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# The Perrymander, Polarization, and *Peyote v.* Section 2 of the Voting Rights Act

Rosemarie Unite

*J.D. 2014, Loyola Law School, Los Angeles*

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# THE PERRYMANDER, POLARIZATION, AND PEYOTE v. SECTION 2 OF THE VOTING RIGHTS ACT

*Rosemarie Unite\**

*The Voting Rights Act of 1965 accomplished what the Fifteenth Amendment alone could not: safeguarding minority voting rights. One of the Act's key enforcement provisions, Section 2, has helped protect not only minorities' access to the polls but also their right to an undiluted vote against potentially discriminatory means such as legislative redistricting. By prohibiting minority vote dilution even when a legislative redistricting plan is drawn strictly for political gain, Section 2 has also become one of the only checks on partisan gerrymandering. Yet a certain confluence of circumstances puts Section 2 at risk of being either struck down by the Supreme Court as unconstitutional, or eviscerated, leaving the narrower interpretation of Section 2 that Chief Justice Roberts advocated when he worked at the Justice Department. These circumstances—the polarization of Congress, the ideological disposition of the Supreme Court, and the changing composition of the electorate—threaten to squelch the minority vote just as it amasses the potential to swing presidential elections and, thus, the futures of the political parties.*

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\* J.D. 2014, Loyola Law School, Los Angeles; B.A., Rice University. Thanks to Professors Jessica Levinson and Justin Levitt for their help navigating the upheaval in Voting Rights Act jurisprudence in the midst and wake of an election year. Thanks also to Professors Richard Hasen and Spencer Overton for granting me early access to their work. Thank you to Professors Allan Ides and Aimee Dudovitz for their insight into gray areas of the law, and to Professor Susan Bakhshian for her excellent writing instruction. I am especially grateful to Robert Shepard and Cameron Bell for their literary expertise and invaluable feedback, and to Leah Johannesson for her painstaking efforts and patience. Special thanks go to Sean Hanle, Daniel Straw, Diana Sfrjian, Jessica Mead, and their staffs for all of their hard work. My apologies go to Michael Driscoll, Zack Muljat, Scott Klausner, Brett Safford, Diana De Leon, and Marleina Paz for the logistics required to publish an article with the shelf life of an average campaign promise. Thank you to Anselmo & Rosario Unite, Andrew Smith, and Josefina Smith for everything else.

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“[T]he State took away the Latinos’ opportunity because Latinos were about to exercise it.”

—Justice Kennedy, *League of United Latin American Citizens v. Perry*<sup>1</sup>

## I. INTRODUCTION

In 2003, a partisan gerrymander in Texas, orchestrated by then-House Majority Leader Tom DeLay, infamously prompted busloads of Texas legislators to break quorum and flee the state—a failed attempt to prevent the gerrymander’s enactment.<sup>2</sup> Although the Supreme Court in *League of United Latin American Citizens v. Perry* (*LULAC*) refused to strike down the redistricting plan<sup>3</sup> as an unconstitutional partisan gerrymander<sup>4</sup>—a claim that has never succeeded in the Supreme Court<sup>5</sup>—the Court held that the plan violated Section 2 (“Section 2”) of the Voting Rights Act (VRA) by diluting the voting strength of Latinos in one district.<sup>6</sup> In Texas’s Twenty-Third Congressional District (“District 23”), the growing Latino community had given its incumbent Republican representative less support with each successive election, so the Republican-controlled Texas legislature drew districts to protect his seat.<sup>7</sup> As Justice Kennedy put it, “[T]he State took away the Latinos’ opportunity [to vote] because Latinos were about to exercise it.”<sup>8</sup> Nevertheless, DeLay’s brazen<sup>9</sup> partisan gerrymandering

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1. 548 U.S. 399, 440 (2006).

2. The Texas House and Senate members who fled staged two separate walkouts, each when DeLay’s redistricting plan reached the floor for a vote. STEVE BICKERSTAFF, *LINES IN THE SAND: CONGRESSIONAL REDISTRICTING IN TEXAS AND THE DOWNFALL OF TOM DELAY* 1, 141–43, 191–94 (2007); see also Mark Gersh, *Redistricting Journal: Showdown in Texas—Reasons and Implications for the House, and Hispanic Vote*, CBS NEWS (Sept. 21, 2011, 5:45 PM), <http://www.cbsnews.com/news/redistricting-journal-showdown-in-texas-reasons-and-implications-for-the-house-and-hispanic-vote/> (discussing the redistricting battle in Texas).

3. *LULAC*, 548 U.S. at 416–23; BICKERSTAFF, *supra* note 2, at 385–86.

4. *LULAC*, 548 U.S. at 447. Because Texas redistricted in 2003, when the Republican Party won a majority of the Texas Legislature, rather than immediately after the 2000 Census data emerged, the redistricting map was challenged primarily as a partisan gerrymander, drawn for political gain rather than to accommodate population changes in the state. *Id.* at 417.

5. See *Vieth v. Jubelirer*, 541 U.S. 267, 278–79 (2004). The only relief provided for an unconstitutional partisan gerrymander was a preliminary injunction by a lower court. *Id.* at 279.

6. *LULAC*, 548 U.S. at 403, 437, 443, 447.

7. *Id.* at 423–24.

8. *Id.* at 440.

9. Richard L. Hasen, *Looking for Standards (in All the Wrong Places): Partisan Gerrymandering Claims After Vieth*, 3 ELECTION L.J. 626, 626 (2004); see Nicholas Kusnetz,

masterpiece<sup>10</sup> succeeded in entrenching Republican power in both Texas and Congress, and essentially invited partisan gerrymanderers across the country to draw district lines “as partisan as the law allows.”<sup>11</sup>

Though the *LULAC* Court required Texas to redraw District 23 in 2006 to give the Latino community the ability to elect its preferred candidate, the state took away that ability once again only a few years later.<sup>12</sup> In the rash of nationwide redistricting efforts spurred by the 2010 Census and congressional midterm elections, then-Republican Texas Governor Rick Perry orchestrated what has been called the “Perrymander,”<sup>13</sup> a “radical partisan gerrymander”<sup>14</sup> that Texas legislators admitted was even more ambitious than Tom DeLay’s.<sup>15</sup> Like its predecessor, the Perrymander diluted minority-voting rights, but it used far more cunning methods.<sup>16</sup> By redrawing District 23 to maintain a bare majority of Latino voters within its boundaries, the Texas legislature tried to make the district look “functionally identical” to its previous composition as mandated by the *LULAC* Court.<sup>17</sup> In reality, however, the legislature replaced active Latino voters in District 23 with inactive Latino voters, effectively reducing Latino voting power while making it appear to stay the same.<sup>18</sup>

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*Behind Closed Doors: GOP and Dems Alike Cloaked Redistricting in Secrecy*, NBC NEWS (Nov. 1, 2012, 6:35 AM), [http://openchannel.nbcnews.com/\\_news/2012/11/01/14839356-behind-closed-doors-gop-and-dems-alike-cloaked-redistricting-in-secrecy](http://openchannel.nbcnews.com/_news/2012/11/01/14839356-behind-closed-doors-gop-and-dems-alike-cloaked-redistricting-in-secrecy) (describing the “baldly partisan warfare” of Texas’s 2003 redistricting plan and the resulting flight of state legislators).

10. BICKERSTAFF, *supra* note 2, at 384.

11. *Id.* at 84. “Republicans have won all of Texas’s statewide offices since 1994, the longest streak of single-party dominance in the country.” Neil King, Jr., *Deep in the Red of Texas, Republicans Fight the Blues*, WALL ST. J., Apr. 4, 2013, <http://online.wsj.com/article/SB10001424127887324883604578397021579876246.html>.

12. *Texas v. United States*, 887 F. Supp. 2d 133, 154 (D.D.C. 2012).

13. David Wasserman, ‘Perrymander’: Redistricting Map That Rick Perry Signed Has Texas Hispanics up in Arms, NAT’L J. (Aug. 22, 2011, 11:03 PM), <http://www.nationaljournal.com/politics/-perrymander-redistricting-map-that-rick-perry-signed-has-texas-hispanics-up-in-arms-20110819>.

14. *Perez v. Perry*, 835 F. Supp. 2d 209, 217 (W.D. Tex. 2011), *vacated* 132 S. Ct. 934, *remanded* to 891 F. Supp. 2d 808 (W.D. Tex. 2012).

15. Gersh, *supra* note 2.

16. *See Texas v. United States*, 887 F. Supp. 2d at 155–56.

17. *Id.* at 155; *see* Justin Levitt, Professor, Loyola Law Sch., Los Angeles, Remarks at the Voting Rights Act and Redistricting Panel at the George Washington University Law School Symposium: Law and Democracy (Nov. 16, 2012) at 24:35 [hereinafter Levitt Symposium], available at <http://vimeo.com/user9108723/review/55780860/5749aec1a9>.

18. *Texas v. United States*, 887 F. Supp. 2d at 155.

By 2010, however, Texas was a much different state: minority groups collectively made up a majority of the population.<sup>19</sup> In fact, the 2010 census showed not only that the population had grown by over four million new residents—earning the state four additional seats in Congress and thus prompting the redistricting—but also that those new residents were overwhelmingly non-white and 65 percent Latino.<sup>20</sup>

Despite—or because of—this huge minority population growth, the Texas legislature strategically crafted the Perrymander to ensure that minorities would not be able to elect their preferred candidates in any of the state’s four new congressional districts.<sup>21</sup> Though the burgeoning Latino population, in particular, might have translated to increased Latino representation in Congress, once again Texas took away Latinos’ voting power just as they were about to exercise it.<sup>22</sup> If the current Section 2 challenge to the Perrymander<sup>23</sup> proves that

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19. Gersh, *supra* note 2; Ryan Lizza, *The Party Next Time*, NEW YORKER (Nov. 19, 2012), [http://www.newyorker.com/reporting/2012/11/19/121119fa\\_fact\\_lizza](http://www.newyorker.com/reporting/2012/11/19/121119fa_fact_lizza) (citing a 55 percent minority population according to Steve Munisteri, chairman of the Republican Party of Texas).

20. *Texas v. United States*, 887 F. Supp. 2d at 156; *see* Gersh, *supra* note 2.

21. *Texas v. United States*, 887 F. Supp. 2d at 155, 178.

22. *See id.* at 160. Though a minority group’s representation in Congress is not required to be proportional to its population, the Perrymander widened the gap between the minority population and its representation, which led the United States District Court for the District of Columbia to conclude that the redistricting plan diluted minority voting rights. *Id.* at 158–59.

23. Two challenges to the Perrymander were brought under the VRA: a Section 2 challenge in federal district court in San Antonio, *Perez v. Perry*, 835 F. Supp. 2d 209 (W.D. Tex. 2011), *vacated* 132 S. Ct. 934, *remanded to* 891 F. Supp. 2d 808 (W.D. Tex. 2012), and a Section 5 challenge in federal district court in Washington, D.C., *Texas v. United States*, 887 F. Supp. 2d 133 (D.D.C. 2012). *See infra* Part II.A, for more on Section 5 and preclearance. This Article focuses on the Section 2 challenge in the San Antonio court, although the Section 5 action has played an important part in its proceedings.

While awaiting the D.C. court’s decision in the Section 5 case, the San Antonio court stayed the proceedings of the Section 2 challenge in November 2011 and drew interim redistricting maps for Texas to use in the meantime for the 2012 elections. *Perez v. Perry*, 835 F. Supp. 2d 209 (W.D. Tex. 2011), *vacated* 132 S. Ct. 934, *remanded to* 891 F. Supp. 2d 808 (W.D. Tex. 2012). The Supreme Court, however, ordered the San Antonio court to redraw its interim maps to reflect the Perrymander’s original lines, except in those districts that the district court ascertained would have a “reasonable probability” of being denied Section 5 preclearance by the D.C. court. *Perez v. Perry*, 132 S. Ct. 934 (2012) (*per curiam*) (clarifying the legal standard to be used in drawing interim maps awaiting preclearance). Texas then used the redrawn interim maps (the “Revised Perrymander”) in its 2012 elections. *Perez v. Perry*, 2014 WL 2740352, at \*1 (W.D. Tex. June 17, 2014).

On June 23, 2013, the Texas legislature passed maps virtually identical to the Revised Perrymander (the “2013 Perrymander”) for its 2014 elections. Ross Ramsey and Julián Aguilar, *Feds Seek to Restore Voting Law Restrictions on Texas*, TEXAS TRIBUNE, July 25, 2013, <http://www.texastribune.org/2013/07/25/holder-seeks-restore-preclearance-requirement>. Texas

the Texas legislature once again diluted Latino voting rights, the state will have to redraw its maps again to more effectively represent Latino voting preferences, which have leaned fiercely Democratic for at least three decades.<sup>24</sup>

This time, though, more serious consequences are at stake for the Republican Party. If Latinos increase their ability to elect their candidates of choice, Republicans risk losing their grip on power in Texas, a longtime party stronghold.<sup>25</sup> With a Latino population that will form a plurality in the state by 2014 and a majority by 2020,<sup>26</sup> Texas reflects a general transformation of the electorate across the country.<sup>27</sup> If most Latinos continue to prefer voting for Democratic candidates<sup>28</sup> the 50,000 Latinos nationwide who reach voting age

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then moved to dismiss the Section 2 case, arguing that the passage of the 2013 Perrymander rendered the claims moot by replacing the Perrymander, which was the subject of the plaintiffs' complaints. See Chris Tomlinson, *Redistricting Case Could Delay Texas Primaries*, HOUS. CHRON., Aug. 11, 2013, <http://www.chron.com/news/texas/article/Redistricting-case-could-delay-Texas-primaries-4723999.php>.

On September 6, 2013, the San Antonio court ruled that the claims against the Perrymander were not moot, noting that

[t]he fact that the Legislature has adopted the Court's interim plans in an attempt to curb this particular litigation is no assurance that it will not engage in the same conduct in the next legislative session or any session thereafter. Thus, a dispute remains over the challenged practices, there is no assurance that the conduct will not recur, and Plaintiffs maintain a personal stake in the controversy.

*Perez v. Perry*, No. 11-CA-360-OLG-JES-XR, 2013 U.S. Dist. WL 4784195, at \*7 (W.D. Tex. Sept. 6, 2013) (order granting plaintiffs' request to amend their pleadings and denying defendants' motion to dismiss plaintiffs' claims as moot).

24. SPENCER OVERTON, *STEALING DEMOCRACY: THE NEW POLITICS OF VOTER SUPPRESSION* 69, 110-11 (2007); Mark Hugo Lopez & Paul Taylor, *Latino Voters in the 2012 Election*, PEW RESEARCH HISPANIC CTR. (Nov. 7, 2012), <http://www.pewhispanic.org/2012/11/07/latino-voters-in-the-2012-election> (chart showing Democratic advantage of at least eighteen points since 1980).

25. Emily Bazelon, *Has the South Risen Above Racist Voting Laws?*, SLATE (Nov. 19, 2012, 4:10 PM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2012/11/supreme\\_court\\_voting\\_rights\\_act\\_2012\\_will\\_the\\_2012\\_election\\_lead\\_the\\_justices.single.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2012/11/supreme_court_voting_rights_act_2012_will_the_2012_election_lead_the_justices.single.html).

26. Lizza, *supra* note 19 (quoting Steve Munisteri, Chairman of the Republican Party of Texas).

27. Sudeep Reddy, *Latinos Fuel Growth in Decade*, WALL ST. J., Mar. 25, 2011, <http://online.wsj.com/news/articles/SB10001424052748704604704576220603247344790>; Hope Yen, *High Court Poised to Upend Civil Rights Policies*, GATEWAY NEWS, Mar. 31, 2013, <http://www.thegatewaynews.com/ap%20washington/2013/03/29/high-court-poised-to-upend-civil-rights-policies> ("The District of Columbia, Hawaii, California, New Mexico, and Texas already have populations of racial and ethnic minorities that collectively add up to more than 50 percent."); Adolfo Flores, *Latinos to Make Up Plurality of Californians by 2014, Report Finds*, L.A. TIMES: L.A. NOW (Jan. 31, 2013, 12:08 PM), <http://latimesblogs.latimes.com/lanow/2013/01/latinos-to-make-up-majority-of-california-by-end-of-2013.html>.

28. *E.g.*, Lizza, *supra* note 19.



every month for the next twenty years<sup>29</sup> present particularly grave implications for the Republican Party.<sup>30</sup>

Nowhere is this fact more critical than in Texas, which has the second-largest number of electoral votes in a presidential race.<sup>31</sup> Texas Republican Senator Ted Cruz<sup>32</sup> warned that if his party cannot convince Latinos to vote Republican, Texas will become a blue state.<sup>33</sup> If that happens, simple math will deliver an inexorable truth: the Republican Party would no longer be able to elect a president.<sup>34</sup> Without Texas, Republicans cannot amass the 270 electoral votes needed to win the White House.<sup>35</sup> At that point, as Republican-Party

29. Charlie Cook, *For Republicans, Just Doing the Math Is Frightening*, NAT'L J. (Jan. 18, 2013, 5:39 PM), <http://www.nationaljournal.com/columns/cook-report-for-republicans-just-doing-the-math-is-frightening-20130117>; see also Sylvia R. Lazos, *Latino Voters 2012 and Beyond: Will the Fastest Growing and Evolving Electoral Group Shape U.S. Politics?*, 11 ELECTION L.J. 118, 119 (2012) (reaching similar conclusions but estimating 200,000 Latinos turn eighteen each month).

30. David Lauter, *Nonwhite Voters and Cultural Shifts Make 2012 Election Pivotal*, L.A. TIMES, Nov. 10, 2012, <http://www.latimes.com/news/nationworld/nation/la-na-election-20121111.0,2275455.story>; Gerald F. Seib, *Tough Loss Leaves GOP at a Crossroads*, WALL ST. J. Nov. 7, 2012, <http://online.wsj.com/news/articles/SB1000142405297020334710457809936142917912>; Michael D. Shear, *As Electorate Changes, Fresh Worry for G.O.P.*, N.Y. TIMES, Nov. 8, 2012, [http://www.nytimes.com/2012/11/08/us/politics/obamas-victory-presents-gop-with-demographic-test.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2012/11/08/us/politics/obamas-victory-presents-gop-with-demographic-test.html?pagewanted=all&_r=0); Derek Thompson, *Two Graphs That Should Accompany Every Discussion of the GOP's Demographics Problem*, THE ATLANTIC (Nov. 9, 2012, 2:39 PM), <http://www.theatlantic.com/politics/archive/2012/11/2-graphs-that-should-accompany-every-discussion-of-the-gops-demographics-problem/265032>; Allison Kopicki & Will Irving, *Assessing How Pivotal the Hispanic Vote Was to Obama's Victory*, N.Y. TIMES: THE CAUCUS (Nov. 20, 2012, 4:16 PM), <http://thecaucus.blogs.nytimes.com/2012/11/20/assessing-how-pivotal-the-hispanic-vote-was-to-obamas-victory>.

31. Texas has thirty-eight electoral votes, second only to California's fifty-five. Lizza, *supra* note 19.

32. Senator Cruz is the former Solicitor General of Texas who defended DeLay's partisan gerrymander before the Supreme Court in *LULAC*. BICKERSTAFF, *supra* note 2, at 386.

33. Lizza, *supra* note 19 (quoting Julián Castro, the Democratic mayor of San Antonio: "Within the next six to eight years . . . I believe Texas will be at least a purple state, if not a blue state."); Kevin Sack & Sarah Wheaton, *G.O.P. Strains to Define How to Close Gap with Voters*, N.Y. TIMES, Nov. 11, 2012, <http://www.nytimes.com/2012/11/12/us/politics/first-republicans-must-find-common-ground-among-themselves.html?pagewanted=all> (quoting Emory University political scientist Alan I. Abramowitz: "Texas is going to become a swing state. And if Texas becomes a swing state, it's all over."); Ann Beeson, *Texas Could Become a Swing State Sooner Than You Think*, N.Y. TIMES: CAMPAIGN STOPS (Nov. 6, 2012, 10:23 PM), <http://campaignstops.blogs.nytimes.com/2012/11/06/e-day/#>.

34. Cook, *supra* note 29; Lizza, *supra* note 19 (assuming California and New York will remain Democratic for the foreseeable future); William Yeomans, *GOP v. Voting Rights Act*, REUTERS: GREAT DEBATE (Jan. 10, 2013, 2:29 AM), <http://blogs.reuters.com/great-debate/2013/01/10/gop-v-voting-rights-act>.

35. See Cook, *supra* note 29; Lizza, *supra* note 19 (quoting Sen. Cruz: "New York and California are for the foreseeable future unalterably Democrat. If Texas turns bright blue, the

leaders have already acknowledged, the Grand Old Party (GOP) will meet the fate of the Whig Party.<sup>36</sup>

The GOP has tried to forestall this grim trajectory by playing both offense and defense. On the one hand, some Republicans have found a “new appreciation” for issues important to Latinos, such as immigration reform.<sup>37</sup> On the other hand, the party has also redoubled its defensive measures to retain power,<sup>38</sup> such as implementing strict voter-ID and registration laws as well as restricting early voting.<sup>39</sup> Undeniably, the GOP’s greatest success has come from its coordinated, nationwide, partisan-gerrymandering effort—of which the Perrymander is merely one part—ensuring a Republican majority in the U.S. House of Representatives for the next decade.<sup>40</sup>

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Electoral College math is simple. . . you can’t get to two-seventy electoral votes. The Republican Party would cease to exist.”)

36. See Robert Draper, *Can the Republicans Be Saved From Obsolescence?*, N.Y. TIMES MAG., Feb. 14, 2013, at MM24; Lizza, *supra* note 19.

37. King, Jr., *supra* note 11 (citing the Texas GOP’s request that its local chapters stop holding party meetings at country clubs and start hosting recruiting tables at naturalization ceremonies); Karl Rove, *About That ‘Permanent Democratic Majority’*, WALL ST. J., Jan. 31, 2013, at A13 (arguing that Republicans can win more Latino votes with changes in policy, more Latino candidates, and “better messaging”); Julia Preston, *Senators Offer a New Blueprint for Immigration*, N.Y. TIMES, Jan. 28, 2013, <http://www.nytimes.com/2013/01/28/us/politics/senators-agree-on-blueprint-for-immigration.html?pagewanted=all> (quoting Republican Senator John McCain, explaining the difference between 2013 and 2010, when a similar immigration bill failed: “Look at the last election . . . We are losing dramatically the Hispanic vote.”). *But see* Lisa Mascaro, *GOP Promise of Immigration Reform Fades a Year After Election*, L.A. TIMES, Nov. 29, 2013, <http://www.latimes.com/nation/la-na-immigration-gop-20131130,0,3679179.story> (“[Speaker of the House John] Boehner, if he kills off immigration reform, will be remembered as the speaker who killed the GOP.”).

38. Ari Berman, *Why Are Conservatives Trying to Destroy the Voting Rights Act?*, THE NATION (Feb. 5, 2013), <http://www.thenation.com/article/172685/why-are-conservatives-trying-destroy-voting-rights-act> (“GOP . . . has responded to demographic change by trying to suppress an increasingly diverse electorate.”); *see* Yeomans, *supra* note 34.

39. *E.g.*, Berman, *supra* note 38.

40. With REDMAP (REDistricting MAjority Project), the Republican State Leadership Committee (RSLC) has implemented a successful strategy of controlling redistricting in state legislatures across the country, resulting in a thirty-three-seat majority for the Republican Party in the House despite losing the popular vote to Democrats by over a million votes in 2012. To that end, the RSLC also spent \$750,000 in Texas to gain the four new congressional seats in the Perrymander. *2012 REDMAP Summary Report*, REDISTRICTING MAJORITY PARTY (Jan. 4, 2013, 9:13 AM), <http://www.redistrictingmajorityproject.com/?p=64>.

Another defensive method the GOP attempted to implement was to change the way states award electoral votes in a presidential race. Instead of awarding all electoral votes to the winner of the presidential race in the state at-large, states would award the votes according to the winner of the presidential race within each Congressional district—that is, the same Congressional districts that have been gerrymandered along partisan lines to deliver a Republican majority. Neil

But successful partisan redistricting often comes at the expense of minority voting rights, as Texas's VRA violations demonstrate.<sup>41</sup> Minority Texas lawmakers have, in fact, referred to the state's redistricting plan and its voter-ID law as "'a textbook example' of why the Voting Rights Act is needed in Texas."<sup>42</sup> Scholars view the legal challenges to the Perrymander as probative of the nationwide VRA debate,<sup>43</sup> if not as a warning of how racial discrimination in redistricting will become routine without full-scale enforcement of the VRA.<sup>44</sup>

Indeed, the VRA remains crucial in protecting minority voting rights going forward, notwithstanding the unprecedented power of the minority vote exercised in the 2012 election.<sup>45</sup> Minorities' newfound voting strength is predicated on a foundation of equal access to the polls and undiluted votes, yet an overwhelming number of racially discriminatory voting laws were enacted heading into the 2012 election, fracturing that foundation.<sup>46</sup> In fact, since the 2010 midterm elections, more challenges have been filed under the VRA

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King, Jr., *Move to Split Electoral Votes Proves Divisive*, WALL ST. J., Jan. 26, 2013, <http://online.wsj.com/news/articles/SB10001424127887323854904578264102403098718>; Paul West, *GOP Faces Hurdles in Challenging Voting Laws*, L.A. TIMES, Jan. 27, 2013, at A8.

41. "In the last four decades, Texas has found itself in court every redistricting cycle, and each time it has lost." *Texas v. United States*, 887 F. Supp. 2d 133, 161 (D.D.C. 2012); *see also* LULAC v. Perry, 548 U.S. 399, 440 (2006) ("[T]he redrawing of the district lines was damaging to the Latinos in District 23. The State not only made fruitless the Latinos' mobilization efforts but also acted against those Latinos who were becoming most politically active.").

42. Peggy Fikac, *Turner Urges AG to Drop Voting Rights Act Challenge*, HOUS. CHRON.: TEXAS POLITICS (Feb. 25, 2013), <http://blog.chron.com/texaspolitics/2013/02/turner-urges-ag-to-drop-voting-rights-act-challenge> (quoting Rep. Trey Martinez Fischer, San Antonio Democrat and head of the Mexican American Legislative Caucus).

43. Ellen Katz, Professor, Univ. of Mich., Remarks at the Voting Rights Act and Redistricting Panel at the George Washington University Law School Symposium: Law and Democracy: A Symposium on Political Law (Nov. 16, 2012) at 10:50 [hereinafter Katz Symposium], available at <http://vimeo.com/user9108723/review/55780860/5749aec1a9>. *See infra* Part IV, for discussion of the VRA debate.

44. *See* Levitt Symposium, *supra* note 17, at 24:35 (discussing the blatant discrimination in the Texas redistricting plan even with Section 5 of the VRA still in effect). *See infra* Part II.A, for more on Section 5.

45. *See* Lauter, *supra* note 30; Shear, *supra* note 30; Paul West, *No Longer Your Father's Electorate*, L.A. TIMES, Nov. 8, 2012, <http://articles.latimes.com/2012/nov/08/nation/la-na-analysis-20121108>.

46. Berman, *supra* note 38; Nathaniel Persily, *Is the Voting Rights Act Doomed?*, N.Y. TIMES: CAMPAIGN STOPS (Nov. 14, 2012, 8:58 PM), <http://campaignstops.blogs.nytimes.com/2012/11/14/is-the-voting-rights-act-doomed> (discussing laws struck down before the 2012 election under Section 5 of the VRA for retrogressing the voting rights of minorities); Yeomans, *supra* note 34.

than in the previous forty-five years combined.<sup>47</sup> Just as the minority vote is finding its strength, concerted efforts are aiming to sap it. As a result, the VRA remains vitally necessary to make sure that minorities' nascent voting power is not taken away just as they are about to exercise it.

Yet, the Supreme Court is dismantling the VRA. The Court's recent gutting of Section 5<sup>48</sup> leaves Section 2 as the only remaining comprehensive provision to enforce the statute.<sup>49</sup> Now Section 2

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47. Drew Singer, *Court Rejects Texas Redistricting Maps*, REUTERS, Aug. 28, 2012, available at <http://www.reuters.com/article/2012/08/28/us-usa-texas-voter-id-idUSBRE87R14020120828>.

48. On June 25, 2013, in an Alabama case, the U.S. Supreme Court struck down Section 4 of the VRA, codified in 42 U.S.C. § 1973b(b). *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2631 (2013) (holding Section 4 unconstitutional for violating states' rights to "equal sovereignty" because its formula for determining jurisdictions subject to Section 5 no longer accounted for "current conditions"). Because Section 5, "the brain" of the VRA, is inoperable without Section 4, the *Shelby* ruling left Section 5 still on the books but "a zombie." Ciara Torres-Spelliscy, *The Walking Dead Supreme Court*, HUFFINGTON POST (July 2, 2013), [http://www.huffingtonpost.com/ciara-torresspelliscy/the-walking-dead-supreme-\\_b\\_3535208.html](http://www.huffingtonpost.com/ciara-torresspelliscy/the-walking-dead-supreme-_b_3535208.html). See *infra* Part II.A, for more about Section 5 and its coverage formula.

The day after the Court issued its *Shelby* ruling, then-Texas Governor Rick Perry signed into law the 2013 Perrymander. *Perez v. Perry*, No. 11–CA–360–OLG–JES–XR, 2013 U.S. Dist. WL 4784195, at \*3 (W.D. Tex. Sept. 6, 2013); see *supra* note 23. The next day, the Court vacated and remanded the Section 5 challenge to the original 2011 Perrymander in light of its invalidation of Section 4. *Texas v. United States*, 133 S. Ct. 2885, 2885 (2013).

49. After the *Shelby* ruling gutted Section 5, some plaintiffs in the Section 2 case against the Perrymander moved for leave to amend their claims in the district court in San Antonio. *Perez*, 2013 U.S. Dist. WL 4784195, at \*4. These plaintiffs added claims against the 2013 Perrymander as well as claims challenging the original 2011 Perrymander under Section 3 of the VRA. *Id.* 42 U.S.C. 1973a(c). On July 25, 2013, one month after the *Shelby* ruling, the U.S. Department of Justice filed a statement of interest in the case, also asking to "bail-in" Texas under Section 3. *Perez*, 2013 U.S. Dist. WL 4784195, at \*4; Eric Holder, Att'y General, U.S. Department of Justice, Address at the National Urban League Annual Conference (July 25, 2013) (transcript available at <http://www.justice.gov/iso/opa/ag/speeches/2013/ag-speech-130725.html>). Section 3, however, is not a comprehensive enforcement provision like Section 2. See Travis Crum, Note, *The Voting Rights Act's Secret Weapon: The Pocket Trigger Litigation and Dynamic Preclearance*, 119 YALE L.J. 1992, 1997 (2010), available at <http://www.yalelawjournal.org/images/pdfs/895.pdf>.

Section 3 is an "obscure" provision of the VRA that operates as a remedy for violations of the Fourteenth and Fifteenth Amendments, see *id.*, by providing for jurisdictions to get "bailed-in" and thus be subject to the federal oversight that preclearance demands. 42 U.S.C. § 1973a (2006). Until now, Section 3 has been "ignored" in favor of Section 5's broader protections, in part because the VRA's original coverage formula captured many of the jurisdictions with discriminatory voting practices and required that voting changes be precleared. See Crum, *supra*, at 1997; Rick Hasen, *Why AG Holder's Decision to "Bail In" Texas Under the Voting Rights Act Is a Big Deal, Legally and Legislatively*, Post-Shelby County, ELECTION LAW BLOG (July 25, 2013, 9:03 AM), <http://electionlawblog.org/?p=53425> [hereinafter Hasen, *Bail In*].

Section 3 would give the San Antonio court the discretion to require Texas once again to preclear voting changes as it did under Section 5, pre-*Shelby*. Hasen, *Bail In*, *supra*. See *infra* Part

itself is vulnerable to being struck down or gutted by the Court.<sup>50</sup> This Article argues that a confluence of political polarization in both Congress and the Supreme Court may threaten Section 2, precisely at a time when it is most needed to ensure that minority voters—and their growing importance to election outcomes—are courted, not thwarted.

Part II provides a brief background on the VRA and its enforcement of the Fifteenth Amendment. It also explains how the Supreme Court gutted Section 2 by statutory interpretation in 1980,<sup>51</sup> and how Congress passed a legislative override of that decision in 1982, making Section 2 more powerful but also problematic.<sup>52</sup> Part III argues that, if the Court eviscerates Section 2 again, a polarized and gridlocked Congress—thanks, in part, to partisan gerrymandering—would no longer be able to muster a legislative

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II.A, for more on preclearance. This “bail-in” remedy, however, would require the plaintiffs to prove that the Texas Legislature intentionally discriminated against them, which is a tougher standard to meet than under Section 5, Hasen, *Bail In*, *supra*, or under Section 2. Adam Serwer, *The Secret Weapon That Could Save the Voting Rights Act*, MSNBC.com (July 8, 2013, 12:36 PM), <http://tv.msnbc.com/2013/07/08/sec-3-the-secret-weapon-for-protecting-minority-voters> (“[U]nder Section 2, unlike Section 3, you need to prove only that changes will adversely affect minorities, not that they were *intended* to.”). See *infra* Parts II.A, II.B.3.

Section 3 is also limited because its application is discretionary and allows the court to restrict the scope of preclearance as it sees fit, such as only for redistricting actions or only for a limited period of time. See Richard L. Hasen, *Holder’s Texas-Size Gambit: Will It Save the Voting Rights Act?*, NAT’L LAW JOURNAL (Aug. 5, 2013), <http://www.nationallawjournal.com/id=1202613130666>. Finally, because Section 3 is a remedial provision, it must be added on to other voting rights claims, such as the Section 2 challenge to the Perrymander in San Antonio. See Richard Pildes, *Enforcement of Section 3 of the VRA: The Second Phase?*, ELECTION LAW BLOG (Aug. 1, 2013, 10:33 AM), <http://electionlawblog.org/?p=53839>; see also Crum, *supra*, at 2009 (“Initiated as a section 2 suit, section 3 requires a court to find . . . a constitutional violation.”).

Because Section 3 case law is sparse, questions abound regarding the procedures and parameters of the provision. Authorities agree, however, that Section 3 claims will likely end up at the Supreme Court for interpretation. See Lyle Denniston, *Texas Fights New Voting Supervision*, SCOTUSBLOG (Aug. 6, 2013, 4:02 PM), <http://www.scotusblog.com/2013/08/texas-fights-new-voting-supervision>.

Thus Section 2 is the VRA’s most comprehensive enforcement provision in operation.

50. Zachary Roth, *Conservatives Prepare to Finish Off Voting Rights Act*, MSNBC.COM (July 19, 2013, 12:15 PM), <http://tv.msnbc.com/2013/07/19/conservatives-prepare-to-finish-off-the-voting-rights-act>; see Richard Hasen, *Texas Ups the Ante in Fight over Voting Rights Act, Betting on an Emboldened Conservative Supreme Court*, ELECTION LAW BLOG (Aug. 7, 2013, 9:28 PM), <http://electionlawblog.org/?p=54118>, Sam Bagenstos, *A Test of Seriousness For Those Who Say Section 2 Is Sufficient*, ELECTION LAW BLOG (July 17, 2013, 9:26 PM), <http://electionlawblog.org/?p=53131>; Katz Symposium, *supra* note 43, at 1:09:32.

51. *City of Mobile v. Bolden*, 446 U.S. 55, 60–61 (1980), *superseded by statute*, Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131.

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

override.<sup>53</sup> It also explains how Section 2, by prohibiting the effect of minority vote dilution, became one of the only ways to keep partisan gerrymandering in check.<sup>54</sup> Part IV argues that Section 2 may not withstand constitutional scrutiny under a congruence and proportionality test in the current Supreme Court, but that if the Court wanted to uphold the statute, it would have several arguments available to do so. Part V argues that the current polarization of the Court makes it likely that Section 2 will either be gutted again or declared unconstitutional.<sup>55</sup> It also argues that Chief Justice Roberts, not Justice Kennedy, may end up being the swing vote in what would likely be a politically charged case. This part also points out that the end of protections for minority voting rights, and the harm that would result, is not merely theoretical: it has happened before. Finally, Part VI concludes that, if the Section 2 challenge to the Perrymander reaches the Supreme Court, Chief Justice Roberts may face a problem in how his vote at the Court may be perceived. Whether deserved or not, the Chief Justice may be seen as protecting minority voting rights at the expense of his party, or protecting his party at the expense of minority voting rights and, quite possibly, the legitimacy of the Court. Because minorities are becoming crucial to election outcomes, his vote may determine far more than the fate of Section 2.

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53. See Richard L. Hasen, *End of the Dialogue? Political Polarization, the Supreme Court, and Congress*, 86 S. CAL. L. REV. 205, 209 (2013).

54. See Emily Bazelon, *It's Appalling That Gerrymandering Is Legal*, SLATE (Nov. 9, 2012, 5:14 PM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2012/11/the\\_supreme\\_court\\_may\\_gut\\_the\\_voting\\_rights\\_act\\_and\\_make\\_gerrymandering.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2012/11/the_supreme_court_may_gut_the_voting_rights_act_and_make_gerrymandering.html); Heather Gerken, *Coloring Inside the Lines*, SLATE (Nov. 10, 2010, 4:16 PM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2010/11/coloring\\_inside\\_the\\_lines.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2010/11/coloring_inside_the_lines.html).

55. Brentin Mock, *Why the Voting Rights Act Likely Won't Survive Supreme Court Review*, THE NATION: VOTING RIGHTS WATCH (Nov. 14, 2012, 11:23 AM), <http://www.thenation.com/blog/171241/why-voting-rights-act-likely-wont-survive-supreme-court-review#> (“[Chief Justice Roberts] sounded every alarm about why the discriminatory effect clause shouldn't happen.”); see Richard L. Hasen, *Roberts's Iffy Support for Voting Rights*, L.A. TIMES, Aug. 3, 2005, <http://articles.latimes.com/2005/aug/03/opinion/oe-hasen3>.

## II. BACKGROUND OF THE VOTING RIGHTS ACT OF 1965

*“There goes the South for a generation.”*<sup>56</sup>

—President Lyndon B. Johnson, as he signed the Voting Rights Act of 1965

The VRA, often cited as one of the twentieth century’s most successful pieces of legislation,<sup>57</sup> accomplished what the Fifteenth Amendment could not on its own—the protection of minority voting rights.<sup>58</sup> Though the Fifteenth Amendment was ratified in 1870, racism in the South proved to be too strong, and the Supreme Court too uncommitted,<sup>59</sup> for African-Americans to be able to vote unhindered.<sup>60</sup> As a result, their disenfranchisement continued for almost a hundred more years, perpetrated by violence, voting fraud, and political processes like gerrymandering and at-large elections, all coordinated to prevent African-Americans from voting and being elected.<sup>61</sup> Not until the Civil Rights movement was the VRA finally passed<sup>62</sup> to enforce the Fifteenth Amendment, which states:

§ 1 The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

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56. *Civil Rights Act Turns 40*, CBS NEWS (Dec. 5, 2007, 3:18 PM), <http://www.cbsnews.com/news/civil-rights-act-turns-40/>.

57. See, e.g., Bernard Grofman & Chandler Davidson, *Editors’ Introduction to CONTROVERSIES IN MINORITY VOTING: THE VOTING RIGHTS ACT IN PERSPECTIVE*, at i (Bernard Grofman & Chandler Davidson eds., 1992) [hereinafter *CONTROVERSIES IN MINORITY VOTING*]; see also Luis Fuentes-Rohwer, *Understanding the Paradoxical Case of the Voting Rights Act*, 36 FLA. ST. U. L. REV. 697, 763 (2009) (calling the VRA “the crown jewel of the civil rights movement”).

58. See Chandler Davidson, *The Voting Rights Act: A Brief History*, in *CONTROVERSIES IN MINORITY VOTING*, *supra* note 57, at 7.

59. Ellen D. Katz, *Reinforcing Representation: Congressional Power to Enforce the Fourteenth and Fifteenth Amendments in the Rehnquist and Waite Courts*, 101 MICH. L. REV. 2341, 2356 (2003) [hereinafter Katz] (citing *United States v. Cruikshank*, 92 U.S. 542 (1876) and *United States v. Reese*, 92 U.S. 214 (1876)).

60. Davidson, *supra* note 58, at 9–11. Although Congress passed measures at the time to enforce the Fifteenth Amendment, the Supreme Court essentially gutted them. See *infra* Part V.

61. See *id.* at 10–11.

62. Legislation passed in 1957, 1960, and 1964 all proved ineffective to protect minority voting rights. Then President Lyndon Johnson asked for the “goddamnedest toughest” voting bill, which became the VRA. Davidson, *supra* note 58, at 17.

§ 2 The Congress shall have power to enforce this article by appropriate legislation.<sup>63</sup>

To enforce the Fifteenth Amendment, the VRA provides for government oversight of electoral practices across the country<sup>64</sup> to be carried out mainly through its two major provisions, Section 5 and Section 2.<sup>65</sup> Both sections prohibit new voting laws that would have the effect of denying or abridging the right to vote on account of race.<sup>66</sup> Though Section 5 is no longer operational,<sup>67</sup> an understanding of its function is fundamental to understanding the abilities and vulnerabilities of Section 2.

#### A. Section 5 of the VRA

Section 5 of the VRA enforced the prohibition against denying or abridging the right to vote by requiring certain jurisdictions with a history of racial discrimination to submit any new voting standard, practice, or procedure for preclearance to the Attorney General of the United States or the United States District Court for the District of Columbia.<sup>68</sup> The jurisdiction would have the burden of proving that its new voting law would not cause backsliding in minority voting rights.<sup>69</sup> Because Section 5 required states to obtain federal approval before implementing a state or local law,<sup>70</sup> it stirred controversy as an “uncommon exercise of congressional power” with a decisive lack of deference to the state.<sup>71</sup> Undeterred, the Warren Court upheld

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63. U.S. CONST. amend. XV, § 2.

64. Tom Perez, Assistant Att’y Gen., U.S. Dep’t of Justice, Civil Rights Div., Keynote Address at George Washington University Law Symposium on Political Law, (Nov. 16, 2012) at 24:34, available at <http://vimeo.com/user9108723/review/55788542/08da95f2a6>.

65. Richard H. Pildes, *Voting Rights: The Next Generation*, in RACE, REFORM, AND REGULATION OF THE ELECTORAL PROCESS 17, 20 (Guy-Uriel E. Charles et al. eds., Cambridge Univ. Press 2011).

66. *Id.*

67. *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2648 (2013) (Ginsburg, J., dissenting) (“The Court stops any application of § 5 by holding that § 4(b)’s coverage formula is unconstitutional.”); see *supra* note 48.

68. 42 U.S.C. § 1973(c) (2006).

69. *Id.*; Justin Levitt, *Bringing Sweats to the Court*, AM. CONST. SOC’Y BLOG (Feb. 26, 2013), <http://www.acslaw.org/acsblog/bringing-sweats-to-the-court>.

70. See *Beer v. United States*, 425 U.S. 130, 140 (1976) (explaining that “freezing election procedures” until they are precleared was a necessary response to jurisdictions gaming the system to pass new discriminatory laws as soon as the old ones were struck down).

71. *South Carolina v. Katzenbach*, 383 U.S. 301, 334 (1966).



Section 5 in 1966 in the seminal case *South Carolina v. Katzenbach*<sup>72</sup> because of the “exceptional conditions” surrounding voting discrimination when Congress enacted the VRA.<sup>73</sup>

Since the VRA was passed, the immense progress achieved in the South for minority voting rights is principally due to Section 5.<sup>74</sup> It prevented discriminatory practices—such as literacy tests, re-registration requirements, and gerrymandering<sup>75</sup>—from being implemented. Indeed, Section 5 prevented covered jurisdictions from implementing *any* new practice or procedure, unless a jurisdiction could prove that the proposed law would not detrimentally affect minority voting rights.<sup>76</sup> By circumventing the often protracted route of a private plaintiff bringing suit in the regular course of litigation, Section 5’s preclearance regime broke the cycle of jurisdictions enacting new discriminatory laws as soon as the previous laws were challenged.<sup>77</sup> The significant increases in voter registration among minorities and the record number of minorities elected to public office in the last four decades are a testament to the effectiveness of Section 5.<sup>78</sup> Section 5 has been equally effective in recent years by preventing the implementation of discriminatory laws such as a restrictive photo identification requirement in South Carolina, the reduction of early voting days in Florida, and the Perryman’s dilutive redistricting plan in Texas, all in the months leading up to the 2012 general election.<sup>79</sup>

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72. *Id.* at 308.

73. *Id.* at 335.

74. Transcript of Oral Argument at 30, *Shelby Cnty. v. Holder*, 133 S. Ct. 2612 (2013) (No. 12-96) [hereinafter *Shelby* Transcript] (statement of Solicitor General Verrilli); Robert Barnes, *Supreme Court Considers South’s Legacy and Progress on Voting Rights*, WASH. POST, Feb. 23, 2013, [http://www.washingtonpost.com/politics/supreme-court-considers-souths-legacy-and-progress-on-voting-rights/2013/02/23/3f1ba416-7c71-11e2-82e8-61a46c2cde3d\\_story.html](http://www.washingtonpost.com/politics/supreme-court-considers-souths-legacy-and-progress-on-voting-rights/2013/02/23/3f1ba416-7c71-11e2-82e8-61a46c2cde3d_story.html).

75. See Davidson, *supra* note 58, at 22–23.

76. See 42 U.S.C. § 1973c (2006).

77. See *South Carolina v. Katzenbach*, 383 U.S. 301, 328 (1966) (“[C]ase-by-case litigation was inadequate to combat widespread and persistent discrimination in voting, because of the inordinate amount of time and energy required to overcome the obstructionist tactics invariably encountered in these lawsuits.”); *Shelby* Transcript, *supra* note 74, at 14 (statement of Justice Sotomayor).

78. Barnes, *supra* note 74 (quoting Alabama state Representative John Knight).

79. Yeomans, *supra* note 34. Yet in the wake of the *Shelby* decision, all three of these states, plus at least three others, passed harsh voting restrictions within two months. William R. Hanauer, *Community View: All Must Demand Congress Restore Voting Rights Act*, LOHUD.COM (Aug. 23, 2013), <http://www.lohud.com/article/20130824/OPINION/308240032>; see also Lizette Alvarez, *Ruling Revives Florida Review of Voter Rolls*, N.Y. TIMES, Aug. 8, 2013,

Three days after the 2012 general election, however, the Supreme Court granted certiorari to an Alabama case in which petitioners alleged that Section 5 was unconstitutional.<sup>80</sup> At the same hour that the statue of Rosa Parks was unveiled in the Capitol, the Justices across the street heard oral argument on whether to strike down Section 5 of the VRA,<sup>81</sup> the “crown jewel of the civil rights movement.”<sup>82</sup> For over one hundred years, the Supreme Court had not invalidated a civil rights law.<sup>83</sup> In June 2013, the Court eviscerated Section 5.<sup>84</sup>

### B. Section 2 of the VRA

Section 2 of the VRA also prohibits laws that have the effect of denying or abridging the right to vote due to race or color, but it does so in a way that invites less controversy than Section 5.<sup>85</sup> Unlike Section 5, which applies to just a handful of jurisdictions with a history of discrimination, Section 2 applies to all jurisdictions across the country, making it impervious to the equal sovereignty arguments leveled at Section 5.<sup>86</sup> Section 2 also presents less of an intrusion on states’ rights than Section 5 for three main reasons. First, Section 2 places the burden of proof on the plaintiff to show that a voting standard, practice, or procedure has a racially discriminatory effect, rather than placing the burden on the jurisdiction to prove

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<http://www.nytimes.com/2013/08/08/us/ruling-revives-florida-review-of-voting-rolls.html> (explaining that Florida, Texas, and other states “seized on the Supreme Court ruling to advance legislation calling for tougher voting rules or oversight”).

80. *Shelby Cnty. v. Holder*, 133 S. Ct. 2612 (2013).

81. Bill Press, *Americans Risk Losing Our Most Sacred Right*, CHI. TRIB., Feb. 28, 2013, [http://www.chicagotribune.com/sns-201302281800--tms--bpresstt--m-a2013022820130228,0\\_5344718.column](http://www.chicagotribune.com/sns-201302281800--tms--bpresstt--m-a2013022820130228,0_5344718.column).

82. Fuentes-Rohwer, *supra* note 57, at 763.

83. J. Gerald Hebert & Armand Derfner, *Shelby County, Alabama and the Supreme Court*, CAMPAIGN LEGAL CTR. BLOG (Feb. 28, 2013, 7:07 AM), [http://www.clcblog.org/index.php?option=com\\_content&view=article&id=505:shelby-county-alabama-and-the-supreme-court](http://www.clcblog.org/index.php?option=com_content&view=article&id=505:shelby-county-alabama-and-the-supreme-court).

84. *Shelby Cnty.*, 133 S. Ct. 2612 (holding that Section 4 of the VRA, which determines which jurisdictions are subject to Section 5, is unconstitutional, making Section 5 inoperable even if technically still valid); *see supra* note 48.

85. *See* 42 U.S.C. § 1973 (2006); Luis Fuentes-Rohwer, *The Future of Section 2 of the Voting Rights Act in the Hands of a Conservative Court*, 5 DUKE J. CONST. L. & POLICY 125, 129 (2010).

86. *See* 42 U.S.C. § 1973; *Shelby* Transcript, *supra* note 74, at 21 (arguing that Section 4, the coverage formula that determines which jurisdictions are subject to Section 5, did not treat states equally).

nondiscrimination, as did Section 5.<sup>87</sup> Second, Section 2 claims are filed after a discriminatory law has been enacted—and in local federal district courts rather than with the Department of Justice or with the D.C. District Court—so a state or local jurisdiction does not need approval from Washington before it implements its own voting laws.<sup>88</sup> Finally, because Section 2 is a permanent provision of the VRA needing no renewal,<sup>89</sup> it does not invite the controversy that accompanied each Section 5 reauthorization by Congress.<sup>90</sup> Although these characteristics make Section 2 less controversial than Section 5, some of them may make it less effective as well.

Arguably, Section 2 is a poor substitute for Section 5.<sup>91</sup> Whereas Section 5 is designed to block new legislation until a jurisdiction proves that the changes would not diminish minority voting rights, Section 2 allows new legislation to be implemented until a plaintiff proves the law is discriminatory, and a court strikes it down.<sup>92</sup> Therefore, relying on Section 2 to operate through the regular course of litigation allows most discriminatory voting laws to take effect unless a preliminary injunction is granted.<sup>93</sup> Courts rarely enjoin voting laws, however, because local district courts are reluctant to interfere with elections without a full trial.<sup>94</sup> Whereas Section 5 preclearance proceedings are relatively straightforward—requiring only a showing that minorities would not be worse off with the new

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87. See 42 U.S.C. § 1973b–c.

88. See *id.*; *id.* § 1973c; Charlie Savage, *Decision on Voting Law Could Limit Oversight*, N.Y. TIMES, Mar. 1, 2013, at A13.

89. Compare 42 U.S.C. § 1973c (expiring at the end of the twenty-five year period), with *id.* § 1973 (lacking a similar sunset provision).

90. For example, in 2006, although the Senate unanimously voted to reauthorize Section 5, the Republican chairman of the Senate Judiciary Committee filed a report almost a week later to raise serious constitutional questions about the reauthorization. The Democratic members of the committee, who were not shown the report before it was filed, dissented and contended the report did not reflect the committee's findings in support of reauthorization but instead provided ammunition to challenge Section 5 in court. Nathaniel Persily, *The Promise and Pitfalls of the New Voting Rights Act*, 117 YALE L.J. 174, 183–89 (2007); Rick Hasen, *The Missing VRA Senate Report*, ELECTION L. BLOG (July 27, 2006, 9:08 PM), <http://electionlawblog.org/archives/006344.html>; Rick Hasen, *Senate VRA Committee Report Now Available*, ELECTION L. BLOG (Aug. 1, 2006, 11:22 AM), <http://electionlawblog.org/archives/006382.html>.

91. *E.g.*, *Shelby* Transcript, *supra* note 74, at 36–37 (statements of Justice Kennedy and Solicitor General Verrilli); Hebert & Derfner, *supra* note 83.

92. Savage, *supra* note 88.

93. Hebert & Derfner, *supra* note 83.

94. *Id.*

law<sup>95</sup>—Section 2 trials are protracted due to a multi-factor inquiry that all but demands extensive discovery, several expert witnesses, and multiple appeals to win a claim.<sup>96</sup> As a result, Section 2 claims commonly cost several million dollars to litigate,<sup>97</sup> making some discriminatory laws too costly for a private plaintiff to challenge,<sup>98</sup> and thus allowing the discrimination to go unchecked.<sup>99</sup>

The multi-factor inquiry that makes Section 2 claims so expensive comes from *Thornburg v. Gingles*,<sup>100</sup> in which the Court set out its test for Section 2 violations—generally claims of vote dilution in redistricting. First, a plaintiff must show that a minority group satisfies three preconditions:

(1) it is large and geographically compact enough to constitute a majority in a single-member district;<sup>101</sup>

(2) it is politically cohesive;<sup>102</sup> and

(3) its collective vote is submerged by the Caucasian majority voting as a bloc.<sup>103</sup>

If any of these preconditions are not met, then Section 2 does not require the court to grant relief.<sup>104</sup> On the other hand, if all three preconditions are met, then the court must determine by a totality of the circumstances whether the minority group has the “ability to elect its chosen representatives.”<sup>105</sup> If not, the court would then mandate the creation of a majority-minority district in which the minority

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95. Savage, *supra* note 88; see Hebert & Derfner, *supra* note 83.

96. Hebert & Derfner, *supra* note 83.

97. *Id.*

98. *Id.* Pamela Karlan, Professor, Stanford Law Sch., Remarks at the Election Law in the Roberts Court Panel at the George Washington University Law School Symposium: Law and Democracy: A Symposium on Political Law (Nov. 16, 2012) at 1:04:42 [hereinafter Karlan Symposium], available at <http://vimeo.com/user9108723/review/55785546/b29247c2fc> (responding to Rick Pildes’s assertion that the Texas redistricting plan could still be invalidated by Section 2 of the VRA even if Section 5 becomes unavailable by pointing out that the Texas Democrats might be able to afford to hire election law litigator Gerald Hebert, but local, individual school board candidates probably would not).

99. Hebert & Derfner, *supra* note 83.

100. 478 U.S. 30 (1986).

101. *Id.* at 50. As of 2009, a minority group must make up more than 50 percent of the population of a district to satisfy this prong. *Bartlett v. Strickland*, 556 U.S. 1, 12, 26 (2009).

102. *Gingles*, 478 U.S. at 51.

103. *Id.*

104. J. GERALD HEBERT ET AL., *THE REALIST’S GUIDE TO REDISTRICTING: AVOIDING THE LEGAL PITFALLS* 35 (2d ed. 2010).

105. *Gingles*, 478 U.S. at 51; accord 42 U.S.C. § 1973(b) (2006).

group would have the ability to elect its preferred candidates.<sup>106</sup> This “race-conscious districting”<sup>107</sup>—whether in the form of remedying vote dilution under Section 5 or Section 2—has been criticized as a form of “racial gerrymandering,”<sup>108</sup> as “a sordid business” by Chief Justice Roberts;<sup>109</sup> and even, by Justice Scalia, as a “racial entitlement.”<sup>110</sup> This Article does not address the validity of this Court-created remedy but instead focuses on the validity of the provision itself that was created by Congress.<sup>111</sup>

### 1. Section 2 Before *City of Mobile v. Bolden*

In its original form, Section 2 provided: 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 the right of any citizen of the United States to vote on account of race or color.<sup>112</sup>

Because its original text merely parroted the Fifteenth Amendment,<sup>113</sup> Section 2 was rarely used to litigate as the basis for an independent claim; it was instead considered duplicative<sup>114</sup> of claims brought by minority voters under the Fifteenth Amendment itself as well as under the Fourteenth Amendment.<sup>115</sup>

106. See HEBERT ET AL., *supra* note 104, at 36.

107. Abigail Thernstrom, *Commentary on Shelby County v. Holder*, SCOTUSBLOG (Feb. 28, 2013, 5:46 PM), <http://www.scotusblog.com/2013/02/commentary-on-shelby-county-v-holder/#more-160299> (discussing the problems of creating majority-minority districts as a remedy for voting discrimination).

108. Roger Clegg, *Comments on the Oral Argument in Shelby County v. Holder*, SCOTUSBLOG (Feb. 28, 2013, 10:11 AM), <http://www.scotusblog.com/2013/02/comments-on-the-oral-argument-in-shelby-county-v-holder/>.

109. *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 511 (2006) (Roberts, C.J., concurring in part, concurring in the judgment in part, and dissenting in part).

110. *Shelby* Transcript, *supra* note 74, at 46–47 (statement of Justice Scalia); see also Spencer Overton, *Justice Scalia’s Latest ‘Racial Entitlement’ Remark*, HUFFINGTON POST (Apr. 17, 2013, 6:11 PM), [http://www.huffingtonpost.com/spencer-overton/justice-scalias-latest-ra\\_b\\_3103845.html](http://www.huffingtonpost.com/spencer-overton/justice-scalias-latest-ra_b_3103845.html) (“Even aside from improperly commenting on a pending case, Scalia is wrong” about Section 5 of the VRA being a form of “racial entitlement.”).

111. See *infra* note 258 (discussing the difference between Section 2 and its remedy as set forth in *Gingles*).

112. 42 U.S.C. § 1973(a) (1970); Davidson, *supra* note 58, at 17.

113. ABIGAIL THERNSTROM, *VOTING RIGHTS AND WRONGS: THE ELUSIVE QUEST FOR RACIALLY FAIR ELECTIONS* 81 (2009); Fuentes-Rohwer, *supra* note 85, at 129.

114. See Fuentes-Rohwer, *supra* note 85, at 129.

115. Adam B. Cox & Thomas J. Miles, *Judging the Voting Rights Act*, 108 COLUM. L. REV. 1, 6–7 (2008).

Originally, vote discrimination meant denying the right to vote to minorities by preventing them from reaching the polls through the use of tactics such as literacy tests and either physical violence or the mere threat of it by “security” personnel carrying guns or torches.<sup>116</sup> Over time, however, as racism became less overt, vote discrimination took new forms, changing from outright denial to the abridgment of the right to vote.<sup>117</sup> Ballot access claims gave way to vote dilution claims, usually alleging that legislatures had drawn districts in ways that prevented minority groups from gaining votes sufficient to elect representatives chosen by their own communities.<sup>118</sup> Because plaintiffs claiming vote dilution through complex redistricting schemes had a harder time proving their allegations than those alleging they had been physically barred from voting, Section 2 became even less useful as a viable claim.<sup>119</sup>

Because of the difficulty in proving a legislature’s subjective intent to dilute minority votes “on account of race or color,” some lower courts began inferring discriminatory intent using a totality-of-the-circumstances analysis of more objectively verifiable factors.<sup>120</sup> Such factors, known as the *Zimmer* factors, included histories of official discrimination in a jurisdiction, majority vote requirements, overt or subtle racial appeals, the exclusion of minorities from candidate slating processes, and racial discrimination in education, employment, and health.<sup>121</sup> By finding discriminatory intent through these kinds of indirect evidence, plus a showing of a discriminatory effect, courts gained the ability to grant relief for Section 2 claims more readily than for Fifteenth Amendment claims, which require direct evidence of both discriminatory intent and effect.<sup>122</sup> The Supreme Court, however, put an abrupt stop to this practice in *City of Mobile v. Bolden*.<sup>123</sup>

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116. Davidson, *supra* note 58, at 15.

117. Fuentes-Rohwer, *supra* note 85, at 129–30.

118. *Id.*

119. *See id.*

120. *Zimmer v. McKeithen*, 485 F.2d 1297, 1304–07 (5th Cir. 1973).

121. *Id.* at 1305.

122. Fuentes-Rohwer, *supra* note 57, at 735.

123. 446 U.S. 55 (1980), *superseded by statute*, Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131.

## 2. The Gutting of Section 2 in *City of Mobile v. Bolden*

In 1980, a plurality of the Supreme Court in *City of Mobile v. Bolden* held that a Section 2 violation required direct evidence of both discriminatory intent<sup>124</sup> and discriminatory effect, ending many lower courts' practice of inferring discriminatory intent through the *Zimmer* factors' totality-of-the-circumstances analysis.<sup>125</sup> By requiring a plaintiff to affirmatively prove intentional discrimination, the fractured Court interpreted Section 2 exactly like the Fifteenth Amendment, and this restrictive statutory interpretation essentially gutted Section 2 as a viable claim in vote dilution cases.<sup>126</sup>

Having to prove a legislature's intent to dilute minority voting strength was a significant setback for plaintiffs.<sup>127</sup> Because plaintiffs challenged laws that had been in place for many years, exposing discriminatory legislative intent meant discovery was prohibitively burdensome.<sup>128</sup> In fact, because the subjective intent to discriminate had become mostly unspoken by the 1980s, especially in the halls of government, discriminatory intent was almost impossible to prove.<sup>129</sup> In addition, courts were loath to find vote dilution upon a showing of purposeful discrimination because doing so forced them to characterize elected officials as racists.<sup>130</sup> Thus, granting relief for Section 2 violations became so divisive that it threatened to undermine any racial progress in a community.<sup>131</sup> Very quickly, the new intent requirement brought Section 2 claims to a "virtual standstill"<sup>132</sup> and compelled existing cases to be overturned and dismissed.<sup>133</sup>

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124. *Id.* at 69–70.

125. *See* Davidson, *supra* note 58, at 38.

126. Fuentes-Rohwer, *supra* note 85, at 130–31.

127. Davidson, *supra* note 58, at 38.

128. *Id.*

129. SAMUEL ISSACHAROFF ET AL., *THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS* 621 (4th ed. 2012) (quoting Robert Kreuger, a former member of Congress who testified at the congressional hearings for the 1982 amendments to the VRA).

130. *See* Memorandum from John Roberts to the Att'y Gen. 3 (Jan. 22, 1982) [hereinafter Roberts, Jan. 22 Memo], available at <http://www.archives.gov/news/john-roberts/accession-60-88-0498/030-black-binder1/folder030.pdf#page=5>.

131. Pamela S. Karlan, *Two Section Twos and Two Section Fives: Voting Rights and Remedies After Flores*, 39 WM. & MARY L. REV. 725, 735 (1998) (quoting testimony of Arthur S. Flemming, Chairman of the U.S. Commission on Civil Rights).

132. ISSACHAROFF ET AL., *supra* note 129, at 621; Cox & Miles, *supra* note 115, at 6–7; Fuentes-Rohwer, *supra* note 85, at 130–31.

133. ISSACHAROFF ET AL., *supra* note 129, at 621 (quoting Armand Derfner).

### 3. Section 2 After the Legislative Override of *City of Mobile v. Bolden*

The resulting outcry of the civil rights community prompted Congress to override *Bolden* with a 1982 amendment to the VRA that affirmatively eliminated any intent requirement in Section 2 and established a test for discriminatory effect only.<sup>134</sup> Congress changed the text of Section 2 from “to deny or abridge the right . . . to vote on account of race or color”<sup>135</sup> to “in a manner which results in a denial or abridgment of the right . . . to vote on account of race or color.”<sup>136</sup> From then on, relief could be granted for a violation of Section 2 by showing the discriminatory effect of vote dilution alone, without any direct proof of a legislature’s discriminatory purpose to cause it.<sup>137</sup> This one change became the source of Section 2’s power as well as its problems.<sup>138</sup>

The 1982 amendment to the VRA also changed Section 2 by mandating a return to the pre-*Bolden* totality-of-the-circumstances analysis, and the Senate Report supporting the amendment included a list of factors to be analyzed that closely resembled the *Zimmer* factors.<sup>139</sup> In the end, the congressional override of the Court’s holding in *Bolden* resurrected Section 2 as a viable enforcement arm of the VRA for the next three decades.<sup>140</sup>

If the Court eviscerates Section 2 again, however, a congressional override may not be forthcoming to save it. If, for example, the Perrymander’s Section 2 challenge reaches the Supreme Court on appeal, the Court may again interpret Section 2 in a way that makes Section 2 essentially unenforceable. This time, however, the ongoing legislative gridlock may prevent Congress from overriding the ruling.<sup>141</sup> Without a congressional override, the Court’s statutory interpretation would prevail, and Section 2 claims

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134. Davidson, *supra* note 58, at 38–40.

135. *Id.* at 17.

136. 42 U.S.C. § 1973(a) (2006).

137. *See id.*

138. *See* discussion *infra* Parts III.B, IV.

139. Davidson, *supra* note 58, at 38–40.

140. *See* Binny Miller, *Who Shall Rule and Govern? Local Legislative Delegations, Racial Politics, and the Voting Rights Act*, 102 YALE L.J. 105, 108 (1992); *see also* Samuel Issacharoff, *Polarized Voting and the Political Process: The Transformation of Voting Rights Jurisprudence*, 90 MICH. L. REV. 1833, 1845–47 (1992) (discussing the 1982 amendment).

141. *See supra* Part III.A.2.b.



may once again grind to a halt.<sup>142</sup> If that happens, enforcement of the VRA would fundamentally cease.<sup>143</sup> Congressional gridlock, therefore, poses a real threat to the survival of Section 2, and thus, the VRA.

### III. CONGRESSIONAL GRIDLOCK AND POLARIZATION

“You show me a nation without partisanship, and I’ll show you a tyranny.”

—Tom DeLay, Farewell Address to U.S. House of Representatives, June 12, 2006,<sup>144</sup> prior to his conviction for money laundering in connection with his 2003 partisan gerrymander in Texas<sup>145</sup>

Congressional gridlock stems from the political polarization of Congress.<sup>146</sup> Polarization occurs at both ends of the legislative process: it affects and is affected by redistricting because polarized legislatures gerrymander district lines to reinforce partisanship in election results.<sup>147</sup> Though the VRA does not explicitly encompass claims of partisan gerrymandering, it is one of the few means available to control it.<sup>148</sup> A retrenchment in the VRA’s enforcement, therefore, would likely result in increased partisan gerrymandering<sup>149</sup>

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142. See *infra* Part II.2.

143. ISSACHAROFF ET AL., *supra* note 129, at 621. Although Section 3 might still exist, it has historically been interpreted as a remedial claim brought as part of Section 2 litigation. See Michael Li, *Q&A on the New Section 3 Claim About Texas Redistricting*, TEX. REDISTRICTING & ELECTION LAW (July 3, 2013, 8:06 PM), <http://txredistricting.org/post/54556057254/q-a-on-the-new-section-3-claim-about-texas>. Without Section 2, then, Section 3 may also become inoperable, leaving the VRA without an enforcement mechanism.

144. BICKERSTAFF, *supra* note 2, at 389.

145. *Tom DeLay Convicted of Money Laundering*, FOX NEWS (Nov. 24, 2010, 9:46 AM), <http://www.foxnews.com/politics/2010/11/24/jury-convicts-delay-money-laundering-trial>. *But see Texas Appeals Court Reverses Tom DeLay's 2010 Conviction*, WALL ST. J., Sept. 19, 2013, <http://online.wsj.com/article/SB10001424127887324492604579085102718299452.html>.

146. John Harwood, *Deep Philosophical Divide Underlies the Impasse*, N.Y. TIMES, Mar. 1, 2013, [http://www.nytimes.com/2013/03/02/us/politics/a-peek-under-the-hood-of-sequestration-politics.html?\\_r=0](http://www.nytimes.com/2013/03/02/us/politics/a-peek-under-the-hood-of-sequestration-politics.html?_r=0); Nate Silver, *As Swing Districts Dwindle, Can a Divided House Stand?*, N.Y. TIMES: FIVETHIRTYEIGHT (Dec. 27, 2012, 9:46 AM), <http://fivethirtyeight.blogs.nytimes.com/2012/12/27/as-swing-districts-dwindle-can-a-divided-house-stand>.

147. Telephone Interview with Jessica Levinson, Assoc. Clinical Professor, Loyola Law Sch., Los Angeles (Feb. 24, 2013).

148. Bazelon, *supra* note 54; Gerken, *supra* note 54; see Part III.B. *infra*.

149. Bazelon, *supra* note 54; Richard L. Hasen, *If the Court Strikes Down Section 5 of the Voting Rights Act*, REUTERS: GREAT DEBATE (Jan. 30, 2013), <http://blogs.reuters.com/great-debate/2013/01/30/if-the-court-strikes-section-5-of-voting-rights-act>.

and, in turn, even more congressional polarization and gridlock.<sup>150</sup> But the relationship is symbiotic: Congress's polarization may also end up allowing a retrenchment in the enforcement of the VRA to prevent a legislative override, should one become necessary.

### A. *The Polarization of Congress*

Congress is more politically polarized now than at any time since Reconstruction.<sup>151</sup> Both Democrats and Republicans have moved so far to the extremes that finding common ground between them is almost unheard of.<sup>152</sup> Because virtually no moderates remain in Congress to bridge the gulf between these extremes,<sup>153</sup> bipartisan agreements are rarely reached, and when they are, it is only through a hard-fought, protracted struggle.<sup>154</sup> This current dysfunction stands in stark contrast to the relative ease with which Congress put together bipartisan agreements during the Reagan era, when about half of the members of Congress were considered moderates.<sup>155</sup> Conservative and moderate Democrats who lubricated the wheels of Congress in the past were often called Scoop Jackson Democrats during the Cold War and Boll Weevil Democrats in the Reagan era, but their most recent incarnations, the Blue Dog and Third Way Democrats,<sup>156</sup> are dwindling in number.<sup>157</sup> The Blue Dogs, for example, have gone from being a powerful coalition of fifty-four moderate congressional Democrats in 2010 to only fourteen

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150. Silver, *supra* note 146.

151. Keith T. Poole & Howard Rosenthal, *The Polarization of the Congressional Parties*, VOTEVIEW.COM, [http://voteview.com/political\\_polarization.asp](http://voteview.com/political_polarization.asp) (last updated Jan. 18, 2013); see Hasen, *supra* note 53, at 234; Keith T. Poole, *Graphic Picture of a Polarized Congress*, 41 UGA RES. 32, 32–33 (2012), available at [http://iissuu.com/ugaresearch/docs/ugaresearch\\_sp12](http://iissuu.com/ugaresearch/docs/ugaresearch_sp12).

152. Poole, *supra* note 151, at 33.

153. Gerald G. Seib, *Centrist Democrats Hold Possible Cure*, WALL ST. J., Feb. 26, 2013, <http://online.wsj.com/news/articles/SB10001424127887323699704578326142187948904>; Devin McCarthy, *The 2012 Elections and the Vanishing Congressional Moderate*, FAIRVOTE.ORG (Nov. 15, 2012), <http://www.fairvote.org/the-2012-elections-and-the-vanishing-congressional-moderate#.UPJlhOjrmBD>.

154. Seib, *supra* note 153; McCarthy, *supra* note 153.

155. Poole, RESEARCH, *supra* note 151, at 33.

156. Seib, *supra* note 153.

157. Molly Ball, *The New, Progressive Congress*, THE ATLANTIC (Nov. 16, 2012, 10:13 AM), <http://www.theatlantic.com/politics/archive/2012/11/the-new-progressive-congress/265329> (noting the replacement of moderate Democrats with “real” progressives).

members remaining in office after the 2012 elections.<sup>158</sup> Liberal Republicans also helped Congress function more smoothly in the past, but there are almost none left to count.<sup>159</sup> Congressional centrists from both sides of the aisle, who are more pragmatic rather than strictly defined by party ideology, are nearly extinct,<sup>160</sup> or at least in hiding.<sup>161</sup> As a result, floor votes are carried out largely along party lines, and because Republicans control the House and Democrats (arguably) control the Senate,<sup>162</sup> dysfunction prevails. The current 113th Congress comprises the lowest number of moderates ever,<sup>163</sup> which puts it on track to be the most dysfunctional Congress ever.<sup>164</sup> Congress's inability to pass bipartisan legislation may put Section 2 in jeopardy at the hands of the Supreme Court.<sup>165</sup>

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158. *Id.*; Nate Silver, *In House of Representatives, an Arithmetic Problem*, N.Y. TIMES: FIVETHIRTYEIGHT (Dec. 21, 2012, 9:50 PM), <http://fivethirtyeight.blogs.nytimes.com/2012/12/21/in-house-of-representatives-an-arithmetic-problem>.

159. Seib, *supra* note 153.

160. *Id.*

161. See Charles M. Blow, Op-Ed., *Poison Pill Politics*, N.Y. TIMES, Mar. 1, 2013, <http://www.nytimes.com/2013/03/02/opinion/blow-the-sequester-poison-pill-politics.html>.

162. Democrats have made up a simple majority in the Senate since 2007, *Party Division in the Senate, 1789–Present*, UNITED STATES SENATE, [http://www.senate.gov/pagelayout/history/one\\_item\\_and\\_teasers/partydiv.htm](http://www.senate.gov/pagelayout/history/one_item_and_teasers/partydiv.htm) (last visited Mar. 14, 2014), but arguably do not “control” it. See *infra* Part III.A.1.b.

163. See Poole, *supra* note 151, at 33; Keith T. Poole & Howard Rosenthal, *House 1879–2012 Percentage of Moderates (-0.25 to 0.25 in the Parties on Liberal-Conservative Dimension)*, Graph in *The Polarization of the Congressional Parties*, VOTEVIEW.COM, [http://voteview.com/political\\_polarization.asp](http://voteview.com/political_polarization.asp) (last updated Jan. 18, 2013); see also Silver, *supra* note 146 (discussing the sharp polarization of Congressional districts in 2012). If Congress was at its most polarized in the spring of 2012, when Mr. Poole’s research was last updated, it most likely still holds true after the 2012 election ushered in even more political polarization. Doyle McManus, Op-Ed., *The Worst Job in Congress*, L.A. TIMES, Jan. 6, 2013, <http://www.latimes.com/news/opinion/commentary/la-oe-mcmanus-column-boehner-20130106.0,679523.column> (noting that the Republican majority in the House is both smaller and more conservative than it was before the 2012 election because most of the Republicans who left were moderates).

164. Poole, *supra* note 151, at 33 (“Given that trends in polarization have continued unabated for decades[,] . . . it is unlikely that this deadlock will be broken anytime soon.”); Silver, *supra* note 146 (“As partisanship continues to increase, a divided government may increasingly mean a dysfunctional one.”). But see John Hudak, *The Fiscal Cliff Deal: The Benefits of Politics as Usual*, THE BROOKINGS INST.: UP FRONT (Jan. 7, 2013, 3:00 PM), <http://www.brookings.edu/blogs/up-front/posts/2013/01/07-fiscal-cliff-politics-hudak> (explaining that Republicans no longer have a reason to promote gridlock after Obama was reelected, and that the bipartisan fiscal cliff deal that transpired shortly thereafter should not be seen as an anomaly but instead, perhaps, as the beginning of an encouraging trend).

165. See *infra* Parts IV, V.

## 1. A Cause of Congressional Polarization: Partisan Gerrymandering

One cause for the disappearance of congressional moderates is partisan gerrymandering, which the Supreme Court characterized as “the deliberate and arbitrary distortion of district boundaries and populations for partisan or personal political purposes.”<sup>166</sup> The tradition of gerrymandering is not new to the redistricting process; it has been called “as American as apple pie or, perhaps more precisely, as American as slicing an apple pie in such a way as to feed your friends and family while starving your enemies.”<sup>167</sup> As such, partisan gerrymandering is widely considered to be a cause of political polarization, though some social scientists debate the extent of its influence.<sup>168</sup>

### *a. How partisan gerrymandering helps polarize the House of Representatives*

In the “political blood sport”<sup>169</sup> of legislative redistricting, the party in control of the state legislature draws Congressional districts that are less competitive and more politically homogeneous, ensuring

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166. Kirkpatrick v. Priesler, 394 U.S. 526, 538 (1969) (Fortas, J., concurring).

167. Jamin B. Raskin, *Nonrepresentational Line-Drawing and the Universal Representational Imperative: Why Judges Should Replace Gerrymandering with Proportional Representation*, 30 YALE L. & POL’Y REV. INTER ALIA 51, 52 (2012), [http://ylpr.yale.edu/inter\\_alia/nonrepresentational-line-drawing-and-universal-representational-imperative-why-judges](http://ylpr.yale.edu/inter_alia/nonrepresentational-line-drawing-and-universal-representational-imperative-why-judges).

168. Jamie L. Carson et al., *Redistricting and Party Polarization in the U.S. House of Representatives*, 35 AMERICAN POLITICS RESEARCH 878, 899–900 (2007) (explaining that redistricting’s impact on polarization contributes to a polarization that already exists within the electorate); Rob Richie & Devin McCarthy, *The House GOP Can’t Be Beat: It’s Worse Than Gerrymandering*, SALON (Jan. 13, 2013, 9:00 AM), [http://www.salon.com/2013/01/13/the\\_house\\_gop\\_cant\\_be\\_beat\\_its\\_worse\\_than\\_gerrymandering](http://www.salon.com/2013/01/13/the_house_gop_cant_be_beat_its_worse_than_gerrymandering). In addition to partisan gerrymandering, “unintentional gerrymandering” also gives Republicans a structural advantage. Democrats often choose to live in dense urban areas, essentially packing themselves into supermajority districts with more than the necessary number of Democratic votes to win a seat, thus “wasting” some votes. See JAMES A. THOMSON, A HOUSE DIVIDED: POLARIZATION AND ITS EFFECT ON RAND 17 (Rand Corp. 2010), available at [http://www.rand.org/content/dam/rand/pubs/occasional\\_papers/2010/RAND\\_OP291.pdf](http://www.rand.org/content/dam/rand/pubs/occasional_papers/2010/RAND_OP291.pdf); Griff Palmer & Michael Cooper, *How Maps Helped Republicans Keep an Edge in the House*, N.Y. TIMES, Dec. 14, 2012, <http://www.nytimes.com/2012/12/15/us/politics/redistricting-helped-republicans-hold-onto-congress.html>; Nicholas Goedert, *Not Gerrymandering but Districting: More Evidence on How Democrats Won the Popular Vote but Lost the Congress*, THEMONEYCAGE (Nov. 15, 2012), <http://themonkeycage.org/blog/2012/11/15/not-gerrymandering-but-districting-more-evidence-on-how-democrats-won-the-popular-vote-but-lost-the-congress>.

169. Jessica Levinson, *The Political Blood Sport Known as Redistricting Comes to L.A.*, KCET (Jan. 26, 2012, 10:03 AM), [http://www.kcet.org/news/1st\\_and\\_spring/commentary/the-political-blood-sport-known-as-redistricting-comes-to-los-angeles.html](http://www.kcet.org/news/1st_and_spring/commentary/the-political-blood-sport-known-as-redistricting-comes-to-los-angeles.html).

that its own candidates will win and that their party will control those seats in the House of Representatives.<sup>170</sup> Because representatives from gerrymandered districts know that they only need to please the constituents in their own party to be reelected, they are less likely to compromise in Washington.<sup>171</sup> In fact, incumbents from “safe” districts are more likely to lose party primaries to challengers in their own party than to lose the general election to opponents from another party.<sup>172</sup> Because the general election’s outcome is preordained by redistricting, the primary has become the true election, creating “a race to the extremes.”<sup>173</sup> Thus, the winners arrive in Washington beholden to the outer fringes of the party, giving them even less reason to vote as centrists or to cooperate with the opposing party in Congress.<sup>174</sup> Bipartisanship has cost representatives their seats in reelection bids,<sup>175</sup> and the parties themselves tolerate less ideological diversity within their ranks than they have in the past.<sup>176</sup> Even moderate legislators who have not been “primaried” are replaced upon retirement by successors catering to the political extremes.<sup>177</sup> The result is a scarcity of moderates who can bridge the ever-

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170. See Carson et al., *supra* note 168; Palmer & Cooper, *supra* note 168.

171. Palmer & Cooper, *supra* note 168; Aaron Blake, *How Redistricting Leads to a More Partisan Congress—in Two Charts*, WASH. POST: THE FIX (Oct. 16, 2012, 3:29 PM), <http://www.washingtonpost.com/blogs/the-fix/wp/2012/10/16/how-redistricting-leads-to-a-more-polarized-congress-in-two-charts>.

172. See Robert Draper, *The League of Dangerous Mapmakers*, THE ATLANTIC (Sep. 19, 2012, 8:56 PM), <http://www.theatlantic.com/magazine/archive/2012/10/the-league-of/309084/>.

173. *Id.*

174. See Blake, *supra* note 171.

175. See Ball, *supra* note 157. Even John Boehner’s bipartisanship actions have endangered his position as Speaker of the House. Tamara Keith, *The Boehner Rule*, NPR: IT’S ALL POLITICS (Mar. 6, 2013, 3:45 AM), <http://www.npr.org/blogs/itsallpolitics/2013/03/06/173533398/the-boehner-rule-speaker-bucks-house-gop-for-some-legislation>; see *GOP Trying to Chart a Way Forward*, HOUS. CHRON., Jan. 5, 2013, <http://www.chron.com/default/article/GOP-trying-to-chart-way-forward-4170064.php>; Ball, *supra* note 157; Elspeth Reeve, *The Secret iPad List to Bring Down Boehner*, THE ATLANTIC WIRE (Jan. 4, 2013), <http://www.theatlanticwire.com/politics/2013/01/secret-ipad-list-bring-down-boehner/60592>.

176. Nate Silver, *Party-Line Voting Makes Scott Brown Part of a Dying Breed in the Senate*, N.Y. TIMES: FIVETHIRTYEIGHT (Feb. 4, 2013, 8:08 PM), <http://fivethirtyeight.blogs.nytimes.com/2013/02/04/party-line-voting-makes-scott-brown-part-of-a-dying-breed-in-the-senate>.

177. THOMSON, *supra* note 168, at 16; Jeff Zeleny & Jonathan Weisman, *As Republicans Debate Future Direction, One Senator Decides He Will Step Aside*, N.Y. TIMES, Jan. 26, 2013, <http://www.nytimes.com/2013/01/26/us/politics/as-republicans-debate-future-direction-one-senator-steps-aside.html>.

widening gulf between two opposing ideologies, thus reinforcing the chronic political polarization in the House.<sup>178</sup>

*b. Polarization in the Senate*

The Senate also suffers from polarization.<sup>179</sup> Though senators are elected statewide instead of by district and are thus not prone to partisan gerrymandering like their counterparts in the House,<sup>180</sup> the Senate is nevertheless just as gridlocked.<sup>181</sup> As in the House, Senate votes tend to be in lockstep along party lines, and moderates needed for bipartisan agreements are few.<sup>182</sup> Although Democrats currently hold a majority in the Senate, they do not have a supermajority of sixty votes necessary to overcome a filibuster,<sup>183</sup> which is the “new normal” for almost any vote to succeed.<sup>184</sup> In recent years, Republicans have filibustered<sup>185</sup> to block the nomination of a defense secretary for the first time<sup>186</sup> and to block even purely procedural measures as a matter of course.<sup>187</sup> In fact, more presidential nominations have been filibustered under President Obama than

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178. See Harwood, *supra* note 146 (“Over the last generation, polarization has melted away the alloy that once narrowed differences between Republicans and Democrats, leaving both as masses of near-pure ideological ore.”); see also David Weigel, *Your Congress, Now With Helpful Color Coding!*, SLATE.COM (Sept. 5, 2013, 7:12 PM), [http://www.slate.com/articles/news\\_and\\_politics/politics/2013/09/almanac\\_of\\_american\\_politics\\_a\\_biennial\\_reference\\_book\\_explains\\_why\\_we\\_re.html](http://www.slate.com/articles/news_and_politics/politics/2013/09/almanac_of_american_politics_a_biennial_reference_book_explains_why_we_re.html) (explaining that “the gerrymanders of 2010 have taken most of the country out of play” and that the gerrymander was possible because voters no longer split their tickets or vote for candidates with views that buck the party line).

179. Jonathan Weisman, *The Senate’s Long Slide to Gridlock*, N.Y. TIMES, Nov. 25, 2012, <http://www.nytimes.com/2012/11/25/us/politics/new-senates-first-task-will-likely-be-trying-to-fix-itself.html>.

180. See Carson et al., *supra* note 168, at 883.

181. Weisman, *supra* note 179; Poole, *supra* note 151, at 33.

182. See Silver, *supra* note 176; *Explore the Senate*, THE U.S. CONGRESS VOTES DATABASE, <http://projects.washingtonpost.com/congress/110/senate/members/#> (last visited Nov. 6, 2013).

183. See Weisman, *supra* note 179. Although the Senate rules now require only a simple majority to confirm presidential appointments (except Supreme Court Justice nominees), the rules still require a supermajority to pass legislation. Michael Memoli & Lisa Mascaro, *Senate Democrats Invoke ‘Nuclear Option’ on Filibusters*, L.A. TIMES, Nov. 21, 2013, <http://www.latimes.com/nation/la-na-senate-filibuster-20131122,0,7284880.story>.

184. Hasen, *supra* note 53, at 206.

185. Memoli & Mascaro, *supra* note 183.

186. Jackie Calmes, *White House Concerned About Delay in Security Confirmations*, N.Y. TIMES, Feb. 17, 2013, <http://www.nytimes.com/2013/02/18/us/politics/mcdonough-expresses-concern-on-delay-in-hagel-and-brennan-confirmations.html>.

187. Weisman, *supra* note 179.

under all previous presidents combined.<sup>188</sup> Nevertheless, the “nuclear option” that Democrats invoked to lower the number of votes required to confirm most presidential nominations without threat of a filibuster only escalates the procedural warfare within the Senate.<sup>189</sup> That landmark vote to change a century-old rule shows the extent of the Senate’s current dysfunction<sup>190</sup> and merely invites Republicans to use other procedures to achieve their own aims.<sup>191</sup> Thus the Senate’s long-storied tradition of collegiality<sup>192</sup> is sinking into the same “partisan mud”<sup>193</sup> that is miring the House in gridlock.

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188. Louis Jacobson, *Harry Reid Says Eighty-two Presidential Nominees Have Been Blocked Under President Obama, Eighty-six Blocked Under All the Other Presidents*, POLITIFACT.COM, Nov. 21, 2013, <http://www.politifact.com/truth-o-meter/statements/2013/nov/22/harry-reid/harry-reid-says-82-presidential-nominees-have-been> (pointing out that the figures actually represent the number of cloture attempts made, not nominees blocked, meaning Senator Reid’s point is actually stronger because more nominees have been blocked since President Obama took office than before that date). A cloture motion, which requires sixty votes to pass, stops a filibuster and allows the Senate to proceed to a final vote. *Id.*; see also Russell Wheeler, *The Torturous, Protracted Wait to Confirm Judges—From Abe to Obama*, THE ATLANTIC (Feb. 25, 2013), <http://www.theatlantic.com/politics/archive/2013/02/the-tortuous-protracted-wait-to-confirm-judges-from-abe-to-obama/273485> (“[A]dvise and consent has become obstruction and delay.”).

189. Memoli & Mascaro, *supra* note 183. The rule change will not apply to passing legislation or confirming Supreme Court Justices, which will continue to be subject to a sixty-vote threshold to overcome a filibuster. Though it may be easier to confirm most presidential nominees in the immediate future, other orders of business are expected to be far more difficult due to a “toxic atmosphere” that now pervades the Senate because of the rule change. *Id.*

190. *Id.*; Ashley Parker & Jonathan Weisman, *Holiday Finds Congress Well Short of Goals*, N.Y. TIMES, Nov. 23, 2013, <http://www.nytimes.com/2013/11/23/us/politics/filibuster-vote-just-tip-of-dysfunction-iceberg.html> (citing a “daunting” list of bills, from a tax code overhaul to immigration reform, that have stalled in Congress due to deep-seated distrust between the parties).

191. Charlie Savage, *Despite Filibuster Limits, a Door Remains Open to Block Judge Nominees*, N.Y. TIMES, Nov. 29, 2013, <http://www.nytimes.com/2013/11/29/us/politics/despite-filibuster-limits-a-door-remains-open-to-block-judge-nominees.html> (explaining the blue slip tradition giving Senators “a silent, unaccountable veto” of federal judges nominated to the bench within a Senator’s state).

192. See *id.*; Chris Cillizza, *Senate Has Become More Partisan, Less Collegial—More Like the House*, WASH. POST, Apr. 7, 2013, [http://www.washingtonpost.com/politics/senate-has-become-more-partisan-less-collegial-more-like-the-house/2013/04/07/611756de-9f92-11e2-82bc-511538ae90a4\\_story.html?tid=pm\\_politics\\_pop](http://www.washingtonpost.com/politics/senate-has-become-more-partisan-less-collegial-more-like-the-house/2013/04/07/611756de-9f92-11e2-82bc-511538ae90a4_story.html?tid=pm_politics_pop).

193. Damian Paletta & Janet Hook, *Cuts Roll In as Time Runs Out*, WALL ST. J., Mar. 1, 2013, <http://online.wsj.com/news/articles/SB10001424127887323478304578332543799317924>; Poole, *supra* note 151, at 33.

## 2. The Effect of Polarized Gridlock

The effects of congressional gridlock are not merely theoretical but have had a serious impact on the daily lives of Americans.<sup>194</sup> As a result, Congress's approval rating hit an all-time low in 2014,<sup>195</sup> ranking lower than the Internal Revenue Service (IRS), President Nixon during the Watergate scandal, and lawyers.<sup>196</sup> The 112th Congress was the least productive ever recorded,<sup>197</sup> having passed the lowest number of laws since Congress started keeping track,<sup>198</sup> with most of those laws merely housekeeping measures, such as naming post offices.<sup>199</sup> The public's overwhelming disapproval was largely due to Congress's partisan bickering,<sup>200</sup> which is not new on Capitol Hill, although the gridlock for which Congress is now reviled is unprecedented.<sup>201</sup>

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194. See Richard Simon, *Government Shutdown Hits Fisherman, Farmers, Physicists*, L.A. TIMES, Oct. 11, 2013, <http://www.latimes.com/nation/la-na-shutdown-impacts-20131012,0,1327984.story>.

195. *Public Faith in Congress Falls Again, Hits Historic Low*, GALLUP, INC. (June 19, 2014), <http://www.gallup.com/poll/171710/public-faith-congress-falls-again-hits-historic-low.aspx> (“America’s current confidence in Congress is not only the lowest on record, but also the lowest Gallup has recorded for any institution in the 41-year trend.”).

196. Colorado Senator Michael Bennet presented a chart entitled *The Popularity of Congress Today* on the Senate floor, showing approval ratings for the IRS at 40 percent (Gallup 2009), Nixon during Watergate at 24 percent (Gallup 1974), lawyers at 29 percent (Gallup 2011), and Congress at 9 percent (New York Times / CBS 2011). U.S. Senator Michael Bennet, *Congress Hits Rock Bottom*, YOUTUBE (Nov. 10, 2011), <http://www.youtube.com/watch?v=awXdkKgF3Qw>; Chris Cillizza, *Congress’s Approval Problem in One Chart*, WASH. POST: THE FIX (Nov. 15, 2011, 12:09 PM), [http://www.washingtonpost.com/blogs/the-fix/post/congress-approval-problem-in-onechart/2011/11/15/gIQAkHmtON\\_blog.html](http://www.washingtonpost.com/blogs/the-fix/post/congress-approval-problem-in-onechart/2011/11/15/gIQAkHmtON_blog.html).

197. Chuck Todd et al., *First Thoughts: Farewell to the 112th Congress*, NBC NEWS (Dec. 31, 2012, 8:42 AM), [http://firstread.nbcnews.com/\\_news/2012/12/31/16266493-first-thoughts-farewell-to-the-112th-congress?lite](http://firstread.nbcnews.com/_news/2012/12/31/16266493-first-thoughts-farewell-to-the-112th-congress?lite); see also Steven Rattner, *America in 2012, as Told in Charts*, N.Y. TIMES: OPINIONATOR (Dec. 31, 2012, 7:43 PM), <http://opinionator.blogs.nytimes.com/2012/12/31/america-in-2012-as-told-in-charts> (“That Congress has ceased to function effectively has become an article of faith for most Americans. But the extent of the gridlock on Capitol Hill may not be fully appreciated. Over its two-year life span, the 112th Congress that just adjourned passed just 200 laws, 31 percent of the average of the 32 Congresses preceding it.”).

198. Todd et al., *supra* note 197.

199. *Id.*

200. Allison Kopicki, *Approval of Congress Matches Record Low*, N.Y. TIMES: THE CAUCUS (Sept. 16, 2011, 7:00 AM), <http://thecaucus.blogs.nytimes.com/2011/09/16/approval-of-congress-matches-record-low/>.

201. Poole, *supra* note 151, at 32–33. But see Conor Friedersdorf, *The Do-Nothing Congress of 1880 as Described at the Time*, THE ATLANTIC (Mar. 1, 2013, 7:15 AM), <http://www.theatlantic.com/politics/archive/2013/03/the-do-nothing-congress-of-1880-as-described-at-the-time/273459/> (citing a June 20, 1880, issue of *The Republic* that suggests Congress might have been just as unproductive and disrespected at that time).



*a. Tangible effects of congressional gridlock*

Perhaps the most profound effects of congressional gridlock result from the ongoing battle over fiscal matters.<sup>202</sup> Senator Joe Manchin III of West Virginia put it succinctly: “Something has gone terribly wrong when the biggest threat to our American economy is the American Congress.”<sup>203</sup> The debt-ceiling standoff of 2011, for example, helped provoke the Standard & Poor’s downgrade of U.S. Treasury debt,<sup>204</sup> costing taxpayers an estimated \$18.9 billion in additional interest payments<sup>205</sup> and triggering a stock market slump.<sup>206</sup> Yet, in the sequester stalemate of 2013, budget compromises with bipartisan support were actually abandoned in favor of political posturing,<sup>207</sup> and neither party put forth a credible effort to avert<sup>208</sup> the automatic cuts that may cost Americans an estimated 900,000 jobs within a year.<sup>209</sup> The federal government’s

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202. See, e.g., Michael D. Shear & Jackie Calmes, *Lawmakers Gird for Next Fiscal Clash, on the Debt Ceiling*, N.Y. TIMES, Jan. 3, 2013, <http://www.nytimes.com/2013/01/03/us/politics/for-obama-no-clear-path-to-avoid-a-debt-ceiling-fight.html> (quoting Mark Zandi, the chief economist at Moody’s Analytics, in regard to looming partisan battles over the national debt: “We’re in for another round of brinksmanship and uncertainty . . . I don’t think the economy can really find its footing and jump to a higher level of growth until we get to the other side of this.”).

203. Peter Coy, *The Fiscal Cliff Deal and the Damage Done*, BLOOMBERG BUSINESSWEEK (Jan. 2, 2013), <http://www.businessweek.com/articles/2013-01-02/the-fiscal-cliff-deal-and-the-damage-done#p3> (quoting Senator Joe Manchin III).

204. *United States of America Long-Term Rating Lowered to ‘AA+’ Due to Political Risks, Rising Debt Burden; Outlook Negative*, STANDARD & POOR’S (Aug. 5, 2011, 8:13 PM), <http://www.standardandpoors.com/ratings/articles/en/us/?assetID=1245316529563> (“The political brinksmanship of recent months highlights what we see as America’s governance and policymaking becoming less stable, less effective, and less predictable than what we previously believed.”).

205. Binyamin Appelbaum, *Debt Ceiling Doubt and Its Costs*, N.Y. TIMES: DEBT RECKONING (Jan. 2, 2013, 5:52 PM), <http://www.nytimes.com/interactive/us/politics/debt-reckoning.html#sha=97881b346>; see Todd et al., *supra* note 197.

206. Annie Lowrey, *Obama and Republicans Gear Up for Next Fiscal Fight*, N.Y. TIMES, Jan. 6, 2013, <http://www.nytimes.com/2013/01/06/us/politics/obama-and-gop-gear-up-for-next-fiscal-fight.html>; see Mary Williams Walsh, *Credit Ratings Services Give Mixed Reviews to Tax Deal, Debt Reckoning*, N.Y. TIMES (Jan. 3, 2013, 3:42 PM), <http://projects.nytimes.com/live-dashboard/mobile/debt-reckoning>.

207. See Paletta & Hook, *supra* note 193; Jonathan Weisman, *Senate Shoots Down Competing Bills on Cuts*, N.Y. TIMES, Feb. 28, 2013, <http://www.nytimes.com/2013/03/01/us/politics/senate-shoots-down-competing-bills-to-undo-cuts.html>.

208. William Kristol, *A Darkling Plain*, THE WKLY. STANDARD (Mar. 4, 2013), [http://www.weeklystandard.com/articles/darkling-plain\\_703140.html](http://www.weeklystandard.com/articles/darkling-plain_703140.html).

209. Andy Sullivan, *Insight: Largely Out of Sight, U.S. Budget Sequester Still Cuts Deep*, REUTERS, Sept. 28, 2013, available at <http://www.reuters.com/article/2013/09/28/us-usa-budget-sequester-insight-idUSBRE98R05K20130928>. Some of the cuts affect public defenders, who are

sixteen-day shutdown in October 2013 cost the U.S. economy an estimated \$2.4 billion<sup>210</sup> when, among other consequences, fishermen could not obtain permits to catch Alaskan king crab, tourists canceled vacations to national parks, and scientists put their research on hold.<sup>211</sup> Thus, Congress's "reflexive polarization"<sup>212</sup> results in severe, tangible repercussions felt by ordinary Americans.

*b. An intangible effect of congressional gridlock*

But one effect of congressional gridlock may have flown under the radar of most Americans, even though it may have more lasting consequences than Congress's current fiscal clashes. Because of its functional inability to pass legislation, Congress has basically ceded power over the final interpretation of federal statutes to the Supreme Court.<sup>213</sup> After all, a gridlocked Congress can no longer participate in its normal dialogue of statutory interpretation with the Supreme Court. Ordinarily, Congress writes a statute, the Court interprets it, and Congress rewrites the statute if it disagrees with the Court's interpretation.<sup>214</sup> This dialogue was what saved Section 2; it allowed Congress to respond to the Court's holding in *City of Mobile v. Bolden*<sup>215</sup> by passing the 1982 amendment to the VRA.<sup>216</sup> If the Court were to gut Section 2 again, however—which may be likely as discussed in Parts IV and V below—a now-gridlocked Congress may not be able to muster enough agreement among its polarized

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furloughed for twenty days per year and, ironically, must be replaced with higher-priced private-sector lawyers to defend poor defendants. *Id.*

210. Annie Lowrey, Nathaniel Popper & Nelson D. Schwartz, *Gridlock Has Cost U.S. Billions, and the Meter Is Still Running*, N.Y. TIMES, Oct. 16, 2013, <http://www.nytimes.com/2013/10/17/business/economy/high-cost-to-the-economy-from-the-fiscal-impasse.html> (citing Standard & Poor's estimate of the cost of the shutdown in terms of inflation-adjusted gross domestic product).

211. Simon, *supra* note 194. The shutdown was spurred by a faction of the Republican Party that threatened to let the U.S. government default on its debt payments unless Congress defunded the Affordable Care Act, otherwise known as Obamacare. Gerald F. Seib, *Was the Point Republicans Made in the Shutdown Worth the Price?*, WALL ST. J., Oct. 16, 2013, <http://online.wsj.com/news/articles/SB10001424052702304384104579139961910774786>.

212. Joe Scarborough, Op-Ed., *Singing the Sequester Soap Opera*, N.Y. TIMES, Mar. 1, 2013, <http://www.nytimes.com/2013/03/02/opinion/how-obama-overplayed-his-hand-on-the-sequester.html>.

213. Hasen, *supra* note 53, at 209–10, 226–27.

214. *Id.* at 209–10.

215. 446 U.S. 55 (1980), *superseded by statute*, Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131.

216. Fuentes-Rohwer, *supra* note 85, at 130–31; *see supra* Part II.

members to rewrite the statute. If Congress cannot, then the Supreme Court would have the final word on the statutory interpretation of Section 2,<sup>217</sup> which, like *Bolden* did until its 1982 amendment, may put an end to Section 2 as a practical matter.<sup>218</sup> Like the more obvious economic effects of congressional gridlock, this repercussion is not just theoretical. Congress has become so gridlocked that the Court has had final say on statutory interpretation almost as often in recent years as it has on constitutional interpretation.<sup>219</sup>

In fact, congressional gridlock already has incapacitated Section 5 of the VRA by preventing Congress from heeding the Court's warning, in *Northwest Austin Municipal Utility District Number One v. Holder* (*NAMUDNO*),<sup>220</sup> to revise the provision.<sup>221</sup> Although Chief Justice Roberts, in an opinion joined by seven other Justices, addressed the constitutional weaknesses of Section 5 in dicta, the Court ruled instead on statutory grounds, arguably to allow Congress the chance to address those weaknesses.<sup>222</sup> Because Congress failed to revise the VRA accordingly, the Court eventually gutted Section 5 in 2013.<sup>223</sup> Because many members of the Senate and the House represent jurisdictions formerly covered by Section 5 and even

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217. By contrast, however, partisan overrides—ones that do not need bipartisan support—may still be possible, but are still improbable unless both houses of Congress and the Presidency are controlled by the same party. Hasen, *supra* note 53, at 238.

218. Fuentes-Rohwer, *supra* note 85, at 130–31.

219. Hasen, *supra* note 53, at 209. Though the Supreme Court may not have intended to arrogate this power of statutory interpretation, it is apparently well aware of it. For example, during oral arguments for *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566 (2012), Justice Scalia made it clear that if the Court severed a provision of the Patient Protection and Affordable Care Act, commonly known as Obamacare, its ruling would decide the law's final form because Congress would almost certainly not be able to agree on a revision to the severed provision. Transcript of Oral Argument at 73, *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012) (No. 11-393). Justice Scalia explained to the Petitioners' attorney Paul Clement, "You can't repeal the rest of the Act because you're not going to get sixty votes in the Senate to repeal the rest of it." *Id.* Thus, the Court recognized the expanded power it wields because Congress cannot act when gridlocked. See Hasen, *supra* note 53, at 206–07.

220. 557 U.S. 193 (2009).

221. *Id.* at 202–05; Hasen, *supra* note 53, at 227–28 (citing *NAMUDNO*, 557 U.S. at 229).

222. *NAMUDNO*, 557 U.S. at 202–05; see Guy-Uriel Charles, *Race, Redistricting, and Representation*, 68 OHIO ST. L.J. 1185, 1187 (2007).

223. *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2631 (2013) (holding Section 5's trigger provision, Section 4, unconstitutional for no longer being "justified by current needs" and for not abiding by a principle of "equal sovereignty" among states, thus making Section 5 inoperable); see *supra* note 48.

supported its demise,<sup>224</sup> Congress is unlikely to be able to resuscitate the provision in any form<sup>225</sup> for the foreseeable future.<sup>226</sup> Thus, the Court's evisceration of Section 5 may be final.<sup>227</sup> As a result, the ability to bring a claim under the VRA now falls largely to Section 2.

### *B. Section 2 Combats Polarization by Constraining Partisan Gerrymandering*

Though Section 2 may be at risk due to the polarization of Congress, Section 2 is paradoxically one of the few ways to combat polarization. As one of the only means to constrain partisan gerrymandering,<sup>228</sup> Section 2 helps to stem gerrymandering's widespread effects, including congressional polarization. In fact, Section 2 can be more successful in this endeavor than a partisan gerrymandering claim itself.

#### 1. Partisan Gerrymandering: An Essentially Unenforceable Claim

The widespread growth of partisan gerrymandering in the last twenty-eight years may be largely attributed to the Supreme Court's unwillingness to find even egregiously drawn districts

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224. Paul West, *Republican Party Increasingly a Matter of Region*, L.A. TIMES, Jan. 5, 2013, <http://www.latimes.com/news/nationworld/nation/la-na-gop-analysis-20130106,0,787706.story> ("To an unprecedented degree, today's Republican majority in the House is centered in the states of the old Confederacy . . . [T]he South's dominance and internal politics have reinforced the tilt [of House Republicans] toward sharply conservative views.").

225. See Richard Hasen, *Online VRA Symposium: The Voting Rights Act, Congressional Silence, and the Political Polarization*, SCOTUSBLOG (Sept. 10, 2012, 11:45 AM), <http://www.scotusblog.com/2012/09/online-vra-symposium-the-voting-rights-act-congressional-silence-and-the-political-polarization/>.

226. Rick Hasen, *The Chances of a Deal to Fix the VRA After Shelby County? Observations About the Senate Judiciary Committee Hearing*, ELECTION LAW BLOG (July 17, 2013, 12:34 PM), <http://electionlawblog.org/?p=53094> ("Today's hearing showed how far apart Democrats and Republicans are."); Alexei Koseff, *Former Voting Rights Act Provision Gets Hearing in Senate*, L.A. TIMES, July 17, 2013, <http://articles.latimes.com/2013/jul/17/nation/la-na-voting-rights-20130718> ("A Senate Judiciary Committee hearing reveals a partisan split over how to respond to the Supreme Court's recent ruling striking down Section 4 of the Voting Rights Act.").

227. In 1965, Congress willingly gave up some of its policy-making power to the Court by writing the broadest possible statute, entrusting the Court to promote, not hinder, the aims of the VRA. The Court, for its part, interpreted the VRA broadly, trusting that Congress would not override its interpretations of the statute. However, this "constitutional partnership" to further voting rights policy, which lasted for decades after the enactment of the VRA, no longer exists. See Fuentes-Rohwer, *supra* note 85, at 150–52.

228. Bazelon, *Gerrymandering*, *supra* note 54.

unconstitutional when motivated solely by party politics.<sup>229</sup> Although the Court held in *Davis v. Bandemer*<sup>230</sup> that partisan gerrymandering claims are justiciable, a plurality of the Court set forth a standard for unconstitutionality that has never been met in almost three decades since the Court's ruling.<sup>231</sup> The absence of a clear, majority-approved standard for just how much partisan redistricting rises to the level of unconstitutionality has given legislators since 1986 a "constitutional green light"<sup>232</sup> to gerrymander at will.<sup>233</sup>

With no limits set for politically motivated redistricting, legislators face few constraints in drawing district maps.<sup>234</sup> Basically, as long as legislators draw the district lines in the pursuit of their own political interests, the plan will survive constitutional scrutiny as a partisan gerrymander.<sup>235</sup> As an equal protection claim, a partisan gerrymandering action must be brought by voters who have suffered discrimination based on their political affiliation.<sup>236</sup> Political parties, however, are not a protected class under the Fourteenth Amendment,<sup>237</sup> and political affiliation is not an immutable

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229. *Id.* (quoting Nathaniel Persily: "[I]f the facts in those two cases weren't egregious enough, it's hard to see a set of facts that would be, from the Court's point of view."). Professor Persily is referring to *Vieth v. Jubelirer*, 541 U.S. 267 (2004), and *League of United Latin American Citizens v. Perry*, 548 U.S. 399 (2006).

230. 478 U.S. 109 (1986).

231. At the Supreme Court level, the standard for unconstitutional partisan gerrymandering is stated as "[the] continued frustration of the will of the majority of the voters or effective denial to a minority of voters of a fair chance to influence the political process." *Id.* at 133 (White, J., plurality opinion on the merits). Justice White also wrote for the majority in *Bandemer* that a partisan gerrymandering claim brought under the Equal Protection Clause is justiciable. *Id.* at 143.

232. *Id.* at 173 (Powell, J., concurring in part and dissenting in part).

233. *Session v. Perry*, 298 F. Supp. 2d 451, 474 (E.D. Tex. 2004) (per curiam) (three-judge panel) (quoting *Bandemer*, 478 U.S. at 173 (Powell, J., concurring in part and dissenting in part)) (internal quotation marks omitted) ("It is now painfully clear that Justice Powell's concern that the decision offered a constitutional green light to would-be gerrymanderers has been realized."), *vacated sub nom. Travis Cnty., Tex. v. Perry*, 543 U.S. 941 (2004).

234. *See Bandemer*, 478 U.S. at 173 (Powell, J., concurring in part and dissenting in part).

235. Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593, 637 (2002).

236. *See Bandemer*, 478 U.S. at 127 (majority opinion).

237. *Vieth v. Jubelirer*, 541 U.S. 267, 288 (Scalia, J., plurality opinion) ("[The Constitution] guarantees equal protection of the law to persons, not equal representation in government to equivalently sized groups."); Laughlin McDonald, *The Looming 2010 Census: A Proposed Judicially Manageable Standard and Other Reform Options for Partisan Gerrymandering*, 46 HARV. J. ON LEGIS. 243, 246 (2009) ("There is nothing in the federal Constitution that expressly prohibits gerrymandering.").

characteristic like race<sup>238</sup> because it may change from election to election, or even within the same election.<sup>239</sup> To draw redistricting plans, therefore, legislators just have to ensure that “impermissible motivations are accompanied by permissible ones.”<sup>240</sup> Because the constitutional standard for measuring partisan discrimination is unclear, and because the Court considers partisanship a permissible motivation for drawing district lines, partisan gerrymandering has proliferated largely unabated since *Bandemer*.<sup>241</sup>

## 2. Section 2’s Constraint on Partisan Gerrymandering

The motivation behind a redistricting plan plays no role in the Section 2 effects test, so some partisan gerrymanders run afoul of the VRA regardless of the legislature’s purported intent.<sup>242</sup> The mere effect of diluting minority voting strength, whether for political power or racial animus, violates Section 2, which enables the VRA to check political overreaching when a partisan gerrymandering claim cannot.<sup>243</sup> As long as a minority group tends to side with a particular party, as Latinos currently do with Democrats, for example, the VRA can effectively curtail partisan gerrymandering when a redistricting plan has the effect of discriminating against that minority group.<sup>244</sup> In Tom DeLay’s redistricting plan, for example, Texas’s District 23, drawn specifically to exclude certain Latino voters, did not violate the Court’s standard for an unconstitutional partisan gerrymander, but it did violate Section 2 of the VRA for

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238. *Vieth*, 541 U.S. at 287.

239. *Id.*

240. Dan Ortiz, *The Myth of Intent in Equal Protection*, 41 STAN. L. REV. 1105, 1116 (1989).

241. In 2004, Justice Scalia, writing for a plurality in *Vieth*, argued that the total absence of successful claims meant that partisan gerrymandering must be non-justiciable for lack of judicially manageable standards. *Vieth*, 541 U.S. at 287 (plurality opinion). Nevertheless, Justice Scalia’s reasoning failed to garner majority support in either *Vieth* or *League of United Latin American Citizens v. Perry (LULAC)*, 548 U.S. 399, 447 (2006), so partisan gerrymandering remains justiciable under *Bandemer*, but with no majority-approved standard of what level of partisan gerrymandering is unconstitutional. See Daniel H. Lowenstein, *Vieth’s Gap: Has the Supreme Court Gone from Bad to Worse on Partisan Gerrymandering?*, 14 CORNELL J.L. & PUB. POL’Y 367, 393–94 (2005).

242. See OVERTON, *supra* note 24, at 109; Bazelon, *supra* note 54.

243. See OVERTON, *supra* note 24, at 110; Bazelon, *supra* note 54.

244. Gerken, *supra* note 54; see Michael Li, *Legal Wrangling Over Texas Redistricting Misses the Big Story*, FORT WORTH STAR-TELEGRAM, Jan. 31, 2012, <http://www.star-telegram.com/2012/01/31/3702035/li-legal-wrangling-over-texas.htm> (“[C]oalition districts are protected when minority groups act cohesively.”).

diluting Latino voting rights.<sup>245</sup> Likewise, in the Perrymander, the Texas legislature excluded Latino voters from District 23 and replaced them with Latino non-voters, but failed to evade a lawsuit under Section 2.<sup>246</sup> In both cases, the effect of discrimination against Latinos, not against Democrats, is what prevented the wholesale implementation of the Texas legislature's redistricting plans.<sup>247</sup>

### 3. The Scope of Section 2's Constraint on Partisan Gerrymandering

On the other hand, Section 2's constraint on partisan gerrymandering is limited because it applies only when minority voting rights are diluted.<sup>248</sup> After all, the Court upheld Tom DeLay's partisan gerrymander, for example, in all Texas districts but one, District 23.<sup>249</sup> Even so, Section 2 provides more protection for minority voting rights than another avenue for relief—an equal protection claim for racial discrimination in voting.<sup>250</sup> Even though race, unlike political affiliation in a partisan gerrymandering claim, is an immutable characteristic protected by the Constitution and thus subject to strict scrutiny,<sup>251</sup> equal protection claims are still less likely to succeed than Section 2 claims. Plaintiffs find it more difficult to prove an infringement of minority voting rights under the equal protection clause because such a claim requires a showing of racially discriminatory intent, whereas a Section 2 claim does not.<sup>252</sup> In fact, legislators drawing the maps understand how to avoid an equal protection violation: they know that just about any redistricting objective is permissible as long as they never mention race, just as they know they are entitled to free speech over the airwaves as long

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245. *LULAC*, 548 U.S. at 447. Some scholars even suggest that Justice Kennedy, writing for the majority, expanded the *Gingles* precondition of compactness to be able to grant relief under Section 2 because he recognized the injustice to District 23 but could not grant relief under the Court's partisan gerrymandering standard. Charles, *supra* note 222, at 1186–88. See *supra* text accompanying notes 101–04, for discussion of *Gingles*.

246. *Perez v. Texas*, 891 F. Supp. 2d 808, 813 (W.D. Tex. 2012).

247. See *id.* at 826, 838; *LULAC*, 548 U.S. at 447. Although the Section 2 claim against the Perrymander has not yet been decided on the merits, the litigation caused interim maps to be drawn for the 2012 election. *Perez*, 891 F. Supp. 2d at 825.

248. See 42 U.S.C. § 1973b (2006).

249. *LULAC*, 548 U.S. at 447.

250. See U.S. CONST. amend. XIV, § 1.

251. See *Vieth v. Jubelirer*, 541 U.S. 267, 293–94 (2004) (plurality opinion).

252. See Davidson, *supra* note 58, at 38 (citing and discussing *City of Mobile v. Bolden*, 446 U.S. 55, 104 (1980)).

as they avoid the “seven dirty words.”<sup>253</sup> Because a plaintiff needs only to show a discriminatory effect for a violation of Section 2,<sup>254</sup> even redistricting plans purportedly drawn for nonracial reasons may be deemed unlawful if they have the effect of discriminating against minorities.<sup>255</sup>

Now that race is widely considered a proxy for political party affiliation,<sup>256</sup> the VRA’s protections have become even more important in protecting minority voting rights, especially when a defendant jurisdiction can easily disclaim its intent to discriminate. After all, the impact of a partisan gerrymander that deprives minorities of an equal vote transcends the election itself and effectively denies them a voice in the legislature and in the laws it enacts thereafter.<sup>257</sup> The VRA, therefore, is not only an important protection against the abridgment of minority voting rights, but also “the only real bulwark against gerrymandering,”<sup>258</sup> because it provides more protection than a partisan gerrymandering claim or an equal protection claim. Thus, the VRA is an important restraint on

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253. *See id.* at 48 (noting how easily constitutional scrutiny for a gerrymander is averted under equal protection analysis, even under the more exacting level of scrutiny for a protected class in a racial gerrymandering claim, by avoiding producing evidence of discriminatory intent (citing *FCC v. Pacifica Found.*, 438 U.S. 726, 777 (1978))).

254. *See supra* Part II.B (subject to the *Gingles* analysis).

255. *See League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 447 (2006).

256. BICKERSTAFF, *supra* note 2, at 12.

257. Peter H. Shuck, *The Thickest Thicket: Partisan Gerrymandering and Judicial Regulation of Politics*, 87 COLUM. L. REV. 1325, 1329 (1987).

258. Bazelon, *supra* note 54; OVERTON, *supra* note 24, at 111. The counterargument is that the Court’s creation of majority-minority districts to remedy minority vote dilution allows a legislature to “pack” minorities into certain districts, thus draining the surrounding districts of their minority voters and promoting polarization. Michael Carvin, Partner, Jones Day, Remarks at the Voting Rights Act and Redistricting Panel at the George Washington University Law School Symposium: Law and Democracy: A Symposium on Political Law (Nov. 16, 2012) at 40:58 [hereinafter Carvin Symposium], available at <http://vimeo.com/user9108723/review/55780860/5749aec1a9> (“Republicans like majority black districts or high-percentage minority districts because the adjacent districts are going to be that much whiter, that much more gettable by Republicans.”). This argument, however, addresses the Court’s remedy as set forth in *Gingles*, not Section 2 itself. Nothing in Section 2’s text mandates the creation of single-member majority-minority districts. Section 2 only requires a minority group to have the ability to elect its candidate of choice, which may be achievable through other means. *See* Allan Ides, *Approximating Democracy: A Proposal for Proportional Representation in the California Legislature*, 44 LOY. L.A. L. REV. 437, 451 (2011); Raskin, *supra* note 167, at 53; Daniel R. Ortiz, Note, *Alternative Voting Systems as Remedies for Unlawful At-Large Systems*, 92 YALE L.J. 144, 145 (1982); *The Fair Voting Solution for U.S. House Elections*, FAIRVOTE.ORG, <http://www.fairvote.org/fair-voting-solution#.UTeYORnmXW> (last visited Apr. 4, 2013).



the political polarization and gridlock that may threaten its very survival.

#### IV. THE CONSTITUTIONALITY OF SECTION 2

*I've got no basis for viewing [Section 2] as constitutionally suspect today, and I'm not aware that it's been challenged in that respect since it was enacted. It may have been, but as I say, I'm not aware of it.*

—John G. Roberts Jr., to the Senate Judiciary Committee in confirmation hearings after his nomination to be Chief Justice of the U.S. Supreme Court<sup>259</sup>

Although Section 2's effects test is what makes the VRA an effective means of challenging minority vote dilution and, by extension, partisan gerrymandering, it may be exactly what makes Section 2 unconstitutional to the Supreme Court. Although the constitutionality of Section 2 has never been challenged before the Court,<sup>260</sup> the 1982 amendment to the VRA—Congress's override of *City of Mobile v. Bolden*—triggered constitutional concerns that had not existed previously.<sup>261</sup> In fact, one young attorney working at the time in President Reagan's Department of Justice argued vociferously against the amendment of Section 2:<sup>262</sup> John G. Roberts Jr.<sup>263</sup>

Roberts warned that Section 2 would be constitutionally suspect if the 1982 amendment were enacted.<sup>264</sup> He argued that Section 2 originally mirrored the Fifteenth Amendment by requiring a showing

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259. Fuentes-Rohwer, *supra* note 57, at 697 (citing *Nomination of John G. Roberts, Jr., of Maryland, to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 317 (2005) (statement of John G. Roberts Jr., nominee, Chief Justice of the Supreme Court of the United States)).

260. Though Chief Justice Burger and then-Justice Rehnquist called for a constitutional inquiry into Section 2 in their dissent to the Court's summary affirmance in *Mississippi Republican Executive Committee v. Brooks*, 469 U.S. 1002 (1984), the Court has not yet granted full review to a Section 2 challenge. Fuentes-Rohwer, *supra* note 85, at 134.

261. Hasen, *supra* note 55 (quoting Chief Justice Roberts as referring to the amended Section 2 as “not only constitutionally suspect, but also contrary to the fundamental [tenets] of the legislative process on which the laws of this country are based”).

262. *Id.*

263. *Id.*

264. *Id.*

of both discriminatory intent and discriminatory effect, but the proposed 1982 amendment to the VRA mandated an effects-only test that would not require a showing of discriminatory intent.<sup>265</sup> This uncoupling of the VRA from the constitutional amendment it enforced raised constitutional questions in his eyes<sup>266</sup> about whether Congress was acting within its authority and whether the means of enforcement it was proposing was “appropriate.”<sup>267</sup> These questions implicate the separation of powers doctrine as well as federalism concerns.<sup>268</sup>

### A. Separation of Powers

Whereas the final say in statutory interpretation belongs to Congress,<sup>269</sup> the last word in constitutional interpretation belongs to the Court under the judicial supremacy principle set forth in *Marbury v. Madison*.<sup>270</sup> If the Court interprets a statute that enforces a constitutional amendment, however, does a legislative override of that decision constitute Congress’s valid authority over statutory interpretation or an improper encroachment into the Court’s exclusive authority over constitutional interpretation?<sup>271</sup> Once Congress amended Section 2, this question came to the fore.

As a provision of the VRA, Section 2 is part of the legislation Congress enacted to enforce the Fifteenth Amendment.<sup>272</sup> Originally, the statute echoed the amendment’s text<sup>273</sup> to provide relief only if vote discrimination resulted from purposeful discrimination based on race, color, or previous condition of servitude.<sup>274</sup> For years, however,

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265. Memorandum from John Roberts to the Att’y Gen., Voting Rights Act: Section 2, 4 (Dec. 22, 1981) [hereinafter Roberts, Dec. 22 Memo], available at <http://www.archives.gov/news/john-roberts/accession-60-88-0498//030-black-binder1/folder030.pdf#page=9>; see *supra* Part II.B.3.

266. Memorandum from John Roberts to the Att’y Gen., *supra* note 265; see *infra* Part V.C.

267. Fuentes-Rohwer, *supra* note 85, at 133; Michael Pitts, *Congressional Enforcement of Affirmative Democracy Through Section 2 of the Voting Rights Act*, 25 N. ILL. U. L. REV. 185, 203–16 (2005).

268. Pitts, *supra* note 267, at 203–16.

269. See *supra* Part III.A.2.b.

270. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is.”); Fuentes-Rohwer, *supra* note 85, at 134; Fuentes-Rohwer, *supra* note 57, at 750.

271. Fuentes-Rohwer, *supra* note 85, at 133–34.

272. Grofman & Davidson, *supra* note 57, at 17.

273. THERNSTROM, *supra* note 113, at 81; Fuentes-Rohwer, *supra* note 57, at 735.

274. U.S. CONST. amend. XV, § 1.

lower courts inferred a legislature's discriminatory intent through a totality-of-the-circumstances analysis because of the difficulties in finding direct proof of discrimination.<sup>275</sup> *City of Mobile v. Bolden* halted this practice of allowing indirect evidence.<sup>276</sup> In its decision, the Court interpreted Section 2 to require direct proof of discriminatory intent because the Fifteenth Amendment had also done so.<sup>277</sup> By amending the VRA to override that ruling, the question arose whether Congress had acted within its powers by interpreting Section 2, or had instead encroached on the Court's exclusive powers by attempting to interpret the Fifteenth Amendment.<sup>278</sup>

Mere days after the 1982 amendment to the VRA became law, however, the Court may have answered that question by issuing an opinion suggesting that Section 2, as amended, did not violate the separation of powers doctrine.<sup>279</sup> In *Rogers v. Lodge*,<sup>280</sup> the Court decided an equal protection and Fifteenth Amendment challenge to an at-large county election system in Georgia that had the discriminatory effect of diluting the African-American community's votes.<sup>281</sup> In its constitutional analysis, the Court inferred discriminatory intent to dilute the minority vote using various forms of circumstantial evidence, such as a history of official discrimination, a majority vote requirement, and discrimination in education and employment.<sup>282</sup> In other words, the Court essentially applied Congress's amended Section 2 test to analyze constitutional claims.<sup>283</sup> In fact, the Court applied a totality-of-the-circumstances analysis (without using that term) and considered indirect evidentiary

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275. Pitts, *supra* note 267, at 204–05; *see supra* Part II.

276. Pitts, *supra* note 267, at 205 (citing *White v. Regester*, 412 U.S. 755, 765–66 (1973)).

277. *City of Mobile v. Bolden*, 446 U.S. 55 (1980), *superseded by statute*, Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131. The Court held that Section 2 merely restated the Fifteenth Amendment, which the Court interpreted to require purposeful discrimination. *Id.* at 60–62. Therefore, a violation of Section 2 would also require proof of discriminatory intent. The Court also held that the *Zimmer* factors were insufficient to establish discriminatory intent for an Equal Protection Claim under the Fourteenth Amendment. *Id.* at 72–73.

278. Fuentes-Rohwer, *supra* note 85, at 133.

279. *See* Pitts, *supra* note 267, at 206–07.

280. 458 U.S. 613 (1982).

281. *Id.* at 615.

282. *Id.* at 624–27. For example, some of the county's schools were still essentially segregated in 1982. *Id.* at 624–25.

283. *See* Davidson, *supra* note 58, at 41.

factors that bore a striking resemblance to the *Zimmer* factors,<sup>284</sup> “albeit cloaked in the language of intent.”<sup>285</sup> The Court, therefore, interpreted the Fourteenth and Fifteenth Amendments to require the same standard Congress provided for enforcing those constitutional amendments via Section 2.<sup>286</sup> Thus, any argument that Congress encroached on the domain of judicial interpretation and violated the separation of powers by amending Section 2 became largely moot after *Rogers v. Lodge*.<sup>287</sup>

### B. Federalism

Whether Section 2 violates principles of federalism is a more complex question. The evisceration of Section 5 makes the amended Section 2 especially vulnerable to the arguments in the Court’s Enforcement Clause jurisprudence.<sup>288</sup> By eliminating the intent requirement from Section 2, Congress made it easier for plaintiffs to prove its violation but harder for scholars to prove its constitutionality.

#### 1. Congress’s Enforcement Power

Congress’s enforcement power under the Enforcement Clause of the Fourteenth Amendment allows Congress to pass remedial measures appropriate to the constitutional wrongs they are meant to redress.<sup>289</sup> Congress enacted the VRA, however, specifically to enforce the Fifteenth Amendment, which has its own enforcement clause, and thus to remedy the wrong of denying or abridging the right to vote on account of race, color, or previous condition of servitude.<sup>290</sup> Because the Fifteenth Amendment’s own enforcement

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284. See *supra* Part II.B, for discussion of *Zimmer* factors.

285. Davidson, *supra* note 58, at 41 (quoting Bernard Grofman, *Criteria for Districting: A Social Science Perspective*, 33 UCLA L. REV. 77, 97 (1985)).

286. See Pitts, *supra* note 267, at 209.

287. *Id.*

288. Compare Katz Symposium, *supra* note 43, at 1:09:32 (arguing that Section 2 is “undeniably vulnerable” for the same reasoning that the Court will invalidate Section 5 in *Shelby County*), and Pamela Karlan, Professor, Stanford University, heard offscreen at Katz Symposium, *supra* note 43, at 1:04:32 [hereinafter Karlan Offscreen] (asking why a court that has held Section 5 unconstitutional would uphold Section 2 as constitutional “to the extent that Section 2 goes beyond forbidding that which the Constitution itself forbids”), with Carvin Symposium, *supra* note 258 (implying that Section 2 is not as vulnerable as Section 5 to federalism concerns).

289. *City of Boerne v. Flores*, 521 U.S. 507, 524–25 (1997).

290. 42 U.S.C. § 1973(a) (2006).

clause simply restates the Enforcement Clause of the Fourteenth Amendment,<sup>291</sup> whether Congress's power to enact the VRA and its 1982 amendment originates from the Fifteenth Amendment alone or from both the Fourteenth and Fifteenth Amendments may be the crux of the debate over Section 2's constitutionality.

*a. Congress's enforcement power originating from the Fifteenth Amendment*

If Congress's enforcement power originated with the Fifteenth Amendment exclusively, then the means Congress chose to enforce it—here, Section 2—may be judged by the highly deferential “appropriate means” standard established in *McCulloch v. Maryland*.<sup>292</sup> In fact, *McCulloch* gave Congress so much deference to enforce the Constitution<sup>293</sup> that between *McCulloch* and the drafting of the Fourteenth Amendment, no congressional law was struck down under this standard except, tellingly, in *Dred Scott v. Sandford*.<sup>294</sup>

Furthermore, each of the five constitutional amendments protecting the right to vote—the Fourteenth, Fifteenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth—has its own enforcement clause alluding to the *McCulloch* standard: “The Congress shall have power to enforce this article by appropriate legislation.”<sup>295</sup> The separate authorization for each one of these amendments suggests that protecting voting rights is well within Congress's power, and that Congress is due great latitude in creating a means to enforce them.<sup>296</sup>

Finally, the Fifteenth Amendment is specifically limited to preventing racial discrimination in voting, so—the argument goes—it need not be subject to the limits of “congruence and proportionality”; those limits were meant to prevent Congress from

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291. Compare U.S. CONST. amend. XIV, § 5, with U.S. CONST. amend. XV, § 2 (containing identical enforcement clauses).

292. “Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.” *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819); Akhil Reed Amar, *The Lawfulness of Section 5—and Thus of Section 5*, 126 HARV. L. REV. F. 109, 119 (2013), available at <http://harvardlawreview.org/2013/02/the-lawfulness-of-section-5-and-thus-of-section-5>.

293. Amar, *supra* note 292.

294. 60 U.S. 393 (1856); Amar, *supra* note 292, at 115.

295. U.S. CONST. amend. XIV, XV, XIX, XXIV, XXVI; Amar, *supra* note 292, at 119.

296. Amar, *supra* note 292, at 119–20.

having plenary power over a wide swath of rights such as life, liberty, and property—not to mention unspecified privileges and immunities—all of which fall under the Fourteenth Amendment.<sup>297</sup> Because the Fifteenth Amendment focuses only on voting rights and is expressly limited in scope, it does not trigger a need for the Court to infer additional limits, as it did under the Fourteenth Amendment, to protect states' rights.<sup>298</sup>

Finally, in *City of Rome v. United States*,<sup>299</sup> which was decided the same day as *City of Mobile v. Bolden*, the Court interpreted the Fifteenth Amendment's enforcement clause to allow Congress to forbid discriminatory voting practices, even if they do not violate the amendment itself, as long as the measures Congress adopts are "appropriate."<sup>300</sup> The Court determined that Congress could have rationally concluded that banning electoral practices that were only discriminatory in effect was an appropriate means of enforcing the Fifteenth Amendment, even if the amendment only prohibited intentional discrimination.<sup>301</sup>

The prevalent view, however, is that Congress's power to enact the VRA and its 1982 amendment does not stem exclusively from the Fifteenth Amendment.<sup>302</sup> If it did, Section 2 would not be vulnerable in the view of election law scholars<sup>303</sup> and, if the past is any indication, in the eyes of the Chief Justice of the United States Supreme Court.<sup>304</sup>

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297. *Id.* at 120.

298. *Id.* at 119–20.

299. 446 U.S. 156 (1980), *superseded by statute*, Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131.

300. *City of Rome*, 446 U.S. at 177. Though *Rome* implicated Section 5 of the VRA, the interpretation of the Fifteenth Amendment's enforcement clause under *McCulloch v. Maryland* is still applicable here. *See* 17 U.S. (4 Wheat) 316, 421 (1819).

301. *City of Rome*, 446 U.S. at 173, 176–77.

302. *See* Amar, *supra* note 292, at 119–20 (proffering the Fifteenth Amendment enforcement power as a backup argument); Interview with Allan Ides, Professor, Loyola Law Sch., Los Angeles, in L.A., Cal. (Feb. 28, 2013).

303. *See* Fuentes-Rohwer, *supra* note 85, at 138; Katz, *supra* note 59, at 2407; Douglas Laycock, *Conceptual Gulfs in City of Boerne v. Flores*, 39 WM. & MARY L. REV. 743, 749–52 (1998).

304. *See* Hasen, *supra* note 55.

*b. Congress's enforcement power originating from the Fourteenth and Fifteenth Amendments*

Most authorities agree that Congress's power to enact and amend the VRA originates from both the Fourteenth and Fifteenth Amendments,<sup>305</sup> so Section 2 must comport with the Fourteenth Amendment Enforcement Clause jurisprudence introduced in *City of Boerne v. Flores*.<sup>306</sup> Under the Fourteenth Amendment, Congress may enforce rights guaranteed by the Constitution, but it cannot create or alter them; a statute cannot expand or limit the underlying constitutional right it is meant to enforce.<sup>307</sup> The *Boerne* Court applied a stricter standard of "appropriate" than the Court in *McCulloch*.<sup>308</sup> Congress's chosen means of enforcement must be congruent to the constitutional right it enforces and proportional to the harm it is meant to address.<sup>309</sup> By requiring congruence and proportionality, the *Boerne* Court aimed to ensure that Congress did not exceed its Enforcement Clause power,<sup>310</sup> violating the principle of federalism by assuming power reserved to the states by the Tenth Amendment.<sup>311</sup>

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305. Katz, *supra* note 59, at 2406 ("Congress's enforcement powers under the Fourteenth and Fifteenth Amendment are 'coextensive.'"); Interview with Allan Ides, *supra* note 302. This view is bolstered by the Court's dicta in *Northwest Austin Municipal Utility District Number One v. Holder* (NAMUDNO), 557 U.S. 193, 204 (2009), that "raised the possibility that a line of Fourteenth Amendment power cases beginning with *City of Boerne v. Flores* could apply now to review of voting rights." Rick Hasen, *The Curious Disappearance of Boerne and the Future Jurisprudence of Voting Rights and Race*, SCOTUSBLOG (June 25, 2013, 7:10 PM), <http://www.scotusblog.com/2013/06/the-curious-disappearance-of-boerne-and-the-future-jurisprudence-of-voting-rights-and-race>. Although the NAMUDNO Court raised the issue regarding the standard of review, it left the question open and instead ruled on statutory, rather than constitutional, grounds. NAMUDNO, 557 U.S. at 204, 211.

306. *City of Boerne v. Flores*, 521 U.S. 507 (1997); Interview with Allan Ides, *supra* note 302.

307. *Boerne*, 521 U.S. at 519.

308. Compare *id.* (limiting the scope of the Necessary and Proper Clause), with *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819) (defining the scope of the Necessary and Proper Clause broadly).

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

310. *Id.* at 519–20. Because Congress's enforcement power is merely remedial, enacting substantive legislation that guarantees more than the constitutionally protected right the legislation is supposed to enforce would exceed that power.

311. The Tenth Amendment to the U.S. Constitution states: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

At issue in *Boerne* was a federal statute enacted to legislatively override the Court's decision in *Employment Division v. Smith*.<sup>312</sup> In *Smith*, the Court upheld an Oregon law that denied unemployment benefits to two Native American employees who were fired for their religious use of peyote.<sup>313</sup> Because the law was neutral, generally applicable, and did not intentionally ban religious practices, the Court held that it did not violate the Free Exercise Clause of the First Amendment or the Equal Protection Clause of the Fourteenth.<sup>314</sup> In response, Congress enacted the Religious Freedom Restoration Act (RFRA) to eliminate the requirement of religion-based discriminatory intent and thus override *Smith*.<sup>315</sup> The *Boerne* Court, however, held that the RFRA failed the congruence and proportionality test for which *Boerne* is now known.<sup>316</sup> Because the RFRA created a new right that was far greater in scope than the right to the free exercise of religion provided in the Constitution,<sup>317</sup> the Court considered it not to be an "appropriate" means to enforce the Free Exercise Clause of the First Amendment and thus struck down the RFRA as unconstitutional except as applied to the federal government.<sup>318</sup>

## 2. Why Section 2 May Not Survive Under *Boerne*

Despite the obvious similarities between the RFRA and Section 2 of the VRA, the *Boerne* Court actually compared the VRA favorably to the RFRA in explaining why the RFRA exceeded Congress's enforcement power.<sup>319</sup> Notably, however, the *Boerne* Court compared the RFRA to Section 5, not Section 2.<sup>320</sup> For

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312. 494 U.S. 872 (1990), *superseded by statute*, Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 1993 U.S.C.C.A.N. (107 Stat.) 1488, *invalidated by Boerne*, 521 U.S. at 512.

313. *Id.* at 890.

314. *Id.* at 881–82.

315. *Boerne*, 521 U.S. at 512–13.

316. *Id.* at 533.

317. ALLAN IDES & CHRISTOPHER MAY, CONSTITUTIONAL LAW: INDIVIDUAL RIGHTS 48 (Vicki Been et al. eds., 5th ed. 2010). The RFRA would have protected against even a slight burden to any religion caused by any law—federal, state, or local—no matter how long that law had been in place. The *Boerne* Court considered this right to be far greater than the evil that Congress sought to remedy: the fear that neutral laws might sanction religious bigotry. *See id.*

318. *Boerne*, 521 U.S. at 536.

319. *Id.* at 530–33.

320. *Id.*; Fuentes-Rohwer, *supra* note 85, at 137.



example, the Court noted that the VRA's voluminous congressional record of voting discrimination justified the need for the "uncommon exercise" of Congress's enforcement power in Section 5, whereas the RFRA's congressional record included no evidence of facially neutral laws passed due to religious bigotry within the previous forty years.<sup>321</sup> Also, while Section 5 of the VRA applied only to jurisdictions with histories of voting discrimination and regulated only laws involving electoral changes, the RFRA restricted all federal, state, and local laws, regardless of subject matter.<sup>322</sup> Finally, Section 5 included a sunset clause that originally limited its validity to five years, but the RFRA included no time limit whatsoever.<sup>323</sup> The Court thus found the RFRA to be too all-encompassing to be congruent to the incidental burdens that generally applicable laws place on certain religious practices absent intentional discrimination.<sup>324</sup> Therefore, the Court invalidated the RFRA as applied to state and local governments.<sup>325</sup>

The RFRA was only the first of several federal laws that the Court, under Chief Justice William Rehnquist, struck down under its new congruence and proportionality standard.<sup>326</sup> It was followed by the Violence Against Women Act, the Americans With Disabilities Act, and the Fair Labor Standards Act.<sup>327</sup> Surprisingly, however, the Rehnquist Court, well-known for its "dramatic lack of deference to Congress" and so-called "federalism revolution," did not strike down the VRA.<sup>328</sup> In fact, the Rehnquist Court imported its *Boerne* reasoning about the VRA from opinions upholding Section 5 that were issued by the Warren Court,<sup>329</sup> well-known for being far more

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321. *Boerne*, 521 U.S. at 530–31.

322. *Id.* at 532–33; see *supra* Part II, for discussion of Section 5.

323. *Boerne*, 521 U.S. at 532. Though the Court clarified that restrictions such as geographic and time limits are not required, they "tend to ensure Congress'[s] means are proportionate to ends legitimate under [the Enforcement Clause]." *Id.* at 533.

324. *Id.* at 532, 536.

325. *Id.* at 536. The RFRA is unconstitutional as applied to state and local governments, although it still applies to the federal government under Congress's Article I powers. Laycock, *supra* note 303, at 745.

326. J. Morgan Kousser, *The Strange, Ironic Career of Section 5 of the Voting Rights Act, 1965–2007*, 86 TEX. L. REV. 667, 726 (2008).

327. *Id.*

328. *Id.*

329. *Boerne*, 521 U.S. at 517–27 (e.g., citing heavily from *South Carolina v. Katzenbach*, 383 U.S. 301 (1966), and *Katzenbach v. Morgan*, 384 U.S. 641 (1966)).

deferential to Congress than the Rehnquist Court was at the time of *Boerne*.<sup>330</sup>

Yet sixteen years later, the Roberts Court did not even refer to *Boerne* when it eviscerated Section 5 of the VRA, the very provision that served as a yardstick of congruence and proportionality for the Rehnquist Court.<sup>331</sup> Citing volumes of evidence of voting discrimination presented in the legislative record, the Rehnquist Court in *Boerne* considered Section 5 of the VRA to be proportional to the widespread and pervasive harm it was remedying.<sup>332</sup> Even so, the Roberts Court effectively invalidated Section 5—without addressing any standard of review—despite more than 15,000 pages of new voting discrimination evidence that Congress introduced to reauthorize the statute in 2006.<sup>333</sup> By contrast, the passage of Section 2’s amendment was supported by “relatively sparse findings of intentional discrimination,”<sup>334</sup> much like the RFRA.<sup>335</sup> Though the *Boerne* Court considered Section 5’s geographic and temporal limitations to support Section 5’s congruence and proportionality,<sup>336</sup> Section 2 has neither limitation.<sup>337</sup> It applies across the country and is a permanent provision, much like the RFRA.<sup>338</sup>

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330. See Erwin Chemerinsky, *Assessing Chief Justice William Rehnquist*, 154 U. PA. L. REV. 1331, 1338 (2006).

331. Hasen, *supra* note 305 (“Perhaps the biggest surprise of *Shelby County* is that the majority purported to ignore this *Boerne* issue . . . even though this has been a key issue involving the constitutionality of Section 5 for years.”).

332. Laycock, *supra* note 303, at 748.

333. *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2636 (2013) (Ginsburg, J., dissenting) (citing the “systematic evidence that intentional racial discrimination in voting remains so serious and widespread in covered jurisdictions that section 5 preclearance is still needed” (internal quotation marks omitted)); Richard L. Hasen, *Shelby County and the Illusion of Minimalism*, 22 WM. & MARY BILL RTS. J. 713, 723 (2014) ([The majority in] “*Shelby County* ignores the *Boerne/Katzenbach* standard of review question entirely . . . and it shifts the constitutional question from one focused on the constitutionality of section 5 preclearance to one solely addressing the constitutionality of the section 4 coverage formula.”). By holding Section 4 to be unconstitutional, the Court effectively invalidated Section 5 as well because Section 4 determined which jurisdictions were subject to Section 5. See Hasen, *supra* note 305.

334. Katz, *supra* note 59, at 2404.

335. *Id.*

336. *City of Boerne v. Flores*, 521 U.S. 507, 530–33 (1997).

337. Katz, *supra* note 59, at 2404.

338. *Id.*; *Boerne*, 521 U.S. at 532–33. On the other hand, Section 2 may not be considered a law of general applicability like the RFRA because it prohibits only the effect of racial discrimination in voting. The RFRA as passed prohibited the effect of religious discrimination in all laws: federal, state, and local. Interview with Aimee Dudovitz, Professor, Loyola Law Sch., Los Angeles, in L.A., Cal. (Feb. 15, 2013).

In fact, the amended Section 2 looks a lot less like Section 5, of which the *Boerne* Court approved, and more like the RFRA, which the *Boerne* Court severely limited.<sup>339</sup> For one, both Section 2 and the RFRA encompass nearly the entire scope of the constitutional right that they were enacted to enforce.<sup>340</sup> Both Section 2 and the RFRA were enacted to legislatively override the Court's legal standard requiring discriminatory intent.<sup>341</sup> Consequently, both statutes forbid more conduct than the Constitution itself prohibits, thus expanding the constitutional right they were enacted to enforce.<sup>342</sup> In other words, Section 2 is "doctrinally irreconcilable" with *Boerne*.<sup>343</sup> In fact, Professor Douglas Laycock, who argued in support of the RFRA before the *Boerne* Court, maintains that Section 2 would not withstand a *Boerne* analysis.<sup>344</sup> Noting all the similarities between Section 2 and the RFRA, Laycock concluded: "The Court summarily upheld the 1982 Act in 1984, but [*Boerne*] implied the opposite result."<sup>345</sup> The summary affirmance of Section 2 to which Laycock referred occurred years before *Boerne*.<sup>346</sup> But in that summary affirmance, Chief Justice Burger and then-Justice Rehnquist dissented, calling for full judicial review of Section 2.<sup>347</sup> This fact further suggests that even though the *Boerne* Court implied Section 5 was congruent and proportional,<sup>348</sup> it would not have come to the same conclusion about Section 2.<sup>349</sup> As a result, Section 2 is likely the next target for constitutional challenge, and it would probably fail a *Boerne* analysis, especially in light of *Shelby County v. Holder*'s<sup>350</sup> restriction on Congress's power against the states.<sup>351</sup>

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339. Katz, *supra* note 59, at 2403–04; Laycock, *supra* note 303, at 749–52.

340. Laycock, *supra* note 303, at 749–52.

341. *Id.*; Katz, *supra* note 59, at 2403–04.

342. Katz, *supra* note 59, at 2404; Karlan Offscreen, *supra* note 288.

343. Katz, *supra* note 59, at 2369; see Fuentes-Rohwer, *supra* note 85, at 137 ("[If] *City of Boerne* serves as a guide, it is hard to believe the Voting Rights Act as amended in 1982 will survive . . . judicial review.").

344. Laycock, *supra* note 303, at 752.

345. *Id.*

346. *Miss. Republican Exec. Comm. v. Brooks*, 469 U.S. 1005–06 (1984).

347. *Id.* at 1005 (Burger, C.J., and Rehnquist, J., dissenting).

348. *City of Boerne v. Flores*, 521 U.S. 507, 532–33 (1997).

349. See Fuentes-Rohwer, *supra* note 85, at 137; Katz, *supra* note 59, at 2404–07; Laycock, *supra* note 303, at 748.

350. 133 S. Ct. 2612 (2013).

351. See Fuentes-Rohwer, *supra* note 85, at 137; Katz, *supra* note 59, at 2404–07; Laycock, *supra* note 303. Professor Richard Hasen surmises that

### 3. How Section 2 Might Survive in Spite of *Boerne*

In spite of the ease with which the Roberts Court might strike down Section 2 under *Boerne*, if the Court wanted to uphold it, several arguments are available. Using the *Boerne* Court's method of analogizing to other statutes, if the Roberts Court compares Section 2 to statutes other than the RFRA, it may be able to construe it to be congruent and proportional.

Compared to a functional Section 5, for example, Section 2 might be able to withstand a constitutional challenge. After all, Section 2 places a considerably smaller burden on federalism than Section 5,<sup>352</sup> so the Court might require less justification to find Section 2 to be an appropriate means to enforce the Fifteenth Amendment.<sup>353</sup> Section 5 of the VRA is an "uncommon exercise" of Congress's power that must be justified by "exceptional conditions" to be considered an appropriate means of enforcing the Fifteenth Amendment.<sup>354</sup> Though the Court recently curbed this "unprecedented" power,<sup>355</sup> Section 2 is the very model of a more common exercise of Congress's enforcement power.<sup>356</sup> Unlike Section 5's preclearance regime, which puts the burden on the defendant jurisdiction to disprove discrimination in a new voting law, a Section 2 claim requires plaintiffs to bear the traditional burden of proof.<sup>357</sup> Section 2 also does not allow the federal government to presume a law to be discriminatory until proven otherwise, nor does it require the claim to be filed with the Department of Justice or the United States District Court for the

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the Chief Justice obfuscated the standard of review in [*Shelby*] as a time bomb: in a future case he could cite to *NAMUDNO* and *Shelby County* fn. 1 for the proposition that the Court has held that the Fourteenth and Fifteenth amendment standards are the same, and then bootstrapping the *Boerne* standard into a Fifteenth Amendment case. Saying so directly would have made [*Shelby*'s] controversial decision even more provocative.

Hasen, *supra* note 305. If Professor Hasen's prediction is right, then he expects the next constitutional challenges to target Section 2. *Id.*

352. Fuentes-Rohwer, *supra* note 85, at 137.

353. *See id.*

354. *See* South Carolina v. Katzenbach, 383 U.S. 301, 334 (1966).

355. *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2626 (2013). Section 5 became inoperable once *Shelby* invalidated Section 4, which determined the jurisdictions covered by Section 5. *Id.* at 2648 (Ginsburg, J., dissenting).

356. Pitts, *supra* note 267, at 210–11.

357. *See id.* at 211.

District of Columbia.<sup>358</sup> Like most federal laws, Section 2 applies to all jurisdictions equally across the country, not just those with histories of discrimination, as does Section 5.<sup>359</sup> Section 2 does not prevent a discriminatory voting law from being implemented but instead provides a judicial remedy after the discrimination has already occurred.<sup>360</sup> In essence, Section 2 looks like other federal statutes except that it does not require proof of intentional discrimination, unlike its underlying constitutional right.<sup>361</sup> Even if the Court considers Section 2's effects test to be "uncommon" compared to other federal statutes, it is still not as "uncommon" as Section 5's effects test, burden shift, coverage formula, and forum restrictions.<sup>362</sup> In fact, Section 5 is still on the books, which makes Section 2 look fairly ordinary—and less burdensome to federalism—by comparison.

Besides, an effects test is not necessarily "uncommon," as a comparison to other federal statutes illustrates.<sup>363</sup> For example, Title VII of the Civil Rights Act of 1964 not only prohibits intentional discrimination in all aspects of employment, but also prohibits neutral policies that may have the effect of limiting job opportunities for some racial groups.<sup>364</sup> Title VIII of the Civil Rights Act of 1968 (and as amended in 1988) is also considered to have an effects test for prohibiting discrimination in the sale, rental, or financing of housing based on race, color, religion, national origin, or familial status.<sup>365</sup> Because these statutes employ effects tests in the everyday realms of housing and employment, a comparison to them may make the use of an effects test in Section 2 appear to be more common and

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358. 42 U.S.C. § 1973(b) (2006).

359. HEBERT ET AL., *supra* note 104, at 32.

360. JUSTIN LEVITT, A CITIZEN'S GUIDE TO REDISTRICTING 47–48 (2010).

361. *See* Pitts, *supra* note 267, at 203, 209. The Fifteenth Amendment protects the right to vote from intentional discrimination. U.S. CONST. amend. XV.

362. *Compare* 42 U.S.C. § 1973(a), *with id.* § 1973c (requiring the state or political subdivision to show that its proposed voting provision will not have "the effect of diminishing the ability of any citizens of the United States on account of race or color" to elect their preferred candidate).

363. Pitts, *supra* note 267, at 210–11.

364. 42 U.S.C. § 2000e-2(k); *Questions and Answers About Race and Color Discrimination in Employment*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, [http://www.eeoc.gov/policy/docs/race-color.html#N\\_71\\_](http://www.eeoc.gov/policy/docs/race-color.html#N_71_) (last modified May 16, 2006).

365. Carvin Symposium, *supra* note 258, at 04:13; *The Fair Housing Act*, U.S. DEP'T HOUS. & URBAN DEV., [http://portal.hud.gov/hudportal/HUD?src=/program\\_offices/fair\\_housing\\_equal\\_opp/progdsc/title8](http://portal.hud.gov/hudportal/HUD?src=/program_offices/fair_housing_equal_opp/progdsc/title8) (last visited Feb. 15, 2012).

less burdensome. The test would then require less justification to be found congruent and proportional to the harm of minority vote dilution.

In addition, Section 2's burden on federalism may be seen as minimal simply based on its operation. For example, if a jurisdiction's redistricting plan violates Section 2, the jurisdiction is usually given an opportunity to remedy its own plan by redrawing the maps.<sup>366</sup> Moreover, requiring state and local governments to stop diluting minority voting power is hardly more intrusive to states' rights than the Constitution's own prohibition on abridging the rights of minorities to vote.<sup>367</sup> Furthermore, unlike other congressional remedies such as the Patent Act, Section 2 does not provide monetary damages as a remedy, so state and local governments need not fear plaintiffs' raiding their treasuries.<sup>368</sup>

If a comparison to the RFRA struck down in *Boerne* cannot be avoided, Section 2 may still be distinguished in ways that may ultimately save it from invalidation. Unlike the RFRA, Section 2 not only protects the fundamental right of voting, which preserves all other rights,<sup>369</sup> but also protects the suspect class of racial and ethnic minorities, so Congress should merit considerable deference for crafting Section 2 of the VRA as an enforcement mechanism.<sup>370</sup> Furthermore, because the VRA enforces not only the Fifteenth Amendment but also the Fourteenth<sup>371</sup> and the Elections Clause,<sup>372</sup> Congress's enforcement power was at its strongest when it enacted the revised Section 2.<sup>373</sup> Finally, unlike the RFRA and other laws struck down by the Rehnquist Court's federalism decisions,<sup>374</sup>

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366. Pitts, *supra* note 267, at 214.

367. *Id.* at 215.

368. *Id.* at 211–12.

369. See *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).

370. Persily, *supra* note 90, at 252.

371. See *Katz*, *supra* note 59, at 2384 (The precedent-supported view is that “Congress’s powers under the Fourteenth and Fifteenth Amendments are ‘coextensive.’”).

372. See Pamela S. Karlan, *Section 5 Squared: Congressional Power to Extend and Amend the Voting Rights Act*, 44 HOUS. L. REV. 1, 4 (2007); Daniel Tokaji, *Shelby County v. Holder: Don’t Forget the Elections Clause*, SCOTUSBLOG (Feb. 13, 2013, 11:43 AM), <http://www.scotusblog.com/2013/02/shelby-county-v-holder-dont-forget-the-elections-clause/>.

373. Persily, *supra* note 90, at 252–53.

374. See, e.g., *United States v. Morrison*, 529 U.S. 598 (2000) (striking down the Violence Against Women Act); *United States v. Lopez*, 514 U.S. 549 (1995) (striking down the Gun Free School Zones Act).

Section 2 has already been in effect for almost a half century as part of the VRA, “the crown jewel of the civil rights movement.”<sup>375</sup> In fact, the Rehnquist Court’s preservation of the VRA precedents despite its “federalism revolution” in the 1990s has been attributed to Chief Justice Rehnquist’s unwillingness to overrule such historic and important decisions.<sup>376</sup> In the previous decade, the Burger Court upheld Section 5 in *City of Rome v. United States*, on the same day that it gutted Section 2 in *City of Mobile v. Bolden*, purportedly because Chief Justice Burger was also unwilling to completely dismantle “the most effective civil rights statute in history.”<sup>377</sup> Now that the Roberts Court has gutted Section 5, will it be willing to finish off the VRA by striking down Section 2? The answer may lie less within the constitutional arguments surrounding Section 2 than within the Justices’ personal ideologies.<sup>378</sup>

## V. THE POLARIZATION OF THE SUPREME COURT

*“The absolute worst violation of the judge’s oath is to decide a case based on a partisan political or philosophical basis, rather than what the law requires.”*

—Justice Antonin Scalia<sup>379</sup>

Despite strong legal arguments both for and against upholding Section 2, its fate may be viewed, rightfully or not, as subject to the prevailing ideology of the current Supreme Court Justices.<sup>380</sup> A great majority of Americans already believe that the Justices rule according to their personal or political views.<sup>381</sup> If the current

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375. Fuentes-Rohwer, *supra* note 57, at 763.

376. Katz, *supra* note 59, at 2369–70, 2370 n.166.

377. Fuentes-Rohwer, *supra* note 57, at 763.

378. See Fuentes-Rohwer, *supra* note 85, at 155 (“[T]he constitutional question at the heart of Section 2 will not be determined by law as commonly understood, but rather, the way the Justices have always done it: in accordance with the individual policy preferences of the Justices in the majority.”).

379. Lyric Winik, *Are There Too Many Lawyers?*, PARADE (Sept. 14, 2008), <http://www.parade.com/hot-topics/intelligence-report/archive/too-many-lawyers>.

380. See Fuentes-Rohwer, *supra* note 85, at 155.

381. Seventy-five percent of Americans believe the Justices rule according to their personal beliefs at some point, while only 12.5 percent believe that they rule solely on legal analysis. See Adam Liptak & Allison Kopicki, *Approval Rating for Justices Hits Just 44% in New Poll*, N.Y.

conservative Court majority aligns itself with Chief Justice Roberts's views, the Roberts Court would not be the first to be guided by a Chief Justice's "substantive vision."<sup>382</sup> Whenever the Court has intervened in the political sphere, however, it has inevitably been regarded as improperly partisan.<sup>383</sup> The highly charged cases of *Bush v. Gore*<sup>384</sup> and *Citizens United v. Federal Election Commission*<sup>385</sup> only bolstered that perception, especially because their decisions were split 5–4 along both ideological and partisan lines.<sup>386</sup> This alignment between the ideology and partisan affiliation of each of the Justices has only served to reinforce their image as political players.<sup>387</sup>

### A. *How the Court Became Polarized*

Although ideological polarization among Justices on the Supreme Court is nothing new, the alignment between ideology and partisan affiliation is a recent phenomenon.<sup>388</sup> In the past several years, Justices whose ideologies were not already aligned with those of the presidents who appointed them were succeeded by Justices whose ideologies were more closely aligned with their appointing presidents.<sup>389</sup> In 2006, for example, Justice Sandra Day O'Connor, a moderate conservative nominated by a Republican president, was succeeded by Justice Samuel Alito, a strong conservative nominated by a Republican president.<sup>390</sup> Three years later, Justice David Souter, a liberal nominated by a Republican president, was succeeded by Sonia Sotomayor, a liberal nominated by a Democratic president.<sup>391</sup>

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TIMES, June 7, 2012, <http://www.nytimes.com/2012/06/08/us/politics/44-percent-of-americans-approve-of-supreme-court-in-new-poll.html>.

382. Chief Justice William Rehnquist, for example, "was very successful in that the Court adopted his views and visions" in every major area of constitutional law. Chemerinsky, *supra* note 330, at 1331, 1334–35. The Marshall Court is now known for Chief Justice John Marshall's vision of judicial review and federalism, and the Warren Court is known for Chief Justice Earl Warren's vision of "a more equal society better protecting the dignity of individuals." *Id.* at 1331.

383. Adam B. Cox & Thomas J. Miles, *Judicial Ideology and the Transformation of Voting Rights Jurisprudence*, 75 U. CHI. L. REV. 1493, 1538–39 (2008).

384. 531 U.S. 98 (2000).

385. 558 U.S. 310 (2010).

386. Liptak & Kopicki, *supra* note 381.

387. *See* Hasen, *supra* note 53, at 243.

388. *Id.*

389. *Id.*

390. *Id.*

391. *Id.*



Finally, in 2010, Justice John Paul Stevens, a moderate liberal nominated by a Republican president,<sup>392</sup> was succeeded by Justice Elena Kagan, a liberal nominated by a Democratic president.<sup>393</sup> Now the Court consists exclusively of conservative Justices nominated by Republicans and liberal Justices nominated by Democrats.<sup>394</sup> Perhaps because presidents want to ensure that the Justices they appoint will continue to rule in accordance with their own views instead of eventually tipping the balance of the Court in the other direction, the Court's polarization may begin at the nomination stage. Nominees may be chosen for their reliably liberal or conservative—rather than moderate—views so that the Court's ideological composition is predetermined even before the nominees become Justices.<sup>395</sup>

Like Congress, then, the Court is losing its moderate voices, and with similar results: the Supreme Court is more polarized than ever<sup>396</sup> and will remain so for the foreseeable future.<sup>397</sup> In fact, the 2006 Supreme Court term—in which Justice Alito replaced Justice O'Connor—had the highest number of cases split along ideological lines in the Court's history.<sup>398</sup> Professor Pamela Karlan noted: “[The Court's different worldviews] were not always connected to partisan interests in the way that they are today. In the past, you had cross-cutting alliances, [but] that is disappearing.”<sup>399</sup>

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392. *Id.*; Jeffrey Rosen, *The Dissenter*, N.Y. TIMES, Sept. 23, 2007, at F50.

393. Hasen, *supra* note 53, at 243.

394. *Id.*

395. However, the successful nominees are usually those who are not necessarily viewed as extreme by the opposing party, or else their nominations will not pass the Senate, whether they are nominated to the Supreme Court or its stepping stone—a circuit court of appeals. See Bill Mears, *Senate Republicans Block Floor Vote for Key Obama Judicial Nominee*, CNN (Mar. 6, 2013, 1:38 PM), <http://www.cnn.com/2013/03/06/politics/senate-judicial-nominee>.

396. John Hudson, *The Supreme Court Is More Polarized Than Ever*, THE ATLANTIC WIRE (June 19, 2012), <http://www.theatlanticwire.com/politics/2012/06/supreme-court-more-polarized-ever/53698>.

397. See Rosen, *supra* note 392.

398. *Id.* (explaining that the brief honeymoon period in which the Court managed to issue some unanimous decisions during the first few months of Chief Justice Roberts's term abruptly ended once Justice Alito took the bench); see AKIN GUMP STRAUSS HAUER & FELD LLP, SUMMARY MEMO: END OF TERM STATISTICAL ANALYSIS OCTOBER TERM 2008 2 (2009), available at <http://www.scotusblog.com/wp-content/uploads/2009/07/summary-memo-final.pdf>. To date, the 2006 term holds the record for the most 5–4 split decisions, although Alito joined the Court after the term had already begun.

399. Karlan Symposium, *supra* note 98, at 42:00. Justice Ginsburg also acknowledged the Court's “spirit of bipartisanship which prevailed in the early 90's.” Colleen Walsh, *Ginsburg Holds Court*, HARVARD GAZETTE (Feb. 6, 2013), <http://news.harvard.edu/gazette/story/2013/02/ginsburg-holds-court>.

## 1. The Loss of Moderates and Judicial Neutrality on the Court

Justice Stevens, for example, was part of those cross-cutting alliances in the past. Though he was known as a liberal icon as a Justice, he did not consider himself to be liberal and, as the last of a breed,<sup>400</sup> he declined to acknowledge any party affiliation while he was on the Court.<sup>401</sup> He explained that he only appeared to be liberal because he had been joined by increasingly conservative Justices.<sup>402</sup> Justice Stevens's legal opinions throughout his tenure on the Court actually were consistent with the opinions he had expressed during his confirmation hearings in 1975.<sup>403</sup> At the time of his nomination, he was known to be a moderate Republican,<sup>404</sup> although now he acknowledges that moderate Republicans—such as Justices John Harlan, Potter Stewart, Lewis Powell, Harry Blackmun, David Souter, and himself<sup>405</sup>—would no longer be nominated to the Court today.<sup>406</sup>

Justice Stevens calls himself a “judicial conservative,” which he defines as someone “who tries to follow precedents and ‘who submerges his or her own views of sound policy to respect those decisions by the people who have authority to make them.’”<sup>407</sup> The Court, however, did not always share his judicial restraint, leading him to predict in *Citizens United*: “The path [the Court] has taken to reach its outcome will, I fear, do damage to this institution. . . . Essentially, five Justices were unhappy with the limited nature of the case before us, so they changed the case to give themselves an opportunity to change the law.”<sup>408</sup> He also decried the loss of the

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400. Rosen, *supra* note 392; Jeffrey Toobin, *After Stevens*, NEW YORKER (Mar. 22, 2010), [http://www.newyorker.com/reporting/2010/03/22/100322fa\\_fact\\_toobin](http://www.newyorker.com/reporting/2010/03/22/100322fa_fact_toobin).

401. Rosen, *supra* note 392.

402. Justice Stevens explained in 2007: “Including myself, every judge who has been appointed to the Court since Lewis Powell has been more conservative than his or her predecessor. Except maybe Justice Ginsburg. That’s bound to have an effect on the Court.” Rosen, *supra* note 392.

403. *Id.*

404. Justice Stevens was nominated by moderate Republican President Gerald Ford. *Id.*

405. *See* Toobin, *supra* note 400.

406. *See* Rosen, *supra* note 392.

407. *Id.* Nevertheless, Robert Nagel criticized Justice Stevens for his “ambitious moral agenda” and disregard of established legal doctrine in imposing his own personal preferences. *Id.*

408. *See* *Citizens United v. FEC*, 558 U.S. 310, 396 (2010) (Stevens, J., concurring in part and dissenting in part); Toobin, *supra* note 400 (“If it is not necessary to decide on broad constitutional grounds, when other grounds are available, doesn’t that create a likelihood that people will think you’re not following the rules?”).

Court's political neutrality in *Bush v. Gore*: "Although we may never know with complete certainty the identity of the winner of this year's Presidential election, the identity of the loser is perfectly clear. It is the Nation's confidence in the judge as an impartial guardian of the rule of law."<sup>409</sup> Justice Stevens's retirement in 2010 left the Court "as just another place where Democrats and Republicans fight."<sup>410</sup>

## 2. Partisanship of the Current Court

As Justice Stevens predicted, the Court is no longer seen as impartial. "The Court itself is a product of election returns," Professor Pamela Karlan has opined, adding, "This Court is a product of *Bush v. Gore*, because had *Bush v. Gore* come out the other way . . . it would have been David Tatel not John Roberts [as Chief Justice]."<sup>411</sup> Although Justice Scalia disclaims the role of personal politics in our judicial system,<sup>412</sup> media reports of some current Justices' possible conflicts of interest<sup>413</sup>—and publicly expressed predispositions<sup>414</sup> on issues that could be interpreted

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409. *Bush v. Gore*, 531 U.S. 98, 128 (2000) (Stevens, J., dissenting); Toobin, *supra* note 400.

410. Toobin, *supra* note 400.

411. Karlan Symposium, *supra* note 98, at 03:36 (referring to Judge David Tatel of the D.C. Circuit).

412. Winik, *supra* note 379.

413. See Michael Kirkland, *Under the U.S. Supreme Court: Justices Get Down, Get Funky with Tea Party*, UPI (Mar. 6, 2011, 3:46 AM), [http://www.upi.com/Top\\_News/US/2011/03/06/Under-the-US-Supreme-Court-Justices-get-down-get-funky-with-Tea-Party/UPI-13681299401160](http://www.upi.com/Top_News/US/2011/03/06/Under-the-US-Supreme-Court-Justices-get-down-get-funky-with-Tea-Party/UPI-13681299401160) (noting that, though some current Justices are criticized for fraternizing with conservative Republican partisans, in the past, the same may have been said of some former Justices with liberal Democrats).

414. Dahlia Lithwick, *Grumpy Old Justices*, SLATE.COM (Aug. 26, 2013, 6:16 PM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2013/08/ginsburg\\_and\\_scalia\\_s\\_s\\_upreme\\_court\\_complaints\\_do\\_they\\_agree\\_about\\_what.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2013/08/ginsburg_and_scalia_s_s_upreme_court_complaints_do_they_agree_about_what.html) (citing Justice Scalia's speech "tipping his hand about the outcome in the gay marriage cases"); Editorial, *Justice Ginsburg's Misdirection Ahead of the Gay Marriage Rulings*, N.Y. TIMES, Apr. 2, 2013, [http://www.nytimes.com/2013/04/03/opinion/justice-ginsburgs-misdirection-ahead-of-the-gay-marriage-rulings.html?\\_r=0](http://www.nytimes.com/2013/04/03/opinion/justice-ginsburgs-misdirection-ahead-of-the-gay-marriage-rulings.html?_r=0) (Although Justice Ginsburg gave no indication how she would vote in the same-sex marriage cases that were before the Court at the time, her widely quoted comment about *Roe v. Wade* going "too far, too fast" was "routinely cited to argue for a timid resolution on the issue."); Overton, *supra* note 110 ("Even aside from improperly commenting on a pending case, Scalia is wrong" about Section 5 of the VRA being a form of "racial entitlement."); see Collin Levy, *Litigating for Liberty*, WALL ST. J., Jan. 7, 2012, <http://online.wsj.com/article/SB10001424052970203513604577144902274972614.html> (quoting Chip Mellor, chief of the Institute for Justice, citing Justice Scalia's prediction that a particular case would be overturned soon).

(accurately or not) to influence their legal opinions<sup>415</sup>—undermine whatever is left of judicial neutrality in the public eye.<sup>416</sup> The perception of Justices as partisan players may be the reason that the Court now engenders a distrust among Americans that transcends ideological lines.<sup>417</sup> Congress, it turns out, is not the only branch of government to lose the public's trust because of its outward displays of partisanship.<sup>418</sup>

### B. Justice Kennedy's Swing Vote

Although Justice Kennedy is considered to be at the ideological center of the Supreme Court, he is also a conservative Justice on an increasingly conservative Court.<sup>419</sup> In the 2009 term of the Supreme Court, for example, he voted ten out of twelve times with the conservative bloc on cases deemed to present ideological questions, including *Citizens United*.<sup>420</sup> It is well known that, when the Court splits along ideological lines, Justice Kennedy's vote is almost always decisive.<sup>421</sup> During the 2006 term—the first full term in which Justice Alito replaced Justice O'Connor—the Court split five

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415. Ashby Jones, *On Justice Thomas and the Supreme Court's Strange Recusal Process*, WALL ST. J.L. BLOG (Oct. 28, 2010, 10:31 AM), <http://blogs.wsj.com/law/2010/10/28/on-justice-thomas-and-the-supreme-courts-strange-recusal-process> (suggesting a possible conflict of interest for Justice Thomas due to his wife's political activities); Kirkland, *supra* note 413 (suggesting possible conflicts for Justice Scalia for hunting with Dick Cheney while a Cheney case was on the docket; and Justices Scalia and Thomas for attending events hosted by Republican financiers the Koch brothers shortly after *Citizens United*; and Justice Kagan for having served as U.S. Solicitor General while the Affordable Care Act was being negotiated).

416. Robert Greenberger, *Scalia Defends His Impartiality in Cheney Case*, WALL ST. J., Mar. 19, 2004, <http://online.wsj.com/article/0,,SB107962231690759140,00.html> (citing a speech given by Justice Scalia in which he criticized the reasoning of an appeals court ruling that was subsequently appealed to the Supreme Court); Jonathan Turley, *Justice Scalia Is a Political Star and That's Bad for the Supreme Court*, WASH. POST, Feb. 21, 2011, <http://www.washingtonpost.com/wp-dyn/content/article/2011/01/21/AR2011012102923.html>.

417. Down from 66 percent approval in the late 1980s, the Court's approval ratings now register at about 40 percent among liberals and conservatives alike. Liptak & Kopicki, *supra* note 381.

418. *Id.*

419. Andrew Cohen, *The Kennedy Court*, CBS NEWS (Feb. 11, 2009, 6:18 PM), [http://www.cbsnews.com/2100-18567\\_162-1774288.html](http://www.cbsnews.com/2100-18567_162-1774288.html); Linda Greenhouse, *Is the Kennedy Court Over?*, N.Y. TIMES: OPINIONATOR (July 15, 2010, 9:39 PM), <http://opinionator.blogs.nytimes.com/2010/07/15/rethinking-the-kennedy-court>.

420. Greenhouse, *supra* note 419.

421. *Id.*; Cohen, *supra* note 419.

to four in twenty-four cases, and Justice Kennedy was in the majority in all twenty-four.<sup>422</sup>

Although he has consistently opposed affirmative action,<sup>423</sup> Justice Kennedy's record on voting rights is mixed,<sup>424</sup> so his vote may truly be a swing vote if Section 2 is finally given full judicial review. For example, Justice Kennedy voted with the conservative bloc to uphold Tom DeLay's mid-decade redistricting plan against a claim of unlawful partisan gerrymandering,<sup>425</sup> but he also wrote that it violated Section 2 of the VRA because "the State took away the Latinos' opportunity because Latinos were about to exercise it."<sup>426</sup> Still, some scholars propose that it was "out of character" for him to side with minorities, and that he did so in *LULAC*—the first case in which minority plaintiffs ever succeeded in a vote dilution claim at the Supreme Court level—merely because the plaintiffs were unable to prevail on the partisan gerrymandering claim despite the plan's "rank partisanship."<sup>427</sup> In another Section 2 case in 2009, though, Justice Kennedy wrote that "racial discrimination and racially polarized voting are not ancient history" and that "[m]uch remains to be done to ensure that citizens of all races have equal opportunity."<sup>428</sup> On the other hand, these cases both involved statutory, rather than constitutional, interpretations of Section 2.

Because the constitutionality of Section 2 has not yet been challenged in front of the Supreme Court, Justice Kennedy's views on it are still unknown. When the Court issued another statutory interpretation of Section 2 in 1991, however, Justice Kennedy wrote a separate two-sentence dissent to point out that the Court did not address the question of Section 2's constitutionality.<sup>429</sup> Because Section 2's constitutionality rests largely on states' rights, an issue dear to Justice Kennedy,<sup>430</sup> he might base his decision in favor of

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422. Greenhouse, *supra* note 419.

423. Charles Lane, *Kennedy Reigns Supreme on Court*, WASH. POST, July 2, 2006, <http://www.washingtonpost.com/wp-dyn/content/article/2006/07/01/AR2006070100936.html>.

424. *Id.*

425. *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 408 (2006).

426. *Id.* at 440.

427. Fuentes-Rohwer, *supra* note 85, at 153–54 (citing Charles, *supra* note 222, at 1187).

428. *Bartlett v. Strickland*, 556 U.S. 1, 25 (2009); Fuentes-Rohwer, *supra* note 85, at 154.

429. *Chisom v. Roemer*, 501 U.S. 380, 418 (1991) (Kennedy, J., dissenting).

430. Lyle Denniston, *On Marriage, Kennedy in Control*, SCOTUSBLOG (Mar. 26, 2013, 12:31 PM), <http://www.scotusblog.com/?p=161752> (referring to states' rights as a "usual concern" of Justice Kennedy). Also, tellingly, in the oral argument on Section 5 in *Shelby*, Justice

states' rights—and rule against Section 2—even if he otherwise supports the civil right at issue. Although Justice Kennedy's majority opinion overturning the federal Defense of Marriage Act combined two of his "jurisprudential loves"—states' rights and gay rights<sup>431</sup>—the reasons he signed onto the Court's decision to eviscerate Section 5 during the same term were left unstated.<sup>432</sup> The majority opinion in that case reveals little of Justice Kennedy's views on the VRA, but makes amply clear the views of its author, Chief Justice Roberts.<sup>433</sup>

### C. Chief Justice Roberts's Vote

Chief Justice Roberts's views on the constitutionality of Section 2 are already known.<sup>434</sup> When he worked as a Justice Department attorney in the Reagan Administration, he fervently advocated the notion of trying to kill the Senate bill that eventually became the 1982 amendment to the VRA, including the amended Section 2,<sup>435</sup> the legislative override of *City of Mobile v. Bolden*. Roberts vigorously argued that the amended Section 2<sup>436</sup> would lose its "constitutional moorings" if it no longer mirrored the Fifteenth Amendment.<sup>437</sup>

Although political Justice Department employees are expected to support their president's policy positions, the written record of Roberts's own memoranda suggests he was perhaps even more invested than President Reagan in defeating the bill.<sup>438</sup> Going well beyond the president's "if-it-ain't-broke-don't-fix-it" rationale for

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Kennedy asked the solicitor general, "[I]f Alabama wants to have heroes to the Civil Rights Movement, if it wants to acknowledge the wrongs of its past, is it better off doing that if it's an own independent sovereign or if it's under the trusteeship of the United States Government?" *Shelby Transcript*, *supra* note 74, at 50–51.

431. Garrett Epps, *Kennedy's Marriage Ruling Is About Gay Rights, Not States' Rights*, THE ATLANTIC (June 26, 2013, 3:00 PM), <http://www.theatlantic.com/national/archive/2013/06/kennedys-marriage-ruling-is-about-gay-rights-not-states-rights/277251>.

432. See *Shelby Cnty.*, 133 S. Ct. at 2617.

433. See *id.*

434. Roberts, Jan. 22 Memo, *supra* note 130.

435. Hasen, *supra* note 55; see Mock, *supra* note 55.

436. See Memorandum from John Roberts to the Att'y Gen., Talking Points for the White House Meeting on the Voting Rights Act (Jan. 26, 1982) [hereinafter Roberts, Jan. 26 Memo], available at <http://www.archives.gov/news/john-roberts/accession-60-88-0498/030-black-binder1/folder030.pdf#page=1>.

437. Roberts, Jan. 22 Memo, *supra* note 130.

438. Hasen, *supra* note 55; Mock, *supra* note 55 ("[Roberts] sounded every alarm about why the discriminatory effect clause shouldn't happen.").

opposing the bill,<sup>439</sup> Roberts decried the revised Section 2 as “not only constitutionally suspect but also contrary to the most fundamental tenants [sic] of the legislative process on which the laws of this country are based.”<sup>440</sup> In fact, a common thread throughout his memoranda leading up to the bill’s passage was the pronounced urgency with which he advocated defeating it.<sup>441</sup>

Since joining the Supreme Court in 2005, Chief Justice Roberts has presided over five<sup>442</sup> VRA cases on the merits and has consistently ruled to restrict the scope of the statute in every one.<sup>443</sup> This record suggests that his general disposition toward Section 2 has not changed much since his days at the Justice Department,<sup>444</sup> especially in light of his well-known pursuit of a color-blind Constitution<sup>445</sup> and his oft-cited opposition to racial preferences.<sup>446</sup> Now that race-based remedies are disfavored by the Court,<sup>447</sup> which

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439. Roberts, Jan. 26 Memo, *supra* note 436.

440. Roberts, Dec. 22 Memo, *supra* note 265.

441. *E.g., id.*; Memorandum from John Roberts to the Att’y Gen., Voting Rights Act Testimony: Questions & Answers, 23 (Jan. 21, 1982), available at <http://www.archives.gov/news/john-roberts/accession-60-88-0495/040-civil-rights-division/folder040.pdf#page=20>; Roberts, Jan. 22 Memo, *supra* note 130; Memorandum from John Roberts to the Att’y Gen., Voting Rights Act, 22 (Jan. 25, 1982), available at <http://www.archives.gov/news/john-roberts/accession-60-88-0498/folder030.pdf#page=9>; Roberts, Jan. 26 Memo, *supra* note 436.

442. See Joshua A. Douglas, *The Voting Rights Act Through the Justices’ Eyes: NAMUDNO and Beyond*, 88 TEX. L. REV. 1, at 8–9 (2009), <http://www.texaslrev.com/wp-content/uploads/Douglas-88-TLRSA-1.pdf>. Including *Shelby County v. Holder* makes five. Although the Court has decided procedural matters in *Perez v. Perry*, its decision was not on the merits. 132 S. Ct. 934 (2012). The Court also vacated the denial of preclearance for the Perrymander in *Texas v. United States*, 133 S. Ct. 2886 (2013), and remanded that Section 5 case to the U.S. District Court for the District of Columbia in light of the *Shelby* decision striking down Section 4, making Section 5 inoperable.

443. *Shelby Cnty. v. Holder*, 133 S. Ct. 2612 (2013); Douglas, *supra* note 442.

444. See Douglas, *supra* note 442.

445. See Ronald Collins, *Q & A with Jeffrey Toobin*, SCOTUSBLOG (Oct. 22, 2012, 10:45 AM), <http://www.scotusblog.com/2012/10/q-a-with-jeffrey-toobin>.

446. In a Section 2 case, Chief Justice Roberts wrote, “It is a sordid business, this divvying us up by race.” *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 511 (2006) (Roberts, C.J., concurring in part and dissenting in part). In an opinion striking down a voluntary affirmative action plan, he wrote: “The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.” *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007).

447. Fuentes-Rohwer, *Future*, *supra* note 85, at 152 (“It is clear that five Justices on the Court have strong reservations about the use of race in general.”); Ellen Katz, *On Overreaching, or Why Rick Perry May Save the Voting Rights Act But Destroy Affirmative Action*, 11 ELECTION L.J. 420, 425 (2012) (citing dissents by Justices Kennedy, Scalia, and Thomas in affirmative action cases); Pitts, *supra* note 267, at 186 (“[T]he Court has exhibited a general distaste for race-based remedies.”).

effectively struck down “the heart of the VRA” in a decision that Justice Ginsburg called “stunning in terms of activism,”<sup>448</sup> Section 2’s future looks bleak in the Roberts Court.<sup>449</sup>

Nevertheless, Chief Justice Roberts’s vote may not necessarily be preordained. He has already demonstrated his awareness of the stakes for the Court in another politically charged case: *National Federation of Independent Business v. Sebelius*,<sup>450</sup> which upheld the Patient Protection and Affordable Care Act (ACA, also commonly known as Obamacare).<sup>451</sup> As the only Justice to cast a vote that was contrary to his partisan affiliation on the most contentious provision—the individual mandate—the Chief Justice allowed the Act to pass almost intact.<sup>452</sup> In doing so, Chief Justice Roberts demonstrated that he was well aware of the Court’s precarious position in the public eye in the wake of *Bush v. Gore* and *Citizens United*.<sup>453</sup> Striking down the health care law with a decision split along ideological lines would only have solidified the already widely held view that the Court was just another player in polarized politics.<sup>454</sup> In addition, because the legal challenges to the individual mandate were “at best novel and at worst frivolous,” a one-vote margin to strike it down might have imperiled the Court’s legitimacy.<sup>455</sup> The press had already portrayed Chief Justice Roberts as “out to get” President Obama,<sup>456</sup> and the President reminded conservative critics of the judicial activism they had denounced for

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448. Adam Liptak, *Court Is ‘One of Most Activist,’ Ginsburg Says, Vowing to Stay*, N.Y. TIMES, Aug. 24, 2013, <http://www.nytimes.com/2013/08/25/us/court-is-one-of-most-activist-ginsburg-says-vowing-to-stay.html> (referring to *Shelby*, 133 S.Ct. 2612).

449. Fuentes-Rohwer, *supra* note 85, at 126–27.

450. 132 S. Ct. 2566 (2012).

451. *Id.* at 2608.

452. *Id.*; David L. Franklin, *Why Did Roberts Do It? To Save the Court*, SLATE (June 28, 2012, 3:51 PM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2012/06/john\\_roberts\\_broke\\_with\\_conservatives\\_to\\_preserve\\_the\\_supreme\\_court\\_s\\_legitimacy.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2012/06/john_roberts_broke_with_conservatives_to_preserve_the_supreme_court_s_legitimacy.html).

453. Franklin, *supra* note 452.

454. *Id.*

455. *Id.*

456. *Id.*; Daniel Epps, *In Health Care Ruling, Roberts Steals a Move from John Marshall’s Playbook*, THE ATLANTIC (June 28, 2012, 12:47 PM), <http://www.theatlantic.com/national/archive/2012/06/in-health-care-ruling-roberts-steals-a-move-from-john-marshalls-playbook/259121>.



allowing an unelected judiciary to overturn laws passed by the people.<sup>457</sup>

In response, Chief Justice Roberts did not display an “aggressive, line-drawing conservatism . . . bent on remaking great swaths of Supreme Court precedent,”<sup>458</sup> but instead applied judicial restraint and “[ook] one for the team.”<sup>459</sup> With Justice Kennedy, the usual swing vote, firmly in the camp to strike down the ACA,<sup>460</sup> Chief Justice Roberts voted to uphold it,<sup>461</sup> incensing conservatives who considered themselves betrayed.<sup>462</sup> By doing so, Chief Justice Roberts demonstrated that the Court could operate “above-the-fray” of partisan politics,<sup>463</sup> thus preserving the Court’s legitimacy in the eyes of the public and securing his own legacy as a brilliant strategist in the process.<sup>464</sup>

A challenge to the Perrymander under Section 2, however, would present Chief Justice Roberts with a choice of considerable import. On the most basic level, he could finally address the constitutional deficiencies he found in Section 2 during his time at the Department of Justice and strike it down as unconstitutional. Doing so would trigger challenges to redistricting plans drawn to comply with Section 2 and invite more egregious partisan gerrymandering to the detriment, even the retrenchment, of minority voting rights, but at the risk of political fallout.<sup>465</sup> On the other hand, Chief Justice Roberts could uphold the last nationwide enforcement provision in the VRA, enabling more Latinos and other minorities to elect their preferred candidates in a state that may soon decide the fate of his own political party—Texas. Either path he chooses may

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457. Jeffrey Rosen, *Second Opinions*, NEW REPUBLIC (May 4, 2012), <http://www.newrepublic.com/article/politics/103090/magazine/conservative-judges-justices-supreme-court-obama#>.

458. See Toobin, *supra* note 400.

459. Franklin, *supra* note 452.

460. *Id.*

461. Nat’l Fed’n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012).

462. Ashby Jones & Brent Kendall, *Roberts Straddles Ideological Divide*, WALL ST. J., June 28, 2012, <http://online.wsj.com/article/SB10001424052702303561504577494723149538572.html>.

463. Franklin, *supra* note 452.

464. Epps, *supra* note 456.

465. See Richard L. Hasen, *If the Court Strikes Section 5 of the Voting Rights Act*, REUTERS: GREAT DEBATE (Jan. 30, 2013, 4:48 PM), <http://blogs.reuters.com/great-debate/2013/01/30/if-the-court-strikes-section-5-of-voting-rights-act>.

be interpreted as inherently political—to court minorities or to thwart them, the same quandary the Republican Party currently faces as it tries to avoid the fate of the Whig Party.<sup>466</sup> Still, Chief Justice Roberts has demonstrated an awareness of the partisanship that has damaged the Court as well as a willingness to put the Court’s legitimacy above his own personal politics.<sup>467</sup> If he is willing to do so again, perhaps Section 2 would not be doomed in the Roberts Court after all.

On the other hand, if Chief Justice Roberts still considers Section 2 to be “a sordid business, this divvying us up by race,”<sup>468</sup> the Court may very well strike down or eviscerate the last of the VRA. If it does, this Court would not be the first to retrench from protecting minority voting rights.<sup>469</sup> In 1876, the Supreme Court under Chief Justice Morrison Waite narrowly construed Reconstruction legislation according to his own personal legal philosophy.<sup>470</sup> In doing so, the Court “virtually gutted the Fourteenth and Fifteenth Amendments,” setting back minority voting rights<sup>471</sup> for almost a century until the VRA was finally passed in 1965.<sup>472</sup>

Before serving on the Court, Chief Justice Waite had been an active member of the Whig Party.<sup>473</sup>

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466. *E.g.*, Draper, *supra* note 36; Lizza, *supra* note 19.

467. Franklin, *supra* note 452; Jones & Kendall, *supra* note 462.

468. League of United Latin Am. Citizens v. Perry, 548 U.S. 399, 511 (2006) (Roberts, C.J., concurring in part and dissenting in part).

469. J. Morgan Kousser, *The Voting Rights Act and the Two Reconstructions*, in *CONTROVERSIES IN MINORITY VOTING*, *supra* note 57, at 135, 163 (explaining that the end of the First Reconstruction was brought about when “a racist Supreme Court overrode the clear intent of Congress and the framers of the Reconstruction amendments in order to deny African Americans an effective vote”).

470. Katz, *supra* note 59, at 2347–60; see Robert Dixon, *Biography of Chief Justice Morrison R. Waite*, THE MORRISON R. WAITE AMERICAN INN OF THE COURT, <http://www.waiteaic.org/waitebio.htm> (last visited Feb. 8, 2013).

471. Davidson, *supra* note 58, at 10 (citing *United States v. Cruikshank*, 92 U.S. 542 (1876) and *United States v. Reese*, 92 U.S. 214 (1876)); Katz, *supra* note 59, at 2347–60; see Francisco M. Ugarte, *Reconstruction Redux: Rehnquist, Morrison, and the Civil Rights Cases*, 41 HARV. C.R.-C.L. L. REV. 481, 485–88 (2006).

472. The Voting Rights Act of 1965 was passed ninety-five years after the Fifteenth Amendment guaranteed the right to vote, regardless of race, in 1870. Davidson, *supra* note 58, at 9, 17.

473. Waite, *Morrison Remick*, THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES (Kermit L. Hall, ed., 2d ed., online version 2012), <http://www.oxfordreference.com/view/10.1093/acref/9780195176612.001.0001/acref-9780195176612-e-1281>.

## VI. CONCLUSION

*“History can move backward.”*

—Historian C. Vann Woodward, testifying before the House Judiciary Subcommittee, when asked the lesson to be learned from the First Reconstruction<sup>474</sup>

In light of a confluence of circumstances in both Congress and the Supreme Court, Section 2 of the VRA may be at risk of being either gutted or struck down. The polarization in Congress would likely prevent a legislative override of any statutory holding in a Section 2 case, making the Court’s interpretation essentially final. Such an interpretation likely would not uphold Section 2 if the current Court, as polarized as Congress, rules only according to its members’ personal ideologies, as the Court is already perceived to do. Chief Justice John Roberts may seize the chance to vindicate his past efforts at the Justice Department by holding Section 2 unconstitutional. Or he may recognize the need for judicial restraint on such a politically charged issue to preserve the Court’s legitimacy in the public eye. His individual vote may be viewed, deservedly or not, as a political move aligned with his party’s best interests: to court minority voters by upholding a revered civil rights statute, or to thwart them by invalidating one of the last protections of their undiluted vote. If history is repeated, the loss of such protection could take almost a century to regain, especially in light of the increased partisan gerrymandering that would likely result from invalidating or gutting Section 2. At a time when the minority vote’s influence is becoming crucial to electoral outcomes, Chief Justice Roberts may hold the future of Section 2—and his party—in his hands.

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474. Kousser, *supra* note 326, at 774.