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“The Politics of First Best”: Depolarization by Design and the Voting Rights Act

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Liberal and conservative Justices are rarely of one mind about Voting Rights Act, but on this much they agree: the VRA was “meant to hasten the waning of racism in American politics.” This understanding of the statute’s purpose has not, however, been successfully integrated into the doctrinal tests for liability or the design of remedies under the Act. Ironically, the Supreme Court’s initial constructions of Section 2—the VRA’s core provision of nationwide application—pushed the states to draw supermajority-minority electoral districts that many Justices believe to be racially divisive, and constitutionally dubious to boot.

This irony, not lost on the Court, has engendered two responses. The first, led by Justice O’Connor, was to give the states the option of complying with the VRA by crafting electoral districts so as to provide substantive rather than descriptive representation for minority communities. States would be free to break apart majority-minority electoral districts provided that the minority voters were regrouped into new districts where they would exercise substantial political influence in combination with white voters. O’Connor’s solution was probably doomed from the get-go, however, because it required courts both to ascertain and, more important, to pass judgment upon the degree of political power wielded by competing political factions—a task that the political question doctrine counsels the courts to avoid. O’Connor briefly mustered a narrow majority for her approach with respect to Section 5 of the VRA in 2003, only to be reversed by Congress three years later.

The Court’s other, more implicit response to the perceived conflict between majority-minority districts and the VRA’s ambition to “hasten the waning of racism in American politics” has been to narrow the Act at virtually every opportunity. When Congress enacted the Section 2 “results test” in 1982, the courts were left with great discretion to develop a common law of racial vote dilution, and the Supreme Court has used this leeway to rebuff minority voting rights advocates time and again. Save for the Court’s first decision interpreting the 1982 amendments, voting rights advocates have lost every Section 2 case but one in the Supreme Court. And their sole victory actually says much about the Court’s dissatisfaction with Section 2 as traditionally understood.

Section 2’s future would be brighter if the courts—or Congress—could realign its substantive requirements with the overriding purpose the Supreme Court has ascribed to the Act. This Article marks the path for realignment. The argument comes in two steps.

I first explore what political scientists now understand about the effects of alternative electoral arrangements on racial conflict and race-based voting, and I consider what this implies for Congress if Congress wanted to rewrite Section 2 so as to “hasten the waning of racism in American politics” (what I shall call “depolarization”). Congress, I conclude, would be centrally concerned with *information* (what voters know about candidates, particularly minority candidates); *incentives* (whether candidates and political parties are rewarded for being racially conciliatory or racially inflammatory); and *appearances* (the salience of racial conflict and normative dissensus).

Though a reformed, depolarization-minded Section 2 could rehabilitate the conventional majority-minority district, the overall picture I have sketched will seem very strange to lawyers steeped in the case law. Section 2 has never been used to improve the informational environment in which voters make their choices; Section 2 has long been focused on minorities’ opportunity to elect a roughly proportionate number of “preferred candidates of choice”—as opposed to minority officeholders who are responsive to non-minority voters; and the appearance of discrimination was never thought relevant to a Section 2 claim prior to Justice Kennedy’s surprising opinion in the recent case of *LULAC v. Perry*. Moreover, it is almost canonically true that the reasons behind the establishment or maintenance of a particular electoral arrangement are irrelevant to its permissibility under Section 2, which establishes a results test. One might reasonably suppose, then, that if Congress doesn’t rewrite Section 2, there’s little the courts can do to advance the depolarization project on their own.

This is wrong, or so I shall argue in the latter half of this paper. It is open to the Supreme Court to adapt Section 2 to depolarization ends, without jettisoning the body of law it has already developed. A substantial adaptation could be achieved via one minor clarification to the standard for liability under Section 2, and the formal acknowledgment of a logical but heretofore unseen implication of the law of remedies under Section 2. As to the clarification: the Court must state that Section 2 liability for “vote dilution” obtains only if the plaintiffs show not only (1) that they belong to a politically cohesive racial group that lacks a roughly proportionate opportunity to elect its candidates of choice, and (2) that there exists a potential remedy which the courts would have authority to implement, but also (3) that the “totality of the circumstances” confirm that the electoral process in the jurisdiction is somehow infected by negative racial stereotypes and racial resentments. Let us call these, respectively, the representational, the remedial, and the racial elements of liability. The racial element has received scant attention from the Supreme Court to date, but it is central if Section 2 is to be converted into a tool for depolarization.