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**GOING, GUTTED, GONE?
WHY SECTION 2 OF THE VOTING RIGHTS ACT IS IN DANGER,
AND WHAT STATES CAN DO ABOUT IT**

*Eric S. Lynch**

ABSTRACT

Since the Supreme Court's decision to gut the Coverage Formula of the Voting Rights Act (VRA) in Shelby County v. Holder, election lawyers and academics have searched for a different way to protect minority voters. Many have turned to Section 2 of the VRA which prohibits intentional and effectual minority vote dilution. But a small contingency at the Supreme Court has long argued—beginning with Justice Clarence Thomas's concurrence in Holder v. Hall—that Section 2 cannot be used to challenge the redistricting process. Although Section 2 has withstood this opposition, there is a renewed concern that recent changes in the Supreme Court's composition is breathing new life into this debate and foreshadowing Section 2's demise.

This Article explores that concern, and considers whether states are presently prepared to protect minority voting rights without Section 2. First, it explains Section 2's purpose and examines the merit of public concern regarding Section 2. Next, this Article supposes—to borrow from baseball vernacular—that Section 2 is “going, gutted, gone,” and thus creates four categories to represent how states presently protect minority voters. Then it considers how the Court might do away with Section 2, and concludes that states are largely unprepared to be without Section 2's minority voter protection in the legislative redistricting context. Finally, this Article surveys the methods used in states that have minority voter protections beyond what appear in Section 2 to offer as possible solutions in jurisdictions that need additional minority voter protections.

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TABLE OF CONTENTS

INTRODUCTION	1443
I. EXPLAINING SECTION 2 AND ITS UNCERTAIN FUTURE.....	1446
A. <i>Legal Analysis to Section 2 Claims</i>	1447
B. <i>Why Section 2 May Soon Be Gone</i>	1448
II. THE FOUR CATEGORIES OF MINORITY VOTER PROTECTION	1452
III. HOW THE COURT COULD ELIMINATE SECTION 2	1454
A. <i>Scenario 1: Section 2 is Unconstitutionally Applied to Redistricting</i>	1454
B. <i>Scenario 2: Federal Minority Voters Protections are Gutted</i>	1456
C. <i>Commentary on Scenarios 1 and 2</i>	1456
IV. WHAT STATES CAN DO TO PREVENT MINORITY VOTER DISCRIMINATION	1457
A. <i>State Constitutional Hook</i>	1458
B. <i>Mini-VRAs</i>	1460
C. <i>Multimember Districts</i>	1462
D. <i>Independent Redistricting Commissions</i>	1464
CONCLUSION	1465
APPENDIX	1467

INTRODUCTION

Not so long ago, the United States government required certain states and local jurisdictions to preclear any changes to election standards, practices, and procedures.¹ The Voting Rights Act of 1965 (“VRA”)² granted the federal government this authority to address the country’s history of minority voter discrimination.³ Section 5 of the VRA assigned the federal government its preclearance authority,⁴ but this oversight was fueled by Section 4(b)⁵ (the “Coverage Formula”) which designated the jurisdictions subject to preclearance.⁶

The Coverage Formula was crucial to the federal government’s ability to protect minority voters because it served as the instrument to bring each jurisdiction under Section 5. Once subject to preclearance, the federal government could ensure that no new election standards, practices, and procedures had a retrogressive effect on minority voters’ ability to participate in elections, and that no laws written with a discriminatory purpose could be enacted.⁷ This system worked—the VRA was reauthorized various times over the next forty years⁸ as the federal government processed thousands of preclearance requests.⁹

But in 2009, the Supreme Court telegraphed the Coverage Formula’s demise. In *Northwest Austin Municipal Utility District Number One vs. Holder*, the majority upheld Section 5 of the VRA but noted that it “impose[d] substantial federalism costs” and “differentiate[d] between the States, despite [the United States’] historic tradition that all the States enjoy ‘equal sovereignty.’”¹⁰ The Court noted that blatantly discriminatory election administration practices were a rarity compared to when the VRA was

¹ Voting Rights Act of 1965, Pub. L. No. 89-110, §§ 4–5, 79 Stat. 437, 438–39 (codified as amended at 52 U.S.C. §§ 10303–10304 (2012)).

² *Id.*

³ See Eric S. Lynch, Note, *Trusting the Federalism Process Under Unique Circumstances: United States Election Administration and Cybersecurity*, 60 WM. & MARY L. REV. 1979, 1992–93 (2019) (outlining the mechanics of VRA enforcement).

⁴ 52 U.S.C. § 10304.

⁵ 52 U.S.C. § 10303(b).

⁶ *Id.*

⁷ DANIEL P. TOKAJI, ELECTION LAW IN A NUTSHELL 104–08 (2d ed. 2017).

⁸ See Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 3, 96 Stat. 131, 134 (codified as 42 U.S.C. 1973b (2012)); Voting Rights Act of 1965, Amendments, Pub. L. 94-73, § 206, 89 Stat. 400, 402 (1975) (codified as 42 U.S.C. §§ 1973–1973d, 1973k (2012)); Voting Rights Act Amendments of 1970, Pub. L. 91-285, § 2, 84 Stat. 314, 314–15.

⁹ See TOKAJI, *supra* note 7, at 28, 103.

¹⁰ *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 202–03 (2009) (quoting *United States v. Louisiana*, 363 U.S. 1, 16 (1960)).

enacted, and thus questioned whether covered jurisdictions still required federal oversight.¹¹

Four years later, the Supreme Court finally gutted Section 5 in *Shelby County v. Holder*.¹² The Court found that the Coverage Formula was based on “decades-old data and eradicated practices”—like the use of literacy tests and poll taxes to discriminate against racial minority voters, and voter registration and turnout data from the 1960s to the early 1970s—even though circumstances had significantly improved.¹³ Since the “[Coverage Formula]’s ‘current burdens’ [were not] justified by ‘current needs,’ and any ‘disparate geographic coverage’ [had to] be ‘sufficiently related to the problem that it target[ed],” the Court held that the Coverage Formula was unconstitutional.¹⁴

Since *Shelby County*, election lawyers have debated how the VRA might be redirected to continue serving as a robust protector of minority voters in the democratic process, with an emphasis on Section 2 of the VRA.¹⁵ Section 2 prohibits intentional and effectual minority vote dilution.¹⁶ But a small contingency within the Supreme Court has argued that Section 2 cannot be

¹¹ See *id.* at 203.

¹² *Shelby County v. Holder*, 570 U.S. 529 (2013).

¹³ *Id.* at 551. The Court recognized that “such tests [had] been banned nationwide for over 40 years. And voter registration and turnout numbers in the covered States [had] risen dramatically in the years since.” *Id.* (citations omitted).

¹⁴ *Id.* at 551 (quoting *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 203 (2009)). The Court notably left the door open to Congress instituting an updated formula, see *id.* at 557, but Congress has yet to act on that option.

¹⁵ Voting Rights Act of 1965, Pub. L. No. 89-110, § 2, 79 Stat. 437, 437 (codified as amended at 52 U.S.C. § 10301 (2012)); see, e.g., Dale E. Ho, *Something Old, Something New, or Something Really Old? Second Generation Racial Gerrymandering Litigation as Intentional Racial Discrimination Cases*, 59 WM. & MARY L. REV. 1887 (2018) (arguing that Section 2 be used to bring more intent-based discrimination claims); Daniel P. Tokaji, *Applying Section 2 to the New Vote Denial*, 50 HARV. C.R.-C.L. L. REV. 439 (2015) (advocating a three-part test focusing on disparate impact to challenge voting practices and procedures under Section 2); Jesus N. Joslin, Comment, *Navigating the Post-Shelby Landscape: Using Universalism to Augment the Remaining Power of the Voting Rights Act*, 19 SCHOLAR 217 (2017) (advocating that states adopt practices and procedures that protect voting rights—like automatic voter registration, online voting, and expanding early voting—rather than rely on the VRA); Edward K. Olds, Note, *More Than “Rarely Used”: A Post-Shelby Judicial Standard for Section 3 Preclearance*, 117 COLUM. L. REV. 2185 (2017) (explaining how preclearance can be reanimated through Section 3 of the VRA).

¹⁶ 52 U.S.C. § 10301; see *infra* Part I.A (elaborating on Section 2’s scope and function). There are two different kinds of claims under Section 2: vote denial and vote dilution. See Tokaji, *supra* note 15, at 442. The former “concerns impediments to voting and the counting of votes,” and the latter “implicate[s] the value of *participation* [, for example] being able to register, vote, and have one’s vote counted.” *Id.* (emphasis in original). Since this Article focuses on redistricting, the analysis exclusively considers Section 2 vote dilution claims.

used to challenge the redistricting process.¹⁷ Section 2 has withstood this opposition and continues to be an important tool to combat minority voter suppression.¹⁸ But there is a renewed concern that recent changes in the Supreme Court’s composition are breathing new life into this opposition and foreshadow Section 2’s demise similar to how *Northwest Austin* signaled the end of the Coverage Formula.¹⁹

This Article explores that concern, and considers whether states are prepared to protect minority voting rights without Section 2. First, this Article explains Section 2’s purpose and examines the merit of public concern regarding Section 2.²⁰ Next, it supposes that—to borrow from baseball vernacular²¹—that Section 2 is “going, gutted, gone,” and thus creates four categories to represent how states presently protect minority voters.²² Then it considers how the Court might do away with Section 2, and concludes that states are largely unprepared to be without Section 2’s minority voter protection in the legislative redistricting context.²³ Finally, this Article surveys the methods used in states that have minority voter protections beyond what appear in Section 2 to offer as possible solutions in jurisdictions that need additional minority voter protections.²⁴

¹⁷ See *Holder v. Hall*, 512 U.S. 874, 892 (1994) (Thomas, J., concurring) (arguing that the “size of a governing body” is not within the terms of the Section 2); *infra* notes 522–666 and accompanying text (considering Justice Thomas’s continuing opposition to race-conscious districting).

¹⁸ See, e.g., Jessica Cassella, Note, *Using Section 2 of the Voting Rights Act to Fight Voter Suppression Tactics After Shelby County v. Holder Without a New Section 4(b) Formula*, 42 HASTINGS CONST. L.Q. 161 (2014) (arguing that reframing Section 2 can replace a gutted Coverage Formula to challenge voter suppression tactics).

¹⁹ See *infra* Part I.B. Although the circumstances are similar, the Coverage Formula and Section 2 differ in their legal application. Whereas the Coverage Formula’s minority voter protections only applied to those covered jurisdictions, see Voting Rights Act of 1965, Pub. L. No. 89-110, § 4, 79 Stat. 437, 438 (codified as amended at 52 U.S.C. § 10303(b) (2012)), Section 2 protections extend to every “State and political subdivision,” § 10301(a). Thus, the termination of Section 2 could have even more widespread implications than the Coverage Formula.

²⁰ See *infra* Part I.

²¹ Former Cincinnati Reds broadcaster Harry Hartman famously described homeruns as “Going, Going, Gone!” GREG RHODES, CINCINNATI REDS HALL OF FAME HIGHLIGHTS 106 (2011).

²² See *infra* Part II.

²³ See *infra* Part III. This Article focuses its analysis on state-legislative redistricting. Notably, this means that this Article does not review or analyze any municipal, school district, county, or federal-congressional redistricting practices.

²⁴ See *infra* Part IV. This Article concentrates on what states can do to further protect minority voters through redistricting, but it recognizes that there are other means to protect the democratic process besides the VRA. See, e.g., *Anderson v. Celebrezze*, 460 U.S. 780, 786 n.7 (1983) (finding that Ohio’s early petition filing deadline imposed on third-party candidates violated the First and Fourteenth Amendments); Ben F.C. Wallace, Note, *Charting Procedural Due Process and the Fundamental Right to Vote*, 77 OHIO ST. L.J. 647 (2015) (examining procedural due process as a tool to protect voting rights).

I. EXPLAINING SECTION 2 AND ITS UNCERTAIN FUTURE

Section 2 began as an original VRA provision in 1965.²⁵ This iteration only prohibited election standards, practices, and procedures that *intentionally* denied equal access to the political process.²⁶ Although this may now seem like an oversight, the drafters' focus on intentional discrimination is best understood by considering the rampant race-based voter intimidation that preceded the VRA's passage.²⁷

Congress revised Section 2 several times over the years.²⁸ The current version now forbids both *intentional and effectual* voter discrimination:

(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 4(f)(2) [52 USCS § 10303(f)(2)], as provided in subsection (b).

(b) A violation of subsection (a) 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) 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.²⁹

In short, Section 2 “prevent[s] the inequitable dilution of minority communities’ voting power where alternative districts might otherwise allow minorities to maintain an effective opportunity to elect candidates of

²⁵ Voting Rights Act of 1965, Pub. L. No. 89-110, § 2, 79 Stat. 437, 437 (codified as amended at 52 U.S.C. § 10301 (2012)).

²⁶ *See id.* (“No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision *to* deny or abridge the right of any citizen of the United States to vote on account of race or color.”) (emphasis added).

²⁷ *See* Lynch, *supra* note 3, at 1984–94 (providing a history of African-American disenfranchisement that led to the passage of the VRA).

²⁸ *See* Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 3, 96 Stat. 131, 134 (codified as 42 U.S.C. 1973); Voting Rights Act of 1965, Amendments, Pub. L. 94-73, § 206, 89 Stat. 400, 402 (1975) (codified as 42 U.S.C. §§ 1973–1973d, 1973k (2012)); Voting Rights Act Amendments of 1970, Pub. L. 91-285, § 2, 84 Stat. 314, 314–15.

²⁹ 52 U.S.C. § 10301 (first emphasis added). Subsection (a) of this statute references a different statute which specifically protects language minority voters. *See* 52 U.S.C. § 10303(f)(2) (2012) (“No voting qualification . . . or prerequisite to voting, or standard practice, or procedure shall be imposed . . . because [the citizen] is a member of a language minority group.”)

choice.”³⁰ This is a legal tool to prevent the cracking and packing phenomenon,³¹ or “vote dilution” as a catch-all term.³²

This Part both summarizes how courts analyze Section 2 claims, and why voting rights advocates worry that it may not be around much longer.

A. *Legal Analysis to Section 2 Claims*

The Court explained how a plaintiff can use Section 2 to challenge a districting scheme in *Thornberg v. Gingles*.³³ A successful challenge relies on the three *Gingles* conditions: compactness,³⁴ political cohesion,³⁵ and ability to elect.³⁶ Since its initial appearance, the Court has refined the *Gingles* analysis in various cases to explain its many nuances.³⁷

Ultimately, even if a plaintiff survives the *Gingles* analysis, the challenged map may still comply with federal law. Under Section 2, a vote dilution claim is also tested under the “totality of circumstances.”³⁸ *Gingles* instructs that courts may use the “Senate factors”³⁹ to conduct this examination.⁴⁰

³⁰ Justin Levitt, *Quick and Dirty: The New Misreading of the Voting Rights Act*, 43 FLA. ST. U. L. REV. 573, 586 (2016).

³¹ “Cracking” is when a minority voting group lives in one area but the redistricting process splits them into several neighboring districts so as to decrease their ability to select a candidate of choice in any of those districts. Lauren Payne-Riley, *A Deeper Look at Gerrymandering*, POLICYMAP: MAPCHATS BLOG (Aug. 1, 2017), <https://www.policymap.com/2017/08/a-deeper-look-at-gerrymandering/>. “Packing” is when map drawers concentrate a minority voting group into one district to diminish their voting power in the surrounding districts. *Id.* The best way to understand something is to do it. So, any reader that would like to learn more about packing and cracking should visit USC ANNEBERG CTR., REDISTRICTING GAME, <http://www.redistrictinggame.org/index.php> (last visited July 25, 2020), for an excellent interactive educational tool.

³² See *supra* note 16 (defining “vote dilution”).

³³ See *Thornburg v. Gingles*, 478 U.S. 30, 50–51 (1986) (describing the *Gingles* conditions as a “necessary preconditions” to establish a vote dilution claim).

³⁴ See *id.* at 50 (“First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district.”).

³⁵ See *id.* at 51 (“Second, the minority group must be able to show that it is politically cohesive. If the minority group is not politically cohesive, it cannot be said that the selection of a multimember electoral structure thwarts distinctive minority group interests.”).

³⁶ See *id.* (“Third, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it—in the absence of special circumstances, such as the minority candidate running unopposed . . .—usually to defeat the minority’s preferred candidate.”).

³⁷ See TOKAJI, *supra* note 7, at 128–35, for a summary of the caselaw that defined vague terms like “sufficiently large and geographically compact,” “politically cohesive,” and “totality of the circumstances.”

³⁸ 52 U.S.C. § 10301(b) (2012).

³⁹ The name derives from a Senate report that accompanied the Voting Rights Act Amendment of 1982. See S. REP. NO. 97-417, at 28–29 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 205–07 (enumerating the typical factors a plaintiff may show to establish a vote dilution violation).

⁴⁰ *Gingles*, 478 U.S. at 44–45.

The Senate factors include circumstances like the jurisdiction's history of race-based voting discrimination, whether campaigns in that jurisdiction included overt or subtle appeals to racism, and the degree to which elected officials had been unresponsive to the minority group's concerns.⁴¹

If the Section 2 claim is successful, then the court enjoins the map and compels the jurisdiction to redraw the lines⁴²—possibly transforming the jurisdiction into a “majority-minority district.”⁴³ If the claim fails, then the district remains as-is.⁴⁴

B. *Why Section 2 May Soon Be Gone*

There are two reasons to believe that Section 2 may be on its last legs. First, a series of Supreme Court opinions beginning with *Holder v. Hall*. And second, recent changes in the Supreme Court's membership. To a degree, these are two independent considerations, but Section 2's longevity can be reasonably questioned when studying what they mean together.

As suggested earlier, the series of Supreme Court opinions begins in 1994 with *Holder v. Hall*.⁴⁵ In this case, the Court considered whether Section 2 applied to alterations in the form of government.⁴⁶ A county in Georgia planned to replace its commissioner—who performed all legislative and executive functions—with a commission consisting of representatives from five single-member districts and one chairperson elected at-large.⁴⁷ Minority voters contended that Section 2 required the new commission to be of a sufficient size so that the County's black voters—roughly 20% of the eligible voting population—constituted a majority in at least one of the single-member districts.⁴⁸

The Court reviewed Plaintiffs' Section 2 vote dilution claim and reasoned that “a court must find a reasonable alternative practice as a benchmark

⁴¹ S. REP. NO. 97-417, at 28–29.

⁴² See, e.g., *Gingles*, 478 U.S. at 42, 80 (affirming the district court's injunction of a redistricting plan).

⁴³ “Majority-minority districts” are districts in which “a single racial or language minority constitutes a majority of the population.” *The Redistricting Glossary*, NAT'L CONF. ST. LEGISLATURES, <http://www.ncsl.org/research/redistricting/the-redistricting-lexicon-glossary.aspx> (last updated Aug. 23, 2018).

⁴⁴ See, e.g., *Abbott v. Perez*, 138 S. Ct. 2305, 2313–14 (2018) (finding that all but one of the legislative districts reviewed were lawful).

⁴⁵ *Holder v. Hall*, 512 U.S. 874, 876 (1994) (plurality opinion).

⁴⁶ *Id.* at 876. The appeal included Fourteenth and Fifteenth Amendment challenges, but the Court remanded the case for consideration on these constitutional claims. *Id.* at 877, 885.

⁴⁷ *Id.* at 876–77. For further discussion on single member districts and at-large schemes, see *infra* Part IV.C.

⁴⁸ *Holder*, 512 U.S. at 876, 878.

against which to measure the existing voting practice.”⁴⁹ Plaintiffs tried to establish a benchmark to compare against the County’s new municipal governing structure, but the Court rejected the attempt and found that no clear benchmark could be developed.⁵⁰ Thus, the Court held that the new form of government “[could not] be challenged as dilutive under [Section] 2.”⁵¹

Justice Clarence Thomas’s concurring opinion criticized the Court’s Section 2 jurisprudence.⁵² He expressed discomfort with the Court positioning itself to make political judgements on reapportionment,⁵³ contempt for the assumption that all members of a minority group will vote in the same way,⁵⁴ and concern that permitting race-conscious line drawing to create majority-minority districts would stoke racial tension.⁵⁵

In the end, Justice Thomas, joined by Justice Antonin Scalia, agreed with the Court’s judgment but disagreed with its reasoning.⁵⁶ Justice Thomas argued that challenging the size of a governing body is a non-starter under Section 2 because it is not an election “standard, practice or procedure.”⁵⁷

⁴⁹ *Id.* at 880. The Court further reasoned that “[i]n order to decide whether an electoral system has made it harder for minority voters to elect the candidates they prefer, a court must have an idea in mind of how hard it should be for minority voters to elect their preferred candidates under an acceptable system.” *Id.* (citing *Thornburg v. Gingles*, 478 U.S. 30, 88 (1986) (O’Connor, J., concurring in judgment)).

⁵⁰ *See id.* at 881–82, 885 (rejecting Plaintiffs’ reasoning for setting the benchmark for comparison to a hypothetical five-member commission and finding that Plaintiffs “provide[d] no acceptable principles for deciding [benchmarks in] future cases”).

⁵¹ *Id.* at 881.

⁵² *Id.* at 891–92 (Thomas, J., concurring). For an in-depth analysis on Justice Thomas’s concurring opinion in *Holder*, see Scott D. Gerber, *Justice Clarence Thomas and the Jurisprudence of Race*, 25 S.U. L. REV. 43, 65–72 (1997).

⁵³ *Holder*, 512 U.S. at 893–94 (“An examination of the current state of our decisions should make obvious a simple fact that for far too long has gone unmentioned: 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.”).

⁵⁴ *Id.* at 904–06. On this point, Justice Thomas scolded the Court: “The assumptions upon which our vote dilution decisions have been based should be repugnant to any nation that strives for the ideal of a color-blind Constitution.” *Id.* at 905–06.

⁵⁵ *Id.* at 906–07 (“As a practical political matter, our drive to segregate political districts by race can only serve to deepen racial divisions by destroying any need for voters or candidates to build bridges between racial groups or to form voting coalitions. ‘Black-preferred’ candidates are assured election in ‘safe black districts’; white-preferred candidates are assured election in ‘safe white districts.’ Neither group needs to draw on support from the other’s constituency to win on election day.”).

⁵⁶ *Id.* at 891.

⁵⁷ *See id.* at 892 (“The broad reach we have given [Section 2] might suggest that the size of a governing body, like an election method that has the potential for diluting the vote of a minority group, should come within the terms of the Act. But the gloss we have placed on the words ‘standard, practice, or procedure’ in cases alleging dilution is at odds with the terms of the statute and has proved utterly unworkable in practice.”).

To Justice Thomas, “an ‘effective’ vote [under the VRA] is merely one that has been cast and fairly counted.”⁵⁸ Thus, he proposed that Section 2 be read only to review voting practices that affect minority citizens’ access to the ballot box,⁵⁹ and not to judge election-related procedures, such as “the selection of one set of districting lines over another.”⁶⁰

Since *Holder v. Hall*, Justice Thomas has continued to argue this point during his tenure on the Court.⁶¹ He consistently opposes race-conscious districting—whether to crack minority voter populations through gerrymandering or pack minority voters into majority-minority districts—and he opposes Section 2 being used as justification.⁶²

Most recently, Justice Thomas revived this opinion in *Abbott v. Perez* where the Court considered whether Texas’s state and federal districting maps constituted vote dilution in violation of Section 2.⁶³ The lower court held that the State Legislature packed a large group of geographically compact Hispanic voters into a series of neighboring districts such that they were a minority in each instance, and thus could not elect their candidate of choice.⁶⁴ But the Supreme Court reversed, finding that the lower court “disregarded the presumption of legislative good faith” and unfairly credited Texas’s line drawers with racial intent.⁶⁵ Justice Thomas filed a concurring opinion reasserting his position that Section 2 should not apply to racial gerrymandering claims.⁶⁶

⁵⁸ *Id.* at 919.

⁵⁹ *See id.* at 922 (referring to “all manner of registration requirements, the practices surrounding registration . . . , the locations of polling places, the times polls are open, the use of paper ballots as opposed to voting machines, and other similar aspects of the voting process”).

⁶⁰ *Id.* at 923 (referring also to “the choice of a multimember over a single-member districting system” and “any other such electoral mechanism or method of election that might reduce the weight or influence a ballot may have in controlling the outcome of an election”).

⁶¹ *See, e.g.*, *Ala. Legis. Black Caucus v. Alabama*, 135 S. Ct. 1257, 1281 (2015) (Thomas, J., dissenting) (citing *Holder*, 512 U.S. at 907); *Bartlett v. Strickland*, 556 U.S. 1, 26 (2009) (Thomas, J., concurring in judgment) (citing *Holder*, 512 U.S. at 891); *Grutter v. Bollinger*, 539 U.S. 306, 374 (2003) (Thomas, J., concurring in part and dissenting in part) (citing *Holder*, 512 U.S. at 899); *Georgia v. Ashcroft*, 539 U.S. 461, 492 (2003) (Thomas, J., concurring) (citing *Holder*, 512 U.S. at 891).

⁶² *See, e.g.*, *Cooper v. Harris*, 137 S. Ct. 1455, 1485–86 (2017) (Thomas, J., concurring) (citing *Holder*, 512 U.S. at 922–23) (“[Section] 2 does not apply to redistricting and therefore cannot justify a racial gerrymander.”).

⁶³ *Abbott v. Perez*, 138 S. Ct. 2305 (2018).

⁶⁴ *Id.* at 2318–19.

⁶⁵ *Id.* at 2326–27. The Court effectively overturned this matter by focusing on the “totality of circumstances” analysis. *See supra* notes 38–41 and accompanying text (discussing this part of the Section 2 analysis).

⁶⁶ *Abbott*, 138 S. Ct. at 2335 (Thomas, J., concurring).

At first glance, Justice Thomas's *Perez* concurrence may seem like his same old routine,⁶⁷ but it marks an important shift in the argument that he had been making alone for nearly a quarter century. When newly appointed Justice Neil Gorsuch joined the opinion, legal commentators condemned him for breathing new life into Justice Thomas's *Holder* concurrence.⁶⁸ Soon after, before he even had the chance to take part in oral arguments, some speculated that Justice Brett Kavanaugh "[would] join with the court's conservative justices to further roll back [minority] voting rights protections and other civil rights laws."⁶⁹ Should Justice Kavanaugh join Justices Thomas and Gorsuch, the *Perez* concurrence may be the first in a series of signals that the Court is ready to finally take down Section 2 similar to *Northwest Austin's* relationship to the Coverage Formula.⁷⁰

But the serious concern amongst legal commentators is that the Court's recent shakeup positions Chief Justice John Roberts to serve as the Court's mystical swing vote.⁷¹ As noted earlier, the Court recently dealt a severe blow to the VRA in *Shelby County v. Holder*.⁷² Commentators are quick to point out that the Chief Justice authored that opinion, thus making him an unlikely candidate to preserve minority voter protections.⁷³ Commentators

⁶⁷ See *supra* note 61 and accompanying text (providing examples of Justice Thomas' commitment to the argument that Section 2 does not apply to election-related procedures like gerrymandering).

⁶⁸ See, e.g., Mark Joseph Stern, *Neil Gorsuch Declares War on Voting Rights Act*, SLATE (June 25, 2018, 11:54 AM), <https://slate.com/news-and-politics/2018/06/abbott-v-perez-neil-gorsuch-says-the-voting-rights-act-does-not-prohibit-racial-gerrymandering.html> (describing Justice Gorsuch as a "fierce opponent of the [VRA]"). Mark Joseph Stern, a Supreme Court and legal commentator, also noted that Justice Gorsuch joined the Court's 5-4 margin in two earlier Abbot-related procedural matters when the Court blocked lower court rulings that would have required Texas to redraw both its legislative and congressional district maps. *Id.* (citing *Abbott v. Perez*, No. 17A225, 2017 U.S. LEXIS 4434, at *1 (U.S. Sept. 12, 2017); *Abbott v. Perez*, No. 17A245, 2017 U.S. LEXIS 4435, at *1 (U.S. Sept. 12, 2017)). In summary, Stern described Justice Gorsuch's short tenure on the Court as "declar[ing] war on the VRA, inviting future challenges designed to sabotage the law's ability to guard against racial vote dilution" and proclaiming himself as "a staunch ally to lawmakers who wish to suppress the votes of minority Americans." *Id.*

⁶⁹ Ari Berman, Opinion, *Does Brett Kavanaugh Spell the End of Voting Rights?*, N.Y. TIMES (July 13, 2018), <https://www.nytimes.com/2018/07/13/opinion/sunday/voting-rights-voter-id-kavanaugh.html>. This fear is largely based on Justice Kavanaugh's lower court opinion which approved South Carolina's voter identification statute against the federal government's challenge. See *id.* (referring to *South Carolina v. United States*, 898 F. Supp. 2d 30 (D.C. Cir. 2012)).

⁷⁰ See *supra* notes 10–14 and accompanying text (summarizing the gradual path the Court took in finding the Coverage Formula unconstitutional).

⁷¹ See, e.g., Richard L. Hasen, Opinion, *What the Supreme Court Could Look Like with John Roberts as its Swing Vote*, L.A. TIMES (Apr. 10, 2017, 4:00 AM), <https://www.latimes.com/opinion/op-ed/la-oe-hasen-roberts-swing-vote-20170410-story.html> (considering the effect on the Court's decisions if its political makeup shifted such that Justice Roberts held the swing vote).

⁷² See *supra* notes 12–14 and accompanying text (explaining that the Court held that the Coverage Formula was unconstitutional because the burdens it imposed were not justified by current needs).

⁷³ Berman, *supra* note 69.

also look skeptically on his experience prior to the bench—specifically a 1981 Justice Department memo wherein he argued that the federal government should only exert Section 2 authority in intentional discrimination cases and *not* effectual discrimination cases.⁷⁴ As Professor Richard Hasen observed: “[we] may have no choice but to put faith in [Chief Justice] Roberts” as the swing vote, and “the possibility that [Chief Justice] Roberts’ restraint is the best hope . . . shows us that [we] are in a truly poor position.”⁷⁵

Considering Justice Thomas’s concurrence in *Holder*, and the recent shift in the Court’s composition that placed Chief Justice Roberts at its ideological center, there is reason to be concerned that Section 2’s minority voter protections are “going, gutted, gone.”⁷⁶

II. THE FOUR CATEGORIES OF MINORITY VOTER PROTECTION

The United States Constitution requires all states to follow federal law,⁷⁷ and thus the states must comply with the VRA in their redistricting process. However, should the Court decide that Section 2 does not apply to redistricting,⁷⁸ states will have to look elsewhere for additional minority voter protections.⁷⁹

This Part constructs four categories which represent how states presently protect minority voters. All fifty states are sorted into these four categories in the Appendix.⁸⁰ The four categories are organized on a sliding scale from those with the least to the most minority voter protections.

Category A includes states which offer no state law minority voter protections. Although Category A states must comply with the Supremacy Clause, it is strange that these states have not established any minority voter protections in either their constitutions or statutory codes. These states all instruct on basic redistricting principles such as allocating their designated line drawer the authority to conduct reapportionment⁸¹ and establishing a timetable to conduct reapportionment after the decennial census data is

⁷⁴ *Id.*; see also Ari Berman, *Inside John Roberts’ Decades-Long Crusade Against the Voting Rights Act*, POLITICO MAG. (Aug. 10, 2015), <https://www.politico.com/magazine/story/2015/08/john-roberts-voting-rights-act-121222> (detailing Chief Justice Roberts’ history on voting rights issues throughout his career).

⁷⁵ Hasen, *supra* note 71.

⁷⁶ RHODES, *supra* note 21.

⁷⁷ U.S. CONST. art. VI, cl. 2.

⁷⁸ See *infra* Part III, which imagines how the Court might dispose of Section 2.

⁷⁹ See *supra* note 24 (explaining that there remain constitutional provisions to protect minority voters, but they are outside the scope of this Article).

⁸⁰ See *supra* note 23 (explaining this analysis’s limitations).

⁸¹ See, e.g., GA. CONST. art. III, § 2, ¶ II (requiring that the State Legislature conduct reapportionment).

reported.⁸² But these states fail to make any mention of minority voter protections even though the United States has a long history of minority voter discrimination.⁸³ Notably, Category A includes seven of the nine states that came under the Coverage Formula at the time of the *Shelby County* decision, and one state wherein forty counties were subject to federal oversight.⁸⁴ Thus, these states have earned their unique designation.

Categories B and C share only a slight difference, and thus they will be discussed together throughout this Article. Category B represents those states that only make references to the VRA to protect minority voters in their constitutional or statutory language, whereas Category C includes states that have reproduced Section 2's language in their own state law.⁸⁵

At this time, in a world where Section 2 is operational, Categories B and C function no differently than Category A. Therefore, their main distinction from Category A is that these jurisdictions at least have something in their constitutions or statutory codes that demonstrate an intent to protect minority voters. In the context of this Article, this distinction is most important when discussing how jurisdictions might be affected if the Court decides that discriminatory redistricting claims are no longer a colorable claim under Section 2 in federal courts.⁸⁶

Finally, Category D consists of those states that have additional measures to protect minority voters. These states, like those in Categories B and C, may point directly to the VRA or use language that appears in Section 2.⁸⁷

⁸² See, e.g., MISS. CONST. art. 13, § 254 (mandating that the State Legislature begin redistricting after the decennial census, and calling upon a backup commission to draw the map if the State Legislature cannot successfully complete the process within a specific time frame).

⁸³ See *supra* note 27 and accompanying text (providing a history of minority disenfranchisement).

⁸⁴ *Jurisdictions Previously Covered by Section 5*, U.S. DEPT. JUSTICE, <https://www.justice.gov/crt/jurisdictions-previously-covered-section-5> (last updated Aug. 6, 2015).

⁸⁵ Compare MONT. CODE ANN. § 5-1-115(2) (2019) (“In the development of legislative districts, a plan is subject to the Voting Rights Act. . . .”), with MD. CODE ANN., ELEC. LAW § 16-201(a)(7) (Lexis Nexis 2020) (“A person may not willfully and knowingly . . . engage in conduct that results or has the intent to result in the denial or abridgement of the right of any citizen of the United States to vote on account of race, color, or disability.”). One quirky exception that fits into Category B is Wisconsin. Although Wisconsin does not dedicate constitutional or statutory language that directly points its line drawers to follow the VRA, the state’s statutory code allows citizens to file petitions with the State’s Attorney General that allege the redistricting process did not comply with Section 2. WIS. STAT. § 5.081 (2020). The State’s Attorney General then has the discretionary authority to commence legal action in any relevant court. *Id.*

⁸⁶ See *infra* Part IV.B.

⁸⁷ See, e.g., N.Y. CONST. art. III, § 4(c)(1) (“When drawing district lines, the commission shall consider whether such lines would result in the denial or abridgement of racial or language minority voting rights, and districts shall not be drawn to have the purpose of, nor shall they result in, the denial or abridgement of such rights.”).

But these states differ in that they have constructed their own defenses to protect minority voters. For example, some states prioritize drawing districts with minority representation,⁸⁸ while others explicitly prohibit drawing districts with “the purpose of diluting the voting strength of any language or ethnic minority group.”⁸⁹

In total, there are twenty-nine states in Category A, eight in Category B, four in Category C, and nine in Category D.⁹⁰

III. HOW THE COURT COULD ELIMINATE SECTION 2

Since there is reason to believe that the Court may set aside Section 2’s minority voter protections,⁹¹ this Part explores how the Court could accomplish this task. Furthermore, this Part uses the aforementioned Categories⁹² to explore how the Court’s reasoning would affect the remaining minority voter protections across the country.

A. Scenario 1: Section 2 is Unconstitutionally Applied to Redistricting

In this scenario, the Court follows Justice Clarence Thomas’s concurring opinion in *Holder v. Hall* and holds that reapportionment is not a “standard, practice, or procedure” under Section 2.⁹³ Thus, minority voters could not

⁸⁸ See, e.g., 10 ILL. COMP. STAT. § 120/5-5(a) (LexisNexis 2019) (“[D]istricts shall be drawn . . . to create crossover districts, coalition districts, or influence districts.”).

⁸⁹ See, e.g., OR. REV. STAT. § 188.010(3) (2019); cf., COLO. CONST. art. V, § 48.1(4)(b) (“No map may be approved . . . if . . . drawn for the purpose of or results in the denial or abridgement of the right of any citizen to vote . . . including diluting the impact of that racial or language minority group’s electoral influence.”); FLA. CONST. art. III, § 21(a) (“[D]istricts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or to diminish their ability to elect representatives of their choice. . . .”); CAL. ELEC. CODE § 14027 (Deering 2020) (“An at-large method of election may not . . . impair[] the ability of a protected class to elect candidates of its choice . . . as a result of the dilution or the abridgement of the rights of voters”); IOWA CODE § 42.4(5) (2019) (“No district shall be drawn . . . for the purpose of augmenting or diluting the voting strength of a language or racial minority group.”); WASH. REV. CODE § 29A.92.030(1) (2019) (finding a violation when “elections in the political subdivision exhibit polarized voting” and “members of a protected class . . . do not have an equal opportunity elect candidates of their choice as a result of the dilution or abridgement of the rights of members of that protected class”).

⁹⁰ See *infra* Appendix.

⁹¹ See *supra* Part I.B. (suggesting grounds such as the shift in the Court’s composition and growing support for the position that Section 2 should not apply to racial gerrymandering claims).

⁹² See *supra* Part II (explaining the different approaches that states take in protecting minority voters in the redistricting process).

⁹³ *Holder v. Hall*, 512 U.S. 874, 892 (1994) (Thomas, J., concurring). See *supra* notes 45–60 and accompanying text for more details on the Court’s opinion in *Holder v. Hall*, and Justice Thomas’s

use Section 2 to challenge discriminatory intent or effect in the redistricting context, nor would they be able to rely on language that references or tracks Section 2 to make those challenges in state courts.⁹⁴

Categories A, B, and C are most affected in this scenario because they rely on federal jurisprudence in applying Section 2 to redistricting claims. Category A jurisdictions already rely solely on Section 2 through the Supremacy Clause because neither their constitutional or statutory language make reference to federal minority voter protections, nor do they establish their own protections.⁹⁵ Category B similarly relies solely on Section 2 because these jurisdictions simply point to federal law as controlling in this matter.⁹⁶ Since Category C jurisdictions have their own constitutional and statutory language dedicated to protecting minority voters,⁹⁷ any jurisdiction *with language accompanied by its own jurisprudence* would survive this scenario. But at this time, none of the minority voter protections in Category C jurisdictions fit this description, and thus they would all suffer the same fate as Category A and B jurisdictions.

Under this ruling, Category D jurisdictions still have some defenses to challenge effectual discrimination because they offer additional minority voters protections beyond what appears in Section 2.⁹⁸ Furthermore, like Category C, any jurisdiction with protections that use language that tracks with Section 2 *and* is accompanied by its own jurisprudence would survive this scenario.⁹⁹ But those jurisdictions that include these provisions and simply follow federal jurisprudence would be struck down like Categories A,

concurrency. This Article does not consider a scenario where Section 2 is found unconstitutional because that possibility is inconceivable at this time. *See* *Shelby County v. Holder*, 570 U.S. 529, 537, 557 (2013) (“Section 2 is permanent, applies nationwide, and is not at issue in this case. . . . Our decision in no way affects the permanent, nationwide ban on racial discrimination in voting found in [Section] 2”); *Holder*, 512 U.S. at 893 (Thomas, J., concurring) (arguing that Section 2 does “reach . . . state enactments that limit citizens’ access to the ballot”).

⁹⁴ Recall that no matter what the Court may do to Section 2, there are still constitutional backstops that plaintiffs may use to challenge redistricting schemes. *See supra* note 24 (noting other means such as the First and Fourteenth Amendments, as well as procedural due process).

⁹⁵ *See supra* notes 81–84 and accompanying text.

⁹⁶ *See supra* note 85 and accompanying text.

⁹⁷ *See supra* notes 85–86 and accompanying text.

⁹⁸ *See supra* notes 87–89 and accompanying text. For a detailed description of the additional protections in each Category D jurisdiction, see *infra* Appendix.

⁹⁹ For example, California’s statutory code uses language that mirrors what appears in Section 2. *Compare* 52 U.S.C. § 10301 (2012), *with* CAL. ELEC. CODE § 14027 (Deering 2020). But California’s statute would survive a facial challenge under this scenario because its courts have deciphered its meaning in a way that makes it distinctive from Section 2. *See, e.g.,* *Rey v. Madera Unified Sch. Dist.*, 138 Cal. Rptr. 3d 192, 201 (Cal. Ct. App. 2012) (finding that “the [California] Legislature’s use of the phrase ‘imposed or applied’ indicates that . . . violating Elections Code section 14027 is premised on the party having taken some sort of affirmative action with respect to the election.”).

B, and C.¹⁰⁰ Thus, Category D encompasses the only jurisdictions that currently have minority voter protections at the state-level which could survive this scenario.

B. Scenario 2: Federal Minority Voters Protections are Gutted

In *Holder v. Hall*, Justice Thomas argues that Congress did not appoint the Justices to be “mighty Platonic guardians . . . [who] determine the best form of local government for every county, city, village, and town in America.”¹⁰¹ Instead, Congress granted the Court limited authority, so “[the Court] should be cautious in interpreting any Act of Congress to grant [it] power to make such determinations.”¹⁰²

Under that reasoning, in this scenario, the Court holds that discriminatory redistricting challenges can no longer be brought into federal courts under Section 2. This is a more limited approach than discussed in Scenario 1. Although Scenario 2 would still have the same effect on Categories A and B because those jurisdictions solely rely on the VRA in these matters,¹⁰³ this limited holding would permit Category C and D jurisdictions to continue reviewing discriminatory reapportionment claims under their respective constitutional and statutory language.¹⁰⁴ Notably, unlike in Scenario 1,¹⁰⁵ Category C and D jurisdictions that have state laws that track Section 2 language survive this scenario whether or not the language is accompanied by its own jurisprudence at the time of the Court’s decision because the Court’s holding is limited to federal courts.

C. Commentary on Scenarios 1 and 2

Scenario 2 is the more likely outcome for two reasons. First, due to the recent shift in the Court’s composition,¹⁰⁶ many commentators have speculated about public confidence in a politicized Supreme Court.¹⁰⁷

¹⁰⁰ See *supra* notes 94–97 and accompanying text.

¹⁰¹ *Holder v. Hall*, 512 U.S. 874, 913 (1994) (Thomas, J., concurring).

¹⁰² *Id.*

¹⁰³ See *supra* notes 95–96 and accompanying text.

¹⁰⁴ Regardless of what happened in the Category D jurisdictions, they would retain their additional minority voter protections on redistricting matters like in Scenario 1. See *supra* note 98 and accompanying text.

¹⁰⁵ See *supra* notes 97–100 and accompanying text.

¹⁰⁶ See *supra* notes 68–69 and accompanying text.

¹⁰⁷ See, e.g., Lawrence Baum & Neal Devins, Opinion, *The Hidden Silver Lining if Kavanaugh is Confirmed*, WASH. POST (Oct. 5, 2018), https://www.washingtonpost.com/opinions/the-hidden-silver-lining-if-kavanaugh-is-confirmed/2018/10/05/fc2d7fb6-c8ce-11e8-b2b5-79270f9cce17_story.html?utm_term=.903e731a38c5.

Although Chief Justice Roberts' position on voting rights has garnered significant speculation,¹⁰⁸ Supreme Court commentators have also argued that the Chief Justice is particularly conscious about the Court's legacy under his leadership.¹⁰⁹ Thus, if the Court were to limit Section 2's application, he may look for a way to limit the effect.

Second, and more importantly, Justice Thomas's aggressive approach has not gained traction over the years. Although Chief Justice Roberts and Justice Samuel Alito were not on the Court at the time of *Holder v. Hall*, they have both passed on numerous opportunities to join Justice Thomas's position.¹¹⁰

Notably, Scenario 2 shares a key characteristic with the Court's *Shelby County* decision: the Court would gut Section 2 for vagueness while inviting Congress to pass further legislation¹¹¹ that clarifies whether reapportionment is an election "standard, practice, or procedure." This may not be Justice Thomas's most desired outcome, but it would stop all Section 2 redistricting claims from ever reaching his desk again.

IV. WHAT STATES CAN DO TO PREVENT MINORITY VOTER DISCRIMINATION

As demonstrated in Part III, many states are unprepared to protect minority voters' rights in the event that the Supreme Court either guts or strikes down Section 2 of the VRA. This Part offers proactive remedies to this problem. It follows a path already suggested by many legal commentators: return to the "test tubes of democracy" to "normalize election practices."¹¹² This Part reviews the different mechanisms used across the country—and the legal challenges to those efforts—to outline what

¹⁰⁸ See *supra* notes 73–74 and accompanying text.

¹⁰⁹ E.g., Baum & Devins, *supra* note 107 (arguing that Chief Justice Roberts may steer the Court to limited decisions because the political turmoil surrounding how the Court's ideology shifted exacerbates his unique role as the Court's institutional leader who must "maintain[] the court's standing by fostering its esteem among the general public").

¹¹⁰ See, e.g., *Abbott v. Perez*, 138 S. Ct. 2305, 2312–13 (2018) (Alito, J., filing the Court's opinion) (Roberts, C.J., joining); *Cooper v. Harris*, 137 S. Ct. 1455, 1486 (2017) (Alito, J., concurring in judgment in part and dissenting in part) (Roberts, C.J., joining); *Ala. Legis. Black Caucus v. Alabama*, 135 S. Ct. 1257, 1274 (2015) (Scalia, J. dissenting) (Roberts, C.J., and Alito, J., joining); *Shelby County v. Holder*, 570 U.S. 529, 532–34 (2013) (Roberts, C.J., filing the Court's opinion) (Alito, J., joining); *Bartlett v. Strickland*, 556 U.S. 1, 5 (2009) (Kennedy, J., filing the Court's opinion) (Roberts, C.J., and Alito, J., joining).

¹¹¹ See *Shelby County*, 570 U.S. at 557 ("Congress may draft another formula based on current conditions.").

¹¹² Joshua A. Douglas, Opinion, *To Safeguard Voting Rights, Go Local*, CNN (Feb. 17, 2017, 2:58 PM), <https://www.cnn.com/2017/02/17/opinions/improve-voting-local-level-douglas/index.html>.

practices states can implement to secure minority voter protections in their own jurisdictions.¹¹³

A. *State Constitutional Hook*

The most obvious way to protect minority voters is to return to the basics: the fundamental right to vote. When litigants rely on federal claims to protect voting rights, they point towards “‘negative’ rights, or prohibitions on governmental action, as opposed to specifically stated grants of individual liberties.”¹¹⁴ The federal constitution mentions the right to vote seven times, but never actually grants the right to vote.¹¹⁵ Meanwhile, forty-nine states explicitly grant the right to vote,¹¹⁶ and the fiftieth state (Arizona) implicitly confers this right.¹¹⁷

Since the fundamental right to vote is grounded in each states’ constitution, states can look to these foundational documents to protect minority voters in the districting process. Most notably, twenty-six state constitutions mandate that elections be “free,” “free and equal,” or “free and open.”¹¹⁸ States could look to these provisions to protect minority voters because plaintiffs recently succeeded in using Pennsylvania’s Free and Equal Clause¹¹⁹ to strike down a statewide partisan gerrymander.

In *League of Women Voters v. Commonwealth*, the Supreme Court of Pennsylvania concluded that the Commonwealth’s districting scheme diluted Democrats’ votes to the extent that “all voters [did] not have an equal opportunity to translate their votes into representation.”¹²⁰ The Court recognized its broad interpretation, but reasoned that this expansive scope “guard[ed] against the risk of unfairly rendering votes nugatory, artificially entrenching representative power, and discouraging voters from

¹¹³ No jurisdiction is perfect—even those in Category D could do more to ensure that minority voters are protected. This Part is not intended to scold those states in Categories A, B, and C. Instead, this Part aims to offer every jurisdiction a panoply of options for further action.

¹¹⁴ Joshua A. Douglas, *The Right to Vote Under State Constitutions*, 67 VAND. L. REV. 89, 95 (2014) (citations omitted).

¹¹⁵ *Id.* at 96–97 (referring to Article I, § 2, and the Fourteenth, Fifteenth, Seventeenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth Amendments).

¹¹⁶ *Id.* at 101.

¹¹⁷ *Id.* at 102. (“[S]tating that ‘no person shall be entitled to vote . . . unless’ the person meets the citizenship, residency, and age requirements.”) (citing ARIZ. CONST. art. VII, § 2).

¹¹⁸ *Id.* at 103.

¹¹⁹ PA. CONST. art. I, § 5 (“Elections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.”).

¹²⁰ *League of Women Voters v. Commonwealth*, 178 A.3d 737, 814 (Pa. 2018), *cert. denied*, *Turzai v. Brandt*, 139 S. Ct. 445 (2018).

participating in the electoral process because they have come to believe that the power of their individual vote . . . ‘does not count.’”¹²¹

Although *League of Women Voters* reviewed a partisan gerrymander, a court may apply the same principle when assessing racial or ethnic minority vote dilution. The Supreme Court of Pennsylvania found that vote dilution was “the antithesis of a healthy representative democracy. . . . because each and every Pennsylvania voter must have the same free and equal *opportunity* to select his or her representatives.”¹²² Thus, the Court did not find that the Free and Equal Clause ensures *Democrats and Republicans* have the same free and equal opportunity to select their representatives—it found that *all voters* have the same free and equal opportunity to select their representatives. No matter what group the voters belong to, the Court held that vote dilution contravened the Commonwealth’s Free and Equal Clause.

Besides Fair and Equal Clauses, three state constitutions require “competitive” districts.¹²³ So far, only Arizona’s Competitiveness Clause has received judicial attention, but the state’s Supreme Court merely clarified the provision rather than reviewed it on the merits.¹²⁴ Since these state constitutional provisions were not designed—or yet been proven—to protect minority voters, they cannot be used to bring these jurisdictions into Category D.¹²⁵

Nevertheless, litigants should consider pursuing these state constitutional claims because they can avoid messy federal election law jurisprudence and favorable decisions are unlikely to merit federal review.¹²⁶

¹²¹ *Id.*

¹²² *Id.* (emphasis in original).

¹²³ ARIZ. CONST. art. IV, pt. 2, § 1(14)(F) (“To the extent practicable, competitive districts should be favored where to do so would create no significant detriment to the other goals.”); COLO. CONST. art. V, § 46(1)(c) (“The redistricting commission should set district lines by ensuring constitutionally guaranteed voting rights, including the protection of minority group voting, as well as fair and effective representation of constituents using politically neutral criteria.”); MO. CONST. art. III, § 3(c)(1)(b) (“Districts shall be designed in a manner that achieves both partisan fairness and, secondarily, competitiveness.”). Notably, the state of Washington also requires “competitive” districts, but through the state’s statutory code. WASH. REV. CODE § 44.05.090(5) (2018) (“The commission shall exercise its powers to provide fair and effective representation and to encourage electoral competition.”).

¹²⁴ *Ariz. Minority Coal. for Fair Redistricting v. Ariz. Indep. Redistricting Comm’n*, 208 P.3d 676, 686 (Ariz. 2009).

¹²⁵ See *infra* Appendix.

¹²⁶ See Charlie Stewart, *State Court Litigation: The New Front in the War Against Partisan Gerrymandering*, 116 MICH. L. REV. ONLINE 152, 159 (2018) (noting that the Pennsylvania Supreme Court’s holding that “a claim under the Pennsylvania Constitution’s free and clear elections clause should be adjudicated” differently than under the federal equal protection clause “insulated [it] from Supreme Court Review”).

B. Mini-VRAs

States can further defend historically disenfranchised minority groups by enacting their own “mini-VRAs.” So far, there is little academic writing on the topic. But those scholars discussing mini-VRAs view them as offering substantive and procedural benefits to minority voters and the legal system, as well as forecasting a future where states “legislate[] without federal oversight.”¹²⁷

The California Voting Rights Act of 2001 (CVRA)¹²⁸ was the first mini-VRA.¹²⁹ It targets “racially polarized voting”¹³⁰ by allowing minority voters to challenge at-large election schemes in state courts.¹³¹ A violation of the CVRA occurs when “it is shown that racially polarized voting occurs in elections for members of the governing body of the political subdivision or in elections incorporating other electoral choices by the voters of the political subdivision.”¹³² The CVRA builds on the federal statute to provide plaintiffs an easier opportunity to challenge at-large election schemes.¹³³ But unlike the federal statute, the CVRA allows plaintiffs to establish a successful discrimination challenge without having to prove geographical compactness

¹²⁷ *E.g.*, Kareem U. Crayton, *Reinventing Voting Rights Preclearance*, 44 IND. L. REV. 201, 239–41 (2010).

¹²⁸ California Voting Rights Act of 2001, ch. 129, 2002 Cal. Stat. 703 (codified as amended at CAL. ELEC. CODE §§ 14025–14032 (West 2020)).

¹²⁹ Crayton, *supra* note 127, at 239.

¹³⁰ ELEC. § 14026 (defining “racially polarized voting” as “voting in which there is a difference . . . in the choice of candidates or other electoral choices that are preferred by voters in a protected class, and in the choice of candidates and electoral choices that are preferred by voters in the rest of the electorate”).

¹³¹ *See* ELEC. § 14027 (“An at-large method of election may not be imposed or applied in a manner that impairs the ability of a protected class to elect candidates of its choice or its ability to influence the outcome of an election, as a result of the dilution or the abridgment of the rights of voters who are members of a protected class . . .”).

¹³² ELEC. § 14028(a). “The occurrence of racially polarized voting shall be determined from examining results of elections in which at least one candidate is a member of a protected class or elections involving ballot measures, or other electoral choices that affect the rights and privileges of members of a protected class.” *Id.* ELEC. § 14028(b).

¹³³ *See supra* note 34 and accompanying text (explaining that geographical compactness is a necessary factor to establish a Section 2 claim).

or concentration.¹³⁴ The drawback is that the CVRA only applies to at-large election schemes.¹³⁵

The CVRA has already survived multiple Equal Protection challenges. First, the California Court of Appeals held that the CVRA was race-neutral because it did not favor one race over another, nor benefit or burden a litigant based on race.¹³⁶ More recently, a California District Court dismissed a similar claim for lack of evidence that the litigant's district, as drawn under the CVRA, classified the litigant into his district based on race, and the Ninth Circuit affirmed.¹³⁷

A mini-VRA out of Illinois takes a different approach. The Illinois Voting Rights Act of 2011 ("IVRA")¹³⁸ instead tries to limit large minority voter populations from being fractured in the redistricting process. The IVRA instructs line drawers "to create crossover districts, coalition districts, or influence districts" when possible to benefit "racial minorit[ies] [and] language minorit[ies]."¹³⁹ The IVRA specifically defines "racial minorities or language minorities" as the "same class of voters who are members of a race, color, or language minority group receiving protection under the federal [VRA]."¹⁴⁰

The IVRA also survived its own constitutional challenge. Plaintiffs argued that the IVRA violated the Equal Protection Clause because it elevated race to be the predominant factor in redistricting.¹⁴¹ But the Northern District Court of Illinois found that the IVRA survived this

¹³⁴ See ELEC. § 14028(c) ("The fact that members of a protected class are not geographically compact or concentrated may not preclude a finding of racially polarized voting . . ."). Notably, plaintiffs may use compactness to demonstrate vote dilution, but it is not required. See ELEC. § 14028(c), (e) (listing "voting practices or procedures that may enhance the dilutive effects of at-large elections" as among "probative, but not necessary factors" to establish a successful claim").

¹³⁵ See Joaquin G. Avila et al., *Voting Rights in California: 1982–2006*, 17 REV. L. & SOC. JUST. 131, 152 (2007) (noting that the CVRA "does not apply to other methods of elections, redistrictings or other voting changes"). See also Joanna E. Cuevas Ingram, *The Color of Change: Voting Rights in the 21st Century and the California Voting Rights Act*, 15 HARV. LATINO L. REV. 183, 192–96 (2012) for a more in-depth comparison between the CVRA and Section 2.

¹³⁶ *Sanchez v. City of Modesto*, 51 Cal. Rptr. 3d 821, 843 (Cal. Ct. App. 2006).

¹³⁷ *Higginson v. Becerra*, 363 F. Supp. 3d 1118, 1127–28 (S.D. Cal. 2019), *aff'd*, 786 F. App'x 705 (Mem.) (9th Cir. 2019).

¹³⁸ Illinois Voting Rights Act of 2011, Pub. Act No. 96-1541, 2010 Ill. Laws 7774 (codified at 10 ILL. COMP. STAT. §§ 120/5-1–5-5).

¹³⁹ § 120/5-5(a)–(b). For further clarification, the state of Illinois defines these terms for the line drawer. *Id.* § 120/5-5(b).

¹⁴⁰ § 120/5-5(c).

¹⁴¹ *Radogno v. Ill. State Bd. of Elections*, No. 1:11-cv-04884, 2011 U.S. Dist. LEXIS 122053, at *24–25 (N.D. Ill. Oct. 21, 2011).

challenge because it clearly states that any use of race in line drawing must be subservient to federal and Illinois constitutional law.¹⁴²

Although the mini-VRA is a new and relatively untested concept, they have so far survived constitutional challenges to address specific minority voter problems in their respective jurisdictions. Unlike the state constitutional hooks discussed at length in Part IV.A, mini-VRAs do shift states into Category D because they are established for the purpose of protecting minority voters in the redistricting process.¹⁴³

C. Multimember Districts

Multimember districts (“MMDs”) are probably the most agreed upon way to remedy minority vote dilution. MMDs are “electoral districts that send two or more members to a legislative chamber.”¹⁴⁴ The concept is best understood in contrast to its counterparts: single-member districts (“SMDs”)—districts that elect only one representative to the legislature¹⁴⁵—and at-large districts—districts that extend over the entire political subdivision and elect either one or several candidates.¹⁴⁶

SMDs are not inherent to the Constitution’s structure, nor United States’ history,¹⁴⁷ yet SMDs are the norm among states. Ten state legislatures presently have at least one legislative chamber with MMDs,¹⁴⁸ but many states limit the practice to some degree. At least six states outright require SMDs.¹⁴⁹ Meanwhile, some states only require SMDs in the State Senate,¹⁵⁰ and others only require SMDs in the State House or Assembly.¹⁵¹ Hawaii and New Jersey are anomalies. Hawaii allows MMDs, but limits them to

¹⁴² *Id.* at *25–26 (citing § 120/5-5(a), (d)).

¹⁴³ *See infra* Appendix.

¹⁴⁴ *State Legislative Chambers that Use Multi-Member Districts*, BALLOTPEDIA, https://ballotpedia.org/State_legislative_chambers_that_use_multi-member_districts (last visited July 25, 2020) [hereinafter *MMDs Explained*].

¹⁴⁵ *The Redistricting Glossary*, *supra* note 43.

¹⁴⁶ *Id.* Presently, at-large districts are only used by states which are allotted one representative in the House of Representatives. *MMDs Explained*, *supra* note 144.

¹⁴⁷ *See* *Holder v. Hall*, 512 U.S. 874, 897–98 (1994) (Thomas, J. concurring) (finding “no principle inherent” in the Constitution that makes SMDs the “‘proper’ mechanism for electing representatives” and noting that “[i]t was not until 1842 that Congress determined that Representatives should be elected from [SMDs]”).

¹⁴⁸ *MMDs Explained*, *supra* note 144 (citing Arizona, Idaho, Maryland, New Hampshire, New Jersey, North Dakota, South Dakota, Vermont, Washington, and West Virginia as having MMDs in their respective state legislatures).

¹⁴⁹ *See* ALASKA CONST. art. VI, § 4; CONN. CONST. art. III, §§ 3-4; KAN. CONST. art. II, § 2; LA. CONST. art. III, § 1; MD. CONST. art. III, § 3; ME. CONST. art. IV, pt. 2, § 2.

¹⁵⁰ *E.g.*, ALA. CONST. art. IX, § 200; MASS. CONST. amend. art. CI, § 2; N.H. CONST. pt. II, art. 26.

¹⁵¹ *E.g.*, N.Y. CONST. art. III, § 5.

four representatives per district.¹⁵² New Jersey requires that two representatives are elected from each district.¹⁵³

Critics highlight the winner-take-all format as the inherent problem with SMDs because it leads to—among other things—low representation for racial minorities.¹⁵⁴ In contrast, MMDs offer racial minorities an opportunity to regularly elect a candidate of choice without being packed into majority-minority districts. For example, one study of Louisiana at the federal level found that SMDs created one minority-preferred candidate alongside five other safely held seats in the state, but MMDs would create two minority-preferred candidates, two safely held seats, and two moderate representatives.¹⁵⁵ But MMDs accomplish more than just increased minority representation in the state legislature—they place every voter, regardless of race, in the position to elect a candidate of choice.¹⁵⁶

Even Justice Clarence Thomas recognized the benefits of MMDs in his *Holder v. Hall* concurrence. He described non-winner-take-all systems as “voting mechanisms . . . that can produce proportional results without requiring division of the electorate into racially segregated districts.”¹⁵⁷ If Justice Thomas points to a way to solve the underlying issues that keep plaguing the Court—and him—with Section 2 claims, then it serves states as a strong indicator to where they may find a suitable mechanism to protect minority voters.

It is important to note here that MMDs do not factor into this Article’s categorization of jurisdictions.¹⁵⁸ Although MMDs have been demonstrated to benefit minority voters in the redistricting process to access political representation,¹⁵⁹ they do not factor into this part of the analysis because they are not a tool to seek legal remedy. Instead, jurisdictions should view MMDs as a means to avoid litigation entirely.

¹⁵² HAW. CONST. art. IV, § 6(7).

¹⁵³ N.J. CONST. art. IV, § II, ¶ 4.

¹⁵⁴ E.g., Rob Richie & Andrew Spencer, *The Right Choice for Elections: How Choice Voting Will End Gerrymandering and Expand Minority Voting Rights, From City Councils to Congress*, 47 U. RICH. L. REV. 959, 960 (2013).

¹⁵⁵ *Id.* at 1004–05 (citing *2011 Redistricting and 2012 Elections in Louisiana*, FAIRVOTE (Sept. 2012), <http://www.fairvote.org/assets/2012-Redistricting/>).

¹⁵⁶ *Id.* at 1006.

¹⁵⁷ *Holder v. Hall*, 512 U.S. 874, 909–10 (1994) (Thomas, J., concurring).

¹⁵⁸ See *infra* Appendix.

¹⁵⁹ See *supra* notes 154–56156 and accompanying text.

D. Independent Redistricting Commissions

States may also consider implementing independent redistricting commissions (“IRCs”) to protect minority voting communities. IRCs are groups of citizens that a state authorizes to conduct the redistricting process.¹⁶⁰ IRCs recently faced a constitutional challenge, but the Supreme Court upheld the voters’ ability to reassign redistricting authority from the state legislature to an independent group.¹⁶¹ Six states will use IRCs in the 2021–2022 redistricting cycle.¹⁶²

There are various rules to ensure that politics stay out of IRCs. For example, elected and public officials are ineligible to become members of IRCs, and some states even bar legislative staff and lobbyists from participation.¹⁶³ Furthermore, once a citizen becomes a member of an IRC, there can be certain restrictions placed on them such as becoming ineligible to run for elected office in the districts that they draw or a ban on becoming a registered lobbyist for a period in the future.¹⁶⁴

But IRC rules do not solely address partisanship redistricting concerns—they also extend to minority voter protections. For example, Arizona directs its IRC to draw district boundaries that “respect communities of interest to the extent practicable.”¹⁶⁵ Michigan has a similar “communities of interest” directive, but clarifies that “communities of interest” includes “populations that share cultural or historical characteristics or economic interests . . . [and] not . . . relationships with political parties, incumbents, or political

¹⁶⁰ See Justin Levitt, *Who Draws the Lines?*, ALL ABOUT REDISTRICTING, <http://redistricting.lls.edu/who.php> (last visited July 25, 2020) (describing the various groups, such as an IRC, that draw district lines across different states).

¹⁶¹ *Ariz. State Legis. v. Ariz. Indep. Redistricting Comm’n*, 135 S. Ct. 2652, 2658–59, 2677 (2015). For further review on this case, and information on IRCs generally, see Barry Edwards et al., *Can Independent Redistricting Commissions Lead Us Out of the Political Thicket?*, 9 ALB. GOV’T L. REV. 288 (2016).

¹⁶² See ARIZ. CONST. art. IV, pt. 2, § 1(3); CAL. CONST. art. XXI, § 1; COLO. CONST. art. V, § 46(2); MICH. CONST. art. IV, § 6; N.Y. CONST. art. III, § 4; UTAH CODE ANN. § 20A-20-201 (West 2020).

¹⁶³ See ARIZ. CONST. art. IV, pt. 2 § 1(3); CAL. CONST. art. XXI, § 2(c); COLO. CONST. art. V, § 47(2)(c); MICH. CONST. art. IV, § 6(1)(b); N.Y. CONST. art. III, § 5-b(b); UTAH CODE ANN. § 20A-19-201(6) (West 2020).

¹⁶⁴ See ARIZ. CONST. art. IV, pt. 2 § 1(3); CAL. CONST. art. XXI, § 2(c); MICH. CONST. art. IV, § 6(1)(e).

¹⁶⁵ ARIZ. CONST. art. IV, pt. 2 § 1(14)(D); see also N.Y. CONST. art. III, § 4(c)(5) (directing IRC to “consider the maintenance . . . of pre-existing political subdivisions, including . . . communities of interest”); UTAH CODE ANN. § 20A-20-302(5)(a) (West 2020) (making “preserving communities of interest” a redistricting priority).

candidates.”¹⁶⁶ New York and Colorado go the furthest by requiring that the IRC’s composition “reflect” their respective populations.¹⁶⁷ This all but ensures that minority voters will sit on the IRC and have a voice in the redistricting process.

Some scholars argue that, in practice, IRCs are “inconsequential for communities of color” because IRCs “fail[] . . . to enhance minority representation.”¹⁶⁸ Others argue that IRCs simply shift the “significant social and political pressures to produce a set of district lines that is fair to all relevant interest groups, including those that define themselves by race” from the legislature to citizens,¹⁶⁹ and some assert that “partisan redistricting aimed at protecting incumbents . . . results in a preferred legislative product.”¹⁷⁰ But IRCs are such a relatively new tool in the districting process, and thus such a small sample size cannot yet yield a definitive conclusion. Thus, the fact that a jurisdiction has an IRC does not factor into this Article’s categorization of jurisdictions unless the statute expressly states an intention to protect minority voters.¹⁷¹ Even though there is little data on IRCs at this time, states should still be encouraged to implement IRCs in a way that directs line drawers away from vote dilution through built-in minority voter protections.

CONCLUSION

The combination of Justice Thomas’s continued opposition to Section 2 in the redistricting context and the change in the Court’s ideological composition has led to the concern that Section 2 may be “going, gutted,

¹⁶⁶ MICH. CONST. art. IV, § 6(13)(c); *see also* COLO. CONST. art. V, § 46(3)(b)(I) (defining community of interest as “any group in Colorado that shares one or more substantial interests that may be the subject of state legislative action, is composed of a reasonably proximate population, and thus should be considered for inclusion within a single district for purposes of ensuring its fair and effective representation”).

¹⁶⁷ *See* COLO. CONST. art. V, § 47(10)(a) (“To the extent possible, ensure that the [IRC] reflects Colorado’s racial, ethnic, gender, and geographic diversity.”); N.Y. CONST. art. III, § 5-b(c) (“To the extent practicable, the members of the [IRC] shall reflect the diversity of the residents of this state with regard to race, ethnicity, gender, language, and geographic residence and to the extent practicable the appointing authorities shall consult with organizations devoted to protecting the voting rights of minority and other voters concerning potential appointees to the [IRC].”).

¹⁶⁸ Glenn D. Magpantay, *So Much Huff and Puff: Whether Independent Redistricting Commissions are Inconsequential for Communities of Color*, 16 UCLA ASIAN PAC. AM. L.J. 4, 6 (2011).

¹⁶⁹ Melissa L. Saunders, *Of Minority Representation, Multiple-Race Responses, and Melting Pots: Redistricting in the New America*, 79 N.C. L. REV. 1367, 1369–70 (2001).

¹⁷⁰ C. Daniel Chill, *Political Gerrymandering: Was Elbridge Gerry Right?*, 33 TOURO. L. REV. 795, 796 (2017).

¹⁷¹ *See infra* Appendix.

gone.” In examining vote dilution protections at the state level, it is clear that many states are largely unprepared to be without Section 2’s minority voter protections in the redistricting context. Forty-one states are in Categories A, B, and C¹⁷²—meaning that nearly every jurisdiction in the United States relies solely on Section 2 to protect minority communities from vote dilution. This is unacceptable.

Luckily, many states offer roadmaps for how to protect minority voters. Some require dusting off unused language in a state’s constitutional or statutory language, and others call upon the political grit that accompanies legislative action. All voters should have the opportunity to participate in fair elections and be able to elect the candidate of their choice in those fair elections. But even more fundamental—a voter’s ability to challenge unfair districting schemes should not hinge on a shift in one courthouse’s bench.

¹⁷² See *infra* Appendix.

APPENDIX

State	Category	Redistricting Authority Citation (1)	Redistricting Authority Citation (2)	Commands VRA Compliance	VRA Language Statute	Additional Protection Statute	Additional Protection Language
Ala.	A	Ala. Const. art. IX, §§ 198-200	N/A	N	N	N	N/A
Ark.	A	Ark. Const. art. 8, §§ 2-3	N/A	N	N	N	N/A
Conn.	A	Conn. Const. art. III §§ 3-4	N/A	N	N	N	N/A
Del.	A	Del. Code tit. 29 § 804	N/A	N	N	N	N/A
Ga.	A	Ga. Const. art. III, § II, ¶ 2	N/A	N	N	N	N/A
Haw.	A	Haw. Const. art. IV, § 6	N/A	N	N	N	N/A
Ind.	A	Ind. Const. art. 4, § 5	N/A	N	N	N	N/A
Kan.	A	Kan. Const. art. 10, § 1	N/A	N	N	N	N/A
Ky.	A	Ky. Const. § 33	N/A	N	N	N	N/A
La.	A	La. Const. art. III, § 6	N/A	N	N	N	N/A
Mass.	A	Mass. Const. amend. art. CI	Mass. Const. art. CIX	N	N	N	N/A
Me.	A	Me. Const. art. IV, pt. 1, § 2	Me. Const. art. IV, pt. 2, § 2	N	N	N	N/A

State	Category	Redistricting Authority Citation (1)	Redistricting Authority Citation (2)	Commands VRA Compliance	VRA Language Statute	Additional Protection Statute	Additional Protection Language
Minn.	A	Minn. Const. art. IV, §§ 2-3	N/A	N	N	N	N/A
Miss.	A	Miss. Code § 5-3-101	Miss. Const. art. 13, § 254	N	N	N	N/A
N.C.	A	N.C. Const. art. II, §§ 3, 5	N/A	N	N	N	N/A
N.D.	A	N.D. Const. art. IV, § 2	N.D. Cent. Code § 54-03-01.5	N	N	N	N/A
N.H.	A	N.H. Const., pt. 2, arts. 9, 11, 26	N/A	N	N	N	N/A
N.J.	A	N.J. Const. art. IV, § 2	N/A	N	N	N	N/A
Neb.	A	Neb. Const. art. III, § 5	N/A	N	N	N	N/A
Nev.	A	Nev. Const. art. 4, § 5	N/A	N	N	N	N/A
Ohio	A	Ohio Const. art. XI, §§ 3, 6-7	N/A	N	N	N	N/A
Penn.	A	Penn. Const. art. II, § 16	N/A	N	N	N	N/A
R.I.	A	R.I. Const. art. VII, § 1; art. VIII, § 1	N/A	N	N	N	N/A
S.C.	A	S.C. Code Ann. §§ 2-1-35, 70	N/A	N	N	N	N/A

State	Category	Redistricting Authority Citation (1)	Redistricting Authority Citation (2)	Commands VRA Compliance	VRA Language Statute	Additional Protection Statute	Additional Protection Language
Tex.	A	Tex. Const. art. III, §§ 25-26	N/A	N	N	N	N/A
Va.	A	Va. Const. art. II, § 6	Va. Code § 24.2-305(A)	N	N	N	N/A
Vt.	A	Vt. Const. Ch. II, §§ 13, 18	Vt. Stat. tit. 17, ch. 34A, § 1903	N	N	N	N/A
W.V.	A	W. Va. Const., art. VI, §§ 4, 6	N/A	N	N	N	N/A
Wy.	A	Wyo. Const. art. 3, §§ 3, 49	N/A	N/A	N	N	N/A
Alaska	B	Alaska Const. art. VI, § 6	N/A	Alaska Stat. § 15.10.300(d)(2)	N	N	N/A
Idaho	B	Idaho Const. art. III, § 5	Idaho Code § 72-1506	Idaho Code § 72-1506(3)	N	N	N/A
Mich.	B	Mich. Const. art. IV, § 6(13)	Mich. Comp. Laws § 4.261	Mich. Const. art. IV, § 6(13)(a); Mich. Comp. Laws § 4.261(a)	N	N	N/A
Mont.	B	Mont. Const. art. V, § 14	Mont. Code Ann. § 5-1-115	Mont. Code Ann. § 5-1-115(2)	N	N	N/A

State	Category	Redistricting Authority Citation (1)	Redistricting Authority Citation (2)	Commands VRA Compliance	VRA Language Statute	Additional Protection Statute	Additional Protection Language
S.D.	B	S.D. Const. art. III, § 5	S.D. Codified Laws § 2-2-41	S.D. Certified Laws § 2-2-41	N	N	N/A
Tenn.	B	Tenn. Const. art. II, §§ 5-6	Tenn. Code Ann. §§ 3-1-102, 103	Tenn. Code Ann. § 3-1-103(b)	N	N	N/A
Utah	B	Utah Code § 20A-20-201	N/A	Utah Code § 20A-20-302(4)(A)(v)	N	N	N/A
Wis.	B	Wis. Const., art. IV, §§ 4-5	N/A	N	N	Wis. Stat. § 5.081	The State creates an avenue for citizens to file a petition with the State's Attorney General alleging failure to comply with Section 2. The AG then has discretionary authority to commence legal action in any relevant court.

State	Category	Redistricting Authority Citation (1)	Redistricting Authority Citation (2)	Commands VRA Compliance	VRA Language Statute	Additional Protection Statute	Additional Protection Language
Ariz.	C	Ariz. Const. art. IV, pt. 2, § 1(14)	N/A	Ariz. Const. art. IV, pt. 2, § 1(14)(A)	Ariz. Const. art. XX, ¶ 7	N	N/A
Colo.	C	Colo. Const. art. V, § 48.1	N/A	Colo. Const. art. V, § 48.1(1)(b)	Colo. Const. art. V, § 48.1(4)(b)	N	N/A
N.M.	C	N.M. Stat. Ann. §§ 2-7C-3, 2-8D-2	N/A	N	N.M. Const. art. XXI, § 5	N	N/A
Okla.	C	Okla. Const. art. 5, § 9A	N/A	N	Okla. Const. art. I, § 6	N	N/A

State	Category	Redistricting Authority Citation (1)	Redistricting Authority Citation (2)	Commands VRA Compliance	VRA Language Statute	Additional Protection Statute	Additional Protection Language
Cal.	D	Cal. Const. art. XXI, § 2(d)	Cal. Gov't Code tit. 2, ch. 3.2, §§ 8251-8253.6	Cal. Const. art. XXI, § 2(d)(1)-(2)	Cal. Elec. Code § 14028(a)	Cal. Elec. Code § 14027	“An at-large method of election may not be imposed or applied in a manner that impairs the ability of a protected class to elect candidates of its choice or its ability to influence the outcome of an election, as a result of the dilution or the abridgment of the rights of voters who are members of a protected class.”
Fla.	D	Fla. Const. art. III, §§ 16(a), 21	N/A	Fla. Const. art. III, § 21(b)	Fla. Stat. § 104.0515(4)	Fla. Const. art. III, § 21(a)	“[D]istricts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or to diminish their ability to elect representatives of their choice.”

State	Category	Redistricting Authority Citation (1)	Redistricting Authority Citation (2)	Commands VRA Compliance	VRA Language Statute	Additional Protection Statute	Additional Protection Language
Ill.	D	Ill. Const. art. IV, § 3	N/A	10 Ill. Comp. Stat. § 120/5-5(d)	N	10 Ill. Comp. Stat. § 120/5-5(a)	“In any redistricting plan ... Representative Districts shall be drawn ... to create crossover districts, coalition districts, or influence districts.”
Iowa	D	Iowa Code § 42.4	Iowa Const. art. III, § 37	N	N	Iowa Code § 42.4(5)	“No district shall be drawn for the purpose of favoring a political party, incumbent legislator or member of Congress, or other person or group, or for the purpose of augmenting or diluting the voting strength of a language or racial minority group.”
Md.	D	Md. Const. art. III, § 4	N/A	N	N	Md. Code Ann. Elec. Law § 16-201(7)	“A person may not willfully and knowingly . . . engage in conduct that results or has the intent to result in the denial or abridgement of the right of any citizen of the United States to vote on account of race, color, or disability.”

State	Category	Redistricting Authority Citation (1)	Redistricting Authority Citation (2)	Commands VRA Compliance	VRA Language Statute	Additional Protection Statute	Additional Protection Language
Mo.	D	Mo. Const. art. III, § 3	N/A	Mo. Const. art. III, § 3(c)(1)(b)	N	Mo. Const. art. III, § 3(c)(1)(b)	<p>“Notwithstanding any other provision of this Article, districts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or diminishing their ability to elect representatives of their choice, whether by themselves or by voting in concert with other persons.”</p>
N.Y.	D	N.Y. Const. art. III, §§ 4-5	N/A	N.Y. Const. art. III, § 4(c)	N	N.Y. Const. art. III, § 4(c)	<p>“When drawing district lines, the commission shall consider whether such lines would result in the denial or abridgement of racial or language minority voting rights, and districts shall not be drawn to have the purpose of, nor shall they result in, the denial or abridgement of such rights.”</p>

State	Category	Redistricting Authority Citation (1)	Redistricting Authority Citation (2)	Commands VRA Compliance	VRA Language Statute	Additional Protection Statute	Additional Protection Language
Or.	D	Or. Const. art. IV, § 7	Or. Rev. Stat. § 188.010	N	N	Or. Rev. Stat. § 188.010(3)	“No district shall be drawn for the purpose of diluting the voting strength of any language or ethnic minority group.”
Wash.	D	Wash. Const. art. II, § 43	Wash. Rev. Code § 44.05.090	N	Wash. Rev. Code §§ 29A.92.010 (3), (5); 29a.92.020	Wash. Rev. Code § 29A.92.030(1)	“A political subdivision is in violation ... when it is shown that: (a) Elections in the political subdivision exhibit polarized voting; and (b) Members of a protected class or classes do not have an equal opportunity to elect candidates of their choice as a result of the dilution or abridgment of the rights of members of that protected class or classes.”

