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## RESPONSE

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### JUSTICE KENNEDY TO THE RESCUE?

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In response to Christopher S. Elmendorf, *Making Sense of Section 2: Of Biased Votes, Unconstitutional Elections, and Common Law Statutes*, 160 U. PA. L. REV. 377 (2012).

Section 2 of the Voting Rights Act is a doctrinal mess.<sup>1</sup> Through a totality of circumstances inquiry, Section 2 has evolved from its modest beginnings as a codification of the Fifteenth Amendment into a “mysterious judicial inquiry”<sup>2</sup> that places the Supreme Court in the enviable position of policing the contours of the politics of race. This is a role that the Justices have played to mixed reviews. The criticisms are well known: not only does the doctrine offer little guidance to the lower courts,<sup>3</sup> but it also promotes the creation of majority-minority districts, a mode of racial policymaking that is said to be inconsistent with our commitment to racial equality.<sup>4</sup> These two criticisms make clear that Section 2 is vulnerable to constitutional attack.

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<sup>1</sup> See Pub. L. No. 89-110, 79 Stat. 437, 437 (1965) (codified as amended at 42 U.S.C. §§ 1973–1973bb-1 (2006)).

<sup>2</sup> Christopher S. Elmendorf, *Making Sense of Section 2: Of Biased Votes, Unconstitutional Elections, and Common Law Statutes*, 160 U. PA. L. REV. 377, 381 (2012).

<sup>3</sup> See ABIGAIL THERNSTROM, VOTING RIGHTS—AND WRONGS: THE ELUSIVE QUEST FOR RACIALLY FAIR ELECTIONS 206 (2009) (arguing that the Court will have to resolve questions of race and representation surrounding Section 2).

<sup>4</sup> See *Shaw v. Reno*, 509 U.S. 630, 647 (1993) (rejecting a reapportionment plan because it gave the misleading “perception that members of the same racial group . . . think alike, share the same political interests, and will prefer the same candidates at the polls”).

Professor Elmendorf's article is a welcome response to this state of affairs. He offers an understanding of Section 2 "as a delegation of authority to the courts to develop a common law of racially fair elections, guided by certain substantive and evidentiary norms, as well as norms about legal change."<sup>5</sup> This is a thoughtful and intriguing proposal. It also finds much support from the historical record in at least three respects. First, a call to delegate authority to the courts is precisely the approach Congress took when it chose to enforce the Fifteenth Amendment through the Voting Rights Act.<sup>6</sup> This argument need only recognize two obvious points: that Congress wished to enforce the amendment to its constitutional limits, and that Congress could not be sure where these limits were. What we see in response is a statute drafted in general terms, which was essentially an invitation to the Court to extend the law as far as constitutionally permissible.<sup>7</sup> The language also allowed the Justices to adapt the law to changing circumstances.<sup>8</sup>

Second, conceptualizing Section 2 as a common law statute makes sense of the Court's voting rights jurisprudence. This is how the Court has interpreted the Voting Rights Act—and Section 2 in partic-

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<sup>5</sup> Elmendorf, *supra* note 2, at 383.

<sup>6</sup> See Luis Fuentes-Rohwer, *Understanding the Paradoxical Case of the Voting Rights Act*, 36 FLA. ST. U. L. REV. 697, 729 (2009) (arguing that Congress wanted to "shift the constitutional inquiry . . . to the Attorney General or the district court" to speed up changes in the law and shift the burden of proof to the states).

<sup>7</sup> See *Allen v. State Bd. of Elections*, 393 U.S. 544, 566-67 (1969) ("Indicative of an intention to give the Act the broadest possible scope, Congress expanded the language in the final version of § 2 . . ."); see also *Nw. Austin Mun. Util. Dist. No. One v. Holder (NAMUDNO)*, 129 S. Ct. 2504, 2514 (2009) (explaining that "specific precedent, the structure of the Voting Rights Act, and underlying constitutional concerns compel a broader reading of the bailout provision" under Section 4(a) of the Act); *NAMUDNO*, 129 S. Ct. at 2524 (Thomas, J., concurring in part and dissenting in part) ("[B]ecause it sweeps more broadly than the substantive command of the Fifteenth Amendment, § 5 pushes the outer boundaries of Congress' Fifteenth Amendment enforcement authority.").

<sup>8</sup> See *Georgia v. Ashcroft*, 539 U.S. 461, 480 (2003) (reinterpreting § 5's retrogression inquiry as a totality of circumstances test); *Dougherty Cnty. Bd. of Educ. v. White*, 439 U.S. 32, 47 (1978) (applying § 5 to a county school board's internal policy regarding employees running for public office); *United States v. Bd. of Comm'rs*, 435 U.S. 110, 117-18 (1978) (applying § 5 to all political units, not just those listed in § 14(c)(2)); *Georgia v. United States*, 411 U.S. 526, 531 (1973) (applying § 5 to apportionment); *Perkins v. Matthews*, 400 U.S. 379, 387-95 (1971) (applying § 5 to changes in polling places and boundary lines, as well as to the shift from ward-based voting to at-large elections).

ular—for much of its history.<sup>9</sup> Finally, the substantive norms at the heart of Elmendorf’s proposal date back to arguments made in the early years of the Act. Under his proposal, a dilution injury is one where “*race-biased decisionmaking* . . . results in minorities having less representational opportunity than they otherwise would.”<sup>10</sup> A “*race-biased decision*” is a decision that “would have been different had the race of persons considered by the decisionmaker been different.”<sup>11</sup> A participation injury arises when race-biased decisions lead to “disparate burdens on minority participation.”<sup>12</sup> Similar arguments were pressed by former Attorney General Katzenbach during the 1975 Senate hearings and by lower courts in the early years of the Act.<sup>13</sup>

That said, I part company with Professor Elmendorf, if modestly so, in one crucial respect. His proposal requires much greater faith in the conservative Justices on the Court than the existing evidence allows me to endorse. As an attitudinal question, these Justices have made clear that they are not fans of race-conscious policymaking in general and of Section 2 in particular. Chief Justice Roberts, for example, in an opinion joined by Justice Alito, writes that the creation of majority-minority districts is a “sordid business, this divying us up by race.”<sup>14</sup> Justice Thomas argues that these districts “exacerbate racial tensions,”<sup>15</sup> and explains, more generally, that “[w]e would be mighty Platonic guardians indeed if Congress had granted us the authority to determine the best form of local government for every county, city, village, and town in America.”<sup>16</sup> Justice Scalia agrees that the jurisprudence in this area “continues to drift ever further from the Act’s pur-

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<sup>9</sup> For a general discussion of the Court’s interpretation of Section 2, see Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *The VRA in Winter: The Death of a Superstatute* (2012) (unpublished manuscript) (draft on file with author).

<sup>10</sup> Elmendorf, *supra* note 2, at 383-84.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *See Extension of the Voting Rights Act of 1965: Hearings on S. 407, S. 903, S. 1297, S. 1409, and S. 1443 Before the Subcomm. on Constitutional Rights of the S. Comm. on the Judiciary*, 94th Cong. 125 (1975) (statement of Nicholas Katzenbach, former Att’y Gen. of the United States) (“While blacks have made important gains, these gains do not reflect the political power of their numbers were there no discrimination.”); *see also Beer v. United States*, 374 F. Supp. 363, 389-90 (D.D.C. 1974) (explaining that “the question before us is not whether New Orleans must confer upon its black citizens every political advantage that a redistricting plan conceivably could offer,” and suggesting that plaintiffs should “press vigorously . . . for all that is their due, but . . . no more”).

<sup>14</sup> *League of United Latin Am. Citizens v. Perry (LULAC)*, 548 U.S. 399, 511 (2006) (Roberts, C.J., concurring in part and dissenting in part).

<sup>15</sup> *Holder v. Hall*, 512 U.S. 874, 907 (1994) (Thomas, J., concurring).

<sup>16</sup> *Id.* at 913.

pose of ensuring minority voters equal electoral opportunities.”<sup>17</sup> These four Justices are poised to strike down the Act on constitutional grounds.<sup>18</sup>

Professor Elmendorf recognizes this problem. He responds that his proposed standard “should allay the concerns of critics like Justice Thomas, who assert that insofar as Section 2 reaches anything beyond barriers to casting a valid, duly counted ballot, nothing will limit it except the ‘political imagination’ of judges.”<sup>19</sup> Elmendorf reads this passage to suggest that Justice Thomas objects to Section 2 because of its lack of limits on judges.

I read these Justices differently. They seem to be concerned not with the lack of a limiting principle for Section 2, but with the fact that Section 2 is too race-conscious for their taste. Their particular concern is a matter of policy and not necessarily legal interpretation. Through their interpretations of the Voting Rights Act, Justices Scalia and Thomas have made clear that they will go to any lengths in order to see their policy preferences reflected in law, irrespective of the will of Congress or established precedent. As I argue elsewhere, their interpretations of the Act can only be described as “judicial activism on steroids.”<sup>20</sup>

Justice Scalia’s opinion for the Court in *Reno v. Bossier Parish School Board* (*Bossier Parish II*) encapsulates his interpretive approach.<sup>21</sup> This is a case where Justice Scalia showcases his considerable abilities as both jurist and sophist.<sup>22</sup> Conclusion in hand, he easily casts aside contrary precedents as “nothing more than an *ex necessitate* limitation upon the effect prong in the particular context of annexation,”<sup>23</sup> or by explaining that the case “involved an unusual fact pattern,”<sup>24</sup> or by not-

<sup>17</sup> *LULAC*, 548 U.S. at 512 (Scalia, J., concurring in part and dissenting in part).

<sup>18</sup> See Luis Fuentes-Rohwer, *The Future of Section 2 of the Voting Rights Act in the Hands of a Conservative Court*, 5 DUKE J. CONST. L. & PUB. POL’Y 125, 127 (2010) (“Five Justices have strong reservations about the constitutionality . . . of [S]ection 2 . . . . Whether the Court ultimately strikes down [Section 2] is a question only Justice Kennedy can answer.”).

<sup>19</sup> Elmendorf, *supra* note 2, at 383 n.26 (quoting *Holder*, 512 U.S. at 911 (Thomas, J., concurring)).

<sup>20</sup> Fuentes-Rohwer, *supra* note 6, at 751.

<sup>21</sup> 528 U.S. 320 (2000).

<sup>22</sup> See Fuentes-Rohwer, *supra* note 6, at 739 (describing the opinion as a “lawyerly brief, full of technical arguments and distinguished cases”).

<sup>23</sup> *Bossier Parish II*, 528 U.S. at 330 (referring to *City of Richmond v. United States*, 422 U.S. 358 (1975)).

<sup>24</sup> *Id.* at 339 (referring to *City of Pleasant Grove v. United States*, 479 U.S. 462 (1987)).

ing that unsupportive language was “pure dictum.”<sup>25</sup> Needless to say, the intent of Congress plays no part in the Court’s decision. Curiously, however, neither does the language of the statute. This is an attitudinal tour de force.<sup>26</sup> The opinion brings to mind criticism penned by Justice Scalia himself about judging and the “Living Constitution”:

The starting point of the analysis will be Supreme Court cases, and the new issue will presumptively be decided according to the logic that those cases expressed, with no regard for how far that logic, thus extended, has distanced us from the original text and understanding. Worse still, however, it is known and understood that if that logic fails to produce what in the view of the current Supreme Court is the *desirable* result for the case at hand, then, like good common-law judges, the Court will distinguish its precedents, or narrow them, or if all else fails overrule them, in order that the Constitution might mean what it *ought* to mean.<sup>27</sup>

This passage accurately describes the Court’s opinion in *Bossier Parish II*.

Justice Thomas is similarly creative. In his concurring opinion in *Holder v. Hall*, he challenges the existing orthodoxy, which places the Supreme Court in charge of questions of political representation.<sup>28</sup> As an abstract question of political theory, Justice Thomas makes a powerful point; redistricting questions in general and the concept of vote dilution in particular ask courts “to choose among competing bases of representation—ultimately, really, among competing theories of political philosophy.”<sup>29</sup> As a question of law, however, his opinion is terribly unpersuasive.

To begin, Justice Thomas’s opinion candidly admits to the role played by his personal politics and policy preferences. The Justice can hardly conceal his contempt for the use of race by the state. As he argues,

in resolving vote dilution actions we have given credence to the view that race defines political interest. We have acted on the implicit assumption that members of racial and ethnic groups must all think alike on important matters of public policy and must have their own “minority pre-

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<sup>25</sup> *Id.* at 338 (referring to a statement regarding apportionment from *Beer v. United States*, 425 U.S. 130 (1976)).

<sup>26</sup> For a description of the attitudinal model, which argues that “the Supreme Court decides disputes in light of the facts of the case vis-à-vis the ideological attitudes and values of the justices,” see JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* 86 (2002).

<sup>27</sup> ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 39 (Amy Gutmann ed., 1997).

<sup>28</sup> 512 U.S. 874, 891 (1994) (Thomas, J., concurring).

<sup>29</sup> *Id.* at 897 (quoting *Baker v. Carr*, 369 U.S. 186, 300 (1962) (Frankfurter, J., dissenting)); see also *id.* at 894 (“Vote dilution cases have required the federal courts to make decisions based on highly political judgments—judgments that courts are inherently ill-equipped to make.”).

ferred” representatives holding seats in elected bodies if they are to be considered represented at all.<sup>30</sup>

Consequently, he writes that “few devices could be better designed to exacerbate racial tensions than the consciously segregated districting system currently being constructed in the name of the Voting Rights Act.”<sup>31</sup>

For evidence that his attitudes about race are driving the analysis, note that his argument about political theory as applied to the Voting Rights Act applies with equal if not stronger force to the law of democracy writ large. If the argument is one of political theory and the immersion of federal courts into an area where contested and irresolvable political questions abound, then his work is only beginning. He must be prepared to overturn fifty years of election law while returning the Court to the days before *Baker v. Carr*. But twenty years after *Holder*, he has yet to take up this cause.

Only after demonstrating his displeasure with the use of race in this context does Justice Thomas turn to law, and specifically to the plain meaning of the statute. He offers a reading of Section 2’s language that returns the jurisprudence to the early days of the Act, up to 1969. From his perspective, the post-1969 jurisprudence is where everything went wrong, starting with *Allen v. State Board of Elections*.<sup>32</sup> As his many citations to Justice Harlan’s dissent in *Allen* attest, this is not a new fight.<sup>33</sup> It is also true that much precedent stands in his way. This is precedent that, incidentally, has been ratified by Congress numerous times. Yet these earlier cases, not to mention the historical record, prove no match to Justice Thomas’s ingenuity, just like Justice Scalia’s in *Bossier Parish II*. In this case, as in many others, he is clearly and unquestionably a “single-minded seeker[] of legal policy.”<sup>34</sup>

The question for the future is whether Justices Scalia and Thomas will eventually move the Court’s conservative wing toward their preferred position. This is particularly pertinent as applied to Justice

<sup>30</sup> *Id.* at 903.

<sup>31</sup> *Id.* at 907; see also *id.* at 905 (“We have involved the federal courts, and indeed the Nation, in the enterprise of systematically dividing the country into electoral districts along racial lines—an enterprise of segregating the races into political homelands that amounts, in truth, to nothing short of a system of ‘political apartheid.’” (quoting *Shaw v. Reno*, 509 U.S. 630, 647 (1994))).

<sup>32</sup> 393 U.S. 544 (1969).

<sup>33</sup> See *Holder*, 512 U.S. at 896, 898-99, 919-20, 922, 930, 935.

<sup>34</sup> Tracey E. George & Lee Epstein, *On the Nature of Supreme Court Decision Making*, 86 AM. POL. SCI. REV. 323, 325 (1992).

Thomas, who in recent years has seen his influence on the Court grow to the point that many of his positions that were once considered radical now command a majority of Justices.<sup>35</sup> If Justice Thomas had his way, then the Voting Rights Act—a superstatute in its own right<sup>36</sup>—will be domesticated and rendered an ordinary statute through judicial interpretation or, more extremely, will be struck down on constitutional grounds.

But on this question, as with many others, the final word rests with Justice Kennedy, the Court's resident super median.<sup>37</sup> Almost twenty years ago, Justice Kennedy argued that racial districts hinge on "offensive and demeaning assumption[s]" about minority voters and lead to racial stereotyping.<sup>38</sup> This was the essentialist critique that was a staple of conservative jurisprudence in the 1990s. It fit comfortably with the general colorblind critique of race-conscious measures. Justice Kennedy expressed these views as late as 2003, in his dissent in *Grutter v. Bollinger*.<sup>39</sup> Four years later, however, Justice Kennedy's views began to shift.<sup>40</sup> The case was *League of United Latin American Citizens v. Perry (LULAC)*.<sup>41</sup> This change reflected a far more accommodating view on questions of race than Justice Kennedy had expressed throughout his

<sup>35</sup> See Jeffrey Toobin, *Partners*, NEW YORKER, Aug. 29, 2011, at 41 ("Since the arrival of Chief Justice John G. Roberts, Jr., in 2005, and Justice Samuel A. Alito, Jr., in 2006, the Court has moved to the right when it comes to the free-speech rights of corporations, the rights of gun owners, and, potentially, the powers of the federal government; in each of these areas, the majority has followed where Thomas has been leading for a decade or more. Rarely has a Supreme Court Justice enjoyed such broad or significant vindication.").

<sup>36</sup> See WILLIAM N. ESKRIDGE, JR. & JOHN FERREJOHN, A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION 76 (2010) (describing how the civil rights movement led to an "electoral transformation . . . through *federal superstatutes*"); Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *Superstatutory Interpretation* (2012) (unpublished manuscript) (on file with author) (arguing that the VRA is a superstatute and has been understood and interpreted by the Supreme Court as such throughout its history).

<sup>37</sup> See Lee Epstein & Tonja Jacobi, *Super Medians*, 61 STAN. L. REV. 37, 43 (2008) (describing Justice Kennedy as a super median Justice due to his ability to "extract considerable deference and exert inordinate influence on the Court").

<sup>38</sup> *Miller v. Johnson*, 515 U.S. 900, 911-12 (1995).

<sup>39</sup> See 539 U.S. 306, 394 (2003) (Kennedy, J., dissenting) ("If universities are given the latitude to administer programs that are tantamount to quotas, they will have few incentives to make the existing minority admissions schemes transparent and protective of individual review. The unhappy consequence will be to perpetuate the hostilities that proper consideration of race is designed to avoid. The perpetuation, of course, would be the worst of all outcomes.").

<sup>40</sup> See Luis Fuentes-Rohwer, *Is this the End of the Second Reconstruction?* 13 (Ind. Legal Studies Research Paper No. 197, 2011), available at <http://ssrn.com/abstract=1954684>.

<sup>41</sup> 548 U.S. 399 (2006).

career on the bench.<sup>42</sup> Two years later, in his controlling concurring opinion in *Parents Involved in Community Schools v. Seattle School District No. 1 (Parents Involved)*,<sup>43</sup> Justice Kennedy spelled out his changing views. He no longer subscribed to “an all-too-unyielding insistence that race cannot be a factor,” nor did he agree with the plurality’s “dismissive[ness] of the legitimate interest government has in ensuring all people have equal opportunity regardless of their race.”<sup>44</sup> Justice Kennedy even took on Justice Harlan’s dissent in *Plessy v. Ferguson*, an iconic statement of faith in conservative circles.<sup>45</sup> According to Kennedy, Harlan’s axiom that “[o]ur constitution is color-blind”<sup>46</sup> is nothing more than an “aspiration,” and as such, it “must command our assent.”<sup>47</sup> This is where most arguments end, but not Justice Kennedy’s. For as he explained, “In the real world, it is regrettable to say, it cannot be a universal constitutional principle.”<sup>48</sup> The shift in Kennedy’s jurisprudence is nothing short of “striking.”<sup>49</sup>

This shift is the reason why this Response ends on a hopeful note. Professor Elmendorf’s approach seems tailor-made for Justice Kennedy. Though I am skeptical that Justices Scalia and Thomas would grapple seriously with the content of a common law approach to policymaking in the context of voting rights, Justice Kennedy has shown that he is willing to engage. It is less than clear that the Court’s conservative wing is interested in giving these questions the care they deserve. Rather, slogans and ideology tend to replace thoughtful engagement with these difficult issues.<sup>50</sup>

Without a doubt, the questions raised by the Voting Rights Act are serious questions of policy and constitutional law. They demand serious answers. Professor Elmendorf’s rich and thoughtful argument has provided an important framework that promises to move us forward. But this is why the efficacy, and ultimately the constitu-

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<sup>42</sup> *Id.* at 435 (rejecting a state redistricting plan because it divided a particular Latino district as a result of the district having “found an efficacious political identity”).

<sup>43</sup> 551 U.S. 701 (2007).

<sup>44</sup> *Id.* at 787-88.

<sup>45</sup> 163 U.S. 537, 552 (1896).

<sup>46</sup> *Id.* at 559 (Harlan, J., dissenting).

<sup>47</sup> *Parents Involved*, 551 U.S. at 788.

<sup>48</sup> *Id.*

<sup>49</sup> Heather K. Gerken, *Justice Kennedy and the Domains of Equal Protection*, 121 HARV. L. REV. 104, 109 (2007).

<sup>50</sup> How else to understand the Chief Justice’s statement that the “way to stop discrimination on the basis of race is to stop discriminating on the basis of race?” *Parents Involved*, 551 U.S. at 748.

tionality, of the Voting Rights Act, hangs in the balance. The ball is in Justice Kennedy's court.

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