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## RESPONSE

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### What Kind of Discrimination Does the Voting Rights Act Target?

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In response to Guy-Uriel E. Charles, Response, *Section 2 is Dead: Long Live Section 2*, 160 U. PA. L. REV. PENNUMBRA 219 (2012), <http://www.pennumbra.com/responses/01-2012/Charles.pdf>, and Luis Fuentes-Rohwer, Response, *Justice Kennedy to the Rescue?*, 160 U. PA. L. REV. PENNUMBRA 209 (2012), <http://www.pennumbra.com/responses/01-2012/FuentesRohwer.pdf>.

#### INTRODUCTION

In Volume 160 of the *University of Pennsylvania Law Review*, I present an interpretive reconstruction of the Voting Rights Act's (VRA) core provision of nationwide application, Section 2.<sup>1</sup> My account responds to longstanding critiques of Section 2 as utterly opaque, likely to worsen racial conflict, and probably unconstitutional (because inadequately tethered to the prevention or remediation of actual constitutional violations).

My paper builds upon a shared premise of liberal and conservative jurists: that the Voting Rights Act was meant "to hasten the waning of

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<sup>1</sup> See Christopher S. Elmendorf, *Making Sense of Section 2: Of Biased Votes, Unconstitutional Elections, and Common Law Statutes*, 160 U. PA. L. REV. 377 (2012).

racism in American politics.”<sup>2</sup> Professor Guy-Uriel Charles responds, “[T]his move is question-begging: what is racism in American politics, and how will we know whether it is waning?”<sup>3</sup> I agree with Professor Charles that the apparent consensus against racial discrimination in America is somewhat illusory, resting on divergent understandings of what constitutes discrimination on the basis of race.<sup>4</sup> But I disagree with the thrust of Professor Charles’s Response, namely, that reading Section 2 to target state action that discriminates on the basis of race (1) does little to help lawyers and judges applying the statute, given the lack of societal consensus about the meaning of discrimination,<sup>5</sup> and (2) is essentially pointless, because the Fourteenth and Fifteenth Amendments already prohibit race-discriminatory state action with respect to elections.<sup>6</sup>

Let me start by briefly restating how my account of Section 2 would operate in the courts:

- Plaintiffs would have to trace the electoral inequality at issue to *race-biased decisionmaking* by conventional state actors or by the electorate.<sup>7</sup> A decision is race-biased if

<sup>2</sup> See *id.* at 395 & n.89 (quoting and discussing two Supreme Court opinions in which liberal and conservative justices agree on the purpose of the VRA).

<sup>3</sup> Guy-Uriel E. Charles, Response, *Section 2 is Dead: Long Live Section 2*, 160 U. PA. L. REV. PENNUMBRA 219, 223 (2012), <http://www.pennumbra.com/responses/01-2012/Charles.pdf>.

<sup>4</sup> See *id.* at 222-24; see also, e.g., R. Richard Banks et al., *Discrimination and Implicit Bias in a Racially Unequal Society*, 94 CALIF. L. REV. 1169, 1170 (2006) (arguing that “the ostensible consensus fractures as one moves from broad statements of principle to specific circumstances”); Gregory Mitchell & Philip E. Tetlock, *Antidiscrimination Law and the Perils of Mindreading*, 67 OHIO ST. L.J. 1023, 1085-86 (2006) (noting disagreement over whether antidiscrimination norms should be understood to prohibit “Bayesian bigot[ry],” i.e., discrimination grounded in statistically valid inferences about an individual’s likely characteristics based on observations of American society).

<sup>5</sup> See Charles, *supra* note 3, at 222-24.

<sup>6</sup> See *id.* at 223 (“[I]f racial animus is the evil that Section 2 is seeking to eradicate, then it is not clear what [Section 2, so interpreted,] would add to the Fourteenth and Fifteenth Amendment standards . . .”). To be clear, the points to which I am responding in this short Reply do not comprise the entirety of Professor Charles’s thoughtful Response. He also observes, for example, that my account of Section 2’s constitutionality is “like a game of Jenga,” consisting of “a series of arguments that build on each other but . . . become more precarious as each block is added to the tower.” *Id.* at 225. I like the metaphor, and I agree that my argument has a Jenga-like quality, though I would like to think that the tower is stable, even if not engineered for redundancy. Professor Charles also suggests that as a society, we might be better off with a universal VRA concerned with all forms of voting discrimination, not just discrimination on the basis of race. See *id.* at 226. He may well be right. But my article was written about the VRA we have, not the one I would create if starting anew.

<sup>7</sup> See Elmendorf, *supra* note 1, at 421-36.

it “would have been different had the race of persons considered by the decisionmaker been different.”<sup>8</sup>

- Though plaintiffs must make a showing of race-biased decisionmaking, this showing need not comport with conventional evidentiary standards. It suffices for plaintiffs to show bias to a significant likelihood, rather than proving it more likely than not.<sup>9</sup>
- Consistent with the substantive and evidentiary norms I have just bulleted and with the common law’s norm of incremental legal change, courts would have broad discretion to decide (1) what types of electoral structures may be challenged under Section 2 and, correlatively, what remedies a judge may order;<sup>10</sup> (2) whether to limit the reach of Section 2 through proximate causation requirements or state-interest balancing;<sup>11</sup> and (3) whether to establish presumptions to narrow the judicial inquiry and to constrain judicial discretion, either across the board or in certain classes of high-stakes cases.<sup>12</sup>

Now, would a Section 2 that operates in this way be normatively indeterminate, or redundant with the Fourteenth and Fifteenth Amendments? Regarding the indeterminacy objection, although law professors may be hopelessly divided over how to define racial discrimination, constitutional law is not, and statutes enacted pursuant to the enforcement provisions of the Fourteenth and Fifteenth Amendments should be read for normative consistency with those Amendments when possible.<sup>13</sup> It is of course well established that the antidiscrimi-

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<sup>8</sup> *Id.* at 384.

<sup>9</sup> *See, e.g., id.* at 421-30.

<sup>10</sup> *See id.* at 404-55. To be sure, the courts must, at a minimum, read Section 2 to permit “dilution” challenges to at-large elections and multi-member districts, as well as challenges to certain “participation” injuries regardless of whether they result in actionable vote dilution. This much was clearly contemplated by the enacting Congress. *See Elmendorf, supra* note 1, at 418-21 (regarding participation claims); Michael J. Pitts, *The Voting Rights Act and the Era of Maintenance*, 59 ALA. L. REV. 903, 918-19 (2008) (regarding dilution claims).

<sup>11</sup> *See Elmendorf, supra* note 1, at 445-46 (discussing such limitations as a possible response to worries about the statute’s “congruence and proportionality”).

<sup>12</sup> *Id.* at 439, 450-51 (discussing constitutional and prudential norms that should govern judicial discretion under election-related statutes).

<sup>13</sup> There are precedents for such a presumption in favor of normative consistency, *see* William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 GEO. L.J. 1361, 1376-77 (1988), and the presumption would help resolve constitutional doubts about the congruence and proportionality of otherwise questionable exercises of the enforcement

nation provisions of the Constitution reach state actions that adversely impact minorities only if they were undertaken “because of” the race, sex, religion, etc., of the disadvantaged persons.<sup>14</sup> It is also clear that good intentions are generally not a defense to the State’s use of race as a decisional criterion. Racial classifications face strict scrutiny whether drawn to oppress a historically disadvantaged group or to help it achieve socioeconomic parity.<sup>15</sup> Nor may the government use protected-class status as a proxy in furtherance of normatively unrelated objectives.<sup>16</sup> Even if there is a robust statistical correlation between class membership and some harder-to-observe trait or behavior, the Constitution disallows use of the proxy unless the government has a compelling objective and no other way to achieve it.<sup>17</sup>

The point is, a reasonably well-settled body of law about what kinds of racial discrimination render state action presumptively unconstitutional already exists. To be sure, some important questions remain open. Are formally race-neutral actions taken “because of” the actor’s subconscious racial biases presumptively unconstitutional? (I would say yes, but as a matter of positive law, the answer is uncertain.<sup>18</sup>) Are

power, *see* Elmendorf, *supra* note 1, at 414, 428-30. *But see* Bertrall L. Ross II, *Against Constitutional Mainstreaming*, 78 U. CHI. L. REV. 1203, 1206-07 (2011) (making the case against reading the Voting Rights Act to conform to constitutional norms).

<sup>14</sup> *See, e.g.*, *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 272 (1979) (stating that a law violates the Equal Protection Clause “only if [a disproportionate impact] can be traced to a discriminatory purpose”); *Washington v. Davis*, 426 U.S. 229, 239 (1976) (“[O]ur cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional solely because it has a racially disproportionate impact.”).

<sup>15</sup> *See* *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 224 (1995) (overruling *Metro Broadcasting v. FCC*, 497 U.S. 547 (1990), and holding that “all racial classifications . . . must be strictly scrutinized”); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 490-91 (1989) (holding that the use of a racial classification for benign or compensatory purposes does not rescue the classification from strict scrutiny).

<sup>16</sup> *See, e.g.*, *United States v. Virginia*, 518 U.S. 515, 550 (1996) (stating that “generalizations about ‘the way women are,’ [and] estimates of what is appropriate for *most women*, no longer justify denying opportunity to women whose talent and capacity place them outside the average description”).

<sup>17</sup> *See, e.g.*, *Johnson v. California*, 543 U.S. 499, 507 (2005) (applying strict scrutiny to California’s practice of segregating inmates by race during a sixty-day evaluation period, notwithstanding undisputed evidence concerning violent prison gangs organized along racial lines); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 139 n.11 (1994) (stating that gender-based classifications that utilize stereotypes violate the Equal Protection Clause “even when some statistical support can be conjured up for the generalization”).

<sup>18</sup> The uncertainty exists because the Court has both (1) frequently treated the “because of race” standard as if it were an “intentional discrimination” standard, *e.g.*, *Davis*, 426 U.S. at 240, and (2) long insisted that the Equal Protection Clause is centrally concerned with stereotyping, *see supra* text accompanying notes 16-17, which operates

formally race-neutral actions with a racially integrative purpose presumptively unconstitutional, or are they exempt from strict scrutiny because the State's use of race was ameliorative and concealed? (Again, the law is uncertain, though Justice Kennedy seems to think it is often permissible to pursue racial integration objectives using race-neutral means.<sup>19</sup>) Eventually these questions will be answered, and the courts' understanding of what constitutes objectionable race-biased decisionmaking for purposes of Section 2 should evolve accordingly.

Reading Section 2 in this way would not make it redundant with the Fourteenth and Fifteenth Amendments. Section 2 on my account provides additional protections. Most obviously, it alleviates the evidentiary burden on plaintiffs. Litigants suing under Section 2 must establish only a significant likelihood of bias, rather than prove bias more likely than not.<sup>20</sup> Section 2 also enables plaintiffs to obtain prophylactic or quasi-compensatory relief for a class of constitutional violations that are otherwise nonjusticiable—specifically, election out-

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on an automatic or subconscious level. Several Justices have suggested that the Equal Protection Clause reaches subconsciously discriminatory state action. *See, e.g., Adarand*, 515 U.S. at 274 (Ginsburg, J., dissenting, joined by Breyer, J.) (“Bias both conscious and unconscious, reflecting traditional and unexamined habits of thought, keeps up barriers that must come down if equal opportunity and nondiscrimination are ever genuinely to become this country's law and practice.”). However, the Court has never squarely faced this question.

<sup>19</sup> *See, e.g., Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 788-90 (2007) (Kennedy, J., concurring) (identifying several contexts in which race-conscious actions by a school board are permissible). For a careful analysis of the constitutional status of race-neutral measures designed to enhance opportunities for underrepresented racial groups, see Kim Forde-Mazrui, *The Constitutional Implications of Race-Neutral Affirmative Action*, 88 GEO. L.J. 2331 (2000).

<sup>20</sup> *See supra* note 9 and accompanying text. I concede that requiring plaintiffs to make a significant-likelihood showing could substantially increase their evidentiary burden, relative to the status quo in circuits that do not presently require any showing concerning the reasons for race-correlated voting patterns. However, the marginal cost of this requirement should not be prohibitive. As our society becomes more multiethnic and our neighborhoods become more integrated, the conventional statistical techniques for estimating racial voting patterns on the basis of aggregate data break down. *See* D. James Greiner, *Re-Solidifying Racial Bloc Voting: Empirics and Legal Doctrine in the Melting Pot*, 86 IND. L.J. 447, 451 (2011). Greiner argues convincingly that plaintiffs will need to combine aggregate data with individual-level data, collected through exit polls, in order to reliably estimate racial voting patterns. *See id.* at 481-84 (discussing alternative quantitative measures to discern legally cognizable discrimination). In the exit poll, researchers could include questions about the respondent's racial beliefs, questions that tap racial resentment, and experimental vignettes designed to detect the respondent's use of candidate race as a decisional criterion. As well, courts could develop burden-shifting frameworks that presume race-biased voting in regions where the white population scores high on measures of racial bias.

comes that are unconstitutional because the electorate made its choice “because of” race.<sup>21</sup>

I readily acknowledge, however, that reading Section 2 to require a showing of race-biased decisionmaking and using the Fourteenth and Fifteenth Amendments to delimit racial bias will not relieve the courts of tough judgment calls. My account of Section 2 clarifies how the statute should be understood broadly, and it rules out some conceptions of what constitutes a race-biased decision for purposes of the statute, such as definitions premised on the impact of the decision rather than on the behavior and beliefs of the decisionmakers.<sup>22</sup> However, my account does not instruct courts how to exercise their considerable remaining discretion.

To illustrate the point, consider five hypothetical cases, each arising in a biracial jurisdiction. In each case, plaintiffs challenge at-large elections and seek a single-member district remedy. In each case, plaintiffs make a showing of race-biased decisionmaking by the electorate (more precisely, by a portion of the electorate sufficient to control the outcome of at-large elections in the jurisdiction). Plaintiffs do not allege that the State adopted or maintained the at-large system for discriminatory reasons.

The first case is brought by black voters, who show that white candidates regularly make racial appeals and regularly win, owing to deep-seated racial animus on the part of the white majority. The second and third cases are also brought by black voters, but here the showings of majority-group bias are rather different. In one case, whites are reluctant to vote for black candidates not because of animus per se, but because white voters assume that black candidates are generally less honest and hardworking than white candidates. In the other case, whites resist voting for black candidates because they think—and let’s assume they are correct—that black candidates are more liberal on average than white candidates.

In the fourth case, white voters are willing to support black candidates, but only conservative black candidates who promise to dismantle social programs that disproportionately benefit black citizens. The evidence shows that whites in the jurisdiction have abnormally high

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<sup>21</sup> See Elmendorf, *supra* note 1, at 430-47 (explaining why such election outcomes are unconstitutional and why “electorate motive” challenges to the result of elections for representatives should nonetheless be deemed nonjusticiable).

<sup>22</sup> See *id.* at 428 (stating that “a pure disparate impact test . . . would be a very clumsy device” for identifying electoral arrangements that are unconstitutionally discriminatory).

levels of what some social scientists call “racial resentment.”<sup>23</sup> They believe that black people no longer face significant barriers to opportunity and that problems afflicting black communities are largely due to culture, poor choices, or weak effort.

In the fifth case, the table is turned. The plaintiffs are white conservatives who cannot elect their candidates of choice because the jurisdiction’s at-large elections are controlled by a cross-racial coalition of lower-income blacks who vote their economic interests and affluent whites who vote their “racial guilt,” as the plaintiffs style it. Plaintiffs argue that if white members of the majority coalition were not so focused on the racial consequences of redistributive programs, then the plaintiffs would have a better chance of uniting with them and electing the plaintiffs’ candidates of choice. The plaintiffs seek replacement of at-large elections with single-member districts, and demand that at least one of the new districts be “majority white conservative” in terms of its citizen voting-age population.

In each of the above scenarios, plaintiffs’ efforts to secure representation are hindered by what can be described as race-biased decision-making by the majority-group electorate. Election outcomes “would have been different had the race of persons considered by the decisionmaker[s] been different.”<sup>24</sup> Limiting Section 2 to the types of discrimination that presumptively violate the Constitution when undertaken by state actors probably excludes the fifth claim,<sup>25</sup> but not the others.<sup>26</sup>

<sup>23</sup> For a review of the literature on racial resentment, including the debate over whether commonly used statistical measures of racial resentment capture race-specific views or ideological conservatism, see Leonie Huddy & Stanley Feldman, *On Assessing the Political Effects of Racial Prejudice*, 12 ANN. REV. POL. SCI. 423 (2009).

<sup>24</sup> Elmendorf, *supra* note 1, at 384.

<sup>25</sup> The discrimination in the fifth case is facially race neutral and designed to better the socioeconomic opportunities and conditions of historically disadvantaged groups. This type of discrimination (or affirmative action), when undertaken by the State, is generally thought permissible. See *supra* note 19. To the extent that the fifth case involves a use of race generally permitted to state actors, my Article’s shorthand definition of race-biased decisionmaking was overbroad. I should have made more explicit my equation of race-biased decisionmaking with the uses of race that trigger strict scrutiny if the decisionmaker is a state actor.

<sup>26</sup> The fourth case is also a close call. Though it would certainly be unconstitutional for the government to eliminate a social program “because of” the fact that most beneficiaries are black, it would not be unconstitutional to eliminate the program “because of” the belief that hard work is all it takes to get ahead in our society. Whether a court finds race-biased decisionmaking in the fourth case will depend on how it adjudicates the long-simmering dispute among social scientists about whether “racial resentment” metrics capture race discrimination or ideological conservatism. For a review of this debate, see Huddy & Feldman, *supra* note 23, at 425.

Does it follow that courts must decide the other cases the same way? No. Section 2, properly understood, delegates authority to the courts to develop a common law of racially fair elections. So long as the courts respect the basic normative and evidentiary guideposts outlined above,<sup>27</sup> they have discretion to draw further normative or practical distinctions as they see fit.<sup>28</sup> A court could reasonably hold, for example, that minority plaintiffs challenging the design of legislative districts must show a greater degree of exclusion—i.e., lack of representation in proportion to the plaintiff group’s population share—if their representational impairment owes to white voters’ use of race as a proxy for ideology, as opposed to animus or negative stereotypes about minorities’ competence or integrity.<sup>29</sup> A court might even decide that if the plaintiffs’ only evidence of discrimination concerns statistically valid uses of race as a proxy for ideology, then plaintiffs may only seek remedies designed to improve voters’ access to non-racial information about candidates, as opposed to reforming the basic arrangements for translating votes into representation.<sup>30</sup> Such holdings, once made, would not be set in stone. Rather, on the common law understanding of Section 2, the judiciary may revisit these holdings as conditions change and as appellate courts develop a better feel for how their doctrinal innovations work in practice.

I wrote my Article to answer a three-pronged critique of Section 2. The critique holds that Section 2 is conceptually opaque, likely to exacerbate racial conflict, and probably unconstitutional. I provided a fresh account of Section 2’s constitutional function,<sup>31</sup> one that aligns nicely with the conservative center’s understanding of the Equal Pro-

<sup>27</sup> See *supra* text accompanying notes 7-12.

<sup>28</sup> To be sure, some such distinctions will be more defensible than others. Following the common law method, the courts should proceed incrementally. Additionally, out of respect for legislative supremacy, the courts should be especially solicitous of claims that resemble the paradigmatic instances of vote dilution at the time that Congress adopted the Section 2 results test. And since the Section 2 results test incorporates by reference previous Supreme Court decisions, see Elmendorf, *supra* note 1, at 409-10, the courts should pay attention to what the Supreme Court said in those cases as they apply the results test.

<sup>29</sup> For a discussion of voters’ use of racial cues as a proxy for other traits, see Monika L. McDermott, *Race and Gender Cues in Low-Information Elections*, 51 POL. RES. Q. 895 (1998). For a review of actual cross-racial differences in policy preferences, see Donald R. Kinder & Nicholas Winter, *Exploring the Racial Divide: Blacks, Whites, and Opinion on National Policy*, 45 AM. J. POL. SCI. 439 (2001).

<sup>30</sup> For a brief discussion of potential informational remedies in Section 2 cases, see Elmendorf, *supra* note 1, at 443-44.

<sup>31</sup> See *id.* at 428-47 (discussing the problem of election outcomes that are unconstitutional because of race-biased voting, yet not judicially remediable in constitutional litigation).

tection Clause.<sup>32</sup> I explained that the claim that Section 2 causes racial conflict has been undermined by political scientists' findings about the consequences of minority electoral success,<sup>33</sup> and I showed that Section 2 can support a heretofore unrecognized cause of action against electoral arrangements that unnecessarily induce or sustain voting on the basis of racial considerations.<sup>34</sup> Finally, I demonstrated that Section 2, though often regarded as inscrutable, establishes normative, evidentiary, and legal-change norms that provide significant guidance to the courts.<sup>35</sup>

The careful reader who has worked through my Article, the Responses by Professors Charles and Fuentes-Rohwer, and this Reply will ultimately agree, I hope, with two and a half of my conclusions. Section 2 is constitutional, even granting the normative and jurisprudential premises of the conservative center. Section 2 offers more salve than sting when it comes to racial conflict. And—here dear reader please meet me halfway—Section 2, though leaving much unresolved, contains substantially more normative structure than its critics have perceived.

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<sup>32</sup> Professor Fuentes-Rohwer is absolutely correct in remarking that my account of Section 2 is “tailor-made for Justice Kennedy.” Luis Fuentes-Rohwer, Response, *Justice Kennedy to the Rescue?*, 160 U. PA. L. REV. PENNUMBRA 209, 216 (2012), <http://www.pennumbra.com/responses/01-2012/FuentesRohwer.pdf>.

<sup>33</sup> See Elmendorf, *supra* note 1, at 397 (summarizing research showing that “the election of out-group candidates tends to reduce biased voting by members of the in-group and to diminish negative stereotyping of the out-group, so long as the out-group officeholders have incentives to respond to in-group concerns”).

<sup>34</sup> See *id.* at 420-21, 442 (arguing that plaintiffs should be able to bring “depolarization claims” under Section 2).

<sup>35</sup> See *id.* at 417-47.