different purpose."[364] What it did not quite articulate—and what this section explains—is the full breadth of that purpose. *Gingles* birthed a doctrine that facilitates self-liquidation and, in so doing, facilitated section 2's disparate-treatment design. That doctrinal insight reveals *Gingles* as an underappreciated critical facet of the statute's colorblindness compatibility.

Turning from doctrine to facts, this section then connects each precondition to facts on the ground.[365] National (albeit nonuniform) trends reflect the decreases in racially identifiable housing and voting patterns that limit section 2's activation. That reality offers additional cause to believe that cases where section 2 activates genuinely implicate the problems that Congress legitimately attacked. To reiterate, I intend to make distinctly *legal* claims. But law regulates a world of facts, which is a point with particular salience for the Voting Rights Act.[366] I am interested in what those trends imply, whatever their causes, for the legal idea of self-liquidation.

a. Gingles *1*

The Law. *Gingles* 1 may be most underappreciated. Its effective demand for racially identifiable housing patterns fits well with a disparate-treatment paradigm focused on the effects of past or present discrimination. Grofman and Handley implied, but did not spell out, this function,[367] and *Milligan*'s otherwise-sophisticated account brushed past it. And scholars who have noted the theoretical possibility of understanding *Gingles* 1 in this way have

362. *See* Whitcomb v. Chavis, 403 U.S. 124, 153 (1971); *accord* Graves v. Barnes, 343 F. Supp. 704, 726 & n.18 (W.D. Tex. 1972), *aff'd in relevant part sub nom.*, White v. Regester, 412 U.S. 755 (1973).

363. *See, e.g.*, *supra* Parts II.B.3.c–d (discussing public understandings of section 2's design).

364. Allen v. Milligan, 143 S. Ct. 1487, 1503 (2023).

365. No single set of trends could fully encapsulate the totality-of-circumstances inquiry.

366. *See* 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, 1518 (2002) [hereinafter Pildes, *Voting-Rights Law*].

367. *Cf.* Grofman & Handley, *supra* note 34, at 402–03 (referencing "residential segregation sufficient to allow" illustrative districts satisfying *Gingles* 1 as a "conditio[n] that no sensible person would wish to see perpetuated"); *see* Karlan, *Maps & Misreadings*, *supra* note 148, at 177 (connecting residential segregation to "racial discrimination in both the private and public housing markets," although ultimately criticizing *Gingles* 1).

observed that this has not been the Court's explicit explanation and deemed racially polarized voting a "better proxy for discrimination."[368]

Though I agree with the first point, well-fitting explanations can go beyond explicit judicial rationales. On the second, I can assume arguendo that racially polarized voting is a better proxy. I argue only that racially identifiable housing patterns are at least a solid proxy.

Start with government-sponsored housing segregation.[369] From the start, *Whitcomb* and *Regester* appreciated housing segregation's relevance, even noting that racialized "ghetto[es]" are "often the result of a social, legal, or economic restriction or custom."[370] The Court was right; last century's race-based governmental skewing has marked this century's housing patterns.[371] It has done so by shaping present financial means to choose a home as well as the attitudes that shape living choices.[372] Indeed, racially identifiable physical separation quietly teaches that sociopolitical interests should track that separation.[373] Given the facts of American housing, that separation is itself evidence of the discrimination-rooted, politics-corrupting effects in which section 2 is interested.

Some *Gingles* 1 glosses look in this direction.[374] Consider *League of United Latin American Citizens v. Perry*'s[375] (*LULAC*) so-called "cultural compactness" reasoning.[376] There, the "enormous geographical" separation of a district's Latinos, coupled with their "disparate needs and interests," rendered that district "noncompact for § 2 purposes."[377] On this approach, an illustrative district drawn around a geographically compact but socioculturally heterogeneous population might nevertheless fail *Gingles* 1.[378] That could be true even if the population is otherwise

368. Nicholas O. Stephanopoulos, *Civil Rights in a Desegregating America*, 83 U. CHI. L. REV. 1329, 1380 n.296 (2016) [hereinafter Stephanopoulos, *Civil Rights*].

369. *See generally, e.g.*, RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA (2017). *See, e.g.*, MARIA KRYSAN & KYLE CROWDER, CYCLE OF SEGREGATION: SOCIAL PROCESSES AND RESIDENTIAL STRATIFICATION 3, 7–10 (2017).

370. Whitcomb v. Chavis, 403 U.S. 124, 131 n.8 (1971); *see also supra* notes 165–66 and accompanying text.

371. *See* Rothstein, *supra* note 369, at vii–viii, 179–80, 215–17.

372. *See* KRYSAN & CROWDER, *supra* note 369, at 10–14, 244–46, 252–56.

373. *See id.* at 255–56 (noting how segregation shapes racial attitudes and preferences); ROBERT J. SAMPSON, GREAT AMERICAN CITY: CHICAGO AND THE ENDURING NEIGHBORHOOD EFFECT 131–37, 298–99 (2d ed. 2024) (discussing segregation's effects on racial attitudes and how those attitudes affect living choices); *cf.* Shaw v. Reno, 509 U.S. 630, 647–48 (1993) (insisting that majority-minority districts "created solely to effectuate the perceived common interests of one racial group" send "pernicious" messages about the nature of political interests). Racially identifiable housing patterns separate persons in concrete ways that mere race-conscious districting does not.

374. To be clear, not all of *Gingles* 1 fits here. For example, it is not obvious how *Bartlett v. Strickland*'s demand for a numerical (not functional) majority advances the disparate-treatment model. *See* 556 U.S. 1, 14 (2009).

375. 548 U.S. 399 (2006) [hereinafter *LULAC*].

376. Daniel R. Ortiz, *Cultural Compactness*, 105 MICH. L. REV. FIRST IMPRESSIONS 48, 50 (2006).

377. *LULAC*, 548 U.S. at 433–35.

378. *See* Pildes, *Minority Representation*, *supra* note 355, at 1145 & n.19.

politically cohesive. This interpretation fits well with an interest in the present-day effects of past or present intentional discrimination. Insofar as state action shaping the opportunities of racial groups qua racial groups helps explain why groups possess "distinctive minority group interests,"[379] the persistence of such interests may evidence that state action's continued significance.[380] Conversely, intragroup divergences in needs and sociocultural positions may indicate that past discrimination no longer determines interests.

Something similar can be said of the recent confirmation that illustrative districts must be "reasonably configured," i.e., "comport[ing] with traditional districting criteria," like contiguity and compactness.[381] Imagine a culturally compact minority population large enough to be a majority in an additional single-member district—but only if the district is not reasonably configured. *Gingles* 1 would bar such a claim.[382] This further limits section 2, as a practical matter, to nondiffuse (what some call "naturally occurring") minority communities.[383] While diffuse living patterns may not inherently disprove the outcome-determinative impact of past discrimination on living patterns,[384] one cannot discount the historical links between geographic insularity and discrimination. Segregation's relevance to the pre-*Bolden* cases offers reason to take it as a sign of the condition those cases condemned. When such a community's physical location positions it to be a repeated electoral loser, that may show that present-day state choices are intersecting with discrimination's effects in ways that distort electoral opportunities.[385]

Gingles 1, then, is a heuristic. Housing patterns barring its satisfaction bespeak either a lack of relevant intentional discrimination or the eradication of its effects. The heuristic is imperfect, but it has the benefit of being both administrable and probative. In its defense, racially identifiable voting patterns are also a proxy for the underlying evil.[386] They are, after all, not

379. Thornburg v. Gingles, 478 U.S. 30, 51 (1986).

380. *Cf.* White v. Regester, 412 U.S. 755, 767–70 (1973) (describing a clearly culturally compact Mexican-American community); *see supra* Part III.B.2.b (discussing similar points regarding political cohesion).

381. Allen v. Milligan, 143 S. Ct. 1487, 1503 (2023). *Gingles* did not explicitly address this point, having spoken only of the configuration of the *minority population*. 478 U.S. at 50–51.

382. This further underscores cultural compactness's limiting character. One could have imagined *LULAC* opening section 2's door to geographically noncompact, culturally compact populations. *See generally* Ortiz, *supra* note 376. But it would be difficult to draw a reasonably configured district around such populations.

383. Nathaniel Persily, *The Promise and Pitfalls of the New Voting Rights Act*, 117 YALE L.J. 174, 237–40 (2007) (using this phrase to describe a latent preference in *LULAC* and some *Shaw* cases for majority-minority districts that "would be created" if nonracial district-drawing principles were applied); *see also supra* notes 376–80 and accompanying text (discussing *LULAC*); *cf.* Miller v. Johnson, 515 U.S. 900, 916 (1995) (asserting that communities of interest must be "defined by *actual* shared interests" (emphasis added)); *id.* at 920.

384. *See infra* notes 404–06 and accompanying text.

385. *Cf.* Johnson v. De Grandy, 512 U.S. 997, 1015 (1994).

386. *See Gingles*, 478 U.S. at 57.

sufficient for a claim, and their probative value turns partly on their intensity.[387]

The Facts. One can quibble about how much causal responsibility to assign to section 2. But as a practical matter, the facts show distinct trends away from the sort of housing segregation needed to satisfy *Gingles* 1.[388]

No universal rubric for measuring housing segregation exists.[389] The "most common measure," "the index of dissimilarity," measures "the share of a group's members who would have to move from one geographic subunit to another in order for the group to be spread uniformly across a broader geographic region."[390] This tracks what I agree is segregation's "colloquial meaning," "the degree to which two or more groups live separately from one another."[391] On that index, the midpoint between perfect integration and complete segregation is 50 percent.[392] Measures are pairwise (e.g., Black-White), with the most comprehensive statistics being for Black-White segregation.[393]

Professor Nicholas Stephanopoulos has explained that the dissimilarity index for Black-White segregation stood at 80 percent in 1970 but had "sunk to roughly 55 percent" by 2010, essentially where it stood in 1910 before a dramatic uptick in the twentieth century.[394] Another comprehensive account of the 2010 census information agrees that "segregation is declining" and has been doing so from 1980 through 2010.[395] The latest information from the 2020 census indicates that these trends have continued.[396] In light of *Gingles*'s focus on compact populations, one striking trend is the dramatic drop from 1980 to 2010 in the number of metropolitan neighborhoods that are at least 90 percent White and the (smaller) drop in the number of neighborhoods that are at least 90 percent Black.[397]

---

387. *See De Grandy*, 512 U.S. at 1011; Mulroy, *supra* note 9, at 729.

388. I follow the norm of using "housing segregation" to reference racially identifiable housing. *See* Stephanopoulos, *Civil Rights*, *supra* note 368, at 1341.

389. *Id.* at 1339–41.

390. *Id.* at 1332, 1340.

391. *Id.* at 1341.

392. *Id.* at 1340–41.

393. *Id.* at 1340.

394. *Id.* at 1332.

395. KRYSAN & CROWDER, *supra* note 369, at 19; *see also* Benjamin Elbers, *Trends in U.S. Residential Racial Segregation, 1990 to 2020*, SOCIUS, Jan.–Dec. 2021, at 1, 1 (explaining that "multigroup segregation strongly declined in the United States" over the 30-year period from 1990 to 2020). Benjamin Elbers disaggregated the major racial groups and found that Black-White and White-Hispanic desegregation primarily drove the trend; White-Asian segregation had increased slightly. *Id.* at 1, 3.

396. Domenico Parisi, Daniel T. Lichter, Shrinidhi Ambinakudige & Christian Kelly Scott, *Racial Segregation in a Multiracial Society: Black Exclusion and Spatial Integration in US Municipalities, 1990–2020*, POPULATION, SPACE & PLACE, Jan. 2025, at 1, 1; Elbers, *supra* note 395, at 3 (noting that segregation for all groups "declined between 2010 and 2020").

397. KRYSAN & CROWDER, *supra* note 369, at 19; *see also* Stephanopoulos, *Civil Rights*, *supra* note 368, at 1343–47 (describing drivers of this declining metropolitan segregation).

To be sure, commentators have also cautioned that we are far from perfect integration.[398] Black-White segregation has not fallen uniformly, and it remains particularly high in the Midwest and Northeast.[399] Additionally, segregation scores for non-Black racial minorities have not meaningfully declined, although their scores began at lower levels.[400]

I do not claim that we've achieved ideal integration. The point is just that a continuing desegregative trend exists.[401] That implies decreases in the compactness *Gingles* 1 demands.[402] Whatever the ideal point is, declines short of it are still relevant. Sufficient integration to obstruct a *Gingles* 1 showing arrives somewhere before 0 percent on the dissimilarity index. While scholars dispute what drives integration, we can take its increase as a sign that the effects of the public and private discrimination that caused it are dissipating.[403] *Gingles* 1 is attuned to that result.

Gingles 1 is not beyond critique. It is not obvious that inability to be drawn into a reasonably configured single-member district, without more, proves the equal opportunity that section 2 contemplates.[404] Intentional discrimination might explain why a politically cohesive minority group too diffusely distributed to satisfy *Gingles* 1 is nevertheless constantly outvoted by a bloc-voting majority.[405] Ironically, this critique strengthens the liquidating function I posit for this precondition, because it suggests that section 2 errs on the side of false *negatives*. It therefore appears, pro tanto, less likely to inject race where it is not already distorting political systems or to accidentally intervene where intentional discrimination's effects no longer persist. Any failings in this regard for *Gingles* 1 thus further undercut any narrative that section 2 has overflowed the channel Congress cut in 1982.

b. Gingles *2 and 3*

The Law. Although the Court has rarely had occasion to elaborate either *Gingles* 2 or 3,[406] they can be summarized succinctly. Jurists and scholars generally shorthand as "racially polarized voting" circumstances in which a bloc-voting majority (*Gingles* 3) regularly outvotes a politically cohesive

398. KRYSAN & CROWDER, *supra* note 369, at 19–24.
399. *Id.* at 24–26; Stephanopoulos, *Civil Rights*, *supra* note 368, at 1355.
400. Stephanopoulos, *Civil Rights*, *supra* note 368, at 1347.
401. Parisi et al., *supra* note 396, at 1.
402. *See* Stephanopoulos, *Civil Rights*, *supra* note 368, at 1379.
403. *Cf. id.* at 1348–55 (suggesting some causes, consistent with my claim in text).
404. *See, e.g.*, Karlan, *Maps & Misreadings*, *supra* note 148, at 199–204, 207 (elaborating this point). Karlan also points out that geographic compactness is absent from the legislative history. *See id.* at 197–98, 210. True, although *Regester* did allude to geographic insularity. *See* White v. Regester, 412 U.S. 755, 766 n.10, 768 (1973).
405. A possible counterpoint is that such integration implies a sociopolitical system escaping past discrimination's effects. The point warrants more research before it is accepted. Some evidence suggests that greater Black residential integration "has a small but statistically significant negative impact on racial polarization in voting." Nicholas O. Stephanopoulos, *Race, Place and Power*, 68 STAN. L. REV. 1323, 1359 (2016).
406. *See, e.g.*, Elmendorf, Quinn & Abrajano, *supra* note 90, at 607.

minority (*Gingles* 2).[407] That concept is uncontroversially located at section 2's analytical core,[408] and rightly so. It is hard to imagine stronger contextual indicia of "intensive racial politics" than voting patterns determined by race.[409]

That said, it is not always clear what racially polarized voting means.[410] One important lurking question is whether the causes of racially identifiable voting patterns matter. The *Gingles* Court fractured on this point. For a four-justice plurality, Justice William J. Brennan Jr. deemed them irrelevant.[411] Justice Sandra Day O'Connor's disapproving four-justice "concurrence" disagreed.[412] Justice White's concurrence seems closer to Justice O'Connor's.[413] As discussed later, I agree that reasons matter, albeit not at this stage of the analysis. For now, I argue only that *Gingles* 2 and 3 dovetail with the disparate-treatment account notwithstanding this definitional uncertainty.

The key is disaggregating the prongs (which *Gingles* itself did)[414] and focusing on the idea of political cohesion permeating both. Together, *Gingles* 2 and 3 describe an electorally agonistic relationship between cohesive, racially distinct groups. For some voters, this agonism may reflect racial animus; for others, it may not. Either way, given race's unique role in shaping American political life,[415] such a relationship bears directly on whether a challenged electoral device effects the disparate treatment that section 2 targets.

Start with *Gingles* 2. If most Black individuals within a jurisdiction cohere politically qua Black voters, one cannot presume that to be happenstance. Nothing about being a member of an identifiable group requires political cohesion with other group members; indeed, "most social groups do not cohere politically," at least not "to any great degree."[416] When a minority

407. *Id.* at 589.

408. *See, e.g.*, Pildes, *Voting-Rights Law*, *supra* note 366, at 1518; Tokaji, *supra* note 30, at 543–46.

409. S. REP. NO. 97-417, at 33–34 (1982) (making this connection).

410. *See generally* Elmendorf, Quinn & Abrajano, *supra* note 90.

411. Thornburg v. Gingles, 478 U.S. 30, 74 (1986) (arguing that only correlation between "the race of voters and the selection of certain candidates" matters); *see also id.* at 61–62 (describing the arguments the plurality rejected).

412. *See id.* at 100–01 (O'Connor, J., concurring).

413. *See id.* at 82–83 (White, J., concurring).

414. *See id.* at 51 (majority opinion); *see also* Allen v. Milligan, 143 S. Ct. 1487, 1503 (2023); Elmendorf, Quinn & Abrajano, *supra* note 90, at 609.

415. *See, e.g.*, CHRISTOPHER H. ACHEN & LARRY M. BARTELS, DEMOCRACY FOR REALISTS: WHY ELECTIONS DO NOT PRODUCE RESPONSIVE GOVERNMENT 246–47 (2016). *See generally* ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES (2000).

416. Leonie Huddy, *From Group Identity to Political Cohesion and Commitment*, *in* THE OXFORD HANDBOOK OF POLITICAL PSYCHOLOGY 737, 737 (Leonie Huddy, David O. Sears & Jack S. Levy eds., 2d ed. 2013); *see also* Seo-young Silvia Kim & Jan Zilinsky, *Division Does Not Imply Predictability: Demographics Continue to Reveal Little About Voting and Partisanship*, 46 POL. BEHAV. 67, 67–70, 81–84 (2024); DARA Z. STROLOVITCH, AFFIRMATIVE ADVOCACY: RACE, CLASS, AND GENDER IN INTEREST GROUP POLITICS 39–45, 51–52 (2007). Consider, for example, American women's substantial political heterogeneity. *See, e.g.*, Erin

remains tightly cohesive, a stronger (though rebuttable) inference is a connection between the cohesion and any past discrimination that has defined a community's experience.[417] The inference is less justifiable as cohesion wanes. In short, distinctively racialized political cohesion is a good encapsulation of the "racial politics" that section 2 targets.[418]

The cohesion requirement thus supports section 2's ultimate aim. Any districting-related choice "inevitabl[y]" advantages the aggregative interests of some identifiable communities over those of others.[419] When plaintiffs seek section 2 intervention, doctrine sensibly looks for group cohesion bearing the marks of intentional discrimination. The Court has not said much about this prong's function; *Milligan* explicitly tied it only to showing potential to elect.[420] But, elsewhere, *Milligan* seems to grasp the core of this point. It stressed that voters within the diluted Black "community of interest" shared (along with "concentrated poverty," inadequate healthcare, and "unequal access to government services") a "lineal connection to 'the many enslaved people brought there to work in the antebellum period.'"[421]

Gingles 3 can work similarly. As ample White crossover voting attests, White voters need not cohere *as White voters*, as opposed to the myriad other qualities with which they might identify.[422] Distinctively *White-voter* cohesion offers some reason to suspect the persistence of distinctively racialized political systems rooted in intentional discrimination.[423] And, of course, *Gingles* 3 demands not just sufficient majority cohesion for bloc voting, but majority bloc voting that consistently opposes and denies a cohesive minority group's preferred outcomes. It requires, in other words, outcome-determinative racial agonism. Those vote-aggregation outcomes are themselves evidence of discrimination that has left a political system unable to aggregate beyond race. When a state's aggregation device incorporates that outcome-determinative racial agonism into its results, the harm that follows is, as *Milligan* recognized, "plausibly on account of race."[424]

C. Cassese & Amanda Friesen, *A Look Back at 20 Years of Research on Gender and Voting*, 21 POL. & GENDER 51, 53, 55–56 (2025).

417. *See* Karlan, *Maps & Misreadings*, *supra* note 148, at 188 (observing that the Black community in *Regester* was "a community of interest, formed, in large part, by prior intentional discrimination in virtually every facet of life"); *cf.* White v. Regester, 412 U.S. 755, 768–70 (1973) (emphasizing discrimination against the Mexican-American community and the resulting suffering in "education, employment, . . . health, [and] politics").

418. *See* Karlan & Levinson, *supra* note 105, at 1229.

419. Johnson v. De Grandy, 512 U.S. 997, 1015 (1994); *see also* Gaffney v. Cummings, 412 U.S. 735, 753 (1973) (citing, inter alia, *Whitcomb* and *Regester*); Karlan & Levinson, *supra* note 105, at 1204, 1209 n.37.

420. *See supra* note 347 and accompanying text.

421. *See* Allen v. Milligan, 143 S. Ct. 1487, 1505 (2023) (quoting Singleton v. Merrill, 582 F. Supp. 3d 924, 1012–13 (N.D. Ala. 2022) (per curiam)).

422. *See, e.g.*, Pildes, *Voting-Rights Law*, *supra* note 366, at 1522, 1563–64; Nicholas O. Stephanopoulos, *Election Law for the New Electorate*, 17 J. LEGAL ANALYSIS 42, 57 (2025) [hereinafter Stephanopoulos, *Election Law for the New Electorate*].

423. Karlan & Levinson, *supra* note 105, at 1229.

424. *Milligan*, 143 S. Ct. at 1503.

In sum, the dual satisfaction of *Gingles* 2 and 3 is evidence that race substantially explains electoral results. Consistent with colorblindness's core commitment to race's irrelevance, section 2 treats that as a problem worthy of correction. And it does so, consistent with historical experience, because it recognizes a prima facie link between race's overwhelming importance in a political system and the evils the statute seeks to suppress: the effects of intentional discrimination. Where race defines individuals' aggregative choices because of how discrimination shaped politics, section 2 seeks to free both sides from that trap. *Gingles* 2 and 3 implement that insight.

None of this analysis requires an exhaustive definition of racially polarized voting. Indeed, it leaves room for methodological disagreement.[425]

The Facts. Once again, concrete facts bolster theory. I am not the first to observe that the "primary racial development in recent elections has been a decline in racially polarized voting" or to connect that trend to the self-liquidation concept.[426] In that respect, the 2024 presidential election continued a national trend that has covered the last three presidential elections and their dividing midterms: non-White voters moving toward the Republican Party.[427] The most dramatic shift has been among Hispanic voters. Pew Research Center's postelection analysis reports that, after losing Hispanic voters by 38 points in 2016, President Donald J. Trump lost them by only 25 points in 2020 and then, in 2024, lost them by only 3 points.[428] Similar trends have occurred in midterm elections.[429]

Over the same period, Asian American and Pacific Islander voters have also trended toward decohesion, though less dramatically.[430] And, while the trends are even less dramatic for Black voters, who have historically voted cohesively Democratic, decohesion has reached them, too.[431] After losing Black voters by about 85 points in 2016 and 2020, President Trump lost them by only 68 points in 2024.[432] This trend has also manifested in midterm

425. Part IV.C returns to what this analysis implies for the role of causation in section 2 liability.

426. Stephanopoulos, *Election Law for the New Electorate*, *supra* note 422, at 55, 60–61.

427. *See id.* at 56 (discussing non-White voting between 2012 and 2020 in presidential and federal congressional elections); HANNAH HARTIG, SCOTT KEETER, ANDREW DANILLER & TED VAN GREEN, PEW RSCH. CTR., BEHIND TRUMP'S 2024 VICTORY, A MORE RACIALLY AND ETHNICALLY DIVERSE VOTER COALITION 7–10, 22–24 (2025) [hereinafter PEW REPORT], https://www.pewresearch.org/wp-content/uploads/sites/20/2025/06/PP-2025.6.26_validated-voters_report.pdf [https://perma.cc/B5CM-AFS7]; *see also* CATALIST, WHAT HAPPENED IN 2024, at 6–7 (2025), https://catalist.us/whathappened2024/ [https://perma.cc/JT39-MSR2] [hereinafter CATALIST REPORT].

428. PEW REPORT, *supra* note 427, at 22–23; *see also* CATALIST REPORT, *supra* note 427, at 27 (showing essentially the same trend).

429. Stephanopoulos, *Election Law for the New Electorate*, *supra* note 422, at 56.

430. *See* CATALIST REPORT, *supra* note 427, at 31; PEW REPORT, *supra* note 427, at 23 (showing a similar trend as Catalist, except that Pew lacked a sufficient sample size for 2016).

431. *See* Stephanopoulos, *Election Law for the New Electorate*, *supra* note 422, at 56–57; PEW REPORT, *supra* note 427, at 23.

432. *See* PEW REPORT, *supra* note 427, at 23.

elections.[433] Trends for White voters writ large have been more stagnant, although they are (again, nationally speaking) already not cohesive.[434]

To be clear, these national facts do not apply everywhere. Extreme Black-White polarization continues to characterize the Deep South.[435] It remains correct to say that Black voters cohesively vote Democratic nationwide.[436] And even where the trends exist, there may be sufficient cohesion to sustain a section 2 claim, although Stephanopoulos has collected cases where these trends may have undercut lawsuits.[437]

More important is what this portends for the self-liquidation claim. As to whether the trends are likely to sustain, consider two of their likely causes. In the past, ideologically conservative non-White voters have voted for Republicans in smaller numbers than ideology alone would suggest, but that has begun to change.[438] Similarly, a trend of voters low in socioeconomic status moving toward Republicans has spread from White voters to non-White voters.[439] Decohesion, then, may be both effect and harbinger of the deracialization of voting that self-liquidation requires.[440]

c. Totality of the Circumstances

Per *De Grandy*, plaintiffs must also satisfy a totality-of-the-circumstances standard.[441] That inquiry looks closely to the Senate Factors,[442] which themselves are attuned to the effects of intentional discrimination.[443] At this

433. *See* Stephanopoulos, *Election Law for the New Electorate*, *supra* note 422, at 56.

434. *See* CATALIST REPORT, *supra* note 427, at 21; PEW REPORT, *supra* note 427, at 23; *accord* Stephanopoulos, *Election Law for the New Electorate*, *supra* note 422, at 57 (noting, pre-2024 election, a small shift in White voters preferring the Democratic presidential candidate).

435. Stephanopoulos, *Election Law for the New Electorate*, *supra* note 422, at 61.

436. Shiro Kuriwaki, Stephen Ansolabehere, Angelo Dagonel & Soichiro Yamauchi, *The Geography of Racially Polarized Voting: Calibrating Surveys at the District Level*, 118 AM. POL. SCI. REV. 922, 930 (2024).

437. Stephanopoulos, *Election Law for the New Electorate*, *supra* note 422, at 60–61.

438. *See id.* at 57; JOHN SIDES, CHRIS TAUSANOVITCH & LYNN VAVRECK, THE BITTER END 230–31 (2022) (tracking 2016 to 2020 changes for Black, Latino, and Asian American conservatives).

439. *See* Stephanopoulos, *Election Law for the New Electorate*, *supra* note 422, at 57.

440. *See, e.g.*, Bernard L. Fraga, Yamil R. Velez & Emily A. West, *Reversion to the Mean, or Their Version of the Dream?: Latino Voting in an Age of Populism*, 119 AM. POL. SCI. REV. 517, 523–24 (2025) (discussing factors explaining shifts in Latino vote for Republicans in recent years and deeming them likely to sustain); *see also* Arica Schuett, Beyond the Bloc: Black Voter Subgroups & Declining Democratic Support 17, 38 (Aug. 29, 2025) (unpublished manuscript), https://doi.org/10.33774/apsa-2025-x95cm-v2 (on file with the *Fordham Law Review*) (applying Professors Bernard Fraga, Yamil R. Velez and Emily A. West's method to analyze declining Black support for Democratic candidates and linking the decline with "generational and normative shifts . . . suggest[ing] durable changes"). To be clear, nothing here predicts monolithic non-White voting for Republicans. Decohesion is enough for liquidation.

441. Johnson v. De Grandy, 512 U.S. 997, 1011–12, 1018 (1994) (observing that section 2's text ties the ultimate violation to the totality-of-the-circumstances inquiry).

442. *See* Allen v. Milligan, 143 S. Ct. 1487, 1503 (2023); *see also De Grandy*, 512 U.S. at 1010–11.

443. *See supra* note 270 and accompanying text.

stage, *Milligan* explicitly called out the "history of official discrimination in the state" and the need for "searching practical evaluation of the past and present reality."[444]

De Grandy demanded a "comprehensive" totality-of-circumstances inquiry, necessarily extending beyond the Senate Factors.[445] Its rationale made two important points that underscore the work of the *Gingles* regime.

First, *De Grandy* established proportionality as one indicator of "equality or inequality of opportunity . . . to participate in the political processes."[446] As previously mentioned, *De Grandy* refused to treat proportionality as a categorical defense.[447] But its absence is probative of dilution (and its presence probative of nondilution).[448] Rejecting a bright-line rule made sense. Sometimes, if racial politics reign, proportionality's absence may indicate the discrimination-rooted political exclusion that section 2 targets. That inference is not compelled, however; proportionality might also be absent where racial bloc voting's waning permits racial minorities to routinely aggregate across racial lines. Once again, doctrine implements statutory design—here, the rejection of proportionality as a core value.

Second, *De Grandy* recognized that whatever inferences the *Gingles* factors might justify can be rebutted at the totality-of-the-circumstances stage. The "extent of the opportunities minority voters enjoy to participate in the political processes," for example, might defeat a claim, even where the preconditions were satisfied.[449] This tracks section 2's design. Through a disparate-treatment frame, the ultimate question is whether the effects of past or present discrimination sufficiently distort elections to generate unequal electoral opportunity. The *Gingles* factors are proxies in that inquiry, but nothing in the statute's text or history suggests that courts should bar states from presenting competent information of their own on the point. The most obvious type of evidence, in light of *Regester* and *Whitcomb*, would be evidence suggesting that losses are not really "on account of race" in the statutory sense.[450]

The disparate-treatment structure also shows up in *Milligan*'s totality analysis. There, Alabama proposed that every section 2 case require a "multimillion-map set" of a jurisdiction's "possible districting maps," generated via a computer algorithm "designed to comply with traditional districting criteria but to not consider race."[451] The "median or average number of majority-minority districts in the entire multimillion-map set," Alabama said, should be the "race-neutral benchmark."[452] That is, if a state's actual map contains a "similar" number of majority-minority districts, it must

444. *Milligan*, 143 S. Ct. at 1503.
445. *De Grandy*, 512 U.S. at 1011.
446. *Id.* at 1011–12, 1020.
447. *See supra* notes 331–38 and accompanying text.
448. *See De Grandy*, 512 U.S. at 1013–14, 1020–21 & n.17.
449. *Id.* at 1011–12, 1012 n.10.
450. *See infra* Part IV.C.
451. Allen v. Milligan, 143 S. Ct. 1487, 1506 (2023).
452. *Id.*

win[453] because the "totality-of-circumstances analysis requires . . . irregularities in the State's enacted plan that can be explained only by racial discrimination."[454] Building on the idea that speaking of dilution requires an undiluted baseline,[455] Alabama baited its hook well; this benchmark was, it said, "race-neutral."[456]

The problem was, *Milligan* explained, that this benchmark missed section 2's point. The statute targets dilution harms occurring when "minority voters face—unlike their majority peers—bloc voting along racial lines, arising against the backdrop of substantial racial discrimination within the state, that renders a minority vote unequal to a vote by a nonminority voter."[457] Core to section 2's repudiation of *Bolden* was the view that an electoral rule may cause those harms despite pure-hearted enactors. Alabama's benchmark might imply that a present-day map drawer's mindset was indistinguishable from, say, the map that a precocious newborn untutored in American history would draw.[458] But section 2, as interpreted in *Gingles*, is interested in more.

As *Milligan* said, an illustrative map shows that it is "*possible* that the State's map has a disparate effect on account of race."[459] And "whether that possibility is reality" turns not on the mapmakers' intent, but on "polarized voting preferences," other relevant past discrimination, and any other information relevant under the comprehensive totality-of-the-circumstances inquiry.[460] What Alabama's proposal missed was that section 2's design keys on how discrimination by actors *other than* a map's enactors may so distort politics that genuinely neutral devices may nevertheless result in discriminatory effects. *Milligan* did not explicitly spell out that point. But glimmerings of this understanding seem to animate its rejection of the suggestion that Alabama entwined with its benchmark proposal: "[A]dherence to a previously used districting plan" was at least presumptively permissible.[461] In dispatching that assertion, the Court explained that section 2 "does not permit a State to provide some voters 'less opportunity' . . . just because the State has done it before."[462] Likewise, section 2 cannot assume that race-blind behavior today creates a categorical

453. *See id.*

454. Brief for Appellants at 44, *Milligan*, 143 S. Ct. 1487 (No. 21-1086).

455. *See* Reno v. Bossier Par. Sch. Bd., 520 U.S. 471, 480 (1997); Karlan, *Maps & Misreadings*, *supra* note 148, at 176. Part IV.A discusses this Article's implications for benchmark questions.

456. *Milligan*, 143 S. Ct. at 1506.

457. *Id.* at 1507.

458. *Accord* Brief for Appellants, *supra* note 454, at 54 (emphasizing that "racial demographics were not even visible to Alabama's map-drawer"); *id.* at 74 (claiming that section 2 merely "prescrib[es] a means to suss out whether it can be reasonably inferred that a voting rule was the product of invidious discrimination").

459. *Milligan*, 143 S. Ct. at 1507.

460. *Id.*

461. *Id.* at 1505; *see also* Brief for Appellants, *supra* note 454, at 53–54, 61 (touting "retaining the cores of existing districts" as a "non-discriminatory redistricting principl[e]" that undercuts a section 2 claim).

462. *Milligan*, 143 S. Ct. at 1505 (quoting 52 U.S.C. § 10301(b)).

safe harbor. In both cases, the alternative would lock in, rather than expunge, the cumulated discrimination that section 2 targets.

3. Self-Liquidation Takeaways

Gingles, as articulated, as developed, and as best understood, has honored section 2. As Part II explained, section 2's design crystallized the pre-*Bolden* regime's insight: The effects of intentional discrimination may so corrupt a political system that a genuinely neutral electoral device may impair some voters' ability to aggregate their votes on account of their race. Whatever the *Gingles* regime's imperfections, its criteria tie section 2's activation to those malign effects.

Critically, they do so with particularity, not assumptions.[463] Under *Gingles*, and consistent with its design, section 2 demands that a *particular* politically cohesive, bloc-voting majority consistently oppose and defeat a cohesive bloc-voting geographically identifiable racial minority. Consistent with the pre-*Bolden* regime, those facts justify a prima facie inference that the problem that section 2 targets persists. But defendants may undercut any such inference with relevant particularized facts at the totality stage.[464] The section 2 cases thus dovetail with *Shaw*'s condemnation of race-based assumptions and "stereotypes."[465]

The factual trends discussed above underscore self-liquidation's concreteness. In myriad jurisdictions, conditions on the ground may simply preclude the inference that the evil section 2 targets exists. At the least, the empirics show that nothing in section 2's mandates has blocked the widespread dissipation of *Gingles* preconditions like racially identifiable voting or housing.[466]

Such a showing is not trivial. Section 2's opponents have always claimed that it would encourage non-White voters to isolate themselves politically, prioritizing section-2-based spoils over political integration.[467] As the nationwide depolarization of non-White voters liquidates the statute, it thus also vitiates the still-common charge that section 2's political impact "freez[es] . . . racial constituencies into law."[468] Something similar can be

---

463. *See* S. REP. NO. 97-417, at 33–34 (1982); *cf. LULAC*, 548 U.S. 399, 500–01 (2006) (Roberts, C.J., concurring in part, concurring in the judgment in part, and dissenting in part) (defending the lower court's section 2 reasoning by arguing that "[n]o one has made any 'assumptions' about how voters . . . will vote based on their ethnic background" because "[t]here was a trial" and "[a]t trials, assumptions and assertions give way to facts").

464. *See, e.g.*, Johnson v. De Grandy, 512 U.S. 997, 1014–16 (1994) (providing facts about proportionality defeated a claim). Other facts might be relevant too. *See infra* Part IV.C.

465. *See* Shaw v. Reno, 509 U.S. 630, 647 (1993).

466. *See supra* Part III.B.2.b.

467. *See, e.g.*, S. REP. NO. 97-417, at 149–50, 183 (1982) (Subcomm. Rep.); *Senate Hearings*, *supra* note 181, at 231 (statement of Walter Berns).

468. Will, *supra* note 14; *see also Senate Hearings*, *supra* note 181, at 231 (statement of Walter Berns) (raising this complaint in 1982); S. REP. NO. 97-417, at 149–50 (Subcomm. Rep.) (same).

said about the undeniable desegregative trends in housing.[469] The upshot: Persistent, localized polarization, coupled with persistent, localized racially identifiable housing, seems all the more likely to genuinely reflect areas where section 2's remedy may be warranted.

Indeed, this discussion offers reason to embrace the strongest version of the self-liquidation claim. Section 2 connects minority-group representatives with majority-group partners in the legislature and exposes majority-group voters to representation by a minority-group member.[470] That the sky doesn't fall under such circumstances may in itself help eradicate the attitudes—rooted in past discrimination—that sometimes undergird racially polarized voting.[471] Section 2 thus may well accelerate its own abnegation. Synthesizing substantial empirical work in 2012, Professor Christopher S. Elmendorf concluded that "the election of out-group candidates tends to *reduce* biased voting by members of the in-group and to diminish negative stereotyping of the out-group, so long as the out-group officeholders have incentives to respond to in-group concerns."[472] On similar lines, a recent survey-based study concluded that, between 1988 and 2023, White voters became more likely to support Black candidates who faced White opponents, with the findings most significant for White Democrats.[473]

Put otherwise, one may reasonably think that when section 2 stops intentional discrimination's effects from distorting elections, it breaks a vicious cycle and helps begin a virtuous one. Further research is needed before an unqualified embrace of this causal claim, but the evidence certainly provides no reason to stop section 2 from doing its work. Indeed, evidence cutting the other way is the steady post-1982 decline in both the number of section 2 claims brought and the number of successes.[474]

In sum, contra early critiques of *Gingles* as anti-integrationist,[475] it has aligned the statute with Part II's assertion that section 2 is a fundamentally integrationist statute.[476] Once states adequately integrate their populations residentially and politically, section 2 becomes quiescent. In Professor Ellen D. Katz's terms, section 2 rejects "normalization" and welcomes "adaptation."[477]

---

469. *Contra* S. REP. NO. 97-417, at 150 (Subcomm. Rep.) (claiming that section 2 would encourage racial minorities to seek segregated neighborhoods).

470. *See* Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success*, 89 MICH. L. REV. 1077, 1114–17 (1991).

471. *See, e.g.*, Karlan & Levinson, *supra* note 105, at 1229.

472. *See* Elmendorf, *Making Sense of Section 2*, *supra* note 30, at 397–98 & nn.97–101; *see also* Grofman & Handley, *supra* note 34, at 403 n.221.

473. Anna Caroline Mikkelborg, *White Democrats' Growing Support for Black Politicians in the Era of the "Great Awokening"*, 119 AM. POL. SCI. REV. 1902, 1911–12 (2025).

474. *See* ELLEN D. KATZ, BRIAN REMLINGER, ANDREW DZIEDZIC, BROOKE SIMONE & JORDAN SCHULER, UNIV. MICH. L. SCH. VOTING RTS. INITIATIVE, TO PARTICIPATE AND ELECT: SECTION 2 OF THE VOTING RIGHTS ACT AT 40, at 5 (2022), https://voting.law.umich.edu/wp-content/uploads/2022/02/VRI-Findings-and-Appendix.pdf [https://perma.cc/8PLV-AX7N].

475. *See* Issacharoff, *Polarized Voting*, *supra* note 118, at 1852 n.94 (highlighting critiques of *Gingles* 1).

476. *See supra* notes 308–12.

477. *See* Katz, *supra* note 312, at 362, 372.

I do not claim that the Court has taken this path fully consciously or that every statutory gloss marches in this direction. Doctrine has many goals. Nevertheless, the immanent order here is real.

C. Dissoluble Conflict

Rightly understood, section 2 lives amicably with colorblind constitutionalism.

First, most of section 2's applications do not plausibly require any classifications of individuals.[478] As this Article explains, the statute's command to neither deny nor abridge the vote on account of race is a command to avoid giving present-day electoral force to the effects of past or present intentional discrimination.[479] By prohibiting the disparate treatment that flows from flouting that command, section 2 simply requires states to avoid *creating* a classification through the operation of a facially neutral aggregation device.

Nor need remedies raise classification problems. When remedies are at issue, colorblindness concerns generally target "race-based redistricting."[480] Of course, section 2 is remedially agnostic. Nothing in the statute demands a majority-minority district remedy, or indeed a districting remedy at all.[481] More fundamentally, no racial classification inheres in section-2-required correction of disparate treatment. The oft-criticized *Shaw* distinction between awareness and predominance perceived this point. Decisionmakers' mere awareness of race does not necessarily classify persons,[482] and awareness in that sense pervades all districting.[483] Only deviant prioritization of race transforms the workaday grouping of persons that characterizes every facially neutral districting scheme into one risking illegitimate classifications.[484] But *deviant* prioritization is not inherent in correcting section 2 violations. There is nothing constitutionally deviant about guarding against intentional discrimination's present-day effects. Thus, even the cases in which section 2 requires some action from states usually should not demand special justification or raise the concern that a classificatory remedy be limited in time.

---

478. *See supra* notes 42–48 and accompanying text; *see also SFFA*, 143 S. Ct. 2141, 2225 (2023) (Kavanaugh, J., concurring) (observing that governments may "act to undo the effects of past discrimination in many permissible ways that do not involve classification by race" (quoting Richmond v. J. A. Croson Co., 488 U.S. 469, 526 (1989) (Scalia, J., concurring in the judgment))).

479. *See supra* Part II.B.3.

480. Allen v. Milligan, 143 S. Ct. 1487, 1519 (2023) (Kavanaugh, J., concurring); *id.* at 1519–20, 1540 (Thomas, J., dissenting).

481. *See supra* notes 339–41 and accompanying text; Singleton v. Allen, 782 F. Supp. 3d 1092, 1112 (N.D. Ala. 2025) (explaining that a section 2 remedy need not include an additional majority-minority district); Mulroy, *supra* note 9, at 742–44 (discussing judicial recognition of "nondistrict remedies"); Katz, *supra* note 312, at 382–85.

482. *See supra* notes 42–48, 56; *cf.* United States v. Skrmetti, 145 S. Ct. 1816, 1829 (2025).

483. *See* Bethune-Hill v. Va. State Bd. of Elections, 137 S. Ct. 788, 797 (2017) (citing Shaw v. Reno, 509 U.S. 630, 646 (1993)).

484. *See id.* at 797–98; *Shaw*, 509 U.S. at 643–47.

SFFA's vision of classification is not to the contrary. Consider the permissibility of "considering an applicant's discussion of how race affected his or her life."[485] That permission makes sense if classification occurs when rules disparately deploy protected statuses to distribute benefits or burdens. The caveat is probably best read as deeming such individualized consideration not a classification at all.[486] Awareness of race within genuinely individualized considerations that all persons receive does not treat different statuses differently (indeed, it may be the only way to avoid differential negative treatment of persons whom race has affected). Any decision turns on personal experiences, not assumptions about what an individual's group membership entails. Likewise, in simply preventing racialized disparate treatment, the mine-run corrective application of section 2 gives "race qua race" no special weight. It merely cancels out particularized preexisting negative weighting of race.

Section 2 is thus a heartland attempt to "undo the effects of past discrimination" without "classification by race."[487] But put aside this threshold question. Even if one thought far more applications of section 2 racially classify than argued above, section 2 remains viable. All section 2's applications—classifications or not—pass a gauntlet rendering them uniquely compatible with colorblindness.

To see how, start with the remedial justification described in Part I.A. If precisely identified, harms intentionally inflicted on account of race remain remediable.[488] And no case has taken the extreme view that "any race-related objective" prima facie invalidates a policy.[489] The taboo is invocation of generalized past discrimination. As implemented via *Gingles*, section 2's disparate-treatment design avoids that peril. Based on present particularized facts and individual harms, it draws particularized, rebuttable, inferences about past or present intentional discrimination's continued distortion of electoral environments. That carries it far from the forbidden original-sin assumption.

The concerns animating this area only bolster an appeal to the remedial justification. As against reliance on "race qua race,"[490] section 2's core value rejects proportionality and addresses whether discrimination-rooted racial politics determine electoral outcomes. Rather than rest on assumptions about race or discrimination's permanence, section 2, via *Gingles*, demands hard proof of intentional discrimination's persistent effects on identifiable voters seeking to aggregate their votes on par with others.[491] And it lets states rebut

485. *SFFA*, 143 S. Ct. 2141, 2176 (2023).

486. *See supra* note 56 and accompanying text.

487. *SFFA*, 143 S. Ct. at 2225 (Kavanaugh, J., concurring) (quoting City of Richmond v. J. A. Croson Co., 488 U.S. 469, 526 (1989) (Scalia, J., concurring in the judgment)).

488. *See supra* notes 53–64 and accompanying text.

489. Starr, *supra* note 57, at 164–65 (describing this view).

490. *SFFA*, 143 S. Ct. at 2170.

491. *See LULAC*, 548 U.S. 399, 500–01 (2006) (Roberts, C.J., concurring in part, concurring in the judgment in part, and dissenting in part).

the inference of such effects with competent evidence.[492] Far from injecting race into politics, section 2 bars rules that hinder voters' aggregative interests along racial lines because of race's *previous* distortive injection.

Two of *SFFA*'s concerns warrant special note here: the zero-sum concern and the temporal concern. Take each in turn.

As to the first, *SFFA* condemned harms to nonculpable persons in a zero-sum admissions game. The aggregation rules that section 2 sometimes disrupts are of course zero-sum in one sense. Everyone wants their preferred candidate to win, and different aggregation devices change the likelihood of that outcome. But the aggregation right is a right to have one's ballot aggregated on equal terms with others, not a right to one's ideal aggregation regime.[493] Section 2 does not burden that right when—to cure racial vote dilution—it moves a majority-race citizen from one aggregation regime that does not dilute that citizen's vote to a different, still-nondilutive system.[494] The playing field section 2 alters is thus singularly not zero-sum. Because of its disparate-treatment design, the statute deprives voters only of that to which they are not legally entitled: electoral advantages flowing from an electoral system distorted by racial politics.

Next, consider *SFFA*'s key temporal emphasis that justifications for racial classifications cannot justify their permanent use.[495] Note first that this is not fairly read as a claim that barring discrimination or remedying its harms has a time limit.[496] It is a claim about how one justifies means. In that regard, the *SFFA* universities disclaimed remedial justifications entirely, emphasizing instead diversity's importance to evergreen societal interests.[497] In that, and in the admission programs' operation, *SFFA* saw a use of race sweeping beyond the inherently limited task of correcting racial wrongs to reifying and normalizing racial classifications. "[N]o end [was] in sight."[498] Not so for section 2's particularized responses to present-day state actions that give force to past wrongs in ways that produce individualized electoral harms. The disparate-treatment paradigm inherently flows toward self-liquidation. *Gingles* keeps section 2 within that channel, and the facts on the ground offer ample reason to buy its self-liquidation in practice, not just theory. In short, *SFFA* sits comfortably with *Milligan*'s reaffirmation of section 2's constitutionality and rejection of an ostensibly colorblind interpretation of its scope.[499] Skepticism of mechanisms built to satisfy *Grutter v. Bollinger*[500] requires no skepticism of section 2.

---

492. Johnson v. De Grandy, 512 U.S. 997, 1011–12 & n.10 (1994).
493. *See supra* notes 118–21 and accompanying text.
494. *See supra* notes 118–21 and accompanying text; Issacharoff, *Polarized Voting*, *supra* note 118, at 1879–80; *accord De Grandy*, 512 U.S. at 1020.
495. *See supra* notes 11–13 and accompanying text.
496. *See supra* note 63 and accompanying text; *see* U.S. CONST. amend. XV.
497. *See SFFA*, 143 S. Ct. 2141, 2174 n.8 (2023).
498. *Id.* at 2166.
499. *See supra* notes 451–62.
500. 539 U.S. 306 (2003).

Indeed, one obvious comparator, *Shelby County v. Holder*,[501] underscores this point. Of course, the preclearance formula it invalidated "singled out" states, unlike section 2.[502] Still, *Shelby County* prefigured *SFFA*'s temporal laments in its complaints that, despite improved conditions, Congress not only reauthorized preclearance "as if nothing had changed"[503] but had *increased* its burden.[504] But while the initial conditions prompting the extraordinary preclearance remedy have dissipated,[505] that is far less clearly true of the conditions prompting section 2's milder remedy of barring mechanisms that racially dilute votes because of discrimination's effects. Moreover, by design and in practice, that milder remedy self-liquidates in a way that preclearance could not. Unlike the difficult-to-achieve affirmative judicial intervention prerequisite to earning particularized release from preclearance,[506] section 2's dictates lessen when its justifying conditions dissolve.

In sum, both facially and in the vast majority of its applications, the disparate-treatment frame means that section 2 satisfies the strictest scrutiny.[507] No one doubts the compelling need to make whole individuals harmed by intentional racial discrimination. The tricky part is demonstrating that harm and pursuing it in an appropriately tailored way. Section 2's self-liquidating character is up to the task. It triggers only when individuals are harmed *today* on account of race in particularized, empirically demonstrable ways. And the corrections it demands are peculiarly non-zero-sum. If properly calibrated, such appeals to "rid[ding] the electoral process of racial discrimination" retain force.[508]

Section 2 may be unique. But its uniqueness goes to the nature of how the individual's interest in combining a single vote with others may be burdened: when discrimination-deformed political systems corrupt the outputs of otherwise neutral electoral devices. This is no untethered assault on societal discrimination or "underrepresentation." Indeed, once one understands what makes voting different, the harm section 2 attacks is materially indistinguishable from what Title VII's disparate-treatment provisions

501. 570 U.S. 529 (2013).

502. *Id.* at 553; *see also id.* at 557 (referencing section 2 as unaffected by the decision).

503. *Id.* at 549.

504. *Compare SFFA*, 143 S. Ct. at 2166 ("[N]o end is in sight."), *with Shelby County*, 570 U.S. at 549, 553–54.

505. The *Shelby County* dissent disputed not the changes but rather who should decide (and how) whether the changes required terminating preclearance. 570 U.S. at 559 (Ginsburg, J., dissenting).

506. *See* Travis Crum, Note, *The Voting Rights Act's Secret Weapon: Pocket Trigger Litigation and Dynamic Preclearance*, 119 YALE L.J. 1992, 2027 (2010) (describing the so-called "bailout" process); Katz, *supra* note 312, at 360–62 & nn.49–51 (describing the difficulty of bailing out and relative dearth of successes); Persily, *supra* note 383, at 212 (same).

507. I do not suggest that every section 2 suit should succeed or that all as-applied challenges should fail.

508. *Cf.* Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *The Voting Rights Act in Winter: The Death of a Superstatute*, 100 IOWA L. REV. 1389, 1432, 1436–39 (2015) (expressing some skepticism in this regard).

attack. It is no less colorblind than the Reconstruction Amendments; it is hard to imagine a more appropriate way to enforce them.

IV. LESSONS AND ENTAILMENTS

In closing, the Article addresses the implications of the disparate-treatment model for other section 2 issues.

A. Baselines

Section 2 discourse often implicates the need for some baseline or benchmark for measuring dilution.[509] Most agree that the concept of dilution implies some "undiluted" benchmark.[510] While section 2 skeptics generally concede that dilution is contextual,[511] they sometimes charge section 2 with demanding a colorblindness-antithetical benchmark (e.g., racial proportionality).[512] Or, relatedly, they say that even if an acceptable benchmark could exist, its practical implementation has rested on values anathema to colorblindness.[513]

It is sometimes easier to know that a benchmark flouts section 2, as Alabama's "race-neutral" benchmark in *Milligan* did, than to affirmatively identify an acceptable one. Although *Milligan* lacked an explicit positive account, in rejecting Alabama's race-neutral benchmark it did say that "[d]eviation from" *Gingles* 1 illustrative maps "shows it is *possible* that the State's map" violates section 2.[514] This Article fleshes out the answer embedded in that statement.

In section 2's idealized vision of politics, individuals may, on par with others in the jurisdiction, use their single votes to build aggregative coalitions.[515] Yet section 2 simultaneously recognizes that intentional discrimination's effects may distort that ideal situation. In implementing that design, *Gingles* itself provides the baseline. An illustrative map presents a possible alternative world, which (because it requires a geographically and culturally compact minority) itself offers reason to infer discrimination's persistent effects. Coupled with that map, the remainder of *Gingles* justifies treating that possible world's nonexistence as a negative baseline: an Archimedean point that reveals that the actual political world has been distorted by race's prior injection.

My claim is not that the illustrative map would exist but for race's past distortive injection. In a counterfactual world, the group might well have

509. *See, e.g.*, Reno v. Bossier Par. Sch. Bd., 520 U.S. 471, 480 (1997); Allen v. Milligan, 143 S. Ct. 1487, 1522–23 (2023) (Thomas, J., dissenting).

510. Issacharoff, *Polarized Voting*, *supra* note 118, at 1850; Karlan, *Maps & Misreadings*, *supra* note 148, at 176.

511. *See, e.g.*, *Milligan*, 143 S. Ct. at 1523 (Thomas, J., dissenting).

512. *See, e.g.*, S. REP. NO. 97-417, at 109, 111 (1982) (Subcomm. Rep.).

513. *See Milligan*, 143 S. Ct. at 1523, 1540 (Thomas, J., dissenting).

514. *Id.* at 1507 (majority opinion).

515. *See supra* notes 158–84 and accompanying text; *see also* Johnson v. De Grandy, 512 U.S. 997, 1020 (1994).

been fully integrated, physically and politically. Rather, the full *Gingles* paradigm shows *departure* from section 2's baseline, that is, circumstances in which all voters—irrespective of race—can equally with others "pull, haul, and trade to find common political ground."[516] Failure to satisfy *Gingles* 1 offers some reason to doubt that discrimination still distorts aggregative opportunities. Its satisfaction cuts the other way, indicating that complained-of electoral defeats can't be blamed on the neutral application of traditional districting principles. When satisfied, *Gingles* 2 and 3 offer further reason to believe that discrimination's outcome-determinative effects explain the gap between potential and reality.

Any further demand, such as a single a priori baseline to define the section-2-required world, misses section 2's point. Innumerable nondilutive ways to structure a political system exist, containing myriad gradations of power for identifiable groups. Section 2 does not require picking a winner among those possible structures; it merely requires some way to know that none of them are reality.[517] Worse than quixotic, a demand for an a priori baseline would be perverse. Section 2 can self-liquidate precisely because its measure for violation—its baseline—is context-sensitive. Frameworks that reject situation-specific contexts are the ones that risk falling into blind assumptions about race.

Any claim that section 2's only coherent account of how much power a group should have rests on race-based proportionality is thus quite wrong. Section 2's answer to the "how much" question is that a group's constituent members "should" have the power to seek and build potential coalitions they would have absent unremedied race-based wrongs. *Gingles* helps show that they lack that power, not that the group lacks proportionality. And the harms it detects link to past or present discrimination, not proportionality's absence. Thus, this Article's account offers a positive alternative to the claim that section 2's real baseline is proportionality, either per se or against a backdrop of polarized voting.[518]

B. Internal Limitations

As compared to the "external" limits potentially imposed on section 2 by a colorblind Equal Protection Clause, I have said less about so-called internal limits, i.e., limits inherent to the idea of "appropriate" legislation.[519] External and internal limits are not hermetically separated (it would be "inappropriate" to command states to pass bills of attainder), but they are not doctrinally

516. *De Grandy*, 512 U.S. at 1020.

517. Consistent with this view of illustrative maps as heuristics, not entitlements, states need not pick any of the illustrative maps to cure a violation. *See* Singleton v. Allen, 782 F. Supp. 3d 1092, 1162 (N.D. Ala. 2025). Indeed, nothing in the concept of curing the violation conceptually requires majority-minority districts. *See supra* note 481 and accompanying text; *infra* note 557 and accompanying text.

518. *Compare* Gerken, *supra* note 113, at 1689, *with Milligan*, 143 S. Ct. at 1536–37 (Thomas, J., dissenting).

519. *See supra* note 301 and accompanying text (distinguishing external and internal limits).

coextensive. In theory, section 2 might be inappropriate legislation without violating an independent constitutional provision.

As noted, the Senate and House committee reports invoked the Fourteenth and Fifteenth Amendment enforcement powers.[520] *Milligan* confirmed that the Fifteenth Amendment sufficiently grounds section 2.[521] *Milligan* also confirmed that Fifteenth Amendment "appropriateness" remains rooted in *McCulloch v. Maryland*,[522] rather than the stricter Fourteenth Amendment standard rooted in *City of Boerne v. Flores*.[523] As explained, section 2 targets past and present discrimination's effectuation of present-day denials of the right to vote on par with others. A statute so designed satisfies either standard's demand for an adequate connection to what courts deem the Constitution to independently prohibit.[524] After all, it focuses on discriminatory intent and effect, which the Court places at the heart of the Equal Protection Clause and Fifteenth Amendment.[525]

Rogers v. Lodge,[526] the Court's latest Fourteenth Amendment vote-dilution case, is something of a proof case. After embracing the *Bolden* plurality's intent rule,[527] *Rogers* tracked the approach that section 2 codified seamlessly.[528] Although no equivalent elaboration of the Fifteenth Amendment intent rule as applied to vote dilution exists,[529] it seems fair to assume that it at least reaches what the Fourteenth Amendment reaches. Under *Boerne*, and certainly *McCulloch*, one should not lightly hold a statute aimed at what judicial doctrine targets—and so aimed for the same ultimate reason—to go too far beyond the constitutional prohibition that it enforces. Differently situated institutions might choose different means for attacking

---

520. *See* S. REP. NO. 97-417, at 40–43 (1982); H.R. REP. NO. 97-227, at 31 (1981). Only one competent source of power is necessary; indeed, Congress need not explicitly invoke a source to sustain a statute on that ground. *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 570 (2012).

521. *Milligan*, 143 S. Ct. at 1516. I largely bracket section 2's language-minority protections. *See supra* note 244.

522. 17 U.S. (4 Wheat.) 316 (1819); *see Milligan*, 143 S. Ct. at 1516–17 (referencing *City of Rome v. United States*, which relied on *McCulloch*).

523. 521 U.S. 507 (1997); *see, e.g.*, Travis Crum, *The Unabridged Fifteenth Amendment*, 133 YALE L.J. 1039, 1127 nn.544–45 (2024). While justifying the different standards is beyond this Article's scope, others have offered justifications. *See id.* If one wished to eliminate the disjuncture, the conventional tools of constitutional interpretation seem to point to *McCulloch* as the appropriate standard. *See* McConnell, *supra* note 298, at 186–88.

524. *See supra* Part II.B.

525. *See supra* Part II.B; *cf.* Murray, *Discriminatory Effect(s)*, *supra* note 248 (manuscript at 7–9).

526. 458 U.S. 613 (1982).

527. *See id.* at 615, 618–19, 620, 622, 627.

528. *See id.* at 623–26. If *Rogers* plainly framed itself as following the *Bolden* plurality's formal rule, in holding the rule satisfied, it just as plainly emphasized the factors driving the pre-*Bolden* cases. That was fair play. The *Bolden* plurality claimed to have merely followed those cases. *See* City of Mobile v. Bolden, 446 U.S. 55, 69–70 (1980) (plurality opinion).

529. This may be because it was not until *Milligan*'s invocation of the Fifteenth Amendment to ground section 2's constitutionality that the Court endorsed the Amendment's applicability to vote dilution in at least some senses. Allen v. Milligan, 143 S. Ct. 1487, 1516–17 (2023); *cf.* Voinovich v. Quilter, 507 U.S. 146, 158–59 (1993) (treating the Fifteenth Amendment's relationship to vote dilution as an open question).

disparate treatment. But section 2 calls into question none of the Court's substantive views about the underlying prohibitions. Indeed, it merely aims to eradicate harms that the Court has recognized.[530]

If more were needed on the "appropriateness" front, the permissibility of prophylaxis provides it.[531] Assume arguendo a case where *Gingles*-based signs of intentional discrimination's persistence do not "really" reflect present-day electoral distortion and in which the defense is somehow unable to rebut the inference generated by *Gingles*'s satisfaction. Note first that this scenario is implausible under Part III.B's account of self-liquidation. A suit that surmounts *Gingles* and any state rebuttal attempts is best viewed as genuinely responding to electoral distortions flowing from intentional discrimination's present-day effects. Prophylaxis is seldom needed. In any event, congressional power to enforce the bar against intentional discrimination at least includes the power to establish general rules capturing the exceptional situation that bears all the marks of discrimination-distorted politics but does not "really" fit that bill. The enforcement power embraces "authority both to remedy and deter violation of rights" by "prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text"; Congress may ban "facially constitutional conduct, in order to prevent and deter unconstitutional conduct."[532]

C. Race, Party, and Causation

This Article also bears on the causation question that fractured the *Gingles* Court and has bedeviled the lower federal courts.[533] In this Article's view, racially identifiable voting patterns—in the sense of correlation, not causation—are prima facie evidence of legally significant racially polarized voting. Those patterns, married with other evidence of discrimination's continued effects, can show that race continues to matter in a way that risks present-day disparate treatment.

Still, consistent with the line the pre-*Bolden* cases drew and the Senate Report's key "racial politics" discussion,[534] this Article suggests that the reasons for voting behavior and associated electoral losses matter. The "question is not whether black and white voters show distinct preferences at some level of statistical significance," but whether those distinct preferences

530. *See, e.g.*, City of Boerne v. Flores, 521 U.S. 507, 529 (1997) (relying on the principle that Congress may not "decree the substance of" a constitutional guarantee).

531. *See, e.g.*, *id.* at 518 (explaining that, even under the *Boerne* standard, Congress still can prophylactically ban some things that courts would not hold invalid); *see also Milligan*, 143 S. Ct. at 1516 (same point for the Fifteenth Amendment).

532. Nev. Dep't of Hum. Res. v. Hibbs, 538 U.S. 721, 727 (2003) (describing congressional power to enforce the Fourteenth Amendment); *see also Milligan*, 143 S. Ct. at 1516 (elaborating the same point under the Fifteenth Amendment's more-forgiving standard).

533. *See supra* notes 411–13; Elmendorf & Spencer, *supra* note 30, at 2165 & n.106.

534. *See supra* Part II.B.

indicate a denial of equal opportunity.[535] Of course, this Article has explained that those preferences might be effects of intentional discrimination that deny equal opportunity if given force by an electoral device. But one cannot *conclusively* presume such effects from distinct voting patterns. That would undermine the assumption embedded in section 2's text and context that not all racially identifiable electoral behavior is "racial politics."[536]

Caution is needed here. Justice Brennan was correct that there are *wrong* ways to operationalize these points.[537] Race and party often correlate.[538] Some would either implicitly or explicitly have plaintiffs "negate partisan politics as a causal factor" to demonstrate the requisite causation.[539] Such an approach would not only mean that the state almost always wins,[540] but would also imply that there has almost never been actionably polarized voting and that purely partisan mapmaking motives are a safe harbor. That would undermine section 2's careful correction of *Bolden*.[541] If we know anything about section 2's design, it is that pure-hearted enactment is not enough. And if any Congress knows anything, it knows that party always matters in politics. Party's relevance is compatible with a robust vote-dilution regime; that, at least, was the view of the pre-*Bolden* cases and the statute that incorporated them. Treating race and party as mutually exclusive causal explanations ignores that American politics has long been defined by partisan competition for group support, and that groups often deem one major party to better represent their interests.[542]

Without attempting definitive resolution, a few guideposts are possible.

First, *Whitcomb* and *Regester* recognized that party and race might correlate, yet still distinguished losses better attributed to party from losses embodying unlawful vote dilution.[543] Section 2's interest in whether the losses are "on account of race" is faithful to that history.[544] Nonetheless, the truism that partisanship matters does not, without more, show that voters have received the equal opportunity to which section 2 entitles them. That is because race may explain party's role. If so, voters may still be denied equal opportunity "on account of race."

The crisper view is that the task is not "disentangling" race from party but asking whether a political environment has been so tainted that partisan

535. Issacharoff, *Section 5 of the Voting Rights Act*, *supra* note 355, at 1726 (deeming this view more faithful to *Gingles*'s interest in "legally significant polarized voting").

536. *See supra* Part II.B; S. REP. NO. 97-417, at 33–34 (1982).

537. *See* Thornburg v. Gingles, 478 U.S. 30, 64–74 (1986) (plurality opinion).

538. *See* Richard L. Hasen, *Race or Party, Race as Party, or Party All the Time: Three Uneasy Approaches to Conjoined Polarization in Redistricting and Voting Cases*, 59 WM. & MARY L. REV. 1837, 1839–41, 1863 (2018).

539. Karlan & Levinson, *supra* note 105, at 1223–24 (criticizing one such approach).

540. *See id.* at 1224.

541. *Cf. id.* at 1223–24 (criticizing one approach on these grounds).

542. *See, e.g.*, ACHEN & BARTELS, *supra* note 415, at 235–58; KEYSSAR, *supra* note 415, at 32–34, 172, 196, 200, 209–13.

543. *See, e.g.*, Whitcomb v. Chavis, 403 U.S. 124, 152–55 (1971).

544. 52 U.S.C. § 10301(a).

effects are downstream of race. As the pre-*Bolden* cases recognized, the legal conclusion of racial vote dilution must rest on something beyond normal politics. But this does not demand some metaphysical "disentanglement" of two (perhaps inextricably intertwined) concepts. Rather, the question is whether politics are sufficiently racialized to justify the fundamentally legal inference that what might contextually seem to be mere politics should be attributed to past or present discrimination.

Second, *Gingles* responds to this need by offering prima facie reasons to think partisanship is downstream of racialized electoral distortion. Agonistic, racially identifiable voting patterns and racially identifiable housing are suggestive of past or present intentional discrimination essentially determining politics. Of course, these prima facie reasons are not and should not be sufficient for liability.[545]

That dynamic supports letting states offer evidence at the totality-of-the-circumstances stage that plaintiffs' aggregative disappointments are *not* on account of race, just as with evidence of proportionality.[546] Formalizing that point doctrinally would key on the core value of preventing past or present intentional discrimination's effects from distorting politics, with an eye to section 2's "intensely local appraisal" and *De Grandy*'s insistence on "comprehensive" totality-of-the-circumstances analyses.[547] And it would be proper to calibrate additional ways for states to proffer competent evidence of this sort. For example, jurists might develop Professor Elmendorf's proposal to examine "survey-based evidence of political preferences."[548]

Third, recognizing the above is not just meaningful but precedented. Most courts of appeals have concluded that reasons matter, albeit with some disagreements on where and how.[549] Justices attentive to self-liquidation

545. *See* KATZ ET AL., *supra* note 474, at 10–12 (noting that plaintiffs who satisfy *Gingles* have usually, but not always, won). A quantitative floor above 50 percent for legally significant political cohesion might better align *Gingles* with the ultimate question, although I bracket where precisely that level might be set. *See, e.g.*, Old Person v. Cooney, 230 F.3d 1113, 1122 (9th Cir. 2000) (assuming arguendo that *Gingles* 3 required "white bloc voting" reflecting 60 percent or more cohesion).

546. *See* Johnson v. De Grandy, 512 U.S. 997, 1011–12, 1012 n.10 (1994).

547. *See supra* notes 449–50 and accompanying text.

548. Elmendorf, Quinn & Abrajano, *supra* note 90, at 676.

549. *See* Tokaji, *supra* note 30, at 548; Elmendorf & Spencer, *supra* note 30, at 2165 n.106. In fact, pre-*Bolden*, the U.S. Court of Appeals for the Fifth Circuit read something like this in *Regester*. *See* Cross v. Baxter, 604 F.2d 875, 881–82 (5th Cir. 1979) (requiring, upon plaintiffs' showing that "past discrimination has present effects," defendants to "come forward with rebutting evidence proving" that the complained-of electoral results "are not an effect of the past"). Saying that causation informs whether defendants can rebut the inferences that *Gingles* generates need not contradict the *Gingles* plurality's insistence that "[p]laintiffs 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." Thornburg v. Gingles, 478 U.S. 30, 74 (1986). That point arguably addressed only racial bloc voting itself (i.e., what it takes to satisfy *Gingles* 2 and 3), a place where I agree inquiry into causation is inappropriate. My difference (if any) is that I think the reasons for the complained-of losses at least matter at the totality-of-the-circumstances stage. If that is indeed a difference, I note (again) that most courts of appeals have also embraced my view or something analogous.

might properly confirm the correctness of that lower-court trend, leaving future discursive steps for lower courts and scholars.

D. Future Evolutions

This Article suggests that major doctrinal surgery is unneeded. Section 2 is pegged to the effects of past and present intentional discrimination, and the *Gingles* regime is designed (and operates) to implement that design. For example, we need not quest for an a priori race-blind benchmark or reimagine *Shaw*'s awareness-predominance line. Still, this account can offer a framework for considering whether new rules implement the ultimate aims of section 2 consistent with its design. The points suggested here warrant exploration in future work.

First, space limitations preclude extensive application of this Article to section 2 vote-denial cases. That said, *Brnovich v. Democratic National Committee*'s[550] treatment of practices common in 1982 as presumptively valid[551] seems disconnected from a statute designed to prevent past discrimination's effects from corrupting present-day politics.

Second, recognizing *Gingles* 1 as a heuristic must concede the risk of false negatives. Jurists persuaded that it produces too many false negatives might eliminate *Gingles* 1, as some state section 2 analogs have.[552]

Third, consider alternative voting mechanisms. Section 2 targets discrimination-corrupted electoral mechanisms, but not all devices are equally vulnerable. Under cumulative-voting approaches, multimember districting schemes give each "voter the option either to cast one vote for each position to be filled or to cumulate her votes in support of the candidate she most intensely prefers."[553] This permits numerical minorities to concentrate their strength in a way that, under plausible conditions, ensures their members elect preferred candidates, even with no support from the majority.[554] The practical upshot neuters racially polarized voting and creates incentives for jurisdiction-wide coalition building that may help dissipate the conditions that sustain such polarization.[555] As with extant

---

Moreover, it seems that there were five votes for that view in *Gingles* itself. Justice O'Connor's four-justice concurrence in the judgment embraced it. *See id.* at 100 (O'Connor, J., concurring in the judgment). The main point of Justice White's somewhat-opaque concurrence was that section 2's office as a "hedg[e] against racial discrimination" required caring about candidate race in polarized-voting analyses. *Id.* at 83 (White, J., concurring). That seems to be the sort of thing that one would care about if one cared about why plaintiffs were losing elections.

550. 141 S. Ct. 2321 (2021).

551. *Id.* at 2338–39.

552. *See* Ruth M. Greenwood & Nicholas O. Stephanopoulos, *Voting Rights Federalism*, 73 EMORY L.J. 299, 310 (2023). This course would have to be balanced against the risk posed by abandoning this intentional-discrimination-linked limit on section 2.

553. Richard Briffault, *Lani Guinier and the Dilemmas of American Democracy*, 95 COLUM. L. REV. 418, 432 (1995) (reviewing LANI GUINIER, THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY (1994)).

554. *See id.*

555. *See* GUINIER, *supra* note 553, at 16.

majority-minority districts, jurisdictions might point to cumulative-voting procedures as indicia of equal openness at the totality-of-the-circumstances stage.[556] Or courts might impose them as a remedy. Helpfully, a benefit that cumulative voting shares with many other alternative voting mechanisms is its formal race neutrality.[557]

CONCLUSION

Section 2 is too important to evade colorblind constitutionalism's gaze. Fortunately, it need not. Once colorblindness's core commitments are articulated, section 2's core design understood, and the statute's implementation appreciated, colorblindness can take the statute on board. Some legal conflicts are inevitable. This one, however, is simply false.

556. *Cf.* Bartlett v. Strickland, 556 U.S. 1, 23–24 (2009) (plurality opinion) (discussing majority-minority districts as defenses).

557. *See, e.g.*, Gerken, *supra* note 113, at 1711 n.198 (comparing alternative-voting mechanisms to majority-minority districts); Katz, *supra* note 312, at 384 (same).