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## Discriminatory Intent Claims Under Section 2 of the Voting Rights Act

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# ARTICLES

## DISCRIMINATORY INTENT CLAIMS UNDER SECTION 2 OF THE VOTING RIGHTS ACT

*Amandeep S. Grewal\**

*This Article addresses a new controversy over whether Section 2 of the Voting Rights Act prohibits laws that exhibit “only” discriminatory intent, in the absence of discriminatory results. Lower courts have long embraced an intent approach for Section 2. And the Department of Justice has rested its entire ongoing case against Georgia’s controversial voting bill on an intent approach.*

*However, this Article shows that the Supreme Court’s decision in Brnovich v. DNC effectively rejects the intent approach to Section 2. In April 2023, the Eleventh Circuit reversed its prior cases and now rejects an intent theory. This puts in peril numerous voting rights challenges in the southeastern United States. This Article urges Congress to add an intent test to Section 2, offers draft language for Congress to codify, and explains the anomalies and inequities that may arise if the legislature fails to act.*

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## INTRODUCTION

*We wish we knew exactly what a plaintiff must prove in order to prevail under the Voting Rights Act.*

– Chief Judge Richard A. Posner<sup>1</sup>

Voter discrimination takes many forms and requires numerous legal tools to address. The states ratified the Fifteenth Amendment to address discriminatory laws that denied voting rights to Black men.<sup>2</sup> The Fourteenth Amendment, though probably not established with voting rights firmly in mind,<sup>3</sup> also protects against discriminatory voting laws. The Voting Rights Act (the “VRA”),<sup>4</sup> through its Section 5 preclearance regime,<sup>5</sup> has quashed many discriminatory laws before they could ever go into effect. These authorities hold a storied place in voting rights law.

Section 2 of the VRA, once consigned to a modest role,<sup>6</sup> has become another essential tool to protect voting rights. Section 2(a) imposes a results-based test on state voting laws.<sup>7</sup> A voting law will

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<sup>1</sup> *Barnett v. Daley*, 32 F.3d 1196, 1201 (7th Cir. 1994).

<sup>2</sup> See Travis Crum, *The Lawfulness of the Fifteenth Amendment*, 97 NOTRE DAME L. REV. 1543, 1545 (2022).

<sup>3</sup> See Travis Crum, *The Superfluous Fifteenth Amendment?*, 114 NW. U. L. REV. 1549, 1551 (2020) (“Despite its broad language, the Fourteenth Amendment was originally understood by the Reconstruction generation to *not* encompass the right to vote.”).

<sup>4</sup> Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 52 U.S.C. §§ 10301–10314, 10501–10508, 10701–10702).

<sup>5</sup> Section 5 provides that those jurisdictions described in Section 4 must “obtain federal permission before enacting any law related to voting.” *Shelby Cnty. v. Holder*, 570 U.S. 529, 534 (2013). The number of covered jurisdictions has varied over time but has generally been substantial. See *Section 4 of the Voting Rights Act: The Formula for Coverage Under Section 4 of the Voting Rights Act*, U.S. DEP’T OF JUST. (Apr. 5, 2023), <https://www.justice.gov/crt/section-4-voting-rights-act#formula> [<https://perma.cc/5644-4AWH>] (last visited Oct. 1, 2023) (describing jurisdictions covered by Section 4).

<sup>6</sup> See Thomas M. Boyd & Stephen J. Markman, *The 1982 Amendments to the Voting Rights Act: A Legislative History*, 40 WASH. & LEE L. REV. 1347, 1352–53 (1983) (describing the original version of Section 2 as “a little-used provision that tracked the language of the Fifteenth Amendment”).

<sup>7</sup> Section 2, codified at 52 U.S.C. § 10301, provides in full:

Denial or abridgement of right to vote on account of race or color through voting qualifications or prerequisites; establishment of violation

- (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention

violate the “Results Test” and must be set aside when it fails the equal openness standard prescribed in Section 2(b).<sup>8</sup> Generally speaking, that standard looks to whether a state’s election systems allow minority groups to elect their preferred candidates.<sup>9</sup>

Courts have long wrestled with whether Section 2 violations may arise in situations beyond those prescribed in the statute’s text.<sup>10</sup> Several times, courts have held that a state law enacted with discriminatory intent violates Section 2.<sup>11</sup> Under this “Intent Test,” the Section 2(b) equal openness standard does not provide the exclusive path to show a Section 2 violation.

Whether Section 2 properly includes an Intent Test has become exceptionally important. Section 2 cases have “proliferated in the lower courts” in recent years.<sup>12</sup> The statute has been called upon to support claims that other authorities might not. The Supreme Court has not applied the Fourteenth and Fifteenth Amendments as rigorously as some would like.<sup>13</sup> And, in *Shelby County*, the Court struck down the coverage formula for the Section 5 preclearance regime.<sup>14</sup> Jurisdictions that once faced federal

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of the guarantees set forth in section 10303(f)(2) of this title, as provided in subsection (b).

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

<sup>8</sup> See 52 U.S.C. 10301(b).

<sup>9</sup> See *id.*

<sup>10</sup> See *infra* Part II.

<sup>11</sup> See *infra* Part II.A.

<sup>12</sup> See *Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 2321, 2333 (2021).

<sup>13</sup> See, e.g., Press Release, ACLU of Indiana, *ACLU Disappointed with Supreme Court’s Voter ID Decision* (Apr. 28, 2008), <https://www.aclu.org/press-releases/aclu-disappointed-supreme-courts-voter-id-decision> [https://perma.cc/KD58-E7TB] (explaining concerns about *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181 (2008)).

<sup>14</sup> *Shelby Cnty. v. Holder*, 570 U.S. 529, 556–57 (2013). When operative, the preclearance regime requires that specified jurisdictions obtain federal permission to change their voting laws. *Id.* at 529.

review for new voting laws no longer do.<sup>15</sup> Plaintiffs have relied on Section 2 to help pick up the slack.<sup>16</sup> Challenges to controversial voting bills in Georgia and Florida have relied entirely or significantly on the Intent Test.<sup>17</sup>

This Article explores whether Section 2 properly includes an Intent Test and concludes that the statute does not. Part I explains the statute's amendment history and its standards. Part II discusses the circuit split over whether the statute includes the Intent Test. Part III argues that the relevant Supreme Court precedents reject the Intent Test. Part IV shows that the absence of the Intent Test creates anomalies under the VRA. Part IV thus encourages Congress to codify the Intent Test and offers principles to follow.

## I. DEVELOPMENT OF SECTION 2 OF THE VRA

Congress enacted the VRA to help fulfill the promises made by the Fifteenth Amendment.<sup>18</sup> Though that Amendment nominally prohibits voter discrimination “on account of race, color, or previous condition of servitude,” states repeatedly adopted measures that

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<sup>15</sup> Congress can reactivate Section 5 by enacting an updated coverage formula but has lacked the political will to do so. See Paige E. Richardson, *Preclearance and Politics: The Future of the Voting Rights Act*, 89 U. CIN. L. REV. 1089, 1102 (2020) (“Since the *Shelby County* decision, Congress has been unable to pass any VRA amendments. What was once a bipartisan issue has now become partisan, with votes following the Democratic-Republican party line.”).

<sup>16</sup> See Ellen D. Katz, *Section 2 After Section 5: Voting Rights and the Race to the Bottom*, 59 WM. & MARY L. REV. 1961, 1963 (2018) (“In the years since *Shelby County*, plaintiffs have relied on section 2 of the VRA to challenge those retrogressive electoral practices that section 5 would have blocked.”). For an empirical study of Section 2 claims, see Ellen D. Katz et al., *To Participate and Elect: Section 2 of the Voting Rights Act at 40*, UNIV. MICH. L. SCH. VOTING RTS. INITIATIVE (2022), <https://voting.law.umich.edu> [<https://perma.cc/6GFK-G5KR>]. For further academic discussion, see Christopher S. Elmendorf & Douglas M. Spencer, *Administering Section 2 of the Voting Rights Act After Shelby County*, 115 COLUM. L. REV. 2143, 2147–48 (2015) (arguing that “courts could create rebuttable presumptions under section 2 that would give the statute special bite in many jurisdictions formerly covered by section 5.”).

<sup>17</sup> See Complaint at 42–44, *United States v. Georgia*, No. 1:21-CV-2575-JPB (N.D. Ga. June 25, 2021), ECF No. 1; see also *League of Women Voters of Fla., Inc. v. Lee*, 595 F. Supp. 3d 1042, 1076 (N.D. Fla. 2022) (summarizing plaintiffs’ reliance on the Intent Test under Section 2, as well as plaintiffs’ other claims), *aff’d in part, vacated in part, rev’d in part sub nom.* *League of Women Voters of Fla., Inc. v. Fla. Sec’y of State*, 66 F.4th 905 (11th Cir. 2023).

<sup>18</sup> The Preamble to the VRA describes the act as an effort to “enforce the fifteenth amendment to the Constitution of the United States.” See Pub. L. No. 89-110, 79 Stat. 437, 437. Congress later relied on the Fourteenth Amendment to expand the VRA. See, e.g., Pub. L. No. 89-110, § 4(e)(1) (invoking the Fourteenth Amendment to address language restrictions in voting practices); see also Pub. L. No. 94-73 (adding several references to the Fourteenth Amendment across the act).

abridged minority voting rights.<sup>19</sup> The VRA established a comprehensive scheme that would prevent racially<sup>20</sup> discriminatory laws and provide relief for aggrieved voters.<sup>21</sup>

Section 2 is one part of that comprehensive scheme. As originally enacted, it 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>22</sup>

In 1975,<sup>23</sup> Congress extended these protections to specified “language minorities.”<sup>24</sup> Through Section 4(f)(2), a state cannot “deny or abridge the right of any citizen of the United States to vote because he is a member of a language minority group.”<sup>25</sup> However, Congress did not further explain what it meant to “deny or abridge” a voting right, whether for racial or language minorities.<sup>26</sup>

In *City of Mobile v. Bolden*,<sup>27</sup> the Court plurality addressed how a Section 2 violation would arise. That case involved a “vote dilution” challenge to a local law. Vote dilution occurs when a state counts all votes but adopts measures that render some votes

<sup>19</sup> See *Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 2321, 2330 (2021) (“Despite the ratification of the Fifteenth Amendment, the right of African-Americans to vote was heavily suppressed for nearly a century.”); see also *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 197–98 (2009) (“States were creative in ‘contriving new rules’ to continue violating the Fifteenth Amendment ‘in the face of adverse federal court decrees.’” (citation omitted)).

<sup>20</sup> Though concerns about discrimination against racial minorities drove Congress to enact Section 2, the statute’s language broadly refers to discrimination “on account of race or color.” See Pub. L. No. 89-110, 79 Stat. 437, 437. Thus, the statute can protect racial majorities. See *United States v. Brown*, 494 F. Supp. 2d 440, 444–46 (S.D. Miss. 2007) (discussing relevant authorities), *aff’d* 561 F.3d 420 (5th Cir. 2009). For ease of exposition, this Article will refer only to discrimination against racial minorities.

<sup>21</sup> See *South Carolina v. Katzenbach*, 383 U.S. 301, 315 (1966) (“The Voting Rights Act of 1965 reflects Congress’ firm intention to rid the country of racial discrimination in voting.”).

<sup>22</sup> 79 Stat. 437, 437. The current version of Section 2 is codified at 52 U.S.C. 10301(a).

<sup>23</sup> See Voting Rights Act Amendments of 1975, Pub. L. No. 94-73, §§ 203, 206, 207, 301, 89 Stat. 400, 401–03 (1975).

<sup>24</sup> See 52 U.S.C. § 10310(c)(3) (“The term ‘language minorities’ . . . means persons who are American Indian, Asian American, Alaskan Natives or of Spanish heritage.”).

<sup>25</sup> See Pub. L. No. 94-73, § 203, 89 Stat. at 401 (originally codified at 42 U.S.C.A. § 1973b(f)(2), and now codified at 52 U.S.C. § 10303(f)(2)).

<sup>26</sup> Congress also amended Section 2 such that it cross-references the Section 4(f)(2) protections. See Pub. L. No. 94-73, § 206, 89 Stat. at 403.

<sup>27</sup> 446 U.S. 55 (1980).

practically meaningless.<sup>28</sup> Vote dilution thus differs from “vote denial,” where a state imposes barriers to voting in the first instance.<sup>29</sup>

The *Bolden* plaintiffs alleged that Mobile’s city commissioner system diluted their votes.<sup>30</sup> Under the system, three city commissioners governed Mobile.<sup>31</sup> Each commissioner was elected at large, i.e., by voters across the city. The plaintiffs believed that Mobile should replace the city commissioner system with a representative system.<sup>32</sup> Under that system, Mobile would draw separate districts. Then, each district would elect a single member to represent it in government. This single-member system would “provide blacks a realistic opportunity to elect blacks to the city governing body.”<sup>33</sup> A Black candidate who could not earn at-large support might be elected to a smaller district with a proportionately larger Black population.<sup>34</sup>

The plaintiffs in *Bolden* claimed that the law required a switch from Mobile’s at-large system.<sup>35</sup> They argued that the current system violated Section 2, as well as the Fourteenth and Fifteenth Amendments.<sup>36</sup> In rejecting the plaintiffs’ claims, the Court plurality concluded that Section 2 merely codified the

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<sup>28</sup> See Daniel P. Tokaji, *Applying Section 2 to the New Vote Denial*, 50 HARV. C.R.-C.L. L. REV. 439, 442 (2015) (“Vote dilution . . . refers to practices that diminish a group’s political influence. . . . The most common examples of practices that may dilute minority votes are at-large elections, multimember districts, and gerrymandered districts.”).

<sup>29</sup> See *id.* (“[V]ote denial concerns impediments to voting and the counting of votes.”) (punctuation omitted).

<sup>30</sup> See *Bolden*, 446 U.S. at 58.

<sup>31</sup> *Id.* at 59.

<sup>32</sup> See *Bolden v. City of Mobile*, 423 F. Supp. 384, 385 (S.D. Ala. 1976) (“The prayed-for relief consists of, (1) a declaration that the present at-large election system is unconstitutional, (2) an injunction preventing the present commissioners from holding, supervising, or certifying any future city commission elections, (3) the formation of a government whose legislative members are elected from single member districts, and (4) costs and attorney fees.”), *aff’d* 571 F.2d 238 (5th Cir. 1978), *rev’d* 446 U.S. 55 (1980).

<sup>33</sup> *Id.* at 403.

<sup>34</sup> See generally Lani Guinier, *The Representation of Minority Interests: The Question of Single-Member Districts*, 14 CARDOZO L. REV. 1135 (1993); see also Laughlin McDonald, *Holder v. Hall: Blinking at Minority Voting Rights*, 3 U.D.C. L. REV. 61, 95 (1995) (arguing that increases in the number of Black elected officials within Georgia can be “traced directly to the gradual demise of at-large elections and the increased use of [single-member] districts containing effective Black-voting majorities.” (citing QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT 1965–1990 89–90 (Chandler Davidson & Bernard Grofman eds., 1994))).

<sup>35</sup> See *Bolden v. City of Mobile*, 446 U.S. 55, 58 (1980).

<sup>36</sup> *Id.*

protections provided by the Fifteenth Amendment.<sup>37</sup> That is, just as successful Fifteenth Amendment challenges required intentional discrimination, so too did Section 2 challenges.<sup>38</sup> Because the plaintiffs could not show discrimination, their Section 2 and Fifteenth Amendment claims failed. The Court also rejected their Fourteenth Amendment claims. That Amendment’s Equal Protection Clause concerned itself with discriminatory intent, rather than discriminatory effects.<sup>39</sup>

The Court plurality also rejected the plaintiff’s vote dilution theory.<sup>40</sup> To the plurality, the Fifteenth Amendment reached vote denial only.<sup>41</sup> That is, the amendment “prohibits only purposefully discriminatory denial or abridgment by government of the freedom to vote.”<sup>42</sup> In *Mobile*, Black persons could “register and vote without hindrance.”<sup>43</sup> This made their vote dilution theory unviable: “The Fifteenth Amendment does not entail the right to have [Black] candidates elected.”<sup>44</sup>

*Bolden* prompted “an avalanche of criticism,”<sup>45</sup> including in Congress. The Senate Judiciary Committee Report (the “Senate Report”) claimed that *Bolden* improperly added an intent requirement to Section 2.<sup>46</sup> That is, it “was possible in 1965 to regard Section 2 *both* as a restatement of the Fifteenth Amendment, *and also* as reaching discrimination whether or not intent could be

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<sup>37</sup> *Id.* at 60–61 (plurality opinion); *see also* *Chisom v. Roemer*, 501 U.S. 380, 392 (1991) (“At the time of the passage of the Voting Rights Act of 1965, § 2, unlike other provisions of the Act, did not provoke significant debate in Congress because it was viewed largely as a restatement of the Fifteenth Amendment.”).

<sup>38</sup> *See Bolden*, 446 U.S. at 62 (plurality opinion) (“Our decisions . . . have made clear that action by a State that is racially neutral on its face violates the Fifteenth Amendment only if motivated by a discriminatory purpose.”).

<sup>39</sup> *See id.* at 66 (plurality opinion) (reciting “the basic principle that only if there is purposeful discrimination can there be a violation of the Equal Protection Clause of the Fourteenth Amendment.” (citing *Washington v. Davis*, 426 U.S. 229 (1976))); *see also id.* (finding that at-large systems “could violate the Fourteenth Amendment if their purpose were invidiously to minimize or cancel out the voting potential of racial or ethnic minorities”).

<sup>40</sup> *See Allen v. Milligan*, 599 U.S. 1, 40 (2023) (“‘Congress drew § 2(b)’s current operative language’ from the 1973 decision *White v. Regester* . . . a case that was also about districting.” (citation omitted)).

<sup>41</sup> *See Bolden*, 446 U.S. at 65.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* (cleaned up).

<sup>44</sup> *Id.*

<sup>45</sup> *Allen*, 599 U.S. at 1 (“Almost immediately after it was decided, [*Bolden*] ‘produced an avalanche of criticism, both in the media and within the civil rights community.’” (quoting Thomas M. Boyd & Stephen J. Markman, *The 1982 Amendments to the Voting Rights Act: A Legislative History*, 40 WASH. & LEE L. REV. 1347, 1355 (1983))).

<sup>46</sup> *See* S. REP. NO. 97-417, at 36 (1982) (criticizing intent inquiry as “unnecessarily divisive because it involves charges of racism on the part of individual officials or entire communities” and asserting that it “asks the wrong question”).



established.”<sup>47</sup> Viewed this way, Section 2 violations would arise whenever there was discriminatory intent or a discriminatory result. *Bolden*, the Senate Report concluded, had contradicted precedents that blessed these two separate frameworks.<sup>48</sup>

The Senate Report also criticized *Bolden*’s dismissal of the vote dilution theory. The report concluded that the Court had previously allowed vote dilution claims.<sup>49</sup> Thus, *Bolden* reflected a “marked departure from prior law.”<sup>50</sup>

To address *Bolden*,<sup>51</sup> Congress in 1982 amended Section 2 and split it into two parts.<sup>52</sup> Section 2(a) established the Results Test, prohibiting any law that “results in a denial or abridgment” of a voting right, “as provided in subsection (b).”<sup>53</sup> Section 2(b) established an equal openness standard for the Results Test, under which a jurisdiction violates the Test “if, based on the totality of circumstances,” the political processes in that jurisdiction “are not equally open to participation” for protected groups.<sup>54</sup>

To flesh out the equal openness standard, Congress looked to the Supreme Court’s decision in *White v. Regester*.<sup>55</sup> In *White*, the plaintiffs argued that election systems in two Texas counties improperly diluted minority votes.<sup>56</sup> The Court held that for the plaintiffs to prevail, they could not merely show that minorities failed to secure proportional representation.<sup>57</sup> Rather, the plaintiffs needed to “produce evidence . . . that the political processes leading to nomination and election were not equally open to participation by the group in question—that its members had less opportunity than did other residents in the district to participate in the political

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<sup>47</sup> *Id.* at 19 (emphasis added).

<sup>48</sup> *See id.* at 22 (“[I]t is clear that, prior to *Bolden*, plaintiffs in dilution cases could prevail by showing either discriminatory results or intent.”); *see also id.* at 26 (“A fair reading of *Bolden* reveals that the plurality opinion was a marked departure from earlier Supreme Court and lower court vote dilution cases.”).

<sup>49</sup> *See id.* at 26.

<sup>50</sup> *Id.* at 19.

<sup>51</sup> *See Allen v. Milligan*, 599 U.S. 1, 40 (2023) (“Congress adopted the amended § 2 in response to the 1980 decision [*Bolden*].”).

<sup>52</sup> *See Voting Rights Act Amendments of 1982*, Pub. L. No. 97-205, § 3, 96 Stat. 131, 134.

<sup>53</sup> *Id.* at 134.

<sup>54</sup> *Id.*

<sup>55</sup> 412 U.S. 755, 766 (1973); *see also Allen v. Milligan*, 599 U.S. 1, 40 (2023) (“Congress drew § 2(b)’s current operative language’ from the 1973 decision *White v. Regester* . . . a case that was also about districting.” (citation omitted)).

<sup>56</sup> *See* 412 U.S. at 758–59. Regarding elections for the Texas House, the plaintiffs argued that the “multimember districts for Bexar County and Dallas County operated to dilute the voting strength of racial and ethnic minorities.” *Id.* at 759.

<sup>57</sup> *See id.* at 765–66 (“To sustain [their] claims, it is not enough that the racial group allegedly discriminated against has not had legislative seats in proportion to its voting potential.”).

processes and to elect legislators of their choice.”<sup>58</sup> This somewhat inscrutable language provided the template for Section 2(b).<sup>59</sup>

The proposed shift from an Intent Test to a Results Test met fierce opposition in the Senate.<sup>60</sup> Some believed that the Results Test would improperly mandate proportional representation for minorities or lead to “essentially standardless” judgments.<sup>61</sup> To placate these concerns, Congress qualified Section 2: “[N]othing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.”<sup>62</sup>

Section 2’s pieces do not fit together perfectly. Section 2(a), through its “denial or abridgement” language, speaks most easily to vote denial measures.<sup>63</sup> But Section 2(b) provides a standard drawn from the vote dilution context.<sup>64</sup> This might help explain why the statute has generated interpretive difficulties<sup>65</sup>—Section 2 applies to

<sup>58</sup> *Id.* at 766.

<sup>59</sup> See *supra* note 55.

<sup>60</sup> See *Miss. Republican Exec. Comm. v. Brooks*, 469 U.S. 1002, 1010 (1984) (Rehnquist, J., dissenting) (quoting H.R. REP. NO. 97–227, at 29).

<sup>61</sup> *Id.* (citing *Hearings on S. 53, S. 1761, S. 1975, S. 1992, and H.R. 3112 Before the Subcomm. on the Const. of the S. Comm. on the Judiciary*, 97th Cong., 1309–13, 1334–38 (1982)); see also President Ronald Reagan, Statement About Extension of the Voting Rights Act (Nov. 6, 1981), (<https://www.reaganlibrary.gov/archives/speech/statement-about-extension-voting-rights-act> [<https://perma.cc/9EKS-8TAC>] (expressing support for the extension of the VRA but arguing that Section 2 should not switch from an intent-based standard to an effects-based standard)).

<sup>62</sup> 52 U.S.C. § 10301(b).

<sup>63</sup> The Fifteenth Amendment refers to votes being “denied or abridged” on account of race. U.S. CONST. amend. XV, § 1. Even outside of *Bolden*, the Court has strongly implied that vote denial or abridgement does not include vote dilution. See *Reno v. Bossier Par. Sch. Bd.*, 528 U.S. 320, 334 n.3 (2000) (“[W]e have never held that vote dilution violates the Fifteenth Amendment ... [W]e have never even ‘suggested’ as much.”) (citation omitted). Thus, Section 2(a), if viewed in isolation, probably would concern itself only with vote denial. *Cf.* *Shaw v. Reno*, 509 U.S. 630, 645 (1993) (concluding that the vote dilution scheme in *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), though resolved by the majority under the Fifteenth Amendment, was properly resolved under the Fourteenth Amendment, per Justice Whittaker’s concurring opinion).

<sup>64</sup> See *Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 2321, 2333 (2021) (noting that the Senate Report “listed many examples of what the Committee took to be unconstitutional vote dilution, but the survey identified only three isolated episodes involving the outright denial of the right to vote.”); Michael J. Pitts, *Rethinking Section 2 Vote Denial*, 46 FLA. ST. U. L. REV. 1, 3 (2018) (“[T]he results standard—while applicable to vote denial claims—arose primarily out of a need for a new standard in vote dilution litigation.”). In *Thornburg v. Gingles*, 478 U.S. 30 (1986), the Court laid out several preconditions and factors for vote dilution claims under Section 2.

<sup>65</sup> *Cf.* *Miss. Republican Exec. Comm.*, 469 U.S. at 1010 (Rehnquist, J., dissenting) (“[T]he language used in the amended statute is, to say the least, rather unclear.”); see also Luis Fuentes-Rohwer, *Justice Kennedy to the Rescue?*, 160 U. PA. L.

both vote denial and vote dilution,<sup>66</sup> but Congress did not neatly tailor the statute to either concept.

Whether for vote dilution or vote denial, discriminatory intent does not control the analysis. Section 2(a) tells courts to concentrate on *results*, as provided in Section 2(b).<sup>67</sup> And Section 2(b) tells courts to evaluate results under the equal openness standard.<sup>68</sup> Without discriminatory results, no violation may arise.

Though Section 2's literal language concerns itself with results, whether that narrow focus comports with legislative objectives presents a difficult question. The Senate Report states that the 1982 amendments would reject the Intent Test "as the *exclusive* standard for establishing a violation of Section 2."<sup>69</sup> In other words, the Senate Report contemplates that Section 2, after amendment, would permit plaintiffs to proceed under either the Results Test or the Intent Test. As the next part shows, the apparent conflict between Section 2's text and its legislative history has generated a circuit split within the lower courts.

## II. SURVIVAL OF THE INTENT TEST IN THE LOWER COURTS

The lower courts have adopted different approaches to the Intent Test. Some courts have found that the Intent Test survives the 1982 amendments. Meanwhile, the Eleventh Circuit has rejected it.

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REV. PENNUMBRA 209 (2012) ("Section 2 of the Voting Rights Act is a doctrinal mess. Through a totality of circumstances inquiry, Section 2 has evolved from its modest beginnings as a codification of the Fifteenth Amendment into a 'mysterious judicial inquiry.'" (quoting Christopher S. Elmendorf, *Making Sense of Section 2: Of Biased Votes, Unconstitutional Elections, and Common Law Statutes*, 160 U. PA. L. REV. 377, 381 (2012))).

<sup>66</sup> Until recently, plaintiffs did not often rely on Section 2 for vote denial claims. *See* League of Women Voters of N.C. v. North Carolina, 769 F.3d 224, 239–40 (4th Cir. 2014) (discussing how Section 2 had historically applied in the vote dilution context); *see also* Tokaji, *supra* note 28 at 448 (discussing expanded role of Section 2 in litigation).

<sup>67</sup> *See* 52 U.S.C. § 10301(a) (prohibiting a law "which results in a denial or abridgement . . . as provided in subsection (b)").

<sup>68</sup> *See id.* § 10301(b) (violations arise when "political processes . . . are not equally open to participation by members of a class of citizens protected by subsection (a)").

<sup>69</sup> S. REP. NO. 97-417, at 36 (1982) (emphasis added).

*A. Acceptance of Intent Test*

*McMillan v. Escambia County* illustrates how a court used the Senate Report to embrace the Intent Test.<sup>70</sup> *McMillan* involved a challenge to a Florida county's at-large election system for county commissioners. Under the at-large system, county commissioners would run for seats associated with the district in which they resided.<sup>71</sup> However, the entire county, rather than specific districts, would vote for the commissioners.<sup>72</sup> The Black plaintiffs argued that this at-large system diluted their votes.<sup>73</sup>

*McMillan* followed a convoluted procedural path, which helps illustrate the relationship between Section 2 and other authorities. After the district court ruled that the at-large system violated Section 2, as well as the Fourteenth and Fifteenth Amendments, the Fifth Circuit affirmed the Fourteenth Amendment holding without reaching the other two.<sup>74</sup> The Supreme Court noted probable jurisdiction<sup>75</sup> but returned the case to the Fifth Circuit.<sup>76</sup> The Court concluded that the Fourteenth Amendment issue could be avoided through a holding on Section 2.<sup>77</sup> The Court thus directed the Fifth Circuit to determine whether the at-large system violated that statute.<sup>78</sup>

The Fifth Circuit held that Section 2 included both a Results Test and an Intent Test, and that the at-large system violated both.<sup>79</sup> The Results Test provided a "less stringent standard" than did prior law, and numerous factors established its violation.<sup>80</sup> Additionally, having previously held that the county maintained the at-large system with discriminatory intent, the court easily found that the county violated the Intent Test.<sup>81</sup>

To justify the Intent Test, the court relied on the Senate Report. That report showed that "Congress intended that fulfilling either the more restrictive intent test or the results test would be

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<sup>70</sup> See 748 F.2d 1037, 1042–43 (5th Cir. 1984); see also *United States v. Brown*, 561 F.3d 420, 432 (5th Cir. 2009) ("To violate [Section 2] . . . these practices must be undertaken with an intent to discriminate or must produce discriminatory results.").

<sup>71</sup> See *McMillan*, 748 F.2d at 1040.

<sup>72</sup> See *id.*

<sup>73</sup> *Id.*; see also *id.* at 1043 (describing racially polarized voting practices whenever a Black candidate ran for countywide office).

<sup>74</sup> *McMillan v. Escambia Cnty.*, 688 F.2d 960 (5th Cir. 1982).

<sup>75</sup> *Escambia Cnty. v. McMillan*, 460 U.S. 1080, 1080 (1983).

<sup>76</sup> *Escambia Cnty. v. McMillan*, 466 U.S. 48, 49–50 (1984).

<sup>77</sup> *Id.* at 51.

<sup>78</sup> *Id.* at 52.

<sup>79</sup> *McMillan v. Escambia Cnty.*, 748 F.2d 1037, 1046–47 (5th Cir. 1984).

<sup>80</sup> *Id.* at 1046.

<sup>81</sup> See *id.* at 1047.

sufficient to show a violation of section 2.”<sup>82</sup> The court did not attempt to reconcile the Senate Report with Section 2’s language.<sup>83</sup>

In *Baird v. Consolidated City of Indianapolis*, the Seventh Circuit suggested that the Intent Test enjoys a statutory basis.<sup>84</sup> Judge Easterbrook wrote that when Congress amended Section 2, it agreed “with *Bolden* to the extent it held that intentional discrimination violates”<sup>85</sup> the statute. Thus, he wrote, “proof of intentional discrimination under § 2(a) remain[ed] an option”<sup>86</sup> for plaintiffs who could not satisfy the Results Test under Section 2(b).

*Baird* suggests that Section 2’s components established two separate tests, with subsection (a) establishing the Intent Test. If plaintiffs cannot satisfy that test, they must “pin their hopes on the outcome approach of § 2(b).”<sup>87</sup> In treating Section 2(a) as a standalone provision, *Baird* did not address its textual link to Section 2(b). The court did not tackle the part of Section 2(a) that says violations arise “as provided in subsection (b).”<sup>88</sup>

### B. Rejection of the Intent Test

*Johnson v. DeSoto County* illustrates how a court may reject the Intent Test.<sup>89</sup> In *DeSoto County*, the plaintiffs argued that the county’s at-large school board election system violated Section 2.<sup>90</sup> The district court embraced the Intent Test, agreeing with the plaintiffs’ claims. The court found that “intent alone is sufficient to establish a claim under § 2”<sup>91</sup> and, alternatively, that even if intent alone were insufficient, any results ““need only be minimal.””<sup>92</sup> The plaintiffs did not need to meet Section 2(b)’s Results Test.

On appeal, the Eleventh Circuit reversed the district court and rejected the Intent Test. The circuit court concluded that Section

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<sup>82</sup> *Id.* at 1046 (emphasis omitted) (relying on S. REP. NO. 97-417, at 27 (1982)).

<sup>83</sup> The Fifth Circuit has continued to embrace the Intent Test. *See, e.g.*, *Fusilier v. Landry*, 963 F.3d 447, 463 (5th Cir. 2020) (“The district court’s finding of discriminatory intent formed an independent basis for liability. . . . An election practice violates Section 2 and the Fourteenth and Fifteenth Amendments if it is undertaken and maintained for a discriminatory purpose.” (citing *McMillan v. Escambia Cnty.*, 748 F.2d 1037, 1046 (5th Cir. 1984))).

<sup>84</sup> 976 F.2d 357, 359 (7th Cir. 1992).

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 360.

<sup>87</sup> *Id.* at 359.

<sup>88</sup> For the full statutory text, see *supra* note 7.

<sup>89</sup> *Johnson v. DeSoto Cnty. Bd. Comm’rs*, 72 F.3d 1556 (11th Cir. 1996).

<sup>90</sup> The plaintiffs in *DeSoto County* were Black voters who believed that their votes had been diluted through the at-large voting system. *See id.* at 1558.

<sup>91</sup> *Id.* at 1559 (citing *Johnson v. DeSoto Cnty. Bd. Comm’rs*, 868 F.Supp. 1376 (M.D. Fla. 1994)).

<sup>92</sup> *Id.* (quoting *Johnson v. DeSoto County Bd. Comm’rs*, 868 F.Supp. 1376, 1380 (M.D. Fla. 1994)).

2 “expressly requires a showing of discriminatory results,” with “no exception for situations in which there is discriminatory intent but no discriminatory results.”<sup>93</sup> The court acknowledged that the Senate Report suggested otherwise.<sup>94</sup> But the Supreme Court had never held that judges could “override the plain language of § 2.”<sup>95</sup> The Eleventh Circuit believed that the Supreme Court, in *Voinovich v. Quilter*,<sup>96</sup> had already rejected the Intent Test.<sup>97</sup> The court was bound “by Supreme Court holdings, not by statements in legislative committee reports.”<sup>98</sup>

The Eleventh Circuit concluded that discriminatory intent may play a role if connected to the Results Test.<sup>99</sup> Section 2(b) calls for courts to examine the “totality of the circumstances” around a voting law. Discriminatory intent could provide “circumstantial evidence of discriminatory results.”<sup>100</sup> But discriminatory results were required.<sup>101</sup>

The Eleventh Circuit’s struggles with Section 2 continued after *DeSoto County*. In *Askew v. Rome*, the court held that Section 2 violations may arise when election laws “either have a discriminatory purpose or effect.”<sup>102</sup> The court thereby embraced the same Intent Test that *Desoto County* rejected and continued to contradict itself in subsequent cases.<sup>103</sup> Most recently, in *League of Women Voters v. Florida*,<sup>104</sup> the Eleventh Circuit determined that stare decisis compelled the court to reject the Intent Test.<sup>105</sup> The court would follow *DeSoto County*, the oldest precedent within the circuit.<sup>106</sup>

In an ongoing case, *United States v. Georgia*, the Department of Justice has argued that the Intent Test continues to

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<sup>93</sup> *Id.* at 1563.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> 507 U.S. 146, 155 (1993) (citing *Thornburg v. Gingles*, 478 U.S. 30 (1986)).

<sup>97</sup> *Johnson*, 72 F.3d at 1562 (concluding that *Voinovich v. Quilter*, 507 U.S. 146, 155 (1993), “forecloses the district court’s holding, and the plaintiffs’ position, that discriminatory intent alone can violate § 2 even without discriminatory results.”). For further discussion of *Voinovich*, see *infra* text accompanying notes 152–165.

<sup>98</sup> *Johnson*, 72 F.3d at 1564.

<sup>99</sup> *Id.* at 1565.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 1563.

<sup>102</sup> 127 F.3d 1355, 1373 (11th Cir. 1997).

<sup>103</sup> See *Brooks v. Miller*, 158 F.3d 1230, 1237 (11th Cir. 1998) (“[D]iscriminatory intent alone, in the absence of a showing of discriminatory effect, is insufficient to establish a violation of § 2.” (citing *Johnson*, 72 F.3d 1556 (11th Cir. 1996))); *Osburn v. Cox*, 369 F.3d 1283, 1289 (11th Cir. 2004) (allowing for both Intent Test and Results Test under Section 2).

<sup>104</sup> 66 F.4th 905, 921 (11th Cir. 2023).

<sup>105</sup> *Id.* at 943.

<sup>106</sup> *Id.*

apply in the Eleventh Circuit.<sup>107</sup> The DOJ believes that the Eleventh Circuit has merely required *some* results under the Intent Test.<sup>108</sup> That is, plaintiffs can bring Section 2 intentional discrimination claims when they allege some “discriminatory impact or adverse effect.”<sup>109</sup> That showing, the DOJ maintains, differs “from the ‘discriminatory results needed to establish a section 2 violation in the absence of intentional discrimination.’”<sup>110</sup>

The DOJ’s position deviates from relevant precedents. In *DeSoto County*, the Eleventh Circuit rejected the district court’s theory that a plaintiff could succeed by showing “minimal” results.<sup>111</sup> Instead, the Eleventh Circuit said that it was “bound by the plain language of § 2.”<sup>112</sup> In *League of Women Voters*, the Eleventh Circuit acknowledged that though a Florida voting law may have had some “disparate impact,” that impact was “not enough to meet section 2’s high standard.”<sup>113</sup> Therefore, the Eleventh Circuit has already rejected the minimal-results theory which the DOJ now embraces.<sup>114</sup>

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<sup>107</sup> See United States’ Opposition to State Defendants’ and Intervenor Defendants’ Motions for Judgment on the Pleadings at 10-11, *United States v. Georgia*, No. 1:21-CV-2575-JPB (N.D. Ga. June 8, 2023).

<sup>108</sup> See *id.* at 13–14.

<sup>109</sup> *Id.* at 14.

<sup>110</sup> *Id.* (quoting *Dillard v. Baldwin Cnty. Bd. of Educ.*, 686 F. Supp. 1459, 1468 n.10 (M.D. Ala. 1988)). The Department of Justice also relies partially on *Garza v. County of Los Angeles*, 918 F.2d 763 (9th Cir. 1990), *cert. denied*, 498 U.S. 1028 (1991). See *id.* at 13–14. In *Garza*, the court stated that the statutory results test “did not affect the remedies under Section 2 for intentional discrimination.” 918 F.2d at 770 (citing S. REP. NO. 97-417, at 27 (1982)). Thus, the court appeared to embrace the Intent Test. See also *id.* at 771 (“Although the showing of injury in cases involving discriminatory intent need not be as rigorous as in effects cases, *some* showing of injury must be made to assure that the district court can impose a meaningful remedy.”). However, the court then stated that for Section 2 intentional discrimination claims, the discriminatory intent “must result” in a violation of the equal openness standard under Section 2(b). *Id.* at 771. That language suggests that minimal results do not suffice. Instead, a violation of the Section 2(b) equal openness standard must have occurred. See *id.* at 771 (applying the equal openness standard and finding that the Los Angeles measure at issue violated it). Cf. *Afr. Am. Voting Rts. Legal Def. Fund, Inc. v. Villa*, 54 F.3d 1345, 1357 n.18 (8th Cir. 1995) (“[*Garza*] relied upon the text of the Voting Rights Act to find that a discriminatory effect was required in an intent case.”). Whether *Garza* requires minimal effects in Section 2 intent cases, or instead requires a violation of the equal openness standard, remains frustratingly unclear.

<sup>111</sup> *Johnson v. DeSoto Cnty. Bd. Comm’rs*, 72 F.3d 1556, 1564 (11th Cir. 1996) (quoting *Johnson v. DeSoto Cnty. Bd. Comm’rs*, 868 F.Supp. 1376, 1380 (M.D. Fla. 1994)).

<sup>112</sup> *Id.* at 1563.

<sup>113</sup> *League of Women Voters of Fla., Inc. v. Fla. Sec’y of State*, 66 F.4th 905, 943 (11th Cir. 2023).

<sup>114</sup> See *id.* at 943–44 (defining Section 2’s “high standard” by reference to the equal openness standard in Section 2(b) and concluding that the plaintiff’s

### III. THE INTENT TEST IN THE SUPREME COURT

This part explains how the Supreme Court has established that Section 2 only includes a Results Test. While no Court opinion embraces the Intent Test, the Court has not rejected it in absolute and express terms.<sup>115</sup> This reticence might contribute to lower courts' struggles with the Intent Test. Although Congress should add an Intent Test to the VRA, this part argues that the Court's rejection of that test comports with its proper judicial role.

#### *A. The Court's Rejection of the Intent Test*

*Brnovich v. Democratic National Committee (DNC)* illustrates how the Results Test provides the exclusive path for a Section 2 violation.<sup>116</sup> *Brnovich* involved vote-denial challenges to two Arizona voting laws:<sup>117</sup> the first nullified votes made in the wrong precinct (the "precinct rule")<sup>118</sup> and the second limited who could collect a voter's mail-in ballot (the "collection rule").<sup>119</sup> The district court upheld these laws and the Ninth Circuit panel affirmed.<sup>120</sup> But the en banc Ninth Circuit struck them down.<sup>121</sup> The precinct rule, the court found, violated Section 2's Results Test.<sup>122</sup> The collection rule violated Section 2's Results Test, its Intent Test, and the Fifteenth Amendment.<sup>123</sup>

The Supreme Court reversed the Ninth Circuit. In doing so, the Court determined that Section 2 warranted a "fresh look."<sup>124</sup>

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challenge to a Florida registration-delivery provision "does not come close to meeting that standard.").

<sup>115</sup> Individual Justices have been less circumspect. *See, e.g.,* *Allen v. Milligan*, 599 U.S. 1, 44 (2023) (Kavanaugh, J., concurring) ("[A]s this Court has long recognized—and as all Members of this Court today agree—the text of § 2 establishes an effects test, not an intent test."); *see also* *Chisom v. Roemer*, 501 U.S. 380, 406 (1991) (Scalia, J., dissenting) ("As currently written, [Section 2] proscribes intentional discrimination only if it has a discriminatory effect, but proscribes practices with discriminatory effect whether or not intentional.").

<sup>116</sup> 141 S. Ct. 2321 (2021).

<sup>117</sup> *See id.* at 2333–34. For a general discussion about *Brnovich*'s potential consequences for election law, see Derek T. Muller, *Brnovich v. DNC: Election Litigation Migrates from Federal Courts to the Political Process*, 2021 CATO SUP. CT. REV. 217 (2021).

<sup>118</sup> *See Brnovich*, 141 S. Ct. at 2334.

<sup>119</sup> *See id.*

<sup>120</sup> *See* *Democratic Nat'l Comm. v. Reagan*, 329 F. Supp. 3d 824, 883 (D. Ariz. 2018), *aff'd*, 904 F.3d 686 (9th Cir. 2018) (subsequent history omitted).

<sup>121</sup> *See* *Democratic Nat'l Comm. v. Hobbs*, 948 F.3d 989, 998 (9th Cir. 2020), *rev'd and remanded sub nom. Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321 (2021).

<sup>122</sup> *Id.* at 999.

<sup>123</sup> *Id.*

<sup>124</sup> *Brnovich*, 141 S. Ct. at 2337.



Cases under that statute had typically involved alleged vote dilution rather than, as in *Brnovich*, alleged vote denial.<sup>125</sup> Additionally, the Court had shifted its interpretive methods since Section 2's enactment. An earlier case merely quoted the statute's language and then "jumped" to the legislative history.<sup>126</sup> But now, the Court's "statutory interpretation cases almost always start with a careful consideration of the text."<sup>127</sup>

The Court observed Section 2(a)'s prohibition on any law that "results in a denial or abridgement of the right . . . to vote on account of race or color,"<sup>128</sup> concluding that it need not determine what that language would mean if it "stood alone."<sup>129</sup> Section 2(b) explained how a Section 2 violation arose: through a violation of the equal openness standard.<sup>130</sup> The Court then listed several, non-exclusive factors relevant to whether a state violated the equal openness standard.<sup>131</sup> Applying those factors, the Court found that neither the precinct law<sup>132</sup> nor the collection law violated Section 2.<sup>133</sup>

*Brnovich* implicitly rejected the Seventh Circuit's approach to Section 2.<sup>134</sup> *Brnovich* concluded that Section 2(a) does not stand "alone."<sup>135</sup> Instead, the Results Test under Section 2(a) turns on Section 2(b)'s equal openness standard.<sup>136</sup> The Seventh Circuit embraced an Intent Test because it believed that Section 2(a) stood alone.<sup>137</sup>

*Brnovich* also rebuffed the Ninth Circuit's application of the Intent Test. Unlike the Ninth Circuit,<sup>138</sup> the Court did not use

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<sup>125</sup> *See id.* at 2333.

<sup>126</sup> *Id.* at 2337 (citing *Thornburg v. Gingles*, 478 U.S. 30 (1986)).

<sup>127</sup> *Brnovich*, 141 S. Ct. at 2337.

<sup>128</sup> 52 U.S.C. § 10301(a); *see also id.*

<sup>129</sup> *Brnovich*, 141 S. Ct. at 2337.

<sup>130</sup> *See id.*

<sup>131</sup> *See id.* at 2338–40.

<sup>132</sup> *See id.* at 2346 ("In light of the modest burdens allegedly imposed by Arizona's out-of-precinct policy, the small size of its disparate impact, and the State's justifications, we conclude the rule does not violate §2 of the VRA.").

<sup>133</sup> *See id.* at 2348 ("As with the out-of-precinct policy, the modest evidence of racially disparate burdens caused by HB 2023, in light of the State's justifications, leads us to the conclusion that the law does not violate §2 of the VRA.").

<sup>134</sup> *See generally Baird v. Consol. City of Indianapolis*, 976 F.2d 357 (7th Cir. 1992), *see also supra* text accompanying notes 84–88.

<sup>135</sup> *Brnovich*, 141 S. Ct. at 2337.

<sup>136</sup> *See* 52 U.S.C. § 10301(a) (prohibiting a law "which results in a denial or abridgement . . . as provided in subsection (b)").

<sup>137</sup> *See Baird*, 976 F.2d at 360 (explaining the plaintiffs "have not stated a claim under § 2(b), although proof of intentional discrimination under § 2(a) remains an option.").

<sup>138</sup> *See Democratic Nat'l Comm. v. Hobbs*, 948 F.3d 989, 999 (9th Cir. 2020) ("We hold, further, that . . . [the collection rule] was enacted with discriminatory intent, in violation of the 'intent test' of Section 2 of the VRA.").

Section 2 to analyze the intent of the Arizona collection law. Instead, the Court, in Part V of its opinion, separately rejected the claim that the collection law was “enacted with a discriminatory purpose.”<sup>139</sup>

Unfortunately, Part V of *Brnovich* does not explain *why* the Court examined the collection law’s intent. In *United States v. Georgia*, the district court concluded that Part V of *Brnovich* endorses the Intent Test for Section 2.<sup>140</sup> The court reasoned that if Section 2 carried no Intent Test, then *Brnovich* would not have performed discriminatory purpose analysis for the collection law.<sup>141</sup>

However, *Brnovich*’s purpose analysis, read in context, does not endorse an Intent Test. That analysis comes only after the Court held that the precinct law and the ballot law each complied with Section 2.<sup>142</sup> This indicates that the intent analysis was relevant to a different legal issue, which, as the Ninth Circuit revealed, was whether the Arizona collection law violated the Fifteenth Amendment.<sup>143</sup> Though Section 2 carries no Intent Test, the Fifteenth Amendment unequivocally does.<sup>144</sup> And the Ninth Circuit had held that the collection law’s purpose led to a Fifteenth

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<sup>139</sup> See *Brnovich*, 141 S. Ct. at 2348.

<sup>140</sup> See *United States v. Georgia*, 574 F. Supp. 3d 1245, 1253 (N.D. Ga. 2021), *reconsideration denied sub nom.*, *In re Georgia Senate Bill 202*, No. 1:21-CV-02575-JPB, 2022 WL 1516049 (N.D. Ga. Apr. 21, 2022).

<sup>141</sup> See *id.* (“Presumably, the Supreme Court would have rejected the plaintiffs’ discriminatory purpose claim if, as State Defendants contend, such a claim were invalid as a matter of law.”); see also *United States’ Opposition to State Defendants’ and Intervenor Defendants’ Motions For Judgment On The Pleadings*, 1:21-CV-2575-JPB, 12 (N.D. Ga. June 8, 2023) (explaining that in *Brnovich*, “the Court considered a Section 2 discriminatory purpose claim separately from the discriminatory results claim in the same case.”); U.S. DEP’T. OF JUST., GUIDANCE UNDER SECTION 2 OF THE VOTING RIGHTS ACT, 52 U.S.C. § 10301, FOR REDISTRICTING AND METHODS OF ELECTING GOVERNMENT BODIES, at 9 (Sept. 1, 2021), <https://www.justice.gov/media/1164546/dl?inline> [<https://perma.cc/7AZV-AQ4Z>] (“Section 2 of the Voting Rights Act also prohibits use of a redistricting plan or method of election adopted or maintained for a discriminatory purpose, which is the same prohibition imposed by the Fourteenth and Fifteenth Amendments.”).

<sup>142</sup> See *supra* notes 130–33 and accompanying text.

<sup>143</sup> See *Democratic Nat’l Comm. v. Hobbs*, 948 F.3d 989, 999 (9th Cir. 2020). The district court believed that Section 2 included an Intent Test and so, like the Ninth Circuit, its discriminatory purpose holding related both to Section 2 and the Fifteenth Amendment. See *Democratic Nat’l Comm. v. Reagan*, 329 F.Supp.3d 824, 878–82 (D. Ariz.).

<sup>144</sup> See, e.g., *Chisom v. Roemer*, 501 U.S. 380, 403–04 (1991) (explaining that *Mobile v. Bolden*, 446 U.S. 55, 100 (1980), put on plaintiffs the “burden of proving discriminatory intent” in Fifteenth Amendment cases).

Amendment violation.<sup>145</sup> Given this context, it makes sense that the Court would examine the collection law's purpose.

Of course, the Court in *Brnovich* should have expressly stated that the Fifteenth Amendment made the collection law's purpose relevant. Reading a judicial opinion should not be like reading tea leaves.<sup>146</sup> But here, at least, the tea leaves yield an answer: the Fifteenth Amendment carries an Intent Test and Section 2 does not.

Justice Kagan, in her *Brnovich* dissent, similarly found that Section 2 focuses on results.<sup>147</sup> Congress, Justice Kagan wrote, did not “hinge liability on state officials’ motives.”<sup>148</sup> Rather, “Congress made it ride on their actions’ consequences.”<sup>149</sup> Section 2 “tells courts that they are to focus on the law’s effects.”<sup>150</sup> Justice Kagan believed that the Arizona laws violated the Results Test.<sup>151</sup>

Another Supreme Court case confirms that Section 2 concerns itself with results. In *Voinovich v. Quilter*, the plaintiffs made a vote dilution challenge to an Ohio apportionment plan.<sup>152</sup> They claimed that the state had intentionally packed Black voters in

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<sup>145</sup> See *Hobbs*, 948 F.3d at 999 (holding that the collection rule was enacted with discriminatory purpose, in violation of the Fifteenth Amendment). Though the Ninth Circuit applied intent analysis to Section 2, see *id.*, the Court in *Brnovich* completed its Section 2 analysis without mentioning intent. See *supra* notes 130–33 and accompanying text. Thus, Part V of *Brnovich* should be traced to the Ninth Circuit’s holding on the Fifteenth Amendment rather than its holding on Section 2. See also Travis Crum, *Deregulated Redistricting*, 107 CORNELL L. REV. 359, 443 (2022) (explaining that the Court’s discriminatory-purpose analysis was offered in evaluation of a Fifteenth Amendment claim and tracing the Court’s analysis to the district court’s determinations).

<sup>146</sup> In *Allen v. Milligan*, 599 U.S. 1 (2023), the Court continued its delicate approach towards Section 2. In describing the 1982 legislative compromise leading to the revised statute, the Court said that “Section 2 would include the effects test.” *Id.* at 13. The Court did not say that Section 2 would include *only* a Results Test. Presumably, the Court was aware of the controversy over the Intent Test in the lower courts and did not wish to expressly opine on it. However, the cases discussed in this part show that the Court has accepted the Results Test as the exclusive path to prove a Section 2 violation.

<sup>147</sup> See 141 S. Ct. at 2350 (Kagan, J., dissenting).

<sup>148</sup> *Id.* at 2357.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* Justice Kagan further stated that because she “would affirm the Court of Appeals’ holding that the effects of these policies violate Section 2,” she “need not pass on that court’s alternative holding that the laws were enacted with discriminatory intent.” *Id.* at 2366 n.10. Like the majority, she does not identify which legal authority makes intent relevant. But her opinion, like the majority’s, is difficult to reconcile with an Intent Test under Section 2. If Justice Kagan believed that Section 2 includes an Intent Test, it would be odd for her to explain a discriminatory intent holding as an “alternative” to a Section 2 violation.

<sup>151</sup> See *id.* at 2366 (Kagan, J., dissenting) (“Both [Arizona] policies violate Section 2, on a straightforward application of its text.”).

<sup>152</sup> 507 U.S. 146, 147 (1993).

a small number of districts.<sup>153</sup> The plaintiffs believed that this weakened Black voter strength in the other districts.<sup>154</sup> They claimed that the Ohio apportionment plan thus violated both Section 2 and the Fifteenth Amendment,<sup>155</sup> and the district court agreed.<sup>156</sup>

The Supreme Court unanimously reversed. For Section 2, the district court had failed to “determine the consequences of Ohio’s apportionment plan before ruling on its validity.”<sup>157</sup> Section 2 “focuses exclusively on consequences” and could apply “[o]nly if the apportionment scheme ha[d] the *effect* of denying a protected class the equal opportunity to elect its candidate of choice.”<sup>158</sup> When “effect has not been demonstrated, § 2 simply does not speak to the matter.”<sup>159</sup> The district court’s conclusion, unmoored from the Results Test, could not stand.<sup>160</sup>

The Court then turned to the plaintiffs’ Fifteenth Amendment claim. Here, the Court considered whether intentional discrimination motivated the Ohio apportionment plan<sup>161</sup> and concluded that it had not.<sup>162</sup> The district court had clearly erred.<sup>163</sup>

*Voinovich* shows that any Intent Test must be tied to an authority outside Section 2. If Section 2 carried an Intent Test, why would the Court say that the statute “focuses exclusively on consequences”?<sup>164</sup> The Court did not simply forget about intent issues, after all. The Court made intent inquiries—under the Fifteenth Amendment.<sup>165</sup>

The only arguable Supreme Court support for an Intent Test comes in *Chisom v. Roemer*.<sup>166</sup> In *Chisom*, the Court examined

<sup>153</sup> *See id.* at 149.

<sup>154</sup> *See id.* at 149–50.

<sup>155</sup> The plaintiffs also argued that the Ohio apportionment plan created districts of unequal size, in violation of the Fourteenth Amendment. *See Voinovich*, 507 U.S. at 149, 160. The Court remanded for further proceedings on that issue. *See id.* at 162.

<sup>156</sup> *See Quilter v. Voinovich*, 794 F. Supp. 695, 695 (N.D. Ohio 1992), *rev’d*, *Voinovich v. Quilter*, 507 U.S. 146 (1993).

<sup>157</sup> *Voinovich*, 507 U.S. at 155.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> Rather than focus on the Results Test, the district court in *Voinovich* had flatly concluded that Section 2 “prohibits the creation of majority-minority districts unless such districts are necessary to remedy a statutory violation.” *Id.* (citing *Quilter v. Voinovich*, 794 F. Supp. 695, 701 (N.D. Ohio 1992)).

<sup>161</sup> *See id.* at 158–60.

<sup>162</sup> *See id.* at 160.

<sup>163</sup> *See id.* at 159 (“Even if we assume that the Fifteenth Amendment speaks to [vote dilution claims], the District Court’s decision still must be reversed: Its finding of intentional discrimination was clearly erroneous.”).

<sup>164</sup> *Id.* at 155.

<sup>165</sup> *See id.* at 158–160.

<sup>166</sup> 501 U.S. 380 (1991).

whether Section 2 applied to judicial elections.<sup>167</sup> In holding affirmatively,<sup>168</sup> the Court endorsed the Results Test. Under Section 2, the Court advised, “proof of intent is no longer required to prove a § 2 violation.”<sup>169</sup> Instead, Congress “incorporated the results test.”<sup>170</sup>

But the Court muddied the waters through a footnote. In explaining that the Results Test “requires an inquiry into ‘totality of the circumstances,’”<sup>171</sup> the Court cited and block-quoted a passage from the Senate Report.<sup>172</sup> That passage included the line, relied on in *McMillan*, that the Intent Test and the Results Test provided alternative paths under Section 2.<sup>173</sup>

A single line in a block-quoted footnote does not provide the best source of authority. But the district court in *United States v. Georgia* relied on that single line to embrace an Intent Test.<sup>174</sup> The district court’s approach ignored the entire context of the opinion and the Court’s Section 2 jurisprudence generally.

Recently, in *Allen v. Milligan*, the Court addressed a Section 2 challenge to an Alabama redistricting plan.<sup>175</sup> The Court upheld the plaintiffs’ challenge and “reiterated that §2 turns on the presence of discriminatory effects, not discriminatory intent.”<sup>176</sup> Though the Court detailed Section 2’s history and operation,<sup>177</sup> it made no reference to an Intent Test.

In *Allen* and elsewhere, the Court has not recited the magic words, “Section 2 does not include an Intent Test.” This might help explain why some lower courts have clung to that test. Additionally, as *Brnovich* suggested, lower courts may not have accounted for shifts in the Supreme Court’s interpretive approach.<sup>178</sup> In a prior era, the Court occasionally strayed away from statutory text.<sup>179</sup> If

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<sup>167</sup> *Id.* at 384.

<sup>168</sup> *See id.* at 404.

<sup>169</sup> *Id.* at 394.

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *See id.* at 394 n.21.

<sup>173</sup> *Id.* (quoting S. REP. NO. 97-417, at 27 (1982)).

<sup>174</sup> The district court treated that line as a statement from the Supreme Court itself. *See United States v. Georgia*, 574 F. Supp. 3d 1245, 1251 (N.D. Ga. 2021) (summarizing *Chisom v. Roemer*, 501 U.S. 380, 394 n.21 (1991), in a parenthetical without noting that the Court was quoting the Senate Report), *reconsideration denied sub nom.*, *In re Georgia Senate Bill 202*, 2022 WL 1516049 (N.D. Ga. Apr. 21, 2022).

<sup>175</sup> 599 U.S. 1 (2023).

<sup>176</sup> *Id.* at 25.

<sup>177</sup> *See id.* at 10–14.

<sup>178</sup> *See Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 2321, 2337 (2021) (reversing the Ninth Circuit after giving Section 2 a “fresh look” under current text-focused interpretive methods).

<sup>179</sup> *See id.* (explaining that in *Thornburg v. Gingles*, 478 U.S. 30 (1986), the Court “jumped” to rely on legislative history rather than rely on statutory text).

the Court had done so for Section 2, the Court might have said the Intent Test survived the 1982 amendments.

But the Court now adopts a largely textual approach.<sup>180</sup> And Section 2's plain text focuses on results.<sup>181</sup> In every major Section 2 case, the Court has emphasized the Results Test.<sup>182</sup> If the Intent Test survived the statutory amendments to Section 2, the Court probably would have said so at least once.

### *B. Observance of the Judicial Role*

This section argues that the Court observed its proper role in *Brnovich* and related cases. The absence of an Intent Test creates anomalies for Congress, not the courts, to fix. Claims that the Court should rewrite Section 2 do not hold water. Nor do some other potential objections.

One objection may relate to the “incompetent racist” problem. If Section 2 carries no Intent Test, then government officials or bodies might get away with racially discriminatory actions, as long as they do so incompetently. That is, racially discriminatory actions that do not violate the equal openness standard will face protection from Section 2 challenges. This suggests that the Court embraced an “absurd” interpretation.<sup>183</sup>

However, the incompetent-racist concern reflects a narrow view of the law. *Brnovich*'s approach hardly grants immunity for discriminatory acts. The Fourteenth and Fifteenth Amendments, for example, allow plaintiffs to pursue intentional discrimination claims like the ones contemplated by the statutory Intent Test.<sup>184</sup>

Of course, an Intent Test under Section 2 may catch some discriminatory behavior that other laws do not. For that reason, Congress should add the Intent Test to the Section 2 regime and address incompetent racists.<sup>185</sup> But the existing gap in Section 2 does not render *Brnovich*'s interpretation absurd. As Chief Justice

<sup>180</sup> See generally Diarmuid F. O'Scannlain, “*We Are All Textualists Now*”: *The Legacy of Justice Antonin Scalia*, 91 ST. JOHN'S L. REV. 303 (2017).

<sup>181</sup> See 52 U.S.C. § 10301(a) (prohibiting a law “which results in a denial or abridgement . . . as provided in subsection (b)”).

<sup>182</sup> See *supra* Part III.A.

<sup>183</sup> See John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2394 (2003) (“[I]f a particular application of a clear statute produces an absurd result, the Court understands itself to be a more faithful agent if it adjusts the statute to reflect what Congress would have intended had it confronted the putative absurdity.”).

<sup>184</sup> For a discussion of the standards that apply to Fourteenth and Fifteenth Amendment voting rights claims, see *City of Mobile v. Bolden*, 446 U.S. 55, 62, 66 (1980) (plurality opinion).

<sup>185</sup> Cf. *Reno v. Bossier Par. Sch. Bd.*, 528 U.S. 320, 332 (2000) (arguing that an intent test has “*value and effect* . . . even when it does not cover additional conduct.” (emphasis added)).

Marshall explained, the absurdity doctrine overrides statutory text only when the “injustice of applying the provision to the case, would be so monstrous, that all mankind would, without hesitation, unite in rejecting the application.”<sup>186</sup> Reading Section 2 to include only a Results Test fails this perhaps overly dramatic standard.

Another objection to *Brnovich* may relate to legislative expectations. Section 2’s language shows that the Results Test provides the exclusive path to establish a Section 2 violation. But the Senate Report shows that some legislators wanted to expand the statute through the Results Test.<sup>187</sup> Arguably, the Court should have credited this legislative history rather than have given the statute a “fresh look”<sup>188</sup> with textualism principles. When Congress amended Section 2, courts sometimes gave legislative history significant interpretive weight.<sup>189</sup> The textualism revolution had not yet occurred,<sup>190</sup> and statutes usually take on the meaning they had when they were enacted.<sup>191</sup> Thus, the argument might go, the Court should have interpreted Section 2 with reference to its legislative history.

This argument folds into broader theoretical questions about whether courts should read statutes using current interpretive canons or past ones.<sup>192</sup> Luckily, those questions can be safely avoided here. In 1982, there was no commonly accepted judicial view that the

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<sup>186</sup> *Sturges v. Crowninshield*, 17 U.S. 122, 203 (1819).

<sup>187</sup> See *supra* note 69 and accompanying text.

<sup>188</sup> *Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 2321, 2337 (2021).

<sup>189</sup> See Nicholas R. Parrillo, *Leviathan and Interpretive Revolution: The Administrative State, the Judiciary, and the Rise of Legislative History, 1890-1950*, 123 YALE L.J. 266, 269 (2013) (“In the 1980s, legislative history was uncontroversial and very common. It appeared in more than half the U.S. Supreme Court’s opinions on federal statutes.”).

<sup>190</sup> For a discussion on the rise of textualism in the 1980s, see William Eskridge, *The New Textualism*, 37 UCLA L. REV. 621 (1990).

<sup>191</sup> Like all interpretive canons, the contemporaneous meaning canon faces limits. Sometimes, the context of a statute changes through further legislative enactments and this changed legislative context can affect the statute’s meaning. See, e.g., *United States v. Fausto*, 484 U.S. 439, 453 (1988) (explaining that the “classic judicial task of reconciling many laws enacted over time, and getting them to ‘make sense’ in combination, necessarily assumes that the implications of a statute may be altered by the implications of a later statute.”).

<sup>192</sup> See Bradford C. Mank, *Legal Context: Reading Statutes in Light of Prevailing Legal Precedent*, 34 ARIZ. ST. L.J. 815, 837 (2002) (arguing that issues over how to use “prevailing judicial doctrines at the time a statute was enacted” present a “more controversial question”). The Court has rejected reliance on contemporary legal context when that context is not reflected in statutory language. See, e.g., *Alexander v. Sandoval*, 532 U.S. 275, 288 (2001) (“We have never accorded dispositive weight to context shorn of text.”).

words in a legislative report could contradict statutory language.<sup>193</sup> Sometimes courts emphasized legislative history, and sometimes they emphasized text.<sup>194</sup> If legislators in 1982 assumed that courts would always treat whatever appeared in their committee reports as law, these legislators were mistaken.

To hold that the Senate Report overrides Section 2's language would reflect an aggressive interpretive approach. The court in *McMillan* did so without any meaningful explanation.<sup>195</sup> Today, a cautious judge would probably rely on legislative history only to resolve ambiguities.<sup>196</sup> But, at least as it relates to the Intent Test, Section 2's text exhibits no ambiguity to resolve. Congress set forth a prohibition in Section 2(a) and keyed violations to results, "as provided in subsection (b)."<sup>197</sup> Section 2(b) adopts an equal openness standard, not an Intent Test.<sup>198</sup> Perhaps this textual clarity explains why even the *Brnovich* dissent focused on the Results Test.<sup>199</sup>

Presumably, *Brnovich* allows for intent inquiries in the manner that the Eleventh Circuit suggested in *DeSoto County*.<sup>200</sup> That is, proof that lawmakers intended to violate the equal openness standard can help a court determine whether their laws in fact did so.<sup>201</sup> But legislative intentions would be only one factor within the "totality of circumstances" described in Section 2(b). Discriminatory intent, unless accompanied by a violation of the equal openness standard, cannot support a Section 2 claim.

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<sup>193</sup> For a detailed empirical study on the varied uses of legislative history over time, see generally David S. Law & David Zaring, *Law Versus Ideology: The Supreme Court and the Use of Legislative History*, 51 WM. & MARY L. REV. 1653 (2010).

<sup>194</sup> See *id.* at 1665–88 for a summary of empirical studies on the use or non-use of legislative history.

<sup>195</sup> See *supra* notes 79–83 and accompanying text.

<sup>196</sup> See, e.g., *True Oil Co. v. Comm'r*, 170 F.3d 1294, 1301 (10th Cir. 1999) ("Legislative history should be used to resolve ambiguity, not create it." (quoting *Miller v. Comm'r*, 836 F.2d 1274, 1283 (10th Cir. 1988))).

<sup>197</sup> 52 U.S.C. § 10301(a).

<sup>198</sup> See *id.* § 10301(b).

<sup>199</sup> See *supra* notes 147–151 and accompanying text.

<sup>200</sup> See *supra* notes 93–98 and accompanying text.

<sup>201</sup> In *Reno v. Bossier Parish School Board*, dealing with Section 5 of the VRA, the Court implied that lawmakers who act with a specific purpose will usually accomplish that purpose. See 528 U.S. 320, 332 (2000) ("[W]henver Congress enacts a statute that bars conduct having 'the purpose or effect of x,' the purpose prong has application entirely separate from that of the effect prong only with regard to unlikely conduct that has 'the purpose of x' but fails to have 'the effect of x.'").



## IV. RECOMMENDATIONS FOR CONGRESS

Responsibility for Section 2 ultimately lies with the legislature. Congress amended the statute after a tortuous negotiation process.<sup>202</sup> The legislative compromise produced awkward statutory language that probably did not serve a single, concrete goal. Congress should thus fix the mess that it created. This part first argues that Congress should codify an Intent Test. Then, it offers principles to follow in that codification.

*A. Reasons for Codification*

To address the inconsistent case law, Congress should codify the Intent Test. Ordinarily, whether to adopt an intent test reflects a delicate question. Intent-based inquiries often yield intractable issues related to mixed motives, evidentiary limitations, and so on.<sup>203</sup>

In the Section 2 context, however, these issues carry less significance. When a jurisdiction allegedly denies or dilutes voting rights, *intent-based inquiries already arise*. The Fifteenth Amendment applies to vote denials that occur with discriminatory intent.<sup>204</sup> The Fourteenth Amendment applies to vote dilution that occurs with discriminatory intent.<sup>205</sup>

The availability of intent claims under the Constitution hardly establishes that a codified Intent Test would be superfluous. Instead, as discussed below, that codification would help integrate the overall VRA scheme. It would also help resolve statutory tension over how the VRA addresses language minorities.

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<sup>202</sup> See *supra* notes 52–62 and accompanying text.

<sup>203</sup> Legislators recognized these issues when they amended Section 2. See S. REP. NO. 97-417, at 214 (1982) (criticizing intent inquiry as “unnecessarily divisive because it involves charges of racism on the part of individual officials or entire communities,” and asserting that it “asks the wrong question”); see also *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977) (“Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.”); see also John Hart Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 *YALE L.J.* 1205, 1207 (1970) (“The Supreme Court’s traditional confusion about the relevance of legislative and administrative motivation in determining the constitutionality of governmental actions has, over the past few terms, achieved disaster proportions.”).

<sup>204</sup> See *supra* notes 144–45 and accompanying text.

<sup>205</sup> See, e.g., *Shaw v. Reno*, 509 U.S. 630, 641 (1993) (finding that electoral schemes “violate the Fourteenth Amendment when they are adopted with a discriminatory purpose and have the effect of diluting minority voting strength”).

## 1. Integration of the VRA Scheme

When the Attorney General or an aggrieved person sues “under *any statute* to enforce the voting guarantees of the fourteenth or fifteenth amendment,”<sup>206</sup> the VRA’s machinery comes into play. Under Section 3(a), a court may authorize federal election observers to monitor the state.<sup>207</sup> Under Section 3(b), any voting tests or devices will be suspended.<sup>208</sup> And under Section 3(c), the court retains jurisdiction over the state to ensure compliance with the law.<sup>209</sup> These safeguards do not apply to intent-based actions under constitutional amendments.<sup>210</sup> Those actions do not proceed under “any statute.”<sup>211</sup>

This seems strange. The VRA implements the Fourteenth and Fifteenth Amendments. Yet if a lawsuit proceeds only under those amendments, the VRA’s safeguards become unavailable. A codified Intent Test would cure this anomaly.

One might believe that the concern expressed here relies on overly literal statutory interpretation. However, a new controversy shows that judges may closely follow the VRA’s language. In *Arkansas NAACP v. Arkansas*,<sup>212</sup> the district court addressed whether private parties may pursue Section 2 claims.<sup>213</sup> The VRA, through Section 3 and elsewhere, assumes that private parties will bring actions under a “statute to enforce the voting guarantees of the fourteenth or fifteenth amendment.”<sup>214</sup> *Arkansas NAACP* held that

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<sup>206</sup> 52 U.S.C. § 10302(a) (emphasis added). 52 U.S.C. § 10302(b) and § 10302(c) contain identical phrasing.

<sup>207</sup> *Id.* § 10302(a).

<sup>208</sup> *See id.* § 10302(b).

<sup>209</sup> *See id.* § 10302(c); *see generally* Travis Crum, *The Voting Rights Act’s Secret Weapon: Pocket Trigger Litigation and Dynamic Preclearance*, 119 YALE L.J. 1992 (2010).

<sup>210</sup> In *United States v. Georgia*, No. 1:21-CV-2575-JPB (N.D. Ga. June 25, 2021), the government alleged a Section 2 violation under the Intent Test. *See* Complaint in *United States v. Georgia*, *supra* note 17. The complaint requests that the court appoint observers under Section 3(a) and apply the Section 3(c) bail-in provisions. *See id.* at 45.

<sup>211</sup> *See supra* note 206 and accompanying text.

<sup>212</sup> 586 F. Supp. 3d 893, 899 (E.D. Ark. 2022).

<sup>213</sup> Two Justices have recently expressed interest in whether Section 2 permits private parties to sue. *See* Brnovich v. Democratic Nat’l Comm., 141 S. Ct. 2321, 2350 (2021) (Gorsuch, J., concurring) (“Our cases have assumed—without deciding—that the Voting Rights Act of 1965 furnishes an implied cause of action under § 2.”); *see also* Allen v. Milligan, 599 U.S. 1, 90 n.22 (2023) (Thomas, J., dissenting) (“The Court does not address whether § 2 contains a private right of action, an issue that was argued below but was not raised in this Court.”). *Cf.* *City of Mobile v. Bolden*, 446 U.S. 55, 60 (1980) (plurality opinion) (“[a]ssuming, for present purposes, that there exists a private right of action to enforce” Section 2).

<sup>214</sup> 52 U.S.C. § 10302(a). § 10302(b) and § 10302(c) contain identical phrasing.

actions under Section 2 are not so described.<sup>215</sup> Section 2, through the Results Test, establishes relief “different from, and broader than, the far narrower guarantees in the Fourteenth and Fifteenth Amendments.”<sup>216</sup> Therefore, the court concluded that private parties cannot pursue Section 2 claims.<sup>217</sup> They have no cause of action.<sup>218</sup>

*Arkansas NAACP*, read in conjunction with *Brnovich*, establishes consequences probably unintended by legislators. Private parties who invoke the Section 2 Results Test have no cause of action. Their claims go beyond the “guarantees” of the Fourteenth and Fifteenth Amendments. If private parties invoke the Intent Test, their claims *would* fit comfortably within those guarantees. But Section 2 does not include an Intent Test.

Congress should fix this.<sup>219</sup> Reasonable persons can debate some VRA reforms, such as those related to the Section 5 preclearance regime.<sup>220</sup> But remedying the awkward interaction of Section 2, *Arkansas NAACP*, and *Brnovich* should transcend political differences.<sup>221</sup> When Congress originally enacted Section 2, it caused little controversy because it merely “restated the prohibitions already contained in the Fifteenth Amendment.”<sup>222</sup> A newly codified Intent Test would make a similar restatement.

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<sup>215</sup> *Arkansas NAACP*, 586 F. Supp. 3d at 921.

<sup>216</sup> *Id.* at 910; *see also* *Reno v. Bossier Par. Sch. Bd.*, 520 U.S. 471, 482 (1997) (“Because now the Constitution requires a showing of intent that § 2 does not, a violation of § 2 is no longer *a fortiori* a violation of the Constitution.”); *see also* Nicholas O. Stephanopoulos, *Disparate Impact, Unified Law*, 128 *YALE L.J.* 1566, 1593 (2019) (noting that Section 2 “prohibits a broad swath of conduct that is constitutionally innocuous: government activity that lacks a discriminatory purpose but produces a disparate impact.”).

<sup>217</sup> *Arkansas NAACP*, 586 F. Supp. 3d at 921.

<sup>218</sup> *Id.* at 921–22.

<sup>219</sup> Of course, the judiciary itself might resolve whether private parties may enforce Section 2. *See, e.g.*, *Turtle Mountain Band of Chippewa Indians v. Jaeger*, No. 3:22-CV-22, 2022 WL 2528256, at \*6 (D.N.D. July 7, 2022) (“Because this Court finds that Section 2 may be enforced through [42 U.S.C. § 1983], the Court need not decide whether Section 2 of the VRA, standing alone, contains an implied private right of action.”). But any such resolution seems destined to take time. Congress should immediately address the issue.

<sup>220</sup> For a short summary of some VRA proposals, *see* L. PAIGE WHITAKER, CONG. RSCH. SERV., *VOTING RIGHTS ACT: SECTION 3(C) “BAIL-IN” PROVISION 4–5* (2022).

<sup>221</sup> When Section 2 merely “restated the prohibitions already contained in the Fifteenth Amendment,” the statute caused little controversy. *See City of Mobile v. Bolden*, 446 U.S. 55, 61 (1980) (plurality opinion). Today, restoring an Intent Test to the statute would align the VRA with the Constitution.

<sup>222</sup> *Id.*

## 2. Protections for Language Minorities

A codified Intent Test would help ensure that language minorities receive the protections that Congress provided them. When it revised the VRA in 1975, Congress found that where “officials conduct elections only in English, language minority citizens are excluded from participating in the electoral process.”<sup>223</sup> Congress, finding that language minorities faced “physical, economic, and political intimidation,”<sup>224</sup> wanted to end many English-only elections.<sup>225</sup>

As part of its 1975 revisions, Congress added Section 4(f)(2) to the VRA.<sup>226</sup> Section 4(f)(2) mirrored Section 2, as it then existed, except that it referred to language minorities rather than racial minorities.<sup>227</sup> The 1975 amendments also revised Section 2 such that it cross-referenced the protections described in Section 4(f)(2).<sup>228</sup>

Under the pre-1982 version of Section 2, language minorities could bring language discrimination claims under the Intent Test.<sup>229</sup> Today, whether they may do so remains unclear. Section 2 now provides only a Results Test. Section 4(f)(2)’s language suggests that it includes an Intent Test.<sup>230</sup> But it is not obvious that language minorities can sue under Section 4(f)(2),<sup>231</sup>

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<sup>223</sup> See Voting Rights Act Amendments of 1975, Pub. L. No. 94-73, § 203, 89 Stat. 400, 401 (1975) (originally codified at 42 U.S.C. § 1973b(f)(1), and now codified at 52 U.S.C. § 10303(f)(1)).

<sup>224</sup> *Id.*

<sup>225</sup> *Id.* § 301, 89 Stat. at 402–03 (1975). The ban on English-only elections applies under specified circumstances.

<sup>226</sup> See *id.* § 203, 89 Stat. at 401.

<sup>227</sup> See *id.* (“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 because he is a member of a language minority group.”).

<sup>228</sup> See *id.* § 206, 89 Stat. at 402 (1975) (amending Section 2 such that it protects against laws that are “in contravention of the guarantees set forth in section 4(f)(2)”).

<sup>229</sup> See *City of Mobile v. Bolden*, 446 U.S. 55, 61 (1980) (plurality opinion) (interpreting pre-amendment version of Section 2 to reach intentional discrimination claims).

<sup>230</sup> See 52 U.S.C. § 10303(f)(2) (prohibiting laws that “deny or abridge” the rights of language minorities). The language “deny or abridge,” in the Fifteenth Amendment and in the pre-1982 version of Section 2, has been understood to reach intentional discrimination. See *Bolden*, 446 U.S. at 61–62 (1980).

<sup>231</sup> In the past, the Court has adopted a flexible approach towards private actions under the VRA. See *Allen v. State Bd. of Elections*, 393 U.S. 544, 557 (1969) (finding that the VRA supported private actions related to Section 5 because “[w]e have previously held that a federal statute passed to protect a class of citizens, although not specifically authorizing members of the protected class to institute suit, nevertheless implied a private right of action”). Today, the Court adopts a

rather than only under Section 2.<sup>232</sup> If they can do so, then another anomaly arises. Language minorities would be able to invoke an Intent Test under the VRA, while racial minorities could not.<sup>233</sup> This seems odd. Racial minorities, after all, were the original and principal beneficiaries of the VRA regime.<sup>234</sup>

Congress should resolve the statutory tension. It makes little sense for Section 4(f)(2) to announce broad protections and for Section 2 to limit them. Congress should codify an Intent Test that would protect language and racial minorities. Congress's awkward 1982 amendments created doubts where there should have been none.

If the VRA does not protect language minorities from intentional discrimination, those minorities will be left in a difficult position. The VRA provides them with their principal if not sole protection against voter discrimination.<sup>235</sup> Racial discrimination claims, by contrast, may usually proceed under the Fourteenth and Fifteenth Amendments.<sup>236</sup> The Court applies heightened constitutional scrutiny for race-based laws, not for language-based laws.<sup>237</sup>

Congress should fix this. In the abstract, legislators might differ on the proper legal protections for language minorities. But a codified Intent Test within the VRA should not trigger political divisions. That test would simply restore or reaffirm the protections provided to language minorities in 1975.

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more cautious approach towards implied private actions. *See, e.g.*, *Alexander v. Sandoval*, 532 U.S. 275, 286–88 (2001) (emphasizing the role of statutory text).

<sup>232</sup> *See* 52 U.S.C. § 10308(d). The VRA plainly allows the attorney general to seek enforcement of Section 4(f)(2), but it does not have a clear corresponding provision for private persons. Additionally, it appears that the DOJ treats Section 2 as the principal basis upon which to bring language discrimination claims. *See, e.g.*, *United States v. Uvalde Consol. Indep. Sch. Dist.*, 625 F.2d 547, 554 n.11 (5th Cir. 1980) (noting that the DOJ “might have premised” its lawsuit on Section 4(f)(2), but did so instead under Section 2).

<sup>233</sup> “Language minorities” is defined such that it includes several groups of racial minorities. *See* 52 U.S.C. 10310(c)(3). Those racial minorities would be able to bring language discrimination claims under an Intent Test, but other minorities would not.

<sup>234</sup> *See supra* note 20 and accompanying text.

<sup>235</sup> For discussion of the limited protections that language minorities receive outside of the voting context, see Kiyoko Kamio Knapp, *Language Minorities: Forgotten Victims of Discrimination?*, 11 *GEO. IMMIGR. L.J.* 747 (1997).

<sup>236</sup> *See Reno v. Bossier Par. Sch. Bd.*, 528 U.S. 320, 332 (2000).

<sup>237</sup> *See Donna F. Coltharp, Comment, Speaking the Language of Exclusion: How Equal Protection and Fundamental Rights Analyses Permit Language Discrimination*, 28 *ST. MARY'S L.J.* 149, 168 (1996) (explaining that “language minorities making equal protection claims are generally stopped well before having to prove intent, because although language minorities share many of the traits of suspect classes, language discrimination nearly always receives minimal scrutiny” (citing *Hernandez v. New York*, 500 U.S. 352, 371–72 (1991))).

*B. Proposed Codification: Section 2A Intent Test*

If legislators add an intent test to the VRA, they must choose language to codify. The intent test under the Section 5 preclearance regime provides a good model. Though that test itself raises tough interpretive questions,<sup>238</sup> ambiguities will arise for any intent test. An approach modeled on Section 5 will bring some rough consistency within the VRA regime.<sup>239</sup>

Congress enacted the current Section 5 intent test in response to *Reno v. Bossier Parish School Board*.<sup>240</sup> Under Section 5, as it existed in *Bossier*, a covered state’s voting law would be prohibited if it had the “purpose” or “effect of denying or abridging the right to vote on account of race or color.”<sup>241</sup> The Court held that a Section 5 prohibited purpose, like a prohibited effect, related only to situations where a state law would make minorities worse off.<sup>242</sup> So, if a legislature merely intended to entrench racial inequities, rather than affirmatively make them worse, Section 5 would not apply.

Legislators believed that this was an unconscionable result.<sup>243</sup> Congress thus amended Section 5 to broaden that statute’s intent test.<sup>244</sup> Section 5 preclearance now applies to a law with “any

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<sup>238</sup> See Michael J. Pitts, *Redistricting and Discriminatory Purpose*, 59 AM. U. L. REV. 1575, 1581–82 (2010) (“Congress legislatively overruled the Court through an amendment to Section 5 that re-established the federal government’s power under the discriminatory purpose standard. Even so, what the congressional amendment means for future enforcement of the discriminatory purpose standard remains very much up for grabs.”).

<sup>239</sup> The principles of the Section 5 preclearance regime do not necessarily translate identically to issues under Section 2. See *Bossier*, 528 U.S. at 334 (explaining how Section 2 and Section 5 require comparisons to different baselines).

<sup>240</sup> 528 U.S. 320, 341 (2000); see S. Rep. No. 109-295, at 16 (2006).

<sup>241</sup> Voting Rights Acts Amendments of 1982, 42 U.S.C. § 1973(c), 96 Stat. 131, 132.

<sup>242</sup> See *Bossier*, 528 U.S. at 341 (“[W]e hold that §5 does not prohibit preclearance of a redistricting plan enacted with a discriminatory but non-retrogressive purpose.”).

<sup>243</sup> See S. REP. NO. 109-295, at 16 (2006) (“The Supreme Court’s decision in [*Bossier*] has created a strange loophole in the law: it is possible that the Justice Department or federal court could be required to approve an unconstitutional voting practice ‘taken with the purpose of racial discrimination’ . . . . The federal government should not be giving its seal of approval to practices that violate the Constitution.” (quoting Testimony of Nina Perales, *Renewing the Temporary Provisions of the Voting Rights Act: Legislative Options After LULAC v. Perry, Before the Subcomm. on the Const., C.R., and Prop. Rts. of the S. Judiciary Comm.*, 109th Cong. 2 (2006) (statement of Nina Perales))).

<sup>244</sup> Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, § 5, 120 Stat. 577, 580–81 (2006), codified at 52 U.S.C. §§ 10304(c)–(d).

discriminatory purpose.”<sup>245</sup> The statute no longer applies only to laws intended to make minorities worse off.

Congress should use the Section 5 intent test as a model for a new Section 2A. The new Section 2A should prohibit any state law that has the “purpose of denying or abridging the right to vote within the meaning of the Fourteenth or Fifteenth Amendments, or which has the purpose of contravening the guarantees of Section 4(f)(2).” As under Section 5, “purpose” should be defined broadly, to “include any discriminatory purpose.”<sup>246</sup> Also, as under Section 5, Section 2A should prohibit attempted vote dilution as well as attempted vote denial.<sup>247</sup>

It might seem redundant to add Section 2A when Section 5 already provides an intent test. But the Section 5 preclearance regime remains dormant unless and until Congress updates that statute’s coverage formula.<sup>248</sup> And even if Congress makes that update, Section 5 will apply only to some jurisdictions. Section 2A would apply nationwide and would not duplicate the Section 5 regime.

The violation standard under Section 2A would differ from the violation standard under Section 2. A state law violates the Results Test under Section 2 only when it flouts the equal openness standard. But Section 2A would nix a state law that carries *any* discriminatory purpose, rather than only the purpose of violating the equal openness standard.

This divergence is necessary. The Section 2A intent test harmonizes the VRA with the intentional discrimination principles of the Fourteenth and Fifteenth Amendments. The test does not follow the Results Test of Section 2. If Section 2A were limited to intentional violations of the equal openness standard, the problems described in Part IV.A of this Article would not be resolved. That

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<sup>245</sup> 52 U.S.C. § 10304(c) (emphasis added); *see also* *Shelby Cnty. v. Holder*, 570 U.S. 529, 539 (“Section 5 now forbids voting changes with ‘any discriminatory purpose’ as well as voting changes that diminish the ability of citizens, on account of race, color, or language minority status, ‘to elect their preferred candidates of choice.’”) (citation omitted).

<sup>246</sup> 52 U.S.C. § 10304(c).

<sup>247</sup> The Court has recognized that the Section 5 preclearance regime applies in the vote dilution context. *See* *Allen v. State Bd. of Elections*, 393 U.S. 544 (1969). The Section 5 preclearance regime also contains a special interpretive rule for vote dilution. *See* Section 5(b), codified at 52 U.S.C. 10304(b); *see also* S. REP. NO. 109-295, at 18–21 (2006) (explaining how legislators wanted to enact Section 5(b) to overturn the totality-of-circumstances approach adopted in *Georgia v. Ashcroft*, 539 U.S. 461 (2003)). For Section 2A, generic language that covers state laws with the “purpose of vote dilution in violation of the Fourteenth Amendment” would provide the simplest fix and avoid any debates over the wisdom of Section 5(b).

<sup>248</sup> *See* *Shelby Cnty.*, 570 U.S. at 557 (finding that existing VRA coverage formula is unconstitutional).

is, some acts of intentional discrimination covered by the Fourteenth and Fifteenth Amendments would remain outside the VRA.

Section 2A differs from a recent legislative proposal to amend the VRA. The John R. Lewis Voting Rights Advancement Act of 2021 (the “Lewis Act”) would substantially revise Section 2.<sup>249</sup> The statute, after revision by the Lewis Act, would establish separate frameworks for vote dilution and vote denial claims. For vote dilution claims, the act would generally follow Court precedent.<sup>250</sup> For vote denial claims, the act would depart from precedent.<sup>251</sup>

The Lewis Act also proposes a complicated intent test for both vote dilution and vote denial claims.<sup>252</sup> The intent test would apply whenever laws are discriminatory “at least in part.”<sup>253</sup> The Lewis Act also specifies that to violate its intent test, discrimination “need only be one purpose.”<sup>254</sup> A law with a discriminatory purpose will violate the intent test even if an “additional purpose ... is to benefit a particular political party or group.”<sup>255</sup> The act provides a detailed interpretive rule related to the political and historical context of a challenged law.<sup>256</sup>

The Lewis Act may very well deserve passage. However, the act would create new complexities for Section 2. The act also addresses significant voting matters beyond Section 2.<sup>257</sup> These factors establish significant political and practical obstacles.<sup>258</sup>

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<sup>249</sup> See John R. Lewis Voting Rights Advancement Act of 2021, S.4, 117th Cong. (2021); see also John R. Lewis Voting Rights Advancement Act of 2021, H.R.4, 117th Cong. (2021).

<sup>250</sup> See S.4 § 101(b) (adding a new Section 2(b) to the VRA that would expressly incorporate the legal standards from *Thornburg v. Gingles*, 478 U.S. 30 (1986)).

<sup>251</sup> See *id.* § 101(c) (adding a new Section 2(c) to the VRA that would establish vote denial standards different from those in *Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 2321 (2021)).

<sup>252</sup> See *id.* § 101(d) (adding a new Section 2(d) to the VRA that would address intended vote dilution or intended vote denial).

<sup>253</sup> See *id.* (adding a new Section 2(d)(1)).

<sup>254</sup> See *id.* (adding a new Section 2(d)(2)).

<sup>255</sup> See *id.* (adding a new Section 2(d)(2)).

<sup>256</sup> See *id.* (adding a new Section 2(d)(3) that would provide: “Recent context, including actions by official decisionmakers in prior years or in other contexts preceding the decision responsible for the challenged qualification, prerequisite, standard, practice, or procedure, and including actions by predecessor government actors or individual members of a decision making body, may be relevant to making a determination” about a violation of the Intent Test).

<sup>257</sup> See generally L. PAIGE WHITAKER, CONG. RSCH. SERV., IF12015, THE JOHN R. LEWIS VOTING RIGHTS ADVANCEMENT ACT OF 2021, S. 4 (117TH CONGRESS): LEGAL OVERVIEW (2022).

<sup>258</sup> For some thoughtful criticisms of the Lewis Act, see Matthew Weil & Christopher Thomas, *How the Senate Should Fix the House Voting Rights Bill*, ROLL CALL (Aug. 27, 2021), <https://rollcall.com/2021/08/27/how-the-senate->



Unlike the Lewis Act, Section 2A would offer a quick, relatively simple fix for anomalies within the VRA. The proposed statute should appeal to any reasonable legislator, of any political persuasion. Congress should immediately add Section 2A and address other voting rights issues over time.

#### CONCLUSION

Section 2, in some ways, reflects a remarkable achievement. Legislators reacted swiftly to *Bolden* and reached a compromise. This compromise was hardly a foregone conclusion. Fierce debates surrounded the VRA reauthorization process.<sup>259</sup>

Alas, a “compromise that seeks to have things both ways, as this one did, produces nightmares in implementation.”<sup>260</sup> The latest nightmare relates to whether Section 2 includes the Intent Test. The lower courts have struggled with that issue for decades.

Congress should end the struggles. Though Section 2’s language does not support the Intent Test, sound policies do. A relatively short new provision would further those policies. With luck, that small reform will motivate Congress to further consider how to address the new voting rights landscape.

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should-fix-the-house-voting-rights-bill/. For coverage of related political battles, see, for example, Carl Hulse, *After A Day of Debate, the Voting Rights Bill Is Blocked in the Senate*, N.Y. TIMES (updated Jan. 27, 2022), <https://www.nytimes.com/2022/01/19/us/politics/senate-voting-rights-filibuster.html> [<https://perma.cc/RA8V-JV4M>] (discussing challenges to passage of two voting bills, including the Lewis Act).

<sup>259</sup> See generally Howell Raines, *Voting Rights Act Signed by Reagan*, N.Y. TIMES (June 30, 1982), <https://www.nytimes.com/1982/06/30/us/voting-rights-act-signed-by-reagan.html> [<https://perma.cc/T3A8-K6PM>].

<sup>260</sup> *Baird v. Consol. City of Indianapolis*, 976 F.2d 357, 359 (7th Cir. 1992) (referring to the statutory compromise shown by the results-focused test and the proviso on proportional representation).