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Section 2 of the 1965 Voting Rights Act and White Americans

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Section 2 of the 1965 Voting Rights Act and White Americans

Denny Chan*

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INTRODUCTION

Election Day every year is one of the most important days for Americans; oftentimes, the stakes are high, and hotly contested elections generate anxiousness and uncertainty. Imagine in the time leading up to Election Day, a local party official engages in a number of steps with the purpose of diluting the vote of a particular racial group. The scheme is elaborate and well orchestrated. He intentionally recruits poll workers who belong to one racial group; he blatantly disregards the law governing the counting and validation of absentee ballots, and he purposely solicits nonresidents, ineligible to hold office, to run in local

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elections. The official does all of this to promote the interests and the visibility of his own racial group.

In a country that prides itself on constantly striving toward racial progress, this sort of egregious conduct plainly violates contemporary notions of racial fairness. It also happens to violate the law. Existing statutes like the 1965 Voting Rights Act (VRA) contain provisions that protect against such pernicious discrimination. In particular, Section 2 of the VRA protects voting rights by prohibiting any state or locality from imposing a voting qualification, prerequisite to voting, standard, practice, or procedure that results in the denial or abridgment of the right of any U.S. citizen to vote on account of race or color based on a totality of the circumstances test.¹ Interestingly, courts and commentators have yet to explore in robust detail whether this statutory provision affords protections only for voters of color, as Congress arguably intended when it passed the legislation, or if it applies equally to white Americans as well. One federal circuit has assumed that white voters fall under the statute's ambit with little explanation.² Additionally, the rare application of Section 2 to white voters, in light of a long history of consistent application to voters of color, might raise some novel questions in practice. The question of whether the VRA applies to white voters warrants further academic inquiry.

This question is particularly timely because of the dynamic and contemporary nature of race relations, and where they are likely to proceed in the future. Race relations have changed since the passage of the VRA in 1965.³ Commentators have observed heightened discomfort among white Americans as shifting racial demographics jeopardize their majority status in this country.⁴ Amidst amplified racial tensions, recent allegations of white voter intimidation in Philadelphia on Election Day 2008 and the Department of Justice's (DOJ) handling of the situation—from initially investigating and pressing charges to then dropping many of them—have plagued the Obama administration.⁵ The DOJ's

1. 42 U.S.C. § 1973 (2011). The totality of the circumstances test means that courts look at what is generally regarded as “the Senate factors” to help determine whether Section 2 has been violated. These factors—taken from a Senate judiciary committee report—include racially polarized voting, official history of discrimination in voting, racial appeals in political campaigns, etc. See generally *Thornburg v. Gingles*, 478 U.S. 30, 36–38 (1986).

2. *United States v. Brown*, 561 F.3d 420, 432 (5th Cir. 2009).

3. Orlando Patterson, *Race and Diversity in the Age of Obama*, N.Y. TIMES BOOK REV., Aug. 16, 2009, at 23; Susan Saulny, *Census Data Presents Rise in Multiracial Population of Youths*, N.Y. TIMES, Mar. 25, 2011, at A3; Sabrina Tavernise, *In Census, Minorities Show Gains in Youths*, N.Y. TIMES, Feb. 5, 2011, at A10. For a general description of changes in race relations in American history, see Douglas S. Massey, *The Past & Future of American Civil Rights*, DÆDALUS, Spring 2011, at 37, 37–54. For commentary on equal protection legal principles in light of shifting racial dynamics, see Mario L. Barnes, Erwin Chemerinsky & Trina Jones, *A Post-Race Equal Protection?*, 98 GEO. L.J. 967 (2010).

4. Ross Douthat, Op-Ed., *The Roots of White Anxiety*, N.Y. TIMES, July 19, 2010, at A21; see also Hua Hsu, *The End of White America?*, ATLANTIC, Jan.–Feb. 2009, available at <http://www.theatlantic.com/magazine/archive/2009/01/the-end-of-white-america/7208>.

5. Charlie Savage, *Racial Motive Alleged in a Justice Dept. Decision*, N.Y. TIMES, July 7, 2010, at

application of Section 2 in that case to white voters was controversial even with seasoned career attorneys in the Voting Section of the DOJ's Civil Rights Division.⁶ Underlying the inherently messy and political nature of the incident is the question of whether white Americans, too, are protected under the statute.

The stakes for this question are high. First, if the VRA only protects voters of color, some might be concerned that such an interpretation would negatively impact the progress of race relations in America. With the 2008 election of President Barack Obama, there is at least an illusion that U.S. race relations are improving. Although white voters have not filed many claims in the past, the changing face of America increases the likelihood that this will change. Second, protecting only voters of color runs contrary to our notions of basic fairness. It contradicts our cultural norms of treating everyone the same regardless of race. Finally, an interpretation that applies Section 2 of the Act to white voters will help ensure its constitutionality—a critical move given the number of past and pending constitutional challenges to Section 5 of the VRA, a provision that requires certain jurisdictions to “preclear” their election-related changes with the Attorney General or before a three-judge panel in the district court for the District of Columbia.⁷ The VRA is regarded as one of the most important civil rights statutes in our country's history, and how to protect it from constitutional challenge is a timely and important question. With the U.S. Supreme Court possibly declaring Section 5 unconstitutional in the foreseeable future, a robust Section 2 on which voting rights attorneys may rely is crucial. Yet, there is a possibility that critics of Section 5—or others—may also find Section 2 constitutionally questionable, resurrecting unsuccessful constitutional challenges of the past.⁸ Constitutional concerns aside, allowing white voters to bring claims under the VRA likely would mitigate political concerns, its application seen perhaps as a natural consequence of a racially complicated America, whereas barring white voters from the Act's protections might only fuel hostility, spark political concerns, and raise the possibility of social turmoil.

In this Note, I argue that courts should interpret Section 2 of the VRA to protect all voters, regardless of race. This is what I will refer to as a “broad” interpretation of Section 2.⁹ A dynamic and broad interpretation—as opposed to a

A11. For a detailed report issued as a result of an investigation, see U.S. COMM'N ON CIVIL RIGHTS, RACE NEUTRAL ENFORCEMENT OF THE LAW? THE U.S. DEPARTMENT OF JUSTICE AND THE NEW BLACK PANTHER PARTY LITIGATION, AN INTERIM REPORT (2010).

6. Jerry Markon & Krissah Thompson, *Black Panther Case Reveals Schism*, WASH. POST, Oct. 23, 2010, at A1.

7. 42 U.S.C. § 1973c (2006).

8. *Jones v. City of Lubbock*, 727 F.2d 364 (5th Cir. 1984); *United States v. Marengo Cnty. Comm'n*, 731 F.2d 1546 (11th Cir. 1984).

9. A broad interpretation of the VRA is not necessarily the same as a “colorblind” VRA. The first recognizes the importance of race while protecting all people, while the latter may potentially require race to be excluded as a factor entirely.

narrow interpretation that protects only black voters or voters of color—ensures its continuing constitutionality and helps address upcoming voting rights issues of an increasingly racially dynamic and fluid country. To substantiate these claims, in Part I, I employ traditional tools of statutory interpretation to examine Section 2, observing that while the legislative history arguably indicates a Congressional intent to guarantee the enfranchisement of minority voters, other traditional tools of statutory interpretation, like textual analysis, examining statutes in *pari materia*, and the canon of constitutional avoidance favor applying Section 2's protections to all voters. Part II offers policy reasons for a broad interpretation of Section 2, including factors such as basic fairness, the existence of officially unrecognized minority groups, and ensuring the Act's ongoing constitutionality. Finally, Part III considers how a broad interpretation would work in practice, noting potential problem areas and positing possible solutions.¹⁰

I. THE BROAD INTERPRETATION OF THE VOTING RIGHTS ACT AND TRADITIONAL TOOLS OF STATUTORY INTERPRETATION

Statutory interpretation is the logical place to begin when analyzing a statute's ambit. This Part examines the VRA's history, the plain language of Section 2, the VRA's legislative history and congressional intent arguments, statutes in *pari materia*, and the canon of constitutional avoidance.

A. The History Behind the 1965 Voting Rights Act

The significance of the history behind a legislative enactment to exercises of statutory interpretation is well established.¹¹ Therefore, the appropriate place to begin the analysis is with the history of the 1965 Voting Rights Act. This historical summary is offered to paint a contextual picture of the circumstances that led to the Act's adoption.¹²

The 1965 Voting Rights Act originated from a long and pervasive history of

10. I cabin my analysis to Section 2 because the inclusion of Section 5 necessarily presents complex, difficult issues that are separate and outside of the scope of inquiry. For example, because Section 5 is used in covered jurisdictions to make sure that election changes do not have an intent or the effect of retrogression on minority voting, how the provision would apply to white voters is unclear.

11. See, e.g., *Leo Sheep Co. v. United States*, 440 U.S. 668, 669 (1979) (“[C]ourts, in construing a statute, may with propriety recur to the history of the times when it was passed; and this is frequently necessary, in order to ascertain the reason as well as the meaning of particular provisions in it.”) (citing *United States v. Union Pac. R.R. Co.*, 91 U.S. 72, 79 (1875)); see also Anita S. Krishnakumar, *The Anti-Messiness Principle in Statutory Interpretation*, 87 NOTRE DAME L. REV. (forthcoming 2012) (including, within the analysis of the Supreme Court's anti-messiness doctrine, a legislative history as a factor in statutory construction).

12. For a detailed review of the two decades leading up to the VRA's passage, see DAVID J. GARROW, *Black Voters and the Federal Voting Rights Enforcement Effort in the South, 1940–1964*, in *PROTEST AT SELMA: MARTIN LUTHER KING, JR., AND THE VOTING RIGHTS ACT OF 1965*, 6, 6–30 (1979).

disenfranchisement of freed slaves in America. During the Reconstruction Era after the Civil War, Congress passed a series of constitutional amendments attempting to guarantee the rights of recently freed slaves, including the Fifteenth Amendment,¹³ which prohibited a voting qualification based on race, color, or previous condition of servitude in the United States.¹⁴ Although the Amendment passed in 1870, in the years following its ratification, states went to great measures to disenfranchise black Americans. Four prominent examples of the many mechanisms that states employed were white primaries, grandfather clauses, literacy tests, and poll taxes.¹⁵ For example, between 1927 and 1953, the Supreme Court struck down four attempts by Texas to prevent black Americans from voting in primaries.¹⁶ Sometimes, the mechanisms were combined to effectuate even stronger disenfranchisement. One example was Oklahoma, which combined literacy tests and grandfather clauses as conditions of voting; these practices were challenged in *Guinn v. United States*.¹⁷ Meanwhile, poll taxes required voters to pay a nominal tax as a prerequisite condition. Many argued that this disproportionately affected black Americans, who often could not afford the tax. The Supreme Court eventually struck down poll taxes as violations of equal protection.¹⁸

Judicial action was often too little, too late. Although the Supreme Court ultimately did strike down many of these states' mechanisms, the challenges first were heard in openly resistant and skeptical district courts and courts of appeals, which often strained to rule in favor of the states.¹⁹ Furthermore, proponents of these devices often successfully claimed that they were not in violation of the

13. The Fifteenth Amendment is entitled "Universal Male Suffrage." U.S. CONST. amend. XV. Section 1 reads: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." *Id.* § 1. Section 2 reads: "The Congress shall have power to enforce this article by appropriate legislation." *Id.* § 2.

14. Women received the right to vote with the passage of the Nineteenth Amendment in 1919. U.S. CONST. amend. XIX.

15. For a thorough treatment of white primaries and the cases the Supreme Court decided about them, see Ellen Katz, *Resurrecting the White Primary*, 153 U. PA. L. REV. 325 (2004). For a general overview of black disenfranchisement in light of the Fifteenth Amendment, see Benno C. Schmidt, Jr., *Principle and Prejudice: The Supreme Court and Race in the Progressive Era, Part 3: Black Disenfranchisement from the KKK to the Grandfather Clause*, 82 COLUM. L. REV. 835 (1982).

16. See *Terry v. Adams*, 345 U.S. 461 (1953); *Smith v. Allwright*, 321 U.S. 649 (1944); *Nixon v. Condon*, 286 U.S. 73 (1932); *Nixon v. Herdon*, 273 U.S. 536 (1927).

17. *Guinn v. United States*, 238 U.S. 347 (1915). Over forty years later, the Supreme Court considered literacy tests alone in *Lassiter v. Northhampton County Board of Elections*, 360 U.S. 45 (1959).

18. *Harper v. Virginia State Bd. Of Elections*, 383 U.S. 663 (1966). Poll taxes were also attacked in other ways. See Bruce Ackerman & Jennifer Nou, *Canonizing the Civil Rights Revolution: The People and the Poll Tax*, 103 NW. U. L. REV. 63 (2009).

19. DERRICK BELL, *Voting Rights and Democratic Domination*, in RACE, RACISM, AND AMERICAN LAW, 341, 353 (2008) ("Litigation protesting the disenfranchisement provisions and the white primaries was filed in state and federal courts. The decisions, in the main, upheld the rights of states to fashion their own suffrage provisions [M]ost disenfranchisement devices were allowed to stand.").

Fourteenth and Fifteenth Amendments, as the statutes that enacted many of these devices either did not constitute state action or were facially race-neutral. Even if the Supreme Court ultimately reversed a state's racist mechanisms (and the Supreme Court was not always the most reliable and consistent advocate for black Americans' voting rights²⁰), little could be done retroactively for disenfranchised black voters given the inherently time-sensitive nature of elections. Except in the rare order for a new election—which raises its own set of difficult questions—courts lacked the ability to protect voting rights violations ex-post.

It is against this backdrop of state subversion of constitutional mandates that Congress passed the Voting Rights Act of 1965. Since the language of the Fifteenth Amendment expressly allowed for Congressional enforcement via appropriate legislation, the legislature took the opportunity to effectuate the enfranchisement of black Americans in southern jurisdictions. Responding to the many state mechanisms used to deprive blacks of their vote, the 1965 Act affirmatively banned the use of tests or devices in determining voter eligibility,²¹ explicitly authorized the Attorney General to challenge state poll taxes,²² and even allowed for the possibility of court-appointed federal observers in elections to ensure compliance with the Fourteenth and Fifteenth Amendments.²³

Perhaps most importantly, the VRA contained two provisions that continue to have utmost importance today: Sections 2 and 5. The former creates a cause of action for voting rights violations of the VRA, and the latter imposes restrictions on local election officials planning to change election procedures. Section 2 as written now prohibits any state or local voting qualification, prerequisite to voting, standard, practice, or procedure that results in the denial or abridgment of the right of any U.S. citizen to vote on account of race or color based on a totality of the circumstances test;²⁴ Congress added the totality of the circumstances test to Section 2 during the 1982 reauthorization after the Supreme Court's decision in *Mobile v. Bolden*.²⁵ This amendment was significant; before 1982, Section 2 was hardly ever invoked in its original form, and after 1982 it became the primary way to challenge vote dilution.²⁶ Vote dilution is generally defined as practices that

20. As the Supreme Court struck down poll taxes and white primaries, it upheld the constitutionality of literacy tests. See *Lassiter*, 360 U.S. at 4.

21. 42 U.S.C. § 1973b.

22. *Id.* § 1973h.

23. *Id.* § 1973a(a); *id.* § 1973f.

24. *Id.* § 1973 (2011).

25. *Mobile v. Bolden*, 446 U.S. 55 (1980). For an in-depth look at the 1982 amendment to Section 2, see Roy A. McKenzie & Ronald A. Krauss, *Section 2 of the Voting Rights Act: An Analysis of the 1982 Amendment*, 19 HARV. C.R.-C.L. L. REV. 155 (1984).

26. Ellen Katz et al., *Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982*, 39 U. MICH. J.L. REFORM 643 (2006).

have the effect of depriving minority voters of an equal opportunity to elect a candidate of choice.²⁷

Section 2's sister provision, Section 5, requires certain jurisdictions—determined by a particular coverage formula²⁸—to “preclear,” or seek advance approval of, any new voting qualification, prerequisite, standard, practice, or procedure it wishes to establish, by either instituting an action in the U.S. District Court for the District of Columbia, or seeking approval from the Attorney General.²⁹ Section 5 is a temporary measure and subject to Congressional reauthorization regularly after a set period of time.³⁰

Section 2 is one of the core provisions of the VRA. Scholars cite Section 2 as largely instrumental to the rapid enfranchisement of black southerners in a matter of years.³¹ In *Mobile*, the Court held that Section 2 claims required an “invidious purpose” showing because its sole purpose was to effect the Fifteenth Amendment. Congress responded to *Mobile* by amending the statute to eliminate a purposeful discrimination requirement and to employ the current totality of the circumstances—a results-oriented—test.³² This language makes Section 2 one of the most powerful remedies in a voting rights case, so the argument mostly rests with the post-1982 amendment.

The VRA called for a greater role for the federal government, particularly the Attorney General and federal courts, in state and local elections. Because of this increased oversight and subsequent southern hostility to federal interference, the VRA—particularly Section 5—was immediately subject to a series of constitutional challenges.³³ Since its enactment, the VRA has survived one constitutional challenge after another in our country's high court.³⁴ In *Northwest Austin Municipal Utility District Number One v. Holder*³⁵ (NAMUDNO), the most recent Supreme Court VRA case and the first constitutional challenge since the 2006 reauthorization, the Court avoided the question of the VRA's constitutionality and instead resolved the claim on statutory grounds. Even so,

27. NAACP Legal Def. and Educ. Fund, *Redistricting & Vote Dilution*, REDRAWING THE LINES, <http://www.redrawingthelines.org/redistrictingvotedilution> (last visited Jan. 16, 2012).

28. 42 U.S.C. § 1973c (2006).

29. *Id.*

30. *See id.* § 1973b(a)(8) (extending the provisions for another twenty-five years from the 2006 reauthorization date).

31. Katz et al., *supra* note 26.

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

33. The first of these challenges the Supreme Court entertained was *South Carolina v. Katzenbach*, 383 U.S. 301 (1966), where the Court upheld the “incentive” manner that Congress chose to exercise its authority, saying that “Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting.” *Id.* at 324.

34. *See, e.g.*, *Lopez v. Monterey Cnty.*, 525 U.S. 266, 282–85 (1999); *City of Rome v. United States*, 446 U.S. 156, 173–78 (1980); *Georgia v. United States*, 411 U.S. 526, 531–32 (1973).

35. *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193 (2009).

NAMUDNO seriously called into question the Act's constitutionality; commentators have predicted that the opinion is a sign that the high court will eventually strike down the VRA in another constitutional challenge.³⁶ Despite the challenges, the VRA has established itself as a legitimate and continuing presence in American electoral politics, and some commentators have even hailed the VRA as "one of the most remarkable and consequential pieces of congressional legislation ever enacted."³⁷

B. *The Plain Language of Section 2*

With the question of whom the statute is designed to protect as the focus, this Subpart analyzes Section 2's plain language. The plain language³⁸ of the provision supports a broad reading of the VRA that includes voters of all racial backgrounds.

Subsection (a) of the 1982 amendment to Section 2 banned any practice or procedure that results in the denial or infringement of the "right of any citizen of the United States to vote on account of race or color."³⁹ The words "any citizen" and "on account of *race* or *color*" clearly mean that Section 2's protections apply broadly to all voters, leaving the protections as broad as possible. The statute does not specify a particular racial identity it seeks to protect, leaving the statute as a remedy in voting rights cases for all races. Nothing in the language suggests that a citizen whose vote was either denied or abridged as a result of a state practice or procedure need be a black American or other person of color in order to file a claim for relief.

The text of subsection (b) reaffirms this reading of the statute. Subsection (b) defines a violation of subsection (a) using a totality of the circumstances test that shows the political processes are not open to "members of a *class of citizens*

36. See, e.g., Linda Greenhouse, Op-Ed., *Down the Memory Hole*, N.Y. TIMES, Oct. 2, 2009, at A31.

37. Katz et al., *supra* note 26, at 644.

38. Section 2 reads:

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

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

42 U.S.C. § 1973(a), (b).

39. *Id.* § 1973(a).

protected by subsection (a)” and lists one consideration as the extent to which members “of a *protected class*” have been elected to office.⁴⁰ The use of “class” in these sentences signals a level of generality that looks beyond specific racial identities as a basis for offering protection. Indeed, the term “protected class” is a legal term of art that has longstanding significance and has been interpreted broadly in Supreme Court jurisprudence. For example, in the 1996 case of *O’Connor v. Consolidated Coin Caterers Corp.*,⁴¹ Justice Scalia wrote about protected classes in the context of the Age Discrimination in Employment Act (ADEA) of 1967. The meaning of the term of art can be traced as far back as 1973 in *McDonnell Douglas Corporation v. Green*,⁴² where the Supreme Court interpreted Title VII of the Civil Rights Act of 1964.⁴³ These cases interpreted the legal principle behind “protected class” as focusing on not a particular identity group, like African Americans, men, or underage youth, but on broader immutable traits protected under the law, like race, gender, or age. The *O’Connor* Court’s interpretation of the ADEA is particularly illustrative on this point, holding “[t]he discrimination prohibited by the ADEA is discrimination because of [an] individual’s age though the prohibition is limited to individuals who are at least 40 years of age.”⁴⁴ The Court explained, “This language does not ban discrimination against employees because they are aged 40 or older; it bans discrimination against employees because of their age, but limits the protected class to those who are 40 or older.”⁴⁵

Based on the reasoning in *O’Connor*, when Congress passed the VRA in 1965, it could have banned discrimination on account of race in voting, and subsequently limited the class of individuals only to black Americans or voters of color. Congress did not specify any racial categories when it passed the 1982 amendment, and it again remained silent on this question during the most recent 2006 reauthorization. Therefore, the plain language of Section 2 bolsters a broad interpretation that offers the provision’s protections to all voters.

C. Legislative History and Congressional Intent

This section looks to the Act’s legislative history through the congressional record for the 1965 passage, the 1982 amendment to Section 2, and the most recent 2006 reauthorization. The legislative history is the most adequate proxy for

40. *Id.* § 1973(b).

41. *O’Connor v. Consol. Coin Caterers Corp.*, 517 U.S. 308, 309–10 (1996).

42. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800–01 (1973).

43. Some commentators have even traced protected classes to the early 1900s. *See, e.g.*, Robert C. Farrell, *Classes, Persons, Equal Protection, and Village of Willowbrook v. Olech*, 78 WASH. L. REV. 367, 370 (2003) (citing *Bachtel v. Wilson*, 204 U.S. 36, 41 (1907)).

44. *O’Connor*, 517 U.S. at 312 (citations omitted) (internal quotation marks omitted).

45. *Id.*

congressional intent.⁴⁶ Congressional intent is perhaps the most important factor in statutory construction.⁴⁷

The legislative history of the VRA arguably compels a more narrow interpretation because all of the sources indicate that Congress contemplated the Voting Rights Act to operate in the context of black Americans' and language minorities' voting rights.

For the passage of the 1965 Voting Rights Act, the Committee on the Judiciary issued a report accompanying the House bill speaking to the long history of difficulties our country experienced in its responsibility to enforce the Fifteenth Amendment. It wrote,

The history of the Fifteenth Amendment litigation in the Supreme Court reveals both the variety of means used to bar Negro voting and the durability of such discriminatory policies. . . .

The past decade has been marked by an upsurge of public indignation against the systematic exclusion of Negroes from the polls that characterizes certain regions of this Nation.⁴⁸

The report also detailed measures in the years preceding 1965 that disenfranchised black Americans, including purging from eligible voter rolls, dismal voter registration rates, and issues related to the registration process, literacy, and civics tests.⁴⁹

The understanding of Congress that these measures targeted black Americans and that the VRA was to be a tool for greater enfranchisement could not have been clearer, and again, the House report is illustrative. Congress noted that previous legislative and judicial measures had been largely ineffective. It concluded,

Such experience [of judicial relief] amply demonstrates that the case-by-case approach has been unsatisfactory. . . . The burden is too heavy—the wrong to our citizens is too serious—the damage to our national conscience is too great not to adopt more effective measures than exist today. Such is the essential justification for the pending bill.⁵⁰

Given the resolve of some jurisdictions to continue to block black Americans from voting, legislation was needed because “[i]n widespread areas of several States tests and devices, as defined in this bill, have been effectively and

46. I limit my analysis to congressional committee reports because they, with the exception of the bills themselves, tend to be most authoritative when interpreting legislative intent, and also to cabin the scope of my inquiry. “Committee Reports represent the most persuasive indicia of congressional intent in enacting a statute.” 2A NORMAN J. SINGER & J.D. SHAMBIE SINGER, STATUTES AND STATUTORY CONSTRUCTION § 48:6 (7th ed. 2007).

47. See *Miller v. French*, 530 U.S. 327 (2000); *United States v. N.E. Rosenblum Truck Lines*, 315 U.S. 50 (1942).

48. H.R. REP. NO. 89-439, at 8 (1965), reprinted in 1965 U.S.C.C.A.N. 2437, 2440–41.

49. *Id.* at 10–12.

50. *Id.* at 10–11.

repeatedly used to deny or abridge the right of Negroes to vote.”⁵¹

The legislative history for the 1982 amendment confirms a congressional interest in guarding the rights of racial and language minority voters. The House report accompanying the amendment is informative on this point. Under a section entitled “Progress Under the Act,” the House reported triumphant gains in both voter registration and the election of candidates of choice.⁵² However, it also limited the extent of the VRA’s success, noting that

these gains are fragile. The registration figures for minorities remain substantially lower than those for white voters.

The number of minority elected officials is still a fraction of the total number of elected officials; there are many jurisdictions with large minority populations which have no minority elected officials and which have never had any.⁵³

The report then explained that the gains made by candidates of color were generally limited to local positions, and noted the influence of racially polarized voting to their success.⁵⁴ It concluded this section remarking, “At the same time, discrimination continues today to affect the ability of minorities to participate effectively within the political process.”⁵⁵ It is worth noting that in the 1982 amendment, Congress described a concern about discrimination against more than black Americans. The House report specifies discrimination against minorities in general. The broadening of congressional concern is most likely explained by the 1975 reauthorization of the VRA, during which Congress added Section 203, a provision designed to address discrimination in voting against language minorities.⁵⁶ In the 1982 changes, Congress continued to articulate a need for the VRA based on discrimination against voters of color, leaving the issue of white Americans’ voting rights entirely unaddressed.

The most recent reauthorization of the VRA in 2006 echoed many of the same sentiments as the 1982 Amendment. One of the explicit congressional findings in the House report accompanying the bill stated, “However, vestiges of discrimination in voting continue to exist as demonstrated by second generation barriers constructed to prevent minority voters from fully participating in the electoral process.”⁵⁷ Congress additionally found that the existence of racially polarized voting meant that racial and language minorities remained politically vulnerable and warranted the ongoing protections of the VRA. It also cited several

51. *Id.* at 13.

52. Voting Rights Act Extension, H.R. REP. NO. 97-227, at 7–8 (1981) (Report together with Supplemental and Dissenting Views, accompanying H.R. 3112).

53. *Id.* at 7–8.

54. *Id.* at 10.

55. *Id.* at 11.

56. 42 U.S.C. § 1973aa-1a(e) (2011) (defining “language minorities” as “persons who are American Indian, Asian American, Alaskan Natives, or of Spanish heritage”).

57. H.R. REP. NO. 109-478, at 2 (2006).

examples of continued discrimination since 1982, including actions taken by the Department of Justice (DOJ) to block discriminatory election practices, a number of judgments denied by the U.S. District Court for the District of Columbia, and DOJ litigation to enforce the VRA.⁵⁸ The report stands for the proposition that as recently as 2006 Congress maintained the view that the VRA was intended to ensure the rights of racial and language minorities at the polls, while the question of whether white Americans were protected under the VRA remained unaddressed. It is worth noting that the Senate report also provided reasons for a broad interpretation. Senators Cornyn and Coburn submitted additional views expressing concern because the Section 5 coverage formula needed to be updated to avoid constitutionality issues. Reading the VRA broadly to ensure its ongoing constitutionality is explored in Subpart D.

There is a plausible argument that the congressional intent behind Section 2 was to protect all voters and not specific minority groups. Congress wrote the provision to cover all races in 1965. The fact that the 1982 amendment did not limit the class advances this claim because through the multiple reauthorizations, Congress had multiple opportunities—including one in 2006—to deliberately narrow the class of individuals it wanted to protect. Instead, it left the framework in terms of whom the Voting Rights Act is intended to protect untouched.⁵⁹ In fact, the Supreme Court has held that the 1982 amendment to Section 2 was intended to broaden, not constrict the scope of the statute.⁶⁰ One district court even concluded from this that “[f]rom the foregoing, it is manifest that Section 2 broadly protects the voting rights of all voters, even those who are white.”⁶¹

Although there is a reasonable argument that the congressional intent of Section 2 covers all voters, the legislative history strongly supports a narrower reading of the provision.

D. Other Civil Rights Laws: Statutes In Pari Materia

The next mode of statutory interpretation is to examine how courts have treated similar statutes, that is, statutes in *pari materia*. Congress adopted the VRA during a transformative time in American history when it passed many other civil rights statutes. Reviewing how courts have interpreted other similar statutes to include protections for white individuals may provide further context on how Section 2 should be read to ensure consistency among the nation’s

58. *Id.*

59. I recognize this argument may be limited because age and race are not socialized exactly the same. Although both characteristics are generally thought of as immutable in the present, age is thought of as something everyone will typically experience at some point, while race does not change as a result of time. Nonetheless, the argument still remains that Congress could have limited the class if it so desired.

60. *Chisom v. Roemer*, 501 U.S. 380, 404 (1991).

61. *United States v. Brown*, 494 F. Supp. 2d 440, 446 (S.D. Miss. 2007).

antidiscrimination laws. A contrary interpretation would allow whites statutory protections with the exception of the federal voting rights context.

The Supreme Court has a large body of case law interpreting civil rights statutes to include white plaintiffs.⁶² In 1978, shortly after the passage of many of the country's groundbreaking civil rights laws, the Supreme Court heard the landmark *Regents of University of California v. Bakke*⁶³ case, in which a white male who applied to University of California, Davis Medical School and was denied admission challenged the school's admissions program that gave preference to economically and educationally disadvantaged applicants. Bakke challenged the program on the grounds that it violated Title VI of the Civil Rights Act of 1964, which guards against discrimination by government agencies receiving federal funding, and Fourteenth Amendment equal protection principles.⁶⁴ The Court acknowledged that Title VI had historically ensured black Americans were not barred from federal financial assistance, and without pause concluded, "[w]e assume, only for the purposes of this case, that respondent has a right of action under Title VI."⁶⁵ Later cases brought by white plaintiffs challenging university admission policies continued this interpretation.⁶⁶

In addition to the Title VI context, the Court has also permitted white plaintiffs to bring challenges under Title VII, which protects against employment discrimination. For example, in *McDonald v. Santa Fe Trail Transportation Company*,⁶⁷ two white employees brought suit against their employer when they were discharged for mishandling cargo, but a black employee who committed the same offense was not. Justice Marshall, writing for the majority, cited to the broad nature of the statute's plain language⁶⁸ and also referenced supporting legislative history.⁶⁹ Ultimately the *McDonald* Court held that Title VII of the Civil Rights Act of 1964 prohibits racial discrimination in private employment against whites as

62. One example is in *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970). Often cited for its holding on the summary judgment standard, *Adickes*'s underlying story was that a white schoolteacher brought suit against a restaurant that refused her service because she was in the company of black students. After it tracked the history of the Fourteenth Amendment as a response to the pernicious racism of the Ku Klux Klan, the Court ultimately held that "petitioner would show an abridgement of her equal protection right, if she proves that Kress refused her service because of a state-enforced custom of segregating the races in public restaurants." *Id.* at 171.

63. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

64. *Id.* at 278.

65. *Id.* at 284.

66. *Gratz v. Bollinger*, 539 U.S. 244 (2003) (addressing a lawsuit where white plaintiffs challenged university admissions programs under the Fourteenth Amendment and Title VI); *Grueter v. Bollinger*, 539 U.S. 306 (2003) (same).

67. *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976).

68. *Id.* at 287 ("On the contrary, the statute explicitly applies to 'All persons' . . . including white persons.").

69. *Id.* at 289 ("[T]he immediate impetus for the bill was the necessity for further relief of the constitutionally emancipated former Negro slaves, [but] . . . the bill was routinely viewed, by its opponents and supporters alike, as applying to the civil rights of whites as well as nonwhites.").

well as people of color.⁷⁰ The Court's later rulings in Title VII jurisprudence continue to allow white individuals to bring suits based on the statute, regardless of the underlying merits of the claim.⁷¹

Given the direction of the case law in other civil rights contexts, a broad reading of the VRA is consistent with the broad reading of similar statutes that protect whites as well as people of color, a point further reinforced by the race-neutral protections of the post-Reconstruction constitutional amendments and statutes passed to effectuate them.

E. The Canon of Constitutional Avoidance

The canon of constitutional avoidance is another important doctrine of statutory interpretation that has appeared in a number of election law cases.⁷² Because interpreting Section 2 to protect only voters of color raises Fourteenth Amendment equal protection concerns, constitutional avoidance would argue for a broad interpretation that comports with the Act's plain language.

First articulated in *Murray v. The Schooner Charming Betsy*,⁷³ courts have used the canon to dodge constitutional questions because "an Act of Congress ought not be construed to violate the Constitution if any other possible construction remains available."⁷⁴ Of the two possible interpretations of Section 2, only the broad reading is clearly constitutional.

A narrow reading of Section 2 that protects some voters but not others on the basis of race, in contrast, might violate equal protection principles enshrined in the Fourteenth Amendment, despite the Court holding that the VRA is "a legitimate response" to counter the evil of racism in voting.⁷⁵ As recently as 2007 the Supreme Court stated that "when the government distributes benefits on the basis of individual racial classifications, that action is reviewed under strict scrutiny."⁷⁶ Strict scrutiny means that the government actor "must demonstrate that the use of individual racial classifications in the assignment plans here under

70. *Id.* at 280.

71. *Martin v. Wilks*, 490 U.S. 755 (1989); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986); *United Steelworkers of Am., AFL-CIO-CLC v. Weber*, 443 U.S. 193 (1979).

72. See Richard L. Hasen, *Constitutional Avoidance and Anti-Avoidance by the Roberts Court*, 2009 SUP. CT. REV. 181 (2009), for an in-depth examination of two recent election law cases, *Northwest Austin Municipal Utility District Number One v. Holder*, 557 U.S. 193 (2009) ("NAMUDNO"), and *Citizens United v. Federal Election Commission*, 129 S. Ct. 2893 (2009) (mem.) (asking the parties to file supplemental briefs on whether to overturn two of its precedents), 130 S. Ct. 876 (2010), *aff'g in part, rev'g in part* 2008 WL 2788753 (D.D.C. 2008) (decided as Hasen article went to press), in the context of the constitutional avoidance doctrine.

73. *Murray v. The Schooner Charming Betsy*, 6 U.S. 64 (1804).

74. *N.L.R.B. v. Catholic Bishop of Chic.*, 440 U.S. 490, 500 (1979).

75. *South Carolina v. Katzenbach*, 383 U.S. 301, 328 (1966).

76. *Id.* at 720 (citing *Johnson v. California*, 543 U.S. 499, 505–06 (2005), as one of several cases standing for this proposition).

review is ‘narrowly tailored’ to achieve a ‘compelling’ government interest.⁷⁷ Strict scrutiny is justified for racial classifications because “racial classifications raise special fears that they are motivated by an invidious purpose,”⁷⁸ such that an exacting standard of review “smoke[s] out illegitimate uses of race by assuring that [government] is pursuing a goal important enough to warrant use of a highly suspect tool.”⁷⁹

A narrow VRA that protects only voters of color must survive strict scrutiny in order to pass constitutional muster. This challenge seems difficult given the exacting nature of strict scrutiny⁸⁰ and the Court’s election law jurisprudence,⁸¹ but a compelling government interest can be framed. In this case, the interest would potentially be to protect and ensure the voting rights of historically disenfranchised black Americans and language minorities; in other words, eliminating racism against racial minorities in our elections would be the government interest at stake. This type of argument has been made before in many voting rights cases, such as *Shaw v. Reno* and *Bush v. Vera*.⁸² Given the fundamental nature of the right to vote⁸³ and the country’s glaringly racist past at the ballot box, a court could find this to be a compelling government interest.

Assuming arguendo a court does deem such an interest to be sufficiently compelling for strict scrutiny purposes, there is still significant doubt over whether a narrow interpretation of Section 2 is “necessary” to combat racism in American elections.⁸⁴ One could claim that a narrow interpretation is narrowly tailored to combat the discrimination that was originally considered with the passage and

77. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007) (citing *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995)).

78. *Johnson v. California*, 543 U.S. 499, 505 (2005).

79. *Id.* at 506 (citing *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (first alteration in original)); *Washington v. Davis*, 426 U.S. 229, 242 (1976) (“racial classifications are to be subjected to the strictest scrutiny and are justifiable only by the weightiest of considerations”).

80. *Bernal v. Fainter*, 467 U.S. 216, 220 n.6 (1984); see also *Fullilove v. Klutznick*, 448 U.S. 448, 519 (1980) (Marshall, J., concurring) (defining “conventional ‘strict scrutiny’” as “scrutiny that is strict in theory, but fatal in fact”); Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 806–08 (2006).

81. See, e.g., *Shaw v. Reno*, 509 U.S. 630 (1993) (applying strict scrutiny to a North Carolina race conscious redistricting plan that proposed to create a second majority-black district).

82. *Bush v. Vera*, 517 U.S. 952, 981 (1996) (“The United States and the State next contend that the district lines at issue are justified by the State’s compelling interest in ameliorating the effects of racially polarized voting attributable to past and present racial discrimination.”) (citations and internal quotation marks omitted); *Shaw*, 509 U.S. at 653–54 (“The state appellees suggest that a covered jurisdiction may have a compelling interest in creating majority-minority districts in order to comply with the Voting Rights Act. The States certainly have a very strong interest in complying with the federal antidiscrimination laws that are constitutionally valid as interpreted and applied.”).

83. *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) (“Though not regarded strictly as a natural right, but as a privilege merely conceded by society, according to its will, under certain conditions, nevertheless [voting] is regarded as a fundamental political right, because preservative of all rights.”).

84. *Adarand Constructors*, 515 U.S. at 237 (“When race-based action is necessary to further a compelling interest, such action is within constitutional constraints if it satisfies the ‘narrow tailoring’ test this Court set out in previous cases.”).

subsequent reauthorizations of the VRA, but one factor the Court has weighed when considering the narrowly tailored element is whether the government has considered alternatives.⁸⁵ Here, one could argue that a narrow Section 2 necessarily has a more effective alternative: a broad Section 2. This alternative may be enough cause for a court to strike down a narrow Section 2 as unconstitutional. This point is particularly salient because a broad interpretation is a “workable race-neutral alternative”—the kind the Court seemed to be referring to in *Grutter*—that still serves the VRA’s purpose.

In reviewing several tools of statutory interpretation, the only one that compels a narrow interpretation of the statute is the VRA’s legislative history. It evinces a clear congressional intent to protect the rights of minority voters, and as recently as 2006, Congress, after compiling an exhaustive record, indicated it wanted to continue these protections for minority and language minority voters. The persuasiveness of legislative history should not be doubted. On the other hand, the statute’s plain language, examining statutes in *pari materia*, and the canon of constitutional avoidance favor a broad interpretation. Therefore, based on the total statutory analysis, the VRA should be read as extending to the claims of white voters. Furthermore, a broad interpretation is not at odds with the congressional intent during the VRA’s passage or subsequent reauthorizations because a broad interpretation can—and should—continue to enforce the voting rights of minority and language minority voters. Any argument that Section 2 should not apply to white voters because it is not used enough already to protect racial and language minority voters is unconvincing. A broad interpretation of Section 2 does not mean that racial and language minorities will not be protected; rather, it only means more people can enjoy the protections of Section 2.⁸⁶ Finally, even assuming that the legislative history is sufficient to overcome the other tools of statutory interpretation, the next Part examines several key policy reasons that lend further support for a Section 2 that protects the rights of all Americans.

II. POLICY REASONS TO FAVOR A BROAD INTERPRETATION OF SECTION 2

This Part analyzes the policy reasons that favor a broad interpretation: basic fairness, the Act’s constitutionality, and the emergence of officially unrecognized

85. *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003) (“Narrow tailoring does not require exhaustion of every conceivable race-neutral alternative. . . . Narrow tailoring does, however, require serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks.”).

86. I recognize that some DOJ Voting Section career attorneys and others were frustrated with *United States v. Brown*, 561 F.3d 420 (5th Cir. 2009), and the administration’s handling of the Black Panther investigation because it seemed to them that the administration prioritized filing cases that protected white voters’ interests over the interests of traditionally marginalized groups. My argument only proffers that under a broad interpretation, these two do not necessarily need to be in conflict and are not mutually exclusive. The concern does raise a valid point about enforcement priorities from administration to administration.

minority groups who also deserve Section 2's protections.

A. Basic Fairness

Regardless of the legal arguments proffered in support of or against a broad interpretation of Section 2, basic fairness dictates that white voters be offered the same statutory protections as black and language minority voters. Although a perverse and longstanding history of discrimination against blacks and language minorities exists in the voting context and is powerful and informative, this history does not necessarily justify reading the statute to exclude white voters. After all, systematically excluding white Americans from the VRA's protections would seem to leave them without a statutory remedy if they faced some discriminatory act in the electoral process. Commentators have explained that the value behind a Section 2 remedy as amended in 1982 is that a claim can be filed under a results or effects test, whereas a constitutional remedy under the Fifteenth Amendment requires discriminatory intent, an element plaintiffs generally find more challenging to demonstrate.⁸⁷ The example in the introduction of a rogue local party official purposely impeding the votes of white voters is a compelling one. Especially when reading the statute to apply broadly seems to pose no major difficulty, the possibility that white voters could potentially be left without a cause of action seems avoidable, undesirable, and counterintuitive to basic notions of fairness. Interpreting the statute narrowly would be the near-equivalent of unfairly neglecting white voters simply on the basis of their race.

B. Ongoing Constitutionality

It is also clear that a broad reading of Section 2 promotes its constitutionality. These arguments largely parallel the constitutional avoidance canon from Part I.

As mentioned in that section, all government racial classifications are immediately suspect, subjecting the VRA to strict scrutiny analysis. Since its passage, the VRA has come under fire as proponents challenge Section 5's ongoing constitutionality, claiming it is no longer a rational, congruent, or proportional means to enforce the Civil War Amendments. The idea that Section 5 is no longer proportional and congruent was argued recently in *Northwest Austin Municipal Utility District Number One v. Holder* (NAMUDNO).⁸⁸ Although NAMUDNO left Section 5 largely intact, as the Court resolved the issue on statutory grounds, Chief Justice Roberts's opinion for the majority hinted at what the Court would hold if forced to decide the substantive issue. Roberts wrote:

87. Frank R. Parker, *The "Results" Test of Section 2 of the Voting Rights Act: Abandoning the Intent Standard*, 69 VA. L. REV. 715, 745 (1983).

88. *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 129 S. Ct. 2504 (2009).

Things have changed in the South. Voter turnout and registration rates now approach parity. Blatantly discriminatory evasions of federal decrees are rare. And minority candidates now hold office at unprecedented levels.

. . . Past success alone, however, is not adequate justification to retain the preclearance requirements. . . .

. . . .

. . . The evil that § 5 is meant to address may no longer be concentrated in the jurisdictions singled out for preclearance. . . . The statute's coverage formula is based on data that is now more than 35 years old, and there is considerable evidence that it fails to account for current political conditions.⁸⁹

Given Roberts's language that "[t]hings have changed in the South," it is clear that the VRA is at risk of being partially struck down in the near future. This opportunity may even be presented sooner than expected by the many ongoing cases challenging Section 5's constitutionality.⁹⁰ If any of these cases makes it before the Supreme Court as it is currently comprised, the Court may take the opportunity to strike down Section 5.

Simply put, the recent constitutional attacks on the VRA mean that an immediately suspect narrow interpretation invites only further constitutional scrutiny. Such a move would also potentially raise the question of whether Section 2 is within congressional authority.⁹¹ Admittedly, the preclearance requirement of Section 5 and the nondiscrimination mandate of Section 2 are functionally different, but they respond to the same problem: racism in elections. If the Supreme Court determines that the preclearance requirement is no longer necessary to respond to this evil because the evil is weakened, such a move raises the question whether Section 2 is still necessary. The Court could decide that with the changing face of racism, the Fourteenth and Fifteenth Amendments sufficiently protect the right to vote and guarantee racism-free elections. Section 2's constitutionality has been unsuccessfully challenged before, but those challenges were in light of the Court finding Section 5 constitutional. The Court's analysis of Section 2's constitutionality might look different if Section 5 no longer

89. *Id.* at 2511–13.

90. This argument is one of the key arguments in the current case *Shelby Cnty. v. Holder*, No. 10-0651, 2011 WL 4375001 (D.D.C. Sept. 21, 2011), on appeal to the D.C. Circuit after a district court's careful opinion affirming its constitutionality. This was also the main claim in *Laroque v. Holder*, now revived after the D.C. Circuit reversed the lower court's standing decision. *Laroque v. Holder*, 650 F.3d 777 (D.C. Cir. July 8, 2011). And Florida and Arizona have both announced they will join in challenging Section 5's constitutionality. Rick Hasen, *Now Florida Gets Into the Act of Claiming that Voting Rights Act Section 5 is Unconstitutional*, ELECTION LAW BLOG (Oct. 11, 2011 1:54 pm), <http://electionlawblog.org/?p=24100>.

91. For cases examining this line of questioning, see *Jones v. City of Lubbock*, 727 F.2d 364 (5th Cir. 1984) and *United States v. Marengo Cnty. Comm'n*, 731 F.2d 1546 (11th Cir. 1984).

exists. Proponents of race-neutral policies, like the plaintiffs in the anti-affirmative action cases, would entertain raising Section 2's constitutionality if the Court found unintentional racism as a negligible issue in today's elections. Of course, even a broad interpretation might not be enough to save Section 2 in front of a skeptical, politically conservative court, but courts should be sure to not give anyone yet another reason to strike down a statute as important as the VRA.

C. A Racially Complicated America

Finally, a broad interpretation of the VRA comports with the reality of a racially dynamic America in 2012. It would also best effectuate the statutory goals given the seemingly arbitrary nature of government racial classifications.

As discussed previously, America's racial demographics have shifted from the 1960s, and the picture of race in America is increasingly complex. While a narrow interpretation of Section 2 would limit its protections to racial and certain language minorities, a broad interpretation would allow for the flexibility necessary to respond to our country's new racial dynamics. For example, a broad Section 2 helped the sizeable⁹² Arabic-speaking population residing in Hamtramck, Michigan,⁹³ that was the target of discriminatory election practices in 1999.⁹⁴ Because Arabic is not a language covered by Section 203,⁹⁵ the provision of the VRA protecting language minorities, bilingual election requirements were not triggered. Yet, previous incidents of discrimination had occurred against Arab voters. Challengers questioned the qualifications of only Arab voters, many of whom had dark skin and Arabic names, and even required some to take oaths as a condition to voting. In response, the DOJ filed a claim under Section 2, as well as

92. As of 2000, Hamtramck's population is over ten percent Arab, including Iraqi, Lebanese, and Bangladeshi Arabs. *Department and Services: Demographics*, CITY OF HAMTRAMCK: MICH., <http://www.hamtramck.us/about/demographics.php> (last visited Jan. 16, 2012).

93. Conor Dougherty, *U.S. Nears Racial Milestone: Whites Are on Verge of Becoming a Minority Among Newborns in Long-Expected Shift*, WALL ST. J., June 11, 2010, available at <http://online.wsj.com/article/SB10001424052748704312104575298512006681060.html> (explaining that nonwhite minorities accounted for over forty-eight percent of the children born between July 2008–2009, and that minority births will soon eclipse births of whites of European ancestry); *Minorities Expected to Be Majority in 2050*, CNN, Aug. 13, 2008, http://articles.cnn.com/2008-08-13/us/census.minorities_1_hispanic-population-census-bureau-white-population?_s=pm:us; Lisa Lambert, *Number of 'Majority Minority' US Cities Grows-Brookings*, REUTERS, Aug. 31, 2011, <http://www.reuters.com/article/2011/08/31/usa-states-cities-populations-idusn1e77u0wq20110831>; Sam Roberts, *In a Generation, Minorities May Be the U.S. Majority*, N.Y. TIMES, Aug. 13, 2008, available at <http://www.nytimes.com/2008/08/14/washington/14census.html>; *Hispanics Become America's New Majority Minority*, NPR, Apr. 18, 2011, available at <http://www.npr.org/2011/04/18/135517137/hispanics-become-americas-new-majority-minority>.

94. For a more detailed treatment of the Hamtramck litigation and its limitations, see Jocelyn Friedrichs Benson, *¡Su Voto Es Su Voz! Incorporating Voters of Limited English Proficiency into American Democracy*, 48 B.C. L. REV. 251 (2007) (discussing treatment of the Hamtramck litigation and its limitations).

95. 42 U.S.C. § 1973aa-1a(e) (2011) (defining "language minorities" as "persons who are American Indian, Asian American, Alaskan Natives, or of Spanish heritage").

the Fourteenth and Fifteenth Amendments.⁹⁶ A federal district court in August 2000 agreed with the DOJ, ordered the city to establish a program to train election officials and citizens about election challenges and to place bilingual poll workers in Hamtramck on Election Day, and assigned federal observers to ensure compliance.⁹⁷ If Section 2 applied only to those whom the government deems to be racial minorities, Hamtramck's Arab Americans would be unable to file a claim under Section 2, rendering court-ordered relief under the statute basically impossible.

The fact that Arab Americans are an unrecognized minority group means that Section 2 needs to be read broadly to help ensure that the voting rights of Arabs and other unrecognized vulnerable minority groups remain protected.

D. Courts and Their Institutional Role

Some might be concerned that a broad Section 2 would raise potential for misuse among indignant white voters and others. To prevent overreaching and abuse by any one particular group, courts are best situated to adjudicate claims under a broad interpretation of Section 2. They have both the statutory interpretation expertise as well as the knowledge about policy goals that can best effectuate the VRA's objectives, and have navigated similar challenges in the past. One partial example of unintentional discrimination under Section 2 applying to non-black and language minority voters is the example discussed above of Arab Americans in Hamtramck, Michigan. Although the record demonstrated some incidents of racial discrimination against Arabs in the past, this factor arguably should not have been dispositive in the court's analysis. In other words, because Arab Americans were not an enumerated group under Section 203 and therefore are not granted the same language access protections in elections, the DOJ needed to rely on the court's broader interpretation of the VRA to fairly give effect to the statutory purpose.

Under such a broad interpretation, some may argue that political forces could then manipulate Section 2 in such a way that the interests of white voters are prioritized over the interests of black and language minority voters, running against the VRA's purpose. If courts allowed meritless VRA claims brought by white voters to proceed through legal channels, this would be problematic and perverse given Section 2's long and inspiring history. Although such a trend is entirely possible, there is no evidence that courts would not meet these challenges with skepticism. Courts are asked to ferret out meritless and baseless claims in many other contexts, so their skills to do so effectively are to be depended upon in this regard. Courts are familiar with the VRA and its legislative purpose; indeed, if

96. Benson, *supra* note 94, at 265–66 & nn.82–83.

97. Consent Order and Decree at 6–10, *United States v. City of Hamtramck* (No. 00-73541, E.D. Mich. Aug. 7, 2000).

they are not, the record is plentiful and spans thousands of pages. Therefore, they should be entrusted to interpret the statute to best carry out the VRA's goals.

III. APPLYING SECTION 2 OF THE VOTING RIGHTS ACT TO WHITE VOTERS IN PRACTICE

Having explained why a broadly interpreted Section 2 is sound both as a matter of statutory interpretation and policy, this Part examines precisely how the VRA should work when applied to white voters. It first lays out the only case where Section 2 was applied to white voters, *United States v. Brown*, explaining both the factual circumstances giving rise to the litigation as well as the legal analysis. Then, it examines possible issues of intentional and unintentional discrimination in voting under a broad Section 2.

As discussed earlier, Section 2 of the VRA prohibits any practice or procedure that results in the denial or infringement of the right to vote on the basis of race, defining the analysis under a totality of the circumstances test. The clearest instance of the need for Section 2 to apply to white voters arose in the case of *United States v. Brown*.⁹⁸

The events giving rise to the litigation merit some attention. The Department of Justice brought a Section 2 violation claim against Ike Brown, the Noxubee County Democratic Executive Committee (NDEC), and the Noxubee County Election Commission. For five years, Ike Brown was the chairman of NDEC, the entity responsible for performing all duties related to the qualifications of Democratic primary election candidates and for conducting the primaries themselves. According to the Department of Justice, chairman Brown impermissibly pushed a racial agenda of aggressively recruiting black candidates for office.⁹⁹ In both 2003 and 2005 Brown encouraged black candidates who were either not residents of Noxubee County or residents of the particular ward to run against white incumbents, in violation of state law.¹⁰⁰

The court in *U.S. v. Brown* applied Section 2 after examining the history and case law of the Fifteenth Amendment and concluded that because the Fifteenth Amendment was intended to protect all voters and because the VRA was passed to effectuate the Fifteenth Amendment, the only logical conclusion is that VRA must be interpreted to protect all voters. The Fifth Circuit affirmed on appeal. The district court found, “[W]hen Brown was chairman of the NDEC . . . , Brown not only recruited black candidates to run against whites with the aim of defeating white incumbents, but his plan involved the candidates’ falsely representing their

98. *United States v. Brown*, 561 F.3d 420, 432 (5th Cir. 2009).

99. *Id.* at 453.

100. Mississippi Code provides that “[t]he mayor and members of the board of aldermen shall be qualified electors of the municipality and in addition, the aldermen elected from and by wards shall be *residents* of their respective wards” (emphasis added). MISS CODE ANN. § 21-3-9 (West 2011).

residency in order to qualify to run.”¹⁰¹ The court also noted Brown’s false accusations of racial discrimination, which he knew were unfounded.¹⁰² Most importantly, the opinion emphasized the Department of Justice’s main contention: Brown allegedly engaged in a complex scheme of absentee ballot abuses designed to minimize white voter participation in the 2003 Democratic primary.¹⁰³ The court also cited evidence of improper assistance to black voters and disparate treatment of white candidates at the polls.¹⁰⁴

For all of these reasons, the district court concluded that the defendants violated Section 2 of the VRA, and the Fifth Circuit subsequently affirmed this decision. Specifically on the question of the applicability of the VRA to guard the interests of white voters, the district court briefly explained that *Brown* presented an “atypical” VRA case because of the discrimination against white voters,¹⁰⁵ but explicitly stated, “Section 2 provides no less protection to white voters than any other class of voters.”¹⁰⁶ The court concluded,

The United States Supreme Court has made it clear that the essence of this Section 2 inquiry is whether the challenged “electoral law, practice or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by [minority] and [majority] voters to elect their preferred representatives.” Such interaction simply does not exist when dealing with the voting rights of historically privileged white voters and who as a group do not suffer the effects of past discrimination. However, where the proof establishes a specific racial intent by black election officials to disenfranchise white voters, *Section 2 applies with ease*.¹⁰⁷

Meanwhile, the circuit court opinion affirmed the lower court’s decision, failing to mention and taking for granted the legal analysis the lower court invoked to apply Section 2 to white voters.

The district court’s legal analysis of the issue is sound.¹⁰⁸ The opinion appropriately cites to *Rice v. Cayetano*,¹⁰⁹ where a Hawaiian resident challenged a state voting scheme that restricted participation in the election of trustees to those of Hawaiian ancestry. The resident, Rice, brought a challenge under the Fifteenth

101. *Brown*, 494 F. Supp. 2d at 453.

102. *Id.* at 455.

103. *Id.* at 455–70. The validity of the Department of Justice’s substantive allegations is outside of the scope of my inquiry, but the district court thoroughly examined the DOJ’s absentee ballot claim in precise detail in its opinion.

104. *Id.* at 470–72.

105. *Id.* at 444.

106. *Id.*

107. *Id.* at 486 (emphasis added) (citations omitted).

108. This general conclusion is true even though *Brown* did not recognize the potentially conflicting interpretation of the legislative history behind Section 2. Instead, it simply cited to case law that supported the conclusions it made without acknowledging a more narrow legislative record.

109. *Rice v. Cayetano*, 528 U.S. 495 (2000).

Amendment, and the Supreme Court, using ancestry as a proxy for race, struck down the scheme.¹¹⁰ Although *Cayetano* is quickly distinguishable from *Brown* because the former involved only a constitutional claim and not a statutory claim under the VRA, like the district court indicated, the Supreme Court has indicated that Section 2 was passed to effectuate the nondiscrimination guarantees of the Fifteenth Amendment.¹¹¹ Furthermore, if there were any doubt about the parameters of the Fifteenth Amendment prior to 2000, Justice Kennedy—writing for the majority in *Cayetano*—alleviated any concerns by offering extremely clear language explaining its scope. He wrote:

There is no room under the Amendment for the concept that the right to vote in a particular election can be allocated based on race. Race cannot qualify some and disqualify others from full participation in our democracy. All citizens, regardless of race, have an interest in selecting officials who make policies on their behalf, even if those policies will affect some groups more than others. Under the Fifteenth Amendment voters are treated not as members of a distinct race but as members of the whole citizenry.¹¹²

The district court in *Brown* also referenced *Mobile*, a Supreme Court decision where black residents of Mobile, Alabama, challenged the state's at-large city commissioner voting scheme, claiming it unconstitutionally diluted the black vote and violated Section 2. The *Mobile* Court briefly analyzed the Section 2 claim, citing several sources of legislative history that showed Section 2's uncontroversial nature since it was "almost a rephrasing of the 15th [A]mendment."¹¹³ In progressing to the constitutional claim, the Court said,

In view of the section's language and its sparse but clear legislative history, it is evident that this statutory provision adds nothing to the appellees' Fifteenth Amendment claim. We turn, therefore, to a consideration of the validity of the judgment of the Court of Appeals with respect to the Fifteenth Amendment.¹¹⁴

Although *Thornburg v. Gingles*¹¹⁵ replaced *Mobile's* framework with regard to vote dilution analysis, what the case determined with regard to the relationship between the Fifteenth Amendment and Section 2 remains unchallenged today.¹¹⁶

110. *Id.*

111. *South Carolina v. Katzenbach*, 383 U.S. 301, 324 (1966).

112. *United States v. Reese*, 92 U.S. 214 (1875).

113. *Mobile v. Bolden*, 446 U.S. 55, 61 (1980); *United Jewish Orgs., Inc., v. Wilson*, 510 F.2d 512 (1975).

114. *Id.*

115. *Thornburg v. Gingles*, 478 U.S. 30 (1986).

116. Interestingly enough, similar to *Brown*, the *Mobile* Court does not mention or grapple with a conflicting characterization of Section 2's legislative history, one that frames Section 2 as a mechanism to empower black Americans systematically denied the vote. Framed narrowly, this account potentially cuts against the Court's seamless transition from the VRA to the Fifteenth Amendment.

Furthermore, *Brown's* reliance on *United Jewish Organizations (UJO)*¹¹⁷ strengthens its Fifteenth Amendment conclusion. *UJO* granted standing to Hasidic voters in Brooklyn who claimed that as a result of New York City's compliance with Section 5 of the VRA in drawing district lines on a racial basis, their voting power had been minimized and diluted.¹¹⁸ The state Attorney General responded that the voters, as either Hasidic or white voters, lacked standing to bring claims under equal protection and the VRA.¹¹⁹ The Second Circuit swiftly concluded that although plaintiffs lacked standing as Hasidic individuals,¹²⁰ white voters had standing to bring their claims. The court wrote,

There is no reason . . . that a white voter may not have standing, just as a nonwhite voter, to challenge a denial of equal protection as well as an abridgement of his right to vote on account of race or color regardless of the fact that the fourteenth and fifteenth amendments were adopted for the purpose of ensuring equal protection to the black person.¹²¹

After explaining that white Americans tend to compose the majority in this country but can plainly constitute a minority in any state or political subdivision, the Court said, "to the extent that the fourteenth and fifteenth amendments can be construed as extending the rights of minority groups, in a given situation that group may of course be white."¹²² The Supreme Court subsequently affirmed *UJO* without addressing the Second Circuit's conclusions on standing.¹²³ If the VRA had already been clearly established to protect the rights of white voters at the time the court issued its opinion, the Second Circuit's finding that the Hasidic groups had standing as white Americans would only be strengthened and deemed more intuitive.

Although the *Brown* decision did not engage in statutory interpretation of Section 2, nevertheless its interpretation is useful. First, it is important to note that both the *Brown* Fifteenth Amendment approach and the statutory interpretation argued for in this note lead to the same result: Section 2 protects all voters. Second, although Section 2 derives its strength from the Fifteenth Amendment, that does not necessarily answer the question of how the statute should be interpreted. It is crucial that courts look to the traditional tools of statutory analysis examined here to determine Section 2's scope. For example, if something in the plain language of Section 2 or in its legislative history cut in favor of a particular interpretation, this would be regarded as directly persuasive, as opposed to any argument based in the Fifteenth Amendment.

117. *United Jewish Orgs.*, 510 F.2d at 512.

118. *Id.* at 521.

119. *Id.* at 519.

120. *Id.* at 520–22.

121. *Id.* at 521–22.

122. *Id.* at 522.

123. *United Jewish Orgs. v. Carey*, 430 U.S. 144 (1977).

An intentional discrimination claim under Section 2, such as the claim in *Brown*, is the strongest argument in favor of applying the VRA to white voters. Logically, victims of intentional discrimination—whether white-black, black-white, or any other possible permutation—deserve a recourse under law. Of course, they may bring a constitutional claim under *Mobile*, but it seems unsound to block white voters from seeking recourse under Section 2, especially when the constitutional claim and the statutory claim implicate different standards. That is, there is no reason why racial minorities should be afforded the protections of both the U.S. Constitution and the Voting Rights Act while whites have only the constitutional protection to their avail. In no other civil rights context is this odd inconsistency allowed.

A more interesting question is the idea of unintentional discrimination. Because Section 2 defines the test as a totality of the circumstances inquiry, so long as a pattern or practice has led to an infringement or abridgement of the right to vote based on race—even if such a result was unintended—it is prohibited. This means that white vote dilution claims, similar to the ones raised in *UJO*, would be cognizable in jurisdictions where white Americans comprise a numerical minority. Although somewhat provocative, courts—as institutional guardians of individual rights—should hear these claims and, assuming they are procedurally valid, adjudicate them on the merits.

CONCLUSION

Those who believe in a narrow application of the VRA are not entirely unreasonable. The interpretation is most consistent with the legislative history. The Civil Rights Movement was a unique moment in our country's history, and many viewed the legislation passed during that period as an indication that the United States' historic struggle with race finally shifted toward progress. Applying Section 2 of the VRA to white voters who are discriminated against may seem counterintuitive given the long and pervasive history of disenfranchisement other communities faced; it may lead some to conclude falsely that whites face similar obstacles to what people of color experience.¹²⁴ Furthermore, those who favor a narrow interpretation may argue that the legislative record in 1965 and subsequent reauthorizations and amendments demonstrate only a congressional intent to protect black and language minority voters; the records do not present any evidence of white voter oppression.

Such an interpretation, while understandable, nonetheless is undesirable. The plain language of the statutory provisions militates in favor of a broader reading of Section 2. Additionally, the case law and its synthesis in *United States v. Brown*

124. John Blake, *Are Whites Racially Oppressed?*, CNN, Mar. 4, 2011, <http://www.cnn.com/2010/US/12/21/white.persecution/index.html>; Charles M. Blow, Opinion, *Let's Rescue the Race Debate*, N.Y. TIMES, Nov. 20, 2010, at A19.

interpret the VRA in conjunction with the Fourteenth and Fifteenth Amendments to apply specifically to white voters. Furthermore, other civil rights legislation, such as Titles VI and VII of the Civil Rights Act of 1964, has been interpreted to include whites as well, so a broad interpretation would fall in line with other similarly situated statutes. Finally, a narrow interpretation of the Voting Rights Act presents serious constitutional concerns, especially as the VRA is poised on the defensive and remains vulnerable to attack, and it also fails to recognize the complexity of modern day race relations. For all these foregoing considerations, courts should interpret Section 2 of the Voting Rights Act as applicable to any citizen; such an interpretation best effectuates the purpose of the VRA—protecting the voting rights of all Americans.