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

by JESSICA CASSELLA*

> Voting in the United States is the fundamental act of self-government. It provides the citizen in our free society the right to make a judgment, to state a choice, to participate in the running of his government—in the community, the State, and the Nation. The ballot box is the medium for the expression of the consent of the governed.[1]

> Our fathers believed that if this noble view of the rights of man was to flourish, it must be rooted in democracy. The most basic right of all was the right to choose your own leaders. The history of this country, in large measure, is the history of the expansion of that right to all of our people.
>
> Many of the issues of civil rights are very complex and most difficult. But about this there can and should be no argument. Every American citizen must have an equal right to vote. There is no reason which can excuse the denial of that right. There is no duty which weighs more heavily on us than the duty we have to ensure that right.[2]

Introduction

In *Shelby County v. Holder*,[3] the United States Supreme Court struck down Section 4(b) of the Voting Rights Act ("VRA").[4]

---

* J.D. Candidate 2015, University of California, Hastings, College of the Law; B.S. 2011, Santa Clara University, Political Science. I am grateful to Professor Joel Paul, who provided valuable guidance throughout the writing of this Note. I would also like to thank my friends and family for their continued support, and the *Hastings Constitutional Law Quarterly* membership for their hard work and dedication.

1. COMM'N ON REGISTRATION & VOTING PARTICIPATION, REP. ON REGISTRATION & VOTING PARTICIPATION 5 (1963), *available at* http://babel.hathitrust.org/cgi/pt?id=mdp. 39015041176648;view=1up;seq=12.

2. Lyndon B. Johnson, President Johnson's Special Message to the Congress: The American Promise (March 15, 1965), *available at* http://www.lbjlibrary.org/lyndon-baines-johnson/speeches-films/president-johnsons-special-message-to-the-congress-the-american-promise/.

3. Shelby Cnty. v. Holder, 133 S. Ct. 2612 (2013).

Section 4(b) provided a formula that subjected certain "covered" jurisdictions to preclearance requirements defined in Section 5.[5] Because Section 4(b) and Section 5 were intertwined, the Court's express invalidation of Section 4(b) effectively nullified Section 5—at least until Congress drafts another Section 4(b) formula responding to current political conditions.[6]

In *Shelby County*, the Court ruled that the coverage formula in Section 4(b) was unconstitutional. The Court provided three principle rationales. First, the Court stated that "the [VRA] imposes current burdens and must be justified by current needs."[7] Second, the Court noted that "[t]he Federal Government does not . . . have a general right to review and veto state enactments before they go into effect."[8] The Court supported this position by citing the Tenth Amendment, which protects state sovereignty and provides that the power not delegated to the federal government is reserved to the states.[9] The Court discussed the value of federalism not just as an end, but as a means to an end to ensure rights that are enabled only by the "diffusion of sovereign power."[10] Third, the Court stated that "a departure from the fundamental principle of equal sovereignty requires a showing that a statute's disparate geographic coverage is sufficiently related to the problem that it targets."[11] The Court held that Section 4(b) of the VRA violated these principles by suspending all state election laws until approved by the federal government, and only doing so for certain states.[12]

Section 4(b) and Section 5 contained several important provisions invalidated by *Shelby County*. Under Section 4(b), the covered jurisdictions included states and political subdivisions that had a test or device as a prerequisite to voting as of November 1, 1964, and had less than 50% voter registration or turnout in the 1964

4. *Id.*

5. Voting Rights Act of 1965 § 4(b); 42 U.S.C. § 1973b(b) (2012), *invalidated by Shelby Cnty.*, 133 S. Ct. 2612.

6. *Shelby Cnty.*, 133 S. Ct. at 2631.

7. *Id.* at 2615–16 (quoting Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 203 (2009)) (internal quotation marks omitted).

8. *Shelby Cnty.*, 133 S. Ct. at 2623.

9. *Id.* at 2623–24; U.S. CONST. amend. X.

10. *Shelby Cnty.*, 133 S. Ct. at 2623 (quoting Bond v. United States, 180 L. Ed. 2d 269, 274 (2011)) (internal quotation marks omitted).

11. *Shelby Cnty.*, 133 S. Ct. at 2622 (quoting *Nw. Austin*, 557 U.S. at 203) (internal quotation marks omitted).

12. *Shelby Cnty.*, 133 S. Ct. at 2624.

Presidential election.[13] This formula included jurisdictions that had a history of voter suppression and racial discrimination.[14] Section 5 required the states covered under the Section 4(b) formula to obtain approval from federal authorities before changing "any voting qualification or prerequisite to voting, or standard, practice or procedure with respect to voting."[15] This measure provided a proactive tool for the federal government to limit voter suppression, instead of relying solely on case-by-case litigation in response to state enactments.[16]

In the aftermath of *Shelby County*, it is important to consider alternative methods to effectively enforce the VRA besides Section 4(b) and Section 5. This Note argues that, with some modification of interpretation, Section 2 can replace Section 4(b) and Section 5 in order to challenge voter suppression tactics. Part I of this Note briefly describes the history and background of Section 2. Part II discusses the various constitutional challenges to Section 2, which are similar to the arguments used against Section 4(b) in *Shelby County*. Part III then defends the constitutionality of Section 2 against these challenges. Finally, Part IV proposes amendments and alternative

13. 42 U.S.C. § 1973b(b).

14. Voter suppression can be divided into two categories: (i) voter denial and (ii) vote dilution. Voter denial has been described as the "first generation" of voting rights cases, where certain people were intentionally denied the right to vote, usually based on literacy tests and poll taxes. In contrast, e dilution has been described as the "second generation" of voting rights cases, where jurisdictions have used gerrymandering and at-large elections to decrease the voting power of certain communities—mostly communities of color. There are a variety of recognized voter suppression tactics that today consist mostly of vote dilution, including: changing polling locations or hours shortly before Election Day, eliminating or significantly reducing early voting, limiting the number of polling places, changing district elections to at-large elections, drawing districts in a way that creates majority-minority districts or divides minority communities among districts, and implementing stringent voter identification requirements at polling sites. These tactics have been used for decades, and the prevention of these tactics is at the core of the VRA. *See* Kathleen M. Stoughton, *A New Approach to Voter Id Challenges: Section 2 of the Voting Rights Act*, 81 GEO. WASH. L. REV. 292, 316 (2013); Lynn Eisenberg, Note, *States as Laboratories for Federal Reform: Case Studies in Felon Disenfranchisement Law*, 15 N.Y.U. J. LEGIS. & PUB. POL'Y 539, 540 n.8 (2012); Daniel P. Tokaji, *The New Vote Denial: Where Election Reform Meets the Voting Rights Act*, 57 S.C. L. REV. 689, 702 (2006).

15. Voting Rights Act of 1965 § 5, 42 U.S.C. § 1973c (2012), *invalidated by Shelby Cnty.*, 133 S. Ct. 2612.

16. South Carolina v. Katzenbach, 383 U.S. 301, 328 (1966). *See also* Ex parte Virginia, 100 U.S. 339, 345–46 (1879) ("Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power.").

methods to using Section 2 in order to strengthen enforcement of the VRA after *Shelby County*.

I. History and Background of Section 2 of the Voting Rights Act

Congress crafted the VRA to support the Fifteenth Amendment by preventing voter suppression and providing "stringent new remedies for voting discrimination."[17]

In 1965, there were several important provisions in the original VRA. Section 2 of the VRA prohibited the "denial or abridgment of the right of any citizen of the United States to vote on account of race or color" on a nationwide basis.[18] The language in Section 2 intentionally echoed the language of the Fifteenth Amendment, which states, "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude."[19] In *City of Mobile v. Bolden*,[20] the Court held that Section 2 simply highlighted and restated the protections afforded by the Fifteenth Amendment.[21] Consequently, a plaintiff had to prove that the voting procedure was enacted or maintained to *intentionally* discriminate.[22]

In 1982, Congress amended Section 2 to reduce this burden on the plaintiff.[23] The new standard has allowed plaintiffs to show discriminatory effects, instead of discriminatory intent, through a totality of the circumstances results-oriented test.[24] Currently, Section 2 of the VRA states that:

> 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

17. *Katzenbach*, 383 U.S. at 308; U.S. CONST. amend. XV.

18. Voting Rights Act of 1965 § 2, 42 U.S.C. § 1973(a) (2012).

19. U.S. CONST. amend. XV.

20. City of Mobile v. Bolden, 446 U.S. 55 (1980).

21. *Id.* at 60–61 (1980) ("It is apparent that the language of § 2 no more than elaborates upon that of the Fifteenth Amendment, and the sparse legislative history of § 2 makes clear that it was intended to have an effect no different from that of the Fifteenth Amendment itself.").

22. *Id.* at 66.

23. U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., SECTION 4 OF THE VOTING RIGHTS ACT, http://www.justice.gov/crt/about/vot/misc/sec_4.php (last visited Sept. 15, 2014).

24. U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., SECTION 2 OF THE VOTING RIGHTS ACT, http://www.justice.gov/crt/about/vot/sec_2/about_sec2.php (last visited Sept. 15, 2014).

> 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 1973b(f)(2) of this title, as provided in subsection (b) of this section.[25]

This results language has allowed plaintiffs to bring voting rights challenges not only in cases of discriminatory intent, but also in cases where there were discriminatory effects based on a totality of the circumstances. A report published by the Senate Committee on the Judiciary,[26] and later adopted in *Thornburg v. Gingles*,[27] provides objective factors for the totality of the circumstances results test.[28] These factors include:

1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;
2. the extent to which voting in the elections of the state or political subdivision is racially polarized;
3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;
4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;
5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;
6. whether political campaigns have been characterized by overt or subtle racial appeals;

25. 42 U.S.C. § 1973 (emphasis added).

26. S. REP. NO. 97–417, at 27 (1982).

27. Thornburg v. Gingles, 478 U.S. 30, 44–45 (1986).

28. S. REP. NO. 97–417, at 28–29. These factors were derived from the analytical framework of White v. Regester, 412 U.S. 755 (1973). The factors were refined by the lower courts, in particular by the Fifth Circuit in Zimmer v. McKeithen, 485 F.2d 1297 (1973) (en banc), and affirmed by E. Carroll Parish Sch. Bd. v. Marshall, 424 U.S. 636 (1976) (per curiam).

7. the extent to which members of the minority group have been elected to public office in the jurisdiction;
8. whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group; and
9. whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.[29]

The presence or absence of any of these factors does not *per se* prove or disprove a plaintiff's case; it merely contributes to an understanding of the totality of the circumstances.[30] In *Gingles*, the Court held that the "essence of a Section 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives."[31] In addition to these factors, the plaintiff must show certain conditions for success, including: that they are part of a group that is sufficiently large and geographically compact to constitute a majority within the voting district; that the plaintiff group is politically cohesive; and that the white majority voting bloc usually defeats the plaintiff group's preferred candidate.[32] Some courts have held that more than one racial minority group could be considered politically cohesive as long as the *Gingles* factors in the totality of circumstances test is applied.[33] The *Gingles* factors and these three conditions for success provide standards for Section 2 violations that focus on the discriminatory effects of enacted electoral devices.

II. Why is Section 2 of the Voting Rights Act at Risk?

In *Shelby County*, the Court stated that "[o]ur decision in no way affects the permanent, nationwide ban on racial discrimination in voting found in Section 2."[34] However, previous statements by the United States Supreme Court justices and others have questioned the constitutionality of Section 2 after the 1982 amendments because the

29. S. REP. NO. 97–417, at 28–29.

30. *Gingles,* 478 U.S. at 45.

31. *Id.* at 47. *See also* Johnson v. DeGrandy, 512 U.S. 997 (1994).

32. 42 U.S.C. § 1973(b) (2012). *See also* Benavidez v. Irving Indep. Sch. Dist., 690 F. Supp. 2d 451 (N.D. Tex. 2010).

33. *See* Campos v. Baytown, 840 F.2d 1240 (5th Cir. 1988); Romero v. Pomona, 665 F. Supp 853 (E.D. Cal. 1987) (recognizing rule).

34. *Shelby Cnty.*, 133 S. Ct. at 2631.

totality of the circumstances test focuses on discriminatory effects. Chief Justice Roberts has stated that a test focused on discriminatory effects would likely raise constitutional issues since the Fourteenth and Fifteenth Amendments only ban intentional discrimination.[35] In fact, when Chief Justice Roberts worked for the Reagan Administration as a Special Assistant to the Attorney General, he wrote a memo arguing that "violations of Section 2 should not be made too easy to prove" since doing so would "provide a basis for the most intrusive interference imaginable by federal courts" into state and local processes.[36] He also noted that it "would be difficult to conceive of a more drastic alteration of local government affairs."[37] Other scholars have supported this view, stating, "congressional legislation must be aimed at preventing *intentional* racial discrimination, not just actions that may have an effect that disproportionately affects racial minorities."[38] Moreover, Justice Scalia supported this view in his concurrence in *Ricci v. DeStefano*,[39] stating that the discriminatory effects test actually encourages race-based decision-making, violating the Constitution's equal protection guarantee:

> I . . . write separately to observe that [the Court's] resolution of this dispute merely postpones the evil day on which the Court will have to confront the question: Whether, or to what extent, are the disparate-impact provisions of Title VII of the Civil Rights Act of 1964 consistent with the Constitution's guarantee of equal protection?[40]

Although Justice Scalia's concurrence was regarding the Civil Rights Act of 1964, some election experts have forecasted that

35. Memorandum from John Roberts to the U.S. Attorney General (Jan. 26, 1982), *available at* http://www.archives.gov/news/john-roberts/accession-60-88-0498/030-black-binder1/folder030.pdf.

36. *Second Day of Hearings on the Nomination of Judge Roberts*, N.Y. TIMES, Sept. 13, 2005, at 21, *available at* http://www.nytimes.com/2005/09/13/politics/politicsspecial1/13text-roberts.html?pagewanted=21&_r=0.

37. *Id.*

38. *'Disparate Impact' Isn't Enough*, NATIONAL REVIEW ONLINE (Mar. 22, 2014, 12:00 AM) http://www.nationalreview.com/article/373958/disparate-impact-isnt-enough-roger-clegg-hans-von-spakovsky.

39. Ricci v. DeStefano, 557 U.S. 557, 594 (2009).

40. *Id.* at 594.

"[t]here is no question that the conservatives on the Supreme Court are on the hunt for the effects test."[41]

Also, in the wake of *Shelby County*, many states are looking to push the boundaries of Section 2 in order to defend their state election laws. For example, in a recent court brief, the State of Texas argued that a discriminatory effects test in Section 2 "would require every voting law to have a symmetrical impact," which Texas argues is impossible.[42] For these reasons, as well as the fact that the VRA is now in the national spotlight and therefore subject to attacks in its entirety,[43] it is critical to preemptively defend the constitutionality of Section 2.

III. Defending the Constitutionality of Section 2 of the Voting Rights Act

Many courts have held that "[l]egislation to enforce civil rights including provisions protecting the right to vote, is constitutionally valid."[44] Specifically, Congress has authority to enact legislation to protect the right to vote through the Necessary and Proper Clause,[45] the Supremacy Clause,[46] and the Fourteenth[47] and Fifteenth Amendments.[48]

Under the Necessary and Proper Clause, Section 2 is constitutional because it is consistent with the letter and spirit of the Fifteenth Amendment. The Court has utilized Chief Justice Marshall's test set forth in *McCulloch v. Maryland*[49] to determine the constitutionality of Congressional actions. The test states: "Let the end be legitimate, let it be within the scope of the constitution, and all

41. *Voter ID Cases Could Let John Roberts Destroy Voting Rights Act*, MSNBC.COM (Feb. 14, 2014, 11:46 AM) http://www.msnbc.com/msnbc/could-voter-id-challenges-back fire.

42. Defs.' Mot. to Dismiss at 24, Veasey v. Perry, 2:13-CV-193, 2014 WL 1340077 (S.D. Tex. Apr. 3, 2014), *available at* https://www.dropbox.com/s/jmxvxrjpns6pz32/ motion %20to%20dismiss%20voter%20ID%20-%20new.pdf.

43. *The Seven Top Legal Stories of 2014*, THE NEW YORKER, Dec. 10, 2013, *available at* http://www.newyorker.com/online/blogs/comment/2013/12/the-seven-top-legal-stories-of -2014.html.

44. 25 AM. JUR. 2D Elections § 105 (2004). *See, e.g.*, United States v. Mississippi, 380 U.S. 128 (1965); Hannah v. Larche, 363 U.S. 420 (1960); United States v. Raines, 362 U.S. 17 (1960).

45. U.S. CONST. art. I, § 8, cl 18.

46. U.S. CONST. art. VI.

47. U.S. CONST. amend. XIV.

48. U.S. CONST. amend. XV.

49. McCulloch v. Maryland, 17 U.S. 316 (1819).

means which are appropriate, which are plainly adapted to that end, and which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."[50] Because of evidence that individual litigation was insufficient to protect voting rights, Congress designed and implemented Section 2 of the VRA as a proactive measure to guard against voter suppression by the states.[51] In doing so, Congress chose to focus Section 2 on discriminatory effects, rather than just discriminatory intent, in order to reduce the burden on the plaintiff. Under Chief Justice Marshall's "necessary and proper" test provided in *McCulloch*, Congress' actions are "consistent with the letter and spirit" of the Fifteenth Amendment. Therefore, Congress is not limited to generally enforcing the Fifteenth Amendment—its constitutional mandate authorizes it to act proactively through Section 2 of the VRA.

Likewise, under the Supremacy Clause, Section 2 is constitutional because Congress can expressly or impliedly preempt state law in order to protect the Fifteenth Amendment. The Supremacy Clause provides that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."[52] The Supremacy Clause authorizes Congress to preempt state constitutions because "[i]f the legislatures of the several states may, at will, annul the judgments of the courts of the United States, and destroy the rights acquired under those judgments, the constitution itself becomes a solemn mockery."[53] The Court has previously held that Congress can expressly or impliedly preempt state law in voting rights cases.[54] In *Arizona v. Inter Tribal Council of Arizona*, the Court held that the state of Arizona's requirement that potential voters provide proof of United States citizenship is preempted by the National Voter Registration Act's mandate that states "accept and use" the federal voter

50. *McCulloch*, 17 U.S. at 421. *See also*, *id.* at 327 (*quoting Ex parte Virginia*, 100 U.S. at 345–46 and *citing* James Everard's Breweries v. Day, 265 U.S. 545, 558–59 (1924)).

51. *Katzenbach*, 383 U.S. at 328. *See also Ex parte Virginia*, 100 U.S. at 345–46 ("Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power.").

52. U.S. CONST. art. VI, cl. 2.

53. United States v. Peters, 9 U.S. 115, 136 (1809).

54. *See* Arizona v. Inter Tribal Council of Ariz., Inc., 133 S. Ct. 2247, 2249 (2013).

registration form.[55] The Supremacy Clause allows Congress to interfere with traditional state functions, such as election procedures, when state actions expressly or impliedly conflict with the Constitution and/or federal law. Thus, state actions like those taken by Arizona are impliedly preempted because they interfere with the purposes of federal laws like the National Voter Registration Act and VRA, as well as the Constitution, which is described below.

Under the Fourteenth Amendment, Section 2 is constitutional because it ensures equal protection of voters' rights, protects fundamental fairness, and provides procedures when voters are disenfranchised. The Fourteenth Amendment prohibits intentional racial discrimination and protects the right to vote under the Equal Protection Clause and the Due Process Clause.[56] As the Court stated in *Reynolds v. Sims*,[57] "[t]he right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government."[58] Under the Equal Protection Clause, the:

> fundamental principle of representative government in this country is one of equal representation for equal numbers of people, without regard to race, sex, economic status, or place of residence within a State. Our problem, then, is to ascertain, in the instant [sic] cases, whether there are any constitutionally cognizable principles which would justify departures from the basic standard of equality among voters in the apportionment of seats in state legislatures.[59]

The Equal Protection Clause allows plaintiffs to challenge voting practices that treat residents unequally in violation of the Constitution.[60] For example, in *League of Women Voters of Ohio v. Brunner*,[61] the League of Women Voters of Ohio alleged that the State of Ohio's voting system violated the Equal Protection Cause. According to the League of Women Voters of Ohio:

---

55. *Id.*

56. U.S. CONST. amend. XIV.

57. Reynolds v. Sims, 377 U.S. 533 (1964).

58. *Id.* at 555.

59. *Id.* at 560–61.

60. *See, e.g.*, League of Women Voters of Ohio v. Brunner, 548 F.3d 463, 477–78 (6th Cir. 2008).

61. *Id.*

> Voters were forced to wait from two to twelve hours to vote because of inadequate allocation of voting machines. Voting machines were not allocated proportionately to the voting population, causing more severe wait times in some counties than in others. At least one polling place, voting was not completed until 4:00 a.m. on the day following election day. Long wait times caused some voters to leave their polling places without voting in order to attend school, work, or to family responsibilities or because a physical disability prevented them from standing in line. Poll workers received inadequate training, causing them to provide incorrect instructions and leading to the discounting of votes. In some counties, poll workers misdirected voters to the wrong polling place, forcing them to attempt to vote multiple times and delaying them by up to six hours.
>
> Provisional balloting was not utilized properly, causing 22% of provisional ballots cast to be discounted, with the percentage of ballots discounted reaching 39.5% in one county. Disabled voters who required assistance were turned away. White alleges that the touchscreen voting machine "jumped" from her preferred candidate to another candidate, possibly causing her vote to be counted for the wrong candidate.[62]

The Court held that "Ohio's voting system deprives its citizens of the right to vote or severely burdens the exercise of that right depending on where they live in violation of the Equal Protection Clause."[63] *Brunner* exemplifies the view that vote dilution, through voter suppression tactics like malapportioned districts, burdensome voter eligibility requirements, and inequality within or among districts in ballot counting practices, can be just as, if not more, harmful as physically denying voters access to the ballot.[64]

Some cases have also been brought under the Due Process Clause of the Fourteenth Amendment. Under a due process rubric,

62. *Id.*

63. *Id.* at 478.

64. *The United States Constitution*, THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, http://www.lawyerscommittee.org/projects/voting_rights/page?id=0004.

violations can be found under both procedural due process and/or substantive due process.[65] One court has held that "[substantive] due process is implicated where the entire election process[,] including as part thereof the state's administrative and judicial corrective process[,] fails on its face to afford fundamental fairness."[66] In *Brunner*, the Sixth Circuit found that the League of Women Voters of Ohio could also state a claim for substantive due process because the allegations of voter suppression, if true, would fail on their face to afford fundamental fairness.[67] In other words, long voting lines, unequal appropriation of voting machines to the voting population, inadequate poll worker training, and inadequate procedures for disabled voters are not fundamentally fair. *Brunner* demonstrates the ability of plaintiffs to challenge widespread voter suppression tactics as a violation of substantive due process, especially when a large voting bloc is effectively disenfranchised.

Under procedural due process, "parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified."[68] In *Raetzel v. Parks/Bellemont Absentee Election Board*,[69] voters challenged the constitutionality of Arizona's procedure for counting absentee ballots as a violation of procedural due process.[70] The court held:

> While it is true that absentee voting is a privilege and a convenience to voters, this does not grant the state the latitude to deprive citizens of due process with respect to the exercise of this privilege. While the state is able to regulate absentee voting, it cannot disqualify ballots, and thus disenfranchise voters, without affording the individual appropriate due process protection.[71]

This holding suggests that voting rights can be protected under procedural due process, even when the method of voting is merely a

65. *See, e.g.*, Griffin v. Burns, 570 F.2d 1065 (1st Cir. 1978) (substantive due process); *Brunner*, 548 F.3d at 478 (substantive due process); Raetzel v. Parks/Bellemont Absentee Election Bd., 762 F. Supp. 1354 (D. Ariz. 1990) (procedural due process).

66. *Griffin*, 570 F.2d at 1078.

67. *Brunner*, 548 F.3d at 478.

68. Fuentes v. Shevin, 407 U.S. 67, 81 (1972).

69. *Raetzel*, 762 F. Supp. 1354.

70. *Id.*

71. *Id.* at 1358.

privilege. Moreover, this holding recognizes the larger implications behind voting methods and the application of procedural due process in order to prevent voter disenfranchisement.

Finally, Section 2 is constitutional under the Fifteenth Amendment because it is a rational means to prevent voter suppression and Congress is afforded significant deference under the implementing clause of the Fifteenth Amendment. The Fifteenth Amendment states that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude."[72]

Procedurally, the Court has determined the constitutionality of the VRA under the Fifteenth Amendment by using the rational basis test.[73] In *South Carolina v. Katzenbach*,[74] the Court applied this rational basis test to the VRA, stating "Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting."[75] Thus, as long as Congress' actions are legitimately related to the Fifteenth Amendment, those actions are constitutional. Although the Court has recently questioned this standard, especially in the context of Section 4(b) and Section 5,[76] the Court has thus far declined to apply any other test than rational basis when determining the constitutionality of Section 2.[77] Also, the "Court has consistently held that Congress should be given deference when it legislates under the Fifteenth Amendment."[78] Because Congress has presented significant evidence at every point of the

72. U.S. CONST. amend. XV, § 1.

73. *See* Br. for Senate Majority Leader Harry M. Reid as Amicus Curiae in Supp. of Resp't at 7, Shelby Cnty. v. Holder, 133 S. Ct. 2612 (2013) (No. 12-96) ("[I]n evaluating prior extensions of Section 5 . . . this Court has applied rational basis review.").

74. *Katzenbach*, 383 U.S. 301.

75. *Id.* at 324.

76. *See Nw. Austin*, 557 U.S. at 203 ("[The VRA's] departure from the fundamental principle of equal sovereignty requires a showing that a statute's disparate geographic coverage is sufficiently related to the problem that it targets"); City of Boerne v. Flores, 521 U.S. 507, 520 (1997) (arguing for congruence and proportionality "between the injury to be prevented or remedied and the means adopted to that end"). However, *Boerne*, did not affect the ability of Congress to redress state policies that have a discriminatory effect without proof of discriminatory intent. 521 U.S. 507.

77. *See* Eldred v. Ashcroft, 537 U.S. 186, 218 (2003) ("[P]etitioners ask us to apply the 'congruence and proportionality' standard described in cases evaluating exercises of Congress'[s] power under § 5 of the Fourteenth Amendment. But we have never applied that standard outside the § 5 context." (citation omitted)).

78. Sudeep Paul, *The Voting Rights Act's Fight to Stay Rational: Shelby County v. Holder*, 8 DUKE J. CONST. L. & PUB. POL'Y SIDEBAR 271, 293 (2013). *See also Katzenbach*, 383 U.S. at 326 ("Congress has full remedial powers to effectuate the constitutional prohibition against racial discrimination in voting.").

VRA reauthorization, "there is nothing that justifies a departure from applying the rational basis standard to reviewing legislation Congress passed to combat voter discrimination."[79]

Substantively, courts have consistently affirmed Section 2 of the VRA as a valid exercise of Congress' constitutional powers under the Fifteenth Amendment. Congress has broad power to legislate voting rights because of the implementing clause of the Fifteenth Amendment.[80] This implementing clause states, "Congress shall have the power to enforce this article by appropriate legislation."[81] The Court has held that "[t]his power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than those prescribed in the constitution."[82] In *Katzenbach*, the Court held that "[p]rovisions of [Section 2] were appropriate means for carrying out Congress' constitutional responsibilities under [the Fifteenth Amendment] and were consonant with all other provisions of the Constitution."[83] In *Rome v. United States*,[84] the Court held that Congress' enforcement power under the Fifteenth Amendment authorized Congress to prohibit actions that do not expressly violate the Fifteenth Amendment, but are otherwise not reasonable methods to promote the purposes of the Fifteenth Amendment.[85] Also, in *Katzenbach*, the Court held that both the federal government and the courts could enjoin operation of state voting regulations.[86] These holdings have allowed Congress to prohibit state actions that have discriminatory effects, not only discriminatory intent, because they give Congress discretion to enforce the Fifteenth Amendment. However, the Court has limited Congress' power in this area by preventing Congress from creating an entirely new class of forbidden discrimination[87] and

79. *Id.*

80. U.S. CONST. amend. XV, § 2.

81. *Id*. The Nineteenth Amendment, which protects the right to vote regardless of sex, and the Twenty-Sixth Amendment, which protects the right to vote for persons eighteen years of age or older, also have identical enforcement clauses. U.S. CONST. amend. XIX, § 2; U.S. CONST. amend. XXVI, § 2. Although each amendment has different subject-matter focuses, the enforcement clauses of these three Amendments have been treated under one analysis. 1 Federal Civil Rights Acts (3d ed.) § 1:10.

82. *Katzenbach*, 383 U.S. at 327.

83. *Id.* at 308.

84. City of Rome v. United States, 446 U.S. 156 (1980).

85. *Id.* at 177.

86. *Katzenbach*, 383 U.S. at 324.

87. Oregon v. Mitchell, 400 U.S. 112, 296 (1970) (holding that the Voting Rights Act Amendments of 1970, which attempted to lower the minimum voting age for federal elections to eighteen years old, was unconstitutional under the Fifteenth Amendment).

requiring Congress to show proof that current actions are justified by current needs.[88]

Furthermore, the constitutional right to vote includes the right to an *effective* vote. For example, in *United States v. Saylor*,[89] the Court held that Congress had power to punish state election officers for committing conspiracy during an election in which a member of Congress was to be elected.[90] Although *Saylor* concerned state election officials physically tampering with a ballot box, this precedent stands for the proposition that Congress has legitimate authority to intervene in state election procedures in order to protect a meaningful and effective right to vote. Other cases have also supported this right to an effective vote in ways beyond physical access to the ballot box.[91] In other words, the "right to an effective vote, regardless of race, nationality, or creed, is as open to protection by Congress as the right to put a ballot in a box, and a state is subject to federal legislation aimed at protecting the right to vote against state restrictions deemed improper."[92] This idea of a right to an effective vote is important because it creates a right not based on the right itself—i.e., the ability to physically cast a ballot—but based on the effect of that vote—having that ballot be counted. This allows Congress to use the results-oriented test that includes the *Gingles* factors and conditions for success (articulated in Part I).

These constitutional provisions and court precedent strongly support the constitutionality of Section 2. Still, it is essential to defend Section 2 against the rationales that the Court adopted in *Shelby County* to invalidate Section 4(b) (discussed in Part I). One rationale was that "a departure from the fundamental principle of equal sovereignty requires a showing that a statute's disparate geographic coverage is sufficiently related to the problem that it

88. *Nw. Austin*, 557 U.S. at 203.

89. United States v. Saylor, 322 U.S. 385 (1944).

90. *Id.* at 387.

91. *See, e.g.*, Burdick v. Takushi, 504 U.S. 428, 433 (1992) (the right to cast an effective vote "is of the most fundamental significance under our constitutional structure"); P.R. Org. for Political Action v. Kusper, 490 F.2d 575, 580 (7th Cir. 1973) ("the right to vote encompasses the right to an effective vote") (internal quotation marks omitted); Smith v. Winter, 717 F.2d 191, 198 (5th Cir. 1983) ("the right to an effective vote [is] broadly [construed] as a right of meaningful access to the political process rather than narrowly as a mere right of registration and access to the ballot box"); United States v. Post, 297 F. Supp. 46, 51 (W.D. La.1969) (under the VRA, the defendants had a duty "to refrain from applying any voting procedure which will have the effect of denying to Negro voters the right to cast effective votes for the candidate of their choice").

92. 25 Am. Jur. 2d Elections § 105.

targets."[93] As described above, this "sufficiently related" test has never been used to determine the constitutionality of Section 2. Also, with Section 2, there is less of an equal sovereignty issue because federal government action depends only on states that implement discriminatory voting practices. This is in contrast to Section 5's preclearance, which always subjects the same jurisdictions to federal government approval.[94]

A second rationale that the Court relied upon to strike down Section 4(b) was that, under the Tenth Amendment, "[t]he Federal Government does not . . . have a general right to review and veto state enactments before they go into effect."[95] Section 2 does not allow for this right of review before state laws are implemented. Instead, federalism concerns allow the federal government to step in to protect the letter and spirit of the Constitution, including the Necessary and Proper Clause, the Supremacy Clause, the Fourteenth Amendment, and the Fifteenth Amendment. Finally, a third rationale was that Section 4(b) of the VRA did not impose current burdens that were met by current needs.[96] This seemed to be the main concern for the Court because Congress was relying on demographics from 1964 when it reauthorized the VRA in 2006.[97] Because of the centrality of these rationales to the *Shelby County* court's holding, the next section of this Note will specifically address how to strengthen Section 2 in order to address these concerns in the future.

IV. Amendments to Strengthen Section 2 of the Voting Rights Act

The Court in *Shelby County* said, "Congress may draft another [Section 4(b)] formula based on current conditions."[98] However, as one scholar pointed out, "a divided Congress is unlikely to pass legislation touching on sensitive issues of race and political power."[99] In the meantime, and in case a new coverage formula does not find

93. *Nw. Austin*, 557 U.S. at 203.

94. 42 U.S.C. § 1973b(b).

95. *Shelby Cnty.*, 133 S. Ct. at 2623.

96. *Nw. Austin*, 557 U.S. at 203.

97. 42 U.S.C. § 1973b(b).

98. *Shelby Cnty.*,133 S. Ct. at 2631.

99. Nicholas Stephanopoulos, *The South After Shelby County* (Univ. of Chi. L. Sch., Pub. Law, Working Paper No. 451, abstract), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2336749.

political support in Congress, Section 2 will be used as the primary vehicle to enforce the VRA.[100]

A. Modify the *Gingles* Factors

This Note proposes several solutions to address the loss of Section 4(b) and, effectively Section 5, by bolstering Section 2. First, this Note proposes amending Section 2 in ways that would encompass the spirit of Section 4(b) and Section 5. One way to amend Section 2 is to modify the *Gingles* factors to reflect current social conditions and recent voter suppression tactics. One additional *Gingles* factor could be to consider the timing of the proposed change; are the proposed changes going to take effect immediately preceding an election, shortly before the voter registration deadline, or after a majority of registered voters are from marginalized communities? Many cases of voter suppression occur immediately before a key election or voter registration date. For example, in 2001, after the African-American residents in Kilmichael, Mississippi became a majority of the registered voters in the town, the local government attempted to cancel an upcoming election.[101] The United States Department of Justice ("DOJ") intervened under the VRA and the Fourteenth and Fifteenth Amendments because evidence showed that the cancellation was intended to weaken African Americans' voting strength.[102] When the DOJ required the town to hold an election, voters elected the town's first African-American mayor and three African-American supervisors.[103]

Another additional *Gingles* factor could be to consider whether the state has different voting systems for state and federal elections. This factor would contribute to the totality of the circumstances by demonstrating how states treat voters differently for the same basic right to an effective vote. For example, Arizona and Kansas are developing a two-tiered system of voting to distinguish between voters who provided proof of citizenship status when they registered to vote (which will allow them to vote in federal, state, and local elections) and those who did not (which will only allow them to vote

100. *Justice Department to File New Lawsuit Against State of Texas Over Voter I.D. Law*, U.S. DEPARTMENT OF JUSTICE, (Aug. 22, 2013), http://www.justice.gov/opa/pr/2013/August/13-ag-952.html.

101. *The Voting Rights Act: Protecting Voters for Nearly Five Decades*, BRENNAN CTR. FOR JUSTICE, (Feb., 26 2013), http://www.brennancenter.org/sites/default/files/analysis/VRA_Shelby_Background.pdf.

102. *Id.*

103. *Id.*

in federal elections).[104] Although these additional *Gingles* factors would not *per se* prove or disprove a plaintiff's case, they would ensure that the totality of the circumstances test remains relevant and current to fight various iterations of voter suppression tactics.

B. Modify the Compactness Condition for Success Under the Totality of the Circumstances Test to Include and Weigh Cultural Compactness More Than Geographical Compactness

Second, the conditions for success for the totality of the circumstances test should be modified in two key ways. The first condition for success is that the plaintiff is part of a group that is sufficiently large and geographically compact to constitute a majority within the voting district.[105] This means that the plaintiff has to show that a "reasonably geographically compact group of minority voters could form a majority within a district."[106] The problem with this condition is that it excludes districts "that are bizarrely shaped or whose minority populations are overly heterogeneous or below 50 percent in size" because they are not geographically compact or large enough to constitute a majority of voters.[107] Gerrymandering is relatively common when drawing district boundaries, and districts like these shown below[108] are unprotected by this condition for success:

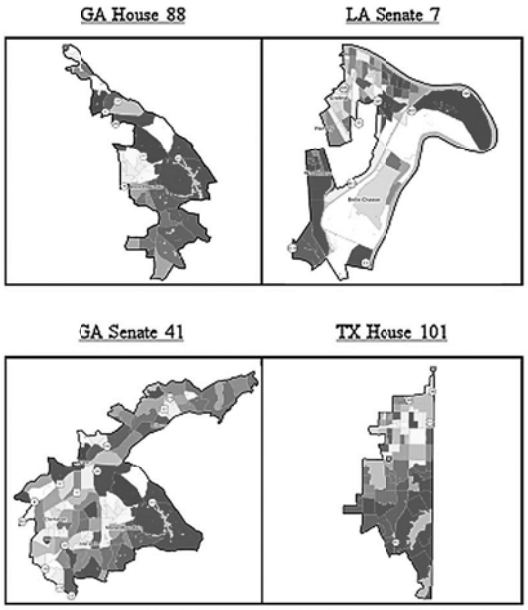
104. *2 States Plan 2-Tier System for Balloting*, N.Y. TIMES, Oct. 11, 2013, *available at* http://www.nytimes.com/2013/10/12/us/2-states-plan-2-tier-system-for-balloting.html.

105. 42 U.S.C. § 1973(b). *See also Benavidez*, 690 F. Supp. 2d 451.

106. Daniel R. Ortiz, *Cultural Compactness*, 105 U. MICH. L. REV. FIRST IMPRESSIONS 49, (2006), *available at* http://www.michiganlawreview.org/assets/fi/105/ortiz.pdf.

107. Stephanopoulos, *supra* note 99.

108. Nicholas Stephanopoulos, *The Future of the Voting Rights Act*, SLATE.COM (Oct. 23, 2013, 4:37PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2013/10/section_2_of_the_voting_rights_act_is_more_effective_than_expected_new_research.html.



109

Congress should reduce the weight of this condition for success because it provides legislators with more incentives to gerrymander and draw districts in odd shapes in order to prevent Section 2 applicability. This condition for success provides little value in measuring the success of the plaintiff's case and the presence of voter suppression tactics.

Another interesting question that this first condition raises is: can compactness include cultural compactness?[110] In other words, will the Court only consider geographical compactness in evaluating the first condition, or can the Court also look at the homogeneity of the minority voters who have been aggregated together?[111] Traditionally, the Court has only considered geographical compactness.[112] However, the decision in *League of United Latin Am. Citizens* (*LULAC) v. Perry*[113] changes this.[114] In *LULAC*, plaintiffs alleged that redistricting changes "diluted the voting rights of Latinos who remain in the

109. *Id.*

110. Ortiz, *supra* note 106.

111. *Id.*

112. Shaw v. Reno, 509 U.S. 630, 641 (1993) (North Carolina's redistricting legislation based on race was so irregular, without regard to traditional districting principles and without compelling justification, that it was sufficient to grant relief under the Equal Protection Clause).

113. League of United Latin Am. Citizens v. Perry, 548 U.S. 399 (2006).

114. *Id.*

district. Specifically, the redrawing of lines . . . caused the Latino share of the citizen voting-age population to drop from 57.5% to 46%."[115] The Court in *LULAC*, based on the district court's findings, was concerned that even though districts may have similar demographic and racial makeups, the districts may still not be culturally compact.[116] The Court stated:

> [A] State may not "assum[e] from a group of voters' race that they 'think alike, share the same political interests, and will prefer the same candidates at the polls.' In the absence of this prohibited assumption, there is no basis to believe a district that combines two farflung segments of a racial group with disparate interests provides the opportunity that § 2 requires or that the first *Gingles* condition contemplates. The purpose of the Voting Rights Act is to prevent discrimination in the exercise of the electoral franchise and to foster our transformation to a society that is no longer fixated on race. We do a disservice to these important goals by failing to account for the differences between people of the same race.[117]

Relying on this analysis, the Court held that "it is the enormous geographical distance separating the Austin and Mexican-border communities, coupled with the disparate needs and interests of these populations—not either factor alone—that renders District 25 non-compact for § 2 purposes. The mathematical possibility of a racial bloc does not make a district compact."[118] *LULAC* has created the possibility of including cultural compactness in the analysis of the first condition for success. However, the Court is careful to point out that neither geographical compactness nor cultural compactness should be evaluated alone.[119] The beneficial implication of this is that, whenever geographical compactness is evaluated, cultural compactness should also be evaluated. Still, this also means that evaluations of cultural compactness must also look at geographical compactness. This may limit the reach of *LULAC* because there was an "enormous geographical distance separating the Austin and Mexican-border

115. *Id.* at 427.

116. *Id.* at 430.

117. *Id.* at 433–34 (internal citations omitted).

118. *Id.* at 435.

119. *Id.*

communities."[120] This statement implies that communities who are not culturally compact still have to show that they are not geographically compact; cultural compactness is not enough. This would disproportionately impact physically smaller states, where the state's burden to demonstrate that it is not "geographically compact" would be difficult to prove. It is easier to show geographical compactness where states are physically smaller and have less land.

Evaluating cultural compactness in addition to geographical compactness is a step in the right direction because it allows "geographically noncompact groups of minority voters to establish violations so long as they can show that they are culturally homogeneous."[121] This expands Section 2 because it provides another factor to show compactness and relaxes the geographical compactness requirement. However, in implementing this standard, it should be noted that if cultural compactness is read to be a second requirement in addition to geographical compactness, this may restrict use of Section 2 for communities who can show cultural, but not geographical compactness.

The Court should use *LULAC* as precedent to loosen geographical compactness requirements and add a cultural compactness component to broaden the reach of Section 2. The Court should also weigh the cultural compactness component more than the geographical compactness component since the "essence of a Section 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives."[122] This stated purpose does not include geographical factors if they do not relate to the social and historical conditions. Cultural compactness, on the other hand, directly speaks to these social and historical conditions. Thus, compactness should be redefined to include and weigh cultural compactness more than geographical compactness.

C. Permit Distinct Ethnic and Language Groups to Aggregate Under the Politically Cohesive Condition for Success

The second condition for success is that the plaintiff is part of a group that is politically cohesive. Politically cohesive means that the minority communities in the district in question tend to vote for the

120. *Id.*

121. Ortiz, *supra* note 106.

122. *Gingles*, 478 U.S. at 47. *See also Johnson*, 512 U.S. 997.

same candidates.[123] This is distinct from the cultural compactness described above because politically cohesive focuses on the voting patterns, not demographic information, of the communities in question. Political cohesiveness has also received some attention recently because "the circuits are split as to whether different minority groups may be aggregated to establish a Section 2 claim."[124] In *Bridgeport Coalition for Fair Representation v. City of Bridgeport,*[125] the Second Circuit held that there was a possibility of a Section 2 violation where African American and Hispanic voters had been aggregated to establish the politically cohesive condition, but the Second Circuit did not specifically state that such aggregation was permissible.[126] The Court has not explicitly decided this issue, but it has indicated that a plaintiff relying on this aggregation of minority groups would have to demonstrate that all of its members are politically cohesive.[127]

In *Growe v. Emison*, the plaintiffs alleged that Minnesota's congressional and legislative districts were malapportioned in a way that diluted the voting strength of minority voting groups.[128] The plaintiffs claimed that various minority voters of distinct ethnic and language groups could be politically cohesive under the conditions for success.[129] The Court held that the record did not contain any statistical or anecdotal evidence of minority political cohesion among the distinct ethnic and language minority groups.[130] However, the Court did not expressly state that political cohesion among voters of distinct ethnic and language groups could not be found. It merely suggests that significant evidence is needed to show this political

123. Ortiz, *supra* note 106.

124. Pope v. Cnty. of Albany, 687 F.3d 565, 574 (2d Cir. 2012). *Compare* Nixon v. Kent Cnty., 76 F.3d 1381, 1393 (6th Cir. 1996) (en banc) (holding such "coalition suits" were not permissible), *with* Concerned Citizens of Hardee Cnty. v. Hardee Cnty. Bd. of Comm'rs, 906 F.2d 524, 526 (11th Cir. 1990) (approving aggregate Section 2 claims) *and* Campos v. City of Baytown, 840 F.2d 1240, 1244 (5th Cir. 1988) (approving aggregate Section 2 claims).

125. Bridgeport Coal. for Fair Representation v. City of Bridgeport, 26 F.3d 271 (2d Cir. 1994), *vacated on other grounds*, 512 U.S. 1283.

126. *Bridgeport*, 26 F.3d at 275–76.

127. Pope v. Cnty. of Albany, 687 F.3d 565, 574 n.5 (2d Cir. 2012). *See* Growe v. Emison, 507 U.S. 25, 41 (1993). *See also* Badillo v. City of Stockton, 956 F.2d 884, 890–91 (9th Cir. 1992) (affirming dismissal of Section 2 claim because plaintiffs failed to show sufficient cohesion, without discussing whether aggregation was in fact permissible).

128. *Growe*, 507 U.S. at 27–28.

129. *Id.*

130. *Id.* at 38–41.

cohesion.[131] This strategy of allowing political cohesion among voters of distinct ethnic and language groups should be allowed, and future litigation should ensure that the record shows abundant evidence of cohesion among the various ethnic and language groups. Although this requires significant data gathering and analysis, allowing this political cohesion among voters of distinct ethnic and language groups creates an opportunity to challenge voter suppression where none previously existed. This strategy supports the purpose of the Fifteenth Amendment and Section 2 of the VRA by evaluating the political impact of voter suppression tactics on minority communities, even if there are distinct ethnic and language communities within the larger political community. This strategy also aligns with changing demographics as communities become more diverse.

D. Allow for Cumulative Voting Remedies to Section 2 Violations

Finally, cumulative voting should be used as a tool to ensure full voter participation in a way that reflects the demographics of the district and as a remedy for Section 2 violations of vote dilution. Cumulative voting allows voters to "(1) receive as many votes to cast as there are seats to fill; (2) . . . distribute these multiple votes among the candidates in any way they prefer; and (3) . . . thus cumulate or "plump" all their votes on one candidate or give one vote each to several candidates."[132] Cumulative voting creates a remedy that can replace the creation of majority-minority districts in order to foster voting participation of minority communities.[133] In *United States v. Village of Port Chester*,[134] the district court found that "[c]umulative voting is lawful as a remedy under the Voting Rights Act and New York Law."[135] In *Port Chester*, the plaintiffs claimed that "the at-large system used to elect the six members of the Port Chester Board of Trustees denied the Hispanic population of the Village an equal opportunity to participate in the political process and to elect representatives of their choice."[136] Because the court found that this system violated Section 2 and "no case law . . . rejects cumulative voting as a lawful remedy under the Voting Rights Act,"[137] the court

131. *Id.*

132. Daniel A. Klein, Annotation, *Propriety and Use of Cumulative Voting Under Voting Rights Act*, 57 A.L.R. FED. 2D 477 (2011).

133. *Id.*

134. United States v. Vill. of Port Chester, 704 F. Supp. 2d 411, 448 (S.D.N.Y. 2010).

135. *Id.* at 448.

136. *Id.* at 416.

137. *Id.* at 448.

accepted cumulative voting as a Section 2 remedy as long as the Village of Port Chester engaged in voter education about the new cumulative voting system.[138] Likewise, in *United States v. Euclid City School Board*,[139] the district court said that no particular election scheme was required for Section 2 violations, and a cumulative voting system could serve as one of those remedies.[140] The court stated:

> Whether a particular plan is legally acceptable [to remedy a Section 2 violation] is a fact-specific inquiry. Generally speaking, however, a legally acceptable plan is one that corrects the existing Section 2 violation without creating one anew. Such a plan must ensure equal opportunity in voting and afford the minority population a reasonable opportunity to elect its preferred candidate through meaningful participation in the political process.[141]

This meaningful opportunity to participate in the political process includes evaluating factors such as the district's voting age population, existing political realities, historical and predicted voter turnout rates, and effects of past discrimination leading to depressed turnout.[142] Although the Court has not yet ruled on the feasibility of cumulative voting as a Section 2 remedy, the use of cumulative voting may be restricted to certain kinds of elections. While some courts have embraced cumulative voting in the context of local government or school board elections,[143] at least one court has rejected its application for judicial elections.[144] Nevertheless, cumulative voting creates an opportunity to remedy Section 2 vote dilution and foster political participation in marginalized communities, and it should be used more often to strengthen Section 2.

138. *Id.* at 451.

139. United States v. Euclid City Sch. Bd., 632 F. Supp. 2d 740 (N.D. Ohio 2009).

140. *Id.*

141. *Id.* at 751–52 (internal citations omitted).

142. *Id.*

143. *See, e.g.*, United States v. Vill. of Port Chester, 704 F. Supp. 2d 411 (S.D.N.Y. 2010); McNeil v. City of Springfield, 658 F. Supp. 1015 (C.D. Ill. 1987); United States v. Marengo Cnty. Comm'n, 731 F.2d 1546 (11th Cir. 1984); Dillard v. Chilton Cnty. Comm'n, 615 F. Supp. 2d 1292 (M.D. Ala. 2007).

144. Cousin v. Sundquist, 145 F.3d 818 (6th Cir. 1998) (cumulative voting inappropriate remedy for Section 2 violations, especially when used during election of state judges).

Conclusion

Despite the Court's ruling in *Shelby County* and its impact on Sections 4(b) and 5 of the VRA, Section 2 remains an resilient tool to fight voter suppression tactics. However, important changes are needed in order for Section 2 to have the same, or relatively similar, vitality that Section 4(b) and Section 5 once had. Recognizing that any changes to the VRA are difficult, and inevitably political, this Note proposes several ways to strengthen Section 2 that would be less controversial and would likely withstand legal challenges.

First, this Note proposes that a *Gingles* factor should be added to consider the timing of the proposed change in the totality of the circumstances test for discriminatory effects. Second, this Note proposes that the compactness condition under the totality of the circumstances test for discriminatory effects should include and weigh a cultural compactness evaluation more than geographical compactness. Third, this Note proposes that distinct ethnic and language groups should be permitted to aggregate under the politically cohesive condition for success, even though this would require significant data gathering. Finally, this Note advocates for cumulative voting remedies to Section 2 violations. These changes would significantly increase the strength of Section 2 to fight voter suppression in the absence of Section 4(b) and effectively Section 5 because these changes do not require Congressional action, unlike creating a new Section 4(b) formula. Moreover, these changes would create enhanced tools for marginalized voters to challenge Section 2 violations.