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Restoring the Fifteenth Amendment: The Constitutional Right to an Undiluted Vote

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ABSTRACT

In 1965, Congress enacted the Voting Rights Act (VRA) to enforce the Fifteenth Amendment of the U.S. Constitution. Specifically, Section 2 of the VRA, as originally adopted in 1965, closely tracked the language of the Fifteenth Amendment and prohibited voting practices that denied or abridged the right to vote on account of race or color. But in 1980, the U.S. Supreme Court's decision in *City of Mobile v. Bolden* complicated the parallel relationship between Section 2 and the Fifteenth Amendment by imposing an intent standard on vote dilution claims brought under the Fifteenth Amendment. Since Section 2 and the Fifteenth Amendment were treated as coextensive, the Court also imposed the intent requirement on Section 2 claims. In response to the *Mobile* decision, Congress amended Section 2 and instituted a discriminatory effects test. An unfortunate consequence of the Section 2 amendment, however, was that it created a profound divergence between the statutory and constitutional standards for vote dilution claims. Congress established a private cause of action under Section 2 that would extend the Fifteenth Amendment's reach. In doing so, Section 2's broader effects standard rendered the Fifteenth Amendment futile.

The disappearance of the Fifteenth Amendment in modern voting rights jurisprudence has proven particularly problematic in vote dilution cases that arise today. Rather than honoring the Fifteenth Amendment's robust protections of minority voting rights, the Court has relied heavily on narrow equal protection principles that often produce absurd results. Using the Court's most recent voting rights decision, *Shelby County v. Holder*, as a framework, this Comment explores the Fifteenth Amendment's role (or lack thereof) in the modern landscape of vote dilution claims. This Comment further advocates for a restoration of the Fifteenth Amendment in future voting rights cases because the Court's current reliance on equal protection principles compromises the VRA's original vision and purpose.

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> Unless we act anew, with dispatch and resolution, we shall sanction a sad and sorrowful course for the future. For if the Fifteenth Amendment is successfully flouted today, tomorrow the First Amendment, the Fourth Amendment, the Fifth Amendment—the Sixth, the Eighth, indeed, all the provisions of the Constitution on which our system stands—will be subject to disregard and erosion. Our essential strength as a society governed by the rule of law will be crippled and corrupted and the unity of our system hollowed out and left meaningless.[1]

INTRODUCTION

Against the backdrop of egregious disenfranchising laws[2] following the Reconstruction and Civil War Amendments, President Lyndon B. Johnson urged Congress to enact legislation that would prohibit the denial or abridgement of the right to vote.[3] Given the blatant disregard for the Fifteenth Amendment's demands, President Johnson envisioned a more robust and bona fide reading of the amendment that would finally unite rather than divide the nation.[4] But more than four decades later, his vision has yet to be fulfilled. The modern U.S. Supreme Court's voting rights jurisprudence has eroded the restorative potential of the Fifteenth Amendment.

A recent illustration of this erosion is the Court's decision in *Shelby County v. Holder*.[5] On June 25, 2013, the Court invalidated a key provision of the Voting Rights Act (VRA) as unconstitutional.[6] The provision in question was Section 4(b), which subjected certain states and political subdivisions with a history of discriminatory voting practices to a preclearance requirement.[7] The preclearance

1. Text of President Johnson's Voting Rights Message (Mar. 15, 1965), *reprinted in* 1 RACE, VOTING, REDISTRICTING AND THE CONSTITUTION: SOURCES AND EXPLORATIONS ON THE FIFTEENTH AMENDMENT 89, 91 (Marsha J. Tyson Darling ed., 2001) [hereinafter Voting Rights Message].
2. These laws included poll taxes, residency requirements, literacy requirements in the form of multiple-box or secret ballot rules, disqualification for crimes such as bribery and theft, understanding and character clauses, and grandfather clauses. *See* DERRICK BELL, RACE, RACISM, AND AMERICAN LAW 351–52 (6th ed. 2008).
3. *See id.* at 368; *see also* Voting Rights Message, *supra* note 1, at 89.
4. *See* Voting Rights Message, *supra* note 1, at 91.
5. 133 S. Ct. 2612 (2013).
6. *See id.* at 2631.
7. *See* Voting Rights Act of 1965, Pub. L. No. 89-110, § 4(b), 79 Stat. 438. At the time of the *Shelby* decision, the states covered under § 4(b) included Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas, and Virginia. *See Shelby*, 133 S. Ct. at 2620. The covered

requirement prohibited those states and subdivisions from implementing any change that would affect voting[8] without first obtaining the approval of the U.S. Attorney General or a three-judge panel of the U.S. District Court for the District of Columbia. The Court struck down Section 4(b) on the grounds that it exceeded Congress's authority under the Fourteenth and Fifteenth Amendments.[9] Since the coverage formula targeted specific states and imposed on them burdens that were, according to Chief Justice Roberts, not justified by current needs, the Court reasoned that the provision violated principles of federalism and the tradition of equal sovereignty among the states.[10] The Court's reasoning for striking down Section 4(b) largely depended on the distinction between first-generation and second-generation barriers.[11] Whereas first-generation barriers involve direct and formal limitations on the ability of minorities to register and cast a ballot, such as literacy tests and poll taxes, second-generation barriers encompass the more subtle discriminatory practices that result in racially polarized voting and vote dilution.[12] Examples of second-generation barriers include racial gerrymandering,[13] such as packing and fracturing,[14] and at-large voting schemes (as opposed to district-by-district voting) under which the numerical majority consistently controls all election outcomes.[15] The Court ultimately concluded that the coverage formula under Section 4(b) was no longer relevant or correlative to present conditions because first-generation barriers have largely been eliminated.[16]

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subdivisions included several counties in California, Florida, Michigan, New Hampshire, New York, North Carolina, and South Dakota. *Id.*

8. Specifically, the statute prohibits the use of any "test or device . . . for the purpose or with the effect of denying or abridging the right to vote on account of race or color[.]" § 4(a), 79 Stat. 438. Section 4(c) defines "test or device" as "any requirement that a person as a prerequisite for voting or registration for voting (1) demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by the voucher of registered voters or members of any other class." § 4(c), 79 Stat. 438–39.
9. *See Shelby*, 133 S. Ct. at 2631.
10. *See id.* at 2623–28.
11. *See id.* at 2629.
12. *See* Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 HARV. L. REV. 1663, 1671–72 (2001); Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success*, 89 MICH. L. REV. 1077, 1093–94 (1991).
13. *See Shelby*, 133 S. Ct. at 2635 (Ginsburg, J., dissenting).
14. *See* Gerken, *supra* note 12, at 1672.
15. *See Shelby*, 133 S. Ct. at 2635 (Ginsburg, J., dissenting); Gerken, *supra* note 12, at 1672; *see also* Guinier, *supra* note 12, at 1094 (explaining that at-large voting schemes in many southern jurisdictions permanently excluded black participation in elections because "[f]ifty-one percent of the population consistently decided one hundred percent of the elections.").
16. *See Shelby*, 133 S. Ct. at 2625 ("In the covered jurisdictions, '[v]oter turnout and registration rates now approach parity. Blatantly discriminatory evasions of federal decrees are rare. And minority candidates hold office at unprecedented levels.'") (quoting Nw. Austin Mun. Util.

To support this conclusion, Chief Justice Roberts cited to the Fifteenth Amendment and asserted that "[t]he Amendment is not designed to punish for the past; its purpose is to ensure a better future."[17] But this assertion creates a flawed distinction between the past and the future. It ignores the fact that the past necessarily informs the present and the future, especially in the context of voting rights.[18] To the extent that the Court relies heavily on voter registration numbers in the preclearance jurisdictions to suggest that Section 4(b) is no longer necessary, it views race in formal terms or as disconnected from any experience.[19] Despite the long history of black voter suppression, in the Court's view the increase in black voter registration and the prominence of black elected officials in current American politics erases that history. The precipitous erasure of that history then obscures the present and continuing reality of black subordination in the political system because of their underrepresentation, their limited opportunities for creating meaningful policy, and their disenfranchisement due to structural barriers.[20] Thus, the *Shelby* Court commandeered the Fifteenth Amendment to justify its narrow focus on first-generation barriers and to further its colorblind agenda. In doing so, the Court eliminated the role of the Fifteenth Amendment in second-generation voting rights cases and undermined the necessity of race-conscious initiatives.

In light of the *Shelby* Court's misreading of the Fifteenth Amendment's purpose and the decision's detrimental implications, this Comment advocates

Dist. No. One v. Holder, 557 U.S. 193, 202 (2009)). *But see* Jenigh J. Garrett, *The Continued Need for the Voting Rights Act: Examining Second-Generation Discrimination*, 30 ST. LOUIS U. PUB. L. REV. 77, 94 (2010) ("Arguments that attempt to draw a bright-line between first- and second-generation discriminatory voting barriers move us further away from eliminating discrimination in voting because they ignore the existence of otherwise discriminatory acts.").

17. *Shelby*, 133 S. Ct. at 2629. Chief Justice Roberts cites *Rice v. Cayetano* to support his assertion. *Id.* But his reliance on *Rice* is misguided. In its discussion of the Fifteenth Amendment, the Court in *Rice* actually recognized the persistence of second-generation barriers, such as racial gerrymandering, that jeopardize the promise of the Fifteenth Amendment. *See* Rice v. Cayetano, 528 U.S. 495, 513 (2000).

18. *See* South Carolina v. Katzenbach, 383 U.S. 301, 308 (1966), *abrogated by Shelby*, 133 S. Ct. 2612 ("The constitutional propriety of the Voting Rights Act of 1965 must be judged *with reference to the historical experience which it reflects*.") (emphasis added).

19. My use of the word "formal" is consistent with that of Neil Gotanda in his work, *A Critique of "Our Constitution Is Color-Blind."* Gotanda notes that "the modern Court has moved away from the two notions of race that recognize the diverging historical experiences of Black and white Americans: status-race and historical-race. In place of these concepts, the Court relies increasingly on the formal-race concept of race, *a vision of race as unconnected to the historical reality of Black oppression* . . . . By relying on it, the Court denies the experience of oppression and limits the range of remedies available for redress." Neil Gotanda, *A Critique of "Our Constitution is Color-Blind"*, 44 STAN. L. REV. 1, 37 (1991) (emphasis added).

20. *See* EDUARDO BONILLA-SILVA, RACISM WITHOUT RACISTS 38–41 (4th ed. 2014).

for a restoration of the Fifteenth Amendment in future voting rights cases, particularly in the context of vote dilution claims.[21] Vote dilution claims are brought under Section 2 of the VRA, which provides that "[n]o 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."[22] The focus on Section 2 vote dilution claims is timely and especially pertinent for two reasons. First, the shortcomings of the *Shelby* decision require that future voting rights adjudication place a stronger emphasis on second-generation dilutive measures.[23] The elimination of first-generation barriers is hardly a victory if more subtle discriminatory measures take their place. As a result of the evolution from first-generation to second-generation barriers, challenges to blatant vote denial practices are now rare and vote dilution claims dominate most of the activity under Section 2.[24]

Second, Section 2 remains the last pillar of the VRA post-*Shelby*[25] and therefore deserves particular attention. As the Court struck down Section 4(b) and in effect Section 5,[26] it made clear that "Section 2 is permanent, applies

21. Vote dilution doctrine rests on the premise that voting involves more than the ability to cast a ballot. *See* Gerken, *supra* note 12, at 1677. In *Reynold v. Sims*, the Supreme Court articulated this basic premise by asserting that "[t]here is more to the right to vote than the right to mark a piece of paper and drop it in a box or the right to pull a lever in a voting booth. The right to vote includes . . . . the right to have the vote counted at full value without dilution or discount." Reynold v. Sims, 377 U.S. 533, 555 n.29 (1964) (quoting South v. Peters, 339 U.S. 276, 279 (1950) (Douglas, J., dissenting)). "Dilution doctrine rests on two assumptions about the way representative democracy works: first, that there is more to 'voting' than merely casting a vote, and second, that members of an electoral minority should enjoy an equal opportunity to coalesce effectively despite the mandate of majority rule." Gerken, *supra* note 12, at 1677. In this respect, dilution claims represent an aggregate harm and are distinct from conventional individual rights. *See id.* at 1681. For a comprehensive understanding of vote dilution claims as a unique, group-based injury, see generally *id.*

22. Voting Rights Act of 1965, 42 U.S.C. § 1973(a) (2012).

23. *Cf. Shelby*, 133 S. Ct. at 2651 (Ginsburg, J., dissenting) ("In truth, the evolution of voting discrimination into more subtle second-generation barriers is powerful evidence that a remedy as effective as preclearance remains vital to protect minority voting rights and prevent backsliding.").

24. *See* Nicholas O. Stephanopoulos, *The South After* Shelby County, 2013 SUP. CT. REV. 55, 73–74 (2013).

25. *See id.* at 55–56.

26. The *Shelby* decision did not issue a holding on the constitutionality of Section 5—the provision of the Voting Rights Act (VRA) that requires states with a history of racially discriminatory practices to clear electoral changes. *See* Voting Rights Act of 1965, Pub. L. No. 89-110, § 5, 79 Stat. 439. The dissent acknowledged, however, that "without [the coverage formula set out in § 4(b)], § 5 is immobilized." *Shelby*, 133 S. Ct. at 2632 n.1 (Ginsburg, J., dissenting); *see also* Ari Berman, *A New Strategy for Voting Rights*, NATION (July 2, 2013), http://www.thenation.com/article/175090/new-strategy-voting-rights ("Without

nationwide, and is not at issue in [*Shelby*]."[27] But contrary to the Court's guarantee, Section 2 may also be susceptible to a constitutional challenge on the grounds that it exceeds Congress's enforcement powers.[28] In *South Carolina v. Katzenbach*,[29] the Court used a rational basis standard of review to uphold the preclearance provisions of the VRA as "a valid means for carrying out the commands of the Fifteenth Amendment."[30] Thirty-one years later, however, the Court in *City of Boerne v. Flores*[31] introduced a more demanding "congruence and proportionality" standard to strike down analogous legislation.[32] Although the Court has yet to articulate which standard of review applies to determine the VRA's constitutionality,[33] Richard Hasen predicts that the

Section 4, there's no Section 5. The most effective provision of the country's most important civil rights law is now a ghost unless Congress resurrects it."). On January 16, 2014, members of Congress introduced the Voting Rights Act Amendment of 2014, a bipartisan legislation intended to reinstate protections for minority voters post-*Shelby*. *See* Ari Berman, *Members of Congress Introduce a New Fix for the Voting Rights Act*, NATION (Jan. 16, 2014, 11:53 AM), http://www.thenation.com/blog/177962/members-congress-introduce-new-fix-voting-rights-act-test. But legal scholars are skeptical that such an amendment will pass because the new legislation would still subject four states to the preclearance requirement and raise other constitutional concerns. *See, e.g.*, Kevin Drum, *Can 3 Lawmakers Revive the Voting Rights Act After the Supreme Court Trashed It?*, MOTHER JONES (Jan. 20, 2014, 7:00 AM), http://www.motherjones.com/kevin-drum/2014/01/ voting-rights-act-revive-supreme-court-congress; Rick Hasen, *Initial Thoughts on the Proposed Amendments to the Voting Rights Act,* ELECTION L. BLOG (Jan. 16, 2014, 1:32 PM), http://electionlawblog.org/?p=58021. *But see* Spencer Overton, *A Bipartisan Voting Rights Act Is Possible*, HUFFINGTON POST (Jan. 16, 2014, 5:24 PM), http://www.huffington post.com/spencer-overton/a-bipartisan-voting-right_b_4612657.html (contending that the new legislation suggests that a bipartisan update is possible, even if its passage is not guaranteed).

27. *Shelby*, 133 S. Ct. at 2619.

28. *See, e.g.*, Luke P. McLoughlin, *Section 2 of the Voting Rights Act and* City of Boerne*: The Continuity, Proximity, and Trajectory of Vote-Dilution Standards*, 31 VT. L. REV. 39, 42–45 (2006); Jennifer G. Presto, *The 1982 Amendments to Section 2 of the Voting Rights Act: Constitutionality After* City of Boerne, 59 N.Y.U. ANN. SURV. AM. L. 609, 624–25 (2004).

29. 383 U.S. 301 (1966), *abrogated by Shelby*, 133 S. Ct. 2612.

30. *Id.* at 337. The Court stated that "Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting." *Id.* at 324.

31. 521 U.S. 507 (1997).

32. *Id.* at 520.

33. In 2009, the Supreme Court again encountered the constitutionality of the VRA's preclearance requirement in *Northwest Austin Municipal Utility District No. One v. Holder*. But rather than deciding the question of constitutionality, the Court invoked the doctrine of constitutional avoidance and decided the case on alternative grounds. *See* Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 204–11 (2009). Similarly, the *Shelby* Court chose to ignore the *Boerne* issue. In fact, "[t]he majority does not even *cite* to *Boerne* even though this has been a key issue involving the constitutionality of Section 5 for years." Richard Hasen, *The Curious Disappearance of* Boerne *and the Future Jurisprudence of Voting Rights and Race*, SCOTUS BLOG (June 25, 2013, 7:10 P.M.), http://www.scotusblog.com/2013/06/the-curious-disappearance-of-boerne-and-the-future-jurisprudence-of-voting-rights-and-race. The only mention of the constitutional issue appears in footnote one of the

Court will employ the higher congruence and proportionality standard from *Boerne* in future Fifteenth Amendment cases.[34] If that is the case, new challenges to Section 2 of the VRA will arise on the grounds that they exceed Congress's Fourteenth and Fifteenth Amendment voting powers.[35] The Court's conceptual failure to look beyond flagrant forms of voting discrimination in conjunction with the potential constitutional challenge to Section 2 makes necessary a reevaluation and reformulation of current voting rights jurisprudence under the Fifteenth Amendment.

This Comment proceeds in three parts. Part I provides a brief history of the Fifteenth Amendment's trajectory in voting rights legislation. Although the Fifteenth Amendment played a critical role in creating and shaping the VRA, this fact has proven elusive given "the atrophy of the [F]ifteenth [A]mendment"[36] after the Court's decision in *City of Mobile v. Bolden*,[37] which introduced an intent standard to vote dilution claims. This Part discusses Congress's reaction to the *Mobile* decision and the resulting "doctrinal schism"[38] between Section 2 and the Constitution that virtually erased the Fifteenth Amendment from vote dilution cases.

Part II explores the modern landscape of vote dilution claims. It begins by identifying two strands of vote dilution cases: the traditional Section 2 vote dilution claim and the "analytically distinct" vote dilution claim. This Part then analyzes three cases, *Bartlett v. Strickland*, *Shaw v. Reno* (*Shaw I*), and *Miller v. Johnson*, to demonstrate that the Court's current voting rights jurisprudence severely limits the possibilities for remedial measures.

Finally, Part III argues the Fifteenth Amendment must be restored in vote dilution claims and overall voting rights jurisprudence. The Court's present focus on equal protection principles compromises the VRA's original purpose and often produces absurd results that are ineffective at protecting minority voting rights.

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opinion where the Court defers to *Northwest Austin Municipal Utility District* despite the very fact that it failed to address the standard of review. *See Shelby*, 133 S. Ct. at 2622 n.1.

34. *See* Hasen, *supra* note 33.

35. *Id.*

36. Emma Coleman Jordan, *Taking Voting Rights Seriously: Rediscovering the Fifteenth Amendment*, 64 NEB. L. REV. 389, 430 (1985).

37. 446 U.S. 55 (1980).

38. McLoughlin, *supra* note 28, at 104.

I. THE FIFTEENTH AMENDMENT'S TRAJECTORY IN VOTING RIGHTS

A. The Voting Rights Act of 1965, the 1982 Amendments, and *City of Mobile v. Bolden*

In response to the widespread practice of state disenfranchisement and acts of violence toward voting rights activists,[39] Congress enacted the VRA of 1965 "[t]o enforce the [F]ifteenth [A]mendment to the Constitution of the United States."[40] Supporters of the bill in the House of Representatives and the Senate understood the Fifteenth Amendment to be at the heart of voting rights legislation. The House Judiciary Committee submitted a report explaining:

> A salient obligation and responsibility of the Congress is to provide appropriate implementation of the guarantees of the 15th amendment to the Constitution. Adopted in 1870, that amendment states the fundamental principle that the right to vote shall not be denied or abridged . . . on account of race or color.[41]

Similarly, in a joint statement supporting the adoption of the VRA, twelve members of the Senate Judiciary Committee wrote: "We all recognize the necessity to eradicate once and for all the chronic system of racial discrimination which has for so long excluded so many citizens from the electorate because of the color of their skins, contrary to the explicit command of the 15th amendment."[42] The joint report documented the history of Fifteenth Amendment litigation, from the use of grandfather clauses to racial gerrymandering, and concluded that "[t]he barring of one contrivance has too often caused no change in result, only in methods. The 15th amendment was intended to nullify 'sophisticated as well as simple-minded modes of discrimination.'"[43] Thus, Congress broadly interpreted the protections of the Fifteenth Amendment, anticipating that methods of voting discrimination would evolve.

39. *See* U.S. DEP'T OF JUSTICE, *The Voting Rights Act of 1965*, JUSTICE.GOV, http://www.justice.gov/crt/about/vot/intro/intro_b.php (last visited Feb. 21, 2015); *see also* H.R. REP. NO. 89-439, at 9–11 (1965) (highlighting the inadequacies of state and local case-by-case enforcement of voting rights to address the rampant and evolving methods of voting discrimination).

40. *See* Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437.

41. H.R. REP. NO. 89-439, at 8 (1965).

42. S. REP. NO. 89-162, pt. 3, at 2 (1965). The Joint Statement included the individual views of Senators Dodd, Hart, Long, Kennedy, Bayh, Burdick, Tydings, Dirksen, Hruska, Fong, Scott, and Javits. *See id.* at 1.

43. *Id.* at 5 (citations omitted).

Specifically, Section 2 of the VRA, as originally adopted in 1965, closely tracked the language of the Fifteenth Amendment. It read, "[n]o 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."[44] For all intents and purposes, Section 2 and the Fifteenth Amendment were coextensive.[45] But in 1980, the Supreme Court's decision in *City of Mobile v. Bolden*[46] complicated the parallel relationship between Section 2 and the Fifteenth Amendment. In *Mobile*, black citizens of Mobile, Alabama brought a class action lawsuit challenging the at-large system of municipal elections.[47] These citizens alleged that the at-large system diluted the voting strength of blacks in violation of Section 2 of the VRA and the Fourteenth and Fifteenth Amendments.[48] In a plurality opinion, the Court held that a plaintiff bringing a vote dilution claim under the Fourteenth and Fifteenth Amendments must prove discriminatory intent.[49] The Court refrained from addressing the statutory claim because "it is apparent that the language of § 2 no more than elaborates upon that of the Fifteenth Amendment, and the sparse legislative history of § 2 makes clear that it was intended to have an effect no different from that of the Fifteenth Amendment itself."[50] In doing so, the Court imposed the intent standard on Section 2 claims.

Congress immediately resisted this interpretation. In 1982, Congress amended Section 2 "to make clear that plaintiffs need not prove a discriminatory purpose in the adoption or maintenance of the challenged system of practice in order to establish a violation."[51] The amendment replaced the original language of "to deny or abridge" with "in a manner which results in a denial or abridgement."[52]

44. Voting Rights Act of 1965, Pub. L. No. 89-110, § 2, 79 Stat. 437.
45. *See* City of Mobile v. Bolden, 446 U.S. 55, 61 (1980) (plurality opinion) ("The view that [Section 2] simply restated the prohibitions already contained in the Fifteenth Amendment was expressed without contradiction during the Senate hearings. Senator Dirksen indicated at one point that all States . . . were prohibited from discriminating against Negro voters by § 2, which he termed 'almost a rephrasing of the 15th [A]mendment.' Attorney General Katzenbach agreed." (quoting *Voting Rights: Hearings Before the S. Comm. on the Judiciary*, 89th Cong. 208 (1965) (statement of Nicholas deB. Katzenbach, Att'y Gen. of the U.S.))).
46. *Id.*
47. *See id.* at 58.
48. *Id.*
49. *Id.* at 62–65.
50. *Id.* at 60–61; *see also* Rogers v. Lodge, 458 U.S. 613, 619 n.6 (1982).
51. S. REP. NO. 97-417, at 27 (1982).
52. *Compare* Voting Rights Act of 1965, Pub. L. No. 89-110, § 2, 79 Stat. 437, 437 ("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."), *with* Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131, 134 ("No voting qualification or prerequisite to

Congress advanced several arguments in favor of the amendment, two of which are particularly compelling.[53] First, the discriminatory intent requirement was inconsistent with the original legislative understanding of Section 2 in 1965.[54] Both the Senate and House Judiciary Committee Reports cited to the 1965 hearings during which then-Attorney General Nicholas Katzenbach testified that Section 2 reached practices with a discriminatory effect.[55] The Senate Judiciary Report further emphasized that the statements made during the hearings and debates equated discriminatory effects with a denial or abridgement and never stated or implied that Section 2 covered only intentional discrimination.[56]

Second, the *Mobile* decision was a radical departure from case precedent.[57] In pre-*Mobile* cases, such as *Whitcomb v. Chavis*[58] and *White v. Regester*,[59] plaintiffs could prevail on a Section 2 claim by demonstrating through a totality of the circumstances that a voting practice or procedure denied or abridged the right to vote.[60] As David Walbert explained during the 1981 hearings, proof of intent was never part of the voting rights litigation landscape: "It was not until the plurality's 1980 opinion in *Mobile* that anyone ever conceived that intent might be a prerequisite to a Fifteenth Amendment case. The Supreme Court's own reading of the legislative history should have produced the opposite result with regard to § 2 in *Mobile*."[61] Thus, the results test was the controlling standard in voting rights cases prior to *Mobile*.[62]

In addition, Congress reiterated its expansive reading of the Fifteenth Amendment by noting that Section 2 "extends beyond formal or official bars to registering and voting" and instead "depends upon a searching practical evaluation

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 . . . .").

53. In addition to the two arguments presented, Congress also noted that an intent test placed a significant burden on plaintiffs, was impossible to administer, and was irrelevant to whether minorities were denied a fair opportunity to participate in the electoral process. *See* S. REP. NO. 97-417, at 36–37; H.R. REP. NO. 97-227, at 29 (1981).
54. *See* S. REP. NO. 97-417, at 17; H.R. REP. NO. 97-227, at 29.
55. *See* S. REP. NO. 97-417, at 17; H.R. REP. NO. 97-227, at 29.
56. *See* S. REP. NO. 97-417, at 18.
57. *See id.* at 19; *see also* H.R. REP. NO. 97-227, at 30 ("This [amendment] is not a new standard.").
58. 403 U.S. 124 (1971).
59. 412 U.S. 755 (1973).
60. *See* S. REP. NO. 97-417, at 20–22.
61. *Extension of the Voting Rights Act: Hearings Before the Subcomm. on Civil & Constitutional Rights of the H. Comm. on the Judiciary*, 97th Cong. 2033 (1982) (statement of David F. Walbert, Professor, Emory University School of Law).
62. *See* S. REP. NO. 97-417, at 32.

of the 'past and present reality.'"[63] Albeit in a footnote, Congress further clarified that contrary to the *Mobile* plurality's suggestion that the Fifteenth Amendment is limited to the right to cast a ballot, "[Section 2] without question is aimed at discrimination which takes the form of dilution."[64] The 1982 amendment is not simply a revision but rather a restoration of the Court's precedent before *Mobile* and Congress's flexible understanding of the Fifteenth Amendment.[65]

B. The Post-*Mobile* Doctrinal Schism

Despite Congress's effort to clarify and restore the promise of the Fifteenth Amendment, the amendment to Section 2 inadvertently created a profound divergence between the statutory and constitutional standards for vote dilution claims, which produced more questions than answers. After *Mobile*, are Section 2 and the Fifteenth Amendment still coextensive? If they are no longer coextensive, where does this leave the Fifteenth Amendment in voting rights cases? The 1982 Senate Judiciary Committee Report anticipated these concerns: "It is true that in light of the 1980 [*Mobile*] decision, the Congress now must decide whether to have Section 2 continue to be coextensive with the Fifteenth and Fourteenth Amendments, or whether to maintain Section 2 as a provision available in situations where discriminatory intent is not proved."[66] Congress resolved this conflict by establishing a private cause of action under Section 2 that would extend the Fifteenth Amendment's reach.[67] Since the Court's holding in *South Carolina v.*

63. *Id.* at 30.
64. *Id.* at 30 n.120.
65. Opponents of the discriminatory effects standard claimed that adopting such a standard would establish a system of proportional representation. *See, e.g., Extension of the Voting Rights Act: Hearings Before the Subcomm. on Civil & Constitutional Rights of the H. Comm. on the Judiciary*, 97th Cong. 2045–46 (1981) (statement of Henry J. Hyde, Member, Comm. on the Judiciary). But Congress made clear that the results test did not create a right of proportional representation. *See* S. REP. NO. 97-417, at 33, H.R. REP. NO. 97-227, at 30 (1981). Evidence of disproportionate representation "does not, in itself, constitute a violation of the section although such proof, along with other objective factors, would be highly relevant." H.R. REP. NO. 97-227, at 30. In order to further alleviate such concerns, Congress inserted a provision in Section 2(b) to make explicit that "nothing in [Section 2] establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131, 134.
66. S. REP. NO. 97-417, at 18.
67. *See* S. REP. NO. 97-417, at 39–40; H.R. REP. NO. 97-227, at 31–32; *see also Extension of the Voting Rights Act: Hearings Before the Subcomm. on Civil & Constitutional Rights of the H. Comm. on the Judiciary*, 97th Cong. 906 (1981) (statement of William H. White, Visiting Professor, University of Texas School of Law) ("I think it is very important, either by express language or legislative history, that there be a private cause of action under [S]ection 2 of the Voting Rights Act . . . . So if you are able either through some change in the wording or through the legislative history to make the coverage of [S]ection 2 of the Voting Rights Act

Katzenbach[68] emphasized Congress's full remedial powers,[69] Congress concluded that it "need not limit itself to legislation coextensive with the Fifteenth Amendment, if there is a basis for the Congressional determination that the legislation furthers enforcement of the amendment."[70]

This expansive reading of Section 2 had a double-edged effect. On the one hand, the 1982 amendment was a victory for minority plaintiffs and voting rights advocates. In *Thornburg v. Gingles*[71]—the first Supreme Court case to construe amended Section 2—the plurality adhered to the results standard and held that a plaintiff can prevail on a vote dilution claim by only establishing that an electoral practice or structure results in less opportunity for minority voters to participate in the political process and to elect representatives of their choice.[72] Whereas the *Mobile* decision led to an immediate halt in the filing of vote dilution cases,[73] Congress's amendment to Section 2 and the Court's subsequent *Gingles* decision resuscitated vote dilution claims often with successful outcomes.[74]

On the other hand, the broader results standard rendered the Fifteenth Amendment futile. The Section 2 amendment placed Congress in a bind: Since amended Section 2 extends beyond the Fifteenth Amendment, Congress had to defend the pre-*Mobile* results test against constitutional challenges.[75] The Senate Report explicitly addressed the constitutional issue by indicating that "the proposed amendment to [S]ection 2 does not seek to reverse the [*Mobile*] Court's

greater than the 14th and 15th amendments, then make quite clear, please, that private plaintiffs have a right of action under that section.").

68. 383 U.S. 301 (1966), *abrogated by* Shelby Cnty. v. Holder, 133 S. Ct. 2612 (2013).

69. S. REP. NO. 97-417, at 39 (quoting *Katzenbach*, 383 U.S. at 326) ("Congress has full remedial powers to effectuate the constitutional prohibition against racial discrimination in voting.").

70. *Id.*; *see also* H.R. REP. NO. 97-227, at 31.

71. 478 U.S. 30 (1986) (plurality opinion).

72. *Id.* at 43–44.

73. *See* S. REP. NO. 97-417, at 26.

74. *See* ANA HENDERSON & CHRISTOPHER EDLEY, JR., WARREN INST. ON RACE, ETHNICITY & DIVERSITY, VOTING RIGHTS ACT REAUTHORIZATION: RESEARCH-BASED RECOMMENDATIONS TO IMPROVE VOTING ACCESS 7–8 (2006) (indicating that since 1982, 322 Section 2 cases with published resolutions were filed and plaintiffs prevailed in 117, or 36.3 percent, of those cases).

75. *See Voting Rights Act: Hearings Before the Subcomm. on the Constitution of the S. Comm. on the Judiciary*, 97th Cong. 977 (1983) (statement of Joseph L. Rauh, Jr., Leadership Conference on Civil Rights). For an illustrative example of the argument against amended Section 2's constitutionality, see *id.* (statement of Orrin G. Hatch, Chairman, Subcomm. on the Constitution) ("Let me try to understand this unique theory of constitutional law; you are saying that although we have the Constitution of the United States, limiting Congressional authority, if Congress so chooses it can go beyond the Constitution and add to the 15th amendment even though we have had a well-defined case like the [*Mobile*] case, which is in opposition with the proposed changes. Congress can reinterpret the Constitution and impose greater obligations upon the States through the 15th amendment?").

constitutional interpretation."[76] But in doing so, Congress acquiesced to *Mobile*'s interpretation of the Fifteenth Amendment at the same moment it denounced and replaced *Mobile*'s intent standard. On a formal and procedural level, this seeming contradiction can be explained by the simple fact that Congress does not have the authority to overturn the Court's substantive interpretations of the Constitution.[77] Such substantive interpretations can only be changed by constitutional amendment or a subsequent decision by the Court.[78] In that respect, the amendment to Section 2 cannot reverse *Mobile*'s constitutional interpretation because it is legally impermissible. But on a functional level, Congress's concession of the Court's constitutional interpretation represents a larger perplexity. If Congress amended Section 2 because it understood the Fifteenth Amendment to require a results standard, then the amendment necessarily disturbs and seeks to reverse the judicial interpretation in *Mobile*.[79] This is certainly not to suggest that Congress's amendment to Section 2 was a poor legislative decision. Rather, my point is that an unintended and unfortunate consequence of the Section 2 amendment was a subtle yet profound theoretical shift in understanding the Fifteenth Amendment and its role in protecting minority voting rights. What was once the core of the VRA dematerialized into a hollow reminder of *Mobile*'s oppressive intent standard.

C. The Ghost of *Gomillion v. Lightfoot*

Since *Mobile* "sounded the death knell"[80] for the Fifteenth Amendment and the 1982 amendments did not formally overturn the constitutional intent standard, minority vote dilution became purely a statutory, as opposed to a constitutional, injury.[81] But five years before the VRA's enactment, the Court decided a

76. S. REP. NO. 97-417, at 41.
77. *See id.*; *see also Voting Rights Act: Hearings Before the Subcomm. on the Constitution of the S. Comm. on the Judiciary*, 97th Cong. 983 (1983) (prepared statement of Joseph L. Rauh, Jr., Leadership Conference on Civil Rights).
78. *See* S. REP. NO. 97-417, at 41.
79. *Compare* City of Mobile v. Bolden, 446 U.S. 55, 65 (1980) (plurality opinion) ("The Fifteenth Amendment does not entail the right to have Negro candidates elected . . . . That Amendment prohibits only purposefully discriminatory denial or abridgement by government of the freedom to vote 'on account of race, color, or previous condition of servitude.'"), *with Extension of the Voting Rights Act: Hearings Before the Subcomm. on Civil & Constitutional Rights of the H. Comm. on the Judiciary*, 97th Cong. 18 (1982) (statement of Vernon E. Jordan, President, National Urban League, Inc.) ("*Mobile v. Bolden* makes necessary the amending of Section 2. The 15th Amendment does not establish any test of purpose; it says categorically that no one shall, on account of race or color, be denied the right to vote. It assumes—and indeed how could it not?—that the fact of denial is evil enough, without inquiry into the minds and intents of the deniers.").
80. Jordan, *supra* note 36, at 391.
81. McLoughlin, *supra* note 28, at 41.

racial gerrymandering claim under the Fifteenth Amendment that focused on the effect of the state action.[82] This case was *Gomillion v. Lightfoot*,[83] which involved an Alabama redistricting scheme that altered the boundaries of the City of Tuskegee from a square shape to a "strangely irregular twenty-eight-sided figure."[84] The legislation had the effect of removing virtually all the black voters from Tuskegee but not a single white voter.[85] The Court held that if the allegations were true, such a scheme would be unconstitutional under the Fifteenth Amendment because "the inescapable human effect of this essay in geometry and geography is to despoil colored citizens, and only colored citizens, of their theretofore enjoyed voting rights."[86] The *Gomillion* decision is noteworthy because it did not rely upon a showing of intent.[87] Rather, "[t]he Court assumed that there were no rightful aims in the legislative mind when it so radically altered the boundaries of Tuskegee."[88] The Court's focus on the human effect as opposed to legislative intent marked a victory for the black petitioners.

Nonetheless, the victory was marginal and the precedential value of *Gomillion* has largely been distorted and ignored.[89] Subsequent gerrymandering and dilution cases that cite to *Gomillion* generally interpret the case in one of two ways. First, they forget that *Gomillion* was decided under the Fifteenth Amendment and anchor it to a Fourteenth Amendment equal protection framework instead.[90] Or second, they use *Gomillion* to reinforce an intent standard under the Fifteenth Amendment[91] as the Court did in *Mobile*. But neither of these interpretations uphold the "Fifteenth Amendment's explicit mandate to

82. *See* Gomillion v. Lightfoot, 364 U.S. 339 (1960).
83. *Id.*
84. *Id.* at 341.
85. *See id.*
86. *Id.* at 347.
87. *See* BELL, *supra* note 2, at 360.
88. *Id.*
89. *Id.*; *see also* Beer v. United States, 425 U.S. 130, 156 n.15 (1976) (Marshall, J., dissenting) (dismissing the relevance of *Gomillion* in formulating a test for Section 5 cases "given the scarcity of Fifteenth Amendment case law").
90. *See* Gaffney v. Cummings, 412 U.S. 735, 751 (1973); Whitcomb v. Chavis, 403 U.S. 124, 149 (1971); BELL, *supra* note 2, at 360; *see also* Shaw v. Reno (*Shaw I*), 509 U.S. 630, 645 (1993) (supporting "th[e] Court's subsequent reliance on *Gomillion* in other Fourteenth Amendment cases" while acknowledging that the "[*Gomillion*] majority resolved the case under the Fifteenth Amendment"); Karcher v. Daggett, 462 U.S. 725, 748 (1983) (Stevens, J., concurring) ("Although the Court explicitly rested its decision on the Fifteenth Amendment . . . the Court has subsequently treated *Gomillion* as though it had been decided on equal protection grounds.").
91. *See* City of Pleasant Grove v. United States, 479 U.S. 462, 474 (1987); Mobile v. Bolden, 446 U.S. 55, 62–63 (1980). *But see* Hous. Lawyers Ass'n v. Texas, 501 U.S. 419, 427 (1991); Chisom v. Roemer, 501 U.S. 380, 390 & n.15 (1991).

protect the voting rights of blacks when addressing plaintiffs' charges of vote dilution."[92]

There are several theories that may explain the dearth of Fifteenth Amendment case law in vote dilution cases despite the *Gomillion* decision. Emma Coleman Jordan suggests that perhaps *Gomillion* "would have greatly advanced the fight against all species of racial gerrymander" had Justice Frankfurter issued "[a] stronger statement that the [F]ifteenth [A]mendment protected against redistricting with racially discriminatory effects as an unconstitutional abridgement of the right to vote."[93] Derrick Bell attributes *Gomillion*'s little precedential value to the Court's unwillingness to declare actions unconstitutional when they do not directly replicate the stark discriminatory scheme present in Tuskegee: "Judicial commitment to the eradication of discrimination in the electoral process has often faltered when confronted with challenged actions that appear normal but for their effect on the black vote, and when the relief requested would undermine white voting power legitimately obtained."[94]

As a result of the inconsistent application of *Gomillion* and the obscure role of the Fifteenth Amendment in voting rights cases, the Court has yet to decide whether vote dilution claims are cognizable under the Fifteenth Amendment.[95] And there is clear disagreement within the modern Court as to whether *Gomillion* (and implicitly the Fifteenth Amendment) cover vote dilution claims. For example, Justice Ginsburg takes into account voting realities and understands *Gomillion* as "the Court's first case addressing a voting practice other than access to the ballot . . . under the Fifteenth Amendment."[96] Furthermore, Justice Ginsburg and Justice Breyer have described *Gomillion* as "a pathmarker" in vote dilution cases because the "apportionment was unconstitutional not simply because it was motivated by race, but notably because it had a dilutive effect: It disenfranchised Tuskegee's black community."[97]

92. BELL, *supra* note 2, at 379.
93. Jordan, *supra* note 36, at 406.
94. BELL, *supra* note 2, at 360.
95. *See* Holder v. Hall, 512 U.S. 874, 920 (1994) (Thomas, J., concurring); Voinovich v. Quilter, 507 U.S. 146, 159 (1993). There is also a circuit split on the issue. *Compare* Page v. Bartels, 248 F.3d 175, 193 n.12 (3d Cir. 2001) (concluding that the Supreme Court's silence on the issue does not foreclose plaintiff's Fifteenth Amendment claim), *with* Prejean v. Foster, 227 F.3d 504, 519 (5th Cir. 2000) (noting that the Supreme Court has rejected application of the Fifteenth Amendment to vote dilution claims).
96. *Hall*, 512 U.S. at 958 (Stevens, J., separate opinion) (emphasis added). Justice Ginsburg joined Justice Stevens's separate opinion. *Id.* at 957.
97. Miller v. Johnson, 515 U.S. 900, 939 n.2 (1995) (Ginsburg, J., dissenting). Justice Breyer joined Justice Ginsburg's opinion. *Id.* at 934.

On the other hand, Justice Thomas and Justice Scalia are adamantly opposed to the idea that voting rights extend beyond access to the ballot and thus believe that vote dilution claims never present a justiciable question even under Section 2 of the VRA.[98] They narrowly construe Section 2 and argue that "[p]roperly understood, the terms 'standard, practice, or procedure' in § 2(a) refer only to practices that affect minority citizens' access to the ballot. Districting systems and electoral mechanisms that may affect the 'weight' given to a ballot duly cast and counted are simply beyond the purview of the Act."[99] In an attempt to reconcile his narrow statutory construction with *Gomillion*, Justice Thomas significantly limits the scope of *Gomillion* to cover access claims only.[100] Under this interpretation, Justice Thomas believes that "*Gomillion* thus 'maintains the distinction between an attempt to exclude Negroes totally from the relevant constituency, and a statute that permits Negroes to vote but which uses the gerrymander to contain the impact of Negro suffrage.'"[101] Justice Thomas and Justice Scalia endorse the Court's reasoning in *Shelby* by distinguishing between first-generation and second-generation barriers and suggesting that the VRA was originally meant to protect only the former.[102] To claim otherwise would "convert[] the Act into a device for regulating, rationing, and apportioning political power among racial ethnic groups."[103] The post-*Mobile* doctrinal gap, the conflicting interpretations of *Gomillion* as precedent, and the unresolved issue of whether the Fifteenth Amendment applies to vote dilution claims have

98. For a comprehensive account of Justice Thomas and Justice Scalia's arguments against vote dilution claims under Section 2 of the VRA, see *Hall*, 512 U.S. at 891–946 (Thomas, J., concurring). Justice Thomas and Justice Scalia frequently cite to Justice Thomas's concurring opinion in *Hall*, which Justice Scalia joined, in subsequent vote dilution cases. *See, e.g.*, Bartlett v. Strickland, 556 U.S. 1, 26 (2009) (Thomas, J., concurring); LULAC v. Perry, 548 U.S. 399, 512 (2006) (Scalia, J., concurring in part and dissenting in part); Johnson v. De Grandy, 512 U.S. 997, 1031–32 (1994) (Thomas, J., dissenting).

99. *Hall*, 512 U.S. at 914 (Thomas, J., concurring).

100. *See id.* at 920 n.20 ("The *Gomillion* plaintiffs' claims centered precisely on access: Their complaint was not that the weight of their votes had been diminished in some way, but that the boundaries of a city had been drawn to prevent blacks from voting in municipal elections altogether.").

101. *Id.* (quoting Allen v. State Bd. of Elections, 393 U.S. 544, 589 (1969) (Harlan, J., concurring in part and dissenting in part)). But Justice Stevens challenged Justice Thomas's interpretation of *Gomillion* as an access to the ballot case by taking it to its logical extreme. *Id.* at 959 n.1 (Stevens, J., separate opinion). If the *Gomillion* gerrymander interfered with ballot access because some voters could not cast ballots for the same offices as before, then "[u]nder such reasoning the substitution of an appointive office for an elective office, or a change in district boundaries that prevented voters from casting ballots for the reelection of their incumbent congressional Representatives, would also be covered practices." *Id.* (citations omitted).

102. *See id.* at 893 (Thomas, J., concurring).

103. *Id.*

all contributed to the current landscape of vote dilution litigation under Section 2 of the VRA.

II. THE MODERN LANDSCAPE OF VOTE DILUTION

Vote dilution cases today take on two different forms. On the one hand is the traditional statutory claim brought under Section 2 of the VRA, "which organizes political representation around the concept of interest."[104] On the other hand is the more controversial "analytically distinct" vote dilution claim, which values "the long-standing Anglo-American commitment to organizing political representation around geography."[105] This variant of the vote dilution claim has warranted a great deal of attention in the past few years because it fabricated a new type of equal protection injury.[106] This Part addresses each type of claim in turn and demonstrates how the Court's treatment of each claim threatens the remedial purpose of vote dilution litigation. Taken together, these "two alternative conceptions of representative government collid[e] like tectonic plates"[107] and significantly undermine the possibility of race-conscious districting.

A. The Traditional Vote Dilution Claim: Statutory Injury

Thornburg v. Gingles[108] represents a pivotal moment in voting rights jurisprudence insofar as it constructed a doctrinal framework that became the "linchpin" of the modern era of vote dilution litigation.[109] Under this framework, plaintiffs must satisfy three preconditions: A minority group must show (1) that it is sufficiently large and geographically compact to constitute a majority, (2) that it is politically cohesive, and (3) that bloc voting by the white majority usually defeats the minority's preferred candidate.[110] If all three requirements are met, the Court

104. Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After* Shaw v. Reno, 92 MICH. L. REV. 483, 483 (1993).

105. *Id.*

106. *See, e.g.*, Shaw v. Reno (*Shaw I*), 509 U.S. 630, 679–80 (Souter, J., dissenting) ("[T]he Court recognizes a new cause of action . . . . Until today, the Court has analyzed equal protection claims involving race in electoral districting differently from equal protection claims involving other forms of governmental conduct . . . .").

107. Pildes & Niemi, *supra* note 104, at 483.

108. 478 U.S. 30 (1986).

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

110. *See* Thornburg v. Gingles, 478 U.S. 30, 50–51 (1986). In *Gingles*, the three preconditions applied to a multimember districting scheme. *See id.* at 46–47 & n.12. But in *Growe v. Emison*, the Court held

must then examine the totality of the circumstances through a balancing of various factors taken from the 1982 Senate Report.[111] Some of these factors include the history of voting-related discrimination in the State or political subdivision, the extent to which voting in the elections of the State or political subdivision is racially polarized, the extent to which the State or political subdivision has used voting practices or procedures that tend to enhance the opportunity for discrimination against the minority group, and the extent to which minority group members bear the effects of past discrimination.[112] The totality of the circumstances must reveal that "the political processes leading to nomination or election . . . are not equally open to participation by members of a [protected class] . . . 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."[113] Thus, the three preconditions are necessary but not sufficient.[114] Even if plaintiffs satisfy each precondition, their Section 2 claim can still fail if the totality of the circumstances does not demonstrate that the challenged electoral scheme gives them less opportunity to participate and elect representatives of their choice.[115] Similarly, if any one of the preconditions is not met, then plaintiffs' Section 2 claim automatically fails and the court does not reach the totality of the circumstances inquiry (and when it does, it is faulted for doing so).[116]

This Subpart focuses on the requirements for meeting the first *Gingles* precondition—that a minority group is sufficiently large and geographically compact to constitute a majority—because it has posed a particular problem of statutory interpretation for the Court.[117] Although a minority group that makes up 50 percent of the voting age population would certainly satisfy the requirement as a numerical majority, cases in which the minority group constitutes less than 50 percent of the voting age population in a district have been less clear.[118] In vote

that these preconditions are also necessary to establish a vote fragmentation claim in a single-member district. *See* Growe v. Emison, 507 U.S. 25, 40 (1993).

111. *See* LULAC v. Perry, 548 U.S. 399, 425–26 (2006) (citing Johnson v. De Grandy, 512 U.S. 997, 1011–12 (1994)); Gingles, 478 U.S. at 44–45.

112. *See Gingles*, 478 U.S. at 44–45 (citing S. REP. NO. 97-417, at 28–29 (1982)). This list is "neither comprehensive nor exclusive." *Id.* at 45.

113. *Id.* at 43 (emphasis added) (quoting Voting Rights Act, 42 U.S.C. § 1973(b) (2011)) (internal quotation marks omitted).

114. *See De Grandy*, 512 U.S. at 1011.

115. *See id.* at 1011–14.

116. *See, e.g.*, Growe v. Emison, 507 U.S. 25, 37–38 (1993) (reversing the district court's finding of unlawful dilution because the district court ignored the *Gingles* preconditions and instead proceeded directly to the totality of the circumstances analysis).

117. *See, e.g.*, Bartlett v. Strickland, 556 U.S. 1, 12 (2009).

118. *See* Luke P. McLoughlin, Gingles *in Limbo: Coalitional Districts, Party Primaries and Manageable Vote Dilution Claims*, 80 N.Y.U. L. REV. 312, 319 (2005).

dilution cases that involved a sub-50 percent minority group, the Court avoided making a judgment on the ambiguity by assuming that the first precondition was met and deciding the case on alternative grounds.[119] Thus, the question of whether the first *Gingles* requirement could be satisfied by a minority group that does not comprise a numerical majority remained unresolved.

In 2009, the Court finally addressed the issue in *Bartlett v. Strickland*.[120] The legal question in *Bartlett* was whether Section 2 requires state officials to draw district lines to allow a minority group, though not a numerical majority, to join with other voters to elect the minority group's candidate of choice.[121] This type of district is known as a "crossover" district as opposed to a majority-minority district or influence district.[122] The Court held that Section 2 does not require crossover districts and reinforced the bright-line 50 percent rule.[123] Justice Kennedy, writing the plurality opinion, offered two general arguments in favor of the Court's holding. First, Justice Kennedy asserted that crossover districts run contrary to Section

119. *See, e.g.*, LULAC v. Perry, 548 U.S. 399, 443 (2006); *De Grandy*, 512 U.S. at 1009; Voinovich v. Quilter, 507 U.S. 146, 154 (1993).

120. 556 U.S. at 12 (plurality opinion) ("The Court has since applied the *Gingles* requirements in § 2 cases but has declined to decide the minimum size minority group necessary to satisfy the first requirement. We must consider the minimum-size question in this case.") (citations omitted).

121. *See id.* at 6. This case arose in an unusual procedural posture and is somewhat atypical for a vote dilution claim. Generally, minority voters bring a Section 2 claim against the state or county with the alleged dilutive voting practice. In *Bartlett*, however, the voters were not a party to the lawsuit. *See id.* at 8. Rather, Pender County in North Carolina brought suit against the Governor of North Carolina, the Director of the State Board of Elections, and other state officials for violating the state's Whole County Provision when they split Pender County into two districts. *See id.* As a defense, state officials argued that Section 2 required them to draw the districts in such a way so as not to dilute black voters' voting strength. *See id.* at 7–8. Thus, the issue in the case was a conflict between the state's prophylactic measure to comply with Section 2 and its Whole County Provision. *See id.* Despite this nontraditional procedural posture, *Bartlett* is still a traditional vote dilution case insofar as the state bore the burden of proving that a Section 2 violation would have occurred absent the Pender County split. *See id.* at 8.

122. *Id.* at 13. The Court characterizes a crossover district as "an intermediate type of district" and distinguishes it from a majority-minority district and an influence district. *Id.* At one end of the spectrum are majority-minority districts, in which a minority group constitutes a numerical majority (50 percent) of the voting age population. *Id.* At the other end are influence districts, in which a minority group that is not a numerical majority can nevertheless influence the outcome of an election even if its preferred candidate cannot be elected. *Id.* Crossover districts are somewhere in the middle. *Id.* In a crossover district, a minority group does not make up a numerical majority but it is still large enough to elect its preferred candidate "with help from voters who are members of the majority and who cross over to support." *Id.*

123. *Id.* at 15. The Court's holding did not consider the permissibility of crossover districts as a legislative choice. Under Section 2, states are permitted to choose their own method of compliance, including creating crossover districts. *Id.* at 23. But the Court did note that Section 2 "is not concerned with maximizing minority voting strength, and, as a statutory matter, § 2 does not mandate creating or preserving crossover districts." *Id.* (citation omitted).

2's mandate.[124] The statute requires a showing that minorities have less opportunity than other members of the electorate to elect their preferred candidate.[125] But since the black voters did not form a majority of the voting age population in the district, "[they] have no better or worse opportunity to elect a candidate than does any other group of voters with the same relative voting strength."[126] Under Justice Kennedy's view, "Section 2 does not impose on those who draw election districts a duty to give minority voters the most potential, or the best potential, to elect a candidate by attracting crossover voters."[127]

Second, Justice Kennedy endorsed the strict majority-minority requirement because it provided a neutral, "workable standard" in contradistinction to inquiries that "would place courts in the untenable position of predicting many political variables and tying them to race-based assumptions."[128] The Court's concern with the latter approach is rooted in its longstanding aversion to racial classifications and race-based remedial measures.[129] Yet in the same breath, Justice Kennedy concedes that the *Gingles* requirements "cannot be applied mechanically and without regard to the nature of the claim."[130] Nevertheless, because engaging in race-based inquiries would "raise[] serious constitutional questions,"[131] Justice Kennedy invoked the canon of constitutional avoidance to further support the Court's majority-minority requirement.[132]

An important and related theme interwoven throughout the Court's arguments for adhering to the 50 percent threshold is the distinction between equality of opportunity and maximization.[133] Petitioners advocated for a less restrictive

124. *Id.* at 14.
125. *Id.*
126. *Id.*
127. *Id.* at 15.
128. *Id.* at 17.
129. *See id.* at 18.
130. *Id.* at 19 (quoting Voinovich v. Quilter, 507 U.S. 146, 158 (1993)) (internal quotation marks omitted).
131. *Id.* at 21. In *League of United Latin American Citizens v. Perry*, a case involving influence districts that was decided before *Bartlett*, Justice Kennedy made a similar argument: "If § 2 were interpreted to protect this kind of influence, it would unnecessarily infuse race into virtually every redistricting, raising serious constitutional questions." LULAC v. Perry, 548 U.S. 399, 446 (2006).
132. *See Bartlett*, 556 U.S. at 21.
133. *See id.* at 15–16, 20. This distinction first appeared in *Johnson v. De Grandy* to strike down a legislative districting plan on the grounds that minority voters formed effective voting majorities. 512 U.S. 997, 1016–17 (1994). Although the Court concluded that all three of the *Gingles* preconditions were met, it nonetheless upheld the plan because, under the totality of the circumstances, there was no evidence to suggest that plaintiffs had less opportunity to participate in the political process. *Id.* at 1013–15. The Court found that plaintiffs had an equal opportunity to participate because they formed effective voting majorities in a number of districts roughly proportional to their respective shares in the voting age population, which is a relevant (although not dispositive) fact in the totality of circumstances analysis. *Id.* at 1024.

interpretation of Section 2 by directing the Court to the statutory text and its protection of "equally open" political processes and a minority group's "opportunity" to elect representatives of their choice.[134] Since crossover districts create opportunities for minority voters that they otherwise would not have in majority-minority districts, petitioners maintained that crossover districts should also be subject to Section 2 protection.[135] In response, Justice Kennedy adhered to the word "equally" and argued that Section 2 does not guarantee minority voters an electoral advantage or maximum voting strength: "One may suspect vote dilution from political famine, but one is not entitled to suspect (much less infer) dilution from mere failure to guarantee a political feast."[136] According to *Bartlett*, reading Section 2 to require a more flexible and functional standard that extends beyond the majority-minority requirement would amount to preferential treatment, providing minority groups an unjustified advantage.

The *Bartlett* decision significantly narrowed the protections of Section 2.[137] Post-*Bartlett*, plaintiffs bringing vote dilution claims face a formal, mechanical barrier that is antithetical to Section 2's functional view of the political process.[138] When Congress amended Section 2 to eliminate *Mobile*'s intent standard, it explicitly envisioned a broad reading of Section 2 that would take into account voting realities[139]—realities that are the product of entrenched structural inequalities dating back to the era of undisguised disenfranchisement. The *Gingles* court also recognized that "[t]he essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives."[140] By imposing a bright-line numerical standard for vote dilution claims, the *Bartlett* plurality directly contravened Congress and the spirit behind Section 2 and the Fifteenth Amendment.[141]

134. *Bartlett*, 556 U.S. at 20 (quoting Voting Rights Act, 42 U.S.C. § 1973(b) (2011)).
135. *Id.*
136. *Id.* at 16 (quoting *De Grandy*, 512 U.S. at 1017) (internal quotation marks omitted).
137. *See, e.g.*, Ryan P. Haygood, *The Dim Side of the Bright Line: Minority Voting Opportunity After* Bartlett v. Strickland, HARV. C.R.-C.L. L. REV. AMICUS 1, 8 (Feb. 25, 2010), http://harvardcrcl.org/wp-content/uploads/2010/02/HaygoodFinalFINAL.pdf.
138. *Id.*
139. *See* S. REP. NO. 97-417, at 30 (1982) (explaining that Congress reiterated its expansive reading of the Fifteenth Amendment by noting that Section 2 "extends beyond formal or official bars to registering and voting" and instead "depends upon a searching practical evaluation of the 'past and present reality'") (quoting White v. Regester, 412 U.S. 755, 769–70 (1973)).
140. Thornburg v. Gingles, 478 U.S. 30, 47 (1986).
141. *See* Haygood, *supra* note 137, at 8–9.

Justice Souter's dissenting opinion in *Bartlett* recognizes the functional and remedial value of crossover districts in vote dilution cases.[142] He believes that the right to vote is the right to an undiluted vote and adhering to a mechanical majority-minority standard fails to treat dilution as a remediable harm.[143] In practice, Justice Souter notes that "a crossover district serves the same interest in obtaining representation as a majority-minority district; the potential of 45% with a 6% crossover promises the same result as 51% with no crossover, and there is nothing in the logic of § 2 to allow a distinction between the two types of district."[144] Since *Bartlett*, application of the 50 percent rule has proven to be anything but workable and has produced absurd results.[145] For instance, in *Benavidez v. Irving Independent School District*,[146] the Northern District Court of Texas applied the *Bartlett* bright-line test and denied the plaintiff's vote dilution claim because the Hispanic citizen voting age population ranged from 41.7 to 45.4 percent and thus did not meet the 50 percent threshold.[147] *Benavidez* illustrates not only the unfeasibility of the *Bartlett* standard, but also the widening gap between the VRA's vision and the implementation (or lack thereof) of that vision. As Justice Ginsburg puts it, "[t]he [*Bartlett*] plurality's interpretation of § 2 of the Voting Rights Act of 1965 is difficult to fathom and severely undermines the statute's estimable aim."[148]

B. The "Analytically Distinct" Vote Dilution Claim: Equal Protection Injury

Perhaps even more problematic than the Court's narrow reading of Section 2 and of the *Gingles* majority requirement is the relatively new strand of dilution claim in which white voters allege that a race-conscious redistricting plan constitutes an unconstitutional racial gerrymander and dilutes their voting strength.[149]

142. *See* Bartlett v. Strickland, 556 U.S. 1, 32 (Souter, J., dissenting).
143. *Id.* at 28.
144. *Id.* at 37.
145. *See* McLoughlin, *supra* note 118, at 325.
146. 650 F. Supp. 2d 451 (N.D. Tex. 2010).
147. *Id.* at 457.
148. *Bartlett*, 556 U.S. at 44 (Ginsburg, J., dissenting).
149. *See, e.g.*, *Shaw I*, 509 U.S. 630 (1993). The Court in *Shaw I* clarified that the appellants' claim was not that North Carolina's redistricting plan diluted white voting strength, but rather that "the deliberate segregation of voters into separate districts on the basis of race violated their constitutional right to participate in a 'color-blind' electoral process." *Id.* at 641–42. But this clarification reveals two sides of the same coin. If white voters claim that their constitutional right to a colorblind electoral process has been violated, then that necessarily entails some representational harm. Thus, contrary to the Court's interpretation, it seems proper to characterize this type of claim as a dilution claim, especially in order to highlight its absurdity as applied to white voters. *Cf.* Pildes & Niemi, *supra* note 104, at 494

Whereas the traditional vote dilution claim alleges that a voting scheme improperly dilutes the voting strength of a minority group, the analytically distinct dilution claim alleges that a voting scheme is unconstitutional under the Fourteenth Amendment because it uses race to segregate voters into separate districts.[150] *Shaw I*[151] and *Miller v. Johnson*[152] are the leading cases that involve these analytically distinct claims. In both *Shaw I* and *Miller*, white voters challenged precleared[153] redistricting plans as unconstitutional racial gerrymanders.[154] The Court approached these claims as a basic equal protection inquiry and applied strict scrutiny without taking into account the unique context of race-based legislation in voting.[155]

In *Shaw I*, Justice O'Connor acknowledged that the case "involves two of the most complex and sensitive issues this Court has faced in recent years: the meaning of the constitutional 'right' to vote, and the propriety of race-based state legislation designed to benefit members of historically disadvantaged racial minority groups."[156] Yet despite this acknowledgement, Justice O'Connor issued an opinion that significantly limited the conception of the right to vote and the opportunities for race-based remedial measures. The issue in *Shaw I* was whether a revised North Carolina redistricting plan with boundaries "of dramatically irregular shape" (language that should sound familiar from *Gomillion v. Lightfoot*[157]) formed an unconstitutional racial gerrymander in violation of the Fourteenth Amendment.[158] The Court held that the white plaintiffs stated a cognizable

("To begin to understand *Shaw* [*I*], one must first note that vote dilution is not involved in the case. The plaintiffs could not prove—and the Court acknowledged that they did not allege—vote dilution. . . . Certainly, white residents, who constitute seventy-six percent of the population in North Carolina and approximately seventy-eight percent of its voting-age population, could not claim impermissible dilution of their voting power.").

150. *See* Miller v. Johnson, 515 U.S. 900, 911 (1995). Although Justice O'Connor claims "voters of any other race" can bring the analytically distinct claim, it is no coincidence that only white voters have brought the claim thus far to attack a state's race-based remedial districting scheme. *Shaw I*, 509 U.S. at 652.

151. 509 U.S. 630 (1993).

152. 515 U.S. 900 (1995).

153. The redistricting plans at issue came from jurisdictions in North Carolina and Georgia, respectively, that were subject to Section 5 pre-clearance pre-*Shelby*. *See Miller*, 515 U.S. at 905; *Shaw I*, 509 U.S. at 634. In both cases, white voters challenged the constitutionality of race-conscious redistricting plans that received preclearance from the Department of Justice. *See Miller*, 515 U.S. at 909; *Shaw I*, 509 U.S. at 637.

154. *See Miller*, 515 U.S. at 909; *Shaw I*, 509 U.S. at 636.

155. *See* Shaw v. Hunt (*Shaw II*), 517 U.S. 899, 915 (1996); *Miller*, 515 U.S. at 920; *Shaw I*, 509 U.S. at 657.

156. *Shaw I*, 509 U.S. at 633.

157. 364 U.S. 339 (1960).

158. *Shaw I*, 509 U.S. at 633–34. After the Attorney General objected to the North Carolina General Assembly's reapportionment plan when it was submitted for preclearance, the General Assembly

claim under the Fourteenth Amendment and remanded the case to determine whether the redistricting plan passes strict scrutiny.[159]

Justice O'Connor viewed the revised redistricting plan as a facially neutral racial classification and therefore subject to strict scrutiny.[160] She contended that separating voters into districts on the basis of race, especially when those districts are irregularly shaped, "bears an uncomfortable resemblance to political apartheid" and "reinforces racial stereotypes."[161] She cited *Gomillion* to support the proposition that "district lines obviously drawn for the purpose of separating voters by race require careful scrutiny under the Equal Protection Clause regardless of the motivations underlying their adoption."[162] Nevertheless, Justice O'Connor recognized that "redistricting differs from other kinds of state decisionmaking in that the legislature always is aware of race when it draws district lines [and] [t]hat sort of race consciousness does not lead inevitably to impermissible race discrimination."[163] This suggests that the Court may be open to race-conscious districting in future cases in which the boundaries are not "so bizarre on its face."[164] But the bulk of her opinion repudiates any sort of racial classification, even ones for remedial purposes in the voting rights context.[165]

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enacted a revised redistricting plan that included two majority-black districts. *Id.* at 634–35. The first of the two districts, District 1, was "somewhat hook shaped. Centered in the northeast portion of the State, it moves southward until it tapers to a narrow band; then, with finger-like extensions, it reaches far into the southernmost part of the State near the South Carolina border." *Id.* at 635. The second district, District 12, is "even more unusually shaped. It is approximately 160 miles long and . . . . winds in snakelike fashion . . . ." *Id.* at 635. The Attorney General did not object to the General Assembly's revised plan with the two irregularly shaped majority-black districts. *Id.* at 636.

159. *Id.* at 658. *Shaw I* is particularly disturbing given the history of voting discrimination in North Carolina. As Justice Blackmun notes in his dissenting opinion, "[i]t is particularly ironic that the case in which today's majority chooses to abandon settled law and to recognize for the first time this 'analytically distinct' constitutional claim . . . is a challenge by white voters to the plan under which North Carolina has sent black representatives to Congress for the first time since Reconstruction." *Id.* at 676 (Blackmun, J., dissenting) (citations omitted).

160. *Id.* at 643–44.

161. *Id.* at 647, 650.

162. *Id.* at 645.

163. *Id.* at 646.

164. *Id.* at 644.

165. *Id.* at 657. *But see* Pildes & Niemi, *supra* note 104, at 495 ("[W]e believe *Shaw* [*I*] is best read as an exceptional doctrine for aberrational contexts rather than as a prelude to a sweeping constitutional condemnation of race-conscious districting."). Pildes and Niemi concede that Justice O'Connor's distinction between awareness of race in drawing district lines and race-consciousness dominating the districting process "will look inconsistent, or unprincipled, or like compromises having little logical foundation." *Id.* at 505. Yet they argue that *Shaw I* can be justified by recognizing "expressive harms" as constitutional injuries. *Id.* at 506.

> An expressive harm is one that results from the ideas or attitudes expressed through a governmental action, rather than from the more tangible or material consequences the action brings about. On this view, the *meaning* of a governmental action is just as

Two years after *Shaw I*, the Court decided *Miller v. Johnson*, which extended and strengthened the logic of the analytically distinct claim by introducing a new race-as-a-predominant-factor standard.[166] Under this standard, redistricting legislatures can be "aware of racial demographics" so long as race does not predominate in the redistricting process.[167] To demonstrate that race is a predominant factor in redistricting, the plaintiff has the burden to prove that the legislature "subordinated traditional race-neutral districting principles . . . to racial considerations."[168] But as the Court itself acknowledged, "[t]he distinction between being aware of racial considerations and being motivated by them may be difficult to make."[169] And given the standard's ambiguity, the Court has considerable discretion in determining when it has been met.[170] The *Miller* decision in fact suggests that it is relatively easy to satisfy the standard. Although the Court does not decide whether the shape of the district, taken together with the relevant racial demographics, are sufficient to show that race was a predominant factor, it does point out that such evidence is "quite compelling."[171] Even if district shape and racial demographics alone would not suffice, any indication of a "maximization agenda" in the redistricting process would show that race was a predominant factor.[172] Once predominance is established, the redistricting scheme cannot be upheld unless it passes strict scrutiny.[173]

In its strict scrutiny analysis, the Court recognized a compelling state interest in remedying the effects of past discrimination and reiterated the strong basis in evidence standard.[174] The Court further held that compliance with Section 5

> important as what that action *does*. . . . On this unusual conception of constitutional harm, when a governmental action expresses disrespect for [relevant public] values, it can violate the Constitution.

Id. at 507. Thus, to the extent that the *Shaw I* plaintiffs stated an expressive harm—separating voters on the basis of race expresses disrespect for the value of race neutrality—even in the absence of a concrete harm, their claim is constitutionally cognizable.

166. Miller v. Johnson, 515 U.S. 900, 916 (1995).
167. *Id.*
168. *Id.* The Court lists compactness, contiguity, and respect for political communities defined by actual shared interests as several examples of traditional race-neutral districting principles. *Id.*
169. *Id.*
170. *See id.* at 934 (Ginsburg, J., dissenting) (noting that the majority "expands the judicial role" to review any district "with contours predominantly motivated by race").
171. *Id.* at 917 (majority opinion). The Court clarified its holding in *Shaw I* and stated that a district's shape does not need to be bizarre on its face before there is a constitutional violation. *Id.* at 915. District shape is one relevant consideration but "parties alleging that a State has assigned voters on the basis of race are neither confined in their proof to evidence regarding the district's geometry and makeup nor required to make a threshold showing of bizarreness." *Id.*
172. *Id.* at 917–18.
173. *Id.* at 920.
174. *Id.*

preclearance is not enough to show that remedial action is required.[175] Because of the Court's "presumptive skepticism of all racial classifications," the judiciary has an independent obligation to engage in the equal protection analysis.[176] For those reasons, the Court also held that "[w]hen the Justice Department's interpretation of the Act compels race-based districting, it by definition raises a serious constitutional question . . . and should not receive deference."[177] Implicit in this holding is the Court's erroneous belief that there is a moral equivalence between using race to separate voters into districts in order to comply with the remedial provisions of the VRA and using race to segregate citizens in public parks and schools.[178] This belief was the theoretical basis for the Court's ultimate holding that Georgia's remedial redistricting plan violated the Equal Protection Clause of the Fourteenth Amendment.[179]

The new cause of action at issue in *Shaw I* and *Miller* is perplexing because the injury is unclear.[180] The white voters who brought these challenges have not been shut out of the electoral process and their voting strength has not been diluted.[181] Absent a showing that remedial redistricting denies the white appellants equal access to the political process, it is difficult to discern their stated injury. As Justice White wrote in his dissenting opinion in *Shaw I*, "it strains credulity to suggest that North Carolina's purpose in creating a second majority-minority district was to discriminate against members of the majority group by 'impair[ing] or burden[ing their] opportunity . . . to participate in the political process.'"[182]

Furthermore, this type of claim ignores the important distinction between "an enactment that helps a minority group from enactments that cause it harm[, which] is especially unfortunate at the intersection of race and voting, given that African-Americans and other disadvantaged groups have struggled

175. *Id.* at 922.
176. *Id.*
177. *Id.* at 923 (citation omitted).
178. *Id.* at 911 ("Just as the State may not, absent extraordinary justification, segregate citizens on the basis of race in its public parks, buses, golf courses, beaches, and schools, so did we recognize in *Shaw* [*I*] that it may not separate its citizens into different voting districts on the basis of race.") (citations omitted).
179. *Id.* at 927–28 ("It takes a shortsighted and unauthorized view of the Voting Rights Act to invoke that statute, which has played a decisive role in redressing some of our worst forms of discrimination, to demand the very racial stereotyping the Fourteenth Amendment forbids.").
180. *See Shaw II*, 517 U.S. 899, 921 (1996) (Stevens, J., dissenting); *Miller*, 515 U.S. at 931 (Stevens, J., dissenting); *Shaw I*, 509 U.S. 630, 659 (1993) (White, J., dissenting) ("Appellants have not presented a cognizable claim, because they have not alleged a cognizable injury.").
181. *See Shaw II*, 517 U.S. at 921.
182. *Shaw I*, 509 U.S. at 666 (White, J., dissenting) (quoting United Jewish Orgs. of Williamsburgh, Inc. v. Carey, 430 U.S. 144, 179 (1976) (Stewart, J., concurring)).

so long and so hard for inclusion in that most central exercise of our democracy."[183] In *Shaw I*, Justice O'Connor misapplied *Gomillion*. Although bizarre district shape can sometimes demonstrate invidious intent, that is not always the case across the board. And the *Shaw I* fact pattern is clearly distinguishable from that in *Gomillion* because in *Shaw I*, the North Carolina legislature had the benign purpose of drawing a new district to include a majority of African-American voters.[184] Thus, "[a] majority's attempt to enable the minority to participate more effectively in the process of democratic government should not be viewed with the same hostility that is appropriate for oppressive and exclusionary abuses of political power."[185] And as Justice Breyer notes, "[t]he Court, perhaps by focusing upon what it considered to be unreasonably pervasive positive use of race as a redistricting factor, has created a legal doctrine that will unreasonably restrict legislators' use of race, even for the most benign, or antidiscriminatory, purposes."[186]

III. RESTORING THE FIFTEENTH AMENDMENT

A. The Problem With Equal Protection Principles in Voting Rights

Remediation for vote dilution and race-conscious districting are extremely limited when analyzed under principles of equal opportunity and equal protection.[187] In particular, the Equal Protection Clause of the Fourteenth Amendment is not an adequate approach to analyzing voting rights law. Although traditionally the Court developed a set of rules that were unique to voting rights, *Shaw I* changed the landscape of voting rights jurisprudence and "attempt[ed] to merge the analysis governing race-conscious districting back into general-purpose equal protection doctrine."[188] This attempt, however, is misguided and ineffective because voting is a unique right and distinct from other equal protection claims.[189]

First, vote dilution is a group-based aggregate harm and the purpose of reapportionment is to treat voters as members of groups, rather than as individuals.[190]

183. *Miller*, 515 U.S. at 933 (Stevens, J., dissenting).
184. *Shaw I*, 509 U.S. at 677 (Stevens, J., dissenting).
185. *Shaw II*, 517 U.S. at 918 (Stevens, J., dissenting).
186. Abrams v. Johnson, 521 U.S. 74, 119 (1997) (Breyer, J., dissenting).
187. *See supra* Part II.
188. Pamela S. Karlan & Daryl J. Levinson, *Why Voting Is Different*, 84 CALIF. L. REV. 1201, 1202 (1996).
189. *Id.*
190. *See* Gerken, *supra* note 12, at 1681; Karlan & Levinson, *supra* note 188, at 1204. Heather Gerken identifies at least three differences between dilution claims and conventional individual rights:

Unlike affirmative action cases in which the alternative to race conscious measures is an individual remedy, "the alternative to race-conscious districting is not to treat individuals as individuals, but rather to use some other demographic characteristics as an aggregating tool."[191] Limiting the ways in which race can play a role in districting—such as *Miller*'s race-as-a-predominant factor standard—and instead relying on other characteristics "ha[ve] the perverse consequence of discriminating against the intended beneficiaries of the Fourteenth and Fifteenth Amendments. If only race is excluded from the political calculus of redistricting, then only black and Hispanic voices will be excluded from the process of governance."[192] In light of the group-based nature of vote dilution claims and the lack of an individual remedy, reliance on equal protection principles to the exclusion of race-based remedies will consistently disfavor minority groups.

Second, race serves a different purpose in redistricting than it does in other areas of the law because it is also a source of political community.[193] Pamela S. Karlan and Daryl J. Levinson explain:

> "[R]ace" means something different in the political context than it means in the areas in which the Court's individual rights conception of affirmative action has developed. In these other areas—university admissions, government contracts, and public employment—the government uses race as a proxy for past discrimination resulting in present disadvantage. Thus, race operates primarily as an external ascription of a particular identity to the minority group by the majority . . . . In the electoral context, however, race is first and foremost an internal identification, generated through the political positions taken by members of a discrete, demographically-identifiable group.[194]

Applying equal protection principles to electoral districting ignores the fact that race and politics are inextricably linked and erects barriers to favorable redistricting measures for minority voters.[195]

> First, although the harm of dilution can be understood as an individual injury, fairness is measured in group terms. Second, the right of an individual to an undiluted vote rises and falls with the treatment of the group. Third, the right is unindividuated among members of the group; no group member is more or less injured than any other group member.

Gerken, *supra* note 12, at 1681.

191. Karlan & Levinson, *supra* note 188, at 1208.
192. *Id.* at 1207–08.
193. *Id.* at 1216–17.
194. *Id.* at 1217.
195. *Id.* at 1220.

Third, "racial bloc voting provides a unique, if not unprecedented justification for race consciousness" in districting.[196] Contrary to the Court's belief that segregating voters on the basis of race is valid grounds for a cognizable constitutional injury, race-conscious districting does not take away one's right to vote or limit a voter's exercise of free choice.[197] Rather, race-conscious districting "give[s] minority voters, as distinct groups, an equal opportunity to elect the candidates of their choice in the face of essentially unreachable private conduct that would otherwise frustrate their efforts."[198] Moreover, the Court has repudiated race-conscious districting because it conflicts with integrationist ideals. As Justice Kennedy wrote in *Miller*, "[i]f our society is to continue to progress as a multiracial democracy, it must recognize that the automatic invocation of race stereotypes retards that progress and causes continued hurt and injury."[199] But Justice Kennedy ignores that race-conscious districting "does not resemble state attempts to *segregate* citizens on the basis of race, but rather state attempts to *integrate* previously de jure segregated institutions like the public schools."[200] In that respect, race-conscious districting is necessarily integrationist as opposed to segregationist.

To the extent that applying an equal protection framework to race-conscious districting "has actually created a doctrinal morass by selectively wrenching concepts out of the contexts in which they were developed and attempting to jury-rig them to work in a context where they do not make sense,"[201] this Comment suggests that the Equal Protection Clause should play no role in determining whether a race-conscious districting plan is constitutional. The Fourteenth Amendment's demand for equal protection and colorblindness operates directly against the Fifteenth Amendment's race-conscious protections. Remedial race-based districting plans, such as those in *Shaw I* and *Miller v. Johnson*, "bring[] the [VRA], once upheld as a proper exercise of Congress' authority under § 2 of the Fifteenth Amendment, . . . into tension with the Fourteenth

196. *Id.* at 1203.
197. *Id.* at 1227.
198. *Id.* at 1228.
199. Miller v. Johnson, 515 U.S. 900, 927 (1995) (quoting Edmondson v. Leesville Concrete Co., 500 U.S. 614, 630–31 (1991)).
200. Karlan & Levinson, *supra* note 188, at 1230 (emphasis in original).
201. *Id.* at 1216; *see also* Henry L. Chambers, *Colorblindness, Race Neutrality, and Voting Rights*, 51 EMORY L.J. 1397, 1428–29 (2002) ("Applying the Fourteenth Amendment rights protection structure to Fifteenth Amendment voting rights is troubling. . . . [T]he result of the Court's jurisprudence is general acceptance of the constitutionality of colorblind electoral rules . . . and general skepticism of the constitutionality of color-conscious electoral rules . . . . This may be at odds with the spirit of the Fifteenth Amendment, which, based on the content of the voting rights that the Fifteenth Amendment protects, entails some measure of substantive political equality.").

Amendment."[202] In light of this tension, a remedial statute such as the VRA should not be scrutinized using a colorblind principle.

B. The Necessity of the Fifteenth Amendment and Race Consciousness in Voting Rights

The argument for restoring the Fifteenth Amendment in voting rights must begin with a discussion of its unique contributions that have eluded the Court for too long. The Court's reliance on the Fourteenth Amendment and equal protection principles in deciding voting rights cases is troubling given the history of the VRA's enactment and Congress's intention to have it be coextensive with the Fifteenth Amendment. Unlike the Fourteenth Amendment, which does not refer specifically to the right to vote, the Fifteenth Amendment not only explicitly protects the right to vote but also protects against denials and abridgements of that right.[203] In analyzing vote dilution, the Fifteenth Amendment "is the primary repository of the constitutional value of preserving the political access and participation of Blacks and other racial minorities."[204]

The Fifteenth Amendment was passed to allow once-disenfranchised black citizens the opportunity to affect elections, which indicates that voting rights are not limited to casting a ballot but also protect against vote dilution.[205] Thus, "the Fifteenth Amendment should be viewed more broadly as protecting the generalized right to representation when a minority group's numbers are sufficient or the right to influence elections when the group's numbers are not sufficient to guarantee the election of the group's candidate of choice."[206] Under this understanding, "minority groups would be merely exercising the democracy-based rights accorded groups of citizens when their numbers are sufficient to garner representation" as opposed to exercising a special right or being given an electoral advantage.[207]

In reworking and restoring the Fifteenth Amendment back into voting rights jurisprudence, particularly in the context of vote dilution claims, many of the inconsistencies and paradoxes that face current vote dilution claims can be resolved. If, for example, the Court understood the Fifteenth Amendment as

202. *Miller*, 515 U.S. at 927 (citation omitted).
203. *See* Jordan, *supra* note 36, at 440–41.
204. *Id.*; *see also* Chambers, *supra* note 201, at 1425 ("The Fifteenth Amendment right not to be discriminated against in exercising one's voting rights—as opposed to a direct right to vote—is not a right that can be provided through or needs to be protected through the Fourteenth Amendment's equal protection clause.").
205. *See* Chambers, *supra* note 201, at 1422.
206. *Id.*
207. *Id.* at 1440.

protecting the general right to representation or the right to influence elections and applied that principle in *Bartlett v. Strickland*, then crossover and influence districts would be able to satisfy the first *Gingles* precondition. Crossover and influence districts would not provide members of a minority group a special advantage that unjustifiably maximizes their voting strength. Instead, such districts would allow minority voters to justifiably maximize their voting strength to fully exercise their right to representation under the Fifteenth Amendment.

To be clear, this Comment does not suggest that vote dilution claims should solely be brought under the Fifteenth Amendment. Since plaintiffs who allege unconstitutional vote dilution must still prove discriminatory intent and effect per *Mobile*, it is unlikely that such claims will succeed. Rather, the Fifteenth Amendment should serve as a foundational predicate for analyzing and deciding vote dilution claims brought under Section 2 of the VRA, as well as those claims that are analytically distinct from vote dilution.

CONCLUSION

During the congressional debates over the VRA's enactment, Representative Emanuel Celler articulated the value of the Fifteenth Amendment in voting rights:

> For almost a century we have had the 15th amendment, which forbids any State to discriminate in voting on the basis of race or color. That amendment has been allowed to go into desuetude. It must be brought back. That is exactly what the voting rights bill will do—it will put flesh and muscle and sinew on the buried skeleton of this amendment and breathe new life into it.[208]

Unfortunately, despite the VRA's passage, the Supreme Court's voting rights jurisprudence has pushed the Fifteenth Amendment back into desuetude. In light of the Court's decisions in *Shaw I*, *Miller v. Johnson*, *Bartlett v. Strickland*, and most recently *Shelby County v. Holder*, in which voting rights protections have been considerably restricted, the Fifteenth Amendment must be brought back from the shadows in order to reinforce the original spirit and purpose of the VRA.

208. 111 CONG. REC. 15,637 (1965) (statement of Rep. Celler).