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## RESPONSE

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### SECTION 2 IS DEAD: LONG LIVE SECTION 2

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

Voting rights law is in the midst of an existential crisis. The Voting Rights Act (VRA) is probably the most celebrated civil rights statute ever enacted by Congress.<sup>1</sup> By most accounts, the central concern that gave rise to the VRA—racial animus against black voters and black candidates by white state and private actors—has, blessedly, retreated into the annals of history since the Act’s passage.<sup>2</sup> Bull Connor is dead; black voters can register and vote on par with white voters; black candidates can run for office, and white voters will vote for them; the voting rights framework now incorporates Latinos and other Americans of color, allowing more individuals to take advantage of the pro-

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

<sup>2</sup> See Grant M. Hayden, *Resolving the Dilemma of Minority Representation*, 92 CALIF. L. REV. 1589, 1591 (2004) (describing the success of the VRA in ensuring minority access to the polls and increasing minority representation in legislatures); Richard H. Pildes, *Is Voting-Rights Law Now at War with Itself? Social Science and Voting Rights in the 2000s*, 80 N.C. L. REV. 1517, 1529-39 (2002) (reviewing social-science studies that found an increasing prevalence of white voters supporting black political candidates); Michael J. Pitts, *Section 5 of the Voting Rights Act: A Once and Future Remedy?*, 81 DENV. U. L. REV. 225, 249 (2003) (explaining how the diminished level of purposeful discrimination may make an extension of Section 5 unconstitutional).

tections of the VRA; and a black man is President of the United States. Though isolated instances of racial animus in voting persist, and may be with us always, the VRA has replaced the systematic, state-sponsored racial exclusion that affected the rights of millions of American citizens seeking to participate in the political process with a new reality. Literacy tests are no more, at least as a feature of the electoral process; grandfather clauses are buried with the grandfathers; retaliation by private employers against black voters who dared to register to vote exists only in our memories, if at all; and few twenty-first century Americans could imagine that anyone would assault a voter or group of voters for exercising their right to vote, much less that the state would fail to prosecute such an attacker. The question then is what steps remain for voting rights policy.

Voting rights law, doctrine, practice, and, pointedly, scholarship have been unable to figure out the next move. Some scholars argue that it is time to sunset the VRA.<sup>3</sup> Others have proposed new alternatives and modifications.<sup>4</sup> The Supreme Court has threatened to strike down one of the Act's most central provisions, Section 5,<sup>5</sup> on constitutional grounds,<sup>6</sup> while commentators—including some Justices on the Supreme Court—have argued that the VRA's other central provision, Section 2,<sup>7</sup> is unconstitutional.<sup>8</sup> No sophisticated student of voting

<sup>3</sup> Samuel Issacharoff, *Is Section 5 of the Voting Rights Act a Victim of Its Own Success?*, 104 COLUM. L. REV. 1710, 1731 (2004).

<sup>4</sup> See Heather K. Gerken, *A Third Way for the Voting Rights Act: Section 5 and the Opt-In Approach*, 106 COLUM. L. REV. 708, 716 (2006) (proposing an “opt-in” system that would “create space for community and legislative leaders to negotiate the best deal possible for racial minorities but place a bargaining chip in their pockets—a chance to demand that the Act’s traditional constraints apply should bargaining break down”).

<sup>5</sup> VRA § 5, 42 U.S.C. § 1973c (2006) (subjecting to review any attempt to change “any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting” in defined jurisdictions).

<sup>6</sup> *Nw. Austin Mun. Util. Dist. No. One v. Holder* (NAMUDNO), 129 S. Ct. 2504, 2513 (2009) (suggesting that the VRA is unconstitutional, but finding alternative grounds for the holding).

<sup>7</sup> VRA § 2, 42 U.S.C. § 1973 (2006) (prohibiting any voting qualification or prerequisite that discriminates on the basis of race or color).

<sup>8</sup> See *Bartlett v. Strickland*, 129 S. Ct. 1231, 1250 (2009) (Thomas, J., concurring) (reiterating his position from his concurring opinion in *Holder v. Hall*, 512 U.S. 874, 891 (1994), that Section 2 of the VRA does not authorize vote dilution claims, and suggesting that such an interpretation makes the statute unconstitutional); *Georgia v. Ashcroft*, 539 U.S. 461, 491 (2003) (Kennedy, J., concurring) (considering it a “fundamental flaw” that “the Department of Justice is permitted or directed to encourage or ratify a course of unconstitutional conduct in order to find compliance with a statutory directive”); cf. *League of United Latin Am. Citizens v. Perry* (LULAC), 548 U.S. 399, 511 (2006) (Roberts, C.J., concurring in part and dissenting in part) (questioning the court’s role in “rejiggering the district lines under § 2”).

rights would be surprised if the Court were to strike down Section 2 or Section 5 as unconstitutional within the next two to five years.

Leaving aside the constitutional questions—which may ultimately be fatal to the Act—the policy questions are equally pressing. What does vote dilution mean in a political context in which the vast majority of African-American voters—and increasingly Latinos—support the Democratic Party? What does racial bloc voting mean when black voters are unwilling to vote for black Republican candidates but some white voters will vote for the Republican candidate regardless of race? Is it racial discrimination if a Republican state legislature adopts a voter identification requirement when the law will likely have a disproportionate impact on the state’s Democratic voters, a plurality of whom would be voters of color? Is such a voter identification requirement a barrier to political participation and thus a violation of Section 2? When should a state’s failure to draw coalition and influence districts be a violation of Section 2? Why are felon disenfranchisement statutes consistent with Section 2? What is the constitutional expiration date on Section 2’s results test? These are just a small sample of the types of questions raised by voting rights policy that are not only currently unanswered, but that we do not seem to know how to answer.

In *Making Sense of Section 2*, Christopher Elmendorf tackles some of these problems head-on. Professor Elmendorf’s purpose is to resurrect and save Section 2. In particular, he focuses on three criticisms that judges, practitioners, and academics have lodged against Section 2. They have argued that Section 2’s standard is difficult to apply, that remedies for violations of Section 2 will contribute to racial balkanization, and that Section 2 is unconstitutional.

Professor Elmendorf makes a number of moves in his article. First, he ascribes to the VRA and Section 2 the purpose of quickening the “waning of racism in American politics.”<sup>9</sup> Second, he argues that Section 2 “should be understood as a delegation of authority to the courts to develop a common law of racially fair elections, guided by certain substantive and evidentiary norms as well as norms about legal change.”<sup>10</sup> Third, Professor Elmendorf reorients Section 2’s substantive standard from the factors set forth in *Thornburg v. Gingles*<sup>11</sup> and the

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<sup>9</sup> Christopher S. Elmendorf, *Making Sense of Section 2: Of Biased Votes, Unconstitutional Elections, and Common Law Statutes*, 160 U. PA. L. REV. 377, 381 (2012).

<sup>10</sup> *Id.* at 383.

<sup>11</sup> 478 U.S. 30, 50-51 (1986) (finding that the plaintiff must show that a group is “sufficiently large and geographically compact”; that it is “politically cohesive”; and that

totality of circumstances approach rooted in Section 2's legislative history to a focus on "race-biased decisionmaking."<sup>12</sup> He defines "race-biased decisionmaking" as an electoral decision that was affected by the decisionmaker's consideration of the subject's race.<sup>13</sup> This substantive standard would cover both dilution claims and participation claims. Finally, Professor Elmendorf offers two particularly innovative applications of this new substantive Section 2 standard. Section 2, Professor Elmendorf argues, should be used to respond "to the problem of election outcomes that are unconstitutional because of the role of race in the electorate's verdict."<sup>14</sup> Given that these types of claims would not be justiciable under the Court's political question doctrine, the Court can address those claims under a statutory framework.<sup>15</sup> Presumably, these are claims where white (or black) voters refuse to vote for a black candidate (or white candidate in the case of black voters) because of the candidate's race. Section 2 would also address "depolarization claims," which Professor Elmendorf defines as claims alleging that an electoral structure has "unreasonably induce[d] or sustain[ed] race-biased voting."<sup>16</sup>

There is much to admire about *Making Sense of Section 2*. I think Professor Elmendorf is clearly right that courts should interpret Section 2 in the same way that they develop the common law. It is not surprising that I would take this view given that Professor Luis Fuentes-Rohwer and I have advanced a similar and broader argument.<sup>17</sup> In our view, the Court has interpreted the VRA consistent with a common law approach and in partnership with both Congress and, to a more limited extent, the Department of Justice. One cannot fully appreciate the development and evolution of voting rights policy without understanding how those three institutions have interacted together to give effect to the often-shared, at least at the outset, constitutional vision of the Fifteenth Amendment and the statutory aspirations of the VRA.

But this common law approach has its limits, and in this regard, *Making Sense of Section 2* raises as many questions as it answers, as a good article should. Voting rights policy's existential crisis is due in

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a white majority generally votes as a bloc, which overcomes the minority group's preferred candidate).

<sup>12</sup> Elmendorf, *supra* note 9, at 383.

<sup>13</sup> *Id.* at 384.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 414-15.

<sup>16</sup> *Id.* at 385.

<sup>17</sup> See Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *Superstatutory Interpretation* (2012) (unpublished manuscript) (on file with author).

large part to its failure to come to terms with the purpose of voting rights law in the twenty-first century. Professor Elmendorf squares up to this problem by recognizing a supposed consensus with respect to the purpose of Section 2 between both liberals and conservatives on the Court. Section 2's purpose, and maybe that of the VRA more broadly, is to reduce if not eliminate racism in American politics. But this move is question-begging: what is racism in American politics, and how will we know whether it is waning? Resolving that inquiry is a necessary condition to rehabilitating Section 2. Without an adequate conceptual understanding of the racism that Section 2 ought not to tolerate in the political process, it is hard to evaluate Professor Elmendorf's innovative and important contributions to Section 2's future development, namely: (1) his introduction of race-biased decisionmaking as the substantive standard under Section 2; (2) his focus on unconstitutional outcomes to justify and guide the constitutional scope of Section 2; and (3) the relevance of depolarization claims under this new understanding of Section 2.

Is the *telos* of Section 2 the removal of Jim Crow-like barriers to political participation? If the racism is defined as or limited to racial animus, then the conservatives are right that there is nothing left for voting rights policy to vindicate. The Voting Rights Act has largely achieved this purpose, and Section 2 should only be preserved in the annals of history. Relatedly and more specific to Professor Elmendorf's project, if racial animus is the evil that Section 2 is seeking to eradicate, then it is not clear what the introduction of "race-biased decisionmaking" would add to the Fourteenth or Fifteenth Amendment standards and whether depolarization claims would be any different from ordinary Fourteenth Amendment equal protection claims. Again, the inevitable conclusion, at least under this understanding of racism as Jim Crow, is that there is nothing left for Section 2 to do.

If race-biased and depolarizing claims are not aimed at Jim Crow-style racial animus in the political process, then what types of race-tinged political behavior would implicate Section 2's substantive standard? Professor Elmendorf suggests "prejudiced voting by majority-group citizens causes a participation harm within the meaning of Section 2 whenever it burdens minorities' efforts to participate in normal party politics."<sup>18</sup> But *Making Sense of Section 2* does not define prejudice or its conceptual complement, normal politics. If we discard Jim Crow-type prejudice as a possibility, then the next best doctrinal op-

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<sup>18</sup> Elmendorf, *supra* note 9, at 420.

tion is a disparate impact standard. We could, for example, rewrite the sentence above to say that “whenever a majority votes as a bloc to defeat the minority’s preferred candidate, minority voters suffer a participation harm within the meaning of Section 2.” But of course this is the *Gingles* standard, which *Making Sense of Section 2* rejects explicitly and maybe rightly so.

For a slightly different perspective, one could borrow an interpretation of the Court’s decision in *League of United Latin American Citizens v. Perry* (*LULAC*) to reconstitute a workable intent standard.<sup>19</sup> In *LULAC*, Latino plaintiffs argued that Texas violated Section 2 of the VRA when it removed some Latino voters from a district in order to prevent Latinos as a group from voting out the incumbent representative.<sup>20</sup> In his opinion for the Court, Justice Kennedy not only agreed with the Section 2 claim, but he also implied, rather strongly, that the state’s action might constitute intentional discrimination in violation of the Equal Protection Clause.<sup>21</sup> Though it is hard to parse this cryptic argument, and though it might mean nothing more than a reiteration of the classical intent standard,<sup>22</sup> it might also mean that Justice Kennedy is amenable to a redefinition of the intent standard in order to reach certain types of voting rights violations.<sup>23</sup> If this is true, then it would mean that the state engages in intentional race discrimination in the electoral process when its actions burden voters (of color? numerical minorities? incipient political majorities?) and that the state does not have a compelling justification for imposing that intentional burden. The difference, of course, between this redefinition and classical equal protection doctrine is that classical equal protection doctrine does not apply heightened scrutiny unless the state burdened voters of color because of their race.<sup>24</sup> Under this redefinition, it might not matter whether the voters burdened are voters of color, and it certainly does not matter that race was not the reason for imposing the burden. Again, it is not clear whether this is a robust line of inquiry, but it would have been an interesting one for Professor Elmendorf to explore.

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<sup>19</sup> 548 U.S. 399 (2006).

<sup>20</sup> *Id.* at 423-25.

<sup>21</sup> *Id.* at 440.

<sup>22</sup> See Ellen D. Katz, *Reviving the Right to Vote*, 68 OHIO ST. L.J. 1163, 1171 (2007) (concluding, however, that the *LULAC* opinion does more than reiterate the intent standard).

<sup>23</sup> For a preliminary attempt at this redefinition, see Guy-Uriel E. Charles, *Race, Redistricting, and Representation*, 68 OHIO ST. L.J. 1185, 1207-10 (2007).

<sup>24</sup> *Washington v. Davis*, 426 U.S. 229, 239-42 (1976).

Moreover, this line of inquiry—redefining the intent standard toward the aperture opened up by Justice Kennedy in *LULAC*—is congruent with another one of Professor Elmendorf’s important aims, which is to shore up the constitutionality of Section 2. Professor Elmendorf tackles that task by offering a series of arguments that build on each other but, like a game of Jenga, become more precarious as each block is added to the tower. The first move is the argument that voters, as a collective, are state actors.<sup>25</sup> According to this argument, voters are an “it” and not a “they,” and as an “it,” their collective behavior constitutes state action. Professor Elmendorf argues next that election outcomes are unconstitutional when they are the product of “race-biased voting.”<sup>26</sup> Presumably, this means that it is unconstitutional for white voters to elect, for example, a white representative because these voters prefer the white representative to a hypothetical black challenger on racial grounds. At the same time, Professor Elmendorf argues that each voter’s individual decision—and by hypothesis, racist decision—is constitutionally protected but that the aggregation of those decisions constitutes state action and violates the Constitution.<sup>27</sup> Professor Elmendorf next concedes that even though the electoral outcome is state action, it would not be justiciable because of the lack of remedy for the constitutional violation.<sup>28</sup>

From this rather unstable tower of reasoning, Professor Elmendorf derives two implications. First, the Court should interpret its constitutional standard for assessing Congress’s power to promulgate Section 2 in light of the fact that Section 2 is attempting to reach constitutional violations that would not be justiciable under the Constitution.<sup>29</sup> Second, Section 2 ought to recognize “depolarization claims,” which manifest themselves where the electoral structure promotes or facilitates race-biased electoral behavior.<sup>30</sup> Under Professor Elmendorf’s framework, depolarization claims under Section 2 would make up for the fact that the unconstitutional outcome cases are not justiciable. Functionally, these depolarization claims would replace the *Gingles* or totality of circumstances standard.

The problem with this framework is that intellectually it is quite fragile. First, one has to buy into the distinction between the right to

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<sup>25</sup> Elmendorf, *supra* note 9, at 430-32.

<sup>26</sup> *Id.* at 430.

<sup>27</sup> *Id.* at 432.

<sup>28</sup> *Id.* at 437-38.

<sup>29</sup> *Id.* at 441-42.

<sup>30</sup> *Id.* at 442.

vote as an individual right and as an aggregate right. Second, one has to agree that the individual right is protected by the First Amendment, but the aggregate right is not. Third, and this is a familiar refrain, one would have to distinguish between instances where voters prefer a candidate for benign reasons and where voters prefer a candidate on the basis of race for malign reasons. Fourth and finally, one would have to agree that the Fourteenth Amendment is relevant to electoral outcomes. Each of these moves is deeply contested in election law scholarship, to put it mildly.<sup>31</sup> In my view, they are also unnecessary for Professor Elmendorf's conclusion.

From an altogether different vantage point, one could argue that the *telos* of voting rights policy is to ensure consequential political participation by voters of color. Put differently, maybe voting rights scholars need to articulate a right of political participation that is unmoored to any conception of racial discrimination. It is a small step from Professor Elmendorf's concept of depolarization to a normative argument that electoral structures should not submerge completely the rights of racial minorities.<sup>32</sup> This might kill the current Section 2 framework, but we might have to kill Section 2 to save it.

Conceptually, I am increasingly attracted to a universal, as opposed to race-based, approach to thinking about electoral inequality. But a right of consequential political participation for voters of color may paradoxically be a critical way station. That is, in the process of universalizing voting rights policy, one can begin by articulating a right of consequential political participation based upon race, while recognizing that this is not the ultimate limitation of the right. If it is possible to reason out from race,<sup>33</sup> and even if it is not, then one might move voting rights policy toward removing barriers to political participation, even if those barriers do not have a disparate racial impact.

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<sup>31</sup> See, e.g., Guy-Uriel E. Charles, *Racial Identity, Electoral Structures, and the First Amendment Right of Association*, 91 CALIF. L. REV. 1209, 1279 (2003) ("The state's purpose should not be to try to remove race as a factor in American politics; instead, this choice should be left to individuals."); Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 HARV. L. REV. 1663, 1718 (2001) (cautioning against fitting aggregate rights into the "conventional individual rights framework"); Pamela S. Karlan, *The Rights to Vote: Some Pessimism about Formalism*, 71 TEX. L. REV. 1705, 1707-08 (1993) (explaining the aggregate components of the right to vote).

<sup>32</sup> See generally LANI GUINIER, *THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY* (1994).

<sup>33</sup> This is not an insignificant hurdle, if the Court's experience in *Vieth v. Jubelirer* is at all instructive. See 541 U.S. 267, 284-87 (2003) (noting that the Court's experience with racial gerrymandering is irrelevant in the context of partisan gerrymandering).

Professor Elemendorf's article is a thoughtful and learned exposition on what ails Section 2 of the VRA specifically, but captures much of the VRA more generally. It is bold in its solutions and rich in its details. He not only helps us understand how to make sense of Section 2, but also that we might have to kill Section 2 in order to save it.

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Preferred Citation: 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/1-2012/Charles.pdf>.